

The Sea Loan in Genoa in the Twelfth Century

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THE SEA LOAN IN GENOA IN THE TWELFTH CENTURY

SUMMARY

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THE sea loan, or *faenus nauticum*, is one of the most ancient forms of contractual relationship between individuals for the purpose of providing the entrepreneur with the funds of the capitalist. Developed as it was by the mutual interest of the possessor of idle funds who desired the most lucrative possible investment, and of the merchant who could see opportunities for immense profits in trading ventures by sea, if only he could secure the funds to provide a cargo, the sea loan has shown a most remarkable tenacity in use, and in one form or another has endured from the days of classical antiquity until modern times. Indeed, some writers, gifted with a strong sense of romance and as strong an imagination, have placed the origin of the sea loan back another half millennium in India. In a speech by Demosthenes of about 340 B.C. mention is made of a sea loan which resembles in a striking way the sea loan as it was used in medieval times, and even bears considerable likeness to the modern bottomry bond.¹

1. See Walford, *Cyclopedia of Assurance* (London, 1871), i, 335, for a comparison of an ancient Greek sea loan with a modern bottomry bond.

The remarkable similarity in type of contracts used in the trade of the Mediterranean in periods separated by more than a thousand years naturally raises the question whether the sea loan continued in use uninterruptedly from the days of Demosthenes to the Crusades, or whether the awakening economic life of the western Mediterranean called forth a commercial device similar to that in use at the time when about the same stage of economic development had been attained in ancient Greece.

Fortunately there exists sufficient documentary evidence to answer the question with some degree of accuracy. The sea loan in use at the time of the height of Roman commerce was essentially the same as that in use in Greece at the time of Demosthenes. While no actual contracts are now in existence which date from Roman times, the references to the sea loan which occur in the early Roman law and in the Code and Digest of Justinian,² are sufficiently explicit to establish the similarity of the Greek and Roman types. Since the commercial life of Greece and of Rome is separated by no such hiatus as that which stretches between Roman civilization and the renaissance of the Italian commercial towns such as Genoa and Venice, there seems no reason to doubt that the Roman sea loan was a direct descendant of the type in use in Greece several centuries before. The references to the sea loan in the *Basilica* show that it was used in the Byzantine Empire.³

Since the Italian maritime cities, such as Venice and Genoa, had carried on a considerable trade with Constantinople, from the time of their very origin as medie-

2. See W. Ashburner, *The Rhodian Sea Law* (Oxford, 1909), p. cccvii.

3. The *Basilica* was compiled about A.D. 867-880. For reference to its provisions in regard to the sea loan, see Walford, *op. cit.*, I, 337.

val commercial centres, it seems probable that there exists a direct historical connection between the ancient Greek and the medieval Italian forms of the sea loan, through the medium of Rome and the Byzantine Empire. It was, however, the great revival of commerce following the Crusades which brought back the sea loan to the western Mediterranean, where it must have died out along with the commerce which had occasioned its use.

The notarial records of the commune of Genoa probably afford a greater number and variety of sea loans of the twelfth and thirteenth centuries than are available in the archives of any other city of the period.⁴

4. These records consist in the main of the acts of the Genoese notaries who drew up the contracts for the parties to the agreement. The notaries were public officials of the commune of Genoa. They usually stationed themselves in the habitual meeting places of the merchants, particularly when the sailing of a ship or convoy of ships was in prospect. On these occasions many contracts would be drawn up in a single day. On other occasions the notary drew up the copies of the contract in the home of the merchant who was a party to the contract. All these transactions were written down by the notary, and copies given to the parties to the contract. The original copy of the contract was filed in the public archives of the city. The acts of the notary Giovanni Scriba are the earliest that have been preserved down to the present time. They cover the period from 1154 to 1164. This notularium has been edited in the *Historiæ Patriæ Monumenta*, and is generally known as *Chartarum II*. The records of the notaries following Giovanni Scriba, for a period of more than one hundred years, have been photographed by Professor E. H. Byrne of the University of Wisconsin. The photostatic copies of the documents of this period are now on file in the library of the University of Wisconsin. They have not yet been edited. References to the unpublished records are here made to the notary to whom the volumes are ascribed in the *Archivio di Stato di Genoa*, and to the numbered folios, or to the unnumbered reverse, as f. 52 v.

The period covered in this discussion includes the first six years of the thirteenth century, partly because they naturally belong to the period of Genoese trade which was brought to an end by the expulsion of the Genoese from the trade with the Byzantine Empire following the Fourth Crusade; but principally because the material presented here which deals with the Genoese sea loan is intended to parallel the work of Byrne on the Genoese *Societas* and *Accomendatio*, which covers a like period. His monograph appeared in the *Quarterly Journal of Economics*, Vol.

This form of contract seems to have been used throughout the entire field of Genoese maritime endeavor.⁵ Examples of sea-loan contracts which provided funds for trade with Constantinople, Syria, North Africa, Egypt, southern France, Sicily, Sardinia, and Corsica, are common.⁶

It was not only the Genoese merchants, however, who found it convenient to revive the use of the sea loan in the western Mediterranean. The sea loan was used also in Venice, Marseilles, Barcelona, and very likely in all the other cities of the Mediterranean coast in which there was an active trade.⁷

We find that throughout the area of commerce served by the Italian, Provençal, and Catalan merchants of the sea, the ancient sea loan was revived in substantially its original form; and altho in the course of decades of use it was adapted to the changing demands of a rapidly expanding commercial activity, yet it always retained some of the ancient forms and phrases, in order that the law might treat the new development merely as a form of contractual relationship sanctioned by custom, hardened into law.

The sea loan was destined to be of the greatest importance in the development of loan contracts in Genoa, for at the time when it came into use it represented the sole type of contract for the loan of capital funds at in-

xxxi, November, 1916, under the title, "Commercial Contracts of the Genoese in the Syrian Trade of the Twelfth Century."

A very few references are to contracts which were executed as late as 1215. These are used, however, merely to indicate the trend of events after the twelfth century, in order to compare or contrast that century with the period immediately following it.

5. For an account of Genoese trade during the twelfth century, see E. H. Byrne, "Genoese Trade with Syria in the Twelfth Century," in *American Historical Review*, Vol. xxv, No. 2.

6. See Notaio Guglielmo Cassinense, ff. 57 v, 107, 203, and Notaio Lanfranco, registro I, ff. 132 v, 90, 75 v, 77.

7. For numerous citations of sea loans in these cities, see Goldschmidt, *Handbuch des Handelsrechts* (Stuttgart, 1891), pp. 347-353.

terest which was not illegal. Usury was illegal at Canon Law, and its position before the Civil Law was uncertain at best. But the sea loan offered an opportunity to bring a loan at interest under the protection of the law. This protection was of maximum importance to the lender, since it assured him of the return of his funds, barring loss at sea; and it was of equal importance to the borrower, since, without the assurance to the lender of the legal enforcement of the loan contract, the temporary transfer of capital funds from lender to borrower was hardly possible.

