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Benefit of Clergy--A Legal Anomaly

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BENE FIT OF CLERGY—A LEGAL ANOMALY.

I. DEVELOPMENT OF BENEFIT OF CLERGY.

Among the most prized privileges of the Medieval Church was benefit of clergy. This may be defined as an immunity by which clergymen accused of felony, could be tried only in their own courts. Not only did the ecclesiastical courts have exclusive jurisdiction in cases of offenses by clerks against criminal law, but also in all cases of offences by laymen against clerks. By this privilege the clergy acquired a peculiar sanctity which set them apart from the laity. The personal inviolability surrounding them gave them a great advantage in contests with civil authority and since the Church was held responsible only to divine law, it became almost independent of the civil power and in all differences with temporal rulers this privilege was of great value. This medieval custom was not established without a long and bitter struggle. It was not considered unreasonable that disputes between ecclesiastics should be settled by their bishops, and this was the established rule of the church from an early period. But the claim that the felonious clerk should not be tried in a temporal court and that all disputes between laymen and ecclesiastics should be settled in church courts was not easily granted.¹

Benefit of clergy had its origin in the high regard in which the Church and its officials were held by secular rulers. As early as 355 A. D., the Roman Emperor Constantius decreed that bishops could be tried only by bishops² and later Justinian allowed the clergy the right to have episcopal judges, though he carefully reserved the power of disregarding the exemption: "nisi princeps iubeat."³ The early British Church presents one

¹Medley "English Constitutional History" (1907) 570-571. Lea "Studies in Church History" (1883) 177.
²Lea, supra, 178-179; Ayer "Source Book of Ancient Church History" (1913) 283; See Codex Theodosianus (319 A. D.) XVI, 2, 2.
³Lea, supra, 182.
of the first instances of benefit of clergy. The Welsh canon laws of the seventh century⁴ provided that if a clerk sued a layman he was to bring his case before the secular court. But if the clerk was the defendant, the trial was to be held before the bishop, and if the clerk had been tried and convicted in an earlier trial he had to content himself with secular law. In the Frankish Kingdom laws were personal instead of territorial. The Franks, Romans, Goths, and Burgundians were allowed trial by their own code of laws, no matter how mixed the population, and so it was only natural that the clergy, as a separate class, should have the benefit of canon law. As early as 538 A.D., the Third Council of Orleans was able to enact a canon declaring that episcopal consent was necessary before a clerk could appear in a secular court either as plaintiff or defendant.⁵

The steady persistence of the Church, backed by the use of excommunication, succeeded to such an extent that by 1000 A.D. benefit of clergy was acknowledged by the laws of practically all nations of Europe. This privilege proved to be an injury to the community and a source of corruption to the clergy. The clerk, while he might be exempted from secular law, was not exempted from committing secular crimes. The facility of escape in the ecclesiastical courts far exceeded that in the temporal courts for in the Church there was a fraternal spirit which made ecclesiastical judges very lenient toward accused clerks appearing before their courts.⁶ Moreover, the theory that degradation was the heaviest punishment that the episcopal court could inflict and the rule that forbade the ecclesiastical judges to inflict the death penalty rendered the Church an asylum for those charged with crime. Nevertheless, benefit of clergy was an established institution in the middle ages. There was much legislation to limit its scope but the privilege was not abolished until modern times. Established in a period when men could look to the Church alone for protection against violence, it remained after the formation of well organized courts of justice. Its purpose was to give the Church protection from unjust and biased decisions of worldly judges, but in practice the benefit tended to evade justice and protect the enemies of society. So,

⁴ Hadden and Stubbs "Councils of Great Britain" I:133.
⁵ Lea, supra, 184, 192.
⁶ Pearson "History of England" (1867) II:487.
throughout the Middle Ages, we find the State waging war against the Church over the privilege of benefit of clergy. The struggle was bitterly fought on both sides and it was with great difficulty that the Church was forced to submit to the secular courts.

We do not find benefit of clergy in Anglo-Saxon England, although there was a very close bond between Church and State. Beginning with the conversion of Ethelbert of Kent (597 A.D.) the spread of Roman Christianity in England was very rapid. The attitude of the subjects toward the Church depended somewhat upon the position of their rulers, but generally the Anglo-Saxons received Christianity with intense fervor when it was presented to them. The churchmen were always better educated than those about them and naturally gained important positions in the Anglo-Saxon kingdoms. It was customary to have a bishop as chief councilor to the king, and there were very few conflicts over authority between the crown and the Church. The clergy as a class ranked high socially and politically. Their spiritual services endeared them to the laity and their dignity and learning excited a feeling of profound respect. Preambles to the Anglo-Saxon laws invariably show respect for the counsel of bishops. These laws show that the wergeld, or the value of the life, of an archbishop ranked with that of an Anglo-Saxon prince, that of the bishop with that of the ealdorman, and that of the priest with that of the thegn.

In the administration of the law of the land ecclesiastical and secular officials worked hand in hand. The authority of the Church to impose penance was a punitive power of great importance as it could be imposed upon clerks and laymen alike. In principle it was not exactly a judicial power, although to outward appearance penance became a weapon supplementing the authority of the State during the Anglo-Saxon period, for the Church could inflict punishment for vices ignored by secular law and hear cases in which no temporal punishment was provided. From early times the clergy had great influence over

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1 Collection of Anglo-Saxon laws may be found in convenient form in Gee and Hardy’s “Documents Illustrative of English Church History” (1896) 47-50; the Latin text is found in Stubbs “Select Charters” (1890) 65, 71, 75. See Stubbs “Constitutional History of England” (1880) I: 264.

2 Makower “Constitutional History of the Church of England” (1895) 391-392.
the temporal courts and it was quite common to find a civil official and a bishop presiding jointly over the shire moot as well as the hundred moot, both judges, secular and ecclesiastic, expounding the same law. While ecclesiastical courts to try disputed civil questions existed in the Anglo-Saxon period, often presided over by the bishops in person, there was no sharp distinction between the judicial and administrative authorities.

The king had the right to inflict voluntary punishment upon his officials and in the same manner the higher officers of the Church exercised disciplinary powers over their subordinates. This caused them to suffer double punishment for grave crimes, that is, degradation and the temporal punishment. In the laws of Alfred . . . . "if the priest kill another man, let the bishop secularize him, then let him be given up from the minster unless the lord will compound for his wer." All disputes between clergymen were settled in the ecclesiastical courts. A law of Edgar's reign reads . . . . "and we enjoin that no dispute that be between priests be referred to the adjustment of secular men; but let them adjust among and appease among their own companions; or refer to the bishop if that be needful."

However, the laws of the Anglo-Saxons, as well as those of other Teutonic nations, did not contemplate the entire withdrawal of the clergy from the authority of the secular tribunals. The sin of the clergyman might be punished by his ecclesiastical superior and penance could be inflicted upon the lay brother by the clergy but a crime against the laws of the State was punished by the State. One of the laws of Edward the Elder decreed that if a man in orders steals, fights, purjures himself, or is unchaste, he shall be subject to the same punishment which the laity, under the same circumstances, would be and to his canonical penance besides. The plainest evidence that the clergy, even including the most dignified of the body, were held to answer in the ordinary courts is shown in the laws as to the mode of conducting their trials. But the position of the bishops.

