Charles Donahue, Jr., 'Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law', in Morris S. Arnold, Thomas A. Green, Sally Scully, and Stephen White, ed., *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* (Chapel Hill: North Carolina University Press, 1981), 127–158.

5 Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law

Charles Donahue, Jr.

The study of receptions, or as one student would have it, transplants, has commanded considerable attention in the field of legal history recently. For some, the fact that the whole or a significant part of a foreign legal system can be received by another system indicates that the links between law and society are tenuous at best.[1] For others, the length of time that any reception or transplant takes in order fully to be implemented is indicative of the extraordinarily close relationship between law and society.[2] The reception of Romano-canonic witness procedure by the medieval English church courts provides some support for both points of view. What this reception may tell us about the broader question of the relationship between law and society is treated in the last section of this essay. We begin, however, first, by outlining the Romano-canonic law of witness proof; second, by examining how that law was received into the practice of the English church courts; and third, by looking at the ways English practice differed from what the learned law suggested it ought to be.

I

The most immediately practical result of the revival of academic law study at Bologna in the twelfth century was the joint development by both civilians and canonists, generally using sources from both laws, of

Research for this paper was supported in part by generous grants from the W. W. Cook Fund of the University of Michigan Law School. Earlier versions of this paper were given at a joint meeting of the Columbia University Seminar on the History of Legal and Political Thought and the Seminar on Medieval Studies and at the 1979 Annual Meeting of the American Society for Legal History. Archival material from the Borthwick Institute of Historical Research is used with the kind permission of the Director, Dr. D. M. Smith.

1. E.g., A. Watson, *Legal Transplants* (Edinburgh, 1974).

2. E.g., J. Carbonnier, "L'influence du Code français sur la société européenne," *Bulletin d'information de l'Association internationale d'histoire du droit et des institutions* 10 (1975): 19–27.

In Morris S. Arnold, Thomas A. Green Sally A. Scully and Stephen D. White, eds., On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne (Chapel Hill: University of North Carolina Press, 1981), pp. 127-58.

what has come to be known as the Romano-canonic procedural system.[3] Although little of the work of the first Bolognese jurists, either civilian or canonist, was designed to provide guidance on matters of procedure to practicing lawyers and judges, an outpouring of practical procedural writing began when Bolognese learning was coming to have a noticeable effect on the workings of the church courts, particularly the papal court under Alexander III (1159–81).[4] By the end of the twelfth century, books on the course of judgment, *ordines judiciarii*, had become a most popular form of Romano-canonical writing.[5] Probably the greatest *ordo* is Tancred's, composed around 1215;[6] the most comprehensive is Durantis's, the second edition of which probably was finished around 1291.[7] In addition to the *ordo judiciarius*, which describes the entire course of a legal proceeding from initial process through appeal, the academic lawyers also composed treatises on specific aspects of procedure. For our purposes the most important are the various short treatises on witnesses.[8]

When the Bolognese glossators began writing, the standard methods of proof in the secular courts were ordeal, battle, and compurgation, and ordeal and compurgation were used in the church courts as well.[9] Asking questions of those who knew or could find out about the case was not unknown, but it was clearly not the preferred method of proof. Now

3. The literature on the topic is vast. See K. Nörr, "Die Literatur zum gemeinen Zivilprozess," in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 1, *Mittelalter*, ed. H. Coing (Munich, 1973) (hereafter cited as Nörr, in *Handbuch*), pp. 383–400, esp. the literature cited on pp. 386–87.

4. The first piece of academic writing directed specifically to someone conducting a court is by the civilian Bulgarus, whose *ordo* or *excerpta legum*, written at the request of the chancellor of the Roman church, dates from between 1123 and 1141. It is edited by L. Wahrmund, in *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 4, pt. 1 (Innsbruck, 1905); see Nörr, in *Handbuch*, p. 387, and literature cited. For the relationship between the work of the proceduralists and the papal court, see K. Nörr, "Päpstliche Dekretalen in den ordines iudiciorum der frühen Legistik," *Jus Commune* 3 (1970): 1–9; K. Nörr, "Päpstliche Dekretalen und römisch-kanonischer Zivilprozess," in *Studien zur europäischen Rechtsgeschichte [für Helmut Coing]*, ed. W. Wilhelm (Frankfurt, 1972), pp. 53–65.

5. Listed by Nörr, in *Handbuch*, pp. 387–91.

6. Edited by F. Bergmann, in *Pilii, Tancredi, Gratiae, Libri de iudiciorum ordine* (Gottingen, 1842) (hereafter cited as Tancred, *Ordo*), pp. 88–316.

7. There is no modern edition. I have used Basel, 1574; reprint ed., Aalen, 1975.

8. Thirteen are listed in S. Kuttner, "Analecta iuridica vaticana," in *Collectanea vaticana in honorem Anselmi card. Albareda*, Studi e Testi, vol. 219 (Vatican City, 1962) (hereafter cited as Kuttner, "Analecta iuridica"), pp. 430–31. One (no. 13) is known only by reference. To this we may add that no. 3 (British Library Egerton MS 2819 [not 3819], fols. 3v–11v) bears a marked resemblance to no. 8 (Vatican Library MS Barb. lat. 1440, fols. 15vb–21ra), with a different *proemium*. Whether this means that the *Summa de testibus* which Johannes Andreae ascribed to Bagarottus (see Kuttner, "Analecta iuridica," pp. 425–27) is in fact the work of an Anglo-Norman "Master G." is a question that must await a future paper.

9. See generally *La preuve*, vol. 2, Receuils de la Société Jean Bodin, vol. 17 (Brussels, 1965), especially J.-Ph. Lévy, "L'évolution de la preuve, des origines à nos jours," pp. 9–70; F. Ganshof, "La preuve dans le droit franc," pp. 71–98; J. Gaudemet, "Les ordiales au moyen âge: doctrine, législation et pratique canoniques," pp. 99–136; and R. van Caenegem, "La preuve dans le droit du moyen âge occidental," pp. 691–754.

there is nothing about ordeal or battle or compurgation in the classical Roman law texts to which the early glossators addressed themselves, although some of the ancient canonic texts did deal with these methods of proof.[10] The Roman law texts deal exclusively and the canon law texts principally with proofs by witnesses and written instruments. The jurists' discovery that "the law" called for proof by "rational" methods—witnesses and instruments—rather than by "irrational" methods—ordeal, battle, and compurgation—was among the causes of the intellectuals' attacks in the twelfth century on the irrational methods of proof.[11]

We find some reflections of this hostility to the irrational methods of proof in the writings of the early proceduralists.[12] The attitude reflected in an anonymous *Summula de testibus* of the late twelfth century, perhaps by an Anglo-Norman canonist, is typical. The *Summula* repeats an injunction found in *Causa* 2 of Gratian's *Decreta*: a bishop is not to be judged unless he himself confesses or unless he is regularly convicted by innocent witnesses canonically examined.[13] This means, the summist notes, "not in single combat nor in [the trial] of hot iron, nor of cold or hot water, nor of lashes, but of oath alone."[14] Few proceduralists address themselves as specifically to the issue of irrational methods of proof, but many emphasize that witnesses are the best method of proof, better than written instruments, and, by implication, far better than ordeal or battle.[15]

At the Fourth Lateran Council in 1215, as is well known, the church withdrew her support for the ordeal.[16] The development of an alternative system of proof was the work of the Romano-canonic proceduralists up to and including Tancred. Relatively little innovation occurs after Tancred's time, and we can best explore the Romano-canonic system of witness proof by outlining Tancred's titles on witnesses.

10. See especially the texts collected in C.2 q.5; see also Gaudemet, "Les ordiales"; and J.-Ph. Lévy, *La hiérarchie des preuves dans le droit savant du moyen-âge*, Annales de l'université de Lyon, 3e sér., droit, fasc. 5 (Paris, 1935), pp. 131–35.

11. See Gaudemet, "Les ordiales"; and H. Nottarp, *Gottesurteile*, Kleine allgemeine Schriften, Geschichtliche Reihe, nos. 4–8 (Bamberg, 1949), pp. 222–97; see now P. Hyams, "Trial by Ordeal: The Key to Proof in the Early Common Law," in this volume, for the suggestion that the decline of the ordeal was the product of social rather than intellectual forces. Whatever the ultimate cause, it is clear that the beginnings of the attacks on the ordeal considerably antedated the revival of the academic study of law.

12. There is considerably more material of relevance to this debate in the writings of the decretists. See J. Baldwin, "The Intellectual Preparation for the Canon of 1215 against Ordeals," *Speculum* 36 (1961): 613–36, at 619–26.

13. C.2 q.1 c.2.

14. Cambridge, Trinity College MS 0.40.70, fol. 182v: "Non in monomachiam necque [*leg.* examinacionem] candentis ferri necque acque frigide necque verberum sed solius iuramenti."

15. For the controversy on the witnesses vs. instrument point and its ultimate resolution in favor of witnesses, see Lévy, *La hiérarchie*, at pp. 84–105, and sources cited.

16. Lateran IV (1215) c. 18, *Conciliorum oecumenicorum decreta*, ed. J. Alberigo et al., 3d ed. (Bologna, 1972), p. 220 (= X 3.50.9); cf. X 5.35.3. See generally Baldwin, "Intellectual Preparation for the Canon of 1215."

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.[17]

Once produced, the witnesses are 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.[18]

When all the witnesses have been examined, the parties are to renounce further production of witnesses. The witnesses' depositions will then be published by the notary who has written them down. 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 were produced, or he may seek to demonstrate that their testimony is false in some respect.[19]

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: (1) 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; (2) witnesses are to be examined carefully to determine if they are telling the truth about events they saw and heard themselves; and (3) 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.

As a general matter, Tancred tells us, two witnesses make a full proof.[20] But not everyone may be a witness. Slaves, women (in certain circumstances), those below the age of fourteen, the insane, the infamous, paupers (although Tancred has some doubts about this), and infidels may not be witnesses. Criminals may not be witnesses. No one may be a witness in his own cause. Judges, advocates, and executors may not be witnesses in cases in which they have performed their official duties. Children may not testify on behalf of their parents or parents on behalf of their children, with certain exceptions. Familiars and domestics of the producing party

17. Tancred, *Ordo*, 3.8 (pp. 230–36); see generally *Select Cases from the Ecclesiastical Courts of the Province of Canterbury*, ed. N. Adams and C. Donahue, Jr., Selden Society, vol. 95 (London, 1980) (hereafter cited as Adams and Donahue, *Select Cases*), pp. 37–56.