The sea-loan contract is frequently referred to by the notaries as a *mutuum*.⁸ The use of this term demonstrates the scrupulous care of the notaries lest the sea-loan contract should come within the purvey of the anti-usury laws. A *mutuum* was technically the loan of a *consumptible* or *fungible*, with no provision for the payment of usury.⁹ A loan contract which provided for the repayment of a loan together with a sum in addition to the principal was a *fœnus*, and according to Canon Law a *fœnus* was illegal. However, the *fœnus nauticum*, or sea loan, occupied a unique legal position, since the peculiar risk of loss which the lender in a maritime loan necessarily underwent was generally considered sufficient justification for the repayment of something more than the principal.¹ It is unlikely that

8. Not. Gugl. Cass., pp. 222 v, 242, 246; Not. Lanfr., reg. II, f. 12 v.

9. For an explanation of *res fungibles* and *res non fungibles* and their importance to the medieval interest doctrine, see O'Brien, *An Essay on Medieval Economic Teaching* (London, 1920), p. 178.

1. The *fœnus nauticum* seems to have been regarded as legal according to Canon Law, at least until the middle of the thirteenth century. At that time (1227-1234) it is referred to in a decretal of Gregory IX (lib. V, tit. xix, c. xix) which has aroused considerable controversy. The decretal apparently forbade the *fœnus nauticum* as usurious. However, most authors and commentators on Canon Law seem to believe that a *bona fide* sea loan, in which the bonus paid on borrowed funds was directly proportionate to the maritime risk involved, never be-

there had ever been a definite ruling by the ecclesiastical authorities which had specifically established the legality of the *fœnus nauticum*.² Rather, the sea loan depended, for such legal status as it had, upon the supposition that it was not a *fœnus* at all, and that any sum which was paid in addition to the principal was not usury, but an insurance premium instead. In consequence, the anxiety of the lender that there should be no slightest taint of usury about the contract can be readily appreciated. As a result of this apprehension on the part of the lender, the term *fœnus nauticum*, which was employed in Roman times, was never used in the Genoese contracts, so far as the writer is aware. Instead, the term *mutuum* was used, in order implicitly to deny the usurious character of the contract.

On account of the fact that the sea loan was become illegal at Canon Law in spite of this decretal. Some commentators base their opinion on the belief that the text of the decretal in its present form is corrupt, and that the construction of the rest of the decretal would call for the insertion of the word *non* in front of the phrase *est censendus*; hence a proper transcription would make the decretal read, "Naviganti vel eunti ad nundinas . . . usurarius *non* est censendus," so that, instead of prohibiting the sea loan, it would be specifically exempt from the operation of the anti-usury laws. See Ferrari, *Bibliotheca Canonica Juridica Moralis Theologica* (Rome, 1885-1892), v, 757-771.

Certainly there were sea loans made after the time of Gregory IX (Schaube, *Handelsgeschichte der Romanischen Volker des Mittelmeergebietes bis zum Ende der Kreuzzüge* [Munich, 1906], p. 112). Just as certainly the sea loan declined in importance during the period following the decretal; but this was probably due rather to the development of pure marine insurance than to any respect for papal decrees, however authentic. Altho Schaube states that the sea-loan contracts of this later period were disguised as transactions in exchange, this fact proves nothing, for sea-loan contracts had been so disguised for decades before the time of this decretal.

2. Altho usury as such was categorically forbidden by the ecclesiastical authorities, yet it was clearly recognized that in connection with the lending of funds a recompense might be claimed by the lender, due to certain extrinsic titles, one of which was risk, or *periculum sortis*. Altho this particular title was in dispute after the decretal of Gregory IX, it was probably recognized before that time, and its general validity was established as late as 1645. O'Brien, *op. cit.*, pp. 192, 193.

sidered legal at both Civil and Canon law, the original form of the sea-loan contract was frequently altered in order to make possible its application to loans which were essentially of a different nature from the type which the old form of the sea loan had been designed to serve. This circumstance gave rise to numerous variations in form. The contractual forms differed in detail with almost every transaction. Nevertheless, it is possible to separate the vast number of contracts into several main types.

Three types of the sea loan may be distinguished, according to the purpose for which the funds loaned were to be used. The first type may be called the original, or *bona fide*, type of sea loan, the second the *pignus* type, and the third the usury-evasion type.

I

The original sea loan was a combination of loan contract and insurance contract, which was admirably adapted to the needs of a rather primitive sea-borne commerce.³ Two purposes were served by this form of contract. In the first place, capital funds could be loaned at interest without running counter to the laws against usury; and secondly, the borrower of the capital

3. Not. Gugl. Cass., f. 37 v, of the year 1191, is an example of this type:

Confitetur Obertus Casapapa se cepisse in mutuo a Bernatione Scoto libras 150. Et Baudo Rubeus libras 125. Et Bertolotus Smeratus libras 125. Unde ei dare promittunt bisantios III et quartam Saracenes mundos ab omne directo et iusta ponderis per libram ad mensem I proxamam esquo fuerint ultramare eudenti imprimis in Sardiniam pro carricari et inde ultramare. Salva eunte nave vel maiori parte rerum navis que parati sunt ire. Et si forent disturbata que non moverentur pro ire in predicto viatico aliqua iusta impedimenta que disturbarentur inde ad mensem promittunt reddere predictas libras. Sub pena dupli insolidum abrenunciatione iuri solidi et omni iuri. Testes Alexander Triesellus. Willelmus filius Bonasensoris. Albertus de Nonatar. Et pro pena et sorte navem et carcum navis ei stipulanti obligant sub pena dupli Bertolotus. In ecclesia Sancti Laurentii ea die. Jurant et ita attendere rebus quantum et cum et sint vel assent.

funds obtained what amounted to insurance against maritime disaster involving his borrowed capital. In the ordinary sea loan of this type, the borrower was a Genoese merchant who needed funds to buy a stock of goods for use in trading in the East, or who intended to use the funds borrowed for the direct purchase of wares in the East. The borrower agreed to repay the funds which were loaned to him, plus an additional amount, which was actually interest upon the loan, but which, according to a legal fiction, was merely a bonus or premium paid to the lender of the funds because of the peculiar risk incident to trading at sea. This concept of the bonus paid for the use of the capital funds as an insurance premium rather than as usury was a reasonable one, since the borrower was not under obligation to repay his loan if the goods in which the funds were invested were lost at sea. The sea loan was carefully phrased so that the lender of the funds underwent the maritime risk of the venture, and he was assured of the repayment of his capital only if the ship which carried the investment overseas escaped the perils of the sea. The customary phrase used to express the contingency principle in the contracts was *sana eunte nave vel maiore parte rerum ipsius nave*. In some cases the borrower of the funds was the owner or part owner of a ship, and the proceeds of the loan were for use in outfitting his ship, or paying the advance wages of his crew, or for any of the other expenses which a ship owner has to meet.⁴ Whether the borrower was a merchant or whether he was a ship owner, the terms of the sea-loan contract were not essentially different.

The general prejudice against the taking of usury was so strong that every effort was made in drawing up the contracts to conceal the rate of interest charged on the

4. Not. Lanfr., reg. I, ff. 93 v, 99 v; and Not. Gugl. Cass., ff. 151 v, 107, 107 v.

loan. The greatest pains were also taken by the notaries in drawing up the contracts for sea loans, or indeed loans of any sort, to avoid the use of the term usury. Sometimes the sum paid for the use of borrowed funds was called *proficuum*,⁵ and at other times it was referred to as *lucrum*.⁶ Often the interest rate on the loan is stated as *tribus quatuor* (four for three), or as *quatuor quinque* (five for four),⁷ representing in the first case a loan at thirty-three and one third per cent, and in the second case, one at twenty-five per cent. Infrequently the expression *per centum* was used.⁸ Occasionally the interest rate is calculated upon the basis of *solidi* or *denarii per libram*.⁹ In the majority of cases the notaries avoided the use of any term at all which might be interpreted as referring to usury.

