Anti-Usury Doctrine and Evolution of Agency

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1. Method of Research and Basic Premise

My attention to Thomas Aquinas' *Summa Theologica* was concentrated on questions 77 and 78 in the second division of the second part (*secunda pars secundæ*); I used the English translation of Summa Theologica and, in the supportive alternative, the Latin original; I have considered the relevant part of Thomas Aquinas as a complex.

Based on analysis of a part of Aquinas' *Summa Theologica*, I present a premise about the anti-debt character of Aquinas' teachings, followed by (a) theoretical reflections on the consistency of Aquinas' teachings with the function of agency, and (b) historical facts confirming my assertion about the impact of the Aquinas' thought.

Aquinas and other theologians and lawyers built complex legal constructions to support their efforts against usury and debt (generated via *mutuum*). The complicated doctrine created by Aquinas, along with his predecessors and followers, then confronted the social, economic and legal realities, with the interests of people and with their desires. The anti-usury doctrine then lost this conflict 300 years after the death of Aquinas.[1]

[1] COOKE, Colin Arthur, *Corporation, Trust and Company*, Manchester, 1950, p. 44.

2. Detailed Arguments for the Premise and Predictable Objections

(i) If someone is trying to eliminate usury, and defends the poor, or people with financial difficulties, then he will defend the poor against debts in general, because even no-interest debt is a potential danger – *mutuum* is connected with generating new things, opposed to *commodatum* or *precarium*, which both only require maintenance and protection of already existing thing(s).

(ii) However, even if the Medieval theologians and other anti-usury doctors did not intend to suppress the existence of debts (i.e. *mutuum*) in society (in the Christian part of the world), then their teaching had the effect of elimination of the *mutuum*, because *mutuum* without interest loses substantially its economic importance.

(iii) Furthermore, even the interest-free *mutuum* can be a source of usury – there are easily realizable situations where usury is hidden under the cover of interest-free loans (e.g. the borrower signs a confirmation that he borrowed a higher amount than he actually did).

(iv) The aspirations of the owners of capital and non-owners of capital (potential debtors) then led to an attempt to defeat the anti-usury doctrine, with legal constructions that were no less complex as legal concepts within the anti-usury doctrine.

(v) One of the attempts to defeat the strict law against usury was, for example, a distinction between *damnum emergens* and *lucrum cessans*. The construction of this distinction then allowed creditors to collect payments which were *id quod interest* or *interesse*, but not usury *de iure*.[2] And the *trinus contractus* was also a circumvention of the usury ban,[3] and also *cambium*.[4]

(vi) However, resistance to debt is not only a matter for Christians, but it is also part of the Islamic religion. Even in the geographical part of the world dominated by Islamic religion, it can be assumed that resistance to debt stems not from theology *per se*, i.e. directly from religion as such, but from

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[2] COOKE, Colin Arthur, *Corporation, Trust and Company*, pp. 42–47, 44; ASHLEY, William James, *An Introduction to English Economic History and Theory*, Part I, 4th ed., New York, 1910, pp. 196–197; URFUS, Valentin, *Právo, úvěr a lichva*, Brno, 1975, pp. 34, 41, 56, 57, 67, 95.

[3] O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, London, 1920, pp. 210–212.

[4] HOLDSWORTH, William Searle, *A History of English Law*, Vol. VIII, London, 1925, pp. 126–146.

the social and economic consequences of debt, and from the associated financial difficulties,[5] which are relevant not only for borrowers but also for the stability of society as a whole.

(vii) In line with the premise that the teachings of Aquinas and other anti-usury theologians and lawyers were primarily aimed at protecting helpless debtors against debts as such is fact, that interest was regularly paid for state debts;[6] because this was not a relationship between a bad borrower and a poor debtor, but rather a relationship between a helpless creditor and the all-powerful state.

3. Description of the Summa Theologica Structure

I consider *Summa Theologica* to be the key text on which I base my hypothesis. This extensive work by Thomas Aquinas is divided into three parts (*pars*), which are further partitioned and divided. Each individual matter is then processed in questions (*questiones*). The issue of just price (*iustum pretium*) is mainly dealt with in question (*questio*) 77 and the matter of usury in the following question (*questio*) 78 of the second division of the second part (*secunda secundæ*).

Aquinas uses the following three types of the sources (literature): (1) Bible, (2) *Corpus Iuris Civilis*, and (3) works by philosophers (Aristotle, Cicero) and theologians (Jerome, Augustine, Chrysostom, Ambrose, Cassiodorus).

Thomas Aquinas' systematic argumentation is roughly as follows. The structure of the text in both 'questions' starts with a brief introduction, which leads to 4 articles, both in question 77 and 78. Each article (*articulus*) starts with objections ranging from 3 to 7. The general answer follows and then the individual answers to the individual objections are presented, in which Aquinas gives principles according to the biblical text, subsequently supported by civil law and supplemented by the ideas of philosophers (especially Aristotle) and Christian theologians.[7]

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5 VALACHOVÁ, Sára, *Regulation of Financial Markets: Islam vs. conventional financial systems. Diplomová práce*, Praha, 2015, available at: <https://is.cuni.cz/webapps/zzp/detail/140921/?lang=en> (23rd June 2020).

6 O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, pp. 193–198; SCOTT, William Robert, *The Constitution and Finance of English, Scottish and Irish Joint-stock Companies to 1720*, Vol. I, 1912, p. 54.

7 URFUS, Valentin, *Právo, úvěr a lichva*, pp. 34–35, 43.

The reasoning of the objections and the answers to them thus begins with the introduction of various texts from the Bible, often mutually contradictory, including various interpretations. The Bible, along with theological and philosophical thoughts, completes the concept of natural or moral law, which, at that time and according to Aquinas, is *per se* unenforceable.[8] And, similarly, the friendly loan ('to lend money to one who is in straits is to do him a favour for which he should be grateful') is, according to Aquinas, unenforceable – it is not a civil obligation, but only natural obligation.[9]

There are also arguments of an economic nature (risk of default of outstanding loans as a counterargument against usury – loss through lending money).[10] Positive law or civil law (*ius civile*), based on *Corpus Iuris Civilis*, is crucial to enforceability from the point of view of Aquinas.

