BRILL

GROTIANA 44 (2023) 247–275

GROTIANA
brill.com/grot

Grotius's Contribution to the Law of Secured Credit

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Received: 30 June 2023 | Accepted: 22 October 2023 | Published online: 29 December 2023

Abstract

Over the centuries, Grotius's writings on *onderzetting* (rights of hypothec) have been widely cited, particularly in the Netherlands and South Africa. This article investigates the originality and lasting impact of Grotius's contributions to this field. The article follows the layout of the chapter on hypothecs of Grotius's *Inleiding tot de Hollandsche Rechts-geleertheyd*. It examines Grotius's translation of hypotheca as *onderzetting*, the structure of his *Inleiding*, the distinctions between various kinds of hypothec, and contemporary requirements for the creation of hypothecs. It then explores the right to follow encumbered assets into the hands of third parties and analyses the enforcement of hypothecs, priority issues in cases of competing hypothecs, and reflects on Grotius's influence on Dutch security rights. In summary, although Grotius's insights were largely derivative, often echoing interpretations of earlier scholars, they illustrate Grotius's deep understanding of the influence of Germanic and Roman law on Roman-Dutch security rights. Grotius had a lasting impact on legal scholarship and practice because he was the first to provide a scholarly systematization of Roman-Dutch law within the framework of Justinian's Institutes and firmly placed the rights of hypothec in the book on property rights of his *Inleiding*.

Keywords

Hypothec – *onderzetting* – credit – *Inleiding* – priority

1 Introduction

Grotius introduced the rights of hypothec by explaining that *onderzetting* is a right over the property of another which secures a claim (‘*gerechtigheid over eens anders zaeck, dienende tot zekerheid van inschuld*’).[1] In other words, the Roman-Dutch *onderzetting* was a creditor’s limited property right in the debtor’s assets (*ius in re aliena*) to secure the performance of an obligation, a concept derived from Roman law.[2] In the event of a debtor’s default, the secured creditor could enforce his right of hypothec by having the charged assets sold at a public auction and using the proceeds to satisfy the secured debt.[3]

Over the centuries, Grotius’s writings on *onderzetting* have been widely cited and referenced in literature on the law of secured credit. Eminent scholars of the seventeenth and eighteenth century, such as Simon van Leeuwen (1626–1682) and Johannes Voet (1647–1713), often referred to Grotius’s *Inleiding tot de Hollandsche Rechts-geleertheyd* and some of his published legal opinions in the *Consultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (commonly known as the *Hollandsche Consultatien*). Nowadays, in the Netherlands, legal historians typically use Grotius’s works to discuss or analyse the Roman-Dutch law of secured credit.[4] References to Grotius’s works are ubiquitous in modern South African case law, legal handbooks and other literature regarding security rights.[5]

1 Hugo de Groot, *Inleiding tot de Hollandsche Rechts-geleertheyd* (The Hague: Van Wou, 1631), 2.48.1, p. 103r.

2 Cf. Antonius Negusantius, *De pignoribus et hypothecis* (Lyon: Giunta, 1549) *membrum* I, *pars* I, nr 3, p. 2r.

3 In this paper, the term ‘pledge’ will be used as the generic term for a possessory or non-possessory security right, that is, a limited property right, not an ownership right, in the debtor’s assets. The term hypothec will be used specifically for non-possessory pledges. The grantor of a right of pledge to secure its own obligation will mostly be referred to as ‘debtor’. It will be stated expressly if the grantor created a right of pledge to secure the obligation of another person. The person who had a right of hypothec will mostly be referred to as ‘(secured) creditor’. Encumbering, pledging, hypothecating, and charging will be employed interchangeably.

4 Among many others: Rian Bobbink, *Antichresis en pandgebruik* (Deventer: Wolters Kluwer, 2021), pp. 129–82; Egbert Koops, *Vormen van subsidiariteit* (Den Haag: Boom, 2010), pp. 131–51; Vincent J.M. van Hoof, *Generale zekerheidsrechten in rechtshistorisch perspectief* (Deventer: Wolters Kluwer, 2015), pp. 85–140.

5 For example: Cooper NO en andere v Die Meester en ’n ander [1992] 2 *All SA* 20 (A); Cornie G. van der Merwe and Anne Pope, ‘Real Security’, in F. du Bois, *Wille’s Principles of South African Law* (Cape Town: Juta, 2007), pp. 630–65; Gerhard F. Lubbe ‘Mortgage and Pledge’,

Grotius's high citation count shows that his work was and still is widely recognised as a legal classic[6] and is primarily a source of knowledge for Roman-Dutch law. However, an answer to the question as to what extent Grotius writings on security rights were original and innovative is lacking. Despite the many references to his work, there is a need for more in-depth examination in order to fully understand and appreciate the significance of Grotius's contribution to the law of secured credit. In this article, I will discuss the originality and legacy of Grotius's writings on security rights. I will address the originality of his work by conducting a comparative analysis of Grotius's works with sources of Roman and customary or local law. His impact will be examined by tracing his legacy in later Dutch laws, Roman-Dutch literature, and South-African case law, with special focus on those aspects of his writings which were original.

Grotius's *Inleidinge* is the primary subject of this research as it contains most of Grotius's writings on security rights. It was the first comprehensive work in Dutch on Roman-Dutch law and was written with legal practice in mind.[7] The *Inleidinge* 'is a work of masterly systematisation, a condensed summary of existing laws (…)', as R.W. Lee put it in 1930.[8] In the introduction to his *Inleidinge*, Grotius explained that he provided an overview of the Roman law that was applied in Holland, which was supplemented by local laws:

> *Uit de Roomsche Rechten is hier in ghestelt 't gunt by ons in ghebruyck is niet alleen uyt de Justiniaensche Rechtsinleydinge, maer oock uyt de andere boecken der Rechten, waer by ghevoucht is ons eyghen recht voor soo veel*

revised by T.J. Scott, in *The Law of South Africa*, ed. by L.T.C. Harms & J.A. Faris (Durban: LexisNexis, 2008) 17.2, pp. 324–7; André J. van der Walt; Nzumbululo Silas Siphuma, 'Extending the Lessor's Tacit Hypothec to Third Parties' Property', *South African Law Journal 132*, nr 3 (2015), 518–46; Reghard Brits, *Real Security Law* (Cape Town: Juta, 2016). See on the reception of Roman-Dutch law in South Africa: Reinhard Zimmermann, *Das römisch-holländische Recht in Südafrika* (Darmstadt: Wissenschaftliche Buchgesellschaft 1983), pp. 1–73.

6 Robert W. Lee, Hugo Grotius, *The Jurisprudence of Holland* (Oxford: Clarendon, 1936), I, p. vii.

7 Boudewijn Sirks, 'Inleiding tot de Hollandsche Rechtsgeleertheyd – 1631', *Pro Memorie* 21.2 (2019), pp. 42–6.

8 Robert W. Lee, 'The Introduction to the Jurisprudence of Holland (Inleiding tot de Hollandsche RechtsGeleertheyd) of Hugo Grotius', *Transactions of the Grotius Society*, 16 (1930), pp. 29–40, at pp. 37–8.

> *het selve den Insteller was bekent door oude handvesten, vonnissen ende andere bewijsen*.[9]
> (For the Roman law which is applied with us is not only drawn from the aforementioned Justinian's Institutes, but also from other books of law; to which I have added our own law to the extent that it was known to me through the old charters, verdicts, and other proofs.)

In the 48th part of the second book of his *Inleidinge tot de Hollandsche Rechts-geleertheyd*, Grotius provided an overview of the Roman-Dutch law of secured credit.[10] I will discuss the various topics concerning the law of secured credit, including his opinions on security rights, by following the layout and lines of Grotius's *Inleidinge*. The article begins by discussing Grotius's translation of hypotheca as *onderzetting* (§2), followed by an examination of the structure of his *Inleidinge* and the distinctions between various rights of hypothec (§3). The focus then shifts to contemporary requirements for the creation of rights of hypothec (§4). Subsequently, the concept of the right to follow encumbered immovables into the hands of third parties is discussed (§5). In paragraph 6 the legal maxim *mobilia non habent sequelam* is examined as it sometimes prevented a secured creditor to follow encumbered movables into the hands of third parties. Subsequently, the maxim is discussed in connection with the fiduciary transfer of ownership (§7). Furthermore, there is an analysis of the enforcement of rights of hypothec and the issue of priority that often arises in cases involving competing rights of hypothec (§8). Finally, the article reflects on Grotius's influence on the security rights landscape in the Netherlands (§9).

2 The Translation of Hypotheca as *Onderzetting*

Grotius employed the term *onderzetting*, which is translated as 'underplacement' or 'placement under' and is a reference to the Greek word *ὑποθήκη* or *hypotheca*

9 Hugo de Groot, *Inleiding tot de Hollandsche Rechts-geleertheyd* (The Hague: Van Wou, 1631), p. Ir; Cf. Sybrandus Fockema Andreae, 'Voorrede', in S.J. Fockema Andreae and L.J. van Apeldoorn, *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (Arnhem: Quint, 1939), I, p. XIV.

10 See for the preparatory process of the *Inleidinge*: Robert Fruin, 'Hugo de Groot's Inleidinge tot de Hollandsche Rechts-geleerdheid', *Robert Fruin's Verspreide Geschriften*, ed. by P.J. Blok, P.L. Muller & S. Muller, *Deel VIII* (The Hague: Martinus Nijhoff, 1903), pp. 10–31.

in Latin, meaning to place something under a charge.[11] It also echoes the Germanic *Zetting* (*Satzung*), as Grotius pointed out in his private annotations.[12] Prior to Grotius's *Inleidinge,* Christoffel Plantijn (1520–1589) discussed the verb *ondersetten* in the context of granting security in his *Thesaurus Theutonicae Linguae, Schat der Neder-duytscher spraken*.[13] He used the term *wedden* as a synonym for *ondersetten* and added the meaning of '*Gager, mette en gageure ou en ieu. Pignore certare, deponere aliquid*'.

