

A stratagem to avoid the limit on interest

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OPSOMMING

'n Slim plan om die grense betreffende rente te vermy

Die artikel ondersoek 'n aantal tekste in die *Corpus juris civilis* gebaseer op die aanname dat hul 'n gemeenskaplike kenmerk het, naamlik om die beperking wat die Romeinse reg op rente geplaas het, te vermy. 'n Analise van hierdie tekste maak dit moontlik om die metode wat gebruik is te rekonstrueer.

1 INTRODUCTION

The present recession shows that the world is ruled by bankers. This may not come as a surprise to legal historians and Romanists. The latter are well aware of the continuous conflict in Roman law between moneylenders and debtors and the policy to limit the interest rate.¹ The fact that organised banking managed to obtain a number of privileges enacted in *Novella* 136² indicates an outcome well ahead of the rude awakening of 2007/2008. The article investigates another well-kept secret, namely, how the Roman bankers and other moneylenders avoided the limits placed on interest. Non-observance of these limits was widely accepted,³ but technical avoidance, which must have been aided and abetted by lawyers, is only hinted at.⁴ However, a number of texts in the *Corpus Juris Civilis* may provide an indication of an apparently perennial practice and the article intends to link these texts and reconstruct the stratagem employed to commit usury.

1 Pikulska "Fenus unciarum" 2002 *RIDA* 165–183; Verboven "The *Sulpicii* from Puteoli and usury in the early Roman empire" 2003 *Tijdschrift voor Rechtsgeschiedenis* 7ff; Thomas "Did the Twelve Tables limit interest?" 2008 *TSAR* 52–65.

2 *De argentariorum contractibus*. Special rights were granted to bankers, eg an implied lien on property bought with their money.

3 Cf Horace (Quintus Horatius Flaccus, 65–8 BC, Roman poet) *Satirae* I 2 14; Cicero (Marcus Tullius Cicero, 106–43 BC, Roman statesman, philosopher, orator) *In Verrem* III 71, *Ad Atticum* V 21 11, *Epistulae* VI 1 5&6 and 2 7; Juvenal (Decimus Iunius Juvenalis, 55–127 AD, Roman poet) *Saturae* IX 7; Tacitus (Publius Cornelius Tacitus, 56–117 AD, Roman historian) *Annales* 6 16.

4 Eg Noodt (Gerard Noodt, 1647–1725, Dutch legal scholar) *De foenore et usuries libri tres* in *Opera Omnia* (1735) II 13 & 14.

2 LIMITS ON INTEREST

It is generally held that the Twelve Tables⁵ placed a limit on interest rates,⁶ although opinions concerning the extent of this limit vary from one per cent per year to one hundred per cent *per annum*. There appears good reason to assume that a limit on interest was first introduced by the *lex Duilia Menenia* of 357 BC,⁷ but as this statute also used the term *fenus unciarium*, interest of one-twelfth, the calculations still run from one to one hundred per cent per year. In 347 BC the rate of interest was halved, and in 342 BC the *lex Genucia* made lending money at interest illegal.⁸ In 51 BC the senate introduced the *usura centesima*, the limit of one per cent per month, which remained in force during the empire.⁹ The Justinian changes did not play a role in this respect.

The article assumes that the crucial distinction between evasion and avoidance¹⁰ was greatly appreciated by Roman moneylenders. Evasion is illegal and practised by stealth, threats, violence, intrigue and manipulation. Small lenders operated outside the law and collected with threats and force, while big players like Brutus in his dealings with the citizens of Salamis, made use of front men and could orchestrate *Senatus Consulta*.¹¹ Avoidance is within the law and successful stratagems are hard to beat. Another relevant distinction can be found between the different categories of loans, lenders and debtors. In his seminal work,¹² Andreau provides a definite structure and analysis of the Roman financial world during the rise and apex of Rome. Of particular interest for this article is his distinction between professional and amateur money-men. Other relevant distinctions are between micro and macro loans and between productive and non-productive loans. The clients of the Sulpicii¹³ were traders, while Brutus was a macro lender who lent to municipalities.¹⁴ Many people borrowed for purposes of consumption, which in the past meant that they had to rely on the equivalent of modern credit cards, *faeneratores*, issued by small-scale moneylenders charging above the interest limit.

