The Establishment of a Rule Against Hearsay in Romano-Cannonical Procedure

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I. INTRODUCTION

Anglo-American evaluations of the hearsay rule manifest a certain schizophrenia. On the one hand, hearsay is praised as the "greatest contribution" of Anglo-American law to the world's jurisprudence. According to proponents of the rule, the hearsay bar provides a salutary mechanism to judges who are distrustful of the abilities and fairness of the jury. By barring hearsay, the judge, as gatekeeper of the evidence, can prevent the jury, an "untrained tribunal," from overestimating the value of hearsay statements that may be unreliable.

* Assistant Professor of Law, Boston College Law School. For their helpful reviews of earlier drafts of this Article, the author is grateful to Aviam Soifer, Dean and Professor at Boston College Law School; Professors Ingrid M. Hillinger, James R. Repetti and Mark S. Brodin of Boston College Law School; and Professor Charles Donahue, Jr. of Harvard Law School.

1. All translations in this Article are the work of the author. English language translations consulted are: of the cited works of Cicero and Quintilian, the translations accompanying the texts in the respective Loeb Classical Library editions; of Justinian's Digest, The Digest of Justinian (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 4 vols. 1985); and of Beaumanoir's Coutumes de Beauvaisis, The Coutumes de Beauvaisis of Philippe de Beaumanoir (F.R.P. Akehurst trans., 1992).

Volumes in the series Monumenta Germaniae historica and Monumenta iuris canonici are cited as MGH and MIC, respectively. Volumes in the series Patrologiae cursus completus, edited and published by J.P. Migne (Series Latina, 221 vols., Paris 1844-1891) are cited as Patrologia Latina.

4. Id. at 265.
5. Id.
Proponents of the contrary view regard the hearsay bar as a complex of cumbersome rules and exceptions that are, in the final analysis, "an unintelligible thicket."6 Worse than that, the rule is basically unnecessary. Because jurors today are "increasingly well-educated and capable, under guidance from the court, of assessing probative force,"7 the need for the rule is substantially diminished.

These contrasting assessments of the hearsay rule, however different in their conclusions, share a common starting point. Both the positive and the negative view begin with the assumption that the hearsay rule owes its existence to the institution of the Anglo-American jury. If the jury is viewed as a group of gullible factfinders, who are dangerously prone to attribute excessive value to hearsay statements, then the bar's discipline contributes to reliable verdicts. If, on the contrary, the jury is viewed as a temporary community of sophisticated factfinders, who can be trusted to assess hearsay accurately, then the rule's barriers impede reliable judgments. Both views focus on the institution of the jury for justification, or lack thereof, for the hearsay rule's existence.8

Such Anglo-American arguments that tie the hearsay rule to the jury fail to grasp the essential nature of the rule. In fact, the hearsay rule developed on the European continent long before English juries began to receive witness testimony in court.9 An examination of the Continental rule's origin and growth in medieval Europe will show that the rationale for a rule against hearsay does not depend upon the presence of a jury. Even in the absence of a


8. "[By 1840] it became the fashion to attribute the exclusion of hearsay to the incapacity of the jury to evaluate, and in the development of exceptions to the rule, courts have doubtless been influenced by this notion." Eric D. Green & Charles R. Nesson, Problems, Cases, and Materials on Evidence §12-13 n.1 (2d ed. 1994) (quoting Model Code of Evidence 221 (1942)). Thayer viewed the English law of evidence as intelligible only "as a product of the jury system" in which "untrained citizens are acting as judges of fact." James B. Thayer, A Preliminary Treatise on Evidence at the Common Law 509 (Boston, Little Brown 1898).

9. The English jury, as judges of fact, did not generally depend upon witness testimony presented in court until some time during the sixteenth century. See 5 John H. Wigmore, Evidence §1364, at 15 (James H. Chadbourn ed., 3d ed. 1974). The practice did not become firmly established until the early seventeenth century. Id. Before then, jurors gathered evidence by going about the countryside and making their own inquiry of persons who might know something about the case. Id.
jury, Western jurisprudence repudiated hearsay. By the thirteenth century, Continental jurists enshrined in law a deliberate value judgment that rested on the authority of much older Roman and canonical texts: hearsay should be rejected regardless of who the factfinder is, because a reliable verdict must be based on first-hand testimony at trial, subject to testing before the factfinder. The English jury system may provide a means to assure enforcement of the English hearsay bar, but the rejection of hearsay does not depend upon the jury for its rationale or for its origin in Western legal culture.

II. CLASSICAL ROME

Early Roman law made no assumption that the only testimony a factfinder should consider was the statement a witness gave in person before the factfinder based on personal knowledge. In the classical period of Roman law, roughly from the first century B.C.E. through the first half of the third century C.E., no limit existed on derivative testimony. Nonetheless, the reasons for mistrusting such secondary evidence were already apparent. Understanding the issues of hearsay in the classical period requires an appreciation of their context at trial. This, in turn, requires a sense of some salient features of Roman trial procedure.

It had long been established by the first century B.C.E. that no citizen could be deprived of life or property without appropriate legal procedure. “[O]ur ancestors long ago set down . . . that nothing concerning the life of a citizen or his goods can be taken without a judgment of the senate or of the people, or of those constituted judges concerning a particular matter.”

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10. The period of the Principate (27 B.C.E.-235 C.E.) is commonly identified as the classical period of Roman law. See Hans J. Wolff, Roman Law: An Historical Introduction 91 (1951). Some authors consider the classical period to extend back to the late Republic. See Mauro Cappelletti & Joseph M. Perillo, Civil Procedure in Italy 5 (1965).


Roman Empire accorded citizenship to more and more persons within its regions, the scope of this guarantee expanded.\textsuperscript{13}

Trial procedure was accusatorial, at least by Cicero's day.\textsuperscript{14} Even a factually guilty person could not be convicted of a crime unless he was formally accused.\textsuperscript{15} A private accuser initiated an action after receiving permission from a magistrate.\textsuperscript{16} The accused was informed of the charge and the accuser's identity,\textsuperscript{17} and both parties could be represented by advocates.\textsuperscript{18}

The trial took place in public.\textsuperscript{19} In the earlier part of the classical period, the trial was held before jurors.\textsuperscript{20} Later, it took place before a governor or other delegate of the emperor,\textsuperscript{21} aided by an advisory council of distinguished persons.\textsuperscript{22} Individuals of high rank constituted the jury, which was of no fixed number.\textsuperscript{23} In one trial at which Cicero acted as defense counsel, the jury numbered fifty, equally divided among senators and knights.\textsuperscript{24} Conviction required an absolute majority vote.\textsuperscript{25} The accuser presented his case first\textsuperscript{26} and had the obligation to prove it.\textsuperscript{27} Witnesses were

\begin{enumerate}
\item The \textit{lex Iulia} (90 B.C.E.) extended Roman citizenship to all allies in Italy, and the \textit{lex Plautia Papiria} (89 B.C.E.) allowed two months to any person domiciled in Italy to obtain citizenship upon request. See H.F. Jolowicz & Barry Nicholas, Historical Introduction to the Study of Roman Law 66 (3d ed. 1972). The \textit{constitutio Antoniniana} (c. 212 C.E.) granted citizenship to virtually all inhabitants of the empire. See id. at 345-46.
\item See Kunkel, supra note 11, at 67; Gustav Geib, Geschichte des römischen Criminalprozesses bis zum Tode Justinian's 254 (Leipzig, Weidmann'sche Buchhandlung 1842). Although a magistrate could investigate on his own initiative, the accusatory form remained normal throughout the classical period. See Jolowicz & Nicholas, supra note 13, at 403.
\item See Geib, supra note 14, at 254.
\item See A.H.J. Greenidge, The Legal Procedure of Cicero's Time 459-66 (photo. reprint 1971) (1901); Jones, supra note 11, at 64, 110, 117; Kunkel, supra note 11, at 67.
\item See Geib, supra note 14, at 270-73; Jones, supra note 11, at 64-65.
\item See Jones, supra note 11, at 63-64. "The fairness with which the rules of Roman criminal procedure afforded the accused scope for making his defence is most impressive and might even seem to us exaggerated. He could sometimes have as many as six advocates appearing for him." Kunkel, supra note 11, at 68.
\item See Wolfgang Kunkel, Prinzipien des römischen Strafverfahrens, in Kleine Schriften 1, 23 (Hubert Niederländer ed., 1974).
\item See Jones, supra note 11, at 45, 91.
\item See id. at 97-113; 2 James L. Strachan-Davidson, Problems of the Roman Criminal Law 156-58 (photo. reprint 1991) (1912).
\item See Jones, supra note 11, at 84.
\item See id. at 69; Strachan-Davidson, supra note 21, at 97.
\item See Cicero, Pro Flacco 2.4 (59 B.C.E.), in Cicero, The Speeches 360, 364 note a (Louis E. Lord trans., 1937).
\item See Geib, supra note 14, at 367; Jones, supra note 11, at 45, 72-73; Kunkel, supra note 11, at 68.
\item See 2 Emilio Costa, Cicerone Giureconsulto 143 (2d ed. 1927); Greenidge, supra note 16, at 477; Mommsen, supra note 11, at 431.
\end{enumerate}
placed under an oath to tell the truth, and they were subjected to direct and cross-examination. In the early part of the period, parties or counsel questioned the witnesses, and the judge generally played a passive role. He could control questioning and the number of witnesses, but he did not admit or exclude evidence. During the latter part of the period, the judge became increasingly active, joining in the examination of the witnesses and replacing the jury as factfinder.

_No rules of evidence_

Rule-bound limits on the kinds of proof receivable at trial had not yet emerged in this period. No legislation or binding judicial authority treated the question of how a party could or could not prove his case. There was no formal theory of evidence, and no rules restricted factfinders in what they could consider of the various types of proof set before them. Nor did a judgment require any particular standard of proof. In one of Cicero's rare appearances as a prosecutor, he gave an indication of how broad the range of proofs could be. At the trial of Verres, he announced: "Now let us accuse this man [of corruption in office] with documents, witnesses, private and public letters and authorities."

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27. See Gerardo Broggini, La Preuve dans l'ancien Droit romain, in 1 La Preuve 223, 276 (Recueils de la Société Jean Bodin No. 16, 1964); Jolowicz & Nicholas, supra note 13, at 185; Kunkel, supra note 11, at 67.


29. See Kunkel, supra note 11, at 68.

30. See id; Pugliese, supra note 28, at 318.

31. See Greenidge, supra note 16, at 495; Kunkel, supra note 11, at 68; Mommsen, supra note 11, at 421-22; Pugliese, supra note 28, at 318.

32. See Geib, supra note 14, at 631-32; Jones, supra note 11, at 113-14; Mommsen, supra note 11, at 422.

33. See W.W. Buckland, A Text-Book of Roman Law from Augustus to Justinian 662-64 (3d ed. 1966); Jones, supra note 11, at 97; Mommsen, supra note 11, at 447.

34. See Buckland, supra note 33, at 637; Geib, supra note 14, at 327; Jean Philippe Lévy, La formation de la théorie romaine des preuves, in Studi in onore di Siro Solazzi 418, 420, 424, 430 (1948); Strachan-Davidson, supra note 21, at 121-22; Pugliese, supra note 28, at 306.

35. See Lévy, supra note 34, at 420.

36. See id. at 430.

37. See Geib, supra note 14, at 335.

Hearsay employed for whatever value the factfinder might attribute to it

In this vacuum of evidentiary limits, nothing prevented a party from using hearsay as a means of proof. Of course, its use reveals nothing about its efficacy. Cicero’s speeches bristle with instances of the accuser or the accused relying upon hearsay evidence. Cicero, for example, acting in his more customary role as defense counsel, had to protect Plancius, charged with corrupting an election, against witnesses for the accuser who testified to oral statements they had heard, including reports and rumors of Plancius’s corrupt practices.39

Proof could also include a wide variety of written hearsay.40 A party might offer private letters that bore directly on factual issues in the case.41 For instance, when Flaccus, whom Cicero defended, was accused of extortion, the accuser relied upon private letters in which the aggrieved author had complained to his mother and sister that Flaccus had extorted fifty talents from him. The writer of the letters never testified.42

Public letters from entire communities provided another means of written proof. Usually the group’s representative (legate) presented these letters, and they typically conveyed the character of a party or the community’s grievances.43 Parties also produced written declarations at trial from persons who did not appear in person. These deponents gave statements outside of trial with authenticating witnesses present but in the absence of the opposing party.44 Official documents, books and accounts could likewise be put forward.45

The factfinder was free to evaluate these various types of hearsay evidence for their probative value, like any other evidence presented in this period. Roman law had not yet established the

41. See Real-Encyclopädie, supra note 40, cols. 1051-52.
42. See Cicero, Pro Flacco 36.90-37.93, supra note 24, at 460-65.
43. See Greenidge, supra note 16, at 489-91; Real-Encyclopädie, supra note 40, cols. 1052-53.
44. See Greenidge, supra note 16, at 488; Real-Encyclopädie, supra note 40, cols. 1028, 1051-52.
45. See Greenidge, supra note 16, at 493-95.
principle that a witness's testimony had to be given at trial and had to be based on firsthand knowledge.

