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

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Common Law Recognition of Opportunity Costs:

The Classification Dilemma and the Religious Legacy

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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

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

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

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

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CHAPTER ONE : INTRODUCTION

The concept of 'opportunity cost' is certainly not new, either in the finance literature or legal literature. English courts have tacitly recognised an opportunity cost associated with the use of real property as early as cases recorded in the Plea Rolls and records of the 13th and 14th centuries.[1] The influence of the Scholastics in the post-Norman period hindered the development of coherent economic theory[2] involving opportunity cost. It wasn't until the early political economists, notably Smith[3], Von Thünen,[4] Mill,[5] Menger,[6] and Von Wieser[7] developed the concept of opportunity cost that the doctrine came into recognisant prominence, although under different names such as shadow cost, alternative cost, and displacement cost.[8] The debate in the late 19th century and early 20th century between the Austrian 'alternative cost' and the Marshallian 'opportunity cost' was intricate and complex, theoretically coherent, and involved widespread academic involvement.[9] The Austrian economist Eugene Von Bohm-Bawerk's[10] historic account of the denial of interest, published in German during the period from the 1890's to 1914, is a lucid display of scholastic effort to explain opportunity cost and advance economic theory of interest generally. It may seem surprising, therefore, given this considerable

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[1] *Lacon v Toppe and Toppe,* cited as Case 165 in Conyers, A., 1973, *Wiltshire Extents for Debts Edward I-Elizabeth I – Devizes* Wiltshire Records Society p. 119; *Chyppenham and Leversegge*, Assize of 1463-4, *The Edington Cartulary,* case 657, Wiltshire Records Society, pp. 168-169.

[2] Ekelund, R. B. and Hebert, R. F. 1983, *A History of Economic Theory and Method,* McGraw Hill chapter one. (Throughout this thesis, the citations of authors' chapters attempts to follow the format in the cited text, whether a printed numeral or a word form of the chapter number)

[3] Smith, A. 1776, *Wealth of Nations,* p.55; also cited in Ekelund and Hebert 1983, p. 92.

[4] Fonseca, G. 2000, "Opportunity Cost Doctrine", online, accessed 4 November, 2000. http://cepa.newschool.edu/het/essays/margrev/oppcost.htm ; also see Wartenberg, C. M. 1966, *Von Thünen's Isolated State,* Oxford Pergamon Books, pp, 22-35; Pribram, K. 1983, *A History of Economic Reasoning,* John Hopkins University Press, p. 204.

[5] Mill J.S. 1848, *The Principles of Political Economy,* cited Fonseca 2000.

[6] Menger, C. 1871, *Principles of Economics,* Dingwall and Hoselitz translation, 1950, Free Press, pp. 163-165.

[7] Von Wieser 1876, cited Fonseca 2000, p.1; Pribram 1983, pp. 281-2.

[8] Pribram asserts that it was Green that first used the term "opportunity cost". See Green, D. 1894, "Pain-Cost Opportunity Cost", January 1894, *Quarterly Journal of Economics,* pp. 218-229.

[9] Fonseca 2000.

ancestry, that the literature on opportunity cost, both legal and economic, is lacking in a major respect. The notorious difficulty of opportunity cost recovery in litigious circumstances has not been examined sufficiently to explain why the English and Australian courts have not accepted, or at least not conceptually grasped fully, the economic concept of opportunity cost which is contemporarily taken for granted in economics and finance literature.

Common law courts, from the earliest plea rolls,[11] have agonized over the limits of damages awards to plaintiffs who seek the recovery of all losses suffered either in tort or as a result of a breach of contract by a defendant. This includes the losses caused by the defendant failing to pay promptly the contractual debt or damages.[12] This additional damage to the plaintiff from time delay was generally precluded from recovery by common law courts, apart from the intervention of simple statutory interest[13]. This breeds a conflict in the common law, for there is an entrenched 'rule' of fully restoring a plaintiff to the financial position s/he would have been in but for the losses incurred from the defendant's refusal to meet contractual obligations, or failure to pay tort damages promptly.[14] Militating against this position, the common law sets limits on the types of losses which can be recovered which prevent the victim of wrongful action from being fully compensated for all the losses inflicted. The outcomes of litigation do not, in most instances, reflect the commercial reality of the damage inflicted by late payments by

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[10] Von Bohm-Bawerk, E. 1890-1904, *Capital and Interest* 1959 reprint vol. 1, chapter 2.
[11] The earliest plea roll surviving is from 1130, but there are many from later in the 12th century, mainly from the time of Henry II, and the earliest rolls of the King's Court, the *Coram Rege* rolls, began in 1234. Goodman, E. 1995, *The Origins of the Western Legal Traditions*, Federation Press, pp. 226-8.
[12] *The Dundee* 2 Hag. Adm. 137 at 141, cited Denning M.R. in *Techno-Impex v Gebr. Van Weelde Scheepvaarkantoor B.V* [1981] 1 Q.B. 648 at 662; *The Amalia* (1864) 5 N.R. 164; *President of India v Lips Maritime Corporation* [1988] 1 A.C. 395.
[13] *London, Chatham, and Dover Railway v South Eastern Railway Co.* [1892] 1 Ch. 120; *Page v Newman* (1829) 9 B & C 377; 109 E.R. 140.
[14] *Owners of the Dredger Liesbosch v Owners of the Steamship Edison* [1933] A.C. 449.

defendants of either the debt(s) in question, or the delay in settling damages for an injury, economic or otherwise, in a prompt manner.

The refusal of common law courts to conceptually embrace theoretical economic principles relevant to opportunity cost recovery stems from both the historic religious legacy and the perceived intangibility of opportunity cost itself. The Catholic Church's hatred of usury from the time of the earliest Christian writings imbued the common law with a prohibition against recovery of additional sums to compensate for the loss incurred by a party for the time value of an overdue sum of money. This was, in effect, a rejection of compensation for the opportunity cost for money wrongfully withheld by a defendant. The rigidity of the legal system's attitude towards the recovery of the opportunity cost of funds was compounded in the period after the Norman Conquest because justices were drawn mainly from the Catholic clergy, essentially the only literate class of people in Europe from the time of the fall of Rome.

Economic concepts such as inflation, future earnings capacity, and statistical analysis have not readily found acceptance in the common law. This highlights the differences in the methodology of the two disciplines. The common law was formed in the medieval era of feudal and manorial relationships from a mix of the ancient customary Teutonic law and the Roman law. In addition, it was especially influenced during its crucial formative years by Canon law, at a time when the Church was rising to its apex of social influence in the period from the 11th to the 14th centuries. Modern finance, in contrast, has arisen as a subset of economics primarily in response to the commercial realities of the 19th and 20th centuries. The different origins of the disciplines of law and finance have shaped the way each approaches the issue of opportunity cost. The common law's formulary, remedial, and consequential framework focuses upon past events, and relies

upon adversarial parties in every instance. This conflicts with the innovative, future-oriented, and mathematical nature of the discipline of finance, breeding a deep philosophical clash between the two worldviews which is still not resolved. The common law has retained the ancient approach to the disposition of cases, maintaining a dichotomy, solidified in the early 19th century, between the actions with respect to tangible assets such as land, and the actions with respect to money. Finance eschews this dichotomy, and by implication deprecates what it regards as the artificial and unjustifiable differences imposed at law.

Although in the late 18th century the common law showed a glimmer of a widening acceptance of consequential losses from time delay under the reforming pressure of Lord Mansfield, this was crushed in the inexorable move toward conservatism which swept England around the turn of the 19th century.[15] A seminal case in 1829, *Page v Newman,*[16] cemented the prohibition of opportunity cost recovery where defendants had withheld payments of money by prohibiting awards of interest on the overdue sums in common law. From that time forward, courts refused to recognise losses arising from the time value of money, but in a contradictory manner accepted other time-related losses when linked to tangible property such as land or goods. This constituted a 'classification dilemma'. Economics and finance, in contrast, recognise opportunity cost in far wider circumstances. There remains, therefore, considerable and largely unreconciled tension between the financial perspective and the common law over recovery of opportunity costs caused by late payment of debts or damages, whether in contract or tort. This tension is evident in areas other than just opportunity cost recovery. The matrix of inconsistencies weaves a tapestry which encompasses both historical and

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[15] Atiyah, P. 1979, *The Rise and Fall of Freedom of Contract,* Oxford Clarendon Press.

contemporaneous contradictions which should not be passed over in the search for a coherent explanation of the difficulty of recovering losses arising from the withholding of money.

The intervention of the statutory direction of the *Civil Procedure Act 1833 (UK)* (Lord Tenterden's Act) only served to cloud the underlying inconsistencies which have been endemic to the legal approach to opportunity cost by permitting the award of simple interest on overdue sums in very limited circumstances. The award of an interest component for time delay had previously been left to juries as a rule of evidence. The intervention of Lord Tenterden's Act as a possible consequence of the "deep torpor following *Page v Newman*"[17] only served as a compromise to placate tension erected in that case. The classification dilemma in common law lasted until partially resolved in the Australian High Court case of *Hungerfords v Walker*[18] in 1989.

The underlying reasons for the inconsistencies in the treatment of opportunity cost between law and finance are found by tracing the influence of the church, which culminated in early 19th century English cases, which refused to allow common law courts to assess additional sums for late payments of debts or damages by defendants. This precluded the recovery of opportunity costs incurred when a plaintiff was deprived of the use of money wrongfully withheld by the defendant. The reluctance of the common law to award losses incurred from the delay in payment, entrenched through its own formulary system and its doctrine of *stare decisis*, stem from the historic position generated from religious hostility to loans at interest. The Christian Church condemned

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[16] (1829) 9 B & C 377; 109 E.R. 140.
[17] Mason and Carter 1995, *Restitution Law in Australia,* Butterworths, p. 949.
[18] (1989) 171 C.L.R. 125.

this practice as *usury*. This thesis seeks to fill the lacuna in the opportunity cost literature by tracing the influence of the Catholic Church's hatred of usury and offering a plausible explanation for the perpetuation of the classification dilemma in the common law.

Introduction to Usury, the Church, and the Common Law

The English term 'usury' comes from the Latin '*usuris*' and connotes the use of an object.[19] With respect to the use of money, *usura* was charged by lenders for the use of a sum of money for a time.[20] Usury was deprecated by ancient writers, allowed in the Roman Empire, but then forbidden as the Roman Catholic Church rose to prominence subsequent to the events which swept the Emperor Constantine the Great to power in the early 4th century. From the time of the landing of Augustine in England in 597 A.D. to the 15th century, the Christian clergy were essentially the only literate class in English society.[21] Accordingly, the common law of England formed with Christian clergy sitting as members of the judiciary in the early courts. Consistent with this ecclesiastical influence, the early common law entrenched an attitude toward loans at interest, reflecting the church's teaching, through the common law doctrine of *stare decisis*, or precedent, which bound judges to follow clear principles arising from previous cases. The zenith of the church's power and influence coincided with the formation of the common law in the post-Norman era, and reached to approximately the time of the fall of

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[19] Von Bohm-Bawerk 1890, *Capital and Interest,* chapters 1 and 2; Noonan 1957, *The Scholastic Analysis of Usury,* Harvard University Press; Wilson, 1572, uses the plural derivative *usura* and it is rendered *usurarium* in Von Bohm-Bawerk's account of Besold and Salmasius in chapter 2.

[20] Von Bohm-Bawerk 1890, vol. 1, pp. 14-15. Aquinas was antagonistic to the practice of usury for this very reason, as he identified time as a free resource from God given to all and viewed money as a consumable. See *de Usuris*, Part 1, chap 4, cited in Von Bohm-Bawerk 1890, p. 446, note 15. Von Bohm-Bawerk 1890, pp. 14-16 identifies Turgot as the first to identify the issue of time in the modern sense, although he labelled Turgot as "modest and naïve".

[21] Brand, P. 1992, *The Making of the Common Law*, Hambledon Press; Hamilton, B. 1981, *The Medieval Inquisition*, Edward Arnold, p. 17; Goodrich, P. 1987, "Literacy and Language in the Early Common Law", *Journal of Law and Society*, vol. 14, no. 4, pp. 422-444 at p. 426; Berman, H. 1983, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, pp. 62-68.

Constantinople in 1453. The social changes resulting from the major social and natural catastrophes in the century prior to the fall of Christianity's eastern capital eroded confidence in the ability of the church to govern all aspects of life.[22] The church's influence further declined sharply in the period subsequent to the Protestant Reformation, beginning in the 16th century. The church's hatred of usury, however, left a legacy which outlasted the official sanction of the church. The common law of England was imbued with the church's anti-usury position, influencing the courts long after the reason for its objection had been swept away.

In the 19th century, one particular Chief Justice of the King's Bench in England, "a radical defender of the church," denied that a common law court even had the power to award interest for late payment.[23] This was an outright denial of recovery for the opportunity losses attached to an overdue sum of money. This development led to a dichotomy in the way that courts viewed the opportunity cost associated with the use of assets. Courts recognised and accepted evidence regarding a variety of opportunity cost/profits, including, lost rent on land or houses,[24] the consequential damage from the change in market price of goods withheld[25] in breach of contract, and lost profits on copyright violation.[26] In contrast, opportunity costs arising from the loss of the use of money, a moveable asset, were precluded from recovery. Rather than letting the evidence in each case prove the total loss suffered by a plaintiff, these losses were now considered

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[22] Tawney, R. H. 1948, *Religion and the Rise of Capitalism,* Penguin Books, p. 48.
[23] *Page v Newman* (1829) 9 B & C 377; 109 E.R. 140 per Lord Tenterden; Campbell, J. L. 1971, *The Lives of the Chief Justices of England,* 3rd edition, 4 volumes, London, John Murray, vol. 4, pp. 309-411; Townsend, W. C. 1846, *The Lives of Twelve Imminent Judges*, London, Spottiswoode, vol. 2, chapter 5, pp. 234-278.
[24] After the Statute of Frauds in 1677, all litigation with respect to interest in land and the subject of a contract were required to be evidenced in writing. This is also the current Australian position. See s. 54 Conveyancing Act 1919 (NSW)
[25] *Ribaud v Russell,* Fair Court of St. Ives, A.D. 1287, S.S. vol. 23, p. 15, cited Fifoot 1949, p. 308

too remote, contrary to the common law, and by implication, usurious.[27] Although modified by statute during the time of Henry VIII (1509-1547), the courts still restricted the recovery of interest for time delay. Common law judges began to allow juries discretion with respect to damage awards, with the evidence pointing to an orderly progression as the early effects of the Industrial Revolution began to accumulate in English society. This discretion was firmly proscribed by cases at the beginning of the 19th century. *Page v. Newman*, in 1829, became the seminal case used to justify the classification dilemma, and, although challenged in 1893, the rigid form of the doctrine of precedent prevailed over the misgivings of Law Lords[28]. The proscription continued until 1989 in Australia.

The Partial Resolution of the Classification Dilemma

The High Court of Australia partially resolved the classification dilemma through the leading case of *Hungerfords v Walker*[29] in 1989. In this case, additional sums were awarded for the loss of the use of funds paid away as a result of a defendant's actions, with reference to commercial *compound* interest rates. The plaintiffs were a group of stores which had overpaid tax over several years because of the negligence and breach of contract of its firm of accountants. Bollen J., at first instance, found for the plaintiffs and awarded interest at 10%.[30] The plaintiffs appealed, and the Full South Australia Supreme Court (King CJ., Millhouse and Jacobs JJ.) awarded an additional sum in compensation for the loss of the use of the overpaid money by reference to compound interest rates,

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[26] *L.E.D. Builders v Eagle Homes Pty. Ltd.* [1999] FCA 584, (7 May 1999), (unreported) Federal Court of Australia.
[27] *Hungerfords v Walker* (1989) 171 C.L.R. 125, per Mason CJ. and Wilson J. at p. 137; *London, Chatham, and Dover Railways v South Eastern Railway Co.* [1892] 1 Ch. 120, per Kay, LJ. At 148; *President of India v Lips Maritime Corporation* [1988] 1 A.C. 395.
[28] *London Chatham and Dover Railway Co. v South Eastern Railway Co.* [1893] A.C. 429.
[29] (1989) 171 C.L.R. 125.

increasing the damages award substantially. The accountants appealed to the High Court of Australia. In finding for the plaintiffs, the High Court affirmed the award of additional sums for the loss of the use of the money paid away and unrecoverable, caused by the breach of the defendants. This changed the legal environment for opportunity cost recovery for late payment of debt or damages, and potentially impacts upon a far wider-ranging set of circumstances than just that which is evident by the facts of the case. Despite this milestone, the underlying conflict is not completely resolved. Further tension between the issues raised by the classification dilemma is inevitable.

Awarding Losses: Matter of Evidence, or Rule of Law?

How courts resolve issues in disputes at trial depend upon whether the issue falls to be decided as a matter of fact, where evidence then becomes paramount, or whether the court decides that the issue is covered by a rule of law. Rules of evidence are largely decided as procedural matters, and are focused solely upon the facts of each individual case. Juries decide the matters of fact in each case, and the court applies the rules of law to the facts that the jury decides are true.[31] The question "Has the defendant breached the contract by conduct inconsistent with good faith and fair and proper dealing?" is answered either 'yes' or 'no' according to whose story the jury believes. The documentary evidence and oral testimony are brought before the jury, and the jury makes its decision. The rule of law is then applied to the facts that the jury decides are true. In the question above, under a rule of law the court would use the rule "Where a man executes a bond as surety for the principal obligor, he will be freed from liability on the

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[30] *Hungerfords v Walker* (1989) 171 C.L.R. 125 at 127.

[31] Historically, juries were more integrally included as a matter of course in the legal process, whereas in the contemporary legal environment, cases are heard more often than in the past by judges in the absence of a jury.

bond by conduct of the obligee which is not consistent with good faith and fair and proper dealing".[32]

Perhaps starting at a rule such as that arising from *Robinson v Harman*[33], the court may decide the "rule of the common law is that a person is entitled to be put into the same position, as far as money can do, as if the breach of contract had not occurred." Another example is the rule in *Hadley v Baxendale*,[34] where it was said that a plaintiff is entitled to recover the loss caused by the defendant's breach of contract which results from the "usual course of things" when a breach of contract like the one in question actually occurred. Additionally, the plaintiff can recover any losses "in the contemplation of the parties" when they made the contract that they knew would occur if a breach of the relevant type eventuated. The jury in *Hadley* decided that the defendant had indeed breached the contract and caused certain losses, but on appeal the bench decided on the extent to which losses were recompensable according to a 'rule' of law, now generally known as the two limbs of the rule in *Hadley v Baxendale*. The classification dilemma arises because the losses from the defendant's delay in paying a debt, which had been allowed along with all the other losses which the plaintiff proved, were no longer considered legitimate losses to be proved to the jury's satisfaction and awarded as a matter of course in litigation. This new 'rule' removed the issue of opportunity cost awards from the consideration of the jury as a matter of evidence to its subsequent position as a matter covered by the rule of law in *Page v Newman* (1829), which rendered it unrecoverable. Plaintiffs were then open targets for unscrupulous defendants

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[32] Broom, H. 1878, *Philosophy of Law*, 2nd edition, London, Maxwell & Sons; 1980 reprint, Rothman & Co., p. 139.
[33] [1848] 1 Ex. 850; 154 E.R. 363.
[34] [1854] 9 Ex. 341; 156 E.R. 145.

who were largely protected from additional penalty unless the plaintiff filed a writ very soon after the defendant's default.

Prior to the crystallisation of the classification dilemma, there is some evidence that a plaintiff might recover additional sums for unjust detention of money under certain circumstances.[35] In some cases prior to the 19th century additional sums were considered as matters of evidence and were proved by the plaintiff or rebuffed by the defendant in each case.[36] In response to the commercial pressures of the early beginning of the Industrial Revolution in the late 18th century, early judges awarded sums for unjust detention[37] based on the jury's discretion and whether the burden of proof was discharged in each case. Thus, each court decided the matter on the basis of a 'rule of evidence'. A loss from the time delay was proved or not, and awarded or not, as juries saw fit from the facts of each case. This reflects an orderly flexible progression in the growth of the common law. After *Page v Newman* the primary underlying legal rule of *restitutio in integrum*, or restoring the plaintiff to the position s/he would have been in but for the culpable behaviour of the defendant, was now impossible to achieve with respect to those opportunity losses incurred in consequence of the defendant's actions. If the defendant could successfully plead that the losses fell under the rule of law relating to the classification dilemma, the plaintiff failed. Using the language of contract, the losses of this type were deemed by the courts not to be recoverable because the rule dictated that they were 'too remote'. Recovery of any losses depended upon the specific terms of

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[35] Pollock, F. Maitland F. W. 1898, *The History of English Law Before the Time of Edward I,* two volumes, 2nd edition reprint 1989, Cambridge University Press; vol. 2, p. 400 ff. Also see the cases in Chapter Four below.

[36] Fifoot 1949, p.380-6; *Hillhouse v Davis* 1 M & S 169 (1813); 105 E.R. 64; *Blaney v Hendrick* 3 Wils. K.B. 205; (1771) 95 E.R. 1015; *Trelawney against Thomas* 1 H. Bl. 303 [1789] 126 E.R. 178.

[37] Buller CJ, Chief Justice of the Common Pleas, held from a surprisingly modern perspective, that an insurance company who had unreasonably withheld insurance money due under a life insurance policy had to pay interest for the time of the delay.

the contract which reflected the "contemplation of the parties" at the time of making the contract, and the "usual course of things", [38] terms which lack specificity, and which plagued later case judgments where judges grappled with issues of damages awards.[39]

The legal issues of causation and remoteness of damages directly affect whether the court will deem the losses of the plaintiff to be recoverable against the defendant. These are not simple concepts in law, and are affected by additional considerations of public policy in the courts themselves. These issues form part of the decision framework which promulgates resistance to opportunity cost recovery in common law. The litigious recovery of opportunity costs, therefore, must consider both the historic antecedents and additional legal scaffold which accompany the court process. To consider the classification dilemma will entail scrutiny of the religious objection to usury and its subsequent legal legacy, the common law reception of the historic legacy, and its inculcation into the common law as a rule in 1829. The common law characteristics which support this dilemma must be examined and the characteristics which are relevant to opportunity cost recovery scrutinised. In addition, the partial resolution of the classification dilemma will show what problems remain, and how far the dilemma has been resolved.

Thesis Profile

The thesis is divided into two major sections. The first section is comprised of three chapters which, respectively, establish the church's religious legacy in the legal attitude

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[38] The terminology of remoteness and contemplation was actually first used in *Hadley v Baxendale* (1854) 9 Ex. 341; 156 E.R. 145, but the context of the case language suggests that it was in use long before this time.

[39] *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.; Coulson & Co. Ltd (3rd Parties)* [1949] 2 K. B. 528; *Owners of the Dredger Liesbosch v Owners of the Steamship Edison* [1933] A.C. 449.

toward opportunity cost, the formation and secularisation of the common law of England, and the solidification of the classification dilemma in the beginning of the 19th century. The second section is introduced by a methodological chapter which examines the conceptual conflicts between the legal and economics/financial worldviews. The second section then examines the factual issues in litigation which erect obstacles to opportunity cost recovery, the rules of law affecting the disposition of cases by the courts which present difficulties to courts in dealing with opportunity cost, and the underlying problematic public policy issues which affect not only opportunity cost but other theoretical economic concepts. This is followed by an analysis of the partial resolution of the classification dilemma and the cases subsequent to *Hungerfords v Walker* (1989). The concluding chapter draws together consideration of the effect of the classification dilemma and the burden courts place on actors in commercial dealings to provide for opportunity cost as a usual term in contract.

Part One: Origins of the Classification Dilemma

Chapter Two: The Generation of the Religious Legacy - Hatred of Usury

This chapter establishes the church's rejection of usury and the reasons upon which it relied for its stance. It examines the Biblical texts used by the church to support its antimony to usury. Usury was considered heresy. This hatred of usury was carried by the personam of the clergy as Christianity spread throughout Europe during the time from the fourth century onwards when Rome was collapsing and the church represented a comforting buffer between common peoples and the harsh reality of anarchy. The church's sanction of the practice of usury grew in severity collateral with the church's ascendance to the pinnacle of its power in the 13th century. The ecclesiastical mandates (canons and decretals) which deprecated usury threatened with temporal and eternal punishment both usurers and secular authorities who failed to institute laws prohibiting

the practice. The church's influence began to wane with the social changes brought about in the century of tragedy beginning with the pandemic of the Black Plague in the 1340's and ending with the fall of Christianity's eastern capital, Constantinople, in 1453. The church's fall was accelerated with the Protestant Reformation, beginning in 1517, and the break from Rome of Henry VIII of England in the 1530's. The religious acrimony to the practice of usury infected the common law during the church's overwhelming social prominence.

Chapter Three – The Imprint of the Religious Legacy on the Common Law

This chapter traces the birth of the common law and its ecclesiastical nurturing during the formation period. The common law formed as a result of the efforts of the English Kings to centralise power in the King's Court. The King was the *regnal* ruler and the Pope was the *sacerdotal* ruler. The use of the clergy as judges in the *regnal* courts entrenched the anti-usury viewpoint in the law, and as English Kings subsequent to William I[40] did vassalage to the Roman Pontiff, this view became an organic characteristic of the English common law system. As England entrenched a formulary system of pleading in the courts, and the personnel who specialised in pleading began to diverge in perspective from the Canon law, forces of secularisation challenged many of the influences of the Catholic Church. Although in the early 16th century Henry VIII legalised the taking of interest at regulated rates in loan contracts, the courts maintained a restrictive view of the practice, thereby recognising the historic legacy of the church.

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[40] Cheney, C. R. 1982, *The Papacy and England 12th-14th Centuries,* Variorum Reprints. Cheney outlines the Interdict of 1208-1214 which settled the issue that the English Kings were *de jure* Pontifical vassals: pp. 295-318.

Chapter Four: The Classification Dilemma

The last chapter of Part One establishes the historic antecedents of the prohibition of opportunity cost recovery by the courts. It will focus upon the divergence of the common law from a logical development of a coherent doctrine on this issue. Recognised tangible commodities generated rights to recover consequential damages from breach of contract or tort associated with those assets, but there were no rights generated in law to recover opportunity cost from consequential damage incurred by late payment of a sum of money. The courts failed to perceive that money was a commodity like any other. This dilemma was entrenched in the seminal case of *Page v Newman* in 1829. It has not been fully resolved.

Chapter Five: Conceptual Conflicts Between Law and Finance

This chapter, which divides the two major sections of this thesis, examines the conflicts in the perspectives of law and economics/finance. The time value of money comprises an important axiom in finance literature. Valuing cash flow streams and future cash flows is central to financial decision-making.[41] This generates a present-future paradigmatic orientation in contrast to that of the common law, which is consequentialist and hind-sighted. Paradoxically, however, commercial society is impossible without the law of contract and, therefore, it is inescapable that the finance worldview will depend upon the law for its very life and survival. One hind-sighted and remedial framework, therefore, enforces and informs a future-oriented commercial framework. One framework uses a narrow, past-events orientation to invoke its sanction mechanism, and the other a framework which has a future-oriented, broadminded, adventurous attitude in generating new ways of increasing cash flows.

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[41] Price, C. 1993 *Time, Discounting and Value*, Blackwell Books chapter 7; Von Weiser, F. 1893, *Natural Value*, 1971 reprint, Augustus M. Kelly, chapters I and II.

Finance uses money as a metric in all circumstances. The common law concludes with a money metric, but deals with the wider qualitative considerations of property and person through the overriding notion of justice in each case. Finance recognises the opportunity cost of changing capital placements, the law abhors dealing with matters too intangible or notional to fit into the extrusion mechanism generated from the past events. Finance recognises losses in conceptual form, whether a loss between two alternatives or from one time to another where capital stands idle and unproductive. Law only recognises a loss when the evidentiary burden is discharged and it has an ability to crystallise the loss into money terms, eschewing notional or intangible losses which are considered too remote, or unproven. Finance seeks an underlying theory, whereas law seeks to deal with specific situations. Law continually refers to the past to strive for consistency through the doctrine of *stare decisis*, or precedent. Finance seeks ways to generate new situations, while law seeks to fit new situations into old forms. Finance seeks innovative change, the law seeks a conservative posture. The characteristics of each worldview render a harmony between them difficult, if not impossible.

Part Two: The Contemporary Legal Environment

The second major section of the thesis systematically examines the influential rules the courts use to dispose of cases involving awards of damages. This portion of the thesis focuses upon the problems arising in opportunity cost recovery generated from three sources. These will be covered in three successive chapters. The final chapter in this section, Chapter 9, assumes a contemporaneous perspective on the resolution of the classification dilemma and how the courts have overcome legal contradictions and the antecedent factors which prevented recovery of opportunity cost for time delay.

Chapter Six: The Legal Burden of Party Presentation

Chapter Six will focus upon the way that information which affects the outcomes of cases is introduced through the parties to litigation. This is called the doctrine of Party Presentation.[42] The Plaintiff, in any legal action, initially bears the burden of proving that a case exists which warrants the intervention of the courts. The issue of causation in law, remoteness of damage and subsequent legal perspective on recovery of pertinent consequential losses is examined in detail. The issues pertaining to the opportunity cost incurred through time delay, and how these issues are determined by the courts, are affected by the legal application of notions of causation and remoteness. The seminal case of *Hadley v Baxendale,*[43] the starting point for modern contract damages awards, is criticised for its lack of linguistic precision which plagued later decisions involving damages awards for consequential losses, including opportunity losses.[44]

Chapter Seven: The Rules of Law Affecting Recovery of Damages

This chapter examines the rules in the legal process itself which affect the discretion of the courts to award damages for the consequential opportunity costs of plaintiffs. These are 'rules of law' which affect the recovery of damages, such as the rule of '*restitutio in integrum*', or the right of a plaintiff to be restored to a position s/he would have been in but for the defendant's act or omission; the once-for-all payment in common law for an actionable wrong, and the limitation of common law courts to award damages for losses in money terms. Conceptually, these 'rules' comprise a burden which is placed upon the Bench. This is contrasted with the previous chapter where the burden fell upon the

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[42] Ligertwood, A. 1993, *Australian Evidence,* 2nd ed., Butterworths.
[43] (1854) 9 Exch 341; 156 E.R. 145.
[44] *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.; Coulson & Co. Ltd (3rd Parties)* [1949] 2 K. B. 528

parties to litigation themselves. Although the delineation of the subject matter in chapters Six and Seven overlap, the main thrust of this chapter is to show that there are major contradictions in both principle and practice in the way that the law deals with the losses incurred by a plaintiff. It will be argued that the classification of losses without a consistent conceptual framework will continue to maintain inconsistencies in the law.

Chapter Eight: The Lingering Influence of Public Policy in Court Decisions

Chapter Eight examines public policy and how consideration of efficiency, accuracy, and predictability have shaped the legal system, especially its attitude toward the awards of damages for consequential losses of plaintiffs. Certain characteristics manifest in the courts' attitude over centuries have revealed that the courts rely on the use of underlying social policies which (sometimes greatly) influence the outcome of cases. This is especially true when issues arise where financial theory has come to the attention of the courts. This has affected the way courts have regarded the economic theory behind claims for damages. By examining economic issues in case law, this chapter argues that the underlying social policies of efficiency, accuracy, and predictability in damage awards delayed the development of a sound and defensible conceptual basis for opportunity cost awards until the *Hungerfords* rule in 1989.

Chapter Nine: Partial Resolution of the Classification Dilemma - the Rule in *Hungerfords*

This chapter will analyse the Australian High Court decision in *Hungerfords v Walker*[45] which partially resolved the classification dilemma by recognising the legal inconsistencies inherent in the refusal to award opportunity cost for time delay. The High Court affirmed the award of additional sums by reference to compound interest rates

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[45] (1989) 171 C.L.R. 125.

upon money which was lost or paid away by a plaintiff as a result of the act or omission of the defendant. Cases subsequent to *Hungerfords* will also be examined, showing the application of the rule formed in that case by later courts, and the remaining issues pertaining to opportunity cost recovery which are unresolved.

Chapter Ten: Conclusion

The final chapter, the conclusion, will take the position, in light of the preceding material, that opportunity cost recovery, although still predominantly covered under restrictive rules of law, should be matters of evidence to be borne by the parties to litigation to be proved according to the requisite standard in each case. The chapters above will show the influence of the 'rules of law', as distinct from matters of evidence, which restrict the recovery of the opportunity losses incurred by plaintiffs through the delay of payment of debt or damages by defendants , and have restricted recovery since the classification dilemma arose in 1829. Although the effects of the religious legacy can still be ascertained lingering in the framework used in Australian common law courts, the door is opening to a resolution of the legal inconsistencies which have plagued the common law since its inception.

CHAPTER 2: THE RELIGIOUS LEGACY: HATRED OF USURY

Introduction

Opportunity cost for the loss of the use of money has historically been tied to the question of usury. Profit from trade was accorded socially differential treatment to profit from investment. Profitable traders were not condemned, although regulated and scrutinised. Profitable *lenders*, in contrast, were censored heavily. Writers of antiquity criticised those who even advocated the taking of interest. Thus, the Catholic Church played a major role in the historic prohibition of lending at interest in the period from Constantine (306-337 A.D.) to the Protestant Reformation in the 16th century. Religious influence infected the common law of England and bred hostility to the recovery of interest for overdue debt or damages. This, in effect, was a prohibition on the recovery of the opportunity cost associated with money. The influence reached its peak in the 13th century, a seminal time in the formation period of the common law of England. This influence was recognised as late as 1989 when the High Court of Australia overturned the common law prohibition on damages awards for the loss of the use of money, which partially resolved what this thesis stipulates as the 'classification dilemma'.

This chapter canvasses the history of the ascendance and subsequent dissipation of the church's influence in prohibiting the practice of usury. The church's objection to usury was maintained by the use of force, manipulation, and threat by church officials. Although the Christian Church was not the only religious source of objection to lending

at interest, it was the greatest source of influence in the English common law. The church's objection will be analysed, starting first with the pre-Christian philosophers, then, progressing through the Old and New Testaments and Roman times, into the early medieval period. The forces prevailing during the late medieval period, the Renaissance period, the century of tragedy, and finally the Protestant Reformation show the decline of the church's influence. Despite the use of increasing force against usurers, the evidence shows that the practice was never completely stopped.

The Aristotelian View of Money and the Ancient Writers

Aristotle's idea of the place of money and interest was formed through his own cultural and ideological perspective (384-322 B.C.). Economics as a subject, according to Aristotle, hinged around the household. In his view, usury, i.e., lending at interest, was unnatural :

> Of the two sorts of money-making one, as I have just said, is a part of household management, the other is retail trade: the former necessary and honorable, the latter a kind of exchange which is justly censured; for it is unnatural, and a mode by which men gain from one another. The most hated sort, and with the greatest reason, is usury, which makes a gain out of money itself, and not from the natural use of it. For money was intended to be used in exchange, but not to increase at interest. And this term usury, which means the birth of money from money, is applied to the breeding of money, because the offspring resembles the parent. Wherefore of all modes of making money, this is the most unnatural. [1]

The appeal to the 'nature' of money or some 'natural' law is a characteristic which is endemic to the ancient writers on this subject. The inherent normativity of the assumptions concerning what is 'natural' which are contained in Aristotle's statements were not specifically addressed for over a millennium. The principles which Aristotle's writing contains may be summarised as:

(1) There is no inherent ability of money to generate other money. It is, therefore, a barren asset, without any ability apart from the labour of the one who uses it.

(2) The lender demands interest from the lending of this barren asset, and the economic burden of the interest cannot come from any economic power in the money itself, but only from an unreasonable demand upon the borrower's labour by the lender,

(3) The taking of interest comes from the injustice of the lender tapping into the labour of the borrower by taking advantage of the situation where someone must borrow. Interest, therefore, is an abuse.

Aristotle was taking the same stand as Plato[2] concerning interest and the nature of money, considering interest contrary to nature and thus to be abhorred. Vermeersch asserts this position to be congruent with Seneca and Plutarch, but dismisses them with a line because they "knew little of economic science".[3] It is Von Bohm-Bawerk who identifies the lack of a conceptual framework which forms the heart of the objections of these writers:

> The philosophers ... such as Plato, Aristotle, the two Catos, Cicero, Seneca, Plautus and others, usually touch on the subject too cursorily to give any foundation in theory for their unfavourable judgment. In addition, the context often makes it doubtful whether they object to interest on the ground of a peculiar fault inherent in itself, or only because it usually results in an increase of the riches they despise.[4]

Whether or not the writers in antiquity despised riches or attributed an inherent fault to the taking of interest is now a moot point. What is relevant is that they uniformly

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[1] *Politics*, I, x,xi Jowetts' Translation, p. 19.
[2] *Laws*, v 742; also Vermeersch, A. 1912A, "Usury" *The Catholic Encyclopedia* 1912 Robert Appleton online edition, 1999 edition, Kevin Knight, http://www.newadvent.org/cathen/15235c.htm .
[3] Vermeersch 1912A, p.1.
[4] Von Bohm-Bawerk 1890, p. 11.

condemned interest-taking. Von Bohm-Bawerk's criticism that they contributed nothing to the rational theory of economics is well founded, if the writings which have survived are their only writings on the matter. Lewison[5] prefers to frame the philosophers' objections by appealing to their ideologies: "the taking of interest was seen as intolerable [...] having no place in their ideal city-states". Regardless of ideology, the text of the ancient objections show a livid disgust with the practice. Cato even went so far as to note that the usurer was lower than a thief, at one point comparing it to homicide. [6] "Cato begins [his work on rural economy, *De Agricultura*] by contrasting agriculture, the citizen's most honourable calling, with the most shameful – usurious profit-seeking, *fenerari*. 'Our fathers in their laws punished the usurer (*fenerator*) more harshly than the thief.'"[7]

The ancient writers, therefore, universally condemned lenders who charged interest to borrowers. Loans were normally consumptive, and the loan for production purposes hardly existed, if at all. There was no 'market mechanism' against which to judge the writings of the ancients, despite evidence that Egypt had an advanced economic framework as early as 3000 years before Christ.[8] Economic theory could not, in hindsight, expect to benefit from the writings of Aristotle or the other ancient writers where communal relationships did not include modern commercial dealings. The institution of the 'market' in a commercial sense, where money is widely accepted as a "store of value",[9] simply did not exist for them, and they viewed the potential changes

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[5] Lewison, M. 1999, "Conflicts of interest? The Ethics of Usury", *Journal of Business Ethics,* December 1999, vol. 22, issue 4, pp. 327-339, online edition; Von Bohm-Bawerk 1890, p. 338.
[6] Cicero "De Officiis", II, xxv.
[7] Koebner, R. 1966, "The Settlement and Colonization of Europe", in *The Cambridge Economic History of Europe Volume 1: The Agrarian Life of the Middle Ages*, Cambridge University Press, pp. 1-91, at p. 14.
[8] Ekelund and Hebert 1983, p.11-12.
[9] Creedy and O'Brien 1984, p.4.

which the widespread use of money brought to bear upon barter societies with suspicion.[10] Aristotle's influence was remarkably long-lasting:

> Interest was condemned by Aristotle as a consequence of his natural-law views on money. Interest leads to an unnatural accumulation. These exhortations against interest took on additional momentum when the doctrine of natural law was dressed in theological garb by church Schoolmen of the Middle Ages. The consequences of this latter development probably retarded the development of a market economy.[11]

The objections to the practice of lending money with the expectation of receiving interest, raised by the ancient writers above, gained widespread social acceptance in the post-Constantine era, as the Catholic Church's social and governmental power increased, and Rome increasingly manifested a military impotence which led to the anarchic times in Europe in the fifth to tenth centuries.

Biblical Prohibitions of Usury

Old Testament

Concern about the exploitation of the poor by the rich is found, and condemned, in the Vedantic literature,[12] and is prohibited in the Quran.[13] It was the Christian Church's aversion to the taking of interest, though, which was most influential in the formative times of the English common law and, therefore, it is upon this ancestral element that concentration will be focused. The texts which the church used to defend its anti-usury

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[10] Ekelund and Hebert 1983, p.13-18.
[11] *ibid.* p.18.
[12] Glaeser, E. L. and Scheinkman, J. 1998, "Neither a Borrower Nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws" [1998] 41 *Journal of Law and Economics,* No. 1 (April 1998), pp. 1-36, at pp. 1-2.
[13] Carota, E. and Carota, M. 1994, "Turning the Tables: Why We Must Find Alternatives to Interest-based Economics" *The Other Side,* Vol. 30, pp. 44-47; Visser, W. A. M. and MacIntosh, A. 1998, "A Short Review of the Historical Critique of Usury", *Accounting, Business and Financial History,* vol. 8, no. 2, pp. 175-189 at 177; Price, C. 1993, *Time, Discounting & Value,* Blackwell Books, pp. 64-65.

stance will now be systematically examined to determine whether the Church's position was internally coherent and defensible.

