

Of Kings and Popes and Law:

An Examination of the Church and State Relationship in England
During the High Middle Ages and the Influence of that Relationship
on the Structure and Processes of English Law

by

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B.A., University of Calgary, 1976

M.Sc., University of Calgary, 1986

LL.B., University of Calgary, 1989

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Supervisory Committee

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Professor Emeritus John McLaren, Co-Supervisor
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Abstract

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During the latter half of the 11th century through to the end of the 13th century, Europe was experiencing what is considered by some historians as “*the*” medieval renaissance, otherwise referred to as the European Renaissance of the Twelfth Century. The time appears to have been ripe for an explosion of cultural and intellectual advancement and change. Two fields that experienced significant development during that period were law and governance, both secular and ecclesiastical.

In England, the period which most legal historians consider to be the key formative years of the common law was the reign of King Henry II. Indeed, Sir William Holdsworth credits Henry II for “substituting one common law for that confused mass of local customs of which the law of England had formerly consisted”. But as R.H. Helmholz said, “legal history, like any other, is a history of winners, and the history of the losing side is often overlooked. That we only hint of the history of the canon law by reference to the common law is a fact of life and not to be lamented”. However, he admonishes us not to ignore the intrinsic importance of the jurisdiction once exercised by the courts of the Church in the development of the law of England.

I take up Helmholz’ challenge in this thesis and examine the relationship that developed between the English royal authorities and the Latin (Western) Christian Church from the beginning of the reign of Edward the Confessor to the end of the reign of King John. Through a review of cases reported by the Selden Society from the royal courts of Henry II, Richard I and John, I then focus my research on the 62 year period between the beginning of the reign of Henry II and the death of John, and consider the influence of the Church and State relationship on the structure and processes of the developing English royal law and its scope.

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Dedication

To my dear friends Patti and Richard Riegert,

Carpe diem, my friends, carpe diem.

And to my husband, Carey Johannesson,
for all of your help, love, patience and humour.

INTRODUCTION:

The year was 1157. The setting was King Henry II's royal court. The players were the King and his elite inner-circle of barons and bishops. The bishop of Chichester rose, and, at a nod from the king's chancellor, Thomas Becket, began his case: "Jesus Christ, my lord King!"; he repeated, "Jesus Christ, our Lord!"; and then a third time, "Hear all and understand! Jesus Christ our Lord has established two abodes and two powers for the governance of the world: one is the spiritual, the other the material." The bishop then proceeded to lecture Henry II on the "devolved" authority Jesus had placed on each pope from the Apostle Peter forward, to superintend the governance of the Church of God. It was, he concluded, impossible for any layman, indeed even for a king, to depose a bishop without the judgment and permission of the pope. "Very true", said the King, "a bishop may not be deposed". Then he made a gesture of pushing with his hands. "But, see, with a good push he could be ejected." Everyone at court broke out laughing - except the bishop of Chichester.¹

The bishop's speech was actually his opening argument in a dispute with the abbot of Battle Abbey over the Abbey, its lands and its privileges. What is interesting about the scenario is that it was a matter involving two Church officials and Church lands being decided in the secular court of King Henry II - or was it just a secular court? And why the affected lecture on the "two abodes and two powers for the governance of the world" when the issue at hand was a simple land dispute?

Five years on, in 1162, a member of the clergy had seduced a girl and killed her father. It was a breach of the king's peace that had occurred within the kingdom of England and therefore, according to Henry II, should be adjudicated in the king's royal courts by his justices. In May of that year, Henry had appointed his good friend Thomas Becket as the archbishop of Canterbury; nevertheless, on behalf of the Church, Thomas challenged the King's claim of jurisdiction. A scribe in the king's court noted that it was the first "estrangement" between Henry and his archbishop. The king demanded that the cleric be examined by his judges in a lay court and judgment passed on him there.

¹ R.C. van Caenegem, ed., *English Lawsuits from William I to Richard I*, Selden Society, vol. 107(ii) (London: Selden Society, 1991) at 310.

The archbishop refused the king's command and kept the cleric in the bishop's custody so that he "would not be given over to the king's justice".²

That was not the only instance of the archbishop defying a command from the king. Refusing to hand over crimmious clerks to secular adjudication was to become routine on Thomas' part - as was ignoring the king's summons to appear before him. Henry II had made Thomas archbishop not only because he was his good friend, but because he was also a skilled political advisor and chancellor, and a staunch royal supporter. He had expected Thomas to continue in his role as his chancellor, as well as being his archbishop, and to support him in his plans to increase the king's power over the Church. That did not happen - in fact, within a few weeks of his consecration as archbishop, Thomas resigned his position as chancellor and became an ardent supporter of Church reform, challenging Henry, seemingly, at every opportunity, both personally and politically.³

What did these two cases have in common? Both were subplots of a far greater series of events unfolding in Rome that would change the political face of Western Europe, challenging centuries of tradition - the Papal Reform of the Latin (Western) Christian Church: a bid by the Church for independence from secular control. The conflict between certain officials of the English Church and their King, particularly between Thomas and Henry, was but one example of the conflict being fought between the Church and secular authorities over political and legal jurisdiction - and souls - throughout Europe.⁴ Historical documents that have survived from Henry II's court reveal that the impact of the Church reform movement was being felt in England every bit as much as in any kingdom on the Continent; distance was no buffer. Those documents describe Henry II's "fury" as he was lectured to, in his own royal court, by a bishop about how Jesus, himself, set the pope above all secular rulers. They reveal Henry's ire towards officers of the English Church whenever the pope or his papal agents came too close to threatening the monarchical authority Henry II believed God had granted him. Emotions ran high - even though in a large number of cases where the Church attempted to intrude on Henry's monarchical authority the underlying cause simply involved tenure to land. Perhaps this should not be surprising, however, since

² van Caenegem, *supra* note 1 at 404.

³ Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 256.

⁴ Berman, *supra* note 3 at 97.

land meant power and wealth, and the Church was one of the largest land holders in Europe; it is said to have owned one-fourth to one-third of all the land in Western Europe and to have held one-fifth of the wealth of England.⁵

In this thesis I explore the relationship that developed between the English royal authorities and the Church during the 62 years that lay between the beginning of the reign of Henry II (1154) and the end of King John's reign (1216), as the English Crown and the Church competed for legal jurisdiction in England. I also attempt to assess whether or not that relationship influenced the development of the structure and processes of the English royal law or its scope during that period. The jurisdictional struggle between the royal authorities and the Church took place at the same time the Church in Rome was attempting to expand its authority and control over western Christendom, and rulers of the emerging states in Western Europe were endeavoring to consolidate and extend their own territorial power and reach; the clashes that took place in England were simply one facet of a much larger contest. Episodes of conflict, rivalry and tension between the royal authorities and the Church in England, as well as the maneuvers made by those two institutions to win and defend their jurisdictions, can be illustrated and their effects traced through a review of legal documents that have survived from the royal courts of Henry II, Richard I and John.

Since 1887, the Selden Society has recorded and translated approximately 8500 of those legal documents. That compilation has formed the data base examined for this thesis. In reviewing and interpreting the historical documents available from the 62 year period in question, consideration must be given to the limitations of the data. First, the Selden reports represent a very 'select' group of documents. Not many documents from that period survived into modern times. Of those that did survive, many have since been damaged to the point where they are now illegible or lost due to war, poor storage conditions or unfortunate handling methods (without the benefit of modern archival techniques). Of the documents that are now extant in the 21st century, many have never been translated into modern English. And of those that have been translated, the ones reported in Selden Society publications make up a small fraction of what is actually

⁵ Robert Bartlett, *England Under the Norman and Angevin Kings* (Oxford: Oxford University Press, 2000) at 377; Robin Fleming, *The Domesday Book and the Law* (Cambridge: Cambridge University Press, 1998) at 2-3; Berman, *supra* note 3 at 237. The term "wealth" is used by Bartlett to describe the combination of land, dues, rents, mortgages, chattels, livestock, etc. and the Church's one-tenth claim to the income of all Christians in England as documented by the Domesday survey of 1086.

available; even the titles of the Selden Society volumes make it clear that many contain only 'selections' of cases available. So although the numbers reviewed for this thesis may appear large, the reports represent a very small fraction of the documents that were originally created. In addition, the reports (or as they are referred to in this thesis, 'cases') were accounts prepared by scribes whose input may have been editorial, as much as simply mechanical. The ones from the earliest periods would often be based on such sources as chronicles, and, therefore, second hand information. Further, they may not have been objective accounts, and indeed, may have been created to present a partiality of interest. Nevertheless, the records do provide insight into the inter-jurisdictional conflict that existed and the ways which it was dealt with. The caution here, therefore, is to consider any of the trends identified or interpretations that will be made in this thesis, within the context of the limitations of the data base.⁶

In addition to the Selden Society materials, a variety of documents, articles, books, publications and papers (including a translation of the Constitutions of Clarendon, 1164 and Gratian's Decretum) were reviewed and considered. Those materials recount the social and cultural changes that occurred during the early and High Middle Ages, the evolution of the relationship between the Church and secular authorities during that period, the development of governance and infrastructure within both the Church and the English royal administration, and the formation of the canon law of the Church and the royal law of England. The literature provides a historical context for the events and activities described in the case reports and legal documents contained in the Selden Society volumes, as well as valuable insight and information to assist in the interpretation and analysis of the trends and developments observed in the data base.

Through the examination and interpretation of documents that survived from the early and High Middle Ages, historians became aware of a tension that developed between the spiritual and secular authorities in Western Europe over the matter of jurisdiction. Both legal historians and medieval historians have commented on the relationship between the Church and State during that period and, although there may be disagreement on the intensity of the antagonism between the two, there has been

⁶ Personal communication, Richard W. Ireland, Senior Lecturer, University of Wales, Aberystwyth, Wales, June 22, 2012.

general agreement that the source of the disputes was always related to the determination of the limits of their respective authority.⁷

In an early study of the Act Books of the diocese of London (1847), Archdeacon W.H. Hale commented on the limited and occasional nature of conflict between the Church and the State. The issues over which they disagreed were quite few in number and usually of limited importance in the over-all scheme of the jurisdiction of each institution.⁸ In 1911, Maitland came to a similar conclusion, saying, "There was no question of a war all along the entire line between the spiritual and the temporal power. The king never disputed that many questions belonged of right to the justice of the Church, nor the bishop that many belonged to the justice of the king. But there was always a greater or less extent of boarder-land [*sic*] that might be more or less plausibly fought for."⁹ Sir William Holdsworth described the situation as follows: "... it was inevitable that occasions for disputes between the temporal and spiritual powers should arise. Two systems of courts exercising two systems of law cannot long co-exist in a rapidly progressive state without disputes as to the limits of their respective authority. Within a certain sphere each was supreme. But there was always debatable land over which neither party was completely sovereign".¹⁰ According to G.B. Flahiff, "there was admittedly a whole sphere of spiritual and quasi-spiritual jurisdiction over which no secular authority, not even that of the king, claimed any rights. Nevertheless, between

⁷ James A. Brundage, *Medieval Canon Law* (Harlow: Pearson Education Limited, 1995) at 33-37; Marjorie Chibnall, *Anglo-Norman England 1066-1166* (Oxford: Basil Blackwell Ltd., 1986) at 194-205; William R. Cook and Ronald B. Herzman, *The Medieval World View*, 2nd ed. (Oxford: Oxford University Press, 2004) at 187-188; Charles Donahue Jr., "Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined After 75 years in the Light of Some Records from the Church Courts" (1973-1974) 72 *Michigan Law Review* 647 at 701-705; C. Duggan, *Canon Law in Medieval England* (London: Variorum Reprints, 1982) at 365-375; G.B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century", pt. I (1944) VI *Mediaeval Studies* 261 at 261; A. Daniel Frankforter, *The Medieval Millennium*, 2nd ed. (Upper Saddle River: Pearson Education, Inc., 2003) at 177-179; R.H. Helmholz, "Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250-1640" (1990-1991) 12 *Cardozo Law Review* 707 at 708-710; Sir William Holdsworth, *A History of English Law*, 7th ed. (London: Methuen & Co Ltd. and Sweet and Maxwell Ltd., 1969) vol. 1 at 584; W.R. Jones, "Relations of the Two Jurisdictions: Conflict and Cooperation in England During the Thirteenth and Fourteenth Centuries" in William M. Bowsky, ed., *Studies in Medieval and Renaissance History* (Lincoln: University of Nebraska Press, 1970) vol. VII, 79 at 81-82; Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1889; repr. 1968) vol. I at 198; Jane E. Sayers, *Papal Judges Delegate in the Province of Canterbury 1198-1254* (Oxford: Oxford University Press, 1971) at 5-7 and 11; Bartlett, *supra* note 5 at 405-412; Berman, *supra* note 3 at 254-269.

⁸ Jones, *supra* note 7 at 81.

⁹ Pollock and Maitland, *supra* note 7 at 198.

¹⁰ Holdsworth, *supra* note 7 at 584.

purely spiritual and purely temporal lay a borderland that was shadowy and ill defined.” It was upon this “borderland” that these authors suggest the king and the Church each applied pressure in order to gain an advantage.¹¹

In more recent years the focus of the discussion has shifted from the degree of conflict between the two institutions to a consideration of the extent of cooperation between them and how much they influenced one another’s procedural and substantive law. W.R. Jones stated that “the crown showed a great willingness to tolerate the activities of the Church courts within the areas defined by the king’s justice. The spiritual nature of many pleas was readily admitted.... But the attitude of the secular power often went beyond mere tolerance to open support and encouragement; and in several instances the crown sought the advice or assistance of the Church or lent its coercive powers to the enforcement of ecclesiastical decisions”.¹² Charles Donahue, Jr. challenged the paradigm of the “embattled English Church struggling against the native law of England”. In his review of “instance”¹³ records of the English ecclesiastical courts, he did not see an embattled institution at all; surprisingly he found little evidence of litigation in the records of any kind. Most of the cases were abandoned, compromised or settled out of court. Litigation in the Church courts was controlled by the parties to the cause; if they chose not to advance the case, the court did not take an active role. The Church was far more interested in restoring peace between the disputants; the result they desired was not a “sentence”¹⁴, but rather an accord between the parties, however that was achieved. Donahue concluded that type of conduct on the part of the Church was unlikely to attract the attention of the secular authorities in England, or to threaten them.¹⁵ Jane Sayers, in her book on Papal Judges-Delegate, admitted that it was “impossible to deny that there was some clash between Church and lay courts in England during Henry II’s reign as to the relative competence of tribunals, but it is

¹¹ Flahiff, *supra* note 7 at 261.

¹² Jones, *supra* note 7 at 205.

¹³ R.B. Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts* (Cambridge: Cambridge University Press, 2007) at 9-10; Donahue, *supra* note 7 at 703. ‘Instance’ matters (causes) and ‘office’ matters (causes) are terms used by canonists to distinguish between what we today would call civil law and criminal law, respectively. Judges adjudicated private disputes between litigants in ‘instant causes’, whereas ‘office causes’ or corrective prosecutions dealt with complaints of individual misconduct made by churchwardens or clerics, often as a result of their routine ecclesiastical visitations.

¹⁴ Colin Morris, “From Synod to Consistory: the Bishop’s Courts in England, 1150-1250” (1971) XXII *Journal of Ecclesiastical History* 115 at 117. “Sentence” is the term used by canonists to describe the final stage of the Romano-canonical legal procedure used by an ecclesiastical tribunal.

¹⁵ Donahue, *supra* note 7 at 704-708.

possible to over-emphasize the importance of principles in the quarrel. That it was to some degree a sincere attempt to reach a compromise over disputed points of jurisdiction and competence has perhaps been overlooked.” She suggests that the dispute between the two jurisdictions reached the 13th century in “a diluted form”.¹⁶

R.H. Helmholz suggested that there are three ways to look at the relationship between the Church and the State: first, is to examine the areas of clash (a difference of legal principles) between the two systems; second, is to look at areas of cooperation (necessary mutual aid) between the courts of the Church and State; and third, is to investigate areas of possible reciprocal influence (lawyers using ideas drawn from the other system) between the canon and the common law.¹⁷ With regard to cooperation, he suggests there is now a consensus that it was broader than historians once thought. Even when the power and independence of the Church was at its height in the High Middle Ages, legal relations between Church and State ought more often to be seen in terms of mutual assistance than in terms of struggle.¹⁸ He believes too much focus is given to the moments of dramatic conflict or constitutional disputes, rather than to ordinary and routine litigation, which he admits, is not particularly dramatic. The everyday matters dealt with by courts, both ecclesiastical and secular, during this period are in sharp contrast with the best known conflict, that of Henry II and his archbishop, Thomas Becket.¹⁹ But as Helmholz muses, although the clergy involved in rendering Church justice may have admired Thomas’ martyrdom, few likely cared to emulate him.²⁰

Disputes did occur between Church and State authorities in England, however, and in their examinations of the period from the beginning of the reign of William the Conqueror through to the end of the reign of King John, Robert Bartlett, R.H. Helmholz and Charles Donahue Jr. identified three issues that tended to reoccur and form the basis of those disputes: i) the control of Church official appointments, ii) the nature of ecclesiastical property, and iii) the demarcation of judicial powers.²¹ For their part, Harold Berman, James Brundage, William Cook and Ronald B. Herzman looked at the relationship

¹⁶ Sayers, *supra* note 7 at 163-164.

¹⁷ R.H. Helmholz, *Canon Law and the Law of England* (London: The Hambledon Press, 1987) at 2.

¹⁸ Helmholz, *supra* note 17 at 5.

¹⁹ Helmholz, *supra* note 7 at 707.

²⁰ Helmholz, *supra* note 7 at 714-717.

²¹ R.H. Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to 1640s*, vol. 1 (Oxford: Oxford University Press, 2004) at 112- 118; Bartlett, *supra* note 5 at 405; Donahue, *supra* note 7 at 80-84.

between the two institutions in Western Europe, beginning at the time of the late Roman Empire, through the conquest of Western Europe by the Germanic tribes from Western Asia, and into the era of the raids by the Vikings, Magyars and Muslims during the 9th and 10th centuries. They found that religion had become assimilated into the lives of the people of Western Europe during that time period. There was no 'institution' that stood separate and apart from the social or political order; religion was embedded in politics, law and everyday life. Nor did it challenge state institutions, rather, it supported them; ecclesiastical and secular jurisdictions were integrated and inseparable.²²

That was the type of religious environment Western European society had become accustomed to over a period of six centuries: a 'wholly integrated' religion that weathered all manner of change and stress, and which had become inherent in the customs, traditions, practices and relationships of that region.²³ However, these historians also noted that following the collapse of the political hegemony of the Frankish Carolingian Empire in the late 9th century, the conditions that supported the customary integration of the Church into secular activities waned, and a new secular political structure took hold in the early 10th century. As expected, the relationship between the ecclesiastical and secular authorities changed, as it had during previous episodes of political turmoil, but this time the change appeared to threaten the well-being of the Christian religion in a different manner than had been experienced in the past. Church officials in Rome watched as the sanctity of the Christian religion and their provincial officials were used and corrupted for political gain by powerful temporal leaders throughout Western Europe, and that development disturbed them deeply.²⁴

Ecclesiastical leaders became concerned that the fundamental principles of the Christian religion, Christian leadership and the unity of the Christian community were in jeopardy. They believed that in order to salvage their organization, a concerted effort had to be made to resist secular encroachment on Church affairs and arrest the participation of its officers and clergy in secular activities, particularly involvement in political and military pursuits.²⁵ By the early 8th century, a few monastic houses were successfully resisting attempts to bring them under control of lay interests. The Burgundian monastery of

²² Berman, *supra* note 3 at 63-65 and 91; Brundage, *supra* note 7 at 70-71; Cook, *supra* note 7 at 22.

²³ Berman, *supra* note 3 at 63.

²⁴ Berman, *supra* note 3 at 86-87 and 91; Brundage, *supra* note 7 at 30-34; Cook, *supra* note 7 at 184-188; Frankforter, *supra* note 7 at 177.

²⁵ Berman, *supra* note 3 at 86-87; Brundage, *supra* note 7 at 35-37; Cook, *supra* note 7 at 184-188.

Cluny (founded in 909) was one of the first reformed religious communities, but others were soon attracted to the cause. These ecclesiastical centers became the fonts from which more ambitious reform ideas began to flow. By the mid-11th century, Church reform efforts began to attract support from influential civil authorities such as the German kings and emperors, particularly Otto III (r.983-1002) and Henry III (r.1039-1056), as well as from the English king, Edgar the Peaceable (r.959-975).²⁶

A decisive event in Church reform occurred when Henry III appointed his cousin, Bruno of Toul as Pope Leo IX (r.1049-1054). The new pope's entourage included other notable reform monks (including, Hildebrand, later Pope Gregory VII, r.1073-1085). These men introduced a reform programme to the Church that has been called, among other names, the 'Investiture Struggle'²⁷ because one of the key issues of the reform became the right of the Church to invest its officials to ecclesiastical office without secular interference. Another key issue was the determination of the Church's jurisdiction over ecclesiastical matters; i.e., where the division between temporal and spiritual matters resided. A third major concern of the Church was the widespread practice of expropriation of Church property for private use by nobles and wealthy secular families.²⁸ Underlying all of those concerns, however, was a fourth issue – the critical question of ultimate allegiance: 'obedience to God or Caesar', a question Helmholz believes can be considered central to the disputes that arose not only on the Continent, but in England, as well.²⁹

The reoccurring issues that Bartlett, Helmholz and Donahue identified as undercurrents of the disputes that arose between the royal authorities and the Church in England were fundamentally the same as the issues that concerned the rest of Western Europe. The tensions experienced between Henry II and the Church were also being experienced on the Continent. The nuances may have varied from state to state, kingdom to kingdom, dukedom to dukedom, but the broader strokes were the same. What was occurring throughout Western Europe was reflected in the events in England, although with less

²⁶ Brundage, *supra* note 7 at 34; Cook, *supra* note 7 at 185-186.

²⁷ Berman, *supra* note 3 at 84-88; Helmholz, *supra* note 21 at 89. Among other names, the reform programme of the Church has been called the Papal Reform, the Gregorian Reform, the Investiture Contest, The Investiture Struggle, the Papal Revolution, the Cluniac Reform and the Hildebrand Reform.

²⁸ Berman, *supra* note 3 at 84-88 and 94; Brundage, *supra* note 7 at 35-36.

²⁹ Berman, *supra* note 3 at 88, 94 and 97; Brundage, *supra* note 7 at 35-36; Helmholz, *supra* note 7 at 708; Helmholz, *supra* note 17 at 112-113.

violent confrontations than had occurred, for example, between Pope Gregory VII and the German Emperor, Henry IV (r.1056-1106).³⁰

In this thesis, I look at the changes that occurred in the relationship between the Church and the secular authorities during the High Middle Ages and consider what influence that evolving relationship had on the development of the structure, processes and scope of the English royal law. Chapter One sets out a review of the Church/State relationship in Western Europe generally, and more specifically in England from the beginning of the reign of Edward the Confessor (r.1042-1066) to the start of the reign of Henry II (r.1154-1189). I examine the headway made by the Church reformers, during that same time span, in their attempt to create an independent Church, as well as development in the governance, administration and law of the nascent Church infrastructure.

Chapter Two focuses on the early years of the reign of Henry II (1154-1164), particularly his conflict with the Church over legal jurisdiction in England and the drivers of that conflict. England had just been through almost 20 years of civil war when Henry II took the throne, and that war had caused significant social disruption and an epidemic of lawlessness that Henry was determined to end. As a result, he focused on re-establishing peace and order, and strengthening monarchical authority. His strategy centered on the provision of uniform justice for all of his subjects that focused on reducing crime, punishing criminal acts and preventing the use of violent self-help strategies. Perhaps surprisingly, the biggest opponent of his plans was the Church. This chapter looks at Henry II's secular objectives that aimed at consolidating his control over England in light of the competing objectives of the contemporary Papal Reform and discusses the resulting effect on England. The Church's power was expanding in Western Europe during this period, and at the same time, the Church was also attempting to extend its jurisdiction. That unrelenting pressure from the Church caused Henry II to try to limit the expansion of ecclesiastical authority within his realm and I discuss both his legal and administrative responses and strategies in that effort.

Case reports that have survived from Henry II's court reveal trends and changes in the manner in which Henry II dealt with matters that touched the Church and the ecclesiastical challenges to his judicial authority. In Chapter Two, I provide a synopsis of many of the case reports and discuss what they reveal about the relationship between

³⁰ Brundage, *supra* note 7 at 40.

Henry II and the Church, and the conflict over jurisdiction that occurred during the early years of his reign, considering the tensions and pressures, both political and ecclesiastical, that Henry was under. Part of the historical dialogue of that time was, of course, the conflict between Henry II and his archbishop of Canterbury, Thomas Becket, concerning legal jurisdiction over secular crimes committed by members of the clergy. Case reports relating to those events are part of the data base of this thesis and I include comments on those cases in my discussion.

Chapter Three begins with an examination of the state of affairs between the Church and the state authorities in the later years of Henry II's reign (1165-1189) and the outcomes and consequences of the tensions that existed during that period. Following Henry II's death, relations between the Church and the English Monarchy remained in a state of flux through Richard I's reign and, particularly, during that of John, and I consider the dynamics of these two reigns (including the distractions the two kings faced and the growth of the royal bureaucracy in England under the management of Hubert Walter), and how political events affected the Church/State relationship. The papacy of Innocent III, who was a strong reform pope and a compelling Church leader, overlapped the reign of King John. As a result, he was a good foil for John, and their relationship, to say the least, was intriguing. Many more case reports have survived from John's courts than from Henry II's or Richard I's, and they provide more continuity and a clearer picture of the matters litigated in the royal courts involving Church officials, and whether change had occurred in the types of causes, or in the procedures used in cases that touched Church matters. Chapter Three concludes with an examination of the relative jurisdictions of the Crown and the Church as they existed at the end of John's reign.

Chapter Four presents conclusions drawn from my review and interpretation of the historical case reports, as well as from the other literature and materials considered in this thesis. My conclusions focus primarily on the relationship that developed between the English royal authorities and the Church during the 62 years that lay between the beginning of the reign of Henry II (1154) and the end of King's John's (1216). I examine how that relationship changed and seek to determine whether it influenced the structure and processes of the royal law or its scope, as the two institutions competed for legal jurisdiction in England. I also consider the changes that occurred within both institutions during that period, driven by the conflict and competition that developed between them, and what effect those changes had on the law and justice rendered in England.

However, the events that took place in England were only one facet of the larger story of the Church/State relationship in Western Europe, and I present a summary and comments on that broader picture in order to set the stage for the events that occurred in England. Although Jane Sayers suggested that the dispute between the two jurisdictions reached the 13th century in “a diluted form”, the power struggles and conflicts that were taking place between the Church and the secular authorities in Western Europe and the underlying tensions did not disappear at the end of John’s reign. They would resurface time and again through the Late Middle Ages, and continue to shape the English royal law and, ultimately, the English common law.

Chapter 1: Christianity and Kingship

The King and the Church in Anglo-Saxon England

Very late in the 6th century, Pope Gregory the Great (d. 604) commissioned Augustine to lead a mission to England with the task of converting the Anglo-Saxons.¹ In July 598, Gregory wrote to the Patriarch of Alexandria, announcing the miraculous success of the mission: “At the feast of Christmas last more than 10,000 English are reported to have been baptized”.² About 150 years earlier, in the mid-5th century, the ancestors of the Anglo-Saxons, a mix of northern Germanic tribes (Angles, Jutes, Saxons and Frisians), began to migrate to and settle in England. They were a warrior society, and the men pledged oath-bonds of loyalty to their war-chiefs and followed them into battle. Their social structure revealed a strong sense of hierarchy and deep bonds of kinship. Although initially they had no system of written law, they had a recognizable legal order that incorporated the principles of honour, trust and mutual responsibility.³ They lived communally and worshipped pagan gods of war and nature. Those same characteristics: the bonds between kin and amongst allies, the bonds of tribal fealty and the bonds between a chief/lord and his followers, formed the network of interdependence that came to underpin Anglo-Saxon society.⁴

The gospel Augustine and his fellow missionaries preached to the Anglo-Saxons described a universal church with a divine view of life and death. The message of the new religion was passive, focused on spiritual withdrawal from the temporal world and life in the world to come; it was not concerned with temporal or secular issues.⁵ However, even as the new religion claimed its doctrine was ‘universal’, physically it consisted of individual bishoprics, local churches and local monasteries scattered throughout Western Europe; Christianity was not yet a unified organization embodied as an institution, separate and corporate. And though Pope Gregory the Great had initiated Augustine’s mission to England, in reality the Church in Rome had little actual influence

¹ R.H. Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to 1640s*, vol. 1 (Oxford: Oxford University Press, 2004) at 2-3.

² James Campbell, Eric John and Patrick Wormald, *The Anglo-Saxons* (Oxford: Phaidon Press Limited, 1982) at 45.

³ Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 49.

⁴ Berman, *supra* note 3 at 51.

⁵ Berman, *supra* note 3 at 62.

or control over the episcopal matters in far-flung localities. It was largely through the efforts of the missionaries and the local clergy that the Christian religion became integrated into the social, political, legal and economic life throughout Western Europe; eventually spiritual and secular were intermingled and inseparable.⁶

One effect of the new Christian doctrine, however, was apparent in the change and enhancement of the role of tribal chiefs and lords. Once converted to Christianity, a chief or lord became the religious leader of his followers, as well as their temporal leader: the mortal representative of a universal deity, appointed by God as divine leader and ultimate earthly judge. In essence, he became the head of an ecclesiastical realm on earth. In line with the unifying ideology of Latin Christianity, the universality of imperial kingship came to prevail, not only due to military power, but also through the spiritual authority of the king as a Christian prince.⁷ As Christ's deputy on earth and the head of the Church, a king now was expected to govern and defend the Church in addition to executing his temporal functions.⁸ He would call and preside over Church councils and make Church law. And as the moral elements of Christianity began to influence Anglo-Saxon values, the king also became responsible to see that justice rendered within his realm was tempered with mercy and in accordance with Christian principles.⁹ That dual authority (ecclesiastic and royal) became a dynamic factor in the development and advancement of law and governance in both the secular and spiritual realms, since the king was continually balancing his loyalty to, and the interests of, a changing Church and a maturing secular world.¹⁰

By the mid-10th century, territorial England had been unified under the West Saxon kings; King Eadred (r.946- 955) was the first Anglo-Saxon king to be referred to as "King of all England".¹¹ His coronation included a legal and constitutional tripartite promise to defend the Church, to keep the peace and to do justice. That oath reflected the growth and expansion in the king's functions since the conversion of the Anglo-Saxons to

⁶ Berman, *supra* note 3 at 63-65; Helmholz, *supra* note 1 at 20.

⁷ Berman, *supra* note 3 at 66.

⁸ John Blair, *The Anglo Saxon Age: A Very Short Introduction* (Oxford: Oxford University Press, 2000) at 29; H.R. Loyn, *The Governance of Anglo-Saxon England 500-1087* (London: Edward Arnold (Publishers) Ltd, 1984) at 88-89; Campbell, *supra* note 2 at 189.

⁹ A. Daniel Frankforter, *The Medieval Millennium*, 2nd ed. (Upper Saddle River: Pearson Education, Inc., 2003) at 131-134; Berman, *supra* note 3 at 66; Helmholz, *supra* note 1 at 18.

¹⁰ Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (Oxford: Blackwell Publishers Ltd., 1999) vol.1 at 67; Berman, *supra* note 3 at 67; Blair, *supra* note 8 at 29.

¹¹ Campbell, *supra* note 2 at 168.

Christianity. Although at that time most matters affecting the daily lives of the king's common subjects continued to be dealt with through local custom and public sanction, the king's authority was broadening and justice, governance and judicial business eventually came to be central to the king's monarchical obligations.¹² For example, in the Frankish kingdoms on the Continent the protection of the king's peace originally had extended only to persons within the royal Household and the king's allies. By the 8th - 9th centuries, however, that protection had expanded to cover his entire realm with the result that any breach of the kings' peace brought to his attention could come under sanction and penalty of the crown. By the 9th - 10th centuries the Anglo-Saxon kings had also begun to maintain the king's peace throughout their territories.¹³

Also by that time, the king had begun to issue dooms (judgements) and general decrees (affirmations of customs), a function which had previously only been within the purview of the moot (a public assembly reflecting tribal tradition and affinities). Those royal edicts, decisions and decrees became an important source for the nascent royal law.¹⁴ Responsibility for the adjudication and determination of certain matters and disputes, including extraordinary cases and cases for mercy's sake (for example, cases of widows or orphans, or men who had no families to protect them, as well as cases of the very worst crimes for which no amount of monetary compensation was sufficient) had also shifted from the moot to the king. His royal court was where he delivered his rulings and the king personally gave judgements both for the benefit of his nobles and the common people. His was not only a court of original jurisdiction, but also a court of appeal and the final authority in the judicial process for both secular and ecclesiastical matters.¹⁵

The ultimate test of royal authority, however, is whether it was respected throughout a kingdom, and in order to establish and engender that respect there had to be a manifestation of royal authority present in the localities. As the great scholar and homilist, Aelfric of Eynsham and of Cerne Abbas (c.955 – c.1010) stated, “.... because a single man cannot be everywhere and sustain all things at once, though he might have

¹² John Hudson, *The Formation of the English Common Law* (Harlow: Pearson Education Limited, 1996) at 20 and 27-29; Berman, *supra* note 3 at 67; Loyn, *supra* note 8 at 22 and 85.

¹³ Berman, *supra* note 3 at 67.

¹⁴ *Ibid.*

¹⁵ J.H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007) at 9; Berman, *supra* note 3 at 62-67; Hudson, *supra* note 12 at 27-28; Wormald, *supra* note 10 at 119.

sole authority....” a king could not act alone.¹⁶ He had to look within his royal Household and throughout his realm for men with special authority and standing in their own localities, who would be able to keep the royal presence known and respected, even when the king was not present. Those officials and advisors were drawn from the noble class and the officials of the Church, and placed in the positions of ealdormen (nobility, usually related to the king through blood or marriage), thegns (normally high level servants of the king or a lord), and later, reeves (men who looked after estates, renders, finances and manpower of the nobility) and shire-reeves (the men who looked out for the interests of the king in the localities). Through the men he selected and placed in those positions, the king was able to exercise directive authority in the shires of his kingdom.¹⁷

Although theoretically the king was ultimately responsible for governing his kingdom, he turned to his royal court (mostly members of his extended family) and to his witan (his council of advisors, both ecclesiastical and temporal) for help in exercising and enforcing the principles of law and governance. The king and his advisors constituted an active body in matters concerning the creation, declaration and promulgation of law and the administration of justice.¹⁸ Most of the activity of this body was conducted orally, but as Anglo-Saxon society became more complex and the king was required to deal with more complicated legal and administrative matters, it became necessary to maintain continuity through precedent. The practice of writing down rules, procedures and laws benefited from the literacy of Christian clerics who were able to record customs, traditions, events and decisions in permanent written documents. Because of their skills those clerics were in a demand by the king for positions in his administration.¹⁹

As the conversion of the Anglo-Saxons progressed through the 6th to 8th centuries and the English Church became established, it received strong royal patronage from the king and the nobility.²⁰ Through the course of the 9th and 10th centuries, the relationship between the Church and the king continued to strengthen. Cooperation between the Church and the king’s government increased significantly and the Church became actively involved in the royal business of the realm. The prominent position of the

¹⁶ Quoted in Loyn, *supra* note 8 at 101.

¹⁷ Loyn, *supra* note 8 at 47, 74, 100-101, 131 and 133.

¹⁸ Baker, *supra* note 15 at 8; Loyn, *supra* note 8 at 69, 97 and 101.

¹⁹ Rosamond McKitterick, *The Carolingians and the Written World* (Cambridge: Cambridge University Press, 1989) at 3; Blair, *supra* note 8 at 29; Baker, *supra* note 15 at 3.

²⁰ M.T. Clanchy, *England and its Rulers 1066-1272* (Oxford: Basil Blackwell Publisher Limited, 1983) at 23-29.

Church and churchmen in royal government and its administration is one of the noteworthy features of late Anglo-Saxon society characterized by the lack of differentiation between lay and spiritual functions: bishops were advisors in the king's court on issues of temporal governance, and kings and other secular nobles played a personal role in Church councils.²¹

The close association that had developed between the nobility and the Church in England was representative of the state of affairs throughout Western Europe. However, although the Church was benefitting from that association, both politically and financially, it was also experiencing increasing political and economic interference and control of its ecclesiastical affairs by local secular authorities. The increasing involvement of the clergy in secular affairs and of laymen in Church matters began to concern Church officials as they witnessed the doctrine of the Church and its clergy being used by secular leaders for their own ends. In addition, the marriage of clerics into families of local rulers threatened the Church's authority over their ministry by splitting the clergy's loyalty between the Church and their families. A strong movement to purge the Church of these influences, and the corruption that inevitably accompanied them, began in the early 10th century in religious houses and abbeys in southern France. Initially, the movement sought to reduce the power of local rulers over ecclesiastical matters by prohibiting the buying and selling of church offices (simony) and clerical marriages and clerical concubinage (nicolaism), practices that drew Church officials and priests into local secular politics and alliances.²²

By the middle of the 10th century, Church reform of this nature was underway in Anglo-Saxon England as well. A group of high-ranking and influential churchmen, trained on the Continent, championed the reform movement and received support from the Anglo-Saxon kings during the latter half of the 10th century.²³ Monks who accepted the reform movement were trained and educated by the Church, coming to hold a near monopoly on literacy and writing, and they quickly took over the highest offices of the Church in England, as well as many positions in the king's administration. Monks who did not conform were expelled from the monasteries, risking the loss of prestigious positions in

²¹ Robert Bartlett, *England Under the Norman and Angevin Kings* (Oxford: Oxford University Press, 2000) at 395-396; Helmholz, *supra* note 1 at 17.

