Charging of Interest from Joinder of Issue ?

by Jan HALLEBEEK

(*Amsterdam*)

In some of the present-day Western-European Civil Codes a provision can be found which prescribes that from the moment the debtor is summoned to court interest will be charged. This, however, cannot be said for the Dutch civil law. There, interest is due from the moment the creditor demands payment, so long as he gives notice that in case of further delay interest will be claimed, or else from the moment interest is claimed in court (1). The latter can of course coincide with the summons to pay the principal debt, but this is by no means necessary. In the German civil code, the "Bürgerliches Gesetzbuch", however, there is a general rule making the moment of the summons to pay the debt decisive as to the running of interest (2).

This provision has its origin in the continental *ius commune*, which was displaced by the nineteenth century codifications. This rule can in its turn be considered as deriving

1) BW 1286.
2) BGB 291.

from a statement of the late classical jurist Paul, who wrote in his commentary on the praetor's edict the following words, preserved for us through the Digest of Justinian :

> D. 22.1.35. *Paulus libro quinquagensimo septimo ad edictum. Lite contestata usurae currunt.* (Interest runs from joinder of issue).

Naturally the material continuity can be doubted on the ground that in the formulary procedure joinder of issue had a totally different character from *litis contestatio* of the medieval roman-canon procedure, which to a considerable extent was based on the proceedings *in cognitio* and was of great importance for the formation of our current law of civil procedure. Nevertheless, outside the spheres of constitutional and criminal law, the Justinianic legislation was regarded by the medieval lawyers as the current law and not as historic material. They were able to understand the statement of Paul as an independent rule, thereby disregarding its original signification. I shall hope to make this clear immediately below.

When we look upon the interpretation of the adage "*lite contestata usurae currunt*" in the history of legal science, it appears that one question has always played a predominant role, viz. that of the exact scope of the rule, the delimitation of its application. According to the Accursian Gloss it applies to the contracts of good faith (3). Nevertheless the dissenting view of Rogerius is also mentioned, that it should apply to all contracts even those controlled by strict law. According to the *dissensiones dominorum* this opinion of Rogerius must also have been

3) The gloss "*Lite*" ad D. 22.1.35.

maintained by Martinus and Jacobus (4). They assert that interest is charged from the moment of delay if the obligation is one which can be enforced by an action of good faith and from the moment of joinder of issue if the relevant action belongs to the strict law.

This controversy naturally loses much of its importance once *iudicia stricti iuris* and *iudicia bonae fidei* were given equal status after the reception of Roman law. Yet the charging of interest has readily evoked discussion in Roman-Dutch law right up to the present century. A survey of the opinions of the older authorities can be found in the doctoral thesis of VAN ZIJL STEYN on *mora debitoris,* written in Afrikaans and published at Stellenbosch in 1929 (5). Here it appears that joinder of issue is often related to delay. It is considered to be a form of making a demand from the debtor or as carrying the implication that the debtor is wrongfully delaying the performance (6).

The question I should like to discuss today is whether our Dutch legislators in the past century did indeed scrap a principle which originated in Roman law and was preserved e.g. in the German civil code. May the statement of Paul be understood as one of the rules of early law ? Did our codification put an end to the validity of a rule of law which was already employed by the classical Roman jurists ?

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4) G. HAENEL, *Dissensiones dominorum*, Leipzig 1834, p. 42-43.

5) I. VAN ZIJL STEYN, *Mora debitoris volgens die hedendaagse Romeins-Hollandse reg*, Stellenbosch 1929.

6) P. 74. Cf. also P. VAN WARMELO, Enkele aspekte van moratoire interesse, in : *Tydskrif vir hedendaagse Romeins-Hollandse reg*, 10 (1946), p. 58-59.

In Roman law, for interest to begin to run it was often a requirement that the debtor must have fallen into delay. The late classical jurist Marcian formulated the rule generally for the actions of good faith : *In bonae fidei contractibus ex mora usurae debentur* (In contracts of good faith, interest is payable from the date of delay) (7). Besides this general rule, there are examples of actions of strict law with *formulae incertae* which apparently had the same consequences.

