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By

Shael Herman

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Herausgegeben von Prof. Dr. Reiner Schulze, Trier,
Prof. Dr. Elmar Wadle, Saarbrücken,
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For Helen, Jordana, and Dara

Geleitwort

In dem programmatisch angelegten Band 3 dieser Schriftenreihe hat Peter Landau mit eindringlichen Worten den Einfluß des kanonischen Rechts auf die europäische Rechtskultur hervorgehoben. Der vorliegende Band nimmt dieses Thema insofern auf, als seinen Ausgangspunkt dasjenige der kanonistischen Dogmen bildet, das mehr als jedes andere das Verkehrsrecht des Mittelalters geprägt hat: das kanonische Wucherverbot. Konsequent durchgeführt, hätte es das Wirtschaftsleben wohl weithin zum Erliegen gebracht. Daß es dazu nicht kam, sondern daß internationaler Handel, daß Wirtschafts- und Finanzwesen einen bis dahin unerhörten Aufschwung nahmen, liegt nicht zuletzt daran, daß die mittelalterlichen Juristen eine ganze Vielzahl von Wegen ersannen, auf denen das Wucherverbot mehr oder weniger subtil umgangen werden konnte. Einer der praktisch wichtigsten von ihnen war die in der Regel als Kauf deklarierte Begründung einer Rentenschuld. Die Entwicklung dieses Finanzierungsweges und ihre rechtliche Beurteilung im mittelalterlichen Frankreich und England bilden einen Schwerpunkt des vorliegenden Bandes. Eingebettet sind diese Erörterungen in den weiteren Fragenkreis der zunehmenden Kommerzialisierung mittelalterlicher Lehnsbeziehungen; ergänzt werden sie durch einen Blick auf den von der Kirche tolerierten Judenwucher, auf dessen staatliche Reglementierung sowie auf mögliche Verbindungslinien und Wechselwirkungen zwischen jüdischer Doktrin und mittelalterlicher Geschäfts- und Finanzierungspraxis.

Kanonisches Recht, Judenrecht, Feudalrecht und mittelalterliches Wirtschaftsleben: dies alles sind europäische Themen par excellence. Dieser europäische Charakter der Studie wird noch dadurch unterstrichen, daß die durch das anglonormannische Recht hergestellte Verbindung zwischen England und Frankreich deutlich hervortritt und damit einmal mehr die Vorstellung einer gänzlich isolierten Entwicklung des englischen Rechts als ein Mythos erwiesen wird.

Zum ersten Mal erscheint hiermit ein Band dieser Schriftenreihe in englischer Sprache; damit wird die schon im Vorwort zu Band 7 angedeutete vorsichtige sprachliche Öffnung fortgeführt, die nach dem Verständnis der Herausgeber dem europäischen Charakter der Schriftenreihe entspricht.

Der Autor dieses Bandes, Shael Herman, verkörpert europäische Tradition außerhalb Europas. Er ist Professor an der Tulane Law School, Louisiana, und

unterrichtet damit in einem Staat, wo wie in nur wenigen anderen civil law und common law aufeinanderprallen bzw. ineinander übergehen. Ich freue mich sehr, daß es gelungen ist, diese überaus anregende Studie im Rahmen der Schriften zur Europäischen Rechts- und Verfassungsgeschichte zu publizieren und sie damit für das europäische Lesepublikum sehr viel leichter zugänglich zu machen, als sie es in einem amerikanischen Law Journal wäre.

Februar 1993

Reinhard Zimmermann

Preface

This book builds upon my earlier study, "Legacy and Legend: The Continuity of Roman and English Regulation of the Jews," 66 *Tulane Law Review* 1781 (1992). Like "Legacy and Legend," this book blends aspects of Roman law, canon law, and Jewish law, as well as medieval English and French law. In terms of outlook and argument, however, the studies are fundamentally different. "Legacy and Legend" laid equal stress upon Roman law and English law and viewed canon law as a bridge between them. To highlight links among these bodies of law, the article showed that the Jewish rejection of Christ's message decisively affected their self-definition and the course of their relations with Christians. During the earliest centuries of Christianity, for example, this rejection inspired in Christianized Roman emperors a scorn for Jews. Reinforced by church leaders, this imperial hostility dramatically affected the terms of Jewish survival among Christians. Centuries later, medieval English monarchs, similarly scornful of Jews, nevertheless imported Jewish lenders from Normandy to act as financiers to the newly conquered Norman realm. These monarchs found in Roman doctrine and canon law a convenient, ready-made user's manual for their Jews.

