OUTLINE — LECTURE 15

The Commentators

An Attempt to Summarize the Whole Period

Van Vechten Veeder,1 Foreword to J. MacDonald ed., *Great Jurists of the World* (CLHS 2, 1914) p. xxi:

“The Glossators aimed to explain difficult passages, and their work, as collected by Accursius in 1260, constituted the staple of legal learning for centuries. The Glossators were animated by the belief in authority characteristic of the Middle Ages, and their work is therefore without historical perspective; but they rendered a service of great value in collecting and preserving the text of the great monuments of Roman law.

“The post-Glossators or Bartolists, applied to the law the methods of the Schoolmen, developing the comparatively simple methods of their predecessors into a highly artificial system. While they contributed little of importance to the knowledge of Roman law, they undoubtedly aided in adapting it to a later age. To Alciati and Cujas we are indebted for the methodical presentation of Roman law as a portion of classical antiquity. By directing their attention to the sources, and studying them in their historical perspective, they contributed materially to a real understanding of the subject. The influence of Alciati and Cujas in the direction of historical and positive jurisprudence soon gave way, however, to the philosophical conception of natural law.”


What’s wrong with Veeder?

1. Almost everything that he says about the ordinary gloss is wrong.
2. The post-Glossators cannot be regarded as the ones who “applied to the law the methods of the Schoolmen.”
3. Alciati and Cujas are leaders of the humanist school of jurisprudence (16th century).
4. The natural law school is a phenomenon of the 17th century, and we’re a long ways away from that yet.

‘Civilians’

Odofredus de Denariis (†1265) (Bologna, all CJCiv)
Jacobus de Ravaniis (Jacques de Révigny) (†1296) (Orléans, all CJCiv)
Dinus de Mugello (†c.1303) (Bologna; 1st *consilia*, De regulis iuris)
Petrus de Bellapertica (Pierre de Belleperche) (†1308) (Orléans; Inst., Dig. Nov., Cod.)
Oldradus de Ponte (†1335) (Bologna, Pauda; consilia)
Cinus de Pistoia (1270–1336) (imperial judge, Siena; Cod.; teacher of Bartolus)
Johannes Faber (Jean Fauri) (†a.1350) (probably not a teacher; Inst.)
Bartolus de Saxoferrato (1313–1357) (Perugia; all CJCiv; teacher of Baldus)
Baldus de Ubaldis (1319/20 or 1327–1400) (Perugia, Pavia; most of CJCiv and some CJCan, consilia)
Johannes Christopherus Portius (Parcus, Porcus) (fl. 1434) (Inst.)
Paulus de Castro (†p.1441) (Florence; Dig., some Cod., consilia)
Alexander Tartagnus de Imola (†1477) (Bologna; consilia)
Jason de Mayno (1438–1519) (Padua, teacher of Alciatus; consilia)
Philippus Decius (1454–c.1535) (Pisa; consilia)
Robertus Maranta (c. 1476 – c. 1534 (Naples, proceduralist)

Civilians of this period

1. Like the glossators, almost all of the commentators were teachers.
2. Just as the school of Martinus had broken away in the mid-12th century and was brought back into the Bolognese mainstream by Azo and Accursius, so too, the commentators brought back into the mainstream the work of the French professors of the late 13th century.
3. By and large, the Italian commentators are associated with the imperial (Ghibbeline) faction of Italian politics.
4. Increasing use of custom and statute.
5. Incorporation of canon law.
6. Consilia are a new form of literature in this period.

