

CLASS OUTLINE — LECTURE 10

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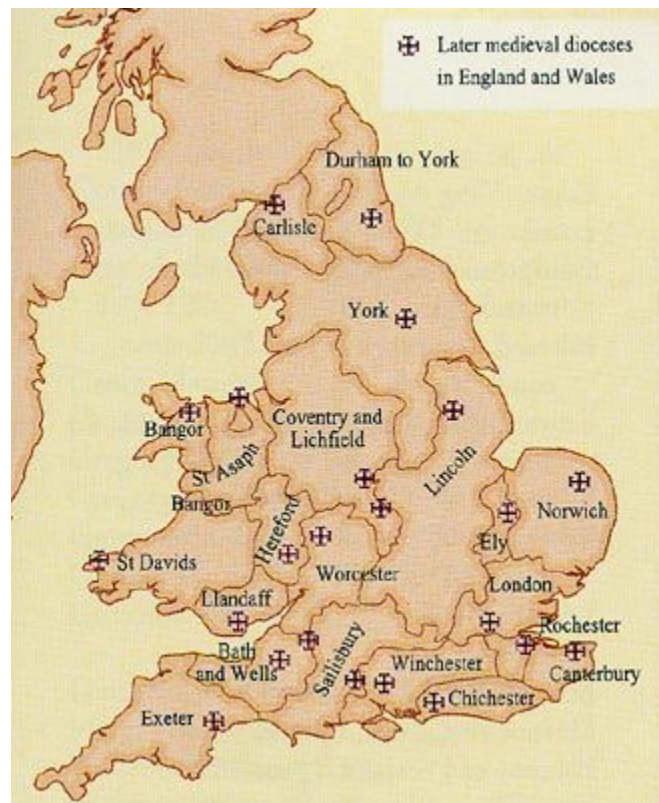
Smith c. Dolling

The role of cases in Continental European legal systems

1. Some comparative remarks.
2. The presence of case records in the medieval and early modern periods.

The *processus* in Salisbury in *Dolling c. Smith*

[*Smith c. Dolling*. The principal record in this case is what is known as a *processus*, the entire record of a case before a particular court. It was made up when the defendant in the original case, Smith, appealed from the consistory court of the bishop of Salisbury to the provincial appellate court of the archbishop of Canterbury. So the *processus* is a *processus* in a case that would be called *Dolling c. Smith*. The archbishop of Canterbury had jurisdiction to hear appeals from the Southern Province in England, 14 dioceses in England proper and 4 in Wales.



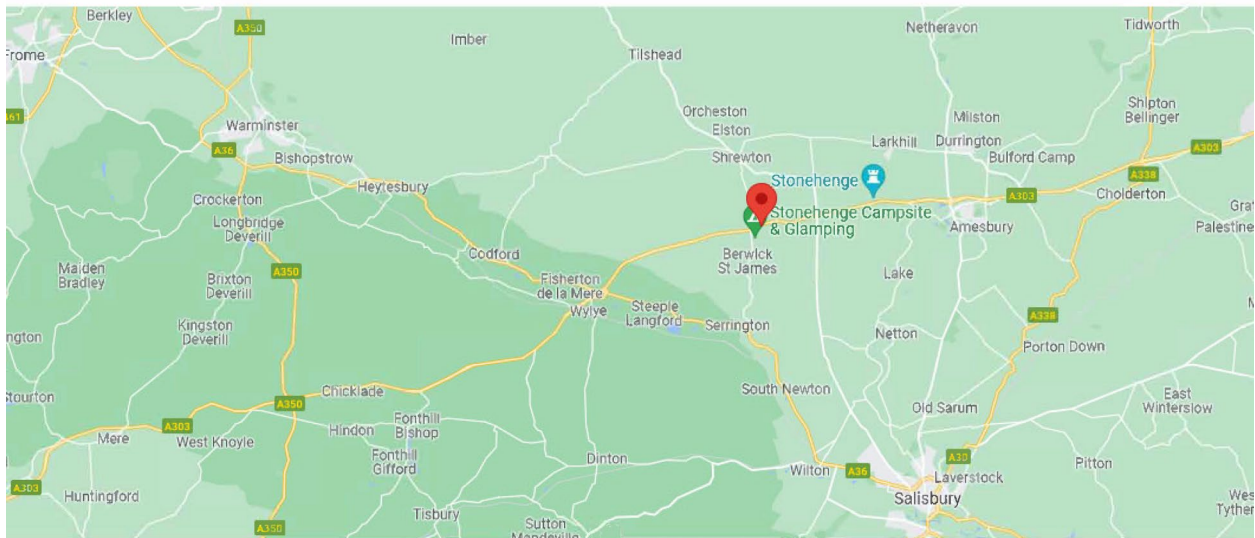
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[Normally, the appellate court would sit in London, but because the see of Canterbury was vacant (the archbishop having died and a new one not yet appointed), the court sat in Canterbury, because the prior and chapter of Canterbury cathedral exercised vacancy jurisdiction. The record is today in the Cathedral Archives and Library at Canterbury. Here's what happened in the court from which the appeal was taken, the consistory court of the bishop of Salisbury.]

10 July 1271—Alice Dolling appeared in the consistory court of Salisbury claiming that William Smith was her husband. William denied the charge, and Alice was told to produce her witnesses before the dean of Amesbury.

“A.D. 1271, Friday after the feast of the translation of St. Thomas, martyr [10 July], Alice of Winterbourne Stoke appeared against William Smith saying against him that he contracted marriage with her, wherefore she asked that he be adjudged her husband by sentence; she says this, etc. [not committing herself to proving each and every element in her libel but insofar as she proves so far may she obtain]. The man, joining issue, denies the contract; the parties sworn to tell the truth say the same thing as before. The reception and examination of witnesses is committed to the dean of Amesbury.”