To these thematic threads the present book adds an analysis of medieval financial practices and doctrines. Our story-line here may be summarized as follows: medieval churchmen, professing aversion to commercial activity, rejected Roman doctrines that authorized lending at interest. The rejection eventually assumed the form of a canonical usury ban. Exempt from the ban, Jewish lenders attracted a social opprobrium of almost biblical proportions. Jews' usury was a badge of their rejection of Christ's message; in the collective medieval imagination, Jewish lenders summoned images of biblical money changers in the temple. Despite its efforts, the Church could not eradicate usury, for it was a manifestation of human profitseeking. A quickening thirteenth century commerce demanded interest-bearing transactions; and clerics, monarchs, and nobles engaged routinely in such transactions. Seeking to reconcile material aspirations with spiritual ones, theological imaginations were bent to the task of accommodating commercial practices to the usury ban. An account of that accommodation, this book speculates about the effects of medieval usury upon the feudal structure of the Anglo-Norman realm.

In a book about debts, I would be remiss if I failed to record my own. I am grateful to Professors Peter Stein (Queens' College, Cambridge), Richard Helmholz (University of Chicago), and Reinhard Zimmermann (University of Regensburg) for having generously read and commented on drafts of this work. Each colleague offered a number of thoughtful suggestions for improving the story. I am also grateful to Professor Zimmermann for the foreword and for having recommended this book for German publication in the series, *Schriften zur Europäischen Rechts- und Verfassungsgeschichte*. The series editor, Professor Reiner Schulze (University of Trier), has kindly coordinated publication of the book with Duncker & Humblot. Lynn Becnel and Stephanie Mitchell painstakingly typed and corrected the manuscript more often than any of us can remember. Catherine Bellordre carefully checked substantive information in the book against endnote references. Mark Cunningham checked formal consistency of the endnotes. Kimberly Koko Glorioso and Kevin Hourihan, both of the Tulane Law Library, contributed their expertise to preparation of the bibliography. These librarians, along with Margareta Horiba and James Donovan, also of Tulane Law Library, generously gave their time in the search for bibliographic sources. At Duncker & Humblot, Professor Norbert Simon and Frau Heike Frank expertly supervised the book's production. I thank all of these individuals for their patience and cooperation.

Preparing a camera-ready manuscript is a challenge, especially for an American author unschooled in German printers' terminology and modern computer technology. Colleagues fortunately recognized my shortcomings and came to my rescue. I wish to thank Professor Joachim Zekoll, Tulane Law School, for explaining Duncker & Humblot's specialized vocabulary and for helping me on several occasions to communicate with the German editors. Thanks are also due to Marcia Zierlein, Tulane Law School, for laying out this book in camera-ready form.

Finally, this work was completed during my tenure as a scholar-in-residence at the Louisiana Bar Foundation. For their material support and confidence in me, I thank the Foundation, and particularly its executive counsel, James Gulotta; its president, Marcel Garsaud; and its secretary-treasurer, Eldon Fallon.

Shael Herman

New Orleans, Louisiana
March, 1993

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I. Introduction

The canonical ban on usury or profitseeking[1] is usually traced to Luke's biblical injunction, *mutuum date nihil inde sperantes* ("Lend: expect nothing in return").[2] This maxim of moral conduct began to assume its own life among patristic writers in the fourth century. By the 1100s, the beginning of the "golden age of canonical studies,"[3] the ban had taken shape as a canonical prohibition on interest. Seemingly a variation of the golden rule, Luke's aphorism of financial ethics evoked the essential impulse of Christian *caritas*. As an axiom of economic relations, however, the usury ban might have seemed irrational: one needed no doctorate in macroeconomic theory to realize that the usury ban, by stigmatizing as sinful an expectation of compensation for one's trouble and risk,[4] could have retarded the progress of emerging credit economies during the eleventh and twelfth centuries.[5] A conflation of business and charity might seem incongruous in a devoutly Christian vision of reality centered on salvation in the afterlife. Although the profit motive merited no reward in the heavenly hereafter, its classification as sin in the earthly here-and-now was unduly harsh and punitive.

We do not know why the early Christian Church adopted a rule so apparently counterintuitive as the usury ban. The ban was probably attractive to early church leaders who depicted themselves as an impoverished brotherhood of man. In agrarian economies more dependent on barter than currency, perhaps the difficulties of the ban's enforcement easily escaped notice. As trade accelerated and more complex credit economies overtook simpler agrarian ones, however, the usury ban's clog on commerce became increasingly troublesome.[6]

Whatever the rationale for the usury ban, authoritative classical texts in both the Hebrew and Roman traditions permitted reasonable profit in business transactions. Even if church leaders understandably resisted Jewish learning[7] on the subject of lending at interest, they could have found in Roman texts a justification for profitseeking. Roman law, in its recognition of the irrepressible human urge to truck and barter, foreshadowed modern law. Medieval clerics, the main students of the classical Roman texts rediscovered in Bologna in about 1100 A.D., had full access to Roman law regulation of business practices and virtually any other subjects that had ever intrigued Roman jurists.

