# *Antichresis*, *hemiolia* and the statutory limit on interest in Gerard Noodt's *de foenore et usuris*

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**OPSOMMING**

**Antichresis, hemiolia en die statutêre beperking op Noodt se de foenore et usuris**

Rente is kontroversieel. Die Hollandse regsprofessor Gerard Noodt was 'n kampvegter vir hierdie instelling en het die aangeleentheid in 'n monografie sistematies behandel. Die artikel ondersoek Noodt se uiteensetting van hoe die statutêre beperkings omseil word. Noodt behandel *antichresis* uitvoerig en kom tot die konklusie dat die statutêre limiet ook hier van toepassing was. Dit is egter duidelik dat die moontlikheid om rente in ander vorme te ontvang kontrole bemoeilik. Bowendien was die statutêre beperking nie op landbou produkte van toepassing nie. Gevolglik het woekeraars gestipuleer dat die geleende geld asook die rente in die vorm van landbou produkte terugbetaal moet word. Keiserlike wetgewing het die probleem aangespreek in *C Th* 2 33 1, maar die *hemiolia* het 'n rentekoers van vyftig persent gebly totdat Justinianus dit afgeskaf het. Noodt se benadering is om die ekonomiese oorwegings bo die moraliteit van die saak te stel.

## 1 Introduction

Cicero wrote to his friend Atticus that during his tenure as governor of Cilicia he had decreed in his edict that he would observe an interest rate of twelve per cent per year with annual compound interest. Nevertheless, a moneylender named Scaptius claimed forty-eight per cent per year on the strength of the terms of a promissory note. Cicero said to him "What are you saying? Can I act contrary to my own edict?"[1]

The facts of the above were that the citizens of Salamis had tried to raise a loan in Rome where no one was prepared to lend them money on account of the *Lex Gabinia*.[2] However, the moneylenders Scaptius and

1 *M Tulli Ciceronis Epistularum ad Atticum* V 21 10: interim cum ego in edicto translaticio centesimas me observaturum haberem cum anatocismo anniversario, ille ex syngrapha postulabat quaternas. 'quid ais?' inquam, 'possumne contra meum edictum?'

2 Nood *De foenore et usuris libri tres* in *Opera Omnia* (1735) II 4 211f (= L II c IV p 211sq = Book II chapter 4 page 211f) relates that many interpreters believed that the *lex Gabinia* had introduced the 12 % maximum rate for interest and prohibited

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Matinius eventually undertook to make the loan at an interest rate of forty-eight per cent, on condition that they were granted dispensation from the *Lex Gabinia* by the senate. At the initiative of Brutus, for whom they were fronting,[3] a *senatus consultum* was passed to the effect that this particular loan would not be deemed to be an evasion of the statute by the people of Salamis or the moneylenders.[4] Scaptius and Matinius paid out the money, but subsequently discovered that the *senatus consultum* only protected them if the people of Salamis reimbursed the principal and interest of their own free will. If they were unwilling to do so and had to be forced, the *senatus consultum* was to no avail because the *lex Gabinia* not only forbade lending money at interest to provincials in Rome, but also prohibited magistrates from administering justice on the strength of such a promissory note. In consequence, Brutus obtained another *senatus consultum,* which granted their promissory note the same legal force as those which the law allowed to provincials.[5] However, in terms of the traditionary edict only twelve per cent per year could be charged in these promissory notes. Cicero was accordingly free to uphold his edict and not to allow the interest mentioned in the acknowledgment of debt. He concluded his tale to Atticus[6] telling him that he persuaded the Salaminians to pay Scaptius the entire debt, but with interest at twelve per cent calculated from the date of the last renewal of the promissory note, not at simple interest but compounded annually.

## 2 *De Foenore et Usuris Libri Tres*

The above anecdote is repeated and analysed in Noodt's *De foenore et usura*,[7] a work devoted to money lending at interest.

The Dutch legal historian Van den Bergh has plucked this Dutch jurist from relative obscurity with his book entitled *The life and work of Gerard*

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the administration of justice on the basis of a promissory note in which interest above 12% was promised. He himself, however, interpreted Cicero *ad Atticum* V 21 10ff in a different manner and held that the 12% limit had been introduced by the *praetor*. For the *lex Gabinia* he refers at II 4 212 to Johannes Fredericus Gronovius *Antexegesi* 2 *de centesima* & *uncia usura* para 36. Johann Friedrich Gronovius (1611–1671), a classical scholar held the chair of Greek at Leiden from 1658 until his death. However, it would appear that the reference should be to Pascasius Grosippus (pseudonym of Gasparus Scioppius or Kaspar Schoppe (1576–1649), German philologist and jurist), since authors and titles of the work referred to appear to be Joh Frederici Gronovii *De sesteriis seu subsecivorum pecuniae veteris Graecae* & *Romanae libri IV*. Accesserunt L Volusius Maecianus JC & Balbus Mensor *De asse*, Pascasii Grosippi *Tabulae nummariae: Mantissa,* & *tres antexegeseis de foenore unciario et centesimi usuris*: item *de hyperpyro*: Salmasii *Epistola,* & *ad eam responsio*: Logarik e palaia kai nea Graece & Latine (1691) Lugduni Batavorum Johannes du Vivie.

3 As becomes clear in *Ad Atticum* VI 1 5 and 6.

4 Ut neve Salaminis neve qui eis dedisset fraudi esset; *Ad Atticum* V 21 12.

5 Non ut alio ea syngrapha esset, quam ceterae, sed ut eodem. *Ad Atticum ibid.*

6 *Ad Atticum* VI 2 7; he relates the matter to his friend in letters V 21, VI 1 and VI 2.

7 II 4 211f. The full title is *De foenore et usuris libri tres*. This work appeared in 1698 and the fourth edition is found in the *Opera omnia* of 1735 published in Leiden by Johannes Arnold Langerak, which is the work consulted.

*Noodt*.[8] Noodt's *Opera omnia,* first published in 1713,[9] has received scarce attention in South Africa, a country whose common law is rooted in Dutch law from the 17th and 18th century. His monograph on interest deals with a perennial and controversial topic[10] without which "commerce, man's only protection against poverty" would not survive according to the author.[11]

In this treatise Noodt displays his classical erudition,[12] but never lets his contemporary objective out of sight, namely to prove beyond reasonable doubt that demanding interest has always been permitted,[13] albeit subject to certain limitations. In the context of such limits the author discusses the possibility of various ways of evasion, one of which leads by way of real security.

Noodt's point of departure is found in Plutarchus' *De vitiando aere alieno*,[14] namely that one does not lend money to poor people, but only to secure debtors. He finds support for this approach in Seneca[15] and Ulpianus

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8 Van den Bergh *The life and work of Gerard Noodt (1647–1725) Dutch legal scholarship between humanism and enlightenment* (1988).

9 Van den Bergh 252.

10 Van den Bergh 181f mentions that taking interest received enormous attention from humanists and that during the sixteenth century much was published on the various aspects of the problem. Van den Bergh uses the term "usury", but Noodt's monography does not address this evil as the conclusion of this paper will show.

