

The Commentators

The concept of the *ius commune*

Among proceduralists even in the 13th century the distinction between canonists and civilians will not hold water. We have indicated above that the distinction among the academics was becoming increasingly blurred in the later MA. Among the practicing lawyers it is hardly to be found at all. Both canonists and civilians get legal jobs in the church. Some churchmen with law degrees have degrees only in civil law. Some laymen have doctorates in both laws. Johannes Andreae was a layman and seems to have had a degree only in canon law. Professional associations of lawyers from doctors' commons in England to the guilds of lawyers in Italy rarely distinguish between holders of the two kinds of degrees.

By the 14th century lawyers all over Europe are referring to the *ius commune*, the common law. It means the law that Europeans have in common, a combination of Roman and canon law, to be distinguished from the customary law of a particular city or region or the law embodied in the statutes or *fueros* of a particularly city or region. A notion of a hierarchy of sources prevailed over most of Italy and southern France as well. Local statute was primary. If it applied to the case, it was binding. After that came the *ius commune*. But the power of the *ius commune* was even greater than the hierarchy would seem to suggest, because the local statutes were interpreted in the light of the *ius commune*. The terminology and structure of the *ius commune* was the terminology and structure that every trained jurist used, and jurists were increasingly used as judges and consultors. Some of them participated in the drafting of the statutes for the city-states.

The Commentators on Wild Animals

Bartolus de Saxoferrato (Bartolo da Sassoferrato) (1313 – 1357), the best-known of the civilian commentators, taught first at Pisa and then at Perugia. He survived the Black Death, but died relatively young. For one whose career was quite short his output was enormous: commentaries on almost all the parts of the Corpus Iuris Civilis and a large number of *consilia* and treatises.

Bartolus on D.41.1.1–5

Bartolus on D.41.1.1. “**Of certain things**. [1] In the text there ‘**become**’. See what is noted below [D.41.1.10.3]. [2] In the first gloss, at ‘**not between things but of doers**’, that is to say, the types of acquiring things are not distinguished, according to Jacobus de Arena [c. 1220 – c. 1288]. [3] In the gloss **everywhere**. This gloss implies [*sentit*] that the *ius gentium* does not seem to bind those who are not subject to the empire. The opposite is true by this text. [C.1.1.1, ‘All peoples’] does not stand in the way because there [the text is dealing with] the civil law, here the *ius gentium*, as [as said] there by the Doctors; keep this in mind. [4] It is opposed that ownership is acquired by civil law. Solution: Ownership is of the law of nations, but the means of acquiring ownership are of the civil law. And see the gloss that states the modes and begins: **Rome, by its**

excellence, etc. And add one more means, by judgment, as you will see in [D.41.2.13.9].”

The text on which he is commenting (and which is not given in the manuscripts or the printed editions) reads as follows:

D.41.1.1: GAIUS, *Diurnal or Golden Matters*, book 2: “**Of certain things** we obtain ownership by the law of nations, which is **everywhere** followed among men, according to the dictates of natural reason; and we obtain the ownership of other things by the civil law, that is to say, by the law of **our own country**. 1. So all animals taken on land, sea, or in the air, that is, wild beasts, birds, and fish, **become** the property of those who take them.”

[1] D.41.1.10.3 is a complicated text on what is required mentally for one to have possession that gives rise to usucapion (roughly ‘adverse possession’). Bartolus has a long comment on this topic that he wants his students to look at it in the context of this text.

[2] D.41.1.1 v^o ‘Of certain things’. “Of which there are five *genera* [citation omitted]. And the fifth member here follows, to wit, those things that are or become property of individuals [citation omitted], and thus it notes here a difference **not between things but of doers**.”

[3] D.41.1.1 v^o ‘Everywhere’. “I.e. within the empire and outside.” It is unclear why Bartolus needs to comment on this gloss. Perhaps his copy of the gloss did not have ‘and outside’.

[4] Bartolus’ text does not say where the ‘opposition’ come from. Somebody, and it may well be Bartolus himself, has been giving some thought to the *ius gentium*, the law of nations, and has come to the conclusion that the means of acquiring property are matters of the positive law of the area, what he calls the ‘civil law’. This is not the Roman jurists’ view, but Bartolus is willing to go against the juristic mainstream: “Solution: Ownership is of the law of nations, but the means of acquiring ownership are of the civil law.” This interest in the abstract general categories is something that we are going to see more of as we go on. I would suggest that the implication here is that perhaps even capture of wild animals is not so much a matter of natural law that positive law can’t change it. Perhaps Bartolus is even suggesting that it does not lead to ownership unless the positive law recognizes it.

Ordinary gloss on “**our own county**”: “**Rome, by its excellence**, as [JI.1.2.2]. As, for an example, by usucapion, prescription, arrogation, monastic profession, deportation, testament, succession, *bonorum possessio*, entering into an inheritance.”

The glossators had accommodated their own world to the list of classical civil-law means of acquiring ownership by adding monastic profession, which operates like inheritance: the heirs of the monk acquire his property. Bartolus here simply adds one more to the list given in the gloss of the civil-law methods of acquiring ownership:

“And add one more means, by judgment, as you will see in [D.41.2.13.9].”

If Bartolus was intending to imply in his comment that one does not acquire ownership of a wild animal by capture unless the positive law recognizes it, he gets cold feet here and simply expands on the traditional civil-law methods of acquiring ownership.

