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Usury and the Medieval English Church Courts

By R. H. Helmholz

Historians of medieval England have devoted little sustained attention to the law of usury, and what attention they have paid to the subject has not been focused on the law's enforcement in court practice. A common assumption has been that one could not go much beyond academic treatises and legislative enactments in studying the subject. This has left an undeniable gap, one which English historians have not made as much progress in filling as have Continental historians. In dealing with enforcement of the law of usury in medieval England, therefore, most general treatments have had either to make reasonable guesses from secondary evidence or to be silent.

This article fills a part of the gap. It collects the evidence relating to the subject of usury found in the surviving records of the English church courts. In some measure, the approach is purely descriptive, bringing to light evidence not previously available. However, insofar as the records permit, the article also attempts to interpret and explain the evidence. Regrettably, the attempt cannot wholly succeed. The records that survive are far from complete, and the information they contain is often unsatisfactory, leaving many questions unanswered. However, the records do contain useful and sure information about the church's attempts to enforce its usury prohibitions in medieval England. They further allow the historian to compare canon law theory with practice and to suggest tentative reasons for the shape that medieval practice took.

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2 Among the general treatments consulted in the preparation of this article are T. P. McLaughlin, “The Teaching of the Canonists on Usury” (part 1), Medieval Studies 1 (1939), 82–107, and (part 2), ibid. 2 (1940), 1–22; Benjamin N. Nelson, The Idea of Usury (Princeton, 1949); John T. Noonan, Jr., The Scholastic Analysis of Usury (Cambridge, Mass., 1957); Raymond de Roover, La pensée économique des scolastiques (Montreal, 1971).

3 Some account of the character of the records of the church courts, together with bibliographical references, may be found in G. R. Elton, England, 1200–1640 (Ithaca, N.Y., 1969), pp. 102–7.
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THE ENGLISH BACKGROUND

From at least the twelfth century, prosecution of living usurers in England belonged to the church. Glanvill, author of the earliest systematic treatise on English law, denied any jurisdiction to the royal courts except at the usurer’s death, when the king would be entitled to the usurer’s chattels and the feudal lord would be entitled to his lands. The twelfth-century Dialogue of the Exchequer gave a similar account of English practice. The church was entitled to hear all pleas concerning usury during the lifetime of offenders, and to determine them freely according to the canon law. This remained the basic jurisdictional rule until the Tudor era. Although medieval parliaments passed occasional statutes marginally affecting the enforcement of the law of usury, they left principal regulation of the subject to the canon law.

This rule was consistent with the canon law itself. The medieval church claimed exclusive jurisdiction to determine what conduct amounted to usury. The church did not, however, claim exclusive jurisdiction to punish proven usurers. At least some canonists allowed secular courts to undertake prosecution and enforcement of the law against usury, provided that enforcement followed the church’s definition, and provided also that cases of doubt about the usurious nature of any specific transaction would be referred to a church court. English medieval common law was, therefore, slightly more favorable to the rights of the church than the canon law itself required, because until 1485 the royal courts declined to exercise any jurisdiction at all over usury except at the usurer’s death.

The canon law to which the English common lawyers conceded jurisdiction was strict in definition. It defined usury as “whatsoever is taken for a loan beyond the principal.” Any gain stemming from a loan, no matter how small, was considered usurious and unlawful. The law was also strict in sanction. Offending usurers were subject to ipso facto sentence of excommunication. This entailed exclusion not only from the church’s sacraments, but also from the normal company of other Christians — a real and considerable penalty under medieval conditions. Convicted usurers were required to make restitution.

6 15 Edw. III, st. 1, c. 5 (restating the jurisdictional rules); 3 Hen. VII, c. 5 (condemning “bargayns groundyt in usurye” and subjecting makers to a penalty of £100 in addition to ecclesiastical sanctions).
7 E.g., Panormitanus, Commentaria in libros decretalium (Venice, 1589) ad X 2.2.8, no. 17, distinguishing two canonistic opinions on the point, but stating that given in the text as the communis opinio. For modern treatment, see McLaughlin, “Teaching of the Canonists” (part 1), pp. 18–21.
8 Decretum Gratiani, ed. A. Friedberg (Leipzig, 1879), dictum post C.14, q.3, c.4: “Ecce evidenter ostenditur, quod quicquid ultra sortem exiguitur usura est.”
9 See, for example, the statement of the penalties in the work of the thirteenth-century canonist Hostiensis, Summa aurea (Venice, 1574), 5, tit. de usuris, no. 10. For a modern discussion, see McLaughlin, “Teaching of the Canonists” (part 2), pp. 1–12.
tion of the usury to the victim or (if the victim were unavailable) to charitable uses. Unrepentant usurers were denied Christian burial, and a variety of ecclesiastical decrees struck at those who aided and abetted usurers.

In England, as in most parts of western Europe, local church councils adopted specific legislation to implement and supplement this law. For example, the incumbent of every English parish was enjoined to make a public statement three or four times each year in his church declaring all usurers excommunicate. Episcopal visitations of English dioceses were to search out and correct cases of usury. William Lyndwood, the great English canonist, discussed usury’s meaning and noted its illegality in commenting on the constitutions of the province of Canterbury. If fully implemented, therefore, the canon law of usury would have been both widely known and strict in effect. It would have put severe obstacles in the way of anyone wishing to lend or borrow money at even low rates of interest.

