# *AD PRAESUMPTIONEM* OR *AD PLENAM FIDEM*? THE PROBATIVE VALUE OF THE ACCOMPLICE'S TESTIMONY IN MEDIEVAL CANON LAW

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***Abstract*:** In Romano-canonical procedure, confessed criminals could not be examined on their accomplices, except for enormous crimes. In these cases, however, twelfth- and thirteenth-century canonists disagreed about the probative value of these statements. According to some jurists they could be deemed as a full proof, while others held that they only counted as a presumption. Nevertheless, from the thirteenth century the doctrine reached a consensus that the statements of the defendants had to be further corroborated in order to have effect. These principles were also confirmed in the inquisitorial procedure against heresy. This essay, providing a survey of the manuscripts, reconstructs the stages of the debate on this topic, distinguishing among the contribution of the Anglo-Norman, Parisian and Bolognese schools.

***Key words*:** Romano-canonical procedure; accomplice witness; testimony; presumption; law of proof; medieval canon law

***Summary:*** 1. Introduction. – 2. From *Gratian's Decretum* to the *Liber Extra*. – 3. *Ad praesumptionem*: the *exploit* of Honorius' *Summa*. – 4. The theory of presumption between Bologna and Paris. – 5. *Cum aliis probationibus*: at the origins of the rule of corroboration. – 6. Further steps from Bernardus Compostellanus to Willielmus Vascus. – 7. The horizons of the thirteenth-century decretalists. – 8. The probative value of the accomplice's testimony in the inquisitorial procedure against heresy. – 9. Conclusion.

1. *Introduction.*

The historiography on the rules of evidence developed by medieval jurists[1] has also examined the discipline of testimony[2]. In this regard, it is known that both in Roman and canon law there existed a considerable area of unfitness to testify, which included various subjects for several reasons. Among those considered unfit to testify, a certainly not marginal role – above all in criminal trials – was that of the *socius criminis*. This is the focus of this study, the aim of which is to integrate my previous researches on this topic[3].

First of all it should be made clear that the term *socius criminis* in the legal terminology of *ius commune* has various meanings. In this context it can be rendered as 'accomplice', regardless of further distinctions[4].

This leads to the objectives of the present investigation, the first of which is to ascertain whether accomplices, in canonical procedure, could be allowed to testify against other accomplices and, if so, to determine what probative value could be attributed to such statements: a problem which, as we will see, resulted in conflicting interpretations by medieval canon law scholars.

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[1] A. Padoa Schioppa, *Sur la conscience du juge dans le jus commune européen*, in *La conscience du juge dans la tradition juridique européenne*, J.-M. Carbasse - L. Depambour-Tarride (eds.), Paris 1999, pp. 95-129, It. transl. *Sulla coscienza del giudice nel diritto comune*, in Iuris vincula. *Studi in onore di Mario Talamanca*, VI, Napoli 2001, pp. 119-162, also in Id., *Italia ed Europa nella storia del diritto*, Bologna 2003, pp. 251-292, pp. 280-281.

[2] The most detailed study is Y. Mausen, *Veritatis adiutor. La procédure du témoignage dans le droit savant et la pratique française (XIIe-XIVe siècles)*, Milano 2006 (with extensive bibliography). See also A. Bassani, *Udire e provare. Il testimone* de auditu alieno *nel processo di diritto comune*, Milano 2017.

[3] G. Chiodi, *Tortura 'in caput alterius', confessione 'contra alios' e testimonianza del correo nel processo criminale medievale. Nascita e primi sviluppi dei criteri del diritto comune (secoli XII-XIV)*, in *Interpretare il Digesto. Storia e metodi*, D. Mantovani - A. Padoa Schioppa (eds.), Pavia 2014, pp. 673-728, with the first results of the canon law scholars' investigation at pp. 702-706.

[4] With regard to the criminal liability of the accomplices in canon law see N. Kermabon, *La contribution du droit canonique de l'époque classique (XIIe-XIVe siècle) à la conception contemporaine de la complicité*, in *Der Einfluss der Kanonistik auf die Europäische Rechtskultur*, Bd. 3: *Straf- und Strafprozessrecht*, M. Schmoeckel - O. Condorelli - F. Roumy (eds.), Köln-Weimar-Wien 2012, pp. 169-199.

Moreover, in the sources of *ius commune* and in judicial practice, the testimony of the accomplice could be made in two distinct forms.

On the one hand, the testimony could consist of statements made by persons not co-accused under trial, and who were called upon to testify as witnesses against a defendant (accused or under *inquisitio*, once this *modus agendi* had been introduced). However, in these cases the defendant could counter this testimony by raising the exception of the witnesses' complicity in the same crime attributed to them, which rendered such witnesses unfit to testify. On the other hand, the testimony of the accomplice could involve revelations made by the defendant himself as regards accomplices in the same crime. Both Roman and canon law sources took into consideration the case of the confessed criminal and reflected on whether he could be interrogated also about his accomplices. It was above all in this second case that the testimony of the accomplice assumed a central role in the criminal law procedure, and on this basis the accused was considered the source of evidence not only towards himself, but also with regard to his accomplices[5]. But with what value, and under what circumstances did this take place, and by which stages?

The accomplice was a category of witness that was well known to legal scholars, who had crafted an elaborate law of proof that became an integrating part of the accusatorial *ordo*, and subsequently part of the inquisitorial procedure: it is a symbol of the creativity of the medieval science of *ius commune*, and is widespread throughout Europe. The starting-point seems to have been identical. Reasoning on the texts, civilists and canonists started from a negative rule both for the admissibility of the testimony of a person who then was revealed to be an accomplice of the accused, and for the fitness of the confessed criminal to testify about accomplices. This study intends to point out the importance of the debate that took place in the *ius canonicum* schools between the end of the twelfth and the beginning of the thirteenth century, with regard to the probative value of the accusatory statements of the defendants

[5] More recently: G. Chiodi, *Nel labirinto delle prove legali: la testimonianza del complice nel processo penale d'età moderna*, in «Rivista Internazionale di Diritto Comune», 24 (2013), pp. 113-179.

against their accomplices. In fact, in this period originated both doctrines aimed at introducing limits to the judge's conviction, as well as to the opposite view, prepared in such a way that it would give the judge more discretionary power in assessin the declarations/statements. A contrast between bond and freedom was also a constant dychotomy in the approach to this problem in Modern Era criminal procedure. The examination of the confessed criminal along with accomplices, especially if carried out by means of torture, continued to have importance, becoming one of the typical ways of imparting justice in the *ancien régime*.

2. *From Gratian's* Decretum to the Liber Extra.

In Gratian's *Decretum*[6], the main passage which will be taken into account was certainly the c. *Nemini*, which dated back to Pope Julius I (337-352). The text was inserted among the *auctoritates* which were used to solve in the negative sense the *quaestio* III of the *causa* XV, regarding the probative value of the statement of a woman who had accused a cleric of sexual misconduct. It established that it was not opportune to believe the words of the confessed criminal, as «omnis rei professio periculosa est»[7], and this should not be admitted, with the exception of lese majesty[8]. Gratian had already drawn the conclusion that a woman, in this specific case, was not allowed to accuse the priest: firstly, because she was a woman, and secondly, because she was a confessed criminal. Nor could she be believed, even for the purposes of condemning the accused.

Also important was the c. *Si quis papa*, which reported a decision by the

[6] This paper does not take into consideration the events of pre-Gratian canon law, which would require a separate study.

[7] C.15 q.3 c.5: «Nemini (preterquam de crimine maiestatis) de se confesso super alienum crimen credi oportet, quoniam eius atque omnis rei professio periculosa est, et admitti aduersus quemlibet non debet» (*Corpus iuris canonici*, I, E. Friedberg [ed.], Leipzig 1879, reprint Graz 1959, c. 752). This principle was also used to deny the accused the possibility of accusing others (C.3 q.11 c.1, *Neganda*, and c.3, *Non est credendum*). See E. Jacobi, *Der Prozeß im Decretum Gratiani und bei den ältesten Dekretisten*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte», Kan. Abt., 88 (1913), pp. 223-343, pp. 288-289. Also due to the unfitness of the *criminosus*: C.6 q.1 c.6, *Qui crimen*.

[8] To be connected with C.6. q.1 c.22, *Si quis cum militibus* (= C. 9.8.5), which, strictly speaking, was referring to the premiums due to the delators of a *factio*.

Roman synod of 499 presided by Pope Symmachus, on the collaboration provided by the accomplices in the crime opting out of the criminal activity as delators (not as witnesses). Their use was allowed for discovering accomplices, as this was a plot against the serving pope (agreements for the election of a new pope), and they were promised impunity on the condition that the persons indicated were convicted «rationabili probatione»[9].

To complete the series of authorities contrary to any probative value of the statement of the accomplice, the constitution of Honorius and Arcadius on the inadmissibility of the *socii criminis* in the guise of witnesses was reproduced also in Gratian's *Decretum*, in the *summula de testibus*[10].

What integrations did the popes bring to this legal framework in their decretals?

The ban on admitting accomplices as witnesses was authoritatively

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[9] See T. Sardella, *Società Chiesa e Stato nell'età di Teoderico. Papa Simmaco e lo scisma laurenziano*, Soveria Mannelli 1996, pp. 70-77, p. 72; Ead., *Simmaco, santo*, in *Enciclopedia dei Papi*, I, Rome 2000, pp. 464-473, p. 467.

[10] C.4 q.2-3 c.2 §40, c. *Si testes* (C. 4.20.11 pr.). The *summula*, as is known, is a mosaic of 37 fragments from the Digest and from the *Codex.* With regard to the texts of Roman law in the *Decretum* see J. Gaudemet, *Das römische Recht in Gratians Dekret*, in «Österreichische Archiv für Kirchenrecht», 12 (1961), pp. 177-191, also in Id., *La formation du droit canonique*, London 1980, n. IX; J. Rambaud-Buhot, *Le legs de l'ancien droit: Gratien*, in G. Le Bras - Ch. Lefebvre - J. Rambaud, *L'âge classique 1140-1378. Sources et théorie du droit (Histoire du droit et des institutions de l'Èglise en Occident*, *7)*, Paris 1965, pp. 119-129; W. Litewski, *Les textes procéduraux du droit de Justinien dans le Décret de Gratien*, in «Studia Gratiana», 9 (1966), pp. 65-109, pp. 81-85; B. Basdevant-Gaudemet, *Les sources de droit romain en matière de procédure dans le Décret de Gratien*, in «Revue de droit canonique», 27 (1977), pp. 193-242; J.M. Viejo-Ximénez, *El Derecho Romano "nuevo" en el Decreto de Graziano*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte», Kan. Abt., 88 (2002), pp. 1-19, under the title *Las etapas de incorporación de los textos romanos al Decreto de Graciano*, in *Proceedings of the Eleventh International Congress of Medieval Canon Law*, Catania, 30 July-6 August 2000, M. Bellomo and O. Condorelli (eds.), Città del Vaticano 2006, pp. 139-152; Id., *La ricezione del diritto romano nel diritto canonico*, in *La cultura giuridico-canonica medioevale. Premesse per un dialogo ecumenico*, E. de Léon - N. Álvarez de las Asturias (eds.), Milano 2003, pp. 157-209, particularly pp. 177-179; C. Larrainzar, *La ricerca attuale sul "Decretum Gratiani"*, ivi, pp. 45-88. Da ultimo: G. Murano, *Graziano e il Decretum nel secolo XII*, in «Rivista Internazionale di Diritto Comune», 26 (2015), pp. 61-139, pp. 91-95.

reiterated in Alexander III's decretal *Veniens* addressed to the archbishop of Canterbury. With reference to a trial against a presbyter accused of simony, in conformity with the *ordo rationis* the pope had approved the prelate's decision to reject the testimony of a parishioner who had declared he had personally received from the accused the promise of some barrels of wine in exchange for the appointment to canon, on the basis of the principle «nulli de se confesso adversus alium in eodem crimine sit credendum»[11]. This decretal sparked off some debate among canonists once it was included in the 1 Comp.

The accused's bad reputation and the accomplice's testimony could lead to the requirement for the former to swear an oath of innocence. This was provided in the decretal *Significasti* by Alexander III, on the subject of adultery. Following the accusatory statement of the woman accomplice of the crime, and in line with the *ius vetus*[12], the pope ordered the *purgatio canonica* to be imposed on the slandered presbyter[13].

Nor did Clement III's (1187-1191) decretal *Cum monasterium* regarding a trial for murder, then inserted in the 2 Comp., stray from the path of the *ordo* as it had been established until that moment. Certainly a fundamental link in the canonists' construction of a negative rule, parallel to that of the civilists, regarded the testifying capacity of the accomplice. The Roman pontiff had decided that «secundum utriusque iuris statuta de se confessi super aliorum conscientiis interrogari non debent[14], et, crimine laesae maiestatis excepto, de reatu proprio confitentis periculosa confessio non est adversus quemlibet admittenda». For this reason, persons who had

[11] Alexander III, *Veniens ad nos* (Ja. 8869; JL 13801), 1 Comp.2.13.9 = X. 2.20.10, *de testibus*.

