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Separation of English Lay and Ecclesiastical Jurisdiction, Its Antecedents and Aftermath

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SEPARATION OF ENGLISH LAY AND ECCLESIASTICAL JURISDICTION, ITS ANTECEDENTS AND AFTERMATH

by

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VITA AUCTORIS

John James McKechnery, S. J. was born in Chicago, Illinois, April 8th, 1913. He attended St. Gertrude's Parochial School and Loyola Academy, graduating from the latter in June, 1931. In September of the same year he entered the Arts and Science Department of Loyola University. Two years later he began his course of studies in the Society of Jesus in the Novitiate of the Sacred Heart, Milford, Ohio. The Novitiate was affiliated with Xavier University, Cincinnati, Ohio. In the Fall of 1937 he was transferred back to Loyola University where he took his Bachelor's Degree the following June. He thereupon began his graduate work at Loyola University. Thereafter two years of study in August, 1940 he fulfilled the requirements for his Master's Degree in History.
INTRODUCTION

IMPORT OF THE SEPARATION OF THE TWO POWERS

Ten years\(^1\) after the Battle of Hastings, William the Conqueror issued a writ separating the Lay and Ecclesiastical Courts in England. William Stubbs does not hesitate to term this writ, "the most important ecclesiastical measure of the reign."\(^2\) G. B. Adams describes it as "the most violent and serious innovation by the Conqueror in the Saxon judicial system."\(^3\) G. M. Trevelyan adds, "The differentiation of the functions of lay and spiritual courts was a long step towards higher legal civilization. Without it neither Church nor State could have freely developed the law and logic of their position."\(^4\) F. M. Stenton puts a rather sinister interpretation to it. He observes in it the foreshadowing of the legal sovereignty of the Pope over the church in England. According to him William himself must have had forebodings of this possibility for he no sooner promulgated the decree than he made three reservations: "No Pope should be recognized in England, no papal letters should be received, and no tenant-in-chief excommunicated without his consent."\(^5\)

These reservations made in an effort to counteract the logical consequences of the decree were an unfortunate
compromise. They gave rise immediately to a quarrel with Pope Gregory VII. In the next reign they were directly responsible for the strained relations between William Rufus and St. Anselm over the question of lay investitures. And moreover they were at least indirectly responsible for the greater struggle which raged between Henry of Anjou and St. Thomas a Becket a century later.

The separation of the two powers placed an English prelate in an anomalous position. As an ecclesiastic he was not subject to the law of the land, but owed his allegiance directly to the Pope. As a feudal landlord he must be subject primarily to the king. Who then had prior rights to his loyalty, the king or the pope? Who should have the right to appoint him? A nobleman who could be relied upon to furnish his full quota of men and lances for every royal campaign was not necessarily the best qualified to keep intact the orthodoxy of his diocese and the morals of his clergy and lay folk. A loyal noble did not always make the best bishop. Because of the abuse that was rampant before the coming of the Normans this conflict of interests did not arise in Anglo-Saxon England. The wishes of Rome were either unknown or disregarded. An ecclesiastical appointee differed only accidentally from the lay lords. Both held their offices to promote the temporal prosperity of the kingdom. While theoretically the Pope was
the immediate superior of the bishop, to all practical purposes papal influence was negligible. The bishop was the "king's man". As the "king's man" he received his appointment from the king and the witan,6 and as the "king's man" he ruled his diocese.

The inevitable crisis arising from the innovation of the Conqueror was not reached until the reign of Henry I.7 The king weighing only the feudal aspect of the dignity of the episcopate insisted vehemently on his right to fill the Sees as he willed. Rome no less vehemently denied this right. What followed of course was the celebrated controversy between Henry and St. Anselm over the question of lay investitures. The battle waxed for years on end. Anselm was cast into exile, returned, was banished again. The principal advisors of the king were excommunicated, and the king himself was on the verge of being so sentenced when a compromise was reached. Henry and Anselm agreed that the prelates might be appointed by the cathedral chapters, but the election must be held in the king's court. They agreed also that church councils could be held whenever the bishop chose, provided the king's consent be first obtained.8 In view of the feudal character of both Church and State, this compromise seemed to be the only solution of the deadlock. But it did nevertheless leave the Church in a state of dependence on a civil government hardly consonant with her divine origin.
At least an indirect consequence of the separation of the two powers was observable in the anarchy that marked the reigns of Stephen and Matilda who followed Henry I to the throne. William of Newburgh has nothing but lamentations to offer for these years:

"It is written of one period in the history of the ancient people: 'in those days there was no king in Israel, but everyone did what was right in his own eyes.' But it was worse in England in King Stephen's reign. For because then the king was powerless and the law weak by reason of the king's powerlessness, some indeed did what was right in their own eyes, but many did what by natural reason they knew to be wrong, all the more readily now that the fear of the law and the king was taken away."9

William of Malmesbury is more graphic:

"The garrisons drove off from the fields both sheep and cattle; nor did they abstain either from churches, or churchyards. Seizing such of the country yeomen as were reputed to be possessed of money, they compelled them by extreme torture to promise whatever they thought fit. Plundering the house of the wretched husbandmen even to their beds, they cast them into prison; nor did they liberate them, but on their giving everything they possessed or could by any means scrape together for their release. Many calmly expired in the midst of their torments bewailing, which was all they could do, their miseries to God."10

As William of Newburgh sagely notes, this crime wave would never have made the headway it did had not the central government been powerless to cope with it. Because the political
situation of the country was unsettled the policing and judicial functions of the commonwealth were thrown out of line. Law and order, after the bishop was removed from the secular courts, were in direct proportion to the strength of the occupant of the throne. Previous to the decree of the Conqueror a weak central authority was a commonplace in England. Yet throughout this period there is evident no disorder comparable to that which ran riot during the reigns of Stephen and Matilda. The most plausible explanation for this phenomenon seems to be that the presence of the bishops in the shire and hundred courts was somehow or other a stabilizing influence. The Catholic doctrine that an injustice of any kind was necessarily an offense against God afforded the ecclesiastics ample reason to look after the observance of the law when the secular power was unable to do so.

While it would be absurd to place the full blame for the anarchy of these years on the Decree separating the Spiritual and Temporal Powers, it would be equally unwise to suppose that the ecclesiastics occupying their old places in the secular courts of the land could not have tempered to some extent this state of crime and disorder. With his gentleman's knowledge of even the civil law the bishop could have stepped in easily and assumed full charge of the court. His spiritual influence over his people would have supplied all the sanctions he needed. The judicial system would have been saved from
total collapse, and could have made a somewhat more formidable stand against crime.

William Stubbs blames the Conqueror's decree for the disorder in the reign of Stephen and Matilda on still another score: "The clergy thus found themselves in a position external, if they chose to regard it so, to the common law of the land; able to claim exemption from the temporal tribunals, and by appeals to Rome to paralyze the regular jurisdiction of the diocesans. Disorder followed disorder, and the anarchy of Stephen's reign in which every secular abuse was paralleled or reflected in an ecclesiastical one, prepared the way for the Constitutions, and the struggle that followed with all its results down to the Reformation itself."

It is not unlikely that some of the clergy actually did try to stem this lawlessness by assuming some of the burdens of the civil courts. Significantly enough, they were accused by Henry II in the following reign of going beyond the limits allotted to them by the Conqueror. So remarks H. W. C. Davis: "The courts of the Church had been showing the aggressive tendency common to all legal tribunals, and had been showing it in an altogether exceptional degree. To some extent their encroachments were encouraged by the laity. The canon law was more scientific, more comprehensive, and more equitable than the uncouth tangle of precedent and custom by which the royal courts were governed. Suitors desirous of benefiting
by the wisdom of Justinian and the Roman Curia readily admitted that the breach of an ordinary contract might be considered as a form of perjury, and therefore within the cognisance of the archbishop's court.12

This supposed extension of clerical jurisdiction, and the crimes said to have resulted from the inadequate punishments of criminous clerics, heralded another battle between a saint and a king. This time the saint was Thomas a Becket and the king, Henry II. According to Stubbs, the treatment of criminal clerks had been a matter of difficulty, the lay tribunals being prevented by the ecclesiastical from enforcing justice because the latter were able to inflict spiritual penalties only. The reasonable compromise which had been proposed by the Conqueror himself, in the injunction that the lay officials should enforce the judgments of the bishops13 had been rendered inefficacious by the jealousies of the two estates. The result was that in many cases grossly criminal acts of clerks escaped unpunished, and gross criminals eluded the penalties of their crimes by declaring themselves clerks. The king proposed that criminals should be tried in the ordinary courts of the country. If they were convicted or confessed, they should be degraded by the bishops and delivered over to the executioners for condign punishment. St. Thomas resisted. Criminal or not, the offender was a cleric. As such he had been placed beyond the arm of the civil law by
William the Conqueror. If the criminal were convicted in the ecclesiastical court he would be sufficiently punished by the penalties imposed on him by that court, and by his loss of clerical status if the crime were serious. The state had no business insisting upon a second trial and a second punishment. St. Thomas was but invoking the principle that no man should be tried twice for the same crime. If the criminal offended again he would offend as a layman, and as such would be subject to the full rigor of the law of the land.

Without attempting to see the reasonableness of Becket's solution, Henry switched his attack to other "abuses". He complained loudly of the exactions of the ecclesiastical courts, and proposed to the assembled bishops that they should promise to abide by the customs which regulated those courts as they had been allowed in the days of his grandfather. The archbishop saw that to concede this unreservedly would be to place the whole of the clergy at the king's mercy. Not to agree might put them in even greater jeopardy. Accordingly, he prevailed on the bishops to assent "saving their order". But the king, irritated by the apparent subterfuge, left the council in a rage. 14

The upshot of all this was the murder of Becket, and the Constitutions of Clarendon, a piece of definitely ant clerical legislation. Henry decreed:

"1. If a controversy arises between laymen,
between men and clergymen, with regard to advowson and presentation to churches, it shall be treated or concluded in the court of the lord king.

"3. Clergymen charged and accused of anything shall on being summoned by a justice of the king, come into his court, to be responsible there for whatever it may seem they should there be responsible for -- so that the king's justice shall send into the court of Holy Church to see on what ground matters are there to be treated. And if the clergyman is convicted, or if he confesses, the Church should no longer protect him.

"8. With regard to appeals, should they arise -- they should proceed from the archdeacon to the bishop, and from the bishop to the archbishop. And if the archbishop fails to provide justice, recourse should finally be had to the lord king, in order that by his precept the controversy may be brought to an end in the court of the archbishop; so that it should not proceed farther without the assent of the lord king.

