

PART IX. GLOSSATORS: WITNESSES

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A. DIGEST 22.5

ed. T. Mommsen and P. Krueger, trans. A. Watson, *The Digest of Justinian* (Philadelphia, 1985) pp. 2:650–53

[See above, Part I, Section D]

B. CODE 4.20

in S.P. Scott trans., *The Civil Law* (Cincinnati, 1932) 13:36–41

[See above, Part I, Section E]

C. GRATIAN OF BOLOGNA, CONCORDANCE OF DISCORDANT CANONS, CAUSA 4, QUAESTIONES 2 ET 3 (c. 1140)

in E. Friedberg ed., *Corpus Juris Canonici* (Leipzig, 1879; repr. Graz, 1959) 1.536, 538–41 [CD trans.]

CASE 4

A certain man who had been excommunicated decided to accuse a bishop. He gets a youth younger than fourteen years of age to put forward his cause. Prohibited from accusing he makes the youth the accuser and himself a witness. The youth desires to play the role of accuser and witness. On the day appointed for trial by the chosen judges, the bishop does not come. He is suspended from communion. Then, the trial being renewed, the accuser is found guilty in his accusation. At length he proceeds to assert his own case. (Qu. I) Here it is first inquired whether someone who is excommunicated can accuse another? (Qu. II) Secondly, whether someone below fourteen can testify in a criminal case? (Qu. III) Thirdly, whether someone prohibited from accusing can assume the role of witness? (Qu. IV) Fourthly, whether the same person can be accuser and witness? (Qu. V) Fifthly, whether someone should be suspended from communion for not coming on the appointed day. (Qu. VI) Sixthly, if someone is found guilty in the role of accuser in the trial of bishops, whether he can then be admitted to assert his own cause?

Questions 2 and 3

Gratian: The second and third questions are decided by one and the same chapter of the same council [7 Carthage (419)]. It is this:

Canon 1. *Those who are excluded from accusation or have not yet reached the age of fourteen cannot be witnesses.*

We decide moreover that witnesses are not to be admitted to testimony who are ordered not to be admitted to accusation and also whom the accuser himself produces from his own house. Moreover, let those within fourteen years of age not be admitted to testimony.

Canon 2. PALEA.¹ *About the same thing.*

From the Council of Macon, c.6 [Aachen (809) c.6]:

It pleased the holy gathering that witnesses not be brought in to give testimony for a price, and that whoever was best and more faithful be taken for testimony, so that he against whom they ought to give testimony not be able to accuse them of calumny, and that no one give testimony if he were not fasting.

Gratian: Item in a criminal case, “a witness cannot be produced who has previously given testimony against the same defendant,” as is found in the twenty-second book of the Digest, title on witnesses [D.22.5.23]. Item in the same title [D.22.5.21]:

¹ A note placed in the medieval texts to indicate that the material was added after Gratian’s time. The word means ‘straw’ and seems to have been derived from Paucapalea, who was one of Gratian’s students, the first to comment on his work. Whether Paucapalea’s name (it means ‘little straw’) was real, or whether he adopted it out of modesty, is unknown.

Canon 3.²

If witnesses are all of the same honesty and reputation, and the nature of the affair and the instinct of judge concurs with them, all their testimony is to be followed. If, however, some of them say something different, although they are not of even number, what fits the nature of the affair and what lacks suspicion of enmity or favor is to be believed, and the judge will confirm the instinct of his spirit from the arguments and testimonies that he finds more fitting to the matter. For one ought not respect the multitude, but the sincere faith of testimonies and the testimonies which the light of truth more strongly supports. Item [D.22.5.2]: Sec. 1. In witnesses faith, dignity, mores and gravity is to be weighed, and therefore witnesses who vacillate against the faith of their testifying are not to be heard. Item [D.22.5.3]: Sec. 2. The faith of witnesses is to be carefully examined, and therefore with regard to their persons there should be explored, first, the condition of each, whether he is a decurion or a plebeian, and whether of honest or blameful life, and whether any one is marked down or reprehensible, or rich or poor so that he would easily admit something for the sake of gain, or whether he is the enemy of him against whom he gives testimony or the friend of him for whom he gives testimony. For testimony is to be admitted that lacks suspicion, either on account of the person by whom it is offered, that he be honest, or on account of cause, that it not be for the sake of gain, favor or enmity. Item [*Id.*]: Sec. 3. It is provided in the lex Julia on violence that no one is permitted to give testimony against an accused under this law who freed himself from him or from his parent, or who will be under the age of puberty, or who shall have been condemned in a public trial (whichever of them shall not have been restored in *integrum*), or whoever of them will be in chains or in public custody, or who shall have hired himself out to fight with beasts, or who prostitutes himself or shall have prostituted himself openly, or who has been adjudged or convicted of having taken money to give or not give testimony. Item [D.22.5.4]: Sec. 4. In the lex Julia on public trials it is provided that one should not be unwillingly denounced for testimony against a father-in-law, son-in-law, step father, step son, male or female first-cousin or their child, or those who are in nearer relation. Sec. 5. Item, nor his freedman nor his children's, parent's, wife's, husband's. Sec. 6. Item patrons and patronesses, that patrons and patronesses not be compelled to give testimony against their freedmen nor freedmen against their patron. Sec. 7. When moreover it makes an exception that the son-in-law and father-in-law not be compelled unwillingly to give testimony, it is held to include within the name "son-in-law" the espoused of the daughter. Item the father of one's fiancée within "father-in-law." Item [D.22.5.6]: Sec. 8. They do not seem to fitting witnesses who can be commanded to be witnesses. Item [D.22.5.7]: Sec. 9. The reply of slave is to be believed at that time when other proof for rooting out the truth does not exist. Item [D.22.5.8]: Sec. 10. The following are not to be compelled to give testimony unwillingly: old men, valitudinarians, soldiers, or those who are absent because of a magistracy of the republic or those who are not permitted to come. Item [D.22.5.19]: Sec. 11. Publicans, also, do not give testimony unwillingly. Sec. 12. Item, he who is absent, not because he wanted to refuse testimony. Sec. 13. Item, he who shall have hired an allowance for the army. But neither can children be denounced for testimony. Item [D.22.5.20]: Sec. 14. The accuser should not cite to testify him who shall be defendant in a public trial or him who shall be younger than twenty years. [D.22.5.21]: Sec. 15. Someone condemned for a libelous poem cannot be a witness. Item: Sec. 16. If the matter requires it, not only may private persons but also magistrates, if they are present, may give testimony. The praetor may also give testimony in a case of adultery. Sec. 17. If the condition of the matter is such that we are compelled to admit a gladiator or like person as a witness, his testimony is not to be believed without torture. Item [D.22.5.24]: Sec. 18. It was decided that witnesses whom the accuser shall have produced from his house should not be interrogated. [D.22.5.25]: Sec. 19. Patrons also may not give testimony in the case of him to whom they provide patronage, which also is to be observed in executors of affairs. Item [D.22.5.16]: Sec. 20. Those who have spoken falsely or variously or have offered testimony for both parties are fittingly punished by judges. Item [D.22.5.17]: Sec. 21. A father and a son who is in his power, or two brothers who are the power of the same man, can both be witnesses to the same will or the same affair, for there is nothing harmful in offering many witnesses from the same house to another's affair. Item [D.22.5.15]: Sec. 22. The quality of the dominant sex shows whether an hermaphrodite can be a witness to

² The tendency of modern scholarship is to regard this canon as not having been compiled by Gratian.

a testament. Item [D.22.5.9]: Sec. 23. A father is not a fitting witness for his son, nor a son for his father. [D.22.5.10]: Sec. 24. No one is held to be a fitting witness in his own matter. Item [D.22.5.11]: Sec. 25. Even a witness who has not been summoned is understood to bear faith to a matter that has been done. Item [D.22.5.12]: Sec. 26. Where the number of witnesses is not laid down, even two suffice. For the plural usage includes the number two. Item [D.22.5.3]: Sec. 27. In witnesses who simply speak their testimony, it should be considered whether they are offering one and the same premeditated speech, and whether they answer the interrogations with answers that befit the time. Item: Sec. 28. Frequently the truth of the matter is discerned without public monuments; sometimes the number of witnesses, sometimes their dignity and authority, sometimes fame, as it were consenting, confirm the truth of the matter. Therefore the judge should not tie his court to one kind of proof, but should reckon by the judgment of his soul what he should believe and what he thinks has not been proven to him. Item: Sec. 29. The authority of present witnesses is one thing, that of testimonies that have customarily been recited another. Item Code, lib. IV, tit. de testibus [C.4.20.2[1]]: Sec. 30. Witnesses alone do not suffice for proof of free birth if they are not supported by instruments and arguments. Item [C.4.20.3[2]]: Sec. 31. Even in the civil law the faith of a domestic is disapproved. Item [C.4.20.4[3]]: Sec. 32. It is certain that a case is of no worth if it is put forward on the basis of attestation alone and not proven with other lawful bits of evidence. Item [C.4.20.5[4]]: Sec. 33. It is necessary to put forward those witnesses to bolster the truth who can put the faith fitting the religion of the court before all grace and power. Item [C.4.20.6[5]]: Sec. 34. Parents and children are not to be admitted against each other even if willing. Item [C.4.20.7[6]]: Sec. 35. The person who brings the case ought to offer proofs proper to his claim and not ask that his adversary be compelled to produce those people through whom the affair came about. Item [C.4.20.8[7]]: Sec. 36. Slaves can neither be interrogated for their owner nor against him, but may be interrogated about their own deed. Item [C.4.20.9[8]]: Sec. 37. Let witnesses be compelled to swear by religion before they offer testimony, and faith ought to be given to the more honest. Sec. 38. No judge should easily admit the testimony of one person in any kind of case; rather the response of one witness in no way should be heard, even if he glows with the honor of the praesidial curia. Item [C.4.20.10[9]]: Sec. 39. The laws remove from all the power to give testimony in their own matter. Item [C.4.20.11[10]]: Sec. 40. Let free witnesses be sought in the cases of others, if they are not said to be partners and participants in the crime, but confidence of their knowledge is to sought from them. Let the fitting expenses of those coming to trial be looked after by the accuser or those by whom they have been required, even if witnesses are to be produced by either party in a pecuniary case. Item [C.4.20.12[11]]: Sec. 41. Let freed men not offer testimony against their patrons of their own motion, nor are they to be compelled to come if they are called to trial. Item [C.4.20.17[13]]: Sec. 42. If anyone has used witnesses and the same witnesses are produced against him in another litigation, he will not be allowed to except to their persons, unless he shows that the enmity has arisen between him and them in the meantime on the grounds of which the laws command that witnesses be repelled from testimony. He shall not in such circumstances, however, be deprived of the power to refute their testimony out of their own depositions. Sec. 43. But also if he shows by clear proofs that they were corrupted by gift or promise of money, this allegation, too, must be kept open for him.

[**Gratian.**] But the case of blessed Bricius [Sulpicius Severus l.3. vitae S. Martini] is objected, who was proven innocent by the voice of a child who was thirty days born. But divine miracles are to wondered at, not used as examples for human action.

D. TANCREDUS BONONIENSIS, ORDO IUDICIARIUS 3.6

in F. Bergmann ed., *Pillii, Tancredi, Gratiae, Libri de iudiciorum Ordine*
(Göttingen, 1842) 222–8 [CD trans., citations modernized]

Tancred's *Ordo iudicarius* (1st ed. c. 1216, 2d ed. after 1234) is probably the best known of the some forty *ordines iudicarii*, outlines of the entire course of procedure in a lawsuit, that were produced between roughly 1140 and roughly 1290. The overall outline of the work is typical of many of this genre:

- Part I [The persons of the ordo]
 - Title 1. Ordinary judges
 - 2. Judges delegate

3. Arbiters
4. Assessors and auditors
5. Advocates and their duties
6. Proctors
7. Syndics and actors [representatives of corporations in litigation)

Part II. [Preliminaries]

Title 1. That the plaintiff ought to enter into judgment

2. How one enters into judgment
3. Citations to judgment
4. The contumacious and those who do not come to judgment
5. Exceptions and replications
6. Recusals of judges
7. Crimes and how one proceeds against criminals
8. The libel of accusation in criminal cases
9. The libel of recovering possession or restitution
10. The libel of gaining possession
11. The libel of retaining or defending possession
12. How to form a libel in a personal action
13. The libel of vindicating a thing in a real action
14. The surety of the plaintiff
15. The surety of the defendant
16. The surety of proctors and other persons
17. Delays
18. Holidays
19. Counterclaims and crossclaims
20. The order of judgments and incidental questions
21. The interrogations that are made before joinder of issue

Part 3. [Joinder of issue and proof]

Title 1. Joinder of issue

2. The oath of calumny
3. Interrogations made *in iure* (i.e., after joinder of issue)
4. Confessions *in iure*
5. Proofs
6. Witnesses
7. How many witnesses suffice in a case
8. When witnesses are to be produced and how
9. The oath of the witnesses and how they are to be examined
10. The publication of the witnesses
11. The reproof of witnesses
12. Which witnesses are to be believed and how much
13. The production of written instruments and how much they are to be believed [*fides eorum*]
14. Presumptions
15. [Legal] allegations

Part 4 [Judgment and appeal]

Title 1. [Final and] interlocutory sentences

2. The sentence that is *ipso iure* void
3. How a valid sentence is overturned
4. The execution of the sentence
5. Appeals
6. Restoration after sentence [*in integrum restitutio*]

A word about the context of the except translated below in order: The form Tancred gives for the admission, examination and reprover of witnesses is part of the standard overall form for the course of judgment in Romano-canonic civil procedure. The case is introduced by a summons and a libel on behalf of the plaintiff and then a joinder of issue (*litis contestatio*). The plaintiff is then assigned a number of terms (three was standard; a fourth was given as an exceptional matter) to produce witnesses to discharge his burden of proof on his case in chief.