11 I *praefatio* 175: scilicet, quia ea commercium, unicum humanae indigentiae subsidium, pace & bello, sive privatos, sive civitates, sive principes, sive denique in maximis, minimis, praesentis opportunitatem pecuniae putes, carere non possit. (The reason is of course that commerce would not survive without interest and commerce is man's only protection against poverty, in peace and in war, whether you are considering private individuals or states, or princes, or in short the advantage of ready cash in the greatest or smallest transactions).

12 His citations range from Accius to Varro, Aristoteles to Vossius and deserve further research.

13 Virtually the whole first book is devoted to this aim. In chapter 4 Noodt holds that in the true use of *usura* or *foenus* there is nothing that a good and wise man would disapprove of in spite of the fact that Cato, Aristoteles, Seneca, Lactantius, Ambrosius, Chrysostomus, and the authors and interpreters of Canon law hold a contrary view; in chapter 6 he justifies lending money at interest, which he holds to be in accordance with human solidarity as it consists of an interchange of benefits and is permitted by the *ius gentium*; In chapters 7 and 8 he rejects the arguments for distinguishing between *foenus* and *locatio* proferred by Chrysostomus, Hotmanus, Pomponius, Ulpianus and Paulus; chapter 9 rejects Seneca's objections, while in chapter 10 the Mosaic prohibition on interest is explained away and chapter 11 interprets Luke 6 35 and Matthew 5 42.

14 I 11 200. Egeno pecuniam nemo credit, sed iis qui sibi copiam aliquam parare volunt, testemque & sponsorem habent, esse se quibus tuto mutuum committatur. (*On avoiding debt*: No-one lends money to a destitute person, but only to those who plan to acquire riches of some sort for themselves and with a witness and a surety that they are people to whom a loan can safely be entrusted). Plutarchus (c 46–127 AD), Greek historian, biographer and essayist; the work in question is found in his *Moralia* X 57.

15 Seneca *De beneficiis* I 2: ut nomina facturus non diligenter in patrimonium & vasa debitoris inquirat. (that he who intends to open an account with another does not make careful enquiries about the estate and life-style of the potential debtor). Quod alioquin prudentis creditoris esse (as one would in any case expect from a sensible creditor) adds Noodt I 11 200. Lucius Annaeus Seneca (c 4 BC–65 AD), Roman philosopher, orator and playwright.

in *D* 17 1 42[16] and his *credo* is thus summed up where he states that "a loan is not given to someone vexed by constant indigence, for money would be loaned in vain to one who has nothing; but he is given alms".[17] As a result the author cites without a hint of irony[18] Johannes Chrysostomus making fun of the difficulties and worries of moneylenders.[19]

## 3 Interest is Payment for the use of Money or Produce

In his analysis of the meaning and use of the words *foenus* and *usura* Noodt establishes that interest is payment for the use of money and produce. As he is wont to do, Noodt relies on legal[20] and other authority.[21]

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16 Ulpianus libro undecimo ad edictum . . . (t)antumdem et si tibi mandavi, ut vires excuteres eius cui eram crediturus et renuntiaveris eum idoneum esse. (At least if I have instructed you to investigate the financial position of him to whom I intend giving credit, and you report back that he is able to pay).

17 He relies also on Aulus Gellius *Noctes Atticae* XX 1 who says that a loan is "subsidium hoc inopiae temporariae quo communis omnium vita indiget" (this relief of a temporary need which generally crops up in any man's life). Aulus Gellius, Latin author and grammarian (c 125–after 180 AD).

18 John Chrystomos (347–407 AD) archbishop of Constantinople, Saint and Father of the Christian church was opposed to lending money at interest.

19 *Homilia* 57 on *Matthaeus* 17, vol 1 503: Quid enim difficilius quam foenerari & pro usuris vel hujusmodi commutationibus vehementer sollicitum vades quaerere, & modo de pignoribus, modo de sorte, nunc de tabulis, nunc de usuris, nunc de vadibus ipsis formidare? In his enim secularibus etiam subtilis fidejussionum securitas suscepta fragilis est. (For what is more difficult than to lend at interest and with the greatest of care to seek sureties for the interest or payments of this nature, and then to live fearing for the pledges or the principal or the account-books, or the interest or the very sureties themselves? For in these worldly matters even the simple safety of suretyships is brittle). Cf Noodt I 11 200.

20 Africanus, *D* 19 5 24, who speaks of *reditus pecuniae* (the return on money); *C Th* 13 1 18 calls it *crescentis in dies singulos pecuniae accessio* (the increase of money growing from day to day); but see also *C* 4 32 23 Impp Diocletianus et Maximianus Iasoni. Oleo quidem vel quibuscumque fructibus mutuo datis incerti pretii ratio additamenta usurarum eiusdem materiae suasit admitti. (If oil or other fruits whatsoever have been given in loan for consumption the changing prices have been the reason that the addition of interest of the same kind has been allowed); *C* 4 32 11 (12) Imp Alexander A Aurelio Tyranno. Frumenti vel hordei mutuo dati accessio etiam ex nudo pacto praestanda est. (Interest on wheat and barley given in loan for consumption must be paid even on the strength of a mere agreement). Although Noodt also refers to D 31 70 1 (*infra* n 28) the authority of the latter text is questionable in this matter.

21 Tertullianus *Adversus Marcionem* 4 17: Pecuniam inquit suam foenori non dedit, & quod abundaverit, non sumet; foenoris scilicet redundantiam quod est usura. Prius igitur fuit, ut fructum foenoris eradicaret, quo facilius assuefaceret hominem ipsi quoque foenori, si sorte perdendo, cujus fructum didicisset, amittere. (He did not give his money as a loan and shall not accept what is over and above the principal, namely that amount exceeding the loan, which is interest. His first priority was to stop the interest on loans, in order to more easily reconcile a man even to the possible loss of the money loaned, when first he had learned to remit the fruits thereof). Quintus Septimus Tertullianus (c 160–220 AD), early Christian theologian; Festus *De verbis veteribus s v Foenus*: Foenus appellatur naturalis terrae foetus, ob

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Noodt explains that although some authors are of the opinion that interest only applies to money,[22] it had become the accepted rule that if produce was owed, for example oil, wine or corn, interest could be paid on these products.[23] The reason for this he finds in the *Historia naturalis*[24]

