Prosecution (criminal) – KTL, SW

KTL: Legal proceedings were meant for securing the conviction and punishment of criminals. It started with communal prosecution. Many forms of prosecution existed, indeed depending on the nature of the prosecuted crime, the source of prosecution, which could be either private or public, would change. Thus the goals pursued and the forms of the procedure would change. Private prosecution was the dominant form in England before the twelfth century. The victim or his kin (in cases of homicide) could make an accusation of crime against a perpetrator. This procedure was called appeal. It started formally with the hue and cry, raised by the victim. Once the crime was notified to the royal officials, the appellor had to begin his suit in person at the next county court. Then summoned, the appellee had to show up at the court on penalty of being outlawed. He also had to be attached, which is to say that he was required to find a surety who would ensure that he would appear at the trial. The presumption behind the appeal was that criminal conduct could affect – individually – a private person in particular ways. In the case of simple homicide, that is to say death by misadventure or homicide committed without dissimulation. Appeal and litigation through the payment of compensation (a 'bot') or wergeld in the case of homicide, was the way to repair the wrongs committed against the victim and therefore to avoid vengeance.

SW: The ecclesiastical jurisdiction has a similar kind of proceeding, although they didn't deal with violent crimes in the same way. They had civil cases in which the plaintiff sought damages for the recovery of property and so on, and criminal cases where the object was punishment against some offence of public order. These were things like marriage cases, violence against clerks, defamation, issues like that. Procedure in Roman law and consequently canon law differed slightly between civil and criminal cases. In Roman law, the primary difference between the two was the nature of the sentence. There was a bit of difference at the start of the trial too – not everyone who could bring a civil case could bring a criminal case and in criminal cases the accuser was responsible for proving his case, and if he could not prove the case (and this is the point about sentences), he would undergo the same punishment as the offender would have received. Canon law doesn't entirely stick to that Roman way of dealing with things. Gratian doesn't distinguish at all in the *Decretum* between civil and criminal procedure, but the canonists that followed him attempted to make a distinction between the two, with civil cases following Roman procedure more closely and criminal cases following procedure modified by the canons. Tancred of Bologna, William Durantes and others devoted titles to criminal procedure in their treatises, and William of Drogheada promised to do so, but that was one of the many treatises he never managed to write. Despite the devotion of titles to criminal procedure, there is as I said very little difference. The main issue was how you would punish somebody following the sentence. Criminal proceedings could be instigated by accusatorial procedure, as you said, or by inquisitorial procedure. That mean either an accusation brought by an individual or with an inquest initiated by a judge *ex officio*, by virtue of his office. I think this is very similar to presentment procedure in common law.

KTL: Actually, from the tenth century, there may have been forms of public prosecution as well. Some crimes were not considered to affect individuals only; they were seen as a matter of public concern, because they were considered to be crimes against the community. In this category, we find murder, theft, rape and assault, for instance. Because of this public nature, a public official could initiate criminal prosecution. Then in the late twelfth century, public prosecution was generalised in England. Under the Assize of Clarendon in 1166, the jury had to present, that is to say to report, all individuals publicly suspected of having committed a crime of murder, robbery or theft to the sheriff's court and to the eyre justices. This was called presentment. This procedure enabled some

crimes to be prosecuted even if the victim did not appeal. We also observe that at the end of the twelfth century that it was routine judicial practice to put on trial appellees when the prosecution was dropped by appellors. Thus the nature of prosecution changed in the late twelfth century. Presentment would become the predominant form of prosecution.