

PART XII. COMMENTATORS: WITNESSES

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A. TRACTATUS DE REPROBATIONE TESTIUM

in Ziletti, *Tractatus de testibus* (Venice, 1574) 83–106 [CD trans.]¹

This treatise is variously ascribed to Jacobus Balduini, a student of Azo's (d. 1235); Bagarottus (d. after 1246), a thirteenth century civilian who wrote on procedural matters; Jacobus Aegidii Viterbensis, prior Ameliensis, a thirteenth-century canonist, who is known only for this treatise (if he wrote it), and Bartolus. The additions are definitely by Angelus de Ubaldis de Perusio (1328–1407), the brother of Baldus, and like him, a writer on both civil and canon law. Large hunks, but perhaps not the whole, of the basic treatise appear in Durantis's, *Speculum iudiciale*, a fact that suggests that a considerable portion of it was in existence before Bartolus' time. Durantis's debt to Jacobus Aegidii is noted by Johannes Andreae, who writes in the early 14th century. Thomas Diplovatatus, an early 16th century humanist who edited the treatise as a work of Bartolus also notes that Durantis used the treatise of "Jacobus Ameliensis," but when he came to edit this treatise he says that Jacobus Aegidii de Viterbo, prior Avielensis (*sic*), simply published Bartolus's treatise at the request of one Gualfredus Mediolanensis, the chief judge of the church of Viterbo. {The note, however, attributed to Diplovatatus in Bartolus's *Opera omnia*, states that only the first paragraph is by Bartolus, and that the rest of the work is by Jacobus Aegidii, with additions by Angelus. It is possible that Ziletti falsified or confused Diplovatatus's note.} Without considerable work with the manuscripts the question of authorship cannot be resolved.² I include portions of the treatise here because it shows us a "living text" from the period of the commentators.

In the name of the lord Jesus Christ and his glorious virgin mother Mary, amen. Here begins the treatise of sir Bartolus de Sassoferrato for reproving witnesses, and in the first place are reproved, to wit, the infamous, slaves, rectors of churches, or a monk, abbot, etc., friars minor or preachers, and representatives of corporations (*oeconomi*), women, minors, madmen, paupers, infidels and excommunicates, domestics, those who do not swear, those in their own case, concerning the debtor, concerning the seller, concerning the surety, concerning the tutor curator, concerning the *negotiorum gestor*, concerning the judge, concerning the advocate and proctor, if they are single, if in a common cause, if participants and partners, if they are obscure, if the witnesses return to the judge, if they do not say the reason for their statement, if the judge does not interrogate them, if they are enemies or a criminal case is pending between them, if they say one thing for another, if they speak having been corrupted, if they don't speak the truth, if they don't give testimony close to the matter that is being inquired about, if they give a premeditated and single speech. Notaries are reproved who do not write out the saying of the witness in full. If one speaks about one thing and another about another. If one speaks about one person and another of another. If they do not well compute the grade of consanguinity. If they are in discord about the place. If they are in discord about the time. If they are in discord about the matter. If someone speaks about my thing for you and your things for me. When they don't speak to the matter, because they speak false things and various things. If they are usurers. Even suspect judges are reproved. Concerning the recusation of judges. If they are received again. If they are otherwise false or were so. If they have testified against you and you want to produce them for you. If they have learned what they testify. If they do not say their saying secretly. If they are not received by the judge. If they want the required number when a certain number is required. If articles are not made for the case. If they depose beyond what is claimed. If they are interrogated about their crimes. If the multitude of them is great. If their sayings are not reduced to public form. If witnesses or instruments are thought to be brought in against themselves. Who are compelled though unwilling and who not. Pimps and tax-collectors (*proxenetae et censuales*) are reproved, hermaphrodites,³ parents and mothers infinitum. Concerning children.³ Concerning those who are in mortal sin. If they do not speak from sight but from credulity and hearing.⁴ Whether given witnesses (*testes dati*) are reproved, and how, and which not.⁴

¹ Compared in certain places with Bartolus, *Opera omnia*, vol. 10 (Venice, 1602), fol. 167rb–170rb (cited as OpOm). Additions or alternate readings suggested by this edition are placed in curly brackets { }. Somewhat later I expanded the text on the basis of OpOm. These expansions are placed in diamond brackets <> and have yet to be checked against the Ziletti edition.

² Linda Fowler Magerl, in private communication, reports that the manuscripts that she has seen tend to confirm the note that appears in Bartolus's *Opera omnia*.

³ OpOm reads: "parents and children infinitum."

⁴ OpOm omits.

The slipperiness and variety of witnesses {is to be resisted}, and their falsity and machinations, through which many things are perpetrated contrary to the truth <as [C.4.20.18]>. and secret thefts are committed, while by their statements by judicial authority, which has to judge according those things alleged and proven <as [D.1.18.6.1, X 5.27.4, C.24 q.3 c.4]>,⁵ the wretched owners of things are {greatly} despoiled <as elsewhere says [C.7.31.1], [and] the guiltless> and innocent seriously punished, although it would be more fitting to leave the unpunished crime to the delinquent than to condemn the innocent in any way. <as [D.48.19.5]> Those that are wicked in these things are worse than thieves, robbers, cattle-rustlers, and any criminal. For the witness who speaks falsely offends three persons: God, because by touching the holy scriptures of the church he dislocates and perjures their presence; next the judge, whom he deceives and plays false by lying; and finally the innocent whom he harms by his false testimony <as [X 5.20.1]>. Therefore I propose to put an obstacle in the way of the criminous voices of witnesses, by which and by which causes their testimony is reproved, omitting no contingency, for nothing is deemed done so long as anything remains to be done <as [C.6.35.11].> I will briefly explain according to canon law and civil law, and in the first place:

Witnesses are reproved if they are infamous <as [D.22.5.3.5] and [X 5.40.10 v° *testes*].> But by the infamy of law and {not of} of fact <as [C.12.1.2] and [C.10.59(57).1]> . But what of the other crime⁶ to which the crime is opposed? Say as in [X 2.20.54]. But whether those condemned of crime are admitted pending appeal, say as notes [X 2.20.56]. For what reasons someone is infamous by the infamy of law {and of fact} is contained in <[D.3.2.2.5, 3.2.3, 3.2.4.2] and throughout [the title] and [C.2.11.13, 12, 15, 16, 18] and [JI.4.16.2], for the infamous are repelled from any lawful act, as [D.22.5.14] and [C.1.1.1], where there is [matter] concerning this.⁷>

Witnesses are reproved if they are slaves, <[C.4.20.8, 3]> because slaves would suppress the truth out of fear of their masters, <as [X 5.40.10 v° *testes*] and [C.4.20.14] with similar [laws and canons] (*cum si.*)> But what of a monk, a canon regular, an archpriest, an abbot, a rector, since they are slaves of God and of their monastery, because they have nothing of their own and renounce their own will <as [C.12 q.1 c.11] and [C.19 q.3 c.3, 7]> and because they are dead to the world <as, [C.1.3.54(56)].> . But can they be compelled to give testimony both for their monasteries and for their churches where they reside? And certainly yes, as argue <[C.16 q.1 c.33, c.12] and [Nov. 123.27]> and [X 2.20.12] [and] <[C.14 q.2 c.1] and [X 2.24.26]>, and this in civil cases; in criminal cases, however, say as in the same chapter [X 2.20.12]. But can friars minor and preachers be compelled to testify and say the truth if they have the license of their prelates? And certainly because a bishop is compelled and he is more religious than they⁸ {with the Holy Scriptures, however, placed before them, rather than touched [Nov. 123.7 in C.1.3.7]}, and it is not likely that they would forswear or suppress the truth since this is the foremost fear of nature and they are foremostly children of God who is “the way, the truth and the life” (Jn. 14:6) <and [D.1.11.1.1] is relevant.> . And often the son is like the father and from a sweet tree sweet apples fall, according to that word of Christ “If I speak the truth why do you not believe me” (Jn. 8:46) and another saying “The Lord has sworn and will not repent him.” (Ps. 109:4 [Vulgate]) <as [X 2.24.26]>. For if they forswear the truth, they are to be reputed as heretics, for certain heretics do not swear and who hides the truth sins mortally <C.11 q.3 c.80>. . And about the confusion of witnesses say as notes [X 2.20.54], and this is what is read against them. [C.22 q.1 c. 9, 8]. Slaves, however, are admitted against their master. <[C.4 q.2&3 c.3 s. 36] and [D.22.5.7], and thus these religious men are admitted.> ⁹Again in a criminal case ... And if these religious are not admitted,⁹

⁵ See K. W. Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit, iudex secundum allegata non secundum conscientiam iudicat* (München: Beck, 1967). The fact that the maxim was a commonplace by the time the author wrote may explain the starined nature of the citations that support it.

⁶ OpOm omits. This makes better sense: “But what of another person, i.e., other than someone who is infamous, against whom a crime is opposed?” It also fits with the cited decretal, which deals with objections to witnesses on the ground of crime, not one that involves infamy.

⁷ The reference is to the gloss on C.1.1.1 v° *divina* (Lyon, 1604), col 14.

⁸ Ziletti’s text is corrupt here. OpOm reads as translated.

⁹⁻⁹ OpOm omits, perhaps by mistake.

they are compelled to the testimony of truth, for otherwise the faculty of proof would be narrowed which ought not be. [C.1.5.21.3]

Item, women are repelled from testimony, because women are not admitted in a criminal case {[C.33 q.5 c.17]} . And the reason is that they always have a various and mutable head {heart} <as [X 5.40.10 v^o testes]>, whence the verse says:

Femina fallere falsaque dicere quando carebit?
 Beccharia piscibus et mare fluctibus tuncque carebit.
 [When will woman cease to deceive and speak falsehood?
 When the fishmonger¹⁰ ceases to have fish and the sea, waves, then she will cease.]

And elsewhere it is said that woman is no good because she changes three times in an hour. In civil cases, however, they are admitted.¹¹... In criminal, moreover, they are admitted¹¹ when the process is civil, as against heretics <as [X 2.20.3, 33]>. In testaments and last wills they are not admitted <as [C.6.23.21pr] and [D.28.1.20.6]>. In codicils, however, they can well be witnesses. <as in the said [D.28.1.20.6]>.

Witnesses younger than fourteen years are reproved in civil cases <as [D.22.5.3.5]; [C.4 q.2&3 c.3 s. 14]¹²>. In criminal those younger than twenty years are repelled <as [D.22.5.19]>. Those who have reached the age of puberty can nonetheless testify about what they saw when they were below puberty, and the same is true of a slave made free <as [D.50.16.99.2] and note in [D.48.18.10] and [C.6.35.12]>.

