Proof – KTL, SW

KTL: The most distinctive forms of proof in Common law, which were prevalent elsewhere in western Europe as well, were of Germanic origin. There was the trial by ordeal, compurgation, and trial by battle. These earlier forms of proof shared a feature: they relied in different ways and to different extents on divine intervention as regards the outcome of the case. The trial by ordeal might be the most obvious example, as it was expected that God would intervene in the outcome if defendant was right. In the ordeal of cold water, the accused was dunked in the pool of water: if he was innocent, he would sink; if he was guilty, he would float. In the ordeal by hot water, the accused would reached into a pot of boiling water and retrieve an object. If the accused was innocent, he would not show any sign of burns; if he was guilty, burns would reveal his guilt. Similar to this was the ordeal by hot iron. The accused would carry a burning hot iron. In compurgation, so-called wager of law, the defendant's case was proved if he and a sufficient number of supporters, called compurgators, successfully swore the prescribed oath to deny the charge that had been made against the defendant. Breaking an oath amounted to perjury, a serious religious and secular offence, that could be punished by excommunication and forfeiture of legal rights. In trial by battle, people relied on the power of God to help the rightful party win the battle. As we have seen, law and religion were intertwined in medieval modes of proof, both conceptually, because the outcome was thought to show the comment of God, and institutionally, because the conditions of the proofs, especially the trial by ordeal, were overseen by members of the clergy. To a certain extent, the outcome of a case, especially of criminal law, was determined by the church.

SW: We see a shift following from the Fourth Lateran Council in 1215. It was determined at that council that having clergy supervise ordeals amounts to tempting God, which you are not allowed to do. By not permitting clergy to take part in this, they basically abolished ordeals in general. You needed an alternative system of proofs. In the ecclesiastical courts, this was done by adopting the Romano-canonical procedure regarding witness testimony. There were also a number of other forms of proof you could use, including confession, presumptions, written evidence, oaths of parties and inquests, but witnesses were certainly the most common. There were clear outlines developed in the Romano-canonical procedure, which provided the means for examining witnesses in such a way as to elicit the truth. There were also rules for rejecting witnesses and resolving conflicts. The overall burden of proof rested with the plaintiff. This obligation could of course be bypassed by the admission of guilt by the opposing party, but that almost never happened. After oaths were taken, the plaintiff was assigned three terms to produce his witnesses and the defendant could in turn make exceptions to these witnesses and their statements. They could produce any number of witnesses between two and forty, which is quite a few. These would be sworn in in the presence of the opposing party, and their examination committed to an examiner but not to the judge. These witnesses were then examined according to a set of articles, questions that were drawn up on the basis of the issues that the case had brought forward. There could be another set of these for cross-examination provided by the opposing party. The most common questions regarded the witness's status, their relationship to the parties, possible reasons for prejudice or corruption, along with the necessary questions about the case. These questions were highly specific and would often concern not only the facts of the case, but also the weather, how witnesses knew about the events, what time of day something took place. Witnesses were examined separately and in secret, so that they couldn't corroborate their accounts (unless they had done it beforehand). These testimonies were probably written in English and French, but the records that we have are in Latin. In addition to witnesses, parties could bring documents as well. These were often brought in a sealed box and they could be submitted at any time before the formal conclusion of a case. Documents used in this way could be

a deed of composition, a bill of complaint from the royal courts, a chirograph, or certificate stating that the person in question had gone on crusade, anything like that. Oral testimony from witnesses was still preferred and even when documentary evidence was available, witnesses were still often introduced to verify the written records.

KTL: In England at the end of the twelfth century, things went a bit differently. Firstly, we observe that these earlier forms of proof started to decline gradually for multiple reasons. The other is the practice used to determine the question of guilt and innocence of the accused person when no other mode was available. Therefore, the procedural gap following the Fourth Lateran Council had to be filled by another procedure. This decree of condemnation of supra-human proofs, brought England into a secular path that differed from the continental, as it has probably contributed to the development of the trial by jury. We have to be careful because its impact remains uncertain and widely discussed. The jury system was based on neighbours' testimonies. Local knowledge had been used for a long time in inquiries into all sorts of civil and criminal cases, for example in ecclesiastical courts. What is interesting is that gradually the role of the criminal jury expanded to the delivery of the final verdict on guilt or innocence in the early thirteenth century. Trial by jury also progressively superseded trial by battle, which was considered too risky and uncertain. Although secular, the trial by jury replaced the divine judgment to a certain extent, as it aspired to reach the same level of certainty through conceiving the verdict as inscrutable. The use of proof by jury maintained the holistic attitude to the settlement of dispute, which underpinned medieval proofs.