CHAPTER 6

Crafting the Hierarchy of Debts: The Example of Antwerp (Fifteenth–Sixteenth Centuries)

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6.1 Introduction

The history of credit has been described from two main perspectives, which over the course of the nineteenth and twentieth centuries gained momentum in different periods.[1] An older view was historicist. It considered debt and credit relations from the angle of context. An underlying assumption was that the relations between debtors and creditors were determined not only by rational choice, but also by social, religious and cultural beliefs. Value and prices, as well as debt, were viewed as rooted in agreements rather than as objective facts. As a result of all this, the rules and practices relating to debt were not regarded as universal, but

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rather as being different across time and regions.[2] A second view posited the primacy of economic incentives. This other approach was initiated in the early twentieth century by such economic scholars as Carl Menger and Joseph Schumpeter. Rational and calculist choice by individuals were considered the prime factors determining debt relations; constraints were described as hampering the spontaneous outcome of the market mechanisms of supply and demand. A common strand in studies that adhered to this approach was a distinction between the market and other spheres of society.[3]

In the course of the twentieth century, several new directions of research emerged, though in many respects they remained offshoots of these two perspectives, 'historicist' and 'rational'. In the 1960s and 1970s, E.P. Thompson described economic relations as connected to moral values; the formulation and implementation of the former reflected class struggles.[4] Karl Polanyi famously described the 'embeddedness' of credit in social, political and cultural ideas and beliefs. Polanyi stated that markets were regulated by institutions (law, but also trust and confidence) and that the institutional boundaries of markets related to the moral fabric of society.[5] The 'New Institutional Economics' approach adjusted the abovementioned views of Austrian economists. Such scholars as Douglass North and Avner Greif have acknowledged that contracts and debts are dependent on institutions, defined as norms that structure behaviour, in that they increase the likelihood of certain outcomes of behaviour; they can be—with which Polanyi would agree—legal as well as social and cultural. However, these institutions are deliberate set-ups that ensure higher yields than non-regulated behaviour; as a result, New

[2] On the coming into being of this approach ('historical economics' or 'economic sociology'), see E. Grimmer-Solem, *The Rise of Historical Economics and Social Reform in Germany, 1864–1894* (New York, Oxford UP, 2003), esp. 127–170.

[3] P.J. Boetke and Ch. J. Coyne, eds., *The Oxford Handbook of Austrian Economics* (Oxford: Oxford UP, 2015).

[4] E.P. Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century', *Past and Present* 50 (1971): 76; E.P. Thompson, 'Eighteenth Century English Society: Class Struggle without Class?', *Social History* 2 (1973): 133.

[5] J. Beckert, 'The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology', *MPIfG Discussion Paper* 07/1 (2007): 7–8, at www.mpifg.de/pu/dp_abstracts/dp07-1.asp (last accessed 19 June 2018).

Institutional Economics perpetuates views that belong to rational choice appreciations.[6]

The earlier two perspectives, 'historicist' and 'rational', resonate throughout these later theories and schools of thought. Scholars of the early modern period more commonly link the former approach to household economies, and the latter to long-distance trade. So, for example, social historians often assume the 'embeddedness' of debt and credit.[7] By contrast, historical accounts belonging to 'New Institutional Economics' focus on long-distance trade, for which—so it is assumed—stronger institutions or coalitions are required than for 'informal' debt.[8] As a result of the divide in viewpoints, the household and the market are still usually regarded as different and mainly unconnected economic spheres. This division echoes Braudel's distinction between separate layers of capitalism, even though, according to Braudel, these layers interacted as well.[9] Further, this division of viewpoints has meant that the separation of public and private debt remains a *Leitmotif* in historical studies.[10]

What all the strands of scholarship mentioned above have in common is a focus on debt as a modality of agreements and an insistence on considering debt from the viewpoint of actors, *i.e.* creditors and debtors. For the fifteenth and sixteenth centuries, these approaches are at least partially anachronistic because of the significant influence of government intervention on the requirements for and the effects of registration and

[6] D. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge UP, 1990); A. Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge: Cambridge UP, 2006).

[7] An example, even though opposing Polanyi's views on disembedded markets, is L. Fontaine, *The Moral Economy. Poverty, Credit, and Trust in Early-Modern Europe* (Cambridge: Cambridge UP, 2014).

[8] Cl. Lemercier and Cl. Zalc, 'Pour une nouvelle approche de la relation de crédit en histoire contemporaine', *Annales. Histoire, Sciences Sociales* 67 (2012/4): 661–691, 666–668. Rightly emphasising embeddedness in networks of Armenian long-distance trading merchants is the chapter by Alexandr Osipian in this volume.

[9] F. Braudel, *Civilisation matérielle, économie et capitalisme, xve–xviiie siècle* (Paris: PUF, 1979).

[10] Admittedly, several studies analyse the intersections of public and private finance, for example with regard to the issuance of annuity bonds by individuals in the later Middle Ages and sixteenth century. See J. Tracy, *A Financial Revolution in the Habsburg Netherlands. Renten and Renteniers in the County of Holland 1515–1565* (Berkeley: University of California Press, 1985); C.J. Zuijderduijn, *Medieval Capital Markets. Markets for Renten, State Formation and Private Investment in Holland (1300–1500)* (Leiden: Brill, 2009).

enforcement of debts. Government intervention was, in turn, influenced by normative ideas laid out in legal doctrine and theoretical writings.