A number of texts, which at first glance deal with innocuous facts and have drawn attention (and were saved for posterity) for dogmatic points of law and the legal development they represent, are interpreted from a different perspective. It

5 Table VIII 18 a. *Tacit. Ann. 6,16*: Nam primo XII tabulis sanctum, ne quis uncario amplius exerceret. b. *Cato de r. r. praef.*: Maiores – in legibus posiverunt furem dupli condemnari, feneratorum quadrupli.

6 Kaser *Das römische Privatrecht* I (1971) 486; Zimmermann *The law of obligations Roman foundations of the civilian tradition* (1990) 166; Thomas (fn 1) 56–64; Pikulska 179ff.

7 Livy (Titius Livius, 59 BC– 17 AD, Roman historian), *Ab urbe condita libri VII* 16; Thomas (fn 1) 61ff.

8 Livy VII 42; Thomas (fn 1) 60ff; Verboven 7.

9 Verboven 8; Zimmermann 168ff.

10 Cf Huxham and Haupt *Notes on South African income tax* (2006) 365: Tax avoidance versus tax evasion. Avoidance – an attempt to minimise tax liability using legal means; evasion – the use of illegal means to reduce a tax liability.

11 Cicero *Ad Atticum* V 21 10 and 12, VI 1 5 and 6, VI 2 7; Thomas “*Antichresis, hemiola and the statutory limit on interest in Gerard Noodt’s de foenore et usuris*” 2007 *De Iure* 52ff.

12 *La vie financière dans le monde romain les métiers de manieurs d’argents (IVe siècle av. J.C.–IIIe siècle ap. J.C.)* (1987).

13 Verboven *passim*.

14 Eg Salamis.

is argued that Roman moneylenders perfectly understood the concept of avoidance and that a fresh look at the texts in question unravels a long-serving stratagem.

3 HELPING A FRIEND?

3 1 D 12 1 11 pr

The point of departure is *D 12 1 11 pr*. This topic of the text is found in the title *De rebus creditis*, which deals with credit and sets out aspects of loans for consumption, loans for use, deposits, pledges and *stipulatio*.

Ulpianus libro vicensimo sexto ad edictum. Rogasti me, ut tibi pecuniam crederem: ego cum non haberem, lancem tibi dedi vel massam auri, ut eam vendereset nummis uteris. Si vendideris, puto mutuam pecuniam factam. Quod si lancem vel massam sine tua culpa perdideris prius quam venderes, utrum mihi an tibi perierit, quaestionis est. mihi videtur Nervae distinctio verissima existimantis multum interesse, venalem habui hanc lancem vel massam nec ne, ut, si venalem habui, mihi perierit, quemadmodum si alii dedissem vendendam: quod si non fui proposito hoc ut venderem, sed haec causa fuit vendendi, ut tu uteris, tibi eam perisse, et maxime si sine usuris credidi.¹⁵

A asked B for a loan of money. B had no money, but gave A a valuable object to sell and use the money so realised. Ulpian thinks that if the object is sold, the money is owed on the basis of a loan for consumption. However, the legal question under discussion was as to who would carry the risk relative to the object prior to the sale. The answer depends on the unasked question as to which contract or contracts the parties had concluded. Did the handing over of the gold dish establish a conditional or unconditional *mutuum*,¹⁶ *precarium*,¹⁷ *mandatum*,¹⁸ *aestimatum*¹⁹ or *do ut facias*,²⁰ which was changed into *mutuum*, if and when the dish was sold? No information is provided about the parties, but it appears unlikely that this scenario took place between two rich aristocrats or in the context of a banker and client relationship. Thus, it is likely that two middle class friends are the protagonists in this case.

15 Ulpian in his 26th book of his commentary on the Edict. You asked me to lend you money; because I had no money I gave you a dish or a piece of gold so you could sell this and use of the money. If you sold it, I think that the money made is owed as a loan. What is the position if the dish or the lump of gold was lost without your fault before you sold it, does the loss fall upon me or upon you. It is my opinion that the distinction made by Nerva is perfectly correct, namely, that the point of importance is whether I had the dish or the lump of gold for sale or not. If I had had it for sale, the loss is mine in the same manner as if I had given it to someone else to sell; but if it has not been my intention to sell it, but the only reason of the sale was that you might use the proceeds, you must carry the loss, especially if I lent the money to you interest free.

16 A loan for consumption subject to the suspensive condition that the object is sold (within a certain time); an unconditional loan for consumption would be a possibility if the handing over of the object were to be accepted as a *datio in solutum*.

