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Tales of the Living Dead:

Dealing with Doubt in Medieval English Law

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Abstract:

This paper focuses on the narrow issue of proof of death to open up a broader discussion of several inter-related themes regarding early common-law development: the fashioning of specialized writs and legal processes to deal with doubtful deaths in criminal and civil cases alike, the cross-fertilization of ideas about proof in canon law and the common law, litigants' strategies in responding to and taking advantage of problems of proof, and the common law's reliance on a combination of strict proceduralism and equitable flexibility to reduce the likelihood of false felony convictions or illegitimate outcomes in cases involving the right to possession of land. While the common law employed a combination of procedural safeguards and delay to avert the possibility of a wrongful execution in felony cases, it relied more heavily on witness testimony, compromise, and presumptions in land cases, where the stakes were lower and the equities favored the resolution of possessory disputes and the peaceful transfer of land. Drawing such insights from frequently terse legal records, this paper also highlights the problems of proof faced by medieval historians in making sense of our source materials.

…and so ten years,

Since Enoch left his hearth and native land,

Fled forward, and no news of Enoch came.

— Tennyson, *Enoch Arden*[2]

INTRODUCTION

In his essay *De Ira*, Seneca tells the story of a soldier who fell under suspicion of homicide after returning from a leave of absence without his traveling companion.[3] Haled before a judge, Gnaeus Piso,[4] the soldier asked for time to search for his comrade. Piso refused, reasoning "that if the man did not produce his companion, he had killed him."[5] Rather than waiting for the production of more conclusive evidence, or indeed any proof of the alleged homicide, Piso confidently commanded the soldier's immediate death. A centurion led the soldier outside, where he presented his neck for execution. Suddenly, the missing comrade appeared on the scene, and the execution was halted. The centurion brought the condemned soldier back to Piso "in order to free Piso from blame" because, in his mind, "fortune had freed the soldier."[6]

A jubilant crowd accompanied the centurion and two soldiers, locked arm in arm, before the judge. Piso, however, "mounted the tribunal in a rage." Rather than freeing the falsely accused soldier, he ordered three men to be executed: the two soldiers and the centurion. Seneca offered a scathing commentary on Piso's behavior: "O how clever is anger in devising excuses for its madness! 'You,' it says, 'I ordered to be executed because you were condemned; you, because you were the cause of your comrade's condemnation; you, because you did not obey your commander when you were ordered to kill.'"[7] Through this colorful tale, Seneca emphasized the debilitating nature of anger with regard to the exercise of judicial discretion. Piso had allowed anger to cloud his judgment and had mistaken "inflexibility for firmness" in refusing to reconsider a capital sentence in light of new exculpatory evidence.[8] This, however, was Piso's second grave mistake. His first was to hand down

an initial judgment—a sentence of death, no less—in a capital case plagued by doubt at the outset and resting on the most tenuous of circumstantial evidence.

Although Seneca penned the tale of Gnaeus Piso in the first century AD, the story proved to have a long afterlife, as would Seneca's stoical brand of philosophy generally.[9] The story was retold and adapted in the twelfth and thirteenth centuries by the likes of Peter the Chanter and John of Wales, whose retellings emphasized the perils of judging in the absence of clear proof and in the presence of doubt.[10] This article will focus primarily on thirteenth-century cases, but the tale continued to work its way into the popular imagination well into the fourteenth century, when Geoffrey Chaucer reproduced Seneca's story, by way of John of Wales, vernacularizing Seneca and John's *milites* as *knyghtes* returning from abroad.[11] Chaucer, whose primary interest in sharing the Senecan tale was to caution against overweening anger, also emphasized the judge's rash certainty in handing down his initial judgment of death:

> And as Fortune would have it,
> One of them came home, the other not.
> At once the knight before the judge is brought,
> Who said thus, 'Thou hast thy fellow slain,
> For which I judge thee to death, certain.'[12]

The resonance of Seneca's story in medieval England (and Paris, in the case of Peter the Chanter) is attributable not only to the drama of the tale, but also to a practical conundrum faced by tribunals tasked with adjudicating felony cases and even some disputes over land. Indeed, this problem of the living dead—of doubt in the absence of a corpse, and the possibility of a presumptively dead individual appearing on the scene—was not merely the stuff of fantastical tales but instead a serious legal and moral problem faced in practice.[13] Key common-law land actions, most notably mort d'ancestor (an heir's right to the estate of his or her late ancestor) and dower (a

widow's right to a life estate in a third of her husband's lands, with the land reverting to the husband's heir after her death), were predicated upon the event of a death.[14] Sometimes doubt existed as to whether or not a death had occurred, particularly if the purportedly dead person had been traveling abroad. This was, after all, a time when it was not uncommon for individuals to depart on travel—for pilgrimage, study, crusading, and the like—that could keep them away for months or even years at a time.[15]

Matters internal to the common law, such as writs making an assertion about a person's death, and matters external to the common law, most notably the perils and uncertainties of medieval travel, converged on the question of proof, which was itself in a transitional phase both in England and in continental Europe in the late twelfth to thirteenth centuries. Admittedly, absent corpses animate relatively few felony or land-law fact patterns, yet such cases, when they do appear, enable us to view the mechanisms the common law employed to manage problems of proof in cases of extreme doubt. A modern comparison might be the way in which the insanity defense, although seldom invoked in practice, helps scholars of the criminal law conceptualize the bounds of criminal responsibility by focusing analysis on what qualities of mind make a person incapable of incurring subjective culpability for harms they caused.

While Gnaeus Piso's judgments were clearly immoral, in some instances judges and jurors in medieval England were faced with cases involving greater ambiguity, something less than full, incontrovertible proof. Indeed, Seneca's story had much to impart to a medieval English audience at a time when the common law and its modes of proof were undergoing great transformation, whether due to Henry II's (r. 1154–89) innovations in land law in the late twelfth century—which put the question of possessory right to a local jury-like body—or to the radical transformation of the law of proof in felony cases following the Fourth Lateran Council (1215), when trial by ordeal gave way to trial by jury.[16] Concerns with proof lay behind these procedural innovations and similarly

undergirded other aspects of the trial process, some of which predated the legal innovations of Henry II in land law and Henry III (r. 1216–72) in criminal law. In continental Europe, the paradigmatic case of extreme doubt is often described as the crime lacking eyewitnesses given the requirement in the civil and canon law context of either two eyewitnesses or a confession to constitute proof "as clear as the light of day," to borrow a phrase from Albertus Gandinus.[17] England, of course, did not adopt this same rule of proof for felony cases or really any distinctly articulated rule of proof, opting instead to adopt a new *method* of proof, jury trial, once the ordeal was no longer available.[18]

This paper focuses on the narrow issue of proof of death to open up a broader discussion of several inter-related themes regarding early common-law development: the fashioning of specialized writs and legal processes to deal with doubtful deaths in criminal and civil cases alike, the cross-fertilization of ideas about proof in canon law and the common law, litigants' strategies in responding to and taking advantage of problems of proof, and the common law's reliance on a combination of strict proceduralism and equitable flexibility to reduce the likelihood of false felony convictions or illegitimate outcomes in cases involving the right to possession of land. Although medieval England did not have fully articulated rules of evidence, concern with proof in the face of doubt likely contributed to the high acquittal rate in felony cases while also reducing the likelihood of illegitimate outcomes in civil cases predicated in part upon an individual's death.[19] Drawing such insights from frequently terse legal records, this paper also highlights the problems of proof faced by medieval historians in making sense of our source materials.[20]

A Brief Road Map

Part I opens with an introduction to the office of the medieval coroner, which from the late twelfth century onward ensured that most "unnatural" deaths, typically intentional and accidental homicides, were investigated by the coroner and a local inquest jury. Considering the possibility of a

homicide accusation in the absence of a coroner's inquest over a body, Part I then returns to the themes of Seneca's tale of Gnaeus Piso, introducing the twelfth- and thirteenth-century adaptations of the story by Peter the Chanter and John of Wales. The final section of Part I highlights a writ in the treatise *Bracton* (c. 1230) for use in instances in which a person was falsely or mistakenly accused of felony, was then outlawed after fleeing, and ultimately wished to seek a pardon after the purported homicide victim turned up alive. *Bracton* thus recognized the possibility of a false accusation of felonious homicide when no homicide had occurred and provided a remedy for a person outlawed under such circumstances. Something like the Piso story, in other words, found new life in a legal writ.

Acknowledging that few such cases likely occurred in medieval England, the article next turns to the initial question raised in the introduction, namely, whether a person might be accused of homicide, and perhaps even convicted, in the absence of a corpse in medieval England. Part II explores the few cases of the "living dead," as I have termed it, that I have found in the medieval English plea rolls, and hypothesizes about the strategies employed to cope with extreme uncertainty in capital cases. Procedural mechanisms, such as the requirement that an accuser claim to have witnessed a homicide with his or her own eyes and ears, and the delays built into the system of felony prosecution, helped avoid the possibility of a wrongful execution in doubtful homicide cases. Part II also considers the practice of pardoning convicted defendants who survived hanging at the gallows. Such seemingly miraculous occurrences called into doubt the underlying conviction and led to speculation that God perhaps desired a different outcome and/or that the case had not been sufficiently proven in the first place.

Recognizing that doubt about death was not confined to the realm of felony law, Part III turns to an exploration of commonly used writs, namely the writs of mort d'ancestor and dower, both of which involved a demand for possession of land following a person's death. I rely primarily

on the records of the King's Bench (the KB 25 series at the British National Archives).[21] The first subsection focuses on instances in which an alleged heir claimed an inheritance, but the death of his or her ancestor was called into doubt by the current tenant. The next subsection considers the plight of the widow trying to prove her entitlement to dower lands, only to have the fact of her widowhood called into doubt. Part III demonstrates the common law's reliance on presumptions and compromise to resolve issues of uncertainty in land-related cases and argues that the overriding concern in such cases—the peaceful transfer of land and the sustenance of heirs and, even more importantly, widows—helps explain the willingness to reach a final judgment even when doubt remained.

Part IV situates the strategies of common lawyers and litigants in both felony and land-related cases in the broader world of legal proof, contrasting the procedural and postural moves of the common law with the comparably rule-based approach of the contemporary canon law. Part IV also compares the rhetorical strategies of law reports and legal treatises with trial records from the plea rolls, suggesting that litigants might have opportunistically capitalized upon the uncertainties of travel abroad in bringing claims and defending against them and, in doing so, may have borrowed imaginative approaches from other legal and perhaps even literary genres.

I. Death Investigation in Medieval England

By the late twelfth century in England, the office of coroner was firmly established.[22] Among the coroner's duties was the inspection of a corpse when there was reason to believe a person had died an unnatural death. The coroner, assisted by an inquest of typically twelve men, would examine the body, measure any wounds, and craft a narrative that could be produced later in court should a suspect be put on trial. The thirteenth-century treatise, *Placita Corone*, would give one to believe that a person wishing to bring a private accusation of homicide *had* to produce evidence of the death: "…it is necessary…" the treatise informs us, "…to show his wound if it is a case of wounding or the

death of whomsoever it may be if it is a case of homicide."[23] However, although inspection by the coroner was de rigeur in the typical case in which a corpse was available for viewing, surviving cases in the plea rolls demonstrate that the absence of a corpse was by no means a bar to bringing a charge of homicide.[24] Moreover, outside of criminal cases, there was no routine procedure for inspecting corpses and producing a record of death, such that civil claims based upon an underlying death, as in cases of mort d'ancestor and dower, did not require litigants to produce the medieval equivalent of a death certificate.[25]

If lack of a body was no bar to initiating a felony prosecution, could a person be convicted and sentenced to death, perhaps even executed, without the presence of an identifiable corpse? If so, what if the person believed to have been killed later returned, Martin Guerre-style, thereby casting a pall over the earlier legal proceedings?[26] From the few records I have found thus far in the plea rolls, I tentatively conclude that felony homicide cases were not likely to proceed to trial and conviction where doubt existed as to whether a homicide had actually occurred. Beyond the criminal context, however, doubt about a death underlying a claim to landed property did not preclude adjudication on the merits.

In criminal cases today, the concept of *corpus delicti* (literally "body of the crime," but referring to proof that a crime has occurred) provides some guidance to prosecutors. In cases of homicide, it requires that before a person can be charged, there must be direct or circumstantial evidence supporting the idea that a person has, in fact, been killed by means of criminal agency.[27] Such evidence, despite the name of the concept, need not be an actual corpse, but could instead be sufficient evidence pointing to the fact of an illicit homicide. A corpse with signs of a violent end might provide the clearest evidence, but in some instances circumstantial evidence could be pieced together today to form the *corpus delicti* even in the absence of an actual *corpus*.

Writing in the mid-seventeenth century, Mathew Hale (d. 1676) emphasized the importance of the body as crucial evidence: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead," relying on two cases of a wrongful conviction and execution, one from Edward Coke and one from his own memory, to drive the point home.[28] He closed his discussion with a Latin maxim, "Tutius semper est errare in acquietando quam in puniendo, ex parte misericordiae, quam ex parte justitie," or "It is always better to err in acquitting than in punishing, on the side of mercy, rather than the side of justice."[29] Hale could have been borrowing a page from Seneca, who centuries earlier had expounded upon the dangers of prioritizing harsh, inflexible judgment at the expense of caution and mercy. He might alternatively have found inspiration in Genesis 18.23-32, in which Abraham secures a promise from God not to destroy Sodom if ten just men (*iusti* in the Vulgate Latin) remain in the city.[30]

Whatever the source of his maxim, Hale's concern about the possibility of a false conviction of murder in the absence of incontrovertible proof reflected a seventeenth-century strain of an anxiety long expressed by lawyers and theologians alike. In the medieval context, this anxiety had to do at least in part with concern for the soul of the judge or juror should they issue a wrongful verdict or judgment, as demonstrated by James Whitman in *The Origins of Reasonable Doubt*.[31] Barbara Shapiro has persuasively argued in response to Whitman that Hale's medieval forebears were also preoccupied with the issue of factual proof.[32] "The medieval world," Shapiro observes, "may have been greatly concerned with salvation, but it was not unconcerned with accurate fact-finding."[33] This interest in accurate fact-finding, in fact, predated the adoption of jury trial for felony in England.

Doubt in the Age of Ordeal

In the late twelfth century, one particularly significant flashpoint for worries about proof was the practice of trial by ordeal, which relied in theory upon outward signs—a healing or festering hand, a sinking or floating body—to determine a person's guilt or innocence. In the decades

preceding the Fourth Lateran Council (1215), which would withdraw priests from administering the ordeal, theologians like Peter the Chanter called into doubt the ordeal's efficacy and advocated a new approach to matters of proof in criminal cases. In England, the end of the ordeal provided the impetus for a novel reliance on juries to issue final verdicts in felony cases. On the surface, it would appear that the *iudicium Dei*, or judgment of God, was replaced by purely human judgment when trial by ordeal gave way to jury trial. However, before 1215 other forms of proof already co-existed with the ordeal, which was typically employed as a last resort in the absence of certain proof by other means.[34] Moreover, human judgment influenced ordeal verdicts prior to 1215,[35] and divine judgment was not completely displaced by the introduction of juries into felony procedure either. Rather, judges and jurors alike considered the perils that awaited them at the Last Judgment should they approach cavalierly the task of judging their neighbors in capital cases.[36] They therefore tried to adopt the right frame of heart and mind in judging others.[37] Moreover, fearing an erroneous outcome, they often resorted to acquittals or pardons in cases of doubt.[38] As will be discussed below, when a defendant mysteriously survived hanging at the gallows, some were inclined to take this as a sign of divine intervention in a human judgment gone awry. In other words, God, presumably knowing the defendant's heart, might appear to desire a different judgment than that handed down by judge and jury. While the conceptual changes brought about by the abandonment of trial by ordeal might be overstated, it is noteworthy that ordeal abolitionist Peter the Chanter found inspiration in a tale like Seneca's in arguing against the ordeal as a method of proof in the late twelfth century.

Although he died nearly two decades before Lateran IV, Peter the Chanter's virtual presence was unmistakable at the church council. Both in his writings and through his influence on a generation of similarly influential bishops and theologians, Peter could be credited with one of the council's major innovations: the effective abolition of trial by ordeal.[39] Decades before Lateran IV,

Peter had concluded that the ordeal was illegitimate and in fact dangerous, resulting in false positives and allowing for judicial resolutions in instances where proof, or lack thereof, should have inspired greater circumspection. In arguing against the use of ordeals, Peter employed a variety of methods, from disputing the ordeal's scriptural basis, to questioning its theological grounding, and even to sharing a tale or two from the trenches of ordeals gone bad. He relayed the story, for example, of a man named Aurelian, accused of stealing a reliquary from the Church of Blessed Samson.[40] Aurelian offered to prove his innocence through a purging ordeal (*per iudicium purgaturum*), was found guilty, and immediately met his end at the gallows. After some months, a thief was caught and convicted for stealing another reliquary and, faced with execution, confessed to the earlier theft, even explaining where to find the stolen goods.[41] Trial by ordeal, in other words, had produced a false conviction.

More famously, perhaps, elsewhere in his *Verbum adbreviatum* (c. 1187) Peter shared the story of two English pilgrims who set out together towards Jerusalem but returned by different paths, one taking the direct route home, and the other taking a detour "*ad Sanctum Iacobum*," a reference to Santiago de Compostela, already a popular pilgrim destination in Peter's time.[42] Having returned from Jerusalem without his traveling companion, the speedier of the two pilgrims fell under suspicion. The absent man's relatives claimed that the pilgrim had killed his companion and kept his possessions. Presumably the pilgrim had suspiciously arrived home with his partners' worldly goods in tow, providing further reason for concern about the well-being of the absent traveler. Eager to prove his innocence, the pilgrim volunteered to submit himself "to that diabolical judgment" (*ad iudicium istud diabolicum*), as Peter termed it, not concealing his contempt for unilateral ordeals. The pilgrim failed the ordeal and was hanged.

A short while later, the deceased's companion returned "healthy and unharmed" (*sanus et incolumis*). At this, the judges grew confused, as did those who had procured the man's hanging.

Moreover, Peter tells us that the hanged man's friend mourned his death, of which he had inadvertently been the cause, until his own death some time later. Peter closed with the moral of the story: "Therefore in doubtful cases, sentence is to be held back, especially in blood cases, where it is not enough to proceed by way of conjecture or probabilities, but rather to judge according to reasons that are the most transparent and clearer than daylight, lest by judging otherwise one be guilty of the death of the condemned person."[43]

This story has been identified by John Baldwin as an anecdote drawn by Peter from "the realm of experience and practice."[44] It may be that Peter indeed witnessed such a tragic ordeal or heard about it contemporaneously from other witnesses. Alternatively, he may have derived it not from an actual trial he had heard about or witnessed in his lifetime, but rather from Seneca's story of Gnaeus Piso and the hapless soldiers or another story like it.[45] The parallels with the Piso story are striking, although there are key differences as well.[46] Most notably, both stories involve a person falsely accused of killing a traveling companion and convicted despite the absence of a body. In both tales, the purported homicide victim emerges on the scene to disrupt what had appeared to be *res judicata* and *causa finita.* Rather than focusing on judicial temperament, however, Peter uses the story of the two English pilgrims to call attention to the problem raised by Piso's initial judgment, i.e., the danger of issuing a capital sentence in the absence of dispositive proof. For Peter, the problem with trial by ordeal lay in part in the procedure's indifference toward proof and its use in doubtful cases in which a conviction might rest on mere conjecture. Unlike some of his contemporaries, who might have had greater confidence in divine intervention to ensure a rightful judgment,[47] Peter rejected the ordeal as an illicit tempting of God and a dangerously inaccurate fact-finding procedure. Peter's writings helped sway those church leaders, most notably Pope Innocent III, who pushed for the ordeal's effective abolition at Lateran IV.[48] In England, ordeals would be replaced by jury trials within a decade of the church council. However, some of Peter's concerns with proof in doubtful

cases would not necessarily be mitigated by the introduction of juries. In the early decades of jury trial in England, proof continued to be an issue of great interest to religious and legal thinkers, including sermon writers like John of Wales and the authors of the early thirteenth-century *Bracton* treatise.

John of Wales' Adaptation of the Senecan Tale

John of Wales' retelling of Seneca's tale in his *Communiloquium*, or *Summa collationum*, in the 1260s or 1270s demonstrates how concern with doubt, and with rash judgments handed down despite the absence of proof—manufacturing three crimes after discovering none—reached a broader audience in medieval England. The *Communiloquium* was a handbook for preachers containing pithy stories that could be incorporated into sermons.[49] The book was divided into thematic sections, and the tale of Gnaeus Piso appeared in a section on the topic of rightful judging, including the importance of seeking the truth, not being swayed by strong emotion, and avoiding the execution of innocents. John of Wales shortened the Piso tale and removed the name of the judge, but otherwise relayed it much as it had appeared in the Senecan original.

For the ambitious sermon writer, the *Communiloquium* facilitated easy reference to other sources from which further lessons and *exempla* might be extracted. In fact, John of Wales provided specific citations—typically referencing author, title, and book or chapter—to related works, including excerpts from the book of Proverbs, the writings of Valerius Maximus, Augustine's *City of God*, and John of Salisbury's *Policraticus*.[50] The Piso story itself is cited as "Señ. lib'. ii. de ira," enabling the curious reader to look up the full story in its broader context. Therefore, a priest using the *Communiloquium* to draft a sermon on the topic of rightful judging could, with access to a robust library, reference John of Wales' cited sources to expand upon the homiletic theme.

