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Witnesses: A Canonist's View

by WILLIAM HAMILTON BRYSON *

THE PREVAILING OPINION regarding the history of equity procedure is that it came through chancery from the medieval ecclesiastical courts. The connection between the English high court of chancery and the courts Christian is due to the practice of the medieval English kings of recruiting their chief advisers, the chancellors, from the ranks of the native episcopacy. As the secular chancery developed its court, the chancellor quite naturally adopted those procedures which were most familiar to him, which were those of his own consistory. Also many of the bishops who became chancellors had studied civil (Roman) law and canon law in the universities, but few had had much professional contact with the cruder procedures of the common law courts. Thus the situation of the court is a unique substance of lay justice administered by means of a procedure which is basically ecclesiastical, the Romano-canonical procedure.

The purpose of this essay is to examine and compare with our present practices a medieval text or summary of canonical procedure, the *Summa de Ordine Iudiciario* by Ricardus Anglicus—more narrowly, chapter XXX, which is concerned with witnesses. There are several reasons for examining the work of Ricardus Anglicus. This Englishman was a brilliant canonist in an age when the most ingenious and aggressive intellectuals were gravitating to the field of canon and civil law. Also he gives us a rather full summary of the subject.

Ricardus Anglicus has definitely been identified as Richard of Mores who was born in Lincolnshire in the second half of the twelfth century and who died in 1242. We find him first mentioned as being in Paris around 1186, 1187. It is probable that he went from there back to England to the University at Oxford. He was in Bologna during the pontificate of Celestine III (1191-1198) where he was a student and then a well-known and highly regarded professor of canon law; in fact he was one of the first English canonists at Bologna. By 1198 he was back again in England, and during the years 1198 through 1202 he was in professional association

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with Hubert Walter, the archbishop of Canterbury and chancellor of England.¹ He was a canon of Merton, and in 1202 he was elected prior of the monastery at Dunstable. Ricardus left the court of the archbishop at this time but continued to be active in public administration. He went several times to Rome: in 1203 on behalf of King John and in 1216 to attend the Fourth Lateran Council. Nevertheless he remained always an academician at heart.²

The *Summa de ordine iudiciario* was written in 1196 in Bologna. This work was immediately successful and was well known in western Europe. However, it was soon superceded; it was antiquated by the end of the thirteenth century and generally forgotten. It is not incautious to assume that Ricardus had a copy with him when he was in the service of Hubert Walter and that his patron and his colleagues, the vice-chancellors, were familiar with it.³

Ricardus' summa is not a well-structured treatise, but rather it is a collection of well chosen quotations similar to the *Corpus Iuris Civilis* of Justinian, upon which it so heavily relies. In the section on witnesses, every single paragraph is taken from the works of another; however, every thought is properly cited as being that of another with one exception in which the citation precedes the quotation by several pages. The only original words of Ricardus in this section are the introductions to the quotations, but even here the substance is not original. The quotations which comprise this section were taken from three sources: Justinian, Gratian, and Bernard of Pavia. The sections of the *Corpus Iuris Civilis* used primarily are the three sections entitled "*de testibus*" ("witnesses"), i.e. *Digest*, XXII. 5; *Code*, IV. 20; and *Novel* 90. In fact, the quotations from these three sections make up about seventy-five percent of the total chapter; this is to be expected since the ecclesiastical procedure was closely derived from the Roman model. Six of the seven citations to Gratian are to the second part, *causa* III,

¹ C. E. Lewis, "Ricardus Anglicus, A 'Familiaris' of Archbishop Hubert Walter," 22 *Traditio* 469-471 (1966).

² S. Kuttner, *Dictionnaire de droit canonique*, vol. 7, col's. 676-681; S. Kuttner and E. Rathbone, "Anglo-Norman Canonists of the Twelfth Century," 7 *Traditio* 279, 327-339 (1949-1951); L. Wahrmund, *Quellen zur Geschichte des Römisch-Kanonischen Prozesses im Mittelalter*, vol. 2, part 3 (1915).

