Tancred Outline
Ordeal
Tancred on Witnesses
Eval
Achievement

CLASS OUTLINE — LECTURE 9

Romano-canonical Procedure

Introduction:

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.”

If a right is only a prediction of what will happen if it is violated, then we need to know the system by which violations of rights are redressed. How do you get into court? What can you say when you get there? How are facts proven? What remedy will you get? How do I get the government to enforce the remedy that has been granted? What is it going to cost? Only when you know the answers to these questions are you going to able to begin to assess what the likely effect was of a given law.

Student comment.

Procedural law before the glossators:

When the glossators set out to create Romano-canonical procedure, the material that they had from the past was singularly unhelpful. In the case of Roman law the problem was that the texts in the *Digest* are dependent on a type of procedure that was no longer in use in Justinian’s time; so the compilers tended to leave out procedural material in the *Digest*. There is more procedural material in the *Code* and the *Novels*, enough to show the basic outlines of the procedural system of Justinian’s time, known as the *extraordinaria cognitio*, but no one ever tells us the basics, and there is much that is still unknown about it.

In the case of canon law it seems reasonably clear that no one had ever tried to create a specifically canonic procedure. As in the case of formation of marriage, the church had taken procedure as it found it and had engrafted on it some basic ideas that were of concern. There some examples of this in 74T. A particularly dramatic example is the false decretal that says: “A prelate shall not be condemned except with seventy-two witnesses” (c.69, tit. 7, p. VI–20; cf. c.84, p. VI–23.) Overall, if a clergyman, particularly a bishop, was to be tried there ought to be legitimate accusers and legitimate witnesses. People ought to have notice and an opportunity to be heard, etc. Many of the basics of what we call due process can be found in this tendentious work. At the same time, there is no evidence that the system of procedure described in 74T was ever implemented; pieces of it may have been quoted in argument, but no one that we know of ever used it as a whole. Indeed, it is hard to imagine how they could have; 74T is hardly a how-to-do-it book.

Ordines Iudiciarii:

Bulgarus de Bulgarinis (1123 X 1141) (written at the request of Aimericus, Chancellor of the Roman Church), in L. Wahrmund, *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 (Durantis) (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:

Albericus de Porta Ravennate (1170 X 1180), ed. E. Genzmer, 'Summula de testibus ab Alberico de Porta Ravennate composita', in *Studi di storia e diritto in onore di Enrico Besta* 1 (Milano 1937) 491–510.

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).

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

Anon. (c. 1200), ed. E. Genzmer, 'Eine anonyme Kleinschrift de testibus aus der Zeit um 1200', in *Festschrift Paul Koschacker* 3 (Weimar, 1939) 399ff.

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

Bagarottus (d. 1242), 'Quid sit testis', Vatican City, MS Barb. lat. 1440, fols. 15vb-21ra. Includes a piece ascribed to an Anglo-Norman canonist Master G, 'Inter homines litium', London BL Egerton MS 2819.

Jacobus Balduini (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.

See S. Kuttner, 'Analecta iuridica vaticana', in *Collectanea vaticana in honorem Anselmi card. Albareda*, Studi e Testi 129 (Vatican City 1962) 430–31.

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 sentences 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).

Many questions about this.

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.

Many questions about this.

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. infidels

   h. criminals

i. no one may be a witness in his own cause

j. judges, advocates, and executors in cases in which they have performed their official duties

k. children on behalf of their parents or parents on behalf of their children, with certain exceptions

l. familiars and domestics of the producing party

m. 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–7

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 a 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").

Tancred, *Ordo*, tit. 3.12

If a witness contradicts himself, or says the opposite, or varies, or says the truth in one matter and falsehood in another, he is rejected, and what he says has no force, as [C.4 q.3 c.3 s.20], [C.3. q 9. c. 17], [X 2.19.9].