The church’s law of usury was also technically complex. Transactions that were not loans — such as annuities, shared risk contracts, or penal bonds to guarantee payment of a debt — were held to fall outside the prohibitions of the law. Only a contract classified as mutuum fell within. This definitional complexity might seem to have left room for evasion of the law; however, it was balanced by the rule that a transaction not formally a mutuum nevertheless fell afoul of the prohibitions if the transaction served merely as a cloak for usury. Thus, if a man sought to borrow 100s., and the lender agreed only if the borrower would purchase a hat from him that was worth 2s. for the sum of 25s., this amounted to usury. It was a fraud on the prohibition against usury, because the sale of the hat served only to permit the loan to be made without formal interest. In short, it was a mere subterfuge. This “cloaked” usury is a simple example of the many transactions that might come within the church’s ban because they were made in an attempt to evade the law’s prohibitions.

The resulting intricacies of the medieval law of usury are not within the scope of this article except as they affected court practice shown in the surviving records. Nonetheless, it is useful to look at the subject of contemporary practice with an appreciation both for the strictness of the law’s standards and

10 Glossa ordinaria ad X 5.19.14 (Lyons, 1566) s.v. restituerit: “Non enim excusatur usurarius si nullus repetat ab eo vel si denuntiet, immo etiam tenetur usuram restituere saltem pauperibus si nullus apparat cui restitutat; aliter non liberatur a peccato.” For modern discussion, see Karl Wienzierl, Die Restitutionslehre der Frühscholastik (Munich, 1936).


14 On contracts in fraudem usurarum, see McLaughlin, “Teaching of the Canonists” (part 1), pp. 112–24.
the intricacy of many of its provisions. The combination of these two characteristics has caused some modern writers to conclude that the academic law on the subject bore little relation to the course of most men’s lives. The law of usury, critics say, was “remote from the practical conduct of affairs.” In practice, therefore, it must have been “largely evaded or ignored.” Against this sort of unfavorable but not implausible judgment, the evidence drawn from the surviving records should be evaluated.

**Extent of Enforcement**

Cases involving usury have been found in the early court records of the dioceses of Canterbury, York, Bath and Wells, Chester, Chichester, Ely, Hereford, Lichfield, Lincoln, London, Rochester, Salisbury, and Winchester. This list includes virtually all the dioceses for which medieval court records have survived. It seems fair to say that usury cases formed a regular part of ecclesiastical jurisdiction throughout England. One cannot always be sure that the church’s jurisdiction was successful simply because cases were introduced and heard. Sometimes offenders ignored citations and disobeyed decrees. However, prosecutions were undertaken and carried forward widely enough that one can fairly conclude that the canon law of usury was by no means the dead letter in England that critics have sometimes assumed.

Some of the examples found in the records were instance causes, that is, suits brought by the debtor to secure restitution of the usury paid as well as punishment of the usurer. Such a suit, normally styled a *causa usurarie pravitatis* in the records, could entail long judicial process. It could call for repeated court sittings, documentary evidence, and testimony by witnesses. Complicated legal points might arise, and there might have been good reason both for delay and for consultation among legal experts to decide such cases. Instance usury cases, in other words, could and in fact sometimes did fully occupy the energy of English ecclesiastical lawyers.

Most of the cases discovered, however, were not instance causes. They were criminal prosecutions, begun and carried forward *ex officio* by the court itself. Brought against men and women who had attracted public notoriety as usurers, these cases were dealt with summarily, normally in one or two court sessions. The records normally style the defendants in these cases as “public”.

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17 There are cases in which women appear accused of usury in the remaining records: e.g., Ex officio c. Marionia Turboll, diocese of Salisbury, Subdean’s Act Book 1 (Wiltshire Record Office, Trowbridge), fol. 9v (1477).

18 Marionia Turboll, in the Salisbury case just cited, for instance, was described as “publica usuraria” in the act book.
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or “common” or “manifest” usurers. This phraseology did not necessarily signify that the person accused was a person who made a career out of lending money at interest. The canon law and the evidence of the records themselves make it clear that the “manifest” character of the usury had to do with public knowledge of the act of usury. The act’s repetition, although naturally leading to public knowledge, was not what made a man a “public” usurer.

If usury prosecutions were a routine part of the business of a medieval English church court, they were never a large part. Most courts heard few such cases each year. In the commissary court for the diocese of Canterbury, for example, only five usury cases were heard during the two-year period 1373–74. Almost a century later, for 1453–54, the total for the same court came to a similarly small figure of four. The greatest incidence found comes from the diocese of Lichfield, where seven instance causes were introduced in 1477. But that figure is exceptional. One, two, or perhaps three cases per year was the norm in the diocesan courts.

Sometimes the annual records of a particular diocesan court contain no usury cases at all. For instance, Rochester’s consistory court for 1445–46 and London’s commissary court for 1513–14 apparently heard none. Such total absence is unusual, but not unparalleled. It would be fair to say that although it never comes as a surprise to find a usury prosecution in one of the remaining court books, it is unusual to find many of them undertaken in any one year. Because most of these diocesan courts were dealing with something like a hundred cases each year, the appearance of usury cases can be character-