The term *onderzetting* has endured, albeit with a short interruption at the beginning of the nineteenth century. The Civil Code of 1809 of the Kingdom of Holland, the successor of the Batavian (and before that Dutch) Republic referred to the security rights as *pand* or *hypotheek*, without the term *onderzetting*.[14] In the preceding drafts, one by Arnold Kreet (1740–1804) and one by Joannes van der Linden (1756–1835), the terms *pand* and *hypotheek* were also employed.[15] In 1810, the French emperor Napoleon Bonaparte (r. 1804–1814) annexed the Kingdom of Holland. A year later, he introduced the French Civil Code of 1804 and the term *hypothèque* was used to describe rights of hypothec in immovable assets. After the defeat of Napoleon, the Low Countries regained their independence and strived to introduce their own civil code. The committee responsible for the Dutch civil code of 1838 reintroduced the term *onderzetting* as a synonym for *hypotheek*. Inspiration for this terminology was drawn from Grotius's *Inleidinge*.[16] Since 1992, the new Dutch Civil Code no

11 Tobias M.C. Asser, 'Hugo de Groot, 1583–10 april-1883', *De Gids* 1883, p. 7; Simon Vissering, 'De rechtstaal van H. de Groot's Inleiding tot de Holl. Rechtsgeleerdheid' in *Hugo de Groot herdacht in de Koninklijke Akademie van Wetenschappen* (Amsterdam: Müller, 1883), pp. 102–3.

12 Folke Dovring, Herman F.W.D. Fischer and Eduard M. Meijers, *Hugo de Groot, Inleidinge tot de Hollandsche Rechts-Geleerdheid* (Leiden: UP, 1965), ad II,48, p. 187.

13 Christoffel Plantijn, *Thesaurus Theutonicae Linguae, Schat der Neder-duytscher spraken* (Antwerp: Plantijn, 1573) ad *ondersetten*.

14 Art. 1804 of the Wetboek Napoleon ingerigt voor het Koningrijk Holland.

15 Marjolein J.E.G. van Gessel-de Roo, *Zakenrecht 1798–1820* (Zutphen: Walburg Pers, 1991), p. 110 (art. 5) en p. 122 (art. 11); Joannes van der Linden, *Ontwerp Burgerlijk Wetboek 1807–1808, Heruitgave verzorgd door (…) J. Th. de Smidt* (Amsterdam: Graphic, 1967), art 2, p. 150.

16 Joan Melchior Kemper wanted to create a Dutch civil code that progressed from Roman-Dutch law and admired the works of Grotius. See for example: J.C. Voorduin, *Geschiedenis en beginselen der Nederlandsche wetboeken, volgens de beraadslagingen deswege gehouden bij de Tweede kamer der Staten-generaal* (Utrecht: Natan 1837), I,I, p. 32. De Pinto expressly referred to Grotius regarding the term *onderzetting.* See: Abraham de Pinto, *Handleiding tot het Burgerlijk Wetboek* (The Hague: Belinfante, 1840), part 2, p. 317.

longer uses the term *onderzetting*. The verb *onderzetten*, however, is still used today in legal practice.[17]

3 The Outline of the *Inleidinge* and the Distinctions Between Rights of Hypothec

The outline of the *Inleidinge* is essentially based on the outline of Justinian's Institutes, as Grotius remarked in the introduction to his book. The second book of Grotius's *Inleidinge* is dedicated to property rights (*van beheering*), which is also the subject of the first part of the second book of Justinian's Institutes. Grotius's addition of hypothec to the second book, however, is quite original, since this subject is scarcely touched upon in Justinian's Institutes. By doing so, Grotius firmly places the hypothec in the category of property law. The layout of the discussed topics in the *title* on *onderzettinge* echoes Roman law by following the lines of the twentieth book of Justinian's Digests, the creation and terms of express rights of hypothec in sections 1–3, 8–9, and 23–32 (cf. *Dig*. 20.1), the capacity to encumber assets in sections 4–6 (cf. *Dig.* 20.3), implied rights of hypothec in sections 10–21, 37 (*Dig*. 20.2), the way in which the priority is determined between competing rights of hypothec in sections 33–36, 38–40 (*Dig*. 20.4), the enforcement of rights of hypothec in sections 41–43 (*Dig*. 20.5) and the way in which rights of hypothec are terminated in section 44 (*Dig*. 20.6). Grotius clearly was a scholar of Roman law.[18]

After having introduced the concept of *onderzetting*, Grotius proceeded with discussing the things that could be charged. A solvent[19] debtor (with legal capacity)[20] could charge all of his or her assets, including a right of

17 For example: Argenta Spaarbank N.V., Algemene voorwaarden hypotheken (version 1 April 2006), url: https://www.argenta.nl/sites/default/files/documents/Algemene%20vw%20NL%202006-04-01%20st.PDF (consulted 14 Sept. 2023); Hof Amsterdam 20 July 2021, ECLI:NL:GHAMS:2021:2179.

18 Fockema Andreae, *Voorrede*, p. XI; Philipp C. Molhuysen, *De bibliotheek van Hugo de Groot in 1618* (Amsterdam: Noord-Hollandsche Uitgeversmaatschappij, 1943); Karl Wellschmied, 'Zur Inleidinge tot de Hollandsche Rechts-Geleerdheid des Hugo Grotius', *Tijdschrift voor Rechtsgeschiedenis* 20 (1952), 389–440.

19 De Groot, *Inleiding*, 2.48.6, p. 103v and his opinion in: Joannes Naeranus, Consultatien, advisen en advertissementen, gegeven en geschreven bi verscheiden treffelike rechtsgeleerden in Holland en elders (Rotterdam, 1664), V 133, p. 421.

20 De Groot, *Inleiding*, 2.48.3, p. 103r. Cf. Dideric Lulius, Pieter van Spaan, Joannes van der Linden & Reinier van Spaan, *Rechtsgeleerde observatien* (…) *van wylen Hugo de Groot* (Den Haag: Mensert, 1776), II, 60, pp. 141–2.

usufruct (*lijf-tocht*), a fief (*leen-goed*), leasehold land (*erfpacht-goed*) and rural servitudes (*erfdienstbaerheden*).[21] In one of his letters to his brother, Grotius remarked that anything which could be sold, could be encumbered by a right of hypothec.[22] This remark clearly echoed an opinion by the Roman jurist Gaius.[23] In the letter, Grotius argued that a charged asset had to be useful to several different people because the encumbered asset had to be sold to someone if the pledgor defaulted on the secured claim.[24]

Rights of hypothec were either expressly agreed upon (*besproocken*) or implied (*stilzwigende*).[25] The *besproocken* right of hypothec was the result of an agreement between the parties whereas the *stilzwigende* right of hypothec was created by operation of law.[26] Grotius also discussed the distinction between general (*algemeen*) and special (*bysonder*) rights of hypothec.[27] Grotius enumerated eleven implied rights of hypothec.[28] Some of these legal or implied rights of hypothec were clearly derived from Roman law, such as the hypothec of a lessor over the assets that the lessee brought with him into the leased property (*invecta et illata*) as security for the rent,[29] the hypothec of a creditor who lent money for the repairs to a ship[30] or of an underaged pupil

21 De Groot, *Inleiding*, 2.48.2, p. 103. Grotius mentioned that two exceptions were made in the public interest: urban servitudes and agricultural machinery could not be pledged. Cf. Dionysius van der Keessel, *Voorlesinge oor die hedendaagse reg na aanleiding van De Groot se 'Inleiding tot de Hollandse rechtsgeleerdheyd'* (Amsterdam: Balkema 1964), III, ad *Inleiding* 2.48.2, p. 411.

22 Grotius's letter to Willem de Groot of 29 August 1615, Molhuysen, *Briefwisseling*, nr 417, http://grotius.huygens.knaw.nl/letters/0417.

23 According to the Roman jurist Gaius, anything which could be sold could also be pledged (20,1,9,1 (Gaius 9 *ad edictum provinciale*)). Cf. Max Kaser, *Das römische Privatrecht*, I (München: C.H. Beck, 1971), § 110, p. 465.

24 '*Plane autem ius pignoris requirit ut res utilis esse possit pluribus: quia et dum pignus durat, debet esse aliqua credentis utilitas, et postea debet exstare aliquis cui possit vendi; non emuntur autem res inutiles.*'

25 De Groot, *Inleiding*, 2.48.7, p. 103v.

26 Ibid., 2.48.8–9, p. 103v. Cf. Van der Keessel, *Voorlesinge*, ad. Gr. 2.48.8–9, p. 413. According to Grotius, a judicial right of pledge is no right of pledge *strictu sensu* because it awarded the creditor no priority over other creditors. Cf. Kaser, *Das römische Privatrecht*, I, § 110, p. 466 with references; Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.9, p. 413.

27 De Groot, *Inleiding*, 2.48.22, p. 104r.

28 See Lulius, Van Spaan, Van der Linden & Van Spaan, *Rechtsgeleerde observatien*, II, 61, pp. 143–5 on whether the fiscal right of pledge was an implied right of pledge.

29 *Dig*. 20.2.7 (Pomponius 13 *ex variis lectionibus*). Cf. Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.17, p. 425.

30 *Dig*. 20.4.5 (Ulp. 3 *disp.*). Cf. *Dig*. 42.5.26 (Paul. 16 *brev.ed.*).

over the assets of his tutor, securing the pupil's claims on the tutor regarding the management of the pupil's estate.[31] Other legal hypothecs originated from early modern statutes, such as the legal hypothec over the property of the East India Company's administrators, for the loss incurred by mal-administration of the company. Some of the implied rights of hypothec which were mentioned by Grotius, however, were subject of debate.[32] For example, Van der Keessel (1738–1816) pointed out that a creditor who lent money for the building of a new house or ship had no right of hypothec by operation of law but was required to create an express right of hypothec.[33] In short, the substantive law of this chapter on *Onderzetting* was essentially of Roman origins and was supplemented by customary law and local statutory laws.

4 Requirements for the Creation of Rights of Hypothec

Grotius discussed the various contemporary requirements for the creation of rights of hypothec, particularly regarding the debtor's immovable assets. These requirements constituted a deviation from Roman law, since Roman law required no formalities.[34] He remarked that a right of hypothec had to be created before a court in order to encumber the debtor's immovable assets.[35] Fiefs (*leen-goed*) had to be charged before the steward (*stad-houder*) and vassals (*leenmannen*).[36] These deviations from Roman law were the result of statutory law.

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31 See for example Grotius's opinion (July 1616) in Joannes Naeranus, *Consultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Rotterdam: Naeranus, 1662), III, 202, p. 539. Cf. Kaser, *Das römische Privatrecht*, I, § 110, p. 468. Cf. Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.16, pp. 421–5.