After the early period of the sea loan it is unusual to find a contract with a definite interest rate stated. Indeed the contract was not usually drawn so that the borrower was to repay the same sort of coin as that in which the money was loaned. If the amount to be loaned was stated in Genoese pounds, which was the customary standard of value, the terms of the loan provided that the loan should be repaid in the money of the country in which the funds borrowed were to be used in trade.¹ The object in this provision for the loan

5. For example, Not. Lanfr., reg. I, ff. 164, 183 v.

6. For example, Not. Gugl. Cass., f. 264 v.

7. For example, Chartarum II, nos. 452, 708.

8. Not. Lanfr., reg. III, f. 64.

9. Not. Gugl. Cass., f. 264 v.

1. In the case of the Syrian trade, the loan was almost always to be repaid in Saracen besants (Not. Lanfr., reg. I, f. 91 v; Not. Lanfr., reg. II, f. 35); in the North African trade the coin of repayment was the besant *masumotinus* or *miharensis* (Not. Gugl. Cass., f. 98 v, f. 107); in the trade with Sicily it was the ounce of gold *tarrenti* (Not. Lanfr., reg. I, ff. 81 v, 90); with Marselles the coin was the *regalium coronatorum* (Not. Gugl. Cass., ff. 154, 176 v); while in the trade with Constantinople the *perperrus* (*yperperus*) was the most frequently designated currency for repayment (Not. Gugl. Cass., f. 57 v). These coins were the commonest units of repayment, but other sorts are mentioned.

of money of one sort and the repayment of another was to render obscure the amount of the premium paid, so that the large amount would not create the suspicion that usury had been charged in addition to insurance. At other times the interest rate is concealed, in that the amount of the funds loaned is not definitely mentioned, but, instead, the contract merely reads that the borrower has received an indefinite amount of the goods or money of the lender,² and is to repay so many Genoese pounds. The fact that, wherever the amount of the sum loaned is not mentioned, the repayment is to be in Genoese pounds, indicates that the repayment in terms of some foreign coin in the other case was not merely for the convenience of the borrower in making repayment.

In the case where the sum loaned is not definitely stated, the determination of the interest rate is, of course, impossible; but in the case where the loan is to be repaid in some foreign coin, altho made in terms of Genoese money, the determination of the rate of interest is still possible. If we were compelled to assign a constant value to each coin used in the transaction, the results obtained would be of questionable value; for the problem of fluctuation in the rate of exchange between the moneys of different countries, which is caused now by inflation of the currency, was caused in those days by the difference in purity or weight of coins minted at different times, altho designated by the same name. Fortunately, however, in the later form of sea loan it was usually necessary to specify in the contract itself the approximate exchange value of the two moneys used in the transaction.³ In

2. The expression used was *tantum de tuis rebus*. See Not. Lanfr., reg. I, ff. 17, 38 v, among many others.

3. See Not. Gugl. Cass., ff. 224 v, 202 v, 304, 310; Not. Lanfr., reg. I, ff. 17, 26, 81.

this way, wherever the exchange rate is specified, and in those cases where the interest rate is definitely stated in one way or another, it is possible to arrive at the rate of interest which was charged for the different voyages.

In general, the amount of the interest charged varied with the length and character of the voyage undertaken, rather than with the actual time for which the money was used by the borrower. Possibly this was the case in order to retain the color of a venture loaned upon the sea, so that any interest charged might be considered as due to risk rather than to usury. As a result there tended to be a modal rate of interest for each trade.

The interest rate to Syria was usually about fifty per cent.⁴ To Sicily the rate was customarily between twenty-five and thirty per cent,⁵ to North Africa from twenty to thirty per cent,⁶ and to Sardinia or Corsica from ten to twenty per cent,⁷ with a similar rate to the sea towns of southern France and the small Italian ports near Genoa.⁸ There are a few cases of sea loans in which no interest rate is paid, but, instead, a share of the profits is given. This practice, however, was not common, and the terms of these contracts are usually

4. The rate to Syria is 50 per cent in Not. Lanfr., reg. I, ff. 93 v, 149, 155 v, 182 v, and in Not. Gugl. Cass., f. 48 v, and others. In Not. Lanfr., reg. I, ff. 141 v and 142, it is 42½ per cent. In Not. Gugl. Cass., f. 37 v, it is 62½ per cent; but this last contract gives the right to trade in Sardinia also.

5. The rate to Sicily in the contracts recorded in *Chartarum II* is almost invariably 25 per cent. In Not. Lanfr., reg. I, f. 108 v, the rate is 43 per cent; in Not. Lanfr., reg. I, f. 122, it is 34 per cent; and in Not. Lanfr., reg. I, f. 90, 50 per cent.

6. For the interest rate for the voyage to Ceuta, Garbo, Tunis, Bougie, etc., see Not. Lanfr., reg. I, ff. 3 v, 77, 99 v, 167 v, 184 v, 197, 197 v.

7. For the rate to Sardinia and Corsica, see Not. Lanfr., reg. I, ff. 25, 65 v, 75 v, 77, 183 v, 184 v, 189.

8. For the interest rate to maritime cities of southern France and the small ports near Genoa, see Not. Lanfr., reg. I, ff. 32 v, 53 v, 62, 163.

not very clear.⁹ Occasionally there is no provision at all for payment of a return on the funds loaned.¹ In this case probably the amount stated in the contract is really greater than the borrower received, and the interest is provided for in that way.

The lenders of the funds in the sea loans were usually exceedingly careful to see to it that their funds did not lie idle or lose any accrued interest. When funds were loaned to merchants or mariners who were to be gone for considerable periods, it was usually provided that the funds loaned should be repaid, not in Genoa, but in the country to which the merchant was going, to the certified agent (*certo misso*) of the lender.² In this way the man who loaned funds to a merchant going to Syria would obtain an interest rate of perhaps fifty per cent on the outward journey, and would likewise be able either to loan the money to a merchant in Syria and make a similar return on his money for the homeward voyage, or he would be able to make a profit on the goods which he or his agent purchased with his funds in Syria, and later sold in Genoa. When the funds loaned were to be employed for carrying on trade with neighboring cities or districts, such as Marseilles, Montpellier, Corsica, or Sardinia, provision was usually made for repayment after the return of the trader to Genoa.³

9. In Not. Gugl. Cass., f. 325, the parties to the contract agree that for the use of 5 pounds of money of Genoa, the borrower is to pay four fifths of whatever profit he shall make on the money during a voyage to Bougie. This contract seems quite clear and definite in its terms.

1. For example, Not. Gugl. Cass., f. 293.

2. For example, Not. Gugl. Cass., f. 265; Not. Lanfr., reg. I, ff. 93 v, 142, 145 v.

3. Thus if the sea loan were made for a journey to Syria it would be repaid there (Not. Gugl. Cass., f. 57 v; Not. Lanfr., reg. I, f. 93 v). The same principle held for sea loans to Constantinople (Not. Gugl. Cass., f. 57 v), Garbo (Not. Gugl. Cass., ff. 98 v, 183 v), Bougie (Not. Gugl. Cass., ff. 107, 183 v), and indeed to all other distant ports. The contrary was true if the loan were to be carried to some neighboring city or country, as Montpeher (Not. Lanfr., reg. I, f. 132 v), or Sardinia (Not. Lanfr., reg. I, f. 75 v).