In fact, the opinion that debts are generic can be traced back to the canon law premise that '*pacta sunt servanda*'. This maxim, expressing the enforceability of any promise irrespective of its form or contents, from the later sixteenth century onwards slowly became accepted as a rule of municipal law throughout continental Western Europe.[11] In the English common law, the writ of *assumpsit*, which in the sixteenth century was conceived of as 'in lieu of debt', became used for any breach of promise and thus incorporated the same idea.[12] The adoption of this maxim as law came after a process of reducing legal differences among types of debt and various agreements. In particular, in continental trading cities, the late-medieval rules—detailed and divergent—which had differentiated between types of agreements and debt instruments disappeared over the course of the fifteenth and sixteenth centuries.[13] As this example already demonstrates, an exclusive focus on the actions of individuals in considering credit relations obfuscates the interventions by governments in channelling new views on debt enforcement and in deciding which debts were more important than others. In the sixteenth- and seventeenth-century cities of trade, both in England and on the continent, municipal bylaws and the practices of local courts were profoundly important in fixing the norms of debt enforcement, even though central governments also acted in this regard. Cities preserved a high degree of autonomy in regulating contracts that were made at their markets.[14]

[11] R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1990), 537–545.

[12] D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford UP, 2001), 130–147.

[13] A detailed overview of these transitions, in the County of Holland, is described in D. De ruysscher and I. Kotlyar, 'Municipal Traditions v. Academic Law: Collateral Rights over Movables in Holland (c. 1300–c. 1700)', *Tijdschrift voor rechtsgeschiedenis (The Legal History Review)* 86 (2018): 365–403.

[14] This was the case throughout continental Western Europe, because of the limited scope of princely law and the policies of monarchs to check and keep local and regional law in force. See J.P. Dawson, 'The Codification of the French Customs', *Michigan Law Review* 38 (1940): 765–800; J. Gilissen, 'Les phases de la codification et de l'homologation des coutumes dans les XVII provinces des Pays-Bas', *Tijdschrift voor Rechtsgeschiedenis (The Legal History Review)* 18 (1950): 36–67 and 239–290; 'Reformation (Rechtsquelle)', in *Handbuch zur Deutschen Rechtsgeschichte*, vol. 4 (Berlin, 1990), col. 468–472. In English trading towns, there was usually a petty court or a borough court where cases for

In the next paragraphs, I will argue that early modern credit was enshrined in government-imposed norms. Regulations and court-imposed rules did not merely affect the registration or enforcement of debts. The norms detailed in municipal bylaws and the approaches of local judges profoundly marked what could be considered as debt, and how market actors valued agreements and debt instruments. Against the 'New Institutional Economics' view that efficiency was the prime purpose of institutional change, it will be argued that magistrates were often hesitant as to which rules to impose. They were subject to influences such as trends in legal doctrine, but the latter was often incomplete or ridden with debates, which meant that the urban rulers themselves had to devise consistent sets of norms. The Northian argument of credible commitment contrasts with the fact that the choices of municipal legislators did not always result in legal certainty.

Antwerp's policy changes regarding the nature and hierarchy of debts provide a complex and illuminating case in point. The Antwerp administrators aimed at providing support for traders and others, and they did so by lowering enforcement requirements for debt instruments. However, at the same time, the recipe for success was far from clear. This is evident in the haphazard approaches to the way debts were ranked between c.1495 and c.1550. The municipal administrators were creative in the drafting of rules, but also drew on legal doctrine. Differences of opinion found in the writings of law professors prevented Antwerp legislators from easily borrowing from them.

6.2 The Relevance of Ranking Debts

In 1596, the Antwerp printing shop of Christopher Plantin published the *Flandriae descriptio* by *Jacobus Marchantius*: Jacques Le Marchand.[15] It is a history of the county of Flanders and also of other areas of the Southern Low Countries, in particular of the Duchy of Brabant in which Antwerp was located. The author, a native of Furnes in Flanders, was a

debt could be brought. See for example N.R. Amor, *Late-Medieval Ipswich: Trade and Industry* (Woodbridge: Boydell, 2011), 142–146.

[15] J. Le Marchand, *Flandria commentariorum libres iiii descripta in quibus de Flandriae origine, commoditatibus, oppidinis, …* (Antwerp: Plantin, 1596).

jurist by training and historian in his free time.[16] Le Marchand describes the history, including the economic history, of these regions, with an eye for the legal details. In a few paragraphs, for example, he explains that starting in the 1480s the commercial attractiveness of the city of Bruges dwindled, and that groups of foreign merchants left the town and moved to the city of Antwerp.[17]

This story is well known and was familiar to contemporaries as well. However, Le Marchand's statements on the causes of Bruges' demise are original. He attributes the emigration of Spanish merchants to the fact that the Antwerp legal regime regarding the priority of debts was much more beneficial than the rules applied in Bruges. In particular the status of the dowry mattered: Le Marchand stresses that at Antwerp, upon the insolvency of the husband, the dowry had priority over all debts, even over older and express pledges and mortgages. Since this *privilegium dotis* was absolute in Antwerp, merchants from Bruges were attracted by it: the rule allowed them to shield their assets in the event of bankruptcy. If they construed their estate as their wife's property, then at the event of persistent default their creditors would have no compensation for their debts and the debtors could remain in possession of their effects. Le Marchand qualified this as fraudulent behaviour, which it certainly was.[18]

According to Antwerp municipal law of the early sixteenth century, not all types of debt were valued equally.[19] In cases of expropriation proceedings where the total amount of debt outweighed the available assets—that is, when the debtor was insolvent—individual debts were paid with proceeds coming from these assets, according to a legally imposed ranking.[20] Le Marchand sensed that this was a relevant issue. Though it

[16] L. Morery, *Le grand dictionnaire historique ou le mélange curieux de l'histoire sacrée et profane* (Amsterdam: Boom & Van Someren, 1694), III:438.