32 Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.10–21, pp. 413–31 (with references to Groenewegen van der Made and Voet); Lee, *Jurisprudence of Holland* II, pp. 207–8.

33 Ibid., ad *Inleiding* 2.48.13, p. 415. Van der Keessel also argued that funerary costs were privileged debts and not secured by an implied right of pledge. Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.14, p. 417. Cf. Fockema Andreae and Van Apeldoorn, *Inleidinge* II, 2.48.13, p. 229.

34 Kaser, *Das römische Privatrecht*, II § 251, p. 315; Hendricus L.E. Verhagen, *Security and Credit in Roman Law* (Oxford: Oxford University Press, 2022), §10.5, pp. 334–42.

35 De Groot, *Inleiding*, 2.48.23, p. 104v; Van der Keessel, *Voorlesinge*, ad. Gr. 2.48.30, pp. 451–3.

36 Cf. Negusantius, *De pignoribus*, *membrum* II, *pars* II, nrs 43–49, pp. 12r-12v. See on the pledging of fiefs and cities in the Netherlands in particular: Rian Bobbink, 'Het recht van pandgebruik op de stad Woerden', *GROM* 36 (2019), pp. 3–26.

In 1529, Emperor Charles V (r. 1515–1555) stated that general or special rights of hypothec (*hypothecatien* or *hypotheecqueringe*) which were not created before a local court were null and void (*nul*).[37] According to the emperor, purchasers were often deceived by sellers who deliberately withheld information on existing encumbrances ('*gecircumvenieerd ende bedrogen, omdat de lasten verzwegen werden*'). The creation of rights of hypothec before the local court only encumbered the immovable assets that were located within the jurisdiction of that court.[38] The emperor wanted to protect third-party purchasers of immovable property.

Dutch legal practice, however, decided that a general right of hypothec could be created before any local court in Holland and still encumber all of the debtor's immovable assets located elsewhere in Holland.[39] The States of Holland confirmed this deviation from the imperial legislation in the *Politieke Ordonnantie* of 1580 (art. 35 jo. art. 37).[40] In Amsterdam, however, assets which were situated in Amsterdam were only encumbered if the deed was executed before the court of Amsterdam.[41]

Deeds of hypothec were already recorded in the local court registers over a long period, when, in 1560, the Spanish King Phillip II (r. 1555–1598) required all hypothec deeds regarding immovable assets to be registered there.[42] Phillip

37 Plac. 10 May 1529 in C. Cau, *Groot placaet-boeck, vervattende de placaten, ordonnantien ende edicten van de Staten Generael der Vereenighde Nederlanden, ende van de Staten van Hollandt en West-Vrieslandt, mitsgaders vande Staten van Zeelandt, eerste deel* (The Hague: Van Wouw, 1658), pp. 373–4.

38 Joannes. Naeranus, *Consultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Rotterdam: Naeranus, 1645), II, 123, p. 248.

39 Naeranus, *Consultatien*, II, 130, p. 261.

40 Anne S. De Blécourt and Nicolaas Japikse, *Klein Plakkaatboek van Nederland* (Groningen: Wolters, 1919), p. 132.

41 De Groot, *Inleiding*, 2.48.38–9, p. 105v; Simon van Leeuwen, *Het Rooms-Hollands-Regt* (Leiden: Hackens, 1664), 4.12.4, p. 313; Joannes Voet, *Commentarius ad Pandectas* (Leiden: Verbessel, 1698) I, ad 20,1,10, p. 858; Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.23, p. 437, ad *Inleiding* 2.48.30, 451, and ad *Inleiding* 2.48.39, p. 469.

42 Frederick C.J. Ketelaar, 'Van pertinent register en ordentelijk protocol. Overdracht van onroerend goed in de tijd van de Republiek' in *De levering van onroerend goed. Vijf opstellen over de overdracht van onroerend goed vanaf het Romeins Recht tot het Nieuw Burgerlijk Wetboek*, ed. by J.J.A. de Groot et al. (Deventer: Kluwer, 1985), pp. 42–3; Christiaan van Bochove, Heidi Deneweth, and Jaco Zuijderduijn, 'Real Estate and Mortgage Finance in England and the Low Countries, 1300–1800', *Continuity and Change* 30 (2015), p. 14.

II noted that abuse and inconveniences occurred with regard to the sale or encumbrances because of a lack of adequate registration.[43] The required registration meant that a secretary of the court transcribed (a part of) the contents of the deed of hypothec in a register or record.[44] The States of Holland maintained these rules on registration in the *Politieke Ordonnantie* of 1580.[45]

In 1612, the States of Holland expressly decreed that encumbrances, such as hypothecs, had to be registered in the local court's register, under penalty of nullity of the right of hypothec (*nul, krachteloos ende van onwaerden*).[46] The parties frequently passed a debt acknowledgement form containing the right of hypothec in the presence of the aldermen, a so-called *schepenkennis*.[47] Grotius noted that the registration was mandatory for the creation of special rights of hypothec.[48] He did not, however, at this point in his *Inleidinge*, discuss the requirement of registration with regard to general rights of

43 Plac. 9-5-1560, in: Cau, *Groot placaet-boeck* (...) (1664), II, pp. 1401–2: '*ter cause vande verkoopingen ofte belastingen van goeden veele abuysen, inconvenienten ende questien gebeuren endoe voort ghestelt worden, uyt dien dat vande selve verkoopingen en belastingen geen behoorlijck registre gehouden wort*' ('due to the sales or encumbrances of goods, many abuses, inconveniences, and disputes arise and persist, because proper registration of these sales and emcumbrances is not being maintained').

44 See also Patricia G.H.T. Konings, *De openbare registers ten hypotheekkantore* (Deventer: Kluwer, 1990), p. 15.

45 Art. 37: '(...) *dat een yegelick, van wat state, qualiteyt ofte conditie hy zy, die eenige constitutie van generale oft speciale hypoteecque op eenige onroerende goederen in den voorsz. landen ende graefschappen van Hollandt ende Vrieslant hebben ofte pretenderen willen, binnen een jaer nae de publicatie van desen, deselve aenbrengen sullen den gerechte van de plaetse daer de goederen, ten hypoteecque gestelt, zijn ghelegen, omme aldaer volgende d'instructie die by de voorsz Staten daertoe sal worden ghemaeckt, aengheteeckent te worden, elcke constitutie voor eenen halve stuyver, op pene van te vervallen in een jaer renten, t'appliceren een derdendeel den hooftofficier, een derdendeel den armen van der plaetse ende het derde derdendeel den aenbrenger.*' In: De Blécourt and Japikse, *Klein Plakkaatboek*, p. 132. A small fee (*halve stuiver*) had to be paid to the Secretary. See for registration fees: Van Bochove, Deneweth, and Zuijderduijn, 'Real Estate and Mortgage Finance', pp. 15–6.

46 Plac. 22 December 1598, amended in 1612 in Cornelis Cau, *Groot placaet-boeck, vervattende de placaten, ordonnantien ende edicten van de Staten Generael der Vereenighde Nederlanden, ende van de Staten van Hollandt en West-Vrieslandt, mitsgaders vande Staten van Zeelandt, eerste deel* (The Hague: Van Wouw, 1658), XII-XIII, p. 1957, pp. 1960–3. Cf. Herman, *Het karakter*, p. 70.

47 *Amsterdamsche secretary*, 1: '*Schepenen-kennissen zyn in 't generaal alle Acten, die voor Schepenen verleden en gepasseert worden; maar gemeenlyk verstaat men daar door zodanige Schuld-kennisse, die, ter zake van geleende en verstrekte penningen, ten overstaan van Schepenen, gepasseert zyn.*' ('Schepenen-kennissen, in general, are all deeds that are executed and passed before aldermen; however, commonly understood by that are such debt acknowledgments that have been passed before Schepenen in relation to borrowed and lent money'). See also Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.40, pp. 471–3.

48 De Groot, *Inleiding*, 2.48.30, p. 105r.

hypothec.[49] However, in one of his opinions, Grotius argued that registration was not the '*substantia actus'* but was required to facilitate proof (*ad faciliorem probationem*). He added that if the registers or the deeds were accidentally lost, the creation of a right of hypothec could be proved by other means.[50]

A year after the publication of Grotius's *Inleidinge*, in 1632, the States of Holland amended the law by clarifying that registration was also mandatory for the creation of general rights of hypothec, under penalty of nullity of the right of hypothec. According to Voet, a general right of hypothec which was not registered awarded no priority to the secured creditor, not even over unsecured creditors.[51] If a lack of registration was due to a civil servant's negligence, the civil servant was liable for damages.[52]

The requirement of registration enabled magistrates to identify a tax base. From 1598 onwards, a tax was levied on the transfer of ownership of immovable assets, the so-called fortieth tax (*veertigste penning*), or 2.5 per cent of the worth of the transferred immovable.[53] From 1612 onwards, the same tax was levied on the creation of special rights of hypothec in immovables.[54] This meant that the parties had to pay 2.5 per cent tax over the secured claim.[55] The payment of the tax was required under penalty of nullity of the right of

49 De Groot, *Inleiding*, 2.48.23, p. 104r.

50 Joannes Naeranus, C*onsultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Naeranus, 1662), III, 173, p. 465 (6 May 1616). Cf. Fockema Andreae and Van Apeldoorn, *Inleidinge*, II, 2.48.30, p. 232.

51 Voet, *Commentarius* I, ad *Dig*. 20.1.10, p. 858.

52 Ibid., ad *Dig*. 20.1.11, p. 859.

53 Plac. 22 December 1598, in: Cau, *Groot placaet-boeck* (…) (1658), I, 1954 and 1961.

54 Ibid., 1954. See also Cornelis van Bijnkershoek, *Observationes tumultuariae*, ed. by E.M. Meijers et al. (Haarlem, 1926) I, 68, 23 (14 January 1705). It is should be noted that the preamble ot he plakkaat of 4 March 1599 states: '*Van schepenen kennissen ofte obligatien verleeden met speciale hypothèque van sekere sommen van penninghen te betalen op daghen, wordt verstaen dat den impost meede sal worden betaelt*.' ('In the case of Schepenkennissen or obligations passed with special rights of pledge for certain sums of money to be paid of certain days, it is understood that the tax shall also be paid'). *Verklaring* 4 March 1599, *Hollandts placcaet-boeck: begrijpende meest alle de voornaemste placcaten, ordonnantien ende octroyen* (Amsterdam, 1645), p. 253, and in: Cau, *Groot placaet-boeck* (…) (1658), I, 1963. This suggests that the fortieth penning was levied from 1599 for the creation of general rights of pledge. It is conceivable that this statement was changed when the plakkaat of 1612 came into force, but this change is not evidenced by the plakkaatboeken. No tax was levied when a transferor of an asset reserved a right of pledge at the moment of the transfer. See for this reservation of a right of pledge: Voet, *Commentarius* I, ad *Dig*. 20.1.11, p. 859.

