JOHN SELDEN'S

H I S T O R Y O F T I T H E S

IN THE CONTEXT OF

TWO OF HIS OTHER EARLY WORKS

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The translations of all passages in this work quoted in Latin, Greek, Hebrew and French are my own.

ABSTRACT

In the seventeenth century one very keenly contested issue was that of tithes. In many areas these were still levied in kind - one-tenth of all produce of the land - though some had been commuted to money payments. Because so much former monastic land had come into possession of lay persons at the Dissolution of the Monasteries, many of the tithes were held by lay landlords and were not being paid to the clergy. Also some former monastic lands were exempt from tithe. As a result, many parish livings no longer provided a reasonable livelihood for a clergyman. The Church was trying to regain the tithes, which it saw as rightly Church revenue, by arguing that tithes were a levy set by divine law for the upkeep of the clergy. Those who believed this based their argument on the Bible, and also on canon law, which gave control of the tithes to the Bishops. They maintained also that any dispute over tithes must be determined in the ecclesiastical courts. The landed interest on the other hand said that as tithes were a levy on land, disputes over tithes belonged properly to the common law courts.

When John Selden wrote his History of Tithes he elected not to enter the argument as it stood, but claimed to set out in full the whole history of tithes from the time they were first levied. In the course of this history he not only examined Biblical texts and writings of pagan antiquity, but also early Saxon

laws for tithing in England. However he spent a very great part of the work in discussing the medieval period, including researching and quoting from wills, chartularies and legal cases. In the course of this analysis he argued that tithes, not only in England but throughout Europe, were established by secular law, and disputes about them were properly matter for the secular courts; also that when tithes had been legally conveyed by will or gift to a monastic church this created a valid title in law which must stand. Most of these conveyances were made prior to the thirteenth century; after that the title to tithe was settled in the parish rector.

Selden allocated the second half of the work to examining the situation in England in detail, and showed that as all the former monastic lands in England were held by the right of the Statutes of Dissolution of the Monasteries, with all the rights inhering in them at the time of the Dissolution, all the rights to tithe and exemptions from tithe held by lay persons should remain with them. However he also claimed that the clergy were more assured of their right to the tithes they held by accepting his argument than they were if they claimed them by divine law, since not everyone believed in divine law. He believed that the Church's rights were inextricably linked with the land, and if this linkage were broken the stability of society would be disrupted, and the parish clergy would be in danger of losing their rights altogether.

To obtain a full understanding of his thought on the matter, this thesis examines the History of Tithes in the context of two of his other works written at about the same period, in which ancient laws were researched and the importance of the early Middle Ages, which he saw as the seminal period for the constitutional and legal framework of society, demonstrated.

INTRODUCTION

At the outbreak of the English Civil War the King summoned John Selden to join him at York. Selden's letter to the Marquis of Hertford gave a long explanation as to why he judged it better not to come: he was not well; but even if he were, it would not really advantage the King to have him there, - it might occasion some "difference" between the King and the House of Commons:

> ...My legal and humble affections to His Majesty and his service are, and shall be, as great and as hearty as any man's, and therefore, when I am able I shall really express them.

He went on to ask the Marquis to persuade the King not to be angry with him for not coming.[1]

Yet Selden had on many occasions come into conflict with both James I and Charles I. He had been summoned before High Commission after publishing his History of Tithes; he had been committed to the Tower when he shared in the protest to James I when the King refused to receive the remonstrance of the twelve members - though released after one month; in 1624 he served on the Election Committee which established that the House of Commons had jurisdiction over the election of its own members and this right did not depend on royal grant. In 1627 he pleaded for the discharge of Hampden and later took part in framing the Petition of Right. In 1629 after Charles I dissolved Parliament he was committed to the Tower. On these grounds he

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[1] Selden Table Talk Preface by S.W. Singer (Reeves & Turner 1890) p. xlvi.

might have been expected to be persona non grata to the King. On the other hand the King had been very pleased with Selden's Mare Clausum, published in 1635, which sets out to prove that the sea contiguous to the British Isles is under the jurisdiction of the King of England; the King had ordered copies to be kept in Admiralty and the Exchequer. Selden had also served on a Committee set up by Laud to look into the state of the Established Church.

His situation at the beginning of the Civil War, being a member of the Long Parliament but expected by the King to join him, is reminiscent of the situation of Cicero at the beginning of the Civil War between Caesar and Pompey, both of whom wrote summoning him to join them. The similarity between the two men is quite striking: both were lawyers and researchers into old laws; both wrote extensively on religious matters;[2] both were respected for their voluminous knowledge, and this explains to a great extent why both were desired as supporters on either side of the conflict. For in both these Civil Wars there was a certain amount of constitutional argument to support either side, and a person who had such immense legal and constitutional knowledge would be invaluable: hence both sides wanted to enlist them.

This illustrates why it is impossible to fit Selden into any of the categories which analysts of the Civil War conflict have drawn up. He first came into prominence as a researcher; when he was first called in to

[2]E.g. Cicero de Natura Deorum; Selden De Iure Naturali apud Veteres Hebraeos.

assist Parliamentary leaders in 1621 to draw up the Protestation of the Commons he was not an M.P., but he had already established a reputation as a researcher into legal history.

> John Selden's contribution was his complete mastery of legal authorities, and his vast unrivalled knowledge of constitutional precedent. He supplied the munitions of attack from a peerless armoury of learning.[3]

Fletcher is looking at Selden as an exemplar of the Parliamentarian side in the Royalist/Parliamentarian conflict. This confrontational model is no longer accepted as accurate by a large number of historians. Clearly, though, whatever model we use to explain the conflict, Selden was claimed as a supporter by both camps: equally clearly he did not feel that he fitted completely into either. Perhaps the clue to his thought is found in the motto which he had printed on the title page of many of his works: περὶ πάντος τὴν ἐλευθερίαν : freedom in all things. For him this seems to have meant predominantly intellectual freedom - the freedom to pursue a line of thought no matter where it led him.

Along with other important lawyers and Parliamentarians of the early seventeenth century, like Spelman, Camden, Ussher and Cotton, Selden belonged to the Society of Antiquaries which had been founded in Elizabeth's reign. There was at that time an increasing interest in early legal and constitutional authorities, and repositories of earlier Parliamentary records were established at the Rolls House and the Tower, the four Treasuries at Westminster, the State Paper Office at White-

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[3] Sir Eric Fletcher John Selden: Selden Society Lecture 1969 p.7.

hall, and various Government departments. One of the Society members, Sir Robert Cotton, collected a large private library of ancient wills, chartularies, and other manuscripts, to which Selden makes frequent references in his works.

James I looked on the Society "with disfavour" and it ceased to meet about 1608. Attempts to revive its meetings about 1614 were blocked by the King.[4] However the members of the Society continued their researches and some of these were of great importance in supporting the arguments over many of the political and religious issues of the day. Sir Eric Fletcher says that the History of Tithes was the work which

> ...transformed Selden into a figure of national importance and controversy.[5]

Selden was summoned before High Commission to answer charges relating to it, and was eventually prevailed on to sign a document apologising for the publication of the book, though he did not recant the opinions contained in it. He was forbidden to answer any attack made on the book or on himself. Fletcher believes that this

> ...roused in Selden, at the outset of his political career, a resistance to absolutism in government [6]

Certainly Selden did not believe in absolutism - see for example his comment:

> If a Prince be servus natura, of a servile base spirit, and the subjects liberi, free and ingenuous, ofttimes they depose the Prince

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[4] C. Tite Impeachment and Parliamentary Judicature in Early Stuart England (Athlone Press 1974) p.29.

[5] Fletcher John Selden p.5.

[6] ibid. p.6.

> and govern themselves. On the contrary, if the People be servi natura, and someone among them of a free and ingenuous spirit, he makes himself King of the rest: and this is the cause of all changes in the State: Commonwealths into Monarchies, and Monarchies into Commonwealths.[7]

but it is impossible to say whetherthis experience caused that opinion. The History of Tithes however was probably the first of Selden's works which brought him into prominence. It is a contribution to an argument which was of great importance to the Church and to society at large in the seventeenth century, when the right to tithes was a matter of great economic importance. It also provided Selden with a forum for arguing a theme which was of great importance to him: the relative authority of ecclesiastical law, civil law, and common law. It also provided him with cogent arguments for demonstrating that the basis of English constitutional and legal practice lay in the Middle Ages.These themes can be studied not only in the History of Tithes but in two other books which, together with it, form a group of early works published within a few years of each other: Jani Anglorum Facies Altera (1610), Titles of Honor (1614) and History of Tithes (1618). This thesis will argue that Selden was seeking to prove that the common law had precedence over ecclesiastical and civil law; that tithes were due by positive secular law and not by divine law; and that since the Church was linked with the land, its title to tithe was more secure, not less, if it rested its claim to tithe on positive secular law. These themes are clarified by

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[7]Selden Table Talk ed. Singer p.122.

being seen in the context of arguments put forward in the other two works. Selden's preoccupation with the Middle Ages becomes more understandable when we see that he saw it as the seminal period for the establishment of the parochial system, linked firmly to the landowners, lay and monastic, who between them controlled the land, not only in England but in all European countries, by an interlocking fabric of rights and tenures which is reminiscent of the Great Chain of Being - an idea so popular in the seventeenth century.

Selden himself makes it clear that he did not approve of antiquarian research without a purpose. In the Dedication to Sir Robert Cotton at the beginning of the History of Tithes[8] he defends the study of antiquity, in that it enables us to add to our years by drawing on the wisdom of our ancestors, but condemns the

> ...too studious affectation of bare and sterile Antiquitie, which is nothing else but to be exceeding busie about nothing.

We may take it therefore that his antiquarian researches do have a purpose, and are not undertaken merely to display his learning.

In the Preface to the History of Tithes Selden sets out his reasons for writing it. He claims that in the "frequent disputations" about tithes - which he does not specify by name - not only are Biblical arguments used, but also historical arguments, which have been adduced very inaccurately. These include:

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[8] No page numbers.

> ...the kinds of payment of them among the Hebrews, among the Gentiles, the maintenance of the Church in the primitive times, the arbitrarie consecrations, appropriations, and infeodations of them in the middle times, the payment of them at this day in the several states of Christendome, together with the various opinions and positive laws touching them.[9]

This summary is in fact a guide to the order of the subjects he himself discusses in the History of Tithes, and clearly he felt that the inaccuracy in the way they had been dealt with by other writers needed correction. He claims that the "Canonists and Divines" who have written these works have not only misquoted the early sources they claimed to be using, but also assumed that if there was a Canon about tithing this proved that people were obeying it, which was far from the case.[10] The canon law

> ...was never receivd wholly into practice in any State, but hath ever been made subiect in whatsoever touches the temporalties or maintenance of the Church (which come from Laymen) to the varietie of the secular Laws of everie State, or to National customs which cross it.[11]

He claims that the clergy will not be disadvantaged by the arguments he puts forward. There has never been so much evidence collected to show the obligation by human positive law to pay "whole tithes" as here.[12] Whereas, if they are agreed to be due only by Divine Law, the way is open to those who do not believe in Divine Law to refuse to pay them at all; or to those who deny parochial right to say they are pay-

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[9]Preface to History of Tithes p.III.

[10]ibid. p.IV

[11]ibid.

[12]ibid. p.XII

able as alms to the clergy of one's choice - the argument used by Dominican and Franciscan friars, Wycliffe, and Erasmus.[13] (This was the position adopted by the Jacob church in Selden's day).[14] The constitution and practice of Christian states have settled the payment of tithes as maintenance for the clergy by civil title, and this is what his History sets out to show.[15]

Selden says that some people (unnamed) have questioned what right a common lawyer has to be writing on the subject of tithes. He considers a common lawyer a more appropriate person than a Divine, a Canonist, or a Civil Lawyer. None of these study the history of laws and practices correctly. Even study of the practice of tithing among the Hebrews is history rather than divinity. This is study proper to a common lawyer and indeed is undertaken as part of Philology.[16]

This is a very important clue to the kind of study Selden saw himself as undertaking, and indeed to many of the arguments he adduces, particularly his concentration on the Middle Ages. As Pocock explains, the true forerunner of modern historical studies is to be found in the historical studies of law carried out in the Law Faculties of sixteenth-century French universities, where the attempts of the humanists to study Roman law texts, expurgated of the glosses and commentaries of later jurists, had led them to compare and collate original texts to determine the original

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[13] Preface to History of Tithes p.XIV

[14] See Conclusion to this thesis.

[15] Preface p.XIV.

[16] ibid. pp.XVII-XVIII

meanings.[17] Their researches thus revealed something of the original context in which Roman laws were formulated, and robbed them of their aura of universality.

One of the principal thinkers of this school was François Hotman, who is frequently referred to by Selden in Titles of Honor. None of the references is very telling in itself; Selden does not set out to give any exposition of his thought. However the scattered brief references do reveal a familiarity with his writings, and indicate that the similarities in their thought are not coincidental. One would in fact expect some familiarity with Hotman's thought in Selden, considering Hotman's life history. He was the son and brother of traditionalist and conservative lawyers, who broke away from his family tradition, joined the Reformed religion, made contact in Paris with juristic thinkers who were working on new lines, and went to Geneva in 1548 where he "venerated Calvin as his spiritual father."[18] He was a prolific writer, whose writings were widely known and used in polemical arguments by seventeenth century writers. Like the other French jurists with whom he was associated, he advocated that French customary law should be treated as the law of the country rather than Roman law, and they all regarded the Papacy and the canon law as having usurped royal authority and corrupted ancient law.[19]

This group of thinkers was very interested in

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[17] J.G.A. Pocock The Ancient Constitution and the Feudal Law (C.U.P. 1957) p.8.

[18] Hotman Francogallia ed. R.E.Giesey and H.M. Salmon (C.U.P. 1972): editor's introduction pp.11-12.

[19] Francogallia Introduction p.15.

feudalism as being the repository of customary laws. Some of them believed that it had a Celtic Gallic origin; others - including Hotman - thought that it was Germanic and Frankish (the Franks being originally a Germanic people). It is noteworthy that in Titles of Honor Selden follows Hotman in regarding feudalism as deriving specifically from the Frankish kingdom. The point which Hotman and the other French jurists were making was that customary laws derived from the "free" barbarian peoples, and were both native to their lands, and superior to the Roman law which had been imposed on them.

In this context Selden's insistence on the priority and superiority of the common law of England, and the native laws of other countries of Europe, to canon law or Roman law, becomes clearly an important ideological point. It was not merely a ploy to get as much work as possible into common law courts in rivalry to the civil lawyers, as Levack suggests when analysing the practical reasons for conflict between civil lawyers and common lawyers in James I's reign.[20] No doubt practical considerations had some influence, but the philosophical reasons went much deeper.

Thus Selden's identification of his study as being part of Philology (see above) is also clarified. The sixteenth century French jurists, as Pocock said, compared and collated texts to determine the original meanings of legal and constitutional terms.[21] This

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[20] B. Levack The Civil Lawyers in England (O.U.P. 1973) pp. 3 ff.

[21] Pocock Ancient Constitution p.8.

is the method which Selden uses in the three books under discussion in this thesis. He uses a large number of original manuscripts, some of which he lists in his own index at the end of Titles of Honor, though he is not at all methodical, and the index is far from exhaustive. But in enquiring into the origins of titles and offices from King and Emperor downwards, especially in Titles of Honor, he enquires at length into the original meaning of the words, and compares explanations from many sources to prove the points he is making. Clearly he sees himself as being in the tradition of Hotman and his compatriots, and it is understandable therefore that the salient points of his conclusions are similar: the importance of the study of early laws; the priority of the common law and its superiority to the canon law and civil law "intruders"; and the importance of the feudal system as the defender of each nation's customary law. The fact that the feudal system was inextricably linked to the land made the study of tithe a natural choice as a field for studying these principles in detail, and the current interest in tithes in England for practical economic causes was another reason for choosing this subject.

The conclusions he came to were unacceptable to the Establishment of his day when they first appeared. No doubt there was more than one reason for this. The Bishops were all in favour of the theory that tithes were due by divine law, and that they should be under

the control of the bishops, and out of the hands of the lay impropriators. These persons claimed to hold them in right of the fact that all former monastic possessions which had passed to other hands at the Dissolution of the Monasteries came with all their possessions, visible and invisible, intact. The bishops laid claim to tithe in virtue of their diocesan authority. The difference this would have made to the revenues of the Church, and the income of the clergy, was incalculable.

The King looked to the Bishops as important supporters of his authority and thus was on their side in this argument. Moreover he would have been in disagreement with Selden's view about the primacy and superiority of the common law. Some of the civil lawyers in England were his best supporters in the theory of royal supremacy. In 1607 Dr John Cowell, Professor of Civil Law at Cambridge, published The Interpreter, in which various political terms were defined. This book stated that the King of England was an absolute king and that laws made in Parliament could not bind the ruler:

> ...(that) were repugnant to the nature and constitution of an absolute monarchy.[22]

James I did not state the doctrine of absolute monarchy quite so fully as Dr Cowell, but he did regard the civil lawyers as very important supporters: so he had this reason also for objecting to the History of Tithes with its strong arguments against civil law. These factors led to Selden's summons to answer to High Com-

[22] J.R. Tanner English Constitutional Conflicts of the Seventeenth Century (C.U.P. 1928) p.21.

mission over the book (see above) and brought him into prominence as a political figure.

This thesis examines in detail the arguments adduced in the History of Tithes in the context of the other two works, and seeks to establish their significance. For this reason the first printed texts only of the three books have been used. Later editions incorporate other material, which may have been added with hindsight by the author, or even interpolated by other persons. In any event they would blur the impact made by the original arguments.

In Chapter 1 Selden's account of the payment of tithes in the ancient world is examined - both payment by the Hebrews as recorded in the Bible, and payment of tithes or similar levies in pagan communities. Chapter 2 deals with his account of the payment of tithes in Christian countries, and how the parochial system emerged and the tithes were annexed to it. The rise of the monastic system and the conflict between this and episcopal rights is also discussed. From this emerges the query as to whether tithes were a right annexed to the land or a specific levy on the faithful for the support of the clergy, and therefore by what law they should be set and enforced. This leads Selden to a discussion of the relative claims of ecclesiastical and secular law. This is examined in Chapter 3.

This discussion leads on to an enquiry into Selden's views on the origin of law and of authority in

society, and the relationship of law and monarchy. This is discussed in Chapter 4. As Selden's opinion is clearly that feudalism was the basis of English and European society, (see above), Chapter 5 examines his views on feudalism in detail. Chapter 6 then deals with Selden's analysis of the practice of tithing in England. In the History of Tithes he divided the subject in this way, spending about half the book on the rest of the world and half on England. It seems important to follow his lead in analysing them separately, in order to understand his argument. He wanted to establish the principle that secular law was the basis for tithing by looking at the universal practice and to reinforce this by analysing English law and practice in detail. He also wanted to emphasise that the parochial system is inextricably linked to land tenure, and is the true basis of the Church's position, so that the clergy are better off relying on his arguments than basing their claims on divine law. The conclusion will examine whether this argument reflects Selden's own genuine opinion, or whether it was an excuse for keeping the tithe in the control of the landed interest.

CHAPTER 1

Although one of Selden's primary concerns in the History of Tithes is to show that tithes are due by human positive law, and that those who claimed that they were due by divine law were in error, he nevertheless spends the early chapters of the work in examining the practice of payment of tithes as recorded in the Old Testament. He also discusses similar payments made in the Gentile world of ancient times. He concludes that on the whole these latter payments were not similar enough to Hebrew practice to be regarded as the basis for tithes as payable in his own day. With regard to the Old Testament practice, however, he clearly finds sufficient grounds for comparing them in some detail with current practice, notwithstanding that he is afterwards at pains to prove that there was a considerable lapse in time before the Christian Church adopted tithing at all.

In paying so much attention to the Old Testament as a source, Selden was of course continuing a tradition which went back to the early Church fathers. He quotes Ambrose and Augustine of Hippo as preaching in support of tithing on the grounds that it is enjoined in the Old Testament.[1] As will be discussed further, the various schools of thought which were arguing in favour of tithes were clearly using the Old Testament as a justification of their arguments. It appears, however, that many thinkers after the Reformation used the Old Testament as a source for secular law. Wilfrid Prest, in discussing Sir Henry Finch, says that some writers (including Finch) believed that English Common Law was so ancient and so consistent with Jewish law that it was probably based

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[1] History of Tithes pp 46-7.

on it in the distant past, and that defects in the common law arose in the time of "popish darkness".[2]

In 1653 Judge Keble expressed this view strongly: "...so is the law of England the very consequence of the very Decalogue itself: and whatsoever is not consonant to Scripture in the law of England is not the law of England."[3]

Although Selden himself does not discuss this view, at least in the works examined in this thesis, he did regard the ancient Jewish writings as an important source of the law of nations. For example a great part of his argument in the Mare Clausum is based on the supposed division of the world among the sons of Noah after the flood. It was natural therefore that he should spend a considerable time on the Old Testament evidence for tithing.

Such an attitude to the Old Testament is in a sense merely a further extension of the normal practice of lawyers to seek precedent for laws of their own time in earlier law. This reflects the assumption underlying most legal systems, that law itself is a reflection of the inherent rationality of the Universe, and that it therefore has an inbuilt raison d'etre, so that to establish that a law has been accepted and obeyed is a reason why it should continue to be so. Those who regard this as merely another way of maintaining a ruling class in power will question the assumption, but it has the merit of allowing for the accumulated wisdom of generations to be represented in any given situation.

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[2]Wilfrid Prest "The Art of Law and the Law of God: Sir Henry Finch 1558-1625" in Puritans and Revolutionaries ed. Pennington & Thomas (Clarendon Press 1978) p.98.

[3]R.V. Love 5 State Trials 43, 172. Quoted in Law in the Making, C. Allen (Clarendon 1939) p.368.

It was clearly impossible to base any argument for Christian tithing on the New Testament. Tithes are nowhere enjoined on Christians in the New Testament. The upkeep of Christ and the apostles was basically that of wandering preachers who were supported by those among whom they sojourned, on a voluntary basis. The only mention of tithes in the New Testament are references to the careful tithing of the Pharisees, who are not being held up as models, and a reference in the Epistle to the Hebrews[4] which speaks of tithes as still being paid to the Temple.

Naturally therefore we find that the orders of Friars, especially the Dominicans and Franciscans, who believed that their life was modelled on that of Christ and the apostles, taught that tithes were alms which could be paid at will to any clergy. Selden discusses this position, and says that the similar views of Wycliffe and other heretics were based on it. He points out that the Friars' teaching on tithes was condemned at the General Council of Viénna in 1340, and that of Wycliffe at the Council of Constance.[5]

Clearly, however, Selden does not want to base his own argument on the decisions of Church Councils, since these were Councils of the Roman Catholic Church; nor did he want to align himself with the arguments of the friars or of Wycliffe, since he believed, as will be seen, in the parochial right to tithes. He was therefore at pains to show that tithes are due by human positive law, but that this law itself can find a justification in Old Testament practice.

He refused however to go as far as the Canonists, who claimed that tithes were due by a positive law of God going

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[4] Hebrews 7:5.

[5] History of Tithes pp.166-7.

back to the Creation. Indeed he opposes this idea quite vehemently: "I think indeed that in the time of this light of learning none have durst venture their credits upon such fancies."[6] Although he does not spell out his reasons for rejecting the idea, it is possible to deduce two: that the idea of a positive law of God at this early stage would divorce tithes from a necessary connection with the ownership of land, and that tithes among the Gentiles would be of equal force with Hebrew tithes - an idea which he firmly rejected, as is discussed later.

However, as evidence that such an idea was held, he quotes from a penitential made for the use of priests hearing confessions in Henry VI's time, which expressly says that God gave commandment to Adam to give up one-tenth of his produce to God, and burn it since there was no Church to receive it. Cain was in disfavour because he "tithed falsely and of the worst", and he then killed his brother Abel who was blessed by God because he tithed well: "So ye may see that false tithing was the cause of the first manslaughter that ever was, and it was cause that God cursed the earth."[7]

Selden argues that the suggestion that Cain was tithing incorrectly was due to a misunderstanding of the Hebrew - it was his disposition that was at fault. For him, the first tithing is that of Abraham, who paid "one-tenth of everything" to Melchizedek, King of Salem.[8] This is significant for Selden because it removes tithing from any necessary connection with the Temple and the Levitical priesthood. He discusses however at some length whether Abraham was paying one-tenth of all his possessions, or merely one-tenth of the spoils of

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[6] History of Tithes p.169

the military expedition from which he was returning. It is the latter view that he accepts, and moreover he emphasises that Abraham was paying them to Melchizedek as "priest of the most high God" and not as King of Salem.[9] In the Review at the end of the History of Tithes he returns to this point, and quotes from St Ambrose, Eucherius, Bishop of Lyons, and Philo in support of the view that this was a payment of thanksgiving to God for victory in war.[10]

He also discusses the question of who Melchizedek really was, and identifies him with Sem the son of Noah, and therefore Abraham's own ancestor. It is not quite clear why he was at such pains to do this, unless because he had already argued that Abraham, Isaac and Jacob were priests according to the old custom, before the Levitical priesthood was established, and that as fathers of families they were priests in their own right, so that it would seem unnecessary for Abraham to render tithes to anyone else.[11]

The other payment of tithes which he identifies before the Mosaic law is that of Jacob's vow: "Of all that thou givest me I will give the tenth to thee."[12]

He then moves on to tithes as established by the law of Moses. It might be expected that this would be clear-cut, but in fact it seems that even among Jewish commentators there was a great deal of doubt as to what was laid down, and this doubt was reflected in the varying practice of the Church through the centuries. There seems, in fact, for Christian writers, to be a twofold problem: not only how to interpret the apparently varying meanings of first and second tithes,

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[9] History of Tithes pp.170 ff.
[10] ibid. p.450
[11] ibid. p.5.
[12] Genesis 28:22.

etc, which Jewish writers also disagree about, but how to disentangle laws about tithes as such from laws about sacrifices, which Christians do not carry out, but which are intermingled with the laws about tithes, as also with those about first-fruits, sin-offerings, etc, so that picking texts out of their context is apt to cause confusion. So in Numbers 18 the whole of the early part of the chapter is devoted to the offerings made directly to the priests, the family of Aaron, who alone may eat them: sin-offerings, guilt-offerings, first-fruits, etc. However the whole tribe of Levi, who are to be temple attendants and not priests, receive the tithe. They receive it to relieve them of the necessity of growing food for themselves. They, however, must present an offering of whatever they receive to the Lord: "a tithe of the tithe."[13]

However in Deuteronomy 14:18-29 the implication is that only the tithe of each third year is to be used in this way, and even then the Levites are only to share the tithes with "the sojourner, the fatherless, and the widow." In the first two of every three years the tithes are to be laid aside and brought to God's tabernacle: "before the Lord your God in the place which he will choose to make his name dwell there, you shall eat the tithe of your grain, of your wine, and of your oil, and the firstlings of your herd and flock."[14] It would appear from the wording that this precept reached its verbal form before there was a settled place for the tabernacle, since in v.24 it is enjoined further that if it is too far to take the produce it must be sold and the money taken to the place, and there other produce must be bought

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[13] Numbers 18:26

[14] Deuteronomy 13:23

and the feasting be thus carried out.

The whole process was complicated by the various periods when the Law lapsed and was revived, as well as the centralisation of worship in one place and the enormous multiplication of priests and Levites. Selden refers to periods when the Israelites were punished for not having paid the tithes correctly,[15] but without explaining their historical context. The punishment referred to the period of the reforms of Hezekiah, who found the old and neglected books of the Law and restored the correct worship, as he understood it, to the Temple at Jerusalem.[16] But the situation was quite different from that in which the Deuteronomy precept had been laid down. Then the re-establishment of Temple worship after the Exile, as recorded in Nehemiah, reflects yet another situation, in which the Levites living in various towns were actually responsible for collecting the tithes and transporting them to the temple for storage.

In view of all these varying enactments it was rather unrealistic for the Christian church to have laid down regulations about first and second tithes by which the clergy were enjoined themselves to pay tithes of what they received. Yet in view of the importance of this law as a potential source of conflict, it seems strange that Selden merely summarises it in passing and does not comment on it:

> The Priests received no Tithes of the Husbandman: onlie the Levites received Tenths from them, and paid their Tenth to the Priests; being (as S.Hierome sayes) *tanto illis minores, quanto ipsi maiores populo.** So Clergie men, by that example, have paid Tithes to the Pope; and so by a late Law they doe in this Kingdom to the Crowne. (Stat 26 Hen 8 cap 3).[17]

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*so much less than they, as they themselves are greater than the people.