³ Campbell is of the opinion that Walter did not attend to the duties of chancellor himself since he constantly employed vice-chancellors. 1 *Lives of the Chancellors* 116-118 (7th ed., 1885). However, it is not known what their duties were; it could be that Campbell's view is anachronistic.

of his *Decretum*. Four of the five references to the *Compilatio Prima* (1192) of Bernard of Pavia are to book II, title 13. This summa is nevertheless a very helpful work for us and was for the medieval practitioners and judges also. We have much more than a mere form book; it is a summary of the law.

The arrangement of ideas within Ricardus' work is somewhat haphazard, and so I will discuss them in an order which seems to me to be easier to follow. I have divided the material into three parts: competency, mode of examination, and substance of examination.

The competency of witnesses was determined by the judge. The criteria for this determination were designed to exclude those who would be most likely to commit perjury for various reasons. The language of this section seems to indicate that there was to have been a *voir dire*, because the judge was to allow a witness to testify only if he was satisfied that he would not perjure himself. The most important, certainly the most emphasized, criterion was integrity and good reputation; truthfulness in the past should be a fair indication of veracity in the future. Also the social status or rank of the proposed witness should be considered; the upper classes would be better educated and more conscious of the duty to testify truthfully. The wealthy witness was to be preferred over the poor one since the temptation to swear falsely for money would be less. Friendship, moreover; with one of the parties was to be noted, as was enmity towards the opposite party. And in addition the judge should observe the manner, bearing—shifty-eyes, sweaty palms, nervous fidgeting—and general behavior of the witness. This seems to be an attempt to exclude from court those who will detract from the dignity and solemnity of the proceedings by ill manners as well as by false testimony. Furthermore, those who hesitate in answering or give contradicting answers should be rejected.

The above-mentioned criteria are matters within the discretion of the judge. However, there are several classes of persons who are legally prohibited from testifying. Neither a freedman nor his immediate family nor his spouse can testify against his former master or his patron or vice versa. This is the privilege of the party; note also that the freedman can testify on behalf of his patron. Slaves are completely incompetent to testify. If a proposed witness is asserted to be in servitude, then his evidence will be taken and then, if it can be proved that he is free, his evidence can

be used, if not it will be quashed. This disqualification of slaves was copied from the Roman law to refer to serfs or villeins.⁴

The disability of foreigners and unknown persons seems to reflect a natural distrust of strangers. It is consistent with the above-mentioned preference for witnesses with good reputations, for these persons have no reputation at all.

As to family and dependents of the adversary party, there seems to be a conflict in the rules. At one place these persons seem to be allowed to testify against their kin and master, only if they so desire (and dare). But two paragraphs later they seem to be absolutely prohibited from testifying at all. The purposes of these two paragraphs, however, are not in conflict; the purpose of the second is to protect the outsider from the bias of witnesses who are kin to or under the control of the other party. This purpose is not frustrated nor is the outsider at all prejudiced by the voluntary testimony of the relatives of the adversary party against said adversary. The purpose of the first is to protect the integrity of the family by not allowing a stranger to turn one member against another and to encourage familial closeness by protecting shared confidences.

In regard to the disability of witnesses who are "under suspicion," "unfriendly," "not of good behavior," etc., it need only be pointed out that these conditions are so vague that each case must be entirely in the discretion of the judge, and thus we have only a repetition of the rules of competence discussed above.

Finally, if a witness is produced who has at the same time a lawsuit pending with the other party, this party may object if the witness holds an enmity towards him because of said pending litigation. If the suit with the witness is of a criminal nature, then his testimony cannot be taken until after the said suit is terminated. If it is a civil case, then the testimony of the witness will be taken, but it cannot be used until after the litigation with the witness has ended. This rule is based on the premise that the witness is liable to commit perjury out of malice for the party who also has a suit against him, but that, after the suit is ended, the witness's antagonism will abate. This rationale, however, does not explain why, in the case of a civil suit between the witness and party, the witness can give his testimony but it cannot be used until after that suit is ended. The Romans and the canon lawyers recognized the

⁴ In England at this time only free persons could appear in the common law courts as witnesses, whether a champion: Glanvill II, 3; or a compurgator: Glanvill V, 5; or member of a grand assize: Glanvill II, 11 and IX, 7; or a petite assize: Glanvill XIII, 3, 4, 7, etc.

greater dangers of criminal prosecutions; here may be the key to the answer. Perhaps the witness would attempt to injure and harass by means of perjury the other party in his action against the witness. Perhaps the preferable method of dealing with the problem, as in the cases of criminal suits, could not be allowed for reasons of the efficiency of judicial administration in cases of civil suits, which tend to be more complicated and drawn out.