[12] C.2 q.5 c.24, *Interrogatum est*.

[13] Alexander III, *Significasti* (Ja. 8190), 1 Comp.5.13.6 = X. 5.16.5, *de adulteriis et stupris*.

[14] These are the words in the main *sedes materiae* of the *ius civile*, the constitution of Honorius and Teodosius of the 409 in C. 9.2.17.1, *de accusationibus et inscriptionibus*, l. *Accusationis § Nemo*: «… cum veteris iuris auctoritas de se confessos ne interrogari quidem de aliorum conscientia sinat. Nemo igitur de proprio crimine confitentem super conscientia scrutetur aliena». For other sources on this topic in the *Corpus iuris civilis* see the article cited in note 3.

confessed to the crime of which they were accused could not be interrogated about their accomplices, and their testimony, being dangerous and therefore unreliable, could not be admitted against anyone, with the exception of the crime of lese majesty. This meant that the pope had to require the truth to emerge by «aliis modis et iustis rationibus»[15] in order to pronounce the sentence of condemnation against the accomplices accused by a priest who had confessed to a murder. At the end of the twelfth century, there was therefore full awareness of the fact that the rule constituted a fundamental principle of the *utrumque ius*.

In the context of the canon law of the end of the twelfth century, only the decretal *Quoniam* might have appeared to buck the trend. This was an epistle of May 593 by Gregory the Great addressed to the Sardinian *defensor* Sabinus[16], then inserted in the 1 Comp., regarding not-better-specified crimes committed by a presbyter, Epiphanius. In the letter the pope exhorted the judge to conduct a diligent investigation, citing both the women who participated in the crime and other persons informed of the facts, so that through their testimony it would be possible to reach the truth[17]. This decision appeared to clash also with the rule of the incapacity

[15] Clement III, *Cum monasterium* (JL 16618), 2 Comp.5.6.2, *de omicidio volontario vel casuali* = X. 2.18.1, *de confessis*. The decretal groups together the provisions of Honorius-Teodosius and Julius I.

[16] *Quoniam* (Ja. 876; JE 1241: may 593), 1 Comp.2.13.4 = X. 2.20.3, *de testibus*. See Gregorii I Papae, *Registrum epistularum*, I, Libri I-VII, P. Ewald et L.M. Hartmann (eds.), Berolini 1957 (MGH, *Epistularum* I), III, 36, pp. 193-194; S. Gregorii Magni *Registrum Epistularum libri I-VII*, D. Norberg (ed.), Turnhout 1982 (CCL 140), III, 36, pp. 181-182; Id., *Lettere*, V. Recchia (ed.), Roma 1996-1999, p. 437.

[17] Regarding Gregory the Great and his way of doing justice: G. Arnaldi, *Gregorio Magno e la giustizia*, in *La giustizia nell'alto medioevo (secoli V-VIII)*, I, Spoleto 1995, pp. 57-102. Observance of the *ordo*: L. Loschiavo, *Il ruolo dei testimoni e la formazione dell'*ordo iudiciarius *canonico tra VII e IX secolo*, in *Solvere et ligare. Prospettive di soluzione giudiziale e stragiudiziale dei conflitti*, I, F. Zanchini (ed.), Milano 2005, pp. 118-121; A. Padoa Schioppa, *Grégoire le Grand dans son rôle de juge*, in *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, B. d'Alteroche - F. Demoulin-Auzary - O. Descamps - F. Roumy (eds.), Paris 2009, pp. 801-812; Id., *Il rispetto della legalità nelle Lettere di Gregorio Magno*, in *Der Einfluss der Kanonistik auf die Europäische Rechtskultur*, Bd. 1: *Zivil- und Zivilprozessrecht*, O. Condorelli - F. Roumy - M. Schmoeckel (eds.), Köln-Weimar-Wien 2009, pp. 25-31; Id., *Gregorio Magno giudice*, in «Studi medievali», 51 (2010), pp. 581-

of women to testify.

Like the Roman procedure, the canonical procedure thus appeared to be decidedly orientated towards the path of rigour: the *ordo iuris*, in other words the *ordo rationis*, imposed not believing the accused who had confessed to committing the crime, even though he had not yet been condemned. His statement of his guilt threw a heavy shadow of discredit on his reputation and on his personal credibility, which rendered him inadmissible as a witness.

Nevertheless, in specific cases canon law also authorised the judge to interrogate the accused to obtain indications about accomplices, derogating from the higher probatory standards imposed by the *ordo iuris*. Crimes considered *excepti*, which permitted resort to testimony by accomplices, were above all lese majesty and simony. These were exceptions that the doctrine justified, as it regarded them as "enormous" or "serious" crimes[18]. «Propter enormitatem facinoris», «ob facinoris immanitatem»: Simon of Bisignanus, in Bologna[19], and Rodoicus Modicipassus[20], of the Anglo-Norman school[21], were among the first

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610, especially pp. 589-591. More recently: A. Fiori, *Il giuramento di innocenza nel processo canonico medievale. Storia e disciplina della «purgatio canonica»*, Frankfurt am Main 2013, pp. 54-56.

[18] According to the analytical reconstruction of J. Théry, *Atrocitas/enormitas*. *Pour une histoire de la catégorie d'«énormité» ou «crime énorme» du Moyen Âge à l'époque moderne*, in «Clio@Thémis», 4 (2011), pp. 1-45.

[19] Simon Bisinianensis, *Summa* ad C.15 q.3 c.5, *Nemini* (*Summa in Decretum Simonis Bisinianensis*, P.V. Aimone Braida ed., Vatican City 2014, p. 285): «In hoc enim crimine propter enormitatem facinoris hec et alia sunt concessa specialia. Admittitur enim socius inite factionis... Idem uidetur in crimine simonie esse dicendum…». Among the first decretists, Simon is the one who uses the term *enormitas* the most in commenting the *Decretum*: Théry, *Atrocitas*, cit. (note 18), p. 23; Id., *L'émergence de la catégorie d'enormitas dans les commentaires au Décret de Gratien (v. 1150-v.1190)*, XV International Congress of Medieval Canon Law, Paris 17-22 July 2016 (to be published in the *Proceedings*). See also D. von Mayenburg, *Die* enormitas *als Argument im mittelalterlichen Kirchenrecht*, in *Der Einfluss*, 3, cit. (note 4), pp. 259-292, pp. 274-275. The author of the App. 'Ordinaturus Magister' also uses it in the same place, as noted by G. Minnucci, *Processo e condizione femminile nella canonistica classica*, in *Studi di storia del diritto medioevale e moderno*, F. Liotta (ed.), Milano 1999, pp. 129-183, p. 144.

[20] *Summa 'Omnis qui iuste iudicat'*, ad D.79 c.2, v. *pertulerit* (*Summa 'Omnis qui iuste*

decretists to put forward this explanation in the margins of the texts that admitted the testimony of the *socius criminis*.

Furthermore, canon law soon recognised among the *excepti* cases also those provided for by Roman law. A precise early list of these infractions, drawn up on the basis of the *Corpus iuris civilis*, is contained in the *ordo Tractaturi de iudiciis* (1165 ca.), and it has been ascribed to the English master Walter de Coutances[22]. There are five crimes in which the *particeps criminis* is allowed both to accuse and to testify against his accomplice: magic, counterfeiting, murder of his master by a servant, robbery, desertion[23].

The *excepti cases* were analysed also in the great apparatus of the

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*iudicat' sive Lipsiensis*, Tom. I, R. Weigand - P. Landau - W. Kozur eds., adlaborantibus S. Haering - K. Miethaner-Vent - M. Petzolt, Città del Vaticano 2007, p. 337): «Speciale uero est quod hic dicitur, quia socius et participes criminis admittitur ob facinoris immanitatem. Idem obtinet in crimine lese maiestatis». See R. Weigand, *The Transmontane Decretists*, in *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, W. Hartmann and K. Pennington (eds.), Washington D.C. 2008, pp. 174-210, pp. 195-196.

[21] As demonstrated by P. Landau, *Rodoicus Modicipassus – Verfasser der Summa Lipsiensis?*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte», Kan. Abt., 92 (2006), pp. 340-354; Id., *The Origins of Legal Science in England in the Twelfth Century: Lincoln, Oxford and the Career of Vacarius*, *Readers*, in *Texts and Compilers in the Earlier Middle Ages*. *Studies in Honour of Linda Fowler-Magerl*, K.G. Cushing - M. Brett (eds.), Ashgate 2009, pp. 165-182.

[22] The identity of this character, the English archbishop of Rouen, was also discovered by P. Landau, *Walter von Coutances und die Anfänge der anglo-normannischen Rechtswissenschaft*, in*"Panta rei". Studi dedicati a Manlio Bellomo*, III, O. Condorelli (ed.), Roma 2004, pp. 183-204; Id., *Die Anfänge der Prozessrechtswissenschaft in der Kanonistik des 12. Jahrunderts*, in *Der Einfluss*, 1, cit. (note 17), pp. 7-23, p. 14. On this work, its datation and the initial allocation to a *magister* Walter: A. Gouron, *Une école de canonistes anglais à Paris: Maître Walter et ses disciples (vers 1170)*, in «Journal des Savants» (January-June 2000), pp. 47-72, also in Id., *Pionniers du droit occidental au Moyen Âge*, Aldershot-Burlington 2006, n. VI.

[23] *Ordo 'Tractaturi de iudiciis'* A, XIII. *De numero testium*, § 6 (*Incerti auctoris ordo judiciarius, pars summae legum et tractatus de praescriptione. Nach einer Göttweiger (Stiftsbibliothek. Saec. XII.ex.) und einer Wiener (Hofbibliothek. Saec. XIII.ex.) Handschrift*, C. Gross (ed.), Innsbruck 1870, pp. 121-123). For other ideas see Chiodi, *Tortura 'in caput alterius'*, cit. (note 3), pp. 685-687.

thirteenth century, which will be further examined below. The subject was certainly of the highest importance, as it broadened the opportunities to discover the truth, breaking the close constraints of the area of unfitness to testify established by the *utrumque ius*. The identification of the excepted crimes, however, raised questions that for canonists were independent from those faced by civilists: for instance, the interpretative issues surrounding the crime of simony. This aspect will not be further examined here, but what is important is the issue of the effects of the accomplice's testimony in the *excepti* cases: this question certainly occupied canonist of the twelfth and thirteenth centuries more than civilists, and it gave rise to a broader range of interpretations of the sources.

These cases presented a dilemma the solution of which was not immediate: how could the accused's statement be assessed; what probative effect could be attributed to it? Could the accomplice, in other words the accused himself in the cases where he was allowed to testify, be considered without doubt to be on a par with a suitable witness, so as to provide – together with another able witness – full proof? Or should his statement, which could be obtained, be evaluated differently? Moreover, for the purposes of the probatory result, was it sufficient to have only the accused's statement, or was further corroboration required? What was the role of the *arbitrium iudicis* in this operation? Was the judge free to assess the reliability of the statement and classify its probative value on the basis of the elements available, or was he bound to a specific probatory outcome?

As explained in the following pages, the doctrine was to draft the probatory directives according to divergent trends.

## 3. Ad praesumptionem*: the* exploit *of Honorius' Summa.*

For a long time the masters in decretists' schools taught that in general a confessed criminal was not allowed to accuse or testify against his accomplices. Following on from Gratian, this development can be seen from the first *summae* interpreting the c. *Nemini* which declared that a woman, as written in C.15 q.3, was not allowed to accuse a priest of sexual misconduct, or to testify against him for two reasons, one of which was her

condition of confessed criminal[24].

In cases where the confessed criminal was allowed to testify, in other words in the excepted crimes, the accomplice's testimony was not considered a problem, nor was it considered necessary to introduce any further requirements for that testimony to have effect. In other words, in cases which admitted the testimony of accomplices, they appear to have been considered witnesses like the others, and the jurists' interest was entirely devoted to the identification of the excepted crimes.

Although more complete research of hitherto unpublished material might make it possible to trace other opinions, the first important starting point aimed at limiting the efficacy of the testimony of the accomplice (in cases where this was admitted) came from the *Summa De iure canonico tractaturus*, composed by Honorius of Kent, master of the Anglo-Norman school, in the last decade of the twelfth century[25]. Analysing the c. *Si quis papa*, he raised some serious doubts. On the hypothesis of a plot against the pope, Honorius noted that by admitting the testimony of the accomplice the text seemed to stand in contrast to what had been written in other parts of Gratian's *Decretum* with regard to both accomplices' and perpetrators' unfitness to testify. Indeed the confessed criminals – an important detail which had not been highlighted in the previous *summae* – were to be considered also *criminosi* (criminals), another kind of witnesses not admitted by the *ordo iudiciarius*[26]. But there was also a contradiction with what was stated in the same canon, which required rational proof in

[24] This was clearly stated by Stefanus Tornacensis, *Summa* ad C.15 q.3 (ed. G. Minnucci, *La capacità processuale della donna nel pensiero canonistico classico.* I. *Da Graziano a Uguccione da Pisa*, Milano 1989, p. 80 from the ms. *Biblioteca Apostolica Vaticana*, Borgh. 287, ff. 69rb-69va and from the ed. J.F. von Schulte, Giessen 1891): «Unde cum hec mulier de se confiteatur, quod cum eo adulterata sit, profecto aduersus eum uocem accusationis uel testificationis facere non potest». Regarding witnesses in Gratian's *Decretum* a still valid starting point is the article by E. Jacobi, *Der Prozeß*, cit. (note 7), pp. 300-310.

