Reconciling old and new: imprisonment for debts and *cessio bonorum*, in Antwerp and Mechelen (*c.* 1500–*c.* 1530)

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1. Introduction

The process of reception of academic law in localities in continental Europe, in the fifteenth and sixteenth centuries, is a very complex one. Older rules could live on, under a learned label. Received solutions, found within academic legal literature, were – as is the case in every process of reception[2] – altered, to the needs and wishes of those in favour of applying them. Furthermore, the context in which the 'new' concepts, formulas and norms were injected determined their form and use. Another variable in this respect was the level of legal appreciation at the place of reception, which brought about either a clumsy, haphazard remodelling of learned elements or – when this level was high, ideally – a more thorough understanding of their meaning.

The mentioned characteristics and phenomena are clear in the adoption of academic terms and norms surrounding *cessio bonorum* in the cities of Antwerp and Mechelen in the first decades of the sixteenth century. Even though both cities belonged to different principalities (the Duchy of Brabant and the *heerlijkheid* of Mechelen respectively), territorial proximity made that they had much in common with regard to their law and forensic practice. *Cessio bonorum* was a legal arrangement of Roman law, which in the later Middle Ages had been reworked by legal scholars to a measure of compensation for imprisonments for debts.[3] It entailed the transfer of the complete estate of a detained defaulter, after which the latter regained his freedom. Even though in Antwerp and Mechelen there had been a comparable proceeding ('abandonment'), around 1500 it was restyled in order to align it – to a limited extent – with the *cessio bonorum* that was

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2 Peter Burke, *The European Renaissance. Centres and Peripheries* (Blackwell 1998) 9-10.

3 See Walter Pakter, 'The Origins of Bankruptcy in Medieval Canon and Roman Law' in Peter Linehan (ed.) *Proceedings of the Seventh International Congress of Medieval Canon Law* (Bibliotheca Apostolica Vaticana 1988) 485-506; Patricia Zambrana Moral, *Derecho Concursal Histórico I. Trabajos de Investigación* (Barcelona, Cometa, 2001).

described in contemporary legal literature (hereafter this new locally applied arrangement will be called '*cessie van goede*' or '*cessie*'). In the later 1520s and in the 1530s, royal legislation and the practice of royal institutions modified this '*cessie van goede*' and fitted it into a wider and more equitable insolvency and bankruptcy proceeding, which was more congruent with scholarly views on the topic.

2. The context: imprisonment for debts in Antwerp, Mechelen and Brabant (later Middle Ages)

2.1. Private and public imprisonment in 14th and early 15th centuries Antwerp, Mechelen and Brabant

In the second half of the 1300s and in the early 1400s, in Antwerp and Brabant, a defaulter was easily locked away in a public prison. This had much to do with the lack of rules regarding generalized collaterals. Debts out of private and unwritten agreements, which were often made by merchants, could only be pursued against assets following lengthy proceedings before the local court. A swift attachment on the basis of the agreement, which could secure the creditors' claims and pressure the debtor into fulfilling his obligations, was not allowed. Only authenticated annuity and *census* contracts, which had the form of aldermen's letters, comprised rights of collateral on the property of the debtor.[4] For arrears out of such contracts assets could be locked even before a judicial decision of the Antwerp aldermen regarding the debt was reached.[5] This lack of contractual collaterization in private and informal agreements explains why imprisonment for debts was so important for merchants trading in Antwerp. It was the prime method of securing informal debts upon default. An imprisoned defaulter could be forced into a judgment of the local judges, authorizing a public sale of (parts of) his estate.[6]

When a debtor was arrested and imprisoned, it was usually not clear whether he had enough assets to compensate the overdue debts. During the

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4 For example, Egied I Strubbe and Edward Spillemaeckers, 'De 'Antwerpse rechtsaantekeningen' van Willem de Moelnere' (1954) 18 *Bulletin de la commission royale pour la publication des anciennes lois et ordonnances de Belgique* 7, 37-38.

5 The Antwerp government allowed but few exceptions to this general rule. See, for example, *Coutumes du pays et duche de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, Guillaume De Longé (ed.) vol 1 (Brussels, Gobbaerts 1870) 2-89 (hereinafter *Keurboeck*) 20 (s. 53/3). Informal contracts involved no rights of attachment upon default of a debtor and required the creditor to ask for the surrender of a movable asset as surety for his debt, and this was imposed by judgment (after a lengthy court proceeding) if necessary. See for the typical formula *Keurboeck*, 46 (s. 125).