There are five Hebrew words in the Old Testament normally translated as 'usury' in English Bibles, *mashsha, neshek, nashak, tarbit,* and *marbit. Mashsha, neshek,* and *nashak* are related to one another, stemming from the Hebrew verb *nasha* which means primarily "to *strike* with a sting (as a serpent): figuratively to oppress with interest or usury on a loan".[14] In Psalm 73:18 the term used in conjunction with a rich oppressor is *mashuot* which implies a deception or fraudulent scheme, but technically, *nashak* literally means "to bite".[15] *Tarbit* and *marbit* both come from the Hebrew word *rabah* which means "many" or "numerous". Ballard[16] asserts that *tarbit* is always used to signify interest on money, while he canvasses different views on whether *marbit* is restricted to commodities.

The Old Testament mentions usury in a number of passages, but not all are outright prohibitions of usury. In some cases a double standard is promulgated, especially within the text of Deuteronomy, examined below. The Deuteronomic double standard bred tension in its application to Jews and Gentiles in the 5th to 15th centuries, but was used by the Jews to justify mercantile activity among the Gentiles.

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[14] Strong, J. 1980, *The Exhaustive Concordance of the Bible* Iowa Falls, Iowa, Word Bible Publishers, p. 1093, cross referenced to Hebrew Dictionary p. 81. The edition consulted is a reprint from a much earlier work, but the year of publication does not appear within the text consulted.
[15] Glaeser, E. L. and Scheinkman, J. 1998; Gross 1997.
[16] Ballard, B. 1994, "On the Sin of Usury: A Biblical Economic Ethic", *Christian Scholar's Review*, vol. 24, no. 2, pp. 210-228.

Exodus 22:25[17] states that "[i]f you lend money to My people, to the poor among you, do not act as a creditor, exact no interest [*neshek*] from them." This passage clearly illustrates two important points which are common to the religious objections to interest-taking. The first is that the lending is to the poor. This also implies that it comes from the rich, or at least from someone who is not poor. The second point is that it is clearly addressed to the Israelites. The term 'My people' is a reference to the ethnic Israelite people, who are to be contrasted with those ethnic groups which lie outside the twelve tribes of Israel, the Gentiles. What is conspicuous about Exodus 22:25 is specifically what it does *not* say. There is no condemnation of interest-taking *per se*, and certainly no discussion of why a blanket prohibition should be instituted. It is directed toward a limited class of people within the nation of Israel. This passage must also be considered in the light of the other passages which deal with this subject. Taking the Old Testament as a whole it would be incumbent on the serious reader to consider and synthesize the passages which cover the same material before taking any single passage out of its context.

In Deuteronomy 23:19-21 it is written that:

> You shall not charge interest to your brother – interest on money or food or anything that is lent out at interest.[nashak] To a foreigner you may charge interest,[nashak] but to your brother you shall not charge interest,[nashak] that the Lord your God may bless you in all to which you set your hand in the land which you are entering to possess.

The prohibition of lending to other Jews at interest, pronounced in this passage, is clearly juxtaposed against lending to Gentiles at interest, which is permitted. It speaks more of an exhortation to a close brotherhood within the ethnic Israelites than a blanket

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[17] All quotes from the Bible are taken from the New King James Version, Thomas Nelson Publishers copyright 1979, unless otherwise noted.

prohibition arising from the intrinsically sinful or evil nature of interest-taking. This very point would be the pivot of antagonism against the church's prohibition of lending at interest by later Christian writers on the subject. Although Visser and MacIntosh[18] interpret this to be *business* dealings with foreigners, this interpretation cannot be justified strictly from the text. What is interesting is that the practice of lending at interest is recognised in the present tense, not a former or past tense, nor does it deprecate the practice in nations surrounding the Children of Israel. Other passages in Deuteronomy which portray God's condemnation of practices He found abhorrent can be found, and it is conspicuous that this passage openly allows interest on loans to communities outside ethnic Israel.[19]

The prohibitions contained in Nehemiah 5:1-13 also show that the proscription of interest and the threat of Nehemiah against the nobles and rulers who were creditors was clearly generated because they were requiring repayment of interest *from their brethren* and not from any other source.

> And there was a great outcry of the people and their wives against their Jewish brethren. For there were those who said, "We, our sons, and our daughters are many; therefore let us get grain for them, that we may eat and live." There were also some who said, "We have mortgaged our lands and vineyards and houses, that we might buy grain because of the famine." There were also those who said, "We have borrowed money for the king's tax on our lands and vineyards. Yet now our flesh is as the flesh of our brethren, our children as their children; and indeed we are forcing our sons and our daughters to be slaves, and some of our daughters are brought into slavery already. It is not in our power to redeem them, for other men have our lands and vineyards. ... After serious thought, I rebuked the nobles and rulers, and said to them, "each of you is exacting usury [*mashsha*] from his brother." So I called a great assembly against them.

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[18] 1998, p.177.

[19] An incontrovertible example is shown just prior to the above passage, in Deuteronomy 18:9-14, where practices of the surrounding nations are condemned in very certain terms.

These passages portray a violation of the very points outlined above in the proscriptions in both Deuteronomy and Exodus. [20] Gross disagrees, arguing instead that the passage focuses not upon the issue of interest, but instead, upon behaviour after the loans had defaulted: "...the focus is neither on the charging of interest, nor whether or not it was right to make loans, but on inappropriate demands for repayment" .[21] Therefore, it is doubtful that this passage can stand either on its own, or in conjunction with the other texts, to prohibit the practice of usury in any other environment except in respect to the lending between Jews.

In Psalm 15 and Ezekiel 18, which Wee and Ballard treat together, there appears at first glance to be a formidable prohibition to interest-taking. According to Wee:

> Psalm 15 makes it clear that one of the attributes of the righteous is the fact that they will not lend out money at interest:
>
> > O Lord, who shall sojourn in thy tent? Who shall dwell on thy holy hill? He who walks blamelessly, and does what is right, and speaks truth from his heart... who does not put out his money at interest [neshek] and does not take a bribe against the innocent (Ps. 15: 1,2,5)
>
> Ezekiel's word of judgment, spoken to those within the community, makes it clear that the lending of money for interest is in violation of the law:
>
> > If a man is righteous and does what is lawful and right... does not oppress any but restores to the debtor his pledge, does not lend at interest [neshek] or take any increase... executes true justice between man and man, walks in my statutes and is careful to observe my ordinances – he is righteous, he shall surely live, says the Lord God (Ezekiel 18:5-9).[22]

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[20] In the King James Version, and the New American Standard Version, this passage is translated as "cries of the poor". This further substantiates the position that a blanket prohibition cannot be justified from the text.

[21] Gross, C. D. 1997, "Is There Any Interest In Nehemiah 5?", *Scandinavian Journal of the Old Testament*, vol. 11, no. 2, Scandinavian University Press, p. 271.

[22] This entire quote is taken from Wee, P. A. 1986, "Biblical Ethics and Lending to the Poor", *Ecumenical Review*, vol. 38, No. 4, pp. 416-430 at 420.

A close reading of the text, however, shows that the position is not as simple as Wee would portray. Firstly, a close look at Psalm 15 shows that there are lines in the Biblical text which are missing from the quote above. In context, a complete character portrayal is being solicited, and the main required attributes are given in verses 3 and 4 which are omitted in the passage quoted above: "[H]e who does not backbite with his tongue, nor does evil to his neighbour, nor does he take up a reproach against his friend; in whose eyes a vile person is despised, but he honors those who fear the Lord." It is clear that these verses are portraying the relationship of a person to the immediate community and to God, and say nothing about trade and commerce. In addition, if one considers the local conditions and context of surrounding communities to whom this Psalm was written, especially in light of difficulty of travel and the stringent prohibition of intermingling with other ethnic races,[23] it is difficult to see how it could be interpreted to be other than a restricted application to the local communities of the ethnic Israelites.

In Ezekiel 18, there are also lines of the passage which are omitted in Wee's quote which are certainly relevant to the interpretation of the whole text. The missing text reads, starting at verse 7:

> If he has not oppressed anyone, but he has restored to the debtor his pledge; has robbed no one by violence, but has given his bread to the hungry, and covered the naked with clothing; If he has not exacted usury nor taken any increase, but has withdrawn his hand from iniquity and executed true judgment between man and man,

In context, this is an application of the Deuteronomic prohibition which was examined above. It is an exhortation with respect to the Jewish community, and lending to the local poor and destitute among them. This is reinforced by Ezekiel 18:17, which further defines the action which Wee and Ballard denounce in the passage above, as loaning

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[23] Psalm 15:3-4.

money at interest *to the poor*: "[That] hath taken off his hand from the poor, [that] hath not received usury...". It is a closer analogy to portray bankers lending to domestically repatriated refugees at high rates of interest and the subsequent prohibition of this practice, rather than maintain that it is a general exclusion of interest-taking. Both Psalm 15 and Ezekiel 18 are clear examples, not of the prohibition of usury in principle, but of the admonition to take serious one's social responsibility which was integral in the stated goal in the Old Testament for the Israelites to lead an exemplary lifestyle, setting them distinctively apart from the practices of the surrounding nations.[24]

One line found in Proverbs 28:8 is also cited for its alleged anti-interest posture.[25] The passage reads, at the relevant part: "One who increases his possessions by usury and extortion gathers it for him who will pity the poor." There are two important aspects to this passage. The first is that it is contained in a larger chapter which is nearly wholly concerned with the contrast of evil and good.[26] The second, the key to understanding this verse, lies with the conjunction 'and' which is used to couple together usury and extortion. It is conspicuous that this verse does *not* say "usury *or* extortion". It can be interpreted to mean that usury was being practiced by extortionists, perhaps an exorbitant *rate* of interest, or the enforcement of the lending contract was oppressing the poor, or even perhaps that it was a practice of lending to the Jewish brethren, the very practice

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[24] The text of Exodus 19 portrays that God had set His people apart, and they were to be a special people to play a role as a nation, as priests to the world for God. Assuming this as a predicate, it can be readily understood that there would be special social conditions which would accompany the calling of God to the Israelite nation.

[25] Ballard, B. 1994, "On the Sin of Usury: A Biblical Economic Ethic", *Christian Scholar's Review,* 1994, volume 24, no. 2, pp. 210-228, at 218.

[26] Starting in verse one (chapter 28 verse 1) the subject matter mentions: the wicked (vs. 1); transgression of a land (vs. 2); a poor man who oppresses the poor (vs.3); praising the wicked (vs. 4); evil men (vs. 5); one perverse in his ways (vs. 6); a companion of gluttons (vs. 7); increase by usury and extortion (vs. 8); the abomination of the prayer of one who turns away from hearing the law (vs. 9); causing the upright to go astray (vs. 10). Examining this one verse, therefore, in the larger context shows the juxtaposition of evil and good, the selfish ways of the rich as opposed to the poor, and the perversion of justice through wickedness.

condemned in the passages above. Whatever view is taken, it can be immediately realised that one view that is *not* forced upon the reader by this passage is a blanket prohibition of the practice of lending at interest.

The passages examined above comprise the scriptural basis used by the Christian Church from the Old Testament to justify its antipathy to usury. In addition to the Old Testament texts, there are four passages in the New Testament, two of which are essentially duplicates of each other, which must be examined. The church, from the early 2nd century[27] also relied on these passages to justify the prohibition on lending at interest.

New Testament

In Acts 4:32-35 the disciples are portrayed as selling all they had and contributing to the common good.

> Now the multitude of those who believed were of one heart and one soul; neither did anyone say that any of the things he possessed was his own, but they had all things in common. And with great power the apostles gave witness to the resurrection of the Lord Jesus. And great grace was upon them all. Nor was there anyone among them who lacked; for all who were possessors of lands of houses sold them, and brought the proceeds of the things that were sold and laid them at the apostles' feet; and they distributed to each as anyone had need.[28]

This is an account of the early disciples in Jerusalem in the first days after the events of Pentecost.[29] A description, however, is not the same as a teaching. It does not logically nor necessarily follow from the description that this passage is meant to exemplify a

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[27] This comment actually presupposes some argument form the sections below where it is asserted that the church's ideology of poverty provided the framework within which the hatred of usury was justified. The earliest commentary on the passages examined is found in the *Didache* or the "Teaching of the Twelve". Anonymous, 1987, "Gallery of Church Fathers and Their Thoughts on Wealth", in White, Petersen, and Runyon (eds.) 1987, *Christian History*, vol VI, no. 2, pp. 10-11, 35.
[28] Acts 4:32-35.
[29] Acts 2.

lifestyle which the general population should follow in its entirety. The ostentatious riches of the medieval church would be a poor example to follow if this passage was to exemplify a lifestyle upon which all should pattern. In addition, the implications of the teaching that they "had all things in common" would have meant that there would have been an abrogation of the commandment in Exodus 20:15 against stealing. There can be no stealing if there are no ownership rights. The better view of this passage is that it was simply a description of what Jesus did among His people in the formation of His church in the crucial time of its birthing.

This passage has been used to justify the church's idealistic belief that poverty is the preferred pathway for the Christian disciple.[30] This ideology was maintained until Luther's preaching that one's work is a 'calling' provided an ideological alternative, and the Protestant work ethic ushered in a new social climate in Protestant countries in the 16th century.[31] Both Tawney and Weber maintained the position that by subverting the ideology of poverty, the church maintained its grasp over social industry. When that grasp weakened, the resulting social legitimacy attributed to persons who invested capital with the intention to make money improved the general standard of living in areas where previously the church had stifled commercial development.[32]

In contrast to Acts 4:32-35, Luke 6:20-49 is indeed a teaching; a teaching credited to Jesus Himself. This passage shall therefore be scrutinised carefully to determine its relevance. Luke 6:30-36 states:

> Give to everyone who asks of you. And from him who takes away your goods do not ask them back. And just as you want men to do to you, you also do to them likewise. But if you love those

[30] Runyon 1987.
[31] Lindberg 1987; Weber 1930.
[32] Tawney 1948, p.47 ff, Weber 1930.

> who love you, what credit is that to you? For even sinners love those who love them. And if you do good to those who do good to you, what credit is that to you? For even sinners do the same. And if you lend to those from whom you hope to receive back, what credit is that to you? For even sinners lend to sinners to receive as much back. But love your enemies, do good and lend, hoping for nothing in return; and your reward will be great and you will be sons of the Highest. For He is kind to the unthankful and evil. Therefore be merciful just as your Father also is merciful.

This passage has been used to justify opposition to all forms of usury.[33] It is submitted that this passage exemplifies the exhortation to a higher communal social ethic within the believer's community, but specifically says nothing regarding commercial endeavour or the principle of lending with interest. Close scrutiny of the passage will reveal that it is focussed upon a *spiritual* good, and contains no earthly principle: "and if you lend to those from whom you hope to receive back, what [*spiritual*] credit is that to you? For even sinners lend to sinners to receive as much back" [v.34] Jesus does not condemn the practice in this passage, but contrasts worldly practices with the practices of His disciples. He is essentially calling the disciples to a higher communal ethic. Unless one takes the initial view that the Christian communal lifestyle was intended to be a model upon which to build all social structure, this passage will not support an anti-usury position in a wider sense. It is parallel to the "outcry" against the usurers in the passage of Nehemiah 5 which was examined above, where there was an absence of mercy in the enforcement of debt against the ethnic Israelites. It seems to be the better view that Jesus' words are an exhortation to 'mercy' as a lifestyle, and this attribute should be a character trait of his followers. This would be consistent with the other passages examined.

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[33] Van Hove, A. 1908, "Zeger Bernhard van Espen", *The Catholic Encyclopedia,* Robert Appleton Company, 1999 online edition at http://www.newadvent.org/cathen/05541b.htm .

It is difficult to ascertain an unequivocal denunciation of usury within both Old and New Testament the passages cited above. The passages appear to show that they are attempting to portray a higher social ethic between individuals, rather than impose a theoretical stance. If, however, the doctrine against usury is assumed to be contained within the passages, it then becomes easier to incorporate them in support of that position. Ballard[34] disagrees with this criticism, and advocates the anti-usury position of the church. Citing both passages in Luke 6 and Acts 4, he incorporates the criticism of Aquinas and the early Jewish teaching against usury, concurring with Wee,[35] Carota and Carota,[36] and Vermeesch[37] in defence of the church's historic position. From the Biblical passages above, these objections are difficult to justify.[38] These authors assume the prohibition, but do not critically analyse the scriptures they use to defend their stance. None of them consider the passages in Matthew 25 and Luke 19 regarding the parable of the talents, which succinctly and expressly shows that Jesus' emphasis was not upon money itself, but the person's attitude toward it.

Jesus, in Matthew 25 and in Luke 19 expressly endorsed the practice of banking with those who would pay interest on deposits. Despite the clarity and importance of these passages, they are ignored in most historical exegesis focussing on prohibition of usury. The passages are essentially identical:

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[34] Ballard, B. 1994, pp. 210-228.

[35] To be fair, Wee advocates a modified position where reasonable costs are offset and projects are evaluated by their contribution to the social good.

[36] Carota and Carota are the most contradictory in their stance, supporting a Pittsburg financial institution who lends at interest to the poor, but advocating deposits that are interest-free.

[37] It is not surprising that Vermeersch takes an anti-usury stance, as he writes for the Catholic Encyclopaedia.

[38] For a contrary view from a unique perspective, see Nelson 1969, *The Idea of Usury: From Tribal Brotherhood to Universal Otherhood,* University of Chicago Press. Nelson contributes an interesting point to the argument in tracing the Catholic objection to usury and its compromise in the 19th century to avoid public criticism, by showing a transition to a "universal otherhood" which logically fits the facts of history, although some criticism can be leveled at the way that he deals with historic writers in the English legal

> Therefore you ought to have deposited my money with the bankers, and at my coming I would have received back my own with interest. Therefore take the talent from him, and give it to him who has ten talents. For to everyone who has, more will be given, and he will have abundance; but from him who does not have, even what he has will be taken away. And cast the unprofitable servant into the outer darkness. There will be weeping and gnashing of teeth.[39]

This passage appears to portray a lack of diligence in any person who does not put idle capital to profitable employment. The unprofitable servant was given what was, in effect, a capital punishment for the lazy selfishness of hiding his master's money. Juxtaposed with the other Old Testament and New Testament passages examined above, these passages do not stand together if an anti-usury position is maintained for there is no unequivocal condemnation of the practice. Neither is there a systematic defence of the practice. Rather than presume that the Biblical passages purporting to deal with lending money condemn usury in its entirety, it may be more pointed to ask "What is the duty placed upon a lender, to ensure that a contract of borrowing does not lead the borrower into financial disaster?" This brings to the forefront of consideration the close community ties of the Jewish people and tolerates lending to the Gentile nations. This seems the better view, as it synthesises the Biblical passages and derives a more Biblically consistent and philosophically defensible perspective.

Medieval Agrarian Conditions and Church Influence

It is suggested by Holdsworth,[40] Chamberlain,[41] and Heaton[42] that the early church's interpretation of the scriptures was heavily influenced by the agrarian economy in

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fraternity during the period of the 16th and 17th centuries. His arguments cannot be considered here. See Nelson 1969, chapter III.

[39] Matthew 25:27-30; Luke 19:22-26. Luke's account is essentially the same with slight grammatical differences which are irrelevant to the analysis.

[40] Holdsworth, W. 1903, *History of the English Law,* 1976 reprint, Methuen & Co., vol. 8, pp. 101-2.

[41] Chamberlain, J. 1976, *The Roots of Capitalism*, Liberty Press, pp. 72-74.

[42] Heaton, H. 1948, *Economic History of Europe,* revised edition, Harper & Bros., pp. 191-194.

which it was situated. The church was also a significant landowner. The church found favour with rulers and landed nobility anxious for their souls who endowed the church with land rights and gifts of tracts of land.[43] This permitted the building of monasteries and convents which incorporated surrounding land. As the effort at Christianisation extended further and further from Rome, contact with the Teutonic tribes dominating Europe was inevitable. The Germanic people held the Christian monks in high regard as their teachers:

> Clearing [of neglected land which had turned into forest] is no doubt one of the processes that the Germans learnt in the conquered provinces from Roman neighbours and dependants. Churchmen stood high among their teachers. For precisely in the transition period from the Roman Empire to the Teutonic domination, the Church was brought in to close contact with agriculture. All she could expect from the state was gifts of property and land to use. [...] Monks had to seek remote waste places in order that they might more completely shun all worldly things and convert the neglected souls to be found there.[44]

When European communities descended into anarchy after the fall of the political institutions of the Roman Empire in Western Europe (after 476 A.D.),[45] the church was well-placed to offer an alternative.[46] The respect of the people for the Christian clergy continued to increase through the influence the church exerted against the barbarous conditions which existed in the countryside. It was a short step for the church, therefore, to go from simply a 'settler' in the 'wilderness' to a landed manor. *Coloni*[47] attached themselves to the church manor in the same way other peasants were attached to the landed manors of other lords.

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[43] Lloyn 1991, pp. 241, 251, 257; Goodman 1995, pp.149-153; Berman 1983, p.238.
[44] Koebner 1966, p. 44.
[45] Baskin and Miranti 1997, pp. 30-31.
[46] This thesis will not explore the social evolution of the fall of the Roman occupation of Europe and the rise of feudal and *seigniorial* structure.
[47] "Peasants", the equivalent of which was the villein tenant.

As a *seigniorial* structure arose between the 5th to 10th centuries, the manor lord became the centre of the social focus, the protector, judge, police chief and public administrator for the peoples upon 'his' lands; the very focal point being the lord's homestead which was normally a fortified structure, sometimes "attaining the stature of a genuine castle".[48] The church, through local abbots or a local bishop, also partook in the system, for often the local manor house was the monastery. The church became a buffer for the peasant and freeman alike from the harsher realities of a world which descended into the Middle Ages where the paramount concern was simply to survive. The church stood against what it viewed as unfair lending practices aimed at the underprivileged and poor:

> [T]he Church was the buffer which defended the individual against the more abrasive trends of the times. Naturally the Church took a stand against usury in a period when there was no opportunity for money loans to expand into a fruitfulness that would reward both the borrower and the lender.[49]

As the church became more prominent as a social leader after the 5th century, it was in a position to influence the leaders of the 'secular' society, many of whom were educated by the monks, including promoting the church's view on the prohibition of usury.[50] This reached a peak in the 13th century which, concurrently, was the pivotal period in the formation of the common law of England.

The Early Church and the Rise of Opposition

The church was not without dissenting voices which spoke out on the issue of usury. In the first hundred years after Christ, a contrary view to the church's prohibition regarding

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[48] Heilbroner 1962, p. 32.
[49] Chamberlain 1976, p. 73.
[50] For a detailed and graphic account regarding the Church's sequestration of the instruments of learning and the ascendancy to the place of social guardian of written knowledge, see Goodrich, 1987 "Literacy and the Languages of the Early Common Law", *Journal of Law and Society* Vol. 14, Number 4, winter 1987, pp. 422-444.

usury arose. Clement of Alexandria (c.150-213 A.D.) lectured his students that the correct portrayal of the Christian and money was one of wise stewardship. In a paraphrased version of Clement's *Quis Dives Salvetur?* White explains that Clement focused upon stewardship of money, and not on the attributes of money itself. Clement's teaching regarding this issue is insightful for the time. "If God really wanted Christians to give everything away, why would He have commanded us to feed the hungry and clothe the naked? No, God wants us to use wealth wisely. Money, in itself, is neither good nor bad."[51] Clement's view of the inherent neutrality of money was not accepted widely through the centuries, as the actions of the Catholic Church, and notable members such as Francis of Assisi, considered below, attest.[52] Coupled with the stark reality of the plight of the peasant *colonus* farmer who was at the mercy of the landed manor lord who could exploit the peasant through harsh usury exaction, the church rejected Clement's view on money. Promulgating the view that the practice of usury was a barbarian exploitation,[53] the church began to formulate canonical decrees against it. Starting as early as the Council of Elvira (305 or 306 AD) the councils of the church formulated the canons, many of which comprise Catholic Church law to the present time.[54] However, after the Protestant Reformation, which began in 1517,[55] the canons assumed a diminished significance outside the Catholic Church. The threat of excommunication or

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[51] White 1987, 13.

[52] Runyon, D. 1987, "St. Francis of Assisi on the Joy of Poverty", *Christian History*, vol. 6, no. 2, A.K. Curtis Christian History Institute p. 15.

[53] Berman 1983, in chapters 9 and 10 systematically covers the underlying philosophical changes which formed the legal relationships in feudal and manor law during the period of the 5th to the 12th centuries. His account of the superiority of the canon law with respect to generality, objectivity, and the autonomy of persons is interesting, and although relevant to a degree, cannot be covered in this thesis.

[54] Fanning 1980 asserts that in ancient times the Greeks used a *kanon* to make straight lines, and the early Church preferred this word to the word *law* as the latter had a harsh meaning for the faithful in times of persecution. Beginning in the 4th century, however, the word took on new meaning, for the church ascended to political power, ending the threat of continuing persecution. The word "canon" came to mean a rule by which to guide one's life, a disciplinary decree, and was, in fact, an enforced law of the church.

[55] The Great Schism of 1054, which witnessed the division of the church into the Eastern Orthodox Church, and the Roman Catholic Church, will be ignored for the purposes of this paper, except for the

punishment as a heretic, implying a death sentence in earlier times, began to lose its criminal significance.

Despite the church's dangerous condemnation of usury, practice in many areas diverged greatly and creatively from pure church doctrine. Inventive usurers devised a variety of means to circumvent the church's prohibition of usurious contracts. Introducing complex technicalities, contracts were formed with innovative terms giving lenders rights to receive additional payments from the borrowers. This indulgence was extended to the widespread usury practice of the Jews. These subversions led to increasingly stringent denunciations by those in church leadership. The Council of Elvira forcefully denounced the charging of interest.[56] Usury was characterised as the opposite of the preferred lifestyle of the disciple, which was poverty. Thus, in the writings of Church Fathers such as Tertullian (C. 160-220), poverty was idealised for the Christian as a sign of the completeness of dedication to Christ and His principles[57]. This was also the theme of Irenaes, Bishop of Lyons (C.130-202) and Cyprian, Bishop of Carthage (195-258).

The Councils of Carthage (345-419) also prohibited usury, linking it to the sin of avarice and calling it the "mother of all evil things". Canon V reads:

> AURELIUS, the bishop, said: The cupidity of avarice (which, let no man doubt, is the mother of all evil things), is to be henceforth prohibited, lest anyone should usurp another's limits, or for

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relevance drawn in relation to the fall of Constantinople and the attitude of the Greek scholars who dwelt there.

[56] Carota and Carota 1994, p. 46.

[57] Anonymous 1987, "A Gallery of Church Fathers and Their Thoughts on Wealth" *Christian History,* vol VI, no. 2, 10,11, 35.

gain should pass beyond the limits fixed by the fathers, nor shall it be at all lawful for any of the clergy to receive usury of any kind . [58]

The Epitome to Canon V makes it clear that it is a relational edict, deduced from a further prohibition. "As the taking of any kind of usury is condemned in laymen, much more is it condemned in clergymen."[59] Canon XVI of the Carthage Council reasserts the property right of the clergy to receive back what was lent, either money, or in kind, but says nothing about usury.[60] Canon 36 of the Council of Aix (789) declared it reprehensible even for laymen to make money by lending at interest.

Despite ecclesiastical prohibition the practice of taking interest still continued, otherwise there would have been little need for the persistent condemnation of the "stratagems to which even clerics resorted to evade the law of the general councils".[61] The condemnation became increasingly more oppressive with each church council. As the church's power grew from the 8th century to the 13th century, the language used in the church's prohibition became so trenchant that at the Third Lateran Council (1179) and the second Council of Lyons (1274) the assembly condemned usurers. In the Council of Vienne (1311) it was declared that if any person obstinately maintained that there was no sin in the practice of demanding interest he should be punished as a heretic.[62] This implies, therefore, that at the height of the church's opposition to the taking of interest in loans, a person who defended, theoretically or otherwise, the taking of interest in a loan

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[58] Canon V; Johnson 1997, "The Canons of the 217 Blessed Fathers who Assembled at Carthage (A.D. 345-419)" online edition at http://www.ccel.wheaon.edu/fathers/NPNF2-14/6sardica/afcan16.htm also see Canon XVI.

[59] Canon V; an epitome was a note of explanation attached to a decree of a synod or council of the church.

[60] There is some doubt about the authenticity of the reference in the epitome to laymen, along with another similar reference and the prohibition of interest in the documents to the Council of Elvira (305 or 306). Johnson 1997, unnumbered notes.

[61] Schaff, P. and Wace, H. (eds) 1955, *The Nicene and Post-Nicene Father*, Grand Rapids, Eerdmans, online edition http://www.ccel.org/fathers2/ .

[62] Vermeersch, 1912A; Tawney, 1948, pp. 58-9, note 66.

might be put to death: "...taking the schedule of condemnation in hand, read the same; wherein was contained the burning of heretics, who either spake or wrote anything repugnant to the Papistical Church."[63]

The ill-treatment of heretics was not confined to usurers. It had started with Constantine (306-337) and progressed to the time of Theodosius and Valentinian III (313-424) where various penal laws were enacted which styled 'heretics' as infamous persons, depriving them of public office. They could neither receive an estate by inheritance nor dispose of their lands by will. They could not contract, nor even buy nor sell in the public arena. In 382 heresy was pronounced a capital crime by Theodosius, encouraging slaves to inform against their masters, thus purchasing their freedom and insuring that children of the denounced master lost their patrimony. It gained a slow relentless momentum, exacerbated by infamous religious heretics such as the Ophites, Marcionites, Encratites, Montanists, Manichaens, Judeo-Gnostics, Nicolaites, Arianism, Catharism, and Pelagianism[64]. The church's hierarchy increasingly meddled in the affairs of secular states, with no single ruler strong enough to challenge the church's actions.

Some rulers attempted to challenge the church's dominance. In England in the early 13th century, King John objected to the appointment of Stephen Langton as Archbishop of Canterbury, refusing to receive or recognize his authority. The English clergy withdrew all spiritual services except last rites, effectively instituting a strike which was later named the "Great Interdict"[65]. During this time King John refused to recognize Papal Bulls issued over matters in England, seized church lands, and prohibited clergy from

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[63] Foxe, J., *Foxe's Book of Martyrs,* King Edition, 1974 reprint, p. 148.
[64] Wilhelm, J. 1910, "Heresy", *The Catholic Encyclopedia,* vol. VII, Robert Appleton Company, online http://www.newadvent.org/cathen/07256b.htm .

leaving England to escape the conflict. In 1215 John buckled to the social pressure and the deteriorating political situation in Europe and acknowledged himself as a vassal of the Pope.[66] The church had become, in effect, a transnational state with nearly absolute power.

Rise of Codified Law and Church Authority

Church lands, during the later decline of the Roman Empire and in the centuries to the Carolingian Kings (6th to 9th centuries), had come under the influence of local nobility who appointed the abbots and exercised absolute control.[67] The church had large land holdings, its possessions were merged, therefore, with the feudal and manorial economy. Local lords sometimes styled themselves as 'protector' of the church, taking the revenues and tithes from the church holdings for personal use. An appointment, therefore, to a bishopric or an abbacy was a coveted prize, for it bestowed a significant measure of power and riches upon the recipient. In addition, the appointment was quite profitable for the nobility exercising control. Bishoprics were even endowed with local civil jurisdiction and performed essential governmental functions.

Those appointed to the abbeys were not necessarily motivated by a 'spiritual calling,' and marriage and concubinage was rife.[68] The social view that these practices were debasing led to the Cluniac reforms of the early 10th century. Local abbeys gained certain concessions from local landlords and protectors, essentially starting a reformed

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[65] Ullman, W. 1955, *Growth of Papal Government in the Middle Ages,* 2nd ed., 1962, p. 50.
[66] Cheney, C. R. 1982 ,*The Papacy and England 12th-14th Centuries*, Variorum Reprints.
[67] Kelly, J. M. 1994, *A Short History of Western Legal Theory*, Oxford, Clarendon Press, p.116.
[68] It is interesting to see that as late as the Great Interdict in England in the early 13th century against King John, the practice of having lovers had not been stamped out, for John demanded some great payments for the return of the female lady lovers of the ecclesiastics who fled, whom John had held during the period. See Duggan 1970.

autonomous movement within the church's land-holding matrix. Specifically, the Cluniac reformers detested the practice of simony, or the bestowing of a church office for a sum of money.[69] The growth of the Cluniac model proved to be a model for the church as an organisational whole. The Roman Papacy, by the 9th century, was in a degraded and corrupt state. In the 32 years following the murder of Pope John VII in 882, Goodman cites that no less than 15 Popes came and went. "Most had acquired the pontificate through crime, corruption, or factionalism, and were relieved of their office by exile, deposition or assassination."[70] It is true that there had been reformers, namely Gregory I and II in the 8th century, but the reforms did not have instant or uniformly lasting effect.

The Papacy had turned more and more to legal argument to bolster its tarnished spiritual authority and to centralise Rome as the focus of religion. Pope Adrian I had been insistent, in legal terms, that the Emperor Charlemagne make a 'donation' of certain eastern cities. The Emperor had been reminded of the decrees of Constantine which gave the Roman Church the legal title or '*potestas*' (power) over the Western parts of the world. He responded by demanding to see the documentary evidence of title, but his demands were refused. The argument between the Emperor and the Pope was distinctly legal.[71]

The Papacy could not have anticipated the outcome of the increased appeal to the law,[72] which it used from the Frankish times of the 8th and 9th centuries, to subjugate secular rulers to its will. It was to law that the papacy appealed, and it was to law that the

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[69] The term "Simony" being taken from Acts Chapter 8 where Simon the Sorcerer offered money to the Apostles in exchange for the gift of the ability to give the Holy Spirit to others.
[70] Goodman, E., 1995, *The Origins of the Western Legal Traditions*, Federation Press, p.192.
[71] Ullman 1955, pp. 90-96.
[72] The term 'law' in this context is that of the Romans. It was, specifically, the Roman law of Justinian as codified in the *Institutes* of the 6th century.

ensuing secular rulers turned, until finally the invocation of Roman law by the governmental authorities of the secular rulers helped to frame a defense against Papist interference in government which the people would respect and honour.[73] The change brought about a basic, if only creeping, change in the foundation of the ruler's right to rule; shifting from an ecclesiological basis, to a humanist basis. It may have been arguable, however, that the blatant excesses of the church would, or perhaps should, have portrayed a humanist motive within the church in any event. The final symbolic division of church and State and the subsequent 'secularization' of the worldly kings and rulers through what is called the 'Investiture Conflict' in the mid-11th century will be examined in greater detail in Chapter Three. For this section it is enough to mention that it raised the status and social acceptance of legal argument in general, and established the Roman Papacy as a transnational state.

The study of law and legal processes increased dramatically during the 11th-14th centuries. This process was not limited to formal educational institutions such as universities, for there were men who laboured independently to bring the study of law into the forefront of the intellectual movement. The Italian monk, Johannes Gratian compiled and published the *Decretum Gratiani* in 1140, which may have been the first attempt to systematically categorise and study the canon law[74]. It was the precursor to the *Corpus Juris Canonici,* the body of Catholic law. In England, the treatise called 'Glanvill' was compiled around 1188[75], and the Englishman Henry of Bratton is accredited with the compilation of the English law during the early 13th century in the

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[73] Ullmann 1977, *Medieval Foundations of Renaissance Humanism,* London, Paul Elek, pp. 36-39.
[74] Berman 1983, pp. 454-5.
[75] This treatise exhibited writs issued by the King's Court which generally named the ascension of Henry I (1135 A.D.) as the time of legal memory for possessory rights of land. This will be more relevant in the succeeding chapter.

essay called "*De Legibus Et Consuetudinibus Angliae.*"[76] Glanvill and Bracton are considered the first major works in the systematic exposé of English law.

The Papacy, in addition to justifying its rejection of *regnal* superiority, turned to a distinctly legal framework for its own perceived 'spiritual' purposes. Heresy was regarded as "more malignant than treason".[77] The practice of usury, in particular, was not spared from the eradicators' foci. The problem of dealing with the 'heresies' became, for the Pope, a universal concern to be crushed in a comprehensive form. The attention of the pontiff turned to the people who would carry out the work of stamping out heresy. The Pope, in short, needed a personal religious army.

Hatred of Heresy: Motivation for Oppression

The Papal bull *Ad abolendam* of 1184 had ordered all bishops to make inquisition for heresy. This was ineffective, perhaps because bishops were officials removed from the diocese and occupied with more personal governmental matters.

> Most of [the bishops] had large estates to manage, many of them had great lordships to govern, and all of them had to deal with a good deal of legal and administrative work which nowadays would be the province of civil authorities. Such men had little time to spare for hunting down heretics, however desirable in theory they may have considered such work to be.[78]

The church solved the problem by conscripting full-time inquisitors who were versed in the Catholic doctrine and able to devote time to the task. The Dominican order was chosen, as it had been formed specifically to combat a particular heresy called Catharism and was trained in theology. Franciscans were also involved in the work. Since these

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[76] "On the Laws and Customs of England" this work is commonly cited as "Bracton" although he may have been only the last compiler.
[77] Wilhelm 1910, p. 13.

orders were avowed to poverty, this provided some assurance against the worldly temptations of bribery. They took orders directly from the Pope, and they could devote themselves full time to the work. Trials were held in camera, the public was not admitted, the powers of the inquisitors were extensive but initially restricted by the orders of Pope Gregory IX to entice the heretic into recantation and full acceptance into the church. Repentant heretics were not sentenced, but "unrepentant heretics who refused to recant were normally burnt".[79]

From as early as 1022, when "Robert the Pious had burnt the canons of Orleans"[80] the laws of the secular states and rulers began to take up the practice of not only persecuting religious dissent, but any doctrine that disagreed with the church's orthodoxy as interpreted by local officials. Within "20 years of the [4th Lateran] Council the secular authorities in all those countries of western Europe in which heresy was at all common had sanctioned the enforcement of the church's decrees against heresy".[81] The church received powerful support for its condemnation and punishment of heretics when Frederick II, Holy Roman Emperor and King of Sicily, incorporated upon his coronation the canons of the Fourth Lateran Council of 1215. In 1224 he specified the penalties for convicted heretics to be burning, or if their lives were to be spared, their tongues should be cut out.[82]

> Everyone was bound to denounce heretics, the names of the witnesses were kept secret; after 1243, when Innocent IV sanctioned the laws of Emperor Frederick II and of Louis IX against

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[78] Hamilton, B. 1981, *The Medieval Inquisition,* Edward Arnold Publishers, p.35.
[79] The description of the history and choice of the inquisitors, their subsequent trial procedures and successes are found in Hamilton 1981, chapters 3 and 4.
[80] "Canon" in this sense, means "[a]n ecclesiastical person, (Lat. *Canonicus*), a member of a chapter or body of clerics living according to rule and presided over by one of their number". The Catholic Encyclopedia, http://www.newadvent.org/cathen/c.htm .
[81] Hamilton 1981, p. 34.
[82] Wilhelm 1910, section XIII; Hamilton 1981, p. 33.

> heretics, torture was applied in trials; the guilty persons were delivered up to the civil authorities and actually burnt at the stake.[83]

Usury was regarded by the ascendant church as a particularly insidious manifestation of heresy. The Council of Vienne (1312) severely denounced the practice of interest-taking. The Council threatened with excommunication any secular ruler who dared not repeal legislation which sanctioned contracts of usury. The words suggest that the Papal intolerance to usury had grown, along with arrogation of governmental power. Those money-lenders who had avoided the prohibitions previously were ordered to submit their books of account for examination to prove their innocence.