[25] Weigand, *The Transmontane Decretists*, cit. (note 20), pp. 198-199.

[26] Honorius, *Summa 'De iure canonico tractaturus'*, ad C.6 q.1 p.c.21, v. *dum socius* (Magistri Honorii *Summa 'De iure canonico tractaturus'*, Tom. I, R. Weigand - P. Landau - W. Kozur (eds.), adlaborantibus S. Haering - K. Miethaner-Vent - M. Petzolt, Città del Vaticano 2004, p. 119): «et ita criminosus».

order to condemn: it was not possible to consider the statement of an accomplice sufficient for this purpose[27]. There was, however, a solution. In reality, the person admitted to testify against the accomplices was not the material perpetrator of the crime, the principal delinquent, but the person who had simply allowed the crime to be carried out. In this way the jurists introduced a considerable limitation, reducing the scope of the derogation and revealing disfavour for this kind of testimony.

Another of Honorius' doctrines worth remembering is to be found in the margin of a passage concerning accomplices. This is the c. *Illi qui* (C.5. q.5 c.4), according to which heretics, enemies and those who declared *sponte* (an adverb that is interpreted in various ways by the doctrine) others' crimes were not allowed to present accusations against bishops.

What is interesting here is Honorius' reasoning. On the basis of the presumption that between accusation and testimony there should be full equivalence of regime, Honorius raised an objection as to the probative value of the testimony of the third category of persons indicated in the canon.The conclusion was that those persons, if tortured (as was prescribed by the text), could be considered credible as witnesses. But Honorius responded that the latter's statement could not be attributed the effect of a testimony, but only that of a presumption, which was however sufficient to force the confessed criminal to swear an oath of innocence, in exactly the same way as a presumption arose from the servant's statement against his master[28].

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[27] Honorius, *Summa 'De iure canonico tractaturus'*, ad D.79 c.2, *Si quis papa*, v. *particeps* (ed. cit. note 26, p. 225): «Nos autem hoc et illud de partecipe intelligimus: qui eo tempore interfuit coniurationibus, nec tamen coniurationem fecit, vel pecuniam dedit vel accepit, set tantum consensit; quo consenso culpa si qua contracta fuit facile purgari poterat per dissensum. Hic ergo admittitur; principalis non admitteretur; alioquin qualiter rationabilis probatio diceretur que per criminosum fieret?». Note that Honorius, like Walter de Coutances before him, referred this text to accomplices, whereas it properly dealt with delators.

[28] Honorius, *Summa 'De iure canonico tractaturus'*, ad C.5 q.5 c.4, *Illi qui*, v. *diversis cruciatibus* (ed. cit. note 26, p. 112): «Set obicitur: Hii repelluntur ab accusatione, qualiter ergo eorum confessioni creditur cum qui repellitur ab accusatione et a testimonio, cum contra sit iiii. Q.iii. c.i. (C.4 q.2-3 c.1)? Resp.: Eorum confessio pro testimonio non accipitur set pro responso, ut iiii. Q.iii. § Item in criminali, ibi: Serui responso (C.4 q.2-3 p.c.2 c.3 §9).

The concept of presumption, the doctrine of which was developed in the same period by the canon and civil schools of law[29], was useful to Honorius of Kent to attract and integrate within their limits the effect of the statements by persons whose credibility was suspect, affirming an innovative result that went beyond the text. The effect of such testimonies was precisely that and only that of a presumption. With this hugely interesting statement, not contained in the texts, Honorius took up again an interpretation of the *Summa Lipsiensis*, and therefore of Rodoicus Modicipassus, and he taught expressly that a similar statement should not be believed in the same way as that of a witness, but only for the purposes of a presumption. It is interesting to highlight here that the two masters of the Anglo-Norman school qualified the servant's statement as a presumption and not as an ordinary testimony[30]. This is because it will

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Nec tali responso creditur ad condempnationem set ad presumptionem, que posset reum cogere ad purgationem».

[29] With regard to the elaboration of the theory of presumptions in canon law schools, the most important works are R. Motzenbäcker, *Die Rechtsvermutung im kanonischen Recht*, München 1958; A. Gouron, *Aux racines de la théorie des présomptions*, in «Rivista Internazionale di Diritto Comune», 1 (1990), pp. 99-109, also in Id, *Droit et coutume en France au XII^e^ et XII^e^ siècles*, Aldershot 1993, n. VII; Id., *Théorie des presomptions et pouvoir législatif chez les glossateurs*, in *Droits savants et pratiques françaises du pouvoir (XI-XV^e^ siècles)*, J. Krynen - A. Rigaudière (eds.), Bordeaux 1992, pp. 117-127, also in Id., *Juristes et droits savants: Bologne et la France médiévale*, Aldershot 2000, n. III; Id., *Placentinus 'Herold' der Vermutungslehre?*, in *Festschrift zum 65. Geburtstag und zur Emeritierung von Professor Dr. Hans Kiefner*, hrsg. von Freunden, Kollegen und Mitarbeitern, Münster 1995, pp. 90-103, therein, n. VIII. On this topic, with more in-depth information, see A. Fiori, Praesumptio violenta *o* iuris et de iure*? Qualche annotazione sul contributo canonistico alla teoria delle presunzioni*, in *Der Einfluss*, 1, cit. (note 17), pp. 75-106, and now Ead., *Il giuramento di innocenza*, cit. (note 17), pp. 428-446. The use of the notion of presumption to express the probative value of a testimonial statement was pointed out, with regard to the sole witness, by A. Gouron, Testis unus, testis nullus *dans la doctrine juridique du XII^e^ siècle*, in «Medievalia lovaniensia», Series I, Studia 24 (1995), Medieval Antiquity, pp. 83-93, also in Id., *Juristes et droits savants: Bologne et la France médiévale*, Aldershot-Brookfield USA-Singapore-Sydney 2000, n. IX.

[30] *Summa 'Omnis qui iuste iudicat'*, ad C.4 q.2 et 3 c.3 § 9 *Servi responso credendum* (ed. cit. note 20, Tom. II, Città del Vaticano 2012, p. 225): «ad presumptionem»; ad C.5 q.5 c.4, *Illi qui in fide* (p. 241): «Tales admittuntur non tamen pro testibus, set ut ab ipsis quoquo modo rei veritas excutiatur, sicut vox serui pro testimonio non recipitur, eius

subsequently be seen that others would use similar reasoning at a later date with regard to the statement of a *socius criminis*.

Honorius's contribution did not end here: he also suggested the correct way to raise an objection against the accomplice witness. This was the early doctrinal solution to a problem that was developed later on. The accused had to be careful not to admit his guilt incautiously. For this reason Honorius advised him to adopt the correct formula: «Brother, you have committed the crime that you claim that I have committed, and even if this were true, which it is not, that I have committed it, I would reject you as an accomplice»[31].

4. *The theory of presumption between Bologna and Paris*.

For Honorius, then, the effect to attribute to a servant's statement against his master is that of presumption, and statements made by other categories of witnesses should likewise be treated as presumptions.

It appears that the first to hold such an opinion about the *socius criminis*, in the margins of c. *Quoniam* and of c. *Veniens* della 1 Comp., was Richardus Anglicus at the end of the twelfth century, in his apparatus to the 1 Comp. (1197-1198)[32]. However, if what has been established above is

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tamen responsioni creditur, cum ad ueritatem eruendam alia probatio non inuenitur». As far as the civilists are concerned, Azo's opinion derives from a gloss to D. 22.5.23 pr. in his *apparatus* to the *Digestum vetus* published by Mausen, *Veritatis adiutor*, cit. (note 2), p. 489 note 371: «ille non recipitur ut plenam faciat fidem, set ad indicium pro ueritate requirenda».

[31] Honorius, *Summa 'De iure canonico tractaturus'*, ad C.4 q.2-3 c.3 § 40, v. *particeps criminis* (ed. cit. note 26, p. 102): «qui probata participatione remouentur in omni casu secundum canones; contra tamen arg. xv. q. iii. Nemini (C.15 q.3 c.5). Set sub qua forma uerborum proponetur hec exceptio? Resp.: Sic: 'Frater tu commisisti crimen quod dicis me commisisse, ut si etiam esset uerum quod non est, scilicet me commisisse, ratione participii te repellerem'».

[32] Richardus Anglicus, App. 1 Comp.2.13.4, *de testibus*, c. *Quoniam*, ms. Bamberg, *Staatsbibliothek*, Can. 20, f. 13ra, v. *mulieres*: «i. xv. q. iii. Nemini (C.15 c.3 c.5) contra. Solutio: non inducantur ad probationem sed ad presumptionem, ut ff. de exib. l. ult. (D. 10.4.20)». With regard to the identification of this doctrine, and for the edition of this gloss, see the more recent studies of G. Minnucci, *La capacità processuale della donna nel pensiero canonistico classico*. II. *Dalle scuole d'oltralpe a S. Raimondo di Pennaforte*, Milano 1994, p. 90; Id., *Processo*, cit. (note 19), p. 144 (the qualification, however, should

acceptable, he merely applied to the normative hypotheses of those decretals a thesis that had already surfaced in the doctrine of the decretists, at least with reference to the discipline of the testimony of servants.

For interpretation of Gregory the Great's letter, it is possible to document a tradition of thought that from Richardus, through Alanus Anglicus and Tancred, a pupil in Bologna of Azo and Laurentius Hispanus, leads to Bernard of Parma[33].

An almost identical path can be seen for the glosses, with the same contents, of Richardus Anglicus to c. *Veniens*[34], which passed into

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be corrected as these are not «notizie di reati presuntivamente avvenuti»). With regard to the datation, see K. Pennington, *The Decretalists 1190 to 1234*, in *The History of Medieval Canon Law*, cit. (note 20), pp. 211-245, p. 215.

[33] Alanus, App. ad 1 Comp.2.13.4, *de testibus*, c. *Quoniam*, ms. Halle, *Universitätsbibliothek*, Ye 52, f. 22va: «s. xv. q. iii. Nemini (C.15 q.3 c.5) contra. Solutio: non hoc inducitur ad probationem set ad presumptionem».

Tancred, App. ad 1 Comp.2.13.4 (1210-1215), *de testibus*, c. *Quoniam*, ms. Bamberg, *Staatsbibliothek*, Can. 19, f. 19rb, v. *cum quibus*: «ecce audiuntur socii criminis, ut lxxix. di. Si quis papa (D.79 c.2), vi. q. i. Si quis cum (C.6 q.1 c.22). Sed contra i. e. t. Veniens (1 Comp.2.13.9), xv. q. iii. Nemini (C.15 q.3 c.5), C. de testibus Quoniam (C. 4.20.11), iiii. q. iii. § Liberi (C.4 q.2-3 c.3 §40). So.: hic non inducuntur socii criminis ad probacionem, sed ad presumptionem, sicut servi iiii. q. iii. (C.4 q.2-3 c.3 §9)… t.». Ed. also by Minnucci, *La capacità*, II, cit. (note 32), p. 183 (from the mss. Vat. Lat. 2509 e 1377). For the dates of the apparatus by Alanus and Tancred: Pennington, *The Decretalists*, cit. (note 32), pp. 220 and 238.

Bernardus Parmensis, App. ad X. 2.20.3, *de testibus*, c. *Quoniam*, v. *peregisse*: «et sic videtur quod socii criminis admittantur: sic lxxix. dist. Si quis papa (D.79 c.2) et vi. q. i. c. Si quis cum militibus (C.6 q.1 c.22) et contra i. eo. Veniens (X. 2.20.10) et s. de confes. c. i. (X. 2.18.1) et xv. q. iii. Nemini (c.15 q.3 c.5). Hic non recipiuntur socii ad plenam probationem, sed ad praesumptionem tantum, sicut servi quandoque ad praesumptionem recipiuntur, iiii. q. iii. c. Si testes § Item servi (C.4 q.2-3 c.3 §9)».

[34] Richardus Anglicus, App. ad 1 Comp.2.13.9, *de testibus*, c. *Veniens*, ms. Bamberg, *Staatsbibliothek*, Can. 20, f. 13rb: «§ ar. quod de se confesso non creditur super crimine alieno… Solutio: de se confesso non creditur super alieno crimine quo ad convictionem, creditur tamen quo ad presumptionem, ut his legibus continetur exceptis criminibus, ut vi. q. i. § Verum (C.6 q.1 p.c.21)». Richardus had studied canon law in Paris and had come into contact with Honorius's scientific circle.