6 Willem Van der Tannerijen, *Boec van der loopender practijken der Raidtcameren van Brabant*, E Strubbe (ed.) vol 2 (Brussels, CAD 1952) 262.

incarceration, it was assessed whether the imprisoned debtor had properties, which he refused to sell in order to be released, or whether he had no sufficient funds or sureties to compensate the arrears. If the latter was proved, and if the prisoner had been in the town prison for at least six weeks,[7] he was set free if he formally ceded all rights of ownership on his (very few) belongings to his creditors. This was done in a public performance, in which the debtor declared under oath that he had not hidden parts of his estate from his creditors. In 1474–76, in Antwerp, this practice was referred to as 'showing the tail of one's coat' ('*zijn slippe presenteren*'), which the debtor probably did during the ceremony, as a defamatory ritual.[8] In Mechelen, at around that time, the formal transfer of assets to creditors in order to be liberated from the public prison was called 'abandonment'.[9] This concept of 'abandonment' was closely related to forfeiture, and confiscation, of an entire estate following the sentencing of a crime. In early sixteenth-century Antwerp, it was regularly said that a *fugitivus*, *i.e.* a debtor who had fled the city because of his debts and who was therefore regarded as a thief, had in the act 'abandoned' his movables and immovable property.[10] In this period, insolvency was still conceived as fraudulent, and long-term indebtedness and (criminal) bankruptcy were not yet distinguished from one another.

This also made that, following the 'abandonment' of his estate and the release from public prison, the defaulter was handed over to his creditors, who were allowed to consider him as their property. They could hold him captive for as long as they wanted, and put him in chains at a private location.

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7 Egied Strubbe, 'Het Rechtsboek van Lier (ca. 1415)' (1949-50) 16 *Bulletin de la commission royale pour la publication des anciennes lois et ordonnances de Belgique* 150, 167; Van der Tannerijen, *Boec van der loopender practijken*, vol 2 (see n. 6) 262.

8 Van der Tannerijen, *Boec van der loopender practijken*, vol 2 (see n. 6) 262-263. Van der Tannerijen wrote this book between 1474 and 1476. On p. 263, Van der Tannerijen refers to this practice as '*cessie*', which points to his awareness of the similarities with learned doctrine regarding *cessio bonorum* and – maybe – with late-medieval French literature (Boutillier, de Beaumanoir) in which '*cession de biens*' was mentioned. It is nonetheless clear that the contents of what he describes refer to a local practice, and not to academic law.

9 The 1535 *costuymen*, *i.e.* the compilation of law of the city, defines '*cessie*' with the notion of '*abandonneren*'. In the 1527 draft version, this concept had pointed to the practice of refusing an inheritance. See *Costumen van de heerlijkheid Mechelen, II. Costumen van de stad Mechelen. Vol. 2: Ontwerpcostumen van 1527*, Louis-Theo Maes (ed.) (Brussels, CAD 1960) (hereafter *Ontwerpcostumen*) 89 (s. 462); *Coutumes de la seigneurie de Malines, I. Coutumes de la ville de Malines* (Brussels, Gobbaerts 1879) (hereafter *Mechelen Costuymen 1535*) 158 (ch. 21, s. 3).

10 Antwerp City Archives (hereinafter ACA), Vierschaar (hereinafter V) 68, f. 42 (2 January 1526 (n.s.)); *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers* vol 1 Guillaume De Longé (ed.) (Brussels, Gobbaerts 1870) 91-378 (hereinafter *Antwerp Costuymen 1548*) 180 (ch. 4, s. 29).

This chaining was done most often, since it had become the rule that a prisoner who escaped private detention was considered as being freed from his debts.[11] In order to allow negotiations on pledges and sureties, it was required that friends and relatives of the detainee had access to him. The incarcerating creditors were held to provide the prisoner with a minimum of supplies. If the latter managed to find new funds during his private incarceration, he was released. This could also be done if the creditors considered imprisonment no longer useful. In that case, prosecution for the old debts, against the defaulter's person or against his assets, remained possible, and without restrictions. This decision of setting the debtor free was only the creditors'.[12]

2.2. The decline of imprisonment (public and private) for debts

In the later fifteenth century, in Antwerp, more links were established between debts and assets for private (often mercantile) contracts and agreements. Attaching movables found with the debtor became the most commonly used strategy for creditors pursuing their debts.[13] It seems that over the course of the second half of the fifteenth century in Antwerp it became also accepted that movables served as collateral for commercial

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[11] Egied I Strubbe, 'Het veertiendeeuwsche oude rechtsboek van Vilvoorde' (1936) 15/2 *Bulletin de la commission royale pour la publication des anciennes lois et ordonnances de Belgique* 45, 79-80. This rule was quite severe, in the sense that even if the debtor had been put in chains, and escaped, the debt was considered to be extinguished. The general rule, of local and learned law, for imprisonments in public prisons, was that the debt remained (and under the circumstance of escape was even considered to have been 'confessed') except when the prisoner had regained freedom without (using his) force. In that case, the guard of the prison was held liable. See, for example, and echoing the learned law in this respect, Filips Wielant, *Practijke civile* (Antwerp, Henrick vander Loe 1573 – anastatic reprint 1968) 79 (ch. 13), and Van der Tannerijen, *Boec van der loopender practijken*, vol 2 (see n. 6) 263.

