

A SURVEY OF THE IMPACT OF AGRICULTURAL
LEGISLATION ON COMMON LAW PRINCIPLES
WITH SPECIAL REFERENCE TO THE FOLLOWING
STATUTES :

| | | |
|-------|---|--------|
| (i) | THE LAND SETTLEMENT ACT NO. 12 OF 1912, AS AMENDED. | Page 1 |
| (ii) | THE FARMERS' ASSISTANCE ACT NO. 48 OF 1935, AS AMENDED. | 1 |
| (iii) | THE MARKETING ACT NO. 26 OF 1937, AS AMENDED. | 2 |
| (iv) | THE CO-OPERATIVE SOCIETIES ACT NO. 29 OF 1939, AS AMENDED. | 3 |
| (v) | THE LAND BANK ACT NO. 13 OF 1944, AS AMENDED. | 3 |

WILLIAM RUDOLPH GIEMRE,
B.A., LL.B., C.S.H.L., F.C.S.S.

Advocate of the Supreme Court of South Africa.

SUBMITTED FOR THE DEGREE

OF **MASTER** OF LAWS

IN THE

UNIVERSITY OF CAPE TOWN

1956.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

TABLE OF CONTENTS.

| <u>CHAPTER</u> | | <u>Page</u> |
|----------------|--|-------------|
| I | FARMING AND THE LAW. | |
| | The aim of law | - 1 |
| | The hazardous nature of farming | - 2 |
| | Legal protection to the farming industry | - 3 |
| | Scope of investigation | - 3 |
| II | THE CONCEPT OF PARATE EXECUTIE IN RELATION TO THE LAND BANK ACT, 1944 (ACT NO. 13 OF 1944) AS AMENDED. | |
| | Parate Executie | - 6 |
| | Position under early Roman law | - 7 |
| | Position at the time of Justinian | - 7 |
| | Actio quasi - Serviana and hypotheca | - 8 |
| | The right to sell under Roman law | - 9 |
| | Position under Roman Dutch law | - 11 |
| | Case law | - 14 |
| | Statutory provisions | - 18 |
| | Land Bank Act, 1944 | - 19 |

Position/...

iii.

| | | |
|---|---|----|
| Position under insolvency | - | 23 |
| Competent courts | - | 26 |
| Position in relation to the Farmers' Assistance Act, 1935 | - | 27 |
| Due notice of sale | - | 28 |
| Liability for improvements | - | 29 |
| Moratorium Acts | - | 30 |
| Methods of attachment | - | 31 |
| Transfer in absence of title deeds | - | 31 |
| Disposal of surplus proceeds of sale | - | 32 |
| Limitation of bank's rights | - | 33 |
| Parate Executive and charge loans | - | 36 |
| Position of co-operative orga- nisations to which loans are granted | - | 38 |
| Sale of movables before immo- vables | - | 41 |
| Strict interpretation | - | 42 |
| Reasons for legislation | - | 43 |
| Number of sales by the bank | - | 44 |
| Summary and conclusions | - | 45 |

III/...

| | | | |
|-----|--|---|----|
| III | THE CONCEPT OF INSOLVENCY IN RELATION TO THE FARMERS' ASSISTANCE ACT, 1935 (ACT NO. 48 OF 1935) AS AMENDED. | | |
| | Object of the Act | - | 50 |
| | Concept of insolvency | - | 50 |
| | Insolvency under Roman law | - | 51 |
| | Missio in Possessionem and Bonorum Emptio | - | 52 |
| | Bonorum Distractio | - | 53 |
| | Cessio Bonorum | - | 53 |
| | Early German and Frankish law | - | 55 |
| | Position under Roman Dutch law | - | 55 |
| | Cessio Bonorum | - | 55 |
| | Brieven van Cessie | - | 55 |
| | Bankrupts | - | 58 |
| | Desolate Boedelkamers | - | 58 |
| | Special ordinances | - | 58 |
| | Immissio in Possessionem | - | 58 |
| | Atterminatie or Respijt | - | 59 |
| | Inductie | - | 59 |
| | Moratorium | - | 59 |
| | Ordinances in the Netherlands | - | 64 |
| | Early Cape law | - | 65 |

Subsequent/...

v.

| | | |
|--|---|----|
| Subsequent legislation | - | 66 |
| Need for adequate measures of relief | - | 66 |
| Farmers' Assistance Act | - | 68 |
| Farmers' Assistance Board | - | 68 |
| Farmers eligible for assistance | - | 69 |
| Certificates and their effect | - | 69 |
| Meeting of creditors to consider board's proposals | - | 71 |
| Extension of time | - | 73 |
| Effect of notice of meeting | - | 74 |
| Procedure at meeting | - | 74 |
| Rejection of compromise | - | 75 |
| Acceptance of compromise | - | 76 |
| Discharge from liability | - | 78 |
| Passing of ownership | - | 78 |
| Dealings with property | - | 79 |
| Interpretation of Act | - | 81 |
| Summary and conclusions | - | 82 |

IV. THE CONCEPT OF LEASE IN RELATION TO THE LAND SETTLEMENT ACT, 1912 (ACT NO.12 OF 1912) AS AMENDED.

| | | |
|---------------------------------|---|----|
| Land settlement in South Africa | - | 87 |
|---------------------------------|---|----|

The/...

| | | |
|--|---|-----|
| The Land Settlement Act | - | 88 |
| Allotment | - | 88 |
| Probationer lessees | - | 88 |
| Duration of leases | - | 89 |
| Rental | - | 89 |
| Option to purchase | - | 89 |
| Crown grant | - | 89 |
| Holdings and farms purchased for settlers | - | 90 |
| Extent of land settlement | - | 90 |
| Nature of lease | - | 92 |
| Locatio conductio rerum | - | 94 |
| Emphyteusis | - | 94 |
| Quitrent tenure | - | 96 |
| The Land Settlement Act | - | 97 |
| Payment of rent and proba- tioners | - | 97 |
| Remission of and alteration in rent | - | 98 |
| Sub-letting and dealings with leases | - | 101 |
| Roman law on leases | - | 102 |
| Roman Dutch law on leases | - | 102 |
| South African law on leases | - | 103 |

Quiet/...

vii.

| | | |
|---|---|-----|
| Quiet enjoyment | - | 106 |
| Occupation | - | 107 |
| Residence | - | 114 |
| Improvements | - | 115 |
| Landlord's hypothec | - | 119 |
| Old Dutch law | - | 121 |
| Roman law | - | 121 |
| South African law | - | 123 |
| Invecta et illata | - | 124 |
| Fruits and crops | - | 124 |
| Goods of sub-lessees | - | 125 |
| Goods of third parties | - | 125 |
| Effectiveness of hypothec | - | 125 |
| Special statutory hypothec | - | 126 |
| Pledge of movables | - | 128 |
| Compensation for improvements and removal of crops | - | 133 |
| Trees | - | 137 |
| Sale in execution | - | 140 |
| Set-off | - | 141 |
| Restriction on alienation or encumbrance of land | - | 142 |

Summary/...

| | | | |
|----|---|---|-----|
| | Summary and conclusions | - | 144 |
| V. | THE CONCEPT OF SURETYSHIP IN RELATION TO THE LAND BANK ACT, 1944 (ACT NO. 13 OF 1944), AS AMENDED. | | |
| | Definition | - | 147 |
| | Position in Roman law | - | 148 |
| | Indemnity and suretyship | - | 152 |
| | Position in Roman Dutch law | - | 153 |
| | Intercessio in subsidium | - | 154 |
| | Pactum constitutum pecuniae | - | 155 |
| | Suretyship proper | - | 156 |
| | Strict interpretation | - | 156 |
| | Voluntary and statutory agree- ments | - | 157 |
| | Statutory suretyship under the Land Bank Act, 1944 | - | 158 |
| | Bank's powers of recovery | - | 159 |
| | Nature of obligation | - | 160 |
| | Future advances under a Land Bank loan | - | 163 |
| | Nature of services contemplated in the Act | - | 163 |
| | Nature of goods supplied in terms of the Act | - | 166 |

List/...

ix.

| | | |
|---|---|-----|
| List of members showing their liability | - | 167 |
| Liability of co-sureties | - | 169 |
| Position under the Land Bank Act, 1944. | - | 171 |
| Beneficium ordinis seu excussionis | - | 174 |
| Position under the Land Bank Act, 1944 | - | 175 |
| Beneficium cedendarum actionem | - | 177 |
| Position under the Land Bank Act, 1944. | - | 181 |
| Liability of women and minors | - | 182 |
| Senatus consultum velleianum and authentica si qua mulier | - | 182 |
| Position of minors | - | 185 |
| Liability for interest | - | 186 |
| Summary and conclusions | - | 188 |

VI. THE CONCEPTS OF PLEDGE, POSSESSION AND OWNERSHIP IN RELATION TO THE LAND BANK ACT (ACT NO. 13 OF 1944), AS AMENDED, THE CO-OPERATIVE SOCIETIES ACT (ACT NO. 29 OF 1939), AS AMENDED AND THE MARKETING ACT (ACT NO. 26 OF 1937, AS AMENDED.

| | | |
|--|---|-----|
| The Co-operative Societies Act and co-operatives | - | 195 |
|--|---|-----|

The/...

| | | |
|---|---|-----|
| The Marketing Act and regulatory boards | - | 198 |
| The Land Bank Act and finances | - | 201 |
| Controlled and uncontrolled products | - | 202 |
| Land Bank's "statutory pledge" | - | 203 |
| Co-operative's "statutory pledge" | - | 206 |
| Nature of pledge | - | 208 |
| Pledge as accessory right | - | 209 |
| Tacit or legal mortgages | - | 210 |
| Liens or rights of retention | - | 210 |
| Tacit hypothecs | - | 211 |
| Statutory hypothecs sui generis | - | 212 |
| "Statutory pledge" under Land Bank Act | - | 213 |
| "Statutory pledge" under Co-operative Societies Act | - | 218 |
| Possession and delivery | - | 222 |
| Delivery in pledge | - | 223 |
| Decided cases on "statutory pledges" | - | 225 |
| Nature of "statutory pledge" | - | 227 |

Ownership/...

| | | |
|--|---|-------|
| Ownership under Marketing Act | - | 228 |
| Essentials for passing of ownership | - | 230 |
| Effects of Marketing Act | - | 231 |
| Practical implications of the three Acts | - | 232 |
| Summary and conclusions | - | 235 |
| | | |
| VII. | THE EXTENT TO WHICH COMMON LAW PRINCIPLES HAVE BEEN ALTERED, THE GENERAL TREND OF AGRICULTURAL LEGISLATION AND CRITICISM THERE-OF AND SUGGESTED AMENDMENTS. | |
| | Need for the protection of the farming industry | - 240 |
| | Summary of extent of alterations to the common law | - 240 |
| | General trend of agricultural legislation and criticism | - 244 |
| | Need for co-ordinated and planned legislation | - 252 |
| | Suggested amendments | - 253 |
| | | |
| | BIBLIOGRAPHY | - i |
| | TABLE OF CASES | - iv |
| | INDEX | - xi |

CHAPTER I.
FARMING AND THE LAW.

Contents: The aim of Law; Hazardous nature of farming; Legal protection to farming industry; Scope of Investigation.

The aim of law :

The increasing complexities of modern life have led to the promulgation of more and more legislation each year. However necessary such legislation may appear to be to regulate our daily lives, it is not, by any means, an unmixed blessing. Much of this legislation impinges on our common law principles - principles which have regulated man's conduct for centuries past.

It is not the object of this treatise to discuss at any length the philosophy of law and the various ends to which law should be directed. One thing is certain, that man existing in an organised community, is unlikely to direct his laws deliberately towards encompassing his own destruction.

A vital industry such as farming, upon which man, irrespective of race, colour or creed, is primarily dependent for his very existence, is thus more likely

to/...

to be treated sympathetically than harshly by the law of the land.

The hazardous nature of farming :

From time immemorial man has tilled the soil, engaging upon a vital, and, in the eyes of the law, a hazardous occupation. That the law regards farming as hazardous is evidenced by Davis J. when discussing the powers of a tutor as follows :-

... In the case of Sackville West v. Nourse and another (1925, A.D. at p. 535), Kotze, J.A., went fully into the relevant passage in Voet, which deals with the carrying on by a tutor of a mercantile undertaking which had been left to the ward, and he points out that ordinarily that should not be done as being too hazardous. I agree, and I think that farming operations stand on the same footing. (1)

Hoexter J. was of the same opinion when stating :-

Nor can any right of alienation be inferred from the words in clause (6) authorising the administrators to carry on farming operations, because in the absence of such words the administrators would not have the right to carry on what would quite properly be regarded as a hazardous undertaking. (See ex parte Bellingan's Executors (1936 C.P.D. at page 517) and Sackville West v. Nourse and ano. (1925 A.D. at page 535)). (2)

It is indeed unfortunate that the success of otherwise of the farming industry should depend so

largely/...

(1) Ex parte Bellingan's Executors, 1936 C.P.D. 515.
 (2) Est. Issroff vs. Issroff N.O. 1948 E.D.L.D. 417.

largely upon the vicissitudes of nature and upon many uncertain and often unpredictable economic factors. No wonder then that society has found it necessary, as a measure of self preservation, to afford protection to this industry.

Legal protection to the farming industry :

Protection in the field of economics has, of necessity, had to be accomplished by legal means. Regulatory boards have been established by statute for the efficient (and sometimes inefficient) control of marketing and distribution of agricultural products. In other spheres of law, too, many privileges are enjoyed by the farming industry which could not reasonably be extended to other industries. These aspects will be considered later in greater detail.

Scope of investigation :

In subsequent chapters reference will be made to the particular common law concepts of p a r a t e e x e c u t i e, insolvency, lease, suretyship, pledge, lien, possession and ownership. The relative agricultural legislation affecting these concepts will be examined in the light of the rules relating to the interpretation of statutes. The extent to which the legislation has affected those concepts will be gauged and from such study will be

deduced/...

4.

deduced the reasons for the promulgation of the legislation, the object sought to be achieved thereby, and whether or not that object is being achieved.

CHAPTER II.

THE CONCEPT OF PARATE EXECUTIE IN RELATION TO THE LAND BANK ACT, 1944 (ACT NO. 13 OF 1944) AS AMENDED.

Contents: What is parate executie; position under early Roman law; contractus fiducia; position at the time of Justinian; pignus; actio quasi-Serviana; hypotheca; the right to sell under Roman law; position under Roman Dutch law; Voet; Groenewegen; Matthaeus; Grotius; Van Leeuwen; Merula; Huber; Van der Keessel; Pothier; Bynkershoek; Van der Linden; case law; position in Transvaal, Orange Free State and Natal; immovables; movables; statutory provisions; parate executie under Land Bank Act; position under insolvency; solvent spouses; competent courts; effect of Farmers' Assistance Act; due notice of sale, liability for improvements; Moratorium Acts; methods of attachment; transfer in absence of title deeds; disposal of surplus proceeds of sale; limitation of bank's rights; charge loans; rights against co-operative organisations; seizure of property hypothecated to third parties; sale of
movables/...

movables before immovables; strict interpretation to be given; amendments to the Land Bank Act; Parliamentary debates; reasons for legislation. number of sales by the bank; summary and conclusions.

Parate Executie:

The right of p a r a t e e x e c u t i e may perhaps best be described as the right conferred by agreement or by operation of law or by custom on a pledgee or mortgagee enabling him to sell the hypothecated property, without judicial process, on default of the pledgor or mortgagor, as the case may be.

We are here concerned with two opposing and contending principles of law.

On the one hand there should be the utmost freedom of contract. A man should be held to his word and should not be heard to complain if the other party holds him to his bargain.

On the other hand, no-one should be allowed to take the law into his own hands. This is based on grounds of public policy and in protection of a debtor. Creditors should seek the aid of the courts which society has established and which it maintains. (1)

The/...

(1) Nino Bonino vs. de Lange, 1906, T.S.

The history of the principle of parate executie reflects the struggle between these two tendencies.

Position under early Roman law :

Under early Roman law, a debt due by the debtor to a creditor could be secured by a contractus fiduciae whereby property given as security by the debtor was actually transferred to the creditor on the condition that it had to be re-transferred back to the debtor, if the debt was paid on or before due date. The creditor meanwhile became owner of the property, having the right to sell, bequeath or otherwise dispose of it, the debtor having only a personal right for return of the property if thus conveyed away by the creditor. This right was embraced in the actio fiduciae directa, a bonae fidei action. The debtor, therefore, lost his property if the creditor had already disposed of it.

To agree that the creditor should not have the right to sell was ineffective, as the full property in the thing so pledged had been made over to the creditor by mancipatio or in jure cessio.

Position at the time of Justinian :

The contractus fiduciae had become obsolete long before the time of Justinian and in its place and
in/...

in protection of the debtor, we find the pignus, in terms of which the creditor was placed in possession of the property only, ownership therein remaining vested in the debtor, who thus retained his right in rem to the property, enforceable against the whole world.

At first, the creditor had the right to sell the property only if so agreed under a pactum de pignore vendendo. With the effluxion of time this right of sale became an integral part of the transaction. (1)

Possession was an essential of pignus but it often happened that neither the creditor wished to obtain possession of the property, nor the debtor to relinquish possession.

Actio Quasi-Serviana :

The Praetor Servius thus introduced the actio-serviana, by means of which a landlord could take possession of his tenant's stock for rent due where it had been agreed that the stock should

constitute/...

(1) D. XIII. 7. 4 - 6.

constitute security for rentals. By the actio quasi-serviana or hypothecaria this principle was extended to all cases where a debtor and a creditor had agreed that certain property would constitute the security, although possession thereof had not been given to the creditor. By this informal agreement of hypotheca without delivery of possession, the creditor obtained a real right - a right in rem.

The difference between the forms of pignus and hypotheca thus lay in the fact that for the former, possession was required whereas no possession was needed for the latter form of security.

The right to sell under Roman law :

Where the debtor consented at the time of a hypothecation or even afterwards to a sale by the creditor, or where they were silent as to such a sale taking place, the creditor had the right to sell, but the position was different where there existed a specific agreement that there should be no such sale, as is evident below.

In/...

constitute security for rentals. By the actio quasi-serviana or hypothecaria this principle was extended to all cases where a debtor and a creditor had agreed that certain property would constitute the security, although possession thereof had not been given to the creditor. By this informal agreement of hypotheca without delivery of possession, the creditor obtained a real right - a right in rem.

The difference between the forms of pignus and hypotheca thus lay in the fact that for the former, possession was required whereas no possession was needed for the latter form of security.

The right to sell under Roman law :

Where the debtor consented at the time of a hypothecation or even afterwards to a sale by the creditor, or where they were silent as to such a sale taking place, the creditor had the right to sell, but the position was different where there existed a specific agreement that there should be no such sale, as is evident below.

In/...

In the Digest (1) it is stated :-

4. If the parties have come to an agreement as to the sale of the thing pledged, either at the first or subsequently, then not only is a sale valid, but the purchaser at once becomes owner of the thing. However, even where there has been no agreement made about the sale of what is pledged, still the law in force is that a sale is allowable, provided there is no agreement that it should not be allowable; but, if it was agreed that there should be no sale, then, if the creditor sells, he is liable to an action for theft, unless the debtor was three times called upon to pay, and he did not do it.
5. This is the rule, whether the agreement was that there should be no sale at all, or something has been done in breach of the terms agreed to, either in reference to the amount, or a condition, or the place of sale.
6. Should it be agreed that you are to be at liberty to sell the land which is pledged with you, still it does not follow that you can be compelled to sell, even though the person who gave you the pledge (qui pignus dederit) is insolvent, because the assurance in question was given for your own sake. However, Atilicinus holds that on special cause shown the creditor can be compelled to sell; suppose, he says, the amount owed is much less than the value of the thing pledged, and the latter can be sold just now for more than it would fetch later on. Still, the better rule would be that the person who gave the pledge should be able to sell it, and pay the debt when he has received the purchase money, it being understood that the creditor is compellable to allow the property pledged to be inspected, if it is movable, provided the debtor gives him a sufficient undertaking to save him harmless; the fact is that it would amount to cruelty that a creditor should be compelled to sell against his will.

Justinian/...

(1) D. XIII. 7. 4, 5 and 6 (Monro's translation).

Justinian by his constitution, permitted the parties to fix the time, place and manner of sale at their pleasure. If there was no such special agreement, then the provisions of his constitution were to take effect, namely, that the thing might be sold after two years had elapsed from the time the creditor had given the debtor notice to pay. If no purchaser could be found, the creditor could petition the emperor, after the lapse of a further period of two years, to be declared the owner and the debtor had a further period of two years thereafter within which he might redeem the pledge.

Position under Roman Dutch law :

So much for the Roman law. The Roman Dutch law on the subject is not by any means as consistent.

Voet states (1) :-

Now, although in our law parate executie without any form of legal action, has, on account of public utility, been adopted in various respects, for instance in regard to taxes and money payments due to the treasury, for the expenses necessary for the repair of dykes, roads, mills and the like, in regard to the lighter fines for not promptly repairing country roads, and the like (van Leeuwen, cens. for., pt.2, bk.1, ch.33, num.32 and sqq.; Holl. Cons., pt. 3, vol.1, consil. 122; Papagaey of van Alphen, pt.1, tit. 32 in princ.); and although in other places documents are in use which contain agreements for parate executie, commonly styled guarentigiatia, so that a previous action

at/...

(1) Voet. 42. 1. 48. (Krause's translation)

at law is not necessary at all, but a writ of execution is simply taken out without more ado, as is certain from what is stated by Joh. van Sande (decis. Frisic., bk. 1, tit.12, defin. 3; Merula, prax., bk.4, tit.100, ch.1); nevertheless with us it is not permitted to anyone to acquire for himself this right of parate executie by agreement (Appendix decisionum post Holl. Cons., pt.3, vol.1, p.16 in the middle). In the place thereof a clause consenting to judgment and voluntary condemnation is rightly, according to our law, inserted in documents; the effect of which is that the defendant, who is in default after one citation, is condemned, and suffers execution as the result thereof, just as if he had been condemned in a formal law suit, after a full hearing of the case (Instruct. Curiae Holl. art. 118). And this is in conformity with the Roman Civil law (D.42.1.26; D.10.3.21; see Voet, 4.8.31.)

Voet again states (1) :-

But whatever method or practice for the sale of a pledge has been introduced by municipal law or old established usage must be observed, and it cannot be departed from by private agreements of creditors and debtors, nor can the rule be altered. Consequently, if it has been agreed that the creditor may sell the pledge without judicial process (autoritate privata) nevertheless this can only be lawfully done by a sale by public auction under a decree of the judge, whenever either the debtor refuses to allow the sale to be made, privately according to agreement, or it concerns other hypothecary creditors that no such sale shall be made. In fact, such creditors would not be deprived of their legal rights by a private sale, but either the sale would be invalid or the buyer would acquire the property subject to its legal burden.

Groenewegen states (2), inter alia, that by the custom then prevailing, private alienations of pledged property have fallen into disuse.

Matthaeus/...

(1) V. 20.5.6.
 (2) Ad. J. 2.8.1.

Matthaeus states (1) - "By our laws such an agreement is of no effect".

Among writers who also declare an agreement for parate executie to be invalid are found - Grotius (2), Van Leeuwen (3) and Merula (4).

Among the later jurists who affirm the validity of such an agreement for parate executie are such prominent writers as Huber (5) and Van der Keessel (6) who states -

Although a creditor cannot without the authority of a judge sell property mortgaged to him, whether generally or specially, yet there is nothing to prevent his legally selling a pledge delivered to him, where it was originally stipulated that he might sell it.

Van der Keessel (7) states, too, that a stipulation permitting parate execution is not, according to Bynkershoek (Q.J.Priv. 2. 13), invalid.

Van der Linden (8) states, inter alia, however, that it is most prudent before proceeding to the sale to obtain the sanction of the court -

Tot her verkoopen van roerende goederen, tot pand ter minne gegeven (waar onder men ook gemeene Lands Obligatien rekenen kan - v.d. Keessel,

Thes. 480/...

-
- | | |
|--|---------------------------------------|
| (1) De Auct. 1. 3. 11. | (5) Heed. Rechts. 2.48.13. |
| (2) Inleydinge 2. 48. 41. | (6) Thes. 439 (Lorenz's translation). |
| (3) Het Roomsche Hollandsche Recht. 5. 8. 3. | (7) Thes. 480. |
| (4) Manier van Procederen 4. 100. 1. 10. | (8) Inst. 1. 12. 5. |

Thes. 480), is almede een vonnis van den Rechter noodig (Grotius, Inleydinge 4. 48. 41), - ten dien opzichte is egter de schuldeischer meestal gewoon, om bij de Beleeningsacten te bedingen, dat hij, bij wanbetaling, tot den verkoop van het beleende gevolmagtigd zijn zal. Schoon dit beding naar regten bestaanbaar is (D.13.7.4.), handelt men egter in dit geval voorzigtigst, om, alvorens tot den verkoop over te gaan, daar toe auctorisatie van den Rechter te verzoeken.

In conclusion it is evident that the earlier writers on the laws of Holland favour the view that an agreement for parate executie is invalid, for instance, Grotius, Van Leeuwen, Merula, Groenewegen, Van Alphen, Voet, Matthaeus, Lijbrecht and Kersteman.

The later writers, however, declare such an agreement to be valid, such as Bynkershoek, Van der Keessel, Van der Linden, Decker and Van Zutphen. Van der Keessel, furthermore, limits this right to movables, as quoted supra.

It is submitted that the weight of authority is against upholding an agreement for parate executie as far as Roman Dutch law is concerned. Sir J.W. Wessels (1) is, however, of the opinion that the question still belongs to the jus controversum.

Case Law :

As to our own South African law where the parties have expressly agreed that the mortgagee or
pledgee/...

(1) History of Roman Dutch law.

pledgee may avail himself of parate executie there have been widely differing opinions.

As early as 1893, De Villiers C.J. had stated (1) -

Such a thing as a mortgagee taking possession of the mortgaged property for the purpose of selling it is wholly unknown to our law and practice, even as between the mortgagee and the mortgagor himself. The mortgagee can only realise his security by order of the Court and through the medium of the Sheriff or other officer of the Court.

On the other hand it was subsequently held to have been the established practice in the Orange Free State, Transvaal and Natal, at any rate, to uphold the principle of parate executie and to recognise the pledgee's and the mortgagee's rights in that respect. (2)

In Natal, these previous decisions were apparently overlooked in a later case (3) which was decided to the contrary.

In the Transvaal it was later held (4) that where there existed a prior agreement of parate executie and the mortgagor subsequently objected to a sale without recourse to Court, a judgment would be
required/...

(1) Whinney N.O. vs. Gardner N.O. 1893. 10.S.C. 341.
 (2) Van Wijk's Executor vs. Joubert. 1897. O.R. 360;
 Evans Estate vs. S.A. Breweries Ltd. 1901. N.L.R.22.
 (3) Gundelfinger vs. Drake & Co. 1906. N.L.R. 27.
 (4) John vs. Trimble. 1902. T.H. 146.

required if the circumstances were such as to be prejudicial to any other mortgage creditors.

Immovables.

Although the trend of earlier decisions pointed to the conclusion that an agreement for parate executie was valid in South Africa, it is submitted that the weight of later authority is against upholding such an agreement as far as immovable property is concerned. Later decisions support this view (1) notwithstanding the fact that in Natal the court will authorise a mortgagee to sell by public auction on approved terms. (2)

Movables.

An agreement of parate executie is apparently valid in the case of movables. As far back as 1886 Sir J.C. Kotze in his translation of Van Leeuwen's Commentaries stated in a note -

It is possible that in South Africa the courts of law may sanction a private sale by a creditor of a chattel, e.g. a watch or a horse given in pledge, where such has been agreed upon; but, they will not favour such a practice and will certainly not extend it to immovable property or movable property of considerable value.

In/...

-
- (1) John vs. Trimble 1902. T.H. 146; Israel vs. Solomon 1910. T.P.D. 1186; Douglas vs. Douglas & Parkins 1920. G.W.L. 117.
 (2) Paruk vs. Glendale Estate Co. 1924. N.P.D.; Benson vs. Hirschhorn 1936. N.P.D. 277.

In the Cape Province (1) it was held that an agreement of parate executie was valid in respect of movables delivered to a pledgee, but the pledgor is always free to seek the protection of the Court, if he can show that the pledgee has effected the sale in a manner prejudicial to his rights.

It is also the established custom for banks to sell shares pledged to them in security for overdrafts where clients have previously agreed to their doing so. In this way, property worth thousands of pounds is sold almost daily.

Reference may finally be made to a fairly recent case (2) in which Ogilvie Thompson A.J. is reported to have stated :-

In the absence of an express agreement for parate executie, a pledgee is not under our law entitled to sell the pledged property without prior recourse to the Court (Cape of Good Hope Bank vs. Melle 10 S.C. 280), and the Roman Dutch authorities cited by Wille, "Mortgage and Pledge".

It is very evident that our law in regard to parate executie is in need of clarification by an authoritative decision by the Appellate Division of the Supreme Court, but until such a decision is given,

it/...

(1) Osry vs. Hirsch Loubser & Co. 1922. C.P.D. 547.
 (2) Mercantile Bank of India Ltd. & ano. vs. Davis
 1947. S.A.L.R. 723.

it is submitted that the weight of authority is against upholding an agreement for parate executie as far as immovable property is concerned. That the legislature has deemed it necessary to make special statutory provision to authorise the exercise of parate executie in certain circumstances, supports that view. As far as movable property is concerned, the better view indicates that an agreement for parate executie is valid in our South African law.

Statutory Provisions:

Various statutory provisions have been enacted from time to time which have some bearing on this particular concept and are of passing interest.

By Section 81 of Transvaal Ordinance 32 of 1902, for instance, hotelkeepers can sell out of hand property deposited with them in security for debt of board and lodging.

By Transvaal Ordinance 13 of 1894 pawnbrokers are permitted to sell out of hand articles not redeemed.

Section 22 of Act 22 of 1916 also empowers the Railway Administration to sell out of hand, goods on which it has a pledge for freight expenses.

Section 83 of the Insolvency Act No. 24 of 1936, furthermore, entitles a trustee of an insolvent estate, in certain prescribed circumstances, to take

possession/...

possession of and realise property pledged to another. The pledgee's common law rights have thus been taken away.

Land Bank Act, 1944 (No. 13 of 1944) as amended :

Of much greater consequence are the drastic powers conferred upon the Land Bank by section 55 of the Land Bank Act No. 13 of 1944, which is a consolidation of all previous Land Bank legislation.

This institution was established in October, 1912, to assist the development of the agricultural industry in the Union, inter alia, by granting loans to farmers and to certain agricultural organisations. (1)

Loans to farmers take the form of mortgage advances secured by first mortgage bonds (2) and the form of charge loans for the purpose of erecting fencing, obtaining a supply of water, constructing dipping tanks and silos. (3)

It is in section 55 of the Act, No. 13 of 1944, (formerly section 37 of Act No. 18 of 1912, as amended) in which are found the bank's rights of parate executie as far as concerns individual farmer debtors. This section reads as follows :-

55. (1)/...

(1) Section 21 of Act 13 of 1944.

(2) Section 24 of Act 13 of 1944.

(3) Sections 27, 28, 29 and 30 of Act 13 of 1944.

55. (1) If -

- (a) at any time any sum of money, whether principal or interest, due in respect of any advance made by the bank, be unpaid; or
- (b) in the opinion of the board, any such advance has not been applied for the purposes for which it was made or has not been carefully and economically expended; or
- (c) the debtor become insolvent, or be sentenced to imprisonment without the option of a fine, or assign his estate; or
- (d) the security for the advance be declared executable by order of a competent court or be attached in pursuance of a judgment of any such court; or
- (e) the debtor being deceased, his estate is about to be administered under the provisions of sub-section (3) of section forty-eight of the Administration of Estates Act, 1913 (Act No. 24 of 1913), or has been sequestrated as insolvent; or
- (f) a notice has been published with reference to the debtor under sub-section (1) of section ten of the Farmers' Assistance Act, 1935 (Act No. 48 of 1935); or
- (g) the debtor, being a co-operative society, has been placed in liquidation or has, in the opinion of the board, ceased to carry on business, or the period of its establishment, if any, has expired; or
- (h) there be a breach of any other condition of the advance; or
- (i) the advance be not applied within such time as the board may consider reasonable to the purpose for which it was made,

the board may proceed as in sub-section (2) prescribed.

(2)/...

(2) Whenever any circumstance mentioned in sub-section (1) arises, the board may -

- (a) refuse to pay any portion of the advance which has been approved, but not yet paid;
- (b) after demand by registered letter, addressed to the address of the debtor stated in the form of application for the advance, has been made for the repayment of the advance, and, if the land or other security is mortgaged to any person other than the bank, after due notice to the mortgagee, and without recourse to a court of law, enter upon and take possession of and sell by public auction, through an auctioneer or a sheriff or his deputy, whether or not such sheriff or deputy is a licensed auctioneer, the whole or any part of the security for the advance, upon such conditions as appear under all the circumstances to be just:
Provided that -
 - (i) if the default be only in respect of the circumstances mentioned in paragraph (a) of sub-section (1), such seizure and the sale shall not take place until after the expiration of three months from the date on which payment was due of the sum of money in respect of which the default has occurred;
 - (ii) in the circumstances mentioned in paragraph (c), (d), (e) or (f) of sub-section (1), the board may so enter upon and take possession of and sell the whole or any part of such security as soon after the debtor's estate has been finally sequestrated or assigned, or the debtor has been sentenced, or the property has been declared executable or attached, or the debtor's estate is being administered under the provisions of sub-section (3) of section forty-eight of the said Administration

of/...

of Estates Act, 1913, or a notice has been published with reference to the debtor under sub-section (1) of section ten of the said Farmers' Assistance Act, 1935, as the board may deem expedient;

- (c) transfer such land or other security to the purchaser and give a good and valid title thereto, notwithstanding that it may then be hypothecated or subject to a lien or charge in favour of some other person, and without production to the registrar of deeds of the title-deeds, provided it is certified that the board has been unable to obtain the same; and
- (d) make an advance under the provisions of this Act, on such conditions as it may deem fit, to the purchaser of such land or other security, for the purpose of defraying the whole or part of the purchase price, notwithstanding that such advance may exceed the limits prescribed by section twenty-six:

Provided that no such sale shall take place until the expiry of at least fourteen days from the date of a notice in the Gazette and in some newspaper circulating in the district, stating the date, hour and place, and the conditions of the sale.

(3) No property mortgaged to the bank shall be sold in execution by a messenger of the court, or a sheriff, or the trustee of an insolvent estate, or the assignee of an assigned estate, or the executor administering the estate of a deceased person under the provisions of sub-section (3) of section forty-eight of the said Administration of Estates Act, 1913, or a liquidator or trustee elected or appointed under section fifteen or sixteen of the said Farmers' Assistance Act, 1935, unless the bank agrees in writing to such sale or has failed to sell such mortgaged property within six months after receipt of a notice from the messenger, sheriff, trustee of the insolvent estate, assignee, executor or liquidator, or the trustee so appointed, as the case may be,

to/...

to the effect that the property mortgaged has been attached, or that the estate of the debtor has been finally sequestrated or assigned or is being administered under the aforesaid provisions of the Administration of Estates Act, 1913, or that a notice with reference to the debtor has been published under sub-section (1) of section ten of the said Farmers' Assistance Act, 1935.

