AD PRAEUMPTIONEM OR AD PLENAM FIDEM?
THE PROBATIVE VALUE OF THE ACCOMPLICE’S TESTIMONY
IN MEDIEVAL CANON LAW

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

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

1. **Introduction.**

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

First of all it should be made clear that the term *socius criminis* in the legal terminology of *ius commune* has various meanings. In this context it can be rendered as ‘accomplice’, regardless of further distinctions\(^4\).

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

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


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

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

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

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

2. From Gratian’s Decretum to the Liber Extra.

In Gratian’s Decretum⁶, the main passage which will be taken into account was certainly the c. Nemini, which dated back to Pope Julius I (337-352). The text was inserted among the auctoritates which were used to solve in the negative sense the quaestio III of the causa XV, regarding the probative value of the statement of a woman who had accused a cleric of sexual misconduct. It established that it was not opportune to believe the words of the confessed criminal, as «omnis rei professio periculosa est»⁷, and this should not be admitted, with the exception of lese majesty⁸. Gratian had already drawn the conclusion that a woman, in this specific case, was not allowed to accuse the priest: firstly, because she was a woman, and secondly, because she was a confessed criminal. Nor could she be believed, even for the purposes of condemning the accused.

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

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

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

Also due to the unfitness of the criminosus: C.6 q.1 c.6, Qui crimen.

⁸ To be connected with C.6. q.1 c.22, Si quis cum militibus (= C. 9.8.5), which, strictly speaking, was referring to the premiums due to the delators of a factio.
Roman synod of 499 presided by Pope Symmachus, on the collaboration provided by the accomplices in the crime opting out of the criminal activity as delators (not as witnesses). Their use was allowed for discovering accomplices, as this was a plot against the serving pope (agreements for the election of a new pope), and they were promised impunity on the condition that the persons indicated were convicted «rationabili probatione»

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

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

The ban on admitting accomplices as witnesses was authoritatively

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

The accused’s bad reputation and the accomplice’s testimony could lead to the requirement for the former to swear an oath of innocence. This was provided in the decretal *Significasti* by Alexander III, on the subject of adultery. Following the accusatory statement of the woman accomplice of the crime, and in line with the *ius vetus*¹², the pope ordered the *purgatio canonica* to be imposed on the slandered presbyter¹³.

Nor did Clement III’s (1187-1191) decretal *Cum monasterium* regarding a trial for murder, then inserted in the 2 Comp., stray from the path of the *ordo* as it had been established until that moment. Certainly a fundamental link in the canonists’ construction of a negative rule, parallel to that of the civilists, regarded the testifying capacity of the accomplice. The Roman pontiff had decided that «secundum utriusque iuris statuta de se confessi super aliorum conscientiis interrogari non debent¹⁴, et, crimine laesae maiestatis excepto, de reatu proprio confitentis periculosa confessio non est adversus quemlibet admittenda». For this reason, persons who had

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

¹² C.2 q.5 c.24, *Interrogatum est*.

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

¹⁴ These are the words in the main *sedes materiae* of the *ius civile*, the constitution of Honorius and Teodosius of the 409 in C. 9.2.17.1, *de accusationibus et inscriptionibus*, l. *Accusationis § Nemo*: «... cum veteris iuris auctoritas de se confessò ne interrogari quidem de aliorum conscientia sinat. Nemo igitur de proprio crìmine confitentem super conscientia scrutetur aliena». For other sources on this topic in the *Corpus iuris civilis* see the article cited in note 3.
confessed to the crime of which they were accused could not be interrogated about their accomplices, and their testimony, being dangerous and therefore unreliable, could not be admitted against anyone, with the exception of the crime of lese majesty. This meant that the pope had to require the truth to emerge by «aliis modis et iustis rationibus»\textsuperscript{15} in order to pronounce the sentence of condemnation against the accomplices accused by a priest who had confessed to a murder. At the end of the twelfth century, there was therefore full awareness of the fact that the rule constituted a fundamental principle of the \textit{utrumque ius}.

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

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\textsuperscript{15} Clement III, \textit{Cum monasterium} (JL 16618), 2 Comp.5.6.2, \textit{de omicidio voluntario vel casuali} = X. 2.18.1, \textit{de confessis}. The decretal groups together the provisions of Honorius-Teodosius and Julius I.


of women to testify.

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

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

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20 *Summa ‘Omnis qui iuste iudicat’,* ad D.79 c.2, v. pertulerit (*Summa ‘Omnis qui iuste
decretists to put forward this explanation in the margins of the texts that admitted the testimony of the *socius criminis*.

