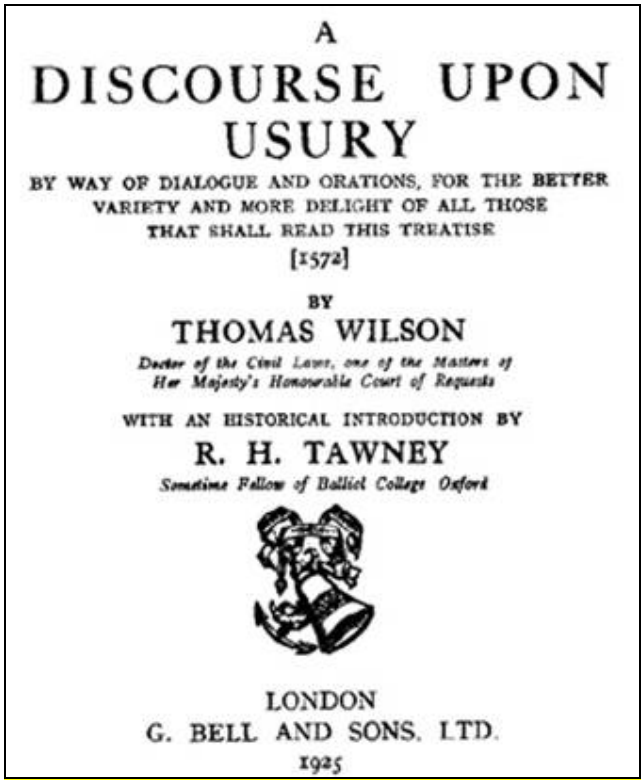
The Compromise of 1571

from

The Historical Introduction to A Discourse Upon Usury

by

R. H. Tawney



A

DISCOURSE UPON USURY

BY WAY OF DIALOGUE AND ORATIONS, FOR THE BETTER VARIETY AND MORE DELIGHT OF ALL THOSE THAT SHALL READ THIS TREATISE

[1572]

BY

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WITH AN HISTORICAL INTRODUCTION BY

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Exchange transactions could not be isolated from the general business of the *Money Market*, for the *Financiers* who dealt on the *Bourses* of Antwerp and London subscribed to *Government Loans* and took up the *Gentry's Mortgages*.

The *Act of 1552* appears, if not to have been effective, at least to have led to unwary *Capitalists* finding themselves involved in legal proceedings[1] and the experience naturally added fuel to the irritation felt, as by the *Merchant* in Wilson's dialogue, against *Blundering Officials* and *Clerical Busybodies*.

It was inevitable, therefore, that the growing opposition to *State Interference* with the *Foreign Exchanges* should pass into a general attack on the whole policy of making the demand for interest on loans a *Criminal Offence*.

The theoretical considerations by which the repeal of the *Act of 1552* was supported are set out at length in the memorandum of which part has already been cited.[2] Its object was to suggest a working compromise between what it regarded as the impracticable rigour of the existing law, the disposition of financial interests to profiteer at the expense of *The Public* and *The State*, and the supposed concern of the *Government* to prevent *Speculation*.

The argument of the author turned on the convenient distinction between *Interest* and *Usury*, which had been ignored by the *Act of 1552*, but which was being popularized by one school of *Theologians* and was destined to be the policy of the future.

> "Usury and trewe interest be thinges as contrary as falshed is to trewth. For usury contayneth in itself inequalitie and unnaturall dealinge and trewe interest observeth equitie and naturall dealinge. Usury tendeth to the destruction of the common wealthe, but the borrowing of money or any other thinge, yielding to the lender trewe and just interest, is one of the commodities which issued by the societie of man."

The *Prohibition of Interest*, though well-intentioned, had been based on a misunderstanding of the *Teaching of the Theologians* - the ingenious author makes even Aquinas give a qualified blessing to 'trewe and unfeigned interest' - was contrary to the policy of most civilised nations, and had aggravated the very evil which it was designed to prevent.

