Legal Procedure and the Law of Evidence in Ancient Egypt

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The ancient Egyptians established fixed procedures for dispute resolution. As is the case with modern U.S. law, the ancient Egyptian courts tried to follow precedent, recognized the importance of due process, and kept records of their decisions so that, when similar problems arose, they were able to resolve those problems in a consistent fashion. There was no viable appeal procedure until the first millennium B.C.; or if there was a right of appeal earlier, it was extremely limited in scope. The ancient Egyptian had his day in court (so to speak) and that was it. Indeed, most trials lasted only one day. Although there were no professional lawyers, scribes seem to have specialized in preparing legal documents for pleading, and also wrote wills and other documents of a legal nature. Thus, the scribal class functioned somewhat like lawyers or quasi-lawyers. But scribes did not plead cases for others as advocates. Most of the evidence points to a relatively simple procedural structure. The plaintiff, or the state official acting in the capacity of a prosecutor, brought his case (often by means of a written complaint), argued it, and then the defendant answered, arguing his case, followed by a summation. It is clear that both oral evidence (i.e., bringing in witnesses to speak on your behalf) as well as documentary evidence (e.g., contracts, wills, deeds, and tax records) were both admissible. However, the Egyptians preferred to have the testimony of their witnesses written down. The judges took an active role at trial, asking questions and interviewing witnesses. Witnesses were threatened with severe penalties for perjury and sometimes were tortured. Officials had authority to search houses and to seize property as evidence. Although the special courts were not bound by formulaic court procedures, they too relied on traditional judicial mechanisms (e.g., investigation) and standard types of evidence (e.g., witnesses, documents, searches, and visits to the scene of the crime). We are not sure how much power the courts possessed to enforce their judgments.

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I. INTRODUCTION

This Article begins by describing one particular lawsuit that provides a curious look at civil procedure and litigation (involving a variety of stages).[1] This case provides a partial paradigm[2] and reveals a blend of elements that are typical of ancient Egyptian legal procedure: various officials conducting investigations; witnesses testifying; parties using documents (some falsified) as evidence; and, the persistent retrying of the same issues again and again with diverse results. Although the text analyzed in this Article focuses on a dispute from the time of Ramses II (*c.* 1279-1212 B.C.), many of the relevant facts of the case stretch back to the beginning of the eighteenth dynasty (*c.* 1552 B.C.).[3]

This case involves several related disputes regarding the ownership of a parcel of land. The Great Court sitting in Heliopolis, with the vizier presiding, dispatched a commissioner to the district where the property in question was located. He appointed one of the parties, a woman named Wernero, as trustee to cultivate the land on behalf of her brothers and sisters. One sister objected and apparently convinced the commissioner to change his mind. The vizier then ordered that the land, which had hitherto been considered indivisible, be split into separate parcels for each of the six heirs. At this juncture, a man named Huy, the father of the principal litigant (whose name was Mose (or Mes)), and Wernero (Huy's mother) appealed the commissioner's decision to divide the property. When Huy died soon thereafter, his widow, Nubnofre, attempted to use self-help to retake the land by cultivating it, but she was ejected by a man named Kha-y. She then appealed unsuccessfully to the Great Court in Heliopolis. Years later, Mose, the son of Huy and Nubnofre (Wernero's grandson), again appealed to the Great Court. The Great Court reversed its prior decision, persuaded by witnesses who testified as to Mose's descent. It seems that, in the earlier case between

1. *See* T.G.H. JAMES, PHARAOH'S PEOPLE: SCENES FROM LIFE IN IMPERIAL EGYPT 93-97 (1984); William A. Ward, *Some Aspects of Private Land Ownership and Inheritance in Ancient Egypt, ca. 2500—1000 B.C.*, *in* LAND TENURE AND SOCIAL TRANSFORMATION IN THE MIDDLE EAST 63, 64-65 (Tarif Khalidi ed., 1984); SALLY L.D. KATARY, LAND TENURE IN THE RAMESSIDE PERIOD 218-21 (1989).

2. *See infra* text accompanying note 46.

3. *See* Schafik Allam, *Women as Owners of Immovables in Pharaonic Egypt*, *in* WOMEN'S EARLIEST RECORDS FROM ANCIENT EGYPT AND WESTERN ASIA 123, 132 (Barbara S. Lesko ed., 1989); JAMES, *supra* note 1, at 93; Ward, *supra* note 1, at 63, 64-65 ("The story of this estate began in the mid-sixteenth century B.C. when an ancestor of Mose, the Ship's-captain Neshi, was given a plot by the king as a reward for his services in war.").

Kha-y and Nubnofre, a commissioner had colluded with Kha-y to falsify the land records.

This account suggests that the Egyptians did not strictly adhere to the principle of *res judicata* to the extent done today. It is also notable that subsequent litigants were able to appeal what appeared to be final decisions to the same court.[4] Regarding the case of Mose, James concludes that "[this] demonstrates something of the care with which a case of this kind might be pursued; how documents lodged in official archives might be consulted; how legal decisions taken by such high courts could be challenged and, ultimately, reversed by the introduction of fresh evidence."[5]

In Middle Egyptian (the "classic" period of the ancient Egyptian language), the verb *mdw* was used to describe a legal dispute or litigation.[6] Legal procedure itself was of vital importance to the ancient Egyptians. It is likely that they never used a completely arbitrary method of decision-making, such as the River Ordeal practiced in Mesopotamia.[7] However, there may have been occasions when an oracle identified a thief by drawing names by lot.[8] In Deir el-Medina, local officials occasionally handled minor offenses on their own without resorting to the courts or an oracle. For example, in the case recorded on Papyrus Deir el-Medina 26 A recto, involving a workman who stole some lamps,[9] the accusing scribe searched the workman's hut and found the lamp but did not take the case to court.[10] Still, to the ancient Egyptian, having a formal dispute resolution process may have been almost as important as actually winning a case in court. The Egyptians realized that without a formal procedure for resolving disputes, individuals would perceive grave injustice. Working through the dispute resolution process was an

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4. *See generally* SIR ALAN GARDINER, EGYPT OF THE PHARAOHS 268-70 (1961); Ellen Bedell, Criminal Law in the Egyptian Ramesside Period 45 (1973) (Brandeis University, Ph.D. dissertation).

5. JAMES, *supra* note 1, at 97.

6. *See* ANDREA MCDOWELL, JURISDICTION IN THE WORKMEN'S COMMUNITY OF DEIR EL MEDINA 20-21 (1990) ("The verb *mdw* . . . is used almost exclusively with the meaning 'dispute' or 'contest.'" "Since in the overwhelming majority of cases the verb *mdw* means to dispute with someone at law, we may fairly translate it with "to litigate against."); *see also* R.O. FAULKNER, A CONCISE DICTIONARY OF MIDDLE EGYPTIAN 122 (1999) (defining "*mdw hn_* [as] 'dispute with' . . . *šm r mdt hn_* 'to go to law with'").

7. *See* Schafik Allam, *Legal Aspects in the 'Contendings of Horus and Seth', in* STUDIES IN PHARAONIC RELIGION AND SOCIETY IN HONOUR OF J. GWYN GRIFFITHS 137, 140 (Alan B. Lloyd ed., 1992).

8. *See* Bedell, *supra* note 4, at 252-54.

9. *Id.*

10. *See* MCDOWELL, *supra* note 6, at 202. It is interesting, however, that the accused apparently sought help from the oracle, but got none. *Id.*

essential element of justice.[11] Thus, they acknowledged the importance of something akin to modern "due process."[12] One Middle Kingdom (*c.* 2040-1674 B.C.) instruction text advises the judge, "The petitioner likes attention to his words better than the fulfilling of that for which he came. . . . It is not (necessary) that everything about which he has petitioned should come to pass, (but) a good hearing is a soothing to the heart."[13] Having a legal procedure was particularly vital for the poor and disadvantaged. "That the poor and weak could obtain justice was a fundamental object of the legal process in ancient Egypt. . . ."[14]

Scholars have been unable to detect any clear pattern or schedule that might constitute anything like a court calendar. The *knbt* could convene on practically any day. Texts exist that show courts in session on weekdays, weekends, and even during festival days.[15] It is likely that two factors most affected the scheduling of the *knbt* sessions: First, the urgency of any given case; and, second, the availability of the court officials. Interestingly, there is only one instance where two cases were heard on the same day, and the same person was the plaintiff in both

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11. *See* GARDINER, *supra* note 4, at 196 (noting that the viziers were instructed to allow litigants to speak their minds at great length).