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

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


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

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

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

3. **Ad praesumptionem**: the exploit of Honorius’ *Summa*.

For a long time the masters in decretists’ schools taught that in general a confessed criminal was not allowed to accuse or testify against his accomplices. Following on from Gratian, this development can be seen from the first *summae* interpreting the c. *Nemini* which declared that a woman, as written in C.15 q.3, was not allowed to accuse a priest of sexual misconduct, or to testify against him for two reasons, one of which was her
condition of confessed criminal. In cases where the confessed criminal was allowed to testify, in other words in the excepted crimes, the accomplice’s testimony was not considered a problem, nor was it considered necessary to introduce any further requirements for that testimony to have effect. In other words, in cases which admitted the testimony of accomplices, they appear to have been considered witnesses like the others, and the jurists’ interest was entirely devoted to the identification of the excepted crimes.

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

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


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

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

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

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

28 Honorius, *Summa De iure canonico tractaturus*, ad C.5 q.5 c.4, Illi qui, v. diversis cruciatibus (ed. cit. note 26, p. 112): «Set obicitur: Hii repelluntur ab accusatione, qualiter ergo eorum confessioni creditur cum qui repellitur ab accusatione et a testimonio, cum contra sit iii. Q.iii. c.i. (C.4 q.2-3 c.1)? Resp.: Eorum confessio pro testimonio non accipitur set pro responso, ut iii. Q.iii. § item in criminali, ibi: Serui responso (C.4 q.2-3 p.c.2 c.3 §9).
The concept of presumption, the doctrine of which was developed in the same period by the canon and civil schools of law\textsuperscript{29}, was useful to Honorius of Kent to attract and integrate within their limits the effect of the statements by persons whose credibility was suspect, affirming an innovative result that went beyond the text. The effect of such testimonies was precisely that and only that of a presumption. With this hugely interesting statement, not contained in the texts, Honorius took up again an interpretation of the \textit{Summa Lipsiensis}, and therefore of Rodoicus Modicipassus, and he taught expressly that a similar statement should not be believed in the same way as that of a witness, but only for the purposes of a presumption. It is interesting to highlight here that the two masters of the Anglo-Norman school qualified the servant’s statement as a presumption and not as an ordinary testimony\textsuperscript{30}. This is because it will

\begin{flushright}
Nec tali responso creditur ad condemnationem set ad presumptionem, que posset reum cogere ad purgationem».
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\textsuperscript{30} \textit{Summa 'Omnis qui iuste iudicat', ad C.4 q.2 et 3 c.3 § 9 Servi responso credendum} (ed. cit. note 20, Tom. II, Città del Vaticano 2012, p. 225): «ad presumptionem»; ad C.5 q.5 c.4, \textit{Illi qui in fide} (p. 241): «Tales admituntur non tamen pro testibus, set ut ab ipsis quoquo modo rei veritas excutiatur, sicut vox serui pro testimonio non recipitur, eius
subsequently be seen that others would use similar reasoning at a later date with regard to the statement of a *socius criminis*.

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


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

It appears that the first to hold such an opinion about the *socius criminis*, in the margins of *c. Quoniam* and of *c. Veniens* della 1 Comp., was Richardus Anglicus at the end of the twelfth century, in his apparatus to the 1 Comp. (1197-1198)\(^{32}\). However, if what has been established above is
acceptable, he merely applied to the normative hypotheses of those decretals a thesis that had already surfaced in the doctrine of the decretists, at least with reference to the discipline of the testimony of servants.

For interpretation of Gregory the Great’s letter, it is possible to document a tradition of thought that from Richardus, through Alanus Anglicus and Tancred, a pupil in Bologna of Azo and Laurentius Hispanus, leads to Bernard of Parma33.

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

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

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

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

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

34 Richardus Anglicus, App. ad 1 Comp.2.13.9, de testibus, c. Veniens, ms. Bamberg, Staatsbibliothek, Can. 20, f. 13rb: «§ ar. quod de se confessio non creditur super crimen alieno... Soluto: de se confessio non creditur super alieno crimen quo ad convictionem, creditur tamen quo ad presumptionem, ut his legibus continetur exceptis criminibus, ut vi. q. i. § Verum (C.6 q.1 p.c.21)». Richardus had studied canon law in Paris and had come into contact with Honorius’s scientific circle.
Tancred’s apparatus, to the *Glossa ordinaria* to 1 Comp.\(^{35}\) (but not into Bernardus Parmensis’ ordinary apparatus).