Go  Maps Winterbourne Stoke





<http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/SalisburyCathRearHarvard.jpg>



<http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/SalisburyCathFrontHarvard.jpg>

The record is written in Latin. Alice could have hired a proctor to represent her in the court, but if she had the record would have said that she did. Alice did not know Latin, nor did she know the formula that we used to fill in the ‘etc.’ in the record: “not committing herself to proving each and every element in her libel but insofar as she proves so far may she obtain.” Alice probably appeared in court and made her complaint in Middle English. There is a substantial filter between Alice’s voice and what we read here.

The record of the first entry tells us that William denied the charge, and that Alice was told to produce her witnesses before the dean of Amesbury. Below the level of the diocese there are archdeaconries. Within each archdeaconry in most places parishes are arranged into deaneries.



The map shows the four archdeaconries and the deaneries in the diocese of Salisbury today. The boundaries have changed a bit, but not much, since the Middle Ages. The deanery to the north of Salisbury that is today called Stonehenge was called Amesbury in the Middle Ages; Amesbury was then, and is now, a fairly substantial town about six miles east of Winterbourne Stoke.

30 July 1271—Alice asked for and obtained a second production of witnesses.

“Thursday next after the feast of St. Peter in chains [30 July], the parties appeared personally and the woman asked for a second production and got it.”

23 September 1271—The depositions of Alice’s three witnesses were published in open court.

“Wednesday next after the feast of St. Matthew the apostle [23 September], the parties appeared personally; the woman renounced further production; the attestations were published with the consent of the parties; the parties were given a copy; a day was given for sentencing if it was clear. The woman constituted her brother Roger her proctor in the acts to hear the definitive sentence.”

26 October 1271—William confessed that he had had intercourse with Alice six months previously but denied that they had contracted marriage, claiming that he had been in Bulford on the St. Stephen’s day [26 December] almost three years previously, the day on which Alice alleged that they exchanged the words of marital consent in Winterbourne Stoke. (Technically, this was an exception against Alice’s witnesses, an allegation that they had perjured themselves.) The dean of Amesbury was to examine William’s witnesses.

“Monday next after the feast of the apostles Simon and Jude [26 October], the parties appeared personally; the man under interrogation confessed in court that he had carnal knowledge of the said Alice a half a year ago. The same man proposed an exception in the following form: ‘Before you, sir judge, I, William of Winterbourne Stoke, peremptorily excepting propose against the witnesses of Alice Dolling that they depose falsely because from the ninth hour of the day on which her witnesses depose that I contracted marriage with her until the first hour of the subsequent day I was continuously at Bulford, so that it would have been impossible for me at the hour about which the witnesses depose to have contracted marriage at Winterbourne Stoke. And this I offer to prove.’ The reception of the witnesses produced by the man on his exception and their examination is committed to the dean of Amesbury.”

18 November 1271—Alice answered William’s exception with a replication that alleged that William had indeed been in Winterbourne Stoke on 26 December 1268. The rectors Berwick and Orcheston were to examine Alice’s witnesses.

“Wednesday next before the feast of St. Edmund, king and martyr [18 November], the parties appeared personally; the woman made a replication of presence; let the woman produce her witnesses before the rectors of Berwick and Orcheston, however many she wishes to produce before the next consistory; let the man also produce however many witnesses he wishes to produce about his absence before the said dean and the chaplain of Amesbury before the next consistory.”

15 December 1271—The depositions of William’s ten witnesses on his absence and Alice’s four witnesses on his presence were published in open court

“Tuesday after the feast of St. Lucy the virgin [15 December, 1271], the parties appeared personally; the woman excepting proposed that it was not her fault that her witnesses had not been examined and asked that they be admitted in court; they were sworn, their examination committed to the dean of Amesbury and Richard de Rodbourne, and the way of further production precluded for her. On the same day [this may not be right] the attestations both on absence and presence were published with the consent of the parties; copies of the attestations were offered to and obtained by the parties, and a day was given for doing what law shall dictate.”

27 January 1271/2—After some dispute a day was given for sentencing.

“Wednesday next after the octave of St. Hilary [27 January, 1271/2], the parties appeared personally, and when there had been some dispute among the parties about the attestations of the parties, a day was given for sentencing if it was clear.”

11 February 1271/2—William was ordered to produce his witnesses again so that the court might inquire more fully into the continuity of his absence.

“The day after St. Scholastica the virgin [11 February, 1271/2] the parties appeared personally. It was decreed that the aforesaid W. produce in the next consistory all his witnesses whom he had previously produced on his exception so that it might be inquired more fully about the continuity of absence.”

