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

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

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

1. **Introduction.**

The treatises by fifteenth-century jurists were distinct from those that would be written the following century. Thanks in part to humanist influences, the jurists believed it was necessary to make sources more accessible through treatises that focused on a single theme; they also experimented with new paths and new forms of language in an attempt to bring order to the growing number of sources. These varying approaches to their works were dependent upon the origins and the education of the jurists themselves\(^1\).

In 1568 in Venice, Giovanni Battista Ziletti published a collection of works on witness testimony\(^2\) entitled *Tractatus de testibus probandis, vel reprobandis variorum authorum*\(^3\). It contains many works that were written between the thirteenth and sixteenth centuries, including numerous writings by fifteenth-century authors\(^4\).

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

There is no unifying structure to the works in the collection\(^5\): for example, Tindaro’s *de testibus variantibus* is organized as a dialogue; and while the first part of the collection frequently delves into the characteristics and conditions that make a witness *inhabilis\(^6\)*, not all of the works are organized in this manner. Furthermore, it is not uncommon to read a text that opens with a description of its structure and the reason behind the author’s decision to write about the subject – namely, a need to consolidate the various writings on testimony to a more accessible form – while other works forgo a preamble entirely. Some works leave no doubts as to their practical aims and go into a detailed examination of a series of case studies; in others, the author keeps a tight grip on the reins and goes the route of theory, though sometimes the discussion becomes so rarefied that it is of hardly any use for the *practicus*, which would be better served by separating the subject into *regulae e fallentiae*.

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

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auctoritates\textsuperscript{7}. Although they did not renounce the past, the exponents of fifteenth-century legal doctrine were fully aware of their own self-worth\textsuperscript{8}. Indeed, the two authors that we are going to examine in this article, Nello da San Gimignano and Alberico Maletta, were active participants in the political life of the era (the former in Florence, the latter for the Houses of Este and Sforza). This is only further evidence of the strong role jurists played in society and of the power their profession commanded\textsuperscript{9}. Nonetheless, the two were very different from one another, and it is interesting to place them side by side for a comparison\textsuperscript{10}.

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

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


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

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

\textsuperscript{10} M. Miletti refers to both of them in Il nemico capitale. La ripulsia del testimone nelle pratiche di età moderna in «Acta Histriae» 19 (2011) f. 1-2, pp. 105-126.
Visconti-Sforza era were granted ample opportunity to assert themselves in an experimental process of state-building.\(^{11}\)

2. **Nello da San Gimignano.**

Nello studied in Bologna during the 1390s, but he spent his professional career in Florence.\(^{12}\) The Cetti family was from San Gimignano, where Nello was born in 1373; besides practicing law, he also served the city of Florence as an adviser and diplomat; in 1424 he wrote two minor treatises entitled *de bannitis* and *de testibus.*\(^{13}\)

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

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

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

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15 The *Tractatus de testibus et eorum reprobatione, d. Nelli de Sancto Geminiano I.U.D.* in *Tractatus de testibus probandis vel reprobandis variorum authorum per Ioannem Baptismat Ziletum Venetum I.U.D. in lucem editi*, Venetiis 1568, ff. 117-167, consists of 251 §§. The work is also published in *Tractatus Illustrium in utraque tum pontifici, tum cesarei iuris facultate lirisconsultorum, De Probationibus. Tomus Quartus*, Venetiis 1584,
immediately clear from the short *incipit* that the tone of this work is different than that established in the *praemium of de bannitis*: Nello almost impatiently declares that he undertook the treatise at the insistence of his colleagues\textsuperscript{16}. While *de bannitis* examined the geopolitical situation of the Italian communes at the macro level and promised original and systematic solutions, *de testibus* sought to model itself on Durand’s *Speculum* and provide answers at each step of the way\textsuperscript{17}. Though the work would be remembered as having been professionally executed by a confident author of proven experience, it would not be as appreciated as *de bannitis*.