It was probably more convenient to have the funds payable in Genoa than elsewhere, and funds were repaid in other cities only in those cases in which the amount of the interest was enough to compensate the lender for the trouble and expense of arranging for an agent to receive payment for his account in a foreign city, and for the cost of lending or otherwise investing the proceeds of the loan so that they could be returned to Genoa in a reasonable length of time.

The sea loan was undoubtedly used in many instances as an instrument for carrying on transactions in foreign exchange. The provision in great numbers of such contracts for payment in a foreign port, and frequently in a foreign currency, might easily lead to the belief that one of the major purposes of the sea loan was to furnish a means of remitting funds without the necessity of sending bullion. This possibility seems strengthened by the fact that the bill of exchange which was used in the commerce of the Mediterranean undoubtedly borrowed the phraseology of the sea loan in large measure.⁴ However, it seems more probable that the provision for repayment in the outport was in order to avoid the loss of interest on funds loaned, and that the provision for repayment in foreign coins was in order to cloak the essentially usurious character of the contract.

The period of grace that was allowed the borrower of the funds after arrival at the place where repayment was specified varied from eight to sixty days. The shorter period for repayment applied to the loans for short voyages mentioned above, while the longer period applied to the more extended voyages to Syria, Constantinople, and Alexandria. For short voyages the loan was payable within fifteen days after arrival in port,

4. Goldschmidt, *op. cit.*, p. 412.

while one month was allowed for the longer voyages.⁵ The purpose of this waiting period between arrival at destination and time of repayment was to permit the merchant to sell his goods so that he could provide himself with the means to repay his loan.

In a few instances, repayment was specified at a definite calendar date, instead of so many days after arrival of the ship in port.⁶ In these cases there is some doubt as to whether the contract is a *bona fide* sea loan, since the essential feature of the true sea loan consists in making the repayment contingent upon the safe arrival of the ship carrying the commodities in which the loaned funds were invested. When payment must be made at a certain date, it is obvious that the clause providing for repayment only in case of the safe arrival of the invested capital is nullified. The matter is not clear, however, since the clause for repayment at a specified date may have been inserted in some cases for greater definiteness, and in other cases to provide for a longer period between the time of arrival and the time of repayment. The courts may have refused to enforce payment of the loan if the investment suffered marine disaster, in spite of the provision of a definite date for repayment.

During the early period of the development of Genoese trade, the security for the funds loaned in the sea loan was provided for in a variety of ways. The most characteristic form of security was the general obligation of all the possessions of the borrower. That this was not merely a form, as it perhaps became later, but was actually legally enforceable is indicated by the fact that very frequently the wife of the borrower was

5. For examples of the fifteen-day period, see Not. Lanfr., reg. I, f. 183 v, a sea loan to Sardinia, and *ibid.*, f. 184 v, to Corsica. See Not. Gugl. Cass., ff. 315, 316, for period of one month on sea loans to Ceuta.

6. For example, Not. Lanfr., reg. I, ff. 81 v, 83, 142.

made a party to the loan, and was required to renounce certain legal rights which were provided under the Roman law.⁷ The purpose in doing this apparently was to make the right of action of the creditor absolute over the property of the borrower, as it evidently would not have been if his wife had not been a party to the loan, since she could have maintained her dower rights in her husband's property.⁸ This is shown by the fact that when the wife is made a party to the loan, in order that there may be no question of coercion by the husband, male members of her own family very often certify that she agrees to the contract by their advice.⁹ Sometimes in these cases the borrower of the funds states that his property has no prior claims against it.¹ In some cases, the surety given for repayment is real estate,² and in other cases, friends of the borrower are his sureties for repayment of the loan.³

In the period of the wider development of the commerce of Genoa, a considerable change took place in the nature of the security offered. By the end of the thirteenth century the typical borrowers were no longer men who could obtain small capital funds only by mortgaging the private possessions of themselves or of their family. Nor was it usually necessary for the borrower to have friends act as personal sureties. The borrower of this later period was usually a merchant whose business credit was good. He was the possessor of a ship, or shares in a ship, or of a stock of wares, which comprised the capital of his business. It was

7. Chartarum II, 265, 333, 438, 440, 445. All these prior to 1158.

8. According to the *Lex Julia* and *Senatus consultus Velleianum*.

9. Chartarum II, 445, 516, 519, 550. All these prior to 1159.

1. *Ibid.*, 438 (1157).

2. *Ibid.*

3. *Ibid.*, 685, 709, 833, 926. All these prior to 1161.

these shares in ships⁴ or the goods⁵ of the merchant which were hypothecated; and in case of default, the rights of the lender of the funds over this type of property seem to have been well enough established in the law by this time, so that the older custom of the consent of the wife and her relatives to the loan was no longer necessary.

II

The development of the *pignus* type of sea loan marks an important step in the development of the loan contracts used by the Genoese, since it represents an original contribution to the available legal credit instruments of the time.⁶ The first type of sea loan which

4. For examples of ships or shares in ships pledged as security for loans, see Not. Lanfr., reg. I, ff. 93 v, 99 v; and Not. Gugl. Cass., ff. 151 v, 107, 107 v., among scores of others.

5. For examples of goods pledged, see Not. Gugl. Cass., ff. 98, 112 v, 153, 154, 179, among a large number of others.

6. As an example of a simple form of the second type of sea loan, a contract (Not. Gugl. Cass., f. 212) of the year 1203 may be taken:

Confitetur Guglielmus de Astur se portare jussu et voluntate sui patris Hugonis de Astur in accomendatione a Guglielmo Bello de Castello cannas LVIII ad cannas ianue, de telis de Rens que constant solidi VIII per canna et cannas XLI de Stanfortis Albis. Et constant per canna solida XIII et constat supratotum libras L et solida XI et supra quas res debet vendere ultre mare se pagare voluntate predicti Guglielmus ultre mare debisantis LXXII minus Solre caratulas III mundos ab omni drictos et avaris et de justo peso. Sana eunte nave de donna vel maiori parte rerum ipsius navis ultre mare et hoc facit ei pro libram XXV denarius ianue quas ductus Guglielmus Bellus confitetur se recepisse a predicto Guglielmo de quibus vocal se quietum et pagatum (ab eo) abrenuncians exceptioni nonnumerate peccunie. Residuum quod supraerit (in predictis rebus) in solutione predictorum bisanteriorum debet et promittit ei implicare causa mercandi bona fide. Et quod residuum promittit ei ianuam aducere implicatum vel si mutaret naticum promittit ei (ianuam) mittere cum testibus in potestate eius vel sui certi missi proficuum quod deus dederit cum capitali et de quo residuo debet expendere et lucrari per libram cum aliis quas portat et de quo residuo debet habere quartam proficui. Testes Villanus de Sancto Georgio Johans Velutus, Henricus de Guaberto actum ea die et loco et hora.