Tancred's apparatus, to the *Glossa ordinaria* to 1 Comp.[35] (but not into Bernardus Parmensis' ordinary apparatus).

The theory that may be called "of presumption," regarding the probative value of the confessed criminal's statement against his accomplice in crime, originated and became consolidated therefore during the rich hermeneutic activity of the 1 Comp.and this theory was subsequently used by canonists also in the interpretation of passages of the *Decretum* and of the *Liber Extra*, which allowed the accomplices in the crime to testify[36].

An important detail arises here. Richardus, and those who subsequently agreed with his thought, attributed presumptive value to the testimony of the accomplice also in the excepted crimes[37]. His interpretation of some Roman rules on the subject is clear: «non creditur super alieno crimine quo ad convictionem, creditur tamen quo ad presumptionem, ut his legibus continetur exceptis criminibus». This introduced a considerable limitation on the laws that allowed accomplices to testify.

This hermeneutical result is documented also in other schools. The canonists of the Paris school of Petrus Brito were moving along the same lines in the same period in some glosses to the c. *Quoniam* and, above all,

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[35] Tancred, App. ad 1 Comp.2.13.9, *de testibus*, c. *Veniens*, ms. *Biblioteca Apostolica Vaticana*, Vat. lat. 2509, f. 23vb, v. *de se confesso*: «ar. quod de se confesso non creditur super alieno crimine xv. q. iii. Nemini (C.15 q.3 c.5), iii. q. xi. Neganda (C.3 q.11 c.1-2), vi. q. i. Qui crimen (C.6 q.1 c.6), ff. ad exhibendum l. penult. (D. 10.4.20). Ar. contra s. e. t. Quoniam aliqua (1 Comp.2.13.4), C. de feriis Provinciarum [(C. 3.12.8(10)], ff. de questionibus l. i. Cum quis (D. 48.8.26). Solutio: de se confesso non creditur super alieno crimine quo ad convinctionem, creditur tamen quo ad presumptionem, ut in exceptis criminibus, ut vi. q. i. § Verum (C.6 q.1 p.c.21). R». With regard to the elaboration method of Tancred's *apparatus*: Pennington, *The Decretalists*, cit. (note 32), p. 238.

[36] For another important example of the use of the notion of presumption by the canonists see A. Lefebvre-Teillard, *L'influence du droit canonique sur l'apparition d'une présomption de paternité*, in *Der Einfluss*, 1, cit. (note 17), pp. 249-263.

[37] About the relationship between enormous crimes and the judge's *arbitrium*, the important ideas of Théry, *Atrocitas*, cit. (note 18), pp. 25-45 must be taken into consideration. Regarding a significant example of extension of the judge's *arbitrium* in enormous crimes: G. Chiodi, *Crimini enormi e tortura ex processu informativo: una violazione del diritto di difesa dell'imputato?*, in *Glossae*. *European Journal of Legal History*, 13 (2016), pp. 71-107.

to c. *Veniens*. This school was discovered by Rudolf Weigand and has recently been thoroughly and innovatively studied by Anne Lefebvre-Teillard[38], in some glosses to c. *Quoniam*[39] and above all to c. *Veniens*[40].

[38] The papers used for this research are: A. Lefebvre-Teillard, *Fils ou frère? Sur le manuscrit 17 de Lons le Saunier*, in «Bulletin of Medieval Canon Law», 24 (2000), pp. 58-68; Petrus Brito legit… *Sur quelques aspects de l'enseignement du droit canonique à Paris au début du XIIIe siècle*, in «Revue historique de droit français et étranger», 79 (2), April-June 2001, pp. 153-177; Ead., *Magister P. Note sur les maitres parisiens du debut du XIIIe siècle*, in «Bulletin of Medieval Canon Law», 25 (2002-2003), pp. 86-93; Ead., *«D'oltralpe»: observations sur l'apparat* Militant siquidem patroni, in A. Padoa Schioppa - G. di Renzo Villata - G.P. Massetto (eds.), *Amicitiae pignus*. *Studi in ricordo di Adriano Cavanna*, II, Milano 2003, pp. 1311-1335; Ead., *Magister A. Sur l'école de droit canonique parisienne au début du XIIIe siècle*, in *"Panta rei"*, III, cit. (note 22), pp. 239-257; Ead., *La Lecture de la Compilatio prima par les maîtres parisiens du début du XIII^e siècle*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte», Kan. Abt., 91 (2005), pp. 106-127; Ead., *Magister B. Étude sur les maîtres parisiens du début du XIIIe siècle*, in «Tijdschrift voor Rechtsgeschiedenis», 73 (2005), pp. 1-18; Ead., *Un curieux témoin de l'école de Petrus Brito: Le manuscrit Paris, Bibliothèque National latin 9632*, in «Bulletin of Medieval Canon Law», 26 (2004-2006), pp. 125-152; Ead., *L'école parisienne et la formation «politique» des clercs au début du XIIe siècle*, in *Science politique et droit public dans les facultés de droit européennes (XIIIe-XVIIIe siècle)*. Sous la direction de Jacques Krynen et Michael Stolleis, Frankfurt am Main 2008, pp. 23-40; Ead., *La voix de son maître. Étude sur le manuscrit Lilienfeld Stiftsbibliothek 220*, in «Revue historique de droit français et étranger», 86 (3) July-September 2008, pp. 305-330; Ead., *Petrus Brito, auteur de l'apparat* Ecce vicit leo*?*, in «Tijdschrift voor Rechtsgeschiedenis», 77 (2009), pp. 1-21.

[39] App. *Militant si quidem patroni* ad 1 Comp.2.13.4, ed. Minnucci, *La capacità*, II, cit. (note 32), pp. 113-114 from the ms. Troyes, *Bibliothèque Municipale*, 385 (1st layer, f. 28ra, vv. *Quum quibus peregisse*. For the datation (1205/06-1210) see Lefebvre-Teillard, *«D'oltralpe»*, cit. (note 38), p. 1326.

[40] App. *In quibusdam libris* ad 1 Comp.2.13.9, *de testibus*, c. *Veniens ad nos*, ms. Paris, *Bibliothèque Nationale*, 15398, f. 225vb (ed. Lefebvre-Teillard, *«D'oltralpe»*, cit. [note 38], p. 1323; cit. Mausen, *Veritatis adiutor*, cit. [note 2], p. 533 note 556): «… huius tamen confessio valet ad praesumptionem quia nunquam ad convictionem et ita intelligitur lex predicta et eam intelligit p.b. quando antequam confessus esset de crimine lata fuerit litiscontestatio, quia post confessionem nullatenus creditur nisi quoad presumptionem et hoc etiam si accusatus funeste esset opinionis quia si bone nec etiam contra eum presumatur ut II q. I in primis [c.7] circa fine».

The interpretation of the l. *Provinciarum* claimed by Petrus Brito in this important work, on which Anne Lefebvre-Teillard drew attention, is also mentioned in other *apparatus* coming from the same *milieu*.

Like Richardus Anglicus, the Parisian canonists knew well the Roman texts on the subject, and they applied the theory of presumption, understood as the presumption of the *purgatio canonica*[41] to one of these in particular [C. 3.12.8(10)], on the subject of robbery – a crime that was excepted in Roman law.

5. Cum aliis probationibus*: at the origins of the rule of corroboration*.

An examination of the glosses by the canonists active in the Paris schools enables us to add another essential element for determining the

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App. *Qui noluit*, ms. Bruxelles, *Bibliothèque royale*, 1407-1409, ad 1 Comp.2.13.9, *de testibus*, c. *Veniens ad nos*, f. 20va, v. *confesso*: «nisi in crimine lese maiestatis xv. q. iii. Nemini (C.15 q.3 c.5): quod videtur non quo ad plenam probationem sed quo ad presumptionem».

App. *Libellus iste*, ad 1 Comp.2.13.9, *de testibus*, c. *Veniens ad nos*, ms. London, *Lambeth Palace* 105, f. 159va.

App. *Bernardus Papianus prepositus* ad 1 Comp.2.13.9, *de testibus*, c. *Veniens ad nos*, ms. Saint-Omer, *Bibliothèque Municipale*, 107, f. 32rb: «§ vi. q.ii. Placuit (C.6 q.2 c.3). Valet tamen ad presumptionem vox unius quia preiudicium fit socio latronis quo ad presumptionem de crimine confitenti. Co. de feriis l. Provinciarum iudices in questionibus latronum moneantur et maxime Isaurorum nullum quadragesime nec venerabilem pascharum diem existiment excipiendum ne differatur sceleratorum proditio consiliorum que per latronum tormenta querenda est, cum facillime in hoc summi numinis speretur venia, per quod multorum salus et incolumitas procuratur contraria lex [C. 3.12.8(10)]. Sed p. b' hanc legem intelligit quando confitetur de furto socii antequam de suo, post confessionem vero proprii criminis nulli facit preiudicium socii confessio et forte talis confessio in criminali causa purgationem inducit, ii. q. v. Si mala (C.2 q.5 c.16)». I found no evidence in mss. Lons-le-Saunier, *Arch.Dép.*, 17; Paris, *Bibl. Nat.*, lat. 9632; Lilienfeld, Stiftsbibl. 220, studied by Lefebvre-Teillard, resp. *Fils ou frère?*, cit. (note 38), *Un curieux temoin*, cit. (note 38) and *La voix de son maître*, cit. (note 38).

With regard to the intensive, even «invasive», use of Roman law texts (often reported in full) by Parisian teachers: Ead., *La Lecture de la Compilatio Prima*, cit. (note 38), pp. 120-122. For the chronology of the apparatus I followed the indications of the scholar p. 109; Ead., Petrus Brito *auteur*, cit. (note 38), p. 2 (1205-1209). On St. Omer's manuscript, «incontestablement le plus riche de tous le manuscrits de l'école», see Lefebvre, Petrus Brito legit, cit. (note 38), p. 163. Book II of 1 Comp., dedicated to the procedure, is the most appealing for this scholar (ivi, p. 165); Ead., *Magister A.*, cit. (note 38).

[41] In future applications, the accomplice's deposition would be used as an *indicium ad torturam*: discussed extensively by Chiodi, *Tortura 'in caput alterius'*, cit. (note 3), and *Nel labirinto delle prove legali*, cit. (note 5).

effect of the accomplices' statements. What emerges is a doctrinal construction that developed gradually, by means of contributions from various minds. Some masters maintained that in the *excepti* cases, in which *leges* and *canones* made it possible to believe the accomplices, this could not be done *sic et simpliciter*: more evidence was necessary to assist and support the naming of the accomplice. The jurists who put forward this idea also took care to find a textual base for it in the papal *ius novum*.

The author of the apparatus *Ecce vicit* leo, probably jurist Petrus Brito himself[42], found this in the decretal *Licet Heli* by Innocent III (1199) on the subject of simony. There the pope, *de aequitate*, ending a great dispute in a trial that was not being conducted *criminaliter* (with the accusatorial procedure) but instead *civiliter* (with the inquisitorial procedure), had allowed a number of *criminosi* monks – a category of witness considered unfit to testify, distinct from that of the *socii criminis*[43] – to testify against an abbot. The pope rejected the exceptions raised by the person under *inquisitio* with the following motivation: «quoniam et si fidem testium debilitarent in aliquo, non tamen evacuarent ex toto, praesertim quum alia contigerit adminicula suffragari» (a passage that was cut in the redaction of the *Liber Extra*[44]). This prescription was reiterated in the subsequent

[42] As demonstrated by Lefebvre-Teillard, *Petrus Brito, auteur*, cit. (note 38).

[43] See W. Litewski, *Der römisch-kanonische Zivilprozeß nach den älteren ordines iudiciarii*, Krakow 1999, pp. 388-389, 418; Mausen, *Veritatis adiutor*, cit. (note 2), pp. 490-503.

[44] Innocent III, *Licet Heli*, 3 Comp.5.2.3 = X. 5.3.31, *de simonia*; *inquisitio* against the abbot of Santa Maria di Pomposa, see *Die Register Innocenz'III., 2. Pontifikatsjahr, 1199/1200, Texte*, O. Hageneder - W. Maleczek - A.A. Strnad (eds.), Rom-Wien 1979, n. 250 (260), 2 dec. 1199, pp. 477-480: «[…] Ne vero vel innocentiae puritas confusa succumberet, vel simoniae pravitas effugeret impunita, nos, aequitate pensata, nec omnes exceptiones contra testes oppositas duximus admittendas, nec repellendas duximus universas, sed illas duntaxat exceptiones oppositas probandas admisimus, quae forte probatae non de zelo iustitiae, sed de malignitatis fomite procedere viderentur, conspirationes scilicet et inimicitias capitales, ceteras autem obiectiones oppositas ut furti et adulterii propter immanitatem haeresis simoniacae, ad cuius comparationem omnia crimina quasi pro nihilo reputantur, duximus repellendas, quoniam et si fidem testium debilitarent in aliquo, non tamen evacuarent ex toto, praesertim quum alia contigerit adminicula suffragari».