[12] As for those characteristics of this arrangement, for Antwerp, see Van der Tannerijen, *Boec van der loopender practijken*, vol 2 (see n. 6) 262-263, and for Mechelen, *Ontwerpcostumen* (see n. 9) 186-190 (s. 1084-1090).

[13] The recent nature of the generalized possibility of attachment at this time is evident in the rule that the 'freedom of the market', which originally served as a period in which no prosecution for debts was allowed, did not apply to debts made at a previous fair. This rule emerged around 1500, and was most probably a response to swift seizures by non-merchant creditors, on the basis of private contracts, for they could hinder trade. The exception for 'fair debts' is first mentioned in ACA, V, 2, s. 141. This manuscript (the so-called "Golden Book") dates from the early 1530s, and contains rules that had been established at *turbe*-inquiries. For this particular rule no *turbe*-record could be found. Yet, it is likely that it dates from the early years of the 1500s.

and other debts even if this had not been provided in the agreement. As a result then, imprisonment became illegal if sufficient assets could be found with the debtor.[14] Another consequence of these developments was that the abovementioned predominant motive of incarceration of defaulters, *i.e.* that of making an estate collateral for a debt, virtually disappeared in late fifteenth-century Antwerp. This was also, in part, related to the protection from arrest and detention which in this period was given to large groups within the urban community (merchants of chartered *nations*, citizens).[15]

To these legal restrictions, the costs of imprisonment must be added. In the later years of the 1400s, an arrested debtor should always be locked away in the public prison of the town (private imprisonment had gone out of use), but – in case the incarceration was considered illegitimate – the living costs and the salary of the guards had to be paid by the creditor advocating the detention. In any case, these payments had to be made in advance until a definitive judgment on the matter was made. Those costs were minimal, if the comfort of the imprisoned is taken as a benchmark, but they were significant for any creditor wanting to get paid as soon as possible. The costs differed as to the benefits of the prisoner. Near the end of the fifteenth century and in the early sixteenth century, with the entrance fee being included, an imprisonment on a basic regime and for two weeks, in the Antwerp public prison (the *Steen*), would have cost twenty-one *stuiver*.[16] This equalled approximately a week's wage of a master mason.

It is no coincidence that, because of all these developments and disadvantages, in the later 1400s arrest and incarceration for mercantile debts

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[14] For some hesistant and inconsistent remarks in this respect, which most probably reflected very recent ideas, see Van der Tannerijen, *Boec van der loopender practijken*, vol 2 (see n. 6) 262.

[15] Citizens of Antwerp were given protection against imprisonment after 1450. In the early 1500s, such a rule did not (yet) apply to resident non-citizens. See ACA, V, 1232, f. 248v (3 October 1500). From the early 1400s onwards, merchants belonging to chartered *nations*, which were organisations that had obtained charter privileges from the Duke of Brabant and which administered the interests of merchants of a single nationality residing or visiting Antwerp and the Duchy of Brabant, were protected from arrest and incarceration. Even though these privileges did not prevent imprisonment (it was to be contested in the City Court, after it had happened), they most probably contributed to the dwindling attractivity of this method of debt collection. See, for privileges to Hanseatic merchants, ACA, PK, 1063/2 (30 April 1409). For the English, consult Oskar De Smedt, *De Engelse natie te Antwerpen in de XVIde eeuw (1496-1582)* vol 1 (Antwerp, De Sikkel 1950) 93.

[16] ACA, PK, 1371 (Antwerp ordinances of 15 November 1539 and of 10 February 1581 (n.s.)). In Mechelen no less than four *stuiver* had to be paid daily for supplies. See Liesbeth Troubleyn *et al.*, 'Consumption Patterns and Living Conditions inside Het Steen, the late Medieval Prison of Malines (Mechelen, Belgium)' (2009) 1 *Journal of Archaeology in the Low Countries*, ch. 4.

were rather rare. They still occurred, but to a lesser extent than before. If a debtor was imprisoned, this measure was now – and certainly with regard to traders – considered to be 'rigorous' because it could seriously harm his reputation.[17] The Antwerp aldermen therefore exerted strict control. A detention generally did not last for more than three days, and was usually shorter. The prisoner could contest his arrest and imprisonment within twenty-four hours, and a judgment imposing release often came soon.[18] For creditors, aiming at generating a shock effect, arrest and imprisonment could nonetheless be remedies of last resort.