By virtue of the provisions of section 50 of the Act, the conditions set out in the Second Schedule to the Act, are implied in every mortgage bond passed to secure an advance made by the bank. Among these conditions so implied in each bond, are:-

(6) That the power of sale and incidental powers in that behalf conferred upon the bank under the Land Bank Act, 1944, or any amendment thereof, shall be implied herein and that they may be exercised if and whenever the mortgagor makes default in the full and punctual payment of any instalment of interest or principal in accordance with the respective conditions for payment thereof herein contained, or if and whenever the mortgagor makes default in the faithful observance and performance of any other condition on his part herein contained or implied.

(7) That if and whenever the mortgagor makes any such default as in the past preceding condition mentioned, it shall be lawful for the bank to call up and compel payment of all principal, interest and other moneys for the time being owing under this security, notwithstanding that the time or times hereinbefore appointed for the payment thereof, respectively, may not have arrived.

Position under Insolvency.

These rights may be exercised even after the mortgagor's insolvency, as section 90 of the Insolvency

Act/...

Act No. 24 of 1936, as amended, provides :-

The provisions of this Act shall not affect the provisions of any other law which confer powers and impose duties upon the Land and Agricultural Bank of South Africa ... in relation to any property belonging to an insolvent estate.

In considering details of the above legislation an interesting point emerges from the provisions of section 55 (1) (c) of the Land Bank Act No. 13 of 1944, as quoted above. This sub-section empowers the bank to exercise its powers of parate executie "if the debtor become insolvent".

What of the position where the spouse of a Land Bank debtor to whom the debtor is married out of community of property, becomes insolvent. The bonded property of the solvent spouse, who is the bank's debtor, by law falls into the insolvent estate until released therefrom by the trustee in terms of section 21 of the Insolvency Act No. 24 of 1936.

When such property has been released the position is clear, as also while the burdened property is only provisionally vested in the trustee pending release.

If, however, the Bank's security is not released, then the question arises as to whether the bank can in law exercise its rights of parate executie in respect of the particular property which then forms

part/...

part of the insolvent estate of a person who is not the bank's debtor. In other words, can the insolvent estate be deemed to have become the bank's debtor by a process of statutory substitution effected under the provisions of the Insolvency Act?

The Land Bank Act speaks only of the "debtor" becoming insolvent and omits any reference to his or her "spouse". A presumption exists to the effect that, unless the contrary is clear, a statute must be interpreted so as to impose the least possible burden on the person affected so as not to take away nor encroach on his rights. (1)

However, the trustee in the insolvent estate in taking over the property of the solvent spouse (the bank's debtor) must assume not only benefits but also all the encumbrances attaching to the property, namely, its bond. It is a condition of the bond of the solvent spouse that the bank may exercise its right of parate executie in given circumstances and thus the insolvent estate would also be bound thereby.

It may also be argued with some weight that, in declaring the insolvency of the debtor as a ground for summary recovery by the bank, the legislature was
not/...

(1) Principal Immigration Officer vs. Bhula 1931. A.D.

not so much concerned with the status of the debtor, but rather with the fact that the encumbered property was likely to be subjected to administration in insolvency involving costs.

Finally, the provisions of the Insolvency Act are general, while those of the Land Bank Act are special "generalia specialibus non derogant".

It is a paramount and golden rule of interpretation of statutes that regard must be had to the intention of the legislature as a whole, which must be gleaned ex visceribus actus. (1). The sounder view appears, therefore, to be that where the property of the solvent spouse finally vests in the insolvent estate, then the evil contemplated in section 55 of the Land Bank Act arises because, in relation to the mortgaged property itself, the incidents of insolvency intervene and the bank may, as a consequence, use its powers of parate executie.

Competent Courts.

Section 55 (1) (d) speaks of the security for the advance being declared executable by order of a competent court or being attached in pursuance of a judgment of any such court. As a matter of interest
the/...

(1) Farrars' Est. vs. Commissioner of Inland Revenue
1926. T.P.D.

the competent court herein referred to, has been held to include a magistrate's court and is not restricted to a supreme court only, as was originally considered to be the case. (1)

Position in relation to the Farmers' Assistance Act, 1935 (Act No. 48 of 1935).

Section 55 (1) (f) provides that the bank may exercise its rights of parate executie whenever a notice has been published with reference to its debtor, under sub-section (1) of section ten of the Farmers' Assistance Act No. 48 of 1935.

This Act, which will be examined more fully later on, provides briefly for calling of a meeting of a farmer's creditors in certain circumstances for the purpose of arriving at a solution of his difficulties or effecting a possible compromise in respect of his debts under section 12 of that Act. Provision is also made under section 16 of that Act for the farmer's estate to be administered as insolvent.

By reason of the fact that the Land Bank Act is later in time, the provisions of section 55 (1) (f) would override the provisions of the earlier 1935 Farmers' Assistance Act, in so far as there is any inconsistency between these statutes.

It/...

(1) Daniels & Smit vs. Pienaar 1942. O.P.D.

It appears therefore that the Land Bank does not lose its rights of parate executie by abstaining from taking part in any proceedings under the Farmers' Assistance Act.

On the contrary, it is the very existence of the circumstances as envisaged by the latter Act which gives rise to the bank's right of parate executie.

It is submitted, too, that a compromise to which the bank is not a party, would also not affect the bank's rights. Even where the bank takes no steps at all and remains silent, such inactivity would not then amount to a tacit consent as there is no duty upon the bank to speak.

Regard being had to the foregoing provisions relating to solvent spouses of insolvent persons, it is submitted furthermore, that, by analogy, where the bank's debtor is the solvent spouse of a person, married out of community of property, and the latter's estate is being administered under section 16 of the Farmers' Assistance Act No. 48 of 1935 as insolvent, then the bank's rights of parate executie under section 55 of its own Act would also arise.

Due Notice of Sale.

Before proceeding with a sale, the bank must publish details thereof in the Government Gazette and
in/...

in a newspaper circulating in the district in which the property is situated.

Such a Gazette notice would normally constitute notice to the world, but it is submitted that the bank with its special rights should not be allowed to ride rough-shod over the rights of interested third parties such as fidei-commissaries and usufructuaries. Special notice should be given to such parties, if at all legally possible, as the courts may possibly insist on their being given ample opportunity of protecting their rights independent of the hurly-burly of a public auction. (1)

Liability for Improvements.

The bank, in the exercise of its drastic powers, would also be well advised to protect itself by announcing at the sale that it has no knowledge of any claims in respect of improvements or liens by others over burdened property for fencing, piping, etc. supplied. In the case of an ordinary sale in execution following a judgment, such other interested parties would have had an opportunity of putting forward their claims, but not where the bank steps in and sells without recourse to a court of law.

Moratorium Acts/...

(1) Fick vs. Fourie. 1934. E.D.L.D. 152; Land Bank vs. Schoeman. 1942. T.P.D.

Moratorium Acts :

Upon the happening of any of the events specified in section 55 (1) (a) to (i), the bank may, after completing the prescribed formalities, "without recourse to a court of law, enter upon and take possession of" the security. This right of parate executie does not appear to be a "civil legal remedy" for the purposes of the Moratorium Acts which prevent the exercise of "all civil legal remedies whatsoever," during times of war.

Although the general tendency is to interpret the latter phrase extensively, so as to prevent a person on active service being worried with legal proceedings (1) the bank's rights of parate executie are more in the nature of "self-help", as was held to be the case where a landlord detains invecta et illata under his lien. (2)

Although sale by the bank has some of the attributes of a judicial sale it is certainly not a judicial sale. It is submitted, therefore, that the bank's rights of parate executie are not hit by the Moratorium Acts.

Methods/...

(1) Lloyd vs. Horn. 1915. C.P.D. 136.

(2) Olivier and Havenga vs. Moyes. 1916. O.P.D.

Methods of attachment :

Although the Act, as such, does not specify the manner in which the bank is to enter upon and take possession of the security, the bank should certainly attach immovable property by means of a notice to all interested parties, including the Registrar of Deeds. The bank is not required to follow the formal procedure of a sheriff or messenger of the court in making an attachment, but would be strongly advised to follow such procedure as closely as possible so as to make its attachment effective. For instance, movables ought to be physically attached and be placed under control of the bank. The power to enter and take possession exists so as to enable the sale by public auction to be effectively carried out and to legalise what would otherwise be an act of trespass on the part of the bank.

Transfer in absence of Title Deeds :

After having sold the attached security, section 55 (2) (c) provides that where the board of the bank is unable to obtain the relative title deeds, the board may transfer the land or other security to the purchaser and give him a valid title thereto notwithstanding that the land or other security may be hypothecated or be subject to a lien or charge in favour of some other person.

This/...

This is indeed a drastic provision. Where rates are owing to a rating body, that body can usually prevent transfer of fixed property until the rates are liquidated in full. It seems, however, that the bank can override any such restraint against transfer in terms of the provisions of section 55 (2) (c) of its Act.

Disposal of Surplus Proceeds of Sale :

The Act, in section 56, specifically names the parties to whom surplus proceeds of sale must be paid. Rating authorities are not mentioned therein. It could hardly have been the intention of the legislature to prefer the debtor or his creditors to a rating body, as far as surplus proceeds of the sale are concerned. It would seem advisable, therefore, to clarify this matter by an amendment to the Act whereby rating authorities would be afforded a preference over the surplus proceeds thus implementing their present statutory powers under which the transfer of property is prohibited until rates have been paid.

On the topic of the disposal of surplus proceeds of a sale, section 56 of the Act specifically mentions payment being made to a sheriff, but excludes mention of a messenger of the court. In view of the
decision/...

decision as to what constitutes a competent court envisaged in the Act (1) a further legislative amendment to this section is required to clarify the position where a sale takes place by reason of a messenger's attachment and surplus proceeds result. To whom must the surplus be paid?

Limitation of the Bank's Rights :

Section 55 (3) of the Act prevents a messenger, sheriff, trustee, assignee, executor and a liquidator from selling property bonded to the bank, for six months after serving a notice of attachment on the bank, unless the bank agrees in writing to a sale.

This sub-section was apparently enacted so as to give the bank an opportunity of rehabilitating its debtor and thus avoid taking the ultimate step of selling. If the bank has failed to sell within that period, the messenger, sheriff, and others named above, may do so.

It may be contended that the bank should be held automatically to have lost for all time its right of parate executie after the lapse of six months from the date of receipt of the notice of attachment mentioned.

In/...

(1) Daniels vs. Smit and Pienaar, supra.

In support of such a contention, may be advanced the argument that the right of parate executie is a special one which makes inroads into accepted common law principles and should therefore be restrictively interpreted. There is also a rebuttable presumption in law that a statute does not intend to alter the common law more than is necessary. (1) A statute should, therefore, be interpreted so as to conform to existing law as far as possible, unless, of course, the contrary is plainly intended. It would not be out of place to reiterate here that our common law is not always clear on the matter of parate executie.

Van den Heever, J. is reported to have stated:- (2)

The bank, as a creditor, is favoured above the general concourse of a debtor's creditors and it is entitled to its pound of flesh but not to one drop of blood in addition.

The learned judge then refers to the -

Code 2.3.39 : Omnes licentiam habent his quae pro se introducta sunt renunciare;

and to the

Digest 4.4.41 : Unicuique licet contemnere haec, quae pro se introducta sunt;

drawing the conclusion therefrom that the Land Bank must be taken to have lost its privileges through remissness
in/...

(1) Johannesburg Municipality vs. Cohen's Trustees. 1909. T.S.

(2) Daniels vs. Smit and Pienaar, supra.

in not selling within the period of six months envisaged in section 55 (3) of the Act.

With due deference to the learned judge, it is submitted that the legislature did not intend the bank to lose its special powers of parate executie for all time in relation to its security, if it failed to exercise those powers within the prescribed period.

It is one of the prime rules of interpretation that where the words of a statute are plain, they must be given their literal, simple meaning without importing any other words unless from the intention of the legislature it is quite clear, manifestum, that the literal meaning may be departed from (1).

The view which seems to be more consistent with the wording of the Act is that the bank loses its privilege (other than by consent) only when two factors are present, namely, the six months' time period must have elapsed and the judgment creditor, trustee, executor, etc. as the case may be, must have taken steps to sell.

Where, therefore, such creditor, trustee, executor, etc., never takes any action to sell and remains dormant, then it seems that the bank's rights
of/...

(1) Dadoo Ltd. and oths. vs. Krugersdorp Municipal Council. 1920. A.D.

of parate executie remain in force until such time as action is taken by such judgment creditor or other party, as the case may be.

Section 55 (3) is addressed to the judgment creditor, trustee, etc., and nowhere in the whole Act can a reference be found to the automatic cessation of the bank's rights by the mere effluxion of time.

All that section 55 (3) does is to allow the bank a preferent period in which to act, after the expiry of which all parties are free to act, if they want to, and the devil take the hindmost. The bank is, in any event, fully secured under its first mortgage bond even though an interested third party may execute against the security.

The ratio for the judgment in Daniel's case, supra, was obviously the fact that the judgment creditor had then in fact applied to have the security sold and by such act had put an end to the bank's rights. Had he never taken that action, it is submitted that the bank could of its own accord have seized and sold the security.

Parate Executie and Charge Loans.

It is also very doubtful as to whether the bank's rights of parate executie extend to the recovery of so-called "charge" loans for fencing and the like,

which/...

which are noted against the title deeds of the relative property under the provisions of section 3 of Act No. 20 of 1911 read in conjunction with the Land Bank Act.

The noting of the charge against the title deeds and the prohibition against transfer constitutes the security - not the land itself- the nature of such a prohibition being to constitute "something not wholly in the nature of a lien or a hypothec, but sui generis" per Curlewis J. (1) while the creation of a charge corresponds to a legal hypothec.

The hypothec and prohibition against transfer constitute passive remedies available in a concursum creditorum and are analagous in effect to a legal hypothec or a jus retentionis.

Section 55 of the Land Bank Act contains drastic remedies and it might well be straining the language of it to include charge loans therein - as it is a trite canon of construction that privileges are to be interpreted restrictively - privilegia sunt strictissimae interpretationis.

Position/...

(1) Cohen's Trustees vs. Johannesburg Municipality. 1909. T.H. at page 137.

Position of Co-operative Organisations to which loans are granted :

The bank's rights of parate executie certainly do not end with the selling of the farm of an individual farmer. Not by any means.

Loans may also be made by the bank to co-operative societies and companies, as defined in the Act. (1)

Upon default, the bank may seize and sell a co-operative society's burdened property in terms of section 55 of the Act, as dealt with above, but it may also, either before or after such a sale, frame a plan of contribution apportioning the debt among members. (2)

After publication of the plan in the Government Gazette, the board may, under the provisions of section 61 (2) of the Act :-

..... without recourse to any court of law, seize and sell through the sheriff or messenger, as the case may be (as it is hereby authorised to do), so much of the property and effects of each of the defaulting persons, as may be necessary to meet the liability of that person as shown in the plan of contribution, together with any costs that may be incurred by the bank in connection with such seizure and sale.

Sub-section/...

- (1) Sections 2 and 35, Act No. 13 of 1944.
 (2) Section 61 (1), Act No. 13 of 1944.

Sub-section (7) of the same section 61 provides furthermore :-

(7) The board in having recourse to the remedies provided by this section shall in every case sell as aforesaid movable property before selling immovable property, and the provisions of paragraph (c) of sub-section (2) of section fifty-five shall apply to any immovable property so sold.

But the plot thickens. The provisions of section 62 (1) and (2) provide, in addition :-

62. (1) In the event of the board deciding to exercise the remedies conferred upon it by sections fifty-five and sixty-one, in respect of an advance made to a co-operative society, the board may, in addition to the said remedies, without recourse to a court of law enter upon and take possession of and sell by public auction, after advertisement, the whole or any part of the assets of the society even if they are not specially hypothecated to the bank.

(2) If any such assets are immovable property, the provisions of paragraph (c) of sub-section (2) of section fifty-five shall be applicable thereto.

As section 55 of the Land Bank Act does not include a reference to co-operative companies, recourse must be had to section 63 for the bank's special remedies for the recovery of loans granted to companies in contradistinction to societies.

Here again we find similar drastic remedies available to the bank.

In these instances, upon default of the company or upon the happening of other prescribed events -

63. (1)/...

63. (1) the board may, after giving seven days notice by registered letter, addressed to the secretary of the company at the address recorded in the bank's books, and after due notice to the mortgagees, without recourse to a court of law, seize and sell, either by public auction or by private treaty, any or all of the company's assets which have been specially mortgaged to the bank,

(2) If any person whose liability to pay any subscribed but unpaid capital or any contingent liability attaching to shares, has accrued in terms of the company's memorandum, if any, and articles of association or regulations, fails, upon written demand being made by the board, to pay such amount within seven days after the date of the demand, the board may, after notice to the mortgagees and without recourse to a court of law, seize and sell through the sheriff so much of the immovable or movable property of such person as may appear to be necessary to make good the amount including the costs incurred by such seizure and sale.

(3) The board in having recourse to the remedies provided by this section, shall, in every case, sell as aforesaid movable property before selling immovable property, and the provisions of paragraph (c) of sub-section (2) of section fifty-five and the proviso to that sub-section shall apply to any immovable property so sold: Provided that, if any property so sold is not specially hypothecated to the bank, but is specially hypothecated to some other person, or is subject in favour of some other person to a hypothecation of a date prior to any hypothecation in favour of the bank, the board shall pay to such person the proceeds of such sale (after deducting any costs incurred by the bank in connection therewith) or so much thereof as may be owing to that person under the deed of hypothecation.

These/...

These powers of parate executie are indeed very drastic and one wonders whether any one creditor should have been armed with so many weapons.

For a creditor to be empowered to exercise his rights of parate executie in respect of property bonded to himself may perhaps be justified in very special circumstances, but to allow him to seize and sell, without recourse to a court of law, property not bonded to him but which is specially hypothecated to another, is quite foreign to our accepted tenets of common law.

Sale of Movables before Immovables.

It is noteworthy, too, that where the bank has been given the power to execute against property not hypothecated to it, it must sell movables before selling immovables, vide sections 61 (7) and 63 (3) of the Act.

Was this enacted as lip service to the ordinary common law and statutory procedure of usually executing against movables first, or can it be ascribed to bad draftsmanship? What of the position where the bank has bonded the immovable property of a co-operative company in security for a loan granted to it?

When recovering under the provisions of section 63 of the Act, the bank is obliged by the section

to/...

to excuss movables first before excussing the immovable property bonded to it as security! Surely this position was not intended by the legislature. It affords a creditor a certain security and then compels him first to excuss something else.

Strict Interpretation.

It is obvious that the very strictest interpretation will be given to these provisions by a court, affording to the bank its exact pound of flesh and not one drop of blood in addition - per Van den Heever, J. in Daniels case, supra.

From a reading of the various provisions quoted above, relating to the recovery of loans to individual farmers, co-operative societies and companies, it is clear that section 55 of the Land Bank Act (recovery of loans to individuals) is much more comprehensive and exact in its wording than the provisions relating to the recovery of co-operative debts.

Experience has apparently shown up defects in section 55 which have been remedied from time to time. In fact, amendments to that section have been made on no less than four occasions, namely, by Act No. 30 of 1916, Act No. 36 of 1921, Act No. 32 of 1924 and Act No. 58 of 1934 (all consolidated in Act No. 13 of 1944).

On/...

On the other hand, the bank has had very little, if any, occasion to seize and sell co-operative property (1) with the result that obvious defects in the legislation remain unaltered.

Although reference to Parliamentary debates is not permissible in determining the intention of the legislature (2) a reading of the Assembly Debates of the 22nd May, 1912, during the committee stage of the Land Bank bill reveals that the bank was apparently given powers of parate executie for the following reasons, namely :-

- (1) to enable the bank, by means of the threat of seizing and selling within six months, to bring pressure to bear upon the farmer-debtor to pay his other judgment creditors and thus to have them uplift their attachments, thereby obviating an ultimate sale and assisting in his rehabilitation;
- (2) to save the farmer the costs of levying of execution on a judgment of the court in the normal way;

(3)/...

(1) Land Bank Annual Reports from 1912.
 (2) Mathiba vs. Moschke. 1920. A.D.

(3) ultimately to safeguard the taxpayers' moneys as State funds are voted to the bank by Parliament each year for loans to farmers.

Number of Sales by the Bank :

A scrutiny of the bank's annual reports shows that these wide powers have, in fact, been used very sparingly.

Of the 103,076 bonds registered during the bank's existence since 1912, the bank has had to seize and sell the security in 1,682 instances only, for the following reasons :-

| <u>Reason:</u> | <u>Number of Sales:</u> |
|---|-------------------------|
| Accumulated arrears and bad financial position of debtors | - 508 |
| Debtors having given up farming and having requested that their farms be sold | - 469 |
| Debtors insolvent | - 414 |
| Insolvent deceased estates | - 156 |
| Other judgment creditors' attachments | - 80 |
| Debtors' estates administered under the Farmers' Assistance Act | - 55 |
| TOTAL | - <u>1682</u> |

This constitutes $1\frac{1}{2}\%$ only of the 103,076 bonds registered. (1)

Summary/...

(1) Annual Report 1954.

Summary and Conclusions.

Although under early Roman law the creditor had the definite right to sell the security on default of the debtor, the creditor, at the time of Justinian, could only exercise such a right of sale without judicial process, if the debtor had, at the time of the hypothecation or subsequently, agreed to such sale; furthermore this right was not confined solely to movables.

The weight of authority on Roman Dutch law, on the other hand, is against the upholding of an agreement for parate executie, but there is no doubt that the principle has come to be recognised as part of our South African law, as far as movable property is concerned. In English law such a sale is lawful in respect both of pawns or pledges and of mortgages.(1)

To sanction such a sale of immovable property, the legislature has thus deemed it necessary to enact special legislation as in the case of the Land Bank.

Although the motive for such legislation may well be laudable, as, for instance, the protection of State moneys lent to the bank and the saving to the debtor of the cost of legal process, it is submitted
that/...

(1) Halsbury's Laws of England, Vols. 21 & 22.

that the wide powers so given are quite out of proportion to the object sought to be achieved thereby.

The bank may only advance moneys to a farmer against first mortgage of immovable property and then only up to two-thirds of the bank's valuation of the security. (1) This in itself greatly minimises the risk of loss. If the bank were a second bondholder one could more easily visualise circumstances where quick action would be necessary to safeguard its interests, e.g. where the margin of security was small and the property was being neglected and was rapidly deteriorating in value.

It is submitted furthermore that in most of the circumstances contemplated in section 55 (1) of the Act, as in insolvency, attachment by a second bondholder or estate cases, the protection and secured rights given to a first bondholder by existing legislation, are in themselves adequate without the need for investing the bank with special powers of parate executie in those instances, powers which even allow it to ride roughshod over the rights of the holder of a prior lien or charge over the property so sold. (2)

It/...

(1) Section 26, Act No. 13 of 1944.

(2) Section 55(2) (c), Act No. 13 of 1944, supra.

It is, however, in the realm of the financing of co-operative societies and companies that we find even greater drastic powers which cut right across the common law rights of third parties.

Before excussing the assets of a co-operative society to which a loan has been made, the bank may, in terms of section 61 of the Act, seize and sell without recourse to a court of law, the members' property and effects which are not bonded or hypothecated to it. The bank may so sell in terms of section 62 of the Act, the society's assets, too, even though they are not specially hypothecated to the bank.

In the case of recovery of a loan made to a co-operative company, the bank may, in terms of section 63 of the Act, seize and sell without recourse to a court, the movable and immovable property of members in order to meet their liability for unpaid capital on subscribed shares, even though such property is not hypothecated or bonded to the bank.

To afford a privileged creditor the right of parate executie may be justified in special circumstances, but it is submitted that the drastic powers mentioned above are hardly necessary and are indeed quite foreign to our accepted concepts in common law.

The Act, too, contains certain defects which give one the impression of patchwork legislation.

For/...

For instance, provision should be made in section 56 for the disposal of surplus proceeds of sale to rating bodies and to messengers of the court. Furthermore, the loss or retention of the bank's rights in the circumstances contemplated in section 55 (3), should be clarified by a suitable amendment to the Act.

The bank, too, in recovering a debt from a co-operative company, will find itself being forced to sell movable property not hypothecated to it, before it can touch the immovable property specially bonded to it ! This is indeed a strange provision.

There has fortunately been little need for the bank to liquidate co-operative societies and companies and there have also been comparatively few sales of property of individual farmers as is evident from the figures quoted above.

That the bank has had such little occasion to seize and sell under its Act is, perhaps, just as well from its point of view, as a more frequent use of its drastic powers would certainly have given rise to criticism long ago.

CHAPTER III.

THE CONCEPT OF INSOLVENCY IN RELATION
TO THE FARMERS' ASSISTANCE ACT, 1935,
(ACT NO. 48 OF 1935) AS AMENDED.

Contents: Object of the Farmers' Assistance Act; concept of insolvency; insolvency under Roman law; missio in possessionem and bonorum emptio; bonorum distractio; cessio bonorum; early German and Frankish law; position under Roman Dutch law; cessio bonorum and brieven van cessie; bankrupts; desolate boedelkamers and special ordinances; immissio in possessionem; atterminatie or respijt; inductie and moratorium; ordinances in the Netherlands; early Cape law; other subsequent legislation; need for adequate measures of relief; Farmers' Assistance Act; Farmers' Assistance Board; farmers eligible for assistance; certificates and their effect; meeting of creditors to consider board's proposals; extension of time; effect of notice of meeting; procedure at meeting; rejection of compromise; acceptance of compromise; discharge from liability; passing of ownership; dealings with property; interpretation of Act; summary and conclusions.

Object of the Farmers' Assistance Act, 1935 :

The Farmers' Assistance Act (Act No. 48 of 1935) was promulgated in 1935 to enable the farming community to weather the storm of the world-wide economic depression of the early thirties by granting farmers respite from their debts or even total escape from liability altogether. It allows a farmer who is virtually in insolvent circumstances, to come to an arrangement with his creditors and thus relieve himself of further liability without suffering any of the disabilities of an ordinary insolvent. He may, for instance, be granted extension for payment of his debts, he may effect a compromise with his creditors or he may elect to have his estate sequestrated in the ordinary way.

It is in the light of the whole concept of insolvency as it exists in South Africa, in which the Farmers' Assistance Act must be examined in order to gauge its effect in relation to common law principles.

Concept of Insolvency :

The procedure in insolvency in South Africa and the disabilities of an insolvent are now for the most part regulated by statute (1) but there are a
great/...

(1) Insolvency Act No. 24 of 1936 as amended.

great many questions relating to insolvency for which our Insolvency Act (1) and the previous laws in force in the Provinces, Colonies and Republics of South Africa made no provision. These questions fall to be decided in accordance with the common law which is to be found in the works of various writers like Grotius, Voet, Van Leeuwen, Van der Keessel, Van der Linden and Bynkershoek.

Insolvency under Roman Law - Manus Injunctio :

The concept of insolvency is one which has grown and developed over many centuries. A little more than two thousand years ago a person's creditors enjoyed the option, in the event of non-payment of debts, of selling the debtor into slavery or even of cutting his body into pieces. (2) Though the latter right may perhaps not have been practised in fact, the alternative and almost equally severe course of selling the debtor into slavery was undoubtedly adopted.

The sale of a debtor into slavery was apparently prohibited by the Lex Poetelia (3) but in later times a debtor could be imprisoned for debt in a public/...

-
- (1) Insolvency Act No. 24 of 1936 as amended.
 (2) Twelve Tables 3 and 4 in 451 B.C. according to Mars The Law of Insolvency in S.A. - H.E. Hockly.
 (3) About 326 to 313 B.C. but the exact effect and provisions are not clear.

public prison. However, Constantine in A.D. 320 abolished imprisonment for debt unless the debtor was contumacious. (1)

Missio in Possessionem and Bonorum Emptio :

So much for a debtor who was unable to pay his debts. What of a debtor who sought to evade his liabilities by leaving the country or concealing himself from his creditors.

The Praetor (2) specially provided a means of execution against the debtor's property in those circumstances by means of a missio in possessionem. The Praetor had, ready to hand, as it were, a model in the ancient sectio bonorum, namely the sale by the Questors of the property of convicted criminals and it is not improbable that he was influenced thereby. The procedure was also in many respects similar to that of the former execution against the person of the debtor. Three decrees were issued by the Praetor. The first authorised one or more of the creditors to take possession of all the debtor's assets, rei servandae causa, and to announce the projected sale by advertisement, proscriptio. The second decree entitled creditors to choose a magister from amongst themselves to supervise
the/...

(1) Hunter's Roman Law. 2nd Edition, p. 1036.

(2) About 167 or 104 B.C., it seems.

the sale and the third authorised the actual sale.

Under this procedure of missio in bonorum possessionem the whole of the debtor's assets, the universitas juris, was sold en bloc and transferred by means of the Praetor's addictio to the person who offered to pay the creditors the highest dividend on their claims.

Bonorum Distractio :

In later years this procedure was modified, firstly in respect of debtors of high rank and later in general, in so far that a curator was appointed instead of a magister, subject to the Praetor's sanction. This curator did not sell the debtor's estate en bloc but in the most advantageous and convenient lots. As the debtor was not dispossessed of the whole of his estate there was no universal succession as in the case of a bonorum emptio. This modified procedure was known as a bonorum distractio.

Cessio Bonorum :

These rights above were created solely in the interests of creditors. Only later were certain procedures afforded for the relief of debtors themselves. At the time of Julius Caesar or Augustus, the Lex Julia, for instance, allowed an insolvent debtor to surrender his estate on his own accord to his creditors, a cessio bonorum/...

bonorum, in lieu of execution against his person. Such a surrender did not discharge him from his debts but saved him from arrest, imprisonment and slavery. The debtor could, furthermore, use subsequently acquired property for his necessary subsistence but such property, over and above his requirements for subsistence, was nevertheless liable to be sold in order to pay his debts. This latter benefit was known as the beneficium competentiae. (1) This cessio bonorum could apparently be claimed by a debtor as of a right (2) and was followed by the emptio bonorum at first and then in later times by the distractio bonorum.

At the time of Justinian the old form of emptio bonorum with its many formalities and universal succession had disappeared with the old civil process of judicia ordinaria. Under the system of extraordinaria judicia creditors could merely possess themselves of the goods of their debtors by order of a judge and dispose of them as they thought proper. (3) In fact, even before the system of extraordinaria judicia had begun, the simple process of levying execution only on so much of the debtor's property as was requisite, had been introduced at the time of Antoninus Pius.

Early/...

-
- (1) Digest 42. 3. 4 : Code 7. 71. 1.
 (2) Digest 42. 3. 9 : Code 7. 71. 6.
 (3) Digest 42. 5. : Code 7. 72. 9. Inst. 3. 12.

Early German and Frankish Law :

Sir J.W. Wessels states that the German law allowed the creditor to enslave his debtor and the later law of the Franks made the debtor work for the creditor. (1)

Position under Roman Dutch Law :

The early law of Holland recognised the attachment of the person for debt. Sir J.W. Wessels (2) maintains that according to the handvesten given by the Counts from time to time to the towns, between the years 1245 to 1412, if a debtor could not pay his creditors, the former was handed over to the latter until the debt was paid.

Cessio Bonorum and Brieven van Cessie :

Mention of the cessio bonorum itself is made by Van der Keessel to the effect: (3)

That the benefit of cessio bonorum had already come into use amongst us towards the end of the 15th century, appears from a report of certain disputes between the magistrates of Leyden, respecting its having been too readily granted to the Count of Holland.

It seems, however, that unlike the Roman law, the cessio bonorum had ceased to be a right which the
debtor/...

-
- (1) History of the Roman Dutch Law by Sir J.W. Wessels.
 (2) Ibid.
 (3) Select Theses 883. Trans. C.A. Lorenz.

debtor could claim, but was regarded in the Dutch practice as being a privilege which the court might in its discretion extend to a debtor, if his insolvency was due to misfortune.

Grotius states, for instance: (1)

Cessio bonorum is an act of grace obtained from the Sovereign

and again (2)

We say an act of grace obtained from the Sovereign, for in Holland an order for that purpose must be applied for to the High Council.

This was a costly and difficult procedure and the debtor had to petition the Court of Holland setting out the causes of his default and that his estate had declined without fault of his own together with an inventory of his property. (3) The Court then referred the matter to the burgomaster for investigation, afterwards granting a rule nisi why the issue of brieven van cessie should not be confirmed. The effect of the issue thereof was to free the debtor from arrest, to stay execution and to place the debtor's goods in charge of a curator, but the writ or brieven did not discharge the debtor from his debts. It amounted virtually to a surrender by an insolvent of
all/...

(1) Introd. 3. 51. 2.
 (2) Ibid. 3. 51. 3.
 (3) Heed. Rechts. 5. 42.

all of his estate for the benefit of his creditors.

Huber (1) says that :

By this cession the debtor is not indeed freed from debt, but from the embarrassment of execution and especially from the liability to be thrown into prison which otherwise a creditor is at liberty to do.

Huber, too, has it that when such brieven are granted, the debtors nevertheless remain bound to their creditors all their lives. (2) None the less, says he : (3)

A person damages the sheen of his reputation not a little by sending others to look for their money and bringing himself into the condition of not being able to keep his word.

In France, an insolvent who had obtained the benefit of cession had to wear a green cap, while during the sixteenth century at Rotterdam and at Leyden, persons who had obtained brieven van cessie were required to stand before the steps of the town hall in their underclothing for an hour a day during three successive days. (4)

If, on the other hand, a petitioner was unfortunate enough to have his petition refused, then he was exposed to the public view on the scaffold for half-an-hour with the judgment on his breast. This

was/...

-
- (1) Heed. Rechts. 5. 42. 2. Trans. P. Gane.
 (2) Ibid. 5. 42. 9.
 (3) Ibid. 5. 42. 15.
 (4) History of the Roman Dutch Law by Sir J.W. Wessels
 Chap. 24.

was actually carried out on one Feike Hoytes on 15/7/1606. (1)

Bankrupts :

A bankrupt, that is, a person who fled the land to escape his debts, was regarded in the same light as a thief and the law had no mercy for him. A number of placaten were promulgated for the punishment of such bankrupts.

Desolate Boedelkamers and Special Ordinances :

During the seventeenth century the insolvent estates of deceased persons and the estates of absentees were administered by commissioners under the supervision of the Schout and Schepenen, or local magistrates, but subsequently during the eighteenth century various local ordinances were framed for the administration of insolvent estates which were then placed in the hands of

Desolate Boedelkamers. (2)

Immissio in Possessionem :

In addition to the brieven van cessie, equivalent to the cessio of Roman law, it seems that the immissio in possessionem of the Romans in some form or other was also practised in Holland. Voet says: (3)

If/...

-
- (1) According to Huber, Heed. Rechts. 5. 42. who also quotes other cases.
 (2) History of the Roman Dutch Law by Sir J.W. Wessels.
 (3) Voet, 42. 5. 1. Trans. L.E. Krause.

If no satisfaction has been given or payment has been made to the creditors who have been placed in possession for the sake of preserving the property, a second decree is issued at their request in order that the creditors may secure the right of selling those goods.

and again: (1)

After the creditors have been placed in possession it is absolutely advisable, and in fact necessary, that a curator should be appointed over the property.

Thereafter the goods are sold, but, says Voet: (2)

The sale must be held openly, by public auction and the goods must be put up and offered separately, each article by itself, not all the goods in one lot together, to be bid for once only.

Van der Linden, too, outlines the procedure to be adopted where creditors seek the sequestration of the debtor's estate (3) and points out the existence of special ordinances on the subject and of the creation of special chambers (4) (Desolate Boedelkamers).