[15] History of Tithes p.18

[16] II Chronicles 31

[17] History of Tithes p.13

Selden proceeds beyond the Old Testament in quoting later Jewish writers. He quotes Rambain De Decimis cap 9 that after Judas Maccabaeus's rededication of the temple, after its desecration, until his fourth successor John Hyrcanus (about thirty years) everyone paid first-fruits and Therumahs but none paid the first and second tithes, or at least not correctly, because the overseers were corrupt, until the Sanhedrin enacted that more honest overseers should be chosen, and that one-hundredth of all produce should be paid to the priests and the "second tithe" paid to the Temple, but no "first tithe or poor man's tithe" was to be paid at all.[18] This form of tithing, he says, continued "until the last destruction of the Temple." This however does not agree with the findings of a modern scholar Professor Joachim Jeremias. In discussing tithes as paid in New Testament times he shows that variant readings and interpretations have given rise to the idea of a "first" and "second" tithe, one to be delivered in kind, and the other to be used in Jerusalem by the owner of the property, both payable in each year. He is doubtful of the accuracy of this interpretation and points out moreover that the tithe of the herd was to be slaughtered as a food-offering but "could be consumed by the owner after the priests' portions had been abstracted".[19]

If this was so (and it is borne out by the Deuteronomy precepts) it was not consistent to demand the tithe of the herd for Christian clergy who ate it themselves, and had no ritual requirement to slaughter it in sacrifice. Selden in fact quotes both Aquinas and Hugo de Gaudano on this very

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[18] History of Tithes p.18

[19] Joachim Jeremias Jerusalem in the Time of Jesus tr. F.H. and C.H. Cave (S C M Press 1969) pp.134-6.

point. The latter is quoted:

> *Adveniente lege evangelica et cessantibus ceremoniis cessavit et solutio decimae, pro quota illa.*[20]
> With the arrival of the law of the Gospel and the cessation of the [Temple] ceremonies the payment of tithe ceased also, as far as proportion is concerned.

Although he quotes this, Selden does not seem to take the point that is being made. He recognises that they are saying that Christian clergy need some subsistence but not necessarily a tithe; he appears not to see the point that the Jewish priesthood had to keep the cultus going out of the tithe. He does not therefore query the right of Christian clergy to demand one-tenth of all offspring born to flocks and herds each year, although he says this was done, as will be discussed in a later chapter.

Another matter which is not clear is whether all "herbs" are to be tithed. The early passages in the Books of the Law quote grain, wine and oil: were vegetables to be tithed as well? Selden quotes from Rambain and Mikotzi, two Jewish doctors, that only plants to be eaten by man are to be tithed.[21] This would exempt animal feed, which is logical, seeing that the animals will be tithed anyway. However, as will be seen when we come to discuss post-Conquest tithing in England, hay and brushwood were tithed at that time, contrary to Jewish practice. Selden points out that the Pharisees did tithe herbs (though these are in any case men's food). He claims that Christ praises them for doing so, which is rather overstating his case. "You tithe mint and dill and cummin, and have neglected the weightier matters of the Law, justice and

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[20] History of Tithes p.159.

[21] ibid. p.20.

mercy and faith; these you ought to have done, without neglecting the others."[22] Selden comments: "Our Saviour likes well their payment, and expresslie says they ought not omit it, which admonition of his was to them while yet the Mosaical laws were not all expired by the Consummatum est."[23]

This argument appears to be double-edged. If it is meant to explain merely that the Pharisees were in the right until the death of Christ (the "Consummatum est" being the Latin for "It is finished" - the last cry of Christ on the cross, which many Christian commentators take to mark the ending of the old Law) we may ask why tithing was not abrogated once and for all. If however the old Law was not abrogated, why do Christians not observe it all, such as circumcision, dietary laws, etc? Indeed this was one of the very questions which had to be determined by the infant Church, as we see in the Acts of the Apostles, Chapter 11.

Further, Selden shows that since the destruction of the Temple in 70 A.D. the Jews themselves have not paid tithes, partly because there is no Temple, and partly because they are not in the right land. He relates that Joseph Scaliger asked some Jews whether, if they could return and rebuild the Temple, they would do so and resume the sacrifices; they replied that they would not, because there was no longer a verifiable priesthood among them.[24] However in the Review Selden partially retracts this view, saying that most devout Jews gave alms of one-tenth of their income in lieu of tithes (presumably all to the poor).[25]

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[22] Matthew 23:23 (R.S.V.)

[23] History of Tithes p.21.

[24] ibid. p.22.

[25] ibid. p.453

Although the establishment of a connection with Old Testament practice gave a kind of sacred respectability to the Christian practice, the differences arising from the expiry of the Hebrew cultus, and the greater number of products tithed under the Christian system, mean that any argument for tithing based only on continuity would not stand up to scrutiny. Even though Selden himself does not examine the various arguments in as much depth as he might have done, it is clear that continuity would not provide all the answers. He himself is at pains to show, as will be discussed in Chapter 2, that there was a long lapse of time before the Christian Church began to use tithing as a means of raising revenue, and that when it did, the sanction was positive human law.

However, before turning to an examination of how tithes arose in the Christian church, he spends Chapter III in discussing tithes among non-Jewish ancient peoples. It appears from the tenor of his arguments that some of the writers who claimed that tithes were due by natural law (the Canonists) had used as an argument to support their case a claim that the practice of tithing was widespread in pagan religions. The quotations which Selden gives do seem to bear out this idea, although he himself repeatedly asserts that tithing was not a general custom, but usually undertaken as the result of some vow, or as thanksgiving for a particular event. If this is so, it leaves us wondering why he spent so long on the tithes paid by Abraham to Melchizedek, since he himself insisted that this was a thanksgiving for a particular event. However it does not seem that he has made out his case entirely satisfactorily: the practice would seem to be

more general that he will allow. He quotes Plutarch In questionibus Romanis: Διά τι τῷ Ἡρακλεῖ πολλοὶ τῶν πλουσίων ἐδεκάτευον τὰς οὐσίας; Why do many of the rich men tithe their substance to Heracles?[26] which does not sound like anything but a regular payment.

Nearly all the examples he gives, from, for example, Plautus and Cicero, speak of tithing to Hercules (Heracles), and it is a fact that his worship was widespread in Southern Italy and Sicily, and probably predated the religion of Jupiter there. In some legends Hercules is the son of Jupiter, but this is one well-known method of obtaining a rapprochement between the invading god of a victorious people and an indigenous god who refuses to vanish. It would probably be impossible at this stage to disentangle Hercules from later accretions, and discover whether his cultus did involve regular tithing, but it seems quite likely.

Other gods who are represented as receiving tithes are Apollo at Delphi, to whom the Pelasgi gave one-tenth of all gains of their sea-merchandise, Hera at Samos, and Pallas Athene at Athens. The examples he gives do bear out his assertion that they were not tithes of crops, but rather for merchandise or, in some cases, the spoils of war. He reiterates several times that the ancients paid tithes on specific occasions, at will, and to some gods only, from which it appears that several writers must have been repeating that payment of tithes was a general practice. He quotes Festus: *"Decima quaeque veteres diis suis offerebant."* - The ancients used to offer tithes of everything to their gods.[27] But, he says,

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[26] History of Tithes, p.25

[27] ibid. p.28

probably Festus had a much fuller account which was contracted by his glossator Paulus. If they had been in the habit of paying annually at hervest time, he says, Cato in his De Re Rustica would certainly have mentioned it.

This final point is not very sound, as Cato was writing about the area where the religion of Jupiter was dominant. The territorial and ethnic distinction of South Italy and Sicily (known to the Romans in classical times as Magna Graecia) where Hercules was so important, appears to have escaped Selden, and yet it could be very significant. He remarks that the Carthaginians paid one-tenth of their Sicilian spoils to Hercules at Tyre, and suggests that they may have learned the practice from the Jews.[28] It could be just as easily argued that both practices had a common origin. The Carthaginians were originally from Phoenicia and spoke a Semitic language; Sicily was their own first overseas colony.

Perhaps it was unfortunate for the sake of his argument that Selden apparently did not know about the secular tithes, also apparently originating in Sicily, which are described by Cicero in the orations Against Verres. These tithes were a way of taxing land, used by the Romans in Sicily instead of the methods used in other provinces. In his Second Oration against Verres, Book III, chapter 6 onwards, Cicero explains that the Romans had allowed the Sicilians to continue with a tax they were accustomed to, as set by a former ruler of Sicily, Hiero of Syracuse - namely a payment of one-tenth of the produce of the land, corn, wine and oil. The difference was that now the tax was to be paid to the Romans instead of to their native rulers.

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[28] History of Tithes p.33.

There is some doubt as to whether Cicero is saying that the right of collecting the tithes was let to the Roman tax farmers, or whether the land itself, as now being ager publicus, was leased back by the Censors to the original owners, who had to pay both rent and tithes. The question is discussed at length by Long.[29] Naturally this commentary was unknown to Selden, but a manuscript of the Verrine orations was known in the 15th century, so it seems that it may have been by ill fortune that Selden did not know of what was undeniably an example of tithes set by secular authority. The fact that Sicily was also apparently an area of religious tithing to Hercules may have suggested to Hiero the idea of secular tithing in the first place. And, as old customs die hard, it is at least possible that tithing in some form continued in the Sicily-South Italy region for the next four or five centuries, and that when Christian tithes did begin they were actually suggested by this practice. The Papacy had particularly strong land interests in that region.

It would certainly appear that Selden missed a good opportunity of finding a strong argument in support of his main thesis. On the other hand, as will be discussed later in considering his views on the comparative merits of the claims of common law and canon/civil law, he was so vehement in rejecting any suggestion that Roman law had ever had, or should have, influence in England, apart from a few carefully circumscribed and insignificant items, that he might have found the whole topic a severe embarrassment.

An interesting parallel with the introduction of tithing into Christian practice, drawing sanction from Old Testament

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[29] George Long Commentary on Cicero's Orations (Whittaker & Co. 1862) pp. 301 ff.

practice, is found in the introduction of Sabbath observance. William Barclay has outlined the history of this legislation.[30] Jews in New Testament times had a strict code of practice regarding abstinence from work on the Sabbath, but Christians ceased from observing this, and instead celebrated Sunday as the day of the Resurrection, without transferring to that day any of the Sabbath observance. However the Emperor Constantine passed an edict in 321 A.D. that work in cities must cease on Sundays, so that they could be kept as days of prayer. Later Emperors added further regulations, but it was not until the 8th century that Alcuin identified Sunday with the Sabbath and said that any work done on Sunday was a breach of the Fourth Commandment. Aquinas later repeated this identification and the Church drew up detailed prohibitions concerning work on Sundays. The early Reformers however, including Luther and Calvin, specifically denied that Sunday should be identified with the Jewish Sabbath, or that Christians were bound to observe the Fourth Commandment. But in England in 1595 a book by Nicholas Bound, a Suffolk clergyman, called True Doctrine of the Sabbath, claimed that all the observances of the Jewish Sabbath had been transferred to Sunday and were binding on Christians.

Christopher Hill notes that English Puritans in the seventeenth century emphasised the importance of Sabbath observance because of its association with preaching, Bible reading and household prayers, and that Justices of the Peace in many areas enforced Sunday observance. James I and Charles I, on the other hand, authorised traditional Sunday sports

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[30] William Barclay The Plain Man's Guide to Ethics (Fount Paperbacks 1977) pp. 27-37.

partly because if they were deprived of these distractions people would tend to indulge in "a number of idle and discontented speeches."[31]

Legislation regarding the "correct" observance of Sunday has been passed in both England and Scotland by a series of Acts, many of which are still on the Statute Book and are still sometimes invoked, despite the lack of New Testament authority enjoining any Sabbath observance on Christians.

The similarity of this history with that of the introduction of tithes is striking, especially, as will be seen in the next chapter, the timing. Selden explicitly places the full introduction of laws about tithing in the eighth century, in Charlemagne's kingdom, where the same Alcuin was very influential (although Selden himself overlooks Alcuin). The Christian church began without any observance of tithing, but when it was introduced by law, Christian writers were quick to use the Old Testament to justify it. Selden spends a large section of his work in describing how tithing was introduced, and the stages by which it took root and flourished. This will be considered in the next chapter.

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[31]Christopher Hill The Century of Revolution 1603-1714 (Sphere Books 1969 p.81.

CHAPTER 2

In discussing how tithing came to be established in the Christian church, Selden seems at first to be rather perverse, in quoting and then discounting what appear to be sound early examples, from about the third century onwards, for their payment. In spite of these examples he does not accept that there was any general payment of tithes until the time of Charlemagne. Earlier examples are rejected as being only local custom. The case he makes out for this does not always appear sound. It is therefore pertinent to enquire why he attributed such importance to the time of Charlemagne.

The clue to this appears to be that he saw Charlemagne as the originator of the feudal system, as will be discussed in Chapter 5. Like Hotman he undoubtedly saw the medieval period as the great repository of native customary law.[1] Also, the greater part of the History of Tithes, in both the general and specifically English part of the work, is spent in discussing the Middle Ages. In fact, although he states that he will bring the discussion up to his own day he does not do so. Clearly the medieval period was to him the vital period. It will be argued in this thesis that the principal reasons for this were: that he wanted to establish the close link between tithing and the parish system which united the Church to the land; that the parish system had grown up largely as a result of lay endowments; that he wanted to show the way in which monasticism and the parish system had developed to produce such a network of interlinked rights

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[1] See above, Introduction.

and loyalties that they could not be disentangled; that the rights of landowners in his own day in their possession of former monastic lands, or of tithes arising out of them, were based on sound claims; and that the secular law and not ecclesiastical law should be the final arbiter in any dispute.

As will be discussed in Chapter 6, these were the issues in dispute in seventeenth century England. It seems that Selden decided that, rather than beginning by arguing them, he should lay down the historical basis on which his view rested.

He shows that in the early Church the Bishop and priests lived in common and were supported by a common fund from the offerings of the faithful, which were divided into four parts - one for the Bishop's own expenses, one for the upkeep of the other clergy, one for the maintenance of the Church buildings and provision of necessities for worship, and one for poor relief.[2] He says that the Churches were originally centred in large cities and that the words diocese and parish had the same meaning. The Bishop sent clergy around to any chapels erected in smaller centres, but basically all the clergy lived together. As time went on the Bishop needed to divide the diocese into smaller units, and appoint priests to serve these lesser churches on a more or less permanent basis; but the Bishop still retained control of all the offerings.

Through all the subsequent changes of organisation brought about by the rise of the later parish system and of monasticism, this original right of the Bishop to one

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[2] History of Tithes, pp.80-81.

quarter of all church revenue for his own use was enshrined in Canon law, and was the basis of claims made in Selden's own day by the Church, that at least that proportion of tithes held in lay possession should be paid to the Bishop. Selden says:

> For that Episcopal right grew afterward to be so established by the received Canon Law, that till this day where prescription of 40 yeers excludes not, the fourth part of all oblations and tithes are by it due to the Bishop, and some Canonists make it as a duty succeeding in lieu or proportion to the Tenth of the Tenth that was paid by the Levites to their Priests.[3]

It seems that Selden is justified in saying that these early offerings were not tithes. When churches were mainly in cities the members would mostly give offerings in money, and Selden quotes Tertullian (about 200 A.D.):

> *Stipem menstrua die vel cum velit, et si modo velit, et si modo possit, apponit. Nam nemo compellitur sed sponte confert.*[4]
> He gives an offering monthly or when he will, how how much he will, and how much he is able. For no-one is compelled, but gives willingly.

There is evidence however. quoted by Selden himself, of a change in the diocese of Carthage to lands being given to the church to support the clergy. Cyprian, when bishop of Carthage (about 250 A.D.), wrote in Epistle 266, that the clergy

> *tanquam Decimas ab fructibus accipientes, ab altari et sacrificiis non recedant et die ac nocte caelestibus rebus et spiritalibus serviant.*[5]
>
> receiving as Tithes from the produce, they need not withdraw from the altar and sacrifices, and day and night they may give themselves to heavenly and spiritual matters.

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[3] History of Tithes p.83

4Tertullian Apologetic cap. 39 quoted History of Tithes p.36.

[5] Quoted History of Tithes p.38.

Selden maintains that this does not mean that the offerings were tithes, but that they were used by the Church in the same way as the Old Testament tithes were used to support the Levites. However he himself quotes Augustine, Ambrose and Jerome, in the next century, as preaching in support of tithing and adducing Old Testament authority. Jerome says:

> *quasi Levita et Sacerdos vivo de decimis, et altari serviens altaris oblatione sustentor habens victum et vestitum.*[6]
>
> like a Levite and a priest I live by the tithes, and serving the altar I am sustained by the offerings of the altar, having food and clothing.

And Augustine, in a homily, says that one-tenth of everything is due. If a Christian is not a landed proprietor, he must pay one-tenth of whatever he lives by. Non-compliance will be punished by spoiling of the goods. Ambrose says:

> *Decimas nostras annis singulis de cunctis frugibus pecoribus etc. praecipit erogandas Dominus.*[7]
>
> The Lord ordains that our tithes of all crops, flocks etc. are to be paid each year.

In face of these examples quoted by himself it seems strange that Selden can continue to maintain that tithing did not become general until the eighth century. It seems fairly clear that as Christianity spread into the countryside it became a general practice for the clergy to be maintained from the produce of the land. It is true that, as Selden says, the Eastern churches never adopted the practice of tithing,[8] but there the bishop did receive a tax called the canonicon, which was paid partly in money, partly in kind, according to the number of families in the village,

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[6] History of Tithes p.46

[7] ibid p.54.

[8] ibid. p.462.

which he used for the upkeep of the cathedral clergy, so there was something analogous to tithing, though it did not maintain the parish clergy who worked their own piece of land.[9]

Selden goes on then to discuss the change from all churches being under the direct control of the bishop, to the custom of laymen building and endowing churches on their own territory. He places this change at around 500 A.D.,[10] and although he does not suggest a reason for a change at this time, it coincides with the gradual change over Western Europe from a predominantly city-based economy to a situation where more people were living on country estates grouped around the landowner for protection, and living on the produce of the estate. This was a result of the breakdown in communications due to the waves of barbarian invasions. In such circumstances a Christian landowner would build his own church and endow it with a piece of land. He would then consider that he had the right to appoint the priest to perform Divine service for himself and his tenants. Selden says the landowner would build and endow

> ...Parish oratories or Churches in their Lordships, and in them place or invest Chaplains ordained, that is, made priests by the Bishop, but not instituted by presentation as at this day... and the Chaplain or Incumbent, acknowledging the Lord of the Churches Territory for Patron... received now the profits that rose out of Christian devotion to a particular use of his own Church, the Canons nevertheless saving the fourth part to the Bishop.[11]

The Church did not like the resultant fragmentation of the diocese and the erosion of the Bishop's control over the clergy, but in the circumstances it was the lesser of two

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[9] J.M. Hussey The Byzantine World (Hutchinson 1967) p.99.

[10] History of Tithes p.82.

[11] ibid. p.83.

evils. Selden says that attempts were made by Canon Law to prevent the lay founder from receiving any share of the profits of the Church, but in some cases the patron divided the profit with the incumbent when he first founded the church. No doubt he felt entitled to this as the defender of the area against military incursion. Selden says that this practice was condemned by the Second Council of Bracara (about 620) and the Ninth Council of Toledo (about 660). Also priests took to solemnly consecrating offerings on the altar, so that it would be sacrilege to take them.[12]

Notwithstanding any arrangements made about the profits of the church, the fact remains that when a landowner built and endowed a church on his property for the use of himself and his tenants, thus setting up a parish, this linked the Church inextricably to the land and to the landowner. This was a quite different concept from that of the first centuries, where the bishop had jurisdiction over all Church properties. It was also different from the later development by which landowners gave away part of their land to a monastery and relinquished their rights in it. These different concepts continued to exist side by side, and, as will be seen, to accommodate within themselves various gradations of ownership and tenure. This is why all the questions of legal ownership, and of which law should be arbiter of any disputes, were so complex. Also, the relative power of the landowners and Bishops concerned could vary considerably from time to time and place to place. Some of the landowners concerned were very powerful: on the other hand, some Bishops were powerful landowners in their own right.

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[12] History of Tithes p.85.

This process, already occurring in Roman-held lands, was accelerated when the Germanic invaders of the Empire themselves became Christian. They brought with them the idea of the land-holder building a temple on his land and being able to determine what went on in it. When he became Christian and built a church, it became necessary to inculcate the idea that the bishop would not countenance the notion of ordaining a priest to such a church, unless he had sufficient land attached to it to keep him independent of the landowner. The custom grew, in order to counteract the idea that the landowner could still regard the land as his, of giving it to God or to the Saint to whom the church was dedicated, so that it did not revert to the landowner on the death of the priest. This notion was introduced from Roman law: Ulpian states that gods can be named as heirs, if they have been recognised by the Senate and the constitutions of the Emperor.[13]

Another way of giving a legal basis to Church property was adopted among some peoples. Among some of the Saxon peoples in England, Christian clergy were assimilated into the folk by a kind of legal fiction making them in effect part of the king's kin. This made them capable of holding part of the land, and guaranteed them the king's protection.[14] Whichever way the deal was achieved, it had the result of making the church an entity belonging to the particular area, and weakening the central authority of the bishop. This remained so even when the patron's right in the church was reduced simply to the right of presentation: the church was

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[13] Pollock & Maitland History of English Law ed. Milson (C.U.P. 1968) pp.498-9.

[14] J.E.A. Jolliffe Constitutional History of Medieval England 3rd ed.(A. & C. Black 1954) pp.12-13.

still linked to the particular area. Selden's discussion of the gradual change in legal standing of the patron will be reserved to the next chapter, where the conflict of ecclesiastical and common law will be discussed more fully.

In order to give the priest an assured income it became the practice to require that all the people who lived in the area served by that church should pay the tithe - one-tenth of their produce - to the church. Selden maintains that this did not become general until about 800, and that the right of the parish priest to such tithes was not definitely settled until about 1200. Clearly there was great variation in practice: in some areas the bishop was able to claim his original quarter of the tithe-offering, and in some his authority was not strong enough to enable him to do so, but various authorities had obviously been quoted by other people, and Selden is at pains to refute them. For example a Synod at Seville in 610 has been cited as an authority, and a letter of Pope Gelasius. He disputes the authenticity of these documents. A letter of Boniface, Archbishop of Mainz, is dismissed on the grounds that it allows the tithe to be given to the church of one's choice, or to the poor. An enactment of the Synod of Friuli 791 is said by him to prove nothing as it is binding only on that province and not on the whole Church.[15]

Indeed Selden takes the convenient line that when a document tells in his favour its authenticity is not challenged but when he finds it inconvenient it can be considered full of interpolations or downright lies:

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[15] History of Tithes pp.60-66.

> Those kind of Acts and Legends of Popes and others are indeed usually stuffd with such falsehoods as being bred in the middle ages among idle monks, not only grow antient now, but are receivd among us with such reverence that the antiquitie which the copies have gained out of later times, is mistook for a character of truth in them for the times to which they were first, by fiction or bold interpolation, inferred.[16]

He is even more scathing about an account by Hector Boetius of a law about tithing established by King Congallis in Scotland about 620 A.D.:

> But it will, I think, fall out to be too bold an assertion of that faining Hector, who often, as it were, makes laws for Scottish Kings, that hee may relate them; or else hee was deceivd by them from whom hee took it.[17]

From about 800 onwards Selden accepts that payment of tithes became general, especially as they now had the reinforcement of laws passed by Charlemagne: a series of laws passed for his own Frankish kingdom prior to his becoming Emperor. For example:

> *Ut unusquisque suam decimam donet atque per iussionem Episcopi sui dispensetur.*[18]
>
> Let each man give his tithe and let it be disbursed according to the command of his Bishop.

However he believes that the custom of paying tithes was not always observed even with the sanction of secular law to back up the demands of the Church. The laity were jealous of their rights over their possessions and inclined to resist, as is shown by enactments reiterated over periods of years.[19] An epistle of Alcuin to Charlemagne of about 797 A.D. is quoted in support of this point. Alcuin is advising Charlemagne not to impose tithing on the newly converted Huns and Saxons until they are more firmly established in the faith:

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[16] History of Tithes p.44.

[17] ibid. p.130.

[18] ibid. p.130.

[19] ibid. pp.71-2.

> *Scimus quia Decimatio substantiae nostrae valde bona est. Sed melius est illam amittere quam fidem perdere. Nos vero in fide Catholica nati, nutriti et edocti, vix consentimus substantiam nostram pleniter decimari. Quanto magis tenera fides et infantilis animus et avara mens illorum largitari non consentit.*[20]
>
> We know that tithing of our property is indeed good. But it is better to omit that than to lose the faith. We indeed, born, nourished and brought up in the Catholic faith, scarcely consent to have our possessions tithed completely. How much more will the untried faith and child-like mind and grasping disposition of these people not consent to be deprived.

A further complication arising in this period was occasioned by the growth of monasticism. Selden spends what seems at first a disproportionate amount of his treatise on quoting old wills and charters to illustrate the practice of the laity in granting churches with their tithes, or tithes of other tracts of land, to monasteries. It is clear that he regarded the issue as one of great importance, and this must be because he was trying to prove that those lay persons who held lands and/or tithes in England which had formerly belonged to monasteries held them by valid title - which in some cases had been given the additional cachet of a Papal endorsement. This point, as far as it refers specifically to the English situation, will be discussed further in Chapter 6. However in this earlier part of the work Selden is at pains to make it clear that the situation had been similar throughout Western Europe, and that the results had persisted to his own day, and had led to conflicts within the Church over the validity of the practice, in that it deprived parish clergy of their rightful support.

One of the reasons for the growth of Benedictine monasticism throughout Charlemagne's territories was that the

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[20] History of Tithes pp.70-71.

Emperor and his family were such strong supporters of the movement, and influenced other secular rulers to support it also. "In the ninth and tenth centuries support for the Rule became everywhere a central feature of secular government. From this time its future was assured."[21] Southern shows that this was partially a political move, in that territorial rulers were able to play off the conflicting demands of the monastic orders, the Papacy, and the bishops against one another. Some of the examples quoted by Selden bear this out, but he does not discuss this aspect, being more interested in the legal problems raised, both concerning valid title to Church lands and tithes, and to the legal sanction for enforcement and arbitration. He is also interested in the evidence of the growing power of the central authority of the Church from about 800 to about 1200, during which time, he says, the Papacy had to acquiesce in the conveyancing of Church lands to the monastic orders to the detriment of the parochial system, whereas from 1200 onwards it was able to put a stop to this practice.

There were three ways in which monastic endowments could conflict with the existing parochial system. In new areas where a monastery was set up where there were no existing parishes, there was already a conflict of interests, since such an area was assigned to some existing diocese. By canon law the bishop was entitled to the tithes of all land which was within his diocese but not assigned to a particular parish. However, the original endowment of a monastery was exempt from paying tithes, since it was meant for the support of the monks who were doing the work of God direct. Where there

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[21] R.W. Southern Western Society and the Church in the Middle Ages (Penguin 1970) p.218.

was no existing parish, laymen attended Divine Service at the monastic church and paid tithes from their land to it instead of to the bishop. Over a period of time monasteries began setting up chapels which afterwards became parish churches in their own right, either served directly by priests from the monastery, or, more usually (since monks were not all priests, and in any case had to take their part in the corporate life of the monastery) served by a secular priest appointed by the monastery and presented to the Bishop. In such cases the monastery was a patron in a similar situation to the lay patron. However, in such cases the tithe, because it arose on land still belonging to the monastery, was regarded as due to the monastery and not to the parish clergyman. Such a clergyman was called a vicar. He collected the tithe and profit of the glebe only as the agent of the monastery, and was allowed a stipend at the rate fixed by the monastery. He was answerable to the Bishop only on spiritual matters, but to the monastery on temporal matters. Selden says that some people claimed that the incumbent had merely to give an account of what profit and tithe he had made, not to hand it over, but he agrees with those who believe that the actual temporalties were to be handed over. He quotes Hostiensis and Durand in support of this view, and says:"Hostiensis and Durand are better authority to prove how the law was anciently taken, than a cartload of the later and more barbarous."

He also quotes a Bull of Pope Lucius II to the Prior and Canons of Kenilworth giving permission to hold such churches ad proprios usus (from this we get the term appropriation):

> *...in manu vestra retinere et earum beneficia ad proprios usus reservare constitutis ibidem Vicariis et Diocesano Episcopo praesentatis qui ei de spiritalibus, vobis vero de temporalibus omnibus, videlicet Decimis et obventionibus debeant respondere, dum modo vicariis et caeteris ministris earundem ecclesiarum in necessariis provideatis.*[22]
>
> ...to keep under your authority and reserve their benefices to your own use, providing for them Vicars and presenting these to the Diocesan Bishop, who shall answer to (the Bishop) on spiritual matters but to you on all temporal matters, namely tithes and offerings, provided that you provide for the necessities of the vicars and other ministers of the said churches.

This was an important point to establish for laymen who had come into possession of monastic lands, as it meant that they could claim that the vicar of their own day in such a church must hand over the tithe to them and be content with the stipend they gave him, and that the bishop had no legal right to object. This was a very useful argument in seventeenth century disputes between the landed interest and the Church.

