Corruption in pre-modern societies

CHALLENGES FOR HISTORICAL INTERPRETATIONS

Edited by
MARIA FILOMENA COELHO
LEANDRO DUARTE RUST

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the worth of a humble man's word during the Middle Ages

ARMANDO TORRES FAUAZ[1]

The modern political definition of the term corruption presupposes the condition of public agency or the occupation of a public office. It works by opposing the private individual's interest to the public's interest or, more generally, to the common good. In this sense, Klitgaard affirms that "Corruption occurs when an agent betrays the principal's interests in pursuit of her own".[2] This is not completely inapplicable to mediaeval times. In the Middle Ages, however, the notion of public agency or public office is not reducible to Weber's notion of bureaucracy.[3] A public agent need not be someone paid by the public treasure. Several authors have shown that to be a public agent, from Carolingian times onward, meant mostly to take part of public life, which until the end of the eleventh century revolved around the courts, i.e., legal institutions.[4] Not only to be a judge meant to have a public responsibility; witnesses were also socially responsible,[5] as well as co-jurors, guarantors of a public action, etc. In their particular mediaeval sense, all of these were public charges and, as such, they could be susceptible of corruption. But how, specifically?

In the Middle Ages, to act publicly and legitimately meant to act in a trustworthy manner. Were it because every public action presupposed the tissue of fidelities (*fides*) that made up the social bond; or because such an action implied the assertion, the promise, or the confirmation that whatever was being conducted was done truthfully

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[1] Professor and researcher at Universidad Nacional de Costa Rica; Associate researcher LAMOP, Paris I.

[2] KILTGAARD, Robert. *Controlling Corruption*. Berkeley: University of California Press, 1988, p. 24.

[3] WEBER, Max. Legal domination in the direction of bureaucratic administration. In: *Economy and Society*. Berkeley: University of California Press, 1968 [1921].

[4] LEMESLE, Bruno. *Conflits et justice au Moyen Âge*. Paris: Presses Universitaires de France, 2008, p. 35-46.

[5] MAUSEN, Yves. *Veritatis adiutor*. La procédure du témoignage dans le droit savant et la pratique française (XIIe et 5 XIVe siècles). Milan: Guiffrè, 2006.

and openly.[6] This becomes self-evident when, after the twelfth century, the swearing of oaths became a requisite for taking part of public life, as a witness, judge, mediator, arbitrator, party in a lawsuit, and, later, as a city official and even an artisan.[7] Faithfulness (*fides*) can be therefore understood, in this context, as "fidelity to the given word".[8] This is why, to be able to partake of the public sphere, individuals had to be considered trustworthy (*boni, probi, fidedigni*). No one who had a public responsibility or whose actions could affect the common interest could lack this quality.[9]

In this context and from this point of view, to be corrupt meant to trespass against faith. To lie, out of selfishness or other motives, meant to tear the link between promise and act, i.e. to be unfaithful to one's word. All actions against trust or faith bore grave social consequences and were morally and legally condemned, from the *perfidia* denounced by the Church Fathers[10] onto the more formal accusations of perjury and false testimony, which brought about legal punishment, ignominy, and infamy. Witnesses were particularly worrisome in this regard, since their public duty implied the establishment of the facts upon which justice depended, and this was solely done by giving testimony, i.e. by proffering truthful, faithful words. Such an important role in one the most valuable aspects of Christian mediaeval society, which is justice, made jurists pay particular attention to witnesses' potential actions against faith. And one of the greatest risks they perceived was the giving of false testimony in exchange for money or favour, i.e. venality.

With this in mind, mediaeval jurists argued that, although anyone could be corrupted, there were some people more corruptible than others. These could belong to political or social minorities since their condition or provenance casted a doubt over their reputation. Or they could be vicious people whose word had proven to be worthless. Naturally, judges and bishops were corruptible. And indeed, the venality of judges worried early mediaeval jurists who still pulled on the thread of Roman law. As

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6 SASSIER, Yves; FALWOSKI, Wojciech (eds.). *Confiance, bonne foi, fidélité*. La notion de fides dans la vie des sociétés médiévales (VI -XV siècles). Paris: Classiques Garnier, 2018, p. 7-11.

7 DUTOUR, Thierry. *Sous l'Empire du bien*. Paris: Classiques Garnier, 2015.

8 LEFEBVRE, Jean-Luc. Prud'hommes, serment curial et record de cours. Paris: De Boccard, 2006. FORREST, Ian. Trustworthy men. Princeton: Princeton University Press, 2018.

9 TODESCHINI, Giacomo. *Au pays des sans-nom*. Gens de mauvaise vie, personnes suspectes ou ordinaires du Moyen Âge à l'époque moderne. Paris: Verdier, 2015.

10 TONEATTO, Valentina. "*Ut memores sitis fidei nobis promisae*": Notes à propos de la *fides* (IVe-IXe siècle)". In: JÉGOU, L.; JOYE, S.; LIENHARD, T.; SCHNEIDER, J. (eds.) *Splendor Reginae*. Passions, genre et famille. Turnhout: Brepols, 2015, p. 321-328.

well, simony was at the very centre of canonists' debate, especially in the context of the Gregorian Reform. However, there were several legal and social principles that excluded people from priesthood or the judiciary, so that vileness and the low condition of people did not necessarily worry the jurists who were theorising the range of legitimate actions of prelates or magistrates. On the contrary, these preoccupations were central when thinking about witnesses.

Being a witness was one of the very few public roles that could be fulfilled by people outside the most prominent social circles. In principle, anyone who was honest and lived a good and faithful life was qualified to act as a witness, provided he knew what he was testifying about. This entailed a significant risk because it allowed the participation of people whose reputation could not be confirmed and who could be easily corrupted, due to their social position and material condition. In this paper we shall explore the arguments given by jurists to wage down the word of the humble. These arguments are in all cases closely tied to a common model of suitability based, partly, on the social condition of men.