In the Digest we can read that when a tutor was failing to discharge himself by making restitution of the pupil's estate, interest was charged (8). Although this text by Africanus is sometimes related in the literature (9) to the *actio tutelae*, which is an action of good faith (10), it is nevertheless possible that it contemplates an obligation of the tutor arising from a so-called *satisdatio* or *cautio* that the property of the pupil will be kept intact. In that case we would be dealing with an action of strict law provided with a *formula incerta*. Also the strictly obligated surety who rendered himself liable for the rent could be sued for interest when the tenant caused delay in the payment (11). The same held good for the person owing under a trust if he was late with his performance. According to the Institutes of Gaius (12) a rescript of the Emperor Hadrian provided that no interest was chargeable where a legacy had to be paid, although already in a later pre-Justinianic source, viz. the Sentences of Paul, a new rule

7) D. 22.1.32.2.
8) D. 46.6.10.
9) R. VIGNERON, *Offerre aut deponere*, Liège 1979, p. 113.
10) G. 4.62.
11) D. 19.2.54.pr.
12) G. 2.280.

has apparently come into being, which was then also confirmed in the Code : legacies and trusts are put on the same level and interest is due in case of delay in both situations (13). Hence KASER states, generally, that in case of delay by the debtor interest was due whenever the obligation could be claimed under all actions with *formulae incertae* (14). Differently from our current law, interest was not invariably charged when the debtor fell into delay. Obligations resulting from *mutuum* or stipulation of a certain sum of money, could never be increased by delay on the part of the debtor.

The next question is therefore whether joinder of issue would have consequences for the extent of obligations and particularly for the charging of interest. Differently from the medieval lawyers, nowadays we do not easily look upon the adage "*lite contestata usurae currunt*" as a general rule holding for a great part or the entire law of obligations. Other source material that could confirm such a general purport is almost completely lacking. Therefore KASER holds the view that a general rule requiring interest to be charged from joinder of issue is not very likely (15).

Joinder of issue does appear in an enactment of the Emperor Gordian (16), dating from 239. This can be regarded as a tentative settlement of a development in imperial legislation on the question whether interest is due when a trust must be performed. This new legislation puts trusts and legacies on the

13) PS. 3.8.4.
14) M. KASER, *Das römische Privatrecht*, I[2], München 1971, p. 516.
15) M. KASER, *Das römische Zivilprozeßrecht*, München 1966, p. 287.
16) C. 6.47.4.

same level just as the Sentences of Paul did, and in both cases interest will be charged. But as the date from which interest is to run, not the delay of the debtor but the joinder of issue is mentioned. However, I cannot attach further consequences ot this enactment, and because of its late date it cannot be of any use in interpreting the statement ascribed to Paul.

On closer investigation of the inscription of the text by Paul, it appears that we are dealing with a fragment taken from his commentary on the last part of the praetor's edict, which seems to deal with the execution and particularly with the possibility of levying distress against the debtor's goods, called *missio in bona* (17). In case of personal actions the praetor could grant such a remedy whenever the defendant refused to appear because as a consequence it was impossible to reach a joinder of issue. For this very reason one should not really expect the words *litis contestatio* in a commentary on this particular part of the edict. If the inscription is correct - and there are no reasons to doubt it - it is more likely that the statement originally did not stand alone, but was added to a remark concerning another subject. Fortunately it is possible to derive some further information from the words of the statement itself.

In the first place it may be mentioned that the use of an ablative absolute is not always the appropriate way to indicate the moment from which interest is to run. In many other texts prepositions are used, which are far more exact such as *ex* (18) or

17) O. LENEL, *Das Edictum perpetuum*, Lipsiae 1927³, p. 415. (E. 205 *Qui absens iudicio defensus non fuerit*). Cf. G. 3.78

18) D. 22.1.32.2; PS. 3.8.4; C. 6.47.1.

post (19). Secondly for the running of interest the verb *currere* is not always used. We can find e.g. the verbs *debere* (20), the interest is due, *peti* or *exigi posse* (21), the interest can be claimed, and *teneri* (22), the debtor is bound. In the third and last place the verb *currere* has often when it is used metaphorically the neutral meaning "to run" and not "to start to run". This can be said about interest (23) as well as prescription (24). Outside the adage "*lite contestata usurae currunt*" the notion *currere* appears in another five fragments ascribed to Paul in the Digest. Two times in a literal meaning viz. the flowing of a river (25) and running as a game or sport (26), two times in the meaning of proceeding or continuing as well of interest (27) as prescription (28), and only once in the special meaning of starting to run (29). Now we come upon a point of great interest because one of these texts is of the utmost importance viz. D. 46.2.19.

> D. 46.2.19. *Paulus libro quinquagensimo septimo ad edictum. Novatione legitime facta liberantur hypothecae et pignus, usurae non currunt* (Mortgages and pledges are released by lawfully made novation and interest does not run).