The second method by which monasteries could come into possession of tithes was that sometimes laymen who had given land for a monastery to be built also gave it, as part of its endowment, an existing parish which had belonged to their family, together with the tithes belonging to it. Henceforth its revenues would go to the monastery, and usually the right of presenting a clergyman to it was handed over to the monastery as well, though occasionally the layman would retain the right of presentation of his own nominee, who would however not have rights over the tithes and other revenues but merely act as the monastery's agent for them, like the vicars in parishes actually set up by the monastery.

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[22] History of Tithes pp.96-7.

Selden gives details of a number of such cases in France and the Low Countries, including one of Louis IV of France to Cluny in 939.[23] Similar grants in Britain include a grant of Robert de Bruis of churches in his possessions with their tithes to the monastery of Giseburn in Yorkshire, in 1290.[24]

The third method, which must have caused even more complications than the others, was the assigning of the tithes only of specific tracts of land to churches other than the parish church - usually monastic churches - as a pious endowment. These are known as impropriations. Sometimes these were granted in the form of a charter issued during the grantor's lifetime, and sometimes by will, but in either case they were regarded as valid and binding once carried out, although there were various attempts by the Church to prevent the practice.

Ragimer Duke of Lorraine in 852 gave to the Abbey of Vito in Verdun the whole town of Longuion with the tithes of all land within the town, for the good of his soul and the souls of his wife, children and parents, and one of his successors by a charter of 946 gave to a monastery on the Moselle all the tithes within the liberty of the town where it stood.[25]

The monastery of Cluny in Burgundy, founded by William Count of Auvergne in 910, had various tithes granted to it, confirmed by a charter of Louis IV of France in 939 and by decrees of various Popes, including Urban III 1185:

> ...in whose Bull a recital and confirmation also is of an instrument of Adhemar Bishop of Xantoigne made to this monastery, that hath these words in it:

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[23] History of Tithes p.99.

[24] ibid. pp.193-4.

[25] ibid. p.74.

> *Damus et concedimus vobis decimas quas a Laicis acquisistis vel acquirere potestis,** with a command that laymen in the precinct of their Abbey should not convey their tithes to any other Churches.[26]
>
> *We give and grant to you the Tithes which you have acquired from laymen or are able to acquire.

This is noteworthy for several reasons. First the abbey had title not only from the original endowment but from the King of France, their lord's overlord. Then, several Popes had confirmed the grant, the last of them even doing so after the Lateran Council of 1180 had forbidden any further consecrations of tithes to religious houses without the consent of the Bishop.[27] Also, laymen who live near the Abbey are ordered not to convey their tithes away to any other Church. This is an interference with the rights of private property which in general were most jealously guarded at this period. Selden even quotes a war in Saxony over the tithing issue. In 1062 when Otho became Marquis of Turingia, Sigifrid, Archbishop of Mainz refused to let him be seized of the lands he inherited from his brother, but held of the Archbishop, unless he agreed that the Archbishop should have the tithes of all his tenants' lands. Apparently these included tithes which had been granted by the tenants to the Abbeys of Fulda and Herfeldt. The tenants protested that they would not give up their hereditary right to dispose of their tithes as they saw fit, and a war broke out on this issue in 1067. A Council was held in Erpesfurt where canon lawyers argued the whole issue, and although the Emperor Henry IV sided with the Archbishop, it appears that the Abbots and the Archbishop came to some agreement to divide the tithes.[28] This does

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[26] History of Tithes p.75.
[27] ibid. p.137.
[28] ibid. p.111.

illustrate that tithes were regarded as real estate which the owner of the land had the right to dispose of. It also illustrates the conflicts which could arise through the multiple interests in land within the feudal system. It shows, too, the importance attached to these sources of revenue as between different interests within the Church, and leads one to suspect that ideas of tithe being largely for the support of the poor and needy had been lost sight of.

Concern about the abuse of the system, by which some monasteries became very rich without doing anything to justify the revenues they were collecting, is quoted from varied sources. Selden says that some monasteries had tithes of 60 or 70 parishes appropriated to them, sometimes from different dioceses or even from different countries. The distant tenants never saw the monks, only the provost who came around to collect the tithes. In a petition to a Parliament of Edward III it was affirmed:

> That aliens (which by reason of appropriations made to their houses beyond the seas, or to their Priories or cells in this Kingdome, or the like) did so devoure the salaries due to Parish Curats, and so neglect the Divine Service which they should have taken care for in every Parish, that they did more hurt to Holy Church than all the Jews and Saracens of the world.[29]

and correspondence between Bernard of Clairvaux and Peter, Abbot of Cluny, is cited in which Bernard says that the Cluniacs should not possess so many tithes of parish churches, which are intended to enable the person who does the parish work to spend his time in that, and not make a living by other work.[30] Abbot Peter replies that the prayers of the monks were offered for the well-being of the whole church, and Peter Damian is quoted as saying that some monasteries did

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[29] History of Tithes p.106.

[30] ibid. p.107.

distribute the tithes as food to the poor and needy.[31] Nevertheless the reduction in income to the parish clergy, caused by so many tithes being granted away from the parish where they arose, led to the prohibition of any further such grants of tithes by the Lateran Councils of the late 12th and early 13th centuries, although any which had already been granted were permitted to stay in force. Selden attributes this to the ability of the Papacy to enforce its policies more strictly at this period, because its authority had become stronger and communications easier, so that canons were more generally obeyed, and the parochial right to tithes was established by the Lateran Council of 1215. He says that English common lawyers have asserted that "before the Council of Lateran, every man might have given his tithes to what Church he would."[32]

The other matters which interfered with parochial right to tithes which Selden discusses, were lay infeodations and exemptions. A lay infeodation arose when the tithes of a section of land were granted by one layman to another. Some people claimed that these must have been taken away from a church, but Selden believes they were more likely to have originated from an original lay endowment. That is, when a landowner originally set up a new parish he did not always hand over the tithes of the land to the clergyman but kept some or all for himself and paid the clergyman a stipend. He then might feel free to give it away on the same terms. So for example Charles King of France about 900 granted to Thierry 1st Earl of Holland a Church and all belonging to it. In some cases monasteries had themselves created infeodations

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[31] History of Tithes p.108.

[32] ibid. pp.137-8.

of tithes to laymen in return for services rendered, such as military protection of the monastery and its lands. Selden says that in his day some such infeodations still existed especially in France and Spain: "neither are the Tithes so possest, other than meere Lay possessions, and determinable before the secular Iudge."[33]

New infeodations of this kind were also forbidden by the Lateran Council of 1180, nor was it permitted to transfer existing ones to another lay person: they must be handed back, if any change was contemplated, to the Church. The canon states:

> *Prohibemus ne Laici Decimas cum animarum suarum periculo detinentes in alios Laicos possint aliquo modo transferre. Si quis vero receperit & Ecclesiae non reddiderit, Christiana sepultura privetur.*[34]
>
> We forbid Lay persons retaining tithes to the peril of their souls to transfer them to other lay persons by any method. If anyone receives them and does not hand them back to the Church, let him be denied Christian burial.

Selden says that such infeodations into lay ownership were virtually unknown in England. All those possessed by laymen were a result of former impropriations to monasteries, which had come into lay ownership at the Dissolution.

> For the portions of tithes conveyed to them out of Closes, parts of Manors, and whole Demesnes, by the owners, together with the tithes granted and possessed with appropriated Churches, were first by the Statute of Dissolution of Monasteries in 31 Henry VIII and by that other of 1 Edward VI given to the Crown, and from thence granted to laymen, whose posterity or assignees to this day hold them with like limitation of estate, as they do other inheritances of lands or rents, and, for them, have like remedy by the Statute of 32 Henry VIII cap 7 by real action as Assise, Dower, or other originals, as for lands, rents, or other lay possessions by the common law they might have.[35]

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[33] History of Tithes p.115.

[34] ibid. p.113.

[35] ibid. pp.395-6.

As for the practice of earlier times in granting tithes to laymen, it was so far from being the practice in England that when Parliament granted Henry V the tithes of certain "Priors aliens" he had them settled in the Crown in fee and conveyed them to other "Ecclesiastic Corporations".[36]

Probably Selden was at pains to establish this point, because otherwise the Canon of 1180 just quoted could be invoked, to establish that it was not permitted to hand over tithes from one lay person to another. If all the lay impropriations in England were the result of the Statutes of Dissolution their legal standing was assured by that, and not affected by the earlier Canon.

The matter of exemptions gave great concern at the time Selden was writing. When monasteries were originally set up, the land on which the monastery itself stood was exempt from tithe as contributing directly to the work of God as performed by the monks, but on other lands belonging to the monastery the monks were technically due to pay tithe - to the bishop if they did not form part of a parish. However some religious orders had been exempted from tithes by Popes. For example, about 1150 Hadrian IV exempted the Cistercians, Templars and Hospitalers from all tithes. This was, in the case of the Templars and Hospitalers, because of their contribution to the work of the Church in the Crusades.[37] These exemptions had never been rescinded, and when, in England, these lands came into lay ownership the new owners still regarded the lands as exempt from tithe, since the Statutes of Dissolution granted to any lay patentees of

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[36] History of Tithes p.396.
[37] ibid. p.120.

lands formerly held by religious houses any exemptions which they held.[38]

The situation regarding tithes was therefore exceedingly complex. It was rendered more complex by the division of opinion as to the primary function of tithing. If it was to provide sustenance for the clergy, then there was clearly force to the argument that tithes should not be conveyed away from the parish: those who wanted to support monasteries should do so by some other means. That argument presupposes however that the parish system is good in itself. This would not necessarily seem clear to someone living in a parish where the priest was lazy or rapacious, especially considering that the parish might originally have been set up to suit the convenience of some landowner. On the other hand, if tithing was principally for the support of the poor and needy, tithes granted to a monastery might perform this function better. Ivo Bishop of Chartres is quoted as saying (about 1130) that though tithes are generally due to the parish they may rightly be conveyed to monasteries, hospitals, the sick, and pilgrims, for

> *licet Decimae et oblationes principaliter clericali debeantur militiae, potest, tamen, Ecclesia omne quod habet cum omnibus pauperibus habere commune.*
>
> although tithes and offerings are principally owed to the priestly army, the Church may nevertheless hold all it has in common with all the poor.

Ivo adds however that the lay owner must not decide the matter for himself, as tithes belong to the church and are not his to dispose of.[39]

Clearly the practice of tithing in Christian Europe had grown up piecemeal, and this is why there was so much room for disagreement over the function of tithing and the

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[38] History of Tithes p.408.

[39] ibid. pp.125-6.

law by which it should be enforced. Selden set out to show the conflicts of interest arising from the growth side by side of the parochial and monastic systems. He says however that by about 1200 not only had the rights of parish clergy become fairly well entrenched, but the central authority of the Church was growing stronger and more able to assert its policies.[40] He therefore turns, in considering the period from 1200 onwards, to consider the question of whether tithes were due by divine law or by secular law. He was firmly of the opinion that they were due by secular law: the next chapter will analyse his discussion of the issue.

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[40] History of Tithes pp.137-8.

CHAPTER 3

In discussing the period from approximately 1200 to his own day, Selden sets out the arguments used by different groups of thinkers to support their own reasons for believing that tithes are due by divine law. He disputes the validity of these arguments and contends that the weight of the historical evidence shows that tithes were due by secular law, as being specifically a land tax and due to the Church as holder of the land, not because of divine authority. He maintains, with many examples, that this was so all over Europe, and that it was incorrect to believe that every country except England obeyed Roman law. On the contrary, he says, almost every country of Europe has its own indigenous common law; by those laws the Church holds its lands and exacts its tithes: and disputes over these matters are resolved, and should be resolved, in secular courts.[1]

This attitude to the relationship of the Church to the land fits very well with the view of the relationship of Church and State often labelled Erastian. As Chadwick says

> The momentous change in the Reformation idea of the State appeared to be a legal change - the subjection of clerical legislation to the secular. Therefore it was widely held in Lutheran Germany that all the jurisdiction of the medieval bishop passed to the secular sovereign. In England, asked in 1540 whether the apostles made bishops from their apostolic authority or only from necessity because there was no Christian sovereign to make them, Archbishop Cranmer of Canterbury replied hesitantly that the jurisdiction of the bishop was derived from the sovereign, just as was that of the Lord Chancellor. The king needed ministers for the different spheres of the

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[1] History of Tithes Preface p.v.

> realm, some civil and some ecclesiastical. But Cranmer's theory was extreme, and the later English Erastians would probably not have gone so far.[2]

In a document printed by R.G. Usher in the early 17th century, The Puritan's Directions to Avoyde the Proceedings of the Byshopps advice is given to Puritan clergy who are in danger of being evicted from their livings. The clergy are advised that the Bishops' powers to enforce legislation derive only from their membership of High Commission and therefore extend only to the matters laid down in the Acts of Uniformity. If anyone is in danger of being deprived for any other reason he and his family should stay in his parsonage and church to prevent anyone else being inducted, as the common law will defend his right to his freehold. If he is evicted by force he must apply at once to a local magistrate for redress. In the final analysis he can expect the court of the King's Bench to be on his side.

Rose, who discusses this document, adds:

> In the years after 1604 this was a reasonable expectation. The parson's benefice was a freehold, though a freehold of a very peculiar kind, and the protection of freehold could almost be called the main purpose of the common law.[3]

He characterises the English Puritans as Erastian in their policy of collaborating with the common law in this way, as Erastus had taught that the church's power to enforce ecclesiastical discipline was subject to appeal to the civil magistrate (if he was a Christian). This, as he points out, was counter to Calvin's constitution

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[2] Owen Chadwick The Reformation (Penguin 1972) p.395

[3] Elliott Rose Cases of Conscience: Alternatives open to Recusants and Puritans under Elizabeth I and James I (C.U.P. 1975) pp.181-2.

at Geneva where consistory controlled the magistrates.[4]

This attitude is consonant with Selden's own thinking. In the Table Talk he is recorded on several occasions as putting forward thoroughly Erastian views, such as in the following passage:

> Question: Whether is the Church or the Scripture judge of religion?
> Answer: In truth neither, but the State... The State still makes the religion, and receives into it what will best agree with it.... Why are the Venetians Roman Catholics? because the State likes the religion; all the world knows they care not threepence for the Pope.[5]

Selden sees the Church as a bulwark of stability and order precisely because it has such close affinity with the land. This is why he felt that his arguments to prove that tithes were essentially land taxes, and due to the Church for that reason, were a better guarantee that the parish clergy would continue to enjoy them than the arguments usedd by others to prove that they were due by divine law. To give one-tenth of your income to support the clergyman of your choice, or rather, of what you believed was God's choice, could lead to arguments to show that a Catholic in England could pay it to the priest, or an Independent to his minister, leaving the Established Church parish clergyman without support.

This is precisely what Selden would most disapprove. He never in fact discusses the Independent churches in the History of Tithes. The nearest he comes to mentioning them is in one sentence where he says he will not discuss the Reformed Churches which have departed from

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[4] Elliott Rose Cases of Conscience: Alternatives open to Recusants and Puritans under Elizabeth I and James I (C.U.P. 1975) pp.177-8.

[5] Table Talk ed. S.W. Singer pp.142-3.

the practice of supporting their clergy from the land and gone over to stipends.[6] In making this comment he appears to have conveniently forgotten that he himself described how in the early Church the clergy were supported by stipends out of the common diocesan fund.[7]

As to Catholics in England, he does not discuss them in the History of Tithes, but in the Table Talk he does sum up his objection to them: he says that Catholics in England could not expect the same privileges that Protestants had in France, because French Protestants did recognise the King of France, whereas: "The Papists, wherever they may live, have another King at Rome; all other Religions are subject to the present State, and have no Prince elsewhere."[8]

Selden appears to have waited to set out the arguments for and against the right of the clergy to tithes by divine law until he has first laid out the historical background, with the set purpose of giving the maximum weight to his own views. There were many people, as he himself points out, who were able to quote Scriptural texts out of context in support of their own view. He believes that the strength of his own argument lies in the historical facts which he has researched. He has assembled and quoted extracts from so many ancient charters, wills, etc, to prove his points about the ownership of land and of the right to collect tithes, and

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[6] History of Tithes p.194

[7] ibid. pp.80-81.

[8] Table Talk ed. Singer pp.117-8.

the reason why so much had been held by the monasteries as distinct from the parishes or dioceses. The historical and legal basis of these holdings was of immense importance in England in his own day, because so much monastic land had come into lay hands, and the right to the tithes of these lands was in dispute. Selden obviously felt that the facts needed to be established to make it clear that these claims were not merely arbitrary.

On the other hand, he also points out that around 1200 the central authority of the Church was becoming stronger, and it was therefore more possible than it had been formerly for the Popes to enforce obedience to their Canons. For this reason, he says, Canons were passed at that period forbidding any new conveyancing of tithes to monasteries, or in any other way away from the parish church: tithes must be paid within the parish.[9] As he sees it, it was not until about 1200 that it was laid down by Canon law and secular law that tithes were settled as of right in the parish clergy, whereas before this the owner of the land was considered to have the right to determine for himself where he wished to pay his tithes - to parish church or monastery. Apparently this argument had been opposed by some persons when they first read extracts from the book, for Selden makes a full and vehement reiteration of it in the Review which was added at the end:

> But it is plain, after Parochiall right established, that is, since about MCC when the Canons grew more powerfull and obedience to them became

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[9] History of Tithes pp.137-8.

> more readie, such confirmations by bishops and Popes, and such consecrations, creations or new grants by Laymen of Tithes, have bin taken and declared cleerly void.... and who can doubt now but that all such grants (in regard of prevention of the Parsons right) be not only void by the practicd Canon law to this day, but also by the Secular or common Laws of most States (if not of all where Tithes are paid) in Christendom.
>
> For admit at this day, that Titius grant Decimas suas of such an acre to the Parson, Abbot or Bishop of such a Church, and this be confirmed by whom you will; the Tithe due by him parochially is not toucht by it. Why? Because they are settled iure communi (as the Law is practicd) in the Parish Rector. But in those elder times, such an arbitrarie grant vested the Tithe in the Church to which it was given, and no other afterward was paid. Why? because then notwithstanding the Canons, no ius commune, no Parochiall right of Tithes was settled, or admitted in the practice of the Laitie.[10]

Selden is careful in these contexts to refer to ius commune in Latin and not translate it into common law, because it has a different meaning. To the canon lawyer ius commune means the common core of law found in all lands practising the same system, as distinct from local custom or local statute or canon. Pollock & Maitland sum it up:

> They [the canonists] use it [ius commune] to distinguish the general and ordinary law of the universal church both from any laws peculiar to this or that provincial church, and from those papal privilegia which are always giving rise to ecclesiastical litigation.[11]

According to Selden, therefore, there could be no question from around 1200 onwards that the tithes belonged to the parish priest. He acknowledges however that this was not universally accepted as correct even within the Church,

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[10] History of Tithes p.468

[11] Pollock & Maitland The History of English Law 2nd ed. Ed. Milsom. (C.U.P. 1968) p.176.

and he discusses the differing views of the canonists and those whom he refers to variously as divines and schoolmen on the issue, as also certain views which he regards as heretical. The nub of the disagreement was an attempt to salvage some upkeep for non-parochial churches and churches in London by distinguishing praedial and mixed tithes from personal tithes. Praedial tithes are those arising directly from the land, i.e. crops; mixed tithes are tithes of animals, or wool, or milk etc from animals which graze on the land. Personal tithes are those which a person makes from his labour - wages or profits - by artisan's work or trade. Many canonists took the line that although praedial and mixed tithes were due to the parish church, personal tithes could be paid to the church where a person customarily heard Divine service and received the sacrament. This allowed for those people who chose to attend a monastic church because they preferred it, or who lived in a town but drew a great part of their income from estates in the country, to give some substantial offering to the church they actually attended. Selden maintains that the early authorities made no such distinction.[12]

He relates however that the Franciscan William Russell was condemned as a heretic in 1427 both by the University of Oxford and in Rome, for preaching that personal tithes could be paid to any priest of one's choice. He was condemned to perpetual imprisonment unless he recanted, which he finally did. Selden remarks:

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[12] History of Tithes p.164.

> If Russell were therefore an Heretique, doubtlesse he hath had and now hath many fellow-Heretiques; for thus many, nay the most of such as most curiously enquire herein, and divers Canonists also that are for the morall right of prediall and mixt Tithes, denie that personall are due otherwise then as Custome, or Law positive (which is subiect to custome) directs.[13]

He discusses the main difference, as he sees it, between the views of the Canonists and those of the Scholastics, which is that the canonists believe that one-tenth of all annual increase of the land (and generally, of all other income) is due by divine law, whereas the scholastics say that the amount is a convention not binding on the Christian conscience, although the clergy must have some maintenance by divine law.[14] He does not, in fact, take the point which some scholastics were making, although he quotes them: that now that the cultus of the Jewish temple has ceased, there is no need for a whole tenth of all produce and flocks to be given.[15]

In considering both canonists and scholastics, Selden is concerned to query what they actually mean by divine law. He finds that some of them seem to imply that any statement found in the Bible is divine law, or even that any precept of Canon law is divine law.[16] He quotes an epistle of Pope Alexander III that a church which has been in possession for 40 years of tithes growing in another parish should go on receiving them because possession for 40 years prevents any contrary action being taken:

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[13] History of Tithes p.174.

[14] ibid. p.159.

[15] See above, Chapter 1.

[16] History of Tithes p.161.

> *...iure divino et humano melior est conditio possidentis quoniam quadragenalis praescriptio omnen prorsus actionem secludit.*
>
> ...by divine and human law the state of the person in possession is stronger because the 40-year rule prevents further action being taken.

He goes on:

> who sees not that he here uses ius divinum for positive and human law of the Church?[17]

The point he is making is that ius divinum, as used by a canonist, does not necessarily imply a direct law from God. This is important to him because he is trying to disprove the position of those who claimed that tithes were due by a direct law of God, and used canon law to prove their point. He quotes from the 1215 Lateran Council:

> *Illae quippe decimae necessario sunt solvendae quae debentur ex lege divina vel loci consuetudine approbaba.*[18]
>
> Those tithes indeed must be paid which are due by divine law or the custom of the place.

He maintains that this is clear proof that divine law is used in the sense of ecclesiastical law; if it meant by God's command the custom of the place would not be cited as an alternative.[19]

The importance of this argument - which Selden continues by pointing out that Popes would not have granted exemptions from tithes in certain cases if they had really thought they were due by command of God - is that he wanted by every means to reinforce the idea that tithes were enforceable by secular law. People might not accept the jurisdiction of the ecclesiastical courts, and therefore if an attempt were made to ground payment of tithes on ecclesiastical law some people would refuse to pay them; if however they were due by secular law everyone

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[17] History of Tithes p.161

[18] ibid. p.162.

[19] See also discussion of Selden's equation of his idea of Natural Law with command from God, in Ch.4.

would have to pay them, and the clergy would be assured of maintenance.[20]

Selden reserves his most concentrated attack for those who taught that tithes were alms, not due to the parish clergy as of right, but payable to any who did "spiritual labour" - "especially if the Pastor well performed not his function."[21]

Within the Catholic Church this was the preaching of the Dominicans and Franciscans, though it was also preached by heretics such as Wycliffe. Selden quotes Pope Innocent IV in 1250 writing against the teaching of the Dominicans and Franciscans in this regard:

> *...isti novi magistri et praedicatores qui docent et praedicant contra novum et vetus testamentum.*[22]
>
> ...these new teachers and preachers who teach and preach contrary to the new and old testament.

He also quotes a passage from Wycliffe on the same subject:

> O Lord Iesu Christ, sith within few yeeres, men payed their Tithes and Offerings at their own will free to good men, and able to great worship of God to profit and faireness of holy Church fighting in earth. Where it were lawfull and needfull that a worldly Priest should destroy this holy and approved custome, constraining men to leave this freedome, turning Tithes and Offerings into wicked uses.[23]

As there were none but Catholic clergy in England at the time Wycliffe is talking about, it is presumably the Friars to whom he is referring as the "good men".

Selden complains that the friars were not only at odds with ecclesiastical law here, but were ignoring "positive and human" laws.

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[20] History of Tithes Preface p.lx

[21] ibid.p.165

[22] ibid. p.167

[23] ibid. p.291

In fact his arguments against accepting ecclesiastical law as a basis for tithes are a fuller exposition of a point he made in the Preface:

> ...the canon law was never receivd wholly into practice in any State, but hath ever been made subiect in whatsoever touches the temporalties or maintenance of the Church (which come from Laymen) to the varietie of the secular Laws of everie State or to National customs that cross it.[24]

His arguments are not purely negative: he gives actual examples of statutes and customs concerning tithes in several European countries, and also traces the development of the way in which the Church held land, to prove his point that these matters should be dealt with by secular laws.

For example, he notes that in France, although in 1542 the Bishop, Dean and Chapter of Paris stated that tithes and first fruits were *"introduitées et instituées de droict divin"*,[25] nevertheless the French "common law" has allowed customs of non-payment in certain areas, or of paying less than one-tenth, and has made tithes subject to civil titles, infeodations, discharges, compositions, and the like. Tithes infeodated into lay lands before the Lateran Council of 1215 continue undisturbed, and have not been returned to the Church except in cases where they have been discharged of feudal service.[26] In a judgment of the Parlement de Paris it was laid down that:

> *Suivant le doctrin de S.Thomas nous tenons qu'en la loi de grace les dixmes sont devés non de droit divin mais*

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[24] History of Tithes Preface p.v.

[25] ibid. p.175. ("introduced and set up by divine law")

[26] ibid. p.178.

> *positif, et l'église en naissant n'a été fait dame de ce droit ains par le don et conception des rois, princes et autres à qui de droit il appartenait.*[27]
>
> Following the teaching of St. Thomas we hold that under the law of grace tithes are due not by divine law but by positive law, and the infant Church was not made mistress of this right except by the gift and on the initiative of kings, princes and others to whom [the power] belonged by right.

Selden, in quoting these and similar passages, shows how he inclines to the feudal doctrine that all land belonged to some lord and that rights in it could only have been granted by him: rights to ecclesiastical land and to tithes were granted by the owner to the church, whether by the individual lord of the manor building and endowing a single parish church on his land, or by kings granting huge tracts of land to monastic orders.

Spain and Italy provide Selden with other examples of lay authority over the payment of tithes. In Spain, he says, Alfonso I published an ordinance that everyone should pay tithes to "nuestro Sennor Dios" but that if anyone tried to impose new tithes and sue for them in the ecclesiastical court, the matter can be referred to the King's Court.[28]

He points out that in Venice there are no praedial tithes, but a stipend is paid to the priest out of profits on lands lying within the parish boundaries. On the other hand in the Kingdom of Naples Frederick II in 1220 ordained that tithes should be paid as in the time of King William. In Germany, some laymen were imposing tithes on profits arising from improvements on lands they owned; the clergy complained of this in a Diet at Nuremberg, but in vain.

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[27] History of Tithes. p.181

[28] ibid. p.188.

Further variations are noted in Hungary and Poland, and the point is made again that the Eastern churches pay no tithes.[29]

These various examples help to build up a picture of varying practices in Christian countries and of civil authority regulating them, all of which tends to reinforce Selden's argument that tithes were a matter for enforcement by secular law, and had been throughout the time that they had been generally paid in Christian countries.

This method of excursion through the customs of different countries in the span of a few pages, and glancing back and forth across the centuries, is precisely the method Selden uses throughout his Titles of Honor, in which he looks at methods and forms of government throughout Europe through the centuries, and it seems he is trying to build up a picture of interlocking, interlacing authorities which are governed as much by a network of courts of law as by kings or princes. His emphasis on legal edicts and on conflicting interests in legal systems in this work is illuminated by his fuller discussion of them in Titles of Honor which will be discussed in Chapters 4 and 5.

One matter which Selden might have been expected to deal with in somewhat more depth than he does, is the church's actual title to land.

In line with his general tendency to discount any basic differences in English law before and after the Norman Conquest, he does not discuss any variant ideas about the ownership of land and the individual's right

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[29] History of Tithes pp.186-192.

to alienate it, with the effects this had on the Church's right to hold land. Thomas Scrutton discusses the various kinds of land-holding in Saxon times and shows that some of these could be alienated during one's lifetime. It was possible, for example, for the lord of a manor to alienate his manor, or part of it, to another lord, with all its tenants passing to the new jurisdiction. Some lands held by other legal forms could only be granted for life or for a period of two or three specified lives, reverting then to the previous owner's family. Most lands held by the Church were of this kind. Before the Conquest land could also be devised by will. Scrutton says that wills were introduced by the Church, under the influence of Roman law, so that the Church could benefit from donations of land and other property. However, after the Conquest it was no longer possible to devise land by will, and all alienation became more difficult: this was because the tenants were supposed to provide the army to defend the land.[30]

Scrutton also shows that during the thirteenth century the secular lords' control over the land became stronger. The second version of Magna Carta in 1217 specifically prohibited any tenant from alienating his land to the Church in such a way that he owed his services for it in future to the Church instead of to its original lord. This was reinforced by the Provisions of Westminster 1259:

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[30] Thomas E Scrutton Land in Fetters (C.U.P. 1886) pp.15-19. See also Chapter 6 below.

