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The Rise and Fall of the Classical Usury Paradigm: From Thomas Aquinas to Hugo Grotius

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Abstract

The intellectual operation of considering that the mere existence of a money loan constitutes a sufficient basis to legitimise the existence of interest paid by the borrower to the lender is the result of a long evolution in our way of thinking, which resulted in the emergence and then the decline of a paradigm of usury which, in its classical form, is found in Thomas Aquinas's writings on economic matters, at the end of the thirteenth century. Its starting point was Thomas Aquinas's representation of money loans, which differs from that which stemmed from Gratian's *Decretum* and logically required the use of a real contract from Roman law, the *mutuum*, one of the characteristics of which was to be by definition a free contract – which obviously prohibits any payment of interest because of this loan. But at the same time, money loans were viewed, by Thomas Aquinas among others, as involving the existence of both a surplus of exchange and decision in time – which could give rise to the payment of interest. A possible conciliation, that made it possible to circumvent the intellectual obstacle created by the *mutuum* was the introduction of alternative ways of charging interest through various extrinsic titles, supported by most theologians, typically Thomas Aquinas, Peter of John Olivi, Alexander of Alexandria and, in the early years of the 17th century, Leonardus Lessius. And still in the 13th century, shortly after the death of Thomas Aquinas, the obstacle was challenged by a decretal of Nicholas III which argued in favour of the possibility of separating use and property, so that its indirect consequence was to open the way to the payment of interest despite the *mutuum*, as witnessed by John Duns Scotus, Gerald Odonis and, much later, after the successive and sometimes contradictory bulls of Clement V and John XXII, by Leonardus Lessius. But the final stage in this evolution was not reached until Hugo Grotius, in 1625, gave the reasons for overcoming the logical trap imposed by the *mutuum*, explaining why the nature of a money loan made it possible for interest to be charged on it.

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1. Introduction

The intellectual operation of considering that the mere existence of a money loan constitutes a sufficient basis to legitimise the existence of interest paid by the borrower to the lender is quite common nowadays. Nonetheless, it is the result of a long evolution in our way of thinking which led us to give up the paradigm of usury which emerged, in its classical form, in Thomas Aquinas's writings on economic matters, at the end of the thirteenth century. From its very origin, this intellectual construction was threatened by various practical or analytical supplements to which it resisted, and we had to wait till the beginning of the seventeenth century to come to a genuine alternative, provided by Hugo Grotius. This paper accounts for this very long journey.

Its starting point (§2) is Thomas Aquinas's representation of money loans, which differs from that which stemmed from Gratian's *Decretum* and logically required the use of a real contract from Roman law, the *mutuum*, one of the characteristics of which was to be by definition a free contract – which obviously prohibits any payment of interest because of this loan. But at the same time, money loans were viewed, by Thomas Aquinas among others, as involving the existence of both a surplus of exchange and decision in time – which could give rise to the payment of interest. A possible conciliation, that made it possible to circumvent the intellectual obstacle created by the *mutuum* was the introduction of alternative ways of charging interest through various extrinsic titles, supported by most theologians, typically Thomas Aquinas, Peter of John Olivi, Alexander of Alexandria and, in the early years of the 17th century, Leonardus Lessius (§3). And still in the 13th century, shortly after the death of Thomas Aquinas, the obstacle was challenged by a decretal of Nicholas III which argued in favour of the possibility of separating use and property, so that its indirect consequence was to open the way to the payment of interest despite the *mutuum*, as witnessed by John Duns Scotus, Gerald Odonis and, much later, after the sometimes contradictory bulls of Clement V and John XXII, by Leonardus Lessius (§4). But the final stage in this evolution was not reached until Hugo Grotius, in 1625, gave the reasons for overcoming the logical trap imposed by the *mutuum*, explaining why the nature of a money loan made it possible for interest to be charged on it (§5).

2. Building the *mutuum* trap (Thomas Aquinas): Making the money loan necessarily free

One difficulty we encounter in addressing the question of usury is due to a linguistic peculiarity already noted by E. Gibbon in the chapter on Roman jurisprudence from his *Decline and Fall of the Roman Empire* (Gibbon 1788, p. 368; see also Lapidus 2025, p. 339): the word “loan”, as we commonly use it, can cover very different situations for which Latin uses different words, corresponding to different types of contract, all discussed in book 3 of Justinian’s *Institutes* (titles 13 to 29): the *mutuum*, like the *commodatum*, are contracts *re*, formed by the delivery of a thing, *res* (*Institutiones*, 3.14.pr., 1 and 2); the *locatio-conductio* is a contract *consensu*, a synallagmatic contract of good faith, based on the agreement of the parties (*Institutiones*, 3.24); by contrast, the payment of an interest through a *foenus* requires another type of contract known as a contract *verbis* (a formal contract of strict law by “word of mouth”), typically a *stipulatio* consisting in a question (from the creditor) and an answer (from the debtor) mutually coherent (*Institutiones*, 3.15). For example, I can lend sugar to my neighbour who has run out provided she returns it to me in a week’s time (*mutuum*); lend her the 1000 euros she needs and ask her, in a year’s time, to give me back 1100 euros (*foenus*); lend her my car to go shopping, asking her to return it the same evening (*commodatum*); or lend it to her during the summer when I am away on the condition that she returns it to me at the end of September for an extra 100 euros (*locatio-conductio*). In all these cases, where Latin uses a different denomination, it is not an excessive strain on the language to refer to them simply as “loans”.

Now, if you pay attention to the title of the question on usury in Thomas Aquinas’s *Summa Theologiae* (IIa-IIae, q.78), you read “*De peccato usurae, quod committitur in mutuis*”, which we would usually translate as “Of the sin of usury committed in loans”. This shows that the possibility of sin was addressed by Thomas not in the context of a loan in general, but in that of a *mutuum*, according to the original expression.

An alleged etymology of the *mutuum* (see the nice discussion in Januar 2021, pp. 606-609), taken up, after Paucapalea, by Robert of Courçon at the beginning of the 13th century, argues that its name derives from “what is mine becomes yours [*de meo fit tuum*]” (*De Usura*, p. 15), so that like the *foenus* but unlike the *commodatum* or the *locatio*, the property of the thing lent, which must be returned in kind, passed from the lender to the borrower for the duration of the loan. Like, also, the *commodatum* but unlike the *foenus* and the *locatio*, the *mutuum* is a free loan. One immediate consequence is that, because the *mutuum* is by definition free, using it to

lend money gives no right to claim interest by reason of that loan. When you use the noun “*mutuum*” or its derivatives to denote a loan you are granting, it would be a contradiction in terms if at the same time you were to ask your borrower to pay a fee for this. But what if instead of a *mutuum*, you use a *foenus*? From Christian antiquity to Aquinas, there has been no shortage of reasons for condemning this transaction as usurious (Chaplygina and Lapidus 2016, pp. 31-32). Yet, Thomas Aquinas was to add something more: he makes his reader understand that not only is the existence of interest condemnable *if* the money loan is a *mutuum*, but that this loan *must* be a *mutuum*.

This is clear from the comparison between, on the one hand, a *palea* called *Ejiciens*, wrongly attributed to John Chrysostom, and introduced during the 12th century in the *distinctio* from Gratian’s *Decretum* dealing with the involvement of clerics in secular commercial activities (I, dist.88, can.11, §4; see Noonan 1957, pp. 38-39) and, on the other hand, the position expressed by Thomas Aquinas in his later and most influential works such as the *Summa Theologiae* (IIa–IIae, q.78, a.1, resp.), presumably written in 1272, or, a few years earlier, the *De Malo* (q.13, a.4, resp.) which developed the same argument. *Ejiciens* began with a condemnation of merchants, explained how to recognise them (they are those who buy to sell, not to consume what they had bought), and then moved on to usurers, who are said to be even worse than merchants. The *palea* was very influential in the understanding of money loans and therefore quoted after its integration in Canon law by several theologians or canonists, such as Raymond of Peñafort, Alexander of Hales and Albert the Great (Noonan 1957, pp. 45-46). However, it seems that it was only with Thomas Aquinas that something was to change in the perception of money, and of the money lent.

Bringing together *Ejiciens* and the corresponding passage of the *Summa* leads to favour three issues following the order given in *Ejiciens*, related to a. the function of money; b. its usufruct; c. its stock-flow interpretation (see Chaplygina and Lapidus 2016, pp. 33-34; 2022, pp. 95-96):

**Gratian, *Decretum*,
I, dist.88, can.11, *Ejiciens*, §4**

**Thomas Aquinas, *Summa Theologiae*,
IIa–IIae, q.78, a.1, resp.**

a. function of money

Someone else said: Is not the one who rents a field to receive its fruits, or a house to receive an income, similar to the one who lends money at usury? Certainly not. First, because money has no purpose except to buy things.

