Hugo Grotius, Google Translate, and Some Others: Issues Regarding Money Loans

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Abstract

Relying on Hugo Grotius's analysis of money lending, this paper aims to illustrate the reasons why, though unanimously praised as a philosopher and a lawyer, his recognition for his contribution to the shaping of economic ideas is far from assured. An investigation of several translations and re-editions of Grotius's *De Jure Belli ac Pacis* (1625) shows that, when they deal with the different types of loan contract, they favour variants of a functional, rather than structural, distinction between them – which makes it possible to identify what remains in the hands of the lender as the object of the disagreement between Grotius and the earlier scholastic approach. It is then shown that this disagreement concerned the nature of usufruct and property during a money loan. Grotius borrowed from the *Digest* the idea of an expanded usufruct, the price of which can be interpreted as the interest paid to the lender. This called for a reconsideration of what property right was all about. Such a reconsideration leads us to see in a property right derived from the very possibility of contracting through a *mutuum* the source of the expanded usufruct. However, this was not made explicit in the *De Jure*, but in an earlier commentary by Grotius on Luke 6:35, mentioned by Barbeyrac in a footnote to his 1724 translation, but which disappeared from most later translations and editions. Insofar as economic issues are concerned, the identification today of Grotius's contribution is still dependent on various editions of the 18th and 19th centuries, i.e. of their translation and editorial biases.

1. Introduction: Grotius, loan contracts, and Google Translate

This paper was initiated by my imprudent request to Google Translate to process a short passage of Hugo Grotius's chapter on contracts in his *De Jure Belli ac Pacis* (1625), obviously written in Latin. It was in these few lines that Grotius had challenged the core of the scholastic doctrine of usury, namely the impossibility of transferring the use of money to the borrower without the transfer of its ownership. Such a position, made clear by Thomas Aquinas in his *Summa Theologiae* (IIa-IIae, q. 78, a. 1, resp.) or in *De Malo* (q.13, a.4c), called for the legal framework of a contract from Roman law, the *mutuum*, in which both ownership and use are transferred from the lender to the borrower. In such case, the loan is free because the lender has

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the ownership of the loaned good during the loan – an ownership which would justify the payment of interest.

The most striking part of Grotius's argument against this view is when he compared two pairs of contracts from Roman law, the *mutuum* and the *foenus* on the one hand; the *commodatum* and the *locatio* on the other hand. These four contracts are differentiated structurally from each other in two ways: i) the *mutuum* and the *commodatum* are free loans, unlike the *foenus* and the *locatio*; ii) the ownership of the good lent is transferred with its use in the case of the *mutuum* and the *foenus*, whereas it remains in the hands of the lender in the case of the *commodatum* and the *locatio*. In the case of the *mutuum* and the *foenus*, the thing lent is returned to the lender *in genere*, that is in kind, whereas it is returned *in specie* in the case of the *commodatum* and the *locatio*, that is the same physical object is given back to the lender. It was in regard to these loan contracts that Grotius claimed that the *mutuum* is to the *foenus* what the *commodatum* is to the *locatio*:

> Nam quod de mutuo dicitur gratuitum esse, tantundem et de commodato dici potest : cum tamen pro usu rei pretium exigere illicitum non sit, sed efficiat ut contractus in aliud nomen transeat. (*De Jure*, II, 12.20.1)[1].

A footnote, after *dici potest* in the above passage, allowed him to confirm the comparison, by showing that since Roman antiquity, the words *commodatum*, *mutuum* and *foenus* have all been used to denote money lending. It was on this occasion that he insisted:

> Valde enim affinia commodatum et mutuum, ut locatio et foeneratio. (*De Jure*, II, 12.20.1, fn. 1)

Insofar as, when it comes to matters relating with the prohibition of usury, the names of the above Roman contracts are now commonly used as they stand (for example, J. Noonan 1957, p. 40), without the need to transpose them specifically into English, it is reasonable to translate the passage from *De Jure*, II, 12.20.1 (see Lapidus 2021, p. 107; 2023, p.11) and its footnote as follows:

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

[1] The edition used of Hugo Grotius's *De Jure Belli ac Pacis* is that by J.B. Scott in 1913, which reproduces the 1646 edition, published just after Grotius's death. References are given according to the numbering for chapters, sections and sub-sections in the quoted translation. Otherwise, that is, in most cases, the numbering in Kelsey's translation from 1925 is used.

> For there is a great affinity between *commodatum* and *mutuum*, like between *locatio* and *foenus*. (*De Jure*, II, 12.20.1, fn. 1).

Basically, the reference to a change of name when a payment is made is all the more justified in that these contracts fall into distinct categories, set out in book 3 of Justinian's *Institutes* (titles 13 to 29): the *mutuum* and the *commodatum* are *real contracts*, or contracts *re*, in which it is usually considered that they are formed by the delivery of a thing, *res*, or the performance of an act (*Institutiones*, 3.14.pr., 1 and 2); the *locatio* is a contract *consensu*, a synallagmatic contract of good faith only based on the agreement of the parties (*Institutiones*, 3.24); by contrast, the payment of an interest through a *foenus* requires another type of contract known as a contract *verbis* (a formal contract of strict law by "word of mouth"), typically a *stipulatio* consisting in a question (from the creditor) and an answer (from the debtor) mutually coherent (*Institutiones*, 3.15). The operation which allows the initial real contracts to be transformed into, respectively, *foenus* and *locatio* is therefore a move from one legal category to another. Properly speaking, a move reflected by a change of words, as Grotius called it.

