The Law of Obligations

Roman Foundations of the Civilian Tradition

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PART III

CHAPTER 6
Mutuum

I. THE ROMAN CONTRACT OF MUTUUM

1. The nature of mutuum

We turn now Co the real contracts, the prototype of which was mutuum, the loan for consumption. It is, in fact, the only real contract Gaius specifically deals with in his *Institutes.* He describes it in the following terms:

> "[MJutui autem datio proprie in his fere rebus contingit quae pondere numero mensura constant, qualis est pecunia numerata, vinum, oleum, frumentum, aes, argentum, aurum. quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipiencium fiant et quandoquc nobis non eadem, sed aliae eiusdem naturae reddantur";'

and he adds a speculation as to why this type of contract was called mutuum: "[U]nde etiam mutuum appellatum est, quia quod ita tibi a me datum est, ex meo tuum fit."[2] This is a pseudo-etymology.[3] Mutuum is probably derived from "mutare", which means "to change", "to swop".[4] Yet, ex meo tuum facere was an essential feature of the contract of mutuum. A datio had to take place[5] on account of which ownership of the objectfs) lent passed to the borrower. Once this datio had been effected, the borrower became obligated to the lender not to return the very things that he had received, but (in the case of money) an equal sum or (as far as other fungibles were concerned) objects of the same kind, quantity and quality.[6] To enforce this obligation, the lender could avail himself of the condictio (actio certae creditae pecuniae).[7] Owing to the fact that its intentio was abstractly framed (that is, it did not refer to the obligatory basis of the claim), this action was very flexible and apt to cater for all situations where certum dare was owed. That is why we have already come across the condictio in the cases of stipulationes certi and contracts litteris.[8]

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[1] Gai. Ill, 90.
[2] Cf. also Paul. D. 12, 1, 2, 2.
On its origin, see von Lubtow, *Darlehensbeqriff,* pp. 1 sqq., 19 sq.
[4] A. Walde, j.B. Hofmann, *Lateinisches etymologisches Worterbuch* (3rd ed.), vot. II (1954), pp. 137 sq.; cf. also J.M. Kelly, "A Hypothesis on the Origin of Mutuum", (1970) 5 *The Irish Jurist* 155 sqq. with further speculation.
[5] For this central requirement of mutui datio cf. V. Stanojevic, "La 'mutui datio' du droit romain", (1969) 15 *Labeo* 311 sqq.
[6] Cf., for example, Pomp. D. 12, 1, 3.
[7] *Inst.* Ill, 14 pr.
[8] Cf. supra, pp. 32 sq., 89 sq.

Three obvious inferences can be drawn from what has been said so far. Whereas not every loan of fungibles[9] can be classified as a mutuum (in the case of fungible objects which are ordinarily used without being consumed, the lender will often want to get back the thing itself and not only its equivalent in kind; already, therefore, a transfer of ownership to the borrower is not envisaged by the parties), non-fungible objects cannot be the object of a mutuum: the borrower's obligation presupposes the existence of an equivalent in kind.[10] Secondly, as both ownership and possession pass to the borrower and as a contractual obligation does not come into existence without this transfer having taken place, risk problems cannot arise. If the borrower loses the money or the goods received, this is entirely his own affair and does not have any effect on his obligatio arising from the mutuum: "et is quidem qui mutuum accepit, si quolibet fortuito casu quod accepit amiserit, veluti incendio, ruina, naufragio aut latronum hostiumve incursu, nihilo minus obligatus permanet."[11] This is entirely in accordance with the natural principle of casum sentit dominus (or res perit suo domino):[12] it is the owner who has to bear the risk of accidental loss or destruction and, except by way of insurance, he cannot shift the risk onto somebody else's shoulders. Thirdly, prior to the datio (that is, the vesting of ownership in the borrower), no obligation could come into existence. A pactum de mutuo dando, i.e. the promise to grant a loan in future, was unenforceable—unless, of course, it was couched in the form of a stipulation.

2. Mutuum and stipulatio

A further, very important characteristic of mutuum is the fact that the contract gave rise to only one action (the condictio of the lender against the recipient of the loan) and consequently only to one obligation (namely that of the borrower to return res aliae eiusdam naturae). Thus, especially, a claim for interest could not be enforced. The condictio was, after all, an actio stricti iuris. The judge therefore did not have any discretion to give effect to informal, ancillary agreements between the parties, or to equitable considerations; he could only condemn the borrower in as much as the latter had received from the lender. Strictly speaking, mutuum was thus a unilaterally binding, gratuitous contract.

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[9] As to the term "fungibles" (derived from the Latin "fungibilcs"), see Pothier, *Traite du contra! du pret de consomption,* n. 25: "Earum natura est, ut aliae aliarum ejusdem generis rerum vice fungantur."

[10] Cf. e.g. Nicholas, *Introduction,* p.167.

[11] *Inst.* Ill, 14, 2.

[12] Cf. C. 4, 24, 9; also Ulp. D. 50, 17, 23 in fine. This remains true as long as there is no specific reason to shift the loss. Such shift is justified normally on the basis of culpa or dolus (delictual liability), but there are certain instances where even accidental loss does not lie with the owner. On the precise ambit of casum sentit dominus, see Andreas Wacke, "Gefahrerhohung als Besitzerverschulden", in: *Festschrift fur Heinz Hubner* (1984), pp. 670 sqq-

In commercial practice, however, few people were (and still are) prepared to make loans on an entirely altruistic basis.[13] Yet, if the lender wished to receive interest on the capital loaned, he had to extract from the borrower a promise in the form of a stipulation,[14] i.e. the parties had to enter into a separate, additional contract. This is in fact what usually happened; and since a stipulation had to be made anyway, if the loan was to be given for interest, the parties usually took the opportunity to incorporate the principal debt as well, so that the borrower's obligation to return the capital was very often reaffirmed by way of stipulation.[15] At the same time, this was a convenient way to make certain incidental provisions binding—for instance, those relating to the time of repayment or the place of performance. Under these circumstances the transaction was re et verbis[16] rather than merely re: datio and stipulatio were two acts, both giving rise to the obligation to restore the capital, and both, incidentally, enforceable by means of the condictio. Naturally, however, performance had to be made only once, and in case of failure of performance the creditor could also bring the condictio only once. This he probably did on the basis of the stipulatio, for the Roman lawyers seem to have been of the opinion that the obligatio re was absorbed by the obligatio verbis:

> "Cum cnim pecunia mutua data stipulamur, non puto obligationem numeratione nasci et deinde cam stipulatione novari, quia id agitur, ut sola stipulatio teneat, et inagis implendae stipulations gratia numeratio intellegenda est fieri."[17]

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[n] Even a loan without interest is, however, not always (perhaps even: not usually) made for purely altruistic reasons. Roman society was characterized by a network of (informal) relationships which could either be created by, or which engendered a (moral) duty to grant, a (seemingly) gratuitous loan. Thus, for instance, loans could be given not in order to receive interest but to gain political influence, to generate loyalty or to create a situation of dependence. Furthermore, the usual duties arising from the Roman concept of "amicitia" (on which cf. e.g. supra, p. 115) must be taken into consideration. Both the granting of a (usually short-term) loan in order to allow the borrower to cope with a momentary problem of liquidity and the (informal) "'remuneration" of such friendly service with other services or favours were natural implications of the officium amici. The average Roman paterfamilias did not go to a professional moneylender (fenerator) but turned to his amici when he was in need of capital. For all details, particularly the social and economic background as it can be reconstructed on the basis of Roman literary sources, cf. Alfons Burge, "Vertrag und personale Abhangigkeiten im Rom der spatem Republik und der fruhen Kaiserzeit", (1980) 97 *ZSS* 114 sqq. On the (low) social position of the fencratores (and on banking business in general) cf. idem, "Fiktion und Wirklichheit: Soziale und rechtliche Strukturen des romischen Bankwesens", (1987) 104 *ZSS* 488 sqq., 495 sqq. The fact that credit was readily available through private connections substituted for (and in turn contributed to) the lack of a large-scaie banking system in Rome. Cf. also infra, pp. 217 sq.

[lt] Afr. 1). 19, 5, 24.

[ъ] Cf. e.g. Paul. D. 12, 1, 40; Scaev. D. 45, 1, 122, 1; Paul. D. 45, 1. 126. 2; Ulp. D. 46, 2, 6, 1.

[ь] Ulp. D. 12, 1, 9, 3; Mod. D. 44, 7, 52 pr. These texts have often been regarded as spurious; cf., for example, Alfred Pernice, "Der sogenannte Realverbalkontrakt", (1892) 13 *ZSS* 246 sqq.; Schulz, *CRL*, p. 507; but see Max Kaser, "'Mutuum' und 'stipulatio'", in: *Eranion G.S. Maridakis*, vol. 1 (1963), pp. 155 sqq.

[ґ] Pomp. D. 46, 2, 7; cf. Fritz Pringsheim, "1d quod actum est", (1961) 78 *ZSS* 79 sqq.; Kaser, *Eranion Maridakis*, pp. 157 sqq.

Of the above-mentioned incidental provisions, the fixing of a date for repayment of the capital is obviously of particular interest to a borrower. A loan transaction can hardly achieve its purpose if the capital has to be repaid immediately after it has been handed over by the lender to the borrower. Yet this was, strictly speaking, the case where the-mutuum was not accompanied or reaffirmed by a stipulation. For it was the datio that gave rise to the obligation to repay the capital, and this obligation came into effect immediately. The due date for repayment could, at least originally, not be deferred by the parties because whatever they might have agreed upon informally could not be considered in iure civili. This result was less inconvenient than it sounds, because mutuum was used, at first, between friends or neighbours for the purposes of short-term loans without interest.[18] Here, social ties arising from amicitia and humanitas were strong enough to prevent the creditor from (ab-)using his formal position and bringing the condictio immediately. For commercial loan transactions the formal, but very dangerous, nexum was available.[19] When it disappeared during the period of the Republic, mutuum took over this function too and became the universal loan transaction. But in the commercial context it was, in actual practice, always accompanied by a stipulation containing all the special arrangements of the parties.

3. The consensual element of mutuum

(a) Consensus and rex interventio

Furthermore, even with regard to mutuum proper the consensual element came to be increasingly emphasized in the course of time. It is obvious that not every datio could give rise to a condictio. Perhaps the property had been transferred in order to enrich the recipient permanently (as in the case of a donation), to discharge an obligation or, for instance, to give a dowry. Thus, to classify a transaction as mutuum, we need not only the transfer of fungible things but also some sort of understanding between the parties that this specific transfer takes place in order to effect a loan, i.e. that the recipient has to restore the value of what is being transferred to him. Thus we find Paulus stating:

> "Non satis autem est dantis esse nummos et fieri accipientis, ut obligatio nascatur, sed etiam hoc animo dari et accipi, ut obligatio constituatur. itaque si quis pecuniam

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[18] Kaser, *RPr* I. p. 170; Watson, *Evolution,* pp. 9 sqq. Cf. also Kelly, (1970) 5 *The Irish Jurist* 156 sqq. (according to whom mutuum originated as barter) and Geoffrey MacCormack, "Gift, Debt, Obligation and the Real Contracts", (1985) 31 *Labeo* 139 sqq., who specifically links mutuum with gift.

[19] Cf. supra, pp. 4 sq. Nexum may have been immediately enforceable by execution, without prior lawsuit and judgment: *c(.* Kaser, *Altromisches ins,* pp. 119 sqq.; but see Ludwig Mitteis, "Uber das Nexum", (1901) 22 *ZSS* 96 sqq.; Max Kaser, "'Unmittelbare Vollstreckbarkeit' und Burgenregress", (1983) 100 *ZSS* 111.

suam donandi causa dederit mihi, quamquam et donantis fuent et mea fiat, tarnen non obligabor ei, quia non hoc inter nos actum est."[20]

This mental element, the animus, ut obligatio constituatur,[21] for a long time merely qualified the purpose for which the datio had been niade; it was not a proper contractual agreement and left no room for the regulation of details concerning the loan. However, it is apparent from the sources that a development took place in this regard.[22] First of all, the ius honorarium offered opportunities to take into consideration informal arrangements between the parties concerning the time of repayment. On the basis of such pacta de non petendo intra certum tempus the praetor was prepared to grant an exceptio pacti; alternatively, he could also help with an exceptio doli.[23] But in the course of time mutuum became transformed into a true obligatory contract based, like all contracts, on consensus,[24] but it was dependent, in addition, on rei interventio. There is some evidence that the consensual leg of mutuum was already far enough developed in classical law that arrangements relating to the time of repayment could be accommodated; this would have meant that the bringing of the condictio according to the ius civile was regarded as deferred until that time had expired.[25] This development, of course, continued in post-classical times with the general disintegration of the system of contracts of classical law. The emphasis was squarely on the consensus between the parties; the datio (distinguishing mutuum from other contracts and making it a contractus re) remained as a mere additional requirement.[26] Vinnius put it very clearly when he wrote, some hundred years later: "Constituitur mutuum non solo ac nudo consensu, sed rem intervenire ac tradi oportet."[27]

A good example of how the classical Roman lawyers tried to give effect to what the parties had actually agreed upon—without, however, unduly prejudicing the "real" nature of mutuum—is provided by Ulp. D. 12, 1, 11, 1:

"Si tibi dedcro decern sic, ut novem debeas, Proculus ait, et recte, non amplius te ipso iure debere quam novem. sed si dedero, ut undecim debeas, putat Proculus amplius quam decern condici non posse."

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[20] Paul. D. 44, 7, 3, 1. On this text, see Fritz Raber, "Hoc animo dare", (1965) 33 *TR* 58 sqq.

[21] Pringsheim, (1961) 78 *ZSS* 79 sqq.; O. Stanojcvic, (1969) 15 *Labeo* 311 sqq., 317.

[22] For a detailed analysis, see Kaser, *Eranion Maridakis,* pp. 171 sqq.; also Raber, (1965) 33 *TR* 58 sqq. and Giuseppina Sacconi, " 'Conventio' e 'mutuum'", (1987) 15 *Index* 423 sqq.

[23] Flor. D. 2, 14, 57 pr.; Ulp. D. 44, 4, 2, 6. Cf. von Lubtow, *Condictio,* p. 135.