Justice and corruptibility

Justice was the single most important value for Christian political thought. Augustine follows Cicero in this idea,[11] introducing the nuance that men's justice will always be inferior to God's.[12] In the structure of the polity, justice was one of the highest and most important functions, making the magistrate or judge the deliverer of princely and godly justice. From the 5th Century, the law conceived a judge's venality as a major crime, punishable even by death, as can be attested in the very first edict of the *Edictum Theodorici* (6th Century):

> In the first place We have decreed that if a judge accepts money to pass judgment which imperils the life or civil status of an innocent person against the ordinances and provisions of the public law, let him be subjected to a capital penalty.[13]

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[11] CICERON. *De Oficiis*, I, 20: *De tribus autem reliquis latissime patet ea ratio, qua societas hominum inter 11 ipsos et vitae quasi communitas continetur; cuius partes duae: iustitia, in qua virtutis splendor est maximus, ex qua viri boni nominantur; et huic coniuncta beneficentia, quam eandem vel benignitatem vel liberalitatem appellari licet. Sed iustitiae primum munus est, ut ne cui quis noceat, nisi lacessitus iniuria; deinde ut communibus pro communibus utatur, privatis ut suis.*

[12] AUGUSTINE, *De fide rerum quae non videntur*, I - II, 4.

[13] MONUMENTA GERMANIAE HISTORICA (MGH) LL V, p. 152: *Priore itaque loco statuimus, ut si iudex acceperit pecuniam, quatinus adversum caput innocens contra leges et iuris publici cauta idicaret, capite puniatur*. (Translated by LAFFERTY, S.. *The Edictum Theoderici:* A Study of a Roman Legal Document from Ostrogothic Italy. PhD Thesis. University of Toronto, 2010, p. 269).

If the bribed judge's sentence did not affect life or status—meaning freedom—but rather fortune and estate, the corrupted judge would have to retribute fourfold the value of the bribe (*venalitas*) to whomever his sentence had wronged.[14] The *Leges Burgundionum* (5th Century) establish likewise, in a far more reprimanding tone:

> If any of the aforementioned is corrupted against our laws, or if he is convicted of having accepted a prize during a trail he was judging, once his crime has been proved, let him be subjected to the capital penalty, as an example to all.[15]

But these codes were not only concerned with the corruption of judges. They were also concerned with the integrity of witnesses. A witness's oath or deposition affected the functioning of justice just as much as a judge's discernment because it was at the origin of truth. Certainly, testimony alone had no probative value before the 12th and 13th centuries, but it was nonetheless constitutive of proof, alongside the swearing of oaths and the passing of an ordeal.[16] This is why false testimony had to be punished and deterred. In that sense, the *Edictum Theodorici* established that "Those who deliver conflicting or false testimony or provide such testimony to either party [in a suit], shall be sent into exile".[17] A fine of three hundred sous was established as punishment for the same crime in the *Lex Burgundionum,*[18] while, in this code, the fine against murderers was established at 150 sous,[19] which would appear to make false testimony more grievous than homicide.

When dealing with the corruption of witnesses, the *Edictum Theodorici* elaborates on the *Lex Cornelia de Falsis* (81-79 B.C.) which deals with falsehood in a judicial context. This law condemns slaves to torture and free men to exile if they ever testify a lie,[20] accepting favours or money to deliver a false testimony, or to suppress the truth.[21]

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[14] EDICTUM THEODORICI, MGH LL V, p. 152, n. 2.

[15] MGH LL III, p. 527, n. 5: *Quod si quis memoratorum corruptus contra leges nostras, aut etiam iuste iudicans, de causa vel iudicio praemium convictus fuerit accepisse, ad exemplum omnium probate crimine capite puniantur*. (Translation is mine).

[16] GIULIANI, Alessandro. *Il concetto di prova*. Contributo alla logica giuridica. Milano: Giuffrè, 1971; LEMESLE, Bruno. *Conflit et justice au Moyen Âge*...; JACOB, Robert. *La grâce des juges*. Paris: Presses Universitaires de France, 2014.

[17] MGH LL V, p. 160, n. 42: *Qui varium vel falsum testimonium dixerint, aut utrique parti prodiderint, in exilium dirigantur*. (trans. Lafferty, p. 271).

[18] MGH LL III, p. 566-567, n. 80.

[19] MGH LL III, p. 533, n. 2.

[20] JUSTINIAN. *Institutes*. IV, 18 (Ortolan, Paris, 1857).

[21] ELIO MARCIANUS. *Institutionum*, book 14 (2nd Century A.D.): *Dig*. 48.10.1, 2.

These examples illustrate how false testimony in Roman and early mediaeval law was often related to bribery. By accepting or offering money to lie, one was acting against the truth and corrupting justice. This is why the law makers' concern extended to avoiding that corrupt or corruptible people testify. The most obvious way to do so was to forbid that those guilty of false testimony or perjury would ever function as witnesses in a trial, since their word had completely lost its worth. They had acted against faith and were, therefore, untrustworthy. In that sense, the Julian Law on extortion (59 B.C.) stated that those condemned of having received money to falsely testify or to abstain from testifying, as well as the judges who had taken bribes, could never testify or be judges again.[22] This was retaken by Papinianus, who commented on the *Lex Remnia de Calumniatoribus* (80 B.C.), stating that those guilty of extortion or peculate could not be received as witnesses.[23] Likewise, Paul sentenced that those guilty of false or varying testimony were inadmissible as witnesses and should be punished,[24] and Ulpian inhibited those whom had retracted after a deposition.[25] But to have *fide dignitas* meant more than just not being guilty of a crime. Admissible witnesses were only those whose credibility was beyond a doubt (*quorum fides non vacillat)*.[26] So, anything that made a person suspicious would become an impediment to testify. This is why adulterers could not serve as witnesses, neither could convicted criminals nor anyone whose reputation (*fama*) was dubious.[27]

A humble man's word

Apart from those who had committed crimes and perjury, Roman lawmakers and jurists agreed upon the fact that a humble man could never be trusted to be a witness in a trial. Roman law casted a shadow over those who came from lower social strata. Their origin made them prone to vice, thus morally ambivalent. Emperor Justinian, the compiler of the ultimate collection of Roman Law (sixth century), considered that only three things could determine whether a man's word could be trusted (*bonae*

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[22] VENULIUS SATURNINUS: *Eadem lege tenentur, qui ob denuntiandum vel non denuntiandum testimonium pecuniam acceperint. Hac lege damnatus testimonium publice dicere aut iudex esse postulareve prohibetur*. *Dig*. 48.11.6.1

[23] *Dig*. 22.5.13

[24] *Dig*. 22.15.16

[25] *Dig*. 22.15.17

[26] Charisius, *Dig*. 22.5.1.

