THE DANELAW AND THE DANISH LAW: ANGLO-SCANDINAVIAN LEGAL RELATIONS DURING THE VIKING PERIOD

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In Norway, Sweden and Denmark codes were written down during the centuries following the Viking age, but they give us only desultory and unreliable information regarding the law of the Scandinavian peoples before that period. Therefore, any contribution throwing light on the law of the Viking age must be included in the investigations. An idea which then immediately suggests itself is that on their expeditions and emigrations towards the east to Russia, towards the south to the shores of the Frankish Empire, especially Normandy, and towards the west to the British Isles and later on to Iceland, the Northmen may have brought with them their native law, which may have left its mark in the foreign districts and perhaps have survived the Viking age as something that may be recorded and perceived as Scandinavian law.

This point of view will be taken in what follows, especially when considering the relation between Anglo-Saxon and Norwegian–Danish law. This seems natural since in English legal history it is often pointed out that the legal systems of the districts which were dominated by the Scandinavian settlers during certain periods of the Viking age were influenced or even replaced by Scandinavian law.[1]

From the time of Canute the largest of these districts was called the Danelaw, i.e. the part of England where Danish, not English, law and custom predominated. After the Viking age all England was divided into three parts. This tripartite division appears in the laws of Canute, where a sharp distinction is made between the King's jurisdiction in Wessex, Mercia, and the Danelaw. This division is stated in the laws of William the Conqueror, and when throughout the 12th century legislators speak of the Danelaw they mean the area from Yorkshire to Middlesex.

Whereas the differences between the law of Mercia and the law of Wessex were but few and purely technical, the distinction

[1] When Danish law in particular is mentioned below, no contrast with Norwegian law is aimed at, as the methodological problems are almost the same.

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between the Danelaw and the rest of England is considered very profound.[2]

As early as 1889 *F. W. Maitland,* the famous English legal historian, wrote: "The influence of the Danes in the development of English law has until recent years been too much neglected."[3]

In *A History of English Law* published in 1903, *Sir William Holdsworth*[4] says: "The Danes were a kindred race to the Saxons. But we shall see that terminology and the social condition of the northern and eastern parts of England have the impress of the Danish settlements; and that the Dane-law was recognized in the laws of Henry I as one of those separate groups of custom which made up the English law." Holdsworth did not, however, discuss this Danish impress in detail. The following statement is made in a work of Maitland, published in 1908: "In the twelfth century, some time after the Conquest, it was the established theory that England was or had been divided between three laws, the West-Saxon, the Mercian, and the Danish. The old laws themselves notice this distinction in a causal way; but we have little means of telling how deep it went. It is highly probable, however, that a great variety of local customs was growing up in England, when the Norman Conquest checked the growth. Originally there may have been considerable differences between the laws of the various tribes of Angles, Saxons, and Jutes that invaded Britain, and the Danes must have brought with them a new supply of new customs."[5]

In his work *English Society in the Eleventh Century,* which also dates from 1908, *Paul Vinogradoff* states: "And yet it is interesting to notice that there is a distinct stream of Scandinavian principles and practice running through this preconquestual legal lore."[6]

The year 1912 marks a turning point in the exploration of the relation between Anglo-Saxon and Scandinavian law. In that year *Felix Liebermann* published the second volume of his great work *Die Gesetze der Angelsachsen,* comprising "Wörterbuch, Rechts- und Sachglossar".[7] With this, the full extent of the Scandinavian element in the Anglo-Saxon legal language became obvious to everybody.

[2] Cf. Stenton, *Anglo-Saxon England,* Oxford 1963, p. 499.
[3] *Collected Papers,* II, p. 22.
[4] Vol. II (Cambridge 1911), p. 15.
[5] *The Constitutional History of England,* pp. 3–4.
[6] *Op. cit.,* p. 4.
[7] Vol. I, "Text und Übersetzung", 1903; vol. III, "Einleitung zu jedem Stück; Erklärungen zu einzelnen Stellen", 1916, reprinted Aalen 1960.