4. The Basic Theoretical Concept of Anti-Usury Doctrine

The important legal basis which Aquinas relied on was the Roman-legal division of things into consumable (*res quae usu consumuntur* or *res fungibiles*) and non-consumable (*res quae usu non consumuntur* or *res non fungibiles*).[11] Money is consumable. On the consumability of money, Aquinas built a principle of the need to transfer ownership of money from creditor to debtor, because otherwise it could not be further alienated.[12] It is a case of consumption – the wine is drunk, it is consumed, money is spent, it is consumed, so it is always necessary to transfer ownership;[13] and, rent cannot be paid (i.e. interest cannot be paid).

Therefore, it is not possible to borrow money without (at the same time) transferring ownership of it.[14] Only exceptionally money is borrowed for use (not for consumption) – for example, a rare coin for display in an exhibition.[15] If one wanted

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8 CHITTY, Joseph, *A Treatise on the Laws of Commerce and Manufactures, and the Contracts Relating thereto*, Vol. I, London, 1824, pp. 28, 35.

9 AQUINAS, Thomas, *The Summa Theologica*, Part II, No. 2, New York, 1918, p. 334.

10 Ibid., p. 333.

11 O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, p. 178.

12 AQUINAS, Thomas, *The Summa Theologica*, Part II, No. 2, p. 331.

13 Ibid., pp. 331, 336.

14 Ibid., p. 333.

15 KINCL, Jaromír, URFUS, Valentin, *Římské právo*, Praha, 1990, p. 118.

to sell wine separately from its use, it would be a double sale because he would sell something that does not exist. However, concerning e.g. a house, it is possible to transfer ownership and separate the use of the house.[16]

Furthermore, it is not possible to pay more in the case of a repayment of purchase (i.e. the 'purchase' of borrowed money with a subsequent repayment), or even less (i.e. 'prepayment' of future cash flows), as this would violate the rule of just price. In addition, both transactions (operations) ought to occur at the same time.[17] The just price doctrine thus clearly represented an obstacle also for, or maybe especially for, usury.

5. Replacement of *Mutuum* by Other Legal Institutes

Consequently, the prohibition of interest led to the suppression of the institute of a loan (*mutuum*) – i.e. lending of generically determined things, the lending connected with the transfer of ownership of the items being lent.[18] Other institutes, transactions that were not loans (*mutuum*) – such as annuities, shared risk contracts, or penal bonds to guarantee payment of a debt – were not prohibited.[19]

Hand in hand with suppression of *mutuum*, the using of things without transfer of ownership became common, the using being legally close to Roman law institutes, such as *locatio conductio rei*, *commodatum* and *precarium* – particularly in the case of immovable property where the legal system of reciprocal rights of use was typical of the entire feudal system.[20]

However, the system of rights of use also concerned matters of movable things (chattels), such as big livestock – cows. Ashley gave us an example of a dispute between the subjects (villagers) and their landlord (bishop), in which the bishop successfully argued that the herd of cattle used by the villagers belongs to him and not to the villagers – he believed they owned only bells that cows had on their necks. Ashley put his thoughts on the impossibility of villagers, or subjects, to

16 AQUINAS, Thomas, *The Summa Theologica*, Part II, No. 2, p. 331.

17 Ibid., p. 337.

18 KNAPPOVÁ, Marta, ŠVESTKA, Jiří, DVOŘÁK, Jan a kolektiv, *Občanské právo hmotné II,* 4., aktualizované a doplněné vydání, Praha, 2006, p. 227.

19 HELMHOLZ, Richard Henry, *Usury and the Medieval English Church Courts*, in: Speculum, Vol. 61, No. 2, Chicago, 1996, p. 366.

20 KINCL, Jaromír, URFUS, Valentin, *Římské právo*, p. 308.

own anything as a possible permanent legal status (but also refers to sources that deny this).[21]

But I submit an explanation which is different from Ashley's. In all likelihood, the herd of cattle was given to the villagers only to use – a legal situation close to the Roman law institute of *precarium*. And even though pieces of cattle – cows and bulls – have changed over time, i.e. new ones born and others slaughtered, the herd as a whole (*universitas rerum distantium*) has always been owned by the landlord. The reasons for the mere use of bovine animals by villagers, without acquiring ownership of them, can be seen in the higher price of cattle, i.e. the need for a substantial initial investment, which in many cases would mean undesirable indebtedness of the user. However, even the difficult transport of these animals (the villagers could move), and the need for a considerable amount of grass as feed were other influencing factors.[22] It was precisely the necessity to have a large pasture which was a fact that fastened the cows significantly to the pasture, or more precisely to the owner of the pasture. Conversely, smaller livestock (pigs, hens, etc.) were almost certainly always owned and possessed by the same person – i.e. in our case, by villagers.

Thus, from the user's point of view, the system of using things without transfer of ownership had its undisputed advantages, mainly that a part of the risks associated with the thing (risk of damage to the thing) were still attributed to owner, not to user.[23] In the case written by Ashley, the cattle were fully under the actual control of the villagers, even to such extent that they had apparently forgotten the landlord's lasting ownership, which was reminded upon litigation. And the villagers had been justified (empowered) to slaughter any individual pieces, apparently at their own discretion. But the owner could every time exercise his rights against a user who lacked a firm and effective legal title (the holding of the thing was 'precarious', dependent on the will or pleasure of another), as it turned out.

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21 ASHLEY, William James, *An Introduction to English Economic History and Theory*, Part II, 2nd ed., London, 1893, pp. 276–277.