For example, looking to Book 5 of John of Salisbury's *Policraticus*, cited in the same section as the Piso story, a sermon author would have found a warning against judges allowing strong emotion

to influence them, "for it is not easy for the mind to perceive the truth when these feelings prevail."[51] Anger and other strong emotion, according to John of Salisbury, clouded a judge's ability to ascertain the truth: "For equity, to which the judge owes obedience, does not know the left hand of hatred nor the right hand of love; because in judgments it is not permissible to deviate from the right line of the truth."[52]

Relatedly, John of Wales drew upon sources that emphasized the importance of being inclined to absolve rather than to condemn.[53] He paraphrased, for example, a story from Book 18 of Augustine's *City of God* that recounted Mars' trial for homicide before twelve gods. The gods split evenly in judgment, six favoring acquittal and six condemnation. An acquittal was issued accordingly, the idea being that one should err in favor of acquittal rather than condemnation in such a doubtful case.[54] On this theme of caution in judging, John of Wales also referenced Exodus 23, which advises, "The innocent and just person thou shalt not put to death: because I abhor the wicked."[55] Other sources cited by John of Wales discouraged reaching a final decision in the presence of great doubt. Elsewhere in Book 5, for example, John of Salisbury cautioned, "a doubtful matter cannot be brought to a final decision without temerity."[56] Instead, he encouraged delay in such circumstances: "…when the case is a doubtful one, there is always a postponement, if not of the trial, at least of the decision."[57] He went on to provide an example of a complicated legal case in which the judges chose to avoid a final decision: "…thinking that what was said on both sides raised a grave and inexplicable doubt, and for fear lest their decision in favor of either party might defeat itself, [they] left the case undecided, postponing it permanently."[58]

In discussing doubtful cases, Valerius Maximus, another writer cited by John of Wales in this section of the *Communiloquium*, similarly emphasized the curative nature of procedural delay when a case presented a truly heart-wrenching fact pattern. The example he gave was the case of a housewife in Smyrna who killed her husband and son after learning that they had killed her son by a

prior marriage.[59] The proconsul assigned to the case referred it to the Areopagus in Athens, where the decision was made to command the prosecutor and defendant alike to return in one hundred years for a final disposition, thereby averting the troubling decision over whether to convict or acquit. In this instance, it was not doubt about the underlying facts but rather doubt about the just outcome of a tragic case that drove Valerius Maximus' argument in favor of delay. By referencing such source materials about rightful judging and doubt in his discussion of Seneca's pithy tale and related *exempla*, John of Wales provided fodder for sermon authors who might draw upon the *Communiloquium* in drafting homilies which would, in turn, reach a broader audience. The problem of proof was not the province of common lawyers alone, but of men and women learning how to examine their own consciences and how *not* to judge their neighbors at a time when uncertainty was a part of daily lived experience both in the courtroom and in the domestic courtyard.

Bracton's Writ for the Living Dead

Of course, concerns with proof and doubt were also a subject of keen interest to lawyers. Seneca's tale of the two soldiers and Peter the Chanter's ordeal story contained what later lawyers would refer to as a "presumptive cause" (*causa praesumptiva*),[60] what we might today think of as an accusation based solely upon circumstantial evidence: the soldier or pilgrim who returned alone was presumed to have killed his traveling companion and charged with that crime despite the absence of any definitive proof of homicide. The *Bracton* treatise, written soon after England's transition from ordeal to jury trial, alludes to the possibility of a presumptive cause underpinning a felony accusation:

> A cause may be presumptive though not true, because of suit or an inquest made before the justices, [even] though no cause at all exists, as where he who was alleged to be slain is alive and well and he alleged to be the slayer, a timid man, fled because of the suit and

> appeal [i.e., a private action for felony], or where one appealed in two counties has successfully made his defense (or surrendered himself to prison) in one of them and has been outlawed in the other, [or] where he who says that he was robbed, imprisoned and chained never was robbed etc. and so though there is a cause it is insufficient, as where men have been drowned or crushed and the like, dead through misadventure, [or] if the wound of which one is appealed is not dangerous, and does not involve mayhem.[61]

Bracton thereby lumped together deliberately false or overblown claims along with accusations based on a mistaken belief in a defendant's guilt of a crime. Elsewhere *Bracton* references the potential of popular *fama* and suspicion to give rise to wrongful accusations, sometimes based upon mere rumor, sometimes on greed or hatred, and sometimes on sheer bad luck, such as being found standing "over the body of the dead man with his knife dripping blood" or "fleeing from his body".[62] According to the treatise authors, such a presumptive cause could be enough to set inexorably in motion the wheels of outlawry,[63] particularly if a homicide suspect fled, thereby introducing a presumption of guilt. *Bracton* notes, "because of the presumption raised by flight and the appellor's suit, the matter must proceed to outlawry, and if suit has been properly made according to the law of the land the outlawry will be good, despite the fact that there is no cause or an insufficient cause, because of the flight and the suit."[64] A person who took flight and then failed to appear when summoned to multiple sessions of the county court would be outlawed. *Bracton* does not go so far as to suggest that a presumptive cause would suffice for a felony conviction, but the treatise at the very least acknowledges that circumstantial evidence or a spurious accusation could result in a bona fide outlawry.

An outlawry based on a presumptive cause, though technically valid, might rightfully be the object of the prince's grace, according to *Bracton*. In some instances, outlawry procedure might be cancelled or declared void, such as in cases where "he who was alleged to be slain is produced alive and well *before* the outlawry, since there is then no cause, true or presumptive; it is otherwise if he is produced alive *after* the outlawry."[65] In the latter instance, until the presumptively dead person returned alive and well and the pardon process transpired, the outlawry remained valid with all its perilous consequences for one who returned to the vicinity "bear[ing] his judgment with him on his own head" for having taken flight rather than submitting to the king's peace.[66] In fact, the outlaw could be killed on sight unless an official pardon of the outlawry had been secured. Common-law procedure precluded reversal of the outlawry before the completion of the pardon process, which in turn required producing the living homicide "victim" in court. This suggests that witness statements affirming the victim's well-being would not suffice to reverse the outlawry.

Elaborating upon the theme of presumptive causes, *Bracton* contains a writ designed for situations in which a person believed to have been slain returns home alive and well.[67] The writ allowed a person who fled after being accused of homicide, thereby raising a presumption of guilt due to flight, to return home without suffering the continuing taint of outlawry. As a preamble to the writ explained, "If a homicide is charged to some timid man and he has fled and been outlawed at someone's suit, or has been indicted and has fled, and he who was alleged to be slain afterwards makes his appearance alive and well, the king of his grace remits the outlawry by this writ," which I have reproduced below:

> A writ where one said to be slain returns alive and well. (Breve de eo qui interfici debuit, si sanus et vivus revertatur.)
>
> The king to the sheriff, greeting. Know that our justices who were last on eyre in your county record that when A. in our court before

> our same justices appealed B. and others of the death of his brother C., the said B., a timid man and frightened for himself, withdrew himself and did not stand trial on that appeal before our said justices and was therefore held suspect of the same death by the jurors and the vills, especially because of his flight, and in consequence by order of our said justices he was exacted from county court to county court until he was outlawed according to the law of the land.

The writ presumes that outlawry occurred due to the defendant's failure to appear after being summoned repeatedly by the appellant at the county court. The writ continues:

> Nevertheless, since the same C. who was supposed to be slain has been found alive and well (*inventus est vivus et sanus*), we, being unwilling that the presumption raised by flight be preferred to the truth, and because it is now plain that there was no true cause for the outlawry, have forgiven B. the said flight and pardoned the outlawry, so that of our special grace he may come to our peace. Therefore, we order you to cause the same C., who was said to be slain, to be produced in your full county court, where the same B. was outlawed, to be viewed by all, and then to cause B. to be inlawed and received into our peace and also to have it publicly proclaimed that we have received him into our favour and given him our steadfast peace. Witness etc.[68]

Like Peter the Chanter's pilgrim, the theoretical accused person imagined in *Bracton*'s writ faced an accusation of homicide brought by the kin of the purportedly deceased person. Where Peter's pilgrim willingly submitted himself to the ordeal in the hopes of clearing his name, the subject of

Bracton's writ avoided trial by fleeing the vicinity in fear when faced with an accusation, however false, of homicide. He was, in fact, described in the writ specifically as "a timid man" (*homo meticulosus*), whose resulting flight brought him under the suspicion of a local jury and the neighboring vills.[69] In her study of the royal pardon, Naomi Hurnard refers to the *meticulosi* as those who "fled in panic when they were in no way implicated in a crime."[70] She offers the example of one who had been present at a sudden death, although the writ described here involved a case in which no death had occurred.

After the purportedly dead man returned alive and well (*Bracton*'s writ says "*sanus et vivus*," as compared with Peter's "*sanus et incolumis*," both likely formulaic phrases meaning, roughly, "alive and well" or "safe and sound"), the accused man had to be returned to the king's peace. The writ's rationale for pardoning the outlawry is reminiscent of Peter's warning that convictions should not be based on mere conjecture or probabilities. Truth was the ultimate goal. The process of inlawry required publicity above all else given the accused's notoriety within the community as a homicide suspect. This public process could have also served as a first step toward reintegrating the former outlaw into the community.

This grant of pardon and peace, incidentally, was a matter of royal discretion or grace, not of right; if the initial outlawry had been contrary to "the law of the land," then it would have been a matter of right, but a factually incorrect accusation alone did not make the resulting outlawry repugnant to the law of the land.[71] The defendant's flight, combined with the formal accusation against him or her, raised a presumption of guilt under the common law while also constituting an independent offense in its own right. The *Bracton* author clarifies that, though a pardon of right might not be available, a defendant under such circumstances should receive a pardon of grace: the treatise states that in instances where there was "no cause, despite the fact that the outlawry is lawfully and properly done," the outlawed person was to be admitted to the king's peace "of grace

and without difficulty and as of *some* right, the grace of the prince accompanying it."[72] Furthermore, a person wrongly accused of homicide might be restored to his or her forfeited property in instances "where he who was alleged to be slain is produced alive after the outlawry." Such production of the alleged homicide victim provided "true proof" (*vera probatio*), which in turn "conquers the presumption" (*vincit praesumptionem*) of guilt.[73]

The *Bracton* writ might represent another adaptation of the colorful Senecan tale of a false homicide accusation, a lawyerly exercise in imaginative hypotheticals, intended for the edification of men training in the practice of law, men who may very well have read Seneca's *De ira* as schoolboys.[74] Alternatively, it might reflect an actual case of false accusation. The level of detail contained in the writ, such as the description of the accused fleeing out of fear, suggests that the writ might have been adapted from an actual case tried before the king's courts.[75] Nevertheless, the writ was not to find an afterlife in the abundance of registers of writs produced in the centuries after *Bracton*,[76] suggesting that it did not speak to a problem faced with great frequency by the courts. I have not yet found *Bracton*'s writ for inlawing a timid outlaw falsely accused of homicide in any register of writs.[77] It may be that cases lacking a corpse did not often proceed to either outlawry or conviction, thereby reducing the need for a writ of pardon keyed to such an event.

II. NON HABEAMUS CORPUS: THE LIVING DEAD IN THE PLEA ROLLS

Some snippets from the thirteenth-century plea rolls demonstrate that cases of the living dead, i.e., accusations of homicide where there was reason to doubt that a homicide had occurred, arose on occasion in the royal courts. This was true in the age of ordeal, and it continued after the introduction of jury trials post-1215. Such cases do not appear to have resulted in convictions, suggesting that English felony procedure helped avert the Piso catastrophe of a capital sentence in a case lacking proof that a homicide had occurred. The high acquittal rate during this period further suggests a discomfort with too readily handing down convictions in doubtful cases.[78]

For example, a 1208 homicide accusation was called into doubt due to inconsistencies in the accuser's dating of the alleged homicide as well as evidence that the purported homicide victim had appeared "*sanus et incolumis*" (the same language used by Peter the Chanter) over two weeks after the allegedly fatal wounding. According to the record in the plea rolls, Robert of Bradele appealed Geoffrey of Bellum of having "evilly killed" (*nequiter occidit*) Robert's brother Gilbert at Ripon.[79] The record suggests that the court may have had some reason to be skeptical of Robert's accusation, insofar as he responded in the negative to questions about whether a view had been held after Gilbert had been wounded and whether the hue and cry had been raised once he died. Typically one would have expected the first finder of Gilbert's body to raise the hue and for the coroner to have been summoned to commence an investigation. Adding further doubt, Geoffrey denied the felony and pointed out that Robert had given conflicting information earlier regarding the time of the wounding and death. Perhaps even more damning was Geoffrey's assertion that the supposed homicide victim was seen for fifteen days after the purportedly fatal wounding "healthy and unharmed and laboring in the workshop of the monks of Fountains" (*sanus et incolumis et fabricans in fabrica monacorum de Fontibus*), strange behavior for someone with a mortal injury.[80] Confident of his innocence, Geoffrey offered forty shillings to have an inquest on the matter, thereby interposing a jury finding of fact to postpone the court's disposition of the case. The final outcome remains unclear, but there is no indication at this stage of the proceedings that Geoffrey was sent to the ordeal to test his innocence. Rather, it would appear that Geoffrey was able to employ a dual strategy of technical challenges focused on the specifics of the accusation—failure to raise the hue, conflicting information regarding timing, etc.—and recourse to a jury with local knowledge about the purported homicide victim's behavior in the days following his alleged wounding.

The plea rolls also include the following 1210 case, again from a date preceding the abandonment of trial by ordeal in England:

> Christina of South Luffenham, who was in prison at Northampton, having been retained by the appeal of Gunhilde of the death of Thomas her son, was released on pledges before the justices because it was testified that the same Thomas, husband of the same Christina, was a beggar (*mendicus*), and it is not known whether he is living or dead, nor is she suspected of that death by the vill of Luffenham. These are the pledges [that she will] stand to right if anyone wishes to speak against her: Hugh son of Simon of Luffenham, Hugh son of Anketil, William son of Robert Turbern the Miller, Roger son of Hugh, Robert Luvet, Solomon the Tailor, Simon son of Herbert, William of Seldenethorpe, Simon Prudhome.[81]

The accusation against Christina appears to have been brought by her own mother-in-law, but the local community did not suspect her of the death, if there had even been a death at all. Indeed, the word used to describe Thomas, *mendicus*, suggests that he was in the habit of begging, possibly traveling outside Luffenham at times to pursue charity; it may be that Thomas failed to return from his most recent wanderings, giving rise to his mother's suspicion that he was dead.[82] Bolstered by the vill's unwillingness to prosecute her, and further supported by nine pledges, Christina was fortunately able to avoid trial, at least for the present. Prominent in the record of the private accusation is the fact that the well-being of Christina's husband was not readily ascertainable. In the end, the lack of evidence as to the husband's condition trumped his mother's desire to prosecute her daughter-in-law for homicide, and the case of private appeal did not move forward. To the extent that suspicion continued to surround Christina, the use of pledges offered some reassurance as to her future good behavior and cooperation if the case were later to proceed to trial. In the meanwhile, Christina was spared the ordeal, suggesting the court's reluctance to submit her to such procedure—particularly when death by burning was the punishment facing a woman convicted of petit treason—in light of the absence of proof that a death had even occurred.

Nearly a century later, on a Monday in late September 1307, Alice daughter of John of Sercombe appeared before the king's justices, Roger de Belle Fago[83] and John de Acton, who had been assigned to preside over trials of all those imprisoned in the gaol at Gloucester Castle.[84] Alice's imprisonment in Gloucester Castle followed an indictment for the homicide of her husband, Richard of Sydenham. Now finally having her day in court, she was asked by the justices how she wished to respond to the accusation against her. Alice denied having killed her husband, not an unusual plea for one accused of homicide. Remarkably, however, she added that her husband was, in fact, present in the courtroom that very day. The court conceded that an inquiry should follow, and a hundred jury subsequently affirmed that indeed Richard of Sydenham was present in the courtroom. Alice was duly acquitted. The terse gaol delivery record fails to answer many of the questions we might pose. For example, how had Alice come under suspicion for a homicide that never occurred? What investigatory process, if any, preceded her indictment? And what were the circumstances surrounding Richard of Sydenham's initial disappearance and eventual reappearance in the courtroom at the Gloucester Castle's gaol? Had Richard not shown up in court, might Alice have been convicted of homicide?

An earlier case at the Devon Eyre in 1238 similarly involved a demonstrably false accusation of felonious homicide. In this instance, John de Culum secured an acquittal, but only after great delay. According to the brief eyre record:

> John de Culum, who was charged with the death of Sara daughter of William Grammer of Cornwall, comes and produces the same [Sara] alive and well (*vivam et sanam*). And the jurors testify that it is the same Sara. And therefore John is acquitted.[85]

This case, roughly contemporaneous with the *Bracton* treatise, employs the same "*vivus et sanus*" phrasing as the Bractonian writ. As Henry Summerson, editor of the Devon Eyre volume points

out, John de Culum's presumed innocence was already apparent nine years earlier. Namely, in the Close Rolls for March 1229, it was recorded that, after John had been detained in the king's prison for the homicide of Sara, the sheriff had found her living (*postea vivam reperiit*).[86] Twelve pledges were assigned to ensure that John, once released, would appear before the justices at the next session of the eyre (*ad primam assisam*). To secure his release, John had availed himself of a writ of bail, as opposed to the curious writ of the *Bracton* treatise, which was designed for men who had been outlawed after taking flight, not for those held in prison like John. The fact that the case resurfaced nine years later may be attributed to the infrequency of royal judicial visitations, as opposed to any insubordination on the part of John or his twelve pledges. The delay in clearing John suggests that the initial homicide charge, though based on a mere *causa praesumptiva*, had to be resolved formally in court, the sheriff's earlier statement as to the happy fate of the homicide "victim" notwithstanding. A jury had to confirm that the Sara who appeared in court was the same Sara allegedly killed nine years earlier. This would seem to confirm the discussion in *Bracton* of the process for inlawing a person outlawed based on a presumptive cause, where procedural rules similarly required that the living homicide "victim" be produced in court before a pardon might follow.

The Close Rolls for the year 1247 also record an instance of a person believed to be dead reappearing. Namely, a brief entry recounts that Nicholas de Chisleden and Matilda his wife, detained in the king's prison at Salisbury, as well as Nicholas of Thorpe, held in the prison of Marlborough, had been accused of the death of Isaac son of Isaac the Jew (*Judei*), who was later found alive (*qui postea…vivus inventus fuit*).[87] Having been charged with homicide, the three were now given a writ for release to the bailiff to stand to right when the king should so order. It is not clear whether they would need to produce Isaac in court to attain closure. No further record of this case survives, so far as I am aware.

Another record illustrates how the mere accusation of felonious homicide, even in the absence of a body, could lead an innocent person to panic and flee to sanctuary if possible, just like in the *Bracton* writ. The patent rolls for 1251 include a royal letter granting a pardon to Robert son of Henry, along with permission for him to return from abroad "and dwell at peace within the realm". Robert had abjured England some time earlier, presumably having confessed to the homicide of Richard son of Robert Engaynne.[88] A jury, however, had since determined that Richard was actually "safe and sound," resulting in this grant of pardon. In this instance, the pardon extended only to "whatever pertained to the king", apparently leaving open the possibility of a private suit, although presumably Robert could avail himself of the written record to prove his innocence should anyone step forward with a fresh homicide accusation.

William Serle, like Robert son of Henry, similarly sought sanctuary and confessed despite his innocence. In a 1263 case arising at the Surrey Eyre, Serle, who had recently been acquitted of involvement in the homicide of Simon le Kapier, placed himself in the church of Chipstead and confessed to having killed his wife, Joan. During the abjuration process, William tried to leave the king's highway and was pursued and captured through the hue and cry. He was imprisoned pending trial at gaol delivery. Oddly enough, William's wife appeared at gaol delivery, and William was returned to gaol to await a pardon.[89] It is unclear why he made a false confession of homicide and began the abjuration process—perhaps he wished to leave the marriage, or perhaps after a domestic altercation he truly believed he had killed his wife—but in any event he was fortunate not to have met the fate of other abjurors who found themselves decapitated after veering off the king's highway.

An excerpt from the treatise *Fleta* (c. 1290) may shed some light on William's rationale for confessing to the homicide of his wife. *Fleta* makes the following observation about the strategies of some sanctuary seekers:

> There are, however, certain timid men (*meticulosi*) who seek the protection of the Church, although they have not committed a felony. In this event they will be well advised to acknowledge that they have slain someone whom they will be able to produce afterwards alive and well, so that they may be in a position to sue for the king's grace should they require it, and therefore diligent examination is necessary in abjurations and voluntary acknowledgements of felonies, lest they be actuated by fear or despair of life.[90]

The treatise *Britton* (c. 1290), written in law French rather than Latin, adds the following:

> We will and grant, that whenever anyone has abjured our realm through fear (*par poour*), and it can be afterwards proved that he was not guilty of the felony which he confessed, he may safely return, saving to everyone his suit; and in such cases the heirs of the fugitives shall not be disinherited, but their chattels shall notwithstanding be forfeited by reason of their flight.[91]

If we apply this treatise evidence to William's case, we might surmise that William sought sanctuary due to his fear of being implicated in another felony. However, rather than confessing involvement in that felony, William falsely confessed to having killed his own wife, knowing full well that he could later produce her in court once it was safe for him to return.[92] *Fleta* suggests that coroners should respond to this strategy by modifying their procedure, working to uncover the motivation behind a supposed felon's confession in the sanctuary context presumably to discourage this misuse of sanctuary and abjuration.

These passages from *Britton* and *Fleta* describe an alternative path for one accused falsely of felony: while the outlaw of the *Bracton* writ fled the vicinity entirely for fear of prosecution, the subjects of the *Britton* and *Fleta* passages fled instead to sanctuary, choosing to confess falsely to

felony, abjure the realm, and bide their time abroad until it was safe to return.[93] Safe haven in France was preferable to the risk of a felony conviction and hanging.