> *Viris religiosis non liceat ingredi feodum alicuius sine licentia capitatis domini, de quo scilicet res ipsa immediate tenetur.*[31]
>
> It is not permitted to men in religion to enter into possession of anyone's feudal holding without permission of the chief lord, from whom the estate is immediately held.

The Statute de Religiosis of 1279 enacted that lands which had been alienated into church hands contrary to these previous laws could be entered and seized back by the chief lords.[32]

It might also be queried whether the changes brought about by the Reformation created any conflict whereby the Roman Catholic and Protestant churches laid claim to the same lands, so that there was also conflict over who had the right to the tithes. This was not so, because the land was seen as belonging to the individual churches and not to the central Church authority. This is made clear by the discussions on the law relating to Church property in Pollock & Maitland.[33] Church property was held in various ways - either in return for specific spiritual services, such as saying mass on specific dates for the donor's soul; for unspecified spiritual services - virtually free tenure, or frankalmoin; or by lay tenure, in return for specific services such as a layman might have to render. The abbeys, for example, after the Conquest, held by knight's service. Any dispute about ownership in the case of spiritual tenures could only be heard in the ecclesiastical courts, in early days, but gradually during the 13th century such disputes shifted

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[31] Thomas E Scrutton Land in Fetters (C.U.P. 1886) p.64.

[32] ibid. p.65.

[33] Pollock & Maitland The History of English Law ed. Milson (C.U.P. 1968) Vol.I pp.240-251 and 486-511.

to the secular courts. This was in spite of Henry II's concession in the Constitutions of Clarendon that such cases belonged to the ecclesiastical court.

The actual donation however was made firstly to God and the Saint to whom the church was dedicated, not to the parish priest or the Abbey or Bishop. Hence there was no question of an actual vacancy being created, even in a Parish church with only one priest, at the death or resignation of the incumbent. The individual parish church held the land, the parish rector was its guardian and administrator. There was therefore no change in title to land at the Reformation.

On the other hand the original idea that the land still belonged to the donor and had to be regranted at every vacancy, had also been lost over the years. This of course could have made a difference at the Dissolution of the Monasteries if the original idea had remained in force. Presumably the families of the original owners could have claimed the land back, since the corporation of monks to whom they had granted the land had actually come to an end. Selden does not raise this issue, but he does describe in detail the original method by which the landowner had invested the priest with land, and he mentions the changed circumstances of his own day, but without any discussion of the intervening period.

The landowner, he says "in the elder times" could not make a building into a church without the bishop's consecration, nor consecrate a priest; but when a church was consecrated the landowner took upon himself the

advocatio (or advowson) that is the defence of the incumbent's title, and the collation by investiture at every vacancy. In some places the Bishop took part in the investiture by putting a robe on the lay patron as part of the ceremony - as was done by Ulric Bishop of Augsburg in 950.

> The practice came to be that parish-churches and all the temporalties annext to them, as the glebe and tithes... were at every vacancy conferred by the Patrons to their new Incumbents by some ceremony not differing from our livery of seisin (which is nothing but investiture; for investiture is only the immediate giving of seisin or possession) with these words Accipe Ecclesiam, or the like.[34]

Selden goes on to say that in his own day the patron could only present his candidate to the benefice; the "interest and possession" is received from the acts of the Bishop and Archdeacon, but in the earlier times

> the Incumbent as really, as fully, and as immediatly received the body of his church, his glebe, and what Tithes were ioynd with it, in point of interest from the Patrons hand, as a lessee for life receives his lands by the lessor's liverie. Whence by the phrase of the time that kind of giving a church was styled Commendatio Ecclesiae.[35]

He goes on to show that this practice was not approved of by the Church's central authority. It was forbidden for example by the Eighth General Council of Constantinople of 871 and by the Council of Rome under Gregory VII of 1078:

> *decernimus ut nullus Clericorum investituram Episcopatus vel Abbatiae vel Ecclesiae de manu Imperatoris vel Regis vel alicuius Laicae personae, viri vel feminae, suscipiat.*[36]
>
> we decree that no cleric shall accept investiture of a Bishopric, Abbey or Church from the hand of an Emperor or King, or any Lay person, male or female.

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[34] History of Tithes p.86.

[35] ibid. p.87.

[36] ibid. p.91

The Lateran General Council of 1119 under Callixtus II decreed:

> *Decimas et Ecclesias a laicis non suscipiant absque consensu et voluntate Episcoporum. Et si aliter praesumptum fuerint canonicae ultioni subiaceant.*[37]
>
> Let them not accept tithes and churches from lay persons without the consent and approval of the Bishops. And if they dare to do otherwise let them be subject to the canonical penalty.

But, Selden says, people continued to disobey these canons until with the increase of papal power the practice ceased about 1200.

Another interesting point is the right of a son to succeed his father as parish clergyman. The fact that this practice was actually forbidden by a Canon of the National Synod of Westminster in Henry I's reign: *"Ut filii presbyterorum non sint haeredes Ecclesiarum patrum suorum"*[38] (Let sons of priests not be the heirs of their fathers' churches) shows that there had at that time been some dispute about the matter. Some people have assumed that references to sons of priests in earlier centuries arose when a widower who already had children was ordained as a priest, but some people believe that in earlier centuries the parish clergy, as distinct from the monastic clergy, did marry, as is still the case in the Orthodox Churches. It was of course a matter of interest to the post-Reformation clergy, and a distinct hardship, in the days when possession of land was so important, that this was one calling in life where a father could not leave a livelihood to his son, even if the son followed the father's calling.

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[37] History of Tithes p.92.

[38] ibid. p.386.

The owner of the advowson was under no obligation to present a son as the next in line to his father's living, although in some cases he may have done so.

Lord Denning sums up the conflict between the ecclesiastical and secular law:

> A great deal of law relating to ecclesiastical affairs was and is declared and enforced exclusively by the temporal courts. The best instance, perhaps, is an advowson or right of patronage

and he quotes Justice Blackburn in the case of the Bishop of Exeter v. Marshall

> ...there can be no doubt that the patron has the right to sue in quare impedit in the temporal court to enforce the institution of his presentee and the ouster of any clerk wrongfully instituted.[39]

Trials of strength, however, sometimes resulted in victory to the ecclesiastical side. Archbishop Grindal in the 1570's refused to accept a certain William Ireland who was being presented to a living, because he failed to reach a satisfactory standard in biblical and theological knowledge, and installed a candidate of his own.[40]

Denning also mentions a factor which Selden does not discuss: the issue of consecration of the land on which a church is built.

> ...By it the land or building is by the ecclesiastical law separated for ever from the common uses of mankind, and nothing short of an Act of Parliament can divest it of its sacred character. The temporal courts have always recognised that by consecration the status of the building and the soil is altered, and have given effect to it.[41]

Denning's assumption that an Act of Parliament can annul the effect of religious consecration might be regarded as

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[39] A.T. Denning "The meaning of Ecclesiastical Law" 60 Law Quarterly Review (1944) p.239.

[40] Collinson Archbishop Grindal (Jonathan Cape 1979)p.209.

[41] Denning p.240.

an example of vox populi, vox Dei: but it does illustrate the growth of acceptance of the idea that secular law, in the last analysis, is predominant over ecclesiastical. Selden would have agreed with the sentiment.

Selden's discussion of the rival claims of different legal systems and the prestige and authority which they wielded naturally leads to the consideration of the basis and origin of law and the part it plays in society: the origin, in fact, of authority in human society.

To obtain a fuller picture of Selden's views on this subject we need to look further than the History of Tithes, and to discuss his examination of the subject in Titles of Honor. This will form the subject of the next chapter.

CHAPTER 4

The question of the origin of law and kingship, and of which preceded the other, is addressed by Selden in Titles of Honor. He was one of a long line of writers who had been debating this problem in different forms for centuries. Quentin Skinner traces various theories, which had influenced later thinkers, back to the humanist jurists of the thirteenth and fourteenth centuries. He shows how the conciliarists at the Sorbonne influenced the thinking of many Calvinists, including English Puritans, in the belief that the people "never alienate but only delegate their ultimate sovereignty."[1] He also shows how the Thomist revival led to Catholic thinkers of the sixteenth century, such as Suárez, to state

> since all men in the nature of things are born free, it follows that no one person has political jurisdiction over any other, just as no one person can be said to have dominion over anyone else.[2]

Skinner analyses the dilemma of the early Lutheran and Calvinist writers, who could not claim that God had sometimes imposed tyrannical rulers on men for the punishment of their sins, and yet that it was right to resist them, because this was to make God the author of evil (the unjust tyranny). Ponet, Goodman, and Knox, the principal British writers on the subject, refer back to the conciliarists in claiming that not all rulers are ordained by God: the people must have made a mistake when they chose one who turned out to be tyrannical.[3]

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[1] Quentin Skinner The Foundations of Modern Political Thought Vol. 2 The Reformation (C.U.P. 1978) Chapter 2 "The Background to Constitutionalism" p.123.

[2] ibid. p.156.

[3] ibid. pp.227-230.

Further, the Christian commonwealth has a duty to resist a ruler who is breaking God's law, since every Christian has entered into a covenant with God to uphold God's laws.[4]

These ideas represent what may be called the radical side of Protestant thinking. Selden does not fit into this category because he does not, in the works under discussion, consider at all the question of whether the ruler is or is not keeping God's law.

On the other hand he does not fit in with the views expressed by James I himself, and echoed, as Kenyon says, by many of the seventeenth century Parliamentarians such as Pym, though in different terms.[5]

> The state of monarchy is the supremest thing upon earth; for kings are not only God's lieutenants upon earth, and sit upon God's throne, but even by God himself they are called Gods.[6]

It is true that he goes on to speak of the differences which exist between kings "in their first original" and kings in "civil kingdoms" of his own day, who make laws "at the rogation of the people". Nevertheless it is noticeable that he speaks of governing according to <u>his</u> laws; no question arises of either natural law or a fundamental constitution to which the king himself is subject. He denies that the people have any right to query the king's decisions:

> So is it sedition in subjects to dispute what a king may do in the height of his power.... I will not be content that my power be disputed on, but I shall ever be willing to make the reason appear of all my doings, and rule my actions according to my laws.[7]

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[4]Skinner p.237.

[5]J.P. Kenyon <u>The Stuart Constitution</u> (C.U.P. 1978) p.10.

[6]Speech to Parliament 21 March 1610 quoted in Kenyon p.12.

[7]ibid. p.14.

Those common-law theorists, on the other hand, who propounded the idea of an ancient immemorial constitution which could not be changed, but only interpreted, by subsequent law, presented a body of opinion fundamentally different from the King's ideas, even though many of them were firm supporters of royalty, and the King in practice, as Kenyon points out, was at pains to honour his coronation oath and conform to the common law. The best-known leader of this school of thought was Coke, and their general belief was that all aspects of the English constitution were of immemorial antiquity, and had persisted unchanged throughout all the vicissitudes of changes of dynasty. This, it was believed, should prevent the King from making any changes to the Common Law, which had proved its worth as ideally suited to the English people, and it was believed to be founded on reason. As Sir John Dodderidge said in his text-book The English Lawyer, the maxims of the common law were "either conclusions of natural reason, or drawn or derived from the same."[8]

Selden was not aligned with any of these schools of thought. He did not so much discuss the divine authorisation of kingship as accept it as a fact of life, and limited his theoretical arguments to the question of who may justifiably consider themselves kings, and how their authority may be proved and exercised. He did not regard the King as the fount of law, but looked on monarchy and law as having grown up together because each needed the other.

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[8]Quoted in R. Tuck "The Ancient Law of Freedom" in Reactions to the English Civil War ed. John Morrill (Macmillan 1982) p.140.

In some of his later writings we may see a less respectful attitude towards kingship emerging. In the Table Talk he is recorded as saying "A king is a thing men have made for their own sakes, for quietness' sake."[9] Nevertheless he never gives any indication of an inclination towards republicanism, and when discussing constitutions of other states he seems to be studiously avoiding any reference to Republics, whether in ancient Greece or Rome, or in contemporary Venice or the United Provinces.

In this chapter Selden's discussion of kingship and the origin of law will be considered as these matters are dealt with in the earliest editions of Jani Anglorum Facies Altera (1610), Titles of Honor (1614) and History of Tithes (1618). It is clear from the sections often quoted from the complete edition of his works that other material has been added later, so that these would represent a later stage of his thought, when conditions were quite different. On the other hand, it seems essential to consider them all together, because Selden himself said in the Preface to Titles of Honor that he had been writing the work over a period of time as a relaxation from his other labours. Some of it reads as a kind of commentary and expansion of the conclusions reached in Jani Anglorum Facies Altera. All the works were written as a result of his researches into early laws, and indeed it is as an antiquarian and researcher that he first became known. It is this, too, which marks him off from such writers as Coke. He prefers to find a specific

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[9] Table Talk ed. Reeves & Turner (1890) p.74.

beginning and authorisation of a law whenever possible, rather than suppose it to be of immemorial antiquity.[10]

To him, the origin of law was a specific command, or set of commands, from God. He is recorded as saying in the Table Talk:

> I cannot fancy to myself what the Law of Nature is but the Law of God. How should I know, I ought not to steal, I ought not to commit adultery, unless someone had told me so?... From a higher power, nothing less can bind... it must be a superior Power, even God Almighty."[11]

In later writings, notably De Iure Naturali et Gentium iuxta Disciplinam Ebraeorum, Selden spelt out the commands which God gave to all mankind after the Flood. As a Hebrew scholar Selden did a great deal of research in the Talmudic teachings, on the commands given to Noah and his children after the Flood. The Decalogue, as being applicable more to the Hebrews than to people in general, Selden treated as being of less importance.

Considering the difficulties which most people would have in making themselves familiar with Talmudic teachings, it seems somewhat perverse to place such essential knowledge as the commands of God, binding on all mankind, in them. However the general idea underlying Selden's thought seems to be that the basic law of God is that "*Fides est servanda*"[12] - A promise must be kept - and that rulers, making laws which people must obey, are in effect passing on this basic message to their people. By doing this they keep order in civil society and protect it, thus allowing human life to flourish, but they themselves

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[10] cf. D. Hirst Authority and Conflict (Arnold 1986) p.152.
[11] Table Talk p.85.
[12] ibid. p.84.

must likewise obey it. This line of thought is reminiscent of the sixteenth-century French political writing, the Vindiciae contra Tyrannos. Gooch sums up the basic message of this work:

> The people... established kings, and put the sceptre into their hands.... So far from derogating from a king's dignity to have his will bridled, nothing is more royal than to be ruled by good laws. If he disobey them, he is no less guilty of rebellion than any other individual.[13]

In Titles of Honor, Selden enquires into the historical origins of kings and laws, going back to records as early as possible. This takes him to the account in the Book of Genesis. The first recorded king, he says, was Nimrod (mentioned in Genesis 10:8). Selden dates him at about 1720 years from the Creation and says that his kingdom was in Babylon, Erec, Accad and Calna. He attempts to identify him with other persons found in non-Biblical legends. He says that he was the same as the man called Belus by the Assyrians; that he had a son called Ninus; that he built the first city, Nineveh, and named it after his son. He was not called Belus until after his death when he began to be worshipped as a god.[14]

Indeed, Selden says that the cultus of many gods started in this way - statues were made in honour of kings and other great personages, who were by later generations worshipped as gods. It appears that Selden wished to explain polytheism in this way because he based one of his arguments in favour of monarchy on the

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[13] G.P. Gooch English Democratic Ideas of the Seventeenth Century ed. Harper (Torchbooks 1959) p.13.

[14] Titles of Honor pp.8-9.

idea that it imitates the order of the Universe as ruled by one supreme God, and he maintains that even pagans really knew this.[15]

Nimrod was also, according to Selden, identified by some persons with the Greek Orion, who he says was called כסיל by the Hebrew writers.[16] The odd thing here is that כסיל is identical with the first two syllables of the Greek word βασιλ(εὺς) i.e. king. It would have strengthened Selden's argument to point this out, yet he fails to do so, which for a supposed expert in the Greek and Hebrew languages seems strange. He also remarks that some, even among Christian writers, have said that the Egyptians had the first monarchy, but that since Nimrod is named as the first king in Genesis, which was written by Moses, we must believe this and reject the other theories.[17]

This shows Selden in what to some people would be a most unexpected light. He has often been assumed, on the basis of his having disputed the divine right to tithes, to be a secularist thinker, but closer study of his works reveals how frequently he refers to Biblical authority to settle disputed opinions.

Another interesting point here is that in fact the passage in Genesis does not describe Nimrod as a king. The Hebrew word for king is מֶלֶךְ, but Nimrod is described as גִּבֹּר־בַּ֣אָרֶץ - a mighty man in the land. The Septuagint translators have rendered this as γίγας

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[15] Titles of Honor p.3.

[16] ibid. p.14.

[17] ibid. p.17.

- giant, or mighty man, not king. Yet the word מַמְלָכָה - kingdom - is used for the area he governed. It seems that the writer of Genesis was not such a close theorist as Selden himself.

In Chapter 1 of Titles of Honor Selden says that families were the basis of civil society. Each father was as a king to his own family. After a period of living in more or less formless groups of families, people realised that it would be advantageous to have one man in charge. "Some fit man's virtue" made him by public consent - or in some cases by force -

> what every one of them were in proportion to their own families: that is, over the common state and as for the common good, king.[18]

Naturally such early families were polygamous, and therefore faster-growing and more loose-knit than a modern family.

It is clear that Selden does not have any belief in the patriarchalist view put forward later in the century by Filmer, that royal lines can (theoretically) trace their ancestry back to the first heads of families in the world. His theory shows a more pragmatic approach. However he does regard monarchy as the natural form of government, both because it imitates the whole Universe, which is ruled by one supreme God, and because animals always choose one leader to lead their pack or herd, or in the case of bees, their hive. Even pagans generally realised there was one supreme God although there might be many lesser gods. He quotes among others Apuleius de Mundo and Hermes Trismegistus to prove this point.[19]

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[18] Titles of Honor p.1.

[19] ibid. p.3.

He believes that there were short periods in some places when monarchies had not been established and people lived in a kind of democracy, but this inevitably gave way to monarchy, because people found it preferable.

> Those who first tried the inconveniencies of popular rule, saw that in their government likewise should be someone selected Monarch; under whose arbitrarie rule their happy quiet might be preserved.[20]

Selden here, without giving exact references, refers to certain writers who have discussed this particular point. Justin claimed that monarchies came first, and that kings did so much harm that they were removed by the agreement of good men. No doubt Justin was thinking of, for example, the foundation of the Roman Republic, but Selden contradicts him. He says that the commentators on Aristotle and Bodin, and Machiavelli in his Commentaries on Livy, have all discussed the point: he finds Machiavelli the most convincing and so he has reproduced his argument.[21]

In point of fact this is a misleading comment. It is true that Machiavelli does say:

> In the beginning of the world, when its inhabitants were few, they lived for a time scattered like the beasts. Then, with the multiplication of their offspring, they drew together, and, in order the better to be able to defend themselves, began to look about for a man stronger and more courageous than the rest, made him their head, and obeyed him.[22]

However Machiavelli goes on to trace the deterioration of monarchies when they become hereditary, and frequently throughout the work denies that sole rulers are less likely to do harm than the people when either are

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[20] Titles of Honor p.4.

[21] ibid. p.4.

[22] Machiavelli Discourses (Pelican Classics 1970) Trans. L. Walker p.107.

disobeying the law, and more likely to do good when obeying it.[23] He sees potential for good in all forms of constitution, and favours above all the type of constitution which contains elements of monarchy, aristocracy and democracy - the "classical republic". Selden does not, in these works, make such a careful analysis of constitutions, and he ignores the virtues of republics altogether.

It is clear however that the benefit which he sees in monarchical government is the "happy quiet" which he mentions. The disadvantages which he fears in popular government are turmoil and strife. But he does not believe that choosing one ruler will of itself solve all problems; it is necessary that both the ruler and the people should be restrained by Law. He pours scorn on the idea of a Golden Age when kings ruled without Law, their expressed wish being sufficient to guide the people:

> Can we believe that in Humanitie this could at all continue? Inbred corruption never endured it. The absolute power of the one, and the unlimited libertie of the other, were even incompatible, unlesse they bee referred to some short time in the beginning of States, when, by necessitie, no Laws were, but onlie the arbitrament of Princes, as Pomponius speakes of Rome.[24]

Laws, then, were necessary at a very early stage; and they are a sign of a functional society. In Jani Anglorum Facies Altera he sums up a long description of how early British laws were founded by saying:

> *Caeterum leges suis non sunt absque conditoribus et custodibus, aut frustra sunt: reliquum est igitur ut summatio de iis perstringam. Conditae vel usu et consuetudine; diuturnae usu adprobatae leges obtinent vigorem, aut legislatorum sanctione.*[25]

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[23] Machiavelli Discourses (Pelican Classics 1970) Trans. L. Walker P.107.

[24] Titles of Honor p.15.

[25] Jani Anglorum Facies Altera p.123.

> For the rest, laws are not (laws) for their own people without legislators and guardians, or they are in vain: it remains for me to relate these in summary. Or else they are founded by use and custom; being approved by daily use laws obtain their force, or by the sanction of legislators.

This sums up the standard common-law idea, but also makes it clear that for Selden there must be a machinery of law enforcement (the custodes) even when a law is founded on use and custom, otherwise the laws will not be obeyed. Indeed a considerable part of these treatises deals with law enforcement. This aspect will be examined in the next chapter of this thesis, which deals with Selden's view of the feudal system, because it appears that for him one of the most important aspects of the feudal system was its complex interlocking of law courts. Meanwhile however there are two other matters to be considered - the lines of descent, if any, by which knowledge of the laws has been carried down through the centuries, and the ways by which legitimate kingly authority can be recognised.

It has already been mentioned above that for Selden the law of Nature can only mean a direct command of God, and that he derived this from the commands given to Noah and his sons after the Flood. In Book I of Jani Anglorum Facies Altera he gives a hint of a line of descent for Europeans from Japheth, Noah's youngest son. He cites ancient authors (Ptolemy, Diogenes Laertius, Pausanias) as saying that the whole of Europe was originally peopled by the Celts, who were called Samothei as being descended from one Samothes, whom Selden identifies as a brother

of Gomer and Tubal the sons of Japheth.[26] It is not clear on what grounds he makes this identification, as the name Samothes does not appear among the sons of Japheth in Genesis 10. Nennius in his History of the Britons claims that Europeans are descended from Japheth, but this is through one Alanus, the father of several eponymous founders of European tribes.[27]

Selden however does not press the point, as he gives an alternative version of the name, not of the Celts in general but of their lawgivers the Druids, i.e. Semnothei: seed of the gods. Selden says there is no reason to doubt that there could be men learned in the law among the Druids in the same way that the Greek philosophers were, and that since some people regarded such men as Plato, Amphiaraus, Aesculapius and Hippocrates as demigods, why should not the Druids have had the same reputation?[28]

He does not go so far as to suggest that any of these persons actually were demigods, but unless they were it is not quite clear how they are supposed to have had special access to knowledge of the divine law. However he compares the Druids with other lawgivers among the Greeks: with mythical figures like the Erinyes on the one hand, and with humans like the Pythagoreans on the other. The Pythagoreans actually did rule Croton, a city-state in Southern Italy, so the comparison with the Druids is not unreasonable, although Selden is particularly

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[26] Jani Anglorum p.2.

[27] Quoted in H. Marsh Dark Age Britain (Archer Books 1970) pp.72-3.

[28] Jani Anglorum p.3.

interested at this point in their similar teaching on the transmigration of souls.[29]

Selden discusses the Druids at some length because he wants to emphasise that their laws were the basic laws obeyed all over Britain in early times. He mentions the legendary King Brutus who is supposed to have come from Latium to Britain after a dispute with the other descendants of Aeneas - Brutus himself being descended from Aeneas's eldest son, born before he left Troy, not from his children born of his later marriage with the Latin princess. According to this legend (narrated by Geoffrey of Monmouth) Brutus landed in Devon and took over Britain, dividing it among his children and founding London, which he called New Troy, and gave Britain laws modelled on Trojan laws.

Selden is sceptical about the idea that Britons were descended from Trojans, on the grounds that altogether too many peoples of Europe claimed descent from the Trojans.[30] It is true of course that they did - including the Romans - but it hardly seems worse than fanciful lines of descent from Japheth. After mentioning other legendary early lawgivers such as King Molmutius and King Belinus, Selden returns to his own favoured opinion that the Druids were the early lawgivers of Britain, basing this apparently on the grounds that Julius Caesar gives an account of their laws in de Bello Gallico. As Caesar was in Britain so briefly and went only a small distance inland, his testimony would not seem to carry much weight.

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[29] Jani Anglorum p.22.

[30] ibid. p.11.

However Tacitus also has an account of the Druids, although Selden does not refer to this, and he makes it clear that the Druids functioned in both Gaul and Britain, and that their law codes extended to both civil and religious matters. It is therefore reasonable for Selden to give an account of Druid law as related by Caesar. What is less reasonable is that he then glances over the 400 years during which Britain was a Roman province, with scarcely any account of Roman law or law enforcement procedure, although Roman provincial government was founded on law, and Roman law must have been a very strong influence on the Britons, probably even after the central power in Rome crumbled. Apparently Selden wanted to play down the role of Roman law in British history. This is consistent with his frequent assertions that Civil Law is not and never has been accepted as part of the law of England. One example of this is his quotation from the Parliamentary Rolls of Richard II:

> *Pur ce que la roialme d'Angleterre n'estait devant ces heures ny a l'entent de nostre dit Seigneur le Roy et Seigneurs du Parlement unque ne serra rules ne gouvernes par la Loy Civil.*[31]
>
> Since the kingdom of England was not before this time, and according to the intention of our said Lord the King and the Lords of Parliament, never will be, ruled or governed by the Civil Law.

Selden's own account of this incident makes it clear that a process of trial for some suspected traitors is in question here. But he also relates that in the time of King Stephen Roman laws were expelled from the country; he suggests this was probably meant to cover "decrees

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[31] Jani Anglorum pp.89-90.

of the Popes" as well.

He is so determined to play down any Roman law influence in Britain during Roman times that he suggests that Roman law extended only to the coloniae of veterans. This is inaccurate. Roman provincial governors always held courts and enforced law in important matters,though local custom was allowed to stand for minor matters. The New Testament gives plenty of evidence of the general pattern of a Roman province, and Tacitus' Agricola mentions his encouragement to the British to adopt Roman education and a Roman way of life. That Selden had read this work is clear by his using or adapting (without acknowledgment) some of Tacitus' own characteristic elliptical phrases e.g. *"habitus Romanorum honor et frequens toga"*[32] - the dress of the Romans became an honour and they frequently adopted the toga.

He then spends some time over the story of the adoption of Christianity by King Lucius. This person, represented as first having introduced Christianity to the Britons by Nennius and Bede, is usually regarded now as legendary, though there seems no basic impossibility in the idea of a British client-king functioning under the Romans. There was certainly a well-established British church from which three bishops were sent to the Council of Arles in 314.[33]

Selden accepts Lucius without question: his concern however is mainly to show that although he accepted divine teaching from the Pope, he was directed to make

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[32] Jani Anglorum p.35 quoting Agricola ch.21 §3.

[33] P. Hunter Blair Roman Britain and Early England (Sphere Books 1969) p.160.

his own laws for secular affairs. Lucius is said to have requested *"leges profanas"* - secular laws - from Pope Eleutherius, who replied:

> *Leges Romanas et Caesaris enim nuper miseratione divina in regno Britanniae et fidem Christi habetis penes vos in regno, utramque paginam. Ex illis Dei gratia per concilium regni vestri sume legem, et per illam Dei patientia vestrum reges Britanniae regnum; vicarius vero Dei estis in regno.*[34]
>
> You have knowledge of the Roman laws and the laws of Caesar and the faith of Christ, both pages, by the mercy of God in the kingdom of Britain. From these by the grace of God, through the council of your kingdom, choose a law, and through it by the mercy of God you will rule your kingdom of Britain; for you are the representative of God in the kingdom.

It is noticeable that the alleged reply of the Pope tells Lucius to make laws *"per concilium regni vestri"* ; and whenever Selden mentions enactments of later kings he represents them as working through some form of council.

He passes to Saxon times without suggesting any superiority as between British or Saxon traditions. He repeats Gildas' story of bands of Saxons, Angles and Jutes being invited into Britain by Vortigern, so that no conquest is involved.[35] In his account of the early Saxon kings he says that the king of each tribe was listened to in the council of the tribe in accordance with his age, nobility and prowess in war: he persuaded rather than ordered his people.[36] This account fits in well with his theory of the origin of kingship in Titles of Honor, that for defending themselves a group of families would choose one man notable for his valour or wisdom to lead them (see above).