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In the year 1923 the British professor *J. E. G. de Montmorency* delivered a lecture before the University of Copenhagen entitled "Danish Influence on English Law and Character".[8] In it he said: "It will be useful to indicate briefly a few of the Danish vestiges which directly appear, though it has to be remembered that it was not so much in specific instances as in general results that we must look for what I may call the national influence of the Danish settlers."[9] At first this approach may seem rather dangerous, especially when shortly afterwards[1] the author says about the Danes that "they did not come as aliens, they did not bring something new and strange to the land of their adoption". Therefore, the author finds it "surprising" that "Danish influence played some part, some important part, in the up-growth of the jury, the grand jury as we understand it to-day, and to say that is to say very much ...".

After that de Montmorency points out a series of similarities between Danish and English law and, accordingly, it is difficult for him to point out such phenomena as are obvious manifestations of Danish influence—apart from the features resulting from a military occupation of a foreign country: "The (Danish) Here, when it finally settled, did not come in tribal fashion, though it fitted into the vestiges of tribal communism that still abounded in England. It came in military fashion with military ideals, organization and discipline, and these characteristics, as I understand the position, the new settlers imposed on the land and on its people." And further: "In any event the Danelaw 'Hundreds' were artificial organizations."[2]

These statements inevitably reduce the force of de Montmorency's final remarks concerning "the influence of the Danes on the conception of freedom in England".

De Montmorency ended his lecture by stating the need of further research regarding Danish influence on English law and by calling for international collaboration in this area. Already at that time the historian *F. M. Stenton* had investigated these problems more closely than any other Englishman. In 1926 Stenton published "The Free Peasantry of the Northern Danelaw", a lecture which he had delivered the year before at Lund in Swe-

[8] Printed in *The Law Quarterly Review*, vol. XL, 1924, pp. 324–43.
[9] *Op. cit.*, p. 333.
[1] *Op. cit.*, p. 335.
[2] *Op. cit.*, pp. 336–8.

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den,[3] and in 1927 *The Danes in England* appeared. In this monograph Stenton surveys the situation.[4] He concludes with the following statement: "All lines of investigation—linguistic, legal, and economic—point to the reality of the difference between Danes and English in the tenth century." He bases this on, among other things, the following reflection: "Owing to the isolation of the Scandinavian settlers in England they maintained in common use many terms of law and agriculture which were obsolete in the Scandinavian countries before the time of written records began. Not infrequently English texts of the eleventh or twelfth centuries supply a direct answer to questions which in Denmark, Norway, or Sweden can only be approached by way of inference from materials of the later Middle Ages. Nearly fifty years have now passed since *Steenstrup's Normannerne* first illustrated in adequate detail the points of contact between Old English and Scandinavian society. They have seen the establishment of many parallels between the customs of the English Danelaw and those of the Scandinavian mainland. Many others await confirmation. But at present it is still the linguistic rather than the agrarian or even the legal evidence which is of the most direct value to the historian."

Stenton is quite right in speaking of "the establishment of many parallells" in the legal area also. From linguistic parallels legal ones have been inferred. The only question to be asked is to what extent the legal parallels are anything else but linguistic ones, parallels of legal language, which may mislead the scholar who investigates the contents of the legal phenomena that in the Danelaw bore names borrowed from Scandinavian legal language.

Later in his monograph Stenton sets out to show that a knowledge of Old Norse can help the researcher to throw light on otherwise incomprehensible phenomena in English medieval law.[5] "Bracton and his successors, for example, refer to a process by which a hand-having thief was prosecuted, and sometimes executed, by an official known as the 'sacrabar'. Fifty years ago, Steenstrup pointed out that this strange word must represent the Old Norse *sakaráberi,* well recorded in Scandinavian law in the

[3] Originally published in the *Bulletin de la Société Royale des Lettres de Lund,* 1925–26. New edition, Oxford University Press, 1969.
[4] Raleigh Lecture on History. From the *Proceedings of the British Academy,* vol. XIII (1927), pp. 3–46.
[5] *The Danes in England,* pp. 34–6.