Yet Google Translate did not see things quite so clearly:

> For what is said of a loan to be gratuitous, the same can be said of a loaned one: since, however, it is not illegal to exact a price for the use of the thing, but to cause the contract to pass into another name. (Google Translate, 2023/07/03).

> In fact, lending and borrowing are very closely related, such as leasing and financing (Google Translate, 2023/07/22).

Perhaps a generous reading, disregarding the translation of the footnote, might be satisfactory. However, my feeling is that it compared, on the one hand, a loan without a price and a loan with a price to conclude that it is not illegal to ask a price for the use of a thing. And in the footnote, the comparison moves to lending and borrowing, which are related to leasing and financing.

I freely admit that when it comes to Latin versions, I trust the Latinists around me (I'd like to take this opportunity to express my gratitude to them) more than Google Translate. And this, although I give it the extenuating circumstances it deserves, because its database is made up of the only corpus of ancient and medieval sources that have been translated into English; and this is really no match for the countless translated documents that exist, for example, between French and English.

But if you think about it, Google Translate puts its finger on an old and well-known translation problem. The subtlety of the distinction between *mutuum* and *commodatum* is

difficult to convey. E. Gibbon already noted this difficulty in the chapter on Roman jurisprudence from his *Decline and Fall of the Roman Empire*, emphasizing that unlike the Latin language, "our poverty is reduced to confound [both types of contracts], under the vague and common appellation of a loan" (Gibbon 1788, p. 368). A century later, F. Pollock and F.W. Maitland quoted Gibbon in a footnote, to support their position that "Englishmen are without words which neatly mark the distinction" (Pollock, Maitland 1895, vol. 2, p. 177, fn. 531). And, again one century later, Zimmermann (1996, pp. 188-189) hold the same view, quoting his predecessors – a view also shared by Birks (2014, p. 31), who noted "that the class of contracts '*re*' does not slip easily into English".

Yet, I took the translation that was offered to me as an invitation to explore those that preceded it. Google Translate, when I used it, came in at the end of the chain, after many translations of the *Law of War and Peace*, which were in no way indebted to artificial intelligence. It was clear to those who had to deal with Grotius's original text that the peculiarities of his expression justified, more than in many other cases, recourse to a translation. One of his eminent first translators (into French), J. Barbeyrac (1724, p. i), was persuaded of "the need for a more intelligible and accurate translation" – more than that of his predecessor, A. de Courtin (1687) – for an author who, as he noted further, translated "passages of Greek poets into Latin verse, which was fun for him" (*Ibid*., p. xxvi) – thus hinting that it was not as funny for all his readers. W. Whewell, who published an abridged translation of the work (into English) in the mid-19th century ("abridged" meant that the translator had removed a great deal of the quotations and scholarly incidentals, which reduced significantly the size of the text), pointed out that his work might be of concern even to those of his readers who had benefited from a classical education:

> The translation may perhaps be welcome, even to the classical scholar, for Grotius's style is not only very concise and pregnant, but also full of expressions borrowed from the jurists and the schoolmen. (Whewell 1853, p. xiv).

And for those who might still have doubts, Foster dispelled them a few decades later, as an acute observer of Grotius's stylistic sophistication, through an "attempt to present in pure and readable English" his *Defence of the Catholic Faith*:

> Grotius's style was eminently sequacious. He delighted in linking his sentences together by innumerable connective particles, and availed himself freely of the resources of the Latin language to accomplish this (Foster 1889, p. vii).

An investigation of several translations and re-editions of Grotius's *De Jure Belli ac Pacis* shows that, when they deal with the different types of loan contract, they move away from a *structural* distinction (emphasizing the nature of what is transferred) in favour of primarily a *functional* distinction between them (what these loans seem to be made for). This makes it possible to identify what remains in the hands of the lender as the object of the disagreement between Grotius and the earlier scholastic approach (section 2). It is then shown that this disagreement concerned the nature of usufruct and property during a money loan. Grotius borrowed from the *Digest* the idea of an expanded usufruct, of which the price can be interpreted as the interest paid to the lender. This called for a reconsideration of what property right was all about. Such a reconsideration leads us to see in a property right derived from the very possibility of contracting through a *mutuum* the expression of the expanded usufruct. However, this was not made explicit in the *De Jure*, but in an earlier commentary by Grotius on Luke 6:35. This commentary was mentioned by Barbeyrac in a footnote to his 1724 translation, taken up by Morrice in 1738, but disappeared from most later translations and editions (section 3). Insofar as economic issues are concerned, the identification today of Grotius's contribution is still dependent on various editions of the 18th and 19th centuries, i.e. of their translation and editorial biases.

2. Is comparison reason?

Long before Google Translate, the refinement of the syntax in Latin and the sophistication of the references to Roman law, the *Scriptures*, and their commentaries, made it clear that Grotius's masterpiece was worth translating for those unfamiliar with them. Among whom, of course, economists, since Grotius was talking about economics.