18. Tancred, *Ordo*, 3.9 (pp. 236–37).

19. Ibid., 3.10–11 (pp. 240–45).

20. Ibid., 3.7 (p. 228).

and those who are enemies of the party against whom they are produced may not be witnesses.[21]

Witnesses are to be questioned, Tancred continues, about all the details of what they have seen and 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 the consul was, and so on. In only a few instances, such as in computing the degrees of relationship in incest cases, is hearsay testimony to be accepted.[22]

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 who are 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 and status, then the judge should stand with the side that has the greater number of witnesses. If they are of the same number and dignity, then absolve the defendant.[23]

The doctrinal development from the first treatise on witnesses, written by Albericus de Porta Ravennate sometime in the 1170s,[24] to Tancred is substantial. Albericus's treatise, derived solely from Roman law, has a much shorter and anachronistic list of possible exceptions against the persons of witnesses, mentions the two-witnesses rule but does not go into the question of how the witnesses are to be examined, and contains no advice at all on how the judge is to resolve conflicts among the witnesses.

In the development of practical advice on questioning and on balancing discordant testimony, papal decretal law played a considerable role, as the numerous citations in Tancred to the *Compilationes antiquae* indicate.[25]

21. Ibid., 3.6 (pp. 223–28).

22. Ibid., 3.9.2 (pp. 238–40).

23. Ibid., 3.12 (pp. 245–48).

24. Edited by E. Genzmer, in "Summula de testibus ab Alberico de Porta Ravennate composita," in *Studi di storia e diritto in onore di Enrico Besta*, vol. 1 (Milan, 1937), pp. 491–510. For Gratian on witnesses see F. Liotta, "Il testimone nel decreto di Graziano," in *Proceedings of the Fourth International Congress of Medieval Canon Law*, ed. S. Kuttner, Monumenta iuris canonici, ser. C, vol. 5 (Vatican City, 1976), pp. 81–93, and sources and literature cited therein.

25. On the role of the decretals see Nörr's two articles, cited above in n. 4.

Perhaps of equal importance, however, was the work of the proceduralists of the generation preceding Tancred. The first extended discussion I have found of how to question a witness is in an anonymous *Summula de testibus*, dating from around 1200.[26] On the other hand, there are hints of what is to be the later approach as early as 1171 in the French canonist *ordo* "In principio."[27] By far the most elaborate treatment of how to evaluate conflicting testimony is to be found in Pillius's *Summula* on witnesses, which probably dates from shortly before 1195.[28] Pillius's rule-laden treatment of the issue stands in marked contrast to that of the earlier anonymous *ordo* "Si quis de quacumque re," which states: "In sum respect should never be paid to the multitude of witness but to the sincere faith of the testimony and to the testimony that the light of truth rather aids, because the judge, once he has examined what is said in the constitutions and responses of the jurists on these matters, can know more than the discipline of law can teach or permanently define."[29] Similar statements, derived from a long dictum in Gratian's *Causa* 4, may be found in the French *ordo* "Tractaturi de judiciis" of about 1170[30] and the Anglo-Norman *ordo* "Quia judiciorum" of about 1185.[31]

In sum, then, by 1215, Romano-canonical procedure had developed a means for examining witnesses in such a way as to elicit the truth. It had also developed a series of rules for rejecting the testimony of those who were unlikely to tell the truth and another series for resolving conflicts in the testimony presented. The procedure necessarily left some discretion to the judge, but the fundamental tendency of this procedural writing is to limit the judge's discretion, to prescribe rules by which he must decide, rather than to provide guidance as to how he was to exercise his discretion. This same concern with limiting the discretion of the judge is reflected in the maxim that the academic proceduralists were exploring in a number of different contexts: the judge is to judge according to things

26. Edited by E. Genzmer, in "Eine anonyme Kleinschrift de testibus aus der Zeit um 1200," in *Festschrift Paul Koschaker*, 3 vols. (Weimar, 1939), 3:399.

27. Edited by F. Kunstmann, in "Über den ältesten Ordo judiciarius," *Kritische Überschau der deutschen Gesetzgebung und Rechtswissenschaft* 2 (1855): 19.

28. Pillius, "Quoniam in iudiciis frequentissime," Vatican Library MS Chigi E.VII.218, fol. 84rb; Rome, National Library MS Sessor. 43, fol. 74r; Cambridge, Trinity College MS B.1.29, fol. 217r; for the date see Kuttner, "Analecta iuridica," at p. 430.

29. Edited by N. Rhodius, as Bk. 4 of *Placentini iurisconsulti vetustissimi de varietate actionum libri sex* (Mainz, 1530), 4.17 (p. 105): "In summa nequamque ad testium multitudinem respici opportet, sed ad synceram testimoniorum fidem et testimonia, quibus potius lux veritatis adsistit [citations] Quod iudex, discussis omnibus quae in responsis et constitutionibus de his caventur magis scire poterit, quam ulla iuris possit disciplina doceri vel in perpetuum definiet." For the work see Nörr, in *Handbuch*, p. 387.

30. "Tractaturi de judiciis," ed. C. Gross, *Incerti auctoris ordo judiciarius* (Innsbruck, 1870), 13.3 (pp. 120–21). "Si vero alter litigantium multos habeat testes, alter paucos, non pluralitati credendum est, immo conversatio et vita et fides illorum et istorum consideranda est et secundum hoc judicandum est." For the work see Nörr, in *Handbuch*, p. 388. The *dictum* is C.4 q.3 *dictum post* c.2 and c.3.

31. Ed. J. von Schulte, "Der Ordo judiciarius des Codex Bambergensis P.I.11," *Sb. Akad. Vienna* 70 (1872): 310. For the work see Nörr, in *Handbuch*, p. 387.

alleged and not according to his conscience (*judex secundum allegata non secundum conscientiam judicat*).[32]

It is not surprising that the academic writers on procedure should have been urging rules that would eliminate, or at least substantially reduce, the judge's discretion. The overall thrust, after all, of the revival of academic law was the development of coherent bodies of doctrine, the harmonization of the diverse sources that commanded academic attention.[33] Further, and perhaps more important, the academic proceduralists were urging the adoption of a system in which judgment was given not by God, invoked by battle, ordeal, or the inscrutable oath of the parties and their compurgators, but rather by all-too fallible men, judges, on the basis of the testimony of equally fallible witnesses. For such a fundamental change to have been acceptable, it was necessary for people to believe—and perhaps even for it to be true—that the ultimate decision of the case not be within human discretion but be dictated by the rules of law. People might accept a judgment of the law rather than a judgment of God; it was less likely that they would accept a judgment of man rather than one of God.[34]

Although there were relatively few advances in doctrine after Tancred, there were a number of advances in the forms by which these doctrines were implemented. For example, Tancred does not make it completely clear that the plaintiff is to submit a list of articles, statements of fact concerning which his witnesses are to be examined. Shortly after Tancred this was to become standard practice.[35] It also became standard practice for the defendant to submit a list of proposed interrogatories for the witnesses, and the examiner was bound to ask these, unless they were unduly repetitious.[36]

32. For a detailed and sophisticated treatment of the development of this maxim, see K. Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit*, Münchener Universitätsschriften, Reihe der juristischen Fakultät, vol. 2 (Munich, 1967). Of course, the maxim and the rules about witnesses are directed to slightly different ends. The former limits the judge's discretion by ensuring that the parties control the process; the latter limits the judge's discretion by ensuring that what the parties produce is evaluated according to rules of law. See further below, next paragraph.

33. See especially S. Kuttner, *Harmony from Dissonance* (Latrobe, Pa., 1960).

34. For this point see J. Langbein, *Torture and the Law of Proof* (Chicago, 1977), pp. 5–8. For this point to be valid it is not necessary that the elaboration of Romano-canonical procedure have been the cause of the decline of the "irrational" methods of proof—a proposition about the truth of which there is considerable doubt. See, e.g., van Caenegem, "La preuve," esp. pp. 752–53; and Hyams, "Trial by Ordeal." Rather, it is simply necessary that the academic proceduralists have been aware that their method of proof had not been adopted by all courts and that one of the possible objections to it, whether articulated or not, might be the amount of discretion it gave to the judge. In parts II and III below, we shall see that the real alternative to the Romano-canonic system in England was the jury, judgment not by God but by the community, rather than the judge.

35. See, e.g., Gratia Aretinus, *Summa de judiciario ordine* 2.5, Tancred, *Ordo*, at p. 369; and Adams and Donahue, *Select Cases*, at p. 47.

36. Durantis, *Speculum*, 1.4.[2]*de teste*.6.21 (pp. 322–23); see generally, ibid., 1.4.[2]*de teste*.6 (pp. 319–23); and Adams and Donahue, *Select Cases*, at pp. 47–48.

One might expect that the rigidity of the doctrines announced by Tancred would have softened after judgment by human judges on the basis of witness testimony had become the accepted norm. In fact, quite the opposite is the case. One of the notable differences between Tancred's and Durantis's treatment of witnesses is the larger number of classes of people whom Durantis excludes from testifying.[37] The thirteenth- and fourteenth-century writers also refine the rules on what makes a full proof, carefully dividing and defining *indica*, *probationes semiplenae*, and *probationes plenae*.[38] It is not until the fifteenth century that we begin to find authors willing to relax the strict standards of Romano-canonical proof,[39] and the beginning of the fifteenth century will be the ending point of our exploration of the reception of the Romano-canonical law of witness proof in the English church courts.

II

The doctrines announced by the academic proceduralists had, at least in their broad outlines, an early reception in the English ecclesiastical courts.

Of the English church courts prior to 1200 we know tantalizingly little. No court archives (as opposed to litigation documents kept by one of the parties normally as a muniment of title) survive from the period before the pontificate of Hubert Walter as archbishop of Canterbury (1193–1205), so the history of the English ecclesiastical courts from the Conqueror to the reign of Richard I must be pieced together from chance survivals. There is, however, a handful of scattered documents that shed some light on how claims were proved before the English ecclesiastical courts. They indicate that the English church courts, like the secular, made considerable use of compurgation, although there seems to be no evidence that they used the ordeal.[40] These documents also indicate that

37. Compare Tancred, *Ordo*, 3.6 (pp. 223–28), with Durantis, *Speculum*, 1.4.[2]*de teste*.1 (pp. 289–304). F. Sinatti D'Amico, "Il concetto di prova testimoniale: spunti di una problematica nel pensiero dei glossatori," *Rivista di storia del diritto italiano* 39 (1966): 155–85, notes the same hardening of the doctrine in the period after Tancred, a hardening that she attributes to the influence of canonic practice. The rest of this essay will suggest that canonic practice, at least in England, was more like the arbitral justice of the Italian communes than Sinatti D'Amico would have us believe.

38. See Lévy, *La hiérarchie*.

39. See B. Schnapper, "Testes inhabiles: les témoins reprochables dans l'ancien droit penal," *Tijdschrift voor Rechtsgeschiendenis* 33 (1965): 576–616. For developments since that time, see U. Mosiek, "Der Grundsatz 'Unus testis nullus testis' und seine Geltung im kanonischen Recht," *Revue de droit canonique* 25 (1976): 371–77.

