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# Hugo Grotius on Usury:

## Acknowledging the End of the Scholastic Argument

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### Abstract

This paper explores the way the Scholastic argument against usury, which culminated in the 13th century with Thomas Aquinas's question on interest loans in the *Summa Theologiae*, found an end with Hugo Grotius's introduction of economic issues, in *De Jure Belli ac Pacis* (1625). Whereas Grotius inherited at least part of his predecessors' repugnance of interest lending, he found in his questioning of categories from Roman law the source of both a criticism of the main features of the Scholastic argument and an alternative analysis of interest loans in which the income received by the lender is explained and legitimate.

## 1 Introduction

The Scholastic argument against usury culminated in the 13th century with Thomas Aquinas's question on interest loans in the *Summa Theologiae*, when he provided foundations to the use of a loan contract from Roman law, the *mutuum*, which gave the borrower free ownership and use of a good for the duration of the loan. Such a position was both effective in that it made usury not only a moral fault but also a fault against reason, and soon disputed, since alternative representations rapidly emerged.

However, the definitive questioning of the Thomistic argument on usury was really achieved when it was opposed not only by an authority or a simple tolerance bias, but by a systematic elaboration which provided on the one hand an analytical criticism

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and, on the other hand, a reliable alternative construction. It could be argued that such elaboration is the result of a progressive movement<sup>1</sup>, combining two strands of evolution. The first one is an extension of the range of extrinsic titles – that is, of the only reasons, external to the loan contract itself, for which a supplementary income might be given from the borrower to the lender. Peter of John Olivi, in the *Tractatus de Contractibus* (1293) or Alexander of Alexandria in his *Tractatus de Usuris* (1307), were examples of this extension (see, respectively, S. Piron 2012 and A.-M. Hamelin 1962), whose final touch could be seen in Grotius’s master in Rome, Leonard Lessius who introduced in 1605 a new extrinsic title, *carentia pecuniae* – the lack of money (see J. Noonan 1957, pp. 262-266; T. Van Houdt 1995; W. Decock 2007) – in his *De Justitia et Jure* (Bk II, chap. 21). The second strand might be viewed as an ongoing debate rooted in a bull of Pope Nicholas III in 1279 (*Decretales*, Liber Sextus, V, tit.11, c.3, *Exiit qui seminat*) concerning the rule of the Friars Minors, which challenged the necessity of the *mutuum* as the necessary contract for money loans. The use which could be done of *Exiit qui seminat* in the usury debate appears in Gerald Odonis’ *Liber de Contractibus* (1315-17) – if not, some years before, in John Duns Scotus (see J. Noonan 1957, pp. 60-61; A. Lapidus 1991, p. 31; G. Ceccarelli and S. Piron 2009, n. 78, p. 186) – in order to support the idea that in a money loan, the transfer of its use might be separated from its ownership.

We can consider that these two currents converge in Hugo Grotius’s work, *De Jure Belli ac Pacis* (1625), which is justly renowned for the part it played in the emancipation from religion of knowledge about man and society (§2). Economic issues (including money loans) were introduced mainly in Book II, where Grotius discussed the causes of the birth of war and, in a more systematic way, in chapter 12 on contracts. His sophisticated theory of “acts”, borrowed from Roman law, was introduced in chapter 12 on contracts, and he used it in order to challenge Thomas Aquinas’s classical argument against usury (§3). Whereas he inherited at least part of his predecessors’ repugnance of interest lending, he relied on the “acts” involved in transfers of

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<sup>1</sup> The question of knowing when this long maturation reached its conclusion is still disputed. Noonan, for instance, argued that most of the criticism against the doctrine of usury was performed during the second half of the 16th century, with Conrad Summenhart (see Noonan 1957, pp. 341-345), before the same line of argumentation reappears in the following century. O. Langholm, alternatively, supported the idea that this was performed in the continuation of the School of Salamanca, by such authors as Molina and Lugo (Langholm 1998, pp. 74-76).

ownership or use and on a discussion of the respective properties of the various types of contracts in Roman law, to criticize the main features of the Scholastic argument on the necessity of the *mutuum*, to remove doubts about the legitimacy of extrinsic titles, and to provide an alternative analysis of interest loans in which the income received by the lender is both explained and legitimate (§4).

## 2 Hugo Grotius after Scholasticism: a radical extension

Whereas the works of Hugo Grotius are well-known to lawyers and philosophers, with a focus on his role in the emergence of modern theories of natural law (see, for instance, K Haakonssen, 1996) or his views on such issues as punishment or international relations (R. Tuck 1999), they are far less familiar to economists<sup>2</sup>. A possible source of this lack of interest might come from Schumpeter's sweeping judgement, likely to deter further investigation:

Hugo Grotius [...] was first and last a great jurist whose fame rests upon his outstanding performance in international law. He dealt but briefly with economic subjects, such as prices, monopolies, money, interest, and usury in [*De Jure Belli ac Pacis* (The Law of War and Peace), 1625] Book II, ch. 12 – very sensibly no doubt but without adding anything of note to the teaching of the late scholastics. (J. Schumpeter 1954, p. 112).