III. The Bases for Hostility to Hearsay in the Classical Period

Notwithstanding this absence of evidentiary limits, the use of hearsay clashed with fundamental principles of Roman factfinding. Roman trial procedure valued most highly live testimony from witnesses who had personal knowledge of facts and who swore to them under oath, while subject to cross-examination by opposing counsel or, later, by the judge.46 Hearsay evidence was the antithesis of such live, sworn, in-court testimony. Consequently, the use of hearsay was already at odds with the legal environment even before any rule of evidence developed to bar it.47

*Emphasis on live testimony*

Then, as now, live testimony provided the best proof of a matter in issue.48 Quintilian (c. 35-110 C.E.), the leading Roman rhetorician of the period, was also an experienced trial practitioner.49 He addressed his treatise, *The Institutes of Oratory* (c. 95 C.E.), to lawyers who wished to know how to prove their cases. Quintilian heavily stressed the use of live testimony. He also devoted detailed attention to the presentation of witnesses.50 Frequently, he looked to Cicero as a model in this regard. Quintilian warned that reliance upon the writing of an absent witness is likely to meet with defeat. "It is easier to repel written evidence"51 than live, he advised, because an adversary can point out that an absent declarant is likely to have less difficulty hiding his shame before a few persons who attest to his document than he would when he faced a

46. See id. at 482; Jolowicz & Nicholas, supra note 13, at 185; Real-Encyclopädie, supra note 40, cols. 1051-53.
47. See Buckland, supra note 33, at 637; Geib, supra note 14, at 335; Mommsen, supra note 11, at 411, 440; Salvatore Messina, La testimonianza nel processo penale romano, 73 Rivista Penale 278, 292-93 (1911); Real-Encyclopädie, supra note 40, col. 1053.
48. See 2 Costa, supra note 26, at 144; Greenidge, supra note 16, at 272-74; Real-Encyclopädie, supra note 40, cols. 1046, 1051.
49. For brief biographies of Quintilian, see James J. Murphy, Introduction to Quintilian on the Teaching of Speaking and Writing ix, xiv-xviii (James J. Murphy ed., 1987); The Oxford Classical Dictionary 907 (2d ed. 1970).
50. See infra text accompanying notes 85-89. For Quintilian's complete exposition of how witnesses should be examined, see Quintilian, Institutio oratoria 5.7.3-37 (c. 95 C.E.), in 2 The Institutio Oratoria of Quintilian 170-91 (H.E. Butler trans., 1921).
51. "Simplicior contra tabulas pugna." Quintilian, Institutio oratoria 5.7.1, supra note 50, at 168.
factfinder. Moreover, a jury is likely to consider the declarant’s absence as a sign that he lacks confidence in his testimony.\textsuperscript{52}

Quintilian’s reasoning makes clear that the witness’s presence was valued, at least in part, for the opportunity it offered the factfinder to observe demeanor and to use it as a measure of credibility. Cicero frequently made the same point, calling the jury’s attention to the details of how a witness comported himself when testifying. In defense of Flaccus, for example, Cicero asked the jurors (in making their decision whether to believe accusing witnesses) to scrutinize the expressions on the witnesses’ faces and to recognize that they spoke in an impudent tone.\textsuperscript{53} He reminded the jury how one witness, as he testified, was angry, shame-faced, trembling and pale.\textsuperscript{54} Another was irate, yet hesitant as he spoke.\textsuperscript{55}

Direct exposure of a live witness also gave the factfinder an opportunity to determine whether the witness appreciated the gravity of the occasion. Arguing that one witness appeared too casual, Cicero asked the jury: “Does Indutiomarus [the witness] know what it is to testify? Is he moved by the same fear that would move each one of us, when he is brought into that place [the witness box]?”\textsuperscript{56} An incautious witness, in an unguarded moment of candor, might also let slip a word that revealed his bias or lack of restraint.\textsuperscript{57} Such subtle and telling demeanor, which could only be observed when the witness appeared directly before the factfinder, helped the jury decide whether the witness’s testimony was believable. “Therefore, see with what expression on their face, with what audacity they speak; then you will know with what trustworthiness they testify.”\textsuperscript{58}

The absence of the declarant, of course, made it impossible for the jury to judge truthfulness on the basis of facial expression, tone, earnestness or spontaneity. Cicero was quick to condemn an accuser who relied on hearsay in place of live witnesses. He dismissed the hearsay letters against Flaccus with acid rhetoric:

\begin{itemize}
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} See Cicero, Pro Flacco 4.10, supra note 24, at 376.
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} See id. 4.11.
  \item \textsuperscript{56} “Scit Indutiomarus, quid sit testimonium dicere? Movetur eo timore, quo nostrum unus quisque, cum in eum locum productus est?” Cicero, Pro Fonteio 27 (c. 70 B.C.E.), in Cicero, The Speeches 308, 334 (N.H. Watts trans., 1958).
  \item \textsuperscript{57} See id. 28, at 334-36.
  \item \textsuperscript{58} “Itaque videte quo vultu, qua confidentia dicant; tum intellegetis qua religione dicant.” Cicero, Pro Flacco 4.10, supra note 24, at 376.
\end{itemize}
But the charge made by Flacidius [the author of the letters] is remarkable; he says he gave fifty talents to Flaccus. Let us hear the man. He is not present. How, then, does he speak? His mother proffers a letter and his sister another; they say he wrote them and that he gave a great deal of money to Flaccus... [W]hy do we not hear him himself?... Did you think you could prove so great a charge, Decianus, by having letters recited and merely these women produced, while the praised writer was absent...?59

Ironically, the strength of the factfinder's expectation of live testimony and the common distrust of hearsay are revealed by the elaborate measures Cicero took to excuse his own use of hearsay in the defense of another of his clients, Roscius Comedus.60 The accuser claimed Roscius owed him money. Cicero wished to show the accuser had already been paid.61 There was no eyewitness available to testify. The defense, therefore, was reduced to relying upon the hearsay statement of someone who claimed he had heard an eyewitness report of the payment.62 Cicero labored to justify his use of such secondary evidence. His explanation to the jury was not unlike that of a modern American practitioner who argues to a judge that some hearsay should be allowed because it is necessary and reliable.63 Cicero first insisted that no direct witness to the payment was available to be called before the jury.64 Second, he argued that his absent declarant was a judge, a knight, a man without bias whose probity the opposing party himself had once accepted.65 Third, he explained that the declarant knew the gods would punish him if he lied, even though he was not under oath.66

59. At Flacidianum crimen est ingens; talenta quinquaginta se Flacco dicit dedisse. Audiamus hominem. Non adest. Quo modo igitur dicit. Epistulam mater eius profert at alteram soror; scriptum ad se dicunt esse ab illo tantam pecuniam Flacco datam... [C]ur non audimus ipsum?... His tu igitur epistulis, Deciane, recitatis, his mulierculis productis, illo absente auctore laudato tantum te crimen probatum putasti...?

61. Id. 14.41, at 312.
63. See Fed. R. Evid. 803(24), 804(b)(5).
64. Cicero, Pro Roscio Comoedo 14.42, supra note 60, at 312.
65. Id.
66. Id. 16.46, at 316-17. For a discussion of the oath requirement, see infra text accompanying notes 74-80.
In short, Cicero claimed the hearsay was trustworthy. His extended excuses for the use of hearsay were made to a jury that anticipated meeting a declarant face-to-face and that received hearsay skeptically.

The importance of personal knowledge

An advocate’s strongest proof was a witness testifying from personal knowledge.67 In Cicero’s defense of Archia68 against a charge that he was not a citizen, Cicero announced to the jury that he would produce an eyewitness in support of his client: “There is present a man of the greatest authority, trustworthiness and credibility, M. Lucullus, who says that he does not think, but knows, not that he heard, but saw, not that he was only present, but that he was active.”69 Conversely, Cicero poured scorn on witnesses who testified not from personal observation but on the basis of reports they received from others. In urging the jury to reject the hearsay used against the allegedly corrupt Plancius, Cicero argued: “But nothing is so fleet as an evil report; nothing is sent about more easily, nothing is picked up more quickly, nothing spreads more widely.”70 It was not the bad report the jurors should consider, but rather the actual source of it. When the source remained unknown, Cicero urged the jurors to reject it: a witness who testifies that “I heard” relates nothing more than “the voice of the mob.”71 “The report of the people” and “the testimony of the multitude,” Cicero argued, constitute the type of evidence which “truth itself can hardly refute.”72 Failure to establish truth in a reliable manner created the risk that innocent persons would be convicted. Indeed, the community itself was imperiled if this type of hearsay were to be the basis of a judgment: “One thing I greatly ask and beg of you, jurors, where there is danger here not only to the man I defend, but to the community, do not think to subject the fortunes

67. See Greenidge, supra note 16, at 482; Real-Encyclopedia, supra note 40, col. 1046.
69. “Adest vir summa auctoritate et religione et fide, M. Lucullus, qui se non opinari, sed scire, non audisse, sed vidisse, non interfuisse, sed egisse dict.” Id. 4.8, at 14.
70. “Nihil est autem tam volucre, quam maledictum; nihil facilius emittitur, nihil citius excipitur, nihil latius dissipatur.” Cicero, Pro Plancio 23.57, supra note 39, at 480.
71. “[I]lla vox vulgaris, audivi.” Id. at 482.
of the innocent to fictitious hearsay [auditiones] or to common talk which has been seeded and scattered about.\textsuperscript{73}

\textit{The need for testimony under oath}

Roman procedure required witnesses at trial to testify under oath.\textsuperscript{74} The oath strongly enhanced veracity. Cicero made repeated claims for the reliability of evidence on the authority of the oath: “Q. Minucius, having been sworn, says the money was paid,”\textsuperscript{75} or “You will hear from persons under oath.”\textsuperscript{76} On the other hand, a witness’s failure to recognize the serious obligation of the oath warranted rejecting his testimony. Cicero called upon the jury to disregard the witnesses against Flaccus because they treated their oath like a joke and their testimony like a game.\textsuperscript{77}

Cicero seized upon the conflict of hearsay with the oath requirement\textsuperscript{78} as an additional argument for dismissing the hearsay letters against Flaccus: “Will he [the author], then, unsworn, whom no one would believe if he held the altar [to make an oath], prove what he wishes by using a letter?”\textsuperscript{79} On the same ground Quintilian disparaged hearsay: “For we know testimonies of whole nations as well as entire classes of testimonies have been made light of by orators; as with hearsay statements [auditionibus]; for [it will be said] those [testifying] are not themselves witnesses but relate the voices of the unsworn.”\textsuperscript{80} Thus the unsworn nature of hearsay constituted

\textsuperscript{73} “Ille unum vos magnopere oro atque obsecro, iudices, cum huius, quem defendo, tum communis periculi causa, ne fictis auditionibus, ne disseminato dispersoque sermoni fortunas innocentium subjiciendas putetis.” Cicero, Pro Plancio 23.56, supra note 39, at 480.

\textsuperscript{74} Pugliese, supra note 28, at 317; Real-Encyclopdie, supra note 40, col. 1051.

\textsuperscript{75} “Q. Minucius, iuratus dicit pecuniam datam ...” Cicero, In Verrem 2.33.80, supra note 38, at 380.


\textsuperscript{77} Cicero, Pro Flacco 4.12, supra note 24, at 378.

\textsuperscript{78} It was possible for a declaration made outside of trial to be sworn. “[O]rdinary private evidence was also accepted in written form. The witness had to take an oath and write out his testimony in the presence of sworn witnesses, who affixed their seals.” Jones, supra note 11, at 71-72; see Pugliese, supra note 28, at 317. Such evidence, however, was easily derided if the declarant was absent at trial. See Buckland, supra note 33, at 637; see also supra text accompanying notes 51-52.

\textsuperscript{79} “Ergo is, qui si aram tenens iuraret, crederet nemo, per epistulam quod volet inuiaturus probabit?” Cicero, Pro Flacco 36.90, supra note 24, at 460.

\textsuperscript{80} “Nam et gentium simul universarum elevata testimonia ab oratoribus scimus et tota genera testimoniorum: ut de auditionibus; non enim ipsos esse testes sed inuiatorum adferre voces ...” Quintilian, Institutio oratoria 5.7.5, supra note 50, at 170.
another of its principal defects, even in an age without rules of evidence.

The importance of examining witnesses

Finally, hearsay could not find any secure place in the Roman trial environment because it violated the system's expectation that witnesses would be subjected to probing examination. In the first years of the classical period, this questioning took place much like that in a modern American courtroom, where parties are subjected to cross-examination by their opponents before the jury. In the later part of the period, the judge actively examined the witnesses. This role increased to such a degree that the judge, sitting with a council of advisors, replaced the jury-courts. Regardless of who asked the questions or found the facts, however, Roman procedure greatly stressed the role of witness examination to test credibility.

During Cicero's time, parties or advocates still asked the questions. Cicero recalled how rhetoricians praised cross-examination and how one advocate was remembered particularly for his ability to expose the witness candidly to the jury, even against the witness's will. "He interrogated the witness well; he attacked him heatedly and caught him; he led him where he wanted to; he refuted and rendered [the witness] speechless . . . ." Quintilian also strongly emphasized the art of cross-examination. His instructions are as relevant today as when he first gave them at the end of the first century C.E. His masterful, extensive presentation reveals the essential role of cross-examination in the Roman trial. Quintilian's first rule was "to know the witness" who is to be examined. A party must carefully prepare his own witness for the important test of cross-examination. This preparation was to take place before trial to enable the witness to withstand the real thing.

81. See Jones, supra note 11, at 114 (noting the significant role of witness demeanor in the evaluation of testimony); see also Mommsen, supra note 11, at 430-32; Messina, supra note 47, at 297; Pugliese, supra note 28, at 318.
82. See Jones, supra note 11, at 113-14; Mommsen, supra note 11, at 430; Messina, supra note 47, at 297; Pugliese, supra note 28, at 318.
83. See Kunkel, supra note 11, at 69-74; see also Jones, supra note 11, at 110, 113-14 (explaining the mechanics of the senate as a court of law as well as the courts of the emperor).
84. "[B]ene testem interrogavit; callide accessit, reprehendit; quo voluit adduxit; convictit et elingueu rediddit . . . ." Cicero, Pro Flacco 10.22, supra note 24, at 390.
85. "[P]rium est nosse testem." Quintilian, Institutio oratoria 5.7.26, supra note 50, at 182.
in front of the factfinder. The witness was not to appear timid, wavering or imprudent, because such a witness could be confused and led into snares by the opponent's counsel. The unprepared witness might well do more harm than the good that could be done by a steady and calm witness: "For a timid witness can be terrorized, a stupid one tricked, an irritable one excited, and a vain one puffed up." If the opposing witness clearly intended not to yield the truth, the cross-examiner would have to twist out of the witness what the witness was unwilling to give up voluntarily. This was best done by lengthy and repeated questioning. Eventually, the witness would say things he thought harmless, yet which would ineluctably make it impossible for him to deny the very thing he had never wanted to say. The reluctant witness would contradict himself and be forced to admit or recant. If counsel was unsure of the opposing witness's intentions, Quintilian counselled, then the cross-examiner should proceed step by step, by cautious degrees through seemingly innocuous and irrelevant questions until he secured from the witness what he desired.

Quintilian's elaboration of cross-examination could only have been written by an experienced advocate, who practiced within a system where the art of cross-examination was regularly displayed and where factfinders would expect testimony to be probed. Although factfinders could consider hearsay in this period, a skillful advocate would encourage them to attach little weight to such untested evidence.