Bartolus on D.41.1.1–5pr: “‘**All.**’ Read up to [D.41.5.5.1]. . . .”

All animals, therefore, which are captured on land, on sea, or in the air, that is to say, wild beasts and birds, as well as fish, become the property of those who take them.

2. FLORENTINUS, *Institutes*, book 6: The same rule applies to their offspring, born while they are in our hands.

3. GAIUS, *Diurnal or Golden Matters*, book 2: For what does not belong to anyone by natural law becomes the property of the person who first acquires it. **1** Nor does it make any difference, so far as wild animals and birds are concerned, whether anyone takes them on his own land, or on that of another; but it is clear that if he enters upon the premises of another for the purpose of hunting, or of taking game, he can be legally forbidden by the owner to do so, if the latter is aware of his intention. **2** When we have once acquired any of these animals, they are understood to belong to us, as long as they are retained in our possession; for if they should escape from our custody and recover their natural freedom, they cease to belong to us, and again become the property of the first one who takes them,

4. FLORENTINUS, *Institutes*, book 6: Unless, having been tamed, they are accustomed to depart and return.

5. GAIUS, *Diurnal or Golden Matters*, book 2: [Wild animals] are understood to recover their **natural freedom** when our eyes can no longer perceive them; or if they can be seen, when their pursuit is **difficult**.

As Bartolus sees it, there are actually four issues raised by these texts: (1) Can the statement that what belongs to no one is acquired by the person who first acquires it be applied generally? (2) Can someone prohibit anyone from coming on his land to take something? (3) What happens if I capture a wild animal on someone else’s land after I have been forbidden to do so? and (4) What happens if I capture an animal and then it escapes? Here’s what he has to say about these issues:

Bartolus on D.41.1.1–5pr (cont’d): . . . **[1]** It is opposed that a man belongs to no one, and nonetheless he is not granted to the occupant. Say as in the gloss and in [JI.2.1.12]. **[2]** [D.10.4.15] and [D.43.28.1] are opposed. **[3]** I wish to go into your field for fowling, and even though you prohibit it, I go in; do I acquire a right by my hunting? And the gloss sends you to [D.8.3.16]. The contrary is noted in [JI.2.1.12], but the gloss on [D.8.3.16] is true, and Dy. holds to it. **[4]** Take this case: someone taken captive in a church is ordered by a judge to be released to his own liberty, you let him go a little way and then seize him; have you fulfilled the judgment? Certainly not because such liberty ought to be given to him that his pursuit would be difficult, as in [D.41.1.5.pr]. I add for you [D.50.16.48] with its gloss.”

[1] Ordinary gloss on “by natural law becomes”: “This is not true in the case of a free man, and the reason is that this rule speaks of those things which can be subjected to our ownership, which does not exist in the case of a free man, as in [JI.3.19.pr, 1]. It is also not true in the case of a sick slave cast out by its owner, who is made free. [C.7.6.1.3]. And since this rule seems not to be true in the case of many other things say in how many ways something is said to be no one’s [*nullius in bonis*], as notes [D.1.8.1]. . . .”

[2] The second issue is introduced and concluded by “[D.10.4.15] and [D.43.28.1] are opposed.” Here we know the source of the opposition, though it is not found in the text at which we are looking or in the gloss but in the gloss to the parallel passage that appears in Justinian’s *Institutes*. The cited texts say that owner of acorns that have fallen onto someone else’s land (D.43.28.1) or of treasure buried on someone else’s land (D.10.4.15) may obtain a court order to enter onto the land and get his property. That is obviously not analogous to the situation here, and the distinction is too obvious to need stating.

[3] “What if he takes something after prohibition?”, as the gloss on the “legally forbidden” asks, or as Bartolus puts it “I wish to go into your field for fowling, and even though you prohibit it, I go in; do I acquire a right by my hunting?” When we looked at the glosses on the *Institutes* passage, we said that Accursius argued that the animal taken after prohibition did not belong to the poacher. We also said that this was almost certainly wrong as a matter of Roman law, and that Accursius probably said this in order to protect the hunting rights of Italian lords of his day against poachers. Another passage in the Digest, D.8.3.16, gave rise to the same question:

D.8.3.16: “Divine Pius wrote thus to the fowlers: ‘It is not consonant with reason that you do your fowling on others’ land when the owners are unwilling’.”

Ordinary gloss on D.8.3.16: “The same is true in the case of hunting. But since fowling on another’s land is prohibited by this law, therefore that which is taken does not become his who takes it . . . and if it happens, it seems that it ought to be restored But I [?Accursius] say to the contrary, as in [JI.2.1.12, 13 . . .] But can the hunter be distrained while he is still in the field so that he return what he has captured? Say that he cannot . . . but let [the owner] bring an action of *iniuria*.”

Bartolus: “the gloss sends you to [D.8.3.16]. The contrary is noted in [JI.2.1.12], but the gloss on [D.8.3.16] is true, and Dy. holds to it.”

[4] Bartolus’ treatment of the fourth issue, the problem of the wild animal which escapes, assumes the teaching of the base text and applies it to a hypothetical question that is quite far away from the base text. The citation of D.50.16.48, a reference to the Digest title on the meaning of words where the word ‘freed’ is being expounded, seems to be squarely on point. We may take this comment as illustrative of the tendency of the commentators to carry their arguments further and further afield, away from the fact-situations that are the basis of the original texts.