Canonists

Henricus de Segusio (Hostiensis) (†1271) (diplomat, prelate; X)
Johannes Andreae (†1348) (Bologna; X, VI, Clem.)
Aegidius Bellamera (Gilles Bellemere) (†1407) (auditor of Rota; X, Decisiones Rotae)
Antonius de Butrio (†1408) (Bologna; X)
Franciscus Zabarella (Cardinalis) (†1417) (Padua; X, Clem.)
Nicolaus de Tudeschis (Panormitanus, Abbas Siculus) (†1443) (Siena; X, VI)
Johannes de Turrecremata (Torquemeda) (†1468) (cardinal; Decreta)

Canonists of this period

1. Encyclopedic commentaries
2. Continued development of procedure
3. The development of conciliarism
4. Consilia

The development of the ius commune
Among proceduralists even in the 13th century the distinction between canonists and civilians will not hold water. We have indicated above that the distinction among the academics was becoming increasingly blurred in the later MA. Among the practicing lawyers it is hardly to be found at all. Both canonists and civilians get legal jobs in the church. Some churchmen with law degrees have degrees only in civil law. Some laymen have doctorates in both laws. Johannes Andreae was a layman and seems to have had a degree only in canon law. Professional associations of lawyers from doctors’ commons in England to the guilds of lawyers in Italy rarely distinguish between holders of the two kinds of degrees.

By the 14th century lawyers all over Europe are referring to the *ius commune*, the common law. It means the law that Europeans have in common, a combination of Roman and canon law, to be distinguished from the customary law of a particular city or region or the law embodied in the statutes or *fueros* of a particularly city or region. A notion of a hierarchy of sources prevailed over most of Italy and southern France as well. Local statute was primary. If it applied to the case, it was binding. After that came the *ius commune*. But the power of the *ius commune* was even greater than the hierarchy would seem to suggest, because the local statutes were interpreted in the light of the *ius commune*. The terminology and structure of the *ius commune* was the terminology and structure that every trained jurist used, and jurists were increasingly used as judges and consultors. Some of them participated in the drafting of the statutes for the city-states.

None of this would have been possible had it not been for the effort that had been going on for over two centuries to tame the sources, to make Roman law and the vast assemblage of canonic sources usable in a world far different from that in which most them had been written. None of it, too, would have been possible had the jurists not shared a common training and a common methodology.

**The ‘Bottom Lines’**

1. *Wild Animals*. When we were examining the law of wild animals, we noted that Accursius seemed to be trying to accommodate what his Roman-law texts were saying to contemporary realities by moving in two directions: First, he was quite firm in his opposition to poaching. Second, he twisted the Roman-law texts, although he had some support here from minority view expressed in those texts, to make things easier for the legitimate hunter. The commentators, we will see, because they recognized, as Accursius formally did not, that there was law that was not Roman law were more willing to let the Roman texts say what they pretty clearly mean. We also noted that the glossators were interested in the texts about capture of wild animals because they raised issues about a more general conceptual concerns about possession. This concern continued. It is particularly noticeable in writers who were trying to make a construct of law that they regarded as the “law of nature,” because Justinian had said that occupation of unowned things was one of the “natural” modes of acquisition.

2. *Marriage*. The commentators on marriage have not received a very good press. The basic scheme had been fixed by the canon law at the beginning of
the 13th century by Alexander III and Innocent III. The problem was to return in the 16th century (Trent 1563) in ways and for reasons that we will see, and much needed to be done in individual cases as we will see in section, but little, the traditional view is, that the commentators taught about marriage is of much interest.

a. There is more development in the area of marital property. The civilians having abandoned the field of the formation of marriage to the canonists spent some time adapting the Roman system of dowry to the conditions of the middle ages. By and large in this period southern Europe, with the exception of Spain, became a region of dowries; women were largely excluded from control of marital property, and male control became the norm. Male control also became the norm in northern Europe as well, but there the tradition of dower, prestation by the man or his kin, and of community property was much stronger.

b. It has recently been suggested, however, that quite a bit happened with the regard to marriage during the period of the commentators. The most extreme version of the argument goes something like this: Marriages may be made by consent in canon law, but in the practice of the people they were not fully marriages until the couple had had sexual intercourse. Gratian had it closer to right than did Alexander III. Over the course of the 14th and 15th centuries, so the argument runs, this popular notion of marriage penetrated into the *ius commune*. I think that extreme view is wrong, and I will try to show you next week, when we deal with a pair of consilia by the fifteenth-century Panormitanus, why I think it is wrong. The question, however, of whether an unconsummated marriage was indissoluble in all circumstances continued to arise.