IV. THE INCEPTION OF A LIMIT TO WHAT EVIDENCE A FACTFINDER COULD CONSIDER

The reign of the Emperor Hadrian (117-138 C.E.) marked a high point in the development of Roman jurisprudence. The emperor took great personal interest in improving the quality of justice and often sat as a judge himself. "Indeed, the Roman law of evidence owes a good deal to texts of his reign, and . . . the legal principles
can properly be ascribed to the emperor personally."93 Like his predecessors, Hadrian issued written answers to Roman officials who consulted him for legal guidance. These responses, called "rescripts," were usually drawn up in consultation with legal advisors to the emperor.94 Several of Hadrian's rescripts focused on how a factfinder could evaluate witness testimony.95 Hadrian confirmed the broad freedom of factfinding judges to make judgments relying on their own consciences (ex sententia animi tui).96 With respect to assessing witness testimony, he explicitly declined to limit that discretion. In answer to a question from a provincial official about how to determine the credibility of witnesses, Hadrian replied:

What arguments are sufficient to each matter for a method of proof cannot be satisfactorily defined in any certain way. Often, though not always, the truth can be determined without public records of each matter. Sometimes the number of witnesses, sometimes dignity and authority, at other times a commonly held rumor confirms the credibility of a matter about which there is question. Therefore, in sum, this alone I can reply to you: certainly you should not immediately make a trial [cognitionem] depend upon one type of proof, but you ought to draw conclusions from the opinion of your own self what you either believe or consider not sufficiently proven to you.97

93. Id. at 12.
94. See Kunkel, supra note 11, at 129. Statutory validity was assumed for the decisions contained in the rescripts. Id. at 128. An inferior judge who inquired about a legal issue was bound by the emperor's response. Id. at 129. For a detailed description of the Roman rescript system, see Honoré, supra note 92, at 33-70.
95. See Callistratus, De cognitionibus bk. 4 (198/211), Dig. 22.5.3 (533), in 1 Corpus Iuris Civilis 327-28 (Theodor Mommsen & Paul Krueger eds., 22d ed. 1973) (quoting Rescript of Hadrian to Vitius Varus, legate to the province of Cilicia; Rescript of Hadrian to Valerius Verus; Rescript of Hadrian to Iunius Rufinus, proconsul of Macedonia; Rescript of Hadrian to Gabinius Maximus). For the passage of Callistratus in the context of the reconstructed work, see 1 Palingenesia Iuris Civilis cols. 81, 88, para. 28 (Otto Lenel ed., Leipzig, Bernhard Tauchnitz 1889) [hereinafter Palingenesia]; see also Corbett, supra note 91, at 766 (synopsizing Hadrian's rescripts on witnesses).
96. See infra note 97 and accompanying text.
97. Quae argumenta ad quem modum probandae cuique rei sufficiant, nullo certo modo satis definiri potest. sicut non semper, ita saepe sine publicis monumentis cuiusque rei veritas deprehenditur. alias numerus testium, alias dignitas et auctoritas, alias veluti consentiens fama confirmat rei de qua quaeritur fidem. hoc ergo solum tibi rescribere possis summatim non utique ad unam probationis speciem cognitionem statim alligari debere, sed ex sententia animi tui te aestimare oportere, quid aut credas aut parum probatum tibi opinaris.
In a similar vein, the emperor wrote to Vibius Varus, a legate in the province of Cilicia:

You can know more how much credence is to be placed in the witnesses, who and of what dignity and of what repute they are, who are seen to speak candidly, whether they put forward one and the same studied talk or whether they respond truthfully and instantaneously to those matters which you question them about.98

The emperor was speaking about witnesses who appeared before the factfinder. Only in such cases could the factfinder attend to the subtleties of phrasing and scrutinize the candor of a witness's response to questions, as the emperor directed. Because the factfinder was on the scene, he was in a position to make such refined assessments. The emperor, far removed from the courtroom, declined to limit the discretion of a factfinder who had the witness in front of him.

When the witness did not appear in court, but sent written testimony, the factfinder lost the immediacy of an encounter with the declarant. In such a case, Hadrian did not hesitate to establish a limit:

The same divine Hadrian wrote to Iunius Rufinus, the proconsul of Macedonia, that witnesses themselves and not their written testimonies shall be believed. The words of the letter pertinent to this part are these: "Alexander brought up charges against Aper before me. Because he did not prove them or produce witnesses, but wanted to use written statements, which have no place in my court (for I am accustomed to question the witnesses themselves), I sent him back to the one presiding in that prov-

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98. "Tu magis scire potes, quanta fides habenda sit testibus, qui et cuius dignitatis et cuius estimationis sint, et qui simpliciter visi sint dicere, utrum unum eundemque meditatum sermonem attulerint an ad ea quae interrogeueras ex tempore uerisimilia responderint." Rescript of Hadrian to Vibius Varus, supra note 95, at 327.
ince, so that he could inquire about the reliability of the witnesses . . . .”

Here Hadrian created a clear boundary. A factfinder was entitled to weigh the testimony of a witness appearing before him because examination and observation could assure reliability. Testimony submitted in writing eluded such probing. The emperor, therefore, instructed the factfinder to disregard such statements completely. The judge would have no difficulty following this directive. As factfinder, he did not even have to expose himself to the contents of the testimony. He could simply refuse to read the submission, which is apparently what Hadrian did. Other judges may have heard the testimony and then rejected it: “Lucius Titius brought a charge of insult against Gaius Seius and in that action he [Titius] recited written testimony before the praetorian prefect: the prefect, because he did not put credence in written testimony, pronounced the judgment that Lucius Titius had suffered no insult from Gaius Seius.”

Presumably the basis for Hadrian’s instruction was not skepticism about the factfinder’s ability to weigh evidence for its proper worth, because one assumes that the emperor, who practiced his own rule, did not distrust himself. His rescript instead represents the statement of an extremely sophisticated judge, lawgiver and factfinder that evidence which cannot be ques-

99. Idem divus Hadrianus Iunio Rufino proconsuli Macedoniae rescrispit testibus se, non testimoniis crediturum. Verba epistulae ad hanc partem pertinentia haec sunt: ‘Quod crimen obiecerit apud me Alexander Apro et quia non probabant nec testes producebat, sed testimoniis uti volebat, quibus apud me locus non est (nam ipsos interrogare soleo), quem remisi ad provinciae praesidem, ut is de fide testium quaeret . . . .’ Rescript of Hadrian to Iunius Rufinus, supra note 95, at 327-28.

100. See Pugliese, supra note 28, at 320.

101. “Lucius Titius crimen intendit Gaio Seio quasi iniuriam passum atque in eam rem testationem apud praefectum praetorio recitavit: praefectus fide non habita testationis nullam iniuriam Lucium Titium passum esse a Gaio Seio pronuntiavit.” Paulus, Responsorum libri xxiii, bk. 2 (218/235), Dig. 3.2.21 (533), in 1 Corpus Iuris Civilis, supra note 95, at 67. For the passage of Paulus in the context of the reconstructed work, see 1 Palingenesia, supra note 95, cols. 1223, 1225, para. 1450. For the translation of “crimen . . . quasi iniuriam” as “insult,” see 1 The Digest of Justinian, supra note 1, at 86.

The court over which the praetorian prefect presided was the highest in the empire. See Alan Watson, Glossary to 1 The Digest of Justinian, supra note 1, at xv, xxiv. For a description of the praetorian prefect’s place in Roman administration, see Jolowicz & Nicholas, supra note 13, at 334-35.
tioned should have “no place” in the formation of a legal judgment.\textsuperscript{102}

Hadrian’s rescript had lasting influence. Imperial responses to official inquiries were often used not only as an answer in a single case but as a general model of correct procedure.\textsuperscript{103} After Hadrian, the third-century jurist Callistratus (211/217) preserved this rescript in his book, \textit{De cognitionibus},\textsuperscript{104} thereby making it available to students, jurists and practitioners.\textsuperscript{105} Through Callistratus, the rescript eventually passed into the great sixth-century compendium of Roman law, the legislation of Justinian.

V. JUSTINIAN’S LEGISLATION

At Constantinople, the Emperor Justinian (527-565) issued his monumental codification of Roman law intending to record the governing law of the Empire in an organized, permanent fashion.\textsuperscript{106} The legislation was composed of several parts: the Digest (excerpts from earlier influential jurists) (533), the Institutes (a textbook for law students) (533), and the Codex, or Code (a collection of laws from earlier emperors, with obsolete passages removed) (534).\textsuperscript{107} After 534 Justinian supplemented the Code

\textsuperscript{102} The rationale for Hadrian’s rejection of written hearsay would also apply to oral statements from absent persons, but no rescripts are preserved to indicate whether the emperor in fact extended his logic to such testimony.

\textsuperscript{103} Kunkel, supra note 11, at 129.

\textsuperscript{104} \textit{De cognitionibus} deals with the trial procedure of the \textit{cognitiones extraordinariae}. See supra note 97; Jolowicz & Nicholas, supra note 13, at 392.

\textsuperscript{105} It is conjectured that jurists such as Callistratus may have formed aristocratic clubs, or “schools,” for the discussion of legal matters. See Jolowicz & Nicholas, supra note 13, at 380.

\textsuperscript{106} Since the sixteenth century, Justinian’s compilation has been referred to as the Corpus Iuris Civilis. See Kunkel, supra note 11, at 168. For the stereotype edition, see Corpus Iuris Civilis, supra note 95. For detailed accounts of how the Corpus Iuris was compiled, see Buckland, supra note 33, at 40-47; Jolowicz & Nicholas, supra note 13, at 478-98; Paul Krüger, Geschichte der Quellen und Literatur des Römischen Rechts 365-92 (2d ed. 1912).

\textsuperscript{107} Although the Code was originally issued in 529, only the restatement of 534 remains. See Jolowicz & Nicholas, supra note 13, at 479.
with new laws (*constitutiones*), called the Novels,\textsuperscript{108} designed to fill gaps in the Code and to take account of new legal developments.\textsuperscript{109} In his compilation, Justinian treated the testimony of witnesses as a unified subject. This marked a significant advance over earlier Roman law, which had not given any organized consideration to means of proof.\textsuperscript{110} The Digest, the Code and the Novels each devoted a section to witness testimony. Although these sections did not create a system of rules of evidence, they provided many directives governing testimony.\textsuperscript{111}

To ensure that the factfinder could scrutinize statements of witnesses, Justinian required the witnesses to testify in their own voice under oath.\textsuperscript{112} In civil cases, the factfinding judge could excuse a witness’s presence only if exceptional hardship existed such as age, sickness, military duty or distance from the court.\textsuperscript{113} If the witness lived outside the jurisdiction, a judge in the witness’s locality would depose the witness.\textsuperscript{114} The examining judge would then send the deposition to the judge having original jurisdiction over the case.\textsuperscript{115} The opposing party had the opportunity to be present at the depo-

\textsuperscript{108} The Novels are printed in 3 Corpus Iuris Civilis (Rudolf Schöll & Wilhelm Kroll eds., 10th ed. 1972), with the original Greek in the left-hand columns and a Latin translation in the right-hand columns. The translation probably dates from the sixth century and is known as the Authenticum, because some scholars of the later Middle Ages considered it to be Justinian’s official collection. See Jolowicz & Nicholas, supra note 13, at 498. The translation generally is word-for-word from the Greek. See Krüger, supra note 106, at 402.

\textsuperscript{109} Jolowicz & Nicholas, supra note 13, at 496.

\textsuperscript{110} See Lévy, supra note 34, at 433-34.

\textsuperscript{111} See Dig. 22.5 (533), in 1 Corpus Iuris Civilis, supra note 95, at 328; Code J. 4.20 (534), in 2 Corpus Iuris Civilis 158 (Paul Krüger ed., 15th ed. 1970); Nov. 90 (539), in 3 Corpus Iuris Civilis, supra note 108, at 449.

\textsuperscript{112} See Code J. 4.20.16 (c. 527), in 2 Corpus Iuris Civilis, supra note 111, at 159. Justinian’s law (*constitutio*) addressed trials at Constantinople. If the witnesses were outside the imperial city, the parties could send representatives to deposite them. Id.

\textsuperscript{113} See Dig. 22.5.3.6, 22.5.8 (533), in 1 Corpus Iuris Civilis, supra note 95, at 328.

\textsuperscript{114} “[W]e know a law has long existed that if someone brings a case here [in Constantinople] but needs to establish proof in some part of a province, it is permitted to produce the witnesses within the province (a judge deciding this and determining a sufficient continuance) and to return the case here after the matters have been done and the case to be decided by the original judge . . . .” (“[S]cimus dudum factam legem, ut si quis hic litem exercet, oportet autem in provinciae parte aliqua adprobari, licentiam habere iudice hoc decernente et sufficiens temporis spatium definiente deducere intrà provinciam testes et hoc transmittere litem gestis perlatis et ab eodem iudicari iudice . . . .”) Nov. 90.5 (version of Authenticum), in 3 Corpus Iuris Civilis, supra note 108, at 450. The *constitutio* extends this procedure to cases brought in any province. Id.

\textsuperscript{115} Id.
sition.\textsuperscript{116} This procedure resembles modern American provisions for the use of prerecorded testimony.\textsuperscript{117} In criminal cases, however, the presence of witnesses before the presiding judge was strictly required.\textsuperscript{118} Thus, the normal practice in both civil and criminal cases was for a witness to testify live before the factfinder. In the Digest, Justinian also adopted Hadrian's rescript rejecting written testimony.\textsuperscript{119}

These passages, taken together, insisted that witness testimony be subject to the factfinder's examination.\textsuperscript{120} Their terms, however, did not clearly prevent reliance upon oral derivative testimony. Although the reception of such hearsay may have violated the logic of Hadrian's rescript, Justinian's texts only required witnesses to be present in court to testify. They did not unambiguously preclude secondary oral testimony. This would have involved the additional requirement that in-court witnesses testify solely on the basis of personal knowledge. Although the Code required witnesses to testify "about what they know,"\textsuperscript{121} it did not mandate that such knowledge be based on firsthand observation. Apparently it was still possible for a judge, as factfinder, to rely upon secondary oral evidence.

In at least one instance, however, Justinian warned that what a witness overheard was not to be relied upon at all.\textsuperscript{122} This passage merits special attention. It marks the first formal rejection of oral

\textsuperscript{116} "[I]t is fitting that he [the prospective adverse party] living in the city in which testimonies are given, be advised by the judge or defensor to be present and to hear testimony." ("[O]portet et illum in ea civitate constitutum in qua testationes dantur, admonitum a iudice sive defensore praesentem esse et audire adtestationes.") Nov. 909 (version of Authenticum), in 3 Corpus Iuris Civilis, supra note 108, at 452. A defensor was a municipal official invested with minor powers of jurisdiction in criminal and civil matters. See Jolowicz & Nicholas, supra note 13, at 430, 446-47.

\textsuperscript{117} See Fed. R. Evid. 804(b)(1).

\textsuperscript{118} "Understanding all these things [i.e., provisions for taking the testimony of witnesses before a court not having jurisdiction of the case] in pecuniary [i.e., civil] matters; for in criminal [matters], in which there is danger concerning great things, by all means witnesses are to be present before the judges and tell of those things that are known to them . . . ." ("Haec omnia in pecuniariis quæestionibus intellegentes; in criminalibus enim, in quibus de magnis est periculum, omnibus modis apud iudices praesentari testes et quae sunt eis cognita edocere . . . .") Nov. 905.1 (version of Authenticum), in 3 Corpus Iuris Civilis, supra note 108, at 451. The constitutio allows for the witnesses to be tortured to obtain the truth from them. Id.