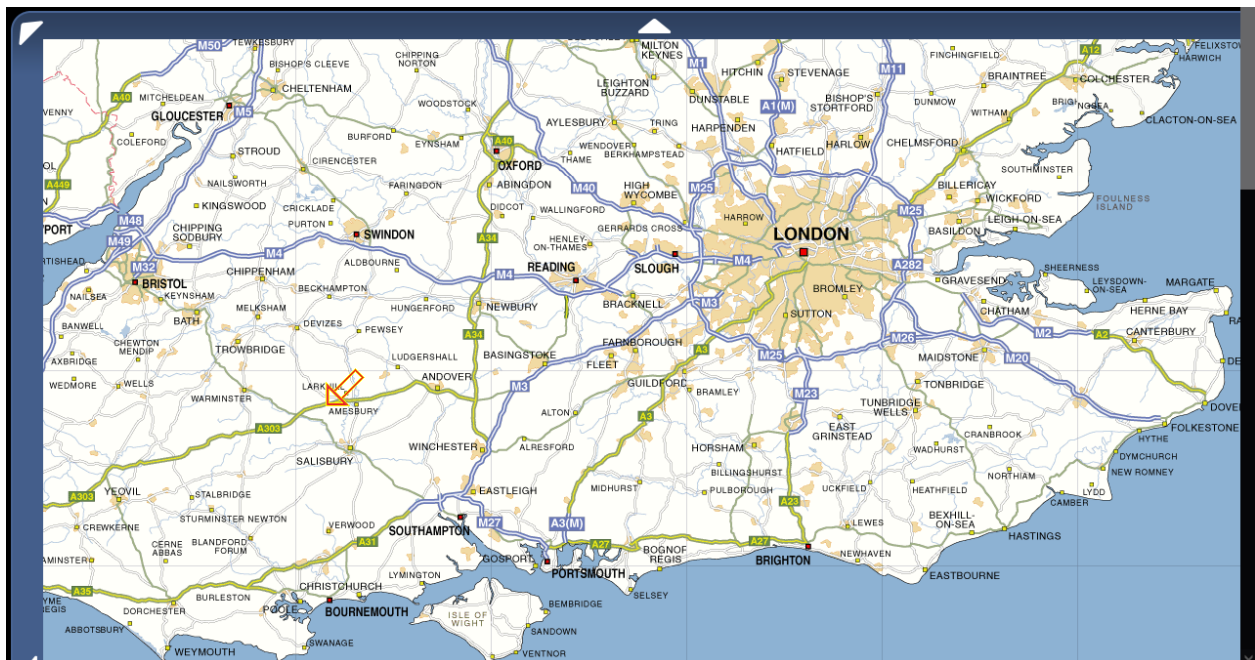
1–5 March, 1271/2—William alleged that he could not produce his witnesses again because some of them had died “and some of them had left the province for a pilgrimage and for other necessary cause.” The parties once more disputed about the process, and a day was once more given for sentence. [The Salisbury processus inserts the depositions of the witnesses at this point.]

“Tuesday after the feast of St. Mathias the apostle, continued until Wednesday, Thursday, Friday, Saturday next following [1–5 March, 1271/2], the parties appeared personally. The same man alleged that he could not produce his witnesses before us because some of them did not exist in the nature of things and some of them had left the province for a pilgrimage and for other necessary cause. And when the parties had disputed for a while about the processus, the same William demanded that a copy of the entire processus be made for him, which decreed and obtained, a day was given for doing what law shall dictate in the next consistory after Easter.”

11 May 1272—The official of Salisbury rendered sentence for Alice declaring that William was her lawful husband. [A later document in the case tells us that William immediately appealed to the Court of Canterbury.]

“Wednesday after ‘Misericordia’ Sunday [11 May], A.D. 1272, the parties appeared personally and concluding the case asked that sentence be given. We the official of Salisbury proceeded to definitive sentence in this way: “In the name of the Father, amen. We the official of Salisbury having examined the merits of the aforesaid cause and having gone over the acts of court carefully, because we find the claim of the said Alice sufficiently proven, notwithstanding the exception proposed on the part of William, which is not proved clearly in its form, as it ought to be, adjudge William by sentence and definitively to be husband to the same Alice.”

Proceedings on appeal to the Court of Canterbury



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3 June 1272—The record of the hearing on this day does not survive, but is described in the examiners’ report (below).

26 July 1272—William probably appeared in the Court of Canterbury on this day (the record does not survive but is referred to in a subsequent record. Alice, we learn from the examiners' report (below) did not appear.

Between 26 July and 30 September (undated)—Alice did not appear. William Smith and his proctor William Attehide of Writhlington appeared and were given the next court day after Michaelmas [29 September] to proceed with the case according to the *acta* of 26 July, 1272.

30 September prorogued to 4 October 1272—Alice did not appear. William proposed exceptions to the *processus* before the official of Salisbury. The judge (unnamed) ordered the examiners of the court to examine the *processus* and report back to him about it at the end of October. The report has survived:

“On 10 July, 1271, Alice of Winterbourne Stoke brought an action against William Smith saying that he made a marriage contract with her and asking that he be adjudged her husband. The man denied the contract. The parties took an oath *de veritate dicenda* and made the same statements as before. Four witnesses were produced to prove the woman's claim; these were examined, their attestations published with consent of the parties, and a copy made for the parties. The man proposed an exception of absence; the woman replied with an exception of presence. Ten witnesses to prove the exception of absence and four to prove the replication were examined, and their attestations published. The judge decreed that the man's witnesses should be produced again to be reexamined about the continuity of his absence, but he could not produce them in that term because some were dead and others away on pilgrimage or elsewhere. After a short debate, the man asked for a copy of the *processus*, and on 11 May, 1272, sentence was brought against him. From this sentence he appealed to the see of Canterbury, and the official of Salisbury assigned 3 June, 1272, as a peremptory term in the Court of Canterbury before the official or his commissary. In order to spare the parties labour and expense he sent the entire *processus* to Canterbury, sealed with his seal. On 3 June, in the absence of the woman, the commissary of the official pronounced in favour of the jurisdiction of the appeal court. After the woman had been contumacious at four sessions, the judge decreed that the *processus* and sentence with its alleged iniquities be examined by the examiners of the Court of Canterbury who were to make a written report on 29 October, 1272, the day given for hearing sentence.

“Item, having examined the statements of the witnesses of the said Alice on the *de presenti* marriage contract that she proposed, the first two witnesses seem to depose that they contracted between themselves by words of the future tense. And these witnesses were sisters of each other, as the second witness seems to depose. Item, the third witness seems to depose that the man contracted by words of the present tense and the woman by words of the future tense, and she says that the second witness is the sister of Alice.