Roman law sharply distinguished and categorized loan transactions based upon whether a lender's purpose was essentially altruistic or selfish[8]; each loan

category contained distinct liability rules that have survived in many civil-law systems.[9] Roman tolerance of profitseeking was evident in Roman imperial rulings that authorized lenders to charge their borrowers a reasonable rate of interest.[10] Yet, on the issue of profitseeking, the Church fathers, despite guidance offered by Christian and pagan emperors,[11] preferred an outright ban. As if to make this financial policy odder still, the medieval Church engaged in a program of "do as I say, not as I do." At any historical moment, the Church selectively condemned some usurers, defended certain usurious transactions by means of elaborate casuistry, and itself engaged in lending at interest.[12] The Church's inconsistent attitude toward usury and the delicate lines drawn by churchmen and canonists between licit and illicit interest should have provoked consternation even in the hearts of devout believers. To those convinced of the inevitability of profitseeking, the usury ban must have seemed a financial policy inimical to financial progress itself. Scholastic thinkers' imaginative justification of usury could not conceal the ban's commercial dysfunction.[13]

In an expanding credit economy, the Church's usury regulation affected the actors, the form, and the function of transactions that the actors chose to accomplish their commercial ends. By openly forbidding profit, the Church interposed a major roadblock to business through interest-bearing loans. Good Catholics, preoccupied with conducting business so as to avoid jeopardizing their spiritual welfare, resorted to legal contortions to assure that their profit-seeking dealings would pass clerical muster.[14] These dealings were bound to occur amid a barrage of conflicting signals about sin and salvation. Taking as a given the tortuous path to contradictory goals of spiritual and material prosperity, this book examines how the usury ban affected the development and enforcement of certain financing devices in medieval England and France. The book further suggests ways in which the usury ban and the financing devices inspired by it may have contributed to a deterioration of centuries-old seigneurial ties that medieval minds took for granted.

To begin our inquiry, Section II develops a point already suggested: as an heir of Roman law, the church was well situated to have adopted a Romanist approach to interest and profit. Nevertheless, medieval church leaders, although they continued to use convenient Roman terminology concerning credit transactions, appear to have consciously rejected a Romanist approach in favor of a view of money espoused by Aristotle and Aquinas.[15] Section III explores theological foundations of the usury ban and the way in which the ban resulted in innovative financing devices whose main function was to conceal the collection of interest. Section IV examines one such financial device, the nontenurial rent, commonly known in medieval English law as the rent charge. This device, a common evasion

of the usury ban during the twelfth and thirteenth centuries, retained its vitality well into the eighteenth century.[16] Our investigation of the "rent" occurs in stages: Section IV discusses a prototype of this medieval financing device and its enforcement; Section V examines French experience with rents; and Section VI focuses on English variations of the rent that the Normans, once established in England, had imported from France.

To illuminate the role of rents in a primitive English economy, Section VII examines the commercial role of medieval Jewish lenders, for the Norman conquerors, conscious that the Church tolerated Jewish usury, invited them to England to act as lenders to virtually anyone with borrowing power. We shall explore the function of the Exchequer of the Jews, a special department of the royal exchequer administered according to Jewish law for the throne's benefit and concerned exclusively with Jewish loans and lending practices. Because many Jewish lenders' transactions with high nobility and clerics invoked the Assize of Jewry, Section VIII explores certain commercial doctrines of the Assize with a view to assessing their similarity with and possible contribution to English law. We shall suggest how English borrowers' understandable ambivalence toward the usury ban and English kings' equally strong ambivalence toward their Jewish lenders may have directly affected important English statutes of Edward I, whose prowess in drafting and enacting legislation earned him the title "the English Justinian."[17] In passing, we also note seemingly parallel patterns of royal enactments on both the English and French sides of the Channel, as well as parallel patterns of deterioration of feudal estates that these enactments sought to check.

Although we cannot conveniently connect into a rigorous linear argument the images, personalities, and phenomena that we have summoned, we can stitch them into a composite like features of a medieval tapestry. This medieval art form thematically connects images and symbols that might often be physically and chronologically remote from one another. Such thematic unity resulted from the shared theological conviction of both audience and artists that reality was an organic and divinely ordered chain of being. Because we no longer subscribe to such a theological outlook, appreciation of such unity today requires an educated eye: although a casual glance hardly anticipates subtle dependencies among recurring symbols and motifs, a closer inspection vindicates the artist's confidence in the unity of his subject; he has imaginatively implied a link between a pair of clerics in the foreground with a white hart in the background; though distant from each other, images of knight-crusaders and serfs are also thematically linked. Instead of a rigorous argument for our conclusions, we offer several