Dead Men Walking: Survivors of the Gallows

Sometimes, however, a felony conviction and hanging served as a prelude, not the final act. One writ which alludes to the rare circumstance of a dead man walking is the writ of pardon for a person who survived hanging. For example, the Luffield Register, a collection of writs likely datable to the early to mid 1260s, records a writ of pardon for cases in which a person judged to be hanged for receiving thieves, and indeed having actually been hanged, subsequently escaped alive (*viva evasit*), as reported to the court by "the testimony of trustworthy men" (*ex testimonio fidedignorum*).[94] In such instances, the king might pardon the condemned person "out of consideration of divine charity" (*divine caritatis*). Unlike other writs of pardon, which indicated that the pardoned person should nonetheless stand to right should anyone else wish to bring an accusation, this pardon was apparently intended to offer the final word, precluding further prosecution of the gallows survivor.

Evidence from the Close Rolls demonstrates that such pardons were indeed granted on rare occasion. For example, in 1234, the king pardoned Walter de Pyonne, who had been hanged at the gallows following a homicide conviction, but was discovered to be alive while being carried to his burial. The king interpreted Walter's survival as a manifestation of divine clemency and commanded the sheriff of Hereford to ensure that Walter not be molested by anyone within his bailiwick.[95] Walter might have experienced some awkward encounters in his neighborhood in the years to come, particularly when the living dead man crossed paths with the local jurors who had secured his conviction. In Walter's case, and others like it, his survival of the gallows ordeal seemed to offer persuasive proof of God's desire for a different outcome than that ordained at trial. In doing so, it cast doubt on the jury verdict that had sent him to the gallows. Doubts that plagued trial by ordeal

continued to haunt the age of jury trial, when people might credit divine intervention after a defendant survived the gallows ordeal seemingly miraculously.

An altogether different interpretation appears in a case arising a few decades later. The Close Rolls for 1261 record a gallows survival, and the interpretive lens applied to the rare event provides some insight into the contemporary idea that men should only hang for crimes that had been thoroughly proven. After the cord with which he had been hanged ruptured, William le Newman of Stiventon was returned to prison. A writ ordering his release relied not on the notion of God's clemency, but rather on the idea that William had not been properly proven guilty and attainted in the first place. The writ notes that William:

> …was not convicted of the robbery of the church of Stiventon for which he was charged nor indeed guilty [of this robbery], nor also was he convicted or guilty of breaking the prison of Basingstoke, of which he was accused by only one man and not otherwise proved or attainted, and thus no rational cause was proven for which he should have been adjudged to hang...[96]

William was freed on the condition that he secure pledges to ensure that he would stand to right before the royal justices at the next assize. The concerns raised about lack of proof appear to offer a post-hoc explanation for the aptly named Newman's survival of the ordeal of hanging. If he failed to succumb to death, then he must not have been proven guilty in the first place!

III. WRITS FOR LIFE'S RISKS

Land disputes did not raise the same life-and-death stakes as felony cases, at least not with the same immediacy, yet doubt about death occasionally factored into the disposition of such matters. For example, some writs hint at the possibility of judicial intervention in instances where a legal process depended upon a death that was not immediately ascertainable. A writ of mort

d'ancestor (Fr. "ancestor's death") initiated a possessory claim to land by means of which a plaintiff alleged that his or her ancestor had died seised in his or her demesne as of fee (a technical phrase indicating that the plaintiff's ancestor held the land heritably, such that it could pass to heirs), and that the plaintiff was the ancestor's heir. Dower was a widow's customary right to a portion, typically one-third, of her deceased husband's lands, which she could claim by means of a writ of dower. Possessory claims of dower and mort d'ancestor were predicated upon a death: of the husband, in the former instance, and the ancestor, in the latter. In some cases, particularly when relying upon a local jury, that underlying death might be difficult to confirm.

For example, the Luffield Register includes a writ for the situation in which "anyone, leaving an inheritance, sets forth on a pilgrimage to the land of Jerusalem or to Saint James or anywhere else to remote parts, and dies."[97] The appropriate writ, entitled "When an ancestor has set forth on pilgrimage," instructs the sheriff, upon receiving security from the claimant, to summon twelve "free and lawful men of the neighborhood" (*liberos et legales homines de visneto*) to state under oath whether the claimant's ancestor was in possession of a particular tract of land on the day he or she began the journey.[98] Second, the jury was to determine whether the claimant was indeed the deceased's next heir. Although the writ called for a view of the land in question,[99] and for the current tenant to be present at the recognition (when the abovementioned twelve men would state their findings under oath), it made no provision for routine inquiry into whether the ancestor had indeed died while on pilgrimage. The jury, in other words, was to deal with facts that were ascertainable locally, not with the question of whether or not a death had occurred abroad. The writ was grouped with a related writ for a case in which a person had assumed the religious habit (*Quando habitum religionis assumpsit*), essentially becoming dead to the world.[100]

A similar pairing of a writ of mort d'ancestor for a case of pilgrimage and another for a relation who had entered the religious life can be found in other registers.[101] In fact, the two writs

date back at least to the time of the *Glanvill* treatise (c. 1187-1189), itself contemporaneous with the writings of Peter the Chanter. *Glanvill* includes this very pairing of a pilgrimage and a religious life writ.[102] In theory, an inquiry as to whether a death had indeed occurred might be in order when a person brought a writ of mort d'ancestor generally speaking (i.e., not just in cases involving pilgrimage) or, for that matter, whenever a widow claimed her dower, but such writs similarly did not focus on ascertaining the truth as to the underlying death, which was presumed to have taken place unless the defendant raised the issue in responding to the plaintiff's claim or the assize jury independently raised doubts about the death.[103] Even the bail writ for a person claiming that they had been accused of homicide out of hate and spite (*odio et atia*) sought only to ascertain whether the accused was appealed from hate and spite or, in the alternative, because he or she was guilty of the crime.[104] While in theory one could imagine a person appealing another out of hate and spite when no homicide had occurred, the writ did not allude to this possibility or urge inquiry into whether a person had indeed been killed.

To return to dower and mort d'ancestor, we see that concern with proof of death was not unique to felony cases, but could also arise in civil litigation over possession of land. The absence of a landholder for a lengthy period of time raised complications for those who wished to ensure that the land remained under cultivation, that any services due were rendered, and that the land ultimately passed to the appropriate heirs (with a portion, where applicable, being reserved to the widow) rather than reverting to the lord's possession upon the landholder's death. In 1176, Henry II clarified the procedure of mort d'ancestor through the Assize of Northampton, directing that, "if the lord of the fee denies the heirs of the deceased the seisin of the same deceased which they claim, the Justices of the lord king are thereupon to cause recognition to be made by twelve lawful men of what seisin the deceased held on the day on which he was alive and dead; and as it was recognized, thus should restitution be made to his heirs."[105] The Assize of Northampton also touched upon

dower, providing that the wife of the deceased should have her dower and a portion of her husband's chattels as well.[106] While neither dower nor possessory actions were innovations of Henry II,[107] the Assizes of Clarendon and Northampton ensured access to royal writs, and thereby to the king's courts, for those aggrieved in such matters. Plea rolls of the turn of the twelfth to thirteenth centuries indicate that litigants made great use of the king's courts, and in some instances called into question the underlying death in an action for dower or plea of mort d'ancestor. Once the issue was raised, then the matter of whether a death had occurred became the focus of concern, raising troubling issues about how to prove a fact that was often difficult to ascertain.

Questioning the 'Mort d'Ancestor' Underlying Writs of Mort d'Ancestor

By far the most frequent cases in the plea rolls involving a mysterious death were the above-mentioned pleas of mort d'ancestor.[108] Some mort d'ancestor cases involved an ancestor's death abroad, typically while on pilgrimage.[109] The early introduction of specialized writs of mort d'ancestor to deal with the problem of death abroad demonstrates that such circumstances raised extraordinary concerns for which the standard mort d'ancestor writ would not suffice. Crusading and pilgrimage alike hindered the peaceful transfer of landed wealth between spouses and generations in instances when a landholder traveled abroad and failed to return. Moreover, some travelers, anxious about the long journey ahead, made testamentary gifts prior to their departure, gifts they might reconsider if they managed to make the journey home safely. The surviving records illustrate the possibility of plaintiffs relying on pleas of mort d'ancestor guilefully to gain possession of land to which they did not have a rightful claim, perhaps hoping that the murky details surrounding the ancestor's death would remain unknown and be assumed to favor the claimant, and of defendants claiming that the ancestor had not in fact died in an attempt to maintain their possession of the land.

In a 1200 case of mort d'ancestor recorded on the plea rolls, Ranulf Picot pursued a claim against the abbess of Chatteris for a hide of land in Madingley "as his right and inheritance" (*sicut jus suum et hereditatem*).[110] The abbess had previously availed herself of essoins, i.e., offering an excuse for failure to appear at court, and the land had eventually been taken into the king's hands, presumably due to a rejection of one of the essoins by the court.[111] Later, the abbess had tried to regain possession of the land by means of replevin, an action for recovering property.[112] In his 1200 mort d'ancestor case, Ranulf alleged that his father, Arnold, had been "seised of the land in his demesne as of fee and by right" (*fuit saisitus in dominico suo ut de feodo et jure*) in the time of king Henry the father (presumably a reference to Henry II, father of the present king, John) and that Arnold had taken profits to the value of five shillings or more.[113] The essence of Ranulf's claim was that his father Arnold had possessed a heritable estate before his death, and that this landed property should have passed to Ranulf as heir but was wrongly held instead by the abbess. Ranulf offered to prove his claim through a free man, apparently proposing battle. Simon de Foxton, representing the abbess in court, alleged that Arnold, Ranulf's father, was still alive (*ad huc vivit*). Ranulf, in turn, produced "sufficient witnesses" (*testes sufficientes*) who could attest to Arnold's death, namely Anketil son of Eustace, Simon de Cotes, and Otway de Pelham, who testified that they saw Arnold at Pelham both alive and dead (*vivum et mortuum*, a term of art to reference the day of a person's death). Simon demanded a view of the land, which was granted. The case was postponed to the next visit of the king's justices, with a view to take place in the interim.

It seems that the case eventually reached a jury, Ranulf's offer of battle notwithstanding. Namely, an assize jury was summoned to recognize whether Arnold, Ranulf's father, had been in possession of the land on the day on which he departed on pilgrimage to Jerusalem, where he died, and whether Ranulf was his nearest heir. Notably, Ranulf's claim had rested upon the standard mort d'ancestor writ, not the writ keyed to pilgrimage, and indeed Ranulf's witnesses testified to Arnold's

death in Pelham, a domestic space. In other words, Ranulf had never claimed that Arnold had gone on pilgrimage, much less died abroad. However, someone raised the issue of pilgrimage. Most likely the abbess, through her attorney, had introduced this new detail into the legal action. Charged with commenting on Arnold's seisin and Ranulf's status as heir, the assize jurors stated that Arnold was in possession of the land on the day of his departure for the Holy Land, and that Ranulf was indeed his nearest heir, but that they did not know whether Arnold had died abroad.[114] This jury testimony must have called into doubt the testimony of Ranulf's witnesses to Arnold's death in Pelham. In fact, it may even be that Arnold had gone on pilgrimage and, before doing so, had made a testamentary promise to the abbey.[115] If so, it would have behooved the abbess to raise the issue of the pilgrimage in her response to Ranulf's claim.

The parties appear to have reached a compromise, as suggested by an entry in the rolls in Easter term 1203, where it was recorded that a day had been given to Simon de Foxton, representing the abbess, and Ranulf Picot, to receive their chirograph (*ad recipiendum cirographum suum*) in fifteen days after the feast of St. Michael.[116] The record refers to a partition being made. The case remained unresolved in Michaelmas term of 1203.[117] A year later, in Michaelmas term 1204, Ranulf and the abbess' attorney were again given a day in the octave of St. Martin for resolving the issue of the chirograph, and the court enlisted the sheriff to arrange that Ranulf would have half of that hide and the capital messuage (i.e., dwelling house), as was contained in the note (*sicut continetur in nota*), presumably a reference to a written agreement between the parties.[118] Remarkably, this was not the end of the case, with an additional record on the rolls for Hilary term 1205.[119]

One last plea roll entry can be found during Trinity term 1205. Ranulf's frustration surfaces in the terse record, which records yet another postponement, with Ranulf asking that the sheriff might finally secure for him the half portion of land and the capital messuage as agreed, or that he might be given an exchange tenement (*escambium*), an equivalent substitute, instead.[120] Fortunately for

Ranulf, the abbess finally relented, as suggested by an entry on the feet of fines c. 1206.[121] The surviving records of Ranulf's mort d'ancestor claim demonstrate how frustratingly long a case might take before reaching a final resolution, if such a resolution ever occurred. To the extent that the death of Ranulf's father remained in doubt, procedural delay might have allowed new evidence to come to light. It might have also been a strategic maneuver by a powerful litigant to maintain the status quo for as long as possible, hoping to wear down her opponent. The fact that Ranulf had, according to the plea roll, produced "sufficient witnesses" to attest to his ancestor's death might make the outcome of the case surprising, but it may be that the abbess had been able to present witnesses of her own to contradict the testimony of Ranulf's witnesses. It is also possible that Arnold had both made a promise to the abbey before departing on pilgrimage *and* died in Pelham; following a safe return from the Holy Land, Arnold might have reneged on an earlier promise to bequeath land to the abbey and decided to try to keep the land in the family instead. In any event, despite questionable witness testimony and great delay, the litigation eventually ended in compromise between the parties, an altogether acceptable outcome in a case with an uncertain death at its center.

In a striking 1206 case of mort d'ancestor, we learn of a wrongful claim of death, not of the ancestor, but of the elder brother who held the right to bring a mort d'ancestor claim by reason of male primogeniture.[122] That elder brother, William the son of Richard, brought a claim of mort d'ancestor against the Prior of Merton, who was in possession of five acres in Upton claimed by William as his inheritance.[123] According to the plea roll, an assize jury was called upon to determine whether Richard, William's father, had been in possession of the land in question on the day he died. The prior appeared in court and stated that William's claim should fail because William had a younger brother who had previously brought an assize of mort d'ancestor against the prior to claim the same land. At that time, the objection had been raised that the younger brother had an older

brother, namely William, who would have priority in bringing a claim of mort d'ancestor.[124] The younger brother, in turn, had counterclaimed that his elder brother was dead, and he and his mother had produced suit (i.e., brought forward witnesses) stating that the brother had died. The case proceeded to resolution, although the younger brother—who may have been deceitful, or perhaps entirely mistaken about his brother's survival—did not gain possession of the land. Instead, the assize jury stated that Richard, the father, had not been in possession of the land on the day he died, thereby rendering irrelevant the question of which brother was entitled to bring the action of mort d'ancestor in the first place.

In the subsequent 1206 case, the elder brother petitioned the court, inquiring whether he was to be deprived of the assize of mort d'ancestor due to an earlier assize initiated by his younger brother and to the "proof" produced of his supposed death. A day was set for William to hear his judgment on the morrow of the feast of St. John. In the meanwhile, William's mother Eva tried in vain to bring a claim for her dower against the prior during Michaelmas term in 1206; the court determined that her dower petition should not receive a response while her elder son's mort d'ancestor claim was pending.[125]

William's case was still pending a year later in Michaelmas term 1207, when the prior's response shed further light on the features of the parcel of land (noting that it included five acres of land and a stream) and even more significantly on how the younger brother and mother had come to claim that William had died years earlier: namely, William had been *ultra mare*, beyond the sea.[126] In fact, the younger brother and mother might have legitimately believed William to be dead if years had transpired without word from him. The prior again noted that the younger brother's earlier claim of mort d'ancestor had failed. The court therefore decided that the case should not proceed, and that William would have to avail himself of a writ of right (*breve de recto*, which was designed to restore land to its rightful "owner," as opposed to merely restoring possession) if he still wished to

claim the lands from the prior. The final outcome, assuming William brought a writ of right, remains unclear, although the presence of three later roll entries referring to a William de Upton with land involving some kind of watercourse suggests that William might have finally succeeded in regaining his father's lands.[127] As in Ranulf Picot's case above, procedural delay allowed additional evidence to come to light regarding the earlier plea of mort d'ancestor, thereby reducing the likelihood of a wrongful outcome in a doubtful matter of inheritance.

Like William's travels *ultra mare*, pilgrimage abroad could give rise to inheritance claims by relatives back home. In a 1220 case of mort d'ancestor, for example, a man named Robert claimed that his uncle Jordan de la Tur had been in possession of eleven acres of meadow and certain rents (i.e., land that generated periodic revenues) in Enfield on the day he left on pilgrimage to Rome. The land was now in the hands of the earl of Essex, William de Mandeville, represented in court by his attorney.[128] The jurors, who were questioned by faith (*quesiti per fidem*),[129] revealed that Robert's claim of mort d'ancestor was a sham, insofar as the nephew had in fact taken possession of the land in question after the death of his uncle Jordan, but had been disseised or dispossessed, in turn, after failing to render the services (*pro defectu servicii*) that were due. Robert was therefore fined for a false claim (*pro falso clamore*), and it was resolved that he might only seek the land through a writ of right in light of the earl's success on the possessory matter of mort d'ancestor. In this case, the fact of the ancestor's death was not disputed in the court proceedings, which focused instead on the issue of whether the claimant, as rightful heir, had indeed not taken possession of the land after the death of his uncle. If the jury got it right, it seems that Robert had brought a fictitious claim, trying to capitalize a second time on his ancestor's death to reclaim land he had lost for default of services.

A second claim of mort d'ancestor, brought by the same Robert but in another county, sheds further light on the difficulties he faced in seeking possession of his uncle Jordan's patrimony, in this instance twelve acres of land with appurtenances in Peckham.[130] This parcel of land was in the

possession of one Reginald of Brentungeherst.[131] Upon questioning, the jurors expressed reluctance to speak definitively regarding facts they could not readily ascertain. The jurors stated that Jordan had been in possession of the land on the day of his departure, and that Robert was indeed Jordan's nearest heir, but added that "they do not know for certain whether Jordan is dead or not" (*nesciunt pro vero si Jordanus mortuus est nec ne*). It is unclear whether Reginald, the current possessor, raised doubts about the ancestor's death, or whether instead the jury raised this issue. The jury was more inclined to believe that Jordan was dead than alive (*set melius credunt quod mortuus sit quam vivus*), not exactly a vote of confidence regarding this basic fact underpinning Robert's mort d'ancestor claim. Upon further questioning, the jurors conceded that they also did not know whether Jordan had been in possession of the land in question on the day on which he allegedly died abroad. Ultimately, the controversy was resolved through a concord between the current tenant and the claimant nephew.[132] In the absence of clear proof, a compromise between the litigants might have offered the most expedient resolution.

In cases such as these, a possible wrinkle involved the ascertainability of the death of an ancestor, particularly if the alleged death had occurred abroad. Consider one last example: the 1218 mort d'ancestor suit of Simon Moisant, who claimed that his uncle had died abroad on pilgrimage to Jerusalem.[133] Simon offered to produce witnesses to his uncle's death and burial, while the current tenant, the prior of Ormesby, claimed that the uncle "is alive in the land of Jerusalem healthy and unharmed" (*est in vita in terra Jerusalimitana sanus et incolumis*). The parties allowed a jury to settle the matter, although the prior first withdrew his claim regarding the uncle still being alive abroad, a fact that admittedly might have been beyond the knowledge of local jurors. In any event, the jury issued a verdict in favor of the prior, stating that Simon's uncle had not actually been in possession of the land when he left on pilgrimage in the first place, which would have made his life or death abroad immaterial to the mort d'ancestor claim.

Through the testimony of a local jury as to the possession, or lack thereof, of the uncle before his departure to Jerusalem, the court avoided the thornier question of whether the uncle was still alive abroad. In mort d'ancestor cases like these, courts relied upon delay to allow new evidence to arise, compromise when the available evidence was inconclusive, and jury adjudication of easily ascertainable facts that might allow the court to avoid more challenging questions, such as whether an ancestor had indeed died abroad. As will be seen below, dower cases had the same potential to rise or fall based on questions raised about a death, in this instance the death of the claimant's husband.

Doubtful Dower Claims

Pleas of dower, a widow's right to a life estate in a third of her husband's lands,[134] demonstrate another routine category of writ dependent upon an underlying death—the husband's—for the claim's viability. According to *Bracton*, the present tenant of the disputed land—whether the husband's heir or another party—had several options in responding to the widow's claim. For example, the tenant could peremptorily argue that the woman ought not to have dower at all or could make the case for delaying the action of dower.[135] Of interest here is the fact that the tenant could alternatively claim that the woman's husband was still alive.[136] If the tenant succeeded in raising this objection, the woman's action would fail unless she could rebut the assertion that her husband was still alive insofar as "a constitution of dower and a gift *propter nuptias* [i.e. on account of marriage] is confirmed by the death of the husband."[137]

Just as writs of mort d'ancestor could allude either to bodily death or the "death" incurred by entry into a religious order, *Bracton* distinguished between natural and civil death in discussing dower. If a woman claimed that her husband was civilly dead due to his entry into a religious order, the tenant might object that the husband could in theory "return to the world, because he has only assumed the probationer's habit."[138] If, however, the woman responded that the husband "has taken

the habit of profession," entering irreversibly into a religious order, then a further inquiry would be necessary; the action of dower would be delayed "until the truth is established by the ordinary of the place, namely, the bishop, abbot, or another."[139] While questions about whether an assignment of dower had been announced at the church door, i.e., had been specifically designated at marriage, could rest on witnesses or a jury,[140] this issue of the husband's permanent assumption of the religious life was instead a matter for the local ordinary, who presumably would be better informed than local jurors about the nature of any vows taken.