Despite the severity of his judgement, which may have had some responsibility in the lack of interest in the economic aspects of Grotius's writings, Schumpeter made a point of stressing the connection with his scholastic predecessors. Hugo Grotius, a Protestant jurist, was himself a student of the Belgian Jesuit Leonard Lessius. The latter had been taught in Rome by Francisco Suárez, who was one of the leading figures of the so-called School of Salamanca. Issues relative to prices, money, interest and competition had become sufficiently important in Salamanca that, despite the differences, it was possible to recognise the constituent features of a genuine *school* in economics, as it already was in philosophy and theology (M. Grice-Hutchinson 1952). It was clearly the School of Salamanca that Schumpeter referred to when speaking of the “late scholastics”. For a long sixteenth century, the thinkers of the University of Salamanca,

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<sup>2</sup> Yet, some interest appears in the scarce references to such issues as Grotius's understanding of price (A. Lapidus 1986), his influence on the birth of Scottish political economy (I. Hont 1990), his conception of poverty (J. Salter 1999), his doctrinal position on free trade (P. Borschberg 2011; C. Suprinyak 2022) or the way he articulates economic issues, like the money loan, and a normative legal concern (A. Lapidus 2021).

and later of the University of Coimbra, had intellectually nourished the Counter-Reformation. A remarkable instrument of this operation was the substitution of Thomas Aquinas's *Summa Theologiae* for Peter Lombard's *Liber Sententiarum* as a basic reference in the education of the clerks. Such revival of the most eminent figure of thirteenth century scholasticism, Thomas Aquinas, was far from self-evident: it came after a long eclipse of an Aristotelian realism, the *via antiqua*, of which Thomas had been one of the most eminent representatives, in favour of a *via moderna*, illustrated for instance by the nominalism of William of Occam (Gilson 1944, p. 712).

It is therefore clear that one cannot deduce from the existence of this link between Aquinas and one of the founders of the modern theories of natural law that the legacy of the former on moral, political and economic matters was passed on, without transformation, to the latter (see Lapidus 1986, pp. 45-49; 2021, pp. 102-111): on the one hand, Grotius's approach to knowledge regarding human beings and society might be viewed as a kind of radical extension of Thomas's approach; but, on the other hand, on such topics as those regarding economic matters, the break could be deeper.

The Prolegomena with which Grotius's major work, *De Jure Belli ac Pacis* [*The Law of War and Peace*], begins, combine numerous references to Roman law and to ancient authors. Among the latter is Aristotle, who "deservedly holds the foremost place", although his preeminence had, "ages ago, been converted by others into a tyranny" (*De Jure*, Prol., 42)<sup>3</sup>. To these should be added the thinkers of Salamanca, such as Vitoria, Covarruvias and Vasquez, whom he cites and discusses (for instance, *De Jure*, Prol., 37, 55) and, more generally, the Scholastics, to whom he pays tribute in spite of the religious opposition:

The Scholastics, who followed them, often show how much talented they are [...] Nevertheless, when they agreed about some moral matter, they were seldom in error; since they were very perceptive to see what may be criticized in the sayings of others. And even in their enthusiasm for contradicting one another, they provided a praiseworthy example of modesty: for they fought among themselves with reasons and not with the insults which defile contemporary literature, and are the shameful products of impotent minds. (*De Jure*, Prol., 52).

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<sup>3</sup> The edition used of Hugo Grotius's *De Jure Belli ac Pacis* is that by J.B. Scott in 1913, which reproduces the 1646 edition, published just after Grotius's death. Each time it seemed faithful enough to the Latin original, the translation of Grotius's quotations hereafter relies on F.W. Kelsey's translation into English of 1925. References are given according to the numbering for chapters, sections and sub-sections in Kelsey's translation.

References to Aristotle and the Scholastics offer evidence that this ancient affiliation was claimed (see also Grotius's biographer, Knight 1925, pp. 210-21 and Saint Leger 1962, pp. 45-57). An affiliation which nevertheless serves as a support for the emergence of what was already in the making in Thomas: by proposing, as is well known, to found faith in reason, he could retrospectively be viewed as having opened the way to a separation between the one and the other. On first view, Thomas's position amounted to giving reason and nature a prominent place in the explanation of what was previously the domain of faith. In question 9 of *Quodlibet* 4 on intellectual power, after having, in the *respondeo* of article 3, considered from a rhetorical standpoint the problem of choosing between the argument of reason and the argument of authority according to the audience one is addressing (the Jews, the Manichaeans or the Greeks), Thomas concluded by discussing the way in which an argument should be conducted, this time within the Schools, between people who share the same faith. He then observed:

[T]here is a magisterial argument in the Schools, not to remove error, but to instruct the audience so that they may be brought to an understanding of the truth they believe in. And then it is necessary to rely on reasoning which seeks the root of truth and enables one to know how what is said is true. Otherwise, if a teacher decides a question by mere authorities, the hearer will be assured that such is [the truth], but he will acquire no knowledge or understanding and will retire empty. (*Quodl* 4, q. 9, a. 3, resp.).

The importance of this position should not be underestimated. The risk to the Church was tangible. It was the same one that had already crossed over into Islam and was now threatening the training of its clerks. Through the intermediary, in particular, of a master of the Faculty of Arts in Paris, Siger of Brabant, the theses of the Arab philosopher Averroes (Ibn Rashid) had penetrated the Parisian schools. The threat they posed was the so-called doctrine of the "double truth": the truth of faith and the truth of reason. Averroes imposed a radical separation between the two. However, what was in the making was that if you had two truths, there was one you could do without. And as scary as this possibility seemed, it could be the truth of faith.

Yet it is this scary possibility that was achieved, three and a half centuries later, in the work of Grotius. Knowledge about human being and society there appeared sufficiently mature for the religious authority of faith and revelation to be set aside in

favour of the authority of reason. Grotius announced this with infinite oratorical caution, after having pointed out how two conceptions of natural law, narrow and broad, were related:

And what we have just said would have its place even if we were to concede, what we cannot concede without the greatest wickedness [*etiamsi daremus, quod sine summo scelere dari nequit*], that there is no God, or that human affairs are of no concern to Him. (*De Jure*, Prol., 11).

