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LEGAL ARGUMENTATION AND CITATION OF *JUS COMMUNE* SOURCES IN PLEADINGS IN THE COURT OF SESSION, 1549/1550

ATHOL L. MURRAY AND GERO DOLEZALEK

This article presents pleadings from the mid-sixteenth century, discovered by Athol Murray. They were written by Scotland's Lord Advocate. He represented Crown and State, sat on the bench with the judges in the "College of Justice" (later known as the "Court of Session"), and was even entitled to partake and vote in their deliberations. In the present case, he acted as a pursuer in civil proceedings to disprove a forged document in order to pave the way for criminal prosecution. He submitted to the judges a mass of citations from learned literature of Roman and canon law (the so-called *Jus Commune*). The pleadings of this high-ranking civil servant illustrate that *Jus Commune* was applied in Scotland whenever a situation was not expressly regulated otherwise by national legislation or custom. Comparison to cases in *Sinclair's Practicks* (1540–9)¹ will additionally illustrate this.

The tasks for this article were divided between the two authors as follows. Athol Murray searched archival records and respective repertories to find more information on events which led to this court case and which followed from it. He furthermore prepared parts of the edition of case papers, thus the texts in Appendix I. The pleadings, however, were edited and commented on by Gero Dolezalek, and he also provided Appendix II – which presents the source texts to which Lauder referred.

Only a few Scottish pleadings from proceedings in the Court of Session before 1700 have survived.² In general, case papers which had been lodged by litigants (thus

1 These "Practicks" are summaries of deliberations among the judges on juristically interesting cases. They were collected by John Sinclair during his first nine years after elevation to the bench. A provisional edition by A. L. Murray and G. Dolezalek has been available on the Internet since 1998 (<https://home.uni-leipzig.de/jurarom>, "Scotland: edition Sinclair's Practicks"). See also the articles by A. L. Murray, "Sinclair's Practicks", in Alan Harding (ed.), *Law-Making and Law-Makers in British History* (London, 1980), pp. 90–104; and G. Dolezalek, "The Court of Session as a *Jus Commune* court – witnessed by 'Sinclair's Practicks', 1540–1549", in Hector L. MacQueen (ed.), *Miscellany Four*, Stair Society vol. 49 (Edinburgh, 2002), pp. 51–84. Many judges in superior collegiate courts under *Jus Commune* kept notebooks of this kind. Usually they were kept secret and thus destroyed after the judge had left office, but some escaped destruction. Discovery and scholarly examination of extant formerly secret notebooks only began in the 1970s. The oldest specimen discovered so far was compiled in the 1330s, 1340s and 1350s by judges of the papal *Sacra Rota Romana*, namely Bateman (later bishop) and Simon of Sudbury (later archbishop and chancellor of the king of England).

2 J. W. Cairns, "Ius civile in Scotland, ca. 1600", *Roman Legal Tradition* 2 (2004), 136–70, at 142.

for instance pleadings) were simply bundled and kept in court as long as they were needed there (= “process bundles”). Thereafter, such papers were either demanded back by the parties or discarded. A small percentage, however, escaped destruction – for whatever reason. Such residual process bundles are now kept in the archival series CS15 of the National Records of Scotland. The bundle here in question is archived under shelfmark CS15/1 “Lauder v. Anderson”.³

Law texts of “*Corpus iuris civilis*” or “*Corpus iuris canonici*” are cited as follows:

D. = Digesta, promulgated by Emperor Justinian in 533

C. = Codex Justinianus, promulgated by Emperor Justinian in 534

Inst. = Institutiones, promulgated by Emperor Justinian in 534

Auth. = Authenticum, a collection of late legislation by Emperor Justinian, in Latin translation

LF. = Libri feudorum, a collection of texts, disseminated from the mid-twelfth century onwards

Decr.Grat. = Decretum Gratiani, a collection of texts, disseminated from 1140 onwards

X. = Decretales (so-called “*Liber Extra*”), promulgated by Pope Gregory IX in 1234

VI. = Liber Sextus Decretalium, promulgated by Pope Boniface VIII in 1296

Clem. = Constitutiones Clementinae, promulgated by Pope John XXII in 1317

Extrav. = collections of other important legislation by popes, 1281–1484.

PART 1: A CASE OF FORGERY, 1547–50 (ATHOL L. MURRAY)

This article discusses the case of *Lauder v. Anderson* decided by the Court of Session in 1550. This is noteworthy for two reasons, the first being the involvement of the Lord Advocate, Henry Lauder, in what appears to have been a family dispute. The second is that the court process, the dossier of documents relating to the case, includes Lauder’s answer to the defences, drawing heavily on the *Jus Commune*, the body of civil and canon law, used by civil as well as church courts in Scotland.⁴

On 18 May 1547, a young Edinburgh woman, Elizabeth Aikman (an orphan, aged 13–17), came to the burgh court seeking to be served as heir to her father, Francis Aikman. Proceedings were halted by her stepmother, Jonet Anderson, who produced an instrument of sasine purporting to grant her all her deceased husband’s heritable property. Three days later, the Lord Advocate, Henry Lauder, presented a bill (petition) in the outer house of the Court of Session, contending that the instrument was forged (no. 1 in Appendix I). The proceedings ended three years later with a decree finding the instrument to be false and forged (no. 12 in Appendix I).

The court which heard the case had been transformed by the establishment of the College of Justice in 1532 and now embodied a permanent body of paid judges, a president and fourteen ordinary senators or lords of session, with four extraordinary

³ National Records of Scotland (NRS), Court of Session processes, first series, box 1 (CS15/1), 1549 *Lauder v. Anderson*. Like all the processes in box 1, it is incomplete. The four items it contains are printed in Appendix I as nos 1, 4, 6 and 10.

⁴ G. Dolezalek, *Scotland under Jus Commune: Census of manuscripts of legal literature in Scotland, mainly between 1500 and 1660*, 3 vols, Stair Society vols 55–7 (Edinburgh, 2010), *passim*.

(supernumerary) lords.⁵ While the court's records have been studied in relation to its organisation and jurisdiction,⁶ rather less attention has been given to their form and the way in which they were compiled.

Though the court's register of acts and decreets⁷ might appear to be a complete record, this is far from being the case. Proceedings in *Lauder v. Anderson* began with the admission of Lauder's bill on 21 May 1547 (see no. 2 in Appendix I). This admission does not appear in the register. There were no further proceedings until an act of 19 July 1549 (see nos 4 and 5 in Appendix I) and a further interlocutor of 7 December 1549 (see nos 6 and 7 in Appendix I). The respective items in the process bundle (thus nos 4 and 6) both bear a note that the clerk register had "extracted" these texts (one might thus think: from the court's register). They exist indeed in the register, but it appears that they were only booked there much later.⁸

Lauder's pleadings (see no. 10 in Appendix I) were not recorded. With few exceptions, the record of a case in the register of acts and decreets only gives the pursuer's version of the facts and the court's decision, the statement of facts being taken from the petition or summons by which the pursuer had initiated proceedings. Thus a case might end with the court finding for the defender but with no indication in the record of why their narrative or arguments were preferred.⁹ The main exception was when a party to the case "asked instruments", that is: requested that some particular statement of a party, or piece of evidence, or point of law should be entered in the record – so that at any time a public instrument could be issued on this statement of the party, or lodging of evidence, or submission of legal argument.¹⁰

The present case related to property acquired by Francis Aikman, an Edinburgh burghess, presumably a member of a prominent family in the burgh, though there is no evidence of his exact relationship. On 30 November 1528, Aikman acquired a tenement on the north side of the High Street, near the Netherbow, bounded on the east by one belonging to Margaret Broun, on the west by another belonging to Richard Hoppar, and on the north by the yard (garden) of Trinity College. On 5 January 1530, he took new title to it in favour of himself, Beatrix Blacater his "affianced spouse", and the children to be born of their marriage. They were married by 30 May 1530, when he and Beatrix acquired an annualrent (rent charge) of forty

5 A. Mark Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court* (Leiden and Boston, 2009), ch. 3.

6 Godfrey, *Civil Justice*, chs 4, 5, 8.

7 What was originally a single, continuous series of registers from the reign of James III to 1650 was split three ways c. 1810: *Acta dominorum concilii* (NRS, CS5) up to 1532, *Acta dominorum concilii et sessionis* (CS6) 1532–58, and *Acts and decreets* (CS7) 1543–1650. The division between CS6 and CS7 is arbitrary.

8 Extracting (= the transumption of a certified copy of a recorded text) could take place before or even without "booking" (its entry in a register). Thus the Clerk Register issued an extract of a decree of 19 July 1549 even though it had not yet been "insert in the book". It was eventually entered by order of the court on 24 March 1559/60 (CS7/3/1, fos 157–9).

9 This is the main problem in trying to recast the record as a law report, as in I. H. Shearer (ed.), *Selected Cases from Acta Dominorum Concilii et Sessionis 1532–1533*, Stair Society vol. 14 (Edinburgh, 1951).

10 Godfrey, *Civil Justice*, 186. The clerks of session were notaries (CS7/3/1, fo. 159), but the note was not entered in the notary's protocol book, nor was it embodied in a formal notarial instrument. CS6/27 seems to contain a separate record of instruments, some of which also appear in the main record.

shillings charged on the backlands of Margaret Broun's tenement, coupled with her permission to demolish the dividing wall between their backlands and replace it with mutual gable for new buildings on either side. Shortly afterwards, on 8 October 1530, Margaret acknowledged that she had sold Aikman the west half of her backland, and three weeks later he had sasine of the waste land of her tenement on both the east and west sides.¹¹

Between 1530 and 1533, Aikman put up a new building on the backland of his tenement. During these years, Beatrix died having given birth to their only child, Elizabeth, and Francis married his second wife, Helen Crichton. On 23 July 1533, probably fairly soon after their marriage and to make provision for Helen, he resigned part of his tenement for a new title to himself, his spouse, and the heirs male to be procreated between them, whom failing, his heirs whomsoever. This comprised the upper hall of the newly built backland, with the chambers, kitchen and loft above, and the chamber of the foreland, or original building, with its upper merchant booth.¹² This marriage, too, did not last, for Helen died without giving birth to a son, though it seems that she did have a daughter who was alive and a co-heir in 1551.

John Foular, town clerk of Edinburgh, the notary who had recorded Aikman's transactions, died in late 1534 or early 1535, before Aikman's third marriage to Jonet Anderson, which probably took place in December 1536 or January 1536/7. It is likely that Aikman made some provision, if not for Jonet then at least for the offspring of their marriage, perhaps by splitting off further parts of his tenement. All that is certain is that in 1546 Jonet held two documents, one a marriage contract, possibly forged, the other the instrument of sasine, the subject of this litigation. It appears to have been a genuine instrument written by Foular, but altered so as to appear to convey Aikman's properties. The few details available show that Foular's preamble had been kept, with the date altered to 26 January 1536/7, some two years after his death. The main body of the text had been deleted and replaced with one written by the forger, containing more properties than the marriage contract, some acquired after January 1536/7. Finally, Foular's docket had been altered to allege that the instrument had been written by an assisting person.¹³ Inclusion of his later acquisitions suggests that the forgery was carried out some time after the marriage, perhaps after Aikman's death.

In March 1539, Aikman acquired a piece of waste ground adjoining his property that had belonged to Margaret Broun's husband, George Aitchison. Both Margaret and George were by then dead, and the property had passed to Margaret's grandson, John Newton.¹⁴ This is the last known fact about Aikman. Though his marriage to Jonet failed to produce a male heir, they had two daughters, Jonet and Marion. He is said to have acquired property some four years after the date of the forged instrument (i.e. January 1541),¹⁵ but was dead by 30 January 1546 when his eldest daughter,

11 J. Durkan (ed.), *Protocol Book of John Foular 1528–1534*, Scottish Record Society (Edinburgh, 1985), nos 72, 180, 230, 253, 443.

12 *Protocol Book of John Foular*, no. 499.

13 Appendix I, no. 10 (= process bundle's item 4), lines 5–20, 67–72. The date of the instrument is taken from NRS, CS7/3/2, fo. 535v.

14 NRS, Edinburgh burgh protocol books, Andrew Brounhill, 1538–47 (B22/1/11, fo. 93). The series of protocol books covering 1534–50 appears to be incomplete.

15 Appendix I, no. 10, line 20.

Elizabeth, chose two curators, Hew Rigg and John Pardovan.¹⁶ As Hew Rigg was an advocate, it is possible that the mysterious “Aikman contra Andirsonne” endorsement on the process bundle’s item 4 (see no. 11 in Appendix I) may relate to unrecorded litigation, possibly aiming to annul Jonet Anderson’s marriage contract, which was not produced in the case under discussion but seems to have been discredited in some other way.¹⁷

What is certain is that once Jonet had stopped Elizabeth’s service as heir to her father on 18 May 1546, neither Elizabeth nor her curators played any recorded part in subsequent proceedings. Instead, within days, her cause was taken up by Henry Lauder as Lord Advocate. His bill (petition), admitted in the court on 21 May 1547, contended that the instrument of sasine produced by Jonet was forged and that she and her children’s curators should be punished for using it. Unusually, the Lord President himself dealt with the bill,¹⁸ rather than one of the lords ordinary who took turns to deal with bills in the outer house. Following his deliverance on the bill, Jonet and the curators were summoned to appear in court on the following Tuesday (25 May), along with James Carmichael, bailie of Edinburgh, as holder of the instrument. It seems that then the case was heard by John Sinclair, one of the ordinary lords, and continued to a later date.¹⁹

Had the case progressed further at that time, Sinclair might have referred to it in his “Practicks”, a collection of reports which paid particular attention to cases involving the *Jus Commune*.²⁰ Although the instrument was duly lodged with the court, Lauder failed to pursue the matter until July 1549, by which time Sinclair had given up reporting.

A new hearing on “improving” (thus annulling), this time against Jonet Anderson and her second husband, Archibald Spittal, took place on 19 July 1549, when the case was continued until 16 August, Archibald being allowed to inspect the instrument to decide whether he and Jonet would “abide thairat”.²¹ The next hearing did not take place until 7 December 1549, when Spittal appeared in person. Having seen the instrument, he was asked by the Lord Advocate whether he and Jonet would “stand, byde and use it”. His answer was somewhat evasive, denying responsibility for the document but wanting to make use of it. It was “nocht his awin deid nor yit his said spous sa far as he culd haif knowledge” but, he alleged, the giving of sasine “was and is trew and trewly done” as the instrument stated. Nevertheless, if the court found any “elast or defalt”, it should not hurt their right to the property, but the instrument should be taken as not used by them. Lauder interpreted this as meaning that Spittal stood by it, “allegiand that it was nocht his deid and that he knew nevir the samin bot latly, and thairfor he belevit the samin to be trew”. Spittal’s contention and the Lord Advocate’s interpretation of it were recorded because both had “asked instruments” for this.²²

16 NRS CS6/28, fo. 29. Her sisters’ curators were Thomas Slewman and Jonet Anderson’s brother, William (Appendix I, no. 1, line 4).

17 Appendix I, no. 10, lines 16–18.

18 Alexander Myln, abbot of Cambuskenneth.

19 Appendix I, no. 3, last endorsements.

20 As cited above in n. 1.

21 The text in Appendix I, no. 4, purports to be an extract from the “liber actorum” but was only booked there much later – see Appendix I, no. 5, and nn. 7–8 above.

22 For the text of these “instruments”, see below, Appendix I, no. 8.

The case was continued until 17 December, when Lauder was to produce his witnesses, reasons and documents for “improving” the instrument. Meanwhile, the defenders’ procurator, Thomas McCalzeane, was to give in written defences by the next Monday.²³ Even if this meant Monday 16 December rather than Monday 9th, the time allowed seems inadequate, and there is no record of proceedings on 17 December.

Also, McCalzeane’s defences were based on purported teachings of *Jus Commune* (see no. 9 in Appendix I). Though they have not survived, we can get some idea of them from the detailed refutation in Lauder’s answers (no. 10 in Appendix I), the subject of the second part of this article.

Judgment was given on 10 March 1549/50. As was usual, this provides little indication of the *ratio decidendi*, merely the usual formula that the parties’ “rychtis, ressonis, allegatiounis and juris” had been heard, seen and understood. The lords of council decreed that the instrument was “vitiis and suspect in divers points” and that no faith should be given to it in judgment or otherwise.²⁴ We can infer that the court saw no means to defeat Spittal’s assertion that he and his wife had not known that the instrument was a forgery. Consequently, no record of any criminal prosecution was found. This was the end of the case but not the end of the matter.

Although the forged instrument had purported to cover all of Francis Aikman’s properties, Elizabeth’s attempted service seems to have related only to his High Street tenement. Accepting that the rest would have to be shared with her three sisters, she was served as co-heir of her fourth part of the “land” built on Margaret Broun’s waste land that Aikman had acquired in 1539 and half of the lodging (*mansio*) between the gable of Margaret’s “great lodging” and land he had acquired from Lord Seton. On 25 December 1549 (thus even before the final judgment *Lauder v. Anderson*), she obtained a new sasine of these in favour of herself and her spouse, David Somer.²⁵ Following the decree annulling the forged instrument, she was retoured as her father’s heir and obtained a precept of sasine from chancery. On 31 July 1550, she finally got sasine of his tenement “fore and back, nether and upper, built and waste”.²⁶

Archibald Spittal asked the notary who recorded Elizabeth’s sasine to record his protest for nullity of it and the inquest on which it had proceeded, and for “remeid of law”.²⁷ The text no. 11 in Appendix I suggests that this may not have been a futile gesture. For the second endorsement on the process bundle’s item 4 “Jonat Andersoun and Aikman. Improb[atious]” could indicate that Jonet and her husband did manage to get “remeid”, perhaps through unrecorded court proceedings. Elizabeth Anderson had to go back to chancery for another precept, most probably following a new retour, because her right to sole ownership of her father’s tenement extended only to those parts not included in the new sasine taken after his second marriage and also, seemingly, of a further sasine perhaps related to his third marriage. In respect of

23 The record in the register (Appendix I, no. 7) skips the appointing of a time for McCalzeane’s defences, whereas this appointing is mentioned in the purported “extract” from the register (Appendix I, no. 6) – which was in practice written long before the booking into the register took place. McCalzeane had been admitted as an advocate in 1537. M. D. Young (ed.), *The Parliaments of Scotland* (Edinburgh, 1993), pp. ii, 446.

24 NRS CS7/3/2, fo. 395v = see Appendix I, no. 12.

25 NRS B22/1/15, fo. 34r.

26 NRS B22/1/15, fo. 34r.

27 NRS B22/1/15, fo. 35v.

those, she was not sole heir but merely co-heir with her three sisters. On 20 February 1551, she got a new chancery precept limited to specific parts of the tenement: the laigh tavern (*taverna subterior*) of the foreland with the vault, and the upper chamber with its galleries, and the laigh hall of the backland with two chambers, kitchen thereof, five cellars and a kitchen beneath them and a further small chamber under one of the chambers. The following day at the tenement, she presented the precept to Bailie Alan Dickson, who gave her sasine of those parts and also cognosed and entered her as heir to a fourth part of the remainder of the tenement: the upper hall of the backland with the chamber, kitchen and loft above them, the upper merchant booth of the foreland and its upper chamber with the loft above it, together with the whole yard (garden) and waste land. Immediately afterwards, she resigned the lot and got a new sasine to herself and her husband, David Somer.²⁸ Finally, on 1 July 1551, Elizabeth acquired the final piece of her father's property, the annualrent from Margaret Broun's backlands.²⁹ Because her mother had held joint title to it, it did not have to be shared with her sisters. The eventual resolution of the three-dimensional puzzle of ownership of her father's tenement lies outside the scope of this article.

PART 2: THE LORD ADVOCATE'S PLEADINGS (GERO DOLEZALEK)

1 The procedural situation

Lord Advocate Lauder's petition in the College of Justice led to a temporary stay of proceedings in the burgh court of Edinburgh. In that court, Elizabeth Aikman had petitioned the provost and bailies to give effect to a brieve from the king's chancery. Obviously the brieve had mandated to inquire whether Elizabeth was apparent heir to her deceased father Francis Aikman, and, if so, to vest and saise her as of fee (i.e. heritably) in her father's tenements. Jonet Anderson had intervened and contended that Elizabeth had no right at all because she, Jonet, had been joint feuar ("*in coniunctfie*") together with Francis Aikman, and so she was now, after his decease, sole feuar of the tenements. She lodged a purported public document and requested that it should be taken as an authentic record of her purported joint infestment.

Lauder pursued Jonet Anderson (and at first also the two curators of her daughters) in the College of Justice. He sought a decree that the document was forged and thus void, in order to open the way for criminal proceedings and subsequent confiscation of the culprits' property.

Lauder finally obtained the decree which he had sought. So, he stopped the upholders of the forged document. Yet, he probably saw no chances to prosecute them criminally in the Justiciary Court.

The logical outcome of the case was that now the stayed proceedings in the burgh court had to be resumed, since Jonet Anderson's intervention had failed because she now had no admissible means to prove her purported title to the tenements.

In the end, as Athol Murray has shown above, Elizabeth Aikman merely got sasine as sole heir for those tenements which her father had held in joint fee with Elizabeth's

²⁸ NRS B22/1/15, fo. 91v.

²⁹ NRS B22/1/15, fo. 139r.

mother, burdened with expectancy rights of children from their marriage. This was but a minor part of Francis Aikman's heritable estate at death. The remaining major part then went to Elizabeth and her three stepsisters as co-heirs.

2 The protagonists

- (a) In all likelihood, it was advocate Hew Rigg who got this case under way. He was curator for Elizabeth Aikman,³⁰ so probably it was he who informed Lord Advocate Lauder. The two lawyers were close colleagues.³¹ Rigg had a good reputation and thus many clients. Sinclair's notes on cases (1540–9) mention him twenty times.³²
- (b) Thomas McCalzeane, the defenders' advocate, was possibly a cousin of Lord Advocate Lauder – if Lauder's mother Margaret McCalzeane was a sister of James McCalzeane, the father of Thomas. This is likely, since the “men of law” in Edinburgh were a close-knit community, often interrelated by family bonds.³³ Later, in 1570, Thomas McCalzeane was elevated to the bench as Lord Cliftonhall.
- (c) Archibald Spittal, the acting defender in the case, was an experienced and astute litigant. In 1531, he had successfully pursued his relative Finlay Spittal before the lords of Council and Session.³⁴ Archibald had skilfully circumvented procedural obstacles. He firstly sought admittance to pursue before the lords and obtained there a decree of annulment (“reduction”) of Finlay's charter of infeftment. This left Finlay defenceless when Archibald subsequently pursued him for surrender of the land in question – because, before the lords, title to land could only be proved by charter.³⁵ Archibald had no fear of resisting the Lord Advocate who pursued him and his wife as upholders of a forged document.
- (d) Lord Advocate Henry Lauder of St Germain's³⁶ appears in the present case as a strikingly well-versed *Jus Commune* lawyer. This confirms the presumption that

30 Athol Murray found Rigg's appointment in NRS CS6/28, fo. 29, dated 30 January 1545/6. Murray also found that Elizabeth Aikman must have been born after 1530, because her parents did not yet have children when they married in that year (Durkan (ed.), *Protocol Book of John Foular 1528–1534*), so she was a minor. By the way, under *Jus Commune*, the age of full majority was 25 years, but in a contested case the Court of Session confirmed that Scottish custom had regulated this otherwise, so that the Scottish age of majority was 21 years: *Sinclair's Practicks* (as in n. 1), no. 444, “John Steill v. John Hamilton” 1548/9.

31 Rigg acted as Lauder's substitute in November–December 1546: John Finlay, *Men of Law in Pre-Reformation Scotland* (East Linton, 2000), p. 176 n. 51 and p. 178. Lauder and Rigg together were entrusted to welcome King James V's bride Mary of Guise when she arrived in Scotland in 1538: Finlay, *Men of Law*, pp. 57–8.

32 *Sinclair's Practicks*, nos 24 (18 January 1540/1), 30, 33, 60, 113, 117, 119, 133, 138, 139, 141, 158, 170, 188, 206, 232, 276, 280, 303, 465–6 (17 February 1548/9).

33 Finlay, *Men of Law*, in particular pp. 66 and 221.

34 Godfrey, *Civil Justice*, pp. 338–9.

35 Andrew R. C. Simpson and Adelyn L. M. Wilson, *Scottish Legal History: Volume One, 1000–1707* (Edinburgh, 2017), p. 124. The rule that title to land must be proved by charter is discussed in section 6 below.

36 For Henry Lauder's biography, see John Finlay, “College of Justice, procurators of the”, in *Oxford Dictionary of National Biography*, vol. 12, pp. 618–20, at 619. See also Finlay, *Men of Law*, pp. 62, 178, 198, 219–20; G. Brunton and D. Haig, *An Historical Account of the Senators of the College of Justice from its Institution in 1532* (London, 1832), p. 63; G. W. T. Omond, *The Lord Advocates of Scotland from the Close of the 15th Century to the Passing of the Reform Bill*, 2 vols (Edinburgh, 1883), vol. 1, pp. 20–5.

Lauder must have undergone university study of law on the European continent, and possibly in France. This would explain why his mastery of French language was good enough that King James V sent him to address and welcome the king's French bride Mary of Guise at her arrival in Scotland in 1538.³⁷ At the latest in November 1513, he was back in Scotland as a graduate. By that date, he was married to Agnes Stewart of Rosyth.³⁸ The subsequent years saw him in a career as an advocate and also as a sheriff of Perth (1516), Linlithgow (1525) and Selkirk (1527).³⁹

In 1532, when the College of Justice at Edinburgh was instituted, Henry Lauder was one of nine advocates whom the judges admitted to plead before their court. Soon after, in November 1533, the then Lord Advocate Adam Otterburn made Lauder his general depute.⁴⁰ Later, in spring 1538, the king provisionally appointed Lauder as Lord Advocate because Otterburn was in prison. The latter was released and for a while readmitted, but in 1539 he was permanently removed, so that Lauder took over. From March 1540 onwards, he sat on the bench and voted with the judges. In 1543, he became in addition a member of the king's Privy Council. He died in July 1561.

Lord Advocate Lauder pursued in civil proceedings whenever he deemed that a situation touching the interests of Crown or State could be remedied in that way.⁴¹ The court registers show that Lauder regularly pursued parties who had lodged an instrument which was suspected of forgery⁴² – as in the case here in question.

An Act of Parliament of December 1540 expressly reflected a provision of *Jus Commune*, legislated in the *Codex Justinianus* as C.4.19.24. It threatened forgers, or persons who knowingly upheld a forged instrument, that they would be “punist in thare personis and gudis with all rigour”.⁴³ Nonetheless, forgeries remained a frequent point of complaint in Scotland.

3 “Hering v. Scot” 1542, a relevant Scottish precedent for “Lauder v. Anderson” 1549/50

*Sinclair's Practicks*⁴⁴ preserves two precedents in which Lord Advocate Lauder used *Jus Commune* to defeat upholders of forged documents. It will be shown below that the same texts of *Jus Commune* which played a role in these precedents were also used by Lauder in his pleadings in the present case.

In the case “Hering v. Scot” (*Sinclair* no. 258, dated 18 June 1542), Lauder had pursued upholders of an instrument which related that a certain person made

37 Finlay, *Men of Law*, pp. 57–8.

38 Finlay, *Men of Law*, pp. 219–20.

39 Finlay, *Men of Law*, p. 62, and https://en.wikipedia.org/wiki/Henry_Lauder,_Lord_St_Germain (accessed 11 December 2019).

40 Finlay, *Men of Law*, p. 178.

41 *Sinclair's Practicks*, nos 12, 22, 35, 41, 56, 70, 72, 75, 88, 111, 119, 145, 176 (with supplement 576), 177 (with supplement 577), 212, 229 (with supplement 567), 238, 258 (with supplement 559), 281, 300, 315, 323, 325, 346, 349, 398, 400, 405, 417 (year 1547), 424, 447, 471, 482–3, 485, 493.

42 Finlay, *Men of Law*, p. 198.

43 RPS 1540/12/22; APS ii 360.

44 *Sinclair's Practicks*, nos 258 and 471.

a promise in Montrose on a certain day. Lauder offered to prove that this person had sojourned all day long in Edinburgh on that date. The judges, by interlocutor, admitted this probation. This was thus a precedent that notarial documents could be annulled on evidence that protagonists mentioned in the document had not really been at the place – analogous to the present case where the forged document mentioned a bailie who had in fact not been bailie in that year.

I translate:⁴⁵

The eighteenth of the same month [June 1542]. In a case moved by James Hering of Glasklyne against William Scot dwelling in Montrose, at the hearing assigned to master Henry Lauder to disprove a certain public instrument lodged by the said William, the said master Henry contended that the said pretended instrument was false and feigned ... because it contained that master Thomas Dickson promised warrandice of certain lands which were pledged to the said master Thomas, who provided that the same were assigned to the said William ... And in addition in the said case the said master Henry offered to disprove the said instrument in so far as he should prove that on the day contained in the same [= in the instrument] made in Montrose, the said master Thomas was all day long in Edinburgh. And the lords by interlocutor decerned the 29th day of the same month for the said alibi to be proved. And that a public instrument can be disproved by persons written therein as witnesses to it, see Panormitanus abbas [= Nicolaus de Tudeschis, d. 1445] and Felinus Sandeus [d. 1503] and others in their commentaries to the law text “*Cum Joannes*”, X.2.22.10, and see the commentators of Roman law on the law texts “*In exercendis*”, C.4.21.15, and “*Item verbo*”, Inst.3.19.12.

It is worth while taking a closer look at the references in this law report, because they illustrate how *Jus Commune* worked. It is conspicuous that John Sinclair did not directly cite the *Corpus Juris* texts X.2.22.10, C.4.21.15 and Inst.3.19.12. Instead, he merely cited commentaries on these texts – and in surprising order: he cited Inst.3.19.12 last, although at first glance this law text might seem to cover the situation best. Yet, if one gives it a closer reading, it becomes clear that Sinclair did well to rank Inst.3.19.12 last.

In Inst.3.19.12, Emperor Justinian repeated the essence of his wordy legislation in C.8.37.14. It envisaged situations where a document had recorded a contract stipulated between certain parties, and the notary had named the protagonists who allegedly had negotiated the stipulation. Problems arose when one party later alleged that there existed no valid contract, because in fact one of the named protagonists had not really been at that place on that day and at that time. Justinian legislated

45 Original text of no. 258: “The aucten mensis eiusdem [18 June 1542]: In ane caus movit be James Hering of Glasklyne contra William Scot commorantem in Monros, in termino assignato Magistro Henrico Lawder ad improbandum instrumentum quoddam publicum, productum per dictum Willielmum, the said Mr Henry allegit that the said pretendit instrument wes fals and fainyeit ... for it contenit that Mr Thomas Diksone promittit varrandice of certane landis apprysit to the said Mr Thomas, quha causit assigne the samyn to the said William ... And als in the said caus the said Mr Henrie offerit to imprevre the said instrument, in sa far as he sould preve that the day contenit in the same, maid at Monros, the said Mr Thomas wes all that day in Edinburgh. And the lordis be interlocutour decernit the xxix day of the samyn moneth to the said alibi allegit to be provin. Et quod instrumentum publicum potest reprobari per testes descriptos in eodem, vide Pan., Feli. et alios in cap. Cum Joannes, Extra de instrument., legistas in l. In exercendis, C. de fide instrumentorum et in § Item verbo., Insti. de stipulationibus.”

that in such cases the judges shall “in all regards” [*omnimodo*] believe the document, “unless the one who bases himself on such disapproved allegations will prove by utmost manifest proofs, either by a document or by suitable witnesses, that in that entire day, when the document was made, he or the adversary party were in other places”.⁴⁶

Inst.3.19.12 does not lend itself to straightforward application. One may ask: under which circumstances would a proof be so “utmost manifest” that a “disapproved” contention should nonetheless be followed up? When is a witness so “suitable” that his oral testimony can override the very strong presumption that notaries do not misrepresent facts which they allege to have personally witnessed? Furthermore, Emperor Justinian’s compilation comprised a directly contrasting text by his remote predecessor Constantine, namely C.4.21.15. I translate: “In proceedings in court, the probatory value [*fides*] of instruments and the testimony of witnesses have the same strength”.⁴⁷

In contrast, the law text which Sinclair ranked first, namely X.2.22.10 “*Cum Johannes eremita*”, is more suitable to practical application. The text was excerpted from a judgment by Pope Innocent III (d. 1216). In the law case in question, a notarial document from 1206 had recorded that a certain citizen Petrus in Viterbo had sold his house to a certain Johannes, a hermit. It was uncontested that Johannes got the house much cheaper than the price other possible buyers had offered for it. Johannes now pursued the seller Petrus for immediate delivery of possession. Petrus as the defender, however, averred that in the sale’s stipulation they had agreed on a clause that Petrus should retain lifelong possession of the house, and after his death his two children should live therein. They were “*nepotes*” of the buyer (= grandchildren or nephews). Such a clause was not contained in the notarial document, however. Petrus presented four witnesses who had been present when the sale was stipulated. Their presence was uncontested, although they were not mentioned in the document. All four witnesses clearly remembered that clause. In contrast, the notary, called as a witness, did not remember any detail of that case. Neither did a fifth witness who had also been present and was even mentioned in the document. Petrus based his juridical argument on “*legitimas sanctiones*” (= Roman legislation’s sanctions). Obviously C.4.21.15 was in his mind. On the other side, counter-arguments could be based on C.8.37.14 as summed up in Inst.3.19.12. In the end, Pope Innocent III (advised by a group of cardinals) gave judgment for Petrus.

X.2.22.10 does not expressly provide juridical reasons for the pope’s decision, but the underlying principles were enunciated by authors who commented on this text. They developed detailed doctrines which extended the principles to a wide range of similar factual situations.

The case’s juridical problems belong to the field of procedural law, and in particular to rules on presumptions which regulate the burden of proof, and on evidence needed

46 Latin wording at the end of Inst.3.19.12: “nisi ipse qui talibus utitur improbis allegationibus manifestissimis probationibus vel per scripturam vel per testes idoneos approbaverit, in ipso toto die quo conficiebatur instrumentum sese vel adversarium suum in aliis locis esse”.

47 Latin wording in C.4.21.15: “In exercendis litibus eandem vim obtinent tam fides instrumentorum quam depositiones testium”.

to overrule such presumption.⁴⁸ *Jus Commune's* procedural law had been developed in the late Middle Ages. The development was mainly driven by “*decretales*” (juridical decisions by popes) and juridical literature which commented on them. The popes took guidance from Roman law, but their *decretales* and the literature on them developed the law further. This is why in procedural matters *Jus Commune* lawyers always considered canon law first. Thus X.2.22.10 ranked higher than C.4.21.15 or C.8.37.14 / Inst.3.19.12.

Panormitanus (d. 1445) and Felinus Sandeus (d. 1503) were cited first because their commentaries on the *Decretales* by Pope Gregory IX aggregated the essence of previous literature on this part of the *Corpus Juris Canonici*. The commentary by Felinus was more recent and thus complemented the one by Panormitanus. The two works combined served as tools to find relevant references and therewith determine what was the “common opinion” (Latin term *communis opinio*).

The courts under *Jus Commune* usually followed the “common opinion”. Whenever there existed various opinions on a point of law, the lawyers regarded as “common” the one which had the greatest weight of authority behind it. The respective authors adhering to the various opinions were not simply counted. Rather, their aggregated renown and authority was weighed. An author’s “weight” depended on his academic prowess in the respective field of law in question, and on the quality of his reasoning on the specific point of law. So, the same author could have a heavy weight in one field and almost none in another. Even in an author’s best-mastered field of law, an opinion of his weighed little if he had stated it without explaining his underlying reflections.

As we have seen, the juridical problem in this precedent was not directly ruled on by any text in the *Corpus Juris Civilis* or *Corpus Juris Canonici*. However, the texts X.2.22.10, C.4.21.15 and Inst.3.19.12 gave rise to thorough elaboration of juridical doctrines, and they served as “*sedes materiae*” (“seat of the matter”). This term meant

48 From the late twelfth century onwards, *Jus Commune* and all countries which follow its tradition upheld the principle that notarial acts or instruments bring full proof of the facts which they authenticate, unless the contrary be proved beyond any doubt. In contrast, this principle was never acknowledged in the common law of England. After the United Kingdom became for some decennia a member of the European Union, its notaries complained because their notarial documents had lower probatory value than the ones authenticated by their colleagues on the continent. Therefore the Civil Procedure Rules for England and Wales 1998 were amended accordingly in 2005. The Civil Procedure (Amendment No. 3) Rules 2005 [UK Statutory Instruments 2005 No. 2292 (L. 21)] ordered under its no. 36: “After rule 32,19 insert [as a new rule no. 32,20] – A notarial act or instrument may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved.”