> Declaring that it had learned with dismay that there are communities which, contrary to human and Divine law, sanction usury and compel debtors to observe usurious contracts, it declares that all rulers and magistrates knowingly maintaining such laws are to incur excommunication, and requires the legislation in question to be revoked within three months. Since the true nature of usurious transactions is often concealed beneath various specious devices, money-lenders are to be compelled by the ecclesiastical authorities to submit their accounts to examination. Any person obstinately declaring that usury is not a sin is to be punished as a heretic, and inquisitors are to proceed against him *tonquam contra diffamatos vel suspectos de heresi*.[84]

Other secular rulers also bowed to the will of the Pope. Threatening excommunication, the power of the Papacy had continually grown under the widely held premise that the church held dominion over the whole of life and had the authority to speak decisively in every area.[85] The Lateran Council of 1215 had been attended by over 400 bishops, 800

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[83] Wilhelm, 1910, p. 10.

[84] Tawney 1948, p. 58 note 66. It is too often forgotten that the Church had stood out against the violent treatment of heretics for almost 200 years, as long a period as separates us from the American Revolution. It is, indeed, arguable that the church finally came to condone coercion because the attitude of the clergy was shaped by the society in which they lived, which regarded the persecution of heretics as normal. See Hamilton 1981, p. 33.

[85] Tawney 1948, pp. 35-45, develops this point in conjunction with the change in worldview accompanying the Protestant Revolution. This will be further examined below, but the social influence of the church and the resulting impact of the characterisation of all of human life as incorporating a *moral* and thus ecclesiastical foundation, cannot be overstated.

abbots, together with representatives and delegates representing the Latin Emperor of Constantinople, the kings of England, France, Aragon, Hungary, Cyprus, and Jerusalem.[86] It constituted the most widely influential Council in the history of the Catholic Church.

The zenith of the church's prohibition against usury, therefore, was in the 13th century[87]. It is also evident, or at least deducible, that the practice of taking interest was never eradicated. "Thus Robert of Courcon (d. 1219) found usury to be 'universally infecting society, protected and indulged in by princes and ecclesiastics alike'"[88]. This implies that the church maintained on one level the utter abhorrence of the practice, but that it may have been selectively enforced, ignored, or otherwise circumvented. What is certain is that the church was unsuccessful. The prohibition of usury may have even been a tool with which one could seize the lands of an adversary, procure the death of a hated person, gather wealth from fining heretics, or accomplish an otherwise forbidden deed by conniving to gather either persons as witnesses or the 'evidence' that a person had committed this 'crime'.

Sanctions against heretics did not always result in capital punishment. More trivial heretical offences were fined according to the ability of the suspect to pay. Pursuit of personal gain for the inquisitors, despite the precautions alleged in choosing a class of men who were set apart through holy orders, became a troublesome practice. Thus, large amounts were exacted in areas of affluence for alleged crimes of heresy. The Franciscan

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[86] Hamilton 1981, p. 31.

[87] Kelly, 1994, *A Short History of Western Legal Theory*, Oxford, Clarendon Press, p. 124. Kelly asserts a different time, but essentially the same perspective, putting the date at about 1302 with the issue of *Unam Sanctum* of Boniface VIII which set out that every human on earth, to gain salvation, had to submit to the Roman Pontiff.

inquisitor Piero dell' Aquila, in two years, had exacted fines of more than seven thousand florins for heresy from the local populace of Florence. Villani had criticised him strongly for being a "proud and avaricious man" and "wished posterity to know that there were not enough heretics in Florence to realise that amount. 'But in order to make money, he exacted large fines, according to man's wealth, for every little idle word that anyone said against God, or for saying that usury was not a mortal sin'".[89]

The flourishing business community in Florence in the 13th and 14th centuries would certainly not have welcomed the condemnation of usury. When the inquisition initiated a posthumous exhumation and condemnation of Giovanni da Matro in 1305 for, among other things, denying the sinfulness of usury, it sparked a skeptical and hostile reaction. Previously, in 1299, a riot had broken out in Bologna when a posthumous exhumation and burning of the influential citizen Rosafiore had been initiated. It was alleged that the principal motive was to seize a castle which had been a property of Rosafiore.[90] Events like these reflected a deeply-rooted and growing hypocrisy in the church.

Doctrinal Contradictions Regarding Trade

A dichotomy became apparent and began to increase in the 13th century at the height of the Roman Church's prohibition of usury. On the one hand the church prohibited usury in the lower clergy and laity, yet at a higher governmental level openly fraternized with

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[88] Noonan 1957, *The Scholastic Analysis of Usury,* Harvard University Press, p. 41; Cooney 1993, *Usury Revisited,* Working Paper, Series No.2, University of Wollongong, p.7,

[89] Webb, D. M. 1984, "The Possibility of Toleration: Marsiglio and the City States of Italy", *Persecution and Toleration Studies in Church History,* volume 21, Basil Blackwell, p. 109. The opposition to the inquisitor in this account may seem justified but the government's reaction to forbid the inquisitor from taking fines for heresy, and if a heretic was found and proven s/he was to be burnt, or, if allowed to live, their tongue was to be cut out may not have been an improvement from a modern perspective.

[90] Webb 1984, p. 111.

the money-lenders.[91] What were small compromises practiced in the early centuries became open hypocrisy in the later centuries:

> The Papacy was, in a sense, the greatest financial institution of the Middle Ages, and, as its fiscal system was elaborated, things became, not better, but worse. The abuses which were a trickle in the 13th century became a torrent in the 15th. [...] Priests ... engage in trade and take usury. [...] Cathedral chapters lend money at high rates of interest. The profits of usury, like those of simony, would have been refused by churchmen as hateful to God; but a bishop of Paris, when consulted by a usurer as to the salvation of his soul, instead of urging restitution, recommended him to dedicate his ill-gotten wealth to the building of Notre Dame.[92]

The hypocritical standard promulgated by the Catholic Church at that time became a focal point of conflict. At the pinnacle of power the Church was indulging in practices that were openly hypocritical. The simmering discontent sparked by the church's action was beginning to be noticed.

> Contemporaries were under no illusion as to the reality of economic motives in the Age of Faith. They had only to look at Rome. From the middle of the 13th century a continuous wail arises against the iniquity of the Church , and its burden may be summed up in one word, "avarice". At Rome, everything is for sale. What is followed is the gospel, not according to St. Mark, but according to the marks of silver.[93]

Another divergence had arisen from approximately the middle of the 10th century onwards between the Byzantines and those in the feudal houses of the West. After the Eastern Empire had broken away from Rome in the Great Schism of 1054, the heads of the Byzantine Church had not replicated the Roman stance against usury and the accumulation of personal wealth. Runciman notes that:

> Every Byzantine had a proper respect for industry and commerce. Pride in his family origins never kept him from wishing to enrich himself however best he could. Even amongst the landed nobility of late Byzantine times there was seldom any of the arrogant contempt for trade that

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[91] Heilbroner 1962, pp. 53-4; Heaton 1948, pp. 191-2.
[92] Bonnin 1832, p. 35, cited Tawney 1948, p. 42.
[93] See Seldon Society 1891, vol. 5, *Jurisdiction City of Norwich*, W. Hudson ed. p.35 for examples of priests engaging in usury. A medieval garner 1910-*The Cardinals' Gospel*, p. 347, cited Tawney 1948 p.42.

> characterised the feudal houses of the West. Money-making was always a highly respectable preoccupation. [94]

The Catholic Church *canons*, therefore, could be taken as a force which, by curtailing economic activity, severely hindered the advancement of the living conditions of the lower classes in Europe. The suppression of trade through the strict enforcement against the taking of interest propagated the power of the church and, coincidentally, it also perpetuated the subjugation of the peasants by the landed class in the West.[95] In contrast, in Byzantium trade developed significantly, bringing a flurry of economic activity and prosperity.[96] The growth in trade which ushered in a relatively new and growing economic era, starting about the mid 10th century, raised the despised merchant to a level of respectability and, in some cases, nobility. Merchants trading in the very heart of the Papacy added significantly to the purses of a conglomerate of secular rulers who generated a propensity for developing seaports to accommodate the growing international emphasis of trade.[97]

The conflict between theology and practice was apparently not restricted to Christendom, however, as the records of some Italian merchantmen show. Merchants of all three confessions, Judaism, Islam, and Christianity, knew and exploited loopholes in the ecclesiastical laws making a variety of credit transactions possible.

> Non-Muslims in Islamic lands often found it preferable to follow Muslim commercial practice, which apportioned responsibility in the event of loss more conveniently than Jewish law. And the Jewish philosopher Maimonides expresses the position clearly when he says, in response to a query from Egyptian Jewish merchants, that deferment of payment in order to charge interest was

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[94] Runciman, S. 1987, "Byzantine Trade and Industry", The *Cambridge Economic History of Europe* vol. 2, 2nd ed., pp. 132-167 at p. 166.
[95] Tawney 1948, and Weber 1930 both take this position.
[96] Heilbroner 1962, p. 49.
[97] Lopez, R. 1987, "The Trade of Medieval Europe: the South", *The Cambridge Economic History of Europe,* vol. 2, 2nd ed., pp.306-401, at pp. 336-8.

> not in breach of the Torah: far from being objectionable, it was necessary in order to sustain a great range of livelihoods. Attempts to argue that the Muslim merchant of the Middle Ages was less 'capitalistic' in his use of money than his Christian or Jewish counterpart are the product of wishful thinking by Muslim apologists.[98]

Gieysztor[99] illustrates how merchants even used the churches themselves as warehouses (*ecclesia mercatorium)* for their trading activities. A treaty in 1229 signed in Smolensk contained detailed agreements on law and credit between Novgorod traders' corporation and German and Gotlandic merchants, including storage in Church property.

A process of empowerment, starting with the Constantine secondment of the ecclesiastics into government, and the increased social power from the Cluniac reforms, had incrementally elevated the church into an unprecedented place of influence over the entire region of Europe and North Africa. The Cluniac reforms had culminated, through the Investiture Conflict, in the Papacy achieving an unforeseen dominance over secular rulers. The concept that the secular powers (*regnum*) were subservient to the Papistical power (*sacerdotum*), although not initially universally held, generally gained ascendance. The socially influential clerics asserted the view that the church held sway over every aspect of life, thus inhibiting the growth of individualism through the persecution of anyone who spoke or wrote anything contrary to the teachings of the church. It was the church who was able to organise the Crusades, starting in 1195.[100] No other ruler or group of rulers had the ability to organise such a large scale military movement. The ability of the church to order the lives of the lower classes was coupled with a strict regulation on the ability of land-workers to leave their plots or change their profession.

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[98] Abulafia, D. 1987, "Asia, Africa, and the Trade of Medieval Europe", *The Cambridge Economic History of Europe,* vol. 2, 2nd ed., pp. 402-73, at p. 407.
[99] Gieysztor, A. 1987, "Trade and Industry in Eastern Europe before 1200", *The Cambridge Economic History of Europe,* volume 2, 2nd edition, p. 475.

This reinforced a strict class system which condemned an individual's desire to rise in social stature through the accumulation of personal wealth. This was a 'functional' view of society, which committed each person to their own 'station' in life, where it was given: "to each class to accept the station of being low, and of course, the upper classes ... were to accept being the upper class".[101]

Despite the efforts of the church to perpetuate power and influence over the entire European society, the attributes of a theocratically governed populace were never universal. After the pinnacle of the church's power was reached in the late 13th century, a slow tortuous descent began in the 14th century which signalled an end of the nearly universal church power and gave rise to the formation of powerful secular states.

The Church's Fall from Influence

Although the Church enjoyed unparalleled power over the constituents of the Western Empire, it was not to last long past the 13th century. From the mid 14th century, three major events would assault the prominent social influence of the church and radically change European social structure. These events, which took place between the 1340's and 1453, were the ravaging of the Black Plague, the Great Schism of 1378, and the fall of the eastern capital, Constantinople, in 1453.

The Ravages of the Plague

Although the first recorded major outbreak of plague was Justinian's plague between A.D.541-544, its spread had been limited to Europe, south of the Alps, and the north eastern Mediterranean area, particularly Constantinople. The spread of the plague north

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[100] Berman 1983, p. 443.

of the Alps was probably limited due to the previous deterioration of trade relations between peoples of the two areas, and the climate of the Alps themselves which hindered vermin movement.

By the 14th century the entire commercial infrastructure and economic environment had changed. Trade had developed into sophisticated networks; fleets of trade vessels roamed the Mediterranean, Europe and North Africa. The population of Europe had risen to a level not seen since the days prior to the fall of the Roman empire. The Black Plague, thought to actually have begun in China in the 1330's, followed these developed trade routes. It spread to Crimea from Central Asia in 1345, and from there to the Black Sea where it was picked up by merchant ships and carried south, hiding in bulky crates and scurrying about the ships on rats. The plague struck Constantinople in 1347and subsequently accelerated its spread into Italy. By 1348 it had spread to almost the entire Mediterranean Basin, killing between one third to one half of the population by 1350, when it turned north into Europe and England, following the sea lanes and rivers.[102]

The plague spared no group of people and hit some groups harder than others. Those who came into contact with higher numbers of people, including doctors, ecclesiastics, and academics, suffered higher death rates. Medical ignorance at the time meant that many thought it was God's judgment on the world.[103] Whole towns were wiped out, guilds

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[101] Tawney 1948, p. 36.

[102] Gottfried, R. 1983, *The Black Death: Natural and Human Disaster in Medieval Europe,* New York Free Press, cited Anonymous 2000, TED Case Studies, "The Role of Trade in Transmitting the Back Death", online at http://www.american.edu/projects/mandala/TED/BUBONIC.HTM .

[103] It wasn't until 1266 that Theodoric, Bishop of Cervia stood against the doctrine of "laudable pus", held by the contemporary physicians of the time, advocating rational asepsis, or dry treatment of wounds. Garrison 1929, *History of Medicine*, 4th ed., 1963 reprint, Saunderson Books, p. 152. Singer and Underwood 1962, *A Short History of Medicine*, Oxford, Clarendon Press. Singer and Underwood assert that the medicine of the Middle Ages at least to the 15th century was still that of the ancient Greek Galen and "had lost in exactness what it gained in bulk from the Arabic and Latin commentators; pathology was

could not replace lost tradesmen, and fleets were quarantined. The independent nature of the Manorial system ensured that no cooperation was engendered on a wide scale to combat the disease. In Germany, where hygiene was higher and a developed public health system existed, the death rate was lower.

Even after the crisis had passed, and the world remained, there were those who wondered why God should have so scourged the world. The population had been so reduced that large areas of arable land, now abandoned from lack of tenders, returned to forest. As the social shock of the plague rippled across the countryside, lingering questions regarding the church's inability to deal with the plague spread. Many communities had witnessed the growth of Flagellants, "bands of semi-naked men and women [who] wandered about the country whipping each other severely"[104] and proclaiming God's wrath. The stark reality that the Church had been helpless through the entire episode was obvious, for monasteries and abbeys had been ravaged along with other social groups.

The aftermath of the plague had a catastrophic impact on the entire range of socio-economic relationships existing at the time.[105] Peasant labour rose against landowners demanding higher pay and better conditions,[106] while a glut of supply and low prices

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still that of the four humours; ... and the sciences of pharmacology and biochemistry had not yet been conceived; while the medieval conception of nature of epidemics was the very perversion of reason and common sense. Osler points out the irony that the church, manned at least in part by those motivated to help the poor and sick, should have condemned so many to a pitiful death by holding as true that "[k]nowledge other than that which made a man wise unto salvation was useless. All that was necessary was contained in the Bible or taught by the church." He maintains that it really wasn't until about 1542 that medical knowledge began to move forward with any pace at all, and this was well after the tumultuous beginning of the Protestant Reformation. Osler, W. 1913, *The Evolution of Modern Medicine*, Sillman Foundation Lecture Series, online at http://www.bookrags.com/books/teomm/PART5.htm .

[104] Castiglioni, A. 1969, *A History of Medicine,* Jason Aronson, pp. 363-4.

[105] Tawney 1948.

[106] Interestingly, the reaction of the aristocratic rulers was to pass a labourer's law restricting wages and prices to pre-plague levels and virtually enslaving the remaining population. See Henderson, E. F. 1896,

made general conditions better for those who survived. Population levels remained low, however, and did not regain pre-plague numbers in some areas until well into the 17th century.[107] The first 'assault' against the social power of the church in Europe had been initiated by a 'disease'. In contrast, the next event was not natural, but purely a result of the political choices of the church hierarchy.

The Great Schism

The Great Schism of 1378 significantly affected the outward social manifestation of obedience that many secular rulers gave to the church and Pope. The death of Gregory XI on 27 March 1378 prompted action by the college of Catholic Cardinals to elect a new Pope. The Cardinals were politically divided on sensitive social issues such as whether or not to move the Papacy back to the French city of Avignon, which would capitulate to the wishes of its French faction.[108] The choice for a new Pope, Bartolommeo Prignano, then the Archbishop of Bari, was unique in that he was not a cardinal, and had formerly been Vice-Chancellor of the Roman Church.[109] He took the name Pope Urban VI. His lack of political association with either of the two major factions of the college made him suitable for election, perhaps only by compromise.

"The Statute of Labourers 1351", *Select Historical Documents of the Middle Ages*, London, George Bell and Sons.

[107] Skip Knox, E.L. 2000, "The Black Death", *History of Western Civilisation,* online edition at http://history.idbsu.edu/westciv/plague/01.htm .

[108] Ullman 1948, *The Origin of the Great Schism,* Burns, Oates and Washbourne.

[109] Brusher 1996, *Popes through the Ages,* online http://www.ewtn.com/library/CHRIST/POPES.TXT , also cited Salembier 1912, "Western Schism", *Catholic Encyclopedia,* Robert Appleton Company, at http://www.newadvent.org/cathen/13539a.htm .

Urban's public tirades and accusations against the church Cardinals soon alienated him from those who had elected him.[110] He took seriously the doctrine of Papal infallibility which the church had propagated. His lack of political awareness and public outbursts of humiliating language soon bred hostility and anger from not only the Cardinals and other church leaders but also secular authorities. This brought about some disquiet among those who would have otherwise supported him in his opposition to the corruption endemic to the college of Cardinals.[111] The result was that "[t]he deterioration in the relations between Pope and Cardinals was accompanied by a like deterioration in his relations with the secular princes".[112] On 5 August 1378 an open rift divided the Catholic Church. The disgruntled Cardinals plotted ways to rectify the situation, issuing a manifesto publicly outlining their intended course of action. Their decision to elect another Pope was completed on 20 September 1378 when they elected the anti-pope Clement VIII.

> In retrospect one cannot but come to the conclusion that this division of allegiance to the "heads" of Christianity greatly accelerated the break-up of Western Christendom in the sixteenth century. ... The mass said by the Urbanist bishop or his adherents was proclaimed a blasphemy, and the mass celebrated by the Clementine rival was equally loudly condemned as sacrilege. In many dioceses public worship was an impossibility, and the populace was left in confused state of bewilderment and cynicism.[113]

The two popes, therefore, were both subject to criticism and the power base of the church was thus weakened considerably. The formerly unquestionable authority of the papal institution was reduced to "a repulsive spectacle of unworthiness and dishonour".[114]

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[110] Ullman 1948, infers that Urban VI was a reformer but Brusher labelled Urban as "whimsical, haughty, and suspicious". This is echoed by Salembier, who recounts Brusher's portrayal.
[111] Italy had been racked with warfare during the reign of the previous Pope, Pierre Roger de Beaufort who became Pope Gregory XI. Robert of Geneva, destined to be the anti-pope, had aligned himself with Breton mercenaries and butchered the entire city of Cesena.
[112] Ullman 1948, p. 49.
[113] Dietrich of Niem, cited Ullman 1948, p.97 n.1.
[114] Ullman 1948, p. 99.

Catholic writers attempt to label the Schism of 1378 as simply "a deplorable misunderstanding concerning a question of fact, an historical complication which lasted forty years."[115] In reality, it greatly reduced the social power of the church, exposed the wrangling and intrigue in the church's governmental hierarchy. It can be argued also that without the intervention of secular rulers such as Charles VI of France and Geoffrey Boucicaut, who laid siege to Avignon, effectively depriving the successor to Clement, Benedict XIII, of liberty, the Schism might have lasted far longer than it did.[116]

One of the most influential outcomes of the Schism, however, lay in the generation of rhetoric concerning the lawfulness of the actions of the Clementine Cardinals in electing a new anti-pope. The discussion was succinctly a *legal discussion* drawing upon the concepts of positive law. The jurists of the day tacitly questioned the infallible authority of the pope.

> If the Cardinals should have chosen a Pope, *who does not suit the Church*, she [the Church] has the right to revise the work of her agents and even to deprive them of her commission. ... The criterion by which all acts of Church and State are to be judged is whether they do, or do not, promote the general good.[117]

The church had increasingly appealed to law in its defence against the interference of secular rulers in ecclesiastical affairs since the 8th and 9th centuries, and now the conflict between the factions within the church itself was bound to be fought within a 'legal' context.

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[115] Salembier 1912, p.3/5.

[116] Salembier glosses over the events and their implications, following Brusher. Ullman does not deal specifically with them, but infers that the Schism was one of the greater sources of Renaissance humanism. See Ullman, W. 1977, *Medieval Foundations of Renaissance Humanism*, London, Paul Elek.

[117] Henry of Langstein, cited Ullman 1948, p. 181. This perspective foreshadows writings three hundred years later which would base judgment of a sovereign's laws on whether the 'common good' was promoted. From this perspective the utilitarian view of economics was founded, thus influencing the foundations of English law itself in men such as Adam Smith and Jeremy Bentham.

> Earlier dual papacies had been the results of conflicts between rival factions within the College of Cardinals ...or else had been caused by rivalries between popes and emperors. The division which began in 1378 fitted neither of these patterns [...] Faced with this situation, the only possible reaction to the question of legitimacy and alliance was to consider it in legal terms.[118]

The crises which subjected Europe to unprecedented savagery from the Black Death of the 1340's to the fall of Constantinople in 1453, therefore produced a tumultuous social review. The pre-eminent social position of the church, the social appraisal of the institution of labour, and the stranglehold that the manor lord held over the peasantry were severed from their traditional positions. A widespread attitude of fatalism gripped the population of the European monarchies. "The revival of fatalism originally fostered by the Black Death contributed immensely to the shock produced throughout Europe by the outbreak of the schism in 1378, coinciding as it did with the social and economic consequences of the plague".[119]

Prior to, and concurrent with these crises, the universities of Europe played an expanding role in the government of church and state alike. As theological faculties trained more clergy, law faculties trained more lawyers and bureaucrats which were imbued with Aristotelianism, prompting Pope Honorius III to ban the study of the [Roman] civil law at the University of Paris in 1219. This may have been a veiled attempt to secure a lasting academic loyalty to the church, as the universities, hence also their graduates, became involved in the conflicts which embroiled church and state, or papacy and Cardinal. As time went on, the universities indeed began to assume a more prominent position in the realm of both the church and state:

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[118] Swanson R. N. 1979, *Universities, Academics and the Great Schism,* Cambridge University Press, pp. 23-4.
[119] Swanson 1979, p. 21.

> [A]ppeals to the universities [were not] confined to issues which, although obviously political, might still be considered as falling within the 'ecclesiastical' sphere. Academics, with their increasing involvement in secular matters, were also consulted on non-ecclesiastical matters.[120]

The recognition of the role that universities played in settling the disputes during the Great Schism placed a certain legitimacy upon academic decisions, which prompted later rulers to seek out university intellectuals to generate support for their *regnal* ideals. In the 16th century, Henry VIII turned to the universities of Europe for support in his struggle against the Pope to gain a divorce from Catherine of Aragon[121]. This ascendancy in the reputation of the universities, and the role of law as an institution in itself, sparked a total renovation of the previously prevailing social view that the church was an institution with authoritative influence over all aspects of life. Later, in the 16th and 17th centuries, the expertise in legal argument gained during the Schism "passed into the political armoury of the growing numbers opposed to authoritarian government, whether in church or state. [122]

The schism diminished the church's power over secular rulers who, prior to this, would have feared the church's ability to muster a military force together to thwart expansionist aspirations. By playing upon the church's political wrangling for competitive adherents, the secular rulers had an excuse for increasing interference in ecclesiastical matters. In addition, the reaction of the people to a war between the rival camps was inevitably leading to a rejection of the papacy in general. Economic interests, such as usury, could not have been excluded from consideration during this time, as international

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[120] Swanson 1979, p. 15.
[121] Parmiter G. C. 1967, *The King's Great Matter: A Study of Anglo Papal Relations 1527-1534,* London, pp. 123-5.

communication and trade were beginning to be restored after the ravages of the plague. In short, the fear of the church's ire toward the taking of interest and accumulation of personal wealth came under social reassessment along with other areas of life, where the church's influence also declined.

The church had now endured humiliation and degrading questions regarding its ability to fulfil the role of social arbiter. The first two events in the century of tragedy from 1340 to 1453 were initiated firstly, by a disease and, secondly, by the church itself. In contrast, the last event, the fall of Constantinople, was brought about by a third party, the Ottoman Turks.

The Fall of Constantinople

The Eastern Orthodox Church had broken away from the Roman Church in the Schism of 1054.[123] Constantinople had continued as the capital of the Eastern Empire since the division in the 4th century. It was well defended but suffered from interminable raids from the Northern Tribes and the Eastern Islamic troops which depleted manpower and accelerated the decay of the city. The population had been reduced severely during the plague, and had never recovered. It was at its weakest and most vulnerable state by the 1450's and the Muslim Turk, Mehemed II, was aware of this.

The significance of the fall of Constantinople to the Turks in 1453 arises from two factors; the exodus of people from the city in the face of the assault from the advancing

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[122] Swanson 1979, p. 209.
[123] Fortescue, A. 1912, "The Eastern Schism", *The Catholic Encyclopedia*, 1999, online Robert Appleton Company at http://www.newadvent.org/cathen/13535a.htm .

Ottoman forces, and the fact that it was conquered by an 'infidel' army.[124] The fall of Constantinople opened up Western Europe to the military assault of the Ottoman Turks. The Catholic Church showed itself impotent to stop what was believed to be another scourge on the earth. It marked more than a city's fall, it marked the end of the Middle Ages.[125] Fleeing Greek scholars moved into the western empire, including Italy, bringing the seeds of Renaissance humanism,[126] and the Byzantine culture of wealth accumulation. They also took Greek texts of the early Christian writings with them and they distrusted the Roman Church. Such was their sacred esteem for the writings that when they fled the Turk forces, many of the Orthodox Priests left personal belongings in order to save the ancient scrolls. Although Rome was closer, many chose to go to the capital cities of Europe instead. The Greek texts they carried with them were used to educate the English Royalty during the time when the conflicts with Rome were reaching their peak. The Church's fall from social influence had gained momentum.

The time interval between the fall of Constantinople in 1453 to the discovery of the Caribbean Islands by Columbus in 1492 was less than 40 years. The interval between the fall of Constantinople to the Protestant Reformation in 1517 was only 64 years. One lifetime, in modern terms, separates the fall of the eastern capital city of Constantinople from the fire of revolt against the teaching of the Catholic Church. Increased commerce, rising discontent with the church's governance, and peasant living conditions all contributed to the decline in the church's influence. The next section examines the Protestant Reformation and its impact upon social acceptance of the practice of usury.

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[124] Munro 1912, *Translations and Reprints from the Original Sources of European History*, revised ed. vol.3, pp. 15-16, online at http://www.fordham.edu/HALSALL/source/choniates1.html .
[125] Green 1964, *Renaissance and Reformation*, 2nd ed., Edward Arnold, p. 19; Cheyney 1936, *The Dawn of a New Era 1250-1453*, Harper & Bros., pp.325-327.
[126] Ullman 1977.

The Protestant Reformation

The social rejection of Catholic Church government came from a number of sources. The church had solidified its social power by promulgating three principles[127] which fitted neatly into its theocratic worldview:

- The idea that religion embraces all aspects of life, which carried with it the connotation that religion placed a *moral* end upon all activity of man, economic or otherwise;
- The functional view of class organisation, which committed each person to their own 'station' in life;
- The doctrine of economic ethics which damned acquisition and stringently resisted upward social mobility through the attainment of wealth;

> He who has enough to satisfy his wants... and nevertheless ceaselessly labours to acquire riches, either in order to obtain a higher social position, or that subsequently he may have enough to live without labour, or that his sons may become men of wealth and importance – all such are incited by a damnable avarice, sensuality, or pride.[128]

General discontent with church government, the relentless rise of mercantilism and commerce, and the growing acrimony with the church's position with respect to the plight of the peasant on the land who suffered under the heavy hands of the landed manor lord were only some of the factors which sparked the fire of change under the figurehead of Martin Luther's rebellious stance against the Catholic Church. An intellectual rebellion against the Roman church's excesses was inevitable.

> When the Dominican John Tetzel began to preach in Germany [regarding] the indulgences proclaimed by Pope Leo X for those who contributed to the completion of St. Peter's Basilica in Rome, opposition arose on the part of the people and of both civil and ecclesiastical authorities.

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[127] Tawney 1948, pp. 35-44.

> Luther set the match to the fuel of widespread discontent. He at once gained a number of adherents powerful both in Church and State; the Bishop of Würzburg recommended him to the protection of the Elector Frederick of Saxony.[129]

Luther did not promote an actual *theory* of interest and changed his initial prohibitive stance as he grew older. He had seen the Catholic ideology of poverty as the preferred path of salvation juxtaposed with the ostentatious riches of the cathedral. It is no surprise, therefore, that Luther, especially at the beginning of the movement, had preached on poverty as the "preferred path of salvation", and that the "rich earned merit for salvation by almsgiving".[130] His stance, in contrast to his Catholic indoctrination, centred on the stewardship of wealth, and not on the intrinsic evil of wealth itself.[131] The paradigm shifted from holding that money was a sterile barren metal, a fungible good, to an emphasis on what a person actually *does* with the money they have. Despite this fundamental theoretical shift in social thought, Luther preached against much of what he viewed as a great sin in the expanding mercantilist influence as the movement against the Catholic Church took hold. His "Sermon on Usury" (1519) and his "Admonition to the Clergy That They Preach Against Usury" (1540) were unequivocal positions against the social consequences of the *unregulated* practice of usury which he witnessed first-hand.

Luther sought to offset what he saw as an illegitimate ideology of poverty which ratified the Catholic Church's non-involvement in the rising vagrancy and underemployment of the time by initiating communal welfare programs. In 1522 he founded a common chest for social welfare in Wittenberg, which was followed in 1523 with common chests in Leisnig, Augsbürg, Nüremberg, Altenburg, Kitzingen, Strasbourg, Breslau, and

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[128] Henry of Langtein, cited Tawney 1948, p. 36, n. 41.
[129] Wilhelm 1910, p. 6.
[130] Lindberg, C. 1987, "Luther on the Use of Money", *Christian History,* vol. 6, no. 2, p. 17.

Regensbürg. Motivated by Luther's view of justification by faith, the nerve of the ideology of poverty was cut. He provided low-cost loans to burdened citizens which in itself gave support for the taking of interest in principle. His main objection to interest, however, centred on excessive and oppressive interest. He may have been exasperated by the fact that the church, through Albert of Brandeburg, had borrowed with interest from the Austrian merchant Joseph Fugger and Pope Leo X had authorized the selling of indulgences to help generate the funds to pay back Fugger. When Johann Tetzel, the Dominican monk brought his traveling appeal to Wittenberg, as mentioned above, Martin Luther, along with a number of the citizens, became incensed.[132]

The Protestant Reformation unrelentingly assaulted the teaching of the Catholic Church in many areas. The generation of a 'work ethic' and the emphasis on the stewardship of money contrasted starkly with the ideology of poverty and self-denial which had characterised the outward piety of the Catholic ideal which had been modeled on the Cluniac reforms of the 10th century.[133] Coupled with the manifest excesses which the peasant masses witnessed, this led to wholesale changes in the peasant worldview:

> Prior to the Reformation it was widely believed among Christians that the only way to overcome worldliness was through self-denial and monastic asceticism. In contrast to this view, the Protestant idea of having a calling meant more than merely having a job to do. Believing that you had a calling also meant believing that the only way to live acceptably in the sight of God was through fulfilling the obligations imposed on you by your position in the world. Only though your calling could you do the will of God. [...] This belief provided *moral* justification for active Christian involvement in the world. The economic impact was far reaching, for those with spiritual natures that led to becoming the highest type of monk now pursued those ideals through families and careers.[134]

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[131] Wallace, R. S. 1959, *Calvin's Doctrines of the Christian Life,* Oliver and Boyd, Edinburgh and London, pp. 152 *et seq.* [Sermon on I Timothy 6:9-11].
[132] Petersen, R. 1987, "Selling Forgiveness: How Money Sparked the Protestant Revolution", *Christian History*, vol. 6, no. 2,, Christian History Institute, p. 18-19.
[133] Goodman 1995, pp. 146-8; Weber 1930.
[134] Hartgerink, V. 1987, "The Protestant Ethic of Prosperity", in *Christian History,* vol. VI, no. 2, p. 21.

Although it may be tempting to attribute a general change in the theory of interest (and therefore the practice of usury) to the Protestant Reformation, it is important to note that the actual theoretical basis for the practice of usury did not make significant gains for over a century past the beginning of the Protestant Reformation. The theorists of the day, both Protestant and Catholic alike, still appealed to a religious basis for their condemnation of the taking of interest. Indeed, understanding of interest would not advance until about the year 1640.[135]

The freedom from the shackles of church government began to have an effect upon the observations of the commoner. There had always been cunning ways to circumvent the prohibition on the taking of interest, such as the purchase of annuities, intricate partnership agreements, and the indemnification from the borrower for the time interval involved in a deferred payment (*Damnum emergens* and *lucrum cessans*). The time interval between loan date and repayment only entitled the lender to interest (*interesse)* if the borrower was in *mora,* or some sort of culpable negligence which entitled the lender, upon proof, to compensation. The addition of two terms to a contract, the first releasing the vendor from the proof of *mora*, and the second setting out a pre-agreed amount which was to be paid, allowed circumvention of this requirement. Because the lender did not have to prove *mora*, the borrower was technically placed in *mora*, entitling the lender to the agreed extra payments.[136]

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[135] See Von Bohm-Bawerk 1898, vol. 1, chapter 2.

[136] Von Bohm-Bawerk 1959, p. 17; There were other widespread circumventions, many of which normally associated the giving of interest where the lender was taking a real risk that the capital would not be returned.

Calvin, the Protestant reformer, may have been the most prominent among the first advocates of the new view on interest-taking. He dismissed the prior scriptural basis for the prohibition, based on the assertion that the church had misinterpreted passages, and relegated the argument regarding the 'barrenness of money' to insignificance, calling it of "little weight".

> [I]t is with money as it is with a house or a field. The roof and walls of a house cannot, properly speaking, beget money, but through exchange of the use of the house for money a legitimate money gain may be drawn from the house. In the same way money can be made fruitful. Since land is purchased with money, it is quite correct to think of the money as producing other sums of money in the shape of the yearly revenues form the land. Unemployed money is barren, to be sure, but the borrower does not let it lie unemployed. The borrower therefore is not defrauded by having to pay interest. He pays it *ex proventu*, that is to say, out of the gain that he makes with the money.[137]

In France the jurist Molinaeus, writing in 1546, also opposed the Catholic prohibition of usury, and was censored and exiled. He begins, as Calvin did, in consideration of the "Law of God". He, too, concluded that the scriptural passages used to justify the prohibition of interest-taking (examined above) were misinterpreted. He pointed out "in detail that in almost every loan there is involved an *interesse* of the creditor, some injury caused or some use foregone – the compensation for which is just and economically necessary. This compensation ... is interest, is *usura*, in the right and proper sense of the word."[138] Molinaeus agreed with Calvin regarding the parallels of land and money, both being barren without the labour of men.

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[137]Calvin, J. cited in Nymyer, F. 1957, "John Calvin on Interest", at http://www.visi.com/~conta_m/pc/1957/3-2Calvin.html; also Von Bohm-Bawerk 1959, p. 19.
[138] Von Bohm-Bawerk 1959, p. 20 note 76.

Mercantilism and trade during the intervening time between the Christian Church Fathers' reaction to the taking of interest and the writing of Molinaeus and Calvin had radically changed.

> By the end of the fifteenth century both an Italian Archbishop, Antonino of Florence, and a German schoolman, Gabriel Biel, realised that loan capital was related to the productivity of an enterprise and deserved a monetary reward. In any case what the theologians thought about usury and business had less and less relevance to what was actually happening in economic life.[139]

Molinaeus's argument included pragmatic recognition of everyday economic practices, reflecting a stark contrast to what could have been expected in earlier times. Commercialism had gripped the entire English and European society by the 17th century, and observations of the negative social impact from the church's prohibition of lending at interest were inescapable:

> Finally, to the argument which urges the natural barrenness of money Molinaeus replies ... that the *everyday experience of business life* shows that the use of any considerable sum of money yields a service of no trifling importance, and this service, even in legal language, is designated as the "fruit" of money. [140] [emphasis added]

Although the church's rise to power had taken approximately six centuries from the time of Constantine I, the decay was much faster. In England, King Henry VIII, under the advice of More and Cromwell, instigated open rebellion against the Catholic Church, and made legislative provision for usury in 1545. The reaction from the Catholics was symbolic only. Nothing military could be done, for by this time secular rulers were divided and military might was not to be risked for such ecclesiastical squabbles. Trade and commerce and the conquest of newly discovered lands, events sparked by the closure

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[139] Green 1964, p. 22.
[140] Von Bohm-Bawerk 1959, p. 21.

of the overland routes to the Orient from the fall of Constantinople, led to new sea exploration. These considerations occupied higher priorities for the Western European monarchies. The world had now embraced a secular/sacred dichotomy, and Europe soon threw off the medieval chains of the church's authority.

This was not the end of the church's influence over the way in which usury and the taking of interest on loans were regarded. The church provided literate personnel to the institution of government all over Europe well past the Protestant Reformation. This was also true in England where, during the height of the church's influence in the 12th to the 14th centuries, the common law of England was extruding forms of actions and legal doctrines which shaped the way that later courts dealt with the usury issue. This eventually led to what this thesis calls the 'classification dilemma'.

Summary

The ancient economies were agricultural, or agrarian in nature. In an agrarian society, possession of land becomes the paramount goal, and the subsequent buildings, tools, and chattels are the means of survival. It seemed natural to medieval society to require payment, first in coinage, then when the coinage failed, payment in kind, from those who used the tools of survival. The title to the asset never transferred during the leasing process and the lender or lessor was perfectly justified in demanding payment for the use thereof.

Money, in contrast, was viewed as a fungible good, having no ability to produce anything on its own except by the labour of the one to whom it was loaned. Although it was long recognised that land was made productive by the sweat and labour of the peasant, the

money produced by the sweat and labour of the merchant escaped the notice of those theologians and canonists who considered the matter theoretically. Money, it was thought, was used up in the same way as fruit or anything perishable, the title to which is transferred, and the value exhausted upon its use. The need, therefore, to distinguish between the physical assets and their value, and emerging financial assets, and their value, was an ongoing, painful problem.[141] The underlying difficulty originated in where 'value' was stored. According to the agrarian perspective, land stored value. It held promise for survival. If you had land, it was taken for granted that the knowledge was available, or the labour in the substitution for the knowledge, of how to make the land produce for both survival and income.[142]

The peasant represented the class that normally worked the land, and was generally poor. There was, therefore, a natural aversion to the oppression of this working class through the taking of interest, by the canonists who considered the plight of the poor. When the church, as an institution, was seconded into government in the post-Constantine era in Rome, the Christian clergy were able to disseminate the hatred of the practice of usury to a society descending into the anarchic feudal Middle Ages. Although this may have been generally true, it was most definitely not universally true. The continuing practice by both "princes and ecclesiastics alike" of taking usury testifies to the universality of the practice and to the ongoing larger economic ties.

During approximately one century from the start of the pandemic of the Black Death in the 1340's to the fall of Constantinople to the Ottoman Turks in 1453, the church's social

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[141] Cooney 1993, p. 7.
[142] This perspective is echoed in the 18th century French Physiocrats, who considered that land and agriculture was the prime manufacturing business of a nation's economy.

authority in Europe came under unprecedented attack. The subsequent rise of individualism, the change in the social attitudes towards the role of money and personal wealth, and the demise of the stranglehold in which the church held authority over all parts of life led to the rapid decline in the church's influence over commercial matters and business ethics. Respect for law and legal reasoning had risen in response to physical events to provide a logical social framework of legitimacy, reflecting Roman legal principles. Secular rulers argued against the ecclesiastical authority of the church in a legal mode which gained widespread social acceptance. The fear of the church's retribution was substantially removed in Northern Europe in the 16th century with the Protestant Reformation and the formation of the Church of England under Henry VIII.