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

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

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


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

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


The interpretation of the I. *Provinciarum* claimed by Petrus Brito in this important work, on which Anne Lefebvre-Teillard drew attention, is also mentioned in other *apparatus* coming from the same *milieu*.
Like Richardus Anglicus, the Parisian canonists knew well the Roman texts on the subject, and they applied the theory of presumption, understood as the presumption of the *purgatio canonica*\(^{41}\) to one of these in particular [C. 3.12.8(10)], on the subject of robbery – a crime that was excepted in Roman law.

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

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

\[^{41}\text{In future applications, the accomplice’s deposition would be used as an } \textit{indicium ad torturam: } \text{discussed extensively by Chiodi, } \textit{Tortura ‘in caput alterius’, } \text{cit. (note 3), and } \textit{Nel labirinto delle prove legali, } \text{cit. (note 5).}\]
effect of the accomplices’ statements. What emerges is a doctrinal construction that developed gradually, by means of contributions from various minds. Some masters maintained that in the *excepti* cases, in which *leges* and *canones* made it possible to believe the accomplices, this could not be done *sic et simpliciter*: more evidence was necessary to assist and support the naming of the accomplice. The jurists who put forward this idea also took care to find a textual base for it in the papal *ius novum*.

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

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\(^{42}\) As demonstrated by Lefebvre-Teillard, *Petrus Brito, auteur*, cit. (note 38).


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

For a detailed interpretation of this decretal: L. Kéry, *Inquisitio – denunciatio –
decretal *Per tuas*, by means of the reservation «aliis adminiculis suffragantibus» (maintained in the *Liber Extra*45). However, reference was also made to the thesis of presumption.

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

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GIOVANNI CHIODI

Petrus Brito’s attention for the passage in question of the decretal *Licet Heli* is also apparent from glosses to the apparatus to 1 Comp.composed in his school\(^{47}\).


The above-mentioned gloss includes the interpretation of the l. *Provinciarum* already ascribed to Petrus Brito (Petrus abbas) in the other apparatus of the Parisian school (above, note 40): confirming the attribution of the work to this law scholar. For more information regarding the author see Lefebvre-Teillard, *Petrus Brito legit*, cit. (note 38), pp. 161-162; Ead., *Magister B.*, cit. (note 38), pp. 12-13.

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

For further proof of this line of interpretation see App. *Bernardus Papianus prepositus* ad 1 Comp.2.13.9, *de testibus*, c. *Veniens ad nos* (ms. Saint-Omer, *Bibliothèque municipale*, 107, f. 32rb): «Nos dicimus sine distinctione aliqua quod infames in exceptis criminibus s. simonia lesa maiestate ad accusationem contra prelatos admittantur ut c. Tanta, sed oportet quod per idoneas personas semper fiat probatio i. e. De cetero (1 Comp.2.13.14 =
The author of the apparatus *Animal est substantia*, a pupil of Pierre Peverel\(^48\) who adopted the same interpretation as Petrus Brito on the need for further evidence in order to give credit to the statement of an accomplice, added instead the controversial decretal *Quamvis ad abolendam* (JL 16635) attributed to Clement III\(^49\).

hic ergo habemus quod in exceptis criminibus admittitur particeps criminis ad accusationem et etiam bene admittitur talis ad testimonium. In criminibus exceptis tamen cum aliis probationibus, extra t. de simonia Quamvis (Gilb. 5.2.3; 2 Comp.5.2.6). Tamen si particeps criminis ducetur odio vel esset capitalis inimicus non admittitur et in exceptis criminibus extra t. de exceptionibus (sic) Licet Heli sacerdos (Alan. App. 29; Gilb. Brux. 5.1.2; 3 Comp.5.2.3). Sunt etiam aliis speciales casus in quibus particeps criminis bene admititur, ut si maritus accusat uxorem et illa replicat de lenocinio mariti bene auditur et illum honorat non se tenebat, ff. de adulteris l. i. §Si publico (D. 48.5.2.5). \(^5\)Similiter si confiteatur aliquis se dedisse pecuniam iudicii bene admittitur contra eum, co. de pena iudicis qui male iudicavit in authentica Nemo iure (rectius Non iure, p. C. 7.49.1). Similiter in crimen false monete bene admittitur socius criminis, co. de falsa moneta l. i. (C. 9.24.1) et etiam de insignibus latronibus creditur socio criminis, co. de feriis Provinciarum [C. 3.12.8(10)] et hoc verum est quod cum tormentis credendum est talibus, ut dicit ma. PP., aliter non. h tamen intelligit legem istam quando prius confiteetur super alieno crimen, post modum de se\(^6\). Similiter in simonie particeps criminis admirritur lxxix. d. Si quis papa (D. 79 c.2) et etiam sacrilego ii. q. i. In primis (C.2 q.1 c.7), tamen