Now money, according to the Philosopher [*Ethic.* v, 5; *Polit.* i, 3] was invented chiefly for the purpose of exchange: and consequently, the proper and principal use of money is its consumption or alienation whereby it is sunk in exchange. Hence it is by its very nature unlawful to take payment for the use of money lent, which payment is known as usury: and just as a man is bound to restore other ill-gotten goods, so is he

bound to restore the money which he has taken in usury.

b. usufruct of the money lent

Secondly, because having a field, by ploughing it, he receives its fruit; having a house, he receives the use of a residence. This is why the one who rents a field or a house seems to be giving his use and receiving money, and in a way seems to be exchanging gain for gain: from money which is stored up, you make no use.

[W]e must observe that there are certain things the use of which consists in their consumption: thus we consume wine when we use it for drink and we consume wheat when we use it for food. In such cases, one must not count the use of the thing apart from the thing itself but, as a result of conceding the use, the thing itself is conceded. And this is why, for such things, the loan [*mutuum*] transfers property. Accordingly [...] he commits an injustice who lends wine or wheat, and asks for double payment, viz. one, the return of the thing in equal measure, the other, the price of the use, which is called usury.

c. stock-flow interpretation

Thirdly, the field or the house grows old through use. But money, once lent, suffers neither diminishing nor ageing [*Pecunia autem quum fuerit mutuata, nec minuitur, nec veterascit*].

On the other hand, there are things the use of which does not consist in their consumption: thus to use a house is to dwell in it, not to destroy it. Wherefore in such things both may be granted: for instance, one man may hand over to another the property of his house while reserving to himself the use of it for a time, or vice versa, he may grant the use of the house, while retaining the property. For this reason a man may lawfully make a charge for the use of his house, and, besides this, revendicate the house from the person to whom he has granted its use, as happens in renting and letting a house.

The first point, related to the function of money, leads to similar conclusions. Both *Ejiciens* and the *Summa* emphasise the function of money as an intermediary in exchanges – without reference to Aristotle’s authority in *Ejiciens* because his works in moral and political philosophy had not yet been rediscovered through their Latin translations in Gratian’s time. Receiving an income from a money loan is therefore usurious, since it uses money as something other than an intermediary for exchanges.

With regard to the second point, each text stresses a specificity of the usufruct of the money lent. *Ejiciens* lays emphasis on the absence of any usufruct of the money lent if it is merely stored, as opposed to the productivity of a field (*fructus*) or the service rendered by a house (*usus*). Later, the *Summa* supports the well-known claim that while there is some kind of *usus* for the money lent from the moment it is not stored but used to buy something, this *usus* cannot be separated from the property of the money and disappears with it when this money is employed as a medium of exchange¹.

¹ It should be noted, however, that Pope John XXII, in the quarrel that pitted him against the Franciscan supporters of Michael of Cesena, adopted a Thomistic reading of the author of *Ejiciens* in *Quia vir reprobus* (p. 427, col. 2)

A clear difference between the two texts appears on the third point, where Thomas skilfully reverses *Ejiciens*' argument. The *Decretum* asserted that a stock was a source of income from the moment it began to depreciate. The income was then the counterpart of that depreciation. A field or a house suffered such a depreciation, thus justifying the income perceived by its lender, in contrast to money which did not suffer any depreciation. Now, in the *Summa*, the income perceived by the lender no longer proceeds from the depreciation of a stock, but from the possibility of separating the property of this stock from its usufruct, the flow it generates. It is the sale of the latter which produces the income paid by the borrower. Seven centuries before Léon Walras in his *Études d'Économie Sociale*, Thomas Aquinas asserted that the property of a stock gives birth to the property of the flow of services it generates and the property of the price of these services (in a competitive market, Walras will add, so that a just transaction is performed; see Walras 1896, p. 136). Therefore, a house or a field could be the source of an income, because their lender remains their owner and can sell their use. On the contrary, bread, wine and, of course, money cannot remain the property of the lender during the loan, so that he is no more able to sell their use.

The two last points, by which Thomas Aquinas breaks with the position expressed in *Ejiciens*, constitutes the classical usury paradigm. Now, the *mutuum* is no more a mere legal framework, appropriate to account for the prohibition of usury, but an analytical necessity. We have no more choice: if money is lent, it should be through a *mutuum*. The trap is built.

But one difficulty is that in addition to the *mutuum* trap, Thomas Aquinas gives elements that we know are likely to compromise its proper functioning. These elements are related to the existence of a surplus in exchange and to decision in time.

The two specifically economic questions in the *Summa Theologiae* concern what Aquinas called “voluntary exchanges”² when introducing them. He is more explicit in question 77:

in 1329, lending him the idea of the inseparability of property and use for money, like for all consumptible goods, an inseparability in which he recognised the basis for the prohibition of usury. See Lambertini 1994-1997, pp. 190-193.

² The question of voluntary exchange is crucial in the explanation of transactions in the Scholastic framework. It is clearly a necessary condition to the acceptability of a transaction, but it is not sufficient: the will of each participant should not be “conditioned” (*voluntas conditionata*). See Chaplygina and Lapidus 2016, pp. 31-32 and on the origin and evolution of the concept, Januard 2022, pp. 109-111 and 2023, pp. 655-664.

[B]uying and selling seem to be established for the common advantage [*pro communi utilitate*] of both parties, one of whom needs [*indiget*] that which belongs to the other, and vice versa, as the Philosopher [Aristotle] states in Polit. I. (*Summa Theologiae*, IIa-IIae, q.77, a.1, resp.).

The existence of this common advantage implies both the idea of an exchange surplus and, for the seller (resp. the buyer), a reservation price below (resp. above) which he would derive no advantage from entering into the transaction. It is therefore clear that for the exchange to exist, since the surplus is the difference between the two reservation prices, the buyer's reservation price must be higher than that of the seller. It is on this basis that Aquinas continues, concluding that the price that validates the exchange must provide a just allocation of this surplus between the seller and the buyer:

But what is the common advantage to both should not involve more of a burden for one than for the other; and any contract between the two parties should, therefore, be based on an equality of things. Now the quantity of things which come to human use is measured according to the given price [...] To sell for more or to buy for less than a thing is worth is, therefore, unjust and illicit in itself. (*Summa Theologiae*, IIa-IIae, q.77, a.1, resp.).

This is a way of saying that there is a price, i.e. a key for allocating the surplus, that ensures justice in the exchange. Now, a money loan is also a voluntary exchange³. With this particularity that it takes place in time.

In the question on restitution in the *Summa Theologiae* (IIa-IIae, q. 62, a. 4, resp.), there is a most interesting discussion about the amount of this restitution, according to alternative situations. Thomas first discusses the case of a harm that results from depriving someone of what he currently owns. For instance, if you destroy the house in which I am now living. In such a situation, Thomas argues, the compensation should be what the house is worth now. Secondly, he deals with the case where the harm is related not to a present, but to a future possession. He then answers as follows:

Someone may cause harm by preventing another from acquiring what he was on the way to obtaining [*si damnificet aliquem, impediendo ne adipiscatur quod erat in via habendi*]. And then, the compensation should not be founded on equality because possessing something in power is not as valuable as possessing it in act [*quia minus est habere aliquid virtute quam habere actu*] (*Summa Theologiae*, IIa-IIae, q. 62, a. 4, resp.).

³ A money loan can be viewed as an exchange (*commutatio*). Note, however, that it is not a contract of sale (*emptio-venditio*), because the latter is a contract *consensu* in which a good is exchanged for money (and not money for money). Nor is it a barter contract (*permutatio*), which is an innominate contract in which a good is exchanged for another good.

Thomas relies on the Aristotelian couple in power/in act (*virtute/actu*) in order to introduce the idea that the present value of a good is lower for a future good than for the same present good.

Extended to the special transaction represented by a money loan, this amounts to saying that the exchange surplus it generates is shared between the lender and the borrower according to a future “compensation”, evidently at least as great as the loan itself. A consequence of this, apparently contrary to the logic of the *mutuum*, is that there is room for a non-usurious interest: the difference between the compensation and the loan.

However, the contradiction between the *mutuum*, which forbids interest on a loan, and the interest which comes from the surplus generated by an intertemporal exchange is only apparent. This is because the *mutuum* prohibits the payment of interest on the loan *because of this loan*, under the main contract, *but it does not prohibit it for other reasons*, external determinations which are not linked to the main contract.