The next chapter will deal with the concurrent rise of the English common law during the very period when the Church enjoyed the apex of her influence. The imprint of the canons and the canon law on English law was distinctive and unmistakeable during this time. The Investiture Conflict, the death of Thomas a Beckett and other events played a major role in shaping the common law, and its subsequent posture toward the compensation of lenders who suffered losses from unscrupulous borrowers who refused to make timely repayment of sums.

Chapter Three: The Imprint of the Religious Legacy on the Common Law

The last chapter examined the church's hatred of usury, the social and governmental influence which the church enjoyed in the time from the 5th to the 15th century, and the events which led to the decline in the social esteem attributed to church leadership. This chapter traces the infection of the common law during its formation between the 12th and 14th centuries with the Church's hatred of the practice of usury through the church's exclusive supply of literate personnel to government for both legal and administrative purposes. This was coupled with the overwhelming power that the church wielded over secular rulers in England and Europe during the 11th to 14th centuries.

For the hatred of usury to be so firmly implanted into the common law, the ontology begins long before the church rose to the plateau of its social influence. The heritage of the Roman legal system, the customary law of the indigenous Germanic clans inhabiting northern Europe and England, the imposition of a Norman aristocracy in lordship over the English, the conflicts originating in the investiture struggle, and the military tension between Henry II and King Steven in the 1150's all provided a fertile intellectual, legal, and social climate for the incubation of the hatred of usury and its subsequent implantation into the common law.

Rome and the Role of Government

The legal thinking of jurists in the monarchies which formed subsequent to the fall of the Western Roman Empire in the 5th century was greatly influenced by the perspective of

Roman jurists. The Roman jurists formulated a systematic view of law based initially in a segmented ascending view of power, where the Roman ruler derived power because the populace bestowed it upon the sovereign's office.[1] The Romans also divided the law into the public law (*ius publicum*), the private law (*ius privatum*), the natural law (*ius naturale*) the law of persons (*ius gentium*) and the law of the nations (*ius civile*). This system of division subsumes knowledge and ideology under a technical perspective where legal institutions and the notion of law are supported by reason, justice, and social recognition of legitimacy. It is true that early Caesars had developed the doctrine of the imperial cult where any word of the Emperor could be enforced as law.[2] Despite this, an ascending view prevailed in the citizenry. Roman jurists, instead of seeking a total consistency in the paradoxical situation where the power to rule came from both the populace and the office of the ruler, *imperium et postestatem conferat*, formulated categories to provide the means whereby a working system of law could be advocated while still holding an apparent contradiction.[3]

This dichotomy between the ontological source of political power and the public and private exercise of power was balanced by a formulary system of actions and remedies. This formulary system was reconstructed in the English legal system during the time

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[1] Burdick, W. L. 1938, *The Principles of Roman Law,* Gaunt & Sons, 1989 reprint; Samuels, G., 1994, *The Foundations of Legal Reasoning,* MAKLU, Ontwerp; Milsom, S. F. C. 1981, *Historical Foundations of the Common Law*, 2nd edition, Butterworths; Pollock, F. and Maitland, F. W. 1898, *The History of English Law Before the Time of Edward I*, 2nd ed., 1989 reprint, Cambridge University Press. Pollock and Maitland 1898, vol. 1 chapters I and II, resile to a degree from overemphasising the impact of Roman Law on England in the same way that Roman Law influenced the juristic development in other European nations, most notably Italy and France. It may be the better view to assert that Roman law competed with the customary law and other systems of law, such as the feudal and manorial law, canon and ecclesiastical law, for acceptance into the English legal system.

[2] Whether there was a philosophical conflict in the legal-political realm or not may be arguable, but it does not address the objection based on the observation that Caesars had control of the military and the imperial bureaucracy as well as numerous other positions of political significance. To speak of this contradiction within itself, therefore, may be a paradoxical contradiction in practical terms. (see Goodman 1995, p. 133).

[3] Samuels, G. 1994, pp. 40-41.

when the "second life of the Roman law"[4] was being heralded in Europe in the 11th to the 13th centuries. Pollock and Maitland[5] attribute the distinctive features of the English common law to the unconscious reproduction of the formulary system in the English sphere. Stone[6] speculated that the English system was therefore closer to the actual Roman model than other European civil systems for this reason. This formulary model was built on a rigid system of actions and remedies. The classification of an event, therefore, was crucial in determining the remedy. The relevance of this observation will become more apparent in Chapter Four which considers the classification dilemma. The next section examines the foothold the Roman *ecclesiae* gained in English government during the time from 597 to the changes under the Norman Kings.

Church Involvement Prior to William I

The Christian Church evangelised England beginning in the 6th century, making significant inroads with the people and the rulers under the leadership of the monk Augustine.[7] The Christian monks brought written documents with them, as well as knowledge of the Latin legal system. The respect which the English gave to Christianity grew both through the acceptance of Christianity by the English ruling class, and also because it was a religion of writing. Writing became associated with Sacred Script, the

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[4] Samuels uses this phrase to connote the time when, during the Papal revolution, the incorporation of Justinian's *Corpus Iuris Civilus* into the legal wrangling between church and secular authorities raised the social awareness of legal reason, and generated a renewed interest in the study of the Roman legal model in the Universities in Europe, starting with Bologna. It may be possible to defend the viewpoint that this conflict actually bred the very conditions in the social sphere which led to the church's downfall in the period from the 14th century to the Protestant Reformation in the 16th century. For an account of the process of rediscovery of legal science. See Ullman 1975, *Medieval Political Thought,* Penguin Books, pp. 53-79.

[5] Pollock, F. and Maitland, F. W. 1898, p. 558.

[6] Stone, J. 1964, *Legal System and Lawyers' Reasonings*, 2nd printing 1968, Maitland Publications, Stanford University Press.

[7] This is not Augustine of Hippo, the Catholic theologian, but the first Archbishop of Canterbury. See Anonymous 2001, *The Succession List of the Archbishops of Canterbury,* online at http://www.archbishopofcanterbury.org/success.htm .

dedication to God through monasticism, and the arts of antiquity.[8] Literacy was relatively rare, and in much need for the administration of government. The church, therefore, was seconded into governmental oversight from its early entry into England, and occupied a powerful position in the social strata.[9]

The incorporation of bishops and abbots into governmental office was not limited to England, though, with governmental dependence on clerical personnel to be found in other areas in Europe. From Spain to Scandinavia, the church exerted a social influence which was intensified from the very fact that it had monopolised a knowledge base which was indispensable to governments.

> Bishops, who constituted virtually the only literate members of the community, ... were used extensively as administrators. The monarchy in Germany and Lombardy, for example, governed by entrusting counties and jurisdictions to carefully selected bishops. The bishops governed the territories, while ensuring that political and economic control was retained by the monarch.[10]

The church monopolized the instruments of learning, and jealously guarded the production of servants trained in literate skills. The manufacture and circulation of manuscripts proceeded as the church saw fit according to its own need. "The church came to achieve an effective control over all social institutions, even monarchies, simply by taking priestly charge of the most powerful of the available means of transmitting the indispensable knowledge necessary for centralised organisation".[11] The church educated whom it pleased, and certainly wielded this privilege with effective and advantageous political implications.

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[8] Clanchy, M. 1993, *From Memory to Written Record, England 1066-1307*, 2nd ed, p. 333.
[9] Loyn 1991, pp. 277-290; Goodman 1995, p. 147-152.
[10] Goodman 1995, p. 193.

The church's influence within the court systems may have been more acutely concentrated than in any other social institution. The main court of justice in England, in a regional sense, in the time prior to and concurrent with William I was the *Witenagemot*, the meeting of the King alongside his array of 'wise men'. The most important cases, involving either the King's household, or appeal to the King for the sake of justice, went to where the King sat with his crown in this court. There were certainly other courts, including "the Ecclesiastical Court, the (lesser) King's Court, the Exchequer, the County Court, the Burghmot, the Hundred or Wapentake Court, the Manorial Court, and the Forest Court".[12]

The courts, at every level, had clergy who either presided solely or with appointed laymen. Although the clergy had rights and obligations to preside over the lay courts and hear temporal matters as well as ecclesiastical matters in the Ecclesiastical Courts, the laity had no right to judge ecclesiastical matters in lay courts after the edict of William I.[13] William supported the jurisdiction of the church in temporal matters, but did not support the jurisdiction over clerical issues by lay judges. The King issued a proclamation in the form of a charter dividing the judicial powers of the clergy from those of the laity. "This law required that spiritual causes should no longer be tried in the secular courts. It thus made mandatory the trial of purely ecclesiastical causes in the Ecclesiastical Court; ... But it is more interesting to notice that the clergy were not forbidden to attend upon the lay courts".[14]

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[11] Goodrich, Peter 1987, "Literacy and the Languages of the Early Common Law," *Journal of Law and Society*, vol 14, number 4, winter 1987, pp. 426-427.
[12] Bigelow, M. 1880, *History of Procedure in England* 1987 reprint, p. 19. William I strengthened control over the forests, and therefore this court may not have existed prior to William. The evidence is not complete on this point.
[13] Caenegem 1988, p. 13, Bigelow 1880, pp. 25-28. Bigelow makes the pointed remark that it is difficult at times to tell whether a court is a Witenagemot or a Synod because the personnel are the same in each.
[14] Bigelow 1880 p. 30-31.

The church, therefore, had an unmistakable hold upon the justice system. There was no functional executive arm of government until the last half of the 12th century, no public service structure which operated with rules or in disregard of the class of party involved. Whichever courts were held were presided over by ecclesiastics. Even if there were laymen involved, the laity would be hard pressed to disagree with the clergy in a legal matter. The courts during this time in England went basically unchallenged with respect to the influence of the clergy. Although the evidence is inconclusive regarding the extent of the church's influence prior to the Conquest in 1066, the evidence afterwards clearly shows that the *ecclesiae* were inmistakeably the masters of governmental oversight, judicial as well as administrative.[15]

From this pinnacle, the church supplied the personnel, the administrative staff, the expertise, and the oversight to the whole of England and Europe. Given the stance of the church toward usury, the courts which operated under this influence were infused with the church's hatred of interest-taking. Any cleric in the position of adjudicator, both before the rise of the bench in the modern sense, and after the King's justices turned professional in the 13th century, who allowed interest-taking would have risked deposition, excommunication, deprival of any benefice, and finally, burning as a heretic.[16]

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[15] Bigelow 1880, p. 34; Goodrich 1987, pp. 424-26. Goodrich asserts that the Benedictine Monasteries held the complete mastery from the 8th century onwards on all forms of Latin learning, regarding the local languages as too vulgar to equip the user with the articulate means of expounding the essence of the law. Some *coloni* were born, lived, and died within a range of approximately 60 miles from their home and had a vocabulary of only about 600 words.

[16] Although it is true that heavy fines were more predominantly levied against usurers, during the time of the conflict between John and the Papacy in the Great Interdict of 1208-1214, Cheney accounts that a foreign merchant burnt as a heretic in "an attempt to kindle the Londoner's faith", by implication may have

The influence of the church would not have been limited to the 'educated' clergy. Berman calls attention to the fact that the laws of the peoples of Europe were based in "an integral part of the common consciousness, the 'common conscience' of the community"[17] which saw local participation in legal processes. His portrayal of participatory adjudication by the people instead of the ruling monarch or judge is supported by Brand[18], Goodman,[19] and Pollock[20]. Feudal lords both in England and the European Continent relied upon 'suitors to court' as part of the lord-vassal relationship. Suitors occupied, in essence, the role of the jury in modern thought. The difference between the ancient jury and the modern jury was that the ancient juries were normally seconded for a particular matter because they were neighbours to the accused, and presumed to have knowledge of the facts of an alleged crime. They were sworn under an oath, an oath administered by a cleric, to judge truthfully according to what they knew. Coupled together with the very powerful influence of the church during this period, the hatred embodied in the church's position against usury permeated every part of society. Forms of 'proof' regarding whether a person had committed this 'crime' were irrational and from a modern perspective, savage and barbaric. The issue of how courts decided cases with evidence, and the formation of courts in a modern sense will be discussed in the next section.

Juries, Early Evidence, and Proof

The established English legal system existing at the time of the Norman Conquest was a community participatory model. There was no court system which resembled modern

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been burnt for advocating or actually taking interest. See Cheney 1982 chapter IX p. 315 at footnote 4 where he also acknowledges the remarks of Richardson in this position.

[17] Berman 1983, p. 77.

[18] Brand 1992, p. 80.

[19] Goodman 1995, pp. 165-66.

courts. The important members of each community met together from time to time and relied upon the inhabitants within an area to know the truth of events the subject of legal dispute.[21] Both plaintiff and defendant could recruit members of the community to give an oath in court in support of the credibility of the plaintiff or defendant. One alternative form of this was *compurgation*, or 'waging law' where groups of men would swear openly before the local court about the truth of the oath of the accused, or the truth of the situation at hand. The accuser would call oath-helpers, and the accused would call oath-helpers. One fatal slip of the tongue, or a stammer by an oath-helper, could spell defeat of the cause, whether in regard to the accuser or the accused.[22] The oath-helpers were presumed to know the truth, i.e., there was an expectation of knowledge regarding the relevant events placed upon them. Gradually, in the time from the Conqueror to the beginning of the 14th century, the expectation put upon these oath-helpers changed from an expectation of knowledge to an expectation of unbiased ignorance. As late as 1421, in *Whittington v Turnebonis*,[23] a jury still dictated the truth of a matter regarding the incurrence of a debt by the defendant in the courts of London. The transition from an expectation that a jury knew the truth of a matter to the expectation of objectivity and finding of fact brought a change in the prominence of evidence within the trial, and placed a requirement upon the jurors (as they subsequently became known) that if they knew anything of the facts regarding the accused, they were excused from participation. This is a far cry from the prior expectation that if a juror swore he knew nothing of the accused, he was excused.[24]

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[20] Pollock 1899, p. 216.
[21] Devlin 1966, pp. 4-9.
[22] Stone and Wells 1991, pp. 11-13.
[23] Thomas, A.H. (ed) 1943, "The Plea Rolls of the City of London", *Calendar of Plea and Memoranda,* pp. 91-3, cited in Fifoot, C.H.S. 1949, *History and Sources of the Common Law: Tort and Contract*, London, Stevens & Sons p. 314 note 98.
[24] Pollock and Maitland 1898, and Devlin 1966, both portray the defendant as being "upon the country", i.e., that he depends upon the people of his country to know the truth regarding the accusations made in

Other modes of 'proof' at trial were not rational from a modern perspective.[25] The appeal to the forces of the supernatural imprinted each form of 'evidence' in the trial procedure. The accepted[26] forms of trial were by ordeal and by compurgation. The accepted forms of trial by ordeal were:

- Boiling water - a person was forced to retrieve a stone from a pot of boiling water, whereupon the stone was dropped and the hand that retrieved it was immediately bandaged. If, after four days the wound was festered, the person was guilty.
- Hot iron – a person was forced to pick up a hot metal piece and carry it at least nine paces. The piece was the dropped and the hand immediately bandaged. If, after four days, the hand was festered, the person was guilty.
- Cold water – a person was tied with a rope and dropped into a pond or stream. If they sank past a certain part of the body, then they were innocent. The logic was that the water that baptised them would refuse a guilty person, and therefore they would not completely sink if they were guilty.
- Trial by the book - pages of a book, usually a Bible, were hung between witnesses on a pole and the accused would stand before it. The accused was 'guilty' if the pages turned in a rotation counter to that of the sun and innocent if the pages turned in the opposite direction.

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court. Stone and Wells 1991, highlight the stark contrast in the expectations placed upon juries by courts from the early community reliance upon knowledge, to the later reliance upon ignorance.

[25] Stone and Wells 1991, p. 16.

[26] Stone and Wells present some variation in these forms at pp. 6-8. Also see Pollock and Maitland 1898 vol. II, pp. 598-607, Baker 1990, *An Introduction to English Legal History,* Butterworths, pp. 85-86; Milsom 1980, pp. 410-12. Milsom asserts that even as late as the 19th century, despite the old ordeals being abolished much earlier, the accused was still not allowed counsel in criminal matters, inferring that this was a lingering influence of the old ordeals. Henderson 1910, *Selected Documents of the Middle Ages*, London, George Bell & Sons, pp. 314-317; also cited Halsall P. 1996, online at http://www.fordham.edu/halsall/source/water-ordeal.html .

- Trial by battle - This is supposed to be a uniquely Norman import into England. After meeting in an open place and taking the prescribed oaths, the adversaries would battle. According to this trial, the winner was innocent, and the loser was guilty. The gradual use of substitute warriors for battle may have been instrumental in the development of the modern English adversarial legal system, where substitute 'legal warriors' oppose each other at the bar table.

It is, as Baker points out, rather improper to use the term 'trial' in the context of the methods above, adopted by the Teutonic tribes in England and elsewhere. In fact, there was no trial in any modern sense. The methods above were directed to the issue of 'proof' but not to the weighing of evidence or the determination of any legal question. To the Germanic inhabitants of the times, proof of guilt was all that was necessary, and the oaths of trustworthy men of the community solved disputes. There was a conspicuous absence of legal questions, reasons, and rules. The legal meetings were conducted entirely in oral fashion, as writing was rare, and the advent of royal justice brought no great changes instantly. "It was the only system anyone knew. ... Nevertheless a different, more investigative approach began to appear in the twelfth century in certain kinds of case, and its advantages very soon made the older ways obsolescent."[27]

Ecclesiastical courts were the first to systematically forsake these "irrational" forms of proof.[28] The 4th Lateran Council of 1215 prohibited priests taking part in trial by ordeal

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[27] Baker, J. H. 1990, *An Introduction to English Legal History*, Butterworths, pp .85-86. Milsom, S.F.C. 17 *Univ Toronto Law Jo.* 1 cited Baker p. 85

[28] If, contrary to this position, Pollock and Maitland are correct in the assertion that Henry II's institution of the Grand Assize which seconded juries into action with respect to the truth of the accusations against a defendant, was actually the motivating force of legal rationalisation (c. 1150's) then, depending on what view is taken upon the rationality of the work of early juries, the position which they take can be defended. [1898 vol. II pp. 603-04]. Devlin's view moderates this polarizing position somewhat by asserting that Henry only extended and acted upon the existing view of compurgation, which was the way of showing the

(canon 18). Other canons of Lateran IV (35-38) presume a more complex legal system exists and is in widespread use. Judges as third party adjudicators were assumed and recognised, appeals were allowed procedurally (canon 35), jurisdiction was set by the distance of the accused to the court (canon 37), and a procedure of recording and reporting was outlined (canon 38). The church, therefore, was setting standards with respect to evidence, procedure, and a legal profession before England had as yet entrenched any of them in its legal system. The introduction of 'rational' modes of proof, therefore, came through the ecclesiastical personnel used in the English court system. The resulting pressure upon the English legal system as a whole to conform to the "complete legal system" of Canon law[29] which had arisen to displace the study of Roman Law[30] was enormous. This change from the irrational to the rational was only a part of the larger changes which inundated England in the time from Henry II (1154) to Edward I (1272). The death warrant of the old irrational forms of proof was signed in 1215 when the canons of the Fourth Lateran Council were accepted and endorsed by Innocent III,[31] and introduced into England through the clergy.

The church was diametrically opposed in many respects to the philosophy underlying the folklaw, the oral community-applied laws of the clans. The church justified its concern on the care of souls, based sanctions on the character and degree of an offence, rested on the concepts of repentance and forgiveness, and was directed towards the preservation of the spiritual welfare of both the individual and the community. The folklaw, in contrast,

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superiority of one's own oath. It may be possible to argue that this form of proof was still supernatural and irrational, as one slip of a tongue or word could spell disaster for the compurgator. It was still possible, up to 1824 to use compurgation to clear oneself from accusation (*King v Williams* 2 Barn. & Cres. 538, also cited Pollock and Maitland 1898, vol. II, p. 601).

[29] Berman 1983, p. 452 ff makes the note that whereas the manorial and feudal systems of law were viewed as generally inferior and incomplete, the Ecclesiastical law was viewed as a complete legal system, and therefore superior.

[30] Berman 1983, pp. 200-204.

was concerned with the control of the incessant blood feuds, based sanctions on the extent of real harm, rested on concepts of honour and fate, and was directed toward repression or the forestalling of the conflicts and violence between and within tribes, clans, lordships, and communities.[32] It is easy to see why the church raised antagonism to the ingrained local customary laws.

The church also brought a change to the previous oral tradition which characterised the early English communities. Written instruments were rare, and invariably associated with the important men of the realm. Writing meant authority, and the clans revered those who could read and write with a mystic devotion. From the entry of the church into England in the 6th century, the church was the predominant force in the use of charters and the use of written instruments for communication and records. The view that the highest form of land title was 'bookland', as opposed to other forms of land title, the promulgation of written forms of edicts, the *dooms*, and acceptance of papal bulls in *written* form, all worked together to place Christianity in England upon a social platform of sacredness,[33] significantly through the view that writing was a skill of the learned, powerful, and spiritual. This later developed into a dichotomy of certain forms of action which could only be enforced under a written document.[34] The church had supplied resources which informed the compilation of the law-codes prior to the Norman Conquest, and the powerful Archbishop Wulfstan of York was responsible for the form of much of the legislation of both Ethelred (978-1016) and of Canute (1016-1035).[35] He was also

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[31] Devlin 1966, p. 7; Berman 1983, p. 204; Goodman 1995, pp. 139-144.
[32] Loyn 1991; Berman 1983, p.72.
[33] Loyn 1991, p. 238, stresses the importance of Christianity being viewed as a religion of a book, holding sacred the skill of writing. Since it was associated with the great men of the English clans, the impact of the sequestration of writing cannot be underestimated.
[34] Pollock and Maitland 1898, vol 1, p.60; vol. 2, pp. 219-221; Baker 1990, p. 11.
[35] Kerr, M. H. 1991, *Catholic Church and Common Law: Three Studies in the Influence of the Church on English Law,* PhD thesis, University of Toronto, U.M.I., pp. 7-8. Kerr outlines the codes of the day which

responsible for the philosophical division of the Anglo society into three groups: fighters, prayers, and workers, and it is noteworthy that it was the duty of the clerics to oversee the equity between persons, and to safeguard fair dealing in trade.[36] So important a function as oversight of commercial dealings reflects the view that agreements between persons was a function of the attribute of 'faith', *fidei laesio*, between them, and therefore was the purveyance of the church.[37] The conflict which developed between the secular authorities and the ecclesiastical authorities over who rightfully held the final penal rights over contract-breakers, and its associated recovery of a sum of money as a fine from the contract-breaker from the breach of faith, was exacerbated in some respect by the intervention of the Investiture Struggle.

William and the Investiture Struggle

The Investiture Struggle features prominently in the formation of the western legal tradition.[38] The manner in which both the struggle arose, and then was settled, significantly affected the way that secular rulers assessed the power of the church. This is especially salient in England where the church, from William I in the 11th century, to Henry VIII in the 16th century, with some notable exceptions, held the English monarchs to be vassal kings.[39]

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were enacted in at least one instance (I and II Edgar – 946-961) as a "matched set", i.e., one set as civil ordinances, the other as religious ordinances, although with identical material.

[36] Loyn 1991, p. 247.

[37] Pollock and Maitland 1898, vol. 2 pp. 197-199.

[38] The term "western legal tradition" is used by Berman 1983, Goodman 1995.

[39] Duggan 1982, *Canon Law in Medieval England*, Variorum reprint. Goodman 1995, points out that William actually refused to make Gregory VII, then Pope, his "temporal overlord" [at p. 225] but nevertheless William's rhetoric was not matched with commensurate action, as the influx of canon lawyers into England in the post-conquest period, the reformation of the English Church in accord with the Cluniac model, and the payment of Peter's pence all speak of submission more than rebellion. The issue was far more openly contentious during the reign of Henry II, from 1154 to the martyrdom of Thomas a Beckett at Canterbury Cathedral in 1170, than during the reign of William I.

Prior to the Gregorian Reforms in the 11th century, as the church received land granted from nobility, it became subjected to secular rulers who heavily influenced the election of local ecclesiastical officials.[40] To secular rulers, it was necessary to ensure that the income-producing estates within their jurisdiction would continue to supply ongoing financial needs. As positions became vacant through natural attrition or by another source, a noble took guardianship of the church estates in the vicinity, and appropriated the revenue from the estate for private use. To obtain headship of a lucrative abbey or bishopric, therefore, was a profitable endeavour for any nobleman who then controlled the church's revenue streams. The practice of selling ecclesiastical offices for sums of money, *simony*, was regarded with abhorrence by the Papacy (see Chapter Two), bringing friction between the church and secular rulers. In response, Cardinal Hildebrande, as Pope Gregory VII in 1073, instigated the process which both elevated the church to an ascendant position over secular rulers, and sowed the seeds for the church's fall from social influence three centuries later. This struggle, which separated church and State, has been called the Investiture Struggle,[41] the Papal Revolution,[42] the Gregorian Reforms, or the Hildebrand Reforms.

William I, although holding to himself the banner of a crusader, did not view himself as a vassal-king. His reaction to the events happening on the continent in Europe was to take a reactionary and isolationist position. He erected a barrier policy, in 1076, "successfully devised... to control the two-way traffic between England and the Roman *curia*, and which also regulated in the royal interest various matters where the jurisdictions of

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[40] Paton, J.1893, *British History and Papal Claims,* London, Hodder and Stoughton, vol. 1, p. 4.
[41] Ullman 1962.
[42] Berman 1983; Goodman 1995, p. 202 ff.

church and monarchy might overlap."[43] William's distaste of Papal bulls overriding his own jurisdiction prompted him to take a stand against what he saw as foreign intervention. Lanfranc, whom William appointed as Archbishop of Canterbury in 1070, set to reform the English Church upon his appointment. This did not mean, in William's eyes, that the church's preferences would take any priority over that of the sovereign. The appointments of clergy under Lanfranc were more politically motivated than anything else, replacing native English clergy, with Norman or French. Under William I, the English Church remained firmly under the King's control.

Gregory VII had approached the problem of the secular influence over church leadership by reasoning that either the secular rulers were clergy, or they were laity. Since they were not ordained, they could not be clergy and therefore, they were laity. Secular rulers, in Gregory's view, had no rights to interfere in the elections of the ecclesiastical positions, or partake in oversight of the church's affairs. Goodman sees a specific political goal in Gregory's tactics:

> Gregory's theories and actions were intended, in practice, to undermine the power of the Salian dynasty precisely because it was the German rulers who were the most powerful extant rulers in Christendom. Only by a successful challenge to the basis of authority of the Salians would it become possible for the Papacy to assert supreme rulership.[44]

This sparked a series of tense conflicts between secular rulers, who wished to retain power, and the church. The argument was distinctly legal, yet the Pope used more 'spiritual' weapons when he excommunicated rebels, such as Henry IV of Germany, who undertook military action against the Papacy, but who experienced the ire of nobles and people at the prospect of royal rebellion against the church. Secular capitulation and the

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[43] Duggan 1970, chapter I, p.369.
[44] Goodman 1995, p.196.

subsequent peace, promulgated through the Concordat of Worms between the Holy Roman Emperor Henry V and Pope Calixtus II on 23 September 1122, brought a putative end to the controversy on the European Continent, although in England and Normandy the Concordat of Bec in 1107 had provided some temporary respite from tension. The tension in England between the *regnal* ruler and the *sacerdotal* ruler continued until at least 1170 and was only nominally settled in the events surrounding the martyrdom of Thomas a Beckett who was murdered in Canterbury Cathedral. The social outrage which this produced forced Henry II to perform penance by walking barefoot from the outskirts of the city to the cathedral to do homage to the Church.[45] This was not the end of the conflict in England between the Crown and the Papacy, for later the Papacy put England under a general interdict (the Great Interdict of 1208) when King John refused to ratify the election to the archbishopric of Canterbury of Stephen Langton.[46]

According to Berman the church set out within a legal framework to force the constituents, both within the established Roman Church, and the wider secular powers, to acquiesce to the church's demands for reformative supremacy. Ullman,[47] and Duggan[48] both take a more global perspective that the conflict between the ecclesiastical and political powers only formed a part of a larger series of events lasting from the mid-eleventh century until approximately 1177 and the settlement between Frederick and Alexander III at Venice. The importance of law and legal reason was simply part of an argumentative array employed by both the secular and ecclesiastical authorities alike.

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[45] Berman 1983, p.255-256; Duggan 1982.
[46] Cheney 1982.
[47] Ullman 1975.
[48] Duggan, C. 1970, "The Significance of the Beckett Dispute in the History of the English Church" *Canon Law in Medieval England,* 1982 reprint, Variorum Books.

Professor Berman's assertion, therefore, that in the late 11th and 12th centuries the church "set out to reform both itself and the world by law" [49] is difficult to follow, unless the implication is drawn that the efforts of the Papacy were directed to agents within the church as much as to secular rulers, for the statement appears to put law as the master and the church's goals of social supremacy as the servant. That the church set out to achieve a reformation (or perhaps a revolution as Berman asserts) is without doubt. That it originally set out to do it by law is another matter, and it may be the better view to state that the church set out to initiate reformation and simply found the most useful and effective tool to be law, as it was accepted by most people, lay and cleric alike, as a tool with authority. It is not evident that autonomous bodies of law grew in the intermediary period between instigation and settlement of the Papal Revolution, without reference to the larger political-ecclesiastical confrontation.

Berman, however, correctly focuses upon the pride of place which 'law' enjoyed in the settlement of the Investiture Struggle. The argument turned distinctly legal in its formation and logic and it has been regarded as 'fortuitous' the discovery of a complete copy of Justinian's *Institutes* in a library in Florence about 1080.[50]

Papal supremacy over secular authority, as a doctrine, however, had been launched some six centuries prior to the Papal Revolution through the promulgation of the Petrine doctrine of Papal succession. This doctrine was initiated through what is now regarded as a forged letter dating from the end of the second century. It was translated in the fourth or fifth century purporting to illustrate that Peter had given his powers of 'binding and loosing' to (Pope) Clement I (A.D. 88-97) in what can clearly be seen as a handing over

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[49] Berman 1983, p. 83.

of authority based on the Roman doctrine of legal succession,[51] known as *potesta jurisdictionis.*[52] That the Investiture Struggle took on a distinctively legal flavour, therefore, comes as no surprise.[53]

The Gregorian Reform conceptually separated the worldly system of secular authority (*regnum)*, and the church's other-worldly, spiritually appraised authority (*sacerdotum*) . "In practical terms the Papacy strove for the liberty of the church and its jurisdictional autonomy, while in the realm of ideas it asserted with increasing confidence its superiority over lay power." [54] Although William I granted to the English Church the rights to hold courts as royally recognised separate institutions[55] and enabled them to collect fees and fines for ecclesiastical and related misdemeanours, he still refused acknowledgement of Gregory VII as his temporal overlord.[56] "[W]hen directly called upon by Gregory [VII] to do fealty to the Papacy for his realm, the Conqueror sternly replied, 'Fealty I never willed to do, nor do I will to do it now. I have never promised it; nor do I find that my predecessors did it to yours.'"[57]

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[50] Goodman 1995; Ullmann 1975; Kuttner 1956, who asserts the year to be 1070.
[51] Ullman 1975, pp. 23-4.
[52] Burdick outlined the implications of this doctrine as follows: "In Roman Law, an heir was one who succeeded either by intestacy or by will, and he succeeded to all kinds of property alike, both immovable and movable. The heir was not only the personal representative of the deceased, his administrator, or his executor, but he was also, in many respects, legally identical with the deceased. The heir carried on just where the deceased left off, for the theory of a Roman inheritance (hereditas) like that of an established monarchy was a series of continuous successions. It never died." Burdick, W.L. 1938, *The Principles of Roman Law,* 1989 reprint, W.M.W. Gaunt & Sons Inc., p. 581.
[53] The Church had only just suffered the Schism of 1054 where the Eastern Orthodox Church separated from the Roman Church. The prospect of another segment of the Church's jurisdiction being alienated would not have been thrilling and this is reason to suspect the mandate given to William I.
[54] Duggan 1982, p.368.
[55] Thus tacitly ensuring to the Crown a resource of experienced personnel for juridical purposes.
[56] Goodman 1995, p.225; Thurston 1912.
[57] Paton, 1893, p.6.

The geographical isolation of England and its newly-conquered status, together with the English Crown's acquiescence to the church's increased influence in the legal system, enabled William I to avoid direct and signal social consequences from the Investiture Struggle. The ecclesiastical personnel during William I's reign still took part in government, the English Crown still maintained an integral influence over ecclesiastical appointment or election, and England took a divergent path in its governmental and legal system to that of the other European nations. As Goodman, and Berman both point out[58], the political system of the mutually advantageous positions of church and secular state had changed in England, and yet survived.

The ramifications of the conflict, however, were far more momentous than either the Papacy or the *regnal* rulers could have imagined. Gregory VII had appealed to the law to convince the secular rulers to bow to Papal power. This initiated a major change in the way 'law' was used, and therefore significantly changed the way it was studied. During the time of this conflict, the law of England was canvassed in the first written treatise by the Chief Justice of the King's Court of Henry II, Ranulf de Glanvill.[59] Gratian codified the Canon Decretals, and systematic study of Roman and Canon law was widespread in the Universities in Europe. In addition, Anselm, Lanfranc's successor, also wrote the logically-based thesis *Cur Homo Deus* (Why God-man?) in 1099, which was based on the feudal law of the times.[60] Peter Lombard wrote *Libri Sententiarum* in 1150, "the first treatise on systematic theology," which remained a major Catholic Church work long

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[58] Goodman 1995, chapter 7; Berman 1983 asserts in detail the impact on all aspects of law, from criminal to commercial, can be theoretically tied in one way or another to the processes initiated in the conflict between secular and sacred authorities through the Papal Revolution.

[59] It is to be noted that Glanvill manifests knowledge of Canon law, Roman law, and English law and was a cleric. There is some dispute about Glanvill's authorship cf. Milsom 1981, pp. 18, 37; Baker 1990, pp. 15-16; Plucknett 1956, p.18.

[60] Anonymous 2001, "Anselm of Canterbury" *Encyclopaedia Britannica* online at http://www.brittanica.com/bcom/eb/article/5/0,5716,7815+4,00.html .

after Aquinas wrote *Summa Theologica* a century later.[61] Through the changing role of 'law,' the legitimacy of authority, and especially the role of secular versus Papal authority, changed radically. Rational proof, without reference to supernatural power, became the basis of the defense of Christianity; reason was used to subdue argument, and the church's worldview turned distinctly legal.

Anselm's analysis of Christ's atonement started with the seemingly impossible object of proving "from reason alone" the necessity of the sacrifice of Christ for man's sin. By explaining in rational terms the necessity of God's sacrifice through Christ, Anselm answered the question of the need and extent of the sacrifice of the God-man, Christ, in a distinctly legal and methodical dialectic. By connecting legal thought with rational defense of the Gospel of Christ, Anselm connected legal reason with ecclesiastical necessity. "[I]t was [Anselm's] theory that first gave Western theology its distinctive character and its distinctive connection with Western jurisprudence."[62] It was, at heart, the pronouncement of theology explained in legal terms, the impact of which could not have been foreseen by its author or 12th century readers. Anselm laid a theoretical foundation for Western jurisprudence,[63] appealing to the logical mind by promoting a theology of law.[64]

Anselm's 'theology of law' put 'law' as the basis for justifying theology. Within this framework is the underlying presupposition that men are subject, irregardless of caste, birth, possessions, or merit, to the 'rule of law'. The 'rule of law' later formed the

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[61] Berman 1983, pp. 174-5.
[62] Berman 1983, p. 177.
[63] For a wider perspective on the growth of the study of law in the university system in Europe during both the Investiture conflict and the Great Schism of 1378, see Ullmann, W. 1962; 1975; and 1977.
[64] Weber, A., 1896, *History of Philosophy,* Thilly translation (1908), online, the Medieval Sourcebook available at http://www.fordham.edu/halsall/basis/anselm-intro.html .

theoretical basis of the English legal system. The subsequent struggle which Anselm endured with Henry I over the right of the English King in the lay investiture of the agents of the church culminated in Henry renouncing his right to invest the ring and crossier (staff) in clerics at the Synod of Westminster in 1107.[65] The change in the basis for legal judgment, from appeal to supernatural forces to appeal to legal reason, assaulted the base of the customary folklaw, subjugating custom to the sieve of reason and thought. Thereafter, the English clan's folklaw custom accelerated in its social decline, and law based on reasonable notions of justice, accelerated its social and legal ascension. 'Custom' thereafter, began to be judged as either 'good custom' and, therefore, included into the laws 'common to England,' or else judged as 'bad custom,' and overruled and forsaken by the English King's Justices. The formation of a modern concept of English common law had started. Berman, building on Maitland's statement that the twelfth century was a 'legal century', has called it "*the* legal century".[66]

Paradoxically, the long-term result of the church's reversion to legal reasoning was the opposite of the original intention of Gregory VII in divesting secular influence from the church. His original intention had been to free the church from the humanistic and degrading influence of less-than-spiritually-motivated nobles and kings. The very tool which enabled his vision to be accomplished, albeit after his death, was the tool which changed the epistemological perspective of the very nobility he wished to contain, and

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[65] The Synod of Westminster, however, provided a model upon which the Concordat of Worms was fashioned in 1122 which settled, at least tentatively, the Investiture Struggle in Europe. Anselm was exiled to Rome for a lengthy period (1103 to at least August, 1106) during what was probably the negotiation of the terms for the Synod of Westminster. The king required that although he renounced his right to invest the ring and crossier, he required that the bishops do homage to him prior to the investment by the superior cleric. See Kemp, J. A. 2001, "The Satisfaction Theory of Redemption", *Encyclopedia Brittanica,* online http:///www.brittanica.com/eb/article?eu=7815&tocid=328 . Also see Keck, K.R. 1996, "Anselm of Canterbury," The Ecole Initiative, online edition, http://cedar.evansville.edu/~ecoleweb/glossary/anselmc.html .

[66] Berman 1983, p.120.

was salient in forming the modern concept of a State subject to the rule of law, not the rule of the church. Success for the church, in a way, came at a very high price.

The Investiture Struggle, therefore, gave birth to the epistemological dichotomy between secular and sacred in such a way that the legal processes of the English common law diverged from the legal systems of the nations in the other European monarchies. This uniqueness resulted from an amalgamation of customary law, feudal law, the centralisation of justice in the King's Court, and the influence of the ecclesiastical law. The changes did not instantly arise from the Norman Conquest of England in 1066, nor instantly from the Investiture Struggle. The most radical changes from previous English customary law, though, were a result of the Norman aristocratic imposition.[67]

The King and English Law

William I replaced nearly all previous tenants-in-chief with his own followers, rewarding them for their loyalty in the military campaign. His courts, however, soon after began to hear cases which would have been traditionally heard in the regional courts of the previous tenants-in-chief.[68] He heard disputes about land tenure, questions regarding descent and the vindication of privileges associated with feudal usage.

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[67] Indeed, Pollock and Maitland 1898, vol. 1, p.79, and Baker 1990, p.14, have described the Norman Conquest as a "disaster which determined the whole future of English law".

[68] Although it is easy to judge the changes William instituted from a modern perspective and a great chronological distance and label them as radical changes, it must be remembered that even the doling out of land to William's followers, normal practice for a conquering monarch, took from the time of the victory in 1066 to approximately the time of the Oath of Salisbury in 1086, i.e., twenty years. Far more radical changes might be said of the 20th century where such legislation as the Family Law Act 1975 (Cth), the Trade Practices Act 1974 (Cth), and Corporations Legislation changed fundamental aspects of the law in these areas in much more expeditious fashion.

William I first projected the kingly law outside of his own locality by travelling on 'eyre' which eventually became the 'assizes'.[69] He still had the kingly duty to dispense 'justice' to his subjects. Travelling justices from the King's Court would go on a regular systematic circuit with the King, hearing the cases which the lower courts either could not hear, or where they would not be able to administer a just outcome. The pleadings were rudimentary in the local courts, suffered from the strictest procedural difficulties, and were limited in the types of actions they could hear; mainly hearing disputes in the criminal sphere, and disputes with land. The King's justices, though, always possessed, by necessity, a clerical component.