c. Another area concerning marriage that was left unsettled at the beginning of the thirteenth century was the precise grounds for separation without the permission to remarry. A man or woman whose spouse had committed adultery could obtain a separation. That doctrine was clearly established. But were there any other grounds for separation? In particular, could the couple obtain a separation if she (and it usually was she, but sometimes it was he) was being subjected to physical abuse by her spouse? What is the couple were constantly fighting with each other? We have already seen that Beaumanoir suggests that the customary court of Beauvaisis in his period would, in some circumstances, separate the community property of such people. Increasingly, in the fourteenth and fifteenth centuries local ecclesiastical courts seemed willing to grant separations on the ground of cruelty. That possibility came to be recognized by the mainstream canonists, perhaps because they were aware of what was going on in the courts, perhaps because of internal doctrinal developments, and perhaps, and this is the view to which I incline, because of a combination of both.

3. *Witnesses.* The commentators on the topic of witnesses, indeed, on the topic of procedure generally, is a bit of puzzle. We talked about it yesterday in the law and graduate section, and we’ll talk about in the discussion class with the
undergraduates at the end of the week. A considerable amount of material in
the style of the commentators, though here by way of treatise rather than by
way of commentary on ancient texts was produced in the second half of the
thirteenth century. Durantis’s great Speculum iudiciale collects most of this
material. Your materials contain portions of a treatise that, at least in part, is
contained in Durantis. It also contains extracts from a late 13th-century
treatise on criminal procedure that Durantis does not seem to have used. The
next extract is from Robertus Maranta, who completed his work in 1525.
When we looked at Tancred on witnesses it seemed that key issue was what
types of witnesses were going to be excluded from testifying. This is also the
key focus of Durantis’s treatment of the topic. Maranta, though he cites a
number of works on the topic of exclusion of certain kinds of witnesses,
works that had been written closer to his time, devotes very little space to that
topic. Though the evidence is certainly not all in, it would seem that between
the early fourteenth century and the early sixteenth century when Maranta
wrote, the courts, in practice, ceased to follow the rules that even in Tancred’s
hands were rather rigid. They were, of course, well aware of the possibility of
bias and of bribery, but they wanted to listen to the testimony anyway and
make up their own minds as to whether it should be believed. We’ll see some
actual cases that suggest this quite dramatically.

Commentators on Witnesses

1. Let’s take a look at the treatise “Testium facilitate et varietate” (p. XII-2).
Who wrote it? Jacobus Balduini, a student of Azo’s who died in 1235?
Bagarotus was his contemporary, a writer on procedural matters exclusively?
Jacobus Aegidii de Viterbo, prior Ameliensis, who cannot be dated, but the
2d half of s.13 is plausible, unless he’s a contemporary of Bartolus’s as
Diplovatatius, an early 16th century humanist, says? Bartolus? All of these
have manuscript attributions to support them, except Bartolus who is given in
the printed text that Diplovatatius edited from an unknown manuscript. My
suggestion is that all of them may be right. What we are dealing with here is a
“living text,” a text that developed over time to which a number of authors
contributed.