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[34] Jani Anglorum p.38.

[35] ibid. p.40.

[36] ibid. p.43.

Selden sketches in the process by which these small kingdoms became the seven kingdoms known to historians as the Heptarchy, and how Egbertus King of the West Saxons conquered four of the other kingdoms in war, so that the remaining two lost hope of remaining independent and came in with him.[37] After that there was a line of single kings who gave laws to England: Ina, Alfred, Edward the Elder, Athelstan, Edmund, Edgar, Ethelred and Knut the Dane. He relates how these laws were later collected under the name of the Laws of King Edward (The Confessor) *"non quod ille statuerit, sed quod observaverat".*[38] (Not because he ordained them, but because he observed them.)

These laws were later agreed to by the early Norman kings as the basis on which they were to govern England. Thus the basic laws of England are not immemorial, as a beginning can be found for them, but they are very ancient, and continuity is preserved through the Conquest period. There are in fact considerable discrepancies in Selden's account of how much difference was made in the laws of England by the Norman conquest, which will be discussed in the next chapter.

Meanwhile however there were two other claimants to be considered the fount of law in Christendom, as distinct from individual kings, and Selden has some pertinent ideas to put forward on these points. One theory held that the Pope, as ruler of the universal Church, invested all Christian kings with their power; another held that the Emperor was a distinct source of power,

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[37] Jani Anglorum p.49

[38] ibid. p.49 quoting William of Malmesbury.

and exercised the right of making law valid for all Christendom in virtue of his inheriting the lawmaking functions of the universal Roman Emperor.

Naturally Selden had no need to labour his disagreement with the first of these theories, for since the Reformation no Protestant power would have entertained it for a moment, though some medieval Popes had claimed the power to depose Kings:

> The deposition of kings was decreed when the Pope had reached the conclusion that the king in question was unsuitable for his office, as again Gregory VII made clear.[39]

In 1571 Pope Pius V issued a Bull releasing English Catholics from their obedience to Elizabeth: and Selden attacks Catholics on the grounds that they are potentially disloyal subjects in that they obey an alternative King:

> The Papists, wherever they live, have another King at Rome; all other religions are subject to the present State, and have no Prince elsewhere.[40]

By way of endorsement of the importance he attaches to this whole question one need only see the great proportion of the Jani Anglorum Facies Altera which is given up to the conflict between Thomas à Becket and Henry II, culminating in the Constitutions of Clarendon. This indeed is the climax of the work, whereas the part-English version which was published later, England's Epinomis, goes on to Magna Carta.

No discussion of the position or office of the Pope is entered into in Titles of Honor, although his position

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[39] Walter Ullman A History of Political Thought: The Middle Ages (Pelican 1970) p.112.

[40] Table Talk, pp 117-8.

as ruler of the Papal State might well have entitled him to some consideration. Selden however does spend a great deal of time in a consideration of the Emperors: the question of who may consider themselves Emperors, and the difference between Emperors and Kings.[41] Clearly he considered this to be a matter of considerable importance, and he was not alone in this; for many centuries it had been considered by many thinkers that the Roman Empire in some form still held jurisdiction over Christendom, and those who held that Civil Law should be received by all the states of Europe, on the whole still subscribed to this theory.

Walter Ullman discusses the apotheosis of the Roman emperor into "God's vicar on earth" so that Justinian could claim "The laws originate in our divine mouth",[42] and shows how later some of these attributes of the Byzantine emperor were transferred to the west by the creation of the Western Empire under the aegis of the Popes.

The theory that the authority of the Western Emperor was derived direct from God, and not from the Pope, was put forward by Dante in de Monarchia:

> *Quod si ita est, solus eligit Deus, solus ipse confirmat, quum superiorem non habeat.*[43]
>
> As this is so, God alone chooses him, he alone himself confirms him, since he is not to have a superior.

And he says that all mankind should obey him, as it is better to have one ruler and judge, and this should be the Roman Emperor, seeing that nature made the Roman people

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[41] Titles of Honor Chapter 2.

[42] Quoted in Ullman History of Political Thought: The Middle Ages p.35.

[43] Dante De Monarchia Bk.III Ch.XVI.

the rulers of the world. The theory that the Emperor's authority was not derived from the Pope was regarded as heretical and the book was condemned to be burned, but the idea that the Empire as enshrining Roman law was the ultimate temporal authority for Christians persisted.

In Titles of Honor Selden quotes the influential jurist Bartolus, whose works were studied and taught widely by civil lawyers, that:

> *Ratione protectionis et iurisdictionis Imperator est Dominus Mundi, quia tenetur totum mundum defendere et protegere, sed particularium rerum non dominus sed princeps.*[44]
>
> For reasons of protection and jurisdiction the Emperor is Lord of the World, because he is obliged to defend and protect the whole world, but over individual states he is not supreme Lord but ruler.

But Selden says "that weaker greatness" did not extend beyond Italy and Germany. The distinction both he and Bartolus seem to be drawing is that the Emperor was also feudal owner of certain areas, and these were in Italy and Germany. Even so that would not prevent the Emperor being overlord of other kings where they were feudal rulers. Selden however says that "Tramontan Doctors" (unnamed) do not agree that the Emperor has dominion over the King of France or Spain:

> they might well add, nor of England, Scotland, Denmark, or the like which by prescription of time, regaining of right, or conquest, one (as the other) in no kind subordinate or subject to any but God. And therefore by an act of Parliament of Scotland (5 James III) it was long since ordained
>
> > 'sen our soverain Lord has full iurisdiction and Free Empire within this Realm, that his hienesse may make notaries and tabelliones, qualis instruments sall have

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[44] Titles of Honor p.26

> full faith in all causes and contracts within the Realm; and in time to come that no Notar be maid, or to be maid be the Emperor's authoritie, have faith in contracts civill within the Realm, lesse then hee bee examined be the Ordinar and apprieved be the Kings hienesse'
>
> which Act, it seems, had it not been for the Imperialls then in use, according to which Publique Notaries are to be made onlie by the Emperor, his Palatins or such like, need not to have been made. For what might not a King (absolute in regard of any Superior) do, which the Emperor could? And in England that constitution of public notaries was long since without scruple, or any act for it.[45]

It is very significant that Selden chooses this passage rather than, for example, Henry VIII's Act in Restraint of Appeals 1533, which claims that England is an Empire, to quote at length. The acid test by which the King of Scotland is seen to be a truly autonomous ruler is that he can appoint lawyers who have full jurisdiction in his realm. Life cannot proceed in an orderly way without law and lawyers. If a king and his Parliament agree that he can appoint them, he is settled in his title without reference to any higher earthly authority.

This is a common-lawyer's argument and leaves aside all questions of the relative merit of different laws or their ultimate authority. Selden says that anyone who is "truly a king" may also be styled Emperor. But who is "truly a king"? Many theorists felt that the religious ceremony made a man a king, especially unction, because this had Biblical authority. Selden discusses unction at some length in Chapter VII of Titles of Honor, and shows that it was used by Gentiles as well as Jews

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[45] Titles of Honor p.27.

among the ancients, to transmit sanctity to sacred objects and priests as well as kings. He also relates various stories about the supposed divine origin of the oil used in the coronations of the Kings of France.[46] All Christian kings have now, he says, adopted the custom of being crowned and anointed.[47]

Similarly with crowns: these were not originally signs of royalty though they have now been adopted as such.[48] He also discusses the various types of sceptres in use among the royalty of different countries, and the many and varied titles by which kings are known, and the way these have changed over the years. The conclusion seems to be that it is not any of these things which make a man "truly a king": rather, he is truly a king who proves himself to be such by having his edicts obeyed, and preferably when these have been passed by whatever form of Council is in use in his kingdom, and made known by due process of law. Such a king can rightfully follow the example of King Edgar (one of the Saxon kings mentioned in the Jani Anglorum Facies Altera as lawgivers, see above):

> Our ancient Edgar in his Charters called himself *Albionis et Anglorum Basileus*, and once *"cunctarum nationum qua infra Britanniam includuntur Imperator et Dominus."*[49]
>
> Emperor and Lord of all peoples included within Britain.

Consideration of the growth and development of the Parliaments and Councils, which for Selden is bound up with the feudal system, is reserved for the next chapter. It is clear however that for him the ruler and the law

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[46] Titles of Honor p.132.
[47] ibid. p.131.
[48] ibid. p.136.
[49] ibid. p.25.

of each kingdom was a self-sufficient unit, based on ancient custom, and not owing allegiance to any outside person; for that reason there could be no question of laws which concerned land, like tithing laws, being subject to some external authority. This is all the clearer when we consider his original premise about kingship - that kings were originally chosen to safeguard the interests of a group of families. Any theory of kingship which would allow a king to subserve the interests of some external person or body would not be acceptable, any more than one which permitted the king to exploit the land for his own interests.

The clue to Selden's basic belief about the nature of kingship is perhaps to be found in one of his sayings in the Table Talk: "Every law is a contract between the King and the People, and therefore to be kept."[50] This is a thoroughly feudal concept. As Allen says:

> But the Middle Ages also gave birth to the principle of feudalism, founded upon the notion of contract, not of command. The coexistence of these two fundamentally different theories of government leads to a curious dualism, nowhere better illustrated than in the development of monarchical doctrine in England.

He goes on to quote the great medieval English jurist Bracton:

> But the king himself ought not to be subject to man, but subject to God and to the law, for the law makes the King. Let the King, then, attribute to the law what the law attributes to him, namely, dominion and power, for there is no king where the will and not the law has dominion.[51]

We may well see in this a summing up of Selden's own position, and this makes it more understandable that he

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[50] Table Talk ed. Singer p.83.

[51] Allen Law in the Making p.11.

spent so long in all these early treatises discussing the Middle Ages and the situation in England at the height of the feudal system. This makes it necessary to examine what Selden had to say about the feudal system, which will be the topic of the next chapter.

CHAPTER 5

It becomes increasingly clear as one considers Selden's analysis of landholding and tithing on the one hand, and of royal power and law on the other, that he considered the feudal system to be the formative influence on society as he knew it, not only in England but throughout Europe. As Hirst says, speaking of the historical scholarship of the early seventeenth century, associated with the Society of Antiquaries:

> Without doubt the finest achievement of the developing historical consciousness was the research by John Selden and Sir Henry Spelman into the nature of feudalism and feudal law.[1]

No consideration of Selden's thought, therefore, could be complete without an analysis of what he has to say about feudalism.

In discussing the seventeenth century historians' theories about feudalism, Pocock follows Maitland in associating the rediscovery that feudalism was based on military tenure with Spelman, in his book Archaeologus (published 1626).[2] In fact, however, Selden's first version of Titles of Honor (1614) predates Spelman's work, and is largely taken up with a discussion of feudalism as military tenure. It appears likely in any case that both of them had been working independently on the subject as members of the Society of Antiquaries. Pocock himself discusses the researches of Hotman and Cujas into feudalism,[3] and these are authors

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[1] Derek Hirst Authority and Conflict: England 1603-1658 (Arnold 1986) p.88.

[2] J.G.A. Pocock The Ancient Constitution and the Feudal Law (C.U.P. 1957) p.90.

[3] ibid. Chapter 4.

whom Selden refers to frequently.[4] Spelman and Selden do not appear to agree in all their conclusions but their methods are similar. Pocock remarks that in Archaeologus Spelman investigates the words denoting feudal officials, enquires into their origins and compares them with the words used in other languages, in order to arrive at the actual function of the official and his place in the feudal structure.[5] Selden used precisely the same method, as will be discussed later in this chapter.

Clearly Selden and Spelman would have disagreed about many issues. For example, Spelman wrote works "vindicating the sanctity of tithes and deploring lay ownership of sacred property".[6] However in the first edition of Titles of Honor, the one discussed in this thesis, Selden was of similar opinion to Spelman in regarding military tenure as having been introduced at the Norman Conquest, whereas by the second edition of his work in 1631 he was of the opinion that feudal tenure had existed before the Conquest.[7]

Pocock believes that until Spelman's researches the English common lawyers such as Coke had believed that feudalism was of immemorial antiquity, but had not understood its military character, looking upon it merely as a method of inheritance. This is not borne out by Selden, who speaks of military tenure as something already well-known. He merely disputes the generally accepted version of its origin.[8] It appears

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[4] See Introduction.

[5] Pocock p.94.

[6] ibid. p.93.

[7] See below

[8] Selden Titles of Honor pp.293-4.

however that Pocock may have misunderstood Coke. He says that Coke "knew all there was to know about feudal law in England, except the single fact that it was feudal".[9] He bases his assumption about Coke's ignorance of the matter on his acceptance of what he (Pocock) assumes to be Littleton's definition of the feudal system:

> *Feodum idem est quod haereditas, et simplex idem est quod legitimum vel purum, et sic feodum simplex idem est quod haereditas legitima vel haereditas pura.*[10]

The fact is, however, that this is not a definition of feudalism but of fee simple:

> Fee is the same as inheritance, and simple is the same as legitimate or unmixed, and so fee simple is the same as legitimate or unmixed inheritance.

That is, Littleton is distinguishing fee simple from entailed inheritances, not giving a definition of the feudal system as such. It cannot be used, therefore, as any sort of indication that either he or Coke did not understand feudalism.

On the other hand, Hooker certainly knew at an earlier date that feudal tenure was military:

> In this realm where the tenure of lands is altogether grounded on military laws... the building of churches, and consequently the assigning of either parishes or benefices was a thing impossible without the consent of such as were principal owners of the land.[11]

Therefore when Selden speaks of feudal military tenures as being already well-known, he does not mean simply by those non-English writers whom he had been researching.

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[9] Pocock Ancient Constitution p.66.

[10] Quoted Pocock Ancient Constitution p.65.

[11] Hooker Laws of Ecclesiastical Polity (Everyman ed.) ii pp.464-5.

All lawyers indeed because so much of their work dealt with cases about land must have been well aware of the statute de Religiosis of 1279, which specifically states that religious orders have entered upon lands

> ...in defiance of the former statutes, by which the services due for national defence are lost...[12]

Selden however does not merely discuss the holding of land by military tenure, and show how this affected the right to build churches and endow them; he also shows the strong connection between the feudal system and the right to hold a court of law. The interlocking system of courts and the consequent conflict of jurisdictions was, in his view, a basic reason for the disputes over the right to hear cases concerning tithes. It is also clear why in the last analysis the tithe, being a tax on land, seems to him to belong to the land court, that is, the common-law court, when any dispute arises.

As will be seen in the next chapter, Selden was taking part in a long-running argument between common-law and church courts in this matter. He himself does not comment on the contemporary arguments as such; instead he sets out to build up as complete a case as possible, built on the historical development of the law court system and the system of land tenure, to show the inescapable connection between the church and the land, and hence the overriding authority of land courts in matters connected with the tithe.

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[12] Scrutton Land in Fetters p.65; see also Chapters 3 and 6.

In considering the historical picture which Selden gives of these matters, it will be important to show what difference he sees as having been introduced to England by the Norman Conquest, especially as some of his contemporaries traced back the heavy load of tithes which they laboured under to the "Norman Yoke". As Pocock points out, the Levellers in particular looked upon the Norman Conquest as having introduced an alien and oppressive system of law into the country.[13] It will also be of interest to consider why Selden so completely altered his view of the Norman Conquest in the course of his writings.

Although Selden adverts to the feudal system frequently in all the three works considered in this thesis, the most extensive discussion of it is in Titles of Honor. Indeed since Honor is itself used as a technical word for the feudal holding of a great tenant, including all sub-infeudations, it is probable that he chose the title of the treatise to indicate that it was intended as an analysis of the feudal system. His method is to analyse the meaning of the words used as titles of honour, from King and other royal titles downwards, with historical comparisons of the ways in which the words are used in different countries, as well as their supposed linguistic origin. This was a method intended to prove the real function of the dignitary concerned, in the origin and development of his office. It explains why Selden claimed to be an

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[13] Pocock Ancient Constitution p.126

adherent of the Lady Philologie, (as discussed in the Introduction to this thesis), and some of these analyses will be mentioned when the function of the courts over which they presided is considered, later in this chapter.

Having considered the various gradations of titles down to Vavasour, and before going on to Knight, which may be regarded as the basic unit in military tenure, Selden spends Chapter VIII of Titles of Honor in discussing how the feudal system began. He says he has now described all feudal dignities, and that he calls them this because, although they are now honorary, their origin was:

> Chiefly referd to the first disposition of Territories and Provinces in Feudall right under the French and German Empires. The beginning of Feuds cannot but be here necessarie. The common opinion supposes it in the Longobards or Lumbards, a Northern nation.[14]

He quotes various authorities supporting this opinion, including Florus lib. 3 cap. 3, as saying that when in their wanderings through Europe, having been driven out of Gaul and Spain, the Lombards:

> ...requested the Roman state *ut Martius populus aliquid sibi terrae daret quasi stipendium; ceterum, ut vellet, manibus atque armis suis uteretur*
>
> ...that the people of Mars should grant them some land as a wage; in return it [i.e. the people of Mars] should use their hands and weapons as it desired.[15]

Selden goes on

> ...for Militarie Feuds had therin onlie their being, that the Tenants should be readie for the Defence of their Lords with Martiall accoultrements.[16]

[14-15] Titles of Honor p.294. (The people of Mars of course are the Romans - Romulus was the son of Mars.)

[16] ibid. p.295.

He points out that this system was established in law and written down under Frederick Barbarossa about 1150 by Gerard Neger and Obertus de Orto of Milan, and that this was felt necessary about that time because it was then that the Civil Laws began to be

> awakt out of that neglect wherein they had neere DC yeers slept... and were now publiquelie read and profest in Bologna by Irnerius, the first publique professor of them after Justinian's time.[17]

According to Selden, the two systems interacted, in that the influence of Civil lawyers caused those who professed feudal law to see that their system also was written down, but this had the converse effect of making people in lands which had not hitherto had a feudal system feel that their title to nobility was insecure unless they also held their land and title by feudal tenure. He quotes Sigonius as saying

> *Nova nobilitatis ratio... in Italiam est inducta, ut ii demum soli Nobiles iudicarentur qui ipsi aut eorum maiores his atque eiusmodi aliis honestati (sic) privilegiis essent.*[18]
>
> The new form of nobility was introduced into Italy, so that finally only those were considered nobles who themselves, or whose ancestors, were so in virtue of these privileges of honour or others of the same kind (reading *honestatis* for *honestati*)

Selden however believed that the feudal system did not originate with the Lombards, but dated from an earlier origin in France under Charlemagne, from whence it spread to the Lombards and then to the German Empire, and so to the rest of Europe.

> For what else was their Terra Salica but a Knight's Fee, or land held by Knight's service?[19]

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[17] Titles of Honor p.295

[18] ibid.

[19] ibid. p.296.

The chief difference, he says, between these early French fiefs and the Lombard and German ones was that in France they were generally given for life and not hereditary. Even when occasionally Charlemagne made the land-holding hereditary he did not grant honorary titles annexed to them in hereditary form, but for life only.[20]

It seems that for Selden Charlemagne's reign was a seminal period. As discussed in Chapter 2, he dated the commencement of secular laws for tithing from that period also. Presumably he saw Charlemagne as very significant in taking over the title of Emperor from the Eastern Empire,[21] for he also points out that a similar system of feudal fiefs existed in the Eastern Empire, and he quotes a Constitution of Constantine Porphyrogennetus against alienation of them

> that it bee not lawfull for soldiers to alien those possessions by which militarie service is maintained.[22]

From page 300 onwards Selden turns specifically to consider pre-Conquest landholding in England. He says that almost all land was held by some kind of military tenure unless, as in the case of ecclesiastical land, it had been specifically exempted by the King. Even when exempted from providing soldiers for the King's army, tenants were usually subject to three charges: repairing bridges, raising a tax for the King when he went to war, and repairing and guarding fortifications. This "threefold obligation" is also mentioned when he discusses pre-Conquest laws in Jani

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[20] Titles of Honor p.296.
[21] ibid.p.297. [22] ibid.

Anglorum Facies Altera. But, he says, these were obvious necessities for the common good and not really dependent on holding one piece of land rather than another. The kind of military fief which came in with the Normans was something new.[23] Wardships also came in at this time, though they appear to have existed earlier in Scotland under Malcolm II. Selden quotes from his laws

> When he distributed the kingdom into tenancies ... *omnes Barones concesserunt sibi Wardam et Relevium de haerede cuiuscunque Baronis defuncti, ad sustentationem Domini Regis.*[24]
>
> All the Barons granted him wardship and a Relief in respect of the heir of any deceased Baron, for the upkeep of the Lord King.

In England however there had been some lands in pre-Conquest times which were not in the gift of the King, but belonged to the old kinship groups and were inherited directly from the ancestors. Selden implies that this distinction was no longer valid after the Conquest:

> Now everie Feud or Fief paid a Relief or Heriot upon death of the Tenant, and the Heir or successor came in alwaies (as at this day) in some fashion of a new Purchas. But where no tenure was, there the inheritance discended freely to the Heire, who claimed it alwaies meerlie from his Ancestor.[25]

It appears that when Selden brought out his enlarged version of Titles of Honor in 1631 he had changed his mind completely on this issue. Pocock says that Harrington used this work in support of the view that feudal tenures were older than the Conquest and part

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[23] Titles of Honor p. 301.

[24] ibid. p.302.

[25] ibid.

of the immemorial law, and that the King's thanes held of the King by knight service. (In this, he would have parted company with Spelman, whose views were similar to those of Selden in his earlier version).[26]

We already see this change in Selden's thought occurring in the History of Tithes. There, he seems to gloss over the change from Saxon to Norman times in the body of the work, and then in the Review which was added later he supports the theory that the Conquest was not really a Conquest, but a recovery of the kingdom out of the hands of rebels. The kingdom had been promised to William by Edward the Confessor, and in any case William had the best right to it, as being nearest in blood to Edward on his mother's side. People who had not rebelled were confirmed in title to their possessions, which proves it was not really a conquest, or their title would have been destroyed by it.[27]

The argument seems rather circular: the definition of rebel is obviously one who did not agree that William was the true heir to the kingdom. As Jolliffe has shown by analysing examples of new ownership of land from Domesday Book, real and substantive changes took place. As one example, Geoffrey de Mandeville was put in as tenant of the King in succession to a "rebel", Asgar the Staller, and in spite of protests he regarded and occupied as his fee not only Asgar's own property of 250 hides in the South Midlands, but

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[26]Pocock Ancient Constitution p.135

[27]History of Tithes pp.482-3

also the lands of forty freemen who had merely voluntarily commended themselves to Asgar for protection.[28]

One is left to speculate why Selden changed his mind over the Conquest. Several examples of the earlier attitude (some of which will be mentioned shortly) remain in the earlier works. Yet in the History of Tithes there seems to be a gap in his account of the history of tithes in England, where he passes from the reign of Edward the Confessor to that of Henry I with only a sentence or two to link them, as if possibly a section had been excised there and then the other section included in the Review. Whether this is because Selden found it politic to follow the official Royal line about the Norman Conquest and about William's right to the kingdom, especially after the King had had him called in to be reprimanded over certain features of the History of Tithes, or whether he had become convinced that to regard William as a conqueror made the laws of England depend on his will, and therefore on the will of subsequent kings, instead of on the ancient constitution, as Pocock suggests was the motivation of the common-law theorists,[29] must remain conjectural.

In spite of his insistence on the Review that the Conquest brought in no real changes, Selden does give several examples of changes in Titles of Honor. Following his discussion of the origins of the feudal system in Chapter VIII he proceeds to analyse the meaning of Knight in Chapter IX. After describing how Knights were made in different countries, he points out

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[28] J.E.A. Jolliffe Constitutional History of Medieval England (A & C Black 1954) p.140

[29] Pocock Ancient Constitution p.53.

that the Latin word usually used to describe them was the ordinary word *miles* (soldier).

> And note once by the way, that in the Empire as well as elsewhere, Miles was in the more barbarous times both a Knight and any common Souldier, and one also that held his Fief by Knight's service, as out of the Feudalls you are instructed.[30]

However, he tells us that under King Alfred in England a religious ceremony was added to the ordinary knighting ceremony - including solemn confession of sins and receiving the sword from the altar at the hands of a clergyman, who girded the Knight with it and gave him Communion. He goes on to say:

> But this kind the Normans much misliked[31]

and tells us that at the Synod of Westminster 1102 it was enacted:

> *Ne Abbates faciant Milites.*[32]
> Let not Abbots make Knights.

We are left to speculate on the reason for this. Presumably the Norman Kings thought that Knights who felt genuine religious convictions might object to being called out to fight in certain causes; even if they did not feel so much as this, the girding of a Knight by a representative of the Church could be seen as a division of authority. The decision of the Synod of Westminster left the religious ceremony in the hands of Bishops, and by this time virtually all Bishops were Norman appointments, which was not the case with Abbots.

A more significant change from the point of view of tithes was the requirement after the Conquest that

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[30] Titles of Honor p.313.
[31] ibid. p.314.
[32] ibid.

all monastic lands should provide Knights for the King, that is, pay for the upkeep of a certain number of Knights. Generally in Saxon times monastic and church lands had been exempt. Selden quotes an example from a grant of Ethelbald King of Mercland:

> *Concedo ut omnia Monasteria et Ecclesiae Regni mei a publicis vectigalibus, operibus et oneribus absolvantur, nisi instructionibus Arcium vel Pontium quae nunquam ulli possunt relaxari.*[33]
>
> I grant that all monasteries and churches in my kingdom shall be exempted from public taxes, works, and responsibilities, except the building of fortifications and bridges, which can never be relaxed for anyone.

After the Conquest, Selden says, William changed this. He quotes from Matthew Paris:

> *inrolutans singulos Episcopatus et Abbatias pro voluntate sua quot milites sibi et successoribus suis hostilitatis tempore voluit a singulis exhiberi.*[34]
>
> enrolling individual Bishoprics and monastic holdings according to his own will (as to) how many Knights he wished each of them to provide for him and his successors in war time.

Provision of armed knights was a very expensive business. Even when not on campaign they had to keep in fighting practice and therefore could not engage in lucrative occupations. Their horses were expensive animals and expensive to feed. Also each Knight must have a more ordinary horse for general riding, so as not to over-exercise his war horse, and a mounted servant to travel with him and care for his armour and horses. It follows that the clergy by this enactment of the Conqueror, were faced with a serious increase in the revenue they must find. Selden says that in

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[33] Titles of Honor p.301

[34] Jani Anglorum p.62.

the times of Knut it was enacted that tithes must be paid in proportion to one's ploughland and of the annual increase of herds, and firstfruits of seeds on St Martin's Day, to the parish church, but that in Edward the Confessor's time, through coldness of devotion, and the negligence of many clergy who found it not worth their while to demand tithes, as their endowments were good, the custom had fallen into disuse.[35] Now they would need to collect them to meet these new expenses.

After the Conquest many more tithes were demanded on a much greater variety of commodities, and they were collected, it appears, with greater efficiency - several authorities are quoted by Selden. One from from the annals of Roger of Hoveden reads:

> *Omnes decimae terrae sive de frugibus sive de fructibus Domini sunt et illi sanctificantur. Sed quia multi modo inveniuntur decimas dare nolentes; statuimus ut iuxta Domini Papae praecepta admoneantur semel, secundo et tertio ut de grano, de vino, de foetibus animalium, de lana, de agnis, de butyro, et caseo, de lino et canabe et de reliquis quae annuatim renovantur decimas integre persolvant... Quod si commoniti non emendaverint, anathemati se noverint subiacere.*[36]
>
> All tithes of the earth, whether of grain or of fruit, are the Lord's and are sacred to Him. But because many are found to be unwilling to give tithes; we decree that according to the commands of the Lord Pope they must be warned once, a second, and a third time, that they must pay tithes fully of grain, wine, fruits of trees, offspring of animals, wool, lambs, butter and cheese, linen and hemp, and other things which increase annually.... If having been warned they do not make amends let them understand that they are subject to anathema.

A collection of Constitutions of the English of about Henry III's time mentions that land turned into meadow or pasture does not become exempt from tithes - it is still due for tithes of hay, flocks, and wool

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[35] History of Tithes p.278.

[36] ibid. pp.228-9.

or dairy produce. The threat of excommunication is reiterated, and it is laid down that full payment must be made to the priest before the excommunication can be lifted.[37] A very precise Canon of Edward I's time lays down instructions to be binding on the whole Province of Canterbury specifying, among other things, money payments in lieu of the offspring of flocks, if the flock is so small that there are fewer than ten born in a year. If sheep are grazed in different parishes according to the seasons, tithes of wool must be divided. Flour from the mill must be tithed - a most illogical ruling since the grain had already been tithed. Income made by artisans and merchants, and the wages of day-labourers, must also be tithed.[38]

These examples show the increased burden of tithes after the Conquest. It seems reasonable to suppose that the requirement laid on Church lands to provide knights must have had some influence in leading the clergy to demand more tithes in order to meet these commitments. Conversely, the new landholders who built and endowed churches on their land increased the number of parish clergy to whom tithes were due. Whereas previously a monastery, as had almost become the norm in Saxon England in some areas, provided all the church services over a wide area through its chapels, and shared the tithe among all its clergy and the poor - even when it troubled to collect it at all - now there might be new parish churches in addition, and some who had formerly been parishioners of the monastery now

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[37] History of Tithes p.232.