40. For compurgation see, e.g., the celebrated case of Archdeacon Osbert accused of murdering Archbishop William of York, in John of Salisbury, *Letters*, ed. W. Millor, H. Butler, and C. Brooke, 1 vol. to date (London, 1955), 1:27. For other cases involving criminous clerks *temp*. Becket, see H. Richardson and G. Sayles, *The Governance of Mediaeval England*, Edinburgh University Publications, vol. 16 (Edinburgh, 1963), pp. 303–4. Cf. P. Fournier, *Les officialités au moyen-âge* (Paris, 1880), pp. 262–70. For the use of ordeals in ecclesias-

the English church courts, like the secular, were experimenting with ways of making use of sworn members of the community to aid in the resolution of disputes. As is the case with the secular courts, the origins of the use of these jurylike bodies in the church courts may lie in Continental practices of inquest by secular or ecclesiastical officials for administrative, disciplinary, or peace-keeping purposes.[41] By the twelfth century, however, we find such bodies being used in what today we would call civil cases.

For example, between 1123 and 1148, Alexander, bishop of Lincoln, having taken counsel with the chapter of St. Mary's Lincoln, ordered one W. B. "to make a recognizance by the oath of lawful men" to determine whether the land of Banbury belonged to the demesne of the bishop of Lincoln when Alexander's predecessor, Bishop Robert, gave Eynsham abbey the tithe of Banbury. The tithe was currently the subject of litigation between the abbey and one Willelmus Gramatica. If the land did belong to Bishop Robert, the tithe was to be awarded to the abbey.[42]

Between 1160/1 and 1162, Gilbert Foliot, bishop of Hereford, and Godfrey, archdeacon of Worcester, sitting as papal judges delegate, rendered a sentence in a case between the canons of St. Mary's Warwick and the canons of the Holy Sepulchre, Warwick:

> We therefore, afforced by apostolic authority to the decision of the case, keeping in mind that proof ought by law to rest on the plaintiff and that he ought to have reasons by which he might show that what he contends is true, adjudged the proof of those things which they were claiming to the canons of St. Mary. By the oath, therefore, of six priests and six laymen it was proven that that part of the parish which the already-said canons were claiming belonged to their church, and by the oath of four priests and three laymen again it was proven that the mentioned 30d. were owed to their church by an old agreement and were paid to their church by the hand of the prior[s] of St. Sepulchre, Emery, Anthony and Ralph, on the feast of All Saints.[43]

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tical courts outside England, see Gaudemet, "Les ordiales," at p. 117; and C. Morris, "Judicium Dei," *Studies in Church History* 12 (1975): 103–9.

41. For the possible connection between the ecclesiastical and secular institutions, see J. Goebel, Jr., *Felony and Misdemeanor* (New York, 1937), pp. 322–26.

42. *The Cartulary of Eynsham*, vol. 1, ed. H. Salter, Oxford Historical Society, vol. 49 (Oxford, 1907), pp. 41–42 [no. 15A].

43. ". . . Nos itaque quos ad ipsius cause decisionem apostolica vigebat auctoritate [*leg.* auctoritas], attendentes actori probacionem de iure incumbere opportere eumque raciones habere quibus quod intendit verum esse insinuet, canonicis sancte Marie probacionem eorum quod intendebant adiudicavimus. Sex itaque sacerdotum et sex laicorum iuramento probatum est partem illam parochie quam vendicabant iam dicti canonici ad ecclesiam suam pertinere et quatuor sacerdotum triumque laicorum iuramento item probatum est memoratos triginta denarios ecclesie sue ex antiqua paccione fuisse debitos et per manum prioris sancti Sepulcri Almeri, Antonii, Radulphi in solempnitate omnium sanctorum fuisse solutos. . . ." (Warwick College Cartulary, London, Public Record Office MS E.164/22, fols. 18r–19r [no. 27]).

A separate charter of the archdeacon of Worcester in the same cartulary simply states that the judges patiently heard the allegations of the parties and had adjudged that right and truth lay on the side of St. Mary's by the abundant proof of the witnesses and the faithful inspection of instruments.[44]

In 1173, Pain, the abbot of Sawtry, and Herbert, the prior of St. Neot's, made a concord concerning the amount of water that could be taken from the abbot's mills without harming the prior's. The parties chose twelve lawful men, six millers and six others knowledgeable and wise enough to settle the dispute. These men decided the case after having "sworn on the gospels that they would say the truth, all interference having been removed."[45] There are at least two other examples of arbitration under ecclesiastical auspices making use of a sworn verdict in this way, one in 1188, another from the late date of 1246.[46]

The pattern established by these cases and others like them[47] makes it reasonably clear that proof of fact by a jurylike body was not unknown to the English ecclesiastical courts in the twelfth century. Indeed, as R. C. van Caenegem has shown, such documents illustrate a typical institution, one that on the secular side was to become the assize and inquest juries in the reign of Henry II, the jury in writs of entry and trespass in the reign of John, and the criminal trial jury in the reign of Henry III.[48]

We can, however, exaggerate the jurylike characteristics of these early uses of the sworn testimony of neighbors in the ecclesiastical courts. The institution that we are looking at in the early and mid-twelfth-century documents is as much the ancestor of the canonical witness as it is the ancestor of the secular jury, as the archdeacon of Worcester's description of the Warwick case suggests. Not until the late twelfth century does a distinction appear between the two institutions, the academic law shaping the canonic institution into what today we would call witnesses and the assizes of Henry II shaping the English secular institution into the familiar jury.[49]

44. Ibid., fol. 19v [no. 30].

45. St. Neot's Cartulary, British Library MS Faustina A.IV, fols. 38r–38v, reported in R. van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Society, vol. 77 (London, 1959), p. 75.

46. *Newington Longeville Charters*, ed. H. Salter, Oxford, Historical Society, vol. 3 (Oxford, 1921), p. 89 [no. 116] (1166 X 1188); Oxford New College MS 13,885 (*ex* Writtle 401) (1246).

47. E.g., *Cartulaire de Loders*, ed. L. Guilloreau, Chartes anglo-normandes, vol. 1 (Evreux, 1908), p. 59 [no. 50] (1169).

48. See van Caenegem, *Royal Writs*, pp. 40, n. 2, 65, 73, 75–76, for a discussion of all of these examples except the Writtle charter, for which see J. Sayers, *Papal Judges Delegate in the Province of Canterbury, 1198–1254* (Oxford, 1971), p. 87, n. 3.

49. That Glanvill should state that the exceptions which can be made to the jurors of the grand assize are the same as those which can be made to witnesses in the canon law suggests that contemporaries saw the connection between the two institutions (*Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur*, ed. and trans. G. Hall [London, 1965], II, 12 [p. 32]).

If we have to focus on one characteristic distinguishing the canonic witness of academic writing from the juror of English practice, it would be that the English jury's verdict is essentially inscrutable. True, an English justice will occasionally ask specific questions of the jury, occasionally will plainly disbelieve their story, but this is as far as it ever goes. The only way the jury's verdict can be upset is by the separate process of attaint.[50] In the developed canonic system, on the other hand, cross-examination is not only encouraged but required, and introducing further witnesses to disprove what the previous witnesses have said is standard practice.

Those who see the essential difference between witnesses and juries in party- rather than court-production, and those who see that essential difference as lying in the fact that witnesses are notionally eyewitnesses whereas jurors are not, have reversed at least the logic if not the chronology. It is because the testimony of witnesses can be upset by cross-examination and by introducing the testimony of other witnesses that the parties rather than the court can be relied on to produce them. It is because the testimony of witnesses must be subject to cross-examination that they must be, at least notionally, eyewitnesses of the event. Put another way, once the English secular jury has found for the plaintiff, there is nothing left for the court to do but to render judgment for the plaintiff. Once the canonic plaintiff and defendant have produced their witnesses, the court's job really begins. If this is right, then what we are looking at is an essential difference in the method of adjudication of much greater significance than simply a difference in the method of proof.

This distinction, however, operates on a somewhat theoretical level: it distinguishes the theory of witnesses in academic Romano-canon' law from the theory that can be discerned as underlying fully evolved English jury practice. But however fully evolved the academic theory of witnesses was in the time of Tancred, it remains to be seen whether that theory was applied in practice, and, of course, English jury practice was anything but fully evolved by 1215. Though we cannot, unfortunately, trace the development of the inscrutable quality of the English jury, we can suggest how, if not why, the eminently scrutable quality of the canonic witness developed.

A major collection of ecclesiastical court documents survives from the pontificate of Hubert Walter.[51] Of the ninety-odd documents in this collection, some twenty-two are depositions. These give us a clear insight

50. See Sir F. Pollock and F. Maitland, *The History of English Law before the Time of Edward I*, 2d ed., reissued with a new introduction and select bibliography by S. Milsom, 2 vols. (Cambridge, 1968) (hereafter cited as *P&M*), 2:622–32.

51. Described in Adams and Donahue, *Select Cases*, at pp. 3–4, 8–12; calendared in ibid., pp. 104–14. A *familiaris* of Hubert Walter, Ricardus Anglicus, wrote an *ordo judiciarius*, probably some time before his return to England in 1198. The *ordo* is strictly academic and provides no help for the student of English canonic procedure. See generally W. Bryson, "Witnesses: A Canonist's View," *American Journal of Legal History* 13 (1969): 57–67.

into the extent to which Hubert Walter's court had conformed its practice to that of the academic canonists. For example, one of these depositions states:

> William de la Waie, sworn, said that he was present when it was agreed between Gilbert Martel and Hugh de Kimble at Bucklebury that the land of the said Hugh de Kimble be handed over to Gilbert in farm, and they took an oath. He was also present afterwards when Hugh handed over a signed document to Gilbert in the house of the same Gilbert, and he heard the agreement, inserted in the chirograph which Gilbert had, read; he does not know about the price of the land. Asked about the time, he said that the first agreement was entered into on a Monday, three years ago, around Hockday.[52]

Clearly this witness is being asked about what he knows. The price was a key issue in the case, but the witness was not expected to inform himself about it. Despite the fact that this type of questioning had not yet made much of an appearance in the academic writing, we already see the witness being asked about the time of the events. In another deposition in the same case the witness will be asked about the place where the agreement took place and whether the parties were standing or sitting.

"Odo de Burghfield, sworn, said that he knows nothing except by report of his son, who at that time was with Gilbert, and of others."[53] This witness's testimony is worth no more than a line. He was not an eyewitness; there were other such witnesses, and their testimony is to be preferred.