At first, the King's Justices heard cases which were limited to those cases of equity where local courts were not possessed of any 'cause of action' which would give justice between the parties. In time, however, the types of matters which were being heard by the King's Court began to enlarge. As the King commanded the largest military, the local landed manor lords were unwilling to challenge the King's justice outright. The Anglo-Saxon notion that the King had the spiritual right and duty to administer 'justice' generated a philosophical problem with the local peoples. The problem was how to take a diverse collection of 'rules' administered locally in shire and borough, and unite them into a cohesive legal system.[70]

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[69] Baker, 1990, points out that by the time of Glanvill (c. 1180's) the King's Court was already recognisably travelling on "assize" with detailed instructions given in the treatise which dealt with the procedure to follow in the King's Court. See Baker 1990, pp. 9-11; Pollock and Maitland 1898, vol. 1, p. 85.

[70] Allan, D., and Hiscock, M. 1992, *The Law of Contract in Australia*, 2nd ed., CCH Australia, p. 567. Baker 1990, chapter 2, paints a somewhat different portrait with respect to the impact of the Norman invaders into England. His perspective, which essentially attributes the emerging forces of cohesion in English law to the institutions prior in time to William I, has some merit, although a synthesis of all perspectives available is beyond the scope of this thesis.

The church, through the supply of judges to the King's Court perpetuated its firm and undeniably powerful grasp upon the entire English legal system. The process of the change to a more centralised system of justice came through tumultuous social events, but as power centralised in the *Curia Regis*, the King's Court, the church injected its hatred of usury into the newly-forming English legal system.

Events from William I to Henry II

Henry I, who assumed the crown upon the (somewhat suspicious)[71] death of William the Conqueror's son, William Rufus, in 1100, affirmed the laws which were in existence in the time of King Edward (the Confessor).[72] When Henry died, however, he left only a daughter, Matilda, who soon became embroiled in a war for the English throne with Stephen, who had been sworn as king in 1135. Her son, the future Henry II, made compromise with King Stephen at the Treaty of Winchester in 1153, and became King of England upon Stephen's death in 1154. This created a conflict between the liegemen of Stephen and the liegemen of Henry, for each of the Kings had given land, or recognized the title to land through Kingly gift for the same land parcels, to different liegemen. As the land had been given on the honour of the tenant-in-chief or noble who granted it under the King, it created a tension in the social structure, for the grantor could not now take it away without breaking faith with the existing tenant. Many of the final grantees were militarily highly skilled and socially dangerous to have as disgruntled landless vagabonds. The manor lord depended upon the strength of the relationship with his men in order to uphold his power. This put the previous tenant in a difficult position when he

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[71] Palmer, R. 2000, *English Legal History Materials,* University of Houston, online http://vi.uh.edu/pages/bob/elhone/comcrts.html p.1.

tried to enforce land rights, raised through the settlement in the Treaty of Winchester of 1153, against those who were possessed, or *seised*, of the disputed land.

To overcome this, Henry started to issue written orders, called *writs*, which could be purchased, which ordered that when a current tenant died, the former tenant, who was *seised* of the property prior to the reign of Stephen, could regain possession. This *writ* could remain with the claimant for years, although later they were written directly to the sheriff of an area and contained a deforciant clause, intended for immediate execution.[73] This was called the *writ of right* and was the first major wholesale incursion of the royal prerogative into the legal realm of what had been the omnicompetent area of the local manor courts and personal relationships of the feudal lords. These writs were in relatively standard form, and were significant for a number of reasons.

Firstly, the source of the writ was not the manor lord who had given the land in fee to the liegeman. This enabled the nobility to pass the blame of the *disseisin, or* forcible dispossession, to the royal court, where the local manor lord would not have to break faith with the disseised tenant. Secondly, the writing of these documents warranted that there be a group of personnel who would actually carry out this duty ('writ-writers'). These writers were attached to the Chancery, or the King's personal Chaplain. The writ-writers soon developed an authority beyond the simple writ of right. Writs were issued for matters which fell into an additional authority of the writ-writer, and were written upon subjects which the King, as Sovereign, had pre-eminent jurisdiction. Writ-writers became familiar with the types of writs each could write, and those writs upon subjects

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[72] King Henry's coronation charter restored "the law of King Edward, together with those amendments by which my father, with the counsel of his barons, amended it." [clause 13]; also see Plucknett 1956, pp. 14-16.

which were forbidden to them. Over time this procedure formed a legal machine which appealed to 'rules' as a matter of law, and the common law formulary system, the *forms of actions* was born. "Our *legis actiones* gave way to a formulary system. Our law passes under the dominion of a system of writs which flow from the royal chancery."[74]

The availability of the writs for certain actions which had previously been the jurisdiction of the local courts, enabled contentious proceedings in local courts to be removed to the King's Court. From 1154, the jurisdiction of the King grew rapidly. The actions grew one by one, and as such, there was a tendency to avoid an outright confrontation over the land rights issue which had prompted the expansion.

> [The forms of action] grew up little by little. The age of rapid growth is that which lies between 1154 and 1272. During that age the Chancery was doling out actions one by one. There is no solemn *Actionem dabo* proclaimed to the world, but it becomes understood that a new writ is to be had or that an old writ, which hitherto might be had as a favour, is now 'a writ of course'. It was an empirical process, for the supply came in response to a demand; it was not dictated by an abstract jurisprudence; it was conditioned and perturbed by fiscal and political motives; it advanced along the old Roman road which leads from experiment to experiment.[75]

The resulting social conflict which arose from these writs was instrumental in breeding the civil war of 1173-74, where Henry II fought against his own son, the young Henry. Henry II's forces were victorious, however, and the Assize of Northampton of 1176, which sought to settle the kingdom and implement the peace between Henry II and his son, not only perpetuated the King's *regnal* longevity, it also expanded the availability of access to the King's Court. Within three years after the Assize of Northampton, the number of writs issued through the King's Court explodes. The King's justices hear and

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[73] Palmer, R. 2000, at http://vi.uh.edu/pages/bob/elhone/seisin.html at p.3-4/9.
[74] Pollock and Maitland 1898, vol 1, pp. 558-559.
[75] Pollock and Maitland 1898, vol. 1, p. 559.

decide cases, usurp the formerly manorial and feudal lords' powers, and the common law process is established.[76]

It was political conflict, therefore, and not a purposive jurisprudence which bred the common law of England. The disparate groupings of Germanic customary laws in the boroughs, shires and counties, were slowly changed from a community participatory model to the modern legal form where the judge, as one versed in law, was able to give judgment between conflicting parties. The grasp of the church over the proceedings was unmistakeable, and it need only be mentioned that, of course, the early judges in *eyre* were certainly *literati*. The resulting formulary system generated a need to record, systematise, and recognise former judgments, so that later judges could refer to the former judgments for guidance in disparate legal situations. In order to meet this need, the emerging system developed the idea of *stare decisis*.

Early Doctrine of Stare Decisis

The King's court, by nature, was mainly a travelling court. There was diversity in the regional customary laws. The King's justices, at first alongside the King in judgment, and then later by themselves on assize, changed from time to time. The doctrine of *stare decisis* emerged where the decisions of local cases administered by the King's Justices would be used to extract principles from which other cases similar by factual analogy could be consistently judged. This not only provided a trend toward overall legal consistency and centralisation of the legal process, it has also had far-reaching consequences in a number of areas of English law, the significance of which will be

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[76] Palmer, 2000, p.4/9.

further explored in Chapter Five. *Stare decisis* comprised an integral part of the common law, therefore, from the earliest conception period, the 11th to the late 13th century.

It is not certain exactly when the doctrine came into being. It is most likely that it took a gradual process from obscurity to legal recognition. Lord Denning[77] attributed recognition of *stare decisis* to Bracton sometime in the mid 13th century, although "it must not be thought that one judge brought the doctrine into being".[78] The doctrine was built upon the normative proposition that 'like cases are decided alike'. The underlying assumption of this proposition is the 'declaratory theory of the Bench'. This view dictates that judges only find and apply the law, providing consistency in the judicial process and enabling 'rules' to be used to settled cases without philosophical discussion at every level. This practice enabled cases to be disposed of more rapidly, thus giving ventilation to a social policy of efficiency. It also substantiated a social policy of predictability in the law. How the judge obtains authority to derive, declare, and enforce the law is another question altogether. This power must either be derived or self-evident.[79] The literature generated upon this aspect of common law court procedure is varied and problematic. A further analysis will be considered in Chapter Seven.

The church's position on usury was reinforced by the declaratory theory of the bench which promulgated the idea that the law was a rigid and absolute standard, to which the judge turned to settle a dispute between parties. The idea that judges only 'declare the law' enabled difficult issues to be settled by a pronouncement from the bench espousing the tenets of 'the law'. Previous judgments which brought usury practices before the

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[77] Denning LJ 1982, *What's Next in the Law?* Butterworths, p. 5.
[78] MacAdam and Pyke 1998, p.19.
[79] Cross, R. and Harris, J.W. 1991, *Precedent in English Law*, 4th edition, Oxford Clarendon Press, p.209.

court ensured, therefore, that the prohibition against the practice was upheld. At first, when the church held great power over every aspect of life, the challenge against the prohibition of usury was unthinkable. The judge would likely be a cleric, or at least trained by a cleric, and to make an attempt to justify such practice would be to openly proclaim that one belonged to "the damnable sect of the usurers".[80] In practical terms, therefore, the challenge was unthinkable.

> *If thou haft plaied the Ufurer with a man, that is, hafte lent hym Money looking to receiue backe againe more than thou gauest, not money onely, but more than thou gaueft, whether it bee Corne, or Wine, or Oile, or any thing els, if thou lookeft to receiue more backe than thou deliueredft, thou art an Vfurer, and in that to bee blamed*[81] [italics in the original]

Later, in the time from the 16th to the 18th centuries, when social pressure to challenge the rule became stronger, the doctrine of precedent gave judges the ability to avoid criticism that judges had extra-legal predilections diverging from practical commercial litigants by appealing to the doctrine of precedent regarding what was, or was not, part of English law.[82] As case judgments were reported more and more frequently in the plea rolls, the doctrine of precedent became a tool in the hands of the legal professionals who collectively formed as English law took a divergent legal direction from the other European monarchies. The next section will examine the legal profession in England and the secular direction which the legal profession instilled in English law, despite its theological origin.

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[80] Caesar, P. 1578, *A General Discourse Against the Damnable Sect of Usurers,* 1972 reprint, Arno Press
[81] Caesar 1578, p. 13.
[82] The effect of the doctrine of precedent upon opportunity cost recovery is examined more carefully in Chapter Eight which examines relevant aspects of legal public policy.

The First Legal Professionals

Although Pollock illustrates that the early Anglo-Saxon courts were insufferably rigid in the pleadings and procedure,[83] the emerging centralisation of royal law in the King's Court and the writ process after 1154 added complexity in the legal order, and changed the social environment in a number of ways. Firstly, a group of men began to arise who knew the procedure well enough to be able to handle the complexities and intricacies for others who found themselves in legal conflicts, and secondly, it meant that a legal central bureaucracy was forming around the King's Court. Access to the King's Court only through a royal writ meant that those seeking the King's attention in a case needed to obtain a writ to continue the action in the *curia regis*. If the *cause of action* did not fall into a recognised class, the King's Court might not have jurisdiction and the case would be thrown back into a local court where the claimant might fail to have a remedy. It was very important, therefore, for the wording of the complaint to adhere strictly to the form which was needed to invoke the King's justice, even if it contained blatant fictions. The wording in a writ of trespass, for example, might contain the words "with force and arms and against the King's peace he broke the plaintiff's close ..."[84] even though no arms or force was used in the alleged trespass. In order to invoke the jurisdiction of the King's Court the plaintiff would have to allege some misdemeanour which would justify the intervention in what would normally be the jurisdiction of the local court. This adherence to legal fiction carried on even past Blackstone's day. Maitland remarks that the English legal system itself would have been in jeopardy of collapse if these fictions had not been perpetuated.[85]

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[83] Pollock 1899, pp. 212-216.
[84] Maitland, F.W. 1909, *Forms of Action at Common Law* online, the Medieval Sourcebook, available at http://www.fordham.edu/halsall/basis/maitland-formsofaction.html at p.4/50.

In the time from Henry I to Henry II a distinct class of persons is recognisable; *serjeants at law*, men willing to stand for others in a legal dispute.[86] As early as the Court of King John (1199) some fourteen men appear in the early court documents with enough frequency as "to suggest that they may have been professional lawyers".[87] It is without doubt, though, that at least at the time of Edward I, the legal profession in England is in existence.

> We do not know how it came about that the litigant was allowed to speak through the mouth of another, though it has been suggested that it was not to prevent mistakes being made but to prevent them being fatal. Certainly the litigant could disavow what was said on his behalf; and perhaps it was only "said" by him when he formally adopted it.[88]

In 1275, chapter twenty-nine of the *Statute of Westminster I* legislated guidelines concerned with misconduct in the legal profession, indicating that the legal profession was in existence and sufficiently developed to warrant such legislative attention. This is more acutely significant because legislation was still a novel occurrence at the time.

The significance of a legal profession does not end there. Firstly, the development of a class of persons who could represent a litigant, without the presence of the litigant in court, made it possible for the development of a court process which ran apart from the personal involvement of those who were accusers, accused, and witnesses. This development was the precursor to a bureaucracy which ran as a matter of course and relied upon rules. As professionalism began to proliferate in the legal profession from 1275-1290, rules became more important, solidifying the underlying principle of damages awards in part as the choice of an applicable rule to dispose of a case. Secondly,

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[85] *Ibid.*

[86] Brand, P. 1992, *The Making of the Common Law*, Hambledon Press, p. 50; Milsom, S.F.C. 1969, *Historical Foundations of the Common Law*, London, Butterworths, pp. 26-28.

those who constituted the actual judges in cases were drawn from the serjeants practicing in court. [89] Thus a professional serjeant could theoretically sit at judgment in a case, then step down in the next case to practice for a client. Brand outlines the amercement of John Bucuinte in 1220, in all probability for sitting in judgment in a case where he had been hired to represent a client.[90] Judges were, in fact, drawn from a *legal* background nearly exclusively, and this meant by default, from the *ecclesiastical* ranks of the *literati*.

Another significance attached to the emergence of a legal profession comes with the time frame of its materialization. The church was at the peak of its social influence, and although England had escaped to a large degree the impact of the ascendancy of Roman Papal rule, the church still controlled the education process. The church churned out the literate servants to act in the courts of the King and the county courts both in the cities and in rural areas. The word 'cleric' was synonymous with both the benefit of clergy in the legal process, and the literate men of the time[91]. If a person was 'cleric', they were considered *literati*, and vice versa. Soon a mass of literate men were thought of as 'secular' clergy, for they were neither ordained nor did they work for the church as an institution in any sense, who were put into positions of administration and influence.

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[87] Stenton, D. M. 1966, *Pleas Before the King or His Justices, 1198-1212,* Seldon Society, London; Brand 1992, p. 50-1.
[88] Milsom 1969, p. 28.
[89] Herz, M. 1999, "Coif Comes to Cardozo", *Cardozo Life*, Spring 1999, online edition at http://www.cardozo.net/life/spring1999/coif/ p.1.
[90] The outline of Chew and Weinbaum 1970, *The London Eyre of 1244*, London, Record Society cited in Brand 1992, p. 6, note 18. The note draws attention to the fact that there was a sufficient need for specific regulations against the practice of both sitting in judgment and practicing as a serjeant in the same case in London City Courts from the time prior to 1244 for a proscription to be entrenched in legislation.
[91] It was tempting to include a section on the use and abuse of the benefit of clergy, but it proved to be so well known in the literature that it was considered superfluous.

As a professional class of serjeants-at-law began to be recognised in the court system, it bred the need for legal education.[92] This educational process was formed through the Inns of Court, a place where apprentices came to learn the language and nuances of the law. What was unique was that the law that they learned was *English* law, although Canon and Roman law were also canvassed to some degree. As English law was the primary law, the *counters*, men trained in the processes of the pleading, or counting, began to divorce from the need to depend upon Roman law (and daresay Canon law) for legal principles. The Canon law and the Roman law began to hold no interest for the upcoming English law students. They were interested in the lucrative practice and prestige which came with the office of *serjeant at law*, and instead of being trained as canonists in the clerical tradition, were most likely taught the law by the reading of Bracton and Glanvill, and by an education through association in or around the courts in London. Bracton, it has been thought, was an attempt to integrate both the English common law and the learned law of the European Universities, and was originally:

> addressed to English lawyers who had been brought up in the clerical tradition and expected a law-book to be built upon the plan of contemporary civilian and canonical works but that in the second half of the thirteenth century this public 'was rapidly being replaced by another whose tastes were very different. The academic Roman, Latin and clerical tradition had no attraction for the new men who were insular, French and lay.[93]

The changes, therefore, which eventually segregated *regnal* legal power from that of the church were birthed in the very courts forged by ecclesiastical *literati*. The epicentre of the legal process became the *counting*, which stemmed from the oral tradition of the courts. Milsom asserts that it surely must have been the rise of the fixed bench in the

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[92] Goodman's account frames legal education as an utmost necessity, and it is apparent in hindsight that the legal machine erected during the Investiture Struggle, gained more momentum than could possibly have been imagined during the contemporary age of the rulers involved in its instigation. See Goodman 1995 p. 241-245.

court of common pleas which allowed surrogates in the *narratio*, or the formal making of the count in court.[94] The recognition of the forms of actions in the middle of the 13th century in the *Brevia Placitata*, and the rise of Bracton's influence on the legal practitioners and students of the same period, concurrently shifted both the direction of study and the speed of ascendancy of a legal profession. This same legal profession would later view ecclesiastical participation in the legal system as unnecessary.[95]

An independent English legal profession sparked another unforeseen legal process. As the adversarial parties now had access to legal representatives who specialised as surrogate legal warriors in conflicts, each side to the litigation emphasised the past case judgments which threw a more favourable light upon their own legal position, and of course, also brought to the mind of the bench those cases which could be used by analogy to deprecate the opposing party's legal position. Thus, a need for the recording of past case judgments caused records of cases to be kept as a routine in the court sessions. At first, single parties began to see the value of recording judgments in volumes for students to study and practitioners to use. After a time, official records were kept. From about 1270, plea rolls,[96] and later pipe rolls, still survive, known as the Year Book Reports. This was both the start of legal case reporting, which had a significant impact on the doctrine of *stare decisis*, as well and the preserving in accounts the ritual and form of the pleadings and procedure inside the courtroom itself.

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[93] Plucknett T.F.T. 1958, *Early English Legal Literature*, Cambridge University Press, p. 96; Brand 1992, p. 73 note 88.
[94] Milsom 1969, p. 28.
[95] Plucknett 1958, p.30.
[96] The King's Court rolls were the *Coram Reges.*

The litigious process inside the courtroom began by the making of a formal count, and then a formal defence. There might be a rebuttal of the defence offered, and the abandonment of the first defence or the rebuttal of the plaintiff's assault against it. Eventually, although perhaps only after a great oral duel is performed before the bench, the argument is narrowed to a single issue, or a very few issues, which are truly in dispute before the parties. From this very short list of issues, either issues in law, or in fact (or both), the rest of the trial between the parties was planned and fought. If the crucial issue to be decided was an issue of law, then after argument the justices would render judgment between the parties after some additional consideration. If the crucial issue was one of fact, then a jury was sworn, and the facts alleged in the course of pleading were true or not, according to the findings of the jury. Judgment was then given to one of the parties.

The appeal to a 'rule' as the settlement of the 'issue' in question started therefore from the earliest inception of the legal profession. The entrenchment of the appeal to, and the routine of searching for, the applicable 'rule' was a significant step in forging the English legal process and formed the central pillar in the conflict between the parties. The modern common law model grew from this early beginning.

This emphasis upon the rule of law is somewhat doubted, however, by Pollock and Maitland,[97] and Bigelow[98] who remind us that the early 'rule of law' was in fact, the 'rule of writs'. Perhaps they infer that this was the inevitable mechanism of following the Roman legal logic of forms, and the "spirit that built up the Roman law".[99] In any event,

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[97] Pollock and Maitland 1898, p. 563.
[98] Bigelow 1987, chapter IV.
[99] Pollock and Maitland 1898, p. 564.

they conclude, through this process the English unwittingly reproduced, in a curiously unique fashion, much of the early Roman experience. "England was unconsciously reproducing [Roman] history; it was developing a formulary system which in the ages that were coming would be the strongest bulwark against Romanism and severe our English law from all her sisters."[100]

It was during this time that the Medieval Inquisition, mentioned in the previous chapter, began.[101] It reached it peak after the 4th Lateran Council of 1215. The inquisitors' reach into England was tempered somewhat by the attitude of the English Sovereign to Papal interference in domestic English affairs which arose shortly after the conquest by William I, and had forced the church to institute the Great Interdict during John's reign, from 1208 to 1213. The legal ascendance of the King's Courts, the integral part played in the English legal process by clerics, the gradual decline of the ecclesiastical courts concomitant with the rise of the common law in the late 13th and early 14th centuries, and the generation of case reports which served to disseminate legal knowledge through the education of an independent legal profession, all served, albeit only gradually, to produce a unique legal system which both embraced, and then ironically rejected the church's influence, the majority of which was accomplished during the century of tragedy from about about 1350 to 1453.

The Break From Rome

In Chapter Two it was mentioned that one of the major factors which led to the reassessment of the Church's role in medieval society was the fall of Constantinople to

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[100] Pollock and Maitland 1898, 558.
[101] Hamilton 1981.

the Muslim hordes in 1453. The city had been sacked by the 'Christian' soldiers of the Fourth Crusade in 1204 amidst civil strife within the city itself, a task not otherwise feasible given the strength of the city-wall fortification. This weakened the city significantly, leading to an inability to recover to its former strength.[102] When it fell to the Muslim hoards of the Ottoman Turks, Biblical scholars fled, taking the Greek texts of the New Testament and many other manuscripts with them to avoid the great city's siege.

It was these very Greek texts which inspired Erasmus and Colet to take an anti-cleric stand in the time of Henry VII and Henry VIII. They were hostile to the Romanist monks as "protagonists of obscurantism", and were "inflamed with indignation at the tricks by which the baser sort of clergy conjured money from the ignorant and superstitious".[103] Henry VIII himself had been educated in this anti-clericalism from the Oxford group under Erasmus, and this anti-papal influence played on Henry VIII's attitude toward Rome. When Thomas More suggested that Henry VIII break from Rome, his coup against the Roman Church was fitful and vicious. He not only declared a new church government under himself in 1533, he confiscated and sold church lands, monasteries, and goods. In earlier centuries, English Kings would have suffered popular revolt if these things had been done. However, the social upheaval and rejection of the Papacy during this time was really only the final straw in the larger process of social reassessment which began in the aftermath of the plague in England starting in about 1350. The succeeding events, covered in the previous chapter, the enclosures which displaced so many small farmers starting in 1517 concurrent with the news of the Lutheran revolt, the growing social realisation that there were workable secular alternatives to the church's

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[102] It was ironic that the Medieval world's greatest icon of Christianity should fall to the Muslims by the act of other Christians.
[103] Trevelyan, G. 1942, *English Social History*, Spottiswoode, Ballantyne & Co. Ltd., 1948 edition, p. 101.

rule, and the rise of individual thought, all were symptomatic of a renovated social climate where the Catholic Church played a far smaller social role than had previously been the case. Henry VIII and Thomas More took advantage of the new social climate to initiate the final break from Rome.

Not long after Henry asserted his supremacy over Rome, in 1545, Henry legalised the practice of interest-taking.[104] The Henrician statute did not render usury lawful, but instead redefined it to be any interest charged in excess of 10%. The penalty for violation was a significant fine and risk of imprisonment. "Ten per cent might be stipulated 'for the forbearinge or givinge daye of payment', so that the theory of the matter was that the debtor must be in *mora*." [105] Despite Henry's legislative attempt to legalise the practice of usury, courts still refused to enforce contracts where an interest component was in dispute.[106] Henry's statute was repealed, soon after its passing, in 1552 "by A *Byll against Usurie*,[107] which complained that people had misunderstood the Henrician Statute, which had never been intended to permit usury."[108] In 1571, a new *Acte Against Usurie*[109] was passed which introduced a combination of the old penalty under the 1545 statute, and a new provision which rendered any contract with interest over 10% completely void. The sum total of the new legislation was that a 'usurer' according to the statute was punished more harshly than the 1545 Henrician Statute, combining in addition to the fines and imprisonment available to courts under the earlier statute the avoidance of the contract as well.

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[104] 37 Hen. VIII, c.9.
[105] Simpson, A.W.B. 1987a, *A History of the Common Law of Contract,* Oxford, Clarendon Press, p. 513.
[106] Holdsworth, W. 1903, *A History of the English Law*, 1976 reprint, Methuen & Co. Ltd., Sweet and Maxwell, vol 8, p. 110.
[107] 5 and 6 Edw. VI, c. 20.
[108] Simpson 1987, p. 513.

The cases during the subsequent century reflect an uncertain and pioneering attitude in some members of the bench. In 1622, in *Sanderson vers Warner,* the plaintiff brought suit in *assumpsit* for a debt and interest[110] due in consideration for a promise to forbear a debt.[111] The court refused to give verdict for fear of creating a precedent, recognising that usage in common terms had grown so strong that trying to rule against the collection of usury would fly in the face of practical reality. Ley CJ, Houghton and Chamberlain JJ thought "usury which is allowed by statute has obtained such strength by usage, that it would be a great impediment to traffic and commerce if it should be impeached" but Dodderidge J. "on the other hand, took the view that all usury was unlawful both by statute and common law and the law of God; ... The only thing that was permissible was damages for loss of *interesse* through non-payment".[112]

In 1624, in *Oliver v. Oliver,* Dodderidge J. added to the confusion over usury by reiterating his opposition to all forms of usury in holding that usury was against the public good or "*quia encounter ley natural*", and was "monstrous".[113] The conflict between the law, religion, and conscience continued into the passing of the *Statute of Usury* of 1623, where clause 4 contained a provision that although the tolerated rate was to be eight per cent, it was not to be thought to make usury permissible in either religion

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[109] 13 Eliz. I, c. 8 made perpetual 39 Eliz. I, c. 18.

[110] *Assumpsit* provides the root of the modern word 'assume' and was an action whereby a plaintiff brought charge against a defendant for assuming the liability to pay for a good or service, sometimes on behalf of another.

[111] (1622) Palmer 291; 81 E.R. 1087.

[112] Dodderidge J. argued that usury was "*encounter ley common & ley de Dieu*". This translation is from Simpson 1987 pp. 514-5; the original judgment is in legal French. The implication of the concession of Dodderidge J. in granting permission for interest for time delay seems to have escaped both himself and other members of the bench, for time allotted for the use of a sum of money runs both prior to the due date, as well as afterwards.

[113] 2 Rolle. 469; (1624) 81 E.R. 922; also mentioned Simpson 1987, p. 515. Knight asserts that this expression, "*encounter ley*", and especially the phrase "*encounter ley natural*" formed the starting point for the recognition that courts make rulings according to public policy based on the "common good". Winfield supports this. This point will be considered again in Chapter Eight, which examines public policy regarding

or conscience.[114] In 1632, in *Harris v Richards,*[115] Houghton J. allowed interest, and differentiated between usury and *interesse*, whether it was *interesse lucri*, or *interesse damni.*[116]

The difference between legal interest and usury, in the courts' opinion, rested upon the intention of the parties to the contract. Annuities, even in canon law, were legal, and therefore a precedent existed for an investor's return, but which was *different* from the capital sum. The focus lay upon the intention to receive back the capital sum in addition to the interest, which was forbidden unless the borrower was placed in *mora* for withholding the debt past its due date. If the borrower could avoid payment of the interest by paying promptly, or where there was a clear hazard that no money might be paid back at all, then the contract was not usurious. Dodderidge J., who had opposed all forms of usury in the above cases, attempted in 1618, in *Roberts v Tremayne*[117], to exempt contracts of hazard from the taint of usury. Contractors incorporated hazards, the possibility for which they were to be recompensed, into contract documents which, as Simpson correctly points out, were "quite unlikely to occur",[118] merely as a pretense to avoid the legal prohibition on the practice of usury.[119]

These cases reflected the more widespread social phenomenon where the entire relationship of law and religion was undergoing fundamental social and legal

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the awards of interest. See Knight, W.M.S. 1922, "Public Policy in English Law", 38 L.Q.R. 207; Winfield, P. H. 1929, "Public Policy in the English Common Law", 42 Harv. L. Rev. 76.

[114] 21 James I, c. 17.

[115] (1632) Cro. Car. 273, 79 E.R. 838.

[116] Simpson 1987, p. 515 notes this case as a milestone, for the implication in the report, that Houghton J. allowed compound interest where the plaintiff had forborne payment of sums due for three years, shows that economic considerations were making slow, but inevitable inroads into the thinking of judges, who increasingly defined usury in terms which divorced it from centuries of prior legal opinion.

[117] (1618) Cro. Jac. 509; 79 E.R. 433.

[118] Simpson 1987, p. 518.

reassessment. During the period of the 16th to 18th century the manner in which Christian principles were 'safeguarded' in law "pass from the ecclesiastical courts to the ordinary courts of law and equity."[120] At the beginning of the period, the judiciary of the secular courts, by now nearly completely comprised of members who had studied English law at the Inns of Court in London, were delineating between issues to be heard in the King's Court system and those to be heard in the ecclesiastical courts. In 1618, in *Atwood's Case*[121] the King's Bench ruled "that the uttering of scandalous words against the established religion, was certainly not a matter over which the justices of the peace had jurisdiction ..." In the same year, in *Traske's Case*[122] the Star Chamber "sentenced the accused for maintaining the theses that the Jewish and not the Christian Sabbath should be observed", but they did so only because of their view that there was a sedition in the preaching of these opinions which was scandalous to the King, bishops, and clergy. This is a stark contrast to the 1612 case of Legate where, being condemned as a heretic, he was burned.[123] When, in 1677, the ecclesiastical courts lost the ability to inflict capital punishment, actions for heresy disappeared. Over the next 50 years, the courts retreated from the earlier views regarding heresy. In 1729 in *R. v Woolston*,[124] the court was careful to point out that disputes between scholars on fine "controverted points" was not heresy. In the intervening time the *Toleration Act 1689*[125] had been passed, which removed social restrictions previously placed on religious dissenters, and the courts interpreted the Act widely.

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[119] Wilson, T. 1572, *A Discourse Upon Usury*, London, Frank Cass & Co., p. 108
[120] Holdsworth 1903, vol. 8, p. 406.
[121] (1618) Cro. Jac. 421; 79 E.R. 359.
[122] (1618) Hob. 236; 80 E.R. 382.
[123] Holdworth 1903, p. 406, vol. 1, p. 618.
[124] (1729) 2 str. 834.
[125] (1689) 1 Wil. & Mary c. 18.

The forms of action developed during the previous centuries of church influence did not change concomitant with the decay in the relationship between church and state which marked the 17th and 18th centuries. Through the doctrine of *stare decisis*, the courts maintained a parochial worldview, reluctant to change the old and established forms of actions. Indeed, "lawyers are, by nature, reluctant to abandon ancient forms".[126] Maitland summed up the lingering ability of forms of action to influence the way the common law fits new factual situations into old forms when he stated in the first decade of the 20th century, "[t]he forms of actions we have buried, but they still rule us from their graves".[127] The common law, therefore, did not instantly change its attitude toward usury, nor relinquish its religious ancestry. Recognition of the loss inflicted upon lenders for the delay in payment of a sum due on a date certain competed with the religious attitude that all forms of usury were hateful. Thus, plaintiffs' arguments regarding opportunity losses fell on deaf ears in the courts and went uncompensated.

In *Howard v. Harris* in 1683, however, Lord Guilford, handing down judgment at the Lord Keeper's Court in November of that year, gave interest upon interest in the recovery of a debt due upon a mortgage in forfeiture. The case is relevant for its *dicta* regarding the interest award, specifically, interest upon interest, or compound interest. Counsel for the defendant widow, against whom compound interest was being claimed, stated "it was never known in this court that interest upon interest was at any time allowed in any case", and "this had never been practiced and there was not any such precedent in the court..."[128] This may have been the first *reported* decision which allowed compound interest, based on the terms of a contract of mortgage. An award of compound interest

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[126] Simpson 1987, p. 122.
[127] Maitland, F.W. 1909, *Forms of Actions at Common Law,* 1936 reprint, Chaytor and Whittaker (eds.), Cambridge University Press.

would have been unthinkable a generation earlier. Case reports, though, were not as precise as in modern times. This makes it difficult to see a clear delineation in the way courts dealt with the issues of usury and opportunity cost. What is certain, though, is that the common law did not maintain complete stasis, but was changing slowly to meet new social demands.

In the first half of the 18th century, some cases reveal that judges who were more aware of the changes in the commercial and social climate began to refuse to adhere to the old ways. The most notable was Lord Mansfield, Chief Justice of the King's Bench. Although Washington called Lord Mansfield an "arch conservative",[129] Mansfield recognised the injustice perpetrated upon plaintiffs where defendants withheld proper payment of debts when due. Defendants could then wait until the action went to court, and either pay the debt just before the action was to be heard, thus extinguishing the cause of action, or else just let judgment run against them, for the costs of the action were less in some transactions than the interest component of the contract price.

Legal practitioners who argued strongly against the restrictions on lending contained in the usury statutes often manifested metamorphic change when elevated to the bench. In 1750, in *Chesterfield v Janssen,*[130] Lord Mansfield, as Solicitor-General Murray, had argued vehemently against the intervention of equity into the realm of contracts freely given. He was successful on technical grounds, as well as the argument against the court's intervention to the detriment of freedom of contract and commerce. Solicitor-General Murray:

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[128] *Howard v Harris* [1558-1774] All E.R. Rep. 609 at 611.
[129] Washington, G. 1975, "Innovation in Nineteenth Century Contract Law", [1975] 91 L.Q.R.247.

> [argued] that the plaintiffs sought to turn the courts of equity into legislatures: "Then what is this public good, this rule they so much insist on, that no man shall spend above his annual income? How can that be prevented? Is it in human nature? He will spend it; men of the best sense have done it; where will be the publick utility" Where the encouragement to industry? Will the court consider every man as a lunatick who exceeds his income?[131]

As Chief Justice of the King's Bench, Mansfield thought it his duty, in contrast to his own opinion, that he should strictly uphold the usury statutes. His own sense of internal cognitive dissonance forced him in later cases to recognise that there was a stark injustice where defendants willfully withheld sums from plaintiffs, an injustice where he was willing to give damages in recompense for the time delay in payment.[132] The Chief Justices who succeeded Lord Mansfield, however, did not have the progressive attitude toward commerce which had motivated their predecessor to hand down judgments which recognised the opportunity losses inflicted upon plaintiffs. Their reluctance was compounded by a frigid conservatism which swept England during the late 18th and 19th centuries which stifled common law recognition of economic principles.

The Common Law and the Assault of Principles

In the late 18th and 19th centuries an English social renovation changed prevailing views on the role of the State, views toward legislation, the influence of economists, and the development of modern-style dialogue with respect to various social views. There seemed to be a widespread search for a 'principle' which underpinned important aspects of social phenomena:

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[130] 1 Atk. 301 (1750); Oldham, J. 1992, *Mansfield Manuscripts and the Growth of the English Law in the Eighteenth Century*, University of North Carolina Press, vol. 1, pp. 643-44.
[131] Cited in Oldham 1992, p. 644.
[132] The cases are considered in Chapter Four.

> There were principles of political economy, principles of ethics and morality, principles of jurisprudence, principles of political behaviour, principles of commercial behaviour; there were also Men of Principle; and there was the contrast between Principle and Expediency.[133]

During this time, many cases reveal that the courts sought to entrench 'rules' for decisions which had been previously left to the discretion of the courts. Major cases regarding the losses for tortious conduct or breach of contract, the *rationes* of which have reached down to the present day, were handed down during this period. Whether those judgments can still be justified in the modern context is another matter. The cases reveal that the courts may not have had expertise in commercial matters, at least from a modern perspective, and the common law vacillated between the medieval hatred for usury, and the modern recognition of time value of money until 1829. There were cases where courts awarded the opportunity cost of overdue sums of money, normally endowed under a jury's discretion. Up to this time the cases reflect a tension between the 'old' and the 'new', which the courts finally resolved by retreating into the safety of conservatism. This will be considered in the next chapter which will show how the courts transmuted opportunity costs from a rule of evidence, to a rule of law.

Summary

The struggle between the *regnal* powers and the *sacerdotal* powers over social and legal supremacy was based on legal argument. This, in turn, influenced the way that law was studied, and how it was used in both social discourse and in political competition. The original intention of the church had been to divest itself of the 'ungodly' secular influence under which it suffered from the 8th century to the 11th century. The Gregorian Reforms, provided a platform for the justification of the church's independence from the

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[133] Atiyah, 1979, pp. 345-6.

secular influence of European nobility interested in manipulating the resources of the church for selfish gain. In the conflict, the whole of European and English society was subject to a fundamental shift where the concept of law changed in its formation, education, support, and usage. Having 'won' the Investiture Struggle, the church was at the pinnacle of social influence during the crucial formation period of the English common law, the 12th and 13th centuries.

This chapter traced the historical factors which comprised the making of the common law and its subsequent endowment with the church's hatred of usury. The common law formed with clerics as judges, and an ecclesiastical mandate as support for its existence. Clerics were the only literate class of persons upon which the European Monarchies could draw to carry out administrative tasks of government. The church's acrimony towards the practice of usury was therefore propagated in the common law through the formulary system and the doctrine of precedent, through the clerics who administered justice in the King's Court. The clergy imbued the common law with an intolerance of the practice of usury, entrenching this acrimony into the common law through the formulary system and the doctrine of precedent. As Papal leadership waned, and eventually was discarded through the Protestant Reformation and the formation of the Church of England under Henry VIII, the hatred for the practice of usury lingered on.

Although the courts still ruled that usurious practice was a 'hateful practice', the issue began to be left to juries to decide. For a brief period, around the end of the 18th century, cases reveal that juries awarded additional losses to plaintiffs at trial, recognising the time value of money. In the beginning of the 19th century, there was a distinctively conservative social paradigm shift in the English aristocracy. The recovery for the lost use of sums overdue, previously left for juries to decide, was removed from their

discretion and a prohibition on recovery was entrenched as a 'rule of law'. The losses for the use of land, in contrast, were awarded if proven. This underlying philosophical contradiction of the conflict referred to in this thesis between the way the courts dealt with assets of real property, and assets of money, is named the 'classification dilemma'.

CHAPTER FOUR : THE CLASSIFICATION DILEMMA

Introduction

Between the 12th and 16th centuries the common law developed recognised forms of action. Paradoxically, there was also a flexibility in the law associated with the surrounding societal changes. Abbot observed that "in theory the law did not change, but in six centuries of reporting it can be seen that the growth of legal thought was directly related to the evolution of the society it served"[1]. Epstein notes that, "[o]ne of the most persistent themes in the legal literature is that the common law grows and matures in response to social change. ... Older principles are distinguished away or swept aside by judges who recognize their obsolescence".[2] This has not always been the accepted view. The declaratory theory of the bench dictated that judges only find the law, not make the law. Historically, a philosophical tension arose between the previous orthodoxy of the declaratory theory, and the subsequent orthodoxy that judges help to change the law.[3]

This ability to make law within a conservative framework may differentiate the common law from any other legal system. This is relevant, for the focus of this chapter is the period from the mid 18th century to the mid-1980's in both Australia and England, where the outworking of judge-made law is quite evident. The major leading cases on the subject of damages in tort and breach of contract were handed down during the first half of the 19th century. These cases have dictated the starting point and outcome of civil

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[1] Abbott, L.W. 1973, *Law Reporting in England 1485-1585*, Athlone Press, University of London, p.4.
[2] Epstein, R. A. 1980, [1980] 9 *Journal of Legal Studies* 253 at 254.
[3] Washington, G. 1975, "Innovation in Nineteenth Century Contract Law", [1975] 91 L.Q.R. 247; Brenner, S., and Spaeth, H. 1995, *Stare Indecisis*, Cambridge University Press; Denning LJ 1959, *From Precedent*

litigation on the subject of opportunity cost recovery from that time until major changes in Australia in 1989. During this period the courts refused to engage in a logical and practical dialogue which recognized the perpetration of injustice against plaintiffs who sought recovery of losses incurred for the delay in obtaining payment of debt or damages.