The next topic to be considered is the mode of examination. The witness is to be examined in court by a judge. Since the argument and exceptions to the evidence take place at a later time, and since the witness can be examined several times, it can be inferred that the testimony was written down in the form of a deposition. Also the language about the publication of the evidence strongly suggests a written deposition.

Usually the same judge who will eventually decide the case hears the witnesses. However, there are several exceptions to this rule, and in certain special cases the judge sends out one of his subordinate officers to take the deposition of a witness. This is done where the testimony of a bishop is needed, out of respect for his sacerdotal dignity. Also the fairer sex are allowed to give evidence by means of depositions taken in their own homes. This deference to feminine delicacy was taken from a very adamant Roman order.

If a witness is too ill or feeble to be brought to court, then his deposition can be taken at his home. And if a witness resides in another jurisdiction, his deposition can be taken before certain officials in that jurisdiction and sent back to the judge before whom the action is pending. There must have been a commission under seal and notice to adverse parties; the judgment must be rendered by the judge in whose court the proceedings were initiated; and this is allowed only in civil cases.

Witnesses are to be examined in the presence of both parties. However, if one party having been given due notice refuses to appear, then he is estopped to object to any of the questions or responses or to the *ex parte* nature of the proceedings. A party will not be permitted to deprive his opponent of the use of evidence by merely refusing to be present at the examination of witnesses.

Any person who is not forbidden or excused from testifying may be compelled to come to court and give evidence. We have already discussed those persons who are forbidden or incompetent to testify; so now let us turn to those who are excused from giving testimony if they do not care to.

No person can be compelled to testify against his immediate family if he is unwilling. This rule states the privilege of the wit-

ness not the party. It lists the most distant kin covered by the exemption and then includes all those related in any nearer degree; since fathers-in-law and sons-in-law are listed, then wives must be included in this privilege.

Furthermore, old persons, invalids, soldiers, and magistrates absent on official business have the privilege of refusing to testify, if they wish to shirk their duties towards the administration of justice.

Before testifying the prospective witness should be sworn; the substance of his oath should be that he will tell the truth and not testify because of partiality or hatred towards any party or through fear or because of any remuneration. He also should swear that what he would testify to was told to him by his ancestor;⁵ I assume that this part of the oath refers only to matters beyond his own percipiency. It is clear that a witness is to be impartial in his testimony and not the flaming partisan of the party who produced him.

The judge is empowered to punish persons who have committed perjury, according to the nature of the offense.

Usually the competency of a proposed witness is determined before he is sworn, but Ricardus mentions two situations in which the evidence is taken under reservation. In the first situation, if the witness can later prove that he is not a slave as asserted by the other party, then his testimony will be allowed. In the second, the evidence of a witness who has a civil suit pending against the other party may be taken and held in abeyance until his said suit has been concluded.⁶ These rules undoubtedly saved time and expense of the parties, the witnesses, and the court.

In civil cases, if it were necessary, a witness could give his testimony *in camera* in order to protect his rights.

The general rule is that witnesses can be examined only three times before publication of their testimony; they cannot be brought back after publication except on new articles, i.e. set of questions. However, they can be brought in a fourth time or after publication, if a party objects to the evidence as improper or incomplete or if the other party has made an objection after the third time. It should be noted that the party producing the same person a fourth time must give an oath that he has not suppressed evidence or acted deceitfully but that he has not been able to use the evidence already

⁵ Cf. the oath of the demandant in reference to his champion in an action of right: Glanvill II, 3.

⁶ See *supra*.

given. No fourth production will be allowed after a long interval; the parties will not be allowed to protract the litigation unnecessarily; it is the judge's responsibility to see that justice is administered as expeditiously as possible. Thus after a witness has completed testifying and after his testimony has been published and made available to the parties, both parties have the right to object to it and recall the witness, if the judge finds defects or incompleteness in his testimony.