The apparent radicality of the “impious hypothesis”, the possibility of the non-existence of God (Crowe 1976) was downplayed by many commentators – foremost among them Grotius’s first French translator, Jean Barbeyrac in 1724 – and it would be inappropriate to see it as an expression of atheistic bias. We can even rule out the possibility of a secular inspiration by pointing out that it came from Salamanca, presumably from Vasquez (Saint Leger 1962). But even if we put its meaning into perspective, the fact remains that by acknowledging the existence of laws of nature implanted in the reason and the heart of people, the use of faith to account for them was rendered superfluous. These unwritten natural laws claimed by Grotius still hold sway, even in the situation where no law might be thought to exist, in the state of war where civil laws are suspended (*De Jure*, Prol., 26). And it is not to religion, but to reason, that we owe the knowledge of these “laws which are perpetual and appropriate to all times” (*Ibid.*). That is to say, the source of the natural law is the consistency of our actions with our humanity, as rational and as social beings:

Natural law is the dictate of right reason, which points out that an act, according as it is or is not in conformity with rational and social nature, has in it a quality of moral turpitude or moral necessity (*De Jure*, I, 10.1).

And, as Grotius put it, it is only “consequently [*consequenter*] [that] such act is forbidden or commanded by God, the author of Nature” (*Ibid.*). The argument is still strengthened by what appears as a plea against divine omnipotence, rooted in the universal truth of what will be called later analytical propositions:

Natural law is so immutable that it cannot be changed by God himself [*ne a Deo quidem mutari queat*]. Immense as is the power of God, nevertheless it can be said that there are certain things over which it does not extend; for if we speak of these things being done, what is said in this way is only said, it has no sense which expresses the matter, and it is contradictory.

Just as even God, then, cannot make that twice two should not be four, so He cannot make that what is intrinsically evil be not evil (*De Jure*, I, 1.10.5).

This justifies that Grotius might rightly be regarded as a founding figure of what L. Strauss (1953) called “modern natural law” (see also Haakonssen 1996). By contrast with Thomas, for whom reason made it possible to find what faith had already made it possible to know, Grotius distances himself from religious imperatives in his understanding of natural law: it is no more in God that natural law finds the source of its binding force. And despite his numerous references to theologians or canonists, it is free of religious imperatives that he engages in a critical discussion of the categories derived from Roman law.

### **3 The framework and the target: typology of acts and doctrine of usury**

It is from the critique of these legal categories from Roman Law that the elements of economic knowledge arise, and more particularly those concerning an understanding of interest loans which could be traced back to the works of Thomas Aquinas.

#### *3.1 The legal typology of acts and economic issues*

The economic developments are mostly found in Book II of the *Law of war and peace*, which deals with the causes of the birth of war. It is in discussing these causes that Grotius addresses collective and private property, its acquisition and transfer. And it is on the occasion of the legal examination of obligations deriving from property that he introduced the Chapter 12 on contracts, most of which being devoted to analyses of price, trade, money and interest loans.

Grounded in a Roman law perspective, these analyses are built upon a categorization of “acts”, either “simple” or “mixed” (*De Jure*, II, 12.1). Insofar as economic matters are favoured, most of simple acts fall under the heading of “permutatorial acts” (*permutatorii*) as opposed to “beneficial acts” (*benefici*) (*De Jure*, II, 12.2; reference was given to Aristotle’s distinction between two ways of alienation, “gift” and “sale”, in footnote a), even though some of them could be seen as proceeding from the so-called beneficial acts “with mutual obligation”. The latter refer to what was

called “real contracts” in Roman law, typically when “some effect remains”. Among them, he places, for instance, the *commodatum* (that is, the loan for use, in which the lender keeps the ownership of his good and gives its use for free.), the commission or the deposit (*Ibid.*). Following the Roman jurists, Grotius regarded permutatorial acts as divided into acts that “separate the parties” (*dirimunt partes*) and acts that “produce a community” (*communione adferunt*) (*De Jure*, II, 12.3.1). Typically, acts that produce a community refer to firms through, for example, the contract of society (*societas*) (*De Jure*, II, 12.4), while acts that separate the parties cover most of the modalities of exchange as we usually conceive them (*De Jure*, II, 12.3). Though legally distinguished, these two types of acts are nevertheless permutatorial acts, which already invites us to recognise the continuity established between exchange, strictly understood, and organisation as alternative methods of allocation.

This also shows how working on legal categories produces economic categories, as if Grotius’s task was to make obvious that the borders usually acknowledged between legal categories were porous enough to allow economic reasoning to cross them. This is further evidenced by the way in which Grotius introduced exchange (*commutatio*). The latter arises from the criticism of the distinction in Roman law between the so-called “nominate” (*nominatos*) contracts, which are allegedly the oldest, and the “innominate” contracts, which are more recent (*De Jure*, II, 12.3.2-3): Grotius likened “barter” (*permutatio*) to “purchase and sale” (*emptio ac venditio*), emphasising that although nominate, the latter (where goods are exchanged for money) is more recent than the innominate former (where goods are exchanged for each other). So much so that natural laws would invite us to look in the same way at all the contracts (nominate and innominate) amounting to exchange (“permutatorial acts”, in Grotius’s words), in which the “giving” or the “doing” of one side meets the “giving” or the “doing” of the other side (*De Jure*, II, 12.3.3) in a combinatorics drawn from the *Digesta* (lib. XIX, tit. 5.5) that, from an economic point of view, could pretend to be exhaustive.

For instance, with regard to contracts in which one party *gives* so that the other party also *gives*, barter (*permutatio*) is the giving of one thing so that another thing is given; *buying and selling* (*emptio ac venditio*), the giving of one thing so that money is given; *change* (*cambium*), the giving of money so that money is given; *lease* (*locatio*), the giving of the use of a thing so that money is given (*De Jure*, II, 12.3.4). Completing this

picture with contracts in which one party is *doing* in order that the other party should *give* or *do*, allows introducing *renting* (Grotius again uses the term *locatio*) or *insurance* (*assecuratio*) – the recent favour of which at his time he pointed out (*De Jure*, II, 12.3.5). Finally, he introduced the possibility of “mixed” acts that combine simple acts, permutatorial or beneficial (*De Jure*, II, 12.5). This typology is remarkably efficient, since it covers the variety of bilateral transactions. Among them was the money loan, whose standard treatment, as it was known in medieval times, typically in Thomas Aquinas (see Chaplygina and Lapidus 2022), was directly challenged.