Madmen and those captive in mind are repelled as by the office of the judge¹³ <C.4 q.7 c.1>.

Paupers are repelled because not much faith ought to be given them because there is fear that they would testify corrupted for money, because the poor are more easily corrupted than the rich, <as [D.22.5.3pr] and [Nov. 90.1] and [D.27.1.15.15]¹⁴>. But paupers are admitted in the interim, because not only by his faculties but by his faith is a witness deemed suitable, <as [JI.1.26.13] and [Nov. 90.1] and [C.4 q.2&3 c.3 v^o si testium fidem¹⁵>. And whatever the pauper says not so much faith is given it, but his proposition is examined <[D.2.15.8.11 i.m.]; [D.26.10.8]; [D.26.5.21.6]>.

Infidels, excommunicates, heretics, and those not in communion with the holy Roman church are reproved, <as [C.2 q.7 c.26] and [X 5.39.59]. For excommunication is a separation from the communion of the faithful, as [C.11 q.3 c.24] etc. And therefore excommunicates are not admitted to testimony, nor does a sentence or recommendation (*laudum*), nor a precept, nor an arbitration rendered by an excommunicate hold, nor can he serve as an advocate (*nec patronus advocare potest*) if he is excommunicate, nor can play a role in court (*esse in iudicio*), although he can defend himself and bring an appeal case, as [X 2.25.2, 5, 11, 12] and [X 2.27.24]. Nor can an excommunicate impetrate [apostolic] letters, nor can he postulate for others, as [X 1.29.12]. So it is no wonder that he cannot be a witness.>

From the aforesaid things, moreover, six witnesses are repelled. The reasons moreover are summed up in these verses:

Conditio, sexus, aetas, discretio, fama,
 Et fortuna, fides: in testibus ista requires.
 [Condition, gender, age and discretion,

¹⁰ A *beccaria* would normally be a meatmonger, but the sense seems to be that given here unless it is some kind of in-joke about a man with that name.

¹¹ OpOm omits, probably by haplography on “admitted.”

¹² This citation is odd. See p. IX–**Error! Bookmark not defined.** C.4 q.2&3 c.1 (above, p. IX–**Error! Bookmark not defined.**) may be meant.

¹³ OpOm reads “as they are to be judged by office, i.e., (probably) of the judge.”

¹⁴ This would seem to be the section being referred to (*in fi.*), because it is the only one that deals with poverty. It would seem, however, that our author has misread its applicability to his concerns.

¹⁵ Probably a reference to C.4 q.2&3 c.3 s.2 (*Testium fides diligenter examinanda est*), above, p. IX–**Error! Bookmark not defined.**

Fame and fortune and truth,
 If these are lacking,
 Without the court's backing,
 From witnessing hold 'em aloof.]¹⁶

[The rest of the text follows the outline given in the first paragraph quite closely. There are ten more columns in *Opera Omnia* in addition to the two given here. Just before the end we find:]

{Hermaphrodites are reprov'd, or not compelled, but the quality of the sex is considered, as [D.22.5.15[.1], 18¹⁷]. And a hermaphrodite is said to be he who is proven to have both sexes [D.1.5.10].}

¹⁶ See above, Sec. IX. **Error! Reference source not found.**, p. **Error! Bookmark not defined.**

¹⁷ See above, § I.D. Why do you think this text is cited here?

B. AUTHORITIES CITED IN *DE REPROBATIONE TESTIUM*

a. TABLE OF AUTHORITIES

Listed below are the authorities that cited in the extract given above in the order in which the author 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. The translation is Scott's for the material from the *Corpus Iuris Civilis*, mine <incomplete> for that from the *Corpus Iuris Canonici*. (I have translated from the vulgate version of the decretals that the author was using rather than the full edition given by Friedberg.) [If someone wants to write a paper about this, let me know; I can translate the canonic passages that I haven't gotten to.]

C.4.20.18 — Above p. I-**Error! Reference source not found.****Error! Bookmark not defined.**

2. D.1.18.6.1
3. X 5.27.4
4. C.24 q.3 c.4
5. C.7.31.1
6. D.48.19.5
7. X 5.20.1
8. C.6.35.11

D.22.5.3.5 — Above p. I-**Error! Reference source not found.****Error! Bookmark not defined.**

X 5.40.10 — Above p. IX-**Error! Reference source not found.****Error! Bookmark not defined.**

9. C.12.1.2
10. C.10.59(57).1
11. X 2.20.54
12. X 2.20.56
12. D.3.2.2.5
14. D.3.2.3
15. D.3.2.4.2
16. C.2.11.13
17. C.2.11.12
18. C.2.11.15
19. C.2.11.16
20. C.2.11.18
21. JI.4.16.2
22. C.1.1.1

C.4.20.8 — Above p. I-**Error! Reference source not found.****Error! Bookmark not defined.**

C.4.20.3 — Above p. I-**Error! Reference source not found.****Error! Bookmark not defined.**

X 5.40.10 — Above p. IX-**Error! Reference source not found.****Error! Bookmark not defined.**

C.4.20.14 — Above p. I-**Error! Reference source not found.****Error! Bookmark not defined.**

23. C.12 q.1 c.11
24. C.19 q.3 c.3
25. C.19 q.3 c.7

26. C.1.3.54(56)

27. C.16 q.1 c.33

28. C.16 q.1 c.12

29. Nov. 123.27

30. X 2.20.12

31. C.14 q.2 c.1

32. X 2.24.26

X 2.20.12 — Above no. 30

33. Nov. 123.7 in C.1.3.7

34. D.1.11.1.1

X 2.24.26 — Above no. 32

35. C.11 q.3 c.80

X 2.20.54 — Above no. 11

36. C.22 q.1 c. 9

37. C.22 q.1 c. 8

C.4 q.2&3 c.3 s. 36 — Above p. IX-**Error! Bookmark not defined.**

D.22.5.7 — Above p. I-**Error! Reference source not found.****Error! Bookmark not defined.**

38. C.1.5.21.3

C.33 q.5 c.17 — Above p. IX—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

X 5.40.10 — Above p. IX—**Error! Reference source not found.****Error! Bookmark not defined.**

X 2.20.3 — Above p. IX—**Error! Reference source not found.****Error! Bookmark not defined.**

X 2.20.33 — Above p. IX—**Error! Reference source not found.****Error! Bookmark not defined.**

39. C.6.23.21pr

D.28.1.20.6 — Above p. IX—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

D.28.1.20.6 — Above p. IX—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

D.22.5.3.5 — Above p. I—**Error! Reference source not found.****Error! Bookmark not defined.**

C.4 q.2&3 c.3 s.14 (see above note 12)

D.22.5.19[.1] — Above p. I—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

D.50.16.99.2 — Above p. IX—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

40. D.48.18.10

41. C.6.35.12

42. C.4 q.7 c.1

D.22.5.3pr — Above p. I—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

Nov. 90.1 — Above p. IX—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

43. D.27.1.15.15

44. JI.1.26.13

Nov. 90.1 — Above p. IX—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

C.4 q.2&3 c.3 s.2 (see above note 15)

45. D.2.15.8.11 i.m.

46. D.26.10.8

47. D.26.5.21.6

48. C.2 q.7 c.26

49. X 5.39.59

50. C.11 q.3 c.24

51. X 2.25.2

52. X 2.25.5

53. X 2.25.11

54. X 2.25.12

55. X 2.27.24

56. X 1.29.12

D.22.5.15[.1] — Above p. I—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

D.22.5.18 — Above p. I—**Error! Reference source not found.****Error! Reference source not found.****Error! Bookmark not defined.**

57. D.1.5.10

2. D.1.18.6.1

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

The truth is not changed by error, and hence the governor of a province must follow the course which is suitable by taking into consideration facts which have been proved.

3. X 5.27.4

(Alexander III to the archbishop of Toledo [1159 X 1181]) (CD trans.)

The bearers of these presents intimated to us that both they and many others celebrated divine services after they had been excommunicated or interdicted. We command your brotherhood that if it is apparent that only forty or fewer were delinquent in these matters, you should permanently depose them all from priestly office. If, however, you determine that a great multitude sinned in this matter, you should condemn those whom it is apparent were more the cause of the crime to perpetual deposition, and the others, who were not so greatly delinquent, you should suspend from office for a time, and you should enjoin on all penance in according with the discretion that God has given you.

4. C.24 q.3 c.4

(Jerome on Leviticus [not in Jerome but probably derived from Origen's homily on Lev. c.24.]) (CD trans.)

If someone is cast out and sent outside not by the right judgment of those who are in charge of the church, if he previously did not go out, that is, if he did not behave in such a way that he merited going out, he is not harmed in this matter, because he seems to have been expelled not by the right judgment of men. And so it is that in the meantime he who is without is [really] within, and he is without, who seems to be held within.

5. C.7.31.1

(Justinian to John, praetorian prefect [531]) (S.P. Scott trans.)

As we, by our care, have disposed of the name and substance of acquisitions *ex jure Quiritium*, and have provided that ordinary prescription shall be valid everywhere, whether it arises from possession for ten, twenty, or thirty years, or even for a much longer time, it would be useless to admit the right of usucaption only with reference to property situated in Italy, and to exclude it from application to that situated in the provinces. Where, however, anyone has had in his possession in good faith, for the term of two years, property belonging to another, which is situated in Italy, the unfortunate owner of the same shall lose his right to it, and shall be entitled to no recourse with reference to said property, which was lost without the knowledge of the said owner, for which reason there is nothing more unjust than for him, who is ignorant of the fact, to be deprived of his possession in so short a time.

Therefore, we order by the present law, that where property situated in Italy is either immovable, or is understood to be such, the term of usucaption shall be extended (like that for a year), so that it will now run with those of ten, twenty, or thirty years, and others of still longer duration, and that the present limited period shall be abolished.

Moreover, as the ancients fixed the time for the acquisition of movable property, or that which was capable of moving itself, or which was, in any way retained (of course when held in good faith), whether situated in Italy or anywhere else in the world, and allowed ownership to vest after possession for a year, we consider that this should be amended, so that where anyone has had possession in good faith of any movable property, or of any which was capable of moving itself, either in Italy, or in any of the provinces, for the continuous term of three years, he can acquire a legal title to the same, just as if it had been acquired by usucaption, it being only observed that in all such cases he must, in the first place, obtain it in good faith, just as is required by a prescription of long time, and that the possession acquired by any preceding lawful possessor shall be included in the term of ten, twenty, or thirty years.