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11 Makower, supra, 389; Institutes of Polity c. 10.
12 Kemble "Saxons in England" (1876) II: 437.
13 Idem; Ead. Gud. 3 Thorpe, I:168.
in the State, their prominence in the court system, and the policy of ecclesiastical judgment of disputes between clergymen made the assumption of ecclesiastical privileges easy after the coming of William the Conquerer (1066).

The basis of the immunity of clerks from civil jurisdiction in England is to be found in the ordinance of William I which separated the spiritual and temporal courts.\(^1\) This ordinance prescribed that all those who were impleaded by the episcopal laws for any crime were to come to a place which the bishop was to choose. There they were to answer for their crimes, not according to the hundred, but according to the canons and episcopal laws. If the accused criminal refused to obey the summons the civil authorities were to have the power to compel him to be present. The king’s officers and other laymen were forbidden to concern themselves with the laws which belonged to the bishop.\(^2\) This made legal the establishment of a separate system of criminal justice for the Church in England and unwittingly the Conqueror made possible the long contests between Church and State which were waged for several centuries after his day.

There were two great institutions in the Middle Ages, the Church and the State, each claiming to be supreme. Not only did the Church claim supremacy in spiritual matters but in temporal matters as well. The Popes regarded kings and princes as members of their flock and by use of excommunication and the interdict they made their influence felt in purely political matters, and as long as the king’s subjects were blindly religious, the Church proved its superiority to the State, as witnessed by the subjection of the German Emperor Henry IV at Canossa.

On the other hand practically all churchmen were members of the feudal system over which, theoretically at least, the kings presided. It was easy for William to ordain that clerks should be tried in Church courts, but generally the great churchmen were great lay nobles as well. A strong king was always found ready to prevent the disruption of his legal system by holding

\(^{1}\) Adams and Stephens "Select Documents of English Constitutional History" (1902) 1; Gee and Hardy, \textit{supra}, 57; the Latin text is found in Stubbs "Select Charters" 85.

\(^{2}\) Although this is the basis for the development of benefit of clergy, the ordinance contains no provisions for the personal exemption from temporal jurisdiction and says nothing concerning the regulations and mode of conducting trials in the ecclesiastical courts.
his clerical vassals responsible to his feudal law although during weak reigns or civil war the Church, as a "never dying" institution and an international state, constantly gained in power at the expense of the temporal rulers.

The control of the Church by a strong king is well illustrated by the case of William I and his half-brother Odo, Bishop of Bayeux, who had been condemned to imprisonment on a charge of inciting rebellion and treason even though he had pleaded immunity from secular justice. Odo was Bishop of Bayeux, but had served as regent for William in 1073. He had helped put down the rebellion of the Earl of Hereford and Norfolk and, as a reward, was made Earl of Kent. Thus he had a double status, clerical and baronial, and had been raised to second rank in the kingdom. When William I, in assembly, demanded the conviction of Odo his barons remained silent. The King spoke again, "When a man disturbs the commonweal of the whole realm, he should not be spared out of any personal favor." He bade his barons seize Odo and put him in ward, but there was no man who dared lay hands on a bishop. Then William seized his brother with his own hands. "I am a clerk," cried Odo, "and a minister of the Lord. It is not lawful to condemn a bishop without the sentence of the Pope." Then answered William, the subtle mind of Lanfranc, Archbishop of Canterbury, it is said, suggesting the distinction, "I do not meddle with clerks or prelates. I do not seize the Bishop of Bayeux, but I do seize the Earl of Kent." The Pope, though indignant, had nothing to urge in Odo's favor except stock passages of Scripture which forbid the laying of profane hands upon the Lord's appointed, and Odo remained in prison until the general release of prisoners by William on his death-bed.

In the reign of William Rufus (1087-1100), William, Bishop of Durham, was tried for treason and rebellion though he repeatedly denied the right of laymen to judge a bishop. The words of Bishop William might have won favor with Pope Gregory but were not received favorably by Lanfranc, who

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16 Pollock and Maitland "History of English Law" (1899) I:451.
17 Freeman "History of the Norman Conquest" (1875-6) IV: 69, 70, 72, 73.
18 Freeman, supra, IV:630.
19 See Gneist "History of the English Constitution" (1889) I:235.
upheld the traditions of William I. Although he was convicted, it should be noticed that Bishop William gave up only his bishop’s fief, and the severest canonist would not deny that purely feudal cases lay within the king’s jurisdiction.\(^\text{20}\)

Within a year of his consecration as Archbishop of Canterbury, Anselm was forced by William Rufus to appear before the *curia regis*. He was charged with laxness in fulfilling his feudal obligations during the Welsh War. Although William of Durham and Thomas, Bishop of London, had strongly asserted the privileges of the clergy, Archbishop Anselm did not make the slightest claim to any immunity from secular jurisdiction during his long dispute with William Rufus. The truth is that benefit of clergy was a novelty at this time and the doctrine of clerical exemption from secular jurisdiction was in its infancy.\(^\text{21}\)

In the laws of Henry I (1100-1135), we find the direct statement that those who belong to sacred orders are to be tried for all causes, both great and small, in the presence of their own judges.\(^\text{22}\) However, it has been much disputed whether the author of these laws had given the customs as they actually prevailed in England, or whether he borrowed from the Continent. As we have no cases to illustrate this point, it has always been a matter of conjecture.

Bishop Robert of Salisbury, together with his son and nephews, was seized by King Stephen (1135-1154) despite the ordinance of William I. Stephen claimed that they had broken his peace and as “satisfaction” demanded their castles. Upon their refusal they were imprisoned and maltreated. An ecclesiastical council censored the king and the immunity of clerks was strongly asserted. After the King’s actions were condemned, it is thought that he even did penance for them, but it is noteworthy that he kept the castles.\(^\text{23}\)

Osbert, a clerk accused of having poisoned Archbishop William of York, was charged before King Stephen and the bishops and barons of the Realm. Osbert relied upon his clerical privilege and refused to be judged by laymen. The King declared that the atrocity of the crime and the fact that the

\(^{\text{21}}\) Idem.
\(^{\text{22}}\) Pollock and Maitland, supra, I:450; Makower, supra, 399-400, note 24.
\(^{\text{23}}\) Pollock and Maitland, supra, I:452.
charges had been preferred in his presence made the case come under his jurisdiction. John of Salisbury writes that the greatest difficulty was experienced in getting Osbert out of the clutches of Henry II after the death of Stephen (1154).24

Thus we find benefit of clergy getting a foothold in England during the period of the Norman kings though it was generally ignored by the temporal power in important political cases when the offenders were barons of the realm. However, the Church sought to gain new privileges with the coronation of each new monarch. The second Charter of Stephen made great concessions to the Church.25

"I permit and confirm justice and power over ecclesiastical persons and all clerks and their effects and the distribution of ecclesiastical goods to be in the hands of the bishops. The dignities of churches confirmed by their privileges, and their customs had of ancient continuance, I ordain and grant to remain inviolate."

Though the privilege was ignored on many occasions, the growth of benefit of clergy in ordinary cases was so steady that by the time of Henry II (1154-1189), it was a recognized evil in the judicial system and its definite establishment in his reign was a turning point in medieval English law.