Atterminatie or Respijt, the Inductie and the Moratorium:

Of particular interest vis-a-vis the Farmers' Assistance Act (5) are the common law procedures of Atterminatie or Respijt, the Inductie and the Moratorium.

Voet/...

-
- (1) Voet. 42. 7. 1. Trans. L.E. Krause.
 (2) Ibid. 42. 5. 2.
 (3) Van der Linden. Institutes 3. 10. 2.
 (4) Ibid. 3. 10. 1.
 (5) Act No. 48 of 1935.

Voet has it that :-

In our practice a debtor has two methods for endeavouring to obtain a respite, namely, by obtaining letters of induction (brieven van inductie) or the moratorium certificate or letters of respite (brieven van respijt en atterminatie). The former is granted by the Court of Holland, the latter by the Supreme Court, although before the establishment of the Supreme Court, the Court of Holland had jurisdiction to grant either kind of certificate. (1)

The object of the induction according to Voet, was that the creditors might each separately be induced to give the debtor a respite from paying his debts but only against security for due payment thereof.

The letters became effective if the majority of the creditors agreed to grant the respite. (2) These are apparently the letters of atterminatie mentioned by Van der Linden (3) when he refers to the High Court of Holland granting a delay of payment for five years or less against security given by the debtor for payment of the debt after the lapse of the specified time.

The object of such a procedure is stated by Voet (4) to be :-

But/...

-
- (1) Voet 42. 3. 20. Trans. L.E. Krause.
 - (2) Ibid.
 - (3) Institutes 3. 1. 7. 3.
 - (4) Voet 42. 3. 15. Trans. L.E. Krause.

But letters of respite are granted to those only who on account of want of means cannot satisfy their creditors at once, and for such it is a sufficiently great advantage that they cannot for the time being be compelled to pay against their will.

This procedure was thus available to a debtor who was solvent but who needed time in which to pay his creditors. He obtained relief by way of petition for such letters.

Van der Keessel (1) points out that :-

In respect of letters of respite the consent of the majority of creditors is also necessary.

During the period of respite interest ceased to run. (2) If the creditors disagreed the Court itself could grant a stay for not more than five years. According to Huber that is why the letters of respite were commonly called quinquenellen. (3)

Voet also mentions the procedure of petitioning for a respite when the majority of creditors were not prepared to consent to payment being postponed. (4)

Van der Linden calls such a procedure an Inductie, pointing out that a debtor, on petition, may pray the Court to induce his creditors to grant him time

to/...

-
- (1) Van der Keessel. Theses Select. 891. Also Huber Heed. Rechts. 5. 42.
 (2) Huber. Heed. Rechts. 5. 42.
 (3) Ibid. 5. 42. 11.
 (4) Voet 42. 3. 20.

to effect payment or to make such order as it deems fit in the circumstances. (1)

As to the procedure of the moratorium, it was very different from what we to-day know as Moratorium Acts for the suspension of legal proceedings against persons during times of war, although the relative statutes have their roots in this old common law concept. Voet (2) says that :-

He also escapes imprisonment and has no need to surrender his goods, who, under the expectation that he will improve his fortunes, obtains from the Prince the moratorium certificate (letters of respite) which does not reflect on his honour But this kind of certificate cannot be obtained unless the majority of his creditors give their consent and a certificate once obtained only becomes effective on condition that the debtor gives adequate security by means of sureties for the payment of his indebtedness after the expiration of the prescribed time.

The moratorium certificate did not, however, deprive dissenting creditors of their rights,

because the Prince does not usually nor must he be presumed to have wished to deprive another, by his certificate, of a right or an obligation acquired by that other. (3)

Bondholders, however, who did consent to the granting of letters of respite were, according to Voet (4) deprived/...

-
- (1) Van der Linden. Institutes 3. 1. 7. 4.
 (2) Voet 42. 3. 14. Trans. L.E. Krause.
 (3) Voet 42. 3. 15. Trans. L.E. Krause.
 (4) Voet 42. 3. 16. Trans. L.E. Krause.

deprived :-

..... of the licence of suing for payment of the debt, unless in this or that place there be some other statutory provision.

Under our common law, therefore, when the majority of creditors had granted a respite to the debtor, it did not prejudice the rights of the dissenting minority, but the latter, though they could not take steps to force a sale, could, however, claim to be paid out of any ready money accruing to the debtor, against security for restitution. In this connection Voet (1) says :-

However the minority of creditors who do not consent to the delayed payment or to a remission of part of the debt, are not allowed forthwith to go over to sell the goods by means of a trustee appointed for that purpose, in order that they may secure payment for what is due to them, lest, through such an untimely sale the debtor should also fail in being able to make payment in full of the remaining liabilities not remitted. And this is so according to equity, although we have no direct law to support it.

These various remedies for the relief of impoverished debtors are no longer in use in South Africa. The present law of Holland seems, however, to have retained the moratorium, modified and improved to suit modern requirements, under the name of surcheance van betaling.

Ordinances/...

(1) Voet 42. 3. 16. Trans. L.E. Krause.

Ordinances in the Netherlands.

There were also apparently a large number of local ordinances relating to insolvency in the Netherlands, but the 1777 ordinance of Amsterdam is undoubtedly of the greatest importance. Much of our South African law of insolvency is based on that old ordinance, in terms of which a Chamber was established to administer the estates of all debtors who were obliged to stop payment, whether by notice of the debtor himself or by his creditors, as well as the estates ceded under benefit of an inventory.

When a debtor found himself unable to pay his debts he advised the Chamber - the Desolate Boedelkamer - or his creditors did so, requesting the Chamber to take charge of the estate. Two members of the Chamber then took charge and endeavoured to make suitable arrangements with the creditors. If their efforts were not crowned with success, they made an inventory of the assets, examined the insolvent, called a meeting of creditors and elected provisional sequestrators who took charge of affairs. The debtor was given one month in which to compound with his creditors, failing which he was regarded as insolvent and the sequestrators became the curators or trustees in insolvency. Claims were filed
in/...

in the insolvent estate and the assets were duly liquidated. (1)

Early Cape Law :

As early as 1717, the Court granted an ex parte application for an "order van preferentie en concurrentie", in terms of which a distribution account of the petitioner's insolvent estate was confirmed. (2) This account had been framed by two commissioners appointed by the Court.

A cessio was also applied for but refused by the Court in 1728. (3)

The dual form of relief certainly existed in the Cape after the Commissioner, General de Mist, founded a chamber called the Desolate Boedelkamer in 1803 to deal with not only abandoned estates, but also estates of those debtors who stopped payment because of their inability to meet their obligations, estates of those against which execution was to be levied and the estates of all those obtaining a cessio bonorum.

A Sequestrator took the place of the Desolate Boedelkamer in 1818 and in 1827 a Commissioner assumed the duties of the Sequestrator. The 1829 Insolvency Ordinance No. 64 fused the English and Dutch practices
and/...

(1) History of the Roman Dutch Law by Sir J.W. Wessels.
 (2) In re Heyns - Requesten in Cape Archives 1716 - 1721.
 (3) In re Bierman, Cape Archives, 1728.

and officially recognised the difference between voluntary and compulsory sequestration. The Master became the official sequestrator of estates.

Various laws were subsequently passed in the Cape Colony culminating in the Ordinance No. 6 of 1843 which has been the foundation of our later legislation on insolvency.

Other Subsequent Legislation :

Natal, Orange Free State and Transvaal Ordinances followed the provisions of the Cape Ordinance of 1843 closely and since Union, our statutory enactments have crystallised in the Insolvency Act No. 24 of 1936 as amended, which, inter alia, abolished statutory assignments (envisaged in Act No. 32 of 1916) and introduced other important additions and innovations to our law and practice relating to insolvency.

So much then for our common law concept of insolvency and its development in our law.

Need for Adequate Measures of Relief:

It is of interest to note that Justice L.E. Krause once expressed the hope :-

that when our present defective law of insolvency is amended by Parliament it will be entrusted to a commission consisting of members and assessors who know their job; and that the remedy of the moratorium will be restored. Had it been embodied in the present Act, hundreds of honest but unfortunate debtors might

have/...

have been saved from insolvency during the late period of depression. (1)

Although the old Insolvency Act (2) did not provide for a moratorium as suggested above, it did provide for a voluntary assignment of assets by a debtor for the benefit of his creditors. An assignment was defined in that Act as an agreement whereby a debtor transferred or agreed to transfer his property to a person, called the assignee, for the benefit of his creditors. Such agreement had to be in writing and the instrument in which it was contained was called the Deed. (3) Assignment differed from insolvency in that a debtor could not be compelled to make an assignment, that in the absence of special provision in the Deed to the contrary it automatically released a debtor from all debts due or the cause of which arose before the date of the assignment, (4) that it in no way affected the debtor's personal capacity or property acquired by him subsequent to the date of assignment and that the debtor who had assigned did not subsequently apply for rehabilitation. These provisions relating to voluntary assignments have been repealed. (5)

The/...

-
- (1) Note to his translation of Voet 42.3.14. The depression there referred to is the world-wide economic depression of 1930/33.
(2) Act No. 32 of 1916, repealed by Act No. 24 of 1936.
(3) Act No. 32 of 1916, Sec. 116.
(4) Act No. 32 of 1916.
(5) By Act No. 24 of 1936.

The Farmers' Assistance Act :

The Farmers' Assistance Act (1) which followed closely on the economic depression of 1930/1933, was primarily designed to enable the hard-hit farming industry to weather the economic storm.

It is not the intention to quote this Act in extenso nor to deal with each and every one of its numerous provisions in detail, but only with those main provisions which have a bearing on our common law concept of insolvency and related procedures. Certain references to merely administrative provisions of the Act have necessarily been made so as to obtain an outline of the general framework of the Act. The procedure envisaged in the Act smacks not only of an assignment, but also of the old moratorium, and of a voluntary surrender.

The Farmers' Assistance Board :

The Act is administered by the Chairman and his Board (2) together with the Secretary of the State Advances Recoveries Office (a Government Department) who has also been designated as Deputy Chairman.

Farmers/...

(1) Act No. 48 of 1935.

(2) Act No. 48 of 1935 : Sec. 2.

Farmers Eligible for Assistance :

Not all, but only certain farmers may apply for protection under the Act (1) as specified therein.

Unlike the common law procedures, therefore, which applied to all debtors, the benefits of the Act have been limited to certain persons only.

Here one finds an application being made by the hard-pressed debtor, not to a court of law as under the common law of respijt and inductie, but to a statutory body, the Farmers' Assistance Board, whose chairman can grant immediate relief. An inventory of assets and a list of liabilities is attached to the application.

Certificates and their Effect :

If the Chairman of the Board considers that prima facie there is a reasonable prospect of the Board granting assistance, he issues a certificate (2) which, upon its being filed in a court, has the effect of staying any proceedings instituted in any court against the debtor for the recovery of any debt due by him or for the attachment or sale of any assets belonging to him in execution of a judgment of such court. (3)

Furthermore, when such a certificate has been filed in any court, no civil proceedings can be instituted

in/...

(1) Act No. 48 of 1935 : Sec. 5.
 (2) Ibid. : Sec. 7.
 (3) Ibid. : Sec. 7.

in the court for the purpose of enforcing payment of any debt owing by the debtor or for the sequestration of his estate, until the certificate lapses in terms of the Act. This happens if the board eventually refuses the application or if the proceedings taken under the Act in regard to the applicant fall away through circumstances mentioned later herein.

This is indeed a drastic provision, the operation of which depends upon the discretion of one man - the chairman (or his deputy) - in issuing the relative certificate. The rights of creditors are placed in suspension pending the final outcome of the board's deliberations. This is virtually a form of moratorium for a limited time.

It should be noticed that these provisions of the Act apply to the stay of proceedings for the recovery of a debt, and not, for instance, to an action for cancellation of a contract of sale of land, together with a claim for ejection from the land and payment of damages on the ground of non-payment of the purchase price which is not a proceeding instituted for the recovery of a debt or for enforcing payment of a debt in terms of sections 7 (1) or (2) of Act No. 48 of 1935. It has been held that such action is accordingly not stayed or barred by the filing of a certificate in terms of those sections. (1)

It/...

(1) Marais vs. Rottcher, 1936. T.P.D.

It has been held, too, that the debt envisaged in section 7 of the Act also means a debt due in money and not, for example, vindication of property by another person which is an illiquid claim. The filing of a certificate in terms of that section is therefore not a ground for staying proceedings in a magistrate's court for the recovery of a motor car sold to a farmer on the hire-purchase system owing to his non-payment of instalments. (1)

It is interesting to note that under the old Insolvency Act (2) relating to assignments, legal proceedings against the debtor on any liquidated claim provable against his estate were also at once stayed. (3)

Calling of Meeting of Creditors to consider Board's Proposals:

The board then considers whether it is desirable that the debtor should effect an arrangement with his creditors or obtain an extension of time for payment of his debts regard being had to his reasonable prospects of carrying on farming operations successfully in the future. After consulting the debtor, and with his agreement, the board, if it so deems fit, proceeds to call a meeting of creditors (4) by suitable publication of a notice of such meeting.

Before/...

-
- (1) Kruger vs. Manning & Patterson Ltd. 1937. C.P.D.
 (2) Act No. 32 of 1916 repealed by Act No. 24 of 1936.
 (3) Ibid. : Sec. 126 (2) (c).
 (4) Act No. 48 of 1935 : Sec. 10.

Before doing so, however, the board itself determines the nature of its proposals which it intends making to creditors at such a meeting. If the board considers that the debtor will be able to carry on farming with a reasonable prospect of success if he is relieved of part of his liabilities, then the board may (and usually does) propose that less than the amount of their claims be accepted by creditors, or, in other words, that a compromise be effected.

In order to finance such a proposal the board may advance money to the debtor against security of a first mortgage bond over immovable property or the board itself may acquire the whole or any part of the debtor's immovable or movable property.

These proposals are communicated to the debtor before being presented to creditors - a far cry from the common law procedure of petitioning court or the sovereign for relief or surrender of goods.

The board and the debtor get together, as it were, and to all intents and purposes force a compromise on creditors, who know that if they reject the proposal (which they are entitled to do (1) under the Act) they will have to sell up the debtor who is a man of straw, and possibly forfeit a portion of their claims besides incurring legal costs.

Extension/...

(1) Act No. 48 of 1935 : Sec. 16.

Extension of Time.

The board, on the other hand, may propose a mere extension of time for payment of debts. This it usually does where the debts were incurred subsequent to the date of promulgation of the Act, because although the Act is silent on the point, it has been the policy of successive Governments to render actual financial assistance to the farmers concerned in respect of debts incurred prior to 1935 only and to propose extension of time for payment of the other subsequent debts. As mentioned above, this procedure is a far cry from the moratorium envisaged in common law which was a form of relief granted by "the Prince" and which did not prejudice the rights of the dissenting minority of creditors, who could claim out of any ready money accruing to the debtor.

The board, in making its proposals, actually wields extensive powers and encroaches on the rights of the individual. Van der Keessel (1) points out that :

It was essential in Holland that an agreement of composition between an insolvent and his creditors had to be confirmed by public authority.

Van der Linden/...

(1) Van der Keessel Theses 829.

Van der Linden (1), too, says :

Where no other law to the contrary the common law prevails, according to which no creditors can be forced to agree to a composition by which their claims would be reduced, the authority of the Court is of little avail and the authority of the sovereign is absolutely necessary to confirm the composition.

So much then for these overriding statutory powers of the board under the Act.

Effect of Notice of Meeting.

Upon the publication of the notice calling a meeting of creditors the debtor still remains liable for his debts and obligations. He is merely prevented from liquidating them and from disposing of his assets. He must also ensure that his agents do not dispose of any of his assets. (2)

Procedure at Meeting.

At the meeting itself, creditors prove their claims as in the case of insolvency. Proceedings at the meeting are administrative, not judicial. (3)

Creditors must now decide whether to accept a compromise or reject such a proposal, but the Act goes further. It provides that the proposal shall be deemed to have been accepted by all creditors and to be binding on all unless it is rejected by a majority of creditors
who/...

(1) Van der Linden. Institutes 3.1.10.IV. Trans. H. Juta.

(2) Richter vs. Assist. Master and Bfn. Town Council 1941.
O.P.D.

(3) Ibid.

who are not to be paid in full and whose claims aggregate more than half of those not to be paid in full. A secured creditor (mortgagee, pledgee or holder of a lien) is also entitled to reject the compromise if, in terms thereof, he is not to be paid in full or to receive the full value placed by him on his security. (1)

The Farmers' Assistance Act introduces an entirely new concept which is foreign to our common law by deeming a compromise to have been accepted unless rejected. The reason for the introduction of such an innovation is not difficult to fathom. It is obviously another form of protection of the farmer against creditors.

Rejection of Compromise.

If the proposal is rejected by creditors, then the debtor still has another opportunity of escaping the consequences of and disadvantages attaching to an ordinary insolvency. The presiding officer asks him whether he desires his estate to be dealt with in terms of section 16 of the Act. If he replies in the negative all proceedings under the Act fall away and his creditors are entitled to sequester his estate in the ordinary way if they so desire. If he replies in the affirmative, i.e. to have his estate dealt with under section 16, then
the/...

(1) Act No. 48 of 1935. Sec. 12 (5).

the provisions of the Insolvency Act (1) mutatis mutandis apply as far as they can be applied in connection with the election of a trustee, his powers, etc., but the debtor shall not be deemed to be an insolvent and his estate shall not be deemed to be under sequestration for the purpose of any other law, (2) even though his assets vest in the trustee and the debtor is automatically released from all liabilities which he incurred prior to the date of the election or the date of appointment of the trustee.

This is indeed a far-reaching and radical change in our common law - a debtor's estate is wound up as an insolvent estate, but the debtor himself is not regarded as insolvent and suffers none of the disabilities of an insolvent. Apart from those disabilities enumerated in our Insolvency Act (3), Wessels points out that under the common law of Holland an insolvent could not make any contract or appear in court as plaintiff or as defendant, as long as his estate was being administered by the Insolvency Chamber and so long as he had not been rehabilitated. (4)

Acceptance of a Compromise.

If the arrangement or compromise is accepted,

a/...

(1) Act No. 24 of 1936.

(2) Act No. 48 of 1935. Sec. 16 (5).

(3) Act No. 24 of 1936.

(4) History of the Roman Dutch Law by Sir J.W. Wessels.

a liquidator is appointed who must provide security for his appointment and who generally acts as a trustee, as envisaged in the Insolvency Act. (1)

As a point of interest, Huber (2) has it that :

a curator (liquidator) is not to be deemed a proxy of the creditors but as representing the person of the debtor.

Immediately a compromise is accepted then :-

- (a) the debtor is relieved of every liability disclosed in his application, except in so far as the compromise may otherwise provide;
- (b) every asset which in terms of the compromise had to pass from him to the board or to any creditor ceases to be vested in him and is vested in the board or the creditor as the case may be;
- (c) the debtor is prohibited from disposing of or encumbering any land which, in terms of the compromise had to remain his property, but which was to be mortgaged or made subject to any condition or restriction, until the mortgage has been registered or until the relative condition or restriction has been registered against the title deed.

Discharge/...

(1) Act No. 24 of 1936.

(2) Huber. Heeden. Rechts. 5. 44. 12.

Discharge from Liability.

It is worthy of note that once the Deed of Assignment under the now repealed Insolvency Act (1) had been duly registered as required by that Act, the debtor was discharged from all liability for debts due or the cause of which had arisen before such registration (2) unless the Deed provided otherwise.

As to our common law position according to Van der Linden (3) when dealing with a surrender of goods:-

..... the debtor who has obtained a writ of cessio bonorum (brieven van cessie) and has had it confirmed by the judge of the domicile, is no longer liable to his creditors unless his pecuniary circumstances should afterwards improve.

Passing of Ownership.

The Farmers' Assistance Act (4) provides for an automatic passing of ownership from the debtor to the board or to the agreed creditor upon acceptance of the arrangement.

In the case of an assignment under the common law, however, until the assignee had taken delivery of the debtor's assets, they remained vested in the debtor and were liable to be seized in execution by a judgment creditor of the debtor. (5)

Voet/...

-
- (1) Act No. 32 of 1916 as repealed by Act No. 24 of 1936.
 (2) Ibid. Sec. 126 (2) (b).
 (3) V.d. Linden. Institutes 1.18.11. Trans. H. Juta.
 (4) Act No. 48 of 1935.
 (5) Barton vs. Warrens Assignee 1908 T.S.; Barr vs. Bergman & Co.'s Assignee 1913 E.D.L.

Voet, too, in dealing with the common law of surrender of goods states, inter alia, that :-

..... the cedent is not, before the goods are sold, held to have been deprived of his goods for all legal purposes. (1)

and again later :-

it must, however, be observed that after making the surrender the debtor is not thereby divested of the ownership in his goods, in so far that if they have not yet been sold, he can, on repenting of his action, stop the sale and recover his property, provided that he is prepared to defend himself and to satisfy his creditors. (2)

Dealings with Property.

Two further encroachments on common law rights are contained in sections 19 and 22 of the Act. (3)

Whenever, for instance, a transfer of immovable property is to be effected in terms of an accepted compromise, or a mortgage bond has to be registered or cancelled, the Registrar of Deeds is obliged to effect the transaction on authority of a certificate by the chairman or deputy chairman of the board notwithstanding the absence of the usual power of attorney or consent. A far-reaching provision indeed! (4)

Furthermore, the board has been given power to make loans to farmers, to buy in their farms and to re-sell

or/...

-
- (1) Voet 42. 3. 1. Trans. L.E. Krause.
 (2) Voet 42. 3. 9. Ibid.
 (3) Act No. 48 of 1935.
 (4) Act No. 48 of 1935. Sec. 19.

or lease them back to the debtors concerned (1) and to have registered against the title deeds of the relative property any one or more of the following conditions, namely :-

- (i) that the property may not be mortgaged or otherwise encumbered except with the consent of the board;
- (ii) that it may not without the consent of the board, be attached or sold in execution, except at the instance of the holder of a mortgage bond on such property;
- (iii) that if the owner of the property becomes insolvent or assigns his estate under the Insolvency Act, the property shall not, without the consent of the board, form part of the insolvent or assigned estate but shall become the property of the board and may be dealt with by the board as it may deem fit, subject to the rights of the holder of any mortgage bond thereon. (2)

These restrictions give rise to "real" rights as opposed to "personal" rights. They are restrictions on the rights of ownership, are registrable and cannot be legally nullified by another person but are enforceable by the courts. (3) As such they attach to the land.

The effect of these conditions is, therefore, to impose a real restraint against the land, which is valid and effective against all persons until the property is transferred to another. Shrand (4) has it
that/...

(1) Act No. 48 of 1935. Sec. 9.

(2) Act No. 48 of 1935. Sec. 22.

(3) Smith vs. Farrelly's Trustee 1904. T.S. - See also Newall's The Law and Practice of Deeds Registration. P. 4.

(4) The Administration of Insolvent Estates in South Africa. P. 271.

that the restrictions fall away automatically on subsequent transfer; neither has the board power to withdraw these restrictions once imposed. If the debtor is no longer indebted to the State the board will grant a general consent to mortgage.

Interpretation of Act.

It is obvious that this Act must at all times receive a restricted interpretation so as to respect and safeguard all those common law rights of the subject which are not clearly, either by word or implication, brought within its meaning. (1) It has also been held (2) that the Act (3) contemplates a very arbitrary inroad into the rights of creditors. It sets aside the rights of such creditors to recover what is due to them and may force them into a position where they cannot have their just dues under the ordinary law or force them to effect a compromise with their debtors which they would not otherwise have come to. When, therefore, such a measure is the subject of interpretation, the Court must take into consideration the fact that anything which may on the face of it appear to be harsh to a debtor is already something in the nature of indulgence because the Act (4) extends indulgence to
 debtors./...

(1) Meyer vs. Viljoen 1940. O.P.D.

(2) Richter vs. Assist. Master and Bfn. Town Council 1941, O.P.D.

(3) Farmers' Assistance Act No. 48 of 1935.

(4) Ibid.

debtors.

The lot of the farmer is not a very enviable one on the whole, although it is sometimes handsomely profitable, but a poor farmer has many difficulties with which to contend. Well may one bear in mind what Voet (1) tells us when dealing with a surrender of goods by a debtor :-

For the privilege of surrender was not introduced in favour of the creditors, in order that they might make a profit out of it to the detriment of the debtor: but it was introduced for the benefit of the debtor, from a certain feeling of pity for his lot, and no principle of law or generous conception of equity will tolerate it, that what has been introduced for the advantage and benefit of humanity, should, by a harsh interpretation, be extended to operate cruelly, contrary to their advantage.

Summary and Conclusions.

To sum up, the Roman law recognised imprisonment for debt and divided the goods of a debtor amongst his creditors, with the assistance of the praetor who granted immissio in possessionem, cessio bonorum, prescriptio and vendito bonorum.

German law allowed the creditor to enslave the debtor and the later law of the Franks made the debtor work for the creditor.

The law of Holland at first recognised the attachment of the person and towards the beginning of
the/...

(1) Voet 42. 3. 9. Trans. L.E. Kräuse.

the 16th century admitted the cessio bonorum. The 17th century saw insolvent estates and those of absentees, administered by commissioners under the supervision of the schout and schepenen and in certain towns, the insolvent estates of those who had obtained brieven van cessie were administered in the same way. The bankrupt was treated as a criminal, but apart from the above, there was no general law of insolvency during the 17th century.

Various local ordinances were framed in the 18th century which placed insolvent estates in the hands of the Desolate Boedelkamers, the most important ordinance being that of Amsterdam of 1777, most of the principles of which were introduced into our country by De Mist in 1803.

Later an official sequestrator took the place of the commissioners and in 1819 the Insolvent Ordinance wove Dutch and English practice together, thereby establishing the principles of our present practice. The 1843 Ordinance superceded that of 1829 and fixed our modern South African law of insolvency.

While the cessio bonorum and the immissio in possessionem are no longer in force in South Africa, they may well be regarded as the forerunners respectively of our voluntary and of compulsory sequestration.

There is no doubt whatsoever that the Act (1)
makes/...

(1) Farmers' Assistance Act No. 48 of 1935.

arbitrary inroads into the rights of creditors and it is for this reason that its application was limited at the time to certain persons only, namely farmers, and rightly so. It would be a sad day for creditors and indeed for the country as a whole, if its application were extended to all debtors. The debtor-creditor relationship with its mutual rights and obligations would count for nought because, under the Act, an insolvent debtor may well slam the door on his creditors and walk out free from debt and without the ordinary disabilities attaching to an insolvent.

The legislature saw fit in 1935 to introduce this special legislation to meet an emergency when most farmers were facing bankruptcy. Its application should accordingly have been limited to that state of emergency alone but it has remained on our statute book ever since and its provisions are still being used in isolated cases to-day.

It is surprising that no accurate statistics have been kept by the State Advances Recoveries Office as to the issue of certificates under the Act, but it is evident from research that many thousands of farmers have been rehabilitated through the application of the Act. It is submitted that present day circumstances do not justify the continued use of such arbitrary powers at all.

By/...

By the mere stroke of a pen, without previous enquiry but merely on prima facie grounds, a Government official can deprive creditors of most of their centuries old common law rights.

The board can virtually force a composition on creditors in spite of the fact that compulsory composition is no longer part of our common law. Furthermore, a proposal by the board, whatever it may be, is deemed to have been accepted unless rejected by creditors in meeting, and a farmer who is in fact insolvent, can be relieved of all his debts and obligations and yet suffer none of the disabilities of an insolvent. But more is to follow. Ownership of the debtor's property is, in the circumstances contemplated in the Act, automatically vested in the board without the requisite formalities of transfer, or delivery. This is certainly contrary to all common law concepts. The board may then register a bond or transfer the property without a power of attorney! Furthermore, it can burden the property with real restraints against alienation!

These powers gravely affect the rights of subsequent bona fide creditors and one wonders how many of them are aware of the risk of granting credit, even many years after proceedings have been taken under the Act in respect of the debtor concerned.

This Act, it is submitted, is open to grave
abuse/...

abuse by the government of the day, whichever it might be, and the temptation of using it in present-day circumstances should be removed by repealing its provisions altogether. Having served a good purpose, it has earned a decent but long overdue burial.

CHAPTER IV.

THE CONCEPT OF LEASE IN RELATION TO THE LAND SETTLEMENT ACT, 1912 (ACT NO.12 OF 1912) AS AMENDED.

Contents : Land Settlement in South Africa; the Land Settlement Act; allotment; probationer lessees; duration of leases; rental; option to purchase; Crown grant; holdings and farms purchased for settlers; extent of land settlement; nature of lease; locatio conductio rerum; emphyteusis; quitrent tenure; the Land Settlement Act; payment of rent and probationers; remission of and alteration in rent; sub-letting and dealings with leases; Roman law; Roman Dutch law; South African law; quiet enjoyment; occupation; residence; improvements; landlord's hypothec; old Dutch law; Roman law; South African law; invecta et illata; fruits and crops; goods of sub-lessees; goods of third parties; effectiveness of hypothec; special statutory hypothec; pledge of movables; compensation for improvements and removal of crops; trees; sale/...

sale in execution; set-off; restriction on alienation or encumbrance of land; summary and conclusions.

Land Settlement in South Africa:

Land settlement and the disposal of Crown lands prior to the Union were governed:-

- in the Cape - by Acts No. 37 of 1882; No. 15 of 1887; No. 26 of 1891; No. 23 of 1893; No. 40 of 1895 and No. 42 of 1908.
- in Natal - by Act No. 44 of 1904;
- in the Orange Free State - by Ordinances No. 22 of 1902 and No. 26 of 1907; and
- in the Transvaal - by Ordinances No. 45 of 1902 and No. 37 of 1907.

The South Africa Act (1) vested in the Governor-General all Crown lands belonging to the several/...

(1) Section 122 of the South Africa Act, 1909; 9. Edw.VII.

several colonies at the establishment of Union.

The subsequent grant of Crown lands has been effected by various and varied enactments since Union.

The Land Settlement Act, 1912 (As amended):

The original Land Settlement Act, No. 12 of 1912, for instance, has been amended no less than thirteen times since its promulgation and has unfortunately been, to some extent at any rate, the political football of various Governments.

The Act provides for the allotment of Crown lands to intending settlers for agricultural or pastoral purposes and provides further for the improvement and subsequent disposal of such lands.

Allotment:

In brief outline, the Act envisages the purchase by the Government, through its Land Board, of large tracts of land in suitable localities for the purpose of establishing settlements. Lands are divided into lots on which dwellings and other farm buildings are erected.

Probationer Lessees:

Probationer farmers are settled on these lots
and/...

and if they prove their farming abilities and suitability as lessees they are eventually granted leases of the holdings occupied by them (1).

Duration of Leases:

Leases are granted for an initial period of five years but may be extended by the Minister for further periods of five years. (2).

Rental:

No rental is required for the first two years and thereafter a low rental is paid annually. (3).

Option to Purchase:

Lessees are entitled to apply for the purchase of their holdings after the lapse of a prescribed period, the purchase price being based on a valuation made by the Land Board including the value of improvements. (4).

Crown Grant:

After ten years have elapsed lessees can pay the balance purchase price and receive freehold title under Crown Grant. Otherwise the purchase price is paid over a period of sixty-five years. (5).

Holdings/...

-
- (1) Act No. 38 of 1924.
 - (2) Sec. 24 of Act No. 12 of 1912.
 - (3) Ibid.
 - (4) Section 27 of Act No. 12 of 1912.
 - (5) Section 43 of Act No. 12 of 1912.

Holdings and Farms purchased for Settlers:

The Act empowers the Land Board to allot holdings to lessees without any probationary period and also to give them the option to purchase the holdings.

A settler may also himself select a farm and the Government will then purchase the farm and resell it to him against payment of one-tenth of the purchase price in cash and the payment of the balance over a period of sixty-five years. (1).

Extent of Land Settlement:

The extent to which land settlement has taken place in the Union can be gauged from the Government's latest report to the United Nations Organisation (2) according to which :-

- (1) There were approximately 120,000 farmers in the Union at the 31st March 1952, of which 100,000 farmers were land-owners and the remaining 20,000 farmers were lessees. Of the latter 20,000 farmers, 8,133 farmers were Government lessees.

(2)/...

(1) Section 11 of Act No. 12 of 1912.

(2) Progress Report of the Government of the Union of S.A. to United Nations Organisation on Land Reform.

- (2) Since 1912 to 1952 no less than 11,626 holdings had been allotted to settlers, covering 10,932,323 morgen and costing £11,745,307.
- (3) During the same period, 6,695 farms had also been purchased by the Government at the request of settlers, at a cost of £11,881,912 and totalling 4,366,421 morgen in extent.
- (4) The number of Crown Grants issued since 1912 to 1952 totalled 6,677 in respect of 5,693,346 morgen costing £7,551,507 while 3,511 leases were either cancelled or surrendered in respect of 3,353,726 morgen costing £3,766,894.

It is obvious from the above that land settlement plays a very substantial part in our agricultural economy. The extent to which the rights of over eight thousand farmers are regulated by Government leases and the relationship in which third parties stand towards such lessees is a matter therefore of some considerable importance.

Nature/...

Nature of Lease:

Before discussing various provisions of the Act (1), the nature of a lease will be briefly considered.

Pothier (2) defines a lease:-

as a contract whereby one of the two contracting parties undertakes to give to the other the enjoyment or use of a thing during the period of time agreed upon, in consideration of a certain price, which the other, on his part undertakes to pay.

Van der Linden (3) states that by a lease:-

..... is understood the transaction by which the one party binds himself to let the other have the use of a certain thing for a fixed time in consideration of a certain rent which the other binds himself to pay to him.

In more modern parlance letting and hiring, locatio conductio, or huur en verhuring, is a contract whereby one person agrees to give another the use of a thing, or his own services, or those of another human being, or of an animal, and the other person agrees to pay him a price in return. (4).

In Roman law the contract of locatio conductio was/...

(1) Land Settlement Act No. 12 of 1912.

(2) Pothier's Treatise on the Contract of Letting and Hiring. (Contract De Louage) trans. by G.A. Mulligan. 1st Ed. 1953.

(3) v.d. Linden. Institutes. Trans. Sir H. Juta.

(4) Principles of S.A. Law - G. Wille 3rd Ed. 1949 at page 380.

was completed by the mere consent of the parties thereto as soon as the amount to be paid for the hiring was agreed upon. (1).

In South African law, however, a lease, or contract of letting and hiring of movable or immovable property is formed by the agreement of the parties on the following three points: that one party is to let or to give the other the use, of ascertained property, at a fixed or fixable rent.

The contract in Roman law gave rise to personal rights alone and not any real rights. The hirer was not even entitled to possession as the lessor remained the possessor according to law, his duty not being praestare rem licere habere, but praestare re frui, uti licere.

In modern South African law, however, a lease creates not only contractual rights as between the parties themselves, but also proprietary rights which the lessee can, within certain limits, e.g. registered long leases, make good against the whole world. To some extent, therefore, one is justified in regarding a lease as a species of ownership in land. (2).

Locatio/...

(1) Inst. 3.24.

(2) An Introduction to Roman Dutch Law. R.W. Lee 4th Ed. page 161. and Breytenbach vs. Frankel 1913 A.D.

Locatio Conductio Rerum:

Of the three types of letting and hiring under Roman law, the locatio conductio operarum, the locatio conductio operis faciendi and the locatio conductio rerum, the latter is of concern here, namely, the letting of a thing, such as a house or a farm.