“Item, having examined the witnesses of William produced on his exception of absence it seems that he proved by ten witnesses his absence at the same hour about which the witnesses of the said woman depose. Item, having inspected the statements of the witnesses produced on the replication of presence, they do not seem to obviate the statements of the witnesses on the exception of absence nor do they help the claim of the woman because they seem to speak of the previous year,¹ and even if they are speaking about the same year they seem to depose less fully, and they are only four in number and the witnesses of the man are ten.”

¹ A neat point—Alice's witnesses on the principal claim speak of an event on St. Stephen's day, there were two years passed; William's witnesses on his absence speak of period on St. Stephen's day, there will be three years

29–31 October 1272—Once more Alice did not appear. The commissary of the official of the Court of Canterbury reversed the decision of the official of Salisbury.

“In the name of God, amen. Having heard and fully understood the merits of a marriage case formerly moved before the official of Salisbury, hearing the case by ordinary authority, between Alice Dolling of Winterbourne Stoke, Salisbury diocese, woman, plaintiff on the one side, and William called ‘Smith’ of Bulford, of the same diocese, defendant on the other, and afterwards lawfully devolved on the Court of Canterbury by appeal of the said William from the same official of Salisbury as from an iniquitous definitive sentence, and in the said court long litigated, there being recited before us in court the whole processus had before the official of Salisbury in the said cause between the same parties and the said sentence of the official of Salisbury, having uncovered the iniquities of them, because it lawfully appears to us that the said official of Salisbury rendered a rash sentence in the said case and the said William Smith has well appealed, we, brother Henry Depham, penitentiary of Christ Church Canterbury and commissary of the official, etc., with the counsel of legal experts sitting with us, pronounce the aforesaid sentence of the official of Salisbury rendered against the before-mentioned William in the said case to be unjust, and we quash the same sentence by the authority of the see of Canterbury, absolving the same William from the petition of the said Alice by sentence and definitively by the authority of the aforesaid see, decreeing that the aforesaid official of Salisbury be required by the lord official of Canterbury aforesaid to hold the said William as thus absolved and public and solemnly and to declare him thus absolved or have him [so] declared at times and places which the party of the said William might require in this matter.”

Some remarks on the *processus*

1. The pattern of claim, exception, and replication, with proof taken on each one separately, that we see in the *processus* in the Salisbury court is probably the product of the Romano-canonical rule that one cannot introduce testimony directly contradicting testimony that has already been published. The problem is that with a complaint as vague as this one – “He contracted marriage with me” – the defendant has no idea what he is supposed to get testimony about. The solution to the problem, at least in the English church courts, was to allow the defendant, after the plaintiff had introduced his or her proof and it had been published, to frame his or her defense in the form of exceptions to the plaintiff’s witnesses. The defendant says that plaintiff’s witnesses are not to be believed, because they are liars.
2. This pattern of claim with proof taken on it, then another claim and proof taken on it is characteristic not only of medieval Romano-canonical it is also characteristic of Continental procedure today. The reason for it is clear. There’s no trial in this form of procedure, as we understand a trial, a single occasion on which all the proof is presented, because there’s no jury, and the judge is sitting full-time. This means, particularly in civil cases, that the court and the parties can identify key issues that may determine the case and present proof about them without ever having to present all the proof they have. Some people think that this may be a more efficient way of doing things.
3. In the spring of 1272, the official of Salisbury asked William to produce his witnesses again so that he, the official, could inquire about the continuity of William’s absence. William returns and

passed, i.e., on next St. Stephen’s day; Alice’s witnesses in replication speak of a period on St. Stephen’s day, there were three years passed. We cannot exclude the possibility of scribal error (‘erant’ for ‘erunt’), nor, it seems, could the examiners. The explanation may be, however, that Alice’s replication witnesses were examined after 26 December, 1271.

says he cannot produce his witnesses again because: “some of them did not exist in the nature of things [i.e., they were dead] and some of them had left the province for a pilgrimage and for other necessary cause.” You can believe that if want to; I don’t.

The depositions in the Salisbury court

Production of Alice Dolling on the principal

Celia daughter of Richard Long sworn and carefully examined about the contract of marriage between William Smith of Stoke Winterbourne and Alice Dolling says that she saw and was present when the said William gave his faith in the hand of the said Alice by these words: “I William will have you Alice as wife so long as we both live, and thereto I give you my faith.” And she replied, “And I Alice will have you as husband, and thereto I give you my faith.” Asked about the hour, she says it was at the hour of sunset. Asked about the place, she says in the house of John le Ankere before the bed of the said women, Celia and Alice, on the west side of the house. Asked if they were standing or sitting, she says sitting. Asked about their clothes, she says that the man was dressed in a black tunic of Irish, an overtunic of russet, and a hood of the same color, and the woman was dressed in a tunic of white and a blue hood, and on her feet she had strapped shoes. Asked how she knows this, she says that she was present in the house when all this happened. Asked why the said William came there, she says to have carnal intercourse with her if he could. Asked if she ever saw them having intercourse, she says no, but she saw them naked in one bed. Asked who were present at the said contract, she says the contracting parties, she herself, Margaret, her sister, and no more.

Margaret, sister of the said Celia, sworn and carefully examined about the aforesaid contract says that she saw and was present when the said William gave his faith to the said Alice by these words: “I William will have you Alice as wife as long as we shall live, and thereto I give you my faith.” And she replied, “And I Alice will have you William as husband by such a pact.” About the year, the day, the hour and the place, she agrees with the said Celia, her cowitness. Asked about their clothing, she says that the man was wearing a gray tunic of Irish cloth, and an overtunic of gray and a hood of gray. About the clothes of the woman she agrees with her cowitness. About her knowledge, she agrees with the said Celia. Asked why the said W. came there, she says that she does not know, unless it was to have carnal intercourse with her. Concerning those in the house, she agrees with the said Celia. Asked if she ever saw them having intercourse, she says no, nor did she see them together in one bed.