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quam causam & nummorum foetus foenus est vocatum. (*Foenus* is the name given to the natural produce of the earth, and for this reason the produce of coins was also called *foenus).* Sextus Pompeius Festus (fl 3rd century AD), Latin grammarian who made an abridgment of Flaccus' dictionary and encyclopedia *De significatu verborum*; Hieronymus *Ezekiel* 6 18 206: Putant quidam usuram tantum esse in pecuniam. Quod praevidens scriptura divina, omni rei aufert superabundantiam: ut plus non recipias, quam dedisti. Solent in agris frumenti & milii, vini & olei, caeterarumque specierum usurae exigi: sive, ut appellat sermo divinus, abundantiae. Verbi gratia: ut hyemis tempore demus decem modios: & in messe recipiamus quindecim, hoc est, amplius partem dimidiam. Qui justissimum se putaverit: quartam plus accipiet portionem, & solent argumentari ac dicere: dedi unum modium qui satus, fecit decem modios: none justum est, ut medium modium de meo plus accipiam, cum ille mea liberalitate novem & semis de meo habeat. (Some people think that interest relates only to money, and foreseeing this error, Divine Scripture forbids any form of superabundance: so that you may not receive more than you have given. Interest is usually exacted in the case of lands of corn and cereals, of wine and olive oil, and of all similar types: or, as the Holy Word calls it abundance. For example: were we to give ten measures of corn in winter-time, and at the time of harvest receive back fifteen measures, in other words 50% more, anyone who considers himself absolutely fair will take a quarter more, and normally their argument is: "I gave one measure, which sown did produce ten measures: surely it is only fair that I receive 50% more from what is mine, since as a result of my generosity he receives nine and a half times from what is mine"). Hieronymus, Saint of the Church and prolific author (c 340–420 AD); Isidorus *Origines* 5 25: Usura est incrementum foenoris, ab usus aeris crediti nuncupata. (*Usura* is a growth of *foenus*, so named from the use of money loaned). Saint Isidorus of Sevilla (560–636 AD), Spanish archbishop, scholar and author.

22 See Hieronymus on *Ezekiel* 6 18 206 n 21.

23 I 2 177ff: Utcumque erit; constat, usuram non tantum ex numerata pecunia, sed etiam ex fructibus, deberi; & utriusque sive accessionem, sive additamentum, haberi . . . Igitur usura est accessio pecuniae vel frugum. An & corporum? . . . Possunt igitur usurae ex quantitatibus deberi; sed ex corporibus non possunt. Quid ni, patiente vetere, & propria, verbi significatione? Sed quae pro usu corporum dantur, iis locatis, vel cum mora in eorum praestatione aut restitutione commissa est, non usurae, nec foenus, sed mercedes, vel pensiones, vel reditus, vel fructus,vel quasi fructus, appellantur. (Whatever the case may be, the fact is that interest is not only owed on money paid over, but also on produce, and that it is considered to be an increase of, or addition to, either of them . . . Interest is thus the increase derived from money or crops. Can it also be the increase from corporeal objects? . . . Interest can therefore be owed on sums of money, but not on objects. Why not, given that the old and proper meaning of the word allows it? But what is given for the use of corporeal objects, when they have been leased, or when the delivery or restitution of these has been delayed; that money to be paid is not called interest, nor *foenus*, but rental or instalments or proceeds or profits or quasi-fruits, see *D* 5 3 27 1 & 29; *D* 7 1 7 1; *C* 3 33 13; *D* 22 1 19 pr & 34 & 36).

24 XXXIII 57 164: Pretia rerum, quae usque posuimus non ignoramus alia aliis locis esse et omnibus paene mutari annis, prout navigatione constiterint aut ut quisque mercatus sit aut aliquis praevalens manceps annonam flagellet. (The prices of things that I have here and there given, as we all know, vary from place to place and almost every year, according to the fluctuation in the costs of shipping, or as each market differs, or some monopolist whips up the prices of commodities).

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of Plinius, namely the variation in prices from place to place and year to year. In consequence, the creditor could easily suffer a loss if he made a loan when the produce had a higher price and received it back when the price was lower. Noodt holds this to be contrary to the principle of equality, which has to be observed in contract in terms of the *ius gentium.*[25] A more practical reason is that people would refrain from lending. On the strength of *C* 4 32 23[26] and Hieronymus on *Ezekiel*[27] he concludes that interest is not only owed on money paid over, but also on produce, and that it is considered to be an increase of, or addition to, either of them.[28]

## 4 *Antichresis*

Following this, Noodt relates that interest and the loan do not necessarily have to belong to the same kind, since it is possible to agree specifically that the interest may be paid in another kind.[29] In this instance he relies heavily on Augustinus, who held that if you lend money and expect to

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Gaius Plinius Secundus (23–79 AD), Roman polymath, scientist, historian and natural philosopher. See also *C* 4 32 23 n 20.

25 I 2 177: hoc vero quia non patitur ratio aequalitatis, in contractibus jure Gentium observandae. (This is so because the principle of equality, which has to be observed in contract in terms of *ius gentium,* does not allow this inequality).

26 Cf n 20; Noodt refers to the emperor Philippus, but the *editio stereotypa* attributes this constitution to Diocletianus and Maximianus.

27 6 18 206, see n 21.

28 I 2 177: Nec sat scio, quid moverit Salmasium, *De usuris c* 10 *pag* 615 & *seq* ut existimaret *accessionem* & *additamentum* proprie dici de usuris non pecuniae. sed fructuum mutuo datorum. id enim refutatur *l* 70 § 1 *D de legatis lib* 2 *l* 18 *Cod Theod de lustrali conlatione l* 12 & *l* 23 *C de usuris*, in quibus ea vocabula de usuris tam pecuniae, quam fructuum, indistincte accipiuntur. sed & ipse fatetur *d loc* Salmasius *de aliis usuris* accessionis vocabulum *passim* poni. (And I do not quite understand what moved Salmasius in *De usuris* chapter 20 page 615ff to come to the conclusion that *increase and addition* are properly used concerning interest on products given on loan for consumption but not on money. This is surely refuted by *D* 31 70 1, *C Th* 13 1 18 and *C* 4 32 11 (12) & 23. In these passages those terms are accepted without distinction with regard to both money and produce. But in the work referred to, Salmasius himself acknowledges that *concerning other interest* the term increase is generally used). Salmasius, Claude de Saumaise (1588–1653), French humanist, classical scholar and philologist, professor at Leiden from 1631–1653.

29 I 2 179: Sed utrum in eodem genere quod creditum est, an etiam alio? . . . Hoc, si non specialiter aliud pactum conventum sit. Quod si id sit? Jam placet, usuras etiam alia in re quam quae credita sit, deberi. Nec longe petam auctoritatem: dabit eam Augustinus, *Concione 3 in part 3 Psalmi 36 tom 8 pag* 123. (But does it have to be in the same kind as was loaned, or can it be in another kind? . . . This then is the case if no other special agreement has been entered upon. What then is the case if a special agreement has been entered upon? We have already established that interest can even be owed in another kind than that which was loaned. I don't have to look far for an authority: Augustinus will provide it in part 3 of *Concio* 3, Psalm 36 vol 8 123). For this text see *infra* n 30. Noodt also cites *C* 4 32 16. Aurelius Augustinus (354–430 AD), Saint, bishop of Hippo from 396–430, Father of the Christian church, theologian.

receive back more than you have given, not only money, but for example wheat, wine or olive oil, you are a moneylender.[30]

He cites *D* 20 1 11 1[31] where Marcianus dealing with *antichresis* explains that the creditor is in possession of the pledge and receives the fruits as interest, followed by *C* 4 32 14;[32] in the latter text the emperor replied that it was unnecessary to question whether the house being lived in *in lieu* of interest could have brought in a rental in excess of the allowable interest.

