

Henry II and the Criminous Clerks

IF I venture to write a few words about the great quarrel between Henry and Becket, a quarrel which has raged from their day until our own, it is with no intention of taking a side, still less with any hope of acting as a mediator. But, as it seems to me, there is a question of fact (which is also in a certain sense a question of law) involved in this quarrel, about which we are apt to think that there is, and can be, but one opinion, while in reality there are two opinions. Possibly I may do some good by pointing out that this is so. Perhaps if we were better agreed about the facts of the case we should differ somewhat less about the merits of the disputants. At any rate it is not well that we should think that we agree when really we disagree.

What did Henry II propose to do with a clerk who was accused of a crime? This is a very simple question, and every historian of England has to answer it. Generally, so far as I can see, he finds no difficulty in answering it and betrays no doubt. And yet, when I compare the answers given by illustrious and learned writers, it seems to me that there is between them a fundamental disagreement, of which they themselves are not conscious. The division list, if I were to draw it up, would be a curious one. Some of Henry's best friends would find themselves in the same lobby with warm admirers of Becket, and there would be great names on either side of the line. But I will not thus set historian against historian, for my purpose is not controversial, and I am very ready to admit that every writer has told so much of the truth as it was advisable that he should tell, regard being had to the scale of his work and the character of those for whom he wrote. Rather I would point out that, without doing much violence to the text, it is possible to put two different interpretations upon that famous clause in the Constitutions of Clarendon which deals with criminous clerks. I may be told that the difference between these two interpretations is a small one, one hardly visible to any but lawyers. Still it may be a momentous difference, for neither Becket nor Henry, unless both have been sorely belied, was above making the most of a small point, or insisting on the very letter of the law.

Let us have the clause before us :—

Clerici reſtati et accuſati de quacunq; re, ſummoniti a iuſtitia regis venient in curiam ipſius, reſponſuri ibidem de hoc unde videbitur curiæ regis quod ibidem ſit reſpondendum; et in curia eccleſiaſtica unde videbitur quod ibidem ſit reſpondendum; ita quod iuſtitia regis mittet in curiam ſanctæ eccleſiæ ad videndum qua ratione res ibi tractabitur. Et ſi clericus convictus vel confeſſus fuerit, non debet de cetero eum eccleſia tueri.

Now, according to what ſeems to be the commonest opinion, we might comment upon this clause in ſome ſuch words as theſe:—Offences of which a clerk may be accuſed are of two kinds. They are temporal or they are eccleſiaſtical. Under the former head fall murder, robbery, larceny, rape, and the like; under the latter incontinence, heresy, diſobedience to ſuperiors, breach of rules relating to the conduct of divine ſervice, and ſo forth. If charged with an offence of the temporal kind, the clerk muſt ſtand his trial in the king's court; his trial, his ſentence will be like that of a layman. For an eccleſiaſtical offence, on the other hand, he will be tried in the court Chriſtian. The king reſerves to his court the right to decide what offences are temporal, what eccleſiaſtical; alſo he aſſerts the right to ſend delegates to ſupervise the proceedings of the ſpiritual tribunals.

The words are juſt patient of this meaning. Nevertheless if we adopt it two things will ſtrike us as ſtrange. Why ſhould Henry care about what goes on in the eccleſiaſtical courts if thoſe courts are only to deal with breaches of purely eccleſiaſtical rules? If he did propoſe to ſend delegates to watch trials for incontinence, diſobedience, and the like, he inflicted a gratuitous and uſeleſſ. inſult upon the tribunals of the church. And then let us look at the ſtructure of the clause. In its laſt words it ſays that after a clerk has been convicted or has confeſſed, the church is no longer to protect him. Has been convicted of what? Has confeſſed what? Some temporal crime it muſt be. But the phrase which tells us this is divorced from all that has been ſaid of temporal crimes. We have a clumsy ſentence: 'A clerk, if accuſed of a temporal crime, is to be tried in the king's court; but if he be accuſed of an eccleſiaſtical offence, then he is to be tried in a ſpiritual court; and when he has confeſſed or been convicted [of a temporal crime] the church is no longer to protect him.' And what, if this interpretation be correct, is the meaning of the ſtatement that when he has confeſſed or been convicted the church is to protect him *no longer*? If he is to be tried like a layman in a temporal court, the church will never protect him at all.