[27] *Lex julia de vi publica* (1st century B.C.): *Dig*. 22.5.3.5

opinionis esse): either his riches, his military rank or having occupied a public office. No one from ignoble, lesser (*vilissimi*) or obscure origins could ever be trusted because it would be impossible to assess the moral quality of his life.[28] The main idea remains that of *fama,* i.e., the confirmed public opinion of a person. Before Justinian, classical jurists did not think differently. Slaves (*servi*) and servants (*domestici*) were normally inadmissible as witnesses because of their vileness.[29] However, if no other means were available for establishing the truth, their testimony could be admitted.[30] For their words to be trusted, nonetheless, there was no choice but to submit them to torture.[31]

During the Early Middle Ages, the opinion on the suitability of witnesses did not change considerably. Witnesses admissible were those of *bona fides*[32] or *bona conversatio*,[33] who had knowledge of the facts. From the sixth until the eleventh century little changed in this regard. Vicious and untrustworthy people were simply unreceivable. This excluded perjurers[34] and those guilty of false testimony[35] from testifying, obviously, but also convicted criminals,[36] drunkards,[37] idiots,[38] bastards,[39] heretics, and the anathematised,[40] for all of them were considered infamous.[41] Again,

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[28] JUSTINIAN. *Novellae*, n. 90, *De testibus*, c. 1 (539 A.D.): sanc*imus autem, et praecipue in hac maxima et felicissima civitate, ubi plurima consistit (deo favente sermoni) multorum bonorumque copia virorum, bonae opinionis esse oportere testes et aut carentes huiusmodi derogatione per dignitatis aut militias aut divitiarum aut officii causam, aut si non tales consistunt, ex utroque tamen quia sunt fide digni testimonium perhibere, et non quosdam artifices ignobiles neque vilissimos nec nimis obscuros ad testimonium procedere, sed ut si qua de his dubitatio fuerit, possit facile demonstrari testium vita, quia inculpabilis atque moderata est*.

[29] Paulus, *Dig*. 22.5.24; Codex Justiniani, 4.20.3: *Imperatores Valerianus, Gallienus. Etiam iure civili domestici testimonii fides improbatur*.

[30] 22.5.7: *Servi responso tunc credendum est, cum alia probatio ad eruendam veritatem non est*; 48.18.8: *Edictum divi Augusti, quod proposuit Vibio Habito et Lucio Aproniano consulibus, in hunc modum exstat: "Quaestiones neque semper in omni causa et persona desiderari debere arbitror, et, cum capitalia et atrociora maleficia non aliter explorari et investigari possunt quam per servorum quaestiones, efficacissimas eas esse ad requirendam veritatem existimo et habendas censeo"*; 48.18.9: *Divus Pius rescripsit posse de servis haberi quaestionem in pecuniaria causa, si aliter veritas inveniri non possit. Quod et aliis rescriptis cavetur. Sed hoc ita est, ut non facile in re pecuniaria quaestio habeatur: sed si aliter veritas inveniri non possit nisi per tor-menta, licet habere quaestionem, ut et divus Severus rescripsit. Licet itaque et de servis alienis haberi quaesti-onem, si ita res suadeat*.

[31] *Dig.* 22.5.21: *Si ea rei condicio sit, ubi harenarium testem vel similem personam admittere cogimur, sine 31 tormentis testimonio eius credendum non est*; *Dig*. 48.18.18.7: *Servus, nec si a domino ad tormenta offeratur, interrogandus est*; *Dig*. 48.18.10.1. *Sed omnes omnino in maiestatis crimine, quod ad personas principum attinet, si ad testimonium provocentur, cum res exigit, torquentur.*

[32] Childebert's second decree (A.D. 596), MGH, *Capitularia Regum Francorum* I, 7, c. 7, p. 16.

[33] GRATIAN, *Decretum*, Pars 2ª, C II, q.5 , c. 4.

[34] CARLOMAGNO, *Capitularia*, MGH I, 22, c. 65; I, 35, c. 39; I, 44, c. 11.

[35] PAULUS, Dig. 22.5.16; Yves de Chartres, Panormia, V, 36 (PL 161, col. 1277).

[36] YVES DE CHARTRES. *Panormia*, V, 30 (PL 161, col. 1217).

[37] CARLOMAGNO. *Capitularia*, MGH I, 40, c.15.

[38] YVES DE CHARTRES. *Panormia*, V, 32 (PL 161, col. 1277).

[39] CARLOMAGNO. *Capitularia*, MHG VIII, 167, c. 8.

[40] YVES DE CHARTRES. *Panormia* V, 28 (PL 161, col. 1217).

[41] GRATIAN. *Decretum*, Pars 2ª, C. VI, q. 1, c. 18.

the lower strata remained regularly inadmissible as witnesses because of their proneness to vice. They could not fit the model of a morally good man. This is explicitly stated in a letter by pope Gregory the Great (sixth century), which was later retaken by Gratian (1140). There, Gregory establishes that those of low condition (*inopes*) as well as the vile, who were guilty of crimes, could not be received as witnesses.[42] In that sense, the first letter of pseudo-Stephen of the pseudo-Isidorian tradition, dresses up a repertory of people who are excluded from fully belonging to the Christian community, and were thus considered unreceivable as witnesses and excluded from priesthood. Among the almost thirty kinds of rejects contained in this letter, one can find slaves, even if recently liberated, as well as serfs, many kinds of criminals, and people who acted like crazy.[43] This repertory enlarged the one already established in Roman law, or at least systematised it in one single answer. It is important to remember that this letter, although supposedly composed in the seventh century, dates from the middle of the ninth. This means that it expressed a constellation of ideas which were being discussed at the time and that were certainly drawn from previous canonical thought. Perhaps it was due to the indirect influence of episcopal thought on the matter that emperor Louis the Pious (813-840) banned all vile and infamous people from his court, from acting either as accusers, witnesses, or judges. That meant jokers, mockers, pimps, bouffons, those who have concubines, bastards, slaves, or serfs as well as criminals.[44]

The political scene in the early Middle Ages, as late as the tenth century, has been described as a *Dinggenossenschaft*, a cooperative community of people who could legitimately fulfil the different roles in the Germanic judicial assembly.[45] This meant that those who could act legitimately as witnesses, judges, accusers, were so little in number and so high up the social scale, that they had to take turns in fulfilling those roles. Certainly, in Carolingian and later Merovingian times this order of things was

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[42] GRATIAN. *Decretum*, Pars 2ª, C. II, q. 1, c. 7

[43] Pseudo-Stephen, 1st letter. *Epistola decretalis Stephani papae Hilario directa*. *Decretales pseudoisidorianae et capitula Angilramni*. Leipzig: ed. Hinschius,1883. (cited by Todeschini, *Au pays*…, p. 60; 313).