Once produced, the witnesses were to take an oath to tell the whole truth and to tell the truth for both parties. They are also to swear that they do not come to bear testimony for a price or out of friendship, or for private hate, or for any benefit they might receive. After they have taken the oath, the witnesses are to be examined separately and in secret, after the model of Daniel's questioning of the elders (above, p. II-9).

When all the witnesses have been examined, the parties are to renounce further production of witnesses. The witnesses' depositions will then be published by the notary who has written them down. The defendant now has an opportunity to except to the testimony of the witnesses. He may except to their persons, if he has reserved the right to do so when they are produced, or he may seek to demonstrate that their testimony is false in some respect.

The proceduralists not only outlined the form by which witnesses were to be admitted, examined, and reproved; they also elaborated some basic principles of their system of proof by witnesses. At the core of that system are three propositions: (a) the character of each witness is to be examined; certain witnesses are not to be heard because of their status, and others' testimony is to be regarded as suspicious because of their status or mores or their relationship to one or the other of the parties. (b) Witnesses are to be examined carefully to determine if they are telling the truth about events they saw and heard themselves. (c) On the basis of the written depositions and what has been demonstrated about the character of the witnesses, the judge is to determine whether the standard of proof fixed by law has been met.

As a general matter, Tancred tells us, two witnesses make a full proof, but not everyone may be a witness. The section that follows elaborates on proposition (a), noted above.

6. CONCERNING WITNESSES. WHO AND OF WHAT SORT THEY CAN BE.

We dealt above with the genus of proofs. Now let us look at them by species, and first, concerning witnesses, because living voice is stronger than dead. Nov.73.3. And since more cases are determined by witnesses than by the other proofs, and very frequently greater debate arises about the statements of witnesses than about the other proofs, let us therefore examine witnesses very fully, dividing the treatise on witnesses into many titles, on account of its prolixity. First, it is to be seen who can be witnesses and who not.

Everyone can be a witness who is not prohibited, because the edict about witnesses, like that about proctors, is prohibitory; all, therefore, who are not prohibited can be admitted. D.22.5.1.1.

Slaves are prohibited. 1 Comp. 5.36.10; C.4 q.3 c.3 s.40; C.4.20.11. Sometimes, nonetheless, the answer of a slave is relied on, as [in C.4 q.3 c.3 s.9] and then it ought to be taken with scourging, as [in *id.* s. 17]. If, however, the servile condition of a witness is objected to when he is brought in to testify, and he says they he was free from birth, his testimony ought to be received and reduced to writing, reserving the question for the time of disputations, and then if it is proved that he is a slave, his testimony shall be reproved. If he says, on the other hand, that he once was a slave but that he is now free, he ought not be received until he shows the instrument of his liberty; but if he says he does not have a copy of the instrument, his testimony is received and reduced to writing, but let it not be used for him who brought him in, unless he proves his liberty. C.4.20.11[10] (Nov.90.6 annexed).

Women are prohibited in criminal cases and for testaments. [C.33 q.5 c.17; 1 Comp. 5.36.10; D.28.1.20.6]. In other cases, however, pecuniary, spiritual, matrimonial, or any other, women can give testimony, as is contained in [D.28.1.20.6; D.22.5.18] and in [C.15 q.3 c.2; 1 Comp. 2.13.4; 1 Comp. 4.17.1; 3 Comp. 2.12.6].

Also prohibited is one younger than fourteen years, generally, in every case. C.4 q.3 c.1. Again, one younger than twenty years in a criminal case. C.4 q.3 c.3 s.14; D.22.5.19.1, 20. Nonetheless when he reaches the age of puberty he may testify about those things which he saw when he was below the age of puberty. And the same is to be said of a freed slave, for he can give testimony about those things which he saw in the time of his servitude. D.50.16.99.2; D.37 c.14.

Prohibited is one who lacks discretion or is captive in mind, just as he is excluded from the office of judging and of pleading. C.3 q.7 c.1; D.3.1.2.

Prohibited are the infamous, and they are excluded from testimony. 1 Comp. 5.36.10; 1 Comp. 2.13.23; 2 Comp. 4.12.5; C.4 q.3 c.3 s.2. Nonetheless in excepted crimes the infamous can be admitted to testify, as in simony and the like, but not without torture. 3 Comp. 5.2.3; C.4 q.3 c.3 s.17.

Paupers are prohibited from testimony, both by the law of the forum and by the law of heaven. C.2 q.1 c.7 s.3, c.14; Nov. 90.1. And some say this only obtains in criminal cases, and [others] that it generally obtains of any pauper who has less than fifty *aurei*. To me it seems that this is said only of those paupers who are presumed to suppress the truth upon receiving money, for if the witness is honest, so that there is no presumption against him that he would lie for money, he ought not be excluded from testimony; otherwise you would have to say that many holy and religious men, and even the apostles themselves, ought to be excluded, for they are paupers, having nothing.

([Some mss. add:] Laymen are prohibited from giving testimony against clerics. This is true in a criminal case. 1 Comp. 2.13.14; C.2 q.7 c.14, c.5, where it is said that clerks are dangerous [*infesti*] for laymen, and throughout the same question. Except where the action is being brought only civilly, as is noted above concerning the trials of crimes. If, however, a civil case is brought against a cleric, laymen also are well admitted to testimony. 1 Comp. 2.13.22, at these words: “Because the aforesaid clerics do not have authenticated documents with which they can support their claim, ... we command you that you warn all these clerics, or those laymen whom they name, to show before you the truth of the matter that they know about this case.” Similarly, a clerk cannot bear testimony against a layman in an accusation. C.2 q.7 c.51.)

Infidels are prohibited to give testimony against the faithful. C.2 q.7 c.26; 2 Comp. 2.2.1.

Bind up the aforesaid seven genera of prohibitions in these verses:

Conditio, sexus, aetas, discretio, fama,
Et fortuna, fides: in testibus ista requires.
[Condition, gender, age and discretion,
Fame and fortune and truth,
If these are lacking,
Without the court’s backing,
From witnessing hold ’em aloof.]

[Cf. D.22.5.3 v^o *inimicitia*; X 2.20.2 v^o *vilissimi*.]

Again, all criminals are prohibited from testimony, whether they were previously convicted of the crime or not, so long as they are convicted by way of exception, the crime being stated and proved. 1 Comp. 2.13.13, 12; 2 Comp. 2.11.1; 3 Comp. 2.4.1. And this is true in every case, according to the canons, except in excepted crimes. 3 Comp. 5.2.3, 4. What excepted crimes are and what the law is when they are tried is fully noted above in the title on crimes. And this is the reason why all criminals are excluded from testimony, because they are infamous by canonical infamy. C.6 q.1 c.3, c.4.

Again, anyone is prohibited from giving testimony in his own case. C.4 q.3 c.3 s.24; C.4.20.10. Nonetheless, anyone is admitted in the case of his own corporation. C.14 q.2 c.1; 1 Comp. 2.13.21; 3 Comp. 2.12.11.

Judges, advocates and executors are prohibited from giving testimony in a case which they have handled. C.2 q.6 c.38; C.4 q.3 c.3 s.19. Truly, however, they can give testimony about those things that happened before them, if a question arises about it. 1 Comp. 2.20.35.

Children are also prohibited from giving testimony for their parents and vice versa. C.4 q.3 c.3 s.23; C.4.20.6. Except in three cases. First, a father can be a witness to the testament of a son about [the latter’s] *peculium castrense*. D.28.1.20.2. Second, to prove relationship or age. D.22.3.16. Third, in matrimonial cases. C.35 q.6 c.1; 1 Comp. 4.17.1; 2 Comp. 2.18.5.

Again, family members and domestics are prohibited, those who can be commanded by reason of dominical or paternal power. C.3 q.5, throughout; C.1.12.6.

Suspects and enemies are prohibited from giving testimony against their enemy. C.3 q.5 c.2. With this distinction: capital enemies and conspirators are to be heard in no situation. 3 Comp. 5.2.3, 4. And enemies because of a criminal litigation are not to be received before the end of the case. Enemies because of a pecuniary litigation can be admitted, but how much faith is to given them is reserved for the time of the disputation.

In the aforesaid situations someone is prohibited by the laws, but the same thing sometimes also happens through the office of the judge, when he excludes an unbridled multitude of witnesses, decreeing a certain number, up to which they may be produced. 3 Comp. 2.12.10, 9; D.22.5.1.2.

Witnesses are to be questioned, Tancred continues in subsequent sections, about all the details of what they have seen a heard, for only then can it be determined whether they are consistent. They are to be asked about the matter, the people, the place, the time, perhaps even what the weather was like, what the people were wearing, who was consul, etc. In only a few instances, such as computing the degrees in incest cases, is hearsay testimony to be accepted.

If a witness contradicts himself, Tancred concludes, then his testimony should be rejected. If the witnesses agree, and their *dicta* (literally “the things said”) seem to conform to the nature of the case, then their *dicta* are to be followed. If the witnesses on one side disagree among themselves, then the judge must believe those statements which best fit the nature of the matter at hand and which are least suspicious. If the witnesses on one side conflict with those on the other, then the judge ought to attempt to reconcile their statements if he can. If he cannot, then he ought to follow those most trustworthy—the freeborn rather than the freedman, the older rather than the younger, the man of more honorable estate rather than the inferior, the noble rather than the ignoble, the man rather than the woman. Further, the truth-teller is to be believed rather than the liar, the man of pure life rather than the man who lives in vice, the rich man rather than the poor, anyone rather than he who is a great friend of the person for whom he testifies or an enemy of him against whom he testifies. If the witnesses are all of the same dignity, then the judge should stand with the side that has the greatest number of witnesses. If they are of the same number and dignity, then absolve the defendant. The basic principle, then, is *onus probandi incumbit eit qui dicit* (“the burden of proving is on him who speaks”). Tancred’s title on ‘To what witnesses is faith to be granted and how much’ (3.12) is given below in full in § F.

E. AUTHORITIES CITED IN TANCREDD, ORDO 3.6

a. TABLE OF AUTHORITIES

Listed below are the authorities that Tancred cites in the order in which he cites them. If the authority has previously been reproduced in these materials, the reference is given here. If it has not been reproduced in these materials, it is numbered in the list and reproduced below, in the same order. (My translation, unless otherwise noted, and a very rough translation it is.) I have added to this some relevant glosses from the *glossae ordinariae*.

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|-----|--|-----|------------------------------------|
| 2. | Nov.73.3 | 10. | D.50.16.99.2 |
| | D.22.5.1.1 — Above p. I-32. | 11. | D.37 c.14 |
| 3. | 1 Comp. 5.36.10 = X 5.40.10 | 12. | C.3 q.7 c.1 |
| | C.4 q.3 c.3 s.40 — Above p. IX-4. | 13. | D.3.1.2 |
| | C.4.20.11(10) — Above p. I-36. | | 1 Comp. 5.36.10 — See above no. 2. |
| | C.4 q.3 c.3 s.9 — Above p. IX-3. | 14. | 1 Comp. 2.13.23 = X 2.20.7 |
| | C.4 q.3 c.3 s.17 — Above p. IX-3. | 15. | 2 Comp. 4.12.5 |
| | C.4.20.11(10) (Nov. annexed) — Above p. I- | | C.4 q.3 ?c.3 s.2 — Above p. IX-3. |
| 36. | | 16. | 3 Comp. 5.2.3 = X 5.3.31 |
| 4. | C.33 q.5 c.17 | | C.4 q.3 c.3 s.17 — Above p. IX-3. |
| | 1 Comp. 5.36.10 — See above no. 2. | 17. | C.2 q.1 c.7 s.3 |
| 5. | D.28.1.20.6 | 18. | C.2 q.1 c.14 |
| | D.22.5.18 — Above p. I-34. | 19. | Nov. 90.1 |
| 6. | C.15 q.3 c.2 | 20. | 1 Comp. 2.13.14 = X 2.20.14 |
| 7. | 1 Comp. 2.13.4 = X 2.20.3 | 21. | C.2 q.7 c.14 |
| 8. | 1 Comp. 4.17.1 = X 4.18.3 | 22. | C.2 q.7 c.5 |
| 9. | 3 Comp. 2.12.6 = X 2.20.33 | 23. | 1 Comp. 2.13.22 |
| | C.4 q.3 c.3 s.14 — Above p. IX-3. | 24. | C.2 q.7 c.51 |
| | D.22.5.19.1, 20 — Above p. I-34. | 25. | C.2 q.7 c.26 |

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| 26. 2 Comp. 2.2.1 = X 2.20.23 | C.4 q.3 c.3 s.23 — Above p. IX-4. |
| 27. 1 Comp. 2.13.13 | C.4.20.6(5) — Above p. I-33. |
| 28. 2 Comp. 2.11.1 = X 2.25.1 | 38. D.28.1.20.2 |
| 29. 3 Comp. 2.4.1 = X 2.10.2 | 39. D.22.3.16 |
| 3 Comp. 5.2.3 — See above no. 15. | 40. 1 Comp. 4.18.3 = X 4.17.3 |
| 30. 3 Comp. 5.2.4 = X 5.3.32 | 41. C.35 q.6 c.1 |
| 31. C.6 q.1 c.3 | 1 Comp. 4.17.1 — See above no. 7. |
| 32. C.6 q.1 c.4 | 42. 2 Comp. 2.18.5 |
| C.4 q.3 c.3 s.24 — Above p. IX-3. | 43. C.3 q.5 <i>per totum</i> |
| C.4.20.10(9) — Above p. I-33. | 44. C.1.12.6 |
| 33. C.14 q.2 c.1 | 45. C.3 q.5 c.2 |
| 34. 1 Comp. 2.13.21 = X 2.20.6 | 3 Comp. 5.2.3 — See above no. 15. |
| 35. 3 Comp. 2.12.11 = X 2.20.38 | 3 Comp. 5.2.4 — See above no. 29. |
| 36. C.2 q.6 c.38 | 46. 3 Comp. 2.12.10 = X 2.20.37 |
| C.4 q.3 c.3 s.19 — Above p. IX-3. | 47. 3 Comp. 2.12.9 = X 2.20.36 |
| 37. 1 Comp. 2.20.35 | D.22.5.1.2 — Above p. I-32. |

2. Nov. 73.3

(S.P. Scott trans.)