17 *D 43 26 2 2*, *D 43 26 14* and *D 43 26 19 2*. Cf *infra* fn 39.

18 *G 3 155f*; *D 17 1 2 passim*; *I 3 26 pr–6*. Kaser “Die Verteilung der Gefahr beim sogenannten ‘Contractus Mohatrae’” in Guarino and Labruna (eds) *Syntelesia Vincenzo Arangio-Ruiz* (1964) 77 79.

19 Kaser (fn 18) 79ff in particular 80 fn 22.

20 Accursius in gloss *Si vendideris* ad *D 12 1 11 pr*.

3 2 Risk and transformation of contract

The question concerning the risk and transformation of a contract was addressed earlier in the same title in *D 12 1 4 pr.*

Ulpianus libro trigensimo quarto ad Sabinum. Si quis nec causam nec propositum faenerandi habuerit et tu empturus praedia desideraveris mutuum pecuniam nec vuleris creditae nomine antequam emisses suscipere atque ita creditor, quia necessitate forte proficiscendi habebat, deposuerit apud te hanc eandem pecuniam, ut, si emisses, crediti nomine obligatus esses, hoc depositum periculo est eius qui suscepit. Nam et qui rem vendendam acceperit, ut pretio uteretur, periculo suo rem habebit.²¹

In this text Ulpian discusses the case where money given in deposit was allowed to be used and the effect of this arrangement on the allocation of risk. He distinguishes the moneylender from professional bankers and moneylenders and thus places the transaction into an upper-class context. The friend wishes to borrow the money only if and when he needs it to pay for the land he wants to buy; obviously to minimise interest. The lender is prepared to accommodate him to the extent that he deposits the money with the potential borrower when he has to leave on a trip. If the sale is done, the money is owed as a loan. Before that moment the deposit is at the risk of the receiver. Ulpian motivates this deviation from the normal risk rule relative to deposit with the analogy that he who has received a thing to sell in order to use the money, holds the object at his own risk. Ulpian sees no problem regarding the contracts concluded and thought that the deposit was followed by a loan for consumption once the sale had been concluded.

Ulpian returns to the same legal problem in *D 12 1 9 9* and *D 12 1 10*:

D 12 1 9 Ulpianus libro vicensimo sexto ad edictum 9. Deposui apud te decem, postea permisi tibi uti: Nerva Proculus etiam antequam moveantur, condicere quasi mutua tibi haec posse aiunt, et est verum, ut et Marcello videtur: animo enim coepit possidere. Ergo transit periculum ad eum, qui mutuum rogavit et poterit ei condici.²²

D 12 1 10 Idem libro secundo ad edictum. Quod si ab initio, cum deponerem, uti tibi si voles permisero, creditam non esse antequam mota sit, quoniam debitu iri non est certum.²³

In these texts no information is forthcoming regarding the status of the depositor, raising the possibility that a deposit with a banker is being discussed. In the first

21 Ulpian In his 34th book of his commentary on Sabinus. In the case of a person who has no reason or made no proposal to lend out money at interest, and you who are on the point of buying land and are desirous to borrow money; but you do not want to owe this money before you have bought the property; in consequence, the creditor, who may have an urgent reason to leave, has deposited that money with you, with the arrangement that, if you should buy, you will be liable for the credit. This deposit is at the risk of the party who received it. Because anyone who has received an object in order to sell it so he can use the purchase price, holds that object at his own risk.

22 Ulpian in the 26th book of his commentary on the edict 9. I deposited ten with you, and later I allowed you to use the money; Nerva and Proculus hold that I can claim the money with a *condictio* from you, even before it was used, as if it had been lent. And this is correct and Marcellus is of the same opinion; because you had already become the possessor with your intention, in your mind. Therefore the risk passes on him, who asked for the loan, and the *condictio* lays against him.

23 The same in his second book of his commentary on the edict 10. If I allowed you from the beginning when I deposited the money with you to use it, if you wanted to, the money is not owed before the money is used, because it is not certain that anything will be owed.

texts a normal deposit is transformed in what later would become known as a *depositum irregulare*.²⁴ Ulpian follows Nerva and Proculus who were of the opinion that the *condictio*, in other words the action from *mutuum*, became available as soon as the parties agreed that the deposited money could be used. Thus, even before the money was used the contractual relationship between the parties changed from *depositum* to *mutuum*. Marcellus held the same opinion and motivated this with the argument that you had already become possessor *animo*.