55 Art I van Plac. 17 July 1632, in: *Hollandts placcaet*-boeck, 237; Voet, *Commentarius* I, ad *Dig*. 20.1.9, 858 '*van alsulcke penningen, als sij bij preferentie tegen andere crediteuren* (…) *sullen komen te ghenieten*'.

hypothec.[56] The creation of general rights of hypothec were similarly taxed from 1632.[57] If a secured creditor assigned the secured claim to a third party, the assignment was taxed too.[58]

A registered *schepenbrief* or *schepenkennis* automatically awarded priority to the creditor above all other creditors with regard to the proceeds of all of a debtor's assets, immovable and movable.[59] According to Grotius, a hypothec deed passed in the presence of three witnesses, or a notary and two witnesses was sufficient to create a right of hypothec in movables.[60] Despite the fact that he offered no explanation, it is likely that Grotius proceeded from the interpretation of a fifth century decree by the Roman Emperor Leo I (r. 457–474).[61] In 472 CE, Leo I awarded rights of hypothec which were created by means of public deeds priority over rights of hypothec that were created by other means.[62] Strictly speaking, Roman law required no written hypothec deed.[63] Gaius (1 *form. hyp.*) *Dig*. 20.1.4 pointed out that a written agreement

56 Plac. 22 December 1598, in: Cau, *Groot placaet-boeck* (...) (1658) I, 1957. See also Simon Groenewegen van der Made, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (Leiden: Moyard, 1649) ad I. 3,23,3. Cf. Fockema Andreae and Van Apeldoorn, *Inleidinge* II, 2.48.30, pp. 232–3.

57 Art. I van Plac. 17 July 1632, in: *Hollandts placcaet*-boeck, 237; Voet, *Commentarius* I, ad *Dig*. 20.1.9, 858; Joannes Loenius and Tobias Boel, *Decisien en observation* (Den Haag: Bouquet, 1735) XVII, 118.

58 Groenewegen van der Made, *Tractatus de legibus abrogatis*, ad *Dig*. 13.7.18; Cornelis van Bijnkershoek, *Observationes tumultuariae*, ed. by E.M. Meijers et al. (Haarlem, 1934), II, 1881 (27 October 1722).

59 See Van Waesberge and Schouten, *Handvesten; ofte privilegien ende octroyen; mitsgaders willekeuren, costuimen, ordonnantien en handelingen der stad Amstelredam* (Amsterdam, 1748), II, p. 530; Van Bijnkershoek, *Observationes tumultuariae*, II, p. 1879 (16 October 1722); Van der Keessel, *Voorlesinge*, ad. *Inleiding* 2.48.21, p. 431.

60 De Groot, *Inleiding*, 2.48.28, p. 104v.

61 See also Van der Keessel, *Voorlesinge*, ad. *Inleiding* 2.48.28, pp. 443–5; Lee, *Jurisprudence of Holland* II, pp. 212–4; Pos, *Hypotheek op roerend goed*, p. 154.

62 (C. 8,17,11,1). Cf. Nov. 73,1 (*Imp. Just.*).

63 Cf. Verhagen, *Security and Credit*, §6.5, pp. 199–205. In post-classical Roman law, a written agreement had another advantage compared to an oral agreement. In 472 CE, the emperor Leo I awarded pledges that were created by means of public deeds priority over pledges that were created by other means. Public deeds were prepared by a notary (*tabellio*) and sealed in the presence of witnesses. A written agreement that was signed by three respectable witnesses was put on par with public deeds (C. 8,17,11,1); cf. Nov. 73,1 (*Imp. Just.*); Frezza (n. 8), pp. 266–267; Kaser, *Das römische Privatrecht*, II, § 251, p. 318; Henricus L.E. Verhagen, 'Secured Transactions in Classical Roman Law', in *Roman Law and Economics*, ed. by Giuseppe Dari-Mattiacci and Dennis Kehoe, vol. II (Oxford: Oxford University Press, 2020), pp. 146–7.

facilitated proof of the parties' agreement. In the early modern period, however, Leo's decree was interpreted in the following manner: the sixteenth-century Netherlandish jurist Nicolaas Everaerts (1462–1532) argued that Leo's decree aimed to prevent fraud by means of backdating. As such, a private hypothec deed only offered proof between the parties and not against third parties.[64]

After the publication of Grotius's *Inleidinge,* the creation of a right of hypothec by means of a notarial deed was equally subjected to the payment of the 2.5 per cent tax over the value of the secured claim.[65] The States of Holland provided in 1665 that secured creditors had no priority over other creditors if they had not paid the 2.5 per cent tax over the value of the secured claim.[66] Furthermore, parties could not circumvent the restrictions on rights of hypothec by opting for a fiduciary transfer of ownership (see below). The fiduciary transfer was regarded as a security interest and the tax for the creation of security rights amounting to 2.5 per cent of the value of the secured claim was levied.[67]

Grotius's discussion of the contemporary requirements for the creation of rights of hypothec in a debtor's assets was an evident summary of existing local (or regional) statutory law. In Johannes Voet's commentary on Roman rights of hypothec, several references were made to Grotius's *Inleidinge* and his legal opinions. Voet particularly mentioned Grotius's discussion of local (customary) law (*mores Hollandiae ac vicinarum quarundam regionum*) which (often) deviated from Roman law.[68] The contemporary requirements for the creation of rights of hypothec were examples of such deviations.

64 Nicolaes Everaerts, *Responsa siue Consilia* (Leuven: Sassenus, 1554), XVIII, p. 70. See also Jacobus Butrigarius on C. 8,17,11,1.

65 Cau, *Groot placaet-boeck* (…) (1683), III, 1006; Voet, *Commentarius* I, ad *Dig*. 20.1.12, p. 859; *Amsterdamsche secretary*, p. 52; Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.28, pp. 443–7. See also Anton G. Pos, 'The Hoge Raad of Holland and Zeeland in the 18th Century and Chattel Mortgages (Transfer of Ownership as Security for Debt)', in *The Old Library of the Supreme Court of the Netherlands*, ed. by Joost G.B. Pikkemaat (Hilversum: Verloren, 2008), p. 85.

66 See Voet, *Commentarius ad Pandectas*, I, ad *Dig*. 20.1.10, 858; Van der Keessel, *Voorlesinge oor die hedendaagse reg*, III, ad *Inleiding* 2.48.23, 433, ad *Inleiding* 2.48.28, 445, and ad *Inleiding* 2.48.40, 473.

67 Naeranus, *Consultatien*, III, 147, 426; Van Bijnkershoek, *Observationes tumultuariae*, II, 1485 (27 October 1718). See also Pos, *The Hoge Raad*, p. 86.

68 Voet, *Commentarius*, I, ad *Dig*. 20.1.9; 20.1.10; 20.1.12; 20.1.13; 20.1.14; 20.1.16; 20.2.3; 20.2.7; 20.2.9; 20.2.27–31; 20.4.3–4; 20.4.9; 20.4.18; 20.4.28.

5 The Right to Follow Encumbered Immovables into the Hands of Third Parties

Despite the comprehensive reception of Roman law in general, Roman-Dutch legal practitioners and scholars were reluctant to adopt all legal effects that ensued from a Roman right of hypothec. Especially the secured creditor's right to follow (or trace) encumbered assets in the hands of third parties was not recognised (in its entirety). Grotius explained that a general right of hypothec only affected the assets as long as they belonged to the debtor (or his or her heirs).[69] If an asset was transferred for consideration (*om baat*), the right of hypothec was extinguished.[70] If the asset was transferred gratuitously, however, the asset remained encumbered by the general right of hypothec. Van der Keessel explained that this prevented the transferee from receiving a profit to the detriment of the secured creditor.[71] The absence of the right to follow generally hypothecated assets was foremost aimed at protecting third-party purchasers. Someone who paid a purchase price for an asset should not be confronted by a seller's creditor whose claim was secured with a general right of hypothec. The purchaser was protected because he provided a purchase price that replaced the transferred immovable asset.[72] The seller could use the purchase price to satisfy his creditors. A third party who did not pay for the acquisition was not protected against secured creditors because he was enriched at the expense of the (secured) creditors.[73] A special right of hypothec in immovables awarded the right to follow whether or not the third party paid for the asset.[74]

In one of his opinions, Grotius distinguished between a transfer of a hypothecated asset and the creation of a servitude in a hypothecated asset. He argued that the servitude was enforceable against the secured creditor and

69 De Groot, *Inleiding*, 2.48.24, p. 104v.

70 De Groot, *Inleiding*, 2.48.24, p. 104 verso; See also Voet, *Commentarius* I, ad *Dig*. 20.1.14, p. 861; Naeranus, *Consultatien*, IV, 319, p. 578 (6 July 1656); Groenewegen van der Made, *Tractatus de legibus abrogatis* ad C. 4.10.14.2; Van Leeuwen, *Het Rooms-Hollands-Regt* (1664), 4.13.19, pp. 32–3; Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.24, p. 439, and ad *Inleiding* 2.28.24, p. 439; Van Bijnkershoek, *Observationes tumultuariae*, II, 1276 (28 September 1716); Heleen C. Gall, *Regtsgeleerde decisien Ockers* (Amsterdam: Cabeljauwpers, 2002), *dec*. 19, pp. 126–7.

71 Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.24, p. 439, and ad *Inleiding* 2.28.24, p. 439.