12. *See* Aristide Théodorides, *The Concept of Law in Ancient Egypt*, *in* THE LEGACY OF EGYPT 291, 308 (J.R. Harris ed., 2d ed. 1971) (explaining the importance of the concept of due process); *see also id.* at 320 ("The Nile valley has given us no code, nor any copious theoretical treatises, but the application of law is coherent, despite peculiar features of procedure—the important point being that there was a procedure, with laws to organize it."); JOHN WILSON, THE CULTURE OF ANCIENT EGYPT 92-93 (1951) (discussing the Instruction of Ptah-hotep and emphasizing the importance of public and persuasive speaking). Wilson notes further:

> The interpretation of how *ma_at* was to be applied in the daily activities of the official is intensely practical. It is more important that the magistrate show a sympathetic face than that he take full and final action: 'If thou art one to whom petition is made, be calm as thou listenest to what the petitioner has to say. Do not rebuff him before he has swept out his body or before he has said that for which he came.'

Id. at 93.

13. WILSON, *supra* note 12, at 93; *see also* GARDINER, *supra* note 4, at 196. According to Gardiner, the tomb inscription of Rekhmire, vizier of Thutmose III, says about the job of vizier "that a petitioner better likes to be allowed to pour out his grievances than that they should be put right." *Id.*; *see also* Théodorides, *supra* note 12, at 308-09 (A good judge must give litigants a chance to have their say and must then explain the reasons for their decisions.).

14. JAMES, *supra* note 1, at 78.

15. *See* MCDOWELL, *supra* note 6, at 149.

> [T]he dates of the *knbt* sessions form no clear pattern: a proportionately higher number of court sessions took place on weekends and festival days, but a significant number (16 of the 42) were held on workdays. This contrasts with the distribution of oracle sessions, which show a marked preference for weekends, occurring relatively less often than did the court on weekdays and never known on a festival day, oddly enough.

Id. (citing the work of Vleeming).

cases.[16] Generally, a trial lasted for only one day.[17] In the Great Courts, the same panel of judges usually heard a case from start to finish.[18]

Egyptologists hypothesize that the judges reached their decision together; neither the chief judge nor any one judge had the authority to trump the decision of the group.[19] Courts ordinarily gave specific instructions regarding damages (or some other remedy). Scholars believe that courts did not merely declare a winner and loser.[20]

II. ADHERENCE TO PRECEDENT

Egyptian law was slow to evolve and adhered vigorously to precedent. One factor that contributed to this was the typical ancient Egyptian reverence for the past. Gardiner describes this reverence as a cultural trait that manifested itself as

> a conservatism of expression without parallel elsewhere in the world. No other people has ever shown a greater reverence for what was by them termed 'the time of the ancestors' 'the time of the god', or 'the first occasion'. Occasionally this love of the time honored and the typical led to downright falsification.[21]

As a consequence of this esteem for the past, judges relied on both custom and precedent to decide their cases.[22] It seems likely that, at certain periods, the courts also retained written copies of each judicial opinion.[23]

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16. *See id.* at 150-51.

17. *See* Bedell, *supra* note 4, at 46.

18. *See id.* at 53-54. Bedell notes that this was the case in the Great Tomb Robberies. *Id.*

19. *See* MCDOWELL, *supra* note 6, at 169 (citing the work of Théodorides).

20. *See id.* at 171.

> [T]he court not infrequently gave positive instructions in the form of an order to one party to pay a certain sum to the other." "As a matter of fact, no case ends simply with the verdict 'A is right, B is wrong.'—this is always followed by some action by the court or an oath by one of the parties.

Id. at 172.

21. GARDINER, *supra* note 4, at 56.

22. *See* MCDOWELL, *supra* note 6, at 119, 217 (discussing ancient Egyptians using legal precedent); *see also* Bedell, *supra* note 4, at 2 ("[I]n most cases, at least in the Ramesside Period, judicial decisions were based on precedent."); *id.* at 149 (referring to the Egyptians recognizing precedent).

23. *See* Janet H. Johnson, *The Legal Status of Women in Ancient Egypt*, *in* MISTRESS OF THE HOUSE MISTRESS OF HEAVEN: WOMEN IN ANCIENT EGYPT 175, 177 (Anne K. Chapel & Glenn E. Markoe eds., 1996) ("Egyptian judges based their decisions on traditions and precedent and kept copies of their decisions.") (footnotes omitted); Bedell, *supra* note 4, at 13-15; *id.* at 13 (referring to Egyptian use of precedent). Bedell explains: "We know that in the two Great Courts a record of each trial, which included the decision rendered by the judges, was kept on file in the judgment-hall." *Id.*

Litigants in the New Kingdom (*c.* 1552-1069 B.C.) occasionally cited to the "Law of the Pharaoh" as authoritative precedent.[24] Thus, the Egyptians discovered the utility of following precedent, comparable to the modern doctrine of *stare decisis*.[25] The vizier Rekhmire was explicitly advised to follow the precedents available: "As for the office in which you hold audience, it includes a large room which contains [the records] of [all] the judgements, for he who must practise justice before all men is the vizier. . . . Do not act as you please in cases where the law to be applied is known. . . ."[26] In practice, in the courts at Deir el-Medina litigants cited precedent when pleading their cases.[27]

By the Middle Kingdom (*c.* 2040-1674 B.C.), the Egyptians ordinarily required that trials be held in public and that records of decisions be kept. Written records of decisions were kept so that later judges could refer to them as precedent. In addition to the private records of the litigants, some official records of cases may have been kept at Deir el-Medina (i.e., during the nineteenth and twentieth dynasties (*c.* 1295-1069 B.C.)). There is one fragmentary papyrus (Papyrus Deir el-Medina 26) which appears to be one such account. The particular locations where several judicial ostraca were discovered may suggest that some sort of archive (where documents relating to the same incidents were stored) existed at Deir el-Medina.[28] However, more than likely, most extant judicial ostraca are records preserved by the interested parties whose rights were affected by the litigation. As McDowell says, "It is easy to imagine that a workman would keep a record of a law suit he had won in case the matter was reopened. . . ."[29] Thus, the prevailing party probably kept a record of the legal proceedings and the decision of the oracle or court.[30] "There are no indications, however, that any of the

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24. *See* Johnson, *supra* note 23, at 175, 177.

25. *See* 5 LEXIKON DER ÄGYPTOLGIE (1984), "Recht" 186; *see also* David Taylor, *Law Under the Pharaohs*, 6 POL'Y REV. 66, 67 (1980) ("The principle of *stare decisis* is not a western notion. The Egyptian courts based much of their law on precedent and there are examples of judgements based on decisions many hundreds of years old."); Théodorides, *supra* note 12, at 307-08 (explaining that the Instructions for the Vizier, whose "composition must go back to the 13th Dynasty . . .," say that "justice is to be rendered in public and in such a way that every individual shall always secure his rights. To this end, appeal is made to a sense of equity and also, by implication, to jurisprudence, since it is pointed out that the records of all judgements are kept in the vizier's archives, where they could certainly have been consulted. . . .") (footnote omitted).

26. Théodorides, *supra* note 12, at 309 (ellipses in original).

27. *See* JAMES, *supra* note 1, at 90-91.

28. *See* MCDOWELL, *supra* note 6, at 4-5.

29. *Id.* at 6.

30. *See id.* at 188.

"[I]t is likely that most accounts of the *knbt* and oracle sessions were drawn up for the individual who benefited from them; that is, that the litigant who won the case kept a

texts dealing with private legal disputes were destined for an official archive, although the possibility remains that some of the contents would be incorporated in an official compendium. . . ."[31]

III. OUTLINE OF LITIGATION PROCEDURE

Most Deir el-Medina criminal cases involve the same procedural sequence of events. A local official discovers a problem, reports it to the vizier, and the vizier, in turn, dispatches personnel to find out more details. Ordinarily, this involved taking suspects to the riverbank for questioning before a decision regarding guilt or innocence was made.[32] There were at least three criminal cases where suspects were taken to the riverbank for questioning.[33] Although scholars have advanced a number of theories regarding the interpretation of this procedure, McDowell contends that it simply means the suspect was brought to the riverbank and interrogated there.[34] "[A]fter a crime against the state, which was to be tried in the Great Court, was reported, the official state bureaucracy took over the investigation and eventual prosecution of the criminal. The person who made the accusation was usually called as a witness for the prosecution."[35]

Conversely, victims of civil wrongs had to bring the defendant to court. Neither police nor state prosecutors were responsible for bringing

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> record of the hearing and verdict as evidence for his newly established rights. These would be private documents, then, and it is not surprising that they are drawn up on ostraca, the cheapest and most abundant writing materia; they were kept in the village.

Id.

31. *Id.* at 7.