A comparison of Nello’s work with other treatises *de testibus* reveals the varying approaches taken by the different authors. For example, Tindaro dedicates his entire treatise to the subject of the *testis varius*, and he focuses on the l. *Eos* in the New Digest: in discussing the *opinio Bartoli* as regards that law, he develops a theory of contradictory testimonies\textsuperscript{18}. On the other hand, Nello reserves but a paragraph in the second part of his work for this same issue: in it, he asks himself which testimonies can be described as *diversa et varia*, and he responds that such depositions are provided by a witness who does not remain firm (*non stat firmus*) in his positions, whereas a witness who is uncertain about his version of events will reveal his doubts while testifying. He quotes Bartolus and concludes with a reference to the *Speculator*, who acted as his Virgil in the ‘dark forest’ that was testimonial evidence\textsuperscript{19}.

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

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

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

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

\textsuperscript{19} Nello da S.G., *de testibus*, n. 216, f. 162.
Tu advocate etiam respice an probatum sit verbum principale libelli quod substantiam voco seu substantivum ...  

and:

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

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

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

\[20 Nello da S.G., *de testibus*, n. 154, f. 153. \]
\[21 *Ib.*, n. 172, f. 155. \]
\[22 *Ib.*, nn. 1-35, ff. 122-129. \]
\[23 *Ib.*, nn. 3 e 4, f. 122. See Miletti, *Il nemico capitale* (nt. 10), p. 108 and p. 112. \]
\[24 Nello da S.G., *de testibus*, nn. 36-58, ff. 129-133. In the step dedicated to a summoned witness who does not appear before the Court, Nello describes two concrete hypotheses: that of a witness who, summoned to prove the existence of a contract, has confided to the judge out of court and not in *figura iudicii* that he was not present at the conclusion of said contract (in which case he will be forced to repeat the
structure of Nello’s text begins to differ from that of the Bishop of Mende. Indeed, Nello continues with an analysis of oath-taking, and the consequences that result when an oath is improperly taken or not taken at all\(^{25}\); he describes the phase of the trial in which testimony is given, namely after the *litis contestatio*\(^{26}\); and then he elaborates on the number of potential witnesses\(^{27}\), as well as those cases in which one witness is sufficient. As regards the latter, he presents the *regula ‘unus testis nullus testis’* along with no less than 29 *fallentiae*\(^{28}\). Nello did all of this because he wanted his treatise to be extremely useful for drawing up a list of witnesses, as well as preparing a series of *oppositiones* to those of the opposing party\(^{29}\). In keeping with standard courtroom procedure, at this

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

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


\(^{29}\) On presentation and judgement procedure on *oppositio* grounds, see Mausen, *Veritatis adiutor* (nt. 2), pp. 387-462.
point Nello begins an exposition of how a witness is to be examined, in which he specifies who must carry out the examination, how the depositions are to be transcribed, and who is to transcribe them. On the other hand, the Speculator had followed up his exhaustingly detailed list of reasons for witness inadmissibility with an analysis of when and how witnesses are admitted (quando et qualiter sunt testes recipiendi); this part also featured a noteworthy digression on the examen as conducted by a delegate. Only after these considerations did he deal with the issue of oath-taking. It seems that Nello sought to cater to the needs of those who practice law, and organized his treatise accordingly: though the extensive lists of cases and solutions tend to weigh down his writing, the work is nonetheless shorter and less chaotic than the Speculum. Nello’s discussion of how to carry out the examen includes the formulation of the following: the articuli, which state the version of the facts as seen by the party on behalf of whom the witness has been called to testify; and the interrogatoria, which are the questions to be asked by the opposing party. Durand had dedicated a specific part of his work to the treatment of this subject, right after his section on oaths. Nello, however, seems to be

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

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

32 Perhaps Nello’s outline of articula e interrogatoria is too concise and not so clear: cf. G. Durand, Speculum iudiciale, L. I, P. IV, De teste, De articulis testium, n. 1, f. 120rb and De interrogatorij, n. 1, f. 122va with Nello da S.G., de testibus, n. 99, f. 140a: «Testes debent
more concerned with the educational aspect of the matter, as if he were teaching law students: he points out that the answers given by witnesses must pertain to the *interrogatoria* if they are to be considered valid and of use to the examining party; and that for this reason, the party, or rather the *procurator*, must take great care when drawing up the questions to be submitted to the court, and must keep a copy of those questions in order to verify that the examination of the witness has been carried out correctly. Another important fact to bear in mind is that if a judge should omit a question, *dolo vel malitia vel negligentia*, then that question could only be asked again – after the *publicatio* – if it was recorded among the *interrogatoria*.