²² James A. Brundage, *Medieval Canon Law* (Harlow: Pearson Education Limited, 1995) at 34-36; Berman, *supra* note 3 at 90-91; Campbell, *supra* note 2 at 181-185.

²³ Campbell, *supra* note 2 at 181-184.

both the Church and secular government. The families of those men came to resent the churchmen involved in the reform movement.²⁴ In addition, secular lands occupied by non-reform abbeys were expropriated and handed over to reform bishops and abbots in support of the reform movement, particularly during the reign of King Edgar the Peaceable (r.959-975). Much of that land had been owned by the Anglo-Saxon nobility, and those noblemen and their families also began to resent the reformers.²⁵

The venue for dealing with ecclesiastical matters during this period was the synod or assembly attended by the clergy of the locality (and it would remain so through to the end of the 12th century).²⁶ These meetings were usually convoked by a bishop, but they could be called by an archbishop or even the king if the matter was serious enough or involved members of the nobility. The purpose of these meetings was to 'correct those in need of correction, instruct the ignorant, reconcile the antagonistic, protect the material interests of the Church, enact canons or publicize the law of the Church'. Synods could also undertake investigations or hear whatever disagreements men chose to bring to them; activities that might require the council to consider private rights and to settle disputes amongst the laity. Most of the records that have survived from these meetings involve disputed claims to land. General jurisdiction over the life of both the clergy and the laity was exercised through the synods within the rules established for the Church as a whole.²⁷

Church officials were also active in the courts of the shires and Hundreds, where a bishop or his representative would be present to direct the amends of a priest or laymen if they were found guilty of a breach of their oaths or had committed some other spiritual crime. There was considerable overlap between the ecclesiastical synods and the secular courts in the localities, as important Church officials and laymen attended both. Bishops and temporal magnates presided jointly in these courts; there was no strict line of demarcation between a bishop's exercise of temporal lordship and his spiritual responsibilities. It is even difficult to distinguish the difference between secular

²⁴ Blair, *supra* note 8 at 90.

²⁵ Campbell, *supra* note 2 at 182-189; Helmholz, *supra* note 1 at 23.

²⁶ Colin Morris, "From Synod to Consistory: the Bishop's Courts in England, 1150-1250" (1971) XXII *Journal of Ecclesiastical History* 115 at 116-117.

²⁷ Helmholz, *supra* note 1 at 16-17; Loyn, *supra* note 8 at 157-158; Morris, *supra* note 26 at 166-117.

meetings, to which a bishop had been bidden to attend, from that of a regular synodal meeting in the surviving records.²⁸

Bishops and abbots were the Church's primary political connection with the king and nobility. Similar to secular lords, they attended royal councils, and often led, or even fought actively in the royal host.²⁹ Many of the men who held those offices owned significant estates of their own, and so were wealthy in their own right or through their families, ranking with Anglo-Saxon nobility. They also administered the large tracts of land the Church had been granted throughout the kingdom, and, consequently, controlled large numbers of people living and working on those lands; in the Middle Ages land connoted power and wealth. Anglo-Saxon kings often granted the Church and its officers exemptions from certain burdens attached to their lands, as well as other privileges and liberties, in order to ensure the bishops and abbots remained loyal to them. As a result, the office of bishop or abbot had become a powerful and important station within the governing hierarchy of England; therefore, it was no surprise at the time that the appointment of the bishops and abbots came to rest with the king.³⁰

But the kings' favoured actions towards the Church caused many members of the nobility to begrudge its position and work against Church reform. As kings died and were succeeded frequently in the late 10th and early 11th centuries (there were 9 Anglo-Saxon kings between 975 and 1066³¹) the level of the Church's influence within the royal administration waned or flourished depending on the support or antipathy of the king and his power brokers towards it. Still, overall the Church's involvement in the royal bureaucracy and administration did not diminish through that time and by the beginning of the 11th century, the infrastructure of that administration was a well-organized hierarchy made up of secular and ecclesiastical officers, with the latter predominant.³²

Such was the state of the secular and ecclesiastical relationship in England during the reign of the last Anglo-Saxon king, Edward the Confessor (r.1042-1066). England was a unified kingdom and the king was exercising authority over the realm through a network of his hand-picked representatives in the localities. His efforts were focussed on

²⁸ Helmholz, *supra* note 1 at 16-17; Loyn, *supra* note 8 at 157-158.

²⁹ Baker, *supra* note 15 at 1-2; Blair, *supra* note 8 at 29 and 34; Loyn, *supra* note 8 at 72 and 155-157.

³⁰ Blair, *supra* note 8 at 34; Campbell, *supra* note 2 at 182-185; Helmholz, *supra* note 1 at 21; Loyn, *supra* note 8 at 154-155.

³¹ Loyn, *supra* note 8 at vii.

³² Campbell, *supra* note 2 at 187-188 and 207; Loyn, *supra* note 8 at 74.

governing the Church, maintaining peace within his realm and providing justice 'tempered with mercy' to his subjects. Church officials were active players in the king's government, both as high ranking officials and advisors. The institutions of the government had been exceptionally strong during the preceding two centuries, with an efficient bureaucracy and administration principally in the hands of the clerics. That well founded and effective governance system was the reason why a succession of kings and dynasties had each been able to establish power so quickly after they seized the throne. The government institutions that had been created over the six turbulent centuries of Anglo-Saxon rule were an unusually stable stratum in a politically unstable region, and they were soon to service yet another royal dynasty.

William is a Divine King

Edward the Confessor had not produced an heir to succeed him on the throne of England. Consequently, the dynastic conflicts that had caused turmoil through the previous two centuries of Anglo-Saxon rule continued through his reign. It was rumored that Edward had indicated to a distant young cousin, William, Duke of Normandy, that he would support him as the next King of England. As far as we know, however, Edward never formally announced his support for William and no 'heir apparent' had been constitutionally declared. As a result, there were several men ready to fight for the throne when Edward died; one of them was William. When William heard the English throne had been claimed by Harold, son of Godwin, upon Edward's death, he landed 6000 infantry and 1000 trained horsemen on the coast of England to take the crown of England for himself.³³ William's victory at the Battle of Hastings on the eve of October 14th, 1066 was decisive. He had defeated the last rival for the throne; Harold, son of Godwin was dead and William had 'conquered' England. But winning a battle and conquering, let alone governing a country are very different matters. The early years of William's reign were particularly demanding, but the manner by which he and his compatriots met the challenges of occupying and administering the new Norman kingdom left an indelible mark on England.³⁴

The Normans were adept at administration, state-building and law enforcement and William was no exception. By preserving the Anglo-Saxon tradition of strong kingship,

³³ Blair, *supra* note 8 at 102-103.

³⁴ Marjorie Chibnall, *Anglo-Norman England 1066-1166* (Oxford: Basil Blackwell Ltd., 1986) at 9 and 16; Clanchy, *supra* note 20 at 43-46; Loyn, *supra* note 8 at 175.

with its associated administrative institutions, and adding the power of the Norman feudal warlord, the new monarchy's authority came as close to absolute as had ever been seen in Western Europe. William was the strongest man in the kingdom and both secular governance and the English Church were under his control. He was everyone's master. All the land in the kingdom and the higher functions of the royal court and the Church were ultimately held from him.³⁵

William's genius lay in his ability to address new and challenging situations in a creative, yet pragmatic manner that allowed him to maintain ultimate control. Part of that skill involved understanding the need for balance in his dealings with his new subjects: balancing what was due to the king with the needs and desires of his people.³⁶ One of the first contentious matters that William had to deal with after the Battle of Hastings arose in response to his declaration that he had appropriated all the land in England, and, therefore, the use of any land could be granted only by William, himself. Once aware of that decree, officials from the larger churches and monastic houses rushed to William to secure confirmation of tenure to their estates. Under the Anglo-Saxons, the Church had become a major landholder and it meant to remain so. Indeed, the lands claimed by the English Church were so large in area that they rivaled land grants William had made to his secular tenants-in-chiefs; some estimates suggest that as much as one quarter of all land in England was held by the Church.³⁷ Additionally, some of those lands were in areas that were vulnerable to uprising or invasion and could constitute a threat to the security of the kingdom if the loyalty of the landholders was in question.³⁸

William's response to that situation was unique. The terms he established for ecclesiastical tenure included a requirement for bishoprics and monasteries to take on a share of the maintenance of his army and the defense of the country.³⁹ Further, in order to ensure the loyalty of the bishops and abbots and their fulfillment of temporal/military responsibilities now incumbent on them as landholders, he also required them to pay homage to him and take oaths of loyalty and fidelity at the time of the confirmation of

³⁵ R.C. van Caenegem, *The Birth of the English Common Law* (Cambridge: Cambridge University Press, 1973) at 7, 11 and 18; Hudson, *supra* note 12 at 28 and 87-89; Loyn, *supra* note 8 at 176-177.

³⁶ van Caenegem, *supra* note 35 at 11, 74, 90 and 93.

³⁷ Robin Fleming, *Domesday Book and the Law* (Cambridge: Cambridge University Press, 1998) at 54; John Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford: Oxford University Press, 1994) at 230; Chibnall, *supra* note 34 at 24.

³⁸ Loyn, *supra* note 8 at 181.

³⁹ Chibnall, *supra* note 34 at 34; Loyn, *supra* note 8 at 181.

their estates – just as his secular tenants-in-chief did. The requirement for homage by churchmen to a king was an innovative practice found nowhere else in Western Europe. Due to the uncommon and uncertain circumstances William faced, he felt it necessary to treat the churchmen the same as he treated his lay tenants-in-chief in order to ensure the security of his kingdom.⁴⁰ The result was a unique situation where abbots and bishops were now tenants-in-chief to the king, with significant temporal responsibilities and obligations, in addition to their spiritual roles and duties.

William's conduct in extending control over land tenures held by Church officials should not be misunderstood; in most other ways he was a strong supporter of the Church and its nascent reform movement. His relationship with the Church was close and mutually supportive; however, that relationship must be put into context.⁴¹ On the one hand, the king as an advocate of Church reform was an opponent of nicolaism, simony, and baronial domination of the priesthood.⁴² On the other hand, he was a partisan of sacral kingship, that is, he believed a king should be the head of the Church within his realm. During the early years of the reform movement, that stance did not bring William into conflict with the pope, as the Church had not yet espoused the doctrine of 'freedom of the clergy from all secular control'. Moreover, the Church's efforts were not yet directed toward freedom of election of Church officials, and so it was not against the right of a patron to propose a nominee for election by the chapter.⁴³ As king, William could nominate candidates for election for the office of abbot or bishop; as head of the Church, however, he could also appoint men to those offices without the formality of an election. Either action would have been regarded as entirely proper and in-line with the reformers' position on electoral freedoms at that time.⁴⁴

In addition, the early reform efforts did not threaten the sanctity of kingship. William was considered to be divinely appointed, and as the religious leader of his subjects and head of the Church in his kingdom he had the power to control the activities of the English Church and to restrict its political strength.⁴⁵ On the other hand, William appreciated his

⁴⁰ *Ibid.*

⁴¹ R.H. Helmholz, *Canon Law and the Law of England* (London: The Hambledon Press, 1987) at 5-7.

⁴² Berman, *supra* note 3 at 435; Bartlett, *supra* note 21 at 384.

⁴³ William R. Cook and Ronald B. Herzman, *The Medieval World View*, 2nd ed. (Oxford: Oxford University Press, 2004) at 185-186.

⁴⁴ Chibnall, *supra* note 34 at 38.

⁴⁵ Theodore F.T. Plucknett, *A Concise History of the Common Law*, 4th ed. (London: Butterworth & Co. Ltd., 1948) at 11-12.

ability to retain the throne and rule as a legitimate successor to the Anglo-Saxon kings depended on the continued support and approval of the English Church through its leading churchmen.⁴⁶ Since the prelates in England controlled substantial landed wealth and could raise a force of some 700 knights, Church support in the English context was more than merely moral.⁴⁷ William was keenly aware of the balance he needed to maintain between the English Church and the English throne.

William's skill in maintaining that balance in his relationship with the Church had been earlier reflected in his ability to garner support from Rome for his conquest of England as Duke of Normandy. Pope Alexander II welcomed William's reform position and political support in Europe, and in 1066 gave his blessing to William in his endeavors to become King of England, which Alexander called 'a crusade to reform the corrupt English churches'. But William refused to cooperate with the papacy when the latter sought to limit his power. Within a few years of the Conquest, Pope Gregory VII tried to persuade William to accept his claim of supremacy over the Church as a whole, which he had made in his *Dictatus Papae* of 1075, and to do fealty to Gregory and his successors. William curtly declined and continued to remain in complete control of the Church and the clergy within his kingdom. William made his own appointments to the episcopate without consulting with Rome, and within seven years of the Conquest had replaced all but two bishops in England with Normans (the exceptions being his Italian born archbishop of Canterbury, Lanfranc, and his successor, Anselm).⁴⁸

Although cooperation between William and officials of the English Church, particularly his archbishop, Lanfranc, was one of the notable features of his reign, it remained very apparent that William asserted the ultimate authority in ecclesiastical matters within his kingdom. He enacted ecclesiastical laws and took the customary role of an English monarch in calling and presiding over Church councils held in his realm. An example was his ordinance on court jurisdiction that separated the spiritual forum from temporal justice. In 1072, William decreed that no bishop or archdeacon should hold pleas in the Hundred court concerning episcopal laws nor bring cases concerning the cure of souls before the judgment of laymen. Neither sheriff or other royal official nor any other layman was to meddle with the laws that pertained to the bishop (such as cases

⁴⁶ Loyn, *supra* note 8 at 176.

⁴⁷ Chibnall, *supra* note 34 at 57.

⁴⁸ Berman, *supra* note 3 at 435-436.

involving marriage and bastardy, the bequest of moveables after death, or lay sin), and justice in these matters was to be done in the episcopal see or where the bishop decided.⁴⁹ William also declared that the power of the king and the sheriff should be available to compel appearance before the bishop, since the Church had no way of its own to enforce attendance. That writ eventually resulted in separate courts, procedures, areas of jurisdiction and clerical personnel for the Church.⁵⁰

Even though he had separated the ecclesiastical and secular courts, William maintained ultimate authority over both; his was the final word on all matters that came before these two courts. And although his writ contained a recognition of principles that were vital to the Papal Reform and touched on features that were decisive in the future shaping of ecclesiastical jurisdiction in England, it was William who had legislated on those matters. In that sense there was no sign of ecclesiastical independence from the English king, as yet. William was an advocate of the essential unity of the King and Church; and although conflicts of jurisdiction between ecclesiastical and secular matters did occasionally arise during that period, they were decided by the English king in his court. Throughout his reign William defied the effort of the pope to assert papal supremacy over the English Church and its clergy.⁵¹

Henry is not a Divine King

Henry I's reign began in 1100 in a flurry of activity caused by the unexpected death of his older brother, William II and the threat of invasion from his other brother, Robert, Duke of Normandy. William II died on August 2nd, but by August 5th Henry had taken control of the royal treasury, convinced both the English Church and the aristocracy to support him, was crowned king, and issued a coronation charter renouncing the oppressive practices of his late brother, and promising good government. What had begun as desperate acts of a fourth son, grasping for the reins of power, settled into 35 years of careful, sober, harsh (by some accounts) and methodical rule.⁵²

⁴⁹ Helmholz, *supra* note 1 at 108; Hudson, *supra* note 12 at 49; Plucknett, *supra* note 45 at 12; van Caenegem, *supra* note 35 at 13.

⁵⁰ Chibnall, *supra* note 34 at 193; Hudson, *supra* note 12 at 48-49.

⁵¹ Berman, *supra* note 3 at 437; Helmholz, *supra* note 1 at 106-109; Hudson, *supra* note 12 at 50.

⁵² John Gillingham, *Medieval Britain: A Very Short Introduction* (Oxford: Oxford University Press, 2002) at 13; Chibnall, *supra* note 34 at 66-67; Clanchy, *supra* note 20 at 74; Frankforter, *supra* note 9 at 170-171.

The century after the Conquest was marked by a period of major reform and change in the Latin Christian Church, but both William the Conqueror and William II had successfully opposed attempts by the pope to expand his jurisdiction over the Church and clergy of England. It was not until Henry I's reign that the first major effects of the Church reform were being felt by the monarchy in England. In 1093, William II had appointed Anselm as archbishop of Canterbury, but they were ill matched and their relationship was a fractious one. Anselm was a reform monk and believed, like many of his reforming brethren, that his duty to God, the pope and Church law overrode his duty to William II. William had no sympathy for that position.⁵³ In turn, William provoked the Church through his avaricious fiscal policies, treating the Church as a rich corporation in need of heavy taxing. When vacancies arose in Church offices he was slow to fill them, and insisted on taking the revenues of vacant bishoprics as if they were his fiefs.⁵⁴

In addition, the new decrees and the precepts of the developing canon law conflicted with the king's efforts to systematize his financial rights in his own interest, and the more rigorous definition and papal enforcement of the new tenets were an irritation to William. Changes in the definition of the feudal obligations for vassals that developed under William II were incompatible with the Church's stricter interpretation and application of reformed Church legislation. For example, feudal reliefs that had traditionally been requested from newly-elected bishops or abbots could now be interpreted as simony.⁵⁵ Pitted against a powerful king, however, Anselm's ability to champion Church reform in England was weak. By 1097 Anselm could bear the king's conduct and harassment no longer, and he fled to the Continent.⁵⁶

When William II died and Henry I seized the throne, he knew that his claim to the title was weak. Henry's older brother Robert was still alive and neither William the Conqueror nor William II had declared Henry the heir to the English throne. Under the threat of civil war, he was also aware of the importance of the support of the Church in his attempt to keep the throne and hold the kingdom together. Once crowned he immediately sent for Anselm and reconciled with the Church by renouncing William II's actions against the Church, as well as rescinding any demands he had made that had

⁵³ Gillingham, *supra* note 52 at 12; Plucknett, *supra* note 45 at 14; Helmholz, *supra* note 1 at 113.

⁵⁴ Plucknett, *supra* note 45 at 14; Chibnall, *supra* note 34 at 63; Helmholz, *supra* note 1 at 112.

⁵⁵ Chibnall, *supra* note 34 at 64.

⁵⁶ Helmholz, *supra* note 1 at 112-113.

been unacceptable to the Church. In his coronation charter, Henry I promised “to free the Church of God, which in his brother’s time had been sold and let out at farm, and abolish all evil customs and unjust exactions”.⁵⁷

In 1059, the first papal decree against lay investiture had issued from Rome, and in 1099, a Vatican Council had condemned both lay investiture and doing homage to a secular man. The conflict over the investiture of Church officials was so fundamental to Church reform that the movement is often called the Investiture Controversy. Investiture is the ceremony conducted by the Church under ecclesiastical law that signifies the transfer of an elected cleric to his office (e.g. an archbishop, bishop, abbot, etc.). When a vacancy occurred in an office of the Church, clerics were nominated and then an election was held by the chapter. Once elected, the candidate was invested into office by the ceremonial conveyance of the symbols of that office: the pastoral ring and crozier (staff). The alternative to that process was the direct appointment of a cleric to an office by a senior Church official (the pope or an archbishop).⁵⁸

The reformers had determined that in order for the clergy to be able to lead a moral and spiritual life, the Church must be free of secular control and they fixed on the issue of lay investiture as the symbolic lodestone. To the Church, the receipt of a sacred office from hands polluted by the unjust shedding of blood was an abomination. Additionally, the act of homage, made by a Church official to a king, treated a spiritual office as if it were no more than a mere fief. It was not until Anselm’s return in 1100, however, that anyone in England seemed to have been aware of the papal decrees against these practices; unfortunately for Henry I, Anselm returned to England with full knowledge of the prohibitions. And, even though he had been invested by William II in 1093, he now refused either to do homage to Henry or to consecrate those prelates whom Henry had invested. To Anselm the issue was one of obedience to the law of the Church and the commands of the papacy; that is, “obedience to God over obedience to Caesar”.⁵⁹

⁵⁷ Berman, *supra* note 3 at 255; Chibnall, *supra* note 34 at 67-68; Gillingham, *supra* note 52 at 114-116; Helmholz, *supra* note 1 at 112-114.

⁵⁸ Chibnall, *supra* note 34 at 60-61; Cook, *supra* note 43 at 187-188; Frankforter, *supra* note 9 at 178; Helmholz, *supra* note 1 at 112-113.

⁵⁹ R.H. Helmholz, “Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250-1640” (1990-1991) 12 Cardozo Law Review 707 at 708; Gillingham, *supra* note 52 at 116; Helmholz, *supra* note 1 at 112-113.

This placed Henry in a difficult position; bishops and abbots controlled large portions of land and had the allegiance of large numbers of men. They were also key figures in central and local administration; therefore, he needed their support and their loyalty. Although Henry I did not want to risk a quarrel with the Church in the early years of his reign, he was loath to relinquish his control over the appointments to those offices.⁶⁰ The tension that developed between Henry and the English Church was partly rooted in the dual role of bishops and abbots; they were both prelates with spiritual duties, as well as lords of temporal baronies. To the Church, the temporal bonds of the bishops and abbots to the king caused the loyalty of their officials to be drawn away from the Church and added a frustrating complication to its position on the inappropriateness of lay investiture and the importance of freedom of election.⁶¹ On the other hand, because a prelate's temporal responsibilities were critical to the governance and security of the kingdom, the king became particularly concerned with: i) securing visible recognition from the churchmen that they held their baronies from him (like all of his other tenants-in-chief), and were bound to render loyalty and service in return; and, ii) keeping a controlling voice in the appointment of abbots and bishops, since those offices were a valuable source of patronage, tenure and support (that is, wealth and control).⁶² The positions of the Church and the king became more and more difficult to reconcile as the reform movement strengthened.

Tensions came to a head in 1107 with Henry insisting upon all his traditional rights as head of the English Church, including the right to invest prelates, as well as all his rights as supreme lord over temporal affairs in England. But by then the power balance between the King of England and the papacy had shifted, and Pope Pascal II, a zealous reformer, played his trump card with immaculate timing, threatening Henry with excommunication on the eve of his campaign to wrest Normandy from his older brother, Robert. Henry knew that without the support of the Church his efforts would likely fail; the time for a compromise was at hand.⁶³

Both sides gave up substantial ground in the conciliation documented in the Concordat of Bec (1107). Pope Pascal II ceased to forbid homage and intervention in elections,

⁶⁰ Gillingham, *supra* note 52 at 116.

⁶¹ Helmholz, *supra* note 1 at 112-113.

⁶² Chibnall, *supra* note 34 at 70.

⁶³ Bartlett, *supra* note 21 at 403; Berman, *supra* note 3 at 437-438; Chibnall, *supra* note 34 at 70; Gillingham, *supra* note 52 at 14-15; Helmholz, *supra* note 1 at 113; Plucknett, *supra* note 45 at 14.

and concentrated on investiture. Henry I agreed to free elections of bishops and abbots by the Church in England, but retained the right to be present at those elections, to put forward a nominee for election, to intervene when elections were disputed and to have the king's approval obtained at some stage in the election process. With regard to investiture, Henry I consented to allow the authority to invest bishops and abbots with the insignia of their offices, the pastoral ring and crozier, to be transferred from the king to the pope, although those officials were not to be consecrated by the Church until the king had first received homage and fealty from them. Interestingly, the jurisdiction of the nascent canon law was tactfully ignored by the two leaders.⁶⁴

As often as not, however, the king's candidate continued to be elected after the conciliation took place, and most of the men that were consecrated as a bishop or an abbot continued their secular service to the king after their election.⁶⁵ It appears, therefore, that the concession to investing bishops and abbots to office did not substantially affect the power Henry I exercised over the English Church. However, though Henry preserved the reality of control over issues important to landholding and the security of his kingdom, giving ground on lay investitures took away much of the divine authority from kingship, acknowledging that the office of the king was now primarily secular in nature and that the Church had gained authority over ecclesiastical matters in England. That was a critical step in the evolution of the relationship between kingship and the Church.⁶⁶

As a consequence of the Church Reform, the two centuries that followed the Conquest of England are also noted for the formation of the law of the Church: the canon law or the *Corpus iuris canonici*. Many of the classical tenets of the canon law were still in the process of formulation in the 12th century, but what was in place was taken to apply to all Christians throughout Western Europe.⁶⁷ No one disputed the existence of the spiritual authority of the Church or of the canon law in theory, but kings had difficulty accepting it in reality, especially when the Church argued that its authority and law extended over the temporal realm. Arguments over what matters were spiritual, and therefore fell under the jurisdiction of the Church, and what were temporal matters, and so were within the

⁶⁴ *Ibid.*

⁶⁵ Berman, *supra* note 3 at 437-438; Chibnall, *supra* note 34 at 71; Helmholz, *supra* note 1 at 113.

⁶⁶ Berman, *supra* note 3 at 107 and 404; Frankforter, *supra* note 9 at 168; Gillingham, *supra* note 52 at 116-118.

⁶⁷ Baker, *supra* note 15 at 126; Chibnall, *supra* note 34 at 192.

jurisdiction of secular rulers, created tension between the Church and lay authorities that had not existed before the onset of the reform movement. Those arguments, however, were as likely to be over a conflict of law or legal prerogative, as over a challenge of authority between the two powers; in effect the tension resulted from two legal systems operating in one political territory trying to sort out their respective jurisdictions.⁶⁸

In that formative period, there were several areas of jurisdiction with overlapping or conflicting claims by Church and King, and that situation created an assumption of rights on the part of both parties. The Church in England asserted jurisdiction over disputes where they believed a matter of episcopal law or 'cure of souls' was at issue, whether involving the laity or the clergy. That included issues related to marriage, family matters, sexual acts, bastardy, bequests of chattels after death, breach of faith, breach of oath and acts of sin. The Church also claimed jurisdiction over matters involving accusations of criminal conduct against members of the clergy or other clerical offences. The secular authorities appear to have accepted the Church's claims. At that time, however, many cases were resolved outside of the formal Church (synodal) process and the punishment of clerical offenders was often handled in cooperation with lay powers.⁶⁹

Although some areas of overlapping jurisdiction were handled cooperatively, some were quite sensitive and caused visible tension between the two institutions. For example, the right to the tithes of a church, ecclesiastical dues or its property, as well as the right of advowson (the nomination of a cleric to an ecclesiastical benefice) were all areas of contention. The reason for the discord over these issues was that during the Anglo-Norman period, thousands of churches and chapels were built by wealthy lords on their estates.⁷⁰ These churches were built for the personal use of their families and their vassals. Often patrons of a church would endow it with land, but they would still consider themselves the owner of the church and the land, and it would remain part of the family's inheritance. As such, a patron would expect to name the priest who would serve there, and in addition, take all or at least a part of the tithes (the tenth levied on

⁶⁸ Baker, *supra* note 15 at 128.

⁶⁹ Chibnall, *supra* note 34 at 194; Hudson, *supra* note 12 at 6, 49 and 50.

⁷⁰ Bartlett, *supra* note 21 at 379-382.

agricultural produce of parishioners) collected by the church, which, in some cases, were a rich source of income.⁷¹

Because of the ability to earn wealth, it was not uncommon for churches and chapels to be bought and sold, given in pledge, divided or let out at farm. Litigation over possession or the exercise of advowson was quite common during those times and it was usually handled in the seigniorial courts or king's court. The reason those issues fell under secular jurisdiction, even though they were matters that touched the Church, was quite simple: they were questions pertaining to real property rights, involving disseisin and the right of seisin, and landholding and tenure were of particular interest to the Anglo-Norman kings and lords, thus they claimed jurisdiction. The Church, however, was not convinced by that reasoning and continued to claim jurisdiction over that area, although with limited success.⁷²

Spiritual and temporal jurisdictions also overlapped in relation to the status of persons. The Church claimed broad jurisdiction over the laity in all spiritual matters, which could include authority over virtually every aspect of human beliefs and actions and any religious or moral ideas or conduct that departed from the orthodox norm, including offences the Church deemed to constituted a sin, that is, a threat to the mortal soul, such as a breach of oath. However, in a legal environment that depended on the enforcement of a breach of oath made before God, for example, it was not always easy to distinguish crime from sin. One reason that distinction was a concern to secular and ecclesiastical authorities was because the remedies and penalties under canon law and secular law were often different, with Church law being the more lenient of the two when it came to punishment since it did not condone mutilation or death sentences. As a result, parties to an action would try to invoke the jurisdiction of the Church if they thought the canon law would be more beneficial to the resolution of their claim or their defense than royal law, or that the punishment under canon law would be less severe. In addition, a sin could often be remedied through penance or other act of contrition, according to the Church, but that was not always the case under royal law. Bastardy was condemned by both the Church and the State, but it could be remedied in the Church if the parents married after the birth. It could never be remedied according to royal law (that principle

⁷¹ Helmholz, *supra* note 1 at 23.

⁷² Bartlett, *supra* note 21 at 379-382; Chibnall, *supra* note 34 at 195; Helmholz, *supra* note 1 at 477-479.

was later set out in the Statute of Merton, 1236); a bastard born was always a bastard; this was a fundamental principle in the law of inheritance of real property in England.⁷³

However, the greatest difficulty came when a clerk guilty of murder or some other grave secular was deprived of his orders - the question was then: should the clerk undergo additional secular punishment? When bishops were present to handle ecclesiastical pleas in the shire and Hundred courts before William the Conqueror's ordinance it was unlikely that this question ever arose since the same court could have laid an additional secular penalty on the offender at the same time as the ecclesiastical penance was pronounced. Once separate courts were created, however, uncertainty occurred in relation to the questions of which court a clerk ought to appear in first in order to establish his status: the king's or the Church's, and whether two separate courts should be able to penalize a person for one crime.⁷⁴ The issues raised by these questions were always particularly sensitive matters between the Church and the secular authorities and would later become the foci for a major, although brief, jurisdictional storm.

On the whole, however, the everyday relations between the secular and ecclesiastical courts and their administrators seemed amicable during this period, even cooperative. The areas of jurisdiction that were at issue usually related to situations where: i) the canon law challenged ancient custom; ii) the higher orders in the Church and secular authorities clashed (such as, appeals to Rome or the excommunication of royal ministers, since the king expected them to take place only with his permission and not at all if they were contrary to his interests); or iii) the king wished the status of a case to be decided in his court because it was critical to the outcome of the matter in question (for example, the status of criminous clerks, or the status of land in matters involving advowson).⁷⁵ Those same issues would continue to vex English kings throughout the High Middle Ages and for years to follow.

King Henry is Dead, Long Live Queen Matilda!

At least that is what Henry I had hoped would be shouted out upon his death. But his nephew, Stephen, was in the county of Boulogne, a mere one day trip across the Channel to south-east England. Stephen used that geographical advantage, as well as

⁷³ Helmholz, *supra* note 41 at 187-190.

⁷⁴ Chibnall, *supra* note 34 at 200; Helmholz, *supra* note 1 at 511-514.

⁷⁵ Chibnall, *supra* note 34 at 203; Helmholz, *supra* note 1 at 5-7.

the influence of his brother Henry of Blois, bishop of Winchester, to usurp the throne from Henry I's daughter, Matilda, convincing the English magnates to crown him King of England on December 22, 1135.⁷⁶ But Matilda was not ready to concede her loss so easily, so she carried her challenge for the English throne to Stephen. When she landed in Arundel in the autumn of 1139, civil war was "well and truly joined"; and it lasted for almost 20 years.⁷⁷

Due to the disruption caused by the civil war, the reign of King Stephen (r.1135-1154) is frequently called 'the Anarchy'. That 20 year period is noted for the decay and decentralization of political power in England and the breakdown of monarchical authority.⁷⁸ During that time, however, the Church made gains in both prestige and power; it received strong local support from the populace because the clergy provided relief and welfare to the people suffering under civil strife. At a time when civil justice was often in abeyance, Church synods continued to meet and law was administered in episcopal courts. Denied the option of royal justice, disputants looked to other means; for example, historical documents reveal that even the Church looked more to its own courts and to the papacy during Stephen's reign.⁷⁹ As a result, disputes over the right of patronage of Church offices (advowson) were often tried in ecclesiastical courts. In addition, Church courts in England asserted supremacy in determining whether or not particular land was Church property (*frankalmoign* or 'free alms'). (Both of these matters were to become contentious in the reign of Stephen's successor, Henry II.)⁸⁰

It was not unusual, at that time, for an officer of the Church to be involved in high level political intrigue. Many of England's nobility were also members of the clergy, or a brother or kinsman was. So for Stephen to turn to his brother, Henry of Blois (bishop of Winchester for more than 40 years, 1129-1171) for help in gaining the throne was a demonstration of the power and aspirations of senior members of the clergy. Stephen had bought his coronation with concessions to many parties, but he was particularly

⁷⁶ Bartlett, *supra* note 21 at 79; Gillingham, *supra* note 52 at 20-21.

⁷⁷ Gillingham, *supra* note 52 at 21.

⁷⁸ Keith J. Stringer, *The Reign of Stephen* (London: Routledge Publishing, 1993) at 53; G.J. White, "Continuity in Government", in E. J. King, ed., *The Anarchy of King Stephen's Reign* (Oxford: Oxford University Press, 1994) 117 at 124 and 138-139; Hudson, *supra* note 12 at 118.

⁷⁹ Berman, *supra* note 3 at 255-256; Hudson, *supra* note 12 at 119; Hudson, *supra* note 37 at 99; Stringer, *supra* note 78 at 62; White, *supra* note 78 at 124 and 126-129.

⁸⁰ David Crouch, *King Stephen, 1135-1154* (Harlow: Pearson Education Limited, 2000) at 306-308; Berman, *supra* note 3 at 256-257 and 531.

indebted to the Church. He had applied to Pope Innocent II for confirmation of his right to be crowned king and had received an answer from the pope that persuaded the archbishop of Canterbury to agree to his coronation in 1135.⁸¹

Upon his coronation, and in partial repayment of his moral debt to the pope, Stephen took an oath to restore and preserve the liberties of the Church. In 1136, at his Easter court he put those promises in writing. In the opening statements of his 'Charter of Liberties' he acknowledged that he had been consecrated by the archbishop of Canterbury and confirmed in his position as king by Pope Innocent II, and then he gave a general promise of 'freedom of the Church'. However, it was the clauses that followed that detailed what 'freedom of the Church' meant; they included: avoidance of simony; recognition that bishops had the right of jurisdiction over the clergy and their property; confirmation of all ancient customs, privileges and lands that the Church had held at the death of William the Conqueror; distribution of chattels in accordance with the wishes of the deceased; and, confirmation that vacant churches and their lands were to be entrusted to the keeping of clerks or good men of the bishopric.

Nothing was said about election of bishops and abbots, although much could be inferred from the clauses that recognized the Church's 'ancient customs and privileges held at the time of William the Conqueror', when a bishop's barony, as well as his episcopal office was granted by the king. How much of his regalian rights Stephen had renounced in his 'Charter of Liberties' is still under debate. But there were times when his brother, Henry, bishop of Winchester, interpreting those rights on behalf of the Church, defined them far more broadly than Stephen was prepared to do. Nevertheless, Stephen had won his crown, and the bishops of England swore fealty to him "for as long as he should maintain the freedom of the Church and the strict observance of its discipline".⁸²

Although Stephen failed to live up to the promises he had made to restore and preserve the liberties of the Church, Pope Innocent II never faltered in his support of Stephen. And while his brother, Henry, was very aware Stephen was not living up to them, he also realized that Matilda had even less respect for the liberties of the Church. Thereafter, even as Stephen's treatment of the Church aroused the hostility of many of the cardinals

⁸¹ Chibnall, *supra* note 34 at 18-19 and 85-87; Crouch, *supra* note 80 at 308-309; Stringer, *supra* note 78 at 66-67.

⁸² Chibnall, *supra* note 34 at 85-87; Crouch, *supra* note 80 at 298-300; Stringer, *supra* note 78 at 62-63 and 72.

in Rome, the English Church continued to loyally support him. However, those cardinals, notably Guido di Castello, (who would become Pope Celestine II, r.1143-1144), were more sympathetic to Matilda and eventually their opposition to Stephen became quite vocal. That Stephen was prevented from establishing his dynasty in England and Henry II was placed on the throne, instead, was largely due to that opposition (although the death of his first son Eustace in 1153 played a role, as well). Neither Theobald, archbishop of Canterbury and papal legate, nor Pope Eugenius III (r.1145-1153) would consent to the coronation of Stephen's son.⁸³ The Church had exhibited its rising power and political influence through its intervention in the royal affairs of England.

The reform movement of the Church, during the 11th and 12th centuries, had introduced a new element to the political stage - the liberation of the Church from secular control and the launch of a separate Church infrastructure and law. The Church hierarchy was strengthened, culminating in the declaration of the pope that he was the divinely chosen head of the Church in Western Europe.⁸⁴ The fundamental principle that drove the reform was a change in philosophy at the very highest level of the Church: churchmen now believed that their obligations to God overrode their duty to a king or an emperor. This position was the antithesis of the Church's earlier view that the king had been chosen by God as his representative on earth and, therefore, was the divine leader of the Church, as well as of his subjects.⁸⁵ As a result of this change, the customary structure of the political and spiritual world was being challenged and traditional royal rights over the Church and its clergy were being threatened. That, in turn, stirred up questions regarding the limits that could/should be placed on the power of temporal authorities, the nature of kingship and the authority of law.⁸⁶ It was a confusing time, a challenging time and a time when the secular authorities felt threatened.⁸⁷ But it was also a time of resourcefulness and creativity.