For a detailed interpretation of this decretal: L. Kèry, *Inquisitio – denunciatio –*

decretal *Per tuas*, by means of the reservation «aliis adminiculis suffragantibus» (maintained in the *Liber Extra*[45]). However, reference was also made to the thesis of presumption.

> ar. c. vi. q. i. Qui crimen (C.6 q.1 c.6): et supple 'accusando', quia nullo modo creditur infamibus vel credi etiam in criminibus exceptis si tamen assint alie probationes, ut extra ti. iii. Inno. iii. Licet (Gilb. Brux. 5.1.2; 3 Comp.5.2.3). Co. de feriis Provinciarum contra [C. 3.12.8(10)], ubi dicitur quod uni latroni creditur contra alium. Solutio: ibi intelligitur quod ei creditur antequam de se confessus fuerit set non post. Vel ei creditur quo ad presumptionem

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*exceptio: Möglichkeiten der Verfahrenseinleitung im Dekretalenrecht*, «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte», Kan. Abt., 87 (2001), pp. 226-268, pp. 239-246. Proceedings *per modum inquisitionis* against prelates charged with enormous crimes were studied in various occasions by J. Théry-Astruc. For a more extensive reconstruction, see the more recent article *"Excès", "affaires d'enquête" et gouvernement de l'Eglise (v. 1150-v-1350). Les procédures de la papauté contre les prélats "criminels": première approche*, in *La pathologie du pouvoir: vices, crimes et délits des gouvernants. Antiquité, Moyen Age, époque moderne*, Patrick Gilli (ed.), Leiden-Boston 2015, pp. 164-236. In these *inquisitionis negotia*, as can be seen in the decretal in question, the *inquisitio veritatis* was carried out scrupulously and the defendant could raise a number of exceptions against the witnesses. The considerations of J. Théry-Astruc, *Judicial Inquiry as an Instrument of Centralized Government: The Papacy's Criminal Proceedings against Prelates in the Age of Theocracy (Mid-Twelfth to Mid-Fourteenth Century)*, in *Proceedings of the Fourteenth International Congress of Medieval Canon Law*, Toronto, 5-11 August 2012, J. Goering - S. Dusil - A. Thier (eds.), Città del Vaticano 2016, pp. 875-889 can be consulted with regard to this issue.

[45] Innocent III, *Per tuas*, 3 Comp.5.2.4 = X. 5.3.32, *de simonia*, see *Die Register Innocenz'III., 6. Pontifikatsjahr*, *1203/1204*, *Texte und Indices*, O. Hageneder - J.C. Moore - A. Sommerlechner - C. Egger, H. Weigl (eds.), Wien 1995, n. 243 (244), end Jan.-Feb. 1204, pp. 407-409. See Kéry, *Inquisitio*, cit. (note 44), pp. 246-249. On the use of equity to derogate to the *ordo* see C. Lefebvre, *Une application de l'équité canonique: La décrétale "Per tuas" et l'admission des témoins criminels contre les simoniaques*, in «Revista Española de Derecho Canonico», 6 (1951), pp. 469-495. With regard to the increase in the judge's discretionary powers, deriving from equitable powers: P. Landau, *'Aequitas' in the 'Corpus Iuris Canonici'* (1997), also in Id. *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter. Ausgewählte Aufsätze aus den Jahren 1967 bis 2006 mit Addenda des Autors und Register versehen*, Badenweiler 2013, pp. 285-294, pp. 290-291. The similar use of the term 'conscience', always in the law of proof, as duly noted by R. Helmholz, *Conscience in the Ecclesiastical Courts*, in *Proceedings of the Thirteenth International Congress of Medieval Canon Law*, Esztergom, 3-8 August 2008, P. Erdö - Sz.A. Szuromi (eds.), Città del Vaticano 2010, pp. 71-84, pp. 76-77, 83.

tantum, non quo ad condemnationem[46].

Petrus Brito's attention for the passage in question of the decretal *Licet Heli* is also apparent from glosses to the apparatus to 1 Comp.composed in his school[47].

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[46] Apparatus *Ecce vicit leo*, ad C.15 q.3 c.5, *Nemini*, ms. Sankt Florian, *Stiftsbibliothek*, f. 69ra, v. *credi oportet*. With regard to the works of Gilbert quoted here: P. Clarke, *The Collection of Gilbertus and the French Glosses in Brussels Bibliothèque royale*, *MS 1407-09*, *and an early Recension of Compilatio Secunda*, pp. 132-175 (p. 176); Lefebvre-Teillard, *Magister A.*, cit. (note 38), pp. 240-244. The *Licet Heli*, other than in Alan. App. 29, is also present in Rain. 22 un., moreover in ms. Paris, *Bibl. Nat.*, lat. 3922A most recently critically analysed by A. Lefebvre-Teillard, *De la Francofurtana à la Collection de Gilbert: Une méthode de compilation saisie sur le vif*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte», Kan. Abt., 102 (2016), pp. 23-72.

On the datation of the first version: Weigand, *The Transmontane Decretists*, cit. (note 20), pp. 205-206, and now Lefebvre-Teillard, *L'école parisienne*, cit. (note 38), p. 24 (post 1202); Ead., *Petrus Brito auteur*, cit. (note 38), pp. 2-3 (pp. 15-17 for the mss.). The above-mentioned gloss includes the interpretation of the l. *Provinciarum* already ascribed to Petrus Brito (Petrus abbas) in the other apparatus of the Parisian school (above, note 40): confirming the attribution of the work to this law scholar. For more information regarding the author see Lefebvre-Teillard, Petrus Brito legit, cit. (note 38), pp. 161-162; Ead., *Magister B.*, cit. (note 38), pp. 12-13.

[47] Apparatus *Qui noluit* ad 1 Comp.2.13.9, *de testibus*, c. *Veniens ad nos*, ms. Bruxelles, *Bibliothèque royale*, 1407-1409, f. 20va (ed. Lefebvre-Teillard, *Petrus Brito* legit, cit. [note 38], p. 167; Ead., *Magister P.*, cit. [note 38], p. 91): «Patet quod testes infames crimine simonie non sunt recipiendi lxxix. [d.], si pape [c. 10], ita secundum canones; secundum leges non ita iiii. q. iii. § si autem [C.4 q.3 §17]; extra inno [Innocentius] iii., licet [Gilb. Bx 5.1.2] contra, ubi dicitur in accusatione simonie ratione nullius criminis potest quis repelli. *P.b*' intelligit illam decretalem quando alie sunt probationes et presumptiones, quod tunc admittuntur in detestationem criminis et hec solutio haberi potest ex littera ipsius decretalis. Unde dicendum [est] quod licet infames recipiantur ad accusationem i. de simonia Tanta, tamen numquam ad testimonium infra eodem de cetero [c. 14] licet h. [Huguccio] distinguat utrum accusati sint bone opinionis vel non, si bone ad accusationem etiam non admittuntur». The gloss of ms. Lambeth Palace 105 was very similar, and was also edited in *Magister P.*, cit. (note 38), p. 91.

For further proof of this line of interpretation see App. *Bernardus Papianus prepositus* ad 1 Comp.2.13.9, *de testibus*, c. *Veniens ad nos* (ms. Saint-Omer, *Bibliothèque municipale*, 107, f. 32rb): «Nos dicimus sine distinctione aliqua quod infames in exceptis criminibus s. symonia lesa maiestate ad accusationem contra prelatos admittantur ut c. Tanta, sed oportet quod per idoneas personas semper fiat probatio i. e. De cetero (1 Comp.2.13.14 =

The author of the apparatus *Animal est substantia*, a pupil of Pierre Peverel[48] who adopted the same interpretation as Petrus Brito on the need for further evidence in order to give credit to the statement of an accomplice, added instead the controversial decretal *Quamvis ad abolendam* (JL 16635) attributed to Clement III[49].

> hic ergo habemus quod in exceptis criminibus admittitur particeps criminis ad accusationem et etiam bene admittitur talis ad testimonium. In criminibus exceptis tamen cum aliis probationibus, extra t. de simonia Quamvis (Gilb. 5.2.3; 2 Comp.5.2.6). Tamen si particeps criminis duceretur odio vel esset capitalis inimicus non admittitur et in exceptis criminibus extra t. de exceptionibus (sic) Licet Heli sacerdos (Alan. App. 29; Gilb. Brux. 5.1.2; 3 Comp.5.2.3). Sunt etiam alii speciales casus in quibus particeps criminis bene admittitur, ut si maritus accusat uxorem et illa replicat de lenocinio mariti bene auditur et illum honerat non se tenebat, ff. de adulteriis l. i. § Si publico (D. 48.5.2.5). [a]Similiter si confiteatur aliquis se dedisse pecuniam iudici bene admittitur contra eum, co. de pena iudicis qui male iudicavit in authentica Nemo iure (*rectius* Non iure, p. C. 7.49.1). Similiter in crimine false monete bene admittitur socius criminis, co. de falsa moneta l. i. (C. 9.24.1) et etiam de insignibus latronibus creditur socio criminis, co. de feriis Provinciarum [C. 3.12.8(10)] et hoc verum est quod cum tormentis credendum est talibus, ut dicit ma. PP., aliter non. h tamen intelligit legem istam quando prius confitetur super alieno crimine, post modum de se[a]. Similiter in simonie particeps criminis admittitur lxxix. d. Si quis papa (D.79 c.2) et etiam sacrilego ii. q. i. In primis (C.2 q.1 c.7), tamen

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X. 2.20.14) et hic. Illa autem decretalis Licet (Gilb. Brux. 5.1.2) intelligitur quando alie fuerint probationes unde admittebantur in detestationem criminis».

[48] E.C. Coppens, *The Teaching of Law in the University of Paris in the First Quarter of the 13 Century*, in «Rivista Internazionale di Diritto Comune», 10 (1999), pp. 139-169; Id., *Pierre Peverel, glossateur de droit romain et canoniste (?)*, in *La cultura giuridico-canonica medioevale*, cit. (note 10), pp. 303-394; Id., *L'auteur d'Animal est substantia: une hypothèse*, in *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, cit. (note 17), pp. 289-298. For datation: Weigand, *The Transmontane Decretists*, cit. (note 20), p. 206 (1206-1210); Coppens, *Pierre Peverel*, cit., p. 311; Id., *L'auteur*, cit., p. 292 (1204-1210); Lefebvre-Teillard, *L'école parisienne*, cit. (note 38), p. 24 (1205-1210).

[49] C. Donahue, *P 265 = JL 16635? A Mild Heresy Stated and Defended*, in *«Ins Wasser geworfen und Ozeane durchquert». Festschrift für Knut Wolfgang Nörr*, M. Ascheri - F. Ebel - M. Heckel - A. Padoa-Schioppa - W. Pöggeler - F. Ranieri - W. Rütten (eds.), Köln-Weimar-Wien 2003, pp. 65-187.

> sub hac distinctione s. quod si ille cui obiicitur symonia fuit antea bone opinionis non admittitur contra ipsum particeps criminis, si male bene admittitur, ii. q.i. In primis (C.2 q.1 c.7) et ita solvitur contrarietas decretalium extra t. Veniens (1 Comp.2.13.9)[50].

Both apparata present the thesis that the accomplice in crime, in the *excepti* cases, is admitted as a witness, as long as his statement is corroborated by other elements, as expressly required by at least one of the decretals cited (the *Licet Heli*).

Peverel's disciple, in the apparatus *Animal est substantia*, also conducted a recognition of special cases in which the statement of the accomplice in crime could be used within precise terms, combining citations from civil law and canon law[51]. Moreover, he took care to mention two other rules on the subject. The first also came from canon law and it was taken from the decretal *Licet Heli*, which prescribed that whoever bore hatred towards a certain person or was his arch-enemy could not be admitted to accuse or testify against him. The second was more ancient, as it dated back to Roman law: infamous persons were in no case trustworthy in their statements if such statements were not made

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[50] Apparatus *'Animal est substantia'* ad C.15 q.3 c.5, *Nemini*, ms. Bamberg, *Staatsbibliothek*, Can. 42, f. 92rb, v. *maiestatis* [a-a] ed. also by Coppens, *Pierre Peverel*, cit. (note 48), p. 385, *Addendum*, n. 75. The *Apparatus* 'Animal est substantia' also provides, for our topic, the most complete proof of the intensive use of Roman law by the Parisian teachers: a peculiarity already brought to light in the studies of C. Coppens and Anne Lefebvre-Teillard. For a more complete idea, consider that according to Petrus Brito the mentioned decretal *Quamvis* attributed to accomplice's statements the value of presumption and not of full proof. This results from a gloss of the App. 'Militant siquidem patroni', ad 1 Comp.2.13.9, *de testibus*, c. *Veniens*, ms. Troyes, *Bibliothèque municipale*, 385, f. 28va, published by Lefebvre-Teillard, *«D'oltralpe»*, cit. (note 38), p. 1323: «… Hic ergo patet quod criminosus non admittitur contra clericum in testimonium etiam in exceptis casibus… Item habetur contra extra inno [Innocentius] quamvis (Gilb.auct. 5,3,2] ubi dicitur quod etiam criminosus in crimine simonie contra clericum potest admitti in testimonium; ad hoc dicit p. abbas quod ibi admittitur ad presumptionem non ad fidem faciendam…».