Let us attempt a rival commentary. The author of this clause is not thinking of two different claſſes of offences. The purely eccleſiaſtical offences are not in debate. No one doubts that for theſe a man will be tried in and puniſhed by the ſpiritual court. He is thinking of the grave crimes, of murder and the like. Now

every such crime is a breach of temporal law, and it is also a breach of canon law. The clerk who commits murder breaks the king's peace, but he also infringes the divine law, and—no canonist will doubt this—ought to be degraded. Very well. A clerk is accused of such a crime. He is summoned before the king's court, and he is to answer there—let us mark this word *respondere*—for what he ought to answer for there. What ought he to answer for there? The breach of the king's peace and the felony. When he has answered—when, that is, he has (to use the words of the enrolment that will be made) 'come and defended the breach of the king's peace, and the felony, and the slaying, and all of it word by word,' then, without any trial, he is to be sent to the ecclesiastical court. In that court he will have to answer as an ordained clerk accused of homicide, and in that court there will be a trial (*res ibi tractabitur*). If the spiritual court convicts him it will degrade him, and thenceforth the church must no longer protect him. He will be brought back into the king's court—one of the objects of sending royal officers into the spiritual court is that he may not escape—and having been brought back, no longer a clerk but a mere layman, he will be sentenced (probably without any further trial) to the layman's punishment, death or mutilation. The scheme is this: accusation and plea in the temporal court; trial, conviction, degradation in the ecclesiastical court; sentence in the temporal court to the layman's punishment.

This I believe to be the meaning of the clause. The contrary opinion can only be upheld if we give to the word *respondere* a sense that it will hardly bear. No doubt if nowadays one says that a man will have to answer for his crime at the Old Bailey, one means that he can be tried there and sentenced there. But we ought not lightly to give to *respondere* so wide a meaning when it occurs in a legal document. It means to answer, 'to put in an answer,' to plead, 'to put in a plea.' The words of our clause are fully satisfied if the clerk, instead of being allowed to say, 'I am a clerk and will not answer here,' is driven to 'defend'—that is, formally to deny—the breach of the king's peace and the felony, and is then suffered to add, 'But I am a clerk, and can be tried only by the ecclesiastical forum.' According to this opinion Henry did not propose that a clerk accused of crime should be *tried* in the temporal court, and he did not propose that a *clerk* should be punished by a temporal court. The clerk was to be tried in the bishop's court; the convict who was to be sentenced by the king's court would be no clerk, for he would have been degraded from his orders.

Even if this clause stood by itself we should, so I venture to think, have good reason for accepting the second as the sounder of these two interpretations. If we look to the words it seems the easier; if we look to the surrounding circumstances it seems the

more probable. But we do not want for contemporaneous expositions of it. In the first place I will allege the letter addressed to the pope in the name of the bishops and clergy of the province of Canterbury.

Qua in re partis utriusque zelus enituit; episcoporum in hoc stante iudicio, ut homicidium, et si quid huiusmodi est, exauctorazione sola puniretur in clerico; rege vero existimante poenam hanc non condigne respondere flagitio, nec stabiliendae paci bene prospici, si lector aut acolythus quemquam perimat, ut sola iam dicti ordinis amissione tutus existat.¹

According to this version of the story there is no dispute between king and clergy as to the competence of any tribunal; the sole question is as to whether degradation—a punishment which can be inflicted only by the ecclesiastical court—is a sufficient penalty for such a crime as murder. Still more to the point are the words of Ralph de Diceto.

Rex Anglorum volens in singulis, ut dicebat, maleficia debita cum severitate punire, et ordinis dignitatem ad iniquum trahi compendium incongruum esse considerans, clericos a suis iusticiariis in publico flagitio deprehensos episcopo loci reddendos decreverat, ut quos episcopus inveniret obnoxios praesente iusticiario regis exauctoraret, et post *curiae traderet puniendos*.²

Now this, of course, is as plain a statement as could be wished that the second of our two interpretations is the right one, that the accused clerk is to be tried by his bishop; and those who contend for the contrary opinion seem bound to maintain that the dean of St. Paul's did not know, or did not choose to tell, the truth. Still it may be said of one of these witnesses—the author of the letter to the pope—that he is Gilbert Foliot, Becket's bitter antagonist, and of the other that he may have had his version of the tale from Foliot, and that, though a fair-minded man, he was inclined to make the best case he could for the king; and I must admit, or rather insist, that in the last words of the passage that I have cited from him Ralph de Diceto is making a case for the king, for he is in effect telling us by the phrase that is here printed in italics that we ought to read our Gratian and see how strong the king's case is.