In *C* 4 32 17[33] another imperial rescript decided that the fact that a harvest had brought in an extraordinary profit was no ground for rescission of the agreement of *antichresis.*

These texts establish clearly that in terms of an agreement interest can be determined in another kind than that which was lent[34] and mention the possibility that the fruits or use may exceed the allowable interest.

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30 In part 3 of *Concio* 3, Psalm 36 vol 8 123: Si foeneraveris homini, id est, mutuam pecuniam tuam dederis a quo aliquid plus quam dedisti exspectes accipere; non pecuniam solam, sed aliquid plus quam dedisti, sive illud triticum sit, sive vinum, sive oleum, sive quidlibet aliud, si plus quam dedisti, exspectas accipere, foenerator es. (If you lend to a man at interest, that is to say if you give your money on loan to someone from whom you expect something more than you have given; not only money, but something more than you have given, whether that be wheat or wine or olive oil or whatever else, if you expect to receive back more than you have given, you are a moneylender).

31 Marcianus libro singulari ad formulam hypothecariam. Si ἀντίχρησις facta sit et in fundum aut in aedes aliquis inducatur, eo usque retinet possessionem pignoris loco, donec illi pecunia solvatur, cum in usuras fructus percipiat aut locando aut ipse percipiendo habitandoque. (If an ἀντίχρησις was agreed upon and a tenant is brought onto the farm or into the house, the creditor retains possession by way of pledge until the money is paid to him, since he receives the fruits as interest, either by letting, or by collecting them himself and by living there).

32 Imp Antoninus A Aurelio Arasiani. Si ea pactione uxor tua mutuam pecuniam dedit, ut vice usurarum inhabitaret, pactoque ita ut convenit usa est, non etiam locando domum pensionem redegit, referri quaestionem, quasi plus domus redigeret, si locaretur, quam usurarum legitimarum ratio colligit, minime opertet. licet enim uberiore sorte potuerit contrahi locatio, non ideo tamen illicitum fenus esse contractum, sed vilius conducta habitatio videtur. (If your wife has lent money with the clause that 'in place of interest she would live in the home,' and this has been implemented as agreed, and no rent was paid: then it is not at all necessary that the question be raised whether the house, had it been let, would have brought in more than the allowable interest. Although the lease could have been concluded at a higher rental, this does not make the loan at interest unlawful, but it appears that right to live in the house has been agreed upon at a worse price).

33 Imp Philippus A et Philippus C Aurelio Euxeno. Si ea lege possessionem mater tua apud creditorem tuum obligavit, ut fructus in vicem usurarum consequeretur, obtentu maioris percepti emolumenti propter incertum fructuum eventum rescindi placita non possunt. (If your mother has burdened her possession with the creditor in the following clause 'that fruits would be acquired in place of interest,' the agreement cannot be rescinded on the ground that a greater profit has been made, because the yield of harvests is uncertain).

34 See also Ambrosius *De tobia* c 14: Et esca usura est, & vestis usura est, & quodcumque sorti accedit, usura est. Quod velis ei nomen imponas, usura est. (And food is interest, clothing is interest, and whatever is added to the principal is

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## 5 Is *Antichresis* an Exception from the Statutory Limitation on Interest?

Elsewhere Noodt deals with the question of whether *antichresis* forms an exception to the legal limit set for interest.[35] Cujacius had answered this question in the affirmative in his commentary on the *Codex* holding that the limit set in respect of interest did not apply to *antichresis*. His main argument was that although *antichresis* is a substitute for interest, it is not interest. Noodt does not share this opinion and refutes the various points supporting the argument of the French humanist.[36] He concludes that *antichresis* does not differ from interest and that the limit applies to *antichresis* as well. In consequence, in the event that no doubt exists that the value of the fruits is in excess of the allowable interest the agreement would be an evasion of the statute, which restricts interest to a fixed limit. Thus Noodt concludes on the basis of *D* 22 1 44[37] that one cannot stipulate an equivalent of interest above the fixed limit.[38]

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interest. Whatever name you may wish to put on it, it is still interest.) Ambrosius (339–397), Saint, bishop of Milan, erudite and influential Father of the Christian church.

35 II 9 221–223.

36 II 9 221: Jacobus Cujacius, *ad Novell* 32: causatus, finem qui est usuris positus, non esse positum antichresis: & quamquam usurae vicem habeat antichresis, non tamen usuram esse. Pacto enim fieri antichresis; cum usurae stipulatione constituantur. Deinde; usuras non perimi sortis oblatione; nisi sequuta ejus depositione: antichresin vero sortis oblatione perimi; etsi nulla ejus depositio fiat *l* 11 *C de usuris*. Atque ut in his ab usura differt antichresis: sic nil mirum esse, utramque etiam quoad modum distingui, suadente incerto fructuum, quod in usuris non sit. *l* 17 & *l* 14 *C eod tit* & hoc Cujacius *lib* 8 *Observ c* 17 in primis verum esse opinatur, si manifesta sit antichresi. Nam si tacita sit, adhuc intra usurarum modum coerceri *l* 8 *D In quibus causis pignus tacite contrahitur*. nempe, ut major sit vis expressae, quam tacitae, conventionis. (Jacobus Cujacius in his commentary on Novella 32 argues that the limit placed on interest does not apply to *antichresis*: although *antichresis* is a substitute for interest, it is, however, not interest. Because *antichresis* is constituted by mere agreement, but interest is established by a *stipulatio*. Secondly, that interest does not stop running by the offer of the principal unless followed by actual deposit of the money, whereas *antichresis* is terminated by the offer without a deposit being made, *C* 4 32 11. And just as *antichresis* differs from interest in these respects, so it is no wonder that they are distinguished from one another regarding their limits as well, on account of the uncertainty of the fruits in the case of *antichresis*, which does not apply in the event of interest, *C* 4 32 17 and 14. And Cujacius is of the opinion, *Observationes* book 8 chapter 17, that this is especially true if the *antichresis* is manifest; for in the event of tacit *antichresis* the interest limit is still applied, *D* 20 2 8. The reason is, of course, that an expressed agreement has greater force than a tacit one). Jacques Cujas (1522–1590), French jurist, humanist and classical scholar, taught at universities of Valence and Bourges. The more obvious reference is Cujacius' commentary on *C* 4 32 14 in Iacobus Cuiacius *Opera postuma* V (Paris 1658) *Recitationes solemnes in libros codicis* where Cujacius indeed states that in terms of *antichresis* the creditor retains all fruits without limit. In his *expositio Novella* 32 (in *Opera priora* II (Naples 1758) he repeats the same, but explains that this statute forbids *antichresis* with farmers.

37 Modestinus libro decimo pandectarum. Poenam pro usuris stipulari nemo supra modum usurarum licitum potest. (No one can stipulate a penalty in the place of interest above the lawful maximum interest rate).