The next witness has a slightly different version of the story and knows nothing about the oath. His testimony is basically consistent, but he adds some details and omits others, and so it is reported in full.[54]

The next witness, on the other hand, is reported briefly: "John Bonell, sworn, says the same in every respect as William de la Waie."[55] Here we see what was to continue to be a usual characteristic of depositions in the southern (but not the northern) province. Witnesses who repeat previous testimony do not have their depositions given in full; the clerk simply indicates that they repeat. This is clearly the result of the press of business, but it is a practice that is criticized in academic writing, for obvious reasons.[56]

Depositions of fifteen more witnesses are given. Most of them simply repeat what has been said before; others add some detail.[57]

This production of witnesses is not numbered. Another document from the same case is labeled "first production of Gilbert Martel against Hugh

52. Adams and Donahue, *Select Cases*, A.5, p. 16.
53. Ibid.
54. Ibid., pp. 16–17.
55. Ibid., p. 17.
56. See ibid., pp. 49–50; Durantis, *Speculum* 1.4.[2]*de teste*.7.8 (p. 325).
57. Adams and Donahue, *Select Cases*, p. 17.

de Kimble," and other documents from the same period indicate that the standard practice of three productions was being followed.[58]

In these early depositions, in contrast to later depositions, there are only occasional indications that the examiner was following a set scheme of questions. For example, in another set of depositions from the Kimble case, after a witness has testified about what he does know, we find the entry: "Asked about the time of year, the payment of the money, how many years ago, if anything was put in writing between them, about any other agreement, he says he does not know."[59] Some of these questions would suggest themselves simply from what had been said before, but others, particularly those about a writing and another agreement, suggest that the examiner may have had some predetermined scheme of questions. One of the few commissions to take testimony that has survived from this period outlines the general issue at stake in the case and instructs the examiners to take testimony "on all the annexed articles" (which unfortunately have not survived).[60] We do not know, however, whether the court developed these articles or whether the producing party developed them, as he did in later practice, nor do we know whether articles were only used in cases like this one where the examination of the witnesses was committed to someone distant from the court. There is no evidence, moreover, of the use of interrogatories proposed by the adverse party, a practice that was to become usual by the end of the century.[61]

Three of the cases from this period contain depositions on behalf of both parties.[62] Although much about the defense of cases in this period remains unclear, none of the defendants' depositions refers either to the persons or the statements of the witnesses of the plaintiff, from which we may surmise that what were later called "exceptions to witnesses and what they said" were unknown in this period. One set of defendants' depositions suggests that his witnesses were produced at the same time as the plaintiff's,[63] a second probably concerns an affirmative defense,[64] the third reveals a jurylike procedure with which we shall deal shortly.[65]

The practice outlined for the *Kimble* case is common to all but two of the depositions I have found from this period. One of the unusual documents is headed simply: "the names of those sworn[66] to inquire about the marriage between Stephen de Bello and Agnes his wife."[67] Thirteen names are given, including those of Stephen and Agnes, suggesting the possibility that each of them may have been swearing twelve-handed, the

58. Ibid., p. 15; cf. ibid., p. 15 (a fourth production).
59. Ibid., p. 16.
60. Ibid., A.1, p. 1.
61. See ibid., pp. 47–48.
62. Ibid., A.2, A.3, A.6.
63. Ibid., A.2. Some of the depositions on both sides are contained in the same document (at pp. 5–6).
64. Ibid., A.6, p. 24.
65. See below, at n. 68.
66. Or is the correct translation "the names of the jurors"? The word is *juratorum*.
67. Adams and Donahue, *Select Cases*, A.8, p. 29.

standard practice in compurgation. "All of these," the document continues, "say the same thing about the affinity, to wit, that Agnes, the wife of Stephen was the wife of Elias, a cook, and Isabella, once the concubine of Stephen, was Elias's mother's sister. The whole neighborhood testifies to this, and it is well known to all." The document then considers another possibly incestuous relationship between Agnes and Stephen, arising out of the spiritual relationship of godparenthood. On this issue only five of the jurors swear, and each tells a specific story.

This document is not, at least in form, a document from a case between Agnes and Stephen, but rather the product of an inquest concerning their marriage. The suggestion is that the matter was being pursued ex officio by the court. Perhaps because of the difference between this type of proceeding and the instance procedure of the Kimble and similar cases, the report of the testimony in block and the presence of parties among those sworn in Stephen and Agnes's case stand in marked contrast to the other depositions of the period and indeed to the rest of this particular document. We are closer here to the inscrutable testimony of neighbors than we are to specific witnesses of particular transactions, which we saw in the Kimble case.

One other case suggests a jurylike procedure.[68] In an instance case between the rector of Barkway and the parishioners of the chapel of Nuthampstead concerning the respective rights of the church and chapel, the rector produces twelve witnesses—the number is chance perhaps. But what are we to say when the parishioners also produce twelve witnesses and when their depositions contain some of the elements of a joint statement that we noticed in Stephen and Agnes's case? Clearly, the transition from jury to witnesses is not yet complete.[69]

There should, of course, be nothing surprising about the ecclesiastical courts of Hubert Walter's time employing jurylike procedures. We know that the English church after Hubert Walter's time employed jurylike bodies both for the presentment of offenders against church law, for example, at synod or visitation,[70] and for administrative information gathering, for example, at inquests into the plenarty or vacancy of a church.[71] Thus the English church did not cease to use jurylike bodies after the twelfth century, bodies for which no authorization could be found in the academic proceduralists. The use of such bodies in the twelfth century suggests that it was a procedure which came naturally to the men of the time; their continued use in criminal and administrative procedure and, if our one example from the mid-thirteenth century may

68. Ibid., A.3, pp. 8–10.

69. Cf. ibid., pp. 107 [no. 22], 11: Peter of Blois claims tithes and asks that an inquisition into the matter be made by twelve of "the more lawful parishioners of the church by their oath."

70. See C. Cheney, *English Synodalia of the Thirteenth Century* (Oxford, 1941), pp. 5–6, 8–10, 28–31.

71. See J. Gray, "The Ius Praesentandi in England from the Constitutions of Clarendon to Bracton," *English Historical Review* 67 (1952): 481–509; cf. Adams and Donahue, *Select Cases*, p. 58 and nn. 1–6, for other examples.

suffice, in arbitration procedure,[72] suggests that it continued to come naturally.

Where we do not find jurylike procedure being used after Hubert Walter's time, however, is in civil litigation. There, witnesses, occasionally supplemented by written instruments, are invariably the method of proof. Here the academic law had its greatest effect. But its effect was not to lead the English church courts to employ an institution for which they had no precedents. Rather, an institution, the sworn testimony of neighbors, that could have become the jury, as it did in the secular courts, became, under the influence of academic writing, the Romano-canonical witness. The question remains, moreover, whether the reception of the Romano-canonical witness as an institution involved the reception of all the Romano-canonical doctrine about witnesses as well.

III

Unfortunately, no depositions dating from between Hubert Walter's time and the 1270s have yet come to light. An extensive collection of ecclesiastical cause papers does survive for the vacancy of the see of Canterbury from 1270 to 1273 and another from the vacancy of 1292–94.[73] For the fourteenth and fifteenth centuries the major collection of cause papers is at York, where we find files of documents from some six hundred cases.[74]

By the time we reach the 1270s in the southern province and the early fourteenth century in the northern, the Romano-canonical system of witness proof was, in broad outlines, fully in place in the English church courts, and all the evidence suggests that it remained so throughout the Middle Ages and beyond. If we look solely to the form by which the medieval English church courts proceeded, we will conclude that the Romano-canonic system of witness proof was received by the medieval English courts. With some allowance for local variation, the form of the procedure follows the academic treatises closely, and the local variation is no greater than what one finds today in various jurisdictions purporting to follow a common body of procedural rules.

After the *litis contestatio* the party having the burden of proof gets three terms, exceptionally four, in which to make positions and produce witnesses.[75] The witnesses are produced in open court and sworn in the

72. See above, at n. 46.

73. Described in Adams and Donahue, *Select Cases*, at pp. 4, 16–17, 32–33, 35–37.

74. See D. Smith, *A Guide to the Archive Collections in the Borthwick Institute of Historical Research*, Borthwick Texts and Calendars, vol. 1 (York, 1973), p. 57; C. Donahue, Jr., "Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Reexamined after 75 Years in the Light of Some Records from the Church Courts," *Michigan Law Review* 72 (1974): 647–716, at 656–60.

75. For this and the two following paragraphs, see Adams and Donahue, *Select Cases*, pp. 45–52, and sources cited. For positions, questions posed by one party to the other, to be answered somewhat in the manner of modern written interrogatories, see ibid., pp. 44–45.

presence of the parties. Though it may have been possible for a party to take exception to the witnesses at this point, exceptions are almost invariably deferred until after the testimony is published.[76] Although this procedure somewhat reverses the logic of the order of the academic proceduralists, it is expressly authorized in academic writing as early as Tancred. Tancred requires that a litigant expressly reserve the right to except to the witnesses after their testimony has been published, but exception after publication was so common in England that the *acta* do not always mention that the reservation was made.[77]

The producing party presents a set of written articles according to which the witnesses are to be examined. The party against whom the witnesses are produced may, and frequently does, submit interrogatories to be put to the witnesses. The witnesses are then examined, normally by a court-appointed examiner, separately and in secret.[78] They are asked the questions posed in the articles and interrogatories, and their depositions are reduced to writing, occasionally with comments by the examiner. "This witness vacillates and hoots like an owl," says one waspish fourteenth-century York examiner.[79] When the producing party has renounced further production of witnesses, the depositions are published in open court.

The defendant then has an opportunity to except against the person of the witnesses and against what they said. There is normally a debate about whether these exceptions will be admitted, and if they are, the defendant is given the opportunity to produce witnesses to prove them. Sometimes there is a replication by the plaintiff, which proceeds in the same manner as the exception, and at least in the fourteenth and fifteenth centuries further pleading and production was possible.

Similarity in form can, of course, conceal considerable differences in substance and result. If the English ecclesiastical courts were not following the three basic doctrines about witnesses that we outlined above, then whatever the form that the production, examination, and reprover of witnesses took, we are dealing not with the Romano-canonical system of witness proof but with some variation of it.

But in order to determine what doctrines were being followed, we are faced with considerable evidentiary barriers. Medieval judges (and canon law judges were no exception) were not required to and generally did not render reasoned opinions.[80] Even if they had rendered reasoned

76. For one possible exception, see below, at n. 83.

77. Adams and Donahue, *Select Cases*, p. 50.

78. E.g., *Acta Stephani Langton*, ed. K. Major, Canterbury and York Society, vol. 50 (Oxford, 1950), p. 82 (no. 61): "Jurati [testes] itaque et separatim sicut moris est examinati. . . ."