[24] Cf. Ulp. D. 2, 14, 1, 3: ". . . ut eleganter dicac Pedius nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re sive verbis fiat."

[25] lui. D. 12, 1, 22; Gai. D. 13, 3, 4; Kaser, *Eranion Maridakis, p.* 162; but see also Stanojevic, (1969) 15 *Labeo* 318: ". . . *Se consensus, la volonte des parties, est reste jusqu'a iafin dans l'ombre projete par l'acte materiel—la datio"*

[26] As to the law of Justinian, see Kaser, *RPr* II, pp. 369 sqq. [27] *Institutiones,* Lib. 3, Tit. XV, pr., 1.

Two cases are discussed in this fragment and in both there is a discrepancy between the real and the consensual aspect of the transaction. In the first case ten were given on the understanding that only nine had to be returned; in the second, the borrower agreed to return eleven, even though, again, he had received only ten.[28] If, in the first case, Proculus/Ulpianus granted a condictio for nine only, this was a relaxation of the rule that the exact equivalent of what had been received had to be returned. However, the jurists did not hesitate to give effect to what the parties actually agreed upon; for as far as this lesser sum was concerned, the requirement of rei interventio had been complied with, too: minus in maiore inest.[29] If the lender receives nine, he does not get anything back for which he has not previously handed over an equivalent to the borrower. This is different in the second case. As far as the eleventh coin is concerned, the "real" aspect of the contract of mutuum has not been satisfied. If ten were given, there was no rei interventio, as far as number eleven is concerned. Thus the condictio cannot lie for more than ten.[30]

(b) Ex meo tuum facere

According to the pseudo-etymological basis of mutuum ("ex meo tuum"), there had to be a direct transfer of ownership from the creditor to the recipient of the loan. As Paulus put it figuratively, "item mutuum non potest esse, nisi proficiscitur pecunia";[31] there can be no contract of mutuum, unless the coins "wander" (sc: from the hands of the creditor into those of the debtor). It is obvious that such a conceptually restricted view was bound to lead to cumbersome and very formalistic results. What, for instance, if the debtor was already in possession of the sum of money he wished to borrow because it had been deposited with him by the creditor at an earlier stage? Should one require the depositee under these circumstances to hand the money back to the depositor (thus discharging his obligation under the contract of depositum) only in order to have the very same sum returned to him immediately afterwards, now sub specie mutui? This would have been an inconvenient complication, to say the least. Thus we find already Iulianus taking the more practical view that ". . . si pecuniam apud te depositam convenerit ut creditam habeas, credita fiat, quia tunc nummi, qui mei erant, tui fiant".[32] This decision was facilitated by the fact that the money had actually once "wandered"

[2H] Cf. a.so Paul. D. 2, 14, 17 pr.

[29] Cf. supra, p. 74.

The fact that, as to the eleventh coin, no datio had taken place, and that no valid mutuum had therefore come into existence with regard thereto, does not have the consequence that the whole transaction is invalid: utile per inutile non vitiatur *(cf.* supra, pp. 75 sqq.). As far as the ten coins are concerned, the condictio can be granted.

[31] Paul. D. 12, 1, 2, 3.

[32] Iul./Afr. D. 17, 1, 34 pr.; also Ulp. D. 12, 1, 9, 9.

from the creditor to the debtor; a direct transfer of the coins had taken place (even though, at that stage, no transfer of ownership had been envisaged). In a very wide sense, therefore, one could still reconcile this situation with the "ex meo tuum" requirement. Yet it was the first step towards the recognition of a mere loan by agreement. A subsequent step had to be taken in response to the rise of a commercial banking system. Financial transactions were effected by credit transfers, payments made by what we would call an order of rernittance or by a simple change of entry in the books of the argcntarius.[33] Under these circumstances it was no longer feasible to insist on a direct transfer of individual coins in the case of mutuum: this would have meant the death of mutuum as the central loan transaction. Thus it was recognized, by way of a ius singulare,[34] that transfer of the sum to be advanced could be effected by delegatio solvendi:

> "Singularia quaedam rcccpta sunt circa pccuniam crcditam. nam si tibi debitorcm mcum iussero dare pccuniam, obligaris mihi, quamvis mcos nummos non acceperis."[35]

The creditor ("ego") has ordered his debtor to pay the money to a third party ("tu") to whom he wished to lend it. A contract of mutuum is thereby created between the creditor and the third party, even though the latter has not received his money from the creditor/lender. The same conclusion had already been reached by Iulianus: ". . . quod, si a debitore meo iussero te accipere pecuniam, credita fiat, id enim benigne receptum est."[36] If we compare this with his opinion regarding the previous case (depositum), we see that his reasoning no longer rests on the "ex meo tuum" basis. "Benigne (or possibly: utilitatis causa) receptum" is a clear recognition of what Ulpianus refers to as singularium (receptum), namely, the exceptional nature of this decision, for the sake of practical convenience. Dogmatically, this exception is probably based on a (double) fiction: the transfer from debtor to borrower merely serves as a short cut in order to avoid a cumbersome double transaction. The device is acceptable, because it can be deemed that the money has travelled from debtor to creditor and then from creditor to borrower. This ties in well with the Celsinian construction of delegatio solvendi,[37] based on the understanding (still fundamentally important for the modern law of unjustified

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[33] Von Liibtow, *Darlehensbegriff*, pp. 25 sq. On argentarii, see infra, pp. 514, 764 sq.

[34] Paul D. 1, 3, 16: "lus singulare est, quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est."

[35] Uip. *D.* 12, 1, 15.

[36] Iul./Afr. D. 17, 1, 34 pr.

[37] Cf- Ulp. D. 24, 1, 3, 9-13; von Lubtow, *Darlehensbegriff*, pp. 30 sqq.; Max Kaser, "Zur Frage einer condictio aus gutglaubigem Erwerb oder gutglaubiger Leistung im romischen Recht", in: *Festschrift fur Wilhelm Felgentracger* (1969), pp. 277 sqq., 289 sqq.; Hans Julius Wolff, "Julian und die celsinische 'Durchgangstheorie'", in: *Melanges Philippe Meylan*, vol. I (1963), pp. 409 sqq.

enrichment[38]) that payment by the debtor (drawee) to the borrower (payee) has two legal effects: it is to be regarded as performance by the drawee towards the creditor/drawer (thus effecting a discharge of this debt) and, at the same time, as a performance by the creditor towards the borrower (thus giving rise to the obligation of the latter).

Both Iulianus and Africanus were not prepared, however, to extend this exception to other cases. For their restrictive tendency they advanced an argumentum ad absurdum, ". . . alioquin dicendum ex omni contractu nuda pactione pecuniam creditam fieri posse", thereby dismissing the suggestion that a contract of niutuum might have come into existence in the following case:

> "Qui negotia Lucii Tim procurabat, is, cum a debicoribus ejus pecuniam exegisset, epistulam ad eum emisit, qua significant certain summam ex administratione apud se esse eamque creditam sibi se debiturum cum usuribus sernissibus."[39,1]

Lucius Titius' procurator had collected some money from his debtors. He then wrote to his principal asking him whether he could keep part of this sum as a loan. Even if the principal acceded to this request, a niutuum did not come into existence; otherwise the real element, essential for this type of contract, would, for all practical purposes, have been abolished and mutuum would have become a purely consensual contract.

(c) Towards a loan by agreement

But was it not possible to apply the concept of the double fiction to this type of case, as well?

> "[Q]uod igitur in duabus personis recipitur, hoc et in eadem persona recipiendum est, ut, cum ex causa mandati pecuniam mihi debcas et convenerit, ut crediti nomine earn retincas, videatur mihi data pecunia et a me ad te profecta"

opined Ulpianus[40]—and any attempt to reconcile this statement with that of Iulianus/Africanus[41] would be an absolutely futile piece of *Pandektenharmonismus* ("pandect harmonism"). The texts, relating as they do to exactly the same situation, are in direct conflict. However, Ulpianus wrote about two generations later than Africanus, and by his time the old "ex meo tuum" requirement had been further relaxed, if not disbanded. Iulianus/Africanus had still emphasized the element of datio, even though the sum did not have to be advanced (directly) by the creditor but could be handed over by a third party, acting under his direction or in his name. Now, all that was left was an agreement between debtor and creditor that what was owed, was owed as a loan. And, indeed, if the direct payment from the debtor to the borrower in

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[38] Cf., for example, Lieb, in: *Munchener Kommentar,* vol. Ill 2, (2nd ed., 1986), § 812, nn. 30 sqq.; Reinhard Zimmermann, "A road through the enrichment-forest?", 1985 *Cilsa* 14 sqq.

[3]Mul./Afr. D. 17, 1, 34 pr.

[40] Ulp. D. 12, 1, 15.

[4] Cf. e.g. Ph. E. Huschke, *Die Lehre des Romischen Rechts vom Darlehn* (1882), pp. 57 sqq.

a three-cornered relationship can be looked upon as if two dationes had in actual fact taken place, then the same argument must surely be applicable where debtor and borrower are one and the same person. Instead of requiring the debtor (that is, the procurator in Africanus' case) to hand the money over to the creditor (on account of the actio mandati directa) and then to receive it back subsequently as a loan, the procedure can be considerably simplified by allowing the debtor/ borrower to keep the money and to regard the two dationes as having been performed. Ulp. D. 12, 1, 15 has become the basis for § 607 II BGB ("A person who owes money or other fungibles for any other reason may agree with the creditor that the money or the things shall be owed as a loan"), and it has been argued that the structure of this provision can still only be properly understood on the basis of Ulpian's double fiction.[42] On the same basis other cases, too, could now be fitted into the framework of mutuum. Of particular interest is Ulp. D. 12, 1, 11 pr.:

> "Rogasci me, ut tibi pecuniam crederem: ego cum non haberem, lancem tibi dedi vel massam auri, ut earn vendcrcs ct minimis utereris. si vendidcris, puto mutuam pecuniam factam."

Here, "ego" was quite willing to lend some money to "tu", but did not have any cash available himself. He therefore gave "tu" a dish or a lump of gold so that he could sell the same and then keep the proceeds as a loan. The cautious "puto" betrays a conflict of opinion and, not surprisingly, we find Africanus still rejecting the idea that a contract of mutuum could be created in this manner.[43] But it is not surprising, either, to see Ulpianus taking a more liberal view. The same arguments as in Ulp. D. 12, 1, 15 could be advanced: "tu", for the sake of avoiding cumbersome and unnecessary formalities, should be placed in the position in which he would have been had he first surrendered the proceeds from the sale to "ego" and then received the same from him as a loan.

(d) Contractus mohatrae

Still, however, for the mutuum to come into existence between "ego" and "tu", it was required that the latter did in actual fact sell the object and receive the purchase price.[44] It was only at the time of Diocletian that one further step towards the recognition of a loan by agreement was taken: if the borrower received certain objects from the lender and both parties were agreed as to the value of these objects, then this estimated value was to be taken as the sum which the borrower was under an obligation to return. Whether he used what had been given to

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Cf. von Lubtow, *Darlehensbegriff,* pp. 81 sqq., 156 sqq.; idem, "Ulpians Konstruktion des sogenannten Vereinbarungsdarlehens", in: *Synieieia Vincenzo Arangio-Ruiz,* vol. II (1964), pp. 1212 sqq.

[43] Iul./Afr. D. 17, I, 34 pr.

[44] Cf. also Ulp. D. 19, 5, 19 pr.

him by the lender in order to obtain the money he needed or in any other way, was left entirely to him and was no longer of any concern to the lender. He could sue the borrower with the actio certae creditae pecuniae for the return of a loan on the basis of having given him the objects in the place of money.[45] This conceptual advance was bound to have consequences for the question of who had to carry the risk of these objects getting lost or being destroyed before the sale had been effected by the borrower. It is clear that in post-classical law that risk lay with the borrower—a corollary of the fact that it was now left to him to decide how best to make use of the objects given to him, and that the contract of mutuum came into existence no matter whether he had sold them or not. In late classical law, on the other hand, one might expect the risk to have remained with the lender, until the objects had been sold and that sale had been fully carried out. Only then did the lender lose ownership; only then, too, did the contract of mutuum come into existence. This solution would have been in accordance with the general rule of "casum sentit dominus": the risk of any accidental loss, deterioration or destruction of a thing normally falls on its owner. But the results would not always have been in accordance either with equity or with the interests and presumed intentions of the parties. Where the lender gave a golden vase, which he would never have sold himself, to a friend of his who was in need of money, charging him to sell the vase and to keep the purchase price as a loan, it was hardly equitable to burden the lender with the risk; he had, after all, gone out of his way in order to accommodate the would-be borrower. The latter was now not only in control of the vase, but the whole transaction had also been undertaken in his interest. This is why we find Nerva drawing the following distinction (Ulpianus concurring):

> ". . . multum interesse, venalem habui hanc lancem vel massam nee ne, ut, si venalem habui, mihi perierir, quemadmodum si alii dedissem vendendam: quod si non fui proposito hoc ut venderem, sed haec causa fuit vendendi, ut tu utereris, tibi cam pensse, et maxime si sine usuris credidi."[4ı1]

The allocation of risk is therefore based on the consideration whether the sale was solely in the interest of the prospective borrower, or whether it was also in the lender's interest, because he wanted to sell those particular objects anyway.

The problem discussed in Ulp. D. 12, 1, 11 pr. was interesting, not only from a dogmatical point of view, but also because it showed how a contract of sale could be used to effect a loan. In the Middle Ages the lawyers began to avail themselves of this possibility in a very ingenious

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[45] C. 4, 2, 8. What the borrower owed was the value of the objects as estimated by the parties. If. in actual fact, he could only sell them for less, that was his risk; it did not affect his obligation. In the case of Ulp. D. 12, 1, 11 pr., on the other hand, the borrower would have been liable only for the sum that he had in actual fact received from the sale.