But if anything resembling what has taken place in Armenia should happen, and the comparison of handwriting should prove one thing, and the evidence of witnesses another, we have then thought that the sworn oral testimony is more trustworthy than the written instrument by itself. Still, the wisdom and conscientiousness of the judge should, under such circumstances, induce him to decide in favor of what appears to be better entitled to credence, and we have come to the conclusion that the genuineness of documents should be established in this manner.

3. 1 Comp. 5.36.10

(=X 5.40.10: Isidore, Etymologies 18.15 [early 7th c.])

... Witnesses used to be called *superstites* because they brought forward matter about the status of the case (*super causae statu*); now, a part of the name taken away, they are called *testes*. Witnesses moreover are considered according to their condition, nature and life. By condition, if he is free, and not a slave. For frequently a slave suppresses testimony to the truth out of fear of his master. By nature, if he is a man not a woman (*non foemina*). For a woman always produces variable and changeable testimony (cf. Virgil, Aen. 4.569). By life, if he is innocent and clean (*integer*) of act. For if he is wanting in good life, he lacks trustworthiness. Justice cannot have commerce with a man guilty of crime. (There are two types of witnesses, those that say what they saw and those that put forward what they heard. Witnesses commit wrong in two ways: when they proffer falsity and when they hide the truth by silence.)

v^o non foemina: Understand this in a criminal case where a woman cannot be a witness according to the canons. [C.33 q.5 c.17]. But in civil and matrimonial cases, she well bears testimony. [X 2.20.33, X 2.20.22]. Argument to the contrary, that they can in a criminal case: [C.15 q.3 c.2]. But according to the laws, it is otherwise. Nonetheless in an excepted crime, even a woman of bad fame is admitted to accuse. [X 5.3.7]. And in an inquisition she is admitted to testimony or denunciation. [X 2.20.33, X 2.20.3]. Again in wills a woman is not admitted. [Jl.2.10.6]. Ber.

v^o integer: For a witness ought to be of good fame and without any suspicion. [C.2 q.7]. An infamous witness is rejected. [X 2.21.7].

4. C.33 q.5 c.17

Again, Ambrose [actually Ambrosiaster] in the book of questions on the Old Testament (c. 45) (late 4th–early 5th c.).

It is fitting that a woman be subject to the power of a man, and to have no authority, nor can she teach, nor be a witness (*nec testis*), nor give faith, nor judge.¹

v^o *nec testis*: In a criminal case, except in those cases where the infamous are admitted, nor to a will. [Jl.2.10.6]. Nor against clerks in a criminal case, because they cannot be what they are. [C.2 q.7 c.38]. Nor even against laymen, as notes [C.15 q.3 c.1].

5. D.28.1.20.6

(Ulpian, *On Sabinus*, book I) (S.P. Scott trans.)

(6) A woman cannot act as witness to a will, although she can be a witness in court; as is established by the *lex Julia de adulteriis*, which prohibits a witness who has been convicted of adultery from testifying or making a deposition.

6. C.15 q.3 c.2

(Paul, *On adultery*, book 1, [=Papinian, *On adultery*, book I = D.48.2.2]) (S.P. Scott and CD trans.)

“Women are permitted to bring a public accusation for certain causes, for instance, if they do so on account of the death of any of those persons of either sex against whom they, if unwilling, can not be compelled to appear as witnesses, under the provisions of the law relating to public testimony. The Senate arrived at the same conclusion with reference to the Cornelian Law on Evidence. Women, however, are allowed to testify publicly in a criminal prosecution concerning the will of a freedman of their father or their mother. By the law relating to testaments, the right was conceded to wards, with the advice of their guardians, to institute a prosecution for the death of their father, just as a female ward is allowed to institute one for the death of her grandfather, since the Divine Vespasian permitted wards to bring suit with reference to the will of their father; but they could proceed by means of an interdict just as if the will had not been produced.” In the Code [C.9.1.4]: “If your wife thinks that the death of her cousin ought to be avenged, let her appear before the Governor of the province.” In the Digest [48.4.8]: “Women are also heard in cases involving treason (*laesa maiestas*). A woman named Julia revealed the conspiracy of Lucius Cataline, and furnished the Consul, Marcus Tullius, the evidence upon which to base the prosecution.”

7. 1 Comp. 2.13.4

(=X 2.20.3; Gregory I to Sabinus, defensor of Sardinia [593])

Since various crimes have been reported to us of the person of Epiphanius a priest, it is necessary that you examine everything quite carefully, and you are to hasten to bring here either the women (*mulieres*) with whom he is said to have had dealings or others whom you feel know anything about the same case, so that by ecclesiastical compulsion what is true can clearly be revealed.

v^o *mulieres*: Thus a woman is admitted to testimony against an ecclesiastical person. As [X 2.20.33]. And a woman is well admitted to testimony. [C.15 q.3 c.2]. Argument contra: [C.33 q.5 c.17]. That [passage] ought not to be understood [as applying] in a criminal proceeding where a woman is not received for testimony against anyone. Where the proceeding is civil or by way of inquisition or exception, then a woman is admitted. This chapter is talking about that kind of case, and [X 2.20.33].

¹ The quotation is attributed to Ambrose in the Vulgate edition of Gratian. It comes from a work called *Questions on the Old and New Testaments* that was traditionally attributed to Augustine. For some time, however, it has not been attributed to either of them. Rather, the author is a 4th-century Latin father, called ‘Ambrosiaster’. He is so called because we don’t know his name, but he wrote other works that were once thought to be by Ambrose but are not. That is probably not so important as is the fact that the quotation is taken out of context. If you know Latin, you can find it in the *Patrologia Latina*, vol. 35, col. 2244. The issue with which Ambrosiaster is dealing is whether “God said to them . . . ‘have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth’ [Genesis 1:28]” applies to both men and women or just to men. One of Ambrosiaster’s arguments that it applies only to men is that “How can it be said of woman that she is in the image of God, since it is clear that she is subject to the dominion of man and has no authority? For she cannot teach, nor be a witness, nor give faith, nor judge, how much more so is it not possible that she can rule (*imperare*).” That is to say, Ambrosiaster simply assumes that these are the rules about female incapacity, whereas the quotation that Gratian was using is normative.

8. 1 Comp. 4.17.1

(=X 4.18.3; Clement III to the bishop of Florence [1187 X 1191])

It seems to us Moreover, that parents, brothers and relatives of both sexes be admitted in their testifying to uphold or invalidate the marriage is approved both by ancient custom and the laws, and is similarly approved by both divine and human laws. Therefore, especially parents are received, and if parents are lacking, those closest are admitted, for each strives to know his genealogy both by witnesses and documents and even by the recital of his elders. Since they know better than others, they therefore are particularly admitted. Similarly they are received in testimony for the sake of joining a marriage. For who ought better be received than they who know better and whose interest it is, so much so that if they were not present and did not give consent, there would not be, according to the laws, any marriage? What is read therefore, "A father is not received in the case of his son, nor a son in the case of his father," is true in criminal cases and contracts; in marriage, however, both in the joining and the unjoining, by the prerogative of the bond itself and because it is a favorable thing, they are properly admitted.

9. 3 Comp. 2.12.6

(=X 2.20.33; Innocent III to the prior of St. Fridanus of Lucca and G. canon of Pisa [1203])

Both by your letters and by the depositions of the witnesses that have been carefully heard, we have learned clearly that nothing was sufficiently shown against our beloved son the elect of Lucca, except by hearing alone and fame, since about the other things, if any by chance seemed to be proved, the witnesses were either single [or] those who cannot lawfully prove these things. Since however about the marriage which the same elect is said to have contracted with a widow, witnesses were not received on account of the obstacle of appeal on the ground that laymen and women might not be received on such an article against him, as your letters intimated to us, although the messengers of the elect tried to prove otherwise before us, we, so that the objection of such an irregularity not remain undecided, commit to your discretion by apostolic writing and command that you receive legally witnesses, be they laymen or women, so long as they are fitting, who are brought forward to prove this within a month, and that you examine them prudently, solemnly excommunicating anyone who presumes to impede them from giving testimony to the truth. Finally, when the attestations have been published if it should appear that this irregularity not be proven, you are to require the same elect to undergo canonic purgation about the objections, by seven canons of the cathedral or priors of the secular churches of Lucca, priests or deacons of good fame. Having received this assign to him a competent term, in which he is to present himself before us to be consecrated. If, however, either the impediment of irregularity be proved or if within the constituted term he not undergo the indicated purgation, you, removing him from the prelacy of Lucca by our authority, without any possibility of appeal or contradiction, are to order on our behalf the chapter of Lucca not to delay in canonically celebrating the election of another. The archpriest, however, of Lucca and G. the sacrist, who sent us letters against the aforesaid elect in the name of by far the greatest part of the chapter, since it is clear by the aforesaid attestations that by far the greatest part of the chapter was not aware of these letters, you are to denounce as suspended from office and benefice until they shall merit to obtain our indulgence.

10. D.50.16.99.2

(Ulpian, *On the duties of consul*, book 1) (S.P. Scott trans.)

(2) It would be extremely difficult to define everything included under the term "instrument." (*Quae enim*) Instruments, properly speaking, are documents for whose production a delay should be granted; just as when time is asked for the production of someone who can conduct a case, for instance, a steward, although he may be in slavery, or of someone who has been appointed an agent, I think it may be held that a delay can be requested on account of the papers, in order to enable him to appear for the above-mentioned purpose.

v^o *quae enim*: Finally, note here the express argument that a slave made free can give testimony to what he saw in servitude. Item for this, that he is not prohibited. [D.22.5.1.1]. And concerning a minor, note [D.22.5.3.5]. And this [applies] where the law does not require a certain number of witnesses for the substance of the business, as in testaments, where [the witnesses] must be suitable at the time of the testament. Others say that my slave may be heard if he is tortured and not otherwise. But argument to the

contrary: [D.37.10.3.5], verbo “praeter temporis,” [read: *propter temporis*] where it says that on account of the interval of time the faith of a witness changes. But here from bad to good status, there the contrary Accursius.

11. D.37 c.14

(Clement I, Letter 5 to his disciples [Psuedo-Isidore, p. 65])

... Since anyone may derive from divine scriptures a firm and complete rule of truth, it will not be absurd if he adds anything from common learning and liberal studies, which he pursued in his youth (*in pueritia*), so that, nonetheless, when he teaches the truth, he turns aside falsity and pretense.

v^o *in pueritia*: Argument that anyone can testify about that which he saw in childhood years, as here and [De cons., D.4 c.12, c.111; D.26 c.3]. For when he is made free he can testify about that which he saw when he was a slave. [D.50.16.99.2]. Argument contra: because this age doesn't know what it is doing. [C.9.22.1[.6]]. And a child doesn't understand knowledge. [D.22.6.10]. Say that if he was capable of fraud, he can well testify about pure fact that he saw then, but of the circumstances, for example, how something was done, not, because in this, memory can easily fail. Io[hannes Teutonicus]. This I fully believe. Argument: [Jl.3.19.9; D.50.17.5]. Bartho[lomeus Brixiensis].

12. C.3 q.7 c.1

(‘The Holy Roman Synod says’ [*Captitula Angilrami*, p. 759])

An infamous person cannot be a proctor or a judge (*cognitor*).

13. D.3.1.2

(Gaius, On the provincial edict, book 1)

[Infamous persons cannot appear before the praetor to plead except for ...] a male or female idiot, (for a curator may also be appointed for these persons).

14. 1 Comp. 2.13.23

(=X 2.20.7, Alexander III to R[obert Foliot] bishop of Hereford and B[aldwin] abbot of Forde [1159 X 1181])

On behalf of A., a priest, the complaint has been brought to us that when he had canonically obtained the church of “Clunoden.”² and has possessed it for thirty years and more, a certain knight named H. harmed him with grave injuries and molestations, and at length, concealing the fact that he was a layman, impetrated letters to our judges that they remove him from the said church forthwith if the said priest was the son of him who last ministered in the church and held it by hereditary right or if he publicly had a woman in fornication. At length, moreover, the knight, by a substituted person, brought him to law before the aforesaid judges, and is said to have produced as witnesses certain laymen, infamous and noted (*infames et notabiles*), to give testimony that the aforementioned priest was the son of that priest who had last ministered in that church. Although the aforesaid priest A. asserted that those witnesses ought not be received for him, that some of them indeed were robbers and manifest thieves, and said constantly that he was ready to prove this, nonetheless, the aforesaid judges, having received such witnesses of the other party, took away the aforesaid church, which now the son of the steward of the knight occupies, from the priest while he was absent and after the appeal which he proposes that he had interposed about this matter. Since we fully trust you, we commit this case to your discretion, ordering by the authority of these presents that you call the parties before you, carefully inquire into the truth of the matter, and if it appears to you that the aforesaid priest was not lawfully despoiled of the aforesaid church by appropriate witnesses, you are to restore the church to the same priest without delay, contradiction or appeal, quashing the sentence notwithstanding any letters of confirmation about the church, if any were impetrated, and you should not allow him to be further molested by the aforesaid knight or by him who holds the church. If the matter is otherwise, you are nonetheless to hear the case and bring it to a fitting end. If the same A. calls any witnesses to testify to his assertion, you are to take care to warn them and carefully induce them by divine

² This may be Clun in Shropshire, in which case the knight may be a member of the Say family. See *Letters Foliot* no. 117.

favor and the love of justice to bear testimony to the truth about these things, and let them not presume to hold anything back about it to the peril of their salvation.

v^o infames et notabiles: This sort of exception ought to be reserved for the time of disputation, nor is it fitting that witnesses be reproved in such a way until it is clear that they testify against him, for witnesses can be reproved after the depositions are opened if protestation is made before they are opened. [X 2.20.31; X 2.25.1; X 5.3.31; X 5.3.32]. But this priest did not reserve this, therefore the reception of the witnesses was good and [also] the sentence given, until the witnesses were reproved, notwithstanding the appeal. Sometimes, however, the exception is admitted immediately before he deposes, if for example, he has a criminal case with him. [Nov. 90.1.1]. Sometimes they are received before the opening of the others, so that the business not be prolonged. [X 2.19.9]. Otherwise, they ought to be received immediately, so that the question may be reserved to the time of disputation. [Nov. 90.6, following C.4.20.10]. But from this case the fact that he appealed and the appeal was admitted, it seems that he ought to be heard wanting to prove it immediately. But what I said previously is the ordinary thing, although in fact it happened otherwise here. Or you might say that this exception was opposed after the reception of the witnesses to annul what they said, but it was not admitted; therefore he rightly appealed.