Bartolus on D.41.1.5.1: “**Natural freedom.**” . . .

D.41.1.5.1: “It has been asked whether a wild animal which has been wounded in such a way that it can be captured is understood immediately to become our property. It was held by Trebatius that it at once belongs to us, and continues to do so while we pursue it, but if we should cease to pursue it, it will no longer be ours, and will again become the property of the first one who takes it. Therefore, if during the time that we are pursuing it another should take it with the intention of himself profiting by its capture, he will be held to have committed theft against us. Many authorities do not think that it will belong to us, unless we capture it, because many things may happen to prevent us from doing so. This is the **better opinion.**”

Bartolus on D.41.1.5.1 (cont’d): “. . . The Lombard Law, de venatoribus. l. pen. is opposed. Solution: that law is one thing this law is another, but by custom the

opinion of Trebatius is approved. And keep in mind this gloss which is cited in the treatise on mills. I begin to make a mill; someone finishes before me; can I prohibit him? And according to the reasoning of the jurisconsult no, because when we begin to build something but have not completed it, it is not ours, as here, unless we completely take it. But the gloss says that custom observes the contrary. But I hold to this law. And reply to this law and say as I said in the matter about mills.”

We noted when we were dealing with the parallel passage in the *Institutes* that Accursius had a rather strange reading of the material on wounding. The Roman jurist Trebatius had held that wounding of an animal was enough if it would enable you capture it. Gaius had held that actual occupation was necessary. Justinian had confirmed Gaius’ view on the ground that “for it may happen in many ways that you will not capture it.” Accursius has a rather strange interpretation of this passage; he seems to think that the judge is to make a factual inquiry into whether the wounding huntsman was likely to capture the animal. When Bartolus gets to the problem of the huntsman who has begun but has not finished, he holds to the text, i.e., Gaius not Trebatius. He notes, however, as does the gloss on D.41.1.5.1 that the Lombard law and custom are to the contrary.

Bartolus then cites his own “Treatise on Mills” (see *Mats.* pp. XIII–4 to XIII–8; this is radically abbreviated here to just the points the we need for the lecture):

There is little in Roman law on mills, and nothing directly on the issue that Bartolus raises in this treatise: whether someone who builds a mill acquires the right to take water from the stream when he begins to build or only when he actually begins to draw the water. It’s all done by analogy. The *pro* (“And it seems that he who first began and first proffered the words of occupation is preferred, for what is begun is taken for completed”, p. XIII–4) and *contra* (“On the other hand, it seems that he is preferred who first led the water or completed the building”, p. XIII–5) that he proposes at the beginning of his analysis (p. XIII-4 to XIII-5) rely on the law of judgments. Like our law, Roman law sometimes cuts off rights at the joinder of issue and sometimes at judgment. Bartolus’ *pro* and *contra* citations are on the opposite sides of this issue. That property rights probably accrued to the discoverer of buried treasure rather than the occupier supports the case of the person who has begun but not completed the mill. The cases on occupation of wild animals, on the other hand, suggest that the builder of the mill must have completed the job. Bartolus’ solution (p. XIII–5) prefers the one who first starts to the interloper. He employs both the distinction between public and common things (rivers, he declares, are public in Roman law [with some justification]) and the distinction between animate and inanimate things (the former are acquired by occupation, the latter by staking out). Finally, he notes in passing a judgment in Bologna dividing water (p. XIII-8):

“So it was decided at Bologna when the commune granted first to the Dominicans water from one river for cooking beans, and afterwards granted it to the Franciscans. For since the water was sufficient for both they divided it in measures, and each order leads it to its place.”

I would suggest that this judgment plays an important role in this complicated story. It illustrates a typically medieval view about property. Accumulation is not favored. If you don’t need the water you must share it with your neighbor. Bartolus’ solution also protects that typically medieval creation, the possession of rights:

“It is apparent that he who began has a better right than he who began next if the latter could foresee that his use would impede the use of him who began first.”

Finally, we might note in passing a slightly nasty bit of anti-Semitism:

“When moreover I have said that he follows up on the work, you are not to understand it in the Jewish fashion that it is necessary that he always and in such a way work that he can neither eat nor sleep.”

Johannes Faber (Jean Faure) on JI.2.1.11–13

Johannes Faber was roughly contemporary with Bartolus. He was French, and not well known in his time, but his focus on the *Institutes* was to become more important as time went on. He was also not well served by the early printers. I have less confidence that I’ve gotten all the references in this text right than I do in the case of Bartolus. What I have been able to make of it is found in the Mats. on pp. XIII–9 to XIII–11, preceded by JI.2.1.11 with the Accursian gloss, which is relevant to Faber’s discussion.