22 PEASE, Joseph Gerald, CHITTY, Herbert, *A Treatise on the Law of Markets and Fairs*, London, 1899, p. 33.

23 KNAPPOVÁ, Marta, ŠVESTKA, Jiří, DVOŘÁK, Jan a kolektiv, *Občanské právo hmotné II*, pp. 183, 227, 238, 282.

6. Societas and Agency in Summa Theologica

I argue that replacing of the loan institute (*mutuum*) by other institutes was not the only result of the fight against usury. Another consequence of refusing of loans and debts was the evolution of agency (and related fiduciary duties).

Roman *societas* had an equivalent in the Middle Ages, in which there were two basic forms of *societas* (partnership) – classical *societas* and *commenda*. In addition to these basic forms, there were a number of specific types of associations or types of deeds of association, such as *societas maris*, *collegantia*, *compagnia* or *societas terrae*.[24] *Commenda* had two types of partners: (i) partners-managers (personally involved in the running and operating of this economic entity) and (ii) partners-investors (providing capital).[25]

However, even *commenda* was already known (at least *de facto*, if not *de iure* under this name) in ancient Rome. Gaius states that (i) one partner may not be involved in the loss, and (ii) it is also possible that one partner will bring money to the *societas* and the other may not, but is involved in his work.[26] The fact that one of the partners may not be involved in the loss may mean either (1) that the partner was in the position of a creditor, or, more likely, (2) that he was backed by limited liability.

In addition, however, we have information about *societas publicanorum* (*societas vectigalis*), with investing partners – *participes* or *publicani* (in addition to the partners known as *sociis*).[27] How much *participants* were creditors and how much investors is not yet clear, especially in the absence of the institute of agency in ancient Rome (and the absence of legal entities as well).[28]

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[24] LE GOFF, Jacques, *Peníze ve středověku*, Praha, 2012, pp. 94–95.

[25] COOKE, Colin Arthur, *Corporation, Trust and Company*, pp. 45–46; O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, London, 1920, pp. 205–212; LE GOFF, Jacques, *Peníze ve středověku*, pp. 94–95.

[26] GAIUS, *Učebnice práva ve čtyřech knihách*, Brno, 1981, pp. 178–179.

[27] BUCKLAND, William Warwick, MCNAIR, Arnold Duncan, LAWSON, Frederick Henry, *Roman Law and Common Law: A Comparison in Outline*, 1965, p. 510; HANSMANN, Henry, KRAAKMAN, Reiner, SQUIRE, Richard, *Law and the Rise of the Firm*, in: Harvard Law Review Vol. 119, 2006, p. 1360.

[28] BUCKLAND, William Warwick, MCNAIR, Arnold Duncan, LAWSON, Frederick Henry, *Roman Law and Common Law: A Comparison in Outline*, pp. 510–511; MALMENDIER, Ulrike, *Roman Shares*, in: GOETZMANN, William N., ROUWENHORST, K. Geert (eds.), *The Origins of Value: The Financial Innovations That Created Modern Capital Markets*, 2005, pp. 31–40; MALMENDIER, Ulrike, *Law and Finance 'at the Origin'*, in: *Journal of Economic Literature*,

Aquinas considers as justifiable profits through *societas*; the labor-free profit does not bother him. The most important concern to him is that the investing partner continues to bear the risk of failure (but his risk is limited, he enjoyes the limited liability), even if the failure is caused by the partner-manager, not by the investing partner.[29] Thus, the investing partner bears the risk of losing his or her investment and therefore also has the right to be rewarded for this risk, i.e. to gain a business profit. And the managing partner, in case of failure, has spent his work in vain, but he is not indebted to the investing partner.

An important issue is the argument of Aquinas that the investing partner does not transfer ownership (the principal only entrusts his money through partnership).[30] The statement that there is no change in the owner of the money must therefore necessarily mean that the managing partner was in the position of agent to the investing partner, who was then in the position of principal.

There is a general consensus that agency did not exist in ancient Rome, because Roman law did not envisage representation at all, at least not direct representation.[31]

Vol. 47, No. 4, December, Pittsburgh, 2009, pp. 1076–1108; MALMENDIER, Ulrike, *Publicani*, Berkeley, 2010, available at: <https://eml.berkeley.edu/~ulrike/Papers/Publicani_Article_v5.pdf> (23rd June 2020); FLECKNER, Andreas Martin, *Corporate Law Lessons from Ancient Rome*, in: *HLS Forum on Corporate Governance and Financial Regulation, on Sunday, June 19, 2011*, 2011, available at: <https://corpgov.law.harvard.edu/2011/06/19/corporate-law-lessons-from-ancient-rome/> (23rd June 2020); FLECKNER, Andreas Martin, *Principles of Corporate and Securities Law*, The Max Planck Encyclopedia of European Private Law, 2012, available at: <https://ssrn.com/abstract=2612179> (23rd June 2020); FLECKNER, Andreas Martin, *Roman Business Associations*, *Max Planck Institute for Tax and Public Finance Working Paper 2015 – 10, October*, 2015, available at: <https://ssrn.com/abstract=2472598> (23rd June 2020).

29 AQUINAS, Thomas, *The Summa Theologica*, Part II, No. 2, pp. 336–337; KOUDELKA, Ladislav, *Lichva: trestný čin a společenský jev*, Praha, 2014, p. 19; URFUS, Valentin, *Právo, úvěr a lichva*, p. 32.

30 AQUINAS, Thomas, *Summa Theologica*, Tomus III, (complete *secunda secundæ* in: *Patrologiæ Cursus Completus*), Parisiis, 1846, p. 592; GRAY, Alexander, *The Development of Economic Doctrine: An Introductory Survey*, 1956, p. 59; SCOTT, William Robert, *The Constitution and Finance of English, Scottish and Irish Joint-stock Companies to 1720*, Vol. I, 1912, p. 54.