15. 2 Comp. 4.12.5

(Clement III [1187 X 1191])

As we understand from your letters and the tenor of the petition brought before us, when at one time marriage had been confirmed by an oath between H. a layman and R. a woman, because certain people asserted that they were related to each other in a line of consanguinity, you, calling the pastor (*plebanus*) in whose parish the man and woman were born firmly enjoined him that he carefully inquire into the matter and command the accusers of this marriage on your behalf to come to accuse within a term that the dean might fix for them. And if they did not appear in that term, they would not be further heard. Since the same accusers did not appear in the appointed term, the marriage was confirmed by the coupling (*copula*) of both of them. Since, however, the uncle of the of the aforesaid girl panting, it is said, after her inheritance, came to accuse the marriage in your presence, bringing with him two witnesses, whom the aforesaid man and woman were prepared immediately to prove were infamous, and because you seemed not to consent to what they said, the same man appealed to our audience. Since contracted marriages ought not be separated without great deliberation, nor should questions be taken against them, we command your fraternity, that if these things are true as we have said, you cast out the witnesses and accusers of this marriage as suspect, nor should you admit them, nor allow, as much as it is in your power, anyone else to admit them.

16. 3 Comp. 5.2.3

(=X 5.3.31; Innocent III to the prior of St. Victor and Masters L. of Bologna and L of Modena, canons [1199])

Although Ely the high priest was a good man himself, because he did not effectively root out the crimes of his sons, he brought down the vengeance of divine retribution on himself as well as on his sons, until, his sons having been taken away in battle, he fell from his saddle and died of a broken neck. A prelate ought therefore to strive more earnestly to correct the offenses of those below him the more damnable he deems their uncorrected offenses to be. Against whom, to pass over treatment of notorious crimes, one can proceed in three ways: by accusation, denunciation, and inquisition of them. Careful caution ought to be had in all three, so that lawful inscription ought to precede accusation, charitable correction denunciation, and open attribution (*clamosa insinuatio*) inquisition. "I will go down," says the Lord, "and I will see whether they have fulfilled in deed the cry that has come to me." A cry has come to a prelate at that time when by public fame and frequent attribution the crimes of his subjects are referred to him, and then he ought to go down and see, that is send and inquire, whether truth accompanies the cry that has come. For according to the canonical sanctions if anything comes to the ears of the prelate about any cleric, anything which can justly offend him, he ought not easily believe it, nor ought an unexamined matter spur him to punishment, but the truth is to be examined before the elders of the church carefully, so that, if the nature of the matter requires, canonical distriktion may strike the fault; not as if he were both judge and accuser, but as if fame were claiming and cry denouncing, he may follow the duty of his office, always lending the moderation as is dictated by the form of the judgment and the form of the sentence.

Since things were often attributed to us about the abbot of Pomposa, which sounded too different from honest regularity, the monks coming to our presence, some of them charged him with simony, perjury, dilapidation and insufficiency. When the same about excepted against them that fraternal correction had not preceded this denunciation according to the evangelical rule, and these constantly asserted that such correction had previously taken place, although the oaths of two monks were exhibited on this point, because they still did not cease to argue about it, we, as aforesaid, aroused by frequent cries, wished to inquire of our office about the aforesaid matters, binding all the monks, those who had come with the abbot and those against him, with the bond of an oath to tell the full truth that they knew about what had been proposed. When the depositions, reduced to writing, were published, they began to dispute about them in many ways. Because, however, both by the assertion of the monks and by the confession of the abbot himself we learned that the same abbot had expended a large sum of money left by his predecessor and had obligated the monastery to pay another greater sum of money, we deemed him according to canonic and lawful sanctions on account of these and other presumptions suspect of dilapidation and to be suspended from the administration of the abbacy. And because simony in many ways seemed to have been proven by witnesses against the same abbot, he opposed many exceptions against the witnesses, on which there was a great dispute on both sides, some asserted that in the crime of simony as in the crime of treason (*laesa maiestas*) all indifferently, both infamous and criminals were to be admitted not only to accusation but also to testifying, others replying to the contrary that although these two crimes are deemed as equal with regard to accusation, they differ in many ways, since one penalty is imposed for one and another penalty for the other, and there is a distinction between the person of the accuser and the person of the witness, since crimes are proved not by accusers but by witnesses, many reasons and arguments being brought forth about this. Lest either the purity of innocence fall confounded or the evil of simony escape unpunished, we, weighing equity, deemed that not all the exceptions proposed against the witnesses be admitted, nor all repelled, but admitted to proof those exceptions that seem to prove that they [the witnesses] proceeded not from the zeal for justice but the tinder of malignity, to wit, conspiracies and capital enmities. We deem that the other opposed objections, like theft and adultery, because of the pervasiveness of the heresy of simony, in comparison with which all crimes are like nothing, are to be rejected, for even if they weaken the confidence in the witness in some measure, they do not totally remove it, especially when other indications (*adminicula*) support.

17. C.2 q.1 c.7 s.3

(Gregory I to John the defensor, going to Spain [603])

... The persons of both the accusers and the testifiers ought subtly be looked into, of what condition they are and of what opinion, and that they not be without property (*inopes*) and that they not have any enmity against the aforesaid pastor [Stephen, a bishop, who said that he had been falsely charged], whether they spoke their testimony on hearing or whether they testified specially that they knew surely; if he was adjudged in writing, and the sentence recited to the parties present

18. C.2 q.1 c.14

(=D.48.2.8-11 [Macer, *On public prosecutions*, book 2; Paul, *Sentences*, book 5; Hermogenianus, *Epitomes of law*, book 6; Macer, *id.*])

We will more readily understand who can bring an accusation if we know who cannot do so. Hence, certain persons are forbidden to prosecute a crime on account of their sex or their age, as women, or minors. Many are disqualified because of their oath, for instance, those who are serving in the army; others cannot be brought into court on account of their magistracy, or their power, so long as they exercise this without the commission of fraud. Others, again are forbidden as the result of their own criminality, for example, infamous persons. Some are excluded on account of dishonorable gain, such as those who have filed two accusations signed by them against two different individuals; or who have received money in consideration of accusing, or not accusing others. Some are incompetent in consequence of their condition, as, for instance, freedmen cannot proceed against their patrons. [l. 9] Others are excluded on account of the suspicion of calumny, for instance those who, having been suborned, have given false testimony. [l. 10] Some cannot bring an accusation on account of their poverty, such as those who have less than fifty *aurei*.

[1. 12] Still, all these persons, if they are prosecuting injuries sustained by them, or the death of near relatives, are not excluded from bringing accusations. When children and freedman desire to protect their interests they should not be prevented from complaining of the acts of their parents and patrons; for instance, where they state that they have been forcibly expelled from possession, and do not do so for the purpose of bringing an accusation of the crime of violence, but in order that they may recover possession of the property. For, indeed, a son is not forbidden to complain of the act of his mother, if he alleges that a child has been falsely substituted by her in order that he might have a co-heir, but will not be permitted to accuse his mother under the Cornelian Law

19. Nov. 90.1

(Miller and Saris trans.)³

We then decree that especially in this great and fortunate city where (God guide the words) there is absolutely no lack of good men in large numbers, witnesses must be of good repute. They must either be above any kind of imputation to the contrary, thanks to the unquestionable level of their rank, their position in imperial service, their wealth or their occupation, or should they not be of such a kind, they must be at least attested as trustworthy by others, and no menial, low or totally insignificant types are to come forward to give evidence unless they are such as could easily be proved, if there is a challenge after they have testified, to have lived a blamelessly virtuous life.

20. 1 Comp. 2.13.14

(=X 2.20.14; Alexander III to the archbishop of Salerno [1159 X 1181])

Further, the censure of the sacred canons quite clearly shows that laymen are in no way to be admitted to accuse or testify against a clerk in a criminal case, unless they are prosecuting their own injury; and then they cannot be admitted to testimony but can be to accusation.

21. C.2 q.7 c.14

(Pope Anacletus [Pseudo-Isidore, p. 76])

Laymen are not to heard accusing bishops, because they are greatly hostile to them, and because it is unfitting that they be accused by those whose gravity they do not wish to imitate.

22. C.2 q.7 c.5

(Pope Eusebius, Epistle 1 to the bishops of Gaul [Pseudo-Isidore, p. 230])

Heretofore it has been observed and laid down that laymen are not to accuse bishops, because they are not of the same style of life (*eiusdem conversationis*), and some of them are greatly hostile to them, indeed since their life and style of life ought to be secret and removed from the deeds of laymen, nor should they be sued by those whose chastity and gravity they do not wish to imitate, especially when they do not wish to receive them in their own accusations.

23. 1 Comp. 2.13.22

(Alexander III to the bishop of Worcester [1159 X 1181])

On this question because the aforesaid clerks do not have authentic writings, with which they can support their claim, by the signification of these presents we order you to warn all those clerks or laymen whom these clerks nominate to open the truth of the matter which they know about this case before you and not presume to hold it back for grace or fear of anyone or hate, to the danger of their salvation.

24. C.2 q.7 c.51

(Pope Leo IV to the emperor Louis Augustus [850 X 856])

If we have done anything ineptly and have not preserved the fixity of just law for our subjects, we wish to amend everything by your judgment and that of your *missi*, for if we who ought to correct the sins of

³ The Miller and Saris translation is from the Greek, but in this case (it is not always the case), the Latin that Tancred was probably looking at is clearly a translation of the Greek and can be translated in the same way as the Greek.

others do worse, we will certainly not be the disciples of truth but (we say it weeping) the masters of error before the rest. Hence we implore the clemency of greatness greatly, that you send *missi* in these parts to examine into these things of which we have spoken, those who fear God above all, and let them examine everything (in so far as it concerns your present imperial glory), and not only these things alone which we have spoken of above do we seek to have them examine exactly, but the matters that have been charged against us whether large or small, so that all of them may be brought to a close in lawful judgment, so that from here on there may be nothing that remains unexamined or undefined.

25. C.2 q.7 c.26

Palea; Nov.45.in fine [synopsis])

When a heretic litigates against a heretic, either of them may bring forth a heretic as witness. If an orthodox litigates against a heretic, the testimony of a heretic is valid for the orthodox; against an orthodox, however, the testimony of an orthodox alone is valid. The way, moreover, is open to no heretic to testify in a case where orthodox are litigating.

26. 2 Comp. 2.2.1

(=X 2.20.23; Alexander III [1159 X 1181])

... It is reported to us that Jews living in your city have reached such pride and puffery that if when a case arises between them and a clerk or between you and them, they bring you before a secular judge and litigate with you before any judge whatever, they strive to prove their case by a simple charter without witnesses or by one Christian of any sort or one Jew, against all justice and reason, and they do not accept the testimony of great and upright men against them. Since it is not allowed to any Christian, much less to an enemy of the cross of Christ to bring ecclesiastics to the secular court and put an end to case by the testimony of only one man as if that were lawful, we command your discretion by apostolic writing that if between you and any Christians or Jews a question emerges, you are to take the call to a secular court that you deal with them and be judged there as null, but as justice requires and the reason of equity demand, in whatever case of a Christian and particularly of a clerk, you are to admit the testimony of not less than two or three men who are of upright life and faithful style of life (*conversationis*), according to the Lord's statement: "In the mouth of two or three witnesses stands every word," because, although there are some cases that require more than two witnesses, there is no case that may reasonably be terminated on the testimony of one alone, however lawful.

v^o conversationis: And thus by right a Jew is not admitted to testimony against a Christian. Argument: [C.23 q.4 c.24]. Argument contra: [X 2.20.21]. It is not contrary because there a fact is recited, to wit, that they presumed to use [their witnesses against Christians], but that ought not to happen by right.

27. 1 Comp. 2.13.13

(Alexander III to the bishop of Winchester [1159 X 1181])

Further, if anyone makes an objection of crime against a witness who is produced against him, such that by that way he can remove him from bearing testimony in civil cases, he ought be heard, and if he can civilly prove the crime that he objected against him, he is in no way to be heard bearing testimony, but on account of this he is not to be punished. The Roman church is not accustomed to compel anyone to give testimony to the truth.