But we may turn to other accounts. In the tract known as 'Summa Causae' the king is supposed to address the bishops thus:—

Peto igitur et volo, ut tuo domine Cantuariensis et coepiscoporum tuorum consensu, clerici in maleficiis deprehensi vel confessi exauctorentur illico, et mox *curiae meae* lictoribus *tradantur*, ut omni defensione ecclesiae destituti corporaliter perimantur. Volo etiam et peto ut in illa exauctoratione de meis officialibus aliquem interesse consentiatis, ut exauctoratum

¹ *Materials for the Hist. of Thomas Becket*, v. 405.

² R. de Diceto, i. 813.

clericum mox comprehendat, ne qua ei fiat copia corporalem vindictam effugiendi.³

Thereupon 'the bishops,' who in this version take the king's side, urge that the demand is not unreasonable. *Episcopi dicebant secundum leges saeculi clericos exauctoratos curiae tradendos et post poenam spiritualem corporaliter puniendos.* Thomas replies that this is contrary to the canons—*Nec enim Deus iudicat bis in idipsum.* He argues that the judgment of the ecclesiastical court must put an end to the whole case. It condemns a clerk to degradation. Either this judgment is faulty or it is a complete judgment. It ought not to be followed by any other sentence.

The story as told by 'Anonymus II' is to the same effect. The king's demand is thus described:—

ut in clericos publicorum criminum reos de ipsorum [sc. episcoporum] consilio sibi liceret quod avitis diebus factum sua curia recalebat; tales enim deprehensos, et convictos aut confessos *mox degradari*, sicque poenis publicis sicut et laicos subdi, tunc usurpatum est.⁴

To this the bishops reply, not that a lay tribunal is incompetent to try an accused clerk, but *Non iudicabit Deus bis in idipsum.*

Yet more instructive is 'Anonymus I.' The king's officers, instigated by the devil, took to arresting clerks, investigated the charges against them, and, if those charges were found true, committed them to gaol. (We must note by the way that even these royal officers, though instigated by the devil, do not condemn these clerks to death or mutilation; they are sent to prison.) The archbishop, however, held that though these men were notoriously guilty, the church ought not to desert them, and he threatened to excommunicate any who should pass judgment upon them elsewhere than in the ecclesiastical court. Thereupon the king, admitting the reasonableness of this assertion (*necessitate rationis compulsus*), consented that they should be given up to the bishops, upon condition that if they should be degraded by their ecclesiastical superiors they should then be delivered back to the temporal power for condemnation (*ita tamen ut et ipse [archiepiscopus] eos meritis exigentibus exordinatos suis ministris condemnandos traderet*). Thereupon Thomas, as is usual, is ready with the *Nemo bis in idipsum*.⁵ This is an instructive account of the matter, because, as I read it, it distinctly represents Henry as not venturing to make the claim which he is commonly supposed to have made. No doubt he would like to try clerks in his court, but he knows that the church will never consent to this.

Testimony that could be put into the other scale I cannot find. True, it is often said that the king wants 'to draw clerks to secular judgments (*trahere clericos ad saecularia iudicia*).'

³ *Materials*, iv. 202.

⁴ *Ibid.* iv. 96.

⁵ *Ibid.*, iv. 89.

was Becket's own phrase ;⁶ and though I do not think that it was strictly and technically true, I think that in the mouth of a controversialist it was true enough. Henry did propose that clerks should be accused in his court, and he did propose that punishment should be inflicted by the temporal power upon criminals who were clerks when they committed their crimes. The archbishop might from his own point of view represent as a mere sophism the argument that during the preliminary proceedings in the lay court there was no judgment, and that during the final proceedings there was no clerk. But we can hardly set this somewhat vague phrase, 'to draw clerks to secular judgments,' in the balance against the detailed accounts of Henry's proposals which we have had from other quarters, in particular against the plain words of Ralph de Diceto.