Disputes regarding the husband's natural death could similarly require witness testimony. Such reliance on witnesses in dower cases, while not a new practice, gained increasing emphasis in *Bracton*'s time in order to secure information about endowments at the church door.[141] As a dower case proceeded, the burden of proof could fall on the reputed widow or on the tenant depending upon the circumstances. "It is clear," *Bracton* reports, "that sometimes [the burden of proof] will be on the woman who says he is dead, because one who asserts must prove, and sometimes on the tenant who excepts that he is alive, because by excepting he becomes the *actor*, so to speak, and ought to prove his exception as the woman her action."[142] *Bracton* provided references to actual cases in the plea rolls demonstrating that sometimes the woman was required to offer proof, and other times proof might be required both from the woman and from the tenant.[143] If the woman produced "sufficient suit" (*sectam sufficientem*) as to her husband's death, i.e., "those who were present where he died, at such a place, and was buried, at such a church," and if the witnesses agreed on the particulars on further examination, then the tenant had to provide the woman her dower unless he or she could produce "a weightier suit" (*sectam…validiorem*) demonstrating that the husband was in fact alive.[144]

Suit in this context refers to witnesses ready to verify the litigant's claim, sometimes confirming the honesty of the claim and sometimes providing evidence.[145] *Bracton* specifies that, in

the case of dueling witnesses, "the more valid proof" (*probatio…magis valida*) would be preferred.[146] It is not clear what would make one suit weightier or more valid than another, whether simply the number of witnesses or perhaps the nature of the individuals called to witness. Romano-canonical procedure, for example, had clear rules for weighing witness testimony, focusing on the agreement of witness statements and the trustworthiness of individual witnesses (e.g., favoring a freeborn man over a freedman, older over younger, noble over ignoble, men over women, an honest person over a liar, rich over poor).[147] According to *Bracton*, the easy case in the common-law context was one in which one party had sufficient proof and the other party had no proof, with judgment favoring the former. If neither side had proof, but "only a presumption by virtue of half proof," then the woman would recover the dower unless some other objection could be raised.[148] The *Bracton* authors recognized that in cases with only half proof, it was possible to find out later that the husband was actually alive. Therefore, the treatise specified that "if her husband reappears," the woman would be obliged to restore the dower lands to the tenant "without plea" (*sine placito*), along with the fruits she had taken in the interim.[149] The law's favoring of the purported widow in doubtful cases was therefore counterbalanced by summary procedure—the immediate return of the land—if the husband later turned up alive. There does not seem to have been any further formality comparable to the requirement in criminal cases that a person accused of homicide bring the living "victim" into court to secure an outlawry pardon. The tenant, at least in theory, was to take possession of the land without first producing the living husband in court.

Some evidence from the plea rolls suggests that widows whose husbands died abroad took steps to ensure that they could produce witnesses to attest to the death should the current possessor of the disputed lands claim that the widow had not, in fact, been widowed. In 1200, for example, Matilda, the widow of William de Winsley, brought a claim against Ralph de Hintes for a third part of Winsley as her dower, which had been granted to her as a gift by her husband.[150] Ralph appeared

in court to defend his possession of the land, stating that William, Matilda's husband, was in fact alive. In response, Matilda asserted that William died while on pilgrimage to Santiago de Compostela. The court gave Matilda three weeks to produce "sufficient suit" (*sectam sufficientem*), namely, witnesses who could attest to her husband's death abroad. After the feast of Saint Hillary, Matilda successfully produced witnesses: Reginald de Morton and Ulrich de Scropton testified that they were present when William died and had even witnessed his burial (*testes fuerunt sepulture ejus*).[151] Persuaded by Matilda's witnesses, the court awarded her the dower lands and fined Ralph for lying (*pro mendatio*).

In a 1219 case of uncertain outcome, a widow, Muriel, claiming that her husband, Adam of Croxby, had sold land against her wishes during their marriage (a *cui in vita* claim alleging that, while her husband was alive, she could not contradict him), faced off against a tenant who insisted that the husband was actually "healthy and unharmed" (*sanus et incolumis*) in Jerusalem.[152] In response, Muriel claimed to have two witnesses able to testify to Adam's death and burial abroad. However, she lamented that the two men had withdrawn themselves from the court "on account of her poverty" (*pro paupertate ipsius Muriellis*), as she had not been able to sustain them. A day was set for the parties to produce their suit, and it is unclear whether Muriel eventually managed to convince the two witnesses to return to court on her behalf. Her case nonetheless illuminates the disadvantage faced by impoverished claimants who could not afford to pay for the sustenance of individuals asked to stand as witnesses.

Poverty may also help explain why Emma, purported widow of Thomas de Wappenbury, failed to produce witnesses to back up her claim that her husband was dead after the current tenants alleged that he was alive, *in plena vita*, in France. Emma put her case to the country, and the jury which convened sometime later noted that Thomas was indeed alive, residing near Paris.[153] Emma's poverty is confirmed by the pardon of her fine for a false claim due to her status as a pauper.

Perhaps having been abandoned by her husband, Emma had thought to capitalize upon Thomas' absence to claim that he had died and that she was due her dower. Her claim having been found false, she at least escaped the indignity and burden of paying a fine to the court for her unsuccessful dower suit.

Similarly relying on witnesses, Mabel, the widow of Gilbert son of Gelin, brought an action in 1206 against Stephen de Oxshott regarding the third part of a hide of land in Wanborough, claiming the land as her dower, which she had received as a gift from Gilbert. Stephen, the current possessor, objected, stating to the court that Mabel's husband was still living. Mabel, in turn, denied this, and produced "sufficient witnesses" (*testes sufficientes*), who testified that Gilbert had in fact died at sea off the coast of Ireland on account of a storm (*per quondam tempestatem*), during which tempest they had themselves been present.[154] Although the plea roll enumerates the claims and counter-claims without a break, it appears that Mabel might have introduced her witnesses at a later session of the court, much like Matilda in the case above. This delay is suggested by the fact that the plea roll next records that the defendant's son, Oliver, essoined his father, Stephen, presumably offering some excuse to the court for his father's failure to appear at a subsequent court session. Mabel, perhaps viewing this as an unfair delaying tactic, in turn objected that Oliver could not essoin his father, who had put the son in his place (*posuerat loco suo*), essentially giving him power of attorney to represent him in the proceedings. Oliver pleaded ignorance, saying he did not know whether or not he had been put in his father's place. When the court ordered him to respond as an attorney, Oliver said that Gilbert was still alive and had been seen within the past fifteen days at Cricklade. In doing so, Oliver made himself the *actor*, to borrow *Bracton*'s terminology, obliging him to produce witnesses to back up his statement. However, Oliver produced no suit (*nullam sectam produxit*), lacking witnesses to testify to Gilbert's appearance two counties over from Surrey. In the end, the court decided that Mabel should be granted her dower.

In both Mabel's case and that of Matilda above, a defendant unsuccessfully tried to assert that a widow claiming dower was not actually a widow, and the court permitted the production of witness testimony regarding the underlying death, or lack thereof. In both cases, the widows' claims won the day at least in part due to the production of witnesses who could attest to the husband's death and who were never contradicted by witnesses produced by the tenant-defendant. Where delay might be acceptable in some possessory suits, speedy settlements, within forty days according to Magna Carta, were the preference in dower cases.[155] Presumptions in dower cases also tended to favor the widow due to a combination of solicitude toward widows and confidence that possession could later be corrected if in fact the dower had been wrongly assigned.

IV. LAWYERS' LITERARY LICENSE

During this period in England, foreign travel—whether for crusading, pilgrimage, or study abroad, particularly by aspiring clerics—gave rise to complications when legal cases were predicated on the fact of a dead body. This problem was faced head on by canon lawyers, who developed standards of proof for cases in which a death could only be presumed. Focused on the predicament of the crusader's wife, namely, the woman who wished to remarry when her husband failed to return from abroad, various popes and canon lawyers introduced rules ranging from the exceedingly inflexible to the more permissive.[156] Pope Clement III (1187–91) had issued a decretal indicating that women's petitions to remarry should be denied no matter how long their husbands remained missing unless proof could be provided regarding the husband's death.[157] Laurentius Hispanus (d. 1248), on the other hand, took the more lenient view that a woman who was uncertain of her husband's death might remarry after five years, although she was also to seek confirmation of the death from her husband's commander or, if necessary, make inquiry in the locale where the husband had gone missing.[158] The *Glossa Ordinaria* adopted this more lenient approach, permitting the woman to remarry when the husband's death might reasonably be presumed, thereby requiring something

less than full proof.[159] This facilitated the remarriage of women who might otherwise have experienced financial difficulties, all the more so when they had dependent children to support.

A concrete example can be found in a draft decretal from Pope Innocent III (r. 1198-1216) in a case brought by one Palmerius, who went missing after leaving Perugia for Tuscany with a group of knights on a military expedition.[160] Although Palmerius was said to have been killed on the return journey, the plaintiff "Palmerius" claimed he had merely been wounded, then sold to pirates, then captured by others, and that he had eventually landed in Sicily.[161] Following a pilgrimage to Santiago and a trip to Rome, the purported Palmerius returned to Perugia and was now petitioning the pope to dissolve his wife's remarriage and gain his inheritance. After weighing the evidence and considering the various presumptions, the pope ruled in favor of the defendants, allowing the remarriage to stand.[162]

During the crusading age, canon lawyers worked out a sophisticated set of presumptions and precise rules for such cases of doubt and further refined these rules over time with a tendency toward greater lenience in allowing remarriage. Similarly, Romano-canonical procedure developed clear rules for the examination of witnesses before 1215.[163] During the same period, the English common law took a comparably simplistic approach to the problem of proof of death.[164] Nevertheless, the common law also relied on presumptions, compromise, and the production of witness testimony in disposing of cases of mort d'ancestor and dower, possibly indicative of cross-fertilization between the two legal systems or, alternatively, demonstrating that the exigencies of overseas travel forced innovation in both the common law and the canon law contemporaneously yet separately. Both canon and common lawyers, dealing with remarriage and dower, respectively, settled upon presumptions favoring the widow when doubt remained regarding the husband's death.

With regard to homicide, the plea roll evidence suggests that royal courts largely avoided the Senecan problem of the person falsely accused, convicted, and executed for the homicide of a yet-

living person. Procedural safeguards, such as the requirement that private appeals speak of the claimant's witnessing of the homicide with his or her own eyes and ears, the use of pledges to allow for pre-trial release when there was doubt that a crime had been committed, as well as the natural delays built into the system of felony prosecution, helped to avert the possibility of wrongfully executing a person innocent of homicide. The use of juries in felony cases mitigated the possibility of the other Senecan problem, i.e., a judge handing down a rash judgment and refusing to reconsider it later after new evidence came to light. In felony cases, justices typically issued judgments that accorded with a jury's assessment, informed by local knowledge, of the defendant's guilt or innocence.[165] In general, medieval England relied on a combination of procedural formalism and equitable flexibility in dealing with doubtful felony cases.[166]

To return to some of the cases discussed in Part II, John de Culum, though actually charged with homicide in 1229, was able to walk free on bail once doubt was raised about whether there truly had been a homicide, demonstrating the flexibility of felony procedure in allowing pre-trial release. Of course, one wonders whether John would have secured his freedom had the sheriff not caught sight of the alleged homicide victim. It is noteworthy, too, that John had to go through the formalities of bringing the living homicide "victim" into court in order to close the case against him. In fact, this lends some credence to the Bractonian writ which, although clearly intended for a different sort of case in which the accused had fled, mentioned the idea that the living "victim" had to be produced in court so that all present might witness that he or she was indeed alive.

The ambiguities of the surviving evidence of the handful of "living dead" cases discussed above leave open alternative interpretations of *Bracton*'s curious writ for inlawing a person outlawed for fleeing. The writ might have been a simple lawyerly exercise in playing with remote possibilities, or it might have had a life of its own in the world of legal pleading, serving a felt need, albeit an infrequent one. Surprisingly, while the initial accusation and even charge of homicide might be based

on a mere *causa praesumptiva*, undoing that accusation and securing a pardon required full proof of the reportedly dead person's survival, namely their production in court. It is difficult to explain such formalism, but it may be that a strict rule (i.e., one must bring the living person into court) might be preferred over comparably fallible witness testimony regarding the person's well-being, just as Romano-canonical procedure produced strict rules of law to reassure people that decisions were rule-based rather than resting too heavily upon human discretion.[167]

The case of Christina of South Luffenham similarly demonstrates some of the mechanisms for slowing down or halting process where proof was lacking. When Christina's mother-in-law Gunhilde accused Christina of homicide in 1210, it was the lack of information about the purported homicide victim's whereabouts and survival that led to Christina's release from custody. Yet according to *Bracton*, Christina might alternatively have availed herself of a technical defense to her mother-in-law's accusation: if Gunhilde failed to speak of her own sight and hearing, Christina could have asked for the appeal to be quashed on that ground. *Bracton* enumerates the elements of a formally correct felony appeal: "mention must be made in the appeal of the year, the place, the day and the hour. He must also speak of his own sight and hearing, and must be consistent in what he says and in all circumstantial details" (*in omnibus circumstantiis*).[168] Of course, the record as it comes down to us does not provide the precise wording of Gunhilde's appeal, which might very well have included a claim to having witnessed an actual homicide with her own eyes, although this seems doubtful in light of the absence of a corpse. Nevertheless, the case failed due to the uncertainty involved, and in general the system of private appeals for felonious homicide was presumed to operate on the basis of eyewitness accusations, thereby reducing the likelihood of having to rely on a mere *causa praesumptiva* in adjudicating felony cases.[169] One can indeed find in the plea rolls evidence that the failure to specify that one witnessed the homicide first-hand could be fatal to a private

appeal, although the court might nonetheless proceed with a jury trial in some instances, transforming what had been a private charge into a public accusation.[170]

Procedural formalism and equitable flexibility similarly worked in tandem in areas of land law plagued by doubt. Pleas of mort d'ancestor based on a death abroad while on pilgrimage tended to focus on the knowable facts, such as whether the ancestor had been in possession of the land on the day he departed for the holy land, as opposed to the comparably difficult-to-ascertain fact of whether the ancestor had indeed died abroad. Of course, the stakes in mort d'ancestor were not the stakes of a felony prosecution: should a claimant succeed in a mort d'ancestor plea, only to have the ancestor return mysteriously from Jerusalem, the issue could be resolved through a possessory action or the writ of right, with no harm to anyone's bodily integrity. This was also true in cases of dower, where doubtful claims tended to be resolved in favor of the widow, with the understanding that the issue of possession could be revisited should further evidence come to light in the future. Where avoiding adjudication in a doubtful felony case might be the preferred route, resolution was more typical in doubtful disputes over land in order to allow the transfer of land—and livelihood—to widow or heir.

In some instances, a plea of mort d'ancestor involved more serious inquiry into the death underlying the possessory claim, allowing us to see the strategies employed by litigants. In a Year Book case recorded in the 1270s, the tenants at risk of losing possession called into doubt the fact of the ancestor's death, or rather the conditions surrounding that death. The claimant, daughter of the supposedly deceased landholder, argued that her father had died during a pilgrimage to Santiago de Compostela.[171] The current tenants, however, contradicted her, contending, "we tell you that he set out on no pilgrimage but that he killed his mother and, fleeing the king's peace for this felony, died in Flanders and not making his way towards Santiago, as we are ready to prove."[172] The daughter, Alice, was fined for a false claim.

The Year Book report thus suggests that the court might inquire into the fact of death to defeat a claim of mort d'ancestor and deny the purported heir her inheritance. However, this dispute appears in a law report, not an actual trial record. In fact, thanks to the sleuthing of Paul Brand, who has convincingly traced this case to the 1272 Lincolnshire Eyre, we can compare the law report with its corresponding trial record. Two records survive, and they note that Alice, daughter of Reginald of Bennington, brought her mort d'ancestor claim against one John de Budham.[173] John, in turn, counterclaimed that Alice's father had not actually been in possession of the land when he departed for Santiago de Compostela; he did not allege that Alice's father had committed felony of any kind. The assize jury found in favor of Alice, as Reginald's heir, while John was fined. In other words, the fanciful claim that Alice's late father had been a felonious matricide was an imaginative invention by the author of the law report, while the actual facts underlying the case were comparatively devoid of any hint of scandal. The devout deceased father, departing for pilgrimage, was transformed into a murderous villain for the edification and, no doubt, entertainment of students training in the law.[174] While Seneca does not provide the inspiration here, a similar embellishment of the facts, a lawyer's fancy, is at work, just as I argue it may have been at work in Peter the Chanter's railing against trial by ordeal a century earlier. By extension, it could be that the Bractonian writ for the timid outlaw might similarly represent an example of imaginative play in the drafting of writs in a treatise geared toward the education of men preparing to practice in the king's courts.

But did the Bractonian writ, and perhaps also creative law reports, in turn provide fodder for actual pleading? A case arising at the 1285 Northamptonshire Eyre, recorded both in law reports and in plea roll form, provides some evidence, albeit perhaps more in the way of a *causa praesumptiva* than anything close to full proof, in response to this question. According to the trial record, the claimant, Robert, brought a writ of mort d'ancestor asserting that his father, Richard of Thrupp, had been "seised in his demesne as of fee" of certain rents, which Simon son of Ralph of Thrupp was

allegedly withholding.[175] Simon, apparently well advised as to the various legal strategies for defeating Robert's claim, argued in the alternative that the tenements in question were in two villages, while the writ mentioned only one; that the current tenant, Phillip Champion, was not named in the writ; and, most intriguingly, that Richard, the ancestor, had not died in possession of the land because Richard "committed homicide and… motivated by fear, crossed the seas and lived overseas". Robert denied that his father had ever committed a felony, and the issue was put to a jury. The jurors, in turn, stated upon oath that Richard had never committed homicide or any other felony, but rather "was of good reputation and well behaved and in the king's allegiance" and had died overseas while on pilgrimage, thereby dying seised of the said lands. The jurors also testified that Robert was Richard's heir and, upon further inquiry, acknowledged that twenty-eight years had elapsed since Richard's death, making it all the more surprising that the jurors would have known about his prior good behavior and fate while traveling abroad. The latter issue in particular would not appear to be well suited to local knowledge, particularly after decades had passed. It could be that the decision had been made that, all else equal, Robert's claim was superior to Simon's, and that the juror testimony as to the facts in dispute was tailored accordingly to reach the desired outcome. In another example of the formalism of the common law, because Robert had not used the writ of mort d'ancestor keyed to the issue of pilgrimage, judgment was postponed, but he was eventually given his inheritance.

Had Simon, slandering Robert's ancestor with an accusation of homicide, borrowed his strategy from a law report like that detailing the case of Alice of Bennington?[176] Or was Simon truthful in suggesting that Richard, the ancestor, had once been accused of homicide? If he had not been convicted in his lifetime, this could explain how his wife had continued to receive income from the land, as is mentioned elsewhere in the record.[177] Or, alternatively, had the author of the law report regarding Alice's case, alleging that her father had fled after committing homicide (an

allegation that did not appear in Alice's actual case) borrowed from a case similar to that of Robert of Thrupp?[178] To what extent do law reports and treatises, upon which historians rely for evidence of actual common law precedent and procedure, employ the same literary strategies of authors like Seneca and Chaucer, and theological polemicists like Peter the Chanter, weaving together fact and fiction, truth and fantasy? While the danger of relying on documentary evidence as the source of hard facts confronts all historians, it is particularly problematic in the realm of legal history, where we tend to separate documentary evidence into distinct categories depending upon whether it is perceived to be strictly legal, and therefore factually based, or not. Bearing this in mind, do medieval legal historians need an evidentiary doctrine of the *corpus delicti* variety for determining when we have a sufficient body of evidence to draw conclusions about the actual state of medieval English law?

CONCLUSION

While medieval England did not have a clear *corpus delicti* doctrine in cases of homicide, several aspects of the law offered some protection to defendants who might otherwise face the gallows on a false accusation: the requirement that private appellants speak of having seen and heard the homicide; the natural delays built into the system of traveling royal justice, which gave time for new evidence to come to light; the role of the sheriff in investigating reports of the appearance of one believed dead; and the witness of the community, who might speak out to counter a malicious false allegation or to express doubt over the whereabouts and well-being of a reported homicide victim. The community, after all, had to make peace with any verdict issued by the court.[179] Procedural mechanisms, the use of witness testimony, and presumptions also worked together in doubtful land cases to bring litigation to a satisfactory resolution.

Amidst the uncertainties of medieval English life, it is not surprising that doubt surrounded deaths that occurred abroad. A person who was absent might simply be detained longer than expected; alternatively, they might be dead and buried in a foreign land. Litigants took advantage of

these uncertainties, falsely confessing to felonious homicide, challenging claims of mort d'ancestor and dower, and even trying to fill "vacant" benefices by claiming falsely that the previous holder had died.[180] While such claims of death, sometimes brought innocently, sometimes deviously, could in theory result in miscarriages of justice, common-law procedure helped to mitigate the problem of doubt, either perfecting proof or putting an end to a specious plea. In land cases, the tendency was toward reaching concord in doubtful cases and favoring the widow where possible. In felony cases, delay was often enough to set matters aright before a case even reached a jury. Having long since made the transition from ordeal to trial by jury, England continued to be faced by the difficulties of proof addressed by Peter the Chanter in the twelfth century. Rather than building a law of evidence from the ground up, the common law buried its answer to these concerns in what Henry Maine would later call the interstices of procedure, thereby indirectly alleviating some of the difficulties of processing doubtful cases.