2.1. Naming what is to be compared

However, returning to the question of loan contracts, it must be admitted that this laudable objective of secularising the language of Grotius has only been partially achieved. Of course, this is more satisfying than Google Translate, which translated *mutuum* and *commodatum* first as, respectively, loan and loan, and then, as lending and borrowing whereas *foenus* and *locatio* respectively gave financing and leasing. But a common feature of most translations is that they focus on the commonly admitted *function* of each loan, rather than on their *structural properties* – what they are done for, rather than what they consist in.

A typical example was given by J. Barbeyrac's great translation into French:

> On dit, par exemple, que le Prêt à consomtion est gratuit de sa nature. Mais on pourrait en dire autant du Prêt à usage. (Transl. Barbeyrac 1724, II, 12.20.2)[2].

The distinction is between a loan for consumption (*Prêt à consomtion*) and a loan for use (*Prêt à usage*) – not between a loan which transfers both ownership and use, and a loan which transfers only use. An early eighteenth-century scholar, reasonably familiar with civil law, would have easily recognised the structural distinction between the two types of loan behind the functional distinction displayed – perhaps with the help of the translation of *foeneratio* and *locatio* in the footnote by respectively *Prêt à usure* (usury loan) and *Contrat de louage* (hire contract). Even today, specialists in Roman law refer to *mutuum* alternatively as a "loan for consumption" or to *commodatum* as a "loan for use" (see, for example, Birks 2014, pp. 30 and 129 sqq.). But outside this privileged circle of readers, especially among economists, the sentences that follow are likely to confound those seeking to establish a link with loans for consumption and loans for use:

> Cependant il n'est point illicite d'exiger quelque argent pour l'usage d'une chose qui nous appartient. Tout ce qu'il y a, c'est qu'alors le Contract change de nom. (Transl. Barbeyrac 1724, II, 12.20.2)[3].

J. Morrice's translation into English, which was explicitly based on Barbeyrac's, made things even more obscure a few years later (although in the footnote he simply used Grotius's expressions without translation):

> For whereas it is said of the Loan of a consumable Commodity, that it is what is done freely, as much may be said too of the Loan of any other Thing that is not consumable (Transl. Morrice 1738, II, 12.20.1).

And since R. Tuck's edition in 2005 reproduced Morrice's translation of 1738, things did not get any clearer for English-speaking readers at the beginning of the twenty-first century.

Nonetheless, the bias introduced by the functional character of the distinction between loans (what they are for) deserves to be qualified. Interpreting it as an economist, what a loan is for regards the purpose of the loan. A "loan for consumption" would therefore be a loan whose purpose is the financing of consumption expenses – by opposition to investment expenses, which increase a stock of capital. In a way, this matches the current medieval view about the *mutuum*, as a way to finance consumption – and usually a vital consumption (see Chaplygina,

[2] "It is said, for example, that a Loan for consumption is free by its nature. But the same could be said of a Loan for use."

[3] "However, it is not unlawful to demand money for the use of something that belongs to us. All that happens is that the Contract changes its name".

Lapidus 2016, pp. 31-32). Yet, what a loan is for might also be regarded as denoting what the thing lent is for (and not what its purpose is): either being consumed, like typically food or money, because their use (being eaten or spent) entails their destruction; or like for a house, simply being used (to be lived in), without it being destroyed. It is obvious that it was this last interpretation which was favoured by the scholars who translated and commented on Grotius. So that, though a limit case, a loan for consumption, in this sense, might be used to buy an investment good like a house – which means that from an economist viewpoint, there would be no basis for considering such loan as a loan for consumption. It is therefore clear that the bias introduced by the functional distinction between loans, when read by an economist, is even more pronounced than when read by a lawyer for whom translating *mutuum* by "loan for consumption" at least made sense.

However, in terms of the potential confusion it caused, Barbeyrac's and Morrice's functional bias was no exception: other translations had more or less followed the same path. A. de Courtin's French translation of Grotius, before Barbeyrac's, did introduce the *commodatum*, but in opposition to the *prêt* (loan), which one imagines for his readers must have been the *mutuum* – no clarification coming from the footnote which was not translated:

> [C]ar ce qu'on dit que le prêt est une chose gratuite, on peut le dire aussi du commodat ou prêt pour l'usage (Transl. Courtin 1687, II, 12.20.1).[4]

Later on, the *commodatum* was also retained in P. Pradier-Fodéré's translation (*commodat*; *prêt à usage* (use loan) in the footnote), which aimed in 1865-1867 at renewing Barbeyrac's translation by offering the reader something more faithful to the Latin original. This time, however, the *commodatum* did not simply oppose a loan, but a loan for consumption (*prêt de consommation*). And, in the footnote, *foeneratio* and *locatio* gave *prêt à intérêt* (interest loan) and *louage* (hire). Pradier-Fodéré's translation was reprinted by D. Alland and S. Goyard-Fabre in 1999, then republished in 2005 and in 2012. So that it is still now the standard French translation of Grotius's *De Jure Belli ac Pacis*.