If, however, many witnesses are brought in by only one party, if they agree and the nature of the case and the *motus animi*[1] of the judge agrees with them, then all their testimony is to be followed, and sentence is to be rendered according to their *dictum* (literally, 'the thing said'), as . [C.4 q.3. c.3pr] and [Dig. 22.5.21 §. ult.]. If the witnesses [on one side] disagree among themselves, although they are of unequal number, then the judge must believe those *dicta* which best fit the nature of the matter at hand and which are least suspicious, and the judge will support his *motus animi* from the arguments and the testimonies that he shall find more appropriate for the case; for it is not necessary to have regard to the multitude of the witnesses but to their heartfelt (*sinceram*) faith, as said in [X. 2.20.32], in the previously alleged laws. What if only two witnesses are brought in by one parry, and they contradict each other? I reply, neither [witness] will stand because each of them is alone in what he says, and each one is singular in his testimony, as [X 1.6.23], [X 1.6.32], and because one is not to believe the *dictum* of one person, however much he may shine in dignity, as [C.4. q.3. c.3 s.37–38] [X. 2.20.23] [Cod. 4.20.9.1].

Moreover, when witnesses are brought in by both parties, if they agree, their *dicta* are to be followed, as was said when they are brought in by only one party.

If, however, they are found to be contrary or diverse, the judge ought to reconcile them, if he can, so that their testimony is valid, as [X 2.20.16]. If he cannot reconcile their *dicta* because what they say is in direct contradiction, the judge by his *motus animi* can know to whom faith is more appropriately given, so that the freeborn is more to be believed 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, as [Dig. 22.4. l. ult.] [Dig. 1.5.9], [X 2.20.32]. Further, the truth-teller is more 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, as [Dig. 22.5.3pr], cf. [Dig. 4.3.11] and cf. Dig. [24.3.22.5. 6] and [2] and all of [C.3. q.5]. But you should not think that faith is to be withdrawn entirely from those who are inferior, but that in doubtful matters the more powerful and worthy are more to be believed. What if all the witnesses are all of the same condition, dignity, and faith? I reply the judge then should stand with the greater number, for there is credence in the many; cf. [Nov. 90. c. 2, 3. sub f.], [Dig. 4.8.17.2. (6. 7.)] and [Dig. 4.8.27.3], [Dig. 25.4.1pr], [Dig. 29.3.6], [D.65. c.1, 2, et 3] and more clearly [X 2.20.32]. But if there are as many for one side as there are for the other, and they are equally good, or there are more on one side but more worthy on the other, so that dignity can be equated with number, what ought the judge to do then? I reply that the judge should then absolve the defendant, as in the said decretal [X 2.20.32], because we ought to be more inclined too absolve than to condemn, as [1 Comp. 2.12.2], [Dig. 44.7.47], and those witnesses are to be followed who turn aside from judgment [in the sense of a condemnatory sentence], cf. [Dig. 2.14.8], [Cod. 7.71, l. ult.]. And this is true as a general matter, that judgment is to be given on behalf of the defendant when the witnesses are equal, unless the side of the plaintiff is more favorable, for example, that it stands for liberty, for dowry, for a testament, for legitimation, for a young child, for a widow, for an orphan, for the fisc, for the church, or for any matter or person who is favorable, for then judgment is to given for the plaintiff; cf. [Dig. 42.1.38pr], [Dig. 5.2.10pr], [Dig. 50.17.85pr], [Cod.3.14.un.], [Cod. 1.2.22].

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[1] Literally 'the movement of the spirit' or 'the movement of the soul'. We might say 'instinct', but that does not quite capture it. 'As the spirit moves him' would capture the phrase literally, but in English that phrase implies too much irrationality.

Student comment about this.

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. What happened to the ordeal? In England it disappeared shortly after 1215, replaced by the trial jury in criminal cases, though trial by battle remained a possibility in some criminal cases and in certain types of civil cases. The ordeal also disappeared in France, though it took somewhat longer to happen. Louis IX of France, who died in 1270, promulgated an ordinance of uncertain date, in which he seems to have attempted to abolish trial by battle in the royal courts. By this time the ordeal was probably not being used generally in France. A recent attempt to argue that the ordeal was very long in dying out is flawed, at least in my view, by the fact that it attempts to count the number of ordeals recorded in the thirteenth and early fourteenth century. The statistics are skewed by the fact that that we have records from a large number of cases from Hungary in the early fourteenth century. Hungary in this period was pretty far out of the main stream.