28. 2 Comp. 2.11.1

(=X 2.25.1; Celestine III [1191 X 1198])

Finally, with regard to whether opposition can be made to the dicta and persons of the witnesses against whom nothing was objected before their oath and depositions, you ought to know that this has obtained by long custom in the Roman church, that lawful exception can be raised against the dicta and persons of the witnesses before the oath and depositions or after. And if crimes are objected against the witnesses of which they were not heretofore accused, but are opposed only by exception, proof is to shown of these crimes before the case is ended by sentence, since, as the canonical institutes declare, witnesses in bearing testimony are required to be free of any infamy or suspicion or manifest stain. But if only those crimes are

objected against the witnesses, of which at another time they were convicted, they can be repelled from testimony, since as Pope Stephen and many other Roman pontiffs testify [cf. C.9 q.1 c.3], the confession of those against others is not to be believed unless they first prove themselves innocent. Otherwise if witnesses are convicted or confess crimes objected by exception alone, they ought not be penalized by the ordinary penalty, since they were not accused by the process of law. It suffices therefore that they be repelled from giving testimony, especially where the crime which is objected against them does not seem to concern the case at bar.

29. 3 Comp. 2.11.1

(=X 2.10.2; Innocent III to the bishop of Narni [1198])

[The bulk of this long decretal concerns the *exceptio spoli*, by which a defendant can oust a plaintiff in a property case on the ground that the plaintiff has despoiled him (the defendant) of his property.] ... Truly, where spoliation is proven only by way of exception, restitution is not to be made on account of this, just as when a crime is objected against a witness by way of exception so that he may be repelled from testimony, the ordinary penalty is not on that account to be inflicted on him, but his testimony is not believed. This happens because an accusation has not been brought against him. Witnesses also whose testimony has been reproved are not included among the infamous on the ground of false testimony.

30. 3 Comp. 5.2.4

(=X 5.3.32; Innocent III [to Master R(oberth de Courçon ?)] [1204])⁴

By your letters to us you intimated that you had many doubts about a certain decretal letter which you say that we issued concerning the admission of witnesses against the depravity of simony. You should know that we never issued that letter which begins “Quamvis ad abolendam” [2 Comp. 5.2.6 (? Clement III)], but we acknowledge that we issued another which begins “Licet Heli” [3 Comp. 5.2.3, above no. 15]. For understanding this letter we believe that distinctions ought to be made: whether he against whom there is a case of simoniacal depravity is simply denounced or criminally accused, and whether the case is brought according to the rigor of the law or according to the temperance of equity. Again, whether he is a regular who has already renounced the world or a secular who still is in the world, and whether he is of an inferior grade or of excellent dignity. To this point, whether he previously was of good opinion and fame, or seriously defamed and strongly suspect, and whether he can easily be punished or whether he cannot be punished without scandal. Further whether the witnesses are honest or criminous, and whether they have reformed from crime or whether they still persevere in crime. Again if the crimes are the same or less or equal or greater; and whether the witnesses are believed to testify out of the zeal for justice or out of the tinder of malignity. Finally whether the dicta of the witnesses are the only things for detecting the simoniacal depravity or whether other indications (*adminicula*) support. All these things must be distinguished in order to understand this letter, as the careful examiner can determine from the letter itself. The abbot of Pomposa who had already renounced the world was seriously defamed of simony, perjury, dilapidation and insufficiency. When simony seemed to have been proven in many ways by monks who had sworn to bear testimony to the truth, he opposed many exceptions against the witnesses, conspiracies and capital enmities, theft and adultery, in order to remove them from testimony. We, however, so that the purity of innocence not fall confounded nor the depravity of simony escape unpunished, admitted those exceptions to proof by which it might be clear that the witnesses had proceeded not out of zeal for justice but out of the tinder of malignity, such as conspiracies and capital enmities. The other exceptions, however, such as theft and adultery, because of the pervasiveness of the heresy of simony, in comparison with which other crimes are considered as nothing, we thought ought to be rejected, because even if they were proved, they weaken the faith of the witnesses a bit, but would not entirely destroy it, since other indications (*adminiculis*) supported it, especially since the witnesses had reformed from the crime. Such [witnesses] therefore we think ought to be admitted against such a person not according to the rigor of the law, but according to the temperance of

⁴ Donahue, “P 265 = JL 16635?: A Mild Heresy Stated and Defended,” in *Festschrift Knut Nörr*, argues that Innocent did indeed issue the decretal “Quamvis ad abolendam,” and that the attribution to Clement III in 2 Comp is mistaken. He also suggests that Mr. Robert de Courçon may have been the recipient of this decretal.

equity, when the case is not brought criminally, that he might be deposed from his order, but civilly that he might be removed from administration, as unworthy and condemned. And indeed such prelates can be removed from administrations for lighter reasons, especially by the high Pontiff, who has power not only of judging but of disposing, as the custom of some religious approves. For this reason the aforesaid abbot, not waiting for sentence, gave up the office, like one with a guilty conscience.

31. C.6 q.1 c.3

(Pope Fabian, Epistle 2 to the oriental bishops [Pseudo-Isidore, p. 164])

Those who have committed those sins of which the Apostle speaks: “For those who do such things shall not attain the kingdom of God [Gal. 5:21],” are strongly to be warned and compelled to reform if they will not voluntarily; for they are covered with the stains of infamy and will go to hell, if they are not supported by sacerdotal authority. Similarly those of whom he says: “With such do not take food [1 Cor. 5:11],” because they are noted with infamy, before they are cleansed by sacerdotal authority, and return to the bosom of holy mother church, for those who are outside of us cannot communicate with us.

32. C.6 q.1 c.4

(*idem*)

All those are to be rejected from accusation whom the Apostle mentions saying “With these do not take food,” and before satisfaction are not to be received in church.

33. C.14 q.1 c.1

(Paschal II to Guido archbishop of Vienne [1105])

We greatly wonder at your prudence that in the matter of St. Stephen’s you did not wish to accept the testimony of the clerks themselves. For there are divers kinds of cases, and crimes are not at issue in all cases. In crimes that stricture about accusers and witnesses that is contained in the canons is to be observed, that no domestics be taken for proof. Otherwise in matters of possession and the like they most certainly are to be taken, who dealt with the same business, about whose sight and hearing there ought be no hesitation. If, therefore, the same clerks are fitting to the assertion of this case, they ought in no way be removed, and, as is discussed in other letters, this litigation between the canons of St. John and St. Stephan may be fully decided.

34. 1 Comp. 2.13.21

(=X 2.20.6; Eugenius III to the prior and brothers of Holy Trinity[, London; Alexander III (1159 X 1181)])

Further we decree by our authority that you may give testimony in cases of your church, so long as one or two of you is instituted to bring the case or defend it, the testimony of whom ought not be admitted in cases in which they are instituted as plaintiffs or respondents.

35. 3 Comp. 2.12.11

(=X 2.20.38; Innocent III to the abbots of “Novo Fonte” and “Casa Dei” [1204])

[This long decretal is basically concerned with other issues. In delegating the case (which concerned a disputed election to the deanery of Clermont) to the abbots, the decretal closes with this remark about the canons of the chapter of Clermont, who are third parties in the case and who had been excommunicated for disobeying the sentence of the bishop from whom the appeal was taken.] ... Since those things that happened in the chapter cannot easily be proved except by the canons themselves, we wish and command that you absolve them temporarily, so that called to testimony they may freely testify for either party.

36. C.2 q.6 c.38

(5th Coucil of Carthage c.1 [401])

It is laid down that whoever in the church wishes to bring any case by the apostolic right imposed on churches and the decision of the clerks happens to displease one party, it is not permitted that the clerk be called to court for testimony who was president (*praeses* [a misreading for *presens*]) or the examiner (*cognitor*), and no person of any ecclesiastic may be compelled to give testimony.

v^o *praeses*: I.e. bearing the *praesidium*, i.e., advocate or assessor. *Praeses* is called defender. [C.32. q.4 c.4].

v^o *cognitor*: The instrument of a judge, however, is believed about those things that were done before him, and even his statement is believed. [X 2.13.12 *in fine*; X 2.13.15; X 2.27.17; X 2.27.16; X 2.15.2; X 2.20.28; C.8.37(38).14; C.9.22.21]. Argument contra: [C.3.44.1;] *de arbi.*, *ne in arbitris* [unidentified];⁵ [D.48.3.6; C.2 q.6 c.29 s.10 (?);⁶ X 4.5.6; X 5.1.18 *in fine*.] The judge is believed, however, with other indications (*adminiculis*). [X 2.20.28].

37. 1 Comp. 2.20.35

(Alexander III to the archbishop of Canterbury [1159–1181])

[This long decretal basically concerns other issues. The following seems to be sentence to which Tancred is referring:] ... Hence it is, that we command you fraternity by apostolic letters that if it lawfully appears to you either by the letters of our commission to the aforesaid bishops of Exeter and Chester [as previous papal judges delegate in the case] or by the assertion of the same bishops, or otherwise that appeal was not inhibited in the aforesaid letters, whatever was innovated or changed in this case after the appeal taken from the same bishops to us you shall have reduced to the state in which it was [at the time the appeal was taken]

38. D.28.1.20.2

(Ulpian, *On Sabinus*, book 1) (S.P. Scott trans.)

(2) On the other hand, the question may be asked whether a father can be offered as a witness to will by which his son disposes of his *peculium castrense*. And Marcellus states in the Tenth Book of the Digest that he can be a witness, and that his brother can also be one.

39. D.22.3.16

(Terentius Clemens, *On the lex Julia et Papia*, book 3) (S.P. Scott trans.)

The statement of a mother as to the birth of her children, as well as that of a grandfather, must be accepted.

40. 1 Comp. 4.18.3

(=X 4.17.3; Alexander III to the archbishop of Rheims [1159 X 1181]) (CD trans.)

The letters you have sent us say that when N. your citizen had supported a child until he became a youth, his wife M. then not espoused to him but living with him, he afterwards lawfully espoused her, as is said, and had children by her. When they sought the paternal inheritance, the aforesaid youth contradicted, holding himself out as son and heir, although he was said to be a bastard by the neighborhood which believed him to be their child. The aforesaid N. and Matilda his wife denied that he was their bastard or their child, but said that they had supported him out of piety. When the question was moved before you and the aforesaid youth, because he did not wish to stand in law before you, was tied with a bond of excommunication, you wished to consult us as to what you ought to do about this. We thus reply to your consultation: that in such a case the word of the man and his wife is to be believed, unless by certain indications and witnesses it is apparent to you that the aforementioned youth is [their] son.

41. C.35 q.6 c.1

(Pope Fabian [apparently not in Pseudo-Isidore, but certainly not genuine])

No one should accuse the blood relatives of outsiders or compute consanguinity in synod (*vel consanguinitatem in synodo computet*), but the nearest relatives, to whose notice it pertains, that is, father and mother, brother and sister, paternal uncle and aunt, maternal uncle and aunt, and their children. If

⁵ There is no title “*de arbi.*” in the Code or Digest. There is a title *de arbitris* in the *Liber extra*, but none of the chapters has the incipit *ne in arbitris*.

⁶ “*Supra eo. dubium in fi.*” The cited section would be “*supra eodem biduum in fi.*” The negative inference from this passage (derived from D.49.4.3) is that a litigant may appeal against a judge’s letter if he does it in a timely fashion.

however the entire kin-group (*progenies*) is lacking, let the bishop inquire of the older and truer of those to whom the nearness is known, and if nearness is found, let them be separated.

v^o vel consanguinitatem in synodo computet: You should refer this to a witness. And there is an argument that the same person cannot be both accuser and witness in a criminal case: which is true, although some agree saying that this is special in marriage, that the accuser and witness may be the same, as it is special that there is no oath of calumny in this [case] since it is a spiritual question. [X 2.7.2]. And that consanguines are admitted and that the *ordo iudiciarius* is not completely observed in such cases. [X 2.6.1]. And that testimony on hearing is valid. [C.35 q.6 c.5]. And that witnesses can be brought in after publication. [X 2.20.26; X 2.20.49].

42. 2 Comp. 2.18.5

(=X 2.27.10; Clement III [1190 X 1191])

[Only one sentence of this rather long marriage case seems relevant, although it might be noted that the facts do not suggest that the woman's claim was one of invalidity of the marriage by consanguinity:] ... You should not reject the witnesses, moreover, that the aforesaid M. [the plaintiff] produces from her kin or otherwise so long as they are otherwise suitable, since blood relatives both by charters and by witnesses and even by the recital of their elders and other means usually know their kin better than outsiders.

43. C.3 q.5 *per totum*

Gratian. that witnesses from the house of accusers are not to be produced and that the voice of enemies is not to be heard is shown by the authorities of many: [There follow fifteen canons, all of which deal with accusation procedure but which do support the points Gratian is making.]

44. C.1.12.6.[5/9]

(Leo to Erythrius, praetorian prefect) (S.P. Scott and CD trans.)

5. But if a slave, a tenant, a serf, a member of a household, a freedman, or any other domestic (*domestica*) person of this kind who is subject to the authority of another, after having either broken or purloined property, or stolen himself, should take refuge in any holy place, he shall immediately be returned to his former residence and condition, as soon as the facts have been ascertained by the stewards or defenders of the church it is to do this after he has been punished in the presence of the parties interested, in accordance with the rules of ecclesiastical discipline, or the nature of his offense

v^o domestica: Here some domestic persons are indicated, as in Again, a wife for her husband and vice versa are domestics These things are useful for what is said below in [C.4.20.3].

Johannes Bassianus on the same law (Savigny, *Geschichte* 4.450): "He calls a tenant (*colonus*), a serf (*adscriptus*) and a freedman domestics; therefore they cannot be witnesses."