Various European traditions to authenticate juridical acts and instruments are discussed in Ditlev Tamm et al. (eds), *Handbuch zur Geschichte des Notariats der europäischen Traditionen* (Baden-Baden, 2009).

The development of respective doctrines in papal *decretales* of the twelfth and early thirteenth centuries (based on Roman law) is described in detail by F. Roumy, “Les origines canoniques de la notion moderne d’acte authentique ou public”, in F. Roumy et al. (eds), *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, vol. 2: *Öffentliches Recht* (Weimar and Vienna, 2011), pp. 333–60. The same author describes the gradual rise of the juridical technical term *authentificare* in papal documents and other ecclesiastical charters in the course of the eleventh and twelfth centuries: “De la confirmation à l’authentification des actes juridiques aux XI^e et XII^e siècles”, in B. Basdevant-Gaudemet et al. (eds), *Plenitudo Juris. Mélanges en hommage à Michèle Bégou-Davia* (Le Kremlin-Bicêtre, 2015), pp. 489–514.

that the texts in question were, so to say, “assembly points” where glossators or commentators would state their reflections on the respective topic of law, and where readers could find cross-references to related texts and other relevant literature.

4 “Laird of Dunnone v. Lauder” 1548/9, another relevant precedent for “Lauder v. Anderson”

John Sinclair’s summary of the deliberation on this law case (which took place on 28 February 1548/9) is published under no. 471 in the provisional edition.⁴⁹ Lord Advocate Lauder successfully parried here an appeal against a decree which Lauder had obtained at first instance. The decree had annulled (= “reduced”) the appellant’s notarial instrument of sasine because the first name and family name of the notary was written on an erasure, where writing which had previously stood there had been scraped off. The annulment by the judges at first instance was obviously based on *Jus Commune’s* rule that an instrument has by law “no faith” (i.e. no probatory value) when essential words in it are written on places where previous writing was erased, unless the notary had expressly confirmed in his subscription that he had done the erasure and rewriting with his own hand.⁵⁰ The appellant demanded to quash the judgment at first instance because purportedly it was based on an error in law. He underpinned this with a reference to Jason de Maino (d. 1519) who had stated in his commentary on C.6.33.3 that the rule mentioned above shall not apply if one can see that the notary had rewritten on the erased places with his own hand.

The appellant thus demanded that the judges at second instance should compare the character of the handwriting on the erased places to the handwriting in other documents by the same notary – in order to be convinced that the notary himself had erased and rewritten the words in question.

Jason de Maino had a high renown as a commentator on Emperor Justinian’s compilations of Roman law. His commentaries aggregated and re-elaborated important points from previous literature. So, they were widely used as a tool to find the “common opinion” on controversial points of law. The appellant’s argument thus carried much weight.

I have checked the text passage by Jason in a late printed edition, *Jasonis Mayni secunda super Codice* (Lugduni, 1553). The quoted text is there printed on fo. 145va. The relevant text (no. 19 of the commentary on C.6.33.3) begins with a headline which was supplied by the printers: “As a rule, an erasure in an instrument vitiates the instrument. This fails in many cases.” Jason’s own text then states the above-mentioned main rule in somewhat different wording. He underpins it with five references, and thereafter enumerates eight situations in which the rule fails. I translate:⁵¹

49 As above in n. 1.

50 *Jus Commune’s* “common opinion” on this rule is correctly stated by Lauder in Appendix I, no. 10, lines 25–36.

51 Latin wording [*headline by the printers*]: “Rasura instrumenti regulariter vitiat instrumentum. Fallit tamen in multis casibus.” [*Jason’s text*]: “... rasura instrumenti vel vitium non solum impedit executionem, ut hac lege. Immo regulariter vitiat instrumentum ipsum: ut habetur in c. Cum olim, columna ii., de privileg. [X.5.33.14], in cap. Ex literis, in c. Accepimus, de fide instrumentorum [X.2.22.3 et 4]. Sicut etiam talis rasura vitiat rescriptum, c. Licet, de crimine falsi [X.5.20.5]. Et est bona glossa in dicto c. Cum olim [X.5.33.14], in verbo “subscriptiones”. Istam regulam limita primo ut procedat quando talis rasura reperitur in parte substantiali instrumenti. ... Secundo

a document's erasure or fault does not merely hinder its execution, as in the present law text, but it regularly vitiates the document itself, as we have it in the law texts "*Cum olim*", X.5.33.14, "*Ex literis*", X.2.22.3, "*Accepimus*", X.2.22.4. Just as such an erasure vitiates a papal rescript, according to the law text "*Licet*", X.5.20.5. And there exists a good gloss on the law text "*Cum olim*" mentioned above, X.5.33.14, on the word "subscriptions". Delimit this rule, firstly, that it shall only apply when such erasure is found in an essential place of the instrument ... Secondly note well to delimit [*the main rule*]: unless the writing is erased in an essential place but so well rewritten that it may be seen to be [*rewritten*] by the hand of the same notary – and then it does not vitiate. So also says a noteworthy gloss [*by Franciscus Accursius*] which you should earmark, on the word "prima figura" [*in C.6.33.3*], deemed "very noteworthy" by Bartolus de Saxoferrato, and said to be "unique" by Angelus de Ubaldis. Yet there [*also*] exists a parallel gloss [*by Bernardus de Botone (Parmensis)*] on the law text "*Cum venerabilis*", X.3.36.6 at end, which Bartolus should have quoted here, but in this regard he did a sloppy job.

To counter the appellant's argument, Lord Advocate Lauder tried to convince the judges that Jason's opinion was but a minority view and not "common opinion". For this aim, Lauder referred the judges to texts whose authors unanimously followed a different opinion. The notes by John Sinclair mention here quotations from five authors: Panormitanus, the *glossa ordinaria* by Bernardus de Botone, Paulus de Castro, Baldus de Ubaldis, and Guilielmus Durantis in his "Mirror of Court Practice" (*Speculum iudiciale*). It will again be seen below that most of these quotations recur in the present case's pleadings "Lauder v. Anderson", 1549/50.

John Sinclair noted on this precedent "that in this case the lords of Council decreed according to Panormitanus and not according to Jason". His note, however, must not be taken too literally. I think he merely meant to say that the majority of the judges tended to side with Panormitanus and his followers who regarded it as a strict procedural rule that only the notary himself could confirm that he erased and rewrote words in the document with his own hand. Evidence by comparison of character of handwriting was thus procedurally excluded.

I deem that the judges finally preferred to leave the troublesome question open. The judges, to be on the safe side, admitted the appellant's demand and went ahead comparing the handwriting of the rewritten words to other handwriting by the same notary. They then found: "It was not seen to be rewritten by the hand of the same notary". I think this was a purposefully ambiguous wording, carefully chosen. It could be understood as "the character of the handwriting was not found to be the same, so Jason's opinion is not applicable here anyway". Yet, it may even well be understood as "One can anyway never be sure that words written on erasure were rewritten by the same person". Panormitanus in his cited commentary on X.3.36.7 had rightfully remarked: "One can find many persons who know how to spoof the handwriting of others" (see his text in Appendix II, no. [24], and similarly his commentary on X.2.22.3, *ibidem*, no. [14]). Panormitanus' statement was by even stronger reason

notabiliter limita nisi scriptura instrumenti esset abrasa in loco substantiali, sed ita bene rescripta quod videatur manu eiusdem notarii: tunc non vitiat. Ita glossa hic notabilis quam signa in verbo 'prima figura' in fi. quam Bar. no. multum, et Ang. dicit singularem. Sed habes similem in c. Cum venerabilis, in glossa fin., de relig. domi., quam debuit allegare Bar. hic. Qui in hoc habetur corruptus."

true for notarial handwriting, because notaries wrote their documents in standardised script which thus could particularly easily be feigned.

I translate this interesting precedent:⁵²

On the same day or about [28 February 1548/9]. The laird of Dunnone called master Henry Lauder to hear and see a decree of non-entry (given against him at the instance of the said master Henry) to be quashed, because it was given decreeing that the said laird's instrument of sasine made no faith, no probation, because it was erased in an essential place, namely in the first name and family name of the notary, in the final notarial certification of this instrument, and therefore it was suspicious. And therefore it should not make faith, by law, although the said laird contended that this was no relevant reason by law why a public instrument should have no faith, and that the erasure was rewritten by the notary's hand, and therefore the instrument should not suffer a loss of its verity, as noted by Jason on the law text C.6.33.3, where he is clearly seen to hold this opinion. And the said laird offered to prove that this erasure was rewritten by the hand of the same notary, by comparison to other instruments of this notary. The lords of Council decided that this erasure vitiates the instrument and renders it so suspicious that faith should not be given to it, because it [*the erasure*] was in a suspicious and essential place. And therefore it is well done to be seen as "It was not seen to be rewritten by the hand of the same notary" – as it appeared to these lords of Council from inspection with their own eyes, of this instrument and the erasure, and of other instruments of this notary, submitted to these judges. Even more should this instrument not make faith because the rewriting on this erasure could have been feigned by another person who simulated and feigned the hand of this notary – as stated by Panormitanus on this law text "Cum venerabilis", X.3.36.7, in accordance with the gloss and other commentators. See commentaries to the alleged law text "Si veritas", C.6.42.23. Paulus de Castro to law text "Si unus", C.6.23.12.1. The "Mirror of Court Practice", paragraph "Postremo restat videre", in the rubric "De instrumentorum editione". Commentators on the law text "Licet", X.5.20.5. Baldus and Paulus de Castro on the law text "Contractus", C.4.21.17. And thus note that in this case the lords of Council decreed according to Panormitanus and not according to Jason.

52 *Sinclair's Practicks*, no. 471: "Eodem die vel eocirca <28 February 1548/9>: The laird of Dunnone callit Mr Henry Lawder to heir and sie ane decrete of non-entres (gevin aganes him at the said Mr Henries instance) reitreit, becaus it wes gevin decernand the said lairdis instrument of sasing to mak na fayth, na preiff, becaus it wes rasum in loco substantiali, viz. in nomine et cognomine notarii in ipsius instrumenti subscriptione, et ideo erat suspectum. Et ideo non debebat fidem de iure facere, albeit that the said laird allegit that that wes na relevant caus of the law quhy ane instrument publict suld haiff na fayth, et quod rasura illa erat notarii manu reposita, et ideo veritate instrumentum non debebat carere, ut notat Jason in lege C. de edicto domini Adri., ubi ita videtur tenere clare. Et obtulit dictus dominus se probaturum rasuram illam repositam esse manu eiusdem notarii, per probationem aliorum instrumentorum eiusdem notarii. The lords of Council decerned rasuram illam vitiare instrumentum et reddere adeo suspectum ut fides ei non debeat adhiberi, quia erat in loco suspecto et substantiali. Et ideo licet videri prout non videbatur reposita manu eiusdem notarii, ut ipsis dominis Consilii ex inspectione oculari instrumenti ipsius et rasure et aliorum instrumentorum ipsius notarii coram ipsis iudicibus productorum <videbatur>. Adhuc tamen fidem facere non deberet ipsum instrumentum, ex eo quia repositio illius rasure poterat esse conficta per alium, simulantem et fingentem manum illius notarii, ut dicit Pan. hec in cap. Cum venerabilis, Extra. de rel. domib., ubi glosa et alii doctores. Vide in l. Si veritas, alle., Pau. in l. Si unus, C. de test., Specu. in § Rest. de instr. vendit., doct. in cap. Licet, extra de cri., Bal. et Pau. in l. Contract., C. de fide instrument. Et sic nota quod in hoc casu decreverunt domini Consilii secundum Pan<ormitanum> et non secundum Jas<onem>."

5 The defenders' tactics

We can reconstruct the defenders' arguments from their refutation in Lord Advocate Lauder's pleadings. We do not know, however, in which order these arguments were submitted. I deem we may assume that advocate McCalzeane arranged them in the usual order. Defence pleadings usually begin with a denial of all those facts averred by the pursuer which could possibly be questionable. I have thus arranged McCalzeane's arguments in that order (no. 9 in Appendix I). There the points (a)–(c) deny facts which the pursuer had averred.

McCalzeane could not deny that the instrument had a date long after the death of the notary. Even worse: it was a requirement in notarial documents that their date must also specify the tax-year number within the current Roman fifteen-year cycle of tax years. Yet here the forger had combined the purported year date with an inconsistent tax-year number. So, McCalzeane tried to turn the tables and draw an advantage from this incongruence. He had the good luck that the purported tax-year number suited a year when the notary was still alive. So, McCalzeane tried to argue that the possibly usable tax-year number should override the impossible year date.

Purported underpinning for McCalzeane's point: the commentary by Baldus de Ubaldis on C.6.44.2 says that an error in the date does not vitiate an instrument.

My comment: McCalzeane lifted here a quotation from Baldus without regard to its ambit. In fact, Baldus used the quoted words within a distinction. He said that in some contexts a wrong date does not vitiate a document, but in other contexts it does.

I translate from the edition *Baldus de Ubaldis, In sextum Codicis librum commentaria* (Venetiis, 1577). The text passage on C.6.44.2 is printed on fo. 162va–b.⁵³

Solution: consider, either a date is affixed for some future activity, and then a wrong date vitiates, as in the law text "*Si vitem*", last paragraph (D.43.24.22.5). Or affixed to another kind of activity where it may be essential. If so, then if the date belongs to the formal requirements: same consequence [= *the wrong date vitiates*]. Or it does not belong to formal requirements and merely serves for description of facts, and then neither a wrong description nor a wrong motivation for it vitiates – as here [*i.e. in C.6.44.2*]. And see for the latter case the law text "*Scio*", D.49.1.3.

In the case "Lauder v. Anderson", however, the false year date was a constituent part of the document's final notarial certification to authenticate the document. Therefore it clearly belonged to its "formal requirements". Therefore also Baldus would have judged that the false date vitiating the document. McCalzeane had thus misled the judges.

Next, McCalzeane presented the law texts C.6.23.7 and C.6.23.24 as if they wanted to state that obvious mistakes in a document's text could never be used to doubt the validity of such document. In fact, however, these law texts merely held

⁵³ "Solutio: considera, aut dies apponitur actui fiendo, et tunc alia dies vitiat, ut l. Si vitem § fi. [D.43.24.22.5], aut alicui facto qui habet in se essentialiam: et tunc aut expressio temporis est de forma, et idem; aut non est de forma, sed venit per modum demonstrationis, et tunc nec falsa demonstratio nec falsa causa vitiat, ut hic. Et pro hoc ff. de appella. l. Scio [D.49.1.3]." (Baldus' entire text is paraphrased below in Appendix II, no. [60].)

good for mistakes which were plausibly caused by inadvertent slips of the pen, due to absent-mindedness – and such plausibility must be shown and proved. The two law texts are presented below in Appendix II under nos [44] and [56].

McCalzeane then mentioned that Bartolus in his commentary on D.1.5.8 asked whether a notary may correct his documents even a long time after their issuing, and that Bartolus said “It is seen that ‘yes’”. Yet this was in fact but a rhetorical preliminary answer at first sight. In his subsequent phrases, Bartolus stated the contrary, and he laid out why the preliminary answer was wrong. Bartolus’ text is presented below in Appendix II under no. [54].

It was a common rhetorical technique in the Middle Ages that one should first state a preliminary opinion which at first sight seemed plausible, but which was thereafter rebutted and shown to be untenable. All learned lawyers in the Middle Ages and beyond used this technique. In a first step, they enumerated arguments which at a superficial glance seemed to underpin a view which in the end they wanted to refute. They purposefully presented the assailable opinions of the adversary party as if these were plausible, and they cited all the juridical reasons which could possibly be proffered for them. Only thereafter, in a second step, the learned lawyers would state their own view, together with their own reasoning. Finally, in a third step, they refuted all the specious arguments which had been proffered in the first step. McCalzeane had thus misrepresented the opinion of Bartolus.

Furthermore, McCalzeane submitted an auxiliary contention for the erasures: even if one could really see erasures in the document (which was denied), these would nevertheless be irrelevant according to *Jus Commune*. Here, too, McCalzeane quoted a text passage from Baldus’ commentary to the Codex Justinianus, on C.6.33.3. The text passage stated indeed that rewritten text on erased parchment can be valid – but Baldus referred here to D.37.11.4, and that latter text dealt with recycled parchment sheets, when craftsmen in a workshop scrape old parchment documents entirely clean, from the top to the bottom, so that the sheet can freshly be used a second time. Baldus’ commentary on C.6.33.3 and the law text D.37.11.4 are presented below in Appendix II under no. [27] and [29].

In summary, we can conclude that so far all the contentions by McCalzeane came very close to wilful deception of the judges.

Lord Advocate Lauder’s refutation of McCalzeane’s defence pleadings does not show us whether the latter had also underpinned his arguments with the opinion by Jason de Maino on which the appellant in “Laird of Dunnone v. Lauder” 1548/9 had based his argument.⁵⁴ If we watch, however, how gingerly Lauder in his refutation sidestepped Jason’s opinion, we may assume that all advocates at the court still remembered “Laird of Dunnone v. Lauder” as a troublesome and dangerous precedent. Since the appellant had in the end lost his case, McCalzeane may have shied at calling this case back into the memories of the judges.

McCalzeane’s best chances, in my opinion, lay in his offer to bring witnesses who had personal knowledge that Jonet Anderson had been vested and saised as of fee with the tenements in question. This came down in effect to saying that one needed not go further into the matter of whether the document was valid or not, since Jonet could prove anyway by witnesses that she held valid title to the lands.

54 See my text above, section 4.

6 Lord Advocate Lauder's tactics

Lauder's pleadings are divided into seven sections. *Jus Commune* dominates the sections (b)–(e).

- (a) Facts which raise suspicion against the instrument (lines 1–24),
- (b) References to state that documents are void when they were erased in essential places (24–36),
- (c) Refutation of McCalzeane's purported contrary references to this topic (36–46),
- (d) References to state limitations by law to allege and prove an error in a notarial document (47–61),
- (e) Refutation of McCalzeane's purported contrary references to this other topic (61–7),
- (f) Repetition of the most essential facts which raise suspicion (67–72),
- (g) Refutation of McCalzeane's offer to prove by witnesses that Jonet Anderson got sasine (72–81).

Lauder first recalled facts which cast suspicion on the document, and he repeated these facts towards the end of his pleadings: the instrument has erasures in suspicious places, it bears a date long after the decease of the notary, it mentions a bailie who was not bailie in that year, and it enumerates tenements purportedly held by Francis Aikman, although he had in fact acquired these tenements long after the purported date of the instrument.

While Lauder refuted in detail the purported defences for the erasures and the wrong date, he did not mention any subterfuge from McCalzeane's side for the tenements which Aikman had only acquired long after the purported date of the document (lines 8–9). I therefore assume that McCalzeane, when he wrote his defence pleadings, did not yet know that Lauder had detected this other defect of the document. I think that Lauder had purposefully kept his detection in reserve. He first wanted to wait and see which written defences McCalzeane would submit.

I have also looked up Lauder's own references to *Jus Commune*. At first, I had attempted to find in Scottish libraries early editions from Lauder's time – or, even better, I had hoped to identify some of the very volumes which Lauder had owned and used in person. These attempts remained fruitless, however. The time was wasted. To my regret, I then had to use whatever editions of the cited works happened to be within my reach.

All the texts quoted by Lauder state indeed the points for which he had cited them. Some references, however, were hard to decode, because the copyist had garbled them. Readers of copied texts of *Jus Commune* must incessantly be on their guard against misleading punctuation, skipped or misread words, and garbled references. The copyists were usually not trained in *Jus Commune*, so they did not fully understand the meaning of what they copied. Luckily, the learned lawyers who read the copied texts were very experienced in making good sense of garbled phrases and references which at a first glance were nonsensical.

Right at the beginning of his juridical explanations, Lauder circumvented with remarkable skill the dangerous text passage by Jason de Maino, mentioned above, that emendations written on erasure in a notarial instrument are irrelevant when the character of handwriting shows that the notary had written the emendation

with his own hand.⁵⁵ Lauder knew that the lords had recently followed Jason's opinion and had admitted proof by comparison of handwriting.⁵⁶ This was why Lauder opened his juridical argument with a global contention that according to "the law and doctors" any emendation in a document's essential text always vitiates it entirely, except when the notary had expressly confirmed that he had made the emendation with his own hand (lines 24–7). Lauder purposefully used the juridical term "the law and doctors". This was a standard term to contend that the "common opinion" of juridical authors had interpreted relevant law texts in the *Corpus iuris* as stated by the contender. After this precautionary statement, Lauder referred indeed to Jason's dangerous text – yet with the safeguard that it should be read in context with subsequent paragraphs ("*et sequentibus*"). The context should show that Jason's opinion, when read in its entirety, was not substantially contrary to the "common opinion". Lauder even added a supplementary safeguard. He suggested that Jason's interpretation of the law should be read together with a corrective interpretation by Baldus de Ubaldis on C.6.54.1. Baldus' text is presented in Appendix II, no. [4].

Next, Lauder quoted a legal opinion by Alexander Tartagnus. Its text is presented in Appendix II, no. [5]. It dealt with a document in which an essential text passage had been rewritten in another hand – on erasure. Alexander held that this fact vitiated the document. Lauder argued from there that Alexander's opinion should by even stronger reason apply to Jonet Anderson's document, because there an entire series of essential lines had been erased and rewritten in another hand.

Lauder then added more quotations to support what he had stated in lines 24–7. Texts for these additional references are presented in Appendix II, nos [7] to [26]. Thereafter, he cogently refuted advocate McCalzeane's purported quotations. Texts cited by McCalzeane to underpin his arguments and texts cited by Lauder for refutation are presented in Appendix II, nos [27] to [39].

In the next point, Lauder dealt with McCalzeane's contention that the misdating of the instrument occurred because the notary erred in the date. Lauder countered this by conveying that under *Jus Commune* only a notary in person can allege that he erred in a document which he has written, and he may only do so under strictly limited circumstances. As matters stood in the present case, even the notary himself (if he were still alive) would not be admitted to allege that he erred in the date. The reasons for such inadmissibility were even more stringent when other persons attempted to raise such an allegation (lines 49–60). The cited texts are presented in Appendix II, nos [40] to [54]. McCalzeane's citations of texts to the contrary were misquoted (lines 61–7). The texts pertaining to this point are presented in Appendix II, nos [55] to [61].

Thereafter, Lauder recalled to memory that the erasures and the intervention of a second hand made it far more likely that the entire document was a forgery, and it was quite an unlikely assumption that the notary had dictated part of the text to an assistant, and that he had dictated an erroneous date (line 67 end, to line 72). Lauder thereby warned the judges that they should not bypass *Jus Commune's* restrictive rules against allegations that a notary had erred. If the judges would allow proof by witnesses for such an allegation, this would constitute an inconvenient precedent. It

⁵⁵ See again my text above, section 4. Jason's text is presented in Appendix II, no. [2].

⁵⁶ Case "Laird of Dunnone v. Lauder" 1548/9, discussed above in section 4.

would invite upholders of forgeries to invent allegations that the notary erred, and to blackmail other fraudsters to attest to this.

Into this thought, Lauder embedded yet another strong procedural argument: the College of Justice had a long-standing practice that title to land could only be proved by an authentic public instrument, and not by other means of proof. Advocate McCalzeane's request to admit probation by witnesses intended to bypass this practice.

We may pause here for a moment to see how *Jus Commune* treated such court practices. *Jus Commune* stated in principle that secular courts' procedure (which also comprised evidence) was subject to territorial legislation, and failing this it was subject to rules of canon law, and in last rank rules of Roman law. The territorial legislator, however, could empower a law court in his territory to legislate on its own in these matters. Several supreme courts in Europe were empowered in this sense, or acquired such power by customary law. When Scotland's College of Justice was founded (in May 1532), its members immediately enacted a set of procedural rules for their court. They requested royal ratification and obtained it on 10 June 1532. Thereafter, the College of Justice Act 1540 officially empowered the College to make law "expedient for ordering of processes and the hasty expedition of justice". Henceforth the judges enacted such law, made by them, in their *Acts of Sederunt*.

Furthermore, courts could also create customary law in fields for which they had not been empowered to legislate. Although under *Jus Commune* a single precedent of a territory's highest court did not bind the inferior courts⁵⁷ and merely had persuasive authority,⁵⁸ in contrast a steady line of precedents could become customary law.⁵⁹ This required the formation of a general consensus among the weightiest part of persons interested in the respective field of law that this court practice was beneficial and should thus be law. Customary rules retained their binding legal force as long as the underlying consensus lasted.

The College of Justice's practice here in question certainly had the required footing of general consensus among the court's judges and advocates. This is witnessed in four case summaries in *Sinclair's Practicks*.⁶⁰

- (a) "Laird of Craighall v. Laird of Glenbarwie" (*Sinclair* no. 119, dated 8 February 1541/2),
- (b) "Tod v. Crawford" (*Sinclair* no. 131, dated 25 February 1541/2),
- (c) "Abbot of Glenluss v. Was" (*Sinclair* no. 151, dated 4 March 1541/2),
- (d) "Laird of Ormeston v. Prebendaries of Queen's College" (*Sinclair* no. 360, dated 4 March 1544/5).

57 Thus C.7.45.13. This text delimits the reach of C.1.14.12.3; similarly C.1.22.6 and C.9.2.14. The historical ascent and decline of the principle of binding force of precedent are described in detail in G. Dolezalek, "Stare Decisis": *Persuasive Force of Precedent and Old Authority (12th–20th Century)*. University of Cape Town, Inaugural Lecture, new series no. 156 (Cape Town, 1989).

58 Thus D.1.3.23 and 34 and 37–8; C.1.14.11; C.1.26.2; C.8.10.3; C.9.35.11.

59 *Glossa ordinaria* on C.7.45.13, by Franciscus Accursius, mid-thirteenth century. For a general survey on the historical development of persuasive or binding force of precedent, and on judges' privately collected law reports, of which some leaked out in later times and became widely used and disseminated as tools, see Dolezalek, "Stare Decisis".

60 As cited in n. 1.

Nevertheless, this practice was not followed 100 per cent. In the first two cases (a and b), the judges had in the end not abided by it.

Ironically, advocate McCalzeane himself (who now requested to bypass the practice) had in case (b) pleaded to uphold the practice in full rigour. He had pleaded to dismiss the then defender's request to prove his title to land by a privately written document and by witnesses mentioned therein. McCalzeane had in the end lost, however, because the defender's privately written document dated from a time before the court practice in question was established, and because the defender's witnesses were particularly trustworthy.

Likewise, at a first glance, Lauder too might have found himself in an awkward position because he himself had in case (a) successfully pleaded not to apply the practice on which he now so firmly relied. We shall see below, however, that Lauder had sound juridical reasons on his side.

In case (a), Lauder had pleaded for the pursuer who averred that he (or his precursor) had once possessed a valid authentic public charter for his title to the land in question, as a co-feuar ("in conjunction"), together with a female, probably his wife. The charter was based on an official ascertainment that the Laird of Glenbarwie (or his precursor) had failed to enter into the fee in due time. The said charter, however, had allegedly been "subtracted" by the defender. Now the pursuer merely had witnesses who had seen the charter, and in addition he had an authentic copy of a charter issued for the female co-feuar, and copies of two judicial decrees, obtained by the female co-feuar against other persons who had meddled with the property. Advocate Hew Rigg⁶¹ represented the defender. He firstly submitted that the copies of the female's charter (and those of the court decrees) were not authentic because their transumption (= exemplification, i.e. making of an officially attested copy) from the original charter had been done without previous summoning of possible adversary parties "as required by law". In addition, advocate Rigg insisted upon strict reliance on the practice that title to land could only be proved by authentic public instrument.

Advocate Rigg's first objection was not substantiated. The summoning of possible adversary parties was a safeguard, not a requirement by law. When an instrument was publicly transumpted while possible adversary parties had not been summoned, there remained a risk that an adversary party might later purport, against the authentic copy, that the original instrument had been defective or even forged.⁶² Here, however, it was anyway out of the question that the transumpted charter of the female co-feuar had not had any defects. It had officially been registered in Scotland's books of Council and Session, and its text had been "extracted" from there by the Clerk Register.

Hew Rigg's second objection was more difficult to overcome: namely his firm reliance on the court practice. This needs a somewhat longer explanation. I shall first show how dominant the practice was. Thereafter, I shall point out that it nevertheless had limitations, imposed by *Jus Commune*.

61 Hew Rigg was a close colleague of Henry Lauder (see n. 31 above).

62 In the case narrated in X.5.33.12, a monastery had asked for transumption of an aged charter of a papal privilege which exempted the monastery from rights of the local bishop. So, the local bishop was summoned to raise his objections, if he had any. This law text is presented in Appendix II, no. [11].

The existence of the College of Justice's practice was not contested. It clearly stood the test of reasonability which *Jus Commune* required for customary law. It was in the general public interest that acts of considerable juridical importance should be recorded in writing, and when their importance was particularly great it was highly advisable that such acts were publicly recorded in a certified authentic document. *Jus Commune* recognised this need and provided convenient means to meet it: namely the papacy and the territorial rulers appointed notaries, and these were prominently trustworthy persons. They kept a protocol book to register all the events which they recorded. All documents issued by them had reliable formal characteristics to attest for their authenticity. *Jus Commune* furthermore restricted the admissibility of allegations that a notary had erred, or had misrepresented facts of which he had personal knowledge – as correctly quoted by Lauder in lines 49–67 and in the cases “Hering v. Scot” and “Laird of Dunnone v. Lauder”, mentioned above.⁶³

Jus Commune had itself no mandatory rules for public recording, but church legislation and territorial legislation in Europe introduced such rules. The judges of the College of Justice were in keeping with a Europe-wide trend when they established the practice that title to land must be proved by public authentic document.

A rule under *Jus Commune* said that pursuers had only themselves to blame if they had not cared to provide evidence for a juridical act on which they based their claim. A pursuer could not usually request that the defender should disclose his or her own documents which might prove the pursuer's claim. This was stated in C.2.1.1 (Emperor Antoninus Pius, AD 155). I translate:⁶⁴

See yourself how you may prove that the money, which you allege to have deposited, is owed to you – because what you request, namely that your adversary should disclose her book-keeping, this is under certain circumstances [*ex causa*] accustomed to belong to the office of the judge.

The principle in C.2.1.1 was taken up by canon law in X.2.19.1 (Pope Gregory I, AD 590–604). I translate:⁶⁵

Gregorius to Recharedus king of the Visigoths, excerpt from the letter's words: Your excellence requested that I should write to the Emperor that he should retrieve from his archive the conventions agreed long ago between Emperor Justinian and your predecessors, in order to find out which utility they might provide for you. Yet an obstacle strongly prevented me from doing so, because one cannot tell any other person: “Retrieve among the documents in your own possession those which are against you, and disclose them”.

The two cited texts thus agree that in all cases where proof can only be brought by documents, persons who did not care for this need are usually left helpless.

⁶³ See the main text above, sections 3 and 4.

⁶⁴ C.2.1.1. Imperator Pius Antoninus A. Manilio. Ipse dispice, quemadmodum peculium, quam deposuisse te dicis, deberi tibi probes. Nam quod desideras, ut rationes suas adversaria tua exhibeat, id ex causa ad iudicis officium pertinere solet.

⁶⁵ X.2.19.1. Gregorius Recharedo regi Visigothorum, ex epistolae verbis: Tua excellentia postulavit, ut imperatori scriberem, quatenus pacta in chartophylacio requireret, quae dudum inter Iustinianum principem et praedecessores tuos fuerunt emissa, ut ex his colligeret, quid tibi servare deberet. Sed ad hoc faciendum hoc mihi vehementer obstitit, quia nulli dicendum est: “Ea quae contra te sunt, apud te ipsum debes documenta requirere, in mediumque proferre”.

C.2.1.1, however, allowed exceptions “*ex causa*” (“under certain circumstances” = “under good reasons”). The extent of these exceptions was unclear; but, from the early twelfth century onwards, glossators on C.2.1.1 interpreted that “*ex causa*” meant circumstances similar to those mentioned in D.2.13.6.8–9. I paraphrase this:⁶⁶

The praetor of Rome states in his Edict: “Only for soundly proved reasons shall I command a person to disclose his private documentation to an *argentarius* [= a banker and book-keeper]” ... The praetor prohibits to disclose to a banker, because a banker has his own professional documentation to look things up. It is absurd if he, who is held to disclose to his clients data from his documentation, would request that clients disclose their private documentation to him ... However certain exceptional circumstances can require that clients must disclose their own book-keeping to their banker: namely if he proves that he lost his professional book-keeping in a shipwreck or fire or because a house collapsed, or other similar event, or because his documentation is very far away, for instance overseas.

C.2.1.1 thus tolerated exceptions in situations where documented evidence had existed, but it had perished in a shipwreck, or in a fire, or when a house collapsed, or in other similar events.⁶⁷

Provision for documents which had perished in extraordinary events was extended by Emperor Justinian. He had legislated in C.4.20.18 that settlements of an obligation must normally be proved by a written receipt. But, if such receipt had existed and was lost in a shipwreck, or in a fire, or when a house collapsed, or similar event, then, exceptionally, witnesses were admitted to attest that they had seen that receipt. I translate:⁶⁸

To restrict the light-mindedness of witnesses as much as possible, by which many distortions of truth are perpetrated, we order that debtors who [*allegedly*] had solved obligations which they had undertaken in writing shall not easily be heard when they allege that they have settled the debt fully, or in part, and may want to bring vile and perhaps bribed witnesses about this settlement, unless five able witnesses of highest repute were present when the settlement was made, and they have attested under oath that the debt was settled in their presence – so that all who know that these [*rules*] are

66 D.2.13.6.8–9. Praetor ait: “Argentario ... causa cognita edi iubebo.” Prohibet argentario edi illa ratione, quod etiam ipse instructus esse potest instrumento suae professionis. Et absurdum est, cum ipse in ea sit causa, ut edere debeat, ipsum petere ut edatur ei. ... Nam et ipsi argentario ex causa ratio edenda est: si naufragio vel ruina vel incendio vel alio simili casu rationes perdidisse probet, aut in longinquo habere, veluti trans mare.

67 Respective glosses on C.2.1.1 from the early twelfth century onwards are edited in G. Dolezalek, *Repertorium manuscriptorum veterum Codicis Justiniani*, 2 vols (Frankfurt am Main, 1985), vol. 2, pp. 538–62.

68 C.4.20.18. Imperator Justinianus A. Menae pp. Testium facilitatem, per quos multa veritati contraria perpetrantur, prout possibile est, resecantes omnibus praedicimus, qui in scriptis a se debita rettulerunt, quod non facile audientur, si dicant omnis debiti vel partis solutionem sine scriptis fecisse velintque viles et forsitan redemptos testes super huiusmodi solutione producere, nisi quinque testes idonei et summae atque integrae opinionis praesto fuerint solutioni celebratae, hique cum sacramenti religione deposuerint sub praesentia sua debitum esse solutum, ut scientes omnes ita ea statuta esse non aliter debitum vel partem eius persolvant, nisi vel securitatem in scriptis capiant vel observaverint praefatam testium probationem. His scilicet, qui iam sine scriptis debitum vel partem eius solverunt, praesenti sanctione merito excipiendis.

§ 1. Sin vero facta quidem securitas sit, fortuito vero casu vel incendii vel naufragii vel alterius infortunii perempta, tunc liceat his qui perpessi sunt causam peremptionis probantibus etiam debiti solutionem per testes probare damnumque ex amissione instrumenti effugere.

thus ordained, will not settle a debt, or part of it, unless they receive a written receipt or will have observed the above-mentioned proof by witnesses. If debtors, before this legislation, have settled a debt, or part of it, without written receipt, they must of course be exempted. § 1. However, if a receipt has been issued but it has perished by mere accident or fire or shipwreck or other misfortune, then they who have suffered such loss and prove its cause shall be allowed to prove by witnesses the settlement of the debt, and thus to avoid damage from the perishing of the document.