With regard to the English translations that followed Morrice's, A.C. Campbell's in 1814 contrasted two types of loan, depending, like for Morrice (1738) and later Tuck (2005) on whether they were consumable or non-consumable:

[4] "[A]s we say that a loan is a gratuitous thing, the same can be said of a commodate or loan for use"

> For as to what is said of the loan of consumable property being a gratuitous act, and entitled to no return, the same reasoning may apply to the letting of inconsumable property for hire (Transl. Campbell 1814, II, 12.19).

In Whewell's translation, the *mutuum* became a money loan, and the *commodatum*, any other loan:

> For when it is said that money lent is a gratuitous benefit, the same may be said of any other thing lent (Transl. Whewell 1853, II, 12.20.1).

Neither Campbell nor Whewell translated Grotius's footnote. Although the distinction between money and all other things (for Whewell) or between consumable and unconsumable properties (for Campbell) share the ability to cover the whole range of tradeable goods, it is not clear, except to the already informed and convinced reader, that this amounts to say that for each good, two kinds of contracts are possible, one of them making possible a payment to the lender.

So that a clear move toward a structural, rather than functional, opposition between the two types of loans did not really prevail until Kelsey's translation, three centuries after Grotius published his book (though the translation of the footnote is of little help, since it designates lending of money and letting of property as the corresponding types of contracts with charge):

> For what is said of a mutuum, namely, that it is without charge, may be said also of a commodate. And yet, although it is not unlawful to demand a price for the use of a thing, such a demand may cause the contract to pass under another name. (Transl. Kelsey 1925, II, 12.20.1).

The shift to a functional distinction, though misleading, might be interpreted as an attempt to compensate for the relative "poverty" of the English language (Gibbon 1788, p. 368) which led to translate by "loan" both the *mutuum* and the *commodatum* (after all, it is what Google Translate still does), by borrowing from the French the functional appellations (loan for consumption and loan for use) which allowed to distinguish them in another language (Zimmermann 1996, pp. 188-189). The phrases were neither "very elegant" nor "very accurate", as Birks (2014, p. 132) put it. So that at least this lack of accuracy is not without consequences.

2.2. So what? (the foenus *is to the* mutuum *what the* locatio *is to the* commodatum*)*

For each of the above-mentioned translations, an initial pair of loan contacts without charge is shown to be transformed into another pair, this time with charge, with the result of changing

the names of the contracts. However, it is far from obvious why this familiar operation should be linked to the prohibition or authorisation of interest-bearing money loans. The reason for this link depends on the nature of the distinction between the initial loans, as shown in Table 1 below.

Translation / Edition	*Without charge*		*With charge*	
	Loan #1	*Loan #2*	*Loan #1*	*Loan #2*
Grotius (1625 [1646])	mutuum	commodatum		
	mutuum	commodatum	foeneratio	locatio
Courtin (1687)	prêt	commodat		
Barbeyrac (1724)	prêt à consummation	prêt à usage		
	prêt à consummation	prêt à usage	prêt à usure	contrat de louage
Morrice (1738)	consumable commodity	any other thing		
	mutuum	commodatum	foeneratio	locatio
Campbell (1814)	consumable property	inconsumable property		letting of inconsumable property for hire
Whewell (1853)	money lent	any other thing		
Pradier-Fodéré (1865-1867)	prêt de consummation	commodat		
	prêt de consummation	prêt à usage	prêt à intérêt	louage
Kelsey (1925)	mutuum	commodate		
	mutuum	commodate	lending of money	letting of property
Alland, Goyard-Fabre (1999) [Pradier-Fodéré (1865-1867)]	prêt de consommation	commodat		
	prêt de consummation	prêt à usage	prêt à intérêt	louage
Tuck (2005) [Morrice (1738)]	consumable commodity	any other thing		
	mutuum	commodatum	foeneratio	locatio
	loan	loan		

Google Translate (2023)	borrowing	lending	financing	leasing

Table 1: *Mutuum*, *commodatum*, *foenus* and *locatio* in the translations of Grotius, *De Jure*, II, 12.20.1 (translations from the footnote, when they exist, are below each dashed line)

Of course, Google Translate has reached a climax. But, unlike a structural distinction such as Kelsey's (1925) who simply adopted Grotius's vocabulary as his own, another basis for this distinction prevents the conclusion that lending at interest is either prohibited, like in the scholastic tradition, or accepted, like for Grotius. The reason for this is that it is in the respective properties of the loans, when structurally differentiated, that the characteristic that supports the charging of interest can be found. When a loan is made, something must remain the property of the lender in order to justify his asking a price for what he has disposed of. In the case of a *commodatum*, the lender remains the owner of the good lent, so that because of this ownership, he can demand a price for what he has deprived himself of – the use of the good lent[5]. But in the case of a *mutuum*, the scholastic tradition indicates that, since the whole of the property is ceded by the lender (and not just its use), there is no longer any basis for demanding the payment of interest (Chaplygina and Lapidus 2016, p. 33).