[44] Louis le Pieux, (s.f.) MHG, *Capitularia*, 167, c. 8: *Hoc sancimus, ut in palatiis nostris ad ccusandum et iudicandum et testimonium faciendum non se exhibeant viles personae et infames, histriones scilicet, nugatores, manzaeres, scurrae, concubinarii, neque ex turpium feminarum commixtione progeniti aut servi aut criminosi.*

[45] WEIZEL, Jürgen. Dinggenossenschaft und Recht. Untersuchungen zum Rechtsverständnis im fränkisch-deutschen Mittelalter. Köln: Böhlau Köln, 1985 ; WEIZEL, Jürgen. Die Bedeutung der Dinggenossenschaft für die Herrschaft-sordnung. In: DILCHER, G.; DISTLER, E.-M. (dir.). *Leges – Gentes – Regna*. Zur Rolle von germanischen Rechtsgewoh-nheiten und lateinischer Schriftkultur. Berlin: Schmidt 2006, p. 351-366; NEHLSEN VON STRYK, Karine. Die boni homines des frühen Mittelalters, unter besonderer Berücksichtigung der fränkischen Quellen (Freiburger rechtsgeschichtliche Abhandlungen, NF. Bd.2). Berlin: Duncker & Humblot, 1981, p. 246, 252-254.

not exactly so, given the conquest of vast territories, the organisation of an administrative edifice, and the carrying out of government practices such as the running of enquiries related to custom, the condition of men or of possessions, which were based on the testimonies of local people. Nevertheless, those local people need not only be neighbours of a given community (*vicini*), but they also had to be free, they could not be serfs, nor be of an extremely low social condition. So altogether, legal, and political dynamics of imperial or local courts still excluded an important part of the population. And they did so on account of their untrustworthiness and their vileness. The fact that drunkards, criminals, bastards, idiots, and adulterers were grouped together with slaves, serfs, and those of very low social condition meant that infamy weighed upon all their shoulders. The poor and those of lower condition were then mainly rejected because of their inherent vice, or at least their proclivity to it, just as it was for the Romans and canon law jurists of earlier centuries.

It is important to briefly explain the language of the sources. Like English, Latin condenses the elitist nature of the society and history they helped shape. The English word "dignity" has indeed a moral connotation, and some of its meanings refer to the qualities that render someone worthy of respect. But it also refers to a title, honour or concession awarded to someone by a superior, which grants him/her a high rank or position. Consequently, to lack dignity, to be undignified, might mean to act unworthily, but it can also mean to have no rank or position. The word ignoble works in the exact same way. However, when it comes to the word "vile," taken directly from Latin, it works likewise but in a positive manner. If "undignified" and "ignoble" are defined as the lack of something— negatively vis à vis the concepts of dignity and nobility, the word "vile" positively denotes a condition: that of lowness. It expresses a low quality which again can be moral, but also social. In this sense, the fact that vileness is a synonym of wickedness connotes the assimilation of base morals and base social origins. In our documents, the grouping of pimps, bastards, heretics, serfs, and slaves shows that early mediaeval jurists thought no differently[46]. A noteworthy change did occur after the 11th century pertaining to the reasons for the lower strata to be inhibited from court. Yves de Chartres (1040-1115), a prominent developer of Canon Law, was the first to express it. He wrote in his *Panormia*:

[46] This has best been treated by TODESCHINI, G. *Au pays des sans-nom…*

> Judges should not easily admit vile persons as witnesses. Counts and judges should remember with extreme diligence that vile and undignified people should not be allowed to testify, since there are many who can be driven to swear in exchange for nothing, or in exchange for their own satiation or for a small price. And thus, they risk the loss of their souls.[47]

His ideas are noticeably clear. People from the lower strata, those who were poor or in service, were easily corruptible. Firstly, they could be forced to swear a lie in favour of their master, which is why Gratian (1140) also rejected serfs (*domestici*) from testifying.[48] Secondly, they could be driven to lie under oath in exchange for goods or a little money. This is why their word was worthless in normal circumstances.

Roman thinkers did concede to the fact that there could be extraordinary conditions in which a vile person could testify, notably if there were no other means of proof. Medieval jurists accepted these provisions but, as did the Romans, they saw no other way to exact the truth from the vile if not through torture. "Vile witnesses must not be believed without corporal discussion", affirmed Gregory the Great;[49] while Yves de Chartres was more explicit and little laxer, affirming: "If a vile witness should be produced during a trial, let the judge decide whether or not he must be submitted to torment".[50]

After the eleventh century, the value of witnesses as proof started increasing in the thought of jurists and in legal practice. Before, they mainly functioned as co-jurors alongside one of the parties in a suit, permanently under threat of facing an ordeal if the counterpart contested their testimony. They could also act as mere guarantors to a public act, lending their names as proof that the action had legitimately taken place. But after the structure of the trial and the nature of proof started changing, with the development of juridical thought, witnesses acquired a different worth. They were sworn in and their depositions progressively gained force of proof, to finally displace written documents as the strongest probatory means. This process took place between the end of the twelfth century and the beginning of the fourteenth.