The College of Justice upheld C.4.20.18 in the case “Master of Hailes v. Abbot of Newbottle” (*Sinclair’s Practicks*, no. 462, dated 14 February 1548/9). There the court applied the rule together with its exception provided in its § 1. In Sinclair’s report of the case in question, it was averred that a receipt for settlement of an obligation had been destroyed when a house had burned down. The judges thus admitted witnesses to attest that they had seen that receipt. We shall see below that this practice of the College of Justice with regard to written proof of settlement of debts corresponded to its policy with regard to written proof of title to land.

Justinian’s legislation in C.4.20.18 was taken up by canon law in X.5.33.12. This text is presented below in Appendix II under no. [11]. It reports a judgment by Pope Innocent III (1198–1215) in a case where a document had been stolen. The document in question had in past times been lodged before papal judges delegate. So, it had been inspected by judges and also seen by other witnesses. Pope Innocent III therefore admitted ten witnesses to attest to the text of that lost document. This precedent judgment inspired *Jus Commune* authors to elaborate and generalise the common underlying principles in C.2.2.1 / X.2.19.1 and C.4.20.18.1 / X.5.33.12.

Now let us return to the analysis of Sinclair’s case “Laird of Craighall v. Laird of Glenbarwie”. There, Lord Advocate Lauder had argued that a pursuer can exceptionally prove his title to land by witnesses when the pursuer had in origin held an authentic title charter, but the defender had stolen it. This pleading did not bypass the principle that title to land must be proved by public authentic document. Lauder rightfully relied here on analogy to *Jus Commune’s* above-mentioned concessions for cases where documents had perished in a shipwreck or fire or in the collapse of a house.

This was echoed in the law report. Unfortunately, a part of the report’s narration is lost, but the preserved remainder of the narration gives clues on what was lost.⁶⁹ I translate:

The eighth of February. The lords, in the case of the laird of Craighall against the laird of Glenbarwie, being a case of non-entry [*hereafter a portion of the original text is lost ...*], to prove certain lands to be in non-entry. The king’s advocate submitted the copy of an instrument of joint fee of the lands, and two decrees which the woman joint feuar had obtained long ago against other persons on grounds of wrongful occupation of their lands. The copy of the instrument was recorded in the books of Council and extracted from there by the Clerk Register. And yet another copy of it had been subscribed by two notaries. And thereto the advocate mentioned above alleged that the laird mentioned above had taken the said original instrument away, with intent to defraud the pursuer. And he offered to prove this by witnesses, contending that in this way the tenancy would be sufficiently proved. The procurator of the said laird, master Hew Rigg, objected that the copies mentioned above were not authentic, because they were made and transumpted without summoning the parties concerned, as the law

69 See the text above, between the indicators for nn. 60 and 61.

requires. And he also objected that sasine and matters of heritable property ought to be proved by authentic document, and not by witnesses. Nevertheless the lords, considering the documents mentioned above and other strong presumptions for the party of the said laird of Craighall, and also because in cases where by law a document is required, as in our case, according to the practice of the kingdom of Scotland, if the document has been removed and lost, or taken away by the adversary, then by law anyone must be admitted to prove by witnesses, as stated by Panormitanus and others in commentaries on the law text “*Cum olim*”, X.5.33.12, and commentators on the law text “*Testium*”, C.4.20.18.1. And also because the said laird offered to prove that the said woman as joint feuar during her lifetime enjoyed and used the same lands, and this was a great token that the [stolen original authentic] instrument was true. And because of the law, on grounds of presumptions, therefore they admitted the said advocates to prove by witnesses, according to the law, that the said original instrument was a public and authentic instrument, “not vitiated, nor erased, nor suspicious”,⁷⁰ and that this authentic instrument had been taken away by the defender.⁷¹

Altogether, thus, Lord Advocate Lauder’s reasoning was cogent.

7 The court’s final decree

The decree fully conformed to the usual pattern of judgments in all countries whose courts applied *Jus Commune*. The text briefly narrates the matter of the litigation and the procedural steps which were taken in it. The narration ends with the usual assurance (common among *Jus Commune* judges) that all procedural prerequisites for pronouncement of a judgment are fulfilled: “all the rights, reasons, allegations, defences and juridical arguments of both parties had been heard, seen and understood, and the judges had maturely deliberated on them”. Medieval canon law’s main reasoning for these prerequisites was based on the story of Adam and Eve in the Bible. According to Genesis 3:9–13, even the almighty God took time

70 Words taken over from Emperor Justinian’s text C.6.33.3pr.: “*non cancellatum neque abolitum neque ex quacumque suae formae parte vitiatum ... sine omni vituperatione*” (text provided in Appendix II, no. [1]).

71 Original wording in *Sinclair’s Practicks*, no. 119: The aucht of februar <1541/2>: The lordis, in the laird of Cragyhallis caus aganes the laird of Glenbarwie, in the caus of non-entres [*hereafter a portion of the original text is lost ...*], to preif certane landis in non-entres. The kingis advocat producit the copie of ane instrument of coniunctfie of the landis and tua decretis that the woman coniunctfeuar had obtenit langsyne aganis uthir persones for wranguis occupatioun of thair landis. The copie of the instrument wes registrat in the buikis of Counsall and extract thair of be the register clerk, and als ane uthir copie thair of under tua notaris subscriptiounis. And attour the advocat foirsaid allegit that the laird foirsaid had substractit the said instrument originall in defraud of the persewar. And offerit him to preve the samyn be witnessis, alleging this wayis the said tenendrie to be sufficientlie provin. The said lairdis procuratour, Mr Hew Rig, exceptit the copeis foirsaid nocht to be authentik, becaus thai wer maid and transmit the pairteis haifand intres thairto nocht callit as the law requyris. And als exceptit that seasing and mater of heretage aucht to be provin bot be wretingis authentik and nocht be witnessis. Nochttheles the lordis, haifand consideratioun to the foirsaidis wretingis and uthir gret presumptiounis for the part of the said laird of Cragyhall, and als becaus that ubi de iure scriptura requiritur, ut in casu nostro, secundum practicam regni Scotie, si scriptura interempta et perdita sit vel per adversarium subtracta, ad hoc probandum per testes de iure quivis debet admitti: per <Pan.?’> et alios in cap. Cum olim, extra de privile. et scribentes in l. Testium, C. de testibus. And als becaus the said laird offerit to preve that the said woman as coniunctfeuar during hir lyfetye jousit and brukit the samyn landis, and wes ane great takin that the instrument wes trew. And becaus of the law ex presumptionibus thairfoir thai admittit to the said advocatis to preif be witnessis as accordis of the law that the said instrument originall wes ane publict and authentik instrument, “non vitiatum, rasum, nec suspectum”, and that it wes substractit be the said laird of Glenbarwie.

and patience to give Adam and Eve a fair hearing. He had no need to do so. God knows everything anyway, even beforehand if he wishes so. When God nevertheless undertook to hear, see, understand and deliberate, he must have had a different aim in mind. He wanted to set an example, in order to teach mankind how judges should proceed.

Immediately thereafter follows the pronouncement of the sentence, without more ado: the instrument in question is annulled and void. No juridical reasons are given.

Under *Jus Commune*, judges were strongly discouraged from stating a juridical argument in the text of a judgment. The reason for this lay in Roman law. C.7.64.2 (Emperor Alexander Severus, AD 222–35) stated that a judgment is void from the outset when it is expressly based on a wrong understanding of the law. Such judgment will never become effective, even if no appeal is lodged against it. I paraphrase:⁷²

When a law case pended between you as alleged intestate heir and the grandmother of the deceased as alleged testamentary heir, and the Praeses Provinciae pronounced that boys who are not yet fourteen years old can nevertheless erect a valid testament, and that therefore the grandmother has better title, it is obvious that his judgment disregards the law so manifestly that it has no force at all, and therefore it was not even necessary to lodge an appeal against it.

§ 1. In contrast, if the age of the boy was disputed, and the Praeses Provinciae found that the boy had completed his fourteenth year of age, and therefore he had validly erected his testament, and you did not lodge an appeal, or desisted from pursuing an appeal which you had lodged, then you must not attempt to reopen a law case whose judgment has become final.

Thus, if a judge was unwise enough to mention a juridical reasoning in his formal judgment document, a mischievous litigant might use this as a pretext to contend that the reasoning was erroneous and that the judgment was thus void.⁷³

From the sixteenth century onwards, various territories in Europe began to abolish the principle of C.7.64.2. Eventually this was done in all *Jus Commune* territories, sooner or later, but as long as it still applied (e.g. quite long in Scotland) the judges strictly abstained from writing juridical reasons into a judgment's text.

8 Juridical literature quoted by Lord Advocate Lauder

In the eighty-one lines of his pleadings, Lauder quoted texts of *Jus Commune* at least sixty-nine times – altogether forty-six different texts, and probably even more, since long stretches of text in lines 40–6 were destroyed by mildew and decay, and they

72 C.7.64.2. Imperator Alexander Severus. Si, cum inter te et aviam defuncti quaestio de successione esset, iudex datus a praeside provinciae pronuntiavit potuisse defunctum et minorem quattuordecim annis testamentum facere ac per hoc aviam potioem esse, sententiam eius contra tam manifesti iuris formam datam nullas habere vires palam est et ideo in hac specie nec provocationis auxilium necessarium fuit.

§ 1. Quod si, cum de aetate quaereretur, implese defunctum quartum decimum annum ac per hoc iure factum testamentum pronuntiavit, nec provocasti aut post appellationem impletam causa destitisti, rem iudicatam retractare non debes.

73 The strong advice not to state juridical reasons, and means to circumvent this problem (particularly developed in the papal court *Sacra Romana Rota*), were discussed in detail by G. Dolezalek, "Litigation at the Rota Romana, particularly around 1700", in A. Wijffels (ed.), *Case Law in the Making. The Techniques and Methods of Judicial Records and Law Reports. Volume I, Essays* (Berlin, 1979), pp. 339–73; also Dolezalek, "*Stare Decisis*", in particular pp. 18–20.

might well have contained additional citations. The pleadings thus show that Lauder was excellently versed in *Jus Commune*.

Age of the cited literature

The quoted compilations of civil law in the *Corpus Juris Civilis* date from the early sixth century, and the *Libri Feudorum* annexed to it was composed in the twelfth century. The texts of canon law in the cited parts of the *Corpus Juris Canonici* are datable to times from AD 590 to 1298, but most of them originated between 1180 and 1234. Also, all other cited literature originated in the thirteenth to the fifteenth centuries. The latest author is Jason de Maino (d. 1519).

It was normal in the sixteenth century that advocates and judges used juridical standard literature from the Middle Ages; and this usage continued until far into the 1600s. It has thus been observed in Scottish “Practicks” by John Sinclair⁷⁴ and by Robert Spottiswoode.⁷⁵ On a far greater scale has this been shown by Alain Wijffels. He drew up detailed statistics for the time between 1460 and 1580 (and slots within this time range), on a basis of more than 10,000 references which he had extracted from processes in the “Grand Conseil de Malines” (the highest court of the northern Burgundian territories).⁷⁶ Largely the same predominance of famous medieval *Jus Commune* authors came to light in a collection of reasonings from the “Schöffenstein” at Leipzig (= a high territorial court in Saxony) which I had discovered. Leipzig’s “Schöffnen” (= scabins, i.e. a word for judges in territorial collegiate courts in Middle Europe) advised courts all over Saxony and surrounding territories. The “Schöffenstein” had set this collection up as a secret tool for internal court use. It mainly covered reasonings from the years 1546–56. The judgments of the court, in contrast, were sent out without any juridical reasoning.⁷⁷ The same pattern of predominant references to famous medieval authors appeared when I discovered notes on deliberations 1532–3 in Germany’s “Reichskammergericht”.⁷⁸

74 See articles cited in n. 1.

75 Cairns, “Ius Civile in Scotland” (as cited in n. 2), p. 164. Spottiswoode, in the seventeenth century, still quoted six times the medieval *Tractatus de libellis “Practica aurea Papiensis”* (see my text below, next to the indicator for n. 79), and eleven times its contemporary competing work by Petrus Jacobi de Aureliaco, *Tractatus de libellis “Practica aurea”*. J. D. Ford also confirmed this: *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007), p. 191.

76 A. Wijffels, *Qui millies allegatur. Les allégations du droit savant dans les dossiers du Grand Conseil de Malines (causes septentrionales, ca. 1460–1580)*, 2 vols (Amsterdam, 1985). See there, on p. 183, a revealing table in which authors of commentaries on the *Corpus Juris Canonici* are ranked by frequency of citations: Panormitanus, *Glossa ordinaria*, Pope Innocent IV, Felinus Sandeus, Antonius de Butrio, Johannes Andreae, Johannes de Imola. Likewise on p. 183 a ranking for commentaries on the Codex Justinianus: Baldus, *Glossa ordinaria*, Bartolus, Jason de Maino and Bartholomaeus de Saliceto, and then Paulus de Castro. On p. 178, commentaries to the Digesta: the same four authors in the first four ranks.

77 Edited and commented on by Julia Pätzold, *Leipziger gelehrte Schöffensprachsammlung*, Schriften zur Rechtsgeschichte, Heft 143 (Berlin, 2009). The edition fills 763 pages. Statistics of citations of authors fill pp. 85–100.

78 Edited and commented on by Steffen Wunderlich, *Das Protokollbuch von Mathias Alber. Zur Praxis des Reichskammergerichts im frühen 16. Jahrhundert*. Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich 58, 2 vols (Cologne/Weimar/Vienna, 2011). The edition fills 532 of the 1,469 pages. Besides many hundreds of references to *Corpus Juris Canonici* and *Corpus Juris Civilis*, the text comprises 733 references to authors from the late Middle Ages onwards. Famous medieval authors predominate by far in the respective statistics on pp. 35–58.

Lauder's usage in citation

Lauder applied the mode of citing which was usual under *Jus Commune*. Authors' names and titles of works were abridged. My translation decodes Lauder's quotations, but my edition of the original text purposefully leaves all abbreviations as short as I found them. This method allows readers to check and possibly correct my decoding – and readers can get a taste of seeing *Jus Commune* citations.

Under *Jus Commune*, it was customary to cite widely known authors by mentioning just a short part of their name. In Lauder's pleadings, "glo." stands for the author of the *glossa ordinaria*; and Alb., Alex., Bal., Bar., Bu., Dy., Fel., In., Jas., Pan. and Spec. stand respectively for Albericus de Rosate, Alexander Tartagnus (Imolensis), Baldus de Ubaldis (Perusinus), Bartolus de Saxoferrato (Perusinus), Antonius de Butrio, Dinus de Mugello, Felinus Sandeus, Pope Innocent IV, Jason de Maino, Panormitanus abbas (Nicolaus de Tudeschis, abbot in Sicily, lastly archbishop of Palermo) and "Speculator" (= Guilielmus Durantis, author of *Speculum iudiciale*).

Titles of works were also abridged – if one cited them at all. Most quotations referred to commentaries on parts of the *Corpus Juris Canonici* or *Corpus Juris Civilis*. In such quotations, it sufficed to indicate the respective place in the *Corpus*. Neither the *Corpus Juris* nor other works were cited by page numbers, because such numbers would anyway differ from edition to edition, so it served no purpose to cite them. The same applied to an eventual internal numbering of text passages within a work, because in times under *Jus Commune*, any internal numbering in juridical works was just added by the editor or typesetter, so it also changed from edition to edition. The jurists quoted instead the beginning word(s) of the cited text passage, along with an abbreviation of the work's title, and with abridged first words of the rubric in which the text passage was situated.

When one sees an author's name spelled out, this indicates that the writer wanted to show that he was not expecting readers to be necessarily familiar with that author. In Lauder's pleadings, this applied to "Petrus Ferrarius" and Lanfrancus de Oriano. A spelled-out name does not necessarily indicate that this author's works were less widely disseminated and used. Take for instance "Petrus Ferrarius" = Johannes Petrus de Ferrariis (Papiensis). Lauder relied on this author's *Tractatus de libellis "Practica aurea Papiensis"* (Treatise on plaints "Golden Practice of Pavia"). This work was immensely popular among practitioners. More than fifty handwritten copies have come to my knowledge,⁷⁹ and many printed editions were published.

Also, the work by Lanfrancus de Oriano, *Repetitio* X.2.19.11 "*Quoniam contra falsam*", was well sought after as an introduction and guide to literature on procedural law. The law text in question, X.2.19.11, instructs judges that all their proceedings must be recorded by a public notary, and it enumerates the various steps of procedure to which this applies. When Lanfrancus commented on this law text, he expanded his "*Repetitio*" (a lecture to refresh the audience's memory) to become a short guidebook on judicial practice.⁸⁰

79 Dissemination of juridical works in manuscript can be checked in my database "Manuscripta Juridica": <http://manuscripts.rg.mpg.de/>.

80 The *Oceanus iuris civilis*, 10 vols (Lugduni, 1535) comprises (among many other works) also a printed edition of Lanfrancus' work. A copy of the *Oceanus* is available in Aberdeen University Library.

Handbooks for practitioners such as “Petrus Ferrarius” and Lanfrancus de Oriano had no academic doctrinal ambitions. Among learned lawyers, they were thus held to be on the same footing with alphabetical repertories, dictionaries and encyclopaedias. So, they were cited sparingly. Nevertheless, works of the type were well disseminated on the bookshelves of Scottish higher-class families. Extracts from works of the kind circulated in manuscripts – at times translated into Scots.⁸¹

Preponderance of canon law

As the arguments in the present case pivot on *Jus Commune*’s procedural law, and because the rules on procedure had mainly been developed in the ambit of papal jurisdiction (as explained above), Lauder’s quotations of canon law deliver the most weight for his arguments.

A mere statistical count of the forty-six cited texts fails at first sight to make this evident. Lauder referred to twelve text passages from the *Corpus Juris Civilis* and ten passages of exegetical literature on it, while he only quoted eight text passages from the *Corpus Juris Canonici* and twelve passages of exegetical literature on it. The crude ratio of citations of Roman law against canon law would thus be 22 to 20. We can but add to the canonical side the *Speculum iudiciale* by Guilielmus – because this was the great, absolutely leading manual on procedure in church courts. But the other three cited works deal equally with both civil and canon law: two collections of *Consilia* (by Alexander Tartagnus and Dinus de Mugello), and one general practitioner’s handbook on procedure (by Johannes Petrus de Ferrariis).

We must, however, subtract the bogus citations which advocate McCalzeane had brought up. He cited six law texts and five text passages from commentaries. All eleven belonged to Roman law, and all did not prove what McCalzeane had contended. Yet, Lauder had to cite them while he refuted McCalzeane’s arguments. Only four of them would have been used by Lauder anyway – as we can see because he also cites them outside mere refutation: D.1.5.8 and C.6.33.3, both with commentary by Bartolus. But the remaining seven are sheer bogus references of Roman law. So, I deduct them from the statistics. The net ratio of Roman law against canon law is then 15 to 20.

Lauder did not cite Scottish juridical literature

The juridical problems in the present case were regulated neither in Scottish Acts of Parliament nor in texts from the “Auld Lawis”. So, it is not surprising that Lauder did not refer to these sources of law.

In Scotland, by Lauder’s time, there circulated only one work of Scottish juridical literature which dealt (among other matters) with disproof of charters: namely an anonymous *Tractatus de carta*, beginning with the words “*Ad componendum cartas*”.⁸²

81 For instance, extracts from a French practitioner’s work on procedure were translated into Scots. They circulated in manuscript up to the early seventeenth century: Dolezalek, *Scotland under Jus Commune*, vol. 1, p. 155. The extracts are preserved in three manuscripts, described in vol. 2, pp. 172–3, 182, and vol. 3, pp. 113–15.

82 In some of the manuscripts which preserve this work, it bears the title “*De compositione cartarum*”: Alice Taylor, *The Laws of Medieval Scotland*, Stair Society vol. 66 (Edinburgh, 2019), pp. 22–3 and 359.

The text is still preserved in at least seventeen manuscripts.⁸³ An enlarged late version of this work was edited in print in 1971.⁸⁴ One of the manuscripts had once belonged to the second president of the College of Justice,⁸⁵ so he and maybe also other judges might have read the little treatise on charters which it comprised. The text, however, has no academic ambitions. It is written for entrant apprentices of notaries, and what it says about disproof of charters in Scotland does not deviate from *Jus Commune*. Lauder thus had no reason to refer to this work.

Lauder did not cite Scottish case law, although recent cases had also brought the same juridical rules to bear which now mattered in the present case. Learned lawyers in *Jus Commune* countries, however, only cited or commented on court decisions which had brought some novelty which mattered, in their eyes – for instance a decision where a juridical controversy of *Jus Commune* was at issue, and the decision had now made clear with which body of opinion the court sided in this controversy. In all the above-mentioned cases, however, the judges had simply sided with the “common opinion”. This was no novelty at all for learned lawyers.

By the way, if Lauder had felt interested to cite previous decisions of the court, he would have needed to keep a private notebook and collect therein the deliberations among the judges which interested him – as John Sinclair had done.⁸⁶ The respective notes which Sinclair had collected were private, and he kept them for himself, possibly until his death. The extant manuscripts show that *Sinclair's Practicks* became known to other persons only very late in the sixteenth century – so late that the copyists no longer knew whether Henry Sinclair or John Sinclair was the author. By 1566, when David Chalmers wrote his *Chalmers' Practicks*,⁸⁷ he did not use Sinclair's notes, although he sat daily on the bench with Sinclair.⁸⁸ Chalmers was lucky enough, however, to have at least a copy of Richard Maitland of Lethington's summaries of interesting deliberations

83 Their dates of origin range from the late fifteenth to the early seventeenth century: Cambridge, UL, Ee.4.21, fos 1r–2v; Edinburgh, NL Scotland, 16497 (“Arbuthnott MS”), fo. 1r–v; Accession 11218 no. 5 (“Fort Augustus MS”), fos 142r–v, 146r–147r; Adv.MS. 25.4.10 (“Alexander Foulis MS”), fo. 78r; Adv.MS. 25.4.12 (“Thomas Bannatyne MS”), fos 1r–3r; Adv.MS. 25.4.14, fos 101r–102r; Adv.MS. 25.5.6 (“Monynet MS”), fos 385v–388v, 394r–395v; Edinburgh, UL, 207, fo. 6r–v (the best MS, according to Taylor, p. 359); Edinburgh, UL, 208 (“Colville MS”), fos 172v–173v; Edinburgh, UL, Laing III.402 (the latest MS, datable to 1643), fos 102r–117r; Glasgow, UL, Murray 548, fos 216r–218v, 189v–190r, 229r–231v; London, BL, Additional 48032, fos 211r–213v; Additional 48033, within miscellaneous chapters fos 132r–137r; London, BL, Harley 4700, fos 295v–297v, 302r–303v; London, Lambeth Palace L, 167, fos 156v–158r; St Andrews, UL, 39000 (“Marchmont MS”), fo. 116r–v; St Andrews, UL, msKF51.R4, fos 116r–117r.

Manuscripts are described by Dolezalek, *Scotland under Jus Commune*, in places indicated in vol. 1, pp. 181–2, and by Taylor in places listed in her index on p. 641.

84 J. J. Robertson, “De compositione cartarum”, in *Miscellany One*, Stair Society vol. 26 (Edinburgh, 1971), pp. 78–93.

85 Robert Reid, bishop of Orkney. Manuscript Cambridge, UL, Ee.4.21 had formerly been in his possession.

86 *Sinclair's Practicks*.

87 *Chalmers' Practicks* are only preserved in one manuscript: London, British Library, Additional 27472. Described in Dolezalek, *Scotland under Jus Commune*, vol. 3, pp. 342–5.

88 Sinclair became president of the court on 14 November 1565. Chalmers had been elevated to the bench on 26 January 1564.

from 1550 onwards.⁸⁹ They became known to a wider public earlier than those of Sinclair.⁹⁰

9 Statistics of Lauder's forty-six citations

The spelling of authors' names and titles of works was standardised according to usage in my database "Manuscripta Juridica".⁹¹

<i>Corpus Juris texts</i>	<i>Exegesis on these texts</i>	<i>In Appendix II</i>
D.1.5.8		[53]
	Bartolus de Saxoferrato (d. 1357)	[54] (thrice)
D.37.11.4		[29]
C.4.19.24		[25]
C.6.23.7		[44] (twice)
C.6.23.12.1		[34]
	Baldus de Ubaldis (d. 1400)	[35]
C.6.23.24		[56]
	Baldus de Ubaldis (d. 1400)	[57]
C.6.33.3		[1]
	Jason de Maino (d. 1519)	[2]
	Bartolus de Saxoferrato (d. 1357)	[8] (thrice)
	Baldus de Ubaldis (d. 1400)	[27]
C.6.42.23		[30] (twice)
	Baldus de Ubaldis (d. 1400)	[31]
C.6.44.2		[59]
	Baldus de Ubaldis (d. 1400)	[60]
C.6.54.1		[3] (twice)
	Baldus de Ubaldis (d. 1400)	[4] (twice)
C.9.22.21		[43]
LF. De pace Constantiae		[48]
	Baldus de Ubaldis (d. 1400)	[49]
X.2.19.11		[45]
	Lanfrancus de Oriano (d. 1488)	[46]
X.2.22.3		[12] (thrice)
	Felinus Sandeus (d. 1503)	[13]
	Panormitanus abbas (d. 1445)	[14] (twice)
	<i>Glossa</i> (Bernardus de Botone, d. 1266)	[22] (twice)
	Antonius de Butrio (d. 1408)	[47]
X.2.22.6		[15] (fourfold)
	<i>Glossa</i> (Bernardus de Botone, d. 1266)	[16] (thrice)
	Panormitanus abbas (d. 1445)	[36]

89 Chalmers used a copy of Maitland's notes which ended in 1566. R. Sutherland edited *Maitland's Practicks* from a late heavily reworked and abridged copy, namely Glasgow, UL, Gen. 1333: *The Practiques of Sir Richard Maitland of Lethington: from December 1550 – October 1577*, Scottish Record Society, new series vol. 30 (Edinburgh, 2007).

90 Eighteen extant copies of *Maitland's Practicks* are described in Dolezalek, *Scotland under Jus Commune*. The manuscript tradition of this work was thereafter studied in more detail by A. Wilson, "The transmission and use of the collected legal decisions of Sir Richard Maitland of Lethington in sixteenth- and seventeenth-century Scotland", *The Library* 19:3 (2018), 325–59; A. Wilson, "The Elchies manuscript and the method of Sir Richard Maitland of Lethington", *Manuscripta: A Journal for Manuscript Research* 62:1 (2018), 95–145.

91 Database: <http://manuscripts.rg.mpg.de/>.

X.3.36.7		[17]
	<i>Glossa</i> (Bernardus de Botone, d. 1266)	[18]
	Panormitanus abbas (d. 1445)	[24]
X.5.7.4		[6]
	Pope Innocent IV (d. 1254)	[7]
X.5.20.5		[9] (twice)
	<i>Glossa</i> (Bernardus de Botone, d. 1266)	[10] (thrice)
X.5.33.12		[11]
VI.5.13.88 finis, "Data Romae"		[50]
	Albericus de Rosate (d. 1360)	[51]

Other juridical literature

Alexander Tartagnus (d. 1477), <i>Consilium</i> , vol. 6, no. 14	[5]
Dinus de Mugello (d.c. 1300), <i>Consilium</i> no. 13	[42] (twice)
Guilielmus Durantis (d. 1296), <i>Speculum iudiciale</i>	[28] (thrice)
Johannes Petrus de Ferrariis, <i>Practica aurea Papiensis</i> (composed 1400)	[40]

Altogether forty-six texts: twenty *Corpus Juris*, twenty-two exegeses, two *consilia* and two treatises.

APPENDICES

APPENDIX I

NRS CS 15/1, BUNDLE 2, 1549, "HENRY LAUDER V. ANDERSON"

Conventions for this edition:

Punctuation, capitalisation and the extension of abbreviations have been regularised according to usage in modern editions.

Headings have been supplied by the editors, in **bold type**.

Editors' notes and comments are *italicised* and included in square brackets [].

Doubtful readings are included in round brackets ().

Angled brackets < > mark places where a loss of paper has caused a loss of text. In some of these places, the context has enabled the editors to reconstitute the lost text.

Year dates: in Scotland, by then, the new year began belatedly on 25 March.

(n. 1) CS 15/1, bundle 2, item 1: Petition by Henry Lauder, Lord Advocate, between 18 and 21 May 1547

[Paper, 163 × 230 mm, originally folded twice vertically. Its twenty-three lines are here numbered in { } curly brackets. Along the document's right-hand side, a strip of paper has been cut off. Thus, at each line's end, up to a maximum of thirty characters may be missing. In the present edition, the missing ends are reconstituted in < > angled brackets.]

{1} My Lordis of Counsale. Unto your Lordis humblie menis and schawis thour servitour maister Henr<ie Lauder advocat to our soverane> {2} Lady that, quhair Jonete Andersoun relict of umquhile Francis Aikman burges of Edin<burgh compeirit> {3} the xviii day of may instant before the provest and baillies of the said burgh, comp<eirand with maister Thomas Sleuthman> {4} and William Andersoun curators for Jonete Aikman and Marioun Aikman hir doch<ters, to stop the> {5} breif purchest be Elizabeth Aikman eldest dochter and air of the said umquile <Francis, of certane> {6} landis pertening to hir as air to the said umquhile Francis, liand within the said burgh, <and productit ane instrument> {7} undir the signe and subscriptioun manual of umquhile Johnne Fowlar, allegeit <notar, daitit the xxvi> {8} day of Januar the yeire of God millesimo quingentesimo xxxvi yeris, contenannd that the sa<id Jonete was infest> {9} in the saidis tenementis and housis.

Quhilk instrument is fals and feinyeit in <the self. And the said Jonete,> {10} William and maister Thomas hes usit the samin in jugement that is ane fals <evident. And als> {11} the said evident remanis in the Baillies handis of the said toun. Quhilk is <aganis the interes of our> {12} soverane Ladys liegis that sic fals evident, productit before jugeis, suld pas unpu<nist, I humblie beseik> {13} that ye will gif comand to ane masser or ony uther officiar of armis <to chairge the> {14} provest and baillies of the said burgh and scribis therof in quhais hand the <said evident remanis>, {15} and the saidis Jonete, maister Thomas and William as forgeris, imaginars and <useris of the samin, to> {16} compere befor your Lordis at ane certane day as ye pleis to assigne, to pro<duce the said instrument befor> {17} your Lordis. And to heir and se the samin be improvin, eodem modo quo iur<e potest. And the saids> {18} personis

APPENDIX I

NRS CS 15/1, BUNDLE 2, “1549 HENRY LAUDER V. ANDERSON”

(n. 1) CS 15/1, bundle 2, item 1: Petition by Henry Lauder, Lord Advocate, between 18 and 21 May 1547

{1} My Lords of Council. To your Lordships humbly means and shows your servant master Henry Lauder, advocate to our sovereign> {2} Lady, that, when Jonet Anderson widow of the deceased Francis Aikman burgess of Edin<burgh appeared> {3} the 26th day of May current before the provost and bailies of the said town, app<earing with master Thomas Slewman> {4} and William Anderson curators for Jonet Aikman and Marion Aikman her daugh<ters, to stop the> {5} briefes purchased by Elizabeth Aikman eldest daughter and heir of the said deceased <Francis, of certain> {6} lands pertaining to her as heir of the said deceased Francis, lying within the said town, <and lodged an instrument> {7} under the sign and final notarial certification of the deceased John Fowlar, alleged <notary, dated 26th> {8} January 1536 [1537], which contained that the sa<id Jonet Anderson was infest> {9} in the said tenements and houses.

This instrument is false and feigned. <And the said Jonet,> {10} William and master Thomas have used the same in judgment as a false <evident. And still> {11} the said evident remains in the hands of the Bailies of the said town. It goes <against the interest of our> {12} sovereign Lady's subjects that such a false evident, lodged before judges, should pass unpu<nished. I humbly demand> {13} that you will command a macer or any other officer at arms <to charge the> {14} provost and bailies of the said town and their scribes in whose hands the <said evident remains>, {15} and the said Jonet, master Thomas and William as forgers, inventors and <upholders of the same, to> {16} appear before your Lordships at a certain date as you please to assign, to <lodge the said instrument before> {17} your Lordships. And to hear and see the same being disproven, in the very way in which <it can [be done] by law.

to be decernit to be punist for the using thairof and abiding thairat, conf<orme to the prat>{19}tik of this realme, with certificatioun to thaim and thai failye thairin, that the s<aid evident is> {20} fals and feinyeit in the self, and the saidis personis to be punist for the using <thairof,> {21} with all rigour, as said is, in exemple of utheris to eschew siclik in tyme cuming. <And> {22} to charge the saidis provest and baillies to keip the said evident under <saifkeiping,> {23} according to iustice.

And your ansser humble I beseik.

(n. 2) Overleaf: a note that Lauder's petition is admitted, 21 May 1547

Apud Edinburgh, xxi^o maii anno etc. xlvii^o.

Fiat ut petitur to Tyisday nixt to cum, with continuatioun of dayis.

[*Signature:*] Alex. Cam.th

(n. 3) Overleaf, further down: report by a court messenger that he summoned several persons to appear in court, 21 May 1547

The said xxi day of maii the yeir of God above writtin. I, James Lindesay masar, past at command of this deliverance and chargeit James Carmichaell, ane of the Baillies of Edinburgh, quha hes the instrument within specifijt in his hands, personalie apprehendit, Jonete Andersoun relicte of umquhile Frances Aikman, maister Thomas Sleuthman and William Andersoun hir bruther, all personalie apprehendit, to appeir before the lords of Counsale on Tuisday nixt to cum, with continuatioun of dayis, to produce the instrument within expremit, to the effect within writtin, effir the forme and tenour of this supplicatioun. And to ansser to all pointis and articulis therof. And deliverit ane copy of the samyn to the said Jonete.

This I did before thir wites Thomas Toderik seriand, and Richart Mauchan, with utheris divers. And for mair witnessing I haif affixt my signe heirto.

[*Traces of red sealing-wax, and signature:*] Jac(ob)us Lyn(desay)

[*Below, signature:*] Ja. cl. registri

[*Further down:*] Farder conv.h(?)

[*Yet further down:*] decanus de Restalrig

(n. 4) CS15/1, bundle 2, item 2: Report on first hearing in court, 19 July 1549

[*Paper, 220 × 300 mm, originally folded four times vertically.*]

In Edinburgh the xix day of July, the yeir of God millesimo quingentesimo xlix yeiris.

The Lordis of Counsale continewis the lettres rasit at the instance of maister Henrie Lauder advocat to our soverane Lady aganis Jonet Andersoun relicte of umquhile Francis Aikmann burges of Edinburgh and Archibald Spittell now hir spous for his interes, tuiching the improbatioun of ane instrument of seising gevin to the said Jonet of certane landis and tenementis lyand within the burgh of Edinburgh – as

And the said > {18} persons to be judged to be punished for using it and insisting in it, in conf<ormity with the prac>{19}tice of this kingdom, with a warning to them if they fail therein, <that the said evident is> {20} false and feigned, and the said persons shall be punished for using <it,> {21} with all rigour, as mentioned, to be an example for others to eschew such [*misbehaviour*] in oncoming times. <And> {22} to charge the said provost and bailies to keep the said evident under <safekeeping>, {23} according to justice.

And I humbly demand your answer.

(n. 2) Overleaf: a note that Lauder's petition is admitted, 21 May 1547

At Edinburgh, 21st May 1547.

To be done as petitioned, to the next oncoming Tuesday [*24 May 1547*] with continuation of days.

[*Signature:*] Alexander Cam.th [= *Alexander Mylne, abbot of Cambuskenneth, Lord President of the Court*]

(n. 3) Overleaf, further down: report by a court messenger that he summoned several persons to appear in court, 21 May 1547

The said 21st day of May of God's year mentioned above [*1547*]. I, James Lindsay macer, went at command of this deliverance and charged James Carmichael, one of the Bailies of Edinburgh, personally apprehended, who has the specified instrument in his hands, Jonet Anderson widow of the deceased Francis Aikman, master Thomas Sleuthman and William Anderson her brother, all personally apprehended, to appear before the lords of Council on next oncoming Tuesday, with continuation of days, to lodge the described instrument, for the purpose written therein, according to the wording and contents of this petition. And to answer all points and articles thereof. And I delivered a copy of the same to the said Jonet.