So the same comparison between the *commodatum* and the *mutuum* led to the conclusion that the analogy was irrelevant and that while interest was considered legitimate when moving from the *commodatum* to the *locatio*, it was not when moving from the *mutuum* to the *foenus*. One consequence is that if Grotius found the comparison between the two pairs of loans convincing (and he did), it was because he assumed that his reader had already rejected the scholastic idea that continuity of ownership was a proper basis for paying something to the lender. Otherwise, it is clear that something more was needed.

2.3. What remains in the hands of the lender? (back to Huguccio)

The above distinction between the two real contracts, the *mutuum* and the *commodatum*, originated in the *Digesta* (44.17.1 and 2) and was taken up again in Gratian's *Decretum* (1140) as part of a discussion about usury in question 3 of *Causa* 14. And Grotius's argument that the

[5] This does not prejudge the reasons why the ownership of a good explains the emergence of interest: Gratian's *Decretum* favoured the physical deterioration of a stock (*Decretum*, dist.88, can.11, *Ejiciens*), while at the end of the 13th century, for Thomas Aquinas (*Summa Theologica*, IIa-IIae, q.78, a.1, resp.), the origin was the ownership of the flow generated by the good lent (see Chaplygina and Lapidus 2016, pp. 33-34).

interest was legitimate because the *foenus* is to the *mutuum* what the *locatio* is to the *commodatum* was challenged in advance by one of the earliest commentators on Gratian's *Decretum*, Huguccio Pisanus, presumably between 1187 and 1190, in an unfortunately still unpublished manuscript – at least for its comments on the second part of the *Decretum*. Huguccio's argument, transcribed by T. McLaughlin in 1939, was as follows:

> Sed commodatum est quod traditor alteri, non ut ejus fiat, sed ad commodatum et utendum, unde et idem debet restitui. […] In mutuo ergo dominium transfertur, sed non in commodato. Item in commodato, idem debet restitui, quod non exigitur in mutuo, licet quandoque sic contingat. Sed in hoc convenient mutuum et commodatum quod utrumque debet esse gratuitum. Si ergo pro mutuo aliquid ultra sortem exigatur, quicquid sit, usura est et in hoc solo casu committitur usura, scilicet cum pro mutuo aliquid exigitur vel accipitur ultra sortem. Si vero pro commodato aliquid exigatur, non est usura, sed non est jam commodatum sed alius contractus, scilicet permutatio, vel locatio, vel venditio, etc. (*Summa Decretorum*, C. 14, q.3, dictum ante c. 1; McLaughlin 1939, n. 176, p. 101; see also Noonan 1957, p. 40).

I resist the temptation to discuss the translation by Google Translate[6]. However, have a look at how Huguccio went about it. He explained that in a *commodatum*, something is delivered to a borrower, not for it to become his (*non ut ejus fiat*), but for his use. So that the same thing must be returned (*idem debet restitui*). In other words (other than the ones used by Huguccio), the thing should be returned *in specie*. By contrast, in a *mutuum*, property is transferred to the borrower (*dominium transfertur*), and it is not required that the same thing is returned (*quod non exigitur in mutuo*): it is returned *in genere*. So far, there is no disagreement with what Grotius was to say, centuries later. It was simply a reminder of a typology of contracts and of the structural relationships arising from them: if we look only at the names of the contracts, a gratuitous loan contract, the *commodatum*, can change its name and become onerous, the *locatio*, when the lender retains ownership of the good loaned, and similarly, the same is true when ownership is also transferred through the loan, the *mutuum* becoming a *foenus*. Although

[6] Well, I can at least reproduce it without further comment: "But what is lent is what the transferor gives to another, not to make it his own, but to use the thing lent, whence the same thing must be restored. [...] Ownership is therefore transferred in the borrower, but not in the borrower. Likewise, in the case of a loan, the same must be restored, which is not required in a loan, although sometimes this happens. But in this it is fitting that both the loan and the loan should be gratuitous. If, therefore, something beyond the lot is demanded for the loan, whatever it may be, it is usury, and in this case only usury is commenced, namely, when something is demanded or received for the loan beyond the lot. But if something is demanded in return for the loan, it is not usury, but it is no longer loaned, but another contract, namely, exchange, or lease, or sale, etc." (Google Translate, 2023/07/22). The reader might find helpful the partial translation provided in Lapidus 2023 (p. 11) of the end of Huguccio's argument: "But in this, it is appropriate that both the *mutuum* and the *commodatum* should be gratuitous. If, therefore, something beyond the capital is demanded for the *mutuum*, whatever it may be, it is usury, and in this case only usury is committed, namely, when something is demanded or accepted for the *mutuum* beyond the capital. If, however, something is demanded in return for the *commodatum*, it is not usury, but it is no longer the *commodatum*, but another contract, that is, barter, or *locatio*, or sale, etc."

Google Translate makes this incomprehensible, it is just an alternative way of presenting the traditional typology of loan contracts.

The crucial assumption, which supports by anticipation the disagreement with Grotius, is therefore different. It is the assertion that when you claim that you sell the use of a good, and only the use, it means that you retain ownership during the sale. In this case, it is obvious that the *commodatum* can be transformed into a *locatio* and thus receive the proceeds from the sale of the use of the good, whereas, because as a lender you no longer own anything in a *mutuum*, the basis for the equivalent operation is lacking. And in this last case, anything demanded beyond the principal is usury (*Si ergo pro mutuo aliquid ultra sortem exigatur* […] *usura est*).