But we have yet to consider the story told by Herbert of Bosham. He says that the king was advised that his proposed treatment of criminous clerks was in accordance with the canons, and that the advice was given by men who professed themselves learned *in utroque iure*. Herbert sneers at these legists and canonists as being *scienter indocti*; still he admits that they appealed to the text of the canon law. He puts an argument about that text into their mouths, and then proceeds to refute it in the archbishop's name. Now of course if Henry really proposed to try criminous clerks in a temporal forum he had no case on the *Decretum Gratiani*,⁷ and no one would for one moment have doubted but that he was breaking canon after canon. However we have Herbert's word for it that the king's advisers thought, or at all events said, that the king's scheme was sanctioned by the law of the church, and with Herbert's help we may yet find in the *Corpus Juris Canonici* the words upon which they relied. It will, I suppose, hardly be questioned that Herbert may in the main be trusted about this matter, for he is here making an admission against the interest of his hero, St. Thomas; he is admitting that the king's partisans professed themselves willing to stand or fall by the canon law. And the story is corroborated by phrases which are casually used by other writers, phrases to which I have drawn attention by italic type. When Ralph de Diceto writes *curiae traderet puniendos*, when the author of 'Summa Causae' writes *curiae meae lictoribus tradantur*, when Anonymus II writes *nox degradari*, they are one and all alluding—so it seems to me—to certain phrases in Gratian's book.

The debate, as I understand it, turned on two passages in the *Decretum*.⁷ One of them is the following :—

Decr. C. 11, qu. 1, c. 18. *Clericus suo inobediens episcopo depositus curiae tradatur.*

⁶ Letter by Thomas to the pope, *Materials*, v. 388.

⁷ *Materials*, iii. 266-70.

Item Pius Papa epist. II.

Si quis sacerdotum vel reliquorum clericorum suo episcopo inobediens fuerit, aut ei insidias paraverit, aut contumeliam, aut calumniam, aut convicia intulerit, et convinci potuerit, mox [depositus⁶] curiae tradatur, et recipiat quod inique gesserit.

The other of the two is introduced by a *dictum Gratiani* which ends thus :—

In criminali vero causa non nisi ante episcopum clericus examinandus est. Et hoc est illud, quod legibus et canonibus supra diffinitum est, ut in criminali videlicet causa ante civilem iudicem nullus clericus producatur, nisi forte cum consensu episcopi sui; veluti quando incorrigibiles inveniuntur, tunc detracto eis officio curiae tradendi sunt. Unde Fabianus Papa ait ep. ii. Episcopis orientalibus. . . .

On this follows Decr. C. 11, qu. 1, c. 81.

Qui episcopo insidiatur semotus a clero curiae tradatur.

Statuimus, ut, si quis clericorum suis episcopis infestus aut insidiator extiterit, mox ante examinatum iudicium submotus a clero curiae tradatur, cui diebus vitae suae deserviat, et infamis absque ulla spe restitutionis permaneat.

These passages, it will be seen, contain more than once the phrase *curiae tradere*. What is the true meaning of it?

This seems to me an almost unanswerable question, for it amounts to this: By what standard shall we, standing in the twelfth century, construe certain passages which we believe to come from two popes, the one of the second, the other of the third century, but which really come from a forger of the ninth century, who, it is probable, has been using at second or third hand a constitution of the fifth century, when we know also that these passages have very lately been adopted, though not without modification, by a highly authoritative writer of our own days?

Apparently the disputable phrase takes us back in the last resort to a constitution of Arcadius and Honorius which was received into the Theodosian code.⁹ It begins thus :—

Quemcumque clericum indignum officio suo episcopus iudicaverit et ab ecclesiae ministerio segregaverit, aut si qui professum sacrae religionis obsequium sponte dereliquerit, continuo eum curia sibi vindicet, ut liber illi ultra ad ecclesiam recursus esse non possit, et pro hominum qualitate et quantitate patrimonii vel ordini suo vel collegio civitatis adiungatur; modo ut quibuscumque apti erunt publicis necessitatibus obligentur, ita ut colludio quoque locus non sit.

Then with this in his mind—or rather with the West Goth's *inter-*

⁶ It will be seen hereafter that this word is not in the text of the pseudo-Isidore, nor is it in the *Decretum Ivonis*, p. 5, c. 248.

⁹ Lib. xvi. tit. ii. l. 89.

pretatio of it in his mind, or yet rather with some epitome of that *interpretatio* in his mind—the pseudo-Isidore inserted certain clauses into the decretals that he was concocting for Pope Pius I and Pope Fabian.¹⁰ What he says in the name of Fabian we need not repeat, for it is fairly enough represented by the second of the two passages from Gratian that are quoted above.¹¹ What he says in the name of Pius is this :—

Et si quis sacerdotum vel reliquorum clericorum suo episcopo inobediens fuerit aut ei insidias paraverit aut calumniam et convinci poterit, mox curiae tradatur. Qui autem facit iniuriam, recipiat hoc quod inique gessit.¹²

There is here enough difference between Gratian and Isidore to make us doubt whether the one fully understood the other. But yet a third time did the great forger return to this theme. To the pen of Pope Stephen he ascribed