The hirer of a farm was called the colonus, in apposition to the inquilinus of a house, the rental being termed the reditus or pensio.

The duty of the locator, or lessor, was to guarantee the lessee against eviction and to re-imburse him for any useful or necessary expenses incurred.

The duty of the conductor or colonus, on the other hand, was to take care of the land as a bonus paterfamilias, to give up the land at the end of the term of the lease and to pay the rent agreed upon.

Emphyteusis:

Formerly the lands of the Roman people, of the municipalities or of the college of priests, the so-called agri vectigales, used to be let for differing periods ranging from five years up to periods amounting

almost/...

almost to perpetuity.

With the passage of years, not only lands but houses, too, were let in a similar manner, the lands and houses so let being termed praedia emphyteuticaria. About the time of Justinian these two types of tenure of agri vectigales and of emphyteusis were united under the common name of emphyteusis.

The emphyteuta enjoyed the use and fruits of the land in the same way as a usufructuary and could dispose of his rights over the thing in any way he pleased, except that the dominus had a right of pre-emption. The emphyteuta could not alienate his right under Roman law but in Roman Dutch law this was allowed to a limited extent. (1). Under Roman law on death of the emphyteuta his right was transmitted to his heirs. He was obliged to pay his pensio whether he benefited by his emphyteusis or not and was also obliged to ensure that the land did not deteriorate in value.

Justinian points out that (2) :-

As the ancients were in doubt as to this contract, some regarding it as a letting on hire, and some as a sale, the constitution of Zeno was made, which declared that the contract of emphyteusis

was/...

(1) Grotius Jurisprudence of Holland. Trans.R.W.Lee at page 241.

(2) Inst. 3.24.3.

was of a special nature, and was not to be confounded either with letting on hire or with sale, but rested upon its own peculiar agreements.

Quitrent Tenure:

This mode of land tenure was not identical with the emphyteusis of Roman law, nor was it apparently derived from it, but it was nevertheless influenced in its development by the rules of Roman law. (1). It was a grant of land for an indefinite or limited period subject to the payment of an annual rent (cyns or census). The grantee later became the owner of the land with free rights of alienation inter vivos or by will and had to maintain the land. The grantor was considered to have merely a rent-charge upon the land. A similar type of tenure existed in the Transvaal, namely, that of leeningplaats.

Apart from the various statutes regulating quitrent tenure, it has been held that the rights of the parties must be determined by reference to the grant itself (2) and that although the Government is the dominus directus, it cannot prevent a bona fide sale of the land by the quitrent tenant (3).

Quitrent/...

(1) An Introduction to Roman Dutch Law. R.W. Lee 4th Ed. at page 157.

(2) Col. Government vs. Wasserman 1887. 5. S.C.

(3) Col. Government vs. Fryer 1885. 3. S.C.

Quitrent tenure was, however, for the most part abolished by the Quitrent Act No. 54 of 1945 (1).

The Land Settlement Act:

It is not, however, the intention to deal with the Land Settlement Act in all its varied details but only with those of its aspects which impinge on common law principles.

The Payment of Rent and Probationers:

The payment of rent is essential for the constitution of a lease. The grant of a right of occupation is not a lease if no rent is payable (2). As Pothier has it:-

There cannot be a contract of lease without an agreed price for the use and enjoyment of the thing (3).

It is of interest to note that a later amendment to the Land Settlement Act (4) made provision for the granting of a right of temporary occupation to what the Act (5) terms probationary lessees.

The Minister of Lands determines the conditions/...

-
- (1) Section 2, Act No. 54 of 1945 and note on page 201. Grotius Jurisprudence of Holland, R.W.Lee.
 - (2) Rosen vs. Rand Townships Registrar. 1939 W.L.D.
 - (3) Section 32 . Pothier's Treatise on the Contract of Lease - Contrat De Louage. Trans. by G.A. Mulligan.
 - (4) Act No. 12 of 1912 as amended i.a. by Act No.38 of 1924.
 - (5) Act No. 38 of 1924.

conditions of occupation and may even pay maintenance allowances to these so-called "lessees" either by way of wages or as loans. It is obvious that these occupiers are not by any means lessees in the proper sense of the term. They are merely occupiers whom the Minister of Lands thinks are likely to be suitable as proper lessees of the holding when trained. The designation of probationary lessee in the Act is therefore a misnomer.

Remission of and Alteration in Rent:

The proviso to section 24 of the Land Settlement Act (1) empowers the Minister of Lands, where a lease has been cancelled due to drought, flood, tempest, locusts, lack of water, failure of crops, disease of stock or other adverse farming conditions to waive the whole or any part of the rent due.

An amending Act of 1925 (2) makes provision for the alteration of the rental if a lessee cannot meet his obligations because of drought, flood, tempest, locusts, lack of water, failure of crops or other adverse/...

(1) Act No. 12 of 1912 as amended.

(2) Act No. 26 of 1925, section 18.

adverse farming conditions.

The point at once arises as to whether these provisions alter the common law in circumstances where a lessee might otherwise have claimed a remission of rent under the common law by reason of having been deprived of beneficial use and occupation of the holding.

According to the Digest a lessee may claim a remission or a reduction of rental if he has sustained damage to his crops owing to storms, floods, hostile inroads, or landslips, or blight in the case of olives (1).

Van Leeuwen (2) grants similar relief to a tenant who has enjoyed little or none of the fruits by reason of floods, war, fire or other great damage to leased property.

Van der Linden (3) states that the lessee may demand a remission of the whole or part of the rent if the unfruitfulness has been caused by inundation, heavy thunderstorms, or such like unforeseen misfortunes.

According to Huber (4):-

A/...

-
- (1) Digest 19.2.15.2.
 (2) v. Leeuwen. Romeins Holl. Recht 4.40.7.
 (3) Institutes 15.12 . Trans. Sir H. Juta.
 (4) Huber. Heeden Rechts. 3.8.28. Trans. P. Gane.

A lessee can obtain a reduction of rent on the ground of unavoidable loss namely through war, floods, inundation of salt water, extraordinary prevalence of field-mice or worms, incessant rain and drought, provided that in the circumstances of time and place those things were unexpected and unusual; but for shortage in the crop owing to weeds or failure of crops the lessee can obtain no reduction.

These common law principles have been adopted by our courts and the various circumstances entitling a lessee to remission have been correlated under the general terms of vis major and casus fortuitus.

Wille (1) enumerates many such circumstances such as excessive snowstorms out of season or violent winds and rain (2) ravages of certain birds such as starlings, jackdaws and crows and, of course, locusts, but not where the failure or destruction of a crop is due to some inherent vice in the leased property such as the old age of vines (3).

In the Cape Province and the Orange Free State, special legislation limiting the common law has been promulgated (4) excluding inundation, tempest, (war or insurrection in the O.F.S.) or such like unavoidable misfortune, as grounds for remission of rent.

The/...

-
- (1) Landlord and Tenant in South Africa 4th Ed. at page 222.
 (2) Hansen Schrader & Co. vs. Kopelowitz 1903.T.S.
 (3) Johannesburg Cons. Investment Co. vs. Mendelsohn and Bruce 1903. T.H.
 (4) Cape Law 8 of 1879.S.7 and O.F.S. Ordinance 5 of 1902 S.5.

The Land Settlement Act (1) by allowing a remission of rent, albeit only in the Minister's discretion, for circumstances such as failure of crops, disease of stock, or other adverse farming conditions, goes even further. In addition it makes provision for floods and tempest, circumstances which would otherwise not be taken into consideration for remission of rent in the provinces of C.F.S. and of the Cape.

Sub-Letting and Dealings with Leases:

Section 35 of the Act (2) deals with the prohibition of sub-letting or cession or hypothecation of a lease and reads as follows:-

35. (1). Save as in this Act is provided the lessee of a holding shall not sublet the holding or cede or hypothecate his interest in the lease, unless the consent in writing of the Minister has been first obtained.
- (2). Whenever any interest of the lessee in any such lease is sold in process of execution issued out of any court, the sale shall be subject to the condition that the consent in writing of the Minister to the cession of the lease to the purchaser shall be first obtained.
- (3). The mode in which the interest of the lessee in any lease under this Act may

be/...

(1) Act No. 12 of 1912, as amended.

(2) Ibid.

be ceded shall be as prescribed by regulation.

Roman Law:

Under Roman law sub-letting of lands was allowed, the principle being - nemo prohibetur rem, quam conduxit fruendam, alii locare, si nihil aliud convenit; unless there is an agreement to the contrary, no-one is debarred from letting to another what he has hired for his own use. (1).

Roman Dutch Law:

Roman Dutch jurists had divergent views on whether a lessee could sub-let or cede his lease, particularly as regards praedia rustica.

Grotius, for instance states (2):-

A person who has taken a thing on hire may in turn let it on hire to another in the absence of stipulation to the contrary.

On the other hand, van der Keessel maintains (3):-

Although by the general law as adopted either wholly or with modifications by particular statutes, it is permitted to a lessee to sub-let land leased by him, yet by the Law of Holland of 16th September, 1658, an exception has been

made/...

-
- (1) Code 4.65.6.
 (2) Grotius 3.19.10.
 (3) Select. Theses 674.

made in respect of country lands, which cannot be sub-let without the consent in writing of the landlord.

Voet (1) states definitely:-

It has been established by our customs that leased lands cannot be sub-let without the consent of the owner or landlord.

These writers base their opinions on the Placaats of 1515, 1580, 1658, and 1696, but whether these Placaats referred to original leases or only to nae-huyre (subsequent leases) is still the subject of doubt.

Grotius, Groenewegen and van Leeuwen (2) maintain that a lessee of a rural tenement may sub-let without the lessor's consent.

South African Law:

In the Cape, the Supreme Court has forbidden the cession of leases or sub-letting of rural lands without the landlord's consent (3) but in the Transvaal, the Court took the opposite view (4).

It seems that the generally accepted view
is/...

(1) Voet 19.2.5.
 (2) Rooms. Holl. Recht. 4.21.4.
 (3) de Vries vs. Alexander 1880 Foord.
 (4) Eckhardt vs. Nolte. 1885. S.A.R.

is that under our common law a lessee of a rural tenement may not cede his lease or sub-let without the landlord's consent but the matter is not entirely free from doubt.

It is also clear that under the principles of the Roman Dutch law of delegation a tenant may not cede or assign his lease without the lessor's consent (1) as the consent of all three parties, namely, the lessor, the lessee and the proposed assignee is required for the transference of rights and obligations under the lease.

The distinction between an assignment or cession of a lease and a sub-lease lies in the fact that the former is a transference by the tenant of all his rights and obligations under his lease to another person, so that the assignee is substituted for the tenant; the tenant drops out altogether, he loses all rights and is relieved from all obligations and responsibility under the lease, while the assignee takes his place and becomes the tenant of the landlord, under the terms and conditions of the lease.

On the other hand, sub-letting is a grant by the tenant of the whole or portion of his rights under the lease to another person, called the sub-tenant,
in/...

(1) Henderson vs. Hanekom 1903. 20.S.C.

in return for a rental; a fresh contract of lease, termed a sub-lease, being created between the tenant and the sub-tenant. The original lease between the landlord and the tenant is not affected in any respect and remains in force, but there is no privity of contract between the landlord and the sub-tenant. It follows that the rent under the lease is still payable by the tenant to the landlord, while the rent under the sub-lease is payable by the sub-tenant to his landlord, i.e. the tenant. Similarly, a sub-lease does not incorporate the terms of the original lease, or any of its express conditions, unless the parties to the sub-lease have specially so agreed (1).

There is a common law rule, however, that a compulsory cession, namely, one necessitated by operation of law for the purpose of distributing the proceeds of a tenant's estate among his creditors, is not prohibited by an original agreement between the parties not to cede (2).

Such a prohibition was not, therefore, binding on a trustee in insolvency (3), nor on a liquidator of a company being wound up (4), nor on a messenger of the court acting in pursuance of a sale in
 execution/...

-
- (1) Landlord and Tenant in South Africa. G. Wille 4th Ed. at page 108.
 (2) London & S.A. Exploration Co. vs. Liqd. N.E. Bultfontein Ltd. 1895. S.C. Also Fitzpatrick's Estate vs. Frankel's Estate 1943 A.D.
 (3) Heimann vs. Klempman 1922 W.L.D.
 (4) Himmelhoch vs. Liqd. Fresh Milk Co. 1925 T.P.D.

execution of a judgment against the tenant (1), but the position in regard to trustees and liquidators has been altered by special legislation (2) making such a prohibition now binding upon them, too.

In terms of section 35 (2) of the Act (3) quoted above, however, a sale in execution of the lessee's interest in the lease, is conditional upon the Minister's consent. This latter provision constitutes a statutory limitation of the common law rule and the mode in which the interest is thus to be ceded is also prescribed by regulation.

Quiet Enjoyment of the Leased Property:

Every lessor is under a duty not to interfere with the lessee in the quiet enjoyment and use of the leased property (4). A covenant or agreement to the effect that a lessee is entitled to such a right is implied in every lease (5).

On the other hand, Pothier (6) maintains:-

..... if what a lessor wants to do to the lands of the farm be something which does not lessen the lessee's enjoyment of the lands, or if the diminution of enjoyment which it will cause be something infinitely small, the lessee cannot object, nor even claim an indemnity,

seeing/...

-
- (1) Allison's Est. vs. du Plessis 1925 T.P.D.
 (2) Act No. 16 of 1943, sec.14.
 (3) Act No. 12 of 1912, as amended.
 (4) Dig.19.2.15.8; 19.2.24.4; 19.2.33.
 (5) Watson vs. Geard, 1884. 3. E.D.C.
 (6) Sec. 75. Pothier's Treatise on the Contract of Lease - Contrat De Louage. Trans. by G.A.Mulligan.

seeing that he suffers no loss

..... It is not a disturbance of the lessee's enjoyment if the lessor goes himself, or sends others on his behalf to inspect

Any doubt which may exist as to the lessor's common law right of access to the leased property, is resolved by section 40 of the Act (1) which gives the Minister the specific right to enter upon and inspect the leased holding at all reasonable times, irrespective of the common law.

Occupation of and Residence on the Leased Holding:

Every lessee has available an actio conducti against his lessor for the use and occupation of the property let (2).

The lessor must accordingly deliver the property to the lessee by transferring to him the detentio or physical control thereof (3). He must give the lessee not only vacua possessio but also the commodus usus of the leased property.(4)

The tenant obtains thus a possession which can be protected in law (5).

There/...

-
- (1) Act No. 12 of 1912, as amended.
 - (2) Dig. 19.2.15; 19.2.19.8; Voet 19.2.14.
 - (3) Grotius 2.44.9. Voet 19.2.1. and 14.
 - (4) Tshandu vs. Johannesburg City Council 1947 W.L.D.
 - (5) An informative article on the protection afforded to a possessor appears in the Tydskrif vir Heedendaagse Romeins-Hollandse Reg of November 1954 under the pen of A.W.F. Middelberg.

There are, however, no authorities on the actual nature or degree of occupation necessary to constitute the possession which is required under the contract of lease. It would seem that the lessee should at least have actual physical control of the property (1).

The question of sub-letting has already been dealt with supra.

Section 28 of the Act (2) departs from our common law concept and provides for compulsory residence and occupation by the lessee for specified periods during each year.

For instance, holdings purchased at the instance of settlers under section 11 of the Act (3) and leased back to them, must be beneficially occupied and resided on by the lessee for not less than eleven months in every calendar year (4).

For the purpose of this section 28, "beneficial occupation" of a leased holding is stated to include:-

- (1) the proper care and maintenance of the improvements thereon ;

(2)/...

(1) Scholtz vs. Faifer, 1910. T.S.
 (2) Act No. 12 of 1912, as amended.
 (3) Ibid.
 (4) Sec. 28, Act No. 12 of 1912, as amended.

- (2) the maintenance and improvement of the fertility of the soil and the taking of all measures necessary to deal effectively with existing or anticipated erosion or brackishness of the soil ;
- (3) the extermination of vermin and the eradication of noxious and other weeds in accordance with the provisions of any law requiring such extermination or eradication.

These are far-reaching requirements and will be more fully dealt with infra when discussing the question of improvements on the leased property.

The provisions of this section 28 have been made applicable to all leases (1) and, what is more, are being enforced by the Government, as is evidenced in a recently decided case (2).

This was an application by the Minister of Lands for an order declaring a lease to have been cancelled, for the ejection of lessee, and for other relief.

On/...

(1) By the provisions of Sec. 1 (2) of Act No. 42 of 1944.
(2) Strijdom N.O. vs. Fourie 1953 N.P.D.

On the 13th March, 1947, the lessee had been allotted a farm holding under the provisions of the Act (1) and a lease, with an option to purchase, was entered into between the lessee and the Department of Lands. On 1st October, 1951, the lessee exercised the option to purchase, but the price had not yet been paid. Section 43 of the Act (2) provides for the issue of a Crown grant, inter alia, after not less than 10 years have expired since the date of commencement of the lease. Section 2 of the Act (3) defines "lease" as including the tenure of any holding after the right to purchase it has been exercised and until a Crown grant has been issued. In this particular case the period in every calendar year during which the lessee was required to reside on and beneficially occupy the holding had been fixed, in terms of section 28 of the Act (4) and Government Notice No. 586 dated the 15th March, 1946, at 10 months. During the calendar year 1952 the lessee was absent from the holding from the 14th October to the 31st December, in the course of serving a sentence of 7 month's imprisonment in respect of a conviction for stock theft/...

(1) Act No. 12 of 1912, as amended.
(2) Ibid.
(3) Act No. 12 of 1912, as amended.
(4) Ibid.

theft. Accordingly , on the 19th February, 1953, the Minister cancelled the lease under the provisions of section 42 (2) (c) of the Act (1), upon the ground that respondent had failed to reside on and beneficially occupy the holding for at least 10 months in 1952. The lessee disputed the validity of the cancellation. He was at the time of the action in occupation of the holding, having been released from gaol during 1953, and claimed that his absence was temporary and that the holding at all material times had been his residence. He pointed out that his wife and child had remained on the farm while he was away.

The question to be decided was whether the lessee had resided on the holding for at least 10 months in 1952. "Reside" is defined in section 2 of the Act (2) as meaning to be in occupation of a "habitable house" approved by the Minister. Nothing turned on the aspect of the "habitable house" and the enquiry became whether the lessee had personally occupied the holding for at least 10 months in 1952, within the meaning of the Act (3).

The/...

(1) Act No. 12 of 1912, as amended.
 (2) Ibid.
 (3) Ibid.

The lessee maintained that a person might be said to reside at his house even though he might be temporarily absent and contended that a lessee might be in personal occupation of a dwelling or a farm despite a temporary absence, for example, on a holiday or even in gaol.

The court, however, held that these general illustrations were not helpful, for what had to be considered in this case was what the legislature intended in the Act (1) in requiring lessees to be in personal occupation of their holdings for a minimum period in each calendar year. The court agreed with the Minister's contention that if the legislature had intended constructive occupation as distinct from actual occupation to be sufficient, there would have been no point in prescribing a minimum period of such occupation during the year. The lessee must be in actual occupation of his holding for at least 10 months in the calendar year, i.e., he must not be absent for more than 2 months. The court was not called upon to decide whether these periods were to be calculated continuously or in the
aggregate/...

(1) Act No. 12 of 1912, as amended.

aggregate, because , in this case, on either footing, the lessee had been absent for more than 2 months in 1952. The Minister's cancellation of the lease was held to be valid. The court held, further, that the right to occupy the holding, with all its improvements, had re-vested in the Government in terms of section 42 (4) of the Act (1) and that the Minister was entitled to an order for ejectment.

It will be noted that the question of the continuity of occupation during the prescribed period has been left open.

There is no doubt that the lessee had absented himself from the holding through his own fault. He is deemed to have intended the reasonable and probable consequences of his own acts or omissions, but had he been imprisoned on the 14th November, 1952, instead of on the 14th October, 1952, the Minister would presumably have had no grounds for cancellation as far as non-residence for 1952 was concerned. The reason for his absence is, it is submitted, irrelevant to the issue and the court rightly directed its attention solely to the question as to whether or not there had been actual
 occupation/...

(1) Act No. 12 of 1912, as amended.

occupation for ten months of the year. Although the court was not called upon to decide whether or not such a period should be calculated continuously or in the aggregate it is submitted that the latter method of calculation was intended by the Act, otherwise the legislature would certainly have made specific provision therefor. Where the words of a statute are plain, they must be given their literal simple meaning without importing words to remedy a casus omissus or without subtracting words, even if the result is harsh or unfair (1).

Residence:

Not only is occupation made compulsory but restrictions as to the number and race of residents allowed on a holding were at one time imposed by legislation.

Section 28 (b) of the Act (2), as substituted from time to time (3) provided that not more than one European (other than a lessee's wife, daughters and minor sons) could reside on a leased holding/...

(1) Dadoo Ltd. and others vs. Krugersdorp Municipal Council 1920 A.D.

(2) Act No. 12 of 1912, as amended.

(3) This section 28 (b) was substituted by sec.7 (a) of Act No. 26 of 1925 and by sec. 2 (1) (a) of Act No. 42 of 1944, and was amended by Act No. 23 of 1948.

holding , unless the Minister otherwise agreed. This restriction was furthermore made of retrospective effect so as to attach to every lease issued before 1944 and also applied to all subsequent leases (1).

As was to be expected, the restriction gave rise to a lot of dissatisfaction amongst lessees and was finally abolished by an amending Act in 1949.(2)

Furthermore, the opportunity was afforded to all lessees of approaching the Minister of Lands for the cancellation of the restriction in their leases (3).

No such statutory restrictions as to residence exist at present, but judging by past experience, it is not beyond the bounds of possibility that some future Government may see fit to reimpose them.

Improvements:

In terms of section 29 of the Act (4) every lessee is obliged to care for and maintain the improvements on the holding to the satisfaction of the Minister of Lands and if the Minister considers that the lessee is failing in that respect he may, after not less than one month's notice to the lessee, himself take
immediate/...

-
- (1) Sec. 1 (2) of Act No. 42 of 1944.
 (2) Abolished by sec. 2 of Act No. 42 of 1949.
 (3) Sec. 7 (1) of Act No. 42 of 1949.
 (4) Act No. 12 of 1912, as amended.

immediate steps , at the lessee's cost, to prevent the depreciation of the improvements. The lessee's failure to react to the notice to arrange for the care and maintenance of the improvements renders the lease liable to cancellation.

Where there is no beneficial occupation, the lease may be cancelled. (1)

Now, the obligation to maintain the improvements and the leased property is in accordance with the common law rule that a lessee is under a duty to take care of the leased property (2), that he must use it only for the purpose for which it was let and for no other purpose (3), that he must restore the property to the lessor on termination of the lease, in the same condition as that in which it was delivered to him, fair wear and tear excepted (4) and that he must not, therefore, abandon nor neglect the property (5), nor misuse nor injure it in any way.

Pothier (6) says, for instance, that:-

The lessee must use the thing leased as a good paterfamilias would use his own property; he must exercise the same care to preserve it as

a/...

-
- (1) Strijdom N.O. vs. Fourie supra.
 (2) Voet 19.2.29.
 (3) Ibid and Van der Linden 1.15.12.
 (4) Roberts vs. Krause, 1913 O.P.D.
 (5) Grotius 3.19.11.
 (6) Sec. 190. Pothier's Treatise on the Contract of Lease - Contrat De Louage - Trans. G.A. Mulligan.

a good and careful paterfamilias would in the case of his own property similarly, the lessee of a farm must work the lands properly and in the right season. He is not allowed to overtax the lands ...

But what of the position where the improvements on the leased property are destroyed by the action of a guest of the lessee or damage is done to the leased property by such a third party who is a guest ? Is the lessee liable to the lessor for such damage?

This question was considered by the Cape Provincial Division in a recent case (1). The court (de Villiers, J.P., and Watermeyer, A.J.) held that the lessee was not liable unless he was negligent in admitting the guest, the onus of showing that he was not negligent resting on the lessee in accordance with the principle laid down in *Frenkel v. Ohlsson's Cape Breweries , Ltd.*, 1909 T.S. The court rejected the view expressed by Pothier (2) that the lessee should be held liable even although no blame is attributable to him, and accepted the view of Voet that the occupant of a leased house is not liable for the delicts of his guests/...

(1) *Kealey vs. Landsberg* 1953 C.P.D.
 (2) Section 193. Pothier's Treatise on the Contract of Lease - *Contrat De Louage* - Trans. G.A.Mulligan.

guests unless he was negligent in admitting them.

On the matter of improvements, section 30 of the Act (1) introduces a startling innovation. It makes it obligatory upon a lessee to effect improvements when there are no or very few improvements of a permanent and substantial nature at the date of allotment of the holding to him. The relative section reads:-

Every lessee of a holding on which there are no improvements of a permanent and substantial nature at the date of the allotment thereof or on which there are on the aforesaid date such improvements which in the opinion of the land board are of a value less than one hundred pounds or less than twenty per cent. of the value of the unimproved land, whichever amount may be the greater, shall within ten years of the date of the commencement of the lease effect improvements on the holding which, together with the value of the improvements (if any) existing at the date of allotment, will bring the total value of the improvements to a value which, in the opinion of the board, is not less than one hundred pounds or twenty per cent. of the value of the unimproved land at the date of such allotment, whichever may be the greater.

Huber (2) states quite plainly:-

A lessee is not bound to make improvements but merely to use (the land) properly.

There /...

(1) Act No. 12 of 1912, as amended.

(2) Huber's Heeden Rechts. 3.8.24. Trans. P. Gane.

There is no common law rule requiring a lessee to restore the leased property in a better condition than that in which he received it. (1) The very nature of the contract of lease militates against such a rule; it is the use of a thing which is hired.

Apparently this section 30 of the Act (2) was promulgated in 1912 so as to assist in the building up of a sound agricultural industry in the Union. It's application may well be the cause of hardship in cases where lessees are forced to relinquish farming operations through circumstances beyond their control.

Landlord's Hypothec:

As will be evidenced later, the Act (3) creates a hypothec over the lessee's interest in the lease and introduces a statutory pledge over certain of the lessee's movable property. Before discussing those provisions it is necessary to examine briefly the nature and scope of the landlord's lien as it exists under our common law.

Van der Linden (4) states, inter alia:-

The/...

(1) Menning vs. le Roux 1921, C.P.D.

(2) Act No. 12 of 1912, as amended.

(3) Ibid.

(4) v.d. Linden. Inst. 1.12.2.: Trans. Sir H. Juta.

The law tacitly, without any agreement to that effect being necessary, gives a right of legal or tacit mortgage to the lessors of houses or lands, on all the movable property brought thither by the lessee and also on the fruits which grow upon the land.

Grotius, too, states (1):-

..... likewise the lessor of land (enjoys a tacit hypothec) over produce standing on his land.

Van der Keessel (2) maintains that:-

The lessors of lands, in town as well as in the country, have a tacit mortgage over things brought and carried into such lands. In respect of lands in the country, the fruits growing thereon, and even those which have been carried into barns are subject to the same right. This right should be exercised, or in order to preserve it the things should be put under arrest, before they are carried away from the land.

This tacit hypothec is constituted over the invecta et illata on the leased property for rent due by the tenant.

The hypothec is often wrongly referred to as the "landlord's lien", but a lien owes its
existence/...

(1) Grotius 2.48.27.

(2) v.d. Keessel Theses. Select 423: See also Voet 20.2.2. Grotius 2.48.10.

existence to the fact that the creditor is in possession of the subject matter of the lien, whereas the property which constitutes the subject matter of the landlord's hypothec is on the leased premises and is thus in the possession of the lessee as debtor.

The nature of this hypothec was fully discussed by the Appellate Division in 1911 (1). It has a dual origin, being derived from the pandingsrecht of the old Dutch law, upon which the tacit hypothec of the Roman law has been grafted.

Old Dutch Law:

The old Dutch law did not recognise tacit hypothecs, but only the pandingsrecht which was not a security itself, but merely the right to obtain a security by seizing the goods of the debtor. Under this right the landlord could attach (by a pandneming) the invecta et illata for arrear rent and sell them in execution after notice to the lessee, but without having previously obtained a judgment.

Roman Law:

Justinian (2) makes mention of an interdictum Salvianum given to the owner of a rural estate
as/...

(1) Webster vs. Ellison, 1911 A.D.

(2) Justinian's Institutes 4.15.3.

as a means of getting possession of the goods of the occupier of the estate, which goods had been pledged for the rent.

This process is not to be confused with the actio Serviana. It probably constituted only a step to the latter action and may have fallen into disuse by the time the actio Serviana was introduced as means of redress for the creditor.

In the case of leased land, farming implements and the lessee's other property were held as security for the payment of rent and the praetor Servius gave a lessor this real actio Serviana to enforce his right to these things in the case of non payment of the rent. This action was gradually extended under the name of actio quasi - Serviana and was used to enforce the rights of a creditor over anything thus given in security.

The Institutes state (1) :-

The actio Serviana and the actio quasi-Serviana also called hypothecaria, equally take their rise from the praetor's jurisdiction. The actio Serviana is brought to get possession of the effects of a farmer

which/...

(1) Justinian's Institutes 4.6.7.

which are held as a pledge to secure the rent of the land. The actio quasi-Serviana is that by which creditors sue for things pledged or mortgaged to them.

A tacit hypothec was conferred on a lessor only in the case of the lease of urban property but an express agreement was required to constitute the hypothec in respect of the lease of rural property (1), but nevertheless (2)

in praediis rusticis fructus qui ibi nascuntur tacite intelleguntur pignori esse domino fundi locati etiam si nominatim id non convenerit.

in the case of rural tenements, the fruits produced therein are tacitly understood to be pledged to the owner of the leased property, even if such has not been expressly agreed upon.

S.A. Law:

The landlord's hypothec as we know it today, is a fusion of the old Roman and Dutch law concepts and is the only remaining common law tacit hypothec which has any value for the Insolvency Act (3).

The/...

(1) Digest 20.2.4.

(2) Digest 20.2.7.

(3) Sec. 85 of the Insolvency Act No. 24 of 1936.

The hypothec is given in respect of arrear rent only (1) and covers invecta et illata and fruits and crops of the property leased.

Invecta et Illata:

As to the former invecta et illata they consist of things driven or carried on to leased property (2) such as animals, furniture, ornaments, etc., but not the proceeds of the sale of goods which were subject to the hypothec.(3)

Fruits and Crops:

As to the latter, it does not matter whether the fruits and crops are still growing, or having been gathered, are stacked or stored on the leased property.(4)

In this connection Pothier states:-(5)

..... this right extends to all fruits of whatsoever nature, that have been gathered upon the lands of the farm, such as wheat and grains of all kinds, hay, wood, wine, cider, etc.

The invecta et illata to which the hypothec refers may belong in ownership to the lessee, or to a sub-lessee/...

-
- (1) Woodrow & Co. vs. Rothman. 1884. 4 E.D.C. and Sec.85 Insolvency Act No. 24 of 1936.
 (2) Voet 20.2.2.
 (3) Sugarman vs. Burrows. 1916. W.L.D.
 (4) Voet 20.2.2.
 (5) Sec. 233. Pothier's Treatise on the Contract of Lease - Contrat De Louage - Trans. by G.A.Mulligan.

sub-lessee or to a third party.

Goods of Sub-Lessees:

According to Voet and the Digest (1) the goods of a sub-lessee were subject to the hypothec up to the full amount of the rent due by the lessee, not merely by the sub-lessee, but the position today is that they are subject to the hypothec only up to the amount owing by the sub-lessee for rent as also the fruits and crops of a sub-lessee (2).

Goods of Third Parties:

The goods of third parties found on the leased premises are subject to the hypothec if the owner expressly or implicitly consents thereto. A consent is implied if the owner allows his goods to remain on the leased property for the use of the lessee for a permanent or indefinite period without bringing it to the notice of the lessor that the goods belong to him, when in a position to do so (3).

Effectiveness of the Hypothec:

As soon as the rent is in arrear the
hypothec/...

- (1) Voet 20.2.7: Digest 19.2.24.1.
 (2) Friedlander vs. Croxford & Rhodes. 1867. 5 Earle.
 See also Landlord and Tenant in South Africa.C.
 Wille. 4th Ed. at page 193.
 (3) Goldinger's Trustee vs. Whitelaw & Sons 1916 T.P.D.

hypothec accrues but is of little value unless rendered effective by an attachment (1). Before the goods are attached, the hypothec can be defeated by removing the goods from the leased property (2).

The position under Roman law was different in so far as the movables continued to be subject to the hypothec, even though removed, the praetorian actio Serviana being directed against anyone who had in his possession the goods which were subject to the hypothec (3).

Roman Dutch law and our law also concede a right to the lessor to retake by means of an attachment, removed goods before they reach their destination, provided this is done expeditiously (4). Hence the doctrine of "quick pursuit" (5).

So much then for the brief outline of the landlord's hypothec which is available to the Government as an ordinary lessor under the Act (6).

Special Statutory Hypothec:

The Act (7) does not contain any provision which could be construed as derogating from the common
law/...

(1) Webster vs. Ellison. 1911.A.D.

(2) Voet 20.2.3. Van der Keessel. Select.Theses 423 supra.

(3) Sec. 257. Pothier's Treatise on the Contract of Lease - Contrat De Louage. Trans. by G.A. Mulligan.

(4) Voet 20.2.3. Grotius 2.48.17.

(5) Webster vs. Ellison 1911. A.D.

(6) Land Settlement Act No. 12 of 1912.

(7) Land Settlement Act No. 12 of 1912.

law concept of the hypothec. In fact it goes further than the common law and creates an additional special hypothec under section 37 (1) of the Act (1) which reads i.a. as under:-

The Government shall have an hypothec over every lessee's interest in his lease in security of all amounts owing to the Government by the lessee in respect of
 rent in terms of the lease or under the provisions of this Act; and such hypothec shall rank prior to every mortgage bond, hypothec or charge upon the said interest.

The lessee's interest envisaged in this section cannot be classified as invecta et illata. The latter are things driven or carried on to the leased property such as animals, furniture, or ornaments (2).

It is clear that this provision is in addition to and not in substitution for the common law hypothec given to a landlord.

The presumption, albeit rebuttable, exists that a statute does not intend to alter the existing law more than is necessary and should be interpreted to conform to existing law as far as possible, unless the
 contrary/...

(1) This section 37 of Act No. 12 of 1912 was substituted by section 16 of Act No. 57 of 1934.
 (2) Webster vs. Ellison 1911. A.D.

contrary is clearly intended (1) because it is considered improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention clearly.

Pledge of Movables:

The Act (2) not only affords the Government a special statutory hypothec in addition to the ordinary landlord's hypothec, but also a right described in the Act as a pledge of movables which shall be deemed to be in possession of the Government.

Now the matter of delivery is very important in the contract of pledge of movables. To constitute a valid pledge which is effective against all parties, it is essential to give possession of the movable to the pledgee.

Oppignoratio rerum mobilium quarum
 possessio non est translata in
 creditorem valet quidem respectu
 debitoris sed non praejudicat aliis
 creditoribus (3).

In other words, a pledge of movables,
 possession/...

-
- (1) Johannesburg Municipality vs. Cohen's Trustee 1909
 T.S.
 (2) Act No. 12 of 1912 - Section 37 (2).
 (3) Matthaeus, De Auct. 1.19.74: Voet 20.1.12.

possession of which has not yet been given to the creditor is effective as against the debtor but does not operate to the prejudice of other creditors.