It is therefore clear that, since Huguccio and Grotius both refer to the same structural distinction derived from Roman law, their disagreement on what this distinction reveals is about what does or does not remain in the hands of the lender when a money loan is made. And if something remains in the hands of the lender, this also means that when the borrower benefits from the usufruct of the money lent to him, he does not exhaust all aspects of the property.

3. Usufruct, when property seems to disappear

Compared to the traditional view supported by Huguccio, something more is therefore needed, which would allow to conclude that for Grotius, the *mutuum* was not the only way to lend money. This calls for a return to the entirety of his argument about the legitimacy of interest-bearing money loans. This argument is divided into three heterogeneous components. The first two components are gathered in the first subsection of *De Jure*, II, 12.20, whereas the last one is split between the first and second subsections – and even previous comments of Grotius on Luke.

3.1. Expanding the usufruct

The above comparison between the pairs *commodatum*/*locatio* and *mutuum*/*foenus* is the first component of his argument – it has just been discussed and leads to the conclusion that whilst a change in the name of the contracts involved is conceivable, the basis for such a change is still lacking. The second component is a criticism of the well-known Aristotelian position, drawn from the *Politics* (I, 7), about the sterility of money: Grotius denied any natural basis for this sterility, arguing that like a house, barren by nature, money can be made fruitful thanks to

the industry of men (*De Jure*, II, 12.20.1). But the most important is the third component, which is directly dealing with what was lacking in the comparison between the pairs of loan contracts in order to contradict the Scholastic position on money loans.

It starts with a perfectly well-argued reminder of the reason why, in the Scholastic tradition, money lending can have no legal framework other than that of the *mutuum*, which prohibits the charging of interest for the advantage of the lender:

> It is more plausible [*speciosus*], that here the thing should be returned for the thing [i.e., *in genere* (in kind), and not *in specie*, where the same thing is returned], and the use of the thing cannot be distinguished from the thing itself [*usus autem rei a re distingui non possit*] since it consists in its abuse [*in abusu consistat*], and, therefore, nothing should be demanded for it [the use] (*De Jure*, II, 12.20.1).

This quite serious objection was typically legal. Grotius referred to a full property, whose transfer has always been viewed as a necessary component of the *mutuum*, the *mutui datio*, which implies the right of *abusus*. And he takes over the existence of another attribute linked to property right, the right of *usus*, to recall the traditional position according to which, in the case of money, the exercise of the right of *usus* (spending it) entails this of the right of *abusus*, which would put an end to the ownership of the lender. If accepted as such, this objection prevents the contractual framework of the money loan from being anything else than the *mutuum*, and renders meaningless the idea that, since a *commodatum* can be turned into a *locatio*, a *mutuum* can be turned into a *foenus*: the point is that insofar as the use of the money lent is an abuse, the loan remains trapped in the *mutuum*.

Grotius's reply to this objection in the following subsection continues his legal approach. He first recalled a *Senatus consultum* on the bequest of an inheritance (*Digesta*, 7.5.1 and 2) which curiously (at least, since the medieval use of a Roman law framework in order to condemn interest-bearing money loans) introduced a "usufruct" in a situation where it seems that no right like this should exist:

> The Senate decreed that the usufruct of all things that were found to be in someone's patrimony can be bequeathed. By this *Senatus consultum*, it seems to have been introduced that the usufruct of those things which are taken away or diminished by use can be bequeathed [*ut earum rerum quae usu tolluntur vel minuuntur, possit ususfructus. legari*] (*Digesta*, 7.5.1).

Grotius commented on it as follows:

> But it is to be noted that although the usufruct [*ususfructus*] of things which perish in use, or are transferred to the ownership of another, is said to have been introduced by a decree of the Senate, nevertheless it does not mean that there is, in fact, a usufruct properly speaking [*non tamen effectum, ut proprius ususfructus esset*] (*De Jure*, II, 12.20.2).

Such a reminder amounts to pointing out to the reader that the introduction of a usufruct which would subsist despite the disappearance of the thing possessed contradicts the classical conception of property as a right of *usus*, *fructus* and *abusus*[7]. Grotius's reaction was twofold: on the one hand, he said, it is a question of the appropriateness of the terms used, so it could be a false problem; nevertheless, on another hand, this seemingly false problem points an actual issue: something survives, which is also a right – a right which can be sold, and looks like a usufruct:

> The word "usufruct" is used, which, according to its proper meaning, does not accord with such a right [the right of usufruct, introduced by the *Senatus consultum*]. However, it does not follow that this right is nothing or that it is not estimable (*De Jure*, II, 12.20.2).

This denotes a kind of *expanded usufruct* (Lapidus 2023) for which Whewell, in his translation of 1853, spoke of a "quasi usufruct", using the same words as the *Digest*, in its discussion of the aforementioned *Senatus consultum* (*Digesta*, 7.5.2) or by Thomas Aquinas, when he was commenting on the tolerance of civil laws with regard to loans of money at interest (*Summa Theologiae*, IIa-IIae, q. 78, a. 1, ad 3). However, the nature of this right would remain rather obscure for the contemporary reader who would stick to the text of 1625.