“In the name of the lord Jesus Christ and his glorious virgin mother Mary,
amen. Here begins the treatise of sir Bartolus de Sassoferrato for reproving
witnesses, and in the first place are reproved, to wit, the infamous, slaves,
rectors of churches, or a monk, abbot, etc., friars minor or preachers, and
representatives of corporations (oeconomi), women, minors, madmen,
paupers, infidels and excommunicates, domestics, those who do not swear,
those in their own case, concerning the debtor, concerning the seller,
concerning the surety, concerning the tutor curator, concerning the
negotiorum gestor, concerning the judge, concerning the advocate and
proctor, if they are single, if in a common cause, if participants and partners,
if they are obscure, if the witnesses return to the judge, if they do not say the
reason for their statement, if the judge does not interrogate them, if they are
enemies or a criminal case is pending between them, if they say one thing for
another, if they speak having been corrupted, if they don’t speak the truth, if
they don’t give testimony close to the matter that is being inquired about, if
the give a premeditated and single speech. Notaries are reproved who do not
write out the saying of the witness in full. If one speaks about one thing and
another about another. If one speaks about one person and another of another.
If they do not well compute the grade of consanguinity. If they are in discord
about the place. If they are in discord about the time. If they are in discord
about the matter. If someone speaks about my thing for you and your things
for me. When they don’t speak to the matter, because they speak false things
and various things. If they are usurers. Even suspect judges are reproved.
Concerning the recusation of judges. If they are received again. If they are
otherwise false or were so. If they have testified against you and you want to
produce them for you. If they have learned what they testify. If they do not
say their saying secretly. If they are not received by the judge. If they want
the required number when a certain number is required. If articles are not
made for the case. If they depose beyond what is claimed. If they are
interrogated about their crimes. If the multitude of them is great. If their
sayings are not reduced to public form. If witnesses or instruments are
thought to be brought in against themselves. Who are compelled though
unwilling and who not. Pimps and tax-collectors (proxenetae et censuales)
are reproved, hermaphrodites, parents and mothers infinitum. Concerning
children. Concerning those who are in mortal sin. If they do not speak from
sight but from credulity and hearing. Whether given witnesses (testes dati)
are reproved, and how, and which not”

Now, you might think that this is no improvement on Tancred. In place of
Tancred’s neat listing of the relevant disqualifying factors for witnesses, we
have bed-sheet list. The old hemaphrodites have returned.

“What I would like to suggest is that it is an improvement on Tancred. Once
you know the basics, you want to know the details. This is the way that
Durantis operates too. He gives you all that you might possibly want to know
and then some. Who knows. You might have a case involving an
hermaphrodite. You’re even given a blatant piece of sexism to use against
women.

“Femina fallere falsaque dicere quando carebit?
Beccharia piscibus et mare fluctibus tuncque carebit.
[When will woman cease to deceive and speak falsehood?
When the fishmonger ceases to have fish and the sea, waves, then she will
cease.]”

2. Gandinus and the problem of proof of fame we dealt with yesterday.
“It can be said and it seems that fame is said to be proved as often as witnesses above every exception depose and say that it is publicly said in the city, village or place about which inquiry is being made that so it happened or so it was done [citations omitted]. But if it is asked whether fame proved by the aforesaid witnesses in this way suffices for a full proof, so that out of it alone one can proceed to a definitive sentence, I reply: it seems that a distinction must be made, whether the question is being asked about civil or a criminal case. For in a criminal case, although proof of fame alone, proceeding from lawful time, place and persons above every exception, leads to indication [indicium] and presumption, so that one can proceed, according to some, to interrogation, as is said below in the treatise concerning interrogations and tortures, nonetheless, by that alone no one can be definitively condemned, for no one is to be definitively condemned on the basis of suspicions [citations omitted], for in criminal matters, since the salvation of a man is at stake, proofs ought to be clear and open [citation omitted]. And well I propose and say that on the basis of such a fame as this alone one can proceed to interrogation, because the proof of such a fame makes a presumption and is said to be an argument very like the truth [citation omitted].”

What’s going here? The problem was the 2-witness requirement. It was too strict. What Gandinus does in the full extract given in the Materials is soften you up with examples from cases in civil procedure where fewer than two witnesses will suffice, so that you will buy the proposition that a judge can proceed to interrogation and to torture on the basis of proof of fame. What he says in the extract reproduced above suggests that proof of fame can be pretty perfunctory. That it can be is confirmed by actual depositions that have survived. Whether everyone went as far Gandinus is another story. There is much about arbitrium, the necessity for sound judgment, in the writers. If you buy what I said on Monday and yesterday about the need to keep the peace, you’ll see what was at stake. But what it was to lead to is perhaps the most unattractive phase in continental criminal law and procedure, the systematic use of torture.