19 Ex officio c. Discott, diocese of Hereford, Commissary Court Act Book (Hereford County Record Office, Hereford) O/13, p. 73 (1480): “est communis usurarius.”
20 Ex officio c. Taillour, diocese of Ely, Consistory Court Act Book (Cambridge University Library) EDR D/2/1, fol. 78 (1377): “tanquam usurarium manifestum.”
21 One sense in which this phrase was used by the canonists was that of “manifesti per famam tantum.” See Hostiensis, Summa aurea V, tit. de usuris, no. 10; this was insufficient to establish guilt, but was sufficient to require him to deny the charge on oath. Another sense of “manifest” required a judicial declaration of guilt. It is clear that the English records use the terms in the former sense. See generally McLaughlin, “Teaching of the Canonists” (part 2), pp. 12–13.
22 This is shown by cases in which only one act of usury was noted and nevertheless was treated as being sufficient to give rise to a charge of “common” usury. E.g., Ex officio c. Tente, diocese of Canterbury, Commissary Court Act Book (Canterbury Cathedral Library) X.1.1, fol. 7v (1449): “Ricardus Tente de Dodington notatur quod est communis usurarius pro eo quod mutuavit c s. cuidam Jacobo Lydingden de eadem et recepit ultra sortem.”
23 Taken from Act Book Y.1.1, fols. 27v–109.
24 Taken from Act Book X.1.1, fols. 64v–98v.
25 Taken from Act Book (Joint Record Office, Lichfield) B/C/1/2, fols. 227v–263v.
26 Based on examination of the Consistory Court Act Book (Kent County Record Office, Maidstone) DRb Pa 2.
ized as regular but infrequent, a distinctly minor part of the business of an ordinary English ecclesiastical court.

From this relative infrequency few far-reaching conclusions can be drawn. The records are insufficient to prove either the overall prevalence of usury or the effectiveness of the church's prohibitions. Even leaving aside the question of the force of the church's sanctions, two insuperable barriers stand in the way. First, despite the absence of royal court jurisdiction, other lesser courts did undertake prosecution against usurers during the Middle Ages. Manor courts prosecuted them in places. So did the courts of cities and boroughs, most notably London, where the mayor and aldermen heard usury cases from at least the fourteenth century. The infrequency of usury cases in the records of the commissary court for the diocese of London, the place in England where one would have expected the highest incidence of usury, probably occurred because the local secular courts heard most cases. Legal jurisdiction in medieval England did not break down into a neat pattern. There were many courts with conflicting, and sometimes competing, claims to jurisdiction. Usury was one of the subjects they shared. On a local level, therefore, the canon law's claim to exclusive jurisdiction over usury was not observed as it was on the royal court level. This fact makes conclusions about the extent of usury impossible to draw on the basis of the evidence surveyed.

Second, even had there been no overlapping jurisdiction, the records of the church courts could not furnish an accurate picture of the extent of canonical enforcement. They tell us nothing about enforcement undertaken in what the canon law called "the internal forum," that is, the confessional. As noted above, the diocesan courts dealt only with "public" or "manifest" usurers. This excluded cases where the fact of usury was known only to the parties involved. And in the nature of things, then as now, much usury is not made public. Many debtors will not bring the matter into the open. They may be wary of implicating themselves in the crime (a possibility the canon law left open). They may count the attendant shame a greater cost than the usury paid. They may want to protect future sources of credit. The canon law itself recognized these difficulties and therefore assigned much responsibility for searching out

29 E.g., Wakefield Court Roll (Yorkshire Archaeological Society, Leeds) 1336/7, m. 3: "Adam del Brighous de Elfloburgh est communis usurarius ideo in misericordia"; Hundred of Appletree Court Roll (Public Record Office, London) DL 30/45/523, m. 8 (1389): "Agnes de Tyso est usurarius."


31 See X 5.19.4, and canonists ad idem. The distinction came down to the difficult questions of the degree of need of the borrower and the possible fraudulent intent of the parties.
cases of usury to the parish priest in the confessional. Contemporary confessor's manuals show this plainly.\textsuperscript{32} So do the canon law texts themselves.\textsuperscript{33}

The seal of the confessional, therefore, and the shared nature of jurisdiction over the crime of usury stand in the way of firm conclusions about the incidence of usury or the efficacy of its detection. And there is of course the difficulty of knowing whether or not the courts were able finally to enforce the canon law's sanctions. What one can say with more confidence is that on regular, though not frequent, occasions the courts of the church did undertake public enforcement of the canon law against usury. The possibility existed, and it was used. The further question that can usefully be addressed is: How closely did actual litigation in the church courts follow the formal canon law on the subject?

\textbf{Nature of the Cases}

The records show that the substantive canon law was in fact applied in the cases and that the problems raised in academic treatises on the law of usury were relevant to what happened in the courts. There was correspondence between law and practice. However, there were limits to it. The records show that few large loans were attacked as usurious; they strongly suggest that only substantial rates of interest were punished as usurious; and they demonstrate conclusively that the rules against "indirect" participation in usurious transactions were not put into practice. The English church courts prosecuted only public lenders, lenders who had entered into relatively small transactions, and at relatively large rates of interest.

Correspondence between law and practice is found in the nature of the transactions the English courts treated as usurious. The centrality of the loan, \textit{mutuum}, for the canon law's definition of usury has already been noted. The records are in accord with this. The scribes who kept the records often took care to note specifically that the prosecution was for usury \textit{pro mutuo}\textsuperscript{34} or \textit{pro mutuatione},\textsuperscript{35} or that the defendant \textit{mutuavit} a sum of money and received \textit{ultra sortem} for it.\textsuperscript{36} The language used, in other words, tracks that found in the formal law so closely that the historian may fairly assume that the court officials had the formal categories in mind. This correspondence is not surprising. It is what was supposed to exist under the canon law system, and it occurred in other areas of the canon law applied in the English courts. How-


\textsuperscript{33} X 5.19.10.