45. C.3 q.5 c.2

(Pope Anacletus, letter 3, c.5 [Pseudo-Isidore, p. 84; cf. Ambrose, Letter 64])

They cannot be accusers and witnesses who yesterday or three days ago were enemies, lest in their anger they might desire to harm, or injured they might wish to avenge themselves. Therefore the unoffended behavior of accusers and witnesses is to be sought, and not suspected behavior.

46. 3 Comp. 2.12.10

(=X 2.20.37; Innocent III to the bishop of Piacenza [1206])

... Wishing moreover to bridle the unbridled multitude of witnesses, we wish that you not permit the number of witnesses to exceed forty on either side, so that if they wish to hold ratified the depositions of the witnesses taken at Faventino before our venerable brother the bishop of Ferrara and the abbot of Pomposa, these witnesses will be counted in the aforesaid number; otherwise, since these attestations are closed, the same witnesses may, if necessary, be produced again.

47. 3 Comp. 2.12.9

(=X 2.20.36; Innocent III to the prior of St. Victor [1206])

F. TANCREDEUS BONONIENSIS, ORDO IUDICIARIUS 3.12

in F. Bergmann ed., *Pillii, Tancredi, Gratiae, Libri de iudiciorum Ordine*
(Göttingen, 1842) 245–8 [CD trans., citations modernized]

12. TO WHAT WITNESSES IS FAITH TO BE GRANTED AND HOW MUCH.

A general introduction to Tancred's *Ordo* and a full translation of title 3.6 is found above in § D. I have added title 3.12 here because it was the subject of a good paper in 2023.

Because witnesses who are produced in court sometimes are found to be contrary and sometimes diverse [i.e., say different things], occasionally one contradicts one or many contradict many, whether they are produced by one party or both, let us see, therefore, to what witnesses faith is to be granted and how much.

If a witness contradicts himself, or says the opposite, or varies, or says the truth in one matter and falsehood in another, he is rejected, and what he says has no force, as [C.4 q.3 c.3 s.20], [C.3. q 9. c. 17], [X 2.19.9].

If, however, many witnesses are brought in by only one party, if they agree and the nature of the case and the *motus animi*¹ of the judge agrees with them, then all their testimony is to be followed, and sentence is to be rendered according to their *dictum* (literally, 'the thing said'), as . [C.4 q.3. c.3pr] and [Dig. 22.5.21 §. ult.]. If the witnesses [on one side] disagree among themselves, although they are of unequal number, then the judge must believe those *dicta* which best fit the nature of the matter at hand and which are least suspicious, and the judge will support his *motus animi* from the arguments and the testimonies that he shall find more appropriate for the case; for it is not necessary to have regard to the multitude of the witnesses but to their heartfelt (*sinceram*) faith, as said in [X. 2.20.32], in the previously alleged laws. What if only two witnesses are brought in by one party, and they contradict each other? I reply, neither [witness] will stand because each of them is alone in what he says, and each one is singular in his testimony, as [X 1.6.23], [X 1.6.32], and because one is not to believe the *dictum* of one person, however much he may shine in dignity, as [C.4. q.3. c.3 s.37–38] [X. 2.20.23] [Cod. 4.20.9.1].

Moreover, when witnesses are brought in by both parties, if they agree, their *dicta* are to be followed, as was said when they are brought in by only one party.

If, however, they are found to be contrary or diverse, the judge ought to reconcile them, if he can, so that their testimony is valid, as [X 2.20.16]. If he cannot reconcile their *dicta* because what they say is in direct contradiction, the judge by his *motus anime* can know to whom faith is more appropriately given, so that the freeborn is more to be believed than the freedman, the older rather than the younger, the man of more honorable estate rather than the inferior, the noble rather than the ignoble, the man rather than the woman, as [Dig. 22.4. 1. ult.] [Dig. 1.5.9], [X 2.20.32]. Further, the truth-teller is more to be believed rather than the liar, the man of pure life rather than the man who lives in vice, the rich man rather than the poor, anyone rather than he who is a great friend of the person for whom he testifies or an enemy of him against whom he testifies, as [Dig. 22.5.3pr], cf. [Dig. 4.3.11] and cf. Dig. [24.3.22.5. 6] and [2] and all of [C.3. q.5]. But you should not think that faith is to be withdrawn entirely from those who are inferior, but that in doubtful matters the more powerful and worthy are more to be believed. What if all the witnesses are all of the same condition, dignity, and faith? I reply the judge then should stand with the greater number, for there is credence in the many; cf. [Nov. 90. c. 2, 3. sub f.], [Dig. 4.8.17.2. (6. 7.)] and [Dig. 4.8.27.3], [Dig. 25.4.1pr], [Dig. 29.3.6], [D.65. c.1, 2, et 3] and more clearly [X 2.20.32]. But if there are as many for one side as there are for the other, and they are equally good, or there are more on one side but more worthy on

¹ Literally 'the movement of the spirit' or 'the movement of the soul'. We might say 'instinct', but that does not quite capture it. 'As the spirit moves him' would capture the phrase literally, but in English that phrase implies too much irrationality.

² The manuscripts differ here on what is cited, and none of the citations that they offer pans out. The error probably goes back to the first copy that was made from Tancred's autograph.

the other, so that dignity can be equated with number, what ought the judge to do then? I reply that the judge should then absolve the defendant, as in the said decretal [X 2.20.32], because we ought to be more inclined too absolve than to condemn, as [1 Comp. 2.12.2], [Dig. 44.7.47], and those witnesses are to be followed who turn aside from judgment [in the sense of a condemnatory sentence], cf. [Dig. 2.14.8], [Cod. 7.71, l. ult.]. And this is true as a general matter, that judgment is to be given on behalf of the defendant when the witnesses are equal, unless the side of the plaintiff is more favorable, for example, that it stands for liberty, for dowry, for a testament, for legitimation, for a young child, for a widow, for an orphan, for the fisc, for the church, or for any matter or person who is favorable, for then judgment is to be given for the plaintiff; cf. [Dig. 42.1.38pr], [Dig. 5.2.10pr], [Dig. 50.17.85pr], [Cod.3.14.un.], [Cod. 1.2.22].

By reason of contradiction sometimes the *dictum* of witnesses is not believed, as is shown above. Occasionally, moreover, faith is not given to their *dictum* by reason of their persons, as we showed above in the first title on witnesses [t. 6]. And sometimes faith is not given to them either because they respond badly or because diversity of matter, time, place, or like things stands against them, as is said above in the title on the oath of witnesses [t. 9].

And these sayings about witnesses [i.e., all of tit. 6 through tit. 12] are enough.

G.AUTHORITIES CITED IN TANCREDE, ORDO 3.12

a. TABLE OF AUTHORITIES

Listed below are the authorities that Tancred cites in title 3.12 in the order in which he cites them. If the authority has previously been reproduced in these materials, the reference is given here. If it has not been reproduced in these materials, it is reproduced below, in the same order. (My translation, unless otherwise noted, and a very rough translation it is.) I have not checked the glosses, some of which may give additional clues as to why Tancred cited this authority.

- | | |
|--|---|
| 1. C.4 q.3 c.3 s.20 – in <i>Mats.</i> p. IX-4 | 18. Dig. 24.3.22.5. 6 cf. |
| 2. C.3 q.9. c. 17 | 19. C.3 q.5 all of – in <i>Mats.</i> p. IX-19 |
| 3. X 2.19.9 | 20. Nov. 90. c. 2. 3. sub f. cf. |
| 4. C.4 q.3 c.3pr – in <i>Mats.</i> p. IX-3 (pr = principium, i.e., the beginning section) | 21. Dig. 4.8.17.2. (6. 7) |
| 5. Dig. 22.5.21.3 – in <i>Mats.</i> p. I-34 | 22. Dig. 4.8.27.3 |
| 6. X 2.20.32 | 23. Dig. 25.4.1pr |
| 7. X 1.6.23 | 24. Dig. 29.3.6 |
| 8. X 1.6.32 | 25. D.65. c.1-3 |
| 9. C.4 q.3. c.3 s..37-38 – in <i>Mats.</i> p. IX-4 | 26. X 2.20.32 – above no. 6 |
| 10. X 2.20.23 – in <i>Mats.</i> p. IX-15 | 27. X 2.20.32 – above no. 6 |
| 11. Cod. 4.20.9.1 – in <i>Mats.</i> p. I-36 (it is 4.20.8.1 in the <i>Mats.</i> because Scott used an older numbering) | 28. 1 Comp. 2.12.2 = X 2.19.3 |
| 12. X 2.20.16 | 29. Dig. 44.7.47 |
| 13. Dig. 22.4.6 | 30. Dig. 2.14.8 cf. |
| 14. Dig. 1.5.9 | 31. Cod. 7.71.8 |
| 15. X 2.20.32 – above no. 6 | 32. Dig. 42.1.38pr cf. |
| 16. Dig. 22.5.3pr – in <i>Mats.</i> p. I-32 to I-33 | 33. Dig. 5.2.10pr |
| 17. Dig. 4.3.11 cf. – Citations followed by ‘cf.’ indicate that Tancred says that you can make an argument from this text, rather than that it is squarely on point. | 34. Dig. 50.17.85pr |
| | 35. Cod. 3.14.un. – un = unicus, i.e., it is the only fragment in the title |
| | 36. Cod. 1.2.22 |

2. C.4 q.3 c.3 s.20

(in *Mats.* p. IX-4)

3. C.3 q.9 c.17

(CD trans.)

Again Ambrose in the book About paradise [c. 12]

A pure and simple recital of testimony is to be published. Frequently a witness, when he adds to the recital of things done something of his own, discolours the entire faith of the testimony for the party. Nothing therefore that seems good should be added.

4. X 2.19.9

(CD trans., omitting the parts that are not in the Gregorian decretals.¹)

The same [Innocent III]

Although the case that was pending between the church of Ravenna and the commune of Faenza about the jurisdiction, honors, and district² in the town of St. Peter and castle of Arioli, that by law the said church was proposing belonged to it . . . At length, the attestations having been published, the syndic [a manager of a corporate body] proposed that he wanted to object and prove some things against the persons of the witnesses on the other side, the oeconomus [steward] of the same church asserting that that ought not to happen. About this we made an interlocutory sentence, that he [the syndic] should not be heard, since he had not seen to fit produce such witnesses within the period of three months specified in our letter, within which term both parties could bring in witnesses both about the persons of the witnesses and about the principal matter. After this the same [syndic] objected against the witnesses produced that they corruptly spoke falsehood. . . . Whence, since such an exception can be made not only before but also after sentence, although many believed that the party of the Faventines brought forward this exception with malice aforethought to delay the process, because we did not wish pass beyond the threshold of the law, we ordered masters G and T. that they take care to receive and examine the witnesses that the proctor of the Faventines would bring on this exception to be produced within a month, [the commissioners] inquiring subtly about all the circumstance, there being granted thereafter another month to the proctor of the abovesaid church, within which, if he wished, he might produce before them witnesses to reprove these witnesses.

Although the party of the Faventines produced many witnesses on the principal matter, scarcely six of them remained in agreement, since others contradicted themselves in their testimony, and certain others were singular in what they said in their testimony. To reprove, moreover, some of the witnesses of the church of Ravenna, even if some witnesses were brought in on the part of the Faventines, many were reprovved, because they clearly contradicted each other. Certain of them, moreover, small in number, though they were not reprovved expressly, were of such ill fame and light opinion, that no or little faith is to be given to them. Also the same witnesses of the Faventines are generally to be repelled because they did not prove that which the syndic bound them to prove, i.e., that they [the witnesses for Ravenna] corrupted spoke falsehood, for, even if they seemed to say something about corruption, they said absolutely nothing about falsehood.

From the aforesaid, therefore, it is plainly apparent that the church of Ravenna by witnesses greater in number, whom the light of truth better attends, who also expressed in their testimonies things more fitting the business and closer to the truth, sufficiently showed that for 40 years and within with all jurisdiction, honor, and district, possess the above said places. By which it is apparent, that if the commune of Faenza from 50 years and within, as their witnesses seem to depose, received any services in the aforesaid places, they began to receive them without doubt without just title, since two [parties] cannot at the same time and in the same way possess the same thing, especially when the same Faventines did not show a just title of possession, and by privileges granted by the emperors and the Roman pontiffs, the possession of the same church in the aforesaid places was just. Since, therefore, it is apparent that the Faventines from that time in which they argue that they proved that they possessed, less justly and without title . . . by their own rashness seized (*occupasse*) some things in the aforesaid places, and the oeconomus of the same church asks that the commune of Faenza be prohibited by interdict from troublesome and unquiet force about the premises, we, recognizing in this case there is thus not a place for the interdict ‘*Uti possidetis*’, as [if] we ought to say: ‘*Uti possidetis, ita possideatis*’ (‘as you possess, so you may possess’),³ since the proofs of the church are much

¹ The same letter is found in Innocent’s register addressed to the archbishop of Ravenna and dated 1 Sep. 1207.

² ‘An area of jurisdiction or authority’ DMLBS, s.v.

³ The formula of the Roman interdict *Uti possidetis*.

more powerful than that, and therefore it is higher in interdict, we condemn the commune of Faenza in the aforesaid places, so far as a possessory judgment [is concerned], which is all that was done, imposing on them perpetual silence, and prohibiting them in these matters, that neither by themselves nor by others that they presume to molest the church of Ravenna and the inhabitants of the said places in any way.

5. C.4 q.3 c.3pr

(in *Mats.* p. IX-3 [pr = principium, i.e., the beginning section].)

6. Dig. 22.5.21.3

(in *Mats.* p. I-34.)

7. X 2.20.32

(CD trans., omitting the parts that are not in the Gregorian decretals.)

The same [Innocent III] to the bishops of London and Hereford.