EPILOGUE

A CAUTION AGAINST TELEOLOGY

It is beyond all hope, against all chance,
That he who left you ten long years ago
Should still be living…
— Alfred Tennyson, *Enoch Arden*[181]

Writing in the late seventeenth century, Mathew Hale urged acquittal over punishment and mercy over justice in cases where key facts remained in doubt: "It is always better to err in acquitting than in punishing, on the side of mercy, rather than the side of justice."[182] His own judicial tenure, however, was punctuated by a famous witchcraft trial at the Bury St Edmunds assizes in 1662. The trial, over which Hale presided, ended with the conviction and execution of two elderly women for witchcraft.[183] Notwithstanding his inspiring maxim about doubt and mercy, a maxim he introduced

in a discussion of the evidentiary difficulties of prosecuting cases of witchcraft and rape,[184] Hale erred in this instance on the side of conviction. As a person in attendance described the outcome, "the Judge and all the Court were fully satisfied with the Verdict, and thereupon gave Judgment against the Witches that they should be Hanged."[185]

Shortly before the Bury St Edmunds witchcraft trial, a scandal shook the town of Chipping Camden in Gloucestershire, an incident that would come to be known colloquially as "The Campden Wonder."[186] A seventy-year-old man, William Harrison, disappeared in August 1660 under suspicious circumstances, and his blood-stained possessions were recovered, but not a corpse. After a lengthy investigation and interrogation of those who had last seen William alive, three members of one family met their end on the gallows at Broadway Tower for the man's death, with the one woman involved, Joan Perry, accused of witchcraft in addition to murder. A crime broadside later recorded the event in ballad form:

> It was supposed the Gentleman was dead,
> And by these wretches robd and Murthered,
> Therefore they were all three condem'd to death,
> And eke on Broadway-hill they lost their breath.[187]

Two years after William's disappearance, he reappeared in Chipping Camden as mysteriously as he had first departed, telling a remarkable tale of abduction, sale into slavery in Turkey (echoing the travails of Palmerius above), and an eventual return home by way of Lisbon. As the same broadsheet ballad relayed:

> And thus this Gentleman his freedom bought,
> And by a Turky Ship from thence was brought,
> To Portugal, and now both safe and sound,
> He is at length arrived on English Ground.

Let not this seem incredible to any,

Because it is an end affirmed by many,

This is no feigned story, though tis new,

But as tis very strange tis very true.[188]

The ballad author did not proceed to exonerate the three who hanged for William's death, or to condemn, as did Seneca and Peter the Chanter, the judicial personalities or procedural forces that had brought about a wrongful conviction and execution. Rather, the ballad author doubled down on the accusation of witchcraft against Joan Perry:

You see how far a Witches power extends,

When as to wickedness her mind she bends,

Great is her Malice, yet can God restrain her,

And at his pleasure let her loose or chain her.

If God had let her work her utmost spight,

No doubt she would have kild the man outright,

But he is saved and she for all her malice,

Was very justly hang'd upon the Gallows.[189]

There is a bit of Gnaeus Piso-like logic in the balladeer's unwillingness to pardon, albeit posthumously, the woman falsely accused of homicide. In this instance, the living dead man confirmed—through his tale of deprivation, slavery, woe, and redemption—that someone was guilty of having inflicted great suffering upon him through his abduction from Chipping Camden. The reality of William's survival was so fantastic that, to the ballad author, it could not have anything but a fantastic explanation, in this instance the working of witchcraft. This case is sometimes cited as the

source of the modern doctrine of *corpus delicti*, and the even more strict idea of 'no body—no murder,'[190] although clearly a *causa praesumptiva* was enough to convince the balladeer of the female defendant's incontrovertible guilt in the affair.

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[2] Alfred Tennyson, *Enoch Arden &c.* (Boston, 1865), 28. My thanks to Charles Donahue for the reference.

[3] Seneca, "De ira," in *Moral Essays*, trans. John William Basore, 3 vols. (Cambridge, MA, 1928–1935), 1:154-57. This tale is discussed in Elizabeth Papp Kamali, *Felony and the Guilty Mind in Medieval England* (Cambridge, UK, 2019), 289.

[4] Although the story appears to be a fictional trial account, Gnaeus Piso was a historical figure who lived c.44 BC–20 AD and spent time as governor in Syria. No stranger to intemperate authority figures, Seneca served as an advisor to Nero.

[5] Seneca, "De ira," 154-55.

[6] *Ibid.*

[7] *Ibid.*, 154-57.

[8] *Ibid.*, 154-55.

[9] On the reception of Seneca in medieval England, see Beryl Smalley, *English Friars and Antiquity in the Early Fourteenth Century* (Oxford, 1960), 45-65; Grace G. Wilson, "'Amonges Othere Wordes Wyse': The Medieval Seneca and the *Canterbury Tales*," *The Chaucer Review* 28/2 (1993): 135-45; Rita Copeland, ed., *The Oxford History of Classical Reception in English Literature: Volume I: 800-1558* (Oxford, 2016), esp. chs. 2, 6, 15. John Gower cites Seneca by name nearly thirty times in his *Mirour de l'Omme*. See G. C. Macauley, ed., *The Complete Works of John Gower*, 4 vols. (Oxford, 1899–1902), 1:lvii.

[10] On the perils of judging, see generally James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven, 2008). On the meaning of "proof" in this medieval context, see *The Statesman's Book of John of Salisbury: Being the Fourth, Fifth, and Sixth Books, and Selections from the Seventh and Eighth Books, of the Policraticus* (hereafter cited as John of Salisbury, *Policraticus*) 5.14, trans. John Dickinson (New York, 1927), 140: "The term 'proof' is applied to all the means by which a case can be established…"

[11] Geoffrey Chaucer, "Summoner's Tale," in *Riverside Chaucer*, ed. Larry D. Benson (New York, 1989), 133, lines 2017-42. On John of Wales as Chaucer's source, see the entirely persuasive arguments of Robert A. Pratt, "Chaucer and the Hand that Fed Him," *Speculum* 41/4 (1966): 619-42, esp. 627-29. See also Tim Rayborn, *Against the Friars: Antifraternalism in Medieval France and England* (Jefferson, NC, 2014), 207 n. 49.

[12] Chaucer, "Summoner's Tale," 133, lines 2020-24 (my modernization). The tale appears in the context of a friar offering advice to his friend Thomas who harbored anger toward his wife.

[13] Indeed, it is a problem still faced today, inspiring legislative solutions like the Presumption of Death Act, enacted in the UK in 2013. My thanks to Nicholas Le Poidevin.

[14] A putative widow might also seek to remarry, but disputes over such remarriages were handled by ecclesiastical rather than common-law courts.

[15] The crusading age began in 1095, when Pope Urban II issued a call to arms at the Council of Clermont, thereby initiating the First Crusade. It continued through the twelfth and thirteenth centuries, capped by what is referred to as the Ninth Crusade, the failed attempt of the future Edward I of England and others to retake Jerusalem and other parts of the Holy Land. During this period, English pilgrims traveled to local shrines but often set out as well for distant destinations, including Santiago de Compostela, Rome, and the Holy Land. Other military campaigns abroad, including that resulting in King John's loss of Normandy in 1204, similarly gave rise to life-and-death questions.

[16] On innovations in the law of proof in thirteenth-century continental procedural treatises, see generally Richard M. Fraher, "Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," *Law and History Review* 7/1 (1989): 23-88. See also Charles Donahue Jr., "Procedure in the Courts of the Ius commune," in *The History of Courts and Procedure in Medieval Canon Law*, eds. Wilfried Hartmann and Kenneth Pennington (Washington, DC,

2016), 74-124. On developments in the English law of evidence, including oral and written proof, from the eleventh century forward, see generally F. Joüon des Longrais, "La Preuve en Angleterre depuis 1066," *Recueils de la Société Jean Bodin* 17 (Brussels, 1965), 193-274. And on the specific transition away from ordeals, see Whitman, *Origins of Reasonable Doubt*, 51-90.

[17] See, e.g., Fraher, "Conviction According to Conscience," 24 (quoting Albertus Gandinus). On parallel developments of the concept of doubt in Islamic law, see generally Intisar Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge, UK, 2015); "Reasonable Doubt in Islamic Law," *Yale Journal of International Law* 40 (2015): 42-94. And on the similar requirement of a confession or two witnesses in early Islamic criminal cases, see Rabb, *Doubt in Islamic Law*, 121, 124, 180.

[18] For reliance in Islamic law on a different method of proof in doubtful cases (namely, a fifty-oath procedure in homicide cases with a dearth of evidence), see Rabb, *Doubt in Islamic Law*, 124 n. 71.

[19] On acquittal and conviction rates in medieval English felony cases, including a decline in conviction rates by the late fourteenth century, see J. G. Bellamy, *The Criminal Trial in Later Medieval England: Felony Before the Courts from Edward I to the Sixteenth Century* (Toronto, 1998), 93-95. On the later development of clear rules of evidence in the common law, see generally Barbara J. Shapiro, *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley, 1991). And on a similar avoidance of capital punishment in cases of doubt in Islamic law, see Rabb, *Doubt in Islamic Law*, 114-23.

[20] A problem articulated by early modern historians, who relied on legal concepts to theorize their treatment of historical fact. See generally Barbara J. Shapiro, *A Culture of Fact: England, 1550-1720* (Ithaca, 2000), 34-62.

[21] The KB 25 series is available for the turn of the twelfth to thirteenth century in published, untranslated form in the series entitled *Curia Regis Rolls*. I rely most heavily on volumes 1 through 6 of this series (covering the years 1196-1212). These have been identified as the "*curia regis* rolls" or "*rotuli curiae regis*" due to the happenstance of late nineteenth-century archival classification. On the creation of the class of *curia regis* rolls and its transfer, in 1988, into the more accurately titled class of "Court of Common Pleas and King's Bench and Justices Itinerant: Early Plea and Essoin Rolls," see C. A. F. Meekings and David Crook, *King's Bench and Common Bench in the Reign of Henry III*, Selden Society Supplementary Series 17 (London, 2010), 1-4. To bring the analysis further into the thirteenth century, I supplemented these early cases with later examples from volumes 2 and 3 of *Bracton's Note Book* and various eyre records and law reports. While many examples of cases of mort d'ancestor and dower with a disputed death at the center may readily be found in the *curia regis* rolls, locating felony cases in which a homicide was called into doubt is much closer to a needle-in-a-haystack type of search. I rely upon felony cases I discovered while researching thirteenth- and fourteenth-century eyre and gaol delivery rolls for my recent book, *Felony and the Guilty Mind*, as well as examples generously shared with me by fellow medieval historians.

[22] See generally Sara M. Butler, *Forensic Medicine and Death Investigation in Medieval England* (New York, 2015); R. F. Hunnisett, *The Medieval Coroner* (Cambridge, UK, 1962). For death certification in continental Europe, with a focus on France and northern Italy, see Joseph Shatzmiller, "The Jurisprudence of the Dead Body: Medical Practition at the Service of Civic and Legal Authorities," *Micrologus* 7 (1999): 223-30.

[23] J. M. Kaye, ed. and trans., *Placita Corone*, Selden Society Supplementary Series 4 (London, 1966), 1.

[24] This would continue to be true into the early modern period. See K.J. Kesselring, *Making Murder Public: Homicide in Early Modern England, 1480-1680* (Oxford, 2019), 37 (observing that

individuals who suspected an unlawful killing could try to obtain an indictment from a grand jury in cases lacking a corpse).

[25] By late in the reign of Henry III (r. 1216–72), greater record-keeping was becoming the norm with regard to the deaths of major landholders. For tenants holding directly from the king or from any mesne lord who was a ward of the crown, a writ of *diem clausit extremum* enabled the sheriffs and escheators or other officers to take the lands and chattels of a deceased person into the king's hands to facilitate the initiation of wardship or the payment of an entry fine by the heir. If there were no heir, the lands would escheat to the king. See Charles Roberts, ed., *Excerpta e rotulis finium in Turri londinensi asservatis, Henrico Tertio rege, A.D. 1216–1272*, 2 vols. (London, 1835–36), 1:vi-vii, ix. Roberts notes that this form of writ "must be received with some caution as *proof* of the tenant's death, if unsupported by any other evidence; because similar orders were occasionally made for seizing the lands of persons who were not dead, but who, for rebellion or some other offence, had abjured the realm, or had sentence of banishment issued against them." *Ibid.*, vii (emphasis in original). See also Helena M. Chew, "The Office of Escheator in the City of London during the Middle Ages," *The English Historical Review* 58/231 (1943): 319-30. Like death, birth was not routinely recorded, although witnesses could be called to testify in proof of age proceedings and would often rely on memories of events proximate to a birth to pinpoint a date. See John Bedell, "Memory and Proof of Age in England, 1272–1372," *Past & Present* 162 (1999): 3-27.

[26] My reference here, of course, is to the early modern episode so masterfully recounted by Natalie Zemon Davis in *The Return of Martin Guerre* (Cambridge, MA, 1983). My emphasis is not on revenants or other instances of the living dead in that sense, but on false accusations of homicide where no homicide ever occurred. It is noteworthy, however, that revenants were indeed a cultural preoccupation in this period, as demonstrated by Nancy Mandeville Caciola in *Afterlives: The Return of the Dead in the Middle Ages* (Ithaca, 2016). See also John Blair, "The Dangerous Dead in Early

Medieval England," in *Early Medieval Studies in Memory of Patrick Wormald*, eds. Stephen Baxter, Catherine Karkov, Janet L. Nelson, and David Pelteret (Farnham, 2009), 539-59 (discussing understandings of the troublesome undead in pre-1200 England); Andrew Joynes, ed., *Medieval Ghost Stories: An Anthology of Miracles, Marvels and Prodigies* (Woodbridge, 2001), 87-125.

[27] See, generally, *Black's Law Dictionary*, s.v. "Corpus delicti." My thanks to Andrew Crespo for raising this modern comparison. On the issue of corpus delicti, see also Frank S. Rice, *General Principles of the Law of Evidence* (Rochester, NY, 1893), 465-79; W. A. Brent, "Corpus Delicti," in *American and English Encyclopaedia of Law*, ed. David S. Garland et al., 2nd ed. (Northport, NY, 1896-1905), 861-65; Simon Greenleaf and John Henry Wigmore, *Treatise on the Law of Evidence*, 16th ed. (Boston, 1899), 136-37; Francis Wharton and James M. Kerr, *Treatise on Criminal Law*, 11th ed. (San Francisco, 1912), 436-62; H. C. Underhill and Samuel Grant Gifford, *Treatise on the Law of Criminal Evidence*, 3rd ed. (Indianapolis, 1923), 33-37; Rollin M. Perkins, "The Corpus Delicti of Murder," *Virginia Law Review* 48/2 (1962): 173-95. For modern cases involving the doctrine, see also R. Stefanson, "Homocide [sic]—Corpus Delicti—Body Missing," *Notre Dame Law Review* 37/117 (1961): 117-19. For a case involving a corpse of uncertain identity, see *Mutual Life Insurance Co. of New York v. Hillmon*, 145 U.S. 285 (1892). The case is best known as the source of the exception to the hearsay rule for statements revelatory of the declarant's state of mind or emotional or physical condition, as embodied in *Federal Rule of Evidence* 803(3). My thanks to Anna Lvovsky and Jocelyn Simonson for this last reference.

[28] Mathew Hale, *Historia placitorum coronae*, 2 vols. (London, 1736), 2:290 (my translation).

[29] For discussion of this passage from Hale, as conveyed by John Adams, see Whitman, *Origins of Reasonable Doubt*, 193. For discussion of a similar passage in the writings of Peter the Chanter, namely "tutius est tamen in remissione peccati quam in rigore," see Philippa Byrne, *Justice and Mercy: Moral Theology and the Exercise of Law in Twelfth-Century England* (Manchester, 2019), 170. The phrase is

also, of course, reminiscent of the Roman law maxim that "it is better to let the guilty go unpunished than to punish the innocent." Fraher, "Conviction According to Conscience," 24 (quoting *Digest* 48.19.5).

[30] See generally Alexander Volokh, "*n* Guilty Men," *The University of Pennsylvania Law Review* 146 (1997): 173-216.

[31] Whitman, *Origins of Reasonable Doubt*, 125-57.

[32] See generally Barbara Shapiro, "The Beyond Reasonable Doubt Doctrine: Moral Comfort or Standard of Proof," *Law & Humanities* 2/2 (2008): 149-73.

[33] Shapiro, "Beyond Reasonable Doubt Doctrine," 159-60.

[34] See Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Brattleboro, 2014), 26. On England specifically, see *ibid.*, 64.

[35] See Elizabeth Papp Kamali, "Trial by Ordeal by Jury in Medieval England, or Saints and Sinners in Literature and Law," in *Emotion, Violence, Vengeance and Law in the Middle Ages: Essays in Honour of William Ian Miller*, eds. Kate Gilbert and Stephen D. White (Leiden, 2018), 49-79, at 58-62, 66-73. On the idea that an ordeal verdict might be met with consensus but might also give rise to dissension, see Bartlett, *Trial by Fire and Water*, 39-40.

[36] See Whitman, *Origins of Reasonable Doubt*, 10-24; Kamali, *Felony and the Guilty Mind*, 245-53.

[37] See Kamali, *Felony and the Guilty Mind*, 270-301.

[38] On the royal pardon in medieval England, see generally Naomi D. Hurnard, *The King's Pardon for Homicide before A.D. 1307* (Oxford, 1969); Helen Lacey, *The Royal Pardon: Access to Mercy in Fourteenth-Century England* (York, 2009).

[39] On Peter's influence, see generally John W. Baldwin, *Masters, Princes, and Merchants: The Social Views of Peter the Chanter and His Circle*, 2 vols. (Princeton, 1980).

[40] Petrus Cantor Parisiensis, *Verbum adbreviatum: Textus conflatus*, ed. Monique Boutry (Turnhout, 2004), 506.

[41] Hale cited a similar case of a falsely accused horse thief being exonerated posthumously when the true thief was later captured and confessed that he had stolen the horse and, while evading capture, had asked a stranger to walk it for him. See Hale, *Historia placitorum coronae*, 2:289.

[42] Petrus Cantor, *Verbum adbreviatum*, ed. Boutry, 507.

[43] *Ibid.* (my translation). "In dubiis ergo tenenda est sententia, potissime in causa sanguinis, ubi non coniecturaliter uel probabiliter tantum est procedendum, sed limpidissimis et luce clarioribus rationibus iudicandum, ne aliter iudicans, reus sit mortis condempnati."

[44] Baldwin presents this story as an example of one of several anecdotes of failed ordeals collected by Peter the Chanter. John W. Baldwin, "The Intellectual Preparation for the Canon of 1215 Against Ordeals," *Speculum* 36/4 (1961): 613-36, at 628-29. See also Charles M. Radding, "Superstition to Science: Nature, Fortune, and the Passing of the Medieval Ordeal," *The American Historical Review* 84/4 (1979): 945-69, at 945.

[45] For a discussion of the Senecan and Chaucerian versions of the tale of the angry judge, see Kamali, *Felony and the Guilty Mind*, 289, 292. For another such tale in a widely known classical source, see Valerius Maximus, *Memorable Doings and Sayings* 8.4, 2 vols., (Cambridge, MA, 2000), 2:212-13. "A slave of the banker M. Agrius called Alexander was accused of killing a slave of A. Fannius and tortured by his master on that account. He steadfastly asserted that he had committed the crime. So he was handed over to Fannius and executed. A little time passed and the man believed to have been murdered returned home."

[46] While Peter's tragedy emphasized the vagaries of ordeal verdicts, Seneca's tale cautioned against judges, overtaken by emotion, adhering too strictly to their judgments and refusing to reconsider them in the light of new, incontrovertible evidence. Where Seneca emphasized the

judge's anger, Peter described an ordeal voluntarily entered. Peter's pilgrim was hanged immediately after an initial unjust judgment rather than after a second unjust judgment. By comparison, Seneca appears to be particularly preoccupied with the judge's perverse misuse of law to double down—or indeed triple down—on his initial erroneous death sentence by commanding the executions of the two soldiers and the centurion.

[47] See, e.g., Bartlett, *Trial by Fire and Water*, 78 (describing eleventh- and twelfth-century instances of a guilty person being cleared because God desired to offer another chance or they confessed prior to the ordeal, as well as of an innocent person being found guilty by the ordeal because, though not guilty of the present charge against them, they were guilty of something).

[48] On abolition of the ordeal, see generally Baldwin, "Intellectual Preparation," 613-36; Radding, "Superstition to Science," 945-69; Paul R. Hyams, "Trial by Ordeal: The Key to Proof in the Early Common Law," in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, eds. Morris S. Arnold, Thomas A. Green, Sally A. Scully, and Stephen D. White (Chapel Hill, 1982), 116-24; Stephen D. White, "Imaginary Justice: The End of the Ordeal and the Survival of the Duel," *Medieval Perspectives* 13 (1998): 32-55; Bartlett, *Trial by Fire and Water*, 34-102; Trisha Olson, "Of Enchantment: The Passing of the Ordeals and the Rise of Jury Trial," *Syracuse Law Review* 50 (2000): 109-96; Finbarr McAuley, "Canon Law and the End of the Ordeal," *Oxford Journal of Legal Studies* 26/3 (2006): 473-513. For a summary of changing historiographical theories regarding ordeal, see R. C. van Caenegem, "Reflexions on Rational and Irrational Modes of Proof in Medieval Europe," *Tijdschrift voor Rechtsgeschiedenis* 58 (1990): 263-79.

[49] The *Communiloquium* or *Summa collationum*, which survives in 144 manuscript editions and ten print editions, was written between c.1265 and 1269–72 in Oxford or Paris. See Jenny Swanson, "Wales, John of [John Wallensis] (*d.* 1285)," in *Oxford Dictionary of National Biography* (Oxford, 2004).