5. 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 bizarities (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.

6. 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).

7. 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 to separate the role of

confessor from that of judge (*iudex secundum allegata et non secumdum 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. If we look at the topic sentences of the paragraphs, it looks as if a great many people can’t testify, and that there’s not much that the judge can do about it:

   Slaves are prohibited.
   Women are prohibited in criminal cases and for testaments.
   Also prohibited is one younger than fourteen years, generally, in every case.
   Prohibited is one who lacks discretion or is captive in mind . . . .
   Prohibited are the infamous, and they are excluded from testimony.
   Paupers are prohibited from testimony, both by the law of the forum and by the law of heaven.
   Laymen are prohibited from giving testimony against clerics. [Only in the 2d edition of Tancred.]
   Infidels are prohibited to give testimony against the faithful.
   All criminals are prohibited from testimony . . .
   Anyone is prohibited from giving testimony in his own case
   Judges, advocates and executors are prohibited from giving testimony in a case which they have handled.
   Children are also prohibited from giving testimony for their parents and vice versa.
   Family members and domestics are prohibited . . .
   Suspects and enemies are prohibited from giving testimony against their enemy.

2. Each of these propositions is supported by multiple citations to authority.

   a. Canonical material, largely derived from Pseudo-Isidore, which appears in the first recension of Gratian

   b. Roman law, which is quite skimpy on this topic, but Gratian’s followers had added some Roman sources to the basic texts that Gratian had and the civilians had dug up more from the *Corpus Iuris Civilis*

   c. Decretal letters of popes who are Tancred’s contemporaries or who came in the generation just before him

   The way to read Tancred’s text is to do what he invites you to do: put the material in the citations together into an argument.

3. Putting a cap on witnesses who can excluded.

   “Everyone can be a witness who is not prohibited, because the edict about witnesses, like that about proctors, is prohibitory; all, therefore, who are not prohibited can be admitted. D.22.5.1.1.”

Student comment about this.

D.22.5.1.1 (p. I–33): "ARCADIUS CHARISIUS, *Witnesses*, sole book: Oral evidence is often and necessarily given and should be sought particularly from those who are reliable. **1**. Witnesses can be called not only in criminal cases but, when appropriate, in money suits, if not forbidden to testify nor excused from testimony by any statute."

Tancred here makes an argument by negative inference. He creates a presumption in favor of admitting the witness. If you want to exclude someone you have to find a specific authority that says that this witness ought to be excluded. This puts a cap on any future development of exclusionary rules. It's a quite typical glossatorial move where they thought that the past had gone too far.

4. In virtually all cases, except perhaps for infidels, the insane and the feeble-minded, Tancred cuts back on what could have been a complete exclusion.
5. Limiting the exclusion of women witnesses.

Many student comments about this.

"Women are prohibited in criminal cases and for testaments. C.33 q.5 c.17; 1 Comp. 5.36.10; D.28.1.20.6. In other cases, however, pecuniary, spiritual, matrimonial, or any other, women can give testimony, as is contained in [D.28.1.20.6; D.22.5.18] and in [C.15 q.3 c.2; 1 Comp. 2.13.4; 1 Comp. 4.17.1; 3 Comp. 2.12.6]."

Tancred starts with Gratian who has in the context of marriage a text that he attributes to Ambrose (actually Ambrosiaster) a very strong statement on the subjection of women leading to their incapacity to testify at all (C.33 q.5 c.17 [p. IX–9]): "It is fitting that a woman be subject to the power of a man, and to have no authority, nor can she teach, nor be a witness, nor give faith, nor judge."[2]

A similar statement from Isidore of Seville may be found in 1 Comp. 5.36.10 [p. IX–9]: "Witnesses moreover are considered according to their condition, nature and life. By condition, if he is free, and not a slave. For frequently a slave suppresses testimony to the truth out of fear of his master. By nature, if he is a man not a woman. For a woman always produces variable and changeable testimony (cf. Virgil, Aen. 4.569)."