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

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

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

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

\(^{51}\) This methodological profile coincides with the judgement of Chris Coppens, according to whom the author of the App. ‘Animal est substantia’ was a more complete law scholar than Pietro Brito.
under torture. The most ancient decretists (such as the author of the *Summa Parisiensis*, to remain in the same scientific context) attest to their knowledge of this Roman law rule in the canonical procedure.\(^{52}\)

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

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

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

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

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

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

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


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

Johannes Teutonicus, in his ordinary apparatus to Gratian’s Decretum, instead clearly went back to uniting Compostellanus’s directive on the need for further evidence (or presumptions) in support of the accusatory statement to the theory of the full probative (and not merely presumptive) value of the statement corroborated by some presumption. As was customary for him, however, he failed to mention the name of his predecessor58. Years later this led the ever-well-informed Guido de Baysio

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


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

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

quin talis confessio debet facere preiudicium confitenti et non aliis, ut ff. de questionibus l. Repeti (D. 48.18.16.1) et ff. de re. iu. l. Sciendum (D. 42.1.25).


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


7. The horizons of the thirteenth-century decretalists.

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

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

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

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

Tancred, App. ad 2 Comp. 5.6.2, de omicidio voluntario vel casuali, c. Cum monasterium, ms. Bamberg, Staatsbibliothek, Can. 20, f. 94va; Can. 19, f. 111va, v. aliis modis: «s. legittimis probationibus, eo quod eius confessioni in preiudicium aliorum non
Another very authoritative exponent of this interpretative current was Innocent IV\textsuperscript{63}. It inspired also Guilielmus Duranti’s \textit{Speculum iudiciale}\textsuperscript{64}.

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

\begin{quote}
\begin{itemize}
  \item If the accomplice did not have a reason to believe, «ad convincendum, but only ad praesumendum»
  \item If the accomplice had a reason to believe, «ad probationem»
\end{itemize}
\end{quote}


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

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

which instead the judge could give full faith to the words of the accomplice. However, Goffredus did not specify whether other adminicula were required.\textsuperscript{66}

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

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

\textsuperscript{67} Henricus de Segusio, \textit{Lectura} ad X. 2.18.1, de confessis, c. Cum monasterium (\textit{In secundum Decretalium librum Commentaria}..., Venetiis 1581, f. 71vb), v. confessi: «nulli ergo de se confesso creditur super crimine aliorum... et hoc verum est preterquam in casibus. Sicut est in crimen lese maiestatis... Et in latronibus excellentibus... et in falsa moneta... et in simonia... Sed videtur quod generaliter sit et de alis inquirendum, ut i. de...
had tried to get around the prohibition to interrogate the confessed criminals. They had proposed first interrogating the accused on his accomplices, and only afterwards on his own involvement. This was an inversion of the *ordo iuris* that Hostiensis criticised because it went against a Roman text. Also Baldus de Ubaldis, in the following century, condemned this singular thesis, considering it a fraud against the law. As outlined above, both opinions had already appeared in the doctrine.

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

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


\[\text{69 Johannes Teutonicus, App. ad 3 Comp.2.18.12, \text{de sententia et re iudicata, c. Cum I. & A.} (ed. K. Pennington, Johannes Teutonici apparatus glossarum in compilationem tertiam, Città del Vaticano 1981, p. 330), v. recipi: \text{«set nonne alii de ecclesia, qui forte sunt ydonei, possunt illos repellere, cum sint criminosi et per criminosos non debent convinci? Certe credo quod sic, et quod hic dicitur quod tales admitti possunt, intelligo}}\]
Bernardus of Parma, taking up Johannes’ thought, also expressed the idea that such witnesses, within the limitations Innocent III had deemed admissible, were acceptable «non quantum ad plenam fidem faciendam, sed ad presumptionem»; but with the addition of further elements that could have also had probative value: «cum aliis adminiculis probabunt»70.

On the other hand, at least in the ordinary Gloss the decretal Venerabilis frater of Honorius III did not give rise to specific observations on this point. He allowed some citizens involved in the serious crime to testify to a plot against the archbishop of Ravenna71. Bernardus, nevertheless, took care to point out that these were testimonial depositions of minus idonei persons, which were accepted due to the lack of more trustworthy witnesses. Note that this ratio was in itself very wide and susceptible to application also out of the specific case of the plot, with the risk of extending the conditions of its use to theprobative value of accomplice witnesses in each type of crime, which in practice could not be proven otherwise72.