3. Bypassing the *mutuum* trap (Extrinsic titles): Alternative reasons for claiming interest

These other reasons can be grouped together under the general heading “extrinsic titles” (see, among others, McLaughlin 1939, pp. 125-147 especially on canonists, and Noonan 1957, pp. 105-132; or, beside this early but unrivalled literature, Chaplygina and Lapidus 2016, pp. 36-37). These extrinsic titles such as, typically, *poena conventionalis*, *damnum emergens*, *lucrum cessans* or *carantia pecuniae*, stood apart from the *mutuum* and gave, for each of them, reasons for the supplement paid by the borrower to the lender – a supplement sometimes referred to as “interest”, which distinguished it from usury. Thomas Aquinas accepted the principle of an agreement for a compensation, distinct from the loan contract properly speaking, and which might be interpreted as an opportunity cost associated to the loan contract⁴:

The one who gives a *mutuum* can, without sin, make an agreement with the one who receives the *mutuum* for compensation for the harm [*damnum*] incurred, whereby something is taken away from him that he ought to have; for this is not selling the use of money, but avoiding harm. (*Summa Theologiae*, IIa-IIae, q.78, a.2, ad 1).

⁴ For an interpretation of all or some extrinsic titles as compensation for an opportunity cost borne by the lender, see Lapidus 1991, pp. 26-27; Decock 2007, p. xx; Chaplygina and Lapidus 2016, p. 37; Januard 2025, pp. 27, 65.

Yet, though the principle governing extrinsic titles was accepted, its implementation was not that easy. The problem came from the fact that, although some extrinsic titles became widely accepted, the harm often remained unobservable, so that the possibility of a usurious transaction could not be totally avoided. Accordingly, the level of acceptance or rejection of an extrinsic title depended on trust or distrust in the effectiveness of this harm and to the degree of aversion to the possibility of the sin of usury.⁵

A significant example was given, again, by Thomas Aquinas. He clearly accepted the *poena conventionalis*, whose aim is to protect the lender from a possible failure of the borrower to repay the loan in time by stipulating a daily indemnity in case the expiry date was not respected. In the question on greed in *De Malo*, he argued:

From the money lent [*mutuata*], the lender may incur a harm for something already possessed in two ways: in one way, when the money is not repaid to him at the appointed time; and in such a case, the borrower is bound to pay interest [*interesse*] to compensate the harm (*De Malo*, q.13, a. 4, ad 14).

The use of the word “interest” is all the more significant in that it might be difficult today to use it to designate a penalty for late payment. However, it shows how a general compensation principle can be applied to *poena conventionalis*. But in *De Malo*, Thomas rejects the idea of extending the reasons justifying interest to a harm suffered not only after the expiry date but during the loan. This was the second way to incur a harm, in the discussion from *De Malo*:

In another way, [the lender may incur a harm] within the duration of the *mutuum*, and in that case, the one who received the *mutuum* is not bound to pay compensation for the harm. For the one who lent the money ought to have safeguarded himself against incurring harm, nor should the one who received the *mutuum* suffer harm due to the stupidity of the lender ((*De Malo*, q.13, a. 4, ad 14).

This shows Aquinas’s suspicion against the implementation of a general principle to a wider range of extrinsic titles. But in the *Summa*, he seemed to have been more flexible, allowing also the *damnum emergens* (*Summa Theologiae*, IIa-IIae, q.78, a.2, ad 1). That is, the compensation of a harm because the lender was deprived from a desired consumption. This does not go to a compensation of a profit loss in the *lucrum cessans*:

⁵ An example of weak aversion was given by certain canonists such as Raymond of Peñafort, secretary of Gregory IX and later General of the Dominican order, or Cardinal Hostiensis, for whom there were cases where modest usury could be permitted (see McLaughlin 1939, p. 85; Noonan 1957, pp. 102-103; and Hamelin 1962, p. 86, who contrasted their position with that of Alexander of Alexandria), thus making recourse to extrinsic titles almost useless.

However, compensation for the harm that is considered in the fact that one does not make a profit [*lucratur*] from the money lent cannot be made into an agreement (*Summa Theologiae*, IIa-IIae, q.78, a.2, ad 1).

It seems that Thomas's fear was that the loan be used to finance the profitable activity of a merchant⁶, whose potential negotiation power might be sufficiently great for the compensation to be so high as to render the transaction usurious.

As Noonan (1957, p. 116) pointed it out, the *damnum emergens* and the *lucrum cessans* were not really discussed before the middle of the 13th century (with the notable exception of Robert of Courçon, *De Usura*, pp. 61-63 who, like Thomas later, tolerated the *damnum emergens* and rejected the *lucrum cessans*), that is before a general agreement was reached on the necessity of the *mutuum* as the contractual framework for money loans. However, the 13th century ushered in what might be called a stacking strategy in which, alongside the *mutuum*, extrinsic titles were stacked whose gradual acceptance recognised at the same time the nature of the opportunity costs associated with them.

The Franciscan theologian Peter of John Olivi is justly renowned for having legitimised as early as 1293 the acceptance of *lucrum cessans* in his *Tractatus de Contractibus* (II, 51; see Kaye 1998, p. 119 and Piron 2012, p. 22). This was achieved by converting the money lent into *capitale*⁷, which he saw as the equivalent of the *impetus* of Aristotelian physics, capable of generating a surplus for the merchant who used it (see Kaye 1998, pp. 122-123; Schefold 1998, pp. 112-113; Piron 2012, p. 71 and Franco, Nickl 2018, pp. 18-19, who credited the German philosopher Michael Wolff (1994) for being at the origin of this interpretation).

A peculiarity of this surplus was already noted (Piron 2012, pp. 67-69): its existence depends on a risk inherent in the operation which the lender gives up in order to lend his money. Such assertion stands at odds with the position of Thomas Aquinas whose objection to *lucrum cessans* depended on the inexistence of the basis for a compensation, because the profit anticipated was only probable (*Summa Theologiae*, IIa-IIae, q.78, a.2, ad 1). Preferring present goods is not related to pure preferences in time, but only to the greater risk attached to future

⁶ The affirmed basis of Thomas Aquinas's rejection of *lucrum cessans* is an opposition to speculative gains: "one ought not sell what one does not yet have, and one can be hindered in many ways from obtaining it" (*Summa Theologiae*, IIa-IIae, q.78, a.2, ad 1).

⁷ "Therefore, the aforesaid interesse of probable gain was, in a certain manner causally and, as it were, seminally contained in the aforesaid capital as capital [*capitali in quantum capitali*]; otherwise it could not be licitly demanded" (*Tractatus de Contractibus*, III, 45).

goods. Olivi puts that through a comparison between the certainty of a present and of a future thing:

It is established, however, that the right and the actual possession of a present thing, other things being equal, is worth more than the mere right to a future thing, or than the mere right without the actual possession immediately delivered or about to be delivered. Likewise, the certainty [*certitudo*] of a present thing and of its present possession is greater and more excellent [*maior et prestantior*] than the certainty of a future thing, or than the certainty of a future possession of a present thing. For this reason the first can, without it being undeserved, be sold for more, and the second can legitimately be bought for less (*Tractatus de Contractibus*, III, 55).

Contrary to Thomas Aquinas, Peter of John Olivi therefore argued that the very existence of a risk gave birth to a legitimate interest. An incidental consequence of this conception of a surplus arising from economic activity, noted by Januard (2022, p. 44) is that the interest obtained either from a loan where money is used as *capitale* (*periculum sortis*), or from a loan granted because the lender has given up using his money in a loan of *capitale* which could have yielded him an income (*lucrum cessans*) not only incorporates a risk premium, but is nothing other than this risk premium, its component depending on time preferences simply being irrelevant.

A few years later, in his *Tractatus de Usuris* (1307), Alexander of Alexandria, who was to become Minister General of the Order of Friars Minor, did not differ from his predecessors in his understanding of the origin and role of the *mutuum* in money lending, seeing usury not as a specific contract but as the vice of a contract (*Tractatus de Usuris*, cap. 3, par. 28; see the comments by Hamelin 1962, p. 78). But in return for this systematic view, Alexander was open to the possibilities offered by extrinsic titles, provided that the income they generated was clearly independent of the loan contract itself. It is from this perspective that he discusses the *lucrum cessans* (*Tractatus de Usuris*, cap. 7, par. 64) and the *periculum sortis* (*Tractatus de Usuris*, cap. 7, par. 67), and despite the rigorous conditions to which he subjects them, he accepts their validity alongside the *poena conventionalis* and the *damnum emergens*.

But there was still one step to take. The external circumstances which could give rise to compensation certainly covered a wide range of possible uses for the money loaned, from which the lender was excluded, but this did not go so far as to consider that the deprivation of money, without any further justification, could in itself make a compensation legitimate. It took another three centuries for this step to be taken. It was Hugo Grotius's teacher in Rome, the Jesuit Leonardus Lessius, who was responsible in *De Justitia et Jure* (1605) for stressing the

importance of this last extrinsic title, *carentia pecuniae* (Noonan 1957, pp. 349-352; Van Houdt 1998; Decock 2007, pp. xix-xxii)⁸.