[17] Le Marchand, *Flandria commentariorum libres iiii*, 127.

[18] Le Marchand, *Flandria commentariorum libres iiii*, 127.

[19] As was the case elsewhere. See this volume's chapter by Sebastian Kühn, referring to priorities of wages in early modern Brandenburg and Saxony, and the chapter by Nga Bellis-Phan, about the privilege on furniture in sixteenth- and seventeenth-century Paris.

[20] The most elaborate ranking ordinance was: Antwerp City Archives (FelixArchief) (hereafter ACA), *Vierschaar* (hereafter V), 4 (2 June 1518). A critical edition of this bylaw is in Dave De ruysscher, 'De ontwikkeling van het Antwerpse privaatrecht in de eerste helft van de zestiende eeuw. Uitgave van het *Gulden Boeck* (ca. 1510–ca. 1537) (ontwerpen van) ordonnanties (1496–ca. 1546), een rechtsboek (ca. 1541–ca. 1545) en proeven van hoofdstukken van de costuymen van 1548', *Handelingen van de Koninklijke*

is doubtful that any migration of merchants from Bruges to Antwerp was incited solely by Antwerp's placement of dowries at the top of the hierarchy of debts, the passage in question demonstrates that the hierarchy of debts was considered an important part of Antwerp's political economy, at least by this one author.

The Antwerp rules on the order in which creditors should be paid were based on several criteria. Some rules stipulated ranks of distribution according to the date of the agreements from which the debts stemmed. Roman law imposed priority for creditors that had signed their debts first (*prior tempore, potior iure*).[21] A principle of Germanic origins entailed that creditors who claimed their debts first were given priority over those that did do so only later.[22] In the early sixteenth century, there were still traces of a Germanic 'first come, first served' approach in the Southern Low Countries. Around 1510, the Ghent jurist Philip Wielant notes that, according to Flemish law, debts were pooled in instances of insolvency, but that the first seizing creditor was paid out first from the proceeds of the auctioned assets.[23] In Antwerp, a similar rule prevailed until January 1516. Creditors were ranked not according to the characteristics of their debts, but in the order in which their claims had been filed in the municipal court. Possibly an exception was made for creditors with mortgages (secured creditors). These rules were changed in a bylaw of January 1516. This new law stipulated that, for insolvent estates, non-secured creditors had to accept cuts on their debts, proportionally according to the value of their debt and the available assets.[24] The new regulation attests to the increased trend of using the nature of the debt as a criterion in debt

Commissie voor de uitgave der Oude Wetten en Verordeningen van België 54 (2013), 199–205.

[21] W.J. Zwalve, 'A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods', in *Security Rights in Movable Property in European Private Law*, ed. E. M. Kieninger (Cambridge: Cambridge UP), 38–53, 42.

[22] J. Brissaud, *Le créancier 'premier saisissant' dans l'ancien droit français* (Paris: PUF, 1968).

[23] Ph. Wielant, *Practijcke civile* (Antwerp: van der Loe, 1573), 339–340 (ch. 10, par. 7, s. 6) and 340 (ch. 10, par. 8, s. 1).

[24] For a critical edition of this bylaw, see De ruysscher, 'De ontwikkeling', 196–199. For further analysis, see D. De ruysscher, 'Designing the Limits of Creditworthiness. Insolvency in Antwerp Bankruptcy Legislation and Practice (16th–17th centuries)', *Tijdschrift voor Rechtsgeschiedenis (The Legal History Review)* 76 (2008): 307–327, 310–313.

ranking[25]: preferential debts included debts out of annuities, salaries and debts of alimony (see Sect. 6.4).

6.3 Antwerp Rules on Debt in the Fifteenth Century

Before detailing the development of the ranking of debts, we must take into account the diversity of rules applied to debts during the fifteenth century. Assessing the starting point from which the municipal administrators of Antwerp had to devise rules about debt categories and their rankings allows for an initial analysis of how doctrinal views mattered to this process.

In the early 1400s, registered debts were generally preferred. The administrators of cities allowed for the registration of agreements and they handed out certificates as evidence of this registration (in Antwerp these were called aldermen's letters). Registered debts could upon default be enforced in a court proceeding, resulting in a public auction of the debtor's assets. By contrast, private agreements, whether oral or in writing, were not regarded as sufficient to execute on a defaulting debtor. They did not give the right to attach assets belonging to the debtor. For private agreements, upon default of the debt, the debtor was asked to give a pledge for his debt.[26] If the debtor refused to do so, or if no payment followed, an action of expropriation could be initiated. This action was first aimed at obtaining authorisation from the city's administrators, thus

[25] H. Planitz, *Die Vermögensvollstreckung im deutschen mittelalterlichen Recht. Erster Band: Die Pfändung* (Leipzig: Wilhelm Engelmann, 1912), 291–304.