⁸³ Berman, *supra* note 3 at 256; Chibnall, *supra* note 34 at 92-94; Stringer, *supra* note 78 at 63-65 and 67-69.

⁸⁴ Berman, *supra* note 3 at 94-99; Chibnall, *supra* note 34 at 192; Helmholz, *supra* note 1 at 89-90.

⁸⁵ Gillingham, *supra* note 52 at 12-14; Plucknett, *supra* note 45 at 14.

⁸⁶ Plucknett, *supra* note 45 at 14.

⁸⁷ Cook, *supra* note 43 at 187.

Chapter 2: Conflict and Cooperation

A Time of Change

The span of years from the beginning of Henry II's reign (r.1154-1189) to the end of the reign of King John (r.1199-1216) represents one of the most dynamic periods of change and advancement in both the English royal law and the Church canon law.¹ It was also a unique period for England in that it was a fairly peaceful era sandwiched between two civil wars. That respite gave the English kings and their royal administration time to focus on re-establishing peace and stability in the kingdom, renewing monarchical authority and power, and addressing the lawlessness that had ensued during King Stephen's turbulent reign.²

While the English kings were occupied with achieving and maintaining order in their kingdom, the Church moved closer to ecclesiastical independence in Western Europe. The process of centralization and specialization characteristic of the Angevin reigns was not limited to the English monarchy, it was also evident in the activities of the Church in Rome during that period. Just as a nascent form of common law developed out of the efforts of Henry II and John's administrations, the Church's endeavors resulted in the creation of new systems of ecclesiastical law and governance, separate from temporal authority.³ The jurisdictions of the Church in Rome and Henry II's administration had begun to expand, both in terms of the areas of substantive law they laid claim to, as well as in geographical reach. As the two institutions gained success in extending their respective authority, they began to encroach on areas of law the other had ostensibly claimed and episodes of jurisdictional conflict began to occur.

¹ Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 120; James A. Brundage, *Medieval Canon Law* (Harlow: Pearson Education Limited, 1995) at 61; G.B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century", pt. I (1944) VI *Mediaeval Studies* 261 at 261; John Hudson, *The Formation of the English Common Law* (Harlow: Pearson Education Limited, 1996) at 158; R.C. van Caenegem, ed., *English Lawsuits from William I to Richard I*, Selden Society, vol. 107(i) (London: Selden Society, 1991) at xiii.

² W.L. Warren, *The Governance of Norman and Angevin England, 1086-1272* (Stanford: Stanford University Press, 1987) at 106; Hudson, *supra* note 1 at 122.

³ R.H. Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to 1640s*, vol. 1 (Oxford: Oxford University Press, 2004) at 97; R.C. van Caenegem, *The Birth of the English Common Law* (Cambridge: Cambridge University Press, 1973) at 23.

Church Reform and the Papacy

1. The Drivers of Change

The latter half of the 12th century and the early 13th century was a period of innovation and achievement for the Church and its reform efforts. New developments and advances included the enactment and promulgation of rules and laws governing the conduct of the Church, its clergy and the laity, as well as the introduction of judicial and adjudicative procedures and their attendant prosecutorial and administrative bodies. In order to accommodate and facilitate that progress, the Church's institutional structure underwent reorganization and became more effective than at any time prior to the 12th century, culminating in a hierarchy of ecclesiastical offices and centrally controlled episcopal courts, with the pope and his Roman curia at its apex.⁴ But the most important achievement of the Church reformers during this period was the systemization of the existing canons and decretals, and the resulting development of the *Corpus iuris canonici*, the canon law.⁵

The efforts of the reformers to separate the Church from ever-increasing secular control were the main driver of the rapid development in canon law during that period.⁶ The ultimate aim of the Church reform movement was to restore the Church to a paramount role in society and re-establish the ecclesiastical legal order.⁷ In their efforts to articulate and substantiate their demands for change, the reformers searched through the historical documents of the Church including canons of Church councils, decretals letters of the popes, writings by the Church fathers, biblical passages, as well as fragments of Roman law for corroborating testament to support their claims. That collection of documents, the methods used by the reformers to analyze and interpret the material, and the arguments they advanced came to form the legal underpinnings of the reform program and the makings of the canon law. The primary focus of the reformers' arguments was the assertion of papal rights, including the belief that a single figure, whose considered decisions were beyond earthly challenge, would be able "to discipline,

⁴ Marjorie Chibnall, *Anglo-Norman England 1066-1166* (Oxford: Basil Blackwell Ltd., 1986) at 192; Berman, *supra* note 1 at 86-87; Brundage, *supra* note 1 at 34-43; Helmholz, *supra* note 3 at 68.

⁵ Berman, *supra* note 1 at 86-87; Brundage, *supra* note 1 at 2-4; Chibnall, *supra* note 4 at 192; Helmholz, *supra* note 3 at 68 and 100.

⁶ Berman, *supra* note 1 at 87; Brundage, *supra* note 1 at 34-37; Helmholz, *supra* note 3 at 69.

⁷ Chibnall, *supra* note 4 at 192; Helmholz, *supra* note 3 at 91.

order and reform the Church and clergy", and do so without interference from or concern about the customary rights of the laity.⁸

That principle became fundamental to the reform movement and formed the basis for the pope's claim to absolute authority over the Church and its clergy, and the right to act as the final judge on all matters that touched the Church. That tenet led the papacy to increase its intervention into the practices of its far flung bishoprics and monastic houses and to assert a direct hand into the running of its daughter churches throughout Western Europe; in this manner the Church began to extend its ecclesiastical authority over its religious community in Latin Christendom. But an equally important by-product of the papacy's oversight of local church affairs was the resulting expansion of the Church's authority into the regulation of aspects of the lives of the laity. In others words, by involving itself in the matters of its daughter churches, the authority of the Church in Rome naturally extended into the activities of the parishioners, including matters that had traditionally been considered temporal.⁹

The most controversial assertion of the reform movement was made in 1075 by Pope Gregory VII in the *Dictatus Papae* and was based on a text in Gratian's *Decretum*. It proclaimed that the pope had the power to judge all men - including kings and emperors.¹⁰ Expanding on that statement, the Church asserted that the papacy had the authority and the responsibility to secure justice for all who sought its aid. Therefore it was open to all Christians to call upon the pope for justice, either in the first instance or to right an injustice done by another official - ecclesiastical or secular. The pope was claiming to be the ultimate court of appeal for all Latin Christendom, as well as a court of first instance. That assertion became one of the cardinal principles of reform and a basic assumption of the canon law.¹¹

⁸ K.G. Cushing, *Papacy and Law in the Gregorian Revolution* (Oxford: Clarendon Press, 1998) at 106-110 and 120-121; Helmholz, *supra* note 3 at 70.

⁹ J.T. Gilchrist, "Canon Law Aspects of the Eleventh Century Gregorian Reform Programme" (1962) 13 *Journal of Ecclesiastical History* 21 at 21-38; Brundage, *supra* note 1 at 70-71; Helmholz, *supra* note 3 at 89-90.

¹⁰ Gratian, *The Treatise on Laws*, trans. by Augustine Thompson, O.P. (Washington: The Catholic University of America Press, 1993) at 32-37; Brundage, *supra* note 1 at 40; Helmholz, *supra* note 3 at 95.

¹¹ Berman, *supra* note 1 at 206-207; Brundage, *supra* note 1 at 35; Helmholz, *supra* note 3 at 70, 90 and 95-96.

2. The Case for Change

The reformers, whose customs and practices were grounded in their faith, astutely chose to place their convictions and proposals for change on a solid basis of law. By the late 11th century they had recognized ecclesiastical law as the best means to assert the authority of the Church and its pope over members of the clergy, as well as throughout Latin Christendom. In the middle of the 12th century, canon lawyers had come to dominate the papal office and for the next century and a half the pope was almost always chosen from those trained in canon law; increasingly the office of the pope became the centre of a system of ecclesiastical courts.¹²

Pope Alexander III (r.1159-1181) was one of the first trained canon lawyers to occupy the papacy; he was both a reformist pope and a strong leader.¹³ Upon his ascent to the papal throne, however, Alexander faced an overwhelming number of petitions and complaints from the laity. Parishioners from all over Western Europe had responded to the call by the Church for Christians, especially “those oppressed”, to bring their petitions to the “one Christian court in Europe” to obtain a papal ruling on any matter under ecclesiastical jurisdiction (which the Church defined very broadly).¹⁴ By the mid-12th century, the response from the Christian community to that call was prodigious, but the Church was completely unprepared to handle the volume of petitions and complaints.

Part of the reform program of the Church was the desire to outlaw and punish certain sins and abuses of the clergy, but it had also set its sights on purging the laity of their indulgences, as well. However, the Church was slow to act on its designs for the laity; first, because it lacked the bureaucracy to affect it, and second, because the reformers initially focused their efforts on resolving major internal issues of the Church, including its opposition to the practices of simony and nicolaism.¹⁵ The pressure of the seemingly never-ending flow of demands from laymen, however, eventually became the primary impetus for the evolution of papal governance during the 12th and early 13th centuries, including the development and growth of adjudication processes and procedures, and

¹² William R. Cook and Ronald B. Herzman, *The Medieval World View*, 2nd ed. (Oxford: Oxford University Press, 2004) at 201; Brundage, *supra* note 1 at 68.

¹³ Cook, *supra* note 12 at 201.

¹⁴ Jane E. Sayers, *Papal Judges Delegate in the Province of Canterbury 1198-1254* (Oxford: Oxford University Press, 1971) at 5-7 and 11; Brundage, *supra* note 1 at 160; Helmholz, *supra* note 3 at 96 and 139.

¹⁵ Cook, *supra* note 12 at 201; Helmholz, *supra* note 3 at 70.

the requisite prosecutorial and administrative bodies. Although the motivation for seeking papal intervention may have been unique in each case, collectively the cases formed the primary means by which the reach of the canon law was extended throughout Western Europe and deeper into the temporal realm.¹⁶

3. The Challenges

During the first half of the 12th century the Church's adjudication processes were *ad hoc* at best.¹⁷ No formal judicial procedure existed in the Church, and the canonical rules used by the Church to settle disputes were unstructured and unorganized. At the local level, disputes involving a Church matter (either brought to the Church by the laity or arising among the clergy) were handled primarily in synods called by resident bishops. Synods were regional assemblies of clergy and leading laymen that formed the legislative body for the regional Church. They were the source of new law, doctrinal pronouncements and spiritual guidance, and often functioned as courts, as the assembly listened to complaints of deviant belief and conduct. Synods would remain the principal agency for the adjudication of canonical issues in England throughout the 12th century.¹⁸

In addition, there were no procedures for formal delegation of authority from the pope to Church officials in distant churches or monastic houses; rather, it was the status of the local official's position that provided the basis for their authority to adjudicate local disputes - bishop, abbot, archdeacon, etc.¹⁹ There was also no prescribed system of court hierarchy or court procedures; consistory courts were still one hundred years in the future.²⁰ The local synodal system was slow, expensive and time consuming since litigants might follow a bishop for days or weeks on his peregrinations from one parish to the next in order to make their complaints.²¹ If an English bishop or the synod needed guidance on the arbitration of a dispute, they could turn to their resident archbishop or else correspond in writing with the pope, but neither appears to have been a common practice during this early period. It was an unstructured system and the answers

¹⁶ van Caenegem, *supra* note 3 at 59; Helmholz, *supra* note 3 at 90 and 96; Chibnall, *supra* note 4 at 196-197.

¹⁷ Keith J. Stringer, *The Reign of Stephen* (London: Routledge Publishing, 1993) at 53; Brundage, *supra* note 1 at 120; Helmholz, *supra* note 3 at 137.

¹⁸ Brundage, *supra* note 1 at 8 and 121.

¹⁹ Brundage, *supra* note 1 at 120.

²⁰ Helmholz, *supra* note 3 at 134.

²¹ Brundage, *supra* note 1 at 121.

received were not based on precedent as there was no doctrine of *stare decisis* recognized in canon law, at that time.²²

In Rome, the pope exercised his judicial functions in person, routinely spending most of his days attending to complaints of litigants and making the final decision in each case. Papal decretals were one of the primary ways the pope responded to the questions and petitions he received, or announced decisions on individual cases. The decretals frequently spelled out in some detail the rationale that underlay a decision and might include some general statements on how to deal with similar matters. Since the decretals represented the current views of the highest appeal court in the Church, canonists made collections of them and copies of those collections have been found throughout Western Europe, particularly in England. (According to Helmholz, English canonists were among the most assiduous of the collectors.²³) As a result, decretals became the most important source for the development, evolution and shaping of the canon law.²⁴ Requests for papal intervention were received from all regions of Western Europe and, as the numbers grew, the use of decretals increased significantly. During the pontificate of Alexander III they began to form one of the chief avenues for the advancement of the reform program and the canon law throughout Western Europe.²⁵

4. Implementation of the Process

The nascent canon law had given the pope the authority to exercise original and appellate jurisdiction over controversies and disputes that arose within his jurisdiction and that jurisdiction encompassed all of Western Christendom, including England.²⁶ By the mid-12th century, the number of petitions the pope was receiving became overwhelming and he could no longer handle the demand himself. The initial solution

²² Berman, *supra* note 1 at 122, 128 and 204-205; Brundage, *supra* note 1 at 159; Cook, *supra* note 12 at 34-35; Sayers, *supra* note 14 at xxi, 5-7, 9 and 11. The laws of the Roman Empire were codified (that is, ordered and organized) and the most important codification was commissioned by the Byzantine Emperor, Justinian, around 534. One of his laws forbid judges to follow the opinions of other courts and commanded them to be guided only by the text of the law in his *Corpus*. The emergence of legal systems in Western Europe during the 12th century is tied to the rediscovery at the end of the 11th century of an ancient manuscript of Justinian's code. The code became the object of Europe's first systematic legal studies and the resulting reinterpretation of Justinian's code is known as the *corpus juris Romani*. The *corpus juris Romani*, the Bible, Hebrew scriptures, Germanic law and other materials were used as sources for the canon law.

²³ Brundage, *supra* note 1 at 10; Helmholz, *supra* note 3 at 92-93.

²⁴ Brundage, *supra* note 1 at 65 and 160; Helmholz, *supra* note 3 at 92.

²⁵ Helmholz, *supra* note 3 at 92; Sayers, *supra* note 14 at 7.

²⁶ Helmholz, *supra* note 3 at 96.

was the wholesale delegation of papal authority to cardinals and other senior Church officials in Rome, which allowed them to adjudicate all but the most sensitive or important cases. Even so, litigants could still experience months or even years of delay trying to wend their way through the papal bureaucracy, and the cost of pursuing an action in the papal court was often prohibitive.²⁷

A tenet of the canon law made a distinction between delegated and ordinary jurisdiction, in other words, between the authority which proceeded from a special commission and the authority that was inherent to an administrative function or position. Based on that principle, and in an effort to further assist the pope in handling the mass of requests he was receiving, the Church developed an arrangement of *ad hoc* tribunals that could function away from the center of papal authority. Commissions delegating judicial authority were issued from the papal chancery to senior Church officials in localities throughout Western Europe on an as needed basis. The officials (papal judges-delegate) involved in the *ad hoc* tribunals would act under a special delegation of authority from the pope which was not inherent to their usual positions; they acted on behalf of the pope, rendering justice in his name. The use of the system of papal judge-delegate functioned to extend the reach of both the authority of the pope and the canon law throughout Western Europe.²⁸

The alternative to pursuing a case at the papal court in Rome became an appearance before papal judges-delegate at a petitioner's own locality, and its use increased through the latter half of the 12th century under Pope Alexander III.²⁹ That process had the benefits of combining a local examination and a hearing involving local people, with those of an inquest and judgment by judges who carried full papal authority.³⁰ The means for initiating the process was by ex-parte application: one party petitioned the pope for the appointment of papal judges-delegate, using a standard form petition. If the petition was approved, a mandate or commission was issued which would set out the facts of the case and identify the senior member(s) of the regional clergy appointed as the papal judge(s)-delegate. It also provided the appointed judge(s) with details on how

²⁷ I.S. Robinson, *The Papacy, 1073-1198: Continuity and Innovation* (Cambridge: Cambridge University Press, 1990) at 3; Brundage, *supra* note 1 at 123.

²⁸ Sayers, *supra* note 14 at 100 and 102.

²⁹ Sayers, *supra* note 14 at 9.

³⁰ Christopher R. Cheney, *Pope Innocent III and England* (Stuttgart: Anton Hiersemann, 1976) at 110-112; Sayers, *supra* note 14 at 7-9 and 100-103; van Caenegem, *supra* note 3 at 24.

to proceed with the case, clearly stating the limits of his authority, and, in some cases, even prescribing what ruling should be made should certain facts be proven. Lastly, it would require the judges-delegate to return a written report of the case and the results of the decision to the pope within a set period of time.³¹

One of the goals of the reformers had been to establish a more uniform system of governance that would function through all levels of the newly established Church hierarchy, and in all regions of Latin Christendom. The system of papal judge-delegate helped realize that goal by putting the authority of the pope into effect through delegated authority. Another aim of the reformers had been to re-establish the legal order of the Church, and the system of judicial delegation was one way in which the canon law was clarified, spread and enforced. Papal mandates stated the specific rule or law that was to be applied in each of the cases handled by papal judges-delegate. That new substantive law travelled with the delegates to the locations they attended and jurists in all parts of Europe collected the mandates, consulting, interpreting and applying the rules and law they contained when faced with their own causes.³²

Initially, the pope considered only archbishops or bishops to fill the mandate of delegation, then eventually archdeacons and abbots joined the list; however, the pope never established a specific group of senior officials that he repeatedly relied upon to accomplish the tasks set.³³ In addition, and most importantly, this system of delegation never became a formalized part of the Church's judicial procedures; it remained an *ad hoc* process and its use began to disappear once the consistory courts of the 13th century started to appear in Western Europe. That change was experienced in England as the older and more informal judicial institutions of the English Church (such as the bishop's synods) evolved into the provincial consistory courts in the mid-13th century; shortly after those courts were established evidence of papal judges-delegate activity becomes sparse.³⁴

It was F.W. Maitland's position that medieval England was not exempt from the jurisdiction of the papacy and that the canon law was as binding in English Court Christian as it was in other ecclesiastical courts in Europe. In addition, both Maitland

³¹ Sayers, *supra* note 14 at 11-14 and 100-104.

³² Chibnall, *supra* note 4 at 197; Helmholz, *supra* note 3 at 99.

³³ Sayers, *supra* note 14 at 10.

³⁴ Helmholz, *supra* note 3 at 134 and 139; Sayers, *supra* note 14 at 276-277.

and F.M. Stenton commented on the appearance of the courts of papal judges-delegate in 12th century England, during the reign of Stephen and early in the reign of Henry II.³⁵ That finding is in line with opinions of other historians, who observed that the Church looked more to its own courts and to the papacy in Stephen's reign.³⁶ In addition, Sayers noted in her research that the height of papal judges-delegate activity in England occurred between the accession of Pope Innocent III (1198) and the death of Innocent IV (1254).³⁷ That timing fits quite well with observations by Cheney and Helmholz that evidence of the activity of papal judges-delegates begins to become increasingly scarce in England in the second half of the 13th century.³⁸

The jurisdictional boundaries of the papal authority and the canon law were blurry and uncertain throughout the Middle Ages. Medieval Church courts claimed, and often exercised authority over numerous aspects of life that could as easily be considered the business of the secular authorities. For example, Church authorities claimed that canonical courts possessed full and exclusive jurisdiction over all crimes and offences committed by clerics of all descriptions (anyone in holy orders, as well as anyone who enjoyed the benefits of clerical status, such as students, monks, hermits, nuns, etc.). In addition, they exercised authority over matters dealing with Church held lands throughout Western Europe. Canon law also had significant impact on certain features of commerce and finance, such as the morality of the concept of just pricing, the interest charged on loans, or the concept of excess profit or dishonest gain. Canon law and secular law, ecclesiastical politics and royal politics were all closely intertwined, and that had consequences for the relations between the Church and the secular authorities throughout Western Europe. Secular authorities were not eager to yield control over many of the matters the Church began to claim under their jurisdiction and clashes between ecclesiastical interests and the interests of secular rulers inevitably arose over conflict of laws issues.³⁹

³⁵ F.W. Maitland, *Roman Canon Law in the Church of England* (London: Methuen & Co., 1898) at 107; F.M. Stenton, "Acta Episcoporum" (1929) iii Cambridge Historical Journal 1 at 3, 9 and 13-14.

³⁶ John Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford: Oxford University Press, 1994) at 99; G.J. White, "Continuity in Government", in E. J. King, ed., *The Anarchy of King Stephen's Reign* (Oxford: Oxford University Press, 1994) 117 at 124 and 126-129; Berman, *supra* note 1 at 255-256; Chibnall, *supra* note 4 at 197; Hudson, *supra* note 1 at 119; Stringer, *supra* note 17 at 62.

³⁷ Sayers, *supra* note 14 at xvix and 3.

³⁸ Cheney, *supra* note 30 at 110-112; Helmholz, *supra* note 3 at 100.

³⁹ Brundage, *supra* note 1 at 70-79, 89 and 177; Sayers, *supra* note 14 at 179.

The Reign of Henry II: The Early Years (1154-1164)

1. The Drivers of Change

Upon the death of Stephen on October 25, 1154, Henry I's grandson, Henry, Duke of Normandy, Count of Anjou and Duke of Aquitaine, became King of England. Henry II inherited a country that had just been through almost 20 years of civil war; royal control was lacking, the rights of the crown were being ignored and lawlessness was at a level that was interfering with the proper functioning of the realm. Given that state of affairs, Henry II realized that peace and order could be re-established and maintained only if justice and renewed royal authority were central to his efforts to stabilize his kingdom.⁴⁰ Henry's goal was to restore the strong monarchical control and authority that he associated with the reign of his grandfather, Henry I.⁴¹

At the end of Stephen's reign, conditions in England simply could not support a centralized adjudicative process and many of the advances Henry I had made in his attempt to establish royal law and enforce it within his kingdom had been all but lost.⁴² However, the loss of royal influence over judicial activities and the conduct of Hundred and shire courts that occurred during Stephen's reign did not last long enough to result in a total disruption of the law in England. The very lords who sought to appropriate royal power for themselves during that period imitated royal procedures in their own seigniorial courts and thereby helped to preserve judicial practices: groups of men on oath continued to settle cases at the request of parties; there was little change in people's perception of what the customary laws were (particularly in regard to land-holding); and, the principles of customary heritability of land survived.⁴³

During the social and political turmoil in the early years of Henry II's reign, secular justice and peace-keeping continued to be provided by local magnates and officials in their own regions. There was little direct contact between the king's court and the local tribunals (wapentake, seigniorial courts, shire courts or Hundred courts); royal justice was rarely

⁴⁰ Hudson, *supra* note 1 at 145; Stringer, *supra* note 17 at 106.

⁴¹ White, *supra* note 36 at 39 and 138-139.

⁴² R.C. van Caenegem, ed., *English Lawsuits from William I to Richard I*, Selden Society, vol. 107(ii) (London: Selden Society, 1991) at 338; Hudson, *supra* note 1 at 118.

⁴³ Hudson, *supra* note 1 at 121-122.

taken to the localities.⁴⁴ Although in theory petitions or pleas could have been made to the king by any of his subjects, it was magnates or other senior officers or officials who more commonly brought complaints to the king; in reality the general populace had little access to royal justice. In addition, kings were peripatetic during the early and High Middle Ages, and travel and communication over any distance were difficult for commoners. It was more practical and less costly to use the local and traditional forms of adjudication, and there would be fewer delays.⁴⁵ Later in Henry II's reign, routine royal intervention into the disputes and affairs of his subjects would be conducted through scheduled visitations to the localities by royal officials hand-picked by Henry, and, eventually, royal control over certain areas of criminal and civil litigation would come to characterize his reign.⁴⁶

In the early years of Henry II's reign, however, the primary concern was to restore and support the mechanisms of local peace-keeping and authority; he fully recognized the jurisdiction of the powerful lords, while acknowledging the traditional limits of royal authority.⁴⁷ Initially, royal intervention in matters that were customarily dealt with in the local courts occurred only if complaints were brought directly to the king and only if the claimant had failed to receive justice. As time passed, however, Henry II used those instances to justify increasing intervention and extend royal authority into traditional areas of seigniorial or local jurisdiction. Most often those occasions related to matters involving illegal or criminal activity, the control of which was central to the English king's mandate to curb crime and disorder in the kingdom.⁴⁸

What were the drivers for Henry II's increased intervention? They were at least threefold and were aimed at increasing his power and control over his kingdom. The first, as already noted, was the need to recover from the social disruption and lawlessness caused by the civil war, which included re-establishing peace and order, and settling

⁴⁴ Julia Boorman, "The Sheriffs of Henry II and the Significance of 1170", in George Garnett and John Hudson, eds., *Law and Government* (Cambridge: Cambridge University Press, 1994) 255 at 257.

⁴⁵ Robert Bartlett, *England Under the Norman and Angevin Kings* (Oxford: Oxford University Press, 2000) at 177-178; John Gillingham, *Medieval Britain: A Very Short Introduction* (Oxford: Oxford University Press, 2002) at 60; R.V. Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239* (Cambridge: Cambridge University Press, 1985) at 90.

⁴⁶ J.H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007) at 16; Chibnall, *supra* note 4 at 177-179.

⁴⁷ Paul Brand, "Multis Vigiliis Excogitatam et Inventam: Henri II and the Creation of the English Common Law" in Paul Brand, ed., *The Making of the Common Law* (London: Hambledon Press, 1992) 77 at 82.

⁴⁸ J. Biancalana, "For Want of Justice: Legal Reforms of Henry II" (1988) 88 *Columbia Law Review* 433 at 452-453; Hudson, *supra* note 1 at 145.

disputes that had developed during Stephen's reign.⁴⁹ The second driver was Henry's desire to ensure that his English kingdom could function effectively during his necessary absences across the Channel, to rule and protect his great land holdings on the Continent.⁵⁰ Third, were the promises he made in his coronation oath: to protect the Church and his subjects, to forbid all kinds of rapine and unlawfulness, to do justice, and to protect the rights of the Crown – undertakings he took seriously.⁵¹

2. The Challenges

Henry could only achieve those objectives from a position of strength. Consequently, the restoration of monarchial control and power was critical, and that became the primary focus of Henry's activities during the first half of his reign. In order to accomplish that end, Henry's administration had to understand the extent and dynamics of the crown's rights and re-establish a firm grip on the ability to exercise them. That was reflected in a notable characteristic of Henry II's early administrative activities – the commissioning of select royal officers sent into the localities to gather information from persons with knowledge of the state and profitability of the royal holdings, including manors and estates that had reverted ('escheated') to the crown, estates under wardship, instances of disinheritance and the like, that is, any and all information that would serve the king's intent.⁵² Those inquiries lasted several years and were conducted for the purpose of re-establishing the full extent of the royal estates, both lands and rights, which had been lost through grants by King Stephen and by royal sheriffs failing to prevent encroachment on royal holdings. The combination of the processes and procedures used and the kinds of information gathered during those inquests eventually resulted in the reinstatement of royal lands and associated rights, and that, in turn, led to the restoration of monarchial authority.⁵³

⁴⁹ Hudson, *supra* note 1 at 119-121; Warren, *supra* note 2 at 106; van Caenegem, *supra* note 3 at 45.

⁵⁰ D. Bates, "The Origins of Justiciarship" (1982), 4 *Anglo-Norman Studies* 1 at 1-12; H.R. Loyn, *The Governance of Anglo-Saxon England 500-1087* (London: Edward Arnold (Publishers) Ltd, 1984) at 179; Chibnall, *supra* note 4 at 219.

⁵¹ S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976) at 3-4; D.M. Stenton, *English Justice Between the Norman Conquest and the Great Charter, 1066-1215* (London: Allen and Unwin, 1965) at 220-223; Brand, *supra* note 47 at x and 79-86.

⁵² T.K. Keefe, *Feudal Assessments and the Political Community Under Henry II and His Sons* (Berkeley: University of California Press, 1983) at 119-121; W.L. Warren, *Henry II* (Berkeley: University of California Press, 1973) at 275-277.

⁵³ Brand, *supra* note 47 at 82; Warren, *supra* note 2 at 100.

During Henry II's reign, modifications and growth occurred in the practices and the nature of royal administration resulting in a change in the roles of persons responsible for the provision of the law and justice in England.⁵⁴ One measure Henry II took resulted in a notable turnover of sheriffs and a significant decline in the importance of their role in the king's administration. Along with other royal business dealt with at the Assize of Clarendon in late 1165 or early 1166, including the discussion and promulgation of the measures set out in the Constitutions of Clarendon, two counselors were commissioned to visit the shires and monitor the application of measures announced at that Assize. Upon reviewing the financial results of the application of those measures, it was clear that the shires that were visited by the commissioners had recorded the names of more felons whose chattels had been forfeited to the crown than those shires which had not been visited. The implication was that the sheriffs were either remiss or corrupt, or both, and that resulted in an inquest being conducted in 1170, known as 'the Inquest of Sheriffs'. The result of the visits also provided for the transitioning out of local officials and justices performing royal judicial tasks and the introduction of justices hand-picked by Henry from the ranks of his royal Household, who would regularly travel to the localities to provide royal justice (the itinerant justices).⁵⁵ It also appears that Henry II and his advisors were concerned with the possibility of over-reaching local power because, during that same period, Henry also reduced the number of earldoms, and those earldoms that did survive were stripped of nearly all their administrative and judicial powers. Those were daring moves on Henry's part considering the power of the earls, sheriffs and local officials, but his success went a long way in re-establishing strong, centralized royal authority.⁵⁶

As Henry II's power over his realm increased, he began to reassert authority over the English Church. Monarchical control of the English Church and its clergy had declined during the civil war, and the Church had gained ground during that turmoil. However, the effects of the gains and losses experienced by the Church in Rome from their reform efforts were also being felt in England. Therefore, the relationship that developed between the English Church and the royal authorities during Henry's reign evolved in

⁵⁴ Hudson, *supra* note 1 at 126.

⁵⁵ Boorman, *supra* note 44 at 257; Warren, *supra* note 2 at 110.

⁵⁶ Boorman, *supra* note 44 at 257; Warren, *supra* note 2 at 102-103.

response to the changing imperatives of the Church in Rome, as well as to the unique political and social conditions that obtained in England.⁵⁷

Although some of the issues that fuelled the conflicts between the Church and the State early in the Papal Reform had either been resolved or settled by compromise before the reign of Henry II, there were still some significant grey areas left unresolved. For example, the fundamental and over-riding question of defining the boundary between the spiritual and temporal realm, in general, and the boundary between spiritual and temporal authority, more specifically, was still outstanding.⁵⁸ That question was to cause friction between the Church and secular authorities throughout Latin Christendom during the remainder of the Middle Ages, and England was no exception. As Henry II's authority in England grew stronger and the reach of royal justice spread throughout his kingdom, he began to come up against the expanding jurisdictional claims of the Church and its assertions of papal prerogatives within England. The challenge to the principle that the king's authority, both spiritual and temporal, within his own realm was virtually boundless,⁵⁹ by the pope's claim to the power to judge all men, including kings and princes, created a palpable tension between the king of England and the pope. The general question of levels and degrees of authority and jurisdiction that caused tension between Henry II and the Church were reflected more concretely in contests over the control of Church appointments, appeals to the pope, the nature of ecclesiastical property and responsibility for criminal justice.⁶⁰

3. Implementation of the Process

The key aspects that came to characterize the procedures of royal law were fleshed out and regularized during Henry II's reign; they were the eyre, the assize, the jury (recognition) and the returnable writ. With regard to land law during that time, increasingly, only one jurisdiction would deal with matters of freehold land-holding – the king's; and procedures governing land actions would be initiated and governed by royal

⁵⁷ A. Daniel Frankforter, *The Medieval Millennium*, 2nd ed. (Upper Saddle River: Pearson Education, Inc., 2003) at 255-257 and 263-264; Bartlett, *supra* note 45 at 402-405; Berman, *supra* note 1 at 256; Hudson, *supra* note 1 at 119.

⁵⁸ Bartlett, *supra* note 45 at 402-405; Berman, *supra* note 1 at 255-259; Chibnall, *supra* note 4 at 197-201; Cook, *supra* note 12 at 201-203; Frankforter, *supra* note 57 at 176-179 and 277; Helmholz, *supra* note 3 at 113.

⁵⁹ Bartlett, *supra* note 45 at 121-130; Berman, *supra* note 1 at 66-67; Warren, *supra* note 2 at 15-16.

⁶⁰ Bartlett, *supra* note 45 at 405; Berman, *supra* note 1 at 256-257; Chibnall, *supra* note 4 at 197-201; Helmholz, *supra* note 3 at 114-118.

writ, controlled by the king's administration and taken out to the localities on a regular basis by itinerant justices.⁶¹ The understanding of land tenure and the different types of land-holding was fundamental to resolving land disputes, and the concerns of many of the inquiries conducted by Henry II's commissioners during the first half of his reign included the question of how lands were held, sorting out land tenure customs, and classifying the different types of land-holdings. It was that information which Henry's judicial administrators later drew on to influence legal developments in land law during the latter half of his reign.⁶²

During the Anglo-Norman period, landholding was closely tied to lordship; a man who held land from a lord would have done him homage and been 'seised' with land (i.e. the land would be put into the tenant's possession for his use and occupation in exchange for certain services the tenant would provide to his lord); the relation may be seen as a contractual tenured appointment. The land was never intended to be heritable, but the longer the lands remained in the possession of one tenant's family, the more people would speak of the land as theirs by right. Over time (and through the gradual effect of the royal law), as long as the required services were performed by the tenant, a lord's control over the lands diminished.⁶³

By the middle of the 12th century, the heritability of land was fairly secure, and it continued to strengthen into the early 13th century at which time the principles of land law began to harden such that settlements could only be made with the licence of the king or his justices. Land had become heritable through the continued performance of secular service by a tenant and his family, and was said to be held 'in fee' (reflecting the importance of the Norman concept of feudal land-holding through fief or fee).⁶⁴ Church held lands were starting to be referred to as being held 'in free alms', since the lands had usually been given to the Church with no burden of specified services (other than the

⁶¹ Theodore F.T. Plucknett, *A Concise History of the Common Law*, 4th ed. (London: Butterworth & Co. Ltd., 1948) at 17-19; Brand, *supra* note 47 at 78-79; Hudson, *supra* note 1 at 93 and 140. Hudson, at page 93 uses the term "free" to refer to land held by that portion of the population that was not tied to the land in such a manner as they could not leave (i.e. *villaini* or peasants), the emphasis being on the status of a person and not on the tenure of the land-holding, that is, the burden of the services required by a peasant was attached to the person, not the land. This is an important distinction, since land law remedies, at that time, applied only to 'free' tenements.

⁶² Hudson, *supra* note 1 at 89-94; Plucknett, *supra* note 61 at 111; Warren, *supra* note 52 at 275-277.

⁶³ Baker, *supra* note 46 at 225; Hudson, *supra* note 1 at 87-88; Chibnall, *supra* note 4 at 23-29.

⁶⁴ Hudson, *supra* note 1 at 90, 214 and 228; Hudson, *supra* note 36 at 129; Milsom, *supra* note 51 at 168-169.

general duty of performing divine service or saying prayers for the soul of the donor, known as *frankalmoin*) in the hope that the bequest would ensure the salvation of the grantor. That term also addressed the need to distinguish ecclesiastical lands from lay holdings in response to the reforms of the Church. Several forms of freehold land-holding tended to be classified under the term 'socage'. That type of land tenure was not based on knight service, rather its origins lay in free agriculture tenure; it then was gradually extended to cover most free services to a lord. There were many other classifications of land tenure covering things such as land grants for limited terms, fee-farms (lands held for a fixed rent) and arrangements made for widows, heiress, wards, and dower.⁶⁵

The concerns of tenants who held lands 'in fee' included the security of their tenure, their ability to pass the holding on to their heir(s), and their capacity to grant or sell the holding to a person or institution that was not their heir. A lord's main concerns were to receive the services due in a timely manner and to suffer no act of significant disobedience by his tenant. What if the tenant failed to perform the required services or someone other than a tenant's heir received the land upon his death, or the lord objected to the land being alienated? How were these disputes to be resolved? In the case of a tenant who failed to perform the requisite services, a lord's reply would be to 'distrain' (that is, seize the tenant's moveable goods and on some occasions repossess the land). If he did not distrain, he risked losing the services, as well as the use of the land, including what ever existed in or on the land at the time. But, perhaps as important, his failure to act would be a blow to his standing amongst his peers; land acquisition and maintenance was the method by which lords achieved or sustained their position, wealth and prominence in the Norman social order. The act of disseisin would certainly involve a display of force in order to compel the tenant to submit, but custom required that it be 'reasonable' force, not 'excessively violent'; that subjective measure, however, left the lord considerable leeway in his actions.⁶⁶

The removal of the tenant's goods or land was initially to be temporary - to be restored when the tenant answered the lord's claim; but if the tenant continued to defy his lord, the holding would be forfeited. Many land disputes arose after the death of a tenant or

⁶⁵ Baker, *supra* note 46 at 227 and 247; Hudson, *supra* note 1 at 89-94.