Margaret daughter of Michael sworn and carefully examined about the marriage contract between William Smith of Stoke Winterbourne and Alice Dolling, says that on St. Stephen martyr’s day at Christmas, two years ago, she was present and saw that William Smith whom the case is about gave his faith to the said Alice by these words: “I William take you Alice as my wife if holy church permits, and thereto I give you my faith.” And Alice replied by these words. “And I Alice will have you as husband and will hold you as my husband.” Asked about the hour she says that this was done before the hour of sunset. Asked about the place, she says in the house of John le Ankre in the southern part before the bed of the said Alice.

Production of William Smith on his exception of absence previously proposed

[There are actually ten witnesses; I’ve omitted those where the deposition simply says that the witness testified the same as the previous witness.]

John Chaplain, sworn and carefully examined, asked for what he was produced, says to prove a certain exception proposed by William Smith against Alice Dolling of Winterbourne in court.

Asked what the exception is, he says that the said William proposed by way of exception that he was not present on St. Stephen's day on which the witnesses of the said woman depose that he ought to have contracted marriage with her. Asked where the said William was on the said day, he says that he well knows and that he saw him and spoke with him on the day of St. Stephen martyr, at Christmas there will be three years passed, at Bulford from the ninth hour of the aforesaid day of St. Stephen and for the entire night following up to midday on the following St. John's day [26–27 December, 1268]. Asked how he knows this, he says that they serve[d] a guild of parishioners in the said town of Bulford finding food and other things necessary for those serving, as is customary, along with Alice his mother. Asked where he was at table that day, he says in the house of Alice his mother at Bulford. Asked if he left at any hour of the aforesaid day or night, he says no. Asked how he knows this, he says that both of them were together at the said guild and in eating at the house of Alice the mother of the aforesaid William from the ninth hour until midnight, and immediately afterwards they went to the house of the mother of the aforesaid William where the said William spent the night. Asked who were at the guild, he says the guild brothers. Asked who the guild brothers are, he says almost all the better men of the parish. Asked if all his cowitnesses were present, he says yes. Asked if he knows Alice whom the case is about, he says no. Asked how far Winterbourne Stoke is from the town of Bulford, he says four miles. Asked how he recalls such a lapse of time, he says by this: that in the same year, the guild ceased.

Richard Sturre sworn, examined and carefully asked, says that William Smith whom the case is about was present in the town of Bulford from the ninth hour of St. Stephen, at Christmas there will be three years passed, continuously for the whole day and the night following and St. John's day until noon. Asked how he knows this he says by this that he saw him at the guild of Bulford and spoke with him and saw him serving as butler at the said guild until midnight. And the same day, along with Alice his mother, he found food and other necessaries for the guild, as is customary, for each guild bother in his turn when it came to him. About the rest he agrees with John, previously sworn.

Hugh Meriot, sworn, examined and carefully asked, agrees in all things with the previously sworn John and Richard, adding however that they lay in one bed in the house of his mother at Bulford. Asked who spent the night in that house that night, he says the witness himself, William whom the case is about, and their mother and a serving maid and no more.

Peter son of Alice sworn and carefully examined says that he well knows and it well comes to his memory that William Smith whom the case is about was continuously in the town of Bulford on St. Stephen's day from the ninth hour through the whole day and the following night until the third hour of the next day, this year there will be three years elapsed. Asked how he knows this, he says that he saw him on the said St. Stephen's day eating and drinking at the table of the mother of the said William. Asked where the said W. went after dinner, he says to the guild at the hour of sunset and he stayed there with many others drinking until almost midnight, and afterwards he went to the home of his mother to bed and lay there until morning. Asked how he knows this, he says that he was in his company and is his next-door neighbor. Asked how he remembers when so much time has elapsed, he says by this that in the same year the guild ceased. Asked how far Bulford is from Maiden Winterbourne [today, Maddington, barely a speck on the map a couple of miles north of Winterbourne Stoke], he says three leagues. Asked if the said William left Bulford any hour of the day or night between the ninth hour of the aforesaid St. Stephen's day and the third hour of the following St. John's day, he says no.

Roger de Cowland sworn and carefully examined agrees in all things and through all things with the previously sworn P. and J. except that he does not give the reason for his knowledge.

Production of the said Alice about the presence of the said William

Edith of Winterbourne Stoke sworn and carefully examined about the presence of William Smith says that she saw the aforesaid William Smith in the eastern part of the church of St. Peter of Winterbourne Stoke, leading a game of women² after him on the day of St. Stephen martyr there were three years past. Asked about the hour of the day, she says that it was after dinner before the hour of sunset. Asked about clothing, she says she does not recall. Asked where he went, she says she does not know. Asked how she remembers the lapse of time, she gives no cause of her knowledge. Asked if she saw him many times, she says only once. Asked who saw him with her, she says Edith, Alice and Agnes, her cowitnesses and many others of the parish.

Edith Dolling, the sister of her whom the case is about, sworn and carefully examined about the presence of William Smith, says the same as the aforesaid Edith in all things, adding that she saw him many times that day and that the man was dressed in a cloak of russet and a hood of blue, and that she herself went in his hand.³

Agnes Grey sworn and examined says the same in all things as Edith the next previously sworn, except that she gives the reason for her knowledge of the lapse of time that she was pregnant at the time.

Alice daughter of William Chaplain sworn and carefully examined says the same in all things as the aforesworn Edith Dolling.

What was going on in this case?