[26] Debtors were invited to 'assign a pledge'. If they refused, formal execution proceedings had to be started by the creditor. See, for an example of this, E. Strubbe, 'Het veertiende-eeuwsche oude rechtsboek van Vilvoorde', *Handelingen van de Koninklijke Commissie voor de uitgave der Oude Wetten en Verordeningen van België* 15 (1936): 80. On the proceeding of '*thoonpand*', see Ph. Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle* (Brussels: Royal Academy, 1987), 515, n. 870. For Antwerp, all this is evident in some sections of the *Keurboeck*, which is a compilation of municipal rules that had been extended from around 1390 onwards. These sections stipulate exceptions for hostellers to the general rule that the sequestering and dispossession of assets was not executed without a deed, if there was no cooperation of the debtor. See *Coutumes du pays et duché de Brabant: Quartier d'Anvers. Coutumes de la ville d'Anvers*, G. De Longé (ed.), vol. 1 (Brussels: Gobbaerts, 1870), 20 (s. 53/3). See also 46 (s. 125).

making up for the fact that the debt had not been registered.[27] Sequestration of assets could not be used as method for pressuring a defaulting debtor; it was always the first stage of an expropriation proceeding. Moreover, proceedings were lengthy. Even for the enforcement of registered debts, proceedings of expropriation were time-consuming, particularly when immovable properties had to be sold publicly.[28] This was due to the so-called *recht van naesting*, which were rights of pre-emption granted to relatives of the debtor. They were imposed in order to prevent that properties, and in particular immovable property, be left to the debtor's kin.[29]

Antwerp's municipal law of debt enforcement of the early fifteenth century was closely linked to the law of evidence. In late medieval Antwerp, aldermen's letters were thought of as sufficient evidence of the debts they contained, whereas this was not the case for private contracts or other non-registered instruments such as acknowledgements of debt. This rule applied for most of the fifteenth century, and it also pertained to debts made at the city's fairs. There were two Brabantine fairs, held at Antwerp and Bergen-op-Zoom, during short periods of the year. These fairs were privileged, in the sense that merchants visiting the fairs were granted protection from the Duke of Brabant against detention or arrest of their belongings. In the early 1400s, enforcement of 'fair debts' was possible in the periods in which the fairs' privilege did not apply, but only inasmuch as the debts had been registered at the Antwerp Town Hall; the resulting deeds could be used as instruments of debt enforcement.[30]

In the 1460s and 1470s direct access, upon default, to the debtor's assets was not considered possible, even in the case of registered debts or debt contracts containing a clause which referred to collateral.[31] The proceeding of execution had to be started, even if the debt had been written into an aldermen's letter. Extrajudicial attachments, not leading up to public sales, were not possible. Moreover, sequestration of assets

[27] *Coutumes du pays et duché de Brabant*, vol. 1, 164–168 (s. 5–10).

[28] ACA, V, 4 (14 May 1530). See also De ruysscher, 'De ontwikkeling', 214.

[29] Godding, *Le droit privé*, 243–247.

[30] ACA, *Privilegiekamer* (hereafter PK), 914, fol. 69r (24 November 1515).

[31] The latter is clear in an argument on the earlier practices raised before the Antwerp City Court in 1507: ACA, V, 68, fol. 23v (1 December 1507).

had to be authorised by the aldermen; the official nature of the debt did not procure rights of attachment.

In the 1480s and 1490s, all of the abovementioned rules changed. Several exogenous developments help explain why these changes came about. These include circumstances of war; monetary incentives for officials; merchants' demands; the emergence of a secondary market of bills obligatory; doctrinal ideas. One particular officer of the Duke at Antwerp, the *amman*, was the main official in the city who supervised the sequestration of assets, arrest of debtors and public sales.[32] The rules relating to his office were highly relevant for any enforcement of debts. These rules were broadened substantively in the final quarter of the fifteenth century. This development was closely related to changes in the contents of registered debts. In the 1460s and 1470s, a clause of collateral was regularly added to registered debts. The clause evolved from a specific, negotiated clause, referring to particular assets belonging to the debtor, to a stereotyped one, pointing generally to 'the goods' of the debtor; later on, the provision was left out of debt registrations because its application was presumed; some time later, collateral was deemed to apply even when the contract or document did not mention a clause on collateral.[33] This meant that it was considered normal that any debt was accompanied with the right to enforce the debt on the defaulter's assets. At first, it was not possible to enforce those debts swiftly, since the rules on

[32] ACA, V, 1231, fol. 220r–v (21 May 1493, the assets were kept with the *amman*). The delegation of this matter to one official was due to the rising numbers of attachments. In the 1460s, the amman and two aldermen monitored the (still exceptional) seizure of assets. See ACA, SR, 69, fol. 520r (29 November 1465). Before that time, at least until the early 1440s, liquidations and the distribution of proceeds from public sales did not involve the amman. See, for example, 'Het 2de Oudt Register', *Antwerpsch Archievenblad*, vol. 30 (s.d.) 31–32 (13 January 1442 ns).