⁶⁶ Baker, *supra* note 46 at 237-238; Hudson, *supra* note 1 at 86-87 and 95; Hudson, *supra* note 36 at 29-34.

from the succession of a new lord as a result of conflicting perceptions of claims to the land; for example, its inheritability or the services required from the tenant. A large portion of these disputes took place outside the courts and often led to unjust seizure of a tenant's chattels or even his eviction from the land. That action would often be followed by rounds of violent retaliation between the lord and his tenant. That was the type of situation Henry II was bent on controlling in his drive to curb the lawlessness occurring in his kingdom.⁶⁷

If the land matter was dealt with in a court, however, it would likely proceed to a lord's seigniorial court. Disputes that arose within a lord's jurisdiction were his responsibility to resolve and that included disputes over land-holding between two of his tenants. If the land dispute was between the lord and one of his tenants, the lord could still resolve it, but he must treat his tenant 'right and justly' or else his tenant could appeal to his lord's overlord; and in cases where the lord was a tenant-in-chief, that 'overlord' was the king. The disposition of cases dealing with land matters was formally dealt with in Henry I's writ of 1108:

If in the future there should arise a dispute concerning the allotment of land, or concerning its seizure, let this be tried in my own court if it be between my tenants in chief. But if the dispute be between the vassals of any baron of my honour, let it be held in the court of their common lord. But if the dispute be between the vassals of two different lords let the plea be held in the shire court.⁶⁸

On the basis of that principle, when the king was approached by a tenant complaining that he was not receiving justice from his lord, the king might decide to intervene by sending a sharply worded command orally, or sometimes in writing, to the lord in essence telling him to deal with the issue in his seigniorial court so that the king would be 'bothered with it no more'. As Van Caenegem stated, the "tone was unmistakable and left no room for dithering". If the command was in writing it was known as a writ - consisting of a thin strip of parchment containing a formal letter of a business nature in the name of the king, usually in Latin and sealed with the tip of the great seal. The early Anglo-Norman writs did not direct the institution of litigation; there was nothing in the wording that would commence a court proceeding involving the king. Rather, they were an administrative command from the king directed to a wrongdoer or an inferior jurisdiction (such as a lord or the officers of a shire) to do justice in a particular matter

⁶⁷ Hudson, *supra* note 1 at 96; Hudson, *supra* note 36 at 29-31.

⁶⁸ Hudson, *supra* note 1 at 113.

without delay, and because the writs originated with the king, legal historians have referred to them as 'executive writs'.⁶⁹

Over time, particularly during Henry II's reign, changes in the wording of royal writs caused them to take on a more judicial aspect and develop into 'original writs'; that is, a writ issued out of the king's chancery used to commence secular actions in the king's court or before his justices. Different categories of original writs developed, including an assertion of a right (a demand) or the complaint of a wrong (a plaint). The changes focused on the use of the word "justly" in the royal writs, which it began to take the meaning that the command should only be complied with if its justness was established by due inquiry. An additional change caused the writs to be directed to the king's agent in the shires, the sheriff (rather than a lord or wrongdoer), and introduced an option in the writ: the addressee, usually the sheriff, was ordered by the king to command (*praecipe*) the defendant to do what was demanded by the plaintiff 'or else' come before the king's justices to explain why (*ostensurus quare*) he would not obey. The forms of action for pursuing demands belonged to the category of writs known as *praecipe*. The writ of right was a form of *praecipe* writ used to claim land: the sheriff was to command the defendant to 'render' or yield up to the demandant, justly and without delay, the land which the latter claimed. It also ordered the sheriff to summon men from the vicinity to answer the question framed in the writ by due inquiry and to summon the defendant to hear the answer. There were many variants of that type of writ for claiming all kinds of property, e.g. advowsons, easements, chattels, debts, etc.⁷⁰

A further step in the process was to make the writs 'returnable'; that is, the writ required the sheriff to write the details of what he had accomplished and the names of people he had "summoned" or involved in process, on the face of the writ and 'return' it to specified royal justices on a given date and at a given place (the wording from the writ being: "and have there this writ"). The 'returning' of the writ in this manner provided authority to the justices to carry out their role in the proceedings, as prescribed in the writ. The original writs were designed to keep track of and regulate justice in this manner, but were not intended to limit it.⁷¹ Eventually the option of carrying out the royal command was

⁶⁹ Baker, *supra* note 46 at 54-57 and 230-232; Hudson, *supra* note 1 at 113-114; Plucknett, *supra* note 61 at 355 and 384; van Caenegem, *supra* note 42 at 30-31 and 35.

⁷⁰ Baker, *supra* note 46 at 54-55 and 57-58; Plucknett, *supra* note 61 at 356; van Caenegem, *supra* note 42 at 29.

⁷¹ Baker, *supra* note 46 at 55; Hudson, *supra* note 1 at 125; Plucknett, *supra* note 61 at 356.

removed and the original writ simply demanded that the defendant appear in the king's courts to explain the cause of his default or unlawful actions. This variation became the basis for writs that would commence the various land actions of the 'petty assizes'⁷², all of which were developed during the latter half of the reign of Henry II. The proto-type for the petty assizes was a writ known as '*novel disseisin*', and it contained a command to the sheriff to resei the plaintiff 'justly' of the land he had claimed, as well as the explicit directions to initiate an investigation into the question set out in the writ and summon the defendant to hear the answer.⁷³

The extent of royal intervention in matters involving land disputes increased greatly from the initial forays made by William the Conqueror and Henry I through to the end of Henry II's reign. In addition, the form of the intervention changed: rules were established for when and how it would occur and procedures were put in place to regulate the types of matters that would attract royal attention and the type of intervention that would be made. The king put the new procedures into the hands of a professional core of hand-picked men; in doing so he created an institution that developed its own ways and traditions and controlled access to the royal courts and even the courts of the lords.⁷⁴

In 1153, King Stephen and the future Henry II promised to restore 'the disinherited' who had held lands under Henry I but lost them during the civil war of Stephen's reign. That promise stimulated royal judicial activity, along with two additional decrees made by Henry II:

If anyone pleads about land in the court of his lord, he should come with his supporters on the first appointed day, and if there is any delay in the case, he should go to the justice and make his complaint. Then he shall return to the lord's court with two oath helpers and swear three-handed that the court has delayed in doing him full justice. By

⁷² Plucknett, *supra* note 61 at 112. Plucknett explains that the term assize takes on several meanings during the reign of Henry II. It began by signifying a solemn session of a council or a court, and soon came to mean an enactment made at such a meeting. Among the most important of these assizes were those establishing trial by inquisition, and so it soon became customary to describe the inquisition of twelve men as an assize, while the various procedures leading up to this form of trial were likewise called assizes. Finally, concepts of itinerate justices and eyres were established in order to try these assizes more speedily, and these justices were called justices of assize, and their sessions in the counties/shires were called assizes.

⁷³ Baker, *supra* note 46 at 54-55; Plucknett, *supra* note 61 at 356; van Caenegem, *supra* note 42 at 29.

⁷⁴ Brand, *supra* note 47 at 96; Flahiff, *supra* note 1 at 262-264; van Caenegem, *supra* note 42 at 25 and 38-39.

that oath, whether false or true, he shall be able to go to the court of the supreme lord (*seignur suverain*, i.e. the king)⁷⁵;

and, Article 9 of the Constitutions of Clarendon:

If a dispute arise between a clerk and a layman, or between a layman and a clerk, in respect of any holding which the clerk desires to treat as alms, but the layman as lay fee, it shall be determined by a recognition of twelve lawful men under the direction of the king's chief justice, whether (*utrum*) the holding pertains to alms or to lay fee. And if it be recognized to pertain to alms, the plea shall be in the ecclesiastical court but if to lay fee, it shall be in the king's court, unless both of them shall vouch to hold (*advocaverint*) from the same bishop or baron. But if each of them vouches the same bishop or baron concerning this fief, the plea shall be in the court of the bishop or baron.⁷⁶

Article 9 is particularly significant because it set out the procedure adopted in questions of land-holding and was the beginning of the regular use of recognitions of twelve men in the land law procedures developed during Henry's reign.⁷⁷

Henry II's desire to prevent disorder within his kingdom explains his concern with unlawful disseisin and his provision of remedies for the default of justice associated with it; but, his reforms were also concerned with royal rights and the language used in the remedies emphasized that those rights were not to be blocked by other local interests – seigniorial, ecclesiastical or provincial. The new rule became: 'no one need answer in their lord's court concerning their fee tenement without a royal writ', which became interpreted as meaning that a lord could no longer hear or act on a land matter without a royal order addressed to him. That principle also allowed a defendant to have land disputes moved to the king's court, which facilitated bringing the management of land law within the king's control. During the reign of Henry II, the operation of this principle combined with the growing practice of the issuance of the writ of right, gave the king's court a very wide jurisdiction over land matters.⁷⁸

The eyre became the main forum for dealing with land disputes and the writ of right and the writs of the petty assizes commenced the actions against the unlawful conduct. Legal historians still debate whether the king's reforms were intentional, designed to enhance royal justice and procure the integration of the older local courts, including

⁷⁵ Hudson, *supra* note 1 at 128.

⁷⁶ Yale Law School, *The Avalon Project, Documents in Law, History and Diplomacy* (2008), online: Lillian Goldman Law Library <http://www.avalon.law.yale.edu/medieval/constcla.asp>.

⁷⁷ Baker, *supra* note 46 at 231; Hudson, *supra* note 1 at 87, 127-239 and 247.

⁷⁸ Brand, *supra* note 47 at 97-98.

seigniorial courts, into a single legal system that dealt with all land matters. Whether or not the judicial reforms introduced by the king and his administration were a well thought out and intentional policy, versus piece-meal attempts to improve the functioning of land administration and undo injustices that snow-balled out of control and produced unintended results (as Hudson and Milsom suggest), the eventual consequence was a single legal royal land jurisdiction, at the expense of the local courts and, ultimately, the demise of the seigniorial courts.⁷⁹

In response to the new rule and the increasing consumer demand for access to royal justice, Henry and his judicial administrators developed a set of standardized writs designed to protect seisin (possession) that could be reproduced in set forms for set situations. The oldest of the writs developed, *novel disseisin*, dealt with matters of unlawful disseisin. The original writ was directed to the sheriff of the shire where the land lay and it extended the use of a recognition of twelve lawful men before royal justices to enquire into whether another had recently, unjustly and without judgment, disseised a man of his land. If it was found that he had, the disseisor was to be restored to seisin by judgment of the king's justices. The proceeding was a secular action and could only be brought by the disseised tenant. It was intended to make sure that a claimant could not seize the disputed land and then enjoy it throughout the lengthy process of establishing the greater right, or even argue that being in seisin backed up his claim. However, a verdict by a recognition did not necessarily end the matter. There were procedures by which the losing party could challenge the assize's verdict in hopes of obtaining a reversal of the verdict, including a writ of right, which required the other party to answer him concerning the right to the land. Over time, however, many parties became content to end their disputes on its verdict and *novel disseisin* became a quick form of action in its own right.⁸⁰

The form of the writ of *novel disseisin* was applied to other situations and by the end of Henry II's reign there were 3 petty assizes, all fashioned on the same model and all cognizable solely by the royal courts. Another cause of land dispute occurred when a lord refused seisin to an heir in accordance with the customs of inheritance. The petty assize of *mort d'ancestor* used a recognition to determine whether the plaintiff's ancestor

⁷⁹ Baker, *supra* note 46 at 231; Brand, *supra* note 47 at 97-98; Hudson, *supra* note 1 at 156; Plucknett, *supra* note 61 at 355-360; van Caenegem, *supra* note 42 at 24-28; Milsom, *supra* note 51, Ch. 1.

⁸⁰ Baker, *supra* note 46 at 233-234; Brand, *supra* note 47 at 96-99; Hudson, *supra* note 1 at 192-198; Plucknett, *supra* note 61 at 357-360.

died seised in his *demesne* as of fee of the tenements in dispute, whether he died since the period of limitation, and whether the demandant was his heir. The questions turned on the nature of the tenure, whether the ancestor had been seised in fee on the day he lived and died (that is, did he hold an inheritable estate) and, was the plaintiff entitled to be put in seisin? The assize was of limited scope; to employ this procedure, the plaintiff and the current tenant could not be kin. In addition, the assize could only be brought by close relatives of the deceased tenant whose claims to inheritance were customarily accepted (sons, daughters, brothers, sisters, nephews or niece). Like the assize of *novel disseisin*, the writ of right was available to a defeated party if they chose to challenge the verdict of the recognition.

The third petty assize was known as *darrein presentment* and it applied the principle of *novel disseisin* to cases of advowson (the right to nominate a cleric to an ecclesiastical benefice, i.e. parish), calling upon the assize to say whether the plaintiff was the last patron in time of peace to present a parson to the church in dispute. If so, the plaintiff was seised of that right and was therefore entitled to present the next parson to the church. Again, if the defeated party chose to challenge the verdict, a writ of right of advowson was available.⁸¹

The petty assizes were concerned only with seisin, as opposed to right, and the emphasis of the procedures was on speed. The writ of right answered the question of the relative merits of two titles according to the antiquity of the seisin from which they were derived; it was an order from the king directed to a lord, in his own court, commanding that he “do full right without delay” to the demandant in respect of the default of right that had occurred in regard to the subject land. If the lord did not take action, then, according to the terms of the writ, “the sheriff (or another royal official, or the lord’s overlord) will, that I may hear no further complaint for default of right in this matter” (parenthesis added). These writs were not an order for the parties to appear and have the matter heard in the king’s courts. As long as a hearing took place in the lord’s court and an acceptable decision was reached, nothing further was required. However, if the lord defaulted on his obligations, the case could be dealt with in the county or shire courts. Alternatively, the king or his justices might determine the case, either summoned directly by a writ *praecipe* or transferred from the lord’s or county/shire court under the procedure of *tolt* (which removed a plea from a seigniorial court to the county or shire

⁸¹ Baker, *supra* note 46 at 234; Hudson, *supra* note 1 at 198-201; Plucknett, *supra* note 61 at 360.

court) and then a writ of *pone* (which removed a plea from the county or shire into the common pleas).⁸²

Another form of writ that was critically important in the king's effort to control land matters was a member of the class of writs known as prerogative writs. The broad notion of these writs was that the king had the right to keep all lesser authorities within the procedural and jurisdictional bound set by the law, and provide a subject with a remedy if tribunals or officials exceeded their legal authority or gave orders which were patently contrary to law. This function of controlling authority was regarded as a royal prerogative, thus the name of the writ. The oldest member of the 'prerogative' class of writs was the writ of prohibition, which was developed in the thirteenth century as a means of restraining ecclesiastical courts from exceeding their jurisdiction and meddling in temporal causes. It was the principle tool used during the Middle Ages to curb the Church's judicial conduct in England and was frequently employed to stop an action pertaining to land (such as a plea of advowson or a matter dealing with fee holdings of the Church or its officers) from proceeding in a Church court. The royal writ could be obtained by any person who had been sued in an ecclesiastical court over a matter considered to lie within the temporal forum (as defined by secular position on the proper jurisdictional boundaries between the courts of the Church and the State). The action could be brought against the person who had brought the wrongful suit in the Church court, as well as against the judge in that court.⁸³

The above discussion of writs sets out the principle forms of the writs that would have originated the actions (or pleas) that were the subject of the cases discussed in the following sections.

Cases Touching the Church in the Reign of King Henry III

1. The Early Years of Henry's Reign (1154-1164)

Evidence of the conflicts, as well as the maneuvers used by the English secular authorities and the Church to try to define, shore-up and defend their jurisdictional claims

⁸² Baker, *supra* note 46 at 57-58 and 233; Brand, *supra* note 47 at 98 and 100; Hudson, *supra* note 1 at 201-202; Plucknett, *supra* note 61 at 357.

⁸³ G.B. Flahiff, "The Use of Prohibitions by Clerics against Ecclesiastical Courts in England" (1941) 1 *Mediaeval Studies* 101 at 103; R.H. Helmholz, "The Writ of Prohibition to Court Christian before 1500" (1981) 43 *Mediaeval Studies* 297 at 297; Baker, *supra* note 46 at 128-129 and 143-144; Flahiff, *supra* note 1 at 262-264; Helmholz, *supra* note 3 at 115, 118 and 240; Plucknett, *supra* note 61 at 394-395.

can be glimpsed at and traced through the documents that have survived from that period. It is also through those accounts that we become aware of the mounting tension between the Church and the English monarchy over the matter of judicial jurisdiction and those same sources show us the way in which those issues were dealt with. The records indicate how questions of jurisdiction were decided, who decided where the boundary between the two jurisdictions would lay, whether that determination was respected or not, and to what extent. They also reveal the efforts made and methods used by the two sides to enforce that line and how successful they were.

A review of the writs and lawsuits from Henry II's reign reveals the extent and the nature of involvement of the Church and its clergy in the royal (secular) legal system. In the early years, the majority of cases involving the Church dealt with land matters. On the one hand, this is not surprising since the Church and its officials were major land holders in England and land was key to wealth and power during that period. In addition, all land was ultimately held of the king and, therefore, decisions involving its disposition fell under the king's authority. On the other hand, a large amount of land in England was currently in the possession of the Church, and in the opinion of the pope issues involving Church held land should have been dealt with in the Court Christian. Certainly the pope dealt with an abundance of land issues on the Continent relating to property held by the Church, and the law of the Church included a substantial body of property law.⁸⁴

But such was not to be the case in England; it is clear from the cases reported from Henry II's court that even in the early years of his reign, any determination involving land was his to make, including disputes over land held by the Church (with the exception of land held in "free alms"⁸⁵), as well as cases involving advowson (the right to nominate a cleric to an ecclesiastical benefice, for instance, a parson to a church) because it was viewed by royal law as real property or an appurtenance to land.⁸⁶ Unfortunately, the cases documented in the Selden Society material provide little information to judge the extent (if any) to which the clergy tried to pursue cases touching Church lands in the

⁸⁴ Berman, *supra* note 1 at 237-240; Chibnall, *supra* note 4 at 197; Sayers, *supra* note 14 at 178-188 and 201-204.

⁸⁵ In Henry Campbell Black, *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing Co., 1979) at 593. Free alms, otherwise known as Frankalmoign, is defined as a spiritual tenure whereby religious institutions held the land of a donor forever and were discharged from of all services attached to the land other than religious services.

⁸⁶ Helmholz, *supra* note 3 at 477; Sayers, *supra* note 14 at 183.

ecclesiastical courts in England or through appeal to the papal courts in Rome. As we will see, however, we do know that Pope Alexander III rejected article 9 (along with many others) of Henry II's Constitutions of Clarendon when they were presented for his confirmation, suggesting the Church did not simply acquiesce to Henry's claim to jurisdiction over Church held land.⁸⁷ In addition, as will also be seen, there were some cases of prohibition or *quo warranto* against members of the clergy who tried to resolve land disputes in the ecclesiastical courts, but these are very few and occurred during the reign of King John.

Of the 87 writs involving Church lands that are reported in the Selden Series from those early years, 37 dealt with the return or reversion of land or its appurtenances to an abbey, church, priory or cathedral, or to an abbot/abbess, prior/prioress or bishop. One example is case 348⁸⁸, which involved the registering with the king's court of a memorandum of a quitclaim to an abbey. The quitclaim happened in the abbey's church by the placement of the charter and chirograph pertaining to the property on the altar of the church, as well as by the attendance of the parties in the abbot's own court where a payment of 20 marks of silver was made by the abbey to the heir of the property. The memorandum was witnessed by the reeve of the Hundred. In a similar case (387)⁸⁹, a lord attended at a county court, and before the barons and men of the province 'recognized' (made the truth known publically) he had unjustly held land rightly belonging to monks. The lord restored it "to God and St. Peter and the monks" by placing "it" on the altar of the church, as witnessed by the barons and the whole of the county.

The large number of memorandums, notifications and final concords relating to private land transactions documented in the Selden volumes suggest that enrollment of such agreements with the royal courts may have been required, or at least strongly encouraged. The efficiency of requiring enrollment would certainly have facilitated royal oversight of private dealings involving land seisin and Hudson indicates that these types of out-of-court negotiations were being directed "through the proper channels; everything must be made official".⁹⁰ The presence of those documents in the royal records provides

⁸⁷ Helmholz, *supra* note 3 at 114; Yale, *supra* note 76. Article 9 of the Constitutions of Clarendon dealt with quarrels that arose between a clerk and a layman concerning any tenement which a clerk wished to attach to the church property but the layman to a lay fee.

⁸⁸ van Caenegem, *supra* note 42 at 304.

⁸⁹ van Caenegem, *supra* note 42 at 347.

⁹⁰ Hudson, *supra* note 1 at 142.

information on private land transactions that otherwise likely would not have survived. A review of those documents shows that those matters appeared to be handled in an orderly fashion and affairs involving Church land were dealt with in the same manner as those involving secular land.

Some of the writs were simply confirmations by Henry II of rights held by Church officers during the reign of his grandfather, Henry I, in relation to land. Such was the case in 349⁹¹, where a bishop's liberties and customs relating to land were confirmed as they were "deraigned (proven or not proven) in the court of Henry I". Other cases confirmed an abbey's or priory's tenure to land, as "deraigned by the oath of lawful men" or "as in the time of Henry I and as they were recognized by the lawful men of the hallmoot and wapentake" (see cases 357, 358, 369, 372, 379)⁹². Cases 375 and 376⁹³ dealt with lands held by nuns, who were required to show "by testimony of lawful men" or "as was recognized by lawful men of the county" that the land had come into their possession legally in the time of Henry I. These cases all demonstrate that during the reign of Henry II, matters touching Church land were handled in the king's court and all were 'deraigned' before groups of laymen, in the same manner as cases during the reign of Henry I. Further they substantiate Henry II's position that all grants made during the reign of the 'usurper' Stephen were invalid and his promise that he would restore the disinherited to the lands they had held on "the day King Henry I was alive and dead".⁹⁴

Case 47⁹⁵ deals with the return of a manor that had been given in free alms to a group of monks ("seised to the monks thereof with his sword") after it had subsequently been deforced from their possession by the grantor's family. Henry II ordered the malefactors to reseise the monks "without delay or argument and justly". In Case 47a⁹⁶, Henry II again wrote to the malefactors and stated that "I am astonished and greatly displeased that you have not done what I told you in my other writs concerning the manor, which the monks claim" and firmly ordered, on forfeiture to the king, execution of his command. Henry II often appears as an advocate and quite protective of the clergy regarding land

⁹¹ van Caenegem, *supra* note 42 at 305.

⁹² van Caenegem, *supra* note 42 at 309, 331, 333 and 342.

⁹³ van Caenegem, *supra* note 42 at 334 and 335.

⁹⁴ Graeme J. White, *Restoration and Reform, 1153-1165* (Cambridge: Cambridge University Press, 2000) at 77-78, 130 and 161; Hudson, *supra* note 1 at 127 and 187; Warren, *supra* note 2 at 95-96.

⁹⁵ R.C. van Caenegem, ed., *Royal Writs in England from the Conquest to Glanvill*, Selden Society, vol. 77 (London: Professional Books Limited, 1972) at 435.

⁹⁶ van Caenegem, *supra* note 95 at 435.

complaints in the cases, and is even seen to be somewhat possessive of the clergy, such as in case 92⁹⁷ where he called them “his” monks and ordered that “if his monks have been disseised unjustly” they be reseised without delay.

On the other hand, Henry II’s attitude might have just been a reflection of his opinion that he was still in control of the Church in England at that time, much in line with his great uncle, William II’s statement to Anselm: “What concern is it of yours? Aren’t the abbeys mine? You do what you like with your estates and can’t I do what I like with my abbeys?”⁹⁸ However, Queen Eleanor also showed personal concern for monks who complained to her that they had been unjustly disseised and she ordered the sheriff to enquire without delay because she would “in no way suffer that the monks lose unjustly anything that belongs to them” (case 93)⁹⁹. An alternative interpretation of the concerns of the king and queen is that they could simply be viewed as an extension of Henry II’s determination to provide equitable justice to all his subjects, whether layman or cleric.

Only 4 cases during the early years of Henry II’s reign dealt with the reseisin of an actual church. On the one hand, this would seem to be an issue that should clearly have fallen within the jurisdiction of the Church courts, because it involved a physical church being returned to a Church official. However, since the Church had no means to force a reluctant party to reseise a church, intervention by the secular authorities may have been welcomed or, perhaps, even sought out. Indeed, the promise of secular aid in cases where the episcopal jurisdiction did not have the ability to enforce right was a principle taken from William’s the Conqueror’s Ordinance of 1076, and it became part of the canon law during Henry II’s reign.¹⁰⁰ Case 363¹⁰¹ is an example of the king’s intervention being sought by monks to right a wrong done to them in the past. In that case, King Stephen had been misled by a lord to the effect that a church had been disseised by an abbot. The monarch ordered the abbot to return it. Upon Henry II’s accession to the throne, the monks complained to him of this misadventure. Henry II charged his justices to investigate the matter and ultimately decided the land should be

⁹⁷ van Caenegem, *supra* note 95 at 459.

⁹⁸ Bartlett, *supra* note 45 at 407.

⁹⁹ van Caenegem, *supra* note 95 at 460.

¹⁰⁰ R.H. Helmholz, “Canon Law and English Common Law”, 2 Selden Society Lectures (London: Selden Society, 1983) at 5-7; Helmholz, *supra* note 3 at 111 and 144.

¹⁰¹ van Caenegem, *supra* note 42 at 325.

returned to the abbot, ordering that the abbot “henceforth in no way be answerable to” the complainant.

Case 402¹⁰² is an account of Henry’s intervention on behalf of the Church to enforce a decision by the papal court. The report describes the cooperation and support offered by Henry II to the Church over a canonical matter. In that case Henry II ordered a prior and his canons to execute the judgment given against them by papal judges-delegate regarding the parochial right and the payment of an annual pension. The judges-delegate had been appointed by Pope Alexander III to hear the case in England between two groups of canons. A decision was made by the judges-delegate, and confirmed by the pope. But the Church had no way of enforcing its decision and apparently asked Henry’s help to compel the canons to comply with the verdict of the Church court; this case demonstrates Henry’s willingness to do so.

There are 5 cases that dealt with the presentment of an incumbent to a bishop for a benefice of a church (advowson). Three of the 5 cases involved two Church officials, the bishop of Norwich and the abbot of Hulme, and yet the matters were decided by Henry II in his secular court. And in two of these cases the matter had been recognized by groups of men that included laymen. In case 354¹⁰³, Henry II ordered the bishop of Norwich to cause the abbot of Hulme to have the advowson of the church of Ranworth, as was recognized by oath of lawful men. If the bishop did not do this, Henry stated that the archbishop of Canterbury “shall have it done”. Similarly, in case 355¹⁰⁴, Henry II ordered the bishop to let the abbot have the advowson of the churches of Caister as it was recognized by the oath of lawful men. Again, if the bishop did not do this, Henry stated that the archbishop of Canterbury “shall see to it that it is done”.

In case 383¹⁰⁵, however, Henry II ordered the bishop of Norwich “to do full right to the abbot of Hulme concerning the church of Repps”, which the abbot had deraigned in the bishop’s own court. In other words, Henry ordered the bishop to execute his own judgment, made in his own court over a matter of advowson, without a recognition having been held or any laymen involved. It was unusual that a question of advowson would be dealt with in an ecclesiastical court. So unusual that perhaps that was not

¹⁰² van Caenegem, *supra* note 42 at 361.

¹⁰³ van Caenegem, *supra* note 42 at 307.

¹⁰⁴ van Caenegem, *supra* note 42 at 308.

¹⁰⁵ van Caenegem, *supra* note 42 at 344.

what was happening in this case. Instead, it might have been a situation where the bishop was functioning as a land-holding secular lord determining a matter touching his own land in his own seigniorial court, rather than as an official of the Church dealing with a matter touching Church land.

During the early part of Henry II's reign it was still common for bishops to hold land privately, in their own right; the Church had not been fully successful in discouraging their officials from this type of conduct up to that point. Indeed, in the eyes of the king, the senior Church officials held their baronies and estates from him. Further, Hudson has noted that a wide range of cases involving ecclesiastical lands or privileges took place in either the royal courts or courts of senior ecclesiasts in their role as lords, at that time. Although he admitted that in the latter case, there might have been a large ecclesiastical element, he believed these sessions could be distinguished from sittings of diocesan courts. He also stated that, overall, there was little evidence of conflict, much more of cooperation between ecclesiastical and lay courts during that period.¹⁰⁶ In any event, whether or not the bishop was acting in his capacity as a secular baron, what is clear from the cases is that Henry II still maintained the final word by his royal writ to the bishop, as he believed he should have at that time, whether dealing with secular matters as the King of England or ecclesiastical matters as the head of the English Church.

It is also interesting that in all three cases, Henry stated that if the bishop did not execute his order, the archbishop of Canterbury would. This is in contrast to most secular cases and many ecclesiastical cases, as well, where Henry II would have ordered a secular official, such as a sheriff, earl or baron, to execute his orders if the addressee did not. This was perhaps an acknowledgment/concession in these particular cases, that since the matters involved senior officials of the Church, the ultimate execution of Henry's command should fall to his archbishop. But make no mistake, the final decision still lay with Henry II, and his authority over the English Church had increased by this time such that he could order his archbishop to do his bidding, even in secular matters.

Case 365¹⁰⁷ is a memorandum of an inquest that was held by command of Henry II into whether Hugh the dean held the advowson of the church of St. Peter of Derby. Twenty-four recognitors – a mix of 5 priests, 4 knights, 12 burgess and other men - asserted

¹⁰⁶ Bartlett, *supra* note 45 at 407; Hudson, *supra* note 1 at 50.

¹⁰⁷ van Caenegem, *supra* note 42 at 328.

under oath that the church was founded and built on the 'patrimony' of Hugh and his predecessors; that is, Hugh's ancestors and family built and supported it. As this case shows, Church offices were still being inherited by family members and kinship still played a strong role in these matters; the Church had not yet been completely successful in breaking these traditional familial ties. In addition, this case, and many of the cases referred to above, show how normal it was for a mix of both clergy and laymen to be involved in determining secular legal matters during the early years of Henry II's reign, even those that touched the Church.

Disputes over advowson were not always between two members of the Church. Case 395¹⁰⁸ involves a complaint made to the archbishop of Canterbury (Theobald) by the incumbent of the church of Hinton who was ousted by an earl. After many threats from the archbishop, the earl finally consented to the restitution of the church on the condition that he might be given permission to bring a suit in the archbishop's court to determine the question of right. During the progress of that action the earl produced a writ from the king instructing the archbishop to give the earl justice in respect of the advowson of the church or to restore the earl's clerk to the church which he (the earl's clerk) had been deprived of against the king's edict. The incumbent cleric, in turn, appealed to the papal court, whereupon the earl, claiming the case and the church were not worth the expense that he would incur taking the case to that court, withdrew the suit. This case was fought between a layman (the earl) and a cleric (the incumbent), using almost every judicial avenue available to them: royal court, local ecclesiastical court and apostolic see, and placed the authority of the king and that of the pope in direct opposition. In this account it appears the authority of the pope prevailed - or perhaps it really was the exorbitant cost of taking a case before the papal court.

Case 395 is unusual in that it appears that the threat of drawing the case into the papal court ended the matter, even though the king's assistance had been invoked by the earl. It is a classic case of trumping one another's imperial power. Of course we do not know whether this was actually the end of the matter or not; perhaps Henry II trumped the situation again, but no documents exist to that effect. In 5 other cases that were appealed to the papal court during this early period, (cases 360, 396, 402, 405, 408)¹⁰⁹,

¹⁰⁸ van Caenegem, *supra* note 42 at 353.

¹⁰⁹ van Caenegem, *supra* note 42 at 310, 354, 361, 368 and 387.

however, Henry II ensured that affairs which he claimed were within his competence were ultimately decided in his court.

Case 360 is a fascinating example of the exercise of the king's authority over matters and personnel of the English Church. A portion of the case was briefly summarized at the opening of this thesis; it involved a conflict between the abbot of Battle Abbey and the bishop of Chichester over privileges and exemptions given to the Abbey by William the Conqueror and confirmed in charters by William II, Henry I and Henry II. Upon reviewing each of the charters presented to him in his court by the abbot, Henry II praised them and vowed to protect and preserve the privileges so given to Battle Abbey, as the abbot had hoped he would. It was then that the king's chancellor, Thomas Becket, indicated to the bishop of Chichester it was his turn to make a rejoinder and the bishop proceeded to lecture the king on the separation of power that governed the world – spiritual and temporal. The bishop's tirade ended by claiming that it was impossible for any layman, indeed even for a king, to give ecclesiastical privileges and exemptions to churches. And it was also impossible for those arrogated to them by laymen to be valid except by the permission and confirmation of the pope.

Eventually Henry grew tired of the bishop's lecture and he accused the bishop of attacking the royal prerogatives given to him by God. He reminded the bishop of his fealty and binding oath to the king and commanded that the bishop undergo legal judgment for his presumptuous words against the crown. The bishop realized everyone in the court was against him and changed his tone, finally proceeding to deal with the real matter at hand by listing his grievances against the abbot, which amounted to the abbot not giving the bishop the due respect and canonical obedience required by Church protocol. The bishop then complained that the privileges given to the abbey were too excessive. Henry, again, took exception to the bishop's statements, since it was Henry II's ancestors who had granted them and, therefore, he stated, this matter was no longer an issue of the conduct of the abbot, but was now a matter for Henry to decide because it was he who had to "defend his own personal and royal business".

But the final blow came when Henry discovered that the bishop had procured a letter from the pope which had been served on the abbot of Battle Abbey ordering him to attend at Chichester to hear the commands of the Lord Pope regarding the same matter. Henry asked the bishop if he had procured the letter, and although the bishop denied it,

Henry did not believe him. Realizing the serious trouble the bishop was in, the archbishop of Canterbury (Theobald) asked Henry to command that this matter be settled by the judicial method of the Church, but Henry said, “No”, he would put an end to the matter himself. Henry then left the chapter house and asked the bishop to be sent for. After a period of time he asked for the abbot and his monks to be sent for as well, and at a nod from Henry the bishop proceeded to make a statement within everyone’s hearing. He quitclaimed and acknowledged as free from all claims and charges Battle Abbey, over which he neither should nor could have any rights, and he claimed he made his statement “voluntarily”, not under compulsion (likely, the denial of ‘compulsion’ merely affirms that he had received some ‘coaxing’ from Henry II).

This case shows the conflicted position English bishops were in having pledged an oath of fealty to the king on the one hand, and having the Church demand their loyalty on the other. It also demonstrates the difficulty the Church and the State were having in determining where the king’s royal prerogative ended and the Church’s spiritual prerogative began, and what impact that dilemma could have on the royal court. That Henry II did not appreciate one of his bishops obtaining a papal summons was very apparent in this case. The reason for his displeasure was that the bishop was trying to remove the parties from Henry’s jurisdiction and obtain a resolution from an authority external to the kingdom (the papal court) on a matter that had arisen within Henry II’s realm. That was a direct challenge to Henry’s monarchical authority within his own kingdom; no wonder Henry was not amused.

Case 396¹¹⁰ also reveals Henry’s displeasure at the prospect of papal intervention when an English abbot sent a message to Pope Alexander III complaining of irreparable damage to his woods. In response a mandate was received from the pope addressed to the archbishop of Canterbury and the bishop of Chichester ordering them to take measures to have the woods restored to the abbot, including excommunicating the offender, if necessary. The case states that “having inspected this letter the bishops were full of trepidation”; clearly Henry II’s bishops knew his mind about involving the pope in matters concerning his realm. Henry II’s determination not to have the pope involved was eventually spelled out in the 8th article of the Constitutions of Clarendon of 1164:

¹¹⁰ van Caenegem, *supra* note 42 at 357.

8. Concerning appeals, if they shall arise, from the archdean they shall proceed to the bishop, from the bishop to the archbishop. And if the archbishop shall fail to render justice, they must come finally to the lord king, in order that by his command the controversy may be terminated in the court of the archbishop, so that it shall not proceed further without the consent of the lord king.¹¹¹

However, when it came to areas that Henry II recognized as being within the traditional jurisdiction of the Church, he was quite respectful, such as their jurisdiction over marital and family matters. Case 408¹¹² dealt with questions of the inheritance of land, annulment of a marriage and the subsequent illegitimacy of a daughter. It involved a challenge to the ability of a woman to inherit land on the basis of her illegitimacy, and, therefore had rightly been initiated in the king's court by a royal writ. The plaintiff (the woman's cousin and also in line for the inheritance) alleged the illegitimacy due to the annulment of her parents' marriage. The question of the legitimacy of the marriage had initially arisen 20 years prior to the commencement of the case in question, and at that time Henry of Blois (then bishop of Winchester) had consulted with Pope Innocent II and received a rescript from the pope stating the marriage was sanctified and lawful. Upon the launching of the suit in case 408, the king's justices revisited Innocent's II determination and then asked the archbishop of Canterbury (Theobald) to determine the question of the woman's legitimacy. Theobald, in turn, referred that question to Pope Alexander III and the pope appointed papal judges-delegate in England to investigate. Upon receiving the report from the judges-delegate, Alexander III declared, in keeping with the early pronouncement of Innocent II, that the daughter (now a woman) was a legitimate child of that union. On the basis of the pope's pronouncement, the case resumed in the royal court and the lands were adjudicated by Henry II to the daughter.