Where , therefore, the pledgor retains possession and control of the movables, the pledgee loses his rights if the pledgor alienates and delivers the movables to a third party who is unaware of the pledge (1).

Furthermore, delivery to implement a pledge, must be made with a view to perfecting that pledge, as our law does not consider the delivery to be effective if the pledgor retains possession and control of the movables even if he agrees to hold them precario and to give them up at the request of the pledgee (2).

Now section 37 (2) of the Act (3) contains a radical departure from the above common law principles. It reads , inter alia, as follows:-

All stock and all movable property belonging to any lessee which is, or at any time has been upon his holding shall be deemed to be in the possession of the Government and to be pledged in favour of the Government in security of all amounts owing to the Government by the lessee in respect of
rent in terms of the lease or

under /...

-
- (1) *Hare vs. Heath's Exec.* 1884. 3 S.C. and *Netherlands Bank vs. Yull's Trustee* 1914, W.L.D.
 (2) *Grotius. Holl. Cons.* 3. 174.4; *Voet* 20.1.12.
Stratford's Trustees vs. London & S.A. Bank 1874. 3 E.D.C.
 (3) Act No. 12 of 1912, as substituted by sec. 16 of Act No. 57 of 1934.

under the provisions of this Act: Provided that -

- (a) nothing in this sub-section contained shall in any way interfere with the lessee's right -
 - (i) to use any such stock or movable property necessarily required for consumption by himself, his household or his servants employed upon the holding, or to use any produce necessarily required for the feeding of his stock upon the holding; or
 - (ii) to dispose of any such stock or movable property for the purpose of obtaining funds necessarily required for the carrying on of farming operations upon the holding; or
 - (iii) to dispose of any such stock or movable property in the ordinary course of farming operations;
- (b) the onus of proving that any stock or movable property used or disposed of was used or disposed of in accordance with the provisions of proviso (a) to this sub-section shall lie upon the lessee or other person alleging it;
- (c) The Secretary for Lands or any person thereto authorised by him may by letter direct the lessee not to dispose of any such stock or movable property specified in such letter, and thereupon the provisions of proviso (a) to this sub-section shall not apply to such stock or movable property so specified.

Not/...

Not only are stock and movables on the leased property pledged, but all stock and movables which have at any time been on the leased property are deemed to be in possession of and to be pledged to the Government.

An almost impossible provision to put into practice.

This provision is in direct conflict with our accepted concept of mobilis non habent sequelam. Movables alienated to third parties cannot, as a general rule, be followed up and reclaimed by the true owner unless they had actual knowledge of their having been pledged (1).

This section of the Act (2) must receive a restrictive interpretation as it offends against our common law.

It can apply only to movables which were on the leased holding at the time the lessee was in arrear with his rent, and which are now no longer there. It is submitted, therefore, that the section does not apply to all movables which were ever on the property, as soon
as/...

(1) Netherlands Bank vs. Yull's Trustee 1914, W.L.D.

(2) Sec. 37 (2) of Act No. 12 of 1912, as amended.

as the lessee falls into arrear with his rent.

To soften the effect of this almost impracticable provision as far as concerns movables no longer on the leased premises, the legislation has necessarily exempted stock and movables required by a lessee for household consumption and stockfeeding and has allowed him to dispose of such movables in the ordinary course of farming operations, but has, at the same time, placed the onus of proof thereof on the lessee. The Government may, too, prohibit the consumption and disposal of the so-called pledged movables, so as to render its pledge more effective or it may release the movables from its pledge to enable a third party to hypothecate them (1).

These deeming provisions provide yet another example of those "blanket securities" of which agricultural legislation is so fond. Often insufficient cognisance is taken of the possible far-reaching effects of such provisions and their promulgation is sought to be justified by averring that they are so seldom made use of that the danger to the individual right of the
subject/...

(1) Sub-sec. (3) Sec. 37 , Act No. 12 of 1912, as amended.

subject is, to all intents and purposes non-existent.
A specious argument, indeed !

The Government's right of pledge has already been upheld in a recent case where the Government intervened and objected to a sale in insolvency on the grounds that the attached assets were hypothecated to it (1).

Compensation for Improvements and
Removal of Crops:

Whenever a lease is cancelled and the lessee has to vacate the leased property the question of compensation arises.

Now the Act (2) contains a number of provisions which deal with the right of compensation. It may be as well, therefore, first of all to outline in brief our common law in this respect.

In the absence of an express agreement relating to the removal of improvements or to compensation therefor, the position is governed by the old Articles 10,11,12 and 13 of the Placaat of the States of Holland of 26.9.1658, re-enacted in the Placaat of 24.2.1696, which have been held to be applicable
to/...

(1) Dicks vs. Marais 1951. N.P.D.

(2) Land Settlement Act No. 12 of 1912.

to leases in South Africa (1). Briefly , therefore, the position is as follows:-

(1) On expiration of the lease.

The owner of the land becomes owner of all materials remaining annexed to the property and of disannexed materials not yet removed by the lessee.

(2) Before expiration of the lease.

A lessee may remove all his improvements except necessary ones which are needed for the protection or preservation of the leased property.

As to standing crops and the lessee's right to go upon the land to reap them after the lease has expired, it has been held in two early decided cases (2) that he has such a right. This has, however, been doubted in three later cases (3). The latest case in 1953 on the subject takes the matter no further (4). In this case a clause in the contract specifically provided /...

-
- (1) Rubin vs. Botha 1911. A.D. and van Wezel vs. van Wezel's Trustee 1924 A.D.
 (2) Hansen & Latelle vs. Crafford 1909. 26.S.C; Japtha vs. Mills Exec. 1910. E.D.L.
 (3) Medalie vs. Botha 1913. T.P.D; du Toit vs. Vorster 1928 T.P.D. and Pike vs. Kockott 1934 E.D.L.
 (4) Lessing vs. Steyn 1953. O.P.D. (P.H.1953)(2) A.51)

provided that in the event of there still being crops on the land, which the lessee had sown, at the termination of the lease, the lessee should have the right of entry on to the property after the termination of the lease, to harvest the crop. Shortly before the termination of the lease the lessee had sown some corn and, after the termination, the lessor had refused him permission to harvest it. The lessee sued the lessor for the cost of sowing, ploughing, harvesting and cultivating the land, basing his claim on the right to compensation conferred by section 10 of the Flaccat of 26th September, 1658, re-enacted by section 10 of the Flaccat of 24th February, 1696.

The court held that the right given under the contract excluded the lessee's right to compensation and that the lessee had accordingly mistaken his remedy, which was for damages for breach of the contract. The court accordingly ordered absolution from the instance.

An unusual requirement of the Act (1) was referred to earlier, in terms of which it is obligatory for a lessee to effect certain improvements to his holding. One would expect, therefore, to find the Act (2) making special provision for compensation on a more liberal scale/...

(1) Land Settlement Act No. 12 of 1912.

(2) Ibid.

scale than the meagre measure afforded by our common law, in view of the obligation to effect improvements.

No such thing. The Act (1) on the contrary provides (2) that where a lessee has failed to comply with the requirements of the lease, the right to occupy the holding with all the improvements thereon shall revert in the Government and no compensation shall be payable for any improvements made on or materials annexed to the holding by the lessee, whether or not they have been made or annexed with the knowledge of the Government.

Furthermore (3) if a lessee of a holding has made a false statement in his application knowing it to false, then the Minister for Lands has the power to cancel the lease, unless five years have elapsed, and no compensation is payable in respect of improvements made by the lessee on the holding.

These are indeed drastic provisions which impinge on our common law rights. It is only where a lease is surrendered or cancelled and such surrender or cancellation is, in the opinion of the Land Board, due to/...

(1) Act No. 12 of 1912.

(2) Ibid: Section 42.

(3) Section 18 (3) of Act No. 12 of 1912.

to drought, flood, tempest, locusts, lack of water, failure of crops, disease of stock or other adverse farming conditions that the Minister may pay such compensation to the lessee for any improvements of a substantial and permanent nature effected by him at his own expense on his holding as the Land Board may recommend (1).

It will be observed that the right to receive compensation is hedged around by qualifications and is limited to improvements which are of a substantial and permanent nature. No test is provided in the Act as to what is a substantial improvement.

Trees:

As far as trees on the leased property are concerned, the Act (2) provides specifically that a lessee shall not cut down, destroy or injure any trees on his holding, without the written permission of the Minister of Lands, but he may use dead wood for fuel or for domestic purposes.

As to a tenant's common law rights regarding trees on the leased property, Article 13
of/...

(1) Section 21 of Act No. 26 of 1925.

(2) Section 39 (1) of the Act No. 12 of 1912.

of the Placaat of 1696 allows a tenant to claim compensation for trees planted by him with the landlord's consent. This has also been held to be in force in the Union.(1)

Article 14 of that Placaat thereafter provides that occupiers may not, without the previous written consent of the owner, cut down any fruit-bearing tree or growing timber, nor may they lop or cut the pollard willows, or other cuttable trees (in so far as the occupiers may be authorised to do so) otherwise than at the proper season and time i.e. not sooner than in the fourth year, under a penalty of 10 pounds, at 40 groats per pound, for each tree cut or lopped to the contrary, in addition to the loss and damages, to be fixed by the court.

This article appears to have been abrogated by contrary usage in the Union as our courts have laid down in a series of cases, that since the contract or lease is de usu (2) a tenant has the same rights of cutting down trees as a usufructuary.

Voet/...

-
- (1) De Beers vs. London & S.A. Exp. Co. 1893. 10 S.C.
See also Landlord and Tenant in South Africa.
G. Wille. 4th Ed. at page 232.
- (2) Houghton Est. Co. vs. Mc.Hattie 1894. 1.O.R.

Voet (1) and van Leeuwen (2) maintain that a usufructuary may cut and sell as fructus , reeds, stakes and branches cut from thickets, groves or forests which are sylva caedua. If not sylva caedua they may only be cut for vines or necessary repairs to the dwelling provided the usufructuary does not deteriorate the property. Sylva caedua are cuttable trees which sprout up again from the original stem and roots and which produce fresh crops of wood (3).

Grandiores arbores, fruit trees and non-bearing fruit trees which shade walks and pleasure grounds may not be cut down.

In applying these principles to the contract of lease , our courts have held that provided a lessee leaves the property in the same condition in which he found it, a lessee may cut down gum trees (4) and cut wood for domestic purposes, for firewood, for farm purposes , repairs to outhouses, for fences and for agricultural implements (5) . A tenant may not, however, cut down ornamental trees, fruit trees or wattles (6).

Even/...

-
- (1) Voet 7.1.22.
 - (2) Cens. Forensis 2.15.9.
 - (3) Digest 50.16.30.
 - (4) Houghton Est. Co. vs. Mc.Hattie 1894 L.O.R.
 - (5) Foxcroft vs. Meiring 1907 E.D.C.
 - (6) Brice vs. Zurcher 1908 T.S.

Even where third persons cut and gather wood on a farm while the tenant, despite complaint by the landlord, takes no suitable steps to prevent such acts, the tenant is liable (1) as such acts can really be ascribed to the tenant's negligence (2).

The Act (3), therefore, in prohibiting lessees from cutting down any trees on the holding, deprives them of their common law rights to cut down and use sylva caedua. It is difficult to understand why such an apparently unnecessary restriction should have been imposed by the Act unless, of course, the type of tenant warrants such strict control.

Three further aspects of the Act (4) certainly call for comment.

Sale in Execution:

It has been specifically provided (5) that every land settlement lease shall be protected from seizure under any process of execution issued out of any court and shall not be attached or sold in execution, save only where it has been mortgaged with the consent of the Minister of Lands .

This /...

(1) Von Holdt vs. Bruwer, 1918, C.P.D.
 (2) Voet 19.2.29; Dig. 19.2.25.4.
 (3) Sec. 39 (1) of Act No. 12 of 1912.
 (4) Land Settlement Act No. 12 of 1912.
 (5) Sec. 22 of Act No. 26 of 1925.

This is indeed wide protection for the lessee, but what of the creditor ?

A trustee in insolvency may, however, cede the lease to an approved new lessee (1) and the Land Bank may recover any moneys owing to it in respect of a loan made (2).

Set-off:

It is settled law that for set-off to operate the amounts must be due and payable between the same parties and must be liquid, namely, ascertainable in money.

It is somewhat startling to find in the Act (3) (though by now not quite unexpected) that any moneys owing to the lessee by the Government may be set off by the Minister of Lands against any moneys owing by the lessee to the Government notwithstanding that in either case the amount is unascertained or is owing in respect of debts of a different nature (4).

One wonders exactly in what way effect is ever given to this section in practice.

Restriction/...

(1) Sec. 35 bis. of Act No. 12 of 1912.

(2) Sec. 6 (a) Act No. 6 of 1928.

(3) Land Settlement Act No. 12 of 1912.

(4) Land Settlement Act No. 12 of 1912, Section 38.

Restriction of Alienation or
Encumbrance of Land:

An exposition on the Land Settlement Act would not be complete without some reference to the manner in which the free alienation of land has from time to time been restricted by the Government of the day, that is, land which at one time formed part of a land settlement scheme and in respect of which Crown grant has been issued.

Apparently the right of alienation has in the past been restricted so as to discourage speculation in land by settlers who, after working up their holding into a valuable proposition, sell it at a handsome profit either to an outsider or to another holder who may, in time, become owner of most of the settlement with its concomitant water supplies and other Government irrigation works.

Prior to 1937 a restriction against alienation was inserted in all Crown grants of holdings but the courts rightly held that the restriction did not bind subsequent transferees.

Legislation was therefore introduced in 1937 (1) which provided that Crown grants or deeds
of /...

(1) Section 9 of Act No. 45 of 1937.

of transfers of holdings were to contain a condition that no alienation, hypothecation, encumbrance by means of a servitude (other than a servitude of usufructus, usus or habitatio) lease in longum tempus or division of the land comprised in the holding, or of any portion thereof or undivided share therein, could be effected without the consent in writing of the Minister, granted upon the recommendation of the land board, on such conditions as the Minister deemed fit to impose : This condition was by Act perpetuated in every subsequent conveyance of the land or any portion thereof or undivided share therein.

The year 1949 saw yet another change of mind on the part of the Government and, in fact, change in Government, because further legislation (1) enabled an owner of land thus restricted to apply to the Minister of Lands for the cancellation of such condition in the title deeds of his land, which was granted in every instance.

The 1949 Act (2), on the other hand, prohibited the alienation, hypothecation or lease of a holding in respect of which Crown grant had been issued, to any non-European. In the event of non-compliance with this restriction, the Minister has been given very wide/...

(1) Section 6 (1) of Act No. 42 of 1949.

(2) Section 8 of Act No. 42 of 1949.

wide powers of parate executie to seize and sell the land by public auction without recourse to a court of law and to distribute the proceeds to the persons entitled thereto (1).

Summary and Conclusions:

There is no doubt that the Land Settlement Act (2) has played a most important role in the development of the agricultural industry in South Africa. For the most part based on the common law contract of lease, the Act has enabled many thousands of lessee farmers eventually to become owners of land by converting their leases into agreements of purchase.

A farmer usually bequeaths his farm to a son or daughter so it is to be expected that applicants for Government farms who are not land-owners are, on the whole, persons of little or no means. It is not surprising, therefore, that in dealing with this poorer and quite often unreliable type of farmer, the legislature has seen fit to impose restrictions and obligations upon them more onerous than under our common law, such as :-

(a)/...

(1) Act No. 42 of 1949 - Section 9.

(2) Act No. 12 of 1912.

- (a) the restriction against sub-letting without the Minister's written consent (1) ;
- (b) the Minister's specific right to inspect the leased holding at all reasonable times (2) ;
- (c) the period of compulsory residence and occupation (3);
- (d) the obligation to improve the leased holding (4) ;
- (e) the limited and sometimes lack of compensation for improvements where the lessee has failed to comply with the requirements of the lease (5);
- (f) the restriction on the cutting of trees (6);
and
- (g) the automatic set-off of debts owing as between lessor and lessee notwithstanding that the amount is unascertained or is owing in respect of debts of a different nature (7).

Furthermore/...

-
- (1) Sec. 35 of Act No. 12 of 1912.
 - (2) Sec. 40 *ibid.*
 - (3) Sec. 28 *ibid.*
 - (4) Sec. 30 *ibid.*
 - (5) Sec. 42 *ibid.*
 - (6) Sec. 39 *ibid.*
 - (7) Sec. 38 *ibid.*

Furthermore the Government enjoys a hypothec over the lessee's interest in the lease as also a so-called "pledge" of movables which have at any time been on the leased property (with certain exceptions) for rent owing. It is submitted that this latter provision should receive a very restrictive interpretation to apply to those movables only which were on the leased property at the time the lessee was actually in arrear with his rent. This is indeed a "blanket security", the possible far-reaching consequences of which have apparently received scant consideration.

As many millions of pounds of the taxpayers' money have been spent on land settlement, the legislature has deemed it fit to enact special protective measures which are on the whole not unreasonable in view of the generally poor type of settler found on these settlements. Subsequent amendments to this Act have tended to bring it more into line with common law principles, such as the amendment contained in Act No. 42 of 1949 removing the erstwhile restrictions on the freedom of alienation of holdings held under Crown grant.

CHAPTER V.

THE CONCEPT OF SURETYSHIP IN RELATION
TO THE LAND BANK ACT, 1944 (ACT NO.13
OF 1944) AS AMENDED.

Contents : definition of suretyship; position
in Roman law; nature of fidejussio;
Antoninus Pius; Diocletian; Maximian;
Justinian's Novels; beneficium ordinis
seu excussionis; Hadrian's rescript of
beneficium divisionis; legal fiction of
sale of rights; beneficium cedendarum
actionem; fidejussor indemnitas;
position in Roman Dutch law; development
during feudal period; guarandia or
warrantus; plegius or plegerie; Grotius
and intercessio; intercessio in subsidium;
constitutum pecuniae or pactum constitutae
pecuniae; suretyship proper; privity;
strict interpretation; commercial, legis-
lative and judicial obligations; section
40 Land Bank Act; Bank's powers of recovery;
fidejussor indemnitas; future obligations;
nature of services and goods contemplated in
the/...

the Act and difficulties of interpretation;
 list of members and evidence of liability;
 joint and several liability of members;
 liability of co-sureties; development of
 concept of joint and several liability;
Position in Hadrian, Voet; beneficium divisionis;
 position under Land Bank Act; beneficium
ordinis seu excussionis; position in Roman
 Law; Justinian's Novel; Placaat 1564;
 position under Land Bank Act; beneficium
cedendarum actionem; historical development;
 position under Land Bank Act; liability of
 women and minors; senatus consultum
velleianum; authentica si qua mulier;
 public traders and emancipated minors;
 Civil Code, interest and costs; summary and conclusions.

Definition:

Maasdorp C.J. combines the definitions of
 Voet and van Leeuwen to state that suretyship is a
 contract/...

(1) Maasdorp, *Institutes* vol. 3, 1st ed., page 100.

contract whereby a person for the greater security of the creditor takes upon himself some obligations for which another person is primarily liable; the latter, however, still continuing to be bound thereby (1).

Position in Roman Law:

By far the greater part of our law of suretyship springs from the Roman law as moulded by Germanic custom.

According to Wessels in his "Law of Contract in South Africa", the Roman Dutch law of suretyship which was practised in the courts of Holland during the eighteenth century, was almost identical with that which prevailed in France. Pothier, who dealt with the Roman law of suretyship as it obtained in France prior to the Civil Code, is thus a valuable source of information in our investigation of the historical development of the concept of suretyship.

There were in fact five different forms of contracts of the nature of suretyship known to Roman law during its various stages of development.

The /...

(1) Maasdorp. Institutes vol. 3. 5th Ed. page 316.

The growing complexities of social and commercial life had led to the institution of the fidejussio, which at the time of Justinian was considered to be the only form of true suretyship. Justinian, in fact, treats only of fidejussio as being a guarantee of obligations no matter how incurred. This form had developed so as to overcome the restrictions and limitations attaching to the former sponsio and fidepromissio.

In the case of fidejussio, it was apparently the rule that fidejussores who stated in writing that they had bound themselves as such, were presumed to have observed all the necessary forms of stipulatio (1).

Fidejussio consisted thus of a personal guarantee by a third party who intervened by means of a stipulatio and bound himself to the principal creditor, under the accessory contract, to carry out the debtor's obligation, whether civil, natural, real, consensual or literal.(2) This form of contract of suretyship could also be conditional, was not limited to two years as in the case of the sponsio and the obligation passed

to/...

(1) Inst. 3.20.8.

(2) Inst. 3.20.1.

to the surety's heirs.

Antoninus Pius, Diocletian and Maximian gave the creditor the election of proceeding against either the principal debtor or the surety in the first instance.

Justinian also decreed by Novel (1) that action against one of several sureties for the same debt should not release the others. He also gave the right to sureties of having the principal debtor sued first provided he was within the jurisdiction or could be produced there within a prescribed time. This was known as the beneficium ordinis seu excussionis.

By a subsequent Novel (2) bankers were given the option of suing the surety before excussing the principal debtor.

The rescript of Emperor Hadrian required a creditor to divide his claim amongst all solvent sureties, if required to do so by the surety who was being sued for the whole debt. If such a surety paid the debt in full without claiming this beneficium divisionis/...

(1) Nov. 4.1.
 (2) Nov. 136.1.

divisionis, he could not recover anything from his co-sureties but could recover from the principal debtor by an actio mandati.

Such a surety could, however, remedy the position by obtaining from the creditor a cession of his original rights against the co-sureties. There existed certain difficulties in this respect because the surety could not rightly demand cession before making payment. Payment, on the other hand, discharged the debt and all sureties (1).

To overcome these difficulties, a legal fiction was employed by which the creditor was regarded as having sold his rights to the surety who paid for them by the amount of the debt. By such a cession, the surety was also entitled to any other securities (pignora et hypothecae) held by the creditor, so he could possibly find himself in a more advantageous position by taking advantage of this beneficium cedendarum actionem, than he would have been if he had made use of Hadrian's rescript of the beneficium divisionis in the first instance.

The /...

(1) D. 46.3.76: D.46. 1.39: Cod. 8.41.11.

The two main exceptions regarding women sureties, namely, the senatus consultum velleianum and the authentica si qua mulier are dealt with more fully later herein.

Indemnity and Suretyship:

The contract of suretyship differs from the contract of indemnity.

The contract was sometimes varied so that the surety only promised "what cannot be recovered from the principal" called in later law a fidejussor indemnitatis (1). In this case the indemnitor indemnified the creditor against any shortfall or loss which he may sustain through the inability of the debtor to pay and was thus only liable for the deficiency.(2)

In such a case the indemnitor enters into a separate and original contract to make good the loss, if any, but this separate contract is in no way accessory to the main contract between the creditor and the principal debtor as in the case of suretyship.

The /...

(1) Digest 4.5. 1. 116: Buckland Manual of Roman Private Law.

(2) Imperial Cold Storage and Supply Co.Ltd. vs.Julius Weil and Co. 1912 A.D.

The promise to indemnify does not depend upon the validity of the principal contract at all.

An indemnitor undertakes to pay if the debtor fails to pay for any reason whatsoever; the surety only pays if the principal debtor was legally obliged to pay but does not do so.

So much then for the Roman law concept of suretyship.

Position in Roman Dutch Law:

According to Wessels (1) the contract of suretyship during the feudal period was of extreme importance and extensively used. Sureties were generally required for the payment of debts, for appearance in court and to execute judgment, the contract of suretyship being known as guarandia or warrantus and also as plegius or plegerie.

The creditor often looked rather to the surety than to the debtor and the contract almost lost its accessory nature. In fact, the tendency of the Germanic law during the Frankish times was to make the
surety/...

(1) Law of Contract in South Africa. 2nd Ed. Vol. 11. 3775 et. seq.

surety directly responsible to the creditor and the debtor responsible to the surety.

The benefit of excussion was apparently almost unknown and there was no recourse amongst sureties nor the benefit of division amongst them.

With the later revival of Roman law, the customs of the feudal times and Middle Ages gradually disappeared.

At the time of Grotius, for instance, the Dutch law of suretyship had shed its medieval customs and was practically identical with that of the Corpus Juris.

Intercessio in Subsidiu:

Amongst the several ways in which one could intervene in a contract between two parties for the greater security of the creditor, was by means of an intercessio in subsidium where the original debtor remained primarily liable and the intercessor was liable only to the extent to which the creditor could not obtain payment from the principal debtor, whereas the indemnitor under the fidejussor indemnitas was /...

2 was bound under a ~~s~~eparate contract in no way accessory to the main contract between the creditor and the principal debtor.

This intercessio in subsidium could take place in different ways amongst which was the contract called either constitutum pecuniae or pactum constitutae pecuniae. It is this particular type of contract and the accessory contract of suretyship proper, which are of interest to us.

Pactum Constitutae Pecuniae:

The pactum constitutae pecuniae when it is a promise to pay the debt of another, is in effect, though not in form, a promise to pay in subsidium. The constituens can only be called upon to pay so much of the original debt as the original debtor has failed to pay. It is not an accessory obligation in the sense of a fidejussio and, therefore, it may be more onerous as to time or place of payment than the principal debt. It need not even have the same object as the principal debt, but in most other respects it resembles the contract of suretyship proper.

Suretyship/...

Suretyship:

Where, however, the intercessor contracts with the creditor to become liable in subsidium for the debt and to fulfil the principal debtor's obligation only if the latter does not do so and if the promise is to follow the fortunes of the principal contract, then such contract constitutes the true accessory contract of suretyship. The intercessor must promise on his own behalf by an agreement to which the principal debtor is not a party "fidei iubere pro alio potest quisque etiamse promissor ignoret" (1).

Privity lies between creditor and surety, so that a person who promises a debtor that he will pay his debt for him is not a surety, even if he does so in the presence of the creditor (2).

Strict Interpretation:

The contract of suretyship must be strictly interpreted (3). The rule is probably based on the fact that the original Roman contract of fidejussio had to be completed by a stipulatio, which, according to/...

-
- (1) D. 46. 1. 30.
 (2) V. 46. 1.3.
 (3) V. 46. 1.12.

to Sande (1) was restrictively interpreted to extend only to the extent to which the form and the purpose of the words supported it. Possibly too, the surety can be regarded as a favoured debtor and the creditor must therefore state clearly the extent of the surety's liability.

Voluntary and Statutory Agreements:

Suretyship contracts as we know them today may be divided into two main categories, namely, those voluntary accessory agreements usually found in commercial practice, in which one party takes upon himself the obligation of another and, secondly, those usually of a legislative or judicial character requiring or compelling a person to enter into a suretyship contract before certain acts can be done (e.g. surety bonds for executorships), or saddling a person with automatic suretyship liability for an act done, as in the case of section forty of the Land Bank Act, Act No. 13 of 1944.

It is this latter aspect of the subject which
must/...

(1) Dec. Fris. 3.10.4.

must next engage our attention.

Statutory Suretyship under the Land
Bank Act, 1944, as Amended.

The Land and Agricultural Bank of South Africa, is empowered under its Act No. 13 of 1944, to grant loans, inter alia, in the form of cash credit accounts (1) to co-operative companies (2).

Such an advance in the form of a cash credit account is akin to a fluctuating overdraft, through which account moneys may, from time to time, during the currency of the account, be drawn from or repaid to the bank - vide definitions in the Act.

Section 40 of the Act, to which reference is made above, reads as follows:-

- (1) If an advance in the form of a cash credit account has been made by the bank to any co-operative company -
- (a) every member of that company shall, in addition to any other amount for which he may have become liable to the bank in respect of such advance, be liable to the bank as surety for the repayment of the advance, with interest and costs, by

the/...

(1) Sec. 36, Act No. 13 of 1944.
(2) Sec. 35, Act No. 13 of 1944.

the company, in an amount equal to the amount which he has received from the company out of the advance or which has been paid out of the advance for any goods supplied or in respect of any services rendered to him by the company;

- (b) such company shall, whenever required by the bank to do so, furnish to the bank a list, certified by the chairman and the secretary of the company, or by persons purporting to act in those capacities, showing the name and address of every member of the company who is liable to the bank in terms of paragraph (a), the amount in which he is so liable, and any other particulars which the bank may require.
- (2) Every such list so certified shall be evidence in favour of the bank that each person mentioned therein is so liable in the amount stated therein.
- (3) If any list required by the bank under paragraph (b) of sub-section (1) is not furnished to the bank within thirty days after the date upon which the company concerned was required to furnish such list, the members of the company shall be jointly and severally liable to the bank in respect of the advance made to the company.

Bank's Powers of Recovery:

Sub-section (4) of the above section then proceeds to give to the bank the same powers of recovery in respect of the surety obligations created by sub-section/...

sub-section (1) as the bank possesses under section 63 of its Act as far as the recovery of contingent liability attached to shares is concerned, namely, to seize and sell, without recourse to a court of law, the immovable and movable property of members even though such property is not specially mortgaged to the bank.

Where members of the company are held to be jointly and severally liable under sub-section (3) of section 40 of the Act, as above, then the bank may recover from them in the same way as if they were members of a society without limited liability. In other words, the bank has power to frame a plan of contribution and then to recover by seizing and selling, without recourse to a court of law, the movable and immovable property of members even though such property is not specially mortgaged to the bank.

Nature of Obligation:

Now the contractual relationship which exists between a co-operative and its members is neither one of partnership nor of agency, but a contract sui/...

sui generis (1) but *a vis-á-vis* the bank, as creditor, the above section forty of the Land Bank Act has created a statutory relationship of automatic suretyship liability between the bank and the members, as sureties.

It is significant that the legislature has seen fit specifically to designate this relationship as one of suretyship. It is not then a relationship of fidejussor indemnitas. We have seen that an indemnitor under such an indemnity is liable whether the principal obligation is valid or not. On the other hand, van der Linden states that "no guarantee (suretyship) can exist unless there is a valid principal obligation on the part of the principal debtor" (2).

As the legislature has specifically created a suretyship liability and has designated it as such under the provisions of section forty of the above Act, the members' statutory suretyship liability must, therefore, be dependent upon the validity of the bank's loan to their co-operative company. If the loan for some reason or other proves to be invalid then it

follows/...

(1) Farmer's Co-operative Society vs. Berry. 1912 . A.D.
 (2) van der Linden Institutes.

follows that members will not be liable to the bank under the provisions of the above section, although they will be bound either by contract or by a natural obligation to their co-operative company for advances received and the like - cum causa principalis non consistit, ne ea quidem quae sequuntur locum habent (1)- when the principal obligation disappears, its accessories cannot have any effect either.

Had the legislature intended to impose a direct liability of indemnity upon the members, it would have omitted all reference to suretyship and would merely have enacted that a member should be liable to repay the loan in an amount equal to the amount which he had received out of the loan by way of cash advanced, services rendered, and otherwise.

This is not an instance "cum lex plus scripsit minus voluit" where the legislature enacted more but intended less (2). The words must be given their natural, ordinary and grammatical meaning (3), so that where section forty provides that members shall be liable as sureties, it means just that and nothing more
and/...

(1) D. 50. 17. 129. l. 178.

(2) Venter vs. Rex. 1907. T.S.

(3) Union Government vs. Mack, 1917. A.D.

and nothing less.

This interpretation opens up a wide field of enquiry.

Future Advances under a Land Bank Loan:

The nature of a loan in the form of a cash credit account is such as to include future advances (see definition in the Act) so that the statutory suretyship imposed by this section forty of the Act does not, therefore, impinge upon the common law principle that a surety can be furnished for a future as well as a past obligation - adhibere fidejussor tam futurae quam praecedenti obligationi.(1)

Nature of Services Contemplated in the Act:

Where an amount from the Land Bank loan has been advanced by the co-operative company to the member or where goods which have been purchased out of the loan by the company have been supplied to the member, the amount of the member's liability, in terms of the Act is readily and easily ascertainable.

What, however, of the position where "services have been rendered to him by the company" ?

How/...

(1) D. 46. 1.6.2.

How is one to assess "the amount..... which has been paid out of the advance in respect of" the services so rendered to the member by his company, vide the Act ?

Where, for instance, a citrus co-operative company has bought fumigating or spraying equipment out of a Land Bank loan and has then fumigated or sprayed a member's trees for a particular fee, as is customary with certain citrus companies, is the fee paid by the member to the company to be regarded as the value of the services rendered in assessing the "amount" which has been paid out of the Land Bank loan " in respect of" the services so rendered ? The fee itself has obviously not been paid out of the loan. On the contrary, it is the total cost of the equipment which has been paid out of the loan. Is this latter cost then the "amount" envisaged in the Act ? If so, then every member to whom fumigating or spraying services have been rendered is liable for the full cost of the equipment !

It is submitted that such an interpretation offends against the intention expressed in section 40 (1)

of/...

of the Act above.

It is obvious that in respect of actual amounts of money received by members out of the loan or in respect of goods supplied to them out of the loan, members are liable only for their pro rata shares of the loan so expended and are not severally liable each for the whole loan.

It is a paramount and golden rule of interpretation of statutes that effect must be given to the intention of the legislature. The Act must be read as a whole, the intention being gleaned ex visceribus actus (1).

It is hardly likely that the legislature would have had such a comparatively onerous liability in mind when dealing with "services rendered" in those particular circumstances. Besides which, the legislature specifically enumerates in the ensuing sub-sections of the Act, the particular circumstances in which the more onerous several (and joint) liability is to attach to members - vide sub-section (3) of section 40 of the Act.

Nature /...

(1) Farrar's Estate vs. Commissioner for Inland Revenue. 1926. T .P.D.

Nature of Goods supplied
in terms of the Act:

The matter does, however, not end there. What of manufacturing and processing co-operatives such as jam and canning factories, producers of tinned meats and the like. If a Land Bank loan is used by such a company to purchase ingredients for the manufacture of particular products, or to purchase tins or cartons for their sale, can the goods so purchased out of the loan be regarded as "goods supplied" to members. L2

Members do, in fact, reap the benefit of such purchases, in that they all participate in the profits of the company on a co-operative basis, which profits have been earned by the sale of the manufactured product.

It is submitted that this so-called "automatic suretyship liability" of section 40 does not operate in respect of such "goods" purchased out of the Land Bank loan in those particular circumstances.

When members deliver their primary products to their co-operative for processing, the products lose their identity and merge in the common pool. This relationship/...

relationship between member and co-operative is sui generis (1).

Goods purchased ex the loan to process produce delivered by a member do not, it is submitted, fall within the purview of section 40 of the Act - such goods have not been "supplied to him by the company".

The above illustrations of the practical difficulties in applying the provisions of section 40 are but two of many which could be quoted.

List of Members showing their Liability:

The Land Bank may have foreseen such difficulties or the difficulties may have arisen subsequently with the ever increasing complexities of modern industrial and agricultural development as the provisions were originally enacted in 1936, but be that as it may, the issue has been neatly side-stepped by throwing the onus on the chairman and the secretary of the co-operative company, to furnish a list, when requested by the bank to do so, showing, inter alia, the amount in which every member is so liable under section 40.

Pity/...

(1) Farmer's Co:op. Society vs. Berry. 1912. A.D.

Pity the poor chairman and secretary of a manufacturing co-operative who must judge an issue which even the courts would find difficult !

Every such list is then evidence in favour of the bank that each person mentioned therein is so liable in the amount stated therein - vide sub-section (2) of section 40 of the Act.

The above sub-section has not the effect of making the list irrebuttable and conclusive evidence. It is merely enacted to facilitate proof which would otherwise have to be furnished by production of the company's books of account, documents and the like.