\textsuperscript{119} See supra note 99 and accompanying text.

\textsuperscript{120} See Geib, supra note 14, at 630.

\textsuperscript{121} "[Q]uod noverint." Code J. 4.20.16.1, in 2 Corpus Iuris Civilis, supra note 111, at 159.

\textsuperscript{122} See Nov. 902 (539), in 3 Corpus Iuris Civilis, supra note 108, at 447.
hearsay in Roman law, however narrow its setting.\textsuperscript{123} The passage also became a touchstone for later medieval jurists in constructing a more elaborate edifice against derivative oral testimony.\textsuperscript{124}

Justinian's Novel 90.2\textsuperscript{125} clearly commanded factfinders to give no credence to testimony that a written debt had been paid or was owed if the testimony was based on hearsay:

[T]hose empty testimonies, based on passing by, and fictitious testimonies of this sort, are by no means to be accorded any value, as when someone, coming along on some business or other, hears some people saying that they received money from someone or owed it to someone: for these [testimonies] clearly are suspect to us and not worthy of any credit.\textsuperscript{126}

By placing his rejection of such oral hearsay within formal legislation, albeit in a limited context, Justinian raised the scrutiny of such evidence to a new level. The rejection had now become part of a corpus of law, and it would be carefully studied when Roman law was revived in the late eleventh and twelfth centuries.\textsuperscript{127}

Justinian's legislation was introduced into Italy wherever Roman law was in effect.\textsuperscript{128} Although knowledge of the Digest disappeared\textsuperscript{129} until a full manuscript was discovered in the late eleventh century,\textsuperscript{130} the Code continued to be known at least in a

\begin{itemize}
\item \textsuperscript{123} See Buckland, supra note 33, at 662; C.A. Morrison, Some Features of the Roman and the English Law of Evidence, 33 Tul. L. Rev. 577, 587 (1959).
\item \textsuperscript{124} See infra text accompanying notes 249-52.
\item \textsuperscript{125} See Nov. 90.2, in 3 Corpus Iuris Civilis, supra note 108, at 447.
\item \textsuperscript{126} "Haec autem inania et ex transitu perhibita testimonia nulla modis omnibus valere ratione, et huiusmodi quaedam fingere testimonia, ut propter alium quoddam opus adveniens audiat aliquos dicentes accepisse ab aliquo aurum aut debere alicui: haec namque aperte nobis suspecta sunt et nullius digna ratione." Id. The hearsay reports were untrustworthy because the witness had only casually overheard the hearsay. Justinian allowed the hearsay testimony if witnesses of high repute had been formally gathered to hear a creditor acknowledge payment. Id.
\item \textsuperscript{127} See infra text accompanying notes 241-52.
\item \textsuperscript{128} Roman law was mainly in effect in the south due to the Lombards' conquest of northern Italy. See Wolff, supra note 10, at 183. Indeed, until at least the ninth century Italy was the only area where Justinian's law governed. See Krüger, supra note 106, at 418. For an overview of Roman legal influence outside Italy through the twelfth century, see Wolff, supra note 10, at 183-85.
\item \textsuperscript{129} See Mauro Cappelletti et al., The Italian Legal System 11 (1967); Kunkel, supra note 11, at 181.
\item \textsuperscript{130} See Jolowicz & Nicholas, supra note 13, at 491; Wolff, supra note 10, at 186.
\end{itemize}
reduced form.\textsuperscript{131} The Novels, too, were circulated, principally through a Latin summary by Julian, a law teacher at Constantinople. The \textit{Epitome Iuliani}\textsuperscript{132} was probably intended to guide judges in Italy, where it was known throughout the Middle Ages.\textsuperscript{133} Julian’s strong phrasing of Justinian’s bar against casually overheard statements has a particularly familiar ring to the Anglo-American ear: “[F]or we do not admit testimonies \textit{[non enim admittimus testimonia]} of those who are accustomed to say that, in passing by, they heard someone saying that money was paid to him.”\textsuperscript{134} Regardless of a judge’s general freedom as factfinder, the \textit{Epitome} left no room for the judge to consider the kind of oral hearsay that Justinian rejected.

\section*{VI. Canonical Background and the Rejection of Hearsay by Pope Gregory the Great}

The classical Roman preference for live testimony, Hadrian’s rejection of written testimony and Justinian’s hostility to oral hearsay were all based on Roman mistrust of any evidence the factfinder could not test. There was no mention, however, that hearsay violated any binding judicial order of procedure. This may be explained because no order of procedure existed in the sense of an organized, written summary of how a trial was to be conducted.\textsuperscript{135}

It is striking that in Roman law apparently no great worth was laid upon a clearly arranged summary of the many isolated regulations over the course of procedure. In any event, no trace of an effort has been handed down from

\textsuperscript{131}See Cappelletti et al., supra note 129, at 11; Kunkel, supra note 11, at 181. Justinian’s Institutes were also known in their entirety. See Cappelletti et al., supra note 129, at 12.

\textsuperscript{132}For the text, see Iuliani Epitome latina Novellarum Justiniani (Gustav Haenel ed., Leipzig, Hinrichs 1873) [hereinafter Iuliani Epitome].

\textsuperscript{133}See Kunkel, supra note 11, at 175; J.A. Clarence Smith, Medieval Law Teachers and Writers: Civilian and Canonist 3 (1975).

\textsuperscript{134}“Non enim admittimus testimonia eorum, qui dicere solent, transeuntes se audisse aliquem dicentem pecuniam sibi solutam esse.” Iuliani Epitome 83.324, supra note 132, at 110. In revived Roman law studies in the twelfth and thirteenth centuries, a creditor’s overheard admission that he had been paid would become admissible. See infra text accompanying note 305.

\textsuperscript{135}The Roman jurists did not clearly separate procedural law from substantive law. Callistratus’s \textit{De cognitionibus}, supra note 95, is one of the few exceptions. See Studies in the Glossators of the Roman Law 72 (Hermann Kantorowicz & William Warwick Buckland eds., Scientia Verlag 1969) (1938) ("If [the Romans] ever wrote comprehensive monographs on procedure as a whole, these have certainly not come down to us . . . ").
which to show that a clearly arranged summary was attempted.\textsuperscript{136}

If no set written procedure existed, it is not surprising that the Roman texts opposed hearsay but never stated that its use violated the integrity of a judicial process as such.

In contrast, the Church, at the start of the seventh century, articulated a simplified summary of its judicial practice.\textsuperscript{137} This occurred against the background of long-standing ecclesiastical interest in fair process. Understanding the Church's traditional stress on proper procedure is significant because it was in this context that the rejection of derivative testimony would eventually make its first appearance in ecclesiastical law.

An early attempt to formulate a procedure for settling disputes within the Church appears in the \textit{Didascalia},\textsuperscript{138} composed in the third century by an unknown author,\textsuperscript{139} which guided ecclesiastical judges in resolving disputes among church members.\textsuperscript{140} According to the \textit{Didascalia}, a judge could render a judgment only if both parties had been carefully heard,\textsuperscript{141} the accuser first.\textsuperscript{142} The judge also had to give the accused an opportunity to defend himself.\textsuperscript{143}

In the fourth century, Pope Liberius staunchly supported the integrity of process by refusing, even in the face of imperial threats, to endorse a church synod's judgment made without following

\textsuperscript{136} Linda Fowler-Magerl, \textit{Ordo iudiciorum vel ordo iudiciarius} 9 (\textit{Ius Commune, Sonderhefte} No. 19, 1984).

\textsuperscript{137} See infra text accompanying note 162.

\textsuperscript{138} For the text, see Didascalia, in \textit{1 Didascalia et Constitutiones apostolorum} 2 (Franz X. Funk ed., 1905). The Latin text is a translation of the original Greek, which is now lost. See Franz X. Funk, \textit{Prolegomena to 1 Didascalia et Constitutiones apostolorum}, supra, at i, vi. For an English translation, see \textit{Didascalia Apostolorum} (R. Hugh Connolly ed. & trans., 1929).

\textsuperscript{139} The work is believed to date from c. 230. Jean Gaudemet, \textit{Les Sources du droit de l'Église en Occident du IIᵉ au VIIᵉ siècle} 24 (1985). The author was perhaps a bishop in the area of Antioch. Id. "Because of its size and content, [the \textit{Didascalia}] is considered as the first attempt at a code of canon law." Constant van de Wiel, \textit{History of Canon Law} 38 (1991).

\textsuperscript{140} Jewish talmudic practice may have influenced the procedure of the \textit{Didascalia}. See Artur Steinwenter, \textit{Der antike kirchliche Rechtsgang und seine Quellen}, 54 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung 23, at 1, 93-94 (1934). The author of the \textit{Didascalia} knew of Jewish tracts and appreciated the customs of the synagogues. Id. Scholarly opinion is divided over how much Jewish practice influenced church procedure apart from the \textit{Didascalia}. See id. at 102-03.

\textsuperscript{141} See \textit{Didascalia} 2.47-56, supra note 138, at 142-59.

\textsuperscript{142} See id. 2.49.1, at 142.

\textsuperscript{143} See id. 2.49.2, at 142.

\textsuperscript{143} See id. 2.51, at 148.
proper procedure. No eyewitnesses had given evidence and the accused had not been present at the trial in question. The Pope is recorded to have said to the Emperor Constantius in person: "The ecclesiastical judgments must be given with careful justice . . . . [I]t is not tolerable to convict a man concerning whom we have not made any finding pursuant to proper procedure." 

Similarly, St. Augustine (354-430), the bishop of Hippo, emphasized that adequate procedure was indispensable to a just judgment. Augustine taught that an ecclesiastical judge could not excommunicate persons on the basis of extrajudicial indications of their guilt, regardless of the extent to which such indications might be true (quamvis enim vera sint). Proof had to be made before a judge pursuant to proper order:

[N]ot rashly or in just any manner are evils to be lifted from the Church, but by judgment: so that if they cannot be lifted by judgment, they are rather to be tolerated . . . . For [the apostle Paul] did not wish man to be judged by man on the basis of suspicious opinion, or even by some judgment arrived at outside of procedure, but rather on the basis of God's law according to the procedure of the

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145. See id. at 324.

146. Id. Christianity was recognized in the Roman Empire in the first half of the fourth century. Soon thereafter bishops were invested with state-sanctioned authority to decide many disputes, including charges of clerical violations of criminal laws. See Stephen W. Findlay, Canonical Norms Governing the Deposition and Degradation of Clerics 9-10 (Catholic University of America Canon Law Studies No. 130, 1941); Giulio Vismara, Episcopalis Audientia (Pubblicazioni della Universita Cattolica del Sacro Cuore, 2d Series: Scienze Giuridiche vol. 54, 1937). In 355, for example, an imperial constitution deprived magistrates of initial jurisdiction in trials of bishops and transferred it to the other bishops of the province. Georg May, Anklage- und Zeugnisfähigkeit nach der zweiten Sitzung des Konzils zu Karthago vom Jahre 419, 140 Theologische Quartalschrift 163, 189-90 (1960). The close relationship of Roman law to the daily life of church members consciously or unconsciously exercised a deep influence on the formation of the legal order the Church applied to its proceedings. See id. at 186. For a summary of the interrelationship of ecclesiastical and imperial jurisdiction in the early Church, see Gaudemet, supra note 139, at 67-72; Charles P. Sherman, A Brief History of Imperial Roman Canon Law, 7 Cal. L. Rev. 93 (1918).

147. See St. Augustine, Sermon 351 c.10 (De utilitate agendae poenitentiae [On the usefulness of doing penance]) (391), in 39 Patrologia Latina cols. 1533, 1545-47.

148. "For however much certain things may be true [which community members know but cannot prove in court], they are nevertheless not easily to be believed by a judge, unless they are proven by sure evidence." ("Quamvis enim vera sint quaedam; non tamen judici facile credenda sunt, nisi certis indiciis demonstrentur.") Id. col. 1546.
Church with the person either having voluntarily confessed or having been accused and convicted.\(^{149}\)

Without adherence to "judicial order and integrity" (*ordine judiciario atque integritate*),\(^{150}\) Augustine said, many innocent persons would be convicted.\(^{151}\) Augustine is the first writer known to have used the term "judicial order" (*ordo iudiciarius*).\(^{152}\) The Council of Carthage (419) soon adopted his words almost verbatim as church law.\(^{153}\) These words continued to echo through the centuries, reappearing continually in major ecclesiastical writings on procedure in the Middle Ages.\(^{154}\)

In the early seventh century, Pope Gregory I (the Great) (590-604) translated the Church's longstanding insistence on procedural integrity into a statement of particulars.\(^{155}\) Gregory's background prepared him for the task. Before entering clerical life, he had served as prefect of the City of Rome, a high secular post in which he was responsible for the city's civil administration and had jurisdiction over its citizens.\(^{156}\) As pope, Gregory received an appeal from a Spanish bishop, Stephen, in 603. Stephen complained that other bishops had ejected him unjustly from his episcopal see. In response to this complaint, Gregory assigned John the Defensor,\(^{157}\) a trusted advisor,\(^{158}\) to go to Spain to investigate whether the proceeding against Stephen had been conducted properly. Gregory

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149. [N]on temere aut quomodolibet, sed per judicium auferendos esse malos ab Ecclesiae communione: ut si per judicium auferri non possunt, tolerentur potius . . . . Noluit enim hominem ab homine judicari ex arbitrio suspicionis, vel etiam extraordinario usurpato judicio. sed potius ex lege Dei secundum ordinem Ecclesiae, sive ultimo confessum, sive accusatum atque convictum.

Id. cols. 1546-47.

150. Id. col. 1547.

151. Id.

152. See Fowler-Magerl, supra note 136, at 14.

153. See May, supra note 146, at 185-86.


156. 1 F. Homes Dudden, Gregory the Great 101-03 (1905).