31 BUCKLAND, William Warwick, *A Text-Book of Roman Law from Augustus to Justinian*, 1921, p. 516; BUCKLAND, William Warwick, MCNAIR, Arnold Duncan, LAWSON, Frederick Henry, *Roman Law and Common Law: A Comparison in Outline*, pp. 214, 217; LEAGE, Richard William, *Roman Private Law*, 2nd ed., London, 1909, pp. 421–422; ZIMMERMANN, Reinhard, *The Law of Obligation. Roman Foundations of the Civilian Tradition*, Oxford, 1996, p. 45; FLECKNER, Andreas Martin, *Roman Business Associations*, in: *Max Planck Institute for Tax and Public Finance Working Paper 2015 – 10, October*, 2015, p. 37, available at: <https://ssrn.com/abstract=2472598> (23rd June 2020).

Thus, if someone wanted to buy or sell anything (money or goods, Roman law made no distinction between them) through an intermediary, an indirect representative, then he had to transfer ownership to the money or goods to that indirect representative. Thus, in ancient Rome, when, in *societas*, the investing partner equipped the managing partner with his things (investment), he had to transfer ownership to these things (money or goods) so that the managing partner could subsequently alienate the goods or money.

Aquinas took the fact of non-transferring of ownership of money invested into *societas* as a matter of course. For his position, he does not seek support in civil law, which is a clear distinction from his other ideas, which he systematically supports with the provisions of civil law. Thus, it is not even clear whether he considered the non-transfer of money as a fact that is in accordance with civil law or not – but if he sought support for agency in civil law (i.e. in *Corpus Iuris Civilis*), he would not find it;[32] though different opinion has been declared by Savigny.[33]

That statement in *Summa Theologica*, therefore, must necessarily result in the conclusion that at the time of Aquinas, agency already existed, as a well-established and commonly-known institute. The period before the publication of *Summa Theologica*, i.e. before 1274, is so deep in history that it is hard to find out the exact extent of development of agency in that period. And we can only guess that agency has its original form in the organization and principles of the Christian Church.[34]

The existence of *commenda* is also evidenced by other authors, although mostly without reference to the ancient Roman *societas*. Ashley even informs us, referring to Weber, that *commenda* was not the direct successor of *societas*.[35] And O'Brien states that '*Commenda* was originally a contract, by which merchants who wished to engage in foreign trade, but who did not wish to travel themselves, entrusted their wares to agent or representatives.'[36] And adds that agency existed

[32] ZIMMERMANN, Reinhard, *The Law of Obligation*, pp. 47–49.

[33] Ibid., p. 56.

[34] DUFF, Patrick William, *The Charitable Foundations of Byzantium*, in: *Cambridge Legal Essays*, Cambridge, 1926, pp. 83–99.

[35] SCOTT, William Robert, *The Constitution and Finance of English, Scottish and Irish Joint-stock Companies to 1720*, Vol. I, 1912, pp. 1–2; ASHLEY, William James, *An Introduction to English Economic History and Theory*, Part II, 2nd ed., London, 1893, pp. 412–417.

[36] O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, pp. 206–207.

already in the 10th century (although O'Brien does not cite any source).[37] Other authors draw attention to the difference between the ancient Roman *societas* and the medieval *societas* (partnership) consisting precisely in the absence of agency in ancient Rome and thus the related impossibility of one partner to bind another partner or other partners.[38]

The legal-theoretical development of *commenda* was carried out in two possible ways. Either it was a continuing development of the Roman *societas* with the genesis of agency, or the development of the medieval *commenda* (agency), developed either in common law and/or in commercial practice (customs), and the Latin name *societas* was only used later (in parallel with Italian names *compagnia* and *collegantia*).[39]

However, opponents of anti-usury doctrine could also use the legally-recognized *societas* to create *de facto mutuum* using so-called *contractus trinus*. The concept of opponents of anti-usury doctrine was based on the following arguments. Firstly, *societas* is legal (relation between persons A and B). Secondly, insurance against business losses is also legal (relation between persons A and C). Thirdly, it is legal to insure against fluctuation in the rate of profits (relation between persons A and D). And so, why, couldn't it be entertained in all three contracts only with B (three times relation between A and B)?[40] The entering into all three contracts with one person only is legal too, and if it so happens, then the position of the investor in *societas* (*commenda*) will change from that of a partner who risks his investment to a *de facto* creditor position in a *mutuum* who has the right to recover his claim from a partner-manager.[41]

One of the reactions of opponents of usury to *contractus trinus* and other similar vehicles, which could not theoretically be defeated, was *An Act against*

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37 Ibid., p. 206.

38 HANSMANN, Henry, KRAAKMAN, Reiner, SQUIRE, Richard, *Law and the Rise of the Firm*, in: Harvard Law Review Vol. 119, 2006, pp. 1356–1357.

39 O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, p. 207; MITCHELL, W., *An Essay on the Early History of the Law Merchant*, 1904, p. 10.

40 O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, pp. 210–211; HOLDSWORTH, William Searle, *A History of English Law*, Vol. VIII, London, 1925, pp. 104–105.

41 O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, p. 211.

Usury, 37 Henry VIII. c. 9 (1545),[42] which dealt with the existence of *contractus trinus* and other similar vehicles by way of capping their earnings at 10 % p. a. Although Parliament did not intend to legalize usury, the law was so prevalently understood. After several more years, the law was abolished by another *Act against Usury*, 5 & 6 Edward VI. c. 20 (1551),[43] and after several years later *Act against Usury*, 13 Elizabeth c. 8 (1571),[44] abolished 5 & 6 Edward VI. c. 20 and restored 37 Henry VIII. c. 9.