19) C. 6.47.2.2; C. 6.47.4.
20) D. 22.1.32.2; G. 2.280.
21) PS. 3.8.4; C. 6.47.1.
22) D. 19.2.54.pr; D. 46.6.10.
23) D. 26.7.7.7.
24) D. 41.3.10.pr.
25) D. 8.3.38.
26) D. 11.5.2.1.
27) D. 41.1.48.1.
28) D. 46.2.18.
29) D. 12.1.40

Now, in the Palingenesia this fragment and the statement of Paul which I mentioned earlier, were connected by LENEL (30); and although KASER seems to be a little bit reserved because comparable source material is lacking (31), some arguments may be mentioned in favour of a reconstruction in which the two fragments are linked to each other.

The classical jurists themselves already compared joinder of issue with novation (32). According to Gaius the substance of the obligation includes before joinder of issue a duty to pay but after it a liability to be condemned (33). In later developed dogmatics joinder of issue was regarded as a special form of novation, the involuntary novation (34). Besides this, the occurrence of novation in this place in the commentary on the edict can perfectly be explained. Whoever is not willing to be present or is not able to be present can avoid the distress on his goods by delegating a debtor to take over the debt. In that case the trial never reaches the stage of joinder of issue, but the obligation will be novated. Finally the inscriptions of the two fragments are identical and a comparable use of language can be found, viz. two times an ablative absolute and two times the same expression *usurae (non) currunt*. Considering the fact that a novation in this place in the commentary on the edict can perfectly be explained, while the same cannot be said for joinder of issue, it is questionable

30) O. LENEL, *Palingenesia iuris Civilis*, I, Lipsiae 1889, kol. 1074, Paul. 696.

31) M. KASER, *Restituere als Prozeßgegenstand*, München 1968, p. 64-65.

32) D. 46.2.11; D. 46.2.29.

33) G. 3.180.

34) See e.g. the Accursian gloss "*Possis*" *ad* C. 3.1.1.

whether LENEL was in the right when he put the fragment "*lite contestata*" in front. That gives the impression that the statement would have had a general validity.

I conclude that many arguments can be mentioned in favour of a reconstruction which links the two fragments, but that their accidental sequence in the Digest should be dropped. Starting from that conception, the fragment which mentions novation should be the heart of the reconstructed text while joinder of issue on the other hand must be merely regarded as the notion which was associated. In that case the verb *currere* must have the same meaning in both fragments, viz. to proceed or to continue. This vision can moreover be affirmed by the text corresponding to the "*lite contestata*"-fragment in the Basilica (35) which starts with the Greek word "*kai*" as a feasible reminiscence of a Latin conjunction which for whatever reason is lacking in the Florentine manuscript. Paul therefore only states that a novation puts an end to a number of accessory rights, because the former obligation has *ipso iure* perished (36). Real security for the new debt should once more be established and the charging of interest, viz. the interest which was agreed on or which was due because of delay, will not continue to run. However, when joinder of issue takes place, the interest will continue to run although in many ways it can be compared with a novation. The same helds good for the pledges, which according to another text in the Digest will not perish (37). Hence KASER formulates a general

35) B. 23.3.35.
36) KASER (note 14), p. 648, n. 16, 17.
37) D. 20.1.13.4.

rule that the accessory rights in case of joinder of issue remain intact (38). For these reasons my conclusion is that the statement "*lite contestata usurae currunt*" in the classical law never could have had the meaning that the charging of interest was a consequence of joinder of issue.

It was already Gerard Noodt who wrote in his book *De foenere et usuris libri tres* published in 1698, the following words, which for the greater part I will quote in English : "...*lite contestata usurae currunt*; this means if interest is running before it, it will not cease to run after it; but if it is not running before it, it will not start to run because of it..." (39). This opinion of Noodt possibly has an older origin or had at least a larger diffusion because I also could trace it in the *Iuris civilis controversiae* of this younger German contemporary Samuel von Cocceji (40).

It is mainly their position I am able to consolidate today, partly by making use of new arguments. It was a well-considered position which was disregarded by LENEL without giving reasons. Consequently, it may be right, with all due deference, to query the Palingenesia on this point.

38) KASER (note 14), p. 650, n. 29.
39) *Opera omnia*, Leiden 1713, p. 325.
40) Ed. Francoforti ad Viadrum, 1727, *Pars* II, liber XXII, *Quaestio* XVIII.