This chapter will examine recovery of opportunity cost associated with interests in real property, and then assess the prohibition of recovery of opportunity costs associated with money. Both of these are considered as assets for the purpose of this thesis. The religious hostility to the practice of usury, examined above, accounts for the reluctance of common law courts to enforce usurious contracts. The courts allowed analogous recovery for the lost use of fixed assets, in contrast to the prohibition of recovery for the lost use of money. This is a dilemma arising purely from the classification of the respective assets. A plaintiff could easily recover for the lost use of real property, but a plaintiff could not recover for the lost use of money. This chapter examines and stipulates a definition for this dichotomy as the 'classification dilemma'. To understand how the situation arose and why this term is stipulated, the next section will examine the recovery of opportunity costs associated with land and real property.

Mesne Profits

Mesne profits are essentially the opportunity cost associated with the use of land, assessed by reference to the level of rent which could have been received on a parcel of

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to Precedent, Oxford, Clarendon Press; Mason, A. 1993, "Changing Law in a Changing Society", [1993] 67 *Australian Law Journal* 568.

land, or in a tenancy, but for the defendant's unlawful possession.[4] The word '*mesne*' really means the middle, or intermediate, and it might be an intermediate lord, or intermediate in time.[5] *Mesne* profits is the name that the law gave to the recoupment of the benefits of the use and occupation of the land wrongfully held by a trespasser. *Mesne* profits may be awarded, among other ways, against a tenant who has refused to give possession to a landlord after a valid termination of a devise, and therefore commits a trespass. If it is a situation where a person has possession, and has caused physical damage to the land or premises, those losses may be recovered in addition to the *mesne* profits.[6] This term is still used in the modern courts.[7] The assessment of *mesne* profits is not strictly limited to the level of rent. "Where the rent payable under the former lease is the fair letting value of the property, *mesne* profits are awarded at the rate of the rent; but if the rent is less than the true letting value of the premises, then *mesne* profits may be awarded at a rate exceeding the rent."[8] This portrayal is analogous to a borrower withholding a sum due at a certain time to a lender. In both situations an asset exists that is given to the possession and use of another for a time. At the time of restoration, the asset is withheld. Cohen J. thought that *mesne* profits originated in the action of trespass, and in former times proceeded subsequent to an action of ejectment.[9] Ejectment, for present purposes may be irrelevant, but numerous cases exist from the 15th and 16th centuries which show that *mesne* profits had been awarded for a substantial period.[10] During the time of Charles II (1660-1685), as the Crown of England was restored from

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[4] Butt, P. 2001, *Land Law*, 4th edition, LBC, at 332-334; *Henderson v Squire* (1869) 4 L.R.Q.B. 170; Elvin and Karas 1995, *Unlawful Interference with Land,* pp 116-117.
[5] Black, H. 1990, *Black's Law Dictionary*, 6th edition, p. 990
[6] Elvin, D. and Karas, J. 1995, p. 108.
[7] *Ministry of Defense v Ashman* (1993) 25 H.L.R. 513 (C.A.); and *Ministry of Defense v Thompson* (1993) 25 H.L.R. 552 (C.A.). Also see Elvin and Karas 1995, pp. 108-114.
[8] Cooke, E. 1994, "Trespass, Mesne Profits and Restitution" [1994] 110 *L.Q.R.* 420, Cooke cites *Woodfall on Landlord and Tenant*, vol. 1, para. 19.013 for support.
[9] *Lamru Pty. Ltd. v Kation Pty. Ltd. and Others* (1998) 44 N.S.W.L.R. 432 at 435.

Puritan rule under the Commonwealth of 1649-1660, actions for *mesne* profit were commonplace, for land rights during Cromwell's Puritan reign had been shifted, and restored in tumultuous circumstances.

> Property all over the kingdom was now again changing hands. The national sales, not having been confirmed by Act of Parliament, were regarded by the tribunals as nullities. The bishops, the deans, the chapters, the Royalist nobility and gentry, reentered on their confiscated estates, and ejected even purchasers who had given fair prices. The losses which the Cavaliers had sustained during the ascendency of their opponents were thus in part repaired; but in part only. All actions for *mesne* profits were effectually barred by the general amnesty; and the numerous Royalists, who, in order to discharge fines imposed by the Long Parliament, or in order to purchase the favour of powerful Roundheads, had sold lands for much less than the real value, were not relieved from the legal consequences of their own acts.[11]

Recovery for the lost *use and occupation* of the land, differentiated from *mesne* profits, was also recoverable. This action was where a possessor was seized, perhaps unlawfully in a technical sense, but certainly with the landlord's permission during the relevant time. *Mesne* profits carried the connotation of wrongful possession, whereas an action for the lost use and occupation of land did not.[12]

Early common law courts, as opposed to the equitable jurisdiction of the Chancellor, refused to recognize that a person who had a contractual right to farm or tend a tract of land, subsequently keeping and selling its produce, had any property interest. The Chancery intervened, ironically recognising the injustice of unscrupulous trustees and legal titleholders, who acted against their beneficiaries where fiduciary duties had been given to them. In 1535, the *Statute of Uses*[13] restructured the interest in the land to the

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[10] Cooke, J. 1871, "Restitution", *A Sketch of the History of Berkeley*, Gloucester, John Bellows, online at http://www.rotwang.freeserve.co.uk/HistoryOfBerkeley/Chapter07.html .
[11] Macaulay, T. 1849, *History of England from the Accession of James II*, Philadelphia, Parter and Coates, Chapter II, online http://www.strecorsoc.org/macaulay/m02b.html .
[12] Elvin and Karas 1995, p. 109.
[13] 26 Henry VIII.

benefit of the *cestui que use*. [14] This may have been largely due to economic concerns,[15] but nevertheless manifests a clear understanding that the use of the asset could be split from its ownership and, therefore, the value of its use was recoverable in an action. Before the end of the 16th century, the cause of action was entrenched in the common law. The common law enforced the Chancery writs, leading to the inevitable common law recognition of actions which originally had begun in the Chancery through the precedent of former cases which bound later common law courts. In contrast, the common law courts did not entertain any concept of *mesne* profits associated with money. There was a difference, therefore, in the way the courts *classified* the two types of assets, i.e., land and money. The lost use of land was a recognised cause of action, but the lost use of money was not. It was considered usurious and heretical to advocate the recovery for the lost use of money and any contract providing an interest component above that stipulated in statute was struck down. In redefining usury to be any interest charged in excess of ten per cent, the usury statutes of Henry VIII thrust a small yet uneasy compromise into the religious prohibition of past centuries, and the common law courts refused to allow any latitude beyond the strict construction of the statutes. This rigid restriction began to soften starting in the 18th century with isolated members of the bench prepared to recognise the commercial societal changes which were transforming England and Europe during that time. Recognition that an injury of some sort was inflicted upon a lender who suffered from a delay in payment dawned upon courts who left the additional sums to be awarded for this injury to the decision of the jury.

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[14] Bradbrook, A., McCallum, S., and Moore, A. 1996, *Australian Property Law*, LBC, p. 4.1.

[15] Bradbrook, McCallum, and Moore 1996, *Australian Property Law Cases and Materials*, LBC Information Services, Chapter 4A; Butt 2001 p. 92. The employment of a *use* helped landowners evade duties and taxes to the King, and therefore was popular, evoking the reaction of Henry VIII in the making of the statute. See Birnie, A. 1935, *Economic History of the British Isles*, London, Methuen, p. 42.

It is perhaps ironic that the Courts of Equity were the motivating factor in the legal recognition of the difference between use of an asset and its ownership. Undoubtedly before 1700 the difference between use and ownership had been injected into the common law, which adopted the concept and developed authority in recognition of the Chancery writs. In 1829, *Page v Newman*[16] stifled the progressive common law recognition of opportunity cost through refusal to grant an interest factor in damages awards. Thus, the common law cause of action, *mesne* profits, was regarded as a right. There was also a right in the ownership of the money. In the case of detinue of goods, or wrongful detention, a right to compensation for the use was recognized.[17] Nevertheless money, as an asset, did not enjoy the same legal consideration as real and tangible property, which is indicated in *Page v Newman.*

Cases Involving opportunity cost prior to Page v. Newman

Analogous to the logic of the action in *mesne* profit, during the 18th century the common law began giving awards to lenders for the loss of the use of their money wrongfully withheld by borrowers through the award of an interest component on the overdue capital sum. The logic behind these awards was consistent with the awards for the lost use of land. In 1705, Holt CJ., in *Farmshaw against Morrison*[18] stated that an overdue sum carried "lawful interest" and placed no significant restrictions upon it. In 1722, in *Vernon v Cholmondeley*[19] the court expressly confirmed that it was the province of the jury to set

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[16] (1829) 9 B & C 377; 109 E.R. 140.
[17] For a background on this point see *Strand Electric & Engineering Co. Ltd. v Brisford Entertainments Ltd.* [1952] 2 Q.B. 246; *Gaba Formwork Contractors Pty. Ltd. v Turner Corporation Ltd.* (1991) 32 N.S.W.L.R. 175; *Lamru Pty. Ltd. v Kation Pty. Ltd.* (1998) 44 N.S.W.L.R. 432 at 439. This aspect of opportunity cost recovery will not be partitioned off for specific analysis, but is considered within the context of the larger examination within this thesis on the legal dichotomy between property and money.
[18] 3 Anne, roll 139; 6 Mod. 157; (1705) 87 E.R. 915.
[19] Bunb. 119; (1722) 145 E.R. 617 *per curiam* i.e., by the whole court.

the award with interest for late payment.[20] In 1771, in *Blaney v Hendrick,*[21] the defendant's counsel had moved the court to set aside the jury's decision to award interest on an overdue sum of nearly £3600 which amounted to £811 6s. 8d. The court refused to overturn the jury's verdict and stated, "when a note is due, it carries interest from that time, so likewise, when money lent becomes due, it carries interest from the day it becomes payable".[22] In the 1789 case of *Trelawney against Thomas*[23] the court ruled that money advanced would carry interest, although it refused to award interest on money due for work carried out, depending upon *Blaney v Hendrick* for support. In 1813, in *Hillhouse v Davis,* the court affirmed that it was "within the general province of the jury to give damages for the retention of a debt. Then if they were competent to give such damages, there can be no doubt of the propriety of giving them ... they shall give a just and liberal compensation, which cannot be done without allowing interest for the money withheld."[24] In that case Le Blanc J. went so far as to state that: "The rule of law is affirmative that where a sum is ascertained, and judgment afterwards pronounced thereon in a court of record, if an action of debt be brought on that judgment, the jury may give interest by way of damages for the detention of the debt."[25] The overdue sum and the interest upon it was characterised in that case as "damages which the plaintiffs have sustained by reason of the delay of payment".[26] The general application of the rule in this case was hindered because the debt forming the subject of the complaint was a judgment from a prior action, and not due under contract or in tort.

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[20] The court in *Vernon* expressly approved a jury's award of interest on money lent. Later courts, as will be seen below, refused to give interest awards except where there was express stipulation for it under formal contract. This does not seem to have been a problem in *Vernon v Cholmodeley.*

[21] 3 Wils. K.B. 205; (1771) 95 E.R. 1015.

[22] 3 Wils. K.B. 205 at 206; (1771) 95 E.R. 1015; it is noteworthy that the court did not state that money carries interest form the day it was lent. This is consistent with the concept that in order for a lender to charge the opportunity cost for funds, through requisition of an interest component, the borrower needed to be in *mora.* Default on payment supplied the this culpable condition, justifying the interest component.

[23] 1 H. BL. 303; (1789) 126 E.R. 178.

[24] 1 M. & S. 169; (1813) 105 E.R. 64 at 65 per Lord Ellenborough CJ.

In 1789, in *Craven v Tickell,* [27] Lord Chancellor Thurlow had inquired of the common law judges with respect to the practices of the court in awarding interest for late payment of debts or damages. "From conversations I have had with the Judges, interest is given either by the contract, or in damages upon every debt retained".[28] This case was followed in the 1826 case of *Arnott v Redfern and Another,*[29] where Best CJ summed up the position in the common law, drawing upon the remarks by the Lord Chancellor in *Craven v Tickell.* Best CJ affirmed that interest was given, and although he mentioned that interest was normally given in restricted circumstances to prevent "acts of kindness being converted to mercenary bargains", he relied upon the 1780 judgment of Lord Mansfield in *Eddowes v Hopkins and Another*[30] where interest was said to arise "... in cases of long delay, or vexatious or oppressive circumstances, if a jury, in their discretion shall think fit to allow it." In *Blake v Lawrence,*[31] in 1802, Lord Ellenborough would have allowed interest on an overdue sum if the plaintiff had not received the capital sum prior to the action being tried.

The cases show that the courts were willing to recognise losses inflicted upon lenders where assets, either land or debt, were wrongfully withheld. The courts left the decision regarding this part of the award of damages to a jury. The court considered that the recovery of this loss was a matter to be considered by a jury and, therefore, a matter of evidence to be proven, or rebutted, along with all the other issues of loss which were also submitted in evidence and given to the jury to adjudicate as the trier of fact. This position

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[25] 105 E.R. 64 at 66.
[26] 105 E.R. 64 at 66 per Bayley J.
[27] 1 Ves. Jun. 60; [1789] 30 E.R. 230.
[28] [1789] 30 E.R. 230 at 231.
[29] 3 Bing. 353; [1826] 130 E.R. 549.
[30] Doug. 376; [1780] 99 E.R. 242.

manifests the argument that the losses should be awarded if proved and not awarded if not proved. The injustice of the failure to award compensation to a lender for being kept from the sum due was manifest to the early courts. The jury was the decision-maker in these situations, and the courts were content to leave it to the juries to decide this area of consequential damage. It was, in short, a 'rule of evidence'.

It is interesting that the court equated the lost opportunity to use money with the award of interest. The jury awarded interest in compensation for the time value of the sum withheld just as the lost profits of the land were given in the action for *mesne* profits for use and occupation of the land during a relevant time period. To believe that interest is the fruit of the employment of capital, to be determined by reference to an interest rate, is not inconsistent with financial analysis of opportunity cost. A profitable investment foregone is certainly an opportunity cost, but instead of making inquiry to what other investments a lender may have been able to secure, reference to an interest rate which was known to be available or substantially compensatory for the lost time was sufficient from the jury's point of view.[32] Thus the common law began to shift toward a position consistent with an economic analysis of the value of money. According to Holdsworth, "[t]he modification of the medieval prohibition of usury, and the consequent growth of the law as to when usury was permissible and when it was not, show us that, in the sixteenth century, the organisation of commerce and industry upon a capitalistic basis was an established fact."[33]

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[31] 4 Esp. 147; (1802) 170 E.R. 671.
[32] There are questions which remain unanswered due to the lack of detailed reporting in the early cases. If juries awarded additional sums by reference to interest rates on the capital which formed the cause of action, then how were the interest rates set, and by what criteria? If evidence was considered on this issue within the case, early case reports do not give clues on what it was.
[33] Holdsworth 1926, vol. 8, p. 112.

Not all of the cases during this period were decided in favour of the award of interest. The judgments of some cases reveal that the common law entered a turbulent time where the conflict between the ancient prohibitions and the emerging commercial practices presented enormous problems for courts accustomed to fitting new factual situations into old forms of actions. Although a line of case authority developed which recognised that plaintiffs suffered an injustice where they could not recover for debts withheld from them, an alternative line of case authority still adhered to the old ways of thinking. In 1751, *Barwell v Parker*[34] held that simple contracts, and devises under a will would not carry interest. The court conceded that if the debts were annexed to a will by Schedule and the settling of a trust for the payment, the debts would carry interest. The court used a legal rule to dispose of this case. By phrasing the 'rule' in a negative way the 'legal rule' eclipsed the 'evidential rule', mentioned in the cases above, where the jury was left to decide this part of the damages award. By requiring formality in contract (a contract under seal, i.e., a deed) the common law began shifting into a restrictive posture toward the recovery of the consequential damage of the opportunity cost, which seems at first to have been very subtle, but simultaneously reflects an unseen retreat from the increasing tensions between the old feudal thinking and the new commercial ways.

In *Creuze v Hunter*,[35] in 1793, Lord Chancellor Loughborough heard a petition against orders of the "late Lords Commissioners" where they ordered a Master, hearing the case of a creditors' petition against a deceased life tenant's encumbered estate which included overdue sums on annuities and legacies from the original testator, to compute interest at the rate of four percent. Both Attorney-General, and the Solicitor-General had argued in support of the interest component, using an opportunity cost argument to justify their

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[34] 2 Ves. Sen, 363; [1751] 28 E.R. 233.

position. "If immediate obedience had been paid to the order... the money would have been in the pocket of these parties, and they might have made interest of it."[36]

Loughborough LC refused to allow the order for interest to stand. His Lordship appears to have reacted to a fear that suitors would let interest charges run, thus accruing interest on the original debt such that an estate charged with the interest would be ruined.

> [T]hose, who ought to be most active in prosecuting the decree, would then become more negligent than the parties interested in the estate; and, though in prosecuting it any one creditor may, when he pleases, obtain an order for that purpose, the consequence would be, that they would lie by; and that by the charge of interest the estate would be ruined.[37]

His Lordship recognised the practice of the court and jury in awarding interest to creditors "by note, payable at a day certain",[38] but refused to allow interest on the order of the Lords Commissioners.

Loughborough LC expressly recognised and approved payment of interest where a debt was attached to a mortgage, but refused to recognise the practise where the overdue sum was a contract debt.[39] The difference between the two types of debt is difficult to justify and typifies the legal logic which resulted in the later rigidity introduced into the case law against interest awards. There is a further inference that mortgages, which were normally under seal, i.e., formal contracts, carried a sober difference of legal solemnity in litigious enforcement, a privilege not accorded to informal contract arrangements, which normally required consideration before the courts would enforce them.

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[35] 2 Ves. Jun. 157; (1793) 30 E.R. 570.
[36] (1793) 30 E.R. 570 at 571.
[37] (1793) 30 E.R. 570 at 574.
[38] (1793) 30 E.R. 570 at 575.
[39] (1793) 30 E.R. 570 at 571.

There are cases which follow the line of authority typified by *Vernon v Cholmondeley*[40] (1722) which portray the flexibility of the common law to adopt to changing environmental circumstances, fitting new circumstances into old forms and procedures, and relegating the evidential burden to those attempting to persuade the court to intervene. The additional award for being kept out of the overdue principal sum appears to be in keeping with an intuitive sense of justice in the 18th century, and an awareness of the lost commercial benefit through the lost use of the money. Later judgments in 19th century cases, in contrast, reveal that appeal to 'rules of law' emphasised the line of authority which obliterated the previous discretion accorded to juries. Lieberman asserts that the changes toward a rule-based rigidity had actually started with Lord Mansfield's aspiration in the 18th century to reduce mercantile law to a "certainty":

> Mansfield's court was seen to depart, and not without opposition and controversy, from the prior practices of the common law. The goal of legal certainty, as understood by the Chief Justice, meant that decisions of "fact" previously left by the courts to the determination of a jury, had now to be settled as principles of law, so as to provide a certain guide for future transactions.[41]

The common law's flexibility toward the award of interest on a principal sum would not last long into the nineteenth century, as the following section establishes.

Retreat from Reason

There were three cases upon which the court focussed which influenced the judgment in *Page v Newman.*[42] They are *De Haviland v Bowerbank*[43] (1807), *Calton v Bragg*[44]

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[40] (1722) Bun. 120; 145 E.R. 617

[41] Lieberman, D. 1995, "Property, Commerce, and the Common Law", in Brewer, J. and Staves, S. 1995, *Early Modern Conceptions of Property,* Routlege Books, pp. 144-158 at pp. 150-1. Oldham observed that Lord Mansfield changed his legal views once he was raised to the office of Chief Justice of the King's Bench. See Oldham, J. 1992, vol. 1, p. 645. Roebuck went so far as to label Mansfield the "father of commercial Law who raised both the practical and intellectual standards of the courts." See Roebuck, D. 1983, *The Background of the Common Law*, University of Papua New Guinea Press pp. 10-11.

[42] 9 B & C 377; [1829] 109 E.R. 140.

(1812), and *Higgins v Sargent*[45] (1823). In *De Haviland v Bowerbank*, a debt in 1784[46] had been proved in bankruptcy proceedings against a creditor of one Bezoil, of whom the plaintiff was the last surviving executor. The terms of settlement had required five annual payments. Two payments had been made, but the other three were retained by the defendant-agent of the estate. Two years elapsed before the parties were before the court. The question to be settled was whether the defendant was required to pay interest upon the principal sums withheld for that period.

Lord Ellenborough refused to require the defendant to pay interest. His reasons are a monument of judicial paternalism and mistrust of lower court judges:

> I want very much to lay down a certain rule respecting the payment of interest. I recollect some extremely capricious determinations on this subject; and on all occasions, as little as possible should be left to the discretion of a Judge. It appears to me, that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, & c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used, and interest has been actually made. Without some restrictions of this kind, book debts might be allowed to bear interest; and in every action for work and labour, or for goods sold, there must be a calculation of what is due for interest above the principal debt... – My great object is, to have a fixed rule, and to exclude discretion.[47]

The Attorney-General, for the plaintiff in this case, had brought to the court's attention that the plaintiff had been "damnified by the money being withheld him", and that the measure of loss should not be what the defendant had gained, but what the plaintiff had lost. Lord Ellenborough refused to acknowledge this, retorting that :

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[43] 1 Campb. 50; [1807] 170 E.R. 872.
[44] 15 East. 223; [1812] 104 E.R. 828.
[45] 2 B. & C. 348; [1823] 107 E.R. 414.
[46] The case report does not comment on the great interval of time between the original proof in bankruptcy and the subsequent court action, but it may be that the original proof was 1794, and the case report carries a misprint, for the three payments retained were in the years 1797, 8, and 9.

> the rule proposed, of considering how far the plaintiff was damnified was so wide, that it would let in interest in almost every case, and it afforded no assistance in drawing a line between cases where interest should be allowed, and where it should be refused. If the party lost the use of his money, it was his own fault in not suing for it.[48]

Lord Ellenborough's 'rule' is symptomatic of the refusal of the Chief Justice of the King's Bench to tackle the impact of growing complexity in commercial conflicts in the courts. Referring to the lineage of three particularly influential Chief Justices of the King's Bench from the period 1793-1830, Atiyah calls this a "disastrous period for the law and legal institutions in England".[49] Naming Lords Eldon, Kenyon, and Ellenborough, he states "It is well known that these three men opposed practically all legal reform for nearly thirty years."[50] Eldon's conservatism outlasted his tenure, but was notorious even in his own time; influencing the House of Lords so thoroughly that it was "difficult to persuade the Lords to vote against him". He has been described as a "contemptible statesman", and "On commercial matters he was so old-fashioned that he once had to be reminded by Heath J. that a jobber or dealer in funds performed a useful public function and was not 'always to be considered as a culpable person'".[51]

Gradually the courts came to recognise the changed nature of English society in the late 18th century. England had just suffered the humiliation of the American Revolution, the effects of the Industrial Revolution were manifest and growing, and at the same time "the governing classes in England were swept by the most intense sentiments of conservatism".[52] Companies were regarded as horrific examples of illegal monopolies contrary to the Bubble Act, and when that Act was repealed, Lord Eldon had even

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[47] [1807] 170 E.R. 872 at 873.
[48] *ibid.*
[49] Attiyah 1979, p. 361.
[50] Attiyah 1979 p. 362.

threatened to still hold them illegal at common law. Atiyah refers to him as a "thorough nuisance" despite the fact that concurrent with his threats against companies, many large companies had been formed and were doing substantial business.[53]

It may be that the flames of conservatism were fanned by the widespread changes from the Industrial Revolution, which gripped England during this period. The severe dislocation of large masses of commoners who flocked to urban areas in search of jobs and higher standards of living than were available in rural areas brought demographic changes in such a scale that the entire social order was disrupted to a great degree. Earlier, in the 16th and 17th centuries, the enclosure movement, and its subsequent counter revolution from both government and the lower classes, had brought about depopulation in many rural areas.[54] The movement had benefited the landed aristocracy, the producers, over any other class of people.[55] The conservative movement in the landed aristocracy at the end of the 17th and beginning of the 18th century, may have been an overreaction to the previous events, where the hostile reaction from the lower classes had ended in bloody confrontation. The House of Lords represented the landed class, being comprised of the landed gentry from early constitution, and it is no surprise, therefore, that such a naturally conservative body would be attracted further toward a conservative posture.

The conservative retreat from reason was exhibited further in the case of *Calton v Bragg*,[56] in 1812, where Lord Ellenborough ridiculed the ability of a jury to award

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[51] *Morris v Langdale* 2 B. & P. 284 at 288; [1800] 126 E.R. 1284 at 1286; Atiyah 1979, p.362, note 8.
[52] Holdsworth 1903, vol. 13 p. 503; Atiyah 1979, p. 363.
[53] Atiyah's analysis is congruent with Simpson 1987, and Pollock 1899.
[54] Polanyi, K. 1944, *The Great Transformation*, Beacon Books, pp. 33-36.
[55] Heaton, 1948, pp. 310-312.
[56] 15 East. 223; (1812) 104 E.R. 828.

interest as part of a damages award; an ability taken for granted without question in the early cases noted above:

> It is not only from decided cases, where the point has been raised upon argument, but also from the long continued practice of the Courts, ... that we collect rules of law. Lord Mansfield sat here for upwards of 30 years, Lord Kenyon for above 13 years, and I have now sat here for more than 9 years; and during this long course of time no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence a contract for interest was to be inferred, has interest been ever given [...] If interest were due in this case, why should it not also be due where goods are to be paid for at a certain day, when that time arrives, [...] or in any other case where money is to be paid at a certain day? [...] Juries would give ear readily enough to such a direction: but I dare not vary from the practice which has long prevailed in all the Courts of Westminster Hall. If it be fit that the whole course of our proceedings in respect to giving interest should be recast, it must be done by Act of Parliament.

Lord Ellenborough ignored and dismissed *Blaney v Hendrick*[57] (1771), and was so forceful that he carried the other two Justices with him. By claiming that the changes needed to be wrought by Parliament, the underlying reticence and lack of understanding which drove the Bench in its decision was rhetorically avoided. In addition, the overt comments of mistrust of juries lends support to Atiyah's view that the underlying conservative paradigm shift of the upper classes spilled over into legal conflicts.

Lord Ellenborough was prepared to award interest on debts only where it could be unequivocally be shown that an intention to pay interest was manifest by evidence. In *Nichol v Thompson*,[58] (1807), decided the same day as *De Havilland v Bowerbank*, Lord Ellenborough refused the award of interest, despite the implication that it was contended by both counsels in that case, until the books of the account of dealing between the parties were physically brought into evidence and examined, which showed plainly that

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[57] 3 Wils. K. B. 205; (1771) 95 E.R. 1015.
[58] (1807) 170 E.R. 873 at the notes.

interest had been paid on prior accounts. It is interesting that this case, in the notes to D*e Havilland v Bowerbank,* uses *Blaney v Hendrick* and *Robinson v Bland* for its support.

In *Higgins v Sargent*[59] (1823) the court made subtle, yet significant changes to the latitude afforded juries in damages awards. As noted above, in prior cases it was the jury who awarded the interest, as the consequential opportunity cost inflicted by late payment was to be proven evidentially. It was stated that there was no rule of law prohibiting them from doing so.[60] In *Higgins v Sargent*, however, Abbott CJ, as Lord Tenterden then was, reversed the logic of the previous discretionary latitude of the jury and stated that as a matter of law, interest could only be awarded upon mercantile instruments or where the contract expressed terms of interest to be paid. He stated what was a principle of evidential burden as a positive rule of law: "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances"[61]. It was consistent with the early cases to assert that interest was not "due by law", but by phrasing the 'rule' in the negative, the implication is that the award of interest was to be prohibited. Abbott CJ carried Bayley and Holroyd JJ. with him in this opinion, all of whom failed to perceive the legal implications of their decision. The ability of the common law to award opportunity cost in damages would receive a final definitive prohibition six years later, in 1829, in *Page v Newman.*[62]

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[59] 2 B. & C. 348; [1823] 107 E.R. 414.
[60] *Vernon v Cholmondeley* (1722) 145 E.R. 617; *Eddowes v Hopkins and Anor.* Doug. 376; (1780) 99 E.R. 242.
[61] [1823] 107 E.R. 414 at 415.
[62] 9 B. & C. 377; [1829] 109 E.R. 140.

The position at the time of Page v Newman

The authorities above were handed down during a tumultuous social time in England, where an intense conservatism fought against the commercial changes wrought from the Industrial Revolution[63] and the reorientation of both industry and agriculture from a feudal social order to a modern capitalist model.

> But nothing hath wrought such an alteration in this order of people... as the introduction of trade. This hath indeed given a new face to the whole nation, hath in a great measure subverted the former state of affairs, and hath almost totally changed the manners, customs, and habits of the people, more especially of the lower sort.[64]

The English Parliament attempted to formalise the legal influence of the English Courts over the emerging system of English colonies through the *Australian Courts Act 1828* (Imp.). Although the English common law had technically been "received" upon settlement in 1788 into the colonies of the Eastern seaboard, this Act provided for the reception of English common law as far as was applicable into the colonies as of 25 July, 1828. Thus, The English courts gained influence into the Australian court system when there was yet hardly any of those courts in existence. The array of authorities above and the seminal cases which were to follow were thus imposed upon Australian Courts through the doctrine of precedent.[65]

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[63] Although the classic portrayal of the Industrial Revolution sets the time of its beginning about 1770, Birnie 1935 outlined the fact that the lines of its beginning go back nearly a century prior to that time, and therefore its influence must have been felt both in commerce and in the courts prior to 1770. In any event, the effects of the Industrial Revolution were undoubtedly known at the time of the cases handed down above, and therefore those members of the judiciary who ignored the commercial effects, or defended the old status are more starkly to be blamed for the injustice their judgments have caused plaintiffs. Birnie, A. 1935, *An Economic History of the British Isles*, 1955 edition, Fakenham, Cox and Wyman.

[64] Fielding, H. 1751, *An enquiry into the Late Increase of Robbers, with some Proposals for Remedying this Growing Evil*, in Henley, W. E. (ed.), 1903, *The Complete Works of Henry Fielding*, London, vol. XIII, p. 14, also cited Lieberman 1995, p. 145.

[65] This line of binding precedent continued until the mid 1980's when the *Australia Act* 1985 (Cth) and its associated English counterparts severed official lines of binding precedent and effectively prohibited appeals to English Courts from Australian decisions. This is considered elsewhere in this dissertation.

Landed aristocracy still dominated the English Parliament with the result that the 'common good' was associated with landed interests.[66] The English judiciary embraced the conservative attitude and it was handed down in what might be termed an illegitimate ancestry. The weight of logic and legal consistency was clearly in favour of the award of additional sum for the late payment of debts and damages. Although the courts of Admiralty and the Law Merchant are not salient concerns of this thesis, it must be mentioned that during this time interest (including compound interest) had been awarded in these jurisdictions where appropriate. The reluctance of the common law judges to embrace the new commercial social changes long after it was evident that the changes were set to revolutionise the societal framework both in England and the Western world seems starkly inappropriate from a modern perspective.

The cases between the 12th and 18th centuries also reveal that common law judges developed an inherent contradiction in the attitudes manifested toward litigants. As already noted, the opportunity costs of real property, such as *mesne profits* or usufructory rights, were recognised in the courts. It would have been strange to a litigant of the day to have asserted that the recipient of land wrongly conveyed could have escaped the relinquishment of profits associated with that land during the relevant period. On the other hand, the cases above show that the judges had great difficulty in perceiving sums of money in the same light. The common law had begun to shift, faithful to the ability to change to meet new social demands, in the early cases prior to the tenure of Lord Kenyon. Along with the move toward conservatism, the common law was stifled by a series of law lords who refused to recognise the commercial implications of their actions,

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[66] Birnie, A. 1935, pp.71-72; Lieberman 1995, pp. 145-147.

especially where the profits from fixed assets were recognized, while the profits from money were not. There was no apparent philosophical justification for this dichotomy. It was purely, and simply, a *classification dilemma*. On one hand, losses in respect to fixed property fell under a 'rule of evidence', but losses in respect to overdue sums were quickly falling under a 'rule of law'. This dichotomy was to be formalised by *Page v Newman*, in 1829.

Lord Mansfield, Best CJ., Buller CJ., and Holt CJ. recognized that borrowers who defaulted were taking a valuable right from a lender, a right that should receive a just compensation. The conservative law lords who came after Mansfield, however, reversed his judgments, ignored Best and Holt CJJ., and inappropriately dismissed Buller CJ. out of hand. In the case notes to *DeHavilland v Bowerbank*, the writer makes a note, "It would fortunately be a very difficult matter to fix upon another point of English law, on which the authorities are so little in harmony with each other." It is submitted also that it would be very difficult to find a statement that would succinctly summarise the conflict in English law between the legacy of religious objection to usury and the requirements of the commercial society better than that very case note. This conflict produced the classification dilemma.

This thesis characterised the issue of opportunity cost through a 'rule of evidence-rule of law' dichotomy. It may also be possible to characterize this dilemma in a substantive-procedural dichotomy. This is largely a matter of how the terms are defined and applied. If substantive law is defined as a mechanism used in the courts which "is concerned with the ends which the administration of justice seeks", and "procedural law deals with the

means and instruments by which those ends are to be attained"[67], then the classification dilemma named above can be renamed within the substantive/procedural framework,[68] without strict reference to 'rules of evidence' and 'rules of law'. Evidence simply falls into the category of procedure, and the legal rules fall into the category which is concerned with the 'ends' which are being sought.[69] The reclassification of opportunity costs through an interest component on an overdue capital sum can migrate from a procedural category to a substantive category within the argument presented above from both the historical component and the case conflicts. On balance, the evidence/law contrast was considered to be more appropriate for the purpose of this dissertation.

Page v Newman: No Turning Back

In *Page v Newman*[70] an Englishman, A, resident in France, was indebted to B for money lent, and promised by a written instrument to pay B the sum owed within one month after A's arrival in England. A arrived in England in 1814, and in 1818 B applied to A's attorney for payment. In 1819 B commenced an action for recovery of the principal sum plus interest, which was continued until Easter 1828, when the cause was finally tried before King's Bench (Tenterden CJ.), who refused the interest component.[71] The plaintiff moved for a new trial, arguing that the interest should have been awarded. Lord Tenterden CJ, sitting on appeal, prohibited the award of interest on the overdue sum. Holding the same opinion that he, as Abbott CJ, had held six years earlier in *Higgins v*

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[67] Fitzgerald PJ, 1966, *Salmond on Jurisprudence,* 12th edition, Sweet and Maxwell, p. 462 cited in Tilbury, M. 1990, *Civil Remedies*, Butterworths, p. 3; *Poysner v Minors* (1881) 7 Q.B.D. 329 at p. 333.
[68] Jolowitcz, 1960, uses this nominate framework, as well as Cooper-Stephenson 1990; Feldthusen 1991, Covell and Lupton 1995.
[69] McLeod, I. 1993, *Legal Method*, MacMillan Press, pp. 14-16.
[70] 9 B. & C. 378; [1829] 109 E.R. 140.
[71] The action had been subject to hearing prior to 1829, of which a demurrer had been settled before Tenterden CJ in favour of the plaintiff regarding the argument of the defendant that the Statute of Limitations should apply.

Sargent, his decision entrenched as a 'rule of law' the principle that interest could not be awarded on money lent, secured by written instrument, unless a provision for interest specifically appeared on the face of the instrument. "It is a rule sanctioned by the practice of more than half a century that money lent does not carry interest."[72] He dismissed in derisory fashion the decision of *Arnott v Redfern* and, instead, supported his position with his own decision in *Higgins v Sargent*. Using Lord Ellenborough's words in *Calton v Bragg*, Lord Tenterden dismissed the argument by the plaintiff's counsel which depended upon *Blaney v Hendrick*, and *Arnott v Redfern*. Lord Tenterden refused to consider that plaintiffs would suffer incalculable damage from the hands of unscrupulous defendants, preferring instead to focus upon the court's time which would theoretically be taken up in considering whether a plaintiff had made proper demand for money due. "[I]t might frequently be made a question at Nisi Prius ... That would be productive of great inconvenience."[73]

Lord Tenterden's comments not only draw into question whether he had any commercial understanding, they also raise the question of whether he understood the prior cases. The case report suggests that Lord Tenterden ignored the relevant aspects of the history of the common law prior to Lord Kenyon, and focussed solely upon the era in which he, as a conservative, had risen.

Although it appears that plaintiff's counsel attempted to argue the point, Lord Tenterden had decided. His apprenticeship under the three previous chief Justices of the King's Bench entrenched a conservative attitude that stifled any progressive allowance in

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[72] (1829) 109 E.R. 140 at 141.
[73] *ibid.*

judgment. Campbell portrays him as one fearful of upsetting the established order.[74] Lord Brougham had once written that Lord Tenterden held an "aversion to all that was experimental".[75] In addition, Lord Tenterden was a fanatical defender of the law as a bludgeon for the interests of the church. His belief in the Corporation and Test Acts as "pillars of the Church",[76] show his deep religious feelings. He would have been well acquainted with John Joseph Powell's criticism of usury as "illicit" in the first English treatise on contract law, published in 1792.

> Upon the same principles, a wager, entered into merely as a colour to cover usury, cannot be recovered by action at law; for the moment the truth appears, the contract, whatever shape it may assume, will remain to be governed by the same rule, as if the parties had expressly entered into the illicit and corrupt agreement itself.[77]

So influential was *Page v Newman* that for nearly one and half centuries plaintiffs would suffer at common law for the loss of the opportunity cost of funds withheld. Lord Tenterden's influence was further augmented by the passage of the *Civil Procedures Act 1833* (UK) which he authored and which still bears his name.[78] Section 28 of that Act gives a jury the ability to award *simple* interest in very restricted circumstances[79]. The institution of a statutory regime thus failed to alleviate the common law shortcoming, by further entrenching the restriction against the award of interest so that it was reinforced by a statute. The statute was a compromise between two intractable positions in law. It

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[74] Campbell, 1971, paints a picture of Tenterden as one who was stubbornly opposed to changes in the commercial realm. Tenterden, according to Campbell's portrayal, in essence threw a tantrum regarding the Reform Bill of 1831, which swept away the "close corporation", and vowed that if it passed he would never set foot in the House of Lords again. In fact, after it passed, he was good to his word. vol. 3, pp. 394-398.

[75] Lord Brougham, *Historical Sketches*, cited in Townsend 1846, *The Lives of Twelve Eminent Judges of the Last and of the Present Century,* London, Longman, Brown, Green, and Longmans, vol. 2, p.248.

[76] Campbell 1971, p. 397.

[77] Powell, J.J. 1790, *Essay upon the Law of Contracts*, 1978 reprint, Garland Publishing, vol. 1, p. 184.

[78] Although Lord Tenterden authored the bill, it was passed posthumously, and therefore it may be that it was passed in sympathy.

[79] It is questionable, although reasonable, to conjecture that Mason and Carter's description of "deep torpor" which was struck after *Page v Newman* may have had some influence upon Lord Tenterden in

was a bastard heresy. It was bastard as it was the illegitimate issue from the partnership of the position against the award of interest and the statutory enactment reflecting the doctrine of Parliamentary sovereignty, of which Lord Tenterden was a part. It was a heresy, for it did not fit into either of the considered orthodox opinions which comprised the respective camps of objection to compensation for opportunity costs on religious grounds, and advocacy on commercial grounds.

Cases Subsequent to Page v Newman

The cases subsequent to *Page v Newman* gave mounting support to the view that interest was precluded from recovery. The case became known for the rule that no common law court has the power to award interest on debts or damages overdue. One of the most influential of cases built on this premise was *The London, Chatham and Dover Railway Company v The South Eastern Railway Company,*[80] (LC&D and SE respectively) in 1893.

