

REFLECTIONS ON FIFTEENTH-CENTURY TREATISES:
THE *TRACTATUS DE TESTIBUS* BY NELLO DA SAN GIMIGNANO
AND ALBERICO MALETTA

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Abstract: The essay deepens the study of fifteenth-century *tractatus de testibus*, started with Tindaro Alfani (RSDI 2007 but 2008), by comparing the works by Nello from San Gimignano and Alberico Maletta. Analogies and differences between the texts' frame and the doctrinal contents are analyzed. The article is part of a research which aims to demonstrate the role as laboratory of the fifteenth-century *tractatus* as to the sixteenth century results: the fifteenth-century jurists tested new languages and frames which made possible the synthesis of the contents of the *Commentaria*.

Keywords: Tractatus de testibus; 15th century; Alberico Maletta; Nello Cetti da San Gimignano

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1. *Introduction.*

The treatises by fifteenth-century jurists were distinct from those that would be written the following century. Thanks in part to humanist influences, the jurists believed it was necessary to make sources more accessible through treatises that focused on a single theme; they also experimented with new paths and new forms of language in an attempt to bring order to the growing number of sources. These varying approaches to their works were dependent upon the origins and the education of the jurists themselves¹.

In 1568 in Venice, Giovanni Battista Ziletti published a collection of works on witness testimony² entitled *Tractatus de testibus probandis, vel reprobandis variorum auctorum*³. It contains many works that were written between the thirteenth and sixteenth centuries, including numerous writings by fifteenth-century authors⁴.

¹ See *Le raccolte a carattere monografico* in G. Colli, *Per una bibl. dei tratt. giur. pubbl. nel XVI sec. II. Bibl. delle raccolte – Indice dei tratt. non compresi nel T.U.I.*, Rm 2003, pp. 87-147. D. Quagliani, *Il pubblico dei legisti trecenteschi, i 'lettori' di Bartolo* in *Scritti di st. del dir. offerti dagli allievi a D.Maffei*, Pd 1991, pp. 181-201, spec. pp. 187-188 gives interesting suggestions.

² On witness testimony in medieval law: J.Ph. Lévy, *La hiérarchie des preuves dans le droit savant du moyen-âge*, Paris 1939 e *La preuve—Recueils Jean Bodin*, Deux. P., Bruxelles 1965. More recent, Y. Mausen, *Veritatis adiutor. La procédure de témoignage dans le droit savant e la pratique française (XIIIe-XIVe siècles)*, Mi 2006.

³ Colli, *Per una bibliografia* (nt. 1), p. 117 and, about G.B. Ziletti, pp. 23-24 and nt. 35.

⁴ The following appear in the *Index auctorum*: *Nellus a S. Geminiano, Franciscus Curtius Papiensis, Andreās Barbatius, Stephanus Aufrerius, Tyndarus, Albericus de Maletis, Lanfrancus de Oriano Brixianus, Marianus Socinus Senior*. On the fifteenth century, see bibliography in A. Bassani, *Il Tractatus de testibus variantibus di Tindaro Alfani: un dialogo fra cultura tradizionale e cultura umanistica nella Perugia del Quattrocento* in RSDI 80 (2007 but 2008), pp. 125-188, nntt. 10-12 e 21. See also: D. Quagliani, *Pietro del Monte a Roma. La tradizione del 'Repertorium utriusque iuris' (c. 1453). Genesi e diffusione della letteratura giuridico-politica in età umanistica (Studi e fonti per la storia dell'univ. di Roma 3)*, Rm 1984. On relations between the literary and legal worlds in the age of humanism: G. Rossi, *Alberti e la scienza giuridica quattrocentesca: il ripudio di un paradigma culturale in Alberti e la cultura del Quattrocento – Atti del Conv. internaz. del Comitato Nazionale VI cent. della nascita di Leon Battista Alberti – Firenze, 16-18 dicembre 2004* (R. Cardini e M. Regoliosi ed.), Fi 2007, pp. 59-121 and *Valla e il diritto: l'epistola contra Bartolum e le*

There is no unifying structure to the works in the collection⁵: for example, Tindaro's *de testibus variantibus* is organized as a dialogue; and while the first part of the collection frequently delves into the characteristics and conditions that make a witness *inhabilis*⁶, not all of the works are organized in this manner. Furthermore, it is not uncommon to read a text that opens with a description of its structure and the reason behind the author's decision to write about the subject – namely, a need to consolidate the various writings on testimony to a more accessible form – while other works forgo a preamble entirely. Some works leave no doubts as to their practical aims and go into a detailed examination of a series of case studies; in others, the author keeps a tight grip on the reins and goes the route of theory, though sometimes the discussion becomes so rarefied that it is of hardly any use for the *practicus*, which would be better served by separating the subject into *regulae e fallentiae*.

However, in terms of methodology, one common feature does stand out from the variety of approaches that were adopted: contrary to the norm of the period, the authors were sparing in their reference to the

Elegantiae: *percorsi di ricerca e proposte interpretative in Pubblicare il Valla* (M. Regoliosi ed.), Fi 2008, pp. 507-599. See also the introduction by A. Belloni to the anastatic reprint (2008) of *Iason de Mayno. Commentaria omnia in Corpus Iuris Civilis*. Venetiis 1598: G. del M.. *Curriculum accademico ed Opere*, v. 1-2, pp. I-XXVI. More recently, G. di Renzo Villata-G. P. Massetto, *La Facoltà legale: L'insegnamento del diritto civile: (1361-1535). Docenti e discipline*, in *Almum Studium Papiense. L'Univ. di Pavia dal Medioevo al XXI secolo* (D. Mantovani ed.), I/1, Mi 2012, pp. 429-466.

⁵ See Bassani, *Il Tractatus de testibus* (nt. 4), pp. 127-132. On the manuscript tradition of Tindaro's work see *Catálogo de los manuscritos jurídicos de la Biblioteca Capitular de La Seu d'Urgell* (García y García) 2009, 2577.3, P. Maffei, *I codici urgellesi e la giurisprudenza italiana fra Tre e Quattrocento. Appunti su alcune particolarità* in *Tijdschrift voor Rechtsgeschiedenis* (T.R.) 78 (2010), pp. 383-395, p. 393 nt. 38 and A. Bassani, entry *Alfani, Tindaro* in *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)*. I. Birocchi, E. Cortese, A. Mattone, M.N. Miletti ed. (D.B.G.I.), Bologna 2013, I, 37.

⁶ On *testes inhabiles* B. Schnapper, *Testes inhabiles. Les témoins reprochables dans l'ancien droit pénal*, in T.R. 33 (1965), also in *Id.*, *Voies nouvelles en histoire du droit: la justice, la famille, la repression penale (16eme - 20eme siecles)*, Paris 1991, pp. 145-175. For a discussion of grounds for invalidity of depositions by witnesses see Mausen, *Veritatis adiutor* (nt. 2), pp. 448-577 and pp. 581-659.