Such list would always be open to attack and particularly so, it is submitted, when it purports to attach liability to a member for repayment of the amount of a Land Bank advance which has been expended in respect of services rendered to him by his company.

Sub-section (3) of the above section 40 thereafter provides that if the abovementioned list is not furnished to the bank within thirty days after the date
upon/...

upon which the company concerned was required to furnish such list, the members of the company shall be jointly and severally liable to the bank in respect of the advance made to the company. This is a very drastic provision indeed !

Liability of Co-sureties -
Beneficium Divisionis:

On the matter of the liability of co-sureties, they are under common law actually liable in solidum unless they undertake liability for a proportionate or aliquot share of the debt (1) but they are entitled to the benefit of division.

This concept of dividing the responsibility between several co-sureties making each one liable for his pro rata share existed in the jus antiquum. The Lex Furia of B.C. 95 provided that sponsores could claim this division as of a right but this provision was not extended to fidejussores who subsequently replaced the sponsores. As each surety, by the stipulatio, had made himself liable for the whole obligation, the creditor could proceed against any one surety for the whole debt.

One/...

(1) V. 46.1.24.

One of the epistles of Hadrian (117-138 A.D.) in dealing with fidejussores provided, however, that where several co-sureties interceded on behalf of the same debtor for the same debt, they could demand from the creditor by means of an exception, that the debt be divided amongst all the co-sureties who were solvent at the moment of litis contestatio so that each co-surety should be liable for an aliquot part only.

Voet states (1):-

The benefit is available when several persons have gone surety for the same debt without mention of a share, and when it is raised, one of several sureties, who is bound and sued for the whole, demands that judgment should not be given against him for more than his share of the debt, provided that the remaining co-sureties in regard to whom he seeks this remedy are solvent at the time when issue is joined.

Division of the debt was a matter of right by the Lex Furia but by the epistle of Hadrian it was only a privilege of which a surety might or might not avail himself. He must himself plead it as the court will not raise the matter mero motu.

The governing principle was that if there
were/...

(1) V. 46.1.21. (Swift and Payne Translation).

were several sureties to the same obligation, each of them was liable for the whole amount - "Si plures sint fidejussores, singuli in solidum tenentur". (1)

"These principles of the later Roman Law regarding the beneficium divisionis were adopted by the Courts of Holland" says Wessels in "Law of Contract in South Africa".

From the point of view of the division of the debt, it is important that all co-sureties be for the same debtor and in respect of the same debt, "Fidejussoribus hoc beneficium datur: sed iis, qui non solum ejusdem summae sed etiam ejusdem debitoris, fidejussories sunt".

On the other hand, in making such a division those who are incapable of contracting or whose contracts can be avoided, are excluded so that a person who is co-surety with a woman protected by the senatus consultum Velleianum, must pay the full debt. (2)

Position under The Land Bank Act 1944, as amended.

It is clear from the above statutory provisions that the co-sureties envisaged in sub-section (3) of
 section/...

(1) Inst. 3.20.4.

(2) Voet. 46.1.23.

section 40, although they may have a right of contribution amongst themselves, cannot plead the beneficium divisionis.

Voet (1) in dealing with the fisc tells us:-

For the rest, just as, outside the case of guardians, persons who have stood surety for a debt with a ward who is creditor are not deprived of this benefit, so neither are they who have gone surety to the Treasury either for the payment of taxes, or for any other debt whatsoever. However, that in Holland the benefit of division is denied them, by the very placat and article thereof which deprives them of the benefit of order, is shown above.

His reference above is to 46.1.18 where he deals with the beneficium ordinis seu excussionis stating, inter alia :-

Although sureties for tax collectors do not seem to have been distinguished from the others by Roman Law so far as this benefit is concerned, and could therefore protect themselves by it, yet in Holland it was refused even to them by art.26 of the General Ordinance on tax farming.

Voet's observations as to the position of the fisc are of passing interest in considering the position of the Land Bank.

The/...

(1) Voet. 46.1.22 (Swift & Payne translation).

The bank is a body corporate, capable of owning property and of suing and being sued in its own name (1). It is not registered under the Companies Act as a public company, but was established in 1912 as a separate institution under its own Act of Parliament (2). The operations of the bank are controlled by its own board of directors and not by the head of any State department (3). Nevertheless, its directors are appointed by the Government. It also handles, inter alia, vote funds granted by Parliament (4), and its accounts are subject to audit by the Controller and Auditor-General (5) who reports direct to Parliament. The bank's interests are also represented in Parliament by the Minister of Finance (6).

Although the bank is a separate persona, it nevertheless has many of the attributes of a State department. It could best be described as a quasi-Governmental institution handling public moneys obtained from the Treasury, but is definitely not part of the State, as such. Were it not, therefore, for the specific provisions/...

-
- (1) Land Bank Act, 1944, section 3.
 (2) Under Act No. 18 of 1912, now consolidated in Act No. 13 of 1944.
 (3) Land Bank Act, 1944, section 4.
 (4) Ibid , section 19.
 (5) Ibid , section 68.
 (6) Ibid , sections 65 and 66.

provisions of sub-section (3) of section 40 of the Act, quoted above, co-sureties to the bank would under common law be entitled to plead the beneficium divisionis.

Beneficium Ordinis Seu Excussionis:

This benefit of excussion - the beneficium ordinis seu excussionis - to which Voet here refers enables a surety to require the creditor to excuss the principal debtor first.

By Roman law, the creditor could by-pass the principal debtor and choose any one of the sureties to sue except where he had agreed to the contrary and save in the cases of a surety for a collector of public revenue or for the payment of a debt to the fisc, or for the due administration of a public office (1).

Furthermore, where the creditor of his own volition sued the principal debtor, the sureties under Roman law were released by novatio, but Justinian in Code 8.40.28 determined that this rule should not apply to fidejussores.

By Novel, (2) Justinian also restored to
sureties/...

(1) D. 46.1.51.3.

(2) Nov. 4.1.

sureties their previous right to demand that a creditor first excuss the principal debtor before proceeding against the surety. This is his beneficium ordinis seu excussionis.

By the Placaat of 1564 in Holland a surety could not be sued by a creditor until he, the creditor, had realised specially mortgaged or pledged property.

The surety who has renounced this beneficium is in the same position as the principal debtor vis-à-vis the creditor. This renunciation may be express, tacit or implied. In an early case (1) it was held that sureties to the Treasury for the collection of public revenue are not entitled to the benefit of excussion.

Position under the Land Bank Act, 1944, as Amended:

Reading the Act as a whole, there is nothing which compels the bank to utilise its various means of recovery in any specific order of preference. It seems that the bank may choose any one or more of the means of recovery placed at its disposal in whatever order it desires/...

(1) Rogerson N.O. vs. Meyer & Berning. 2. Menz. 38.42.

desires.

It seems, therefore, that the legislature did not intend that the co-operative company's assets should first be excused before the bank could claim on members under the provisions of section 40 quoted above. It is not unreasonable to suppose that the legislature would have stipulated it specifically if the intention were to make members liable only for any balance due.

Members, too, will have received in appropriate circumstances, amounts advanced to them out of the loan for which the legislature has saddled them with suretyship liability. Approaching these circumstances is also one of Voet's exceptions, in which the benefit of excussion could not be claimed, namely, when a surety had received the amount for which he was liable as surety in advance from the principal debtor (1).

It is submitted, therefore, that member-sureties are deprived of the common law benefit of excussion in relation to their suretyship liability under section 40 of the Land Bank Act.

Beneficium/...

(1) Voet, 46.1.18.

Beneficium Cedendarum Actionem:

What of the member who has paid his share of the debt in terms of this statutory suretyship liability? Is he entitled to a cession of action against the principal debtor?

Voet (1) states that a new action must be instituted by the surety against the principal debtor unless the creditor cedes his judgment against the principal debtor to the surety, because says Voet in speaking of a surety (2):-

..... recourse is given him against the principal debtor for everything which he has been forced to pay as surety; to that end he has the action of mandate if he has gone surety on the mandate of the principal debtor, or the action negotiorum gestorum if he has interposed without the mandate and is proved to have furthered the interests of the debtor.

A surety who pays the debt in full is thus entitled to the benefit of a cession of action for the purpose of exercising his rights of recourse against the principal debtor and of contribution from any co-sureties.

Wessels /...

(1) Voet, 46.1.35.

(2) Voet, 46.1.31 (Swift & Payne Translation).

Wessels J. has considered the origin and development of this beneficium cedendarum actionem in an exceedingly illuminating judgment (1) which can better be quoted than summarised :-

According to the Roman Law the payment of a debt released the debtor and his sureties. The obligation of the surety was regarded as an accessory to the principal obligation of the debtor. In whatever way the principal obligation was extinguished it brought about the extinction of the accessory obligation of the surety. Hence if one of several co-sureties paid the creditor, at the moment the payment was made the debt was extinguished and all the sureties were liberated (Digest 46,1,36). The surety could recover from the debtor by the actio mandati, but he had no action given to him by the Roman Law, by which he could recover from a co-surety. (Digest 46,1,39.) To remedy this the beneficium cedendarum actionem was introduced. (Digest 46,1,17; Code 8, 41, 11.) It was originally based upon a fiction in order to overcome the manifest injustice by which co-sureties could escape from contribution. Paul thought that the transaction might be regarded as a sale to the surety by the creditor of his claim against the debtor: Non enim in solutum accipit sed quodammodo nomen debitoris vendidit. (Digest 46,1,36.).

Consequently, if on or before making the payment the surety demands the cession of the creditor's rights against the debtor, then the creditor was bound to give this cession. This enabled the surety to proceed against the debtor, for the whole debt, and, by virtue of the original right of the creditor against the co-sureties for

their/...

(1) Kroon vs. Enschede and Oths. 1909. T.S. 374.

their shares. If, however, nothing was said about cession of action, then the surety, by paying voluntarily, extinguished the debt, and, once extinguished, it was too late to ask the creditor to give a cession of action - there was nothing left to cede.

The inequity of allowing the co-sureties to escape by a mere act of carelessness in not obtaining the cession in good time, and to burden the surety who paid with the whole debt, was repugnant to the later commentators. They said that, whatever the Roman law texts might say to the contrary, the surety is to be presumed to have paid in his own name so as to release himself, and not either the debtor or the co-sureties.

Grotius adhered to the older view. He says (3.3,31); A surety having paid, releases the principal and the other sureties and has then his recourse against the principal not only for what he has paid, but also for all costs and losses incurred; he may also before payment, but not after, demand from the creditor cession of the right which he has against the co-sureties (beneficium cedendarum actionem), in order that he may recover from them their share of the debt, which he would otherwise not be able to do (Van der Keessel, 506.). Groenewegen, Sande, Van Leeuwen and Voet adopted the more recent and more equitable view, and allowed the cession to be made at any time, even long after payment (Groenewegen, de Legibus Abrogatis, ad Cod. 8, 41, 11; Sande, Cession of Actions, ch. 6, sec. 32; Van Leeuwen, Censura Forensis, 1, 4, 17, 25; Commentaries, 4, 4, 15, Kotze's trans. vol. 2, p.47; Voet, 46, 1, 30; Tamen morum, & c.). Hence we see that the Dutch commentators made a great innovation on the Roman law, and allowed the creditor to give a cession of action at any time

after/...

after payment had been made by the surety and if the creditor refused he could be compelled by the court to do so.

It was held in this case that one of several co-sureties could, upon payment of the debt, claim a contribution from his co-sureties without cession of action from the creditor. That this cession of action should operate ipso facto on such payment was subsequently advocated and confirmed in later cases and is now a well established rule (1).

This matter of contributions amongst sureties recently came up for crisp decision in the Transvaal Provincial Division of the Supreme Court (2) where one of seven co-sureties who had all renounced the benefits of excussion and division paid the full amount of the debt and sued another of the co-sureties for six-sevenths of the amount paid. After reviewing all of the authorities Steyn J. came to the conclusion that such an action was competent by virtue of his cession of action. This decision was reversed on appeal by the Appellate Division which ruled (van den Heever, J.A. dissenting)...

-
- (1) Est. Steer vs. Steer, 1923 C.P.D.; Lever vs. Buhrmann, 1925 T.P.D.; Yorkshire Ins. C. vs. Barclays Bank, 1928 W.L.D. and Strahan vs. Fawcett, 1933. N.P.D.
(2) Gerber vs. Wolson 1954. T.P.D.

dissenting) that the co-surety could only recover from each of the other co-sureties their individual proportionate shares of the debt (1).

Position under the Land Bank Act, 1944, as amended:

Although in common law a surety may be entitled to a cession of rights from the creditor it must be borne in mind that the bank's rights of recourse are statutory ones of parate executie specially conferred upon the bank by Act of Parliament. These rights are not only extensive and drastic, but make deep inroads into common law principles. As such they must be restrictively interpreted and the bank could not legally cede them to another person or body in the absence of statutory authority to do so - delegatus non delegere potest.

A surety paying the Land Bank would, it is submitted, therefore, have to rely on his common law right to institute fresh action against the principal debtor (his co-operative) as afforded him under the old actio mandati.

Liability/...

(1) Gerber vs. Wolson 1955. A.D.

Liability of Women and Minors:

Two further important aspects of the matter remain to be investigated, namely, the liability of women and of minors as members of a co-operative company thus financed by the bank.

During the period of the Roman Republic there was apparently nothing to prevent a woman from binding herself as surety.

Emperors Augustus and Claudius, however, passed edicts prohibiting wives from becoming sureties for their husbands. This was apparently done to protect women against a weakness and tendency to act against their own interests in matters of business.

Senatus Consultum Velleianum and Authentica si qua Mulier:

At about A.D. 46 in the Consulship of Marcus Silanus and Velleius Tutor the Senatus Consultum Velleianum was passed prohibiting all women from interceding for all persons (1). The Roman jurists interpreted this law to confer on women the right to avail themselves of an exception, the beneficium Senatus/...

(1) D. 16.1.2.

Senatus Consulti Velleiani.

Justinian by his Authentica si qua mulier re-introduced the prohibition of women standing surety for their husbands, his Novel (1) reading:-

We make the following provision for the welfare of our subjects. Where a woman consents to bind herself as surety for a loan, and stipulates in favour of her husband, thereby encumbering either her person or her property, we order that such an obligation shall be void, and of no effect, even though she may have done this repeatedly; and it will make no difference whether the obligation was private or public, for it shall, in every instance, be regarded as not having been incurred, unless it is clearly established that the sums lent have been used for the benefit of the woman.

Wessels states that most of the provisions of the Roman law were adopted by the Law of Holland and became incorporated in Roman Dutch law (2). An instructive article on these womens' benefits appears in the Aug./Nov. 1953 issue of the Tydskrif vir Heedendaagse Romeins-Hollandse Reg under the pen of Prof. Dr. P. van Warmelo.

Voet points out that one of the many exceptions to this general rule of non-liability of women/...

(1) Nov. 134. C. 8 (Scott's translation).
 (2) Oak vs. Lumsden 3. S.C. 144.

women sureties is where she has profited or benefited by the transaction (1).

A further exception is where she is a public trader and the suretyship obligation relates to her trade (2).

This is also accepted as the correct view today (3).

In passing it is of interest to learn of the views of v.d. Heever J. on the matter of these benefits afforded to women (4).

On the other hand our law in this respect is a recognised anomaly, a fossil left over from a dispensation in which it was deemed reprehensible in a woman to engage in anything so masculine as the undertaking of suretyship. We should not be astute, therefore, to extend the scope of the legal benefits by analogy or to restrict the operation of statutes designed to curtail them.

The benefit must be "real" and not an illusory or purely sentimental benefit (5).

If a woman is a registered shareholder in an agricultural co-operative company she will be a farmer herself /...

-
- (1) Voet 16.1.11; Digest 16.1.13; 17.2.21.
 (2) Schorer, ad. Grot. 3.3.18; Thomas vs. Baumann & Gilfillan 1914 T.P.D. and Oak vs. Lumsden 3.S.C.144.
 (3) African Guarantee and Ind. Co.Ltd. vs. Rabinowitz 1934. W.L.D.
 (4) Comment made in Van Rensburg vs. Minnie 1942 O.P.D. 257. See also Southern Life Assoc. of Africa vs. Wright & Wright 1943 C.P.D.
 (5) Alliance Commercial Office and Estate Agency vs. Klotz 1951. T.P.D. (S.A.L.R. 291).

herself so that quite apart from the peremptory provisions of section 40 which saddle her with liability she would not in any case, have been able to have escaped liability under the common law for "to carry on farming operations" is a private business (1).

Position of Minors:

As to minors, Voet (2) says:-

As regards minors, they can stand surety with the consent of their guardian or their curator, and they are validly bound by the suretyship in cases in which they do not get restitution. For although because of the risk of restitution a man may lawfully object to a minor as unsuitable if given him as a surety by Law or under agreement, unless the latter goes surety in a personal matter, as for instance for his own agent, so that it is not unusual for people to stand surety against the chance of a minor's obtaining restitution; yet, if minors are offered and accepted as sureties for another's debt, they are held to be validly bound, if they either do not seek restitution or fail to obtain it, as they may fail for many reasons.

Here, too, minors who are members of an agricultural co-operative company will be farming in their own right and will be emancipated to that extent.

They/...

(1) Grobler vs. Schmilz and Freedman 1923 A.D. per de Villiers J.

(2) Voet 46.1.5.

They will be liable as sureties under the peremptory provisions of section 40 of the Act irrespective of their common law rights, if any, in those circumstances.

Liability for Interest:

The question sometimes arises as to whether a surety for a loan is liable for both capital and interest. Voet says no (1). "Interest", says he, "cannot be claimed unless there is an express stipulation for it".

On the other hand, if a surety binds himself in respect of the whole transaction - in omnem causam - he will be liable for interest (2).

The above section 40 of the Act certainly stipulates that a member shall be liable for the whole of the company's capital debt with interest and costs, but it does not go so far as to stipulate that the amount of each member's liability shall also include interest thereon.

If, for instance, the sum outstanding consists
only/...

(1) Voet 46.1.13.

(2) Ibid.

only of a small amount of capital with interest and costs, or if it consists of interest and costs only, the capital debt having been repaid, then the bank is entitled to divide that sum pro rata among members in accordance with the provisions of section 40, but what of the position where the whole loan was utilised in the manner contemplated in section 40 and the whole loan is still outstanding ?

Each member's liability is specifically limited to an amount equal to that which he received out of the loan, so that the total of the members' suretyship equals the total capital debt outstanding, excluding interest and costs.

What then of the interest and costs ? It is submitted that by a strict interpretation of section 40, members' suretyship obligations will not extend to interest and costs, in those circumstances. The bank cannot claim more from each one individually than that individual member received out of the loan by means of money advanced, goods supplied and services rendered.

Such/...

Such an interpretation would be in accordance with the maxim - fidejussio est stricti juris - which interpretation should extend only to the extent to which the form and the purpose of the words support it (1).

Summary and Conclusions:

The contract of suretyship has its roots deep in Roman law and is one which is much used in modern commercial practice. In spite of being a contract which is strictly interpreted, the Land Bank Act (2) has sought to extend its implications by legislative process so as to impose an automatic suretyship liability on members of a co-operative company which has obtained a loan from the bank.

Unlike the relationship of fidejussor indemnitas where an indemnitor is liable whether the principal obligation is valid or not, the legislature has specifically provided that a member's liability shall be one of suretyship in respect of the loan in an amount equal to the advances received by him from his co-operative out of the loan or the amount paid out/...

(1) Sande. Dec. Fris. 3.10.4.

(2) Act No. 13 of 1944, as amended.

out of the loan for goods received or services rendered.

It is this latter provision which gives rise to difficulty in its practical application. On what basis did the Act intend the value of such services to be calculated and what of the many indirect services rendered by a co-operative company to its members in, say, processing produce for better marketing and higher returns to members ?

It is submitted that, in practice, this latter provision will more often than not be impossible of application.

The issue is, however, neatly sidestepped by throwing the onus on the unfortunate chairman and secretary of the co-operative to determine each member's liability, but, it is indeed a startling proposition to find that on default of their submitting the prescribed list showing the individual liability of members, all members of the company are held to be jointly and severally liable to the bank for the loan. What of those members who did not participate in the
loan/...

loan at all ? They, too, are now made jointly and severally liable.

The bank cannot blow hot and cold in the same breath. If the intention was to make those members automatically liable who had participated in the loan, as the intention seems to be, what justification exists for extending the liability to all members, merely because the company has failed to submit the prescribed list showing the liability of participating members.

This is indeed a drastic provision but worse is to follow. In recovering the outstanding debt, the bank has the right to seize and sell, without recourse to a court of law, the immovable and movable property of members even though such property is not specially mortgaged to the bank ! These remedies have been fully discussed in a previous chapter.

It is difficult to justify these drastic remedies on the grounds only that the bank is a semi-governmental institution handling public moneys. In point of fact, we are here dealing with

short-term/...

short-term credit loans for the financing of which no long-term Parliamentary votes are granted to the bank at all ! Why then the preferential treatment afforded the bank as far as security is concerned ?

It is clear, too, that the members as co-sureties cannot claim the beneficium divisionis, nor the beneficium ordinis seu excussionis. As for the beneficium cedendarum actionem, although one co-surety paying the full debt can recover from each of the other co-sureties their individual proportionate shares of the principal debt (1), the bank's statutory rights of parate executie against members cannot be ceded to the paying member to use against his co-sureties. They are special statutory rights given to the bank only by Act of Parliament.

Women members of the co-operative would, it is submitted also be bound notwithstanding the Senatus Consultum Velleianum and the Authentica siqua Mulier. Unless the contrary is intended, words denoting masculine gender include the feminine (2) and women members would, in any event, be carrying on farming /...

(1) Gerber vs. Wolson 1955, A.D.

(2) The Interpretation Act No. 5 of 1910.

farming and be regarded as public traders, for to carry on farming is a business (1). Similarly minors who were members would also be farming in their own right and would be emancipated to that extent.

Enquiry reveals that since section 40 of the Act was promulgated in 1936, the bank has not yet had occasion to test the practical effect of the provisions of this section.

Prior to 1936, most agricultural co-operative organisations were constituted as societies in which all members were jointly and severally liable for their societies' obligations. From the bank's point of view the joint and several liability of all members constituted good security for loans, but with the gradual change over to limited liability companies issuing shares with limited liability, the bank has apparently sought to preserve the form of its erstwhile security by having the provisions of section 40 of the Act enacted which in effect constitute an "automatic liability of members" much akin to the old joint and several liability.

The /...

(1) Grobler vs. Schmilz & Freedman 1923 A.D.

The members of a company, be it a co-operative or ordinary public company, are liable only to the extent of their unpaid capital on shares issued, so that this endeavour on the part of the bank through the legislature, to saddle them not only with an automatic suretyship liability but also with joint and several liability in certain circumstances, runs counter to the accepted concepts.

The general trend of the agricultural legislation examined has been to protect the farmer and the agricultural industry as a whole, but here we find preferential treatment being afforded a particular institution to the disadvantage of the farmer who happens to be a member of a co-operative company obtaining its finances from the Land Bank. If his co-operative borrowed from the usual banking sources he would escape this additional burden.

There appears to be no justifiable reason why the bank should enjoy the special privileges which run counter to common law concepts, and from a reading of the Act as a whole, one gains the impression that

they/...

they were introduced from time to time to meet particular exigencies as they arose in the agricultural industry without sufficient consideration being given to their ultimate far-reaching consequences.

For twenty years no practical use has been made of section 40 of the Land Bank Act. Its repeal would be a welcome step in the direction of bringing our agricultural legislation more into line with well established common law principles.

CHAPTER VI.

THE CONCEPTS OF PLEDGE, POSSESSION AND OWNERSHIP IN RELATION TO:

THE LAND BANK ACT,
(ACT NO. 13 OF 1944) AS AMENDED;

THE CO-OPERATIVE SOCIETIES ACT,
(ACT NO. 29 OF 1939) AS AMENDED;

THE MARKETING ACT,
(ACT NO. 26 OF 1937) AS AMENDED.

Contents: Development of agricultural co-operatives
under the Co-operative Societies Act;
regulatory boards under the Marketing Act;
financing under the Land Bank Act;
controlled and un-controlled products;
Land Bank's "statutory pledge"; co-operative's
"statutory pledge"; nature of pledge; pledge
as accessory right; tacit or legal mortgages;
liens or rights of retention; tacit hypothecs;
statutory hypothecs sui generis; "statutory
pledge" under Land Bank Act; "statutory pledge"
under Co-operative Societies Act; possession
and delivery; delivery in pledge; decided
cases on "statutory pledges"; nature of
"statutory pledge"; ownership under Marketing
Act/...

Act; essentials for passing of ownership; effects of Marketing Act; practical implications of the three Acts; summary and conclusions.

The scope of this chapter cannot do justice to all the implications of the legal relationship and interaction between co-operative organisations, regulatory boards and the Land and Agricultural Bank of South Africa as regards security rights and the rights of third parties. It seeks, therefore, to deal only with those aspects of the relative Acts which have a direct bearing on the concepts of pledge, possession and ownership.

The Co-operative Societies Act,
(Act No. 29 of 1939) as amended:

The modern co-operative movement originated in about the middle of the 19th century in North West Europe. The main characteristic of all co-operatives is that they are voluntary undertakings based/...

based on mutual help, brought about by economic pressure and a certain amount of idealism.

In South Africa the movement has progressed parallel with the development of the agricultural industry. This chapter deals only with agricultural co-operatives, as opposed to trading and consumer co-operatives. Legislation in Natal in 1904, in the Cape in 1905, in the Transvaal in 1908 and in the Cape in 1910 enabled agricultural co-operatives to be formed and to function. It was not until 1922 and later in 1939 (1) that the legislature provided for effective and comprehensive registration and control of co-operatives.

The main object of an agricultural co-operative is to ensure the best return to the producer for his produce by means of co-operative handling and marketing.

The extent to which the movement has developed in South Africa can best be judged from the following statistics.

At 30/6/1953 there existed 255 agricultural
co-operatives/...

(1) Act No. 29 of 1939.

co-operatives in the country with a total membership of 240,100 farmer members. These co-operatives had a total turn-over of approximately £175,000,000. during 1952 and had built up reserves of over £17,000,000.

It is obvious that the special statutory provisions contained in the Co-operative Societies Act (1) relating to the pledge of produce affect a very considerable portion of our population and even greater numbers when regard is had to others indirectly concerned in the co-operative movement. The provisions of that Act have, therefore, far-reaching consequences. Before considering them in detail, a brief survey of regulatory boards is necessary, because for, the most part, agricultural co-operatives act as agents of the regulatory boards. They purchase and sell agricultural produce on behalf of the boards, and obtain funds from the Land and Agricultural Bank of South Africa.

The /...

(1) Act No. 29 of 1939.

The Marketing Act (Act No. 26
of 1937) as amended:

This Act provides for the regulation of the production and sale of agricultural products, as defined in the Act (1). It also provides for the establishment of certain boards in connection therewith, called regulatory boards (2), and for the grading and standardisation of agricultural products.

In terms of the Act, schemes for regulating the marketing of agricultural products and for matters incidental thereto may be promulgated from time to time. Such schemes are, in fact, sets of rules establishing a particular regulatory board and setting out its various powers which are derived from the Act itself (3).

The regulatory boards then proceed to determine who shall deal in the controlled products, through which trade channels and at what prices.

As a matter of interest the following regulatory boards have been established under the Act, namely:-

Regulatory/...

-
- (1) Act No. 26 of 1937. Sec. 1.
 (2) Ibid.
 (3) Ibid. Secs. 18, 19 and 20.

| <u>REGULATORY BOARD:</u> | <u>SCHEME PROMULGATED BY:</u> |
|--|---------------------------------------|
| Chicory Control Board. | Proclamation 335/39 dated 1/1/1940. |
| Citrus Board. | Proclamation 44/47 dated 1/3/1947. |
| Dairy Industry Control Board. | Proclamation 183/54 dated 1/10/1954. |
| Deciduous Fruit Board. | Proclamation 134/51 dated 1/7/1951. |
| Dried Fruit Control Board. | Proclamation 332/49 dated 23/12/1949. |
| Egg Control Board. | Proclamation 8/53 dated 23/1/1953. |
| Livestock and Meat Industries Control Board. | Proclamation 265/45 dated 14/12/1945. |
| Lucernseed Control Board. | Proclamation 22/52 dated 22/2/1952. |
| Mealie Industry Control Board. | Proclamation 77/39 dated 21/4/1939. |
| Oilseeds Control Board. | Proclamation 24/52 dated 25/2/1952. |
| Potato Board. | Proclamation 136/51 dated 27/6/1951. |
| Rooibostee Control Board. | Proclamation 214/54 dated 5/11/1954. |
| Tobacco Industry Control Board. | Proclamation 51/39 dated 21/3/1939. |
| Wheat Industry Control Board. | Proclamation 184/49 dated 29/7/1949. |

In/...

In practice, agricultural produce is purchased by agents acting on behalf of these regulatory boards at fixed prices, which boards then proceed to dispose of the produce locally and overseas, the proceeds in most instances being pooled together, from which pools expenses are met, and surpluses are distributed to producers in the form of final payments or else are utilised for the building up of reserves for future contingencies.

It will be seen later that by special statutory provision, ownership of the product, so controlled, is in certain specified circumstances, deemed to vest in the regulatory board (1).

Agricultural co-operatives act as agents of the regulatory boards as far as the acquisition of controlled products is concerned, but as regulatory boards are not financial institutions and are not thus able to finance such purchases, co-operatives for the most part receive interim financial assistance from the Land and Agricultural Bank of South Africa, until the regulatory boards have /...

(1) Act No. 26 of 1937: Sec. 20 (2) as inserted by Act No. 12 of 1941.

have disposed of the products and the proceeds become available. The bank in its turn enjoys certain statutory rights of pledge to which reference is made later hereunder.

The Land Bank Act
(Act No. 13 of 1944);

As already noticed in the previous chapter the bank is a body corporate, which subject to the provisions of the above Act, may do such things and perform such acts in the same way as a body corporate (1). It is, in fact, a separate persona in law which raises its funds from Parliamentary Votes, from borrowing from the commercial banks, from depositors and by issuing Land Bank bills (2).

The business of the bank is to lend moneys to farmers and to agricultural co-operative companies and societies (3), for the purposes set out in the Act (4).

Considerable sums of money are lent each year by the bank to agricultural co-operatives in the form of cash credit accounts through which account
moneys/...

-
- (1) Act No. 13 of 1944: Sec. 3.
 (2) Ibid. : Sec. 20.
 (3) Ibid. : Sec. 21.
 (4) Ibid. : Secs. 22 and 35.

moneys may be drawn and repaid from time to time during the currency of the loan (1). For instance, loans granted to agricultural co-operatives by the bank amounted to no less than £96,338,000. during the year 1954 (2).

Controlled and Uncontrolled Products:

The bank advances moneys to agricultural co-operatives:

- (a) to finance the purchase and handling, on behalf of a regulatory board, of products, the control of which is regulated by the Marketing Act (3),
- (b) to make advances to its members against the delivery to the co-operative of products not so controlled, which products are disposed of by the co-operative in the ordinary course of its business, and
- (c) for the supply to members of farming requisites, the rendering of services
to/...

(1) Act No. 13 of 1944; Sec. 2, definitions.
(2) Land Bank Annual Report 1954.
(3) Act No. 26 of 1937 supra.

to members and many other purposes.

A regulatory board's statutory rights to the product financed by the bank through the co-operative arise in the case of controlled products only. In all other instances of uncontrolled products the legal relationship is one as between the bank and the co-operative itself.

Land Bank's "statutory pledge":

Whenever the bank, upon application therefor, grants a loan in the form of a cash credit account to an agricultural co-operative company, section 35 of the Act (1) comes into operation, which provides inter alia :

- (1)
- (2) Any such application shall be signed by the chairman and secretary of the company concerned, or by persons purporting to act in those capacities, and shall, when so signed -
 - (a)
 - (b) in the case of a company, bind -
 - (i)/...

(1) Act No. 13 of 1944.

- (i)
- (ii) such of the agricultural produce of the members of the company as is actually in the possession of, or in transit to the company or its agents, and in respect of which application for the advance is made, for the repayment to the bank of any advance made in pursuance of the application.

This "binding" of the produce is again referred to later in the Act (1) when dealing with the cession of unpaid capital on shares which is required by the bank as part security for the loan. In terms of section 38 of the Act,

- (1)
- (2) Such cession shall -
 - (a)
 - (b) bind such of the agricultural produce of the members of the company as was actually in the possession of, or in transit to the company or its agents, and in respect of which the advance was made.

To make assurance doubly sure as it were, sub-section (6) of the same section 38 specifically
creates/...

(1) Act No. 13 of 1944.

creates a "statutory pledge" by providing:-

- (6) While a company owes the bank any money by virtue of an advance mentioned in sub-section (1) -
 - (a) all agricultural produce and all products manufactured by the company from any agricultural produce; and
 - (b) all articles or substances purchased by the company with money so advanced to it,

which are in the possession of or in transit to the company or an agent of the company, shall be deemed to have been pledged to the bank as effectually as if they had been expressly pledged and delivered to the bank, and any disposal thereof by or on behalf of the company, without the consent in writing of the board, shall be null and void.

This "statutory pledge" is further strengthened by the prohibition against the disposal and attachment in execution of the pledged produce or product manufactured therefrom, contained in section 39 of the Act (1) which reads as follows:-

Notwithstanding anything contained in any law or in the regulations of a co-operative society or co-operative company, any produce delivered to that society or company, and any product manufactured therefrom by the society or company shall, while such society or company is

indebted /...

(1) Act No. 13 of 1944.

indebted to the bank in respect of an advance in the form of a cash credit account, be realisable only by the society or company in the ordinary course of its business or by the bank in the exercise of the powers conferred on it by this Act, and such produce or product, or the proceeds thereof shall not, while such debt with interest and costs remains unpaid, be attached in execution by any person other than the bank, except with the written consent of the bank.

Before dealing with the implications of this "statutory pledge" given to the Land Bank vis-à-vis the co-operative, it is interesting to note that the co-operative in turn, has an almost similar pledge over its members' produce.

Co-operative's "statutory pledge":

Section 96 of the Co-operative Societies Act (1) provides inter alia that as long as a member is indebted to his agricultural co-operative company (or to his society, for that matter) in respect of the supply to him by the company, of seeds, fertilisers, bags, fumigants or insecticides or for certain services rendered or for moneys advanced, then, in terms of sub-sections (1) (b) (ii) and (iii),
thereof /...

(1) Act No. 29 of 1939.

thereof:-

- (ii) all produce, whether gathered or not, in the production of which the seeds, fertilizers, fumigants or insecticides were used, or for which the bags were supplied, or in respect of which the fumigating, spraying or cleansing operations were performed, or on which the money was advanced, as the case may be, shall be deemed to be pledged in favour of the society or company for the amount of the indebtedness as fully and effectually as if that produce had been gathered and pledged by delivery to the society or company and were retained in its possession;
- (iii) the seeds, fertilizers, bags, fumigants or insecticides supplied, and the produce, whether gathered or not, in the production of which the seeds, fertilizers, fumigants or insecticides were used, or for which the bags were supplied, or in respect of which the fumigating, spraying or cleansing operations were performed, or on which the money was advanced, as the case may be, shall not be seized in execution of the judgment of any court of law at the instance of any creditor other than the society or company:

Provided that the provisions of this sub-section shall not apply to any produce lawfully disposed of in accordance with sub-section (2) or to any bags containing that produce and disposed of with that produce.

