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# Information and Risk in the Medieval Doctrine of Usury during the Thirteenth Century

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## INTRODUCTION

The doctrine of usury [1], in an expanded thirteenth century - beginning in the mid-twelfth century with the *Decretum* by Gratian and ending in the first years of the fourteenth century with the *Tractatus de Usuris* by Alexander Lombard - seems to superimpose contradictory pictures. A modern reader could, without probing too deeply into the texts, identify as well as a positive explanation of interest, the rejection of any explanation, the justification of interest or the strict prohibition of interest loans. This surely helped some talented economists obtain a costless distant guarantee. To find, for instance, a most suggestive prefiguration of the idea that only business profit raises interest above zero (Schumpeter (1954, p.105)) or that underemployment could be efficiently fought by increasing incentive to invest, which means lowering interest rates (the argument, found in Sommerville (1931), is taken up by Keynes (1936, pp.351-352)). Of course, such readings of the works of schoolmen surely helped make some historians of medieval thought go bald.

My purpose, in this paper, is to stem their hair loss. This is the reason why the method used derives from chemistry rather than from history. More precisely, it is a classical method of separation. The reagents are well-known : they are the usual categories of economic analysis. This does not mean, of course, that I intended to find a first draft of modern economic theory which dates back some seven centuries. I didn't intend to, and I didn't find one. But it is while understanding how and why negotiation, information, property and risk differ from our own representations that one becomes able to reconstruct their specificity and their consistency.

The result of the operation is a play with three characters : a creditor, a debtor and a moralist who could be a theologian or a canonist. The moralist has knowledge which is more or less shared by the other two characters. This means that he has one or several competing theories of interest which exclude other theories. That, as a moralist, he has to admit or reject

[1] Among the secondary references to the doctrine of usury employed in this paper, I have drawn upon Bernard (1950), De Roover (1971, chap.VI), Dumas (1953), Lapidus (1987), Mélitz (1971), Nelson (1949, chap.I and II), Noonan (1957), Spicq (1935, pp. 440-486), Viner (1978, pp. 85-99). Though the importance of information and risk, as related to usury, has widely been recognized (see Noonan (1957, chap.VI) on risk-sharing investment), it has never, with the exception of Chiquet, Huyghes Despointes and Schneider (1987), given rise to a systematic account.

some kind of interest is a different question. But, insofar as he is an actor in the play, he has to tell the other two characters what they ought to do and he cannot therefore avoid dealing with this question.

The first act of the play unfolds in a riskless context (section I). It shows that a negotiation problem between creditor and debtor generates an indeterminacy that could be solved through a just price approach. But - for the show must go on -, the existence of such a price, which conforms with the moralist's knowledge, guarantees neither that this price would be accepted, nor that it could easily be calculated. A problem of estimation and of control then arises, the solution to which is first conceived in terms of rigorous prohibition of usury. But the creditor is often a clever guy. The existence of mere substitutes to usurious transactions allows him to shift to perfectly licit transactions. Hence, the moralist's control has to be tightened up. This is achieved by using property in order to discriminate licit from usurious transactions. End of Act I.

Surely, if the creditor here plays the part of the baddy, he is not short of resources, and he is able to imagine numerous ways of asserting ownership when there is none. Risk associated with property, justifying the claim for a special income, then corresponds to the moralist's line of response in the second Act (section II). Naturally, this association remains questionable, and many forces threaten it, waiting for the day when they will be sold separately. Anyway, there is another, and closer, danger : usually, the creditor knows how risky his operation is ; why then should he share his information with the debtor, or, even if he does, why should he reveal it to the moralist ? The latter's numerous attempts to give a proper answer - agreement between both parties ; recourse to an expert - are far from being fully satisfactory. Only some contracts happen to be especially appealing : it is this kind of contract in which the risk depends on the behaviour of one of the parties and governs the income or quantities to be exchanged. So that the moralist has at least an idea of what his retirement would be like, when he will be able to concentrate on much more important matters such as, for instance, the number of angels that could stand on the head of a pin.

But the story of the pin is another play, in which information and risk hardly belong to the scenery, and which is not performed in political economy before the eighteenth century.

## I. USURY IN A RISKLESS CONTEXT

### 1.1. Usury as a sin of intention : a problem of indeterminacy

If the question of information and risk is so involved in the medieval prohibition of usury, it is because it slipped into the space left by usury itself : far from being merely a material fact, usury is, firstly, a sin of intention. To such an extent that the mere observation of an income received by a lender beyond his capital is never sufficient to conclude that the loan is usurious. Thus, it is possible to describe the main lines of a genuine medieval theory of interest that draw upon the highly sophisticated discussions of usury conducted by theologians and jurists (Lapidus (1987)). But in this paper, the purpose is different and focuses more closely on the understanding of usury as a sin of intention. In the early thirteenth century, William of Auxerre, for instance, defined usury as "the *intention* to receive something more in a loan than the capital" (*Summa Aurea*, t.48, c.1, q.1 ; my italics). Though the formulation insists on the materiality of usury, a similar idea can be found in Robert of Courçon : "usury is a sin resulting from the fact of receiving or *aiming at* receiving something above the principal" (*De Usura*, p.3 ; my italics. See also pp.13, 57, 61 and 78). It must be stressed that these lines were written before the full diffusion, in the Christian Western World, of the Latin translations of Aristotle's works in political and moral philosophy by Robert Grosseteste or William of Moerbeke . This helps to understand that, in part, the doctrine of usury lies in ancient grounds, which differ from those related to Aristotelian thesis about the sterility of money, or to the so-called "classical argument" developed by Thomas Aquinas [1]. In spite of a growing consensus about the importance of pre-Thomistic arguments - such as the Roman law framework of money loans -, the normative dimension of the doctrine of usury has often been underestimated for its poor analytical content.