This I did before the witnesses Thomas Toderik sergeant, and Richard Mauchan, with diverse others. And for more witnessing I have affixed my signet hereto.

[*Traces of red sealing-wax, and signature:*] James Lindsay

[*Below, signature:*] Jacobus clericus registri [*James Foulis of Colinton, Clerk register*]

[*Further down:*] Further continuation(?).

[*or, last word possibly "conveth"? Lord William Lamb rector of Conveth, appointed 19 November 1540*]

[*Yet further down:*] decanus de Restalrig [= *Lord John Sinclair, dean of Restalrig, appointed on the same date*]

(n. 4) CS15/1, bundle 2, item 2: Report on first hearing in court, 19 July 1549

At Edinburgh the 19th day of July, God's year 1549.

The lords of Council continue the letters raised at the instance of master Henry Lauder advocate to our sovereign Lady against Jonet Anderson widow of the deceased Francis Aikman burgess of Edinburgh and Archibald Spittal now her spouse for his interest, touching the disproof of an instrument of sasine, given to the said Jonet of certain lands and tenements lying within the town of Edinburgh – as at more length

at mair lenth is contenit in the saidis lettres, in the samynn forme, force and effect as thai ar now, without preiudice of party, unto the xvi day of august nixt to cum, with continuatioun of dayis. And than the Lordis to proceid and minister justice therintill as accordis, without forthir delay. And in the meyntyme ordains the said Archibald Spittell, spous to the said Jonet, to haif inspectioun of the said instrument to the effect that he may be avisit thairwith, gif he and his said spous will abyd thairat and use the samin or nocht.

Againe the said day. The said advocat being personalie present, and the said Archibald Spittell for him self and his said spous being also personalie present – quhilkis ar warnit heirof apud acta.

Extractum de libro actorum per me magistrum Thomam Marioribankis de Ratho, clericum Rotulorum registri ac Consilii supreme domine nostre Regine, sub meis signo et subscriptione manualibus.

[*Signature:*] Thomas Marioribankis [*followed by his sign as Lord Clerk Register*]

[*Hasty minute, recorded during the second hearing:*] Advocat askit instruments that Spittale baid at the instrument, and offerit him to the xvii day of december. Reservis defencis.

(n. 5) CS 7/3/1, fo. 157v: Respective entry in the Court Register

The Lordis of Counsale continewis the lettres rasit at the instance of maister Henrie Lauder advocat of our soverane Lady aganis Jonet Andirsoun relict of umquhile Francis Aikman burges of Edinburgh, and Archibald Spittell now hir spous for his interes, tuiching the improbatioun of ane instrument of seising, gevin to the said Jonet of certane landes and tenementis lyand within the burgh of Edinburgh – as at mair lenth is conteinit in the saidis lettres, in the samin forme, force and effect as thai ar now, without preiudice of party, unto the xvi day of august nixt to cum [= 16 August 1549], with continuatioun of dayis. And than the Lordis to proceid and minister justice thairintill as accordis, without forthir delay. And in the meyntyme ordains the said Archibald Spittall, spous to the said Jonet, to haif inspectioun of the said instrument to the effect that he may be avisit thairwith, gif he and his said spous will abyd thairat and use the samin or nocht.

Againe the said day. The said advocat being personalie present, and the said Archibald Spittell for him self and his [*omitted: said*] spous being also personalie present, quhilkis ar warnit heirof apud acta.

(n. 6) CS15/1, bundle 2, item 3: Report on second hearing in court, 7 December 1549

[*Paper, 190 × 300 mm, originally folded four times vertically.*]

In Edinburgh the vii day of december the yeir of God millesimo quingentesimo xlix yeiris.

Anent our soverane Ladeis lettres purchest at the instance of maister Henrie Lauder advocat to the Quenis grace aganis Jonet Andersoun relict of umquhile Francis Aikmann burges of Edinburgh, and Archibald Spittale now hir spous for his entres, tuiching the improbatioun of ane instrument of seising, gevin to the said Jonet of certane landis and tenementis lyand within the burgh of Edinburgh, and the said

is contained in the said letters, in the same wording, force and effect as they are now, without prejudice of party, unto the 16th day of next oncoming August [16 August 1549], with continuation of days. And then the lords to proceed and administer justice thereto as needed, without further delay. And in the meantime they order the said Archibald Spittal, spouse of the said Jonet, to inspect the said instrument to the effect that he may think it over, if he and his said spouse will “abide” [= *whether they found their pleading upon it*] and use the same or not.

Again the said day [19 July 1549]. The said advocate being personally present, and the said Archibald Spittal for himself and his said spouse being also personally present, were given a warning about this, placed on record.

Extracted from the Register Book by me master Thomas Marioribanks of Ratho, Clerk Register of Rolls and of the Council of our supreme ruler the Queen, under sign and signature in my own hand.

[*Signature:*] Thomas Marioribankis [*followed by his sign as Lord Clerk Register*]

[*Request for instruments, placed on record on demand of the Lord Advocate, in the second hearing, 7 December:*] The advocate requested instruments that Spittal “bided at the instrument” [= *founded his pleading upon it*], and offered him to [*proceed*] the 17th day of December [1549]. Reserves defences.

(n. 5) CS 7/3/1, fo. 157v: Respective entry in the Court Register

[*The date can be taken from fo. 157r: xix July. Date xviii July precedes on fo. 156r, and date xx July follows on fo. 160r. The court clerks were long in arrears with the register. This series was only entered on command by the judge on 24 March 1559 (1560) – as mentioned by Arthur Murray in his footnote 6.*]

The lords of Council continue the letters raised ... [*verbatim as translated above, with minimal differences in spelling*] ... were given a warning about this, placed on record.

(n. 6) CS15/1, bundle 2, item 3: Report on second hearing in court, 7 December 1549

At Edinburgh the 7th day of December, God’s year 1549.

With regard to our sovereign Lady’s letters purchased at the instance of master Henry Lauder advocate to the Queen’s grace against Jonet Anderson widow of the deceased Francis Aikman burgess of Edinburgh, and Archibald Spittal now her spouse for his interest, touching the disproof of an instrument of sasine, given to the said Jonet of certain lands and tenements lying within the burgh of Edinburgh, and

Archibald comperand in jugement and havand inspectioun of the said instrument to the effect that thai mycht wse [*the scribe miscopied: vesy*] the samin, and gif he and his spous wald abyde therat and use the samin or nocht, lik as at mair lenth is contenit in the lettres and actis maid thairupoun of befor. The saids advocat and Archibald for him self for his interes, and for his said spous, being personalie present. Quha schew that he belevit the said instrument was trew in the self, becaus he knowis na uther thing, for it was nocht his deid nor his spousis, and wald use the samin sa far as he belevis the samin is just. And the said advocat allegit the samin was fals and finyeit, and offerit him to improve the samyn civilie and sufficientlie as he aucht of law.

Therfor the Lordis of Counsale assignis to the said advocat the xvii. day of december instant, with continuatioun of dayis, for improving thair of sufficientlie. And ordanis him to haif lettres to summond sic witnessis and probatioun, and to produce sic writtis, rychtis, ressonis and documentis as he hes or will use for improving of the samin, againe the day forsaid, reservand to the party thair defencis siclik as thai may use now, to the samin day. And the partis presentis ar warnit heirof apud acta.

Extractum de libro actorum per me magistrum Thomam Marioribankis de Ratho, clericum rotulorum registri ac Consilii supreme domine nostre Regine, sub meis signo et subscriptione manualibus.

[*Signature:*] Thomas Marioribankis [*followed by his sign as Lord Clerk Register*]

[*Below, in lighter ink:*] Assignis to McCalzeane [= *advocate of the defenders*] Mounday nixt to cum [= *9 or 16 December 1549*], to geif in all the defences that thai will use for eschewis and defending of the improbatioun of the instrument, relevantly qualifeit. In writt.

(n. 7) CS7/3/1, fo. 214v: Respective entry in the Court Register

Anent our soverane Ladyis lettres purchest at the instance of maister Henrie Lauder advocat to the Quenis grace aganis Jonet Andersone relict of umquhile Francis Aikman burges of Edinburgh, and Archibald Spittale now hir spous for his entres, tuiching the improbatioun of ane instrument of sesing, gevin to the said Jonet of certane landis and tenementis lyand within the burgh of Edinburgh, and the said Archibald comperand in jugement and havand inspectioun of the said instrument to the effect [*omitted: that thai mycht wse the samin, and*] geif he and his spous wald byde therat and use the samin or nocht, lik as at mair lenth is contenit in the lettres and actis maid thairupoun of befor. The [*omitted: saids*] advocat and Archibald for him self for his enteres and for his said spous being personalie present. Quha schew that he belevit the said instrument was trew in the self, becaus he knowis na uther thing, for it was nocht his deid nor his spousis, and wald use the samin sa far as he belevis the samin is just. [*Omitted: And*] The said advocat allegit the samin was [*the scribe miswrote: wals*] fals and feinyeit, and offerit him to improve the samin civilly and sufficiently as he aucht of law.

Therfor the Lordis of Counsale assignis to the said advocat the xvii. day of december instant [= *17 December 1549*], with continuatioun of dayis, for improving thair of sufficiently. And ordanis him to have lettres to summond sic witnessis and probatioun, and to produce sic writtis, rychtis, ressonis and documentis as he has or

the said Archibald appearing in judgement and inspecting the said instrument to think the matter over, to the effect that they might use the same, and [*to condescend*] if he and his spouse wanted to “bide at it” [= *found their pleading upon it*] and use the same or not, like it is at more length contained in the letters and acts made thereupon before. The said advocate and Archibald for himself for his interest, and for his said spouse, being personally present. He showed that he believed the said instrument was true, because he knows no other thing, as it was neither his deed nor his spouse’s, and he wanted to use the same as far as he believes the same is just. And the said advocate alleged the same was false and feigned, and offered to disprove the same civilly and sufficiently as he ought of law.

Therefore the lords of Council assign to the said advocate the 17th day of December current [= *17 December 1549*], with continuation of days, to disprove it sufficiently. And order him to raise letters to summon such witnesses and proof, and to lodge such writings, rights, reasons and documents as he has or will use for the disproving, again the aforementioned day [= *17 December 1549*], reserving to the party their defences, as they may use now, to the same day. And the present parties are given a warning about this, placed on record.

Extracted from the Register Book by me master Thomas Marioribankis of Ratho, Clerk Register of Rolls and of the Council of our supreme ruler the Queen, under sign and signature in my own hand.

[*Signature:*] Thomas Marioribankis [*followed by his sign as Lord Clerk Register*]

[*Below, in lighter ink:*] Assigns to McCalzeane [= *advocate of the defenders*] the next oncoming Monday [= *9 or 16 December 1549*], to submit all the defences which they will use for avoiding [*the petition*] and defend [*themselves*] against the disproof of the instrument. And these should be relevantly qualified. In writing.

(n. 7) CS7/3/1, fo. 214v: Respective entry in the Court Register

With regard to our sovereign Lady’s letters ... [*verbatim as translated above. Minimal differences, as annotated in the edition of the original text*] ... parties are given a warning about this, placed on record. [*Thus not including the final section of text in (n. 6) beginning “Extracted from ...” etc.*]

[*Note: the text in the register skips a repetitive half-phrase which is present in CS15/1, namely “that thai mycht wse the samin, and”. This fact can show that the registry scribe copied from CS15/1, and not the other way round. The paper sheet in CS15/1 thus contains the authentic original minutes for the Court’s own use, and it served at some later time for recording these minutes in the register.*]

My suggestion is not contradicted by the fact that CS15/1, in turn, also lacks some words which are present in the register: namely, the register’s text ends “And the partyis presentis and thair procuratours ar warnit heiroy apud acta”. In contrast, CS15/1 has skipped the words “and thair procuratours”. The clause in question, however, is a standard phrase in court minutes. In CS15/1, the judge or notary of the hearing had noted this clause in shortened wording. The scribe who copied the text into the register, however, knew the clause’s complete wording by heart. He thus supplemented the three words which were missing.]

will use for improving of the samin, againe the day forsaid [= 17 December 1549], reservand to the party thair defencis siclik as thai may use now, to the samin day. And the partyis presentis [*this entry here adds*: and thair procuratours] ar warnit heiroyf apud acta.

(n. 8) CS7/3/1, fo. 214r: Text of “Instruments”, requested by both Spittal and Lord Advocate

[*Requested on 7 December 1549, but recorded as an addition below the record from 19 July.*]

Quhilk day Archibald Spittale for him self and Jonet Andersone his spous, than relict of umquhile Francis Aikman, for his enteres, inquirit be the Quenis advocat geif he and the said Jonet wald stand, byde and wse the instrument productit be thaim. The said Archibald allegit that it was nocht his awin deid, nor yit his spous, sa far as he culd haif knowlege, bot he said that the giving of the sesing contenit in the said instrument was and is trew and trewly done as the instrument proportis, be the balye specefyt thairin, umquhile Jhone Foular commoun clerk of this toun of Edinburgh beand notar thairto. Nochttheles geif only elast or defalt mycht appere to the Lordis quairthrow ony impugnatioun mycht proceed aganis it, he protestit that the samen suld nocht preiuge him, nor hurt his said spous rycht to the landis contenit in it, bot wald nocht haif usit the samen in that cais, and that the samen suld be reput as unusit be him and hir, and na uthir wyse usis the samen bot under the said protestatioun, and herapoun askit instruments.

The advocat askit instrumentis that Archibald Spittale baid at the instrument, allegiand that it was nocht his deid, and that he knew nevyr the samin bot latly, and thairfor he belevit the samin be trew.

(n. 9) [*Original text not preserved.*] Advocate McCalzeane’s pleadings for the defenders

(n. 8) CS7/3/1, fo. 214r: Text of “Instruments”, requested by both Spittal and Lord Advocate

[Requested on 7 December 1549, but recorded as an addition below the record from 19 July.]

The same day [7 December 1549] Archibald Spittal for himself and Jonet Anderson his spouse, former widow of the deceased Francis Aikman for her interest, inquired by the Queen’s advocate if he and the said Jonet wanted to stand, “bide at” [= *found themselves upon it*], and use the instrument lodged by them. The said Archibald alleged that it was not his own deed, nor yet his spouse’s, so far as he could have knowledge, but he said that the giving of the sasine contained in the said instrument was and is true and truly done as the instrument conveys, by the Bailie specified therein, the deceased John Foular common clerk of this town of Edinburgh being the notary thereto. Nevertheless, if any elastance [= *any hindering fact*] or fault might become visible to the lords through which any calling into question might proceed against it, he protested that the same should not prejudice him, nor hurt his said spouse’s right to the lands contained in it, but wanted not to have used the same in that case, and that the same should be held as unused by him and her, and he does in not otherwise use the same than under the said protest. And he asked instruments about this.

The advocate asked instruments that Archibald Spittal “bided at the instrument” [= *founded his pleading upon it*], alleging that it was not his deed, and that he never knew the same but lately, and therefore he believed the same to be true.

(n. 9) [Reconstructed:] Advocate McCalzeane’s pleadings for the defenders

- (a) It is not true that the instrument has erasures. One cannot really ascertain any. [See *Lauder’s pleadings*, line 21.]
- (b) The change of hands after the first few words was there from the beginning, namely the notary was sick, so he asked a helper to go ahead, writing on the notary’s dictation. The notary was absent-minded and confused because of his sickness. This caused him to dictate a wrong year date. The notary then added himself the end-clause and his final certification and notarial sign because the law requires that notaries must do this with their own hand. [See *Lauder’s pleadings*, line 23.]
- (c) All the favours for Jonet Anderson which Francis Aikman gave to her in this instrument merely constituted a fulfilment of promises which he had made to her in a previous contract in view of their oncoming marriage. [See *Lauder’s pleadings*, lines 14–18.]
- (d) The figure for the current tax year [= *indictio*], written behind the erroneous year date 1536, is not congruent to it, but it suits a year when the notary was still alive. This shows that in verity the instrument was not written in 1536, but at a time when the notary was still officiating [see *Lauder’s pleadings*, end of line 64]. [My explanation: Roman law ordered that all documents must state the month and

(n. 10) CS15/1, bundle 2, item 4: Reasons and “Informationes iuris” by the Lord Advocate, without date

[Paper 585 × 400 mm, originally folded twice horizontally and thrice vertically. Its eighty-two lines are here numbered in { } curly brackets.]

day and year when they were written, together with the “indictio” = the numbering of that year within the current Roman fifteen-year cycle of tax years – so ordered by Emperor Justinian in his *Novella no. 47*, proclaimed in AD 537. In old editions of the *Corpus iuris civilis*, this text was provided in *Authenticarum Collatio 5.3 chapter 1*. The notary John Foular had died in 1534. The seventh year within the tax-year cycle 1528–42 began in 1534. Thus, if the alleged “indictio” in the forged document provided any figure below “7”, this would be congruent to a year when the notary was still alive.]

- (e) **Baldus de Ubaldis wrote in his Commentary on C.6.44.2:** “*Item error diei non vitiat publicum instrumentum ... , secundum Dynum in consilio*” [= furthermore, an error in the date does not vitiate a public document ..., as stated by **Dinus de Mugello in a legal opinion** – see *Lauder’s pleadings*, line 66].
 - (f) The fact that the instrument bears a clearly incorrect year date is not relevant, according to law. **Emperor Justinian has legislated in C.6.23.7:** “*Errore scribentis ... , iuris sollemnitas mutilari nequaquam potest*” [= the formal validity of a testament can never be mutilated by an error of the person who penned it – see *Lauder’s pleadings*, line 61].
 - (g) An analogy can be drawn to **Emperor Justinian’s legislation in C.6.23.24:** “*Sive vitio tabellionis vel alterius qui testamentum scribit, nulli licentiam concedimus per eam occasionem testatoris voluntatem subvertere vel minuere*” [= Even in case of mistakes by the notary or other person who writes the text of a testament, we do not concede to anyone permission to subvert the last will of the deceased – see *Lauder’s pleadings*, line 62].
 - (h) Furthermore, **Bartolus de Saxoferrato states in his Commentary on the law text “Imperator”, D.1.5.8:** “*Quaero, nunquid tabellio possit suum errorem corrigere, post publicationem instrumenti? Et videtur quod sic.*” [= I ask, may a notary correct his error, even after the notarial document has left his office? And it is seen that “yes” – see *Lauder’s pleadings*, line 64].
 - (i) Even if the Court were to infer that the instrument has erasures: according to the “common law” [*European Jus Commune*], erasures do not vitiate an instrument. **Baldus de Ubaldis affirms in his Commentary on C.6.33.3:** “*Tamen ego video, quod scriptura in carta rasa valet, ut ff. de secun. tab. l. Chartae*” [= Nevertheless I see that a writing on an erased document is valid, as in the law text “**Chartae**”, **D.37.11.4** – see *Lauder’s pleadings*, lines 36–7].
 - (j) **Baldus furthermore states, in his Commentary on law text “Si veritas”, C.6.42.23,** that an instrument with erasures “*corroboretur viva voce unius boni testis*” [= may be corroborated by the living voice of one good witness – see *Lauder’s pleadings*, lines 39–40].
 - (k) Also the utmost great jurispudent **Bartolus de Saxoferrato argues along the same lines, in his Commentary on C.6.33.3** [see *Lauder’s pleadings*, line 40].
 - (l) We offer to prove by witnesses that Jonet Anderson has indeed been given sasine of the lands and tenements specified in the instrument.
- (n. 10) CS15/1, bundle 2, item 4: Reasons and “Informations” by the Lord Advocate, without date

{1} The resonis, ansveris and informationis for the part of maister Henry Lauder, advocat to our soverane Lady, unto the resonis and {2} informatours productit for the part of Jonat Andersoun and Archibald Spittale in the actioun movit be me as advocat forsaid aganis {3} thame for improbatioun of the allegeit instrument undir the signe and subscriptioun manuale of umquhile Johne Foular notar, contenand {4} certane lands within this burgh of Edinburgh.

{5} In the first, it will pleis your Lordis to remembir that the said pretendit instrument is gevin of ane dait lang efter the decess of the said umquhile Johnne Foular {6} allegeit notar, as is clerlie provin be his confirmit testament, and utheris transumptis of his prothogall be edictis, he being decessit, productit on your Lordis presens.

And {7} als the said pretendit instrument beris the saisings of landis contenit tharintill to haif bene gevin be umquhile Williame Littill as bailye of Edinburgh the tyme the gevin tharof, albeit he {8} wes nocht bailye that yere, as is elikvis productit.

Attoure thar is ane part of landis contenit in the said pretendit saisng quhilks pertenit nocht to the gevar tharof, quhilk wes {9} umquhile Francis Aikman the tyme of the allegeit gevin of the said saisng, bot wes lang tharefter be the space of thre yeris obtenit and conquiest be the said umquhile Fran{10}cis.

And als the said pretendit instrument is nocht onlie in the maist substantiale part tharof, quhilk is the subscriptioun, manifestlie raisit. And quhare it wes writin “manu {11} mea propria”, it is put “manu aliena”. Bot as your Lordis may clerlie persaif: fra the first tua or thre wordis of the begyning it hes bene all deplumit and raisit, and {12} the tennour of this instrument nessit be ane uther hand. And becaus it hes bene ane instrument contenand sum uther effect, maid be the said umquhile Johne and halie writin witht {13} his awne hand and sua subscrivit “manu mea propria”, thai haif maid “mea” – “aliena”, and raisit “propria”, as may clerlie appere be the wyndo quhar “propria” stuid. And tharfor {14} the said pretendit instrument is fals and fenyeit in the self and cane nocht be defendit.

And quhar the partiis adversaris vald mak your Lordis to beleif the samin to be gud, {15} be resoun of ane contract of matrimonie past, bering that the said Jonat suld haif bene infest in the saids landis: My Lordis, that is na motive. It may stand as {16} we beleif in verite that the said pretendit contract is alsua fals and fenyeit as the said pretendit instrument. And als, it may stand that the said pretendit contract hed bene {17} *<10 mm hole, probably: draftit,>* and never (*ink worn off, probably: gottin*) following tharupon. And [*cancelled: sua*] the instrument wes [*corrected from: is*] writin fals in the self.

And atour, gif the allegeit pretendit contract wer productit befor your Lordis, {18} *<10 mm hole, probably: the fa>*lset of the said pretendit instrument vald appere mair

{1} The reasons, answers and informations for the party of master Henry Lauder, advocate to our sovereign Lady, to the reasons and {2} “informatours” submitted for the party of Jonet Anderson and Archibald Spittal in the action moved by me as advocate forsaid, against {3} them, for disproof of the purported instrument by the deceased John Foular, notary, under the sign and final notarial certification in his own hand, containing {4} certain lands within this burgh of Edinburgh.

{5} Firstly, it will please your Lordships to remember that the said purported instrument is dated long after the death of the said deceased John Foular {6}, alleged notary thereof. This is clearly proven by his confirmed testament, and from several “edicts” to transumpt copies from his protocol book, after his death. Such proofs have been submitted to your Lordships.

[Thus, firstly: the Commissary Court had confirmed the validity of Foular’s testament. Thus, at the time of such confirmation, Foular was dead. Secondly: several judicial “edicts” had been granted to allow and authenticate extracts from Foular’s notarial protocol book. The court would not have granted such edicts if Foular was by then still alive.]

And {7} the said pretended instrument mentions sasines of lands, contained in its text, allegedly given by the deceased William Little as bailie of Edinburgh, with date, although he {8} was not bailie in that year. This fact is also submitted.

Furthermore, the *[enumeration of]* pretended sasine comprises lands {9} which at the time when they were given did not pertain to the then giver of them, Francis Aikman, but were acquired long thereafter – three years after – by the said Fran{10}cis.

And the said pretended instrument has undergone manifest erasures. Not alone in its most substantial text passage, the final certification of the notary: where the notary had written “manu {11} mea propria” [= “*in my own hand*”], this has been changed into “manu aliena” [= “*in another’s hand*”]. But as your Lordships may clearly perceive: from shortly behind the beginning, after the first two or three words, it [= *the formerly smooth parchment*] has all been “deplumed” [= *that is to say, “feathers were plucked off”*] and erased, and {12} the present text of this instrument has been “nested” in between, in another hand. And because it had been an instrument with totally different content, created by the said deceased John and wholly written in {13} his own hand, and thus certified “manu mea”, they have changed “mea” into “aliena”, and erased “propria”, as may clearly appear from the “window” where “propria” stood. And therefore {14} the said pretended instrument is false and feigned and cannot be defended.

And where the adversary parties wanted to make your Lordships believe that the instrument is good, {15} as shown by a marriage contract which had preceded, which conveys that the said Jonet should have been infert in the said lands: My Lordships, this is no motivation. It may be as {16} we believe in verity that the said purported contract is as false and feigned as the said pretended instrument. And, it may be that the pretended contract had been {17} <only drafted,> and [*that draft*] never got following. And the instrument is written as a forgery.

And furthermore, if the alleged contract were to be submitted to your Lordships, {18} <the forg>ery of the said pretended instrument would appear even clearer,

clerlie tharbe, be resoun that the partiis aduersaris allegeis it is allanerlie f(und)it upon the said contract. And {19} (in) verite the said pretendit instrument contenis ma tenementis nor ar contenit in the said contract, and utheris nocht pertening to the said umquhile Francis the tyme of the {20} makin of the said contract be the space of four yeris, efter the datis of the said pretendit instrument and contract.

{21} And ansverand to the poynt allegeit be the said Jonat and hir spous aganis the rasour of the said instrument, quare thai say quod non constat ex inspectione, I {22} refer me tharupon to your Lordis, quhare ye may clerly persauf: it is raisit into the said word and put in witht ane uther hand w i t h t blaker ink nor the remanent of the {23} subscriptioun.

And quhar thai vald excuis, it wes done the tyme the notar was seik: that maks the falset mair cleir. For ane seik man culd nocht subscribe and cast {24} the signe sa cleinlie as is cassin in this cace.

Item quhar thai allege quod huiusmodi rasura non viciat instrumentum: My Lordis, **the law and doctours** ar clene contrar, de{25}ciding that quhar ony rasour is contenit in ony instrument in the substantiale poynt tharof, the quhilk maks the effect of the instrument principalie – as is in the poynt rasit {26} in the said pretendit instrument –, talis rasura omnino viciat instrumentum, specialie quhar it is imponit be ane uther hand, and quhar the notar maks na mentioun of the {27} said rasour – ye albeit levand witnes vald afferme the said rasour.

Ita **Jas. in l. fin., numero 19 et sequentibus, C. de edict. divi Adria. tollen.; Baldus in l. i. ut {28} in poss. leg.** [*the copyist had written “in l. i” – this was afterwards miscorrected to become “fi.”, above the line, in black ink. See the parallel quotation at end of line 40.*]

Ita **Alexr. in consilio xiiii., sexto volumine, numero secundo**, ubi concludit quod, dum manifesta falsitas ex rasura apparuit, lik as is in this caus be resoun that the {29} rasour is fillit [*the scribe wrongly wrote “is rasit”*] witht ane uther hand nor the remanent of the subscriptioun, to the effect that the hale body of the instrument may be affermit as writin be ane uther hand, [*another hand completes this phrase, in the margin, in black ink:*] totum viciat instrumentum, {30} iuxta notata **per Inno. c. Fraternitatis, extra, de here.; Bart. in l. fi. § Sin autem, numero tertio, de edict. divi Adria. tollen.**

Rasura vel cancellatio in loco suspecto reddit instrumentum vitio{31}sum. Item carta rasa vel mutata in loco suspecto dicitur falsa: **glossa post textum c. Licet, extra, de cri. fal.; textus in c. Cum olim, extra, de privileg.;** et **c. Ex literis, et ibi {32} Fel. et Abb.;** et **c. Inter dilectos, extra, de fide instru.**

because the adversary parties allege that it is alone based on the said [*marriage*] contract. And {19} in verity the said pretended instrument contains more tenements than are contained in the said contract, and [*in particular*] other ones which did not pertain to the deceased Francis at the time of the {20} [*marriage and*] making of the said contract, by a time difference of four years, after the dates of the said pretended instrument and [*marriage*] contract.

{21} And answering to the contention by the said Jonet and her spouse against the erasure of the said instrument, where they say that it [= *the erasure*] is not proven by inspection, I {22} refer myself thereupon to your Lordships, where you may clearly perceive: an erasure extends into the said word, and something else is put in, in another hand with blacker ink than the remainder of the {23} final certification of the notary.

And where they wanted to excuse this, [*contending that*] it were done at a time when the notary was sick: that makes the forgery even more clear. Because a sick man could not have written the final certification and drawn {24} the notarial sign so cleanly as it is drawn in this case.

Further, where they contend that such an erasure does not vitiate an instrument: My Lordships, **the law and doctors** [= *the legislation in the Corpus iuris and the authors of authority in European Jus Commune*] are clearly against this, de{25}ciding that where any erasure is contained in any instrument in its essential point, [*namely*] the one which constitutes the principal effect of the instrument – as in the point where erasure occurs {26} in the said pretended instrument –, such erasure totally vitiates the instrument, and particularly where something is inserted in another hand, and where the notary does not mention the {27} said erasure – even if some living witness wanted to confirm the said erasure.

Thus **Jason de Maino**, [*Commentary on*] **C.6.33.3, number 19 and subsequent numbers**. {28} **Baldus de Ubaldis**, [*Commentary on*] **C.6.54.1**.

Thus **Alexander Tartagnus**, *Consilia*, vol. 6, **consilium no. 14, section 2**, where he conveys that, when a manifest falsehood has appeared from an erasure, as in this case because {29} the erased space is filled in another hand than the remainder of the final certification of the notary, to the effect that the whole “body” [= *the inner text*] of the instrument may be affirmed as written in another hand, this vitiates the entire instrument, {30} according to what **Pope Innocent IV** noted [*in his Commentary on law text “Fraternitatis”, X.5.7.4. Bartolus de Saxoferrato*, [*Commentary on*] **C.6.33.3**, [*text passage*] **number 3** [*in the edition consulted*].

An erasure or “cancelling” [= *words crossed out*] in a suspect place makes the instrument vitia{31}ted. Also, when a document is erased or changed in a suspect place, it is called “false”. [*This follows from*] the **Glossa ordinaria on law text “Licet”, X.5.20.5 [by Bernardus de Botone]**. And law text “**Cum olim**”, X.5.33.12. And law text “**Ex literis**”, X.2.22.3. And hereto {32} [*the Commentaries by*] **Felinus Sandeus and Abbas Panormitanus** [= *Nicolaus de Tudeschis*]. And law text “**Inter dilectos**”, X.2.22.6.

Ubi litera recentior quam carta, falsam reddit cartam – sicut est in subscriptione notarii in verbo “aliena”, **c. Cum venerabilis**, {33} **extra, de relig. domi.**, et ibi **glo.** [*the scribe inadvertently wrote “Fel.”, but Felinus Sandeus has never commented on this text*]. Ita sentit **Bart. in l. fi. § Sin autem aliquis, numero tertio, C. de ed. divi A. toll.** [*Lauder’s quote clearly means Bartolus’ Commentary on C. 6.33.3, section 3, which is exactly to the point. The scribe, however, penned here “C. de iure delib.”. This would refer to C. 6.30.22.14. That text deals with a totally different topic!*]

{34} Rasura in loco suspecto totum viciat instrumentum, dummodo non conte{34} neat diversa capitula: **Panor. in distinct. c. Ex literis**, et **ibi textus cum glossa** [*here, the figures “27 and 120” were added above the line, in dark ink. This might refer to the numbering in a specific printed edition*]; **c. Inter dilectos, extra, de fide instru., et textus, glossa**; et ibi **Panor. in dicto c. Cum venerabilis** – nisi ob{35}servata cautela de qua **in prefato c. Cum venerabilis**, que in presenti non servatur: quod notarius affirmat rasuram sua manu factam.

Item et si instrumentum suspectum indicitur, et {36} fides ei non imponitur, dicitur “falsum”, de iure: **l. Iubemus, C. de proba.; glossa c. Licet, extra, de cri. fal.** [*in this line, the scribe misread the abbreviation “C.” to be a paragraph mark, and he misread the “c.” (which in those times was written with a prolongation upwards) as “l.”*].

Non obstant **leges** allegate in contrarium.

In the first, **Bal. {37} l. fi. allegat, C. de edict. divi Adria. tollen.** expresse decidit quod, dum rasura extat in aliquo substantiali loco et non in alio, uti est in proposito, instrumentum redditur vitiosum. {38} Sed assertit tantum **Baldus** se vidisse scripturam in carta rasa validam, quod extitit – [*addition in black ink above the line: ut ayit*] – in carta in totum rasa, manu oper[ar]iorum, et in ea ab initio, “Ex ovo” scripte fuerunt [*the scribe miscopied: “Hovo”*].

[*Addition in the margin, by another hand:*] Solum dicit quod instrumenta et testamenta possunt scribi in quibuscumque cartis membranisque vel bumbraginis. **Specu. in loco allegato** contrarius omnino eorum [= Guilielmus Durantis, *Speculum iudiciale*, with implied regard to *D.37.11.4* which states: Chartae appellatio et ad novam chartam refertur et ad deleticiam: proinde et si in opisthographo quis testatus sit, hinc peti potest bonorum possessio].

Quantum {39} autem ad allegata per **Bal. in l. Si veritas, C. de fideicommiss.**, certe non est illius omnino opinio uti per adversarios proponitur. Quia ibidem expresse notat quod rasura {40} presumitur falsa. Et quod potest salvari viva voce unius testis: **in edendo** et <6 mm hole, probably: admini>culando, non autem in probando. **Baldus tamen secutus est** <15 mm hole, probably: **Bartolum**. Et cont>rariam opinionem

Where [*some of the*] writing is more recent than [*the remainder of*] the document, it makes the document “false” – as is the fact in the notary’s final certification in the word “aliena”. {33} See **law text “Cum venerabilis”, X.3.36.7**, and hereto the **Glossa ordinaria**. This is also the opinion of **Bartolus de Saxoferrato** [*in his Commentary on*] **C.6.33.3, number 3** [*in the edition consulted*].

{34} An erasure in a suspect place vitiates the entire instrument, when it does not cont{34}ain several [*independent*] chapters: **Abbas Panormitanus** [= *Nicolaus de Tudeschis*] **in his distinction** [*within his Commentary*] **on law text “Ex literis”, X.2.22.3**. And [*see*] here **the law text itself** [*the text of X.2.22.3*] with its **Glossa ordinaria** [*by Bernardus de Botone*]. And **law text “Inter dilectos”, X.2.22.6**, namely [*equally its*] text, [*as also its*] **Glossa ordinaria**. And here **Panormitanus** [= *Nicolaus de Tudeschis, in his Commentary*] **on law text “Cum venerabilis”, X.3.36.7** – unless a special precaution is ob{35}served, about which [*you may consult*] the above cited **law text “Cum venerabilis”, X.3.36.7** – which [*precaution*] is not observed in the present case: [*namely*] that the notary were to affirm that he had made the erasure with his own hand.

Also, and if a suspect instrument is “accused” [= *taken to court for disproof*], and {36} its trustworthiness is not restored, it is called “false”, by law: **law text “Iubemus”, C.4.19.24**, and **Glossa ordinaria** [*by Bernardus de Botone*] **on law text “Licet”, X.5.20.5**.

The *Jus Commune* texts cited for the contrary do not really hinder this.

Firstly, [*the purported text by*] **Baldus de Ubaldis**, [*Commentary*] **on C.6.33.3**, {37} expressly decides [*in verity*] that, when an erasure exists in some substantial place and not elsewhere, as [*it is in this case*] in question, the instrument is vitiated. {38} **Baldus** merely affirms “that he has seen a writing on an erased document which was [*nevertheless*] valid”, [*namely*] because it stood – [*addition in black ink above the line: as he said*] – on a sheet which had entirely been erased, by the hand of workmen, and on this [*sheet from a completely erased document, new texts*] were written from the [*sheet’s*] top onwards, “from scratch” [*the Latin expression says: “Ex ovo” = “from the egg”*].

[*Addition in the margin, in another hand:*] He merely means to say that instruments and testaments can be penned on whatever sheets of parchment or paper. “**The Mirror of Court Practice**” [*Latin title: Speculum iudiciale, by Guilielmus Durantis*] in the place cited [*below*] has it totally differently [*namely it has implied regard to D.37.11.4, which I paraphrase here as follows: The word “instruments” equally refers to newly manufactured ones and to recycled ones, whose previous text has been totally deleted. Thus, even if someone has written his testament on a palimpsested sheet, one can nevertheless base on it a petition for “Vesting in the possession of the deceased’s estate” (Latin juridical term “Bonorum possessio”*].