7. Concordance of Anti-Debt Doctrine with Fundamentals of Agency

In connection with the general reason for the possibility of capital appreciation, which is not contrary to Aquinas' teaching against usury (*vide supra*), there are other possible reasons for the existence of the agency and the distribution of products through agents or through brokers, dealers or factors:

A. The merchant, acting as an agent only distributing the goods, did not need to have capital to buy products, he only needed the resources to materialize transport of them. The threat of indebtedness for the agent was thus significantly limited or even eliminated.
B. Another reason is that the vendor-agent has no profit (*lucrum*) from the sale of the products, *de iure*;[45] but, of course, agent's reward (compensation/remuneration) may be contingent on the success of the business.[46] Profit

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42 *The Statutes of the Realm. Printed by Command of His Majesty King George the Third. In Pursuance of an Address of the House of Commons of Great Britain. From Original Records and Authentic Manuscripts*, Vol. I, MDCCCX, London, reprinted, 1963, pp. 996–997; PLOWDEN, Francis, *A Treatise upon the Law of Usury and Annuities*, London, 1797, pp. 485–488; SCAMMON, Jonathan Young, *Reports of Cases Argued and Determined in the Supreme Court of the State of Illinois*, Vol. II, Boston, 1841, pp. 599–601.

43 PLOWDEN, Francis, *A Treatise upon the Law of Usury and Annuities*, pp. 489–491.

44 Ibid. pp. 492–495; SCAMMON, Jonathan Young, *Reports of Cases Argued and Determined in the Supreme Court of the State of Illinois*, Vol. II, Boston, 1841, pp. 597–599.

45 AQUINAS, Thomas, *The Summa Theologica*, Part II, No. 2, p. 327; AQUINAS, Thomas, *Summa Theologica*, Tomus III (complete *secunda secundæ* in *Patrologiæ Cursus Completus*), Parisiis, 1846, p. 587.

46 KLEIN, William A., COFFEE, John C., Jr., *Business Organization and Finance. Legal and Economic Principles*, 10th ed., 2007, p. 23.

from simply reselling products, without any processing, was also contrary to Aquinas' teachings.[47] On the contrary, the producer could transport the goods and add transport costs to the price or reflect the change of price over time.[48] Aquinas directly states that goods purchased without intent to sell them, but later sold for some reason, can be sold at a higher price, i.e. profitable, to cover transportation costs, or simply because the thing has changed price at time or relocation.[49]

C. Selling products through agents also ensures that a just price is set correctly (for the producer). The agent sells the product on the market where the market price is set. Market price, or maybe more precisely fair price, can be considered as just price (*iustum pretium*) according to Aquinas (*vide infra*). A producer, who has ownership of the goods sold by the agent, has so ensured 'just price'.

To a large extent, merchants were merely distributors of goods which, as agents, they transported to the markets, where they sold them.[50] Thus, there was no legal ownership of goods by those merchants (principals only entrusted their goods, or money, to agents or representatives),[51] but ownership passed directly from producer to final consumer. And so much of the risk remained with the owner (risk of damage to the thing). The agent-distributor was liable similarly to depositee at *depositum*,[52] i.e. only for *dolus*.[53] In the case of damage, e.g. theft or robbery, the agent's debt to the producer, as *obligatio ex delicto*, did not arise.

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47 AQUINAS, Thomas, *The Summa Theologica*, Part II, No. 2, pp. 327–328.

48 Ibid., p. 328.

49 Ibid., p. 238.

50 O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, pp. 206–207.

51 Ibid.; GRAY, Alexander, *The Development of Economic Doctrine: An Introductory Survey*, 1956, p. 59.

52 ENDEMANN, Wilhelm, *Studien in der Romanisch-Kanonistischen Wirthschafts- und Rechtslehre bis gegen Ende des Siebenzehnten Jahrhunderts*, Erster Band, Berlin, 1874, p. 362.

53 BUCKLAND, William Warwick: *A Text-Book of Roman Law from Augustus to Justinian*, 1921, pp. 464–465; KINCL, Jaromír, URFUS, Valentin, *Římské právo*, p. 308.

8. Fairs and Markets

Aquinas' 'just price' can be marked as 'market price'.[54] However, it was not market price purely on the basis of supply and demand. Just price was more an administrative price (e.g. because of influence of gilds). Of course, even an administrative price was influenced by supply and demand too (e.g. food in time of a crop failure). And, of course, in some cases, setting an administrative price makes no sense – e.g. with horses, where it is necessary to determine the individual price for each different horse. It is much more appropriate to view 'just price' as 'fair price', thus as a price in a heavily regulated market (referred to as a fair but also as a market),[55] determined more or less administratively.

Coase mentions as a reason for the institutionalization of markets the provision of material support for the holding of markets, security, the resolution of related disputes and the setting of legal rules for the organization of exchange – all of which lead to a reduction in transaction costs and consequently an increase in trade volume.[56] The legal rules of exchange deserve our special attention. The purpose of these rules, in particular those ensuring transparency of transactions, was undoubtedly to reduce crime and increase legal certainty.[57]

A general rule is that ownership of goods may be transferred by sale where the vendor has right of ownership himself.[58] If goods were sold by a person who is not the owner, and who does not sell them under the authority or with consent of the owner, the buyer acquires no better title than the seller had.[59]

Nevertheless, if goods were sold in 'market overt', i.e. open (regulated) market, according to the customs of the market, the buyer acquired a good title to the goods, provided he bought them in good faith and without notice of any defect on the

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54 DE ROOVER, Raymond, *Scholastic Economics: Survival and Lasting Influence from the Sixteenth Century to Adam Smith*, in: The Quarterly Law Review, Vol. 69, No. 2, May, 1955, p. 164.

55 PEASE, Joseph Gerald, CHITTY, Herbert, *A Treatise on the Law of Markets and Fairs*, London, 1899, pp. 1–2.

56 COASE, Ronald Harry, *The Firm, the Market and the Law*, Chicago and London, 1990, pp. 8–10.

57 LIPSON, Ephraim, *The Economic History of England*, Vol I. The Middle Ages, London, 1929, pp. 199–200; MAITLAND, Frederic William, *Doomsday Book and Beyond*, 1921, pp. 193–194.