"11. Archbishops, bishops, and all Parsons of the realm who hold of the king in chief have their possessions of the king as baronies and are answerable for them to the king's justices and ministers; also they follow and observe all royal laws and customs and like other barons they should take part with the barons in the judgments of the lord king's court, until the judgment involves death or maiming."\textsuperscript{16}

From all this it may be inferred that the separation of the two powers did prove of some moment to English history. The unfortunate consequences enumerated above seem to indicate that it was a mistake -- and a rather serious one at that. On the other hand is the opinion of the majority of historians who consider it a particularly wise and timely piece of
legislation. This thesis will attempt to determine which of these two opinions merits our acceptance, whether the change was an improvement over the old system, or whether one may hold the opposite view. The thesis will do this by considering somewhat in detail the system it supplanted, then the innovations introduced by the Conqueror together with the reasons why he introduced them. By way of conclusion we shall attempt to pass judgment on the decree in view of the evidence brought to light in the preceding chapters.
NOTES TO INTRODUCTION

7. Adams, G. B., op. cit., p. 94
8. Stubbs, op. cit. I, p. 343
10. William of Malmsbury, *Chronicle*, "Modern History", bk. 1
11. Stubbs, op. cit., p. 308
13. Stephenson and Marcham, *Sources of English Constitutional History*, "Decree of Separation", p. 35
15. Stephenson and Marcham, op. cit., "Constitutions of Clarendon", pp. 73-75
CHAPTER I

FOUNDATION AND DEVELOPMENT OF
ENGLISH ECCLESIASTICAL JURISDICTION

The presence of clergy in the courts of the land was not particularly the fruit of Christianity. This was an established tradition among the Germanic tribes at a time when the Roman emperors could still look on the Christians as an inconsequential eastern sect. Tacitus relates of the barbarians in his _Germaniae_\(^1\) that none but the priests were permitted to judge offenders, or to inflict bonds or stripes. This office was committed to the priests in order to inspire a reverence for law and to render the punishments less invidious. When the Germanic tribes settled in England, the priests continued to be important functionaries in the affairs of state. The assembly of the tribes had given way to the witan, or the council of the "wise men" which was composed of the nobles and relatives of the king. These "wise men" were deemed capable of advising the king because of their position, their age, or their experience.\(^2\) Naturally, the priesthood fell under this category of "wise men". No one questioned the right of the priests to sit by the side of the nobility and help the king thrash out the affairs of his domain. It
was no wonder then, that, after the tribes had been converted to Christianity, the Catholic clergy should find themselves enmeshed in the civil affairs of the state. The rulers, accustomed to see their priests occupying influential posts in the government, merely substituted the representatives of the new religion for those of the old. The union of the two powers existed thus from the very beginning. The preamble to King Ine's code of laws, promulgated about a hundred years after the conversion of Ethelbert, verifies this tellingly:

"I, Ine, by God's grace king of the West Saxons, with the counsel and with the teaching of Cenred my father and Hedde, my bishop, and Ercenwold, my bishop---"3

In the prologue to Wihtred's Dooms published some five years later, we read:

"The king has gathered an advisory assembly of his great men at Berasted. ---every rank of churchman spoke, in unison with the lay folk; and the great men resolved with the assent of all to add to the rightful customs of the men of Kent these following laws."4

Besides Bertwold, Archbishop of Canterbury and Gebmund, bishop of Rochester no one of the "Great men" is mentioned.

With the union of Church and State so close it was no wonder that ecclesiastics should find their way to the shire and hundred courts, instead of confining their influence to their church tribunals. The existence of these courts dated from the pre-Christian era.5 According to Tacitus they were an established institution among the Germanic tribes at the
time he wrote. We have evidence from the Dooms of Edgar that
as early as the beginning of the Ninth Century the judges of
these courts were the ealdorman, who governed under the king
the various units of his realm; the archbishop or bishop, and
a limited number of other councillors.6 In the shire and
hundred courts therefore we have the unusual feature of two
judges presiding: the ealdorman over cases involving breaches
of the king's peace, the bishop or priest over infractions of
the law of God.7 We shall consider the functions of these two
judges in greater detail in the following chapter. Neverthe­
less, it will not be out of place here to point out how closely
the affairs of the Church became those of the state under this
arrangement. King Wihtred would punish severely any man, re­
gardless of his rank, who was discovered secretly worshipping
the pagan gods.8 The Lord's Day was to be observed under the
enormous penalty of eighty shillings. About the same time
King Ine was punishing with a fine of thirty shillings any man
who had not had his child baptized within thirty days of its
birth.9 The privilege of sanctuary was also in vogue at that
time:

"If a man who has incurred the death penalty
flee to a Church let him keep his life and
make (pecuniary) compensation according to
the law; if he has incurred corporal punish­
ment, and so flee let the chastisement be
forgiven him."10

According to Hunt: "The witenagemots almost bore the charac­
ter of Church councils and were mainly concerned with
ecclesiastical business. Although the statesman bishops did not subordinate their sacred duties to their secular employments, they came to be regarded in a secular spirit and plurality was practised. Meanwhile the spiritual jurisdiction of the bishops was in no degree diminished, indeed it probably gained by the exercise of judicial functions by the archdeacons. The clergy besides being under the bishop's law were subject to the general police arrangements of the kingdom, and were equally with the laymen bound to provide surety for their orderly behavior.\[11\]

When the king entrusted to the clergy the administration of some of the seignorial courts, the summit of ecclesiastical jurisdiction may be said to have been reached. The right to preside over these courts was a highly esteemed award granted to the king's most trusted noblemen, lay and ecclesiastical alike. It gave the noble independent sway over a determined piece of territory. His decisions could not be appealed to any higher court. For the ecclesiastics who enjoyed this privilege it meant that they would also judge those cases ordinarily reserved to the sheriff or ealdorman. The monastic houses at Peterborough and Ely are generally given credit for being the first to acquire these franchises or "sokes". They were obtained from King Edgar by Bishop Aethelwold at the time of the foundation of the abbeys.\[12\]

"I, Edgar grant and give today before God
and before Archbishop Dunstan freedom to
St. Peter's minister at Medhamsted, from
king, and from king, and from bishop—,
and so I free it, that no bishop have
any jurisdiction there, but the abbot of
the minister alone.——"13

However, according to Maitland there is a "book" granted by
Cenwolf of Mercia to the Church of Worcester which adds to the
clause of immunity these words:

"and if a wicked man be three times
captured in open crime, let him be
delivered to the king's tun."14

From this he concludes that only the worst offenders were de­
levered to the king's officers, and all the others were to be
under the jurisdiction of the bishop. We have definite evi­
dence of the existence of these seignorial courts in the Tenth
Century from that oft-quoted passage in Domesday Book:

"Ecclesia S. Mariae de Wircestre habet
unum hundredt quod vocatur oswaldealau
in quo jacent ccc. hidae. De quibus
espliscopus ipsius ecclesiae ad con­
stititiones antiquorum temporum habet
omnes redditiones socharum et omnes
consuetudines in ibi pertinentes ad
dominium victum et regis servitium et
suum, ita ut nullus vicecomes ullam
ibi havere possit querelam, nec in
alia qualibet causa."15

Oswald the bishop ruled Worcester 960-992. The conclusion
then that hallmoots had become fairly common institutions by
1050 is not really open to question, being based on the col­
lective evidence of hundreds of passages scattered throughout
the Domesday Survey, which tells us that some church magnate
or some fairly important layman had enjoyed the privilege of "sake and soke" over this-or that estate in the days of King Edward. Nevertheless it had not become a right common to all landowners in the Eleventh Century. The exercise of soke was still regarded as primarily a royal right, and the general rule of the land still enjoined that all men should attend the hundred moots. Furthermore, even where landowners had acquired some measure of soke over their estates, the resulting franchises were regarded primarily as subdivisions carved out of the hundreds by leave of the Crown: and therefore men could still conceive of seigniorial justice as being merely a variant of the general scheme of national justice, and not as a distinct and rival type of jurisdiction to be feared by the Crown and suppressed whenever there was an opportunity. 16

An explanation for the presence of bishops in Anglo-Saxon law courts may be found in the very insularity of the country. At the time England was on the outer rim of Christendom. As America had not yet been discovered and northern Europe was still uncivilized, England did not enjoy her present advantageous position as the focal point of many important trade routes. There was little about this undeveloped country, subject to the ceaseless predatory raids of the Norsemen, to attract the Mediterranean merchant. On the other hand, the native Briton found everything he needed for his sustenance right at home,—a fertile soil, forests stocked with game,
metals, lumber, etc. Why should he bother about trading abroad? In ecclesiastical affairs the Church of England had a most insular character. It was almost independent of Rome. Its bishops and higher clergy were appointed by the king; its parish priests by the local lords. During the Tenth Century no appeals were carried to Rome, nor does it appear that a papal legate set foot in England. The whole outlook of the Church seems to have been national in scope. Church and State grew up side by side. Bishops were national officers, the clergy were subject to the general police arrangements of the kingdom, while even the laws of the Church were decreed in the national assembly. There were not wanting councils of the Church however, which attempted to arrest the insular development of canonical customs. But the distance from Rome remained just as great and provincial England was perforce out of touch with most of the developments on the Continent. Cut off thus from papal leadership and influence at a time when much of value might have been gained from them, the English Church on the Eve of the Norman Conquest bore an extremely singular aspect.

There yet remains the question, why the Church allowed herself to become caught up in affairs of a purely civil nature. The two reasons already offered, the customs of the Anglo-Saxons, and the insularity of the land are partial explanations. But in addition to these, the Church had reasons of her own.
for entering into the purely secular life of the state. These were founded on primitive conditions existing in England at the time. We must remember that the civilization of the Anglo-Saxons had not yet reached even the low standard of the Continent. Periodically, a fresh host of barbarians would sweep over the country, devastating all that lay before them, eventually to settle down in England with their wives and families. The original inhabitants obviously could not assimilate all these peoples; and as a result, whatever heritages the Romans may have left were at length wiped away. Roman ideals of law and order gave way to the barbaric instinct of an eye for an eye and a tooth for a tooth. By themselves the civil courts could offer no assurance that their justice would be any better. The ealdorman entrusted with the court was generally little better versed in the law than the ceorls. In the life of King Alfred we read that the people had so little confidence in the decisions of their ealdorman that they would take their troubles to the king as a matter of course. The bishop and priest were often the only ones present in the court with a knowledge of even the civil law. Their presence therefore, besides adding a certain dignity to the whole proceedings was the most reliable guarantee the people had that the law would be interpreted correctly. This fact, coupled with the respect and honor that was paid the bishop in that Catholic country, was the surest means the government had of weaning its subjects
away from their natural impulse to take the law into their own hands.