[1] Ulp. D. 12, 1, 11 pr. See Max Kascr, "Die Verteilung der Gefahr beim sogenannten 'contractus mohatrae'", in: *Synteleia Arangio-Ruiz,* vol. I (1964), pp. 74 sqq.

way. If A sells his golden vase (value 100) to Б for 120, allowing him to pay the purchase price after the lapse of a certain time, and if B then sells the vase to C for 100, B is in actual fact in the position of a person who, having borrowed 100 from A, has to repay this loan with 20 % interest. The procedure can be greatly simplified by leaving the third party out of the picture and thus confining the transaction to A and B:

> ". . . qiiis egens pecunia emit summo pretio in diem solvendo a mercatore merces, et statim eidem pecunia numerata pretio infimo revendit."[47]

If, for example, A sold his vase to B for 120 and B immediately resold it to A for 100, the second "purchase price" being due immediately, the first one only after the lapse of a certain time (such interval, of course, in reality constituting the period of the loan), the same result was achieved and it did not even matter whether the vase was in actual fact transferred and re-transferred or not. A fictitious double sale could thus be used as a substitute for mutuum and interest stipulation. Naturally, the question will be asked why the lawyers, down to the 17th century, went about what appears to be a fairly straightforward business deal in such a roundabout way. The answer is that, under the influence of medieval canon law, the European ius commune recognized a general prohibition on the charging of interest rates.[40] The contractus mohatrae, as this type of loan, disguised in the form of two contracts of sale, came to be called (in the Latinized version of an Arabian term),[49] was thus a device—one of many!—to sidestep this idealistic but impractical canonical restraint on contractual freedom and on business life in general.[50]

4. On the "reality" of real contracts

Roman law never merged mutuum, pactum de mutuo dando and interest stipulation into a single consensual contract to be transformed into a bonae fidei iudicium. A mere pactum de mutuo dando remained unenforceable and interest had to be stipulated for separately; mutuum had become a true contract, but remained a "real" one. There seems to have been a certain reluctance to improve and streamline this area of the law, and thus to promote the danger of usurious dealings.[51] Both the insistence on formality (as far as interest was concerned)[52] and on the principle that the (future) granting of a loan could not be validly promised, served a very useful warning function, preventing lender as well as borrower from entering rashly into dangerous credit transac-

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[47] Pufcndorf, *De jure naturae el gentium,* Lib. V, Cap. VII, § 12.
[48] Cf. infra, pp. 170 sqq.
[49] Windscheid/Kipp, § 261, n. 5.
- On the contractus mohatrae, see, for example, Stryk, *Usus modernus pandectarum.* Lib. XXII, Tit. I, § 21; Gustav Kiemens Schmelzeisen, *Quellen zur Neueren Privatrechtsgeschichte Deutschlands,* vol. II, 1 (1968), p. 85.
[711] Von Lubtow, *Condictio,* pp. 139 sqq.; idem, *Darlehensbegriff,* pp. 95 sq.
[52] But cf. infra, p. 218, note 226 and p. 538, note 189.

tions. The Roman idea of mutuum as a real contract, giving rise to only one obligation (namely that of the borrower to repay the loan) was bound to become very problematic when, as a result of the general recognition of "pacta sunt servanda",[53] pacta de mutuo dando and informal arrangements about interest could be and were in actual fact regarded as valid and binding.[54] Instead, however, of advancing the process of amalgamation and "consensualization", the authors of the ius commune, particularly in the 19th century, entrenched the idea of the Roman real contracts as something logically necessary and conceptually cogent.

> "The . . . real contracts," we read, "are 'real' in the fullest sense of the term: by the very nature of the case they are, and always will be, real contracts, because they all involve an entrusting of property by one person to another [with a duty in that other to restore itj, so that the 'res', in this instance, determines both the ground and the nature of the obligation. Accordingly the nominate real contracts are real contracts to this very day: a claim for a return of property can only be supported on the ground of the previous delivery."[55]

By the same token, however, the contract of lease would have to be regarded as a real contract, because there, too, the duty to restore the property comes into existence only once delivery has taken place.[56] What the pandectists tended to overlook, was, firstly, the fact that in modern law (otherwise than in Roman law) every performance—as long as it is not illegal or immoral—can be the object of a binding contractual agreement. Secondly, they overemphasized the obligation of the borrower to restore what he had received, without duly taking into consideration that the creation of such an obligation in the person of the borrower can hardly be the content and main purpose of the whole transaction;[57] otherwise the lender might as well have kept his property in the first place. A loan, in other words, is not made in order to get back the money; it is made in order to let the other party have the use of the capital[58] for a certain period of time and (perhaps) to earn some interest for the temporary transfer of such value.[59] It took a long time to overcome such conceptual thinking still based, essentially, on the Roman actional system. According to § 607 BGB, the essence of a loan consists in a person who has received money or other fungibles as a loan, being bound to return to the lender what he has received, in things of the same kind, quality and quantity. No mention is made of

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[53] Cf. infra, pp. 542 sqq., 576.

[54] *Cf.* e.g. Stryk, *Usus modernus pandectarum.* Lib. XII, Tit. I, §§ 3, 5, 9; Van der Kcessel, *Praelectiones ad* Gr. Ill, X, 4 and 8; Windscheid/Kipp, § 370, 2 (n. 18), § 371. n. 6.

[55] Rudolph Sohm, *The Institutes* (trans, by James Crawford Ledlie, 3rd ed., 1907), p. 380.

[56] Philipp Heck, *Schuldrecht,* (1929), pp. 248, 327.

[57] But see Andreas von Tuhr, *Der Allgemeine Teil des Deutschen Burgerlichen Rechts,* vol. II 2 (1918), p. 70.

[58] *Cf.* e.g. Plautus, *Persa,* Act I, 1. 118, "nummos . . . mutuos utendos".

[59] *Cf.*, for example, RGZ 161, 52 (53 sqq.), dealing with the tricky problem of the application of the "in pari turpitudine" rule in cases of usurious loans.

any duties on the part of the lender. It is not surprising, on this basis, that the "Realvertragstheorie" has still found staunch supporters in this century:[60] the agreement to give a loan,[61] in their view, is only a pactum de contrahendo, the loan itself a contract re.[62] Today, however, the unsuitability of this view, both on a conceptual level and as far as the practical consequences are concerned, has been widely recognized.[63] Loan, therefore, is usually regarded as a consensual contract in modern law;[64] the handing over of the capital to the borrower takes place solvendi, and not obligandi causa. A loan at interest, then, is a reciprocal contract, and even where no interest has been agreed upon, duties do not only arise in the person of the borrower (that is, the contract is not any longer merely unilaterally binding). Thus, the lender is obliged to transfer the capital to the borrower and to let him have the use of the value for the time agreed upon; he can be liable on account of defects in title or defects in quality, etc.[6566]

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[60] Enncccrus/Lehmann, *Recht der Schuldverhaltnisse* (15th ed., 1958), § 142 I.

[61] Cf. §610 BGB.

[62] This view still prevails in France (on the basis of art. 1892 code civil) and in Italy (art. 1813 codice civile): cf. the comparative survey by Dieter Henrich, *Vorvertrag, Optiomv ertrag, Vorrechtsvertrag* (1965), pp. 78 sq.

[63] See especially Gustav Boehmer, "Realvertrage im heutigen Recht", (1913) 38 *Archiv ?ir burgerliches Recht* 314 sqq.; but see Carlo Alberto Maschi, *La categorie dei contratti reali* (1973), pp. 1 sqq.

[64] Von Lubtow, *Darlehensbegriff,* pp. 89 sqq.; Karl Larenz, *Lehrbuch des Schuldrechts,* vol. II (12th ed., 1981), § 51.

[65] As to the possibility of a contrarium iudicium. i.e. a claim by the borrower against the lender in case the latter had given the money in foreign currency, so that the borrower had to exchange it at a loss, cf. already Savigny, *System,* vol. V, p. 509. A similar problem can arise, for instance, in the case of a loan of seed corn, if the seed corn is of a bad quality and causes damage *(cf.* Windscheid/Kipp, § 371, n. 2). In modern German law, § 493 BGB is taken to cover this situation, provided the loan was at interest ("The provisions relating to the obligation of the seller in respect of warranty against defects of quality apply mutatis mutandis to other contracts which are for alienating . . ., for value").

[66fl] In South African law, according to D.J. Jouberl in: Joubert (ed.), *The Law of South Africa,* vol. 15 (1981), sub titulo "Loan", loan is a consensual contract. In view of the fact that the authors of the ius commune used to emphasize the rei interventio as a requirement for the contract of mutuum, this statement seems to rest on a somewhat shaky basis, namely a statement by De Vilhers AJA in *Conradie v. Rossouw* 1919 AD 279 at 310 sq. ("the promise of a loan which formerly could only be effected by means of the stipulatio de mutuo dando . . . could now [sc.: in classical Roman-Dutch law] be validly made by means of a simple promise"). Lee, *Introduction,* p. 312 simply remarks: "Loan for Consumption—Loan for Use. All this is Roman law." See further the detailed treatment by Voet, *Commentarius ad Pandectas,* Lib. XII, Tit. I, on which Sir Percival Gane in his translation *(The Selective Voet,* vol. II (1955), p. 750) remarks: "Even at the present day this title may serve almost in detail as an accurate and exhaustive treatment of the law of the loan of fungibles, since no dissent has as yet been expressed from its principles in any of the more than thirty decided South African cases in which it has figured."

II. THE HISTORY OF THE INTEREST RATES AND USURY

1. Policies of the Roman Republic

Moneylending transactions, in so far as they go beyond loans between friends or neighbours, have at all times posed a challenge to the legislator.[67] The borrower is usually in a weak position economically (otherwise he would not be in need of money), and thus a strong possibility exists that the lender may be tempted to exploit his predicament. In order to prevent usurious[68] abuses, the State is therefore called upon to interfere and to afford some protection to the disadvantaged party. The Roman legislator responded to this challenge in a twofold way. He tried to combat usurious interest rates and he addressed himself specifically to the situation where sons in power had taken up a loan.

Roman law is marked by its emphasis on the autonomy of the contracting partners to regulate their own affairs, based on the principle of liberty and corresponding to the authoritative position of the paterfamilias in Roman society.[69] Thus, for instance, Roman law never provided for judicial reconsideration of contracts of sale or lease in cases of gross imbalance between performance and counterperformance. Yet, there is one area in which the law intervened at an early stage: usurious interest rates. In contracts of loan, the freedom of the parties to negotiate usually amounts to the freedom of the creditor to dictate the terms of the contract. The XII Tables already contained a rule "ne quis unciario faenore amplius exerceret".[70] The term "unciarium fenus" (interest of—of the capital) is somewhat enigmatical and has led modern scholars to argue about whether it constituted a ceiling rate of *$1* %, 10 %, 83| % or 100 %.[7]> This dispute arises because it is uncertain whether the interest, according to the XII Tables, had to be calculated per year or per month, and whether the calculation was based on a year

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Cf., for instance, the comparative analysis by Eike von Hippel, *Verbraucher schutz* (3rd ed., 1986), pp. 214 sqq.

[5] The terms "usury" and "usurious" are used here to refer to situations where the interest rate is unreasonable/illegal; etymologically, they are derived from "usura", which means "interest" generally. In the Middle Ages, when the taking of interest was prohibited, both meanings actually amounted to the same thing.

Cf. esp. Schulz, *Principles,* pp. 140 sqq.

[70] Tacitus, *Annales,* Lib. VI, 16; Cato, *De agri cultura, praefatio.*

[7] Cf. Gustav Billeter, *Geschichte des Zinsfusses im griechisch-romischen Altertum bis auf Justinian* (1898), pp. 157 sqq.; Fritz Klingmuller, "Streitfragen um die romische Zinsgesetzgebung", (1902) 23 *ZSS* 68 sqq.; C. Appleton, "Le taux du 'fenus unciarium'", (1919) 43 *NRH* 467 sqq.; Francesco De Martino, "Reformedel IV Secolo A.C.", (1975) 78 *BIDR* 62 sqq. The latter two figures seem to be surprisingly high; however, they are not atypical for archaic legal systems dominated by a primitive barter economy; also, one has to take into account the general distrust prevailing in an agrarian society not well versed in economic affairs-

containing ten or twelve months.[72] It is clear, however, that in case of contravention the usurer incurred a criminal sanction: he had to pay the poena quadrupli. In the course of the following centuries, this limit for the charging of interest rates varied; in 347 B.C., for instance, it was cut down by half (fenus semiunciarium).[73] In practice, however,[74] higher interest rates often seem to have been charged and the borrowers were far from being well protected. Therefore, only five years later, a lex Genucia forbade the charging of interest altogether.[75] But even that did not stop usurious practices. From Appian[76] we hear about a dramatic uprising in 89 B.C.:

> "About the same time dissensions arose in the city between debtors and creditors, since the latter exacted the money due to them with interest, although an old law distinctly forbade lending on interest and imposed a penalty upon any one doing so. . . . But, since time had sanctioned the practice of taking interest, the creditors

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[72] The old Roman year is said to have contained only 10 months. It started with the month of March, i.e. the time of thaw, when nature awoke and flora and fauna regained their vitality; the flowing of the Ufe-sap was seen, apparently, as something essentially male, for the term "Martius" derives from mas, -aris. It is not clear whether this year ran from spring to spring (an interest rate of fenus unciarium based on a yearly calculation would then amount to 8- %) or whether it comprised only the period of agrarian productivity, so that the time *of* nature's hibernation was not counted (under these circumsrances, — for ten months would amount to — for twelve months — 10 %). King Numa is said to have added two further months (namely januarius and Februarius, as nos. 11 and 12) and he thus introduced a year based on twelve months and containing 355 days. Because the year was running ahead of the solar year by 10 - days, intercalations were necessary. Normally, therefore, every second year in the middle of February a whole mensis intercalaris of either 22 or 23 days was inserted. On that basis, however, the calendar overshot the solar year by one day. The question of intercalations seems to have been handled very arbitrarily and was sometimes dependent upon considerations of political expediency. In 190 B.C., for instance, the calendar was 190 days out of step with the solar year. Julius Caesar was the first to introduce a rational system of intercalations. Atter having intercalated 90 days in the year 46, he started the new (Julian) calendar on 1 January 45. The year consisted of 12 months (January now being the first month) or 365 days; every fourth year, one day in February (the 24th or 25th) was counted twice, thus bringing it up to 366 days. In the Middle Ages it became apparent that the calendar had, again, run out of tune with the tropical year. Thus, in his bull "Inter Gravissimas" Pope Gregory XIII (one of many lawyers on the Holy See), decreed that 10 days, the 5th to the 14th October 1582, had to be leaped over and that henceforth every centenary year (except every fourth one, starting from 1600) should cease ro have the intercalary day. During the Middle Ages, incidentally, the year was considered to begin at Easter, which might be at any time between 22 March and 22 April. Usually, however, a fixed date was set (25 March). All the names of our months (with two exceptions) go back to the old Roman calendar prior to the Julian reform. The names September to December, based on the numerals from seven to ten, still bear witness to the fact that, at that time, the year commenced on 1 March. The Quintilis was changed to July in honour of Julius Caesar (his birthday was on 13 July), Sextilis to Augustus in honour of the first princeps (who had conquered Alexandria, and thus finally triumphed over his rival Antonius during the first days of August in 30 B.C.). For further details, see A. Michels. *The Calendar of the Roman Republic* (1967); Hans Kaletsch, *Tag und Jahr* (1970); Alan E. Samuel, *Greek and Roman Chronology* (1972), pp. 153 sqq.