However, a careful examination shows that this content is not so poor. Its main roots are to be found in patristic literature. The Greek and Latin Church Fathers told, in various ways, the same instructive story : that of a consumption loan given by a rich man who is widely provided for in all necessities, to a poor man for whom obtaining the loan is a condition of survival. Later on, most scholastic thinkers [2] considered that in such a situation the "voluntary agreement" of both parties was not enough to prevent the loan from being usurious : this voluntary agreement was called "absolute" for the lender, but "conditioned" for

[1] Chiefly in *Summa Theologica*, II-II, q.78, but also in De Malo, q.13, a.4. The question of the consistency of the classical argument is discussed in Mélitz (1971) and Lapidus (1987).
[2] See the example given by Robert of Courçon in which a poor man is not guilty of usury when he is obliged to contract a loan and pay interest (*De Usura*, pp.17-19).

the borrower. Thus, if this gap between the ways an agreement is conceived makes the condemnation of usury quite unambiguous [1], it nevertheless rests on complex grounds.

In its simplest feature, the money loan is analysed as an intertemporal exchange between the supplier of a present good - the lender - and the supplier of a future good - the borrower. When recognizing the voluntary dimension of the operation, for both parties, scholastic thinkers concede that the exchange can be mutually advantageous [2]. So, the difficulty arises from the way the gain of exchange is shared between the creditor and the debtor. As long as we limit ourselves to a single bilateral transaction, every contemporary economist knows that the present - or future - ratio of exchange between a present good and a future good remains undetermined. The solution can be reached through cooperation, and depends on the negotiation power of both agents.

Here lies a first asymmetry : the supplier of the present good - the rich man - is supposed to be vested with a greater power of negotiation than the supplier of the future good - the poor man -. It is, then, easy to understand that the lender will be able to appropriate most of the surplus emerging from exchange. As early as the fourth century, Gregory of Nazianze denounced "the one who contaminated the soil with usury and interests, amassing where he did not sow and harvesting where he did not scatter seeds, taking his affluence not from the cultivation of the earth but from the destitution of the poor" (*Patrologie Grecque*, T.35, col.957 ; cited by Bernard (1950, col.2324). Small wonder that such a picture is highly disputable, at least in its practical relevance. The fourteenth century, for instance, gives several examples of loans where the borrower is the Prince, so that the greater power of negotiation is on his side, the lenders being threatened with the loss of their capital - if not of their lives.

But, as a consequence of this instructive story, usury, though morally condemned, is recognized as a surplus from exchange belonging to the debtor, but captured by the creditor. Hence, two questions arise, too often mixed together in the writings of medieval theologians and jurists to avoid their being mixed by modern commentators. The first is a positive one :

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[1] The various decisions of the Popes and of the Councils were introduced in the *Corpus Juris Canonici* by Gratian first, in about 1140 (*Decret*, I, dist.46, c.9, 10 ; dist.47, c.1-8 ; II, causa 14, q.1, c.2 ; q.3, c.1-4 ; q.4, c.1-12) and later by the Popes Gregory IX (*Decretals*, l.5, tit.19), Boniface VIII (*Ibid.*, Liber Sextus, l.5, tit.5) and Clement V (*Ibid*., Constitutiones, l.5, tit.5). It is with this last Pope that the condemnation of usury reached a summit, for Clement V promulgated a decretal at the Council of Vienna in 1311 where he decided to punish as heretics those who declared that usury was not a sin.

[2] The idea that trade is mutually advantageous is not specific to the analysis of usury. It clearly comes from the theory of the just price. Thomas Aquinas, for instance, wrote that "purchasing and selling were instituted for the common good of both parties, for each one needs the other's products and reciprocally" (*In Decem Libros Ethicorum*, l.V, lect.9, c ; see also *Summa Theologica*, II-II, q.77, a.1, resp.).

what is the non-usurious ratio of exchange between present and future goods ? The second question is normative : what are the rules of the game that must be set to get as close as possible to this non-usurious ratio of exchange ? Answering these two questions separately will lead us to resolve the obvious contradiction between the rigorous prohibition of usury invoked each time a creditor receives any income above his capital and the numerous justifications of interest often presented by the same authors.

### 1.2. Just price and estimation : from one indeterminacy to another

That the ratio of exchange between a present and a future good is significantly inferior to one is at least implicitly recognized by the major scholastic thinkers of the thirteenth century - here lies a justification of the presence of extrinsic titles, besides the main loan contract, the *mutuum* - ; and this recognition is explicit for some of them. Such was the position of Thomas Aquinas : "One harms one's neighbour when preventing him from collecting what he legitimately hoped to possess. And then, the compensation has not to be founded on equality because a future possession is not worth a present possession" (*Summa Theologica*, II-II, q.62, a.4, resp.2). As for his disciple, Giles of Lessines, he explained in a Böhm-Bawerkian fashion that "Future goods are not evaluated at the same (present) price as the same goods immediately available, even if they could later be of great utility" (*De Usuris*, c.9).