[33] Near the end of the 1460s, nearly all aldermen's letters for mercantile debts contained the clause '*obligat se et sua*'. This clause stipulated that all assets and also the person of the debtor could be seized in case of default. See ACA, *Schepenregisters* (hereinafter SR), 69 (1465–66), containing at least six letters without collateral, both in and outside the privileged period surrounding the fairs: fol. 44v (5 August 1465), fol. 46v (17 August 1465), fol. 83r (17 October 1465), fol. 182r (3 January 1466 ns), fol. 192v (12 October 1465) and fol. 193v. (10 November 1465). In the ledger of 1469–70, no such letters could be found and all mercantile letters had the clause '*obligat se et sua*'. See ACA, SR, 76, fol. 26v (6 June 1469), fol. 28r (8 June 1469), fol. 34v (23 June 1469), fol. 129r (28 March 1470 ns), fol. 323r (11 March 1470 ns) and fol. 367r (13 February 1470 ns). The fact that the clause became assumed, is evident in ACA, V, 68, fol. 23v (1 December 1507).

execution proceedings required attention to a complex hierarchy of creditors, slowing down the process in each individual case. But in the period between 1482 and 1492, when cities and some regions of the Low Countries rose against regent-prince Maximilian of Austria, suddenly it became possible to sequestrate debts without proceedings before Antwerp's court. Attachments were, in that period, explained in terms of reprisal: for example against merchants of a *nation* that had supported the Flemish rebellion against the Burgundian house.[34] Under such circumstances, the *amman* allowed attachments of assets as shortcuts to the general procedural rules. This officer may have had a monetary incentive, since fees paid for sequestrations were part of his remuneration. In the later 1400s, extra-judicial attachment came to be applied to private agreements and documents as well.

Mercantile practices added further to the use of this measure of debt enforcement. In the 1490s and 1500s, the clause of collateral began to be used in bills obligatory—that is, IOUs, or acknowledgements of debt—written in Antwerp.[35] In the 1490s, it was already considered in Antwerp law that a bill obligatory containing a bearer clause was transferable.[36] The document could pass from one creditor to the next; the latter acquired powers of attorney from the bearer clause and the debtor could not refuse payment to the bearer. The negotiability of the instrument grew out of this practice of circulation; in 1507 the Antwerp administrators acknowledged that passing on a bill obligatory containing a bearer clause was an 'assignment' (*assignatie*) which entailed recourse liability (the holder of the paper could claim the debt not only from the debtor, but also from the one who had given him the document if the debtor defaulted or refused to pay).[37] Moreover, the clause of collateral could be general; in 1507 the aldermen of Antwerp certified that a clause in a

[34] ACA, V, 1231, fol. 9r (23 December 1488), fol. 41r–v (20 October 1489). For another example of a seizure of merchandise in Antwerp as a measure of reprisal, see C. J. F. Slootmans, *Paas- en koudemarkten te Bergen op Zoom, 1365–1565* (Tilburg: Stichting Zuidelijk Historisch Contact, 1985), vol. 1, 50 (April–May 1480). Merchandise that had been stolen but was relocated could be attached, even if no deed of the aldermen was presented. See ACA, V, 1231, fol. 7r–v (9 December 1488), fol. 19r (9 April 1489).

[35] J. Puttevils, 'Tweaking Financial Instruments: Bills Obligatory in Sixteenth-Century Antwerp', *Financial History Review* 22, no. 3 (2015): 337–361, 342.

[36] Van der Tannerijen, *Boec van der loopender practijken der raidtcameren van Brabant*, vol. 1, pp. 59–60.

[37] ACA, V, 68, fol. 13r (7 June 1507).

bill obligatory not specifying assets as collateral but merely referring to 'the assets' of the debtor affected all property belonging to the debtor, including the immovable property.[38]

To summarise: various developments culminated in new rules regarding the categorisation, evidence, and enforcement of debts. Whereas in the early fifteenth-century registered debts were considered preferential, by the end of the 1400s defaults on all types of debt were deemed sufficient to start attachment proceedings on the assets of the debtor. This was the legal translation of a contractual trend, which had managed to push aside older municipal rules under specific, exceptional circumstances. The clause of collateral had gained such acceptance that it became acknowledged by law that all debts, even when not accompanied with express collateral, were secured with the assets of the defaulting debtor. Seizure proceedings were henceforth easy to start: default of any debt was considered a sufficient cause to initiate such proceedings.

The developments detailed above went hand-in-hand with considerations found in legal doctrine. Context-specific, pragmatic reasons for change coincided with intellectual approaches. Even with influential changes in market practices and political circumstances, the views of the Antwerp legislators mattered. They could accept novelties as legitimate, or refuse to acknowledge them as valid. The gradual generalisation of the practice of inserting clauses of collateral into contracts, in the 1460s and 1470s, was matched by the growing conviction on the part of Antwerp's rulers that a regime of general collateral was feasible. In this regard, they were influenced by Italian legal doctrine on the '*massa creditorum*'. In Italian legal scholarship of the fourteenth and fifteenth centuries, the *missio in bona*, *i.e.* the collective debt enforcement proceeding of Roman law, had been adapted to contemporary needs. Italian scholars blended the Roman idea of spreading the risk of insolvency by way of cutting claims of non-secured creditors *pro rata* with an insolvency regime that put much emphasis on criminal prosecution. As a result of the strictness of the law, many insolvent debtors absconded, and collective enforcement proceedings were started against *fugitivi*.[39] Even though, at the

[38] ACA, V, 68, fol. 23v (1 December 1507).

[39] D. De ruysscher, 'Business Rescue, Turnaround Management and the Legal Regime of Default and Insolvency in Western History (late Middle Ages to Present Day)', in *Turnaround Management and Bankruptcy*, ed. J.I. Adriaanse and J.-P. van der Rest (London: Routledge, 2017), 22–42, here 25–26, 28.

beginning of the sixteenth century, distributions with proportional debt reductions were known in French and Hanseatic cities and regions as well as in Italy, the influence of Italian legal doctrine in Antwerp at this point is in fact most likely.[40] The municipal bylaw of January 1516 referred to such doctrinal notions as 'preference'. This concept derived from the '*praefertur*' ('is given priority over'), which was a standard formula in fragments of the Justinian Digest, being the basis of legal doctrinal writings on debt relations.[41] Since the middle of the fifteenth century, more university-trained aldermen had joined the ranks of the Antwerp government, and the numbers of graduates of law faculties rose continuously.[42] They used their legal training when drawing up bylaws and when crafting rules of municipal law.