We decree that, in the case of movable property, the legal retention of the preceding holder under a just right of possession, which he exercised over the said property, shall not be interrupted by the fact that the subsequent holder may have been aware that the property belonged to another, even though it was obtained under a lucrative title. The time has been extended by this law with reference to the usucaption of property which is the subject of the same, and we have limited that of usucaption, productive of such loss and injury to owners, and abolished the ancient practice of dividing property into *mancipi*, and *nec mancipi*, which is only in conformity with reason, so that a similar rule may apply to all property and all localities, and useless ambiguities and differences be finally disposed of.

6. D.48.19.5

(Ulpian, *On the duties of the proconsul*, book 7) (S.P. Scott trans.)

The divine Trajan stated in a rescript addressed to Julius Frontonus that anyone who is absent should not be convicted of crime. Likewise, no one should be convicted on suspicion; for the divine Trajan stated in a rescript to Assidius Severus: "It is better to permit the crime of a guilty person to go unpunished than to condemn one who is innocent." Persons, however, who are contumacious and do not obey either the notices or the edicts of governors, can, even though absent, be sentenced, as is customary in private offences. Anyone can safely maintain that these things are not contradictory. What, then, should be done? With reference to parties who are absent it is better to decide that pecuniary penalties, or those which affect the reputation, even to the extent of relegation, can be imposed if they, having been frequently notified, do not appear through obstinacy; but if any more serious punishment should be inflicted, as, for instance, hard labor in the mines, or death, it cannot be imposed upon the parties while they are absent. **1.** It must be said that where an accuser is absent, heavier penalties are sometimes imposed than that prescribed by the *SC. Turpillianum*. **2.** A distinction must be made in more serious crimes, that is whether they have been committed intentionally, or accidentally. And, indeed, in all offences, this distinction should either induce a penalty to be inflicted in strict compliance with the law, or admit of moderation in this respect.

7. X 5.20.1

(Augustine [in fact, Isidore of Seville; see C.11 q.3 c.80]) (CD trans.)

A witness who speaks falsehood offends three people: first, God, whose presence he contemns; next, the judge, whom he deceives by lying; finally, the innocent person, whom he harms by false testimony. Both are guilty: he who hides the truth and he who tells a lie, for the former chooses not to proffer and the latter desires to harm.

8. C.6.35.11

(Justinian to John, pretorian prefect [531]) (S.P. Scott trans.)

The *SC. Sillanianum* is considered by us not only to be meritorious, but also worthy of confirmation, together with the rescript of the divine Marcus published with reference to it, but since we find in it no mention of grants of freedom, and a question arose among the ancient authorities concerning grants of freedom left by the will of a murdered testator, it seems to us to be necessary to dispose of this question. For those who have been given their liberty by a will of this kind, and accept it, can acquire for themselves any advantage which they may receive in the meantime, that is to say, during the delay resulting from taking vengeance for the death of the deceased ; but if they fail to avenge it, they risk the loss of this privilege, even though they may afterwards obtain their freedom. But in order that, in the interval, the slaves may sustain no loss, and especially if, being female slaves, they have brought forth children, and where the estate was afterwards accepted, it seems to us to be perfectly proper to adopt the rescript of the most wise emperor Marcus relating to grants of freedom, in order that this prince, who was well versed in philosophy, may not appear to have sanctioned anything which was imperfect. As his rescript also extended to inheritances, legacies, and trusts, and especially to grants of freedom with which philosophy is always concerned, to the end that any profits which may accrue to the slaves in the interim may be restored to them after they have been liberated, and any children born may be considered to be free as well as freeborn, and that through no machinations whatever an impediment of this kind may cause them any loss, so that their offspring may also be free if in the meantime they should die, and have the right to succeed to them as heirs.

We have deemed it reasonable to confirm in every respect the constitution of the emperor Marcus, for we consider that no act has been performed when something remains to be added, in order to render it complete.

9. C.12.1.2

(Constantine to Volusianus, pretorian prefect [313 X 315]) (S.P. Scott trans.)

The gates of dignities do not lie open to men of bad reputation who are branded with infamy, and whose wickedness, baseness of life, and evil repute exclude them from the society of respectable people.

10. C.10.59(57).1

(Diocletian and Maximian to Chariton [293 X 304]) (S.P. Scott trans.)

Although infamous persons cannot be promoted to dignities which are only conferred upon those of honorable reputation, they are, nevertheless, not exempt from the performance of civil duties, or of those of the decurionate, but are required to make contributions demanded by the public welfare.

11. X 2.20.54

(Gregory IX.¹) (CD trans.)

The testimony of him whom the adverse party opposes on the ground of crime is correctly reproved in a criminal case, and in a civil case if he perseveres in the crime. If, however, he has both made amends for the crime and has not incurred infamy, he is not be repelled in a civil case, nor in criminal one that is being pursued civilly, except for the offense of perjury. If, moreover, an accusation has been made against him in another trial, and he was convicted of crime or confessed, or if he is now convicted of crime by way of exception, or if his reputation is tarnished because he was at one time repelled in such manner, although in

¹ This, and the following, are among the decretals that Raymond of Peñafort wrote for Gregory IX in order to resolve what Raymond thought were unresolved questions in the law.

this case he is not excluded in a civil cause, he can be removed from testimony in a criminal case, even though he has done penance.

12. X 2.20.56

(Gregory IX¹) (CD trans.)

No one ought to be admitted to testify in [cases of] crimes, except perchance excepted ones, while a criminal accusation is pending against him, since even those accused, unless they previously prove themselves innocent, are repelled from accusation and from receiving orders.

13. D.3.2.2.5

(Ulpian, *On the Edict*, book 6) (S.P. Scott trans.)

5. The praetor says: "He who appears upon the stage is infamous." The stage, as defined by Labeo, means any place whether public or private, or on the street, where anyone appears or moves about making an exhibition of himself; provided that it is a place where persons, without distinction, are admitted for the purpose of viewing a public show; and those who contend for gain, as well as all those who appear upon the stage for compensation, are infamous; as Pegasus, and the younger Nerva have stated.

14. D.3.2.3

(Gaius, *On the Provincial Edict*, book 1) (S.P. Scott trans.)

He who hires himself for the purpose of appearing in public exhibitions, and does not do so, is not branded with infamy; because the offence is not so disgraceful a one that even the intention to commit it should be punished.

15. D.3.2.4.2

(Ulpian, *On the Edict*, book 6) (S.P. Scott trans.)

2. The praetor says, "Who acts as a procurer." He acts as a procurer who profits by the prostitution of slaves; but where anyone obtains such profit by means of persons who are free, he is in the same category. Moreover, where he makes this his principal occupation, or as an addition to some other business; as, for instance, where he is an inn-keeper or a stable-keeper and has slaves of this kind for attendance on strangers, and, by means of their opportunities he obtains money in this manner; or if he is a bath-keeper, as is the custom in some provinces, and has slaves for the purpose of taking care of the clothes of customers, and these are guilty of such practices in the baths, he is liable to the punishment of a procurer.

16. C.2.11.13

(Alexander to Juventius [229]) (S.P. Scott trans.)

When a father reviles his sons in his will, this does not render them infamous by law, but causes good and serious men to have a bad opinion of them, as having displeased their father.

17. C.2.11.12

(Alexander to Donatus [224]) (S.P. Scott trans.)

When it is shown, by the decree of the governor, that you have plundered an estate, even if another penalty should be imposed upon you, you will not escape the infamy attaching to the crime of theft.

18. C.2.11.15

(Gordian to Sulpicia [238]) (S.P. Scott trans.)

The obligation of mourning exacted of women having been diminished by the decree of the Senate, they are excused from assuming sombre clothing, and manifesting other indications of grief, but they are not permitted to contract marriage within the period during which a wife usually mourns for her husband; for even if a widow should be married within this time, not only she, but also the man who knowingly married her, even though he be a soldier, becomes guilty of want of decency, under the terms of the perpetual edict.

19. C.2.11.16

(Gordian to Domitian [240]) (S.P. Scott trans.)

It is clear that he who has been beaten with rods, and proclaimed by the public crier to have been guilty of slander, in order that he may be branded as a calumniator, becomes infamous for this reason.

20. C.2.11.18

(Valerian and Gallienus, and Valerian to Antiochus [260]) (S.P. Scott trans.)

The perpetual edict not only renders persons infamous who have been convicted of crime, but also anyone who has made an agreement with reference to it. In cases of this kind, it has been decided that those have made such an agreement who, with evil design and for the purpose of compromise, have paid money to an adversary; he, however, who has done this without paying anything, shall suffer no loss of reputation. If, however, the case should be decided by an oath, no one can doubt that the party will be discharged after having been sworn by the judge.

21. JI.4.16.2

(Moyle trans.)

In some actions condemnation carries infamy with it, as in those on theft, robbery, outrage, fraud, guardianship, agency, and deposit, if direct, not contrary; also in the action on partnership, which is always direct, and in which infamy is incurred by any partner who suffers condemnation. In actions on theft, robbery, outrage, and fraud, it is not only infamous to be condemned, but also to compound, as indeed is only just; for obligation based on delict differs widely from obligation based on contract.

22. C.1.1.1

(Gratian, Valentinian, and Theodosius to the people of the city of Constantinople [380]) (S.P. Scott & CD trans.)

We desire that all peoples subject to our benign empire shall live under the same religion that the divine Peter, the apostle, gave to the Romans, and which the said religion declares was introduced by himself, and which it is well known that the pontiff Damasus, and Peter, bishop of Alexandria, a man of apostolic sanctity, embraced; that is to say, in accordance with the rules of apostolic discipline and the evangelical doctrine, we should believe that the Father, Son, and Holy Spirit constitute a single Deity, endowed with equal majesty, and united in the Holy Trinity. **1.** We order all those who follow this law to assume the name of Catholic Christians, and considering others as demented and insane, we order that they shall bear the infamy of heresy; and when the divine (*divina*) vengeance which they merit has been appeased, they shall afterwards be punished in accordance with our resentment, which we have acquired from the judgment of heaven.

^v *divina* (Lyon, 1604), col. 14: I.e., ecclesiastical, because they are separated from the communion of the faithful. And because he says that they are infamous, therefore they cannot give testimony, as [D.22.5.3.5, above p. I–**Error! Reference source not found.****Error! Bookmark not defined.**]; nonetheless the law grants them this between themselves in contracts and testaments and also between others, as [C.1.5.21pr, 21.3, below no. 38]. Solution: here it speaks of infamy of fact, which does not repel from testimony, concerning which [infamy] [D.37.15.2],² also speaks. Or, otherwise, here it speaks of infamy of law, but it speaks of those heretics who never could testify, who are also designated in that law. Or, for a third reading, their testimony is repelled among orthodox, but among themselves not, except for certain ones who are repelled among themselves, as in that law [C.01.05.21]. Or say that they are infamous not *ipso iure* but by the sentence to be rendered according to heavenly judgment, because the heard of the king is in the hand of

² D.37.15.2 (Scott trans.): “Julianus, Digest, Book XIV. The respect due to parents and patrons is of such a character that an action for fraud or injury can not be granted against them, even though they may appear by an attorney; for although, by the terms of the Edict, if judgment be rendered against them, they might not be considered infamous; still, according to public opinion itself, they will not escape the imputation of infamy through the very proceeding. **1.** Judgment for forcible possession is also forbidden to be rendered against them.”