79. York, Borthwick Institute CP.E. 101/13 m.1 (4 Mar. 1369): "Et videtur mihi R[icardo] de T[unstall, examinatori generali curie Ebor',] quod testis iste est vacillans et nutubans et quod modicum fides est ei adhibenda." For other examples see Adams and Donahue, *Select Cases*, p. 54, and cases cited.

80. See J. Dawson, *The Oracles of the Law* (Ann Arbor, 1968), pp. 50–54; and R. Helmholz, *Marriage Litigation in Medieval England* (Cambridge, 1974), pp. 20–22. For

opinions, they would have been unlikely to justify their decisions on the basis of anything but "the law." Further, many medieval canonic cases did not reach the sentence stage. Any reconstruction, then, of what doctrines were actually being followed must necessarily be tentative and conjectural.

One basic proposition of the Romano-canonical system that definitely was received by the English church courts is that two witnesses make a full proof. Although few documents make mention of this rule, no sentence that I know of violates it, and much that goes on in the ecclesiastical courts would make no sense if this were not a basic assumption. But it is one thing to say that there must be at least two witnesses for there to be full proof, quite another to say that those persons and only those persons whom the academic law would admit in fact served as witnesses, that they testified in a manner consistent with the principles outlined in the law, and that their testimony was evaluated in the way that the academic commentators said that it should be. Indeed, the principal deviations of English practice from the Romano-canonic law of witness proof are these: (1) people who are not qualified to testify under the Romano-canonic rules do indeed testify; (2) people who are not eyewitnesses testify, and they testify about matters of which they have no personal knowledge; and (3) the judges were considerably more flexible in evaluating testimony than at least the mainstream academic commentators suggested they should be. Let us examine these deviations in order.

1. *Unqualified witnesses testifying*: As we have seen, the academic law barred a wide variety of people from testifying.[81] Although there was some variation among the academic writers as to who was barred from testifying, it is clear that once a determination had been made that the law barred a given person from testifying, it was not within the discretion of the judge to admit him. The person barred from giving testimony should not have his deposition taken. Nonetheless, in no English case of which I am aware does the judge refuse to allow someone to testify.

This is not as surprising as it may seem at first. Obviously a witness cannot be excluded from testifying after he has done so, and equally obviously, unless some objection is raised to the witness at the time he is admitted, the fact that he should not be testifying will not normally be known to the judge at that time (particularly if he may not take into account what he knows outside of the record).[82] Because exceptions to witnesses were not raised in English canonic procedure until after the depositions had been published, no one was excluded from testifying.[83]

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a relatively full opinion, see Adams and Donahue, *Select Cases*, B.3ee, at pp. 88–89, which, among other things, indicates that the two-witness rule was being followed.

81. See above, at text accompanying nn. 20–21.

82. See above, at n. 32 and accompanying text.

83. Adams and Donahue, *Select Cases*, C.18, pp. 292–99, is a possible exception, but the events described are more like a brawl than an attempt to raise exceptions to a witness at the time he is produced. In ibid., D.1, pp. 341–42, the party against whom witnesses were produced excepts to their persons and asks that they be excluded from testifying, but this

There are a number of reasons why English proctors and advocates consistently deferred their exceptions to witnesses until after the depositions were published. First, the academic law prohibited testimony from being raised on the same article or on one directly contrary to it until after the depositions on that article had been published. This rule was designed to hinder the subornation of perjury, but if it had been followed, it would have meant that defendants would have had to raise their defenses without knowing what it was that the plaintiff's witnesses were going to say. In order to avoid the rule about contrary articles and at the same time to have the advantage of knowing to what they were replying, defendants' proctors frequently couched their defense in the form of exceptions to witnesses. For example, rather than introducing testimony to prove that he was elsewhere at the time the plaintiff alleged he had contracted with him, the defendant would introduce the same testimony to show that the plaintiff's witnesses were perjurers: they had lied when they said they had contracted with the plaintiff on that day in that place.[84]

Postponing the exceptions to witnesses was also more efficient from the point of view both of the court and of the parties. Once the witnesses were in court it was clearly more efficient to take their depositions rather than postponing the deposition taking until the exceptions and proof on them could be presented. Postponing also gave the defendant time to discover if any exceptions could be raised against witnesses whom he might not know. Postponing until after the depositions were published allowed the proofs on the exceptions against the witnesses and those against what they said to be consolidated. It also allowed the defendant to confine his exceptions and his search for proof to those witnesses and depositions that had proved to be most damning. Finally, we cannot exclude the possibility that at least in some cases postponing the exceptions to witnesses gave the defendant an opportunity for delay. After the plaintiff's case in chief was in, the defendant could raise a blanket exception to witnesses and would be given probatory terms to see if he could find any kind of support for it.

For example, in *John, son of Emma Warner, chapman of Scampston* c. *Alice Redying of Scampston*, a York defamation case of 1367, John excepts against Alice's witnesses, John, son of Roger, and Thomas, son of Roger:

takes place after their testimony has been published. The usual formula in exceptions was to ask that "no faith be put" in the excepted-to witnesses (ibid., C.18, p. 309; see below, at n. 85; cf. Adams and Donahue, *Select Cases*, D.15, p. 556 [claim that testimony is invalid]). Of course, an examiner might have been empowered to exclude witnesses who admitted that they were incapable of testifying, but that never seems to have happened, despite the large number of witnesses who, in effect, make such admissions. See, e.g., ibid., C.2, p. 104; D.15, p. 561 (both involving witnesses of servile status); and cases cited p. 51, n. 4.

84. For both the academic law and examples from practice, see ibid., pp. 51–52; Donahue, "Stubbs vs. Maitland," pp. 686–95.

> [N]o or little faith is to be given to the aforesaid witnesses, their *dicta* and depositions because the said John son of Roger and Thomas son of Roger during the entire time of their reception, deposition, and examination were and still are and each of them was and still is a *nativus* and serf, of servile condition and notoriously in servitude; joined to the said Alice Redying with too much familiarity and friendship, as mediators, promoters, authors, and favorers of the aforesaid case; in this case, as if in their own, unjustly affecting victory for the party of the said Alice; paupers, ignoble, vile, and abject persons, who, unmindful of their salvation, were and are accustomed to, would, and will foreswear themselves and give false testimony for little; and the aforesaid witnesses throughout their reception and deposition in the said case were and still are capital enemies of the said John Warner, keeping company with his enemies, and evilly and maliciously pursuing this John Warner by indictments, conspiracies, and other injurious and guileful prosecutions, made up and fabricated by them on purpose for the confusion and subversion of the faculties and fortune of the said John Warner, or the total destruction of a greater part of them, as a result of which the same John Warner lost all his goods or a greater part of them unjustly and to his grave and almost irrecoverable damage. For these reasons John son of Roger and Thomas son of Roger are multifariously suspect for testifying or bearing testimony against the said John Warner.[85]

No depositions survive for this exception, but John's proctor had clearly opened the way for any kind of testimony about the witnesses's status and characters or their relations with either Alice or John.

Whatever the reason for the general practice of postponing exceptions to witnesses, the practice had substantive effect. Once the witness's testimony is reduced to writing and published, the defendant cannot object

85. York, Borthwick Institute, CP.E. 92/1: "[P]refatis testibus, dictis et deposicionibus ipsorum nulla seu modica fides est adhibenda pro eo et ex eo quod dicti Johannes filius Rogerii et Thomas filius Rogerii, testes predicti, omni tempore recepcionis, deposicionis et examinacionis ipsorum et cuiuslibet [*leg.* quilibet] eorundem fuerunt et adhuc sunt nativi et servi, servilis condicionis et in servitute notorie, dicte Alicie Redyng nimia familiaritate et amicitia coniuncti ut pote mediatores, promotores, autores, fautores cause predicte, in ipsa causa ut in propria victoriam pro parte dicte Alicie indebite affectantes, pauperes, ignobiles, viles et abiecte persone, qui sue salutis immemores pro modico solebant et solent, volebant et volunt se deierare et falsum testimonium perhibere, prefatique testes quocunque tempore recepcionis et deposicionis ipsorum in dicta cause fuerunt et adhuc sunt inimici capitales dicti Johannis Warner cum suis hostibus conversantes ipsumque Johannes Warner per indictaciones, conspiraciones et alias iniuriosas et subdolas prosecuciones fictas et fabricatas ipsorum proposito quasi in confusionem seu subversionem facultatum et fortunarum dicti Johannis Warner vel maioris partis earundem totalem deperdicionem nequiter et maliciose persequentes, quorum occasione et non aliter idem Johannes Warner omnia bona sua seu maiorem partem eorundem in ipsius grave dampnum quasi irrecuperabile amisit minus iuste, ex quibus causis predicti Johannes filius Rogerii et Thomas filius Rogerii ad testificandum seu testimonium perhibendum in hac parte contra dictum Johannem Warner multipliciter sunt suspecti." Cf. York, Borthwick Institute, CP.E. 72/4 (1356).

that the testimony should be excluded. Rather he must argue that "no or little faith" should be placed in the depositions of these witnesses because they are persons who are barred by the law from testifying. The form suggests an argument addressed to the discretion of the judge, an argument concerned with how he should evaluate the testimony, rather than whether he should receive it.

There remains the question, however, of how the judges reacted to such exceptions. The type of character assassination that John's proctor was setting up in the *Scampston* case could pose problems of judicial administration, both because of the delay that proving it (or giving terms to prove it) would cause and because of the scandalous and only tangentially relevant nature of the material that might be introduced. Further, there was a broader ethical consideration: should the law, particularly a religious law, reject out of hand the testimony of those who are of low status solely because of their birth? Tancred suggests this difficulty when he asks whether the apostles would have been rejected as witnesses because of their poverty.[86] Some combination of considerations such as these probably lies behind the ruling of an archdeacon's official in a marriage case in the 1270s. The defendant charges that one of the two witnesses of the plaintiff is of ill fame, of suspect life and opinion, a thief, and a pauper. Any one of these exceptions, if proved, would have been sufficient in the academic law to have the witness's testimony struck, and hence the plaintiff's case would have failed for failure to meet the two-witness requirement. The judge, however, simply quashes the exception. The case was appealed, although no sentence on appeal is recorded.[87]

In other cases exceptions against the person of witnesses were admitted and testimony on them allowed. But how did the judges react to such exceptions if they were proven? Did they treat the testimony of the witness in question as a nullity or did they regard the proven exception to the witness as one of a number of factors to be used in evaluating his testimony? It is difficult to prove which of these two attitudes predominated. Convincing evidence would come from cases in which four conditions are met: (1) the exception is one that the academic authors generally agree is sufficient to bar the witness from testifying; (2) the exception is proven, either by depositions which convincingly demonstrate that the exception is a valid one or by an admission by the excepted-to witness on the face of the record; (3) the witness or witnesses against whom the exception is raised are necessary for proof of the producing party's case: there cannot, for example, be two unexceptionable witnesses on his side; (4) there is a sentence in favor of the party who produced the exceptionable witnesses. Not surprisingly, there are relatively few cases in which all these conditions are met. Nonetheless, the evidence suggests that in English canonic practice of the thirteenth and fourteenth centuries there was no automatic bar to the consideration of anyone's testimony.