Such a position reveals an interesting shift from the analysis that treated a loan as a negotiation problem, the solution to which is ex-ante undetermined : when saying that a future good has a lower present value than a present good, one solves the negotiation problem through a just price approach. This means that we no longer consider a single transaction, isolated from everything that does not concern the interests, respective powers and abilities of both parties, to take into account the social evaluation of goods (see Lapidus (1986, chap.I)). The most prominent justification for this difference between the values of present and future goods is linked to risk. This shall be discussed later, so that we can go on concentrating on the explanation of intertemporal exchange in the absence of uncertainty [1].

Hence, the usual explanation underlines the loss suffered, in such an exchange, by the supplier of the present good. Through the *damnum emergens*, this prejudice is described as an

[1] This distinction may at times be observed in the structure of the works of certain writers. In the chapter of the *Summa Aurea* on usurious contracts (l.3, t.48, c.3) William of Auxerre, for instance, treated in question 1 the case of term certainty and in question 2 the case of term uncertainty.

opportunity cost in terms of the consumption of the lender, compensated for by legitimate interest. The *lucrum cessans* widens the perspective by retaining an opportunity cost in terms of profitable operations. These two extrinsic titles are, as Noonan (1957, p.116) pointed out, not really discussed before the middle of the thirteenth century (with the exception of Robert of Courçon who condemned *lucrum cessans* ; *De Usura*, pp.61-63) : they need, as a prerequisite, the general agreement about the use of the *mutuum* as the formal frame for a money loan, and the development of the Thomistic understanding of money. Thomas Aquinas, in spite of a certain mistrust - chiefly aimed at the *lucrum cessans* - clearly stated the principles that founded them : "In his contract with the borrower, the lender may, without any sin, stipulate an indemnity to be paid for the prejudice he suffers while being deprived of what was his possession ; this is not to sell the use of money, but to receive a compensation. Besides, the loan may spare the borrower a greater loss than the one to which the lender is exposed. It is thus with his benefit that the first makes up the loss of the second" (*Summa Theologica*, II-II, q.78, a.2, ad. 1).

But, if the principle of a difference between present and future goods, potentially justifying the perception of an interest, is quite clear-cut, the estimation of this difference remains difficult to ascertain [1]. As far as it is a just price problem, subjective evaluation of a cost of opportunity is by no way a proper answer. It seemed difficult to find a way between the simple recognition of a "common estimation" [2] which appears as a polysemic expression passing through the Middle-Ages in the place of a missing explanation, and the rough intuition of an internal rate of return for productive goods [3], the importance of which increased as soon as scholastic writers began to consider some kinds of intertemporal exchange as an exchange between a present good and a present right to receive future goods [4].

This difficulty of establishing the proper value of future goods - even if it is acknowledged as inferior to the value of present goods - reveals a lack of information owing not to the things to be exchanged themselves, but to the ability of men, to their power of

[1] Alternatively, the estimation of this difference is easy to obtain only in very specific cases. See, for instance, the description of a non-usurious foreward sale by Giles of Lessines : "Time can be linked with certain transactions of goods for it can add something to or, on the contrary, take something away from the proper value of these goods. In this sense, if somebody, owing to time, sells more or less than at the just price, such a contract is not usurious. For a measure of corn is justly assessed as being worth more in summer than in autumn, all things being equal" (*De Usuris*, c.9).

[2] Generally revealed by the "estimation of a good upright man", as in William of Auxerre's *Summa Aurea* (l.3, t.48, c.3, q.2).

[3] A current idea about the census, for instance, was that it had to be capitalized eight times its annual return (see Noonan (1957, p.156)). Still on this most controversial question, Alexander Lombard wrote that "when you evaluate the just price, it is sufficient to look at the price for the buyer and for his descendents up to a certain level, for example his sons or grand-sons. But one must not consider all his descendents, until the end of time, otherwise the good on sale could not be estimated" (*Tractatus de Usuris*, c.7, par.87).

[4] Such is how the census is understood. See Giles of Lessines (*De Usuris*, c.9) or Alexander Lombard (*Tractatus de Usuris*, c.7, par.101).

calculus. So that the ex- ante indeterminacy of the ratio of exchange is not eliminated by intertemporal cost of opportunity considerations, even in a riskless context.

### 1.3. Normative analysis : the consistency of the rigorous prohibition of usury in question

This leads us to a normative analysis that gives meaning to the consistency of apparently contradictory positions among scholastic thinkers, or even inside the work of some of them. Although Thomas Aquinas, for instance, stated the reasons why a future good had to be estimated at less than a present good, he strongly forbode the seller from increasing his price in a credit sale : "To sell a thing above its just price because one allows the buyer a delay of payment is an obvious usury because the allowed delay has the characteristics of a loan. Consequently, all that is required above the just price for this delay is like the price or the interest of a loan, and thus must be considered as usurious" (*Summa Theologica*, II-II, q.78, a.2, sol.7). Another interesting example of such contradictions can be found in the reactions to the *census*. Initially, the *census*, which appeared in the thirteenth century, was not treated as a loan. It was the sale of a productive good - land, for instance, or cattle - bought with the products of its exploitation [1]. A first difficulty arises from the identification of the length of the period which had to be retained to establish the price paid for the *census*. But, still more important, the same transaction - say a temporary real *census* - could be given two interpretations. In the first, as has been seen, it is a sale. In the second, it is a loan : if the seller of the *census* had first bought cash the productive good from his buyer, he clearly becomes the creditor. Thus, in the first interpretation, the *census* is licit, as Giles of Lessines (*De Usuris*, c.9) or Alexander Lombard (*Tractatus de Usuris*, c.7, par.79) acknowledged ; in the second, it is a usurious loan, as explained by Henry of Ghent (*Quodlibet* II, q.15 ; cited by Hamelin (1962, p.94, n.80)) or by Robert of Courçon (*De Usura*, p.63).