72 Voet, *Commentarius* I, ad *Dig*. 20.1.14, p. 861.

73 Voet, *Commentarius* I, ad *Dig*. 20.1.14, p. 861.

74 See Voet, *Commentarius* I, ad *Dig*. 20.1.13, p. 860; Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.28.32, p. 454.

referred to a.o. Bartolus (1313–1357) to substantiate his view.[75] Grotius explained that a pledgor remained the owner of an asset if he encumbered it with a right of hypothec and could thus still create other limited real rights in that asset. The *actio hypothecaria* was of no use to the secured creditor to bring against the owner of the dominant estate, since this action was only effective against the possessor of the charged asset. Despite the fact that the encumbered asset's value had decreased because of the creation of the servitude, the secured creditor could only have the contract from which the servitude ensued voided if he was able to prove that the contract caused prejudice (*in fraudem*) to the secured creditor and the parties to the contract had been aware of the debtor's insolvency.[76]

6 *Mobilia Non Habent Sequelam* and the Requirement of Consideration

Hypothecated movables could not be traced into the hands of third parties, if the pledgor transferred ownership. This rule was often referred to by the legal maxim *mobilia non habent sequelam* or *roerend goed heeft geen gevolg van hypotheek*. Nicolas Bohier (1469–1539) and Pierre Rebuffi (1487–1557) believed the explanation for this rule – which was also applied in France – was that possession of movables was of little value and worthless (*quia rerum mobilium possessio vilis & abiecta est*).[77] They both referred to to *Dig*. 41.2.47 (Papinianus *26* quaestionum) in which Papinian made it clear that possession of movables was relatively easily lost compared to the possession of immovables.[78] Rebuffi added that more costs would be incurred in the pursuit of movables than they are worth (*plus sumptuum fieret in perfecutione, quàm valerent*).[79] Charles Loyseau (1564–1627) noted that movables did not have as permanent and stable a 'subsistence' as immovables and that movables could easily and

75 Grotius refers to Bartolus who wrote that an addition or subtraction of quality to the asset does not extinguish the mortgage (*addiditio vel detractio qualitatis circa rem, non extinguit hypothecam*), ad *Dig*. 20.1.16.2 (*si fundus § si res*).

76 *Consultatien, advisen en advertissementen, gegeven en geschreven by verscheyden treffelijcke rechtsgeleerden in Holland en elders* (Rotterdam: Naeranus, 1662), III, nr 216, p. 564.

77 Nicolas de Bohier, *Consuetudines Bituricenses* (Paris: Foucher, 1543) *Des coustumes concernans hypotheque, a de suyte d'hypotheque*, fol. LVIr; Petrus Rebuffus, *Commentarii in constitutiones* (Lyon: Sennetonios Fratres, 1550), *Tract. de literis obligata*, art. 4, *glossa* 2, nr 38, p. 122.

78 Papinian discussed the loss of possession when a depositary or borrower refuses to give the asset back to the depositor or lender.

79 Rebuffus, *Commentarii*, *Tract. de literis obligata*, art. 4, glossa 2, nr 38, p. 122.

without inconvenience be handed over to a creditor.[80] He also mentioned that the rule protected commercial practice as it prevented secured creditors from recovering a pin or a grain of corn (*d'une espingle, d'un grain de bled*) from someone who had acquired it from the debtor.

In his *Inleidinge*, Grotius noted that a right of hypothec ended after a transfer pursuant to a legal basis (*wettige titule*).[81] The requirement of a '*wettige titule*' was identical to the local law of Leiden.[82] In the annotations to a new draft of his introduction, which were published more than 300 years after his death, Grotius remarked that a legal basis could be either a valid title for the transfer of ownership or a hypothec agreement.[83] He also added that it was required that the legal basis was for consideration (*requiritur ut titulus sit onerosus*) and he referred to a case in which he had given a legal opinion.[84] This happened in an Amsterdam case in 1632 (published in 1662), where twenty lawyers confirmed the rule that a right of hypothec was extinguished when a movable was transferred 'to a third party pursuant to any legal basis for consideration' (*aan een derde bij eenig tijtel onereux*). In the abstract to this opinion, the publisher, Naeranus noted that this requirement was not only applied in Amsterdam, but also in the rest of Holland and other states.[85] Some eighty years before the publication of Grotius's *Inleidinge* and his opinions, Pierre Rebuffi (1487–1557) pointed out that the rule *mobilia non habent sequelam* did

80 Charles Loyseau, *Cinq livres du droit des offices* (Chateuadun: Angelier, 1610) 3.5, p. 335.

81 De Groot, *Inleiding*, 2.48.29. In 2.48.17, Grotius possibly discussed an exception to the main rule *mobilia non habent sequelam* with regard to the hypothec of a lessor over the assets that the lessee brought with him into the leased property (*invecta et illata*) as security for the rent. If the lessee removed these movable assets from the leased property, the lessor could recover these movable assets if he acted immediately (*dadelick*). De Groot, *Inleiding*, 2.48.17, p. 104r. Cf. Lee, *Jurisprudence of Holland*, II, p. 209. It is unclear, however, if the lessor could recover these assets only from the lessee or any other person and thus whether or not this was an exception to the main rule *mobilia non habent sequelam*. Van der Keessel mentioned the local laws of Leiden where the lessor could attach these movables which were in the hands of a third party. See: Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.17, p. 427.

82 See *Kenningboek der stad Leiden 1553–1570*, ed. by Anne S. de Blécourt and Jacob J.A. Wijs (Utrecht: Broekhoff, 1936) §383b, p. 195.

83 Dovring, Fischer and Meijers, *Inleidinge,* ad 2.48, p. 190.

84 Joannes Naeranus, C*onsultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Naeranus, 1662), III, 174, pp. 466–70 (26 February 1632).

85 Joannes. Naeranus, C*onsultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Naeranus, 1662), III, 174, 466, nr 1. The consulted lawyers also discussed that the transferee had to have *bona fide* possession of the transferred assets.

not apply if the movable was transferred gratuitously, since such a transfer was fraudulent (*titulo lucrativo in fraudem*).[86]

In a different opinion which was published in the *Hollandse Consultatien*, Van Assendelft explained that the rule '*roerend goed heeft geen gevolg*' aimed to protect commerce.[87] According to Van Leeuwen, a 'sufficient title' (*behoorlijke tijtel*), in other words, any legal basis for the transfer of ownership, was sufficient.[88] Voet expressly mentioned that it was irrelevant whether or not the movables were transferred for consideration or gratuitously.[89] Van der Keessel concurred and added that a secured creditor could only recover hypothecated assets if the transferee had knowledge of prejudice to creditors.[90]

The requirement that a transferee had to offer consideration in order to be protected against non-possessory rights of hypothec was eventually adopted in South Africa.[91] In the case Cooper NO en andere v die Meester- en 'n ander, judge Joubert referred to Grotius's *Inleidinge*, Van Leeuwen and Van der Keessel, despite the fact that they did not argue that a title for consideration (*titulo oneroso*) was required.[92] Remarkably, the judges could have mentioned the law of Amsterdam where a title for consideration was required, the customary law on which Grotius had given his opinion.

Grotius acknowledged the Germanic influence on the rule *roerend goed heeft geen gevolg* by inserting a reference to the German Sachsenspiegel

86 Petrus Rebuffus, *Commentarii in constitutiones* (Lyon: Sennetonios Fratres, 1550), *Tract.de literis obligata*, art. 4, glossa 2, nr 39, p. 122. Rebuffi referred to Bohier and Negusantius. Bohier discussed a transfer *in fraudem* in general but not the gratuitous transfer in particular. Nicolas de Bohier, *Consuetudines Bituricenses* (Paris: Foucher, 1543) *Des coustumes concernans hypotheque, a de suyte d'hypotheque*, fol. LVIv. Negusantius also did not discuss the gratuitous transfer by the debtor. He deals with the case in which the secured creditor enforces his right of pledge and sells the pledged asset to a third party and agrees with the buyer that the debtor can redeem the asset if he offers to repay the buyer. Negusantius remarks that the debtor could not bring an action against the buyer, unless the secured creditor assigned his *actio venditi* to the debtor. If a sale of pledged assets was fraudulent, the debtor could only bring an action against the secured creditor who sold the assets. Negusantius 1549 Pars VII, *membrum* II, nr 6.

87 Van Assendelft in Joannes Naeranus, *Consultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Naeranus, 1660), IV, 319, 578 (6 July 1656).

88 Simon van Leeuwen, *Het Rooms-Hollands regt* (Amsterdam: Boom 1676), 4.13.19, pp. 353–4.

89 Voet, *Commentarius* I, ad *Dig*. 20.6.6, p. 917. Cf. Pos, *Hypotheek op roerend* goed, p. 153.

90 Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.25, 441, and ad *Inleiding* 2.48.29, p. 449.

91 Francis v Savage and Hill (1881–1884)1 SAR TS 33; Hare v Trustee of Heath (1884–1885) 3 SC 32; Cooper NO en andere v Die Meester en 'n ander [1992] 2 All SA 20 (A).

92 '*Die saaklike sekerheid wat 'n generale verband aan 'n verbandhouer verleen, verdwyn indien die verbandgewer die beswaarde roerende of onroerende sake aan 'n verkryger titulo oneroso sou vervreem.*'

(11,60) in his private annotations on this rule.[93] Unlike Roman law and many modern continental approaches to property law, Germanic law made no real distinction between ownership and possession.[94] In Roman law, the most comprehensive right in a movable thing was ownership (*dominium*). Ownership was protected by an action, the so-called *reivindicatio*. The owner could bring this action against any possessor to recover the thing. A possessor was someone who had control over the thing (*corpus*) and had the intention to retain the thing for himself (*animus possidendi*). A possessor was distinguished from a detentor, someone who had factual control over the thing on behalf of someone else (the possessor) and thus lacked the intention to retain the thing for himself. Pursuant to Germanic law, a person who had actual control over an asset had *Gewere* or *seisin*. The *Gewere* was protected against any interference. From a Roman law perspective, even a *detentor* had *Gewere*. If someone who had *Gewere* voluntarily handed over the asset to someone else, *Gewere* was transferred to that person, even if that person was supposed to give it back at one point. If this 'holder' transferred *Gewere* to a third party, the original possessor only had an action against his counterparty (the holder) for breach of contract. He could not bring an action against the third party. This effect is sometimes described by the legal maxim *Hand wahre Hand* or 'let hand indemnify hand'.[95] After the reception of Roman law, the legal maxim *mobilia non habent sequelam* ('movables cannot be followed') was used to describe this Germanic lack of third-party effects as opposed to Roman law.[96]

Grotius, however, understood that the rule *roerend goed heeft geen gevolg* could not exclusively be attributed to the influence of Germanic law and he pointed to Roman law as well. In his private annotations, Grotius referred to a *quaestio*, a subject of contention in a scholarly debate, by Tommaso Grammatico (1473–1556).[97] Grammaticus raised the question whether or not a creditor whose claim was secured by a general right of hypothec could recover charged money (*pecunia*) from a third party. The third party was, however, a creditor whose claim was paid by the debtor with hypothecated money *and* who had already spent the money. Grammaticus discussed the various

93 Dovring, Fischer Meijers, *Inleidinge*, ad 2.48, p. 191.

94 Possession was protected by legal remedies (*interdicta*), but a possessor would generally have to hand over the thing to the owner of the thing.