Case 408 is an example of the cooperation that was quite common between the Church and the secular judicial system during Henry II's reign. As R.H. Helmholz has often stated, "Even during the Middle Ages when the power and independence of the Church were great, the history of legal relations between the Church and State ought more often to be seen more in terms of mutual assistance than in terms of struggle".¹¹³ Jane Sayers suggested this earlier when she admitted that it was "impossible to deny that there was some clash between Church and lay courts in England during Henry II's reign as to the relative competence of tribunals That it was to some degree a sincere

¹¹¹ Yale, *supra* note 76.

¹¹² van Caenegem, *supra* note 42 at 387.

¹¹³ R.H. Helmholz, *Canon Law and the Law of England* (London: The Hambledon Press, 1987) at 5.

attempt to reach a compromise over disputed points of jurisdiction and competence has perhaps been overlooked".¹¹⁴

2. Henry and Thomas

Despite the evidence of cooperation between the Church and State, this was also the time when Henry II and Thomas Becket began their infamous estrangement. The growing power of the king in England, an aggressive and confident Church in Rome, and a difference in perspective over judicial jurisdiction combined to cause a mounting tension to develop between the king and the Church.¹¹⁵ Although the conflict may have been over political-legal authority, the outcome was driven by the robust personalities of the two principle players - Henry II and his archbishop of Canterbury, Thomas Becket, and it came to a head in the well-known falling-out between the two. The consequence of Henry II and Thomas' quarrel, sealed by Becket's fate as a martyr, was the hardening of the papal position of its authority over criminous clerks; from then on the Church would claim jurisdiction through a process that became known as 'benefit of clergy'.¹¹⁶

Henry II appointed his chancellor and good friend, Thomas Becket, archbishop of Canterbury on June 3, 1162. Together, Henry had expected that he and Thomas would carry out his policy of resisting the claims of the papacy to expanding jurisdiction in England and re-establish the king's supremacy over the English Church. Surprisingly, however, as soon as Thomas was consecrated as archbishop he 'put off the old man and put on the new', taking on a new spirituality, symbolized by his adoption of the monastic garb and a hair shirt.¹¹⁷ Within weeks, Thomas had resigned his position as chancellor and become an ardent supporter of the independence of the Church from

¹¹⁴ Sayers, *supra* note 14 at 164-165.

¹¹⁵ R.H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Court Christian", (1976) 60 Minnesota Law Review 1011 at 1011-1012; W.R. Jones, "Relations of the Two Jurisdictions: Conflict and Cooperation in England During the Thirteenth and Fourteenth Centuries" in William M. Bowsky, ed., *Studies in Medieval and Renaissance History* (Lincoln: University of Nebraska Press, 1970) vol. VII, 79 at 79-80; Flahiff, *supra* note 1 at 261 and 285-289. The State's position on judicial jurisdiction was that it depended on the matter under dispute, not the status of the litigants. If Church law was involved in the dispute, the case would be dealt with in the spiritual forum; all other pleas lay in the temporal realm and would go through the traditional secular processes. The canon law, however, looked to the status of the litigants to determine the jurisdictional competence of a case, a perspective that encompassed a much larger jurisdiction than the temporal authorities were willing to concede.

¹¹⁶ Berman, *supra* note 1 at 259-260; Helmholz, *supra* note 3 at 117 and 508-514. Benefit of clergy or *privilegium fori* was the right enjoyed by all clerics (and subsequently enlarged to anyone who could make a show of literacy) to escape conviction for felony before the common-law courts.

¹¹⁷ Michael Staunton, *The Lives of Thomas Becket* (Manchester: Manchester University Press, 2001) at 14.

secular control.¹¹⁸ Henry had lost Thomas' support and would soon lose his loyalty and his friendship.

Less than 1 year after Thomas' consecration, a notation in a case entry indicates that Henry II and Thomas were having their first public disagreement. Case 409¹¹⁹ begins: "The first estrangement between the king and St. Thomas occurred because of some cleric who was said to have slept with the daughter of some honest man ... and to have killed the father because of her." Henry wanted the cleric to be examined by a lay court and judgment passed to be on him since this was a criminal matter that had occurred within his realm, and therefore, was within his judicial authority. The archbishop of Canterbury refused and let the cleric be kept in the bishop's custody, so that he would not be given over to the king's justice. One can only wonder at Henry's reaction to Thomas' refusal.

A second notation of a falling out between the two is found in case 410¹²⁰, which begins: "Another [estrangement] occurred because of a cleric who had stolen a silver chalice in a church of the said archbishop". After the cleric had been arrested, Henry II wanted him to be adjudicated by secular judgment, but the archbishop refused and caused him to be dismissed of his orders by judgment of the Church. In order to try to placate Henry, however, Thomas also had the thief branded (which is a surprising gesture on Thomas' part, since the Church condemned blood sanctions, including branding, mutilation or execution¹²¹).

Case 411¹²² offers up an account of the increasing friction between Henry II and Thomas. It was apparently a case that caught the attention of both the king's court and the Church since it was narrated by eight different scribes (secular and ecclesiastic) - one version even took the form of a poem! Each scribe had his own take on the matter, either siding with Henry II or Thomas. In this case, a canon purged himself in the court of the bishop of Lincoln over an accusation of killing a knight. One version begins: "Not long afterwards another violent quarrel broke out between [Henry II and Thomas Becket] because of a canon ... who was accused by some people of killing a knight". One of

¹¹⁸ Berman, *supra* note 1 at 256.

¹¹⁹ van Caenegem, *supra* note 42 at 404.

¹²⁰ van Caenegem, *supra* note 42 at 405.

¹²¹ Brundage, *supra* note 1 at 92; Helmholz, *supra* note 3 at 619.

¹²² van Caenegem, *supra* note 42 at 405.

Henry's judges in eyre strove to reopen the case against him; the canon violently and abusively rejected the jurisdiction of the lay court. The justice complained to the king and: "Upon hearing this the king became furious and, swearing awfully by God's eyes as was his custom, maintained that it was as if the abuse [the canon] had heaped on his knight had been heaped upon himself". The king ordered the canon be brought to justice in his court without delay, but the archbishop, who was present in Henry II's court, said: "This will certainly not be done, for laymen cannot be judges of clerics". Thomas insisted that justice in this matter would be done by the authority of the Church and he had the canon tried in his own court on a charge of 'insulting behavior'. Upon hearing the charge and the final decision of the bishops, the king, thinking they had been too lenient, required the bishops to give oath that they had given a just judgment and had not spared the canon because he was a cleric. The bishops did so and Henry "did not know what to do or to whom to turn to in fury".

Case 419¹²³ is a particularly good depiction of the discord between Henry II and Thomas over the issue of the judgment of criminous clerics. The account begins by noting that "the king is molesting the Church and ecclesiastical men even more vehemently than usual and was resisted by" (as the scribe later calls Thomas) the venerable archbishop. In this case several clerics were arrested and put in prison after they were found guilty by royal officials of various crimes, including theft and homicide. The prisoners were claimed by the archbishop, who forbade lay justices to pass judgment on the clerics, as he was prepared to do justice and pronounce judgment against them in the Church court, in accordance with the canons and decrees. Thomas asserted that clerics held a special status in the eyes of God and must be kept apart from secular obligations; therefore, clerics must be subject to a different law than ordinary men and should not be summoned before a secular court.

In general, Henry II agreed with the Church's position on the special status of clerics, with the exception of criminous clerks. In that regard he took a different view: peace and order were the purview of the crown and, therefore, Henry II wanted the status and judicial jurisdiction of criminous clerics to be determined in his court in order to bring clerical crime under royal control, in line with all other criminal matters. However, "finally, compelled by the force of reason" the king agreed to return the clerics to the archbishop on the condition that they be handed over for sentencing by the secular court after their

¹²³ van Caenegem, *supra* note 42 at 422.

offices had been degraded by the Church. The archbishop objected because in that way, he argued, the clerics would have been judged and punished twice; although he did concede that “if however they were caught afterwards committing crimes, then it would be no concern of his by what judgment they were condemned”.

It appears from the cases involving conflict over the respective jurisdictions claimed by Henry II and Thomas, that Henry was becoming more and more frustrated with the encroachment of the Church on what he considered his royal prerogative and by the defiance of his archbishop. In response to those events, Henry II held a council at his palace at Clarendon in January 1164, where he ordered ‘the oldest and wisest of his magnates’ to consult with clerks and write down the laws and customs of his grandfather’s reign; the result was the Constitutions of Clarendon, which he presented to his nobles and bishops.¹²⁴ In its sixteen articles, he sought to increase his authority over the English Church, lessen clerical independence and weaken the connection of the English Church with Rome.¹²⁵ How effective his Constitutions were, may be seen in the cases from the later years of Henry II’s reign (1165-1189).

In the closing months of 1164, matters between Henry and Thomas reached a head. The rift between the two grew as the archbishop sought to extend the rights of his archbishopric and the Church. Finally, when Becket refused to formally sign off on the documents containing the Constitutions, Henry summoned him to appear before a great council at Northampton Castle on October 8th, 1164. Thomas was to answer allegations of contempt of royal authority and malfeasance in the Chancellor’s office.¹²⁶ Case 420¹²⁷ is an account of that event. Henry’s summons resulted from a series of proceedings Thomas had initiated at the start of his prelacy against several magnates over lands which the Church had been deprived of through the negligence of his predecessors. However, he placed some of the lands he had reclaimed into his own demesne without recourse to a royal judge. One of the magnates whose land he had reclaimed procured a royal writ and attended at the archbishop’s own court for justice. He later alleged that

¹²⁴ Berman, *supra* note 1 at 256; Chibnall, *supra* note 4 at 204; Hudson, *supra* note 1 at 129; White, *supra* note 94 at 196.

¹²⁵ Berman, *supra* note 1 at 256; Helmholz, *supra* note 3 at 115-116; Yale, *supra* note 76.

¹²⁶ van Caenegem, *supra* note 42 at 433.

¹²⁷ van Caenegem, *supra* note 42 at 423.

the archbishop's court denied him justice and he brought a writ of summons ordering the archbishop to answer his charge in his lord, the king's court.¹²⁸

On the day of summons the archbishop failed to appear, sending in his stead four knights and the sheriff of Kent. The king was indignant that the archbishop had not appeared in person to his summons and set another date for Thomas' appearance. Thomas arrived on the prescribed day, but the case was held over because the complainant was in London in the king's service. As a result, the king told Thomas to return the following morning. The next morning, however, Thomas failed to appear or properly excuse himself, again. This was the second time he had failed to attend the king's summons and he was immediately charged with "*lese-majesty*" [*sic*].¹²⁹ The king demanded judgment on the allegations against Thomas and "out of reverence for the royal majesty and because of the strict obligation created by the liege homage which the archbishop had done to the king and because of the fealty and observance of his worldly honour, which he had sworn to him", Thomas submitted to Henry's judgment. He was then condemned to the loss of all his chattels in the king's mercy by "all the bishops, earls and barons of England". The bishop of Winchester pronounced the judgment on Thomas, who indicated he accepted it.

Case 421 is a continuation of the trial of Thomas Becket and begins, "... he [Henry II] immediately sent for [the archbishop] to afflict him even more". Henry II was asking Thomas to account for alleged discrepancies during his tenure as Henry's chancellor that been brought to his attention. Thomas, realizing that "a grave threat of ruin hung over him" (he had been informed by people familiar with the king that if he attended the king's court he would likely be killed or put in prison), pled illness and did not appear that

¹²⁸ Hudson, *supra* note 1 at 128. The magnate's conduct is in line with the decree of Henry II's (c. early 1160's) "If anyone pleads about land in the court of his lord, he should come with his supporters on the first appointed day, and if there is any delay in doing him full justice, he should go to the justice and make his complaint. Then he shall return to the lord's court with two oath helpers and swear three-handed that the court has delayed in doing him full justice. By that oath, whether false or true, he shall be able to go to the court of the supreme lord [*seignur suverain, i.e. the king*]".

¹²⁹ Hudson, *supra* note 1 at 161; van Caenegem, *supra* note 42 at 426. In the account of this case by William Fitzstephen, he states that on the day that Thomas received the second summons to appear before Henry II, all the bishops, earls and barons of England were present and the archbishop was accused of *lese-majesty* [*sic*] against the royal crown because he had failed to appear or properly excuse himself after the king had summoned him the first time. The king demanded a judgment and all in attendance said that Thomas should be condemned to the loss of all his chattels in the king's mercy. According to Glanvill, however, '*lese-majeste*', namely the killing or betrayal of the lord king or of the kingdom or army should have been punishable by death or cutting off of limbs.

day. The next morning when Thomas entered Henry's court, he was chided by the bishop of London for arming himself with his cross and the archbishop of York attacked him for "coming into court armed with a cross" and added that "the king had a sharper sword". Thomas replied: "If the king's sword hits bodies carnally, my sword hits spiritually and sends the soul to hell". His bishops then counseled him to submit to the king, but Thomas refused. Thomas then criticized the bishops for having participated in his judgment in the king's secular court and put a prohibition on them from taking any further part in the judgment against him. They protested that he had placed them "in a tight corner" by his prohibition – "between a hammer and anvil" – since if they disobeyed him they were acting against the Church and if they breached their oath of fidelity to the king they were caught by the Constitutions and the king's anger.

Thomas' defence in the king's court failed and the barons gave judgment that he should be arrested and put in prison on charges of perjury and treason. Thomas refused to hear the judgment, claiming that he had appealed to the pope. While the barons returned to report Thomas' response to Henry, Thomas escaped and fled to France. Case 420 was recorded by eight separate scribes and Case 421 by three, and both are very lengthy compared to most of the other cases from Henry II's reign, suggesting this was an important event. Each scribe recorded his own version of the affair; some were more sympathetic to Thomas than others. But all made it clear in their accounts that Henry had targeted Thomas for either prison or death and he was being encouraged along that path not only by the majority of his secular barons, but by a large number of bishops, as well, who all shouted out in court that Thomas was a traitor.

Thomas had clearly made a great many enemies championing Church reform. But the wording of these two cases suggests that there was more to the tension that had grown between Henry and Thomas than a struggle between two institutions; there is a flavor of a personal power struggle, especially in the conduct of Thomas who ignored three summons from the King of England - the king to whom he had taken an oath of fealty. Thomas' actions provoked a need for Henry to exert authority over him - demanding Thomas' attendance when he summoned him - in case any of his other barons assumed they too could ignore his royal commands. Henry II was still in the process of re-establishing monarchical authority and getting his kingdom under control again. His response was not just directed at the Church's reform or Thomas' defiance; it was the response of a king who was struggling to establish a system of law and governance

within his kingdom, over all of his subjects, be they clergy or laity. He could not afford to condone 'treasonous' behavior, especially not from an archbishop he had hand-picked.

When comparing this event and other cases involving Thomas as archbishop with the rest of the cases from Henry's reign, the cases involving Thomas appear to be an anomaly; they convey a greater sense of conflict and tension than any of the others. There is even a difference in the tenor of cases where Henry and Thomas confronted one another face to face over the issue of jurisdiction, compared to those where they were indirectly involved in the matter. That can be appreciated when reviewing six cases involving the judgment of criminous clerics. In four of the cases, (409, 410, 411 and 419)¹³⁰ Henry II was the person demanding the criminous cleric be examined by the judgment of a lay court and Thomas refused to surrender the clerics to judgment by Henry II or his justices, in Henry's presence; instead the clerics were judged and sanctioned in the ecclesiastical court. In contrast, in case 416¹³¹, when a priest was accused of manslaughter, it was Henry II's official's "sharply insisting" that one of Thomas' bishops should do justice. The reports of each of these cases, except for 416, noted the estrangement between Henry II and Thomas (409, 410, 411, and 419) and recorded the angry words between them that ultimately led to Thomas' refusal to have the clerics judged by Henry's secular justices. Where the involvement of Henry and Thomas was not direct, in case 416, the relationship between the king's officials and the bishop, although obviously brusque, appears to have been less emotional and personal. And Thomas' response to the message from his bishop that the priest had failed his purgation was to immediately punish the priest by depriving him of every ecclesiastic benefice and to dismiss and shut him up forever in a monastery to lead a perpetual life of the strictest penance; possibly the harshest sentence available from the Church (since the Church did not condone execution or mutilation). The sanction given by Thomas in this case was far more severe than in any of the other four cases, yet the tone of the interaction between the secular authorities and the Church officials was more impersonal and less subjective, and there is no mention in the case reports of any anger or emotion on the part of Thomas when he sentenced the priest.

¹³⁰ van Caenegem, *supra* note 42 at 404, 405 and 422.

¹³¹ van Caenegem, *supra* note 42 at 419.

Case 413¹³² is the sixth case dealing with criminous clerks and neither Henry II nor Thomas was involved. It consists of a letter from Bishop Gilbert Foliot to his 'friend' Elias de Say, and although the tone may be considered somewhat derisive, it does not have near the intensity or the angst that was exhibited between Henry II and Thomas:

“You know, dearest, how constantly you have promised to me and the Church around you the love, honour and peace, which you were going to observe in such a way that we would hear no complaint about you and we would have no need to write to you anything but what is peaceful and friendly. Many things could greatly astound me, but I am much more astounded to hear that you subject to the judgment of your court a priest of ours and a dean and that you claim against the Church this power which kings and emperors, in spite of much sweat and labour, have not been able to obtain against her until this day. We therefore order you, dearest, that you shall let us judge our clerics”

However, it does clearly send the message that clerics must be judged by the Church alone, and goes so far as to 'order' de Say to let the Church judge its clerics. So the message is the same as Thomas' but the emotion is much more subdued. Although this sample of cases is small, they do suggest that the height to which the Church/State conflict rose during Thomas' term as archbishop, was as much a clash of personalities as it was a clash of institutions, as Sayers and Helmholtz have suggested.

The general consensus of legal historians is that Becket's martyrdom resulted in the legal jurisdiction over criminous clerks ultimately vesting with the Church.¹³³ However, historians do not appear to agree on why the events surrounding that occurrence unfolded in the manner they did, particularly the two key questions: Why Becket choose to take a strong stand on that particular issue; and, why Henry II eventually conceded the jurisdiction to the Church after Becket's murder?

Article 3 of the Constitutions of Clarendon, which determined how clerics accused of secular crimes should be tried – by Church or State - was a reference to the issue Thomas had fixed on in his defense of freedom of the Church and ecclesiastical liberty during his term as archbishop of Canterbury. In reviewing the Constitutions, however, there are other articles that should have been at least as, if not more, contentious to the

¹³² van Caenegem, *supra* note 42 at 413.

¹³³ C.R. Cheney, "Punishment of Felonious Clerks" (1936) 51 *English Historical Review* 215 at 215; Charles Duggan, "The Becket Dispute and the Criminous Clerks" (1962) 35 *Bulletin of the Institute of Historical Research* at 1-2; Baker, *supra* note 46 at 128; Bartlett, *supra* note 45 at 408; Berman, *supra* note 1 at 260; Cook, *supra* note 12 at 203; Frankforter, *supra* note 57 at 255; Gillingham, *supra* note 45 at 27-28; Helmholtz, *supra* note 3 at 117.

Church. For example, article 8 would have made Henry II supreme arbiter of canon law in England, but Thomas paid no special attention to that provision, or to the nine other articles of the Constitutions that violated canon law.¹³⁴

So why did Thomas set his focus on article 3? Was that article of particular concern to the Pope? Apparently not. When the Constitutions were presented to Pope Alexander III for confirmation, he assented to a few in order to show some tolerance, but condemned the rest (including article 3) as contrary to the canons and the liberty of the Church. When doing so, however, Alexander did not single out article 3 as being more contentious than any of the other articles.¹³⁵ In fact, when Thomas fled to France in 1164 and appealed his case to Alexander III, he was instructed by the pope to adopt a more conciliatory line with Henry II over the matter.¹³⁶ Alexander had more pressing problems to deal with at that time. The powerful Holy Roman Emperor Frederick I (Barbarossa) (r.1152-1190) had renounced his allegiance to Alexander and chosen his own claimant to the papal throne. (The matters at issue between the emperor and the pope sound quite familiar: the legal relationship between the emperor and the pope and the question of the pope's right to intervene in the Empire's affairs.) Consequently, Alexander did not want to alienate another powerful secular leader and so he counseled compromise to Thomas.¹³⁷

For some reason, however, judicial jurisdiction over criminous clerics had taken on an exaggerated importance to Thomas; it had become his litmus test for the Church's liberty from royal control. As a result, notwithstanding the lack of support from his pope, Thomas continued to press that issue to his own eventual ruin. Why? There are several possible reasons ranging from self-promotion to the defense of the Church's jurisdiction and its canons. The Church had fought hard and long for recognition as an institution separate from secular control, with its own systems of governance and law, and the right to judge and punish its clergy.¹³⁸ In exercising that judicial jurisdiction, the Church had instructed its officers to follow the canons, which prohibited them from being involved in judgments imposing blood punishments (e.g., death sentences, mutilation, branding, etc.) and condemned the shedding of human blood by clerics, even in a just cause, upon

¹³⁴ Berman, *supra* note 1 at 257.

¹³⁵ Duggan, *supra* note 133 at 1-2; Helmholz, *supra* note 3 at 144.

¹³⁶ Gillingham, *supra* note 45 at 27.

¹³⁷ Cook, *supra* note 12 at 202-203.

¹³⁸ Michael Prestwich, *Plantagenet England* (Oxford: Oxford University Press, 2005) at 70.

threat of damnation to their mortal souls. The prohibition and threat of damnation can be found in the writings of many ecclesiastical authors from the early and High Middle Ages, who declared that bloodshed was forbidden because man was made in the image of God; “Whosoever spills human blood, His blood is spilled as well: For man is made in the image of God”.¹³⁹

In addition, unlike secular judges and soldiers, who killed pursuant to the law and, therefore, according to the Church canons, were justified because “it is the law that kills” in those situations, the same act barred a man from holding orders in the Church. As Raymond de Penafort, a leading canon lawyer of the early 13th century summed it up: secular justice involved killing – killing that was justified because it was not driven by passion and because it followed the correct procedures, but which nevertheless rendered a cleric unfit for holy orders. The prohibition against the shedding of human blood by clerics (which had been iterated several times in the Church canons since the early years of Christianity) was eventually restated and formally pronounced in the eighteenth canon of the Fourth Lateran Council of 1215, and became known as “Judgments of Blood”. That was also the canon that preached the abolition of the judicial ordeal: “No cleric may pronounce a sentence of death or execute such a sentence, or be present at its execution . . . Nor may any cleric write or dictate letters destined for the execution of such a sentence . . . let this matter be committed to laymen and not to clerics.” That same canon prohibited the participation by clergy in the practice of mutilation, trial by fire or water, or trial by combat.¹⁴⁰

The Church’s prohibition on blood judgments, as well as the papacy’s determination to expand its judicial jurisdiction throughout Europe, likely provided strong encouragement to Thomas in his efforts to extend the Church’s reach in the judicial realm of England. Championing the Church’s claim over all Church matters that arose in England would have helped Thomas achieve that goal. In England, in particular, however, the Church’s contention ran contrary to the royal courts’ claim to all concerns that arose from a breach of the king’s peace; that is, matters of a criminal nature. Contesting the royal court’s position, Thomas argued, based on the canons of the Church, that the right to try clerics accused of secular crimes lay with the Church (i.e., as an institution separate from

¹³⁹ James Q. Whitman, *The Origins of Reasonable Doubt* (New Haven: Yale University Press, 2008) at 28, 29, 34, 36, 41 and 43.

¹⁴⁰ Whitman, *supra* note 139 at 47-49.

secular states, the Church had the right to judge and punish the members of its clergy, and judgment and punishment involving the clergy should not involve blood shedding or mutilation). Therefore, trials of clerics accused of secular crimes should be dealt with by the ecclesiastical courts, not the royal courts.

Had Thomas been successful in his efforts to claim ecclesiastical authority over all criminal matters involving clerics, the jurisdiction of Church courts would, at the very least, have been preserved, and more likely have expanded in England due to the prohibition on blood judgments. The opportunity to escape the death penalty, mutilation or branding would have attracted criminal defendants and felons to the ecclesiastical courts, at the expense of the royal courts. In addition, Thomas' position as archbishop of Canterbury would become the ultimate judge of all Church matters in England, over a growing judicial jurisdiction; a status that would have been extremely attractive to any ambitious man. An opportunity to set an expansion of the Church's jurisdiction in motion, and ultimately to vault the status of the position of archbishop of Canterbury, could certainly have motivated Thomas to champion the cause of criminous clerics.

As an aside to the potential political results, had Thomas been successful in his undertaking, he would have also ensured that neither his position as a member of the clergy nor his own mortal soul would be put in jeopardy since he would not have been involved in the pronouncement of blood judgments in his role as the ultimate ecclesiastical judge in England. Although we may not consider these matters to be strong incentives today, a senior position in the Church at that time could be very lucrative, and the damnation of your soul in the High Middle Ages was a matter of extreme concern to the promise of an afterlife. Issues of conscience, power, money and the disposition of the soul after death, therefore, likely all played a factor in Thomas' actions and in his decision to pursue the matter of criminous clerks.

Turning to the question of Henry II's concession to the Church of the judicial jurisdiction over criminous clerics following Becket's murder, no one can enter Henry II's mind to discern the deliberations or reasoning behind his actions. There are, however, some historical indicators that suggest possible explanations arising from Henry's efforts to bring order to his kingdom and to deal with the rampant lawlessness following Stephen's reign, as well as from the Church's response to the measures he took, particularly the royal claim to jurisdiction over all English subjects, including all members of the clergy,

accused of a breach of the king's peace. From the Church's perspective Henry's initiatives undermined the development of the canon law and the associated canonical legal procedures, as well as the jurisdiction of the ecclesiastical courts claimed by the Church as part of its reform measures, particularly the claim to jurisdiction over all clergy and their conduct.

Establishing the boundaries of the respective jurisdictions of the Church and the king concerned both Henry II and Thomas greatly, as evidenced by Henry's crafting of the Constitutions and Thomas' reaction to them. But time and time again, Western European and Church leaders had demonstrated that a legal solution (including competition and compromise) could be found to resolve questions of ecclesiastical and secular control over matters where there were conflicting views. That belief was reflected in Pope Alexander III's counseling for a conciliatory approach and compromise on Thomas' part in his dealings with Henry. That was what was expected.¹⁴¹ What was not expected was a resort to violence by a king's knights and an archbishop's murder in his own Cathedral. That went completely contrary to the custom that had evolved for dealing with such matters. And an almost universal revulsion at the murder swept through Western Europe, compelling a response from Henry.¹⁴² As Cheney stated, "In more than one respect the murder of Thomas Becket disturbed the gradual adjustment of the relations of Church and State".¹⁴³

Henry's response to Thomas' death (his acts of penance: walking barefoot into Canterbury and allowing the monks to whip him) appeared to exhibit remorse for his role in the demise of his former friend. But it was the reverberations from Henry's own subjects, the Church, its pope and the rest of Latin Christendom, including secular leaders, which were reflected in the number of pilgrimages to the site of the murder, the number of miracles that began to be attributed to Thomas, the Church's condemnation of Henry and the speed at which Thomas was made a saint (a little over 2 years from the time of his death) that forced Henry's hand, and, as Helmholz stated, "finally wrung a concession from a penitent king".¹⁴⁴ In 1172, Henry renounced 'those provisions of the

¹⁴¹ Berman, *supra* note 1 at 268.

¹⁴² Berman, *supra* note 1 at 268, Gillingham, *supra* note 45 at 27-28; Plucknett, *supra* note 61 at 439.

¹⁴³ Cheney, *supra* note 133 at 215.

¹⁴⁴ Helmholz, *supra* note 3 at 315; Frankforter, *supra* note 57 at 255; Staunton, *supra* note 117 at 195 and 217.

Constitutions that were offensive to the papacy' - the most well-known being the right of the secular courts to try criminous clerics.¹⁴⁵

But in reality, Thomas' battle with Henry had reached beyond jurisdiction over criminous clerics, even beyond the competition of the ecclesiastical and royal courts and the boundaries of their jurisdictions.¹⁴⁶ Theirs was not just a battle between two people; their dispute represented the two competing forces in Western European Medieval history, the Church and the State; and the underlying issue was the principle that there were limits to royal jurisdiction and secular authority alone should not decide where those limits lay.¹⁴⁷ Recognizing that issue and bowing to the political backlash from the Western European community (both ecclesiastical and secular) to the reasons for and manner of Thomas' death, Henry likely felt particularly compelled to back down on the issue of criminous clerks. That issue had become a symbol of Thomas' martyrdom to all of Latin Christendom and of what he came to represent: resistance to the oppressive authority of the crown. As a consequence of Thomas' murder the Church hardened its position in favour of clerical liberty and the 'benefit of clergy'; and a king relinquished a part of his royal authority.¹⁴⁸

The expansion of secular jurisdiction at the loss of Church jurisdiction in England and throughout Western Europe has been shown by history to have been inevitable. It was occasioned through continuous rounds of debate, competition and compromise between the Church and the State. In the particular case of Henry II and his concession on criminous clerics, however, it would appear that Thomas' martyrdom was the catalyst that produced particular political pressure, not only from the Church, but from the Western European community, as a whole, which "wrung" a compromise from Henry II.

3. The Constitutions of Clarendon

The Constitutions of Clarendon, of course, were central to the dispute between Henry II and Thomas Becket; and with regard to that conflict, article 3, relating to which court a clerk cited and accused of criminal conduct would be answerable to, was pivotal. However, from a broader perspective, the majority of the contents of the Constitutions

¹⁴⁵ Berman, *supra* note 1 at 263.

¹⁴⁶ Berman, *supra* note 1 at 256, 263 and 269.

¹⁴⁷ Berman, *supra* note 1 at 269.

¹⁴⁸ Baker, *supra* note 46 at 128.

show that Henry II was not just concerned with clerical wrongdoing, but with ridding the country of wrongdoers, and controlling crime and lawlessness, more generally.¹⁴⁹ In early 1166, one of the items of royal business addressed at the Assize of Clarendon was the announcement of procedures to enforce the principles that had been set out in the Constitutions of Clarendon in 1164. Henry placed the responsibility for the implementation of those judicial processes in the hands of his itinerant justices and introduced further measures to ensure that the procedures were effective and enforced throughout his realm.¹⁵⁰

The claims by the ecclesiastical authorities for greater and broader legal autonomy and authority in England were the cause of most of the turmoil between the Church and the king in England throughout Henry II's reign and into John's. Henry's response was to reaffirm the traditional customs of his grandfather's day in a recognition held in Clarendon in 1164 and to document those principles established at the council in his Constitutions of Clarendon. The wording of that document made it clear to everyone in attendance that he intended to observe 'certain' customs, liberties and dignities that were in place during the reign of his grandfather, Henry I. He also made it clear that the Constitutions were in response to the dissension and discord that had arisen between the clergy and the king's justices over the division of jurisdiction within his kingdom.¹⁵¹ The question regarding which respective areas of substantive law fell under the spiritual realm and which fell under the secular realm was the dilemma.

Among other things, the Constitutions purported to state the jurisdictional law regulating Church and State: they explained the jurisdictional competence of each entity by defining rules to demarcate the boundaries of each jurisdiction; they set limits on the procedures that could be used in the ecclesiastical forum; and they asserted and preserved royal prerogatives by drawing a line between the feudal and ecclesiastical duties of bishops (although always with the intent of drawing it to the constant advantage of the king, since, after all, they were the king's rules). Through the Constitutions, Henry was attempting to establish the boundaries of the Church's jurisdiction in his kingdom

¹⁴⁹ R.C. van Caenegem, "Public Prosecution of Crime in Twelfth-Century England" in C.N.L. Brooke, D.E. Luscombe, G.H. Martin and D.M. Owen eds., *Church and Government in the Middle Ages* (Cambridge: Cambridge University Press, 1976) 41 at 66-68; Warren, *supra* note 2 at 108-111; Warren, *supra* note 52 at 284-286.

¹⁵⁰ Hudson, *supra* note 1 at 130-131.

¹⁵¹ D.C. Douglas and G.W. Greenaway, eds., *English Historical Documents, 1042-1189: Volume II*, 2nd ed. (New York: Oxford University Press, 1981) at 325-360.

and to set out a new procedure for coordinating the activities by which the ecclesiastical courts and the English secular courts would share the legal jurisdiction in England.¹⁵²

Henry II's proposed division fell into the following categories:

- The Church courts had jurisdiction over marriage, bastardy, testate and intestate succession to chattels (personal property), and the punishment of mortal sin (e.g. fornication, adultery or gluttony).
- Crimes of murder and theft fell under the jurisdiction of the royal courts as pleas of the Crown (ultimately with the exception of criminous clerks, as a result of the conflict between Henry II and Thomas Becket).
- The Church courts shared jurisdiction with the royal courts over laying violent hands on a clerk (because that action was also a breach of the king's peace), but had sole jurisdiction over defamation (which was not actionable in the king's court, at that time).
- All disputes regarding the status of land would be tried in the royal court, with the exception of land held by the Church given 'in free, pure and perpetual alms', without any service obligation to a lord. However, whether the land was held in free alms had to first be determined in a secular court. As a result, Church officials and clergy had to attend the royal courts for that purpose, as well as to deal with land disputes over Church lands not held in free alms.
- Appointment of clergy to benefices was under the jurisdiction of the Church; but the right to nominate a clerk for the appointment (an 'advowson') was a secular right which was justiciable in the royal courts.
- Tithes (the principal income of benefices) were subject to a division of authority.
- Secular courts had jurisdiction over contracts; but 'breach of faith or oath' was a sin and could be dealt with and corrected by an ecclesiastical court. However, all pleas of debt belonged to the king even where they had been accompanied by a pledge of faith.¹⁵³

In a case of disagreement or conflict over these divisions, the king's law was to prevail and this resulted in, among other things, the development and use of methods to enforce the division of jurisdiction, which included the writ of prohibition. Although the king's court retained complete control over temporal property, including advowson and certain lands held by the Church, this jurisdictional scheme gave the Church pervasive authority

¹⁵² Frankforter, *supra* note 57 at 254; Helmholz, *supra* note 3 at 117.

¹⁵³ Baker, *supra* note 46 at 129; Berman, *supra* note 1 at 256-257; Helmholz, *supra* note 3 at 114-118; Yale, *supra* note 76.

over the laity through family matters, wills and estates, sexual offences, defamation and breach of faith.¹⁵⁴

Henry II issued his Constitutions because he felt the Church was encroaching on his royal authority. Pope Alexander III rejected the Constitutions because he believed Henry II was intruding on the Church's hard won jurisdiction. That was the crux of the tension between the State and the Church that had resulted from the actions of the Church in seeking to remove itself from secular influence and the inevitable conflicts over judicial authority that arose from the partitioning of the English legal system. The resulting question of the division of jurisdiction was debated and argued using legal discourse, precedent and procedure in the court of the pope, the archbishop of Canterbury and the king; and the conflict affected everyone in England from the king to the most humble subject.¹⁵⁵

Did the scheme set out in Henry's Constitutions prove successful? Was Henry II's proposal respected or even acknowledged by the Church? Or by Henry II's own royal judges? Who decided which court or judge - ecclesiastical or royal - could hear which issues and what would that decision be based on? Were there attempts at intrusion by one institution into the other's 'jurisdiction'? If so, what was the reaction of the other body? And how was the boundary between the two enforced? In the following Chapter the records presented in the Selden Society publications dated from the later years of Henry II's reign through to the end of the reign of John are reviewed to determine whether the answers to these questions can be found in the rolls of the cases adjudicated. The cases date from after the promulgation the Constitutions of Clarendon in 1164 and the adoption of those legal principles into royal law at the Assize of Clarendon in 1166.

¹⁵⁴ Baker, *supra* note 46 at 129; Helmholz, *supra* note 3 at 115; Helmholz, *supra* note 100 at 77-78.

¹⁵⁵ Charles Duggan, "The Reception of Canon Law in England in the Later-Twelfth Century", in Stephan Kuttner and J.J. Ryan, eds., *Proceedings of the Second International Conference of Medieval Canon Law*, (S. Congregatio de Seminariis et Studiorum Universitatibus, Civitas Vaticana, 1965) at 378-382; Baker, *supra* note 46 at 128; Jones, *supra* note 115 at 79.

Chapter 3: The Maturing of the Law

The Later Years of Henry II's Reign (1165-1189)

Henry II's reign (r.1154-1189) overlapped the pontificate of Alexander III (r.1159-1181) and each assumed power during a period when both the Church and the English monarchy were under stress. At the beginning of their reigns, both were striving to restore their institutions, and to do so they needed to re-establish authority over and control of their respective dominions. But to achieve that end they had to manage and regulate the activities that were causing the disruption: crime, delinquency and misconduct. In response to that need, they each put in place processes and procedures that established rules defining acceptable and unacceptable conduct, and made clear the consequences and penalties for breaches of those rules within their respective jurisdictions. They also created procedures to enforce those penalties, developed methods to assist in detecting and apprehending offenders, and instituted systems to prosecute and punish them. At the same time, prosecutorial and administrative bodies necessary to implement those processes and procedures were established and the specialization of the roles of officials involved in the adjudication of law became a hallmark of both Henry II's reign and Alexander III's pontificate.¹

Driven by the circumstances he had inherited, Henry II knew that in order to restore stability within his kingdom he had to offer his subjects a viable alternative to the violent self-help methods they were using; honour and vengeance were still playing a prominent role in disputes both over economic resources, such as land, and the revenging of injured or murdered kin.² Any alternative process Henry offered had to provide a quick, decisive solution because his subjects' patience would be limited and they would quickly resort to their own means if they did not receive satisfaction from the king's initiatives. Henry's new procedures, therefore, had to be streamlined, uncomplicated and relatively inexpensive to access and use in order to encourage his subjects to employ them. Most

¹ Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 446; James A. Brundage, *Medieval Canon Law* (Harlow: Pearson Education Limited, 1995) at 37-43; John Hudson, *The Formation of the English Common Law* (Harlow: Pearson Education Limited, 1996) at 139-144; R.C. van Caenegem, *The Birth of the English Common Law* (Cambridge: Cambridge University Press, 1973) at 19 and 25-27.