[73] Tacitus, *Annales*, Lib. VI, 16; Livius, *Ab urbe condita*, Lib. VII, XXVII, 3.

[74] On what was ordinarily charged in practice, sec Billeter, op. cit., note 71, pp. 163 sqq., 228 sqq.

[75] Cf. Max Kaser, *Verbotsgesetze*, p. 36; Giuseppe Tilli, ". . . postremo vetita versura", (1984) 86/87 *BIDR* 147 sqq. See, in this context, too, the lex Marcia, mentioned in Gai. IV, 23.

[76] *Bella civilia*. Lib. I, 54.

demanded it according to custom. The debtors, on the other hand, put otf their payments on the plea of war and civil commotion. Some indeed threatened to exact the legal penalty from the interest-takers. The praetor Asellio. who had charge ot these matters, as he was not able to compose their differences by persuasion, allowed them to proceed against each other in the courts, thus bringing the deadlock due to the conflict ot law and custom before the judges. The lenders, exasperated that the now obsolete law was being revived, killed the praetor."

Asellio was slain in the centre ot the forum Romanum. The Senate offered a reward to anybody who would give testimony leading to the conviction of the murderers of Asellio, but to no avail. The moneylenders covered up everything.

2. Maximum rates from the end of the Republic until Justinian

It is clear from this vivid description that very drastic provisions do not always lead to a satisfactory state of affairs. In fact, they can sometimes be counterproductive. Sulla, therefore, in 88 B.C. seems to have introduced the old fenus unciarium. Towards the end of the Republic, however, the so-called centesimae usurae came into use (j^per month, i.e. 12 % per year).[77,78] They were maintained, essentially unchanged,[79] as maximum rates during the imperial times right down to the 6th century.[8]" Alexander Severus enjoined senators not to charge interest, but soon thereafter a special limit, the usurae dimidiae centesimae (6 %), was fixed for them.[81] Justinian, under the influence of Christianity, was not favourably disposed towards the charging ot interest. He tightened the usury laws and reduced the ordinary maximum rate to 6 % and to 4 % for senators.[82] A special concession was made to those "qui ergasteriis praesunt vel aliquam licitam

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' As to the terminology which was used for the various interest rates (sextans, i.e. the sixth part of 12 % = 2 %, quadrans = 3 %, etc.), cf. *Ins!.* II. 14. 5. In the Middle Ages the words "centesimae usurae" were taken to mean 100 % per year: cf. Wielmg, *Interesse und Prii'dtstrafe,* p. 199.

In 56 B.C., however, it was still possible for two Roman moneylenders (M. Scaptius and *P.* Matinius) to charge an interest rate of 48 % for a loan to the town of Salamis in Cyprus. The island of Cyprus had been conquered by the Romans (and added to the province of Cilicia) two years betore. The Salammians needed the money in order to bribe the Roman governor, P. Cornelius Lentulus Spinther. and thus to induce him not to billet his soldiers on them during the winter. A long drawn-out dispute arose as to when the loan had to be paid back. During the course ot it, Scaptius once prevented the senators ot Salamis from leaving their town hall, until five ot them had died ot starvation. Cicero, when he was governor of Cilicia in 51-50 B.C.. tried to settle the dispute. He proposed to reduce the interest rate to 12 % but to allow inclusion of the accrued interest in the capital sum (anatocism) ("Confeceram. ut solverent (sc: Salaminii) centesimis sexenni ductis cum renovatione singulorum annorum": *Epistulae ad Atticum,* 6, I. § 5). This proposal was rejected by Scaptius. For further details, see Klaus Wille, Dir *Versur* (1983). pp. 13-56.

'" But see Levy. *ObUqationcni'echt,* pp. 160 sqq.

[m] Billeter, op. cit., note 71, pp. 267 sqq.

'" *Codex TluvJpsianus, 2.* 33, 4.

[M"] C. 4, 32, 26, *2.* Cf. Billeter, op. cit., note 71. pp. 306 sqq.; Managrazia Bianchmi, "La disciplina degli interessi eonvenzionali nclla legislazione giustmianca", in: *Studi in oiwrv di Amaldo Biscardi,* vol. II (1982), pp. 391 sqq.

negotiatioiiem gerunt": they could charge up to 8%.[8Л] Regarding policy, it is interesting to see that the problem of usury was tackled in Roman law by way of penal sanctions.[й4] Like all statutory prohibitions in early law,[85] the usury laws were not "perfect",[Sf)] that is, as long as the correct form had been observed, the illegal act was not invalid. However, according to classical law, the debtor did not have to pay the usurious rate of interest:

> "Placuit, sivc supra statutum modum quis usuras stipulatus tucrir sivc usurarum usuras.*[7] quod illicite adicctum est pro non adiccto haberi et licitas peri posse."[44]

The contract was still valid, but the borrower had to pay only the legal maximum rate. Marcianus arrived at this result by introducing a legal fiction: he treated the stipulation as it the parties had made a core stipulation, involving this legal maximum, to which the illegal part exceeding it had then been added. Thus, one only had to subtract this illegal addition ("pro non adiecto haberi"). This operation did not constitute a major interference with the contractual agreements of the parties: particularly the right of the creditor to claim back his capital remained, ot course, entirely unaffected;[8"] mutuum and interest-stipulation were two separate contracts. It the excessive interest had

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" Cf. also Nov. 136, 4. as tar as bankers are concerned. For further special rates ct., tor example, C. 5, 12, 31, 5: C. 5, 13, 1. 7 b and C. 7, 54. 2 sq.

M4 In the same way Roman law dealt with unconscionable bargains relating to the sale of corn and with syndicates formed in order to push up the corn price (societatem eoire quo annona canor fiat). However, the State had started, at an early stage, to take over responsibility for providing the Roman people with gram; towards the end of the Republic, this culminated in a free corn supply tor everybody; later on tor the underprivileged classes only. At the time of Augustus, the number of recipients was 320 000. For all this, ьее е.ц. Stephan Brasslot f. *Sozialpolitische Motifc in der romischen Recht sentwickUtug* (1933), p. 16 sqq., .SO sqq. Some 150 000 tons ot corn travelled annually from Alexandria to Rome during the first three centuries A.D., involving "probably the most ambitious maritime enterprise oi the ancient world" (Lionel Casson, "The Alexandria—Rome Sailing Schedule", in: *Ships and Seamanship in the Ancient World* (1971). pp. 297 sqq.).

8л Kaser. *Verbotscesctzi*[1]. pp. 13 sqq.. 18 sq.

^ Cf. infra, pp.'697 sq., 700 sq.

M; Interest on interest (usurac usurarum) could not be charged; see Ulp. D. 12. 6, 26, I; Mod. D. 42. 1. 27; C. 4, 32. 28. An easy way of evading this restriction consists in capitalizing the accrued interest, i.e. including it m the capital sum, on which m turn an increased amount of interest has to be paid (anatocism, anatocismus coniunctus), This could be achieved by way of a transaction called versura. an act either litteris or verbis (usually a п-и-уурсирґі was drawn up) which had the effect of a novation. For details, see Wille, op. cit., note 78. pp. 46 sqq. Only Justinian prohibited anatocism: C. 4. 32, 2K; 7, 54, 3 pr. O. also Gluck, vol. 21, pp. 115 sqq.. Windschtnd/Kipp, § 261. and § 24S I BGH: "An agreement *made in advance* to the eftect that arrears ot interest shall again bear interest is void." (For details, see Karsten Schmidt, "Das 'Zinseszinsverbot"". 1982 *Jurinenzeituii*^ 829 sqq.) Neither, incidentally, could arrears of interest be charged to the extent that they exceeded the amount of the capital that had been borrowed: Ulp. D. 12. 6, 26. 1 ("supra duplum autem usurae"); C 4. 32. 10 (Ant.); Laura Solidoro, "Ultra sortis summum usurac non exiguntur", (19Я2) 28 *Labco* 164 sqq.; Bianchini, *Stndi Bixardi,* vol. II. pp. 399 sqq. In post-classical times the accrual of interest also ceased, rather strangely, when the amount ^ interest *paid* had reached the amount of the capital sum: Nov. 121, 2: 138; 160 pr. Cf. Kaser. *RPr* II, p. 342.

HK Marci. *D.* 22. 1. 29.

89 Paul. O. 22, 1. 20; C. 4. 2. 8.

already been paid by the borrower, the excess was credited against the capital; if it exceeded the capital or if it had been paid per errorem, it could be reclaimed:

> "Usurae supra centesimum solutae sortem minuunt, consumpta sorte repeti possunt. usurae, quae ccntesimam excedunt, per errorem solutae repeti possunt."[40]

3. The canonical prohibition on usury in the Middle Ages

The history of the law relating to usury is a very interesting and varied one. The development in the Middle Ages was dominated by a rule of canon law which prohibited the charging of interest.[91] It was based on a number of scriptural texts, as, particularly St. Luke's exhortation "mutuum date nihil inde sperantes",[92] but it also tied in with economic and dogmatic considerations: the charging of interest entails the exploitation of need and leads to the further pauperization of the debtor; furthermore, it was argued that money, in the nature of things, cannot yield fruits:[43] pecunia pecuniam parere non potest.[94] The Church, traditionally, regarded commercial profits as a danger to salvation. ". . .homo mercator vix aut nunquam potest Deo placere. Et ideo nullus Christianus debet esse mercator, aut, si voluerit esse, proiiciatur de ecclesia Dei." This was the view of St. John Chrysostomus about merchants,[95] and it applied, of course, a fortiori to a usurer. If the Church tried to imprint its economic ethics on the secular law,[96] it was, generally speaking, only partially successful; the canonical prohibition on interest did, however, come to be received, in principle, in iure avili.[97] The

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[9(1] Paul. Sent. II, XIV, 2 and 4; cf. further Ulp. D. 12, 6, 26 pr.

[9] Cf. the *Decretates Gregorii* IX., Lib. V, Tit. XIX, especially the decree of the third Lateran Council in Lib. V, Tit. XIX, Cap. III.

[92] St. Luke 6, 35 (but see also St. Luke 19, 11 sqq. - St. Matthew 25, 14 sqq., the parable of the talents!); from the Old Testament cf. Exodus 22, 25; Deuteronomy 23, 19; Leviticus 25, 35 sqq.; Nchemiah 5, 6-11; Ezckiel 18, 17 (usury forbidden against "poor" and "brother"; cf. also Psalm 15, 5 (innocent)); it was, however, allowed against strangers (Deuteronomy 23, 20: ", . . unto a stranger thou mayest lend upon usury; but unto thy brother thou shalt not lend upon usury"). "Stranger" is the translation of "Kanaanite", the word that was used in the old Hebrew language for "businessman", "banker", "trader".

[93] The doctrine that money is "sterile" goes back to Aristotle's *Politika,* Book I, III, 16 (1257 b) and has been built upon by St. Augustin and St. Thomas Aquinas.

[94] On the "scholastic analysis of usury", see the comprehensive work, thus entitled, by John T. Noonan, (1957), furthermore especially the classic work by Wilhelm Endemann, *Studien in der romanisch-kanonistischen Wirtschafts- und Rechtslehre bis gegen Ende des 17. Jahrhunderts, 2* vols. (1874 and 1883); also Raymond de Roover, *La pensee economique des Scolastiques. Doctrines et methodes* (1971); Winfried Trusen, *Spatmittetalteriiche Jurisprudenz und Wirtschajtsethik, dargestellt an Wiener Gutachten des 13. Jahrhunderts* (1961).

[95] Cf Decretum Gratiani, Prima Pars, Dist. LXXXVIII, c. 11. Cf., too, Henri Pirenne, *A History oj Europe,* vol. II (1958), p. 229: men "could hardly imagine the merchant's strongbox without picturing the devil squatting on the Hd".

[96] Cf., for example, *Constitutionen dementis V.,* Lib. V, Tit. V, § 1, threatening those who enact statutes providing for the possibility of charging interest with excommunication.