[51] This methodological profile coincides with the judgement of Chris Coppens, according to whom the author of the App. *'Animal est substantia'* was a more complete law scholar than Pietro Brito.

under torture. The most ancient decretists (such as the author of the *Summa Parisiensis*, to remain in the same scientific context) attest to their knowledge of this Roman law rule in the canonical procedure[52].

6. *Further steps from Bernardus Compostellanus to Willielmus Vascus*.

At the beginning of the twelfth century the requirement that statements by accomplices should be corroborated by further evidence in order to be credible and lead to the conviction of those named was professed also in other scientific contexts. In this period Bernardus Compostellanus, a canonist famous for his sometimes eccentric opinions compared to more traditional views[53], became an open and explicit supporter of this. In his apparatus to the *Decretum* (1201-05), Compostellano taught that in some cases the accomplices' statements could be admitted, but that it was not possible to believe in them *ad convincendum* without the contribution of more evidence (such as *infamia facti*): only in this case could the judge condemn the defendant.

> Interdum tamen confessio socii et complicis admittitur, ut ff. ad exi. l. ult. (D. 10.4.20), C. de feriis Provinciarum [C.3.12.8(10)], ubi az. dicit generaliter non esse audiendos complices nisi ubi expressum reperitur. Credo tamen numquam ex illis confessionibus aliquis condemnandus nisi alia indicia suffragentur, quia pravus extiterat vel quia fama mala decrebescit: quo casu ad confessionem reorum credo talem puniendum. b[54].

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[52] P. Landau, *Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa ordinaria*, Köln-Graz 1966, p. 104 notes 41 and 44. Reference to Huguccio can be found in the *Summa* a C.5 q.6 c.3, *Illi qui*: Fiori, *Il giuramento di innocenza*, cit. (note 17), p. 480 note 76; Ead., *La valutazione processuale della personalità dell'accusato: dall'infamia alla "capacità a delinquere del colpevole"*, in *Der Einfluss der Kanonistik auf die Europäische Rechtskultur*, Bd. 4: *Prozessrecht*, Y. Mausen - O. Condorelli - F. Roumy - M. Schmoeckel (eds.), Köln-Weimar-Wien 2014, pp. 157-172, p. 167 note 36.

[53] S. Kuttner, *Bernardus Compostellanus Antiquus. A Study in the Glossators of the Canon Law*, in «Traditio», 1 (1943), pp. 277-340, also in Id., *Gratian and the Schools of Law, 1140-1234*, London 1983, n. VII.

[54] Bernardus Compostellanus, App. ad C.15 q.3 c.5, *Nemini*, ms. Gniezno, Biblioteca Kapitulna, 28 (3rd layer), f. 281ra, v. *confessio*.

For the ms. of Gniezno and the author of its glosses see R. Weigand, *The Development of the* Glossa ordinaria *to Gratian's Decretum*, in *History of Medieval Canon Law*, cit.

In this gloss Bernardus Compostellanus Antiquus, a former pupil of Azo, disagreed with his master on one point: Azo maintained that the accomplices should be admitted only in the excepted crimes, but without further conditions. His disciple Compostellanus considered this doctrine to be too general, so he introduced a limitation: to corroborate the statement of the accomplice, for it to produce effects, it was necessary to have more evidence. However, if this condition were fulfilled then Compostellanus – unlike Azo – considered that the accused could also be condemned and punished[55]. In this way Compostellanus not only required further evidence to support the accusation – he did not include texts in support of his opinion, but he provided the example of an accused *pravus* or person of bad reputation[56] – he went even further, stating that the statements of the accomplice, together with other evidence, were enough to condemn the accused.

Laurentius Hispanus knew Bernardus Compostellanus's theories. However, the author of the Glossa Palatina (c. 1214) is unlikely to have fully followed Compostellanus's directive. Indeed, in Laurentius' work two theses are juxtaposed: that of the value of mere presumption in the statement of the accomplice in crime in the excepti cases, and that of the need for further evidence (put forward by Bernardus Compostellanus). Laurentius suggested also the formally more correct way to raise an objection against such witnesses by avoiding self-incrimination.

et simonie ar. lxxix. Si quis papa (D.79 c.2) et ar. s. e. Sane (C.6 q.1 c.22 §1).

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(note 20), pp. 55-97, pp. 80-81 (influences the ordinary Gloss by means of Laurentius); Pennington, *The Decretalists*, cit. (note 32), p. 223 (ca. 1205). Always relevant is Kuttner, *Bernardus Compostellanus*, cit. (note 53), pp. 326-327 (relationship with Azo); pp. 304, 308 (Johannes Teutonicus); p. 309 (Guido de Baysio).

[55] About Azo's perspective see Chiodi, *Tortura 'in caput alterius'*, cit. (note 3), pp. 689-693.

[56] This passage confirms the fundamental role of the infamy in canonical procedure, also as circumstantial evidence or *adminiculum*. Most recently on this point see A. Fiori, Quasi denunciante fama: *note sull'introduzione del processo tra rito accusatorio e inquisitorio*, in *Der Einfluss*, 3, cit. (note 4), pp. 351-367; Ead., *Il giuramento di innocenza*, cit. (note 17), pp. 377-380, 432; Ead., *La valutazione processuale*, cit. (note 52).

> Sed contra extra i. de testibus Veniens (1 Comp.2.13.9). Sed quidam hoc intelligunt de accusatione et sic non est illud contra. Alii intelligunt hic de teste et hoc innuitur ex illo verbo credi. Illud ergo intellige quando accusatus est clericus et primus erat bone fame. Vel dic quod particeps criminis non audietur in simonia nisi adnexum sit crimen maie. ut in illo c. lxxix. Si quis (D.79 c.2). Sunt autem quidam casus speciales ubi creditur socio contra socium, ut contra latronem statur confessioni socii, C. de feriis Provinciarum [C. 3.12.8(10)] et unius servi contra alium ff. ad exhi. l. ult. (D. 10.4.20). Istis tamen non credetur ut testibus sed ut presumptioni. b. tamen dicit quod numquam valet confessio socii contra socium, nisi aliqua sit presumptio contra eum. az. dicit semper valere ubi expressum invenitur. Propria autem confessio semper preiudicat cuilibet ff. de interrog. act. De etate (D. 11.1.11) ar. contra ff. de excep. Non utique (D. 44.1.9), unde caveat sibi cum excipit contra eum non enim ita excipiet 'tu non potes in me aliquid dicere quia mecum hoc crimen commisisti' sed sic 'non potes me accusare quia tu (*add.* R) illud commisisti[57].

Johannes Teutonicus, in his ordinary apparatus to Gratian's *Decretum*, instead clearly went back to uniting Compostellanus's directive on the need for further evidence (or presumptions) in support of the accusatory statement to the theory of the full probative (and not merely presumptive) value of the statement corroborated by some presumption. As was customary for him, however, he failed to mention the name of his predecessor[58]. Years later this led the ever-well-informed Guido de Baysio

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[57] Glossa Palatina ad C.15 q.3 c.5, *Nemini*, ms. Biblioteca Apostolica Vaticana, Reg. lat. 977 (R), f. 156vb; Pal. lat. 658, v. *preterquam*. On the manuscripts and datation: Weigand, *The Development of the* Glossa ordinaria, cit. (note 54), pp. 81-82, 84 (ca. 1214); Pennington, *The Decretalists*, cit. (note 32), p. 228.

[58] Johannes Teutonicus, App. ad C.15 q.3 c.5, *Nemini*, ms. Biblioteca Apostolica Vaticana, Pal. lat. 625, f. 127vb (137vb), v. *nemini*: «lese maiestatis. Et preterquam de crimine simonie… item auditur confessio unius latronis contra alios, ut C. de fer. Provinciarum [C. 3.12.8(10)]. Item falsarius contra socium suum auditur, ut C. de fal. mo. l. i. (C. 9.24.1). Nunquam tamen valet confessio talium ad convincendum socium, nisi adsit aliqua presumptio, ut ff. de cu. re. Divus (D. 48.3.6.1). Io».

See, on the other hand, Johannes Teutonicus, App. ad C.2 q.5 c.24, *Interrogatum est*, v. *profitetur*: «…Item argument. quod confessio unius non nocet alteri xv. questio iii. Nemini (C.15 q.3 c.5). Argumen. contra lix. distin. Ordinatos (D.59 c.4) et lxxxi. distin. Tantis (D.81 c.3). Et est verum, quod non noceat alii quantum ad condemnationem, nocet tamen quantum ad praesumptionem, ut extra de adulte. Significasti (1 Comp.5.13.6) et

to intervene and reveal the true paternity of the theses contained in the ordinary Gloss[59].

Finally, Willielmus Vasco – a French decretist who taught at Bologna and Padua[60] – was another contemporaneous illustrious canonist persuaded by this line of thought, which was therefore widespread in the early years of the twelfth century. Moreover, in his apparatus to the *Decretum* (1210), Willielmus clearly qualified the statement of the accomplice in crime as a testimony. Consequently, according to the rule *unus testis nullus testis* – also observed in canon law – he considered that at least a second testimony is required to obtain the effect of full proof.

> quia talis confessio debet facere preiudicium confitenti et non aliis, ut ff. de questionibus l. Repeti (D. 48.18.16.1) et ff. de re. iu. l. Sciendum (D. 42.1.25). Sed est ne statim quis condempnandus in crimine tali excepto propter confessionem socii? Non, nisi alia sit presumptio. Sed in hoc est hic speciale, quod ille idem qui accusat potest esse testis et cum uno teste poterit facere fidem. Sed contra extra de testibus Veniens (1 Comp.2.13.9): sed dicas quod sacerdos ille erat bone fame, secus si fuisset gravate opinionis, in quo casu hic loquitur. No. tamen quod secundum leges sunt speciales casus alii quidam in criminibus exceptis in quibus socio criminis adhibetur fides contra socium, ut in maleficiis vel incantationibus et huiusmodi, ut C. de mal. l. ult. (C. 9.18.9). Item latro contra socium, ut ff. de custo. reorum l. Divus (D. 48.3.6) et C. de feriis l. Provinciarum [C. 3.12.8(10)]. Item monetario adulterinam monetam componenti credendum est contra socium, ut c. de fal. monet. l. i. (C. 9.24.1). W[61].

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c.». On datation (c. 1216) and the manuscript tradition, see Weigand, *The Development of the* Glossa ordinaria, cit. (note 54), pp. 82-86 (based on Laurentius Hispanus).

[59] Guido de Baysio, App. ad C.15 q.3 c.5, *Nemini*, f. 229va, v. *contra socium*: «adde ista fuit sententia b. his. qui dicebat quod nunquam valet confessio socii contra socium, nisi aliqua sit presumptio contra ipsum. Sed azo dixit semper valere, nisi [sic!] expressum inveniretur». See also Gilles de Bellemère, *Remissorius, qui secundus est tomus Commentariorum in Gratiani Decreta…*, Lugduni 1550, f. 100rb.

[60] A.-M. Stickler, *Der Dekretist Willielmus Vasco und seine Anschauungen über das Verhältnis der beiden Gewalten*, in *Études d'histoire du droit canonique dédiées à Gabriel Le Bras*, I, Paris 1965, pp. 705-728; Weigand, *The Development of the* Glossa ordinaria, cit. (note 54), p. 87 (ante 1210); Pennington, *The Decretalists*, cit. (note 32), pp. 224-225.

[61] Willielmus Vasco, App. ad C.15 q.3 c.5, *Nemini*, ms. Beaune, *Bibliothèque municipale*, 5, f. 162va, v. *confesso*.

7. *The horizons of the thirteenth-century decretalists*.

This orientation continued during the twelfth century, without however becoming consolidated. The thesis of the merely presumptive value of the accomplice's statement corroborated by other *adminicula*, widely appreciated by civil scholars for the *excepti* cases, was not accepted by all canonists of this time. The doctrine of the decretalists of this period provides a different, less stable picture than that provided, in a more compact way, by the civilists.

Bernardus of Parma was one of the more cautious canonists who favoured attributing only an effect of presumption to the statements by accomplices in the excepted cases – provided they were supported by other presumptive elements left to the judge's discretion. Bernard's opinion is particularly important as it was expressed in the ordinary apparatus to the *Liber Extra* (I ed. 1234-1241). The glosses in the margin of c. *Cum monasterium* in the *Liber Extra* shed some light on the approach to adopt when canon law exceptionally admitted confessed criminals to testify against their accomplices (as in the excepted crimes of lese majesty and robbery). It is recommended that they should be believed «non quantum ad convincendum, sed quantum ad praesumptionem», which is the typical form used to express the theory of presumption. The gloss writer further points out that: «unde si adsunt aliae praesumptiones valent, alias per se non sufficiunt»[62].