On the composition of *Communiloquium*, see Jenny Swanson, *John of Wales: A Study of the Works and Ideas of a Thirteenth-Century Friar* (Cambridge, UK, 1989), 31-32.

[50] For these citations, and to view the Seneca story contextually within John of Wales *Communiloquium*, see the following image from an early printed edition, *Communiloquium siue summa collationum Johannis gallensis*, printed by Jordanus Georg Husner in 1489: http://diglib.hab.de/inkunabeln/e-87-2f-helmst-1/start.htm?image=00042 (last accessed 20 December 2019). The Seneca story commences on the twelfth line in the left-hand column.

[51] John of Salisbury, *Policraticus* 5.12, p. 129.

[52] *Ibid.*

[53] "Erant autem proniores ad absolvendum quam ad condemnandum." (my translation). This appears in the right-hand column on the folium preceding the Seneca tale, viewable here: http://diglib.hab.de/inkunabeln/e-87-2f-helmst-1/start.htm?image=00041 (last accessed 20 December 2019).

[54] Saint Augustine, *Concerning the City of God against the Pagans*, trans. Henry Bettenson (London, 1984) 18.10, p. 772.

[55] Exodus 23.7 (Douay Rheims translation).

[56] John of Salisbury, *Policraticus* 5.12, p. 134.

[57] *Ibid.*, 130.

[58] *Ibid.*, 133-34.

[59] Valerius Maximus, *Memorable Doings & Sayings*, 2:204-05. John of Wales cited specifically to this section (book eight) of Valerius Maximus' writings, which was in fact the first source he cited in the section of the *Communiloquium* containing the Piso story.

[60] For the meaning of *causa* in medieval England, see *Dictionary of Medieval Latin from British Sources* (hereafter cited as *DMLBS*), s.v. "causa," defining the term as a cause, case, action, or plea. It is not

clear from whence *Bracton* derived the idea of a *causa praesumptiva*, although one of his examples (i.e., of a doctor causing death by giving the wrong medicine) is borrowed from the Lex Aquilia. Samuel E. Thorne, trans., *Bracton de Legibus et Consuetudinibus Angliae*, 4 vols. (Cambridge, MA: Belknap, 1968) (hereafter cited as *Bracton*), 2:356 n. 6 (citing Justinian, *Institutes* 4.3.7). I rely throughout on Thorne's translation, with some minor alterations.

[61] *Bracton*, 2:356-57.

[62] *Ibid.*, 403-04. For an example of such damning circumstantial evidence in a case of wounding, see G. O. Sayles, ed., *Select Cases in the Court of King's Bench*, 7 vols. (London, 1936–71), 5:cxxxix; Sayles, ed., *Select Cases in the Court of King's Bench*, 6:109-10 (describing how, in 1352, Robert of Norwich and Ivo of Fulham conspired to bring John of Norwich under suspicion of a brutal attack upon John Skinner by tying up the latter John and covering his clothes and body in pig's blood; the trick was discovered when bystanders saw the purportedly injured John unbind his limbs and push his own cart; Robert and Ivo were nevertheless acquitted by a jury on charges of covin and conspiracy).

[63] Outlawry was a procedure for declaring a person formally outside the law, typically due to flight from justice. An outlawed person could be captured or even killed on sight.

[64] *Bracton*, 2:357. On the use of presumptions generally, see David J. Seipp, "Presumptions in Early English Common Law," in *The Law of Presumptions: Essays in Comparative Legal History*, eds. R. H. Helmholz & W. D. H. Sellar (Berlin, 2009), 117-36.

[65] *Bracton*, 2:358 (emphasis added).

[66] On the dangers of returning while outlawed, see *ibid.*, 362-63.

[67] *Ibid.*, 371-72.

[68] *Ibid.* It is not entirely clear whether C's appearance in court was a required step in securing inlawry, or whether B might nevertheless be inlawed even if C failed to appear. This writ may be

viewed in Harvard Law School Library, HLS MS 1, fol. 56v, at https://iiif.lib.harvard.edu/manifests/view/drs:43551951$116i (last accessed 20 December 2019).

[69] Although the word "meticulous" can refer to acting with prudence or care today, *meticulosus* carried a different valence of meaning in medieval England. See *DMLBS,* s.v. "*meticulosus*" (defining the word's primary meaning as fearful or timid, and secondary meaning as frightful or terrible). The word might also connote cowardice, as in the example from a sermon of Jacques de Vitry quoted in Arpad Steiner, "An Unnoticed Evidence of French Argot in the Early Thirteenth Century," *Modern Language Notes* 58/2 (1943): 121-25, at 124. My thanks to Nick Vincent for this reference.

[70] Hurnard, *King's Pardon for Homicide*, 131.

[71] *Bracton*, 2:357-58, 372 (noting that either a true or presumptive cause could give rise to outlawry that accorded with the law of the land).

[72] *Ibid.*, 373 (emphasis added). The treatise author appears to vacillate as to whether or not the inlawed person could be pardoned of right and regain his or her property; presumably such cases were few and far between such that a clear rule might have been difficult to state without some equivocation. See, e.g., *ibid.*, 375 (describing how a person who fled out of timidity might be pardoned "[o]f right rather than grace, though neither to his inheritance nor his chattels," leaving open the possibility that the latter could be restored through the exercise of grace). This is again contradicted on p. 378, where the author indicates that the king is bound to grant a man's life "of grace" in instances where "there was no *causa* for the outlawry, as where the man alleged to be slain is produced alive and well".

[73] *Ibid.*, 373. It is not clear whether *probatio vera* was the equivalent of the *probatio plena* of the *ius commune*. On the latter, see Joanna Carraway Vitiello, *Public Justice and the Criminal Trial in Late Medieval Italy: Reggio Emilia in the Visconti Age* (Leiden, 2016), 114. While *Bracton* emphasized here the

preference of proof to a presumption, elsewhere (in dealing with the issue of legitimacy and paternity) the treatise favored a presumption over the truth. See Seipp, "Presumptions," 119.

[74] Intriguingly, Paul Brand has hypothesized that *Bracton* might have been written for use in a law school setting designed to teach both common and civil law. Paul Brand "Legal Education in England before the Inns of Court," in *Learning the Law: Teaching and the Transmission of English Law, 1150-1900*, eds. Jonathan A. Bush and Alain Wijffels (London, 1999), 51-84, at 57.

[75] An insight I might credit to Paul Brand (personal correspondence, May 2018), who nonetheless found no corresponding record of such a case in the printed *Close Rolls* from 1227 onwards. Elsewhere Brand has argued that some of the writs in the *Bracton* treatise might have been drafted by William of Raleigh, possibly the primary author of the treatise. See Paul Brand, "The Date and Authorship of Bracton: A Response," *Journal of Legal History* 31 (2010): 217-44, esp. 220-21, 224-25. The writ at issue here could have been drafted for use in a particular case but then may not have become part of the collection of writs in ordinary use in the royal courts.

[76] For links to Harvard Law School's collection of medieval manuscripts, including a large number of registers of writs, see https://listview.lib.harvard.edu/lists/hollis-014684319 (last accessed 20 December 2019). Published examples may be found in Elsa de Haas and G. D. G. Hall, eds. and trans., *Early Registers of Writs*, Selden Society Series 87 (London, 1970).

[77] Sir John Baker (personal correspondence, 1 January 2020) does not recall coming across a writ of this sort in later records either. HLS MS 166 (a mid-fourteenth century register of writs), fol. 20v, does contain a writ for reversing an outlawry, but the facts do not involve a false homicide accusation. See https://iiif.lib.harvard.edu/manifests/view/drs:49668414$46i (last accessed 20 December 2019). My thanks to Charles Donahue.

[78] On the acquittal rate, see supra, note 19.

[79] *Curia Regis Rolls*, 20 vols. (London, 1922–2006), 5:267.

[80] *Ibid.* The case is also discussed in C. T. Flower, ed., *Introduction to the Curia Regis Rolls, 1199-1230 A.D.*, Selden Society Series 62 (London, 1944), 376.

[81] *Curia Regis Rolls*, 6:26-27 (my translation). "Cristiana de Sut Luffenham, que fuit in prisona apud Norht', que retenta fuit per appellum Ginnilde de morte Thome filii sui, dimissa fuit per plegios coram justiciariis, quia testatum fuit quod ipse Thomas vir ipsius Cristiane mendicus (*m'dicus*) erat et nesciebatur utrum sit vivus an mortuus, nec male credebatur de morte illius [per] villatam de Luffenham. Hii sunt plegii standi recto si aliquis loqui voluerit versus eam, Hugo filius Simonis de Luffenham Hugo filius Anketil Willelmus filius Roberti Turbern Molendinarius Rogerius filius Hugonis Robertus Luvet Salamon le Teler Simon filius Herberti Willelmus de Seldeneethorp Simon Prudume."

[82] My thanks to Paul Brand (personal correspondence, March 2018) for pointing out the often peripatetic nature of medieval begging.

[83] Also known as Roger Beaufou (d. 1309). See Paul Brand, "Beaufou [Beaufeu], Roger [Roger de Belle Fago]," in *Oxford Dictionary of National Biography* (2004). Brand observes that Belle Fago, along with Henry Spigurnel, was condemned as a particularly cruel justice by the author of a poem denouncing trailbaston proceedings. For the poem excerpt, see Isabel S. T. Aspin, ed., *Anglo-Norman Political Songs* (Oxford, 1953), 70 (my translation). "Spigurnel and Belle Fago are men of cruelty; / If they had been in my power they would not return." ("Spigurnel e Belflour sunt gent de cruelté; / Si(l) il fuissent en ma baylie ne serreynt returnee.")

[84] My gratitude to Gwen Seabourne for this citation to The National Archives, UK (hereafter cited as TNA) JUST 3/105, m. 9, AALT no. 0018 (1307), http://aalt.law.uh.edu/AALT7/JUST3/JUST3no105/aJUST3no105fronts/IMG_0018.htm (last accessed 20 December 2019).

[85] Henry Summerson, ed., *Crown Pleas of the Devon Eyre* (Torquay, 1985), 35, no. 174; TNA JUST 1/174, m. 30, AALT no. 0726 (1238), http://aalt.law.uh.edu/AALT4/JUST1/JUST1no174/aJUST1no174fronts/IMG_0726.htm (last accessed 20 December 2019) (my translation). "Johannes de Culum qui rettatus fuit de morte Sare filie Willelmi Grammere de Corombe venit et producit ipsam vivam et sanam. Et Juratores testantur quod eadem Sara est. Et ideo Johannes inde quietus."

[86] Summerson, ed., *Crown Pleas of the Devon Eyre*, 35-36; H. C. Maxwell Lyte and A. E. Stamp, eds., *Calendar of Close Rolls, Henry III*, 14 vols. (London, 1902–38), 1:158 (my translation). "Regarding delivering John de Culum on bail.—The sheriff of Devon is commanded that if John de Culum, taken and detained in the king's prison due to Sara daughter of William Grammer, whom he is supposed to have killed, as it is said, and whom the same sheriff later discovered alive, finds etc. twelve men etc. who will guarantee to have him before the justices at the first assize etc. to stand to right, then he may deliver him on bail, etc. Witnessed as above." "Pro Johanne de Colum prisone tradendo in ballio.—Mandatum est vicecomiti Devonie quod si Johannes de Colum, captus et detentus in prisona regis pro Sarra Filia Willelmi le Gramaire, quam occidisse debuerat, ut dicebatur, et quam idem vicecomes postea vivam reperiit, invenerit etc. xij homines etc. qui eum manucapiant coram justiciariis ad primam assisam etc. ad standum inde recto, tunc ipsum Johannem tradat in ballium, etc. Teste ut supra." Thanks to Kenneth Duggan for highlighting John's reliance on a writ of bail.

[87] Lyte, ed., *Calendar of Close Rolls, Henry III*, 6:21 (my translation). "On behalf of Nicholas of Chisledon and Matilda his wife.—Nicholas of Chisledon and Matilda his wife, taken and detained in the king's prison in York, and Nicholas of Thorpe, taken and detained in the prison of Marlborough, for the death of Isaac son of Isaac, Jew, who was later found alive, for which they were charged, have a writ that places them on bail to stand to right when the king should order it.

Witnessed as above." "Pro Nicholao de Chiselden' [Chisledon, Co. Wiltshire] et Matillide uxore eius. – Nicholaus de Chiselden' et Matillis uxor ejus, capti et detenti in prisona regis Sar' [York], et Nicholaus de Thorp', captus et detentus in prisona de Merleberge [Marlborough], pro morte Isaac filii Isaac Judei, qui postea inventus vivus inventus fuit, unde rettati sunt, habent breve quod ponantur per ballium ad standum inde recto quando rex preceperit. Teste ut supra." No record of the case appears in C. A. F. Meekings, ed., *Crown Pleas of the Wiltshire Eyre, 1249* (Devizes, 1961). This may be the same Isaac the Jew who was recorded as a victim of theft at the Wiltshire Eyre of 1268. See Brenda Farr and Christopher Elrington, eds., *Crown Pleas of the Wiltshire Eyre, 1268* (Chippenham, 2012), 106, no. 490. Adam son of Richard of Winchester was arrested for the theft and detained at the prison in Marlborough, from which he escaped to St. Mary's Church, ultimately confessing and abjuring the realm. Another man was outlawed after fleeing for the same theft.

[88] *Calendar of Patent Rolls, Henry III*, 6 vols. (London, 1901–13), 4:119. My thanks to Paul Brand. Abjuration is the process of leaving England permanently to escape punishment for felony. Typically one would first take sanctuary in a church, confess a crime to the coroner, and then proceed to a port to depart the realm.

[89] Susan Stewart, ed. and trans., *1263 Surrey Eyre*, Surrey Record Society Series 40 (Woking, 2006), 279-80, nos. 581-82. Stewart records that William was pardoned on 14 February 1263.

[90] H. G. Richardson and G. O. Sayles, eds. and trans., *Fleta* 4 vols. (London, 1955–84), 2:77. My thanks to Margaret McGlynn for calling this passage to my attention. The original Latin may be found in Thomas Clarke, ed., *Fleta* (London, 1735), 69.

[91] Francis Morgan Nichols, trans., *Britton*, 2 vols. (Oxford, 1865), 1:65.

[92] For early modern examples of this strategic use of sanctuary and a false felony confession, see *Calendar of the Patent Rolls, Henry VI*, 6 vols. (London, 1901–10), 3:238 (pardon granted in 1439 to husbandman John Bartelot, who had abjured the realm after falsely confessing theft of a horse in

order to escape the reach of murderous enemies); *Calendar of the Patent Rolls, Henry VI*, 6:64 (pardon granted in 1458 to laborer Thomas Kendale, who had been indicted for murder in 1452 and fled to sanctuary, falsely confessing and abjuring the realm to save his life), 361 (pardon granted in 1457 to Richard de Grene of Wanteflete, who had fled to sanctuary and abjured the realm to escape his enemies and falsely confessed having been present at a man's death fifteen years earlier), 432 (pardon granted in 1458 to Richard Wode, who had fled to a monastery to escape violent assailants and then, on the advice of the prior who wished to spare the monastery danger from Richard's assailants, falsely confessed having been present at a murder twelve years earlier in order to abjure the realm). My thanks to Shannon McSheffrey for these fifteenth-century examples.

[93] On the possibility of repatriation after abjuration, see William Chester Jordan, *From England to France: Felony and Exile in the High Middle Ages* (Princeton, 2015), 113-35.

[94] See, e.g., de Haas and Hall, eds. and trans., *Early Registers of Writs*, 101. On this phenomenon of surviving a hanging, see, generally, Robert Bartlett, *The Hanged Man: A Story of Miracle, Memory, and Colonialism in the Middle Ages* (Princeton, 2004). For several examples from the plea rolls, see also Henry Summerson, "Attitudes to Capital Punishment in England, 1200-1350," *Thirteenth Century England VIII: Proceedings of the Durham Conference, 1999*, eds. Michael Prestwich, Richard Britnell, and Robin Frame (Woodbridge, 2001), 123-33, at 129-33. For modern examples of convicted felons surviving execution, but without the later application of mercy, see *Frances v. Resweber*, 329 U.S. 459 (1947), permitting a second electrocution after Francis survived an initial attempt at execution; *State v. Broom*, 51 N.E. 3d 620 (Ohio 2016), permitting a second execution attempt of a man who survived an initial botched attempt at execution by means of intravenous injections. My thanks to Andrew Crespo. The latter defendant, Romell Broom, is scheduled to be executed in 2022. See http://drc.ohio.gov/execution-schedule (last accessed 13 October 2020).

[95] See Lyte, ed., *Calendar of Close Rolls, Henry III*, 3:6 (1234 pardon, my translation). "For Walter de Pyonne.—The king pardons Walter de Pyonne, who was condemned to hang by the verdict of the country for the death of Richard de Webbel', for which he was appealed, and who later was found living when he was to be carried to his burial, from which his life was preserved by divine clemency, so that, notwithstanding, he could remain safely and securely in the English realm. And the sheriff of Hereford is commanded that, on account of the aforesaid, he is to inflict no impediment or burden on the same Walter or allow others in his bailiwick to do so." ("Pro Waltero de Pyonne – Rex concessit Waltero de Pyonne, qui dampnatus fuit suspensus per veredictum patrie pro morte Ricardi de Webbel', unde appellatus fuit, et qui postea vivus fuit inventus cum debuit tradi sepulture, quod, eo non obstante, ex quo per divinam clementiam ei est vita reservata, morari possit salvo et secure in regno Anglie. Et mandatum est vicecomiti Hereford' quod occasione predicta nullum impedimentum aut gravamen eidem Waltero inferat vel ab aliis in ballia sua inferri permittat. Teste ut supra.") For further examples of pardons granted to gallows survivors in the thirteenth century, see *Calendar of the Patent Rolls, Henry III*, 3:504 (1247 pardon of Maud wife of Roger of Northampton for the trespasses and felonies for which she was hanged after trial at the eyre, but later escaped alive); *Calendar of the Patent Rolls, Henry III,* 4:12 (1248 pardon of Miles de Longeham, who escaped the gallows alive and was thereafter restored to the king's peace and permitted, upon good behavior, to remain in the realm); *Calendar of the Close Rolls, Edward I*, 5 vols. (London, 1900–08), 1:518 (1279 pardon of William son of Warin de Montekasino for receiving within the liberty of Swanesch John son of Hugh de Holeweye, who escaped alive after being hanged at the gallows for larceny); *Calendar of the Close Rolls, Edward I*, 2:329-34 (1283 writ to the sheriff of Northampton to release on bail twelve men who supervised the hanging of Henry Cule and his sister, Agnes, both of whom escaped alive "by a fortunate chance."). My thanks to Ryan Rowberry.

[96] Stamp, ed., *Calendar of Close Rolls, Henry III*, 11:425 (my translation). "…convictus non fuit de roberia ecclesie de Stiventon' unde rettatus fuit nec inde culpabilis, nec eciam convictus aut culpabilis extitit de fracione prisone de Basingstok', que ab uno tantummodo homine sibi fuit imposita et non aliter probate vel attincta, et sic nulla causa racionabilis probata fuit quare suspendio adjudicari debuisset…"

[97] For the register's dating, see de Haas and Hall, eds. and trans., *Early Registers of Writs*, xliv-lv. On the writ itself, see *ibid.*, 88.

[98] The technical language used in this writ and in trial records references being "seised in demesne as of fee." For the sake of reader accessibility, I employ the shorthand language of possession here and throughout my discussion below, mindful nonetheless of the academic debate over whether the Roman-law concepts of possession and ownership map neatly onto the common-law concepts of seisin and right. See Joshua C. Tate, "Ownership and Possession in the Early Common Law," *American Journal of Legal History* 48 (2006): 280-313.

[99] On the process of viewing the land, see Paul Brand, "Delay in the English Common Law Courts (Twelfth to Fourteenth Centuries)," in *The Law's Delay: Essays on Undue Delay in Civil Litigation*, ed. C. H. van Rhee (Antwerp: Intersentia, 2004), 41.

[100] See de Haas and Hall, eds. and trans., *Early Registers of* Writs, 89. For a report of a 1306 case in Common Pleas involving a writ of formedon and referencing the various kinds of mort d'ancestor writs, including that for one who has taken on the religious habit, see *Seipp's Abridgement*, no. 1306.020rs.

[101] See, e.g., *Registrum Brevium, ca. 1325*, HLS MS 60, fol. 93r (with the former writ applicable for pilgrimages to the Holy Land generally, Jerusalem in particular, or Santiago de Compostela), viewable online at https://iiif.lib.harvard.edu/manifests/view/drs:48777627$194i (last accessed 20 December 2019). See also *Statuta Vetera, Registrum Brevium and Tracts, late 13th or early 14th century*, HLS

MS 184, fol. 153r, viewable online at https://iiif.lib.harvard.edu/manifests/view/drs:48660497$309i (last accessed 20 December 2019).

[102] See G. D. G. Hall, ed. and trans., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford, 1993) (hereafter cited as *Glanvill*), 150-51.

[103] The writ of mort d'ancestor, for example would instruct a jury to declare whether the deceased was seised of a particular parcel of land on the day he died, and whether the claimant was indeed his next heir, but not whether or not a death had in actuality occurred. See, e.g., de Haas and Hall, eds. and trans., *Early Registers of Writs*, 23. Likewise, a writ of dower would command a person to render to the widow her reasonable dower, or in the alternative to appear before the king's justices, again with no inquiry into whether the woman had indeed been widowed. See, e.g., *ibid.*, 30. For the idea that death on pilgrimage was simply stated as a fact in writs of mort d'ancestor, see Flower, ed., *Introduction to the Curia Regis Rolls*, 146.