6.4 Hesitation around the Dowry and Bills Obligatory

In the early years of the sixteenth century, despite the influence of academic writings and a sense of context, hesitation and confusion concerning the priority of debts prevailed among Antwerp's administrators. Doctrine could not provide certain answers on these issues, because of ongoing debates among legal scholars.

[40] W. Pakter, 'The Origins of Bankruptcy in Medieval Canon and Roman Law', in *Proceedings of the Seventh International Congress of Medieval Canon Law*, ed. P. Linehan (Vatican City: Bibliotheca Apostolica Vaticana, 1988), 485–506, 498–499; U. Santarelli, *Per la storia del fallimento nelle legislazioni dell'età intermedia* (Padua: CEDAM, 1964), 238–242. For the French and Hanseatic examples, see E. Richard et al., *Droit des affaires. Questions actuelles et perspectives historiques* (Rennes: Presses universitaires de Rennes, 2005), 547–549; H. Planitz, 'Über hansisches Handels- und Verkehrsrecht', *Hansische Geschichtsblätter* 31 (1926): 1–27, 25.

[41] For example, D. 42.5.38.1.

[42] H. de Ridder Symoens, 'De universitaire vorming van de Brabantse stadsmagistraat en stadsfunktionarissen in Leuven en Antwerpen, 1430–1580', in *De Brabantse stad* (s-Hertogenbosch, 1978), 21–126, and H de Ridder-Symoens, 'Het onderwijs te Antwerpen in de zeventiende eeuw', in *Antwerpen in de XVIIde eeuw* (Antwerp, 1989), 221–250. On the legal education at Leuven University during the 1500s, where many Antwerp lawyers graduated from, see Ph. Godding, 'La formation des étudiants en droit à Leuven (fin 16e-début 17e siècle): fait-elle place au droit coutumier et édictal de nos régions?', in *Recht en instellingen in de oude Nederlanden tijdens de middeleeuwen en de Nieuwe Tijd* (Leuven, 1981), 435–446.

The growing influence of academic legal doctrine had an important effect on discussions among legislators as to whether clauses of collateral in private documents, in particular in bills obligatory, had the effect of creating priorities. The magistracy of Antwerp was not sure; but after a while the mounting influence of academic law allowed for clearer categorisations. The distinction between personal (*in personam*) and real claims (*in rem*) was most relevant. These concepts were crucial for Roman lawyers as well as for legal scholars of the later Middle Ages. A claim *in rem* was considered as being attached to an asset, whereas this was not the case for a claim *in personam*. Claims *in rem* could be accompanied with a right of pursuit; for claims *in personam* this was impossible. The former procured priority over the latter. In 1507, it had been decided that the general clause of collateral in bills obligatory brought about *in rem* effects. It was also ruled that the immovable property of the debtor of the bill obligatory was affected. But the exact implications of these changes for the enforcement of debts were not specified.[43]

In January 1516 and June 1518, municipal bylaws for the first time provided lists containing the order of debts.[44] They provided that registered mortgages preceded private debts, but they did not detail the position of the creditor with a bill obligatory. The status of bills obligatory containing a clause of collateral was therefore ambiguous. Could such collateralised debt instruments be considered preferential over other debts? Since the aforementioned bylaws did not delve into the issue, it was unclear whether the 1507 rule was concerned with the rank of bills obligatory. Between 1518 and 1523, the rule as established in 1507 was inserted into a compilation of rules applied in Antwerp, which was called the Golden Book. One manuscript copy, dating from the early 1530s, does not mention this rule, however.[45] But the rule reappears in another manuscript version dating from the early 1540s, albeit one that was not promulgated as law.[46] But in 1562 the Antwerp aldermen stated in detail that the claim of the creditor of a bill obligatory was only a personal one

[43] ACA, V, 68, fol. 23v (1 December 1507).

[44] See notes 19 and 25.

[45] De ruysscher, 'De ontwikkeling', 132–133.

[46] De ruysscher, 'De ontwikkeling', 293.

(*in personam*) and that mortgages, being *in rem*, had priority.[47] This position arrived after several decades of uncertainty. One might suspect that the gradually mounting popularity of bills obligatory meant that eventually their special status could not be upheld. But the question remains as to why between 1516/1518 and 1562 Antwerp's administrators did not provide legal certainty in this matter. They were clearly doubtful as to which solution should be given, but it is equally evident that they relied on doctrinal concepts when formulating municipal rules.