We noted with Bartolus some interest in the top-level generalities, natural law, law of nations, and civil law. Faber is even more interested in it, and what troubles him troubles scholars today. The Roman law texts on the topic are quite inconsistent. Sometimes they seem to equate natural law and the law of nations; sometimes they separate them. Faber regards them as quite different, and he cannot understand why Justinian sometimes seems to regard them as the same. He is also troubled that the gloss, which also notes the inconsistency, does not seem always to have it right. To make matters more complicated, Faber is also trying to reconcile the canonistic sources, as his reference to *Distinctio 1* of Gratian’s *Decreta* shows. His ultimate conclusion is influenced by the canonistic sources, though it does find some support in the Roman texts:

“You should say that the radical beginning of the law of nations proceeds along with human law, viz. natural reason, which constitutes the same thing among all men [Here he probably thinking of the list given in Gratian *Distinctio 1*, c. 7, which itself is partially quoting Ulpian, *Institutes* (D.1.1,1,3): “the union of man and woman, the succession of children, the education of offspring, the common possession of all things, the single liberty of all, the acquisition of those things that are captured in the sky, the earth and the sea.”] But the law of nations itself, he [the reference would seem to be to Justinian] continues, proceeded afterwards with the multiplication of the populace as you can see [in JI.1.2.2] at the words ‘But the law of nations [is common to all human kind. For wars arose and captivities and slaveries, which are contrary to the natural law. For by the natural law from the beginning all men were born free].’ And when it says here that it is older add ‘than the civil law, but pure natural law is older.’”

Faber notes the conflict between the gloss on JI.2.1.12, ‘legally forbidden’, and D.8.3.16:

“‘What if after’ at the end, the gloss holds the contrary of [D.8.3.16] . . . which seems to be truer. For no one can prohibit fowling but entry. . . . But he has no action [i.e., the landowner has no action to prevent the fowling] and the prohibition ought not operate unless with respect to the entry because he did it injuriously, nor does it impede the act. . . . See [D.41.1.55, the case of the boar that fell into the trap] in that it reproves the distinction between of mine and another’s. And in [C.3.32.17, 22, both of which are cited in the gloss], two things are required so that someone may

profit from fruits, receipt and good faith. Here, however, occupation alone suffices. [JI.2.1.13.] But what if he has him impeded by a judge? Surely then he does not make it his own if the inhibition was made with knowledge. [D.41.4.7.5; D.50.12.8 at the end; the first citation is on point. The second is a bit of a stretch, but both support that notion that judicial action can take away property rights.]. For the prohibition of the judge impedes the transfer of ownership, much more its acquisition. [That's a bad argument; the point is that we are not talking about transfer of ownership.] And cite what Innocent notes [X 5.1.27]. And this applies if the judge inhibits hunting; it is otherwise if he inhibits entry for the reason stated above. And by this it appears that he cannot be detained on the land as notes the said law [D.8.3.16]. Today, however, by the custom by which warrens and enclosures are tolerated, it does not seem that the captor makes it his own and that he ought to restore it. For if the prohibition of the judge can do this, as is said, much more so the customary law which can more than interdict the transfer of ownership. [D.47.14.16; C.11.48.7. Both citations seem to be a bit of a stretch, since both fragments concerns fraudulent sales (*fraus legis*).] Whence when such an occupation grants a right by the law of nations, as I said in the last section, by custom it can be taken away and overcome, as I said above, ... which otherwise might seem to stand in the way. [citing JI.1.2.12, ?JI.1.2.11 is probably meant, though he doesn't quite say it in either place. The argument seems to be that just as the primitive natural law was supplanted with regard to the establishment of private property by the law of nations, so too the law of nations may be superseded by custom.] By the feudal law, moreover, hunting with traps is prohibited except for boars, wolves, etc., in [*Libri feudorum* 2.27.5: Constitution of the Emperor Frederick [?I]): 'No one shall lay nets or traps or any other instrument for taking game (*venationes*), except for taking bears, boars, or wolves'.]

Here Faber moves from the authority of the judge to the authority of customary law. He's the only one to discuss customary law at length in this context (what we would expect from the French). This, and his focus on the *Institutes*, will be important for what is to come. He does not deal with the problem of wounding.

Johannes Christopherus Portius with additions by Jason de Mayno on JI.2.1.12–13 (Mats. XIII–12 to XIII–15)

Johannes Christopherus Portius (Parcus, Porcus), taught at Pavia, where he was born, from 1434 into the mid-1400s. He is known principally for his commentary on the *Institutes*. Jason de Mayno (1435–1519), who wrote additions to Portius' commentary, is considerably more distinguished. He was, among other things, the teacher of the great humanist jurist Alciatus. I have little confidence in many of the restored citations in this text. Someone seems to have tried to make sense of them for the printed edition, but ended up, in many cases, with plausible citations that turn out, on balance, to be unlikely to have been the ones Portius had in mind. The commentary of Portius and Jason is even more prolix than that of Faber. It displays even greater interest in natural law.

Note how Portius seems to have Dinus supporting the position of the Accursian gloss that the poacher does not acquire title to the animal, whereas Bartolus had him coming out the other way:

“Dynus, however, holds to this gloss, and I like his opinion, first by the laws alleged in this gloss, but I urge by a reason [*sed suadeo ratione*]: for from the time that the entrant by entering falls into a state condemned by the law, he ought not get any benefit. . . . And by this reason the rule that when something is no one’s, etc., does not stand in the way because that [rule] does not win primacy of place when the entry was vicious. This is proved here in ‘it is clear [that if he goes on another man’s land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose]’, as if to say, ‘Although I told you that so far as acquiring ownership of those things that are no one’s is concerned, it makes no difference whether someone captures on his own land or another’s; nonetheless, this is true unless he takes having entered against the will of the owner’. And by this also it does not stand in the way, because the entry is punished by the action of *iniuria*, because one could by capture take greater profit than one suffered mulct by vicious entry. I confess, however, that the owner of the land may not hold the hunter until he restore what he has captured, if he knows him, and in this I approve the gloss in [D.8.3.16] which expresses this.”

