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 Diplovatatius, 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 Diplovatatius 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 Diplovatatius'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 the give a premeditated and single speech. Notaries are reproved who do not write out the saying of the witness in full. If one speaks about one thing and another about another. If one speaks about one person and another of another. If they do not well compute the grade of consanguinity. If they are in discord about the place. If they are in discord about the time. If they are in discord about the matter. If someone speaks about my thing for you and your things for me. When they don't speak to the matter, because they speak false things and various things. If they are usurers. Even suspect judges are reproved. Concerning the recusation of judges. If they are received again. If they are otherwise false or were so. If they have testified against you and you want to produce them for you. If they have learned what they testify. If they do not say their saying secretly. If they are not received by the judge. If they want the required number when a certain number is required. If articles are not made for the case. If they depose beyond what is claimed. If they are interrogated about their crimes. If the multitude of them is great. If their sayings are not reduced to public form. If witnesses or instruments are thought to be brought in against themselves. Who are compelled though unwilling and who not. Pimps and tax-collectors (*proxenetae et censuales*) are reproved, hermaphrodites, [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]

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[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."

[4–4] 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 crime[6] 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 resons 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 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 they[8] {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 foreswear 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 foreswear 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.> [9–]Again 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° *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 fishmonger[10] 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 admitted[–11] 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 judge[13] <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 then 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° *si testium fidem*[15]>. 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,

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[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 dilegenter 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 reproved, or not compelled, but the quality of the sex is considered, as [D.22.5.15[.1], 18[17]]. 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 atuhor 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

D.22.5.14

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

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 2.20.47[4]], 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.22.4.6[6]].

[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

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[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 interrrogation, 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.33.7.18.3[11]; 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

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[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° *presumptione*;[14] C.6.23.1 v° *usque huc*;[15] JI.2.10.6 v° *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°fama.*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.

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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*), "Pedius 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 act[3] 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

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[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° *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 *Consilum* 68 (cols., 2 and 6, vol. 2).

The citation of the [opposite] party is also required[10] to see the witnesses swear, for the entire substance of the deposition[11] 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 Abbas[12] 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 acts[15] 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

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[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] Alfanus 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), cheifly 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 alleys[19] 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 *Consilum* 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 for[20] in a witness, and reason it is that saves[21] and destroys what he says, according to Alexander in *Consilum* 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 same[22] as if he had said, "I

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[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 response[23] 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 destroy[25] 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 *Consilum* 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 Mayno[29] 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 *Consilum* 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 *Consilum* 74 (col. 3, at the beginning, vol. 1) and *Consilum* 10 (last col., vol. 2).

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[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 testo sec. fi. 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 Aretino[32] 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 l.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 *Consilum* 106 (vol. 1) and Angelus de Ubaldis[34] in *Consilum* 194 col. 2 at the end. Note this as a limitation against[35] 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]. Also[37] the matter is fully elaborated by Bartolus and the doctors on [Nov. 90.4.1, in C.4.19 after l.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

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[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 reproving, 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 l.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 note 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 l.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 Iserna[42] 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.]

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[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.