\textsuperscript{34} E.g., Ex officio c. Baker, Rochester Act Book DRb Pa 3, fol. 346 (1458): "Alicia Baker super crimine usu reddenso viii d. de Ricardo Hidemont pro mutuo xl d."

\textsuperscript{35} E.g., Ex officio c. Parke, Canterbury Act Book X.1.1, fol. 4v (1450): "pro mutuacione xx s. cuidam Carpenter de Radmersham receperat iiiii nobiles."

\textsuperscript{36} E.g., Ex officio c. Phelpot, Hereford Act Book O/22, p. 200 (1502): "mutuavit Johanni Phelpot xx s. et recepit ab eodem in certis terminis xxv s. per annum et sic ab eodem habet ultra sortem principalem v. s. nomine usure annuatim."
ever, the correspondence between law and practice remains a point worth making, because it did not exist in every area of church court practice.\textsuperscript{37} Where it does, the historian should take note. It means that the academic law was not in fact entirely out of touch with the realities of legal practice.

Moreover, correspondence with the law found in academic writing exists in the many cases of allegedly “cloaked” usury that came before the ecclesiastical judges. The law held that if the purpose of entering into a more complicated transaction was merely to disguise a usurious loan, the transaction was fully as unlawful as the simple receipt of a sum beyond the principal of a loan would have been. These more complicated cases of alleged fraud arose in practice. One found in the surviving records is the simulated contract of sale. For example, at York in 1397, John Domins was accused of usury for contracting to purchase a quantity of grain from Henry Andrew and John Burnman on August 15, and to resell the grain to them on November 11.\textsuperscript{38} The price to be paid by Domins on the former date was 25s. The agreement was that he would sell the grain back to them on the latter date for 40s. The result of such a contract amounted to usury because it was in effect a loan of 25s. to Andrew and Burnman. That sum would be repaid at the end of the three months together with interest of 15s. Domins would be richer by that amount after the three-month period. That it was formally disguised as a sale of grain should not alter its substance.

Regrettably, it is not possible to probe much further into the legal issues raised in the case, and they might in fact have been considerably more complicated. This analysis assumes that the value of the grain would remain essentially the same during the three-month period. However, if there had been a risk of market fluctuation in the interval between August and November, and Domins had agreed to share in this risk, the legitimacy of the transaction could have been defended under canon law. Thus, it is cause for legitimate regret that the court record is not complete enough to show whether any such legal argument was in fact made. All we know is that in this case, and in several like cases,\textsuperscript{39} a contract of sale allegedly in fraudem usurarum was attacked in a church court.


\textsuperscript{38} Act Book (York Minster Library) M 2(0), fol. 27v (1397): “Dominus Johannes Domins comisit usuram gravem emendo a Henrico Androwe et Johanne Burnman de Coton x quarteria ordei emendo quarterium pro ii s. vi d. circa festum Assumptionis beate Marie et vendendo eisdem dictum ordeum circa festum sancti Martini proxime sequens ultimo preteritum viz. unum quarterium pro iii s. dictis viris.”

\textsuperscript{39} Other cases involving allegedly fraudulent sales are: Ex officio c. Makkanhull, York Act Book (Borthwick Institute, York) D/C AB 1, fol. 174 (1465); Ex officio c. Mannyng, London Commissary Court Act Book MS 9064/4, fol. 301v (1491); Ex officio c. Somer, London Commissary Court Act Book MS 9064/6, fol. 77v (1494); Ex officio c. Hogham, London Commissary Court Probate Act Book (Guildhall Library, London) 1496–1500, fol. 38v (1498).
A second kind of “cloaked” usury found in the records involved the mortgage or pledge. At Rochester in 1447, for instance, John Medeherst was cited for making a usurious loan of six marks (80s.) to Stephan Yonge to enable Yonge to purchase land from him for that price. Under the terms agreed upon, Medeherst was to retain formal title to the land until the six marks had been fully paid. But at the same time he also leased the identical land to Yonge for 6s. 8d. a year. This was, in effect, a mortgage. Yonge would pay off the loan in installments, together with 6s. 8d. “rent” each year for four years, until the purchase price had been paid. At that time, the land would be fully his. Under the canon law, the 6s. 8d. represented a usurious payment, because it served no function other than paying for the original loan of the land’s purchase price. In effect the money had been given for deferring payment of the principal. That the transaction formally left title in Medeherst for the interim period, and called the 6s. 8d. rent, should not disguise that fact. In substance there had been a loan, coupled with an interest payment.

This Rochester case shows clearly that the canon law of usury was being put into practice, because Medeherst raised an affirmative defense to the charge. He answered that Yonge enjoyed an unconditional right to pay the six marks at any time during the year term. He brought a written indenture to that effect into court. This should mean, he argued, that the 6s. 8d. truly represented rent for the land, of which Yonge was enjoying the fruits. Since the six marks could be paid at any time, there was, in substance as well as form, no mutuum involved. Hence there could be no usury.

Under the canon law, the outcome of such a dispute turned as much on the intent and understanding of the parties as on the terms of the indenture itself. If the written terms alone controlled, the prohibitions against usury could be too easily evaded. And, in fact, Medeherst’s case was handled in just this way. He was required to swear a formal oath that no fraud on the usury laws had existed in the transaction and to find nine “oath helpers,” neighbors who would swear to their belief in his oath. In the event, Medeherst successfully underwent this process, called canonical purgation. He was consequently dismissed by the Rochester judge.