*auctoritates*⁷. Although they did not renounce the past, the exponents of fifteenth-century legal doctrine were fully aware of their own self-worth⁸. Indeed, the two authors that we are going to examine in this article, Nello da San Gimignano and Alberico Maletta, were active participants in the political life of the era (the former in Florence, the latter for the Houses of Este and Sforza). This is only further evidence of the strong role jurists played in society and of the power their profession commanded⁹. Nonetheless, the two were very different from one another, and it is interesting to place them side by side for a comparison¹⁰.

Nello's work offered a short-sighted view of what was then the here and now: for this reason, his reflections were oriented around the procedure an *advocatus* had to follow when he was in *curia*.

To continue with the metaphor, Maletta's treatise, on the contrary, provided a far-sighted view. The counselor to the Sforza regime wanted to propose a new way of looking at the subject matter, so he summarized the theoretical questions it posed and provided his own answers to them. Perhaps this reflected the role he held for the Sforza *signoria* at the time, when the mentality of jurists was undergoing a change: in fact, between the fourteenth and fifteenth centuries, jurists in Lombardy during the

⁷ Cf. G. di Renzo Villata, entry *Dal Pozzo (de Putheo, Putheus, Puteus) Giacomo*, in *Dizionario Biografico degli Italiani (D.B.I.)* 32, Roma 1986, pp. 219-224, spec. p. 223 and considerations about *Practicus Papiensis*, Gian Pietro Ferraris, by G.P. Massetto, *La cultura giuridica civilistica in Storia di Pv* 3.2, Milano 1990, pp. 476-531, p. 510: «Sembra di avvertire il desiderio, vivo in F., di un ritorno al diritto romano interpretato ed inteso senza gli orpelli e le cavillosità del metodo scolastico».

⁸ For public law, G. Rossi writes «massiccio riuso strumentale di materiali tratti dall'Antichità, originalmente rifusi in una sintesi inedita e posti infine al servizio di un disegno politico di grande respiro e di enorme portata», that is to say «un imponente edificio nel quale sono riconoscibili gli elementi fondativi dello stato moderno», in *Incunaboli della modernità. Scienza giuridica e cultura umanistica in André Tiraqueau (1488-1558)*, To 2007, p. XIV. Reflections in Bassani, *Il Tractatus de testibus* (nt. 4), pp. 134-136, too.

⁹ Reflections and references on the public activity of jurists can be found in Bassani, *Il Tractatus de testibus variantibus* (nt. 4), p. 134 e nt. 23.

¹⁰ M. Miletti refers to both of them in *Il nemico capitale. La ripulsa del testimone nelle pratiche di età moderna* in «Acta Histriae» 19 (2011) f. 1-2, pp. 105-126.

Visconti-Sforza era were granted ample opportunity to assert themselves in an experimental process of state-building¹¹.

2 Nello da San Gimignano.

Nello studied in Bologna during the 1390s, but he spent his professional career in Florence¹². The Cetti family was from San Gimignano, where Nello was born in 1373; besides practicing law, he also served the city of Florence as an adviser and diplomat; in 1424 he wrote two minor treatises entitled *de bannitis* and *de testibus*¹³.

¹¹ On the jurist who places himself as «*lapis in caput anguli ... di un'architettura che è dottrinale e sociale, scientifica e politico-religiosa a un tempo*» see D. Quagliani, *La giustizia nel Medioevo e nella prima età moderna*, Bo 2004, pp. 83-97, p. 87. On the relationship between jurists and the Sforza read N. Covini, «*La bilancia dritta*», *Pratiche di governo, leggi e ordinamenti nel ducato sforzesco*, Milano 2007, spec. pp. 19-110 and for references about Maletta's career, pp. 102 e 107.

¹² On Nello's life and career and the *de bannitis*, references in L. Martines, *Lawyers and Statecraft in Renaissance Florence*, Princeton 1968, a.i.. On *de bannitis*, A.M.C. Mooney, *The Legal Ban in Florentine Statutory Law and the De Bannitis of Nello da San Gimignano (1373-1430)*, Ph.D. thesis, University of California, L.A. 1976 (Xerox University Microfilms, Ann Arbor, Michigan). See A. Bassani, voce *Nello Cetti da San Gimignano*, in D.B.G.I. II, 1419 and for a broader perspective, Ead., *Note a margine della vita e delle opere di Nello Cetti da San Gimignano in Lavorando al cantiere del Dizionario Biografico dei Giuristi Italiani*, a cura di M.G. di Renzo Villata, Milano 2013, pp. 429-463.

¹³ *De bannitis* editions: Pescia (*Bastianus de Orlandis*) 15.7.1486; Milano (*ad impensas Petri Antonii de Castelliono*) 19.11.1493; Venezia (*Paganinus Paganinis*) 10.10.1498; Lugduni 1550 (for Iacopo Giunta, with Jacopo d'Arena's work); *Volumen praeclarissimum omnium tractatum criminalium*, Venetiis 1556 (*Passerus de Montefalco*); T.U.I., XI, 1, 357rb-406ra. *De testibus* editions: in Bartolo's *tractatus varii* edition (*Wendelin von Speyer*, 1472); in two collections of *consilia*, *quaestiones* and *tractatus*, Venezia 7.3.1485 (*Johannes et Gregorius de Gregoriis*) and 20.6.1495 (*Baptista de Tortis*), and in another Venetian collection, the contents of which are different: 25.2.1487/88 ([*Georgius Arrivabene*] *Bernardinus Benalius*: cf. *Gesamt Katalog der Wiegen Druke*, 3, Stuttgart-New York 1968, 3541); in the *tractatus de testibus* collection by Ziletti, Venetiis 1568 and in T.U.I. (see *infra*, nt. 14). Cfr. I.G.I., v. IV, 1965, p. 125: 6774, 6775, 6776 and v. I, 1943, p. 182: 1400 and Colli, *Per una bibliografia* (nt. 1), p. 229.

On *de bannitis* M. Bellomo, *I fatti e il diritto. Tra le certezze e i dubbi dei giuristi medievali*, Rm 2000, a.i.

On unpublished *consilia*, besides Martines (nt. 12) pp. 450-455, see G. Murano, *Una raccolta di consilia (Fi, Biblioteca Nazionale Centrale, Landau Finaly 98)* in *Scr. di st. del dir.*

While the focus of this study is the latter of the above-mentioned works, a schematic comparison of the two is nonetheless useful. Nello begins his treatise on the legal ban by examining Italy in its entirety, and he opines that the institution of the ban was an original creation of the communes themselves, with the goal of resolving a political problem. In addition, he takes on the subject with unrelenting and independent rigor: he proposes a classification of the different kinds of *banniti*; he decides which ones to examine and which ones to leave aside; and he then describes the different parts of his work and why he chose to structure it in that way. His aim is to provide answers – both to the judges who declare a ban and the lawyers of those who are sentenced to it – and he takes a personal approach to finding them. At the same time, he maintains an awareness of the political importance of the institution, and of the serious consequences such a sentence has on the *banniti* and their families¹⁴. Nello interprets the legal ban in his own way, while remaining conscious of the strength and autonomy of each commune's statutes: the solutions he provides are such because each statute provides for a framework of interests, and it has the power to impose and maintain said framework.