However, in the next text Ulpian holds that if the depositor had allowed use of the money from the moment of deposit, the money only becomes owed in terms of *mutuum* once it has been used. His argument is that it is not certain whether it will be owed. Why the same argument did not apply in the previous text and, more pertinently, why this consideration was not raised in *D 12 1 4 pr* – the case of the aristocratic moneylender and his peer who wanted to buy land – is not clear. Moreover, only in *D 12 1 9 9* does Ulpian connect the availability of the *condictio* and the placement of the risk. It should be kept in mind that in their original setting only *D 12 1 9 9* and *D 12 1 11 pr* appeared in the same work and book, namely book 26 on the *Edict*, while *D 12 1 10* was taken from book 2 of the same commentary, but *D 12 1 4 pr* did not appear in the same book or work.²⁵ The upper-class moneylender deposited for another reason than the undefined parties in the last two texts, namely, to accommodate his peer. The non-specified parties of these deposits may well have been a banker and client, while a whiff of teaching examples can also not be excluded. The different solutions may be explained by the balance of interests,²⁶ which is difficult to deduce from minimalists texts and the only guideline in this respect is which party had taken the initiative.²⁷

As a consequence it is remarkable that in the instance of *D 12 1 11 pr* it was not the handing over of the dish or the sale of the dish which decided the risk allocation, but a totally new criterion, namely, whether the lender had the dish for sale or not. In the footsteps of Andraeu this fact would place the transaction outside the world of professional bankers, which is also the approach of Kaser and Zimmermann. In his textbook Kaser²⁸ limits himself to the view that *D 12 1 11 pr* shows that since Nerva these facts were considered to be *mutuum*. However, in his essay in *Syntelesia Vincenzo Arangio-Ruiz*,²⁹ he was more nuanced and stated that the recognition of *mutuum* in the circumstances described in *D 12 1 11 pr* was not unanimous.³⁰ Addressing Nerva's allocation of risk, Kaser considered this solution representative of the proper classical interest theory.³¹ He

24 Recognised by Justinian; named by Jason de Mayno. Zimmermann 218ff.

25 Book 34 of Ulpian's commentary on Sabinus.

26 Cf Kaser (fn 18) 79 81.

27 Cf *D 12 1 9* and *D 12 1 10*. Gloss *Credidi* ad *D 12 1 11 pr*. Also Kaser (fn 18) 81.

28 531 fn 6.

29 Kaser (fn 18) 74–83 discusses an earlier essay with the same title by Koschaker (*Gerichts-Zeitung, Sondernummer J. Schey*, Wien 1923, IX–XI) and refutes the conclusion as well as most older secondary sources on this topic on account of the paradigm shift away from the interpolation method.

30 75 esp fn 4.

31 81: “Und Nerva fand dieses (ein Kriterium) darin, ob der Verkauf im Interesse auch des Gebers lag, weil er die Sache ohnehin verkaufen wollte, oder ausschliesslich in dem des kredit-suchenden Nehmers . . . Diese Unterscheidung . . . beruht auf gut klassischer Interessenabwägung.”

considered *C 4 2 8* a step forward because an action – he did not choose whether this action was on the basis of *mutuum* or *stipulatio* – became immediately available, which represented an extension of recognition of indirect provision of money in *mutuum*.³² Zimmermann³³ follows in Kaser's footsteps and discusses *D 12 1 11 pr* and *C 4 2 8* as steps within the evolution towards a consensual loan for consumption. Without derogating either opinion, this article takes a less doctrinal approach and analyses the content of this text and related texts within the context of usurious money-lending. At first glance the case concerns two friends, and this is indeed the context in which both Kaser³⁴ and Zimmermann interpret the relationship,³⁵ thus following a tradition set during the Middle Ages.³⁶ This leads to the question as to why the set of facts of the two friends engaged in lending and borrowing money when neither has cash, recurs in the texts. *D 12 1 11 pr* indicates that already Nerva³⁷ had been consulted on the question of the risk when the thing given was lost before the sale. Thus, during the first century AD the "friends" were ready to become litigants. More than a hundred years later Ulpian discussed an identical legal question in *D 12 11 1 pr*, and another aspect of the same relationship in *D 19 5 19 pr*.