Clericus ergo qui episcopum suum accusaverit aut ei insidiator extiterit, non est recipiendus, quia infamis effectus est et a gradu debet recedere aut curiae tradi serviendus.¹³

Now of course the phrase in the Theodosian code, *continuo eum curia sibi vindicet*, has nothing whatever to do with the point at issue between Henry and Becket. The clerk who has been degraded from, or who has renounced, his holy orders is to become a *curialis*; he is to become obnoxious to all those duties and burdens, those *munera*, by which in the last days of the empire the *curiales* are being crushed. I suppose that no words of ours will serve as equivalents for the *curia* and the *curialis* of the fourth and fifth centuries; even German writers, with all their resources, leave these terms untranslated. I suppose that if Henry had wished to substitute for the words of Arcadius and Honorius a phrase which should express their real meaning, and be thoroughly intelligible to his English subjects, he would have said, *Clericus degradatus debet scottare et lottare cum laicis*. It would seem also that Becket and his canonists knew something of the history of the words *tradatur curiae*, and were prepared to go behind Gratian. But what I am concerned to point out is that on the text of the Decretum Henry had an arguable case. Here, he might say, are words that are plain enough. A clerk disobeys or insults his bishop; *mox depositus curiae tradatur, et recipiat quod inique gesserit*. What can this mean if it be not that the offender, having been deposed by his bishop, is to be handed over to the *curia*, the lay court, for further punishment? Very well, that is what I am contending for. Further punishment

¹⁰ Hinschius would trace these passages to that epitome of the *Breviarium Alarici* which is represented by the Paris manuscript, *sup. lat.* 215. See Hänel, *Lex Romana Visigothorum*, pp. 246–8.

¹¹ Fabianus, xxi. (ed. Hinschius, p. 165).

¹² Pius, x. (Hinschius, p. 120).

¹³ Stephanus, xii. (Hinschius, p. 186)

after degradation does not infringe your sacred maxim *Nemo bis in idipsum*, or if it does then you are prepared to infringe that maxim yourselves whenever to do so will serve your turn.

But more than this can be said. Not very long after Henry's death the greatest of all the popes put an interpretation on the phrase *curiae tradere*. Innocent III issued a constitution against the forgers of papal letters. The forgers, if they be clerks, are to be degraded and then

postquam per ecclesiasticum iudicem fuerint degradati, saeculari potestati tradantur secundum constitutiones legitimas puniendi, per quam et laici, qui fuerint de falsitate convicti, legitime puniantur [c. 7, X. 5, 20].¹⁴

This seems plain enough. Henry, had he been endowed with the gift of prophecy, might well have said, 'Here, at any rate, is an exception to your principle, and for my own part I cannot see that the forgery of a decretal—though I will admit, if you wish it, that it is wicked to forge decretals—is a much worse crime than murder, or rape, or robbery.'

But this is nothing to what follows. Innocent III speaks once more (c. 27, X. 5, 40).¹⁵

Novimus expedire ut verbum illud quod et in antiquis canonibus, et in nostro quoque decreto contra falsarios edito continetur, videlicet ut clericus, per ecclesiasticum iudicem degradatus, saeculari tradatur curiae puniendus, apertius exponamus. Quum enim quidam antecessorum nostrorum, super hoc consulti, diversa responderint, et quorundam sit opinio a pluribus approbata, ut clericus qui propter hoc vel aliud flagitium grave, non solum damnabile, sed damnosum, fuerit degradatus, tanquam exutus privilegio clericali saeculari foro per consequentiam applicetur, quum ab ecclesiastico foro fuerit proiectus; eius est degradatio celebranda saeculari potestate praesente, ac pronuntiandum est eidem, quum fuerit celebrata, ut in suum forum recipiat, et sic intelligitur 'tradi curiae saeculari;' pro quo tamen debet ecclesia efficaciter intercedere, ut citra mortis periculum circa eum sententia moderetur.

Now this, as I understand it, is an authoritative exposition of the true intent and meaning of the phrase *tradere curiae*, contained in those passages from the Decretum that have been printed above. It was a dubious phrase; some read it one way, some another; but on the whole the better opinion is not that of St. Thomas, but that of King Henry II. And so the king's advisers have this answer to the sneers of Master Herbert of Bosham:—We cannot hope to be better canonists than Pope Innocent III will be.

I am far from arguing that Henry's scheme ought to have satisfied those who took their stand on the Decretum. From their point of view the preliminary procedure in the king's court, whereby

¹⁴ *Reg. Inn. III*, ed. Baluze, i. 574.