[104] See, e.g., de Haas and Hall, eds. and trans., *Early Registers of Writs*, 66.

[105] "A.D. 1176 Assize of Northampton," in William Stubbs, ed., *Select Charters* (Oxford, 1888), 151-52 (my translation). "Et si dominus feodi negat haeredibus defuncti saisinam ejusdem defuncti quam exigunt, Justitiae domini regis faciant inde fieri percognitionem per duodecim legales homines, qualem saisinam defunctus inde habuit die qua fuit vivus et mortuus: et sicut recognitum fuerit, ita haeredibus ejus restituant." On the impact of the Assize of Northampton on dower, see Joseph Biancalana, "Widows at Common Law: The Development of Common Law Dower," *Irish Jurist* 23 (1998): 255-329, at 281-83.

[106] "A.D. 1176 Assize of Northampton," in Stubbs, ed., *Select Charters*, 151 (my translation). "And the wife of the deceased may have her dower and the share of his chattels which befalls her." ("Et uxor defuncti habeat dotam suam et partem de catallis ejus quae eam contingit.")

[107] See, e.g., what appears to be an early writ of mort d'ancestor from 1130, during the reign of Henry I, in R. C. van Caenegem, ed. and trans., *Royal Writs in England from the Conquest to Glanvill*, Selden Society Series 77 (London, 1959), 465. The writ indicates that the ancestor had traveled to Jerusalem, suggesting that such foreign adventures may have given rise to the need for a writ to deal with instances where a rightful heir was unable to secure his or her inherited lands.

[108] For the writ of mort d'ancestor, see *Glanvill*, 150.

[109] For cases involving the question of whether a man who had died while on pilgrimage had been seised in his demesne as of fee, see Doris Mary Stenton, ed. and trans., *Pleas before the King or His Justices*, 3 vols. (London, 1953–67), 2:131 (no. 495, a 1201 Cornwall case involving pilgrimage to Jerusalem and a successful claim of mort d'ancestor by the pilgrim's niece), 157-58 (no. 567, another record of the preceding case), 233 (no. 781, a 1202 Westminster case involving pilgrimage to Jerusalem and a claim of mort d'ancestor brought by the pilgrim's son); William Paley Baildon, ed., *Select Civil Pleas*, Selden Society Series 3 (London, 1890), 87 (no. 215, a 1202 Lincolnshire Eyre case also involving pilgrimage to Jerusalem and an unsuccessful plea of mort d'ancestor), 59-60 (no. 149, a 1203 Kent case involving pilgrimage to Jerusalem and an unsuccessful plea of mort d'ancestor); Stenton, ed. and trans., *Pleas Before the King or His Justices*, 3:150 (no. 965, a 1204 York case involving an unspecified pilgrimage and an unsuccessful plea of mort d'ancestor); Stenton, ed. and trans., *Pleas Before the King or His Justices*, 4:176 (no. 4073, a 1209 Norwich case involving pilgrimage to Rome and an unsuccessful plea of mort d'ancestor by the pilgrim's brother), 261-62 (nos. 4379 and 4381, a 1209 Norwich case involving pilgrimage to Jerusalem and a claim of mort d'ancestor brought unsuccessfully against a minor tenant); F. W. Maitland, ed., *Bracton's Note Book*, 3 vols. (London, 1887) (hereafter cited as *Bracton's Note Book*), 2:608-09 (no. 1787, a 1227 Kent Eyre case involving a claim of mort d'ancestor brought by a son, arguing that his father, Roger Tanere, had been seised in his demesne as of fee before leaving on an unspecified pilgrimage; jurors speaking without oath (*sine*

sacramento) agreed with the present tenants that the land was held partly in dower by a woman named Milisanta, and the claimant's petition for seisin failed); *Bracton's Note Book*, 3:166-67 (no. 1148, a 1235 case involving pilgrimage to Jerusalem by Henry de la Pomeray, who was found to have enfeoffed another man, Geoffrey de la Pomeray, before his departure for the holy land; the claimant and tenant reached a concord); Alan Harding, ed. and trans., *The Roll of the Shropshire Eyre of 1256*, Selden Society Series 96 (London, 1981), 41 (no. 106, in which the deceased's seisin at the time he departed on pilgrimage was called into question, but not the fact of his death while abroad); TNA JUST1/622, m. 25v, AALT no. 0681 (1285), http://aalt.law.uh.edu/AALT4/JUST1/JUST1no622/bJUST1no622dorses/IMG_0681.htm (last accessed 20 December 2019) (Northamptonshire eyre case in which an assize jury was asked to determine whether John son of Alfred of Dingley uncle of Simon son of Eleanor of Dingley was seised in his demesne as of fee in one messuage and two shillings rent from a half virgate of land with appurtenances in Dingley on the day on which he departed on pilgrimage to Jerusalem, on which excursion he died). For later thirteenth-century law reports on this issue, see William Huse Dunham, Jr., ed. and trans., *Casus Placitorum and Reports of Cases in the King's Courts, 1272-1278*, Selden Society Series 69 (London, 1952), 77-78 (no. 18, raising a question of whether the common writ of mort d'ancestor could be used in such instances where the ancestor was said to have died *utre mer*); see also, Paul Brand, ed. and trans., *The Earliest English Law Reports*, 4 vols. (London, 1996–2007), 4:484.

[110] *Curia Regis Rolls*, 1:306 (my translation). "Cambridge—Ranulf Picot claims against the abbess of Chatteris [Co. Cambridgeshire] one hide of land with appurtenances in Madingley [Co. Cambridgeshire] as his right and inheritance, of which Arnold Picot his father was seised in his demesne as of fee and by right in the time of king Henry the father taking from it profits to the value of five shillings or more; and he offers to prove this through a certain free man of his: and

Simon de Foxton in the place of the abbess comes and says that Arnold the father of the aforesaid Ranulf is yet living: and Ranulf produces sufficient witnesses of his death, namely Anketil son of Eustace, Simon de Cotes, Otwey de Pelham, who testify to having seen him living and dead at Pelham: and Simon thereupon asks for a view. He may have it. [They are to appear] at the advent [i.e. next coming] of the justices: and in the meantime let the view be made." ("Cantebr'.—Rannulfus Picot petit versus abbatissam de Catriz j. hidam terre cum pertinenciis in Madingel' sicut jus suum et hereditatem, unde Hernaldus Picot pater suus fuit saisitus in dominico suo ut de feodo et jure tempore regis H. patris capiendo inde expletias ad valentiam v. solidorum vel plus; et hoc offert probare per quondam liberum hominem suum: et Simon de Foxtun' positus loco abbatisse venit et dicit quod Ernaldus pater predicti Rannulfi ad huc vivit: et Rannulfus produxit testes sufficientes de morte ejus scilicet Anketillum filium Eustacii Simonem de Cotes Otwei de Pelham qui testantur eum vidisse vivum et mortuum apud Pelham: et petit Simon inde visum. Habeat. In aventu justiciariorum: et interim fiat visus.") I have translated "Rannulfus" as Ranulf, although Ralph might be a suitable alternative, to distinguish him from the Radulfus who appears translated as Ralph in a later case below. Ernaldus might be translated as Ernaut or Arnold.

[111] *Curia Regis Rolls*, 1:145 (my translation). "Cambridge—Ranulf Picot presents himself on a fourth day against the abbess of Chatteris regarding a plea of one carucate of land with appurtenances in Madingley: and the same [abbess] does not come, etc. Judgment. The land is to be taken into the hands of the lord king, etc., and she is to be summoned to appear at Eastertide in three weeks, etc." ("Cantebr'—Rannulfus Picot optulit se iiij. die versus abbatissam de Chatric' de placito j. carucate terre cum pertinenciis in Maddingelee: et ipsa non venit etc. Judicium. Terra capiatur in manum domini regis etc., et eadem sumoneatur quod sit a die Pasche in iij. septimanas etc.")

[112] Replevin at this time was an action available to recover lands, goods, or chattels. See *DMLBS,* s.v. "replevina." *Curia Regis Rolls*, 1:165 (my translation). "Cambridge—The abbess of Chatteris asks for her land in Madingley by replevin on Wednesday before the feast of the throne of St. Peter against Ranulf Picot, which [land] was taken into the hands of the lord king for default of the same abbess." ("Cantebr'—Abbatissa de Chartriz petiit terram suam de Madingle per plevinam die Mercurii ante Cathedram sancti Petri versus Ranulfum Picot, que capta fuit in manum domini regis pro defalta ipsius abbatisse.")

[113] *Curia Regis Rolls*, 1:306.

[114] This abbreviated Latin entry may be found in Francis Palgrave, ed., *Rotuli Curiæ Regis*, 2 vols. (London, 1835), 2:111. There are further references to the litigation in *ibid.*, 222, 233.

[115] For references to such a possibility, see Claire Breay, ed., *The Cartulary of Chatteris Abbey* (Woodbridge, 1999), 42; "Madingley: Manors and other estates," in *A History of the County of Cambridge and the Isle of Ely*, 10 vols. (London, 1938–2002), 9:168. It would not, of course, be unusual to write one's last will and testament before departing on travel abroad. For an example of a will written prior to a military expedition to Poitiers in 1374, see John Gage, ed., *The History and Antiquities of Hengrave in Suffolk* (London, 1822), 87-88. And on the spiritual and temporal preparations of pilgrims, See Kristine T. Utterback, "A Call to Active Devotion: Pilgrimages to Jerusalem in the Late Middle Ages," in Ann W. Astell, ed., *Lay Sanctity, Medieval and Modern: A Search for Models* (Notre Dame, 2000), 51-53.

[116] *Curia Regis Rolls*, 2:215 (my translation). "Cambridge—A day is given to Simon de Foxton in place of the abbess of Chatteris and to Ranulf Picot to receive their chirograph in fifteen days after the feast of St. Michael etc.; and a partition of the land is to be made." ("Cantebr'—Dies datus est Simoni de Foxton' posito loco abbatisse de Chatric' et Rannulfo Picot ad recipiendum cirographum suum in xv. dies post festum sancti Michaelis prece etc.; et partitio fiat terrarum.") A chirograph is a

document typically written in duplicate or triplicate on a single piece of parchment and then cut to provide multiple written records to an agreement or transaction.

[117] *Curia Regis Rolls*, 3:67 (my translation). "Cambridge—A day is given to Ranulf Picot and Simon de Foxton attorney of the abbess of Chatteris to take their chirograph in three weeks after the feast of Saint Hillary." ("Cantebr'—Dies datus est Rannulfo Picot et Simoni de Foxton' atornato abbatisse de Chatric' ad capiendum cirographum suum in iij. septimanas post festum sancti Yllarii.")

[118] *Ibid.*, 189 (my translation). "Cambridge—A day is given to Ranulf Picot petitioner and to the attorney of the abbess of Chatteris to take their chirograph regarding a plea of one hide with appurtenances in Madingley in the octave of St. Martin; and the sheriff is ordered to make the same Ranulf have half of that hide and the capital messuage, as is contained in the note." "Cantebr'—Dies datus est Rannulfo Picot petenti et atornato abbatisse de Chatric' ad capiendum cirographum suum de placito j. hide cum pertinentiis in Maddingel' in octabis sancti Martini; et preceptum est vicecomiti quod faciat eidem Rannulfo habere medietatem illius hide et capitale masagium, sicut continetur in nota."

[119] *Ibid.*, 238 (my translation). "Cambridge—A day is given to Ranulf Picot petitioner and to the attorney of the abbess of Chatteris to take a chirograph in three weeks after Easter." ("Cantebr'—Dies datus est Rannulfo Picot petenti et atornato abbatisse de Chatric ad capiendum cirographum in iii. septimanas p[ost P]ascha.")

[120] *Curia Regis Rolls*, 4:28 (my translation). "Cambridge—A day is given to Ranulf Picot petitioner and Simon de Foxton attorney of the abbess of Chatteris to take their chirograph in the octave of Saint Michael. And the same Ranulf complains that the [end] is not supported by the tenor of the note, in which it is maintained that the same [Ranulf] should have half of the entire land regarding which there was a plea between them and the capital messuage, namely half of five messuages, of which he has nothing, as he says, [and] the sheriff is commanded to allow him to have half of those

messuages, unless the same Ranulf has from it an exchange, as stated by the abbess' attorney." "Cantebr'—Dies datus est Rannulfo Picot querenti et Simoni de Foxcot' atornato abbatisse de Chatric' ad capiendum cirographum suum in octabis sancti Michaelis. Et quoniam ipse Rannulfus queritur quod finis non tenetur secundum tenorem note, in qua continetur quod ipse debet habere medietatem tocius terre unde placitum fuit inter eos et capitale masagium, scilicet de medietate v. masagiorum, unde nichil habet, ut dicit, preceptum est vicecomiti quod faciat ei habere medietatem illorum masagiorum, nisi ipse Rannulfus escambium habuerit inde, sicut atornatus abbatisse dicit."

[121] Ranulf Picot and the abbess are mentioned in a calendar of the feet of fines during the seventh year of John's reign (roughly 1206). See Walter Rye, ed., *Pedes Finium or Fines Related to the County of Cambridge* (Cambridge, UK, 1891), 6. This may be the corresponding manuscript record, which describes the abbess conceding to Ranulf and his heirs a particular share of the Madingley holdings. See TNA CP 25/1/23/6 (Feet of Fines, Cambridge, 5-8 John), m. 15, AALT no. 0102 (c. 1206), http://aalt.law.uh.edu/AALT7/CP25(1)/CP25_1_23_3-8/IMG_0102.htm (last accessed 20 December 2019).

[122] On the eldest son's "greater right" to bring the claim of mort d'ancestor, see *Bracton*, 3:308.

[123] *Curia Regis Rolls*, 4:161 (my translation). "Buckinghamshire.—The assize comes to recognize whether Richard father of William was seised in his demesne as of fee of five acres of land with appurtenances in Upton on the day on which he died, etc., which land the prior of Merton holds, who comes and says that the assize ought not to lie, because the same William has a certain younger brother, who at another time brought an assize of mort d'ancestor against the same prior regarding the same land in the court of the lord king; to which it was objected that the he had a first-born brother and therefore the assize ought not to lie; he [i.e., the younger brother] responded to the prior that he [i.e., the older brother] was dead, so that the same [younger brother] and his mother produced suit in court proving that he was dead. And for this reason the assize was taken, which

stated that Richard his father did not die seised as of fee on the day on which he died. And he [William] asks consideration whether according to the assize thus taken in the name of his brother and according to the proof thus produced regarding his death the assize should proceed. And William asks consideration as to whether he ought to lose in any event for something done by his younger brother. A day is given to hear their judgment on the morrow of St. John; and the jury is to remain until judgment is done. It is to be discussed." ("Buk'.—Assisa venit recognitura si Ricardus pater Willelmi saisitus fuit in dominico suo ut de feodo de v. acris terre cum pertinentiis in Upton' die qua obiit etc., quam terram prior de Mereton' tenet: qui venit et dicit quod assisa non debet inde fieri, quia idem Willelmus fratrem habet quondam postnatum, qui alia vice tulit assisam mortis antecessoris versus eundem priorem de eadem terra in curia domini regis; cui objectum fuit quod ipse fratrem habuit primogenitum et ideo non debuit assisa fieri; qui respondit priori quod mortuus fuit, ita quod ipse et mater ejus sectam produxerunt in curia probandi quod mortuus esset; et per hoc capta fuit assisa; que dixit quod Ricardus pater ejus non obiit inde saisitus ut de feodo die qua obiit; et petit considerationem utrum super assisam ita captam nomine fratris sui et super probam quam produxerat de morte ejus debeat assisa procedere; et Willelmus petit considerationem utrum debeat in aliquo esse perdens pro aliqua re quam fecisset frater ejus junior. Dies datus est eis ad audiendum judicium suum in crastino sancti Johannis: et jurata remaneat quousque judicium fiat. Loquendum.")

[124] This is a conundrum contemplated by the authors of *Bracton*, perhaps inspired by this case or another like it. See *Bracton*, 3:309 (describing a claim of mort d'ancestor in which the objection was raised that the claimant had an elder brother "across the sea," and the jurors had doubt as to whether this elder brother was alive or dead; the court decided the younger brother should gain seisin but, if the elder brother returned, he was "to have his seisin without plea"). See also *ibid.*, 246 (describing a similar scenario, but where the elder brother had gone on a journey to the Holy Land).

[125] *Curia Regis Rolls*, 4:295 (my translation). "Surrey—Eva who was the wife of Richard of Upton claims against the prior of Merton her dower in Upton. And the prior says that the same [Eva] has a son who once brought an assize of mort d'ancestor against him regarding the same land, and it is said that it is still in judgment; and since it is said that that assize is not yet concluded, he begs consideration of the court whether he ought to respond to her. And it is decided that he should not respond; and her son awaits his judgment." "Surr'—Eva qui fuit uxor [Ricardi] de Upton' petit versus priorem de Mereton' dotem suam in Upton: et prior dicit quod ipsa habet filium quondam qui tulit assisam mortis antecessoris versus eum de eadem terra, et loquela est adhuc super judicium; et desicut loquela de assisa illa nondum est terminate, petit considerationem curie utrum debet ei respondere. Et consideratum est quod non respondeat: et filius ejus expectet judicium suum." On the deferral of a widow's dower claim until an heir's mort d'ancestor claim was resolved, see Biancalana, "Widows at Common Law," 294.

[126] *Curia Regis Rolls*, 5:100-01 (my translation). "Surrey—William son of Richard brings an assize of mort d'ancestor against the prior of Merton regarding five acres of land and one stream with appurtenances in Upton. And the prior comes and says that the assise should not proceed because his younger brother (literally "later born") brought an assize of mort d'ancestor regarding the same land and stream, while the same William was across the sea, such that the younger brother based his suit on the death of the aforesaid William prior to the time the assize was taken, and he gained nothing by that assize; and therefore it does not seem to him that the assize ought to lie. It is decided that the assize should not proceed. He may bring a writ of right, if he wishes, against him." "Surr'—Willelmus filius Ricardi tulit assisam de morte antecessoris versus priorem de Mereton' de v. acris terre et de j. gurgite [i.e., stream] cum pertinentiis in Hupton': et prior venit et dixit quod assisa non debet procedere, quia frater suus postgenitus tulerat assisam de morte antecessoris de eadem terra et de gurgite, dum idem Willelmus fuit ultra mare, ita quod frater suus postgenitus duxit sectam

suam de morte predicti Willelmi antequam assisa capta fuit, et nichil cepit per assisam illam; et ideo non videtur ei quod assisa non debet inde fieri. Consideratum est quod assisa non procedat. Querat breve de recto, si voluerit, versus eum." With regard to William being *ultra mare*, it is possible that he was abroad on a military campaign; *Outremer* commonly referred to the Crusader states. *Ultra mare* had a broader meaning, however, and could refer to travel abroad generally. There was even an essoin *de ultra mare* a defendant could use to excuse an absence from court. See Brand, "Delay in the Common Law Courts," 37. A 1275 statute provided a remedy for situations in which a tenant falsely claimed to be overseas to avoid a summons, suggesting that some litigants made opportunistic use of this essoin. See Statute of Westminster I (1275), c. 44, in *Statutes of the Realm*, 9 vols. (London, 1810–22), 1:37. On the problem of missing appellants in ecclesiastical courts, see F. Donald Logan, "The Court of Arches and the Bishop of Salisbury," in *The Foundations of Medieval Ecclesiastical History: Studies Presented to David Smith*, eds. Philippa Hoskin, Christopher Brooke, and Barrie Dobson (Woodbridge, 2005), 168-69.

[127] *Curia Regis Rolls*, 6:381-82 (a 1212 claim that William de Upton had raised two dikes unjustly and without judgment, to the damage of Geoffrey de Upton's free tenement); *Curia Regis Rolls*, 7:77-78 (a 1214 claim also brought by Geoffrey de Upton against William de Upton for disseisin from his free tenement), 78 (another complaint from Geoffrey about William raising dikes).

[128] *Bracton's Note Book*, 3:356 (no. 1397). This is likely the Enfield in co. Middlesex.

[129] This may mean that their testimony was not under oath. The absence of an oath (i.e., "*sine sacramento*") was explicitly recorded in a 1227 case of mort d'ancestor, possibly because the questions posed to them were beyond the scope of the original assize questions which they had sworn to answer truthfully at the start of the proceedings. My thanks to Paul Brand for this suggestion (personal correspondence, March 2018). For the 1227 proceedings, see *Bracton's Note Book*, 3:608-09 (no. 1787). On the legal distinction between oaths and faith, which courts sometimes used

interchangeably and other times viewed as markedly different in formality, see Ian Forrest, *Trustworthy Men: How Inequality and Faith Made the Medieval Church* (Princeton, 2018), 45.

[130] *Bracton's Note Book*, 2:255-56 (no. 306). This may be Peckham in Co. Surrey.

[131] Possibly Brinnington, Co. Cheshire, or Bringhurst, Co. Leicestershire.

[132] *Bracton's Note Book*, 2:255-56 (no. 306).

[133] See Doris Mary Stenton, ed., *Rolls of the Justices in Eyre for Lincolnshire and Worcestershire*, Selden Society Series 53(London, 1934), 42-43.