3 3 *D 19 5 19 pr*

D 19 5 19 pr. Idem [Ulpianus] libro trigesimo primo ad edictum. Rogasti me ut tibi nummos mutuos darem: ego cum non haberem, dedi tibi rem vendendam, ut pretio uteris. Si non vendidisti aut vendidisti quidem, pecuniam autem non accepisti, tutius est ita agere, ut Labeo ait, praescriptis verbis, quasi negotio quodam inter nos gesto proprii contractus.³⁸

This text refers back to an opinion of Labeo, in other words to a case during the reign of Augustus. Leaving the questionable *actio praescriptis verbis*³⁹ aside, the text makes it clear that the practice of borrowing money from moneyless lenders appears to have been current already during the early empire. Labeo appears unsurprised at the facts, but could not place a label on the legal construct. However, he did not reject the idea that some type of contract had been entered into and presumably advised to proceed with an *actio in factum*.⁴⁰ Ulpian concurs with his argument that a special contract had been concluded. It should, however, be kept in mind that the text deals with an actual legal problem, namely, the fact that the

32 82.

33 160ff. *D 12 1 15* and *12 1 11 pr* are viewed as precursors to *C 4 2 8*.

34 77ff.

35 162.

36 Cf Vivianus' casus on *Rogasti me* (*D 12 1 11 pr*). Eram amicus tuus. Gloss *Si quis nec causam* ad *D 12 1 4 pr*. Vel amicitia eum esse motum ad mutuandum.

37 Either father (ob 33 AD) or son (son praetor designate 65 AD).

38 Ulpian in the 31st book of his commentary on the *Edict*. You asked me to lend you money: because I did not have any, I gave you a thing to sell so that you could use the price. If you did not sell it or sold it but did not accept the money as a loan, it is safer to proceed, as Labeo held, with the *actio praescriptis verbis* as if whatever transaction performed between us had been a special contract.

39 The question whether this action was available in classical law is controversial. Van Oven *Leerboek van Romeinsch privaatrecht* (1948) 296ff; Kaser (fn 6) 259 fn 79, 582f; Zimmermann 534. However, the late classical availability of the *actio praescriptis verbis* may be an indication that the relationship until sale of the object could be considered *precarium*; cf *D 43 26 2 2*, *D 43 26 14* and *D 43 26 19 2*.

40 Kaser (fn 18) 79; (fn 6) 486 580ff.

borrower had either not sold the object “lent” to him or had not accepted the money realised by the sale as a loan after selling the object. The legal question was thus how to get the object or the price thereof back. Neither Labeo nor Ulpian distinguished whether the object had been sold or not and considered that the facts constituted a contract *sui generis*.

The fact that the practice of giving a thing to sell when asked for a loan of money was well known among jurists is also supported by the following text.

3 4 D 17 1 34 pr

*D 17 1 34 pr Africanus libro octavo quaestionum. Qui negotia Lucii Titii procurabat, is, cum a debitoribus eius pecuniam exegisset, epistulam ad eum emisit, qua significaret certam summam ex administratione apud se esse eamque creditam sibi se debiturum eum usuris semissibus: quaesitum est, an ex ea causa credita pecunia peti possit et an usurae peti possint. respondit non esse creditam: alioquin dicendum ex omni contractu nuda pactione pecuniam creditam fieri posse. nec huic simile esse, quod, si pecuniam apud te depositam convenerit ut creditam habeas, credita fiat, quia tunc nummi, qui mei erant, tui fiunt: item quod, si a debitore meo iussero te accipere pecuniam, credita fiat, id enim benigne receptum est. his argumentum esse eum, qui, cum mutuam pecuniam dare vellet, argentum vendendum dedisset, nihilo magis pecuniam creditam recte petiturum: et tamen pecuniam ex argento redactam periculo eius fore, qui accepisset argentum.*⁴¹

In this text Africanus relies on his mentor Julianus (c 110–c 170 AD) to confirm that a loan of money cannot be concluded by mere agreement. In the motivation of this opinion the case under discussion – the procurator asking his principal in a letter whether he could borrow the money collected for the latter – is distinguished from other instances in which the requirement of delivery had been relaxed. The cases were obviously well-known and short references were used; for example, the agreement that deposited money could be borrowed⁴² or the instruction to receive money from my debtor.⁴³ The moneylender who gave silver instead of money resurfaces once again; neither Julianus nor Africanus appears to