With regard to {39} the contentions based on [*the Commentary by*] **Baldus de Ubaldis**, **on the law text “Si veritas”, C.6.42.23**, he is certainly not at all of the opinion which the adversaries purport. Because he expressly writes that an erasure {40} is presumed to be false. And “that it can be saved by the living voice of one witness”, namely [*to assist*] in making a copy for another user [= *as regulated in C.2.1*

affirmat **in l. i.** [*the copyist wrongly wrote l. fi.*] {41} **C. ut in possessio. leg. sive** <25 mm hole, probably: **fideicommissorum**>, ubi dicit quod instrumentum habens <40 mm hole, probably: rasuram in loco suspecto, non potest> validari. Et alibi **Bal.** [*here ink greatly worn off, and then a hole: in dicta lege Si veritas, C. de fideicom.*], [*emendation above the line: et in l. Si unus § i. = C.6.23.12.1. The scribe had wrongly repeated “C. de fideicom.” and jumped to “§ Si unus”*].

{42} Ad allegata **per Bar.** <150 mm hole> (*worn off: -- t -- ad -- m dete --*) <95 mm hole> {43} (quoniam) indignum nullatenus <155 mm hole> (*worn off: idem Abbas? Inter dilectos = as above, Commentary to X.2.22.6*) <100 mm hole> {44} **the said alleg**< 320 mm hole, thus up to end of this line> {45} of the subscriptioun <140 mm hole> lawis befor allegeit (*text worn off: --- quidem servatum?*) <15 mm hole> (*text worn off: textus? et? glossa in dictis c. Ex literis et*) {46} **Inter dilectos, et Licet** <60 mm hole>. [*The subsequent three quarters of the line are preserved, but they are blank.*]

{47} Item answerand to the <10 mm hole, probably: uther> part allegiand that thar is error in <5 mm hole, probably: the> dait committit be the notar, we accept that confessione in sua fer as it maks for ws, and sua {48} it confessis that it is nocht of verite in the dait.

As to the allegiance that yet error may nocht preiuge the party, it is of treuth that of the law sic manifest falset cane {49} nocht now be applyit to error. Nor na sic thing may be allegeit to error of ane notar in that poynt, becaus that – **of the common law** [= *European Jus Commune*] – error [*addition in the margin, by another hand: in cais it mycht be allegit*], suld be allegeit be the samin {50} self notar gevar of the instrument, and suld be protestit be the said notar that he hes errit. And uthervis it is nocht fundin upon the law that error may be allegeit or {51} admittit. And tharfor – the notar being deid as in this cace – thar may na error be amendit, in cace it wer error. And tharfor may nocht be allegeit be this party. This {52} is the decisioun of **Petrus Ferrarius** in “**Forma libelli oppositionis contra instrumentum**”, § “**Caret formis**”; **Specu. in titulo “de instrumentorum editione**”, § “**Postremo**”, **versiculo “Sed nunquid confecto**”, et **ibi Dy., per textum** [*the scribe erroneously transposed the words: “per textum et ibi Dy.”*]{53} **in l. Si quis decurio, C. ad l. Corn. de fal.; et l. Errore, C. de testamentis.**

Item nunc in statu in quo res est, notarius – si viveret – non {54} esset audiendus errorem corrigere aut allegare, quia, quando instrumentum redarguitur falsum, non

and *D.1.13 de edendo*], and in reassurance [= *to double-assure a yet otherwise proven text*], but not in order to bring full proof. **Baldus** has in so far followed <a teaching by **Bartolus**> [*in that author's Commentary on C.6.33.3*]. And he affirms an opposite opinion in [*his Commentary on*] **C.6.54.1**, {41} where he says that an instrument which has <an erasure in a suspicious place cannot be> validated. And in another text, Baldus <... *paper destroyed* ...> in the above-mentioned law text “**Si veritas**”, **C.6.42.23**, [*emendation above the line: and in the law text “Si unus”, C.6.23.12.1*].

With regard to {42} [*the contentions based on the Commentary by*] **Bartolus de Saxoferrato** <... *altogether 245 mm of paper destroyed* ...> {43} because it is unworthy that in no manner <... *155 mm hole* ...> the same **Abbas Panormitanus** [= **Nicolaus de Tudeschis, in his Commentary on**] law text “**Inter dilectos**”, **X.2.22.6** <... *100 mm hole* ...> {44} the said contended <... *320 mm hole* ...> {45} of the final certification of the notary <... *140 mm hole* ...> law texts cited before [*now uncertain reading, ink worn off: still observed? ...*, text and] **Glossa ordinaria to the above-mentioned law texts “Ex literis” and** {46} “**Inter dilectos**”, **X.2.22.3 and X.2.22.6** [*thus canon law legislation plus Glossa by Bernardus de Botone*], and “**Licet**”, [*probably*] **X.5.20.5** <... *60 mm hole* ...>

{47} Answering further to the other party contending that the [*post-mortem*] date is an error committed by the notary, we accept that confession in so far as it makes for us, and so {48} it confesses that [*the instrument*] is not of verity in the date.

As to the contention that in addition an error [*by the notary*] may not prejudice the party, it is true that by law such manifest forgery can {49} not now be attributed to error. Neither may any such thing in that point be attributed to the error of a notary, because, **by the common law** [= **European Jus Commune**], error [*addition in the margin, in another hand: in case it might be alleged*], should be alleged by the {50} notary himself who had given the instrument, and the said notary should protest that he has erred. And not otherwise is it found in the law that error may be alleged or {51} accepted [*in Court*]. And therefore – the notary being dead, as in this case – no error may be put forward for correction, even in circumstances in which such an error may have been made. And therefore may not be alleged by this party. This {52} is the decision of **Johannes Petrus de Ferrariis** [*in his book “Practice of Statements of Claim in Pavia” = Tractatus de libellis “Practica aurea Papiensis”*], in the chapter titled “**Model of a petition of opposition against an instrument**”, paragraph beginning with the words “**Caret formis**” [= “**It lacks formal requirements**”]. [*See also:*] “**Mirror of Court Practice**”, in the chapter “**De instrumentorum editione**” [= *about copying an instrument for use by another*], section beginning with the word “**Postremo**” [= “**Lastly**”], subsection beginning with the words “**Sed nunquid confectio**” [= “**But whether a readily completed**”], and here [*an opinion by*] **Dinus de Mugello**, {53} based on the law text “**Si quis decurio**”, **C.9.22.21**, and law text “**Errore**”, **C.6.23.7**. [*This reference means: Guilielmus Durantis in his “Mirror of Court Practice” (= Speculum iudiciale), in the indicated chapter, section and subsection (situated in book 2, part 2), where he cross-refers to Dinus de Mugello, namely to that author's Consilium nr. 13, which bases its main argument on C.9.22.21 and C.6.23.7.*]

Now, in the present state of the matter, the notary – if he were still alive – were not {54} to be heard if he wanted to correct an error, or to allege one, because when

audietur notarius volens errorem corrigere. Ergo multo magis pars alia non {55} audietur. Hec est decisio **Lanfr. de Oria., de repetitione c. Quoniam contra falsam, extra, de proba., in titulo “de fide instrumentorum”, versiculo “Sed nunc quero de utili et quotiana {56} questione”.**

Item data instrumenti copia parti [*the scribe miscopied the Latin word “parti” as “party”*], error corrigi non potest, ergo nec allegari [*the scribe wrote “allegare”*]: **doctores, c. Ex literis**, et ibi **Antho. de Butrio** [*the scribe wrote “Batro”*].

Item dum questio cadit in {57} die vel loco, non potest etiam ipse notarius corrigere errorem, uti in proposito: **Bal. in titulo de pace Constan., § Pacta, de usu feud.**

Et si error possit corrigi, id {58} primo oportet fieri asserente notario et comprobato errore ex prothogollo et matricula ipsius notarii, et non alias: **Albe.** [*the scribe had wrongly written “Abbas”; corrected by another hand*] **in c. Datum Rome, ff. de regulis juris.**

{59} Ita **Speculator, titulo “de instrumentorum editione”, § “Postremo”, versiculo “Sed nunquid confecto”** tenet quod non potest errorem corrigere ex intervallo.

Item post instrumentum publicatum et postquam {60} esset facta copia parti, de novo tabellio errorem suum corrigere non potest. Ergo nec pars allegare potest errorem: **Bartolus in l. Imperator, ff. de statu hominum.**

Leges in {61} contrarium allegare non obstant.

[*Addition by another hand:*] **Errore, C. de testamen.** nichil facit, neque tractat ad propositum adversariorum, sed potius econtra, quoniam [*corrected from:* quia] ibi dicitur quod error in substantia {62} corrigibilis non est.

Item nec **l. Ambiguitates** autem. Ibi **Baldus** obstat, quia ibi vertitur questio quando notarius se ipsum corrigere possit. Et ibi **post** [*insertion in black ink: quem*] **textum** concludit {63} [*addition in the margin: Baldus*] quod, tradito semel instrumento, se ipsum non potest notarius corrigere ex intervallo. Ergo multo forcius non potest alia pars errorem asserere notarii mortui.

{64} Item **Bar. in l. Imperator** asserit ut supra, et ideo contrarius opinioni partis adverse.

[*the probational value of*] an instrument is contested, the notary wishing to correct an error will not be heard. Consequently, so much the more so will the adversary party not be {55} heard. This is the decision of **Lanfrancus de Oriano, in his “Repetitio”** [= *a wide-ranging lecture*] on law text “**Quoniam contra falsam**”, X.2.19.11, in the section “**De fide instrumentorum**” [= “About probational value of instruments”], subsection beginning with the words “**Sed nunc quero de utili et quotiana** {56} **questione**” [= “But now I ask a useful question, daily arising”].

Further, once an instrument has been issued to a party, an error [*in it*] can no longer be corrected, and thus neither alleged: [*thus*] **the doctors** [= *the authors of authority, in their Commentaries*] on law text X.2.22.3, and among them **Antonius de Butrio**.

Further, when a question arises about {57} day or place [*of a notarial instrument’s rogation*], not even the notary himself can correct an error, as in this present case: **Baldus de Ubaldis, [Commentary on the] Peace treaty of Constance, paragraph “Pacta”** [*printed as an appendix to the Libri feudorum; see there § 19*].

And if an error were corrigible [*at all*], this {58} firstly requires that the notary asserts it and that it be proven from [*the context of*] his protocol book and the immatriculation [*dates*] of this notary, and not in other manner: **Albericus de Rosate, commenting on the words “Datum Romae”** [= “Given at Rome” – *these are the end words of VI.5.13 “de regulis iuris”, and Albericus de Rosate discusses them in his Commentary “De regulis iuris tam civilis quam canonici”*].

{59} The “**Mirror-holder**” [*Guilielmus Durantis, author of “The Mirror of Court Practice” = Speculum iudiciale*] in the chapter “**De instrumentorum editione**” [*as translated above*], § “**Postremo restat videre**”, subsection beginning with the words “**Sed nunquid confecto**” [*text situated in Book 2, part 2, see here above*] holds that he [*the notary*] cannot correct an error after some interval of time has passed.

Also: after the issuing of an instrument, and after {60} a copy of it has been handed over to a party, the notary cannot newly correct his error. By consequence, neither can a party contend an error: **Bartolus de Saxoferrato, [Commentary] on law text “Imperator”, D.1.5.8.**

The *Jus Commune* texts {61} cited for the contrary do not really hinder this.

[*First word added in another hand: Law text “Errore”, C.6.23.7, does not apply, and it does not bear on the argument purported by the adversaries, but is rather against them, because it is here stated [= not expressly stated, but it can be inferred from here, by inverted argument], that an error on the substance [of a phrase in a testament] {62} cannot be corrected.*

Neither does the law text “**Ambiguitates**”, C.6.23.24 apply. Here [*the Commentary by*] **Baldus de Ubaldis** hinders [*the purportedly wide applicability of this law text*], because here the question is discussed how long a notary can correct himself. And here {63} **Baldus** concludes from this law text that, once the instrument has been handed out, the notary cannot correct himself [*because this would constitute a forbidden correction:*] “**ex intervallo**” [= *after an interval of time*]. Thus by even stronger argument can the adversary party not aver an error of a deceased notary.

{64} Furthermore: **Bartolus de Saxoferrato in [his Commentary] on law text “Imperator”, D.1.5.8,** assures the same [*contentions of law*] as above, and he [*too*] is thus contrary to the opinion of the adversary party.

Item ubi allegatur quod valet instrumentum, opposita falsa indictione, non idem {65} est sicut in anno, quia ex anno potest deprehendi falsitas indictionis. Ita tenet **Bart. in lege allegata**, que sic [*the scribe wrote* “si”] nominatim allegari debet.

Et quod allegatur per {66} **Bal. in dicta l. ii., de falsa cau.**, ad id recitat **Felin.** ex opinione **Dyni**. Contrariam tamen opinionem tenet ipse **Baldus in distinctione immediate sequenti**. Et in **apostilla** {67} **ad eundem Baldum** ibi declaratur manifeste ut intranti potest patere.

And tharfor, my Lordis, sene the said pretendit instrument is of ane dait efter the decess of the notar {68} allegeit to haif maid the samin, and als is writin in the first thre or four words be the allegeit notar tharof, and the hale bodi tharefter writin be ane uther hand, rasis {69} in the said body, and than subscrivit againe be the allegeit notar principale, and rasis in the subscriptioun quhar it wes “manu mea propria”, and “mea” translatis and maid {70} “aliena” be ane uther hand of newar ink, and “propria” scrapit furth and ane vyndo left quhar it stuid – quharbe it may appere that it hes bene ane uther in {71}strumet under the signe and subscriptioun of the allegeit notar, halile writin with his awne hand, and tharefter rasis in the body, and the forsaid part of the subscriptioun translatis {72} “mea” and maid “aliena” tharof, and “propria” put furtht, as ye may clerlie persais.

Item quhar it is allegeit be the party that thar is errour in the dait, and offers tham to {73} preif the givin of the saising of the lands, contenit in the pretendit instrument, be witnes [*cancelled*: “nocht contenit in the samen”], and sua to preif the errour of the notar. My {74} Lords, gif sic probatioun suld be ressavit, the prattik of this realme, observit thir mony yeris bigane, suld be pervertit. For it is nocht, nor yet hes bene, lefule [= *lawful*] be the {75} said prattik in ony tyme bipast to preif or verife the givin of ony saising of lands or ony uther title of ryt anent lands, or ony renunciatioun or resignatioun {76} tharof, be witnes. And gif the probatioun offerit be this party suld be ressavit, than suld follow ane saising of lands to be provin be witnes.

Item gif the {77} forsaid allegiance of errour be admittit, as is allegeit and deferit, than it sall follow ane inconvenient: for quhen ony instrument is to be improvit, it wil be inventit {78} and allegeit that the notar erit in the dait and utheris poynts, and suld be deferit that the producer suld be hard to afferme the instrument be witnes.

Further, where it is contended that the instrument is [*shown to be*] valid if one opposes the false numbering of the tax year [*see above, explanation to argument (d) in MacCalzeane's reconstructed defence pleadings*], this is not the same {65} as in a year date, because from a year date one can detect the wrongness of a tax-year number [*but not the other way round*]. This opinion is held by **Bartolus de Saxoferrato** [*in his Commentary on this law text*] **D.1.5.8**, which must be cited prominently.

And to what is contended on the basis of {66} [*the commentary by*] **Baldus on the cited law text C.6.44.2**, **Felinus Sandeus quotes hereto** from a **legal opinion by Dinus de Mugello**. But **Baldus** holds the contrary opinion in an immediately subsequent distinction. {67} And **in an addition** [*by the printers of the consulted edition*] **to the said Baldus**, there this is so manifestly explained that even an intransigent student-in-law can grasp it.

And therefore, my Lordships, since the said pretended instrument is of a date after the death of the notary {68} alleged to have made the same, and is merely written in the first three or four words by the alleged notary, and the whole “body” thereafter written in another hand, [*after*] erasure {69} of the [*entire*] “body”, and then the final certification again written by the alleged principal notary, and erased in the final certification where it was “*manu mea propria*”, and “*mea*” changed and made {70} “*aliena*” in another hand in newer ink, and “*propria*” scraped off, and a “window” left where it stood – whereby it may appear that it has been a different in{71}strument under the sign and final certification of the alleged notary, wholly written in his own hand, and thereafter erased in the “body”, and the aforesaid part of the final certification changed and {72} “*mea*” made “*aliena*”, and “*propria*” eliminated, as you may clearly perceive.

Further, where it is contended by the [*adversary*] party that there is an error in the date, and they offer themselves to {73} prove the giving of the sasine of the lands, contained in the pretended instrument, by witnesses [*struck out: “not contained in the same”*], and so to prove the error of the notary. My {74} Lordships, if such probation would be accepted, the practice of this realm, observed through many bygone years, would be perverted. For it is not, nor yet has been, lawful by the {75} said practice in any bygone time to prove or verify any sasine of lands or any other title of right about lands, or any renunciation or resignation thereof, by witnesses. And if the probation offered by this party were to be accepted, then it would follow that a sasine of lands can be proven by witnesses.

[*See hereto Sinclair's Practicks, decision n. 119 (dated 8 February 1541/2): “sasing and matter of heritage ought to be proven but by authentic writings and not by witnesses”. (In that exceptional case, however, the Court admitted proof by witnesses, on demand by the Lord Advocate.) The said practice of the court was again affirmatively mentioned in decision n. 131 (dated 25 February 1541/2) – but that case equally had extreme exceptional circumstances, so that there, too, the Court allowed proof by witnesses. Sinclair's text is available on the Internet: <https://home.uni-leipzig.de/jurarom>, “Scotland: edition Sinclair's Practicks”.]*

Also, if the {77} aforesaid contention of error were accepted as alleged, and to be preferred, there would follow a difficulty: for when any instrument is to be disproved, it will be invented {78} and alleged that the notary erred in the date and other points, and it would be preferred that the producer should be heard to confirm the

{79} And sa sale it follow that witnes sale verifye the gevin of saising – quhilk is contrar all this pratik be the quhilk is providit that na witnes suld be ressavit {80} upoun the probatioun of saising of lands. And tharfor na witnes cane, aucht, or may be ressavit to the effect allegeit for the part of the said Jonat Andersoun {81} and hir spous.

[*Below, in large characters:*] {82} Scott [= *the document was thus to be filed in the office of the Court Clerk James Scott, dean of Corstorphine*].

(n. 11) Overleaf:

[*In light brown ink, figures and characters:*] Reg.(?) 7(?). D: 1549.

[*Further, vertically written:*] Jonat Andersoun and Aikman. Improb(atioun). d.

[*Further, a flower, also vertically designed.*]

[*In dark brown ink, figures and characters:*] 1546 & 1547(?).

[*Further, vertically written:*] Aikman contra Andirson.

[*The year dates “1546 & 1547” were thereafter struck out by means of a long stroke in black ink, and were replaced at the bottom by a year date “1549”, also in black ink.*]

(n. 12) CS7/3/2 fos 395v–396r (ink figures): The court’s final decree, 10 March 1549 [1550]

[*The date can be taken from the Sederunt on fo. 390r*]

[Fo. 390r (in ink)] Decimo martii anno domini quingentesimo xlix°. Sederunt domini Sessionis episcopus Orchardensis, dominus Ruthwen, abbas de Kylwinnyng, decanus de Restalrig, rector of Conveth, Renfreiw, precentor Glasguensis, prepositus de Dunglas, Clericus Regestri, Clericus Justitiarie, Mag. Hamiltoun, M. Alexander Levingstoun advocatus, M. Thomas Wemys, et M. Johannes Gladstains.

[Fos 395v–396r (in ink)] In the actioun and caus persewit be maister Henrie Lauder, advocat to our soverane Lady, aganis Jonet Andirsoun relict of umquhile Francis Aikman burges of Edinburgh, and Archibald Spittale now hir spous for his interes, makand mentioun that, quhair Elizabeth Aikman eldest dochtir and air of the said Francis Aikman rasit brevis of inqueist of ouer soverane Ladeis Chapell, direct to the provest and ballies of the burgh of Edinburgh, to be servit befor thame as air to hir said umquhile father, of certane landis and tenementis lyand within the said burgh, and at the day of the serving of the saidis brevis, the said Jonet Andirsoun, for stopping of the samin, producit befor the saidis provest and ballies ane pretendit instrument, allegit under the signe and subscriptioun manuale of umquhile Jhone Fowlar, allegit notar thairto, of the date etc. xxvi day of januar the yeir of God millesimo quingentesimo xxxvi yeiris, contenand that the said Jonet was infeft in the saidis tenementis and houssis of the quhilks the said Elizabeth desirit to be servit of. And becaus the said pretendit instrument wes rasit and appeirit to be fals and finzeit in the self, and that the said Jonet usit and baid at the samen in jugement as just and trew (errectit?), the said advocat geif in ane souplacatioun to the lords of Counsale and causit the pretendit instrument to be producit befor thame, to heir the samen civile improbatum omni modo quo de iure potest. Quhilk instrument is and hes lyn befor the saids lords thair twa yeiris bygane with the mair, and na forthir

instrument by witnesses. {79} And so it would follow that witnesses should [*be able to*] verify the giving of sasine – which is contrary to all that practice by which it is provided that no witnesses should be accepted {80} for probation of sasine of lands. And therefore no witness can, ought to, or may be accepted to the effect which was alleged for the party of the said Jonet Anderson {81} and her spouse.

{82} Scott [= *the document was thus to be filed in the office of the Court Clerk James Scott, dean of Corstorphine*].

(n. 11) Overleaf:

[*Notes for storage of the item in court (as long as needed there) and thereafter in the archives.*]

(n. 12) CS7/3/2 fos 395v–396r (ink figures): The court’s final decree, 10 March 1549 [1550]

[*Sederunt on fo. 390r*] On the tenth of March in the fifteen hundred and forty-ninth year of our Lord, there sat the lords of Session: bishop of Orkney, Ruthven, abbot of Kilwinning, dean of Restalrig, rector of Conveth, [*parson of*] Renfrew, precentor of Glasgow, provost of Dunglass, Clerk Register [*Thomas Marioribanks*], Clerk of Justiciary, master Hamilton [*abbot of Paisley*], master Alexander Livingstone advocate, master Thomas Wemyss, and master John Gladstaines. [*Thus altogether fourteen, and eight of them were clergymen.*]

[*Fos 395v–396r*] In the action and cause pursued by master Henry Lauder, advocate to our sovereign Lady, against Jonet Anderson widow of the deceased Francis Aikman burgess of Edinburgh, and Archibald Spittal now her spouse for his interest, mentioning that, where Elizabeth Aikman eldest daughter and heir of the said Francis Aikman raised briefes of inquest of our sovereign Lady’s Chapel [= *the Privy Council*], directed to the provost and bailies of the burgh of Edinburgh, to be served before them as heir to her said deceased father, of certain lands and tenements lying within the said burgh, and at the day of the serving of the said briefes, the said Jonet Anderson, for stopping of the same, produced before the said provost and bailies a pretended instrument, alleged of the deceased John Fowlar, alleged notary thereof, under the sign and final notarial certification in his own hand, of the date etc. 26th day of January the one thousand five hundred and thirty-sixth year of God, containing that the said Jonet was infert in the said tenements and houses of which the said Elizabeth desired to be served. And because the said pretended instrument was erased and appeared to be false and feigned, and that the said Jonet used and “bided at the same” [= *founded her argument upon it*] in judgment as justly and truly (erected?), the said advocate gave in a petition to the lords of Council and caused the pretended instrument to be produced before them, to hear the same civilly disproved in every way in which it can [*be done*] by law. Which instrument is and has [*been*] lying

proces led thairintill. And anent the charge gevin to the said Jonet Andirsoun, and hir spous forsaid for his interes, forgeris, imaginaris and usaris of the said pretendit instrument and bidar thairat, to compeir befor the lords of Counsale to heir and se the said pretendit instrument civilie improvin omni modo quo de iure, as at mair lenth is contenit in the lettres rasit thairupon, actis and utheris lettres maid thairupon of befor, the said maister Henrie Lauder advocat to our soverane Lady being personalie present, the said Jonet Andirsoun comperand or(?) maister Thomas McCalzeane hir procuratour, and the said Archibald Spittell hir spous for his interes being personalie present, thair rychtis, ressonis, allegationis, defencis and juris hincinde herd, sene and undirstand, and thairwith being riplie avisit, THE LORDIS of Counsale decretis, deliveris and decernis the said instrument, under the signe and subscriptioun of the said Jhone Fowlar of the date above writtin, to be vitius and suspect in divers points, and thairfor na fayth sal be had nor gevin to the said instrument of the date forsaid in tyme to cum in jugement nor outwith. Becaus the samen is suspect as said is, as is theirbe undirstand to the saids lords.

before the said lords, more than two years bygone, and no further process led on it. And about the summons given to the said Jonet Anderson, and her spouse aforesaid for his interest, forgers, inventors and users of the said pretended instrument and “biders at it” [= *pleaders who found their argument upon a forged instrument*], to appear before the lords of Council to hear and see the said pretended instrument civilly disproved in every way in which [*it can be done*] by law, as at more length is contained in the letters raised thereupon, acts and other letters made thereupon of before, the said master Henry Lauder advocate to our sovereign Lady being personally present, the said Jonet Anderson compearing by master Thomas McCalzeane her procurator, and the said Archibald Spittal her spouse for his interest being personally present, their rights, reasons, allegations, defences and juridical contentions to and fro heard, seen and understood, and after mature deliberation [*avizandum*] of all this, THE LORDS of Council decree, deliver and decern the said instrument, under the sign and final notarial certification of the said John Fowlar of the date above written, to be vitiated and suspect in diverse points, and therefore no faith shall be had nor given to the said instrument of the date aforesaid in time to come in judgment or outside. Because the same is suspect as here stated, as is thereby understood by the said lords.

APPENDIX II

SOURCES USED BY LORD ADVOCATE LAUDER

This second appendix presents the sources to which Lauder referred – and exactly in the same order of text lines as they appear in Lauder’s pleadings. Readers can thus follow line by line what the judges could read when they looked up Lauder’s references. Readers may thus imagine the experience of stepping into Lauder’s office, seeing which books he had on his desk, and browsing in them to get a taste of their characteristics and content.

All the cited texts originated in the Middle Ages. Their presentation can cast a light on the difficulties for lawyers in the 1500s who continuously had to utilise and cope with these old sources.

Jus Commune pivoted on legislation by the medieval Church (*Corpus iuris canonici*) and legislation by the sixth-century Emperor Justinian (*Corpus iuris civilis*). Both these *corpora* largely consisted of excerpts from case law. Principles were outlined, but few rules for detailed application in practice were provided. So, the task of deducing practical rules from the principles was largely left to the medieval glossators, commentators and writers of treatises and legal opinions. They, in a great common effort, built a coherent system of rules which might regulate all conceivable situations. Their writings served as storehouses where lawyers could find ideas, propositions and rules to work with.

All textual excerpts in this Appendix II deal with problems arising when a document is alleged to have erroneous content, or even to be a forgery. As documents play a role in many different fields of law, the authors searched for applicable law texts across a wide range of different parts and subsections of the *corpora iuris*. For the problems in question, it was mainly the law of civil procedure which had to be considered, and particularly the rules of evidence (by documents or witnesses). Furthermore, criminal prosecution of forgers or upholders of forgeries was relevant. Also, more distantly related subsections of the *corpora iuris* were taken into account: testaments, soldiers’ last wills, privileges, tax-office records, contract deeds in general, specific deeds to transfer property on the occasion of a marriage, rules to uphold decent morals among clergy, and others as well.

The juridical debate pivoted upon the question “Which circumstances taint the probatory value of a document?” When a document lost its “pristine state” (*prima figura*), it immediately became “suspected” (*suspectum*). These words were legal technical terms. A “suspected” document had no probatory value. Yet the principle gave rise to a series of secondary questions: “When is a change so incisive that a document loses its pristine state?” Or “Can a suspected document be corroborated and reinvigorated?” and so on.

Readers will see that the commentators (etc.) underpinned their argument with a far larger number of *Corpus iuris* texts than the twenty which Lauder himself chose to cite. In his pleadings, he merely reported to the judges the most commonly cited law texts on the topic.

The old jurists had tools to facilitate searches for materials which might bear on specific topics. There existed a literary genre of indexes, repertories and other types of guides. But the old jurists rightfully deemed it unwise to rely exclusively on such tools. They knew that good jurists must have specific skills and expertise – and a good memory besides.

Principles applied in presenting Lauder's sources

Lauder's sources are all in Latin. For the convenience of readers, an explanation in English is placed in front of each Latin text. In a few cases, a simple translation was deemed sufficient for this task. In most cases, however, a mere translation would be inappropriate because the Latin texts in question are so briefly worded that one needs expertise in *Jus Commune* to make correct sense of them. Therefore these texts are instead given a free paraphrase or a freely explanatory summary of their contents.

English words in square brackets indicate that these words have no direct Latin match. In contrast, when square brackets contain italicised Latin words, they direct readers to the corresponding place in the Latin text.

Underscored words within a law text indicate that these words are particularly commented on in glosses and/or commentaries. Take law text no. [1], for instance. Its underscored words *prima figura* are cited verbatim in the texts no. [2], [5], [8], [27] and [35].

In the Latin texts, authors' references to other sources are marked **in bold type**.

In texts retrieved from editions of the fifteenth and sixteenth centuries (as here), one must always rework the punctuation, because in the old printing workshops punctuation was very frequently left to persons who lacked sufficient understanding of the text. In addition, the typesetters produced many garbled readings – and particularly in juridical references (which made no sense to them). Very often, they thoughtlessly took wrong readings from a medieval manuscript penned by scribes who had also not studied law. In the present presentation, all easily perceptible defects have been tacitly corrected. However, debatable corrections have been marked as such – so that readers may possibly come up with a better conjecture. As an example, see the conjectures at the beginning of the Latin text no. [47].

The old jurists had the same problem. They continuously needed to be on guard against editors' and copyists' and typesetters' blunders. However, the good news was and is: when one reads several authors' texts on the same topic (as here), and compares them to each other, then they tend to disambiguate each other's garbled readings among them.

SOURCES

[1] C.6.33.3 "Edicto". LAW TEXT (*cited in line 27*)

My explanation: Emperor Justinian notices here that uncertainty has arisen about some details of probate procedure [i.e. ascertainment of the validity of testaments and the respective assignment of deceased's estates]. The uncertainty had arisen from the fact that the procedure in question had been developed in the ambit of complementing and interpreting the legislation on Emperor Augustus's 5 per cent

inheritance tax (*vicesima hereditatis*). In Emperor Justinian's time, such inheritance tax was no longer levied – and had not been for centuries. The tax had been originally introduced by Emperor Augustus's *Lex Iulia vicesimaria*. Mainly in order to facilitate collection of this tax, Emperor Augustus had also instituted a probate procedure in which all testaments had to be publicly opened, and the validity of their contents ascertained by municipal magistrates. The procedure had last been legislated upon in Emperor Hadrian's *Edictum perpetuum* of AD 131 – but this edict had also been abolished long ago.

A publicly recorded probate procedure is a useful institution anyway – even if the state does not levy inheritance tax. Therefore Emperor Justinian upheld and maintained it in C.6.33.3. I translate the wording of his order (*sanctio*), from the word “sancimus” onwards:

“Whenever a deceased's estate is not yet legitimately held by another person [*non autem legitimo modo ab alio detineatur*], and someone contends to be testamentary sole heir [*heres ex asse*] or co-heir [*heres ex parte*], and lodges before a competent magistrate a testament which appears to be in its flawless pristine state [*prima figura sine omni vituperatione*], then the contender shall immediately be assigned into possession of the deceased's estate. The testament must not be struck out [*non cancellatum – this technical term also comprises erasures*], not worn off [*neque abolitum*], and not vitiated [*neque ... vitiatum*] in any essential part [*ex ... suae formae parte*]. It must also have a sufficient number of signatures of testament witnesses. And the contender shall receive possession with certification by persons vested with public authority [*cum testificatione publicarum personarum*].”

[The successful contender would thus keep possession, unless some other contender showed up thereafter and proved to have a better title.]

Full text: Imperator Justinianus. Edicto divi Hadriani, quod sub occasione vicesimae hereditatum introductum est, cum multis ambagibus et difficultatibus et indiscretis narrationibus penitus quiescente, quia et vicesima hereditatis a nostra recessit re publica, antiquatis nihilo minus et aliis omnibus, quae circa repletionem vel interpretationem eiusdem edicti promulgata sunt, sancimus, ut, si quis ex asse vel ex parte competenti iudici testamentum ostenderit non cancellatum neque abolitum neque ex quacumque suae formae parte vitiatum, sed quod prima figura sine omni vituperatione appareat et depositionibus testium legitimi numeri vallatum sit, mittatur quidem in possessionem earum rerum, quae testatoris mortis tempore fuerunt, non autem legitimo modo ab alio detinentur, et eam cum testificatione publicarum personarum accipiat.

Edition used: *Corpus iuris civilis. Editio stereotypa*. Berolini: apud Weidmannos 1880.

[2] C.6.33.3, Commentary by Jason, at number 19 (cited in line 27)

My paraphrase: The glosses on the words “*viciatum*” and “*prima figura*” must be read together. Make from them a rule that an erasure in a testament does not merely hinder proceedings on it, as in this law text, but it regularly vitiates the document itself – as in X.5.33.12, second column, X.2.22.3 and 4, analogy to X.5.20.5, and gloss on X.5.33.12.

Delimit this rule: firstly, that it shall only apply when such erasure is found in an essential place of the instrument, not in a mere preface of the notary, or such like – see the *glossa ordinaria* on C.6.33.3, and X.2.22.3, C.6.23.12.1 and C.6.11.2.1 [this last text says that, in a testament, the signatures of seven witnesses are substantial in this sense (as also stated in Inst.2.10.3). An erasure in the signatures, thus, vitiates the testament].

Secondly, note well to delimit: unless the writing is erased in an essential place, but so well rewritten that it may be seen to be [rewritten] by the hand of the same notary – and then it does not vitiate. So also says a noteworthy gloss [by Franciscus Accursius] which you should earmark, on the word *prima figura* [in C.6.33.3], deemed “very noteworthy” by Bartolus de Saxoferrato, and said to be “unique” by Angelus de Ubaldis. Yet there exists a parallel gloss [by Bernardus de Botone (Parmensis)] on the law text *Cum venerabilis*, X.3.36.7 at end, which Bartolus should have quoted here. But in this regard he did an imperfect job [*Qui in hoc habetur corruptus*].

Thirdly delimit: unless the notary explains in detail in his subscription clause that he himself made this erasure in that line – as it happens in practice. Then it does no harm, according to Bartolus on C.6.11.2.1.

Fourthly delimit: unless it appears from preceding or subsequent words of the document that these erased [and rewritten] words suit the text, and they must almost necessarily be as they are now. Then the erasure does no harm. And this is what the gloss on the end [*in terminis*] of X.3.36.7 says. And from there did Bartolus lift all the words which he stated on this topic.

Fifth ... (not relevant for our case).

Sixth, delimit this noteworthy, and earmark it, that an erasure will vitiate a document, unless such document is corroborated by the living voice of witnesses. And in this case, one single witness would suffice. This is a unique statement by Baldus on C.6.42.23. However, I hold the contrary. And I cite the same Baldus on C.6.54.1, who contradicts himself. There he states as a matter of form [*formaliter*] that, when a document has a defect, it cannot be validated by witnesses. Elsewhere on C.6.42.32.1, in the second column, Baldus asks what to do when some writing in a document is corrupted [*vituperata*]. Will it become executable if it is corroborated by the living voice of one witness? And he denies this for the execution of a testament, as in the present law text C.6.33.3. Different, if the document is lodged in a judicial hearing under the law of obligations [*in iudicio petitorio*] – as stated by him on C.6.42.32.1. This same [opinion] is intended by Bartolus, in his seventh column on this law text. There he draws a distinction between the remedy under the present text C.6.33.3 on the one side, and the interdict “*Quorum bonorum*”, or the claiming of an inheritance [*hereditatis petitio*] on the other side. Namely, Bartolus says that in a procedure under C.6.33.3, a defective document can exclusively be corroborated by another text passage in the same document [*per eandem scripturam*]. But in other proceedings, a defect in a document can be helped by proofs from outside [the document]. ...