3. The first reception of *cessio bonorum*: 'abandonment' in a learned jacket

In the first decades of the sixteenth century, in the Duchy of Brabant and especially in Antwerp, the rules regarding debt collection were once again changing. In January 1516, a collective liquidation proceeding was set up in Antwerp. In case of flight, all creditors of the debtor who had absconded were invited to submit claims to the court, and – except for privileged debts – they were paid rateably if not all debts could be compensated with the proceeds of the publicly sold assets. The adaptations to the urban law, which were made in 1516 and also in 1518, clearly intended to adjust it to an international business environment, which the Antwerp market had become after 1490.[19] However, this new urban legislation was unwieldy in many respects. It applied only to fraudulent bankruptcy and it did not provide how a defaulter could obtain a moratorium from his creditors. According to the mentioned new rules, debts had to be executed rather than re-negotiated. This policy soon proved difficult to maintain. The 1520s were a period

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17 See, for example, ACA, PK, 228 (*provisie van cessie*, *c.* 1515).

18 See, for example, ACA, V, 1233, f. 81 (14 August 1505).

19 On these points, consult Dave De ruysscher, 'Designing the Limits of Creditworthiness. Insolvency in Antwerp Bankruptcy Legislation and Practice (16th-17th centuries)' (2008) 76 *The Legal History Review (Tijdschrift voor Rechtsgeschiedenis)* 307-327; Dave De ruysscher, 'From Individual Debt Recovery to Collective Liquidation Procedures. New Ideas on Creditors' Rights in Sixteenth-Century Antwerp' in Suszanna Peréz *et al.* (eds.), *Turning Points and Breaklines* (Munich, Meidenbauer 2009) 193-206; Dave De ruysscher, 'Bankruptcy, Insolvency and Debt Collection Among Merchants in Antwerp (c. 1490-c. 1540)' in Thomas M Safley (ed.), *Bankrupcy in Early-Modern Europe* (Abingdon, Taylor & Francis in press). Please note that in the first two publications (and in the one mentioned in footnote 36), seizure practice of the fifteenth century refers mostly to the later fifteenth century, as underpinning arguments that contrast with developments that took place in the early sixteenth century and in the periods thereafter. Differentiation as to what happened over the course of the 1400s is detailed in the last mentioned publication.

of crucial transformation in this respect, since degenerating economic conditions laid bare the flaws within the 1516-1518 system. From 1517 onwards, the ongoing Frisian war brought about a financial and economic crisis, which was aggravated when in 1521 the Italian Wars resumed.[20] Rising prices and interest rates shook the economy of the Netherlands and of Antwerp in particular. Large Florentine banking firms with branches in Antwerp went bankrupt, including the Frescobaldi and Gualterotti houses, in 1518 and 1523 respectively.[21]

For some time after 1516 and approximately until the later 1520s, it remained possible for creditors to avoid collective proceedings. Creditors could seize assets of their debtor, and this did not bring about a collective proceeding *per se*, even though other contractual parties might be inclined to join in when they heard of it. In any case, debtors could never impose negotiations on their creditors, not even under these circumstances. The one exception to that principle was used to a very limited extent. If defaulters applied for a royal '*lettre de répit*', their creditors were held to tolerate at least some postponed payments. It is not sure how the proceedings on the basis of such letters were organized in the 1510s. From circumstantial evidence it seems that in this period only the royal councils and courts, many of which could grant such a letter, and not the local judges, were involved in the negotiations that were begun when a letter was granted. Mayb for this reason, between 1495 and 1530, petitions for such letters to the Council of Brabant, which was the competent royal court for the Duchy of Brabant and thus for Antwerp, were not frequent.[22] This might also have been due to the

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20 Herman Van der Wee, *The Growth of the Antwerp Market and the European Economy (Fourteenth-Sixteenth Centuries)* (The Hague, Nijhoff 1963) vol 2, 141-153.

21 Richard Ehrenberg, *Das Zeitalter der Fugger. Geldkapital und Creditverkehr im 16. Jahrhundert. Erster Band: die Geldmächte des 16. Jahrhunderts* (Jena, Fischer 1922) 280-281. Add to the references there, ACA, V, 1235, f. 92 (23 June 1518) f. 99 (20 July 1518) and f. 106v (19 July 1518).