[97] Cf. e.g. Windscheid/Kipp, § 260, n. 3; cf. also Wolfgang Kunkel, *Quellen zur neueren Privatrechtsgeschichte Deutschlands,* vol. I, 2 (1938), p. 4U9 sub "Wucher", fur the local laws during the time of the reception of Roman law. Generally on the history of usury in the Holy Roman Empire of the German nation, see Max Neumann, *Geschichte des Wuchers in*

sanctions against usury were strict. The usurious transaction was invalid and whatever the usurer had taken in excess of the loan was treated as stolen goods. The usurer was also liable for punishment."[8]

But this is only one side of the story. The economic realities were stronger than the monastic ideals of the early Christian Church. With a general prohibition of interest, not even the need to borrow merely for consumption, which arises in a predominantly agrarian society, could be adequately tackled. But in the late 11th and early 12th centuries, the whole economic situation began to change. The rise of commercial capitalism, in its vigour and in the relative rapidity of its development, has been compared with the industrial revolution of the 19th century." Money came to be lent for production or investment; large sums were needed lor financing venturesome economic and military enterprises. The crusades, launched by the Church itself, are one obvious example. Thus, "legitimate trade based on good faith was distinguished from illegitimate trade based on avarice";[1"0] lawful credit devices were distinguished from the sin of usury. The history of the prohibition *Q{* usury from the Middle Ages onwards could well, therefore, be written as the history of its gradual erosion. A variety of transactions were developed and used simply for the purpose of circumventing the prohibition;[101] the contractus mohatrae, where two contracts of sale disguised a loan on interest, has already been mentioned as an example. They necessitated the extensions of the usury rule to contracts of sale and other transactions. This in turn gave rise to a voluminous body of casuistry.[102] Very fine lines, too, had to be drawn to distinguish between illicitae usurae lucratoriae and usurae

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Deutschland bis zur Begrundung der heutigen Zinsgesetze (1654) (1865): cf. also Wieimg, *Interesse und Priyi.itstri.jje.* pp. 197 sqq. Hndcmann, *Studien,* vol. I. p. 2 sums up the influence of the canonical usury doctrine in the following words: *"Die Darstellung der Wucherlehre ergibt, dass sich die Konsequenzen jenes Dogma's allmahlich uber das gesummte Wirthseltaftsieben, und uber Handel und Verkehr erstreckten. . . . Die Rechtshistorie des Verkehrsrechts jener Zeiten kann nichts Anderes sein, als die Geschichte der Herrschaft der Wucherlehre in der Rechtslehre"* (I he analysis of the usury doctrine shows that its consequences gradually extended over the entire economic sphere, over trade and commerce in general. . . . The history ot [he law relating to commercial transactions of those times cannot be but the history of the ascendancy of the usury doctrine in contemporary jurisprudence).

[1(8] Molina, *De iustitia et iure,* Tract. 11, Disp. 334.

[" Henry Pirenne. *Sozial- und Wirtschaftsgeschichte Europas im Mittelalter* (2nd ed.. 1471). pp. 156 sqq., 199 sqq.

[10" Berman, *Law and Revolution,* p. 338.

[" "Sed ita mores avarorum et pessimorum hominum sunt comparati, ut semper novas vias, et artes avantiam exercendi mveniant": Stryk. *Usus modernus pandectariuii.* Lib. XXII, Tit. I, § 1.

[102] For details about transactions for the purpose of evading the prohibition of interest cf. e.g. Stryk, *Usus modernus pandectarwn.* Lib. XXII. Tit. I, §§ 19 sqq.; Molina, *De iustitia et iure,* Tract. II, Disp. 303 sqq.; §§ 1-7 of the XVII. title of the *Reidispolizeiordnmig* (1577); Neumann, op. cit.. note 97, pp. 440 sqq.; Trusen, op. cit., note 94. pp. 60 sqq. As to the casuistic approach adopted in the usury legislation of the time, ct. Helmut Schmidt, *Die Lehre von der Sittenwidrigkeit der Rechtsgeschafte in historischer Sicht* (1973), pp. 33 sqq. On the practice of medieval English Church courts, cf. R.H. Helmholz, *Canon Law and the Law of England* (1987), pp. 323 sqq.

compensatonae;[1„3] availing themselves of the Roman concept of quod interest (interesse),[104] the medieval lawyers allowed the creditor to claim a surcharge in the form of (lawful) interest as a compensation for lucrum cessans, damnum emergens and periculum sortis, or to charge interest in case of delay of performance. Another intricate distinction was that between usury and cmptio annuorum rcdituum (purchase of an annuity, *Rentenkauf).*[1„5] The latter, defined as "contractus instituais a consuetudine, ex quo unus vendit, et alter emit ius certi reditus, singulis annis solvendi in pccunia",[l()fl] had always been regarded as valid, even though the obligation to pay an annual return (census or reditus) usually went ultra sortem and might well have been regarded as a contravention of the prohibition of interest. Especially in Germany, this transaction has been of enormous practical importance as an opportunity to raise and invest capital and thus to create credit.

4. A clash between theory and practice?

It would be going much too far even to mention all the real and quasi-exceptions to the general usury prohibition which were recognized in the Middle Ages[107] and which permitted trade and commerce to flourish. The disputes and discussions clustering around the principle challenged the ingenuity of merchants and lawyers alike. Besides, the Church tolerated usury by Jews: excluded from agriculture, not allowed to own landed property, unable to join the guilds and thus become artisans or ordinary merchants, they were forced to take up the shadier business of moneylending/pawnbroking.[10]* Rejecting Christ as Saviour and doggedly refusing to accept the new law of the Gospel, often charged with wcll-poisonmg and other wicked acts, they were taken to be damned anyway. But special privileges were also granted to

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"' For the difference ct., for example, Pothier. *Traite du contrat du pret de consomption,* n. 53.

" Cf. Lange, *Schadensersatz und Pvivatstrajc,* pp. 10 sqq.

[11:1] W. Ogris, *Der mittelalterliche Leibrentcnvertrag* (1461), pp. 104 sqq.: Coing, pp. 378 sq.; Winfried Triiicn, '"Zum Renrenkaut im Spatmittelalter", in: *festschrift fur Hermann Heimpel,* vol. II (1972), pp. 140 sqq.

Feliciano de Solis, *Commentant de cemibus quatuor Ulms* (Francofurti, 1005), Lib. I, Cap. IV. 8.

[1„7] Cf. the details in John Gilchrist, *The Church and Economic Activity in the Middle Ages* (1969). pp. 62 sqq.; Noonan. op. cit., note 94. pp. 100 sqq.; Hndemann. *Studien,* vol. II, pp. 366 sqq.; Neumann, op. cit., note 97, pp. 109 sqq.

[11)W] As to the social, economic and legal position ot Jews, *cf.* Justus Henning Bochmer, *Ins ecclesiasticum protestantium,* Lib. V. Tit. 6; Guido Kisch. *The Jews in Medieval Germany* (1949); idem, *Jewry-Law in Medieval Germany* (1У59); idem, *Trafen zur Recht:,- und Sozialgeschichte der Juden in Deutschland wahrend des Mittelalters* (1955); cf, also the eminently readable account by Paul Johnson, *A History of the Jews* (1987), pp. 169 sqq. (passim). According to Talmudical theology, usury is a sin (ct. the texts from the Old Testament, referred to in note 92 supra), but only it it is committed against another Jew ("Kanaanite" was now (mis-)understood in the sense ot "'stranger", "non-Jew"; hence the rule that no interest is to he extracted from Jews, even it they are businessmen. On the other hand, the taking of interest from Gentiles is allowed even it they are not businessmen or it they are poor). Ct. e.g. Eberhard Klingenberg, *Das israelitische Zinsverbot in Torah, Misnah und Talmud* (1977).

the montes,[109] financial institutions designed at first by the Italian city-states to boost their rather run-down public finances by way of forced government loans, yet, in the course of time also engaging in other financial and credit transactions — especially deposit banking.[110] In these montes the great public banking corporations originated, of which the Casa di San Giorgio in Genoa eventually became the most important. Since the second half of the 15th century, even the Church started to establish and to run banks, though, of course, these institutions were not called banks but montes pietates (mountains of piety).[111]

In view of all this, one may be inclined to wonder at the hypocrisy of Church and canon lawyers, or at least to deplore the deep ritt that seems to have existed between the ascetic theory behind the usury prohibition and the very mundane commercial activities which the canonists condoned.[112] But, in fact, they not only condoned them — by analysing and systematizing the law of usury for the first time, they actually provided a rational foundation for the dramatic growth of commercial and financial life during the Middle Ages;[115] and it is very likely that this was fully in accordance with contemporary Christian social theory. For the Western Church in the 12th century was no longer fundamentally otherworldly;

> "ir believed in the possibility of reconciling commercial activity with a Christian life. - . . The secular activities (if those engaged in commercial enterprise were to be organized in ways that would redeem them from the sin ot avarice. The merchants were to form guilds that would have religious functions and would maintain

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[11)4] Cf. Endemann, *Studien*, vol. I. pp. 431 sqq.; Raymond de Roovcr, *Money, Banking .»id Crcdil in Medieval Bruges* (194H); Winfried Тпіьси, "Die Anfinge offentlicher Banken und das Zinsproblem, Kontroversen im Spatmittelalter", in: *Recht und Wirtscha? in Geschichte und Gegenwart, Festschrift fur Johannes Barmann* (1975), pp. 113 sqq.

[" Based on the Roman depositum irregulare (ct. e.g. Johann Marquard. *Trcictatus politico-juiidicus de jure mercatonini et conmierciorum .ч*n^uiaгi (Francofurti. 1662), Lib. П. Cap. IX, nn. 21 sqq.), which could thus be used as yet another avenue to sidestep the canonical usury rule; the transaction, in effect, was a loan ot money for investment purposes on interest. Transactions involving bills of exchange were another means ot creating credit, which came to be handled by the montes and which entailed, de facto, an infringement ot the prohibition ot interest. On the history ot bills of exchange, see Endemann. *Studien*, vol. I, pp. 75 sqq.; Raymond de Roovcr. *L'evolution de !>> Lettre de* С/мн^г, *X! I'—Will siecles* (1953); Coing, pp. 537 sqq.

[1] The first montes pietatis were constituted in 1461 and 1462 in Perugia and Orvieto. They were public pawnshops, normally financed by charitable donations and run not tor profit but for the service of the poor. They charged a small fee tor their care ot the pawns and for the expenses of administration (usually 6 %). At the end ot the !8th century, there were 80 montes pietatis in Italy. But gifts alone did not provide sufficient funds. Thus, the montes were soon permitted to raise money by paying interest. Several 16th-century pontiffs authorized the montes to accept deposits and pay interest upon them. On the montes pietatis, see Endemann, *Studien*, vol. I, pp. 460 sqq. The Popes also actively supported the Medici Bank in Florence: cf. Raymond de Roover, *The Rise mid Decline of the Medici Bank 1397-1494* (1963), pp. 194 sqq.

[12] Max Weber, "Die protestantische Ethik und der Geist des Kapitalismus", in: *Gesammelte Aufsatze zur Reiigionssoziologic* (5th ed., 1963), pp. 56 sqq.

[m] Gilchrist, op. cit.. note 107, p. 107.

> .standards ot morality in commercial transactions. . . . Thus the social and economic activity ot merchants was not left outside the reach or moral issues. A social and economic morality was developed which purported to guide the souls ot merchants toward salvation. And that morality was embodied in law. Law was a bridge between mercantile activity and the salvation ot the soul.""[4]

This, incidentally, ties in with what C.S. Lewis has called "the undying paradox, the blessedly two-edged character of Christianity".[115] Christianity is world-denying and world-affirming at the same time, and it is the latter by virtue of being the former: "Because we love something else more than this world, we love even this world better than those who know no other."[1]"'

5. Usura non est lucrum, sed merces

But be this as it may, in the course of the 16th century it became apparent that the canonical prohibition on usury was no longer tenable in iure civili. The main attack came in the wake ot the Reformation:[117] from Calvin m regard to its theological justification, from Carolus Molinaeus[118] and Claudius Salmasius[119] as far as its legal and economic basis was concerned. The words of the Lord in Luke 6, 35 had been misunderstood according to Molinaeus; they did not refer to contracts of loan, but merely to alms. Thus, money that had been given with a charitable intention must never be reclaimed with interest. A loan given per modum negociationis, on the other hand, was valid, as long as only a moderate amount of interest and not turpes usurae had been promised. The Roman rules relating to usury, not being in conflict with Divine law, could therefore still be applied. Salmasius, on the other hand, set about attacking the "sterility *o(* money" doctrine. He regarded the granting of a loan as the hire of the money involved, the interest consequently as the rent to be paid for its use: "Locatur pecunia, quae foenori[1]-" datur, non alio modo, quam aedes aut ager aut opera, pro quibus merces cxigitur ab his, qui ea conduxerunt."[121] Consequence:

> ■'. . . usura non est proprie lucrum, sed merces. Nee propter officium mutuationis accipitur, st'd propter usum pecuniae. Aliud autem est merces, aliud lucrum. Hoc adventiciuin est. et extra rem. 111a profecticia ex ipsa re."

By the time the imperial legislation, in 1654,[122] for the first time

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[4] Berman. *Law and Revolution,* pp. 378 sq.

"'■ "Some Thought;.'", in: *hirst and Second Things* (1985). p. 91. '^ Op. cit., note 115, p. 95. ' Endemann, *Studien,* vol. I. pp. 62 sqq.; Noonan, op. cit., note 94, pp. 365 sqq.

Tractiitns lomnierciorum et usurarum redituumqite pecuniae et monetiirum (Parisiis, 1546). "" *De usnris* (Lugduni Batavorum. 1638).

" Like Calvin and Molinaeus, Salmasius drew a distinction between (illegal) mutuum and (lawful) foenus.

[12]' Op. cit., note 119, Cap. 5.

[122] *liincsur Reichsabscliied,* § 174 (<V.S - *Neue und vollstandige Sammlung der Reichs-Abschiede* (1747). vol. III, 673).

acknowledged the possibility of charging usurae in principle, loans at interest had already become very common in practice.[123] The canonical prohibition came to be regarded as abrogated by general custom.[124] At the same time there was a general move back to the Roman rules relating to interest, modified in many places only in that the maximum rate for ordinary loans was reduced from 6 % to 5 %, either by way of legislation or by customary recognition.[123] In the Catholic countries (Spain, France and Italy), on the other hand, the canonical prohibition continued to be maintained in principle. In 18th-century French literature it still found support in the influential writings of Domat[126] and Pothier.'[2712]«

6. The flexible rule of the BGB

As far as Germany is concerned, this chapter in the history of the laws against usury drew to a close in 1867. In this year, under the influence of economic liberalism, all limitations on interest rates were abolished.[129] In practice the usury laws were very often circumvented[13]" and were regarded as arbitrary and unjustifiable restrictions on the freedom of contract. However, in the years that followed, complaints about usurious exploitation increased. The liberalistic hopes and theories turned out to be castles in the air: with the abolition of criminal sanctions the criminal behaviour itself does not normally disappear. Thus, some control had to be reintroduccd. But there was no return to the old policy of fixing maximum rates.[131] Any limit would have been entirely arbitrary. On what basis could 5 % (or

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[123] Neumann, op. cit., note 97, pp. 506 sq., 511 sqq., 537 sq.; Wieimg, *Interesse und Prii'iitstrajc,* pp. 207 sqq.