Its effect had not been to suppress usury, but merely to change its form. Forbidden to charge interest, *Businessmen* had circumvented the statute by investing their capital in goods, selling them on credit, and charging high prices for what was, in effect, a *Concealed Loan*, or had concentrated on *Exchange Speculation* - *Dry Exchange* - which, though illegal, could not easily be controlled by *The State*.

Hence the last state of the *Borrower* was worse than the first. In practice, indeed, the rate of interest was higher in England, where interest was forbidden, than it was in Flanders and other countries where a moderate rate of interest was allowed, and the *Protestant Religion* was discredited by the fact that 'no better sequel follows so much preaching'

If the charging of interest were prohibited by all commercial nations, the rule might possibly be enforced. But, in the face of *International Competition*, a single nation was helpless. As things were, *Foreign Merchants* could borrow at eight or nine per cent, sell on credit to Englishmen at prices with which *English Merchants*, who could not raise money so cheaply, were unable to compete, and thus at once ruin *English Commerce*, and - an argument calculated to impress a *Mercantilist Government* - cause a drain of *Gold* abroad.

The remedy proposed - to distinguish between *Usury* and *Interest*, and to legalise the latter, provided that the rate did not exceed a maximum fixed by *The State* - was precisely that which the *Commercial Classes* were demanding, and over which the great name of Calvin had thrown an aegis of respectability.

Since the *Businessmen* of the day were less skilful pamphleteers than the *Social Reformers*, they had a good deal the worst of the dialectics of the controversy, and the writing in favour of a *Free Market for Capital* is heavily outweighed by the demands for the maintenance and intensification of *State Control*. But their arguments can be inferred from the retort of their opponents.

It was absurd to apply rules designed for the protection of the impoverished *Peasant* or *Craftsman* to loans advanced to prosperous *Capitalists*. The *Young Tradesman* needed capital; the *Rentier* who could not himself engage in trade was anxious to supply it; why penalise a bargain which was profitable to both?

To discriminate between *Interest on Capital* and *Investment in Land* was neither fair nor *practicable*: if it was

[1] *S.P.D Eliz*., LXXV, no. 54.
[2] See pp. 141-2, 148-9.

lawful to buy a *Rent-Charge* or to share in *Trading Profits*, what was the particular criminality of charging a *Price for a Lloan*? The conditions of national prosperity were individual freedom, security for property, and the strict observance of contracts: the *Agitators* who stirred up class hatred in the name of a gospel which no sane man could support to have meant what it said, were undermining the economic prosperity of the country.

Let the *Clergy* apply their social zeal to preaching thrift and industry to the unemployed, and leave business questions to be settled by *Businessmen* who are the backbone of the *Nation*, provide employment for the *Masses*, keep the *Nobility* afloat with advances, and prove their *Patriotism* by subscribing heavily to *War Loans*.

> "If it were not, the State, as I take it, could hardlie stand…Where is money to be had in time of need if the city should fail ?"

Economic truth is insinuated most easily into the minds of *Statesmen* in the guise of premonitions of impending *Bankruptcy*, and the allusion to the financial importance of *The City* touched a sensitive nerve.

The prohibition of interest had not affected the ability of *The State* to borrow on the *International Market*, but it had made *Public Loans* less attractive to *Investors* at home, and thus threatened to be as embarrassing to the *Governmen*t as it was irritating to *Capitalists*.

Sometimes *The Crown* had expressly indemnified *Lenders* against the risk of prosecution, sometimes it had merely let it be understood that no proceedings would be taken. But after about 1566 there was a change in the world of *International Politics* which profoundly affected the allied world of *International Finance*.