32. *See id.* at 157; *see also id.* at 202 (referring to local officials discovering crimes and then reporting them to superiors); *id.* at 202-08 (explaining the "oath of office" in the Egyptian judicial context, and the duty of officials in Deir el-Medina to report irregularities to their superiors); *id.* at 208 ("In sum, the oath of *sdf3 tryt* played an important part in criminal law, in that a work-related offense was thereby made also a violation of the oath of office, and in that everyone, down to the lowest workman, was obliged to report such offenses to his superiors."). *See id.* at 212 (describing criminal procedure in general). "[I]n the normal course of events a workman would lay his charges before the captains of the gang who would presumably investigate the matter and inform the higher administration if necessary." *Id.*; *see also id.* at 216 (referring to officials of Deir el-Medina reporting criminal conduct to the office of the vizier regarding the obligation to report irregularities). "In sum, everyone whose duties brought him into contact with the Necropolis and the work in progress there was responsible for reporting irregularities to his superiors. If there was any substance to these reports they would eventually reach the office of the vizier." *Id.*; *see also* Bedell, *supra* note 4, at 70 (referring to the duty of any citizen to report crimes to the authorities and also noting that the Nauri Decree required reporting of violations).

33. *See id.* at 221; *see also id.* at 157 (referring to taking an accused to the riverbank for interrogation).

34. *See* MCDOWELL, *supra* note 6, at 219-23.

35. *Id.* at 76.

these noncriminal cases to trial.[36] "Compensation was the main reason for civil actions, and the court did not usually physically punish the offender."[37] The first procedural step for any Egyptian who wished to institute a civil lawsuit against another was to apply to the vizier, who heard petitions daily in the mornings.[38] In the "hall of the vizier," ushers and bailiffs maintained order and lined up the petitioners on a first-come, first-served basis.[39] Thus, to commence a lawsuit, every petitioner had to submit his complaint to the vizier.[40] Originally such complaints may have been merely oral,[41] but the ancient Egyptians probably submitted cases to judges in writing even as early as the Old Kingdom (*c.* 2700-2200 B.C.).[42] The vizier next had to determine whether the petition was legally sufficient, and, if it was, he then notified the defendant. Afterwards, the defendant filed a written answer with the vizier. It is possible that the plaintiff was permitted to reply to the defendant's answer and that the defendant was also given an opportunity to respond to the plaintiff's reply (although the evidence is inconclusive). After all of the "briefs," such as written accusations and responses, were filed, the vizier conducted a hearing by summarizing the parties' arguments and asking them both questions.[43] As is true in modern litigation, the parties also had the option to settle their dispute before the court rendered its decision. This often happened when one of the parties expressly acknowledged liability in the face of convincing evidence.[44] Allam paraphrases the judge's order to Horus and Seth in their mythological

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36. *See* Bedell, *supra* note 4, at 179.

37. *Id.* at 191.

38. *See id.*

39. *See* JAMES H. BREASTED, HISTORY OF EGYPT 240 (1905).

> All petitioners for legal redress applied first to him in his audience hall; if possible in person, but in any case in writing. For this purpose he held a daily audience or "sitting" as the Egyptians called it. Every morning the people crowded into the "hall of the vizier," where the ushers and bailiffs jostled them into line that they might "be heard," in order of arrival, one after another.

Id. (footnotes omitted).

40. *See id.* at 240-41 ("Every petitioner to the king was obliged to hand in his petition in writing at the same office.") (footnote omitted).

41. *See* Johnson, *supra* note 23, at 175, 177 ("Civil lawsuits involved an oral petition to the court by a private individual.").

42. *See* Taylor, *supra* note 25, at 66.

43. *See* Théodorides, *supra* note 12, at 311. Civil procedure began with "lodging a petition with the vizier." *Id.* "When this petition had been declared admissible and notified to the defendant, who in turn made known his own case, and after each had replied, the vizier opened the hearing. He directed the proceedings, beginning in all probability by making known the arguments of the two parties, questioning them, referring to the evidence, and reserving the right to require fuller information. The vizier presided over the court. . . ." *Id.*

44. *See* Allam, *supra* note 7, at 137, 139-41 ("[M]any a trial came to an end by one of the two litigants making an avowal or acknowledgement.") (footnote omitted).

dispute: "Eating and drinking together is by far the best way for opposed parties to negotiate towards a prospective reconciliation."[45]

This Article begins by stating that the case of Mose was not a perfect or universal paradigm; however, it still illustrates a concise summary of basic civil procedure in ancient Egypt. First, the plaintiff filed a complaint with the vizier which explained the basis for the complaint. If the vizier deemed the complaint satisfactory, he then notified the defendant who was given an opportunity to answer the allegations. After this initial pleading stage, the vizier held a hearing at which he could question the litigants and examine the evidence.[46]

Even though there were no professional lawyers, who as advocates pleaded cases on behalf of clients, there were scribes who specialized in legal affairs.[47] These scribes produced legal documents for a fee.[48] James Breasted mentions that an ancient Egyptian deceased was expected to "personally represent himself and thus ensure himself the favor of the god in the hereafter."[49] Perhaps the expectation that the dead would plead their own cases merely mirrors the expectation that the living should plead theirs as well. However, in one sense, *The Book of the Dead* itself functioned like a boilerplate brief for the deceased to present to Osiris. This "brief" was intended to persuade Osiris and his fellow judges to permit the deceased to enter the Netherworld. Thus, the scribes who produced the scrolls containing *The Book of the Dead* were like lawyers who represented their clients via a written brief before the ultimate judge, Osiris. Breasted notes: "The general reliance upon such devices [i.e., *The Book of the Dead*] for escaping ultimate responsibility for an unworthy life must have seriously poisoned the life of the people."[50] He further notes: "In so far as the Book of the Dead had

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45. *Id.* at 141.

46. *See* Théodorides, *supra* note 12, at 311.

47. *See* Schafik Allam, *Egyptian Law Courts in Pharaonic and Hellenistic Times*, 77 J. EGYPTIAN ARCHAEOLOGY 109, 113 (1991) ("Certainly it was his familiarity with law and administration that attracted those who wanted to arrange their legal affairs. . . .") (footnote omitted); Allam, *supra* note 7, at 137-38; David Lorton, *The Treatment of Criminals in Ancient Egypt*, 20 J. ECON. & SOC. HIST. ORIENT 2, 4 (1977).

48. *See* Théodorides, *supra* note 12, at 311 ("There were no professional lawyers pleading instead and in place of their clients, but legal representation was known, and there must, moreover, have been specialized scribes who placed themselves at the disposal of the interested parties."); *see also* David Lorton, *Legal and Social Institutions of Pharaonic Egypt*, *in* 1 CIVILIZATIONS OF THE ANCIENT NEAR EAST 345, 355 (Jack M. Sasson ed., 1995) ("There was no legal profession in Egypt; people argued their own cases.").

49. JAMES H. BREASTED, THE DEVELOPMENT OF RELIGION AND THOUGHT IN ANCIENT EGYPT 287 (1912); *see also* NICOLAS GRIMAL, A HISTORY OF ANCIENT EGYPT 126 (Ian Shaw trans., 1992) ("These funerary formulae recount a ritual which was intended to ensure that the deceased passed through into the afterworld and an existence among the blessed.").

50. BREASTED, *supra* note 49, at 309.

become a magical agency for securing moral vindication in the hereafter, irrespective of character, it had become a positive force for evil."[51] Much the same could be said regarding clever lawyers today who are able to free the guilty on technicalities or with persuasive rhetoric.

IV. PRETRIAL & TRIAL PROCEDURE

In addition to the preliminary steps described in Part III, criminal courts routinely took the following measures as part of their pretrial phase. First, upon receiving a criminal complaint, officials initiated a preliminary investigation. Second, if the preliminary investigation proved fruitful, the officials intensified their investigation in an effort to identify and arrest suspects. Third, the officials submitted a list of suspects to the vizier, and they were deposed (i.e., questioned under oath). Officials questioned the suspects during their depositions in an attempt to locate stolen goods and to discover the identities of other criminals.[52]

It is unlikely that the legal system was completely optional. When a plaintiff accused a defendant, the defendant was under some degree of obligation to appear in court.[53] Either private citizens or law enforcement officials had the capacity to bring charges against another.[54]

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51. *Id.*

52. Bedell summarizes pre-trial procedure as follows:

> This pretrial procedure at least in its essential features was standard among Theban officials. The officials received a report of a crime from some source and they investigated. If they found that a crime had indeed been committed every effort was made to discover the identity of the criminals and arrest them. A list of thieves was then usually submitted to the vizier and a deposition was taken from the culprits. In cases of theft the deposition was mainly to aid in the recovery of the stolen property. In addition to capturing the criminals, there is reason to believe that the investigators uncovered all the information they could about their activities. This information was given to the judges to be used in the trial, and it is evident in the specific nature of their questions.