In chapter 20 of book 2 of *De Justitia et Jure*, relying on his Spanish predecessors like Juan de Medina or Luis de Molina, Lessius showed an unambiguous and generous acceptance of the usual extrinsic titles: the most commonly accepted, *poena conventionalis* (*De Justitia et Jure*, 2.20.15), *damnum emergens* (2.20.10); and also the more disputable, *lucrum cessans* (2.20.11-12; see Noonan 1957, pp. 262-266) and *periculum sortis* (2.20.13). With *carentia pecuniae* (2.20.14), the stacking strategy of extrinsic titles reaches its apogee in the bypassing the *mutuum* trap. Although, as will be shown, Lessius' position was not as clear-cut as might have been imagined.

Each chapter of *De Justitia et Jure* is compounded in a similar way to the questions in the scholastic treatises. Thus, chapter 20 of book 2, explicitly linked to question 78 of the IIa-IIae of the *Summa Theologiae*, deals with “*Mutuum* and usury”. Each of the “doubts” which make it up is itself organised in the same way as an article in a question of the *Summa*, although the structure is a little less apparent, with the result that the author's final position only really emerges at the end. *Carentia pecuniae* is introduced at the very beginning of doubt 14, through a quotation from Juan de Medina in *De Poenitentia, Restitutione et Contractibus* (1581):

Hence it is inferred that the lender can receive something beyond the principal without the vice of usury or injustice, on account of the burden suffered from a lack because of the loaned money [*ex carentia mutuata pecunia*], provided this does not give rise to infamy or scandal, because for that reason it is licit for a seller to take more than the just price (*De Justitia et Jure*, 2.20.14:119).

As it appears in Juan de Medina, the expression *carentia mutuata pecunia* stresses the causal link between the loaned money and the lack, and does not seem to have referred to something very different from *lucrum cessans* (Noonan 1957, p. 349; Van Houdt 1998, p. 12). Nevertheless, it is on this initial conception that Lessius elaborates.

He then explains how Medina's position (which, again, is not *his* position, but the position he is to discuss) can be supported: first, alongside the loan, the lender deprives himself of the equivalent of a surety [*fidejussio*; see *Institutiones*, 3.21] on the sum loaned, “even if there is no risk in the debtor” – a surety which itself has a price. Second, as a result from the “obligation

⁸ *Carentia pecuniae* has been sometimes acknowledged as a prefiguration of the Keynesian notion of liquidity preference. See the references and comments given by Van Houdt 1998, p. 2 and Decock 2007, p. viii.

to the lender of not reclaiming the loaned money”, which has also a price.⁹ The extrinsic nature of this last obligation is immediately questioned (*De Justitia et Jure*, 2.20.14:120), so that the introduction of *caerentia pecuniae* under the authority of John Medina is now supported by the argument of the surety, not by that of the impossibility of claiming repayment of the loan before maturity. As in a scholastic treatise, it is now this position, of partial support, that Lessius discusses, introducing by a “*sed contra*” three counter-arguments all in favour of *caerentia pecuniae*. The first two counter-arguments develop the idea of obligation, either to show its generality, even in the case of negative obligations such as the obligation not to demand repayment of a loan before a certain date (2.20.14:121), or to propose an alternative by highlighting the existence of “certain undue burden [*onus quoddam indebitum*]” (2.20.14:122).

The third counter-argument takes on a different tone. Lessius builds on the idea of pricing the lack of some good to apply it first to the lack of money, as an instrument of trade for a specific merchant, and then to enlarge it to merchants as a whole, asking:

[W]hy should merchants not be able to assign a price, by common consensus, to the lack of money [*caerentia pecuniae*], especially if the rationale of the common good requires it? (*De Justitia et Jure*, 2.20.14:123).

His question was largely rhetorical, and Lessius gave an answer in two stages. First, the link between *caerentia pecuniae* and the common good is established from the observation of a general lack of money, due to a shortage of lenders, “partly dissuaded by the risk of loss of capital or the difficulty of recovering it, and partly to avoid depriving themselves of the ability to engage in various forms of trade” (2.20.14:123; see also 2.23.4:43). This is obviously a reference to three extrinsic titles, *periculum sortis*, *poena conventionalis* and *lucrum cessans*, of which *caerentia pecuniae* might be viewed as a kind of synthesis. It is then through the “common consent of merchants [*mercatores communi consensu*]” that a price is established for *caerentia pecuniae*. Lessius illustrates his point with the example of the Antwerp Bourse¹⁰, where such practice was supposed to have become usual. The second stage of Lessius’s

⁹ It is not self-evident that for Lessius, the obligation of not reclaiming the loaned money during the loan is part of (and not separated from) *caerentia pecuniae*. For instance, the heading of the doubt reads: “Whether, on account of the lack of money [*caerentia pecuniae*] or the obligation not to reclaim it before a certain time [*obligatio non repetendi ante certum tempus*], something can be demanded” (*De Justitia et Jure*, 2.20.14). The separation between *caerentia pecuniae* and the obligation is also confirmed by what Lessius does in *De Justitia et Jure*, 2.3.8, where he relates the possibility to demand repayment of a loan according to the will of the lender to a weaker form of use, possibly at the origin of a separation between property and use. See *infra* §4.

¹⁰ Relying mainly on a comparison between Molina’s and Lessius’s dealing with interest taken from loaned money at the Antwerp Bourse, T. Van Houdt (1998, pp. 15-17) argued convincingly in favour of a crucial influence of Molina over Lessius.

reasoning leads him to assert that, since the price thus fixed to compensate for the *caerentia pecuniae* is just, anyone can enter into a transaction on this basis, even if they have not suffered any harm (2.20.14:125). The significance of this conclusion should not be underestimated. It leads to saying that even if private harms, usually recognised by extrinsic titles, are at the origin of the price fixed consensually by the merchants for the *caerentia pecuniae*, the existence, with a new lender, of a private harm of this type is no longer even necessary for him to be able to claim this price.

Lessius's third counter-argument is undeniably brilliant: he argued that all of them "may seem probable to someone, especially the third" (2.20.14:126). However, such is still not his definitive position. The latter is given just after, starting with the word "nonetheless [*nihilominus*]" which plays the same role as the ritual "I answer [*respondeo*]" in scholastic treatises like, for example, Thomas Aquinas's *Summa*. Lessius's position is now unequivocal:

Nonetheless, I believe that merchants should not be given such loose rein [*laxas habenas*], nor should they be allowed to demand anything beyond the principal if from their *caerentia pecuniae*, no profit ceases, no risk is faced, and no inconvenience is anticipated (2.20.14:126).

This is a way of saying that *caerentia pecuniae* cannot arise for an individual without the opportunity cost compensated by such or such recognised extrinsic title, for which it is nothing more than the general heading under which these extrinsic titles are grouped.

He then explains his answer by emphasising two points of quite different nature. The first, which can hardly be considered a substantive argument, concerns the novelty of an idea not found in any authority, according to which merchants could be given "loose rein". The second argument, more substantive but more specific, returns to the case where the *caerentia pecuniae* depends on the obligation not to demand repayment of the *mutuum* before its due date, in order to hold that this obligation is "intrinsic to the nature of a *mutuum* (otherwise, a *mutuum* would not differ from a *precarium*¹¹)" (2.20.14:127). Note that this last point amounts to repeating

¹¹ The *precarium* can be viewed as another way to denote a loan in Roman law (see *Digesta* 43.26), along with the *mutuum*, *comodatum*, *foenus* and *locatio-conductio*. It is an innominate contract whereby something is granted freely to someone to enjoy for as long as the grantor wishes. It is a typical case where, in contrast to other loan contracts, the obligation not to demand restitution of the thing lent before a fixed term of the contract does not hold. The interpretation Lessius suggests here, which I share, is however debatable. Leaving aside questions relating to the legal protection of the parties, if the *mutuum* is a *precarium* with a fixed term, the transfer to the beneficiary would concern not only possession (*possessio*), but property (*dominium*). Indeed, it is difficult to imagine, in the case of a *mutuum*, that wine drunk, for example, would not have become the property of the person drinking it. But a contrary view is suggested by the *Digest* and might fit better Lessius's view. The title of the *Digest* devoted to this subject contains many examples explicitly implying a transfer of possession, but these do not concern consumptible goods. This can be understood as recognition that the transfer of sole possession (and not full property) can be generalised, in the case of the *precarium*, to the loan of consumptible goods. This

what he already said in his second counter-argument (2.20.14:120). So that when Lessius concludes that this provides an answer to both his first and second counter-arguments, the reader is led to understand that he accepts the *carentia pecuniae* only in a restricted sense according to which it covers the opportunity costs covered by other extrinsic titles already accepted, with the explicit exclusion of the possibility of compensating for any alleged harm caused by the obligation not to demand repayment before the end of the loan.

