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2003

## Common law recognition of opportunity costs: the classification dilemma and the religious legacy

Scott Elbert Dobbs  
*University of Wollongong*

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**Common Law Recognition of Opportunity Costs:  
The Classification Dilemma and the Religious Legacy**

A thesis submitted in fulfilment of the requirements for the award of the degree of

Doctor of Philosophy

From

The University of Wollongong

By

Scott Elbert Dobbs

Bachelor of Commerce (Honours 1)

Bachelor of Law (Honours 2)

The School of Accounting and Finance 2003

*Volume One*

# **THESIS CERTIFICATION**

I, Scott Elbert Dobbs, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the School of Accounting and Finance, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

Scott E. Dobbs

8 October 2002

## ABSTRACT

This thesis examines the history and contemporaneous common law position on the recovery of opportunity costs associated with money sums which are paid late or otherwise withheld from proper payment by defendants. Economics and finance define opportunity cost as ‘the next most profitable employment of an asset’, but this definition has only recently been recognised in Australian courts. Since the formation of the common law in the post-Conquest era, opportunity costs have not been recognised in litigation as recoverable losses. In contrast, opportunity costs have been recognised by courts when associated with tangible assets such as land or goods through the action of *mesne profits*. The origin of the dichotomy stems from the religious influence of the church during the crucial formation period of the common law, coupled with the view that lending at interest in any form was the hateful sin of usury. The use of clerics as judges and the monopoly which the church enjoyed over the instruments of learning gave the church unmistakable and plenary power over the common law processes, a power which is seen through the rules of both evidence and law which permeated early courts and lingers within the modern common law courts. The dichotomy of treatment between real assets and money was entrenched through the doctrine of *stare decisis* in the seminal 1829 case of *Page v Newman* which became known for the principle that no common law court had the power to award interest on an overdue sum of money in the absence of clear contractual terms or recognition of trade practice such as bills of exchange. This hindered commercial practice in Europe and England for centuries, stifling enterprise and subjecting plaintiffs to systemic injustice from unscrupulous defendants. This thesis assigns a stipulative definition of ‘classification dilemma’ to the divergent common law treatment of the opportunity costs of assets and money. This dilemma existed until partially resolved by the High Court of Australia in 1989 through the case of

*Hungerfords v Walker*, which recognized the common law action for the loss of the use of money. The religious legacy, however, still lingers through the evidential burden and the rules of ‘remoteness’ which influence the recovery of damages in the litigious process, for Christianity formed an integral part of the common law from the formation period. Therefore, the fundamental methodology of the common law is antithetical in many respects to the commercial paradigm of economics and finance.

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# TABLE OF ABBREVIATIONS

A.C.	<i>Law Reports (UK) Appeals Cases</i>
A.C.L.C.	<i>Australian Company Law Cases</i>
A.C.S.R.	<i>Australian Corporations and Securities Reports</i>
A.L.J.	<i>Australian Law Journal</i>
A.L.J.R.	<i>Australian Law Journal Reports</i>
All E.R.	<i>All England Law Reports</i>
A.L.R.	<i>Australian Law Reports</i>
App Cas	<i>Law Reports (UK) Appeals Cases (1875-90)</i>
A.T.C.	<i>Australian Tax Cases</i>
A.T.P.R.	<i>Australian Trade Practices Reports</i>
B & C	<i>Barnewall and Cresswell's English King's Bench Reports</i> (1822-30)
Barn. & Ald.	<i>Barnewall and Alderson English King's Bench Reports</i>
Bing.	<i>Bingham's English Common Pleas Reports</i>
Camp.	<i>Campbell's Reports (1808-16)</i>
C.L.R.	<i>Commonwealth Law Reports</i>
Cro. Car.	<i>Croke's English King's Bench Reports Tempore Charles</i>
Cro. Eliz.	<i>Croke's English King's Bench Reports Tempore Elizabeth I</i>
Cro. Jac.	<i>Croke's Reports Tempore James (Jacobus)</i>
Doug.	<i>Douglas English King's Bench Reports (1778-85)</i>
E.G.L.R.	<i>Estates Gazette Law Report (UK)</i>
E.R.	<i>English Reports (Reprint)</i>
Esp.	<i>Espinasse's English Nisi Prius Reports (1793-1810)</i>
Ex	<i>Law Reports (UK) Exchequer</i>

F. 2d.	<i>Federal Reports 2<sup>nd</sup> edition (USA)</i>
FCA	Federal Court of Australia (medium neutral)
F.C.R.	<i>Federal Court Reports</i>
H. Bl.	<i>Blackstone's Reports, Common Pleas (1788-96)</i>
Harv. L. Rev.	<i>Harvard University Law Review (Harvard Law Review)</i>
HCA	High Court of Australia (medium neutral)
HLR	House of Lords Reports (medium neutral)
Hob.	<i>Hobart's King's Bench Reports (1603-25)</i>
I.P.R.	<i>Intellectual Property Reports</i>
K.B.	<i>Law Reports (UK) Kings Bench Division</i>
Lloyd's Rep.	<i>Lloyd's Reports</i>
L.Q.R.	<i>Law Quarterly Review</i>
M.L.R.	<i>Modern Law Reports</i>
Mon. L.R.	<i>Monash University Law Review</i>
M.U.L.R.	<i>Melbourne University Law Review</i>
N.E.	<i>Northeast Reports (USA)</i>
NSWLEC	New South Wales Land and Environment Court (medium neutral)
N.S.W.L.R.	<i>New South Wales Law Reports</i>
NSWSC	New South Wales Supreme Court (medium neutral)
N.Y.	<i>New York State Reports (USA)</i>
P.	<i>Law Reports (UK) Probate, Divorce &amp; Admiralty</i>
Palmer	<i>Palmer's King's Bench Reports (1619-29)</i>
QB	<i>Law Reports (UK) Queen's Bench Division</i>
Qd. R.	<i>Queensland Reports</i>
Q.J.P.	<i>Queensland Justice of the Peace &amp; Reports</i>

Q.L. Rep.	<i>Queensland Law Reports</i>
Q.S.R.	<i>Queensland State Reports</i>
Q.W.N.	<i>Queensland Weekly Notes</i>
S.A.S.R.	<i>South Australia Statute Reports</i>
Sid.	<i>Siderfin's King's Bench Reports</i>
S.R. (NSW)	<i>New South Wales Statute Reports</i>
St. R. Qd.	<i>Statute Reports of Queensland</i>
T.L.R.	<i>Times Law Reports</i>
T.R.	<i>Term Reports King's Bench (1792-1794)</i>
<i>Univ Toronto Law Jo.</i>	<i>University of Toronto Law Journal</i>
Ves. Jun.	<i>Vessey Junior's English Chancery Reports</i>
VSC	Victoria Supreme Court (medium neutral)
Ves. Sen.	<i>Vessey Senior's English Chancery Reports</i>
Wils. K.B.	<i>Wilson's King's Bench Reports (1742-74)</i>

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