41 Africanus in the 8th book of his Questions. When the procurator of Lucius Titius had collected money from the debtors, he sent him a letter informing him that he held a certain sum in terms of his administration and that if this was lent to him he would pay six percent interest. It was asked whether from such cause the money could be claimed as lent and whether the interest could be claimed. He (Julianus) opined that the money was not lent, because otherwise it could be said that money from any contract could be made into a loan by mere agreement. And this was not similar to the case where money was lent if it had been agreed that you could borrow the money deposited with you, because in that instance the coins which were mine, became yours. The same applies in the case where money was lent, if I instruct you to receive money from my debtor, because that has been accepted benevolently. For these the argument is that he, who has given silver to sell when he wanted to lend money, would neither be correct in claiming for money owed; although the money realised from the sale of the silver will be at the risk of him who accepted the silver. The words *his argumentum esse* are rather inconclusive and therefore confusing. The Watson translation reads: “[He went on to say that] from these [remarks] it could be argued that a man who, wishing to give money as a loan for consumption, had given silver to be sold would not, for all that, be right to claim the money as lent.” Cf the German translation: “Dafür diene als Argument, dass ebenso wenig derjenige zu Recht die Darlehensklage erhebe, der ein Gelddarlehen gewähren wollte und dem Empfänger Silber zum Verkauf gegeben hat” (transl Krampe).

42 Cf *D 12 1 9 9*.

43 Cf *D 12 1 15* and *D 24 1 3 12* and 13.

have been prepared to accept the conclusion of *mutuum* even after sale of the silver, but agreed on the fact that the risk was on the “borrower”.

3 5 C 4 2 8

In 293 AD the “two friends” obtained an imperial rescript found in C 4 2 8.

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 consensu aestimatas accepisti, dato auro pignori, licet ultra unam centesimam usuras stipulanti spondisti, 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 proponis, quominus huius quantitatis solutioni pareas.⁴⁴

This rescript was entered in the title *Si certum petatur*, which indicates that any reservations concerning the use of the *condictio* had been left behind.⁴⁵ It may thus be assumed that a completed transaction of this kind was considered *mutuum*. However, the imperial opinion provides important additional information, namely, that before delivery of the object the parties agree upon its value. The case has a familiar ring to it. You ask a person for a loan of money. He says that he does not have any money, but instead offers you silver or animals or other things to sell and use this money. The parties agreed upon the value of these objects. Moreover, the borrower had delivered gold in pledge and the lender stipulated interest of more than twelve per cent. The imperial chancery was of the opinion that the debtor owed the estimated value of the objects as principal and twelve per cent interest on this amount. The fact that the value of the pledged gold was less was considered irrelevant.

C 4 2 8 has been hailed as a step forward, which would consist in the fact that if the parties had agreed upon an estimated value of the delivered object, this amount could be claimed.⁴⁶ However, it is difficult to imagine the relationship under discussion without a valuation of the object having been made. The absence of a valuation would place the lender at the mercy of the borrower, who could sell the thing at far below the value and would only be liable for the realised price. From the questions posed it would appear that C 4 2 8 addresses a completed transaction by which is meant that the object had been sold.⁴⁷ The text indicates that the petitioner objected to both the amount of the principal and the rate of interest. There is no indication how much the borrower actually received as price for the borrowed objects. However, the petitioner’s argument that the

44 Emperors Diocletianus and Maximianus to Proculus. If instead of the loan of money, which you asked from the creditor, you did accept silver or beasts of burden or other specific things the estimated 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 was determined by the agreement of the parties, and as interest only the interest allowed by law can be claimed. And the fact that you declare that the pledge you gave was of lower value, cannot help you at all to avoid obeying the demand for payment of this amount.

45 Kaser (fn 18) 82 holds that the principal determined by the valuation by the parties can be claimed “mit der Klage aus dem Darlehen”; in n 33 he adds “Allenfalls aus Stipulation”. Zimmermann 162.

46 Cf *supra* fn 32 and 33.

47 Another argument in favour of a completed transaction is that the debtor would be able to raise the *exceptio doli* or later the *exceptio non numeratae pecuniae* if he had not sold the thing and thus not received any money. Cf also *supra* the discussion of D 19 5 19 pr.

value of the pledged gold was lower than the estimated value of the delivered object explains the paradox that the prospective borrower was willing to accept silver or animals to sell, when he had gold. In consequence, there is a strong indication that the estimated value exceeded the realised proceeds. This brings the whole construct into the field of usury as the borrower is indebted for much more than he actually received and pays twelve per cent on this fictitious amount. In such context *C 4 32 25* can also be interpreted in a meaningful manner as Constantine appears to have addressed this construction in the title *De usuris: C 4 32 25 Imp Constantinus A ad populum. Pro auro et argento et veste facto chirographo licitas solvi vel promitti usuras iussimus*.⁴⁸