95 Rudolf Hübner, *Grundzüge des deutschen Privatrechts* (Leipzig: Deichert, 1930), p. 433–53; D. Deroussin, *Histoire du droit privé* (*XVIe–XXIe siècle*) (Paris: Ellipses, 2010), nr 418.

96 Willem J. Zwalve and Adriaan J.B. Sirks, *Grundzüge der europäischen Privatrechtsgeschichte* (Wien: Böhlau, 2012), p. 427.

97 *Decisiones sacri regii consilii Neapolitani per D. Thomam Grammaticum* (Venice: Dominicus Lilius, 1557), *quaestio* I, fol. 254r-255v.

diverging opinions on the matter by – among others – Bartolus de Saxoferrato (1313–57) and Baldus de Ubaldis (1327–1400). The general rule of Roman law was that rights of hypothec could encumber money and were enforceable against third parties. Grammaticus, however, referred to Matthaeus de Afflictis (c1447–1523) who had argued that adhering to the general rule could lead to many legal disputes across the whole world (*totus mundus esset in litibus*). Moreover, it would be detrimental to trade, as tradesmen would stop and lose trade (*mercatores cessarent & amitterent commercium*). Grammaticus explained that under Roman law a payment to a creditor whose claim was due and payable was valid, even if the debtor had more creditors. This was an application of the legal maxim that civil law protects the vigilant and not the dormient (*quia vigilantibus & non dormientibus*).[98] Such a (selective) payment could only be rescinded in specific cases where other creditors were prejudiced by it.[99] Grammaticus was of the opinion that the secured creditor could no longer bring an action based on hypothec against the creditor who received payment because he had spent the money.[100] He compared this case to Dig. 12,1,31,1 (Paulus *ad Plautium 17*) where an owner could no longer bring a *reivindicatio* against someone who spent his money (that was part of his slave's *peculium*). The owner had lost ownership (*dominium*) the moment the money was spent. According to Paul, however, the owner could recover money which was not spent. Grammaticus argued that the secured creditor similarly lost his right of hypothec when the money was spent. He added that the secured creditor could bring an action (*in personam*) against the other creditor if the latter had received the money *ex causa lucrativa*, for example if the payment was actually a gift.[101]

Other sources of Roman law illustrate a similar outcome. For example, the jurist Scaevola argued that a hypothec of a shop (*taberna*) resulted in a hypothec of all assets on the debtor's premises at the time of his death.[102] Accursius and Bartolus believed that the Roman jurists regarded the hypothec of a *taberna* as a special right of hypothec in one particular asset, the *taberna*.

98 *Decisiones sacri regii consilii*, quaestio I,2, fol. 254v Cf. *Dig*. 42.8.24 (*Scaevola quaestionum publice tractatarum*) (…) *ius civile vigilantibus scriptum est.* (…).

99 See also Johan A. Ankum, *De geschiedenis der 'actio Pauliana'* (Tjeenk Willink: Zwolle, 1962), pp. 131–4.

100 *Decisiones sacri regii consilii*, quaestio I,6, fol. 255r.

101 Ibid.

102 *Dig*. 20.1.34*pr* (Scaevola *27 digestorum*). Cf. Fritz Sturm, 'Exegese von Scaevola *Dig*. 20,1,34pr., JuS 1962, 427 ff', in *Die rechtsgeschichtliche Exegese*, ed. by H. Schlosser, F. Sturm and H. Weber (München: C.H. Beck, 1993), pp. 40–43; Vincent J.M. van Hoof, 'The 'Generalis Hypotheca' and the Sale of Pledged Assets in Roman Law', *Tijdschrift voor Rechtsgeschiedenis* 85, nrs 3–4 (2017), p. 490.

In this view, the *taberna* itself was an ever-changing group of things which were treated as a whole.[103] Even if the contents of the shop were replaced, it was still seen as a shop. Assets which were sold, were no longer part of the shop and thus no longer encumbered.[104] By referencing to the abovementioned *quaestio* by Grammaticus, Grotius demonstrated he was aware that Roman law did not always allow a secured creditor to recover charged assets from a third party.

7 *Mobilia Non Habent Sequelam* and Fiduciary Transfer of Ownership

The application of the rule *roerend goed heeft geen gevolg* played an important role in an opinion by Grotius on an alternative way to create a security in movables. In addition to rights of hypothec, the law of Amsterdam recognised the transfer of ownership as a security right in movable assets, a concept also known in (classical) Roman law as *fiducia cum creditore*.[105] This entailed that the debtor transferred ownership of an asset to the creditor to secure the performance of an obligation. If the creditor's claim was satisfied, the creditor was under the obligation to transfer the asset back to the debtor. The well-known collection of legal opinions entitled the *Hollandsche Consultatien* provide several examples of this practice.

In the case of Grotius's abovementioned opinion of 1632, the secured creditors were pupils (*weeskinderen*) who had a right of hypothec in their tutor's (*voogd*) assets.[106] This right of hypothec was an implied right of hypothec since it was created by operation of law and secured the pupils' claims on the tutor regarding the management of the pupils' estate. Subsequently, the tutor transferred ownership of his movables to his creditor, a wealthy businessman called Bartolotti.[107] The transfer was evidenced by a notarial deed. The assets were delivered by means of constructive delivery, which means that the tutor kept direct physical control (*detentio*) over the assets. According to Bartolotti, the assets were no longer encumbered by the pupils' right of hypothec, since

103 Cf. *Dig*. 7.1.70.3 (Ulpianus *17 ad Sabinum*); *Dig*. 41.3.30*pr* (Pomponius *30 ad Sabinum*) and *Dig*. 20.1.13*pr* (Marcianus *ad formulam hypothecariam*).

104 Negusantius disagreed and argued that each and every asset in the shop was pledged and that the parties had agreed that assets were no longer encumbered when the debtor sold the assets in his ordinary course of business. See Negusantius, *De pignoribus*, *pars* II, *membrum* II, nrs 19–24, pp. 9r-v.

105 The Institutes of Gaius II, 60.

106 In Naeranus, *Consultatien*, III, 174, 466–70 (26 February 1632). See also Vincent J.M. van Hoof, 'Waakzaamheid en artikel 3:90 lid 2 BW', *WPNR* 6896 (2011), pp. 633–640.

107 Also known as Willem van den Heuvel tot Beichlingen, the first owner of the so-called Huis Bartolotti, situated on the Herengracht 170–172 in Amsterdam.

movables could not be traced into the hands of third parties (*mobilia non habent sequelam/ roerend goed heeft geen gevolg van hypotheek*). The twenty lawyers that were consulted on the customary law of Amsterdam by means of a *turbe*, confirmed that a right of hypothec was also extinguished when a transferor held the assets in his hands *precario* and transferred ownership by means of constructive delivery to a transferee.[108]

Having been asked for a legal opinion on this matter, Hugo de Groot remarked that the legal maxim that *meuble geen vervolg van hypotheecq en geeft*, did not apply, since the debtor still had physical control over the transferred assets.[109] The constructive delivery where the debtor granted possession by mere contract was insufficient to trigger the maxim.[110] Grotius argued that the local custom had to be interpreted in a strict manner (*in strictis terminis*) and used two arguments to substantiate his view. Firstly, the customary law deviated from Roman law and should therefore be interpreted in a strict manner. Secondly, the broad interpretation of the custom would have been detrimental to the pupils' implied right. Grotius even remarked that he considered this practice of fiduciary transfer of ownership with a constructive delivery suspect of simulation and collusion.[111] He added that the pupils could have the transfers without actual delivery voided if those transfers caused prejudice to the pupils and the transferee knew the tutor's immovable assets were insufficient to satisfy the pupils' debts.[112]

Van Leeuwen and Boel, however, accepted the interpretation of the customary law by the *turbe* and only referred to Grotius's opinion because it detailed the *turbe*.[113] South African legal doctrine, however, progressed from

108 Joannes Naeranus, *Consultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Naeranus 1662), III, 174, p. 468, nr 2.

109 Cf. Lee, *Jurisprudence of Holland* II, p. 211; Pos, *Hypotheek op roerend goed*, p. 164, fn. 4.

110 Cf. Bartholomaeus Chasseneux who articulated the maxim as: '*Meubles n'ont point de suyte en hypothecque, quand ilz sont mis hors de la puissance du debteur à qui estoyent lesdictez meubles.*' Bartholomaeus Chasseneux, *Consuetudines Ducatus Burgundiae* (Lyon: Vincent, 1552), p. 827. This suggests that the pledged assets should leave the hands of the debtor.

111 '*suspect van simulatie en collusie*'.

112 See also Bohier who discussed that the maxim did not apply if an asset was transferred *in fraudem*. Nicolas de Bohier, *Consuetudines Biturícenses* (Paris: Foucher, 1543) *Des coustumes concernans hypotheque, a de suyte d'hypotheque*, fol. LVIv.

113 Van Leeuwen, *Het Rooms-Hollands regt* (1676), 4.13.19, pp. 353–4; Joannes Loenius and Tobias Boel, *Decisien en observatien* (The Hague: Bouquet, 1735) L, p. 324. Cf. J.H.A. Lokin, C.J.H. Jansen and F. Brandsma. *Roman-Frisian Law of the 17th and 18th Century* (Berlin: Duncker & Humblot, 2003), pp. 109–14.

Grotius's opinion.[114] In the case Coaton vs. Alexander of the Supreme Court of the Cape of Good Hope, judge C.J. de Villiers called Grotius 'the greatest lawyer of all time' and discussed the opinion as follows: 'I find that Grotius there qualifies this doctrine by stating that where a purchaser obtains articles with a knowledge that they had been hypothecated, he has no greater right in regard to the pledged articles than the pledger himself; he stands in exactly the same position.'[115] In other words, a third party was not protected against a right of hypothec in movables if he knew that the asset was charged. The rule *mobilia non habent sequelam* did not apply.