This is confirmed by his rejection of the third counter-argument, related to the common good and the possibility for those who suffer no harm as a result of their loan to invoke *carentia pecuniae* in order to ask for interest determined by a common assessment of merchants. Lessius claims (2.20.14:127), contrary to his own argument but without further elaboration, that such a right to interest cannot be extended to those who suffer no harm. In short, he introduces a position, extends it, and then goes back on this extension without really arguing his retreat. The rather mild reaction of some of his commentators (Noonan 1957, pp. 350-351; Van Houdt 1998, p. 8) therefore seems an understatement. However, an interesting interpretation is offered by T. Van Houdt, who notes that in a first version of his book, Lessius was more in favour of the extended version of *carentia pecuniae*, but that he seems to have been forced to abandon it in the face of pressure from the Roman censors of his order. But in any case, in its limited or extended version, *carentia pecuniae* seems to be the maximum that extrinsic titles might allow: the *mutuum* is circumvented, but it still imposes its framework.

4. Challenging the *mutuum* trap (*Exiit qui seminat* and after): Separating property and use, even for consumptible goods

Shortly after the death of Thomas Aquinas in 1279, Pope Nicholas III introduced into canon law a bull whose aim had no obvious connection with the question of interest on money loans. This bull, *Exiit qui seminat*, concerned the rule of the Friars Minor and was intended to pacify relations between the Franciscan Conventuals and Spirituals regarding the manner of applying their vow of poverty, and to defend the Franciscan order against those who claimed that this vow was so strict that it was impossible to follow (*Liber Sextus Decretalium*, 5.12.3, *Exiit qui*

interpretation is in line with what Lessius says in *De Justitia et Jure*, 2.3.8, where he presents the revocability of a loan at the will of the lender as making it possible for the borrower to consume a good without being its full owner. See *infra* §4.

seminat).¹² The Pope is thus led to ask whether the friars who make use of consumptible goods which they receive become thereby their owners. In his reply, he first distinguishes between two ways of using a good, *usus juris* and *usus facti*:

Nor because one has oneself renounced the possession of the use [*proprietatem usus*] and the property of anything whatsoever [*rei cujuscumque dominium*] does it follow that the simple use of everything [*simplici usui omnis rei*] has been renounced. For the use, which has the name not of *usus juris* but only of *usus facti*, and which as a matter of fact provides no right to the users, but rather, the necessary use of things both for the sustenance of life and for the execution of the duties of their state, except what is noted below concerning money, is granted to the friars according to their rule and all truth in a moderate way (*Liber Sextus*, 5.12.3, *Exiit qui seminat*, col. 1113).

The difference between *usus juris* and *usus facti* is important because the former designates a use to which legal protection is attached, whereas the latter is given a minimum right, related to the most basic human practice in relation to the external world. For this reason, when a Franciscan friar is given a consumptible good, such as wine, bread or money, only the *usus facti* is transferred to him, with the donor keeping for himself ownership of this good or, better, transferring it to the Apostolic See. Moreover, Nicholas III follows with an example that should immediately win the reader's assent:

Because the retention of ownership of such things with the grant of use made to the poor is not unfruitful to the owner since it is meritorious for eternal rewards and appropriate for the profession of the poor, which is considered more useful to them as it exchanges temporal things for eternal (*Liber Sextus*, 5.12.3, *Exiit qui seminat*, col. 1113).

It is easy to extend this reasoning to money loans by considering that the use transferred to the borrower is not the *usus juris*, which means that the lender retains a property right over the money lent and can, for this reason, charge interest on it by selling the *usus facti* for a definite time. The possibility of such extension could be found in the works of John Duns Scotus. In his commentary on the *Book of Sentences*, written in 1304 after his lectures in Oxford (*Ordinatio Oxoniensis*), the great Franciscan theologian discusses the question of usury in a *scholium* in which he shows a great familiarity with the various debates surrounding the use of a *mutuum*. He considers the possibility of separating property from use and refers to *Exiit qui seminat*:

To contract a *mutuum* justly, it is necessary to maintain equality strictly in number and weight except in certain cases, which will be discussed below [in the rest of the *scholium*]. The reason for this is assigned

¹² On the influence of *Exiit qui seminat* on the treatment of money loans, see Noonan 1957, pp. 60-61 and 345-347 and, in relation to Odonis and 14th century writers, Ceccarelli and Piron 2009.

by some as follows: because the use of money is its consumption, therefore, the one granting money by a *mutuum*, as a result consumes it. Against this, an objection is raised based on the decretal *Exiit qui seminat*, today in the sixth book [*Liber Sextus Decretalium*], where it is stated that the use of certain things is perpetually separated from property (*In IV Sententiarum*, d.15, q.2, Schol.17).

Yet, although he is well aware of the objection, Scotus continues in the following lines, despite the objection he reports, to keep to the case where the loan is made by a *mutuum* and where the lender no longer has any right of property over the money held by the borrower. And it is in a fairly classical manner that in the remainder of the *scholium* (*In IV Sententiarum*, d.15, q.2, Schol.17-19), he successively addresses the argument of the sterility of money, the *poena conventionalis* (for which he sensibly relies on marginalist reasoning *avant la lettre*¹³), the role of risk, and the loan by ostentation (*mutuum ad ostentationem*, in which the money is not spent by the borrower but used to show off his wealth as if he were himself rich; see Chaplygina, Lapidus 2016, p. 33).¹⁴

The influence of Duns Scotus, like that of Olivi, on Gerald Odonis's *Liber de contractibus* (1315-1317) has been clearly recognised (Ceccarelli and Piron 2009, pp. 176-179) but the bull *Exiit qui seminat* played for him a far more crucial role in his approach to money lending. A role accounted for in detail, again by Ceccarelli and Piron 2009 (pp. 185-190), who showed how it resulted in an "uninhibited approach" to interest on money loans. This was achieved by a use of *Exiit qui seminat* in order to distinguish a revenue (*redditus*) from the right to perceive such revenue (*jus percipiendi redditus*) in the context of an annuity contract whose legitimacy was already commonly taken as granted. Odonis then moved on from the annuity contract to the money loan, highlighting the similarity between the pairs "property of a revenue / right to perceive a revenue" in the former contract, and "property of money / right to use money" in the latter, to argue, again relying on *Exiit qui seminat*, that the right to use money for the duration of the loan could be sold by the lender. As a result, the risk that underpinned the existence of interest in Olivi now disappears behind time in Odonis (see Januard 2025, p. 56).

¹³ "The indication of when this is not usurious fraud is clear: it is when the lender would prefer the money to be repaid on the specified day rather than the following day with the penalty added. Conversely, it is fraudulent when the lender prefers that the due date be missed so that the penalty might be enforced rather than the money being repaid on the agreed day" (John Duns Scot, *In IV Sententiarum*, d.15, q.2, Schol.18; see Chaplygina, Lapidus 2016, pp. 36-37).

¹⁴ See also Noonan 1957, pp. 60-61 who seems, however, to consider that Duns Scotus had adopted the argument on money loans drawn from *Exiit qui seminat*.

Some examples of a reference to *Exiit qui seminat* on economic matters can be found during the 14th century (Ceccarelli and Piron 2009, pp. 189-190), but the flow looks as if it was rapidly drying up, to such an extent that, according to Noonan (1957, pp. 60-61, 345), it has disappeared for some two hundred years. The evolution of the position of Nicholas III's successors seems to have been involved in this drying up. Yet, a few decades after *Exiit qui seminat*, Pope Clement V was to confirm his predecessor's position on the rule of the Friars Minors in a decretal of 1312, *Exivi de paradiso* (*Clementis Papae V Constitutiones*, 5.11.1), where, despite the absence of any elaboration that would have continued that of Nicholas, he relied on his predecessor's distinction between *usus facti* and *usus juris* to justify that the simple use (*usus facti*) of certain goods by Franciscan friars did not imply that they had any property right on them (*Clementinae*, 5.11.1, *Exivi de paradiso*, col. 1197).