With the revolt of the Netherlands, the *Antwerp Money Market* was no longer at the disposal of *Foreign Governments*. When Gresham visited it in the autumn of 1566, he found everything in confusion and had the utmost difficulty in raising money from the Welsers at fourteen per cent.[3]

In the following years the economic conditions of the Netherlands went from bad to worse, and after about 1572 the *English Government* seems to have ceased to owe money there. The drying up of what had been its main source of supplies for a generation made it doubly necessary to regularise relations with *The City*; and Gresham, whose political ideal was a *mariage de convenance* between *The State* and *Business*, and who constantly urged the desirability of raising loans in London, was not slow to point the moral.

He had no illusions as to the disinterestedness of the *Mercantile Classes* and had more than once urged the *Government* to rap them on the knuckles. But he viewed the *Problem of Credit* as a practical man to whom excessive interest was not bad morals but bad business, and he was uncompromisingly opposed to the policy of the *Laws against Usury*.

Throughout his financial career he appears generally to have stipulated that those who subscribed on his inducement to *Public Loans* should be relieved of penalties under the *Usury Laws*.[4] In 1560 he urged the repeal of the *Act of 1552*, and in 1568 - the year before Wilson's book was written - he returned to the charge, fortified by the fact that at the moment the *Government* was taking steps to raise one of its first large loans at home.[5]

As early as 1563 the *House of Commons* had passed a bill[6] to restore the law as to *Money-Lending* to the condition in which it had been from 1545 to 1552. It was the session in which Cecil was carrying some of the measures in his programme of conservative reconstruction: the proposal seemed to him, no doubt, a piece of dangerous individualism - a specimen of 'the licence grown by liberty of the gospel' which be deplored - and his opposition appears to have killed it.

But the economic experience of the next eight years compelled a reconsideration of traditional doctrines, and when the matter was next brought up, it was in a different atmosphere.

Two bills on the subject of usury were prepared in 1571. The first provided for the establishment of *Banks* in seven cities, London, York Norwich, Coventry, West Chester, Bristol and Exeter, to be known as 'banks for the relief of common necessity', and to lend money against pledges at the rate of six per cent.[7] It passed its first

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[3] Burgon, *Life of Gresham*, pp. 157-60, letter of Sept. 8, 1566, "I do see and feel that here there is no more money to be had at no price."

[4] Ellis, *Original Letters*, *Second Series*, vol. II, letter CCXXXII; Burgon, *op. cit*., vol. II, p.343, "to every one of the bondes the Queene's Majestie must give out her accostomyd bondes for the dischargyng of the statue of usurye; whyche I wold wyshe might be pressentlye set at libertye, if it were possible."

[5] Burgon, *op. cit*., vol. II, p. 342-3; Ehrenberg, *Das Zeitalter der Fugger* vol. II, p. 174.

[6] Wright, *Queen Elizabeth and her Times*, vol. II p. 126, letter of Cecil to Sir T. Smith: "There is also a very good law agreed upon for indifferent allowances for servants' wages in husbandry. Many other good lawes are passed in the nether house; as for toleration of usury under ten per cent. (which notwithstandinge I durst not allowe); another against Egyptians; another to remedy defrauding of statutes for tillage."

[7] *S.P.D. Eliz*., LXXVII, no. 55.

reading in the *House of Commons*[8] on April 19, but nothing came of it. The second was a bill which followed the main lines of the memorandum already quoted[9] (except that it contained no reference to the *Foreign Exchanges*) and was passed into law.

The debate on this measure, as reproduced by D'Ewes, revealed the revolt of the *Plain Man* against the *Theorists* who had triumphed twenty years before, and his determination that the law should not impose on business an Utopian morality.

Dr. Wilson, with the mercilessness of the expert, began by asserting that he had studied the subject too thoroughly to discuss it with brevity, and his speech against the sanctioning of interest, which marshalled in a single phalanx Solon, Ezekiel, Augustine, the Council of Nicea, and English law books, compared *Usurers* to spiders, serpents and devils, and ended with a practical appeal to remember 'the doings of the *Fuggers* to the very beggaring of great and mighty *Princes*', did more than justice to the alarming candour of his prolocution.