A third form of “cloaked” usury, the gift in return for a loan, appears less

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40 Act Book DRb Pa 2, fol. 75: “Johannes Medeherst de Kyngesden citatus est per A.C. super crimen usurarie pravitatis recipiendo pro mutuo de Stephano Yonge pro vi marcis ad emptionem unius mesuagii mutuati per annum xx s.”

41 Other cases attacking allegedly fraudulent mortgages or pledges are: Schotynden c. Barthelot, Canterbury Act Book Y.1.1, fol. 17 (1373, involving a cow pledged); Ex officio c. Rolf, Canterbury Act Book X.8.3, fol. 49v (1464, involving land); Ex officio c. ap Jeynkyn, Hereford Act Book O/13, p. 22 (1480, involving land); Pravict c. War, Rochester Act Book DRb Pa 4, fol. 303v (1496, involving land); and Fryingham c. Rosse, Hereford Act Book I/5, p. 432 (1523, involving land).

42 Rochester Act Book DRb Pa 2, fol. 75: “Interrogatus dicit quod comparavit de predicto Stephano Yonge unam peciam terre pro vi marcis et concessit et tradidit ei terram predictam ad firmam pro vi s. viii d. annuatim per tres annos et quod convenit et concessit ei quod si solveret ei interim predictas vi marcas rehaiberet predictam terram.”
frequently than either of the other two mentioned. Such cases did, however, occur. At Chichester in 1508, Thomas Fowler was sued for receiving a silver spoon for a loan of 8s. previously made to Richard Sawton, the plaintiff. Fowler’s defense was that Sawton had “freely given” him the spoon; that it had nothing to do with the loan. Again, this case seemingly rested on the difficult question of whether the parties had intended to evade the prohibition against usury. The judge postponed the hearing, the record noted, “because it was arduous.” Thereafter it disappeared from the act book. Like many such cases, one learns only that a transaction allegedly *in fraudem usurarum* was attacked, not what the eventual outcome was. Points from the canon law of usury were raised. To suppose that they were argued according to the formal law would be a reasonable, but not a provable, assumption. Correspondence between theory and practice is, at least, positively suggested.

On the other hand, it would not be reasonable to assume that the courts enforced the canon law rule defining usury as the taking of *any* amount above the principal. In practice, only loans at “immoderate” rates of interest seem to have been subject to prosecution. The act books strongly suggest this important limitation on the law’s enforcement. The evidence to prove it is unfortunately imperfect. Many of the act book entries record no more than that a named person had been cited as a common usurer. And even in fuller cases, where a complicated transaction was involved, it becomes difficult to calculate the effective rate. However, where the record does give the facts about a loan fully and clearly, the case involved a usurer prosecuted for taking more than a small amount beyond the loan’s principal.

Examination of the records has turned up twenty-eight cases where the yearly rate of usury alleged can be calculated with reasonable certainty. Figuring on the basis of simple interest, the mean rate of usury alleged for these cases is 163/4%. The highest rate found was 50%, alleged both in a Canterbury case of 1471 and in a Rochester case from 1456. The lowest was 5⅔%, from an Ely case of 1380, in which the defendant was acquitted “because [the

43 Chichester Act Book (East Sussex Record Office, Chichester) Ep I/10/1, fol. 106v: “et actor allegavit viva voce quod pars rea receptit et adhuc habet de actore unum coeliacium argenteum pro modo usure pro mutuo viii s."
44 Ibid.: “et pars rea negat sed dicit quod actor libere dedit sibi dictum coeliacium.”
46 They were not, however, necessarily complicated. Where a lender took goods or crops as usury, it is impossible to be exact about the rate and they have not been included. E.g., Ex officio c. Cece, diocese of Hereford (1397), in A. T. Bannister, “Visitation Returns of the Diocese of Hereford in 1397,” *English Historical Review* 44 (1929), 453: “mutuavit cuidam Jak atte Hulle xii s. quos recepit integros una cum iiii busselis frumenti pro dilacione.”
47 Three such cases were found: Ex officio c. Taillou, Ely Act Book EDR D/2/1, fol. 78 (1377); Ex officio c. Faupe, Canterbury Act Book Y.1.11, fol. 28v (1468); Ex officio c. Somer, London Commissary Court Act Book 9064/6, fol. 77v (1494).
48 Ex officio c. Mychell, Canterbury Act Book Y.1.10, fol. 93v; Ex officio c. Burgh, Rochester Act Book DRb Pa 2, fol. 293v. Both involved very small loans (3s. 4d., and 4d.)
charge] was not fully proved against him.” 49 Apart from this somewhat equivocal Ely case, the rate in all the rest was higher than 7 1/2% a year, and the great majority clustered between 12 1/2% and 33 1/3%. 50 Although it is possible, therefore, that the church courts would entertain a causa usurarie pravitatis where only a small amount had been taken in excess of a loan’s principal, the evidence suggests that normally they did not.

This finding is not wholly unexpected. Contemporary civilians, that is, commentators on Roman law, followed the texts of the Corpus iuris civilis in permitting interest under certain conditions. 51 One of the texts found in the Novellae permitted a moderate rate of interest to be stipulated in a loan. 52 The civilians endorsed its wisdom. Thus, the distinction between moderate and immoderate rates of interest, with only the latter being considered unlawful, was a living idea at the time of the litigation described here. Many English ecclesiastical lawyers would have been familiar with it.

