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

---

[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

---

[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.

---

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

---

[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.