For other examples of this second type, see Not. Lanfr., reg. I, ff. 91 v, 122, 141 v; Not. Gugl. Cass., ff. 1 v, 62 v, 69; Not. Lanfr., reg. II, ff. 29, 34 v.

was used in Genoa, and which has been described above, was adapted from the sea loan used in Roman times, and indeed shows scant modifications from the earliest sea loan on record, mentioned in the speech by Demosthenes, to which reference has already been made. In contrast to this original or primitive type of sea loan, the second type is of quite a different nature, and resembles the older form, of which it is an adaptation, principally because certain of the forms and phraseology of the original type are preserved in order to obtain the favored position of the older type of sea loan before the law.

The purpose of the second type of loan is quite different from that of the first type. In the original sea loan the purpose of the loan contract was to provide funds for a merchant who was going to undertake a trading venture by sea. In the second case, the purpose of the loan was to permit a merchant who was going on such a venture to loan funds to a merchant who was not engaged in trading by sea at all. By means of the clever way in which the sea loan was inverted it was possible to evade the laws against usury, not only for loans for sea commerce but likewise for trading upon the land.

The second type of sea loan is easier to understand if we assume that the borrower was always a merchant who either purchased goods from traders who had obtained woolen cloth or other goods from England, France, or Belgium, or else had purchased these wares directly, and that the lender was always a merchant who was about to undertake a trading voyage to Syria, Sicily, Alexandria, or elsewhere. This assumption is a reasonable one, for such was the usual case. The merchant who needed cash always gave a pledge of goods (*pignus*), whose value was supposed to be at least equal

to the amount of the loan, plus interest. The terms of the loan provided that the lender was to take the pledge into his custody, and if the loan was not repaid upon arrival at the port to which the lender was going, then the pledge was to be sold by the lender, and the amount of the loan plus the stipulated interest was to be retained by him. Any superfluity was to be returned to the borrower of the funds, who was the legal owner of the pledged property.⁷ If there was any deficiency in the amount obtained from the sale of the mortgaged property, it was to be made good by the borrower when the lender returned to Genoa.

On the face of it, the sale of the pledge seems to be merely a contingent right of the creditor in case the debtor defaulted on the payment of loan and interest. Such a right was sometimes provided in the original type of sea loan, and possibly the right to sell any property given as a pledge for the repayment of a loan was always understood.⁸ But here the case stands quite differently, for it was generally understood that the debtor was not to repay his loan, and that the sale of the pledged property was always to take place. In some contracts it is stated definitely that the pledge is to be sold, instead of making the sale of the pledge contingent upon the non-payment of the debt.⁹ In another case the power or license to sell is formally given.¹ The conclusion is inescapable that the provision for sale only in case the debt was not repaid was not a *bona fide* part of the contract, and was kept in the contract in order to retain the greatest possible

7. See Not. Gugl. Cass., ff. 69, 95, 95 v, 208 v, for examples of pledges of woolen cloth; *ibid.*, f. 202 v, for pledge of a horse; and *ibid.*, 310 v, 311, for pledges of pearls.

8. See *Chartarum* II, no. 438, and Not. Gugl. Cass., f. 255, for specific authority to sell pledged property given as security in a sea loan of the original type.

9. Not. Gugl. Cass., f. 212.

1. *Ibid.*, f. 259 v.

similarity to the old type of loan, so that the interest charged on the loan would not render the contract illegal.

In those cases in which the amount received from the sale of the hypothecated goods was larger than the amount of the principal and interest of the loan, the contract usually provided that the superfluity should be invested by the merchant creditor who sold the pledge, and the investment brought back to the original owner of the goods in Genoa. The creditor did not perform this service gratis for the debtor. In return for the service rendered, he received one fourth of the profits made upon the investment, after the goods purchased with the superfluity had been sold in Genoa. The transaction which involved this superfluity was in this case apparently regarded as an *accomendatio*, and the custom followed in respect to it seems to have usually governed the proceedings. In some cases it is specifically stated that the superfluity is to be carried *in accomendatione*, and in other cases the usual terms of a regular *accomendatio* are explicitly stated.²

In a few cases the terms of the contract provide that the superfluity shall be paid to a specified agent of the borrower, which was ordinarily feasible only in case some acquaintance of the borrower was making the same voyage. If the agent is not at the outport, then the funds are to be invested by the creditor, and carried under the regular terms of an *accomendatio* contract.³ In one instance a third party is brought into

2. See Not. Gugl. Cass., f. 212, for provisions in respect to investment of superfluity, which are almost exactly the same as in the case of the *accomendatio*, altho the term is not used. Ibid., 310 v, the provisions for the investment of the superfluity are simply referred to as *in accomendatione*. For an explanation of the *accomendatio* see Byrne, "Commercial Contracts of the Genoese in the Syrian Trade of the Twelfth Century," op. cit.

3. Not. Gugl. Cass., f. 224 v.

the transaction, and takes the commercial or business risk upon himself.⁴ In this case the third party is to receive any superfluity left after the debt is paid, and in return is to pay any deficit, should the sale of the hypothecated goods not provide sufficient funds for the repayment of the principal of the debt plus the interest.

The provisions which cover the possibility of a deficit are as carefully provided for as are those covering the contingency of a superfluity. The first part of the contract almost always provided for the loan of Genoese pounds and the repayment of them in terms of some other money, frequently Saracen besants, as was true in the case of the original sea loan. The amount which was to be repaid depended upon the length of the voyage, but there is, of course, no mention of interest or usury. If the voyage was to be to Acre in Syria, for example, a sum of fifty Genoese pounds would usually be repaid by one hundred and fifty Saracen besants. Now, in the part of the contract providing that the debtor was to make up any deficit, the agreement usually stated that the creditor should be repaid ten *solidi* for every besant unpaid. The relative value of besants to pounds in the first part of the contract seems to be three besants per pound of Genoa, while in the deficit clause the ratio is only two besants per pound. This seeming anomaly actually is of the greatest advantage in ascertaining the rate of interest which is really charged, because the deficit clause contains a statement of the true exchange value of besants to pounds. The first part of the contract actually provides for an interest rate of fifty per cent. It is not necessary, therefore, to make any further provision for interest in the deficit clause, since this clause provides that the payment of the deficit shall be made, not upon the basis of

4. Not. Lanfr., reg. I, f. 220 v.

pounds unpaid, but of besants unpaid, and, since the main part of the contract provides for the payment of enough besants above the normal ratio of pounds to besants to furnish the stipulated interest, the creditor is sure of getting the full amount of interest upon his investment. Thus the lender actually received one and one-half pounds for every pound originally loaned, even when there was a deficit.

The interest or premium rate on the second type of sea loan did not differ materially from the rate charged on sums loaned under the terms of the first type, for a voyage of the same duration.⁵ It is natural that this should be true, for altho the conditions and circumstances of the two different types of loan were usually quite dissimilar, the risk of the lender and the period during which he lost the use of his funds were the same in both cases.

In a very few cases there are contracts which contain some of the essential clauses of this type, but which are not actually sea loans since they do not contain any risk or insurance clause.⁶ Probably the risk or insurance clause was not a particularly desirable part of the contract, but was retained on account of the established legality of the older forms of the sea loan. This conclusion is also substantiated by the fact that at other times the contract is called an *accomen-datio* by the notaries, indicating that they were in doubt as to whether this contract was really a *bona fide* sea loan.⁷ Indeed, the first contract which can be regarded

5. For example, a sea-loan contract, Not. Gugl. Cass, f. 207, of the first type, bears exactly the same rate of interest as one of the second type, Not. Lanfr., reg. I, f. 141 v, both of which are to Syria. The same is true of two other contracts representing the first and second types, Not. Gugl. Cass., f. 255, and *ibid.*, 259 v. Many other examples might be cited.