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[47] YVES DE CHARTRES. *Panormia*, V, 24 (PL 161, col. 1277): *Viles personas ad testimonium non facile judices permittant accedere. Summopere admonendi sunt comites et judices, ne viles et indignas personas coram se permittant ad testimonium accedere, quoniam multi sunt qui jurare pro nihilo ducunt in tantum ut pro unius dici satietate aut pro quolibet parvo pretio, ad juramentum conduci possunt, et animas suas perdere minime formidant.*

[48] GRATIAN. *Decretum*, Pars 2ª, C. XIV, q. 2, c. 1: *Domestici ad probationem non admittantur, ut pro his uidelicet, quorum sunt domestici, testimonium ferant.*

[49] GRATIAN. *Decretum*, Pars 2ª, C II, q. 1, c. 7, §. 13: *uilissimis testibus sine corporali discussione credi non debeat.*

[50] YVES DE CHARTRES. *Decretum*, XVI, c. 152 (PL 161, col. 933): *Nullius recipiatur testimonium, nisi ejus qui sont bona opinione, vel vitae honestas, vel artis titulus laudabilis, vel etiam aliorum testium vox, de bona vita ejus consentiens. Alius autem testis vilissimus si productos in judicio fuerit, liceat judici si hoc aestimaverit, tormentis eum subiugere.*

As the content of testimonies was given more attention, the condition of witnesses, though decisive of their deposition's worth, was attenuated by their knowledge of the facts. In this sense, Bruno Lemesle has shown how both conflicting elements are present in the thought of Yves de Chartres.[51] The latter, as we saw, distrusted the humble man's word, but he was also concerned with the fact that the judicial process arrive at the truth and that it lead to peace by assuring the satisfaction of both parties. This is why he insisted that witnesses have knowledge of the facts. Not only those who were of vile origin were then rejected, but also those who only knew the facts by hearsay: "We do not admit the testimony of those who affirm that they heard someone say so as they passed by".[52]

Whom Yves grouped in the same category as witnesses who accepted money and those who were subordinated to either party. Their word was equally worthless. But Yves goes further by attaching more importance to honesty and discretion than to social condition or gender as definitive of someone's trustworthiness. Thus, when referring to a promise of marriage, he asserts:

> I believe you feel, like me, that because, in Christ, no one is a serf, nor a free man, neither a woman, nor a man, all those who are drawn together as a Christian people do not think differently of free men or servants. Therefore, any person of any condition can rationally be admitted to testify as long as he/she lives an honest life and is trustworthy (*boni testimonii)*.[53]

There appears to be an inconsistency in Yves's thought, however, since elsewhere he affirms that *vilissimi* cannot be of *boni testimonii.* This sudden access of equality may seem spurious. Nevertheless, this apparent contradiction relates to the value this thinker, and others, attach to the knowledge of truth, which in this case seems superlative. But also, Louis the Pious and Gratian, both highly distrusting of the vile man's word, are attuned to the same fundamental idea. "It is not credible that someone can have more knowledge of the truth of a matter than neighbouring people,

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[51] LEMESLE, B. *Conflits et justices au Moyen Age*…, p. 206-208. See also LEMESLE, Bruno. Les enquêtes dans la région angevine. In: GAUVARD, Claude (éd). *L'enquête au Moyen Âge*. Paris: École Française de Rome, 2008, p. 41-74.

[52] YVES DE CHARTRES. *Panormia*, V, 25 (PL 161, col. 1277): *Non admittimus autem testimonia eorum qui dicere solent transeuntes se audisse aliquem dicentem, pecuniam sibi sublatam esse, sed nec tabulariorum sola praesentia sufficit, nisi testes quoque rogati se subscripserunt*.

[53] YVES DE CHARTRES. *Epistola* 183 (PL 162, col. 184): *Credo autem vos mecum sentire, quia sicut in Christo neque servus est, neque liber, neque masculus, nqeue femina ita in contractibus Christiani populi quos comu-nes habent liberi cum servis, et omnes homines cujuscunque conditionis, si de his controversia orta fuerit, quascunque personas hoastae tam vitae et boni testimonii ad testimonium rationabiliter posse admiti*.

regardless of that someone's status or wealth", says Louis.[54] While Gratian would reject any witness who was not present when events unfolded.[55]

Since the second half of the twelfth century, the transformation of the legal process and the clearer definition of a canonical procedure brought about the existence of manuals intended for local judges.[56] These manuals, known as *Ordines Judicarii¸* defined quite specifically who could be admitted as an accuser, a judge, or a witness. They were composed locally—the first ones emerging in France during the 1170s. The earliest of these *Ordines¸* the *Rhetorica Ecclesiastica*, composed in Paris around 1170,[57] does emphasise the importance that witnesses have knowledge of the facts.[58] Yet it still openly rejects the testimony of serfs or servants, due to their low condition.[59] So, during the first stage of the definition of the proper procedure, which was to be accepted in most Western mediaeval courts, both ecclesiastical and lay, the importance of knowing the truth did not seem to eliminate restrictions based on social status.

During the 13th century, after the profound legal transformation led by pope Innocent III (1198-1216), a more definitive manual emerged, imposing itself as the main reference for the proper conduction of a legal process. This manual is the *Ordo Judicarius* by Tancred, composed around 1230. Tancred set forth a model based on seven criteria for defining the admissibility of witnesses: *Conditio¸ sexus¸ aetas¸ discretio¸ fama¸ fortuna* and *fides.*[60] *Discretio* and *fides* both refer to trustworthiness and honesty. *Fama* refers to the witness's reputation, *aetas* to his age, and *sexus* to his gender. Tancred rejected infamous people as witnesses, as well as minors. He excluded women but was more concerned with excluding hermaphrodites; an idea that can be traced back to an old tradition rooted on Roman law, related to the ambivalence

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[54] MGH Capitularia, VIII, 134, c. 1: *... quia non est credibile¸ ut de satu hominis vel de possessione eius per alios melius cognosci rei veritas possit quam per illos qui vicini sunt*.

[55] GRATIAN. *Decretum*, Pars 2ª, C. III, q. 9, c. 15: *Testes non dicant testimonium¸ nisi de his¸ que presentialiter nouerunt*.

[56] FOWLER-MAGERL, Linda. *Ordo iudiciorum vel ordo iudiciarius*. Frankfurt: Klostermann, 1984; FOWLER-MAGERL, Linda. *Ordines iudicarii et libellus de ordine iudiciorum* (From the middle of the twelfth to the end of the fifteenth century). Typologie des sources du Moyen Âge occidental, n. 63, Turnhout: Brepols, 1994.

[57] *Rhetorica ecclesiastica*. Emil Ott, ed., Vienna, 1892, p. 36-48 (dates it to 1170 in Paris).