The actual turn came ten years later, with John XXII¹⁵. In 1317, however, the Pope was to respond in the bull *Quorundam exigit* (*Extravagantes Joannis XXII*, 14.1) to an appeal of the Spirituals against the Conventual party of the Franciscan order by confirming the position adopted in 1312 by Clement V in *Exivi de paradiso* – and, subsequently, that of Nicholas III in *Exiit qui seminat*. This was to help Michael of Cesena to put some rather rough order among the Franciscans (four recalcitrants, who had previously been submitted to the Inquisition, were burnt at the stake in Marseille), of which he was Minister General. But the persisting discussion between Dominicans and Franciscans about the existence and nature of the property that Christ and the Apostles would have enjoyed during their lifetime led some of them to turn to the Pope to settle their dispute. Now, Nicholas III's *Exiit qui seminat* prohibited re-opening the issues to which it had answered. So that his successor was obliged to rescind this provision by another decretal, *Quia nonnunquam* (*Extravagantes Joannis XXII*, 14.2), which was to arouse the hostility of the Franciscan representatives to the Pope. It was in the wake of these events, at the end of 1322, some months before he canonised Thomas Aquinas, that John XXII issued a decretal, *Ad conditorem canonum* (*Extravagantes Joannis XXII*, 14.3) denouncing *Exiit qui seminat* in several of its provisions. Of course, this concerned, as a general principle, the possibility to rescind the decisions of his predecessors:

¹⁵ On the tumultuous relations between John XXII and the Franciscan Order, see, among an abundant literature, J. Moorman 1968, pp. 310-26.

It is undoubtedly the responsibility of the creator of the canons, when he sees that statutes issued by himself or by his predecessors are more harmful than beneficial, to ensure that they may no longer cause harm (*Extravagantes Joannis XXII*, 14.3, *Ad conditorem canonum*, col. 1225).

In application of this general principle, he denied that the Roman Church was the true owner of all the goods given to the friars for their use and on the contrary, leave them this ownership:

We, therefore [...] with the advice of our Brothers [the Cardinals], decree by this edict, which is to remain permanently valid, that regarding goods which in the future may be conferred, offered, or otherwise in any manner come to the aforementioned brothers or order, [...] no right or property whatsoever shall be acquired by the Roman Church by reason of the said ordinance [*Exiit qui seminat*] or by virtue of any other decree issued specifically on this matter by any of our predecessors. Rather, such ordinations shall, in this respect, be regarded entirely as if not made (*Extravagantes Joannis XXII*, 14.3, *Ad conditorem canonum*, col. 1228-1229).

And, with regard to consumptible goods, he firmly rejects, and not without humour, the possibility that use, even understood as *usus facti*, could be separated from property¹⁶:

It is contrary to law and reason to assert that in such matters [consumptible goods] *usus juris* or *usus facti* can be established separately from the ownership or property of the thing [*separatus a proprie rei seu dominio*]. Nor does it appear to have been the intention of our aforesaid predecessor [Nicholas III] to reserve to the Roman Church the property of such goods. For what sane person could believe that it was the intention of so great a father to retain the property of the Roman Church over a single egg, or a piece of cheese, or a crust of bread, and other consumptible goods, which are often given to the friars themselves for immediate consumption, while leaving their use to the friars? (*Extravagantes Joannis XXII*, 14.3, *Ad conditorem canonum*, col. 1226).

Although Noonan (1957, pp. 60-61) was to consider that the publication of *Ad conditorem canonum* left arguments inspired by *Exiit qui seminat*, such as those of Scotus, unheard until the sixteenth century, their echo was still felt for many years. Michael of Cesena indeed appealed twice against the papal decision. John XXII confirmed his position with the same firmness, first in two other decretals, in 1323 (*Extravagantes Joannis XXII*, 14.4, *Quum inter nonnullos*), and then in 1324 (*Extravagantes Joannis XXII*, 14.5, *Quia quorundam*). In 1329, John XXII deposed Michael of Cesena and sent him directly the bull *Quia vir reprobus*¹⁷, which reiterated all the arguments on the property and use of consumptible goods already put forward

¹⁶ Note, also, the technical understanding of use by John XXII. To use a good means that its substance is saved by the act of using. Which is obviously not the case for consumptible goods. So that their alleged “usus” is, more rigorously, an “abusus” (see *Extravagantes Joannis XXII*, 14.3, *Ad conditorem canonum*, col. 1227).

¹⁷ On *Quia vir reprobus* (which was not included in the *Corpus Juris Canonici*), see Brenner 2014, and in relation to the Franciscan replies on the issue of usury, Lambertini 1994-1997. About the evolution of the debate, in relation to the Franciscan legacy, see B. Koehler 2025.

in *Ad conditorem canonum*. It was in support of Michael of Cesena and the Franciscan position that William of Ockham, already excommunicated, wrote in the early 1330s (in 90 days, as its title indicates) his *Opus Nonaginta Dierum*, in which he refuted point by point the Pope's arguments in *Quia vir reprobus*. With the exception of the writings of Marsilius of Padua around the same time, the debate died out. *Ad conditorem canonum* had become the law of the Church. The parenthesis opened by *Exiit qui seminat* was closed. With John XXII and after him, we had returned to the argument of Thomas Aquinas on the impossibility of dissociating property and use for certain goods, leaving no room for interest to be charged by the lender because of his loan.

This situation changed at the middle of the 16th century with some leading figures of the School of Salamanca like Vitoria, de Soto and Vazquez. Domingo de Soto's paradoxical aim, for instance, was to reconcile Thomas Aquinas's position in the *Summa Theologiae*, Nicholas III's decretal *Exiit qui seminat* and those of his successors, Clement V with *Exivi de paradiso* but also John XXII with *Ad conditorem canonum*. His argument was based on a revision of Thomas's analysis, in which he said not that ownership could not be separated from use in the case of consumptible goods, but that they could not be valued separately. This could authorise lending at interest, whereas usury amounted to valuing the use of money separately from its property in order to derive an income from it (see Noonan 1957, pp. 345-346). We can discuss at length the consistency of Domingo de Soto's approach with that of his predecessors, but it at least made it clear to its readers that the position expressed by John XXII had, more than two hundred years after its publication, lost not necessarily its relevance, but obviously its dissuasive power.

Leonardus Lessius was to exploit this opening with talent, once again in 1605, in his *De Justitia et Jure*. In doubt 8 from book 2, chapter 3, he asked "whether use is distinct from property in things that are consumed by their use" and gives what he considered to be the two answers: the first was that of John XXII in *Ad conditorem canonum*, in which the right to use consumptible goods cannot be separated from their property; the second was related to Nicholas III and *Exiit qui seminat*, and holds that on the contrary, use and property could be distinguished (*De Justitia et Jure*, 2.3.8:31). He immediately adopts the second point of view, which he explains by the possibility of separating property and use when the latter is revocable, giving the example of religious who have taken a vow of poverty, whose goods they use can be taken from them without injustice by their superior, which shows that they were not their property. Even in the case of consumptible goods:

The use, and the right to use bread or money, can be granted in two ways. 1. Irrevocably: in which case it does not seem to differ much from property. 2. Entirely revocably and dependent on the will of the one granting it, so that it can be revoked at any moment without any injury to the user. And this right is without doubt distinct from property, because property is an absolute and firm right over a thing, not dependent on the will or discretion of another. But this right is conditional and extremely weak. I have it if you are willing; I do not have it if you are unwilling for me to have it (*De Justitia et Jure*, 2.3.8:32).

This idea of irrevocability or revocability, which we already encountered when Lessius discussed the *carentia pecuniae* in 2.20.14 as a characteristic of the term of a loan, is ingeniously introduced in support of Nicholas III's position. This makes it all the easier to relate it to the other distinction, from *Exiit qui seminat*, between *usus juris* and *usus facti*:

It must be noted, however, that irrevocable use is called *usus juris* by Nicholas III in the decretal *Exiit*, both because it involves an absolute right and because the laws speak of it in those terms. Revocable use, on the other hand, he calls *usus facti*, not because there is no right involved (for that would make it unjust, as John [XXII] correctly argues), but because it is not an absolute and solid right, being dependent on the will of another until the thing is consumed in fact (*De Justitia et Jure*, 2.3.8:33; see also 36 and the comment from Noonan 1957, p. 347).

This means that when he tackles head-on the classical argument of Thomas Aquinas which leads to the conclusion that the support of a money loan is necessarily a *mutuum*, he concludes that the use in question is a *usus juris*, not a *usus facti*, so that there is no contradiction with the possibility of separating property from a use understood as a *usus facti* (*De Justitia et Jure*, 2.3.8:37).

On this basis, it is obviously possible to imagine a loan transaction involving consumptible goods, such as money, in which the lender sells, on the one hand, the *usus facti* of a good of which he is the owner and, on the other hand, the property itself. Lessius explicitly addresses this possibility, stressing that it is potentially a source of usury (2.3.8:37). So here too, after he has brought to a conclusion an explanation of the interest that challenges the *mutuum* trap, he abandons, the solution that he himself had conceived:

I concede that this right or this use [*usus facti*] can absolutely be sold; but it is of lesser value than the property of the thing, or the irrevocable right of use [*usus juris*]. [...] But if someone wishes, through another contract, to sell direct property [i.e., as a kind of bare ownership from which the *usus facti* would be excluded], it cannot be sold for more than it is worth separately from that use; thus, the price of the use and the price of the direct property will not exceed the just estimation of the thing. However, this manner of contracting is not customary, for it would easily foster usury, even though it is not intrinsically illicit (*De Justitia et Jure*, 2.3.8:37).