The *House* was impressed - 'the matter…was for cunning men a fit theme to show their wit and skill upon' - but it was unconvinced, and only one member supported Wilson's plea for prohibiting interest altogether.

The remaining speakers greeted the proposals of the bill with the enthusiasm which Englishmen reserve for a compromise. The *Canon Law* was out of date and need not be taken seriously. The Bible was the word of God, but, apart from the fact that the *Divines* were not agreed as to its interpretation, it required to be read with common sense and was not a sound basis for parliamentary legislation.

Business was business; to denounce men for pursuing their own economic self-interest was frivolous; to prohibit interest would ruin the trade of the country. The practical course was to avoid the impolitic extremes of excessive righteousness, and to make a concession to human infirmity by drawing a distinction between moderate interest, which the law should sanction, and excessive interest or usury, which the law should forbid.

> "That all should be well is to be wished: that all should be done well is beyond hope. For we are no saints: we are not of perfection to follow the letter of the Gospel…We are not so straitened to the word of God that every transgression should surely be punished here…The mischief is of the excess not otherwise…It is biting and over sharp dealing which is disliked, and nothing else."

In its final form the *Act of 1571*[10] was a less radical measure than might have been expected from the tone of the debate. It was calculated, indeed, to give hardly more satisfaction to the *Merchant* and *Common Lawyer* of Dr. Wilson than to their creator.

Its principal provisions were three. First, it repealed the *Act of 1552*, under which persons taking any interest whatever were to forfeit principal and interest and to be punished with fine and imprisonment.

Secondly, it revived the *Act of 1545*, under which persons taking more than ten per cent. were to forfeit the treble value of their wares and profits and to be punished with imprisonment.

In the third place, it established certain new rules, not contained in the revived *Act of 1545*, of which the most important was that all contracts to pay *more* than ten per cent. were to be void, and that all persons taking *less* than ten per cent. were to be liable to forfeit the interest demanded, however small.

What the statute endeavoured to effect, therefore, was something more complicated than is suggested by the common statement that it substituted for the complete prohibition of interest a maximum rate of ten per cant. It drew a distinction between interest above that rate and interest below it. The former was prohibited under heavy penalties, and an agreement to pay it was *ipso facto* void.

The latter was not made, as it had been under the *Act of 1552*, a criminal offence, but the *Creditor* was given no legal security for it, and the *Debtor* who chose to take *Legal Proceedings* to recover any interest promised could do so.

He might, that is to say, pay interest up to ten per cent. If he thought fit, as a *Borrower* anxious to keep on good terms with the *Money Market* very well might. But , if he decided to face the consequences of bringing an action against his *Creditor*, he need pay, according to the words of the Act, no more than the principal.

Contemporary commentators upon the statute were at pains to emphasise that in prohibiting all interest above ten per cent., it did not intend to secure the *Lender* any interest less than that rate which he might ask.

In 1595 the author of a careful study of legislation on the subject of usury wrote,

[8] D'Ewes, *Journal*, p. 178.
[9] See pp. 148-9, 155-6.
[10] 13 Eliz. C. 8.

> ‘‘There be many simple men, which, having no insight into the statute, are not ashamed to say that it alloweth ten in the hundred. Which, indeed, is a mere scandal and slander, for it upholdeth a kinde of punishment, by the loss of the least usury that is taken…
>
> “…When King Henry did tolerate 10 pound in the 100 many did abuse that libertie under colour of the law; and when King Edward VI had utterly taken away all usurie, this inconvenience came, few or none would lend because they might have no allowance, whereupon her Majestie to avoid this evill made this remissive clause…
>
> “…The *Borrower* hath this libertie by this branche for his owne benefit:
>
> 1. If he promise usury he need not pay unless he will.
> 2. If he pay usurie, he may recover it again if he be grieved.
> 3. lf he be willing to pay usurie, he is at his own choice to complain.”[11]

It is evident that such a measure, though involving an important departure from the position assumed twenty years before, made a less sharp break with traditional doctrine than would have been involved in merely fixing a maximum rate of interest.