This confirms that usury is not a matter of fact, but a matter of intention. And the actualization of this intention depends on the lack of knowledge about the cost of opportunity. It imposes the intervention of the theologian or of the jurist not only in order to understand the formation of interest, but also to institute the rules and incentives that will prevent or, at least, limit usury. Obviously, this interpretation deliberately neglects such questions as the characterization of the fault - a sin against divine law, against civil laws or a fault against

[1] On the development of the analysis of the census, see Noonan (1957, pp.154-170) or, up to Alexander Lombard, Hamelin (1962, pp.91-97).

reason - ; but, once this had been said, the problem faced by the moralist is a typical "agency problem" in which he plays the part of the principal, while the creditor is the agent. In this problem, the calculus of the price of a future good is either impossible or of a prohibitive cost for the principal as for the agent. Thus, any interest on a loan, every difference between the values of present and future goods is a priori suspected of being usurious - i.e. to be a consequence of the higher power of negotiation of the creditor -. So, as long as the decision of the principal is at once costless and highly efficient (for the agent could be charged with a mortal sin), a stern rule, forbidding every difference between the capital lent and paid back comes to be a proper answer that does not contradict the understanding of interest as a morally and analytically admissible economic category.

However, this does not mean that such a position is easy to sustain. The difficulty of the task comes from the existence of a considerably large set of transactions, all of them being close substitutes for an interest loan (credit sale, *societas*, mohatra, mortgage, *foenus nauticum*, bank deposit, etc...) when they are not, like the *census* discussed above, alternatively interpretable as an interest loan itself. And some of these transactions seem to exhibit a perfectly calculable legitimate surplus. As the imagination of merchants and financiers of the Middle-Ages seemed unlimited, the field covered by a strict prohibition of interest loans ran the risk of becoming smaller and smaller. The solution was then to find a characteristic that would permit a partition of the set of transactions formally substituable for an interest loan, so that the usurious transactions could no longer be substitutes for a legitimate operation. Property early became this characteristic.

### 1.4. Property against usury

The play was already performed when, after the rediscovery of Roman law in Italian Universities, a free contract for fungible goods, the *mutuum*, which happened later to become the masterpiece of the Thomistic synthesis about usury, fixed the legal framework for money loans. Indeed, the form of the contract itself precluded any interest being paid on a money loan. Robert of Courçon, at the very beginning of the thirteenth century, explained the mechanism by writing that "the name of the *mutuum* comes, indeed, from that which was mine (*meum*) becomes yours (*tuum*) or inversely. As soon as the five shillings that you lent me become mine, property passes from you to me. It would then be an injustice if, for a good which is mine, you were to receive something ; for you are not entitled to any return from that which is my possession" (*De Usura*, p.15). Sixty years later, Thomas Aquinas completed the argument, showing that contractual interest on a money loan, mentioned in the loan contract

itself, is impossible because this contract could be nothing but the *mutuum* (Lapidus (1987, pp.1097-1103).

The interesting idea, here, is that only private property rights justify a return on a good. It was - and is still - not so trivial. All the more so as the prevailing conceptions about property during the thirteenth century testify that no appropriation, no private use could contradict the objectives of the community. In fact, they occupy a transitory place in the evolution of the Church's conceptions. Since the fifth century, of course, Christianity had given up the communism of Church Fathers such as Ambrosio or John Chrysostome. But private property did not yet reach, for most schoolmen (except, notably, Alexander of Hales or John Duns Scotus), the status of a natural right - and moreover what we should call to-day full property rights, exclusive and transferable -. From Augustine, we know already that it simply came from human law, and it is in this way that Gratian introduced it to Canon Law in about 1140. Still more, for Thomas Aquinas private property was nothing but an institution steming from *jus gentium*, i.e. a supplement that human reason brought to natural law, mainly for considerations of efficiency. We must also stress the persistence of the feudal tradition, characterized by a complex network of property links, which incited the direct owners of many goods to manage them as prescribed by the *jus procurandi et dispensadi* not only according to their private interests, but also according to those of the community.

This allows us to understand that for a transaction formally equivalent to an interest loan to be non-usurious, the surplus must, no doubt, be collected by the owner but the transaction itself and the amount of the surplus must not contradict the socially recognized goals of the community. Many remarks of schoolmen confirm this point. Generally, it is in this perspective that Alexander Lombard acknowledged, at the beginning of the fourteenth century, the legitimacy of exchange operations, firmly prohibited before [1]. But, in some cases, the activity of a merchant or of a financier is analysed as a private alternative to a direct intervention of the State, useful for the community : "The merchant may earn as much as the just and good legislator should attribute to any public servant : if the legislator does not come to his aid, the merchant may make this profit without it being an extorsion. For if there were a good legislator in a country in need, he should rent such kinds of merchants for a high price in order that they provide and store necessary goods : and not only should he supply them and their families with necessities but he should, moreover, remunerate their labour, their experience and all the risks they are running" (John Duns Scotus, *In Quattuor Libros Sententiarum*, dist.15, q.2, 21).