[124] David Mevius, *Vollstandiger Commentarius von wncherlichen Contractai* (Franckfurt/ Leipzig. 1710). I, Cap. VI. § 7;"Gluck. vol. 21. pp. 100 sq.

[U:>] *C{.* the survey in Bochmer, *Ins ecclesiasticum protestauiium.* Lib. V, Tit. 19, §§ III sqq.; Neumann, op. cit.. note 97. pp. 545 sqq. Attempts were also made cither to subject Jews to these maximum rates or to exclude them from the money lending business; *cf.* e.g. *Reichspolizeiordnung* (1577) Tit. XX, 6; Gustav Klemens Schmelzeisen, *Polizeiordnungen und Privatrecht* (1955). p. 475 sqq.

[126] Domat. *Les loix civiles,* Lib. I, Tit. VI, Introduction.

-' E'othier, *Traite du contrat du pret de consomption,* un. 53 sqq. Cf. also Franciscus Hocomanus, *Quaestiones illustres* (Hanoviae, 1601), n. 40.

" In the new Codex Jum Canonici the prohibition on usury is no longer mentioned. But cf. still canon 1534 ot its predecessor, the Codex [uns Canonici of 1917.

[124] BGBl *(Norddeutscher Bund)* 1867. 159; applicable at first only to the Confederation *o(* Northern Germany, but soon to the Reich, too (exception: Bavaria). On the history of these enactments, sec Peter Landau, "'Die Gesetzgebungsgeschichte des § 247 BGB. Zugleich ein Beitrag zur Geschichte der Einfuhrung der Zinsfreiheit in Deutschbnd" in: *Beitrage zur Rechtsgeschichte, (.'.edachtnisschrijt tur Hermann Conrad* (1979), pp. 388 sqq.

[130] Cf. Goldschmidt, "Gcset?gcbungsfrage. betr. die Aufhebung der Wuchergesetze", in: *Verhandlungen des Sechsten Deutschen Juristentages,* vol. I (1865), pp. 232 sqq. He referred to the usury laws as "conventional lies".

" This policy is still pursued in South Africa. Interest rates (in modern parlance: finance charges) are limited by the Limitation and Disclosure of Finance Charges Act 73/1968, amended by Act 90/1980. On this Act and its predecessors, see D.|. Joubert, op. cit.. note 66, n. 295.

any other amount) be regarded as legal and 5,5 % as illegal and punishable? Therefore, a flexible rule was introduced in 1880, first in the field of criminal law. This provision was extended in 1892 to cover contracts other than loan; in 1896 it was incorporated into the new codification of private law.[132] There it is considered as a special case of a legal transaction contra bonos mores:

> "A legal transaction is also[111] void whereby a person exploiting the distressed situation, inexperience, lack of judgmental ability or grave weakness of will of another, causes to be promised or granted to himself or to ,i third party in exchange for a performance, pecuniary advantages, which exceed the value of the performance to such an extent that, under the circumstances, the pecuniary advantages are in obvious disproportion to the performance."[114]

If one compares this to the policy adopted in Roman law, one will find at least tour differences: there is no fixed limit, but a flexible *one* that has to be decided on in each individual case before the courts;[135] the rule is applicable not only to contracts of loan but also to contracts of sale, lease, contract for work, etc.; certain subjective criteria have been introduced that have to be satisfied if a contract is challenged on the basis of being usurious, i.e. an obvious disproportion between performance and counterperformance per se is not sufficient; and we are dealing with a lex perfecta, that is, any contract in violation of § 138 II BGB is void. This latter point, incidentally, leads to problems concerning the law of restitution. If the capital has been handed over to the borrower and it later transpires that the contract of loan is usurious and therefore void, the lender will usually try to get back his capital by means of an unjustified enrichment claim (condictio indebiti). This action, however, seems to be barred by virtue of the fact that the "in pari turpitudine" rule[13ı1] has to be applied analogously in cases of turpitudo solius dantis.[137] But does this mean that the party who was

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[13]~ On the history of usury legislation m the 14th century, sue Klaus Luig, ■'Vertragsfreiheit und Aquivalcnzprinzip im gemeinen Recht und im BGB", in; *Aspekte ettivpiiisilwr Rcchtsycschiihti', h'e<tgabc tur Helmut Cointf* (l'JH2), pp. 17! sqq.; Zimmermann, *Modi'ratiousmht,* pp. 145 sqq. Ct. also John [J. Dawson, "uconoime Duress and the Fair Exchange in French and German Law", (1У37) 12 *l'ulanv LR* 42 sqq.

The "also" refers to § 138 I BGB which reads: "A legal transaction which is contra bonos mores is void."

[14] § 138 II BGB.

'■"■ For details, sec Mayer-Mлiy in: *Mihuhciier Kommentar,* vol. I. (2nd ed., l[l]>84), § 138. un. 117 sqq.

[1] ^ Cf. infra, pp. S4(> sq.. 863 sqq.

[IP]" The in pari turpitudme rule is laid down in § 817. 2 BGB: "The claim for return is barred it the person performing has committed a similar infringement. . . ." This refers to the condictio ob turpem vel injustam causam (§ 817, 1 BGB) which lies in cases where the acceptance of the performance by the recipient constitutes an infringement ot a statutory prohibition or is contrary to public policy. Literally, therefore, § 817, 2 BGB is applicable only if both parties acted immorally or illegally. The practical effect of that rule is that a person who received something under an illegal or immoral contract may keep it. It uould be absurd, however, if only a recipient who had acted immorally himselt were allowed to keep the object of the performance, whereas the condictio would not be barred against л

exploited in the first place is now allowed to make a comfortable profit by being able to keep the money (for ever[138] or at least for the time that the parties had—in their invalid contract—agreed upon) without paying interest at all? This, indeed, is the prevailing opinion today.[139] I think, however, that a case can be made out for granting to the usurer an action against the borrower, based on unjustified enrichment, for the value of the use of the money.[140]

III. SPECIAL TYPES OF LOAN

1. Loans to sons in power

(a) The senatus consultum Macedonianum and its policy The other piece of legislation dealing with specific dangers resulting from moneylending transactions was passed at the time of either Claudius[141] or Vespasian.[142] It was the senatus consultum Macedonianum, named, for once, not after the proposer, but after the person whose scandalous behaviour occasioned it. We find its words recorded by Ulpian in the following way:

> ". . . placere, ne cui, qui filio familias mutuam pecuniam dedisset, ctiam post mortem parentis ems cuius in potestatc fuisset, actio petitioque darctur, ut scirent, qui pessimo excmplo faenerarent nullius posse filii familias bonum nomen expectata patris morte fieri."[143]

The enactment provided that the lender who has given money to a son in power should have no action to reclaim his money, even after the death of the latter's father.[144] It was the legislatorial reaction to an incident which has been described by Theophilus:

> "There lived at Rome a person called Maccdo. When still under patria potestas, he borrowed money from somebody, hoping that after his father's death he would be able to repay the debt. As time dragged on, the creditor pressed him hard, demanding his debt. Macedo had nothing wherewith to pay (how could he, being

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blameless receiver. Thus, 817, 2 BGB must also be applied in cases of turpitude solius dantis. For a more detailed discussion, see Zimmermann, *Moderationsrecht.*, pp. 156 sqq.

[138] This, amazingly, was the solution arrived at in RGZ 151, 70 (72 sqq.). It has been abandoned since RGZ 161, 52 (53 sqq.).

[13] RGZ 161, 52 (53 sqq.); Gustav Boehnier, *Grundlagen der burgerlichen Rechtsordnung*, vol. 1 (1950), pp. 55 sq.

[140] Cf. Dieter Medicus, "Vergutungspflicht des Bewucherten", in: *Gedachttiisschrijt fur Rolf Dieiz* (1973), pp. 61 sqq. There is a tendency to avoid these difficulties by interfering with the contract and reducing the usurious interest rate to an acceptable level, other than to regard the contract as totally void; *c(.* e.g. Mayer-Maly, op. cit., note 135, § 138, nn. 132 sqq. and Lieb, m: *Munchener Kommentar,* vol. Ill, 2 (2nd ed.. 1986), § 817, nn. 16 sqq. Contra: Zimmermann, *Moderationsrecht,* pp. 177 sqq. and passim.

[141] Cf. Tacitus, *Annales,* Lib. XI, 13, 2.

[142] Suetonius, *De i'ita Cacsarum, Divas Vespasianus,* XI; Kaser, *RPY*, p. 532. For a possible reconciliation, see Gluck, vol. 14, p. 308.

[143] Ulp. D. 14, 6, 1 pr.

[144] The praetor either refused an action (denegatio actionis) or he (more often) granted the exceptio senatus consulti Macedoniani (to enable the iudex to examine the facts alleged). See Schulz, CKL, p. 511.

alieni iuris?); so he killed his father. The matter was brought before the senate: Maccdo suffered the penalty tor patricide, and the senatus consul turn called Macedonianum was made."[141]

This story has been challenged more than once: Gerhard von Beseler, the chief interpolation-hunter, has denounced it as a silly Byzantine legend.[146] Theophilus' account has, however, been vindicated most elegantly and convincingly by David Daube,[147] who answered the question "Did Macedo murder his father?" in the affirmative: "It is to be feared that he did." In fact, Theophilus[1] paraphrase provides us with the background against which we can appreciate the true intention *of* the senatus consultum. The most important point is that it barred the lender's claim after the father's death.[14]* During his lifetime, of course, no judgment rendered against the son on account of the obligation he had incurred, was enforceable; any attempt to carry out the execution would have interfered with the patria potestas. If, therefore, before the senatus consultum had been enacted, a capitalist had lent money to a son in power, it was inevitable that the parties to such a loan

"should often look forward to the father's death as a welcome event: it was the father who stood between the filiusfamilias and his inheritance and freedom, and between the moneylender and an unhampered prosecution ot his claim".[14]"

This is exactly the situation in which Macedo found himself. Unfortunately, his father proved long-lived. Having already committed a number of more minor illegalities[15]" (such as possibly embezzling the family's jewels), and thus being conspicuously susceptible to blackmail, Macedo did not seem to have seen any other way ot coping with the demands of his troublesome creditor than to bring his father's life to a premature end. The aim of the senatus consultum, under these circumstances, was to make loans to sons in power as unattractive as possible: which moneylender would still be prepared to make a loan which the law could never assist him to recover? Secondly, even if a moneylender still took the risk, the provisions of the senatus consultum removed any interest the moneylender might have had in the murder of his debtor's father. This crime would no longer improve his position ; neither before nor after the father's death did he have an enforceable claim.[131] The intention of the senatus consultum was therefore not to protect improvident and thoughtless young men from the dangers of leading a sumptuous life *on* credit: it applied to grey-haired senators

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[141] *Paraphrasis institution!!»!,* Lib. IV. Tit. VII, 7.

[146] *Beitragt' zur Kritik der romischen Reditsqtwllen,* vol. IV (1920), pp. 130 sq.; *cf.* also Schulz. *CRL, p.* 512 ("obviously, this story cannot be true").

[117] "Did Macedo murder his father?", (1947) 65 *ZSS* 26I sqq.

[14M] Also, if the son had been granted a pcculium, the actio de peculio against the paterfamilias: C 4, 28, 6 pr.

[1411] Daube, (1947) 65 *ZSS* 268.

[li>(] Cf, Ulp. D. 14. 6. 1 pr.: ". . . et saepe materiam peccandi malis moribus praestaret. . . . "

[151] Daube, (1947) 65 *ZSS* 269.

and consuls, as long as they were alicni iuris,[152] but it did not apply to effervescent teenagers, as long as they were sui iuris. Its application was confined to filiifamihas, that is, to cases where the temptation to eliminate the father could have existed.[153] In enacting the senatus consultuin Macedonianum, the Roman Senate seems therefore to have had m mind the protection of the paterfamilias against the attacks of desperate sons following Macedo's fearful example. The legislation was intended to avert patricide, which is most likely where a depraved filiusfamilias acts under the guidance ot a moneylender.[154] The latter was seen to be the principal culprit behind all these sinister machinations,[155] and the main thrust ot the senatus consultum was therefore directed at eradicating the villainous character of an usurer inciting his debtor to take these desperate steps.

(b) The application of the senatus consultum by the Roman jurists

It was with this intention in mind that the senatus consultum Macedonianum was applied. As in the case of the senatus consultum Vellaeanuin, we find the Roman lawyers adopting a purposive or teleological approach in establishing the scope and rational limitations of the enactment.[156] '1 bus, for instance, we read:

> ". . . si quidem aus causa exceptio datur cum quo agitur, solutum repetere potest, ut acadit in senatus consulte» do intcrccssionibus: ubi vero in odium eius cui debctur exceptio datur, perperam solutum non rcpctitur, vcluti si hliustamilias contra Macedonianum mutuain pccuniam acceperit et patertamilias tactus solvent, non

Unlike the exceptio senatus consulti Vellaeani, the defence under the senatus consultum Macedonianum was not granted m the interest of the person who had incurred the obligation (the defendant, i.e. the woman and the son in power respectively); its function was to thwart the creditor.[15]* Thus, a son in power who accidentally paid back the loan after having become sui iuris was not allowed to recover the money.[159] Normally a person to whom a perpetual (as opposed to a merely

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[H2] Cf. Ulp. D. 14, 6, 1. 3: "hi filio familias nihil dignitas tacit quonimus senatus consultum Macedonianum locum habeat: nam ctiamsi consul sit vel cuiusvis dignitatis, senatus consulto locus est."

[17>] Cf. e.g. Ulp. 1). 14. 6, 3. 3: ". . . nam pecuniae datio perninosa parentibus corum visa est."

[1m4] Daube, (1947) 65 *ZSS* 308. Cf. also, in a broader context. Daube. *Roman Law,* pp. 87

';" Cf.. too. Kaser. *RPr* I. p. 532.

[13fi] Ct. the compilation in Buckland/Stein, pp. 465 sq.; *cf.* also Windscheid/Kipp pp. 583

[b] Marci. D. 12. 6, 40 pr.

* Ct. also Pomp. D. 12, 6, 19 pr.: "Si *poaiae causa* ius cui debetur debitor hberatus est, naturalis obligatio manet. . . ." The senatus consultum, incidentally, did not apply if the moneylender had had no reason to think that his prospective debtor might be ahem iuris: cf. Ulp. D. 14. 6, 3 pr.-2.