God, as [C.1.1.8].³ Today, however, they all are infamous *ipso iure*. Hence, they are repelled, as in [const. Frederick II in C.1.5.19].⁴

23. C.12 q.1 c.11

(CD trans.)

<To be done>

24. C.19 q.3 c.3

(CD trans.)

<To be done>

25. C.19 q.3 c.7

(CD trans.)

<To be done>

26. C.1.3.54(56)

(Justinian to John, praetorian prefect [527 X 534]) (S.P. Scott trans.)

We desire that, with divine aid, everything which is for the honor of the Holy Catholic Church, and is pleasing to God may be done, and we wish to establish this by law, and accomplish it by our own acts. With his assistance we have already sanctioned many regulations which were in agreement with the doctrines of the Church, and, at present, after pious deliberation, we intend to correct whatever, up to this time, has been committed against the fear of God.

It is well known to us that if either a betrothed man or woman, after the customary gifts had been bestowed and accepted, should wish to consecrate himself or herself to the service of religion, and retire from intercourse with the world to lead a holy life, and continue in the fear of God, the man will be compelled to lose the property which he bestowed as a gift, and the woman will be forced to restore double

³ C.1.1.8(4) (Scott trans.): “John, bishop of the city of Rome [Pope John II, 533], to his most illustrious and merciful son Justinian.

“Among the conspicuous reasons for praising your wisdom and gentleness, Most Christian of Emperors, and one which radiates light as a star, is the fact that through love of the Faith, and actuated by zeal for charity, you, learned in ecclesiastical discipline, have preserved reverence for the See of Rome, and have subjected all things to its authority, and have given it unity. The following precept was communicated to its founder, that is to say, the first of the apostles, by the mouth of the Lord, namely: ‘Feed my lambs.’

“This see is indeed the head of all churches, as the rules of the fathers and the decrees of emperors assert, and the words of your most reverend piety testify. It is therefore claimed that what the scriptures state, namely, ‘By me kings reign, and the powers dispense justice’ will be accomplished in you. For there is nothing which shines with a more brilliant lustre than genuine faith when displayed by a prince, since there is nothing which prevents destruction as true religion does, for as both of them have reference to the Author of life and light, they disperse darkness and prevent apostasy. Wherefore, most glorious of princes, the divine power is implored by the prayers of all to preserve your piety in this ardor for the faith, in this devotion of your mind, and in this zeal for true religion, without failure, during your entire existence. For we believe that this is for the benefit of the holy churches, as it was written, ‘The king rules with his lips’, and again, ‘The heart of the king is in the hand of God, and it will incline to whatever side God wishes’; that is to say, that he may confirm your empire, and maintain your kingdoms for the peace of the church and the unity of religion; guard their authority, and preserve him in that sublime tranquillity which is so grateful to him; and no small change is granted by the divine power through whose agency a divided church is not afflicted by any griefs or subject to any reproaches. For it is written, ‘A just king, who is upon his throne, has no reason to apprehend any misfortune’.

“We have received with all due respect the evidences of your serenity, through Hypatius and Demetrius, most holy men, my brothers and fellow-bishops, from whose statements we have learned that you have promulgated an edict addressed to your faithful people, and dictated by your love of the faith, for the purpose of overthrowing the designs of heretics, which is in accordance with the evangelical tenets, and which we have confirmed by our authority with the consent of our brethren and fellow bishops, for the reason that it is in conformity with the apostolic doctrine.”

⁴ Const. Frederick II in C.1.5.19 (Scott trans., original Latin text in Krüger ed. of Codex, p. 513): “We condemn to infamy, set apart, and banish the Gazarists, the Patarians, the Leonists, the Spheronists, the Arnoldists, the Circumcised and all heretics of both sexes, and of every denomination; declaring that all the property of such persons shall be confiscated, and shall not be restored to them afterwards, so that their children cannot succeed to them; for it is much more serious to give offence to Eternal than to temporal majesty.”

the amount which she received; which seems to be contrary to the benign spirit of our religious belief. Wherefore by the present law, which shall remain forever valid, we order that whenever any betrothed man or woman desires hereafter to renounce the life of the world, and dwell in association with the righteous, the betrothed man shall receive all the property which he bestowed as a gift upon his intended wife, without any diminution whatsoever; and the betrothed woman shall not surrender double the amount (as has been the case up to this time), to her betrothed husband, but only what she received as the gift of betrothal, and she shall be compelled to restore no more than what she is proved to have obtained.

Provision has already been made by us under a former law, with reference to husbands and wives who renounce the world, so that if either a husband or a wife withdraws from marriage on account of religion, and chooses a solitary life, both of them shall receive the property which was given as a dowry, or as an antenuptial donation, and only that shall be obtained by way of profit from the one who embraced the solitary life, which he or she could have lawfully acquired under the agreement in case of death.

1. We have determined that the following matters of which we were aware shall be corrected; that is, if any person of either sex still subject to paternal authority, or, after having been released from it, should choose to enter a monastery or become a member of the clergy, and desire to pass the remainder of his or her life in a religious manner; it shall not be lawful for the parents of the party in question to prevent him or her in any way from doing so, or for this reason to exclude him or her from their inheritance or succession, under the pretext of their being ungrateful; but all persons, when they make their last will either in writing or in any other legal way, shall be required to leave them the fourth part of their estates, in compliance with our laws. If, however, they should desire to leave them any more, we grant them permission to do so. But when their parents are not shown to have manifested their last wishes, either by will or by any other final disposition of their property, their heirs shall obtain the entire estate of their parents, to which they are entitled in case of intestacy, according to our laws; and their adoption of a religious life shall present no impediment to this, whether they are called to the succession alone, or along with others.

2. We wish those to enjoy the benefits of our perpetual law who have continued to remain in a monastery, or in the priesthood; for if any of those with reference to whom we have established the present regulation, should choose a religious life, and should afterwards renounce it for a secular one, we order that all their property shall belong to the church or the monastery from which they have withdrawn.

3. These matters having been disposed of in this way, we order that the law shall be repeated which provides that no Jew, Pagan, or heretic shall hold Christian slaves; and if any should be found to have done so, we direct that all such slaves shall become absolutely free, in accordance with the tenor of our former laws.

Moreover, we now further decree that, if anyone of the abovementioned Jews, Pagans or heretics should have slaves who have not yet been initiated into the most holy mysteries of the Catholic faith, and the aforesaid slaves desire to embrace the orthodox religion, they shall, by this law, become absolutely free, after having united with the Catholic Church; and that the judges of the provinces, the defenders of the Holy Church, as well as the most blessed bishops, shall prevent anything being received by their masters as the price of the said slaves.

If, after this, their masters should be converted to the orthodox faith, they shall not be permitted to reduce those to slavery who preceded them in this respect, and anyone who usurps rights of this kind shall be subjected to the severest penalties. Therefore all judges and reverend archbishops, not only in the dioceses of Africa (in which we have ascertained that abuses of this kind are frequent), or in any other provinces, shall see that all these things which we have ordered for the sake of piety shall be rigidly and zealously observed.

Violators of this law shall not only be punished with a pecuniary fine, but also with the penalty of death.

27. C.16 q.1 c.33

(CD trans.)

<To be done>

28. C.16 q.1 c.12

(CD trans.)

<To be done>

29. Nov. 123.27

([546]) (S.P. Scott trans.)

Whenever a suit is brought, and a legal summons is served, or an execution is issued in any civil proceeding whatsoever, either public or private, against a clerk, a monk, a nun, or a monastery, and especially against a monastery of women, we order that notice of it shall be given without the commission of any injury, and with all due respect under the circumstances, and that the nun or the hermit who is sued shall not be taken from his or her monastery, but an attorney shall be appointed to answer in the case. Monks shall, either in their own proper persons, or by an attorney, be permitted to conduct cases in which the monastery is interested, and the judge or judicial officer who violates this law is hereby warned that he will be deprived of his place; that a fine of five pounds of gold will be imposed by the most magnificent count of private affairs; and that the official who executed orders of the tribunal will, in addition to this, be scourged and sent into exile. The most holy bishops of the dioceses will see that these provisions are not violated in any respect, and that if they should be, that the punishment above mentioned is inflicted, and they must notify us whenever it becomes necessary for the judge to impose a different penalty.

30. X 2.20.12

(CD trans.)

<To be done>

31. C.14 q.2 c.1

(CD trans.)

<To be done>

32. X 2.24.26

(CD trans.)

<To be done>

33. Nov. 123.7 in C.1.3.7

([546]) (S.P. Scott trans.)

But let the judge send some of his officials to them, in order that they may tell what they know on the Holy Scriptures, as is proper for priests to do, but they shall not be sworn.

34. D.1.11.1.1(Archadius Charisius, *On the Office of the Praetorian Prefect*, sole book) (S.P. Scott trans.)

1. The authority of the prefects having originated in this manner, it was subsequently increased to such an extent that no appeal can be taken from the decision of a praetorian prefect; for when formerly a question arose as to whether an appeal could be taken from the decision of a praetorian prefect, which, in fact, was allowed by law, and examples of those who did so are extant; afterwards, by an imperial decree publicly promulgated, the right of appeal was forbidden. For the emperor thought that those who were appointed to this high office on account of their eminent industry, after their discernment and integrity had been established, would render judgment not otherwise than he himself would do, the wisdom and enlightenment attaching to their rank being taken into consideration.

35. C.11 q.3 c.80

(CD trans.)

<To be done>

36. C.22 q.1 c. 9

(CD trans.)

<To be done>

37. C.22 q.1 c. 8

(CD trans.)

<To be done>

38. C.1.5.21

(Justinian to John, Praetorian Prefect [531]) (S.P. Scott trans.)

As many judges requiring our advice have consulted us as to the disposal of litigation, in order that they may be advised what to decide with reference to heretic witnesses, and whether their testimony should be accepted or rejected, we order that no testimony shall be given against orthodox litigants by a heretic, or by those who adhere to the Jewish superstition, whether one, or both parties to the suit are orthodox.