Seventh ... (not relevant for our case).

Eighth, delimit the aforementioned rule that it shall apply when, after the completion of a document, one finds that an erasure has been made in it, in a substantial text passage. Yet, if the entire sheet had previously been filled with writing, and the notary had scraped all this old writing off, and [notaries] write on an entirely

erased sheet a new document – such erasure does no harm, according to Baldus, on this text, in his fourth objection [*oppositio*]. The reason is that a notary can also write a document on a palimpsested sheet – see D.37.11.4 where Bartolus comments on this. And in this way you have a full survey of this topic.

Excerpts: ... (fo. 145va, no. 19) Glossam in verbo “viciatum” lego simul cum glossa in verbo “prima figura”. Pro intelligentia istarum glossarum fac regulam quod rasura instrumenti vel vitium non solum impedit executionem, ut hac lege. Immo regulariter vitiat instrumentum ipsum: ut habetur in **c. Cum olim, columpna secunda, de privileg.** [X.5.33.12], in **cap. Ex literis, in c. Accepimus, de fide instrumentorum** [X.2.22.3 et 4]. Sicut etiam talis rasura vitiat rescriptum, **c. Licet, de crimine falsi** [X.5.20.5]. Et est bona **glossa in dicto c. Cum olim** [X.5.33.12], in verbo “subscriptions”.

Istam regulam limita primo ut procedat quando talis rasura reperitur in parte substantiali instrumenti. Secus si esset in exordio vel prefatione notarii: ut tenet **glossa hic in verbo “viciatum”**, et in dicto **c. Ex literis** [X.2.22.3], et in **l. Si unus, supra, de testamentis** [C.6.23.12.1], et in **l. i. § fin., de bo. pos. secundum tab.** [C.6.11.2.1].

Secundo notabiliter limita nisi scriptura instrumenti esset abrasa in loco substantiali, sed ita bene rescripta quod videatur manu eiusdem notarii: tunc non vitiat. Ita **glossa hic notabilis quam signa in verbo “prima figura” in fi.** quam **Bar. notat** multum, et **Ang. dicit singularem**. Sed habes similem in **c. Cum venerabilis, in glossa fin., de relig. domi.** [X.3.36.7], quam debuit allegare **Bar. hic**. Qui in hoc habetur corruptus.

Tertio limita nisi notarius in sua publicatione et subscriptione instrumenti attestetur qualiter fecit talem abrasionem in tali linea, sicut fit. Tunc nil nocet, secundum **Bar. in l. i. § fi. C. de bo. pos. secundum tab.** [C.6.11.2.1], et in **l. Si unus, ubi dixi, supra, de test.** [C.6.23.12.1].

Quarto limita nisi ex praecedentibus et sequentibus verbis instrumenti appareat quod illa verba abrasa conveniant et quasi necessario sic esse debent. Tunc abrasio non nocet. Et hoc est quod dicit glossa in terminis in dicto **c. Cum venerabilis** [X.3.36.7], in glossa finali. Unde **Bar.** sumpsit omnia verba quae ponit hic. ...

[Fo. 145va–b] Sexto notabiliter limita et signa quod rasura vitiet instrumentum, nisi tale instrumentum corroboretur per vivam vocem testium. Et isto casu unus testis sufficeret: ita singulariter **Baldus in l. Si veritas, circa principium, C. de fideicom.** [C.6.42.23]. Ego tamen teneo contra, et allego ipsummet **Baldum contradicentem in l. i. C. ut in pos. leg.** [C.6.54.1], ubi formaliter dicit quod, si instrumentum habet maculam, non potest testibus validari. Alibi **Baldus in l. fi. in ii. columpna, infra, de fideicom.** [C.6.42.32.1] querit quid si scriptura instrumenti est vituperata, utrum, si sit confirmata per vocem vivam unius testis, sit exequibilis. Et dicit quod non, ubi agitur de executione instrumenti, ut hac lege. Secus si contenderetur in negotio principali in iudicio petitorio – ut ibi per eum. Istud **idem vult Bart. hic in vii. columpna**, dum ponit differentiam inter remedium huius legis ex una parte, et interdictum quorum bonorum vel petitionem haereditatis ex alia. Nam **dicit Bar.** quod in hoc iudicio, si instrumentum sit in aliqua parte viciatum, non potest approbari nisi per eandem scripturam; sed in aliis iudiciis vitium instrumenti potest adiuvari per probationes extrinsecus sumptas. ...

[Fo. 145vb] Octavo limita praedictam regulam ut procedat quando post perfectum instrumentum reperitur rasura facta in aliqua parte substantiali. Sed si tota charta erat prius scripta, et notarius abrasit totam illam veterem scripturam, et in charta abrasa scribunt novum instrumentum, illa abrasio non nocet, **secundum Baldum hic in quarta oppositione**. Ratio est quia in chartis abrasis potest notarius instrumentum scribere: **l. Charta, ubi notat Bar., ff. de bo. pos. secundum tab.** [D.37.11.4]. Et isto modo habes collectam istam materiam.

Edition used: Jason de Mayno, *In Secundam Codicis partem Commentaria* ... Lugduni 1553 (fo. 143ra ss.).

[Frontispiece for book six:] *Jasonis de Mayno Mediolanensi jurisconsulti Commentaria in sextum Codicis, in Pisano gymnasio et Ticinensi academia elucubrata.*

[3] C.6.54.1 (lex prima). LAW TEXT (cited in lines 28, 40)

My paraphrase: Since the pursuer merely demands that the defender shall give caution [i.e. in the meantime, until judgment will be given in the law case's main procedure], there is no need to investigate right now in depth whether the bequest in question is owed or not [i.e. whether the testament which grants the bequest is valid or not].

Full text: Imperator Pius. Quoniam nihil actor amplius postulat, quam ut fideicommissi nomine satisdetur, non debet is, qui iuri dicendo praeest, subtiliter cognoscere, debetur nec ne fideicommissum, sed tantum decernere ut satisdetur.

Edition used: as before; see no. [1].

[4] C.6.54.1, Commentary by Baldus (cited in lines 28, 40)

My paraphrase: Note well that there exists one type of summary proceedings which must be entirely based on examination of verity "by the eye" [*oculata fide*], thus without witness hearings, as in C.6.33.3, but other types of procedure do allow witness hearings, as here. The first-mentioned type requires that the document has no immediately evident fault. So, when it has a visible fault, one cannot request that witnesses be examined, in order to progress with that procedure. Jacobus Butrigarius notes this, on the Authentica behind C.2.1.7. And it applies, for instance, in all cases where a statute prescribes that "after seeing the document, this and this shall be done". Because [a procedure under this clause] requires a writing without visible fault – as in D.38.6.1.2.

Excerpt: Et nota quod summaria cognitio aliquando procedit oculata fide, et non ex auditione testium, ut **l. Edicto** [C.6.33.3]. Aliquando procedit etiam ex dictis testium, ut hic. In prima specie summariae cognitionis requiritur scriptura nullam habens in se evidentem maculam. Nec potest testibus validari, si maculam habet oculatam, ut notat **But. in Aute. Si quis in aliquo documento, supra, de edendo** [Jacobus Butrigarius, on Auth. post C.2.1.7]. Et idem est, ubicumque statutum dicit: "viso instrumento sic fiat". Nam debet esse scriptura sine vicio visibili: **ff. si tabulae testamenti nullae extabunt, l. i.** [D.38.6.1.2].

Edition used: Baldus de Ubaldis, *Lectura super Codice, liber 6*. [Perugia, ante 1472.10.20], GW M48536 (digitised by Bayerische Staatsbibliothek München; information kindly provided by Vincenzo Colli).

[5] Alexander Tartagnus (Imolensis), Consilium no. 14 (cited in line 28)

My explanation, and one excerpt: This is a lengthy legal opinion, written for a fifteenth-century law suit in Italy. Calonius (pursuer) contended to be the intestate heir of a certain deceased person. He pursued Franciscus (defender), who was in possession of the deceased's estate: namely, the deceased had appointed Franciscus as sole heir, in a testament which he dictated to a public notary, who wrote the text into his notarial protocol book. In the meantime, the notary had also died, and he had not yet issued a charter for that testament. The pursuer argued that the testament was void because no charter of it existed, and parts of the text in the protocol book were "cancelled" (i.e. scored out), at times even erased, and the notary had scribbled some additions in the margins, and some corrections in the text were written by another person, possibly by the testator, but that was by no means clear.

Alexander Tartagnus arranged his legal opinion in the usual order – which I have described above. Alexander first stated that the testament appeared at first sight to be void. He underpinned this with a long list of references to authoritative texts which stated that interventions by another hand (or erasures, or cancellations) render a document "suspected" and vitiate its probatory value. The text in the protocol book mentioned nowhere that the notary himself had made cancellations or erasures or additions in his own hand. Besides, one could argue that mere notes which a notary jots onto some sheet of paper must juridically be categorised as mere private writings.

Thereafter, however, Alexander points out that protocol books of notaries are public documents in themselves. Notes contained in them are not just private writings. Furthermore, in the present case, all the interventions by another hand, erasures, cancellations or additions in the margins merely concerned bequests which the deceased had meant to be given to charitable institutions, etc. These bequests had no connection to the clause in which the deceased expressly appointed Franciscus as his sole heir. So, the testament was beyond doubt valid on this point.

Alexander underpinned his decisive statement with a plethora of references. And he then showed that the seemingly contrary references which he had given at the beginning did not really match the facts of the present case.

Alexander's legal opinions were highly appreciated in their time and thereafter, because they were so circumspect and contained so many references. Lawyers used them as a bibliographical tool to find authoritative statements for a wide variety of topics.

Alexander's list of arguments which at first sight favour the pursuer begins as follows [see Latin text below]:

"The note in the protocol book appears at first sight to be void. Firstly, because the aforesaid note is written by several hands, and so it is seen to be suspected; see the unique text in Auth.Coll. 3.5.7, cited by Baldus and by Bartholomaeus Salicetus, after Guilielmus de Cugno on C.4.21.17. And X.2.22.6 is seen to prove this. And it is noted in the final gloss on X.3.36.7, and C.6.33.3. And in the commentary by Baldus on C.6.23.12.1, and C.6.23.30. And authors commenting on X.2.22.3.

Secondly, because a writing which has cancellations, as in this writing, is rendered suspected. See the aforementioned law text C.6.33.3, and the said text X.2.22.6, there where it says “some characters in it were”, etc. ... [*more citations follow*] ... and in particular because the notary, at the end, did not mention the cancellations, as it ought to be done ...” [*again many references: seven times Bartolus; Archidiaconus (Guido de Baisio) on Decr.Grat. C.35 q.9; authors on X.2.22.3*].

Excerpt from Alexander’s list of arguments which at first sight favour the pursuer: Primo quia dicta nota est de manu diversarum personarum, et sic videtur suspecta, ut est textus singularis in **Aut. de triente et semisse § Saepe** [Auth.Coll. 3.5.7 = Nov. 18.7], quem ita allegat **Baldus et Salycetus post Guilielmum de Cuneo in l. Contractibus, C. de fide instrumentorum** [C.4.21.17]. Et idem videtur probari in **c. Inter dilectos, de fide instrumentorum** [X.2.22.6]. Et notatur per **glossam finalem in c. Venerabilis** [X.3.36.7 – *thereafter obviously C.6.33.3 inadvertently skipped by the typesetter*], “**prima figura**”. Et notatur **per Baldum in l. Si unus** [C.6.23.12.1], et in **l. Nostram, de testamentis** [C.6.23.30]. Et notant **doctores in c. Ex literis, de fide instrumentorum** [X.2.22.3]. Secundo quia scriptura, in qua sunt cancellationes, prout in ista sunt, redditur suspecta: dicta **l. fi. de edi. diui Adr. toll.** [C.6.33.3], et dictum **c. Inter dilectos** [X.2.22.6], ibi, dum dicit “quaedam literae in eo erant” etc.; (*more quotations*) ... praesertim quia notarius in fine nullam facit mentionem de cancellationibus, prout fieri debuit ...

Edition used: Alexander Tartagnus, *Consiliorum seu responsorum ... liber VI*. Francofurti ad Moenum: sumptibus Lazari Zetzneri 1590, pp. 21–5.

[6] X.5.7.4 “Cum Coelestinus”. LAW TEXT (*cited in line 30*)

My paraphrase: Since the Church Council at Ephesus had declared that Coelestinus and Pelagius are heretics, how could one consider that writings by them might be acceptable – seeing that their authors are condemned?

Full text: Gregorius I Anastasio Antiocheno. Cum Coelestinus atque Pelagius in Ephesina synodo sint damnati, quomodo poterunt illa capitula recipi, quorum damnantur auctores?

Edition used: Friedberg, Emil (ed.), *Corpus iuris canonici ... Decretalium collectiones*. Leipzig 1879.

[7] X.5.7.4, Commentary by Pope Innocent IV (*cited in line 30*)

My paraphrase: What this text says, applies to interpreters of the Bible, and to all other persons who are not appointed to an office of public authority ... But the text’s reasoning cannot be applied to writings of notaries and other public officials, because even if such persons once commit a forgery, other documents [which they write] are nevertheless valid – as long as these persons are tolerated in their office: Decr.Grat. C.8 q.4 c.1. And the reason for this is that they act with public authority: D.1.14.3.

We say however that if a document is proved to be false in one part of the text, the entire document lacks probatory value ... Others however say that, if a document has several chapters, and they depend on each other, and one is declared to be void,

this also makes the others void – but a different outcome applies when chapters in a document deal with independent, separate topics.

Excerpt: Hoc habet locum in expositoribus scripturarum, et in omnibus aliis qui publica auctoritate non habent officium sibi iniunctum ... In scripturis autem tabellionum et aliorum publicum officium gerentium secus est, quia licet fecerint unam chartam falsam, aliae nihilominus valent, quamdiu in officio tolerantur, arg. **8 q. ult. Nonne** [Decr.Grat. C.8 q.4 c.1]. Et hoc est propter publicam auctoritatem, arg. **ff. de off. praesi. Barbarius** [D.1.14.3].

Dicimus tamen quod si instrumentum in aliquo probetur falsum, totum quod in illo instrumento continetur caret robore firmitatis ... Alii tamen dicunt quod si in uno instrumento plura capitula sunt connexa sibi, et unum esset accessorium alteri, uno cassato, connexa et accessoria cassantur. Secus si sint diversa et separata ...

Edition used: Innocentii quarti pontificis maximi *Super libros quinque Decretalium*. Francofurti ad Moenum: Martinus Lechler, impensis Hieronymi Feyerabend 1570–1.

[8] C.6.33.3, Commentary by Bartolus (*cited in lines 30, 33, 39*)

My paraphrase: Interpret this law text with regard to cases where there was a fault, erasure or cancellation in an essential text passage, for instance in the date, or in the clause to nominate an heir. It would be different if a non-essential text passage had a fault, for instance in a bequest. The opposite law text [*C.6.23.12.1 is meant*] provides an argument for this. So says the *glossa ordinaria* [by Accursius]. It would equally be different if this erasure was corrected well, so that it fully appeared to be from the hand of that same notary: as stated in the gloss on the word “*prima figura*”. Or if the notary had stated in his subscription clause: “What is erased, or cancelled, or added, in this and that text passage, I have done this with my own hand” – as proved in the law text D.28.4.1. Or if this erasure or striking out was needed to bring the text into consonance with a sense which can be gathered from a preceding or subsequent passage: as is proved by X.3.36.7 – and its gloss which states this verbatim.

Excerpt: (page 95) Intellige hoc quod erat vitium, rasura vel cancellatio in loco suspecto, utputa circa annos Domini, vel circa institutionem haeredis. Secus si esset vitium in loco non suspecto, utputa in aliquo legato: argumentum legis contrariae [*C.6.23.12.1 is meant*]. Ita dicit glossa. Item secus si illa rasura esset bene correctata, ideo quod omnino appareat de manu eiusdem notarii: ut hic dicit glossa super verbo “*prima figura*”. Vel si notarius in sua publicatione dixisset “Quod supra rasum vel cancellatum est, vel additum in tali loco, manu mea propria feci”: ut probatur in l. **i. ff. de his quae in testamento delentur** [D.28.4.1.1]. Vel si illa rasura vel cancellatio sic deberet stare ut ex praecedentibus vel sequentibus colligitur: ut probatur **extra, de religiosis domibus, c. Cum venerabilis** [X.3.36.7], et in glossa quae hoc ponit ad literam. ...

Edition used: Bartolus a Saxoferrato, *In secundam et tertiam partem Codicis Commentaria*, Basiliae: ex officina Episcopiana 1588.

[9] X.5.20.5 “Licet ad regimen”. LAW TEXT (cited in lines 31, 36)

My explanation: Pope Innocent III advises the addressees how to detect forgeries of papal charters. Such charters had a leaden seal (*bulla*). It was fixed to the charter by means of a thread which was pierced through the rim of the charter, and the thread's two ends were affixed by being set into the lead while molten. Seven frequent tricks of forgers are described. Trick number one: forgers write a false charter and append to it an imitation of a papal leaden seal. Trick number two: forgers take a genuine charter along with its genuine papal leaden seal. The forgers now extract one end of the thread from the lead. They pull it out from the genuine charter, pierce it through the rim of the forged charter, and poke it through the hole in the lead where they had extracted it. The thread thus sits but loosely in the lead, and this fact betrays the forgery. ... Trick number five: forgers take a genuine charter, they leave its original leaden seal [*bulla*] intact, but they change the contents by means of a slight erasure. Thus, one should be on guard when one notices changes in the character of handwriting and/or the colour of ink. ...

Excerpt: Innocentius III Archiepiscopo et Canonicis Mediolanensibus. Licet ad regimen ... Ut autem varietates falsitatis circa nostras literas deprehendere valeatis, eas vobis praesentibus literis duximus exprimendas. Prima species falsitatis haec est, ut falsa bulla falsis literis apponatur. Secunda, ut filum de vera bulla extrahatur ex toto, et per aliud filum immissum falsis literis inseratur. ... Quinta, cum literis bullatis et redditis in eis aliquid per rasuram tenuem immutatur ...

Edition used: as above; see no. [6].

[10] X.5.20.5, Glossa ordinaria (cited in lines 31, 36, 46)

My paraphrase: [The glossator comments beforehand on forgeries of papal documents. Thereafter:] But in other letters or documents one can distinguish whether erasures occur in a “suspected” text passage [i.e. a passage which determines the effect of the document]: then the erasure vitiates (see X.3.36.7). Or in a non-suspected passage on which there hinges no effect [*nulla vis*]: then the erasure is no hindrance (see X.2.22.3 and X.3.36.7).

And this [i.e. the present text X.5.2.5] is understood to apply to an erasure in a suspected passage. And so the law text X.5.20.9 does not contradict, rather the latter text is understood to apply to an erasure in a non-suspected passage, or even in a suspected passage when the erasure is negligibly small (*modica*), i.e. just some characters.

And if it cannot be ascertained by other means whether there is an erasure, the sheet shall be held up against sunlight, so that the sheet is positioned between the eye and the sun. And immediately will such erasure appear.

My excerpt: In aliis autem literis vel instrumentis potest distingui utrum sint rasurae in loco suspecto, ut tunc obsit: **supra, de reli. do. Cum venerabilis** [X.3.36.7], vel non suspecto ubi nulla vis est: tunc non obest, argumento illius decretalis **supra, de fide instrumentorum, Ex literis** [X.2.22.3], et **c. Cum venerabilis** [X.3.36.7].

Et hoc intelligitur quando rasura est in loco suspecto. Et sic non contradicit **infra, eodem, c. ult.** [X.5.20.9]. Quae [*decretalis*] intelligitur quando rasura non est

in loco [suspecto, vel – *the typesetter inadvertently left these last two words out*] etiam in suspecto si modica est rasura, scilicet paucarum literarum

Si aliter discerni non possit, elevari debet ad solem, et interponi debet inter solem et oculos, et statim apparebit rasura illa.

Edition used: *Decretales domini Gregorii papae IX, suae integritati una cum glossis restitutae*. Lugduni: sumptibus Johannis Pillehotte 1613.

[11] X.5.33.12 “Cum olim”. LAW TEXT (cited in line 31)

My paraphrase: Innocent III to the abbot and convent of Saint Peter in Gubbio. Long ago, when we resided in Perugia [AD 1198], and you, my son abbot, humbly showed to us a privilege by Pope Lucius [d. 1185] and requested to renew it, this request was not brought to effect because the bishop of Gubbio intervened and contradicted, and he averred that this prejudiced his rights. ... While this contention was pending, the monk Johannes stole your privileges, other charters and treasure. ... So, when you and the aforementioned bishop of Gubbio appeared before us, with proctors, we entrusted to the cardinal priest B. of the Basilica of Twelve Apostles the task to receive and hear your witnesses on the theft and on the contents of the privilege. He conscientiously collected, in writing, the testimony of ten sworn witnesses ... We thus ... decide that the privilege of Pope Lucius (which – when it was shown to us – appeared to be free of any objection against its leaden seal, the sheet or the writing) had [indeed] the contents which were ascertained by the testimony of the witnesses and the assertions of our brothers [the cardinals].

Excerpt: Innocentius III Abbati et Conventui S. Petri Eugubini. Cum olim essemus apud Perusiam constituti, et tu, fili abbas, privilegium Lucii Papae nobis humiliter praesentans, postulaveris innovari: propter contradictionem Eugubini episcopi, qui tunc temporis supervenit, asserentis hoc in suum praeiudicium redundare, non fuit effectui mancipatum ... [Pendente iudicio Iohannes monachus privilegia, chartas alias et thesaurum monasterii vestri rapuit.] ... Te igitur et praefati episcopi Eugubini procuratoribus in nostra praesentia constitutis, B. basilicae XII. Apostolorum presbytero cardinali dedimus in mandatis, ut super amissione ac tenore privilegiorum testes reciperet, quos duceres producendos. Qui fideliter redegit in scriptis depositiones X. testium iuratorum ... Nos vero ... decernimus, privilegium illud Lucii Papae quod sine reprehensione bullae, chartae vel literae apparebat, quando fuit nobis ostensum, illius fuisse tenoris, cuius per depositiones testium et assertiones fratrum nostrorum noscitur exstitisse.

Edition used: as above; see no. [6].

[12] X.2.22.3 “Ex literis”. LAW TEXT (cited in lines 31, 34, 45)

My paraphrase: From your letters we understand that, when you began (on our command by our letters) to proceed [as our judge delegate] in the case between masters A. and R. about the chapel of Ambitoria, the aforementioned master R. requested to obtain a copy of our letters. He then contended that they were falsified, because they are erased in the narration of facts where it is written “parish rights” [*iura parochialia*] ... We say that this erasure is not a sufficient reason to judge that our letters are “false”. They are not even “suspected”: namely even in charters of papal

privileges [it often happens that] erasures are made [by the issuing staff of the papal Chancery] in text passages which merely enumerate lands and rights [*possessiones*] possessed by the addressee. And in papal letters [to appoint persons as papal judges delegate], mere narrations of facts can be erased without hesitation when they are erroneous.

Excerpt: Alexander III. Ex literis vestris accepimus, quod, cum causam, quae inter magistrum A. et R. super capella de Ambitoria vertitur, de mandato nostro susceperitis terminandam, praefatus R. literarum sibi copiam fieri postulavit. Qui, cum eas argueret falsitatis, quia in narratione facti abrasae sunt, ubi scriptum est: “iura parochialia”... Dicimus, quod propter abrasionem illam iudicari falsae non possunt, nec etiam haberi suspectae, praesertim cum et privilegia in possessionibus abradantur. Et literae in narratione facti, si erratum est, possunt incunctanter abradi.

Edition used: as above; see no. [6].

[13] X.2.22.3, Commentary by Felinus (*cited in line 32*)

My paraphrase: Whether a notary may correct his error, and when – this matter is thoroughly set out by Bartolus on D.50.17.92, and also fully by Guilielmus Durantis, *Speculum iudiciale*, section “But whether after completion” [*Sed nunquid confecto*], and amply by Johannes Andreae [in his *Additiones* to the *Speculum*], and in his *Novella in Sextum*, on VI.5.13.88 “Data”. Likewise fully by Baldus on X.1.6.58, and even more profusely on D.1.5.8 where he relies on Bartolus. And [in Baldus’s commentary] on the Peace Treaty of Constance, in the phrase beginning with “Acta”. And Baldus and Johannes de Imola, both commenting on D.31.1.64 and D.28.5.1.5. And other juridical authors on the above-mentioned law texts.

Yet, to give us a survey of this matter, four guiding principles [*conclusiones*] are here unfolded [*extensae*], in an introduction, together with six explanations [*declarationes*].

- First principle. An error by omitting a component which belongs to the tasks of the notary can be corrected by him. So, when the date was omitted, and he remembers the date, he is believed, and he can supplement [the date], because an office-holder is believed on occurrences in the office entrusted to him: see C.10.19.5 and the other law texts cited by Bartolus, who holds [this principle in his commentaries] on D.50.17.92 and on D.1.5.8, lest the writer’s error should prejudice the parties: C.6.23.4 and C.6.23.7. And Bartolus says the same about an error in the tax-year figure.

It has been said “by omitting” because it is different when a component is stated. So, if [a notary] wrongly states a day, or a month, while he should have stated a different one, he cannot correct himself unless the error is ascertained by witnesses, or by other means mentioned in D.45.1.99, because the notary’s function [to authenticate] has ended: D.42.1.55, according to Bartolus on the aforementioned law text D.50.17.92. And my great master [*dominus*] Antonius de Butrio follows suit [in this proposition].

Against this doctrine, although others may have passed over it, one may quote what Pope Innocent IV notes on X.1.29.9. He says that he to whom some act without jurisdiction has fallen, never fulfils his office until he has solemnly brought it to completion. But the office of a notary is not

a jurisdictional office. And therefore he has not fulfilled his office. Yet, this note by Pope Innocent is understood to mean persons who can freely [without time limit] override [a statement which they have made before]. This does not apply to a witness – or to a notary [because *Jus Commune* compares him to a witness]. They are forbidden to override [their statement, after an interval], according to what Baldus writes on this proposition, on D.2.13.13. From there it can be gathered that such error can only be corrected within the immediate course of events [*in continenti*]: argument based on X.2.21.7, as proposed by Bartolus on D.50.17.92. And for this see also how Johannes de Imola comments on X.1.29.9, in his lecture on VI.1.6.37, on the words there: “ended his function” [*suo functus officio*].

- Second principle. An error of a notary in components which matter for the effect and essence of a contract cannot be corrected by the notary after an interval, but in the immediate course of events [*in continenti*] it can, as will be stated below: namely a notary is compared to a witness [who can correct his testimony within the course of events, but not thereafter], according to D.28.1.27, as proposed by Bartolus on the aforementioned law texts, and Baldus in his last tenet [*notabile*] on C.4.30.13. [In contrast: after an interval, no correction may occur,] unless the error were legitimately proved before a judge, for instance by lodging an original charter handed out to another party [*originale alterius*], from which [the notary] had copied [*sumpsit exemplum*]: see D.50.17.92 and the aforementioned law text C.6.23.7.

Likewise, if [proof were brought] from a non-erroneous [entry in the notary’s] own protocol book, because one resorts to it, as also stated by my great master [*dominus*] the cardinal [i.e. Franciscus Zabarella] on X.2.22.6. I have fully explained this on X.2.19.11, and thus notes the *glossa ordinaria* on Auth.Coll.4.7.1. And in respect of this gloss, the cardinal relates on X.2.22.6 a case from Florence, in which an old charter diverged from the respective entry in the protocol book; and one writing would state that a bequest was bestowed on “the Church of Saint Mary”, while the other bestowed it on “the Society of Saint Mary”. It was advised by legal experts [*fuit consultum*] to adhere to the protocol book, basing this on this gloss “which you should always keep in mind”, as the cardinal said [*quam semper nota, secundum ipsum*]. And add thereto what I stated on the above-mentioned law text X.2.19.11. And when it [i.e. the protocol book] remains with the notary, one presumes in cases of doubt that it is the original, pursuant to the argument “In doubt, we presume the usual course of events”: D.12.1.9.8, and Bartolus on D.50.17.92.

Likewise, if an error were proved by witnesses mentioned in the instrument, as [occurring] in the law text C.2.22.10. Also likewise, [if it were proved] by persons who penned the instrument, as in the law text X.2.19.5, or by middlemen who helped to bring the contract about, as mentioned in the *glossa ordinaria* on Auth.Coll.6.3.7, word “middleman” [*adnumerator*]. And my words “before a judge” will be explained within the fourth principle.

- Third principle ... [*not relevant here*].
- Fourth principle. A notary cannot correct an error, nor emend a defect, unless the authority of a judge intervenes, or of an office-holder appointed for this

task, according to Johannes Andreae on VI.5.13.88 “Data”, who states in his last column that the notary must otherwise be prepared to face a criminal prosecution of forgery, pursuant to the law text D.48.10.27: namely he had ended his function [*est enim functus officio suo*]. And this is how cases of this kind are handled in practice [*sic de facto servatur*], according to him [i.e. Johannes Andreae]. And Johannes de Imola follows suit, here [i.e. on X.2.22.3] and on X.2.22.6.

For all this, see foremost the addition by Johannes Andreae to the *Speculum iudiciale*, in the aforementioned section “But whether after completion”. And Baldus on C.6.23.24 and on C.7.57.3pr. And there he states, if [the notary] would append an end-clause to a document which he had published, namely: “I struck out words in such place because by error . . .”, et cetera, then the words [struck out] are disregarded, and they do not vitiate [the document]. And about this, read also Baldus on the rubric of C.6.23, where he says that a notary cannot strike out an entry in his protocol book unless he would [expressly] state [*diceret*]: “Struck out because [the instrument of debt] has been returned to the party” [i.e. to the obligor]. And read on this also the commentary by Johannes Calderinus on X.2.22, first part. And by all means Dominicus de Sancto Geminiano on VI.2.14.3. And the cardinal [i.e. Franciscus Zabarella], end-section of his foreword to the *Constitutiones Clementinae*. And it appears that this principle is commonly held [by all authors], except in four types of case in which [it is submitted that] no authority of a judge is needed.

- First case, when the error would not affect the meaning of the document’s text: for instance [think of] bad Latin, according to Bartolus, on D.50.17.92, referring to the law texts D.1.5.8 and D.42.1.46. On this [proposition], see the subsequent case.
- Second case, when the document has not yet been submitted in court, and has thus not yet been lodged in a dispute, and no copy of it has yet been disclosed to the adversary party. Because then it may surely be corrected without intervention by a judge, according to Johannes Andreae on VI.5.13.88 “Data”. And Dominicus de Sancto Geminiano, as above [i.e. on VI.2.14.3]. And Johannes de Imola states this here [i.e. on X.2.22.3]. And Baldus on the rubric of C.4.21. Read there his words “But think of a case where a notary” [*Sed pone, tabellio*], et cetera. And from these [law texts] Baldus deduces here that, after an instrument has been handed back, the notary has so completely ended his function that he could not even change a dot, nor change a syllable, meaningfully [*intellectualiter*], without command by a judge. He quotes the aforementioned law text D.1.5.8. In view of this, I doubt that the “First case” proposed above is tenable, lest fraud might be committed under pretext of correcting “bad Latin”.
- Third case, when the error is commonly seen to be obvious [*notorius*], because this needs no authority of a judge, or if authority be required, it would not be necessary to summon any party to court, according to Baldus on the aforementioned law text D.1.5.8. He quotes Cinus de Pistorio on C.1.14.1. He states that it is different for an unclear error [*in errore latenti*], because here a judge is required, and also [summoning of] a party (if any).

- Fourth case, when [the notary] wishes to correct [his instrument] pursuant to law texts [*eo modo quo corrigit lex*], for instance an erroneous tax-year figure, because he can do this on his own authority, since he has a presumption on his side, stated in the law [*praesumptio iuris*], because it does no harm to anyone, since even without this [correction], the law would presume this, and it would be so [by law], according to ample reasoning by Baldus on the First Introductory Constitution to the Codex Justinianus, although there he [also] relates that other authors hold a contrary opinion on the tax-year figure, and Johannes Andreae sides with these in his commentary on VI.5.13.88 “Data”, and Johannes de Imola on X.2.22.6. But their opinion could possibly be defended when the document is solely dated by a tax-year figure. It is different, however, where [also] the year date is expressed – there I side with Baldus, because if one does a calculation with the year date, one obtains the tax-year figure – as stated by my great master the cardinal [i.e. Franciscus Zabarella], on X.2.22.6.

But now these [principles] receive seven explanations [*declaraciones*]. [*Only the fifth one is relevant here.*]

- Fifth explanation. Where a notary adds something between the lines, or erases something, and he wishes that no suspicion shall arise, he must attest at the end of his document that he himself made this interlinear addition or erasure. This is confirmed by Bartolus on D.28.4.1.1, and in a statement by the archdeacon [Guido de Baisio] on Decr.Grat. C.35 q.9. And my great master Antonius de Butrio follows suit, and my [other] great master Abbas Panormitanus, here [i.e. on X.2.22.3]. And although they do not state this expressly, this [precaution] is necessary, as Johannes de Imola sets out in detail on D.28.4.1 – whose tenet, according to him, is written nowhere else. And Bartolus recommends this practice, on C.6.23.12.1, and on C.6.33.3, and on D.48.10.15, and on D.37.11.1.10–11]. And my great master Abbas Panormitanus on X.3.36.7. Yet he adds, in view of a gloss on X.3.36.7: unless the verity of the cancellations could clearly be inferred [*elici*] from text passages which precede or follow. And Bartolus states, on the above-mentioned last paragraph [i.e. D.37.11.1.10–11], that a notary is believed when he writes such an end-clause.

Yet, where [the correction] is [merely] attested on the margin, but not in an end-clause or in the instrument’s main text [*in corpore instrumenti*], no faith is put into such a postscript [*apostilla*], even if it would appear to have been written by the same hand, as noted in detail by Johannes Andreae in his *Additiones* to the *Speculum iudiciale*, rubric “About disclosure of documents” [*de instrumentorum editione*], section “After disclosure” [*Ostenso*], and Johannes’s respective *Addition* begins with the words “Rolandinus stated” [i.e. Rolandinus Passagerii, in his *Ars notaria*]. And above all if this postscript does not have requisites which suggest that it deserves to be trusted, and no other form requirements [*solennitates*]. And because it would open an easy way for fraud, if characters [could so easily] be dissimulated [by some postscript]. And Baldus elegantly promotes this [doctrine], on C.6.23.12.1, and Paulus de Castro there [i.e. on C.6.23.12.1], who relates a case where this doctrine was

applied in practice in court. And he [i.e. Paulus] once wrote a legal opinion in this sense, which begins with the words “In the name of Christ. The doubt [for which advice is sought] is caused” [Paulus de Castro, *Consilia*, no. 36 in the edition used]. And Baldus states this on C.6.23.30, and on C.7.57.3, and Bartolus on D.1.5.8. And my great master Abbas Panormitanus writes this on the aforementioned law text X.3.36.7.

Although Baldus states the contrary on the rubric D.2.14 and on D.2.14.2, and in a legal opinion of his, which begins with the words “In the Book of famous sayings in the Bible” [i.e. Petrus Lombardus, *Liber sententiarum*], based on the authority of Bartolus on D.29.1.15.1 (who does not really talk in terms of such opinion, however), and based on D.2.13.6.6. But the latter law text deals with writings which have a strict arrangement, as Baldus himself points out there [on D.2.13.6.6]. So, it is different in loose note papers [*in filis*] and other [unsystematised] booklets [*quinternis*] or scratch papers which are not stitched together [*scartafaciis non ligatis*], where one writes at whim, without regard to chronological order. And this can be the case with postscripts written on the margin, because [there] one can easily write something afterwards, without regard to chronological order. And therefore the decision by Johannes Andreae is more convincing [*verior*], as I have already stated on X.2.22.1, but not so clearly. ...