[19] He is. as Paulus puts it, under a naturalis obligatio; cf. also Pomp. D. 12. 6, 19 pr. and Pierre Cornioley. *Xatitralis obligatio* (1964). pp. 243 sqq.

temporary, dilatory) exceptio is available may reclaim what has been paid in error."[1]"

Of course, a fortiori, deliberate ratification of the debt, once the son had ceased to be alieni iuris, was permissible too. Thus, the former son in power, now paterfamilias in his own right, could no longer plead the exceptio senatus consulti Macedoniani once he had actually started to pay back the loan[16]'—the transaction had now become fully effective. Furthermore, the paterfamilias did not deserve any protection where the son had incurred the obligation from the mutuum with his consent, or where he (the paterfamilias) had subsequently ratified the transaction.[162] Repayment of part of the loan by the paterfamilias, again, was taken to imply such ratification; the paterfamilias was therefore barred from relying on the protection afforded by the senatus consultum Macedonianum under these circumstances."'[3] There were other cases in which it could be presumed that the son m power, m taking up the loan, did not do so in order to embark on a life of reckless intemperance, but acted in accordance with the wishes and intentions of his father: for instance, it the money was needed for study purposes by a student who had to maintain himself at an overseas university; or if it was used to cover reasonable expenses which the father ordinarily paid.[164] The same applied if the money was used for the benefit ot his father's property.'[6]^ Entirely logical, too, was the solution adopted where the status of the borrower had changed after he had promised repayment of the money, but before it had actually been paid out to him. If the final, decisive act of lending was made to a paterfamilias, the senatus consultum did not apply, even though the receiver had previously been alieni iuris.[166] Conversely, if a person sui iuris had made the promise, but had received the money at a time when he had, by way *of* adrogatio, become alieni iuris, the exceptio was applicable."'[7] This differentiation is explicable on the basis that the senatus consultum was intended to prevent crimes such as the one

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"""Marc. P. 12, 6. 40 pr.: "Qui cxceptionem perpetuam habet, soluium per errorcni repetere potest." Cf. § 813 I I3Cii3: "What was done with the object of fulfilling an obligation may be demanded back even if there was a defense to the claim whereby the enforcement ot the claim was permanently barred."

[1M] Ulp. D. 14, 6, 7, 16: "Si paterfamilias tactus solvent partem debiti, cessabit senatus consultum nee solutum repetere potest."

"[12] C. 4. 28, 7 (lust.). What if the father had agreed to the transaction, but the grandfather was still alive? This was the problem in lui. I). 14. 6, 14: "Fihum habeo et ex eo nepotem: nepoti meo credit uni est iussu patris eins: quaesitum est, an contra senatus consultum tieret. dixi. etumsi verbis senatus consulti hlii continerentur, tarnen et in persona nepotis idem servari debere: iussum auteni huius patris non etticere, quo minub contra senatus consultum creditum existimaretur, cum ipse in ea causa esset, ut pecuniam mutuam invito patre suo accipere non possit."

'[1И] Ulp. P. 14. 6. 7, 15. *M*

Ulp. P. 14. 6. 7, 13. "[5]

Ulp. P. 14. 6, 7. 12. *bl>*

Ulp. D. 14, 6, 3. 4. *ul*

Scacv. II. 14, 6, 6.

committed by Macedo, not on the assumption that it was primarily aimed at the protection of irresponsible youth.

Was the senatus consultum Macedonianum, in accordance with its wording, applied only to loans of money or was it extended, by way of interpretation, to other transactions? Did it cover the filiusfamilias breakfasting every morning on nightingales bought on credit?"'* "Is autem solus senatus consultum offendit, qui mutuam pecuniam fiho familias dedit, non qui alias contraxit, puta vendidit locavit.""[1]" The rationale is set out by Daube:[17,1]

> "A rihus tamihas was tree to squander all his prospective wealth, and more—provided he obtained the credit trom ordinary business men, in an honest manner. He might even stand surety tor a prodigal friend:[1"1] that was not a dirty, underhand arrangement. . . . What: the senate was out to prevent or at any rate render harmless was the pure money loan from an usurer. It was this transaction which so easily led to crime."'[17,]

On the other hand, of course, the parties could not be allowed to sidestep the provisions of the senatus consultum by simply disguising the loan. If a contract of sale had been entered into between the moneylender and the son in power, though the purpose of the transaction really was to effect a loan, the senatus consultum was held to apply.[173]

Even though the senatus consultum Macedonianum was closely linked to the entire system of patria potestas, it survived in Germany until the end of the 19th century.[174] In Roman-Dutch law, on the other hand, its application was restricted to persons under the age of 25.[17:1]

2. Loans to merchants involved in overseas trade

(a) Pccunia tvaiecticia as a form of marine insurance

It has been said above that the borrower remains liable even though he might have lost what he had received by fire, earthquake or shipwreck. The risk, as a matter ot course, was on the borrower/owner. Yet, there was one situation in which the capital was supposed to be at the risk of the lender: pecunia traiecticia[176] or, to use the more accurate

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[">M] Daube, (1947) 65 *ZSS* 2H0.

[""] Ulp. IX 14, 6. 3, 3. Cf., too, C. 4, 28, 3: "Si filius familias aliquid mercatus pretium stipulanti venditori cum usiirarum accessione spondeat. non esse locum senatus consulte.), quo tenerare fihib tamilias prohibitum est. nernini dubium est: origo enim potius obligation^ quam titulus actionis considerandus est."

[17('] (1947) 65 *XSS2W* sq.

[171] For this example, see Ulp. D. 14, f>, 7 pr.

'- Cf. Ulp. *D.* 14, 6. 3, 3. as quoted supra, note 153.

[1/1] Ulp- D. 14, 6, 3, 3: "quod ita denmm crit dicendum, si non traus senatus consulto sit cogitara, ut qui credere non potmt magis ei vendcret, ut ille rei pretium haberet in mutui vicem."

[174] Ct. e.g. the detailed treatment by Windscheid/Kipp, § 373.

[17:1] Groenewcgcn, *De legibus abrogJtis*, Cod. Lib. IV. lit. XXVIII; cf. also Voet *CotmiieuTaritts ad Pandcctas*, Lib. XIV. lit. VI, II. But see Huber, *Hedenddeyse Rethtsye-lecttheyt*, III. Hock, XVI. Kap., 23 sqq.

[171> [■) 22 2.

post-classical term, fenus nauticum.[177] This was a loan of money given to a merchant involved in overseas trade, who lacked the capital to buy the merchandise and to ship it at his own risk. Sea voyages on the Mediterranean were dangerous in Greek and Roman times because of storms and pirates[17"] and the average merchant therefore looked for some kind of marine insurance. This was the function served by fenus nauticum: the money had to be repaid only if the ship arrived safely in port with the cargo on board (si navis intra certum tempus pervenerit in portum). Usually, the loan was given for both the voyage out and the return journey: the merchant would use the money to buy articles suitable for exporting at the port of departure, in order to sell them overseas. He would then avail himself of the proceeds to import other articles on the homebound journey. Because *of* the risk which the lender assumed, the rate of interest, up to the time ofjustinian, was not limited;[174] to charge high interest rates was not regarded as objectionable and usurious as it was not merely a compensation for the use of the capital but a premium periculi,[1HI)] an equivalent for the assumption of the risk of the various maritime vagaries.[1HI] We do not know what rates were in accordance with ordinary trade usage in Rome; Greek moneylenders during the 4th century B.C. charged between 22- and

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" C. 4. 33. As to the Roman terminology, cf. Wicslaw Litewski. "Romisches Seedarlehen". (1973) 24 *Iura* 113 sqq.; Hans Ankiim, "'Tabula Pompeiana 13: ein Seefrachtvertrag oder em S ce da riehen?", (1978) 29 *Iura* 170 sq.

During the time ot the Roman Republic, piracy posed a grave danger tor all sea voyages. Cf., for example, Plutarch, *Vitae.* Pompeius 25-28; Theodor Mommscn, *Romische Geschichte,* vol. II (14th ed., 1933), p. 64: ". . . *die Piratenflotte fwar] die einzige ansehnliche Seemacht im Mittclmecrc, der Menschenjang das einzige daselbst bluhende Gewerbe. Die romische Regierung sah den Dingen zu, die romischen Kaufleute aber standen als die besten Kunden auf dem Skhwenmarkt mit den Piratenkapitanen als den bedeutendsten Grosshandlern in diesem Artikel auf Delos und sonst in regem und freundlichem Geschaftsverkehr."* Pompeius, in his war against the pirates (67 B.C.), largely eradicated piracy in the Mediterranean Sea. For details, see Henry Jl. Ormerod, *Piracy in the Ancient ll'orld* (1924); Friedrich Berber, "'Von der Piraterie in der Antike", in: *Recht uber See. Festschrift fur Rolf Stodtcr* (1979), pp. 147 sqq. and Kar] Heinz Zieglcr, "Pirata communis hostis omnium", in: *De iustitia i't iure, Festgabe fur Ulrich von Liibtow* (1980), pp. 93 sqq.

[174] C. 4. 33, 2 (Diocl.); C. 4, 32. 26. 2 (Just.); Paul. Sent. II, XIV. 3 ("Traiecticia pccunia propter pcricLilum creditons, quamdiu navigat navis, infinitas usuras reeipere potest"). Justinian fixed the maximum rate of interest at 12 % (cf. e.g. Arnaido Biscardi, *Actio pecuniae traiecticiae* (2nd ed., 1974), pp. 54 sqq.; Bianchmi. *Studi Biscardi,* vol. II, pp. 418 sqq.). Already in (late) classical law, interest no longer had to be specifically stipulated for. A mere pactum was sufficient. Cf. Paul. 1.). 22, 2, 7 and Kaser, *RPr* I, p. 409! n. 37; Luewski, (1973) 24 *Iura* 165 sqq.; contra: Arnaido Biscardi, "'Pecunia traiecticia' e "stipulatio poenae'", (1978) 24 *Labeo* 282 sqq.

[1HI>] Cf. Scaev. D. 22, 2, 5 pr.; cf. also Paul. Sent. II. XIV, 3.

Consequently, the high interest rate had to be paid only for the days the ship was at sea, not when it was in port (cf. e.g. Mod. D. 22,2. l;Mod. D. 22. 2. 3: Paul. Sent. II. XIV, 3). On the other hand, the debtor was released from the duty to repay the loan only it the merchandise was lost due to a typical risk of the sea (marina tempestas: C. 4. 33, 4; nautragium: C. 4, 33, 5; also piratarum insidiae: *et.* Gai. D. 13, f>, 18 pr.), not in case of other accidents or carelessness on the part of the debtor. For details of the penculum creditons, see Litcwski. (1973) 24 *Iura* 125 sqq.; idem, "Bemerkungen zum romischen Seedarlehen", in: *Studi in on ore di Gesate Sau?lippo.* vol. IV (1983), pp. 384 sqq.

33^ per cent depending on the distance to be covered by the ship.[182] The merchants, of course, were sometimes tempted to avoid having to pay such large parts of their profit margin to the lender; thus we read of feigned shipwrecks and intentional sinkings of the ships concerned.[183] To avoid manipulations of this kind, the lender usually sent one of his slaves to take part in the whole voyage.

(b) Greek custom and Roman practice

This form of marine insurance by way of fenus nauticum, like most Roman rules of maritime law, came from the Hellenistic East. The Greek bottomry loan was essentially based on the idea of surrogation.[184] Otherwise than in Roman law, the lender still seems to have been entitled to the capital, even after it had been handed over. Likewise, he was entitled to whatever was bought with this money. Thus the merchandise was regarded as pledged to him. If the goods got lost during the sea journey, the creditor had lost the object to which the liability of the borrower attached and, as a consequence, his claim for repayment fell away too. The Roman lawyers seem to have had certain difficulties in accommodating this foreign custom and translating it into the terms and concepts of their law.[185] That is apparent, for instance, from the term "pecunia traiecticia" and from the definition given by Modestinus: "Traiecticia ea pecunia est quae trans mare vehitur. "[186] This statement does not reflect the main characteristic of the transaction, namely the assumption of risk on the part of the lender. But even on a descriptive level it is inaccurate,[187] for it was normally not the money that travelled overseas (that would not have been a very meaningful form of a fenus nauticum because it would have exposed the money to the perils of the sea without using it to yield a profit); it was the merchandise bought with the borrowed money that was in danger of perishing in one *o(* the many possible maritime disasters. Nevertheless, Roman practice followed the Greek custom (in classical times some sort of ius gentium of all seafaring nations) very closely.[!8fi] An instructive example is the detailed account by Quintus Cervidius Scaevola of a transaction concerning a merchant by the name of

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[182] Bilieter, op. cit., note 71, pp. 303 sqq.

[183] Livius, *Ab urbc condita*. ub. XXVI, lll, 10.

[184] Fritz Pringsheim, *Der Kaut mit fremdem Geld* (1916), pp. 4 sqq.

[185] Until the time ofjustinian their aim was never to introduce new rules, or to change the Greek custom, but merely to understand and incorporate it into their legal system, Cf. e.g. Nov. 106 and Pringsheim, op. cit.. note 184, p. 146.

[186] Mod, D. 22. 2, 1.

[187] But see Litewski. (1973) 24 *Iura* 120 sqq. He contends that it was. in *fact,* originally the money that was transported overseas, in order to buy and then import the merchandise; only later was the fenus nauticum used for both import and export purposes.

[188] Pringshcim, op. cit., note 184, pp. 143 sqq. On the relationship between maritime loans in Greek and Roman practice sec, most recently, Giantranco Purpura, "Ricerche in tema di prestito manttimo". (1^87) 39 *Annali Palermo* 202 sqq.