Two competing railway companies, LC&D and SE, signed a joint traffic agreement where each would pay into a common fund and extract a sum each month according to the traffic they each generated from their continental traffic and local traffic. When disputes arose between them, they were to submit to arbitration. A large sum became due to one of the companies and, after submitting to arbitration, the arbitrator's award was handed down in September 1868. Further disputes arose with verification procedures on both sides falling into arrears. The plaintiff company (LC&D) was the "balance-receiving" company, and brought an action to recover arrears owed, and settle the

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attempting to instate some form of compensation for sums withheld by defendants. See Mason, K., and Carter, J.W. 1995, *Restitution Law in Australia,* Butterworths, p. 949.

disputes between the two companies. The defendant company (SE) submitted a defence claiming the arbitrator's award was null and void, resisting the plaintiff company's claim for the defendant to include its assessment of its own local traffic which had been omitted for a substantial time. In February 1886 the court held the arbitrator's award and subsequent agreement to be valid, affirmed by the Court of Appeal in July of that year. This was subsequently affirmed by the House of Lords in May 1888. In November 1887, in the meantime, Kekewich J gave judgment on the action itself, and referred the matter to a referee to determine the amount due under the agreement as from the 1st of February 1881. The defendant company appealed, but it was affirmed by the Court of Appeal in November 1888 and afterwards by the House of Lords. The Official Referee made a report and found that altogether £51,735 1s. 8d. was payable by the defendant, which included a sum of £22,171 16s. 4d. payable by the defendant as interest at 5% on the balance due on the original joint traffic agreement between 1st July 1885 and the 31st of December 1887. A further £14,574 7s. 9d. was also found payable by the defendant as interest at the same rate on the original traffic agreement balance from the 31st of December 1887. This decision was based on section 28 of the *Civil Procedures Act 1833*,[81] which stipulated that in order to receive interest on an overdue sum of money the plaintiff must show that the action was for a "sum certain" due at a "date certain" within the meaning of the section. Kekewich J., at first instance, affirmed the referee's report. The Court of Appeal, however, reversed his decision on the ground that the plaintiff company had also been in arrears with the verification process and, therefore, it could not be said that the conditions of a "sum certain" and a "certain date" with regard to the statute had been fulfilled. The common law consideration of the consequential loss of the

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[80] [1892] 1 Ch. 120 (Court of Appeal) and [1893] A.C. 429 (House of Lords).
[81] 3 & 4 Will. 4, c. 42, as noted above.

use of the sum of money did not form part of the ratio of the case. The plaintiff company (LC&D) appealed to the House of Lords.

The House of Lords, in 1893, affirmed the decision of the Court of Appeal, but for different reasons. If the 1829 decision in *Page v Newman* can be named as an aberration of the power of the court, the 1893 decision of the House of Lords in *London, Chatham and Dover Railway. v. South Eastern Railway* is an abrogation of the power of the court. Mason and Carter called it "breathtakingly conservative".[82] Lord Herschell L.C. considered the argument for recoupment of interest by the statutory regime and dismissed it with an extremely narrow view of the construction of the statute, ignoring the purpose of the statute altogether. He then considered the common law argument, which is more pertinent to the purpose of this thesis. He dismissed the common law claim for unjust detention, but not on grounds of theory, or with his satisfaction of the decided cases, or according to sound principle. Rather, he carried such a narrow view of the cases, that it is questionable whether any case would have convinced him that Lord Tenterden got it wrong. Lord Herschell recognised the injustice done to plaintiffs by unscrupulous defendants, even noting that he could not "be altogether satisfied" with the reason given by Lord Tenterden in *Page v Newman*, concluding that the law was in an unsatisfactory state. Nevertheless, he could not find the courage to pronounce a change.

> I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this reason, that I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a

[82] Mason and Carter 1995, p. 946.

> similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, *upon a consideration of the authorities*, agreeing with the Court below, that it is not possible to do so, although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages.[83]

Thus, Lord Herschell let the early case stand, at the same time laying tacit blame upon Lord Tenterden, both the author of the case judgment, and the author of the statute by which Lord Herschell felt bound. As a consolation to the Plaintiff company, he refused an order for costs. Although he believed that the cases and statute were "too narrow for the purposes of justice", he still acquiesced to the precedent of common law instead of principle. In effect, Lord Herschell L.C. ignored Chief Justices Lords Mansfield and Holt, and followed Chief Justice Lord Tenterden. Although he stated that he preferred the law according to Mansfield LJ,[84] he refused to follow it. Lord Watson agreed that the entire state of the law was unsatisfactory but followed the Chancellor, who also carried Morris and Shand LJJ. with him. This case consolidated the legal understanding of the English judiciary that no interest was allowable for an unjust detention of any debt or damages in a common law court.

Almost as important as the written judgment delivered in the *London Chatham and Dover Railways* case was what it did *not* say. Although in the period between 1829 and 1893, when this case judgment was handed down, the major cases in recovery of damages in contract and tort were decided, no mention of any of them appears in the text of the printed case report. The cases of *Robinson v Harmon*[85] (1848), *Livingstone v Rawyards Coal Co.*[86] (1880), and the seminal case of *Hadley v Baxendale*[87] (1854), fail

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[83] [1893] A.C. 429 at 437 per Lord Herschell L.C. [emphasis added].
[84] (1893) A.C. 429 at 439-40.
[85] (1848) 1 Ex 850; 154 E.R. 363.
[86] (1880) 5 App Cas 25.

to appear in the case judgment of the 1893 case. With the possible exception of *Livingstone*, (which is a tort case) the reasoning contained in these cases is germane to the outcome of the recovery of damages in *London Chatham and Dover Railway. v S. E. Railway*. The court, instead, chose not to equate the interest on the money due with any recognisance that it could have fallen into either the first or the second limb of the rule in *Hadley v Baxendale* (see Chapter Six). In addition, in 1874 the House of Lords itself had considered *Cook v Fowler*,[88] where the court had expressly stated that interest on a debt could be considered either under statute, or as "damages for the detention of a debt."[89] The fact that *Cooke v Fowler* was not cited to the House of Lords in *London Chatham and Dover Railway v S. E. Railway* was noted in the House of Lords in 1988 in *President of India v Lips Maritime Corporation*[90], and by F. A. Mann in 1985[91]. It is particularly discouraging that in *Cook v Fowler* Lord Cairns paraphrased the very point this chapter seeks to make:

> [A]ny claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.[92]

The court confirmed that the tribunal, i.e., the court at first instance with a jury to ascertain the facts of the case, is the proper means to settle the question of whether an additional sum for the detention of the principal debt should be awarded. The implication

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[87] 9 Ex 341; (1854) 156 E.R. 145.
[88] (1874) L.R. 7 H.L. 27.
[89] *Cook v Fowler* [1874] L.R. 7 H.L. 27 at 34 per Lord Cairns, at 35 per Lord Chelmsford, at 36 per Lord Hatherley, at 37 per Lord Selborne..
[90] (1988) 1 A.C. 395 at 408 per Neill LJ.
[91] Mann, F. A. 1985, "On Interest, Compound Interest, and Damages", (1985) 101 L.Q.R. 30 at 36.

of this position is that it is an evidential burden, and not a 'rule of law'. *Cook v Fowler* was not brought to the attention of the House of Lords in the *London Chatham Dover Railway* case. What had been considered carefully in 1874 was disapproved without discussion in 1893.

The House of Lords in 1893 did not, in any event, deal with the underlying principle that the use of money was a right which should be recompensed. So entrenched was the dichotomy of money and property that the parallel could not be seen. Further, it seems on the evidence of the judgment, that the court may not have been willing to step out and make a correction no matter what principle of justice was involved. The statements of the House of Lords are startling reminders of the mindset which can permeate the perspectives of the judiciary.

A reminder of this comes in *The Stockton and Middlesbrough Water Board v The Kirkleatham Local Board*[93] (1893) which gave an assessment of value based in part on consideration that value of fixed property should include an element for the lost profit of that fixed asset. Lord Herschell L.C. refused to alter the sum awarded inclusive of the lost profits only, it seems, because the original Act, under which a sale had taken place between local authorities, had used the term "price" instead of "value", or "worth". So, on the one hand, the court did not value the use of the *money* asset, but valued the use of the *property* asset. This, in essence, is the kernel of the classification dilemma, for it is not manifestly obvious in any way why the two types of assets should be treated in such a disparate fashion in law.

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[92] (1874) L.R. 7 H. L. 27 at 32-3.
[93] [1893] A.C. 444. This case was reported directly after *London Chatham and Dover Railway Co. v South Eastern Railway Co.* reported above.

London Chatham and Dover Railway Co. v South Eastern Railway Co. became further authority for the proposition that no common law court had the power to award additional sums for the late payment of debts of damages apart from the discretionary remedy available under statute.[94] This was the 'rule of law,' and despite the advances and progress into the modernity of the 20th century, this anomaly remained entrenched, although an inroad was beginning to be made under a previously ignored avenue, the rule in *Hadley v Baxendale*.[95]

Weakening the Giant: Reinterpreting *Hadley*

The arguments in the cases above specifically focussed on the giving of interest for late payment as a matter of justice. It was implied, in passing, that an argument could be made that the opportunity cost incurred by a plaintiff might be able to be construed under a limb of the rule of *Hadley v Baxendale*[96] (1854). This argument was not presented to the House of Lords in the cases above. Afterwards, though, there was a recognition that an argument could be made to bring an action for the recovery of the lost opportunity cost under the second limb of the rule in *Hadley*. The rule in *Hadley v Baxendale* is covered at length in a succeeding chapter which also covers other 'rules of law' affecting the court's disposition of a case. For the moment, it will suffice to simply summarise the rule as follows: A party who is injured from a breach of contract can recover any losses which arise "naturally as the usual course of things" from a breach of that kind. The party may also recover any special losses which the court finds are "reasonably supposed to be

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[94] *Marine Board of Launceston v Minister for the Navy* (1945) 70 C.L.R. 518; *President of India v La Pintada Compania Navigacion S.A.* [1985] A.C. 104; *Norwest Refrigeration Services Pty. Ltd. v Bain Dawes (W.A.) Pty. Ltd.* (1984) 157 C.L.R. 149; *President of India v Lips Maritime Corporation* [1988] A.C. 395 [House of Lords].

[95] 9 Ex. 341; [1854] 156 E.R. 145.

in the contemplation of the parties at the time they made the contract".[97] These two types of losses are respectively known as the first and second limbs of the rule in *Hadley v Baxendale,* and are characterised as 'general damages' under the first limb, and 'special damages' under the second limb. A more significant analysis of *Hadley* is given in a subsequent chapter, but this definition will suffice to understand the cases now examined.

Spark of Life – Recognition of the Second Limb in *Hadley*

Cases subsequent to *London Chatham and Dover Railway* began to erode the stringent prohibition against the award of interest for late payment of debts or damages, which had now permeated the common law. In 1933, in *Owners of Dredger Liesbosch v Owners of Steamship Edison,*[98] the House of Lords refused to eliminate recovery of opportunity cost of profit by ordering that the value of a dredge, lost through the sole negligence of the defendant, should be "the capitalised value of the dredge as a profit-earning machine".[99] The court recognized, albeit under somewhat different names, that opportunity cost could be recovered. Interest was still limited, though, to the 5 per cent given under statute. According to the court, the facts of each case will predominate in calculating the value, for it will "not [be] in the abstract but in view of the actual circumstances"[100] that the valuation will take place. A 'rule of evidence' still had a glimmer of recognition.

It is intriguing that the Court in *Leisbosch* grappled with the conflict created by the competing legal rule of remoteness[101] in the award of damages, versus the legal rule that

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[96] 9 Ex. 341; [1854] 156 E.R. 145.
[97] 9 Ex. 341; [1854] 156 E.R. 145 at 151 per Alderson B.
[98] [1933] A.C. 449.
[99] [1933] A.C. 449 at 464 per Lord Wright.
[100] *ibid.*
[101] The legal rule regarding remoteness of damage, and the conflict with the restitutionary principle is covered in Chapter Seven.

a plaintiff is entitled to be completely restored through the doctrine of *restitutio in integrum*. The court held that the "wrongdoer must take his victim *talem qualem*[102] and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer"[103]. The applicability of this case to breach of contract is hindered from the fact that it is a case in tort for negligence, rather than for breach of contract. Nevertheless, despite being a tort case, the *Leisbosch* case became known for the rule that losses flowing from a wrong, which otherwise are considered too remote, might be within the contemplation of parties making a contract. This argument was used in 1952 in *Trans Trust S.P.R.L. v Danubian Trading Co. Ltd.* by Somervell L.J. to justify compensation for losses due to the impecuniosity of a plaintiff:

> Here I have reached the conclusion, on the facts of this case, that the loss of profits claimed by the plaintiffs is not too remote, although consequent upon the plaintiffs' impecuniosity, because the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from the breach of the obligation undertaken by the defendants.[104]

In effect, Lord Somervell put losses which otherwise were considered too remote to be recovered at all, under the second limb of the rule in *Hadley v Baxendale*. Lord Denning went so far as to state that an opportunity cost incurred from the loss of a letter of credit was a recoverable loss if it could be proved to be foreseeable at the time of making the

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[102] In essence, this phrase is taken to mean that a wrongdoer takes the victim as s/he is found, with all weaknesses and cannot complain if the victim is unusually weak or frail and from this frail condition the damages award is greater. *L.* accusative form of *talis*, "of such kind" and *L.* accusative masculine *quails* "how constituted". See Perseus Project Latin dictionary, online, http://www.perseus.tufts.edu/cgi-bin/resolveform?lang=Latin .

[103] *Clipens Oil Co. v Edinburgh and District Water Trustees [1907] A.C. 291 at 303 cited in Leisbosch* [1933] A.C. 449 at 452. This phrase was also used in the Supreme Court of Zambia, where the court had to rule between the arguments considered here. The court in that case had no trouble awarding the opportunity cost by way of damages for late payment at 30% because bank interest had risen to high levels in between the date of loss and judgment. See *Abraham Mohamed, Alantara Transport Ltd. v Safeli Chumbu* 1993/SCZ/3 (unreported) at http://zamlii.zamnet.zm/courts/supreme/full/93scz3.htm accessed 30 January 2002.

[104] [1952] 2 Q.B. 297 at 302. In the text of *Trans Trust* the quote was attributed to Lord Wright in *Leisbosch Dredger*, but the author read over the *Leisbosch Dredger* case many times, confirming the citation given in *Trans Trust*, but could find no such quote as Lord Somervell attributes to that case. It may have been a slip, where the quote should be attributed to Lord Wright in *Muhammad Issa el Sheikh Ahmad*

contract, depending upon *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.* The *Victoria Laundry* case used *Hadley v Baxendale* for its support:

> It was said that the breach here was a failure to pay money and that the law has never allowed any damages on that account. I do not think that the law has ever taken up such a rigid standpoint. It did undoubtedly refuse to award interest until the recent statute: see *London Chatham and Dover Railway Co. v South Eastern Railway Co.*; but the ground was that interest was "generally presumed not to be within the contemplation of the parties" ... That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequences are as a rule too remote. But when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non-payment, then I think such loss may well be recoverable.[105]

In 1945, in *Westminster Bank Ltd. v Riches*,[106] Evershed J. grappled with this lineage of cases and pondered the origin of the "rule in English law that money claims do not carry interest". His Honour's views confirm the argument developed in the earlier chapters of this thesis. He noted how "[a]lthough I have not been able to find any satisfactory statement of the origin of the rule there seems little doubt that it was closely connected with the ancient disapproval of usury".[107] His Honour analysed the early cases and concluded that

> There is, no doubt, a valid distinction between interest on a debt, which is part of the debt, and interest awarded in respect of a debt which is not part of the debt; and the distinction may (though not necessarily must) correspond with the distinction between the conception of interest as a reward for the use of money and the conception of interest as a compensation for the deprivation of money.[108]

The recognition that the time value of a sum withheld should be considered by the courts was slowly gaining legal support.

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v Ali [1947] A.C. 414. The subsequent impact of the decision on the remoteness of damages is otherwise still correct.

[105] [1952] 2 Q.B. 297 at 306 per Denning L.J.. On this point Romer L.J. concurred.

[106] [1945] TLR 344.

[107] [1945] TLR 344 at 347.

[108] {1945] TLR 344 at 348.

In the 1981 case of *Wadsworth v Lydall*,[109] the plaintiff and the defendant went into partnership to farm a property. Later, they agreed to dissolve the partnership where one partner would give vacant possession of the farm property in exchange for £10,000 from the other. The plaintiff left the property as agreed, entering into a contract to purchase another farm for £16,000, on terms that £10,000 be paid on completion and the balance three years later. The defendant failed to pay the £10,000. Some months later the defendant paid £7,200 to the plaintiff, who incurred extra borrowing costs and interest on a second mortgage to fulfil the contract for the second farm. The plaintiff brought an action for the remainder of the debt, plus all the additional associated interest and borrowing costs incurred in relation to the second farm acquisition. At first instance, the judge found that the defendant owed the plaintiff the £2,800 from the original contract, but dismissed the claim for interest and legal costs on the ground that they were too remote. The plaintiff appealed.

The Court of Appeal held that the loss, including interest charges incurred as a consequence of non-payment of money under a contract, was foreseeable at the time of the contract.

> In my view the damage claimed by the plaintiff was not too remote. ...If a plaintiff pleads and can prove that he has suffered special damage as a result of the defendant's failure to perform his obligation under a contract, and such damage is not too remote on the principle of *Hadley v Baxendale*, ... I can see no logical reason why such special damages should be irrecoverable merely because the obligation on which the defendant defaulted was an obligation to pay money and not some other type of obligation.[110]

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[109] [1981] 2 All E.R. 401.
[110] [1981] 2 All E.R. 401 at 405-6 per Brightman LJ.

The court distinguished the rule in *London Chatham & Dover Railway* under the rubric that the *London, Chatham Dover* case did not consider 'special damages'[111] and approved of Denning LJ's comments in the *Trans Trust* case. Ormrod LJ opined that the test of remoteness as to which claims fell under the second limb of the rule in *Hadley* was an objective test that the court would impose upon any defendant. "The court has to look not at what this particular defendant knew or contemplated but what a reasonable person in his position would have contemplated."[112] This is a very different proposition from that originally postulated by the court in *Hadley v Baxendale*, where the second limb of the rule implies that the court will look to the parties themselves to produce proof of what, in a particular case, was within the contemplation of the parties to the contract. Ormrod LJ depended upon *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*[113] (1978) where Lord Denning had expressed the test for remoteness as "[i]n the case of *breach of contract*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of making the contract, would *contemplate* them as being of a very substantial degree of possibility."[114] In addition, Ormod LJ also considered Scarman LJ's opinion that "the court's task, therefore, is to decide what loss to the plaintiffs it is reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind the breach when they made their contract."[115]

The limbs of the rule in *Hadley v Baxendale* had now become blurred. The test applied by the court to ascertain whether damages previously considered too remote for recovery,

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[111] [1981] 2 All E.R. 401 at 405.
[112] *ibid.* at 407.
[113] [1978] 1 All E.R. 525; [1978] QB 791.
[114] [1978] 1 All E.R. 525 at 531; [1978] QB 791 at 801 cited [1981] 2 All E.R. 401 at 407.
[115] *ibid.*

of which opportunity cost was included, was considered to be objective, and not what the actual contractors themselves had considered. This removed the prohibition of the consequential damages incurred through the lost opportunity costs for delayed payment from an insurmountable 'rule of law' and placed it closer to a 'rule of evidence'. A way was now open where the courts could reintroduce the issue of the time value of a sum into cases where it was considered appropriate.

The decision in *Wadsworth v Lydall* was approved by the House of Lords in *President of India v La Pintada Compania Navegacion S.A.* (1985),[116] although the court in that case refused to overturn the rule in the *London Chatham Dover Railway* case on the grounds that the British Parliament had twice intervened on the issue and had not remedied the injustice, and partly because the former cases had judicially qualified the restriction to general damages and not special damages.

> In confirming the authority of its earlier decision, the House of Lords opened the way to a logical and principled development of the law of damages on the topic [of the loss of the use of money] . The means by which this initiative was achieved – asserting that the 1893 decision was concerned only with the first limb in *Hadley v Baxendale* – enabled the House of Lords to escape from the rigours of *stare decisis*.[117]

It was during this time that the Australian High Court began to recognize that opportunity losses might be recoverable, and accepted the argument from the second limb of the rule in *Hadley v Baxendale.* In *Wenham v Ella*[118] (1972) a party had paid for six 1/20th shares in income-producing land by transferral of another company interest to the defaulting party. The defaulting party had paid the income from the land to the plaintiff for a time, but refused to transfer the shares. At trial it was discovered that the defaulting party had

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[116] [1985] A.C. 104.
[117] *Hungerfords v Walker* (1989) 171 C.L.R. 125 at 141 per Mason CJ and Wilson J.
[118] [1972] 127 C.L.R. 454.

sold the shares in the interim time to a third entity. The judge ordered damages to the value of the shares, and in addition, a sum to compensate for the loss of the earnings of the shares. The defendant appealed to the Queensland Court of Appeal (QCA) on the issue of the additional award of the profits on the equity securities. The QCA confirmed the trial judge's order. The defendant appealed to the High Court of Australia.

The High Court affirmed the lower courts' ruling.

> [T]he respondent was entitled at common law ... to recover, in addition to the value of the interest in land of which transfers were promised to be delivered and for which he had paid, damages for the loss of the income which such interest in land would have produced from the date when the transfers ought to have been delivered to the date of judgment.[119]

What is interesting about this judgment is that the High Court not only recognized, as was proper from the decided cases, that the losses linked to the interest in land should include the opportunity cost associated with that land, but also that a security relating to that land (the shares) also included that opportunity cost. The court proceeded on the footing that the income was within the contemplation of the parties under the second limb of the rule in *Hadley's* case, applying it to a security. Money can be characterized as a government security, and to award the opportunity cost associated with an income-producing security associated with land, and then to deny the opportunity cost of an income-producing security associated with an asset other than land seems to manifest the difficulties of the classification dilemma clearly.

By 1972, however, the High Court of Australia was in a far more independent position than earlier English courts had been in relation to previous binding precedent, including

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[119] [1972] 127 C.L.R. 454 at 461 per Barwick CJ.

that pertaining to usury. The strictures from the earlier religious hatred for the practice of usury, though, were still advocated by the counsel for the defendant:

> It was argued for the appellant, with ingenuity and persistence, that common law damages are to be assessed as at the date of the breach of the contract, and, as payment, of that capital value of what has been purchased but not transferred, would provide *restitutio in integrum*, no addition should be made to such a sum in the assessment of damages. To support this argument reference was made to cases such as the failure to pay money as agreed, and the failure to transfer shares as agreed, when, it was said, all that is recoverable is the money not paid or the value of the shares at the date of the breach, as the case may be. Damages for consequential loss are not normally awarded in such cases.[120]

Menzies J. went on to elaborate his support for the comments in the *Trans Trust* case, mentioned above, and as well incorporated the opinions of text writers who, by this time, had certainly recognised that a loss of profit on a sum of money was a real loss.[121] Walsh J. even recognized the point of this chapter, that losses, and the consequent issue of remoteness, are a matter of factual evidence, as opposed to a 'rule of law'. Quoting Lord Wright in *Monarch Steamship Co. Ltd.v Karlshamns Oljefabriker (A/B)*[122] (1949) he stated:

> [T]he broad general rule of the law of damages that a party injured by the other party's breach of contract is entitled to such money compensation as will put him in the position in which he would have been but for the breach... is limited of course by the requirement that the damages must not be too remote. [...] remoteness is in truth a question of fact.[123]

The application of this viewpoint often escaped the courts in the earlier reported cases. The common law had now come nearly 'full circle' back to the original position which emerged prior to *Page v Newman*. The intricacy of the language has increased, the legal arguments given for the maintenance of a rule in support of awarding the opportunity

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[120] [1972] 127 C.L.R. 454 at 463 per Menzies J.
[121] His Honour mentions Street 1962, *Principles of the Law of Damages* at pp. 243-245, but this older edition was not available. See [1972] 127 C.L.R. 454 at 463-4.
[122] [1949] A.C. 196.

costs of a delayed payment of money have changed, but the theoretical injustice which was perpetrated against plaintiffs, entrenched by the rule in *Page v Newman*, was rapidly being eroded.

The Court in *Wenham* applied an objective test regarding what losses were in the contemplation of the parties to the contract.

> The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result form the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation. [...] On principle, therefore, the damages would appear to be recoverable.[124]

The Court in *Wenham* was able to distinguish past cases and apportion a wide latitude to itself in making decisions regarding consequential damages by pointing out the restrictions of precedent and the need for modern courts to construe past decisions in the light of current curial need to do justice between parties in each case.

> In my opinion the error that is contained in the argument for the appellant consists in treating rules which constitute useful guidance in the ascertainment of damages as rigid rules of universal application, instead of treating them as prima facie rules which may be displaced or modified whenever it is necessary to do so in order to achieve a result which provides reasonable compensation for a breach of contract without imposing a liability upon the other party exceeding that which he could fairly be regarded as having contemplated and been willing to accept.[125]

Summary

History shows that there has always been an uneasy tension between commerce and the religious intolerance of the practice of usury. As society changed, and pressures emerged from the changes in commerce during the time of the Industrial Revolution, the common

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[123] [1972] 127 C.L.R. 454 at 466.
[124] [1972] 127 C.L.R. 454 at 471-2 per Gibbs J.

law began to show signs that it would change as well. The early cases noted in this chapter show the gradual evolution of the common law toward adopting a recognition of changing commercial values. Thus, a genesis of appreciation for the changes which pervaded the surrounding social/commercial environment began to creep into the case law under Lord Mansfield. Many early cases reveal that the compensation awarded to a plaintiff for being kept out of a sum of money fell to be decided under a 'rule of evidence' and was considered by a jury. Later cases showed that the court viewed it as a matter which was prohibited under a 'rule of law'. In the absence of the changes legislated under Lord Tenterden's Act, no jury, therefore, would have been able to award any compensation to a lender for the unjust detention of a debt. Lord Tenterden's Act, *The Civil Procedures Act 1833*, partially mitigated, and partially obscured the issue of compensation, denied in the case of *Page v Newman* in 1829. There was a subsequent philosophical tension entwined into the common law through what this thesis names as the classification dilemma. This classification dilemma allowed recovery of the opportunity cost associated with the fixed assets of land, but denied recognition and recovery of the opportunity costs associated with the moveable asset of money. The origin, as was explained in the preceding chapters, and within this chapter, stemmed from the Church's rejection of usury, and an entrenched conservatism, itself probably a reaction to the social changes wrought by the Industrial Revolution.

The legal argument in favour of the compensation for delay in payment began to brighten in the 20th century as cases reflected the changing attitudes of the judiciary on this issue. Based on what the courts imputed to a reasonable defendant under the second limb of the rule in *Hadley v Baxendale*, the courts recognised the inconsistency inherent in the

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[125] [1972] 127 C.L.R. 454 at 466 per Walsh J.

classification dilemma. It cannot be stated with precision what effect the environmental legal change which the legislative severance with the UK courts had upon the decision matrix of the Australian High Court after 1985.[126] The final break with the chains of the past, and recognition of time value whereby a principle recognising opportunity cost was established was further delayed in Australia until the case of *Hungerfords v Walker*[127] in 1989. That decision, and the subsequent cases relying upon the *ratio* from that judgment, will be considered in Chapter Nine. The next section of this thesis will examine the contemporary legal obstacles to opportunity cost recovery, prefaced with a chapter which analyses the methodological conflicts which are apparent when a comparison of the common law and finance is attempted.

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[126] In 1985 the Australian Federal Parliament requested, and received, permission to institute legal changes commensurate with the development of Australia's ability for self-government and legal self-reflection since the time of federation. The Australia Act 1986 (Cth), and corresponding UK legislation, entrenched these changes which prevents the UK Parliament from any further legislation for Australia, and essentially prevents all appeals to UK Courts from decisions of Australian Courts. This, in effect, has cleared the way for the development of a truly Australian common law. This issue will be mentioned again in Chapter Nine which examines the rule in *Hungerfords v Walker.*

[127] (1989) 171 C.L.R. 125.

Chapter Five: Conceptual Conflicts Between Law and Finance

The underlying tension portrayed in case law where judges resist acceptance of financial measures of value and theoretical economic axioms portrays a deeper conflict between the paradigms of common law and finance. The very nature of the common law is antithetical to the nature of finance in a number of salient respects. This chapter canvasses the major points of conflict from a methodological perspective, and concludes that the clash between the two frameworks, when addressing issues of opportunity cost, will not be quickly resolved.

The Origins of the Disciplines

It is superfluous and tautological to begin this section with the statement that the social relationships at the time of William the Conqueror in England were based in the feudal/manorial social structure prevalent at that time. Nevertheless, the observation that commerce was essentially the local manor market, with once or twice yearly the travelling fair, might not accurately reflect to the 21st century observer the rudimentary economy where communication was tediously slow, the overwhelming majority of those who lived on the land were interested in surviving the next winter, and the power of the lord over his villeins was, in many instances, the power of life and death. The land represented life in both its physical and social aspects. Birnie portrayed the feudal social structure as:

> a government of landowners or a government of soldiers. When the central monarchies of Europe became too weak to protect their subjects against the inroads of barbarians like the Northmen or

> the Hungarians, this duty was undertaken perforce by the powerful landowners in each district, who became practically sovereigns within their own domains. ... under feudalism, a landowner was a public functionary, simply because he was a landowner. A man's social status depended on his position on the land; conversely, land tenure determined political rights and duties.[1]

In England, the feudal movement was complete from the time of the Conqueror. In Europe, there had been small parcels or oases of allodial land which escaped the feudal tenure of the surrounding barons or lords. In contrast, William I subjected the entire island of Britain to feudal tenure, formalised through the Oath of Salisbury in 1086. "Lordship and ownership, government and property, were not therefore clearly distinct as they seem to us".[2] Each juror, for example, who participated in the legal system was required to have lands with a minimum value of forty shillings yearly rent, or involvement in the court system was precluded. The complex hierarchy was based on fealty between a lord and his men, and was directly related to the size and type of land held under the lord, or mesne lord. Normally, the larger the land granted to a tenant or underlord, the more duties were attached in service to the granting lord.[3]

Birnie comments that the unique feudal movement in England made it the most feudal nation economically, and least feudal nation politically of the European monarchies. The position of the King was so predominant that he was able to defeat the "political pretensions of the feudal baronage".[4] As the Norman Kings' Court eroded the local courts' jurisdiction in matters previously considered the purveyance of feudal lords' court, the formulary system, mentioned in Chapters Two and Three, incorporated curious fictions and procedures which socially justified the gradual migration of actions from the

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[1] Birnie 1935, p. 37.
[2] Milsom, S.F.C. 1981, *Historical Foundations of the Common Law*, 2nd ed. London, Butterworths, pp. 18-19.
[3] Stenton, F. 1960, *The First Century of English Feudalism* 1066-1166, Oxford University Press, pp. 27-29.

venue of local courts into the central King's Court. The forms of action dictated not only the specific procedures to be followed, for each action formed around the writ, the central justification which allowed the matter to be heard in the King's Court in the first place. If any plaintiff's action could not be framed sufficiently within an established form of action, the plaintiff would fail to have a remedy in the King's Court.[5] The practical result in many cases was to leave the plaintiff without any legal remedy at all. The "plaintiff might brood on the maxim, 'No writ, no remedy'".[6]

Early courts suffered from a scarcity in remedies which could be employed to dispose of all the cases coming for judgment. This situation persisted despite the innovative contrivances of royal writ-writers and travelling royal justices. The lack of flexibility in the ancient customary forms of action meant that each action had limitations and was simply unable to deal with novel situations. The kingly duty of the monarch, as a spiritual leader of his people, was to administer justice in situations where it was manifestly denied through the old forms of action (See Chapter Two). This initially led to the interference of the Chancery into the legal system, for the Chancellor, the king's chaplain, represented the king's conscience and justified intervention in the feudal courts on the ground that the King's conscience was offended. The 'regular scope' of the early

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[4] Birnie 1935, p. 38.

[5] Maitland notes the restrictions in the early forms of action: "In the Middle Ages discretion is *entirely* excluded; all is to be fixed by iron rules... It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice, fail in his action, and take such comfort as he can from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong... The keynote of the form of action is struck by the original writ, the writ whereby the action is begun." Maitland, F. 1909, *Forms of Action at Common Law: A Course of Lectures,* Lecture 1, p. 8, Chaytor and Whittaker (eds.) 1936 edition Cambridge University Press.

[6] Hogue, 1966, p. 14.

common law was thus severely limited.[7] The common law, therefore, formed during the medieval period when the feudal nature of the English social system lacked a developed commercial framework, was severely limited in the scope of actions available, and was overseen by the landed aristocracy through *literati clerici.*[8] These clerics were the first travelling justices in eyre, who looked after the King's business in systematic customary routes through the counties and shires.

During the period from the Norman Conquest to the 14th century the economics of landed tenure was normally accorded the highest importance by the court, and local jurors often attempted to avoid imposts handed down by the royal justices.[9] It was the landed class who normally initiated action through the legal machinery.[10] Servient tenements, the unfree, or villeins were normally the recipients of the law, certainly not participants in its formation. The law, in the historical sense, was unassailably attached to the land before any other consideration. Wealth was attached to land, the only revenue-producing asset and, therefore, the first order of business of the 'law' was that concerning interests of the landed class. The highest member of the landed class was the King, the highest law-giver, the Sovereign, who was interested in matters of business which yielded profit to the Crown.

Chapter Three has already shown how the formation of the common law occurred at the

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[7] Milsom, S.F.C. 1981, p. 18.
[8] The church itself owned large tracts of land, and for that reason, *inter alia*, it should be included within the landed aristocracy, despite the fact that the church was theoretically equipped purposively to interact with all classes of persons alike.
[9] Cameron, R. 1989, *A Concise Economic History of the World*, Oxford University Press, p. 155.
[10] Pollock and Maitland, 1898, vol, 2 pp. 11, 92; Stenton 1960, pp. 10-12; It is also conspicuous that Hogue 1960, begins his work by pointing out the actions in land law in early England, beginning with a definition of common law in terms of land actions; Ullman, 1961, pp. 166-7 cited Hogues p. 6 also defines "common law" as *lex terrae* taken from the *Magna Carta* 1215 c. 39, although too much stress on "law of the land" seems inappropriate.

height of the church's social power, when the surrounding social structure in England and Europe in the 11th to early 14th centuries, was undoubtedly medieval and feudal.[11] Common law was thus medieval in origin, unequivocally represented primarily the interests of the landed class, and gave restricted remedies from customary forms of action. Despite the growth in the number of actions from which choice could be made, the custom of fitting new factual situations into old forms also developed a hind-sighted perspective.

The origin of finance differs in major respects to that of the common law. Modern economics originated in the commercial revolution which took place starting with the age of exploration and the agricultural revolution of the 15th century, gaining impetus with the Industrial Revolution in the late 17th and 18th centuries. The needs of practical commerce, as demonstrated in Chapter Two, generated the necessity to challenge ancient forms of restrictions. Whereas early documentary fragments and court rolls give the historian of the common law a relatively precise origin, those of modern finance are more diffuse and uncertain. Merchants of ancient times were no less capitalistic than those of modern times, adding an artificiality to the ontological analysis of modern economics.

The emergence of economics as a distinct discipline is more readily identified most often with the early political economists in the 18th century, notably Adam Smith and Jeremy Bentham.[12] The few writers who considered economic matters, especially those which impinged on usury, prior to the 17th century ventured in fear of the church's ire against any economic position which might have been construed as contrary to official church

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[11] For this point, the distinction given between the feudal system and the manorial system is ignored.
[12] Smith, A. 1762, *Lectures on Jurisprudence*, 1776, *An Inquiry Into the Wealth of Nations*; Bentham, J., 1780 *Defence of Usury* 4th edition (1818) London, Payne and Foss, online edition available from

doctrine. Few writers dared to risk writing on the subject for fear of their lives and property. Calvin, of course, was not as apprehensive of the vengeance of the Catholics, and was probably the first theologian to oppose the canonistic prohibition of usury. After Calvin and the Dutch jurist Molinaeus (Du Moulin) the way for economic thinking to advance[13] was significantly opened.

From the turn of the 17th century the situation changed markedly on the European Continent. Camerarius, Bornitz, and Besold, heralded the explosion of writing which inundated the European Continent and England which did not bow to the demands of the church. Although the idea of free commerce broke forth in England and Europe, the widespread freedom to pursue economic ideals was still heavily influenced by the mindset of the medieval agriculturalists. The French Physiocrats, founded perhaps by Cantillon,[14] continued to advocate that agriculture was the highest productive effort of a nation. It wasn't until the year of the American Revolution, in 1776, that Adam Smith published the first edition of the *Wealth of Nations*[15] which, along with his contemporary, Jeremy Bentham, systematically changed the study and understanding of economics.[16] Their work was further developed by men such as John Stuart Mill, the philosopher David Hume, and later, in the 19th century, writers such as John Rae,[17] William Stanley Jevons, and Alfred Marshall. The proliferation of writing on the subject

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http://www.econlib.org/library/Bentham/bnthUs1.html ; *An Introduction to the Principles of Morals and Legislation.* Oxford: Clarendon Press, 1907, online http://www.econlib.org/library/Bentham/bnthPML1.html .

[13] Von Bohm-Bawerk 1959, vol. 1, chapter two; Nymeyer, F. 1957, "John Calvin on Interest" *Progressive Calvinism* Progressive Calvinism League online http://.visi.com/~contra_+m/pc/1957/3-2Calvin.html .

[14] Ingram, J. K. 1888, *A History of Political Economy*, online edition, chapter 5, at p.3-4 of 68, http://www.ecn.bris.ac.uk/het/ingram/contents.htm . Smith 1776 notes Cantillon's opinion in discourse on the productivity of labour in Book 1, pp. 102-3. Ingram attributes recognition of Cantillon's founding influence upon the Physiocrats to Jevons, 1881 "Richard Cantillon and the Nationality of Political Economy," in *Contemporary Review,* Jan. 1881, noted in Ingram chapter 5, note 2, p. 4 of 68

[15] Smith, A. 1776, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1976 reprint Oxford Clarendon Press pp. 85-6.

[16] Von Böhm-Bawerk 1959, vol 1, pp. 46-53, Huncke and Sennholz edition, Libertarian Press, Illinois.

of political economy and subsequent development of economic principles from the late 19th century show that the origin of the systematic study of economics is to be considered a modern *genre*. Indeed, there is a significant lack of writing on the subject of economics between the time of the ancient writers, Aristotle, Cato, Plutarch, and Plato, and the modern writers, except for those church writers and jurists who included economic subjects in religious manuscripts, mainly as a means of considering the relationship of economics to moral issues. The standard histories on the subject of economics normally divide medieval scholastics and the mercantilists from the modern era, setting the beginning of the modern era contemporaneous with the Physiocrats in the early 18th century.[18]

The explosion in trade and commerce, the industrialisation of Europe and England generally, and the radically different demographics of the population as the Industrial Revolution burgeoned in the late 18th and 19th centuries led to a paradigmatic shift in the prevailing social attitude toward commerce, attributing more and more power to the rising commercial citizenry as the period progressed. The resulting shift in the western world to a social structure built on commercial values is well documented.[19] The growth in economic theory from the 19th century to the present indicates that economics as a study essentially refects the concomitant proliferation of a commercial social class. The

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[17] Rae is alleged to have worked out discount theory at least a half-century prior to more widely known authors. Mamiya Medical Heritage Center 2001, "John Rae", http://hml.org/mmhc/mdindex/rae.html .

[18] Deane, P. 1978, *The Evolution of Economic Ideas*, Cambridge University Press, p. 2; Schumpeter, J. 1954, *A History of Economic Analysis,* Chapter Two, Heaton, H. 1948, *Economic History of Europe*, revised edition, New York, Harper & Brothers, p. 402. Schumpeter acknowledges that there must have been much writing, especially from the Chinese, dating from the time prior to Christ which presupposes a certain amount of analysis and developed economic thought, and laments that the writing developed during that period has apparently been lost. Schumpeter 1954, p. 53.