1. We grant permission to heretics or Jews, when they have litigation with one another, to introduce witnesses qualified to testify, with the exception, however, of those who are controlled by the Manichean insanity, which it is evident is also shared with the Borborites and those who believe in the Pagan superstition; and the Samaritans are also excepted, as well as those who are not unlike them, together with the Montanists, the Tascodrogites, and the Ophytes, to whom all legal actions are forbidden on account of the similarity of their offences. **2.** We therefore order that the right to be a witness, along with all other lawful acts, shall be forbidden to the Manicheans, the Borborites, and the pagans, as well as to the Samaritans, the Montanists, the Tascodrogites, and the Ophytes.

We desire that the privileges of giving testimony in court against orthodox persons shall only be forbidden to other heretics, in accordance with what has been already decided. **3.** We admit their evidence, however, with reference to wills and whatever relates to the final disposition of property or to contracts, without any distinction, on the ground of public utility and necessity, and in order that difficulty of proof may not be increased.

39. C.6.23.21pr

(Theodosius and Valentinian to Florentius, praetorian prefect [439]) (S.P. Scott trans.)

We order by this carefully considered law that those who make a written will and do not wish anyone to know what is contained therein, shall seal it, tie it, roll it up, or conceal the writing in any other manner, whether it has been written by the hand of the testator himself, or by that of someone else; and, then, having called together seven Roman citizens, who have arrived at puberty,⁵ shall offer the said will to them all at the same time to be signed and sealed, provided, however, that the testator shall say to the said witnesses that the instrument which he offers is his will, and shall sign it with his own hand in their presence. This having been done and the witnesses having signed and sealed the will on one and the same day, and at the same time, it shall be valid, and shall not be rendered void for the reason that the witnesses did not know what was written therein.

40. D.48.18.10(Arcadius Charisius, *On Witnesses*, sole book) (S.P. Scott trans.)

Torture should not be inflicted upon a minor under fourteen years of age, as the Divine Pius stated in a Rescript addressed to Csecilius Jubentinus. **1.** All persons, however, without exception, shall be tortured in a case of high treason which has reference to princes, if their testimony is necessary, and circumstances demand it. **2.** It may be asked whether torture cannot be inflicted upon slaves belonging to the castrense peculium of a son in order to obtain evidence against his father. For it has been established that a father's slave should not be tortured to obtain evidence against his son. I think that it may be properly held that the

⁵ There is nothing in the Latin words that suggests that these witnesses be male.

slaves of a son should not be tortured to obtain evidence against his father. **3.** Torture should not be applied to the extent that the accuser demands, but as reason and moderation may dictate. **4.** The accuser should not begin proceedings with evidence derived from the house of the defendant, when he calls as witnesses the freedmen or the slaves of the person whom he accuses. **5.** Frequently, also, in searching for the truth, even the tone of the voice itself, and the diligence of a keen examination afford assistance. For matters available for the discovery of truth emerge into the light from the language of the witness, and the composure or trepidation he displays, as well as from the reputation which each one enjoys in his own community. **6.** In questions where freedom is involved, it is not necessary to seek for the truth by the torture of those whose status is in dispute.

41. C.6.35.12

(Justinian to John, pretorian prefect [532]) (S.P. Scott trans.)

A doubt which arose among the jurists of antiquity with reference to the *SC. Sillanianum* has been submitted to us; that is to say, that slaves shall be subjected to the punishment of death when they lived under the same roof as their master, and did not afford him aid when he was assassinated. The ancients did not agree upon what was meant by the words “under the same roof,” whether this should be understood to signify in the same bedchamber, in the same dining room, in the same gallery, or in the hall; adding that if the master was killed on the highway, or in a field, those slaves should be punished who were present and did not extend their aid to avert the danger, but they made no distinction in the interpretation of the term “present.”

Therefore we, desiring to deprive them of every opportunity to escape punishment on account of their neglect of the safety of their master, do hereby decree that all slaves, no matter where they may be, whether in the house, on the highway, or wherever their cries can be heard, or an attack can be perceived, who do not bring assistance, shall be subjected to the punishment provided by the *SC.* They are required to go to the aid of their master for the purpose of preventing him from being the victim' of treachery whenever they see that he is in danger.

42. C.4 q.7 c.1

(CD trans.)

<To be done>

43. D.27.1.15.15

(Modestinus, *Of Excuses*, book 6) (S.P. Scott trans.)

Moreover, where anyone has the administration of three guardianships or curatorships, he has no right to be excused from the administration of a fourth; for instance, if he has manifested a desire to accept it. A guardian, however, is only held to have manifested such a desire, who manages a moderate estate.⁶

44. JI.1.26.12-13

(Moyle trans.)

12. Finally, it is to be noted, that guardians or curators who are guilty of fraud in their administration must be removed from their office even though they offer to give security, for giving security does not change the evil intent of the guardian, but only gives him a larger space of time wherein he may injure the pupil's property. **13.** For a man's mere character or conduct may be such as to justify one's deeming him 'suspected'. No guardian or curator, however, may be removed on suspicion merely because he is poor, provided he is also faithful and diligent.

⁶ See above, note 14. The original is in Greek, and the vulgate translation is ambiguous. What the passage probably means is that someone who is the tutor of a pauper will be assumed to have wanted to take on other tutorships (because being tutor for a pauper is not a burden).

45. D.2.15.8.11 i.m.⁷

(Ulpian, *On All Tribunals*, book 5) (S.P. Scott trans.)

The character of the persons must also be taken into consideration; that is to say, what are the habits of life of those for whom provision is made, whether they are frugal and have sufficient for their maintenance from other sources; or whether they are of an inferior class, who will be compelled to depend entirely upon the provision made for them. With regard to the person who is charged with furnishing maintenance, these things must be investigated namely, what his means are, as well as his intentions and his opinions, for it will then be apparent whether he desires to ever reach the party with whom he makes the compromise or not.

46. D.26.10.8

(Ulpian, *On the Edict*, book 61) (S.P. Scott trans.)

We consider a guardian to be suspicious whose behavior is such as to render him an object of distrust; for a guardian, however poor he may be, should not be removed on the ground of suspicion, if he is trustworthy and diligent.

47. D.26.5.21.6

(Modestinus, *Of Excuses*, book 1) (S.P. Scott trans.)

The magistrate should be especially careful not to appoint those who thrust themselves forward for that purpose [i.e., of being appointed tutors], or who offer bribes; for it has been established that such persons are liable to punishment.

48. C.2 q.7 c.26

(CD trans.)

<To be done>

49. X 5.39.59

(CD trans.)

<To be done>

50. C.11 q.3 c.24

(CD trans.)

<To be done>

51. X 2.25.2

(CD trans.)

<To be done>

52. X 2.25.5

(CD trans.)

<To be done>

53. X 2.25.11

(CD trans.)

<To be done>

54. X 2.25.12

(CD trans.)

<To be done>

⁷ The context of this passage is the rather elaborate set of rules designed to protect people who been awarded maintenance in someone's testament from compromising their right too cheaply.

55. X 2.27.24

(CD trans.)

<To be done>

56. X 1.29.12

(CD trans.)

<To be done>

57. D.1.5.10(Ulpian, *On Sabinus*, book 1) (S.P. Scott trans.)

The question has been raised to which sex shall we assign an hermaphrodite? And I am of the opinion that its sex should be determined from that which predominates in it.

C. ALBERTUS GANDINUS, TRACTATUS DE MAELFICIIS

in H. Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastik* (1926) 2:69–72 [CD trans.]

The work dates from the 1280's. Albertus himself lived to around 1310.

Who can and ought by law be admitted to proof of fame.

Now it is to be seen who by law can and ought be admitted to proof of fame.

[sec. 1] *And certainly it seems that those who are not hateful and enemies of him against whom they are produced can by law be admitted and their depositions ought to be valid by law.* Indeed, it seems that generally all can be admitted and received who are not found especially prohibited in the edict about witnesses [D.22.5.1],¹ as is also said of a proctor [D.3.3.43.1]. There can and ought therefore be admitted to the proof of fame forthright and honest men who are above every exception [X 5.1.24].² Whence old [*antiqui*] men, serious and of honest and good fame and opinion are to be admitted to such testimony [D.31.77.25, 31.24;³ X 2.20.47⁴], which seems to be possible for the reason that greater faith in doubtful things is given to men of such condition [D.22.5.3.1;⁵ D.22.4.6⁶].

[sec. 2] *Whence it is asked how fame can be proven*, it can be said and it seems that fame is said to be proved as often as witnesses above every exception depose and say that it is publicly said in the city, village or place about which inquiry is being made that so it happened or so it was done, as is said, as is argued in [D.33.7.18.3 (?);⁷ D.43.12.1]. But if it is asked whether fame proved by the aforesaid witnesses in this way suffices for a full proof, so that out of it alone one can proceed to a definitive sentence, I reply: it seems that a distinction must be made, whether the question is being asked about civil or a criminal case. For in a criminal case, although proof of fame alone, proceeding from lawful time, place and persons above every exception, leads to indication [*indicium*] and presumption, so that one can proceed, according to some, to

¹ See § 1D. Cf. *id.*, D.22.5.18.

² Lateran IV, c. 8, the famous canon *Qualiter et quando* on inquisitorial process. That text says that the *clamor* that leads to inquisition ought to come “not from the malevolent and wicked but from the forthright and honest, and not once only but often.”

³ These references are bizarre, and only further pursuit in the gloss would tell us whether they are just mistakes or whether there was something about these cases of interpretation of wills that led the glossators into thinking about the greater credibility of older people.

⁴ Lateran IV (1215), c. 52, which holds that testimony on the basis of hearsay can no longer be received in cases involving dissolution of marriage on the ground of consanguinity, but which lays down the following exception: “unless there happen to be grave [which might mean ‘old’] persons, in whom faith is deservedly put, and who learned what they testify before the case was brought from those older than they.”

⁵ See § 1D.

⁶ Holds that when one is looking for a person with whom to store a testament, older people are to be preferred to younger.