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sense of prosecutor or accuser." After this Stenton enumerates a series of sources of English medieval law where this *sacrabar* occurs, and he concludes: "Whatever the *inquisitiones* made through the sacrabar may have been, it is at least clear that he was something more than the temporary officer of a court extemporized to do justice upon a hand-having thief. In east Lincolnshire he was clearly an official prosecutor, with the power of summoning juries independently of any royal writ. Of the relation between the process *per sacrabar* and the more familiar process by way of appeal nothing definite can at present be said. But the few facts which have been preserved about the sacrabar form a significant addition to the evidence which suggest that in the conservative Danelaw the course of criminal procedure has been complicated by the survival of ancient Scandinavian elements disregarded in the extant rolls which record the practice of the King's court."

Now the question suggests itself: Are these Scandinavian elements legal or only linguistic? It can be stated at once that the examples given by *Steenstrup* of the use of the word *sakaráberi*[6] in Scandinavian languages, whether in laws or sagas, do not imply the existence of an "official". Every injured person might "bera sakar á einum" and especially in larceny cases this was the case for a long time; thus in *Anders Sunesen*'s paraphrase of the Scanic Law (chap. 95) from the beginning of the 13th century, we read: "Furis condempnacio judiciorum, non exactoris subiaceat potestati." The analogy of Old Norse *sakaráberi* and English *sacrabar* is thus, from a legal point of view, rather weak, covering only the linguistic *prosecutor* or *accuser* and not the subject of these actions. Furthermore, it is a matter of doubt whether anything regarding the Danelaw can be inferred from the sources mentioned by Stenton. It is possible that a selected person or "official" will here get the functions of an accuser, but nevertheless the injured person may still be able to "bera sakar".[7,8]

[6] *bera sakar á einum* = to charge an offence against someone.

[7] *Normannerne*, IV, pp. 329–31.

[8] Recently Mr *J. M. Kaye* has dealt with the *sacrabar* in English law (*English Historical Review*, vol. LXXXIII, 1968, pp. 744–58). Basing himself on the relevant English texts and documents, he concludes: "it appears that although there is some evidence that the word *sacrabar* and its variants had a Scandinavian origin, there is none for the contention that the word, when used to denote a person, denotes an official of the type and with the ancestry claimed; moreover it is likely that the word itself represents the full extent of the borrowing: no-one, presumably, would wish to argue that the

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The name of Steenstrup has now been mentioned several times. In 1882 *Johannes C. H. R. Steenstrup* (1844–1935) published his dissertation called *Danelag* which appeared as the fourth volume of *Normannerne,* his *magnum opus.* In his work Steenstrup, who was a jurist and an historian, set out to study especially the legislation of the Anglo-Saxons and to "call attention to the spheres and legal matters and the legal rules from which, according to my studies, I must conclude that Northern elements can be separated, either as a direct loan from Northern law or as a modification of an already existing institution which must be due to Northern influence. When the legal and social conditions of the Northmen at that time have been established, and when through investigations of details it has been shown in what way they influenced the law of the foreign countries, it will—as the final object of the studies—be possible to give an account of the general nature of the Northmen's conquests, to survey the advantages and drawbacks of the culture brought from the North as compared with the foreign culture, and to show the multifarious influence of the Northmen, not only on the conquered nations but also on the peoples on whose borders they lived or among whom they had settled down as peaceable colonists."[9]

After having commented upon the Danelaw in the two meanings "Danish law" and "Danish province", Steenstrup goes

common form of process against hand-having thieves, in franchise courts or elsewhere, still less the general concepts of 'suit' and 'suit-bearer', were confined originally to the Danelaw." According to this, the word *sacrabar* now has the same meaning in English law as in Scandinavian law. Thus Mr Kaye reaches the same result as Steenstrup in *Normannerne,* IV, p. 331 (quoted by Kaye, *op. cit.,* p. 752, note 5, where Steenstrup says that it is quite by accident that *sacrabar* has only come down to us in connection with cases of theft "or to be more correct: it is also found outside those cases" [my translation of "eller rettere sagt det findes ogsaa andensteds"]), although it seems as if Kaye in the text at p. 752 understands Steenstrup as meaning that in England he would restrict the Norse term to one special type of plaintiff. But after all the existence of an official called "sacrabar" *in the Danelaw* is even more theoretical, and still the problem remains whether an old Scandinavian loan word really is preserved in so wide a meaning in English legal language—or whether the word should have another and more special meaning than that proposed till now. But Mr Kaye's investigations, as well as mine, prove the lack of international cooperation in this area of legal history.