Bedell, *supra* note 4, at 81; *see also id.* at 78 ("It was also standard procedure in Thebes to take a deposition from thieves before their trial. The main purpose of the deposition was to discover the whereabouts of the plunder so that it could be recovered by state officials."); *see id.* at 79 (noting that depositions of suspected criminals were taken prior to trial); *id.* at 72 (referring to the *šmsw*—retainers—who "served the accused with some sort of summons that had the force of law behind it").

53. *See* MCDOWELL, *supra* note 6, at 16 ("When someone says that he . . . 'took' his opponent before the court, this therefore suggests that a certain degree of coercion was involved. . . ."); *id.* at 154 ("[S]ome meager evidence that a private person could force his opponent to come before the *knbt* can be found in various statements that one person 'took' another to court. . . . But on the whole, the evidence that someone could be forced to appear in court is weak.").

54. *See* Bedell, *supra* note 4, at 67.

In either case, the party who initiated the suit had the responsibility to bring the defendant to court and to prove his case.[55]

Civil trial procedure in the New Kingdom (*c.* 1552-1069 B.C.) ordinarily followed a prescribed sequence of events: First, with both litigants standing before the seated court judges, the plaintiff asserted his complaint. Second, the court declared the case "heard" and summoned the defendant to answer. Third, the defendant answered. It was crucial for the court to hear the sides of both parties.[56] Fourth, the court declared its ruling. The litigants then turned to each other and recited ceremonial pronouncements, the winner repeating the court's opinion and the loser agreeing to abide by it.[57] In some cases, at the close of the proceedings, the losing litigant formally promised not to reopen the case.[58] Courts regularly rendered their verdicts in simple terms: *A* is right, *B* is wrong.[59]

At the opening of a trial, the plaintiff usually spoke first. His opening statement ordinarily laid out the relevant facts of the case and explained the basis for his legal claim. In sum, he described the case and explained what he believed the defendant had done to injure him. This statement contained what the Egyptians called the *smi* ("the formal charge against a person").[60] There seem to have been neither idiosyncratic rules about the form nor prescribed content of the plaintiff's opening argument. Plaintiffs simply gave their version of the dispute as best as they could.[61] There exist a number of *ostraca* that record what appear to have been statements of plaintiffs. These are similar to depositions, or affidavits, that might have been read in court, or, at least, submitted to the court like a plaintiff's brief, explaining his version of the

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55. *See id.* at 69 ("It is probable that in local cases there was an official of the court who ensured that the defendant would appear for trial.").

56. *See* Allam, *supra* note 7, at 137-38.

57. *See* MCDOWELL, *supra* note 6, at 177 ("The loser does not seem to have had any choice in the matter, he swore his oath on order of the court."); ADOLF ERMAN, LIFE IN ANCIENT EGYPT 141 (1971); *see also* Bedell, *supra* note 4, at 82 ("Legal procedure in Egyptian courts of the Ramesside Period was not standardized, but officials adhered to certain basic principles of justice and the methods of conducting a trial which best served these fundamental beliefs."). Regarding trial procedure, Bedell writes:

> The Egyptians were a pragmatic people and simply did what was expedient in a particular situation. The introduction of evidence was somewhat haphazard, and it mattered little whether the prosecution or the defense presented his arguments first. The oath which the court administered to ensure against false statements was taken either before or after a beating, but sometimes it was not accompanied by a beating.

Id. at 83.

58. *See* MCDOWELL, *supra* note 6, at 37.

59. *See id.* at 24 ("[T]he standard verdict *m3_t A _d3 B* . . . means no more than *A* is 'right' or 'correct' in his claims, while *B* is 'wrong' or 'incorrect' in his actions.") (footnote omitted).

60. *See* Bedell, *supra* note 4, at 83-84; *see also* FAULKNER, *supra* note 6, at 227.

61. *See* MCDOWELL, *supra* note 6, at 165-66.

facts of the case.[62] In one rather curious text, the defendant's response actually precedes the plaintiffs' complaint.[63] We cannot conclude whether this necessarily means that the defendant really spoke before the plaintiffs as well. In that case, however, the defendant had a higher social standing than his accusers. Thus, his status may have influenced the scribe's decision to enter his statement in the record first. It is uncertain whether his status may have influenced the court to allow him to speak first.[64]

Scholars are not sure if the *knbt* at Deir el-Medina had fixed rules of court procedure. For example, it is unknown how the judges reached their decisions. Specifically, we do not know whether each judge's vote was equal, whether a simple majority vote controlled, or whether unanimity or consensus was required.[65] McDowell allows that "it need not follow that the court had to return a unanimous verdict; a majority opinion could have been enough, or perhaps some judges' votes counted more than others."[66] Some evidence suggests that judges, at least occasionally, articulated in writing the reasons for their decisions. One papyrus from the time of Thutmose III (*c.* 1479-1425 B.C.) in particular contains the conclusion of a case that was dismissed. The writing states the grounds for the decision and the factors considered.[67]

For criminal trials, the order of proceedings was basically the same as for civil trials, except that a state official, perhaps the vizier, took the place of the plaintiff. For criminal trials in the Great Courts, the plaintiff's opening statement was not required since the judges themselves functioned as prosecutors in those cases.[68] Bedell suggests that the defendant/accused (in a criminal case) was required to plead guilty or not guilty at the opening of the trial—just after the accusation was stated.[69] Apparently, an accused criminal defendant was presumed innocent until proven guilty. Bedell maintains that, if an accused refused

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62. *See id.* at 18.

63. *See* Bedell, *supra* note 4, at 85 (citing the slander case of the foreman H3y).

64. *See id.* at 85-86.

65. *See* MCDOWELL, *supra* note 6, at 148, 167, 170.

66. *Id.* at 170.

67. *See* Théodorides, *supra* note 12, at 310 (mentioning a case that shows a legal opinion that explains the basis of its the decision). He notes, "The statement given as to the grounds of the decision embraces the factors taken into consideration, followed by the legal basis of the sentence and the enacting terms. . . ." *Id.*

68. *See* Bedell, *supra* note 4, at 84; *see also id.* at 72 ("[I]n the extant records, a private citizen never acts as prosecutor in a criminal case tried in the Great Court of Thebes.").

69. *See id.* at 88-89 ("The first thing the judges wanted was a plea of guilty or not guilty because the nature of subsequent proceedings would depend on this plea."); *id.* at 145 ("[T]hroughout the tomb robbery texts, the term used for innocent was *w_b*, which literally means 'pure.'").

to confess and the prosecution was unable to produce a witness to testify against him, the accused had to be freed upon swearing an oath of innocence.[70] Ordinarily, criminal courts in ancient Egypt were legitimate deliberative bodies. They were not kangaroo courts staged merely to lend an appearance of authority to punishments. There exists evidence that several defendants in criminal cases pled not guilty, and were indeed later released.[71]

Since there were no advocates who represented the parties, judges took an active role in the litigation. They questioned the parties, often probing with great diligence.[72] The judges typically asked defendants a number of questions, for instance, whether he could produce a witness to support his claims. More often than not, the judge who is recorded as having asked a question was also the highest ranking member of the judges on the court.[73] In criminal cases where one defendant confessed, the judges sought evidence (through their questioning) that would advance the case against other co-criminals. The court also hoped to discover the whereabouts of stolen property. In addition, they pressed for details regarding how the criminals had accomplished their crime. In that way, the judges hoped to gain information that could help them prevent reoccurrences.[74] Thus, the judges extensively questioned criminals in an attempt to elicit accomplices, amounts stolen, the *modus operandi*, and the whereabouts of the plunder. In one tomb robbery case, a thief confessed and then told the court exactly how much gold and other valuables had been taken from the mummies in the tomb. In another case involving a theft from a temple of Ramses III, one of the thieves admitted that he had melted some of the gold that he had stolen

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70. *See id.* at 82, 105-06; *see also id.* at 142 ("If a suspect refused to confess to a crime after being subjected to repeated torture, and he had taken an oath in defense of his innocence the judges had to release him."); *id.* at 71 ("The burden of proof in local court actions was always on the accuser whether the crime was perpetrated against him or against the state.").

71. *See id.* at 90, 131; *see also id.* at 133 (noting that in one case a sailor named Amenhotep was beaten with a stick while testifying, later swore an oath of innocence, and was then declared innocent and set free).