In *de testibus*, the attention is again focused on resolving problems that a lawyer comes up against in practice: Nello was a man of action, and he was interested in providing concrete answers¹⁵. Nonetheless, it is

e bibliogr. giur. offerti a G. Bonfanti (U. Petronio e O. Diliberto ed.), Mc 2012, pp. 299-318, p. 312 and *Autographa I.1 Giuristi, giudici e notai (sec. XII-XVI med.)* (G. Murano ed.) Bo 2012, a.i. and Ead., *I consilia giuridici dalla tradizione manoscritta alla stampa*, Reti Medievali Rivista, 15, 1 (2014), <http://rivista.retimedievali.it>.

¹⁴ Nello da San Gimignano, *Tractatus de bannitis, Proemium*, in T.U.I. XI.1, f. 357r: «In civitatibus Italię communiter reperiuntur statuta ędita contra bannitos pro maleficio, crimine, vel delicto disponentia interdum quod non audiantur interdum exprimitur quod possint occidi». So there are three starting points: statute, sentences by default, impunity for the *bannitus's* killer. Cf. Mooney, *The legal ban* (nt. 12), p. 205 and Bassani, *Note a margine* (nt. 12), pp. 450-452.

¹⁵ The *Tractatus de testibus et eorum reprobatione, d. Nelli de Sancto Geminiano I.U.D.* in *Tractatus de testibus probandis vel reprobandis variorum auctorum per Ioannem Baptistam Ziletum Venetum I.U.D. in lucem editi*, Venetiis 1568, ff. 117-167, consists of 251 §§. The work is also published in *Tractatus Illustrium in utraque tum pontifici, tum cesarei iuris facultate Iurisconsultorum, De Probationibus. Tomus Quartus*, Venetiis 1584,

immediately clear from the short *incipit* that the tone of this work is different than that established in the *præmium* of *de bannitis*: Nello almost impatiently declares that he undertook the treatise at the insistence of his colleagues¹⁶. While *de bannitis* examined the geopolitical situation of the Italian communes at the macro level and promised original and systematic solutions, *de testibus* sought to model itself on Durand's *Speculum* and provide answers at each step of the way¹⁷. Though the work would be remembered as having been professionally executed by a confident author of proven experience, it would not be as appreciated as *de bannitis*.

A comparison of Nello's work with other treatises *de testibus* reveals the varying approaches taken by the different authors. For example, Tindaro dedicates his entire treatise to the subject of the *testis varius*, and he focuses on the l. *Eos* in the New Digest: in discussing the *opinio Bartoli* as regards that law, he develops a theory of contradictory testimonies¹⁸. On the other hand, Nello reserves but a paragraph in the second part of his work for this same issue: in it, he asks himself which testimonies can be described as *diversa et varia*, and he responds that such depositions are provided by a witness who does not remain firm (*non stat firmus*) in his positions, whereas a witness who is uncertain about his version of events will reveal his doubts while testifying. He quotes Bartolus and concludes with a reference to the *Speculator*, who acted as his Virgil in the 'dark forest' that was testimonial evidence¹⁹.

The work aims to be a guide for the *practicus*, as clearly stated in certain passages:

ff. 79ra-88rb and in *Bartoli a Saxoferrato, Omnium Iuris Interpretum Antesignani Consilia, Quaestiones, et Tractatus. Tomus X*, Venetiis 1590, ff. 170va-178rb. The consulted edition is Ziletti's. On the manuscript tradition of Nello's work: *A cumulative Index to Volumes I-VI of P.O. Kristeller's Iter Italicum*, Leiden-New York-Köln 1997, p. 379.

¹⁶ Nello da S.G., *de testibus*, inc., f. 122: «Suscipiant igitur lucidum, et favorabile munus quod longo meo tempore instantissime petierunt».

¹⁷ Ibidem: «...sequendo in quibusdam ordinem Speculi et omnes eius dicta conclusive recitabo».

¹⁸ Dig. 48. 10. 27, *de lege Cornelia de falsis et de Senatus consulto Liboniano (Ad legem Corneliam de falsis)*, l. *Eos*. On contradictory testimonies, see Mausen, *Veritatis adiutor* (nt. 2), pp. 650-675, in particular pp. 658-674.

¹⁹ Nello da S.G., *de testibus*, n. 216, f. 162.

Tu advocate etiam respice an probatum sit verbum principale libelli quod substantiam voco seu substantivum ...²⁰

and:

Et ideo sis cautus: quando incumbit tibi onus probandi famam quod facias interrogatoria de causis et personis a quibus habuit ortum, vel saltem instruas testes quod dicant de causa et de personis.²¹

The text is structured such that it cannot help but be thorough: just as Nello goes back to the *Speculum* for each proposed solution, so too does he go through each step of the legal procedure in writing the treatise. The work is divided into two parts: the first part dedicates 119 §§ to the phase leading up to the *publicatio*, while the second part features 132 §§ that examine the problems that may arise around the *publicatio testium* and the validity of depositions. The order in which Nello deals with the topics suggests that he wanted to recreate the work of an *advocatus* who is preparing for a case: it should be noted, however, that in doing so, Nello did not adhere perfectly to the model established by his *tutor*, Guillaume Durand, and that in fact the way he chose to organize the subject matter was somewhat different.

Nonetheless, both authors start off with the same issue: who can testify and who can be excluded from testifying²². This first part is quite extensive in Nello's work, and his discussion of the *testis inimicus*²³ is of particular interest. He follows that up by enumerating the cases in which a witness can be compelled to testify²⁴: from this point onward, the topical

²⁰ Nello da S.G., *de testibus*, n. 154, f. 153.

²¹ *Ib.*, n. 172, f. 155.

²² *Ib.*, nn. 1-35, ff. 122-129.

²³ *Ib.*, nn. 3 e 4, f. 122. See Miletto, *Il nemico capitale* (nt. 10), p. 108 and p. 112.

²⁴ Nello da S.G., *de testibus*, nn. 36-58, ff. 129-133. In the step dedicated to a summoned witness who does not appear before the Court, Nello describes two concrete hypotheses: that of a witness who, summoned to prove the existence of a contract, has confided to the judge out of court and not in *figura iudicii* that he was not present at the conclusion of said contract (in which case he will be forced to repeat the

structure of Nello's text begins to differ from that of the Bishop of Mende. Indeed, Nello continues with an analysis of oath-taking, and the consequences that result when an oath is improperly taken or not taken at all²⁵; he describes the phase of the trial in which testimony is given, namely after the *litis contestatio*²⁶; and then he elaborates on the number of potential witnesses²⁷, as well as those cases in which one witness is sufficient. As regards the latter, he presents the *regula 'unus testis nullus testis'* along with no less than 29 *fallentiae*²⁸. Nello did all of this because he wanted his treatise to be extremely useful for drawing up a list of witnesses, as well as preparing a series of *oppositiones* to those of the opposing party²⁹. In keeping with standard courtroom procedure, at this

statement before the Court, because the Court cannot decide on the basis of their own personal knowledge: read A. Padoa Schioppa, *La conscience du juge dans le ius commune européen* in *La conscience du juge dans la tradition juridique européenne, Droit et justice*, Paris-Presses Universitaires de France 1999, pp. 95-129, also in Id., *Sulla coscienza del giudice nel diritto comune* in *Studi in onore di Mario Talamanca*, Na 2001, pp. 121-162 and in Id., *Italia ed Europa nella storia del diritto*, Bo 2003, pp. 251-292) and that of a witness who, while regularly summoned, has promised not to testify, and thus will be forced to appear (Nello da S.G., *de testibus*, n. 38, f. 130). On being forced to testify, see Mausen, *Veritatis adiutor* (nt. 2), pp. 150-169 and on examination, pp. 299-349.