158. See Jeffrey Richards, Consul of God 78 (1980).
provided John with a set of letters (commonitorium)\textsuperscript{159} to enable him to assess whether any impropriety had occurred at the trial. These instructions were based upon the legislation of Justinian, issued only a few decades earlier.\textsuperscript{160} They contained many references to the Code, the Digest and the Novels.\textsuperscript{161} In his letters, Gregory carefully set out a list of points John was to investigate. Gregory’s instructions constitute one of the earliest known legal summaries of an order of proceeding within Roman or ecclesiastical law.\textsuperscript{162}

Careful investigation must first be made to determine if the trial was held according to proper order, if some were accusers and others witnesses; then if the type of charges warranted deposition or exile, if the testimony was given under oath against [Stephen], with him present, if [the accusation] was made in writing and if he had opportunity to defend himself. Careful investigation must also be made of the character of the accusers and witnesses, of their type and reputation; whether they were unsuitable, lest perchance they had some hatreds against the said pastor; whether they gave testimony from hearsay [utrum testimonium ex auditu dixerint] or testified that they knew certainly and exactly; and whether the judgment was given in writing and the sentence recited with the parties present. If by chance these things were not solemnly done and a charge not proved which was worthy of deposition or exile, he [Stephen] should be recalled by all means to his church.\textsuperscript{163}

\begin{footnotesize}
\begin{enumerate}
\item[159.] See 1 Max Conrat, Geschichte der Quellen und Literatur des römischen Rechts im frühen Mittelalter 8-9 (Sciinta Verlag 1963) (1891).
\item[160.] Hincmar, Archbishop of Reims (845-882), believed that “Gregory . . . composed the commonitoria [to John the Defensor] afresh from the imperial laws which he judged ecclesiastical.” (“Gregorius . . . commonitoria ex integro de imperialibus contexuit legibus, quas ecclesiasticas judicavit.”) Hincmar of Reims, De praedestinatione Dei et libero arbitrio c.37 (859/60), in 125 Patrologia Latina cols. 65, 403.
\item[161.] For a listing of the Justinianic laws Gregory employed in the commonitorium, see 1 Conrat, supra note 159, at 8 n.7. Gregory is the last known person to cite Justinian’s Digest before its reappearance late in the eleventh century. See Cappelletti et al., supra note 129, at 11.
\item[162.] See Fowler-Magerl, supra note 136, at 9.
\item[163.] Diligenter quaerendum est primo, si iudicium ordinabiliter est habitum aut si ali accusatores, ali testes fuerunt; deinde causarum qualitas, si digna exilio vel depositione fuit; aut si eo praesente sub iureiurando contra eum testimonium dictum est seu scriptis actum est vel ipse licentiam respondendi et defendendi se habuit. Sed et de personis accusantium ac testificantium suuptiliter quaerendum
\end{enumerate}
\end{footnotesize}
Gregory, clearly influenced by the Roman law, thus spelled out the basic elements of a fair trial. Implicit in Gregory's judicial order is a principle that judges should consider only testimony given by live witnesses under oath who have direct knowledge of the facts to which they testify. Reliance upon hearsay (testimonium ex auditu) ("testimony from hearing") violated that principle. Consequently, a judge's decision could not properly rest upon such testimony. By drawing up an order of procedure, Gregory did more than restrict factfinders' consideration of evidence. He also provided a powerful tool for appeal against judicial abuse.

Gregory's commonitorium presumably applied to the cases of his day. It also had vast impact beyond his time. Together with Augustine's emphasis upon procedure, Gregory's definition of the fundamental elements of a fair trial became cornerstones of ecclesiastical law. Hincmar of Reims (845-882), who was deeply versed in both secular and canon law, would recall two and a half centuries later that "St. Augustine showed how there ought to be procedure in accusing and adjudicating . . . . Moreover, St. Gregory . . . commanded in his instruction to John the Defensor how judgment ought to be rendered according to judicial order and with integrity." Major ecclesiastical works of succeeding centuries repeated Gregory's instruction.

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est, cuius condicionis cuiusve opinionis aut ne inopes sint aut ne forte aliquas contra praedictum episcopum inimicitias habuissent, et utrum testimonium ex auditu dixerunt aut certe specialiter se scire testati sunt vel si scriptis judicatum est et partibus praeuentibus sententia recitate est. Quod si forte haec sollemniter acta non sunt neque causa probata est, quae exilio vel depositione digna sit, in ecclesia sua modis omnibus revocetur.

Gregory, Commonitorium, Register 13.47, supra note 155, at 411.

164. For the importance of Gregory's commonitorium as a foundation of the later canonical procedural literature, see Fowler-Magerl, supra note 136, at 9-12.


166. "Qualis ergo debet esse ordo in accusatione et dijudicatione, sanctus Augustinus exponens . . . . Qualiter autem sententia ordine iudicario et cum integritate proferenda sit . . . sanctus Gregorius . . . in commonitorio Joanni Defensori eunti in Hispanias dato demonstrat." Hincmar of Reims, De presbyteris criminosis c.12 (876/77), in 125 Patrologia Latina col. 1098. Hincmar quotes extensively from both Augustine's Sermon 351 and Gregory's commonitorium. See id.

167. See infra text accompanying notes 221, 237.
VII. The Laws of the Visigoths and the Statement of the Medieval Hearsay Rule

The Church was not alone in its effort to restrict testimony to that of live witnesses with firsthand knowledge. In the Visigothic kingdom of Spain, just a few decades after Gregory's instruction to John, King Chindasvind (642-653), along with his son and successor Reccesvind (649-672), began to reform the laws of the realm into an organized system that would apply to both Visigothic and Roman inhabitants. Roman law already had strong influence in the region. The work of the Visigothic kings resulted in the Liber Iudiciorum (Book of Courts) or Fuero Juzgo (654). Like Justinian's Code, the Visigothic work contained a title “Concerning witnesses and written testimony.” It established a more precise restriction on witness testimony than any previously achieved by Roman or canonical legislation: “Witnesses shall not give their testimony through letter, but while present they shall not be silent about the truth which they know, and they shall not speak about any other matters, except about those which they know to have been done in their presence.”

This law obviously resembles Justinian's legislation in that both require the presence of witnesses before the court and both bar written testimony. But in contrast to Justinian's Code, which

168. The realm of the Visigoths centered in Spain but also reached far into what today is southern France. See J.M. Kelly, A Short History of Western Legal Theory 85 (1992).
169. See Adolf Helfferich, Entstehung und Geschichte des Westgoten-Rechts 87 (Berlin, Georg Reimer 1858); P.D. King, Law and Society in the Visigothic Kingdom 18 (1972); E.N. van Kleffens, Hispanic Law Until the End of the Middle Ages 74-75 (1968).
170. See Helfferich, supra note 169, at 132-34. In general, it was not the Roman law of Justinian that influenced Spain, but rather the pre-Justinian Code of Theodosius. See van Kleffens, supra note 169, at 40-41.
171. A second edition of the Liber Iudiciorum appeared in 681 and a third in 693. See van Kleffens, supra note 169, at 75-76. The work is also referred to as the Libro de las Leyes or the Lex Barbara Visigothorum. Id. at 74.
172. Lex Visigothorum 2.4 (654) [hereinafter Lex Vis.], in Leges Visigothorum 94-105 (Karl Zeumer ed., MGH Leges Sectio I No. 1, 1902).
173. “Testes non per epistulam testimonium dicant, sed presentes quam noverunt non taceant veritatem nec de alis nogoitis testimonium dicant, nisi de his tantummodo, que sub presentia eorum acta esse noscuntur.” Lex Vis. 2.4.5 (643/44), supra note 172, at 98. The law is attributed to Chindasvind, see id., who issued most of his legislation in the second year of his reign. See Rafael de Urena y Smenjaud, La Legislaci6n g6tico-hispana 436 (2d ed. 1906).
174. See Leges Visigothorum, supra note 172, at 98 & nn.1-2; Dig. 22.5.3.3-4, in 1 Corpus Iuris Civilis, supra note 95, at 327-28; Code J. 4.20.16, in 2 Corpus Iuris Civilis, supra note 111, at 159. The remainder of Lex Visigothorum 2.4.5 follows Nov. 90.5's provision for taking witness testimony outside of the court with original jurisdiction, see supra note 114, but without restricting it to civil cases.
somewhat ambiguously required that witnesses speak "about what they know," Chindasvind expressly required witnesses to base their testimony upon what actually occurred in their presence; his formulation demands firsthand knowledge. Testimony based on secondhand knowledge—that is, hearsay—is precluded. Whereas Justinian rejected oral hearsay in a narrow context, Chindasvind set down a broad ban against derivative oral testimony.

Chindasvind's precise law was destined to make a lasting impact beyond the bounds of Visigothic Spain. Continental jurisprudence began to adopt Chindasvind's hearsay bar for its judges a thousand years before England recognized a rule against hearsay in its jury courts. Ironically, it was a curious but singularly important episode in medieval forgery that helped the Visigothic formulation spread across the Continent.

VIII. The Forgeries of the Pseudoisidoreans

In the mid-ninth century, a group of unknown clerics working in France, probably at Reims, undertook to protect bishops and higher clerics against the accusations of lower clergy and secular authorities. The clerics wanted to make it virtually impossible to try or even accuse a bishop. To strengthen their hand in this struggle for episcopal independence, they decided to create legal authority for their position. The clerics, therefore, resorted to the use of a common medieval tool: forgery. Plagiarizing thousands of sentences and phrases from many genuine secular and canonical laws, the forgers inserted their own interpolations as they arranged

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175. See supra note 121 and accompanying text.
176. For an account of the influence of the Liber Iudiciorum (Fuero Juzgo) within Spain and in its later colonies, see van Kleffens, supra note 169, at 79, 255-82.
177. The rule against hearsay was not firmly established in England until at least the late seventeenth century. See 5 Wigmore, supra note 9, § 1364, at 18. "No precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the doctrine takes place." Id.
179. See James A. Brundage, Medieval Canon Law 26-27 (1995); Seckel, supra note 178, at 300.
180. Seckel, supra note 178, at 280, 301.
181. Id.; see also Fowler-Magerl, supra note 136, at 13-14.
their bits and pieces into a mosaic suiting their purposes.\footnote{182} They then issued their products under the names of past emperors and popes.\footnote{183}

\textit{The False Capitularies}

These clever, industrious people entitled their first work \textit{The Collection of the Capitularies of Benedict Levitas (847)}.\footnote{184} It purported to be a collection by one Benedict Levitas of hundreds of Frankish laws issued by Charlemagne (777-814) and Louis the Pious (814-840).\footnote{185} These forgeries, now known as the False Capitularies,\footnote{186} were soon accepted as genuine.\footnote{187}

The law of Chindasvind against hearsay was among the sources the forgers covertly employed.\footnote{188} In the False Capitularies, the forgers twice reproduced the bar against hearsay, attributing it to the Frankish kings rather than to the Visigothic law.\footnote{189} The first of these capitularies states:

[Rubric:]\footnote{190} That witnesses may testify only to those matters they know were done in their own sight. [Text:] Witnesses not absent and not by letter shall give their testimony, but they shall not be silent about the truth they know and saw, and they shall not give testimony about

\begin{footnotes}
\item[182] The forgers' technique has often been described as a "mosaic" style of composition. See, e.g., 1 Fournier & Le Bras, supra note 178, at 179; Seckel, supra note 178, at 272.
\item[183] See Davenport, supra note 178, at 179; Seckel, supra note 178, at 272.
\item[184] For the text, see Benedicti Capitularia (F.H. Knust ed.), in 2 MGH Leges pt. 2 at 17 (Hannover, Hahn 1837). A "capitulary" was a Frankish term for a royal legislative or administrative order divided into capitula. See François Louis Ganshof, Recherches sur les capitulaires 3-6 (1958).
\item[185] See Benedicti Capitularia, supra note 184, at 146-47; Seckel, supra note 178, at 296-97, 302.
\item[186] 1 Fournier & Le Bras, supra note 178, at 146.
\item[187] See 1 Heinrich Brunner, Deutsche Rechtsgeschichte 387 (Leipzig, Duncker & Humblot 1887).
\item[189] See Benedictus Levita 2.147, 2.345 (847/52) [hereinafter Ben. Lev.], in Benedicti Capitularia, supra note 184, at 80, 90.
\item[190] Each capitulary is prefaced by a rubric summarizing its content. See Seckel, supra note 178, at 297. The rubrics were sometimes part of the original plagiarized text or, at other times, were the forgers' own making. Id. The rubric here is the forgers' own composition. See Seckel, supra note 188, 34 Neues Archiv at 373.
\end{footnotes}
other matters, except about those alone which they know to have been done in their presence.\textsuperscript{191}

Although basically a quotation of Chindasvind's hearsay law, this passage contains slight but significant alterations that would later raise the question of whether any testimony based on hearing (\textit{ex auditu}) could serve as the basis for a judgment.\textsuperscript{192} The forgers phrased their rubric pointedly: witnesses could only testify to what was done "in their own sight,"\textsuperscript{193} so that the reader could not possibly miss the point that testimony had to be based on seeing. Similarly, the forgers added their own significant addition to the Visigothic requirement that witnesses testify only about "what they know."\textsuperscript{194} They inserted their interpolation "and saw,"\textsuperscript{195} making the same point contained in the rubric: knowledge must be based on sight.

In a second capitulary of Benedict Levitas,\textsuperscript{196} again ascribed to the Frankish kings, the forgers repeated their variation of Chindasvind's hearsay rule, but now they added an observation taken from a sermon of St. Augustine to support the point that only eyewitness testimony was acceptable: when the Pharisees learned of reports that Jesus' body was missing from the tomb and that some of his followers claimed that he was alive, the Pharisees went to the soldiers who had guarded the grave. "The pharisees say to the soldiers, 'We give you money and you say that, while you were asleep, the disciples of Jesus came and stole him away.' Of this Augustine says: . . . . 'If they were sleeping, how could they see? And if they saw nothing, how could they be witnesses?'"\textsuperscript{197} Anything short of eyewitness testimony thus appeared to be barred. This rigid stance, in keeping with the pseudoisidoreans' overall purpose to impede trials against bishops, went far beyond the Visi-

\begin{itemize}
  \item \textsuperscript{191} "[Rubric:] \textit{Ut testes ea tantum testificentur, quae in conspectu eorum acta esse noscuntur.} [Text:] Testes non absentes neque per epistulam testimonium dicant; sed praesentes quam noverunt et viderunt non taceant veritatem. Nec de aliis testimonium dicant, nisi de his tantummodo, quae sub praesentia eorum acta esse noscuntur." Ben. Lev. 2.147, in Benedicti Capitularia, supra note 184, at 80.
  \item \textsuperscript{192} See infra text accompanying note 248.
  \item \textsuperscript{193} The Latin phrase reads "in conspectu eorum." See Ben. Lev. 2.147, in Benedicti Capitularia, supra note 184, at 80.
  \item \textsuperscript{194} The Latin is "quam noverunt." Lex Vis. 2.4.5, supra note 172, at 98.
  \item \textsuperscript{195} In Latin, "et viderunt." See supra note 191. The phrase is of the forgers' own making. See Seckel, supra note 188, 34 Neues Archiv at 373.
  \item \textsuperscript{196} Ben. Lev. 2.345, in Benedicti Capitularia, supra note 184, at 90.
  \item \textsuperscript{197} "\textit{Damus, inquiant pharisaei ad milites, vobis pecuniam, et dicite quia vobis dormientibus venerunt discipuli Iesu et abstulerunt eum.} Unde ait Augustinus: . . . . \textit{Si dormiebant, quid videre potuerunt? Si nihil viderunt, quomodo testes sunt?}" Id.
\end{itemize}
gothic law's requirement of personal knowledge as a basis of testimony. Taken literally, such a rule would bar consideration of everything whatsoever that anyone heard. In any event, injecting a requirement that testimony be based upon "seeing" to be a basis of proof inevitably would cause problems as the pseudoisidorean interpolation spread into authentic canonical collections. Later jurists wrestled, for example, about whether oral statements of any kind based on hearing could be used as evidence.