Due to the fact that the reign of Stephen was a period of disorder and civil warfare, Henry II seems to pass it by and adopt the laws of Henry I. In the charter which he issued upon his accession, he commands that all should hold and receive the rights and liberties from Henry II and his heirs, as it had been confirmed in the charter of his grandfather, Henry I.26 As has been stated, the privileges of the clergy during the reign of Henry I are not known and thus we are at loss to know the exact clerical immunities understood in the early period of the reign of Henry II. However, it is probable that little favor was granted to the clergy in the reign of the strong king Henry I, for we have seen that the State was powerful enough to go beyond the law and try clerks even during the weak and ill-organized administration of King Stephen.

In an attempt to set definite bounds to clerical immunities Henry II became involved in the bitter struggle with Thomas Becket which became one of the most important controversies

24 Idem.
25 Gee and Hardy, supra, 66; Adams and Stephens, supra, 3; Statutes of Realm, charters, 3.
26 Stubbs "Select Charters" 135; Statutes of Realm, charters, 4.
in medieval history. A review of this famous quarrel well illustrates the spirit of the times and the power and influence of the Church. Descriptions of this conflict are found in the chronicles of Matthew Paris and Ralph Diceto. From their accounts we find that the King decreed that felonious clerks were to be punished by the laity, declaring that it was unjust that clerks, found guilty by his officers, should be brought before the bishop and go unpunished. Archbishop Becket had a different viewpoint, thinking that those whom the bishop had freed should not be punished afterward by the secular officers because in such case, for the same offence, they would be punished twice, degradation and the secular punishment. But this theory gave to the clergy the right of committing one crime without danger of serious punishment. And it was against this condition that Henry II directed his Constitutions of Clarendon.

Henry’s plan was to have the clerks, summoned by the King’s officers, answer for their crimes in the curia regis. Then they were to be tried in the Church courts in the presence of royal judges. If they were found innocent they were to be freed, but if guilty, they were to be returned to the secular court for punishment. This punishment was to be the regular layman’s punishment, death or mutilation, whereas in the church court, the clerk would only be degraded for the first offence and possibly imprisoned for the second offense. Thus, the contest was over lay or ecclesiastical punishment. As regards this vital point, Becket’s doctrine of double punishment has never been tolerated by a State and previous to

Many historians, including Stubbs, state that it was Henry’s policy to try clerks in the ordinary courts of the land. At one time Henry may have gone this far, but most translations do not agree with this interpretation. See Stubbs “Select Charters” 138-139.
this time had never been defended by the Church. As a principle of law Becket's theory was condemned by Pope Innocent III and the decree which condemns it is, to this day, a part of the canon law of the Catholic Church.\textsuperscript{32}

It was particularly unfortunate that Becket's murder, coming at a time when interest in the contest was most intense, raised him to the position of a martyr of the Church, for thereby Henry was forced to admit the right of the Church to the privilege of benefit of clergy. A "treaty" at Avranches, 1172, contained no direct declaration regarding either contention, but in 1176, an agreement on the subject was made between Henry and the Papal Legate Hugo.\textsuperscript{33} This agreement provided that in criminal cases in the future, no clerk should be tried in person before a secular judge. Offences against the forest laws and disputes over feudal services due to the king or other lords were excepted from this privilege.\textsuperscript{34} Thus, we find benefit of clergy firmly established and respected by civil authorities largely because of the martyrdom of Archbishop Becket. The hallowed memory of this defender of benefit of clergy made it impossible for the successors of Henry to check the development of this evil.

II. BENEFIT OF CLERGY AT THE HEIGHT OF ITS DEVELOPMENT.

The clerk as a member of a class occupied a peculiar position in medieval England. As a clerk he was subjected to special rules of both ecclesiastical and temporal law. It cannot be said that the clerk was subjected only to ecclesiastical law while the layman was subjected only to temporal law. Every layman was brought under Church jurisdiction in affairs of his life such as marriages, divorces, testaments and wills. The Church could force him to do penance for various offences, and as a last resort, could excommunicate him with the aid of the State. On the other hand, the clerk was protected by temporal law. He could own property, make contracts, and bring suit against a layman in the secular courts. Moreover, all ordinary civil actions could be brought against a clerk and for any crime short of felony he could be tried and punished in the common way.\textsuperscript{35}

\textsuperscript{32} Pollock and Maitland, supra, I:455-456.
\textsuperscript{33} Makower, supra, 402.
\textsuperscript{34} Diceto, supra, I:410.
\textsuperscript{35} Pollock and Maitland, supra, I:439, 440.
The one great exception to temporal law was the privilege which churchmen had of being tried for felonies in separate ecclesiastical courts. A study of the mode of conducting such trials shows many defects in the court system of medieval England. If a clerk committed a crime it was the sheriff's duty to arrest him. If demand were made he would be delivered up to the bishop upon bond to insure his presence in the secular court for examination. An illustration of this is found in the "Court Baron" edited for the Selden Society. One F, who declared that he was a clerk, was taken and imprisoned and was appealed by an approver for fellowship and receipt. The Archdeacon of Northampton came and demanded him as a clerk on behalf of the bishop and according to the custom of the realm he was delivered upon a "penalty of £100." The bishop usually kept the accused clerk in prison for should he escape his bond would be forfeited. In the middle of the thirteenth century it was a matter of complaint among the clergy that they were held imprisoned five or six years before the justices in Erye had made the next round. When the clerk was finally brought before the justices and an application was made for him by the ordinary, or bishop's official, according to Bracton he was immediately delivered up without inquisition. In the thirteenth century it was less simple for twelve jurors were required to say upon oath whether they thought him guilty or innocent. If he should be held innocent he was freed immediately, but if he were declared to be guilty he might be turned over to his bishop for trial.

It was not the business of the secular judge to consider whether the accused was a clerk or not. The ordinary or the defendant had to demand that he be delivered up to the ecclesiastical court. If this demand was not put forward the judgment usually was carried out upon clerks as upon laymen. It seems

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36 Makower, supra, 405.
37 “Court Baron” ed. by Maitland (1891) 91.
39 Carter, supra, 254, note. The ordinary was a clergyman appointed by the bishop to represent him in the secular court. He conducted the test whereby it was decided whether the accused was a clerk or not. If judged a clerk, the ordinary took charge of the prisoner. See Hawkins “Pleas of the Crown” (1795) IV:285-287.
40 Pollock and Maitland, supra, I:442; Hale “Pleas of the Crown” (1736) II:378.
41 For procedure see Holdsworth “History of English Law” (1923) III:296.
that in the time of Edward III (1327-1377) that the granting of clergy depended almost wholly upon the ordinary demanding the defendant as a clerk, although some exceptions will be noticed.\textsuperscript{42}

When the privilege was first introduced, it was necessary that the prisoner appear in the clerical habit and tonsure at the trial, but when reading became the usual test of clergy, this was considered unnecessary.\textsuperscript{43} Reading became the accepted method of testing clergy because of the fact that learning was uncommon among the laity. As a result any man who could read proved himself entitled to this privilege. The passage actually read is a subject of some doubt, and the custom may have differed in several places. The first verse of the fifty-first Psalm was often selected and from that circumstance it acquired the name of "neck verse."