²⁵ Nello da S.G., *de testibus*, nn. 59-72, ff. 133-135. On oath-taking duty, how to take an oath and when an oath is absent, see Mausen, *Veritatis adiutor* (nt. 2), pp. 190-214.

²⁶ Nello da S.G., *de testibus*, nn. 73-82, ff. 135-137. Nello examines the effects on evidence of testimony given outside of proceedings, and the particular case of witnesses *ad aeternam rei memoriam*. On irregular testimonies, see Mausen, *Veritatis adiutor* (nt. 2), pp. 45-50.

²⁷ Nello da S.G., *de testibus*, nn. 83-84, f. 137.

²⁸ *Ib.*, n. 85, ff. 137-138. On *unus testis* read A. Padoa Schioppa, *Unus testis, nullus testis: note sulla scomparsa di una regola processuale*, in *Studi Giuridici-Studia Ghisleriana* (1967), pp. 334-357, now in Id., *Italia ed Europa nella storia del diritto*, Bo 2003, pp. 460-484; A. Gouron, *Testis unus, testis nullus dans la doctrine juridique de Xlle siècle* in *Juristes et droits savants: Bologne et la France médiévale*, Variorum Aldershot 2000, IX. The same theme can be found in larger works: L. Loschiavo, *Figure di testimoni e modelli processuali tra antichità e primo medioevo*, Mi 2004, pp. 36-38 and Mausen, *Veritatis adiutor* (nt. 2), pp. 681-697. F. Treggiari, *La fides dell'unico teste* in *La fiducia secondo i linguaggi del potere* (P. Prodi ed.), Bo 2007, pp. 53-72 interprets the theme in a peculiar context.

²⁹ On presentation and judgement procedure on *oppositio* grounds, see Mausen, *Veritatis adiutor* (nt. 2), pp. 387-462.

point Nello begins an exposition of how a witness is to be examined, in which he specifies who must carry out the examination, how the depositions are to be transcribed, and who is to transcribe them³⁰. On the other hand, the *Speculator* had followed up his exhaustingly detailed list of reasons for witness inadmissibility with an analysis of when and how witnesses are admitted (*quando et qualiter sunt testes recipiendi*); this part also featured a noteworthy digression on the *examen* as conducted by a delegate. Only after these considerations did he deal with the issue of oath-taking³¹. It seems that Nello sought to cater to the needs of those who practice law, and organized his treatise accordingly: though the extensive lists of cases and solutions tend to weigh down his writing, the work is nonetheless shorter and less chaotic than the *Speculum*. Nello's discussion of how to carry out the *examen* includes the formulation of the following: the *articuli*, which state the version of the facts as seen by the party on behalf of whom the witness has been called to testify; and the *interrogatoria*, which are the questions to be asked by the opposing party. Durand had dedicated a specific part of his work to the treatment of this subject, right after his section on oaths³². Nello, however, seems to be

³⁰ Nello da S.G., *de testibus*, nn. 89-119, ff. 139-143, in part. n. 89 f. 139a e n. 90 f. 139b: on the subject of delegating the examination of witnesses by the judge see Mausen, *Veritatis adiutor* (nt. 2), pp. 283-295. The witnesses *qui non sunt latini* are an interesting case: a *notarius* could have difficulty in examining them and Bartolo suggests the presence of two interpreters, or one at least, if finding others is not possible.

³¹ G. Durand, *Speculum iudiciale* (Lugduni 1556), L. I, P. IV, *De teste: Que possunt contra testes opponi* (nn. 1-96, ff. 108vb-116vb); *Quando et qualiter sunt producendi seu recipiendi* (nn. 1-7, ff. 117ra-va and nn.1-25, ff. 117vb-119va: nn. 16-25 spec. on *Commissio receptionis testium*); *De testium iuramento* (nn. 1-7, ff. 119vb-120ra); *De articulis testium* (nn. 1-19, ff. 120ra-122vb); *De interrogatorijs* (nn. 1-24, ff. 122va-124rb); *De testium examinatione* (nn. 1-30, ff. 124va-126vb); *De attestationum publicatione* (nn. 1-12, ff. 126vb-128ra); *De testium reprobatione* (nn. 1-9, ff. 128ra-vb); *De numero testium* (nn. 1-14, ff. 128vb-129va); *Que fides sit testibus adhibenda* (nn. 1-8, ff. 129vb-130ra); *De testium compulsione* (nn. 1-8, ff. 130ra-vb); *De renuntiatione testium productioni* (nn. 1-4, ff. 130vb); *Quaestiones* (f. 131r).

³² Perhaps Nello's outline of *articula* e *interrogatoria* is too concise and not so clear: cf. G. Durand, *Speculum iudiciale*, L. I, P. IV, *De teste, De articulis testium*, n. 1, f. 120rb and *De interrogatorijs*, n. 1, f. 122va with Nello da S.G., *de testibus*, n. 99, f. 140a: «Testes debent

more concerned with the educational aspect of the matter, as if he were teaching law students: he points out that the answers given by witnesses must pertain to the *interrogatoria* if they are to be considered valid and of use to the examining party; and that for this reason, the party, or rather the *procurator*, must take great care when drawing up the questions to be submitted to the court, and must keep a copy of those questions in order to verify that the examination of the witness has been carried out correctly. Another important fact to bear in mind is that if a judge should omit a question, *dolo vel malitia vel negligentia*, then that question could only be asked again – after the *publicatio* – if it was recorded among the *interrogatoria*³³.

Lastly, some pages are dedicated to a series of practical issues that do not fall under the above-mentioned categories, such as the torture of witnesses³⁴.

In the *Secunda Pars*, Nello examines the potential problems that may arise regarding the *publicatio testium*, as well as what characteristics a deposition must have if it is to be convincing³⁵.

examinari super interrogatorijs. et si non responderunt secundum ea que ibi articulantur, non proderunt producenti».

³³ Nello da S.G., *de testibus*, n. 99, f. 140a-b. If *interrogatoria* were not recorded, the judge would ask the questions *ex suo officio*, basing himself on the decretal *Cum causam*, where Innocent III gave instructions to a bishop on the examination of a witness: X. 2. 20. 37, *de testibus et attestationibus* c. *Cum causam*: «prudenter inquirens de causis, videlicet personis, loco, tempore, visu, auditu, scientia, credulitate, fama et certitudine cuncta plene conscribas». About the exam of witnesses and formulation of *articula*, Mausen, *Veritatis adiutor* (nt. 2), pp. 219-246.