Here, as in the case of *carentia pecuniae*, Lessius went as far as he could in identifying a means of escaping the *mutuum* trap. Although for different reasons, in both cases he did not go down the path he himself had mapped out. In *carentia pecuniae*, he had come to see not an extrinsic title, strictly speaking, but an intrinsic disposition, which contradicted the *mutuum*. As for the possibility of separating *usus facti* from property, it is neutralised in its effects, since the aggregate value of this *usus facti* and bare property is equal to the sum lent through a *mutuum*.

5. Overcoming the *mutuum* trap (Hugo Grotius): *Generata non pereunt* [things in kind do not perish]

Economic issues in Hugo Grotius are mainly to be found in the chapter on contracts (book 2, chapter 12) of his major work on the law of war and peace (*De Jure Belli ac Pacis*, 1625), where he addresses questions related to price and exchange (Lapidus 2024), trade, money and money loans (Lapidus 2021, 2023, 2025). Although, like most of his predecessors and contemporaries, he expressed his personal repugnance to lending at interest (*De Jure Belli ac Pacis*, 2.12.20.3; 2.12.21, n. 2), he distinguished himself by accepting its principle, thus countering the classical argument against usury introduced by Thomas Aquinas. This time, it is no more a question of bypassing the *mutuum* trap as with extrinsic titles, nor of challenging it by trying to detach an attenuated form of use from property as the authors who relied on *Exiit qui seminat* attempted to do: it is an alternative way of conceiving interest-bearing loans that Grotius invites.

He discusses the arguments whereby interest on a money loan is contrary to natural law. His starting point is the relative properties of the four contracts inherited from Roman law that can serve as the legal basis for a loan – the *mutuum*, the *commodatum*, the *foenus* and the *locatio*. The argument he relies on is as follows:

What is said of the *mutuum*, namely that it is free, can be said of the *commodatum* [*de commodato dici potest*]: however, it is not unlawful to demand a price for the use of the thing, and all what happens is that it only changes the name of the contract [for *foenus* in the first case, *locatio* in the second] (*De Jure*, 2.12.20.1).

This is supplemented by a footnote referring to the words “... can be said of the *commodatum*”:

For there is a great affinity between *commodatum* and *mutuum*, like between *locatio* and *foenus*. (*De Jure*, 2. 12.20.1, n. 1).

Grotius's reasoning is based on a double "affinity" that allows for an analogy making it possible to extend the demand for a price for the use of a thing to the case of the *foenus*. Yet, although Grotius did not refer to it, the similar double affinity had already been pointed out in one of the early commentaries on Gratian's *Decretum* by Huguccio Pisanus around 1190, the *Summa Decretorum* (the complete printed edition of which is still missing). Discussing question 3 on *Causa* 14 about usury and starting from the same premise, he reached a conclusion clearly opposed to that of Grotius, more than four centuries later:

But *commodatum* is when something is delivered to another, not to make it his own, but for lending [as *commodatum*] and use, whence the same must be returned. [...] In a *mutuum*, therefore, property is transferred, but not in a *commodatum*. Likewise, in a *commodatum*, the same thing must be returned, which is not required in a *mutuum*, although it sometimes happens this way. But in this, it is appropriate that both the *mutuum* and the *commodatum* should be gratuitous. If, therefore, something beyond the principal [*ultra sortem*] is demanded for the *mutuum*, whatever it may be, it is usury; and only in this case is usury committed, namely, when something is demanded or accepted for the *mutuum* beyond the principal. If, however, something is demanded in return for the *commodatum*, it is not usury, but it is no longer a *commodatum*, but another contract, that is, barter [*permutatio*], or *locatio*, or sale [*venditio*] (*Summa Decretorum*, C. 14, q.3, dictum ante c. 1; quoted by McLaughlin 1939, n. 176, p. 101; see also Noonan 1957, p. 40).

Comparing these two texts, however, reveals that while their premises are the same and their conclusions are opposed, their respective modes of argumentation are different: one, that of Huguccio, is based on a pre-Thomistic conception of the relationship between a money loan and its legal support; the other, by Grotius, shows an incomplete argument. For Huguccio, the impossibility of pursuing the analogy until its end arises from the fact that if any surplus beyond the repayment of the sum lent constitutes the usurious character of the loan, then passing from *mutuum* to *foenus* is excluded with regard to a preexistent prohibition of usury. On the contrary, for Grotius, it is the fact of accepting that the use of a good, whatever its nature, has a price, which is the basis for the possibility of moving from *mutuum* to *foenus*, just as one would move from *commodatum* to *locatio*: in each case, it is enough to attach a price to what was granted free of charge. But something more is needed, otherwise the argument remains incomplete: why should the lender receive the price of the borrower's use of the good? Ownership of a good is indeed the only way to collect the price for its use, and in the case of the *mutuum*, ownership of the money lent is transferred to the borrower.

These challenging reasons are introduced by Grotius progressively and indirectly. A key toward the solution is given, after an evocation of the inadequacy of the Aristotelian argument

on the sterility of money, by what seems to be a simple reminder, by a watchful lawyer, of the Thomistic argument on usury – to which he seems to concede some relevance:

It is more plausible [*speciosus*], that here the thing is returned for the thing [i.e., *in genere* (in kind), and not *in specie*, where the same thing is returned], and the use of the thing cannot be distinguished from the thing itself [*usus autem rei a re distingui non possit*] since it consists in its abuse [*in abusu consistat*], and, therefore, nothing should be demanded for it [the use] (*De Jure*, 2.12.20.1).

The emphasis is placed here on the *mutui datio*, an essential feature of the *mutuum*, by which property is transferred to the borrower and, through it, the right of *abusus*. In the case of money, the exercise of the right of *usus*, that is, spending it, entails this of the right of *abusus*, which would put an end to the ownership of the lender. As such, to accept this objection would be to return to Huguccio's position and reject Grotius's own analogy.

From a legal point of view, Grotius begins to answer the objection he has just raised by referring to a *Senatus consultum* which, curiously enough, mentioned the persistence of a usufruct over a good whose use would cause it to disappear. The problem raised by the *Senatus consultum* concerns the way in which the existence of those things which disappear or transfer ownership through use is taken into account when the assets of a bequest are recorded. It concludes as follows:

The Senate decreed that the usufruct of all things that were found to be in someone's patrimony can be bequeathed. By this *Senatus consultum*, it seems to have been introduced that the usufruct of those things which are consumed or diminished by use can be bequeathed [*ut earum rerum quae usu tolluntur vel minuuntur, possit ususfructus legari*] (*Digesta*, 7.5.1).

It is on this meagre material that Grotius relies:

But it is to be noted that although the usufruct [*ususfructus*] of things which perish in use, or are transferred to the ownership of another, is said to have been introduced by a decree of the Senate, nevertheless it does not mean that there is, in fact, a usufruct properly speaking [*non tamen effectum, ut proprius ususfructus esset*] The word "usufruct" is used, which, according to its proper meaning, does not accord with such a right [of usufruct]. However, it does not follow that this right is nothing or that it is not estimable as, on the contrary, it is certain that if someone transfers such a right to the owner, money can be demanded for this (*De Jure*, 2.12.20.2).

The importance of the terminological discussion on usufruct (Lapidus 2021, p. 108; 2023, p. 1042; 2025, pp. 346-349) should not be underestimated. So, whereas in the continuity of *Exiit qui seminat* down to Lessius, the possibility of remaining the owner of a loaned consumptible good depended on a limited form of *usus* (*usus facti*), Grotius takes the opposite view: what is not really a usufruct but looks like one is outside *usus* and *fructus*. Like them and

like *abusus*, it is associated with the full property of a good, but it is distinct from them. As a result, when money is lent to a borrower, he nevertheless retains a property evidenced by this “expanded usufruct” (Lapidus 2023, p. 1042), the sale of which constitutes additional income for the lender.

But in his book of 1625, Grotius does not really go beyond this explanation, leaving his argument incomplete. We understand that he defends the idea of an expanded usufruct, whose origins go back to the *Digest*, which goes beyond the limits of the commonly recognised usufruct and justifies the charging of interest. However, all this does not tell us anything about its nature.