Despite Grotius's reservations against the security transfer, Joannes Ravens (Corvinus) considered the fiduciary transfer of ownership as a valid transfer and effective in a debtor's insolvency in a different case of 1642.[116] Title transfer as a security right was also recognised by the Dutch Supreme Court.[117] It was an alternative to a right of hypothec. Grotius discussed the fiduciary transfer of ownership as a security right in movable assets in two more legal opinions. In the second (and undated) opinion, someone borrowed money from a lender and transferred (ownership of) movables (annuity bonds) to the lender. They agreed upon a so-called *pactum antichreseos*.[118] This contractual clause allowed the creditor to use the transferred asset and draw its fruits, in lieu of something else. The value of the asset's use and fruits had an interest function, since it came in lieu of interest. In his *Inleidinge*, Grotius discussed

114 See on the doctrine of notice (*kennisleer*): Natania Locke, 'Security Granted by a Company over its Movable Property: The Floating Charge and the General Notarial Bond Compared', *The Comparative and International Law Journal of Southern Africa*, 41–1 (March 2008), p. 146, fn. 45 with references.

115 *Cases Decided in the Supreme Court of the Cape of Good Hope* (1879), vol. IX, reported by Ebenezer J. Buchanan (Cape Town: Juta, 1894), pp. 17–22.

116 Joannes Naeranus, *Consultatien*, II, 315, 630. It should be noted that these two documented legal opinions by Grotius (in 1632) and Corvinus (in 1642) coincided with the period of Amsterdam's reluctance to accept notarial deeds of pledge. See Van Waesberge and Schouten, *Handvesten*, II, 535. See also Pos, *Hypotheek op roerend goed*, p. 161; Vincent J.M. van Hoof, 'The Involvement of the City's Aldermen in Shaping the Law of Secured Credit', forthcoming.

117 Cornelis van Bijnkershoek, *Observationes tumultuariae*, ed. by E.M. Meijers et al. (Haarlem, 1946), III, 2823 (17 February 1734); See also Jan H.A. Lokin, 'De spagaat van de Hoge Raad: Eigendom en zekerheid', in *Fiduciaire verhoudingen*, ed. by N.E.D. Faber et al. (Deventer: Kluwer, 2007), pp. 151–3; Anton G. Pos, 'The Hoge Raad of Holland and Zeeland in the 18th Century and Chattel Mortgages (Transfer of Ownership as Security for Debt)', in Joost G.B. Pikkemaat (ed), *The Old Library of the Supreme Court of the Netherlands* (Hilversum: Verloren, 2008), pp. 83–103.

118 Joannes Naeranus, C*onsultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Naeranus, 1662), III, 147, p. 426.

this agreement as the hypothec agreement '*Van Pand-geving'* of both movable and immovable assets.[119] According to Grotius, the fruits which exceeded the customary rate of interest had to be subtracted from the original amount of the loan.[120] Grotius's opinion on fruits exceeding the customary interest rates, however, was not unique. His contemporary, Paul van Christijnen (1553–1631) took a similar view.[121]

Furthermore, Grotius remarked that the disputed agreement was in fact a hypothec agreement, despite the fact that the parties had mentioned a transfer (of ownership). He came to this conclusion because the parties opted for terminology commonly used to describe a hypothec agreement, such as 'to secure (*verseekeren*)', 'to satisfy and to redeem (*te quiten en te lossen*)'. In his third opinion on a similar fiduciary transfer, Grotius argued: 'since that which is done must prevail over that which is simulated.'[122] This was a clear reference to the twenty-second title of the fourth book of the Codex of Justianian which bears the title '*plus valere quod agitur quam quod simulate concipitur*'. Grotius's interpretation of the agreement as a hypothec agreement meant that the rules on the creation of rights of hypothec applied, such as the obligation to pay the fortieth penning (2.5 per cent tax) over the secured claim.[123] Similarly, in the eighteenth century, the fiduciary transfer was treated as a right of hypothec in the grantor's insolvency.[124]

8 The Enforcement of Rights of Hypothec and Priority

The final part of Grotius's discussion of rights of hypothec in the *Inleidinge* concerns the enforcement of rights of hypothec and the rules to determine the priority of various secured creditors. The enforcement of rights of hypothec was essentially in accordance with Roman law, since a secured creditor had to have

119 De Groot, *Inleiding*, 3.8, p. 124r-124v.

120 See also: Bobbink, *Antichresis en pandgebruik,* §4.1.2, p. 132 and §4.2.4, p. 143.

121 See with references; Wouter Druwé, *Loans and Credit in Consilia and Decisiones in the Low Countries* (c. 1500–1680) (Leiden: Brill Nijhoff, 2020), pp. 235–6.

122 Joannes Naeranus, C*onsultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Naeranus, 1662), III, 177, p. 474: *cum praevalere debeat id quod agitur, ei, quod simulatur*. In a different opinion, the Amsterdam lawyer Hercules Roch (1598–1648) had written that 'in establishing whether or not a thing is sold as a pledged object, one must look at what is meant, not at what was written.' See also *Hollandsche consultatien*, III, nr 9, p. 24: '*Emptione pignoris causa facta, non quod scriptum, sed quod gestum est, inspicitur*.'

123 *Hollandsche consultatien*, III, nr 147, p. 426.

124 Van Bijnkershoek in his *Observ*. II, 1485 (27 October 1718).

the charged assets sold at a public auction and was not allowed to appropriate the encumbered asset.[125] Early modern law, however, required that the sale was supervised by the court. Grotius did not, unfortunately, go into detail how the public execution should take place. Grotius is said to have envisaged a fourth book as part of his *Inleidinge* on procedural law, but he lacked time to write this part due to his escape from Loevestein.[126] His contemporaries probably relied on Merula's book on court proceedings, *Maniere van procedeeren in dese provintien* (Amsterdam 1592), as Grotius himself suggested this book in a letter to his brother Willem de Groot.[127] The options for summary execution were debated and developed after Grotius's time.[128]

If a specifically hypothecated immovable asset was in the hands of a third party, the secured creditor could recover the asset to enforce his right of hypothec and was under no obligation to take recourse against the debtor or his heirs first.[129] Even if the charged asset was divided into smaller units and transferred to different parties, every smaller unit remained encumbered by the right of hypothec.[130] Sureties were treated differently, as Grotius pointed out: 'It has been established in Holland and practised since times of old, in opposition to the Roman Law, that those who have been sureties for a debt for which a hypothec has been given, may not be cited in law, and condemned before the discussion of the hypothec, but only after the discussion to the extent which the creditor might fall short, even although the hypothec were in the hands of a third party, unless it were otherwise expressly stipulated.'[131]

Subsequently, priority and the application of the rule of 'special ranks before general' were discussed.[132] In 1580, the States of Holland decreed that later conventional special rights of hypothec in immovables awarded priority over

125 De Groot, *Inleiding*, 2.48.41, p. 105v.

126 Wellschmied, *Zur Inleidinge*, p. 390.

127 Robert Fruin, 'Geschiedenis der Inleidinge tot de Hollandsche Rechts-Geleerdheid, gedurende het leven des auteurs', in Hugo de Groot, *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (Gouda: Quint 1895), p. 7. This book was also a part of Grotius's own collection. See Molhuysen, *De bibliotheek*, p. 62.

128 See Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.41, 473–475; Lee, *Jurisprudence of Holland*, II, p. 219. The topic of summary execution was recently discussed by Van Hoof, De ruysscher and Kotlyar. See Van Hoof, *Generale zekerheidsrechten*, p. 90–1; Dave De ruysscher and Ilya Kotlyar, 'Local Traditions v. Academic Law: Collateral Rights on Movables in Holland (c. 1300–c. 1700)', *Tijdschrift voor Rechtsgeschiedenis* 86–2 (2018), 365–403.

129 De Groot, *Inleiding*, 2.48.32, p. 105r. Cf. Negusantius, *De pignoribus*, *membrum* I, *pars* I, nr 7, 2v., and Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.32, pp. 455–7.

130 De Groot, *Inleiding*, 2.48.42, p. 105v.

131 De Groot, *Inleiding*, p. 3.3.32, p. 117r.

132 De Groot, *Inleiding*, 2.48.34, p. 105r.

earlier conventional general rights of hypothec.[133] This exception to the *prior tempore* rule is usually referred to as '*bijzonder gaat voor algemeen*' or 'special ranks before general'.[134] The special right of hypothec only provided priority over general rights of hypothec with regard to immovables. The priority rule still applied to rights of hypothec regarding the distribution of the proceeds of *movables*.[135] Grotius also discussed the way in which Amsterdam deviated from the rule of 'special ranks before general' by applying the *prior tempore* rule.[136] Implied (or legal) general rights of hypothec were treated as special rights of hypothec.[137]

According to the burgomaster, aldermen, and council of Amsterdam, the introduction of the rule of 'special ranks before general' led to 'various disputes, legal proceedings and misunderstanding' in the city of Amsterdam.[138] They argued that the *prior tempore* rule was beneficial to trade and they successfully asked the States of Holland for permission *not* to apply the rule 'special ranks before general' in Amsterdam.[139] The city's officials suggested that they placed the interests of the prior secured creditor upfront. Subsequent creditors could only get lower-ranking rights of hypothec but had access to information regarding prior rights of hypothec. Priority only ensued from rights of hypothec if the hypothec deed was registered in public registers of the town where the charged immovables were situated.[140] This enabled posterior creditors to make

133 Art. 35 of the *Politieke Ordonnantie van de Staten van Holland* of 1580 in De Blécourt and Japikse, *Klein Plakkaatboek*, p. 132.

134 De Groot, *Inleiding*, 2.48.34, p. 105r; Van Leeuwen, *Het Rooms-Hollands-Regt* (1664), 4.13.18, p. 322; Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.24, p. 439, and ad *Inleiding* 2.48.34, p. 459.

135 See on the priority of secured creditors regarding movables: Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.44, pp. 483–513; Van Hoof, *Generale zekerheidsrechten*, §4.6.2.