Another example of doubts—and here Le Marchand's story comes in again—relates to the dowry. As Le Marchand's account rightly suggests, recoveries of dowries from the estates of insolvents were frowned upon. In such cases, the wife claimed back some of the investments she or her family had made at the beginning of the marriage. If the husband had died insolvent, the widow could 'throw the key (of the couple's domicile) on his grave'. In so doing, she refused the (indebted) inheritance and could recover her entire dowry.[48] In the early decades of the sixteenth century, dowries were still rather common in Antwerp, even though in that period nuptial contracts in which they were commonly mentioned were becoming less fashionable.[49]

In the fifteenth century, nuptial contracts were considered as agreements between the fathers of the couple; since the objects that made up marriage gifts were considered to belong to the donating kin, it was a fixed rule that nuptial contracts could not be altered by the couple during the marriage.[50] But in the first years of the 1500s, it slowly came to be acknowledged that husband and wife could supplement a nuptial contract with donations that were reciprocal. Under such circumstances, an element of chance was crucial. The 'surviving spouse' would receive the donated assets; since this formula could be beneficial for the kin of either spouse, it was considered acceptable. Moreover, nuptial agreements drawn up by the husband and wife alone, without the assistance

[47] ACA, V, 69, fol. 167 r–v (21 August 1562).

[48] Godding, *Le droit privé*, 304.

[49] Mutual wills were far more common: see K. Cappelle, 'Law, Wives and the Marital Economy in Sixteenth-Century Antwerp: Bridging the Gap between Theory and Practice', in *Gender, Law and Economic Well-Being in Europe from the Fifteenth to the Nineteenth Century. North versus South?*, ed. A. Bellavitis and B.Z. Micheletto (London: Routledge, 2018), 228–241, 233–235.

[50] ACA, V, 68, fol. 11r (14 February 1494 ns).

or consent of their fathers, became valid.[51] Yet even in the 1540s, contributions made by the bride at marriage still consisted largely of gifts from members of her family, in particular from her father.[52]

The rank of the dowry was a hair-raising issue for the Antwerp administrators. The aforementioned municipal bylaw of January 1516, which had categorised some debts as preferential, had not mentioned the dowry. Instead, Antwerp's rulers most probably relied on an older rule that stipulated that the wife, or widow in cases of insolvent inheritance, could only claim her dowry after all creditors had been paid.[53] In June 1518, a new bylaw was made. This bylaw completely shifted the ranks mentioned in the 1516 bylaw. Salaries were to be paid first, but debts of lease were now referred to an inferior rank, even after creditors with non-secured debts who had obtained a judgement before the debtor's insolvency.[54] By contrast, in the 1516 bylaw, debts of salaries, debts of lease and debts of alimony had been considered the highest preferential debts.[55] The 1518 bylaw did not mention the dowry; nor did it refer to debts of alimony.

Between 1518 and 1523, a compilation of municipal rules imposed in the Antwerp city court mentioned the dowry for the first time since 1495. It stipulated that the dowry was to be paid after the debts of lease, salaries and alimony, but that it had priority over mortgages.[56] This was a new overhaul. Debts of lease were put higher on the scale again, as compared to the 1518 bylaw. But most crucially, the dowry was now regarded as a preferential debt, which had not been the case before. The dowry was considered the wife's if she had agreed with her husband on investing that dowry into the marriage on the condition that it was to be used by the surviving spouse. The wife could not recover the dowry in the case that she had agreed to have her lawful share of the succession.[57]

But around 1523, shortly after the mentioned compilation was completed, the priority rules changed again; the dowry moved up the

[51] ACA, V, 68, fol. 19r (18 June 1506).

[52] GARB, *Papieren van State en Audiëntie*, 1191/41, 34, s. 5/23.

[53] ACA, V, 68, fol. 5v (24 March 1495 ns).

[54] De ruysscher, 'De ontwikkeling', 203–204.

[55] De ruysscher, 'De ontwikkeling', 198.

[56] ACA, V, 2, s. 119.

[57] General Archives of the Realm in Brussels (hereafter GARB), *Papieren van State en Audiëntie*, 1191/41, 34, s. 5/20.

ladder and was considered the highest preferential debt, even more important than debts of lease, salaries and alimony.[58] It is as yet unclear whether changes in social circumstances influenced this development.[59] In any case, this was the rule to which Le Marchand referred. Quite remarkably, the new rule was the complete opposite of what had been provided in 1495, when the dowry was the last debt that could be claimed. In a period of some thirty years, the regime of recoveries of dowries had thus changed fundamentally. When in 1548 a new compilation of Antwerp law was drafted, the rules were again changed. First came debts of lease, thereafter the dowry, followed by debts of salaries. Alimony was left out.[60] It is improbable that this lowering of the rank of the dowry was incited by motivations of fraud prevention. In this regard, Le Marchand's descriptions are not very accurate. In fact, bankruptcy did not entail a fresh start. So if the wife of the insolvent merchant managed to extract assets or money from the estate on the basis of a fictitious dowry claim, then the merchant had to separate those funds from his own during the remainder of his career. Indeed, men were not allowed to do business with the dowry of their wives.[61] Creditors could recover remainders of old claims, even if they had undergone reduction during a collective insolvency proceeding.

The subsequent shifts and the confusing results cannot be explained except with reference to the doubts of the city's legislators. Possible arguments referring to the number of dowries, or to the advantaging of higher classes of society (which more often signed nuptial contracts) must be left open. It may be an indication that elitist preferences were minimal because of the continuously high rank of salaries. The rules defining this rank were clearly intended as measures of protection for the working poor or lower middle classes. They served their purpose at bankruptcies of entrepreneurs who had engaged in the production and finishing of merchandise. In sixteenth-century Antwerp, there was continuous inflation of prices and

[58] ACA, V, 68, fol. 45v (between March 1523 and January 1526), fol. 63r (2 June 1526), and fol. 83v (22 July 1529).

[59] Kaat Cappelle (VUB) prepares a dissertation on this theme.

[60] *Coutumes du pays et duché de Brabant*, I:172 (s. 14–15).