[19] Birnie 1935, chapters 12,13; Deane, 1978, pp. 2-7, 71-92; Ekelund and Hebert 1975, pp. 30-36; Cameron 1989, pp. 185-188.

segregation of economics and its elevation as a *science*[20] did not come easily, despite advances in theoretical expectations during the 19th century. As late as 1902 Marshall lamented that he could find no disciples to study economics on its own,[21] despite widespread publication of his *Principles of Economics* text and *Elements of Pure Economics* in 1874 by Walras.[22] Walras became good friends with W.S. Jevons, and together they attempted to further the cause of mathematical economics and contacted many prominent economists of the later 19th century to rally support for a mathematical approach to economic issues.[23]

Finance emerged from the flurry of economic writing in the late 19th century through the work of many modern writers, some of whom are still living today. Perhaps one of the first real pioneers in financial economics was Louis Bachelier, writing in 1900 in Paris, who anticipated much of what was to become standard financial theory. His dissertation, *Theorie de la Spéculation*,[24] was either misunderstood, or else simply unappreciated by his examiners and colleagues. He anticipated concepts such as random price theory and Brownian motion, but his dissertation was blackballed and he "dropped into the shadows of the academic underground."[25] Early modern economists had classified financial

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[20] Schumpeter 1954, pp. 41-47.
[21] Whitaker, J. K. 1975, *The Early Economic Writings of Alfred Marshall,* 1867-1890, MacMillan Press, p. 33.
[22] Walras, L. 1874, Eliments d'iconomie politique pure ou thiorie de la richesse sociale, Lausanne, Paris; Maital 1982, p. 282 note 20, asserts the year to be 1871 for Walras' first edition but this source was not available.
[23] Fonseca, G, 2002, "A Short Biography of Leon Walras (1834-1910)" John Hopkins University *History of Economic Thought* http://www.econ.jhu.edu/people/fonseca/Walras/walrbio.htm p. 2/5. It may be that since Walras's *Elements* text was not translated into English until well into the 20th century, his work remained more obscure that it should have been in the English-speaking world for that reason.
[24] "Théorie de la Spéculation", 1900, *Annales de l'Ecole normale superiure* (*Random Character of Stock Market Prices*). Anonymous 2002, http://cepa.newschool.edu/het/profiles/bachelier.htm "Louis Bachelier, 1870-1946".
[25] *ibid.*

markets as "casinos" rather than proper "markets,"[26] and it wasn't until 1938 that Williams argued for an "intrinsic" value assignment to an asset based on discounted future cash flow streams.[27] The idea of the "rational investor" who seeks the highest profit at the lowest risk, the indifference curve, the securities market line, and the capital market line were not developed until after 1952.[28] These concepts are now standard curriculum for the modern finance student. Since the 1950's, research on securities prices has been abundant, theories attempting to evaluate risk and the elusive correlation between risk and return have been put forward, and the discipline of finance, in its own right, is now recognised.[29]

The idea of opportunity cost as a measure of value precedes the complex development of modern economics. Traces of opportunity cost can be found in Von Thünen[30] (1823), and Mill[31] (1848), but more explicitly developed by the marginalists such as Walras (1874), and von Weiser[32] (1884). After Green (1894) termed the alternative use of resources the "opportunity cost",[33] the term has been prevalent. Opportunity cost, as a concept, developed from the notion that 'value' was not derived necessarily from the labour which

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[26] Keynes portrayed financial markets and securities investments as a newspaper "beauty contest" where a contestant focussed not upon the beauty of the female entries, but upon what the other contestants would choose. Keynes, J.M., 1936, *General Theory of Employment, Interest and Money*, London, MacMillan Press, 1973 reprint, pp. 154-156.

[27] Williams, J. B. 1938, *The Theory of Investment Value*, Amsterdam, New Holland Books.

[28] Markowitz, M. 1952, "The Utility of Wealth", *Journal of Political Economy*, vol. LX, No. 2, April 1952, pp. 151-158.

[29] Examples are Bodie, A., Kane, A., and Marcus, A. 1999, *Investments*, Irwin/McGraw-Hill; Grinblatt, M., and Titman, S., 1998, *Financial Markets and Corporate Strategy*, McGraw-Hill Finance Series; Kaen, F. 1995, *Corporate Finance: Concepts and Policies*, Blackwell Business.

[30] Wartenberg, C. M. 1966, *Von Thunen's Isolated State: An English Edition of Der Isolierte Staat*, Oxford, Pergamon Books, pp. 12-35; Pribram, K. 1983, *A History of Economic Reasoning*, Baltimore, John Hopkins University Press, p. 204.

[31] Mill, J. S. 1848, *Principles of Political Economy With Some of Their Applications to Social Philosophy*, 1909 edition, Longman Green and Co, Book II, Chap. 14.

[32] Pribram, 1983, pp. 281-282 actually implies that Walras, Wicksteed, and Jevon took the concept of value being derived from the most important alternative use to which a resource could be put from the implications of the writing of Jean Baptiste Say and his followers.

[33] Green , D. 1894, "Pain-Cost and Opportunity Cost", *Quarterly Journal of Economics*, Jan. 1894 Boston, George Ellis Books, pp. 218-229.

had been used to manufacture a commodity, but was dependent upon the demand placed on that commodity, additionally regulated by the next most profitable use of the commodity's supply factors. The principle of 'scarcity' was thereby incorporated into the economist's consideration, building a 'demand theory' of value in contrast to the 'labour' theory of value which had propelled the work of the classical economists such as Smith[34] and Ricardo.[35] Opportunity cost was afterwards incorporated into the writings of economic theory, and contemporaneous economic writers view it as one of the most important economic principles.[36]

Economics and finance, therefore, are modern in both their origin, and the social class which comprised the intellectual founding and mandate for existence of economics as a distinct discipline. This contrasts ontologically with that of law, where the interests of the early medieval landed aristocracy were considered paramount. Economics and finance are therefore commercial, modern, and based on trade, whereas the common law is ancient and ontologically based on feudalistic relationships[37] and the landed class.[38] It was inevitable, given the ontological dichotomy between them, that an additional divergence would be drawn, where the common law would look to the *past* for a template for judgment through *stare decisis*, but economics and finance would look to the *future* for a template for ascertaining value.

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[34] Smith, 1776, Book I, Chapter v.
[35] Ricardo, D. 1817, *On the Principles of Political Economy and Taxation*, London , John Murray, Chapter 1.
[36] See, for example, Maital 1982, p. 10 where he states that the two questions to be asked before making any economic choice is "What is it worth to me?", and "What do I have to give up to get it?"
[37] Stenton, F. Sir, 1929, *The First Century of English Feudalism 1066-1166*, Westport, Greenwood Press, chapter II
[38] For a moderate review of the influence of economists in the English Parliament in the 19th century, see Fetter, F. W. 1975, "The Influence of Economists in Parliament on British Legislation from Ricardo to John Stuart Mill", [1975] 83 *Journal of Political Economy* 1051, Chicago, University of Chicago Press. Fetter infers that the political association of the economists as a whole with the radicals may have severely hampered their effectiveness in winning the sympathies of the conservatives regarding legislation based on economic theory.

The Element of Time

The formulary system in the early English legal framework was essentially invoked by one or more recognisably 'legal' events. Thus a plaintiff had a *cause* of action if some specified event took place which enabled access to the court system to obtain redress against a defendant. This was intolerably restrictive in the period prior to the Norman invasion, and only marginally less so afterwards.[39] As the process of the King's Court writs gained velocity and recognition, the Chancery began the issue of the writs in the King's name. During the reign of Edward I, "writs under the privy seal became common."[40] The forms did not as yet have limitations set upon them as "writs of course" until the reign of Henry III. The tension between the English Barons and the King over the writs of chancery resulted in the demand that the chancery only issue "writs of course".[41]

As the king's courts grew omnicompetent, the custom of issuing royal writs came under significant pressure from the seemingly endless expansionary aspirations of litigants and novel situations presented to the King's Chancellor. In order to give justice, the king's duty, writ-writers framed novel disputes into forms for which there was an established writ and remedy. After all, "it is the king's business to provide a competent remedy for every wrong."[42] A tension sparked between the barons, the archtypical form of the landed aristocracy, and the interests of the English monarch in fulfilling the duty of maintaining justice between his subjects and exercising control over his kingdom. The Barons

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[39] Pollock and Maitland 1898, vol. 2, pp. 558-9.
[40] Pollock and Maitland, 1898, vol. 1, p. 194.
[41] Pollock and Maitland 1898, vol. 1, p. 196.
[42] Bracton, f. 414, cited in Pollock and Maitland 1898, vol. 1, p. 203.

attempted to restrict the power of the English monarch by requiring the consent of the "council of the Kingdom" prior to issuing a new writ, which was tantamount to a sizeable fetter upon the King's prerogative power. The Baron's had sought to bring a stasis into the common law for they distrusted the chancery's issuance of new writs which incrementally expanded the king's power further. The conservative feudal class thus sought to emphasise the customary law, the known and familiar remedies, and were opposed by the increasingly centralised legal enforcement mechanism of the King's agents, the royal judges.[43]

Royal judges, in finding that a new factual situation was really only an extension of a known form of action, enabled the tension between the progressive and increasingly-centralised legal jurisdiction of the royal courts to be barely tolerable, and helped maintain the constant erosion of legal powers of the manor courts and local courts, despite the affirmation of the local customary laws by the royal representatives. "Any encounter with the common law may reveal this tension, this polarity, between the permanent and the expedient. Courts resort to a legal fiction or grasp at a mere hint of an analogy – anything to avoid open confession that they are pouring new wine into old bottles."[44] The doctrine of *stare decisis* was useful to the King's justices in promulgating social legitimacy for the decisions of the royal courts in a time when the attendants to court may have been representatives of their lord's honour, and therefore that social class least willing to succumb to royal justice. Bracton, as early as the 13th century, confirmed the doctrine of *stare decisis* with references to nearly five hundred cases which were

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[43] Hogue, A. R. 1966, *Origins of the Common Law*, Liberty Press, p. 172.

[44] Indeed, Maitland remarks that the barons may have been successful in stopping new writs, for at the end of the 13th century, "Parliament has to urge the Chancery not to be pedantic, but to grant new writs when new cases fall under old principles". Mailand, F. 1889, *Select Pleas in Manorial Courts*, Selden Society, London, vol. 2, pp. lix-lx; Hogue 1966, p. 11, 21; *Statute of Westminster* II, c.24.

handed down in the plea rolls of royal courts.[45] The constant search for present guidance from judgments in past decisions, framed as legal rules, bred a decision framework which was hind-sighted. The legal dispute was framed in relation to events which were already past. The decisions, from which principles must be extracted to settle the present case, were past decisions. In order to invoke the court machinery, the 'actionable' event must have already occurred. Thus, the courts became review mechanisms to settle past-oriented conflicts. The requirement that judges "deal in establishing and evaluating "facts" means that the events they judge have already transpired. The courts sit to evaluate action primarily undertaken and accomplished by others. The court is traditionally not an active participant in events but a passive reviewer of them."[46]

The court, therefore, is a hind-sighted review mechanism, dealing with past events committed by others, and when confronted with a novel factual situation, measures the new situation from a template gathered from the principles of past cases. It follows that the common law is a *reactive* framework. The template for judgment, i.e., the court's 'rules,' are rules gathered from past decisions through the doctrine of *stare decisis,* binding the present court with fetters considered appropriate in the past. Courts seek to fit new facts into old forms. This starkly contrasts with economics and finance, which are *future-oriented* and *proactive*.

Finance, as a subfield of economics, is to be distinguished by its "focus and methodology".[47] Finance focuses upon capital markets, the pricing of capital assets, and the risk/return relationship with respect to price in both debt and equity capital

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[45] Hogue 1966, p. 202.
[46] Horowitz, D. 1977, *The Courts and Social Policy*, Brookings Institute, p. 68.
[47] Ross, S. 2000 "Finance", *Palgrove's Dictionary of Economics and Finance*, MacMillan Books.

investment decisions. The issue of 'time' is central to the discipline of finance. The central axiom, which enables the discipline to function, is that money has a 'time value'. This is embodied in future expectations. Finance is a discipline which attempts to deal with the issues of time and expectations attached to future events, and then converts these concepts to a currency metric available for present use and comparison. "[T]he basic problem of time valuation which Nature sets us is always that of translating the future into the present, that is, the problem of ascertaining the capital value of future income."[48]

The future-orientation of finance permeates nearly any writing on this subject, expressly or implicitly. The assumption that finance is future-oriented is openly stated by McLaney,[49] Cohan,[50] Brigham,[51] Weston,[52] Cherry,[53] and Fisher.[54] It is assumed by Modigliani and Miller,[55] Solomon,[56] Gitman,[57] Van Horne,[58]and Ross *et al.*[59] It is cautiously questioned by Weston,[60] who loosely treats it as a risk, and emphasised as such by Bierman and McAdams.[61] The centrality of this concept is now considered so basic that the discipline of finance could not exist without it, for the calculations from

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[48] Fisher, I. 1969, "Income and Capital", in Parker and Harcourt (eds.) 1969, *Readings in the Concept of Measurement of Income,* Cambridge University Press, p. 40.
[49] McLaney, E. J. 1986, *Business Finance Theory & Practice*, Pitman Publishing, pp. 1-12.
[50] Cohan, A. B. 1972, *Financial Decision Making Theory & Practice*, Prentice Hall, pp. 47-48.
[51] Brigham, E. F. 1992, *Fundamentals of Financial Management,* 6th ed. Dryden Press, p. 194.
[52] Weston, J. F. 1966, "Toward Theories of Financial Policy", *Journal of Finance,* vol. 10, no. 2 (May 1955) reprinted in Wolf, H. A. and Richardson, L. 1966, *Readings in Finance,* New York, Appleton-Century-Crofts, p. 47.
[53] Cherry, L.J. 1970, *Introduction to Business Finance*, Wadsworth Books, p. 13.
[54] Fisher 1969, pp. 40-48.
[55] Modigliani, F. and Miller, M. H. 1958, "The Cost of Capital, Corporation Finance and the Theory of Investment" reprinted from the *American Economic Review*, June 1958 in Wolf, H. A. and Richardson, L. 1966 *Readings in Finance,* New York, Appleton-Century-Crofts, pp. 91-128, at p. 95.
[56] Solomon, E. 1955 "Measuring a Company's Cost of Capital" in Wolf and Richardson 1966, pp. 129-146 at 129-130.
[57] Gitman, L. J. 1974, *Principles of Managerial Finance*, 1st ed. New York, Harper & Row, pp. 8-9.
[58] Van Horne, J. C. 1977, *Fundamentals of Financial Management* 3rd ed., Prentice Hall, pp. 230-234.
[59] Ross, Thompson, Christensen, Westerfield, and Jordan 2001, *Fundamentals of Corporate Finance,* 2nd ed., McGraw-Hill, Sydney, chapters. 5, 6, 23.
[60] Weston 1966, pp. 43-45.
[61] Bierman, H. and McAdams, A. K. 1966, "Financial Decisions and New Decision Tools" in Wolf and Richardson 1966, pp. 208-218 at 209.

this axiom enable the nexus between the future and the present to be maintained. "[O]f all the techniques used in finance, none is more important than the concept of time value of money".[62]

The issue of the past is mainly ignored in the finance literature. Money spent in the past is considered a 'sunk cost' and is normally precluded from the decision matrix. The constant dilemma, therefore, for the economist and financial theorist is how to accurately bring future perspectives into the present in order to improve the decision quality of business. Finance seeks a definition of value which condenses the future into present time. Past costs are only relevant to the extent that they have an impact on future variables. The past is only valuable to finance in the absence of information from other sources. According to Fisher "past costs have no *direct* influence on value"[63] Decision rules are built on this concept,[64] calculations are premised on this concept,[65] and the discipline of finance integrally holds time value, i.e., *future* value, juxtaposed with *present* value, as the crucial principle in the financial perspective.[66] Finance is inescapably a *proactive, future-oriented* discipline.

Given the differing time orientations of the common law and finance, they differ fundamentally in the method each employs in the approach to resolving pressing issues and deriving value. As noted above, the decisions made in the past have little value to the modern, commercially-oriented financier, but they are fundamental to the medievally-derived and past-oriented judge. The underlying pressure of commerce in general is the

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[62] Brigham 1992, p. 194.
[63] Fisher 1969, p. 41.
[64] "Undertake the project if the [Net Present Value] is positive" Sharpe, W., Alexander, G., and Bailey, J., 1995, *Investments*, Englewood Cliffs, Prentice Hall, p. 611.
[65] Examples are Internal Rate of Return, Net Present Value, Present Value Interest Factor of an Annuity, Dividend Discount, and Dividend Discount with Growth.

generation of revenue and profits. The activity in the market is viewed as a vehicle for profit generation, and innovation is highly valued. Past accomplishments are no guarantee of future performance, and the applicability of a past analysis to present and future conditions is not considered an effective business model to develop future profits.[67] Fundamental dissonance between the two methodologies extends further where common law imports a notion of conflict between the very parties who seek a solution through its procedure, through its adversarial nature, whereas the commercial framework assumes a mutual cooperation between parties through voluntary trade.

The Decision Process: Advocacy and Opposition

The courts will not entertain a case unless there are genuine adversaries who define the issues to be decided. Despite the invitation to speak on wider terms, the dispute will be decided from the evidence and arguments presented by the parties at the bar table, who are genuinely attempting to destroy the opposite party's legal credibility in the eyes of the court.[68] "[A] basic principle of adversarial litigation is that it is for the parties to put evidence before the court and for the court to adjudicate".[69] One special-interest entity seeking to convince the court to include the widest possible array of considerations in setting damages awards as high as possible will be opposed by another special-interest entity seeking to convince the court to include the widest array of considerations in setting damages awards as low as possible. The two parties comprise the case name,

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[66] Stonier, A. W., and Hague, D. C. 1961, *A Textbook of Economic Theory*, Longman, pp. 302-303.

[67] Technical analysts in equities markets may take offence at this statement, but to canvass the literature concerning the debate between fundamental analysis and technical analysis would take this thesis too far from the central subject material.

[68] If a court decides a case with irrelevant information, or fails to take in relevant information presented by the parties to litigation, it may constitute appellable error: see *Associate Provincial Picture Houses Ltd. v Wednesbury Corporation* [1947] 2 All E.R. 680; *Australian Broadcasting Tribunal v Bond and Others* (1990) 170 C.L.R. 321 F.C. 90/032. The doctrine of party presentation is considered below in Chapter Six.

portraying that one party *opposes* another. Judges, as third parties, rule strictly within the parameters of the case. Parties must give opposing entities notice of, and access to, documents of evidence ahead of time,[70] for courts impose a theoretically level playing field between the parties to litigation to ensure that the cause of justice is as fully served as possible. Duplicity[71] is regarded as appellable error, and doctrines of interrogatories and discovery have developed in common law to force parties who would not otherwise communicate, to share the evidence to be presented in court, so that neither party can 'ambush' the other. The evidence is as complete as possible, and justice is achieved through the court's decision.

In contrast, information between commercial parties is commonplace. This does not mean that *all* information is shared, for information itself is viewed as an advantageous and valuable commodity.[72] Sharing information does not mean that information comprising a commercial advantage is compromised, but rather that an underlying assumption permeates the commercial framework which dictates that buyers and sellers transact willingly with informed consent in trade. 'Information efficiency' is the basis of

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[69] Australian Law Reform Commission 1996, *Judicial and Case Management*, online edition 2002, http://www.austlii.edu.au/au/other/alrc/publications/bp/3/management.html .

[70] This rule now embodied in statute: *Evidence Act* 1995 (Cth) ss. 166, 167.

[71] Duplicity is where a plaintiff does not know the case s/he has to answer. It is "deliberate deception or double dealing". *Black's Law Dictionary*, 6th edition 1991, West Publishing, p. 503.

[72] Hogan, W. "Insider Trading" [1988] 6 *CSLJ* 39; *Corporations Act* 2001 (Cth) s. 1043A sets out the parameters of this rule in the context of Part 7.10 of the Act ; *ASC v Burns* (1994) 12 *A.C.L.C.* 545. It goes without saying that the institution of the State has undertaken a more concentrated focus on information access and retrieval as the internet has grown in recent years. The growth in areas such as intellectual property law also attests to the general social value of information and innovation. There is an emerging framework of State intervention into this area, especially in security and derivatives markets. Commercial advantage in knowledge of property, commodities, securities and derivatives is now scrutinised by agents of the State in addition to the review of the courts, for any information acted upon in a way contravening notions of fairness in the "market" context, is viewed as a "fraud upon the market". Anonymous 2002, *What is Supervision,* ASX website online, 22 January 2002, http://www.asx.com.au/about/l3/WhatisSupervision_AA3.shtm . Participants in the market are required to give full and frank disclosure, and the market attempts to regulate itself to avoid additional State intervention, e.g. ASX listing rule 3A which requires immediate disclosure of any information affecting the price of a security traded on the exchange.

market efficiency, which under economic rationalism assumes a superiority to the dead hand of government bureaucracy.

Finance, thus operates in an atmosphere where parties who are not in direct competition freely communicate, at least in a limited sense, voluntarily cooperate to generate mutual profits on projects which require parties with specialised interests and who represent contractors who both produce and consume goods and services. A cooperative surplus, therefore, motivates contractors to refrain from antagonism, acrimony, and unfairness in business dealings. Those parties who contravene these standards normally suffer adverse consequences.[73] Adversaries in mutual projects are normally rare, competition coming prior to transaction execution or antecedent to the issuance of project contracts through procedures of bidding or negotiation. Thus, the commercial environment is competitive in normalcy, with individual buyers and sellers achieving a cooperative tranquillity for the purposes of voluntary trade in specific transactions. The tripartite configuration which exists in common law (party A against party B with the Bench as the third party) is replaced with a bilateral configuration where contractor A cooperates with contractor B in a commercial transaction. Conflicts are not the normal mode of interface. Cooperation is the mark of commerce, which is antithetical to the interface of opposing parties in the common law.

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[73] Although it appears to be common knowledge on this point, the recent episodes concerning HIH Insurance, WorldCom, Enron Corporation, all attest to the fact that practices exist which themselves contravene the standards of conduct, but also those who are revealed to the public suffer both approbation and civil recovery proceedings in addition to criminal sanction.

A Matter of Evidence

When required to adjudicate between parties in conflict, the common law looks for proof in a concrete sense. The past-orientation in the court's scrutiny and procedures dictates that proof comes from both persons and documents which provide some indication of the past events. Without tangible proof in a physical sense, including the oral testimony from the memories of witnesses, the courts refuse to entertain the assertion of an event. The focus which courts normally maintain, to give 'justice' between disputing parties, upholds and informs a socio-legal paradigm demanding that each matter to be determined in court must be proved by the complaining party, whether the prosecution in a criminal complaint, or the plaintiff in a civil complaint.[74] A tacit underlying assumption that sometimes courts do not administer justice in a case supports the legal concept that there should be an avenue of appeal for dissatisfied parties. An appeal, put simply, is a review of a lower court decision where one or more of the parties assert that an error has been made by the lower court. Subsequently, courts do not work in isolation, but form a network of hierarchies. The demand that is placed upon the courts to administer justice between parties, although itself heavily laden with social policies, is scrutinised both by the parties to the litigation, and also by superior courts in the hierarchy. Thus, the courts themselves have review mechanisms which review lower courts acting as review mechanisms.

The recognition of court hierarchies illuminates the principle that society places a *duty* upon courts to uphold 'justice' between the parties in litigation, and where courts fail to

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[74] Reversal of burdens of proof from historical norms by statutory intervention can significantly change commercial circumstances. An example can be found in Chapter 7 of the *Corporations Act* 2001 (Cth), section 945A reversing the burden in proving the reasonableness of giving financial services advice. Under this section, proof that the supplier of the financial product acted upon information which was reasonable

administer justice, the aggrieved party has a right of recourse to a higher court. Decisions that are manifestly unjust and left unchanged give rise to social outcry which may result in a legislative alteration, throwing a social connotation upon a court that it is biased or otherwise socially inadequate.[75] Knowing that each decision may be reviewed prompts judges to be aware that the courts should approach each case from a *deontological* perspective, i.e., they have a *duty* to administer justice in each case. 'Justice' is difficult to achieve for a decision maker who was not present when the events occurred which form the dispute. Normally, the cases which are fought in court comprise only 5% of the actions filed in any common law jurisdiction, and clear cases normally settle early or are discontinued. In order to dispose of the remaining cases, courts have formed rules of evidence dictating the type of allowable evidence the method of introduction into the court process. The evidence introduced into the process enables courts in most cases to derive conclusions regarding the veracity of the events in each case which, subsequently, affect the rules of law used in disposition of that case. Where juries are included in modern court cases, juries still mostly decide the issues of the facts which the court will hold as true.[76] Courts are, therefore, a sociological mechanism, reviewing human actions, depending upon actors external to the court mechanism, examining human intention and interaction within a variety of contexts, all with the deontological goal of coming to conclusions of both fact and law regarding conflicting versions of the past. Proof is not a

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reverses the normal burden of proof, originally placed upon the plaintiff, to prove that the advice was *unreasonable.*

[75] See *Higgon v O'Dea* [1962] WAR 140, where an children's gaming arcade owner was convicted and fined for operating a business which constituted a place of public resort and letting a child apparently under the age of 16 years enter and remain there. The law was immediately changed by the Western Australia Parliament through the *Police Act* 1963 (W.A.).

[76] There are exceptions which are not relevant.

'notional' concept in the court's opinion, and asserted facts must have a provable existence.[77]

The decisions by courts are made *after* the events are assessed, and therefore, the events are subject in most cases to minute scrutiny. This sociological examination looks, for example, at the behaviour of parties to a contract, ascertaining the 'intention' of the parties to its terms, or attempts to set a manifestly justifiable standard of 'reasonableness' upon which to judge the defendant's actions in tort and the requisite level of diligence required to avoid the plaintiff's accusation of negligence. Evidence may be called to ascertain the state of mind of each party to a contract in order for the court to settle the question of what was in the contemplation of the parties when the contract was executed. Classification of a past act, the *actus reus*, the limitations of intent in determining the guilty mind, *mens rea*, the correct venue for an action, *fore conveniens*, all have strict legal meaning to a court, defining the issues over which the case will be won or lost, on either the 'balance of probabilities' or 'beyond reasonable doubt'.[78]

Strictly inferential consonant *inductive logic* is employed throughout the process, and courts attempt to abandon presuppositions regarding the plaintiff and defendant prior to the presentation of evidence in a trial at first instance.[79] Evidence which is minutely scrutinised by courts will affect large segments of society where the case determines an

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[77] See *Federal Commissioner of Taxation and Western Suburbs Cinemas Limited* [1952] 86 C.L.R. 102, where the High Court refused to allow a notional deduction, despite the defensible commercial reasons for its derivation. The court was interested in the nature of the actual cost and deprecated the portrayal of the notional deduction for tax reasons. This portrays the courts preference for actual events over hypothetical events as well.

[78] The issues of risk, probability, hypothetical circumstances, expected value, and onus of proof cannot be discussed in this section. These issues are discussed at length in the three chapters which follow.

[79] Issue can be taken with this last statement if one examines strictly the court assumptions regarding, for instance, that a person is of sound mind to contract if the age of majority is reached, or a person is a "reasonable" person.

important social issue, through the doctrine of *stare decisis*. Court decisions are, for that reason, based on individually-produced evidential criteria determined by the conflict between specific parties, but are subsequently applied to society as a whole within the relevant jurisdiction of the court. The rules taken from past cases are also determined in this manner. Hence, the specific case affects the general application.

In contrast, finance and economics depend upon mathematics for their very life and survival. Mathematical statistical modelling is widely utilised in economics and finance to derive evidence and formulae into which specific facts are placed and prediction is made. This results in a paradigmatic opposite to that of the common law where the specific case prediction is drawn from general social economic history. All relevant social history to an economist is reduced to mathematical figures used in calculations. This illustrates the *deductive logic* of financial principles and dictates that strict decision-making rests upon mathematical justification. This starkly contrasts with the sociological basis of the courts. In addition, economics and finance make significant presuppositions regarding such fundamental issues as the 'rationality' of an investor, and classification and nature of risk in investments.

> In the world of economics, individual actors function according to what economists call "rationality". This is a reasoning process that consists of identifying items of potential consumption or dominion in the world, calculating their value in [currency] terms, and then estimating various kinds of positive and negative risks. Reason is thus reducible to calculation and risk assessment. [80]

Actors in the realm of finance are free to exercise whatever abilities they may possess to contrive ways to generate profits. As the probabilities of future events are weighed, the subsequent decisions which put plans into motion reveal that the decisions regarding the

actions of contractors in the commercial realm are made prior to the events actually occurring. The future events are anticipated, expected, and analysed, but the events have not yet transpired. Consequently, the economist and financier are concerned with *expectations.*[81] This characteristic forces economics and finance into a *proactive* perspective. This is in contrast to the common law, which views events after their occurrence, then makes decisions within a *reactive* framework.

The pursuit of profits dictates that the economics framework is a *teleological* framework, interested in results of investments, assessments of potential risks, and efficiency in costing, all of which contain the paramount goal of increasing profit. That these are measured mathematically imports the assumption that economics is essentially a deductive, mathematically-based, physical discipline, where conclusions necessarily follow from calculation. This view of finance, in part, may be debateable, for hidden factors in the generation of original figures shows that human choice dictates outcomes more significantly than calculations will admit, for humans do not always act in an economically rational manner.

> Economics has had a long love affair with mathematics. The abstract power of mathematics – the logic of numbers, forms, and arrangements – has been enormously important in advancing economics, the logic of choice. It has made possible both good theory and good applications. Mathematics has helped make the fundamental slogan of modern economics – everything depends on everything else – both rigorous and operational. ... [T]he problem is *not* the mathematical nature of modern economic theory. The problem is that the theory's fundamental assumptions and propositions about people are thin straws indeed.[82]

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[80] White, J. 1986, "Economics and Law: Two Cultures in Tension", [1986] 54 *Tenn. L. Rev* 161 at 168.
[81] Stonier and Douglas 1966, p. 317; Sharpe, W. F., Alexander, G. J., and Bailey, J. V, 1995, *Investments* 5th edition, Prentice Hall, pp. 595-598.
[82] Maital, S. 1982, *Minds, Markets, and Money*, New York, Basic Books, pp. 13-14.

Despite the importance to economics of assumptions regarding human behaviour and motives which, in a sense, are not mathematical, and therefore economics cannot be *wholly* mathematical, it is certainly true to state that economics, and finance are mathematically-based, deriving their *rules* from mathematics, and seeking to found the *rationality* of the discipline on mathematics. Thus, the entire linguistic genre of 'rules' is different between economics and the common law.

The Nature of Rules

At common law, the rules extracted from past cases apply in a general sense according to a curial hierarchy through the doctrine of *stare decisis*, and the 'rule of law'. The highest court decisions automatically apply in a wide social sense across all classes of the community from this doctrine and the premise that law carries with it the implied sanction from violation. Where a violator, say, a tortfeasor, is brought to trial, the court is empowered to extract from the violator a monetary penalty commensurate with the court's assessment of the violation. Judges and Magistrates 'enforce' the rules of law,[83] with the overriding goal of administering 'justice' in the case, through the 'rule of law'.

The limitations of evidence, strict pleading circumstances, and forms of action, in conjunction with the general applications of case *rationes* make the rules powerful indeed. However, the overriding principle that justice must be done, and be seen to be done in individual cases, can outweigh the strict administration of rules of law.[84] The development of the Chancery Court in the 14th century was motivated by the deficiency in the common law's ability to achieve justice in the circumstances in many cases.

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[83] For the purpose of this point, public policy, interpretation, and other common law ability to sidestep the rules is ignored.

Judges, as third parties who rely on the disputing parties to provide evidence, developed parochial habits which, coupled with the strict pleading required, bred strict legal logic which canvassed evidence presented by parties with close scrutiny and narrow reasoning. Where a court fails to consider a seminal case which is later found, criticism of the court can be rather trenchant.[85] As a result, judges cannot reserve the privilege to ignore past cases which present difficulty in disposing of a present case (an instant case) and *must* consider past relevant cases, i.e., the past rules, when judgments are handed down.[86] In all circumstances, the attention of the bench will be solely upon the case before it and, accordingly, the court's perspective is limited, preventing judges from lengthy comments on hypothetical circumstances, choosing instead to focus upon the concrete issues of the current dispute.

Whether a principle is accepted into the methods of the financial community depends upon whether, when future periods come to the present, the predicted outcomes are achieved. An *explanatory* ability is highly prized. Acceptance of economic 'rules' is certainly not automatic, nor is there a rigid enforcement mechanism endogenous to the economic matrix, contrasting sharply with the rigid court hierarchy and structurally enforced rules in past judgments. 'Innovation' in finance may dictate that past financial decisions which applied to one situation are then abandoned, whereas the requirement for courts to give written reasons, *ratio scripta,* dictates that courts will certainly carry past decisions into any present case. The overriding consideration in economics will generally be centred upon results measurable in actual cash flows and profits, no single

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[84] This point will be considered more fully in Chapter Seven below.

[85] An example can be found in Chapter Four where the House of Lords in *London, Chatham, and Dover Railways Co. v South Eastern Railway Co* failed to incorporate the reasoning which it had earlier promulgated in *Cook v Fowler*, incurring criticism from Mann 1985, and a later House of Lords in *President of India v Lips Maritime Corporation.*

achievement providing a resting place for industry, for the horizon of investment is continuous and relentless. Courts markedly rest on landmark decisions which alter major points in law. Change is tedious, incremental and proceeds by the restrictive chains of analogy with the past.

Rules of law carry sanctions emanating from the court itself. It is the legal profession, through the bench, which administers the sanctions against violators.[87] In contrast, the economist does not expect any single *real* person to be punished for the violation of an economic 'law'. What s/he expects is that other forces, market forces, will intervene and economically extract an increased rent, or other pecuniary disadvantage, which will then bring the rebel into conformation with the economic principle,[88] using the profit motive, or Benthamite disutility to correct the offender. Although it may be seen that courts often turn to economists and financial theorists for expert opinion to resolve some question regarding the principles behind this or that economic doctrine which may be enforceable by the legal machinery,[89] it cannot be said that economists turn to the courts to elucidate the economic 'laws' about which some strenuous disagreement may be generated. Perhaps some economists, however, wish they could extract cash flow from the legal profession for violation of sound economic 'principles' the same way that the courts extract revenue from the speeding economist when photographed by a digital radar camera. The entire terminology of 'rules' is inconsistent between the two disciplines, and this renders linguistic semiotic harmony between them more difficult.

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[86] This statement clearly overlooks the ability of judges to distinguish a previous difficult case or reason so narrowly that the previous case is "confined to its facts". See Chapter Eight.
[87] This statement ignores the role of juries.
[88] Kleer maintains that there is support for an interpretation of Adam Smith's work which attributes the working of the markets to his belief in a "supernatural benevolent God" who dictated the principles upon which economics, as a science, is built. See Kleer, R. 2000, "The Role of Teleology in Adam Smith's *Wealth of Nations*" *History of Economics Review* No. 31, Winter 2000, pp. 14-29.
[89] E.g. *Trade Practices Act* 1974 (Cth) Part IV, and Part IVA.

Chained Together Through Contract

It is tempting to draw a conclusion that law and economics will forever refuse to fully cooperate and that a constructive harmony between the two reference paradigms is unachievable. This position of cynicism is not substantively defensible as long as the two frameworks are forced to interact through the law of contract. Through the legal enforcement mechanism upholding and providing sanction against breach of contract, economics is able to live and breathe and have its being. It goes without saying that this is true of finance, for trade is impossible without some enforcement mechanism and the 'market' mechanism would leave too many underlying social issues unanswered. Freedom of contract was highly protected by the courts in the 19th and early 20th century, but increased realisation of market failure, notably through the stock market crash of 1929, led to increased statutory and judicial intervention into the economic realm.

Freedom of contract[90] is limited in a number of salient ways. Since the 19th century, the freedom which individual entities have possessed to contract without interference from the State has been slowly eroded. Now this 'freedom' is hindered by consumer credit codes, codes of banking conduct, corporate regulators such as the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, and perhaps, rather loosely, the Australian Accounting Standards Board. In addition, an aggrieved party may institute proceedings to invoke the sanction of the courts which have wide powers, both within the inherent common law rules and under legislation such as *Contracts Review Act* 1987 (NSW), or the *Trade Practices Act* 1974 (Cth). Courts

now have powers to avoid or rectify unfair, harsh, or unconscionable contracts, and to award damages where a loss has occurred unfairly or where the commission of prohibited behaviour has been proven.[91] These pieces of legislation, seen in conjunction with all common law rules available to a court, show that the regulation of economics and finance initially bases restriction on legal intervention, and is not based on factors endogenous within the economics and finance discipline. The endogenous regulation in the discipline of finance comes from the pursuit of profits. Profits are regulated under a 'demand theory' of the market. The 'market' therefore, at least theoretically, is the economic regulator, which concurrently determines profit. As profits are the overriding consideration in the economics and financial decision paradigms, being both the goal and the regulation mechanism, a commercial entity who remains non-profitable normally does not stay that way forever.[92] Through allegations of breach of contract, subsequent curial involvement will force financiers to seek access to the sanction mechanism of the common law, asking for the courts to uphold the economic dealings between parties. It is reasonable to conclude from this observation that a relatively modern, proactive, future-oriented, innovative mathematical framework is supported and informed by an ancient, hind-sighted, and restrictive consequential framework. The two worldviews must both be enemies and friends at the same time.

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[90] Atiyah 1979, examines many relevant issues including the legal and intellectual background during the relevant period from 1770 to 1970, which was the time that major legislative intervention led Atiyah to conclude that freedom of contract had been essentially assassinated.

[91] E.g., ss. 51 AA, 51AB, 52 *Trade Practices Act* 1974 (Cth); ss. 12 BB, 12CB, 12 DG *Australian Securities and Investments Commission Act* 2001 (Cth).

[92] This, of course, ignores entities formed for the very purpose of not-for-profit goals, such as charities, medical organisations and others. This point is not intended to open discussion on market regulatory mechanisms, the State, and self-regulation obligations. The contrast is to be made between general market regulation through withholding of profits from those who violate market rules such as fair play and honest dealing, as opposed to the specific regulatory mechanism of the court, who administers through strict scrutiny and legal rules.

Summary

The ancient medieval origin of the common law, coupled with the adversarial posture endemic to common law courts forces disposition of cases through a painfully technical procedure where argument can be generated for and against each and every salient point. Indeed, legal professionals are highly paid for that very reason. Proof, therefore, in legal terms, is tangible, documentary, and purports to represent an underlying reality of past events. Rules are extracted from past case judgments, themselves open to argumentation from both plaintiffs and defendants, and the present case disposition is filtered through the existing forms of action. Courts are hind-sighted, reactive, sociological review mechanisms, decisionally posterior to the transpiration of events, evidentially restricted to that which is presented by the adversarial parties at the bar table, and render judgment with an enforcement mechanism linked to coercive sanction.

In stark contrast to the common law worldview, the economics/finance worldview is a relatively modern genre, striving to achieve technicality through the use of mathematics, where innovation is highly valued, and the goal is to seek explanatory power for future periods. In finance, value is derived by mathematically transforming the future into the present. The use of statistics, discounting, derivation of expected values, and the linguistics of market-enforced 'rules' enables the economist to theoretically progress from premise to conclusion in the appearance of certainty. This process is anathema to the common law, which progresses on a case-by-case basis.

The common law bases rules on real disputes, where economics bases rules on what it regards as sound theory. The common law concept of proof is firmly grounded in restrictive, tangible issues, where economics and finance theories are 'proven'

mathematically, statistically-gathered, and largely intangible and theoretical. Justification and proof come through future predictive power. The common law enunciates its rules in a specific case, mindful of universal application across society through the 'rule of law' premise. The framework of economics and finance bases rules on essentially 'universal' social information-gathering, and then applies the formulae gathered from empirical research to the specific instance in disparity with the common law. The common law concentration upon a present case clearly contains a short-term focus, where economists average results over periods and base many axiomatic truths in the concept of the "long term"[93] in market demand theory. The common law clearly appeals to the threat of coercive sanction where laws are broken, whereas economists appeal to market mechanisms for enforcement when economic laws are broken. These conflicts portray a deep philosophical disharmony between the common law, on one hand, and economics and finance on the other. Although the portrayal in this chapter has been relatively broad, the specifics of the tension between the two worldviews are more acutely manifest when the common law compensatory framework is explored in the following chapters. The manifest difficulty in finding a resolution between the common law and economics on the issue of opportunity cost recovery will be explored in the following three chapters which analyse the legal doctrines which follow the dispositive apparatus of the courts. The legal framework contains contradictory material specific to issues mentioned above, entrenched in case law. Although the classification dilemma has been partially dismantled by the High Court of Australia, it is not practical to assert that a widespread consonance between the common law and economics will be struck in the foreseeable future regarding the recovery of opportunity costs.

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[93] It is true that the great economist J. M. Keynes cynically stated in derision of the economic assumption of the long term that "In the long term, we are all dead". See http://www.oireachtas-debates.govie/D.0298.197704190070.html .