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

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

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


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

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

37 Hostiensis, *Summa Aurea*, *Liber II, De sententia*, § Qualiter proferri debeat, vers. *Is est ordo iudiciorum solitus*, col. 768: «Et si quis iudex non servaverit hoc, meru iure videtur tenere sententia et lata potius contra ius litigatoris, quam contra ius commune ... ».
sententia ipso iure», whereas «cetera premissa non sunt ita substantialia» \(^{39}\). Bartolus, too, offered insight on the subject: he pointed out how certain authors had stated their opposition to Accursius’s gloss, in which the latter had followed in Azo’s footsteps and included the transcription and publication of testimony among the formalities that made up that «ordo iudiciorum qui si pervertitur, non valet sententia» \(^{40}\).

**Quid dicemus?** Bartolus shared the perspective of the canonists: legal evidence could take the form of documents or a confession, hence any sentence delivered without the *publicatio* would be against the rights of the parties litigant, but not against the *ordo substantialis* \(^{41}\).

Nello, however, was writing for lawyers, and thus he wastes little time in dismissing such subtle debates by simply stating that «si omittatur publicatio testium non redditur iudicium nullum» \(^{42}\). What’s more, he does not cite Durand in doing so, but rather the encouraging words of Baldus: a cursory reference at best, because while Baldus had indeed referred to the Roman Rota, he had deemed its use erroneous \(^{43}\).

\(^{38}\) That is, a series of formalities, like *conclusio et renuntiatio*, but more detailed than the series described by Hostiensis.


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

\(^{42}\) Nello da San Gimignano, *de testibus*, n. 121, f. 149a.

\(^{43}\) Cf. Baldi Ubaldi *Perusini Iuris Utiusque consultissimi, in feudorum usus commentaria*, Venetiis 1580, *Si de investitura inter dominum et vasallum lis oriatur*, n. 12, f. 32ra: «Extra quæro utrum sententia lata testibus non publicatis sit ipso iure nulla. Et in Romana curia
No other witnesses could be called after the *publicatio*, though Nello, as was his wont, enumerates 19 *fallentiae* to that rule⁴⁴.

3. **Alberico Maletta.**

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

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

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


benefited from his family’s active role in Francesco Sforza’s faction\textsuperscript{50}, and he was entrusted with sensitive diplomatic missions\textsuperscript{51}. He became a member of the Council of Justice on 20 January 1454\textsuperscript{52}, and the Secret Council on 18 October 1855\textsuperscript{53}. He died in Campalestro on 12 December 1466\textsuperscript{54}. His \textit{tractatus de testibus}\textsuperscript{55} was probably written in the 1450s: it was

\textsuperscript{50} See Roveda, \textit{Le istituzioni} (nt. 48), p. 83.

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

\textsuperscript{52} See Santoro, \textit{Gli Uffici} (nt. 46), p. 39 and Roveda, \textit{Le istituzioni} (nt. 48), p. 93.


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

\textsuperscript{55} \textit{Subtilis ac perutilis tractatus de testibus} Alberici de Maletis papiensis, Doctoris consumatissimi. \textit{Sine quo perfecte haec materia haberi non potest, cum summaris unicuique cap. positis}, in \textit{Tractatus de testibus probandis vel reprobandis variorum authorum}, ff. 362-453. This work was published in Naples (1471), Rome (1480), Milan
an extensive work that pursued the ambitious goal of taking what had been handed down from the past – confuse satis atque diffuse – and making it clearer and more comprehensible\textsuperscript{56}.