[62] Bernardus Parmensis, App. ad X. 2.18.1, *de confessis*, c. *Cum monasterium*, ms. *Biblioteca Apostolica Vaticana*, Vat. lat. 11158, f. 60vb, gl. *confessi*: «nulli ergo de se confesso super crimine aliorum creditur… preterquam in crimine lese maiestatis… item auditur confessio unius latronis contra alium…istis qui de se confitentur, creditur non quantum ad convincendum, sed quantum ad presumptionem, unde si adsunt aliae praesumptiones valent, alias per se non sufficiunt». With regard to the versions see O. Condorelli, *Bernardo da Parma*, in *Dizionario biografico dei giuristi italiani (XII-XX secolo)*, I, Bologna 2013, p. 230.

In the first decretalists, the c. *Cum monasterium* did not give rise to equally important hermeneutical remarks, as in the glosses of the two scholars detailed below.

Tancred, App. ad 2 Comp.5.6.2, *de omicidio volontario vel casuali*, c. *Cum monasterium*, ms. Bamberg, *Staatsbibliothek*, Can. 20, f. 94va; Can. 19, f. 111va, v. *aliis modis*: «s. legittimis probationibus, eo quod eius confessioni in preiudicium aliorum non

Another very authoritative exponent of this interpretative current was Innocent IV[63]. It inspired also Guilielmus Duranti's *Speculum iudiciale*[64].

Goffredus of Trani, on the other hand, in his fundamental apparatus to the *Liber Extra* (1234-1243), made a clear distinction between non-excepted cases – in which the accomplice could not be believed «ad convincendum, but only ad praesumendum»[65] – and excepted cases, in

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stabitur, ut s. de testi. Veniens el i. (1 Comp.2.13.9), s. de adult. Significasti (1 Comp.5.13.6), nisi in crimine lese maiestatis ut xv. q. iii. Nemini (C.15 q.3 c.5). t.».

Vincentius Hispanus, App. ad X. 2.18.1, *de confessis*, c. *Cum monasterium*, ms. Paris, *Bibliothèque Nationale*, 3967, f. 82rab, v. *subdendos*: «quia non preiudicat eis, i. de testi. Veniens (X. 2.20.10), i. de adult. Significasti (X. 5.16.5), nisi in crimine lese maiestatis, xv. q.iii. Nemini (C.15 q.3 c.5)».

[63] Innocent IV, Comm. ad X. 2.18.1, *de confessis*, c. *Cum monasterium*, n. 2 (*Super libros quinque Decretalium*…, Francofurti ad Moenum 1570, f. 246va): «item confessio unius latronis contra alium valet ad praesumptionem…, falsarius autem contra falsarium non valet ad probationem… et ubi admittitur, alias non sine praesumptione admittentur…, nec sine tormento…». Innocent IV, Comm. X. 2.20.3, *de testibus*, *Quoniam*, v. *mulieres* (ed. cit., f. 254va); Comm. X. 2.20.10, *de testibus*, c. *Veniens* (ed. cit., f. 256ra), v. *credendum*.

[64] Guilielmus Durantis, *Speculum iuris* …, *pars prima*, lib. I, part. II, *De accusatore*, n. 10, Augustae Taurinorum 1578, f. 81va: «quia unius confessio contra alium auditur, quantum ad praesumptionem, C. de fer. Provinciarum [C. 3.12.8(10)]».

[65] Goffredus Tranensis, App. ad X. 2.20.3, *de testibus*, c. *Quoniam*, Wien, *Österreichische Nationalbibliothek*, ms. 2197, f. 50vb, v. *seu mulieres*: «duobus modis videtur quod mulieres non essent admittende ad testimonium: primo quia mulieres, ut xxxiii. q. v. Mulierem (C.33 q.5 c.17); secundo quia laice persone non admittuntur ad testimonium contra clericos accusatos, ut ii. q. vii. per totum. Respondeo: hic agebatur contra istum Epiphanium in modum exceptionis et ideo mulieres admittuntur ut i. de testibus Tam litteris (X. 2.20.33). Vel dic quod admittebantur ad presumptionem non ad probationem vel istud in causa denunciationis».

Goffredus Tranensis, App. ad X. 2.20.3, *de testibus*, c. *Quoniam*, v. *cum quibus*, Wien, *Österreichische Nationalbibliothek*, ms. 2197, f. 50vb: «hic ergo admittuntur socii criminis et sic lxxix. di. Si quis papa (D.79 c.2), vi. q. i. Si quis cum militibus (C.6 q.1 c.22). Sed contra i. e. t. Veniens (X. 2.20.10), xv. q. iii. Nemini (C.15 q.3 c.5), i. de confes. c. i. (X. 2.18.1) … Sed solve ut in glo. superiori, quia hic admittuntur socii criminis ad presumptionem non ad probationem ut i. de adulteriis Significasti (X. 5.16.5)».

Goffredus Tranensis, App. ad X. 2.20.10, *de testibus*, c. *Veniens*, v. *iudicasti*, Wien, *Österreichische Nationalbibliothek*, ms. 2197, f. 51rb: «ipsum absolvendo. Non enim hic locus erat delationi iuramenti eo quod semiplena probatio intervenit, ut s. de procura. Ex insinuatione (X. 1.38.3), C. de iureiurando l. In bone fidei (C. 4.1.3), ff. e. t. l. Admonendi

which instead the judge could give full faith to the words of the accomplice. However, Goffredus did not specify whether other *adminicula* were required[66].

Also Henricus de Segusio seemed inclined to give full credibility to the confessed criminals about accomplices in the excepti cases. The negative rule held true in all the other cases in which, according to Hostiensis, the prohibition to interrogate confessed criminals about their accomplices (*socii*) as stated in the c. *Monasterium*, was not to be understood in the absolute sense, namely according to what was provided by the c. *Quoniam*. Indeed the judge was generally allowed to interrogate the accused on their accomplices in every crime, although only «ad instructionem», to obtain presumptions: from the statements of the confessed criminals, in the non-excepted cases, there could be no full proof from the accomplices «nisi et aliter convincantu»[67]. There had also been others, before Hostiensis, who

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(D. 12.2.31). Nam illa in civilibus locum habent, in criminalibus autem apertissime debent intervenire probationes, ut C. de probationibus l. ult. (C.4.19.25), ii. q. viii. Sciant (C.2 q.8 c.2), v. q. vi. Epiphanium (C.5 q.6 c.4). Vel dic iudicasti purgationem indicendo i. e., ut i. de adult. Significasti (X. 5.16.5). G».

[66] Goffredus Tranensis, App. ad X. 2.18.1, *de confessis*, c. *Cum monasterium*, Wien, *Österreichische Nationalbibliothek*, ms. 2197, f. 47v, v. *confessi*: «confesso de se non creditur super alieno crimine ut hic et xv. q. iii. Nemini (C.15 q.3 c.5), iii. q. xi. Neganda (C.3. q.11 c.1-2), vi. q. i. Qui crimen (C.6. q.1 c.6), ff. de exiben. r. l. penult. (D. 10.4.20). Set contra ar. i. de testi. Quoniam (C. 4.20.11), C. de feriis l. Provinciarum [C. 3.12.8(10)], ff. de questionibus l. i. § Cum quis. Solutio: non creditur ut per hoc aliquis convincatur, creditur tamen quo ad presumptionem, ut i. de adult. Significasti (X. 5.16.5). Creditur tamen in exceptis, ut hic et vi. q. i. § Verum (C.6 q.1 p.c.21), lxxix. di. Si quis papa (D.79 c.2). G».

See also the following glosses: Goffredus Tranensis, *Summa*, ad X. 2.20, *de testibus*, nn. 10-11 (*Summa … in titulos Decretalium …*, Venetiis 1586, f. 97ra): «Item non admittitur quis in causa communis… Et idem dico in socio criminis et participe... Nec ob. inf. eo. tit. c. Quoniam (X. 2.20.3). Nam illud speciale est in causa denunciationis. Vel ibi admittitur socius criminis ad praesumptionem, ut inf. de adul. c. Significasti (X. 5.16.5)… ». With regard to the datation of apparatus and *Summa* (1241-1243) see M. Bertram, *Goffredo da Trani*, in *Diz. biogr. dei giur. it.*, I, cit. (note 62), p. 1038.

[67] Henricus de Segusio, *Lectura* ad X. 2.18.1, *de confessis*, c. *Cum monasterium* (*In secundum Decretalium librum Commentaria…*, Venetiis 1581, f. 71vb), v. *confessi*: «nulli ergo de se confesso creditur super crimine aliorum… et hoc verum est preterquam in casibus. Sicut est in crimine lese maiestatis... Et in latronibus excellentibus… et in falsa moneta… et in simonia… Sed videtur quod generaliter sit et de aliis inquirendum, ut i. de

had tried to get around the prohibition to interrogate the confessed criminals. They had proposed first interrogating the accused on his accomplices, and only afterwards on his own involvement. This was an inversion of the *ordo iuris* that Hostiensis criticised because it went against a Roman text. Also Baldus de Ubaldis, in the following century, condemned this singular thesis, considering it a fraud against the law. As outlined above, both opinions had already appeared in the doctrine.

Moreover, the canonists also used the principle established in the decretals *Licet Heli* and *Per tuas* to explain the meaning of another decretal of Innocent III, *Cum I. & A.* (1208), with regard to a trial against an abbot accused of dissipation, perjury, simony, and other crimes. The pope had admitted the testimony of people accused of conspiracy[68]. These were not considered *socii criminis*, but *criminosi*, another type of unfit witnesses. Concerning these people, however, Johannes Teutonicus, in a gloss of the apparatus to the 3 Comp., where this decretal had been previously inserted and studied in universities, repeated the theory we know[69].

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test. Quoniam (X. 2.20.3) et ff. de questio. l. i. § Cum quis latrones et § Si quis ultro (D. 48.18.1.26-27). So.: dixerunt quidam quod antequam de se confessi fuerunt interrogandi sunt et creditur eis, ut in contrariis. Postquam vero de se confessi sunt, nec interrogari debent, nec creditur eis, ut hic dicit in fi. Sed hoc reprobatur expresse ff. ad Silla. Prius (D. 29.5.17). Dicat ergo, quod interrogari possunt ad instructionem, sed non creditur eis, nisi quantum ad presumptionem…, nec sine tormentis... Nec obstat, quod hic se., interrogari non debent, quia subaudiendum est quantum ad hoc, ut per confessionem ipsorum alii condemnentur, nisi et aliter convincantur». Note the explicit rejection of interpretation also suggested by Petrus Brito (note 41) during his time, by means of arguing from a text of Roman law. On the two versions of the *Lectura* (1262-1265 e 1271) see K. Pennington, *Enrico da Susa, Cardinale Ostiense*, in *Diz. biogr. dei giur. it.*, I, cit. (note 62), p. 797.

[68] Innocent III, *Cum I. & A.*, 3 Comp.2.18.12 = X. 2.27.22, *de sententia et re iudicata*; Po. 3340; *Die Register Innocenz' III.*, 11. Bd, 11. *Pontifikatsjahr, 1208/1209*, *Texte und Indices*, O. Hageneder - A. Sommerlechner (eds.), Wien 2010, n. 270 (276), 18 March 1208, pp. 448-451.

[69] Johannes Teutonicus, App. ad 3 Comp.2.18.12, *de sententia et re iudicata*, c. *Cum I. & A.* (ed. K. Pennington, *Johannes Teutonici apparatus glossarum in compilationem tertiam*, Città del Vaticano 1981, p. 330), v. *recipi*: «set nonne alii de ecclesia, qui forte sunt ydonei, possunt illos repellere, cum sint criminosi et per criminosos non debent convinci? Certe credo quod sic, et quod hic dicitur quod tales admitti possunt, intelligo

Bernardus of Parma, taking up Johannes' thought, also expressed the idea that such witnesses, within the limitations Innocent III had deemed admissible, were acceptable «non quantum ad plenam fidem faciendam, sed ad presumptionem»; but with the addition of further elements that could have also had probative value: «cum aliis adminiculis probabunt»[70].

On the other hand, at least in the ordinary Gloss the decretal *Venerabilis frater* of Honorius III did not give rise to specific observations on this point, He allowed some citizens involved in the serious crime to testify to a plot against the archbishop of Ravenna[71]. Bernardus, nevertheless, took care to point out that these were testimonial depositions of *minus idonei* persons, which were accepted due to the lack of more trustworthy witnesses. Note that this *ratio* was in itself very wide and susceptible to application also out of the specific case of the plot, with the risk of extending the conditions of its use to the probative value of accomplice witnesses in each type of crime, which in practice could not be proven otherwise[72].