3.2. The missing note: Barbeyrac and Morrice on Grotius on Luke 6:35

Jean Barbeyrac, in his translation of 1724, stated this a bit differently. Where Grotius said that "[i]t is more plausible, that here the thing should be returned for the thing" (*De Jure*, II, 12.20.1), he added a footnote in which he claimed that the author "proposes and solves the difficulty in greater length" in a "note on saint Luke" (*De Jure*, II, 12.20, fn. 4). The latter referred to a comment on Luke 6:35, which Grotius wrote some years before the *De Jure* in his *Annotationes in Novum Testamentum*[8]. This very long footnote, in which Barbeyrac translated about twenty percent of Grotius's comment, pointed to a well-known passage of Luke which

[7] The idea that property could be something more than the rights of *abusus*, *usus* and *fructus* is not so exceptional after all. In the contract of sale (rigorously, of buying and selling), for example, it was not until the twelfth century, with what came to be known as the "French sale", that it was accepted that this immediately transferred full property from the seller to the buyer. In classical times, the seller was only required to provide the buyer with peaceful and lasting possession of the thing sold; so that something more was needed for property to actually change hands. However, even when the transaction had not been completed in this way, the part of property that remained in the hands of the seller was deprived of the rights of *usus*, *fructus* and *abusus*. It was therefore broader than its traditional attributes. It was on this margin that Grotius reasoned.

[8] The *Annotationes* were presumably written in 1619-1621, although they were first published only in 1641. See H.J. De Jonge 1984, pp. 97-99.

urged “lend, hoping for nothing again [in the *Vulgate*: *mutuum date, nihil inde sperantes*]” (Luke 6:35). The footnote was later translated into English by Morrice, who based, in 1738, his own translation on Barbeyrac’s, and a reference to the *Annotationes* was given in Whewell’s translation of 1853. But it was generally neglected in most editions.

Yet, Grotius’s comment on Luke reproduced by Barbeyrac in his footnote was more than a resolution to the difficulty “in greater length”. It provided explicitly what was at most implicit in the *De Jure*, the reason for, and the nature of, the right to the expanded usufruct. In a few lines, it was set out clearly that this right consisted in receiving something according to the delay of payment, because the right to receive the same thing not *in specie* (that is, taking into account its individuality), but *in genere* (in kind) showed that the lender’s entire property had not disappeared in the loan:

> Others insist that the *mutuum* transfers property [*mutuo transferri dominium*]; so the fruit [*fructus*] arising from a thing ought to belong to the owner. But even this subtlety of language has nothing to do with natural equity [*Sed ista quoque subtilitas vocum ad aequitatem naturalem nihil facit*]. For, in the case of things that may be returned in kind [*genere*], as money, corn, wine, the right to receive the same thing in kind, stands for property [*jus illud ad recipiendum idem genere est vice dominii*]. Now it is universally agreed, that a person to whom a thing is restored in a short time, receives more than he to whom it is restored after a longer time, on account of the advantages attending the natural possession. [...] this holds true not only in a *mutuum* but also in a *commodatum*[9], if we consider the importance of things in themselves, and not the subtlety of terms. The delay of payment is undoubtedly susceptible of estimation. And this very thing, which lies in the delay of time, can undoubtedly be estimated, and accordingly, it can also be brought into a *stipulatio* [*Hoc ipsum autem, quod in temporis mora situm est, haud dubie aestimari ac proinde et in stipulationem deduci potest*] (*Annotationes*, Luke 6:35).

The importance of this passage should not be overlooked. Grotius explained interest as the sale to the borrower of an expanded usufruct *depending on time*, which the lender can dispose of because of a residual property, whose intuition was already present in the *Digesta*, and which in a *mutuum* represents the right to be repaid in kind (*in genere*) and not, like in a *commodatum*, *in specie*, which amounts to recover the thing lent. Now, this difference points out to an advantage in terms of contractual liability of the things which can be returned in kind: *genera non pereunt*, that is, things in kind do not perish. So that although it can “be brought into a *stipulatio*”, that is, into a contract *verbis* consisting in mutually consistent question and reply,

[9] Instead of *mutuum* and *commodatum*, those who added to their translation this passage of Grotius’s *Annotationes* on Luke, that is, Barbeyrac (1724) and Morrice (1738), respectively wrote “Prêt à consomtion” (loan for consumption) and “Prêt à usage” (loan for use) in the first case, and “Things consumable” and “Things non consumable” in the second case.

like for extrinsic titles (the *poena conventionalis* or the *damnum emergens*, for instance), it becomes difficult to see the sale of the expanded usufruct as independent of the main loan contract. And the *certainty* claimed in the *De Jure* thus finds its foundations:

> [I]t is certain that if anyone transfers such a right [over the expanded usufruct] to the owner, money could be demanded for it (*De Jure*, II, 12.20.2).