38 II 9 221f: Non igitur antichresis ab usura differt rei substantia; etsi eruditissimus censet Interpres. Sed nec modo differt: denique, si legitimas egrediatur usuras, non valet conventio. Nec distinguo, utrum manifesta sit antichresis, an tacita:

*continued on next page*

However, in the event of uncertain returns the creditor is allowed the benefit of doubt. Noodt uses the following example: if the fruits usually collected from the property are lower than the limit for interest, but, sometimes a higher yield is produced, the agreement must be honoured because of the uncertain yield of the fruits. He holds that the expectation of a profit is set off against the risk of a loss and that thus the purpose of the statute, namely the equality between debtor and creditor is maintained with the result that no evasion of the statute is committed.[39]

Thus when a farm has been given in *antichresis*, the creditor may, if the yield of the fruits is uncertain, retain all the fruits of the pledge without being obliged to deduct them from the principal, even if they sometimes exceed the legal interest limit.[40]

Noodt supports this conclusion with *C* 4 32 17,[41] but denies general application with an appeal to Papinianus in *D* 20 1 1 3.[42] In his interpretation the latter text deals with a case in which it is certain that the yield provides interest which is on the whole more than the permissible interest.[43]

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modo si constet, fundi fructus usurarum modum superare: quia ea conventio foret in fraudem legis, usuras ad certum modum coercentis: & sicut non licet mihi usuras stipulari ultra modum; sic nec aliud quod instar usurae sit *l* 44 *D de usuris*. Ita, si appareat, antichresin egredi usurarum finem. (Thus, in essence *antichresis* does not differ from interest, although the very learned interpreter thinks it does. Nor does it differ in the limit; consequently if the legal limit on interest is exceeded the agreement is invalid. Nor do I make a distinction whether the *antichresis* is tacit or manifest, as long as it is an established fact that the fruits from the property exceed the limit set for interest: for that agreement would be an evasion of the statute which restricts interest to a fixed limit; and just as I am not free to stipulate interest over the fixed limit, so also am I not free to do so in the case of any other equivalent of interest, *D* 22 1 44. The same applies if it is obvious that the *antichresis* goes beyond the limit laid down for interest.

39 II 9 222: servanda conventio est, propter incertum fructuum proventum: quo sit, ut nihil in fraudem legis admittatur: atque ut aliquando contingat, ut plus perveniat, tamen aliquando sit, ut minus percipiatur. compensatio igitur spes commodi cum periculo damni; videturque eo induci aequalitas quam lex inter debitorem & creditorem servari postulat. (The agreement should be honoured on account of the uncertain yield of the fruits: in consequence no evasion of the statute is committed and it may sometimes happen that more comes in, and again in other times that less is received. The expectation of a profit is therefore set off against the risk of a loss, and it seems that thereby the equality between debtor and creditor, which the statute wants to maintain, is introduced).

40 II 9 222.

41 See n 33.

42 Papinianus libro undecimo responsorum. Pacto placuit, ut ad diem usuris non solutis fructus hypothecarum usuris compensarentur fini legitimae usurae. Quamvis exordio minores in stipulatum venerint, non esse tamen irritam conventionem placuit, cum ad diem minore faenore non soluto legitimae maiores usurae stipulanti recte promitti potuerint. (There was a clause that if the interest was not paid at the agreed day, the fruits of the mortgaged properties would compensate for the interest to the legal limit. Although in the original *stipulatio* lower rates were agreed upon, it was decided that nonetheless the clause was not void, since if the lower interest was not paid by the agreed day, higher lawful interest could rightly be promised).

43 II 9 222: nam si certum sit, eum proventum dare usuras, plerumque majores legitimis, contra dicendum esse, ex Papiniano intelligitur *l* 1 § 3 *D de pignoribus* &

*continued on next page*

Use, instead of interest, as dealt with in *C* 4 32 14[44] where the creditor receives the debtor's home in pledge with the provision that he can live in it *in lieu* of interest, is another borderline case. Noodt drawes a distinction between the creditor living in the house or letting the house.[45] If he lets the house and collects more from the rent than he could have received from interest, he is obliged to set off against the principal which is more than the permissible interest. But if he does not let the house, and lives in it, then the agreement is valid, even if his habitation of the house is worth more than the amount of the maximum interest. He reasons that in this instance it appears that the house was let at a lower rent and not that an illegal interest rate was agreed upon.[46] The rationale behind this is that if the house is let, the amount of the interest received is immediately apparent, whereas if the house is lived in it could seem uncertain. Not only may the contracting parties overreach each other on the rent, but it is also important when the rental is determined to decide who will occupy the house.[47]

Noodt's bias in favour of interest becomes obvious in his enthusiastic support in favour of tacit *antichresis*. If a field was given in pledge and no agreement regarding interest and fruits was reached, he is of the opinion that *antichresis* has been agreed upon, not expressly but tacitly. He reasons that since *antichresis* is established by agreement, for which mere consensus suffices,[48] there is nothing to prevent *antichresis* from being established tacitly. He believes that a debtor who, after receiving the money in loan, gives the creditor a pledge but does not expressly agree that he will not pay interest, indicates to the world that he wants the interest to be paid from the fruits which will be produced by the pledge.[49]

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*hypothecis*. (For we understood from Papinianus, *D* 20 1 1 3, that in the event that it should be certain that the yield provides interest which is on the whole more than the permissible interest, the opposite must be said).

44 See n 32.

45 II 9 222: licetque mihi aedes inhabitare: quia ea est lex conventionis. addam, locare: etsi id non sit palam conventum. (and I have the right to live in that house, because that is a provision of the agreement. Let me add: I have the right to let the house, even if this was not expressly agreed upon).

46 *C* 4 32 14. See n 32

47 II 9 222: nam & licet contrahentibus naturaliter, se in pretio circumvenire: & multum interest, cum de aestimanda mercede agitur, utrum aedes per hunc, an per illum, habitentur. (For not only have the contracting parties by nature the right to overreach each other on the rent, but another important factor in the determination of rent is whether the house is lived in by this or by that person).

48 *D* 2 14 2.

49 II 9 222: nam si ager simpliciter detur pignori; nec de usuris & fructibus quidquam dicatur: contracta videtur antichresis, non palam, sed tacite. quia enim pacto constituitur antichresis. (For if a field were simply to be given in pledge, and nothing is mentioned regarding interest and fruits, it appears that an *antichresis* is contracted, not expressly but tacitly).

Noodt validates his argument with citations from Seneca[50] and Cicero[51] and adds himself that an appeal to the generosity of the lender would be approval of shamelessness on the part of the receiver, since Roman law follows the precepts of integrity and expects good conduct from each and every person. Therefore, when a pledge has been given without an agreement regarding interest and fruits, *antichresis* is understood to have been established, even if not openly then at least tacitly. This is what *D* 20 2 8[52] means with the words "when a debtor has the use of money free."[53]

If money carries interest, there is no presumption that *antichresis* is contracted, not even tacitly; in such instance when a field has been given in pledge the creditor must collect the fruits and must set off the collected fruits, first against the interest, and after reaching the allowable limit, against the principal.[54]

Thus according to Noodt's reasoning there is no difference between manifest and tacit *antichresis* and both were subject to the limitation on interest.