The False Decretals

Not satisfied, perhaps, that they would accomplish their goals merely by attributing legal principles to the secular laws of the Frankish kings, the forgers, working out of the same workshop, soon undertook a further and much greater project of falsification. They issued a gigantic set of documents or decretals, allegedly the authoritative letters of earlier popes. Like the False Capitularies, these documents were long accepted as genuine. They were thought to have been collected by one Isidore Mercator. Known as the False Decretals, they were probably produced in 850, just a few years after the False Capitularies.

Again the forgers twice reproduced the rule against hearsay which they had borrowed from the Visigothic law. First, they included it in a letter supposedly of Pope Calixtus (217-222) to the bishops of Gaul: "Similarly witnesses shall not proffer testimony through any writing, but present they shall truly give testimony about what they knew and saw. And they shall not give testimony about other issues or matters, except about those they know to

198. See infra note 248 and accompanying text.
199. See Davenport, supra note 178, at xxi, 100-03; Seckel, supra note 178, at 302, 304-05.
200. "Decretal" is a written papal response to an ecclesiastical judge's request for advice on a point of law, or a written papal announcement of the applicable law in the context of an individual case. See C. Duggan, Decretals (epistolae decretales, litterae decretales), in 4 New Catholic Encyclopedia 707, 707 (Catholic University of America ed., 1967).
201. See Davenport, supra note 178, at xxiii.
204. See Davenport, supra note 178, at xxi-xxii. The False Decretals were not definitively determined to be a forgery until 1628. Id. at xxiii n.7; Seckel, supra note 178, at 293.
have been done in their presence." Next, the forgers included the Visigothic exclusion of derivative evidence in a letter Pope Damasus (366-384) allegedly sent to the bishops of Italy: "Whence the canonical constitutions of our fathers, not once but very often, demand that it is not possible to proffer either accusations or testimonies through writings nor can anyone give testimony about other matters except about those which they know to have been done in their presence."206

The pseudoisidoreans had effectively cloaked Chindasvind's hearsay rule with Frankish and papal authority. The rule could now pass beyond the borders of the Visigothic kingdom and claim the obedience of judges across Christian Europe.

IX. Entrance of the Rule Into Authentic Collections of Law

Over the course of the next three centuries, individual bishops made collections of norms (canons)207 governing the Church's procedural and substantive law. They drew these canons from existing authorities, including the pronouncements of ecclesiastical councils and papal decretals.208 Many of the passages of the False Decretals, including the restriction of witnesses to firsthand knowledge, were restated within these canonical collections.209

In the German region, Burchard (965-1025), the bishop of Worms, issued his Decretum (1008/12), which became a standard reference work in medieval libraries.210 Burchard reproduced the

205. "Similiter testes per quamcumque scripturam testimonium non proferant, sed prae­sentem quam viderunt et noverunt testimonium dicant. Nec de aliis causis vel negotiis testimonium dicant, nisi de his quae sub praesentia eorum acta esse noscuntur." Ps.-Calixtus I c.17, in Decretales, supra note 203, at 137, 141. The abbreviation "Ps." for "Pseudo," when prefixed to a papal name, indicates the letter was composed by the pseudoisidorean forgers and not by the pope to whom they attributed it.

206. "Unde canonica patrum constituta non semel, sed saepissime clamant nec accusationes nec testimonia ulla per scripta posse proferre, nec de aliis negotiis quicunque testimonium dicant, nisi de his quae sub praesentia eorum esse noscuntur." Letter of Ps.-Damasus to the Italian Bishops, in Decretales, supra note 203, at 519-20.

207. The word "canon" can refer to any ecclesiastical statute or regulation. See Sherman, supra note 146, at 97. In the context of medieval ecclesiastical law, the term was more narrowly used to designate the statutes of a bishop, a chapter or the rules of a religious order. Id.

208. See van de Wiel, supra note 139, at 68.

209. For an exhaustive analysis of the absorption of the pseudoisidorean forgeries into later canonical collections, see Horst Fuhrmann, Einfluss und Verbreitung der pseudoisidorischen Falschungen (MGH Schriften No. 24, 3 vols. 1972-1974).

210. See Brundage, supra note 179, at 32.
hearsay rule, ascribing it (he thought accurately) to Pope Calixtus, just as the forgers had hoped.\footnote{211}

In Italy, the \textit{Collection in Seventy-Four Titles},\footnote{212} one of the most widely used canonical collections through the mid-twelfth century,\footnote{213} repeated the rule.\footnote{214} Anselm of Lucca (1036-1086), also in Italy, produced his broadly popular \textit{Collectio canonum}, whose influence extended beyond Italy.\footnote{215} He set out the hearsay rule as he believed he had received it from Pope Calixtus.\footnote{216} In 1087 Cardinal Deusdedit of Rome produced still another collection and included the hearsay rule, attributing it first to Pope Calixtus\footnote{217} and later to Pope Siricius (384-389).\footnote{218} Of particular importance, Ivo of Chartres (1040-1115), writing in the French region between 1093 and 1095, produced his \textit{Decretum} and the shorter \textit{Panormia}. In these collections, Ivo related the rule against hearsay as he believed Calixtus had declared it in his letter to the bishops of Gaul.\footnote{219} Ivo also included Justinian's constitution with its statement against oral hearsay as set out in Julian's \textit{Epitome}.\footnote{220} In both

\footnote{211} See Burchard of Worms, Decretum, in 140 Patrologia Latina col. 537, c.1.171, at col. 599. Burchard's version of Ps.-Calixtus's letter does not include the forgers' interpolation about seeing. Id.

\footnote{212} See Collection in Seventy-Four Titles (Diversorum patrum sententie) (1050/76), in Diversorum patrum sententie siue Collectio in LXXIV titulos digesta 1 (John T. Gilchrist ed., MIC Series B: Corpus Collectionum vol. 1, 1973).

\footnote{213} See John T. Gilchrist, Prolegomena to Diversorum patrum sententie siue Collectio in LXXIV titulos digesta, supra note 212, at xvii, xxvii. The author is unknown. Id. at xxx: Brundage, supra note 179, at 37.

\footnote{214} See Collection in Seventy-Four Titles c.48, supra note 212, at 46.

\footnote{215} See John T. Gilchrist, Anselm of Lucca, St., in 1 New Catholic Encyclopedia, supra note 200, at 584-85.

\footnote{216} See Anselm of Lucca, Collectio canonum 3.53 (1081/86), in 1 Anselmi episcopi Lucensis, Collectio canonum una cum collectione minore 142 (Friedrich Thaner ed., 1906). Anselm's version of the letter includes the requirement that the witness saw that to which he or she testified. Id. Anselm also included Gregory's \textit{commonitorium}, see supra note 155, with its ban on hearsay. See id. 3.90, at 169.


\footnote{218} Id. 4.333, at 568-69. These versions of the pseudopapal decretals repeat the Visigothic hearsay ban but do not include a requirement that testimony be based upon seeing only. Id. Deusdedit also included Gregory's admonition against hearsay. Id. 3.96, at 309.


\footnote{220} See Decretum of Ivo 16.152, supra note 219, col. 934. Ivo is largely responsible for spreading knowledge of Roman law north of the Alps. See van de Wiel, supra note 139, at 97.
the *Decretum* and the *Panormia*, Ivo repeated Pope Gregory's instruction, summarizing the elements of proper procedure and citing hearsay as a violation.\(^{221}\) In the *Panormia*, Gregory's rejection is placed after the one attributed to Calixtus.\(^{222}\) Ivo also included in both his works Augustine's passages requiring the observance of integral order in arriving at judgments.\(^{223}\)

These rules were not merely academic. Their combined effect on practice is evident in an undated letter of Ivo to Lisiardus, the bishop of Sens.\(^{224}\) Ivo responded to an inquiry about an accusation that a certain woman had had illicit relations with a close relative of her present husband. To prove the deed, the woman's accuser wished to use witnesses who had not seen the illicit act take place. Ivo advised that no one was to be judged a criminal unless convicted according to judicial order. Regarding the preferred witnesses, he declared: “[The witnesses] who did not see the deed, however much they may be speaking truths, must nevertheless not be heard, since the secular laws [*leges*] demand that witnesses must not be admitted [*non esse admitendos*] against an accused, except about those matters which they know to have been done in their presence.”\(^{225}\)

In his response, Ivo adopted Augustine's position that judgments are not acceptable unless they are reached through proper order\(^{226}\) and melded it with the Visigothic hearsay rejection, received through the pseudoisidorean forgers. Ivo recognized that what witnesses learned apart from their direct knowledge could well be true. Yet, “however much they may be speaking truths,” he declared, the derivative testimony could not play a role in the factfinder's decision making because it violated the demand that judgments be based only on the testimony of witnesses with firsthand knowledge. Ivo's directions were given to a bishop sitting as judge, not to be thought a naive factfinder.

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\(^{221}\) See *Decretum of Ivo* 6.343, supra note 219, col. 515; *Panormia* 4.82, supra note 219, col. 1200; id. 4.94, col. 1202.

\(^{222}\) See *Panormia* 4.93-94, supra note 219, cols. 1201-02.

\(^{223}\) See *Decretum of Ivo* 5.244, supra note 219, cols. 397-98; id. 5.247, col. 399; *Panormia* 4.113, supra note 219, col. 1206.

\(^{224}\) See *Ivo of Chartres, Epistola* 229, in 162 *Patrologia Latina* col. 232.

\(^{225}\) “[Testes] qui factum non viderunt, quamvis vera dicant, non sunt tamen audiendi, cum *leges* continente testes adversus reum non esse admitendos, nisi de his quae sub praesentia eorum facta esse noscuntur.” Id.

\(^{226}\) See supra text accompanying notes 150-52.
X. Gratian's *Decretum*

In the mid-twelfth century, Gratian, a canon law scholar about whom almost nothing is known, surveyed the vast number of canons existing in his day. Recognizing that some canons were incompatible with others, Gratian sought to bring order to this mass of material. About 1140, at Bologna, he produced his *Concordance of Discordant Canons*, later known as the *Decretum* of Gratian. This enormous text, borrowing heavily from earlier canonical collections, transcended them all in thoroughness. It constituted "the first comprehensive and systematic legal treatise in the history of the West."

Gratian organized a major section of his work around a series of hypothetical cases (*causae*). He asked questions and then answered them by using selected canons drawn from earlier canonical collections, harmonizing discordant canons when possible. Gratian often prefaced his canons with short statements of his own (rubrics) which set out his view of a canon's salient point. Sometimes he added his own statements (dicta) before and after the canon to explain it.

In his second hypothetical, Gratian posed the case of a bishop accused of a violation of chastity. In reviewing the adequacy of the proceedings against the bishop, Gratian amassed authorities which stressed the fundamental importance of proper procedure.

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227. See Brundage, supra note 179, at 47; Knut W. Nörr, Die Entwicklung des Corpus iuris canonici, in 1 Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte 835, 836 (Helmut Coing ed., 1973) [hereinafter 1 Handbuch].

228. For the text, see Gratian, Decretum Magistri Gratiani, in 1-2 Corpus iuris Canonici (Emil Friedberg ed., Leipzig, Bernhard Tauchnitz 1879) [hereinafter CIC].

229. Earlier canonical collections fell out of use after the *Decretum*’s appearance, and canons not adopted by Gratian generally lost their force and were forgotten. See Nörr, supra note 227, at 838.


231. See Decreti Secunda Pars, in 1 CIC, supra note 228, col. 356.


233. Id. at 55.

234. See C.2.pr., in 1 CIC, supra note 228, col. 438.

235. For a thorough description and analysis of proper trial procedure under the *Decretum*, see Erwin Jacobi, Der Prozess im Decretum Gratiani und bei den ältesten Dekretisten, 34 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung 3, at 223 (1913). For discussion of Gratian’s regulations on the use of witnesses, see id. at 500-13; Filippo Liotta, Il testimone nel Decreto di Graziano, in Proceedings of
After citing Augustine’s insistence on the faithful observance of judicial order, Gratian quoted Pope Gregory’s instruction that judicial order requires primary testimony and does not tolerate hearsay.

Gratian’s third hypothetical again raised the issue of hearsay. He presented the case of a bishop who sought reinstatement to his see after having been deposed for unspecified reasons. At the bishop’s trial, some persons absent from the courtroom tried to submit testimony against him by letter. To support his rejection of this procedure, Gratian repeated Chindasvind’s Visigothic hearsay bar, together with the pseudoisidorean interpolation requiring testimony to be based on seeing. Gratian ascribed his canon to Pope Calixtus, just as the pseudoisidoreans would have wanted:

Witnesses are not to proffer testimony through any writing, but, while present, they are to give testimony truly about those things which they saw and knew. Nor are they to give testimony about any other cases or matters, except those which they know to have been done in their presence.

Thus, the greatest compendium of the Church’s law directed judges to consider only testimony given in court and based on firsthand knowledge.


236. C.2 q.1 c.1, in 1 CIC, supra note 228, col. 438.
237. C.2 q.1 c.7, in 1 CIC, supra note 228, cols. 439-42.
238. See C.3.pr., in 1 CIC, supra note 228, col. 504.
239. “Testes per quamcumque scripturam testimonium non proferant, sed presentes de his, que uiderunt et noverunt, veraciter testimonium dicant. nec de aliis causis uel negotiis testimonium dicant, nisi de his, que sub eorum presentia acta esse noscuntur.” C.3 q.9 c.15, in 1 CIC, supra note 228, col. 532. Compare Lex Vis. 2.4.5, supra note 172, at 98.
240. “In a formal legal sense, Gratian’s Decretum never acquired the force of law, but its effect would have been essentially no different if it had been proclaimed in a legislative act, especially because it was frequently regarded as a certified ecclesiastical codification analogous to the Roman Corpus Iuris Civilis.” 2 Fuhrmann, supra note 209, at 564 (1973).
XI. TWELFTH- AND THIRTEENTH-CENTURY REFINEMENT OF THE RULE AGAINST HEARSAY

Beginning in the late eleventh century, Bologna had become the principal European center for learning both Roman and canon law. A rediscovery of the full text of the Digest at about this time provided a great impetus to Roman law studies. Canonists engaged in a parallel effort to explicate Gratian’s Decretum. By the mid-twelfth century, thousands of students from all over Europe, including England, travelled to the university at Bologna to hear lectures, to study and to absorb the teaching of the doctors of Roman and ecclesiastical law. Students studied both bodies of law. The teachings of the university jurists came to have immense impact throughout Western Europe as the students returned to practice in their own countries as lawyers, judges and administrators.