[38] ibid. pp.233-5.

belonged to the new parishes. The monastery faced a cut in revenue at the same time as increase in demands on it, and therefore needed to increase the tithe it collected.

Selden does not mention that all the examples just cited of actual tithes demanded were of canons passed by Church bodies and enforced by Church law, but he does enumerate some complaints made to Parliament about tithe exaction in Edward III's reign. When a new Canon was passed at Convocation that tithes must be paid on all wood cut down, a petition was addressed to the Commons that no one should have tithes levied on wood in places where such tithes had not been customarily demanded. After two further petitions to later Parliaments, trees of twenty years' growth or more were exempted - which would not help people cutting firewood.[39]

As was mentioned when quoting from Hooker earlier in this chapter, the landlord was in most cases the person who had built and endowed the church, and retained the right to present his nominee as clergyman to administer the parish. This not only emphasises the strong link between the church and the land, but shows what strong sanctions there were pressuring the lower-ranking tenants to comply with any demands made by the Church. As becomes clear from Selden's account of the courts under the feudal system, the same constraints were operative. To advert to his distinction between legislators and guardians of the law discussed

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[39] History of Tithes p.238.

in the previous chapter, we see how Parliament - the legislators, and the law courts - the guardians of the law, were moulded by the system of land tenure.

Parliament, for Selden, is a post-Conquest phenomenon. He speaks briefly of the comitia of advisors summoned by the Saxon Kings, but the basis of Parliament is the feudal system, as introduced by the Normans; because the people who are the basis of the Parliaments summoned by the post-Conquest kings are the Barons:

> When the Conqueror subiected most Lands in the Kingdom to Militarie Honorarie Tenures, as in making hereditarie Earls, he likewise invested others in smaller territories with base iurisdiction, and they were Barons and had their Courts called Court barons, whence that name to this day remains as an Incident to everie Mannor.[40]
>
> (the manor court heard cases of land and other disputes within the manor.)

He goes on to say that according to most authorities, to make a Barony one had to have a tenure consisting of 13 Knight's Fees and a third part. Elsewhere he reckons that the Knight's fee was land bringing in a yearly revenue of £20 - at least in the early period - and so the early Baronies had a specific monetary value:

> so that their honor was not in those antient times given by writ or patent, but came a censu, or from their possessions and tenure.[41]

He says that all Barons were eligible to come to Parliament. Most were originally given their lands by the King and held directly of him, but Eorls also used

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[40] Titles of Honor p.273.

[41] ibid. p.274.

to have Barons under them, and these also could attend Parliament. So he cites the concord between Llewellyn, Prince of Wales, and Edward I, that five Barons around Snowdon were reserved to Llewellyn:

> *quia se Principem convenienter vocare non posset nisi sub se aliquos Barones haberet ad vitam suam.*[42]
>
> Because he could not correctly call himself a Prince unless he had some Barons under him to provide him with a living.

Baron is one of the words whose etymology Selden discusses at length to find out its original meaning. It is embarrassing that in classical Latin it is a slang word meaning blockhead: in late Latin it is doubtful what its primary meaning is, since it can mean man rather than woman: principal tenant: citizen: and some other meanings. The most likely etymology seems to be from the Greek βαρυς meaning heavy (hence the blockhead meaning) used in the plural in Greek to mean heavy-armed troops, and thus passing through the stages of feudal military tenants to any important tenants, and thus citizens. Strangely, Selden dismisses this etymology in favour of Saxon roots indicating the meaning servant.[43] However it is typical of his interest in the historical meaning of each title of rank within the feudal system that he spends some time discussing them, and in so doing is led to discuss the functions they perform. As a result his style is extremely discursive, but a great deal of information is given, and one suspects that the discursiveness is intentional, as

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[42] Titles of Honor p.275.

[43] ibid. p.277.

a rather impressionistic picture of interlacing authorities is built up, which does mirror the realities of the feudal system.

He tells us, for example, in discussing the monetary value of Knights' fees, that under Edward II and III and Henry VI the value of a Knight's fee was fixed at £40. Those who had that amount of yearly revenue were bound to come to be sworn in as Knights. By this time it had become customary for most tenants to pay a fixed sum to the King to hire mercenary soldiers rather than be called upon to fight themselves: this had occurred in Henry II's reign.[44] All the same they were supposed to come to swear fealty and be assessed for this sum (scutage). If they were late in arriving, they could be refused the honour of knighthood and fined.[45] It seems likely that Charles I got his idea of reviving this old law as a means of making revenue from this treatise of Selden's.

The impression of the interlacing authorities and jurisdictions within feudalism is strongest in reading Selden's discussion of the law courts and law enforcement agencies. When describing officials he is careful to record what court they could preside over. In one passage where he is describing the Saxon Ealdorman and discussing his function he says, quoting a law of Ethelred:

> Therefore in one of their Lawes you read that if the Peace be broken, hee that is wrong'd should be helpt by the Townesmen, or Tithing;

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[44] T.K. Keefe Feudal Assessments and the Political Community under Henry II (Univ. of California Press 1983) p.5.

[45] Titles of Honor p.320.

> if they would not help him, that then the Ealdorman shoulde (that is, the Shirife), and if the Ealdorman woulde not, that then the King shoulde, and if the King woulde not, that then the Shire shoulde not be bound to keep the Kings peace.[46]

It is interesting that Selden chose to quote this passage, as it illustrates the ethos of the Saxon law-keeping process. As Jolliffe says:

> With Eadward (the Elder) begins a series of enactments proceeding from King and Witan ...having for their aim the suppression of disorder, the building up of a peace of the realm, the refinement of legal procedure and its enforcement by penalty.[47]

The King's Peace to the Saxons was a very important concept. Each individual person had a small area of peace in his own house which he could defend, but the King's peace was the area which he could defend, and in which he could enforce peace if it were violated. Every crime committed was a disturbance of someone's peace, and such a wrong should be dealt with by going to the court which was supposed to defend you: first your own tithing (for country areas) or township. Everyone belonged to one or the other. If they failed to right the wrong, the Ealdorman's court, i.e. the Shire court, which met six-monthly, was the next step. If he could not right the wrong, the King must be appealed to. If he failed, there must be a state of insurrection on hand - the Shire no longer owed him obedience. This is reflected exactly in the quotation given by Selden. It is the concept which gave rise to the theory about the good old Saxon times, when the ordinary man was protected, rather than oppressed, by the law, which

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[46] Titles of Honor p.255.

[47] Jolliffe Constitutional History of Medieval England p.113.

we find in Leveller writings. Selden, who does not noticeably champion the cause of the common man in any of his writings, does not himself draw out this conclusion. The impression obtained from him is rather that of quiet and order as being desirable in themselves, regardless of the finer points of justice. This is borne out by certain comments of his recorded in the Table Talk e.g.:

> In troubled water you can scarce see your face, or see it very little, till the water be quiet and stand still. So in troubled times you can see little truth; when times are quiet and settled, then truth appears.[48]

In showing the later developments of the Courts Selden shows what differences were made by the Norman Conquest. In Titles of Honor, as has been said above, he analyses the meanings of the words used for titles to show what were the functions of the officials bearing those titles. In his analysis of the meaning of the word Comes or Count a great deal of constitutional and legal history is expounded.[49] Comes was originally a follower of a great man (elsewhere he more correctly translates as companion), but in the later Roman Empire became a court official with judicial functions or a provincial governor with judicial functions. Later, in the German Empire, it became a feudal dignity, i.e. tied to the land and hereditary. In Saxon England the monks in drawing up charters used the title for many of the nobility, but this does not necessarily mean that they were of equivalent rank to those called Count

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[48] Table Talk ed. S.W. Singer p.157.

[49] Titles of Honor pp. 218 ff.

overseas. Nor is it equivalent in all cases to the Saxon rank of Eorle, though sometimes it is.

In some cases Comes is equivalent (in Saxon writings) to Ealdorman who was a judicial official directly responsible to the King, and who had to summon the Shiremote. In Knut's laws the Shiremote must be held twice a year under the Bishop and Ealdorman. Selden notes that the Latin renders this as:

> *In illo Comitatu sit Episcopus et Comes qui ostendant populo iustitias Dei et rectitudinem saeculi.*[50]
>
> In this Court let there be the Bishop and the Ealdorman who may reveal to the people the justice of God and the righteous judgment of the world.

This combination of secular and religious court - clearly implying a double function in hearing secular and ecclesiastical cases, or perhaps it would be more correct to say, displaying that the English did not see a distinction between them, - was one of the things which was changed by William I. Selden quotes a patent issued by him:

> *Propterea mando et regia auctoritate praecipio ut nullus episcopus vel Archidiaconus de legibus Episcopalibus amplius in Hundredo placita teneat; nec causam, quae ad regimen animarum pertinet ad iudicium secularium hominum adducat: sed quicumque secundum episcopales leges de quacumque causa vel culpa interpellatus fuerit, ad locum quem ad hoc opus elegerit et nominaverit veniat, ibique de causa sua respondeat et non secundum Hundredum sed secundum Canones et Episcopales leges rectum Deo et Episcopo suo faciat.*[51]
>
> Therefore I order and command by royal authority that no Bishop or Archdeacon shall in future hear cases about ecclesiastical matters in the Hundred (i.e. Shire court); nor shall he bring a case which concerns the care of souls to the judgment of secular men; but

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[50] Titles of Honor p.225.

[51] ibid. pp.225-6.

> whoever has been charged with any offence or wrongdoing according to ecclesiastical laws must come to the place chosen and nominated for this purpose and there answer to the charge: and not according to the Hundred but according to the Canons and Ecclesiastical laws let him make reparation to God and his Bishop.

This division of authority between church and secular courts was, of course, one of the principal sources of trouble and cross-litigation in hearing cases about tithes, among other matters which are, one may say, on the borderline of secular and ecclesiastical law (others in the same category being, for example, matters concerning wills and legitimacy of offspring). These troubles and disputes continued to Selden's own day and beyond, as will be seen in the next chapter. The difference which William's pronouncement on this issue made to the legal system in England was considerable, and it is the more surprising therefore to compare it with Selden's statement, referred to above, in the Review to the History of Tithes, that William's becoming King made very little difference to the laws of England. In going on to discuss the functions of the Eorl under William he makes an even more surprising statement, comparing it with what he says in the Review:

> The conqueror William the first, putting all inheritance and possessions both of the Church and Laitie under his suprem Dominion, nor permitting any foot of land within this Realme to be free from either a mediat or immediat tenure of him, created divers into this title of Eorl, making it feudall and Hereditarie. And in some grants made reference to the Saxon times, as in that to Alan Count of Bretagne, in giving him the Eorldom of Richmond by the name of *Omnes Villas et Terras quae nuper fuerunt Comitis Eadwini in*

> *Eborashira, cum feodis Militum et aliis libertatibus et consuetudinibus ita libere et honorifice sicut idem Eadwinus eadem tenuit.*[52] [from Camden In Brigantes.]
>
> All the manors and lands which formerly belonged to Eorl Eadwin in Yorkshire, with the Knights' fees and other liberties and customs, as freely and honourably as the said Eadwin held them.

This charter illustrates a point made by Jolliffe,[53] that Norman lawyers used their own terms in drawing up these charters, such as Knights' fees, which were not applicable to the original landholding, and thus made the continuity of pre- and post-Conquest law appear more real than it was.

Selden's overriding interest in this section of Titles of Honor however, is the Count's right to hold a court. He discusses the kinds of official found on the Continent of Europe called Comes, and shows that, whatever else their function, they all held courts. For example, in the time of King Clothar III of France, c.660 A.D.:

> The King and other great Courtiers sate, it seems, sometime, but the chief autoritie delegat and iudiciarie was in the Count du Palais; and before him as Chief Iustice were all suits determind, crimes examind, the Crown-revenew accompted, and whatsoever done, which to so great iurisdiction was competent.[54]

In England Counts or Eorls were to hold courts for all important cases and to share the revenue of their County or Eorldom with the King: the King to receive 2/3 and the Eorl 1/3. A great part of the revenue was actually to come from cases heard in the Court. Selden quotes Gervase of Tilbury:

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[53] Jolliffe Constitutional History, Introduction, passim.
[54] Titles of Honor p.243.

> *Comes est qui tertiam partem & porcionem eorum quae de Placitis proveniunt in Comitatu quolibet percipit. Summa namque illa quae nomine Firmae requiritur a Vicecomite, tota non exurgit ex fundorum redditibus sed ex magna parte de Placitis provenit, & horum tertiam partem Comes percipit, qui ideo sic dicitur quia Fisco socius est & Comes in percipiendis.*[55]
>
> He is a Count who receives the third part of those (monies) which arise from lawsuits in any County court. For that sum which is required in the name of Tax from the Viscount, does not all arise from landholdings but in great part from lawsuits, and the Count receives a third part of these, who is thus named because he is a sharer in the revenue and a Companion in receiving it.

Selden disputes that the aspect of sharing is the reason why they are called Comites, because such officials received 1/3 of the revenue even when they were called Duces or Consules. It is to be noted that the Vicecomes mentioned by Gervase is not a different official but the same one, according to Selden. Viscounts were not subsidiary to Counts but responsible directly to the King, created by him to govern a less important area than that of Counts.[56] In Saxon times the word Ealdorman was often Latinised as Vicecomes and was equivalent to the man who in Selden's time was called a Shirife and presided over the Shire court.[57] The division of revenue between Count and King dated from before the Conquest as is shown by an extract from Domesday Book:

> *Norwich reddebat XX libras Regi et Comiti X libras.*[58]
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> Norwich paid £20 to the King and £10 to the Count.

Under the Plantagenet Kings King's Justices were set up, whose jurisdiction both overlapped and con-

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[55] Titles of Honor p.232.

[56] ibid. p.250.

[57] ibid. p.254.

[58] ibid. p.232.

flicted with these courts. Selden mentions that doubt arose under Henry III as to whether an Earl could be summoned in any County but his own. John Earl of Huntingdon, being sued for part of the estate of Ranulph of Blundevill in Northamptonshire, which he was withholding from the heirs, tried to refuse the summons as it was not issued in Huntingdon. He claimed that because the Court of Common Pleas had been severed from the King's Bench and set down to sit in a certain place, the writ summoning him to the King's Bench did not apply. He lost this claim and had to appear before the King's Bench.[59]

Because Selden is discussing what a Count and/or Earl was, he does not stop to discuss the King's Bench Judges as such, and the differences the itinerant judges made to the judicial system. This is unfortunate as his comments would have been most valuable. We are merely left to digest the impression of the confusion which this superimposition of one set of courts and judges upon the other made to the whole judicial system.

It is no accident that Selden spent so much time discussing the feudal system: its officials, it courts, its system of land tenure. Clearly he, in common with many other thinkers of his day, was convinced that the basic law of England was still the feudal law. Indeed, as was mentioned above, the King was willing to invoke feudal laws when they assisted him, such as the law that all men of a certain income must come on a fixed

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[59] Titles of Honor p.233.

day to claim Knight's status or pay a fine.

Tuck has shown that Selden, in drawing up a reply for the use of the Commons to the King's demand for recruitment of troops, based his argument on the thesis that the medieval Kings had had no right to levy troops except on the basis of feudal tenure. The Commons made use of this in their printed reply, alleging that although a statute of Edward I had given the King extra powers in levying troops, this had now been repealed, and therefore:

> ...there is now neither common law nor statute law to compel any man to find arms, but those who are bound to do it by their tenures or contracts.[60]

It is necessary to bear in mind this background when considering Selden's thought on the question of tithes, both in considering the conflict of laws and jurisdictions over tithe cases, and in comprehending why he was so adamant that secular law was the basis on which cases must be argued. The Church and the Land (in spite of the division of their courts) were indissolubly connected: the parish churches had been founded and endowed by lay landowners, and the connection and protection which they owed to each other was a necessary part of the stability which had grown up through centuries in a society held together by an interlocking network of authority. To disrupt this fabric would be to invite disorder and chaos.

It is presumably for this reason that Selden never in fact brought the History of Tithes up to his own day

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[60] R. Tuck "The Ancient Law of Freedom" in Reactions to the English Civil War ed. J. Morrill (MacMillan 1982) p.152.

- although he said he would do so - but finished in the reign of Edward III. Many people in his own day were arguing from the point of view of more recent developments: these will be considered in the next chapter. He wanted to prove his point from arguments based on earlier precedent, as will also be considered. To do this he wanted to lay his foundation firmly in the earlier system on which he believed his precedents to be founded.

CHAPTER 6

Selden devotes the second half of the History of Tithes to the discussion of their history in England. Clearly he considered it important to divide the topic in this way: or rather, he considered that the discussion of general principles in the first half of the work had laid the necessary foundation for an understanding of the situation in England. This chapter will examine his discussion of English conditions.

It is remarkable that, although Selden states in setting out his plan of the History of Tithes in the Introduction, that he intends to bring the History up to his own day, he stops short of doing this by several centuries. There is no connected discussion after the reign of Edward III, and no reference to later times except for a few scattered references in earlier chapters. Other references are found in later versions of the work. Christopher Hill refers to Selden Works iii 1395 as quoting from a book printed by Queen Elizabeth's printer in the 32nd year of her reign, in which:

> it is expressly affirmed that it is an error of the Papists that tenths and offerings are due in the Church jure divino.[1]

This reference however is not found in the first edition of the History of Tithes and it is not certain whether later interpolations were made by Selden himself.

Clearly Selden regarded the Middle Ages as crucial to his argument, as is also seen from the fact that the

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[1]Christopher Hill Economic Problems of the Church (Oxford: Clarendon Press 1956) p.136.

first editions of Jani Anglorum Facies Altera and Titles of Honor stop there also: the former work indeed does not go beyond Henry II's reign. This is all the more remarkable considering how much argument was going on among Selden's contemporaries on the whole issue of tithes and impropriations, which he does not specifically advert to at all. To appreciate the extent of what he has ignored, it will be necessary to outline the state of the argument as it then stood, and to consider why he did not join in it.

At the Dissolution of the Monasteries many of the former monastic lands came into the hands of laymen, either granted by the King or purchased from him; and regulations were made for tithing, to last until the projected revised code of ecclesiastical law was completed.[2] (In the event this code was never completed: papal canon law is still the law of the Church of England except where superseded by individual statutes.[3]) However lay impropriators had at first no redress if tithes were not paid to them, as they could not sue for them at common law, nor had they the right to claim them in ecclesiastical courts. In 1548 a statute was passed permitting them to sue in ecclesiastical courts.[4]

We may see this as an important step in the lengthy argument as to whether cases for the recovery of tithes were properly matter for the common law courts or the ecclesiastical courts. Selden, as we shall see later

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[2]Sir Wm. Holdsworth A History of English Law Vol.IV (Methuen 3rd ed. 1945) p.490.

[3]ibid. p.488

[4]ibid.p.490.

in this chapter, spent much time showing that in the Middle Ages clergy had sued each other over tithe cases in both types of court. The innovation in 1548 was to allow lay persons to sue for them at all. Selden makes every effort to show that historically the balance was in favour of the common-law court as the true home of tithes litigation. Not unnaturally he ignores the 1548 statute, which would have materially weakened his case by placing them in the church courts.

In 1549 the rebellion in Norfolk was partly over tithes. Hill points out that some impropriations were owned, not by laymen, but by bishops or deans and chapters, and by Oxford and Cambridge Colleges. He quotes Robert Crowley as saying that the people of Norfolk would not have revolted if in so many parishes the higher clergy had not been intercepting the tithes which should have supported a teaching ministry.[5]

Concern about the clergy was undoubtedly an important factor, but it cannot have been the only one, as the terms of the settlement at the end of the Rebellion make clear. By the statute of 1549 it was enacted that day labourers no longer had to pay tithes on their wages, that land newly brought under cultivation was exempt from tithes for seven years, and that new iron and lead mines were exempt from tithe. These measures clearly were economic.[6] Selden in fact never brings out the economic implications of tithes. Another

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[5] Select Works of Robert Crowley p.140 quoted Hill Economic Problems p.152.

[6] Hill Economic Problems p.88

clause of the statute was that people were not to be put on oath for ascertaining what tithes they were due to pay. This is a most significant legal point, because the oath is part of the procedure in canon law and civil law courts, but not at common law (not, that is, an oath regarding one's own affairs) as it entails giving evidence against oneself. This was a common-law victory, and of more assistance to merchants than to farmers, as farmers' produce could be examined, but merchants' profits could not. It may be that Selden deliberately ignored the economic consequences of the tithes issue for merchants, which was a contemporary issue of some importance, because, as this thesis argues, his concern was with the landed interest and the connection of the Church with the land.

Coke, in discussing the tithes issue, argued that prohibitions, that is, writs issued by secular courts forbidding church courts to hear individual cases, should be used to bring all cases concerning tithes and impropriations into common-law courts, or, in the case of tithes in London, before the Lord Mayor.[7] Archbishop Bancroft on the contrary said they were an ecclesiastical matter.[8] Both sets of courts continued to hear such cases, and this provided an opportunity for delays. Common law courts were expensive, and costs could not be recovered, whereas in church courts they could, so that some people preferred the church

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[7] Coke Second Part of the Institutes (Garland Publishing Inc. 1979) p.661.

[8] e.g. in his Parliamentary bill of 1610 - see below.

courts. On the other hand lay judges and juries tended to be more sympathetic to the laymen's case.

Arguments over the jurisdiction of the courts were natural, because the matter on which the cases rested had become so complex. Originally tithes were understood to be payable on the annual increase of the land,[9] but as some land which had been agricultural began to be used instead for quarrying slate, or mining coal or metals, or cutting peat, the owner of the tithe felt he could claim a tenth of those products also. Selden speaks of arguments for and against tithing these products early in the History of Tithes,[10] but the necessity of paying tithes on such materials was strongly disputed by Coke.[11] Cranmer on the other hand had set up a Commission in 1552 which advocated fair tithing of coalmines, stone quarries, etc, though the proposal had come to nothing.[12]

Disputes over boundaries of land, though relevant in cases of tithe, seemed more naturally to belong to the common law courts, and had been tried as such in the Middle Ages, as will be discussed in this chapter. Then, by the statute of 1549, newly reclaimed land, if converted to arable or pasture, was exempt from tithe for seven years, but marsh or fenland - even if used for grazing - was not. Clearly there was great scope for litigation over the definition of these.

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[9] See above, Chapter 1.

[10] History of Tithes pp.29-30

[11] Coke Institutes 2 pp.651-2

[12] Hill Economic Problems p.102.

Then the tithes of London were a potent source of dispute. Selden relegates these to the Introduction as not being real tithes,[13] and he quotes there from a book published in Henry VIII's reign that money and profit may not be tithed by the law of God, as not being "living gifts". Nevertheless he agrees that the portion of the rents on properties levied in lieu of tithe were the main source of the London clergy's incomes from their parishes. These were set by statute in Henry VIII's reign as 2s 9d in the £1, but were often evaded by false declaration of the value of the property. In 1607 the Court of Common Pleas ruled that London clergy might not sue for these payments in the Church courts - they had to be heard before the Lord Mayor. Such suits were too costly for many poor clergy.

Some attempts were made to remedy the situation. Archbishop Bancroft put a far-reaching proposal before the House of Lords in 1610:

> All tithes were to be paid in kind... the powers of ecclesiastical courts should be strengthened in tithe cases, and all exemptions from tithes abolished.... 3,849 parishes (over forty per cent) were 'impropriated', that is, the right to tithes and patronage was held by laymen. Bancroft wanted a fund to be raised, by Parliamentary taxation, to buy out these laymen, and the right of presentation to be given to Bishops. If this was not possible, Bishops should be authorised to compel impropriators to increase payments to vicars.
>
> This vast programme... would have involved a frontal attack on the property rights... of nearly 4,000 impropriators, strongly represented in Parliament. The scheme was dropped.[14]

Undoubtedly it was the poor clergy and poor laity who came off worst in all this. Hill quotes the 1571

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[13] History of Tithes Introduction pp.ix-x.

[14] Hill The Century of Revolution 1603-1714 (Sphere Books 1969) p.82.

tract The Reformation of the Ecclesiastical Laws:

> It is felt to be a great indignity that tithes are rendered each year to parochial ministers by the poor and labouring peasantry, whilst wealthy merchants and men abounding in learning and skill contribute practically nothing to the necessities of the ministry; especially since the latter stand in no less need of the services of the clergy than do the peasants.[15]

Selden never expresses any concern about the plight of such poor peasantry as the writer of this tract speaks of, or indeed of the poor peasantry of an earlier age, whose plight in trying to meet tithe payments must have been equally hard. But the tract indicates that such concern did exist.

On the other hand, many poor clergy who only held vicarages were dependent on a stipend which had not kept pace with rising prices, and sometimes by custom the "small" tithes levied on garden and orchard produce, the stipend being paid to them by a rector who collected the "great" tithes, of corn, wine, wool, etc. which were increasing in value. The rector, if formerly a monastery, might now be a layman, a bishop, an Oxford or Cambridge College, or a non-resident clergyman holding office under the Crown, but the effect was the same, to reduce many parish clergy to poverty. Russell quotes some figures showing the average stipend in the Lincoln diocese in the sixteenth century as £6.13s.1½d a year.[16] In 1589 Convocation presented a petition to the Queen opposing a Parliamentary Bill intended to prevent pluralities, which stated that because of impropriations the clergy were poor and "out

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[15] Hill Economic Problems p.77.

[16] Conrad Russell The Crisis of Parliaments (O.U.P.1971) p.62.

of some 8,800 livings not more than 600 were fit, held singly, to provide for learned men."[17]

In spite of many attempts to improve them, stipends remained low, hence the attempts by the Church in the late 16th and early 17th centuries to establish the principle that tithes due on monastic lands impropriated to lay owners at the Dissolution should be paid to the Church, which, as Hill says, was seen as a matter of justice.[18]

This was not necessarily such a straightforward matter of justice as was suggested. The tithe as originally paid to the monastery had been used partly to dispense poor relief. The lay impropriators in many cases were now levied for poor rates under the Poor Law Acts of 1597 and 1601, which were administered within the parish unit by Justices of the Peace,[19] and therefore may be said to have inherited that monastic function, though no doubt these were not always collected as thoroughly as they should have been and the administration varied from place to place. Strangely, Selden does not use this argument for the lay impropriator having the tithe.

Moreover, in many areas, due to shifts of population following enclosures, the parish church had been left isolated in a district where there were few parishioners to attend it. This was particularly common in the southern and eastern counties, exactly where Independent churches later became strongest. Indeed by the

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[17] V.K.J. Brook Whitgift and the English Church (E.U.P. 1957) p.130.

[18] Hill Economic Problems p.153

[19] Holdsworth English Law Vol.IV p.157

middle of the century the argument against tithes was frequently based on the consideration that people were paying the stipend of their own minister and could not agree in good conscience to support a minister whose teaching they could not accept. As was stated in An Agreement of the Free People of England drawn up by some of the leading Levellers in 1649:

> XXIII That it shall not be in their power to continue the Grievance of Tithes longer then to the end of the next Representative; in which time they shall provide to give reasonable satisfaction to all Impropriators; neither shall they force by penalties or otherwise, any person to pay towards the maintenance of any Ministers, who out of conscience cannot submit thereunto.[20]

Then again, the lay impropriator was sometimes a well-educated Puritan gentleman, who was dissatisfied with the Anglican clergyman, and was contributing to the stipend of a lecturer, who would preach what the impropriator considered sound doctrine. This was a self-perpetuating situation. If the impropriator paid a low stipend to the Anglican clergyman the living would not attract well-educated clergy, giving excuse to the parishioners for dissatisfaction. Hill notes that in 1604 a Bill was passed in the Commons, though it failed to pass the Lords, that parishioners need not pay tithes to any clergyman who could not produce testimony to his moral conduct and ability to preach, either from his University or from six preachers of his county.[21]

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[20] A.L.Morton (ed.) Freedom in Arms (Lawrence & Wishart 1975) p.274.

[21] Hill Economic Problems p.160.