But the spirit of *Tudor Social Policy* and the attitude of *Tudor Statesmen* is revealed less in statutes than in the activity, half administrative, half judicial, of the *Privy Council*. And the impression of conservatism is heightened if one turns from legislation to administration.

The reasons, apart from the necessities of *The State*, which led it to take an interest in questions of credit, lay on the surface. No *Government* can face with equanimity a state of things in which large numbers of respectable *Tradesmen* may be plunged into *Bankruptcy*.

If the *Grasping Creditor* was not so prolific a cause of disturbance as the *Enclosing Landlord*, he was at least, like the *Engrosser of Corn*, a bad neighbour who kept alive a shouldering discontent, which in times of economic crisis was liable to burst in flame.

To the *Mercantilist Statesman*, concerned with the maintenance of *Public Order* and the encouragement of *Economic Efficiency* the supervision of credit transactions presented itself as precisely analogous to the prevention of depopulation, the control of food supplies, the regulation of the wage contract, and the other measures by which a *Paternal State* endeavoured to check the dislocation of customary economic relations.

In France[12] the *Government of Henri IV* was hardly established before it declared a *Moratorium*, relieved *Debtors* of part of their liabilities, and reduced the rate of interest from 8⅓ to 6¼ per cent. In England the problem was different in degree, but similar in kind; and from the zenith of the system of economic control under Elizabeth, to its last spasmodic movements on the eve of the *Long Parliament*, *Statute Law* was supplemented by periodical attempts on the part of the *Council* at once to increase its practical effectiveness and to supplement its deficiencies.

Its action in this matter was similar to that taken in cases between *Landlords* and *Tenants*, though even more irregular, and consisted partly of attempts to prevent the protection offered by *The Law* being made inoperative through the negligence of *Local Authorities*, partly of intervention to afford relief to individuals in cases of hardship when the *Ordinary Courts* offered no remedy.

The administration of the Act was part of the regular routine of the *Justices of the Peace*, and presentments before quarter sessions show that lt was not a dead letter. In the periodical attempts to galvanise the creaking local machinery, the *Government* called attention to the *Statute against Usury*, with those relating to *Tillage* and the *Engrossing of Corn*, as needing special attention.

Soon after the *Act of 1571* was passed, it appointed two *Special Commissioners* to investigate the execution, among others, of the *Statute against Usury*, who in 1578 reported that some £6,600 was due to *The Crown* in fines from *Offenders*[13] and similar commissions appear to have been issued from time to time down to the *Civil*

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[11] *The Death of Usurie, or the disgrace of usurers* (1595). The same interpretation is given by Fenton, *A Treatise of Usury*, book II, chap. xii: “the usurie or overplus which is taken above the principall is not restored to the borrower.” See also Fulbecke, *A Parallele or Conference of the Civil Law, the Canon Law and the Common law of this Realme of England* (1618).

[12] See Fagniez, *L’économie sociale de la France sous Henri IV*, pp. 169-171.

[13] *S.P.D. Eliz*., CXXVII, no. 76. *An abstract taken by John Edgar and William Hoskyns, Commyssioners for Usary and Concealmentes agaynst the Queenes Majestie*. They report (i) “usurye that is found allreadye and passed over by Jury…” £1,060 3s.; (ii) “by depositions of dyvers and syndrye persons examined by vertue of the Queene’s Maiestie Commyssion” £3,595; (iii) “conceylmentes” £2,000. They add that “there is not as yet examyned the fyefte parte that will be proved.”

War.

Apart from such general measures, which, like most of the social administration of the age, were spasmodic and haphazard, the matter was kept before the *Government* by the appeals which poured into it from individuals.

