OUTLINE — LECTURE 9

Romano-canonical Procedure

Oliver Wendell Holmes, Jr.: “[F]or legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it.”

Ordines Judiciarii:

Bulgarus de Bulgarinis (1123 X 1141) (written at the request of Aimericus, Chancellor of the Roman Church), in L. Wahrmutd, *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter* 5 vols. (Innsbruck and Heidelberg, 1905–1931) (Part IV.1) (edits many other *ordines* and procedural works of the 12th and 13th centuries.)

Tancred (1st ed. c. 1216, 2d ed. p. 1234, translated into both French and German), in F. Bergmann, *Pilii, Tancredi, Gratiae libri de iudiciorum ordine* (Göttingen, 1841).

Gulielmus Duranti (1st ed. 1271 X 1276, 2d ed. 1289 X 1291) (no modern edition but many adequate fifteenth and sixteenth century editions, most with the additions of Johannes Andreae and Baldus).

For the some 40 treatises on the whole of the *ordo* that exist from the time before Durantis, see L. Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius* (Frankfurt, 1984).

Tractatus de testibus:


Anon. (canonist, late 12th c.), ‘Pro utraque parte testem debere instrumento’, Cambridge Trinity Coll. MS 0.7.40, fol. 182r–v.

Pillius (c. 1181 (?1192) X 1195), ‘Quoniam in iudiciis frequentissime’, Paris BN MS n.a.l. 2376 (and at least three others).

Hugolius (c. 1200), ‘Lecturi capitulum de testibus’, Barcelona, Archivo de la Corona de Aragon, MS S. Cugat 55, fol. 140ra-145ra.


Master Nicholas (otherwise unknown) (before 1226), Vatican City, MS Vat. Lat. 2343 fols. 84ra-84va (and at least two others).


Jacobus Balduino (d. 1235), Bagarottus, Jacobus de Amelia (late 13th c.), *De reprobatione testium* (‘Testium facilitati et varietate’). This appears in many MSS in various forms with various attributions.

Vincentius [?Hispanus] (1st half of 13th c.), *De discordia testium* (‘Quoniam iusta petentibus’), Montecassino, MS 136, p. 225.


Titles in Tancred’s *Ordo iudiciarius*:

Part I [The persons of the ordo]

Title 1. Ordinary judges
2. Judges delegate
3. Arbiters
4. Assessors and auditors
5. Advocates and their duties
6. Proctors
7. Syndics and actors [representatives of corporations in litigation]

Part II. [Preliminaries]
Title 1. That the plaintiff ought to enter into judgment
2. How one enters into judgment
3. Citations to judgment
4. The contumacious and those who do not come to judgment
5. Exceptions and replications
6. Recusals of judges
7. Crimes and how one proceeds against criminals
8. The libel of accusation in criminal cases
9. The libel of recovering possession or restitution
10. The libel of gaining possession
11. The libel of retaining or defending possession
12. How to form a libel in a personal action
13. The libel of vindicating a thing in a real action
14. The surety of the plaintiff
15. The surety of the defendant
16. The surety of proctors and other persons
17. Delays
18. Holidays
19. Counterclaims and crossclaims
20. The order of judgments and incidental questions
21. The interrogations that are made before joinder of issue

Part 3. [Joinder of issue and proof]
Title 1. Joinder of issue
2. The oath of calumny
3. Interrogations made in iure (i.e., after joinder of issue)
4. Confessions in iure
5. Proofs
6. Witnesses
7. How many witnesses suffice in a case
8. When witnesses are to be produced and how
9. The oath of the witnesses and how they are to be examined
10. The publication of the witnesses
11. The reproval of witnesses
12. Which witnesses are to be believed and how much
13. The production of written instruments and how much they are to be believed [fides eorum]
14. Presumptions
15. [Legal] allegations

Part 4 [Judgment and appeal]
Title 1. [Final and] interlocutory sentences
2. The sentence that is ipso iure void
3. How a valid sentence is overturned
4. The execution of the sentence
5. Appeals
6. Restoration after sentence [in integrum restitutio]

Witnesses in Tancred’s Ordo:

1. The form Tancred gives for the admission, examination and reprover of witnesses is part of the standard overall form for the course of judgment in Romano-canonic civil procedure. The case is introduced by a summons and a libel on behalf of the plaintiff and then a joinder of issue (litis contestatio). The plaintiff is then assigned a number of terms (three was standard; a fourth was given as an exceptional matter) to produce witnesses to discharge his burden of proof on his case in chief.