58 BLACKSTONE, William, *Commentaries on the Laws of England*, Vol. I, Book II, Philadelphia, 1866, p. 449.

59 PEASE, Joseph Gerald, CHITTY, Herbert, *A Treatise on the Law of Markets and Fairs*, p. 120.

part of the seller.[60] In such way property might be transferred, even if the vendor had no right at all in the goods.[61] And administrative fees (tolls) established in the markets testified the making of contracts.[62]

Yet Saxons prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses.[63] And further, Pease and (Herbert) Chitty say that the Anglo-Saxon law required that all goods above a certain value had to be sold in market-towns (ports), and that the sale had to be witnessed by the port-reeve or other persons. A sale so conducted did not give the buyer an absolute title available against the true owner of goods which had been stolen, but it protected him from the consequences of being found in possession of stolen property. (Paese and Chitty referred to the *Laws of Ina, Athelstan, Cnut, and William the Conqueror*, edit. of 1840, pp. 51, 87, 88, 167, 209, 212).[64]

The market was established by law to prohibit buying and selling elsewhere, the aim of which was to prevent easy disposal of stolen goods. Anybody who bought something out of official markets (i.e. out of superintendence and control),[65] ran a risk of being treated as a thief if he bought stolen goods.[66] And if he was not treated as a thief, he was deprived of the goods.[67]

Pease and (Herbert) Chitty further say that the goods had to be exposed for sale and the whole transaction begun, continued, and completed in open market, so as to give opportunity to the legal owner to pursue them and prevent their sale. It probably originated in the merchant law administrated in courts of pie powder. The custom seems to have been present on the continent as early as the ninth century. Notker, who was living about 850 A.D., says that 'merchants contend that the purchase which is made at an annual fair should be valid, whether it be just or

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60 Ibid.

61 BLACKSTONE, William, *Commentaries on the Laws of England*, Vol. I, Book II, p. 449.

62 Ibid.

63 Ibid.

64 PEASE, Joseph Gerald, CHITTY, Herbert, *A Treatise on the Law of Markets and Fairs*, pp. 120–121.

65 CHITTY, Joseph, *A Treatise on the Laws of Commerce and Manufactures, and the Contracts Relating thereto*, Vol. II, London, 1824, p. 142.

66 MAITLAND, Frederic William, *Doomsday Book and Beyond*, 1921, pp. 193–194.

67 PEASE, Joseph Gerald, CHITTY, Herbert, *A Treatise on the Law of Markets and Fairs*, pp. 120–121.

unjust, because it is their custom;' (Pease and Chitty referred to *Report of Royal Commission*, Vol. I., p. 4).[68]

The market (overt) had to be an open, public and legally constituted market.[69] The first regulated markets were established in the 7th century (traffic among the people before witnesses).[70] The charters of the markets in St Denis 629–759 are well-known,[71] and it should be noted that special courts were established at markets – in the 10th and 11th centuries only courts which could be considered as special trade courts were the courts at markets and fairs,[72] which were created in coincidence with the independence of Italian cities.[73]

Detailed rules regulated market place,[74] time[75] and obligatory nature of transactions.[76] Statute of 3 Edward I. c. 23 (1275) said that all person who frequent a fair are privileged from arrest or molestation for debts not contracted or promised to be paid within the fair.[77] On the other hand, even over-regulation was enacted, which was then removed by the laws of Parliament – e.g. the ordinance of (corporation of) London, which created trade barriers and which was repealed by 3 Henry VII. c. 9 (1487).[78]

Some traded goods required special regulation – especially horses; Coke pays special attention to the functioning of horse markets in his trade comments on the functioning of markets (besides horses then hay and straw). Over the centuries, extensive and detailed regulation of horse trade has been adopted, including

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68 Ibid.

69 Ibid., p. 121.

70 LIPSON, Ephraim, *The Economic History of England*, Vol I, The Middle Ages, London, 1929, p. 199.

71 MITCHELL, William, *An Essay on the Early History of the Law Merchant*, Cambridge, 1904, p. 22.

72 Ibid., p. 39.

73 Ibid., p. 40.

74 CHITTY, Joseph, *A Treatise on the Laws of Commerce and Manufactures, and the Contracts Relating thereto*, Vol. II, London, 1824, pp. 145–146.

75 Ibid., pp. 146–148.

76 Ibid., pp. 148–150.

77 Ibid., p. 142. *The Statutes of the Realm. Printed by Command of His Majesty King George the Third. In Pursuance of an Address of the House of Commons of Great Britain. From Original Records and Authentic Manuscripts*, Vol. I., MDCCCX, London, reprinted, 1963, p. 33.

78 Ibid., p. 143.

regulation laws, in particular 2 & 3 Philip & Mary c. 7 (1555), *An Act against the buying of stolen horses*,[79] and 31 Eliz. c. 12 (1589), *An Act to avoid horse stealing*.[80]

The law regulated horse transactions in detail, set detailed rules for selling and buying horses, or transferring ownership on the market – displaying the horse for one hour on the market, entering the names of the seller and the buyer in the register, indicating the characteristics of the horse in the register, etc.[81] However, even after these conditions were met, assuming a stolen horse was sold, his legal owner had another six months for a claim to return it to him.[82]

9. Spreading of Agency after Aquinas

In the preceding passages the following was explained: (1) why it was necessary to sell goods through markets, and (2) why the requirements of anti-usury doctrine, that is, requirements to eliminate debt and pay a just price, led to selling goods through agents or representatives, and why the merchants had the status of agents who sold goods of others.

Now (I.) it will be argued for other reasons why transactions in the markets were done through agents, i.e. why the producers did not sell their goods on the market themselves and (II.) available evidence will be presented that this was indeed the case.

Ad I.)

a. For example, economic reasons include the fact that all producers (i.e. everyone) in one village did not have to travel to the market, but could commission one of them – even more practical it was when two markets were held at the same time, or when the producer had only a small production, with which he himself did not pay to go to the market.
b. The agent-seller, who was then well-known in the market, could have reached higher sales (i.e. higher turnover and/or higher prices) for the goods he sold.

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79 *The Statutes. Revised Edition*, Vol. I, London, 1870, pp. 573–575.