This constitution addresses two points of law. First, whether interest only applies to money,⁴⁹ and the amount of interest payable⁵⁰ when instead of money, objects were given to the debtor. In short, in the facts described in *D 12 1 11 pr*, *D 17 1 34 pr*, *D 19 5 19 pr* and *C 4 2 8*, a person wishing to borrow money was persuaded by the moneylender to accept goods, gold or silver or cloth. It is a *conditio sine qua non* that the parties agree upon an estimated value, since interest is payable on this amount. The emperor decreed that lawful interest, that is, only 12 per cent per year, can be paid or promised on the basis of the valuation of the goods. The constitution requires that a document is drawn up⁵¹ and it is obvious that the valuation had to be made before or when such an “IOU” was drafted.

4 ANALYSIS

The *Digest* texts deal with the questions of risk and which action must be instituted. Both questions depend on the contract concluded. The texts show that a *communis opinio* was evasive and that even Ulpian wavered. In *D 12 1 4* he proposes the argument that anyone who has received an object in order to sell it so he can use the purchase price, holds that object at his own risk.⁵² However, when this exact situation presented itself in *D 12 11 1 pr*, Ulpian did not apply his own argument, but relied on the authority of Nerva to introduce the distinction as to whether the object had been for sale or not.⁵³ In the same text he gives his opinion that if the object is sold the money made is owed as a loan,⁵⁴ but in *D 19 5 19 pr* he follows Labeo and advises the *actio praescriptis verbis* and not the *condictio*.⁵⁵ This was in line with the reasoning of Africanus and Julianus in *D 17 1 34*

48 Emperor Constantine to the people. 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.

49 The widespread belief that interest relates only to money was also addressed in *C 4 32 23* and *4 32 11 (12)*. Also Hieronymus (Saint of the Church and prolific author c 340–420 AD) *Ezekiel 6 18 206*; Noodt *I 2 177ff*; Thomas (fn 11) 55ff.

50 Namely “*licitas usuras*,” that is twelve per cent per year. Cf *C 4 2 8*: *Licet ultra unam centesimam usuras stipulanti spondesti . . . usurarum titulo legitima tantum rectepetitur*.

51 *Facto chirographo*.

52 *Nam et qui rem vendendam acceperit, ut pretio uteretur, periculo suo rem habebit*.

53 *(V)enalem habui hanc lancem vel massam nec ne, ut, si venalem habui, mihi perierit, quemadmodum si alii dedissem vendendam: quod si non fui proposito hoc ut venderem, sed haec causa fuit vendendi, ut tu uteris, tibi eam perisse, et maxime si sine usuris credidi*.

54 *Si vendideris, puto mutuum pecuniam factam*.

55 *Si non vendidisti aut vendidisti quidem, pecuniam autem non accepisti, tutius est ita agere, ut Labeo ait, praescriptis verbis, quasi negotio quodam inter nos gesto proprii contractus*.

pr. The imperial chancery was not asked the same questions,⁵⁶ but the categorisation of C 4 2 8 indicates that the transaction was viewed as *mutuum*.

5 HYPOTHESIS

It is submitted that the above texts represent an age-old practice of avoiding interest limits. The relevant elements can be reconstituted from the various texts. When the client approaches the moneylender, the latter pretends not to have cash available. Instead of money one or more objects are offered and the arrangement is that the debtor shall sell the goods and use the price realised as a loan. However, before the object is delivered an estimated value is agreed upon. To believe that valuation of the object represents a later development is naive. Omission to place an estimated value on the object from the start would leave the lender at the mercy of the borrower. The latter could and would offer the object at a bargain price to realise a quick sale and get his hands on money. Moreover, he would only be liable to repay the amount realised by the sale. It is therefore submitted that, from the beginning, the valuation of the object was an integral part of the transaction and that the “borrower” was liable to repay the amount agreed upon and not the price he received as the result of the sale. In this manner usurious interest could be realised. If an object was valued at 100, the principal was 100. Twelve per cent interest was calculated. The object was sold for 75. After one year 112 was due, of which in reality 37 was interest, which is nearly 50 per cent of 75.