2. Once produced, the witnesses were to take an oath to tell the whole truth and to tell the truth for both parties. They are also to swear that they do not come to bear testimony for a price or out of friendship, or for private hate, or for any benefit they might receive. After they have taken the oath, the witnesses are to be examined separately and in secret, after the model of Daniel’s questioning of the elders (Mats., p. II–19).

3. When all the witnesses have been examined, the parties are to renounce further production of witnesses. The judge will then order the publication witnesses’ depositions, which have been written them down, normally by a notary. The defendant now has an opportunity to except to the testimony of the witnesses. He may except to their persons, if he has reserved the right to do so when they are produced, or he may seek to demonstrate that their testimony is false in some respect.

4. The proceduralists not only outlined the form by which witnesses were to be admitted, examined, and reproved; they also elaborated some basic principles of their system of proof by witnesses. At the core of that system are three propositions:
   a. The character of each witness is to be examined; certain witnesses are not to be heard because of their status, and others’ testimony is to be regarded as suspicious because of their status or mores or their relationship to one or the other of the parties.
   b. Witnesses are to be examined carefully to determine if they are telling the truth about events they saw and heard themselves.
   c. On the basis of the written depositions and what has been demonstrated about the character of the witnesses, the judge is to determine whether the standard of proof fixed by law has been met.

5. As a general matter, Tancred tells us, two witnesses make a full proof, but not everyone may be a witness. The section that follows (Mats., p. XI–5) elaborates on proposition (a), noted above. The following may not be witnesses:
   a. slaves
   b. women (in certain circumstances)
   c. those below the age of fourteen
   d. the insane
   e. the infamous
   f. paupers (although Tancred has some doubts about this)
   g. criminals
n. no one may be a witness in his own cause
i. judges, advocates, and executors in cases in which they have performed their official duties
j. children on behalf of their parents or parents on behalf of their children, with certain exceptions
k. familiars and domestics of the producing party
l. those who are enemies of the party against whom they are produced

This is all summed up in perfectly ghastly mnemonic poem on p. IX–6

Condition, gender, age and discretion,
Fame and fortune and truth,
If these are lacking,
Without the court's backing,
From witnessing hold 'em aloof.

6. Witnesses are to be questioned, Tancred continues, about all the details of what they have seen or heard, for only then can it be determined whether they are consistent. They are to be asked about the matter, the people, the place, the time, perhaps even what the weather was like, what the people were wearing, who was consul, etc. In only a few instances, such as computing the remoter degrees of kinship in incest cases, is hearsay testimony to be accepted.

7. If a witness contradicts himself, Tancred concludes, then his testimony should be rejected. If the witnesses agree, and their dicta seem to conform to the nature of the case, then their dicta are to be followed. If the witnesses on one side disagree among themselves, then the judge must believe those statements which best fit the nature of the matter at hand and which are least suspicious. If the witnesses on one side conflict with those on the other, then the judge ought to attempt to reconcile their statements if he can. If he cannot, then he ought to follow those most trustworthy—the freeborn rather than the freedman, the older rather than the younger, the man of more honorable estate rather than the inferior, the noble rather than the ignoble, the man rather than the woman. Further, the truth-teller is to be believed rather than the liar, the man of pure life rather than the man who lives in vice, the rich man rather than the poor, anyone rather than he who is a great friend of the person for whom he testifies or an enemy of him against whom he testifies. If the witnesses are all of the same dignity, then the judge should stand with the side that has the greatest number of witnesses. If they are of the same number and dignity, then absolve the defendant. The basic principle, then, is onus probandi incumbit ei qui dicit (“the burden of proof falls upon the person who asserts”).

From 74T to Tancred

1. When the Bolognese glossators began writing, the standard methods for proof in the secular courts were ordeal, battle and compurgation, and compurgation was used in the church courts, and, occasionally, ordeal as well. Witnesses were used in various forms, but appeals to the divine through the ordeal was quite common.

2. The Summula de testibus of an Anglo-Norman canonist of the late 12th century (above, second listed) repeats an injunction found in C.2 q.1 c.2: a bishop is not to be judged unless he himself confesses or unless he is regularly convicted by innocent witnesses canonically examined. This means, the author tells us, “not in single combat nor in the trial of hot iron, nor of cold or hot water, nor of lashes, but of oath alone.”

3. At the 4th Lateran Council in 1215, the church withdrew her support for the ordeal. The development of an alternative system of proof was the work of the Romano-canonic
proceduralists up to and including Tancred.