3. Note the lack of major texts on procedure in the 14th and 15th centuries. Maranta in 1525. What is interesting to me about this text is that the material on what kinds of witnesses can be repelled is referred to other authors. That’s simply not something that you need to tell people in an elementary treatise. What you need to tell them is (1) the order in which witnesses are introduced, (2) how the witnesses are to depose, (3) when they can be produced, (4) the protestation that gives rise to the right of repulsion, (5) you can’t repel witnesses whom you have produced, and (6) you can’t reprove witnesses on appeal. On most of these matters, local rules had been introduced, and the local rules have a tendency to cut down on opportunities for delay. E.g., a maximum of 7 or 10 witnesses vs. the canonic 40.

4. What is driving these changes is interesting, but you can’t see it in the treatises. Where you can see it is in the cases, and to some extent, in the
The decision from Lisbon on marriage 1574 (Mats. § 14.E) shows rather nicely the intersection of the problem of rigid rules on witnesses and arbitrium.

The lords [of the Rota] said that diminished faith, at the discretion [arbitrio] of the lords, was to be given to Helena de Conto and Catharina Gundisalvi, witnesses examined for donna Maria. And some of the lords thought that absolutely no faith was to be given to the aforesaid Helena, because she is a slave [serva], as all the witnesses both of don Pedro and of donna Maria seemed to confess in deposing that she is the daughter of Maria Roderici, an engendered slave [seminigtae servae], and the rule is undoubted that the offspring follows the womb. ...

Nor was it pleasing, what was urged on the other side, that servitude is not one of those things that are perceived by the senses, for the witnesses further deposed that she was treated like a slave and was taken for one at home and outside, that she served and that in effect she was called a slave. From which things it is clearly to be inferred that she is in the status of servitude. That seems to suffice that she not be admitted as a witness. ...

Nor do the witnesses of donna Maria stand in the way when they say that the aforesaid Helena was very well treated in that house, and that it was said by many that she was the sister of the same Maria. For it is said, and the witnesses confirm it, that she is a slave, insofar as it is said that her father left her liberty, her father still being alive. Whence she cannot be free by this, because a testament is confirmed by death, as is generally held.

Nor does it stand in the way that she is the slave or freedwoman of the father and not of Maria, for as soon as she is the slave or freedwoman of the father, she is also the slave or freedwoman of the daughter, and thus also of Maria. [D.50.16.58.1].

Further it is said that she is an aya or a cuitos.¹ Whence it seems to be in her great interest to act so as not to be said to be engaged in bawdry, in which case a witness is repelled. ... And let her not only try to exonerate herself but also her mother .... Since all these things came together, it seemed to some of the lords that she ought be entirely repelled... . Which proceeds even where the truth cannot otherwise be had. ... On the part of some, as I have said, it seemed that she ought to be repelled entirely.

Some said that she ought not be entirely repelled, since some of the witnesses seemed to depose of her reputation and of a certain sort of treatment as a freedwoman, and since the matter is favorable. When there is a case about proof of marriage, in the proof of it witnesses not greater than any exception seem to be admitted, as is handed down to us in [X 4.18.3; Panormitanus ad X 2.20.22] in 3 not., more clearly in [Philippus Decius, Consilium] 163. col. 4. sub. numer. 7. vers. octavo oppono., after [Alexander Tartagnus, Consilium] 146. col. 6. vers. nec obstat si aliquis, vol. 5.

Even those who felt this way agreed that her faith should be reserved for discretion, with not a little diminution.