This transaction was effected in daily practice and rarely reached the courts or the preliminary opinion practice. When this happened a particular aspect was scrutinised. For example, who carried the risk in the object before it was sold?

This hypothesis is to an extent confirmed by a chapter in the *De Tobia* of Saint Ambrose, his work against usury, in which he described how the moneylender operates.

6 DE TOBIA

De Tobia Caput III. Ambrosius feneratorum inhumanitatem in pauperes, et eorum artes quibus illos sibi addicunt, oculia subjicit; ac demum in eosdem invehitur. 10. At ubi usurarum mentio facta fuerit, aut pignoris, tunc dejecto supercilio fenerator arridet, et quem ante sibi cognitum denegebat, eundem tanquam paternam amicitiam recordatus osculo excipit, haereditariae 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 emblematum? Sed pro amico dispendium non reformidabo, cum reddideris, reficiam. Itaque antequam det, recipere festinat: et qui in summa subvenire se dicit, usuras exigit. Kalendis, inquit, usuras dabis: fenus interim, si non habueris unde restituas, non requiro. Ita semet det, frequenter exagitat, et semper sibi debere efficit. Hac arte tractat virum. Itaque prius eum chirographis ligat, et astringit vocis suae nexibus. Numeratur pecunia, addicitur libertas, absolvitur miser minore debito, majore ligatur.⁵⁷

⁵⁶ The questions posed revolved around the quantum of both principal and interest, which becomes clear from the opinion “tamen sors, quae aestimatione partium placito definita est, et usurarum titulo legitima tantum recte petitur”.

⁵⁷ But when interest was mentioned, or pledge, the moneylender smiles with downcast eyebrows, and with a kiss welcomes the same man, whom he previously denied knowing, as if remembering a family friendship and invokes the pledge of hereditary affection, and tells

continued on next page

him not to weep. 'We shall see, he says, whether we have any money at home; for you I shall break the beautifully made family silver: the loss will be very great. What interest will compensate the value of the ornaments? But for a friend, I shall not shun the loss, when you pay me back, I shall have it repaired.' Thus before he gives, he hastens to take back: 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 he gives once, but demands frequently, and always manages that he is owed money. In this way he plays the man. Thus before he binds him with IOU's, he ties him down with his voice. Money is paid, liberty is enslaved, the wretch is released of a small debt and bound for a bigger one.

Although not completely logical,⁵⁸ the text clearly illustrates that moneylenders were in actual fact delivering goods rather than cash to their clients. This information helps to unmask these facts as a stratagem to avoid the limits on lawful interest.

7 CONCLUSION

The texts discussed in this article were retained in the *Digest* for dogmatic reasons, for example the relationship between the utility principle and the allocation of risk, and drawing the boundaries for *traditio ficta*.⁵⁹ Nevertheless, they provide indirect information on daily practice and in this instance traces of usurious practices may be discovered. *Codex* 4 2 8 was an imperial rescript, that is an opinion of the imperial chancery on a specific legal question, while *Codex* 4 32 25 was of general application. The traditional interpretation of ambivalent texts in post-classical statutory law is based on rampant inflation or scarcity of money. However, if money was really so scarce that the moneylenders did not have cash, how was the borrower supposed to convert the lent objects into cash? The text by Saint Ambrose refers to this situation with some embellishments and from his words it is clear that this was just a stratagem to avoid the regulation of interest.

The legal question as to which contract or contracts were concluded was not directly posed to the classical jurists and the *responsa* show the wide variety of Roman casuistry. The *Codex* texts indicate that in post-classical law the described relationship between the usurer and his client was classified under *mutuum*. Finally, the assumption that the texts discussed related to two friends can be put to rest with the words of Mr Tillitson: “Loan oft loseth both itself and friend. The Bard is always right.”⁶⁰

58 In particular: “Sed pro amico dispendium non reformidabo, cum reddideris, reficiam.” The obvious translation “But for a friend, I shall not shirk the loss, when you return it, I shall have it repaired” does not fit the hypothesis that the debtor is to sell the object. An alternative translation which would fit the hypothesis is “For a friend I will shun the loss, when you pay me back, I will make it back”, but is open to philological criticism.

59 Cf eg Johannes Voet *Commentarius ad Pandectas* I (1731) 12 1 4, 5 and 6.

60 Huxley (Aldous Huxley, 1894–1963, English novelist) “The Tillotson banquet” in *Mortal coils. Five stories* (1922) 71–97.