6. For example, Not. Lanfr., reg. I, 19 v.

7. For example, Not. Gugl. Cass., f. 212.

as an example of the second type of sea loan does not purport to be a loan at all, but an actual sale of property, altho it contains the essential clauses of the second type, and in particular contains the *sana eunte* phrase.⁸ After this first case the contracts were generally drawn so as to resemble the regular sea loan as much as possible. It is likely that the *sana eunte* phrase was included at first on account of a real desire on the part of the contracting parties to shift the burden of the maritime risk on to the lender of the funds. Its later inclusion may have been due to the fact that this one use of the phraseology generally connected with the sea loan had suggested the possibility of using this form to cloak the transaction, and thus avoid the laws against usury.

The contracts usually stipulated that the loan was payable only in case the pledge was carried safely to its destination. Thus the phrase *sana eunte pignore* was used instead of *sana eunte nave*. In other cases it is definitely stated that the pledge is carried at the risk of the creditor up to the amount of the loan, while any value above that goes at the risk of the debtor.⁹ This last provision seems complicated and a little involved, but actually it meant that if the pledge were lost at sea, then the contractual relationship of the two parties to the loan came to an end, since the creditor could not obtain repayment of his loan, nor could the debtor obtain anything for the loss of the value of his pledge over and above the amount of the loan.

This second type of sea loan provided a device by which the owner of woolen cloth or other commodities was enabled to obtain funds which he could use at once, without having to wait until the round trip to Syria, Constantinople, or some other distant place could be

8. Chartarum II, no. 794.

9. For example, Not. Gugl. Cass., f. 69.

made. Of course, he might have obtained the funds necessary for the working capital of his business by selling his goods outright. But at certain times there probably existed temporary gluts of the market, so that no one was willing to take the risk of buying his commodities. By means of the new type of contract it was possible to obtain money from men who would not take the risk of buying the goods outright, lest the price for which they could be sold would not repay the capital outlay. But in the *pignus* type of sea loan the lender of the funds was protected against all mercantile or business risks, for the borrower not only pledged the goods which were to be sold, but, as has been said, agreed to make up any deficiency in case the pledged property did not meet the requirements of the loan contract. The lender was assured that the contract would be fulfilled, since the borrower, in addition to the pledged property which was to be sold, obligated all his other possessions, so that any deficiency would be made up, and even in some cases obtained a friend or acquaintance to sign the agreement with him, who thus became the surety for the repayment of the loan.¹

In some cases this form of contract really amounted to an arrangement by which the merchant in Genoa who was not engaged in the eastern trade, but who did not like to accept the prices offered for his goods in Genoa, was able to retain the legal ownership of them and thus to gain the advantage of a higher price than that which he could obtain in Genoa, while at the same time he avoided the necessity of tying up funds which he would have preferred to have available for use in his own particular business. A merchant who borrowed money in this way obviously took the chance of getting a lower price for his goods than he had anticipated.

1. For example, Not. Gugl. Cass., f. 310 v.

It is possible that the merchant who borrowed capital by means of the second type of sea loan used the proceeds of the loan in order to pay in part, at least, for the very goods which were given as a pledge. This may seem incomprehensible, since the security of the pledged goods was required as an essential condition for making the loan. The contract which was finally drawn up by the notary, however, need not necessarily be accepted as a true record of the actual sequence of events in the negotiation of the loan. What actually occurred may have been analogous to the practice of "over-certification," and the "morning loan" of the modern stock-broker serves the same end. If the Genoese merchant who borrowed capital invested it in the goods which were afterwards pledged, he was carrying on a transaction which was quite similar to the present system of buying on margin, since with very little capital of his own he was enabled to speculate in the pledged goods and obtain the advantage of any increase in price, providing his speculation was successful.²

It is possible that this form of contract sometimes became an instrument of exploitation.³ Perhaps the merchant who loaned the funds would not buy the goods offered for sale, and the would-be seller was forced to enter into such a contract in order to obtain funds at

2. In one contract (Not. Lanfr., reg. I, f. 220 v) this second type of sea loan was undoubtedly used as an instrument for speculation. In this instance a third party was brought into the contract, who agreed to pay any deficiency in the value of the pledge, in return for the right to receive any surplus value.

3. The writer is informed by Professor Selig Perlman of the University of Wisconsin, that a form of contract which was very similar in character to the second type of sea loan was in use in Russia at the beginning of the present century. The contract was not connected with marine insurance in any way, however, and the two parties to the loan contract were the manufacturer and the merchant capitalist who marketed the goods of the manufacturer on terms similar to those in the type of contract discussed here. Professor Perlman states that this form of contract frequently was the instrument by which the manufacturer was exploited by the merchant capitalist.

all. The original owner of the goods might be induced to make such an arrangement as this, for he would be assured by the lender of the funds that his goods would be sold to the best advantage and that any superfluity would be returned to him. In spite of the fact that the contract frequently provided for the sale of the goods in the presence of witnesses,⁴ there must have existed considerable opportunity for fraud and chicanery in their sale, so that the superfluity was not so great as it would have been if the goods had been fairly sold.

The development of the second type of sea loan is significant as an indication of the increasing complexity of the economic order in Genoa. Since the lenders of the funds were almost always merchants engaged in sea trade, it is positive proof of the growing importance of the merchant class as a source of capital funds in Genoa.⁵ The older type of sea loan had met the needs of commerce as long as the borrower was invariably a merchant engaged in sea trading, and as long as the capitalist took no active part in merchandising. As soon as there had developed in Genoa a considerable trade with the hinterland, it became necessary to find some form of loan contract which would provide funds for the merchants who carried on the inland commerce, and which would not run counter to the anti-usury laws. Likewise the new loan contract met the needs of those merchants who had amassed sums of money large enough to carry on their own ventures and even to loan out to others.

4. Not. Lanfr., reg. II, f. 29; Not. Gugl. Cass., ff. 95 v, 224 v.

5. Capital for overseas trade was largely supplied in the early period of Genoese trade by the land-owning and noble class. By the end of the twelfth century this class of capitalists was being superseded in importance as a source of funds for the trade, by the more purely mercantile class. See Byrne, *Genoese Trade with Syria in the Twelfth Century*, *op. cit.*, pp. 200, 209, 211, for an account of this gradual displacement.

The development of the second type of sea loan probably served to broaden the market and to insure that goods could always be disposed of in Genoa at some sort of price. This had a tendency to bring about specialization in the trade by breaking it into at least two parts, since it was no longer necessary for a merchant who traded in Belgium or France to carry on trading operations in Syria or Constantinople also in order to find a market for his product. He could now not only dispose of it by outright sale, but if he considered the price in Genoa too low he could pledge his goods, and receive a loan on them large enough to permit him to carry on his own trading operations while the lender of the funds was marketing the pledged goods in some other part of the Mediterranean shores. In addition, the use of this contractual form must have made the turnover of capital much more rapid, and in consequence must have aided in stretching out the meagre amounts of gold and silver which were available as media of exchange.

It is worthy of note that this new form of sea loan did not replace the old, and that the two forms continued in use side by side, but serving different purposes.⁶ The second form was thus a real addition to the credit machinery of commerce in Genoa.