[58] *Rhetorica ecclesiastica*, XII, 1: *Testes facti sunt illi¸ qui in juditio ea¸ quae noverunt¸ dixerint. Non enim de auditu testimonium recipitur* (ed. Ott, p. 116).

[59] *Rhetorica ecclesiastica*, XII, 5 and 6 (ed. Ott, p. 117-118).

[60] TANCRED. *Ordo Juris*, ed. Friedrich Christian Bergmann, *Pillii¸ Tancredi¸ Gratiae¸ Libri de iudicorum ordine¸* 60 *Göttingen*, 1842, Tit. 6, p. 225 ; see also MAUSEN, Yves. *Veritatis Adiutor.* La procédure du témoignage dans le droit savant et la pratique française (XIIe-XIVe siècles). Milan: Dotto, 2006, p. 448-510.

(*vacillatio*) of someone who is neither a man nor a woman.[61] Finally, *conditio* and *fortuna* were indeed related to the social condition and position of potential witnesses. No serf, slave or poor man could be normally admitted to testify, according to Tancred. So, even if he stuck to the idea that the knowledge of truth was definitive of a witness's worth, which he explicitly states,[62] Tancred still considered social conditions to be imperative.

Tancred, however, made an exception regarding the condition of poverty (*paupertas*). A *pauper* was defined by roman law as he who had less than 50 *auri*, which Tancred knew and cited.[63] And to be a *pauper* meant to be rejected as a witness, as we have seen.[64] Nonetheless, the Italian jurist argued that this should only apply to those who could be suspected of lying in exchange for money (*pro pecunia mentiatur*). A poor witness could be an honest witness.[65] Pillio of Medicina, who also wrote an *Ordo judicarius* towards the end of the 12th century, thought the same. In his text, he argued that a *pauper* could indeed be of *bonae famae, opinionis et fidei*[66]. This is a major change regarding previous conceptions, where to be poor immediately meant to be vile and infamous. It does seem that Yves de Chartres succinct ideas had some echo , including that which constitutes the distinction between an unreceivable and an honest witness of low condition, i.e., his corruptibility. And it must be underlined that such corruptibility is clearly defined as the proclivity to take bribery.

In his *Summa Theologiae* (1265-1274), Thomas Aquinas also proposed a model for determining the suitability of witnesses. He established four criteria which founded the exclusion of people as witnesses.[67] First there was guilt, which translated into the exclusion of infidels, criminals and the infamous. Then there was the defect of reason (*defectu rationis*), which meant the exclusion of fools, the crazy, infants, and women—Aquinas being a champion of misogyny. Thirdly, there was affection, which excluded enemies, friends, and servants of either party. And finally, there was the exterior

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[61] *Dig*. 22.5.15.1: *Hermaphroditus an ad testamentum adhiberi possit, qualitas sexus incalescentis ostendit.*

[62] TANCRED. *Ordo*… Tit. 9, p. 239: *Testis autem dicere debet de his, quae vidit et novit et sub eius praesentia acta sunt ; quoniam, si dicat de his, quae ab alio auditu precepit, non valet eius dictum…*

[63] *Dig*. 48.2.1, referred to by Tancred, Ordo... Tit. 6, p. 225.

[64] *Novellae* 90, c. 1.

[65] TANCRED. *Ordo*…, Tit. 6, p. 225.

[66] PILLIO. *Summa de ordine judiciourum*, §. 8, *De testibus*, ed. F. C. Bergmann, Pilii, Tancredi... op. cit., p. 65.

[67] THOMAS AQUINAS. *Summa Theologica,* I, II, Art. 70. See MADERO, Marta. Façons de croire. Les témoins et le juge dans l'oeuvre juridique d'Alphonse X le Sage, roi de Castille. *Annales. Histoire, Sciences Sociales*, 54:1 (1999): 197-218.

condition. This translated itself into the exclusion of serfs and the poor (*pauperes*), because "they can easily be induced to testify against the truth".[68]

Another major legal text of the Middle Ages, the *Siete Partidas*, composed in the court of Alfonso X of Castille after 1260, was heavily influenced by Tancred's *Ordo* regarding the qualities of suitable witnesses.[69] King Alfonso draws up a long list of people whose testimony must be rejected: The infamous (*de mala fama*), those guilty of false testimony, poisoners — which is based in the *Lex Cornelia de sicariis*, murderers, adulterers, rapists, the incestuous, traitors, the crazy, thieves, those who live reprehensible lives, women who dress as men or vice versa, any vassal who has betrayed his lord, and finally the very poor and the vile.[70] Even though there are no explicit reasons given for the exclusion of those belonging to the lowest strata, it is quite evident that Alfonso's text observes the principles established by Roman and Canon Law, which give them a bad reputation because of their corruptibility.

That the poor could be distinguished from the vile when assessing the value of their word is an important technicality that, however, does not seem to have transcended the thought of the second decretalists and late glossators. On the contrary, the jurists of the fourteenth century quite insisted upon the rejection of the poor as witnesses or accusers, by continuing to underline their tendency to accept bribery. Nevertheless, a change did occur at this time, which is of great consequence to our study. As legal thinkers of the time stressed the inaptitude of poor and vile people, they started using the verb *corrumpere* to explicitly name the act of venality. Henry of Segusio, best known as Hostiensis (1200-1271), did use the Latin term *corruptio* as he questioned the worth of a poor man's testimony. However, by corruption he meant the lack of moral quality made evident by actions such as visiting prostitutes, gambling or drinking.[71] This regarded the *fama* of witnesses. However, the word *corruptio* acquired a different meaning in later treatises whilst dealing with the exact same matter.

The first one appears to be Beaumanoir.[72] Later, the idea is highlighted in a quite renown treatise entitled *On the Reprobation of Witnesses*, which was attributed to the

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[68] THOMAS AQUINAS. *Summa Theologica*: *vel etiam ex exteriori conditione, sicut sunt pauperes, servi et illi quibus imperari potest, de quibus probabile est quod facile possint induci ad testimonium ferendum contra veritatem.*

[69] On these other matters pertaining to testimony in the *Siete Partidas*, see MADERO, M. Façons de croire...

[70] Alfonso X, *Siete Partidas*, 3.16.8.