[1] Alexander Lombard, *Tractatus de Usuris*, c.7, par.139.

However, property was not such firm soil insofar as it was established only by means of a formal contract : if some contracts, by their very nature (like the *mutuum*) transfer property so that the owner is clearly identified, others leave open the possibility of manipulation about the actual owner or suppose common property shared by both parties of the transaction, in which the evaluation of each one's property is not obvious and, therefore, of each one's right and contribution to the product of the operation. The *societas* illustrates this last point. In Roman law, this is an association between persons who engaged their labour, money or goods in a profitable operation. The income of each member of the *societas* depends, naturally, on the issue of the operation. Every modality of sharing is allowed. But, in the Middle-Ages, this excepts the modality in which one partner would bear the entire responsibility in case of loss [1].

Therefore, the moralist who was asked to come to a decision on the licitness of a *societas* had to discover, behind the formal terms of the contract, the hidden actual sharing of property. And, of course, he did not have at his disposal the information known by the partner who was interested in dissimulating it.

But, beyond this discovery, the same moralist was supposed to institute the rules which were to compel the partners to set the contract in conformity with their property rights on the outcome of the operation. In other words, he was faced with a kind of what is to-day called a "moral hazard" problem.

## II. USURY, RISK AND INFORMATION

### 2.1. Property and risk : the claim for non usurious income

An institutional way of solving the moral hazard problem stemming from asymmetric information about property is to find a criterium for this latter that has to be revealed by the agent, otherwise he would lose his right to the income. As the operation is already taking place in a riskful context, for most schoolmen, despite several nuances, risk satisfied this requirement, because the total or partial rejection of risk bearing would also mean the total or partial rejection of a future possibility of gain.

[1] Robert of Courçon expressed this by writing that "every merchant contracting with another for trading must, if he wishes in participate to profit, show that he participates in the danger and expenses which attend all buying and selling" (*De Usura*, p.73).

It must be borne in mind that the conception of risk presented here substantially differs from the lack of knowledge which, as was discussed above, results from an insufficient power of calculus for the assessment of future values : risk concerns states of the world conditioned by future events, the occurence of which is not certain. The same Alexander Lombard will later write that "all things being equal, a riskful thing is worth less than a riskless thing" (*Ibid*., c.7, par.67). Furthermore, if risk-bearing reveals property, this does not mean that every property is, by nature, riskful.

Two examples will illustrate this point. The first one deals with commodities : Aegidius Romanus acknowledged that the income received from a riskless rent was licit (see Noonan (1957, p.59)). The second, more significant example is given by Giles of Lessines (*De Usuris*, c.8) who excluded money from the cases in which *venditio sub dubio* - a real doubt about the future value of a good on sale - allowed an income for the creditor. This does not only mean that in a loan, the ownership of money is transferred, but that this money - at least for authors close to Thomas Aquinas'analysis, such as Giles of Lessines himself - is necessarily riskless as a measure of value, a *valor impositus* [1]. A notable consequence is that if risk can be invoked as a reason for an income in a money loan, it will never be because the creditor is uncertain about the future value of the money that will be paid back to him, but for a risk involved in the cost of opportunity of the loan, as mentionned in extrinsic titles like *damnum emergens*. This idea was expressed as clearly as possible by Raymond of Peñaforte, who described "a case in which it would not be usury to receive beyond the principal" in the following way : "When I had wished to buy, or had been ready to buy a certain commodity with money, and when you, because of your great insistence, made me renounce such a purchase ; then, I would like you to give me back as much as I would have from this commodity if I had carried it myself ; however, *I take upon myself the risk*" (*Summa de Casibus Conscientiae*, l.2, par.7, 5 ; my italics).

But the association of property and risk raises another question. In medieval terms, one could ask whether the distinction between them is a "real distinction" or only a "distinction of reason". If the first solution is chosen, there is no evidence for preventing property and risk from being sold separately as two different sources of income. On the contrary, if the second is chosen, they can in no way be separated and, still more, it is not even sure that risk could claim any specific income. According to the importance of a "theory of distinctions" which was to constitute a decisive element of William of Ockham's thought, one would have expected it to be directly connected to the analysis of the relationship between

[1] On this question, Thomas Aquinas differs from the generally admitted Aristotelian position (Lapidus (1987, p.1100)) which will be better represented by some nominalist thinkers of the fourteenth century like Nicholas Oresme.

property and risk. The formation of economic categories would thus have been understood as an expression of broader principles of reasoning. Unfortunately - at least for the elegance of modern accounts - such an expectation would be betrayed. If, however, a certain evolution in the representations of the connection between risk and property may be distinguished, this seems to rest on quite different grounds. If a change appeared, this was hardly before the end of the thirteenth century. Indeed, the period seems to have been dominated by some kind of standard understanding, confirmed by Thomistic analysis. It stated that, whereas property and use could be separated - and sold separately - for non-consumptible goods only, risk always remained linked with property, although its claim for income was justified and sometimes considered separately. However, this representation progressively led to a break between use, property and risk.