22 From about 1490 and until approximately 1520, in the Council of Brabant, debtors occasionally petitioned for '*lettres de répit*' (which granted postponement of payments). Other comparable, but (even) less popular remedies were the '*lettres de sauvegarde*' (protecting the beneficiary from arrest and seizure of his properties, usually without specification of a period of application) and '*lettres de saufconduit*' (they protected from arrest and attachment during a period of travel). In 1497-98, the Council of Brabant granted 22 '*lettres de répit*'. This was a maximum; between *c.* 1495 and *c.* 1520, on average each year between five and ten '*lettres de répit*' were handed out. See Archives of the Realm (Brussels) (hereinafter ARB), Account Rolls (hereafter AR) 20784, 20785 and 20786. The earliest found reference to a '*lettre de répit*' that was mentioned by an Antwerp resident dates from 1504. See ACA, V, 1233, f. 38 (15 January 1504 (n.s.)).

costs[23] and to the uncertainty as to their effect. Obtaining such a letter was indeed not a guarantee for a smooth insolvency case: opposition in court was to be expected.[24]

There are indications that in the early 1500s, imprisonment for debts, and 'abandonment', knew a short and modest revival in Antwerp. The advantages of generalized collaterals had to some extent been annulled by the anonymity and stress that grew in an exceedingly internationalizing markt. Creditors locked defaulters away in the town prison, as a punishment for their behaviour, and not for other reasons. Over the first years of the sixteenth century, imprisoned debtors started applying for the older 'abandonment', but their petitions and the rules of the urban law that were crafted in response, reflected academic influence. In June 1505, for the first time since long, an imprisoned defaulter, who had been in the Antwerp public prison for no less than a year, applied for his release. He offered his creditors to swear an oath that he did not own any properties, and that he would pay his debts in the future if he would obtain new assets, when he would come to better fortune.[25] The notion of '*cessie*' was not mentioned in the judgment confirming this request, and what was asked was similar to the older practice of 'abandonment'. However, a new element was the promise under oath of giving newly acquired assets to the creditors, which supplemented the older oath that no fraud had been committed.[26] In October 1505, another detained debtor applied for the same remedy, which was now described as '*cessie van goede*', and it involved the mentioned promises under oath.[27] In November 1505, an incarcerated hawker of second-hand clothing offered his creditors '*cessie van goede*', but the latter insisted to keep him imprisoned privately thereafter.[28]

In these years, one crucial element of the earlier practice of 'abandonment' – the requirement of the creditors' cooperation – came under pressure, under the influence of the blending of 'abandonment' with learned terminology

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23 When near the end of the 1520s '*lettres de cession*' became popular, the costs probably also had a part in this development. A '*lettre de cession*' costed half the price of a '*lettre de répit*'. See ARB, AR, 20785, f. 2r-v (*s.d.*, *c.* 1498).

24 See, for example, ACA, V, 1233, f. 38 (15 January 1504 (n.s.)).

25 ACA, V, 1233, f. 78 (11 June 1505).

26 In Van der Tannerijen, *Boec van der loopender practijken*, vol 2 (see n. 6) 263, there is a hint to this. However, the provision there refers to the right of creditors, having a defaulter locked away privately, to receive gifts and bequests to which the debtor was entitled, in compensation for their debts.

27 ACA, V, 1233, f. 85 v. (1 October 1505). Jeroen Puttevils (University of Antwerp) brought this reference (and the one in the following footnote) to my attention.

28 ACA, V, 1233, f. 89 (6 November 1505). According to a marginal note, an agreement between the debtor and the creditors, by 18 November, made that the intended '*cessie*' was not performed.

and rules. The newly added formula that upon their release debtors would transfer any new assets to their creditors reflected the idea that after the detention the defaulter had to be given some time in order to recover. This was a concession that could only be made by the creditors, or at least so it was thought until then. In the 1510s and early 1520s, at the level of the royal courts and councils, which then already intervened – though still very occasionally – in such cases, for the first time this was decided against the interests of the creditors and without their consent. It was added in correspondence from those institutions that when being freed from prison, the debtor was not to be arrested again and that he had to be given the opportunity to live according to 'a sober state'.[29] This was much more in line with academic literature, providing the right of the incarcerated defaulter to be set free upon his demand for *cessio bonorum*, and even against the will of his creditors,[30] and requiring leniency after the release from prison.[31]

At a 1520 Antwerp *turbe*, the rights of creditors as to the imprisonment of their debtors proved to be the linchpin of a legal discussion on '*cessie*'. A *turbe* was a testimonial statement of legal practitioners upon an undecided point of the urban law of Antwerp. The mentioned *turbe* was set up following a lawsuit, which had been started in Antwerp and which thereafter was brought in the Council of Brabant, and in which policy considerations played an important role. The advocate of the creditor, who denied the claimant the right to be set free from prison, argued in line with the characteristics of the early fifteenth-century system of debt collection. He said that '*cessie*', in the sense of ending a public imprisonment upon the prisoner's demand and transfer of assets, had probably been used some time in the distant past (he implicitly referred to the older 'abandonment') but also that it had not been preserved when merchants had started giving credit to one another. In that context '*cessie*' would have been a means to escape prosecution for debts. If '*cessie*' were admitted, continued the advocate, it was to be expected that malicious merchants would more often renege on their obligations, because they could – once being imprisoned – obtain their release without much restrictions. The advocate of the creditor stressed that imprisonments for debts were not very common because it was easy enough to lay seizure on assets for overdue debts, and that also for that reason, no special remedy should apply.[32] These arguments were in part correct: the declining numbers of imprisonments for debts had brought about less 'abandonments'. Indeed, as the advocate mentioned, the generalized use of attachments for debts out of informal

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29 Archives of the Realm in Anderlecht (hereinafter ARAnd) Council of Brabant, 6698, f. 2v.