A witness has the right to be reimbursed for his proper expenses, i.e., those incurred by his being required to be present in court, by the party who summoned him. But, of course, he is not to accept money to pervert the substance of his testimony.

The third and final section is the substance of the examination, what sort of things the witness should testify about and in what manner, etc.

The witness should tell the whole truth in his answer but he should limit his answer to matters which are material to the dispute between the litigants. The three citations at the end of the third paragraph are to three diverse sections of the *Corpus Iuris Civilis* in which rights of action are restricted in various ways; for these three sections to be germane and for the entire paragraph to make any sense, this paragraph must have been intended to refer to the inadmissibility of immaterial evidence, i.e., evidence tending to establish a proposition not in issue.

The witness should not only testify to those things of which he has first-hand knowledge but also to that which he learned from others. However, he cannot testify as to what he has been told by the plaintiff or whatever the defendant has told him after the liti-contestation. This is a reasonable restriction on the general admission of hearsay evidence; there is no reason to allow the parties to testify indirectly through their witnesses and thereby swell the record with a glut of self-serving verbiage. It seems to me strange that the defendant is allowed to thus "educate" his witnesses up to the time of the liti-contestation, for surely he would be well aware of the issues to be determined long before this point has been reached.

A party cannot prove a point by the evidence of a single witness; there must be at least two, but two is sufficient, and the inference is that no more should be produced. The judge should not be burdened by evidence which is merely cumulative.

The witness should answer clearly, simply, without qualifications, without embellishment.

Having considered the rules of evidence set out by Ricardus, it remains for us to examine these rules by comparison with current American ideas and practices in order to determine which ones have eternal validity and universal application and which ones were made to suit local conditions and attitudes which change as each generation rebels against its predecessor. The times are constantly changing, and some rules follow the times, others do not. This essay is centered around Ricardus' summa, and so it is unnecessary to mention those rules of evidence not discussed therein. And one further point—it is not necessary to discuss the relative functions of the judge and jury since there was no jury in Romano-canonical procedure.

In the area of the qualifications of the competent witness there has been reform of the magnitude approaching revolution. Ricardus mentions as criteria for competency good reputation, education, personal bias for or against one of the parties for various reasons, demeanor, inconsistency on voir dire, professional bias, social status, wealth, domicile, etc. These situations and conditions are still today recognized as relevant to the likelihood of truthful testimony; however, instead of going to the initial question of competency, these are matters of credibility and weight of the evidence which are to be dealt with in the final argument or summation to the jury.

The only type of restriction mentioned by Ricardus which exists today is the privilege of spouse not to testify against spouse in a criminal prosecution unless both are willing that the testimony should be given.⁷ The reason that this rule has been retained is not because of any probability of perjury but because it is good public policy to protect marital relationships by not subjecting them to this situation which suborns the loyalty of the spouse.⁸

The present practices of allowing persons in these various relationships and situations to testify are good. Many have misgivings as to the abilities of juries to winnow the evidence, but it is my opinion that in the stiff breeze of the summation the chaff will be quite blown away. The reason behind the restrictive rules of the Romano-canonical procedure, to prevent anticipated perjury, is not great enough to outweigh the general policy of broad admissibility, which was recognized then as now. Clearly the medicine is worse than the illness.

⁷ CODE OF VA., sec. 8-287 (repl. vol. 1957), sec. 8-288 (cum. supp. 1966).

⁸ But see *contra* 2 *Wigmore on Evidence*, sec. 600-604 (3rd ed., 1940) and 8 *Wigmore on Evidence*, sec. 2227, 2228 (rev., 1961).

The next topic to be considered is the mode of examination. In the Romano-canonical system the general *modus operandi* was for the judge to question the witness upon interrogatories prepared by the parties. The responses of the witness were written down as a deposition; then at a later stage of the litigation, after publication, the parties could argue any exceptions. The most significant thing here is that the depositions were taken before the judge who would decide the case so that he had the benefit of demeanor evidence, the lack of which was one of the great criticisms of the process of taking evidence in chancery. Today most evidence is given orally in court in the presence of the judge and jury and more and more frequently in chancery also. But today when depositions are used in any court, the demeanor evidence is lost because they are now taken by the attorneys of the parties; the only court official present is the reporter, who passively records the proceedings.