In this perspective, a significant event, not directly connected with risk and hardly connected with usury, happened to be a decretal, originating in Pope Nicholas III around 1280, which stated that members of the Franciscan Order who used material goods did not transgress their rule of poverty, because the use of these goods had to be separated from their ownership (*Decretals*, Liber Sextus, l.5, tit.11, c.3, *Exiit qui seminat*). Hence, the real link between property and use, even for consumptible goods, was broken. This decision was, of course, a supplementary incentive for Franciscan Brothers of the conventual party not to renounce the agreements of life ; it moreover constituted an argument which helped Franciscan authors like John Duns Scotus build up the doctrine of usury on the sterility of money and not on the Thomistic thesis about the confusion of property and use for consumptible goods (John Duns Scotus, *In IV Libros Sententiarum*, Opus oxoniensis, IV, dist.15, q.2, 17). This leads to the idea that among the characteristics of a good, some, which are thought of separately, could also be sold and bought separately. Risk is clearly one of them. This helps explain the wide acceptance of risk as an autonomous source of income, from the end of the thirteenth century onwards. In this respect, it is interesting to note the evolution of the discussion of the *census* which was gradually seen less as a credit sale, or as a shared property on a good, than as an exchange between a present good and a right to future payments. Accordingly, Alexander Lombard justified life *census* on the basis of the pure risk - the uncertainty about the duration of life - accepted by the seller (*Tractatus de Usuris*, c.7, par.81).

To a certain extent, the outcome of such an evolution took place much later, in the fifteenth century, with the generalization of the sale of risk through insurance contracts, previously ignored by Roman law (see Bensa (1897)). Furthermore, the "triple contract" (Noonan (1957, chap.10)) which associated *societas* and insurance for capital ratified the divorce between property, use and risk. It was already underlined that schoolmen imposed an

additional constraint on the Roman law *societas* - no mutual arrangement could share the riskful property of the *societas* between a riskful property for one partner and a riskless one for another. It is this position which is contradicted in the triple contract, since a part of the capital could be entirely guaranteed, though the insurer had to be found outside the *societas* - a quite artificial obligation, easy to be bypassed. Only very few theologians seem to have been conscious that it induced a definite break with the Thomistic tradition (Noonan, (1957, p.203) only quotes John Consobrinus) and, after the renewal of the explanations of interest (Lapidus (1987, pp.1107-1108)), the end of the medieval construction concerning interest and usury.

### 2.2. The incidence of risk on the nature of a transaction

The most convenient starting point for the analysis of the incidence of risk in a transaction is the well-known decretal *Naviganti* by Pope Gregory IX : "Somebody lending a certain quantity of money to one sailing or going to a fair in order to receive something beyond the capital, for he takes the risk upon himself, is to be thought a usurer. Also the one who gives ten shillings to receive after a certain time the same measure of grain, wine or oil, though it is then worth more, when one really doubts whether it will be worth more or less at the date of delivery, must not, for that, be considered a usurer. Because of this doubt again, the one who sells bread, grain, wine, oil or other commodities so that he receives after a certain period of time more than they are worth then, is excused if, in lack of a forward contract, they would not have been sold" (*Decretals*, l.5, tit.19, c.19, *Naviganti*).

This decretal is highly questionable (see Mc Laughlin (1939, pp.103-104) or Noonan (1957, pp. 137 ff)). At first glance, it seems to adopt successively two opposite positions concerning the effects of risk : The first sentence condemns the sea loan (*foenus nauticum*) whilst the concluding sentences allow a reduction in price in the case of anticipated payment - and an increase in the case of a credit sale - if the future value of the sold commodity is uncertain. The difference in treatment is large enough to have led some commentators to imagine that the condemnation of the *foenus nauticum* could have proceeded from an error of transcription by Pope's secretary, Raymond of Peñaforte.

But a careful examination suggests more consistent interpretations. The first one rests on the expression "is to be thought a usurer" (*usurarius est censendus*). If one keeps in mind that usury is already a sin of intention, this means that, in the *foenus nauticum*, the receipt of any income by the lender is not in itself usurious, but that in such a situation, an external

observer, like the theologian, is far from being certain that the lender does not overestimate the risk of the operation to disguise a usurious benefit as a legitimate income.

Besides this "moral hazard" interpretation [1], it may also be noticed that the *foenus nauticum* is not such a simple operation, where only two states of the world can occur - the freight arrives safe and sound or perishes at sea -. Actually, if the freight is intact, the merchant will run another risk when selling it. And this last risk is not taken into account in the contract between the creditor and his debtor. So that, in the event of the ship not sinking, one party has to assume the entire responsability if a loss occurs. As the possibility of selling overseas is submitted to the advance of capital which belongs to the creditor for the duration of the crossing, there is no reason for this ownership to be transferred to the debtor during the second phase of the operation. In spite of its name, the *foenus nauticum* is clearly not a loan [2] but rather similar to a kind of partnership which allows common ownership of money invested in a presumably profitable operation. This strictly forbids any partner from escaping, at any moment, from the responsability of an always possible loss [3].