72. *See id.* at 10 ("[I]n the Ramesside courts the judges thoroughly interrogated suspects to determine the truth in a particular case."); *see also id.* at 54 (referring to the judges asking witnesses questions during the trial); *id.* at 86-88 (referring to judges asking witnesses questions); *id.* at 86 ("The judges were responsible for questioning the plaintiff to make certain that his charges were true and that a crime had actually been perpetrated."); *id.* at 87 (recounting, specifically, questions asked by the judges in the H3y slander case); *id.* at 88 ("It is clear. . . that the judges were obligated to make sure that the accusations of the plaintiff were true. In the local courts this was accomplished by repeatedly questioning the accuser about details of the alleged crime."); *id.* at 88 (referring to judges asking defendants questions).

73. *See* MCDOWELL, *supra* note 6, at 168.

74. *See* Bedell, *supra* note 4, at 56-58, 91-98 (referring to judges questioning criminals who confessed, to discover how a crime was committed and where the stolen goods were hidden).

from the temple. Another thief confessed that he and his cohorts had fenced some of the gold taken from the temple of Ramses II, by purchasing corn with it.[75]

Judges were not confined to asking merely pointed, step-by-step questions of the sort that the modern law of evidence often requires on cross-examination, but could ask defendants open-ended questions. Such inquiries basically sought a narrative of criminal activity.[76] For example, in one case brought before the Great Court of Thebes, a woman by the name Taaper had witnessed a sale of stolen goods. At trial, one of the judges asked her to tell her version of the black market trafficking: "Come tell the story of this copper which you said was in the possession of . . . Peikharu. . . ."[77] Thus, the lion's share of the judges' questions were designed to resolve issues of fact. Unlike the cases heard by the oracles, there was very little discussion in the *knbt* relating to applicable laws and precedential cases. McDowell suggests that the paucity of reference to law is "mostly because the laws or customs involved were familiar to all concerned. . . ."[78] In addition to the judges, occasionally scribes—who may have functioned as prosecutors in these cases—were permitted to ask the witnesses questions.[79]

After the court rendered its decision, the nonprevailing party ordinarily took an oath promising to respect the court's decision. Or, if the court had sentenced the defendant to a punishment, the court itself might implement the penalty, such as beatings. For extremely serious cases, particularly in criminal cases, the court usually referred the matter either to the vizier or the pharaoh for final sentencing.[80]

V. EVIDENCE

A. Introduction

The ancient Egyptians often experienced difficulty obtaining solid, credible evidence. It was burdensome, for example, to discover who stole goods or who vandalized property.[81] But, as Bedell remarks concerning the courts in the Ramesside period, "there was an attempt to

75. *See id.* at 94-98.
76. *See id.* at 57.
77. *See id.* at 73.
78. MCDOWELL, *supra* note 6, at 166.
79. *See* Bedell, *supra* note 4, at 60.
80. *See* MCDOWELL, *supra* note 6, at 116-17; *see also* ERMAN, *supra* note 57, at 141. Erman states, "[I]n criminal cases . . . the accusations were addressed to the governor, who took the place of the plaintiff." *Id.* Then, instead of pronouncing the sentence itself, the court often sent the case to the king for sentencing if the court found the defendant guilty. *Id.* (footnote omitted).
81. *See* MCDOWELL, *supra* note 6, at 228.

base decisions on human experience, perception, and reason, such as testimony and material evidence. . . ."[82] Judges took into account many kinds of evidence including documents and the testimony of witnesses. In fact, the word used for witnesses, *mtrw*, was used not only for human witnesses but also for other types of evidence, such as written documents like letters.[83] Egyptian courts preferred the testimony of witnesses to other kinds of evidence. And although we cannot be certain whether courts in the Old, Middle, and New Kingdoms had verifiable rules of evidence, by the time of the Law Collection of Hermopolis (*c.* 700 B.C.), it appears that rules of evidence had been formulated.[84]

B. Witnesses & Oaths

Parties themselves routinely swore oaths to affirm the veracity of their assertions. In civil trials, witnesses could testify regarding the authenticity of documents, such as wills.[85] One provision in the Law Collection of Hermopolis allows—quite logically—that the testimony of the builders who constructed a house was competent to prove that the party claiming ownership was, indeed, the true owner of the dwelling in question.[86] The ancient Egyptians were very fond of putting a witnesses's testimony into writing and attached great importance to the permanence of written testimony.[87] It appears likely that a witness was required to affix some sort of signature on his written testimony (as a means of validation) when it was used as evidence in court.[88] The courts may have considered relevant the sheer number of witnesses who testified for or against a party. In one case, Papyrus Cairo 65739, for example, the prosecution produced a relatively large number of witnesses: three men and three women,[89] but the content and credibility of the testimony mattered more than numbers alone.

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82. Bedell, *supra* note 4, at 123.

83. *See* MCDOWELL, *supra* note 6, at 21; *see also* FAULKNER, *supra* note 6, at 121.

84. *See* Allam, *supra* note 47, at 109, 119.

85. For example, in the case of *Mose*, the court took into account "depositions of witnesses in the previous litigation over the land in his grandmother's time and verbal statements of his own contemporaries." Ward, *supra* note 1, at 63, 65.

86. *See* George R. Hughes, Preface, Additional Notes, and Glossary to GIRGIS MATTHA, THE DEMOTIC LEGAL CODE OF HERMOPOLIS WEST 33 (1975).

87. *See* ERMAN, *supra* note 57, at 136; *see also* MATTHA, *supra* note 86, at 77.

88. *See* GAY ROBINS, WOMEN IN ANCIENT EGYPT 137 (1993) ("Legal documents, which were often drawn up before the court and produced as evidence, had to be signed by witnesses to validate the contents.").

89. *See* Bedell, *supra* note 4, at 118-19.

Sources from the New Kingdom (*c.* 1552-1069 B.C.) confirm that both women and slaves were legally competent to testify in court.[90] Witnesses, however, were not always treated with a great deal of respect. Court personnel routinely beat or otherwise tortured witnesses.[91] In the case of the famous Great Tomb Robberies under Ramses IX (*c.* 1125-1107 B.C.), officials bound the hands and feet of at least one witness, beat him with a stick, and forced him to swear an oath or else suffer mutilation. After this cruel treatment, officials incarcerated the witness for further questioning.[92] Some of the thieves who testified were "beaten with sticks, and their feet and hands were twisted."[93] Those who were accused and tortured often confessed, but not always.[94] Modern scholars believe that in some cases an accused may have confessed to a crime not due to actual guilt but instead because of pressure and torture.[95] Occasionally, the Egyptian judges themselves became concerned that an innocent defendant might confess to a crime simply in an attempt to stop the beatings that were being inflicted.[96]

The torture of witnesses is an interesting phenomenon. The Egyptian courts tortured not only an accused, but also on occasion

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90. *See* ROBINS, *supra* note 88, at 137 ("[W]hile some female witnesses are known, the majority were men."); WILSON, *supra* note 12, at 203 ("[F]urther, such business documents as we possess from the Empire show that women had their own rights to property, to buying and selling, or to testifying in court."); Théodorides, *supra* note 12, at 307 (noting that slaves "could acquire property and bear witness at law, even against their masters").

91. *See* MCDOWELL, *supra* note 6, at 21 ("The *smtr*, 'examination,' of a witness could be a painful process, involving beatings and other forms of torture to encourage him to confess. . . .") (footnote omitted); Bedell, *supra* note 4, at 59-61 (referring to beating witnesses to elicit testimony and torture to try to induce a confession); *id.* at 90 ("He was examined by beating with the stick; his feet and hands were fettered . . . ."); *id.* at 97 ("[T]heir examination was made by beating with sticks, and their feet and hands were twisted."); *id.* at 101 ("[B]eating the accused and the witnesses was the most common method of checking the truth of their testimony."), *id.* at 102-03 (referring generally to the torture of witnesses); *id.* at 102 (according to Bedell, "Three instruments of torture were used, the stick, the birchrod, and a device for twisting.").

92. *See* GARDINER, *supra* note 4, at 300-01; *id.* at 300 (noting especially the examination of witnesses). "He was examined by beating with a stick, and fetters were placed upon his feet and hands; an oath was administered to him, on pain of mutilation, not to speak falsehood. . . . He was made a prisoner for further examination." *Id.*

93. J. Capart et al., *New Light on the Ramesside Tomb-Robberies*, 22 J. EGYPTIAN ARCHAEOLOGY 169, 172 (1936); *see also id.* at 187.

94. *See id.* at 188; *see also* MCDOWELL, *supra* note 6, at 198 (referring to torture used to elicit confessions).

95. *See* MCDOWELL, *supra* note 6, at 138 ("[H]e was seized upon and beaten. The evident confusion of the accused and the vehemence of his repeated denials leave the modern reader with the uncomfortable feeling that he was innocent all along and had simply been browbeaten into confessing a crime he had never committed.").