Portius basic argument is from natural equity: no one should profit from his own wrong.

Unlike Faber, Portius considers the wounding problem, and what he says suggests that the rather strange opinion of Accursius that the matter was one for determination by the judge had come to prevail:

“In the gloss on the word ‘catch it’ at the end: This gloss is commonly held so that all this resides in the opinion of the judge. If the beast were so wounded that it could not have turned out other than that he would be captured, for it is prostrate, half-dead, immediately it certainly becomes the wounder’s. This is proven in the verse ‘the latter’ at the place ‘because’ *a contrario sensu*. [I.e., P. is making a negative inference from ‘because many things may happen to prevent us from doing so’.] And I cited this text in the determination of a question committed to me. Someone who at that time was a reverend prelate promised a graduate student [*spectabili*], now a doctor, to checkmate with a black knight. With a knight he drove the king onto the line of [another] knight on which there was a rook behind the knight. Then he removed the knight and said that he had captured the king with the knight. The other said ‘No way [*nequaquam*]’, because the king was captured by the rook not by the knight. I inclined to this judgment because of this text. Although the knight had so forced the king that it could be captured, that was not yet its effect, and therefore it was conceded to the previously occupying rook.”

What does all this add up to?

When we were examining the law of wild animals, we noted that Accursius seemed to be trying to accommodate what his Roman-law texts were saying to contemporary realities by moving in two directions: First, he was quite firm in his opposition to poaching. His opposition led him to hold, almost certainly to the contrary of what the Roman law texts hold, that a poacher, even if he captures an animal, still does not own it. Second, he twisted the Roman-law texts, although he had some support here from a minority view expressed in those texts, to make things easier for the legitimate hunter. In both cases, we suggested, he was trying to protect the hunting rights of lords in his own day. The commentators, because they recognized, as Accursius rarely did, that there was law that

was not Roman law were more willing to let the Roman texts say what they pretty clearly mean. We also noted that the glossators were interested in the texts about capture of wild animals because they raised issues about a more general conceptual concerns about possession. This concern continued. It is particularly noticeable in writers who were trying to make a construct of law that they regarded as the ‘law of nature’, because Justinian had said that occupation of unowned things was one of the ‘natural’ modes of acquisition. There are those who argue that it was the commentators who constructed systems out of the Roman materials. We have argued that system-building was also a concern of the glossators, but system-building certainly continued among the commentators, and the systems tended to become more conscious and more elaborate.

Commentators on Witnesses

1. Let’s take a look at the *Tractatus de reprobatione testium* (“Treatise on the Reproval of Witnesses”), which begins *Testium facilitate et varietate*, that is “The slipperiness and variety of witnesses,” extracts from which are found in the *Mats.* on pp. XII–2 to XII–5. Who wrote it? Jacobus Balduini, a student of Azo’s who died in 1235? Bagarotus, his contemporary, a writer on procedural matters exclusively? Jacobus Aegidii de Viterbo, prior Ameliensis, who cannot be dated, but the 2d half of s.13 is plausible, unless he’s a contemporary of Bartolus’ as Diplovatatus, an early 16th century humanist, says? Bartolus? All of these have manuscript attributions to support them, except Bartolus who is given in the printed text that Diplovatatus edited from an unknown manuscript. My suggestion is that all of them may be right. What we are dealing with here is a “living text,” a text that developed over time to which a number of authors contributed.

“In the name of the lord Jesus Christ and his glorious virgin mother Mary, amen. Here begins the treatise of sir Bartolus de Sassoferrato for reproving witnesses, and in the first place are reprovod, to wit, the infamous, slaves, rectors of churches, or a monk, abbot, etc., friars minor or preachers, and representatives of corporations (*oeconomi*), women, minors, madmen, paupers, infidels and excommunicates, domestics, those who do not swear, those in their own case, concerning the debtor, concerning the seller, concerning the surety, concerning the tutor curator, concerning the *negotiorum gestor*, concerning the judge, concerning the advocate and proctor, if they are single, if in a common cause, if participants and partners, if they are obscure, if the witnesses return to the judge, if they do not say the reason for their statement, if the judge does not interrogate them, if they are enemies or a criminal case is pending between them, if they say one thing for another, if they speak having been corrupted, if they don’t speak the truth, if they don’t give testimony close to the matter that is being inquired about, if the give a premeditated and single speech. Notaries are reprovod who do not write out the saying of the witness in full. If one speaks about one thing and another about another. If one speaks about one person and another of another. If they do not well compute the grade of consanguinity. If they are in discord about the place. If they are in discord about the time. If they are in discord about the matter. If someone speaks about my thing for you and your things for me. When they don’t speak to the matter, because they speak false things

and various things. If they are usurers. Even suspect judges are reprov'd.
Concerning the recusation of judges. If they are received again. If they are otherwise false or were so. If they have testified against you and you want to produce them for you. If they have learned what they testify. If they do not say their saying secretly. If they are not received by the judge. If they want the required number when a certain number is required. If articles are not made for the case. If they depose beyond what is claimed. If they are interrogated about their crimes. If the multitude of them is great. If their sayings are not reduced to public form. If witnesses or instruments are thought to be brought in against themselves. Who are compelled though unwilling and who not. Pimps and tax-collectors (*proxenetae et censuales*) are reprov'd, hermaphrodites, parents and mothers *in finitum*. Concerning children. Concerning those who are in mortal sin. If they do not speak from sight but from credulity and hearing. Whether given witnesses (*testes dati*) are reprov'd, and how, and which not”

Now, you might think that this is no improvement on Tancred. In place of Tancred's neat listing of the relevant disqualifying factors for witnesses, we have bed-sheet list. The old hermaphrodites have returned.