³⁴ Nello da S.G., *de testibus*, nn. 100-119, ff. 140-143. On the subject of torture of witness P. Fiorelli, *La tortura giudiziaria nel diritto comune*, Mi 1953, I, pp. 256-270, Mausen, *Veritatis adiutor* (nt. 2), pp. 322-327 and L. Garlati, *Il 'grande assurdo': la tortura del testimone nelle pratiche d'età moderna* in «Acta Histriae» 19 (2011) 1-2, pp. 81-104. A.A. Cassi writes specially about signs of uncertainty in witnesses in *Testis pallidus. Indicazioni per un 'giusto processo' nel Tractatus di Deciani* in Tiberio Deciani 1509-1582. Alle origini del pensiero giuridico moderno (M. Cavina ed.) Ud 2004, pp. 141-156. On the *opinio Bartoli* concerning the credibility of testimony given *cum tormentis* compared with testimony given *sine eis*, some reflections can be found in Bassani, *Il Tractatus de testibus* (nt. 4), pp. 151-152 e nt. 72.

³⁵ *Ib.*, nn. 120-251, ff. 148-167. With regard to *publicatio* in the doctrine of *ius commune*, see Mausen, *Veritatis adiutor* (nt. 2), pp. 363-368.

One example suffices to understand Nello's stance on the subtleties of courtroom procedure. The content of the preliminary examination was to be made available to both parties through an official document called the *publicatio*: if a judge failed to provide this, however, then the issue of the trial's validity would come into play. Indeed, this subject was a *vexata quæstio* for the legal doctrine of the time. Hostiensis was one of the first to break with tradition in terms of the validity of sentencing as it relates to compliance with the *ordo*, as he distinguished between *ordo substantialis* and *iudicialis*: a judge was to adhere to all the actions included under the former, while the actions required by the latter – that is, those steps to be carried out between the oath of calumny and sentencing – were left to his discretion and clemency³⁶. If the judge did not adhere to this second series of procedural steps, then he could be held as acting against the rights of the parties litigant (*contra ius litigatoris*), but not against the *ius commune*; and according to the latter, once the proper formalities had been carried out as provided for by the *ordo substantialis*, the judge was theoretically able to deliver a sentence, even if the parties failed to perform their duties as required by the *ordo iudicialis*³⁷. In his *Speculum*, Durand returned to this *deminutio* of the *publicatio*'s impact on the validity of sentencing, as he defined the legal documents included under the *ordo substantialis* as *substantialia iudicij*; as such, in the absence of said documents, «non tenet

³⁶ Hostiensis, *Summa Aurea* (Venetiis 1574-Torino 1963), *Liber II, De sententia, § Qualiter proferri debeat*, vers. *Is est ordo iudiciorum solitus*, col. 768: «Vel potest distinguere inter ordinem iudicarium, qui si omittitur, non valet processus, ut dictum est: et ordinem iuris, qui, et si pervertatur, mero iure tenet ... vel dic inter ordinem iudicarium substantialem idest per quem de rigore iuris velit, nolit ipse, vel partes, ex quo in figuram iudicij agitur servari debet. et iudicalem idest quem iudex de aequitate et benignitate iuris servare debet, cui tamen à partibus et si in figuram iudicij agatur, potest renuntiari». In the *ordo substantialis* there are *citatio*, *libellus*, *litis contestatio*, *iuramentum calumniae* and the sentence: «et quando contra hunc ordinem pronuntiatur, nulla est sententia». On the other hand, *ordo iudicialis* «videtur consistere in his, quæ aguntur inter iuramentum de calumnia, et sententiam: positiones, responsiones, testium et instrumentorum productiones, publicationes, interlocutiones, renunciationes, conclusiones, allegationes».

³⁷ Hostiensis, *Summa Aurea, Liber II, De sententia, § Qualiter proferri debeat*, vers. *Is est ordo iudiciorum solitus*, col. 768: «Et si quis iudex non servaverit hoc, mero iure videtur tenere sententia et lata potius contra ius litigatoris, quam contra ius commune ... ».

sententia ipso iure», whereas «cetera premissa³⁸ non sunt ita substantialia»³⁹. Bartolus, too, offered insight on the subject: he pointed out how certain authors had stated their opposition to Accursius's gloss, in which the latter had followed in Azo's footsteps and included the transcription and publication of testimony among the formalities that made up that «ordo iudiciorum qui si pervertitur, non valet sententia»⁴⁰. *Quid dicemus?* Bartolus shared the perspective of the canonists: legal evidence could take the form of documents or a confession, hence any sentence delivered without the *publicatio* would be against the rights of the parties litigant, but not against the *ordo substantialis*⁴¹.

Nello, however, was writing for lawyers, and thus he wastes little time in dismissing such subtle debates by simply stating that «si omittatur publicatio testium non redditur iudicium nullum»⁴². What's more, he does not cite Durand in doing so, but rather the encouraging words of Baldus: a cursory reference at best, because while Baldus had indeed referred to the Roman Rota, he had deemed its use erroneous⁴³.

³⁸ That is, a series of formalities, like *conclusio et renuntiatio*, but more detailed than the series described by Hostiensis.

³⁹ Guillaume Durand, *Speculum iudiciale, Secunda Pars, Incipit*, nn. 1 e 2.

⁴⁰ Bartoli à Saxoferrato *Omnis Iuris Interpretum Antesignani Commentaria, Tomus Octavus, In Secundam, atque Tertiam Codicis Partem*, Venetiis 1590, C. 7. 45. 4, *de sententijs et interlocutionibus omnium iudicum*, l. *Prolatam*, n. 5: «Sed testium examinatio, et publicatio non sunt de ordine substantiali, licet hic glossa aliter dicat». Accursio, *Glossa Magna, glossa solitum iudiciorum ordinem*, C. 7. 45. 4, *de sententijs et interlocutionibus omnium iudicum*, l. *Prolatam*: «Dic ergo quod ordo iudiciorum est, ut observatur libellus: lis contestetur: iuretur de calumnia. depositiones testium conscribantur et publicentur. Sententia scribatur, et a iudice proferatur. qui ordo si pervertitur, non valet sententia».

⁴¹ Bartolo da Sassoferrato, *Comm. al Codex*, C. 7. 45. 4, *de sententijs et interlocutionibus omnium iudicum*, l. *Prolatam*, n. 5: «si removeremus examinationem testium, vel publicationem, sententia est, et esse potest. ... Et immo si testibus non scriptis, vel non publicatis est sententia lata, tunc dicitur lata contra ius litigatorum, non contra substantialem ordinem iudiciorum».

⁴² Nello da San Gimignano, *de testibus*, n. 121, f. 149a.

⁴³ Cf. Baldi Ubaldi *Perusini Iuris Utriusque Consultissimi, in feudorum usus commentaria*, Venetiis 1580, *Si de investitura inter dominum et vasallum lis oriatur*, n. 12, f. 32ra: «Extra quæro utrum sententia lata testibus non publicatis sit ipso iure nulla. Et in Romana curia

No other witnesses could be called after the *publicatio*, though Nello, as was his wont, enumerates 19 *fallentiae* to that rule⁴⁴.

3. *Alberico Maletta*.