96. *See* Bedell, *supra* note 4, at 100 ("It was necessary for the judges to check the reliability of a confession because some suspects . . . pleaded guilty out of fear of the beatings used to elicit confessions. In Papyrus B.M. 10052 an accused criminal threatened to lie if the severe beatings were not stopped.").

ordinary witnesses who were merely offering testimony. In a similar vein, during warfare, enemy prisoners are routinely tortured in an effort to extract information. One must wonder whether the goal of such torture is to try to get information out of that particular prisoner. Clearly, to a limited extent the answer is yes. To another degree, however, enemy torture attempts to compel other prisoners to tell the truth. Such torture may increase the likelihood that other prisoners (the ones who see and/or hear their friends being tortured) will tell the truth in an attempt to avoid torture themselves. Perhaps as an analogy, torturing trial witnesses was meant to send a message to other witnesses that they should tell the truth in order to avoid torture.

One must wonder, though, about the viability of such a scheme. Procedurally it may be efficient since witnesses under threat of torture may make a trial run more smoothly because they say what the prosecutor or plaintiff wants them to say. The threat of witness-torture might also have the effect of preventing frivolous lawsuits. However, it might also decrease the willingness of citizens to testify at trial.

Although defendants in criminal trials were permitted to offer the testimony of witnesses into evidence,[97] the witnesses had to swear an oath[98] promising not to commit perjury.[99] The witness's oath ordinarily recited that the witness would suffer severe punishments if he committed perjury. It was common for a witness's oath regarding perjured testimony to invoke the same punishment as the wrong at issue in the case itself.[100] In the case of Mose, one female witness stated that her penalty for perjury would be a demotion in her household. "[I]f I speak falsely, may I be sent to the back of the house."[101] A male witness in the

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97. *See* Théodorides, *supra* note 12, at 312-13 (noting that criminal defendants could use witnesses to try to exculpate themselves).

98. *See* MCDOWELL, *supra* note 6, at 33. For more on legal oaths in general, see *id*. at 36-37. *See also* Bedell, *supra* note 4, at 123 ("An oath taken in a court of law no matter what its purpose was known as an oath of the lord (_nh n nb) and sometimes a great oath of the lord (_nh _3 n nb)." (footnotes omitted); FAULKNER, *supra* note 6, at 44.

99. *See* MCDOWELL, *supra* note 6, at 198 (referring to oaths against perjury); Théodorides, *supra* note 12, at 299; *see also* Bedell, *supra* note 4, at 129 ("All oaths taken by witnesses and defendants while testifying in Ramesside courts were among those that J. Wilson labeled assertory, confirming the truth of a statement or declaration.") (footnote omitted). Bedell notes two types of witness oaths: first, was the standard oath against perjury. It invoked a penalty for perjured testimony. Second, was an oath that a defendant took *sua sponte* as a declaration of innocence. Essentially, the defendant swore that he had not committed the crime as accused. *Id.* "[O]ften a defendant would take both types of oath, one given by the court swearing that he would not give false testimony and one taken specifically as a defense." *Id.* "[T]he cases of perjury that we know of seem to give conflicting evidence about the importance of the oath. In some cases perjury was treated as a serious crime and in others it was overlooked." *Id*. at 140-41.

100. *See* Bedell, *supra* note 4, at 126.

101. *See generally supra* Part I.

Mose case said that he would endure mutilation and banishment. "[I]f I speak falsely, may my [nose] and ears be cut off, and may I be sent to Kush."[102] A female witness in the Great Tomb Robberies trial summoned banishment as her penalty for perjury. "If I speak falsehood, may I be sent to Ethiopia."[103] In another oath, a witness invoked mutilation and impalement. "[H]e is to have his nose and ears cut off and be placed upon a stake."[104] It is likely, however, that the penalties recited in the witnesses' oaths were merely formulaic and served a cautionary function to remind the witnesses of the importance of truthful testimony. It is doubtful that witnesses guilty of perjury actually suffered such severe punishments as a consequence of lying under oath in court.[105]

In contested cases, the judges were forced to decide the case based on their interpretation of which witnesses were telling the truth and which were lying. The credibility of witnesses could play a decisive role in the difference between conviction and acquittal.[106] Furthermore, the status of a witness could affect his credibility. For example, the testimony of important individuals—such as the chief of police in one instance and the vizier in another—influenced the court nearly to the point of being dispositive.[107]

Empirically, more witnesses testified on behalf of the prosecution than of the defense, perhaps because of the prosecution's burden of proof. Without a witness, the prosecution would have difficulty proving a case.[108] There are very few cases where both prosecution and defense witnesses testified.[109] In fact, when defendants were able to produce a witness, the courts were inclined to presume that the defendants were innocent of the charges.[110]

In one tomb robbery case (Papyrus British Museum 10052), the prosecution accused Peikharu of ferrying thieves across the Nile River.

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102. *See* Bedell, *supra* note 4, at 127.

103. *See id.* at 126 (footnotes omitted).

104. *See id.* at 128 (footnote omitted).

105. *See id.* at 127-28.

106. *See id.* at 110 ("[T]he evidence of other witnesses who testified in the Great Court of Thebes was instrumental in convicting or defending the accused. The character and previous credibility of the witness was apparently important to the judges."); *see also id.* at 139 ("In many cases the oath of a defendant stood against the testimony of a witness who had also sworn to tell the truth, and the judges had to decide who was lying.").

107. *See id.* at 111.

108. *See id.* at 112, 117 ("In cases tried in the local courts the witness was almost a prerequisite for the prosecution.").

109. *See id.* at 113 ("A witness for the prosecution and a witness for the defense in the same case is a very rare occurrence in extant texts.").

110. *See id.* at 114 ("We can assume that when a witness for the defendant did testify in court, the judges almost always decided in his favor.").

Peikharu called another ferryman, named Nesamon, as a witness in his defense. In testimony that sounded like something out of the old Perry Mason T.V. series, Nesamon confessed that it was he, not Peikharu, who had provided transport for the robbers. In this instance, the defense witness proved to be critical.[111]

In a few cases, the widow of a deceased suspect was called as a witness. In these circumstances, the court's motive appears to have been a desire to locate the husband's share of the plunder,[112] although some judges seemed to suspect that the widows had some of the loot that their husbands had stolen. This was especially true if the widow had been living beyond her apparent means, for instance by purchasing slaves.[113] One situation involved sons of deceased suspects who had to testify regarding what they knew about their fathers' thefts. By the time of the trial, the sons testified that they were mere children back when the thefts had occurred.[114] In one tomb robbery case, the court demanded that a servant identify which tomb her master had robbed, despite the fact that he had died in the interim.[115]

There exists at least one instance (Papyrus Mayer A) where testimony that would be hearsay today was admitted into evidence. In this tomb robbery case, a prosecution witness, a herald named Perpethew, testified that he had *heard* that a butcher named Pennestytauy had been involved in the robberies in some unspecified fashion. Pennestytauy pleaded innocent. Ultimately, the boss of the thieves testified that Pennestytauy had not been involved. Thus, although hearsay testimony appears to have been admissible, in this particular case, it proved to be untrustworthy (and probably just plain false).[116]

C. Documents and Other Types of Evidence

Parties were more likely to use documentary evidence in civil cases than in criminal ones due to the very nature of the litigation involved.[117] Documents, in particular, could be important in establishing facts.[118] And as a rule, the testimony of witnesses was rarely used in isolation, but rather was used either to corroborate documentary evidence or to

111. *See id.* at 112.
112. *See id.* at 114, 117.
113. *See id.* at 115.
114. *See id.* at 116-17.
115. *See id.* at 101.
116. *See id.* at 113-14.
117. *See id.* at 120.
118. *See* PIETER WILLEM PESTMAN, MARRIAGE & MATRIMONIAL PROPERTY IN ANCIENT EGYPT 68, 84 (1961); *see also* Théodorides, *supra* note 12, at 311.

impeach it.[119] Especially in cases involving contract disputes, land ownership, or disagreements over wills, litigants produced the relevant documents (or purported documents) as evidence.[120] In the property dispute of Mose,[121] for example, the vizier examined title deeds. In the same case, other officials examined official records of the granary and treasury at the Northern capital of Pi-Ra–messe.[122] When the officials themselves conspired to falsify those documents, Mose resorted to bringing in witnesses (both men and women) who swore to his lineage and swore that his father had cultivated the land in question and had paid taxes. The court changed its mind on the basis of these witnesses and the prior written evidence.[123] As another illustration, the Law Collection of Hermopolis required that a plaintiff actually produce an annuity contract in court as a means of proof.[124] Similarly, a valid receipt was considered competent documentary evidence.[125]

In one case (Papyrus Mayer A) the defendant, Howtenefer, was accused of robbery. He argued that his financial situation was such that it

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119. *See* Théodorides, *supra* note 12, at 311 ("[L]egal decisions were made on the basis of documentary proof, supported by witnesses' evidence.").