1. Someone was lying.
2. Two of Alice's witnesses on the principal case seem to have been related to her: they were probably her half-sisters. One of Alice's replication witnesses may have been her full sister.
3. The witnesses on the principal case are not completely clear about what words were exchanged: two of them seem to testify to *verba de futuro*, one of them to *verba de presenti* — but the tense of the verbs should make no difference when intercourse is conceded.
4. The replication witnesses do not seem to be talking about the same day as the first two sets of witnesses are, though this may be the result of scribal error in the depositions or a truncation of what actually happened in the *processus* rather than any confusion on the witnesses' part.
5. None of these observations is new. They are all made in a remarkable document that survives from the case on appeal. The judge of the provincial court of Canterbury asked the examiners of the court to look at the *processus* below and evaluate it for him. They committed their evaluation to parchment, and it is quoted in full above. In the end the examiners suggest that there are too many inconsistencies in Alice's basic story, that her witnesses on her principal claim are suspect because they are related to her, that the witnesses on William's exception tell a convincing story, that Alice's replication witnesses may not even be talking about the same day, and, besides, ten witnesses are better than four. The judge of the provincial court seems to have agreed; he

² A hint of what may be going on here is found in the synodal statutes of Norwich, 1240 X 1243, c. 47 (C&S 1.353): “[W]e firmly inhibit that games and wrestling matches (*ludi et lucte*) take place in cemeteries or the porches of churches nor that women presume lasciviously to perform dances there singing bawdy songs.”

³ An obscure phrase.

reversed the official of Salisbury's decision. This, again, is quite in conformance with Tancred's advice about evaluating witnesses.

Some social history that may help

1. Names. Surnames are unstable in this period, and not everyone in this class of people had them. Alice does, and this suggests that she was of somewhat higher status than were the very poor. Her surname, 'Dolling', is of unmistakably Anglo-Saxon origin. William's surname, 'Smith', is a trade name. We can't even be sure that it is a surname. He may be William, the smith. His witness, who says that his mother is the same as William's mother, calls himself Hugh Meriot. That is also, probably, a name of Anglo-Saxon origin. The prefix of John le Ankere's surname suggests that the name is French, as indeed it is. The name is not found in England until after the Conquest.
2. There is a 'northwest European marriage pattern'. First marriages tended to be relatively late, the women being in their late teens or early twenties, and the men not much older. From puberty to this relatively late marriage both men and women were not supposed to get married and, particularly the women, were supposed not to have sexual intercourse. During the awkward period between puberty and marriage, parents shipped out their children to serve as servants or apprentices for others. This is sometimes called 'life-cycle servanthood'. The women and men who worked as servants were able to save some money. They used this money to get married. It is tempting to think that Alice and her half-sister, Celia daughter of Richard Long were this kind of servant in the house of John le Ankere in 1268.
3. There were relatively few trades that were open to women in medieval England, but brewing ale was one that was. That seems to have been what William's mother, Alice, was doing in Bulford in 1268.

The 'bottom line'

1. Can we draw any social conclusions from such cases?
 - a. Most liars cannot make things up out of nothing.
 - b. One hundred years after Alexander's decisions news of them had reached Winterbourne Stoke.
 - c. Can we ever be sure that the witnesses are telling anything like what really happened?
 - d. Can we say anything about what happened in Winterbourne Stoke?
2. The cases give us some evidence that we can use to tell a story that might otherwise not be told:
 - a. People did seem to know what the rules were.
 - b. Because people knew what the rules were, they knew what they had to say in order to achieve the desired result in court.
 - c. What causes the courts sometimes to accept the results that the parties and witnesses are urging them to accept and sometimes to reject them is a complicated question, the answer to which is highly problematic.
 - d. As the late Michael Sheehan noted, the attitudes toward marriage reflected in the court records are extraordinarily individualistic.
 - e. This individualism, however, has limits.
 - f. What does all this have to do with Alexander III and his decisions?

Reproduced below is a translation of most of the record in *Adam Attebury c. Matilda de la Leye* (Court of Canterbury, 1272), a case similar *Smith c. Dolling* (*Materials*, p. XIV-2 to XIV-6) and like it taken from N. Adams and C. Donahue, ed., *Select Cases from the Ecclesiastical Courts of the Province of*

Canterbury (Selden Soc’y no. 95, 1981) (pp. 118–23). After reading the case carefully, write a coherent essay about it making use of the guide questions that follow. Obviously, you will want to put the document in a larger setting, but sometimes the best way to do this is to begin with the specific and proceed to the general.

Record on appeal (processus) transmitted by the official⁴ of the archdeacon of Huntingdon⁵ to the Court of Canterbury,⁶ 26 February 1272.

To the venerable man of discretion the lord official of Canterbury constituted by the prior and chapter of Canterbury, *sede vacante*,⁷ the official of the archdeacon of Huntingdon greeting, and due and honorable reverence and obedience. At your mandate I transmit the *processus* held before my predecessor, that was pending between Matilda de la Leye, on one side, and Adam Attebury of Berkhamstead,⁸ on the other:

The aforesaid Adam was cited at the instance of the aforesaid Matilda for the Friday after the feast of st Martin in winter (14 November), A.D. 1270, at Harpenden.⁹ The said woman issued a libel against the same Adam: “Matilda de la Leye says and proposes before you lord judge against Adam Attebury of Berkhamstead that the same A. contracted marriage with her, which having been proved, she asks that he be adjudged her husband by way of sentence.” When the libel was recited, Adam immediately joined issue (*litem contestando*) and said that what was told in the libel is not true and therefore what was asked for should not happen. Both parties having been sworn to tell the truth, the woman spoke as she had before, and the man persisted in denying it. When they were asked whether they had had sexual intercourse, both confessed the carnal coupling. A day was given to the woman to produce witnesses and to the man to see the witnesses swear and [to both parties] to do further what the law would require, to wit, the Friday just before the feast of st Lucy the virgin (12 December), in the place as before, in the aforesaid year. On the said day and in the said place, the said M. personally appeared, but the said A. in no way appeared. As a penalty for the contumacy of the said A., the judge admitted two witnesses who were sworn and examined and deposed as follows:

Lucy, wife of Richard the ploughman, sworn and examined, says that she saw and heard Adam Attebury contract with Matilda de la Leye in these words: “I give you my faith that I will have you¹⁰ as my wife from this day forward.” She replied, “And I to have you as husband from henceforth, my sister Alice and Lucy wife of Richard the ploughman being witnesses.” Asked how she happened to see and hear this, she says that she came with them from Luton.¹¹ Asked

⁴ The word in this context means “judge.” He was appointed by the archdeacon.

⁵ The archdeacon of Huntingdon was a subordinate officer of the bishop of Lincoln. As can be seen from this case, the area of jurisdiction of this archdeacon extended in this period beyond the small county of Huntingdon into the county of Hertfordshire.

⁶ The Court of Canterbury was the appellate court for the province of Canterbury. The province included the diocese of Lincoln.

⁷ Between the death of an archbishop and the appointment of another, the cathedral chapter of Canterbury (the prior and chapter) exercised the archbishop’s judicial and administrative functions. The vacancy of the see here is the one between the death of Archbishop Boniface of Savoy (18 July, 1270) and the consecration of Archbishop Robert Kilwardby (February, 1273).

⁸ co. Herts.

⁹ co. Herts.

¹⁰ *volo te habere*. This is “I will have you,” not “I shall have you,” i.e., it is not unambiguously words of the future tense.

¹¹ co. Beds., about 8 miles northeast of Berkhamstead.

about the place, she says it was in the middle of a field called ‘le Riding’.¹² Asked about the day and the hour, she says it on the vigil of st Hugh the bishop (16 November) seven years had passed; it was after dinner¹³ before the evening hour. Asked who were present, she said the contracting parties; she, Lucy, who had sworn, and Alice, sister of Matilda, and no more. Asked about the clothes, she says that the man was dressed in a tunic of russet¹⁴ and an overtunic of hauberget,¹⁵ and the woman in a dress of burnet.¹⁶ Asked if she says these things out of fear or love or for money or a bribe, she says no, only that she might remain without peril from the oath she had sworn.

Alice, sworn and examined, says that she was present when Adam Attebury gave his faith to Matilda de la Leye in these words, “Matilda, I give you my faith that I shall have you¹⁷ henceforth as wife.” She replied, “Thank you, and I you as husband, my sister Alice and Lucy here present being witnesses.” Asked about the place, the lapse of time, the day, the hour, and the clothes of the contracting parties, she agrees in all things with Lucy, who had previously sworn. Asked who were present at the contract, she says the contracting parties and two witnesses.

The named parties having been peremptorily called and personally appearing at the chapter¹⁸ held in the church of Great Gaddesden¹⁹ on the Friday next after the feast of st Vincent (23 January), [1271], the said M. renounced further production [of witnesses], the aforesaid attestations (depositions) were published at the request of the parties, and a copy was decreed for the parties and obtained. And after the parties had disputed about the aforesaid attestations for a while, the often-said A. at the chapter celebrated at Berkhamstead on the Thursday next after the feast of sts Perpetua and Felicity (5 March), in the aforesaid year, excepted against the witnesses of the said Matilda in this way:

“I Adam Attebury standing before you lord official of the lord archdeacon of Huntingdon, except against the person of Lucy, witness of Matilda de la Leye produced to testify against me in a marriage case, and propose that no faith is to be given to her because she is of ill fame, suspect life and opinion, and accused of theft and persevering in that crime. Again, because she is a pauper and without goods, and on account of her poverty strongly suspect, and on account of this to be repelled from testimony. These exceptions I propose in the alternative, and I ask that they be admitted and received, asking that one or the other of them having been proved, which can and should be enough to win the case for me, the testimony of the said Lucy should be annulled and pronounced null, and I should be absolved from the petition of the said Matilda. . . .”

And after solemn dispute was held many times about the said exception, the parties being present, at length the judge in the chapter held at Berkhamstead on Thursday next before the feast of st Botolph (11 June), A.D. 1271, quashed the aforesaid exception with the advice of the legal experts sitting with him and asked the parties if they wished to propose anything other than what had previously been proposed in the said case. And because they proposed nothing lawful, the case was concluded, and the parties were assigned a day, to wit, the Friday next after the feast of

¹² Unidentified.

¹³ Medieval dinner tended to be in the early afternoon.

¹⁴ A coarse, home-spun woolen of reddish brown.

¹⁵ A kind of cloth.

¹⁶ A cloth of some dark color.

¹⁷ *habebo te*. These are unambiguously words of the future tense.

¹⁸ Sessions of lower ecclesiastical courts tended to be called “chapters.”

¹⁹ co. Herts.

st James the apostle (31 July), in the church of st Peter, Berkhamstead, in the aforesaid year. On this day and in this place, because the judge wanted to examine the *processus*, he set for the parties the day after the synod of Hertford in the church of All Saints to hear the definitive sentence precisely.²⁰ On which day and in this place, the parties appearing personally, the judge, with the counsel of prudent men, pronounced sentence in the marriage case in this form:

“In the name of God, amen. Having heard and fully understood the merits of a marriage case which is pending between Matilda de la Leye, on one side, and Adam Attebury, on the other, a libel having been offered, issue having been lawfully joined in the negative, an oath having been taken by each party to tell the truth, the woman asserting the marriage contract, the man denying and confessing carnal coupling with her, an exception proposed against the witnesses of the woman having lawfully been quashed, because we find the complaint of the said Matilda was lawfully proven by the aforesaid witnesses, the subsequent carnal coupling adding support (*adminiculum prestante*), we by sentence and definitively adjudge the said Adam to be the husband of the said Matilda.