4. The doctrinal development prior to Tancred, however, is considerable. Gratian’s original text had little or nothing on the topic; his students added a long list of excluded witnesses from Roman law. It was far too long and full of anachronisms and bizarraities (herewith of publicans, decurions and hermaphrodites). The first treatise on witnesses, written by Albericus de Porta Ravennate sometime in the 1170’s, is also derived solely from Roman law, has a much shorter but also anachronistic list of possible exceptions against the persons of witnesses, mentions the two-witness rule but does not go into the question of how the witnesses are to be examined, and contains no advice on how to resolve conflicts among the witnesses.

5. In the development of practical advice on questioning and on balancing discordant testimony, papal decretal law played a considerable role, as the numerous citations to the *Compilationes antiquae* in Tancred indicate. Perhaps of equal importance, however, was the work of the proceduralists in the generation preceding Tancred. The first extended discussion of how to question a witness is found in Anon. c.1200. By far the most elaborate treatment of how to evaluate conflicting testimony is found in Pillius (1181 X 1195).

6. In marked contrast to what we find in the Roman texts and in some of the earlier canonists, the mainstream Bolognese focused on limiting the discretion of the judge. The best explanation for this is probably that they were seeking at once to separate the role of confessor from that of judge (*iudex secundum allegata et non secundum conscientiam suam debet adiudicari*, “the judge should judge according to the things alleged and not according to his conscience”). An alternative explanation, not inconsistent with this one, is that in seeking to substitute human judgment for appeals to the divine they needed to convince people that the judge would judge somewhat mechanically, according to rules, and not according his social position and connections.

**By Tancred’s time did they realize that they had gone too far?**

1. The drive on women is to limit the exclusion. (Evidence for this in section).

2. The remarkable passage on paupers. (p. IX–6):

   “Paupers are prohibited from testimony, both by the law of the forum and by the law of heaven. C.2 q.1 c.7 s.3, c.14; Nov. 90.1. And some say this only obtains in criminal cases, and [others] that it generally obtains of any pauper who has less then fifty aurei. To me it seems that this is said only of those paupers who are presumed to suppress the truth upon receiving money, for if the witness is honest, so that there is no presumption against him that he would lie for money, he ought not be excluded from testimony; otherwise you would have the say that many holy and religious men, and even the apostles themselves, ought to be excluded, for they were paupers, having nothing.”

3. The concept of excepted crimes:

   Tancred (p. IX–6): “Again, all criminals are prohibited from testimony, whether they were previously convicted of the crime or not, so long as they are convicted by way of exception, the crime being stated and proved. 1 Comp. 2.13.13, 12; 2 Comp. 2.11.1; 3 Comp. 2.4.1. And this is true in every case, according to the canons, except in excepted crimes. 3 Comp. 5.2.3, 4. What excepted crimes are and what the law is when they are tried is fully noted above in the title on crimes. And this is the reason why all criminals are excluded from testimony, because they are infamous by canonical infamy. C.6 q.1 c.3, c.4.”

   3 Comp. 5.2.3 (Innocent III [1199], p. IX–13):

   The decretal is known as *Licet Heli* from its first words; it was issued by Innocent III in 1199, in the case of the abbot of Pomposa, who was accused, among other things, of simony. The decretal is famous because it says that simony should be dealt with by a new form of procedure, an inquisitorial
process, in which the judge of his own motion questions those who know about the incident and
proceeds to make a ruling. The judge does not have to wait until someone makes a formal
accusation, nor is he bound by the elaborate set of procedural rules that limit those who can make
such an accusation and those who can testify about it. The decretal contains two biblical references,
the only authorities cited in it. “Although Eli, the high priest, was himself a good man,” the decretal
begins, “nonetheless because he did not effectively punish the wickedness of his sons, he brought
down the rod of divine judgment both on them and on himself.” See 1 S 2:12–4:18. That a pastor
has the obligation to discipline his flock is a fundamental principle of canon law, and one does not
need to cite Old Testament examples to show it. (E.g., 1 Tm 3:4–5.) “I will go down,” the decretal
later says, quoting words that Genesis ascribes to God in the context of Sodom (Gn 18:21), “and
see whether they have done in fact what is reported to me.” This is a little closer to the real issue,
because it suggests that reports of crimes must be investigated. But the quotation raises more issues
than it settles: Is the pope really arrogating to himself the power of divine judgment? How is the
pope to know what God knows? In particular, is there anything about the story of Sodom that
suggests that it is appropriate for the pope to set aside the ancient canonical requirements about
accusers and witnesses? It would seem, then, that the Bible is being used here more for the purpose
of rhetorical effect (no one who heard these words would miss the implicit verbal equation of
simony and sodomy) than it is for the guidance that it provides for the resolution of the issue at
hand.