Petitions for redress are addressed both to the *Council* and to individual *Councillors* from *Debtors* claiming to have been victimised by *Moneylenders*, from *Moneylenders* who complain that they have been mulcted in exorbitant penalties, from *Justices* who ask advice as to what action they are to take, from *Reformers* who desire the *Government* to take up some infallible recipe for better administration.

The *Master of the Rolls* corresponds with Sir Robert Cecil as to the dealings of a *Scrivener* who has exacted preposterous terms from his *Clients*.[14] An *Alderman of the City of London* write to him on the hard case of a 'poor young man…drawn into these bonds by his uncle's means as a sheep to the slaughter'.[15]

A *Trader* at Peterborough begs to be protected against the 'inconscionable dealing' of a *Merchant*, who threatens to deprive him of his 'whole means of living for himself, his wife, and his children'.[16]

A *Correspondent* writes to Lord Burghley to expose the proceedings of a *Moneylender* who has been brought before the *Court of King's Bench* for taking the not inconsiderable sum of £1,770 contrary to the *Statute against Usury*, and whose principal witness has perjured himself.[17]

A *Moneylende*r condemned to a fine of £150 begs for pardon.[18]

The *Council* protested its unwillingness to interfere with the ordinary course of law.

> "We do not willingly meddle with matters of this sort concerning debts and suits between men."

But considerations of practical expediency would have overcome its reluctance, even if its members had shared the popular prejudice against the extortionate *Moneylender* less thoroughly than, in all probability, most of them did. Its general policy was to try to secure the settlement of disputes out of court through the good offices of a friend, an influential neighbour, or, when necessary, an arbitrator appointed by itself.

The *Justices of Norfolk* are instructed to put pressure on a *Moneylender* who has taken 'very unjust and immoderate advantage by way of usury'.[19] The *Bishop of Exeter* is advised to induce a *Usurer* in his diocese to show 'a more Christian and charytable consideration of these his neighbours'.[20]

Lord Evers has released two offenders imprisoned by the *High Commission for the Provence of York* for having 'taken usurie contrary to the lawes of God and of the realm' and is ordered at once to recommit them.[21]

Apart from flagrant cases of this kind, it is evident that under Elizabeth the *Government* kept sufficiently in touch with the state of business to know when the difficulties of *Borrowers* threatened a crisis, and endeavoured to exercise a moderating influence by bringing the parties to accept a compromise.

Relations between *Debtors* and *Creditors* were naturally most acute when loans were being called in and new accommodation refused. In times of unusual depression, action of this kind to prevent *Creditors* from pressing their claims to the hilt was so constant as to give the impression of something resembling an informal moratorium.[22]

Such intervention was characteristic both of the economic conservatism and of the administrative activity of *Tudor Governments*. But, like the rest of their social policy, it was capricious and irregular, and, at most, did no more than impose an occasional brake on the economic forces which were widening the small instalment of freedom granted to the *Capitalist* in 1571.

For it seems clear that, in its effect both on *Practice* and on *Opinion*, the Act was a turning point. The process by which a measure intended to concede little and restrict much was made in practice to concede much and restrict

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[14] *Hist. MSS. Com., MSS. of the Marquis of Salisbury*, pt. V, pp. 362-3.
[15] *Ibid*., pt. V, p. 356.
[16] *Acts of Privy Council*, June 10, 1600.
[17] *S.P.D. Eliz*., CCXLXV, No. 11.
[18] *S.P.D. Eliz*., CCXXXVIII, p. 10.
[19] *Acts of Privy Council*, XXX, pp. 166-7.
[20] *Ibid*., XXXI, p. 379 (1601, may 26).
[21] *Ibid*., XIV, p. 69 (15186, April 21).
[22] See e.g., *Acts of Privy Council*, 1589-90 pp. 184-5 (a letter to a mortgagee rebuking him for "hard and unchristianly dealing" and requiring him to restore the land in dispute or to appear before the Council), p. 71 (requiring Lord Mayor and Sheriffs of London to grant respite to a debtor), p. 91 (letter ordering Commissioners to commit a creditor guilty of "harde and unconscionable dealing" to the Fleet). The same volume contains many other examples.

little was partly due to the difficulties inherent in all legislation which seeks to protect the economically weak against the consequences of their own frailty.