[61] *Coutumes du pays et duché de Brabant*, II:250 (ch. 41, s. 44) (bylaws of Antwerp, 1582).

stickiness of wages, as well as regular debasements of currency.[62] Under such circumstances, the protection of salaries was an important issue for a politics that aimed at protecting the civic good.

A more likely yet incomplete explanation for the growing trend for the higher legal valuing of dowries between 1495 and 1548 is a concern to protect family wealth from bad matches. Care for the rights of women may have been at stake as well. Around 1532, for example, a new rule of municipal law dictated that married women could sign contracts without the consent of their husband, but at the same time that they had the right to retreat from the contract if they later deemed it insufficiently advantageous.[63] This new norm came after earlier norms of Antwerp law that had mandated that such contracts were null and void because they ignored the legal authority of the husband to administer the household.[64]

Discussion among legal scholars provides a partial explanation for the hesitations of the Antwerp administrators. Even though the city's administrators could resort to academic concepts in order to structure their rules, ultimately they could not find in doctrine a clear answer as to which debt had priority. Accursius' mid-thirteenth-century *Magna Glossa* listed the dowry after tax debts, but hesitated on the question of whether it had priority over contracts of hypothecs (*i.e.* mortgages and non-possessory pledges of movables).[65] Cinus of Pistoia (dec. 1336/37) preferred the dowry over all debts, including tax debts and hypothecs. But Bartolus of Saxoferrato (dec. 1357) and, to an even greater extent, Baldus de Ubaldis (dec. 1400) took contracts of hypothecs as being more important than the dowry.[66] One of the points of debate, which might have deepened the doubts of Antwerp's administrators, involved the '*privilegium duplex*'. This entailed that those creditors having both a *privilegium exigendi* (i.e. a privilege of preference at enforcement) and a *hypotheca tacita* (a legal

[62] H. Soly, 'Social Relations in Antwerp in the Sixteenth and Seventeenth Centuries', in *Antwerp, Story of a Metropolis, 16th–17th Century*, ed. H. Devisscher and J. Van der Stock (Antwerpen: Snoeck-Ducaju, 1993), 37–47, 41–42.

[63] ACA, V, 68, fol. 93r (s.d., c. 1532).

[64] De ruysscher, 'De ontwikkeling', 88–89.

[65] W. Forster, *Konkurs als Verfahren. Francisco Salgado de Somoza in der Geschichte des Insolvenzrechts*, Cologne, Böhlau, 2009, 142–146; Pakter, 'The Origins of Bankruptcy', 502.

[66] Pakter, 'The Origins of Bankruptcy', 502–504.

hypothec) were given priority, but it was unclear whether this combination trumped a contract of hypothec.[67] The dowry fitted within the combined *privilegium*, since the Justinianic texts contained categorisations of the dowry as being *privilegium* (D. 42.5.17.1) and *hypotheca* (Inst. 4.6.29). This being said, the notions of *praeferentia*, as well as the definition of the dowry claim (*actio dotalis*), mentioned in the 1516 and 1518 bylaws, referred to the academic texts. In other words, Antwerp's administrators were well aware of the doctrine, even though it was often insufficient to provide an apt solution.

6.5 Conclusion

The Antwerp case demonstrates that rules regarding debts were crafted in response to diverse and connected phenomena. Lawmakers took into account mercantile practice, even though special circumstances could partly be responsible for legal change as well. The outcome of processes of legislative deliberation was influenced yet not determined by market conditions. Legislators had to retrieve solutions for which there was no blueprint. They had to balance different interests. The legal regime concerning collateral rights proved a challenge for the Antwerp administrators. Le Marchand was right in saying that in Antwerp the dowry was at one point considered a super-priority, but this was only during the period 1523–1548. In spite of Le Marchand's overrating of dowry preferences in bankruptcy cases, his explanation of collateral rights as crucial features of municipal legal constellations is correct. Cities of trade had extensive autonomy over the rules that applied to the contracts that were drafted in their markets. In that regard, the contractual autonomy of creditors and debtors was always limited. Municipal bylaws stipulated hierarchies of debts, and the rules in these bylaws defined how claims were to be enforced.

The shifting ranks of debts in Antwerp, between c.1495 and c.1548, might provide an argument pointing to unwieldy economic politics and an out-of-touch attitude of urban rulers. However, this would ignore the difficulties that came along with the devising of coherent sets of norms in areas of policy that were new. The 1516 bylaw tackled the problem of collective enforcement proceedings for the first time. The ranking of

[67] Forster, *Konkurs als Verfahren*, 149–157.

debts was an issue which ensued from adopting the pooling of debts. One might read these developments as indications of the Antwerp magistracy's intent to craft a 'best' law; the subsequent changes reveal that they could swiftly readjust the existing rules for being suboptimal.[68] Contrary to what New Institutional Economics holds, the hesitations on the crucial issue that was the ranking of debt clearly reflect the fact that there *was* no best solution captured by the Antwerp leaders. At the same time, theoretical notions such as claims *in personam* and *in rem*, the concept of 'preference', the rules regarding general collateral and the '*massa creditorum*' served as anchoring points for the urban legislators. Scholarly writings lacked coherence. In spite of that, such notions and rules could provide resting points on the winding path to legal certainty.

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[68] O. Gelderblom, *Cities of Commerce: The Institutional Foundations of International Trade in the Low Countries, 1250–1650* (Princeton: Princeton UP, 2013), 13–14, 133, 201–203.

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