Alberico Maletta⁴⁵ was born around 1410 in Mortara⁴⁶, where he would meet Francesco Sforza at some point between 1428 and 1429. He graduated from Pavia and taught there as well⁴⁷, and in 1445 he became a member of the Council of Leonello d'Este⁴⁸. He was among the personages who surrendered Pavia to Francesco Sforza in 1447⁴⁹. His political career

servatur, quod fertur sententia testibus non publicatis, et differtur publicatio usque ad tertiam sententiam ad hoc ut non generetur praeiudicium in testibus producendis in causa appellationis, et sic partes procedunt clausis oculis, et in iudice tantum sedet scientia veritatis»: Baldus maintains that this mistake takes origin from another, that is the impossibility to produce witnesses in appeal when they have been published after the first instance.

⁴⁴ Nello da San Gimignano, *Tractatus de testibus*, n. 123, f. 149ab.

⁴⁵ See M.N. Covini, entry *Maletta, Alberico* in DBI 68, Roma 2007, pp. 158-161 and F. Vaglianti, entry *Maletta, Alberico* in D.B.G.I. II, 1234. Some biographical information on Alberico Maletta is the result of research in the State Archives of Milan, Pavia and Mantua conducted by dott. F. Vaglianti, researcher of medieval history (Dip. di Scienze della Storia e della Docum. Storica della Fac. di Lettere e Filosofia – University of Milan), and I thank her.

⁴⁶ See C. Prelini, *Mem. e doc. per la storia dell'Univ. di Pavia e degli uomini illustri che vi insegnarono*, I, Pv 1877 - Bo 1970, p. 44, E. Lazzeroni, *Il Consiglio Segreto o Senato Sforzesco*, in *Atti e Memorie del III Congresso Storico Lombardo* (Cremona 29-31 maggio 1938), Mi 1939, p. 114 nt. 76 and C. Santoro, *Gli uffici del dominio sforzesco (1450-1500)*, Mi 1948, p. 5 nt. 1.

⁴⁷ Cf. Vaglianti, entry *Maletta, Alberico* (nt. 45): between 1431 and 1437, with a monthly salary that went from 60 fiorins in 1433 to 150 fiorins in 1436: see *Cod. Dipl. dell'Un. di Pv. racc. ed ord. dal Sac. Dott. Rodolfo Maiocchi*, Pv 1905, vol. 2: 1401-1440, I, p. 303, p. 316 and p. 354. The *Cod. Dipl.*, vol. 2, II, p. 556 reveals his registration in the Jurists Guild of Pavia (30 April 1431).

⁴⁸ See Lazzeroni, *Il Consiglio Segreto* (nt. 46) p. 114 nt. 76, Santoro, *Gli Uffici* (nt. 46) p. 5 nt. 1 and E. Roveda, *Le istituzioni e la società in età visconteo-sforzesca*, in *Storia di Pavia*, 3.1, Mi 1992, p. 93 and nt. 264.

⁴⁹ Cf. Roveda, *Le istituzioni* (nt. 48), p. 93. M. is among the *spectabiles ac generosi domini* who (18 September 1447) subscribe to the agreement between Francesco Sforza and inhabitants of Pavia concerning University: vd. *Cod. Dipl.* (nt. 47) vol. 2, II, p. 507 and Roveda, *Le istituzioni* (nt. 48), pp. 83-84.

benefited from his family's active role in Francesco Sforza's faction⁵⁰, and he was entrusted with sensitive diplomatic missions⁵¹. He became a member of the Council of Justice on 20 January 1454⁵², and the Secret Council on 18 October 1455⁵³. He died in Campalestro on 12 December 1466⁵⁴. His *tractatus de testibus*⁵⁵ was probably written in the 1450s: it was

⁵⁰ See Roveda, *Le istituzioni* (nt. 48), p. 83.

⁵¹ See P. Margaroli, *Diplomazia e stati rinascimentali. Le ambascerie sforzesche fino alla conclusione della Lega Italica (1450-1455)*, Fi 1992, pp. 101-103. M. was sent to Naples (Copy of the letter of attorney to A.M. to negotiate a marriage settlement between Sforza and Aragona, Naples, 5 October 1455, in State Archive of Milan (henceforth ASMI), Archivio ducale visconteo-sforzesco (Sforzesco), Registri ducali, cart. 2, f. 15r, quoted by Vaglienti) and to France (Copy of the letter of attorney to A.M. to negotiate a marriage settlement between Sforza and Savoia, Milan, 4 March 1465, in ASMI, Sforzesco, Registri ducali, cart. 2, f. 144r, quoted by Vaglienti). In 1466 he helped Bianca Maria Sforza on the occasion of the financial crisis which followed Francesco Sforza's death (Duchess Bianca M. Visconti Sforza letter to A. M., Milan, 8 March 1466, secretary Cicco Simonetta, in ASMI, Sforzesco, Potenze Sovrane, cart. 1458 and Imbreviatura of the convocation of secret councilors, Milan, Corte ducale antistante l'arcivescovado, sab. 13.8.1466, in ASMI, Sforzesco, Potenze Sovrane, cart. 1608, both quoted by Vaglienti).

⁵² See Santoro, *Gli Uffici* (nt. 46), p. 39 and Roveda, *Le istituzioni* (nt. 48), p. 93.

⁵³ See Santoro, *Gli Uffici* (nt. 46), p. 5 and Roveda, *Le istituzioni* (nt. 48), p. 93. On the composition of the two Councils see Santoro, *Gli Uffici* (nt. 46) pp. XIX-XXIII. With regard to their board and jurisdiction, see also F. Leverotti, *Gli ufficiali del ducato sforzesco* in «Ann. della Classe di Lett. e Fil. della Scuola Normale Sup.», s. IV, Quad. I (1997), pp. 17-77 (Reti Medievali: with regard to the Secret Council pp. 6-8, with regard to the Council of Justice p. 8). On the Secret Council, see F. M. Vaglienti, «*Fidelissimi servitori de Consilio suo Secreto*». *Struttura e organizzazione del Consiglio Segreto nei primi anni del ducato di Galeazzo Maria Sforza (1466-1469)*, in *Nuova Riv. Storica*, LXXVI (1992), f. III, pp. 645-708 and F. Leverotti, «*Diligentia, obediencia, fides, taciturnitas...cum modestia*». *La cancelleria segreta nel ducato sforzesco* in *Cancelleria e amministrazione negli stati italiani del Rinascimento*, Ricerche storiche, XXIV/2 (1994), pp. 305-349.

⁵⁴ See Lazzeroni, *Il Consiglio Segreto* (nt. 46) p. 114 nt. 76. On the Maletta family see also Roveda, *Le istituzioni* (nt. 48) pp. 92-94. More information with regard to A. and his family in N. Covini, *'La bilancia drita'. Pratiche di governo, leggi e ordinamenti nel ducato sforzesco*, Milano 2007, a.i..

⁵⁵ *Subtilis ac perutilis tractatus de testibus Alberici de Maletis papiensis, Doctoris consumatissimi. Sine quo perfecte haec materia haberi non potest, cum summariis unicuique cap. positus*, in *Tractatus de testibus probandis vel reprobandis variorum auctorum*, ff. 362-453. This work was published in Naples (1471), Rome (1480), Milan

an extensive work that pursued the ambitious goal of taking what had been handed down from the past – *confuse satis atque diffuse* – and making it clearer and more comprehensible⁵⁶.