[9] *Danelag,* p. 3. The first Scandinavian survey of the themes treated here is J. J. A. Worsaae, *An Account of the Danes and Norwegians in England, Scotland, and Ireland,* London 1852, in which on pp. 151 ff. the author deals with the Danelaw and emphasizes the Scandinavian origin of a series of legal words.

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through the laws, the division of the country, the ranks and classes, the government of the country, the rules of procedure, the criminal law, and the law of property.

It is impossible, of course, here to go through Steenstrup's argumentation and demonstration in all these areas, and while the "criminal law" will be especially dealt with here, this is not done in order to suggest that any shortcomings in method in this particular area are to be found in all other areas too, but only in order to point out the necessity of a re-examination of Steenstrup's results, since the discussion to which the latter have been subjected for the last century has been rather modest; they have been accepted by English historians, only a few of whom have been willing or able to discuss the relation between Scandinavian law and the law of the Danelaw, any more than the linguistic conditions.

As a legal historian Johs. Steenstrup, however, was a product of his time and its research. In spite of the fact that he reacts in several places against the methods of the Germanistic school in the field of legal history and criticizes the mingling of sources of different times and places which had generally taken place since *Wilhelm Eduard Wilda* wrote his *Strafrecht der Germanen* (1842), nevertheless tradition also shines through (thus *Steenstrup* was a pupil of *Konrad Maurer*) in the results he achieved in *Danelag*—especially in the legal branch which he calls "criminal law".

In his retrospect of the results obtained, Steenstrup sums up the Danish influence on the Anglo-Saxon community: "In the *criminal law* we realize the total change undergone by the Criminal Code after Alfred's death. Instead of the law of the ninth century which was soft to the point of weakness, and under which the death penalty was practically unknown, we get a masculine and powerful law which lays much more stress on the frightening and threatening effect of the penalty than on the preservation of society and the reformation of the delinquent; this severity was quite necessary on account of the unquiet and barbarous circumstances." Steenstrup shows that the early Anglo-Saxon laws were characterized by soft penalties and that the Danes now taught the Anglo-Saxons to punish established crimes severely, so that the act and not the social position of the injured person determined the extent of the penalty.

Now, on the basis of the research of the last few decades in the areas of legal history and legal ethnology, this whole account

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is highly questionable. Before the Frankish Empire as well as the Anglo-Saxon and Scandinavian Kingdoms came into existence, the balance of peace and therewith a legal system in each tribal province had been maintained within a system of family groups. Infringements were repaid with revenge by the injured party and his kinsmen, unless an agreement on payment of fines was reached.[1] It followed from this that the kin—not the offender alone—was liable for the payment of fines and especially of *wergild*.[2] Otherwise lawful revenge or feud would befall the offender's whole family. According to what *Bronislaw Malinowski* has called "the give-and-take principle"[3] revenge and feud are not punishments but retributions.

In his investigations of the decline of the Anglo-Saxon monarchy before the year 1066, Paul Vinogradoff arrives at the conclusion that the various social organizations were mere survivals of a system based on kinship. The Anglo-Saxon laws illustrate the fight for peace[4] of the kings, which was at the same time a fight against the feuds and the solidarity of kinsmen, a fight against the numerous centres of power in the service of the building of the state.[5] Feud must await action, but if fines were not paid the feud was still imminent. The kings tried to impose responsibility for infringements on the lord and hundred, so that a legal *borh* system might replace the solidarity of the kindred. These attempts culminated with the laws of Canute in which the Continental rules of peace inspired by the Church are also found again. The Church supported the kings, but the lords and the invading Vikings prevented the development of a centralized Anglo-Saxon state. *Marc Bloch,* in fact, finds that the collapse of the Anglo-Saxon civilization may be interpreted as "the calamity of a society which, when its old social categories disintegrated, proved incapable of replacing them by a system of clearly defined protective relationships organized on hierarchical principles."[6]