The Church then had an obligation to interfere in the courts of law. Her mission to prepare men for the life to come, by teaching them to live right in this life, demanded that she do all in her power to advance the civilization of the natives. History has shown that this has been her policy in every country she has converted. She could scarcely fulfill her mission to "teach all nations" if she confined her teaching to an hour in Church every week. Men find it hard to learn that way. If she would really thoroughly indoctrinate her neophytes she would have to enter into every possible phase of their life. Where she has been most successful in this, there she has been able to introduce almost ideal living conditions and give her members the natural happiness which her Founder promised to those who would "follow Him". In countries with a low standard of living this has been all the more necessary. Anarchy and a low state of morality jeopardize her own interests. Converts would find it extremely difficult to observe the Ten Commandments if the customs of the land were utterly out of harmony with them. Therefore, we can say that by adapting herself to conditions as she found them, and by keeping pace with the political changes of the country, the Church in Anglo-Saxon England was entirely consistent with her finest traditions. Ecclesiastical jurisdiction in England did differ
from the rest of Christendom, but as we have seen, this singularity is explained amply by the circumstances which marked the conversion of the English and redounds very much to the credit of the Church.
NOTES TO CHAPTER I

1. Tacitus, Germania, c. 7
2. ibidem
3. Stubbs, Select Charters, "Dooms of Ine", p. 61
4. Stubbs, ibid, "Dooms of Wihtred", p. 61
7. Oman, Charles, England Before the Norman Conquest, p. 367
8. Stubbs, Select Charters, "Wihtred's Dooms", p. 61
9. Stephenson and Marcham, op. cit., pp. 6-8
10. Oman, Charles, op. cit., p. 377
11. Hunt, William, The English Church In the Middle Ages, pp. 40-1
12. Cambridge Medieval History, III, p. 376
13. Anglo-Saxon Chronicle, a. d. 963
14. Maitland, F. W., Domesday Book and Beyond, pp. 267-276
15. "Domesday Book", I, 172b, as quoted by F. W. Maitland, Domesday Book and Beyond, pp. 267-276
16. Cambridge Medieval History, op. cit., pp. 405-7
17. Stenton, F. M., op. cit., p. 382
NOTES TO CHAPTER I CONTINUED

19. Note: The nationalism of the Church at this period cannot be taken in the same sense that would make the Church of England a national church today. Theoretically, the Anglo-Saxon Church owed allegiance to Rome.

20. White, Making of the English Constitution, p. 62
22. Asser, Life of Alfred, p. 88
23. Pollock and Maitland, History of English Law, p. 17
CHAPTER II

ROLE OF THE CLERICS IN THE
ANGLO-SAXON TRADITION OF JUSTICE

To provide a fairly lucid exposition in the previous chapter of the development of clerical jurisdiction in England it was necessary to refer in passing to the various types of Anglo-Saxon courts. Since that chapter was concerned primarily with the origins of ecclesiastical jurisdiction, it was hardly the place to make a very thorough analysis of the functions of the clergy in the secular courts. It will be the purpose of this chapter therefore to sum up these functions and to depict incidentally the organization of the Anglo-Saxon court system as a whole.

We recall that the witan was the highest court of the land. Although its chief function was to serve the king in an advisory capacity, it deliberated over all those cases which were brought directly before the king. Here were handled also the appeals from the shire, and hundred courts. The makeup of this court and its time for convening depended on the caprice or convenience of the king. It was convoked in whatever locality he happened to be staying at the time, and was composed of the local nobility and clergy whose rank and learning merited for them the appellation of "Wise men". Over this
court the king presided, handed down whatever final decisions were to be made, and received the profits from the trial.¹

Below the witan, there were the shire and hundred courts, and at a later period, the seigniorial. All three had the same general ranking in as much as appeals from them could not be carried to any other court but the witan. Apparently any case which was brought to one of the courts might be brought to the other. What determined the court into which a particular case should go was the wish of the parties, especially of the plaintiff, and the importance of the case. An insignificant action, or one concerning people of low rank could not ordinarily be brought into the shire courts. The hundred was used much more frequently in litigation, and was the normal and habitual court for all ordinary commercial and police business such as maintaining local order and punishing crime.² The shire court on the other hand was occasionally used by the central government for administrative purposes. The utility of the two courts however, was not limited to their judicial proceedings. In a period when few possessed the humble acquirements of reading and writing, the stability of pecuniary transactions was principally dependent on the honesty and character of the witnesses; and the testimony of the hundred was deemed on that account conclusive in questions of litigated right or disputed obligation. Hence men frequented these meetings in the midst of their private business; contracts were
made, exchanges ratified, purchases completed, and moneys paid, in the presence of the court. 3

The shire court, or court of the county enjoyed the most extensive jurisdiction. It was held twice in the year, in the beginning of May and October. 4 Every great proprietor was compelled to attend in the person of his steward, or to send in his place his chaplain, bailiff, and four principal tenants. The bishop, and the ealdorman or earl, as he was popularly called, who presided with equal authority, were advised by the sheriff and the most noble of the royal thegns. Proceedings began with those causes which related to the dues and immunities of the Church, passed to the fines and forfeitures belonging to the crown, and ended with the controversies of individuals. In the last mentioned cases, those involving personal disputes, it was the duty of the court to attempt a reconciliation by proposing a compromise, but if the proposal were rejected, to pronounce definitive judgment. It was also on these occasions that the laws which had been enacted in the great council of the nation were announced and promulgated. 5

The court of the hundred was a replica of the shire court on a smaller scale. Representing one one-hundredth part of the shire 6 it corresponded to the modern police courts. 7 Its origins can be traced back into antiquity. Tacitus we know observed it in a flourishing state among the Germanic
This court assembled every month under the presidency of the ealdorman or chief officer of the hundred, accompanied by the principal clergymen, freeholders, and the reeve, and four men as representatives from each township. Once in the year was convened an extraordinary meeting when every male above the age of twelve was compelled to attend. Here the state of the guilds and tythings was ascertained; and no man was permitted to remain at large who could not provide a surety for his peaceable demeanor.

Functioning side by side with the hundred and shire courts were the seignorial courts or hall-moots as they were more familiarly called. We have already seen something of the nature of these courts in the previous chapter. As a favor to a loyal lord or abbot the king would often grant him "sake and soke" over all crimes or disputes occurring on his estates. This was a privilege, since as a general rule the person in whose name a court was held, be he king or lord, got the profits of the trial. When the king declared that save in exceptional cases nothing was to "go out" of the immunities lands by way of wite, then to all intents and purposes he declares that he and his officers will not meddle with offenses committed in that territory. Often as not the territory held by the noble coincided with a jurisdictional district of a hundred or a group of hundreds. In this case he enjoyed full immunity. Why should the sheriff hold the court? Why should
he appoint a bailiff for that hundred if never could he get a penny therefrom for his own or the king's use? Jurisdiction was limited either by the terms of the original grant or by immemorial usage. In some cases cognizance of all crimes committed within their soke a was granted; in others the jurisdiction was confined to offenses of a particular nature; some might summon every delinquent whether native or stranger before the tribunal; while others could inflict punishment on none but their own tenants. In the soke thus created the essential novelty was not merely the transfer of the king's rights to a nobleman or abbot. The innovation lay in the transfer by which a great number of men, both small and great, who were in no way tenants of the monks or laylords, or under their patronage by "commendation" came to be subjected to them for police and judicial purposes. If they were charged with any crime they had to appear before officials appointed by these lords and upon conviction they became liable to pay their judges whatever fines were imposed upon them.

Now what were the functions of the clergy in these courts? Since the shire and the hundred were the most typical of the period we shall devote our attention to them. The bishop and ealdorman or earl, presided with equal authority and their assessors were the sheriff and the most noble of the royal thanes. Of the two presidents however, the bishop was by far the more important functionary. Strictly speaking the
ealdorman should have handled all infractions of the king's peace; but as a matter of fact most of these violations were also sins against the moral law, and so fell under the bishop's jurisdiction. In actual practise the ealdorman merely presided over law suits between laymen and lent the sanction of the secular power to the decisions of the bishops. Even this meager role as an administrator of justice was not always too pleasing to the Anglo-Saxons. Asser tells how:

"The people very often at the meetings of the ealdorman and reeves disputed among themselves so that hardly any of them would allow that the judgment of the reeves or the ealdorman was right. And constantly driven by this obstinate disputing they were desirous to submit to the judgment of the king alone, and straightway hastened from every side to secure it." The ealdorman's task however, was not altogether a thankless one. The profits accruing from the trials, the sum which the plaintiff paid for bringing the case to court, and the fine imposed on the criminal were shared by the king and the earl in whose domain the case was tried. The king received two thirds and the earl one third of every fine imposed by the court. Thus although the role of the secular lord as a judge was rather insignificant, his generous remuneration made his presence at court wholly worthwhile.

In contrast to the earl the bishop was a very active judge. He was concerned first of all with those distinctly clerical offenses such as breaches of church regulations,
hersesy, witch-craft, and sacrilege. The spiritual short-comings of the clergy, disobedience, drunkenness, and the like also called for his authoritative treatment. They would not come before the popular courts because they were not infractions of the law of the state.\textsuperscript{18} For these, domestic tribunals not differing in kind from the ecclesiastical courts of the later middle ages were in use. In criminal cases in which clerics were involved, the bishop was in court in the relation of a lord and patron to declare what the procedure was. But as all crime could be regarded as a religious and moral offense, the bishop found himself trying laymen also. The Penitential of Theodore contains a provision that the bishop shall determine the causes of the poor up to fifty shillings; the king, if the sum is greater. At the close of the period in Domesday the king is to have the man, the archbishop the woman accused of adultery.\textsuperscript{19} By a natural feeling the minister of Christ was esteemed the proper person to see justice done between man and man, to interpose the warnings of the Church against perjury and to superintend the ordeal. As a chief of the educated class he would speak with authority upon all questions of succession, the standard of measure and weights, etc.\textsuperscript{20}

Although evidence of the bishop's part in judicial procedure for this period is rather limited, we may get a fairly accurate idea what he did from the cases he handled after the lay and ecclesiastical courts had been separated. Then, the
Church claimed cognizance of a cause for one of two reasons: either because the matter in dispute was of an ecclesiastical or spiritual nature, or because the persons concerned in it or some of them were especially subject to ecclesiastical jurisdiction. This jurisdiction included (a) the whole of ecclesiastical status, ordination, and degradation of clerics, consecration of bishops, all purely spiritual functions such as the celebration of divine service, regulation of ecclesiastical corporations, and administration of revenues; (b) decision of all cases which in any way concerned those lands that had been given to the Church especially as alms (frankalmoin); (c) exaction of spiritual dues, tithes, mortuaries, oblations, and pensions; (d) marriage, divorce, and consequently legitimacy; (e) the last will of the dead, the validity of wills, their interpretation, regulation of the testamentary execution; (f) all promises made by oath, or by a pledge of faith; (g) correction of the sinner for his soul's sake, to set him some corporal penance; (h) all personal cases, criminal or civil in which a clerk was the accused or defendant.21

Oath-taking, an integral feature of all Anglo-Saxon trials, required the assistance of the bishop even for those cases presided over exclusively by the ealdorman. Lingard offers some idea of how often recourse was had to the procedure of oaths. In the first place, wherever there was a question of real or personal property, the defendant was bound to
produce witnesses of the transaction which gave him title to the property. They were also needed if stolen property were found in his possession, or if he were discovered forcibly entering on the lands of others. Secondly, the oath was resorted to if the plaintiff or the defendant advanced assertions which could not be proved by evidence. He would then be put under oath, and be ordered to bring forward certain freeholders, his neighbors, who were acquainted with his character and who could swear that in their consciences they believed his assertion to be true. It was only after all the witnesses had given their testimony and the matter still remained doubtful that a jury of free tenants was selected to deliberate among themselves and return a verdict which would decide the question. But if the witnesses agreed, then the earl could return the verdict himself. Therefore, since so much hinged upon the veracity of the oath-helpers it was imperative that every precaution should be taken to safeguard the truth. For this no one was better qualified than the representative of God. He was in convenient position to remind the prospective witness of the terrifying punishments awaiting the perjurer in the next life. It was he who created an aura of solemnity around the taking of oaths, without which the whole procedure would have failed dismally.