The general rule in canon law was that the witnesses were brought to the judge; however, there were appropriate exceptions where this rule would consistently involve hardship, and examiners would be sent out to bishops, women, and invalids. Today we no longer grant this favor to the first two classes, but of course the necessity of using the depositions of invalids continues. If the parties cannot go to his bedside, then his testimony will be lost. As mentioned above, the examination is conducted by the attorneys, therefore examiners are no longer needed or used.

Then as now, if a witness resides outside of the jurisdiction of the court, his deposition may be taken where he resides and returned to the court in which the lawsuit is pending. In this case it is felt that the convenience to the witness and the reduction of expense to the parties outweighs the value of the demeanor evidence. Today it is not necessary to have a commission to take a deposition.

Although at canon law magistrates, soldiers, and invalids had the privilege not to testify at all if they did not care to, under the current system they do not enjoy this privilege. However, the depositions of certain public officials can be used more freely than those of the ordinary garden-variety people. Their depositions can be taken at a time and place that will not seriously inconvenience them; the time and place can be set to suit them, since the judge need not be present. If the judge is required to be on hand, as in the canon law procedure, then everyone else's schedule must be conformed to his. The principle behind these rules is that the performance of public duties of important officials should not be impaired by requiring these men to spend their time in court in matters which do not concern the state.

In both systems the effective administration of justice has shown that the witnesses must be able to be compelled to testify and to testify under oath and to be punished for perjury. Both parties should be present at the giving of testimony; however, if due notice has been given, the other party is estopped to object to an *ex parte* proceeding. This makes the availability of cross-interrogatories meaningful.

As to the amount of testimony, Ricardus infers that three productions of a witness is the normal limit; this would allow for a cross-examination and a re-direct as in our current practice in the court room. In taking depositions today, there is no limit on the number of times a witness can be compelled to depose; however, since the attorneys now ask the questions and cross-examine at the end of the direct examination, it is seldom more than one. The judge has full power to remedy the abusive use of depositions in any case. Ricardus also admits that *interest reipublicae ut sit finis litium*.

In Romano-canonical law, the witness had the right to reimbursement of his expenses in connection with his giving testimony. He does not have this right in our system; however, as a general rule, the party that produced him will repay him for his expenses. Modern judges have no trouble distinguishing these payments from bribes. After all he usually has no personal interest in the suit; if others benefit from his efforts and time, they should pay for it.

In both systems the testimony is limited by the conception of materiality; it is too obvious to mention that a lawsuit must have some sort of boundary.

The canon law courts allowed the witnesses to give hearsay evidence. The reasons we today do not allow it is that a jury is not felt to be able to cope with it as well as a judge, but principally because of the modern emphasis on the importance of cross-examination. However, the innumerable modern exceptions to the hearsay rule indicate that its original purpose was to exclude evidence which was of lesser value, and at the same time these exceptions suggest that the rule is not a foreordained, immutable decree of the Fates.

The refusal of the canonists to accept the uncorroborated testimony of a single witness is a precaution which is not found in Anglo-American law. It would appear obvious to us that one witness is better than none and that lack of corroboration is a question of weight rather than competency, but it is not to the civilians.

Both systems attempt to expedite the course of the trial by discouraging the production of witnesses whose testimony is un-

necessarily cumulative and by encouraging witnesses to testify clearly and directly.

In all that has gone before, we have been examining various rules of evidence to determine their efficacy in bringing the true facts before the court and in keeping from the ears of the court lies, misstatements, and exaggerations. The success of these rules along these lines is absolutely essential to the cause of justice. If the rules of evidence do not perform their functions, then the court is a travesty. The courts should be accessible to all persons, and thus the rules of evidence should promote the efficient and inexpensive use of witnesses. What good is a court, if it is so clogged with business that it cannot hear your case or if it is so expensive that you cannot afford to appear in it? In pursuing these goals, it is well to keep in mind the principles, purposes, and experiences of other systems, especially the more advanced ones, such as the canon and civil laws, upon which we have leaned heavily in the past.