² John Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford: Oxford University Press, 1994) at 49 and 144.

importantly, they had to be applied impartially throughout his kingdom, to each of his subjects.

The Constitutions of Clarendon were central to the development of those procedures in the latter half of Henry II's reign. In article 9 of the Constitutions, Henry described a method for handling disputes that arose between a layman and a clerk over landholding "by the inquest of twelve lawful men, through the judgment of the chief justice of the king". That method became the basis for the assize *utrum* (one of the earlier forms of judicial inquiry or trial introduced during the time of Henry II), which used a recognition (or jury) of neighbours summoned to give a true answer to a question put to them by a public official. The format eventually became the basic method of inquiry used by all the new categories of assizes introduced during Henry's reign, in both criminal and civil pleas, and the recognition became the specific mode of proof used by royal law. In 1166, those measures and others were put into the hands of Henry's itinerant justices to implement, effect and enforce.³

Henry II claimed he would 'restore ancestral times' and during the early years of his reign he did little more than revive the practices of his grandfather, Henry I. But by the middle of his reign, his reform activities had to go beyond those practices in order to deal with the type and the volume of complaints and pleas his subjects were raising.⁴ As a result, traditional practices were subjected to review and scrutiny, and major changes were introduced in many areas of governance and administration including an increased focus on the centralization of royal judicial intervention and the specialization of official roles in matters of adjudication.⁵ It was that review exercise and the subsequent experimentation and ingenuity of Henry II's administration that produced the routine royal legal processes and procedures which came to characterize the royal law by the end of Henry's reign; they included the eyre, the assize, the recognition (jury), the grand jury and the returnable writ. Each one of those practices became a critical element in the eventual development of the English common law.⁶

³ Hudson, *supra* note 1 at 129, 130-131, 157 and 246.

⁴ Paul Brand, "Multis Vigiliis Excogitatam et Inventam: Henry II and the Creation of the English Common Law" in Paul Brand, ed., *The Making of the Common Law* (London: Hambledon Press, 1992) 77 at 83.

⁵ W.L. Warren, *The Governance of Norman and Angevin England, 1086-1272* (Stanford: Stanford University Press, 1987) at 96-98.

⁶ Robin Fleming, *Domesday Book and the Law* (Cambridge: Cambridge University Press, 1998) at 13; Hudson, *supra* note 1 at 192 and 237; van Caenegem, *supra* note 1 at 13.

Henry II had taken his cue from his grandfather's and great-grandfather's examples. His royal administration routinized, formalized and adapted procedures introduced by William I and Henry I when they commissioned royal officials to go out into the localities and conduct inquiries (for instance, William's Domesday inquest and Henry I's itinerant justices).⁷ But William's and Henry I's undertakings had been *ad hoc* measures used to investigate particular concerns of royal interest or to respond to requests from tenants-in-chief or their subtenants for royal intervention in specific matters.⁸ In addition, the itinerant justices of Henry I's reign appeared to have only presided over the courts they held, not to have made judgments. Henry II, on the other hand, sent his judicial emissaries out into the localities, not only by re-establishing visitations into the shires (the 'eyres'), but by scheduling them regularly. He delegated judicial authority to a group of his own hand-picked men ('justices in eyre') who he commissioned to attend at the localities and render judgments on his behalf. Eyres became a formal, regularized part of the royal justice system throughout England under Henry II.⁹

Also during Henry II's reign, ordinary litigation began to be heard and settled at the court of exchequer at Westminster on a regular basis from the 1160's until the end of his reign. This signaled two developments: first, the recognition of the court of exchequer as an institution, rather than an occasion of a meeting; and second, the hearing and determination of cases in the absence of the justiciar or the king. The exchequer had become a competent court, separate from the king's court (*coram rege*). An additional development is noted in 1178, after Henry II received complaints from his subjects that they were unhappy with the frequency of the eyres. In response, Henry ordered five judges from his household to remain *in curia regis*, and to only refer difficult questions to the king. That resulted in a central court sitting regularly at Westminster, rather than following the king on his perambulations.¹⁰

The two nascent legal bodies (the court of exchequer and the sitting court at Westminster), along with the *coram rege* and the eyres implemented and standardized the new land seisin and criminal procedures, and administrative, inquisitorial and

⁷ Fleming, *supra* note 6 at 64; Hudson, *supra* note 1 at 87, 94, 108 and 115-117.

⁸ Marjorie Chibnall, *Anglo-Norman England 1066-1166* (Oxford: Basil Blackwell Ltd., 1986) at 178-179; Hudson, *supra* note 1 at 118; van Caenegem, *supra* note 1 at 13-14.

⁹ Brand, *supra* note 4 at 80-84.

¹⁰ J.H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007) at 18; Brand, *supra* note 4 at 86-91.

disciplinary functions and positions necessary to support those new developments grew-up alongside. In 1176, a major council was held, the Assize of Northampton, which revised the assizes enacted 10 years earlier at the Assize of Clarendon and announced new procedures. Among other things, it expanded the jurisdiction of Henry justices, ordering them to 'determine all suits pertaining to the lord king and to his crown through the writ of the lord king, or of those who shall be acting for him, of half a knight's fee or under'. That resulted in an extension of royal jurisdiction over legal matters throughout the kingdom, limited only by the scope of the writs the king and his advisors were prepared to consent to.¹¹

As the royal law advanced and strengthened under the guidance of the royal justices, its reach and authority expanded. Predictably, disagreements over the demarcation of the boundary between the spiritual and temporal realms continued to surface through that period. But it was now Henry's justices who were taking the lead in guarding against the incursions of the Church into secular affairs because, by that time, most disagreements were conflict of laws issues and their determination was in the hands of court officials, administrators and litigants in the royal judicial forum.¹² The justices looked back to the definitions of jurisdictional competence originally set out in the Constitutions of Clarendon for guidance in determining the boundaries of the judicial authority of the Court Christian; for example, article 9 stated that if land was held in free alms the plea would lie in the ecclesiastical court, but if it was determined to be lay fee it would lie in the king's court. However, if the clerk and layman were tenants of the same bishop or baron the plea would lay in the court of that bishop or baron. Article 1 declared the king's jurisdiction over all disputes involving advowson, and, of course, article 3 had attempted to establish the king's jurisdiction over criminous clerks. In addition, most of the articles included a statement to the effect that the resolution of any dispute over jurisdiction lay with the king. In marking out the competency of each jurisdiction and describing the process to be used in each case, the aim of the Constitutions was to assert royal control over Henry II's bishops and limit both the judicial authority of the

¹¹ Hudson, *supra* note 1 at 132-133; Brand, *supra* note 4 at 96.

¹² G.B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century", pt. I (1944) VI *Mediaeval Studies* 261 at 261 and 264-266; W.R. Jones, "Relations of the Two Jurisdictions: Conflict and Cooperation in England During the Thirteenth and Fourteenth Centuries" in William M. Bowsky, ed., *Studies in Medieval and Renaissance History* (Lincoln: University of Nebraska Press, 1970) vol. VII, 79 at 204-206.

English Church, as well as access to appeals to Rome.¹³ That objective is very evident in the articles that declared certain disputes would “terminate in the court of the lord king” or “would not proceed further without the consent of the king” (articles 1 and 8, which worked to bar any appeal to the pope); prohibited officials of the English Church from leaving the kingdom without the permission of the king (article 4); or disallowed *ex parte* accusations by a Church official against a layman in England (article 6).¹⁴

The next section of this Chapter highlights the accounts of cases from the royal courts that touched matters of the Church during the latter half of Henry II’s reign, following the promulgation of the Constitutions of Clarendon. Evidence of the incursion by the Church into matters Henry II had declared to be within secular jurisdiction was the initial focus of the review of the writs from that period. Also of interest was the response by the secular authorities to those events and the methods used to thwart the Church’s jurisdictional initiatives. As it turned out, however, it was the ratio of rivalry versus accommodation between the two institutions, indicated in the material, which became the most interesting aspect of the analysis.

Cases Touching the Church in the Reign of King Henry II

1. The Later Years of Henry’s Reign (1165-1189)

Out of the 197 cases reported in the Selden Society publications from Henry II’s reign, which followed the promulgation of the Constitutions of Clarendon in 1164, 98 dealt with land issues touching the Church or its members, indicating land disputes remained the matter Church officials attended to most frequently in the royal courts during that period. The causes of these cases were similar to ones from the earlier period, and entailed the reseisin of land to monks or other Church officials, through methods including quitclaim, gifting, granting, concord or the verdicts of sworn recognitions. Twenty of these cases record the summoning of a sworn recognition of 12 men in the manner known as the ‘assize *utrum*’.¹⁵

¹³ R.H. Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to 1640s*, vol. 1 (Oxford: Oxford University Press, 2004) at 114-117; Theodore F.T. Plucknett, *A Concise History of the Common Law*, 4th ed. (London: Butterworth & Co. Ltd., 1948) at 17; Yale Law School, *The Avalon Project, Documents in Law, History and Diplomacy* (2008), online: Lillian Goldman Law Library <http://avalon.law.yale.edu/medieval/constcla.asp>; Warren, *supra* note 5 at 105.

¹⁴ Yale, *supra* note 13.

¹⁵ Hudson, *supra* note 1 at 129-131.

There are 20 cases of advowson from that period, most of which involved the new assize of *darrein presentment*. *Darrein presentment* was the writ of assize which initiated a procedure using a recognition to determine who held the lawful right of advowson.¹⁶ Once the recognition determined who held lawful possession to the advowson, the advowson was normally quitclaimed to that party. Many of the disputes over advowson during this period were between a Church official and a layman (usually a lord) and, interestingly, in 11 out of 13 cases the advowson was quitclaimed to the Church official. That outcome may have been the result of a finding by the secular court that the Church official was the lawful possessor of the right of advowson. On the other hand, it could have just as likely been an out-of-court settlement that ultimately gave rise to a concord of quitclaim being registered with the royal court, as many cases were still settled out of court at that time.¹⁷

Claims of advowson between two laymen with no apparent involvement of the Church or its officials began to appear for the first time during this period (cases 518, 545, 546 and 563¹⁸). The occurrence of these types of disputes lends support to the contention that advowson was viewed as being a right or appurtenance of land, rather than an ecclesiastical benefice, since no members of the clergy were a party to these cases.¹⁹ Henry II's claim that advowson was a secular matter (i.e., a tangible right of land, an immovable, or as Maitland said, 'a thing') was being enforced by his justices, even in cases where Church officials were involved as parties to the action, since they too had to attend to these matters in the royal courts; and they did so not only as defendants, but also as plaintiffs bringing their own claims.²⁰

With regard to the intervention of the Church into judicial matters, 8 cases involving the pope, either through direct correspondence or the appointment of papal judges-delegate, appear in the latter half of Henry II's reign. The earliest case recorded, 418²¹, and a later

¹⁶ Hudson, *supra* note 1 at 242.

¹⁷ Hudson, *supra* note 1 at 181 and 210.

¹⁸ R.C. van Caenegem, ed., *English Lawsuits from William I to Richard I*, Selden Society, vol. 107(ii) (London: Selden Society, 1991) at 570, 598 and 612.

¹⁹ Jane E. Sayers, *Papal Judges Delegate in the Province of Canterbury 1198-1254* (Oxford: Oxford University Press, 1971) at 183; Helmholz, *supra* note 13 at 477.

²⁰ Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1889; repr. 1968) vol. II at 136; Helmholz, *supra* note 13 at 477; Sayers, *supra* note 19 at 183.

²¹ van Caenegem, *supra* note 18 at 421.

case, 445²², made use of an apostolic mandate to try to resolve a dispute, but with quite different outcomes. Case 418 dates from the period when Henry II issued his Constitutions and involved a royal cleric who received a church from a lord who had held it unjustly. After the church was surrendered by the lord to the local abbot, the cleric attempted to convince the abbot to allow him to retain the church, but the abbot refused. The royal cleric then obtained papal authority and letters to strengthen his position. The abbot continued his refusal and called upon the king, pointing out how fraudulently this royal clerk had dealt with the Church. Henry II was very displeased with the royal clerk, likely not only due to the clerk's conduct towards the Church, but also for invoking the pope's intervention in the matter. Indeed, Henry summarily informed the clerk that "if he wanted to stay at his court or even in his kingdom, he should seek to make peace with the abbot". No documentation exists to confirm whether or not the clerk relinquished the church, but after being reprimanded by Henry II in this fashion, it is likely he did.

Case 445, dealt with a case of advowson, where litigation ensued between the lord of Thurlow and the Battle Abbey after the lord attempted to lay claim to the right of patronage and appointed a clerk to the church without the consent of the abbot. He did so in a non-canonical manner; that is, he obtained a mandate from the king ordering the bishop of Norwich to institute the clerk. The abbot complained of the lord's conduct, but received no satisfaction from either the king's court, or the court of the English Church. Finally, the abbot turned to the pope and received a mandate from the apostolic see to the bishop of London, directing the bishop to remove the clerk and restore the church to the abbot. The bishop carried out the order under apostolic authority and the abbot appointed a prior of his own choosing. The apostolic see appears to have had the final say in this case, since there was no indication of secular intervention to prohibit the execution of its instructions.

Of the cases concerning Church intervention, the remaining 6 involved the activities of papal judges-delegate. Three of those cases (478, 499 and 558²³) dealt with disputes between Church officials over the possession of certain churches and the parties had appealed to the pope for a determination. Pope Alexander III commissioned local Church officials as his judges-delegate with instructions to inquire into the matters and settle them. Shortly after the judges-delegates had begun their deliberations, Henry II

²² van Caenegem, *supra* note 18 at 476.

²³ van Caenegem, *supra* note 18 at 519, 551 and 609.

intervened and the cases were all settled “with the king’s consent” in his royal court. Case 480²⁴, however, provides a slightly different twist on the involvement of a papal delegate; it was concerned with the prosecution of both laymen and clerics for offences against the forest-laws. The king impleaded not only earls and barons, but also clerics, the latter without protest from the archbishop of Canterbury or the English bishops. In addition, a papal delegate, who had been given authority by the pope to protect the interests of the clerics, also granted the king license to implead the clerics, despite the Church’s new won authority to try clerics who committed secular crimes. The scribe of this case was not impressed by the delegate’s conduct, as is apparent in the last sentence of his narrative: “Behold the member of Satan, behold the satellite led by Satan himself, who suddenly turned from shepherd into robber, who, seeing the wolf coming, fled and left the sheep behind who had been entrusted to him by the pope and for whose protection the see of Rome had sent him to England”. The scribe was suggesting that the papal delegate had turned his back on the clerks contrary to his commission from the pope to assist them.

A review of all of the cases involving the intervention of the pope in Church matters during Henry II’s entire reign, shows Henry actively intervened in the ultimate decision in each one, with the exception of two (cases 395 and 445, above). In the earlier years of his reign, however, before the Constitutions were issued, we often read that he was ‘displeased’ or ‘angry’ when he learned of an approach to the pope and his intervention appears to be a scramble to regain control over the situation. In the cases that occurred after the Assize of Clarendon (1166), when his Constitutions had been promulgated, his involvement seems to have been more a matter of managing the situation and co-operating with the papal-judges-delegate, though still retaining judicial control over the matter. He never overtly ousted the authority of the pope or the judges-delegate, but it is clear the later cases were settled with his “consent” and “in his presence”.

Although the cases from the first half of the reign of Henry II begin to hint at the jurisdictional boundaries Henry would try to establish through the Constitutions of Clarendon, the strong Church presence and influence in the political and administrative affairs of England at that time often overshadow the emerging pattern. It is not until the latter half of Henry II’s reign, when he had established a stronger hold over his kingdom (and, with that increased power, he and his administration were able to begin to oversee

²⁴ van Caenegem, *supra* note 18 at 522.

and manage the involvement of the Church in English affairs) that it becomes clearly evident the cases are supporting the jurisdictional boundaries Henry proposed. But even though Henry II challenged the authority of the pope and the Church within England in principle, the cases from his reign and content of his Constitutions, also generally show he respected the traditional jurisdiction of the Church. This is evident in cases involving questions of marriage and bastardy, which were sent by Henry II's royal courts to the Church for determination, without exception. In addition, the final paragraph in the Constitutions, which is seldom referred to, recognizes the "many other and great customs and dignities of the holy mother Church which are not contained in this writ. And may they be preserved to the holy Church, and may they be inviolably observed forever". In other words the Church's prerogative and authority was much broader than the specific issues dealt with under the Constitutions, as was its power as a political force, and Henry II recognized this and respected it.²⁵

The exception was advowson, which began as an area of conflict between the Church and the secular authorities in England, but by the end of Henry II's reign had become generally accepted as a temporal right, judiciable by the royal courts. The cases show that in the latter half of his reign, Church officials regularly initiated pleas of advowson in the secular courts, and Henry's courts treated pleas brought by the clergy in exactly the same manner as those brought by laymen. The same can be said with regard to land matters; the royal courts handled all disputes over tenure in the same manner, using the same procedures, whether the parties involved were clergy or laymen. Many cases from that period dealt with the reversion of land to the Church, proof that Church officials came to Henry II's courts frequently to settle land disputes between members of the Church and laymen, but just as frequently to settle lands issues between two Church officials or clerics. The royal legal system worked for the clergy as well as it did for laymen and apparently Church officials had little reluctance using a secular system that offered results. Perhaps they recognized and appreciated the benefits of the time and costs saved, as well as a greater likelihood of resolution and enforcement locally than would have been possible had they resorted to the distant papal court.

Many of the decisions from the king's courts involving the Church were made on the basis of verdicts from recognitions of local men sworn under oath to tell the truth. The cases show us that these groups were often made up of both clerics and laymen, and

²⁵ Yale, *supra* note 13.

the magnates or 'secular' judges overseeing or witnessing the deliberations of these gatherings or courts were as often bishops as they were barons. It seems as though the inter-mixing of the laity with the clerical was the norm in the secular legal system during this period and no concerns appear to have been raised regarding a conflict of interest or jurisdictional intrusion. The procedures used were secular, the law applied was the royal law, the officials were acting under the authority of the king; apparently it did not matter if their affiliation was episcopal or secular so long as they conducted the proceedings according to the king's rules.

Although concessions by the English Church to secular jurisdiction in the legal forum appeared to be occurring in England during the latter half of Henry II's reign, that was still the time when the Church in Rome was actively testing and expanding the boundaries of its new autonomy. It is curious, therefore, that there was not one case that involved the use of the writ of prohibition in the Selden Society material from that period considering Henry's reign is usually defined by the conflict between the king and the Church, most dramatically by the events involving Henry and Thomas Becket. Further, we know that there was contention between the clerics and Henry's justices, evidenced by Henry's statement in the introduction to the Constitutions of Clarendon:

"In the year 1164 from the Incarnation of our Lord, in the fourth year of the papacy of Alexander, in the tenth year of the most illustrious King of the English, Henry II., in the presence of that same king, this memorandum or inquest was made of some part of the customs and liberties. and dignities of his predecessors, viz., of King Henry his grandfather and others, which ought to be observed and kept in the kingdom. **And on account of the dissensions and discords which had arisen between the clergy and the Justices of the lord king, and the barons of the kingdom concerning the customs and dignities, this inquest was made in the presence of the archbishops and bishops, and clergy and counts, and barons and chiefs of the kingdom.**"²⁶ (*emphasis added*)

Yet we have no cases that suggest Henry II or his justices had to police the conduct of the Court Christian in England.

On the contrary, there are cases where Henry II 'commanded' or 'ordered' a bishop or an archbishop to deal with what clearly appear to be secular issues (such as holding a recognition or inquest on a secular matter; reseising a church; or stopping certain monks or canons from being vexed or impleaded over certain lands, e.g., cases 23, 91, 170,

²⁶ Yale, *supra* note 13.

171, 172 and 512²⁷), just as he would one of his secular officials, such as a sheriff or a royal justice. There is also a case (397²⁸) where Henry II ordered a bishop under royal writ to determine a matter of inheritance between two laymen in his bishop's court, which was witnessed by a cadre of men (some 49), a mixture of ecclesiastical officials (deans, archdeacons, chaplains, canons, sub-deacons) and laymen. Also, case 509²⁹ sets out a situation where the verdict of an inquiry "by mandate of the lord King Henry II and recognized in the court of the church of Harrold, by the testimony of many lawful men, clerics as well as laymen, ... strictly and carefully inquired the truth on behalf of the lord king", announced, in the county court, that a church had been donated in perpetual alms.

Although all of these may appear to be cases where Henry II was inviting Church officials to deal with secular matters or seem to be exceptions to the jurisdictional division set out in Henry II's Constitutions, on closer reading, there may be another explanation. These churchmen may simply have been executing their role as land-holding magnates (in other words, acting in their alternate role as tenant-in-chief or sub-tenant under fealty to the king) and so these cases may not be 'exceptions to the rule' after all. They may be just expressions of the other side of the duality of the positions English Church officials held in these times: that of both royal and ecclesiastic plutocrats, who managed to successfully straddle the line between conflict and loyalty to two institutions. In addition, in all of these cases, that same mix of ecclesiastical and temporal was expressed in the composition of the groups summoned to recognize a matter. That mix, expressed in either the dual roles assumed by an individual or in the makeup of a jury, a group of witnesses, or a group of judges, appears to be a customary part of the judicial system in England during Henry II's reign and is an indication of the degree of cooperation and integration that existed between the Church and State.

What of the question of the lack of cases that suggest Henry II or his justices had to police the conduct of Court Christian in England, which is most apparent in the absence of documentation evidencing the use of the writ of prohibition against the ecclesiastical courts in the cases reported from the latter years of his reign? According to research conducted by Flahiff and Adams, this should not be surprising. Although the exact date

²⁷ R.C. van Caenegem, ed., *Royal Writs in England from the Conquest to Glanvill*, Selden Society, vol. 77 (London: Professional Books Limited, 1972) at 423, 459 and 502-503; van Caenegem, *supra* note 18 at 563.

²⁸ van Caenegem, *supra* note 18 at 358.

²⁹ van Caenegem, *supra* note 18 at 560.

of the origin for the writ of prohibition is not known, the first actual form of the writ of prohibition is found in *Glanvill's* treatise on the laws and customs of England (c.1187), and the use of the writs was not witnessed in the Pipe Rolls until the years 1182-1183, nor in the History of the Exchequer until 1185.³⁰ Therefore, no actual writs of prohibition are extant from the later part of Henry II's reign, only references to them, suggesting that the writ may not have yet taken hold in the royal court as a regularized procedure.

By the end of Henry II's reign, the practices introduced and used in the administration of the royal law appear to have been established in the king's courts according to the cases that were reviewed. A significant difference was also noted in the accounts reviewed from the early years of Henry's reign as compared to those of the closing years in terms of the sophistication of the wording and formatting of the accounts (which reflect the reforms made in record keeping), as well as in the description of the judicial process used by Henry's justices, and the expanding role of the judiciary. As well, the new procedures set out in the Assize of Clarendon and the Assize of Northampton appear to have been accepted as part of custom by the end of Henry's reign, an undertaking Henry II and his administration had accomplished in just over twenty years.³¹ According to Peter of Blois, royal officials now swarmed like locusts in the king's courts.³²

Innocent III and the Papal Reforms

The late 12th and early 13th centuries are noted for the rise of the procedural system of the ecclesiastical courts (the *ordo iudiciarius*). By the turn of the 13th century, however, both the civil and criminal procedures of the Church courts had become extremely complex and technical. In contrast to the secular legal procedure of the royal law in England, which relied heavily on oral evidence, the canonical procedure was written. It commenced with a written complaint, the reply from the defendant was in writing, the judgment was in writing, the interrogatories were written, and a written record of the entire proceeding was required. As a result, the process was slow and costly, and demands were heard for simpler, speedier procedures, as were protests over the inordinate delays and excessive costs. It was not unusual for litigants to find they were

³⁰ Norma Adams, "The Writ of Prohibition to Court Christian" (1936) 20 Minnesota Law Review 272 at 273-274; Flahiff, *supra* note 12 at 271-272.

³¹ Warren, *supra* note 5 at 119.

³² Ralph V. Turner, *The English Judiciary in the Age of Glanvill and Bracton c.1176-1239* (Cambridge: Cambridge University Press, 1985) at 5.

penniless by the end of the process and many tried to slip away from the *curia* to evade the costs.³³ As a result, significant changes were made to the *ordo iudiciarius* during the papacy of Innocent III (r.1198-1216).

Pope Innocent III was a strong reform pope, who immediately put kings on notice of his plans for the papacy through the biblical quotations in his enthronement sermon, including: “I have set you today over nations and kingdoms” (Jeremiah 1:10). His pontificate represented the apex of papal political power and influence during the High Middle Ages. Innocent has been described as a fervent legislator and a statesman, who began his papacy by consolidating his hold on the Church, the Papal States and central Italy. His greatest achievement was the reconstruction of the Church into a papal monarchy. He also consolidated and centralized the ecclesiastical court system, made several attempts at enforcing the reforms of the Church (including simony and nicolaism) and redefined canonical doctrine and procedure through his ecumenical gatherings.³⁴

Innocent III was the first pope to style himself as the “Vicar of Christ”, and he effectively exploited that title in his dealings with secular leaders. He believed the pope received both spiritual and temporal authority from God, and that royal powers derived their authority through the pope, “just as the moon derives its light from the sun”. And he had no doubt as to the proper role of kings; they were there to assist the papacy in its work extending the Christian religion and maintaining a just society. Innocent saw kings as his lieutenants and he wanted them to acknowledge his spiritual over-lordship by doing homage to him for their kingdoms.³⁵ He also believed his right to intervene into the political affairs of Europe as sanctioned by God. His decretals and rulings illustrated his conception of his relationship with earthly rulers as an advisor of monarchs; it was his duty to oversee the behavior of kings, and exhort and counsel secular rulers. Since he had the power to preside over questions of “matters of sin”, he concluded he had the right to intervene in disputes over broken oaths, including imperfectly observed treaties, breaches of peace between states and even the legitimacy of a king’s marriage and his

³³ Brundage, *supra* note 1 at 127, 129 and 139; Helmholz, *supra* note 13 at 143.

³⁴ William R. Cook and Ronald B. Herzman, *The Medieval World View*, 2nd ed. (Oxford: Oxford University Press, 2004) at 203; A. Daniel Frankforter, *The Medieval Millennium*, 2nd ed. (Upper Saddle River: Pearson Education, Inc., 2003) at 269-271 and 278; Jane Sayers, *Innocent III* (London: Addison Wesley Longman Limited, 1994) at 15-16, 40-41 and 44-48.

³⁵ Frankforter, *supra* note 34 at 269; Sayers, *supra* note 34 at 15 and 45-46.

heirs. Innocent claimed the right to intervene in the matters of secular kingdoms and did so by using whatever argument would meet with the least resistance.³⁶

Innocent III's approach to matters within the purview of the Church was just as persistent. For example, in response to the complaints that the *ordo iudiciarius* was cumbersome, slow and too expensive, Innocent immediately began to overhaul the process when he became pope.³⁷ Great strides were made in the development of the delegated judicial system during his pontificate, and many of Innocent's decretals concerned changes in the system's administration.³⁸ Petitions for the appointment of papal judges-delegate were *ex-parte* statements setting out the facts of the case from the petitioner's point of view. These were usually prepared by the petitioner's legal advisors who made use of formulary books and models that they adapted to the particular case. The commissions or mandates prepared by the pope's chancery in reply were also based on guides and formularies. In other words, the process was becoming standardized and bureaucratized under Innocent's papacy.

The papal mandate directed the judges to decide a matter on its merits shown by the evidence and it empowered them to summon and examine the plaintiff, defendant and their witnesses.³⁹ In order to streamline the proceeding, Innocent III limited the number of witnesses litigants could call in order that they not be able to draw out proceedings unnecessarily. The mandate also allowed the judges to view relevant documents and Innocent set out guidelines for the evaluation of written evidence that furnished judges with a set of standards to apply in situations where documents were challenged. Finally, the mandates prescribed remedies or penances the judges might impose, depending on the outcome of the case. The canon law had always given judges broad discretion to fit the punishment both to the crime and to the circumstances, often called the "medicinal approach"; that is, the belief that the primary goal of penance ought to be the rehabilitation of the soul. But the reformers tended to be more aggressive and believed a judge should compound a mixture of punishments appropriate to each case; putting

³⁶ Cook, *supra* note 34 at 203; Frankforter, *supra* note 34 at 269; Sayers, *supra* note 34 at 41-48.

³⁷ Brundage, *supra* note 1 at 129-132.

³⁸ Sayers, *supra* note 34 at 122-123.

³⁹ M.T. Clanchy, *From Memory to Written Record: England, 1066-1307*, 2nd ed. (Oxford: Oxford University Press, 1993) at 260-263, 272-278 and 295-299; Brundage, *supra* note 1 at 128.

pressure on the miscreant to comply with the Church law and make peace with God became the aim of the new procedures.⁴⁰

During Innocent III's pontificate, fundamental changes were made to the canonical civil and criminal processes. With regard to the civil procedures, the papal chancery directed the papal judges-delegate to settle cases "summarily, simply and directly, without the clamour of advocates and judicial niceties" (*summarie, simpliciter et de plano, sine strepitu aduocatorum et figura iudicii*). This formula allowed judges considerable leeway to abbreviate and omit features of standard civil procedure, so long as the parties to the case and their legal advisors agreed.⁴¹ In dealing with the criminal process, Innocent introduced the inquisitorial procedures of *per notorium* and *per inquisitionem*. Both procedures held that where the fact of a crime and the identity the offender were obvious and well known throughout the community, a judge could proceed *ex officio* against the defendant and need not observe all the traditional procedural steps. In addition, Innocent authorized a relaxation of the usual strict standard of proof for those proceedings: no eyewitnesses of the event needed to be produced; one witness supported by circumstantial evidence would be sufficient.⁴²

The two new approaches were intended to punish the offender swiftly and cheaply. But unlike the traditional processes, which erred on the side of protecting the defendant's rights, these procedures virtually stripped defendants of all protection and opened the way for serious abuse by the Church's criminal justice system.⁴³ The difference between the two canonical procedures was that in *per inquisitionem*, the conduct of the entire proceeding - determining when and if to initiate the procedure, deciding what charges to prefer and against whom, producing witnesses, taking their testimony, responding to the claims and arguments of the defendant, arriving at a decision, and pronouncing sentence - all lay in the hands of one judge. In addition, the judge was also entitled to menace defendants and even torture them in order to extract a confession or an admission of guilt, and to deter other potential offenders.⁴⁴ The introduction of the

⁴⁰ Brundage, *supra* note 1 at 128, 132-133 and 146-152; Clanchy, *supra* note 39 at 323-327.

⁴¹ Brundage, *supra* note 1 at 139.

⁴² Brundage, *supra* note 1 at 145-150.

⁴³ Richard M. Fraher, "Conviction According to Conscience" (1989) 7 Law and History Review at 577; Kenneth Pennington, *The Prince and the Law, 1200-1600* (Berkeley: University of California Press, 1993) at 229-230, 247-248, 256-257 and 264-266; Brundage, *supra* note 1 at 94-95 and 142-147; Sayers, *supra* note 19, Chapter 2.

⁴⁴ Brundage, *supra* note 1 at 147-151.

changes to both the civil and criminal procedures allowed judges to employ abbreviated and simplified legal proceedings, and along with a relaxed standard of proof, cases were handled more expeditiously. However, that accomplishment was offset by the likelihood of abuse of the discretionary powers granted to the judges.⁴⁵

New legislation was introduced throughout Innocent III's pontificate, but especially in 1215 at the Fourth Lateran Council. The seventy edicts from the Council confirmed the power of the papacy and redefined the practices of the Church, including the clarification of the law of elections in the Church and reaffirmation of the Church's commitment to clerical celibacy and simony. Most importantly, from the perspective of procedural law, the Council forbade clerics from taking part in trial by ordeal or the issuance of blood sentences, which resulted in a substantial decrease in the involvement of the clergy in the administration of royal justice in secular courts. It also effectively caused the demise of the trial by ordeal, which, in turn, drove the need to create new evidential procedures for trying criminal cases in both the secular and canon legal systems.⁴⁶

Why were there so many changes to the canon law during Innocent III's pontificate and why was he able to accomplish so much? As usual, the answer most likely involved a combination of politics, personality and need. Unlike the papacies of the mid-1100s, Innocent became pope during a period of relative stability. The struggles with the Hohenstaufen dynasty, which had occupied his predecessors, had ended with the death of Henry IV of Germany in 1106.⁴⁷ From that secure political base, Innocent III would have been able to concentrate on the spiritual well-being of the Church, its clergy and parishioners, and reaffirm the Church's commitment to the fundamental principles of reform. In addition, he had time to focus on the internal functioning of the Church (Church governance) and to devote attention to developing the much needed legal processes and procedures used to address the hundreds of petitions being received by the pope; tasks which his predecessors either had not had time, or perhaps the inclination, to deal with.

⁴⁵ Brundage, *supra* note 1 at 146-147; Helmholz, *supra* note 13 at 138.

⁴⁶ Robert Bartlett, *England Under the Norman and Angevin Kings* (Oxford: Oxford University Press, 2000) at 409; Berman, *supra* note 1 at 206 and 251; Brundage, *supra* note 1 at 145-147; Helmholz, *supra* note 13 at 128 and 618.

⁴⁷ Frankforter, *supra* note 34 at 269-271.

The Reigns of Richard I and King John

The reigns of Richard I and King John contrast with the degree of legal reform that occurred during the pontificate of Innocent III. All of the secular processes and procedures introduced by Henry II and his administration were well established by the time of his death and his sons inherited a structured and functioning justice system.⁴⁸ After the very vigorous period of Henry II's monarchy, the pace of law and administrative reform slowed in England and there was comparatively little legislative activity during either Richard I's or John's reign. Instead, legal and administrative procedures were refined and extended, particularly under John. The standardization and bureaucratization of procedure, governance and administration, and a remarkable record keeping system set John's reign apart from those of his predecessors.

Why this lack of reform in the royal procedural or substantive law of England during Richard I and John's reigns? There are several possible reasons, including monarchical absenteeism due to Richard's pursuit of the crusades and John's pre-occupation with the loss of most of the Angevin Continental possessions. But the more likely reason was that simply nothing occurred while Richard and John were in power to force large-scale change or modification to the English royal law. Even though three significant political events in England's history occurred during their reigns (first, the capture and ransoming of the king of England, second, the loss of most of Henry II's Continental holdings, and third, the first baronial rebellion and the resulting civil war in England), surprisingly, none appear to have impacted England in such a way as to warrant substantial change in the royal law during at period. (Granted, the third event had significant ramifications for the reigns of John's successors.)⁴⁹ Indeed, the relatively marginal amount of new law or legislation introduced during John's reign (especially in the early years when he was often absent from England), suggests that either his royal administration had sufficient time, direction and stability to focus on improving the existing legal procedures or else they were so harried they did not have time to introduce new ones. Or, perhaps as Hudson suggests, reform was more gradual in part because the necessary judicial machinery had been brought into existence during Henry II's reign, and rather than

⁴⁸ Brand, *supra* note 4 at 101-102.

⁴⁹ John Gillingham, *Medieval Britain: A Very Short Introduction* (Oxford: Oxford University Press, 2002) at 30-32 and 33; Bartlett, *supra* note 46 at 62-67; Frankforter, *supra* note 34 at 256-257; Hudson, *supra* note 1 at 223-227; Warren, *supra* note 5 at 164-165.

making wholesale changes or major additions, the established procedures become more sophisticated and their usage more diverse, being extended or modified to cover new situations or demands.⁵⁰

The function and activity of the royal courts in England, however, changed under King John, tending towards an extreme form of centralization; that is, bringing the handling of royal justice back to the king's immediate orbit. In the 1190's there were arguably three separate royal courts: the exchequer court (the revenue court); the court at Westminster; and the *coram rege* (the court that travelled with the king and dealt with particular suits of royal interest). By 1204, however, the *coram rege* was assuming more and more judicial importance. By 1209, all the business from the eyres and the court at Westminster had been transferred there.⁵¹ In addition, general eyres were held less frequent during John's reign and commissions were more restricted in scope. The type and number of royal remedies available to litigants increased, however; more writs started to be issued *de cursu*. These were inexpensive and easily obtained from the king's chancery. The types of writs and the forms of judicial procedures also multiplied, being modified as the circumstances of a case required, and existing royal remedies were improved or their use broadened; for example, procedures previously used to remedy disseisin were extended for use in the retrieval of rents.⁵²

John's reign saw the rise of administrative kingship, with the development of the *de cursu* writs and the various records and rolls used to exercise central control over justice and finance by establishing the basis for institutional memory. Record keeping burgeoned, and compared to the rudimentary chancery of Henry I, John's chancery contained great series of central records; not even the papal chancery could match the royal chancery in the organization of its archives. These achievements can be attributed to the expanding bureaucracy and its zeal for method and organization, but more

⁵⁰ Hudson, *supra* note 1 at 140.