The procedure at a criminal trial was the same as that at a civil trial, but here resort was more often had to another
form of proof, the ordeal, which might however also be used in a civil case. Here again, the ecclesiastic found himself an important functionary. The ordeal was in theory a formal and solemn appeal to the judgment of God in cases where the court was in too much doubt to make a decision. Ordinarily, the party went directly to the ordeal without first going through compurgation process. The Dooms of Athelstan outline the procedure which must be observed preliminary to the ordeal:

"If anyone is obliged to go to the ordeal, he shall come three days in advance to the priest in charge of the consecration; and before he does so, he shall feed himself on bread, water, salt, and herbs; and on each of the three days he shall attend mass; and on the day he undergoes the ordeal he shall make an offering and take communion; and then, before he goes to the ordeal, he shall swear an oath that according to folkright, he is innocent of the charge against him."

The ordeal generally resolved itself into two types: that of fire, and that of hot or cold water. For the ordeal of hot water a fire was kindled in a remote part of the Church. At a certain depth below the surface which was augmented in the absence of a favorable character from the lord, there was placed a stone or piece of iron of a certain weight. Strangers were excluded from the Church. The accused and the accuser each attended by twelve friends, proceeded to the spot, and the parties were arranged in two lines opposite each other. After litanies had been recited, a person was deputed from
each line to examine the cauldron, and if they agreed that the
water boiled, and the stone was placed at the proper length,
the accused advanced, plunged in his arm, and took out the
weight. The priest immediately wrapped a clean linen cloth
around the part which was scalded, affixed the seal of the
Church, and then waited until the third day before opening the
bandage. If the arm were perfectly healed, the accused was
pronounced innocent; if not he suffered the punishment of his
offense.24

In the other type of ordeal by water the accused was
bound hand and foot and thrown into a pool. The Dooms of
Aethelstan postulate that he sink an ell and a half to prove
his innocence. Floating was damning evidence, since it was
believed the elements would not accept a guilty person.25

In the ordeal by fire the same precautions were taken
in respect to the number and position of the attendants as in
the ordeal by hot water. Near the fire nine paces were
measured off and divided by lines into three equal parts. By
the first stood a small stone pillar. At the beginning of the
Mass a bar of iron weighing from one to three pounds was laid
on the fire. At the last Collect it was taken off and placed
on the pillar. The prisoner immediately grasped it in his
hand, made three steps on the lines previously traced on the
floor, and threw it down. The treatment of the burn and the
indications of guilt or innocence were the same as those in
the ordeal by hot water.

What happened to him if he were found guilty? His fate rested with the Church. Since he had violated the moral law he was given a corporal penance the execution of which was left to the secular power. Capital punishment though uncommon was not unknown\(^{26}\) and imprisonment lasted only until a surety could be found.\(^{27}\) Though the laws speak of prisons it is extremely doubtful whether there was any place where the criminal could be confined for life. There were a number of cases in which a man detected in crime or refusing to surrender to the law might be slain. But these are regulations of police rather than of justice. Likewise, a repeated offender might be mutilated, but the punishment was probably designed to cripple him in his peculiar activity, and to mark him as a convict.\(^{28}\) In general all crimes could be atoned for by a money payment called the bot made to the family of the injured person. In addition the culprit was forced to pay the wite, or fine to the state for his breach of the peace. Every free man had a wergeld or valuation in terms of money, fixed according to his rank. This was paid by his assailant if he were killed or maimed. Moreover it could be used to measure the fine of his own offenses if he were called upon to redeem his life.\(^{29}\)

With the payment of the wergeld and the performance of the prescribed penance of the Church, the criminal was considered to have fully paid his debt to society and to God. He was
then free to return to his former mode of life, reasonably free from fear of vengeance or ostracism from the community.

Thus the role of the Church in the administration of Anglo-Saxon justice was by no means negligible. Without her it is hard to conceive how justice could have been carried out at all. Manifestly, peace and order were maintained in the realm principally by moral force. It argues well for the fundamental uprightness of these people and the greatness of the Church's influence upon them that she was able to preserve the Anglo-Saxon State from anarchy without recourse on the same scale to the punishments that are deemed necessary for the enforcement of law in this Twentieth Century.
NOTES TO CHAPTER II

1. Liebermann, F., The National Assembly In the Anglo-Saxon Period, as quoted by Stephenson and Marcham, op. cit., p. 6


5. Lingard, op. cit., pp. 337-41

6. Note: Just what determined the size of the hundred is disputed. It has been regarded as denoting simply a division of a hundred hides of land; as the district which furnished a hundred warriors to the host; as representing the original settlement of the hundred warriors; or as composed of a hundred hides, each of which furnished a single warrior.--Stubbs, op. cit., p. 104


8. Tacitus, Germania, VI


10. Lingard, op. cit., pp. 337-40

11. Cambridge Medieval History, III, p. 376

12. Maitland, op. cit., p. 278

13. Lingard, ibidem, pp. 337-41


15. Lingard, ibid, p. 339

NOTES TO CHAPTER II CONTINUED

17. Asser, Life of Alfred the Great, pp. 88-9
18. Stubbs, ibid., p. 232-5
19. Domesday Book, as quoted by Maitland, Domesday Book and Beyond, p. 281
20. Kemble, The Saxons in England, II, c. 8
21. Pollock and Maitland, History of English Law, pp. 105-110
23. Stephenson and Marcham, op. cit., "Dooms of Athelstan", p. 15
25. Stephenson and Marcham, op. cit., "Dooms of Athelstan", p. 15
26. Pearson, op. cit., pp. 261-2: "If the accused fails in such an oath and so is proved guilty, the chief of men who belong to the borough shall decide whether or not he be permitted to live."
27. Stephenson and Marcham, op. cit., "Anonymous Dooms", p. 16
29. Adams, G. B., op. cit., p. 31
CHAPTER III

EVALUATION OF THE ANGLO-SAXON TRADITION OF JUSTICE

After this survey of the functions of the clergy in the Anglo-Saxon courts we may very logically ask if there were any theoretical advantages in having the ecclesiastics so placed. A good extrinsic argument that there were might be deduced from the support given them by those idealistic kings, Alfred and Canute, and their endorsement by Archbishops Theodore and Dunstan. But for our present purposes a more satisfying conclusion must be drawn from a careful scrutiny of the system itself. We shall accordingly evaluate the Anglo-Saxon clerical jurisdiction from the point of view: (1) of the man tried (2) of the State (3) of the Church; and (4) of the system itself. If it can stand in a favorable light from these four different viewpoints, then undoubtedly it was a boon to the English and perhaps our first suspicions were correct that the innovation of the Conqueror was only a regrettable mistake.

Very little reasoning is needed to conceive the advantages accruing to the defendant from the presence of the clergy. Since they inspired a respect for justice, often as not they saved him from the mob violence which most certainly would have been his fate under other circumstances. The Anglo-Saxons were a people just recently emerged from a state
semi-barbarity. For them the law of the savage was the quickest and surest means of obtaining justice. Although it is true they had developed the system of wergelds even before they were Christianized, when passions ran high, and weapons were close at hand, money compensation for the loss of a near relative often enough would appear to them woefully insufficient. On such occasions it took all the moral force the Church could muster with her threats of excommunication and eternal damnation to quell the outraged relatives. It is significant that more than one case is left on record where even the dire threats of the Church could not save the fugitive from his pursuers. What would have been the fate of the average thief or homicide without the sanctuaries of the land and the commandments of God and the Church to protect him in those days of weak civil authority is not hard to surmise.

Then too, the law of the Church was more merciful. The Church could not put a man to death, neither could she imprison or maim him. All these were prerogatives of the State. Centuries would pass before the Church by her excommunication would ipso facto hand over a condemned criminal to the State for punishment. Her punishments were limited to a corporal penance, a fine, and the promise of restitution. The state on the other hand, besides having it in her power to fine offenders, could if she so wished, maim the culprit in order to discourage his activity in the future. That the common folk actually
considered the justice of the ecclesiastics more lenient can be deduced from the numbers who sought the benefit of the clergy on the plea that their cause fell under the bishop's jurisdiction on one score or another. Although there is evidence that the ecclesiastics could be venal upon occasion, nevertheless their higher calling, and their professed vocation to strive after the spiritual rather than the material, gave some assurance to the laity that here they had a better chance of being fairly judged than by those who were governed by no such ideals.

Even if the criminal was so unfortunate as not to be able to trump up any reason for being tried by the clergy, such as his being a cleric, or his having in some way trespassed on Church property, the mere presence of the bishop or priest was a moderating influence with his secular judges. The assembly of free men would have to declare whether they believed him guilty or not guilty, and the ealdorman or reeve who would pass sentence, would not be inclined to brave the displeasure of God's representative openly. It is hard for us living in a more sophisticated age to understand the prestige of the ministers of God in those Catholic times. We must remember that these people were for the most part practising Catholics, and being uneducated country folk they were refreshingly simple. The immanence of hell-fire and eternal damnation was horribly real to them. Consequently, when the bishop or priest
sought a hearing his wishes were generally respected. It would have taken a sheriff or ealdorman of more than ordinary daring to be openly unjust without the connivance of his clerical partner.