“Hermaphrodites are reprov'd, or not compelled, but the quality of the sex is considered, as [D.22.5.15[.1], 18]. And a hermaphrodite is said to be he who is proven to have both sexes [D.1.5.10].”

What I would like to suggest is that it is an improvement on Tancred. Once you know the basics, you want to know the details. This is the way that Durantis operates too. He gives you all that you might possibly want to know and then some. Who knows. You might have a case involving an hermaphrodite. You're even given a blatant piece of sexism to use against women.

Femina fallere falsaque dicere quando carebit?
Beccharia piscibus et mare fluctibus tuncque carebit.

“When will woman cease to deceive and speak falsehood?
When the fishmonger ceases to have fish and the sea, waves, then she will cease.”

2. Albertus Gandinus was born around 1245. He was trained as a jurist, but spent most of his career as a judge in various Italian communes. His treatise on crimes (*De maleficiis*), which deals principally with criminal procedure, is perhaps the best known medieval work on the topic. It was written in the 1280s. Extracts from it are included in Mats. pp. XII–17 to XII–19. Albertus himself died in around 1310.

The extract concerns how fame is to be proved. The reason that this is important because in Albertus' view if fame is proven, then the judge can proceed to interrogation, and “at least according to some” as Albertus says, to torture. What Gandinus does in the full extract given in the *Materials* is to soften you up with examples from cases in civil procedure where fewer than two witnesses will suffice, so that you will buy the proposition that a judge can proceed to interrogation and to torture on the basis of proof of fame.

“It can be said and it seems that fame is said to be proved as often as witnesses above every exception depose and say that it is publicly said in the city, village or

place about which inquiry is being made that so it happened or so it was done [citations omitted]. But if it is asked whether fame proved by the aforesaid witnesses in this way suffices for a full proof, so that out of it alone one can proceed to a definitive sentence, I reply: it seems that a distinction must be made, whether the question is being asked about civil or a criminal case. For in a criminal case, although proof of fame alone, proceeding from lawful time, place and persons above every exception, leads to indication [*indicium*] and presumption, so that one can proceed, according to some, to interrogation, as is said below in the treatise concerning interrogations and tortures, nonetheless, by that alone no one can be definitively condemned, for no one is to be definitively condemned on the basis of suspicions [citations omitted], for in criminal matters, since the salvation of a man is at stake, proofs ought to be clear and open [citation omitted]. And well I propose and say that on the basis of such a fame as this alone one can proceed to interrogation, because the proof of such a fame makes a presumption and is said to be an argument very like the truth [citation omitted].”

What he says in this extract suggests that proof of fame can be pretty perfunctory. That it can be is confirmed by actual depositions that have survived. Whether everyone went as far as Gandinus is another story. There is much about *arbitrium*, the necessity for sound judgment, in the writers. If you buy what I said in the previous lecture about the need to keep the peace in the Italian city-states, you’ll see what was at stake. But what it was to lead to is perhaps the most unattractive element in continental criminal law and procedure in this period and well into the early modern period, the systematic use of torture.

The problem was the requirement that there be two witness to criminal act itself. Circumstantial evidence would not do unless two people actually saw the crime being committed. That was too strict. The two-witness requirement could be avoided if the defendant confessed to the crime; hence the use of torture to extract the confession. As we noted before the break when we discussed the rise of inquisitorial procedure, we hear, beginning in the 13th century, that “it is in the interest of the Republic that crimes not go unpunished” (*rei publicae interest ne crimina maneat impunita*). In England, where we don’t find the use of judicial use of torture, the solution was to turn the suppression of crime over to the trial jury, a form, we might suggest, of institutionalized public voice and fame. On the Continent, at least in theory and to some extent in practice, more was required than simply public voice and fame. Some of the *podestà* were accused of making too much use of torture, and that was probably the case in some instances.

3. Note the lack of major texts on procedure in the 14th and 15th centuries. in *Materials*. Maranta, the next text in the *Materials*, extracted on pp. XII–19 to XII–25, was published in 1525. That is not because I left something out. No major texts on procedure written in the 14th and 15th centuries exist. What is interesting to me about Maranta’s text is that the material on what kinds of witnesses can be repelled is referred to other authors. That’s simply not something that you need to tell people in an elementary treatise. What you need to tell them is (1) the order in which witnesses are introduced, (2) how the witnesses are to depose, (3) when they can be produced, (4) the protestation that gives rise to the right of repulsion, (5) you can’t repel witnesses whom you have produced, and (6) you can’t reprove witnesses on

appeal. On most of these matters, local rules had been introduced, and the local rules have a tendency to cut down on opportunities for delay. E.g., a maximum of 7 or 10 witnesses vs. the canonic 40.

What is driving these changes is interesting, but you can't see it in the treatises. Where you can see it is in the cases, and to some extent, in the *consilia*.