The only sanction which church courts could use against those who refused to pay tithes was excommunication. The theological outlook of the day did not make it likely that people would be impressed by this. As Russell says, in church courts

> excommunication had to be used as the penalty for a number of prosecutions, and a punishment which in theory threatened a man's hope of salvation had to be used for questions of fees and property whose spiritual content many people found hard to see.[22]

Excommunication, viewed as exclusion from the sacraments, was not the sanction it had once been. The clergyman was not looked on as a priest who alone could set his parishioners on the way to salvation through the sacraments, but as a preacher whose responsibility was to guide his flock by his preaching and exposition of the Bible towards the inward repentance which was necessary for salvation. In this climate of thought excommunication held few fears. Patrick Collinson has shown that at the Hampton Court Conference there was general agreement that some substitute penalty for it should be found, but that James's first parliament "lacked the legislative will to proceed."[23]

In these circumstances Selden had some justification for saying that statutory obligation, backed by the power of secular law, was more likely to ensure that people paid their tithes than any argument from divine law. He does not however pursue this particular line of argument, no doubt because it would involve a

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[22] Russell Crisis of Parliaments p.60

[23] Patrick Collinson "The Jacobean Religious Settlement" in Before the English Civil War ed. Tomlinson (1983) p.47.

discussion of the shortcomings of some parish clergy as spiritual guides, which is just what he carefully avoids doing. He is anxious that everyone should adhere to the parochial system and was opposed to the introduction of Lecturers:

> If there had been no Lecturers (which succeeded the Fryers in their way) the Church of England might have stood and flourished at this day.[24]

Nor, on the other hand, does he criticise the monarchy for its contribution to the problem. For although James I was a staunch upholder of the argument that tithes were due by divine law, and summoned Selden before High Commission for saying otherwise, the monarchs themselves had undermined the Church's position by selling impropriated tithes to lay persons. Hill notes that Elizabeth followed her father's example by selling or granting the tithes of 2,216 parishes, and James similarly disposed of those of a further 1,453.[25] The poverty of ordinary parish livings which was partly the result of this situation has been mentioned above.

As a result of the Millenary Petition James did write to the two Universities stating that he intended to devote royal impropriations to the improvement of livings, and hoped that the Universities would do the same. Whitgift however represented to the King that withdrawing impropriations from the Universities would reduce their funds and so lead to the overthrow of learning.[26] Why James did not restore the impropriated

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[24] Table Talk Selden Society edition p.49.

[25] Hill Economic Problems p.14.

[26] Brook Whitgift and the English Church p.175.

tithes to the parishes, instead of selling them, is not clear.

It would seem that James was on somewhat shaky ground in insisting that the right to tithes arose out of divine law, since this would interfere with his own claim to the tithes arising outside parish boundaries, a claim which he made in 1619 (a year after Selden's History of Tithes was published). Selden himself showed in this work that by canon law such tithes belong to the Bishop of the diocese, but that according to common law, if they are Crown land the King can grant the tithes to any church he chooses.[27] There is no suggestion that the King himself may collect and use the tithes. Indeed Selden goes on to illustrate his point by specific cases which were argued in Edward I's and Edward III's reigns.

In one of these, the Priory of Carlisle claimed that a former King had granted all tithes in a certain stretch of forest to the Priory and so Edward I had no right to grant the tithes of some reclaimed land within that forest to another Priory. The Bishop of Carlisle was also claiming them. The King's attorney argued that the tithes were the King's to bestow:

> *et quod Rex in Foresta sua praedicta potest villas aedificare, Ecclesias construere, terras assartare, et Ecclesias illas cum decimis terrarum illarum pro voluntate sua cuicunque voluerit conferre. eo quod Foresta illa non est infra limites alicuius parochiae.*[28]
>
> and that the King in his forest aforesaid can build manors, erect churches, bring lands under cultivation, and bestow those churches, with the tithes of those lands, on whomsoever he wishes, because that forest is not within the borders of any parish.

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[27] History of Tithes p.365.

[28] ibid. pp.366-7.

Selden comments further that Herle in Edward III's reign said that no man may arbitrarily give his tithes to a person of his choice if they are outside parish limits, but that the Bishop of the diocese should have them, but

> it seemes he spake suddenlie as out of the Canon Law and not according to the Law of England.[29]

When James I commissioned patentees in 1619 to enquire into what tithes had been concealed, he empowered them to put people on oath: they were to claim for the King all tithes arising on lands outside any parish boundaries on the grounds that

> tithes belonging to no spiritual person belong to the King as supreme spiritual person.[30]

This Commission was criticised in the House of Lords as being against the law. In 1606 the common law judges had ruled that Ecclesiastical Commissioners could not examine laymen upon oath except in matrimonial cases, and in 1607 they had ruled that such commissioners could not try tithe cases at all.[31] Moreover, even if James meant to devote the tithes so collected to poor parishes, he would have been on safer ground by his own arguments jure divino if he had made these tithes payable to the Bishops rather than to himself. If he meant to take his stand upon secular statutes regarding tithes, Ecclesiastical Commissioners were not the right vehicle to enforce them.

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[29] History of Tithes p.368.

[30] Hill Economic Problems p.92.

[31] ibid. p.128.

The argument as to whether ecclesiastical or common law courts were the correct place to try tithe cases therefore, had been going on for some years when Selden wrote his History of Tithes and it seems that, rather than enter into the argument as it stood, he decided to concentrate on the historical development of tithes, and show both on what legal foundation they rested, and how cases about disputes had been tried in the past. By this double line of proof he hoped to show that they were properly a land tax and to be tried as cases of land law, not a spiritual tax at all.

There is however a further line of argument which was important to his case, the one to which he recurs at frequent intervals, that Civil Law had no place in the English legal system. The importance of this to the case about tithes is not immediately apparent, but becomes clear in the light of the post-Reformation situation regarding Church courts in England.

Sir William Holdsworth explains[32] that in all countries where the Reformation was triumphant the study of canon law had been dropped as being a branch of Popery. However in England this had led to a complex situation which had not applied in the same way to European countries. The reason for this was that in England, whereas civil and canon law had been taught at the Universities, and their practitioners had often attained high positions in the Royal service, including diplomatic service, as well as in the Church,

[32]Holdsworth A History of English Law Vol IV pp.228-238.

there was a rival teaching body, the Inns of Court, teaching the common law, which produced the Judges and administered most branches of internal law. Civil law, however, was an essential study for diplomacy and international commerce, which were matters of vital and growing concern precisely at the time of the Reformation. Whereas on the Continent the cessation of teaching in canon law in countries where the Reformation was triumphant did not affect the study of civil law, since all lawyers were trained in the Universities, there was grave danger that in England it would do so. Henry VIII and the Protector Somerset both understood the importance of maintaining the study of civil law, and did their best to ensure that the Universities would continue to teach it. Somerset said to Ridley:

> "We are sure you are not ignorant how necessary a study that study of civil law is to all treaties with foreign princes and strangers, and how few there be at present to do the King's Majesty service therein."[33]

James I said to Parliament in 1609 that the civil law was

> most necessary for matters of treaty with all forreine nations.[34]

The study of civil law was further promoted by Englishmen going abroad to study it, and by foreign civil lawyers coming to Oxford and Cambridge to teach it. An official body, the Association of Doctors of Law was set up to oversee the profession in 1511, and later grew into the Doctors' Commons. The Archbishop

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[33] Cited Cooper Annals of Cambridge ii 35, quoted Holdsworth p.233.

[34] Works of James I (ed.1616) 532 quoted Holdsworth p.233.

of Canterbury issued the rescript allowing the Associate to practise: hence naturally the graduates in civil law often spent part or all of their professional life in the Church courts, which there were no longer canon lawyers to preside over.

Selden does his best to mask these facts by insisting that civil law has never had any but a minor place in England. He makes this point in other works, including the Jani Anglorum Facies Altera as has been discussed elsewhere in this thesis, but in the Review to the History of Tithes which, as he himself savs, was written to enable people to understand the text better, he returns to the point and elaborates it in detail. He says indeed that all nations are governed by their own common law and not by the canon law or by the Imperial (i.e. Roman or civil) law. He says that some people think that:

> the supreme and governing law of everie other Christian state (saving England and Ireland) should be called Civill Law, that is, the old Roman Imperiall Law of Justinian [35]

but that this is due to ignorance. Only some parts of Italy and the Empire are governed by this law; other nations have their own common law as England does. Even in the Empire and Italy the "things of greatest moment" are ordered by local custom.

> These "things of greatest moment" are:
>
> disposition of inheritances, punishing of Crimes, course of Proceedings, Dowers, Testaments.[36]

It is interesting that these do not include contracts or commercial matters or constitutional matters, all of which were dealt with by Roman law, and which were

[35] History of Tithes p.478.
[36] ibid. p.479

of vital and increasing importance in his own day.

He admits some influence of Roman law in some contexts:

> Doubtlesse, Custome hath made some part of the Imperialls to be received for Law in all places where they have been studied; as even in England also in Marine causes and matter of personall legacies - but these are "petie things"[37]

Thus Selden endeavours to minimise the importance of civil law, whose practitioners were presiding over the ecclesiastical courts of his day, and also of the canon laws themselves, though here he treads more carefully:

> The Canon Law everie where, in such things as are not meerly spirituall, is alwaies governed and limited (as with us) by those Common Laws. For by that name are they to be calld as they are distinguisht from the Canon Law, which hath properly Persons and things sacred only and spirituall for its obiect in practice, as the Common Laws deal with Things and Persons, as they have reference to a Common, not Sacred, use or societie establisht in a Commonwealth. Who knows anything in Holy-Writ knows the use of the word Common to be so distinguisht from Sacred.[38]

To find the earliest legal basis on which the collection of tithes in England rested, then, Selden goes back, in Chapter VIII of the History of Tithes, to Saxon laws. The earliest he examines are "An ancient collection of divers Canons" made about the time of Henry I and inscribed with the statement that they were

> *excerptiones Domini Ecgberti Archiepiscopi Eburace civitatis de iure sacerdotali.*[39]
>
> a collection of the Lord Egbert Archbishop of York about ecclesiastical law.

These laid down, concerning tithes:

> *ut ipsi sacerdotes a populis suscipiant Decimas, & nomina eorum, quicumque dederint, scripta habeant,*

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[37] History of Tithes, p.480

[38] ibid. p.478.

[39] ibid. p.195.

> *& secundum auctoritatem Canonicam coram testibus dividant. & ad ornamentum Ecclesiae primam eligant partem, secundum autem ad usum pauperum atque peregrinorum per eorum manus misericorditer cum omni humilitate dispensent; tertiam vero sibimet ipsis sacerdotes reservent.*[40]
>
> let the priests themselves collect tithes from the people, and keep a written record of the names of those who have given, and according to canonical authority let them divide (the offerings) in the presence of witnesses, and reserve the first part for the adornment of the church, and with their own hands distribute the second part to the use of the poor and travellers, mercifully with all humility; but the third part the priests may keep for themselves.

On internal grounds Selden (and Easterby following him)[41] doubt the authenticity of this document because it resembles the laws of Charlemagne on the subject, whereas Egbert, who was Archbishop of York 743-767, predated Charlemagne's laws. As was discussed in Chapter 2 of this thesis, Selden attributes the first secular laws on the subject of tithes to Charlemagne, and he regards the laws attributed to Egbert as being somewhat later and copied from Charlemagne's. He (and Easterby) forget however that Alcuin of York was an eminent person in Charlemagne's court, and could have drafted the laws for him, using Egbert's laws as a model. P.H. Blair calls Alcuin

> the most distinguished pupil of the school which had been founded at York by Archbishop Egbert, and which, inheriting through its founder much of the teaching of Bede, came to be the greatest centre of English learning in the later eighth century.[42]

He relates that Alcuin settled at Charlemagne's court in 782, where he became head of the palace school.

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[40] History of Tithes p.195.

[41] Easterby The Law of Tithes in England p.9.

[42] P.H. Blair Introduction to Anglo-Saxon England (C.U.P. 1956) p.166.

It is the more strange that Selden did not advert to this, since he himself quotes from an epistle of Alcuin to Charlemagne, advising him not to impose tithes on the recently converted Huns and Saxons until they were more settled in the faith.[43] Selden, of course, preferred to think that Charlemagne's laws were the earliest, precisely because they were imposed by a secular ruler, the point he is always trying to establish.

Selden goes on to relate how two legates came to England from Pope Hadrian I in 786 for the formation and establishing of Church laws, including those on tithes:

> *Deciman partem ex omnibus frugibus tuis seu primitiis deferas in domum Domini tui.... omnes studeant de omnibus quae possident Decimas dare; quia speciale Domini Dei est; et de novem partibus sibi vivat et eleemosynas tribuat.*[44]
>
> Bring a tenth part of all your crops or first fruits into the house of your Lord.... let all take care to give tithes of all they possess, for this is the portion of the Lord God; and let a man get his living and give alms of the other nine parts.

One of the legates, Gregory, reports that this together with the other decrees and canons were agreed to at two Councils, one held under King Ealfwald of Northumbria, Archbishop Eanbald of York and his Bishops and Abbots and secular leaders of his kingdom, the other under King Offa of Mercia, Lambert Archbishop of Canterbury, and the Bishops, Abbots and secular leaders there. Everyone present agreed and signed.[45]

Selden says that he does not know whether a copy of the original document is in existence, but:

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[43] History of Tithes p.76.

[44] ibid. pp.199-200

[45] ibid. p.200

> if it be of good authoritie it is a most observable law to this purpose. being made with such solemnitie by both powers of both States, of Mercland and Northumberland.[46]

However he notes that there is some doubt about its authenticity because it conflicts with other accounts about a legation to Wessex.

A further development is that of King Aethelulf in 855 decreeing that everyone should give one-tenth of their goods and possessions to the Church to thank God for his protection against the Danes, and exempting that tenth portion from all other taxes. This charter was given by the King to the Bishop with orders that the decree should be published in every Church.[47]

It seems that what Selden is trying to establish is that tithes have been not merely imposed by Church authority, but at least accepted and reinforced, if not promulgated, by the secular authority of the day. He notes the agreement in 900 between Alfred and Guthrun the Dane, imposing money fines for non-payment of tithe in their respective portions of the kingdom.[48]

Judging from the many further laws which Selden cites in this section, every King in England from then on confirmed laws about tithing at the beginning of his reign. The first which clearly specify that these are to go to a particular church are the laws of King Edgar (c. 970):

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[46] History of Tithes

[47] ibid. pp. 204-5.

[48] ibid. p.206.

> *reddatur omnis decimatio ad Matrem Ecclesiam cui Parochia adiacet.*[49]
>
> let all tithes be paid to the mother church to which the parish is attached.

It goes on to specify that if there is a daughter church with right of sepulture, that church shall receive one-third of the tithes and the mother church two-thirds.

Easterby says that some historians have assumed from this that the parish system already existed full-fledged in Edgar's time, but that this was not so: the "mother church" could just as easily have been a monastery, and in view of the large number of abbeys built and endowed in Saxon times this is most likely.[50]

A quite Draconian fine is threatened for non-payment, and this is repeated in Knut's laws: the defaulter is visited by an officer of the King and of the Bishop, and also the parish priest. They take the one-tenth of the produce for the Church, give him one-tenth to live on, and divide the rest in half - one-half for the lord of the land, the other half for the Bishop.[51] This shows the close collaboration in enforcement of laws between the secular and ecclesiastical authorities. Indeed it implies that at this period the King's authority was not seen as separated from that of the Church. The King seems to be regarded as wielding quasi-divine authority, rather like the Byzantine Emperor. This impression is reinforced

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[49] History of Tithes p.218.

[50] Easterby Law of Tithes p.15.

[51] History of Tithes p.218.

by the fact, discussed earlier in this thesis, that at this period the same court sat to try secular and ecclesiastical cases. The division into secular and Church courts was enacted by William the Conqueror. In the circumstances it is perhaps not very meaningful for Selden to argue that early laws for tithes were made by secular authority.

Easterby says that towards the end of the Saxon period tithes in England were seldom collected because of the unsettled condition of the country, and that this is why very few tithes are mentioned as part of the revenue of churches in Domesday Book.[52] Selden agrees that they were not collected, but refers the reason to the richness of the Church's endowments and coldness of devotion of Christians.[53] As he explained when he was first quoting from them, many of the collections of early Saxon laws were in fact compiled and translated into Latin in the Norman period,[54] at which time strict payment was again enforced. A law of Henry I reiterates the provision of the laws of Edgar and Knut that officers of the King as well as the Bishop should enforce payment.[55]

From this time also there are more stringent requirements as to what tithes are to be paid. A Synod held at Westminster before Richard Archbishop of Canterbury, Henry II, and the young King, laid down that in the Province tithes must be paid:

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[52] Easterby Law of Tithes p.17.
[53] History of Tithes p.278
[54] ibid. p.195.
[55] ibid. p.222.

> *de grano, de vino, de fructibus arborum, de foetibus animalium, de lana, de agnis, de butyro et caseo, de lino et canabe, et de reliquis quae annuatim renovantur.*[56]
>
> of grain, of wine, of the fruit of trees, of the offspring of animals, of wool, of lambs, of butter and cheese, of linen and hemp, and of all other things which are renewed yearly.

Selden mentions that from this time on the power of the Church was becoming stronger, and the Popes were sending letters specifying new tithes which had not been demanded before, of the produce of mills, of garden produce, hay even if it grew along pathways, etc.[57] It is always possible, of course, that rulings emanating from the Papal secretariat were given in response to requests coming from the upper clergy in England in the first place. As was discussed in the section on the feudal system, when the Abbeys under the Normans had to provide the revenue to keep armed knights, it became more necessary to collect as much tithe as possible. Certainly the whole system continued to expand. Imposition of tithes on the wages of artisans and the profits of merchants, which, as has been noted, was still an issue being argued in the 16th and 17th centuries, was first made by a church Council held in London in Edward I's reign. Further, parish priests who through fear or favour neglected to collect the tithe could be suspended until they paid a fine of a silver mark to the Archdeacon.[58] The priest was still, as in the early Church, entitled to only one-quarter for himself. One-quarter went to

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[56] History of Tithes pp.228-9.

[57] ibid.p.228

[58] ibid.p.235.

diocesan funds. Such a law certainly does away with any suggestion that tithes could be paid to a clergyman of one's choice.

In Edward III's reign a Council held in London also specified that wood must be tithed, and from this point complaints were made to the King in Parliament. A petition in the Commons is recorded:

> That no one shall have tithes of wood demanded of him in places where such tithes had not been customarily demanded.[59]

After two more such complaints wood of 20 years' growth was exempted, but this would only have helped people building ships or big houses, not the poor. The complaint to the King in Parliament is interesting, however, as evidence that people thought of the tithe as matter for secular law, because by this time the distinction between secular and church law was certainly marked.

By such examples Selden seeks to establish that the basic right to tithe is grounded in positive human law. Another aspect of the question however is, to whom is tithe payable? The answer to this reflects the interlocking fabric of rights which has been discussed in Chapter 5 as being the very fabric of the feudal system. Selden in the History of Tithes, no less than in Titles of Honor, illustrates this by his method of discussing the same matter several times from different points of view. Not only does he deal with the rise of the parochial system and of the monastic system, with their conflict-

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[59] History of Tithes p.238.

ing loyalties, in the first part of the book, but he looks at it again as it occurred in practice in England in the second part, and then covers the same ground in a different way by looking at how, in practice, the inevitable disputes were settled. This builds up, as in Titles of Honor, a strong impression of the inextricable web of legal rights, customary rights, and tangled loyalties, which were the basis of feudal life, and which certainly made it impossible to devise a set of clear rules by which to arrive at a just division of the property of the Church in his own day. More clearly than any argument, this impressionistic picture gives the message that unless the church accepted its situation of being tied to the land, it would have no security.

He notes that in England, as elsewhere, in early times the bishops and clergy lived in common and shared the diocesan revenues, but that later as elsewhere, landowners built churches on their own property and endowed them. This became the basis of the parochial system. The Bishops accepted this situation

> as otherwise, had they denied that to lay founders, they had given no small cause also of restraining their devotion.[60]

This practice began in Saxon times: Bede records the case of one Puch, a nobleman, about 700, building a church and asking the Bishop to consecrate it.[61] If these churches had right of sepulture they were regarded as parish churches. The Bishops however

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[60] History of Tithes p.259-60

[61] Bede: Hist. Eccl. lib.5 quoted History of Tithes p.260.

sometimes erected new parishes by subdividing land which had originally belonged to the diocesan Cathedral or Abbey and establishing a resident parish priest.[62]

It also became the practice quite early to establish a church but appropriate it to an Abbey,[63] so that the church building, lands and revenues became part of the Abbey's lands and the clergy there had the responsibility of ministering to the people or installing a clergyman to do this, but did not have the original expense of building and endowing the church. Here already there is the possibility of doubt arising as to which churches are bona fide parish churches and which are mere appendages of other churches. The practice of laymen endowing churches prevailed so long in England that even in King John's day there is a letter from the Pope assenting to it:

> *liceat tam episcopis quam comitibus et baronibus Ecclesias in feudo suo fundare; laicis quidem principibus id licere nullatenus denegamus, dummodo Dioecesani Episcopi eis suffragetur assensus, et per novam structuram veterum ecclesiarum iustitia non laedatur.*[64]
>
> it is allowed not only to bishops but also to counts and barons to build churches in their fiefs; we do not refuse to allow this to leading laymen provided the Diocesan Bishop gives his assent, and the rights of old churches are not harmed by the new building.

Selden also believes that until the time of Edward I the tithes were regarded as quite separable from the land and could be granted separately. Until

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[62] History of Tithes p.260.

[63] ibid.

[64] ibid. p.361.

the Statute of Westminster 2 and the Statute Circumspecte agatis, both of 13 Edward I (1285) ruled otherwise, the parish rector could only claim the tithes if they had been specifically included in his title of consecration: otherwise his parochial right was confined to offerings for burials etc.[65] and the tithes could be granted to monasteries for reasons of piety, if the landowner wished. The reason why these statutes laid down the right to tithe as part of the advowson, that is, the right of the patron of the church (layman or cleric) to present his choice of candidate to the living, was that otherwise the value of the advowson would be diminished, and since it was a species of real estate by which the patron provided an income for the person of his choice, the value of it, as private property, must not be diminished, in fairness both to the patron and the presentee.[66] Thus, according to Selden, the actual right of the parish rector to collect the tithe was a right inherent in his status as rector, deriving from a statute set up to protect the rights of property, and not a spiritual right. He notes that Judge Stoner said in judging Corbet's Case in Edward III's reign

> The advowson of the whole tithes is none other than the advowson of the Church.[67]

The fact that Popes and Bishops had been upholding parochial rights prior to this time is interesting as showing the mind of the Church on the matter, but not the legal basis of the right, at any rate in England.

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[65] History of Tithes pp.261-2.

[66] ibid. p.424

[67] ibid. p.285.

This argument was of great importance to the disputes over rights to tithes current in Selden's day for two reasons. First, it seemed to fix definitively the right of secular courts to try any disputes over tithes:

> the right of Advowson and Patronage of Churches or Tithes onlie belongs, by our ancient Lawes and at this day, to the secular court.[68]

Secondly, it establishes the right of laymen who had come into possession of tithes belonging to former monastic lands to keep them. Indeed they could not give them up, if they were to act under the statutes of Edward I making the tithe an inseparable part of the advowson of the church. Selden acknowledges that canon law holds the opposite view about the right to tithe. Lindwood, the medieval English codifier of canon law, had said that the right of advowson extended to the temporal endowments of the church - manse, glebe, rents etc - but tithes were spiritual and came to the parish priest by ius commune. But, says Selden, this is disproved by

> our ancient practiced law of Dotation of Churches by arbitrarie conveyances of tithes at the owner's pleasure.[69]

This refers to the period from about 1000 to about 1200 A.D., when parish boundaries were not yet fixed and people felt they had a right to pay tithes to whatever church they attended, be it monastic or otherwise, although the bishops at intervals tried to establish as a principle that tithes must be paid to the parish church.[70] But not only did people do this during their

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[68] History of Tithes p.425.

[69] ibid. p.426.

[70] See above, Chapter 2.

lifetime: many also made consecrations in their wills of the tithes from parts of their property to churches of their choice - frequently to monasteries in return for the spiritual benefits derived from the prayers of the monks or nuns.

The practice of conveying tithes in this way had apparently arisen from the abolition, after the Norman Conquest, of the right to devise land by will. Scrutton says:

> The power of devise at death, which before the Conquest had only been fettered by the restraints either of the claims of the family on Heirland, or of the conditions of the "book" in bookland, almost entirely disappeared after the Conquest. It had been introduced by Church influence, in opposition to the interests of the family and the lord, in order that death-bed repentances might result in temporal profit to the spiritual adviser, whose ministrations effected them. It was defeated by the interests of the lords, whose pecuniary profits in feudalism were derived in great measure from the payments which they received on the succession and admission of a new tenant to the feud of his dead ancestor. The necessity, if feudalism were to maintain the national defence, of ensuring that lands should be in the hands of a male fit to bear arms, justified the introduction of a fixed rule of succession with payments to the lord by whose allowance it was carried out for his consent to the succession.[71]

It has already been noted that after the Conquest abbeys were held by knights service and were assessed to provide a fixed number of knights,[72] but these of course had to be found and paid for from elsewhere. No doubt it was felt to be impossible to find an adequate supply of such men if more large tracts of land found their way into monastic holdings. Because of

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[71] Scrutton Land in Fetters pp.51-2.

[72] Chapter 5 above.

the inability to provide any longer for the maintenance of monasteries and their charitable works by leaving actual lands in their wills, landowners found a substitute in the beguest of tithes arising from specified tracts of land.

Selden says that conveyances of tithes in this way (before Circumspecte agatis prevented it) created a good title which lasted to his own day, and the King or those who had acquired from him, who had come into possession of the monastic lands to which these tithes had been annexed, now held them by this title, not through arbitrarily appropriating parish churches:

> as some out of gross ignorance with too much confidence deliver.[73]

So the Crown, on the Dissolution of the Monasteries, came into possession of

> (1) the land which was the original endowment of the monastery, which was free of tithe because it had contributed directly and wholly to the upkeep of the divine service of the monastery and the charitable works of the monks, even though clearly that was no longer true.
>
> (2) any land belonging to the monastery which fell within other parishes: on this, tithes had to be paid by the owner of the monastic land. Boundary arguments were naturally a problem.
>
> (3) any parish churches appropriated to the monastery with the tithes belonging to their lands.

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[73] History of Tithes p.290.

These might, as Selden notes, be far distant from the monasteries.[74] Furthermore, it had been laid down by a rescript of Pope Lucius III that in such cases the parish clergyman was answerable to the Bishop in spiritual matters but to the monastery for temporal matters.[75] As long, therefore, as the argument that tithes are due by secular law is accepted, they were clearly still payable to the current owners of monastic land.

(4) any tithes from other land which had been specifically conveyed or bequeathed to the monasteries by deeds of gift or wills legally made before Circumspecte agatis. These are impropriated tithes.

Clearly it was these latter two classes of tithes which many people in England (in the seventeenth century) were claiming should return to the parish church. In the case of appropriated churches the monastery had usually collected the tithe and paid a stipend to the clergyman, unless they had in the past compounded for some other arrangement. Now the current owner,-layman or higher clergyman or, in some cases, Oxford or Cambridge college, - was continuing the arrangement and continuing to pay a stipend which, due to rising costs, was now far too low. In the case of impropriated tithes the current owner was collecting tithes from lands which he might not even own, because having once been legally

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[74] History of Tithes p.371.

[75] ibid.

conveyed they were considered part of the monasteries' real property. Those who agreed with Lindwood that tithes were spiritual rights due to the parish clergy as such, wanted to see them return to the parish clergy. Selden, by showing not only that tithe was a secular right, but that it was annexed to the right of advowson of the church, was arguing that if they were in the hands of landlords they must stay there.

The entire Chapter XI of the History of Tithes is a study of various gifts or bequests of tithes in England from about 1060 to about 1200, copied from the chartularies of Abbeys. Selden says that he copied most of these from the collection of Sir Robert Cotton, who was a well-known antiquarian. One rare case of actual land being granted has to be confirmed by royal Charter (Henry I confirming a grant of land made by Alberique du Ver to the Abbey of Abingdon) because the King was the ultimate owner of all land.[76]

The wills and deeds are a storehouse of information as to what kinds of produce were customarily tithed, and what problems arose when an Abbey built a new parish church to serve parishioners who had previously attended the church of the lord of the manor, and other such matters. Another important matter which they reveal, and which Selden refers to again in the Review, is the motive that so many of the testators had. One of the first mentioned is a bequest by Herbert, a tenant of Henry de Ferrariis to the Abbey of Abingdon, confirmed after his death by his son Robert, with the consent of

[76] History of Tithes p.300.

the lord Henry, of one-third of all the tithes: *pro patris et sui suorumque salute*[77] - for the salvation of his father, himself and his family. Some donors specifically earmark their tithes for charitable purposes: for example, a bequest to the Priory of Boxgrave in Suffolk by William St John (1180) specifies that his tithes shall maintain a fourteenth monk, there being only thirteen in the community, but that if a fourteenth does not join, the tithes shall go to the poor, the widows and orphans of the two manors from which the tithes were bequeathed.[78] Some specify that masses shall be said for their souls and those of their relatives.[79]

Kings themselves figure as granting or bequeathing tithes from their demesne lands and also often mention tithes of venison taken in hunting.[80]

Selden says that after the Lateran Council of 1215 very few more conveyances of tithes away from the parish church were made, but ones already settled were not disturbed.[81] This meant of course that the post-Dissolution owners of monastic land gained in two ways. They held large areas of land which, as the original endowment of the monastery, was free of all tithe, all exemptions having been confirmed by the Statutes of Dissolution, and they held the tithes of the parishes of appropriated churches and other impropriated tithes being paid to them from land which in some cases they did not even own. They must of course pay the stipend

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[77] History of Tithes p.298.