Consequently, some examples in *De Jure*, II, 12.20.2 as in the *Annotationes*, Luke 6:35, aim to show that this expanded usufruct might have a price, which amounts to a legitimate interest paid to the lender. Since the expanded usufruct has the dimension of a flow, that runs for the duration of the loan, its price depends on the time gap between the moment of the loan and the moment of repayment – exactly like, he argued in the *Annotationes*, in the case of something lent and returned *in specie*:

> [T]hat right to receive money or wine only after a certain time is estimable, for less is paid by one who pays less in time (*De Jure*, II, 12.20.2).

The fact that the issue was about something like a usufruct makes easier the continuity between a satisfaction (*usus*) and a profitability (*fructus*). Hence the *Annotationes*:

> [H]e who deprives himself of his money for some time to pleasure another [*qui pecunia ad tempus caret in gratiam alterius*], might have laid it out on some piece of land, or on a house, and received profits arising from them during that time (*Annotationes*, Luke 6:35).

And still in the *Annotationes*, two outstanding thought experiments showed the existence of a price for this expanded usufruct. The first imagined symmetrical loans, a *mutuum* for a *mutuum* and a *commodatum* for a *commodatum* in the special case where the latter concerns a productive good, to show not only their similarity but also that if one of the beneficiaries waived his right to the loan, this would have a price:

> For if I were to lend someone one hundred [through a *mutuum*], I agree with him, that he in his turn shall lend me the same one hundred another time [also through a *mutuum*] which is a true exchange [*ἀνταλλαγή*], how can this agreement be deemed more unjust than if I were to lend [through a *commodatum*] a neighbor an ox for agricultural work with the condition that they would later repay me with an equal value? Moreover, this obligation of lending [a *mutuum*] in his turn, is, like all other things, susceptible of a common measure, that is, an estimation in money (*Annotationes*, Luke 6:35).

The second discussed the consequences of the legacy of money in case it was separated from property:

> [I]f a person to whom the usufruct of a sum of money is bequeathed without ownership [*cui sine proprietate legatus est pecuniae ususfructus*], is considered to become richer by such a legacy, it appears

> that this very use can be estimated; and consequently, the same must therefore be said of the annual use of a sum of money (*Annotationes*, Luke 6:35).

As a result, the last sentence of the *Annotationes* translated in Barbeyrac's footnote sounds like the end of the scholastic paradigm: interest is now explained in the name of the loan itself, and not for reasons external to it:

> Therefore, it should be understood that, without nature opposing it, someone who lacks the use of money for the favor of another can, in turn, negotiate something in return in the name of the agreement [*vicissim aliquid eo nomine pacisci*] (*Annotationes*, Luke 6:35).

4. Conclusion

The adoption of Grotius's position on interest-bearing loans first of all had legal consequences that made it possible to revive contractual forms, combining *mutuum* and *stipulatio*, dating from the classical period of Roman law. Lending money for a reward could now escape the *mutuum* trap in the sense that the legal framework of interest-bearing money loans can be either:

(i) a real contract, the *mutuum*, to which is added an additional clause, a contract *verbis*, a *stipulatio* which fixes the lender's income, without it being anymore required to rely on reasons independent of the main contract – as this used to be the case with extrinsic titles;

(ii) again, a *mutuum* and a *stipulatio*, but with the latter covering interest and capital, so that the amount lent is guaranteed by both contracts (such possibility was explicitly discussed by Ulpian (*Digesta*, 12.1.9.3));

(iii) a *stipulatio* only, which attests that although the possibility of an interest is rooted in the right for the lender to contract through a *mutuum*, it is no longer necessary to the transaction (the argument had already been introduced in the *Digest*, for instance, again by Ulpian (*Digesta*, 46.2.6.1)).

This last possibility, whether or not it is actually implemented, shows the extent to which the evolution of the legal framework had changed the game implemented at least since the thirteenth century with Thomas Aquinas. Of course, the use of the *mutuum* for money loans had already for long been challenged, either indirectly through the introduction of extrinsic titles, or directly by circumventing the idea of a transfer of ownership during the loan. Thomas Aquinas himself (*Summa Theologiae*, IIa-IIae, q. 78, a. 2, ad. 1) illustrates this challenge:

having made a decisive contribution to establishing the use of *mutuum* in the framework of money loans, he endeavoured to lay down conditions under which a lender could receive a reward (Chaplygina, Lapidus 2016, pp. 35-38; and, particularly, about Thomas's early works, Januard 2021). Later, the works of such scholars as Peter of John Olivi at the very end of the thirteenth century, of Alexander of Alexandria and Gerald Odonis in the following century, of Leonardus Lessius some twenty years before Grotius, all continue this challenge (P. Januard 2022, pp. 43-44; Lapidus 2023, pp. 2-3). And Grotius himself traced back what he wrote to the time of Gaius and found arguments in the *Digesta* like in his own understanding of the *Scriptures*. But now, *mutuum* has become something the possibility of which allows us to dispense with it. This, in turn, allows us to understand the interest paid to the lender as a pure time effect, the consequence of the same thing being worth less to us the further in the future it is available. Obviously, this means bypassing the filter of successive translations, of omitted author's notes or editorial notes. And, perhaps most difficult of all, accepting that as economists we are so unprepared to read Grotius. Grotius, of whom J. Schumpeter wrote in his inescapable *History of Economic Analysis*:

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

Well…

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