These elements are summarised in Figure 1 below.

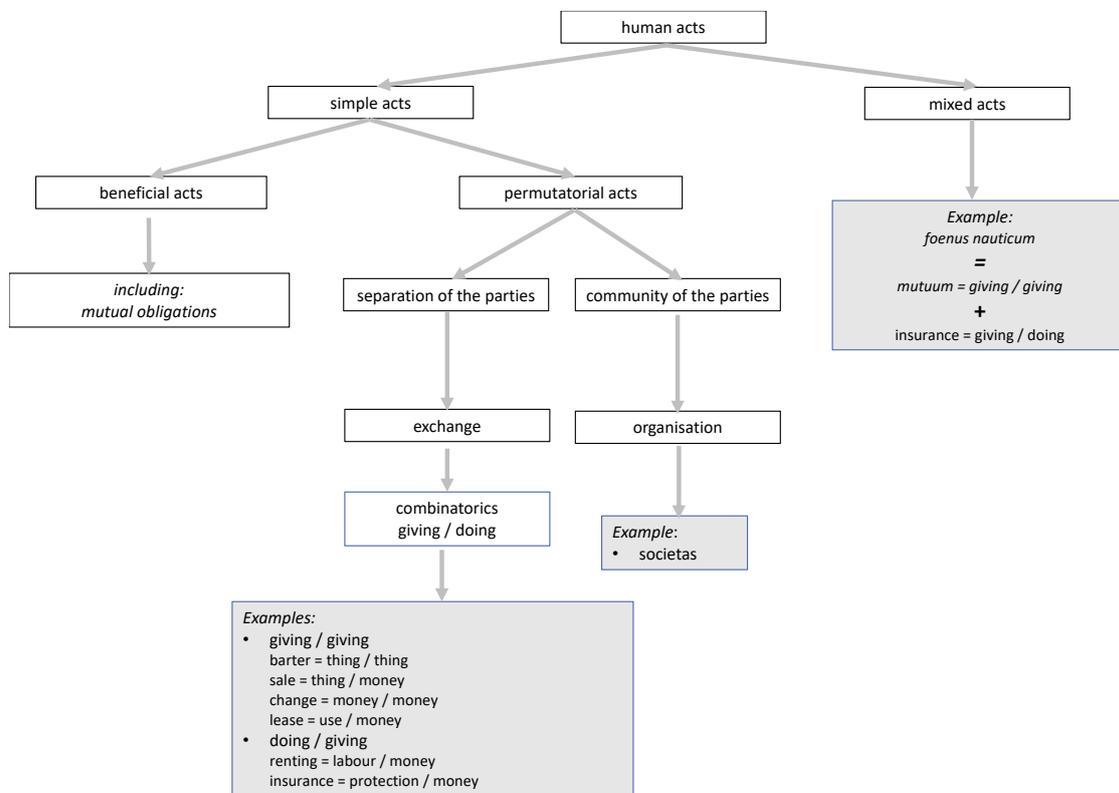


Figure 1: Typology of acts and economic transactions (Grotius, *De Jure Belli ac Pacis*, II, 12)

### 3.2 How was usury prohibited: back to Thomas Aquinas

It is well-known that the prohibition of usury was viewed, in an Aristotelian tradition, as derived from the sterility of money (see, within a wide literature, Langholm 1984). But the legal basis of the classical argument regarding usury in money loans was a contract borrowed from Roman law, called the *mutuum* (*Digesta*, lib. XLIV, tit. 7.4). The

*mutuum* was a loan contract in which property and use are transferred for free. It is therefore obvious that if a money loan is made through a *mutuum*, the lender is not entitled to any payment *on account of the loan contract itself*. Paucapalea, who was around 1165 the first great commentator of Gratian's *Decretum*, initiated this approach to money loans, assuming the legal framework of the *mutuum*, and relying on an alleged etymology of the word to explain why the lender should not receive any return for his or her loan:

A *mtuum* is so-called from this, that mine become yours [*Mutuuum ex eo dictum, quia quod sit meum fiat tuum*]. That is, a *mutuum* is consisting in the quantity that is advanced to you, and I will receive back from you the same amount of the same kind. (*Summa super Decreto Gratiani*, c.14, q.3)

The argument was later systematically repeated, by Robert of Courçon, for instance (*De Usura*, 15), in the first years of the 13th century, till Thomas Aquinas who provided reasons why the *mutuum* was not an arbitrary choice among the alternative possibilities offered by civil law (besides the *mutuum*, a *foenus* – in which both ownership and use are transferred by the loan, but this time not for free -, a *commodatum* or a *locatio*), but a necessary contract for money loans. His position can be found in a famous passage from question 78 of the IIa-IIae of the *Summa Theologiae* (on earlier treatments of usury in Thomas Aquinas, see Januard 2021):

One must know that the use of certain things is identical with their consumption: thus we consume wine when we use it for drink and we consume wheat when we use it for food. In such [exchanges], one must not count the use of the thing apart from the thing itself but, as a result of conceding the use, the thing itself is conceded. And this is why, for such things, the loan [*mutuum*] transfers property. Thus, if someone wanted to sell wine on the one hand and the use of wine on the other hand, he would sell twice the same thing or sell what is not [...]. Conversely, there are things the use of which is not their consumption. So, the use of a house is to live in, not to destroy it. Therefore, one can concede separately use and property. (*Summa Theologiae*, IIa-IIae, q.78, a.1, resp.; see also in *De Malo* q.13, a.4c).

The conclusion is straightforward. Since it seems impossible for money, like for wine, to separate its property from its use, the loan contract cannot be i) a *locatio* in which only the use of the good only is transferred and sold to the borrower; ii) a *commodatum*, which might be viewed as a kind of *locatio*, but for free; iii) a *foenus* either, since it would amount to sell to the borrower a use which he already owns along with the

property of the money lent, during the time of the loan. So that money, like wine or bread, can only be lent for free, through a *mutuum* and there is no room for an interest paid to the lender *in reason of the loan itself*.