That a woman cannot be a witness to a testament is supported by D.28.1.20.6: "[p. IX–10: "ULPIAN, *On Sabinus*, book 1: " . . . A woman cannot act as witness to a will, although she can be a witness in court; as is established by the *lex Julia de adulteriis*,

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[2] The quotation is attributed to Ambrose in the Vulgate edition of Gratian. It comes from a work called *Questions on the Old and New Testaments* that was traditionally attributed to Augustine. For some time, however, it has not been attributed to either of them. Rather, the author is a 4th-century Latin father, called 'Ambrosiaster'. He is so called because we don't know his name, but he wrote other works that were once thought to be by Ambrose but are not. That is probably not as important as is the fact that the quotation is taken out of context. If you know Latin, you can find it in the Patrologia Latina, vol. 35, col. 2244. The issue with which Amborsiaster is dealing is whether "God said to them . . . 'have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth' [Genesis 1:28]" applies to both men and women or just to men. One of Ambrosiaster's arguments that it applies only to men is that "How can it be said of woman that she is in the image of God, since it is clear that she is subject to the dominion of man and has no authority? For she cannot teach, nor be a witness, nor give faith, nor judge, how much more so is it not possible that she can rule (*imperare*)." That is to say, Ambrosiaster simply assumes that these are the rules about female incapcity, whereas the quotation that Gratian was using is normative.

which prohibits a witness who has been convicted of adultery from testifying or making a deposition."]).

The question is what leads Tancred to limit his canonic sources – Ambrose, as he saw it, and Isidore of Seville – to criminal cases? Their language is certainly broader.

In other cases, Tancred tells us, women may be witnesses, citing again D.28.1.20.6, this time for the negative inference that Ulpian draws from *lex Julia de adulteriis* and D.22.5.18 [p. I–40: "PAUL, *Adultery*, book 2: The fact that the *lex Julia* on adultery forbids a woman found guilty to give evidence shows that women have the right to give evidence at a trial," which draws the same negative inference from the same statute.

When Tancred turns to his canonic sources he does not have much to support his position from Gratian. In the pastiche of sources from Roman law about witnesses that Gratian's followers put together in C.4 qq.2–3 (*Mats.*, pp. IX–2 to IX–4), they omitted, perhaps deliberately, D.22.5.18, which Tancred cites directly from the Digest.

Tancred cites another pastiche of Roman-law sources put in by Gratian's followers in C.15 q.3 c.2 [p. IX–10]: "PAPINIAN, *Monograph on Adultery*, book 1 [D.48.2.2]: 'Women are permitted to bring a public accusation for certain causes, for instance, if they do so on account of the death of any of those persons of either sex against whom they, if unwilling, can not be compelled to appear as witnesses, under the provisions of the law relating to public testimony. The Senate arrived at the same conclusion with reference to the Cornelian Law on Evidence. Women, however, are allowed to testify publicly in a criminal prosecution concerning the will of a freedman of their father or their mother. By the law relating to testaments, the right was conceded to wards, with the advice of their guardians, to institute a prosecution for the death of their father, just as a female ward is allowed to institute one for the death of her grandfather, since the Divine Vespasian permitted wards to bring suit with reference to the will of their father; but they could proceed by means of an interdict just as if the will had not been produced.' In the Code [C.9.1.4]: 'If your wife thinks that the death of her cousin ought to be avenged, let her appear before the Governor of the province.' In the Digest [48.4.8]: 'Women are also heard in cases involving treason (*laesa maiestas*). A woman named Julia revealed the conspiracy of Lucius Cataline, and furnished the Consul, Marcus Tullius [Cicero], the evidence upon which to base the prosecution.'"