Once again, the main point seems to have been the link between property and risk. Apart from his own interpretation of *Naviganti*, this was well stated by Raymond of Peñaforte, in a commentary where he tries to synthesize the differences between usurious and licit transactions. Raymond thus pointed out three distinctive characteristics dealing with : i) the link between ownership and risk ; ii) the consumptibility of the good through use ; iii) the sterility of the good [4]. The last two characteristics constitute the grounds on which the scholastic theory of interest and money is built [5]. But the first one plays a different part. It satisfies a discriminatory function. Raymond of Peñaforte suggests that among apparently licit

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[1] Such a reading of *Naviganti* is suggested by Goffredus of Trani (see Mc Laughlin (1939, p.103) or Noonan (1957, p.139)).

[2] In this respect, it must be remembered that in Roman law, the *foenus nauticum* could be paid with the benefits of the operation (*Digest*, 22, 21, 5). This explains the apparent confusion between *foenus nauticum* and *societas* by such canonists as Hostiensis. For an opposite point of view, see Noonan (1957, pp.138-143).

[3] The general principle is stated by Thomas Aquinas in the following way : "The one committing his money to a merchant or a craftsman by means of some kind of partnership does not transfer the property of his money to him, but it remains his possession ; so that at his (the creditor's) risk, the merchant trades or the craftsman works with it ; and he can thus licitly seek a part of the profit as coming from his own property" (*Summa Theologica*, II-II, q.78, a.2, obj.5).

[4] "Gregory sets three differences between loan and rent ; first, in a loan, risk is transferred to the one who receives, which is not the case in a rent ; second, money is not destroyed by use as a house or a horse or another rented thing ; third, the use of money brings neither fruit nor utility to the user, contrary to a field, a house or another rented thing" (Raymond of Peñaforte, *Summa de Casibus Conscientiae*, l.2, par.7, 7).

[5] Nonetheless, the treatment of consumptibility is typically pre-Thomistic, for it argues that money cannot give birth to profit because it is not destroyed through use. The argument of Thomas Aquinas - as well as some earlier treatments, by Robert of Courçon, for instance - is exactly the opposite as it rests on the idea that it is because money is destroyed through use - buying commodities - that the creditor cannot remain its owner (see Thomas Aquinas, *Summa Theologica*, II-II, q.78, a.1, resp. ; Robert of Courçon, *De Usura*, p.15).

transactions, some of them could be usurious for the owner does not take the risk upon himself.

The rule of association between risk and property hence incites the actual owner to reveal his (riskful) property - otherwise he could not ask for any income coming from it - and forbids a formal owner from receiving any income in an operation in which he bears no risk.

### 2.3. The effectiveness of risk and the efficiency of the rule

However, the efficiency of the rule of association between property and risk, closely depends on the effectiveness of the risk invoked. Here again, the information is not symmetric between the creditor (or, sometimes, the debtor), who is assumed to have at his disposal far better information, and his partner in the contract, as well as the moralist who has to decide about the licitness of the transaction.

This idea is well expressed in the case known as *venditio sub dubio*, applied to anticipated payment or to credit sale. The conditions under which these two operations are permitted are explained in two rulings - respectively the already quoted decretal *Naviganti* and the decretal *In civitate* [1].

*In civitate* is the older of the two. It reintroduces the terms of a letter written in 1176 by Pope Alexander III to the Archbishop of Genoa, in which the case of people who buy to-day pepper or cinammon but promise to pay later at a higher price is discussed. "Although arrangements of that kind and of that form", wrote Alexander III, "could not strictly be called usury, sellers are nevertheless exposed to being considered as guilty, unless they could really doubt the plus or minus value of the commodities at the time of payment" (*Decretals*, l.5, tit.19, c.6, *In civitate*). Similarly, in *Naviganti*, Gregory IX argues that a "real doubt" about the future value of a good allows its price to be decreased in case of anticipated payment. It must be stressed that the cases discussed here are quite distinct from that of the present price of a future good when no uncertainty occurs (see supra, pp.6-7) ; they are also distinct from a perfectly anticipated difference between future and present values of the same good (supra, n.7). The question debated here concerns uncertainty about future values. Therefore, if time

[1] Robert of Courçon, as often, anticipated a position about future contracts which was to be later commonly admitted. See *De Usura*, pp.57-61.

influences the value of things it is not for itself - which was definitely excluded ; see Thomas Aquinas, *Summa Theologica*, II-II, q.78, a.2, sol.7) - but for risk in time.

The problem of *venditio sub dubio* is then summarized in the estimation of the actuality of risk, for only a fair estimation attested the absence of usurious intention. In other terms, one has to question the adequacy between the assumed risk of the operation and private information, unknown by the debtor as well as by the moralist. Nearly all the commentators of the two decretals saw the difficulty, at least for the external observer. Consequently, the moralist has to find the way of discovering the hidden information or of forcing its owner to use it as if it were common information. Already in *Naviganti*, Gregory IX introduced a supplementary condition in case of anticipated payment - that the seller actually intended to sell his good later. But if such a condition reveals the goal of the author, it is so easy to manipulate that it remains of no help to reveal what is in the mind of the seller. Nor does the condition imposed by Giles of Lessines (*De Usuris*, c.9) that "the same doubt exists for both parties, on the question of knowing whether one receives, or will receive, more or less" : nothing will compel any party - except the respect of a religious requirement or the fear of a punishment - to reveal private information. A possible solution, efficient but difficult to manage as it is, would be to resort to an expert - a typical medieval solution, each time an evaluation question occurs. In this respect, William of Auxerre wrote that when "the seller sells on credit his commodities for a higher price than that which they were worth at the time of the contract, and sells them according to the estimation of wise men knowing this type of contracts, the contract is not usurious" (*Summa Aurea*, De Usura, c.3, q.2).