⁷ See below, note 14.

interrogation, as is said below in the treatise concerning interrogations and tortures, nonetheless, by that alone no one can be definitively condemned, for no one is to be definitively condemned on the basis of suspicions [D.48.19.5; D.37.9.1], for in criminal matters, since the salvation of a man is at stake, proofs ought to be clear and open [C.4.19.25]. And well I propose and say that on the basis of such a fame as this alone one can proceed to interrogation, because the proof of such a fame makes a presumption and is said to be an argument very like the truth [X 5.34.4;⁸ arg. X 2.13.2;⁹ D.33.10.3.5]. Truly, if the matter is civil, then, although two half-full proofs—such as the statement of one witness and common fame [D.33.4.14]—make up one full proof, so that a definitive sentence can be composed [C.4.19.4; C.4.1.3; D.22.5.3.2], nonetheless, fame alone, which is deemed a half-full proof in this case, cannot regularly have this effect, since out of one half-full proof a sentence is not normally to be given and composed [C.3.1.9; Nov. 73.8]. I say ‘normally’, however, because sometimes it happens that fame alone provides and produces a proof such that it alone proved, a definitive sentence can be laid down, as happens in all matters concerning antique times and remote places. Whence it seems not difficult but impossible to prove by witnesses that they saw Bulgarus dead,¹⁰ and therefore in such a case recourse ought be had to proof of fame. It is said to suffice if witnesses should say that there is fame in his city that he is dead, so that his inheritance can be taken up like a dead man’s [C.8.50.4; C.5.18.5]. The same also seems to be said even if the inquiry is about a remote place, for example that someone has died across the sea; for it is enough to prove that he is dead if this is what the opinion of the crowd says [D.33.10.3.5; D.15.2.1.10; D.1.14.3; C.7.21.7]. And, to speak briefly, there are many special cases about which full proof is taken and had solely by public fame and common opinion without anything added, which cases are stated in these laws: [D.43.12.1.2; X 2.20.27; D.22.5.3.2; D.12.3.7; D.33.7.18.3¹¹; D.41.3.33.1; D.28.5.93; D.38.15.2; Nov. 117.9 (at C.5.17.8 in the Vulgate)]. But against this it seems that fame does not prove [C.1.40.3].¹² But I reply that there was not true fame and therefore there the contrary can be proved, but in the laws cited above, the contrary cannot be proved. Sir Martinus de Fano says [not in the published work, perhaps in a *repetitio* on the following law], however, that fame always proves by itself alone until the contrary is proved, and what is said in [D.22.5.3.2],¹³ “otherwise fame as if

⁸ From the council of Meaux [845]: “If anyone of ecclesiastical rank plainly betrayed himself as one who consented or helped those who were stealing other people’s wives, let him be deposed from his rank; if he is charged of the same by reasonable suspicions, let him purge himself canonically [i.e., with oath helpers].”

⁹ Argument from (i.e., he recognizes that it’s not squarely on point) Alexander III to the bishop of Worcester: “Take care and inquire at what time H. renounced the church, and if it appears to you that he had been despoiled of the church when he renounced it, you should not admit witnesses of the other party to testify about the oath and spontaneous renunciation [that H. made] until he is restored to the church. It is not likely that one who renounces when he is despoiled freely renounces. But do not postpone receiving the witnesses of the same H. by which he means to prove that he was violently despoiled of the church, so long as they are suitable.”

¹⁰ See Accursius on C.5.18.5 v^o *functa est*: The emperors Valerianus and Galienus in 259: “If your wife has been captured by the enemy, her brother cannot claim her dowry as her heir. If, however, she is dead, he can both vindicate her inheritance and a claim to the dowry is his by law, since the claim was provided for by stipulation.” The Accursian gloss on *is dead* says: “But how does he prove that she is dead? Is a necessary witness someone who saw her dead or who buried her? I say according to H. [Hugo or, probably, Hugolinus] that fame alone suffices for this. If there are therefore any who testify that there is public fame in her city that she is dead, that suffices. For otherwise how would it be proved that Bulgarus and Johannes are dead? [There’s a glitch in the text here; what it may mean is that Johannes (Bassianus) raised this question and answered it this way.] And this is implied in [C.8.50(51).4]. [This text seems to involve someone who was killed or captured by the enemy in mysterious circumstances.] But R[ogerus] clearly says that it ought to be proven.” F. C. von Savigny’s *Geschichte des römischen Rechts im Mittelalter* (2d ed. Heidelberg, 1850) 4:96ff. says that “how do you prove Bulgarus is dead” is a “school example” (probably from the late 12th or early 13th century when those who had known him had died out).

¹¹ See below, note 14.

¹² Constantius in 331. Probably a reference to the last sentence: “If there are true cries [which the gloss interprets probably correctly as being complaints against allegedly unjust judges], and they are not poured forth out of passion from clients, we will investigate them carefully, the pretorian prefects and counts who are constituted in the provinces referring the cries of our provincial [subjects] to our knowledge.”

¹³ The translation of D.22.5.3.2 in § 1D says “common knowledge settles the truth of the matter” what the Latin says literally is “fame.” Hence, this is an important text for Gandinus because it is one of the few Roman texts that specifically mentions fame as a means of proof. More fully, the translation in § 1D has “Sometimes the number of witnesses, sometimes their dignity and authority, at others common knowledge settles the truth of the matter in issue.” The Latin, more literally, says “*Alias* the number of witnesses, *alias* their dignity and authority, *alias* fame, as if consenting, confirms the faith of the matter which is being investigated.” The translation of *alias* is the issue between Gandinus and Martinus de Fano, a slightly older contemporary of Gandinus’s and a noted

consenting [confirms the faith of the matter which is being looked into],” say “otherwise,” that is “sometimes” in special cases, “fame consenting,” with the assertion of the party proves, etc., and on this point Accursius also notes in [D.33.7.18.3 (?) v^o *presumptione*;¹⁴ C.6.23.1 v^o *usque huc*;¹⁵ JI.2.10.6 v^o *signaretur*¹⁶]. How such a fame as this proved and by how many witnesses and on what they ought to agree, I have said above in the treatise on inquisitions.

[sec. 3] *But what if a witness asked about many articles says that he knows nothing, but deposes and proves about some*, at the end of his statement deposes that there is public voice and fame about all the aforesaid? Here some say that the statement of the witness is to be confined to only to those articles about which he has deposed, and not to those about which he said that he knew nothing. Others, such as Sir Guillelmus Durantis [Speculum 3.de notoriis criminibus.v^ofama.sec. 6], say, and better, that it ought be referred to all the things contained in all the articles, because when the deponent asserts or deposes about all, this witnesses is understood to respond about all; it is very possible that the witness does not know something, nonetheless when he says and deposes that about all the aforesaid things there is public voice and fame, he speaks and deposes of knowledge and not of belief. It is nonetheless just that a witness in this doubtful matter be required to clarify his statement, and Sir Guillelmus Durantis writes that this is so in his *Speculum* of civil and canon law, which work is greatly approved.

proceduralist. *Alias ... alias* can mean “sometimes ... otherwise,” but it can mean “sometimes ... sometimes.” The difference is important, and the Latin is ambiguous. Reading the passage as whole, Gandinus probably has the better of the argument as to the meaning of *alias*. Whether he has caught the real import of the passage is a matter of more doubt. Both Gandinus and Martinus were dealing in a world that thought in terms of rules about proof. Hadrian, the emperor being quoted in D.22.5.3.2, is clearly not dealing in such a world, and he is urging judges to use their discretion and common sense.

¹⁴ The relevance of this text puzzled Kantorowicz. The key may be in the last sentence: When we are trying to figure out what the testator meant by “farm implements” (*instrumentum*), “Peditus says that it is best not to scrutinize the precise meaning of the words but above all what the testator wanted to designate, and then the natural assumptions [the Latin simply says ‘presumption’] of those who reside in each region.” Gandinus’s citation of the gloss on *presumptione* (ed. Lyon, 1604, col. 1185) helps. What Accursius says (citations omitted) is: “That is, custom, according to which the will of the testator is presumed.” Accursius does not talk about how this is to be proved, but for Gandinus it is obvious. The only way that we are going to prove either custom or what the presumptions are of those in the region is by asking them. Hence, what is going on here is quite like proof of common fame.

¹⁵ C.8.23.1 is a rescript of Hadrian’s that says that if the children (of the testator) consented to have certain people witness their father’s will, they cannot now object that some of the witnesses of the will were slaves or children (of the testator). The Accursian gloss on *usque huc* (ed. Lyon, 1604, col. 1352) says that hence the will is valid, but asks how is it to be proved? (Note that this is not a problem for Hadrian, who is not dealing with rigid rules about who can be a witness in court, though he is dealing with rigid rules about who can be a witness of a will.) The gloss suggests that it may be proved if it were reduced to writing by a notary or if the adverse party concedes it. The glossator raises the question what is to be done if the witnesses are dead, or have incurred infamy, or are absent. But he points out that the testament is nonetheless valid. He does not mention assertion of the proposing party plus fame as a means of proof, so the citation is something of a stretch. He clearly, however, is thinking of the possibility that proof can be had otherwise than by the testimony of witnesses.

¹⁶ JI.2.10.6 is the report in the *Institutes* of the rescript of Hadrian’s in C.8.23.1. The cited gloss says basically the same thing as does the gloss on C.8.23.1.

D. ROBERTUS MARANTA, SPECULUM AUREUM

pars 6, tit. *De testium productione*, tit. *De repulsa testium* (Venice, 1574),¹ pp. 345–7, 384–6; [CD trans.]²

[tit. 6] The sixth act³ that emerges successively in judgment is the production of witnesses. For once the term for proof has been given and the articles or positions, and there has been had the response of the [opposite] party, which denies what is in the positions, it is necessary to prove what is contained in the

¹ Maranta dates the completion his work, or at least this version of it, 20 September 1525. *Id.*, at 481.

² The paragraphing is mine. The translation was made from an edition that contains numerous misprints. I believe that I have reconstructed the sense of the original; whether I have gotten all the details right, only manuscript work would tell.

³ The sixth, and by far the longest, part of Maranta’s *Speculum* is an *ordo iudiciarius*. It is divided into three large sections, from citation to *litis contestatio*, from oath to disputation, and sentence, appeal and execution. The production of witnesses is the sixth “act” of the second part, while the repelling of witnesses is the thirteenth.

articles. The matter of witnesses is thoroughly sifted by many treatises of the writers, particularly by Bartolus in his treatise on witnesses,⁴ by Alb. de mandectis,⁵ by Tindarus in his treatise,⁶ by the Speculator [Guillelmus Durantis] in the title “on witness,” by Lanf[rancus de Oriano, *repetitio* on X 2.19.11 v^o *testium depositione*]⁷ and by many other modern authors, particularly by Cardinalis, extra *de testibus* [X 2.20].⁸ It seemed to me therefore to be superfluous fully to gather this material here, since it is so vast that all by itself it would require a large treatise. Therefore only by way of introduction of the young into the act and practice, I shall briefly touch on three questions, and for the rest I refer myself to the said treatises. The first question will be by what *ordo* are witnesses to be produced and examined. The second question will be how witnesses are to depose about a matter so that they prove it. The third [question will be] up to what time may witnesses be produced.

I turn to the first question and I say that the following order is to be observed: When the term for proof has been given, the party who made the articles has the witnesses cited so that they should come on the first law-day before the judge to swear and to depose testimony of the truth about the articles that have been presented or will be presented. He also has his opponent cited that he come on the same day to see the witnesses testify. And this citation of the witnesses is required for this reason, that it be apparent that they did not meddle in the matter of their own accord, but were asked to do so, because otherwise if they meddled in the matter further they would be suspected of falsehood, according to Bartolus on [D.34.9.5.10], and Alexander [Tartagni]⁹ in *Consilium* 68 (cols., 2 and 6, vol. 2).