4. The decision of the Rota Romana on a case from Lisbon on marriage in 1574 (Mats. § 14.E) shows rather nicely the intersection of the problem of rigid rules on witnesses and *arbitrium*. The decision is given in full on the outline. We're dealing with two witnesses in a marriage case, brought by one donna Maria against one don Pedro, and both witnesses are testifying on behalf donna Maria that a marriage was formed. The fact that this is 1574 makes it unclear whether the Alexander's rules are still being applied, but I suspect that they were, i.e., that the alleged marriage occurred before the decree of the council of Trent of 1563 that required the presence of a priest and two witnesses for the validity of the exchange of marital consent, or at least before that decree became effective in Portugal.

The lords [of the Rota] said that diminished faith, at the discretion [*arbitrio*] of the lords, was to be given to Helena de Conto and Catharina Gundisalvi, witnesses examined for donna Maria. And some of the lords thought that absolutely no faith was to be given to the aforesaid Helena, because she is a slave [*serva*], as all the witnesses both of don Pedro and of donna Maria seemed to confess in deposing that she is the daughter of Maria Roderici, an engendered slave [*seminigtae servae*], and the rule is undoubted that the offspring follows the womb. ...

Nor was it pleasing, what was urged on the other side, that servitude is not one of those things that are perceived by the senses, for the witnesses further deposed that she was treated like a slave and was taken for one at home and outside, that she served and that in effect she was called a slave. From which things it is clearly to be inferred that she is in the status of servitude. That seems to suffice that she not be admitted as a witness. ...

Nor do the witnesses of donna Maria stand in the way when they say that the aforesaid Helena was very well treated in that house, and that it was said by many that she was the sister of the same Maria. For it is said, and the witnesses confirm it, that she is a slave, insofar as it is said that her father left her liberty, her father still being alive. Whence she cannot be free by this, because a testament is confirmed by death, as is generally held.

Nor does it stand in the way that she is the slave or freedwoman of the father and not of Maria, for as soon as she is the slave or freedwoman of the father, she is also the slave or freedwoman of the daughter, and thus also of Maria. [D.50.16.58.1].

Further it is said that she is an *aya* or a *cuitos*.¹ Whence it seems to be in her great interest to act so as not to be said to be engaged in bawdry, in which case a witness is repelled. ... And let her not only try to exonerate herself but also her mother

¹ Both words apparently mean "nanny." "Aya" is today a Spanish word and "cuitos" Portuguese, but in this period the distinction between the two languages was not that great.

Since all these things came together, it seemed to some of the lords that she ought be entirely repelled... . Which proceeds even where the truth cannot otherwise be had. ... On the part of some, as I have said, it seemed that she ought to be repelled entirely.

Some said that she ought not be entirely repelled, since some of the witnesses seemed to depose of her reputation and of a certain sort of treatment as a freedwoman, and since the matter is favorable. When there is a case about proof of marriage, in the proof of it witnesses not greater than any exception seem to be admitted, as is handed down to us in [X 4.18.3; Panormitanus *ad X* 2.20.22] in 3 not., more clearly in [Philippus Decius, *Consilium*] 163. col. 4. sub. numer. 7. vers. *octavo oppono.*, after [Alexander Tartagnus, *Consilium*] 146. col. 6. vers. *nec obstat si aliquis*, vol. 5.

Even those who felt this way agreed that her faith should be reserved for discretion, with not a little diminution.

As to the second witness, Catherina Gundisalvi, since she is [Maria's] nurse and her familiarity remains and consequently she still is a domestic, both of which things normally repel a nurse (. . .) and because she desires that the marriage be effectuated, which desire similarly in marriage cases totally rejects a witness (. . .), on this account the lords wanted equally to reserve her faith also for discretion with considerable diminution. So much the more so because between the first and second examination there are certain variations, which although it seemed possible that it [the testimony] could be saved on account of the lapse of time that intervened between the first and second examinations, nonetheless they displeased the lords.

The two witnesses raise slightly different issues:

Helena is a slave (if not a new institution in Portugal in the 16th century certainly one that was expanding), probably the half-sister of the plaintiff. A large collection of material is brought to bear on the proposition that she is a slave. She is the daughter of a woman who was a slave and offspring follows the womb. The testimony that she was treated like a slave, was regarded as one both inside the home and outside, that she acted as a slave and was called a slave is all admissible to infer that she is slave. That she was well treated and was said to be Maria's half sister is irrelevant. The fact that it is said that Maria's father freed Helena in his testament is also irrelevant, because the father is still alive, and testaments do not take effect until the death of the testator. Nor is it relevant that Helena is the slave of Maria's father and not of his daughter, because "slave or freedwoman of the father, she is also the slave or freedwoman of the daughter." She was also said to be "nanny." And nannies must beware of bawdry, another reason for excluding her testimony.

Catherina is a woman of higher status, but she was Maria's nurse, and emphasis is laid on the proposition that she is still a servant in the household, or, at least, that she still lives there. She favors the marriage, which some authorities regarded as grounds for excluding her testimony. Her testimony was also inconsistent, but that could be explained by the fact that a considerable amount of time elapsed between her first and second depositions.