III

The third, or usury-evasion type of sea loan is not nearly so important as the other two types, and indeed should perhaps not be dignified as a separate or distinct type. In form it does not differ essentially from the first type. Under the third type are included all

6. For instance, Not. Gugl. Cass., ff. 252 v, 253, the first of which is an example of the first type of sea loan, the second of the *pignus* type. Both were drawn up the same day in May, 1205.

those contracts which are not true sea loans at all, either of the first or second type, but are merely contracts using the phraseology of the sea loan to cloak an ordinary loan at usury.

Almost any sea loan which provides simply for the repayment of the loan of a sum of money conditioned upon the safe arrival of a certain vessel named in the contract is under suspicion as covering an ordinary loan at interest.⁷ A *bona fide* sea loan usually contained additional clauses which indicated in what the funds were to be invested, or who was to go on the trading venture, or to what country the funds were to be carried for investment. It is likely, however, that very many, even of the loans containing such phrases, were not necessarily subject to the risk of the sea at all, but contained a risk clause simply that a loan which otherwise would have been illegal on account of its usurious nature might obtain the protection of the law.

In several instances the evidence is overwhelming that certain contracts which purported to be sea loans were not actually such, but were ordinary loans at interest. In a loan made probably about the year 1215, two brothers, who were of the nobility and hence less likely to be borrowing money for mercantile investment, borrow fifty pounds, which they agree to pay back with *proficuo ad rationem librarum XXX per centum*, fifteen days after the ships arrive from Syria.⁸ The repayment of the fifty pounds plus the thirty per cent interest is conditioned upon the safe arrival of a ship called *Peregrina*. But if that ship should not come to Genoa, the money is to be repaid if the ship called *Benedicta* comes safely to Genoa; and if that ship

7. For example, two sea-loan contracts, drawn up on the same folio, Not. Lanfr., reg. I, f. 114. Also, Chartarum II, no. 749.

8. Not. Lanfr., reg. I, f. 64.

does not come safely, the money is to be paid back if the ship which is called Gloria arrives safely! It is plain that the risk involved in the loan of these funds is merely nominal, since it is entirely unlikely that all three of the ships mentioned would be lost. Furthermore, this contract contains a clause which reads, *Sano tamen semper existente in terra dicto capitale*. Thus, to make assurance doubly sure, the lender of the funds provides that they could be employed only on land. This provision, indeed, seems almost superfluous, for at the time of year the contract was drawn (October 18) it was probably too late to have used the funds in any long voyage, since the convoys to Syria and other distant points usually left earlier in the season. Few loans are so palpably a disguise for usury as is this one, and it is difficult to understand how such a loan would ever have been drawn up by a notary who was acquainted with the law. It would have been illegal not only at Canon Law, but probably even under Roman Law; for under the laws of Justinian, which allowed a higher rate of interest upon a sea loan than upon a loan without maritime risk, it had been ruled that the funds loaned must actually undergo the maritime risk if the higher interest rate were to be charged.⁹

In another case, the archdeacon, the presbyter, and some others of the clergy of the church of San Lorenzo borrow sixteen pounds and agree to repay twenty pounds, contingent upon the safe going and coming of a specified galley.¹ They pledge the possessions of the church in Calegnano, and specify that they are going to use the borrowed money in buying church vestments.

9. Before the time of Justinian the rate of interest on an ordinary loan was limited to 12 per cent, with no limit on the rate for a sea loan. Justinian, A.D. 528, lowered the legal rate on ordinary loans, and limited that on sea loans to 12 per cent. Ashburner, *op. cit.*, p. ccxvi.

1. *Chartarum* II, no. 735.

Here again it seems evident that the funds loaned are not really capital for a trading venture, but for a consumptive purpose.

The number of sea loans which can be placed definitely in the third class is rather small, principally because it was usually feasible so to disguise the contract that it is impossible to distinguish it from a sea loan of the first or second type.

It is evident in all three types of sea loan that the insurance clause is legally enforceable, and that it never became merely a meaningless phrase, even when it was used to cloak a usurious loan. The care with which the risk of loss by maritime disaster is differentiated from ordinary business risks,² and the attention given by the notaries to the proper incidence of the marine risk upon the different parties to the agreement, amply support this conclusion.³ The phrase which was most commonly used to express the contingency of repayment was *sana eunte nave vel maiore parte rerum ipsius nave*. Sometimes the phrase was *sana eunte et redeunte*,⁴ and in other cases it was *sana eunte et sana veniente*,⁵ so that in both of these instances the loan would be repayable only if the ship made the outward and the returning voyage safely. At times the name of the ship is mentioned,⁶ and at other times the ship figuring in the contract is any ship on which the borrower of the funds takes passage.⁷ In many cases no particular ship is

2. Thus in Not. Gugl. Cass., f. 177 v, Obertus Pilosus agrees to repay 6 pounds in money of Marseilles to Wilhelmus de Albugono, and agrees that these pounds go "at the fortune of God and Obertus Pilosus, except for the perils of the sea and of the Pisans."

3. For example, in the second type of sea loan, it was provided that the pledged goods went at the risk of the lender, up to the value of the loan, while any surplus value went at the risk of the borrower. See description of this type above.

4. For example, Not. Lanfr., reg. I, f. 190.

5. For example, Chartarum II, no. 516.

6. For example, Not. Lanfr., reg. II, f. 37.

7. For example, Not. Lanfr., reg. II, f. 12 v.

mentioned.⁸ Sometimes when one is specified it is designated, not by name, but as the ship of a certain man or of a certain man and his partners.⁹

Many contracts provide an alternative contingency so that if the original vessel in which the borrower embarked was sold, or changed its journey, so that the vessel would not arrive at the port specified in the contract, the loan would still be payable. Thus, if the contract provided that the loan should be repaid contingent upon the arrival of a certain ship at Palermo, a clause was often inserted in the contract so that, if that particular ship were sold, or changed its route, the loan was to be paid conditioned upon the safe arrival of any ship to which the principal part of the men and goods which had taken passage on the original ship had been transferred.¹ In a contract such as this there is still a reasonable connection between the contingency clause and the protection of the borrower in case of marine disaster. In other contracts, however, it is provided that, in case of the sale or the change of itinerary of the original ship, repayment of the loan was to be made if a certain named ship arrived safely.² It should be noted in this case that there may be no connection at all between the safe arrival of the alternative ship and that of the man and his goods who borrowed the money. The necessity for the alternative contingency in order to protect the interests of the lender is evident enough, although the phraseology indicates that, while the insurance clause was binding at law, its use was not always primarily in order to protect the borrower against maritime misfortune. It is often difficult to tell whether a particular phrasing of a contract means

8. For example, *Chartarum II*, no. 836.

9. For example, *Not. Lanfr.*, reg. I, ff. 1, 93 v, 230.

1. For example, *Chartarum II*, no. 460.

2. For example, *ibid.*, no. 461.

that the lender of the capital is attempting to escape from the maritime risk that he was supposed to assume, or whether he is merely safeguarding himself, lest through accident or fraud his investment might be lost.³

An interesting feature of the insurance clause in the contracts lies in the fact that the contingency expressed was rarely that of the safe going of the ship alone, but, instead, the safe going of the ship and the major portion of its cargo. In this way, any funds invested in a ship or its cargo would have to be repaid even though the ship itself was cast away, if more than half of the goods on board were salvaged. However, if both the ship and over half of the cargo were lost, then none of the borrowed funds need be repaid, altho part of them might have been saved. This apparently was an arbitrary rule of law set up for convenience in determining whether or not the loan was to be repaid. By means of this provision the courts of law were enabled to escape the difficult task of determining just what portion of the loan should be repaid in case of marine disaster. The loan was thus always repaid in full, plus interest, or not at all.