[78] ibid. p.331.

[79] e.g. ibid. p.332.

[80] e.g. ibid p.351:Henry II to Sarum.

[81] ibid. p.356.

of any clergy for whom they were responsible, because this arrangement had already been settled. The clergyman also received offerings and the like, and possibly the "smaller tithe" of the parish - garden produce etc - while the landlord took the more valuable "great tithe" - on grain, wool, wine, etc. There were in fact many varieties of arrangement, which had grown up over the centuries. However, one intangible but very important result was that now that prominent landowning laymen had the right to present their own preferred candidates to vacancies - who were not normally challenged by the Bishop unless manifestly unsuitable - the landed interest in many areas came to control the clergy.

In the body of the work Selden does not speak of any disadvantages in this state of affairs, but in the Review, which was added after he had to appear before High Commission, he does remind the present lay owners that the original tithes were usually bequeathed to monasteries to enable the monks to carry out charitable works, and any lay person now holding the tithes is under a moral obligation to do something similar with them. The lands and impropriated tithes should have been:

> bestowed rather for the advancement of the Church to a better maintenance of the labouring and deserving ministry, to the fostering of good Arts, relief of the Poor, and other such good uses as might retain in them, for the benefit of the Church or Commonwealth, a character of the wishes of those who first with devotion dedicated them (as in some other Countries upon the Reformation was religiouslie done.)[82]

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[82] History of Tithes p.486.

Judging from the reception given to the History of Tithes this small section of the Review did not strike people with the force which the main body of the work did. The message which people received was that lay impropriators were entitled to all the exemptions from payment and all the revenues which had inhered in the monastic lands at the time of the Dissolution. Richard Montagu Bishop of Chichester and Norwich, writing after the first publication of the History of Tithes, said the effect of Selden's argument was

> All, evermore left in the hands and at the wills and disposing of lay owners and landlords, to give tithes as they would and if they would

and that even those who had not read the book believed that

> Master Selden was unanswerable, and had given the clergy such a blow in their claim for tithes as was irrecoverable.[83]

Apart from his emphasis on the legal basis on which the claim to impropriated tithes rested, Selden is at pains to drive home the long history of the association of cases of disputes over tithes with the common-law courts. The whole of Chapter XIV is taken up with a discussion of this issue. Rather surprisingly in view of some of his earlier statements, he says that by their nature tithe cases really belong to the ecclesiastical courts, but that the history of the actual practice in England shows that they have mostly been handled otherwise:

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[83]Quoted Hill Economic Problems p.137.

> It is cleer by the practiced common law, both of this day as also of the ancientest times, that we have in our yeer books, that regularlie the iurisdiction of spirituall Tithes (that is, of the direct and originall question of their right) belongs, I thinke as in all other states of Christendom, properly to the Ecclesiastical Court, and the later Statuts that have given remedie for Tithes infeodated from the Crown after the Dissolution, leave also the ancient right of Iurisdiction of Tithes to the Ecclesiastique Courts.[84] But how the difference of Ages hath herein bin amongst us, is litle enough known even to them that see more than vulgarlie.[85]

He points out that before the Conquest one Court - the Hundred or County Court - tried all cases, spiritual and secular, but that separate Bishops' courts were set up by William I.[86] From then until Henry II's time tithe disputes were heard in both the County Courts and the Bishops' courts, sometimes being transferred from one to the other. Selden gives several examples. In one interesting case Richard, tenant of land in the parish of Lenham, has consecrated his tithes away from his parish church. Andrew, Rector of the Parish, sues for the tithes before the Bishop. Richard states that he has been forbidden by his lord to be party to any case about them unless the lord is present. Nevertheless the court proceeds, and is about to find for the Rector when Richard appeals to Rome. Unfortunately the outcome is not stated.[87]

On the other hand Henry II ordered the Sheriff of Berkshire to hear a case in the County Court about some tithes which the monks of Abingdon alleged had been usurped from them by Turstin fitz Simon. The court

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[84] I.e. the Statute of 1548: see above.

[85] History of Tithes p.411.

[86] ibid. p.413.

[87] ibid. p.415.

found in favour of the monks.[88]

Pope Alexander III ordered the Bishop of Exeter to deprive the parson of Curket and send him to Rome for trial because he had appealed to the King over a case of disputed tithes:

> *quoniam nemini liceat super rebus spiritualibus ad secularem iudicem appellare.*[89]
>
> because no one is allowed to appeal to a secular judge concerning spiritual matters.

Clearly there was a great deal of conflict over the question of jurisdiction. As Selden says, the power of the Popes was increasing during this period. He does not mention that secular courts were also getting stronger, in that the itinerant Judges set up by Henry II were superseding the old County Courts. Perhaps he took it for granted that people would realise this.

He discusses in some detail the ways in which secular courts in England had claimed and retained the right to hear and rule on cases of disputed tithes. He enumerates these:

(1) Prohibitions. These are writs issued by one court to forbid a case to be heard in another. Both secular and ecclesiastical courts issued such writs. So it became a question of whose authority was the stronger in a particular time and place.

(2) Writs of right of advowson. These determined cases in which two patrons conflicted over whose advowson a certain piece of land fell into, and therefore which clergyman had the right to its tithe.

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[88] History of Tithes p.419.

[89] ibid. p.421.

(3) Writs of scire facias by which the King called for a case to be heard in Chancery, that is by the rules of Equity.

(4) Bare processes of command of payment.

(5) Actions taken upon the Statutes of Dissolution of the Monasteries.[90]

Selden says that he will discuss examples of all of these, but in fact as he stops short in the reign of Edward III he never gets on to the fifth group, which from the point of view of the arguments going on in his own day might well have been the most interesting.

Of the first group, the most telling examples he gives are in fact dealt with in an earlier chapter of the History of Tithes, where he discusses two cases which show that kings, nobles and bishops had always acted upon the assumption that they had the right to grant land and tithes out of their demesne land to whatever church they chose, because it was not part of the manor or other communally held lands but was their own property. Therefore cases of disputes over such tithes were not to be heard by the Church court. The logic underlying this assumption is not very clear and indeed the writs quoted make no attempt at logic, but merely state that because the King and his nobles customarily make grants of such tithes out of their demesne land it is a matter that touches the dignity of the Crown and therefore the King forbids the case to be heard in the Bishop's court.[91] This could well be

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[90] History of Tithes p.422

[91] ibid. pp.353-357.

described as a trial of strength.

The second class, writs of right of advowson, were principally cases in which one parson was suing for tithes which he claimed belonged to his parish, but were being collected by the other. Selden says that following the Statute of Westminster 2 in Edward I's reign (referred to earlier in this chapter) such cases had to be tried in the Court of Common Pleas as between the two patrons. This Court must determine in whose advowson the land concerned lay, or whether the tithes belonging to the disputed area had been legally conveyed away to become part of the other advowson. As was mentioned above, the advowson was regarded as real estate even though intangible: it was the right to present a parson of the landowner's choice to the living, and as such it was a method of ensuring that he had a livelihood. Often it was a way of ensuring that a member of the landowner's own family was provided for. So it was important to each patron that his advowson should not be diminished. Naturally arguments concerning boundaries of land were rife, since there was no systematic surveying and registration. When the Court of Common Pleas had found in favour of one patron, the parson of that parish was to receive one quarter of the tithe, that being the part traditionally earmarked for the parson's own upkeep. The portions of the tithe which went to the poor, and the Bishop, would be unaffected. (Selden does not discuss what would happen if the case were between two bishops.)

He says that old authorities differ as to what happened before the Statute of Westminster 2, though the medieval authority Bracton speaks of sworn testimony from a local jury as to which advowson was which, by long custom.[92]

Such cases had relevance to Selden's own day because monasteries had held the advowsons of so many parishes, which were now held by the current owners of monastic land. Selden does not mention any current cases: but it seems he had made up his mind to avoid discussing any current issues.

The third group of cases he mentions, writs of Scire facias, were writs issued by the King calling for certain disputes to be heard in Chancery. These were cases concerning tithes which had been granted directly by the King as being part of forest land over which he had entire jurisdiction.[93] Selden seems rather ambivalent about these, which is understandable as common lawyers disliked the Chancery court, but on the other hand such writs cut down the power of the Church courts. As to the fourth class, that of command of payment, he gives examples of commands by the Kings to sheriffs to see that tithes from forest land granted by royal patent to certain persons were paid.[94]

Both these classes of action were by way of a trial of strength. As Selden mentioned earlier, tithes of land not being part of any parish - which would include forest land - by canon law were regarded as belonging to the Bishop whereas by common law it was considered

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[92] History of Tithes pp.429-30.
[93] ibid. p.443.
[94] ibid. p.365.

that as the land belonged to the King, he had the right to grant its tithes to the church of his choice.[95] The fact that Kings felt strong enough to insist on their rights in this regard reflects the growing power of the Crown as against the Church. Selden mentions that in Henry III's reign the Bishops at the Council of London in 1257 said that no notice was to be taken of Prohibitions issued by the King's Justices on ecclesiastical matters, and if anyone sought to detain a person from suing in the Bishop's court he would be excommunicated. Selden says:

> But this advice of theirs was to litle purpose, nor durst they, questionlesse, have put it in execution.[96]

The real weakness of the Church's position was that the greatest penalty its courts could inflict was excommunication, and if people did not care about their loss of spiritual benefits this would not worry them very much. Even if the "greater excommunication" was involved, which meant that all Christian people should refrain from contact with them, this would only work if those other people took notice of it also. In fact, as far as punishments went, the Church had clearly lost considerably by its division from the secular courts in William I's reign, though this may not have been his intention.

Selden, then, in the latter half of the History of Tithes, has argued that the settlement of ownership of what had been monastic lands, and of the tithes arising from them or annexed to them, was valid as it stood, by

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[95] History of Tithes p.445.

[96] ibid. p.434.

sound legal title and statute, and that any dispute over details of ownership could only - by long custom and by statute - be tried by the law of the land. The effect of this argument was, as Bishop Montagu had said, to leave everything at the disposing of lay owners and landlords: yet Selden himself maintained that he did not intend by this argument to deprive any clergyman of his livelihood, but that rather he was convinced that the clergy would have sounder title to their tithes by his argument than by basing their claim on divine law. Some people have assumed that this was a piece of special pleading made to allay the wrath of High Commission. It is however quite possible that he was perfectly sincere in this claim. This will be discussed in the Conclusion.

CONCLUSION

In the Table Talk Selden is quoted as remarking that his History of Tithes, which was formerly rejected by the "people in Oxford" has now been accepted by them. He compares this change to the initial rejection and later adoption of the teachings of Aristotle, on their rediscovery in the early Middle Ages, by the theologians of twelfth-century Paris.[1]

It seems probable that whereas the theologians at Oxford originally opposed Selden's History of Tithes because - being trained in canon law and civil law - they supported the canon law doctrine that tithes were due jure divino, they came to realise that Selden's arguments gave them a sounder base for retaining their own extensive tithe holdings. Oxford and Cambridge colleges, as being in many cases originally monastic institutions, had been endowed with appropriated churches and impropriated tithes which they still held. Others had come into their hands at the Dissolution, by grant or purchase. Selden's arguments showing that these were all held by valid title by the law of the land were apparently felt to be more persuasive and safer than arguments from divine law, which might have removed the tithes and given them to the poor incumbent of a parish church. Moreover, as Selden himself suggested, people who did not agree with the concept of divine law might have refused to pay the tithes altogether. This change of

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[1] Selden Table Talk ed. Singer p.154.

mind in the Oxford theologians gives an indication that Selden's argument that the right to tithe would rest on a sounder foundation if tithes were seen as part of the secular land law rather than if they were judged to be due by divine law, came to be accepted as valid by many people who had at first mistrusted it.

Certainly it was not accepted by everyone. In the later years of the century Archbishop Laud endeavoured to buy out some of the lay impropriators, and in some cases to override what they saw as their rights, and to strengthen the Church courts. In 1641 he increased the stipend of one poor clergyman, and when Sir Arthur Haselrigg came and complained to him that it was a lay fee in his possession, and that the Archbishop had no right to interfere, Laud replied that

> he hoped ere long not to leave so much as the name of a lay fee in England.[2]

With hindsight we know that Laud was fighting a losing battle. The ecclesiastical courts lost their influence, and although Civil Law retained its control of Divorce, Probate, and Admiralty matters until the mid-nineteenth century, the common law courts enabled the landed interest to hold its Church possessions. Lay owners of advowsons were presenting candidates of their choice to livings through the eighteenth and nineteenth centuries. In the novels of Jane Austen, herself the daughter of a clergyman, we see the system at work. Sir Thomas Bertram and General Tilney, county Members of Parliament, keep "family" livings for their

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[2]Quoted H.R. Trevor-Roper Archbishop Laud (Macmillan 1940) p.429.

second sons; Colonel Brandon offers a living to a young man he hardly knows and who is not yet ordained; and these are the good clergymen. The fact that clergy were still at odds in those days with the lay holders of tithes is reflected in Miss Austen's satirical outline of a novel according to the specifications of the Rev. Mr Clarke, the Prince Regent's librarian, in which she represents the heroine's father, a poor but saintly clergyman, expiring:

> in a fine burst of literary enthusiasm, intermingled with invectives against the holders of tithes.[3]

The landed gentry in fact came to dominate the Established Church, as Bishop Montagu had foretold.[4] It does not necessarily follow that Selden, in putting forward his arguments, was trying to enrich the landed gentry or entrench their power. Probably it would be nearer the truth to say that Selden did realise that the landed gentry would come to control the church, but that, considering possible alternatives, he regarded this as a good thing, because it tended to promote stability and order.

Charles I indeed had the same opinion. As Kevin Sharpe says:

> The re-establishment of authority in the localities, in the hands of the most important local families, was a central beam of his (Charles I's) social reconstruction.[5]

It may be argued that the control exercised by the gentry was a double-edged weapon: Collinson has shown what influence Puritan gentry sometimes wielded

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[3]Quoted in E.V. Lucas Introduction to Emma p.xii.
[4]See Chapter 6.
[5]Kevin Sharpe "The Personal Rule of Charles I" in Before the English Civil War p.61.

and Coward has shown a similar phenomenon on the Catholic side. These points will be discussed below. Nevertheless, on balance Selden seems to have felt that the landed interest could be trusted to maintain stability better than any alternative force.

The striking themes which have emerged in considering the group of works studied in this thesis have been: the supremacyof secular law over ecclesiastical law; the vital connection between the Church and the land; and the tremendous importance Selden gives to the Middle Ages and the feudal system, which he seems to see as the legal basis of English society and the continuing safeguard of its enduring existence.

It seems that one of his strongest motivations in insisting on the supremacy of secular law was that this would ensure the control of the State over the Church. Although in the twentieth century such an attitude is no longer considered acceptable by most liberal thinkers, in the sixteenth and seventeenth centuries people were very concerned to perpetuate the break with the Papacy, and probably saw the maintenance of a strong national Church as necessary for this reason.

Barry Coward says that most English Protestants in the early seventeenth century:

> ...were passionately in favour of one national Church. There was no discernible support for tolerance of congregations outside the Church; all attempts to establish separate congregations in the 1590s had been brutally crushed by the beginning of James I's reign.[6]

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[6]Barry Coward The Stuart Age p.72.

This certainly reflected Selden's own view. In the Table Talk he is quoted as expressing the view that the State is the ultimate authority in questions of religion:

> Question: whether is the Church or the Scripture judge of religion.
> Answer : in truth neither, but the State.[7]

He is particularly concerned that no one should suggest that Catholics should have a similar status in England to that enjoyed by the Reformed Church in France, because the French Protestants recognise the King of France, but:

> The Papists, wherever they live, have another King at Rome; all other religions are subject to the present State, and have no Prince elsewhere.[8]

Fear of Papal influence was very strong in England despite the legal disabilities under which Catholics lived. As Rose says, the Papal bull Regnans in excelsis had

> left Elizabeth's government with no option but to regard every popish recusant as a potential subversive until he gave special proof of his loyalty.[9]

Despite fines for recusancy and laws requiring all children to be baptised in the parish church, and other laws restricting the activities of Catholics passed in Elizabeth's and James I's reign,[10] there were some areas where Catholicism was increasing, precisely among the class which Selden would notice most - the landed interest.

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[7] Table Talk ed. Singer p.142

[8] ibid. pp.117-8.

[9] E. Rose Cases of Conscience p.40

[10] ibid. pp.11-12.

> Counter-Reformation Catholicism in England was a seigneurial religion, which survived within the shelter of the houses of great magnates, some of whom were too powerful to be proceeded against by local magistrates.[11]

There would have been a real possibility in some areas, therefore, that if the principle had been established that tithes were due by divine law, persons such as Coward mentions could have claimed that they were discharging their obligation by paying tithes to a Catholic priest, and the Established Church would have lost them. Selden makes it clear where his sympathies lie when he deals with the conflict between Henry II and the Papacy.[12] He does not spell out the dangers of renascent Catholicism in the History of Tithes, but his many references to the canonists and the scholastics show that he had it in mind.[13]

Patrick Collinson has shown how some Puritan gentry fostered an incipient separatist movement in meetings in their own homes if they found the preaching in their parish church inadequate.

> The presbyterians and the puritan ministry in general went forward on the assumption that religious experience would normally be found and contained within the local church.... And they assumed that the membership and character of that church would be parochial and in practice involuntary, as it had always been. But partly as a consequence of the frustration of puritan hopes of a further reformation of the parish churches, the godly were gathering in increasing numbers in non-parochial meetings, whether of people from more than one community drawn out of their parishes to various preaching occasions, or of semi-separatist cells within the community.[14]

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[11] Coward Stuart Age p.70

[12] Jani Anglorum Facies Altera pp. 95 ff.

[13] See Chapter 3.

[14] P. Collinson The Elizabethan Puritan Movement (Univ. of California Press 1967) p.381.

Collinson shows that such godly households, while being an influence for piety, were at the same time divisive to the parish system, both in holding meetings in their homes for prayers and teaching at which clergy need not be present, and in going to hear sermons and receive the sacrament at churches other than their own parish church.[15] He believes that this situation in the late sixteenth century

> prepared the way for the seventeenth century, when separating and non-separating variations of congregationalism would more than hold their own with the 'old English puritanism' of Elizabethan days.[16]

Murray Tolmie tells us that in 1616 Henry Jacob, returning to England after ten years exile in Middelburg, set up in London a free independent congregation, "a fully developed and completely autonomous rival to the parish churches," in which

> the pastor was supported by voluntary offerings rather than by the compulsory tithes of the parish ministry, and these offerings were also used for the relief of poor members, so that 'all the church's members are givers, or receivers'.[17]

The General Baptists also were established in London from 1612, and by 1625 had five congregations in London and other towns,[18] so that although separatist churches were few in numbers compared with the population of the country as a whole, their presence in London must have been known to Selden, and the tendency of their doctrine and practice to disrupt the parochial system must have been apparent.

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[15] P. Collinson The Elizabethan Puritan Movement p.374.
[16] ibid. p.382.
[17] Murray Tolmie The Triumph of the Saints (C.U.P.1977)p.14.
[18] ibid. p.71.

Although he did not discuss their opinions, he did by implication attack their position when he spoke against those - both Catholics and heretics - who regarded tithes as alms and claimed that they could be paid to the clergy of one's choice. This had not only been the position adopted by Wycliffe and other heretics: it had also been the doctrine of the wandering friars of the Middle Ages, who claimed that where they were providing for the spiritual needs of the laity in places where lax parochial or monastic clergy were not, they should receive the tithes. Selden did not only speak against this doctrine in the History of Tithes;[19] he is recorded in the Table Talk as alleging that their attack on the established Church of their day was a potent agency for the break-up of Christendom:

> If there had been no Fryers, Christendome might have continued quiet and things remained at the stay. If there had been no Lecturers (which succeeded the Fryers in their way) the Church of England might have stood and flourished at this day.[20]

The form of words Selden uses here gives us the clue to his thought, at least in the group of early works considered in this thesis. Christendom might have continued "quiet" and things remained "at the stay." Selden, at least at this stage, was a great advocate of law and order and of stability. To quote Table Talk again:

> In troubled water you can scarce see your face, or see it very little, till the water

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[19] History of Tithes pp.165-8.

[20] Table Talk p.49.

> be quiet or stand still. So in troubled times you can see little truth; when times are quiet and settled, then truth appears.[21]

So stability and quiet are very important to him; he does not see truth emerging from conflict or being rediscovered by a radical upheaval. One can see therefore why his ideal was a strong intertwining of the Monarchy, the Law, the Church, and the Land. Throughout these works we have seen these themes recur.

In Titles of Honor Selden argued that the monarchy and the law grew up together, - each needed the other. There was never a time when people would have been law-abiding without a monarchy to enforce the law (or some power as authoritative as a monarchy, - but he avoids discussing such alternatives, passing over, for example, the Roman Republic) nor when a monarch could have been trusted to rule well without laws to restrain him.[22]

In Jani Anglorum Facies Altera, Titles of Honor and History of Tithes, we see examined from different angles the relationship of the Kings, the Church, and the law. Each book sets out to show, not by a detailed line of argument, but by an impressionistic picture built up of many details, given greater or lesser emphasis, that kings function through various legislative and judicial bodies; that the Church and the King have often been in conflict, but that in almost all countries of Europe the "common law" of the nation has

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[21] Table Talk p.157.

[22] See Chapter 4.

precedence over ecclesiastical law; and that the Church, though in the spiritual dimension ordained by God, owes its stability and well-being on earth to its connection with the land.

So we see the argument in Titles of Honor that the King and the Law grew up together, reinforced by the account in the later part of the book of the interlocking system of courts which between them maintained stability and order.[23] In the History of Tithes we see these same courts in action over specific cases over possession of Church lands or the right to collect tithes from them.[24] In History of Tithes we see arguments between Church courts and royal courts, and in Jani Anglorum Facies Altera we see one specific quarrel between Church and King - between Becket and Henry II - given prominence as the last and most detailed item in the book.[25]

A study of these three works taken together emphasises another aspect of Selden's thought - the prominence he gives to the Middle Ages. All three begin in antiquity: Jani Anglorum Facies Altera in the earliest recorded times in Britain, the other two in the Old Testament with some discussion also of Greek and Roman antiquity. All of them, however, spend most time discussing the Middle Ages, and indeed they do not go beyond the reign of Edward III except for brief references. It is true that the great builders of the English legal system were

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[23] See Chapter 5.

[24] See Chapter 6.

[25] Jani Anglorum pp.95 ff.

Henry II, Edward I and Edward III, and that a lawyer like Selden may well have found those reigns of paramount interest. It is also true, however, that had he continued much beyond that time, the various changes in English life brought about by the Black Death and the Wars of the Roses could have broken up the picture he was building up of the interlocking system of tenures, loyalties, legal rights, and varying methods of enforcement: a picture which he wants us to accept as the underlying fabric of society, guaranteeing rights to the monarchy, the populace and the Church, and forming the basis of law and order.

To emphasise the connection of the church with the land he spends a great deal of time in describing how the parish system arose out of the grants of land made by landowners to have churches erected on their lands: how originally the clergyman was invested with his land like any other feudal tenant, and how although this earlier concept had given way simply to the clergyman being presented by the landowner, nevertheless the inextricable link between the parish clergy and the land remained,[26] and was reinforced by the Statute of Westminster 2 and the Statute Circumspecte agatis of Edward I's reign. In order to emphasise this fundamental legal connection he insists throughout the History of Tithes that although the central church organisation - the Papacy - had tried to exert its authority in the matter of the payment of tithes,

[26] See Chapter 3 and Chapter 6.

the reality had been that the secular authority had enforced payment. He goes right back to Saxon times in England to prove this point, and it is a theme he recurs to at intervals, not only in dealing with England but with other European countries.[27] He downplays the role of ecclesiastical law and also of civil law, which in England in his own day had become the training-ground of lawyers exercising jurisdiction in the church courts.[28] Indeed, having attacked on several occasions the idea that Civil Law was of any importance in England, he spends some time in the Review to the History of Tithes disproving the idea which some people had, he says, that the

> supreme and governing Law of everie other Christian State (saving England and Ireland) ...should be called... Civill Law; that is, the old Roman Imperiall Law of Iustinian.[29]

In fact, he says, although Justinian's code has influenced the laws of other states, there are no European countries, except parts of the Empire and Italy and Portugal, where it has actually been admitted as the law of the land.[30]

He quotes Friar Bacon:

> *Omne regnum habet sua iura quibus laici reguntur, ut iura Angliae et Franciae, et ita fit Iustitia in aliis regnis per Constitutiones quas habent sicut in Italia per suas.*[31]
>
> Every kingdom has its own laws by which the laity are governed: for example the laws of England and France; and Justice is done in other kingdoms through the Constitutions which they have, just as in Italy through its (constitutions).

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[27] E.g. France, History of Tithes pp.175 ff.; Spain, ibid. p.184.

[28] See Chapter 6.

[29] History of Tithes p.478

[30] ibid. p.479.

[31] ibid. p.481.

Yet it was being recognised in Selden's time that Civil Law was important, especially in the spheres of international diplomacy and commerce, and in those areas its importance was growing.[32] Selden must have been aware of this, and his opposition to it could well have been a measure of his concern about it. Clearly he was determined to emphasise the importance of the common law over against both civil law and ecclesiastical law, as part of his general theme of the interlocking of the monarchy, the church, the law, and the land.

It is true that this theory had an inherent tendency to make the Church subservient to the landed interest; but it is clear from the extracts quoted above from Table Talk that Selden saw some real dangers in alternative possibilities: dangers of a renewal of the central power of the Catholic Church and its interference (at least) in England; or of the break-up of the unity of the Established Church even by the influence of lecturers, much more so by the Independent Churches, if their influence were to increase. For this reason he emphasised the importance of the parochial system and the Established Church, and their role in guaranteeing the stability and order of society.

There has been a tendency, commencing even in Selden's own day, to regard him as anti-religious. Hirst says:

> The most radical M.P. was the thoroughly ungodly Henry Marten, and the equally ungodly

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[32] See Chapter 6.

> lawyer John Selden the most cogent constitutionalist.[33]

But Fry has a quite different view. He does not believe that he was "at heart an infidel", but quotes Richard Baxter as saying:

> Sir Matthew Hale oft professed to me that Mr. Selden was a resolved, serious Christian, and that he was a great adversary to Hobbs's errors, and that he had seen him openly oppose him so earnestly as either to depart from him or drive him out of the room.[34]

It seems we may take at its face value Selden's statement that the clergy would find they had a safer title to their tithes by accepting his argument that they are due by positive secular law than by insisting on right by divine law.[35] The fact that in this case a great proportion of the tithes will go to laymen he accepts as an inextricable part of the system, though he does remind the lay holders of their moral obligation to use such tithes for some purpose consistent with the original bequests.[36]

The general tendency of the History of Tithes is to uphold the status quo; but this is to be expected from one who summed up the constitutional situation of England in his own day in the following terms:

> *Augustissima nunc sedent haec comitia, quae mira et ad firmissimam Reipublicae salutem contexta Trium Ordinum, Regis, Magnatum, remque plebis procurantium harmonia...*[37]
>
> The comitia which now sit are very august, - formed in a remarkable way to ensure the strongly established safety of the state of Three Orders, - King, Magnates, and those who manage the affairs of the people...

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[33] Hirst Authority and Conflict p.225.

[34] Fry, Sir Edward "John Selden" in Selden Society edition of Table Talk p.179.

[35] Introduction to History of Tithes pp.XIII-XIV.

[36] History of Tithes p.486 [37] Jani Anglorum Facies Altera p.126.

It seems he felt these people could be trusted to maintain the "strongly established safety" of the Church also, better than any other system. Although this conclusion had the effect of underpinning and strengthening the landed interest, there is no reason to suppose that he was not sincere in advancing it, even though subsequent history has proved him wrong, at least as far as tithes are concerned. During the nineteenth century all tithes were gradually commuted to tax payments,[38] whose value was eroded by inflation. In the twentieth century they were entirely phased out by Act of Parliament. This may have proved Selden's point about the supremacy of secular law, but it shows that in the long run he was mistaken in believing that the Church's right to tithe would be preserved by it.

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[38] Sir Wm. Blackstone, Commentaries p.129.

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