80 Ibid., pp. 664–667.

81 CHITTY, Joseph, *A Treatise on the Laws of Commerce and Manufactures, and the Contracts Relating thereto*, Vol. II, p. 151.

82 PEASE, Joseph Gerald, CHITTY, Herbert, *A Treatise on the Law of Markets and Fairs*, pp. 127–128.

c. The requirement of the law mentioned above for the sale of a horse (*vide supra*) also included the requirement that a clerk at the market had to personally know the original owner of the horse. If not, he had to know a person who confirmed the owner's identity.[83] An owner of a horse who was not known to the market clerks and who intended to sell his horse, had no choice but to engage a market agent who verified the identity of the owner and later testified to the market clerk.

Ad II.)

In 1206, Inocent III. advised that a dowry should be committed to a merchant (i.e. in *commenda*) for obtaining of honest gain.[84] For Edward I (1272–1307), the law of agency was in its infancy, but in the 13th century, the Law Merchant (*Lex Mercatoria*) in England recognized that goods bought by agent became directly the property of the principal, not the agent (Mitchell presented a case in fair court in St Ives in 1291).[85] Partnership and brokerage in the 14th century could be based on *nuda pacta* (unwritten contract).[86] On the other hand, it could also be created on standardized agreements.[87]

However, more evidence is available from the late 13th century and early 14th century. We know that 13 Edward I. (1285) *Statuta Civitatis London* authorized the Court of Aldermen to license brokers (*abrocours*) in the city of London.[88] And we know that a number of lawsuits were filed in the following period under that law before 1300.[89]

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83 Ibid., p. 127.

84 ASHLEY, William James, *An Introduction to English Economic History and Theory*, Part II, 2nd ed., p. 419.

85 MITCHELL, William, *An Essay on the Early History of the Law Merchant*, pp. 83–84.

86 Ibid., p. 105.

87 ASHLEY, William James, *An Introduction to English Economic History and Theory*, Part II, 2nd ed., p. 414.

88 *The Statutes of the Realm. Printed by Command of His Majesty King George the Third. In Pursuance of an Address of the House of Commons of Great Britain. From Original Records and Authentic Manuscripts*, Vol. I, MDCCCX, London, reprinted, 1963, pp. 103–104.

89 KLIMEK, James A., *History of Securities Law*, in: *The Blue Sky Bugle: A Newsletter for Blue Sky Lawyers*, Vol. 2010, No. 2, September, 2010, p. 14.

Ayenbite of Inwyt used the words 'romongours' or 'zelleres' of cloth,[90] which Ashley translated as 'horsedealers' (in Czech language probably 'koňský handlíř') and 'cloth-dealers'.[91] Thus, if the translations are correct, it would prove the existence of agents not only in the sale of horses, but also in the sale of clothing.

Various types of *societas* were used to finance both entities for production and entities for business (*vide supra*).[92] So, in this way, producers could have enough materials to make their products, and merchants had enough resources to transport goods from the place of production to the place of sale, whether on the domestic market or abroad (in the latter case, there was no doubt a higher cost).

The economic logic is that wealthy people (people able to finance a business trip) did not travel abroad, only their agents did. The discretion of the agents might have varied. We know cases where even agents with detailed instructions found themselves in situations not addressed by the principal's instructions, and they had to make their own decisions (as fiduciary).[93]

We can find words about representatives in many statutes, charters and other documents and texts. Statutes against usury often use the words 'factor' or 'broker', as well as charters, instructions of companies or books; merchants, whose position was considered more independent, are referred as representatives too.[94] The agent

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90 MICHEL, Dan, *Ayenbite of Inwyt or Remorse of Conscience*, Vol. I, 1965, pp. 44, 45.

91 ASHLEY, William James, *An Introduction to English Economic History and Theory*, Part I, 4th ed., p. 161.

92 AQUINAS, Thomas, *The Summa Theologica*, Part II, No. 2, New York, 1918, pp. 334, 336; AQUINAS, Thomas, *Summa Theologica*, Tomus III (complete *secunda secundæ* in: *Patrologiæ Cursus Completus*), Parisiis, 1846, pp. 591, 592.

93 HAKLUYT, Richard, *The Principal Navigation,Voyages, Traffiqves and Discoveries of the English Nation, made by Sea or ouerland, to the remote abd farthest distant quaters of the Earth, at any time within the compass of these 1600 yeres*, Vol. I, 1599, [A Catalog… *content*, p. (iv)], pp. 226–230. BORKOVEC, Aleš, *Akciová společnost a rozptýlené vlastnictví*, Praha, 2013, pp. 63–64.

94 CARR, Cecil T., *Select Charters of Trading Companies A.D. 1530–1707*, London, 1913, pp. 1–2; PLOWDEN, Francis, *A Treatise upon the Law of Usury and Annuities*, London, 1797, pp. 477–495; *The Statutes of the Realm. Printed by Command of His Majesty King George the Third. In Pursuance of an Address of the House of Commons of Great Britain. From Original Records and Authentic Manuscripts*, Vol. III, MDCCCXVII, London, reprinted, 1963, pp. 996–997; SCAMMON, Jonathan Young, *Reports of Cases Argued and Determined in the Supreme Court of the State of Illinois*, Vol. II, Boston, 1841, pp. 599–601; WHITMARSH, Francis, *A Treatise on the Bankrupt Laws. Reprinted from the Edition of 1660, with the Supplements to 1672. Containing also the Body of Liberties 1641*, 2nd ed., London, 1817, pp. 399–402; HAKLUYT, Richard, *The Principal Navigation, Voyages, Traffiqves and Discoveries of the English Nation*,…, pp. 226–230, 259–262; CHITTY *on Contracts*, Vol. II, 33rd ed., London, 2018, pp. 7–8.

could also turn into a servant (employee) with a contract *locatio (conductio) operarum* (employment contract).[95] The first bankrupt act, 34 & 35 Henry VIII. c. 4 (1542–3), *An Act against such Person as do make Bankrupt*, mentions 'divers and sundry persons craftily obtaining into their hands great substance of other men's goods…'.[96] In all likelihood, they were 'traders' who acted as agents of other people.[97] Those agents had 'debts and duties' to the principals,[98] maybe generated in the form of 'credit' from suppliers,[99] but not via *mutuum*.