With all this one would think that both witnesses would be excluded. That does not seem to be what happened, however. The clearest statement of the holding comes at the

beginning: “The lords [of the Rota] said that diminished faith, at the discretion [*arbitrio*] of the lords, was to be given to Helena de Conto and Catharina Gundisalvi, witnesses examined for donna Maria.” “Some of the lords,” we are told, thought that absolutely no faith was to be given to the aforesaid Helena.” “On the part of some,” we are later told, “it seemed that she ought to be repelled entirely.” This may well have been the position of the reporter. On the one hand, “some said that she ought not be entirely repelled, since some of the witnesses seemed to depose of her reputation and of a certain sort of treatment as a freedwoman, and since the matter is favorable. When there is a case about proof of marriage, in the proof of it witnesses not greater than any exception seem to be admitted.” For this proposition there seemed to be a considerable amount of academic support. But, we are told, “Even those who felt this way agreed that her faith should be reserved for discretion, with not a little diminution.” There seems to have been more agreement about Catherina: “The lords wanted equally to reserve her faith also for discretion with considerable diminution.”

We noted in *Smith c. Dolling* that the Salisbury court ignored the inconsistencies in Alice’s witnesses and their possible bias, whereas the appellate court at Canterbury paid much more attention to the rules about consistency and bias. We also noted that the further away the court is from the parties, the more likely it is that it will go off on the rules rather than the facts as it sees them. What is remarkable here is that a court in Rome, a long way from Lisbon, is also preserving, for the most part, its discretion. The exclusion of the testimony of slaves, except when tortured in a criminal case, is one of the brightest of the bright-line rules about the exclusion of witnesses. Even here, if we have it right, the majority of the Rota in 1574 wanted to exercise its discretion, though “with considerable diminution.”

As a result of some extraordinary work done on this case by a student the last time that I gave this course, we now know how the case came out. This was just the first of a number of decisions that the Rota issued on the case. Don Pedro’s lawyers tried a number of different ways to get the case dismissed, but ultimately the Rota decided in favor of donna Maria. One of the things that emerges in the later treatment of the case is that this result may not have been totally unwelcome to don Pedro. There is at least some suggestion that his family was more opposed to the marriage than was don Pedro himself.

5. A bottom-line on procedure in the commentators: The commentators on the topic of witnesses, indeed, on the topic of procedure generally, are a bit of puzzle. A considerable amount of material in the style of the commentators, though here by way of treatise rather than by way of commentary on ancient texts, was produced in the second half of the thirteenth century. Durantis’ great *Speculum iudiciale* collects most of this material at the end of century. The treatise on the reproof of witnesses that we just looked at is, at least in part contained in Durantis. Durantis does not seem to have used Gandinus’ treatise. The next extract in the *Materials* from Robertus Maranta is dated in 1525. When we looked at Tancred on witnesses it seemed that key issue was what types of witnesses were going to be excluded from testifying. This is also the focus of Durantis’ treatment of the topic. Maranta, though he cites a number of works on the topic of exclusion of certain kinds of witnesses, works that had been written closer to his time, devotes very little space to that

topic. Though the evidence is certainly not all in, it would seem that between the early fourteenth century and the early sixteenth century when Maranta wrote, the courts, in practice, ceased to follow the rules that even in Tancred's hands were rather rigid. They were, of course, well aware of the possibility of bias, bribery, and lying, but they wanted to listen to the testimony anyway and make up their own minds as to whether it should be believed. The Rota case from 1574 that we just looked at certainly suggests as much.

The Formation of a Persecuting Society?

R. I. Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe 950–1250* (2d ed., Blackwell, 2007) (1st ed. 1987).

1. The development of criminal law in the 13th century.
 - a. *Licet Eli* (p. IX–13) and the development of inquisitorial procedure
 - b. Albertus Gandinus (pp. XII–16 to XII–19): “Whence it is asked how fame can be proven.” (p. XII–17)
 - c. “It can be said and it seems that fame is said to be proved as often as witnesses above every exception depose and say that it is publicly said in the city, village or place about which inquiry is being made that so it happened or so it was done [citations omitted]. But if it is asked whether fame proved by the aforesaid witnesses in this way suffices for a full proof, so that out of it alone one can proceed to a definitive sentence, I reply: it seems that a distinction must be made, whether the question is being asked about civil or a criminal case. For in a criminal case, although proof of fame alone, proceeding from lawful time, place and persons above every exception, leads to indication [*indicium*] and presumption, so that one can proceed, according to some, to interrogation, as is said below in the treatise concerning interrogations and tortures, nonetheless, by that alone no one can be definitively condemned, for no one is to be definitively condemned on the basis of suspicions [citations omitted], for in criminal matters, since the salvation of a man is at stake, proofs ought to be clear and open [citation omitted]. And well I propose and say that on the basis of such a fame as this alone one can proceed to interrogation, because the proof of such a fame makes a presumption and is said to be an argument very like the truth [citation omitted].”
 - d. The use and abuse of torture
2. More's argument. The twelfth century sees the systematic persecution of:
 - a. Heretics
 - b. Lepers
 - c. Jews
 - d. Male homosexuals
 - e. Witches
3. The notion of societal capacity and the difficulty of controlling what one has unleashed.

4. The psychological-anthropological explanation of Moore.
5. The articulated concerns of the reform movement of the 11th century.
6. Religious reform movements that turn to law and those that do not—some suggestions from comparative religion.
 - a. The specific concerns of the reformers, e.g., simony in the 12th century.
 - b. The relation of the reform to a pre-existing legal tradition.
 - c. The goals of the reform in terms of the relationship of the believer to God.