At every goal delivery the bishop sent someone with authority under his seal to be a judge in the tests of clergy. If the condemned man demanded to undergo the test of reading the judge gave him a Psalter and turned to the place which he wished to be read. The prisoner then read to the best of his ability but, as one writer remarks, "often very slenderly."\textsuperscript{44} After he had finished the judge asked the bishop's ordinary "Legit ut clericus?" The ordinary must answer "Legit" or "Non legit" for these were formal words. If he said "Legit," the judge proceeded no farther toward a sentence of death.\textsuperscript{45}

In the reign of Edward IV (1461-1483) one who had abjured the realm for felony in killing a man, being retaken, prayed his clergy. It happened in this case that the man could read only two or three words here and there and could not read any three words together. Still the ordinary claimed him as a clerk. It was observed by the whole court that if it had appeared to them that the prisoner could not read the ordinary should have been fined and the prisoner hanged, and at the same time it was declared that an ordinary should be fined as well for refusing a clerk who could read as for claiming one who could not.\textsuperscript{46}

\textsuperscript{42} Reeves "History of English Law" ed. by Finlason (1869) III:40-41.
\textsuperscript{43} Anon. "Benefit of Clergy" (January, 1890) Green Bag II:51-52.
\textsuperscript{44} See Thomas "Anecdotes and Traditions" Camden Society (1839) No. 1, note.
\textsuperscript{45} Anon. article, supra, 52. Armstrong v. Leslie, 1 Salk. 61, 91 Eng. Rep. 57.
\textsuperscript{46} Reeves, supra, III:40-41.
During a trial held in 1455, the prisoner could read well, but the Archdeacon of Westminster refused to take him. This caused difficulty and delay and the court was unable to offer a solution. However, another archdeacon saved the prisoner. We find a like case in 1481, but this prisoner was not so fortunate and was hanged.

In the reign of Edward III it was intimated that the reading need not be perfect or accurate. In one case a felon was tried by Fortescue and not being able to read but only to spell and so to put syllables together was, nevertheless, allowed his clergy. The teaching of prisoners to read in order that they might pass the tests of clergy was an indictable offence. In 1383 the Vicar of Round Church in Canterbury was arraigned and tried for instructing one William Gore who was unlearned. But it is certain that many lay criminals escaped trial in the secular courts because of some newly acquired learning.

The "neck verse" or fifty-first Psalm is referred to upon many occasions. Thus, in an old song an allusion to the test of clergy is found as follows:

"If a clerk had been taken
For stealing of bacon,
For burglary, murder, or rape,
If he could but rehearse
(Well prompt) his neck verse
He never could fail to escape."

Again, some may be required to read more difficult passages. An old English author writes:

"At holding up a hand
Though our chaplain cannot preach,
Yet he'll suddenly teach
To read of the hardest Psalm."

Several dramatists refer to the "neck verse." For example, in the "Jew of Malta" by Marlowe we find this line: "Within forty feet of the gallows conning his 'neck verse.'" And Massinger in "The Guardian" writes:

"Have not your instuments
To tune when you would strike up, but
Twang perfectly
As you would read your neck verse."

47 Y. B. 34 Henry VI, 49.
48 Y. B. 21 Edward IV, 21.
49 Reeves, supra, III: 41:
50 Pike "History of Crime in England" (1873-6) I: 301, 483.
51 Dodd "Benefit of Clergy" (October 17, 1896) Solicitor's Journal XL: 834.
In Shakespeare's "King Lear" we find another passage regarding the "neck verse."

"Madam, I hope your grace will stand
Between me and my neck verse; if I be
Called in question for opening the king's letter."

In Samuel Butler's "Hudibras" there is an allusion to the practice of singing a Psalm at the gallows. The popular saying among the people was: "If they could not read their neck verse at the sessions, they must sing it at the gallows."

"And if they cannot read one verse
I' th' Psalms, must sing it, and that's worse."

In Scott's "Lay of the Last Minstrel" we find this verse:

"Letter or line know I never a one
Wer't my neck verse at Hairibee."

And in the second of Donne's "Satires" we find:

"One-like a wretch, when at the bar judged as dead
Yet prompts him, which stands next and cannot read
And saves his life—."

The great architect Imigo Jones wrote:

"Whoever on this book with scorn would look
May at sessions crave and want his book."

Although reading was a test of clergy from 1330 until it was finally abolished by Queen Anne, not every one who could read or pretend to read a verse in the Bible was granted the privilege. The justices often insisted that ordination be proved by the bishop's letters. Benefit of clergy was considered rather as a privilege of the Church than of the accused clerk. And as a rule as long as he was not claimed by the bishop, the clerk must lie in prison and stand secular trial. Ordinarily, though, the bishop was not inclined to allow the guilty prisoner to stand secular judgment. The plea rolls seem to prove that the ordinary sat in the secular court day after day and as a matter of course demanded every person who declared that he was entitled to benefit of clergy.

As we have stated, in most cases it was necessary that the ordinary should claim the prisoner as a clerk before he was granted benefit of clergy. An exceptional case is noted by Sir

\*5 Anne c. 6.
\*2 Pollock and Maitland, supra, I:445.
The prisoner, accused of stealing a purse from Sir John de Stapleford, was condemned to be hung. As he was being dragged out of court he clung to a pillar and shouted, "I demand of the Holy Church the benefit of my clergy." He was replaced at the bar and the kind hearted Stapleford stepped forward and begged permission to try the validity of this claim in the absence of the ordinary. After a test it was announced to the court, "Legit ut clericus" and the prisoner's life was saved.

In a plea of the crown in the time of Edward III a man, being arraigned for felony, declared that he was a clerk. However, the ordinary would not claim him and an inquest of office was held and he was found guilty. Accordingly, the court judged that he should be hanged although he was a clerk. The ordinary had been directed by the archbishop not to claim him because he had committed sacrilege. On the other hand, if a clerk were tried and found guilty and the justice knew that he was a clerk, having learned so accidentally, he was not to be hung. This held good even though the judge was not challenged by the ordinary. But in such cases the clerk was not freed but was sent back to prison. If any delay should be caused by the ordinary failing to claim the prisoner immediately, the accused person was always placed in prison pending such consideration.

In the latter part of Edward III's reign, the following distinction was adopted. If the ordinary made a general refusal of a clerk, he would be hanged, but if a cause were stated which could not be allowed by the law of the land the ordinary was fined and compelled to receive the felon. Such cases were the failure to have the tonsura clericalis or ornamentum clericale or the like.

The accused person usually pleaded his clergy to escape trial in the secular courts. However, some cases are recorded in which the prisoner preferred trial by secular judges. One Thomas of Sarre was indicted for poisoning his father. He was asked how he would acquit himself and he declared that he was a clerk but that, saving his clergy, he would put himself on the country. The ordinary handed him the book and he read two

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"Quoted in anon. articles, supra, 52.
"Y. B. 12 Edward III, 68.
"Y. B. 12 Edward III, 598.
"Reeves, supra, III: 40."
verses. Then he was asked, "Will you hold by your clergy or go by the jury? You must make your election of one or the other for you cannot have both." And the accused decided that he would be tried in the secular court. There he was acquitted and his chattels restored to him.  

In the reign of Henry VI (1422-1461) a change was made which was considered more advantageous to prisoners than the older practice. This was to refuse benefit of clergy upon arraignment but to recommend to the prisoner that he plead his felony and be tried by the jury "de bono et de malo." Thus he had the chance of acquittal upon the merits of the case and if convicted, he still might claim his clergy. This policy was continued after this time and was thought to be a great improvement.