The common feature between the operations concerned by *venditio sub dubio* or by such extrinsic titles as *damnum emergens* or *lucrum cessans* is that useful information could be concealed by one of the partners but, if this affects the price of the transaction, it has no influence on the issue of the operation itself, on the realization of the hazard [1]. Here is, of course, the reason that makes it so difficult to achieve control of such transactions.

On the contrary, other contracts are characterized by the influence of the behaviour of one of the parties - this time, often the debtor - or of both of them on the issue of the operation [2]. Beyond the risk concerning goods, prices or external events previously examined, we are also faced with a risk affecting the behaviour of agents. Such would be the risk, for

[1] This is not absolutely true for the *foenus nauticum* not only because the behaviour of the merchant could modify the outcome of the last phase of the operation, but also because the choice of the ship in which the freight was carried was not without interest. Special clauses of the contract were designed so as to incite the merchant to choose the ship assumed to be the more secure (see Bensa (1897, p.23)).

[2] In the same way, Chiquet, Huyghes Despointes and Schneider (1987, chap.2) distinguished two kinds of contracts : with extrinsic and intrinsic risk.

instance, of a debtor not paying back the loan at the time limit, or of a partner in a *societas* not applying all his efforts to reach the goals determined in common. The existence of such a moral hazard was well perceived by several schoolmen, and this explains, for instance, Thomas Aquinas'suspicion of insurance, for it incites the insured person not to take care of his good as well as he would have done if his property had not been secured (*Summa Theologica*, II-II, q.66, a.2, resp). As is well known, a solution to this sort of problem consists in setting a scheme of incentives that would interest the beneficiary of the moral hazard in the non-realization of the event his partner might suffer from.

In that respect, it must be emphasized that if we set aside insurance contracts which were not to be really discussed before the fifteenth century, most of the contracts corresponding to this kind of transaction were precisely recognized as licit since they included such incentives. These can be found, for example, in *societas* or in the *poena conventionalis*. It has already been mentioned that the licitness of a *societas* rests on more stringent conditions than in Roman law - namely, the impossibility of one or some partners avoiding any risk of loss while the others bear the whole risk. Hence, the success of the enterprise is in everyone's interest.

Similarly, the *poena conventionalis*, as an extrinsic title to the *mutuum*, stipulates a daily indemnity to be paid by the debtor in order to dissuade him from exceeding the time limit of the loan. But it is on account of a relative weakness that the *poena* is of interest. Designed to protect the creditor, its counterpart is that it may also threaten the debtor, and this in two different ways. First, the duration of the loan might be so short that the borrower can by no means pay back in time. Naturally, this practice is clearly condemned, but the fault is not so easy to establish. Second, the creditor could increase the indemnity mentioned at the beginning of the contract so that it was higher than the opportunity cost of the non-availability of his money at the expiry date. Some scholastic authors developed this last argument in a very rigorous way. Such was true of Raymond of Peñaforte, who declared that "if the penalty proceeds from a convention, that is from a common agreement between the parties mentioned in the contract, so that at least the fear of this penalty forced payment at the expiry date, there is no usury" [1]. John Duns Scotus, some sixty years later, was still more precise when writing : "An obvious sign that a penalty is not usurious is the following : the merchant prefers to have his money back at the expiry date rather than the day after, accompanied by a penalty" (*In IV Libros Sententiarum*, Opus oxoniensis, IV, dist.15, q.2, 18).

[1] *Summa de Casibus Conscientiae*, II, par.5. See also Robert of Courçon (*De Usura*, pp.65-67) who admitted interest in the *poena* under the condition that it is given to the poor.

In both cases, the purpose of the *poena* can be bypassed by a manipulation either of the duration of the loan, or of the stipulated indemnity. But these possibilities of manipulation are narrower than would be the case with a title like, say, the *damnum emergens*, in which the debtor is unable to influence the payment through the realization of a hazard. Moreover, the discussions about the *societas* and the *poena* marked an important analytical step. They showed that schoolmen soon became conscious that proper incentives, different from the rulings of the Church, could spare them a close personal ex-post control on every transaction. The victory was not complete, but the fight could be expected to become less ferocious.

The authors of the thirteenth century already knew from Augustine, what was later to be forgotten, by Bernard of Mandeville, for instance : that trade is not, by nature dishonest. But the discussions about usury showed that the suspicion of an intention of fraud progressively escaped from the initial money loan to contaminate nearly every economic activity, as long as imperfect information opens the door to strategic behaviour. The schoolmen's answer sounds then like a Promethean project, for only God, wrote Hostiensis, "questions the heart and not the hand" [1]. The purpose of the various devices participating in the prohibition of usury is, indeed, to force the hand to reveal the content of the heart - for want of a direct investigation. As a question in economic theory, the prohibition of usury did not survive the domination of the Church's teaching on the understanding of economic activities. Only the Promethean project remained.

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