Lacking a large number of cases in which all four conditions are met,

86. Tancred, *Ordo*, 3.6 (p. 225).
87. Adams and Donahue, *Select Cases*, C.4, pp. 122–23; cf. ibid., pp. 119–20.

the best evidence for this last proposition is negative. There is no case of which I am aware in which a party lost because some or all of the witnesses necessary to make up his case proved to be incapable of testifying under canon law. Cases that seem at first reading to involve a straight application of the rules incapacitating certain people from testifying prove upon more careful examination to have other elements that better explain the sentence. For example, in *Thomas Bakster of North Collingham* c. *John Coke of Newark*, Bakster sued Coke for breach of faith on the ground that Coke had broken his promise to release a debt (*frangere obligacionem*) which Bakster had satisfied. Bakster introduced two witnesses to Coke's promise to release, one of whom admitted that he was of servile status. In the academic law this would have been sufficient to bar the witness's testimony, and hence Bakster's case would not have been proven. The sentence does go down for Coke. But it seems reasonably clear that the academic rule barring the testimony of those of servile status was not determinative, or, at the very least, that the academic rule was not the only reason for the sentence. In excepting to Bakster's witness on the ground of servile status, Coke raises two other exceptions: that both of the witnesses had agreed to stand surety for Bakster in a suit brought against him by Coke in the king's court and thus their testimony is to be deemed unreliable because they were financially interested in the outcome of the case, and that the witnesses did not testify consistently about when the promise to discharge had occurred, because one testified about an event that had occurred twelve or thirteen years previously and the other about an event that had occurred fourteen years previously. The factual validity of both of these exceptions is apparent on the face of the depositions of Bakster's witnesses, and either exception may well have been the principal or contributing cause to the sentence in favor of Coke.[88]

By contrast to this case there are a number of cases in which the court proceeds to sentence without regard to the fact that the witnesses on the winning side are exceptionable. For example, in *Cecilia Wright* c. *John Birkys*, Cecilia successfully petitioned for a divorce of John from his current wife, Joanna, on the ground that John had previously promised to marry Cecilia and had had intercourse with her. Cecilia produced only two witnesses, one of servile condition, the other Cecilia's sister and the wife of the other witness. Probably neither witness was admissible under the academic law. Yet despite uncontradicted testimony as to the status and the witness's admission of the relationship, Cecilia prevailed in two courts.[89] In *Alice Dolling* c. *William Smith* (1271), a marriage case more

88. York, Borthwick Institute, CP.E. 226 (1396): 226/5, Bakster's articles; 226/4, Bakster's depositions; 226/2, sentence for Coke; 226/1, Coke's exceptions.

89. York, Borthwick Institute, CP.E. 103 (1367–69). This case comes as close as any to meeting the four conditions stated above in the text following n. 87. It doesn't quite, because the witnesses on the exception of servile status (103/5), although they are convinced that the man was of servile status, hesitate to say that his mother was of servile status, and at least one (2d deposition) admits that she was of free status. If the mother was of free

fully discussed below, Alice produced three witnesses to support her basic claim of a *de presenti* marriage. Two of the witnesses were her sisters. Nonetheless, sentence was rendered for her in the court of first instance and was reversed on appeal for reasons that are clearly not confined to the exceptionable nature of her initial witnesses.[90]

More common than cases in which there is a direct conflict with the academic law are cases in which there is some ambiguity about the conflict with the academic law and in which it seems reasonably clear that the case proceeded on grounds other than the academic law. *Prior and Convent of Newburgh* c. *John Pert et al.* may serve to illustrate. The prior and convent, in their capacity as rectors of Hovingham, sued Pert and others on the ground that they had cut down trees in the yard of the chapel of Ness, which the prior and convent alleged was dependent on Hovingham church. In support of their defense the defendants introduced nine witnesses, whose depositions have not survived. The prior and convent excepted to these witnesses on the ground that three of them were of servile status and that all nine were vile, humble, and ignoble people, tenants of John Pert and in bondage. In the depositions on these exceptions the status of the witnesses as serfs and poor people is confirmed, but some of the witnesses go to considerable pains to suggest that, despite their status, the witnesses are honorable people. Others of the witnesses to the exceptions, however, testify that they believe that the excepted-to witnesses would not have testified as they did, except for the fact that they were in the power of Pert.[91] The case proceeds no further and was probably compromised, but the depositions suggest that the reliability rather than the status of the excepted-to witnesses was what was really at issue.

2. *Testimony by those who were not eyewitnesses*: In marriage and breach of faith cases the witnesses tend to be few, and the issues are quite sharply defined. Here the classic form of questioning described in the treatises on procedure is most effective: who was there, what they were wearing, whether they were seated or standing, what the weather was

status, the canon law would have recognized her son as free, at least for some purposes. See X 1.18.8; and *P&M*, 1:422–24; cf. P. Hyams, "The Proof of Villein Status in the Common Law," *English Historical Review* 89 (1974): 721–49, at 730–45. Whether being a sibling (or near affine) of the producing party automatically excluded one from testifying was also a matter of some doubt. Durantis after giving authorities *pro* and *contra* seems to conclude that it did in criminal cases but not in civil (at least where the testimony is not compelled), without discussing the intermediate category of "spiritual cases" in which marriage cases fell. Durantis, *Speculum*, 1.4.[2]*de teste*.1.8–.10, 14 (pp. 286–87).

90. Adams and Donahue, *Select Cases*, C.6, at pp. 127–38; see below, at text accompanying n. 103. For other examples see, e.g., York, Borthwick Institute, CP.E. 16 (1327) (woman testifying in a testamentary case); CP.E. 92 (1365) (serf and stepfather of a party testifying in a marriage case). The latter case is not as clear as is suggested in Donahue, "Stubbs vs. Maitland," at p. 678, n. 175.

91. York, Borthwick Institute, CP.E. 75 (1357–58): exception against the witnesses, 75/2; depositions on the exception, 75/3.

like, and so on. As we move away from this type of case with this type of issue, the relationship between witness practice and the Romano-canonic procedural treatises becomes less clear.

For example, benefice cases, tithe cases, and cases concerning the finding of a chaplain[92] frequently involve a large number of witnesses on both sides, all the way up to the canonical limit of forty.[93] Their testimony, whether it is written out in full or simply entered as being in accord with that of previous witnesses, tends to be remarkably similar: the party for whom the witnesses were produced was rightfully in possession of the benefice, a given church has always received tithes from a given field, a given chapel has always had parochial rights. We have already seen one example from the early thirteenth century of this type of case.[94] In later cases of this type the form of the depositions is less like the report of a jury verdict, but the substance is the same.

A striking example of the use of multiple witnesses to support the parties' position in a case rather than to bring out the facts occurs in the highly political dispute over the prebend of Thame in 1292–94 between Edward St. John, the son of one of the king's most trusted knights, and Thomas Sutton, the nephew of Oliver Sutton, the bishop of Lincoln. During the dispute each party in turn took possession of the prebend by force and appealed to Rome and for the tuition of the Court of Canterbury. Thomas and Oliver Sutton appealed in January 1292/3. Nine witnesses were heard on Thomas's appeal, fourteen on Oliver's. In February a year later, Edward appealed against the bishop and Thomas. Fourteen witnesses were heard on his appeal against the bishop, eighteen on Oliver's plea in opposition. Eight witnesses were heard on Edward's appeal against Thomas, twenty-two on Thomas's plea in opposition. Fifteen witnesses were heard on Thomas's cross-appeal in the same month, eight on Edward's plea in opposition.[95]

Now the issues in a tuitorial appeal are not complex. The case belongs to the Court of Rome, not the Court of Canterbury, and the only issue for the Court of Canterbury is whether the appeal was properly taken and possibly whether the appellee did anything to disturb the status quo pending appeal.[96] Some of the witnesses in the *Sutton* case, however, go deeply into the merits of the case, whereas others simply repeat what others have already said about the possession and appeals. It is hard to escape the conclusion that the purpose of introducing all these witnesses

92. "Invention" of a chaplain, a case in which the parishioners of a chapel seek to have the rector of the mother church appoint a chaplain for them at his expense. E.g., *Residents of the Vill of Subholme* c. *William Rowden, rector of Warsop*, York, Borthwick Institute, CP.E. 151 (1389–91), discussed in Donahue, "Stubbs vs. Maitland," at pp. 675–76.

93. X 2.20.37.

94. Adams and Donahue, *Select Cases*, A.3, pp. 8–10; see above, at text accompanying n. 68.

95. Adams and Donahue, *Select Cases*, D.16, pp. 567–611.

96. Ibid., pp. 64–72.

was to impress the court with the support on each side, particularly when the witnesses include the registrar of Lincoln, the official of Lincoln, and other distinguished members of Oliver Sutton's *familia*.[97]

Hugh de Saxton, vicar of Pontefract c. *Roger, vicar of Darrington* is a typical fourteenth-century tithe case that combines a jurylike quality of the depositions with exceptions to the person of the witnesses. Hugh claimed that Roger had wrongfully withheld from him tithes of wool. Roger excepted that the tithes belonged to him. Both parties introduced witnesses (six for Hugh, ten for Roger) who testified to a dispute concerning tithes from 340 sheep that grazed in an area called "Hughlaches" and who supported their principal's story that he was in the right. Hugh then excepted to Roger's witnesses. "Hughlaches," he argued, was in the parish of Pontefract and the sheep in question wintered in Pontefract. Hugh also objected to the person of the witnesses on the ground that two of them were of servile status and that all of them were of the parish of Darrington and unjustly willed and affected Roger's victory in the case because their financial obligations would be lessened if he won. Roger replied that the two witnesses were of free status but did not deny that all his witnesses came from Darrington. He also proposed that "Hughlaches" had been within the parish of Darrington from time immemorial. Hugh introduced forty witnesses in support of his exception, some of whom testified about the status of the previous witnesses and all of whom testified about "Hughlaches." Roger introduced eight(?) witnesses on his replication, all of whom confirmed the free-status point and Roger's point about "Hughlaches." Then it was Roger's turn to except to Hugh's witnesses. They are not to be believed, he said, because they are all from the parish of Pontefract and stand to gain if Hugh wins.[98]

At this point the case ends,[99] and it seems likely that it was compromised,[100] but the pleadings and depositions tell us much about the reception of the Romano-canonic law of witnesses. That two of Roger's original witnesses were of servile status is clearly a secondary point; few of Hugh's forty witnesses address themselves to the point, although

97. E.g., ibid., p. 578 (merits), p. 586 (repetition), pp. 574–81 (registrar, official, members of familia). There is a suggestion in a contemporary treatise on the practice of the Court of Canterbury that the number of witnesses was particularly important in tuitorial appeals. See ibid., p. 71 and nn. 3–4. Even if this is so, it would not explain the distinction of the witnesses and their testimony on the merits in the Sutton case.