[In context with the question] when an erasure may vitiate [*noceat*], you must distinguish [cases in which it will not vitiate]:

- as here by Johannes de Imola [on X.2.22.3], who concludes in effect that an erasure does not vitiate when closed writings are opened [i.e. think of a sealed envelope or other secure means of closure], as mentioned by the *glossa ordinaria* here [i.e. on X.2.22.3], and on X.5.20.5. And he [i.e. Johannes de Imola] notes this well and follows suit on D.28.4.3. And Baldus here [on X.2.22.3], who mentions D.29.1.20.1 as “an excellent text” for this.
- The same applies if an erasure is situated in non-substantial passages of the text, as here [in X.2.33.3].
- Likewise, if the erasure is specified in an end-clause, as discussed above in the “Fifth explanation”.
- Likewise, if it can be inferred [*colligi*] from text passages which precede or follow that the text must read as it now reads, after the erasure – as also stated by my great master Abbas Panormitanus, on X.3.36.7.
- Also, if it is evident by some other publicly authenticated writing [*per aliam scripturam publicam*] that the erasure was done well [i.e. with good reason].
- Furthermore, if it appears from a comparison of characters that [the text written on] the erasure is from the same hand, according to Goffredus de Trano, and my great master Antonius de Butrio, the cardinal [i.e. Franciscus Zabarella], Baldus, and Johannes de Imola, here [on X.2.22.3], although my great master Abbas Panormitanus is against it, in view of the *glossa ordinaria* on X.3.36.7, which states that a comparison [of handwriting] is out of place unless the erasure is situated in a non-suspected text passage [*in loco non suspecto*]. Yet, it is clear [*certe videtur*] that in a non-suspected text passage a comparison is [by even stronger reason] out of place, because – as

my great master Abbas Panormitanus remarks in a different place – a party is allowed to erase [at whim] a superfluous [narration in an] instrument, beside the [essential] circumstances of the matter, and he quotes Pope Innocent on X.5.7.4. And it can be inferred from this text [*est de mente istius textus*] that, if here a comparison is done [as is the case in this text], this would not be so unless by reason of a “suspected” place which was erased. Therefore it [rather] depends on the question of whether a comparison should be done [at all], except [for comparison of] a document issued in duplicate [*apodissa*] – about which see [the commentary on] X.2.22.2. And in view of the fact that a few words could easily be fabricated, after [previous] characters have been dissimulated by erasure, we cannot let this [doctrine] pass without doubt.

[*Main points, summarised by Felinus:*]

From the above-mentioned [doctrines], note first that an erasure in a text passage which is neither substantial nor dangerous will never vitiate, as also stated by Baldus on C.6.33.3 in his fourth comparative reflection [*oppositio*]. And even more clearly Bartolus on C.6.33.3. In the same sense the *glossa ordinaria* on X.5.20.5.

Differently in a “suspected” passage, even if one single word is changed, as there [in X.5.20.5]. And X.2.22.6 corroborates this.

Secondly, note that [a permitted correction by means of] erasure must have been made in the immediate course of events [*in continenti*]: namely, if a notary emends in his old age what he wrote in his youth, the instrument is “suspected” – according to Baldus here [on X.2.22.3]. Argument: law texts X.2.21.7 and C.4.21.17, except when the sense of the writing on the erased space would inevitably arise likewise [*surgeret necessario*] from preceding text passages [*ex praemissis*] which have no flaw – according to him. His statement must [however] be explained according to [the propositions] presented above ...

Excerpts: ... An et quando notarius possit errorem suum corrigere ... est materia quam solenniter ponit **Bartolus in l. Si librarius, ff. de regul. iur.** [D.50.17.92], et etiam plene **Spe. de instru. edi. § Instrumen., versiculo “Sed nunquid confectio”** [Guilielmus Durantis, *Speculum iudiciale*], et late **Joan. An. ibi** [Johannes Andreae, *Additiones ad Speculum iudiciale*], et in **“Data”, 6. li.** [Johannes Andreae, *Novella*, on VI.5.13.88 last phrase], in **ultima columpna**. Et **Bald. plene in c. Publicato, in columpna i., supra, de elec.** [X.1.6.58], et plenius post **Bart. in l. Imperator, ff. de statu ho.** [D.1.5.8], et in **extravag. de pace Const., in verbo “Pacta”** [Baldus de Ubaldis, *Comm. on Libri Feudorum, De pace Constantiae, § Acta*]. Et **Bald. et Imol. in l. Cum proponere., ff. de leg. i.** [D.31.1.64], et in **l. i. § Si autem, ff. de haere. inst.** [D.28.5.1.5]. Et **doctores in locis allegatis.**

Sed ut rei summam habeamus, tamen intrando extensae sunt quatuor conclusiones, cum septem declarationibus.

- Prima conclusio. Error in omittendo spectantia ad notarium potest per eum corrigi. Unde, si est omissa dies, et recordatur de die, creditur sibi et potest emendare, quia creditur officiali in officio sibi commisso: **l. Apparitores, C. de exactoribus tributorum** [C.10.19.5], cum aliis allegatis per **Bart.**, qui hoc tenet in **dicta l. Si librarius** [D.50.17.92], et in **dicta l. Imperator** [D.1.5.8], ne

scribentis error noceat partibus: **l. Si quis in nomine** [C.6.23.4], et **l. Errore, C. de testa**. [C.6.23.7]. Et idem dicit de errore indictionis.

Est autem dictum “in omittendo”, quia secus si in ponendo. Unde si ponit unum diem, vel mensem, cum deberet ponere alium, non potest se corrigere, nisi de errore constet per testes, vel modis de quibus dictum per **l. Quicquid adstringendae, ff. de ver. ob.** [D.45.1.99], tum quia fungitur enim officio suo: **l. Iudex, ff. de re iudic.** [D.42.1.55], **secundum Bar. in dicta l. Si librarius** [D.50.17.92]. Et sequitur **dominus Antonius** [de Butrio] hic.

Contra quod dictum, licet alii transiverint, adduci potest quod notat **Inn. in c. In literis, supra, de offic. deleg.** [X.1.29.9], ubi dicit quod ille cui incumbit aliquod factum sine iurisdictione numquam fungitur officio suo, donec solenniter perfecerit. Sed officium tabellionatus non est officium iurisdictionale. Et sic non est functus officio. Sed **dictum Inn.** intelligitur in his quibus permittitur variare, non in teste, vel tabellione, quibus est variatio interdicta, **secundum Bal.** in proposito, **in l. fin., in penultima columpna, de eden.** [D.2.13.13]. Ex quo videtur quod possit satis in continenti talis error corrigi: **argumentum c. Preterea, supra, titu. i.** [X.2.21.7], quod sentit **Barto. in dicta l. Si librarius** [D.50.17.92]. Et in hoc etiam vide quae notat **Imo. in dicto c. In literis** [X.1.29.9], dum legit c. **Cum compromissarius, post prin., ibi, “suo functus officio”, de elect., in 6.** [VI.1.6.37].

- Secunda conclusio. Error notarii in pertinentibus ad sortem et substantiam contractus non potest ex intervallo corrigi per notarium, sed in continenti sic, per proxime dicta, aequiparando notarium testi, iuxta **l. Domitius, ff. de testa.** [D.28.1.27]. Ita **Bart. in locis praeallegatis**, et **Bal. in l. Generaliter, in ultimo notabili, C. de non numera. pecu.** [C.4.30.13], nisi aliquo legitimo modo probaretur coram iudice de errore, puta producendo originale alterius, unde sumpsit exemplum: **dicta l. Si librarius** [D.50.17.92], et **dicta l. Errore** [C.6.23.7].

Idem si ex proprio protocollo, non erroneo, ut etiam notat **dominus Card. in cap. Inter dilectos, ad fin., infra, eodem** [X.2.22.6], quia ad illud recurritur, ut dixi plene in **c. Quoniam, in notabilibus, supra, de probat.** [X.2.19.11], et notat **gl. § pen. in Auth. de tabellionibus** [Auth.Coll.4.7.1], per quam dicit **dominus Car. dicto c. Inter** [X.2.22.6], quod cum Florentiae protocollum et instrumentum, quamvis antiquum, discordarent, et unum diceret legatum ecclesiae sanctae Mariae, aliud societati sanctae Mariae, fuit consultum standum esse protocollo, **per gl.** quam semper nota, secundum ipsum. Et adde ad ea quae dixi **in dicto capitulo Quoniam** [X.2.19.11]. Et remanens apud notarium, in dubio praesumitur originale, arguendo “a solitis”: **l. Certi condicio § Si nummos, ff. si cert. pet.** [D.12.1.9.8], et **per Bartol. in dicta lege Si librarius** [D.50.17.92].

Item si appareret error per testes descriptos in instrumento, **de quo in capitulo Cum Joannes, infra, eodem** [C.2.22.10]. Item per ipsos facientes instrumentum, **ut in c. Tertio loco, supra, de prob.** [X.2.19.5], vel per mediatores contractus, **ut per gl. in § Si vero, in Authen. de inst. cau. et fide** [Auth.Coll.6.3.7, glossa ad verbum “adnumeratorem”]. Et quod dixi “coram iudice”, declarabitur in quarta conclusione.

- Tertia conclusio ... [*not relevant here*]
- Quarta conclusio. Non potest notarius errorem corrigere, nec defectum supplere, nisi interveniat auctoritas iudicis vel officialis ad hoc deputati, **secundum Joan. And. in “Data” 6. lib.** [Johannes Andreae, *Novella*, on VI.5.13.88 last phrase], **in ultima columpna**, dicentem quod alias caveat, quia posset sibi impingi falsum, **per l. Eos, ff. de falsis** [D.48.10.27]. Est enim functus officio suo. Et sic de facto servatur, secundum ipsum. Et **sequitur Im. hic** [on X.2.22.3], et **in c. Inter dilectos, infra, e.** [X.2.22.6].

Pro quo vide omnino **Joan. And. in Spec. in dicto versiculo “Sed nunquid confecto”**. Et **Bal. in l. Ambiguitates, in fine, C. de testa.** [C.6.23.24], et **in l. Ea quae, in prin., C. comminationes epistolas** [C.7.57.3pr]. Et ibi dicit, si post publicatum instrumentum adderet in fine: “Cassavi in tali loco, quia per errorem”, et cetera, ista verba vitiantur, et non vitiant. Et de hoc etiam **per Bal. in rub. C. eo.** [C.6.23, rubric], ubi dicit quod non potest cancellare protocollum, nisi diceret “Cancellatum quia restitutum parti”. Et de hoc etiam **per Cal. in isto titulo, pars i.** [Johannes Calderinus, on X.2.22]. Et omnino **Do. in c. Ab., in ultima columpna, de re iud., in 6.** [Dominicus de Sancto Geminiano, on VI.2.14.3]. Et **Car. in prooemio Cle., § fin.** [Franciscus Zabarella, cardinal]. Et videtur ista conclusio comuniter teneri, nisi in quatuor casibus in quibus non requiritur iudicis auctoritas.

- Primus casus est, quando esset error non vitians instrumentum, ut falsa Latinitas, **secundum Bar. in dicta l. Si librarius** [D.50.17.92], **per dictam l. Imperator** [D.1.5.8] et **l. Actorum verba, ff. de re iudi.** [D.42.1.46], de quo in sequenti casu.
- Secundus casus est, quando instrumentum nondum est productum in iudicio, et sic non est deductum in controversia, neque copia data est parti adversae. Nam tunc bene potest etiam sine iudice corrigi, **secundum Joan. And. in “Data” 6. lib.** [Johannes Andreae, *Novella*, on VI.5.13.88 last phrase] et **Do. ubi supra** [Dominicus de Sancto Geminiano, on VI.2.14.3], et **Im. hic** [Johannes de Imola, on X.2.22.3], et **Bal. in rub. C. e., versiculo “Sed pone, tabellio”** [Baldus, on C.4.21, rubric]. Et ex his dicit **Bal. hic**, quod, restituto instrumento, tabellio est adeo functus officio suo quod nec punctum, nec syllabam intellectualiter mutare posset, nisi iudicis mandato. Allegat **dictam l. Imperator** [D.1.5.8]. Ex quo dubito de praecedenti casu, ne sub praetexto Latinitatis fieret fraus.
- Tertius casus est, quando error est notorius, quia iudicis auctoritas non requiritur, vel si requiritur, non est necessaria partis citatio, **secundum Bal. in dicta l. Imperator** [D.1.5.8]. Allegat **Cynum in l. i. C. de legibus** [Cinus de Pistorio, on C.1.14.1]. Secus dicit in errore latenti, quia exigitur et iudex et pars.
- Quartus casus est quando vult corrigere eo modo quo corrigit lex, ut errorem indictionis, quia potest propria auctoritate, cum habet iuris praesumptionem pro se, quia non nocet alicui, cum et sine hoc ius sic praesumeret, et ita esset, **secundum Bal. late, in l. unica, in fine, C. de Iust. Codice compo.** [Codex Justinianus, first introductory constitution], licet in hoc de indictione referat alios contrarium tenere, cum quibus **concordat**

Jo. An. in dicta “Data” 6. [Johannes Andreae, *Novella*, on VI.5.13.88 last phrase] et **Im. in dicto c. Inter dilectos** [X.2.22.6]. Sed eorum opinio posset forte salvari, quando de tempore confecti instrumenti appareret solum de indictione. Alias autem, ubi anni exprimuntur, teneo **cum Bal.**, quia ipsis calculatis habetur indictio, **secundum dominum Car. in dicto c. Inter** [Franciscus Zabarella, cardinal, on X.2.22.6].

Modo recipiunt ista vii. declarationes [*of the subsequent seven declarations, only the fifth one is relevant here*].

- Quinta declaratio. Ubi notarius facit aliquem interlineaturam, vel abrasionem, si vult ut cesset omnis suspicio, attestetur in fine instrumenti quod ipse illam interlineaturam vel abrasionem fecit. Ita **dicit Bar. in l. i. per illum textum, ff. de his quae in test. del.** [D.28.4.1.1]. Et **Archi. in § i., C. 35 q.9** [Decr. Grat. C.35 q.9]. Et **sequitur dominus Ant. et dominus Abb. hic** [on X.2.22.3]. Et licet ipsi non exprimant, istud est necessarium, ut late **per Imo. in dicta l. i.** [D.28.4.1], per illum textum quem dicit non esse alibi. Et in hanc practicam commendat **Bar. in l. Si unus, in fine, C. de test.** [C.6.23.12.1], et **in l. Edicto § Sin autem, in prima columpna, C. de edicto divi Adr. tol.** [C.6.33.3], et **in l. Divus § Ita senatus, ff. de falsis** [D.48.10.15], et **in l. i. § fi., ff. de bo. pos. secundum tab.** [D.37.11.1.10–11]. Et **dominus Ab. in c. Cum venerab., in fine, infra, de religio. dom.** [X.3.36.7], nisi ex praecedentibus vel sequentibus posset elici veritas eorum quae sunt cancellata, secundum ipsum, **propter gl. ibi** [glossa on X.3.36.7]. Et **dicit Bar. in dicto § fin.** [D.37.11.1.10–11] quod creditur notario ita subscribenti.

Ubi autem attestatur hoc in margine, non autem in subscriptione vel corpore instrumenti, non adhiberetur fides tali apostillae, etiam si videretur eadem manu scripta, **ut late per Jo. Andr. in Spe. de instr. edi. § Ostenso, additio incipiens “Dixit Rolandinus”** [Guilielmus Durantis, *Speculum iudiciale*]. Maxime si apostilla non habet requisita ex quibus mereatur fidem, nec alias solennitates. Et quia de facili daretur via fraudibus, dissimulatis literis. Et idem **tenet eleganter Bal. in l. Si unus, C. de testa.** [C.6.23.12.1], et **ibi et Paul. de Cast., qui dicit ita de facto fuisse obtentum. Et ita consuluit Pau. de Cas., Cons. 36, incipiens “In Christi nomine. Dubium facit”.** Et ita notat **Bal. in l. Nostram, in prima et secunda columpna, C. de testa.** [C.6.23.30], et **in l. Ea quae, C. commi. epistolas** [C.7.57.3], et **Bar. in dicta l. Imperator, in fine** [D.1.5.8]. Et **dominus Ab. scribit in dicto c. Cum venerabilis, in fine** [X.3.36.7].

Quamquam contrarium dixerit **Bal. in rubrica et in l. Labeo, ff. de pac.** [D.2.14 rubrica, et D.2.14.2], et **in Consilio incipienti “In libro sententiarum”** [Baldus, *Consilia*], per auctoritatem **Bar.**, qui non loquitur in his terminis **in l. In fraudem, § Sicut, ff. de te. mili.** [D.29.1.15.1], et **per l. Si quis ex argentar. § Si initium, ff. de edendo** [D.2.13.6.6]. Sed illa lex loquitur in scriptis habentibus ordinatam persequentiam, **secundum Bal. ibi** [on D.2.13.6.6]. Unde secus in filis et aliis quinternis vel scartafaciis non ligatis, in quibus scribitur ad placitum, non servato ordine temporis. Et ita potest esse in his que scribuntur in margine, quia commode scribi potest quid

denique, non servato temporis ordine. Et ideo **decisio Jo. An.** verior, ut etiam dixi, sed non ita clare, **in c. i., in fine, supra, eodem** [X.2.22.1]. ...

Quando abrasio noceat, distingue:

- **ut hic per Imo.** [Johannes de Imola on X.2.22.3], concludentem in effectu quod rasura non vitiat quando literae emanant clausae, **ut est gl. hic** [glossa on X.2.22.3], et **in c. Licet, in verbo “tenuem”, infra, de crimine falsi** [glossa on X.5.20.5]. Et hoc bene notat et sequitur **in l. Proxime, ff. de his quae in testa. delen.** [D.28.4.3]. Et **Bal. hic**, dicens esse optimum textum legis **in l. Tribunus § fin., ff. de testamento mili.** [D.29.1.20.1].
- Idem, si est rasura in non substantialibus, ut **in isto textu** [X.2.33.3].
- Idem, si in subscriptione dicitur de rasura, ut supra in declaratione quinta.
- Idem, si ex praecedentibus et sequentibus potest colligi quod ita debet stare prout in rasura, **ut etiam per dominum Ab. in dicto c. Cum venerabilis** [X.3.36.7].
- Idem, si per aliam scripturam publicam appareat rasuram fuisse bene factam.
- Idem, si ex comparatione literarum apparet rasuram de eadem manu factam, **secundum Gof., dominum Ant., Car., Bal. et Imo. hic** [on X.2.22.3], licet **dominus Ab. contra**, propter **gl. in dicto c. Cum venerabilis** [glossa on X.3.36.7], dicentem locum esse comparationi solum quando rasura est in loco non suspecto. Sed certe videtur quod, ubi non est locus suspectus, non sit locus comparationi, quia, **ut in alio loco dicit hic dominus Ab.**, potest pars radere instrumentum continens superfluitatem extra circumstantia negotii, **allegando In. in c. Fraternitatis, infra, de haer.** [Innocent IV on X.5.7.4]. Et est de mente istius textus, propter quod, si locus est hic comparationi, non videtur esse nisi circa locum suspectum rasum. Unde pendet istud a quaestione utrum sit locus comparationi extra apodissam [= *a document issued in duplicate*], de quo supra, c. proximo [X.2.22.2]. Et attento quod pauca verba facile fieri possent, dissimulatis literis abrasis, istud non transit sine dubio.

Et circa praedicta nota primo, quod abrasio in loco non substantiali, neque periculoso, nunquam nocet, **ut etiam per Bal. in l. Edicto, in quarta oppositione, C. de edicto divi Adr.** [C.6.33.3]. Et clarius **Bar. in § Sin autem, in prima columpna** [C.6.33.3]. **Sentit gl. in dicta l. Licet** [X.5.20.5].

Secus si in loco suspecto, etiam in verbo, **ut ibi** [in X.5.20.5]. Et **facit c. Inter, infra, e.** [X.2.22.6].

Nota secundo quod rasura debet fuisse in continenti. Si enim notarius emendat in senio quod scripsit in iuventute, instrumentum est suspectum, **secundum Bal. hic** [X.2.22.3]. **Argumentum c. Praeterea, supra, titulo proximo** [X.2.21.7], et **l. Contractus, C. de fid. inst.** [C.4.21.17], nisi intellectus quem sonat scriptura in loco abraso surgeret necessario ex praemissis, ubi non est vitium, **secundum ipsum.** Cuius dictum declaratur secundum ea quae supra dicta sunt. ...

Edition used: Felinus Sandeus, *Commentariorum ... iuris canonici pars secunda.* Lugduni 1587, fos 163vb–165rb.

[14] X.2.22.3, Commentary by Panormitanus (cited in lines 32, 34)

My paraphrase: (no. 3) Whether someone may correct and erase [a papal charter] if he notices an error, all law teachers say that the answer is “no”. Namely were this to be permitted, any papal rescript would be deprived of its usefulness. Cardinal Hostiensis therefore says [in his *Summa* or his *Lectura* on the *Decretales Gregorii IX*] that the papal Curia has a precept, threatening whomsoever with automatic excommunication (except office-holders in the Curia who are appointed to correct charters), who in a papal rescript with leaden seal [*rescripto bullato*] or in a note [where an envisaged text for such a rescript is noted] erases, destroys, diminishes, complements or changes anything, even one figure or character, and even a half one, without permission of a person who is accordingly authorised. And he says that this precept is often re-publicised in the Curia, so that no-one could pretend that he had not known this precept – as stated in D.34.9.9.1, and X.5.6.6, and Decr.Grat. Dist.16.c.4. And so strictly does the Curia handle [this precept] that great hurdles must be overcome before an excommunicated person is absolved by the Curia.

Nevertheless, someone who has requested and obtained a papal charter may without any punishment destroy his charter, and also its leaden seal, if he no longer intends to use this charter. And remember this well. Because everyone may renounce a right which he has. And see what I said on this in more detail on X.2.13.10.

You can also gather from there that a simple notary who has penned papal charters cannot make corrections in them without permission of an office-holder appointed for this task. From there we get to the question whether a notary may correct other documents, or add to them, when he perceives that he has erred. Antonius de Butrio has treated this topic. But you should read the details stated by Johannes Andreae in his *Novella in Sextum*, on VI.5.13.88 “Data”, and Bartolus de Saxoferrato on D.1.14.3, and Archdeacon Guido de Baisio on Decr.Grat. C.35 q.9 c.1, and Guilielmus Durantis ... Remember one important point: when a notary adds something between the lines, or erases something, and he wishes that no suspicion shall arise, he must attest at the end of his document that he himself made this interlinear addition or erasure. This is confirmed by Bartolus and other authors on D.28.4.1.1, and in a statement by the Archdeacon on Decr.Grat. C.35 q.9 c.1, mentioned above. And if a party corrects or erases, that party must be punished.

Antonius de Butrio seems in effect to follow here the opinion of Pope Innocent IV and Goffredus de Trano, that this text X.2.22.3 shall be understood to apply in cases where the preceding and subsequent text shows that the rewritten correction on erasure is true, or when the correction was made by the same hand. This last observation, also made by Goffredus, is not to my liking, because in order to argue that an erasure does not vitiate the document, two things are needed. First, the erasure must be in a non-suspected place. Second, it must be rewritten by the same hand, as noted in the above-mentioned law text X.3.36.7. So, it is not sufficient that it appears to be from the same hand, if it is done in a suspected place. Because one can easily imitate the handwriting of another person. Therefore proof by mere comparison of handwriting is fallacious, as stated in Auth.Coll. 6.3.1 ...

Therefore I submit a fourth suggestion to interpret the text X.2.22.3: namely when the erasure is not made in a suspected place, and not so big that any suspicion of fraud could arise ...

Last question. Take a case where an erasure is made in a suspected place. Will it vitiate the entire document, or merely the part where it is situated? Oldradus de Ponte [in one of his legal opinions] deems that it will not vitiate all, as reported by Baldus on C.6.33.3 ... And understand this in cases where the document has several separate chapters. Read on this what is written by Pope Innocent IV on X.5.7.4. I also add a good text in VI.1.3.9, where it is clearly stated that one surreptitiously obtained concession of a prebend [in a papal charter] does not vitiate another concession [made in the same charter]. And I am very pleased about this, in cases if and when a papal rescript or any other document has words struck out, in a certain text passage.

Excerpts: ... (no. 3) An autem possit quis corrigere et abraderere, si deprehendit errorem, doctores hic tenent comuniter quod non. Quin immo si hoc praesumeretur, careret omni commodo rescriptum. Unde dicit **Host.** quod in curia est canon latae sententiae excommunicationis in quemcumque alium ab officialibus super hoc in curia deputatis, qui in rescripto bullato, vel notato, aliquid, saltem unam figuram, vel literam, vel etiam dimidiam abraserit, deleverit, diminuerit, compleverit, vel mutaverit sine illius, ad quem spectat, data licentia. Et dicit quod sepe hoc publicatur in curia, ut non possit quis praetendere ignorantiam: **ff. de insti. l. Sed et si palam** [D.34.9.9.1], et **infra, de iud., cap., Ita quorundam** [X.5.6.6], et **16 Dist. c. Quod dictis** [Decr.Grat. Dist.16 c.14, in fine]. Et ita stricte hoc servat curia ut cum magna difficultate absolvat ligatos.

Posset tamen impetrans sine aliqua poena totam literam dilaniare, ac etiam bullam, si illa non vult uti. Et nota hoc ultimum. Nam licitum est cuilibet iuri suo renunciare. Et vide de hoc quod plenius dixi in dicto **c. Ex conquestione** [X.2.13.10].

Habes etiam ex praedictis quod simplex notarius, qui literas apostolicas scripsit, non potest illas corrigere sine licentia officialis ad hoc deputati. Unde facit hoc ad quaestionem an in aliis instrumentis possit notarius corrigere, vel addere, si comperit se errasse? Quod tractavit **dominus Ant.** [Antonius de Butrio]. Sed tu vide plene per **Jo. An. super "Data", li. 6 in Novella** [Johannes Andreae, *Novella*, on VI.5.13.88 last phrase], et per **Bar. in l. Barbarius, de off. prae.** [Bartolus, on D.1.14.3], et per **Archi. 35 q.9 ca.1** [Archidiaconus Guido de Baisio, on Decr.Grat. C.35 q.9 c.1], et **Spe. de instrum. edi. § Instrumentum, versi. Quid ergo si In(?)** [Guilielmus Durantis, *Speculum iudiciale*]. Unum tamen tene menti, quod ubi notarius facit unam interlineaturam, et abrasionem, si vult quod omnis cesset suspicio, attestetur in fine instrumenti quod ipse illam interlineaturam vel abrasionem fecit. Ad hoc **Bar. et cet. in l. i. § Et ideo, ff. de his quae in testa. delen.** [D.28.4.1.1], et per dictum **Archi. in dicto c. i.** [Decr.Grat. C.35 q.9 c.1]. Et si pars corrigit vel abradit instrumentum, debet puniri ...

Dominus Antonius in effectu videtur hic sequi mentem **Innoc.** et **Goff.** [Pope Innocent IV, and Goffredus de Trano], ut intelligatur litera [*i.e. the text of X.2.22.3*], quando ex praecedentibus et sequentibus constat de veritate rescripti in abraso loco, vel quando per aliam scripturam apparet de veritate, vel quando correctio fuit facta de eadem manu. Hoc ultimum, quod etiam fuit **Goff.**, mihi non placet. Nam duo requiruntur ut abrasio non vitiet. Primo, quod in loco non suspecto. Secundo, quod reposita sit scriptura de eadem manu, ut notatur in dicto **c. Cum venerabilis, de re. do.** [X.3.36.7]. Non ergo sufficit, quod eadem videatur manus, si in loco suspecto est

facta, quia de facili simulatur litera alterius. Unde haec probatio, quae fit per solam comparisonem, est fallax, ut dicit textus in **Auth. de instru. cau., in princ., per primam columpnam** [Auth.Coll. 6.3.1 = Nov. 73.1] ...

Quare dico ponendo quartum intellectum: literam intelligendam quando in loco non suspecto facta est rasura, et non sit ita magna quod inducat praesumptionem fraudis. ...

Ultimo quaeritur, pone quod rasura sit facta in loco suspecto, nunquid vitiat totum instrumentum, an solum illam partem cui inhaeret? **Old.** [Oldradus] tenet quod non vitiat totum, ut recitat **Bal. in l. fi. in quarto contrario, C. de edi. divi Adr. tol.** [Baldus, on C.6.33.3]. ... Et intellige quando instrumentum habet plura capitula separata. Ad hoc quod notat **Inno. in c. Fraternitatis, de haer.** [Innocent IV, on X.5.7.4]. Allego etiam bonum textum in **c. Si eo tempore, de rescri. li. 6.** [VI.1.3.9], ubi patet quod surreptio commissa in una gratia non vitiat concessionem alterius gratiae. Et hoc satis mihi placet si quando rescriptum vel aliud instrumentum est cancellatum in certa parte. ...

Edition used: Nicolai Tudeschii Catinensis Siculi, Panormi Archiepiscopi, vulgo Abbatis Panormitani, *Commentaria secundae partis in secundum librum Decretalium. Tomus Quartus.* Venetiis: apud Iuntas, 1588 (fos 146va–147vb). [Digitised by A. J. B. Sirks (Frankfurt, 2005). The digitised volumes lacked the sheets for X.3.27.1 to X.3.50.10.]

[15] X.2.22.6 “**Inter dilectos**”. LAW TEXT (*cited in lines 32, 34, 43, 45*)

My summary: a monastery had pursued the archbishop of Milan before Pope Innocent III on a claim to restore certain lands. The monastery submitted documents which should prove its ownership of the lands in question. The defender contended that merely two of the documents might possibly be relevant. The first one, however, was suspected for three reasons. Firstly, its notation of the tax-year figure [*indictio*] (which is an important element in detecting forgeries) was worn off. Second, while the parchment sheet appeared [*videretur*] to be very old, the handwriting on it appeared to be more recent, as if it had not been written in that time [when the parchment was produced]. Thirdly, a false seal had corruptly been appended to it. ...

Also the second possibly relevant document was suspected for many reasons. It had erasures [*liturae*]. Furthermore, the character of handwriting in the subscription clause differed from the character of the subsequent signature of the notary, but in the subscription clause [allegedly] the notary stated [*profiteretur*] that he had written the entire document in his own hand. Furthermore, the handwriting appeared to be more recent than the sheet, and its ink had been diluted with water to let it appear older ...

Pope Innocent III dismissed the claim because “when the rights of the parties are unclear [*obscura*], it was and is customary [*consuevit*] to give judgment against the claimant”.

Excerpt: Innocentius III. Mediolanensi Archiepiscopo. Inter dilectos filios G. abbatem sancti Donati de Scozula et B. procuratorem tuum super subiectis articulis diu fuit in nostro auditorio litigatum. Petebat siquidem abbas nomine monasterii sui a praefato procuratore tuo nomine Mediolanensis ecclesiae restitui monasterio memorato portum Scozulae, ... dicens, ad monasterium haec omnia pertinere ...

Primo per privilegium Luitardi comitis, quondam episcopi Lucani, qui monasterium ipsum fundaverat, et ei, quae praemissa sunt, donaverat universa. Secundo per instrumentum sententiae Asperti quondam Mediolanensis archiepiscopi ...

Sed contra privilegium donationis a procuratore tuo multa fuerunt obiecta. Primo, quia ibi maxime apparebat consumptum, videlicet in annotatione indictionis, ubi potuisset falsitas facilius deprehendi. Secundo, quia, cum charta vetustissima videretur, recentior apparebat scriptura, tanquam non illo tempore facta fuisset. Tertio, quia falsum sigillum vitiose videbatur appositum ...

Instrumentum quoque sententiae multis modis inveniebatur suspectum, tum quia in ipso quaedam apparebant litureae, tum quia subscriptio notarii videbatur manus alterius fuisse quam subscriptio instrumenti; cum tamen notarius in subscriptione profiteretur, se instrumentum manu propria conscripsisse. Litera quoque recentior videbatur quam charta, et aqua videbatur encaustum infectum, ut antiquius appareret. ...

Cum autem super his fuisset diutius litigatum, quia legitime probata non fuerant, quae petebantur ad monasterium pertinere, ab impetitione ipsius procuratorem tuum nomine tuo et Mediolanensis ecclesiae sententialiter duximus absolvendum, quoniam, cum obscura sunt iura partium, consuevit contra eum, qui petitor est, iudicari.

Edition used: as above; see no. [6].

[16] X.2.22.6, *Glossa ordinaria* (cited in lines 32–4, 46)

My paraphrase: (Gloss on the word “indictionis”) It is customary [*consuevit*] to specify the tax-year figure [*indictio*] in charters of privileges and documents – as here, and in Decr.Grat. Dist. 23 c.1, and Dist. 73 c.1. At the end [of a document] one must indicate the year date, and the name of the emperor, and the month, and the day. And all this can be taken from Auth.Coll. 5.3.1. ... Thus note the significance of the tax-year figure, so that you come to know whether a document can be discerned to be false in view of its tax-year figure ...

And if there is no such tax-year figure [*indictio*], the document is false. And here comes the formula to calculate the “*indictio*”. Increase the year date by three, normally, and divide the sum into parcels of fifteen. And the number which remains in the last parcel (in most cases it is lower than 15), that is the tax-year figure. And if the last parcel happens to contain 15, then the tax-year figure will be 15.

(Gloss on the word “videretur”:) Note that one can infer from the bad condition of a sheet that [the writing on] it is a forgery: see X.5.02.5. And here one compares the quality of the sheet to that of a normal [papal] letter, just as one compares elsewhere the [characteristics of] writing to [normal papal letters’] writing.

(Gloss on the word “litureae”:) The word means “cancellation”, or elsewhere the word “*interlita*” is used for erasures.

(Gloss on the word “profiteretur”:) This means, he gave assurance that he himself complemented the document – as in Auth.Coll. 4.7.1, and in X.5.33.12.

Excerpts: (Glossa ad verbum “indictionis”) *Indictio enim consuevit poni in privilegiis et instrumentis, ut hic, et 23 D. In nomine Domini* [Decr.Grat. Dist. 23 c.1], et **73 D. In nomine patris** [Decr.Grat. Dist. 73 c.1]. In fine anni Domini sunt ponendi, et nomen imperatoris, et mensis, et dies. Et hoc totum legitur **in Auth. Ut nomen**

impera. docu. praepo., coll. 5 [Auth.Coll. 5.3.1 is meant = Nov. 47.1] ... Nota ergo quid sit indictio, ad hoc ut scias an instrumentum falsum ex indictione discernatur ...

Et si non est ibi talis indictio, falsum est instrumentum. Et haec est regula ad inveniendum indictionem: Tres annos domini appone pro indictionibus regulariter, et partire per quindenum numerum. Et quotus numerus remanet infra xv., tanta est indictio. Et si facta divisione remaneant xv., tantum “xv.” est indictio.

(Glossa ad verbum “videretur”:) Nota quod ex qualitate chartae falsitas reprehenditur: **infra, de cri. fal., c. Licet § Cos.** [X.5.20.5]. Et hic fit comparatio chartae ad literam, sicut alibi fit comparatio scripturae ad scripturam: **C. de fide instru. l. Comparationes** [C.4.21.20].

(Glossa ad verbum “liturae”:) Idest cancellaturae, sive rasurae alibi dicuntur “interlita”: **C. de testa. Si unus** [C.6.23.12.1].

(Glossa ad verbum “profiteretur”:) Idest confitebatur per se fecisse completionem instrumenti: **in Auth. de tabel. § i., coll. 5** [Auth.Coll. 4.7.1 = Nov. 44.1], et **infra, de privil., c. Cum olim** [X.5.33.12].

Edition used: Lugduni 1613, as mentioned above; see no. [10].

[17] X.3.36.7 “**Cum venerabilis**”. LAW TEXT (*cited in line 33*)

My paraphrase: Innocent III to the abbot and convent of Farfa. Our venerable brother I., cardinal bishop of Sabina, had claimed [from you] the church Sancti Angeli de Cauceia, and all its possessions, averring that both the spiritual government and also the secular ownership belongs to him ...

In order to show that secular ownership of that church belonged to him, he showed a public document which expressly stated that he, the cardinal bishop of Sabina, had farmed the said church out, with all its pertinences, to the abbot of Farfa and two other persons, for a rent of four shillings yearly. But your party contended that this document had no probatory value, because of writings above the line and erasure in a suspected place, namely where the time [of farming] is counted.