[71] HOSTIENSIS. *Summa Aurea*, Venice, 1505, f. 132 et sq. (cited by TODESCHINI, *Au pays des sans nom*... p. 209.

[72] VITÓRIA, André. Late Medieval Polities and the Problem of Corruption: France, England and Portugal, 1250-1500. In: KROEZE, R.; VITORIA, A.; GELTNER, G. (eds). *Anticorruption in history*. From Antiquity to the Modern Era. Oxford: Oxford University Press, 2018, p. 77-90.

famous commentator Bartolus of Saxoferrato (1313-1357). From the 16th century on, however, a doubt has been cast on its authorship, and it has since been attributed to one Jacob Aegidius of Viterbo,[73] who wrote it near the end of the 13th century.[74] Be it as it may, Bartolus did comment on it, as did his pupil, Baldus (1327-1400). This work is important to us, because it expands on the reasons why the poor should be excluded from testimony:

> The poor must be repelled [from testifying]. They must not be given much faith, since it must be prevented that those corrupted by money should testify. And it is easier to corrupt the poor than the rich.[75]

The same ideas were expressed by Simon de Boraston, an English lawyer of the 14th century, who in his own *Ordo judicarius* (ca. 1338) rejected as witnesses those whose extreme poverty would lead one to believe that they could be corrupted by money.[76] The underlying rationale of both texts is probably explained in the in the words of a contemporary jurist, Jacopo Bottrigari (1274-1347), who in his own treaty *On witnesses* affirms:

> It has been said that more faith should be given to those who have an office or dignity. And the higher the honour, the more one should credit them: emperors more than rulers; nobles more than commoners; the honest more than the dishonest; the rich more than the poor.[77]

So, when we arrive at the crowning moment of mediaeval law, the elitist sentiment underpinning the rejection of the lower strata as witnesses sees the bright light of day. No inuendo necessary. Credibility and social status had again become closely intertwined. Even if all were the same in the eyes of Christ, those who had less could be more easily manipulated through bribery or intimidation. And their corruptibility, which was at the very foundation of their discredit, made them less worthy, less valuable than the good and honest men who could claim full citizenship or full value

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[73] GYMNICH, Jacob. *Tractactus de testibus probandis vel reprobandis*. Köln, 1575, fol. 54.

[74] DONAHUE, Charles. *Comment on the 4th volume of the Tractatus universi iuris (venice 1584–86)*, Harvard, 2014. Available at: https://amesfoundation.law.harvard.edu/digital/tui/TUI1584_auti.php?vol=4.0. Accessed June 15, 2024.

[75] JACOB AEGIDIUS DE VITERBO. *Tractatus de testibus et de eorem reprobatione*, ed. Gymnich, Tractatus…, fol. 56: *Repellentur pauperes, quia non tanta fides eis adhibere debet, quia timor est ne pecunia corrupti testificentur, quia facilius corrumpuntur pauperes quam divites.*

[76] SIMON DE BORASTON. *Compilatio de ordine iudiciario*. (cited by TODESCHINI, Au pays… op. cit., p. 209 : *Nimia paupertate laborans repellendus est de quo presumitur quod pro pecuniis corrumperetur.*

[77] JACOPO BOTTRIGARI. *Tractatus de testis*, ed. Gymnich, Tractatus…, fol. 14: *Et dicendum quod illis potius fides adhibetur, qui sunt in dignitati positi, quanto magis in maiore, tanto magis creditur. Imperatori magis quam presidi. Item magis nobili quam plebeio, magis honesto quam inhonesto, magis diviti quam pauperi.*

in the Christian community.

That this was expressed so bluntly during the fourteenth century can be explained by what Giacomo Todeschini has described as the progressively exclusionary dynamics of late mediaeval and early modern society. This was a moment that saw a highly selective socialisation, capable of totally or partially excluding a great part of the population from the highest forms of sociability, despite being nominally Christian or civil.[78]

Alongside other authors, G. Todeschini has shown how the concept of infamy was central to the forms of exclusion from public life, thus from the legal market, in all periods of the Middle Ages.[79] What remains pivotal is then the concept of *fama*, which is the legal expression of reputation. Infamy could take a very concrete form, as the consequence of being an infidel, a criminal, later a heretic, and so forth. But it could also take a less concrete form, as an inevitable entailment of an individual's objective or subjective condition. For instance, some jobs could give one a bad reputation, such as being a juggler, a joker, or a buffoon, as we have seen above in Louis the Pious capitulary. But this could also be the consequence of being a woman, or to be missing a body part, or, as we have shown throughout this study, of being poor and having a low social condition. This repertory is indeed partly derived from the conditions that early Canon law established as exclusionary from priesthood. However, when it comes to the low social condition and to poverty, Roman law principles of exclusion from the court applied, as we have seen. But the discredit of the poor was also influenced by the fact that the judge could not confirm the reputation of people who were not part of the social elite, *a priori* considered faithful and trustworthy. Their obscure origins were indeed enough to make people of a poor condition suspect of a bad reputation, or infamy.

When bribery became a subject of importance as to justifying the rejection of people of low social condition from the legal market, with Yves de Chartres, an important distinction was introduced. Poverty or low condition need not instantly mean infamy or vileness. Gratian however did not seem to develop on the matter. It was only toward the end of the twelfth century and the beginning of the thirteenth that this distinction was underlined and argued for. It is no coincidence that this was

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[78] TODESCHINI. *Au pays des sans nom*…, p. 25. (Translation is mine).

[79] TODESCHINI. *Au pays des sans nom*..., p. 90.

the juncture at which mediaeval Canon law developed further the concept of *fama*, thus of *infamia*, as a legal mechanism allowing a judge to open a cause *ex officio*, i.e., as indicatory evidence.[80] Therefrom *fama* was something that needed to be proved and that could be the object of an inquiry. This was valid in principle for accusers, denunciatory, but especially for witnesses. It makes perfect sense that the thirteenth-century thinkers we have studied argued for the distinction between the low social condition and the condition of infamy. If the witness or accuser was not stained by the concrete condition of *infamia*, i.e. he was not a drunkard, a criminal, an infidel, a heretic, then his infamy had to be proven, or at least need to be accompanied by a strong suspicion. And, as we saw above, apart from the cited repertory, what could bring infamy to someone of a low social condition was his proclivity to take bribery.