98. York, Borthwick Institute, CP.E. 67 (1354–55): Hugh's libel, 67/17; Roger's first exception, 67/17; Hugh's six witnesses, 67/12; Roger's ten witnesses, 67/13; Hugh's exception to Roger's witnesses, 67/11; Roger's replication, 67/10; Hugh's forty witnesses, 67/6, 67/8; Roger's witnesses on 67/10, 67/5 (document damaged); Roger's exception to Hugh's witnesses in 67/8, 67/3. For similar patterns of depositions and exceptions, see CP.E. 101 (1369) (mortuary); and CP.E. 151 (1389) and CP.E. 208 (1393) (both invention of chaplain cases).

99. Roger introduces positions and articles on 67/3, 67/2, and Hugh makes a replication to 67/3, 67/1. But no depositions on these pleadings survive, and there is no record of any further proceedings.

100. For compromise, see Adams and Donahue, *Select Cases*, pp. 55–56; and Donahue, "Stubbs vs. Maitland," pp. 705–8.

Roger thought that it was at least worth rebutting. The central issue is dependent on the testimony of what are concededly interested witnesses. Further, they are not testifying to a specific fact or facts like the exchange of consent or the uttering of defamatory words, but rather to the common understanding of where a parish boundary lay. Within each group their testimony on this issue is remarkably uniform. They are reporting the *communis sententia patriae*. In short, they are behaving more like a secular jury than like Romano-canonical witnesses.

We should not be surprised that local custom about what parish was entitled to the tithes from a given field should be the core issue in this case. Canon law gave a wide range to local custom, particularly in tithe cases, and the "public voice and fame" about it was clearly one of the ways of proving it.[101] What at least the mainstream academic law does not discuss is how proof by public voice and fame is to be reconciled with Romano-canonic witness procedure. The evidence of English practice suggests that the church courts did it by using witnesses in a most unwitnesslike manner.

Thus, in cases where proof by public voice and fame was called for, the witnesses function much as a jury would, testifying not of their own personal knowledge but to the common belief of the community. Hard cross-questioning is not characteristic of these cases. Both the court and the parties seem to have been aware that the type of questioning called for in the practice manuals was not suitable in this type of case. Moreover, even in cases where the courts insisted on eye-witness testimony, such as marriage cases, the parties do not always seem to have been willing to abandon the notion that the function of a sworn neighbor is not to testify to what he knows from what he has seen but to testify to what the community believes, like a juror, or to support what the party has sworn to, like an oath helper. Corruption need not necessarily be involved, although accusations of corruption are common.[102] There are, however, enough direct conflicts of testimony between witnesses on opposite sides of a case and enough similarities of testimony, down to the last detail, among witnesses on the same side of a case to suggest that a number of medieval Englishmen were either corrupted or willing to lie for what they believed to be a higher cause—there is no other possibility.

For example, in *Alice Dolling* c. *William Smith*, a marriage case first tried before the official of Salisbury in 1271, Alice alleged that William had married her by exchanging with her words of the present tense on a given day in a given place. William excepted that he was someplace else

101. On custom see Donahue, "Stubbs vs. Maitland," pp. 675–78 and sources cited; for public voice and fame, see Lévy, *La hiérarchie*, pp. 37–40, 113–17.

102. E.g., Adams and Donahue, *Select Cases*, B.3cc, pp. 87–88; York, Borthwick Institute, CP.E. 1 (1303); Cathedral Archives and Library, Canterbury, *Sede Vacante* Scrapbook III no. 35 (1293) (cited in R. Helmholz, "Ethical Standards for Advocates and Proctors in Theory and Practice," in *Proceedings of the Fourth International Congress of Medieval Canon Law*, pp. 283–99, at 298–99). For a case in which the pattern of the examiners' questioning and comments suggests that they thought the witnesses were lying, see Adams and Donahue, *Select Cases*, A.6, pp. 18–23.

at the time, and Alice made a replication of William's presence. Alice produced three witnesses to the *de presenti* contract and four on her replication of presence. William produced ten on his exception of absence. Someone was clearly lying. Either William Smith contracted with Alice Dolling or he did not; he could not have been both contracting with Alice and attending an all-day feast four miles away at the same time. Whichever group of witnesses was lying, someone knew enough about what questions were going to be asked to allow both sets of witnesses to supply with reasonable vividness an account of the clothing, the time, and the place where it all happened.[103] Whether modern cross-examination techniques in an open courtroom would have brought the truth of the matter to light or whether they simply would have provided a keener test of whether the seven women or the ten men were the more brazen, we do not know. The medieval authorities argue that cross-examination in open court would have increased the danger of intimidation of witnesses and that allowing the defendant to hear the plaintiff's story as it was developing would simply have invited even more subornation of perjury.[104]

The interesting thing about the medieval English courts' handling of this problem is not what they did about it in marriage cases. In such cases, after all, there had to be a decision, and by far the highest percentage of cases for which we have decisions are marriage cases. The interesting thing is that in those cases where there was less necessity for an immediate decision and less likelihood that any judicially imposed decision would be permanent, the courts took a much more passive attitude in their search for the truth. As we noted above, hard cross-questioning is not a characteristic of tithe cases or cases concerning the finding of a chaplain, or even cases concerning the possession of churches. All these types of cases are eminent candidates for compromise. The *Sutton* case, for example, was settled, admittedly after royal intervention, and the cartularies are full of compromises of such cases after long and bitter litigation.[105] In such cases, what the church courts seemed to have done is to let the parties have their hearing. The parties brought in their supporters and had their statements recorded; after this, more often than not, the case disappears from view. Presumably some form of settlement was reached; presumably too, the settlement was based on some estimate of how the judge would react to the testimony. But the testimony in these kinds of cases is remarkably unrefined: it is almost as if both the court

103. Adams and Donahue, *Select Cases*, C.6, pp. 127–32; see above, at text accompanying n. 90, and below, at text accompanying n. 110. Witnesses were apparently allowed to "refresh their recollection" by discussing the matter with each other before they testified, and this may account for some of the remarkable agreement. See, e.g., Adams and Donahue, *Select Cases*, C.11, p. 175.

104. See the discussion of the various arguments among the proceduralists before the rule about separate, secret examination became fixed, in Genzmer, "Eine anonyme Kleinschrift," at pp. 391–92.

105. Adams and Donahue, *Select Cases*, D.16, p. 569; see C. Cheney, *Pope Innocent III and England*, Päpste und Papstum, vol. 9 (Stuttgart, 1976), pp. 116–18, 194–225; and Sayers, *Papal Judges Delegate*, pp. 239–42, for other examples.

and the parties recognize that the decision of the case is more a political than a judicial one and that the eminently rational Romano-canonic procedure simply is not adequate for resolving this kind of dispute.[106]

3. *Evaluation of testimony*: We have already had occasion to examine the manner in which the medieval English church courts evaluated testimony in our discussion of exceptions to witnesses.[107] There we suggested that the courts had at least a tendency not to include or exclude testimony on the basis of rules but rather to use the bias or status of a witness as one of a number of factors to weigh in arriving at a judgment.

Frequently we get the impression that even if the witnesses are suspect, their testimony will be sufficient to shift the burden of persuasion to the defendant. For example, in *John Dent* c. *John Chace*, a breach of faith case heard by the York court in the winter of 1396/7, Dent sued Chace, alleging that Chace owed him twelve shillings from a sale of iron and coal. He introduced two witnesses who testified that Chace had pledged his faith to pay Dent by the octave of Pentecost. Chace filed five exceptions to the witnesses and their *dicta*: (1) they are, he alleged, authors, favorers and special promoters, affecting the victory of Dent as in their own cause; (2) one witness lied when he said he was not an affine of John Dent, because he is his brother-in-law; (3) the second lied when he said he was not a domestic or familiar of Dent, because he is his hired man or apprentice; (4) the witnesses are too friendly with Dent and hence suspect; and (5) it wasn't Chace who made the purchase and promised to pay the money—it was one Robert Marshall.[108]

Dent denies all of these charges, but one—the one concerning his brother-in-law. Here he simply says that his brother-in-law is a layman and should not be expected to know what an "affine" is. Chace's two witnesses do not fully support his charges. They do, however, confirm that one witness had married Dent's sister and suggest that this relationship may indicate that the witness was too friendly with Dent and suspect. In the academic law the relationship might have been enough to reject this witness's testimony, and hence the two-witness requirement would not have been met. But the court finds for Dent.[109] Though it does not say so, it seems to be holding that Dent had produced enough proof to shift the burden of production to Chace. Chace's story was that Marshall made the contract, not he, but he adduced no evidence on this point, and therefore he lost.

This is not to say that we do not find evaluations that accord with the

106. Cf. Donahue, "Stubbs vs. Maitland," pp. 705–8.

107. See above, at text accompanying nn. 88–91.

108. York, Borthwick Institute, CP.E. 224: Chace's exception, 224/3; articles, 224/3, 224/5. Dent's depositions do not survive, but their content is derivable from Chace's exceptions.

109. Ibid.: depositions, 224/5, 224/2; sentence, 224/4. For the academic law on affines, see above, at n. 89; cf. *Thomas Kendall et ux., ex'rs of Peter Wolffe* c. *Henry de Nincely* [?], *rector of Foston*, CP.E. 193 (1391) (judgment for plaintiffs in a debt case despite testimony that their witnesses are enemies of the defendant and affines of the plaintiff and that one is an adulterer).

principles of evaluating testimony which we find in the academic proceduralists. For example, in *Dolling* c. *Smith*, the Salisbury marriage case described above, the official of Salisbury pronounced sentence in favor of Alice; whereupon William appealed to the Court of Canterbury. The official of the Court of Canterbury gave the documents in the case to two of the examiners of the court and asked them to give him a report concerning the case. That report has survived, and it shows us the examiners going through the *processus* of the lower court carefully and evaluating the testimony. The examiners reported: (1) Alice produced three witnesses about the *de presenti* contract. The first two testified not about a *de presenti* contract but about a *de futuro* contract; the third testified that the man used words of the present tense but the woman words of the future. The first two witnesses were sisters, and the third testified that the second witness was Alice's sister. (2) William's absence at the same time was proven by ten witnesses. (3) The replication of presence was proven by four witnesses who may not have been testifying about the same year (a reference to what may be a scribal dating error in the *processus*). In any event, ten witnesses are better than four, and the four seem to depose "less sufficiently" (a phrase which may refer to the fact that they gave relatively little detail or at least that the examiner's clerk recorded less detail).[110]

All of this is quite in accord with the academic law on reconciling conflicting witnesses. The witnesses must testify to the facts that they are produced to prove; here they are supposed to prove a *de presenti* contract, and they do not. Further, whether the status of being a sibling automatically disqualifies one from being a witness or not, it is clear that one's sibling is a suspect witness when compared to unrelated witnesses.[111] So far as the replication of presence is concerned, it is not even certain that the four witnesses conflict with the ten, because they may not be testifying about the same day. Further, they do not give enough detail, and finally, William should win his case simply on the numbers. It is not surprising that the court on appeal reverses the official of Salisbury. Its action strictly conforms to the Romano-canonic rules of procedure.