¹⁵ *Ibid.* ii. 268.

the civil magistrate acquired a control over the case, would be objectionable, and the mission of royal officers to watch the trial in the spiritual court would be offensive. But still about the main question that was in debate, the question of double punishment, Henry had something to say, and something which the highest of high churchmen could not refuse to hear.

This account of the matter seems to fit in with all that we know of the behaviour of Alexander III and of the English bishops. Had Henry been striving to subject criminous clerks to the judgment of the temporal forum, the case against him would have been an exceedingly plain one. A pope, however much beset by troubles, could hardly have hesitated about it; no bishop could have taken the king's side without openly repudiating the written law of the church. But the pope hesitated and the English bishops, to say the very least, did not stubbornly resist the king's proposal. Even Becket's own conduct seems best explained by the supposition that until he grew warm with controversy he was not very certain of the ground that he had to defend. *Mox depositus curiae tradatur et recipiat quod inique gesserit*, was ringing in one ear, *Nec enim Deus iudicat bis in idipsum* in the other ear.

It is a curious coincidence, if it be no more than a coincidence, that Henry's plan for dealing with criminous clerks—a plan which, as he asserted, was not his plan, but the old law of his ancestors—agrees in all its most important points with what, according to an opinion now widely received, was the scheme ordained by a Merovingian king in the seventh century. The clergy of Gaul had been claiming a complete exemption from secular justice. By an edict of the year 614 Chlothar II in part conceded, in part rejected their claim. If a bishop, priest, or deacon (clerks in minor orders were for this purpose to be treated as laymen) was accused of a capital crime, the accusation was to be made and the preliminary proceedings were to take place in the lay court; the accused was then to be delivered over to the bishop for trial in a synod; if found guilty he was to be degraded, and when degraded delivered back to the lay court for punishment. Merovingian grammar, to say nothing of Merovingian law, is a matter about which no one who has not given much time to its study ought to have any opinion. Still this opinion, put forward by Nissl, has met with great favour.¹⁶ If it be true, then after five centuries and a half we find Henry reverting to a very ancient compromise. On this point I dare say little more, but it does not seem very certain that at any time the lay power in the Frankish state, or in the new principalities which rose out of its ruins, had

¹⁶ Nissl, *Gerichtsstand des Clerus*; Schröder, *Rechtsgeschichte*, 178; Viollet, *Histoire des Institutions Politiques*, i. 394. The settlement thus effected is not very unlike that defined by Justinian's Novels, 83 and 123.

ever, at least by any definite act, receded from the position which Chlothar II took up. I see no proof that the law laid down by Chlothar, the law laid down by Henry, was not the law as understood by William the Conqueror and by Lanfranc. The evidence that we have of what went on under our Norman kings is extremely slight. From cases such as those of Odo of Bayeux, of William of Durham, of Roger of Salisbury, we dare draw no inference about the general law. In none of these cases is there a sentence of death or mutilation. In the two latter the king can be represented as merely insisting on the forfeiture of a fief, and even great canonists would admit that purely feudal causes were within the cognisance of the temporal forum. Bishop William and Bishop Roger rely much less on the mere fact that they are in holy orders than on the great maxim of the pseudo-Isidore (his greatest addition to the jurisprudence of the world), *Spoliatus ante omnia debet restitui*. As to Bishop Odo, Lanfranc very probably would have had no difficulty in proving that the scandalously militant earl of Kent had put himself outside every benefit of clergy. It has not been proved that our Norman kings insisted on treating criminal clerks just as though they were criminal laymen, and on the other hand it has certainly not been proved that such clerks had enjoyed the full measure of exemption that Becket claimed for them. Henry's repeated assertions that he is a restorer, not an innovator, meet with but the feeblest of contradictions.

On the whole I cannot but think that the second of the two interpretations of the famous clause is the right one. If this be so all those modern arguments which would contrast the enlightened procedure of the canon law with the barbarous English customs—I am not at all sure that in the England of the twelfth century the procedure of the ecclesiastical courts was one whit more rational than that of the temporal courts—are quite beside the mark. Henry did not propose that an accused clerk should be tried in the lay court; he was to be tried in a canonical court by the law of the church.¹⁷

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¹⁷ In the middle of the twelfth century the English clergy were still using the ordeal, c. 3, X. 5, 37; and their only alternative for the ordeal in criminal cases was the almost equally irrational compurgation.