The section of the Act empowering the debtor to withhold or recover any interest whatever, even if less than ten per cent., was almost inevitably an advantage more formal than real. The *Moneylender* had little reason to fear proceedings by a needy *Borrower* who, by taking them, would surrender all hope of future advances; and it is significant that even those writers who were most emphatic in insisting that to interpret the Act as sanctioning interest up to ten per tent. was erroneous, admitted nevertheless that such a misinterpretation was general.

This development was assisted, it may be suggested, by the action of the *Courts*. Pending a more thorough examination of cases before them than has yet been made, no final judgment on this point can be given. But so far as the existing evidence goes, it suggests that *Section IV of the Act* was almost a dead letter, that it was normally taken for granted that when interest did not exceed ten per cent. no question as to its legality arose, and that, in short, the rate which under the Act should have been a maximum, became the normal, or even (in so far as the Act was evaded) the minimum rate.

Cases which come into *Court,* so far as they go, bear out the view that that important development had taken place soon after the passage of the Act. Of the few available for analysis there is none in which a contract involving interest of less than ten per cent. is held to be usurious.

In all the rest, both before *Quarter Sessions* and before the *National Law Courts*, the ground of the proceedings is that interest is in excess of ten per cent., and the point which the *Court* is required to decide is whether it is, in fact, interest at all, and therefore usurious, or whether it is merely the result of a bet, or a penalty for the non-fulfilment of a bargain.

The issues arising in connection with this further question show the extreme difficulty of extending to *Debtors* even the modified protection contained in a limitation of the rate of interest to ten per cent. The *differentia* of usury, which distinguished it from, for example, trading profits, was that it was a *certain* payment for the use of money or wares, stipulated in advance.

The obvious resource of the astute *Moneylender* was to insert in the contract conditions which gave to any interest above the legitimate rate the appearance of being contingent, as in a wager or life assurance. Payment was made to depend on the *Borrower's* return from a journey, on his marriage, on the birth of a child, or, most often, on his life, or that of one or more of his family.[23]

When the *Borrower* was in a weak position, he might obviously be induced to agree to the payment of excessive interest on conditions which, though in form contingent, might in fact be certain. Starting from the principle that:

> *"usura est commodum certum quod propter usum mutuatae rei accipitur,"*

the *Courts* had to determine in each case, first, whether the element of uncertainty was *bona fide* or fictitious; second, whether, granted the uncertainty was *bona fide*, it was in fact sufficient to remove the taint of usury from an agreement to pay more than ten per cent.

Thus, to illustrate the first point, there is no doubt that a share in trading profits is not usurious. Sharply, having lent Hurrell fifty pounds for a fishing voyage to Newfoundland, on condition that he be repaid sixty pounds on the return of the ship to Dartmouth, and the principal only if the ship does not reach Newfoundland, brings an action of debt, to which the *Defendant* replies by pleading the *Statute of Usury*.

The *Court* holds, however, that the contract is not usurious: for, though the voyage normally lasted only eight months, it might last two years or more, and the payment demanded, therefore, was in the nature, not of a fixed rate of interest, but of speculative profits.[24]

There is no doubt, again, that the mere sale of an *Annuity* is not usury, even though it is at the rate of £20 a year for a capital sum of £110.[25]

But the distinction between a *Loan* and the sale of an *Annuity* is not easy to draw, and it is still more difficult to determine whether the quality of uncertainty is really present, and, if so, in what degree, or whether a merely formal element of contingency had been introduced into the contract simply in order to evade the law.