Innocent sums up the arguments made in the case as follows: “And because simony in many ways
seemed to have been proven by witnesses against the same abbot, he opposed many exceptions
against the witnesses, on which there was a great dispute on both sides, some asserted that in the
crime of simony as in the crime of treason (laesa maiestas) all indifferently, both infamous and
criminals were to be admitted not only to accusation but also to testifying, others replying to the
contrary that although these two crimes are deemed as equal with regard to accusation, they differ in
many ways, since one penalty is imposed for one and another penalty for the other, and there is a
distinction between the person of the accuser and the person of the witness, since crimes are proved
not by accusers but by witnesses, many reasons and arguments being brought forth about this.”

Innocent concludes: Lest either the purity of innocence fall confounded or the evil of simony escape
punished, we, weighing equity, deemed that not all the exceptions proposed against the witnesses
be admitted, nor all repelled, but admitted to proof those exceptions that seem to prove that they [the
witnesses] proceeded not from the zeal for justice but the tinder of malignity, to wit, conspiracies
and capital enmities. We deem that the other opposed objections, like theft and adultery, because of
the pervasiveness of the heresy of simony, in comparison with which all crimes are like nothing, are
to be rejected, for even if they weaken the confidence in the witness in some measure, they do not
totally remove it, especially when other indications (adminicula) support.”

4. The basic drive, however, in Tancred is for rules as opposed to discretion (perhaps dictated by the
nature of the work, but other things at stake as well). The nature of Durantis’s work suggests that
this may have changed by the late 13th century.

The achievements of the glossators

What was it that these men both canonists and civilians were doing that made the students flock to
them, that made their students sought after in every court in Europe, that made princes and popes
seek their advice? However hazy the origins of the studium at Bologna, there is no doubt that by the
second half of the 12th century students were flocking from all over Europe to Bologna. The
outlines for last week show you chains of masters and students. I traced them into the mid-thirteenth
century, but could, in fact, have traced them right down to the present day. In marked contrast with
Carolingian intellectuals, Hrabanus Maurus, John the Scot, Alcuin, others could be named, these
men had followers who can be traced to the present day. Not only did the students come to Bologna,
but the masters taught at other places. Pillius taught at Modena. Placentinus taught at Mantua and at Montpellier. Recent work with the south of France suggested that there was also an autochthonous movement there, in some sense parallel to Bologna. Vacarius taught in England, probably in the cathedral school of Theobald, abp. of Canterbury, where John of Salisbury who wrote the first original treatise of political thought since the Romans in a Latin as good as Cicero’s also worked.

1. Legal method: verbal gloss, cross-references, distinctions, resolution of contradictions, summaries, disputed points, quaestiones.

2. More than that (the following are more controversial):
   a. Fundamental legal ideas, ius commune, natural law.
      i. Certain animals are wild by nature. They may become property of individuals only if they are reduced to possession. Indeed, certain methods of acquiring property are “natural,” not the product of positive law, among these are occupation.
      ii. Marriages are made by consent of the parties. We may argue about whether anything else is required. The civilians will argue that natural reason requires that parents consent to the marriage of their unemancipated children.
      iii. Certain ways of finding out the truth are “rational.” Appeals to the divine are not rational in this context, but examination of witnesses and instruments is.
   b. Jurisprudence in the continental sense of the term, not legal philosophy but reasonable resolution of particular cases, something that lies in between method and fundamental legal ideas. This is frequently tied in with the notion of equity.
   c. Procedure.
   d. Political theory. We’ll devote a later class to this.
   e. Policy. Vacarius’s Summa de matrimonio, written probably at the height of the debate over what rules would be used for the formation of marriage argues quite expressly for a parental consent requirement on the ground that young people are not be trusted with a decision as important as this one. We suggested that policy was at work in what Accursius was doing with the Roman texts on the topic of hunting on others’ property. We have just suggested that fundamental changes took place in the procedural system because of policy concerns about crime. These latter must be somewhat speculative, but the glossatorial method leads you to an appreciation of the inherent malleability of the law. That, in turn, leads one to thinking about the reasons that lie behind the rules. Natural law, equity, and policy are all ways of getting behind the bald statements of rules and results. There’s more of the first two than there is of the third expressly in the glossators, but I think that I have shown that the third is not totally absent.