In our presence . . . Since, therefore, on one side many, and on the other fewer witnesses in number were produced, who rendered not only diverse but in some respects contradictory testimony, because one ought not look only to the multitude but also to the quality of the witnesses, and to their depositions, which ones the light of truth supports, from which it is fitting that the judge inform his *motus animi*, we order that, if the witnesses produced on both sides are of the same honesty and reputation, you render sentence for the archdeacon [who had the greater number of witnesses]. If, however, the witnesses produced on the side of the monks were of such eminence that their authority is rightly to be preferred to the multitude of the others, you should absolve them [the monks] from the petition of the archdeacon. (2 Id. Dec. [12 Dec.]⁴ 1205)

8. X 1.6.23

(CD trans., omitting the parts that are not in the Gregorian decretals.)

The same [Innocent III] to the canons of Mainz

When C. the archbishop of Mainz of good memory went the way of all flesh, and some canons petitioned that the bishop of Worms, and some the provost of St. Peter, Mainz, be chosen as their pastor, we gave a mandate to the [cardinal-]bishop of Praeneste, legate of the apostolic see [in Germany], that if it was apparent that the same bishop had received any temporal or spiritual revenues in the same church [of Mainz] or had ministered in temporals or spirituals in the church of Mainz, he [the legate] should declare void the postulation made on his behalf.⁵ Next he [the legate] was to inquire into the truth of the election of the same archbishop, and if it appeared to him [the legate] concerning the force that he [the provost] and his supporters feared, (notwithstanding the fact that they went ahead with the election after an appeal had been taken to us, since the others could not raise the exception against him that they [the supporters of the bishop] had chosen not to defer to the appeal [and] that they [ought] not to have proceeded to the election without him and his companions, because he who violates the law invokes the law in vain, hence it seems that they cannot object that he [the provost] was, according to their assertion, elected by the fewer [of the voting canons], when they, contemning the appeal taken to us lawfully, and receiving the mentioned bishop without our license rendered themselves unworthy) he [the legate] should confirm the election.⁶ Although the things that were alleged against the bishop of Worms and his supporters were notorious, the aforesaid legate, out of abundance of caution, received many and great witnesses produced on the side of the same archbishop

⁴ More Roman would be 'pridie Idus'.

⁵ As the fuller text of the decretal makes clear, this was on the ground that only the pope could translate a bishop from one see (Worms) to another (Mainz). By declaring the postulation of the bishop of Mainz void, Innocent was opening an inquiry into the election, as is clear in what follows.

⁶ This sentence is mess. It makes sense if you read it without the long parenthetical. What that says is that if the legate finds that the 'archbishop', who is presumably, the provost, and his supporters feared force, then the election should stand, because, presumably, they proceeded quickly and without at least some of the supporters of the bishop of Worms. The parenthetical makes sense if we assume that it was the supporters of the bishop of Worms who appealed. The election went ahead anyway, and some supporters of the bishop showed up and were able to cast their votes, but they were a minority. Then the bishop of Worms became the *de facto* archbishop, and at least some of his opponents accepted him as such. Whether these were the facts, I'm not sure.

[presumably the provost]. Whence he [the legate], proceeding according to the tenor of our mandate, quashed the postulation made on behalf of [the bishop] of Worms, and took care to confirm the election of the mentioned archbishop [the provost], although it was celebrated by very few [of the electors], and ordained him as a priest, and at length consecrated him as archbishop. Against the process of the legate, however, this [objection] seems [possible] to make: that he proceeded without citing the bishop of Worms and his supporters. But a notorious offense does not require examination, there is a presumption in favor of what is done by a judge, that everything was correctly done, and also it cannot easily be proven that they were not cited, because in the nature of things there is no direct proof for someone who denies a fact, since, even if someone can assert on his own behalf that the citation did not come him, each one of you [sic] is singular in his testimony. Also, they could have safely sent a suitable proctor to the same legate, as they might have sent a messenger. We, therefore, even if we presume in favor of those things that the legate did on account of his judicial authority, we rest nonetheless more on this reason that for the three aforesaid reasons⁷ the adversaries of the archbishop have rendered themselves so unworthy that they ought not to be heard against him. Whence what was done *de facto* by cannot be impeded by them in such a way that even if the electors of the same party [probably referring to the provost] failed in such a way as to make themselves unworthy, the ordination of the church of Mainz would have devolved upon us on this occasion, whereby we can place the said archbishop as pastor of the church of Mainz without violating the law. Having therefore taken careful consideration of these matters, we ratify the quashing of the postulation made on behalf of the bishop of Worms and confirm the election of the mentioned archbishop. (10 Kal. April [23 March], 1202)

9. X 1.6.32

(CD trans., omitting the parts that are not in the Gregorian decretals.)

The same [Innocent III] to the abbot of St. Victor [Paris], the dean of Paris, and Master R. Decortensi, canon of Thérouanne.

When our beloved son the archdeacon of Thérouanne informed us . . . [When] the church of Thérouanne was deprived of the consolation of a bishop, the canons of the same, considering about the replacement of a pastor, unanimously conferred on three canons of Thérouanne the power of choosing a bishop, promising that they would receive as pastor him whom they chose to elect from the bosom of the same church, who, after considering what each of them [?the electors, ?all the canons] willed, elected the archdeacon of the same church as bishop. The metropolitan also, looking carefully at the election and the person of the elect, and also about his age, which some cast into doubt, inquiring solicitously about the truth, declared by sentence the elect was under no defect of age [and] solemnly confirmed the election made of him. . . . Truly, B., who came against the mentioned elect, proposed on the other side, that when the power was granted to the aforesaid three under this form, that the chapter would be held to receive him whom all these three, or a greater or wiser part, chose to nominate as pastor from the bosom of the same church, these electors, not adhering to the terms of the power that was granted to them, presumed to choose the aforesaid archdeacon, whom few in the chapter nominated. Whence the canons of Thérouanne afterwards marveling how the named archdeacon was nominated when there many in the same church more worthy, began, almost all, to say publicly, that they had not nominated the archdeacon, and considering that they were in this matter deceived by what had been done in this matter, chose to reveal [it] to our apostolic. We, moreover, taking heed that it would be a pernicious example if someone by guileful deceit could ascend to the pinnacle of dignity, do determine that it should be provided that, taking an oath that those who oppose the election do not do not move this question against the elect maliciously, the three electors should be constrained by the bond of an oath to say the truth about how many of the canons at the time of the examination agreed on the said archdeacon. And if three together or at least two of them having been sworn say that the greater part of the canons agreed on the said archdeacon, you [the delegates] should impose silence on those who contradict, since against this their proof is not enough, by reason that each of them would be singular in his testimony (*singuli essent in suis testimoniis singulares*). If, however, it is established by their depositions that the oft-said archdeacon was nominated by fewer, then if it shall have been sufficiently shown that they

⁷ Exactly what the three reasons are cannot be determined in this abbreviated text, but at least one of them is given above.

ought to have elected him from the bosom of the church according to the form handed on to them, in which all or a greater and wiser part of the chapter agreed, you should entirely quash the election of the same archdeacon.⁸ Otherwise, holding what was done about him ratified, you should restrain the contradictors by his [B's] petition by ecclesiastical censure, despoiling B. of his prebend in the church of Th rouanne, who bound himself to this penalty if he should fail in proof, notwithstanding that is objected against him [the archdeacon] on the ground of defect of age, and [because] about this a judgment was made by the metropolitan, whose sentence became *res iudicata*, when it was not suspended by lawful appeal within ten days. (4 Non. April [2 April] 1208)

10. C.4 q.3. c.3 s. 37–38

(in *Mats.* p. IX-4.)

11. X 2.20.23

(in *Mats.* p. IX-15.)

12. Cod. 4.20.9.1

(in *Mats.* p. I-36 [it's 4.20.8.1 in the *Mats.* because Scott used an older numbering].)

13. X 2.20.16

(CD trans., omitting the parts that are not in the Gregorian decretals.)

The same [Alexander III] to the provost and canons of Embrun.

When you, my son the provost, with certain of your canons, were in our presence When it was clear that your witnesses swore that he [the archbishop] had rendered a sentence of excommunication after appeal, and the witnesses of the archbishop similarly swore that it was before, we wishing the *dicta* of the witnesses to be benignly interpreted lest they be charged with perjury, because both things could be true, that the sentence was rendered after the first appeal and before the second, we determine that the same sentence cannot stand.⁹

14. Dig. 22.4.6

(Watson trans.)

6 ULPIAN, *Edict*, book 50: Where the issue is with whom a will should be deposited, we always prefer the elder to the younger, the higher in rank to the lower, male to female, and freeborn to slave born.

15. Dig. 1.5.9

(Watson trans.)

9 PAPIAN, *Questions*, book 31: There are many points in our law in which the condition of females is inferior to that of males.

⁸ At first glance, this judgment seems odd. B. does not seem to have been arguing that less than a majority of the arbiters/electors chose the archdeacon, but that they ignored the terms of their commission by not choosing him from the 'bosom of the church' (*de gremio ipsius ecclesiae*). That phrase is not self-defining. B. seems to be arguing that the elect had to be a canon of the cathedral chapter (which the archdeacon does not seem to have been) and/or that it had to be someone whom a majority of the canons supported. What Innocent seems to have decided is that determining what 'from the bosom of the church' meant was a matter that the electors were to decide. If a majority chose the archdeacon, they were also deciding that he fulfilled the requirement, and that is the end of the matter. Only if the choice was not that of a majority of the electors, are the delegates to inquire into the meaning of 'from the bosom of the church'. The way that Innocent sets it up, it seems unlikely that B. will prevail. The archdeacon did become the bishop and served until his death in 1221 (Eubel).

⁹ It is unclear whether there were in fact two appeals in this case, or whether Alexander is imagining that there were in order not to charge the archbishop's witnesses with perjury.

16. X 2.20.32

(above no. 6)

17. Dig. 22.5.3pr(in *Mats.* p. I-32 to I-33.)**18. Dig. 4.3.11¹⁰**

(Watson trans.)

11 ULPIAN, *Edict*, book 11: it ought not to be given. **1.** Moreover, it will not be given to certain persons, for example, children or freedmen against parents or patrons, since it involves infamy. Nor ought it to be given to a man of low rank against someone of higher rank, for example, to a plebeian against a man of consular rank possessing acknowledged authority or to a man of licentious or spendthrift or other worthless habits against a man of more correct behavior. Labeo writes to the same effect. What then, is the position? In the case of such persons, it is to be said that an *actio in factum* is to be given so worded as to make mention of good faith,

19. Dig. 24.3.22.5-6¹¹

(Watson trans.)

22 ULPIAN, *Edict*, book 33: . . . **5.** A daughter must give her consent at the time of joinder of issue where her father brings the action. It follows that if she tells her father she consents and changes her mind or is emancipated before joinder of issue, her father's action is ineffective. **6.** We agree with the view of Labeo that sometimes a father should be refused an action, if he is the kind of man who would be likely to squander the dowry if he received it. So the authority of the judge should be used to protect the interests of both father and daughter as far as possible. But if the daughter goes into hiding so that she cannot be forced to give her consent to a father of this kind, I think an action should be granted to the father, but only after cause has been shown. What if a daughter modestly opposes her father by her absence? Should the father not have an action? But if the father is the kind of man to whom the daughter certainly should give her consent, that is, a man with a good reputation, and the daughter is a fickle woman or too young or too much under the influence of an undeserving husband, the praetor should allow the father to obtain it instead and grant him an action.

20. C.3 q.5(Cited as 'all of' – in *Mats.* p. IX-19)**21. Nov. 90pr-3¹²**

(Blume trans.)

Novel 90.
Concerning witnesses.
(*De testibus.*)

Emperor Justinian to John, etc.

Preface. Use of testimony of witnesses was first made so that transactions might not easily remain undisclosed. But since great dishonesty had taken possession of the minds of men, there is great danger that such use may bring about the contrary. For most of them testify not to disclose transactions but to cover them up. And persons who state something different from what they know, or state something as a fact which they do not know, show that they do not want the true facts known and have judgment rendered in accordance with such facts. On the contrary, they state facts which are not true and want them to be considered in the suit. Still, it is dangerous to dispense with testimony altogether, since many things cannot

¹⁰ Cited as 'cf.' This is in the middle of a chain of texts from different jurists. The issue is the availability of the action for fraud.

¹¹ Cited as 'cf.'