This is a most startling proposition

because /...

because growing crops are deemed to be pledged before they are severed from the ground and have been gathered ! While growing they accede to the land and are surely regarded as immovable property.

The Nature of a Pledge:

A pledge is a right over the movable or incorporeal property of another which serves to secure an obligation, as opposed to the special mortgage of immovables. Possession by the pledgee is essential.

The Roman and Roman-Dutch authorities make use of various terms denoting such security rights which differ in meaning and in application. It is not, however, the intention to give a detailed survey of the development of these concepts except, perhaps to mention that the term pignus was used by Roman writers to denote a security where possession of property was delivered to the creditor, while hypotheca was used where there was no such delivery (1). The Roman Dutch writers also drew the

distinction/...

(1) Inst. 4.6.7.

distinction between pignus and hypotheca depending either upon the method of effecting the security or on the nature of the property secured (1), the pignus or pandt being in respect of movable property which was delivered to the creditor whereas the hypoteek was a security over immovable property.

Pledge as Assessory Right:

We are concerned in this chapter with the concept of pledge or pand as it affects movable property. Whether the contract of pledge is express or tacit, it is in its very nature accessory only and presupposes the existence of some other valid principal obligation (2). Now this other valid principal obligation or origin of a pledge may arise from any of the following sets of circumstances, namely, by contract, by judicial attachment or by operation of law.

The first two circumstances of contract and judicial attachment are also of no concern in dealing with the so-called "statutory pledges" referred to in the Land Bank and Co-operative Societies Acts, supra

Tacit/...

(1) Grotius. Inleyd. 3.8.1.

(2) Voet 20.1.13.

Tacit or legal mortgages:

In regard to the third circumstance, namely, those arising by mere operation of law, or ipso jure, the Roman Dutch jurists point out that certain classes of creditors are accorded a security over the property of their debtors merely by virtue of a relationship which arises between the parties, without any agreement whatever regarding the giving of security (1). These they term tacit or legal mortgages.

These tacit or legal mortgages may, in turn, be classified under the headings of ordinary liens, tacit hypothecs, and a third category sui generis, as under:

Liens or Rights of Retention:

Unlike tacit hypothecs where no possession is necessary, these liens or rights of retention are rights tacitly enjoyed by a creditor, to retain possession of specific property belonging to the debtor, as security for some claim in respect of that property, until the claim has been paid (2). As a
 general/...

(1) Grotius Inleyd. 2.48.8; Van Leeuwen Roomst-Holl. Recht. 4.12.5; van der Linden 1.12.1.

(2) Voet 20.4.19.37; van der Keessel, Theses. 449. 450.453.

general rule money or value has been put into the property of the debtor and possession of the property is essential (1). Builders, bailees, factors and certain others enjoy such rights.

Tacit Hypothecs:

Under our common law, a large number of tacit hypothecs were accorded to particular creditors over the property of their debtors even though the former did not have possession of the debtor's property e.g. the Government for taxes by the debtor, minors over the property of their tutors and curators and many others. The Insolvency Act (2) though not abolishing tacit hypothecs generally, affords preference in insolvency only to the landlord's legal hypothec and hire-purchase hypothecs. It leaves untouched any hypothecary right of a creditor of following property into the hands of third parties and any other preferent right where no insolvency intervenes (3).

Statutory/...

(1) United Building Socy. vs. Smooklers Trustee
1906. T.S.

(2) Insolvency Act No. 24 of 1936.

(3) Lee - Introduction to Roman Dutch law, page 192.

Statutory Hypothec sui generis:

Various statutes enact that no transfer of land may be passed unless certain rates, taxes, licences, etc., have been paid (1) or unless certain certificates by prescribed officers have been produced (2).

The effect of an enactment of this nature has been described by Innes, C.J. (3) as one creating a very real and extensive preference over the proceeds of rateable property. The right itself has been referred to as a lien which is hardly distinguishable from a tacit hypothecation (4) or as a species of lien (5), or as something not wholly in the nature of a lien or a hypothec, but sui generis (6). Perhaps it may best be classified as a tacit hypothec sui generis.

As will be evident from an examination of the Land Bank and Co-operative Societies Acts made hereunder, the right of security envisaged in those Acts smacks somewhat of a hypothec but is specifically termed a "pledge". It cannot satisfactorily be classified/...

-
- (1) Deeds Act No. 47 of 1937.
(2) Land Bank Act No. 13 of 1944. Sec. 33 (3).
(3) Johannesburg Municipality vs. Cohen's Trustee, 1909. T.S.
(4) Smuts vs. Cathcart Div. Council 1896. S.C.
(5) Johannesburg Municipality vs. Cohen's Trustee 1909. T.S.
(6) Mars., Law of Insolvency in S.A.

classified wholly under any of the above three types of security but constitutes a further type sui generis, but, as it is termed a "pledge" in the Acts, it is referred to hereinafter as a "statutory pledge" for the sake of easy reference.

"Statutory Pledge" under the Land Bank Act:

Sections 35 and 38 of the Land Bank Act (1) supra, envisage the "binding" of the agricultural produce of members of the company in the possession of or in transit to the company or its agents. It should be particularly noted that the produce contemplated in these sections is that of members, although the possession thereof is with the company or its agents. In fact, the produce of the members may still be in transit to the company or to its agents, someone else having the actual physical detention.

Nowhere else in the Act is this "binding" of produce again referred to, as such. At this stage one must necessarily construe it as a hypothec, possession/...

(1) Act No. 13 of 1944.

possession not being with the creditor but the produce nevertheless being "bound" to him by reason of the advance having been made in respect of that produce.

Sub-section (6) of section 38 of the Land Bank Act (1), however, refers in the first place to all produce and all products manufactured therefrom and other articles and substances (the latter articles and substances having been financed ex the Land Bank loan) which are in possession of or in transit to the company or its agent. This latter reference to goods in possession or to goods in transitu is identical with that in sections 35 and 38 (2) of the Act quoted above, but a significant omission has been made in section 38 (6). The produce is not that "of members" as previously envisaged. It is "all" produce and "all manufactured products.

Now it is one of the prime rules of interpretation of statutes that general words such as "all" or "any" must receive a general construction/...

(1) Act No. 13 of 1944 quoted supra.

construction and be given their plain and literal meaning (1) unless it is clear from the statute itself that their meaning should be restricted (2) i.e. cum lex plus scripsit minus voluit. The Act must be read as a whole, the intention being gleaned ex visceribus actus (3).

From the reading of the Act as a whole it could hardly be contended that the Land Bank was intended to receive this special statutory security over all produce and all products irrespective of whether they were financed ex the Land Bank loan or not. Read in conjunction with sub-section (2) of the same section 38 and with paragraph (b) of sub-section (6) itself, it is submitted that the produce and products contemplated in paragraph (a) of sub-section (6) are only those "in respect of which the Land Bank advance has been made".

It is very likely that this ambiguity is the result of bad drafting. The words "with money so advanced to it", appearing in paragraph (b) of sub-section (6) of section 38 supra should, it is

contended /...

-
- (1) Union Govt. vs. Mack 1917 A.D.
 (2) Venter vs. Rex 1907 T.S.
 (3) Farrar's Est. vs. Comm. Inland Revenue 1926.
 T.P.D.

contended , have been brought back to the main margin to form part of the rest of the sub-section. This would have removed any doubt in the matter.

This sub-section (6) also throws light on the meaning of the previously envisaged "binding" of the produce of members.

Delivery has now been effected to the company or to its agent, and the produce no longer belongs to members (1). The produce and products manufactured therefrom and other articles and substances are now specifically stated to be pledged to the bank as effectually as if they had been expressly pledged and delivered to the bank and any unauthorised disposal thereof by or on behalf of the company is stated to be null and void.

This then is the "statutory pledge" and by an extensive interpretation of the Act, the so-called "binding" of produce of members contemplated in subsection (2) of sections 35 and 38 respectively of the Act, can also justifiably be regarded as constituting "statutory pledges" in
respect/...

(1) Berry vs. Farmers Co-op. Socy. 1912 .A.D.

respect of members' produce, it being a case of cum lex minus scripsit plus voluit otherwise the expression of "binding" the produce would be meaningless and without substance. Such an interpretation is also in accordance with the presumption that a statute does not intend to make futile or nugatory provisions and must be interpreted ut magis valeat quam pereat (1).

In other words, once a loan has been granted, the members' produce is "pledged" to the bank (vide sections 35 (2) and 38 (2)) i.e. the produce in respect of which the loan has been granted, and remains so "pledged" to the bank even after delivery to the co-operative company (vide section 38 (6)). It can only be disposed of by the co-operative in the ordinary course of its business and may not be attached in execution by anyone other than the bank, except with the bank's consent (vide section 39).

This latter statutory protection would be a necessary adjunct to the bank's rights because
under /...

(1) ex parte Min. Justice; In re R. vs. Jacobson and Levy 1931 A.D.

under the common law, a pledge or movables is absolutely extinguished by the complete alienation of those movables (1) and is lost by an attachment of the movables in execution of a judgment (2) - mobilia non habent sequelam. As previously pointed out, however, this so-called "pledge" is more in the nature of a hypothec and as such should not then require these further protective provisions.

"Statutory Pledge" under the
Co-operative Societies Act:

As stated above, a co-operative company or society also enjoys what is termed for easy reference a "statutory pledge" over all a member's produce whether gathered or not, in terms of section 96 of the Act (3) in respect of facilities granted. Here too, produce is deemed to be pledged to the co-operative as fully and effectually as if that produce had been gathered and had been pledged by delivery to the co-operative and had been retained in its possession.

A/...

-
- (1) Voet 20.1.14: 20.6.6: Grot. 2.48.29:
Schorer Note 259: v.d. Keessel Theses 432.
(2) Hare vs. Trustee Heath 3. S.C. 34.
(3) Co-operative Societies Act No. 29 of 1939.

A co-operative cannot, however, take the law into its own hands and forcibly remove such crops from a member's farm (1).

The case of Meyer vs. Sentraal Westelike Ko:op. Maatskappy, 1943 O.P.D is of much interest because it is the only reported case on the effect of this statutory pledge. A member, Meyer, had been "dispossessed" of his maize by his co-operative. He had been duly enrolled as a member of the co-operative on 24th April, 1941 . Thereafter, on 8th May and 5th July, some 500 grain bags were delivered to him by his co-operative, and these had not been paid for at the date of the removal of the maize by the co-operative.

Meyer applied for a mandament van spolie ordering the co-operative to return to him 140 bags of maize alleged to have been forcibly and unlawfully removed from his farm.

On the facts the court found on appeal and upholding the decision of the Magistrate, that at the date of the alleged spoliation, Meyer was
neither/...

(1) Meyer vs. Sentraal Westelike Ko:op. Mky.Bpk.
1943. O.P.D.

neither in possession, nor was he the owner of the maize in question. In view of the arguments addressed to it, however, the court considered it necessary to deal with the question of the interpretation to be placed upon section 96 of the Co-operative Societies Act, 1939.

It was held, following the dictum of James L.J., in Ex parte Walton (17 Ch. D 746) that when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.

The remarks of de Beer J. are illuminating. He is reported to have stated, inter alia :-

In considering then between what persons and for what purposes the statutory fiction is to be resorted to the whole Act and the language employed in the section must be analysed. It must in the first place be noted that the section states that "all produce whether gathered or not" for which bags were supplied shall be deemed to be pledged and that the effect of sub-section (5) is that "... any produce produced by a member ... to whom...bags ... have been

supplied/...

supplied ... shall be deemed to be produce ... for which the bags were supplied ...". The argument therefore that there is an onus on the society to prove that the 140 bags containing the maize and removed by them were actually supplied by them, seems in view of the above provisions to be untenable: the plain language of the Act suggests that the whole crop of the producer member shall be deemed to be pledged whether the whole or portion only of the crop was in fact bagged in containers supplied by the society. Nor does the argument appeal to me that the literal interpretation of the Act leads to such injustice and absurdity as to justify the Court in the present case modifying the grammatical and ordinary sense of the words. In this connection Lord Bramwell in Hill v. East and West India Dock Co. (9 A.C. 448), states:

"I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another".

However, the intention of the section is clearly to create a valid and enforceable pledge over the crops in favour of the society : this crop, in violation of all the notions of the Roman-Dutch Law, shall be deemed to be pledged although the factual possession remains in the pledgor; had the section said it shall be deemed to have been pledged , that it shall be deemed to have been delivered to the pledgee who shall further be deemed to have retained it in his possession cedit quaestio. As it is , the pledgee can, no doubt, claim the right to enforce his pledge by action, but it is a far cry to say that he can exercise the rights flowing from

a/...

a possession which he has not and which he never had either factually, juridically or fictionally. If, therefore, the possession of the crop had on the tenth September been in the applicant it seems that the society would have been guilty of an act of spoliation in forcibly removing the crop notwithstanding its unassailable right to have claimed the delivery in pursuance of the pledge. Applicant however has been adjudged not to have had possession on that date and in the result the appeal must be dismissed with costs.

Possession and Delivery:

This is a most important case on the particular subject, but with due deference to the learned Judge, not a very satisfactory one. The applicant, Meyer, was held not to have been in that state of possession which would ordinarily have founded an action for spoliation.

On the other hand, the learned Judge points out that Meyer had factual possession but that the pledgee company never had possession "either factually, juridically or fictionally." Who then had full legal possession? Obviously the pledgee would have been deemed to have had full legal possession, if the Act (1) had stated specifically
that/...

(1) Act No. 29 of 1939.

that the crop shall be deemed to have been delivered to the pledgee who shall be deemed to have retained it, but the Act does not say so. It merely states that the crop shall be deemed to be pledged as fully and effectually as if that produce had been gathered, pledged by delivery and retained in the possession of the company.

Sections 35 and 38 of the Land Bank Act (1) also merely deem the produce to be pledged as if it had been delivered but they do not specifically provide that the produce shall be deemed to have been delivered and be deemed to be retained in possession of the bank.

This again raises the question as to whether this so-called "statutory pledge" is constituted as the result of a statutory delivery or whether it is really a tacit hypothec sui generis. It is submitted that the latter designation is the right one.

Delivery in Pledge:

To constitute a valid pledge under the
common/...

(1) Act No. 13 of 1944.

common law, the movable had to be delivered to and retained by the pledgee in his possession.

Delivery can be legally effected in a variety of ways e.g.

- (a) by actual physical handing over;
- (b) by constructive means such as brevi manu, longa manu and constitutum possessorium.

It is clear that delivery of an article can be effected by the mere intention to hold that article in future as agent for another (1). Such a form of delivery is scrutinised very carefully by the courts. There must always be clear proof of intention to effect transfer and good faith on the part of the parties concerned (2).

By common law, delivery is not effective if the movables sought to be pledged are left in the hands of the debtor commodato aut precario, as that was regarded as a fraud upon the custom of Holland requiring delivery (3) and also tends to the injury of other creditors (4).

Decided/...

-
- (1) Goldingers Trustee vs. Whitelaw & Son 1917 A.D.
 - (2) Kaplan vs. The Messenger, Port Alfred 1932 E.D.L. 281 and Estate Hunt vs. de Villiers 1940 C.P.D. 79.
 - (3) Grotius : Opinion Holl. Consult. 3. 174. 4 & 5; Voet 20.1.12.
 - (4) Stratfords Trustees vs. London and S.A. Bank 1874. 3. E.D.C.

Decided Cases Relating to
"statutory pledges":

In the case of the two Acts (1) above, factual possession of the movables remains with the debtor and by a fiction, the creditor is given a "statutory pledge" thereof.

Further light is thrown on this subject by decided cases relating to a somewhat similar form of "statutory pledge" given to the Secretary of the State Advances Recoveries Office for loans to ex-volunteers under the provisions of section 4 of War Measure No. 108 of 1944, section 6 (1) of which reads :-

Upon the execution of a document intended to hypothecate movable property in terms of Reg. 4 the movable property thereby hypothecated shall be deemed to have been pledged to the Secretary as security for the loan in question in the same manner in all respects, as if it had been delivered to him as a pledge, and the validity of the pledge shall not be affected by the absence of any distinctive mark on the security in question .

In a recent case van Zyl J. held that the effect of the words " as if it had been delivered to/...

(1) The Land Bank and the Co-operative Societies Acts, supra.

to him as a pledge" was to give the Secretary a real right in the thing hypothecated just as if the thing had been delivered to him in pledge. This right was available even against a third party who had received the thing in good faith and for value from the pledgor. Consequently the Secretary was entitled to attach the thing in the possession of the purchaser from the pledgor and sell it in execution. The learned Judge points out that in the result the nature of the security envisaged by the legislature is really neither a hypothec of movables, in the ordinary meaning of the term, nor a pledge (1). With due deference to the learned Judge it is submitted that this "statutory pledge" is really a tacit hypothec sui generis.

It is also significant that in a more recent case (2) the court rejected an almost similar provision which was inserted in a contract between the seller and the purchaser of a certain business, namely, that until such time as the full balance of the purchase price had been paid in full,
 the/...

(1) Edwards vs. van Zyl 1951. C.P.D; also S.A.R.O. vs. Theron 1949. O.P.D.

(2) Slabbert vs. Theodoulou 1952 (2) S.A.667 (T).

the purchaser would not be entitled to sell, alienate, remove or otherwise dispose of any assets appertaining to the said business except in the ordinary course of business, the seller being entitled to a lien on those assets until such time as the balance of the purchase price had been paid, the lien to be effective in favour of the seller notwithstanding that the purchaser had the actual physical possession thereof.

In an attempt to prevent the purchaser from further disposing of certain assets of that business, the court held that no lien had in fact been constituted and even if it had, it might well have been necessary for the seller to have taken special steps to protect that right. The right relied upon in that case, said the court, fell outside the principles of the law as laid down in the authorities.

Nature of "statutory pledge" :

The impression is gained that the legislature was so anxious to create a statutory security right that little or no attempt has been made to
define/...

define with any sort of precision the duties of the "pledgees", in these instances , namely, the Land Bank and the co-operative.

What of the common law duty of the pledgee to restore possession of the pledged article undamaged to the pledgor on due discharge of the debt ? Must the pledgee account for the fruits arising from the pledged property ? On whom is the duty to take care of the pledged property placed ? Is it on the pledgee, as under common law ? Under the statutes, the pledgee is deemed to be in possession !

Ownership of the produce may vest in the co-operative or with the member as the case may be, but no matter in whom the ownership rests the produce is still deemed to be pledged to the Land Bank where the bank has advanced moneys in respect thereof (1). This is an important factor because, in certain circumstances when dealing with controlled produce, there is a further change in ownership.

Ownership under the Marketing Act:

Sub-section (2) of section 20 of the Marketing/...

(1) Sections 35 and 38 Land Bank Act No. 13 of 1944, supra.

Marketing Act (1), for instance, provides that :-

A scheme which empowers its regulatory board to prohibit the sale of the product to which that scheme relates, except through that board or such persons as it may determine or as may be specified in the scheme, may provide for the conduct by the board or any such person of a pool for the sale of that product on such basis as may be specified in the scheme, and the ownership in any quantity of that product delivered for sale through the pool shall forthwith vest in the board or person concerned.

Sub-section (3) ter of the same section 20 empowers the regulatory board to so operate a pool as is envisaged above, the relative sub-section reading as follows:-

A regulatory board may, if authorised thereto by the relevant scheme, and on such conditions or on such a basis as may be prescribed therein, conduct a pool for the disposal of any quantity of the product to which that scheme relates, which may in the circumstances described in such scheme be delivered for such disposal to the board or such person as it may determine, by any person who has produced or otherwise acquired that quantity, and the ownership in any quantity of such product so delivered shall upon delivery thereof vest in that board which may dispose thereof in such manner as it may deem fit, and shall distribute the proceeds derived from such disposal, less such amounts as may be specified in the scheme or as the board may determine, amongst the
persons/...

(1) Act No. 26 of 1937 as amended by Act No. 12 of 1941.

persons who are in terms of the scheme entitled thereto, on such basis as may be prescribed in the scheme.

Essentials for the Passing of Ownership:

The common law essentials for the passing of ownership in a thing may be summarised as under :-

- (1) The thing, ownership in which is sought to be transferred, must be capable of being owned. (1)
- (2) The transferor must be the owner or be in a position or have authority to dispose of the ownership.
- (3) An intention on the part of the transferor to transfer the ownership to the transferee.
- (4) An acceptance on the part of the transferee.
- (5) An appropriate causa for the transfer (2).
- (6) A delivery or transfer of the property according to law.

Delivery in turn may be effected by various means e.g. by the physical handing over of
the/...

(1) Voet . 6.1.29.

(2) Commissioner of Customs and Excise vs. Randles Bros. and Hudson Ltd. 1941. A.D.

the thing (traditio) or by constructive means such as brevi manu, by symbolical means longa manu or by means of a constitutum possessorium. The above rules relating to the passing of ownership have been evolved over the centuries to establish in the eyes of the world the right of ownership which is perhaps the fullest and most important real right known.

Effects of Marketing Act:

Although everyone is deemed to know the law, this is far from true in actual practice. It is indeed a matter of far-reaching consequence merely to enact that ownership in a thing shall be deemed to vest in a regulatory board if its scheme so provides in given circumstances, particularly when it is borne in mind that delivery can legally be effected by constitutum possessorium (1).

In the case of certain products like butter for example, circumstances may well arise where a manufacturer (producer) is also appointed as agent for the Dairy Industry Control Board. He could then manufacture the butter (on borrowed capital) and
 deliver/...

(1) Goldingers Trustee vs. Whitelaw & Son . 1917. A.D.
 and Stratford's Trustees vs. London and S.A.
 Bank. 1874. E.D.C.

deliver the product in his capacity as producer to himself in his capacity as agent of the control board, by the process of constitutum possessorium.

Ownership of the butter would then automatically vest in the control board for the purpose of conducting a pool in terms of section 20 of the Marketing Act quoted above.

The producer's creditors who had lent him the capital might well find themselves without any security in such circumstances, because the butter, by being moved, say, from one side of the store to the other side (coupled with notice of delivery given to the board as is, in fact, the practice) will have ceased to be an asset of the manufacturer and will in law belong in ownership to the control board. Few creditors are aware of the significance of these particular provisions of the Marketing Act, the effects of which have not yet been tested in the courts.

Practical Implications of
the three Acts:

In financing agricultural co-operatives,
creditors/...

creditors find such startling innovations as statutory pledges of immovable property, that is, of crops not yet gathered (1) and the automatic passing of ownership in movables by mere delivery without cognisance being taken of other common law requirements.

As an illustration of the diverse rights which are created and extinguished by the interaction of the Co-operative Societies Act, the Marketing Act and the Land Bank Act (2), the supply of seed by a co-operative to a member may be instanced.

If the co-operative has financed the acquisition of seed itself and then supplied it to the member, the seed belongs to the co-operative until sown by the member even though the seed is in possession of the member (3). When sown, the crop growing or gathered belongs to the member but is "pledged" to the co-operative (4). If the crop is a controlled one and the co-operative has been appointed agent to the control board, then on delivery of the crop to the co-operative, ownership thereof passes to the board (5). Presumably it is still "pledged" to the co-operative until the member's debt for the seed/...

(1) Section 96 of the Co-operative Societies Act No. 29 of 1939 supra.

(2) Supra.

(3) Section 96 of Act No. 29 of 1939.

(4) Ibid.

(5) Section 20 of Act No. 26 of 1937.

seed has been repaid, or does the co-operative's pledge cease to be effective because the co-operative has virtually "delivered" the crop to the board ? There is much to be said for both views. But what of the position where the Land Bank's rights are superimposed on the above rights, by reason of the Land Bank having financed the original purchase of the seed by the co-operative before it has been supplied to the member.

All produce of the member and of the co-operative is then "pledged" to the Bank (1) but the crop is also "pledged" to the co-operative under section 96 of the Co-operative Societies Act (2) as long as the member owes his debt for the seed.

Both the Land Bank and the Co-operative Societies Acts of 1944 and 1939 respectively, are consolidations of previously existing legislation. A later "statutory pledge" would therefore override a former one.

No matter in whom the ownership lay nor who the pledgee was, the controlled produce could in
any/...

(1) Sections 35 and 38 of Act No. 13 of 1944.
(2) Act No. 29 of 1939.

any event only be disposed of by the control board or on its instructions, in terms of the various marketing schemes. This in any event nullifies to a great extent the security value of a pledge in those circumstances.

Summary and Conclusions:

The Acts examined above (1) seek to facilitate the financing of crops and the control of the production and marketing of agricultural produce, inter alia, by the pledging of crops to the co-operative before they are severed from the land or gathered (2) by the automatic pledging of crops to the Land Bank (3) and by the automatic passing of ownership of "pooled" products to a regulatory board (4).

It is evident from the way in which their provisions overlap that these Acts have, from time to time, been amended independently of one another in an endeavour to keep pace with an ever developing and changing agricultural economy.

The/...

-
- (1) The Co-operative Societies Act No. 29 of 1939; The Marketing Act No. 26 of 1937; The Land Bank Act No. 13 of 1944.
 - (2) Section 96 of the Co-operative Societies Act No. 29 of 1939.
 - (3) Sections 35 and 38 of the Land Bank Act No. 13 of 1944.
 - (4) Section 20 of the Marketing Act No. 26 of 1937.

The impression is gained, too, that insufficient regard has been paid to the far-reaching consequences of the legal means thus employed to protect this "hazardous occupation", particularly as regards the rights of third parties.

Although the Land Bank plays a large role in financing agricultural co-operatives, it is by no means the only financier in that field. Many such co-operatives, for instance, obtain commercial bank overdraft facilities for crop finance, in some cases, against cession of the co-operative's rights under section 96 of the Co-operative Societies Act. Where, however, a co-operative is partly financed by the Land Bank and partly by a commercial bank, as is often the case, a conflict of rights immediately arises. The crop growing or gathered is deemed to be pledged to the co-operative in the circumstances envisaged in section 96 supra. The co-operative will have ceded its rights of "pledge" to the commercial bank but the Land Bank will also hold a so-called "statutory pledge"/...

pledge" over the produce.

Again in the supply of seed as instanced above, the crop is deemed to be pledged to the co-operative and may, at the same time, be deemed to be pledged to the Land Bank. That same produce if a controlled one under the Marketing Act may at one time belong in ownership to a producer-agent and, by the mere posting of a delivery note to the regulatory board, ownership therein will by statute automatically pass to the regulatory board, to the possible prejudice of his creditors.

Clearly, therefore, these three Acts need careful revision and correlation on the lines indicated hereunder.

From the previous chapters dealing with the Land Bank, it has been observed that the Land Bank already enjoys a very privileged position amongst creditors. It has the power of parate executie and additional security in the form of a statutory suretyship by members of a co-operative company and of the joint and several liability of members of a

co-operative/...

co-operative society. Surely then there is little need of the further security of a "statutory pledge" of crops. It is submitted that this latter form of security could with advantage to the farmer be abolished, or if it is retained, it should at least be accompanied by an act of delivery or some such outward sign which would place other creditors on their inquiry.

Similarly in the case of the Co-operative Societies Act, the "pledge" of growing crops is in direct conflict with common law concepts. If a co-operative is to be given a pledge then it should certainly extend only to crops actually gathered and duly delivered. It is true that the seed or fertiliser supplied by a co-operative to a member is lost in the ground when used and no longer constitutes a security, but it should be quite easy to legislate for the furnishing of other collateral security rather than to create a right of "pledge" which presents not only difficulties in interpretation but also runs counter to well established common law principles.

Furthermore/...

Furthermore, one cannot escape the conclusion that these Acts were promulgated without much, if any, regard being had to the conflict of interests to which they give rise. They require, therefore, to be correlated in the light of experience gained, so as to define clearly where the security rights of the one institution end and the others begin, due regard being had to the placing of creditors and interested parties on their inquiry, by requiring outward acts to be done, such as actual delivery of the produce, as an indication to such third parties that a change of security and the transfer of rights have been effected.

CHAPTER VII.

THE EXTENT TO WHICH COMMON LAW PRINCIPLES HAVE BEEN ALTERED, THE GENERAL TREND OF AGRICULTURAL LEGISLATION AND CRITICISM THEREOF, AND SUGGESTED AMENDMENTS.

Contents : Need for protection of the farming industry; summary of the extent to which common law principles have been altered; the general trend of agricultural legislation and criticism thereof; the need for co-ordinated and planned legislation; suggested amendments.

Need for Protection of the Farming Industry:

Farming is dependent upon many unpredictable factors. The vicissitudes of the weather, diseases, the perishability of products, uncertain economic conditions and the like, make it imperative that some measure of legal protection should be afforded to this vital industry. The
extent/...

extent to which this protection has been given in the statutes examined and the sometimes haphazard manner in which it has been done, at the expense of our common law principles, can for the most part, hardly be justified in the light of the ends sought to be achieved thereby.

The Extent to which Common Law Principles have been altered:

In previous chapters, the impact of particular agricultural legislation on the common law principles of lease, insolvency, ownership, pledge, suretyship and parate executie has been examined and commented upon, in detail. The extent to which these principles have been altered can, at a glance, be gauged from the following brief summary :

- (1) The Land Settlement Act No. 12 of 1912, as amended, in relation to the concept of Lease:
 - (a) The restriction on sub-letting rural property without the consent of the Minister of Lands - sec. 35.

(b)/...

- (b) Compulsory occupation of and residence on the leased property - sec. 28.
 - (c) The obligation to improve the leased property - sec. 30.
 - (d) The limited and sometimes absence of compensation for improvements - sec. 42.
 - (e) The restriction on the cutting of trees on the leased property - sec. 39.
 - (f) The automatic off-set of debts between the lessor and lessee notwithstanding the fact that the amount has not been ascertained - sec. 38.
 - (g) The so-called "statutory pledge" of all movables which at any time have been on the leased property - sec. 37.
- (2) The Farmers' Assistance Act No. 48 of 1935, as amended, in relation to the concept of Insolvency:

It was noticed that this Act introduces a new concept into our law, in some respects running parallel with that of insolvency but often counter thereto. Amongst its salient features are: -

(a)/...

- (a) The suspension of the rights of creditors by a purely administrative act on the part of the authorities - sec. 7.
 - (b) The deeming of a compromise to have been effected unless rejected by creditors - sec. 12.
 - (c) The fact that a debtor is not deemed to be insolvent, that he is not subjected to any of the ordinary disabilities of an insolvent but is nevertheless relieved of all his debts - sec. 16.
 - (d) The automatic passing of ownership of assets without delivery and the transfer of immovables without a power of attorney - secs. 14 and 19.
 - (e) The imposition of real restraints on land as to subsequent hypothecation, sale or insolvency - sec. 22.
- (3) The Marketing Act No. 26 of 1937, as amended, in relation to the concept of Ownership:
- (a) The automatic passing of ownership of controlled produce to a regulatory board which conducts a "pool" for such produce - sec. 20.

(4)/...

(4) The Co-operative Societies Act No. 29 of 1939, as amended, in relation to the concept of pledge:

- (a) The so-called "statutory pledge" of produce whether gathered or not - sec. 96.

(5) The Land Bank Act No. 13 of 1944, as amended, in relation to the concepts of Pledge, Suretyship and parate executie:

- (a) The so-called "statutory pledge" of produce of members of a co-operative and produce of the co-operative itself - secs. 35 and 38.
- (b) The automatic suretyship of particular members of a co-operative company - sec. 40.
- (c) The imposition of joint and several liability on all members of a co-operative company by an administrative act of the officials of the company - sec. 40.
- (d) The exclusion of the beneficium ordinis seu excussionis and of the beneficium divisionis, under sec. 40.
- (e) The right of parate executie, to seize and sell property without recourse to a court of law - sec. 55 - and in the case of co-operatives,

so/...

so to seize and sell the property of the co-operative and of members even if the property has not been specially hypothecated to the bank - secs. 61, 62 and 63.

The General Trend of Agricultural Legislation and Criticism thereof:

The keynote of the statutes examined has been one of assistance to farmers, except perhaps the Land Bank Act No. 13 of 1944, which, while certainly facilitating the granting of financial assistance to the farming industry with the one hand, takes back with its other more than its pound of flesh by way of security.

The Land Settlement Act No. 12 of 1912, in turn, makes less inroads into important common law concepts than do the other Acts examined. Designed to assist the poorer type of farmer, it also protects substantial investments by the Government at the expense of comparatively few important departures from common law principles. This Act has, to a large extent, been the political football of various governments of the day, and, at one time, contained
very/...

very restrictive provisions as to occupation and subsequent hypothecation of holdings allotted under Crown Grant. These provisions aimed at preventing speculation in the buying and selling of land by settlers, but were rightly repealed in 1949 so as to conform with freedom of ownership. Speculation in holdings has now been made less profitable merely by reducing the water-rights of settlers who acquire more land in the settlement, under various Irrigation Acts. The trend of this Act has been stable and subsequent amendments have reflected a tendency rather towards preserving common law principles than to overriding them, e.g., freedom of ownership of Crown Grants. The protection afforded the Government's large capital investment is certainly not unreasonable when compared, for instance, with the powers of the Land Bank under its Act and the almost irresponsible way in which the rights of creditors are dealt with under the Farmers' Assistance Act No. 48 of 1935.

This/...

This latter Act is today the least justifiable of all the statutes examined and it is submitted a dangerous one to retain on our statute book. It was a special Act, introduced in 1935, for a special purpose, namely, to protect the farmer against his creditors during the economic recession of the early thirties. It is clear from the Act as a whole that it was intended to be limited to that state of emergency only, and apart from a few early amendments to remove administrative teething troubles, the Act has remained unchanged for almost twenty years. It virtually forces a compromise on creditors and allows an otherwise insolvent farmer to slam the door on his creditors and walk out a free man. At a forced sale the Farmers' Assistance Board can buy in the property and then resell it to the farmer, who then carries on farming operations free from his previous debts and can snap his fingers at his erst-while creditors. Although it assisted considerably in the rehabilitation of the farming industry in the years immediately following the depression, its
continued/...

continued presence on our statute book is quite unjustified by present day circumstances. Its application in the ordinary sphere of business transactions could easily lead to the breakdown of an otherwise healthy debtor-creditor relationship. Here, indeed, the trend has been to sacrifice sound common law principles on the altar of expediency. The Act should be repealed.

The Marketing Act No. 26 of 1937, has, on occasion, been called the "Farmers' Charter" - naturally by farmers themselves, because it seeks primarily to ensure a stable and profitable return to the farmer by the regulation of the production and the sale of agricultural products. Although the full implications of the Act in the economic sphere do not concern us here, the assistance to the farmer has been rendered, in some measure at any rate, to the possible detriment of creditors. A creditor who makes a loan to an agent of a regulatory board sees before his eyes, for instance, neatly stacked quantities of butter or cheese as security for the advance, but

a/...

a few minutes later his debtor has shed ownership in the stocks merely by posting a delivery note to the board and the creditor's erstwhile security thereafter belongs in ownership to the board ! To facilitate the operation of the Act as a whole, it has apparently been found more convenient to vest ownership of the controlled product in the regulatory board itself, but this has been done with little regard to the accepted common law requisites for the passing of ownership and aspects such as the passing of risk in the product and the possible prejudice to third parties have received scant attention. Here again, it is submitted, an unnecessary inroad has been made into common law concepts for the sake of expediency.