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

The investigation carried out is a prerequisite to understand how the

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


72 Bernardus Parmensis, App. ad X. 2.21.11, de testibus cogendis vel non, c. Venerabilis frater, v. iuramento absolvant: «Item habes hic, quod socius criminis admitterat ad detegendum conspirationem, imo certe tenetur illam conspirationem manifestare et denunciare... Item in defectum probationis minus idonei testes admitterentur, qui alias non admitterentur.... Et propter defectum testium admitteruntur, qui alias admitteri non debent...».
problem regarding the probative value of the accomplices’ statements in proceedings against heretics was solved. In this sense an important step is represented by the decretal *In fidei favorem* by Alexander IV, included in the *Liber Sextus*. With this, the pope, referring to proceedings carried out according to the inquisitorial procedure, also admitted to testify excommunicated persons and those who had taken part in the crime, specifically demanding, however, that the judge look for further evidence, indicated with greater accuracy of the details with respect to the earlier rules. He ordered, in fact, to scrutinize the reliability of the statements on the basis of likely conjectures, the number of witnesses, the quality of the persons and other circumstances. Also in this case the pope, using a technique already used by his predecessors, authorized a derogation of the rules concerning testimonial evidence, limiting, however, the *arbitrium iudicis* with the obligation of a more analytical verification.\(^{73}\)

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

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

\(^{74}\) The issue is not dealt by B. Schnapper, *Testes inhabiles. Les témoins reprochables dans l’ancien droit pénal* (1965), in id., *Voies nouvelles en histoire du droit. La justice, la famille, la répression pénale (XVIème-XXème siècles)*, Paris 1991, pp. 145-175, p. 158, that merely indicates the decretal *In fidei favorem* as an important stage in the history of the probative value of the statements of unfit witnesses.
full proof, but only a presumption or circumstantial evidence. The roots of this theory have been examined and are now used to limit the scope of an exception and privilege, which appeared to be even greater. The sources converge in referring to the thinking of Franciscus Aretinus, and therefore to a supreme canonist of the late fifteenth century, as the authoritative leader of this line of thought, destined to success and consolidation in the most important works on proceedings against heretics. This interpretation limits the apparently more disruptive

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

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

The exception provided for by the c. In fidei favorem was also pointed out by fourteenth century sources. Nevertheless, I did not find doubts or discussions regarding the value of the witnesses’ statements. E.g. see B. Gui, Practica inquisitionis heretic pravitatis, C. Douais (ed.), Paris 1886, IV pars, D., pp. 214-215; il «De officio inquisitionis». La procedura inquisitoriale a Bologna e Ferrara nel Trecento, Introduzione, testo critico e note a cura di L. Paolini, Bologna 1976, III, pp. 113-114; the already mentioned
capacity of the decretal *In fidei favorem*. Nevertheless, if the statements of two accomplices could not be used as evidence of full proof against the defendant, but only as presumption (subject to various outcomes: inquisition, torture, extraordinary punishment according to the case in question), those of three or more accomplices could, on the other hand, be used. At least three witnesses, therefore, could have led to conviction. *Numerus tollit inhabilitatem*: a result excluded by law scholars for other *crimina excepta* according to *ius commune* and valid, on the other hand, for heresy, on the basis of the wording of the text of the decretal of Alexander IV. It is therefore the most important outcome to point out, to complement the research carried out in these pages.77

9. **Conclusion.**

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

Apparently, the answer should be fairly obvious: as a rule for both canon and civil law jurists, the *socius criminis* was barred from testifying. In reality, however, it was not so straightforward: in exceptional cases, the accomplice was allowed to testify. Among the excepted crimes, in which the accomplice’s testimony was given value, there were for instance lese majesty, simony, heresy, and robbery – a dangerous and fearful scourge of medieval society: for these crimes the word of the accomplice was often the only means available to ascertain the truth. On the other hand, once accomplices were admitted as witnesses – in special cases – the question
arose as to the effects of their statements. Could full faith – *plena fides* – rest on them, like on the others? Reading the opinions expressed by the civil law glossators, resorting to the concept of presumption, it emerges that the answer was negative. «Non erit plena probatio, sed aliqua praesumptio»: this was exemplified by Hugolinus and expressed in a well-known gloss by Accursius. The canonists who sought to find a solution to this question did not all agree. Therefore tackling the history of the effects of this testimony is important, and it becomes possible to clarify the stages that led, in the doctrinal debate, to the medieval law of proof, with particular reference to the criminal procedure.

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

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the judge in the probative context of canonical procedure\textsuperscript{79}.

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

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

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