The author begins by outlining the structure of his work in the «*operis partitio*»: the first part is dedicated to the inadmissibility of witnesses⁵⁷; the second part presents the cases in which a witness cannot be compelled to testify⁵⁸; that is followed by the formalities to be carried out in order to insert a deposition into the court records⁵⁹; then Maletta discusses the different ways of examining a witness⁶⁰; and the treatise concludes with objections to testimony⁶¹. Maletta's analysis of the subject matter is organized differently than Nello's, and he approaches the topics from a more personal and critical angle: he divides up the issues and classifies them, he enumerates the *rationes* in favor of one *solutio* or the other, and he often chooses the best one by relying on his personal opinion. Lastly, he is not interested in dealing with procedural matters: he takes a thorough

(1491 and 1494) and Pavia (1497), in the collection by Ziletti and in T.U.I., IV, ff. 162ra-179ra. Cfr. I.G.I., I, 1943, pp. 19-20: 129-133 and Colli, *Per una bibliografia* (nt. 1), p. 207. The work can be found in *Catálogo de los manuscritos* (nt. 5), 2577.1 and see Kristeller (nt. 15), p. 333. See also Vaglianti, entry *Maletta, Alberico* (nt. 45), for the manuscript tradition, and W. Müller, *Die datierten Handschriften der Universitätsbibliothek München*, Stuttgart 2011.

⁵⁶ A. Maletta, *de testibus, inc.*, f. 362.

⁵⁷ A. Maletta, *de testibus, operis partitio*, f. 362: «In parte prima tractabimus quibus testibus fides denegetur vel testimonium perhibere». This part is divided into five chapters: the first (§§ 57), untitled, deals with kinship and affinity, ff. 363-368; the second (§§ 72): *Quando testes repelluntur ratione domesticitatis*, ff. 369-378; the third (§§ 73): *Q. t. r. ratione criminis vel infamiae*, ff. 379-390; the fourth (§§ 76): *Q. t. r. ratione affectionis*, ff. 392-406; the fifth (§§ 39): *Q. t. r. ratione defectus personae*, ff. 407-412.

⁵⁸ *Ibidem*: «In secunda qui testes non compellantur ad testificandum». Sixth chapter (§§ 56): *Qui testes non cogantur testificari*, ff. 414-421).

⁵⁹ *Ibidem*: «In tertia quae solemnitates exigantur in testibus recipiendis seu examinandis». Seventh chapter (§§ 133, no title, ff. 425-433).

⁶⁰ *Ibidem*: «In quarta quae interrogatoria testibus fiant». Eighth chapter (§§ 26: *De interrogatoriis quae solent fieri testibus examinandis*, ff. 444-446).

⁶¹ *Ibidem*: «In quinta et ultima qualiter dicta testium impugnentur vel conserventur, quibus expeditis, erit expleta materia nostra». Ninth chapter (§§ 31: *Quae possint contra dicta testium opponi*, ff. 447-453).

look at the inadmissibility of witnesses, as well as the way to examine and cross-examine them; he makes some observations on the *oppositiones*, albeit rather briefly; but Maletta expresses no interest whatsoever in the delicate phase of the *publicatio* or its effects on the sentence. As a matter of fact, Maletta does not seem to be addressing those who win or lose a case so much as the judges who must make the decisions and the *doctores* who are responsible for educating a new generation of jurists. He offers logical, easy-to-follow solutions for each one of the problems that he identifies, namely who can be considered admissible witnesses; who cannot be compelled to testify; how witnesses are to be interrogated; and which objections can be sustained by the court. Nello and Maletta had differing aims, and as such their approaches diverged: whereas Nello was teaching readers how to win, Maletta was putting forward rational solutions.

Maletta also had broader goals than Tindaro, who had concentrated exclusively on the *testis varians*; as such, he includes this subject in the chapter that covers the *oppositiones* to testimony. A witness can be described as *varius*, *contrarius* or *vacillans* based on his *dicta*: *varius* is the witness who makes contradictory statements at different times, without explaining why the versions differ; *contrarius* is the witness who contradicts himself within the same deposition; and *vacillans* is the witness who speaks without conviction⁶². Later, Maletta tackles the *opinio Bartoli*, which had so engrossed Tindaro. According to Bartolus, a witness could be accused of perjury if he stated one thing out of court but then declared the opposite in court; not only that, his deposition would be invalidated. Eccentric as they may have been, Bartolus's observations did not seem to be of concern to Maletta: he aligns himself with the canonists and reaffirms their conclusion on the matter, namely that statements made in court were to be believed over those made *primo loco*. Thus, he lumps the *opinio Bartoli* together with other exceptions (*Bart. tamen in l. eos ...*)⁶³.

⁶² A. Maletta, *de testibus*, cap. IX, nn. 1-3, f. 447.

⁶³ *Ib.*, nn. 4-5, f. 447; spec. n. 5 on *opinio Bartoli*: «Bart. tamen in l. eos. ff. de fal. dicit contrarium per tex. illius l. eos propterea inquit cautelam esse adhiben. quando veremur ne testes variant, ut coram aliquibus testibus extra iudicium interrogemus eos testes et faciamus responderi. Nam si postea dicant contrarium in iudicio, non valebit eorum dictum, et poterunt

In general, Maletta makes sparing reference to legislative texts, and though he cites authoritative canonists and experts in civil law, he does so rarely; indeed, he demonstrates a masterly command of the subject matter and does not get carried away with case studies. He is not writing as an *advocatus*, and his perspective is not as narrow as Nello's. Nonetheless, Maletta's efforts to examine the *opiniones* of those who came before him – part of his strong desire to bring order to the discussion – at times leads to ambiguities and contradictions in his exposition. In any case, this consideration of his predecessors is more of a *pro forma* tribute to the contemporary legal culture than a true integration of past *auctoritates*, as Maletta shows no remorse in ridding himself of the *opiniones* that he cites when it comes time to express his own ideas, which are always based on concise but convincing *rationes*.

An illustrative example of both the positive and negative aspects of Maletta's approach can be found in the passage in which he discusses *fratris pro fratre* testimony. While the sources he recognizes are indeed the most authoritative on the topic, they also contradict one another, and this leads to some ambiguous overlapping: Maletta does not repudiate the highly influential Azo, who in his *summa* permits testimony by a sibling of the accused, yet at the same time he cites the *Speculum* in pointing out that such testimony is highly unreliable. He borrows from the *Decretum* when he espouses the limitation that siblings cannot testify on each other's behalf in criminal cases⁶⁴; but then he refers to a passage from Baldus's commentary on the I. *Parentes*⁶⁵, in which the jurist complicates the issue by stating the following:

de falso redargui ... ». On the canonists' opinions, which were not so harmonious, read Bernardo da Parma, Glossa ord. al Liber Extra, gl. *Sicut nobis*, X.2.20.9, *de testibus et attestationibus* c. *Sicut*: «Dictum vero praedictorum testium (cum periuri sint) non est aliquatenus admittendum. No. quod periuro non est credendum. Item primo dicto alicuius standum est» and Bernardo da Parma, Glossa ordinaria al Liber Extra, gl. *voluerint*, X.2.20.37, *de testibus et attestationibus* c. *Cum causam*: «Sed si quis testis secundo inductus dicat contrarium eius quod primo dixit: tunc dictum suum non valet, nec creditur». On Bartolo and his *opinio* see Bassani, *Il Tractatus de testibus* (nt. 4), pp. 162-173.