[134] *Bracton*, 2:265. "Dower is that which a free man gives his spouse at the church door because of the burden of matrimony and the future marriage, for the maintenance of the wife and the nurture of the children when they are born, should the husband predecease her. The rightful dower of every woman is the third part of all the lands and tenements her husband held in his demesne and so in fee that he could endow her on the day he married her." The 1217 reissuance of Magna Carta included a definition of dower: "She is to be assigned as her dower one-third of all the land which was her husband's during his life, unless she was endowed with less at the church door." Biancalana, "Widows at Common Law," 281 and n. 122. On the development of dower, see generally George L. Haskins, "The Development of Common Law Dower," *Harvard Law Review* 62 (1948): 42-55; Joseph Biancalana, "The Writs of Dower and Chapter 49 of Westminster I," *Cambridge Law Journal* 49 (1990): 91-116; Janet Senderowitz Loengard, "*Rationabilis Dos:* Magna Carta and the Widow's 'Fair Share' in the Earlier Thirteenth Century," in *Wife and Widow in Medieval England*, ed. Sue Sheridan Walker (Ann Arbor, 1993), 59-80; Thomas A. Lund, "Some Interesting Medieval Dower Cases," *University of Toledo Law Review* 37 (2006): 659-704.

[135] Lack of entitlement to dower could be based on a widow's failure to "support" her husband due to her young age (and accompanying lack of sexual maturity) or on her forfeiture of dower

through adultery. See Paul Brand, "Deserving and Undeserving Wives: Earning and Forfeiting Dower in Medieval England," *Journal of Legal History* 22/1 (2001): 1-20.

[136] See *Bracton*, 3:370. For examples of such counter-claims from the late thirteenth century, see Sue Sheridan Walker, "Litigation as Personal Quest: Suing for Dower in the Royal Courts, circa 1321-1350," in *Wife and Widow in Medieval England*, ed. Sue Sheridan Walker (Ann Arbor, 1993), 81-108, at 86-87.

[137] *Bracton*, 3:370.

[138] *Ibid.*

[139] *Ibid.*, 370-71.

[140] *Ibid.*, 379. *Bracton* includes here a writ for the sheriff to inquire into who were present at the church on the day of the marriage, and to bring twelve lawful men before the king's justices to attest to whether or not the husband had endowed the wife with a specific dower on their wedding day. Biancalana suggests that the years after the 1217 Magna Carta reissue were a time of experimentation with witness proof of endowments at the church door, which was increasingly emphasized by royal justices. A widow claiming nominated dower, i.e., dower that had been specifically designated at the time of marriage, had to produce witnesses of the endowment at the church door, and a defendant would then have to produce contrary witnesses. Similarly, a defendant saying a plaintiff had been endowed with specific lands at the church door would have to produce witnesses, thereby requiring the widow plaintiff to produce her own suit. Biancalana, "Widows at Common Law," 314-15. Biancalana observes that "justices did not impose methods of proof on their own motion." Instead, "rules of proof" defined the range of possibilities for litigants, including agreeing to jury trial instead of a trial based on suit. *Ibid.*, 323.

[141] See Biancalana, "Widows at Common Law," 317. On witnesses to transactions generally, see David Postles, "Choosing Witness in Twelfth Century England," *Irish Jurist* 23 (1988): 330-46.

[142] *Bracton*, 3:371.

[143] *Ibid.* This is a demonstration of what Thomas McSweeney has argued is an early use of case law, with the authors of *Bracton* modeling the treatise on the work of civilians and canonists. See, generally, Thomas McSweeney, "English Judges and Roman Jurists: The Civilian Learning Behind England's First Case Law," *Temple Law Review* 84/4 (2012): 827-62.

[144] *Bracton*, 3:371. Note that *Bracton*'s reference to further examination to see whether witnesses agreed on particulars suggests a commonality with Romano-canonical witness procedure. See Charles Donahue, Jr., "Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law," in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, eds. Morris S. Arnold, Thomas A. Green, Sally A. Scully, and Stephen D. White (Chapel Hill, 1981), 131, 153-55.

[145] Biancalana, "Widows at Common Law," 316.

[146] *Bracton*, 3:371. *Bracton* then proceeds to explain that if the woman offered the more valid proof, the tenant could still raise a concern about whether she had an actual right to her dower; she might therefore be required "to show her right" (*docere de iure suo*). Case law is then provided to demonstrate this.

[147] Donahue, "Proof by Witnesses in the Church Courts," 131. If the witnesses were of equivalent merit on both sides, then the number of witnesses could be dispositive. See *ibid.* English church courts sometimes deviated from strict Romano-canonical procedure, however, in evaluating the reliability of witness testimony. See *ibid.,* 143, 153-54. John of Salisbury offered the following guidelines for weighing witness testimony: "For if all the witnesses are equal in social position and reputation, and if the nature of the transaction and the inclination of the judge agrees with them, all the testimony should be followed. But if some have said one thing and others another, though the number is unequal, that is to believed which squares best with the nature of the transaction, and

affords no suspicion of the taint of hostility or partiality; and the judge will confirm the inclination of his own mind from the inferences and evidence which he finds most consistent with the facts and closest to the truth." John of Salisbury, *Policraticus* 5.14, pp. 140-41.

[148] *Bracton*, 3:371. On the operation of presumptions in dower cases, see Biancalana, "Widows at Common Law," 316-17. The idea of half proof can be found in the *ius commune* as well, where proof ranged from irrefutable (confession) to full and certain (two eyewitnesses) to half proofs (persuasive witness testimony or circumstantial evidence, and finally to quarter or uncertain proofs. See Vitiello, *Public Justice and the Criminal Trial*, 114. In the thirteenth century, William Durand described six types of half proof in canonical criminal cases: a statement under oath that a person believed another to be guilty of a crime, the testimony of a single witness, a document that corroborated sworn testimony, the accused's flight, and false testimony by the accused. See James A. Brundage, "Proof in Canonical Criminal Law," *Continuity and Change* 11 (1996), 329-39, at 335. On the idea that half proofs and full proofs "had no basis in English law," see Shapiro, *Beyond Reasonable Doubt*, 166. The use of these concepts in *Bracton* suggests that they had worked their way into the common law, at least in some limited form, by the early thirteenth century.

[149] *Bracton*, 3:371.

[150] *Curia Regis Rolls*, 1:151 (my translation). "Staffordshire—Matilda who was the wife of William de Winsley claims against Ralph de Hintes a third part of Winsley as her dower which came to her through a gift from William her husband. Ralph comes and says that William her husband is yet living. And the same [Matilda] says against this that he died on his pilgrimage to Santiago. And it was decided that she had sufficient suit that he died three weeks after the feast of Saint Hilary and thus she produced Reginald de Morton and Ulrich de Scropton, who say that they were present where he died and were witnesses to his burial. And therefore it is decided that the same [Matilda] is to have her dower, and Ralph is in mercy for lying as he is convicted." "Stafford'.—Matillis que fuit uxor

Willelmi de Wlseleg' petiit versus Radulfum de Hintes tertiam partem de Wlseleg' ut dotem suam qua (*sic*) eam contingit ex dono Willelmi viri sui: Radulfus venit et dixit quod Willelmus vir ejus adhuc vivus fuit: et ipsa econtra dixit quod obierat in peregrinatione sua versus sanctum Jacobum. Et consideratum fuit quod haberet sectam sufficientem quod obierat in iij. Septimanas post festum sancti Yllarii et tunc produxit Reginaldum de Morton' et Wlvricum de Scropton', qui dicunt quod ipsi fuerunt ubi obiit et testes fuerunt sepulture ejus. Et ideo consideratum est quod ipsa habeat dotum suam: et Radulfus in Misericordia pro mendatio unde convictus est." The rolls record the husband as William "de Wlseleg," which I believe is likely Winsley, Co. Derbyshire, in light of the fact that the two witnesses came from locales—Morton and Scropton—that similarly appear to be in Derbyshire. Ralph "de Hintes" may refer to Hints, Co. Shropshire.

[151] The second witness is listed in the rolls, in the accusative case, as "Wlvricum de Scropton," which I have taken to be Ulric or Ulrich.

[152] Stenton, ed., *Rolls of the Justices in Eyre for Lincolnshire and Worcestershire*, 315. Poverty no doubt limited a widow's options not only in securing witness testimony but also affording legal representation. On the agency of widows bringing dower pleas in particular, see Sue Sheridan Walker, "'Litigant Agency' in Dower Pleas in the Royal Common Law Courts in Thirteenth and Early Fourteenth Century England," *Journal of Legal History* 24/3 (2003): 215-36.

[153] This case is discussed in Walker, "Litigation as Personal Quest," 87, and may be viewed at TNA CP 40/42, m. 72d, AALT no. 4780 (1281), at http://aalt.law.uh.edu/E1/CP40no42/CP40no42dorses/IMG_4780.htm (last accessed 20 December 2019).

[154] *Curia Regis Rolls*, 2:27 (my translation). "Wiltshire—Mabel, who was the wife of Gilbert son of Gelin, brings a claim against Stephen de Oxshott regarding a third part of half a hide of land with appurtenances in Wanborough as her dower, which came to her as a gift of Gilbert etc.; and Stephen

objects saying that her husband is living; and the same [Mabel] denies this and produces sufficient witnesses, who testify that the same Gilbert died in the sea across from Ireland due to a certain storm, where, as they say, they were present; and this they offer [to prove] etc.; and Oliver his son essoins Stephen his father; and the same Mabel says that he cannot bring an essoin, because the same [Stephen] put in his place Oliver his son. And the same Oliver says that he does not know whether he was put in his place or not; and after [it is decided] by consideration of the court that he should respond as an attorney, he says that Gilbert is alive and that he was seen within the last fortnight at Cricklade; and he produces no suit. Thus it is decided that the same [Mabel] is to have seisin of her dower." "Wilt'.—Mabilla que fuit uxor Gilleberti filii Gelini petit versus Stephanum de Ordescot' [Oxshott, Surrey] terciam partem dimidie hide terre cum pertinentiis in Wanberge [Wanborough, Surrey] sicut dotem suam, que eam contingit ex dono Gilliberti quondam etc.; et Stephanus objecerat ei quod vir suus vivus fuit; et ipsa hoc negavit et produxit testes sufficientes, qui testate sunt quod ipse Gillebertus in mari versus Yberniam obiit per quondam tempestatem, ubi, ut dicunt, ipsi interfuerunt; et hoc offert etc.; et Oliverus filius ejus essoniavit Stephanum patrem suum; et ipsa Mabilla dixit quod non debet tenere essonium, quia ipse posuerat loco suo Oliverum filium suum: et ipse Oliverus dixit quod nescivit utrum positus esset loco suo necne; et cum deberet per considerationem curie respondere tanquam atornatus, dixit quod Gillebertus vivus est et quod visus fuit infra istam quindenam apud Crikelad' [Cricklade, Co. Wiltshire]; et nullam sectam produxit. Unde consideratum est quod ipsa habeat saisinam de dote sua." The defendant, Stephen, is described as "de Ordescot," which I believe is likely Oxshott in Co. Surrey in light of the fact that the land at issue was in "Wanberge" [Wanborough, Co. Surrey]. Note the witnesses' emphasis on the fact that they were personally present during the storm, suggesting that it was important that they be eyewitnesses to the events. On this importance of eyewitness as opposed to hearsay testimony in

Romano-canonical procedure, a rule that was often honored in the breach in England, see Donahue, "Proof by Witnesses in the Church Courts," 130-31, 148-53.

[155] Brand, "Delay in the Common Law Courts," 39-40.

[156] See, generally, James A. Brundage, "The Crusader's Wife: A Canonistic Quandary," in *Studia Gratiana XII* (1967), 425-41, and "The Crusader's Wife Revisited," in *Studia Gratiana* XIV (1967), 241-51. Men wishing to remarry, particularly if they were strangers to the region, could also provoke concern. See Sara McDougall, "Bigamy: A Male Crime in Medieval Europe?" *Gender & History* 22/2 (2010), 430-46, at 432. On a specious bigamy claim within a divorce case in fifteenth-century England, see Shannon McSheffrey, "Detective Fiction in the Archives: Court Records and the Uses of Law in Late Medieval England," *History Workshop Journal* 65/1 (2008): 65-78. McSheffrey speculates that false claims of an earlier marriage offered a strategy to spouses hoping to exit an unhappy "second" marriage, and that this strategy might have been used actively c.1469–74 and then abandoned later after meeting resistance from the church courts. *Ibid.*, 69-70. For records of some cases of specious bigamy claims from later in the fifteenth century, see John Hill, Emma Wright c. Elizabeth Leg alias Hill (1488); Emma Rose c. Thomas Dicons, Margery Dicons (c. 1493); and Katherine Martyn alias Apperys c. John Paynaminuta alias Apperys (1495). These case records may be found in *Consistory*, a database of testimony from the primary church court of the diocese of London, accessible at www.consistory.ca (last accessed 7 February 2020). My thanks to Shannon McSheffrey for these case references.

[157] Brundage, "Crusader's Wife Revisited," 248.

[158] *Ibid.*, 246. A similar rule, likely drawn from Roman law, appears in the *Fetha Nagast* (c. 1240), a Coptic legal code; divorce might be permitted after separation, usually for at least five years, due to imprisonment, war, or travel, if there had been no news from the missing partner during that time.

See Ryan Rowberry and John Khalil, "A Brief History of Coptic Personal Status Law," *Berkeley Journal of Middle Eastern and Islamic Law* 3/1 (2010): 81-139, at 112.

[159] Brundage, "Crusader's Wife Revisited," 248. While Hostiensis shared the lenient view, Panormitanus (1386-1445) felt a missing husband should not be presumed dead until one hundred years had elapsed! *Ibid.*, 249-50.

[160] C. R. Cheney and Mary G. Cheney, "A Draft Decretal of Pope Innocent III," *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 41 (1961): 29-47.

[161] Cheney and Cheney, "Draft Decretal," 31.

[162] *Ibid.*, 32.

[163] See generally Donahue, "Proof by Witness in the Church Courts."

[164] Comparing the two systems, Shapiro highlights the rules of the canon law as compared with the flexibility of the common law: "Indeed the absence of set decision rules based on a specific number of witnesses or on confession was the hallmark of the English jury trial." Shapiro, *Beyond Reasonable Doubt*, 166.

[165] On the issue of judge-jury consensus, see Elizabeth Papp Kamali and Thomas A. Green, "A Crossroads in Criminal Procedure: The Assumptions Underlying England's Adoption of Trial by Jury for Crime," in *Law and Society in Later Medieval England and Ireland: Essays in Honour of Paul Brand*, ed. Travis R. Baker (Abingdon: Routledge, 2018), 68-74.

[166] Fraher argues that continental rules governing proof were surprisingly flexible despite the apparent rigidity of the two-witness rule. See Fraher, "Conviction According to Conscience," 62.

[167] On Romano-canonical procedure's development with this concern in mind, see Donahue, "Proof by Witness in the Church Courts," 133. But see Fraher, "Conviction According to Conscience," 57 (arguing that human discretion had played a central role in the ordeal and continued to be accepted as part of the operation of proof in the thirteenth century as well).

[168] *Bracton*, 2:388.

[169] See also *ibid.*, 397. "An appeal before them also falls when the appellor does not speak of his own sight and hearing, even though he spoke of such in the county court and this is attested by the county court, as [in the roll] of the eyre of Martin of Pateshull in the county of Worcester in the fifth year of king Henry." This rule is reminiscent of the Romano-canonical procedural rule that witnesses should speak to "events they saw and heard themselves." See Donahue, "Proof by Witnesses in the Church Courts," 130. Donahue observes, however, that witnesses in English church courts sometimes spoke, like a jury, of common knowledge rather than their own personal eyewitness of an event. *Ibid.*, 143, 148-53.

[170] Objections based on lack of eyewitness status appear rarely in the plea rolls. See Klerman, "Women Prosecutors," 290 and n. 60. On quashed appeals being sent to jury trial by the 1220s, see *ibid.*, 298.

[171] Dunham, Jr., ed., *Casus Placitorum*, 68-69 (no. 11); see also Brand, ed. and trans., *Earliest English Law Reports*, 4:536 (suggesting that the case underlying the law report might date to the Lincolnshire Eyre of 1272; *Seipp's Abridgement*, no. 1272.007ss, which points to the possibility that the case is that recorded at JUST 1/483, membranes 47 and 48d.

[172] Brand, ed. and trans., *Earliest English Law Reports*, 4:536. See also Dunham, Jr., ed., *Casus Placitorum*, 69 (no. 11).

[173] These are viewable online at TNA JUST 1/483, m. 47, AALT no. 2064 (1272), http://aalt.law.uh.edu/AALT4/JUST1/JUST1no483/aJUST1no483fronts/IMG_2064.htm (Incipit: "Assisa venit recognitura si Reginaldus de Benningtone pater Alicie filie Reginaldi fuit seisitus in dominico suo ut de feodo de viginti et una acrae terrae cum pertinenciis…" (last accessed 20 December 2019) as well as the entry immediately following) and TNA JUST 1/483, m. 49v, AALT no. 2238 (1272),

http://aalt.law.uh.edu/AALT4/JUST1/JUST1no483/bJUST1no483dorses/IMG_2238.htm (Incipit: "Assisa venit recognitura si Reginaldus pater Alicie filie Reginaldi de Benningtone fuit seisitus in dominico suo ut de feodo de tribus acris terre cum pertinenciis…) (last accessed 20 December 2019).

[174] There was, incidentally, a literary motif in English and continental literature alike, found in such works as Lawyman's *Brut* and Chaucer's *Troilus*, of men disguising themselves as minstrels, pilgrims, or beggars, to mask their true reason for traveling freely. See *King Horn: A Middle English Romance* (Oxford, 1901), 154 (describing several examples of this motif); Francis P. Magoun, Jr., "Hymselven Lik a Pilgrym to Desgise: Troilus, V, 1577," *Modern Language Notes* 59/3 (1944): 176-78. Such anxiety was heightened in the post-plague decades of the late fourteenth century, when local regulations and royal legislation attempted to address the problem of mendicants, vagrants, pilgrims, and vagabonds who might be wandering for illicit reasons. See Susan Signe Morrison, *Women Pilgrims in Late Medieval England* (Abingdon, 2000), 54. On fiction in the Year Books, see David J. Seipp, "When Lawyers Lie: Forging an English Constitution in 1399," 311-29.

[175] Brand, ed. and trans., *Earliest English Law Reports*, 3:274-75. For the related law reports, see *ibid.*, 270-74. See also *Seipp's Abridgement*, no. 1285.040ss.

[176] Or could a writ have provided inspiration for legal chicanery? Consider, for example, the writ in *Bracton* to remedy the sorry plight of a man who, while traveling abroad, was maliciously accused of theft by neighbors who coveted his lands. Unaware of the summons against him, the man was wrongly outlawed for failing to appear in the county court; he was ultimately pardoned by the king. See *Bracton*, 2:371.

[177] My thanks to Paul Brand (personal correspondence, March 2018) for raising this possibility. Richard's wife is said to have received the rent from the lands for two years following Richard's departure. See *Earliest English Law Reports*, 3:272.

[178] Consider, for example, the case of Richard Curteys, who allegedly fatally struck Walter son of Walter le Fraunceys in the throat with a knife but was then received in the town of Pershore and eventually set off on pilgrimage to Santiago de Compostela with all his movable goods in tow. When this came to light in 1275, his home was confiscated and he was ordered to be outlawed. Jens Röhrkasten, ed., *The Worcester Eyre of 1275*, Worcestershire Historical Society Series n.s. 22 (Trowbridge, 2008), 413-14, no. 883.

[179] On this issue in modern law, see Charles Nesson, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts," *Harvard Law Review* 98/7 (1985): 1357-92. On the legitimizing nature of earlier medieval forms of proof, see generally H. L. Ho, "The Legitimacy of Medieval Proof," *Journal of Law and Religion* 19 (2003): 259-98.

[180] On this last point, see Michael Burger, *Bishops, Clerks, and Diocesan Governance in Thirteenth-Century England: Reward and Punishment* (Cambridge, UK, 2012), 54-55.

[181] Tennyson, *Enoch Arden*, 31.

[182] See supra, n. 29.

[183] See Alan Cromartie, "Hale, Sir Mathew (1609-1676)," *Oxford Dictionary of National Biography* (2004). My thanks to Ryan Greenwood. For an account of the trial written half a century later, see *A Tryal of Witches, at the Assizes held at Bury St. Edmonds for the County of Suffolk; on the Tenth Day of March, 1664* [sic] *Before Sir Matthew Hale, Kt.* (London, 1716).

[184] See Hale, *Historia placitorum coronae*, 2:290.

[185] *A Tryal of Witches*, 104.

[186] My thanks to K. J. Kesselring for calling this case to my attention. For documentary records of the case, see George Clark, ed., *The Campden Wonder* (London, 1959).

[187] Jonathan Goodman, *Bloody Versicles: The Rhymes of Crime* (Kent, OH, 1993), 105.

[188] Goodman, *Bloody Versicles*, 107.

[189] *Ibid.* Hale introduces a comparable logic in describing a factually similar case: "…A was long missing, and upon strong presumption B was supposed to have murderd him, and to have consumed him to ashes in an oven, that he should not be found, whereupon B was indicted of murder, and convict and executed, and within one year after A returned, being indeed sent beyond the sea by B against his will, and so, tho B justly deserved death, yet he was really not guilty of that offense, for which he sufferd." Hale, *Historia placitorum coronae*, 290.

[190] See James Morton, "Evidence in 'No-Body' Murder Trials," *Journal of Criminal Law* 70 (2006): 459-62, at 459 (observing that no convictions for murder absent a body or a confession occurred in England or Wales for nearly 300 years following the Campden Wonder, although the case had not technically produced a new rule). But see Bruce P. Smith, "The History of Wrongful Execution," *Hastings Law Journal* 56 (2004-2005: 1185-1233, at 1196-97 (arguing that in actuality English magistrates and justices were comfortable relying on circumstantial evidence even after the incident of the Campden Wonder).