Both the canonists and the Roman law scholars embraced and carefully refined the doctrine that derivative testimony was to have no place in a factfinder’s considerations. The first medieval jurists to grapple with derivative testimony did not possess an adequate term to capture the kind of testimony that would violate Gratian’s rule. They loosely employed the phrase testimonium ex auditu (testimony from hearing) to designate witness statements the factfinding judge should not consider.


242. See Kunkel, supra note 11, at 182.


244. See Cappelletti et al., supra note 129, at 13-26 (describing the revival of Roman and canon law studies, beginning at Bologna).

245. See Helmut Coing, Die juristische Fakultät und ihr Lehrprogramm, in 1 Handbuch, supra note 227, at 39, 70. “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 what has come to be known as the Romano-canonic procedural system.” Donahue, supra note 241, at 127-28.

246. Revived Roman law and canon law “fused into a single normative system,” Cappelletti et al., supra note 129, at 16, called the jus commune, which gradually was applied, especially in the area of procedural law, across the European continent. See Kelly, supra note 168, at 180. Spread by the university-trained civil and canon lawyers, and received in different countries at different rates, the jus commune came to replace older Germanic customary laws. Id. Thus, the “irrational” Germanic procedures of trial by ordeal, battle and compurgation began to be supplanted by the rational procedures of the Romano-canonical system. See Donahue, supra note 241, at 128-29.

For a study of the employment positions which medieval law students filled after graduation, see Coing, supra note 245, at 85-90.
This was the same term Gregory the Great had used some 600 years earlier in his instruction to John the Defensor.\textsuperscript{247} On its face, however, \textit{ex auditu} could apply to far more than derivative testimony. Taken literally, the words encompassed all testimony based upon the sense of hearing. Yet a trial system that depended upon a witness’s observations but excluded anything that a witness heard would be impractical. The problem presented a challenge to the analytic ability of jurists to distinguish the “hearing” testimony that a factfinding judge could properly consider from the mass of testimony that violated Gratian’s rule. The solution, achieved over the course of the twelfth and thirteenth centuries, represents one of the great accomplishments of evidentiary law.

The difficulty of determining what “hearing” testimony, if any, could serve as the basis for a judgment was apparent in the \textit{Decretum} itself. Gratian’s canon insisted upon sight as the basis of witness testimony. This rigid requirement, it will be recalled, is traceable to the pseudoisidorean forgers’ editorial addition to the original Visigothic hearsay law.\textsuperscript{248} Yet the \textit{Decretum} acknowledges that Justinian himself had allowed solemnly attesting witnesses to say that they \textit{heard} a creditor confess payment of a debt, even though Justinian rejected casually overheard statements.\textsuperscript{249} In dicta after Gratian’s hearsay canon, Justinian’s discordant passage was appended.\textsuperscript{250} In an attempt to harmonize the two, the dictum simply declared that Justinian permitted an exception in civil cases to the usual rule that all testimony be based on sight.\textsuperscript{251} This resolution, of course, was inadequate because all other testimony remained subject to the sight requirement.

Canon law scholars after Gratian made repeated attempts to articulate how the hearsay canon, with a sight requirement embedded in it, could be properly understood. Realizing that the purpose of Gratian’s rule was to guarantee testimony based on firsthand knowledge, they were unwilling to adopt an interpretation that

\begin{itemize}
\item \textsuperscript{247} See supra note 163.
\item \textsuperscript{248} See supra note 193 and accompanying text.
\item \textsuperscript{249} See supra note 126.
\item \textsuperscript{250} Portions of the Roman law, particularly those taken from the Digest and the Code, may have been inserted into the \textit{Decretum} after Gratian composed it. See Adam Vetulani, \textit{Gratien et le droit romain}, 24-25 Revue historique de droit français et étranger 47 (4th ser. 1946-1947); see also Jean Gaudemet, Das römische Recht in Gratians Dekret, 12 Österreichisches Archiv für Kirchenrecht 177 (1961) (maintaining that Roman law passages in the \textit{Decretum} were added continually and slowly during the latter twelfth century).
\item \textsuperscript{251} See C.3 q.9 c.15 (d.p.), in 1 CIC, supra note 228, cols. 532-33.
\end{itemize}
excluded large amounts of primary testimony. An unknown author, commenting on a summary of the *Decretum*, made an attempt to relax the sight requirement by expanding Justinian's hearing exception. The author maintained that the sight requirement did not apply to any "contracts of which the substance consists only of words, as in a stipulation." This exception, though broader than Gratian's, still left almost all hearing-based testimony subject to Gratian's bar. No trial system could survive the exclusion of so much primary testimony.

Around 1158, Rufinus, a teacher of canon law at Bologna who may have studied under Gratian, produced his own summary of Gratian and made an attempt to articulate what hearing evidence could be used. Commenting upon Gratian's exception, Rufinus remarked: "Here [Gratian] gives one case [attesting to a debt] in which someone can be a witness on the basis of hearing [*de auditu*] ...." Rufinus pointed out that Gratian himself made a further exception to the sight requirement in another section of the *Decretum*, where he allowed proof from hearing that persons were blood relatives (which, it would appear, could not be proven by eyewitnesses). Rufinus also noted that the Bible allowed hearing-based testimony in still another case, where such evidence was used to prove that someone had been heard blaspheming God. In this case there could not be any witnesses except those basing their testimony on hearing the blasphemies. These exceptions edged beyond the narrow limits of Gratian, but Rufinus's true contribution to understanding the problem of hearing testimony came not

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252. See Incerti auctoris quæstiones, in Die Summa Magistri Rolandi 237 (Friedrich Thaner ed., Innsbruck, Wagner'sche Universität, 1874). Magister Rolandus composed his summary of Gratian by 1148. The notes of the unknown author were made between 1154 and 1179. See Friedrich Thaner, Introduction to Die Summa Magistri Rolandi, supra, ix, lii.

253. "In his autem contractibus, quorum substantia ex solis verbis subsistit, ut in stipulatione, etiam illi ... ex auditu possunt ferre testimonium." ("Moreover in those contracts, whose substance consists only in words, they [witnesses]... can relate testimony from hearing.

254. See Smith, supra note 133, at 24.

255. See Rufinus, Summa on C3 q.9 (1157/59), in Die Summa Decretorum des Magister Rufinus 270-71 (Heinrich Singer ed., 1902) [hereinafter Rufinus].

256. "Hic ponit casum unum, in quo quis de auditu potest esse testis ...." Id. at 270.

257. See id.

258. "Videtur tamen et alibi posses esse testis de auditu, sicut in vereri testamento de eo, qui audiebat aliquem blasphemantem Deum: in quo casu non poterat esse testes nisi de auditâ blasphemia." ("It seems nevertheless that there otherwise can be a witness from hearing, as in the old testament concerning a person who heard someone blaspheming God: in which case there could be no witnesses except from hearing the blasphemies.") Id.
in adding one exception after another. Rather, he broke new ground by showing that a vast amount of hearing testimony was perfectly acceptable and only one species so dangerous that it could not play any role in forming a judgment:

But it must be noted that it is said in two ways that someone can be a witness about that which he heard. Either that he gives testimony about a matter, which when it was happening, he heard; or that he gives testimony about a matter which he heard had been or was being narrated by another.259

As examples of the first type, Rufinus listed a witness who heard his neighbor promise to marry, or a witness who heard someone blasphemying God, reviling his bishop or swearing by the name of Caesar.260 Rufinus declared that in these cases testimony based on hearing should be permitted.261 Furthermore, said Rufinus, "in numberless other similar cases," such hearing testimony was acceptable when "there cannot be a witness except about that which he heard."262 In Rufinus's view, only the second type of hearing testimony was improper for a judge to consider. As an example, Rufinus cited Justinian's bar against witnesses who, merely in passing by, heard someone talking about a debt.263 This second kind of testimony based on what was reported by another "is properly said to be testimony from hearing [de auditu] and therefore is not receivable [non est receptabile] . . . ."264

Rufinus finally faced squarely the sight-based restriction implanted in Gratian's hearsay rule and proceeded to dismantle it. He began with some difficulty: "[T]he first [type of] testimony [verbal acts], however, is not called testimony from hearing except inappropriately, but properly it is testimony from seeing, i.e., about that which was perceived fully, when it happened, by seeing, i.e., by

259. "Sed notandum est quod duobus modis dicitur aliquis esse testis de eo, quod audivit. Vel quia fert testimonium de re, quam, cum fiebat, audivit; vel quia perhibet testimonium de re, quam fuisse vel esse ab alio narrari audivit." Id.
260. Id.
262. "[I]n . . . aliis infinitis negotiis similibus non posset esse testis nisi de eo, quod audivit." Rufinus, supra note 255, at 270.
263. See supra text accompanying notes 125-27.
264. "Secundum testimonium propriè dicitur testimonium de auditu et ideo non est receptabile . . . ." Rufinus, supra note 255, at 270. Rufinus cites exceptions for proof of consanguinity and solemn attestation concerning debt. Id.
hearing. To justify his expansive view of seeing, Rufinus quoted a sermon of Augustine, another of whose homilies the pseudoisidorean forgers had originally cited to justify the sight requirement: "Therefore, touch and see, taste and see." Rufinus pointed out, too, that people commonly say "Smell and see, hear and see." He held that "consequently such testimony is everywhere to be received, as about that matter which we see with our bodily eyes." Rufinus thus succeeded in interpreting Gratian's rule in a practical manner to allow testimony based on any direct knowledge to remain a proper basis for a judge's consideration, whereas derivative hearing evidence—what a witness "heard had been or was being narrated by another"—was discarded.

The French school of legal writers' Summa "Elegantius in iure divino" (1169) took the same approach as Rufinus: "It is clear that testimony from hearing can be taken in two ways: either we knew a matter to be so by the very experience of our ears or we learned it was so from the report of others. The latter is rejected..."
Johannes Teutonicus adopted Rufinus's interpretation of hearing-based testimony in producing the most influential interpretation of Gratian's *Decretum*. About 1217, Johannes composed marginal notations, called glosses, to accompany and explain Gratian's entire text. Legal scholars soon accepted his gloss as authoritative and referred to it as the "standard gloss" (*glossa ordinaria*).\textsuperscript{274} With respect to Gratian's requirement that witnesses speak only about "what they saw and knew,"\textsuperscript{275} Johannes explained, "that is, what they perceived through some bodily sense, for sight is to be understood broadly."\textsuperscript{276}

At roughly the same time as these canonical attempts to define hearsay, Roman law scholars, or legists, arrived at similar conclusions. Three important Romanists make this unmistakable. Albericus de Porta Ravennate, a student of one of the most outstanding doctors of the Roman law,\textsuperscript{277} produced a summary (*summula*) dealing with witnesses.\textsuperscript{278} Its sources are derived solely from Roman law.\textsuperscript{279} Commenting on witness testimony, Albericus said:

Witnesses are said to be [those] who say those things in person [*viva voce*], at which they were present, and about those things only they shall bear testimony which were done in their presence. For they shall say that they themselves were present to these [events], which were being done, and which they saw . . . .\textsuperscript{280}

\textsuperscript{274} See Smith, supra note 133, at 37-38; van de Wiel, supra note 139, at 116; von Schulte, supra note 230, at 172-75. The practice of glossing Roman and canonical texts was a common method legal scholars employed to clarify and teach the law. See Smith, supra note 133, at 15-16. For descriptions of the Glossators' methods and influence, see Peter Weimar, Die legistische Literatur der Glossatorenzeit, in 1 Handbuch, supra note 227, at 129, 129-40.

\textsuperscript{275} See supra note 239 and accompanying text.


\textsuperscript{277} Albericus was a student of Bulgarus, one of the "Four Doctors" at Bologna most learned in Roman law. See Smith, supra note 133, at 12, 30.

\textsuperscript{278} See *Summula de testibus* ab Alberico de Porta Ravennate composita (1166/97) (Erich Genzmer ed.), in 1 Studi di Storia e Diritto in onore di Enrico Besta 481, 496 (A. Guiffre ed., 1937-1939) [hereinafter Albericus].

\textsuperscript{279} Donahue, supra note 241, at 131.

\textsuperscript{280} "Testes dicuntur, qui viva voce dicunt ea, quibus interfuerunt, et de his demum testimonium ferre debent, que sub eorum presentia acta sunt. dicere enim debent sese affuisse his, que agebantur, et vidisse . . . ." Albericus 1.2, supra note 278, at 496.
Azo (1150-1230), whose summary of Justinian's Code was universally cited to courts as the highest authority, interpreted Justinian's provisions about proof of debt payment to allow an exception to the hearsay rule, "but otherwise testimony from hearing is not believed." In about 1250, Accursius (1182-1260) supplied the standard gloss for Justinian's legislation. This gloss was accepted as the authoritative interpretation of any passage of Justinian and was reproduced in the margins of succeeding manuscripts and printings of Justinian's works into the seventeenth century. Explicating Justinian's restrictions on testimony about debt payment, Accursius noted: "[The witnesses] must give their testimony based on knowledge... Concerning what they heard from another, however, they may not testify..."284

Roman and canon law scholars agreed that hearsay was not to form the basis of a judgment, even when it was a learned judge who evaluated the testimony.285

281. As to the influence of Azo's Summa within and beyond Italy, see Pietro Fiorelli, Azozone, in 4 Dizionario biografico degli Italiani 774, 777 (1962).


283. For the authority and influence of the Accursian gloss, see Cappelletti et al., supra note 129, at 20; Pietro Fiorelli, Accorso, in 1 Dizionario biografico degli Italiani 116 (1960).