But as the fourteenth century closed in, the difference between the concrete condition of *infamia,* as a legal consequence, and the infamy brought upon someone by his subjective or objective conditions tended to blur. A bad reputation, related to someone's job, his/her condition as a stranger or his/her social condition, tends to overshadow this person's potentially honest, Christian life. The rise of cities, the development of local and international markets, and the further development of the idea of citizenship, as well as the consolidation of more centralised, control-directed legal institutions, made both public life and the legal market far more exclusionary. In this context, the distinction between vile and poor drawn by thirteenth-century jurists lost considerable strength. All poor people were suspicious, and they were so precisely, as it had been argued from the eleventh century, because they could be easily bribed. They were corruptible, now explicitly so. In this sense, it could be argued, however more proof would be needed to that effect, that the use of the Latin noun *corruptio* or the verb *corrumpere* to describe the bribing of the poor, in this particular context, is somehow related to the generalising idea that the poor were prone to sin and vice, i.e. that they were morally deficient, which is what the word *corruptio, corrumpere, -uptus* would more frequently denote until the end of the thirteenth century in the sources we have studied.

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[80] THÉRY, Julien. Fama : l'opinion publique comme preuve judiciaire. Aperçu sur la révolution médiévale de l'inquisitoire (XIIe- XIVe siècles). In: LEMESLE, Bruno (ed.). *La preuve en justice de l'Antiquité à nos jours*. Vol. I. Rennes: Presses Universitaires de Rennes, 2003, p. 119-148.

Final remarks

The theory of proof which prevailed after the thirteenth century, and which serves as the foundation of modern procedural theory in civil law—*mutatis mutandis*, conceives evidence as being extrinsic to the facts. If the object of a trial does not show itself in the most evident matter, what mediaeval jurists called notorious (*notorium)* and modern law calls flagrant, then any proof is but a *post hoc* reconstruction. It is imperfect. However, carefully administered, proof is what "sheds the light of truth over a fact which would otherwise remain in the dark".[81] It works only in the realm of doubt.[82] This is why jurists gave so much attention to the fact that witnesses have knowledge of the facts, because their testimony was the main means of reconstructing the truth of the matter. Medieval jurists after the twelfth century preferred witnesses over documental proof, which they saw as the opposition between *viva voce* and dead words. But because the content of truth in every deposition was paramount, jurists rejected witnesses *de auditu*, who only knew the facts by hearsay, and they demanded that witnesses had been present when events unfolded.

However, there were risks in basing the reconstruction of facts on testimonies, because witnesses could lie. This would pervert the entire process away from the known truth. For this reason, witnesses would have to swear before testifying that they would tell nothing but the truth. Such an oath would expose them to punishment for lying under oath or bearing false witness. But another means was conceived to prevent the perversion of justice, i.e., the examination of the suitability (*idoneitas*) of potential witnesses, which determined the admissibility of their deposition. Suitability was composed of two aspects: knowledge of the facts and trustworthiness, the latter being provable only through the examination of other witnesses who would attest to the main witness's reputation, his *fama*.[83] This is when all the restrictions studied in this paper come into play. According to thinkers like Thomas Aquinas, women couldn't testify because they were stupid. Minors could not testify because they had not yet gained reason. Infidels could not because it meant nothing to them to swear on relics or on the Scriptures; they were faithless. Servants could not testify because they would favour their masters. Enemies of either party could not because they would not

[81] MADERO, M. Façons de croire..., p.98-199.

[82] FIORI, Roberto. *Bonus vir*. Politica, filosofia, retorica e diritto nel de officiis di Cicerone. Naples: Jovene, 2011.

[83] VALLERANI, Massimo. La fama nel processo tra costruzioni giuridiche e modelli sociali nel tardo Medioevo. In: PRODI, Paolo (ed.). *La fiducia secondo i linguaggi del potere*. Milan: Il Mulino, 2007, p. 93-112.

be impartial. Finally, those of the lowest conditions, serfs, and the poor, could not on account, first, of their obscure origins, then, of their corruptibility.

This restriction, though attenuated during the thirteenth century, became generalised in legal thought after the fourteenth, as social dynamics became increasingly exclusionary. And it was not lifted anytime soon after the end of the Middle Ages in the kingdoms highly influenced by Canon Law, i.e., the whole European continent. Andrea Alciatus, who published his Judiciary *Processus Compendium* in Milan in 1535 still rejected any witness on account of his condition. This text was retaken by the most famous manual used in Salamanca for educating future jurists and judges, composed by Pedro de Peralta in the middle of the 16th century.[84]

The same restrictions, taken almost verbatim from *Siete Partidas*, are still present in the most famous of Spanish procedural treatises of the seventeenth century, the *Curia Filippica* by Juan de Hevia Bolaños, published in 1603 and still in use by the end of the eighteenth century.[85] The shadow cast by Roman and Canon jurists over the humble man's word long endured, showing how a man's credibility was indeed related to his status, and showing as well that, in order to be corrupted, one did not need to occupy an office, have an honour or dignity. To be a witness meant to play a role of public concern, since the finding of the truth depended on the sincerity of one's deposition. To betray that duty in favour of one's personal gain came to be understood as an act of corruption. And the word itself, used to describe moral flaws until the thirteenth century in legal treatises, started being used to define venality and bribery, especially when referring to the poor who, as of that time and until the middle of the 20th century, were legally equalled to the vile.

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[84] PERALTA, Pedro de. Orden de proceder en las causas civiles y de appelacion y execuçion de la sentencia y de la cession de bienes. Yten del modo que se guarda en las causas criminales a peticion o de officio y del tormento. Compuesto por el doctor Peralta, catedratico de prima de Salamanca, 1566, Biblioteca Universitaria de Salamanca, Ms. 2590, 6, ed. María Paz Alfonso Romero, Theoria y praxis en la enseñanza del derecho: tratados y prácticas procesales en la Universidad de Salamanca a mediados del siglo XVI, en Salamanca, escuela de Juristas. Estudios sobre la enseñanza del derecho en el Antiguo Régimen, Madrid, Universidad Carlos III, 2012, p. 44-76, (especially, p. 52).

[85] HEVIA BOLAÑOS, Juan de. *Curia Filippica*, Madrid, 1725 [first ed. 1603], p. 60, n. 13.

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