8. *The probative value of the accomplice's testimony in the inquisitorial procedure against heresy*.

The investigation carried out is a prerequisite to understand how the

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non quantum ad plenam fidem faciendam, set ad presumptionem. Nam etsi dicta eorum debilitentur, non tamen ex toto evacuantur, ut i. de symon. Licet in fine (3 Comp.5.2.3 = X 5.3.31)».

[70] Bernardus Parmensis, App. ad X. 2.27.22, *de sententia et re iudicata*, c. *Cum I. & A.*, v. *potuerunt*. See also Innocent IV, X. 2.27.22, Comm. ad c. *Cum I. et A.*, *de sententia et re iudicata*, n. 5, f. 314ra, v. *fides* (ed. cit. note 63): «vel dic, horum testimonium praesumptionem et modicam fidem facere, et non plenam, sicut alii testes».

[71] Honorius III, *Venerabilis frater*, 5 Comp.2.13.3 = X. 2.21.11, *de testibus cogendis vel non* (Po. 7762; *Regesta Honorii Papae III…*, P. Pressutti (ed.), II, Romae 1895, rist. Hildesheim-New York 1978, n. 4781, 17 Feb. 1224; P. Herde, *Der Zeugenzwang in den päpstlichen Delegationsreskripten des Mittelalters*, in «Traditio», 18 (1962), pp. 255-288, p. 258.

[72] Bernardus Parmensis, App. ad X. 2.21.11, *de testibus cogendis vel non*, c. *Venerabilis frater*, v. *iuramento absolvant*: «Item habes hic, quod socius criminis admittitur ad detegendam conspirationem, imo certe tenetur illam conspirationem manifestare et denunciare... Item in defectum probationis minus idonei testes admittuntur, qui alias non admitterentur…. Et propter defectum testium admittuntur, qui alias admitti non debent…».

problem regarding the probative value of the accomplices' statements in proceedings against heretics was solved. In this sense an important step is represented by the decretal *In fidei favorem* by Alexander IV, included in the *Liber Sextus*. With this, the pope, referring to proceedings carried out according to the inquisitorial procedure, also admitted to testify excommunicated persons and those who had taken part in the crime, specifically demanding, however, that the judge look for further evidence, indicated with greater accuracy of the details with respect to the earlier rules. He ordered, in fact, to scrutinize the reliability of the statements on the basis of likely conjectures, the number of witnesses, the quality of the persons and other circumstances. Also in this case the pope, using a technique already used by his predecessors, authorized a derogation of the rules concerning testimonial evidence, limiting, however, the *arbitrium iudicis* with the obligation of a more analytical verification[73].

With regard to the evidential value to be assigned to the accusatorial statements of the accomplices, the general text of the decretal («ad testimonium admittantur») contributed in starting a discussion of the effects of the accomplices' testimony, also here with diverse results[74]. I will not deal with this interesting topic in this paper, but I can, however, briefly indicate some of the stages of this interpretive issue, noting how, at a certain point, the canonists started to say that also in proceedings against heretics the concordant statements of two accomplices did not constitute

[73] VI. 5.2.5, *de hereticis*, c. *In fidei favorem*: «Concedimus, ut in negotio inquisitionis heretice pravitatis excommunicati et participes, vel socii criminis, ad testimonium admittantur, presertim in probationum aliarum defectum, contra hereticos, credentes, fautores, receptatores et defensores eorum, si ex verisimilibus coniecturis et ex numero testium aut personarum (tam deponentium quam eorum contra quos deponitur) qualitate ac aliis circumstantiis, sic testificantes falsa non dicere praesumantur». The letter, to the Frairs Preachers of the Dominican Order, inquisitors «hereticae pravitatis in Lombardia e Marchia Januensis», is dated 30 May 1260, in *Bullarium ordinis ff. praedicatorum…*, Tomus primus ab anno 1215 ad 1280, Romae 1729, p. 394, n. CCLXXIII.

[74] The issue is not dealt by B. Schnapper, Testes inhabiles. *Les témoins reprochables dans l'ancien droit pénal* (1965), in Id., *Voies nouvelles en histoire du droit. La justice, la famille, la répression pénale (XVI$^{ème}$-XX$^{ème}$ siècles)*, Paris 1991, pp. 145-175, p. 158, that merely indicates the decretal *In fidei favorem* as an important stage in the history of the probative value of the statements of unfit witnesses.

full proof, but only a presumption or circumstantial evidence. The roots of this theory have been examined and are now used to limit the scope of an exception and privilege, which appeared to be even greater. The sources converge in referring to the thinking of Franciscus Aretinus[75], and therefore to a supreme canonist of the late fifteenth century, as the authoritative leader of this line of thought, destined to success and consolidation in the most important works on proceedings against heretics[76]. This interpretation limits the apparently more disruptive

[75] Franciscus Aretinus, Comm. ad X. 2.20.46, *de testibus*, c. *Non debet*, n.7 in fi. (*In primi, secundi et quinti Decretal. titulos commentaria…*, Venetiis 1581, fol.154vb): «et per illum tex. potest dici, quod in talibus testibus criminosis vel infamibus non sufficerent duo testes etiam concurrentibus coniecturis verisimilibus, et sic intelligo sing. doctrinam Hosti. quam refert Ioan. And. in novel. in c. Ut officium de haere. lib. 6 (VI. 5.2.11) dum dixit, quod in causa hęresis non sufficiunt duo testes. Nam quando testes essent criminosi, vel infames, illud dictum satis probatur in d.c. In fidei (VI. 5.2.5)». The *editio princeps* of the *Lectura super secundo libro Decretalium* was printed in 1481: G. Murano, *Francesco Accolti (1416-1488)*, in *Autographa*. I.1. *Giuristi, giudici e notai (sec. XII-XVI med.)*, G. Murano (ed.), Bologna 2012, p. 242. The solution, as it appears in the text, converges with the distinct question of the number of witnesses required to condemn a heretic, based on an idea attributed to Henricus de Segusio.

[76] The opinion of Franciscus Aretinus was shared by Juan López de Palacios Rubios, Ambrosius de Vignate, Arnaldus Albertinus and with an abundance of argumentation from Francisco Peña. The texts in which the discussion takes part are: Juan López de Palacios Rubios, *Allegatio in materia haeresis*, § 15, in A. de Vignate, *Elegans ac utilis tractatus de haeresi… adiecta sunt praeterea* Ioannis Lopez de Palatios Ruvios *allegatio in materia haresis*…, Romae 1581, fol.114rv (with notes by F. Peña); de Vignate, *Tractatus de haeresi*, cit., q. XIII, ff. 57v-59v, with F. Peña's commentary (with hints in G. Romeo, *I manuali inquisitoriali e le streghe (1568-1588)*, in Id., *Inquisitori, esorcisti e streghe nell'Italia della Controriforma*, Firenze 1990, p. 89); A. Albertinus, *Tractatus solemnis et aureus… De agnoscendis assertionibus catholicis, et haereticis…*, Venetiis 1571, q. XXXIV, n. 3, f. 234r; F. Peña, Comm. to N. Eymerich, *Directorium inquisitorum*…, Venetiis 1607, q. LXIV, comment. CXIII, cc. 603-604 (the main *sedes materiae*). A deep discussion can also be found in P. Farinacci, *Tractatus de haeresi*, Lugduni 1650, q. CLXXXXVIII, § IV, n. 83, c. 210.

The exception provided for by the c. *In fidei favorem* was also pointed out by fourteenth century sources. Nevertheless, I did not find doubts or discussions regarding the value of the witnesses' statements. E.g. see B. Gui, *Practica inquisitionis heretice pravitatis*, C. Douais (ed.), Paris 1886, IV pars, D., pp. 214-215; *Il «De officio inquisitionis». La procedura inquisitoriale a Bologna e Ferrara nel Trecento*, Introduzione, testo critico e note a cura di L. Paolini, Bologna 1976, III, pp. 113-114; the already mentioned

capacity of the decretal *In fidei favorem*. Nevertheless, if the statements of two accomplices could not be used as evidence of full proof against the defendant, but only as presumption (subject to various outcomes: inquisition, torture, extraordinary punishment according to the case in question), those of three or more accomplices could, on the other hand, be used. At least three witnesses, therefore, could have led to conviction. *Numerus tollit inhabilitatem*: a result excluded by law scholars for other *crimina excepta* according to *ius commune* and valid, on the other hand, for heresy, on the basis of the wording of the text of the decretal of Alexander IV. It is therefore the most important outcome to point out, to complement the research carried out in these pages[77].

9. *Conclusion*.

The interaction between the probative value of accusations made by accomplices and the theory of presumptions was to continue to occupy considerable space, and it was developed in an original way by canon law schools. Indeed this aspect was key not only as regards the probative value of a single witness, but also of those witnesses who were exceptionally allowed to testify even though they were unfit to do so.

Apparently, the answer should be fairly obvious: as a rule for both canon and civil law jurists, the *socius criminis* was barred from testifying. In reality, however, it was not so straightforward: in exceptional cases, the accomplice was allowed to testify. Among the excepted crimes, in which the accomplice's testimony was given value, there were for instance lese majesty, simony, heresy, and robbery – a dangerous and fearful scourge of medieval society: for these crimes the word of the accomplice was often the only means available to ascertain the truth. On the other hand, once accomplices were admitted as witnesses – in special cases – the question

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*Directorium* by Eymerich. Information on the works and the jurists mentioned here in A. Errera, *Modello accusatorio e modello inquisitorio nel processo contro gli eretici: il ruolo del procuratore fiscale*, in *L'inquisizione in età moderna e il caso milanese.* Atti delle giornate di studio 27-29 novembre 2008, C. di Filippo Bareggi - G. Signorotto (eds.), Milano-Roma 2009, pp. 151-199.

[77] For other sources see Chiodi, *Nel labirinto delle prove legali*, cit. (note 5), pp. 165-172.

arose as to the effects of their statements. Could full faith – *plena fides* – rest on them, like on the others? Reading the opinions expressed by the civil law glossators, resorting to the concept of presumption, it emerges that the answer was negative. «Non erit plena probatio, sed aliqua praesumptio»: this was exemplified by Hugolinus and expressed in a well-known gloss by Accursius[78]. The canonists who sought to find a solution to this question did not all agree. Therefore tackling the history of the effects of this testimony is important, and it becomes possible to clarify the stages that led, in the doctrinal debate, to the medieval law of proof, with particular reference to the criminal procedure.

Once established that the rules of the *ordo iudiciarius* could be infringed in the repression of the so-called «enormous» crimes by legal scholars, as they aimed to undermine the foundations of the social order and religious constitution, it did not follow that the 'qualified' witnesses were automatically considered *fides* trustworthy like any other fit witnesses. Canon law scholars, or at least a substantial part of them, were also against this consequence, defining the judge's *arbitrium* in two different ways: the accomplices' statements could be worth, at the most, as presumptions; and moreover, to use the testimony in this way, the judge had to have additional circumstantial evidence aimed at supporting and corroborating their statements. Canon law is therefore the origin of a rule of evidence valid also in contemporary systems. A rule certainly subject to further variations and modulations, but at its core already admitted in Roman-Canonical procedure. In all this, the canonists of the twelfth and thirteenth centuries played a fundamental role. Some of them supported a more advanced theory: for them the statements of the accomplices (at least two, according to the principle *unus testis nullus testis*), provided they were corroborated, could constitute in effect full proof, with the total recovery of *fides*. The matter therefore provides an idea of the diverse powers of

[78] Accursius, App. ad C. 9.2.17.1, *de accusationibus et inscriptionibus*, l. *Accusationis § Nemo*, gl. *conscientia*, *Biblioteca Apostolica Vaticana*, ms. Ross. 582, f. 251: «Item eius responsio non erit plena probatio sed aliqua presumptio». For a more extended commentary see Chiodi, *Tortura 'in caput alterius'*, cit. (note 3), pp. 693-698.

the judge in the probative context of canonical procedure[79].

This investigation aims at reaffirming that the in-depth study of the theory of presumption, developed in an original way in civil and canon law schools must continue to receive great attention. Presumption has proved to be a flexible and central tool of the medieval law of proof[80]. The invention of this category, in fact, enabled to solve the problem regarding the evaluation not only of the statement of the *unus testis*, but also of those witnesses who, even if deemed unfit, were exceptionally admitted to testify by the *ius civile* and *canonicum*.

[79] A comparison with the evaluation criteria of the *unus testis* is useful, though not entirely coinciding with those examined here. See, other than the papers mentioned above, note 29, F. Treggiari, *La fides dell'unico teste*, in *La fiducia secondo i linguaggi del potere*, P. Prodi (ed.), Bologna 2007, pp. 53-72.

[80] Numerous examples regarding the role of presumptions in the field of law of proof can now be found in the volume *The Law of Presumptions: Essays in Comparative Legal History*, R.H. Helmholz - W.D.H. Sellar (eds.), Berlin 2009, which focuses above all on the *ius commune* in the Modern Era.