It is obvious that the classical argument gives a firm analytical basis to the prohibition of usury, in the sense that if it is “rightly blamed and loathed” (*Politicorum*, I, 8), it does not depend on a disputable moral perception or on arbitrary legal grounds: it is a fault against reason, so that the income received by the lender (if any) cannot be explained by the loan granted to the borrower. But – and this point should be stressed – we must take this conclusion cautiously: it does not forbid *all* alternative possibilities and explanations, acceptable in reason as well as according to moral and legal standards (see Chaplygina and Lapidus 2016a, pp. 35-39; 2016b, pp. 62-74; 2022, pp. 98-101).

Such possibilities arose from the fact that money lending, as an exchange over time, was generally recognised as mutually advantageous for both the lender and the borrower (see, for instance, *Summa Theologiae* IIa–IIae, q.77, a.1, resp.), so that the situation of none of them could be made worse off. Whether the loan was usurious or lawful depended on the way this advantage was distributed between the lender and the borrower. Given that the loan contract, by nature, forbids any interest, the key of distribution of the surplus should rest on other considerations. The latter were expressed in terms of “extrinsic titles” – extrinsic to the loan contract – or of substitutes to the money loan. Aquinas, for instance, made clear that extrinsic titles were founded on the compensation of a prejudice suffered by the lender:

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. (*Summa Theologiae*, IIa–IIae, q. 78, a. 2, ad. 1).

The literature on usual extrinsic titles, such as *poena conventionalis*, *damnum emergens* or *lucrum cessans*, is extensive (see, among others, the early but unrivalled contributions of McLaughlin 1939, pp. 125-147, and Noonan 1957, pp. 105-132; and, for a recent account, Januard 2022a, p. 750). Beyond an acceptance in principle, the debates surrounding them show that whereas some of them (typically, the *poena conventionalis*) raise few objections, others (such as the *lucrum cessans* for Thomas Aquinas) arouse mistrust, all the more so because they involve professional merchants

as lenders. The existence and the place of extrinsic titles within a construction aiming at prohibiting usury should not be underestimated. It was a definite break with a conception illustrated by Raymond of Pennaforte, secretary of Gregory IX and later General of the Dominican order, who argued in his *Summa casuum conscientiae* (ca 1236) that in certain cases, usury was allowed (McLaughlin 1939, p. 85; Noonan 1957, pp. 102-103; Hamelin 1962, pp. 85-86). For Thomas, usury was in no way allowed, and if a supplement is given to the lender, it is not because of the primary loan contract, but because of external reasons, pointing to the compensation of an opportunity cost suffered by the lender, expressed in extrinsic titles. After Thomas, and till Lessius's introduction of the *caerentia pecuniae* in 1605, the range of extrinsic titles was to increase, and their allowance became broader. Typically, for instance, Alexander of Alexandria introduced the *periculum sortis* in his *Tractatus de Usuris* (1307) and systematized the use of extrinsic titles. So that the Scholastic understanding of money loans combined an analytical core consisting in an exchange in time bearing no interest, and complementary devices allowing interest as a compensation for the prejudice suffered by the lender.

#### **4 Interest without usury**

It is this whole construction that is called into question in Grotius's work. His argument can be reconstituted in two stages, although these do not strictly follow the order of the presentation. The first stage extends and systematises the transformations concerning the classical argument on usury (*supra*, §3.2), after Thomas's death, and the resulting consequences for the appreciation of extrinsic titles. The second stage relies on the typology of acts sketched at the beginning of chapter 12 (*supra*, §3.1), in order to rid the understanding of interest loans of the limitations attached to the prohibition of usury.

##### *4.1 A deconstruction of the classical argument against usury*

The issue of interest loans and usury is tackled head-on in sections 20 to 25 of this same chapter 12 of Book II. Some of the developments could lead to finding at least the conclusions, even if qualified, of his medieval predecessors. Thus, after having, in section 20, multiplied the arguments against the scholastic position on usury, he

considered, based on the *Old Testament*, that the prohibition of usury is “if not necessary, at least morally honest” (*De Jure*, II, 12.20.3). Within a section that discusses the question of under which laws – civil or natural – usury would be possibly prohibited, the reference to necessity and moral honesty is significant of Grotius’s own repugnance to interest lending. A repugnance that was less forceful than that of his predecessors, with more terminological nuances with regard to the vocabulary of his time and its alleged evolution, but which was no less assumed. Thus, he explained in a footnote:

If we want to speak like the jurisconsults of Roman law, the name “*foenus*” is odious, but not that of “*usura*” [*foenus odiosum nomen est, usura non item*<sup>4</sup>]. [...] But as most people have abused “*usura*”, this word has begun to be taken in the wrong way: it has been substituted, in a good sense, for the word “*interest*” (*De Jure*, II, 12.21 n. 2).

Nonetheless, this repugnance did not mean that the income perceived by the lender was contrary to natural law. It is therefore not because it fits in with civil law, but because it does not contradict the rational and social aspects of human nature, that Grotius gave the example of the Dutch legislation which allowed, consistently with natural law, that a non-merchant received 8% on a loan and a merchant 12% (*De Jure*, II, 12.22). So that it escapes the analytical construction which, in Thomas Aquinas, supported both the explanation of a specific income associated with an interest loan and the prohibition of usury. In contrast, Grotius brings out the elements that allow the mechanism of interest loan to be dissociated from its negative normative assessment. The contractual nature of the permutational acts to which the money loans belong makes it obvious that they are inherently mutually advantageous operations, so that the question is again for Grotius, like for Scholastic authors before him, of knowing how these advantages should be allocated between the borrower and the lender. However, not only is the sophisticated device that was intended to prevent usurious transactions missing, but its components are all neutralized.