The citation of the [opposite] party is also required¹⁰ to see the witnesses swear, for the entire substance of the deposition¹¹ consists in the oath, [C.4.20.9], so much so that if the [opposite] party is not cited nor otherwise present at the swearing, their deposition is not valid. [X 2.20.2], and Abbas¹² on it; [C.4.20.19], and Baldus on it.¹³ And we have a rule (*ritus*) of the great court supporting this,¹⁴ which begins, “Again, if in the rubric, etc.” which provides that the master of the acts¹⁵ in the rubric of the witnesses ought to write how they were examined in the presence of the [opposite] party, he seeing their oaths, or if he is absent on account of contumacy, otherwise their depositions are not probative. And the said citation having been made, on the first law-day the oath of saying the truth is administered to those witnesses who appear in the presence of the [opposite] party or [in his absence in penalty] for his contumacy. If, however, the witnesses do not appear, their contumacy is accused, and a decree is interposed that their examination can proceed notwithstanding their contumacy, and from that time forward they can be examined anytime even if the [opposite] party is absent, even on a day dedicated to the honor of God, as the gloss notes on [X 1.29.1], and as I will say below, and even after the end of the term for proof, because their deposition is referred to the

⁴ See above, sec. 12A.

⁵ Probably the author whose name is usually given as Albericus de Maletis Papiensis. He wrote, probably in the mid-fifteenth century, a treatise on witnesses that was ascribed to the much better known Albericus de Rosciate (c. 1290–1354) in the early printed editions. Savigny 6:133 n.f; Bryson s.n.

⁶ Alfano Tindarus (Alfani Tindaro), a rather obscure jurist of the mid-15th century who wrote a treatise *De testibus* that went through several early modern printings.

⁷ Lanfrancus de Oriano, †1488; there are a number of early modern eds. of this *repetitio*.

⁸ Francesco Zabarella, 1360–1417, cardinal and conciliarist, wrote an extensive commentary on the *Decretals of Gregory IX*, which exists in a number of early modern printed editions.

⁹ Alexander Tartagnus de Imola (1424–1477), chiefly known for his large outpouring of *consilia*, though he also commented on the *Digest*, the *Code*, and book 3 of the *Decretals*.

¹⁰ Reading *requiritur*.

¹¹ Reading *depositionis*.

¹² Nicolaus de Tudeschis, Abbas Siculus (also known as *Panormitanus*, from the see that he held), 1389–1445, the best known canonist of the fifteenth century, author of a massive commentary on the *Decretals* and *consilia*.

¹³ Baldus de Ubaldis, 1327–1406, the best-known fourteenth century jurist after Bartolus.

¹⁴ This is almost certainly a reference to the chief court of the Kingdom of Naples, where Maranta practiced.

¹⁵ Reading *actorum*.

very oath,¹⁶ as Lud[ovicus] Rom[anus] holds in *Consilium* 243, col. 2;¹⁷; Abbas on [X 2.19.9] (col.6), and as I have said above in [tit. *De dilatione*] toward the end, and Bartolus holds the aforesaid in his *repetitio* on [D.2.5.2].

There is, however, a statute in the kingdom [of Naples] concerning the limitation of [the number] of witnesses, for it is not generally permitted that as many witnesses be examined as someone wants to produce, for one cannot examine more than seven witnesses on each article unless the contrary seems fair to the judge, or unless we are dealing with old facts, for then up to ten are permitted for each article, as is the royal decree [*pragmatica*] which begins, “We lay down.”

Moreover, when the said witnesses have been produced they ought to be examined in the place of judgment and not outside, unless they are women or distinguished people, or sick, or in other ways hindered to come to court. For then it is permitted to examine them in an honest place outside the place of judgment, as is the rule of the great court, Number 342, beginning “Again, that they not be heard, etc.” And then the [opposite] party ought to be cited to see the oaths of the witnesses in that place where they are to be examined, as is the text with the gloss on [VI 2.1.2] and Alexander [Targagni] on [D.12.2.15]¹⁸ Note this against those notaries of acts who daily go to examine witnesses in the streets and alleys¹⁹ outside the place of judgment.

And that witnesses can be examined on a holiday so long as they have been sworn on a court day is the rule of the great court, Number 47, beginning “Again, that if it were given, etc.” at the end, and another rule, Number 56, beginning, “Again, that if witnesses, etc.” and another, 132, beginning, “Again, that if witnesses, etc.” and another, 154, beginning, “Again, if witnesses, etc.”

If moreover witnesses are cited within the term and have not yet sworn in the term, they can swear within the three days immediately following, and they can be examined after the term, as is another rule, Number 149, beginning “Again, that in certain, etc.”

On the second principal question I conclude that witnesses, in order to prove, ought to assign good cause for their knowledge, by one or another of the five senses, as Bartolus notes in [D.12.1.1] (col. 4), and on it Alexander [Tartagni] and the doctors and Alexander in *Consilium* 32 (col. penult. vol. 5). But a witness is not required to render the cause precisely, unless he is interrogated, [C.4.20.40], and Baldus on it. Whence if he deposes and is not interrogated about the cause of his knowledge, he proves well. But if he is interrogated, if he does not assign a good cause or [assigns] no [cause], he proves nothing. For reason is looked for²⁰ in a witness, and reason it is that saves²¹ and destroys what he says, according to Alexander in *Consilium* 120 (col. 3, vol. 5) and Abbas on [X 2.20.37] (col. 3 at the words “I ask: it is said here,” etc., and Baldus on the said law [C.4.20.40], and Baldus on [C.1.3.15] (col. 4, at the words “Now I come to witnesses,” etc.

And note that the cause of knowledge ought to be separated from the deposition of this witnesses, so that it is same as what he says. An example: the witness says that Titius lent Seius a hundred [coins]. By way of reason for his knowledge he ought to say because he saw the money counted out by reason of a loan, etc. It is otherwise if he says “because I know.” For that does not prove, for it is the same²² as if he had said, “I

¹⁶ Reading *ad ipsum iuramentum*.

¹⁷ Also called Pontanus, he died at the council of Basel in 1439, at the age of thirty. Despite his youth, he was well respected by the practitioners of the *mos italicus*, and his *consilia*, *singularia*, and commentaries on the *Corpus Iuris* are all available in early modern editions.

¹⁸ Reading *ad personas egregias*.

¹⁹ A reminiscence of Lk. 14:21 “Go out quickly into the streets and alleys of the town and bring here the poor, the crippled, the blind, and lame.”

²⁰ Reading *attenditur*.

²¹ Reading *salvat* with the rubric.

²² Reading *idem*.

know.” And thus it is the same response²³ as what he said before, according to Bartolus in [D.1.19.3] and Soc[inus] in *Consilium* 98, (col. final, vol 4).²⁴ Keep this ever in mind, because frequently examining notaries make mistakes in this matter and don’t pay attention to what they are doing, and they destroy²⁵ the cases of litigants, for frequently they take down the speech of the witness and by way of reason for knowledge they write “as he said above and deposed.” And thus they get themselves out with a single word.²⁶ For if in that deposition the witness does not make mention of any sense of the body but only says generally that he knows what he has said, then that reason for knowledge destroys his entire speech. And if would have been better if the notary had not interrogated him. And thousands of times it has happened to me that processes with this sort of depositions have been vacated,²⁷ depositions so inadvertently and—if I may speak with due respect for notaries—bestially written. And often I have raised the objection in allegations of law and have prevailed, that such depositions are not worthy of trust because a cause of knowledge related to the previous statements makes it the same as the [previous] statement.

What I have said, that a witness who is not interrogated about the cause of his knowledge proves, limit, in the first place, in that it does not apply in criminal cases, in which witnesses, even if they are not interrogated, ought to assign a cause; otherwise they do not prove. Alexander [Tartagni] so holds in *Consilium* 15 (col. 5, vol 1). In the second place, limit it in all facts that are perceivable solely by judgment of the intellect, as in proving someone is mad, or an owner, or rich, or dead, or something similar, that is not perceived by the sense of the body, for [here] too the witness even if [not] interrogated ought to depose about the cause of his knowledge; otherwise he does not prove, according to Abbas, in the said canon [X 2.20.37], and Bartolus on [?D.22.3.27],²⁸ and Baldus on the said law [C.4.20.40] (col. 1), and Alexander in *Consilium* 85 (col. 4) and Baldus and Jason de Mayno²⁹ in [C.6.22.9]. In the third place limit it, when by one witness there is to be a deference to a supplementary oath, for it is necessary that that witness, even if not interrogated, render the cause of his knowledge, otherwise he does not make a semi-full proof, according to Baldus in c.1 sec. sacramentum, col. 2, de consuet. rec. fue.³⁰ and Alexander in *Consilium* 22 (vol. 1); Jason in the *repetitio* on [D.12.2.31] (col. 94, vers. 4). See for many other limitations, Baldus and the doctors on the said law [C.4.20.40] and in the canonic manner on the said canon [X 2.20.37].

Out of the aforesaid it is therefore concluded that whenever a witness deposes and assigns a cause removed from his own sense perceptions, he does not prove. Hence it is that a witness who testifies on the basis of belief does not prove, because he does not depose of his own sense perception, as Jason fully notes on the rubric [D.12.2]. Limit this nevertheless when a witness deposes against the one who produced him by the word “I believe,” because then he fully proves against him because he [the witness] was approved by him [the producer]. Ludovicus Romanus so holds prettily in *Consilium* 104 at the end.

Similarly [to the previous general conclusion], when he deposes by the word “I think” or “in my judgment,” he does not prove, because he does not depose of his own true sense perception, according to Bartolus in [D.4.8.21.4], and Alexander in *Consilium* 74 (col. 3, at the beginning, vol. 1) and *Consilium* 10 (last col., vol. 2).

²³ ‘Reason’?

²⁴ Three generations of the Socini family, Marianus (1401–1467), Bartholomaeus (1436–1507), and Marianus (1482–1556), son and grandson (by a different father), respectively, of the first, were distinguished canonists and wrote numerous *consilia*. Their works were frequently printed together. While it is unlikely that Maranta is citing a *consilium* of Marianus II, I have not determined whether this *consilium* is that of Marianus I or Bartholomaeus.

²⁵ Reading *destruunt*.

²⁶ *Expediunt se unico verbo*.

²⁷ Reading *vacari*.

²⁸ Reading *l. qui testamentum ff. de probationibus* for “*l. qui testis sec. ff. de testi.*”

²⁹ 1438–1519, and so roughly a contemporary of Maranta’s. He is chiefly known as the teacher of Alciatus and for his *consilia*.