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50 *Epistola* 81: In hoc quoque falluntur ingrati, quod creditori quidem, praeter sortem, extra ordinem numerant: beneficiorum autem usum esse gratuitum putant. Et illa crescunt mora: tantoque plus solvendum est, quanto tardius. ingratus est, qui beneficium reddit sine usura: itaque hujus quoque rei habebitur ratio, cum conferentur accepta & expensa. (Ungrateful people are also wrong when they believe that they pay the creditor extraordinarily above the principal: because they think that the use of favours is without charge. But favours increase as a result of delay, and payment must be made in proportion to the length of the period that it is overdue. Someone who repays a favour without interest is ungrateful. Therefore this must also be taken into consideration when what has been received is compared with what has been paid out).

51 *De officiis* I 15: Quod si ea, quae acceperis utenda, majore mensura, si modo possis, jubet reddere Hesiodus: quidnam beneficio provocati facere debemus? an non imitari agros fertileis; qui multo plus offerunt, quam acceperunt? etenim si in eos quos speramus nobis profuturos, non dubitamus officia conferre: quales in eos esse debemus, qui jam profuerunt? (But if, as Hesiodus advises, you must return what you have borrowed for your own use in larger measure, if at least you can; what must we do when we are confronted with a good deed? Should we not imitate the fertile fields, which return much more than they have received? For if we do not hesitate to do favours for those who we hope will be of use to us, how ought we to deal with those who have already been of use?).

52 *D* 20 2 8: Paulus libro secundo sententiarum. Cum debitor gratuita pecunia utatur, potest creditor de fructibus rei sibi pigneratae ad modum legitimum usuras retinere. (When a debtor has the use of money free, the creditor can from the fruits of the thing pledged to him, retain interest to the legal limit).

53 II 9 222: Sed quod honestati convenit, jus civile sequitur: bene enim de unoquoque sperat: & ideo pignori dato, neque convento de usuris & fructibus, constituta intellegitur antichresis, etsi non palam, tamen tacite: ac si certus fructuum proventus, retinebit creditor fructus vice usurarum, non in infinitum,sed, ut in superiore casu, usque ad legitimum susrarum finem. (The civil law follows the precepts of integrity, for it expects good conduct from each and every person. Thus, when a pledge has been given without an agreement on interest and fruits, *antichresis* is presumed to have been established, even if not expressly then at least tacitly. And if the yield of the fruits is certain, the creditor will retain the fruits in the place of interest, not without limit, but as in the previous case, up to the legal limit on interest).

54 *C* 8 24(25) 2.

## 6 *Hemiolia*

However, *antichresis* provided the basis for a construction to avoid the limit placed on interest.

In *C* 4 32 26 2[55] Justinianus refers to *foenus nauticum* and a loan for consumption of specific things as two instances in which a higher interest rate had been allowed. Noodt deduces from *C* 10 27,[56] the *Basilica*[57] and Hieronymus[58] that with specific things agricultural products are meant in this context.[59] This brings him to the subject of how the statutory interest rate could be circumvented by moneylenders stipulating that the principal, as well as the interest thereon, was not to be paid back in money, but that a certain quantity of specified agricultural products was to be delivered instead.[60] Noodt explains that not only interest can be paid in another kind,[61] but the lender can also stipulate that something else instead of money must be returned.[62]

The ratio behind this construction was that the rate of interest on agricultural produce was without restriction.[63] This had led to unreasonable

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55 Imp Iustinianus A Menae pp. (i)n traiecticiis autem contractibus vel specierum fenore dationibus ad centesimam tantummodo licere stipulari nec eam excedere, licet veteribus legibus hoc erat concessum: (that in contracts of fenus nauticum and loans of agricultural produce up to twelve percent interest can be stipulated but not higher, although this was allowed in terms of the old statutes).

56 Ut nemini liceat in coemptione specierum se excusare et de munere sitoniae (That no one is allowed to excuse himself concerning the collective purchase of agricultural produce and on the public charge to purchase grain). See C 10 27 1. Imp Anastasius A Matromiano pp. Quotiens urguente necessitate comparationes frumenti vel hordei aliarumque specierum quibuslibet provinciis indicentur. (Whenever through the weight of necessity the purchase of corn or oil and other produce is promulgated in some provinces). See also C 10 27 2.

57 II 8 219: (*speciebus*): quas Graeci interpretantur *fructus.* non male. ut ex Hieronymo mox apparebit. (The Greeks translate as fruits – not badly, as will shortly become clear from a text of Hieronymus). See *Basilica* 23 3 74: Ἐπί δέ των ναυτικων δανείων καί έπί των δανειζομένων είδών ή καρπων.

58 VI 18 206. See n 21.

59 Noodt also finds support for this interpretation in *C* 11 48(47) 20 2 Imp Iustinianus A Demostheni pp. Sin autem reditus non in auro, sed in speciebus inferuntur, vel in totum vel ex parte, interim per officium iudicis fructus vendantur et pretia eorum secundum praedictum modum deponantur. (But if the income is not in gold but in the form of agricultural products, either for the whole or in part, the fruits are once again to be sold by judicial intervention and the price realised on them must be deposited in accordance with the prescribed method).

60 II 8 219: eaque gratia solent avari creditores, pecunia credita, non hanc reddi, & si non reddatur, ejus usuras, stipulari: sed certam fructuum modiationem praestari; as nisi is modus sua die offeratur, mensurarum additamenta. (As a result, greedy moneylenders were wont to stipulate that the loan and for the duration thereof the interest thereon, was not to be paid back in money, but that a certain number of bushels of agricultural products be delivered; and unless that measure be tendered on the due date there would be increases in the volume).

61 See "*antichresis*".

62 II 13 229: Atqui qui pecuniam credit, is & pecuniam reddi stipulari potest, & aliud pro pecunia, *l* 2 *D de rebus creditis.* (on the other hand a person lending money can stipulate that either money be given back or something else instead of money, *D* 12 1 2).

63 See C 4 32 26 2 n 54.

rates being demanded with the result that Constantinus imposed a limit in *C Th* 2 33 1.[64] In this constitution it was determined that an additional third part could be demanded as interest. The emperor illustrates with an example of how this was to be understood, namely if you have lent two bushels of corn you must receive back two bushels for the principal and furthermore a third bushel for the interest. Noodt opines that this is indeed a very high interest, since it is as high as half the principal or capital and he explains that it is therefore called *hemiolia.* He relies for a definition on Aulus Gellius[65] who wrote that a *hemiolios* is that which contains a certain number plus half of that number, as in three to two, fifteen to ten, thirty to twenty.

The reason why such high interest was acceptable in the case of agricultural products is found in Hieronymus' commentary on *Ezekiel*[66] where he gave the following justification:

> "I gave one bushel which after being sowed produced ten bushels; surely it is only fair that I receive back half a bushel more from what is mine, since thanks to my generosity that man now has nine and a half times of what he borrowed from me?"