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<sup>4</sup> Kelsey’s translation, on this point, does not really help to resolve the ambiguity: “the name of usury is hateful, but not in like manner interest”. All the more so since the end of the note is quite faithful to the Latin original: “Because many have misused the word usury [...] the word interest is substituted for it in the good sense” (*De Jure*, II, 12.21 n. 2).

The operation is performed in the two first sub-sections of *De Jure*, II, 12.20, where Grotius discusses the three issues which might lead to the conclusion that usury is prohibited by the law of nature. He therefore:

- i. justifies the possibility of moving from a *mutuum* to a *foenus* for a money loan;
- ii. rejects the Aristotelian argument on the sterility of money;
- iii. claims that in a money loan, the whole ownership is not transferred to the borrower.

The first argument, invoking in a footnote (*De Jure*, II, 12.20.1, n. 1) the authority of the *Codex of Justinian*, is that the *mutuum* is to the *foenus* what the *commodatum* is to the *locatio*. Though he is not quoted, it seems obvious that the source of the “more generally accepted opinion” which Grotius challenges can be found in Huguccio Pisanus who, commenting on Gratian’s *Decretum*, claimed around 1190 that, although a move from *commodatum* to *locatio* was licit, the parallel move from *mutuum* to *foenus* was not:

But in this, it is appropriate that both the *mutuum* and the *commodatum* should be gratuitous. If, therefore, something beyond the lot is demanded for the *mutuum*, whatever it may be, it is usury, and in this case only usury is committed, namely, when something is demanded or accepted for the *mutuum* beyond the capital. If, however, something is demanded in return for the *commodatum*, it is not usury, but it is no longer the *commodatum*, but another contract, that is, barter [*permutatio*], or *locatio*, or sale [*venditio*] (*Summa Decretorum*, C. 14, q.3, dictum ante c. 1; quoted by McLaughlin 1939, n. 176, p. 101; see also Noonan 1957, p. 40).

Grotius’s answer is based on the acknowledged legal possibility to sell the use of a thing, so that such sale only implies a change of contract:

What is said of the *mutuum*, namely that it is free, can be said of the *commodatum*: however, it is not unlawful to demand a price for the use of the thing [*pro usu rei pretium exigere illicitum non sit*], and all what happens is that it only changes the name of the contract [for *foenus* in the first case, *locatio* in the second] (*De Jure*, II, 12.20.1).

This means that if we accept the idea that a good which is the subject of a *commodatum* can just as easily be subject to a *locatio* which also transfers use but for a reward, we can also accept the idea that a good which is the subject of a *mutuum* can in the same way give rise to a *foenus* which transfers both use and ownership, but this time for a reward.

The second argument challenged by Grotius is this, borrowed from Aristotle, of the sterility of money. He had developed an interesting conception of money, at odds with that of Aquinas in his comments on Aristotle's *Politics* (*Politicorum*, I, 7) who saw it as the result of a convention (see Lapidus 1997): he understood money as a good like any other, whose value, constituted by the metals of which it is made, would simply be more stable over time than that of other goods (*De Jure*, II, 12.17). Of course, the idea of a greater stability might be discussed, but since money is also a good like, say, a house, its fruitfulness does not depend anymore on its own nature but, like this of a house, of what we have done of it. After relying, as often, on the authority of the *Digest*, Grotius concludes:

The argument is not more convincing, that money is by its own nature unproductive. For houses and other things, barren by nature, are rendered fruitful by the industry of men (*De Jure*, II, 12.20.1).

The third and last argument questioned in the same subsection is at the heart of the Thomistic conception of money lending, since it deals with the impossibility of separating use and ownership when money changes hands and the resulting impossibility, in reason, to understand a money loan in another framework than this of a *mutuum*:

This is more plausible [*speciosus*] that here [for a money loan], the thing is returned for the thing; that the use of the thing cannot be distinguished from the thing when the use of the thing consists in using it up [*in abusu consistat*]; and that nothing ought to be demanded for such use (*De Jure*, II, 12.20.1).

Grotius's reply can be complemented thanks to a long footnote of Jean Barbeyrac in his translation into French from 1724. Barbeyrac had noted that Grotius already replied to the ownership argument in his *Annotationes in Novum Testamentum*, some years ago<sup>5</sup>, when commenting on the well-known passage of Luke which urged "lend, hoping for nothing again [in the *Vulgate*: *mutuum date, nihil inde sperantes*]" (Luke 6:35). Both the *Annotationes* and the *De Jure* conclude that a shift from the *mutuum* to the *foenus* for a money loan is not only possible but also well-founded, as is the reward for the lender that follows.

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<sup>5</sup> Less than 20% of Grotius's comment on Luke 6:35 are translated in Barbeyrac's note. The *Annotationes* were presumably written in 1619-1621, although they were first published only in 1641. See H.J. De Jonge 1984, pp. 97-99.

Grotius's case in the *De Jure* is developed in the next subsection (*De Jure*, II, 12.20.2), in which he reconsiders the possibility of separating the use of money from its ownership in the case of a money loan, and draws the consequences for the income received by the lender. By arguing that the lack of separation between usufruct and ownership in the case of perishable goods stems from the way in which the word "usufruct" itself is understood, he allows for an expanded understanding of this usufruct for which Whewell, in his translation of 1853, spoke of a "quasi usufruct": if this expanded usufruct enjoyed by the borrower remains dependent on an ownership which the lender has not divested through the loan, the lender has a right to a specific income. Obviously, this can be related to the already mentioned bull promulgated in 1279 by Pope Nicholas III and incorporated in Canon law (*Decretales*, Liber Sextus, V, tit.11, c.3, *Exiit qui seminat*) for which consumption might remain separate from an ownership which can become the object of a transaction, even in the case of money. Consequently, the lender now becomes entitled to claim compensation because of the loan itself:

[I]f anyone should yield such a right to the owner [an ownership from which is derived the expanded usufruct], money could be demanded on that account (*De Jure*, II, 12.20.2).