The question, then, is what will be taken as the principle and what the exception? Gratian seems to acknowledge and Gregory I, whom he cites, certainly did [1 Comp. 2.13.4, p. IX–10] that women could accuse clerics of crimes when the crime was committed against that woman: "Since various crimes have been reported to us of the person of Epiphanius a priest, it is necessary that you examine everything quite carefully, and you are to hasten to bring here either the women (*mulieres*) with whom he is said to have had dealings or others whom you feel know anything about the same case, so that by ecclesiastical compulsion what is true can clearly be revealed."

Into this mix of authorities, some practicalities had emerged recently. Pope Clement III, a slightly older contemporary of Tancred's, dealing not with women but with father and son, says that relatives may be admitted in marriage cases. 1 Comp. 4.17.1 [p. IX–10]: "It seems to us . . . . Moreover, that parents, brothers and relatives of both sexes be admitted

in their testifying to uphold or invalidate the marriage is approved both by ancient custom and the laws, and is similarly approved by both divine and human laws."

And Innocent III, the reigning pope when Tancred writes, confirms this in 3 Comp. 2.12.6 [p. IX–11]: "Since however about the marriage which the same [bishop-]elect is said to have contracted with a widow, witnesses were not received on account of the obstacle of appeal on the ground that laymen and women might not be received on such an article against him, as your letters intimated to us, although the messengers of the elect tried to prove otherwise before us, we, so that the objection of such an irregularity not remain undecided, commit to your discretion by apostolic writing and command that you receive legally witnesses, be they laymen or women, so long as they are fitting, who are brought forward to prove this within a month, and that you examine them prudently, solemnly excommunicating anyone who presumes to impede them from giving testimony to the truth."

We're still not entirely out of the woods. Particularly odd is the fact that Tancred includes criminal cases among the ones in which women cannot testify, whereas many of the cases that led him to undercut his basic passages come from the criminal context. There will be more development of this topic later.

6. The remarkable passage on paupers. (p. IX–7):

"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."

C.2 q.1 c.7 s.3 (Gregory I, p. IX–14): "The persons of both the accusers and the testifiers ought subtly be looked into, of what condition they are and of what opinion, and that they not be without property (*inopes*) and that they not have any enmity against the aforesaid pastor [Stephen, a bishop, who said that he had been falsely charged], whether they spoke their testimony on hearing or whether they testified specially that they knew surely; if he was adjudged in writing, and the sentence recited to the parties present"

C.2 q.1 , c.14 (D.48.2.10, MACER, *On public prosecutions*, p. IX–14): "Some cannot bring an accusation on account of their poverty, such as those who have less than fifty *aurei*."

Nov. 90.1 (Miller and Sarris trans.): "We then decree that especially in this great and fortunate city where (God guide the words) there is absolutely no lack of good men in large numbers, witnesses must be of good repute. They must either be above any kind of imputation to the contrary, thanks to the unquestionable level of their rank, their position in imperial service, their wealth or their occupation, or should they not be of such a kind, they must be at least attested as trustworthy by others, and no menial, low or totally insignificant types are to come forward to give evidence unless they are such as could easily be proved, if there is a challenge after they have testified, to have lived a blamelessly virtuous life."

7. *Licet Heli*, 3 Comp. 5.2.3 (= X 5.3.31) (Innocent III [1199], p. IX–13 to X–14):

Tancred (p. IX–7): “Prohibited are the infamous, and they are excluded from testimony. 1 Comp. 5.36.10; 1 Comp. 2.13.23; 2 Comp. 4.12.5; C.4 q.3 c.3 ?s.2. Nonetheless in excepted crimes the infamous can be admitted to testify, as in simony and the like, but not without torture. 3 Comp. 5.2.3; C.4 q.3 c.3 s.17.”

Tancred (p. IX–7): “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.”

Tancred (p. IX–8): “Suspects and enemies are prohibited from giving testimony against their enemy. C.3 q.5 c.2. With this distinction: capital enemies and conspirators are to be heard in no situation. 3 Comp. 5.2.3, 4. And enemies because of a criminal litigation are not to be received before the end of the case. Enemies because of a pecuniary litigation can be admitted, but how much faith is to given them is reserved for the time of the disputation.”

3 Comp. 5.2.3 (Innocent III [1199], p. IX–13 to X–14):

3 Comp. 5.2.3

Student comments/questions about this.