The canonists also dealt with the possibility of adopting this lenient understanding of usury in commenting on a canon of the Fourth Lateran Council (1215) that condemned gravies et immoderatas usuras. 53 This text could be used to argue that the canon law condemned not simply all usury, but only immoderate usury. The canonists ultimately rejected this understanding of the text, holding that the canon law prohibitions necessarily prevailed over the lax Roman law on the subject. 54 However, their writings show that the distinction had practical force and even appeal at the time. Arguments were advanced in its favor, such as the modern-sounding notion that if a moderate rate of interest were allowed, this would keep borrowers out of the clutches of truly rapacious lenders. 55

Even more than academic opinion, however, evidence from parts of the Continent renders the English situation less surprising than it might otherwise be. Scholars have shown that late medieval practice, often resting on local

49 Wardale c. Bytering, Act Book EDR D/2/1, fol. 126, 128v; the instance cause seems to have been settled by agreement between the parties; the pendent ex officio matter allowed to go to purgation “quia non est clare probatum contra dictum dominum Ricardum.”
50 Records of the cases counted, apart from those noted above, are found in: Canterbury Act Books Y.1.1, fol. 17 (1373), 15 + %; Y.1.3, fol. 80 (1418), 23 1/2 %; X.1.1, fol. 18 (1450), 12 1/2 %; Y.1.11, fol. 64v (1470), 10%; Y.1.11, fol. 93v (1470), 35%; Y.1.11, fol. 107v (1470), 7 1/2 %; Y.1.10, fol. 93v (1471), 50%; Y.1.10, fol. 245 (1475), 8 1/4 %; Y.2.10, fol. 1v (1515), 13 1/4 %; Rochester Act Books DRb Pa 2, fol. 75 (1447), 25%; DRb Pa 2, fol. 293v (1456), 30%; DRb Pa 2, fol. 293v (1456), 50%; DRb Pa 3, fol. 346 (1458), 20%; Leicester (Archeacontry) Act Book, Lincs. Archives Office, Lincoln, Viv/2, fol. 29 (1489), 33 1/2 %; London Act Books 9064/6, fol. 194 (1497), 35 + %; 9064/8, fol. 230 (1499), 25%; Hereford Visitation Book, in English Histori REVIEW 45 (1930), 460 (1379), 33 1/4 % (two cases); Hereford Act Books O/13, p. 274 (1480), 38%; O/22, p. 195 (1501), 8 + %; O/22, p. 200 (1502), 20%; 1/5, p. 432 (1523), 13 1/2 %.
52 Nov. 34.1.
53 X 5.19.18.
54 E.g., Glossa ordinaria ad idem: “Ergo moderatas videtur permitting, a contrario sensu. . . Quod non est verum.”
statutes, permitted the taking of moderate rates of interest in locations as disparate as Venice, Aragon, and parts of northwestern Europe. Usury was apparently thought of in something like the modern sense, as an exorbitant rate of interest. A distinction between high and low rates of usury was apparently accepted in fact, if not in canonical theory, in many parts of Europe. What makes the English evidence striking is that the church courts themselves, the institutions most closely tied to the formal canon law, seem to have accepted the distinction. Whatever the theory, in fact their records suggest that they did not undertake prosecutions against “moderate” usurers.

Equally absent from the surviving records are cases brought to enforce the canonical penalties against those who cooperated with usurers. The canon law contained some sweeping, even extravagant, provisions aimed at discouraging usury. For instance, clerics who granted Christian burial to or received alms from impenitent usurers were to be suspended from their clerical office. Likewise, a cleric or even a layman who leased property to someone who practiced usury on the premises might himself be excommunicated. However, neither of these proscriptions has left any trace of actual enforcement in the surviving records. If they were applied in practice, it was only in the forum of the confessional. Cases found in the surviving act books were brought only against direct participants in usurious transactions and, as noted above, only when that transaction had involved more than a low rate of usury.

In one additional respect the law applied by the church courts seems to have been restricted in practice. That is in the amount of the loans attacked as usurious. Very few involved large sums of money. The largest instance discovered in the surviving act books was for slightly more than £24. The smallest involved a loan of only 4d. The great majority of cases dealt with loans of 40s. or less. Cases brought over loans in amounts between 10s. and 20s. are the most common found. Large lenders, at least if the surviving records are representative, escaped the nets of the church courts.

Why these limitations were observed in English practice is not always easy to

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59 Sext 5.5.2.
60 Sext 5.5.1.
61 Ex officio promo to c. Holnehurst and Blechyndon, Canterbury Act Book Y.1.3, fol. 80 (1418); the loan was for 28 marks, and (at least in the defendant’s submission) a lease of real estate, with no usurious motive, was involved.
63 It is possible that fuller record survival would reverse this conclusion; the medieval records of the Court of Arches (the provincial court of appeal) and the consistory court of London have virtually all disappeared.
determine. No external pressure from the royal courts to limit the scope of
prosecutions or to conform to a lax definition of usury existed. No English
statutes restricted the right of church court judges to follow the letter of the
canon law. Can it be that virtually no borrower at less than a modest rate of
interest complained during the many years of litigation covered by the surviv-
ing records? Or that no official had the energy to prosecute those who aided
manifest usurers? Or that no victim of usury in a large-scale loan had incentive
enough to complain? These possibilities seem implausible. But they are
apparently the fact.

To a large extent, the searcher in the records of the church courts can only
describe the situation as it existed. In the nature of things, the records cannot
provide a satisfactory explanation, because they do not record any motivation
or reasoning on the part of either judges or litigants, and we have little but
record evidence from which to judge. At most, examination of the procedure
used in usury cases will provide suggestions and perhaps some clues to the
meaning of the evidence.