From the 7th to the 11th century the Anglo-Saxon kings did their best to replace the solidarity and the collective responsibility

[1] Cf. Ole Fenger, *Fejde og Mandebod,* Copenhagen 1971, pp. 160 ff.
[2] Literally "man's price" or "man-payment".
[3] *Crime and Custom in Savage Society,* 1st ed., London 1926, p. 47.
[4] Cf. Gösta Åqvist, *Frieden und Eidschwur,* Lund 1968, chap. 6: "Die Frieden im hochmittelalterlichen England".
[5] Cf. Ole Fenger, *op. cit.,* pp. 267–301 (Anglo-Saxon law).
[6] *La société féodale* I, Paris 1939, p. 286; *Feudal Society* I, Chicago 1964, p. 186.

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especially of the powerful kindreds by other forms of responsibility based on other personal bonds or on territorial divisions. Only when this was completed would a royal justice and a criminal law inspired by the Church get a chance. And what has here been said about the development in the Anglo-Saxon kingdoms holds true also of the Frankish Empire and the Scandinavian kingdoms. But to say that the old system is characterized by softness is a mistake, since the reason why the laws lay down fines for infringements—even for manslaughter—and make the size of the fines depend on the rank of the killed person is that the primary function of the fine was to prevent the feud. The payment of fines is forced by the threat of kindred feud, not by the king's power. Feuds resulting in killing of innocent relatives or the relatives' duty to contribute to fines are characteristics of the hereditary system of customary law, which Steenstrup calls "soft", because the laws given by the king and inspired by the Church are silent about the harsh realities, revenge and feud, which, however, were accepted under compulsion, because only kings and chiefs with considerable political and military power were able to alter this situation. The leaders of the Scandinavian conquerors who settled down in England probably possessed such power. A Danish aristocracy created and enforced law within the new territorial division (wapentakes), which was forced upon the old jurisdictions. As mentioned, de Montmorency pointed out especially the distinctive features attributable to the military occupation. However, the analysis ought not to stop here; the creation of law as a whole becomes of another nature when the invaders, or at least their leaders, realize that the law is no longer law because it is hereditary custom, but because they are able to dictate it, adapt it, and apply it. A parallel to this is offered by the creation of law of the Icelandic Free State at the beginning of the 12th century. The warriors of the Viking armies in the British Isles and their successors had left their home kindred and with it the legal system which was founded on the group of relatives. The legal system which was built up in the occupied country must have consisted of constructed rational rules and it was absolutely demanded that they should be observed. At first the system of rules was part of the military discipline; as time went on, however, and the conquerors grew into more peaceable colonists who mingled with the indigenous population, the soil was prepared for a legal system and jurisdiction *sui generis*. Legal rules and institutions now worked in ways equally different from the

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system left in Scandinavia and the conditions in the rest of England. This constructed and artificial legal system of the Danelaw could only develop with the aid of well-known Scandinavian language. But the substance of the rules and institutions was not the same; the same legal terminology may cover three or more different realities in Denmark, in the Danelaw, and in the neighbouring districts, because the social, political and cultural backgrounds of the law and its enforcement were different.

If this is true—and it is not meant to be anything but a working hypothesis—Steenstrup's results in his *Danelag* and, accordingly, a series of assumptions resting upon them must be reconsidered.

The definition given up to the present moment by both English and Danish historians of the Danelaw as "that part of England in which Danish, not English, law and custom prevailed", must therefore perhaps be corrected to "that part of England in which neither Danish nor English law and custom prevailed", since the hereditary common law of the family society was not framed with a view to the conditions in an occupied area in a far-away country across the sea.[7] The comparative investigation is further impeded by the fact that Anglo-Saxon England may not have been very different from Scandinavia from a legal point of view. It seems that the legal systems which both the Anglo-Saxon and the Scandinavian kings had to struggle in order to change were as alike as they could be having regard to the related external and internal circumstances in the widest sense. That is precisely why Scandinavian words may pass over and be applied to similar though not identical legal phenomena.

In any case it is more than questionable whether conclusions can be drawn from the law of the Danelaw to apply to the law of the native countries of the Vikings.

