Witnesses and Jurors – WE, SW

WE: In England in the years following the conquest, lawsuits could be decided through various sorts of proof. It was often up to the court's decision as to which kind of proof would be required, ranging from oral testimony to documentary evidence (if documents existed) to the ordeal, often when there was no other way to decide the case. It seems that the Normans introduced trial by battle, judicial combat, to decide matters concerning land. Later in the twelfth century, during the period of Angevin legal reform, the use of recognitions grew. The recognition was a panel of twelve free men, who were sworn to state what they knew about the facts and dispute. This was used in various different types of assize. For example, various types of possessory assizes, concerning dispossession or inheritance. Also the use of the recognition expanded to cover actions of right, that is actions that were – in contrast to the possessory assizes – more proprietary, concerning the deeper questions of which of the litigants had the ultimate right to the land in question. In an instruction which has been associated with the Council of Windsor in 1179, the grand assize was introduced, which allowed a litigant, the tenant, to elect to have the matter tried by a grand assize. Here we have a panel not just of twelve free men, but twelve knights, who had to decide on the facts and dispute. When *Glanvill* talks about recognitors, it explains that they can be objected to on the same grounds that canonical witnesses can be objected to. Certainly in the late twelfth century, we see a movement towards the judgment of recognitors, a form of jury, in English law in civil matters. Most people assume that the use of the jury in criminal matters is a product of Magna Carta, ordering that individuals should be judged by their peers or by the law of the land, but the addition of that phrase 'or by the law of the land' meant that traditional forms of proof could still be used in criminal cases. At this time, the traditional mode of proof was the ordeal. So if the jury of presentment (which functions a bit like a grand jury in the US) declared on oath that a certain individual was suspected of having committed a crime, they would be put to the ordeal. However, around the time of Magna Carta in 1215, the Fourth Lateran Council forbade the involvement of the clergy in the ordeal, which stripped the ordeal of its sacral properties. Therefore, as a mode of proof, it become mostly useless. So after a period in which there was no formal declaration on how criminals should be tried, a writ of Henry III in 1219 declared that a petty jury should be used. It took the idea of the jury of presentment, that a suspect should be declared by a jury, moved it forward so that a jury decided the actual question of guilt or innocence as well.

SW: As you said, the ecclesiastical courts mainly used witnesses in contrast to juries. These could be eye-witnesses or witnesses testifying to things that were notorious, much like a presentment jury. Then there were various restrictions as to who could be a witnesses and who could give valid testimony. In practice, the total number of witnesses you could bring in an ecclesiastical court varied. It had to be at least two, but the canonical limit was forty. There were a number of ways to determine whose testimony should be used. If a witness contradicted themselves, their testimony should be rejected. If a group of witnesses agreed, that testimony should be followed. If the judge had to choose between two parties that agreed internally but disagreed with each other, he had to choose based on which one was least suspicious and fit the matter best. If none of this was possible, he had to decide based on those which were more trustworthy based on their social status and their relationship to the party. You'd have freeborn over free, old over young, man of property over pauper, noble over ignoble, man over woman, a friend of the defendant over his enemy. If all the witnesses were of the same dignity and status, the judge had to decide by number. If they were the same in number as well, the judge should absolve the defendant. There were many people who were forbidden by law from testifying. That included the unfree, paupers, vagabonds and the excommunicated or those accused of crime. Proctors or advocates from the principal case, if the case was one of appeal, were also barred from testifying. As were servants, relatives of the producing party or known enemies of the party against whom

they were produced. Exceptions against witnesses – much like the exceptions against recognitors – could only be raised after testimony had been given. So no one was excluded from testifying, but doubt could be cast on the testimony after the fact. This was a more expedient way to do it: postpone all the exceptions till after the hearing and then deal with all exceptions at once. Parties would occasionally also struggle to produce witnesses: they could have been too old, too ill to come to court. It was particularly difficult to get witnesses to come to appeal cases, because of the distance needed to travel. If key witnesses were unable to or refused to appear, then the party could ask to compel them to appear or threaten them with excommunication if they didn't. If there was no way for them to physically come to court, they could send an examiner who could examine the witness there. Once a witnesses had testified, the opposing party couldn't ask that the testimony be excluded, rather he argued that no faith was to be placed in the person of the witness, which meant that the value of the testimony was left to the discretion of the judge. Rather than depending on the number of unexceptionable witnesses in the case, the judge then would evaluate the testimonies in comparison with each other and then hold that against the person of the witnesses, the internal consistency and the details when deciding.

WE: So although there are certain similarities between the use of recognitors, jurors and witnesses, they perform a varied function in the resolution of a dispute. So where the verdict of the recognitors or the jurors is the verdict of the court, witnesses in canonical proceedings provide evidence, yet it is the judge's weighing of the evidence of the witnesses that leads to the verdict of the court.

SW: Witnesses only provide the details not any of the judging.