**Procedure and Proof in Usury Cases**

In most respects, practice in usury cases did not differ from that used in
other litigation in the English church courts. When a cause was begun at the
instance of a private party, the responsibility of proving the usurious charac-
ter of the transaction was left to that plaintiff. If the defendant denied the
allegation, the plaintiff had the burden of producing witnesses or written
documents to prove that the transaction was usurious. A few records from
actual litigation have survived to show that this happened in practice.

By far the greater number of usury cases, however, arose from *ex officio*
prosecutions. Unlike instance causes, they were brought in the name of the
court itself to vindicate the public law of the church. In such cases, if the
person accused denied the charge of usury, he was required to swear a formal
oath that he was innocent and to find oath helpers or "compurgators" who
knew him and could conscientiously swear to their belief in his oath.64 Successful
purgation led to acquittal and a public declaration of the defendant's
innocence. Unsuccessful purgation (or failure to find a sufficient number of
compurgators) led to conviction and punishment, normally by undergoing
public penance in the parish church before the congregation assembled on a
succeeding Sunday.

Both forms of procedure contained possibilities of mitigation. There were
ways in which factors that were not strictly legal could have shaped the nature
of litigation. No doubt, certain of the cases that came before the church courts
would have been quite clear-cut. Simple loans of money in return for a prom-
ise to pay a greater sum raised a straightforward question of fact: Had the
loan been made on the terms alleged? However, when the underlying transac-

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64 E.g., Ex officio c. Baker, Rochester Act Book DRb Pa 3, fol. 346 (1458): "Alicia Baker super
crime usurarie . . . , negat et habet ad purgandum se coram vicinis."
tion was more complicated, as it often was, both forms of procedure left room for mitigation in some of the law's strictness.

In instance causes, this could have occurred in two ways. First, the courts required proof that usury had been paid for a loan. They would not give sentence on a debtor's word or simply because of public suspicion. The necessity for proof normally required that the plaintiff bring witnesses to testify, and many a witness had a mind of his own about the subject. They also had a chance to express their views. They were routinely asked to testify whether or not a transaction had been usurious, and they were free to say what they thought. One witness, testifying at Canterbury in 1292, remarked that the defendant could not be a usurer because "he did nothing else than was commonly done in the parish of Aldington in selling oxen and sheep."65 Another added (perhaps sarcastically) that the defendant "took less than the archbishop takes from his debtors."66 In the face of such attitudes and in light of the relative complexity of the canon law of usury, the church court judges would have had to overcome lay attitudes to enforce the rules as rigorously as the formal law required.

Most judges did not make that attempt. This is one reason the law's strictness was subject to mitigation. In practice, the judges routinely permitted, and seem even to have encouraged, compromise and private settlement of usury cases. Far from giving evidence of judicial efforts to impose a strict definition of usury on the laity, the court records repeatedly show the judges allowing the parties to settle their own quarrels. Notations such as Pax est67 or dismissals sub spe concordie68 are frequent in the act books. The court record simply states that the parties had reached an agreement.

This characteristic of usury cases is not unusual; it occurred throughout the litigation heard in the English church courts.69 However, it does suggest a way in which the rules about usury might have been tempered in practice, and one possible explanation for the restricted nature of the prosecution undertaken. The judges permitted litigants to settle the cases themselves, or to do so with the help of neighbors who had taken an interest in the restoration of concord between them. There was little that was inquisitorial about instance jurisdiction over usury. It left room for the parties to set aside some of the harsher canonical rules.

In ex officio cases, the possibility that procedural and attitudinal factors

65 Ex officio c. Hamdenum, Ecclesiastical Suit Roll 92: Matthew Frauncey testified, "quod alio modo non fecit quam communiter efficiitur in parochia de Aldenton vendendo boves et oves."

66 Ibid., John Bere testified that no usury intervened, "...hoc adiciendo quod minus accepit ab isto teste ut dicit quam archiepiscopus accept ip a suis debitoribus."

67 E.g., Ex officio c. ap Goth, Hereford Act Book O/5, p. 16 (1454): "Postea vero pars rea comparat et absoluta est quia dicit quod pax est."

68 E.g., Barbowe c. Fauconer, diocese of Chester, Consistory Court Act Book (Cheshire Archives, Chester) EDC 1/6, fol. 9v (1533): "Stet sub spe concordie."

shaped usury jurisdiction is likewise evident. Both in the inception and the termination of these prosecutions, the community played a role as important as that of the judges. First, most ex officio cases came before the courts as a result of local initiation. Presentment by the parish churchwardens or other appointed “questmen” normally brought suspected usurers before the courts, rather than an officially sponsored investigation. Doubtless there is something to the common allegation that the church courts permitted abusive summoners to ferret out offenses of the laity. But that was the exception, an abuse of canonical procedure. Normally, ex officio cases arose because there was local presentment of the offense by representatives of the parish church.

These representatives, or “questmen,” were laymen drawn from the community. They were appointed to carry out local ecclesiastical duties and to serve (on a smaller scale) the same function a grand jury served in secular criminal practice. They were specifically assigned to report matters that were amiss in their parish, including the existence of public usurers. It may be that some of the prosecutions were brought to the attention of the courts by disgruntled debtors, but presentment by these laymen was the chief source of ex officio prosecutions. The church lacked a functioning and inquisitorial bureaucracy ready to search out cases of usury. Much depended on local and private initiative, and to this extent the strict law of usury was subject to mitigation by the mechanism of failure to present anyone except the creditor who took immoderate usury. Insofar as the men and women of any parish found only gross usury offensive, they were free to translate that sentiment into action by presenting only immoderate usurers.