⁶⁴ A. Maletta, *de testibus*, nn. 27-28, f. 366.

⁶⁵ C. 4. 20. 6(5): «Parentes et liberi invicem adversus se nec volentes ad testimonium admittendum sunt».

concludit ergo secundum ipsum quod aliquibus casibus frater admittitur pro fratre⁶⁶.

There are four cases to consider: in the first two, either the sibling was a witness to the disputed legal transaction and has been summoned by both parties⁶⁷, or the sibling has been called to testify by the opposing party or subpoenaed by the judge⁶⁸; in the third case, living together (*domesticitas*) is not grounds for unfitness⁶⁹; and the fourth case occurs with a civil case of little importance, in which the brother or sister is a reliable person and the siblings do not live together⁷⁰. Baldus, however, adds yet another case to consider, namely that in which a sibling testifies in defense (*ad purgationem*) of a brother or sister: this would suggest that a sibling is allowed to testify *pro fratre* in criminal cases⁷¹. Maletta was still not satisfied: he goes on to cite Antonio da Butrio, who had spoken of three cases in which he believed that a sibling could not be allowed to testify on behalf of a brother or sister⁷². In sum, Maletta presents various, overlapping classifications without adhering to any unifying standard among them, and then he concludes by offering a closing *opinio (mihi autem videtur)* in which he states that he is against the admissibility of a sibling as a witness: specifically, a sibling must not be permitted to testify on behalf of a brother or sister because of *affectio naturalis*; if an *advocatus* or *domesticus* were inadmissible as witnesses because of

⁶⁶ A. Maletta, *de testibus*, n. 29, f. 366. Cf. Baldi Ubaldi Perusini *Iurisconsulti ... In quartum et Quintum Cod. Lib. Commentaria*, Venetiis 1599, C. 4. 20. 6(5) *de testibus* l. *Parentes*, nn. 2-6: Baldo's exposition is more complex than Maletta's itemized list.

⁶⁷ A. Maletta, *de testibus*, n. 30, f. 366.

⁶⁸ *Ib.*, n. 35, f. 366.

⁶⁹ *Ib.*, n. 37, ff. 366-367.

⁷⁰ *Ib.*, n. 38, f. 367.

⁷¹ *Ib.*, nn. 39-40, f. 367.

⁷² *Ib.*, nn. 41-43, f. 367: «Butr. in c. cum oporteat de accusationibus (X.5.1.19) refert Abbatem tenuisse fratrem in tribus casibus non admitti pro fratre. Primus quando fratres sunt in eadem potestate, videlicet quia pater vivit ... Item si haberent bona communia, ut supra dixi, vel etiam si simul habitent ... ». Cf. Antonio da Butrio, *In librum quintum Decretalium Commentarii*, Venetiis 1578 – Torino 1967, X. 5. 1. 19, *de accusationibus, inquisitionibus et denunciationibus* c. *Cum oporteat*, n. 27.

*affectio accidentalis*⁷³, then all the more so a sibling, who is clearly obligated to provide financial support to his or her brother or sister⁷⁴.

It is clear from how Maletta structured his approach to this *quaestio* that references are only made to the most authoritative of authors, and that his efforts are meant to bring order to the opinions on the topic as concisely as possible. In the end, however, Maletta relies on his own opinion to propose a solution.

4. *Conclusions.*

It has been established that the two authors analyzed herein are different. Nello was an *advocatus*: he organized the subject matter based on how a case unfolded in court and he was guided by procedure in asking his questions. Not only was he addressing his colleagues, he was also training law students, and he cited trustworthy *auctoritates* in doing so. His lines of argumentation may confuse a modern jurist, but not Nello's colleagues: they simply had to follow the steps in the process in order to find all the answers they were looking for. Each case was cited, each problem had a solution, and each solution was offered by an *auctoritas*.

Maletta adopted a more wide-ranging approach, and he left a more personal mark on his work: from his perspective, an authoritative *opinio* was no longer a reassuring *solutio* but rather a topic of debate; indeed, he concluded by saying *mihi autem videtur*. His point of view was influenced by his role in two advisory councils (*collegi*) to the *signoria*, which provided

⁷³ A lawyer could not testify in a trial in which he defended one party, *propter praesuntam affectionem*. It was debated whether he could testify *finita advocazione*: Giovanni d'Andrea resolved the question by stating that he would not be admitted if he had achieved *aliquod commodum vel honorem* or avoided *aliquod dedecus et vituperium*, while he could testify when *nullatenus agitur de eius commodo, honore aut dedecore*: read G.P. Massetto, *La testimonianza del difensore nella dottrina e nella giurisprudenza civilprocessualistiche del Regno d'Italia in Officium advocati* (L. Mayali, A. Padoa Schioppa, D. Simon ed.) Frankfurt am Main 2000, pp. 155-227, pp. 155-156.

⁷⁴ A. Maletta, *de testibus*, nn. 44-46, f. 367. On the *reproche* «*propter reverentiam*», to which Angelo degli Ubaldi adds the one directed towards a sibling: Schnapper, *Testes inhabiles* (nt. 6), p. 155.

guidance on matters of judgement and city affairs: he was working towards concise solutions⁷⁵.

The interpretive rigor of Tindaro cannot be found in these authors, just as there was not his unparalleled veneration for the *opinio Bartoli*, which was on par with the Justinian code as far as he was concerned. In Alfani's writing, the dialogue that took place between the spirits of Bartolus, Baldus and Ludovico Pontano became tangible to a certain extent. Not only was the past a treasure that had to be preserved, it was also an extraordinary work that had to be restored to its authenticity and in its entirety. Bartolus's great-grandson engaged in an active dialogue with his ancestor and thereby explained to those who had learned from Bartolus (Baldus) the errors they had committed; he then enriched the discussion by including the best contributions of Bartolus's *moderni* disciples (Ludovico Romano). In this way, Tindaro was able to construct a complete theory of conflicting testimony. Bartolus was an *auctoritas* in the more classic sense, a rich source of information to be drawn upon: it was this humanist spirit that made Tindaro so modern⁷⁶. Nonetheless, both Nello and Alberico made contributions to this push towards modernity as well: the former did so by answering the questions of those who spent every day drawing up and filing court documents, finding witnesses, producing evidence, and bringing exceptions to light; the latter condensed the mass of *opinionones* into rational solutions, and was thus able to systematically arrange the topics to be covered, choose the specific issues that he wanted to deal with, and attribute varying degrees of importance to each based on his personal opinion. Like Tindaro, they too saw the past as a treasure trove of solutions, capable of providing answers to that age-old question of *æquum et bonum*.

⁷⁵ See Vaglianti, *Fidelissimi servitori* (nt. 53), p. 683 and Ead., entry *Maletta, Alberico* (nt. 45).

⁷⁶ See Bassani, *Il Tractatus de testibus* (nt. 4), pp. 138-144 e 184-186.