120. *See* Bedell, *supra* note 4, at 106; *id.* at 117 ("[T]he witness was the most common means of proving an allegation."); *id*. at 122 (mentioning the case of Mose relating to "the dispute over the ownership of lands between Nebnefret and Khay"); *id.* at 123 (referring to problems with litigants attempting to use forged documents as evidence).

121. *See generally supra* Part I.

122. *See* Allam, *supra* note 47, at 109, 114; GARDINER, *supra* note 4, at 269. Gardiner notes:

> His deposition was immediately followed by that of the defendant Kha_y, and it is from their combined statements that we learn what had happened. When the Vizier came to examine the title-deeds he could not fail to perceive that there had been forgery on one side or the other. Nubnofre then proposed that a commissioner should be sent with Kha_y to consult the official records of Pharaoh's treasury and granary at the northern capital of Pi-Ra_messe.

Id.; *see also* GRIMAL, *supra* note 49, at 261 (referring to the location of Piramesse).

123. *See* GARDINER, *supra* note 4, at 269:

> [T]o Mose, determined to recover his rights, no alternative was now open but to establish with the help of sworn witnesses the facts of his descent from Neshi and of his father's having cultivated the estate year by year and having paid taxes on it. The testimony afforded by the men and women cited by him, taken together with the written evidence previously used, no longer left any uncertainty as to the rightness of his cause, and though the end of the hieroglyphic inscription is lost we cannot doubt that the Great Court together with the lesser one at Memphis delivered a final verdict re-establishing Mose in his inheritance.

Id.; *see also* Christopher J. Eyre, *Peasants and "Modern" Leasing Strategies in Ancient Egypt*, 40 J. ECON. & SOC. HIST. ORIENT 367, 385 n.101 (1997); Ward, *supra* note 1, at 63, 65 ("His documentation was impressive: family records going back 300 years; a copy of the official land-register which named his parents as the owners; a copy of the official tax-assessment records showing his family had paid the taxes on the land. . . .").

124. *See* MATTHA, *supra* note 86, at 100.

125. *See id.* at 97.

should be obvious that he had not robbed anyone; he was not living beyond his means. This argument is a savvy one. Many a criminal has been caught when detectives discover that he has an inflated bank account. However, in fact, he was ultimately released after another witness—who had originally testified against him—later recanted his fabricated testimony.[126] Interestingly, the witness who recanted, a slave named Degay, had already admitted guilt himself.[127] But we know from other cases as well that when a defendant was charged with robbery, evidence relating to his finances could be especially relevant.[128]

In addition to witness testimony and legal documents, the ancient Egyptians also searched homes and visited crime scenes, sometimes discovering stolen objects in the process, to obtain evidence.[129] Officials were entitled to search houses of persons who had been accused of theft, but we do not know the scope of the suspects' rights, nor do we know what degree of suspicion was required before such a search could be made.[130] In short, scholars have very little idea of whether the Egyptians had any protections for individuals' rights analogous to the U.S. Constitution's prohibitions regarding unreasonable searches and seizures. As a means of acquiring additional evidence, occasionally judges required an accused to accompany them to a crime scene, such as a tomb that had been robbed. There, the court asked specific questions about the precise nature of the criminal deeds.[131]

VI. PROCEDURE IN THE SPECIAL COURTS

In certain extraordinary circumstances, the king took it upon himself to appoint a special court to deal with unusually sensitive cases.[132] In those instances, the procedures followed may have been ad hoc.[133] There are three kings who appointed famous special courts: Pepi

126. *See* Bedell, *supra* note 4, at 90-91, 108.

127. *See id.* at 108.

128. *See id.* at 116. Bedell mentions two suspects in the Great Tomb Robberies, Irinefer and Ese: "[T]he court thoroughly investigated their financial status." *Id.*

129. *See id.* at 123 (referring to other physical evidence used in court during the Ramesside Period); Jacke Phillips, *Tomb-robbers and their Booty in Ancient Egypt*, *in* DEATH AND TAXES IN THE ANCIENT NEAR EAST 157, 166 (Sara Orel ed., 1992).

130. *See* MCDOWELL, *supra* note 6, at 134 (describing a case involving a search for stolen property in the hut of the accused).

131. *See* Bedell, *supra* note 4, at 101.

132. *See id.* at 74 ("In a few cases serious crimes against the state were reported to Pharaoh. Pharaoh then delegated certain members of his bureaucracy to investigate the alleged offenses."). Bedell gives an example of one such case involving the theft of gold and silver from a temple at Medinet Habu. *See id.*

133. *See* BREASTED, *supra* note 39, at 499. "The old Pharaoh . . . appointed a special court for the trial of the conspirators." *Id.* His charge to the court "lay upon the judges a responsibility for impartial justice on the merits of the case, with a judicial objectivity which is remarkable in

I (*c.* 2325 B.C.), Ramses III (*c.* 1186-1154 B.C.), and Ramses IX (*c.* 1125-1107 B.C.).[134] The earliest example of these extraordinary procedures comes from the sixth dynasty during the reign of king Pepi I.[135] Pepi, as mentioned above, appointed one special prosecutor—a man named Weni—who wrote a report and acted as a single judge for deciding the case.[136]

In an exceptional criminal case, Ramses III selected a special commission to investigate a plot to assassinate him, hatched and developed from within his own harem.[137] He originally appointed fourteen men to serve on the committee to investigate this infamous harem conspiracy.[138] But in this case, the pharaoh expressly ordered the commission to handle all of the details itself, because he did not want to be involved.[139] Apparently, the matter was so personal that Ramses did not want to let his emotions affect the process and, thus, he insulated himself from the proceedings. It was unusual that the same judicial body in this case was empowered both to determine guilt or innocence *and* also to determine the sentence. Often in Egyptian legal procedure, one body decided the merits of a case and another was responsible for sentencing.[140]

In this case, several members of the royal harem originally formulated the plot. Later, members of the military and other officials conspired with them to assassinate Ramses III. Most of the conspirators were attached to the royal household. Their scheme was to kill Ramses

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one who held the lives of the accused in his unchallenged power and had himself just been the victim of a murderous assault at their hands." *Id.* Among the charges, Ramses III reminded the court: "Give heed and have a care lest ye execute punishment upon [anyone] unjustly. . . ." *Id.*; *see also* ERMAN, *supra* note 57, at 141 ("There were of course particular cases, which formed exceptions to the usual procedure of justice. . . ."); *id.* at 142 (explaining that when unusual circumstances occurred, like when the accused persons were close to the king, he would take control of the case away from the usual system and appoint one or more ad hoc judges/fact finders).

134. *See* ERMAN, *supra* note 57, at 142.

135. *See id.*

136. *See id.*

137. *See* BREASTED, *supra* note 39, at 500.

138. *See id.*

139. *See id.*

140. *See* Théodorides, *supra* note 12, at 313. "Some cases were tried by extraordinary means." *Id.* Théodorides gives the example of the "Judicial papyrus of Turin" from the twentieth dynasty in which Ramses III "appointed a special commission, instructing its members to judge the guilty severely but justly, and without referring the matter to him." *Id.* This extraordinary procedure was used because the alleged criminals were involved in a plot to assassinate Ramses, and he thought that he should distance himself from the judicial process. This also presents an unusual case in that the special tribunal both conducted the investigation and carried out the sentence. "Usually in criminal cases authority for the examination of a case was distinct from authority to pass judgement." *Id.*

and to instigate a coup. It was actually after the confederates were arrested that Ramses appointed the commission to investigate.[141] The pharaoh wrote special instructions for this ad hoc "court," telling them to execute those who deserved it but not to tell him anything regarding the matter. In order to operate more efficiently, this commission divided itself into two separate subcommittees. A six-member subcommittee dealt with one group of conspirators and a five-member subcommittee dealt with the others.[142] Interestingly, in the midst of the investigation, three members of the six-person subcommittee were arrested because they were becoming friendly with the harem women. The members of the commission who were arrested for cavorting with the women were tried, convicted, and punished by having their noses and ears cut off.[143] When the other members of the commission had completed their work, the guilty conspirators were forced to commit suicide.[144]

To investigate the royal tomb robberies that occurred under Ramses IX, the pharaoh instructed the vizier to convene a special commission to inspect the pilfered tombs and to report back to the vizier. The commission was empowered to arrest suspects and to hold them pending trial by the vizier and other high officials.[145] The vizier, personally reexamined the scene of the crime.[146] In these extraordinary cases, the vizier wrote an opinion that delineated which defendants were guilty and

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141. *See* ERMAN, *supra* note 57, at 142. "We have a more detailed account of a similar lawsuit of later time, concerning the great harem conspiracy under Ramses III." *Id.* The military, the harem, and other officials were involved in the plot. Ramses "avoided the regular lawcourts, and appointed a number of trusted personages to form a special court of justice, and gave them discretionary powers over the life and death of the criminals." *Id.* "Certain persons belonging to the royal household (fictitious names are given) had conspired against his majesty and planned an open rebellion. The harem formed the centre of the conspiracy." *Id.*; *see also id.* at 143 (The conspirators were discovered and arrested, "and brought before a kind of court-martial, consisting of officials of high and low rank, whom the king believed worthy of his special confidence.").