When a clerk pleaded his clergy and had been delivered to the ordinary, he was taken to the bishop's court for trial. Of what went on in the bishop's court we know very little, but we have reason to believe that its procedure was little better than a farce. In criminal cases the canon law had adopted the old process of compurgation. Canonical purgation took place as follows. The prisoner was tried before the bishop or his deputy and the verdict was rendered by a jury of twelve clerks. All evidence was taken upon oath, but could be introduced only upon behalf of the prisoner. After the prisoner swore to his innocence, twelve compurgators swore that they believed him, then the decision was made whether he was guilty or not guilty. As a result the prisoner usually was honorably acquitted.

According to ecclesiastical law the number of compurgators should be twelve, but frequently other numbers were employed. Bishop Jocelin of Salisbury cleared himself of complicity in the murder of Becket with only three or four oath helpers. Hubert Walter, sitting as archbishop, forbade that more than twelve compurgators be demanded. Shortly before this, the Bishop of Ely had offered to prove with a hundred swearers that he had taken no part in the arrest of the Archbishop of York.

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59 Eyre of Kent, 6 and 7 Edward II, 150.
60 Reeves, supra, III: 41.
62 Dodd, supra, 834.
The proof required of an accuser by the canon law was so rigorous that convictions were rare. As a result, it became the common practice in England to allow the clerk to purge himself. Attempts were made by Church officials to lessen this evil but the whole process rapidly fell into contempt. The clerk was delivered to the ecclesiastical authorities if he had been outlawed or felony, if he had confessed, abjured, and come into the realm again, if he were attaint, or if he had broken the prison of the ordinary. When so delivered the clerk remained a prisoner for life unless pardoned by the king.

If a clerk failed in his purgation, which happened in rare cases, he was convicted and punished. However, this punishment was limited as the Church could not pronounce a sentence of blood. The usual punishment was degradation although the criminous clerk might be relegated to a monastery or imprisoned for life. In some cases whipping was inflicted and Becket resorted to branding but such cases were rare. Whatever the punishment might be, it was generally slight. Furthermore, a clerk who had been degraded could not be punished by the secular authorities for a crime committed before his degradation except in case of apostasy. However, he could be punished by the State if he committed a crime after his degradation. In 1261, the Constitutions of Archbishop Boniface required every bishop to keep a proper prison. It was declared that every clerk who had been convicted of a capital crime should be imprisoned for life, but few cases are recorded of felonious clerks suffering from this punishment.

When a clerk was arrested upon accusation of a crime his goods or chattels were seized by the lay power. In case of acquittal in the secular trial they were supposed to be refunded to him, otherwise they were held until after his trial in the ecclesiastical court. If a clerk were convicted or degraded in the

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63 Pollock and Maitland, supra, I: 444.
64 Hale, "Plea of the Crown" (1756) II: 328.
65 Carter, supra, 254.
66 Pollock and Maitland, supra, I: 444.
68 Bracton "De Legibus et Consuetudinibus Angliae" Rolls Series, III, 2, c. 9.
70 Pollock and Maitland, supra, 1:445.
71 Makower, supra, 413; Matthew Paris "Chronica Majora" VI: 356; Hale, supra, II: 383-384.
Church court, the lay power appropriated the goods held, both movable and immovable. Of this the clergy complained bitterly on the ground that they were being punished twice for the same offense. Even if a clerk were acquitted, it was not always an easy matter for him to regain possession of his goods. Matthew Paris relates that the State frequently disposed of the goods of clerks, after purgation had been made according to the canon law.\textsuperscript{72} In the reign of Edward I (1272-1307) the decision was handed down by William de Bereford that if a clerk were tried and hanged by reason of the ordinary failing to claim him before judgment was given, the crown retained his chattels and the escheat.\textsuperscript{72} During the reign of Edward III it was decided that a clerk who had been tried and convicted was to lose his chattels even though he might have been claimed by his ordinary before judgment and had made purgation.\textsuperscript{74} In case the clerk died during the proceedings, his executors could not secure his property and in case of flight the same thing occurred.\textsuperscript{75}

Concerning forfeiture on account of flight, there is recorded the case of William de Gerbury, who was indicated before the coroners of the county of Norfolk but fled to the Church of Minorities at Canterbury. Later, when indicted before the inquisitors, he pleaded his clergy. Nevertheless, he was declared guilty and forfeiture of his goods was adjudged because he had fled after the indictment before the coroners. The case was appealed but the king sustained the decision.\textsuperscript{76} Finally, it should be noted that a clerk could not be put in jeopardy for the same offense more than once. A felon, who had been granted clergy, could not be arraigned before the king's justices for the same offense and could not be arraigned for previous offenses except for treason against the king.\textsuperscript{77}

Although benefit of clergy was a privilege for clerks in orders, it was not confined to this class alone. Monks and probably nuns shared the immunity but, to their credit, no cases are found that prove that nuns pleaded their clergy. Almost the only statute concerning women was passed in the reign of James

\textsuperscript{72} Matthew Paris, supra, III: 461. \\
\textsuperscript{77} Y. B. 21 Edward I, 396. \\
\textsuperscript{74} Y. B. 21 Edward III, 598. \\
\textsuperscript{76} Hale, supra, II: 382-384. \\
\textsuperscript{77} Hale, supra, II: 385.
I, and this provided that a woman, convicted of stealing goods of a value of less than ten shillings, was to be allowed benefit of clergy for the first offense, but was to be burned in the hand and could be further punished by whipping at the discretion of the judge. These provisions were confirmed in the following reign by a similar act. Hale says that anciently nuns had exemption from temporal jurisdiction but the privilege of clergy does not seem to have been allowed to them by law.

Under Edward I, the inferior orders of clerks were excluded from those entitled to benefit of clergy. Also those accused of crime, who had married a second time, could not plead their clergy. By a provision of Statute de Bigamis, criminals who had married a second wife or widow, could not evade secular sentence by pleading their clergy. An example of this is found in the fifteenth century. Chief Justice Weyland of the Common Pleas was removed for receiving bribes from suitors in his court and this act was pressed against him. He had been twice married after receiving the subdiaconate and this deprived him of the privilege of his clergy and he was compelled to take sanctuary as an ordinary layman.

Before the statute of Elizabeth, which caused criminous clerks to be branded, a clerk who had been delivered to the ordinary and broke the bishop's prison lost benefit of clergy if he were recaptured. In case an alien were tried and demanded benefit of clergy by the test of reading, he had the privilege of reading from a book of his own country. Also, the law provided that a blind man was to have the privilege of speaking Latin instead of reading it, if he could speak it congruously.

The crimes for which benefit of clergy was allowed or disallowed should be noticed at this point. When the privilege was first introduced, the Church was in full vigor and was inclined to extend the privilege as far as possible. Accordingly, its claim was not limited to crimes committed by clerks but the
Church insisted that all civil wrongs should come under ecclesiastical jurisdiction, if clerks were concerned in any way. However, the Church, as we have seen, failed to realize this claim. In a general way we say that all felonies were clergyable unless they had been declared unclergyable by statute. In other words, a clerk could plead his clergy in all cases of felony unless some statute expressly declared that such cases were to be tried in the secular courts. In 1176 immunity of clerks from lay jurisdiction was granted for all punishable acts except those against forest laws and non-fulfillment of feudal obligations. Nevertheless, several cases show that the royal courts continued to sentence clerks for very grave crimes, particularly the crime of high treason. In the acts of the thirteenth and fourteenth centuries, competence of Church courts is mentioned only in cases of felony and it seems that the crime of treason was not considered. It was hardly expected that the State would allow offenders in such grave cases to escape the law even though they were under the protection of the Church. Accordingly, we find the secular law being enforced against clerks, accused of high treason, almost immediately after the death of Becket. Hale says that in case of high treason against the king, clergy was never allowed in the English realm. But a statute in the reign of Edward III granted the privilege of clergy in all cases of felony and treason committed against other persons than the king himself. This practice was never changed.