The comments on Luke make obvious the way in which Grotius understood this specific right, in a money loan, which works like – which rigorously *is* – an ownership, and allows the lender to receive a reward:

Others insist that the *mutuum* transfers ownership; so the fruit arising from a thing ought to belong to the owner. But even this subtlety of language has nothing to do with natural equity. For, in the case of things that may be returned in kind, as money, corn, wine, the right to receive the same thing in kind, stands for ownership (*Annotationes*, Luke 6:35).

Still in the *Annotationes* (Luke 6:35), Grotius gives some examples, which can be viewed as thought experiments, and make it tangible that such a right existed:

- He compares a man who receives a thing immediately with another who receives it much later and concludes that it is universally agreed that the first receives more.
- He then imagines another agreement, in which he lends some oxen to his neighbour for ploughing his ground. The counterpart is that this neighbour shall lend him later his oxen. Now, this obligation can, itself, be submitted to a monetary estimation (*pecunia aestimari potest*).

- Assume now that ownership and usufruct has been redefined in accordance with Grotius's reasoning. If so, a man will be supposed to be richer because he has been given the usufruct of a sum of money, but not its ownership. This shows that such usufruct has a price.

So that he felt entitled to conclude that

Wherefore it must be so held, that it is not contrary to nature that he who deprives himself of the use of his money in favor of another may, in return, negotiate beforehand that the borrower shall give something in return for that service (*Annotationes*, Luke 6:35).

Grotius can therefore understand interest as a magnitude depending on the duration of the loan, which can be paid with the profits of any operations carried out by means of this loan:

So also, the right of repaying money or wine borrowed only after a certain time is something capable of being evaluated: for he pays less who pays late. Also, in an antichresis [a mortgage], the use of money is compensated for by the fruits of an estate (*De Jure*, II, 12.20.2; see also *Annotationes*, Luke 6:35).

These few sentences reduce the previous deliberate gap that could exist between consumption-related and profit-making transactions. It is indeed remarkable that Grotius did not make a break between an explanation of interest based on a preference for present (one pays less when one pays later – the present value of a forward payment is less than the cash value of the same payment made today) and an explanation based on profit (the “fruits of an estate” – the present value of a sum of money available today is less than the present value, after one year, of the fund obtained by having invested this sum). The old distinction between consumption loans and the financing of a commercial or manufacturing enterprise has now been replaced by identical treatment. At the same time as acknowledging that a price is now assigned to the usufruct of a sum of money, this ending of the gap between consumption loans and investment loans has radical consequences for extrinsic titles.

On the one hand, the more or less pronounced reservations about extrinsic titles, as already encountered in the works of the Scholastic authors, are now suppressed. Grotius's position was introduced in a discussion of the “common price”, upstream of the passages strictly devoted to interest loans when, considering the possibility of a gap

between the availability of a good and its payment, he unambiguously established the possibility of

[...] taking into consideration the damage or loss of profit [*damni aut lucri cessanti*], which arise from delayed or anticipated payment (*De Jure*, II, 12.14.2).

The same argument is then used to absolve what might appear to be usury in a framework that is explicitly designated as this of the *mutuum*, so that the comment is clearly about extrinsic titles:

It must be observed, however, that there are certain things which look like usury, and are generally viewed like usury, although they are agreements of a different kind: what is stipulated, for example, as compensation for the damage [*damnum*] suffered by the one who has lent money [*qui pecuniam dat mutuam*], because he will be deprived of it for a long time, or because he will lose, because of the loan, the opportunity to make a profit [*item de lucro ob mutui dationem cessante*] [...]. [...] and for the danger of losing the capital [*pro periculo amittendae sortis*], when no sufficient guarantee is given, is not really usury (*De Jure*, II, 12.21).

Extrinsic titles are not explicitly named, but it is clear that they are at issue and now free of any usurious potential. Damage incurred because the lender has to forego consumption or profit (*poena conventionalis*, in case of delayed payment; *damnum emergens*, and even *lucrum cessans* during the term of the loan), because he is exposed to risk (*ratio incertitudinis*) or even because he is lacking money (*carentia pecuniae*), is sufficient reason for it to be compensated by interest paid by the borrower.

But, on the other hand, though the reasons expressed in extrinsic titles still hold, the *extrinsic* nature of these titles is seriously threatened. Extrinsic titles were so called because the damages invoked were not directly involved in the main contract, the *mutuum*. They were a compensation for opportunity costs, suffered by the lender, not the acknowledgement of an income generated by a persistent ownership benefiting the lender. But now? Grotius's redefinition of ownership as including the "right to receive the same thing in kind" allows considering that the reasons for extrinsic titles depend on the new right which benefits the lender: all reasons for interest being paid now depend on the loan contract itself: the *mutuum* has moved into a *foenus*. For Thomas Aquinas, the legal determination of the loan contract amounted to "trading for no price" – even if something like a price might appear for other reasons (Januard, Lapidus 2023). With Grotius, a shift in the determination of legal categories allowed trading for a price.

## 4.2 *Substitutes for money loans and mixed acts*

The Scholastic conception of usury came up against the existence of close substitutes for interest loans, which are known to have given rise to recurrent controversies. They were the result of the tension between a non-interest-bearing *mutuum* and the numerous interest-bearing financial arrangements, acceptable in principle, provided their intention was not to circumvent the prohibition of usury. It is clear that the abandonment of the necessity of the *mutuum* as the legal framework for money loans reduced, if not cancelled out, this tension. Yet, Grotius discussed these close substitutes for themselves, independently of his conclusions about the *mutuum*. The *societas* and the *foenus nauticum* illustrate this point.

What appears, typically in Thomas Aquinas, is that the existence of a non-usurious intention is sought through its material expression. The various financial arrangements were only deemed non-usurious if the income they generated for the lender could be justified by uninterrupted ownership, possibly evidenced by risk-taking in case of loss. This can be illustrated by the contract of *societas*. In Roman law, it could take the most diverse forms, whereas only some arrangements were acceptable for Thomas<sup>6</sup>. Grotius was obviously more open to a diversity of possible contracts. But he also did so through a link established, like for his predecessors, between ownership and risk.