It is the author of the first major translation of *De Jure Belli ac Pacis* into French, Jean Barbeyrac, in 1724, who provides some elements to complete Grotius’s argument (see Lapidus 2025, pp. 348-349). They consist of a very long footnote inserted in the middle of the recall of the classical argument on usury, when Grotius writes “[i]t is more plausible, that here the thing should be returned for the thing” (*De Jure*, 2.12.20.1). Barbeyrac argues that the author resolves the objection “more at length” in a note on Luke (*Le Droit de la Guerre et de la Paix*, 2.12.20 fn. 4). The latter is part of the *Annotationes in Novum Testamentum*, written a few years before the *De Jure*, but published much later in 1641 (at least, regarding his comments on the four Gospels; see De Jonge 1984, pp. 97-99). The footnote gives a partial translation of Grotius’s comment on the verse in Luke, repeated throughout the Middle Ages, “lend [in the *Vulgate: mutuuum date*], hoping for nothing in return” (Luke 6:35). Before the passage quoted by Barbeyrac, Grotius had explained that he was going to consider the question of lending at interest from four aspects, “natural law, the Law of Moses, the Law of Christ, and the customs of the early Christians, which is usually called Canon Law”. Then, he expressed his approval for “the piety of those who would wish to see this entire means of profit removed from human affairs” because of its morally harmful consequences, as well as his distrust of “excessive strictness [which] often gives rise to unrestrained license” (*Annotationes*, Luke 6:35, p. 256).

He starts his presentation of the natural law perspective by a critical review, like later in *De Jure* (2.12.20.1), of the justifications for the prohibition of usury (*Annotationes*, Luke 6:35, pp. 256-257), dealing on this occasion with the classical argument, on which he is more specific than he will be later in 1625:

Others insist that the *mutuum* transfers property; so the fruit arising from a thing ought to belong to the owner. But even this subtlety of language has nothing to do with natural equity. For, in the case of things that may be returned *in genere*, as money, corn, wine, the right to receive the same thing *in genere*, stands

for property. Now, it is universally agreed that a person to whom a thing is restored immediately receives more than he to whom it is restored after a longer time, on account of the advantages attending the natural possession [...]. This holds true not only in a *mutuum* but also in a *commodatum*, if we consider the importance of things in themselves, and not the subtlety of terms. The delay of payment is undoubtedly susceptible of estimation. And this very thing, which lies in the delay of time, can undoubtedly be estimated, and accordingly, it can also be brought into a *stipulatio* (*Annotationes*, Luke 6:35, p. 257).

This gives meaning to Grotius's statement in *De Jure* (2.12.20.1) that in a money loan, "the thing is returned for the thing [*res pro re reddatur*]". This amounts to saying, using the language of the *Annotationes*, that it is a loan *in genere*, in kind, where the object lent and the object returned are not physically identical, but belong to the same class – in this case, that of quantities of money of the same value as that of the sum lent. Conversely, in the case of a *commodatum*, for example, the transaction is *in specie*, specifically, with the object returned being physically the same one that was lent. Now it is this right to repay a loan *in genere*, and not exclusively *in specie*, that enables the borrower to make use of it: it is because he will repay *in genere* that he has the faculty of using the money borrowed. The right to repay one's debt *in genere* is thus the expanded usufruct where Grotius, in *De Jure* (2.12.20.2), sees the support of the interest on a money loan. From now on, when I lend money, I retain a right of property over it, evidenced by the permanence, throughout the duration of the loan, of an expanded usufruct held by the borrower even if he has spent everything I lent him so that the initial physical money has disappeared. It is because of this continuing property that I can claim from him the price of the expanded usufruct that I granted him until the loan expires.

Grotius's parallel between *mutuum* and *commodatum* is also revealing of his understanding of interest. The person who lends money and the person who lends an ox to her neighbour for agricultural work are in the same situation with regard to what they have lent for the duration of the loan. Both remain the owners. So that selling the expanded usufruct in one case and the usufruct in the other is part of the same process, where the asked price depends on the duration of the loan. At the end of this transformation, the *commodatum* has become a *locatio*. The operation is more complex in the case of the *foenus*. As Grotius points out, the latter must be supplemented (or, more simply, replaced) by a contract *verbis* consisting in mutually consistent question and reply, the *stipulatio*, in order to obtain a *foenus*. The money lent is then like a good subject to a lease, and the interest charged on the sum lent is analogous to the price of this lease.

In his comment on Luke, as in the rest of the chapter on contracts in *De Jure*, Grotius explores the relationship between the level of interest on the one hand and, on the other hand, the duration of the loan, the risk incurred, and the profitability of the operations it finances (see

Lapidus 2023, pp. 1042-1044; 2025, pp. 349-350). Although hidden between his various writings and subject to the vigilance of one of his translators, Grotius's demonstration is brilliant. It is now possible to recognise that the origin of the specific income from a money loan does not lie in considerations external to it, but in the loan itself:

Therefore, it should be understood that, without nature opposing it, someone who lacks the use of money for the favor of another can, in turn, negotiate something in return in the name of the agreement [*vicissim aliquid eo nomine pacisci*] (*Annotationes*, Luke 6:35, p. 258).

It is no longer necessary either to appeal to extrinsic titles or to assume that the borrower makes limited use of the money lent in order to explain interest. Money loans are no longer necessarily free and the *mutuum* trap is over.

6. Concluding remarks

This paper accounts for the very long movement during which our understanding of interest-bearing loans has changed, a movement that stretches from the time of Thomas Aquinas, at the end of the 13th century, to that of Hugo Grotius, at the beginning of the 17th century. Aquinas is to be credited with combining the traditional teaching of the Church, the influence of Aristotle and the categories derived from Roman law, to produce an understanding of the money loan such that it had become impossible to imagine it in a contractual framework other than that of the *mutuum*, which has the specific feature of prohibiting any payment of interest. The very language itself conformed to this: lending money could only be expressed by using the verb *mutuari*, which implied that one did not return more than had been borrowed. In this representation, usury, which was a sin against the cardinal virtue of justice, also became a fault against reason insofar as it was claimed to have its source in the loan itself.

However, such understanding of the money loan has been transformed. The driving force behind this transformation was the simultaneous identification of the prerequisites for interest, whether normatively accepted or rejected: the combination between the existence of a surplus of exchange, the preference for goods that are close at hand rather than goods that are distant in time and the respective negotiation power of the borrower and the lender. The transformations described in this paper have had the effect of loosening the constraint of the *mutuum* and, for the last of them, which is owed to Grotius, of cancelling it out.

Between Thomas Aquinas and Grotius, the transformations that led to overcoming the *mutuum* trap had followed two parallel trends. The first was based on the idea that it was

possible to bypass the *mutuum* trap not directly on the basis of the loan itself, but because of its induced effects, its opportunity cost, embodied in extrinsic titles. The principle had already been admitted by Aquinas, and the names of Peter of John Olivi, Alexander of Alexandria and, finally, Leonardus Lessius, are all milestones that testify, among others, to a gradual acceptance of extrinsic titles like *poena conventionalis*, *damnum emergens* or *lucrum cessans*. Writing at the beginning of the seventeenth century, Lessius deserves particular attention. He went as far as possible in establishing the most encompassing form of extrinsic titles: the *carentia pecuniae* does not associate its opportunity cost with any particular harm: it is a general harm, which does not need to be named other than by the fact that money is lacking. Moreover, once this general harm is recognised, *carentia pecuniae* could be invoked even by those who themselves suffer no harm whatsoever as a result of their loans. Now, such generality condemns it in the eyes of his creator himself: it is difficult, indeed, to see in it only an extrinsic title and not an attempt to modify the contractual framework of the money loan: the *mutuum* trap prevents this step from being taken.

The second trend began in 1279 with a decretal of Nicholas III, *Exiit qui seminat*, devoted to the impact of the vow of poverty on the rule of the Friars Minor. It soon became apparent that the Pope's position, which allowed for the dissociation of a limited form of use of a good, even consumptible, from its property, could be used to challenge the *mutuum* so as to make lending at interest possible. John Duns Scotus or Gerald Odonis illustrated this possibility from the early years of the fourteenth century, but the contrary position, soon taken by John XXII, was to suspend its progress. Here again, Lessius, three centuries later, began by adopting this approach with great skill, but in return he altered it to the point where, like the *mutuum*, it was no longer capable of generating additional income. The framework of the *mutuum* continued to prevail in the way we thought about money loans.

The final stage in this development is to be found in Grotius's main work of 1625, *De Jure Belli ac Pacis*, supplemented by his earlier comments on Luke 6:35. Drawing on a particular feature that money shares with consumptible goods, namely that it is returned to the lender *in genere* (in kind) and not *in specie* (as the same physical good), he shows that the lender retains, throughout the term of the loan, a property that entitles him to demand remuneration. The *mutuum* trap is thus defused. It no longer influences the way we think about money loans. The contractual framework can become secondary and what has finally prevailed is what has been identified as the driving force behind this so long evolution: an intertemporal exchange whose surplus, depending on the parties' preference for the present, had to be allocated between them.

As a result, Grotius opened us up to this intellectual disposition to have no more difficulty in considering the remuneration of a loan of money than that of renting a house. Which, as we all know, has now become quite commonplace.

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