30 Zambrana Moral, *Derecho concursal* (see n. 3) 81-84 and 146-147.

31 Pakter, 'The Origins of Bankruptcy' (see n. 3) 495-496.

32 ACA, V, 68, f. 33-34 (1 June 1520).

contracts had been a factor in this. However, this decline of 'abandonments' had not been the product of a policy attempting to stimulate commerce. The Antwerp aldermen had not inhibited the practice; it had simply gone out of use. Moreover, in the early 1500s, '*cessie*' on the sole initiative of the debtor was quite exceptional in other areas of the Netherlands, where it was not used for it was considered detrimental to commerce.[33] In response to these assertions, the advocate of the claimant, who had asked to be released from the public prison, argued that it was an old practice to free imprisoned defaulters upon their request and upon transfer of their properties, but that the creditors could thereafter keep the debtor locked at their home.[34]

The statement of the legal practitioners, who in the form of a *turbe* were invited to decide what the law was, confirmed this latter opinion. It is quite clear that their views, even though they referred to the '*old customs and practices of the city*', in fact blended academic insights with the older local practice of 'abandonment'. Academic features in their response were the required good faith of the imprisoned debtor (even though that had already been a feature of the older 'abandonment'), and especially the mildness after release (this was clear in the prisoner's promise that he would spontaneously cede any acquired goods to his creditors). Seizure of new belongings of the former prisoner, on the initiative of his creditors, was not allowed.[35] It was not exceptional that statements made at *turben* reflected a policy decision of the Antwerp aldermen. What was said at *turben* corresponded with the views of the aldermen on the matters under discussion. After all, it was they who chose the 'witnesses' at *turben*. Moreover, many declarations at *turben* of this period elaborated on academic doctrine. In the early decades of the sixteenth century, the Antwerp leaders were increasingly working with academically trained personnel. The participants at *turbe*-inquiries were nearly always – and also in *turben* on matters of mercantile contracts and arrangements – former aldermen, legal practitioners or jurists working in the urban courts and councils.[36]

At around the same time as in Antwerp, a similar mixture of 'abandonment' with academic *cessio bonorum* took place in Mechelen, which was not part

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[33] As was mentioned in Filips Wielant's project of a general law for the County of Flanders. See Philippe Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle* (Brussels, Royal Academy 1987) 519. In his *Practijke civile*, Wielant described '*cessie*', with the same caveat as to its application in Flanders. See Wielant, *Practijke civile* (see n. 11) 83 (book 2, ch. 18, nr 6).

[34] ACA, V, 68, f. 34 (1 June 1520).

[35] In a '*cessie*' of around that same time, the debtor formally declared that he would repay his creditors if he would regain wealth. See ACA, V, 1235, f. 253 (26 May 1520).

[36] Dave De ruysscher, 'From Usages of Merchants to Default Rules: Practices of Trade, *Ius Commune* and Urban Law in Early Modern Antwerp' (2012) 33/1 *The Journal of Legal History* 3, 12-17.

of the Duchy of Brabant and was thus not subject to the jurisdiction of the Council of Brabant. It resorted directly under the Great Council, which was the highest royal court in the Netherlands. The presence of lawyers having academic degrees in law in that institution stimulated the application of learned solutions in the city of Mechelen as well. In the forensic practice of the town, '*cessie*' became the label for the earlier 'abandonment' and some changes in the contents of the arrangement were made. The process of reception in Mechelen is very well documented, since in 1527 a first extensive draft of a compilation of urban law (*costuymen*) was made (and has been preserved), and thereafter, in 1535, a thoroughly revised version became accepted as the law of the city. The latter collection of rules was of a higher legal level, containing more academic solutions and content, than the former. The 1527 draft had been composed by Jan van Ophem († 1529), who as a young man had migrated to Mechelen from Ukkel, which was a famous Brabant legal bulwark. He had obtained a degree in *artes*, but not in law. As a legal practitioner (he was a law clerk for most of his life), he remained close to the traditional legal practices of Mechelen, even though he also used learned terminology.[37] In the 1527 project of the Mechelen law, he wrote down the creditors' right to block a demand for '*cessie*', and even provided that after a release from prison, the creditors could seize (newly received) assets found with the debtor as well.[38] The latter rule had most probably also been common under the arrangement of 'abandonment', which had been very creditor-oriented. However, in spite of van Ophem's efforts, the considerable academic influence in Mechelen made that the draft text would be revised, and also as to this point. The Great Council of Mechelen supervised the compiling process of the Mechelen law, being the competent royal institution. Its commissioners were apparently not too happy with the contents of the 1527 proposal, and asked for another version. In the latter, imprisoned debtors were given an absolute right to '*cessie*', which was much more in line with the learned law.[39]Notwithstanding this influence from doctrine, in Antwerp and Mechelen, at around this time the academic ideas regarding *cessio bonorum* were not at all points followed, as '*cessie*' was still for a large part modelled after 'abandonment'. This was foremost clear in the fact that the creditors decided on private imprisonment, and that liberation