The author begins by outlining the structure of his work in the «operis partitio»: the first part is dedicated to the inadmissibility of witnesses\textsuperscript{57}; the second part presents the cases in which a witness cannot be compelled to testify\textsuperscript{58}; that is followed by the formalities to be carried out in order to insert a deposition into the court records\textsuperscript{59}; then Maletta discusses the different ways of examining a witness\textsuperscript{60}; and the treatise concludes with objections to testimony\textsuperscript{61}. Maletta’s analysis of the subject matter is organized differently than Nello’s, and he approaches the topics from a more personal and critical angle: he divides up the issues and classifies them, he enumerates the rationes in favor of one solutio or the other, and he often chooses the best one by relying on his personal opinion. Lastly, he is not interested in dealing with procedural matters: he takes a thorough

\textsuperscript{56} A. Maletta, \textit{de testibus}, inc., f. 362.

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

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

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

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

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

\textsuperscript{(1491 and 1494) and Pavia (1497), in the collection by Ziletti and in T.U.I., IV, ff. 162ra-179ra. Cfr. I.G.I., I, 1943, pp. 19-20: 129-133 and Colli, \textit{Per una bibliografia} (nt. 1), p. 207. The work can be found in \textit{Catálogo de los manuscritos} (nt. 5), 2577.1 and see Kristeller (nt. 15), p. 333. See also Vaglienti, entry \textit{Maletta, Alberico} (nt. 45), for the manuscript tradition, and W. Müller, \textit{Die datierten Handschriften der Universitätsbibliothek München}, Stuttgart 2011.}
look at the inadmissibility of witnesses, as well as the way to examine and cross-examine them; he makes some observations on the oppositiones, albeit rather briefly; but Maletta expresses no interest whatsoever in the delicate phase of the publicatio or its effects on the sentence. As a matter of fact, Maletta does not seem to be addressing those who win or lose a case so much as the judges who must make the decisions and the doctores who are responsible for educating a new generation of jurists. He offers logical, easy-to-follow solutions for each one of the problems that he identifies, namely who can be considered admissible witnesses; who cannot be compelled to testify; how witnesses are to be interrogated; and which objections can be sustained by the court. Nello and Maletta had differing aims, and as such their approaches diverged: whereas Nello was teaching readers how to win, Maletta was putting forward rational solutions.

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

62 A. Maletta, de testibus, cap. IX, nn. 1-3, f. 447.
63 Ib., nn. 4-5, f. 447; spec. n. 5 on opinio Bartoli: «Bart. tamen in l. eos. ff. de fal. dicit contrarium per tex. illius l. eos propterea inquit cautelam esse adhiben. quando veremur ne testes varient, ut coram aliquibus testibus extra iudicium interrogemus eos testes et faciamus responderi. Nam si postea dicant contrarium in iudicio, non valebit eorum dictum, et poterunt
In general, Maletta makes sparing reference to legislative texts, and though he cites authoritative canonists and experts in civil law, he does so rarely; indeed, he demonstrates a masterly command of the subject matter and does not get carried away with case studies. He is not writing as an advocatus, and his perspective is not as narrow as Nello’s. Nonetheless, Maletta’s efforts to examine the opiniones of those who came before him – part of his strong desire to bring order to the discussion – at times leads to ambiguities and contradictions in his exposition. In any case, this consideration of his predecessors is more of a pro forma tribute to the contemporary legal culture than a true integration of past auctoritates, as Maletta shows no remorse in ridding himself of the opiniones that he cites when it comes time to express his own ideas, which are always based on concise but convincing rationes.

An illustrative example of both the positive and negative aspects of Maletta’s approach can be found in the passage in which he discusses fratris pro fratre testimony. While the sources he recognizes are indeed the most authoritative on the topic, they also contradict one another, and this leads to some ambiguous overlapping: Maletta does not repudiate the highly influential Azo, who in his summa permits testimony by a sibling of the accused, yet at the same time he cites the Speculum in pointing out that such testimony is highly unreliable. He borrows from the Decretum when he espouses the limitation that siblings cannot testify on each other’s behalf in criminal cases⁶⁴; but then he refers to a passage from Baldus’s commentary on the l. Parentes⁶⁵, in which the jurist complicates the issue by stating the following:

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

⁶⁴ A. Maletta, de testibus, nn. 27-28, f. 366.
⁶⁵ C. 4. 20. 6(5): «Parentes et liberi invicem adversus se nec volentes ad testimonium admittendum sunt».
There are four cases to consider: in the first two, either the sibling was a witness to the disputed legal transaction and has been summoned by both parties, or the sibling has been called to testify by the opposing party or subpoenaed by the judge; in the third case, living together (domesticitas) is not grounds for unfitness; and the fourth case occurs with a civil case of little importance, in which the brother or sister is a reliable person and the siblings do not live together. Baldus, however, adds yet another case to consider, namely that in which a sibling testifies in defense (ad purgationem) of a brother or sister: this would suggest that a sibling is allowed to testify pro fratre in criminal cases. Maletta was still not satisfied: he goes on to cite Antonio da Butrio, who had spoken of three cases in which he believed that a sibling could not be allowed to testify on behalf of a brother or sister. In sum, Maletta presents various, overlapping classifications without adhering to any unifying standard among them, and then he concludes by offering a closing opinio (mihi autem videtur) in which he states that he is against the admissibility of a sibling as a witness: specifically, a sibling must not be permitted to testify on behalf of a brother or sister because of affectio naturalis; if an advocatus or domesticus were inadmissible as witnesses because of

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

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

68 Ib., n. 35, f. 366.

69 Ib., n. 37, ff. 366-367.

70 Ib., n. 38, f. 367.


72 Ib., nn. 41-43, f. 367: «Butr. in c. cum oporteat de accusationibus (X.5.1.19) refert Abbatem tenuisse fratrem in tribus casibus non admitti pro fratre. Primus quando fratres sunt in eadem potestate, videlicet quia pater vivit ... Item si haberent bona communia, ut supra dixi, vel etiam si simul habitent ... ». Cf. Antonio da Butrio, In librum quintum Decretalium Commentarii, Venetiis 1578 – Torino 1967, X. 5. 1. 19, de accusationibus, inquisitionibus et denunciationibus c. Cum oporteat, n. 27.
affectio accidentalis\textsuperscript{73}, then all the more so a sibling, who is clearly obligated to provide financial support to his or her brother or sister\textsuperscript{74}.

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

4. \textit{Conclusions}.

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

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

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

\textsuperscript{74} A. Maletta, \textit{de testibus}, nn. 44-46, f. 367. On the reproche «\textit{propter reverentiam}», to which Angelo degli Ubaldi adds the one directed towards a sibling: Schnapper, \textit{Testes inhabiles} (nt. 6), p. 155.
guidance on matters of judgement and city affairs: he was working towards concise solutions.\(^{75}\)

The interpretive rigor of Tindaro cannot be found in these authors, just as there was not his unparalleled veneration for the *opinio Bartoli*, which was on par with the Justinian code as far as he was concerned. In Alfani’s writing, the dialogue that took place between the spirits of Bartolus, Baldus and Ludovico Pontano became tangible to a certain extent. Not only was the past a treasure that had to be preserved, it was also an extraordinary work that had to be restored to its authenticity and in its entirety. Bartolus’s great-grandson engaged in an active dialogue with his ancestor and thereby explained to those who had learned from Bartolus (Baldus) the errors they had committed; he then enriched the discussion by including the best contributions of Bartolus’s *moderni* disciples (Ludovico Romano). In this way, Tindaro was able to construct a complete theory of conflicting testimony. Bartolus was an *auctoritas* in the more classic sense, a rich source of information to be drawn upon: it was this humanist spirit that made Tindaro so modern.\(^{76}\) Nonetheless, both Nello and Alberico made contributions to this push towards modernity as well: the former did so by answering the questions of those who spent every day drawing up and filing court documents, finding witnesses, producing evidence, and bringing exceptions to light; the latter condensed the mass of *opiniones* into rational solutions, and was thus able to systematically arrange the topics to be covered, choose the specific issues that he wanted to deal with, and attribute varying degrees of importance to each based on his personal opinion. Like Tindaro, they too saw the past as a treasure trove of solutions, capable of providing answers to that age-old question of *æquum et bonum*.

\(^{75}\) See Vaglenti, *Fidelissimi servitori* (nt. 53), p. 683 and Ead., entry *Maletta, Alberico* (nt. 45).

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