The existence of regulated companies, *de facto* merchant gilds, for overseas and distant trade, from the 13th century in both England and the continent had reduced costs – agency costs and/or transaction costs (traveling of merchants in groups in which individual merchants, helping each other, and monitoring each other; as well as the disciplinary functions of the officers of these regulated companies).

10. Conclusion

The problem of usurer–debtor relationship is throughout human history. Medieval scholars, lawyers and others tried to eliminate interest (usury), and also to eliminate *mutuum* as such, for the reason of negative consequences for debtors (and their families). But the doctrine of usury was not applied to state loans (the creditor was not in a superior position here).

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95 O'BRIEN, George, *An Essay on Mediæval Economic Teaching*, London, 1920, p. 210.

96 *The Statutes of the Realm. Printed by Command of His Majesty King George the Third. In Pursuance of an Address of the House of Commons of Great Britain. From Original Records and Authentic Manuscripts*, Vol. III, MDCCCXVII, London, reprinted, 1963, pp. 899–901; WHITMARSH, Francis, *A Treatise on the Bankrupt Laws. Reprinted from the Edition of 1660, with the Supplements to 1672. Containing also the Body of Liberties 1641*, 2nd ed., London, 1817, pp. 399–402.

97 HANSMANN, Henry, KRAAKMAN, Reiner, SQUIRE, Richard, *Law and the Rise of the Firm*, in: *Harvard Law Review*, Vol. 119, 2006, p. 1380; HOLDSWORTH, William Searle, *A History of English Law*, Vol. VIII, London, 1925, p. 237, *n. 4*.

98 *The Statutes of the Realm. Printed by Command of His Majesty King George the Third. In Pursuance of an Address of the House of Commons of Great Britain. From Original Records and Authentic Manuscripts*, Vol. III, MDCCCXVII, London, reprinted, 1963, pp. 899–901; WHITMARSH, Francis, *A Treatise on the Bankrupt Laws*…, pp. 399–402; O'CALLAGHAN, *Usury and Interest. Proved to Be Repugnant to the Divine and Ecclesiastical Laws, and Destructive to Civil* Society, New York, 1824, p. 175.

99 HANSMANN, Henry, KRAAKMAN, Reiner, SQUIRE, Richard, *Law and the Rise of the Firm*, p. 1365.

Contrary to anti-usury doctrine, there were advocates of usury or credit, supported by the wishes of usurers and potential borrowers (i.e. people eager to indebt themselves with the prospect of getting a more comfortable life). The battles of theoretical legal concepts, accompanied by sophisticated arguments of both parties (opponents of usury and advocates of interest and credit) lasted about 300 years and ended with the victory of credit supporters.

However, anti-usury doctrine not only eliminated or oppressed the institute of *mutuum*, but led to spread the institute of agency too – sale of products through agents not only eliminated debts but decreased the risk of *obligatio ex delicto* as well. In agency, like in *commodatum*, *locatio conductio rei* or *precarium*, ownership was not transferred. The risks associated with the thing (goods), such as destruction of the thing by accident (*vis maior*), remained with the owner, and did not impact the agent or the user of the thing. That was one of the main aspects of protecting an agent from being bogged down in financial problems, i.e. falling into debts that he would not be able to fulfill.

The correct functioning of agency (*societas*, *commenda*) was supported by a system of sophisticatedly regulated markets, via which producers were forced to sell their products. Markets (fairs) also ensured the setting of a uniform level of the price of goods – i.e. just price (*iustum pretium*). In addition, the effectiveness of agency was influenced by gilds (incl. regulated companies) and even state legal regulation (incl. grants and charters).

In the evolution of agency, described above, there is also a step towards the genesis of fiduciary duties and the genesis of incorporated joint stock companies (i.e. corporations doing business with a joint stock), as the new emerging invention of business enterprise.

Summary

Thomas Aquinas is generally known as an opponent of usury, which means any interest on a loan (i.e. any payment over the principal capital). The doctrine created by Aquinas can be called anti-usury doctrine. In medieval economic and legal reality, other legal institutes, instead of the *mutuum*, had been applied for using things (real estate, chattels) without the transfer of their ownership – rent (*locatio conductio rei*), borrowing (*commodatum*) and leniency (*precarium*). In addition, the effects of the anti-usury (and anti-debt) doctrines caused the rise of the institute of agency. In symbiosis with the development of agency, there were (regulated) markets as a tool to combat crime and create legal certainty for which the institute of agency was important; and markets were important for the proper function of agency.

Resumé

Protilichevní nauka a vývoj právního zastoupení

Tomáš Akvinský je všeobecně znám jako oponent lichvy, která v jeho pojetí znamená jakýkoliv úrok na zápůjčku (tj. jakákoli platba nad původní kapitál). Doktrína vytvořená Akvinským může být nazvána jako protilichevní nauka. Ve středověké ekonomické a právní realitě byly další právní instituty, namísto institutu *mutua*, aplikovány pro užívání věcí (nemovitostí, movitostí) bez převodu vlastnického práva – nájem či pacht (*locatio conductio rei*), výpůjčka (*commodatum*) a výprosa (*precarium*). Navíc, účinky protilichevní (a protidluhové) nauky způsobily vzestup institutu zastoupení. V symbióze s rozvojem zastoupení existovaly (regulované) trhy jako nástroj k potírání trestné činnosti a k vytváření právní jistoty, pro které byl institut zastoupení důležitý; a trhy byly důležité pro řádnou funkci zastoupení.

Key words: usury, mutuum, agency, fairs, markets, societas, commenda, price

Klíčová slova: lichva, mutuum, zastoupení, trhy, societas, commenda, cena

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