Mitigation could also have occurred at the proof stage. Compurgation, the method of proof used in ex officio cases, depended on the conscience of both the defendant and his compurgators. The defendant’s oath required him to swear that he had not committed the crime of usury. The oath of the compurgators asked them to swear that they believed the person accused had sworn truly. Neither was asked to swear to a simple question of fact: Did you lend ten marks and receive back twelve? It was a more complicated inquiry. Because the usurious character of many transactions actually depended on whether the transaction had been made in fraud of the usury laws, intent was a relevant factor. Compurgation was therefore not an inappropriate method of fact-finding. It tested whether or not there had been fraud. It also left room for some moderation of the law’s definition of what constituted punishable usury. Much depended on the conscience and understanding of the

70 E.g., Ex officio c. Cressy, archdeaconry of St. Alban’s (Hertfordshire Record Office, Hertford) ASA 7, fol. 6 (1515): “Testes sinodales et inquisitores jurati in eadem parochia dicunt et presentant. . . .”
71 It is possible to suspect this where the debtor also appeared in court: e.g., Ex officio c. Rolf, Canterbury Act Book X.8.3, fol. 49v (1464); Rolf was accused of committing usury in a loan to Richard Aley, who is recorded as appearing personally in court.
72 X 5.19.5, 13.
73 See the judicious remarks in Ralph Houlbrooke, Church Courts and the People during the English Reformation 1520–1570 (Oxford, 1979), pp. 45–46.
parties involved. This may help to explain why the English church courts undertook such restricted enforcement of the law of usury. Procedure influenced substance.

On the other hand, it would be mistaken to suppose that the procedure outlined here adequately explains the failure of the English church courts fully to implement the canon law of usury. Nothing in the records proves that the judges abdicated control of litigation to the judgment of the community. It would be strange if they had. Nor is there much positive evidence (except the result) for supposing that medieval Englishmen considered the taking only of immoderate rates of usury as wrongful. In fact, we can only guess at the attitudes of the judges and the laymen involved in litigation. We are dealing with reasonable conclusion, not proof. With this caveat, however, it remains clear that the procedure used in the courts left room for mitigation of the law. The possibility is there.

**Fate of Ecclesiastical Jurisdiction**

The Reformation did not bring the demise of the English church’s jurisdiction over usury. In fact, the first English canonical treatment of the subject was written in 1569 and published in 1572. It states the traditional law on the subject, citing the medieval canonists in profusion. The temporal law also permitted the continuation of the church’s jurisdiction. Both the statute of 1545 and the more important enactment of 1571 which created a common-law offense of usury contained “savings clauses” to preserve the rights of the ecclesiastical courts. Parliament did not intend to oust the church’s jurisdiction, but to add secular jurisdiction to it.

The church courts in fact took advantage of those “saving clauses.” Records from after 1571 continued to contain both ex officio prosecutions brought against usurers and instance causes brought by debtors. They were little changed in form from those brought prior to the Reformation. The numbers were reduced, as might be expected, but the old forms were maintained by the Elizabethan church courts.

The most revolutionary feature of the Tudor legislation, historians have always assumed, was its distinction between rates of interest in excess of 10% per annum and those below. Although the latter was not made legal, the law’s

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75 Wilson cites Panormitanus (p. 318), Hostiensis (p. 328), Guido de Baysio (Archidiaconus) (p. 290), Franciscus Zabarella (Cardinalis) (p. 329), Joannes Andreae (p. 329), Joannes de Imola (p. 329), Petrus de Ancharano (p. 329), and Willemus Durantis (p. 329).
76 37 Hen. VIII, c. 9, repealed by 5–6 Edw. VI, c. 20, and 13 Eliz. c. 8, made perpetual by 39 Eliz. c. 18. The allowable rate was reduced to 8% by 21 Jac. I, c. 17.
77 Ecclesiastical records after 1571 have been examined less fully than those for the earlier period; there is a real need for more work here. However, the records so far explored do reveal the existence of usury cases: Kywroode c. Jauncye, Hereford Act Book I/11 s.d. 29 Feb. 1576; Ex officio c. Turner, Canterbury Act Book Y.3.16, fol. 290v (1579); Ex officio c. Somefeld, Lichfield Act Book B/C/3/1, s.d. 19 May 1591. See also the valuable discussion in Richard L. Greaves, *Society and Religion in Elizabethan England* (Minneapolis, 1981), pp. 596–611.
full force was directly against only the former. Taking interest at less than 10% was not punishable except by forfeiture of the interest, and it soon became apparent that in practice this would be interpreted to allow rates below that figure. This development normally has been seen as an express rejection of the medieval canon law on the subject, in favor of a more “Calvinist” doctrine that restricted illegal usury to the taking of high rates of interest. In one sense, it was exactly that. The Elizabethan statute did set aside the law of the church that defined usury as the taking of any rate of interest, no matter how small. It did adopt a position something like that advocated by John Calvin.

However, in a more immediate and probably also more accurate sense, the new legislation built upon what had been long-time fact in English legal practice. The distinction between “petit usury” and “grand usury” was not radically new. Evidence from the medieval records shows that the distinction came close to practice that the English church courts had long made familiar. In this way the canon law not only provided much of the legal substance behind the new secular legislation and the common law cases that built upon it; the canon law as enforced in the medieval church courts also provided a practical precedent for the new definition of what rates of interest were usurious enough to call for the full sanctions of the law.

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