Downham, for example, agrees to pay Wolmer ten pounds for a loan of twenty pounds for one year, if Downham's son be still alive. Is this usury? One judge held not, owing to the element of uncertainty: the

[23] Examples are given by Hall, *Society in the Elizabethan Age*, pp. 53-4, and cases cited *infra*.
[24] Brownlow and Gouldsborough, *Reports*, p. 52 (Sharply *v.* Hurrell. Pasch. 6 Jac. I).
[25] *Ibid*., p. 85 (Ellis *v.* Warner. Trin. 2 Jac. I).

majority held that it was, since the uncertainty was not *bona fide*.

> "It is the intent that makes it to be so or not so. If there be a wager between two to have £40 for £20, if one be alive at such a day, that is not any usury, for the bargain was *bona fide*. But if the intent hereby was to have a shift it is otherwise."[26]

Of the second point - that the legality or illegality of the bargain depended on the degree of uncertainty - there are several examples. Thus an agreement to pay thirty-three pounds in six months for a loan of thirty pounds, if the Borrower's son be then alive, is held to be usurious on the ground that the gain is certain.[27]

But an agreement to pay, in return for a loan of £100, £80 at the end of ten years to each of the *Lender's* five daughters then alive, is held not to be usury, but a 'mere casual bargain', on the ground that at the end of ten years some or all of them would probably be dead, though the *Court* added that if the agreement had been to pay in two years instead of ten, the bargain would have been usurious.[28]

The same point came out in a different form when the bargain made the payment of interest contingent, not on the survival of a third party, but on the failure to repay the principal within a stipulated time. The accepted doctrine appears to have been that the answer to the question whether the bargain was usurious depended on whether the time of repayment was at the option of the *Borrower*, or whether it was fixed in the contract.

In the latter case it was usurious, for the *Lender* who had advanced money on land was certain of drawing the profits of it for the time agreed on: in the former case it was not, for the *Borrower* could repay whenever he pleased.[29]

Thus, when A grants B a rent of £20 in return for a loan of £100, payment to begin at the end of twelve months from the date of the loan and the *Borrower* to have the option of redemption in the interval, the *Court* holds that this is not usury.

"lt was in the election of the *Grantor* to have paid the said £100 and to have frustrated the rent, so that the *Grantee* (as the nature of usury is) was not assured of any recompense for the forbearance of £100, and the said rent of £20 was but penalty to the *Grantor."*[30]

Judges more than once called attention to the section in the statute stating that it was to be construed strictly for the suppression of usury, and in this last case they accompanied their decision by the declaration that, had the clause giving the *Borrower* power of redemption been inserted by collusion between the parties, the contract would have been usurious.

With our present knowledge it is too much to say that the *Courts* whittled away the restrictions imposed by the *Act of 1571*, as, with their dislike of unreasonable restraints upon the liberty of the individual to trade as he pleased, they undoubtedly did those contained in the *Statute of Artificers*.

But it is evident that the loop-holes in the statute were not inconslderable. The last decision, in particular, opened a wide door. For it meant that the *Lender* could get more than ten per cent. for his money by stipulating for repayment within a time too short to be practicable, and then charging as a penalty the payment which he could not legally exact as interest.

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[26] Coke's *Reports*, vol. I, pp. 642-3. Button *v*. Downham (Trin. 40 Eliz.).
[27] Coke's *Reports*, pt. V. pp. 70-1. Reighnolds *v*. Clayton (Pasch. 36 Eliz.).
[28] Coke's *Reports*, vol. I, p. 741. Bidingfield *v.* Ashley (Hil. 42 Eliz.).
[29] This appears to be the doctrine laid down in Sir Robert Brookes' *La Graunde Abridgement* (1576).
[30] Coke's *Reports*, pt. V, pp. 68-70, Burton's case (Mich. 33 and 34. Eliz.).