142. *See id.* at 143.

143. *See id.* at 144 ("[T]heir punishment was fulfilled by cutting off their noses and ears.").

144. *See* BREASTED, *supra* note 39, at 498-500 (describing the Ramses III harem conspiracy.).

145. *See* Théodorides, *supra* note 12, at 312 (describing the twentieth dynasty Tomb Robberies, Théodorides says:

> In the most serious cases, such as crimes of pillage in the royal necropolis, it appears to have been on royal indictment that the vizier instituted public proceedings. He began by appointing a commission of inquiry which inspected the scene of the crime and reported its conclusions. The suspects, after being arrested and imprisoned, appeared before the court, which apart from the vizier was composed of high officials. . . .

Id.; *see also* GRIMAL, *supra* note 49, at 188.

146. *See* Théodorides, *supra* note 12, at 312.

which would be acquitted. He then passed his opinion on to the pharaoh who sentenced the guilty.[147]

Based on the case of the Great Tomb Robberies under Ramses IX, McDowell reconstructs and summarizes the procedures of the special courts as follows:

> [T]he standard procedure was for irregularities in the necropolis to be reported to the vizier and other high-ranking officials in Thebes. These would then have sent out a commission to investigate the charges, drawn up a list of suspects, and had them arrested. The vizier and his colleagues themselves would interrogate the suspects, perhaps crossing over to the necropolis to inspect the scene of the crime, and rule on the guilt or innocence of the accused; but the punishment of the thieves was the choice of Pharaoh. A report of the proceedings would be sent to him and the guilty would be imprisoned to await his decision. In all probability he would order their execution.[148]

VII. APPEAL

The judicial system at Deir el-Medina had no procedure for appeal in a modern sense. We know of no case where a losing party appealed to another authority outside of the community for a second opinion. Nor do the sources indicate that someone who lost a case that had been decided by a court could then appeal the matter to the oracle, or vice versa. In fact, a party who lost his case before the *knbt* routinely swore an oath promising not to reopen the issue. For the most part, cases appear to have been adjudicated in a particular forum, by *knbt* or oracle, on the basis of subject matter.[149] Therefore, appeal to another forum was virtually inconceivable.[150] There are a number of instances, however, where the prevailing party took his opponent to court a second, third, or fourth time.[151] Apparently, these cases illustrate attempts merely to reinforce the initial trial and to apply public pressure to coerce the loser into complying with the court's original order. In one case from outside of Deir el-Medina, a man who was convicted of theft by an oracle of

147. *See id.* Théodorides explains that, after this preliminary investigation, the vizier wrote down his conclusions. He then could uphold charges against those whom he deemed guilty and dismiss charges against the others. He sent his written conclusions to the king who ultimately decided the punishments for the guilty. *Id.*

148. MCDOWELL, *supra* note 6, at 192.

149. *See id.* at 118.

150. There are three cases, each involving a storehouse (i.e., real property that technically was probably owned by the state), which *may* have been the subject of some sort of appeal, either from an oracle's decision to a court or to some unspecified authority. The fact that these three cases each involved a storehouse coupled with a lack of details in these enigmatic texts combine to render conclusions about these cases extremely tentative and uncertain. *See id*. at 184-86.

151. *See id.*

Amon later appealed his case to two other Amons. In both instances, the "appellate gods" affirmed the prior verdicts.[152] In general, there seems to have been considerable cooperation between the oracle and *knbt* in Deir el-Medina.[153]

Thus, although there is some evidence to the contrary,[154] conventional wisdom teaches that the Egyptian system did not have higher appellate courts, so that parties basically had only one chance to prove their case. Yet, even though appeal was not technically available, the same court could hear the same case again if new evidence came to light.[155] Some Egyptologists maintain that the pharaoh himself could and did act as a kind of appeals court. In one case (Ostracon British Museum 5631 recto) for example, after a man was accused of stealing copper objects, a Delta official sentenced him to penal labor. His father appealed to the pharaoh who ordered the defendant's release.[156] Breasted argues that there were some instances when a litigant could appeal directly to the king as early as the Old Kingdom (*c.* 2700-2200 B.C.).[157]

By the twenty-second dynasty (*c.* 945-715 B.C.), the Egyptians did finally institute changes providing for appeals in their civil and criminal procedure. In civil cases, a right of appeal was granted. In criminal cases involving minor offenses, defendants also were permitted to appeal. Interestingly, the appeal was made to an oracle for judgment. As a practical matter, though, it is doubtful whether this right of appeal actually had a significant effect on the administration of justice.[158]

VIII. ENFORCEMENT

Generally speaking, one of the key weaknesses of Egyptian procedure was its lack of enforcement mechanisms. As Eyre relates:

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152. *See id.* at 183, 185.

153. *See id.* at 186 ("[B]oth the oracle and the court seem to have reflected the same popular consensus on the rights and wrongs of the matters at issue.").

154. *See* Allam, *supra* note 7, at 137, 139.

155. *See* Théodorides, *supra* note 12, at 310. "[T]here was no higher jurisdiction to which appeal could be made against a judgement pronounced by an inferior court." *Id.* But the same court could hear a case again "in the light of fresh evidence." *Id.*; *see also* Allam, *supra* note 7, at 137, 138; MCDOWELL, *supra* note 6, at 135; Bedell, *supra* note 4, at 267 (stating that decisions by the oracle could be appealed to the courts and vice versa).

156. *See* Bedell, *supra* note 4, at 32-33.

157. *See* BREASTED, *supra* note 39, at 81-82 ("Under certain circumstances, not yet clear to us, appeal might be made directly to the king, and briefs in the case submitted to him. Such a brief is the document from the Old Kingdom now in Berlin. . . .").

158. *See* Théodorides, *supra* note 12, at 317 ("[J]udicial procedure underwent a change to the extent that plaintiffs could appeal to the oracle for judgement in civil cases and those involving minor offences.") (footnote omitted); *id.* at 318 (noting that ordinary tribunals continued their work and "criminal cases remained the exclusive province of the vizier's court until the end of the New Kingdom.") (footnote omitted).

"One of the most noticeable aspects of the legal texts from Deir el-Medina is the apparent difficulty in getting any enforcement of 'decisions' expressed by the local tribunal."[159] For example, in a handful of Deir el-Medina cases, we know that the party who was found liable (or guilty) managed to elude the authorities and simply never complied with the court's final order.[160] According to McDowell, "[T]he *knbt* had very little actual power to enforce its decisions. It relied on its prestige for its effectiveness, and on the fact that the entire village was often witness to the legal proceedings, which probably put considerable social pressure on the litigants to abide by the court's decision."[161] Contradicting the standard view that the court's decisions had no actual teeth, there is other evidence that suggests that the *knbt* did have the muscle to enforce some of its decisions.[162] It is possible that the court itself was supposed to enforce its judgments.[163] Later, in the second century B.C., a "bailiff was empowered to enforce judicial decisions up to the imprisonment of a judgement debtor."[164]

159. C.J. Eyre, *Crime and Adultery in Ancient Egypt*, 70 J. EGYPTIAN ARCHAEOLOGY 92, 102 (1984) (footnote omitted); *see also* MCDOWELL, *supra* note 6, at 2 ("[I]t is by no means clear whether the local bodies had the power to enforce their verdicts.").

160. *See* MCDOWELL, *supra* note 6, at 177-78 ("I count some half dozen cases in which a litigant is known to have disobeyed the court without penalty, some of which are simply outrageous.").

161. *Id.* at 117; *see also id.* at 171 ("Evidently the court could decide where justice lay, but could not ensure that it was done.").

162. *See id.* at 171 ("[T]he local court did have the mechanisms and power to carry out its will even in routine business disputes."); *id.* at 172 ("[T]he court is occasionally seen to take effective action, both in the form of execution against the property of the offender and in the form of physical punishment."); *id.* at 173 ("[T]he court did often phrase its verdict in active rather than passive terms, and . . . it did have some means to enforce its decision."); *id.* at 179.

163. *See* Allam, *supra* note 7, at 137, 142.

164. Allam, *supra* note 47, at 109, 124.