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37 On Jan van Ophem (*Jean de Ophem*), and his role in the writing of the Mechelen law, see Jos Laenen, *Geschiedenis van Mechelen tot op't einde der Middeleeuwen* (Mechelen, Godenne *s.d.*) 185-186; *Ontwerpcostumen* (see n. 9) ix-xi. I would like to express my gratitude to Hilde De Ridder-Symoens for her information on the academic backgrounds of Jan van Ophem. On the legal connections between Jan van Ophem, Mechelen and Ukkel, I intend to write some time later.

38 *Ontwerpcostumen* (see n. 9) 187-188 (s. 1084).

39 *Mechelen Costuymen 1535* (see n. 9) 158-160 (ch. 21).

from detention was thus not entirely the right of the debtor. Furthermore, it was a common rule of late-medieval scholarship that *cessio bonorum* did not bring about *infamia*, which entailed the loss of citizenship and public rights.[40] Yet, in early sixteenth-century Antwerp and Mechelen, this was nonetheless the case, in spite of the 'Romanization' of the '*cessie*' that was crafted there.[41] '*Cessie*' also involved defamatory practices. At around 1500, the locking-away of a debtor in a public prison, and in private premises thereafter, mostly served to break a debtor's reputation. Incarceration was then a private punishment rather than a means to obtain payment. According to the urban legislators creating the measure of '*cessie*', by fusing academic solutions with local practice, the defamatory consequences of imprisonment and 'abandonment' – which had also applied in the 1400s – had to be kept. This idea was also, in this first phase, followed in the royal institutions. Still at around 1520, a '*cessie*' that was granted in the Council of Brabant for example required that the beneficiary presented himself bareheaded and without belt.[42]

4. '*Cessie*' 2.0: the contribution of the royal councils and courts

In the later 1520s and in the early 1530s, the mentioned proceedings changed because of a shift in their underlying ideas. Insolvency became more equitable, debtor-oriented and collective. The holes in the 1516 legislation were filled. This was so in Antwerp forensic practice. Most rules regarding the 1516 procedures following 'flight' were copied onto attachment practice, which marked the beginning of a collective insolvency proceeding. Rules of priority that had been established for fraudulent bankruptcy became, for example, used when two or more creditors were seizing goods of the same debtor.[43]

Moreover, these changes closely followed a new policy of the royal institutions. In the later 1520s, imprisoned debtors applied for more royal letters, and especially for so-called letters of '*inductie*'. Such petitions, to the Council of Brabant, were answered with a commission to the Antwerp aldermen in order to have them mediate an agreement between the creditors and their debtor. The Antwerp judges had to check the veracity of the applicant's statements and check the causes of his insolvency. If it became clear that the debtor had committed malicious acts, his request was denied. If no such problems arose, negotiations between the debtor and his creditors

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40 Zambrana Moral, *Derecho concursal* (see n. 3) 154-155.

41 *Antwerp Costuymen 1548* (see n. 10) 370 (ch. 15, s. 3); *Mechelen Costuymen 1535* (see n. 9) 158 (ch. 21, s. 2).

42 ARAnd, Council of Brabant, 6698, f. 68v (*s.d.*, *c.* 1520).

43 See n. 19.

were started. First, an inventory of his properties was made, and thereafter the creditors submitted evidence of their claims. Thereupon, talks began under the guidance of the Antwerp authorities. When an agreement had been reached, the case file was returned to the Council of Brabant, which confirmed and registered the compromise.[44] Debtors could thus henceforth steer the proceedings of insolvency that had been initiated against them, at least to some extent. Imprisonment became the starting signal for a collective proceeding implying the negotiation of debts.