A fourth advantage given to the defendant by the presence of the ecclesiastics can be understood only by Catholics. It is one however, that may have meant much to the offender in the Anglo-Saxon state. When he was hailed before the ecclesiastical tribunal he may as well have been brought before the Judgment Seat of God. He would be tried for an infringement of the law of God and only incidentally, of the State. His punishment was primarily a penance, only secondarily a compensation to the injured party and to society. When that was paid his worries were over. God would not demand any more, man was perfectly satisfied.

A believer in God will recognize at once that this approached the ideal relation between judge and judged. The law of the State is supposed to be only a more detailed version of the eternal law of God. In truly Catholic countries this legal ideal has always been seduously put in practise. In Anglo-Saxon England the state professed to deal only with the secular aspects of Society; with crime as a moral or religious offense it had nothing to do. It assessed only the losses which the crime entailed on individuals or the community, and enforced or provided for the enforcement of the penalty. To
extirpate sin was the duty of the Church. She saw to it that the cause of the crime should be corrected. Consequently the penances she meted out were not left to the option of the culprit. He would either perform them voluntarily or else he would have the secular power to reckon with. Thus the enforcement of the divine law, and the human positive law flowing directly from it, was principally the concern of men dedicated by their vocation to leading men to God.

Possibly the only drawback from the defendant's point of view in having Church and State so closely united in judicial procedure was in the system of ordeals and compurgation. Unquestionably, the State put too much faith in the possibility of divine intervention. No Catholic today, however strong his Faith, would believe that a man's guilt or his innocence could be determined by the way his wounds healed. Many an innocent person must have been condemned in those credulous times because his body was run down or his blood bad. Had the criminal and civil courts been free from the influence of the clergy there would probably not have been this trust in everyday miracles.

The system of oath-taking during trials which sometimes worked to the prejudice of a defendant unknown in the courtroom must also be attributed to clerical influence in the courts. Naturally, a stranger would find it very difficult to produce the required number of oath-helpers, and if he failed in the
ordeal which followed, he would stand condemned of a crime of which he was innocent. These however, were just occasional instances where an otherwise good procedure would break down. Whether or not such a practice would have existed in that Catholic country if the clergy had not been present at court is at least open to question.

As far as the Anglo-Saxon State was concerned, the advantages of having the bishop or priest in the courts outweighed the disadvantages. As we have already noted, they inspired a certain respect for the State and its laws. Civil authority was none too strong at any time during that period. The constant inter-tribal wars and invasions from over the seas gave the Anglo-Saxon kingdoms little opportunity to attend to their domestic problems. Had the Church not been able to step in with the claim that "An offense against man, meant an offense against God" it is doubtful if those primitive people ever would have bothered to bring their cases to court. They could see a far surer means of obtaining retribution in revenge or in a show of force. Anarchy would have reigned and the Anglo-Saxons would not have made even the meager progress in self-government they did.

We have commented above how the presence of the bishops inspired a more honest administration of justice by the sheriff and the ealdorman. The more certain the justice, the more the people would be inclined to take their disputes to these courts
for arbitration. At this period more than any other in English history did the courts need this help. The great task confronting the State as well as the Church was to prevent the people from taking the law into their own hands. Anglo-Saxon government would hardly be worthy of the name until it was able to do that. Yet taking into account that there was no such thing as a general system of law for all England, that the civil judges were little versed in what law there was, that the temptation to bribery was ever present, the presence of the clergy was of paramount importance in maintaining even a semblance of justice. The ignorance of the king's officers concerning the law of the land made the bishop extremely valuable also as a consulting judge. According to Pollock and Maitland he was often the only one present with a fair knowledge of even the civil law. To all practical purposes in those cases new to the ealdorman, his clerical associate was the judge—a thing not at all repugnant to the best interests of the kingdom.

The one theoretical disadvantage to the State arising from the bishop's role as judge can be found in the seignorial courts. This difficulty arose not from the bishop's character as bishops and spiritual lord of his dominion, but from that of temporal lord. The same disadvantage is noted in all the seignorial courts whether they were presided over by a bishop or by a baron. By granting "sake and soke" over all trials held in the district the king let slip from his grasp the
control of the individuals living in the district. They were responsible only to the immediate seignorial lord, while the lord in his turn could within the limits of the law rule them as he saw fit. This was a severe weakening of the royal authority. If the king were strong enough to try to push through any national reform, or if he desired to use one of the vassals for some mission or other, he would have found himself blocked by this bill of rights he had granted. Practically speaking, this exigency never arose. The idea of a highly centralized government apparently never occurred to the Anglo-Saxon monarchs. What did hurt them however, was the loss of the royal revenues from that territory. In all the fines and court costs imposed in the shire and hundred courts the king received his fee as well as did the sheriff or ealdorman. In the seignorial courts all the profits accrued to the judge. Why the king should have granted a boon of this nature to any of his subjects at great actual disadvantage to himself and still more possible harm is hard to understand. But the seignorial courts were a later development, not appearing in any noticeable numbers until just before the Conquest. Even at that time they were the exception rather than the rule. The majority of trials were still being held in the shire and hundred courts where the difficulties arising from an independent judge were not experienced.

Like the criminal or litigant, and like the civil
government, the Church too was glad to be able to sit in the sessions of the shire and hundred courts. The only drawback she could see in this arrangement was the time it demanded of her clerics. Practically eight weeks might be taken out of every year for attendance at the shire sessions, at least twelve for the hundred. In other words, from two to three months might be set aside from their pastoral duties to be devoted to the civil functions of the state. A zealous ecclesiastic must have found this trying. From the priestly standpoint he could be far better employed in ruling his diocese, in preaching, or administering the sacraments.

But this inconvenience was easily counter-balanced by the great advantages arising from this system. Primary among these was the greater union with the people afforded by the arrangement. A close relationship between the laity and their pastors always has been a desirable goal for the Church. Where this union has existed as in apostolic times, or again in Thirteenth Century Europe, there the Church has been most successful in her work, the clergy more zealous, and the lives of the lay folk more holy. Where this union was broken in Nineteenth and Twentieth Century Spain the very foundations of the Catholic Faith have been rocked. Yes, the Church must have prized the Anglo-Saxon customs. Through them she entered in still another way into the lives of her children. Being a Catholic in those times had to mean more than hearing Mass on
Sunday and abstaining from meat on Friday. By exercising the role of counsellor and protector in court she won the undying gratitude of those who sought her aid. For them she was a living vibrant being, one intensely interested in all they did.

Secondly, the Anglo-Saxon system enabled the Church to enforce her disciplinary measures by physical means. A man guilty of a grave sin would be haled into court because at the same time he had broken one of the laws of the realm. In administering her penance the Church could count on the force of the secular power to see that it was carried out. This gave ecclesiastics a sanction that was a little more immanent for the less imaginative than the terrors of hell-fire. Consequently she was able to make her discipline far stricter than she otherwise would have been able to do. The ever-present ecclesiastical tribunal kept constantly before the eyes of the common folk the idea that every sin would be punished if not in this life at least in the next. While such obedience to the law of fear has never been the most desirable, the Church has always encouraged it when all other motives prove ineffective. Among a simple, unlettered people, whose passions ran high, and who had recourse to arms almost by instinct, this arrangement was almost a necessity.

Judging from the old law that the judge determines the true tenor of the law, the ecclesiastical magistrates must have been invaluable in the evolution of the English legal
system. From the meager evidence handed down to us, the decisions of the clerics in the witan and in the shire and hundred courts must have harmonized beautifully with the ideal of the gospel. Consequently, the harshness apparent in the literal interpretation of some of the Anglo-Saxon legislation was tempered by the application of these laws to specific cases. The clerical judges did much to make the laws of the land more Christian. At a later date their decisions would provide the necessary precedents for the itinerant justices of the Angevin period to go by. Through the decisions of these justices would be erected the scaffold of the present British Common Law.

On the other hand, it may be argued that the presence of the bishops prevented the secular law and judicial procedure from developing naturally. Had the state been left to shift for itself, it might have progressed in the maintenance of law just as easily as any number of countries did before the Church was founded. True, there would have been a period of disorder, but the people would at length have wearied of their perpetual warfare and have settled down to a more peaceable existence. That they would have reached this stage as quickly as they did, is again debatable. But it is true nevertheless, that the English civil law was retarded for centuries in its development by the presence of the ecclesiastics.

The use of the ordeal was also a little too primitive
to be beneficial. While it did represent some advancement over the barbaric custom of private justice, it could not be used as a stepping stone for further progress in the system. Practises like the ordeal are no good basis for any system of law. That people accepted them at all in Anglo-Saxon England bespeaks much more their strong Catholic faith than the wisdom of the system. Such a system could be imposed only on a people whose faith in the supernatural was at white heat. Significantly enough, this procedure has not been attempted in England since the Thirteenth Century.

The success of the oath-taking too demanded either a people whose honor was high, or as in the case of the Anglo-Saxons, whose simplicity gave them a vivid conviction of what would happen to them if they perjured themselves. Although English courts have always based their decisions on the testimony of witnesses, they have not in the periods when they have made any show of being just, accepted this testimony without investigation.

Finally, the Anglo-Saxon administration of justice left no clear distinction where state law ended and ecclesiastical began. The bishop and the ealdorman often as not appear to have tried the same cases. We have already seen how jurisdiction over the poor in Penitential of Theodore was determined only by the amount of money involved. Domesday Book at the other end of the period gives evidence that both Church and
state had a hand in the trial of moral cases. The Anglo-Saxons apparently did not worry too much over generic similarity between the trials they handed over to the ecclesiastics and those to the ealdorman for judgment. Although according to Stubbs there was not the least confusion as to the limits of the powers or uncertainty as to the organization of functions of each, he attributes this harmony to the homogeneity and political unity of the race.

We may conclude therefore that the Anglo-Saxon judicial system under the domination of the clergy was theoretically wholly satisfactory for the period it was in use. In spite of its crudity, its want of organization, its haphazard method of functioning, it should have achieved the primary end of all legal systems. It should have enabled its subjects to work out their temporal and eternal destiny harmoniously, and with a reasonable assurance of their personal safety.
NOTES TO CHAPTER III

1. Stephenson and Marcham, op. cit., "Dooms of Alfred and Canute", pp. 10 and 22

2. Note: Every freeman was numbered in one of the three classes termed twyhind, syxhind, and twelfhind. The first comprised the ceorls, and the third the royal thegns; under the second were numbered the intermediate members of society. The legal value of their lives and the legal compensation for their murder advanced in proportion from two to six, and from six to twelve hundred shillings. But that of an ealdorman was twice; that of an etheling three times; that of a king six that of a royal thegn. The homicide might if he pleased, openly brave the resentment of those whose duty it was to avenge the murder; or he might flee for protection to one of the asylums appointed by law. In none of these cases were his enemies permitted to proceed immediately to the work of vengeance.