285. Jewish law asserted the same rule. In 1180, the great Jewish scholar, Moses Maimonides (1135-1204), finished his composition of the Mishneh Torah (Yad Hazakah). See Maimonides' Mishneh Torah (Yad Hazakah) lxv (Philip Birnbaum ed., 1944). It constituted "a repository of all Jewish teachings from the time of Moses the lawgiver to the time of Moses Maimonides." Id. The last book of the Mishneh Torah discusses procedure in the Jewish courts. See The Code of Maimonides: Book Fourteen, The Book of Judges (Julian Obermann et al. eds. & Abraham M. Hershman trans., Yale Judaica Series vol. 3, 1949) [hereinafter The Book of Judges]. Jewish evidentiary rules, as Maimonides set them out, heavily emphasized due process. See Treatise II, Laws Concerning Evidence, in The Book of Judges, supra, at 81. For a summary of the Mishneh Torah's rules of evidence, see Maimonides' Mineh Torah, supra, at 309-13. For a comprehensive study of Jewish rules of proof, see Z. Frankel, Der gerichtliche Beweis nach mosaisch-talmudischem Rechte (1846). In his treatise on evidence, Maimonides clearly sets out the bar against hearsay:

If a person is advised by others that So-and-so has transgressed such-and-such a negative command, or that So-and-so has borrowed money from So-and-so, even if his informants be many in number and great in wisdom and fear of God, and he believes what they tell him as though he had witnessed it himself, he is not permitted to give evidence. He may testify only if he saw it with his own eyes, or if the borrower personally admitted the loan to him, saying to him, "Bear testimony that So-and-so has loaned me a maneh..." One who bases his testimony on what others have told him is a false witness and transgresses a
XII. "The Truth of the Matter"

Another Bolognese scholar, Tancred, achieved the greatest precision in articulating the doctrine of hearsay. After studying under both Azo and Johannes Teutonicus, Tancred composed his *Ordo iudiciorum* (1216). The writing of such orders of procedure had become quite common in the latter half of the twelfth century, and the genre continued to flourish well thereafter. Tancred's phrases concerning hearsay bear a striking resemblance to those used by Anglo-American lawyers today: "But if the witness perceived by hearing the truth of the matter [veritatem rei] about which he is testifying . . . such testimony is valid." Thus, if by hearing a witness directly perceived the truth of a relevant issue, he could testify. For example, said Tancred, a witness could testify that he heard thunder, if thunder was in issue. It followed that, if the relevant issue was whether something was said—blasphemy, for example—the witness could testify to what he heard. Where the truth, however, was perceived by another and the witness in court wished to testify to what that other had perceived, he could not do so, because the witness did not himself perceive the truth of the fact. By focusing on the direct perception of the truth in issue,
Tancred supplied a key term to distinguish valid from invalid hearing-based testimony. At the same time, he pinpointed the reason for not allowing hearsay: no judge should depend on derivative oral evidence to establish truth.

Exercising wide influence in both ecclesiastical and secular courts, Tancred’s work towered in importance above all other orders of procedure. With his Ordo, Romano-canonical procedure fundamentally took its finished form. Although William Durand’s encyclopedic Speculum iudiciale (1271) soon became an even more effective vehicle for the spread of the Romano-canonical system across the European continent, Durand drew heavily upon the work of his predecessor Tancred. In fact, the Speculum faithfully reproduces Tancred’s hearsay doctrine.

The penetration of learned Romano-canonical principles into secular courts did not, of course, happen all at once. The process of reception was gradual and varied from region to region. Nevertheless, according to one account, a secular court applied the rule against hearsay as early as the mid-thirteenth century. Philippe de Beaumanoir (c. 1247-96), who had a long career as a judge and royal official, reduced to writing the customary law of the Beau-

291. See William H. Dunham, Jr., General Preface to Radulphi de Hengham Summæ ix, xviii (William H. Dunham, Jr. ed., 1932).
292. See Nörr, supra note 288, at 339.
293. See Donahue, supra note 241, at 129; Knut W. Nörr, Die Literatur zum gemeinen Zivilprozess, in 1 Handbuch, supra note 227, at 383, 384.
294. For the text, see Guillelmus Durantis, Speculum iudiciale (1st ed. 1271/76, 2d ed. 1289/91), in 1 Wilhelm Durantis, Speculum iudiciale (photo. reprint 1975) (Gul. Durandi Episcopi Speculum Iuris, 2 vols., Basel, Froben 1574) [hereinafter Speculum].
296. See Falletti, supra note 295, at 1036, 1050.
297. See 1 Speculum 1.4.52-53, supra note 294, at 294. Durand adds a useful distinction. If the witness perceived the truth of the matter through his own hearing (auditu proprio), as in hearing slanderous words, an admission that a debt was paid, or thunder, such testimony is valid because it is like seeing. Testimony concerning what one heard from another (auditu alieno) is not valid. Id.
298. For accounts of the reception of the “learned” Romano-canonical law into the various areas of Western Europe, together with bibliographies on the matter, see Helmut Coing, Einleitung, in 1 Handbuch, supra note 227, at 3, 25; Norbert Horn, Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts, in 1 Handbuch, supra note 227, at 261.
299. See F.R.P. Akehurst, Introduction to The Coutumes de Beauvaisis of Philippe de Beaumanoir, supra note 1, at xiii, xiv-xix.

vais region. Commenting on witness testimony, Beaumanoir stated that those who are appointed to hear cases

should pay great attention and understand how the witnesses respond to questions which are made of them, whether by knowledge, or by belief, or by suspicion [quidier]; because if the witness says: “I know it,” [the one hearing the case] should ask: “How do you know that?” And if the witness answers: “I heard it said [l’oy dire] from this one and from that other,” this testimony is of no value, because it is contrary to the same when he says: “I know for certain,” which he does not know except by hearsay [oir dire]. Therefore, whoever wishes to say: “I know it for certain,” cannot say it if he does not say “I was present and I saw it . . . . And of those who testify only by suspicion, or by hearsay, it is a certain thing that their testimonies count for nothing, however many they may be. ³⁰⁰

The treatment of hearsay reported by Beaumanoir captures the Romano-canonical rule and shows a secular court applying it. Indeed, Beaumanoir’s use of the vernacular oir dire (hear-say) expresses more clearly than the Latin testimonium ex auditu (testimony from hearing) the precise evil the Romano-canonical doctrine targeted.³⁰¹ The rationale for the rejection is equally clear: testimony from firsthand knowledge is the best basis for a factfinding judge’s consideration.

The early reception of the hearsay rule is also evident in Spanish courts. The Siete Partidas (1263/65), the great compilation of

³⁰⁰.[P]oent et doivent oir tesmoins, doivent mult regarder et entendre comment li tesmongs respondent as demandes qui lor sunt fetes, ou par savoir, ou par croire, ou par quidier; car se li tesmongs dist: “Je le sai,” li auditeres li doit demander: “Comment le savés voz?” Et se li tesmongs respont: “Je l’oy dire à celi et à cel autre,” tex tesmongnages est de nule valeur, car il est contraires à li mesimes quant il dist: “Je sai de certain,” ce qu’il ne set fors que par oir dire. Donques, qui veut dire: “Je le sai de certain,” il ne le pot dire s’il ne dist: “G’i fui presens et le vi” . . . . Et de cix qui ne tesmongnent fors que de quidier, ou par oir dire, il est certaine cose que lors tesmongnages ne vaut riens, combien qu’il soient.


Alfonso the Tenth (the Wise), included the Romano-canonical doctrine. The Partidas directed the judge to ask what basis the witness had for his testimony. If the witness replied that he was present at the event, his testimony was valid. Hearsay testimony (el testimonio de oyda), however, was rejected. "But if he says he heard it said by another, what he testifies is incompetent."

XIII. FLEXIBILITY OF THE RULE

The medieval rule was not absolute. Tancred admitted various exceptions for determining blood relationships, for establishing facts beyond anyone's memory and for the admission of a creditor that he had been paid. These early exceptions show that the Romano-canonical rule contained some flexibility, just as the Anglo-American rule does.

Adding to these narrow exceptions, inquisitional procedure, beginning in the late twelfth century, broadened the possibilities for using hearsay. An inquisitional judge could use "common fame" (fama) to establish that there was sufficient reason to begin an investigation on his own authority (ex officio). Fama consisted of a well-founded suspicion, widely held by prudent and honest persons, that someone had committed an act that should be investigated. Those alleging the fama could not be merely spiteful and slanderous, and their allegations had to be based on fre-
quent public reports. Proving the *fama* by eyewitness testimony was, of course, difficult. According to the thirteenth-century jurist Thomas de Piperata, "[i]f the court asked the witness, 'How do you know that there is *fama* about this matter?' and the witness responded that he heard it from other people, the testimony was not probative." In order to avoid the problem of hearsay, Thomas suggested that the court should not ask the witness how he knew of the *fama* but should "prompt the witness to say that the greater part of the populace believed such and such to be true, [although] the witness had no idea about the origin of the belief."

If *fama* was established, its effect was sharply limited. Functioning like probable cause in Anglo-American procedure, it could lead to the detention of a suspect before trial and to the initiation of criminal proceedings. In combination with other circumstantial proof, *fama* could also lead to the initiation of torture in order to extract a confession. Jurists of the twelfth and thirteenth centuries were unanimously hostile to the use of *fama* in trials, however. They allowed its use in civil matters only to confirm proofs already made. In criminal cases, where proof "as clear as day" was required for conviction, *fama* "fell far short of the quantum of proof needed for conviction." According to Thomas, *fama* could not establish guilt. It could only "validate the testimony of witnesses whose character or testimony was not above exception."

Thomas de Piperata recognized that the role of *fama* in inquisitorial procedure conflicted with the medieval ban on hearsay, despite these limits on its use. To the extent that *fama* could be established by hearsay, the medieval rule against hearsay was more flexible than it later would become in England, but its force was

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310. Id. An eyewitness to misconduct could not establish *fama*. Id.
311. Fraher, supra note 235, at 34.
312. Id.
314. Fraher, supra note 235, at 34.
315. See Lévy, supra note 295, at 114.
316. Id. at 115.
317. Id. In criminal cases, Romano-canonical procedure required proof by two direct witnesses or a confession. Fraher, supra note 307, at 587.
318. Fraher, supra note 235, at 37.
319. Id.
320. See supra text accompanying note 311.
not lost.\textsuperscript{321} Where there was no \textit{fama}, no hearsay could be taken into account, and even where \textit{fama} existed, it could not suffice for a conviction, although it might establish probable cause. The Continental rule, therefore, still directed the judge to mistrust hearsay and not to rest his verdict upon it.

\textbf{XIV. Conclusion}

The twelfth- and thirteenth-century revival of legal studies, both Roman and canonical, established reason as the basis for judicial judgment. Resolving disputes between litigants on a rational basis seems self-evident today, but reason’s role was not secure when scholars of the Roman and ecclesiastical law first labored to delineate their procedures and doctrine. In fact, submitting contested matters to decision by reason represented “an event of capital importance”\textsuperscript{322} in an age when trial by ordeal and combat were not far from mind. The Romano-canonical procedure provided a way for judges to arrive at a decision reliably.

The rule against hearsay created by jurists in the twelfth and thirteenth centuries on the authority of texts deeply rooted in the Western legal tradition represents one aspect of this flowering of rational decision making. The factfinding procedure of the legists and canonists required decisions based on reliable evidence. A judgment was sufficiently trustworthy only if based on the testimony of witnesses who appeared in court, subject to examination, and testified under oath on the basis of personal knowledge. The hearsay rule is simply the negative corollary of the requirement that firsthand evidence be tested.

The demand for in-court testing was so strong that judges were ordinarily directed to reject hearsay even though it may be true. Ivo recognized this in the eleventh century.\textsuperscript{323} Rational procedure would not permit so serious a matter as a court judgment to rest on unexamined out-of-court statements that might possibly be true. The legists and canonists directed factfinding judges not to consider derivative testimony, even though they understood this restriction might require judges to disregard some true testimony. In making

\begin{itemize}
  \item\textsuperscript{321} Recourse to the exceptions in the Romano-canonical system was not easy. See Damaška, \textit{Hearsay in Cinquecento Italy}, supra note 306, at 74. The system’s rule retained its “negative effect” and “could prevent judges from declaring proof of a factual proposition, no matter how strongly they believed it to be successful.” Damaška, Of \textit{Hearsay and Its Analogues}, supra note 306, at 440-41.
  \item\textsuperscript{322} Lévy, supra note 295, at 163 (translated from the French).
  \item\textsuperscript{323} See supra text accompanying note 225.
\end{itemize}
this decision, the legists and canonists resisted compromising the integrity of the factfinding procedures they embraced as the best way to arrive at a just result.

As noted at the outset, these rational principles have nothing to do with skepticism about jurors. If skepticism lurks in the Romano-canonical rule, it is the skepticism that warns any factfinder, even a professional, against crediting untested evidence. The rule, as it developed on the Continent, was addressed to the judge as decision maker. It was in no sense a device to shield gullible jurors from unreliable evidence. Viewed as a rule for the court as decision maker, the heart of the hearsay rule is revealed. A judgment should not be based on inherently unreliable derivative evidence no matter who the factfinder may be.

The long traditions and scholarly efforts that gave birth to the Romano-canonical hearsay doctrine, however, could not guarantee that factfinders would obey it. No one could enter into the mind of the judge to be sure that the rule of the scholars was honored in practice. The constant reiteration of the rule, along with the enormous attention given to its proper understanding, indicates that the rule was intended to be an essential part of proper procedure, and a judge violated the integrity of the legal process if he convicted on the basis of hearsay. An unscrupulous judge might nevertheless do so, and even a conscientious one could unwittingly credit hearsay when he should not. Other than by appeal, which could rarely, if ever, ascertain whether a judge had violated the rule, the system had no mechanism to ensure compliance with the ban.

It may be said with Wigmore that England's hearsay rule, when it developed, contributed much to the world's jurisprudence. The English, however, were late to restrict witnesses to firsthand knowledge related and tested in court. While Romano-canonical procedure carefully defined hearsay and taught that it should generally be disregarded, the English had yet to place any limit on its use. This tardiness in developing a hearsay rule occurred in part because English procedure, unlike that of the Continent, did not depend upon the presentation of witnesses in court until sometime at the end of the fifteenth century. Even then England was slow to grasp the lesson of the Continental scholars. The English hearsay bar was not fully established until the late seventeenth cen-

324. See Damaška, Hearsay in Cinquecento Italy, supra note 306, at 85.
325. See 5 Wigmore, supra note 9, § 1364, at 15.
tury. Nonetheless, when England finally adopted a hearsay ban, the rule included an effective enforcement mechanism such that no one could doubt the force of the hearsay bar. When an English judge excluded hearsay, it could not possibly play a part in the jury’s verdict. Moreover, once the English rule was fully established, it left no role at trial for the Continental doctrine of “common fame.”

The institution of the jury did not, however, create the need for the hearsay rule. The rejection of hearsay is part and parcel of any process of dependable decision making, regardless of who finds the facts. Long before England developed its system of trial by lay jurors under the guidance of a judge, medieval jurists articulated the hearsay rule in a system involving factfinders who were sophisticated professionals. The scholars of the twelfth and thirteenth centuries meticulously differentiated what statements based on a witness’s hearing could form the basis for a judgment, and they carefully and emphatically rejected the great mass of hearsay.

The medieval jurists’ hearsay rule constitutes one of Western legal culture’s great guides to reliable verdicts. The guidance of the rule is as valuable to today’s educated jurors as it was to the sophisticated judges for whom it was fashioned.

326. See id. at 18. For discussion of whether the later English rule is related to the Romano-canonical rule, see Shapiro, supra note 313, at 198-200.
327. See Damaška, Hearsay in Cinquecento Italy, supra note 306, at 85.