An instance of this practice is found in *C* 4 32 16 where money was received in terms of an interest carrying loan and it was agreed that both principal and interest would be repaid in the form of wheat. Noodt holds that this scheme was prohibited by emperor Gordianus in this constitution, since it was intended to evade the legal interest limit.[67] This is an over-simplification since the rescript is rather circumspect as the emperor advised the petitioner to use the suitable defence against this dishonest claim.[68]

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64 Quicumque fruges (humidas vel arentes) indigentibus mutuas dederint, usurae nomine tertiam partem superfluam consequantur, id est, ut si summa crediti in duobus modiis fuerit, tertium modium amplius consequantur. Quod si conventus creditor, propter commodum usurarum, debitum recuperare noluerit, non solum usuris, sed etiam debiti quantitate privandus est. Quae lex ad solas fruges pertinet. nam pro pecunia ultra singulas centesimas creditor vetatur accipere. (Whoever gives produce (liquid or dry) on loan to needy persons, may receive a third superfluous part by way of interest, that is to say that if the amount of the loan was two bushels he would receive back a third additional bushel. But if a creditor who has agreed to the above refuses to recover the amount loaned because of the profitable interest, he will lose not only the interest but also the amount of the debt. This statute pertains only to produce, because a creditor is forbidden to receive more than twelve per cent for a loan of money).

65 *Noctes Atticae* book 14.

66 6 18 206. See n 21.

67 II 8 219f: quae res cum sit in fraudem legitimarum usurarum, a Gordiano prohibetur *l* 16 *C de usuris*. (Since this scheme is intended to evade the legal interest limit, it is prohibited by Gordianus in *C* 4 32 16).

68 II 13 229: Noodt explains the rationale for calling the claim dishonest: nunc autem non centesimas, quas rei origo volebat, sed, quasi ex tritico credito, (qui titulus obligationis non verus, sed quaesitus erat) majores usuras stipulatus est. (But now he has stipulated not the twelve per cent which the original transaction required, but a higher interest as if it were on the basis of corn loaned (which title for the obligation was not true but illusionary).

However, such suitable defence,[69] could be frustrated by implementation of the practice mentioned in *D* 12 1 11 pr[70] and fully described by Ambrosius.[71] In this instance the moneylender pretends not to have ready cash and instead lends his client a valuable object to sell and use the proceeds. The emperors Diocletianus and Maximianus address this stratagem in *C* 4 2 8[72] holding that only twelve per cent interest on the principal

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69 The *exceptio doli* or perhaps an *exceptio* based on the relevant legislation, be it the *lex Gabinia* or the imperial constitutions referred to in *D* 19 1 13 26 and *C* 4 32 20.

70 Ulpianus libro vicensimo sexto ad edictum. Rogasti me, ut tibi pecuniam crederem: ego cum non haberem, lancem tibi dedi vel massam auri, ut eam venderes et nummis utereris. Si vendideris, puto mutuam pecuniam factam. (You have asked me to lend you money. Since I had no money available, I gave you a plate or a bar of gold to sell and to use the proceeds. If you have sold the object, I am of the opinion that the money has been lent).

71 Ambrosius, *De tobia* chapter 3: At ubi usurarum mentio facta fuerit, aut pignoris, tunc abjecto supercilio foenerator arridet, & quem ante cognitum sibi denegabat, eundem tanquam paternam amicitiam recordatus osculo excipit, hereditariae pignus charitatis appellat, flere prohibet. Quaeremus, inquit, domi, si quid nobis pecuniae est, frangam propter te argentum paternum quod fabrefactum est, plurimum damni erit, quae usurae compensabunt pretia emblematum? Sed pro amico dispendium non reformidabo, cum reddideris, reficiam. Itaque antequam det, reficere festinat: & qui in summa subvenire se dicit, usuras exigit. Kalendis, inquit, usuras dabis: foenus interim, si non habueris unde restituas, non requiro. Ita ut semel det, frequenter exigit, & semper sibi debere efficit. Hac arte tractat virum. Itaque prius eum chirographis ligat, & adstringit vocis suae nexibus. Numeratur pecunia. (But when mention was made of interest, or of pledge, the lender smiles with down-cast eye-brows, and with a kiss welcomes the same man, whom he previously denied knowing, as if recalling a family friend and invokes the pledge of an hereditary affection, and tells him not to weep. 'We shall see, he says, whether I have any money at home; for you I shall smash the skillfully forged silver inherited from my father: the damage will be very great. What interest will compensate the value of the ornaments? But for a friend, I shall not shirk the loss, when you return it, I shall have it repaired.' Thus before he gives, he hastens to repair, and he who says that he is helping in the matter of a sum of money, demands interest. 'On the first of the month,' he says, 'you shall pay interest: in the meantime I do not seek the principal, if you do not have the means to pay back.' Thus, although he gives once, he regularly demands, and so he brings about that one is always in his debt. With this ploy he manipulates a man. So he first binds him with promissory notes, and then ties him up with obligations of his own words. Money is paid out).

72 *C* 4 2 8 Impp Diocletianus et Maximianus AA et CC Proculo. Si pro mutua pecunia, quam a creditore poscebas, argentum vel iumenta vel alias species utriusque consensus aestimatas accepisti, dato auro pignori, licet ultra unam centesimam usuras stipulanti spopondisti, tamen sors, quae aestimatione partium placito definita est, et usurarum titulo legitima tantum recte petitur. Nec quicquam tibi prodesse potest, quod minoris esse pretii pignus quod dedisti propones, quominus huius quantitatis solutioni pareas. (If instead of a loan of money, which you asked from a creditor, you accepted silver or beasts of burdens, or other specific things the value of which had been agreed upon by both of you, gold having been given in pledge, even though you promised the *stipulator* interest exceeding twelve per cent: nonetheless only the principal which has been determined by the agreement of the parties, and under the heading of interest only the interest allowed by law is rightly claimed. And the fact that you declare the pledge which you have given to be of lower value cannot help you at all to avoid obeying the demand for payment of this amount) (293).

determined by the agreement of the parties could be claimed. This rescript was followed by Constantinus in *C* 4 32 25[73] with the result that where gold, silver, cloth or beast of burden *et cetera* were given in lieu of money only twelve percent interest could be charged on the agreed value of the object. However, it is submitted that *species* in *C* 4 2 8 still had the classical meaning of specific things and had not taken on the meaning of agricultural products[74] as yet. This is supported by the context of *C* 4 2 8; the absence of any mention of *species* in *C* 4 32 25 and finally by *C Th* 2 33 1.

In consequence, where the moneylender loans his client agricultural produce the *hemiolia* or fifty per cent could be lawfully agreed upon and rightly claimed until Justinian promulgated *C* 4 32 26.