⁵¹ M.T. Clanchy, "Magna Carta and the Common Pleas", in Henry Mayr-Harting and R.I. Moore, eds., *Studies in Medieval History, presented to R.H.C. Davis* (London: Hambledon Press, 1985) 219 at 233; J.C. Holt, *Magna Carta*, 2nd ed. (Cambridge: University of Cambridge Press, 1992) at 181; Warren, *supra* note 5 at 127.

⁵² S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976) at 101-102; D.W. Sutherland, *The Assize of Novel Disseisin* (Oxford: Oxford University Press, 1973) at 50-52; van Caenegem, *supra* note 1 at 37.

specifically, to the efforts of one of John's senior bureaucrats, Hubert Walter.⁵³ Hubert had a large influence on the law and administrative procedure under both Richard I and King John; during Richard's reign Hubert was Chief Justiciar (1193-1198), and under John he held office of the Lord Chancellor (1199-1205). During both of those reigns, Hubert held the position of archbishop of Canterbury (1193-1205), as well.

The role of the Lord Chancellor grew to such an extent during John's reign that, for over a dozen years Hubert took over the 'management' of England.⁵⁴ Though he was advanced in years, it was said that there was no one living at that time that had a firmer grasp of the intricacies of royal governing.⁵⁵ But he is also noted for his contributions to the practice of record-keeping; he introduced the "foot of the fine", that is, the preparation of a third copy of an agreement (or chirograph) and the custom of filing it in the royal treasury.⁵⁶ In the first three years of John's reign charter rolls, close rolls, and patent rolls began to be kept and those tools became essential to the efficient running of the expanding administration and court systems. During Hubert's tenure as Chief Justiciar, the Common Bench (the royal tribunal for civil cases) emerged independent of the exchequer and, in addition, the first surviving articles of the eyres come from this period. Progress in law and administration during John's reign is truly the story of Hubert's achievements, as John was busy trying to recapture his lost territories.⁵⁷

The first surviving cases from the Court of Canterbury are from Hubert's term as archbishop of Canterbury, which means he was the chief adjudicator for both the secular court system and the ecclesiastical court system, hearing cases under each jurisdiction at the same time; this, at a time when the debate over jurisdictional authority was still at the forefront of the turmoil occurring in temporal/spiritual relations.⁵⁸ In his positions as Chief Justiciar and Lord Chancellor, as well as his position of archbishop of Canterbury, Hubert Walter managed both the secular authority of the royal courts and the

⁵³ M.T. Clanchy, *England and its Rulers, 1066-1272* (Oxford: Basil Black Publisher Limited, 1983) at 134; Gillingham, *supra* note 49 at 34; Warren, *supra* note 5 at 125-126 and 132; Hudson, *supra* note 1 at 136-138.

⁵⁴ Warren, *supra* note 5 at 134.

⁵⁵ W.L. Warren, *King John*, 3rd ed. (New Haven: Yale University Press, 1997) at 134.

⁵⁶ Chibnall, *supra* note 8 at 205; Hudson, *supra* note 1 at 136-137; Warren, *supra* note 5 at 125-126.

⁵⁷ C.R. Cheney, *Hubert Walter* (London: Thomas Nelson and Sons Ltd, 1967) at 107-109; Brand, *supra* note 4 at 95-96; Clanchy, *supra* note 39 at 74 and 122; Hudson, *supra* note 1 at 137; Warren, *supra* note 5 at 128-133.

⁵⁸ Norma Adams and Charles Donahue Jr., eds., *Select Cases from the Ecclesiastical Courts of the Province of Canterbury, c. 1200-1301*, Selden Society, vol. 95 (London: Selden Society, 1981) at 3.

ecclesiastical authority of the English canonical courts. And he was able to integrate that authority when he became the most powerful official in England, without incurring complaints of intrusion, bias or conflict of interest from either his pope or his king.

Hubert would have been very familiar with the issues and evolution of the relationship between the king, his justices and the Church (both in England and Rome) over the matter of judicial jurisdiction because he was one of the central figures involved in those events during the reigns of three English kings (Henry II, Richard I and John). He would have had intimate knowledge of where the secular courts saw the boundary demarcation and what activities on the part of the Court Christian would incite them to enforce that boundary. Hubert was an intelligent man, with a wealth of experience and knowledge of both judicial systems and the personalities that staffed them. As archbishop of Canterbury and Chancellor of England he would know the line to walk, how to walk it and when to push it – he had to, since he had sworn loyalty to two masters.

To the degree that Hubert Walter was able to successfully manage temporal/spiritual relations, John managed to disrupt them, particularly in his relationship with Pope Innocent III. John and Innocent were in power for almost the identical span of years (John, r.1199-1216; Innocent III, r.1198-1216); they died within months of each other. Their relationship was, to say the least, interesting; both were extremely bright, politically driven and exceptionally demanding, and Innocent appears to have been the perfect foil for John. It was the death of Hubert Walter in 1205, however, which caused the most trouble between the two. With the resulting vacancy of the archbishopric of Canterbury, the monks of Canterbury believed they had the authority to elect their candidate to the position. However, the bishops of the province also felt they should have a say in who filled that position and appealed to the pope. At the same time John proceeded with his own appointment in the time honoured way of English kings. To add to the confusion, Pope Innocent III decided he should have the last word and secured the election of Stephen Langton, a theologian, cardinal, reformer and Englishman. Langton was consecrated by the pope on June 17, 1207. John was furious and refused to accept the pope's appropriation of what he saw as one of his most important rights. He drove the

Canterbury monks out of England, seized the lands of the archbishopric and denied Langton entry into England.⁵⁹

Innocent tried to convince John to accept Langton as his archbishop, but to no avail. Finally on March 24, 1208, Innocent decided to bring John to heel by authorizing an interdict over all of England (that is, the suspension of the sacraments of the Church). The doors of all the churches were shut, divine service suspended, and all the sacraments, except for baptism and extreme unction, were withdrawn. That situation endured for 6 years, and in addition, in the autumn of 1209 John was excommunicated by Innocent III. All but one of John's bishops fled abroad during that time. John, on the other hand, enjoyed huge revenues from the confiscated ecclesiastical property and he failed to be impressed by the threat to his soul. Tension between the Church in Rome and the King of England abounded during that period, to say the least. It was not until the combined pressure of the internal opposition from his barons, the threat of being deposed by his rebellious subjects and fear of an invasion by Philip Augustus of France that John finally came to terms with Innocent III; by that point in time he needed to garner support wherever he could. In an amazing turn of events, John did homage to Innocent, surrendering his kingdom to him and receiving it back as a papal vassal; Langton took his see as archbishop of Canterbury; and, in the summer of 1214, the interdict on England was lifted and John was absolved from excommunication.⁶⁰

The following two sections set out the cases from the reigns of Richard I and King John that deal with matters touching the Church. Although Henry II died in 1189 and his son Richard I assumed the English throne, Richard was rarely in England during the 10 years he ruled. During that period there seems to have been little legislative activity since nothing appears to have changed in the manner of governance and no substantial changes were made in the royal law, either substantively or procedurally.⁶¹ As a result, the cases from Richard's reign are very similar to those from the later years of Henry II's reign and add little to the story of the treatment of matters touching the Church.

⁵⁹ Bartlett, *supra* note 46 at 63-66 and 404-406; Berman, *supra* note 1 at 262-263; Frankforter, *supra* note 34 at 257; Sayers, *supra* note 34 at 84-85; Warren, *supra* note 55 at 158-173.

⁶⁰ *Ibid.*

⁶¹ Plucknett, *supra* note 13 at 20.

Cases Touching the Church in the Reign of Richard I (1189-1199)

The majority of accounts involving Church officials appearing in the royal courts during Richard's reign continued to deal with disputes over Church held lands, and the witnesses, recognitors and justices engaged in the cases remained a mix of lay and clerical personnel. Also, in line with Henry II's reign, there are no cases of the royal courts admonishing the ecclesiasts for intrusion into the secular jurisdiction. However, there are 2 cases involving the intervention by the pope and by papal judges-delegate. In the first case, Pope Celestine III (r.1191-1198) appointed the bishops of London and Lincoln and the abbot of Reading as papal judges-delegate and ordered them to decide a case between the bishop of Winchester and the Order of the Knights Hospitaller of St. John of Jerusalem concerning the administration of a hospital (637⁶²). The bishop of Winchester had appealed the case to the pope, but meanwhile the master of the hospital had caused the bishop to be summoned to the royal court at the exchequer. At that time Hubert Walter was Chief Justiciar and archbishop of Canterbury, as well as a legate of Celestine III. In order to stop the damage being incurred by the hospital, the bishop, "despite his privilege" subjected himself to examination by the 'secular chief magistrate' (Hubert) to gain his assistance. Once all the parties had been brought under control by the "secular authority" of Hubert, the pope instructed his delegates to resume their task.

This case provides a good example of the process followed by the Church in commissioning delegates. The mandate from the pope specified the authority and duties of the delegates, including what actions they should take if certain alternative scenarios occurred. The pope also anticipated what their determinations should be under each of those alternatives. The process followed the exact procedure established by the Church during the pontificate of Alexander III. But what is really interesting about this case was the total acceptance of both Hubert's secular and ecclesiastical roles coming into play without any suggestion of a conflict of interest or bias arising from either the pope or the court of exchequer.

A similar situation is seen in case 661⁶³, where the abbot of Bury St. Edmunds acted in the role of papal judge-delegate, a judge in the royal courts and a justice in eyre, all during the same time. The only criticisms he received were "a curse upon the court of

⁶² van Caenegem, *supra* note 18 at 668.

⁶³ van Caenegem, *supra* note 18 at 707.

this abbot, where neither gold nor silver may help me for confounding my adversary” and “he would not give judgment hastily nor believe every spirit, but proceeded in the order prescribed by law”. He was also known to be more inclined to severity than kindness and to exalt justice above mercy. Outside of these ‘criticisms’ he appears to have fulfilled all of his judicial roles expertly and without apparent bias or favoritism. The ability for Church officials to operate to that extent in both the ecclesiastical and secular legal courts at the same time, without raising the specter of partiality, clearly shows there was a significant degree of acceptance and co-operation between the two systems. And most likely there was also the transfer of ideas and practices as one man alternated between his secular and episcopal roles, perhaps routinely during the same day.

Cases Touching the Church in the Reign of John (1199-1216)

1. Court Christian and Other ‘Church’ Courts

With John’s love for all things written down, over 7800 cases appear in the Selden Society publications from his reign. An interesting new development from these cases is the appearance of requests from priors, bishops, even the archbishop, as well as other Church officials “craving the cognizance” of their own courts or the court of a bishop. In addition, there are requests from Church officials to have cognizance of a cleric, to have the liberty of a cleric respected, or to seek ‘Court Christian’. For example, there are 14 cases reported in vol.s 67, 68, 83 and 84 where a plea of liberty had been entered. In two of the cases, 2113 and 2881⁶⁴, a plea for “*placito libertatis*” (ecclesiastical immunity) was made by a prior and an abbot, respectively, as defendants. In contrast, case 2226⁶⁵ reported a bishop seeking the liberty and oversight of his own court in a plea of land. These two types of cases both appear to be asking for a matter to be dealt with in a Church court, but the reasons for the request are very different: a plea for ecclesiastical immunity from the royal courts versus what appears to be a request to deal with a secular matter (i.e., a plea of land). How is it possible to reconcile these two very different requests (the latter seemingly quite unorthodox) given the jurisdictional competencies set out in Henry II’s Constitutions?

⁶⁴ Dorothy Mary Stenton, ed., *Pleas Before the King or his Justices, 1198-1202*, Selden Society, vol. 67 (London: Bernard Quaritch, 1953) at 184 and 270.

⁶⁵ Dorothy Mary Stenton, ed., *Pleas Before the King or his Justices, 1198-1212*, Selden Society, vol. 83 (London: Bernard Quaritch, 1966) at 298.

In the fourth case (301⁶⁶), a deacon was accused of beating and wounding a man (we do not know whether the man beaten was a cleric or not) and a Church official (a dean) sought to resolve the matter in the bishop's court and "had it" (i.e., the dean's request to transfer the case to a bishop's court was granted by the justices in eyre). 5 other cases involving a plea of liberty were also criminal actions involving clerks (cases 311, 316, 321, 322, 324⁶⁷), and in 4 of the cases the clerks sought Court Christian, while in the fifth case the clerk simply denied the jurisdiction of the secular assize. Including case 301, all 6 cases involving clergy accused of criminal activity sought Court Christian and were granted it. Similarly, an assize held in Dorset reported an additional 5 cases involving criminal activity of clerics: 4 involved killing and 1 involved burglary, robbery and housebreaking (cases 730, 731, 733, 738, and 744⁶⁸). From those cases, 3 sought Court Christian and "had it", and in the other 2 cases, the clerk was remanded to the Church official to await the coming of the justices in eyre.

Volume 1 of the Selden Society publications contains cases of pleas of the Crown between 1200 and 1225 and there are 4 cases in which the cognizance of Court Christian was claimed: 3 of the cases involved subdeacons accused of killing (cases 49, 117, 123) and one case involved an assault by a clerk (case 54⁶⁹). In cases 49, 117 and 54, an official of the Church claimed 'cognizance' of the offender in Court Christian "and had it". In the fourth case (123), however, an official of the bishop of Bath testified that the offender had been ordained as a subdeacon by the archbishop of Canterbury and claimed cognizance of the archbishop's court. The secular justices stated that the official "had not sufficient testimony from the archbishop" and the accused was not handed over to him, but would be committed to him on the next coming of the justices if the official could produce the archbishop's letters testifying to the ordination. The reluctance of the secular judges to release the man into the official's cognizance likely arose out of their suspicion that some of the men who requested Court Christian were not members of the clergy. Many felons petitioned for ecclesiastical immunity (benefit of

⁶⁶ Dorothy Mary Stenton, ed., *Pleas Before the King or his Justices, 1198-1202*, Selden Society, vol. 68 (London: Bernard Quaritch, 1952) at 65.

⁶⁷ Stenton, *supra* note 66 at 68, 69, 70 and 71.

⁶⁸ Stenton, *supra* note 66 at 211, 212, 213, 217, 219 and 221.

⁶⁹ F.W. Maitland, ed., *Select Pleas of the Crown*, Selden Society, vol. 1 (London: Bernard Quaritch, 1888) at 23, 25, 75 and 79.

clergy) claiming to be a cleric because the criminal sentences of the Church courts were usually less severe than those of the secular courts.⁷⁰

There are 27 cases from John's reign where the parties sought various Church officials' courts, other than Court Christian: 16 sought a bishop's court; 7 sought a prior's court, 3 sought an abbot's court and 1 sought the archbishop's court. Most of the cases (25) which sought the bishop's, abbot's, prior's or archbishop's court were matters dealing with land and in 16 of those cases the request was granted. Why were secular matters being transferred to Church courts? The answer lies in the causes of the suits in which a request for the cognizance of a Church court was made (either to Court Christian or a court of a Church official), and by contrasting the cases which dealt with a request for a transfer of a secular matter into a Church official's court against those that claimed Court Christian, a pattern begins to emerge; a distinction can be seen between matters allowed to proceed to a Church official's court and those granted to the Court Christian.

In the 27 cases claiming the cognizance of the bishop's, prior's or abbot's courts, all but one dealt with matters of land or tenants. Those are both issues that would clearly fall within the jurisdiction of the royal secular courts, and yet it appears that they would ultimately be handled in a Church court. However, in reviewing the facts of each case it becomes clear that most of those matters arose from the private landholdings of the bishop, prior or abbot whose court was being requested, suggesting that if the request was approved, the causes would have actually been transferred to the official's own seigniorial court, just as they would to any secular lord's court. This is evidenced by the fact that the cognizance of the official's courts was most often being claimed by the bishops, priors or abbots, themselves, their own stewards (seneschals) or their tenants (e.g. 1161, 1102, 1363, 2226 and 4309⁷¹). In contrast, in the cases where Court Christian was sought, all but one dealt with criminous clerics.

What the 27 cases suggest is that the land and tenant matters being transferred to Church official's courts were not exceptions being made to the jurisdictions of the secular and ecclesiastical court systems, rather they were simply examples of business

⁷⁰ Baker, *supra* note 10 at 513-515; Frankforter, *supra* note 34 at 254; Helmholtz, *supra* note 13 at 511; Pollock and Maitland, *supra* note 20 at 443.

⁷¹ Dorothy Mary Stenton, ed., *Pleas Before the King or his Justices, 1198-1212*, Selden Society, vol. 84 (London: Bernard Quaritch, 1967) at 241; Stenton, *supra* note 65 at 182 and 208; Stenton, *supra* note 64 at 328.

arising from the secular side of the official's activities, and allowed to be dealt with in their seigniorial courts. In addition, the cases that claimed Court Christian show that the majority of complaints laid against clerics involved in secular crimes were being handed over to the ecclesiastical courts, which was appropriate since by this time jurisdiction over criminous clerics had been largely conceded to the Church by the royal courts as an outfall of St. Thomas' martyrdom during Henry II's reign. However, it is also clear from those cases, that the royal courts monitored the pleas for Court Christian and challenged them when they appeared suspect, as seen in case 123, above.

2. Writ of Prohibition and Other Acts of Aggression!

Examples of the royal court's vigilance in its monitoring of the ecclesiastical court can be seen in the cases involving actions of *quo warranto*, *quare impedit* and *quare intrusit*, all of which dealt with questions of the rights of advowson and *darrein presentment*. The *quo warranto* cases dealing with matters touching the Church asked by what right or authority someone holds a church (e.g. case 3467 and case 817⁷²) or "wherefore he does not admit a suitable parson to the church" (e.g. case 3353 and case 991⁷³), and therefore were summoned as inquiries into matters of right. *Quare impedit* ("Wherefore he hinders the plaintiff?"), on the other hand, was a writ or action which lay for a patron of an advowson to ask why someone was impeding presentment to a church (cases 1660, 1992 and 2071⁷⁴). The action was brought by a plea of *impedit presentacionis* (cases 2569, 2668 and 2682⁷⁵) and could be used in the same way as a plea of intrusion (*quare intrusit*) (case 3077⁷⁶) to question why someone had ingressed, for example, on a priory (cases 3347 and 130⁷⁷).

However, the most commonly used method by the secular courts to restrain Church courts from exceeding jurisdiction was the writ of prohibition.⁷⁸ The writs were normally issued on application to the chancery by a litigant. They were used because the Church tried to exercise a broader field of jurisdiction than the king's administration was willing to

⁷² Stenton, *supra* note 64 at 353; Stenton, *supra* note 66 at 244.

⁷³ Stenton, *supra* note 64 at 335; Stenton, *supra* note 65 at 159.

⁷⁴ Stenton, *supra* note 65 at 238, 273 and 281.

⁷⁵ Stenton, *supra* note 71 at 9, 19 and 20.

⁷⁶ Stenton, *supra* note 64 at 291.

⁷⁷ William Paley Baildon, ed., *Select Civil Pleas*, Selden Society, vol. 3 (London: Bernard Quaritch, 1890) at 53; Stenton, *supra* note 64 at 334.

⁷⁸ R. H. Helmholz, *Canon Law and the Law of England* (London: The Hambledon Press, 1987) at 77-78; Flahiff, *supra* note 12 at 261 and 264-266.

accept. For example, the right to enforce a contract made under oath was considered by the Church to be within its judicial mandate; the king's justices disagreed. Their position was that only contracts relating to matters of marriage or testament were within the jurisdiction of ecclesiastical courts. And if the ecclesiastical judges heard suits outside their jurisdiction, they and the party suing could be prohibited from continuing the suit by complaint of the opposing party. What if the writ was ignored and the suit continued? Those who violated the writ of prohibition would be liable to imprisonment or fine, and, eventually, damages in favour of the injured party became an additional remedy.⁷⁹ In this manner, the writ was a tool used, perhaps unwittingly, by litigants to determine where the boundary between the jurisdiction of the royal and ecclesiastical courts in England should lie, and to enforce it. If litigants choose not to use a writ of prohibition to challenge a case brought in the Church courts, then the jurisdiction of the Church expanded, however, if they choose to obtain a writ, then they helped confine it.

There are 16 cases dating from John's reign that dealt with the question of why a secular cause was being adjudicated in the Court Christian. Three of the cases (75, 83 and 145⁸⁰) had been brought in Court Christian contrary to a prohibition. Case 83 is a case involving a plaintiff who had begun an action in debt in Court Christian and then been summoned before the king's justices to shown why he had done so, contrary to the prohibition. Case 145 dealt with a lay fee and the royal court was inquiring into why the defendants had proceeded with the matter in the Court Christian contrary to the order of the Justices in the cause pending in the secular court. According to Henry II's Constitutions, both of the causes (debt and lay fee) lay outside the judicial jurisdiction of the Church and should not have proceeded in the ecclesiastical court.

Although case 75 does not tell us the cause of the suit, it does raise an interesting question of procedure in these types of matters. In this case, Robert the parson did not come to court and the sheriff testified that Robert, since he was a cleric, had no lay fee by which he could be distrained. The question was, therefore, how do you force a person to come to court on a civil matter if they own or hold nothing that can be forfeited

⁷⁹ Charles Donahue, Jr., "Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined After 75 Years in Light of Some Records From the Church Courts" (1973-1974) 72, *Michigan Law Review* 647 at 665-667; R.H. Helmholz, "Conflicts Between Religious and Secular Law: Common Themes in the English Experience, 1250-1640" (1990-1991) 12 *Cardozo Law Review* 707 at 709; Helmholz, *supra* note 78 at 59 and 77-78.

⁸⁰ Baildon, *supra* note 77 at 34, 37 and 58.

in the event of their non-appearance (which would be the case for most of the regular clergy)? In response to that problem the court provided a writ to the plaintiff ordering a bishop to make sure his parson attended court on the specified date. The same tactic was used in case 145, where a writ was sent to the archdeacon to have “their bodies” in court (a dean and a chaplain). Both writs were an early form of a writ of *habeas corpus* requiring a person to be brought before a judge in court. Unfortunately, there is no indication in these cases whether the tactic was successful or not.

In the four Selden Society volumes edited by Dorothy Mary Stenton (vol.s 67, 68, 83 and 84), there are 13 cases of prohibition; all, however, are essoins (that is, brief notations of the practice of offering excuses for not appearing in court on the appointed day in obedience to a summons) and therefore do not provide much detail regarding the facts of the lawsuits they relate to. Nevertheless, it is possible to recognize these cases from the variety of phrases that were used in the essoins to indicate they refer to cases of prohibitions against pleas bought in Court Christian. The most formal statements are those in cases 3102, 3324, 3378, 149, 1565, 1811 and 1999⁸¹ and they are very clear – e.g. “*de placito quare traxit eum in placito in curia Christianitatis contra prohibitionem Justiciarum de aduocatione*” (why he drew them into a plea of advowson in Court Christian contrary to the prohibition of the Justices). These types of cases dealt with matters of debt, advowson, land and chattels, all of which fell outside the Church’s jurisdiction, according to the king’s justices. Cases 1607, 2540, 2549 and 2593⁸² used a type of short hand with the phrase “*processerunt contra prohibitionem*” or simply “*quare processit*”, which simply asks “why he proceeded in a plea”; unfortunately, these cases did not indicate the cause for the prohibition.

Although we see more cases of prohibition during John’s reign than in either Henry II’s or Richard I’s, we are still dealing with a very small number in comparison to the total number of cases from his reign. What accounts for these low numbers? There are numerous possibilities. Perhaps the secular justices were not too scrupulous in their monitoring of the Church’s intrusion into secular jurisdiction or turned a blind eye to them. Perhaps many litigants did not bother to obtain the writs, but rather, allowed (or preferred) their cases to be dealt with in the Church courts. Or perhaps many of the

⁸¹ Stenton, *supra* note 64 at 294, 331 and 338; Stenton, *supra* note 66 at 36; Stenton, *supra* note 65 at 229, 255 and 274.

⁸² Stenton, *supra* note 65 at 233; Stenton, *supra* note 71 at 6, 7 and 11.

writs have simply not survived. However, this was also the time of the general interdict over England and the excommunication of John. All the churches were closed and all but one bishop had fled England during that period. Taking that into account, it may be that there was simply a reduction in matters being handled in Church courts, in general, and therefore a reduction in the matters attracting a writ of prohibition.

What all these cases from King John's reign show us is that Church officials and clerics were, willingly or not, very active in the secular court system as litigants, witnesses, justices and jury members. And many were willing participants, as over 30% of the 765 cases involving Church matters were initiated by Church officials or clerics. They were not merely involved with the secular court as victims/defendants drawn into a secular law suit begun by a layman against their will; rather, they used the secular courts for dispute resolution in civil cases just like laymen did, even against other clerics. Why? Perhaps they had little choice. But perhaps they used the secular courts because they realized they were more likely to obtain a quick and definitive resolution to their disputes and enforcement of the decision there, than in any of the other local or ecclesiastical forums.

What we do not see in the cases from John's reign, however, is any evidence of intrusion by the pope or his papal judges-delegate into English secular legal matters. Although we know papal legates and judges-delegate were still active in England during this period, perhaps the vigilance and attitude of the royal administration and the English kings had made it difficult for the pope to gain access into the secular affairs of England.⁸³ Clerics knew that the kings were not receptive to papal involvement in English matters (see cases 360 and 396 and article 8 of the Constitutions of Clarendon, above). That, along with the interdict placed on England from 1208 to 1213, John's excommunication, the exodus of all but one English bishop, likely resulted in a lack of papal activity in secular matters during that period.

The review of all of the cases touching the Church from John's reign does seem to suggest that the Church's involvement in legal matters deemed to be within the secular realm was more a matter of officials and clerics opting to make use of the secular courts and its processes, rather than trying to appropriate secular jurisdiction. Therefore, perhaps it is now fitting to ask how successful the Church was at keeping the secular 'wolves' at bay when it came to protecting their own jurisdiction? Or was a defensive

⁸³ Sayers, *supra* note 19 at 28.

position even necessary? From the review of the secular cases throughout this 62 year period, there are several cases that involved areas of purported ecclesiastical judicial jurisdiction, including marriage and sexual behavior (no testamentary cases were found in the 7836 cases). For example, case 464⁸⁴ involved a dean in an investigation of an accusation of adultery between “unlawfully wedded and incestuous people”. The case makes it clear that this type of conduct was a matter to be dealt with by the Church: “.... they [the leaders of the town] summoned them under the accusation of adultery and ... placed them in safe keeping, they took the accuser into custody until the accusation could be examined. The following day, as this sort of question belongs to the Church courts, the dean transferred them to a chapel and examined them separately.”

A second case (408) dealt with matters of the legitimacy of marriage and its offspring. The case began during the papacy of Pope Innocent II and resurfaced during the papacy of Pope Alexander III. The facts of the case are related in Chapter 2, above, and show that throughout this period, questions of legitimacy often engaged many levels of the Church. Together, these two cases and the majority of the other cases dealing with marriage and sexual relations suggest that, regardless of the status of the parties – be they members of the baronial class or commoners - the secular courts respected the jurisdiction of the Church over marriage and family matters. That respect generally appears to continue through John’s reign. There are 10 cases where the question of bastardy arises (5, 166, 205, 98, 645, 858, 2288, 4143, 4319 and 4320⁸⁵) and 3 cases where the legitimacy of a marriage is questioned (15, 92 and 109⁸⁶). The latter 3 cases involving a demand for dower, which was reliant on the legitimacy of the marriage, were each sent by writ to either a bishop or archbishop asking them to inquire as to whether the marriage was lawful and to return the “truth” to the justices.

The 10 cases concerning the question of bastardy all involved a matter of the inheritance of land. This is not surprising since bastards were not recognized as heirs to their parent’s land in England and bastardy was a plea that was often used between competing heirs to gain seisin over land. Although land held in fee was within the cognizance of the secular courts, the determination of the legitimate birth of a man or a woman belonged to the Church courts. This distinction meant that whenever an issue of

⁸⁴ van Caenegem, *supra* note 18 at 501.

⁸⁵ Baildon, *supra* note 77 at 3, 67 and 83; Stenton, *supra* note 64 at 23 and 187; Stenton, *supra* note 65 at 116 and 303; Stenton, *supra* note 71 at 197 and 244.

⁸⁶ Baildon, *supra* note 77 at 6, 39 and 45.

bastardy was raised in the royal courts, the process in the secular court should have been suspended while a writ was sent to a high Church official asking for the resolution of the question of bastardy. Once a decision was made by the official, the answer would have been returned to the secular court, which could then complete the case.⁸⁷ In 5 of the 10 cases a writ was sent to an official of the Church, either a bishop or the archbishop, ordering him to determine the truth of the claim of bastardy.

Of the remaining 5 cases, case 2288 is an *essoins* with no indication of the outcome of the matter and cases 645, 4319 and 4320 were resolved by an out-of-court agreement between the parties, so no writ was required to discern the truth of the claim of bastardy. In case 4143, however, an assize of *mort d'ancestor* was heard in Norwich. The jury summoned to recognize the matter decided that the deceased was seised in his demesne on the day he died and that his sons, Ralf and Hugh were his heirs. But the jury also said they had heard it said that the brothers were born before their mother was married. In spite of this information the plaintiff made no objection on that point, so the land went to the brothers. Ralf then immediately granted his right to the land to his older brother, Hugh, and quitclaimed it forever from himself and his heirs. This case is interesting for two reasons: first, because, although the tradition of the eldest son inheriting was maintained, it appears the question of alleged bastardy was ignored, which is very unusual given the importance England placed on the inheritance of land: ("*Nolumus mutare leges Angliae*": Statute of Merton, 1236).⁸⁸ Second, because there was no confrontation between the parties over the issue of bastardy, there was no writ sent to the Church for determination. Does this suggest that the authority of the Church over the matter of bastardy only came into play in a particular case if the question of bastardy was challenged by the parties to an action?

The answer is likely, yes - and no. For example, in cases of a question over the legitimacy of children born out of wedlock, but whose parents later married, the episcopal position was that the children become legitimate upon the marriage of their parents. That was not the view of royal law, where a bastard born was always a bastard. As a result, due to the importance royal law placed on the legitimacy of heirs who inherited land, the secular court often chose not to issue a writ to pursue the question of bastardy through the Church courts if they knew they would not get the

⁸⁷ Bartlett, *supra* note 46 at 567-568; Helmholz, *supra* note 78 at 188; Helmholz, *supra* note 13 at 556-558.

⁸⁸ Helmholz, *supra* note 78 at 187.

answer they wanted or needed. It was not a question of denying the Church's authority or jurisdiction over the determination of a man's legitimacy; they simply did not invoke it. Instead parties often tried to settle cases without recourse to the Church, which may have been the situation in cases 645, 4319 and 4320, where an agreement was reached by the parties, and, therefore, no question of bastardy was referred to the Church.⁸⁹

The accounts of the cases from King John's reign show no outright instances of face to face confrontations between the king and his bishops. There are no accounts of the king being denied by his archbishop or being lectured on the dual powers of the temporal and spiritual realms. That is not to say that the question of jurisdiction had been resolved, but the king's courts were no longer the forum for those high level political debates. Rather the ecclesiastical and royal courts were now the forum where the common litigant determined the boundary between the respective adjudicative jurisdictions. As Jane Sayers asked: "Within the environment the litigant brought his case, where did he take it? He took it to the most suitable court, that is to the one which seemed to him most competent to deal with his individual case, where he could get the most appropriate writ or mandate, and whose enforcement was most likely to operate"⁹⁰; in other words, practicality influenced his choice. The writ of prohibition was an instrument by which a dividing line could be determined and maintained, but the initiative to procure a writ rested with the litigants, not with the king or his justices. If both parties agreed to resolve an issue of advowson in a Church court, little could be done. Indeed, according to Flahiff's calculation, in his review of "200 odd" extant plea rolls of the *Curia Regis* (from the earliest pleas rolls up to the end of the reign of Henry III), in over one third of the cases of prohibition brought by clerics, the king's court recognized the ecclesiastical character of the original plea and sent it back to the Church court.⁹¹

⁸⁹ Helmholz, *supra* note 78 at 188-189.

⁹⁰ Sayers, *supra* note 19 at 165.

⁹¹ G.B. Flahiff, "The Use of Prohibitions by Clerics against Ecclesiastical Courts in England" (1941) 1 *Mediaeval Studies*, 101 at 103 and 107; Sayers, *supra* note 19 at 165-166.

Chapter 4: Conclusions and Thoughts

When Pope Gregory the Great sent Augustine on a mission to England in the late 6th century to convert the Anglo-Saxons to Christianity, he kindled a relationship between the Latin Christian Church and the secular authorities of England that would last for centuries.¹ While that relationship was never static (the next five centuries saw periods of conflict, as well as cooperation), by the time of the Venerable Bede (672/3-735) Christianity had become integrated into Anglo-Saxon society and officers of the Church were sought out by Anglo-Saxon kings and other secular leaders for roles as advisors and counselors.²

That relationship between the Church and the English monarchy endured the coming of the Normans when William, Duke of Normandy conquered England (1066), and it evolved through the successive reigns of the Anglo-Norman and Angevin kings. In this thesis I explored the development of the relationship between the Church and the secular authorities of England from the days of Edward the Confessor through the reign of King John, with particular attention to the 62 year period beginning in 1154 with the reign of Henry II and ending with the death of John in 1216. A review of topical literature on the early and High Middle Ages in Western Europe provided an account of the social and cultural changes that occurred during that period, the evolution of the relationship between the Church and the English secular authorities, the growth of governance and infrastructure in both the Church and the English royal administration, and advances in the canon law of the Church and the royal law of England.

That historical context provided valuable insight into the events and activities described in cases recorded in the Selden Society publications from the reigns of Henry II, Richard I and John that were reviewed for this thesis. In examining those cases, I attempted to trace the effect of the developments in the royal law on the relationship between the Church (both in Rome and England) and the monarchy of England over the 62 year period and *vice versa*. Using first-hand accounts of secular legal matters involving Church officials, changes in the manner and extent to which the clergy were involved in

¹ R.H. Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to 1640s*, vol. 1 (Oxford: Oxford University Press, 2004) at 2.

² James Campbell, Eric John and Patrick Wormald, *The Anglo-Saxons* (Oxford: Phaidon Press Limited, 1982) at Ch. 4.

royal court procedures (as litigants, witnesses or judicial officers and clerics), and in the way they were treated by those courts, helped to illuminate the varying degrees of tension, rivalry or cooperation that existed between the Church and the secular authorities during that period, as well as the adjustments each institution made in their attempt to carry out their respective roles in the English judicial jurisdiction. In addition, based on information gathered from the accounts, I considered whether or not the Church/State relationship influenced the development of the structure, processes or scope of the royal law.

To understand and interpret the events and developments that were recounted in the cases from the royal courts required an appreciation of the dynamics of the relationship between the Church and the secular authorities during that period. To gain that perspective it was necessary to understand why that relationship developed the way it did and how it affected the practices and conduct of the royal courts and their participants, particularly in light of the involvement of the clergy in the secular legal process. The development of the Church/State relationship in England was best illustrated through a progressive review of the responses of English kings to the changes in and expansion of the power and authority of the Church from the late 11th century to the early 13th century.

By the reign of the last Anglo-Saxon king, Edward the Confessor (r.1042-1066), the Church had become a fixture in the administration of the kingdom and its officers held important positions as members of the king's council and the royal Household. At the time, the interests of the Church were largely aligned with those of the monarchy. However, Church officials were aware that they needed to retain the support of the king and the aristocracy to ensure the continuing spread of Christianity throughout England and the growth of the English Church. In addition, the Church needed to continue to curry favour in order to protect the coveted position the clergy had attained in the hierarchy of power within the kingdom, as well as its growing property interests in England. In return, a king gained status, legitimacy and authority through his affiliation with the new religion: being 'appointed by God' to be his temporal representative, to protect and rule over his subjects, and to be their ultimate judge on earth.

That mutually beneficial relationship continued in England into the reign of William the Conqueror. When William crossed from Normandy, he did so with Pope Alexander II's

blessing and support. In addition, senior positions within William's *curia regis* were filled by members of the clergy, including his half-brother Odo, the warrior bishop of Bayeux (who, along with William Fitz Osbern was left in charge of the new kingdom while William returned to Normandy) and his archbishop of Canterbury and counselor, Lanfranc.³ Cooperation between king and Church was one of the notable features of William's reign, as it had been under the Anglo-Saxon kings. One exception, however, was William's response to Pope Gregory VII's request that he do fealty to the "successors of St. Peter", to which William curtly replied, 'No', reminding the pope that it would have been contrary to the practices of his predecessors.⁴ Throughout his reign, William resisted efforts by the pope to assert supremacy over the English Church and its clergy.