Lingard, op. cit., I, pp. 337-42

3. Note: If he sought asylum in the palace of the king, an etheling, or an archbishop he was afforded a respite of nine days; a consecrated church and the house of an ealdorman or bishop a respite of seven days. The object of the sanctuary was to gain time that the passions might cool and the parties be reconciled.

4. Pearson, op. cit., p. 314

5. Lingard, op. cit., p. 349

6. Pollock and Maitland, History of English Law, p. 16-17

7. Maitland, F. W., op. cit., p. 278

8. Cambridge Medieval History, III, pp. 405-7

9. cf. p. 3d

ORIGINS OF ECCLESIASTICAL JURISDICTION
ON THE CONTINENT

We have sketched and at the same time justified in Chapter Two the development of the English custom of sitting both lay and ecclesiastical judges in the same court. What can be said for the system which supplanted it? Can the Conqueror be defended for introducing this innovation? Strangely enough in spite of the merits of Anglo-Saxon judicial procedure the answer is, "He can." A perusal of ancient records at once reveals that the English were totally out of step with the rest of Christendom. However well the Anglo-Saxon judicial system may have satisfied the needs of the English, it harmonized ill with the orthodox union of Church and State in favor on the Continent. The theory back of this relationship is explained by Gierke: "The idea of a single community comprehensive of all mankind and ruled by two organized Orders of life, the spiritual and the temporal, was accepted by the Middle Ages as an eternal counsel of God. In century after century an unchangeable decree of Divine Law seems to have commanded that, corresponding to the doubleness of man's nature and destiny there must be two separate Orders, one of which
would fulfill man's temporal and worldly destiny, while the other should make preparation here on earth for the eternal hereafter. And each of these Orders necessarily appears as an externally separated Realm, dominated by its own particular law, especially represented by a single Fold or People, and governed by a single government.\[1\]

The purpose of this chapter then will be to trace the development of this idea in Continental Europe, and thereby to offer one explanation for its introduction into England.

The process of its development attracts interest to itself. Its origins were imbedded in the very beginnings of Christianity. The early Fathers had made some efforts to dissuade their neophytes from going to law, but to lay their differences before their pastors instead.\[2\] St. Paul's famous text:

"For I am not conscious to myself of anything yet I am not hereby justified; but He that judgeth me is the Lord. Therefore judge not the time; until the Lord come Who both will bring to light the hidden things of darkness, and will make manifest the counsels of the hearts; and then shall every man have praise from God."\[3\]

was given as the basis for this injunction. Rationalist historians have made the mistake of pointing to this custom as the source of episcopal jurisdiction. As a matter of fact, Catholic historians have always defended the divine institution of the episcopacy. Accordingly, they maintained that
episcopal jurisdiction sanctioned thus by the Church soon extended its arbitrament to all manner of legal controversy. Since there was a legal possibility of escaping from the authorities even under the pagan emperors by resorting to the arbitration of persons of high moral authority within the Church, when Christianity conquered under Constantine, episcopal arbitration was extended to every type of case. An attempt further was made to convert it into a special form of expeditious procedure well within the reach of the poorer classes. Then came the Empire’s sweeping recognition of ecclesiastical jurisdiction and the Theodosian Code in which the powers and privileges of the clergy were "portentiously set forth". No bishop might be summoned before a secular court as a defendant, or compelled to give testimony, while to accuse one of the clergy falsely, rendered the accuser infamous. All matters pertaining to religion and church discipline might be brought only before the bishop’s court, which likewise had plenary jurisdiction over controversies among the clergy. This was also open to the laity for the settlement of civil disputes. The bishop of course, had no direct criminal jurisdiction, but through the right of sanctuary claimed by the churches and in consequence of the general striving of the Christian religion for humanity and charity, they were constantly pleading for grace, mitigation of sentences, charitable treatment of convicts and prisoners.
To be sure, under the Christian Roman Empire the authority of the Church as well as its privileges rested upon imperial law. Yet the emperors recognized, rather than actually created, the ecclesiastical authority. When the Empire was shattered there stood the Church erect amid the ruins of the imperial government, and capable of supporting itself in the Teutonic kingdoms. The immediate effect of the destruction of the political unity and of the establishment of independent German kingdoms was to draw the surviving Roman life in the provinces into a closer dependence upon the Church as the only representative of the old common life. The dissolution of the empire left the papacy the immediate and natural heir of its position and traditions.

The conception of a Church law, "jus ecclesiasticum", "jus canonicum" matured in the Fourth Century largely as a result of the new position of Church and State and in conscious or unconscious imitation of civil law. During the decade 305-15 the bishops of Spain met at Elvira, the bishops of Asia Minor at Ancyra and at Neocaesarea, the Western bishops generally at Arles. The codes of these four councils are the earliest material preserved in later canon-law. The Christian bishops, now in a position to dictate to the civil lords, demanded complete separation of Church and State, and asserted that each must be recognized as having its own distinct and independent mission to perform. There must be a clean-cut division of the
two Orders. The view of the ancient world that the two should be intimately associated contained a great danger for the growing Church—the danger of being absorbed in the State, of losing all independence of development and of being diverted from its own proper work to serve political ends. G. B. Adams thinks that it was this danger which forced the early Church to develop so clearly the doctrine of independence of state control, and to insist on it so strongly against Roman emperors and German kings.⁹

By 614 we find clear evidence for the existence of the two separated jurisdictions in Merovingian Gaul.¹⁰ At that time clergy could only be judged on criminal charges by their bishops, while the bishops themselves could only be cited before the councils of the Church. In 829 the episcopal utterances about Church and State at the Council of Worms and Paris, afterwards appended to Capitulary of Worms begin with the Principle:

"universalis sancta ecclesia Dei unum corpus manifeste esse credatur ejusque caput Christus."

From this follows the doctrine advanced by Galesius and Fulgentius that:

"principaliter itaque totius sanctae Dei ecclesiae corpus in duas eximias personas, in sacerdotalem videlicet et regalem divisum esse novimus."¹¹

and lastly the professional duties of the priesthood on the
one hand and the kingship on the other are particularized.

In conclusion, we may cite the preface of the *Summa Magna* of Stephen of Tournai written about a century after William landed in England:

> "in eadem civitate sub uno rege duo populi sunt, et secundum duos populos duae vitæ, duo principatus duplex jurisdictionis ordo procedit."\(^{12}\)

The civitas is the church, the king is Christ, the two folks are the clergy and the laity, the two lives are the spiritual and the temporal, the two spheres of law, the divine and the human.\(^{13}\)

While there is no direct evidence of the existence of the two separate jurisdictions in the Normandy of William the Conqueror, there is no reason to suspect the contrary. If this dual system existed in various parts of France immediately before and immediately after the Conquest, it is only logical to suppose that it functioned also in Normandy. The supposition is borne out by the recognized zeal of the Norman dukes for the highest interests of the Church.\(^{14}\) Even if the Continental System had not been previously introduced, these crafty champions of orthodoxy would certainly have seen its value to the clerical reforms they were trying to bring about. *De facto* they did put it into practise as a part of their reformation of the English Church. Is it too much to suppose that they would have done the same under similar
circumstances in Normandy? There was scarcely a more obvious means of enforcing clerical discipline than by bringing their infractions directly to the notice of their spiritual superiors without any interference from interested lay officials.

No, the existence of the two separate jurisdictions in Normandy of the Eleventh Century is not open to reasonable doubt. The unimaginative Conqueror must have introduced the system of two independent jurisdictions because it was the one system with which he was acquainted.
NOTES TO CHAPTER IV

1. Gierke and Maitland, *Political Theories of The Middle Ages*, pp. 10-1

2. Pollock and Maitland, op. cit., p. 90

3. St. Paul, I Cor. IV
   Constitutiones Sirmondi, XVII, I; as quoted in *Cambridge Medieval History*, I, p. 566


5. *Cambridge Medieval History*, I, p. 566

6. Taylor, H. O., *ibid*

7. Adams, G. B., *Civilization During the Middle Ages*, p. 125

8. *Cambridge Medieval History*, I, p. 178


11. *ibid*, p. 652

12. "Concilium Paris in Mansi", Xiv, p. 605ff
    "Const. Worm. in Mon. Ger.", leg. 1, p. 333, c. 2-3; p. 346ff, as quoted by Gierke and Maitland, op. cit., p. 11


CHAPTER V

REASONS FOR INTRODUCING THE
CONTINENTAL SYSTEM IN ENGLAND

In the Decree Separating the Lay and Ecclesiastical Courts, William advanced as the ostensible purpose of his action to conform the English judicial system with the Continental:

"to amend the law of the Church which up to my time has not been rightly observed in England, nor in accordance with the holy canons." ¹

The reason is plausible enough. William was familiar with the Continental system. He had observed it in practice all his life with comparatively little friction between the two Orders. The system moreover had the full approbation of the Holy See. On the other hand, the Anglo-Saxon system was unfamiliar. He could not understand how a bishop and an earl presiding together over an assembly of thegns, freemen and priests would hold this wide competence over matters which on the continent would have been referred to specifically ecclesiastical tribunals. Neither could he approve of the vast mass of ecclesiastical law which appeared on the law books of the kings of England. All this was foreign to the accepted interpretation of the union of Church and State. Therefore it had to go.
It may be that since this is the explanation preferred by the Conqueror himself, it cannot be the true one. At any rate, many historians prefer to hunt up deeper motives for the change. It is in this spirit that we shall dig into the circumstances surrounding the promulgation of the decree in an effort to find the "real" story in back of it. This we shall do negatively by proposing a few difficulties which stand in the way of the explanation of some other historians, and positively by drawing our own conclusions from what we know of the character of the Conqueror.

Whatever else William the Conqueror was, he was no saint. If he had been he would scarcely have employed the pretext he used to wage war on Harold the Saxon. What is more the handicap of his birth would scarcely have put him in a position to wage war against anybody. William was born under the bar sinister. In those times this meant that he had no legal right to his inheritance, nor to the succession as ruler of Normandy. That he did succeed to the possession of the duchy at all and that he was able to defend it successfully against all his enemies within his realm and outside it, argue more than ordinary strength and cunning. Henry of Huntingdon however, probably exaggerates in thus summing him up:

"He was wise, but crafty; rich but covetous; glorious but his ambition was never satisfied. Though humble to the servants of God, he was obdurate to those who withstood him---. It behooved everyone to submit to his will who
had any regard for his favors, or for his own money, or lands, or even life."