Some interesting cases are found in the State Trials which illustrate the force of secular law in the case of treason. Sir John Gerberge was indicted for breaking his allegiance to the king, Edward III, by warlike actions on the King's highway. He prayed his clergy but this was refused as clergy was held not to be allowed in cases of sedition against the laws and customs of the realm. A certain Peter Thorpe was tried for diverse felonies and treason. He pleaded his clergy but the court held

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Carter, supra, 253.
See agreement of Henry II and Papal Legate Hugo, supra.
Makower, supra, 408-9, footnote 42.
25 Edward III, st. 3, c. 4. This statute provided that all clerks, secular and religious, who were convicted of felonies or treason against other persons than the king himself, should be delivered to the ordinary without delay. Makower quotes the above statute but has it statute 25 Edward III, st. 6, c. 4. This is an error.
Makower, supra, 410, footnote 49. See 4 Henry IV, c. 3.
Willis-Bund “Selection of Cases from the State Trials” (1879) 2-3.
that the laws and customs would not allow benefit of clergy and he was sentenced to be drawn and hanged as a traitor. In 1405 the Bishop of Carlisle was committed to the Tower for treason. When brought before the court, he pleaded benefit of clergy. The justices held that the offense with which he was charged was so great that he must be tried and he was convicted but the judges were not agreed as to the punishment and he was afterward pardoned.

As has been stated, Henry II would not allow benefit of clergy in cases involving non-discharge of feudal dues. Since many of the Church lands were feudal holdings, this principle was of considerable importance, especially in the case of the higher ecclesiastics. The king frequently declared ecclesiastical fiefs forfeited through the royal courts and royal jurisdiction in this province was permanently upheld. The royal courts were also very strict in enforcing the forest laws. According to Bracton, every day found clerks being sued in the lay courts for trespassing. A clerk, who was suspected of forest transgressions could be seized and imprisoned on suspicion, although no conclusive evidence had as yet been found. This was bitterly complained of by the clergy but without effect.

Numerous examples show that the king could call his officials to account for their actions in office, even though they happened to be spiritual persons. No general rule determined the limits of this exception but it seems that it was never questioned. It should be noticed that the counterfeiting of the king's coin or seal of the kingdom was also denied the privilege of clergy.

In conclusion, this discussion of procedure has revealed certain facts. The action in the secular court was merely preliminary to the real trial in the ecclesiastical court. Occasionally conviction in the former may have served to reduce the abuses in the latter, but in general its effect was slight. The notorious incompetence of the Church courts was one of the greatest evils in the judicial administration of the realm. Gradually, its very
incompetence brought its own remedy for the kings were impelled to make constant attempts to find a corrective because of the flagrancy of the evil. During the period of the Tudor monarchs the State was finally successful in limiting this evil and this was done by gradually lessening the number of crimes affected by the immunity.

III. DECAY OF BENEFIT OF CLERGY.

Crime and disorder usually accompanied weak reigns in medieval England as the execution of laws and the administration of justice in feudal States required a strong central government. In the time of Stephen, which was a period of civil warfare between rival claimants for the throne, the Church seized the opportunity of claiming clerical immunity from secular courts of justice. We find benefit of clergy at the height of its development during the wars between the houses of Lancaster and York (1460-1485), but at the close of the Wars of Roses the strong house of Tudor came to the throne in England, and immediately benefit of clergy was attacked and soon greatly weakened.

At the beginning of the reign of Henry VII, the long immunity of clerks from secular jurisdiction was slightly restricted by a statute\(^7\) that declared the existence of "priests, clerks, and religious men, openly noised of incontinent living" and for remedy, the act provided for punishment of criminous clerks by their bishops and also made provision for their lawful imprisonment.

Until 1487 any one who knew how to read might commit a felony as often as he pleased with no other result than that of being delivered to the ordinary to make his purgation. Sometimes he might be delivered to the ecclesiastical court *absque purgatione* but in any case his punishment was slight.\(^8\) In 1489 it was enacted that no person, once admitted to benefit of clergy, should be allowed the privilege a second time, unless he produced his orders.\(^9\) And in order to distinguish their persons, all laymen who were admitted to their clergy were branded

\(^7\) 1 Henry VII, c. 4. See Knight "A Popular History of England" (1867) II: 243.
\(^8\) Stephen, supra, I: 463.
with a hot iron on the brawn of the thumb. The brand was M if the case were murder and a T if the case were theft.100 This distinction between clerks and laymen was abolished by Henry VIII101 but was virtually restored by Edward VI.102 In 1576 Elizabeth abolished purgation103 and in 1622 James I allowed the privilege to women in unimportant cases.104 Under William and Mary women received an immunity which approached benefit of clergy.105 In 1705 the necessity of reading was abolished,106 and under George III branding was practically done away with.107 But while benefit of clergy was recognized as a great evil, the State did not abolish the privilege by statute until after it had become obsolete. This was due to two reasons. In the first place, the clerical party, always strong in medieval England, violently opposed any direct action which the State planned to take to abolish benefit of clergy. In the next place, since practically all crimes were clergyable except when taken from the benefit by statute, the civil authorities found it easier to limit the working of the privilege than to abolish it outright. As a result in the two centuries following Henry VIII almost all grave crimes were declared by statute to be unclergyable.

In 1496 the preamble to a law108 declared that “whereas abominable and wilful murders be by the law of God and natural reason forbidden . . . . yet, not the less, many detestable persons, lacking grace, wilfully commit murder.” The statute goes on to state that one particular Grame, a clerk, had lately murdered his master Tracey. It provided that Grame was to be drawn and hanged as if he were not a clerk and that similar offenders in the future were to be treated in the same way. This is practically the first step taken to limit the privilege and it was followed by the acts of Henry VIII, who displayed much energy in rendering benefit of clergy less harmful to the administration of justice.

100 Lea, supra, 197; Holdsworth, supra, III: 300.
101 28 Henry VIII, c. 1; See 32 Henry VIII, c. 3; 33 Henry VIII, c. 12; 37 Henry VIII, c. 10.
102 19 George III, c. 74, c. 3.
103 1 Edward VI, c. 12.
104 18 Elizabeth, c. 7, sec. 2, 3.
105 21 James I, c. 6.
106 4 William and Mary, c. 9.
107 3 Anne, c. 6.
Before his break with Papal authority, Henry VIII caused several laws to be passed restricting the privilege in atrocious crimes. Henry realized the evils of ecclesiastical immunity from temporal jurisdiction and in his desire to maintain a strong personal monarchy he was eager to limit Church privileges. After his rupture with the Pope, he was even more anxious that clerical offenders should be punished. As early as 1512 benefit of clergy was denied to persons taken in murder or highway robbery. An exception was still made for clerks actually in orders but the Church had been accustomed to shield a vast number of persons of the lower orders or without orders at all under the immunity, and a great part of its influence was due to this protection.