As to the second witness, Catherina Gundisalvi, since she is [Maria’s] nurse and her

¹ Both words apparently mean “nanny.” “Aya” is today a Spanish word and “cuitos” Portugese, but in this period the distinction between the two languages was not that great.
familiarity remains and consequently she still is a domestic, both of which things normally repel a nurse (. . .) and because she desires that the marriage be effectuated, which desire similarly in marriage cases totally rejects a witness (. . .), on this account the lords wanted equally to reserve her faith also for discretion with considerable diminution. So much the more so because between the first and second examination there are certain variations, which although it seemed possible that it [the testimony] could be saved on account of the lapse of time that intervened between the first and second examinations, nonetheless they displeased the lords.

We’re dealing with two witnesses in a marriage case, brought by one donna Maria and one don Pedro who seems to be her father against an unnamed man, and both witnesses are testifying on behalf donna Maria that a marriage was formed. The fact that this is 1574 makes it unclear whether the Alexander’s rules are still being applied, but I suspect that they were, i.e., that the alleged marriage occurred before the decree of the council of Trent of 1563 that required the presence of a priest and two witnesses for the validity of the exchange of marital consent, or at least before that decree became effective in Portugal. The two witnesses raise slightly different issues:

a. Helena is a slave (a relatively new institution in Portugal in the 16th century), probably the half-sister of the plaintiff. A large collection of material is brought to bear on the proposition that she is a slave. She is the daughter of a woman who was a slave and offspring follows the womb. The testimony that she was treated like a slave, was regarded as one both inside the home and outside, that she acted as a slave and was called a slave is all admissible to infer that she is slave. That she was well treated and was said to be Maria’s half sister is irrelevant. The fact that it is said that Maria’s father freed Helena in his testament is also irrelevant, because the father is still alive, and testaments do not take effect until the death of the testator. Nor is it relevant that Helena is the slave of Maria’s father and not of his daughter, because “slave or freedwoman of the father, she is also the slave or freedwoman of the daughter.” She was also said to the be “nanny.” And nannies must beware of bawdry, another reason for excluding testimony.

b. Catherina is a woman of higher status, but she was Maria’s nurse, and emphasis is laid on the proposition that she is still a servant in the household, or, at least, that she still lives there. She favors the marriage, which some authorities regarded as grounds for excluding her testimony. Her testimony was also inconsistent, but that could be explained by the fact that a considerable amount of time elapsed between her first and second depositions.

c. With all this one would think that both witnesses would be excluded. That does not seem to be what happened, however. The clearest statement of the holding comes at the beginning: “The lords [of the Rota] said that diminished faith, at the discretion [arbitrio] of the lords, was to be given to Helena de Conto and Catharina Gundisalvi, witnesses examined for donna Maria.” “Some of the lords,” we are told, thought that absolutely no faith
was to be given to the aforesaid Helena.” “On the part of some,” we are later told, “it seemed that she ought to be repelled entirely.” This may well have been the position of the reporter. On the one hand, “some said that she ought not be entirely repelled, since some of the witnesses seemed to depose of her reputation and of a certain sort of treatment as a freedwoman, and since the matter is favorable. When there is a case about proof of marriage, in the proof of it witnesses not greater than any exception seem to be admitted.” For this proposition there seemed to be a considerable amount of academic support. But, we are told, “Even those who felt this way agreed that her faith should be reserved for discretion, with not a little diminution.” There seems to have been more agreement about Catherina: “The lords wanted equally to reserve her faith also for discretion with considerable diminution.”

d. We don’t know how the basic case came out. We noted in Smith c. Dolling that the Salisbury court ignored the inconsistencies in Alice’s witnesses and their possible bias, whereas the appellate court at Canterbury paid much more attention to the rules about consistency and bias. We also noted that the further away the court is from the parties, the more likely it is that it will go off on the rules rather than the facts as it sees them. What is remarkable here is that a court in Rome, a long way from Lisbon, is also preserving, for the most part, its discretion. The exclusion of the testimony of slaves, except when tortured in a criminal case, is one of the brightest of the bright-line rules about the exclusion of witnesses. Even here, if we have it right, the majority of the Rota in 1574 wanted to exercise its discretion, though “with considerable diminution.”