Farewell. Given at Shillington²¹ on the morrow of st Mathias the apostle (26 February), A.D. 1272.

The result of the case on appeal is not known, but the following depositions taken in the appellate court indicate the kind of issues that Adam was going to raise:

Examination of witnesses produced on behalf of Adam Attebury.

Robert Crips, unlettered, sworn and examined, says that he was present in the church of All Saints', at Hertford, Lincoln diocese, on the day of st Denis the martyr (9 October), around the third hour of the aforesaid day, A.D. 1271, before the official of the archdeacon of Huntingdon, hearing cases by ordinary authority, in a case of matrimony which was pending between Matilda de la Leye, plaintiff on one said, and Adam Attebury, defendant on the other, where on the said day and at the said hour the said official in the said case proceeding rashly, rendered an inequitable²² definitive sentence for the said woman against the aforesaid Adam, as he says.²³ From this sentence as from an inequitable sentence, the same (Adam) appealed to the Holy See and to the see of Canterbury for protection of his appeal²⁴ in English and without writing, as he says. Immediately afterwards master Thomas Pollard²⁵ in writing and in Latin and afterwards orally in French, similarly appealed and asked for *apostoli*,²⁶ as he says. These *apostoli* the said official refused to grant him, as he says. Asked how he knows this, he says he knows it because he was present and saw and heard these things done. Asked how he knows that the official was

²⁰ “Synods” were more important ecclesiastical gatherings than “chapters” and tended to be held once or twice a year. This one probably took place on 8 October 1271. See the next set of depositions.

²¹ co. Beds.

²² *iniquam*. The word can also mean “wicked,” not in the colloquial sense of that word.

²³ The style of this deposition differs from that of the previous ones in that, among other things, this one is sprinkled with a large number of “as he says.” Before we draw the conclusion, however, that this examiner was skeptical of the veracity of this witness, we should remember that this deposition was taken in a different court. It may have been the style of the Court of Canterbury to use a large number of “as he says,” whereas it was not the style of the court of the official of the archdeacon of Huntingdon to do so.

²⁴ Subsequently Adam abandoned his appeal to the Holy See, and the parties agreed to have the case determined in the Court of Canterbury.

²⁵ Not otherwise identified, the title “master” suggests, but not quite prove, that Pollard was a university graduate.

²⁶ These were letters of protection that were routinely granted to appellants. The fact that the official did not grant them (if the witness is to be believed) suggests that the official thought that the appeal was frivolous.

hearing the case by ordinary authority, he says he knows this because the same day the official held a full chapter openly, and this was one of the cases argued in this chapter. Asked why the said A. was called to judgment against the said woman, he says because the said woman asked that this A. be adjudged her husband because he contracted marriage [with her] by words expressing mutual consent, as he says, and he saw and heard this, as he says. Asked how he knows that the said official rashly proceeding rendered an inequitable definitive sentence against the mentioned A., he says that he knows this because he (the official) followed what was said by some witnesses produced against the aforesaid A. One of them was and is the sister of her who produced her. Alice the witness is noted as infamous for witchcraft and theft, and is commonly regarded as a prostitute in those parts. Asked who was present at the appeal thus taken, he says that he and his co-witness, John, and many others both clerk and lay, as he says.

[John de Raddeburne, also unlettered, testifies to the same effect, except that he does not know whether *apostoli* were granted or not.]

Here are some of the questions that you might want to address. (A good essay need not address all of them, you might want to pick and choose.)

- (1) What institutions are evidenced by this case? Briefly, sketch out the prior and subsequent history of these institutions. (This is a question about framework; don't spend a lot of time on it.)
- (2) What is the form of procedure being used by these institutions? Briefly sketch out the prior and subsequent history of this form of procedure. (This is a question about framework; don't spend a lot of time on it.)
- (3) What is the nature of the exception that Adam makes to the testimony of Lucy? Why does Adam's exception say that if he proves either of his exceptions against Lucy he will have won his case? How does the exception suggested by Adam's witness, Robert, differ? To what extent are these exceptions supported by Tancred (*Materials*, p. IX-4 to IX-6)? How would these exceptions have been treated under the procedure described in Maranta's *Speculum aureum* (*Materials*, pp. XII-6 to XII-12)? under the *Ordonnance pour la procédure civile* (*Materials*, pp. XVI-4 to XVI-6).
- (4) What do your answers to question (3) tell you about how the law about witnesses developed between the thirteenth and the seventeenth centuries.
- (5) Have Lucy's witnesses (assuming that we believe them) said enough to allow her to prevail in the case under Alexander III's rules about marriage formation? Have they said enough to allow her to prevail in the case in a jurisdiction that had adopted the rules about marriage formation prescribed by the council of Trent (*Materials*, pp. XVI-2 to XVI-3)? by the *Ordonnance of Blois* (*Materials*, p. XVI-3).
- (6) Does this case tell you anything about why the council of Trent adopted the rules that it did? why the French adopted the *Ordonnance of Blois*?
- (7) What does the ruling of the archdeacon of Huntingdon's official tell us about the role of the judge as he interacts with the social situation of the parties?
- (8) Considering how the Court of Canterbury ruled in *Smith c. Dolling* (*Materials*, p. XIV-2 to XIV-6), how do you think that same Court is going to rule in this case?
- (9) What do your answers to the previous questions tell you about the relationship of procedural and substantive law in the history of Western legal development?