He was easily the match of his compeers in the art of dissimula-
tion. Like many another man of action he was in the habit of acting, and then asking questions afterwards. That he bothered at all to ask the questions seems to show that his conscience was at least a little more tender than that of the average noble. However, once he achieved his end, he felt he could well afford to pay whatever penalties his action may have cost him. His wooing of Matilda is an instance in point. The canons of the Church had forbidden the marriage, because of their close blood relationship. Her grandfather had married an aunt of William's. But his reasons for the marriage, so he thought, were far more weighty than any decrees of the Church. Although she may have been his cousin, she was also the daughter of the powerful Baldwin, count of Flanders. Her dowry would not only add much to his coffers but would insure the boundaries of Normandy from any attack on the north. In short he would be more powerful than the king of France. With a motive such as this he was loathe to await the usual dispensation. He therefore married her at once and waited for the passage of time to let his scruples develop. Afterwards, when she had been recognized everywhere as his consort, he and Matilda set about to placate the Church for their irregularity. As a penance they built two beautiful abbeys at Caen, Matilda that
of the Holy Trinity, William that of St. Etienne. The Church was placated, and William had gotten everything he wanted.

Being what we term today a self-made man, he possessed a singleness of purpose and an extraordinary strength of will. His god was power. This god he served with a devotion that would bring crimson to the cheeks of many a modern dictator. Practically every important step he took in his manhood could be said to be motivated by this ideal. In his marriage, his attack on England, his relations with the Holy See, increase of personal power always lurked in the background. Perhaps his boyhood and youth, during which he had to fight for his every right, moulded his character to this form. At any rate, by the time he took over the reins of government in Normandy the habit of keeping that one end always before him and regulating all his actions to that end, was formed once and for all in his character.

Now we instinctively ask ourselves, "What personal benefit did he expect from separating the lay and ecclesiastical jurisdictions in England?" We can hardly subscribe to the theory of some authors particularly those laboring under an anti-Roman bias, that William separated the two powers merely to give more strength to the clergy. This is the contention advanced by Thierry, one of the Conqueror's severest critics: "The other law of the Conqueror was designed to increase in an exorbitant manner the authority of the bishops of England."
These bishops were all Normans; and it was deemed necessary that their power should be wholly exercised for the advantage of the Conquest. Just how the bishops could be given more authority than they had under the Anglo-Saxons, or why William, whose greatest ambition was personal power, should deliberately make a large group of his subjects legally immune to his interference, is left unexplained.

Equally improbable is the explanation offered by those historians who suppose that William removed the clergy from the civil courts to please the barons. These authors according to Lingard argue that the ecclesiastics were the only order of men who dared to oppose a barrier to the incapacity and injustice of the barons. Undoubtedly the clergy were just that. But it seems unlikely that William would have allowed himself to be hoodwinked in this way by the specious reasoning of these nobles. Whatever were William's sins, injustice and a want of common sense were not numbered among them. He had to be a shrewd judge of men to attain the power he did. He must have recognized the saving influence of the priests and bishops as well as did his contemporaries. Furthermore, constant association with his vassals must have convinced him that they could be trusted just as far as he could heave his lance. By removing the clergy and leaving the barons with unrestricted authority he would be doing the equivalent to inviting anarchy into his newly acquired realm. In the event, the barons found
their administration of justice under no fewer restrictions than it had been before. William's highly developed system of government checked them more effectively than any number of ecclesiastical censures under the old regime. Their acquaintance with him in Normandy could have told them it would. Consequently, why they should advocate this law to insure their own personal aggrandizement is a mystery.

Philips Russell approaches but we believe, does not quite touch the true explanation when he declares that the Conqueror separated the two powers to make his own rule supreme. Judging from the old counsel "divide et impera" this would seem to be a fairly good argument. Nevertheless, it seems more likely that he would have increased his personal power far more had he left the two jurisdictions together. The close relationship that existed between Church and State under the Saxons would have made it easy for him to dominate all ecclesiastical as well as lay legislation. Now by this one act he made it legally impossible for himself to interfere with the decrees and councils of the Church. He deliberately excepted a large and influential group of his subjects from his jurisdiction and thereby made them immune to any interference. Of course, by freeing the Church he would thereby be in a position to direct more attention to his secular lords. But often as not the ecclesiastical lords were as much to be feared as the others. According to this law they would be in a large measure
independent of his jurisdiction. They would be free to hamper
him in many ways and he would never be able to stop them legally. If "divide et impera" were his motto, William made an unprecedented mistake.

That William expected to benefit personally from this bit of legislation we can assume. But if not by personal power and prestige, how would he benefit? The answer is patent from a review of the circumstances of his attack on Harold. William felt that he needed ecclesiastical approval for his expedition. The plea which he used with his barons that Edward promised to allow him to succeed him and that Harold swore an oath of fealty was not the one that lined up the Church on his side.

Rome had her own reasons for wanting England subjugated. For a century no papal decrees had been promulgated in England, nor had any papal legates set foot on her soil. The organization of the English Church, its domination by the secular power, and many of its liturgical functions were entirely at variance with the new reforms spread all over Christendom by Hildenbrand. To all the greater movements which were agitating the religious life of the Continent in the Eleventh Century--the Cluniac revival, the hierarchical claims of the papacy--the English Church as a whole remained serenely oblivious. Its relations with the papacy were naturally very intermittent, and when a native prelate visited the Holy See, he might expect to hear strong words about plurality and simony from the Pope.
At the moment Stigand, a schismatical archbishop, was holding the See of Canterbury backed by Harold the Saxon. William of Malmsbury further declares:

"The clergy contented with a very slight degree of learning could scarcely stammer out the words of the sacraments. The monks mocked the rule of their order by fine vestments and the use of every kind of food." 12

On the other hand, with all his failings William was a devout son of the Church. Men of learning and piety from every part of Christendom were entrusted by him with responsible positions in the Norman Church. These he had attached to his service by ties of personal friendship to himself. The relation between William and Lanfranc, the greatest churchman of the day next to Gregory, is an instance in point. But there were other and less famous members of the Norman hierarchy who stood on terms of personal intimacy with their master. 13 It was but natural therefore that Rome should look upon him with greater favor than on Harold the Saxon. The Pope gave his full approval to the invasion; banners were hoisted announcing the Crusade; and knights from all over Europe gathered around William to help him stamp out the schism. 14 After Hastings had been won and his rule established in every part of England, William set about his task of reforming. He had obtained what he wanted. Now he was willing to pay the price for it. Stigand was deposed, Lanfranc made primate in his place, and the reforms of
Hildebrand introduced. The customs of the English Church permitting the bishops and priests to sit in the shire and the hundred courts had to go. Like many of the other practises of the English Church this differed fundamentally from the accepted practises of the rest of Christendom. William's role of crusader would never permit him to allow this state of affairs to exist any longer. Consequently, he took steps to remedy the "abuse", and incidentally to make his own power unquestioned.

For these reasons we think we are warranted in holding that the motives which ultimately determined William to separate the two jurisdictions were selfish ones. His avowed reason to enforce the observance of the canons and to conform the discipline of the English with that of the continental churches, was a good one, and one which we have seen was fully warranted by the circumstances of the time. How did the Decree of Separation advance his personal power?—It gave him all the might and prestige that could be had in those Catholic times from the unequivocal stamp of approval of his Conquest by the Head of Christendom.
NOTES TO CHAPTER V

1. Stephenson and Marcham, op. cit., "Decree of Separation", p. 35

2. William of Malmsbury, Chronicle, III

2! Henry of Huntingdon, Chronicle, VI

3. Philips Russell, William the Conqueror, p. 20

4. ibid, p. 67

5. Lunt, op. cit., p. 488


7. Lingard, op. cit., II, p. 55

8. Russell, Philips, op. cit., p. 316


10. Russell, Philips, op. cit., p. 104

11. Stenton, William, op. cit., p. 387

12. William of Malmsbury, Chronicle, III

13. Stenton, William, op. cit., p. 381

14. Note: The Norman Conquest was in reality a Crusade organized and led by the Normans, but composed for the most part of warriors from all over Europe.

15. Pollock and Maitland, op. cit., p. 16
CHAPTER VI

RESULTS OF THE SEPARATION
OF THE TWO POWERS IN ENGLAND

The removal of ecclesiastical jurisdiction from the business of the shire and hundred courts affected a revolution in English law. Some of the more regrettable consequences of this reform have already been noted in the introduction of this thesis. But regrettable consequences were not the only offspring. One result was the gradual disuse, and final abandonment of the archaic Anglo-Saxon courts. Another result was to force English civil law to fall back on its own resources. By so doing, English law evolved a legal organism inferior to few in the breadth and justice of its scope of jurisdiction. A third effect and certainly not the least important was the reform of the English Church. This chapter therefore will be devoted to rounding out our survey of the innovations introduced by this piece of legislation in the light of their subsequent history.

The changes introduced by the Conqueror will be best understood by a perusal of the document itself. According to the translation of Stephenson and Marcham, William proclaimed:
"Be it known to all of you and to my other faithful men resident in England, that by the common counsel of the archbishops, bishops, abbots, and all the princes of my realm, I have decided to amend the ecclesiastical law which up to my own time has not been rightly observed in England, nor in accordance with the holy canons. I ordain, and by royal authority command, that henceforth when ecclesiastical law is involved, no bishop, or archdeacon shall hold pleas in the hundred court, nor shall he bring to judgment before laymen any cause that pertains to the cure of souls, but whatever has been accused in any cause, or of any offence, under ecclesiastical law shall come to the place named and selected for this purpose by the bishop, and shall there respond in such cause or concerning such offence, submitting to the judgment of God and of his bishop not according to the judgment of the hundred but according to the canons and to ecclesiastical law. If indeed any one puffed up with pride, neglects or refuses to come for justice before the bishop, let him be summoned once or twice, or thrice. But if even then he will not come to make amends, let him be excommunicated; and should there be need to enforce this ban, let the power and justice of the king be invoked. Moreover, he who being summoned refuses to come before the bishop for justice shall be fined for each neglect of summons as contempt of ecclesiastical law. I likewise prohibit and by my royal authority forbid that any sheriff or reeve or minister of the king, or any layman whatsoever shall interfere with the administration of law pertaining to the bishop. Nor shall any layman bring another man to trial under such law save by the judgment of the bishop. The trial shall indeed be carried out nowhere except at the bishop's see, or in such place as he shall appoint for that purpose."

Summing up therefore the innovations of the Conqueror;
(1) He removed once and for all all ecclesiastical pleas from the jurisdiction of the shire and hundred courts. (2) He denied laymen the right to put on trial persons consecrated to God; clerics were to be governed by canon law alone. (3) Although ecclesiastical judges might appeal to royal sanctions when their own proved inadequate, no royal officer could interfere with the episcopal administration without the bishop's consent.