Altho, as has been said, the phrase *sana eunte nave* expressed the contingency upon which the funds loaned were to be repaid, occasionally this phrase is omitted, either by accident or design, and the loan is to be repaid merely when a certain ship arrives at a specified port.⁴ This omission probably did not change the legal effect of the contract, but the customary phrasing of the risk clause was followed in most cases in order that the contract might not be suspected of being a simple loan at usury.

3. It is probable that a rule of law developed in Genoa, which covered such contingencies as the sale of the vessel named in the contract; for in the contracts drawn subsequent to 1165 it is no longer common to find express stipulations to cover such possibilities.

4. For example, *Chartarum II*, no. 749.

In the second type of loan, described above, there was a careful allocation of risk, so that the pledge representing the funds loaned was carried at the risk of the creditor up to the amount of the loan, and any residuum of value was carried at the risk of the debtor. In addition to the phrase *sana eunte pignore*, it was often the custom to specify the exact risk and its incidence by the phrases *ad tua fortuna*, or *ad sua fortuna*, or by some such phrase as "at the fortune of the aforesaid John," or like wording.⁵

The relationship of the medieval sea loan and the modern loan on bottomry is very close.⁶ They are very similar in their most characteristic feature, which was the insurance clause in the contract, which provided in each case that the loan need not be paid in case of marine disaster. However, the bottomry loan continued in use for a long time after the other forms of sea loans had been abandoned, and during this period it developed certain phraseology and provisions peculiar

5. Not. Gugl. Cass., ff. I v, 93 v, 218; Not. Lanfr., reg. I, f. 142 v.

6. The connection between the ancient Greek sea loan, the medieval sea loan, and the modern bottomry bond seems undoubted. (See Walford, *op. cit.*, i, 335, for comparison of ancient Greek sea loan with modern bottomry bond.) Goldschmidt explains the relationship as a dwindling of the general sea loan of medieval times into one single form of the sea loan which has come to be known as the bottomry bond or bill. *Op. cit.*, p. 354.

The English term "bottomry" seems to have been derived from Dutch sources. In a sea loan of the year 1570, the contract in the Dutch original is called a *bomerij brief*. (Select Pleas in the Court of Admiralty, ii, 75, Publications of the Selden Society.) This contract is very similar to some of the Genoese sea-loan contracts of the twelfth century in its functional provisions. It would not now, however, be considered as coming under the modern laws applying to bottomry. On the other hand, other earlier contracts which are very much like a modern bottomry bond were not so called (*ibid.*, p. 55). There seems no reason to believe that any feature of the English bottomry bond, except its name, was borrowed from Dutch or German sources. What seems more probable is that both the English and Dutch bottomry bonds are derived from a common Italian source, where the sea loan had been so long in use.

to itself. It should be noted that the loan on bottomry developed out of the original or *bona fide* sea loan, rather than from the second or third type of loan described above.

In a modern bottomry bond, the money borrowed by the master of a ship or his agent during the course of a voyage is always secured by a pledge of the ship, and must be used for the emergency outfitting, victualing, or repairing of the ship.⁷ There were no such limitations as to the security or the use of the proceeds of a Genoese sea loan of the twelfth and thirteenth centuries. The Genoese sea-loan contracts furnish examples of the pledge of real property, of ships, of various numbers of shares in ships, and of a general hypothecation of all the borrower's goods. In many other cases, in addition to other pledges, personal friends or acquaintances of the borrower acted as his sureties.⁸ The funds obtained from a twelfth-century sea loan were used for all sorts of purposes, rather than for the emergency service of a ship in a foreign port. They were generally employed in the purchase of goods of all kinds for use in trade. In other words, it was not necessary that the borrowed funds be used in connection with the property pledged as security for the loan.

The modern *respondentia* bond differs from the bottomry bond only in the fact that the cargo of the ship is security for the loan, instead of the ship itself. Like the modern bottomry bond it is an emergency loan, since a loan can be made upon the cargo only in case it is necessary in order to enable the ship to proceed with

7. According to the law of bottomry the lender has a lien on the ship, which has priority over all other claims except subsequent bottomry bonds. Hence the provision that a bottomry loan can be contracted only when it is absolutely necessary in order that the vessel may complete its voyage. See Hughes on Admiralty, St. Paul, 1901, p. 87.

8. See *Chartarum II*, 685, 709, 833.

the cargo to its destination, and only if the ship master is unable to communicate with and obtain funds from the owner of the cargo.⁹ Altho the *respondentia* bond is also probably a lineal descendant of the medieval sea loan, it differs from the sea loan in the same way as does the bottomry bond, and has the same similarities in that repayment of the loan is contingent upon the safe completion of the voyage.

The sea loan met a real need of commerce in the period when it was first developing. It was almost essential that the needy mariner should be able to borrow funds to outfit a ship, and that the merchant should be able to obtain capital for investment in a stock of goods, with the assurance to each that if he did lose ship or cargo by maritime disaster, his loss would be limited to his interest in the ship or cargo, and that his small possessions on shore or his very person would not be seized for a debt that he very likely could not repay. If it had not been for this provision, it is doubtful if many merchants or ship-owners would have had the temerity to borrow capital at all, on account of the heavy burden of the maritime risks.

With the lender the case stood otherwise. In the first place, it may be assumed that the lender could usually afford to stand an occasional loss, since the source of his funds was some sort of economic surplus. The lenders were willing to accord the principle of insurance against marine disaster to the borrowers, since they were thus enabled to loan their funds where they might not otherwise have been able to do so, and as a recompense they received a premium upon the money loaned large enough to include both an interest rate and an insurance premium. Thus the contingency of loss was shifted from a

9. Hughes on Admiralty, p. 91; Walford, op. cit., p. 334.

class which was not economically able to carry it to a class which was able to do so, and in so doing commerce was greatly assisted and stimulated.

As commerce developed during the Middle Ages, the sea loan probably became of greater importance as a means of evading the anti-usury laws than as a means of providing insurance for mariners or merchants. But the essential feature of the sea loan, which was the insurance clause, still continued in effect, and doubtless served a useful purpose. This is shown by the fact that when the necessity for concealment of usury disappeared with the growth of Protestantism and the decline in power of the Catholic Church, those features of the sea loan which had been the result of the ecclesiastical prohibitions of usury dropped away, and that feature which represented a real need of maritime commerce remained and developed into the law of bottomry.¹ On account of the development of pure marine insurance, however, the bottomry bond never became so important as the general sea loan had been, because the real need of commerce for insurance against maritime risk had been finally met in a new and more efficient way.

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1. It is possible that the general sea loan, which, as has been said, included loans on other things as well as ships, declined in importance after the middle of the thirteenth century, on account of the papal decretal of Gregory IX, which rendered its use as a disguise for a usurious loan of questionable value. See Goldschmidt, *op. cit.*, p. 352.