The Effects of the *In Duplum* Rule and Clause 103 (5) of the National Credit Bill 2005 on Interest.

The following insert has been taken directly from the Masters dissertation written in 2006. While the work was printed prior to the promulgation of the National Credit Act 4 of 2005, the now codified in duplum rule will rely heavily for its further development, on its common law history and accordingly the research in the thesis is still very pertinent. A copy of the thesis has been sent and accepted in the Supreme Court Library.

'Consumer protection has been a relatively recent development in the legal sphere. Charging of interest however has not. From simple interest, to no interest, to compound interest the history of usury is lengthy. Its significance, and more importantly, the debate over how it should most effectively be regulated, is equal in length and still a most contemporary discussion. Credit consumer protection, being an obvious hybrid of this development, has also had a fair share of academic literature devoted to it.

Consumer protection is perhaps a misnomer. The term tends to be consumer focused, whereas the actual regulatory exercise directs towards the parameters of the *relationship* between consumer and lender. The concept initially developed from the need to protect (perceptibly) vulnerable consumers against exploitation by lenders, who were in the better position to determine the contractual terms of the loans. The *status quo* has since evolved: not only must legislation caution against over-protection of the consumer, but it has to be considered that the credit industry has economic effects and that the withdrawal of investors due to overbearing legislation would have detrimental effects on the credit market. Moreover, overly zealous consumer protective practices would furthermore leave borrowers with an exclusive selection of lenders, offering credit at exceedingly high rates of interest.

The dissertation investigates a rule of Roman-Dutch origin that polices the interest which may be charged on lending or credit transactions. The *in duplum* rule has, since its inception in Roman law, remained in use. In fact, over and above the many cases that have mentioned its fertile existence over the years, the rule has freshly been included in the recent Credit Bill. While the rule is potentially a very workable consumer protection device, with the prospect to save the consumer from becoming overextended and forcing the lender to take timely action against a defaulting debtor, it needs to be defined and controlled, less its potential as an 'unruly horse' could create both confusion as to its scope and application. Moreover, this would have the effect of downloading the expenses of legal costs on consumers as well as lenders in order to have outstanding issues resolved.

To provide a theoretical basis from which this rule has developed, a brief examination of the historical overview of usury and the control of prices and consumer credit, have been provided.

In this dissertation I shall point out that although, as mentioned above, the *in duplum* rule is a useful consumer credit tool, it needs to be carefully considered. The rule, as developed by the courts, is reasonable and practicable in scope. However, the form in which it is to be represented in codified form must be just as unambiguous in application. A full discussion of the *in duplum* rule in its current common-law form and an analysis of the rule in its codified

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form both in the Bill published in the Government Gazette of August 2004, the *Consumer Credit Bill* and the *National Credit Bill* tabled at Parliament in 2005 (the Bill in its suggested 'new' format) will be provided.

The need to enact an already well-established and well-defined common-law rule is mysterious. The South African common law is well entrenched in its respect for the hierarchy of precedent, and the rule has, as recently as 2001, been valued as 'part of our law' by the Supreme Court. In the last 10 years the *in duplum* rule has appeared in our case law no less than 10 times; three times the issue has come before the Supreme Court of Appeal. Simply to say that it is important to codify the common law on usury, as has been noted in the Credit Law Review of 2003, does not sufficiently justify the encoding of the *in duplum* rule. A dysfunctionality of the rule in its common-law form would perhaps justify its re-enactment in legislation, but no such dysfunctionality has emerged over the years. Not only was the rule inaccurately represented in the Credit Law Review, but its scope and application appeared further confused (perhaps misinterpreted?). Ironically, the rule was exemplified in the Credit Law Review as 'well-known' but 'commonly misunderstood'. The new suggested format in the *National Credit Bill* of the *in duplum* rule in its codified form appears to amend the ambiguities created in clause 76 of the *Consumer Credit Bill* 2004. However, its not without blemish itself.

Through analyses of clause 79 of the *Consumer Credit Bill*, this dissertation will demonstrate how the rule, had it maintained its clause 79 format, would have had the effect of disabling the common law in this area, as it now stands. This would have simultaneously caused high individual costs to consumers, who, seeking the protection of clause 79, would inevitably have been forced to approach the courts to have clause 79 deciphered. Attorneys would have been in no better position to advise perplexed consumers, and *even more so*, perplexed and frustrated lenders, as clause 79 left too many questions open to interpretation. If the wording had remained in its clause-79 sonata, these interpretations would have been able to be engaged only by the most competent of courts. The interpretative dilemma is not, however, completely dissolved with the configuration of the new Bill's codification of the *in duplum* rule. Although the new clause, presently clause 103(5), does more clearly define the limitations that the Bill purports to place on consumers who are in default, it *noticeably* limits the charges, which may be imposed by credit-lenders. There is a concern that the limitations proposed by this clause tip the scales of protection of the relationship of lending too much towards the consumer.

In Western economies, and with particular reference to the South African economy, interest in money-lending transactions or on due payments, is the most common of phenomena. It is a 'strangulation', so to speak, of overextended debtors that the *in duplum* rule was designed [and thereafter preserved] to prevent, while at the same time protecting the interests of the lender.'

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-Full version available at University of Pretoria Law Library or see their web site