In 1515 Parliament met and passed in the House of Commons a bill restricting benefit of clergy. The Abbot of Winchcombe denounced the proposal in a sermon and insisted upon the right of clerks to be tried by the representatives of God alone. Besides much violent language in preaching against this statute, the clergy attacked a certain Dr. Standish who had denied the divine right of clerks to exemption from temporal jurisdiction. The temporal courts naturally defended Standish and Parliament brought the affair before the King, asking him to support Standish against the malicious attacks of the Church. The affair was debated in the presence of the King and Henry decided in favor of Standish and, as a result, the Church sustained a mortifying defeat. In rendering his decision Henry declared that "by permission and ordinance of God, we are king of England and the kings of England in times past have never had any superior but God only." Therefore, he announced that it would be his policy to maintain the rights of his crown in this particular case as well as in all others to come.

About the same time a citizen of London named Richard Hunne (or Hun) was seized on a charge of heresy and confined to the prison of the Bishop of London. He was found hanged in his chamber and though it was asserted that he had committed

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108 4 Henry VIII, c. 2. See Adams and Stephens, supra, 223 for text.
111 Taswell-Langmead "English Constitutional History" (1890) 329.
suicide the Bishop's chancellor was indicted for murder.\textsuperscript{113} Popular opinion was convinced that the man had been foully murdered, though no evidence showed that the official statement of Hunne's suicide was incorrect.\textsuperscript{114} Coming at a time when attention was directed toward the evils of ecclesiastical jurisdiction, feeling ran high and the accused chancellor would probably have been convicted had he been brought to trial. This incident shows the popular attitude toward those who had once been objects of reverence. We find from contemporary writings that there was a marked decline in the respect formerly shown to the clergy and, as a result, it was less difficult to hamper clerical privileges.\textsuperscript{115}

Before the separation of the Church of England from Rome, Henry VIII had caused all persons not actually in orders to be tried in the secular courts for various felonies, such as treason, murder, burglary, and highway robbery. After he had declared his supremacy over the Church he extended these provisions until they included clerks actually ordained.\textsuperscript{116} In his effort to make himself acknowledged as supreme head of the Church in England, he executed priests and monks as well as laymen. This incensed the clergy of the north and in their convocation of 1536 they remonstrated, saying that no clerks should be put to death before degradation. This affair soon became a rebellion which the king speedily put down, leaving him master of the situation.

After the death of Henry VIII (1547) the land was ruled again by a Protestant, Edward VI (1547-1553), and the limitation of benefit of clergy continued. In 1547 the benefit had been taken away in all cases of murder, burglary, house-breaking in which any person was in the house at the time and was put in fear, highway robbery, horse stealing, and robbing churches.\textsuperscript{117} Mary, a Catholic queen (1553-1558), as might be expected, caused these laws to be repealed. However, under Elizabeth

\textsuperscript{113} Hallam, supra, I: 71.
\textsuperscript{114} Innes, supra, II: 67.
\textsuperscript{115} Starkey "England in the Reign of Henry VIII" Printed for the Early English Text Society. This dialogue between Cardinal Pole and Thomas Lupset contains interesting information on current ecclesiastical questions.
\textsuperscript{116} Lea, supra, 198. See the following statutes: 23 Henry VIII, c. 1; 25 Henry VIII, c. 3; 28 Henry VIII, c. 1; 32 Henry VIII, c. 3. In 1535 piracy was made unclergyable by 28 Henry VIII, c. 15.
\textsuperscript{117} 1 Edward VI, c. 12.
(1558-1603) acts were passed excepting more crimes from the privilege. In 1565 clergy was taken away from those guilty of stealing an amount above a shilling.\textsuperscript{118} In 1576 rape and burglary were excepted,\textsuperscript{119} and in 1597 abduction with intent to marry was excluded from the privilege,\textsuperscript{120} although this offense had been made clergyable by Henry VII.\textsuperscript{121} In 1671 those stealing from the king’s stores were deprived of their clergy.\textsuperscript{122} Thus, by the end of the seventeenth century, the following crimes were excluded from benefit of clergy, whether the accused could read or not; high treason, petit treason, murder, piracy, arson, burglary, house-breaking and putting in fear, highway robbery, horse stealing, stealing from a person above the value of a shilling, rape, and abduction with intent to marry.\textsuperscript{123} It cannot be said how this system worked in practice. As was stated, all felonies were clergyable unless taken from the benefit by statute and, as a result, the trial depended upon the interpretation of the various statutes. Naturally, this led to confusion in the courts. Unfortunately, few statistics regarding convictions or executions have been kept.

At Exeter Castle there are preserved many of the records of the Court of Quarter Sessions of the latter part of the reign of Elizabeth. At the Kent Assizes of 1598 there were 134 prisoners. After trial, it was found that seventeen were hanged, twenty flogged, one freed by special pardon, fifteen liberated by general pardon, and eleven claimed benefit of clergy and were branded and set free. At the Epiphany Sessions there were sixty-five prisoners and eighteen were hanged; at Easter, twelve were hanged out of forty-one prisoners; at Midsummer Sessions eight were hanged from thirty-five prisoners; and at the Autumn Assizes there were eighty-seven prisoners and eighteen were hanged, while only one was hanged out of twenty-five at the October Sessions. Altogether, there were seventy-four hanged in one county in one year.\textsuperscript{124} If this is a representative county, the laws of the period were very severe and the number executed

\textsuperscript{118} Elizabeth, c. 4.
\textsuperscript{119} 18 Elizabeth, c. 7.
\textsuperscript{120} 39 Elizabeth, c. 9.
\textsuperscript{121} 3 Henry VII, c. 2.
\textsuperscript{122} 22 Charles II, c. 5.
\textsuperscript{123} Stephen, supra, I: 467.
\textsuperscript{124} Ibid. 467-469.
in the whole realm must have been quite large. In the Midsummer Sessions of 1598, five persons were convicted of sheep stealing. John Capron was sentenced to death, Stephen Juell, Andrew Penrose, and Anthony Shilston were given benefit of clergy and Gregory Tulman was flogged. In Tulman's case the sheep was probably valued at less than a shilling.  

At the beginning of the eighteenth century, restrictions had been removed from benefit of clergy and women were allowed the privilege as well as men, including those who could not read as well as those who could. As a result, punishment for all common crimes became slight. Therefore, while allowing nearly all classes to plead clergy, the government was careful to allow benefit of clergy in very few important cases. Blackstone declared that 160 actions had been declared by Parliament to be without benefit of clergy. But a large number of capital offenses on the statute book is no test for severity. A few general enactments would be much more severe. These 160 offenses might, by analysis, be reduced to a much smaller number. This much is certain—by the nineteenth century, the government had so limited the privilege that it had fallen into disuse.

In the period from 1822 to 1830 the criminal code was revised. It was barbarous, out of date, and notoriously inefficient. In this period, one-half of the capital offenses were struck off at one blow and later the number again was reduced. The privilege of benefit of clergy was formally abolished as part of this reform in 1827. Traces of it still survive in the statutes forbidding judicial impeachment of archbishops and bishops without the consent of the king. The clergy also are exempted from arrest while performing the services of the Church.