³⁰ I have been unable to track down this citation which is probably to the *Commentaria in usus feudorum* attributed to Baldus and many times printed.

In the same manner, when a witness deposes on the basis of what he has heard from another, he does not prove, for example, “I know because I heard it said by such a one,” etc., because he does not depose of his own sense perception, as is the gloss on *praesto* [C.4.20.18] and fully by Felinus [Sandeus]³¹ and Franciscus de Aretino³² on [X 2.20.33], unless [he is testifying] about ancient facts, as is had in [D.22.3.28].

It is also required in a witness in order that he prove that he depose with an oath; otherwise his deposition is invalid. [C.4.20.9, 19.] And he ought to swear in court and not outside. [D.22.5.3.4]³³ with the glosses. And he ought to swear to tell the truth for both parties, as is the gloss and Bartolus on [Nov. 123.7, in C.1.3 after 1.7 (vulgate ed.) and the gloss, and Baldus et generally the moderns on [C.1.3.2].

And if any witness deposes falsely without an oath, he is not subject to the penalty for falsehood, but he is subject to extraordinary penalties, according to Baldus in *Consilium* 106 (vol. 1) and Angelus de Ubaldis³⁴ in *Consilium* 194 col. 2 at the end. Note this as a limitation against³⁵ those who [do this] knowingly.

On the third question, the chief common conclusion is that witnesses can be produced up until the time of the publication in the case and not beyond, except on new articles depending on the old ones. And this rule applies in both the principal case and on appeal, because of the fear of subornation [of perjury]. The text is [?X 2.20.2],³⁶ and it is had by Bartolus in [C.7.43.4]. Also³⁷ the matter is fully elaborated by Bartolus and the doctors on [Nov. 90.4.1, in C.4.19 after 1.19 (Vulgate ed.)] and by Abbas and Felinus and the canonists on [X 2.20.17, 53, 26, 55]. And there is a constitution that conforms to this rule that begins “Of legal experts.” Therefore it suffices for now that I refer to the places previously alleged; the rest of the matter about witnesses I will tell below in the section on repelling witnesses. ...

[tit. 13] The thirteenth act that emerges successively in judgment is the repelling of witnesses. For once the *processus* has been published, if any of the parties has contrary witnesses who strongly urge against him [the other party or his witness], he can ask in court for a term for repelling, which term is granted by the judge and it is half of the first probatory term, as is decided by a royal decree on the course of delays. And this term is granted immediately after the eight days granted by the decree for examining the *processus*. Once the term given for repelling is passed, a publication is deemed to happen *ipso iure* in the matter of repelling.³⁸ We said so above when we spoke of publication in the principal case. And once that publication is made if the other party sees that he is harmed by the repulsion, that is, because his witnesses were reproved, he can ask for a new term to repel the repulsion. And there is given to him half of the term given for repulsion. And once this term is over, there is a publication on this repulsion of the repulsion, and no further repulsion is given, lest the matter be carried on forever. All these things are contained in the said decree on the course of delays. For a bit of introduction to the young, nonetheless, I pose three questions about this material: The first will be how should this repulsion of witnesses be done. The second, whether someone can repel witnesses that he has produced. The third will be whether witnesses can be repelled in a case on appeal.

On the first question you should know that repulsion takes place in one of two ways: one way is against the persons [of the witnesses], the other against what they said. Again, I set down to start off with that repulsion is not granted to one who is seeking it unless there occurs one of three requisites that are laid down

³¹ A distinguished canonist of the second half of the fifteenth century: 1444–1503. He commented on various titles of the decretals, but not on the whole book.

³² Franciscus de Accoltis, Aretinus, 1418–1478. His *lectura* on book 2 of the *Decretals* is all of his commentary on this work that seems to have been printed.

³³ Reading *Gabino* for *Sabino*.

³⁴ 1328–1407, the younger brother of Baldus, and only slightly less distinguished.

³⁵ Reading *contra*.

³⁶ “cl. 2 de testibus.”

³⁷ Reading *quoque*.

³⁸ Probably meaning that the publication need not be requested but happens automatically.

in [X 2.20.31]. The first is that before publication he protests that he wishes to reprove the witnesses, and from this arises that practice, which proctors use every day, that at the time at which they appear to see the oaths of the witnesses, they protest against the persons of the witnesses and what is going to be said by them. I do not however deny that this protestation can be made at any time in any act before publication, as [in] the said canon [X 2.20.31]. See Franciscus de Aretino on the truth of this statement. Do understand this, however: that when a witness has some defect by which he is reproved because he is biased [reading *favore*] against the one doing the reproofing, then a protestation is required. Otherwise he seems to consent and approve the witness. It is otherwise if the defect is one that leads to hate of the witness, such as that he is excommunicate or banished, because then he can be repelled even without protestation. Baldus so declares on [C.4.20.17] (col. 2 at the end, at the words “He doubted here,” etc., although he adds that careful advocates always interpose the said protestation in the manner [described] above.

The second requirement, when he [re]proves, is that he had notice of the defects or exceptions against the witnesses after the publication. The same is true if he was absent at the time of reception of the witnesses up until the publication, according to Baldus on the said law [C.4.20.17], around the end and note the gloss, and Baldus on [C.2.7.23].

The third requirement is that when he did not protest he swears that he is not seeking repulsion out of malice. Otherwise it will not be granted to him, as in the said canon [X 2.20.31], where these things are laid down.

I return now to the first method of repelling, that is against the persons of the witnesses. In this case it does not suffice to allege crimes in general, saying how they are men of evil life, thieves, adulterers, or something similar, but it is necessary that the crimes be laid down specifically, for example, that they committed this crime, this theft, or the like. Bartolus holds this on [D.22.5.3.5] and Baldus on [Nov. 90.6, in C.4.20 following 1.11 (Vulgate ed.)] at the end, and Bartolus on [C.4.20.1] at the end. Supporting this is the text in [VI 2.10.2] and the like. When one wishes to repel what the witnesses said, one ought to object specifically, that they were false because they deposed a falsehood for such and such a reason, and in such and such a place in the examination. Again, that they spoke variously in what they said in such and such a place in the examination, etc., according to the law [D.48.10.27]. Again that they are singular, according to what Baldus notes fully on [C.4.20.18]. Again that they do not depose of their own sense perception, as Alex Mod.³⁹ notes on [D.12.1.1], and as I said above concerning the production of witnesses. And thus with other like matters.

The other party at the same time makes corroborating articles, proving that they are men of good and faultless life and that they have persevered for three years in their good morals and faultlessness, in which case by such a length of time they are presumed to be good and faultless. This is the text, and Angelus on it, at the end of [Nov. 5.1]. Again, he can make articles that they are not various, but reducible to agreement, according to what Alexander and the doctors note on [D.12.1.2.3], and Felinus on [X 2.20.16,⁴⁰ 32] and the glosses there and Bartolus on [D.28.2.29.15]. And thus it is apparent out of the aforesaid when witnesses are repelled as to their persons and when as to what they said.

You ought to know one thing: that this protestation which is made against witnesses has wonderful effect, which is this: that if it happens that the witnesses depose something in favor of the other party who protested, they are not entitled to faith in his favor. And the reason is that by the said protestation he is deemed to have declared that he does not wish to put faith in them. So [it is said] about this in the said canon [X 2.20.31] at the end where Felinus expressly holds this in the last note. Keep this in mind, because daily in every case these protestations are made and few keep in mind that these protestations can be

³⁹ This may be Alexander ab Alexandro, 1461–1523, a contemporary of Maranta’s and a Neapolitan. He was a humanist jurist, and though he is not known to have commented on the *Digest*, the fact that Maranta calls him *modernus* (both, presumably to distinguish him from Alexander Tartagni and because of his new style) and the fact that Maranta may have known him make this identification plausible.

⁴⁰ Reading *cum tu* for *cum tuae*.

damning for those who make them. Whence proctors should take care that they do not make these protestations indiscriminately, except when they are entirely sure that they wish to repel the witnesses. For a declaration concerning this statement and its truth, see above all Franciscus de Aretino in the said canon [X 2.20.31], the next to last column and the one before.

To avoid moreover the evils of those asking for repulsions there is in the kingdom a royal decree put forth, which begins “Crimes,” which lays down a penalty of 10 *tareni* on those who oppose crimes against witnesses if they do not prove them at least semi-fully or by public fame. Likewise if anyone under the color of repulsion produces new impertinent articles, which cannot be produced after publication because of the prohibition of the rules laid down in [Nov. 90.4.1, in C.4.19 after 1.19 (Vulgate ed.)] and there by Bartolus, he is punished for each impertinent article produced in the case, five *tareni* if he is a principal [party] but double if he is a proctor, as is [laid down] in another decree that begins “It happens often.”

You should know about this repulsion that witnesses must be cited and also examined within the term given for repulsion. Otherwise, when the term has expired, they will not be admitted, as is the rule of the great court, Number 256, which begins “Again, that facts” etc. And the reason for this is that repulsion is odious and to be retrained, and the delays of it are granted with great understanding of the cause [for the repulsion], according to Abbas on [X 2.20.49] at the end, although it is otherwise in the principal case where such odium does not flourish, because witnesses examined within the term can be examined after the term, as I said above in verse “Delay” towards the end in [tit. *De productione testium*].

What if someone in his first articles wishes to repel the witnesses [on the other side] and make his own proofs, can he do this? Say that he cannot, for they [the articles in repulsion] are at that time impertinent articles. Hence they are not admitted except after publication, unless someone wishes to repel by reason of enmity, because after [or] before publication [this can be alleged], and no other reason [can be alleged before publication].⁴¹ And about this there is another rule of the great court, Number 235, which begins “Again, this court follows [this practice] that in exceptions,” etc.

Repulsion is introduced only against witnesses. It is not granted against writings, but there is well given to a party the ability to accuse someone of using false writings, as I said above in the preceding act, and there is a rule of the great court about this, Number 165, beginning, “Again, the court follows [the practice] not to grant,” etc.

On the second principal question I say that the common conclusion is that one producing a witness for himself cannot reprove him, because by producing he is deemed to have approved him, even if he [the witness] contradicts him [the producer]. [The remainder of question (2) is omitted.]

On the third principal question I reply that that this question is decided by Andreas de Iserna⁴² on the constitution “Of legal experts,” where he holds that in a case of appeal repulsion is not admitted, except only in the case of falsity, and this rule is followed in the kingdom. [The remainder of question (3) is omitted.]

⁴¹ The text is garbled here.

⁴² c. 1220–1316. He is best known for his commentary on the constitutions of the Kingdom of Two Sicilies.