In dealing with *societas*, he considered the various types of combinations between partners who alternately bring money or industry in whatever proportions. The way money is introduced in the *societas* is of special interest. Relying on the writings of theologians of Salamanca such as Navarro or Covarruvias and on the authority of his master Leonard Lessius, Grotius distinguished between the two ways of introducing money into a partnership: either as a transfer of both the ownership and use, or as a transfer of use (the principle of which no longer raised any objections):

But this comparison [of industry and money] is not done in one way: for either industry and the use of money alone [*cum solo pecuniae usu*] are the relative contributions [...] or industry and the ownership of money itself [*cum ipso dominio pecuniae*] are the relative contributions (*De Jure*, II, 12.24.2).

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<sup>6</sup> P. Januard (2022b, pp. 247-249) discusses alternative interpretations of these arrangements leading to a *societas* in the works of Thomas Aquinas: an “activity-based” approach, illustrated by R. Ege (2014, p. 403) and an investment-based approach (Chaplygina and Lapidus, 2016, p. 37).

Like with his predecessors, the criterion of ownership was the basis for the income of each party, since ownership of a fraction of a stock entitles one to the same fraction of the profit or obliges one to bear the same fraction of the loss, even for the partner who would have contributed only with money:

In a *societas*, when the contribution consists on both sides of money, if the sums are equal [*si pecuniae aequales sint*], the [shares in the] loss and in the profit [*in damno et lucro*] must also be equal; if they are unequal, the shares will also be in proportion [...] And the same will take place if equal or unequal industries [*operae*] are compared. But also industry can be brought together with money, or with money and with industry (*De Jure*, II, 12.24.1).

This analysis would lead to seeing an interest loan in the operation carried out by the partner who is providing money, except that the latter also participates, and in the same proportions, in the loss. This approach may seem, at its beginning, close to that of the Scholastics. All the more so since a limit case of the *societas* was, in first view, excluded of the range of acceptable contracts: when one of the partners participates in the gains but not in the losses: such arrangement, Grotius says, “is against the nature of *societas*” (*De Jure*, II, 12.24.3). But, this time in contrast with his predecessors, he did not conclude that such agreement should be rejected. He only claimed that strictly speaking, it was no more a *societas*, but a “mixed contract”, of *societas* and of insurance, for which he gave the conditions of acceptability:

Under such conditions, the agreement will become a mixed contract of *societas* and insurance against loss, in which equality will be preserved if the one who has taken upon himself the risk of loss shall receive an equivalent increase in profit over what he would otherwise have received (*De Jure*, II, 12.24.3).

The nature of this limit case of *societas* is now clear. Relying on the typology of human acts which Grotius introduced at the beginning of chapter 12, a *societas* in which one of the parties does not participate in the losses is a *mixed act*, which combines two simple acts (see also *supra*, Fig. 1): a *societas*, which is a permutatorial act involving the community of the parties (*De Jure*, II, 12.4), and an *insurance*, also a permutatorial act, but involving a separation of the parties of the type doing (protection) / giving (money) (*De Jure*, II, 12.3.5). Note that in this case, whereas the income received by the partner who bears the risk of loss is indeed interest on the money or the industry he has advanced, a risk premium is deducted, which is added to the interest received by the other party.

A similar role of risk can be observed in Grotius's discussion of the sea loan, the *foenus nauticum*. Regarded as a substitute for an interest loan, the *foenus nauticum* had been the subject of countless debates in previous centuries (Lapidus 1991, pp. 32-34). But with Grotius, this rather complex arrangement, whose non-usurious character depended on the possibility of an uninterrupted ownership, became, like in the limit case of the *societas*, an elementary combination, within a mixed act, between two simple acts: a *mutuum* in which money is given in return for the subsequent return of the same amount of money and, again, an insurance in which money is given in return for the compensation of a peril if it occurs:

So, the sea loan is a mixture between a contract of *mutuum* and an insurance [*foenus quoque nauticum mixtum quid est ex contractu mutui, et periculi aversi*]. (*De Jure*, II, 12.5).

If so, Grotius's treatment of the *foenus nauticum* does not lead to an understanding of the income received by the lender as interest, but as a risk premium paid by the borrower. Stated differently, this is not strictly a price of time, but a price of risk.

## 5 Concluding remarks

From Thomas Aquinas to Hugo Grotius, the repugnance to interest loans has at least persisted. As if the "bite", which R. Ege (2014) had shown how it crossed the three monotheisms from Antiquity to the Middle Ages, could in the same breath also cross the centuries. The practical incidence of such repugnance might obviously be discussed, and it seems obvious that for so long, the existence of interest-bearing loans had become increasingly important in business life.

But with Grotius, something changed in the way interest loans were not necessary *felt* but *understood*. In a way, it might always be argued that such or such idea of Grotius on money loans was borrowed from Lessius, Covarruvias, Odonis, Olivi, Alexander of Alexandria or directly from canon law. And this was paradoxically confirmed by Grotius himself, who seems to have taken pains to find precursors, as if to reduce the originality of his argument. But the result is an impressive intellectual construction that directly challenges the conception of money loan and usury inherited from Thomas Aquinas. From the periphery to the core, the challenge concerned the substitutes for interest loans, illustrated by the contract of *societas* and the *foenus*

*nauticum*, whose usual provisions were recognised; the extrinsic titles, whose extent became increasingly wide; and the requirement of the *mutuum*, which was no longer necessary because not all ownership passes from the lender to the borrower. This was carried out on the basis of a critical reflection, free from religious requirements, on legal categories from Roman law: the different kinds of loan contracts; ownership; usufruct; the typology of human acts. And it is by shifting or rendering porous the boundaries of these legal categories, by altering their content, that he allowed for the transformation of an economic reasoning that now gave way to a renewed understanding of money loans.

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