(=X 5.3.31; Innocent III to the prior of St. Victor and Masters L. of Bologna and L of Modena, canons [1199])

Although Ely (*Licet Heli*) the high priest was a good man himself, because he did not effectively root out the crimes of his sons, he brought down the vengeance of divine retribution on himself as well as on his sons, until, his sons having been taken away in battle, he fell from his saddle and died of a broken neck. [See 1 Sam. 2:12–4:18.] A prelate ought therefore to strive more earnestly to correct the offenses of those below him the more damnable he deems their uncorrected offenses to be. Against whom, to pass over treatment of notorious crimes, one can proceed in three ways: by accusation, denunciation, and inquisition of them. Careful caution ought to be had in all three, so that lawful inscription ought to precede accusation, charitable correction denunciation, and open attribution (*clamosa insinuatio*) inquisition. “I will go down,” says the Lord, “and I will see whether they have fulfilled in deed the cry that has come to me.” [Gen. 18:21] A cry has come to a prelate at that time when by public fame and frequent attribution the crimes of his subjects are referred to him, and then he ought to go down and see, that is send and inquire, whether truth accompanies the cry that has come. For according to the canonical sanctions if anything comes to the ears of the prelate about any cleric, anything which can justly offend him, he ought not easily believe it, nor ought an unexamined matter spur him to punishment, but the truth is to be examined before the elders of the church carefully, so that, if the nature of the matter requires, canonical distriction may strike the fault; not as if he were both judge and accuser, but as if fame were claiming and cry denouncing, he may follow the duty of his office, always lending the moderation as is dictated by the form of the judgment and the form of the sentence.

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 procedure and arguments in the case as follows:

Since things were often attributed to us about the abbot of Pomposa, which sounded too different from honest regularity, the monks coming to our presence, some of them charged him with simony, perjury, dilapidation and insufficiency. When the same about excepted against them that fraternal correction had not preceded this denunciation according to the evangelical rule, and these constantly asserted that such correction had previously taken place, although the oaths of two monks were exhibited on this point, because they still did not cease to argue about it, we, as aforesaid, aroused by frequent cries, wished to inquire of our office about the aforesaid matters, binding all the monks, those who had come with the abbot and those against him, with the bond of an oath to tell the full truth that they knew about what had been proposed. When the depositions, reduced to writing, were published, they began to dispute about them in many ways. Because, however, both by the assertion of the monks and by the confession of the abbot himself we learned that the same abbot had expended a large sum of money left by his predecessor and had obligated the monastery to pay another greater sum of money, we deemed him according to canonic and lawful sanctions on account of these and other presumptions suspect of dilapidation and to be suspended from the administration of the abbacy. 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.

The following might be described as the holding:

Lest either the purity of innocence fall confounded or the evil of simony escape unpunished, 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.

Tancred, with some support from Innocent's own decretal interpreting *Licet Heli* (3 Comp. 5.2.4, p. IX–17), takes this decretal and runs with it. He applies it to the infamous, an issue that was not present in *Licet Heli*; he applies it to all excepted crimes not just simony but treason and heresy as well (there's support for this elsewhere, which he does not cite), and he spells out a procedure to be used in those situations where an enemy of the defendant is admitted to testify: "And enemies because of a criminal litigation are not to be received before the end of the case. Enemies because of a pecuniary litigation can be admitted, but how much faith is to given them is reserved for the time of the disputation."

There has obviously been a change here from the procedural rules outlined in 74T. Why did this change happen? We'll need to say more about that. For now, it seems pretty clear that if you follow the rules laid out in 74T, you are not going to convict many criminals. Perhaps we might say, as did some of the authors of the thirteenth century: *rei publicae interest ne crimina maneant impunita*: it is of interest to the republic that crimes not go unpunished.

8. 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' work suggests that this may have changed by the late 13th century.

Student comment.

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 if frequently tied in with the notion of equity.
   c. Procedure.
   d. Political theory. We'll devote a later class to this.
   e. Policy. Vacarius' *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.