136 De Groot, *Inleiding*, 2.48.38, p. 105v. See: Vincent J.M. van Hoof, 'The Involvement of the City's Aldermen in Shaping the Law of Secured Credit'(forthcoming).

137 De Groot, *Inleiding*, 2.48.36, p. 105r and Grotius's letter to Willem de Groot of 27 October 1623, Molhuysen, *Briefwisseling*, nr 855, url: http://grotius.huygens.knaw.nl/letters/0855; Joannes Naeranus, C*onsultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (Naeranus 1662), III, 202, 539. Van der Keessel, *Voorlesinge*, ad. *Inleiding* 2.48.24, p. 439, and ad *Inleiding* 2.48.36, pp. 463–5.

138 '*verscheyden questien, processen ende misverstant.*', in: *Octroy* 18 March 1594 in *Hantvesten priuilegien willekeuren ende ordonnantien der stadt Aemstelredam* (s.l., 1613), p. 95.

139 Plac. 8 May 1594, in: Cau, *Groot placaet-boeck* (…) (1664), II, 2211. Cf. Van Leeuwen, *Het Rooms-Hollands-Regt* (1664), 4.13.18, p. 322; Groenewegen van der Made, *Tractatus de legibus abrogatis* ad C. 4.10.14.3; Van der Keessel, *Voorlesinge,* ad *Inleiding* 2.48.24, p. 439, ad *Inleiding* 2.48.38, p. 467, and ad *Inleiding* 2.48.40, pp. 469–71.

140 Art. 37 of the *Politieke Ordonnantie van de Staten van Holland* of 1580 in: De Blécourt and Japikse, *Klein Plakkaatboek*, p. 132.

an exposure assessment and to contact creditors with prior rights of hypothec in order to negotiate the terms for a contractual change in priority.

Rights of hypothec were extinguished in the same manner as in Roman law, that is by payment or satisfaction of the secured debt, express or implied waiver, permission to transfer the encumbered asset or to hypothec the object to another creditor, if the charged object ceases to exist, by lapse of time if the parties agreed on such a time limit, prescription of thirty years if the object is in the hands of a third party, or forty if it is in the hands of the debtor (or his heirs).[141]

9 Grotius's (Limited) Influence on the Security Rights in the Netherlands

Eminent scholars from the seventeenth and eighteenth century, such as Simon van Leeuwen and Johannes Voet, often referred to Grotius's writing on security rights. Simon van Groenewegen van der Made (1613–1652) supplemented Grotius's *Inleidinge* with references to Roman law and contemporary sources and he frequently referred to Grotius (and his own comments contained therein) in his treatise on abrogated laws.[142] Simon van Leeuwen's *het Rooms-Hollands-Regt* was clearly influenced by Grotius's work and particularly by his *Inleidinge*. In the introduction to this book, Van Leeuwen expressly praised Grotius's *Inleidinge*. *Het Rooms-Hollands-Regt* was one of the first comprehensive works on Roman-Dutch law in Dutch after Grotius's *Inleidinge*.[143] Van Leeuwen similarly drew inspiration from Justinian's digest and used the same Dutch translation of hypothec as Grotius, *ondersettinge* in the chapters on rights of hypothec.[144] He similarly used the different sources of law to discuss the law of Holland. Apart from this, Grotius's influence on Van Leeuwen's substantive discussion of rights of hypothec was limited.[145] In the chapters on rights of hypothec, Van Leeuwen often referred to the Digest, the collections of *decisiones* by Cornelius Neostadius (Cornelis van Nieustadt,

141 De Groot, *Inleiding*, 2.48.44, pp. 105v-106r. Cf. Van der Keessel, *Voorlesinge*, ad *Inleiding* 2.48.44, pp. 481–3.

142 For example: Groenewegen van der Made, *Tractatus de legibus abrogatis* ad C. 4.10.14, p. 500 and ad C. 8.14(13), p. 670.

143 See on this work: Niels de Bruijn, 'Het Rooms-Hollands-Regt – 1664', *Pro Memorie* 21.2 (2019), pp. 55–8.

144 Van Leeuwen, *Het Rooms-Hollands-Regt* (1664), 4.12.2, p. 312.

145 Van Leeuwen, for example, placed the title on hypothecs in his fourth book on, among other topics, contracts and not in his second book on property rights.

1549–1606) and by Johannes van den Sande (1568–1638) but just six times to Grotius's *Inleidinge.* In Johannes Voet's commentary on Roman rights of hypothec, several references were made to Grotius's *Inleidinge* and his legal opinions. Voet particularly noted Grotius's discussion of local (customary) law (*mores Hollandiae ac vicinarum quarundam regionum*) which (often) deviated from Roman law.[146] No reference to any of Grotius's opinions on security rights was made in *Dertig rechtsgeleerde vraagen uit de Inleidinge tot de Hollandsche Regtgeleerdheid van wylen mr. Hugo de Groot* (…) by Willem Schorer and Hendrik van Wijn.[147] Only two references to Grotius's *Inleidinge* on security rights were made by Dideric Lulius, Pieter van Spaan, Joannes van der Linden & Reinier van Spaan in *Rechtsgeleerde observatien* (…) *van wylen Hugo de Groot*.[148]

With the exception of the word *onderzetting*, Grotius's writings on Roman Dutch security rights had a limited direct impact on the Dutch civil code of 1838 and the present Dutch civil code of 1992. The Dutch civil code of 1838 replaced the French civil code that was introduced after the annexation of the Kingdom of Holland by the French emperor Napoleon Bonaparte. The committee responsible for the Dutch civil code of 1838 adopted some Roman-Dutch legal terminology but adhered to the substantive French law regarding security rights, which deviated from the Roman Dutch approach.[149] In the Netherlands, legal scholars of the nineteenth century, who were still influential in the twentieth century, occasionally referred to Grotius to illustrate the Roman-Dutch approach towards security rights.[150] Nowadays, references to Grotius's writings about security rights are predominantly made by legal historians. Only in South Africa have Grotius's writings on security rights

146 Voet, *Commentarius* I, ad *Dig*. 20.1.9; 20.1.10; 20.1.12; 20.1.13; 20.1.14; 20.1.16; 20.2.3; 20.2.7; 20.2.9; 20.2.27–31; 20.4.3–4; 20.4.9; 20.4.18; 20.4.28.

147 *Dertig rechtsgeleerde vraagen uit de Inleidinge tot de Hollandsche Regtgeleerdheid van wylen mr. Hugo de Groot* (…) *benevens de daar op ingekomene Antwoorden van de Heeren mr. Willem Schorer* (…) *en mr. Hendrik van Wijn* (The Hague: Mensert, 1777). See on these commentaries on Grotius's *Inleidinge*: Guus van Nifterik, 'Dossier on the Inleidinge tot de Hollandsche rechts-geleerdheid, Observations on the Legal Observations', *Grotiana* 40 (2019), 1–6.

148 Lulius, Van Spaan, Van der Linden & Van Spaan, *Rechtsgeleerde observatien*, II, p. 60 and p. 61.

149 Van Hoof, *Generale zekerheidsrechten*, p. 242.

150 For example: Abraham de Pinto, *Handleiding tot het Burgerlijk Wetboek* (The Hague: Belinfante 1840), part 2, p. 317; Gerardus Diephuis, *Het Nederlandsch Burgerlijk recht*, deel VII (Groningen: J.B. Wolters, 1886) § 21, p. 365; Cornelis W. Opzoomer, *Het Burgerlijk Wetboek, verklaard door mr. C.W. Opzoomer*, vol. IV (Amsterdam: Gebhard & Co., 1879), tit. 19, p. 579; Carel Asser and Philip W. van Heusde, *Handleiding tot de beoefening van het Nederlandsch Burgerlijk recht*, deel II (Zwolle: W.E.J. Tjeenk Willink, 1890), p. 281.

become engrained in legal doctrine and case law, as illustrated before. However, there could be some circumstantial influence of Grotius's systematic approach to security rights. For example, the drafters of the French civil code of 1804 and the Dutch civil code of 1838 placed the provisions on hypothecs into the second book, on property rights, just as Grotius had done in his *Inleidinge*.[151] Moreover, the drafter of the Dutch civil code of 1992, Eduard Maurits Meijers, was very familiar with Grotius's works and he also placed hypothecs in the book on property rights.

10 Final Remarks

Grotius delivered on his promise in the introduction to the *Inleidinge* that he would provide an overview of the Roman law that was applied in Holland, which was supplemented by local laws. Both the layout and the substantive law regarding rights of hypothec – on *onderzettinge* – clearly echoed the twentieth book of Justinian's Digest. His discussion of the contemporary requirements for the creation of rights of hypothec was an evident systematisation of existing local (or regional) statutory law. Grotius's interpretation of local (customary) law in both the *Inleidinge* and in his legal opinions, such as the interpretation of the legal maxim *mobilia non habent sequelam*, was consistent with the interpretations of preceding scholars, including Nicolas Bohier (1469–1539) and Pierre Rebuffi (1487–1557), among others. To sum up, it is clear that Grotius's writings on the substantive law of hypothecs were derivative rather than original.

Nonetheless, Grotius's high citation count in modern literature shows that his writings on security rights were, and still are, highly regarded. This is most likely due to the fact that his *Inleidinge* was the first comprehensive work in Dutch on Roman-Dutch law. Moreover, Grotius was the first to provide a scholarly systematisation of Roman-Dutch law by combining the various sources of law in Holland within the framework of Justinian's Institutes and firmly placing the rights of hypothec in the book on property rights.[152] His private annotations to the *Inleidinge*, contained in the Lund manuscript which

151 Many French works have been influenced by Justinian's Institutes. See: André-Jean Arnaud, *Les origines doctrinales du code civil français* (Paris: Pichon & Durand-Auzias, 1969), pp. 130–70. It is unclear to what extent Grotius has influenced these works. The drafters of the French civil code, however, were familiar with Grotius's works and could have drawn inspiration from them. See: Jean-Louis Halpérin, *Histoire du droit privé français depuis 1804* (Paris: Presses universitaires de France, 2001), nr 6.

152 Wellschmied, *Zur Inleidinge*, p. 395.

was published in the twentieth century, illustrate Grotius's deep understanding of the influence of Germanic and Roman law on security rights. The limited originality of the substantive law in his works on security rights is outweighed by the clarity of his writings, the systematisation of the sources, and the display of scholarly brilliance contained therein.