¹² Cited as 'cf.' This Novel is very long and detailed. Reproduced here are the preface and c. 1-3. The editor of Tancred says that the reference is to 'sub F'. I am not sure what that means, but I think that Tancred is referring to the next to last sentence of c. 3.

be known otherwise than through the disclosure by witnesses. However, preceding lawgivers have not permitted all, including the lowest, to give testimony; thus they make many exceptions, excluding many from becoming witnesses. But since the situation is not as it should be even after these prohibitions, we have thought it best to add more details and to diminish false testimony as much as possible. For we find such to have been given recently before the president of the province of Bithynia, where witnesses were shown to be guilty of astounding perjury. They afterward confessed that at the time a testament was being finished, the testatrix died, but that some of them, seizing her hand, when already dead, laid it on the paper and guided it to draw a straight and transverse line with it, and so make it appear that the deceased had made the sign of the venerable cross. Considering these things, we thought it advisable to make some definite provisions as to the manner of witnesses and as to their standing. We confirm all that ancient lawgivers said as to prohibiting persons from giving testimony.

c. 1. We ordain that, particularly in this great and fortunate city where there is, thank God, a multitude of good men, witnesses shall be men of good reputation, and who, by reason of their rank (dignity), position of state-service, wealth or honorable occupation, are above any accusation of perjury, or if they do not belong to these classes, then they must be men whose credibility may be shown by others, excluding men sitting on benches crawling along the earth,^a so that if there is any doubt as to witnesses, their honorable and becoming manner of life may be easily shown. 1. If they are unknown and obscure and appear to want to deviate from the truth in giving their testimony, they may be subjected to torture. Judges who are magistrates may do this themselves; judges who are not magistrates shall, in this city, summon an apparitor of the magnificent Praetor of the People,^b in the province, the Defender of the Palace, and apply torture through them, so that such witnesses may not conceal any of the truth, or may be compelled to acknowledge that they testify for money or otherwise corrupt.

a. Men who make their living by menial services performed on benches or while crawling along the earth—in a word, men who perform menial services. As to torture of witnesses generally, see C. 9.41.

b. Novel 13.

c. 2. Although we provided long ago^a that no witnesses should be received to prove payment of a written duebill, when no written receipt was taken, except upon the condition there stated—which shall remain in force—still, we want to renew such a provision. If a debt was evidenced in writing, and proof of payment, not reduced to writing, is offered by litigants to be made through witnesses, the judges shall receive such proof, provided that the witnesses were present for the specific purpose either of witnessing the payment itself, or to hear the acknowledgment of such payment made by the party who received such payment, and provided that such witnesses, worthy of credence, testify to that fact, and perchance show it by a certificate made at the time. But testimony of no weight shall be of no avail; where, for instance, it is upon information gathered only casually, or when a man makes up a story that he happened to be present on account of some other business, and heard someone say that he had received money from some other party, or that he owed some other party. We suspect such testimony and do not consider it worthy of consideration. We had such a case in court, in which, though the payment of a large sum was said to have been acknowledged, only two notaries (*tabulrii*) claimed to have heard this, without anyone else being present, though the debt was evidenced in writing, and though the person making the acknowledgement (as claimed) knew how to write and could have made a record of the fact at the time. This left us with a bitter taste and gave us the occasion for this law. Again, an impersonator, similar in looks to the person for whom snares were laid, confessed in the presence of witnesses and notaries that he owed a debt, and then, having been hired for the purpose, left. Thereupon, a demand was made on the person impersonated for the payment of the debt, which was confessed by the impersonator as though confessed by the party impersonated. This did not remain a secret, since God does not permit such transaction to remain hidden forever.

a. C. 4.20.18.

c. 3. So we give no credence to such testimony or, as stated, to such statements of notaries when persons who are said to have made the acknowledgments were able to write, since it is easy to state it in writing or make the acknowledgment in court and thus add undoubted verity to the fact. We do not permit such testimony to do injury to the truth, and we are not pleased if anything of that kind takes place. But we do

require that witnesses must be summoned by the party who (subsequently) produces them in court, for the specific purpose (of hearing the acknowledgment made). This must be proven. And these witnesses, so specially summoned, as in the case of wills, must be of good reputation. Thus the transaction may be proven by them, and certificates shall hereafter be valid without the presence, declaration and subscription of witnesses. If the witnesses are not such as we have stated above, they shall be subjected to torture. If they contradict themselves or others, the judges shall pay particular attention to this, and if the testimony is contradictory on the principle points involved, it shall be rejected, and the testimony given by the more worthy and the greater number shall be accepted. If they appear guilty of intentional fraud, and fall into contradictions on that account, they shall not be left unpunished; that is to say, if it is shown that they did so purposely and not through error.

. . . (1 October 539).

22. Dig. 4.8.17.2, 6-7¹³

(Watson trans.)

17 ULPPIAN, *Edict*, book 13: . . . 2. Likewise, if several persons have undertaken to arbitrate, no one of them will be compellable to make an award, but either all or none. . . . 6. Yet, in the first instance, let us take the question, if an arbitration has been referred to two persons, ought the praetor to compel them to make an award because, considering how prone by nature men are to disagree, the matter is never likely to come to an end? For where an arbitration is referred to an unequal number of persons, the reference is valid not because all will easily agree but because, although they disagree, a majority is found whose opinion will stand. But it is common for an arbitration also to be referred to two persons and the praetor ought to compel the *arbitri*, if they do not agree, to select a particular third person whose authority may be obeyed. 7. Celsus, in the second book of his Digest, writes that if an arbitration is referred to three persons, it is certainly sufficient that two agree, provided the third had also been present. However, if he was absent, although two agree, the decision is not valid, because the arbitration was referred to several persons and, if present, he could have brought them over to his opinion,

23. Dig. 4.8.27.3

(Watson trans.)

27 ULPPIAN, *Edict*, book 13: . . . 3. If there were several *arbitri* and they made different awards, these will not be allowed to stand. But, if the majority agree, their opinion will stand and, if it is not obeyed, the penalty is incurred. Hence, Julian raises the question: If one of three *arbitri* condemns for fifteen, the second for ten, and the third for five, which opinion stands? And Julian writes that five ought to be paid because all have agreed on this amount.

24. Dig. 25.4.1pr

(Watson trans.)

1 ULPPIAN, *Edict*, book 24: In the time of the deified brothers, a husband said his wife was pregnant, but the wife denied it. On being consulted about this, they addressed a rescript to Valerius Priscianus, the urban praetor, which stated: "Rutilius Severus seems to be asking for something new in applying for a person to observe his wife whom he has divorced and who asserts that she is not pregnant. So no one will be surprised if we suggest a new plan and remedy. If the husband persists in this demand, it will be best for the house of an extremely respectable woman to be chosen into which Domitia will go, and that three skilled and trustworthy midwives selected by you examine her. If all of them or two of them announce that she appears to be pregnant, the woman must be asked to allow an observer in just as if she wanted this herself. If she does not give birth, the husband should be aware that his reputation and honor are involved, and he will quite rightly be held to have devised this to injure his wife. If, however, all of the women or the majority of them declare that she is not carrying a child, there will be no reason for an observation."

¹³ The reference is to §2, but the editor thinks that §§ 6 and 7 are more relevant. I have included all three sections below. The issue is the commission of a case to arbitrators. The last sentence continues with the opinion of another jurist, but that opinion is not relevant here.

25. Dig. 29.3.6

(Watson trans.)

6 ULPIAN, *Edict*, book 50: But if the greater number of those who sealed has been found, it will be possible for the will to be unsealed with their co-operation and read out.

26. D.65 c.1-3

(CD trans.)

d.a.c.1: Gratian. Part I. The consent of the co-provincial bishops is generally to be sought in the ordination of a bishop. And if any led by enmity wish to contradict, the judgment of the many will prevail. Hence, in the council of Nicea (c. 6):

C. 1. If two or three contradict the ordination of bishops, while the others consent, the judgment of the many will prevail.

Clearly if common consent of all has been rationally proven according to church rules and two or three led by enmity contentiously contradict, the opinion of many priests shall prevail.

C. 2. Concerning the same.

Again from the council of Pope Martin.¹⁴

A bishop ought not to be ordained without the counsel and presence of the metropolitan bishop. All the priests, moreover, ought to be present, whom the metropolitan ought to call together by his letter. And indeed, if all come, that is good; if that proves difficult, many ought to come. Those who do not come, let them make their presence known by a letter, and thus it is fitting that the ordination of bishop be made with the consent of all. If it is otherwise than what has been established by us, we decree that such an ordination has no value.

Part 2. § 1. If moreover an ordination of a bishop has been done according to the canons, and anyone by malice contradicts in any way, the consent of many will prevail.

C.3 Concerning the same.

Again, from the council of Antioch [c. 19].¹⁵

A bishop is not to be ordained without the counsel and presence of the metropolitan bishop, for whom it would be better, if the bishops were gathered from the entire province.¹⁶ If that cannot be done, those who cannot be present should indicate their consent about him [the candidate] by their letters, and then at length after the consent of many, either by their presence or their letters, let him be ordained by consistent judgment. If it is done otherwise than is laid down such an ordination is worth nothing. § 1. If, however, ordination is celebrated also according the defined rules, and some people because of their own domestic grudges contradict, these having been contemned, let the judgment of many concerning him [the designate] prevail.

¹⁴ Friedberg suggests that this comes from Martin of Braga, paraphrasing or quoting the council of Antioch (see the next chapter), in his appendix to the canons of the second council of Braga (572).

¹⁵ Held in the year 314.

¹⁶ This version of the canon speaks of the bishops of the province whereas Martin of Braga's version of the canon (c. 2) speaks of the priests, presumably of the diocese.

27. X 2.20.32

(above no. 6.)

28. X 2.20.32

(above no. 6.)

29. 1 Comp. 2.12.2

(= X 2.19.3. CD trans., omitting the parts that are not in the Gregorian decretals.)

Alexander III

As the praiseworthy custom . . . ¹⁷ Clearly, since we have learned that among you it is customary that when someone has grounded his complaint in instruments or witnesses, an oath is nonetheless imposed on him, which if he does not wish to undertake it, no faith is had in the proofs, we, since recourse should at length be had to such support [i.e., of the decisory oath] when other lawful proofs are known to be lacking, we reprove such a custom.

30. Dig. 44.7.47

(Watson trans.)

47 PAUL, *Plautius*, book 14: Arrianus said that it makes a great difference whether you ask whether someone is liable or whether he is discharged; when the question is about liability, we ought to be more inclined to refute it if we have the opportunity; when it is about its discharge, we ought conversely to hold that you are more entitled to discharge.

31. Dig. 2.14.8¹⁸

(Watson trans.)

8 PAPINIAN, *Replies*, book 10: It is settled that the majority is determined by reference to the amount owed, not to the number of persons. But if they are all owed the same, then the numerical majority of the creditors is to be followed. Where the creditors are evenly divided, the praetor follows the authority of the one who is preeminent in worth. If there is complete equality in all respects, the more humane opinion is to be chosen by the praetor. For this can be gathered from the rescript of the deified Marcus.

32. Cod. 7.71.8

(Blume trans.)

The same Emperor [Justinian] to Johannes, Praetorian Prefect.

Our Majesty is besought in the usual manner, to grant the merciful aid of making an assignment for the benefit of creditors and that creditors be required to elect either to grant them a respite of five years or to accept an assignment of the property, leaving them their good name and exempting them from corporal punishment. It was continuously doubted whose wish should be granted, if some of the creditors wanted to give the five years' respite, while others wanted to accept an immediate assignment. **1.** In such a dispute, we do not have no doubt whatever as to what to think, and we give preference to the more merciful instead of the harsher opinion. And we ordain that the point shall be decided by the amount of the debt or the number of creditors. **2.** If there is one creditor to whom a debt is owing larger in amount than that owing to the others, so that if the debts of the others are united and computed, his exceeds the others, his opinion shall prevail, either in granting time or accepting the assignment. **3.** If there are several creditors, each with a different amount, the greater amount of debt shall have an influence greater than that of the less, whether the number of creditors is equal or unequal, since the point shall be decided, not by the number of creditors, but by the amount of debt. **4.** If the amount of the debt (on each side) is equal, but the number of creditors unequal, then the greater number of creditors shall prevail, and whatever they want, shall be done. **5.** If there

¹⁷ The statement of the custom is missing in the Gregorian decretals, but 1 Comp. shows that it is the custom that what is contrary to law can not be changed by custom.

¹⁸ Cited as 'cf.'

is equality, both in point of debts as well as in the number of creditors, the parties who are more merciful and are in favor of giving respite instead of demanding an immediate assignment, shall prevail. **6.** There shall be no difference in making the choice, between lien-creditors and other creditors. But each creditor shall have such right in the property, which is to be directed by the judge, as the law gives him. **7.** The five years' respite shall not prejudice any creditor in connection with the period of prescription. (531–532).

33. Dig. 42.1.38pr¹⁹

(Watson trans.)

38 PAUL, *Edict*, book 17: Where the judges in a case are equally divided in their opinions, the deified Pius provides that if the issue be one of freedom, those in favor of freedom shall prevail; in other cases, the defendant is to be absolved. And this ought also to apply in public prosecutions.

34. Dig. 5.2.10pr

(Watson trans.)

10 MARCELLUS, *Digest*, book 3: If some of the judges in a case of undutiful will decide against the will, others in its favor, as is accustomed sometimes to happen, it will be more humane to go along with the view in favor of the will unless it becomes clearly apparent that the pronouncement of the judges in favor of the heir in the will (*scriptus*) was unjust.

35. Dig. 50.17.85pr

(Watson trans.)

85 PAUL, *Questions*, book 6: In uncertain cases, it is better to reply in favor of dowries.

36. Cod. 3.14.un

(Blume trans.)

Emperor Constantine to Andronicus.

If anyone obtains an order of our Lenity against any minor under the age of puberty, widow, or person long afflicted or weak with disease, the persons mentioned shall not be compelled by any of our judges to appear at our court. Trial of the dispute shall rather be had within the province within which the litigant, the witnesses and the documents are, and every precaution shall be taken that they may not be compelled to go outside of the provinces. **1.** But if minors under the age of puberty, widows and others, wretched through the injuries of fate, pray a rescript of Our Serenity, especially when they fear anyone 's power, their adversaries shall appear before us.

Given at Constantinople June 17 (334).

37. Cod. 1.2.22

(Blume trans.)

The same Emperor [Justinian] to Demosthenes, Praetorian Prefect.

We ordain that things coming through any liberality of a curial to venerable churches or hospitals, monasteries, poor houses, foundling-inns, orphanages, old men's homes or similar establishments, whether in contemplation of death or by a last will and testament, shall be exempt and immune from the tax on gifts; the law made concerning such tax shall retain its force in the case of other persons, but shall in deference to piety, be relaxed as to churches and other houses assigned to pious assemblages. For why should we not make a discrimination between things divine and human, and why should nota proper privilege be upheld in favor of the celestial love? **1.** These provisions shall apply not only to cases arising in the future, but also to cases pending which have not yet been ended by judicial decree or amicable agreement.

Recited in the new consistory of the Justinian palace, at the seventh milestone of this famous city. (529 AD.)

¹⁹ Cited as 'cf.'