It is interesting to know that the English colonists brought benefit of clergy with them to this country. The privilege was denied to a prisoner being tried for arson in a Virginia court in 1787 and the decision was based largely on Powler's case

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124 Clergy was denied to sheep stealers by 15 George II, c. 34.
127 Innes, supra, IV: 89.
128 7 and 8 George IV, c. 54, s. 6.
which has a long discussion of the various statutes involving the decay of benefit of clergy. In *State v. Gray* the court said:

"No reason can at this day exist why Females shall not be entitled to benefit of clergy as well as Males. We are, therefore, of the opinion that the defendant is entitled to benefit of clergy upon praying the same to be extended to her."

In *State v. Kearney* the prisoner had been indicted for manslaughter and, after he had prayed benefit of clergy, had been convicted and sentenced to a fine and thirty-nine lashes. The court held that under the North Carolina statutes the fine should be paid but the whipping was not to be inflicted. In *State v. Carroll* the prisoner was convicted of grand larceny and when he was brought up for judgment he prayed benefit of clergy to escape the noose. The State resisted this plea, and the Attorney General offered to read to the court the record of a prior conviction for the same offense, when the prisoner had once before been allowed his clergy. This the court refused to hear and sentenced the prisoner to a flogging. On appeal it was held for the prisoner. The State could have filed a counterplea stating that the prisoner had enjoyed the privilege before but "where no counterplea is filed, clergy is allowed as of course." In a South Carolina case the defendant was convicted under an English statute of burning a house in the night time and was declared entitled to benefit of clergy on the theory that when a felony is created by statute, clergy is incident thereto unless expressly taken away. In the Indiana case of *Fuller v. State* Judge Blackford said:

"It is said that the court below erred in refusing to the prisoner the benefit of clergy. As to this objection there surely can be but one opinion. The benefit of clergy was never properly a common law privilege, 1 Chitt. Crim. Law, 667. It originated with that of sanctuary in the gloomy times of popery. It was the offspring of that absurd and superstitious veneration for a privileged order in society, which un-

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131 (1806) 5 N. C. 147.
132 The privilege was extended to women as to men (1806) N. C. Laws, 1796-1820, p. 1063.
133 (1820) 1 Hawks 53, 8 N. C. 53.
134 N. C. Laws, 1796-1820, p. 1364 provided for a whipping or fine instead of branding.
135 (1842-1844) 27 N. C. 139.
138 22 and 23 Charles II, c. 7.
fortunately existed in those ages of darkness, when the persons of clergymen were considered sacred, and church yards were viewed as consecrated ground. The Statutes of England on the subject are local to that kingdom. They were not made in aid of the common law and are certainly not adopted as the laws of our country."

In *State v. Bilansky* Judge Flandrau said:

"It is quite remarkable that a court in this country, at this day, should be called upon to investigate and decide questions of the benefit of clergy and petit treason. [Reviews the development and decline of benefit of clergy.] . . . . The plea has never had any practical operation in the United States, and had it, in the absence of any statutory provision been claimed as a common law right in any State, it would have been denied."

Massachusetts had the credit of abolishing benefit of clergy in 1784, almost immediately after the Revolution. This was possibly due to the escape of the British soldiers accused of manslaughter in the "Boston Massacre." During the trial they were found guilty but were saved by pleading their clergy. Pennsylvania abolished benefit of clergy in 1794. By act of Congress, April 30, 1790, provision was made that clergy should not be allowed in offenses punishable by death, but there seems to be no record of its final abolition in the United States.

In concluding this study we should note that the main objection to benefit of clergy was that it placed the clergy, as a class, outside the scope of criminal law. Although the accused clerk was compelled to stand trial in the bishop's court, this trial usually resulted in his escaping any severe punishment. In one circuit during Edward I's reign ten clerks, accused of crimes of different sorts, were demanded by their bishops. Later they were all declared purged and were restored to their lands. All may have been innocent but the fact remains that sterner justice was awarded in the temporal courts. If a clerk were convicted the usual punishment was degradation and that was a matter of little importance to the hardened criminal. The Church courts had the power to inflict heavy punishment such as imprisonment for life, but they could not shed a drop of blood.

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11 Blackf. (Ind.) 63, 68.
12 (1856) 3 Minn. 246.
13 Lea, supra, 206, note 1. See May "Law of Crimes" (1905) 94.
15 1 U. S. St. at L. c. 9, s. 30.
16 Pearson, supra, 1: 489.
17 Traill "Social England" (1894-1901) II: 297-298; Maitland and Montague "A Sketch of English Legal History." (1915) 71.
and punishment of any sort for criminous clerks was rare, most of them going scot free. Moreover, it must be understood that this immunity was shared with a vast multitude of men not definitely in orders along with the bishop, priest, and deacon. They might be married and living the life of ordinary laymen, but they stood outside the criminal law. The natural result was confusion due to the operation of two distinct and separate courts of justice. Criminal law had been harsh and cruel, many innocent men had been sent to the gallows, but "cruelty is better than caprice." Benefit of clergy made the law capricious without making it less cruel. The chance of escaping punishment was undoubtedly an encouragement to crime. Trevelyan says, "the English judicial system was like a lottery where tickets were drawn for life or death and let a certain proportion of those arrested slip through its clutches irrespective of their guilt or innocence."¹⁴⁶

The great importance of benefit of clergy in the history of the English criminal law lies in the fact that the existence of the privilege determined the form taken by English legislation on the whole matter of legal punishment for serious common offences.¹⁴⁷ Instead of abolishing benefit of clergy by one act, the State was forced to consider the immunity of clerks in connection with each important offence. Those guilty of treason, offenders against the forest laws, and trespassers were denied their clergy from the time of Henry II. Beginning with Henry VIII nearly all succeeding rulers added new exceptions to the immunity. As a result, granting the privilege depended upon the interpretation of the statutes and this, of course, caused much confusion in the court system of medieval England. It is small wonder that contemporary writers refer to benefit of clergy as an object of humor and there is little doubt as to the feelings of the laity. The farcical proceedings in both Church and temporal courts tended to arouse a feeling of scorn and detestation toward the English system of courts and punishments that was difficult to overcome.¹⁴⁸

On the other hand, it is not the purpose to show only the evil side of this privilege. It cannot be denied that many

¹⁴⁷ Stephen, supra, I: 489.
¹⁴⁸ Froude "History of England" (1890) VIII: 9.
Church privileges were useful and beneficial at one time. When benefit of clergy was established the law of the land was weak and the assistance of Church courts often saved deserving men from a terrible death. It is certain that the lack of secular interference left the Church unhampered to do good and preserve order. If the State erred in ceding too much authority to the Church, it erred on the side of leniency and mercy. The fact that clerks were allowed benefit of clergy showed the influence of supernatural awe upon the minds of the laity. It was a blessing that the souls of rough and uncouth men were so controlled by the worship of the Deity that they granted privileges to the Church even though these privileges were unjust.

Finally, it might be said that the privilege of benefit of clergy came into being due to the peculiar circumstances of the time. It ran its course in England and was abolished in the "typical English way" after it had ceased to influence English law. When it was first established it may have proved beneficial but it is certain that it soon became a source of confusion in criminal law and a crying evil in the administration of justice. It was abolished for the benefit of the State and to secure a better standard of peace, morality, and enforcement of law.

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