This was formalized in a 1536 royal law, which fundamentally changed the '*cessie*' that had been applied in Antwerp and Mechelen since the early 1500s. The law provided that '*cessie*' was a right for imprisoned defaulters who had gone insolvent without fraud and that the creditors could not deny this right, even though the possibility to contest the formal grounds of the proposed '*cessie*' in court was left open. '*Cessie*' could only be obtained with a royal '*lettre de cession*'. The local judges had to control this letter, and investigate the circumstances. It was also imposed that after the '*cessie*' the debtor should be left to acquire new means, and that he was required to swear that any new assets would be given to his creditors.[45] Under the new royal rules, it became less feasible to take citizenship from a debtor who was granted '*cessie*'. It could even be detrimental in case a payment plan had been agreed on: if the debtor lost his rights, in principle he could no longer be member of a craft guild. A scandalized debtor was not likely to find a job or obtain credit. Therefore, the 1536 law excluded that for defaulters of good intent '*cessie*' affected their citizenship or good name.[46] These measures proved popular with insolvents. The urban leaders were soon confronted with more numbers of petitions of debtors with payment problems that were sent in from the royal courts, and which were answered according to the procedure that had been written down in the 1536 royal law.[47]

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44 ACA, PK, 271, 1 (1 June 1527); ACA, PK, 299.

45 *Recueil des Ordonnances des Pays-Bas*, 2nd series vol 3 Jules Lameere (ed.) (Brussels, Gobbaerts 1902) 549-550 (30 August 1536).

46 See n. 45. If fraud was detected, the creditors could – according to the 1536 royal law – still organize a defamatory '*cessie*', after which they could lock their debtor in their homes. In his 1567 *Praxis rerum civilium*, Joost De Damhouder mentions that 'ignominous solemnities' had been abolished some time before. See Joost De Damhouder, *Praxis rerum civilium* … (Antwerp, Bellerus 1569) 132 (ch. 70, 16). This followed most probably from the changed meaning of '*cessie*'.

47 However, the 1536 royal law met with resistance from local authorities. The Antwerp leaders considered the 1536 law as an intrusion, as a breach of their liberties, mainly because '*cessie*' was newly linked to a petition for a royal letter. This is clear in the fact that the 1548 *costuymen* of Antwerp made no allusion to the rules that had been imposed with the 1536 royal law, but simply rephrased the (local) rules that had been established at the 1520 *turbe*. See Godding, *Le droit privé* (see n. 33) 519. In a petition

5. Conclusion

At the beginning of the sixteenth century, in Antwerp and Mechelen, 'abandonment' as it had been practised in the middle of the 1400s was no longer useful. It had become obsolete for many reasons. In the early sixteenth century, the earlier applied practice was nonetheless fused with academic terminology ('*cessie*') and was given some learned contents, but older features implying that creditors could privately detain debtors, and regarding the loss of citizenship and defamatory consequences, lived on. This new version of 'abandonment' ('*cessie*') was not practical, as it had not been before. '*Cessie*' was rather a legislative attempt to restore ethical behaviour in a market in evolution and – later – distress. The urban leaders had not yet understood that imprisonment for debts had lost its relevance since generalized collaterals and protection from arrest had become widespread. The future was to negotiations, and discharge (a fresh start) for insolvent debtors, as the awareness grew that failures are inherent to market situations, and that deterrence and punishment of indebtedness do more harm than good. The reception of *cessio bonorum* that was most faithful to academic doctrine finally happened under the impetus of royal forensic practice and legislation. All in all, royal jurists were the first to grasp the full consequences of a system of debt collection in which imprisonment had not much importance. The history of '*cessie*' in Antwerp and Mechelen in the early sixteenth century clearly demonstrates the complexity of the infiltration of academic concepts and rules in local legal practice around that time. The context of available tools of debt collection, the political will of the urban and royal leaders and economic circumstances had a decisive influence on the abovementioned developments.[48]

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that was addressed to prince Philip, at the occasion of his Joyous Entree in Antwerp in September 1549, the Antwerp aldermen demanded that their jurisdiction for '*cessie*' would be restored. See Dave De ruysscher, 'Lobbyen, vleien en herinneren: vergeefs onderhandelen om privileges bij de Blijde Inkomst van Filips in Antwerpen (1549)' *Noord-Brabants Historisch Jaarboek* 29 (2012) in press. The fact that the 1548 Antwerp *costuymen* did not mention the royal rules is to be considered more as tentative opposition than as a reflection of Antwerp practice of that time.

48 Therefore, the claim that the reception of *cessio bonorum* in the Netherlands went against older defamatory practices and their moral (christian) connotations, as is suggested in James Q Whitman, 'The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence' (1996) 105 *Yale Law Review*, 1877-83, is not correct. '*Cessie*', *i.e.* the first academic-local blend of before 1536, also entailed defamatory practices, which only disappeared thereafter. The mentioned opinion stands, too, in the bipolar tradition of regarding local and academic law as two completely different sets of rules, and of considering the process of reception as a matter of importing ready-to-use academic solutions that entirely replace locally crafted rules.