Callimachus.[1ЙЧ] Stichns, a slave of a (Roman) moneylender, had handed over a certain sum of money as a loan to Callimachus in Berytus. The latter was supposed to buy merchandise and to ship it to Brentesium (Brindisi); there he had to sell the goods, use the proceeds to buy import articles and ship them back to the home port, Berytus, Both the merchandise bought in Berytus and that acquired in Brentesium served as a pledge for the lender's claim and travelled at his risk.[1911] Callimachus, furthermore, was liable for the maintenance of the lender's slaves accompanying the transport (in the end, however, only the slave Eros took part in the voyage). Finally, the loan had been given to Callimachus for a maximum period of 200 days, within which both the outward journey and return trip had to be completed. However, it was also agreed that he had to leave Brentesium intra idus Septembres, i.e. on or before 13 September, and to head back directly to Syria.[191] The whole of the contract was affirmed by way of stipulation;[1"2] observance of the right time of departure from Brentesium was secured by stipulatio poenae: if Callimachus should still be in Brentesium on

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[1ьЧ] Scaev. П. 45. 1, 122, 1. On the fragment, sec Ulrich von Liibtow. "Das Seedarlchen des Callimachus", in: *Festschrift fur Max Kaser* (1976), pp. 329 sqq.; Purpura, (1987) 39 *Amiali Palermo* 212 sqq., 301 sqq.

[1"] Generally on pledges in connection with tenus nauticum. Litewski, (1973) 24 *Iura* 169 sqq. An interesting case (Paul. I). 22. 2, 6) is discussed by Robert Rohle, "Zum Beispiel D. 22, 2, 6", (1979) 45 *SDHI* 549 sqq. He vindicates the exegesis given by Cuiacius *(Conmtcnttirii in Lib. XXV Quaest. Pauli*, col. 1216 sqq.) against modern interpretations. The key to the solution is the acccssoriness of pignus. Cf. also Purpura, (1987) 39 *Aiuiali Palermo* 273 sqq.

[191] This date of departure from Brindisi had to be specifically agreed upon in view of the fact that the period of 201) days might otherwise have run into the winter season, during which the seas were "closed" (Vcgetius. *F.pUoma rci militaris*, Lib. IV. XXXIX: "a die VI. kal. funios usque in Arcturi ortum, id est m diem VIII decimuni kal. Octobres, secura navigatio creditur. . . . post hoc tempus usque m tertiurn idus Novembres incerta navigatio est. . . . Ex die . . . tertio ldu[1]* Novembres usque in diem scxtum idus Manias maria claiiduntiir"; that is: from 8 [une to 14 September navigation was sate: between 11 March and 8 (une and from 14 September to 10 November navigation was uncertain: between 11 November and 10 March seas were closed). Winter sailing was particularly dangerous, not so much on account of the storms (the summer storms, in the Mediterranean, especially the Mistral and the Etesianus are notorious too), but because ot the reduced visibility, severely hampering orientation in an age that did not yet know the manner's compass: "'lux minima noxque prolixa, nubium densitas, aeris obscuritas, ventorum inibri vel nivibus geminata saevitia" (Vegetius. loc. cit., on the dangers of winter sailing). Thus. St. Paul's shipwreck (Acts 27. 9) happened because the shipper risked sailing trom Crete after the season had closed. On all this ct. (can Rouge. *Rechercha sur l'organisation du commerce maritime en Mediterranee sous VF.mpire Romain* (1966), pp. 31 sqq.; Lionel Casson, *Ships and Seamanship in the Anciait World* (1971). pp. 270 sqq. Even if Callimachus had set out from Berytus immediately after the opening ot the sailing season (i.e. on 1 ! March), he would have had until 26 September before he had to be back. The distance between Brindisi and Berytus was easily manageable between 13 and 26 September. With a wind from the right direction, ancient sailing ships could travel a speed of between 4^ and 6 knots. We know, tor instance, that under favourable wind conditions the distance from Carthage to Gibraltar (820 nautical miles) could be covered within 7 days. For details, see Casson, pp. 281 sqq.

[142] Generally on the form in which a tenus nauticum was concluded. Litewski, (1973) 24 *Iura* 137 sqq.; Ankum, (1978) 29 *Iura* 171 sq.

14 September, the whole ot the capital plus interest would become exactable "quasi perfecto navigio".[193]

This transaction contains all the typical elements of a fenus nauticum;[194] of course, many variations were possible. Thus, we find an ingenious combination ot fenus nauticum and commercial partnership in Cato's moneylcnding transactions.[!9S] He gave the capital to one of his liberti (a certain Quinctius) who had to get together 50 shipowners and merchants for the purpose of overseas trading. Thus, the partners could share the risk involved; if one of the 50 ships sank, the proportional share of the loss for each of them was only —. Cato, who incidentally was not very keen on voyages by ship himself,[196] has been criticized by his biographer, Plutarch, for indulging in this "most condemn able of loan transactions" (namely fenus nauticum). Such an evaluation, however, does not do justice to a man whom Livius reters to as "vir sanctus et innocens"[1ı7] and who has gone down in history as the epitome of Roman austerity and uprightness; it is based on an un-Roman perception of business activities involving the loan ot money on a commercial basis as something dishonest and discreditable.[VJ]*

Writers in later centuries struggled to comprehend dogmatically and fit in the fenus nauticum;[199] nevertheless, it continued to be practised.

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[143] In the end, *of* course, Callimachus did not start his return journey in time; he left Brentesium only after 13 September, even though he had already loaded the freight before that date. Eros, however, had agreed to this belated departure. On this case and the problems raised by it, see von Liibtow, *Festschrift Kaser,* pp. 329 sqq.; Purpura, (1987) 39 *Annali Palermo* 212 sqq.. 301 sqq.

[!ıı4] As to the stipulationes poenac that were usually attached to fenora nautica. see Kiroly Visky, "'Das Seedarlehii und die damit verbundene Konventionalstrafe im romischen Recht", (1969) 16 *RIDA* 389 sqq.; Litewski, (1973) 24 *Iura* 173 sqq.; Arnaldo ?iscardi, *Actio pecuniae traiecticiae* (2nd ed.. 1974), passim; Knutei, *Stiptilatio poenae.* pp. 39 sq.; ?iscardi, (1978) 24 *Labco* 276 sqq.; Litewski, *Studi San?lippo.* vol. IV, pp. 390 sqq.; Viьку, *Spuren,* pp 85 sqq.

Ct. Plutarch, I *'itac.* Cato Maior 21, 5-7. See Ulrich von Lubtow, "Catos Seedarlehen", in: *Festschrift fur Erwin Seid!* (1975), pp. 103 sqq.; Purpura, (1987) 39 *Annali Palermo* 235 sqq.

[""] He is reported to have said that he made three mistakes in his lite; he told a secret to his wife, he took a boat when he could have walked, and he spent an entire day without a will: Plutarch, *I'itui',* Cato maior, 9, 9.

[v"] *Ab urbe condita.* Lib. XXXII, XXVII. 2-4.

[198] Cf., concerning Cato, the analysis by Von Liibtow, *Festschrift Scidl,* pp. 108 sqq. Cato must have been a very wealthy man (D. Kienast, *Cato, Der Zensor* (1954), pp. 33 sqq.). He-used to say that aь a young man he had had only two sources ot income: agriculture and frugality. Later on, he increased his property by investing his money in various commercial enterprises. He regarded his wealth as the material basis for his independence; it enabled him to devote his time to the Roman political life. On Cato as jurist and politician cf., most recently, Richard A. Bauman, *Lawyers in Roman Republic Politics* (1983), pp. 148 sqq.; Wieacker. *RR,* pp. 538 sq.

[VJ!>] Cf.. for example, the rather tortuous analysis by Huschke, op. cit., note 41, p. 223.

During the time of the usus modernus, it came to be amalgamated with the medieval bottomry loan.[200]

3. Loans to professional sportsmen

In the case of fenus nauticum, repayment of the loan was dependent upon whether the ship arrived safely at its destination, with its cargo on board. Whether or not this condition was satisfied depended on the occurrence or non-occurrence of events entirely outside the control of the parties (shipwreck due to storm, piracy, etc.). There were other cases, however, where whether or not the loan had to be paid back was determined, to a certain extent, by the borrower himself. As long as such transactions did not take on the character of gambling ("si modo in aleae speciem non cada[n]t"),[201] they were entirely valid. Quintus Cervidius Scaevola mentions two examples:

> ■'. . . nee dubitabis. si piscaton erogaturo in apparatum plurimum pecuniae dederim, ut, si cepisset, redderet, et athletae, unde se exhiberet exerceretque, ut, si viasset, redderet."[21,2]

The more interesting of these is the case of the professional athlete who received a loan in order to be able to maintain himself and to cover all expenses incurred in connection with his exercise programme, equipment, etc.[2"3] The money had to be repaid only once the borrower had gained a victory.[204] Success in sport offered the opportunity of

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~[>(> Coing, pp. 552 sq.; as far as medieval law is concerned, cf. also Herman, *Law and Revolution*, pp. 349, 621. He points out that the sea loan was criticized as usurious and condemned by Pope Gregory IX in 1236. For a detailed analysis, see Pothier, *Traite du pret a la grosse aventure.* "Bottomry", incidentally, seems to be a Flemish term derived from the figurative use. pars pro toto, *of* the bottom or keel to designate the whole ship. The bottomry loan was received into the English law via the Law Merchant and through the court of Admiralty, one of the strongholds of the "Civilians" (on which see, most recently, the comprehensive account by Daniel R. Coquilette. *The Cii'iliaii Writers of Dot tors' Gommons* (London. 1988)). It first occurs in the records in 1593. Cf. Holdsworth. *HBL,* vol. VIII, p. 261.

*" Scaev. D. 22. 2, 5 pr.

21)2 D. 22, 2, 5 pr. On this text (and the question ot its classicity). see Gluck, vol. 21, pp. 153 sqq.. 164 sqq.; Litewski, (1973) 24 *Iura* 160 sqq.

2i>s For all details cf especially Andreas Wacke, "Athleten als Darlehensnehmer nach romischem Recht", (1978) 44 *SDMI* 439 sqq.

J4 Such conditions, where the existence of an obligation was made dependent upon a certain achievement on the part ot the (potential) debtor, were not entirely unusual. Cf., for instance, the logical paradox related in Aulus Gellius. *Nodes Atticae,* Lib. V, X. Protagoras ("sophistarum acerrimujs]") had been promised by his pupil Euathlos "mercedem grandem pecuniam", payable at the time the latter won his first lawsuit ("quo primum die causam apud iudices orasset et vicisset"). For a long time Euathlos remained Protagoras' pupil without, however, undertaking any trial work, Protagoras therefore ultimately decided to sue him for his fee. arguing as follows: ". . . si contra te [se: Euathle| lis data erit, merces mihi et sententia debebitur, quia ego vicero; sin vero secundum te iudicatum erit merces mihi ex pacto debebitur, quia tu viceres." Euathlos, however, replied: ". . . si iudices pro causa mea senserint. nihil tibi ex sententia debebitur, quia ego vicero; sin contra me prommhavermt, nihil tibi ex pacto debebo, quia non vicero." The judges were unable to give a decision and postponed the matter indefinitely: "Turn iudices, dubiosum hoc

considerable prestige and social and economic advancement,[2,15] but it entailed devotion and training for years and on a full-time basis.[2"6] Thus it was essential for a young and talented sportsman to find a sponsor who would be prepared to bear the risk that all these efforts might in the end turn out to be in vain. Obviously, this risk was a considerable one, for it must be borne in mind, inter alia, that Baron de Coubertin's comforting emphasis on participation rather than victory would have been entirely out of place in the ancient world.[207] One was either the winner or a loser; there were no prizes for those placed second or third.[208] Thus, as a praemium periculi, the moneylender was entitled to charge higher interest rates than usual;[209] as in the case of fenus nauticum, the interest did not have to be specifically stipulated for.[210] One may ask whether, under these circumstances, the athlete might not have been tempted to abandon striving for victory rather than having to repay loan plus interest. There was the danger, too, that he might accept a bribe from one of his competitors in order to let him win.[211] But on the one hand, the financial incentives and the material and immaterial advantages of victory normally seem to have outweighed such considerations. Successful athletes went from one competition to the other year after year and had a good chance of becoming wealthy men.[212] On the other hand, according to general principles, the condition on which repayment of the loan depended was deemed to be fulfilled if actual fulfilment was prevented, mala fide, by the party which had an interest in its non-fulfilment (i.e. the—potential — debtor).[213]

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inexplicabilcquc esse quod utrimquc diccbatur rati, ne sententia sua, utracumquc in partem dicta esset, ipsa sese rescinderet, rem iniudicatam relinquerunt causamque in diem longissimam distulerunt."

[71] Cf. Mario Amclotti, "La posizionc degli atleti di fronte al diritto romano", (1955) 21 *SDHI* 123 sqq.; Henri W. Pieket, "Zur Soziologie des antiken Sports", in: (1974) 36 *Mededelingen van het Nederlands Instituat te Rome* 57 sqq., 74 sqq.

[A '] The Greek word ciΦXτιττic usually referred to professional athletes, as opposed to an LSLCOTTIC (amateur; literally: idiot).

On sport in Greek and Roman antiquity generally, see e.g. Julius Juthner, *Die athletischen Leibesubungen der Griechen. 2* vols (1965-68); Harold Arthur Harris. *Sport in Greece and Rome* (1972); Edward Norman Gardiner, *Athletics of the Ancient World* (1967); Ingomar Weiler, *Der Sport bei den Volkern der Alten Welt* (2nd ed., 1988).

[2n]* Henri W. Pieket, "Games, Prizes, Athletes and Ideology", (1975) 1 *Stadion* 49 sqq.

[7] <1200. . .

[J)] In this specific instance the parties had agreed that the creditor should get "insuper aliquid praeter pecuniarn", i.e. a lump sum by which the repayable capital was increased ("ad augendam obligarionem"). The state of dependence upon his sponsor which an athlete could get into, under these circumstances, is illustrated by the case in Ulp. D. 4, 2, 32, 2.

[210] Cf. Scaev. D. 22, 2, 5. 1.

On bribery scandals in ancient sport *c(.* Clarence A. Forbes, "Crime and Punishment in Greek Athletics", (1952) 47 *Classical Journal* 169 sqq., 202 sqq. Revealing, too, C. 10, 54, 1 (Diocl.) ("non aemulis corruptis ac redemptis").

[212] Wacke. (1978) 44 *SDHI* 446 sq.

[213] Cf. infra, pp. 730 sq.