However, the general level of cooperation with the Church and control over episcopal matters by the king witnessed during Edward's and William's reigns was not sustained through the reigns of William's successors. The campaign to free the Church from the control of lay interests (the Papal Reform) began to develop traction with the election of the first reform pope, Leo IX (r.1048-1054). Leo IX and his entourage of reformers believed that interference in the affairs of the Church by the laity, no matter who they were and no matter how well intentioned, was not to be tolerated. That position had the potential to seriously affect the authority of secular rulers, due to the amount of land and wealth the Church and its officials controlled throughout Western Europe. Wisely (whether intentionally or not), the reformers confined their initial efforts to matters that did not threaten the authority of secular rulers, such as the prohibition of simony and nicolaism, and the restructuring of the internal functions of the Church. As such, the nascent movement attracted the support of several secular rulers, including the German kings and emperors, Otto III (r.983-1002) and Henry III (r.1039-1059), as well as English kings, such as Edgar the Peaceable (r.959-975) and William the Conqueror.⁵

It was not until the papacy of Gregory VII that the more ambitious principles of the reform movement were articulated in his *Dictatus Papae* of 1075; by that time the reform movement was well established in the Church and was gaining strong political momentum throughout Western Europe. In his *Dictatus*, Gregory put secular rulers on

³ Marjorie Chibnall, *Anglo-Norman England 1066-1166* (Oxford: Basil Blackwell Ltd., 1986) at 12.

⁴ Robert Bartlett, *England Under the Norman and Angevin Kings* (Oxford: Oxford University Press, 2000) at 410; Helmholz, *supra* note 1 at 106-107.

⁵ James A. Brundage, *Medieval Canon Law* (Harlow: Pearson Education Limited, 1995) at 34-35; Chibnall, *supra* note 3 at 38-39.

notice that major changes were occurring when he proclaimed the pope was the divinely chosen head of the Church and declared that all bishops were to be appointed by the pope, subordinate ultimately to him and not to secular authorities. The philosophy of the Church toward the role of its clergy in society and its own relative position in relation to secular authorities had undergone a fundamental change within the top levels of the ecclesiastical hierarchy; churchmen were told that their obligation to God now overrode their duty to a king. That was a reversal of the position the Church had advocated over the previous six centuries.

The Church's new dogma shook the traditional foundations of Western European society and challenged the normal order of things. Under Gregory VII's guidance, Church reform was taken beyond the aim of an independent Church to the repositioning of the Church as the supreme authority in Western Europe, including the claim that the pope was superior to secular rulers and had the right to depose emperors and kings. That position challenged the traditional authority and jurisdiction of secular rulers and questioned the limits of temporal royal power and the nature of kingship. Tension between the Church and secular authorities began to develop when the pope claimed his authority extended over the temporal realm and that the power of the temporal rulers devolved from the pope, not God. Kings were loath to yield up their traditional rights, and arguments over what matters were spiritual and what matters were temporal resulted. Such jurisdictional disputes had never occurred before; but then secular leaders had never stood to lose the degree of status, authority and wealth that would occur if they could no longer control the Church, its wealth and land. The loss of the ability to control the appointment of bishops, and even to 'elect' (read: 'select') the pope was an enormous threat to the traditional prerogatives of Christian rulers and to their ability to dictate matters within their own kingdoms.

England did not start to feel the effects of the more robust Church reforms, however, until the papacy of Pascal II (r.1099-1118) and the reign of Henry I (r.1100-1135). By that time, though, a power shift was already occurring on the Continent and the pope was gaining significant political stature and authority as head of the Latin Christian community. Unfortunately for Henry I, the turn of events that led him to the throne resulted in his need to curry support from the Church in order to secure his position as the King of England. In his dealings with the Church, Henry I faced a strong reform pope in Pascal II, who was demanding the end to lay investiture by all secular rulers in

Western Europe. Henry I was eventually forced into a compromise by the tactics of Pascal II, and in 1107 he agreed to renounce his right to invest prelates with the symbols of their office: the crozier and ring.

Relinquishing the right to conduct lay investitures took away much of the divine authority of a king and acknowledged that the office of the monarch was now largely secular in nature. Henry I's concession supported the pope's claim as the divine leader of the Latin Christian Church, which was a critical step in the evolving relationship between the Church and English kings. But what had Henry I really lost? The clergy had agreed to continue to do homage to the king, the king could still present nominees to the Church chapter for election, the elections continued to be held in the presence of the king and, more often than not, the king's nominee was elected. It seemed Henry I had not given up much; in reality, however, he had conceded the king was no longer the ultimate spiritual leader of his subjects and therefore, the pope, as divine head of the Latin Church, now had a legitimate arena of jurisdiction within the English realm. The king was no longer the supreme defender and judge of all matters (spiritual and temporal) in his realm as Edward and William had been; the English king had lost a portion of his royal jurisdiction.

The Church had won that argument, but it was only one of the many issues disputed and debated while the Church was attempting to establish its standing among the political powers in Western Europe. The height of that struggle occurred during the reigns of Stephen and Henry II. Unfortunately for Henry, the civil war during Stephen's reign had allowed the Church (both in England and in Rome) to gain significant presence and strength in England during that period of political instability. When Henry II ascended to the throne of England in 1154 he faced a stronger, more aggressive and politically active Church than had any of his predecessors. Although it was apparent in reviewing the cases from Henry II's reign, that he generally respected the traditional jurisdiction of the Church over matters such as marriage, bastardy and testamentary matters, it was also evident that he resented, and resisted, the persistent and "daring contempts"⁶ by the Church and the pope to intrude into what he believed were his royal prerogatives, including matters involving Church held lands.

⁶ William Prynne, *Exact Chronological Vindication and Historical Demonstration of the Supreme Ecclesiastical Jurisdiction of our ... Kings*, 3 vols. (London, 1665-1668), v. 3 at 538.

Henry II's response to that situation, however, was not to completely shut out the Church; rather, he was amenable to sharing jurisdiction with the Church, albeit on his own terms. He endeavored to find a way to accommodate this new episcopal entity and to define its jurisdiction within England, while at the same time, maintaining his royal authority and fulfilling his coronation promise to his subjects to provide uniform and equal justice for all. But Henry's response to the situation was a definite departure from the position William the Conqueror had taken; although William's ordinance established two judicial jurisdictions, he remained the ultimate judge of both spiritual and temporal matters. That was not the case for Henry II; he accepted that a dual jurisdiction existed in England, and conceded that the Church had authority over spiritual matters. The outstanding issue was to define what 'spiritual matters' included.

During John's reign, the papacy experienced the apex of its power and political influence under Innocent III. Like Henry II, John generally respected the jurisdiction of the Church within the bounds set out in the Constitutions of Clarendon. Bouts of conflict between a king and the pope by that time were normally restricted to occasions when fundamental rights were either ignored or appropriated by the other party. Such was the case when Innocent III secured the election of and consecrated a new archbishop of Canterbury without engaging John in the process. Although the pope's presumption in that instance caused a significant breakdown in the relationship of John and Innocent III, and between the Church and England, in general, that was not the biggest Church/State drama that occurred during John's reign. That was reserved for John's surrender of the entire kingdom of England to Innocent, his homage to the pope and the reversion of the kingdom to John as a papal vassal. It was exactly the situation Pope Gregory VII had asked William the Conqueror to accept 120 years earlier, to which William's political authority and secure position as head of the English Church allowed him to reply to the pope with a curt "No". But times had changed, and over the years power bases had shifted. John was facing the threat of rebellion within his kingdom and invasion from the French king, so he turned to perhaps his only powerful source of political support - the Latin Christian Church.

The change in the responses of those five English kings (Edward, William I, Henry I, Henry II and John) toward demands of the Church over 175 years reflect developments that had taken place within and between the institutions of the Church and the English monarchy. The relationship evolved as fundamental shifts occurred in their foundational

philosophies, which in turn, drove changes in their customs and traditions, relative power and authority, judicial jurisdiction, and in the form and function of their governance infrastructure and legal systems. However, to focus only on the relationship at the very highest level of politics, that of kings and popes, is to lose sight of important affairs carried on at the lower levels of the political scale.

By the end of Henry II's reign, much of the interaction between the Church and the State over jurisdictional intrusion was occurring at the level of administrative and judicial forums. The disputes that occurred were rather more questions of conflict of laws, than they were challenges between Heads of State. As the royal judicial process in England evolved beyond the *curia regis*, and specialized courts and procedures were created to deal with finance issues, common pleas or criminal actions, the royal courts no longer functioned as the forum for debates between kings, popes, archbishops and papal delegates, as they had in the early days of Henry II's reign. Through the reigns of Henry II and John, the cases illustrate that the royal courts became the forum of interaction between common litigants and the king's justices.

Henry had inherited a fractured kingdom; during the civil war monarchical authority had diminished and been arrogated by powerful earls and barons. As a result, lawlessness was rampant and dominant lords had illegally occupied the lands of weaker lords and vulnerable subjects. Reversion to blood feuds and vengeance to retaliate against theft, unlawful disseisin and the injury or killing of kin were the methods of justice being employed throughout the realm. In order to stabilize his kingdom, Henry needed to diminish the power of his barons and earls and squelch the unlawful activity of his subjects. He drew on his inherent authority to enforce peace and order, punish crime and deliver justice, and used it as a means to reclaim authority and curb lawlessness.

Because unlawful disseisin was a major cause of the unrest occurring within his realm, Henry made 'disseisin without judgment of the court' an action that would fall within the king's mercy and, therefore, subject to his courts adjudication. This eventually helped to accomplished two of Henry's goals; first, it allowed Henry to constrain the violent self-help methods being used by his subjects in attempts to reclaim their lands and settle disputes. That, in turn, helped to limit the occurrence of a blood feud or vengeance killing that perpetuated criminal activity. Second, it established the principle that 'no one

need answer in their lord's court concerning their fee tenement without a royal writ',⁷ which reduced a lord's authority and control over the seisin of his land (lawfully or unlawfully occupied), and, ultimately, lessened seigniorial power and authority. In this manner, Henry II began to regain monarchical power, and assert control over his realm.

The key to his ability to achieve his goals was the consistent and repetitive application of adjudicative procedures by Henry's royal officials who were sent throughout his kingdom under royal commission to determine disputes on behalf of the king. Henry's policy was that the royal law was to be applied impartially and uniformly for the benefit of his subjects, regardless of status or rank.⁸ The problem Henry faced, however, was the burgeoning authority of the Church and its claim to jurisdiction over all matters touching the Church, especially matters involving members of the clergy, which encompassed a large percentage of the population in England, at that time. The potential threat posed by the Church's assertion presented a significant challenge to Henry's judicial authority and, therefore, to his ability to regain control over the conduct of his subjects and the stability of his kingdom. If that threat was realized, it meant a large number of individuals in England would no longer be subject to Henry's judicial authority, rather they would be judged by the Church under the principles of the canon law in a separate court system. More importantly, the penalties and punishment rendered by Court Christian were more lenient, and therefore much more attractive to litigants, and felons in particular.

If Henry's subjects chose to litigate matters involving land seisin and crime through the Church courts, rather than through his royal courts, the consequences could be disastrous for Henry. He would lose the means to lawfully control land, and therefore wealth in his kingdom, as well as the ability to control the activities of his subjects. The ability to control wealth provided Henry critical leverage (authority) over his barons' conduct (power); punishing criminal and unlawful acts allowed him similar leverage over his subject's conduct. If he could not control his barons and subjects through just means, he could not establish or maintain order and stability in his realm according to the terms of his coronation oath; and if he could not do that, he would not be king. The

⁷ John Hudson, *The Formation of the English Common Law* (Harlow: Pearson Education Limited, 1996) at 192; Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1889; repr. 1968) vol. I at 147.

⁸ The reference to 'subject' excludes persons whose status was not 'free', such as *villaini* or peasants. See note 61, Chapter 2, above.

confidence his subjects placed in his judicial procedures and their willingness to employ them when it counted was critical to his success in restoring his kingdom and authority.

At the same time, however, the reformers of the Church were also fighting to regain control and authority over their domain, and they were just as intent on success. The power of the Church was at its height during the High Middle Ages and popes could summon huge numbers of parishioners to follow the cross and fight for the rights of the Church, as seen in their mounting of Crusades against enemies outside Western Europe, but of more concern, within Latin Christendom, as well. Secular leaders knew the Church had the ability to sway public opinion for or against them or their efforts to expand their kingdoms and increase their power. The Church was no longer defenseless; a shift in power had occurred and Henry II was dealing with its consequences. The pope was now a strong political player - an equal to secular leaders - and the Church was powerful due to its wealth, extensive land-holdings and influence over the large Christian community of Western Europe. That gave Church officials the confidence to become aggressive in their demands and to harden their position on fundamental reform principles. Senior Church officers and legates reflected that self-assurance when they parlayed or negotiated with secular rulers, as well as in their roles as advisors and counselors in affairs of state, for both temporal and ecclesiastical leaders. Such were the dynamics of the relationship between the Church and the State during the reigns of both Henry II and John. The Church was no longer cast in a supporting role to kings and emperors; it was in direct competition, and at times looked like it might prevail.

Overlaying that political dynamic were the personalities of the English rulers and the senior Church officials in Rome and England, such as Henry II, King John, Alexander III, Innocent III, Thomas Becket and Hubert Walter. Each one of those men brought wisdom, intelligence, tenacity and a wealth of skills to their positions, all enhanced by a deep desire to rule or lead, and each addressed their skills to situations where they made a difference. Sometimes they won; sometimes they lost – on occasion with fatal results. But each one of them had a considerable influence on the political events and conflicts of their day; certainly, in each of their cases, the absence of their involvement could have significantly changed history.

The fundamental issue that underlay all of the conflicts between the Church and the State from the mid-11th to the early 13th centuries in Western Europe was jurisdiction. The Church's battle for souls was really an effort to expand Christianity over a larger area and a greater number of people; that is, to expand the physical jurisdiction of the Latin Christian Church. In general, secular rulers did not have a problem with the Church extending the geographical reach of Christianity; after all they were 'Christian princes' and the introduction of Christianity into new regions benefited them, as well, by creating the potential to enlarge their kingdoms and increase their authority, also. The problem came when the Church tried to expand its 'spiritual' jurisdiction. Secular leaders did not question the authority of the Church over spiritual matters; they were, however, concerned with the Church's attempts at broadening the definition of 'spiritual' in such a manner as allowed the pope to claim that his authority extended over certain temporal matters. From the perspective of the secular authorities, if the Church expanded its spiritual jurisdiction into the temporal realm, the consequence would be a diminution of secular jurisdiction, and that would threaten the power and wealth of the secular leaders. As a result, as the Church began encroaching into temporal and political affairs, kings began withdrawing their support for the reform effort and challenging its advocates.

The efforts of the Church to increase its jurisdiction, and the conduct of the secular authorities to protect theirs, underwrote the conflict and tension that arose between the Church and the State. With regard to jurisdiction over legal disputes, for example, the Church claimed absolute authority over the conduct of all members of the clergy and defined its competence in any matter by the status of the parties involved; in other words, from the perspective of the Church, if a member of the clergy was involved in a dispute, it would automatically fall within episcopal jurisdiction. That definition resulted in a much larger legal jurisdiction for the Church than temporal authorities were willing to concede. In contrast, the secular authorities considered the subject matter of a dispute, not the status of the parties involved, when determining judicial competency. If the cause of a claim invoked Church law, then the case should be dealt with in the spiritual forum; all other pleas would be dealt with by the temporal courts. That perspective significantly reduced the legal jurisdiction of the Church. The potential consequences that would result if the Church was successful in implementing its philosophy drove secular authorities to try to contain the Church's efforts. Henry II's response to that

situation was to issue his Constitutions of Clarendon (1164), which defined the limit of the Church's legal authority within England and set out processes to enforce it. Of course the Church did not simply concede to Henry's demands; Pope Alexander III condemned most of articles of the Constitution as being contrary to the canons and the liberty of the Church. The conflict over the Constitutions ultimately led to the fatal clash between Henry II and Thomas Becket.

That famous conflict was also over jurisdiction, but it took place on three different levels: a personal level, a state political level and an international level. The clash on the personal level was the result of two robust personalities with two different agendas. Like Henry's earls and barons, the Church and its bishops had gained an independence and power in England during Stephen's reign that threatened Henry II's monarchical authority. In addition, Church officials in England had become accustomed to turning to Rome for counsel and direction, rather than looking to the king. Henry II needed to regain supremacy over the English Church in order to stem the attempts of intrusion by the pope into what Henry perceived were matters within his jurisdiction. He also needed to recover control over the vast landholdings and wealth of the English Church and the loyalty of its bishops in order to increase his monarchical power. Henry appointed Thomas Becket to the most senior position within the English Church, archbishop of Canterbury, in order that his friend and wise counselor could help him attain those goals.

Thomas was an extremely accomplished man and had risen through the ranks of Henry II's administration to the position of chancellor. He had excelled at each successive position he had held under Henry II and had always supported Henry in his political endeavors; it is a given, therefore, that Thomas was ambitious. However, Thomas' appointment as archbishop was viewed with much skepticism by the officers of the Church, both in England and in Rome, so in line with the pattern of his past achievements, Thomas set out to prove them all wrong and become a good, if not great, archbishop. As a result, rather than helping Henry, he switched his loyalty to the Church, relinquishing his position as chancellor and taking up the cause of Church reform with vigor.

In the cases involving Henry II and Thomas, and in the literature relating to the affair, there is abundant evidence of Thomas challenging Henry, primarily in his attempts to re-establish his authority over the English Church and its bishops. But some of Thomas'

challenges had nothing to do with Church matters; rather, they involved Henry in his role as Thomas' sovereign lord, whom he had done homage to (even though Thomas was archbishop of Canterbury, he was still one of Henry's tenants-in-chief, and therefore his vassal). At the beginning of his term as archbishop, Thomas had disseised lands without the judgment of the royal court required by royal law, and then later ignored Henry's royal summons to appear before him to answer to that charge, not once but three times. That conduct amounted to a challenge of the king's authority by one of his tenants-in-chief (which in Henry II's eyes amounted to treason). Henry could not allow that conduct to continue, because, at that time, Henry was in the throes of trying to rein in the power of his earls and barons and enforce his authority over them. He could not risk his most senior vassal flouting royal law and ignoring his commands because that would send the message that his other tenants-in-chiefs (temporal or episcopal) could ignore his commands, also. If that occurred it would totally undermine his efforts to regain authority over his kingdom.

The second level of the conflict between Henry II and Thomas involved their respective roles as the senior officers of their institutions; Henry as King of England and Thomas as the Head of the Church in England. In essence, when Henry II made Thomas archbishop of Canterbury, he handed Thomas his own realm, albeit a spiritual one. As with any other sovereign, and being an ambitious man, Thomas likely relished the power and authority that came with that position. But what he may have experienced for the first time was the possibility that he was no longer a servant to the king, but rather, in eyes of the Church, he was the king's equal as the supreme head of the ecclesiastical realm in England. Church reform was all about the belief that the clergy owed fidelity to God, not man; therefore, from Thomas' perspective his overlord, in his new role, was God via the temporal body of the pope, not Henry II. Given Thomas' personality, that may have introduced a very different dynamic into Henry and Thomas' relationship. Thomas' loyalty had shifted to the Church and he now viewed himself as an equal to the king; that did not sit well with Henry.

Those two elements, the personal challenge to Henry II's authority as Thomas' liege king, and Thomas' assumption that he was now Henry's political equal may have soured Henry and Thomas' personal relationship and affected the internal politics in England, but they would not likely have had an effect on Church/State relations outside of England. Even after Thomas' death, Henry contended with the same demands from

Pope Alexander III, as well as the continued and increased intervention of the Church into matters of English concern, both at an international level, as well as within Henry's realm. Thomas' conduct in his role as archbishop may have acted as a personal albatross around Henry II's neck, but it did not alter the fundamental issues Henry was dealing with. Neither the Church's position on the jurisdictional boundaries of its authority in Western Europe, nor Henry's response to that position, changed because of Thomas' tenure as archbishop.

Although Thomas' conduct and insubordination may have introduced a threat to Henry's efforts at controlling his tenants-in-chiefs, and offended him personally, it did not affect Church/State relations at the highest level; that is, between the papal reformers in Rome and the King of England. Yes, Thomas became a saint and a martyr, but the only effect of his death seems to have been an entrenchment of Alexander III's already firm position on the Church's jurisdiction over criminous clerks. Henry's actions to protect his prerogative rights, like all the other secular leaders in Western Europe, were a reaction to the reform philosophy and aggressiveness of the Latin Christian Church, not to Thomas. In the long run, the question is: what impact did Thomas' conduct and his murder have on the royal law and the development of the common law? From today's perspective, it would appear very little.

Putting the affairs of Henry II and Thomas aside, the broader questions are: whether the jurisdictional debate over ecclesiastical and secular authority was ever resolved? To what extent did ecclesiastical jurisdiction develop and feature in English law and what impact did that have on the royal courts and the reach of their jurisdiction? And finally, was the influence of the papacy (less personal and more institutional) on the question of jurisdiction any more effective or successful than that of Thomas, in the long term?

The first question is the easiest to answer since evidence abounds in the history of the Middle Ages. The question of the relative power of the papacy and monarchs was never resolved; the boundary between the spiritual and temporal was never absolutely defined. Granted, in certain parts of Western Europe the question became irrelevant as some kings and queens successfully challenged the authority of the papacy over them and their subjects in every respect. Nevertheless, it clearly remained an issue during the later Middle Ages in most of Western Europe. For example, the relocation of the papacy from Rome to Avignon for over 70 years (1305-1377) was a result of another chapter in

the relationship between the Church and State, which became known as the Babylonian Captivity⁹; the Great Schism occurred when, for over 40 years, there were two and sometimes three claimants to the papal office backed by different secular factions vying for control over the Church (1378-1418)¹⁰; and European rulers attempted to try to gain control over the Papal States in Italy throughout the 14th century (e.g., the Holy Roman Emperor and German King, Henry VII (r.1308-1313), and the French dynastic leaders of the 14th century).¹¹

During the Middle Ages, the power a pope was able to wield was a crucial factor in his capacity to influence, or even determine matters that temporal rulers considered under their secular purview and authority, as well as his ability to make papal policy or decisions effective. Although the Church had a large political corps in its clergy, it had no army of its own and had to rely on powerful secular allies for the enforcement of many of its papal wishes. Equally, the Church often required protection and defence, and so had to look to the forces of its temporal allies for that service, as well. And it was rare for a pope to be named to office without the backing and support of a powerful secular source.¹² But the history of Europe is fraught with examples where today's allies become tomorrow's enemies and the experience of the late Medieval Church was no different. New political events caused interests to shift and often alliances, also. At those times the Church could become particularly vulnerable and papal designs often lacked the necessary secular power to support them and put them into effect. Ecclesiastical sanctions could be quite ineffective against recalcitrant secular rulers. Without the threat of secular force to call on, a pope could find himself powerless.

The jurisdictional tension between the Church and State continued on the Continent and in England through the 13th and 14th centuries, into the late Middle Ages. For example, in the early years of the reign of Edward I of England (r.1272-1307), the monarchy was strong and successful, and its authority was not challenged by the secular nobility.¹³ However, conflicts with the Church arose frequently, led by the archbishop of Canterbury, John Pecham (r.1279–1292), who embarked on a program of Church

⁹ William R. Cook and Ronald B. Herzman, *The Medieval World View*, 2nd ed. (Oxford: Oxford University Press, 2004) at 258; A. Daniel Frankforter, *The Medieval Millennium*, 2nd ed. (Upper Saddle River: Pearson Education, Inc., 2003) at 311-313.

¹⁰ Cook, *supra* note 9 at 258 -259; Frankforter, *supra* note 9 at 322-324.

¹¹ Cook, *supra* note 9 at 262; Frankforter, *supra* note 9 at 334-337.

¹² Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 262.

¹³ Michael Prestwich, *Plantagenet England* (Oxford: Oxford University Press, 2005) at 129.

reform and threatened excommunication against anyone who interfered with the liberties of the Church, including those who sought writs of prohibition that would remove cases from the Church's jurisdiction.¹⁴ Many of the matters that strained the relationship between the Church and State during that period dealt with the king's authority to control the disposition of land within his kingdom and to collect revenues/taxes generated from those lands.

Edward I made several successful attempts during his reign to tax both the Church in England and its clergy, directly, rather than receive general grants of Church funds from the papacy, as was customary. The Church, like the secular State, collected or received money and goods from its parishioners in the form of tithes, legacies, fines and gifts. A portion of this income would be paid to the monarchy through grants from the papacy, negotiated by the crown; individual clergymen had never been directly taxed by a king.¹⁵ In the 1290's, however, Edward faced a series of expensive wars with the French. In order to raise the money need to support those wars, Edward I seized funds from churches throughout England. In addition, he pressured and compelled the Church in England under threat of outlawry to agree to pay a tax to the king at an unprecedented rate of one-half of its assessed income.¹⁶ He also insisted that each member of the clergy be directly taxed a tenth of the valuation of the moveable goods of the Church they were affiliated with. At that point, Pope Boniface VIII (r.1294-1303) intervened by issuing a bull in 1296 (*Clericis laicos*) that threatened to excommunicate all parties involved in a scheme to render such a tax or pay it. A year later, however, Boniface was forced to issue a second bull (*Etsi de statu*) essentially revoking the first bull, when Edward I withdrew royal protection from the Church and King Phillip IV of France (r.1285-1314) placed an embargo on Italy, halting the flow of revenue to papal coffers.¹⁷

The Protestant Reformation of the 16th century was to have a profound effect on the relationship between royal and ecclesiastical judicial jurisdiction. In England, characteristically, it played out in unique ways. Power struggles between the king and the Church during the reign of Henry VIII (r.1509-1547), inspired by the King's anxieties

¹⁴ *Ibid.*

¹⁵ Prestwich, *supra* note 13 at 71.

¹⁶ Michael Prestwich, "Edward I (1239–1307)", *Oxford Dictionary of National Biography*, Oxford University Press (2008) online edn., <http://www.oxforddnb.com.ezproxy.library.uvic.ca/view/article/8517>; Prestwich, *supra* note 13 at 166.

¹⁷ Cook, *supra* note 9 at 208; Frankforter, *supra* note 9 at 311-312, Prestwich, *supra* note 13 at 167; Prestwich, *supra* note 16.

over succession (he needed a son) and his sexual drives, led to a decisive and enduring split with Rome.¹⁸ Notwithstanding that split, ecclesiastical jurisdiction continued under separate courts, with their own judicial and forensic structures supervised by the Church of England, although increasingly under pressure from the now more and more assertive claims of the royal courts. Eventually, the pressure from the common law judges and the jurisdictional reforms of the 19th century effectively rolled the ecclesiastical jurisdiction into that of the secular courts.¹⁹

The second question posed above is harder to answer. In order to consider the extent to which the development of ecclesiastical jurisdiction in England during the High Middle Ages featured in English law or affected the royal courts and the reach of their jurisdiction, the dynamics of the Church/State relationship in England need to be taken into account (not only between the English Church and the English monarch, but also those resulting from the growing power of the Church in Rome during this period), as well as their effects. The research for this thesis focused on the interaction between the Church and secular authorities and the conduct of those two parties during the height of Church reform efforts in the High Middle Ages. It has been shown through the review of the literature that the pressure exerted by the Church in its effort to expand its authority and jurisdiction at that time caused a variety of responses from secular rulers in their attempts to limit the intrusions of the Church into temporal matters.

Henry II's response was to issue his Constitutions of Clarendon - an attempt to define and clarify the jurisdictions of the royal and ecclesiastical courts and to establish the boundary line between the two. Although the Constitutions were drafted by Henry and his justices and, therefore, reflected a strong monarchical bias in defining what lay within the secular domain, the simple fact that an attempt was being made to establish a boundary and to work towards an accommodation for the two co-existing systems, recognizes the existence of an alternative judicial jurisdiction and concedes the importance and legitimate role of the ecclesiastical courts within the English legal structure. In that sense, and at that time, referencing back to Helmholz' conclusions about history being written by "winners", the Church was the "winner" in respect of Henry's actions. But the victory was short lived. Even though the Constitutions formally

¹⁸ Norman Davis, *Europe: A History* (London: Pimlico, Random, 1997) at 490; Frankforter, *supra* note 9 at 333.

¹⁹ J.H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007) at 131-132.

recognized the Church courts and the primacy they held in certain ecclesiastical matters, in the long term, the Church was never master of the full extent of the judicial jurisdiction it hoped to claim. In the end, Henry and his successors were the ultimate winners, given the shortfall of the Church's achievements as compared to papal goals. Therefore, in answer to the third question posed above, the papacy was ultimately no more successful in the long term than Thomas had been, and as noted in Chapter 2, the gain of secular jurisdiction at the expense of ecclesiastical jurisdiction was inevitable.

The large number of the cases reported from the royal courts of Henry II and John dealt with matters that touched the Church, but which according to the Constitutions fell within the judicial jurisdiction of the royal justices. Those cases show that there was definite recognition on the part of the clergy of the division and scope of judicial competence, as certain articles of the Constitutions required members of the clergy to appear in the royal courts to resolve disputes over matters deemed within secular judicial authority, such as criminal activities, landholding, advowson and debt. The cases also show that the respect for that division and scope generally strengthened over time. An exception to that recognition and respect, however, was the jurisdiction over criminous clerics. As part of the fallout from the murder of Thomas Becket, the Church prevailed in their claim for jurisdiction over clerics who had been accused of committing secular crimes. The success of that claim resulted in the development of a procedure in the canon law for handling such matters, which culminated in a process known as 'benefit of clergy'.

As important, in relation to the royal law, however, the success of the Church's claim over criminous clerics also resulted in an attenuation and restriction of the king's adjudicative prerogative; perhaps the first successful and tangible challenge to and constraint of an English king's authority by another political body. In addition, the consequence of defining the competency of the two institutions in the Constitutions was not only the delineation of the Church's authority in England, but also the establishment of a limitation on the royal courts' jurisdiction. That, and the restriction on the king's right to judge criminous clerks both show that the Church's search for independence had an impact on determining the scope and the jurisdictional reach of the royal law.

On the other hand, Church officials in both Rome and England came to recognize and respect the royal courts' claim to jurisdiction over land matters, including lands held by the Church (except those held in free alms). Seisin and inheritance of land was a key

concern of the king since land represented the only real wealth and power of the time and so it was important for the king to retain control over those matters for political reasons. The cases reviewed for this thesis suggest the Church rarely challenged that right in England and the clergy had little hesitation in attending the royal courts to deal with land matters. In fact over a third of the cases reviewed for this thesis dealing with matters touching Church land were initiated by members of the clergy - and not only initiated against laymen, but also against other members of the clergy.

The Church also came to respect the jurisdiction of the royal courts over matters of advowson, as 'plea of the church' and 'plea of assize of the church' (disputes over possession of a church or its benefices) became common actions in the royal courts during John's reign. Pope Alexander III's eventual acquiescence to Henry II's claim of authority over matters touching Church land was an unusual concession, since in most of Western Europe the Church adjudicated those matters in its own courts, evidenced by the substantial quantity of property law contained within the canon law. That could have easily become an area over which the Church challenged Henry II. However, Alexander chose not to, and, again, (if only by default) the Church influenced the scope of royal law in England by allowing all land matters to be retained under the king's judicial authority.

Although the two sides appear to have generally respected the jurisdictions defined in the Constitutions, intrusions did occur. The methods available to prevent or prohibit actions from proceeding in Court Christian, however, had to be initiated by a party to the proceeding, not an officer of the royal courts, and the cases reviewed suggest that there were very few instances where litigants chose to do so. The small number of extant writs of prohibition from that period and the lack of evidence of the use of other legal initiatives could simply reflect that they may not have been common practices in the royal courts at that time. Nevertheless, the fact that methods to control the judicial conduct of the Church existed at all, is evidence that the intrusions were causing a degree of tension between the Church and secular authorities in England, such that those managing the royal litigation process during Henry II's reign felt a mechanism was necessary in order to restrain ecclesiastical incursions into the royal jurisdiction. That the political environment of the time caused such a tool to be created is a significant part of the story of the relationship that existed between the Church and State in England during that period.

The cases reviewed also confirmed that royal justices, even the Chief Justice, at times, were members of the clergy, knowledgeable in the canon law and its practices (e.g., Hubert Walter), and one cannot help but conclude that those individuals would have had significant influence over the methods, procedures and practices that came to be used in the royal courts, as well as an appreciation for the need and importance of accommodation and at times even compromise between the two systems. In addition, members of the clergy held administrative positions in the royal courts, and appeared as witnesses, jury members and advocates of causes handled in those courts. A mix of clergy and laity in all functions and positions in the processes of the royal courts was the norm in England during the period, and several of the same judges and justiciars held positions in both the royal and ecclesiastical legal systems at the same time. It is reasonable to suggest, therefore, that a transfer or sharing of ideas, knowledge, procedures, even phraseology and wording may have occurred and could have been a contributing factor that allowed royal officials, such as Hubert Walter and other justices to function and work as efficiently and effectively as they did within both systems.

Henry II's reign was a period of restoration and maintenance of peace and order, and the advancement in the law and governance of England during those years reflected his efforts to re-establish stability within his kingdom. Within 20 years of the beginning of Henry II's reign, his government had taken over direct management of much of the administrative function that the local authorities had undertaken during Henry I's reign, as well as, an increasing amount of the judicial work. Where Henry I attempted to monitor the shires through intermittent visitations by local officials, Henry II scheduled regular forays into the shires by his hand-picked royal officers. But the manner by which Henry II made these changes was in line with his Norman ancestor's practices – he adapted, modified and supplemented existing practices, blending old with new.

Comparing the turmoil that marked the beginning of Henry II's reign to the relative order that characterized the beginning of John's, one would think John's should have been an easier reign and that the law might have expanded significantly under the wise tutelage of Hubert Walter and the general 'obsessiveness' of John. But John had his challenges, too; for example, his long absences away from England in the early days of his reign; the interdict on England and John's own excommunication; the loss of the Angevin holdings on the Continent; and, his rebellious barons and the resulting civil war at the end of his reign. Nevertheless, royal law in England continued to mature, and while not expanding

rapidly during John's reign, the law became more sophisticated (perhaps even more elegant), routinized, complex, entrenched, and of course, extremely well documented and filed! (Thanks in the most part to the efforts of Hubert Walter.)

Helmholz stated, "Legal history is winner's history, and at the end of the day the ecclesiastical courts of England were losers".²⁰ That was ultimately the truth.

Nevertheless, during the High Middle Ages the Church and the State jockeyed for position and authority; and while the battles were hard-fought on both sides, it must not have been the intention of the two institutions to rout one another's power completely.

The truth is they needed one another; the pope needed the might of the secular powers for protection and defence and to help spread and enforce the doctrine of the Church.

The Church, on the other hand, controlled significant wealth and land, as well as the loyalty of a vast Christian community. The secular rulers understood the political power that wealth and support lent to the pope and, although they may have begrudged it, they also generally respected it and often curried favour with the Church because of it.

Although certain popes and kings may have personally coveted a position that granted sole power and control, none succeeded, and, in general, the struggle between the two institutes was more a claim for preeminence than complete domination.

It was a symbiotic relationship that had developed uneasily. However, in reviewing the history, although tension became a constant between the two institutions, there appears, overall, to have been more cooperation over the long term than angst. When clashes did occur they were almost always over jurisdictional authority, which lent itself to arguments over legal interpretations of rights and competency; and the royal courts did not always win those arguments. It is unfortunate this period is better known for the martyrdom of Thomas Becket (as interesting as that story is), than for all the successful compromises and collaboration (yes, and tension, too) between the two institutions, which resulted in creative and ingenious developments and advances in the legal and governance systems of the Church and the English monarchy in the High Middle Ages.

In taking up Helmholz' challenge to learn about and consider the importance of the ecclesiastical jurisdiction once exercised by the Church in Western Europe, particularly in England, I have come away believing that, as lawyers today, we are woefully unaware of how our legal system and its practices were influenced by the Church in the early and

²⁰ R.H. Helmholz, *Canon Law and the Law of England* (London: The Hambledon Press, 1987) at 2.

High Middle Ages, and likely poorer for that lack of knowledge. Ecclesiastical law certainly influenced modern English law in the fields that fell within its domain, such as marriage, bastardy, probate and wills, and even criminal law, the law of debt, property law, and corporate governance.

Many of the basic principles and procedures that form the foundation of our common law came into existence or were refined in Western Europe during the High Middle Ages in response to, among other things, the changing relationship between the Church and State and the resulting tension that developed between those two institutions. The efforts of the papal reformers to establish the independence of the Church from secular control (read: expansion of Church jurisdiction and authority), including the ongoing 'battle for souls' between the Church and king (read: influence, power and wealth), and the resulting 'creative tension' (read: power struggles and conflict) between the Church and State authorities were all important factors in the explosion of cultural and intellectual advancement during the High Middle Ages in Western Europe, known as the "renaissance of the 12th century". In turn, the environment that phenomenon created, nurtured and provided the energy for advances to be made in the field of law and in many other scientific and scholarly fields. Certainly it fostered the expansion and increasing sophistication of the royal law in England, as well as that of the canon law in Latin Christendom, along with its theological and ideological roots.

Considering the English experience, specifically, however, it is also important to keep in mind the unique features of its history when contemplating the shaping of law and jurisdiction in that realm. Although influenced by the events on the Continent, the manner in which the monarchy in England developed after the Conquest, coupled with the impact of the civil war during Stephen's reign and the resulting strengthening of the Church's influence in England, had a distinct effect on the way in which royal law and Church law related in that kingdom. The characteristic assertiveness of the Anglo-Norman/Angevin kings coupled with an aggressive, growing Church resulted in a singular tension in England. That, mixed with the particular personalities of the historical characters of that time and place, worked to create different responses to the pressures being felt throughout Western Europe, and so may be looked to in explaining the unique characteristics found in English law, both then and now.

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