The cleavage between lay jurisdiction and ecclesiastical jurisdiction in practice was not as clean-cut as the Conqueror might have hoped. Although clerical offenses were definitely removed from the secular courts, the clergy continued to exert an influence in the conduct of civil trials. The archdeacon for example still retained his right of superintending the ordeal by fire and water. The bishop too would make his appearance in the shire court to carry on his share of the presidency with the sheriff. Possibly this was done in obedience to the laudable tradition which required the presence of the bishop to provide that earthly justice should be tempered with Christian mercy. However, this amiable anomaly did not last long. As the ardent reformers of the next generation took exception to this archaic privilege, the clergy abandoned it of their own free will.²

Strangely enough the removal of the ecclesiastics and the substitution of civil sanctions for the age-old religious
ones did not put a stop to that notorious source of injustice of the Anglo-Saxon courts, -- the ordeal. Unfortunately like the English the Normans too were accustomed to appeal in their courts to the judgment of God. They despised however the fiery ordeals of the English, preferring their own trial by battle as more worthy of freemen and warriors. Since this custom was so deeply rooted among the Normans, it probably never occurred to the Conqueror that there may have been a more equable means of settling disputes. His was not an originating genius. He merely transplanted in England institutions which flourished successfully in Normandy, and which when they pertained to the Church, he knew had the full approval of Rome. Nevertheless where he recognized that the Norman practise would work to the disadvantage of the English, he effected a compromise. This he did with the ordeal. When the plaintiff and defendant were country men he allowed them to follow their national customs. If they were not, and the defendant happened to be a Norman or of Norman descent, he might offer wage of battle. If this were declined he might clear himself by his own oath, and the oaths of his witnesses, according to the provisions of the Norman law. On the other hand, if he were a native it was left to his option to offer battle, to go to the ordeal, or to produce in his defence the usual number of lawful compurgators.3

What actually did result from the removal of ecclesiastical cases was the beginning of the end for the shire and
hundred courts. Although these did not disappear immediately, the following century observed them sinking more and more into oblivion, and finally into complete desuetude. The withdrawal of the salutary influence of the bishops subjected them to many irregularities of time and place. The sheriffs had often obliged them to meet when and where it suited their convenience. Possibly they were even used as engines of extortion for the advantage both of the local officer and of the king. Moreover, from a writ of Henry I to Bishop Samson of Worcester we may infer that there had arisen even this early those questions of disputed jurisdiction of methods of trial, and of attendance at courts which became real problems in future generations. Here too is clearly implied a conflict between royal jurisdiction on one side and private baronial jurisdiction on the other. This was to be settled in favor of the lord's court, if the suit were between two of his own vassals; but if the disputants were vassals of two different lords, it was to be decided in favor of the court held by the king's justice in the county.

What ultimately resulted from the abuses of the proprietors of these courts and the constant conflict with royal jurisdiction was the universal establishment of the system of itinerant justices. The latter institution was a relic of the "missi" first employed by Charlemagne. In as much as it placed both the judge and the profits from his court easily under the
surveillance of the king it appealed strongly to such dynamic rulers as Henry I, Henry II, and Edward I, who could appreciate the wisdom of a nation-wide system of royal courts.

The effects of the Conqueror's freeing clerics from civil jurisdiction manifested themselves both in the future development of canon law and that of English civil law. The growth of the canon law in the succeeding century from a quantity of detached local, or occasional rules to a great body of universal authoritative jurisprudence, arranged and digested by scholars who were beginning to reap the advantages of a revived study of the Roman civil law, gave to the clergy generally a far more distinctive and definite civil status than they had ever possessed before, and drew into church courts a mass of business with which the Church had previously only an indirect connection. But this was not all. According to Trevelyan, "The separate jurisdiction of the Church covered great tracts of human life which in modern times have been made over to the King's courts and the law of the land,--such as felonies committed by persons in Holy Orders, and the great fields of marriage, testament, and eventually of slander. It also included many matters which are not now dealt with by any court at all, such as penance for sins and jurisdiction over heresy." The question of investitures, the marriage of the clergy, and the crying prevalence of simony, within a very few years of the Conqueror's death forced on the minds of statesmen
everywhere the necessity of some uniform system of law. The need of a system of law once felt, the recognition of the supremacy of the papal court as a tribunal of appeals followed of course, and with it the great extension of the legatine administration.9

In this way the Pope de facto regained the supremacy over the Church of England which had always been his de jure. The quasi-schism of Anglo-Saxon England of the previous two centuries which had been brought to a head by the eighteen year arch-episcopacy of Stigand was now officially ended. Although one or another king would question the practical application of this suzerainty in some specific instance, in general the sway of the Pope over matters ecclesiastical remained undisputed until Henry VIII bolted out of the fold five centuries later.

Important as it was for the subsequent fortunes of the Church this decree was perhaps of even greater moment for its influence upon the development of law. There is an opinion that the English Common Law could never have grown to its full native vigor if its nursery had been shared by ecclesiastical lawyers and judges trying to measure English law by Roman rules.10 The canons of the Church on the other hand in the person of Gratian were to set before lay legislators in the next generation the example of a codified body of law aiming at logical consistency and inherent reason. This codex was very different from the collection of isolated enactments which
the English Church of the Eleventh Century inherited from the witenagemots of Alfred and Edgar. It was little wonder therefore that the efforts of the great doctors of canon law began to react upon the work of their secular contemporaries, and that their influence should be especially manifested in the next century. Judging from its influence on the development of the two systems of law, the removal of ecclesiastics from the secular courts was of paramount importance.
NOTES TO CHAPTER VI

1. Stephenson and Marcham, op. cit., "Decree of Separation", p. 35

2. Davis, H. W. C., op. cit., p. 52

3. Lingard, op. cit., II, p. 54

4. ibid


6. Stubbs, Select Charters, p. 104  "Sciatis quod concedo et praecipio ut amodo comitatus mei et hundreda in illis locis et eisdem terminis sederunt in tempore regis Eadwardi et non aliter. Ego enim, quando voluero, faciam ea satis sum mopere propter mea dominica necessaria ad voluntatem meam. Et si amodo exsurgat placitum de divisione terrarum, si est inter barones meos dominicos tractetur placitum in curia mea: etsi est inter vavassores duorum dominorum tractetur in comitatu. Et hoc duello fiat, nisi in eis remanserit. Et volo et praecipio ut omnes de comitatu eant ad comitatus et hundreda sicut fecerunt in tempore regis Eadwardi, nec remore propter aliquam causam pacem meam vel quietudinem, qui non sequuntur placita mea et judicia mea, sicut tunc temporis fecissent.

Teste R. episcopo Lundoniae et Rogero episcopo et Ranulfo cancellario et R. comite de Mellent; apud Reading.

7. Stubbs, op. cit., p. 308

8. Trevelyan, op. cit., p. 129

9. Stubbs, op. cit., p. 308

10. Trevelyan, op. cit., p. 129

11. Stenton, F. M., op. cit., p. 394
CONCLUSION

Two leading conclusions may be drawn from the preceding chapters. There is first of all, the indisputable fact that the Anglo-Saxon system was remarkably well adapted for the period it was in use. Indeed, considering the situation in England at the time it operated, the impotence of the kings, and the warlike traits of the people, no other system could conceivably have succeeded half as well. On the other hand, in spite of such untoward results as the conflict between Anselm and Henry I, and between Becket and Henry II, the introduction of the continental judicial system seems to have been wholly desirable. H. W. C. Davis is quick to term it "a change at which every reformer would rejoice." The logic of this opinion seems well warranted. "The advisability of a moral censorship being once admitted, no man of common sense could approve the idea of placing this censorship under the control of the very class which it was intended to correct."  

We know of our own account that the change was wholly beneficial to Church and State alike. If then both the old and the new form of justice was so desirable how shall we evaluate the decree which substituted the new for the old? Or to put the question in another way, would the Anglo-Saxon tradition of sitting lay and ecclesiastical judges
in the same court have succeeded just as well under the changed conditions brought on by the Norman Conquest? To this we reply in the negative.

Even before the Conqueror set foot in England this system was fast becoming outmoded. The reason for this was the gradual corruption of the clergy. A large percentage of them were married or had concubines. The bishops could scarcely be distinguished from the secular nobles -- so dependent were they on the king. The typical priest was little better than the serfs, his companions in tilling the manorial soil. He was appallingly ignorant, scarcely knowing enough Latin to mumble the formula of absolution. Quite naturally as a consequence the mass of the people gradually lost their respect for the priesthood. The need of clerical influence in the secular courts was just as great as ever. The secular power was no better able to cope with the lawlessness of its subjects than it was two centuries before. But because of their own degraded condition the clergy could no longer command the respect which theoretically put them on the judges' bench.

But with the coming of the Normans there was really no longer any need for the presence of the clergy to insure a respect for the law of the land. The Norman rulers were fully capable of seeing to this themselves. They not only brought over with them the tradition that the will of their duke was supreme, but also transported an efficient policing system to
see to it that this will was obeyed. Even though the individual Normans were remarkably unruly, judging by our own standards, their respect for civil harmony was relatively high in comparison with the English. William by placing his most trusted Norman lords in strategic positions all over the land, saw to it that this laudable trait would not be lost on the English.

Then too, allowing the clerics to remain in the secular courts may have given rise to even greater trouble than was occasioned by their withdrawal. The Norman rulers were decidedly autocratic in temperament. It is not hard to envision the countless quarrels that would have resulted if they suspected that the decisions of the clerical judges were not working to the best interests of the crown. The annals of the Church would be filled with many more "martyrs", and the crown would soon lose the highly valued patronage of the Holy See.

Even granted that the motives of the Conqueror may not have been the most altruistic, the wisdom of this piece of legislation does not lose any of its lustre after scientific investigation. William not only scuttled a tradition which had outlived its usefulness, but had substituted in its place one which accomplished the scarcely credible feat of benefiting the most diversified interests. The fact that the system he introduced was not particularly original with him may deprive him of a niche by the side of those immortal jurists, Hammurabi, Justinian, and Gratian. But for England's needs at the time
not even these legal geniuses could have fashioned a better system. The greatness of this decree then does not lie in its originality, which is after all a rather feeble claim to immortality, but rather in satisfying at one stroke the most intimately personal interests of the legislator, the urgent needs of English civil law, and the highest spiritual aims of the Head of Christendom.

THE END
NOTES TO CONCLUSION

1. Davis, H. W. C., op. cit., p. 51
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The thesis, "Separation of English Lay and Ecclesiastical Jurisdiction, Its Antecedents and Aftermath", written by John James McKechney, S.J., has been accepted by the Graduate School with reference to form, and by the readers whose names appear below, with reference to content. It is, therefore, accepted in partial fulfillment of the requirements for the degree of Master of Arts.

Father Jacobsen
Father Roubik
Father Metzger

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October 25, 1940
October, 1940