The interesting question, however, is why the official of Salisbury ever decided the case the way he did in the first place. Alice never appears in the appeal, perhaps because she knew she had a losing case, perhaps because she was prevented from appearing. It is probably true that, other things being equal, ten witnesses are better than four; but it is not inconceivable that William could have purchased the testimony of his ten witnesses. The Salisbury court asked him—why we do not know—to produce them again, and he said he could not do so, offering what seem to be formulaic excuses.[112] Though the official of Salisbury may have

110. Adams and Donahue, *Select Cases*, C.6, pp. 134–36; see above, at text accompanying nn. 90, 103.

111. Compare n. 89 above with text accompanying n. 109.

112. Adams and Donahue, *Select Cases*, C.6, pp. 129, 132.

been ignorant of the rules, bishops' officials were not normally unlearned men. If he made use of something he knew that did not appear in the record, he was, of course, violating the principle that the judge is supposed to judge according to the things alleged and not according to his conscience, but if he does not decide according to his conscience, how is he to square his conscience with the Supreme Judge?

The only principle that will explain the evaluation of the testimony in *Dent* c. *Chace*, the official of Salisbury's judgment in *Dolling* c. *Smith*, and even the judgment in the Court of Canterbury's reversal in the same case is that the judges felt that they must evaluate testimony taking into account as many factors as they could find on the record, and perhaps occasionally things that did not appear of record as well. This does not mean that status, bias, or number of witnesses was irrelevant, any more than it is today. What we do not find, however, is support for the somewhat mechanical notions of the academic commentators that testimony could be evaluated by rule. There are simply too many cases that deviate from the norms for us to believe that medieval canonic judges thought that any academic decision-rule dictated how they were to evaluate testimony.

IV

Despite these deviations of the English church courts from the principles outlined in the procedural treatises, we should not lose sight of the fact that these courts did adopt a recognizable form of Romano-canonic witness procedure. The inchoate, jurylike use of the sworn testimony of neighbors that we find in the twelfth-century documents gives way at the very beginning of the thirteenth century to a procedure that is identifiably academic in its orientations and provenance. The latter half of the thirteenth century sees an elaboration and careful following of the forms of procedure laid out in the *ordines judiciarii*. We suggested, however, that for the English church courts this was not a great change. Under the proper influences the twelfth-century use of the sworn testimony of neighbors could have hardened into the jury procedure of the English secular courts of the thirteenth, but it was not a radical shift in direction for it to have become the witness procedure of the Romano-canonic law.

We had considerably greater difficulty, moreover, tracing the reception by the English church courts of three key elements in the Romano-canonic law. The reasons why these deviations occurred are complex, and no one explanation will suffice for all of them. In the case of the failure to follow the rules about exceptions to the persons of witnesses we suggested that both the way the exceptions were normally presented and broader ethical considerations may have played some role. In the case of the use of witnesses in a jurylike manner, the nature of the issue clearly played a considerable role, as may the desires of the parties to impress the court

with support for their side. In the case of the rules about evaluating testimony, the dominant force seems to have been the desire of judges for more discretion in making decisions.

It is difficult to generalize from what is necessarily speculation about a complex phenomenon, but two forces seem to predominate among those that we suggested caused the reception of the Romano-canonic law of witness proof to be less than perfect: the desire of judges to have a considerable amount of discretion and the desire of parties to have litigation proceed according to forms like those with which they were familiar. To put it more bluntly, both the judges and the parties sought to manipulate court process, and the Romano-canonic procedural principles suffered as a result.

In the case of the failure to follow the academic rules about exception practice and about evaluating testimony, the desire of the judges, by this time an elite, professional body of decision makers,[113] for greater flexibility is the force responsible for the deviations from the academic law. The parties, on the other hand, seem to have expected witnesses to behave more as jurors or oath helpers, institutions with which they were familiar from the secular and, in the case of oath helpers, the lower church courts. The parties, then, seem to have been chiefly responsible for the deviations we noted from the rule that witnesses are to speak of their own knowledge.

For the most part these two forces operated independently of each other. We have no evidence that the failure of the courts strictly to observe the rules about exclusion of witnesses greatly concerned the litigants. Indeed, it broadened the base of supporters whom they could produce in court for their cause. Nor is there evidence to suggest that litigants were concerned about the failure of the courts to evaluate testimony strictly according to the academic rules. Indeed, to the extent that the church courts were called upon to perform an arbitral function in medieval England, a more discretionary form of decision making would seem to have been called for.[114]

The courts' reaction, on the other hand, to the desire of the parties to use canonic witnesses more like jurors or oath helpers varied, as we have seen, according to the type of case. Where the issue, as in a marriage case, could be resolved by testimony in the academic fashion, the courts tended to insist on such testimony, forcing the parties and their witnesses to attempt to manipulate the process, if my guesses are correct, by perjury. Where, on the other hand, the issue was not a particularly suitable one

113. On the importance of professionalization as a critical factor in the classification and development of legal systems, see R. Abel, "A Comparative Theory of Dispute Institutions in Society," *Law and Society Review* 8 (1973–74): 217–347. In the case of medieval canonic judges another element may be of some importance: the older notion of the religious judge as father confessor. This idea was firmly rejected by the academic lawyers in their development of the maxim that the judge does not judge according to his conscience (see Nörr, *Zur Stellung des Richters*, esp. p. 13); but men all of whom were in orders and at least some of whom could, and probably did, hear confessions may have found it difficult to separate the functions of judge and confessor.

114. See Donahue, "Stubbs vs. Maitland," pp. 705–8.

for the sharp resolution called for by the academic law, as in the case of tithes or even the right to a benefice, they allowed the parties to present their sides of the case in the way to which they were accustomed, and allowed, perhaps even encouraged, a settlement to emerge from the process.

Of course, we cannot exclude other possible explanations of the failure of the English church courts fully to receive the mainstream academic doctrine on witnesses. It may be that the English judges were simply following the doctrines of the early proceduralists, particularly those of the Anglo-Norman and French schools, who, as we noted, gave the judge considerably more discretion in evaluating testimony than did such mainstream writers as Pillius and Tancred.[115] But the pattern of manuscript survival suggests that at least by the fourteenth century it was the mainstream writers, particularly those whose views were incorporated in Durantis, that were generally read, and not the more obscure writers of the 1170s and 1180s.[116]

Possibly, too, we are dealing with a phenomenon unique to England, where, it was once believed, the academic canon law was never fully received. The thesis, of course, that medieval England's relation to the Roman canon law was exceptional has largely been discredited, but whether the way her church courts dealt with witnesses was exceptional cannot be known for certain until more work is done with Continental church court records. It may be that we will find less deviation on the Continent, at least in those areas where the jury and compurgation did not continue to be used in the secular courts. The occasional criticisms of actual practice that we find in the academic writing of authors who had no connection with England, however, suggests that the phenomena we noted above were not confined to England. Further, we are not, by and large, dealing here with a failure to follow the injunctions of specific papal rulings; again by and large, the holdings (in the common-law sense) of the papal decretals concerning witnesses were followed. What was not followed were the broad doctrines that the academic proceduralists assumed underlay these decretals. Thus, the issue here is somewhat remote from the broader issue of English church-state relations.[117]

Finally, we should bear in mind that, to the extent that the procedural-

115. See above, at nn. 28–31 and accompanying text.

116. The twelfth-century treatises and *ordines* are represented normally by one or two MSS. See, e.g., Kuttner, "Analecta iuridica." On the other hand, over a hundred Tancred MSS survive. See G. Dolezalek, *Verzeichnis der Handschriften zum römischen Recht bis 1600*, vol. 3 (Frankfurt, 1972), *s.n.* "Tancredus." To my knowledge no count has ever been made of Durantis MSS, but F. von Savigny, *Geschichte des römischen Rechts im Mittelalter*, 7 vols. (Heidelberg, 1834), 5:589–91, lists over thirty printed editions prior to 1600. John Lecch, the official of the Court of Canterbury in the early fourteenth century, owned two MSS of a *Speculum iudiciale* (almost certainly Durantis's), the only procedural treatises in a well-stocked personal law library of fifty-seven volumes. See A. Emden, *A Biographical Register of the University of Oxford to A.D. 1500*, 3 vols. (Oxford, 1957–59), 2:1119.

117. On the general question see Donahue, "Stubbs vs. Maitland," and sources cited.

ists deliberately limited the discretion of the judge in order to make their procedure more palatable to people who were accustomed to resolve cases by invoking God, to that extent the underlying reason for a significant part of the proceduralists' rules was considerably less powerful by the fourteenth century. Ordeal died out rapidly in England after 1215; proof by battle lingered on, but was not a usual method of secular proof. Only compurgation remained of the ancient "irrational" methods of proof.[118] The academic proceduralists, however, continued to refine their nondiscretionary rules. The change in methods of secular proof may have made it less urgent for the church courts to follow the academic rules, but it does not explain why they deviated from them in the way they did. What we have seen above suggests, if it cannot completely demonstrate, that the force operating against the academic rules was not a societal memory of a time when the judgment of God was invoked in a lawsuit, but rather a societal awareness of the fact that cases could be resolved by the judgment of the community represented by jurors or compurgators rather than by the judgment of the judge.

So the example of witness practice in the English medieval church courts shows us that receptions can and do occur, at least where the doctrine or practice to be received simply gives direction to some preexisting idea or institution. Once the reception has taken place, however, other forces come into play that may undercut the received doctrine itself or blunt its effect. Two such forces are involved in this reception, both, perhaps, of general importance: the desire of decision makers, particularly elite, professional decision makers, not to be bound too tightly to a body of rules, and the expectations of the society using the court. To the extent that it is possible to generalize from tentative conclusions about one example, it would seem that future students of receptions should take more account of such forces. What is said by the academics is certainly important, but it hardly gives us a complete picture of the complex process of reception.

118. See generally *P&M*, 2:598–604, 632–36.