Stenton states:[8] "The eleventh-century writers who described the greater part of eastern England as the Danelaw were not theorizing about the racial composition of its inhabitants. They were simply recording the fact that the customary law observed in the shire courts of this region had acquired a strong individuality from the Danish influences which had once prevailed

[7] The author who gets nearest to this theory is P. H. Sawyer, *The Age of the Vikings*, London 1962, p. 151: "The area under Danish law, that is the area in which the law was administered by a predominantly Danish aristocracy, would naturally tend to be much larger than the area of dense Danish settlement." (2nd ed. 1971, p. 152.)

[8] *Anglo-Saxon England*, p. 499.

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there." This is correct, but the individuality may have been just as strong as compared with the law of 11th-century Scandinavia.

As regards Johs. Steenstrup, it deserves notice that this author is elsewhere[9] more open to the idea of independent creation of law in the Danelaw than he is in his work of the same name. He says: "The law which had developed in the Danelaw, of course, was in several cases of Northern origin, or the English rules of law had been influenced by the Northern ones, but in other cases it was a law created by the Northmen the rules of which were not exactly found again in the North." The fact that Steenstrup does not otherwise stress this latter way of creating law may be due to his general opposition to the result achieved by *Heinrich Brunner* in his *Die Entstehung der Schwurgerichte* of 1871, namely that the law of Normandy was based exclusively on Frankish law. *Danelag* is the young Steenstrup's chief argument in this controversy. Not until his old age, in his middle seventies, did Steenstrup return to these problems. He went to Paris in order to collect material for the work *Normandiets Historie under de syv første Hertuger 911–1066* (The history of Normandy during the period of the first seven dukes 911–1066), which appeared in 1925 and is to be looked upon as a fifth volume of *Normannerne*. The result did not confirm the thesis of the young Steenstrup. Now he admitted that the questions regarding the relation between Scandinavian law and the local Frankish law were more complicated than he had assumed earlier.

In the year 1769 *Peder Kofod Ancher* (1710–1788), the founder of Danish research in legal history, discussed an old English account according to which Canute had introduced some Anglo-Saxon laws, ecclesiastical or temporal, in Denmark, since it was said that Canute ordered that the laws of Edward should be translated from English into Latin, and that, because of their fairness, they should be obeyed in Denmark as well as in England.[1] Kofod Ancher did not believe in this account: "for although the laws of Edward as well as the other old English and Norwegian laws agree with ours as to general principles, sometimes also as to words and customs, it is not possible from this fact alone to draw any reasonable conclusion that one originates in the other." These words of wisdom must still be the starting point when trying to elucidate the relation between the law in Scandinavia of the Viking era and the law in the places where the Vikings and their

[9] *Normannerne*, vol. III (1882), pp. 367–8.
[1] *En dansk Lov-Historie*, I, p. 27.

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successors settled down, and, in the same way, between the Danelaw and the Danish law.

Kofod Ancher was a legal historian, but in the rest of his legal work he was influenced by the natural-law ideas of the period. Therefore he may also have emphasized the fundamental and common features in the law of the past.

Steenstrup was educated according to the Germanistic school, but like all his Scandinavian colleagues he pursued the study of a national legal history and the ways in which it influenced other nations. They emphasized the Scandinavian element, unlike the German legal historians, who had since Jacob Grimm included both Anglo-Saxon and Scandinavian law when trying to construct the original Germanic or German law.

Since the second world war the research into legal history on the Continent and in Scandinavia has become less national. Now, rather, the common trends of European legal development are looked for. Here, after having been neglected by legal history for a long time, canon law comes into the picture. The next few years may prove that the peace-securing rules which occur in the laws of Charlemagne as well as in Anglo-Saxon law are, after all, common manifestations of the endeavours of the Church to influence the local law for the sake of *pax et justitia* in the countries, and not, as it has been held, special results of Scandinavian competence in the legal area. *Ralph Arnold* has said about the Vikings: "They were sticklers for the law and experts on legal procedure."[2] That the clergy were superior to the Vikings in this particular field is a possibility which must not be disregarded.

[2] *A Social History of England from 55 B.C. to A.D. 1215*, London 1967, p. 208.

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