The Co-operative Societies Act No. 29 of 1939 provides yet another example of indirect assistance being rendered to the farming community at the expense of sound common law principles. To facilitate the granting of assistance to a member by his agricultural co-operative and to facilitate
the/...

the giving of security by such member to his co-operative for advances, goods or services so received, this Act seeks to create a so-called "statutory pledge" in favour of the co-operative of the member's produce whether gathered or not. Little thought has been given to the rights of other creditors and the co-operative thus enjoys a specially favoured position. The trend of this particular statute is to afford the maximum benefit to the farmer through his co-operative, which, in fact, belongs to him, by treating transactions as between member and co-operative on a "closed shop" basis, to the exclusion of the rights of the farmer's other creditors. If this form of security is to be retained it should certainly be limited to crops actually gathered.

By far the greatest transgressor of common law principles is the Land Bank Act No. 13 of 1944. Although the Land Bank has been of inestimable value in financing the requirements of the farming industry to the tune of hundreds of millions of pounds since
its/...

its establishment in 1912, the ease with which it has granted these loans has been made possible only by the sacrifice of many sound and well-tried common law principles. Extensive powers have been granted the bank under the guise of the necessity of safeguarding public funds and, in the case of its powers of parate executie, of saving the debtor the costs of levying ordinary execution. In this Act we find a dangerous trend, namely, that of continuing to extend the bank's powers by later amendment. In 1912 the power of parate executie, for instance, existed only in respect of individual loans to farmers - section 37 of Act No. 18 of 1912 - but with the advent of co-operatives, this power of parate executie was extended to include the property of the co-operative itself and then of its individual members as well, irrespective of the fact that such property might not be hypothecated to the bank at all ! Again with the gradual disappearance of co-operative societies whose members were jointly
and/...

and severally liable for the societies' debts and the emergence of limited liability co-operative companies, the bank sought to saddle members of these latter companies with an automatic suretyship liability and even in some instances with joint and several liability as in the case of societies. Unlike the Land Settlement Act No. 12 of 1912, which was subsequently amended to conform more closely to the common law, the subsequent amendments to the Land Bank Act No. 13 of 1944 have, in fact, shown an opposite tendency.

The trend of the other legislation examined has been to assist and protect the farmer and the agricultural industry as a whole, but even though the Land Bank claims to be a farmers' bank it nevertheless burdens its debtors to a much greater extent than would an ordinary lender as far as security is concerned. It has hedged itself around with protective measures and has assumed powers unjustified vis-à-vis the farmers' remaining creditors. The assumption of more and more drastic powers/...

powers is an unhealthy trend which should be arrested.

Need for Co-ordinated and
Planned Legislation:

From a study of the five statutes above, it is plain that the legislature is prepared, it seems without very much persuasion, to override well founded common law principles when dealing with agricultural matters, but what is even more disturbing is the fact that special securities have been given to various bodies, from time to time, with no apparent thought of possible overlapping and conflict of rights. This is particularly so in respect of the Marketing, the Co-operative Societies and the Land Bank Acts. There is a lack of co-ordination and cohesion as far as these three Acts are concerned, each of which plays its own particular part in our agricultural economy. Each, in turn, has been amended to meet exigencies arising in the sphere served by it, so that one is left with the impression of a haphazard growth of patchwork legislation/...

legislation, each institution looking only to its own interests and powers. What is needed is co-ordinated and planned legislation, regard being had to the structure of our agricultural industry as a whole.

Suggested Amendments:

Until such time as the overall co-ordination of related agricultural legislation is undertaken by the Government of the day, which does not seem likely in the near future, the statutes dealt with above could, with advantage, meanwhile be cleared of many provisions which are in conflict with accepted common law principles and which, it is submitted, are not justified in the light of the objects they seek to achieve. Such an interim revision and clarification of existing agricultural legislation would also greatly facilitate the ultimate co-ordination of these Acts.

To this end the blanket-security of the so-called "statutory pledge" of all movables which
have/...

have at any time been on the leased land as envisaged in section 37 of the Land Settlement Act No. 12 of 1912 should be restricted to those movables only which were on the leased land at the time the lessee fell into arrear. Clarification is needed in regard to the period of compulsory residence and occupation required by section 28 of that Act as to whether it should be a continuous or aggregate period. The latter concept is favoured. It is submitted, furthermore, that the provisions of section 38 relating to set-off serve little purpose and should be repealed.

Enough has already been said about the desirability of repealing the Farmers' Assistance Act No. 48 of 1935. Present day circumstances do not at all justify the continued existence of this statute with its arbitrary powers, and it should be repealed.

Section 20 of the Marketing Act No. 26 of 1937, relating to the passing of ownership in controlled products, if it is to be retained, should/...

should certainly be amended to provide that a clear indication be given to creditors and other interested parties of the passing of ownership in controlled products from the agent to the regulatory board so as to place them on their inquiry.

There is, furthermore, no valid reason why co-operatives registered under the Co-operative Societies Act No. 29 of 1939, should enjoy a more favoured position in relation to their members than do ordinary public companies. Section 96 of that Act creating a so-called "statutory pledge" of members' crops in favour of their co-operative is, it is submitted, unjustified for the reasons set out in the previous chapter, but if it is to be retained, then it should certainly be restricted to crops actually gathered. As already stated, this so-called "statutory pledge" is really a hypothec sui generis and in this respect section 96 will also require clarification.

The Land Bank Act No. 13 of 1944

presents/...

presents a wide field for revision and clarification. Sections 35 and 38 of that Act which create the so-called "statutory pledge" require clarification as in the case of the "statutory pledge" under section 96 of the Co-operative Societies Act above. As suggested in the preceding chapter this "statutory pledge" could with advantage to the farmer and his co-operative and with no great hardship to the bank, be abolished altogether. Section 40 of the Land Bank Act creating the automatic suretyship of members of a co-operative has, in fact, served no practical purpose and its repeal would be a welcome step in bringing the Act more into line with our common law. If, on the other hand, it is to remain on our statute book then it certainly requires drastic revision so as to afford the sureties the usual benefits of the beneficium divisionis and the beneficium ordinis seu excussionis. The provisions relating to the joint and several suretyship liability of all members of the co-operative are indeed too burdensome and should be repealed, as
also/...

also the concomitant right of parate executie flowing therefrom. As previously pointed out, the provisions of this section 40 relating to the value of services rendered by a co-operative to its member so as to fix the amount of his suretyship liability, are vague and require clear definition in the light of actual practice.

Finally the bank's right of parate executie under section 55 of the Act is considered unjustified in relation to the objects it seeks to achieve. As already mentioned in Chapter II above, the bank is adequately protected as first bondholder.

There seems little need to arm it with these drastic powers in addition to those already enjoyed by it, particularly so in the case of the peremptory seizing and selling of property which is not even bonded or hypothecated to it, vide sections 61 and 63 of the Act. If, on the other hand, the legislature sees fit to retain these provisions, then section 55 should be amended to make it clear that the bank's special powers are valid for six months only
after/...

after the happening of the events contemplated therein, so as to remove the existing doubt on this point. Provision should also be made for paying the surplus proceeds of sale to the messenger of the court. The anomolous position of having to sell, in all cases, movables before immovables as envisaged in sections 61 and 63 should be repealed particularly as the bank may hold a bond over the immovable property alone and yet be obliged to excuss without recourse to a court of law, the movables first before excussing its immovable security.

It is evident that in an endeavour to keep pace with the growing complexities of an ever expanding agricultural industry, these statutes have become more complex in their interaction one upon the other, than the very complexities they seek to regulate. A revision and clarification on the lines suggested would, it is submitted, not only redound to the immediate benefit of the industry as a whole, but would greatly strenghten its future growth being based on sound common law principles.

i.

BIBLIOGRAPHY.

Reference has been made to the following works
in compiling this treatise:-

- | | | |
|---------------------------------------|-------------|--|
| Buckland | - | <u>A Manual of Roman Private Law.</u> |
| Caney | - | <u>The Law of Suretyship.</u> |
| Code Digest Gaius |))) | - The various works referred to in the footnotes. |
| Gane | - | <u>Hubers' Jurisprudence of My Time.</u> |
| Grotius | - | As referred to in the footnotes. |
| Honoré and Lee | - | <u>The South African Law of Obligations.</u> |
| Huber | - | As referred to in the footnotes. |
| Hunter | - | <u>Roman Law.</u> |
| Justinian | - | As referred to in the footnotes. |
| Juta | - | <u>Van der Linden's Institutes.</u> |
| Krause | - | Translations of Voet. |
| Land and Agricultural Bank of S.A. | - | Annual Reports. |
| Lee | - | <u>An Introduction to Roman Dutch Law.</u> |
| Lee | - | <u>Grotius Jurisprudence of Holland.</u> |
| Lee and A.M. Honoré | - | <u>The South African Law of Obligations.</u> |

Lorenz/...

- Lorenz - Select Theses on the Laws of Holland and Zeeland - v.d. Keessel.
- Maasdorp - Institutes of South African Law. (All volumes).
- Mars - Law of Insolvency in S.A.
- Matthaeus - As referred to in the footnotes.
- Maxwell - Interpretation of Statutes.
- Morice - Van der Linden's Institutes of the Laws of Holland.
- Morice - English and Roman Dutch Law.
- Newall - The Law and Practice of Deeds Registration.
- Pound - Outlines of Jurisprudence.
- Pothier - Pothier's Treatise on the Contract of Letting and Hiring - Contrat De Louage. Trans. G.A. Mulligan.
- Prentice Hall - Weekly Law Reports.
- Price - Possessory Remedies in Roman Dutch Law.
- Progress Report of the Government of the Union of S.A. to U.N.O. on Land Reform - As referred to in the footnotes.
- Salmond - Jurisprudence.
- Sandars - Institutes of Justinian.
- Sande)
Schjorner) - As referred to in the footnotes.

Schrand/...

- Schrand - Administration of Insolvent Estates in S.A.
- South African Law Journal - As referred to in the footnotes.
- South African Law Reports. - As referred to in the footnotes.
- Steyn - Die Uitleg van Wette.
- Tydskrif vir Heedendaagse Romeins Hollandse Reg - As referred to in the footnotes.
- v.d. Keessel)
 v. Leeuwen) - The various works referred to
 v.d. Linden) in the footnotes.
 Voet)
- Wessels - History of Roman Dutch Law.
- Wessels - Law of Contract in S.A.
 (2 volumes) - A.A.Roberts.
- Wille - Principles of S.A. Law.
- Wille - Landlord and Tenant in South Africa.
- Wille - Mortgage and Pledge in S.A.
- Wille and Millin - Mercantile Law of S.A.

TABLE OF CASES.

| | <u>Page.</u> |
|--|--------------|
| African Guarantee and Ind.Co.Ltd.vs. Rabinowitz, 1934. W.L.D. | - 184. |
| Alliance Com. Office & Est.Agency vs. Klotz, 1951. T.P.D. | - 184. |
| Allison's Est. vs. du Plessis, 1925 T.P.D. | - 106. |
| Barr vs. Bergman and Co's. Assignee, 1913. E.D.L. | - 78. |
| Barton vs. Warrens Assignee, 1908.T.S. | - 78. |
| Benson vs. Hirschhorn, 1936. N.P.D. | - 16. |
| Brice vs. Zurcher, 1908. T.S. | - 139. |
| Cape of Good Hope Bank vs. Melle, 10, S.C. 280. | - 17. |
| Cohen's Trustee vs. Johannesburg Municipality, 1909. T.S. | - 37. |
| Col. Govt. vs. Fryer, 1885. 3. S.C. | - 96. |
| Col. Govt. vs. Wasserman, 1887. 5. S.C. | - 96. |
| Commissioner of Customs & Excise vs. Randles Bros. & Hudson, 1941. A.D. | - 230. |
| Dadoo Ltd. and others vs. Krugersdorp Municipal Council, 1920. A.D. | - 35,114. |
| Daniels vs. Smit and Pienaar, 1942. O.P.D. | - 27,33,34. |

de Beers/...

v.

| | | |
|---|---|--------------|
| de Beers vs. London and S.A. Explo- ration Co., 1893. 10. S.C. | - | 138. |
| de Vries vs. Alexander, 1880. Ford. | - | 103. |
| Dicks vs. Marais, 1951. N.P.D. | - | 133. |
| Douglas vs. Douglas and Parkins, 1920. G.W.L. | - | 16. |
| du Toit vs. Vorster, 1928. T.P.D. | - | 134. |
| Eckhardt vs. Nolte, 1885. S.A.R. | - | 103. |
| Edwards vs. van Zyl, 1951. C.P.D. | - | 226. |
| Estate Issroff vs. Issroff N.O. 1948. E.D.L.D. | - | 2. |
| Estate Steer vs. Steer, 1923. C.P.D. | - | 180. |
| Evans Estate vs. S.A.Breweries Ltd., 1901. N.L.R. | - | 15. |
| Ex. parte Bellingan's Executors, 1936. C.P.D. | - | 2. |
| Ex. parte Minister Justice; in re R. vs. Jacobson and Levy, 1931. A.D. | - | 217. |
| Ex. parte Walton, 17. Ch. D. | - | 220. |
| Farmers' Co:op.Society vs. Berry, 1912. A.D. | - | 161,167,216. |
| Farrars' Estate vs. Com.Inland Revenue, 1926. T.P.D. | - | 26,165,215. |
| Fick vs. Fourie, 1934. E.D.L.D. | - | 29. |

Fitzpatrick's/...

| | | |
|--|---|--------------|
| Fitzpatrick's Estate vs. Frankel's Estate, 1943. A.D. | - | 105. |
| Foxcroft vs. Meiring, 1907. E.D.C. | - | 139. |
| Frenkel vs. Ohlssons Cape Breweries Ltd., 1909. T.S. | - | 117. |
| Friedlander vs. Croxford & Rhodes, 1867, 5. Earle. | - | 125. |
| Gerber vs. Wolson, 1954. T.P.D. and 1955, A.D. | - | 180,181,191. |
| Goldingers Trustee vs. Whitelaw & Sons, 1916. T.P.D. and 1917. A.D. | - | 125,224,231. |
| Grobler vs. Schmitz & Freedman, 1923. A.D. | - | 185,192. |
| Gundelfinger vs. Drake and Co., 1906. N.L.R. | - | 15. |
| Hansen and Latelle vs. Crafford, 1909. 26. S.C. | - | 134. |
| Hansen Schrader & Co. vs. Kopelowitz, 1903. T.S. | - | 100. |
| Hare vs. Heath's Exec. 1884. 3. S.C. | - | 129. |
| Hare vs. Trustee Heath. 3. S.C. | - | 218. |
| Heimann vs. Klempman, 1922. W.L.D. | - | 105. |
| Henderson vs. Hanekom, 1903. 20. S.C. | - | 104. |
| Henning vs. le Roux, 1921. C.P.D. | - | 119. |
| Hill vs. East and West India Dock Co. 9. A.C. | - | 221. |

Himmelhoch/...

| | | |
|--|---|-------------|
| Himmelhoch vs. Liqd. Fresh Milk Co., 1925. T.P.D. | - | 105. |
| Houghton Est. Co. vs. Mc.Hattie, 1894. O.R. | - | 138,139. |
| Imperial Cold Storage and Supply Co. Ltd., vs. Julius Weil and Co., 1912. A.D. | - | 152. |
| In re Bierman - Cape Archives, 1728. | - | 65. |
| In re Heyns - Requesten in Cape Archives, 1716 - 1721. | - | 65. |
| Israel vs. Solomon, 1910. T.P.D. | - | 16. |
| Japtha vs. Mills Exec. 1910. E.D.L. | - | 134. |
| Johannesburg Cons. Inv.Co. vs. Mendel- sohn & Bruce, 1903. T.H. | - | 100. |
| Johannesburg Municipality vs. Cohen's Trustees, 1909. T.S. | - | 34,128,212. |
| John vs. Trimble, 1902. T.H. | - | 15, 16. |
| Kaplan vs. Messenger Port Alfred, 1932. E.D.L.D. | - | 224. |
| Kealy vs. Landsberg, 1953. C.P.D. | - | 117. |
| Kroon vs. Enschede and others, 1909. T.S. | - | 178. |
| Kruger vs. Manning & Patterson Ltd., 1937. C.P.D. | - | 71. |

Land Bank/...

| | | |
|---|---|----------|
| Land Bank vs. Schoeman, 1942. T.P.D. | - | 29. |
| Lessing vs. Steyn, 1953. O.P.D. | - | 134. |
| Lever vs. Bhurman, 1925. T.P.D. | - | 180. |
| Lloyd vs. Horn, 1915. C.P.D. | - | 30. |
| London and S.A. Exploration Co. vs. Liqd. N.E. Bultfontein Ltd., 1895. S.C. | - | 105. |
| Marais vs. Rottcher, 1936. T.P.D. | - | 70. |
| Mathiba vs. Moschke, 1920. A.D. | - | 43. |
| Mercantile Bank of India Ltd., and another vs. Davis, 1947. S.A.L.R. 723. | - | 17. |
| Medalie vs. Botha, 1913. T.P.D. | - | 134. |
| Meyer vs. Sentraal West. Ko:op. Mky. Bpk., 1943. O.P.D. | - | 219. |
| Meyer vs. Viljoen, 1940. O.P.D. | - | 81. |
| Netherlands Bank vs. Yull's Trustee, 1914. W.L.D. | - | 129,131. |
| Nino Bonino vs. de Lange, 1906. T.S. | - | 6. |
| Oak vs. Lumsden. 3. S.C. | - | 183,184. |
| Olivier and Havenga vs. Moyes, 1916. O.P.D. | - | 30. |
| Osry vs. Hirsch Loubser & Co. 1922. C.P.D. | - | 17. |

Paruk/...

| | | |
|--|---|-------------|
| Paruk vs. Glendale Est.Co., 1924. N.P.D. | - | 16. |
| Pike vs. Kockett, 1934. E.D.L. | - | 134. |
| Principal Immigration Officer vs. Bhula, 1931. A.D. | - | 25. |
| Richter vs. Assistant Master and Bloemfontein Town Council, 1941, O.P.D. | - | 74, 81. |
| Roberts vs. Krause, 1913, O.P.D. | - | 116. |
| Rogerson N.O. vs. Meyer & Berning, 2 Menz. 38. 42. | - | 175. |
| Rosen vs. Rand Townships Registrar, 1939. W.L.D. | - | 97. |
| Rubin vs. Botha, 1911. A.D. | - | 134. |
| Sackville West vs. Nourse and another, 1925. A.D. | - | 2. |
| Scholtz vs. Faifer, 1910. T.S. | - | 108. |
| Slabbert vs. Theodoulou, 1952. T.P.D. | - | 226. |
| Smith vs. Farrelly's Trustee, 1904. T.S. | - | 80. |
| Smuts vs. Cathcart Divisional Council, 1896. S.C. | - | 212. |
| Southern Life Assoc. of S.A. vs. Wright & Wright, 1943. C.P.D. | - | 184. |
| State Advances Recoveries Office vs. Theron, 1949. O.P.D. | - | 226. |
| | | Strahan/... |

| | | |
|--|---|--------------|
| Strahan vs. Fawcett, 1933. N.P.D. | - | 180. |
| Stratford's Trustees vs. London and S.A.Bank, 1874. 3. E.D.C. | - | 129,224,231. |
| Strijdom N.O. vs. Fourie, 1953. N.P.D. | - | 109,116. |
| Sugarman vs. Burrows, 1916. W.L.D. | - | 124. |
| Thomas vs. Baumann and Gilfillan, 1914. T.P.D. | - | 184. |
| Tshandu vs. Johannesburg City Council, 1947. W.L.D. | - | 107. |
| Union Government vs. Mack. 1917. A.D. | - | 162,215. |
| United Building Society vs. Smookler's Trustee, 1906 .T.S. | - | 211. |
| Van Rensburg vs. Minnie, 1942. O.P.D. | - | 184. |
| van Wezel vs. van Wezel's Trustee, 1924. A.D. | - | 134. |
| van Wyk's Executor vs. Joubert, 1897. O.R. | - | 15. |
| Venter vs. Rex, 1907. T.S. | - | 162,215. |
| Von Holdt vs. Bruwer, 1918. C.P.D. | - | 140. |
| Watson vs. Geard, 1884. 3. E.D.C. | - | 106. |
| Webster vs. Ellison, 1911. A.D. | - | 121,126,127. |
| Whinney N.O. vs. Gardner N.O. 1893. 10. S.C. | - | 15. |
| Woodrow and Co. vs. Rothmann 1884. 4. E.D.C. | - | 124. |
| Yorkshire Ins.Co. vs. Barclays Bank 1928, W.L.D. | - | 180. |

I N D E X.

| | <u>Page</u> |
|--|----------------|
| Actio fiduciae directa | - |
| | 7 |
| Actio mandati | - |
| | 151,178,181 |
| Actio Quasi - Serviana | - |
| | 8,122 |
| Actio Serviana | - |
| | 122 |
| Agricultural legislation - | |
| general trend of | - |
| | 244 |
| need for co-ordination and planning | - |
| | 252 |
| Aim of law | - |
| | 1 |
| Amendments suggested | - |
| | 253 |
| Assignment - | |
| voluntary | - |
| | 67,68,71,78,83 |
| of leases | - |
| | 104 |
| Attachments - | |
| by bank | - |
| | 31 |
| by competent courts | - |
| | 26 |
| Atterminatie or respijt | - |
| | 59,60,61,63,69 |
| Authentica si qua mulier | - |
| | 152,182,191 |
| Bankrupts | - |
| | 58 |

Bank's/...

| | | |
|---|---|-------------------------|
| Bank's rights of recovery in relation to co-operatives | - | 38,39,41,159,237 |
| Beneficium cedendarum actionem | - | 151,177,191 |
| Beneficium cedendarum actionem position under Land Bank Act | - | 181,191 |
| Beneficium competentiae | - | 54 |
| Beneficium divisionis | - | 150,151,169,191,243,256 |
| Beneficium ordinis seu excussionis | - | 150,172,174,191 |
| Beneficium ordinis seu excussionis position under Land Bank Act | - | 175,191,243,253 |
| Bonorum Distractio | - | 53,54 |
| Bonorum Emptio | - | 52,54 |
| Brieven van Cessie | - | 55,56,57,58,83 |
| Cessio bonorum | - | 53,54,55,56,58,65,82,83 |
| Common law -extent of alteration in | - | 240 |
| Constitutum pecuniae | - | 155 |
| Constitutum possessorium | - | 224,231,232 |
| Contractus fiduciae | - | 7 |
| Co-operative movement in South Africa | - | 195 |

Co-operative/...

| | |
|--|------------------------------|
| Co-operative Societies Act - | |
| development under | - 195 |
| general trend of | - 248 |
| special statutory pledge | - 212, 218, 243, 248, 255 |
| Co-operative Societies -reserves and numbers | - 195 |
| Co-sureties - beneficium divisionis | - 150, 151, 169, 172 |
| Criticism of trend of agricultural legislation | - 244 |
| Delivery - in pledge | - 128, 223 |
| Desolate Boedelkamers | - 58, 59, 64, 65, 83 |
| Disposal of surplus proceeds of sale by Land Bank | - 32, 48 |
| Emphyteusis | - 94 |
| Extraordinaria judicia | - 54 |
| Ex visceribus actus | - 26 |
| Farmers' Assistance Act - | |
| acceptance of compromise | - 74, 76, 242 |
| board - constitution of | - 68 |

certificates/...

xiv.

| | | |
|---|---|-------------------------|
| certificates and their effect | - | 69,242 |
| compromise | - | 74,85 |
| dealings with property | - | 79 |
| discharge of debtor from liability | - | 76,77,78,84, 242,246 |
| effect of notice of meeting | - | 74 |
| extension of time for payment of debts | - | 73 |
| farmers who are eligible for assistance | - | 69 |
| general trend of | - | 246 |
| interpretation of | - | 81 |
| lack of statistics | - | 84 |
| meeting of creditors | - | 71 |
| objects | - | 50 |
| ownership in assets | - | 77,78,85,242 |
| procedure at meeting | - | 74 |
| proposal by board | - | 71,72,74 |
| rejection of compromise | - | 75 |
| repeal of | - | 246,254 |
| restrictions on property | - | 80,85,242 |
| stay of proceedings | - | 69 |
| transfer of property | - | 79,85 |

| | |
|--------------------------------------|-------------------------------|
| Farming - | |
| hazardous nature of | - 2 |
| protection of | - 3,240 |
| Fidejussio | - 149 |
| Fidejussor indemnitas | - 152,154,155, 156,161,188 |
| Fidepromissio | - 149 |
| Generalia specialibus non derogant | - 26 |
| Guarandia | - 153 |
| Hypothec - | |
| ordinary | - 37 |
| special - Land Settlement Act | - 126,146,241 253 |
| special - Land Bank Act | - 212,213,243, 256 |
| special - Co-operative Societies Act | - 212,218,243, 248,255 |
| sui generis | - 212,213,226, |
| tacit | - 210,211 |
| Hypotheca | - 9,151,208,209 |
| Hypothecaria | - 9 |
| Immissio in Possessionem | - 58,82,83 |

Inductie/...

| | | |
|--|---|--------------------|
| Inductie | - | 59,61,69 |
| In jure cessio | - | 7 |
| Insolvency - | | |
| bankrupts | - | 58 |
| Cape law | - | 65,66,83 |
| concept of | - | 50 |
| desolate boedelkamers | - | 58,59,64,65,83 |
| German and Frankish law | - | 55,82 |
| legislation in provinces of the Union | - | 66,83 |
| need for adequate measures of relief | - | 66 |
| ordinances in the Netherlands | - | 58,64,83 |
| position under Roman law | - | 51,82 |
| position under Roman Dutch law | - | 55,82 |
| surrender of estate | - | 53,68 |
| surrender in France | - | 57 |
| voluntary assignment | - | 67,68,71,78, 83 |
| Intercessio in subsidium | - | 154,155 |
| Interpretation of concept of suretyship | - | 156,188 |
| Investigation - scope of | - | 3 |

Judicia/...

| | | |
|---|---|------------|
| Judicia ordinaria | - | 54 |
| Land Bank Act - | | |
| general trend of | - | 249 |
| see under parate executie, pledge and suretyship | | |
| Land Bank - | | |
| loans to co-operatives | - | 201,202 |
| loans to farmers | - | 19 |
| nature of institution | - | 19,173,201 |
| powers of sale | - | 20 |
| preferential treatment | - | 193 |
| Landlord's hypothec - | | |
| definition | - | 119 |
| effectiveness of | - | 125 |
| invecta et illata | - | 124,127 |
| fruit and crops | - | 124 |
| goods of sub-lessees | - | 125 |
| goods of third parties | - | 125 |
| old Dutch law | - | 121 |
| Roman law | - | 121 |
| S.A. law | - | 123 |

Land /...

Land Settlement Act -

| | | |
|--|---|---------------------|
| allotment of lots | - | 88 |
| compensation for improvements | - | 133,145,241 |
| crops, removal of | - | 133 |
| crown grant | - | 89 |
| duration of leases | - | 89 |
| false statements by lessees | - | 136 |
| general trend of | - | 244 |
| holdings and farms purchased for settlers | - | 90 |
| improvements | - | 115,118,145 241 |
| landlord's hypothec | - | 119 |
| objects | - | 88 |
| occupation | - | 107,145,241, 254 |
| option to purchase | - | 89 |
| parate executie | - | 144 |
| pledge of movables | - | 128,146,241, 253 |
| probationer lessees | - | 88,97 |
| probationers and rent | - | 97 |
| quiet enjoyment | - | 106 |

Removal/...

| | | |
|---|---|-------------------------|
| removal of crops | - | 133 |
| rental | - | 89,97 |
| rent - remission of and alteration in | - | 98,99,100 |
| residence | - | 107,114,145, 241,254 |
| restriction of alienation or encumbrance of land | - | 142,245 |
| sale in execution | - | 140 |
| set-off | - | 141,145,241, 254 |
| special statutory hypothec | - | 126,146,241 |
| sub-letting and dealings with lease | - | 101,145,240 |
| trees on holding | - | 137,145,241 |
| Land Settlement in South Africa - | | |
| extent of | - | 90 |
| general | - | 87,97 |
| Law, aim of | - | 1 |
| Lease - | | |
| assignment | - | 104 |
| damage by third party | - | 117 |
| duty of lessee | - | 116 |
| grandiores arbores | - | 139 |
| | | improvements/... |

| | | |
|--|---|-------------|
| improvements | - | 116,118,133 |
| landlord's hypothec | - | 119 |
| nature of | - | 92,93 |
| sub-letting under Roman law | - | 102 |
| sub-letting under Roman Dutch law | - | 102 |
| sub-letting under S.A. law | - | 103 |
| sylva caedua | - | 139 |
| trees | - | 137 |
| Leeningsplaats | - | 96 |
| Legislation - | | |
| need for co-ordination and planning | - | 252 |
| patchwork | - | 47,239,252 |
| Lex poetelia | - | 51 |
| Lien - | | |
| or right of retention | - | 210 |
| subject to bank's rights | - | 31 |
| Locatio conductio | - | 92,93 |
| Locatio conductio rerum | - | 94 |
| Mancipatio | - | 7 |
| Manus injectio | - | 51 |

Marketing/...

| | | |
|--|---|--|
| Marketing Act - | | |
| effects of | - | 231 |
| general trend of | - | 247 |
| objects | - | 198 |
| ownership | - | 200, 228, 233, 235, 237, 242, 248, 254 |
| Missio in possessionem | - | 52 |
| Mobilia non habent sequelam | - | 131 |
| Moratorium | - | 59, 62, 63, 66, 68 |
| Moratorium Acts | - | 30, 62 |
| Mortgage , tacit or legal | - | 210 |
| Need - | | |
| for protection of farming industry | - | 3, 240 |
| for co-ordination and planned legislation | - | 252 |
| Notice of sale by Land Bank | - | 28 |
| Order van preferentie en concurrentie | - | 65 |
| Ownership - | | |
| essentials for passing ownership | - | 230 |

of/...

xxii.

| | | |
|--|---|-----------------------------------|
| of produce under Marketing Act | - | 200, 228, 233, 235, 237, 248, 254 |
| of products under Section 96 Co-op.Soc.Act | - | 228, 233 |
| Pactum constitutae pecuniae | - | 155 |
| Pactum de pignore vendendo | - | 8 |
| Pandt | - | 209 |
| Parate executie - | | |
| attachments of assets | - | 31 |
| authoritate privata | - | 12 |
| bank's rights vis-a-vis Farm.Assistance Acts | - | 27 |
| Cape Province, in | - | 15, 17 |
| cession of bank's powers | - | 181, 191 |
| charge loans | - | 36 |
| competent courts | - | 26 |
| co-operatives, loans to | - | 38, 237, 243, 250, 257 |
| definition | - | 6 |
| disposal of proceeds of sale | - | 32, 48 |
| English law | - | 45 |
| guarentigiata | - | 11 |

immovables/...

xxiii.

| | | |
|----------------------------------|---|--------------------|
| immovables | - | 16,258 |
| improvements | - | 29 |
| insolvency, in | - | 23 |
| Justinian, under | - | 7,11,45 |
| limitation of bank's rights | - | 33,46,258 |
| moratorium Acts | - | 30 |
| movables | - | 16,45,258 |
| Natal, in | - | 15 |
| notice of sale | - | 28 |
| position in four Provinces | - | 15 |
| powers of Land Bank | - | 20,243,250, 257 |
| principles of, interpretation of | - | 6 |
| property bonded to another | - | 40,41,48 |
| reasons for power of sale | - | 43,45 |
| right to sell under Roman law | - | 9 |
| Roman law, under | - | 7,45 |
| Roman Dutch law, under | - | 11 |
| sale of co-ops.movables first | - | 39,41 |
| sales, number of | - | 44 |
| S.A. case law | - | 14 |
| strict interpretation | - | 42 |

transfer/...

xxiv.

| | | |
|--|---|-------------------------------------|
| transfer of property | - | 31 |
| various statutory provisions | - | 18 |
| where spouse m.o.c.o.p.is insolvent | - | 24 |
| Pignus | - | 8,9,208,209 |
| Pledge - | | |
| accessory right | - | 209 |
| attachment of products under Land Bank Act | - | 205 |
| binding of produce under Land Bank Act | - | 203,213,237,243,255 |
| co-operative society's statutory | - | 197,206,218,233,235,236,238,243,255 |
| delivery | - | 128,223 |
| duties of parties | - | 228 |
| Land Bank's statutory | - | 203,213,234,235,236,237,243,255 |
| Land Settlement Act | - | 128,146,241,253 |
| nature of ordinary | - | 208 |
| nature of statutory | - | 212,227 |
| State Advances Recoveries Office | - | 225 |
| Plegius , plegerie | - | 153 |

Possession/...

xxv.

| | | |
|--|---|---------------------|
| Possession, in pledge | - | 222 |
| Practical implications of Land Bank, Co-op. Socs. and Marketing Acts | - | 232 |
| Privilegia sunt strictissimae interpretationis | - | 37 |
| Products - controlled and uncontrolled | - | 202 |
| Quinquenellen | - | 61 |
| Quitrent tenure of land | - | 96 |
| Regulatory boards | - | 197, 198, 199, 200 |
| Respijt or atterminatie | - | 59, 60, 61, 63, 69. |
| Right of retention | - | 210 |
| Sales by Bank - see under parate executie | | |
| Scope of investigation | - | 3 |
| Sectio bonorum | - | 52 |
| Senatus consultum velleianum | - | 152, 171, 182, |
| Sequestrator in early Cape law | - | 65, 83 |
| Spoliation | - | 219 |
| Sponsio | - | 149 |

State/...

| | | |
|---|---|---------------------------------|
| State Advances Recoveries Office, pledge | - | 225 |
| Statutory pledge - | | |
| Co-operative Societies' Act | - | 197, 218, 243, 248, 255 |
| decided cases | - | 225 |
| Land Bank Act | - | 203, 213, 237, 243 |
| Land Settlement Act | - | 128, 146, 241, 253 |
| nature of | - | 212, 227 |
| Surcheance van betaling | - | 63 |
| Suretyship - | | |
| Bank's powers of recovery | - | 159 |
| definition of | - | 147 |
| fiction of sale of rights | - | 151, 178 |
| future advances under Land Bank Act | - | 163 |
| indemnity | - | 152, 154, 155, 156, 161 |
| joint and several liability | - | 169, 189, 237, 243, 251, 256 |
| Justinian's Novel | - | 150, 174 |
| Land Bank Act not yet tested by courts | - | 192 |
| Land Bank Act, section 40 | - | 157, 158, 192, 243, 251, 256 |

liability/...

xxvii.

| | | |
|--|---|---------------------|
| liability of co-sureties under Land Bank Act | - | 171,243,256 |
| liability for interest under Land Bank Act | - | 186 |
| liability of minors | - | 182,185 |
| liability of women | - | 182 |
| list of members under Land Bank Act | - | 167 |
| nature of goods supplied in terms of Land Bank Act | - | 166 |
| nature of obligation under Land Bank Act | - | 160 |
| nature of services envisaged | - | 163,189,257 |
| position under Land Bank Act re beneficium cedendarum actionem | - | 181,191 |
| position under Land Bank Act re beneficium ordinis seu excussionis | - | 175,191,243, 253 |
| position under Roman law | - | 148 |
| position in Roman Dutch law | - | 153 |
| public traders | - | 184 |
| statutory agreements | - | 157 |
| strict interpretation | - | 156,188 |
| voluntary agreements | - | 157 |
| Tacit hypothec | - | 210,211 |

Tacit/...

xxviii.

| | | |
|------------------------------------|---|----------|
| Tacit or legal mortgages | - | 210 |
| Transfer in absence of title deeds | - | 31,79,85 |
| Trend of agricultural legislation | - | 244 |
| Warrantus | - | 153 |

21 OCT 1974