## 7 *Pactum Commissorium*

It is noteworthy that Noodt does not mention the possibility of a *pactum commissorium*.[75] The only other link between interest and real security mentioned by him is the lien of the creditor over the pledge; thus interest is often collected by retention of the pledge, for example when interest has been promised in a bare agreement, and the pledge secures the interest as well.[76] However, he states clearly that interest above the legal limit cannot be collected by retention of the pledge[77] and that Papinianus correctly holds that neither pledges nor hypothecs shall secure unlawful interest.[78]

## 8 Conclusion

Noodt refers to excessive interest rates by way of his authorities; Cicero in *In Verrem* [79] refers to twenty-four per cent, Juvenalis in his *Saturae*[80] to thirty-six per cent, Cicero in *Ad Atticum*[81] and in his *Epistulae*[82] mentions forty-eight per cent while Horatius in his *Sermones*[83] speaks of five-fold

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73 *C* 4 32 25 Imp Constantinus A ad populum. Pro auro et argento et veste facto chirographo licitas solvi vel promitti usuras iussimus.(We have decreed that lawful interest be paid or promised on gold and silver and cloth owed in terms of a debt contained in a document).

74 Berger *Encyclopedic Dictionary of Roman law* (1953) *s v species* mentions that in later imperial constitutions *species* (in plur) indicates natural, agricultural products; see also n 56 57 59. As the *constitutio* in question dates from 293AD it cannot be certain whether agricultural produce was included. The *editio stereotypa* mentions in n 12 that the *codex Pistoriensis* reads *res* for *species* and the Basilica **πράγματα**.

75 C 8 34 3. Kaser *Das römische Privatrecht* I (1971) 461 nn 11 and 13, 470 n 5; Van Oven *Leerboek van het Romeinsch Privaatrecht* (1948) 172 176.

76 *C* 4 32 4 and 22; *D* 13 7 11 3. He also mentions that *C* 4 32 4 and 22 deny a creditor this lien for interest in special cases.

77 *C* 4 35 19

78 *D* 22 2 4.

79 III 71.

80 IX 7.

81 V 21 11.

82 VI 1 5 & 6 and letter 2 7.

83 I 2 14.

prices, that is to say sixty per cent. However, Noodt never addresses the question concerning the legality or the legal construction of such loans. In respect of the limit placed on interest Noodt does not venture an opinion in spite of his belief that interest is the price for use and risk. Although he does make mention of various stratagems of evasion,[84] it should be noted that Noodt is diligent in his exposition of the remedies against such abuses, refuting Cuiacius' interpretation concerning *antichresis* and holding that Gordianus had forbidden the transformation of a money loan into produce. Nor does he draw attention to the relationship between *antichresis* and *hemiolia*, which in combination provided a *prima facie* lawful avoidance of the statutory limit on interest. Only the occasional hint reveals that he is well aware of evasive practices.[85] This approach is, however, the logical result of his pro-moneylender's stance, which makes him argue that usurers are not moneylenders, since the latter are good and only lend to reliable debtors.[86]

In the same vein our author refers to the brotherhood of man and solidarity between men and repeatedly reiterates that it is our duty to help our fellow man, but with the *caveat* that this fellow man must be a solid citizen with a temporary cash-flow problem and that our help comes at a

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84 II 13. De vario atque incredibili usurarum abusus, cum manifesto, tum tecto, qui olim fuit: & adducta notabilia utriusque exempla: itemque remedia adversum abusum (On the diverse and incredible abuses of interest, both overt and covert, which were once committed. Notable examples of both are given, and at the same time remedies against abuse) discusses C 4 2 8 and 4 32 16 as well as the guise of concealing usury as a penalty; in II 14 the practice to deduct something from the loan as 'sales tax' or 'gifts' is mentioned. In I 12 he sets out ways to avoid the canon law prohibition on interest and how interest was disguised as compensation for loss suffered or profit forfeited or hidden by way of a purchase and sale.

85 See I 2 17: erat autem aliqua avaritiae causa, aut potius color, hic petendi usuras majores licitis, sive legitimis, id est, centesimis; quod foeneratori esset frangendum, verbi gratia, argentum, aurumve, fabrefactum; nec iniquum videretur, id damnum ei a debitore majore usura, quam licita, reparari. auctor Ambrosius *De Tobia c* 3. (There was, however, some motive, or rather semblance, of avarice, in seeking interest higher than that which was allowable or lawful, in other words higher than 12 % per year, in this case; because if, for example the silver or gold artefact were to be broken by the lender, it would not be seen as unfair that such a loss would be compensated by the debtor with interest over the allowed rate. The author Ambrosius says in chapter 3 of his *De tobia*).

86 II 13 228: Sed liquet pessimi res exempli. sic enim vere dixerim. nam si qui ad eum modum exererent foenus, hi non duri aut acerbi foeneratores, sed impudentes atque improbi, habebantur. nempe, quia causa tam immanis usurae non poterant alia, quam turpis, esse. foeneratores enim, quamquam duri, tamen boni, quia pecunias suas ( quod libro ostendi primo c xi) non aliis foenerabant, quam quibus tuto credi possent, (quos Horatius *nomina certa* sequentibus appellat verbis *lib* 2 *epist* 1 *vers* 103). (But I could truly say that these are clearly the very worst examples. For if they lent money at that interest rate, they were not considered harsh or severe moneylenders, but shameless and dishonest. The reason is of course that a case of such monstrous interest could not be other than vile. For moneylenders, although harsh, were nonetheless good, because (as I pointed out above in chapter 11 of book I) they loaned at interest only to those to whom they could safely give credit, (who Horatius calls *nomina certa,* reliable debtors, in the following passage from book 2 *Epistula* 1 verses 103–105:).

price; in this way both creditor and debtor will contribute to the common wealth.[87] Thus Noodt proves himself an early protagonist of commercial capitalism.

87 I 6 186: igitur si indigeas mea pecunia, quia opprimit te, ut sit, temporaria inopia: tenebor quidem ejus usu, si possim, necessitati tuae succurrere: sed non gratis, si non aliud sit quod me impellat; sed mercede. sicut si opera mea vel domo vel simili indigeas: vult quidem humanae ratio conjunctionis, ut te juvem: sed non ut hoc gratis faciam; si non aliud sit, quod me moveat; sed mercede. aeque enim adjuvo te qui potes mihi hanc vicem praebere; cum te, interveniente mercede, juvo, ac cum gratis: & quamquam humani generis societas desiderat: ut, cum possim, adjuvem te indigentem ope mea: non tamen postulat, ut id gratis faciam: quia vult, utrumque nostrum quod potest, ad commune bonum conferre: me igitur usum sortis meae; te vero usuram, id est usus pretium. (So if you should need my money because you are weighed down by a temporary lack of funds, as often happens, then I shall be bound, if I can, to come to your aid in your need with the use of that money: but not free of charge if there is nothing else that compels me, but for a price. Just as if you need my work or my house or something similar: then indeed the principle of the brotherhood of men requires that I help you, but not that I do it free of charge, if there is nothing else directing me, but against payment. For I am helping you, who can do this in turn for me, as much when I assist you against payment as when I help you free of charge. And although human solidarity expects that I help you, when I can, when you need my assistance, it does, however, not demand that I do so free of charge, because it requires that both of us contribute to the common weal, what we can: that means for me the use of my principal, and for you interest, in other words the price of the use).