Since it was clear to us that the aforementioned church is situated in the diocese of Sabina, we adjudged to the bishop all episcopal rights in spiritual government, except any rights which will be ascertained to have been subtracted from him by authentic charter. We found [*cognovimus*], however, that the aforementioned document, by which the bishop intended to claim secular ownership, was not apt to provide proof on this, namely because of the aforementioned reasons for which it was suspected. So, we decided to acquit you from his claim to the ownership of the church.

Excerpt: Innocentius III Abbati et Conventui Farbensibus. Cum venerabilis frater noster I. Sabinensis episcopus ecclesiam sancti Angeli de Cauceia cum suis pertinentiis et possessionibus petiisset, asserens, eam ad se tam in spiritualibus quam in temporalibus pertinere ...

In temporalibus quoque ad se dictam ecclesiam pertinere, nitebatur ostendere per publicum instrumentum, in quo continebatur expresse, I. Sabinensem episcopum H. Farbensi abbati et duabus personis post ipsum dictam ecclesiam cum suis pertinentiis locavisse pro annua quatuor solidorum Papiensium pensione. Sed pars vestra proposuit, instrumento praedicto nullam fidem penitus adhibendam propter

superlinearem scripturam et rasuram loco suspecto factam, ubi videlicet annotatio temporis recensetur.

Quia nobis constitit, ecclesiam supra dictam constitutam in dioecesi Sabinensi, episcopale ius in omnibus spiritualibus eidem episcopo adiudicavimus in eadem, illis tantum exceptis, quae per authentica scripta ei dignoscuntur esse subtracta. Quia vero instrumentum praedictum, per quod episcopus ecclesiam intendebat quoad temporalia vindicare, ad faciendam super hoc fidem invalidum esse cognovimus, utpote propter praedicta de iure suspectum: vos ab impetitione ipsius quoad temporalia eiusdem ecclesiae duximus absolvendos.

Edition used: as above; see no. [6].

[18] X.3.36.7, **Glossa ordinaria** (*cited in line 33*)

My paraphrase: (Gloss on the words “annotatio temporis”:) To wit, the years Anno Domini. The same would apply to the tax-year figure [*indictio*], because in it one can speedily ascertain a faultiness.

(Gloss on the words “propter praedicta”:) Because of the erasure in a suspected place, and the interlinear writing – see X.2.22.6: namely a document, in order to have probatory value, must be free from any suspicion. Argument based on X.1.3.17, and X.1.3.11, and C.6.33.3. But what if the erasure was rewritten by the same hand? It appears that then it is no hindrance – argument from X.5.33.12, and C.4.21.20. If it is clear that it was rewritten by the same hand, and in a non-suspected place, it is no hindrance.

Furthermore, what if the erasure is situated in one place, and nevertheless it is proved by other text passages in the document that it was well done [*bene propositum*]? It appears that [this document] suffices for probation. A good argument for this can be inferred from X.2.22.10 and C.7.58.3. And it is safe to concede this, because there is no presumption that it was done in fraud, because even without this erasure [the essential facts] would be clear.

However, in X.1.3.25 the mere fact that a litigating party had erased and rewritten a text passage in a lodged document sufficed to cause this person to lose his case.

Excerpts: (Glossa ad verbum “annotatio temporis”:) Id est in annis Domini. Idem esset in indictione, in qua citius comprehenditur falsitas: **supra, de fide instrumentorum, Inter dilectos** [X.2.22.6]. Jo.

(Glossa ad verbum “propter praedicta”:) Scilicet propter rasuram in loco suspecto, et interlinearem scripturam: sic **supra, de fide instrumentorum, Inter dilectos** [X.2.22.6]. Ad hoc enim ut credatur instrumento, oportet quod sit sine omni suspitione: arg. **supra, de rescriptis, Cum adeo** [X.1.3.17], et **c. Ad audientiam** [X.1.3.11], et **C. de edicto divi Hadriani tollendo, l. ult.** [C.6.33.3]. Sed quid si rasura reposita fuerit de eadem manu? Non videtur quod obstat: **arg. infra, de privilegiis, Cum olim** [X.5.33.12]; **C. de fide instrumentorum, Comparationes** [C.4.21.20]. Si constet quod eodem manu, et in loco non suspecto, non obest.

Item quid si rasura sit in uno loco, et tamen per alia quae posita sunt in instrumento, probetur bene propositum? Videtur quod sufficit ad probandum: **arg. bonum supra, de re iudicata, Cum I. et A.** [X.2.27.22, *misspelled*], et **arg.**

C. si ex falsis instrumentis vel testimon., l. 3 [C.7.58.3]. Et hoc satis potest concedi, quia non est praesumptio quod in fraudem factum sit, quia et sine illa rasura constabat.

Item hoc ipso quod instrumentum falsatum fuit, sufficiebat ad imponendum ei silentium: **supra, de rescriptis, Olim** [X.1.3.25].

Edition used: Lugduni 1613, as mentioned above; see no. [10].

[19] **C.6.33.3, Commentary by Bartolus** (*cited in line 33, but already in line 30*)

[20] **X.2.22.3, Commentary by Panormitanus** (*cited in line 34, but already in line 32*)

[21] **X.2.22.3 LAW TEXT** (*cited in line 34, but already in line 31*)

[22] **X.2.22.3, Glossa ordinaria** (*cited in lines 34, 45*)

My paraphrase: A papal judicial order [*rescriptum*] is suspected if it has erasures in a suspected place [*in loco suspecto*]. In contrast, erasures in mere narrations of facts do not vitiate it [if such facts are not relevant for the judicial order's aim – as in the law case decided in X.2.22.3].

From this arose a doubt, because a papal judicial order must appear to be not vitiated, not struck out: see the law text C.6.33.3, and without suspicion [*reprehensione*] against the leaden seal, and the sheet, or the script's characters [*litterae*]: see the law text X.5.33.12. And I understand that this is true where the law is in question, and where the pope's answer concerns the law. But in a mere narration of facts one can erase them, because [the question] whether a mentioned fact is true is not an issue of law [*ad ius non pertinet*], but it is a question of trustworthiness [*fides*] – namely verity of the fact [*idest facti*]: see law text C.6.23.12.1 – that is to say, such narration will not be relied on, unless it will be proved. Neither [by even stronger reason] is a judicial order held to be faulty when the same hand has rewritten on the erasure in a non-suspected text passage. But if letters were closed, then [an erasure] does no harm ...

Excerpt (corresponding to the paraphrase's second paragraph):

Unde videbatur dubitandum, quoniam rescriptum debet apparere non vitiatum, non cancellatum: **C. de edi. di. Hadri. tol. l. ul.** [C.6.33.3], et sine reprehensione bullae, et chartae, vel litterae: **infra, de privil. Cum olim** [X.5.33.12]. Et hoc intelligo verum ubi est ius questionis, et ubi Papa respondet de iure. Set in narratione facti possunt abradi, quia hoc ad ius non pertinet, sed ad quaestionem fidei, idest facti: **C. de testa. l. Si unus** [C.6.23.12.1]. Quia non statur tali narratione nisi illud probetur. Nec dicitur propterea vitiosum rescriptum si de eadem manu rasura reposita est, in loco non suspecto. Si vero litterae essent clausae, tunc non nocet ...

Edition used: *Glossa ordinaria in Decretales domini papae Gregorii noni* ... Lugduni 1510.

<https://reader.digitale-sammlungen.de/de/fs1/object/goToPage/bsb10162240.html?pageNo=510> (scan 510 = fo. 213 verso).

[23] X.2.22.6 “**Inter dilectos**”. LAW TEXT (*cited in line 34, but already in line 32*)

[24] X.3.36.7, **Commentary by Panormitanus** (*cited in line 34*)

My paraphrase: (no. 8) ... Commentary on the last gloss to this law text, on the words “*et in loco suspecto*”. Note this statement in the gloss, because it occurs daily that an erasure renders a document suspected if [such erasure] is situated in a suspected place, even if it appears to have been rewritten by the same hand: namely this is not sufficient. One can find many persons who know how to falsify or imitate the handwritings of others – see the preface to Auth.Coll. 6.3. And therefore heed the notable precaution that wherever a notary has erred in his writing, so that it is necessary to erase something, and then rewrite [on that place], or to add a line in the margin, the notary must – in order to avoid any suspicion – at the end of his document, in continuity, mention that he himself erased that word, etc., or that he himself added that line in the margin. Archdeacon Guido de Baisio wanted to base this on D.29.1.15.1, in his comment on Decr.Grat. C.35 q.9 c.9, see his paragraph “His ita”.

Excerpt: (no. 8) ... **In glossa finali, ibi “et in loco suspecto”**. Nota hoc dictum glosse quia quotidie accidit ut rasura reddat suspectum instrumentum si est facta in loco suspecto, licet videatur reposita eadem manu. Nam hoc non sufficit, cum reperiantur multi scientes adulterari seu dissimulare scripturas aliorum: **in Autentico, de fide instrumentorum, post principium** [Auth.Coll. 6.3.1 = Nov. 73.1]. Et ideo assume hanc cautelam notabilem quod, ubicumque notarius erravit in scriptura, ita ut oporteat radere aliquid, et iterum reponere, vel facere aliquam lineam in margine, debet notarius, ad evitandum suspicionem, in fine instrumenti continuando se, facere mentionem qualiter ipse rasis tale verbum, etc., vel quod fecit talem lineam in margine. Hoc voluit **Archidiaconus in § His ita, xxxv. q. ix.** [Decr.Grat. C.35 q.9 c.9] probari in **l. In fraudem, ff. de testamento militis** [D.29.1.15.1].

Further references, added by Zacharius de Ferrariis (Vicentinus), a pupil of Jason de Maino cites **Bartolus ad l. Si unus, C. de testa.** [C.6.23.12.1]

cites **Bartolus in l. Divus § Item senatus, ff. de fal.** [D.48.10.15.2]

cites **Canonistae in c. Ex literis, de fide instru.** [i.e. the authors on canon law, on X.2.22.3]

cites **Angelus de Aretio in § penultimo, Insti. de test.** [Inst.2.10.12 = Documents can be written on any material, thus also on a recycled erased sheet.]

cites **Jo. Pe. de Ferrariis in Practica sua ... in “Forma opponendi contra instrumenta”, in glossa iii. in fine** (as also cited by Lord Advocate Lauder).

Edition used: Abbas Panormitanus: *Lectura insignis D. Abbatibus Syculi ... Decretalium*. Lugduni: per Jacobum Sacon 1516.

[25] C.4.19.24 “**Iubemus**”. LAW TEXT (*cited in line 36*)

My explanation: The meaning of this precept by Emperors Valens, Gratianus and Valentinianus was unclear for centuries. Already the *glossa ordinaria* rightly stated that two different meanings are possible, and both are plausible.

[*My first translation:*] We command that from now on all parties who hit upon an idea [*comminiscuntur*] to lodge a suspicious document in court, and they do so and found upon it [*prompserint*], if they do not prove the verity [of the document], they shall be detained as culpable of founding upon a nefarious document and as quasi forgers.

[*My alternative translation:*] We command that from now on all parties who invent [*comminiscuntur*] averments that writings are suspected of forgery, and they contend [*prompserint*] this in a court hearing, if they do not add [proofs for] the verity [of their averment], they shall be detained as culprits of slanderous writing and quasi forgers.

Full text: Imperatores Valens, Gratianus, Valentinianus. Iubemus omnes deinceps, qui scripturas suspectas comminiscuntur, cum quid in iudicio prompserint, nisi ipsi adstruxerint veritatem, ut nefariae scripturae reos et quasi falsarios esse detinendos.

Edition used: as before; see no. [1].

[26] **X.5.20.5, Glossa ordinaria** (*cited in line 36, but already in line 31*)

[27] **C.6.33.3, Commentary by Baldus** (*cited in line 36*)

My paraphrase: Fourth, I oppose [namely law texts which conflict with C.6.33.3]. The present text says that the document shall be inspected in its pristine state [*prima figura*]. Objection. Where there is an erasure, there the first state has been altered. To wit, it is clear that the writer has changed something when he erased and rewrote. And so:

- Either the rewriting is from the same hand, and then it is suspected because [the writer] “vacillated” – as in C.4.19.24, and in D.22.5.1pr.
- Or vary this: or it was erased by another person and rewritten: and then the writing is false – as in C.6.23.12.1.

Nevertheless, I see that writings on an erased sheet can be valid – as in D.37.11.4. Solution: there the sheet had beforehand been erased entirely [*per totum*], and then rewritten from scratch [*ab initio*], so that the present state [of the newly written text] is identical to the original text. In contrast, here [i.e. in C.6.33.3] the text differs and varies, because some text passages underwent an erasure, while other text passages underwent none. And so the “natural” state of the text, to wit its first state, differs from its current state.

Be here aware: if the non-erased text provides trustworthiness [*fides*] for the erased [and rewritten] text passage, then the document keeps its probatory value – as shown in the law text D.28.4.1.1, and affirmed by Dinus de Mugello [in his *Consilium* 13].

Excerpt: Quarto opono: dicitur hic quod “prima figura” inspicitur. Contra: ubi est rasura, ibi est mutata prima figura. Nam constat scribentem aliquid mutasse dum rasit, et iterum scripsit. Et sic:

- aut est scriptura unius et eiusdem scribentis, et tunc est suspecta quia vacillavit, ut **supra, de prob. 1. Iubemus** [C.4.19.24], et **ff. de testi. 1. Qui falso** [D.22.15.1].

- Vel varia: aut et ab alio rasum, et denuo scriptum: et tunc scriptura est falsa, ut **supra, de testa. l. Si unus** [C.6.23.12.1].

Tamen ego video, quod scriptura in charta rasa valet, ut **ff. de secun. tab. l. Chartae** [D.37.11.4]. Solutio: ibi erat charta rasa per totum, et in ea ab initio scriptum, ita quod presens status consonat cum rei origine. Hic discrepat et variat, quia erat rasura in aliquo loco, et in aliquo loco non. Et sic naturalis, idest primitivus, status scripturae discrepat ab accidentali.

Attende hic, si ex non raso imponeretur fides, ei quod rasum est, staretur, **ut l. i. ff. de his quae in testamento delentur** [D.28.4.1.1], **per Dynum** [Dinus de Mugello].

Edition used: Baldus de Ubaldis, *In sextum Codicis librum commentaria*, Venetiis 1577, fos 113vb–114va.

[28] **Guilielmus Durantis, Ordo iudiciarius Speculum iudiciale (cited in lines 38, 52, 59)**

Liber 2, Particula 2, titulus “De instrumentorum editione” (pp. 590–690 in the edition), § “Postremo restat videre qualiter scriptura in iudicio producta impugnetur”, versiculo “Sed nunquid confecto” (p. 625 no. 6 in the edition).

My paraphrase: But what about when a document has been produced without date and without the ruler’s name, or place name? Can the notary here, again, redo this and add the missing data, if he remembers it well? An argument for the affirmative can be taken from X.1.16.1, and another such argument is found in D.45.1.1pr.

Distinguish whether it happens within the immediate course of events after producing the document [*in continenti*], or shortly afterwards [*ex modico intervallo*], and then the corrected document is valid. Or a long time after, in which case it is not valid – see Auth.Coll. 7.8.2, and D.45.1.1, according to Albertus Papiensis, and X.1.6.38, and X.2.21.7. Other authors say that the notary can never do this on his own, not even within the immediate course of events, after he has delivered a charter to a party, because with this act he has ended his public function for this business – see D.42.1.55, X.1.29.9, and the aforementioned law text Auth.Coll. 7.8.2.

However, I advise him [i.e. the notary] that he should seek the permission of a judge to do this [i.e. the correction].

Excerpt: Sed nunquid confecto instrumento sine die et consule, vel loco, poterit iterum tabellio reficere et ea apponere, si bene recordetur? Argumentum quod sic: **extra. de sacra. non iterandis, c. i.** [X.1.16.1]. Argumentum **ff. de verborum oblig. l. i. circa principium** [D.45.1.1pr. “intervallum medium”] ...

Distingue an in continenti seu ex modico intervallo fiat, et tunc valet instrumentum. An post magnum intervallum, et tunc non: **Authen. de aequalitate dotis § Aliud** [Auth.Coll. 7.8.2 = Nov. 97.2]; **ff. de verb. oblig. l. i. circa principium** [D.45.1.1pr.], **secundum Albertum Papiensem**; et **extra, de elec. Officii** [X.1.6.38]; **extra, de test. cog. Preterea** [X.2.21.7]. Alii dicunt quod nullo modo potest, etiam in continenti, postquam facta est copia parti, cum functus sit officio suo: **ff. de re**

iudicata, Iudex [D.42.1.55]; **extra, de officio delegati, In literis** [X.1.29.9]; et **in praedicto § Aliud** [Auth.Coll. 7.8.2 = Nov. 97.2]. ...

Consulo tamen sibi quod de licentia iudicis illud faciat ...

Edition used: Guilielmus Durantis, *Speculum iudiciale*. Basileae 1563.

[29] D.37.11.4 “Chartae”. LAW TEXT (cited in line 38)

My paraphrase: The word “charter” is equally used for a [text on a] new sheet or on a recycled sheet. Therefore, even if someone has written his testament on a palimpsest sheet [*deleticium*], or on the reverse of a written sheet [*opisthographum*], one can nevertheless base on it a petition for “vesting in the possession of the deceased’s estate” [*bonorum possessio*].

Full text: Ulpianus 42 ad edictum. Chartae appellatio et ad novam chartam refertur et ad deleticium: proinde et si in opisthographo quis testatus sit, hinc peti potest bonorum possessio.

Edition used: as before; see no. [1].

[30] C.6.42.23 “Si veritas”. LAW TEXT (cited in lines 39, 41)

My paraphrase: If [the testament] does not have a true narration of facts [*veritas*], or lacks form requirements [*solemnitates iuris*], and you have not [voluntarily in view of your high esteem for the deceased] taken up [*amplexus es*] your deceased relative’s wish [*parentis voluntatem*], and have not handed out what he had relinquished [*relicta dedisti*], and you have not agreed to do so in negotiations towards a settlement [*transactionis causa stipulantibus promisisti*], and the matter [*negotium*] is still open [*integrum*], you cannot be compelled to perform [i.e. to deliver the bequests].

Full text: Imperatores Diocletianus, Maximianus. Si veritas vel sollemnitas iuris deest, nec amplexus parentis voluntatem relicta dedisti, vel transactionis causa stipulantibus promisisti, negotiumque integrum est, ad solutionem urgueri non potes.

Edition used: as before; see no. [1].

[31] C.6.42.23, Commentary by Baldus (cited in line 39)

My paraphrase: (no. 4) And note there that an erased document [*rasum*] is assumed to be false; see X.5.33.12 – unless it is corroborated by a living voice [i.e. by witness testimony] – as stated in C.4.19.24. And it appears that one good witness suffices, as stated in the Digest’s title “De edendo” [D.2.13.4.1] [*this title regulates the duty of certain persons to disclose = deliver a copy of documents in their possession to other interested persons*]. Yet, [when merely] “*in edendo*” [i.e. in disclosure of contents of documents], one person suffices. Not in proving [*in probando*], but merely in co-operating as a helpful informant [*in adminiculando*].

Excerpt: (no. 4) Et ibi nota quod rasum praesumitur falsum: **extra, de privil. c. Cum olim** [X.5.33.12] – nisi per vivam vocem corroboretur: **supra, de proba. l. Iubemus** [C.4.19.24]. Et videtur sufficere unus bonus testis, ut **ff. de eden. l. Si quis § ii.** [D.2.13.4.1]. Sed in edendo sufficit unus. Non autem in probando, sed in adminiculando.

Edition used: Baldus de Ubaldis, *In sextum Codicis librum commentaria*, Venetiis 1577, fo. 152va.

[32] C.6.33.3, Commentary by Bartolus (*cited in line 40, but already in line 30*)

[33] C.6.42.23 LAW TEXT (*cited in line 41, but already in line 39*)

[34] C.6.23.12.1. LAW TEXT (*cited in line 41*)

My paraphrase: What you narrate [in your request] about text passages [in a testament] which are deleted, or added above a line, this is not an issue of law [*ad ius non pertinet*], but it is a question of trustworthiness [*fides*]: that it may become clear whether the legatees had merits which caused the testator to change his mind and emend his testament for them, or whether another person thoughtlessly destroyed passages, or whether this was perpetrated by some deceitful person.

Full text: De his autem, quae deleta sive supra scripta dicis, non ad iuris sollemnitatem, sed ad fidei pertinet quaestionem, ut appareat, utrum testatoris voluntate emendationem meruerunt, vel ab altero inconsulte deleta sunt, an ab aliquo falso haec fuerint commissa.

Edition used: as before; see no. [1].

[35] C.6.23.12.1, Commentary by Baldus (*cited in line 41*)

My paraphrase: Second, note that an interlinear addition and an erasure are not [always] in conflict with the form requirements [*solemnitates*] of a testament, or of any other document, but they debilitate it when they are situated in a suspected place, because the first state [*prima figura*] of the document now has a flaw [*vituperatio*]. And therefore one must proceed to an investigation of trustworthiness [*ad veritatis indaginem*].

One can object [against the law text C.6.23.12.1] that C.6.33.3 says: a flaw must vitiate when it can [already] be seen at a superficial first glance [*in prima apparentia*], such as [for instance] a flaw from erasure.

Solution:

- Either this problem arises in a request to obtain possession of a deceased's estate [*bonorum possessio*]. And then a testament in which one can see an erasure (or any other suspicious flaw) will not help the petitioner if [the flaw] is situated in an essential text passage [*in loco fundamentalis*] on which the petition is based [*ex quo agitur*]. It is not so if it is situated elsewhere, argument from [analogy to] C.9.22.2, and C.35.2.18pr.
- Or the problem arises in a procedure based on the law of obligations [*in petitorio*]. And then:
 - Either no suspicion arises from a text passage on which the claim is based, or from a passage on which the authenticity [*fides*] of the writing hinges. And then we will not be bothered about such a flaw, because “If there are two separate issues, and one ...”, etc., as in C.5.16.10 [in the latter text, a

civil procedure is declared not to be affected by problems which have arisen in a criminal procedure between the same parties].

- Or suspicion does arise from an essential text passage. And then begins an investigation of the trustworthiness of the document, as here in C.6.23.12.1, and in D.29.2.46, and D.29.2.1, and D.37.1.14.

You must know, however: when the original notary, who was requested to write the document, declares that he himself added the writing between the lines, or made the erasure, he will be believed if these text passages are part of the main text [*de corpore*] of the document, or of the subscription clause – see D.28.4.1.1, argument inferred by Dinus de Mugello.

But if there were additions in the margin [*extravagantia*], then, because they state neither the date nor the name of the ruler [*consul*], these text passages have no probatory value, according to Martinus Sillimani.

And add what Bartolus comments on D.29.1.15.3, who says that if such additional text in the margin narrates an additional fact, for instance because the notary relates there that he struck out something because he had written it by error, then the cancelled text passage has no probatory value, because it is struck out, and the reason why it is struck out appears clearly.

It is however dangerous to say this, because a forgery can easily be committed by imitation of characters, and many know how to train themselves in writing very similar characters. And therefore we need a different method to invalidate [a text passage] which is written and authenticated [*publicatum*], and has the notary's notarial sign – unless it is a writing in a public archive, which is always believed, as stated in the Authentica “Ad haec” behind C.4.32.16, and in the Authentica “At si contractus” behind C.4.21.20.

Petrus de Bellapertica (?) raises here the question what shall happen when one does not know who erased or cancelled. And he answers, that when the testament was kept by the testator himself, we assume that he himself deleted the text passage. But not so if it was kept by other persons – see D.22.3.24.

Lastly, note that a document which has an erasure in a suspected place is so much suspected that it has no probatory value – neither full proof, nor half proof, unless it is shown by other text passages in the same document (which have no erasures), that the document is [nevertheless] trustworthy [*verum*], and all written by the same hand, as noted in X.3.36.7, and an argument for this can be inferred from D.31.1.77.22. Thus in the first-mentioned case it has no probatory value, because it is assumed to be forged, since one can see there a change [*varietas*], because first there was written one thing [*unum*], and thereafter it was erased.

You must also know that, if a document was produced without a flaw, but afterwards, while it is kept by a notary in a law court, a flaw is found in it, its probatory value does not perish by this – see D.38.6.1, and C.7.52.6, and what is noted in D.26.7.57.

Excerpt: Secundo nota quod interlinearis subscriptio et rasura non sunt contra sollempnitatem testamenti, vel instrumenti, sed debilitant ipsum, quando inveniuntur in loco suspecto, quia prima figura est cum vituperatione. Et ideo pervenitur ad veritatis indaginem.

Opponitur quod vitium superficiale, idest in prima apparentia, sicut est vitium rasurae, habeat vitare - ut **infra, de edicto divi Adriani tollendo, lex finalis** [C.6.33.3].

Solutio:

- Aut agitur possessorio, et tunc testamentum, in quo rasura vel alia suspicio apparet, non prodest agenti, si est in loco fundamentalis, ex quo agitur. Secus si alibi, ut in lege Cornelia, **infra, de fal., l. Satis aperte** [C.9.22.2], et **ff. de Falcidia, l. Filius § Sequens quaestio** [C.35.2.18pr.].
- Aut agitur petitorio, et tunc,
 - aut non est suspicio in loco ex quo agitur, seu in loco ex quo fundatur fides scripturae. Et tunc non curamus de tali vitio, quia “De uno separatorum” ..., etc., ut **infra, de donat. inter vir. et uxo. l. Si maritus quondam** [C.5.16.10]
 - Aut est suspicio in loco essentiali. Et tunc venit ad veritatis indaginem, ut hic, et **ff. de acq. haere. l. Cum falsum** [D.29.2.46], et **l. Pantonius § Rei** [D.29.2.1], et **ff. de bo. pos. l. Cum quidam** [D.37.1.14].

Scias tamen quod notarius, qui fuit rogatus originaliter de scriptura, si dicit se interlineasse vel rasuram fecisse, creditur sibi, si talia verba sunt de corpore instrumenti vel subscriptionis, ut **ff. de his quae in test. delentur, l. i.** [D.28.4.1.1], per **Dynum** [Dinus de Mugello].

Sed si essent extravagantia in margine, tunc quia non habent diem et consulem, talia verba nihil valent, **secundum Mar. Sili.** [Martinus Sillimani].

Et adde id quod notatur **ff. de testa. milit. In fraudem § Si quis** [D.29.1.15.3], per **Bart.** qui dicit quod si in verbo extravaganti, quod apparet in margine, factum adiungitur, ut quia notarius dicit cancellatum quia scriptum per errorem, tunc talis scriptura non probat, cum sit cancellata, et appareat causa cancellationis.

Hoc tamen periculosum est dicere, quia de facili posset falsitas committi per similitudinem literarum, quas multi sibi simillimas facere sciunt. Et ideo videtur esse opus alio adiutorio ad infringendum quod scriptum et publicatum est, et habet signum notarii, nisi forte sit scriptura archivi publici, cui omnino creditur, ut **supra, de fideius., Authen. Ad haec** [Authentica post C.4.32.16], et **Authen. At si contractus** [Authentica post C.4.21.20]. ...

Quaertur hic **Pe.** [Petrus de Bellapertica?] quid si nescitur quis raserit vel cancellaverit. Et respondet quod, si quidem erat testamentum penes testatorem, praesumitur per ipsum facta deletio. Sed si penes alios, secus, ut **ff. de prob. l. Si chyrographum** [D.22.3.24].

Ultimo nota quod instrumentum in quo est rasura in loco suspecto, est adeo suspectum quod non facit probationem, nec plenam, nec semiplenam, nisi per id quod in eodem instrumento continetur non rasum, constet id esse verum, et eadem manu scriptum, ut notatur **extra de reli. do. c. Cum venerabilis** [X.3.36.7], et **arg. ff. de le. secundo, l. Cum pater § Cum imperfecta** [D.31.1.77.22]. Ideo enim in primo casu nihil probat, quia praesumitur falsum, eo quod ibi deprehenditur varietas, cum primo esset scriptum unum, et postea illud rasum.

Scias enim quod, si instrumentum fuit productum sine macula, et postea apud notarium actorum invenitur maculatum, quod per hoc non perit fides instrumenti,

ut **ff. si tab. testa. nullae ex., l. i.** [D.38.6.1], et **infra, de iud. l. Gesta** [C.7.52.6]. Et quod notatur in **l. Chyographis, in prin., ff. de admi. tut.** [D.26.7.57].

Edition used: Baldus de Ubaldis, *In sextum Codicis librum commentaria*, Venetiis 1577, fo. 62rb.

[36] X.2.22.6, Commentary by Panormitanus (cited in line 43)

My paraphrase: Note [as a rule], if the tax-year figure is false, for instance because it is not congruent to the year date, according to the calculation scheme [*modus*] mentioned above, this renders the document false. This rule is not true in all cases [*indistincte*]. And respond hereto what Johannes Andreae notes in his “*Novella*” on VI.5.13.88 “*Data*”, and Baldus on D.50.17.92, and the *Speculator* [Guilielmus Durantis] ..., and the Archdeacon [Guido de Baisio], on Decr.Grat. C.23 q.5 c.43.

Excerpt: (no. 13) ... Nota quod si indictio est falsa, puta quia non concordat modo praedicto cum annis Domini, redditur instrumentum falsum. Hoc non est indistincte verum. Et dic ut **notat Joannes Andreae super “Data”, 6. lib. in Novella** [Novella in Sextum, on VI.5.13.88, finis], et per **Baldum in l. Si librarius, ff. de reg. iur.** [D.50.17.92], et per **Specu. in titu. de instru. edi. § primo, iuxta principium, et § Instrumentum, versicu. “Item quo non est”** [Guilielmus Durantis, *Speculum iudiciale*], et **Arch. 23. q.5 cap. De Liguribus** [Decr.Grat. C.23 q.5 c.43] ...

Edition used: again Venetiis: apud Iuntas 1588, fos 149ra–153rb, here in particular fo. 152rb. See no. 14.

[37] X.2.22.3, Glossa ordinaria (cited in line 45, but already in line 34)

[38] X.2.22.6, Glossa ordinaria (cited in line 46, but already in lines 32–4)

[39] X.5.20.5 LAW TEXT (cited in line 46, but already in line 31)

[40] Johannes Petrus de Ferrariis, Practica aurea Papiensis (cited in line 52)

Fully standardised title: Johannes Petrus de Ferrariis (Papiensis), *Tractatus de libellis “Practica aurea Papiensis”*.

My paraphrase: Chapter heading “Model text to raise exceptions against documents”. § IT LACKS FORM REQUIREMENTS [fo. 61ra–b]. Form requirements which exist for documents have been explained by me in my model text about the production of documents, in my gloss no. 3. And note what is stated in the gloss to C.10.71.3. A question arises here from a very frequently occurring situation. For instance, a notary has omitted to mention in his document the tax-year figure [*indictio*], or the date, or the place name. And thereafter, after a charter has been delivered to a party, he says that he has erred, and he wishes to correct his error. It is asked whether he should be heard. Affirm this [in principle] – although the authors have various opinions on this topic. But according to the judgment of the *Speculator* [i.e. Guilielmus Durantis, author of the “Mirror of Court Practice”], and according to truth, one must distinguish as follows:

- Either the notary himself declares that he erred, and then he may correct his error, because one must believe him about what he himself did.
- Or he does not declare this. And then the document remains faulty – as the same *Speculator* notes ... And arguments for this can be taken from the commentary by Cinus de Pistorio on C.9.22.21, and C.6.23.7, and Bartolus on D.50.17.92 [Text: “If a keeper of minutes [*librarius*] erred when he transcribed the wording of a stipulation, this does not do harm so that the debtor and the cautioner would not be held liable to perform” – *this rule was not valid for notaries, however*], and C.8.7.1. And I have explained this in my preceding chapter. From there, it follows that, if the notary has died, such an error can no longer be corrected – as stated there.

§ ALSO BECAUSE IT HAS ERASURES, ETC. [fo. 61rb–va]. Very often, an exception is based on erasure, faultiness and scoring out in a document. Such flaws render a document suspected and at times faulty, as reported in X.2.22.6 and X.3.36.7.

Truly, for a better presentation of the state of doctrine, one can distinguish as follows, according to Andreas Ciaffi from Pisa. When someone makes a mistake in any writing, or in a document, this happens at times by omission, and at other times by changing the envisaged text.

- In the first case [i.e. omission], consider:
 - Either the writer has omitted a form requirement. And then explain [in a lecture or discussion or academic examination on that topic] what I have stated in the immediately preceding passage.
 - Or he has omitted something else.
 - And then he either omitted some character or syllable. This causes no harm – as shown in D.40.4.54pr. [In this law text a testator bequeathed freedom to a slave “Cratinus”, but the name of the slave whom he clearly meant was “Cratistus”. The law text says that such error *in syllaba* may simply be passed over.]
 - Or he omitted an enunciation. And then this is harmful if it effects a change of sense. Reasons for this will be given below.
- In the second case, when he changed or erased something, then distinguish whether it is a writing which the writer keeps in a securely locked place [*inclusum*], or it lies open.
 - In the first sub-case [i.e. the writing is securely locked away], there results no harm – argument taken from D.28.4.2.
 - In the second sub-case, when the writing lies open, then distinguish, because it might be an erasure or change of a word, or merely of a syllable.
 - If it concerns a word, then the entire writing becomes suspected – see C.6.33.3. And this by even stronger reason [*maxime*] because in canon law, documents become suspected even for a tiny erasure of one character – see X.5.20.5 § “Quanta”.

- If however it is merely a change or erasure of a syllable, or of just one character, then:
 - Either this erasure or change produces a different sense and/or raises doubt. Then the writing is held to be suspected, so that it is assumed to be false – see X.5.20.9.
 - Where it does not produce a different sense, and/or raises no doubt, then it causes no harm – see X.2.22.3.

If it appears, however, that the erasure or the change was made by a notary, in a document which he himself had produced, it would be upheld. Yet, the notary must mention such erasure in his subscription clause – as can be gathered from the statements in the gloss on the aforementioned law text X.2.22.3, and X.2.22.6, and X.3.36.7, and X.1.3.25, and [it can be gathered] in full detail in explanations by the *Speculator* in his aforementioned chapter “*de instrumentorum editione*” ... And see what is noted on the aforementioned law text C.6.33.3, and C.6.23.7, and in similar texts.

Excerpts: Rubrica “Forma opponendi contra instrumenta”

§ CARET FORMIS [fo. 61ra–b]. Que sunt formalia instrumentorum, dixi supra circa formam productionis instrumentorum, in glossa iii., et **nota per glossam in l. Generali, C. de tabul., libro x.** [C.10.71.3]. Circa hoc queritur de eo quod multotiens occurrit de facto. Pone quod notarius omisit ponere indictionem, diem aut locum in instrumento, et inde, tradito parti instrumento, dicit se errasse et vult errorem suum corrigere. Queritur an sit audiendus. Dic quod sic – licet super hoc sint opiniones diversae. Tamen **secundum Speculatoris sententiam** [Guilielmus Durantis, *Speculum iudiciale*] et ipsam veritatem sic distinguendum est:

- Aut notarius protestatur se errasse: Et tunc poterit suum errorem corrigere. Nam in facto suo sibi credendum est.
- Aut non protestatur hoc: et tunc remanet instrumentum vitiosum – ut **per eundem Speculatorem notatur in dicto § Postremo, versiculo “Sed nunquid confecto”**. Ad quod faciunt notata in **l. Si quis decurio, per Cynum, C. ad legem Corneliam de falsis** [Cinus de Pistorio, on C.9.22.21], et in **l. Errore, C. de testamentis** [C.6.23.7], et **per Bartolum in l. Si librarius, ff. de regulis iuris** [Bartolus de Saxoferrato, on D.50.17.92 = “Si librarius in transscribendis stipulationis verbis errasset, nihil nocere quo minus et reus et fideiussor teneretur”], et **in lege finali, de tabulis exhibendis** [C.8.7.1]. Et supra dixi in titulo precedenti. Et ex hoc sequitur quod si notarius fuit mortuus, quod non poterit talis error amplius corrigi – ut ibi nota.

§ TUM QUIA ABRASUM, ETC. [fo. 61rb–va]. Solet opponi abrasio, vituperatio et cancellatio instrumenti. Quae vitia reddunt suspectum et aliquando vitiosum: ut traditur **in c. Inter dilectos, extra, de fide instrumentorum** [X.2.22.6], et **extra, de rerum dominio, c. Cum venerabilis** [X.3.36.7].

Verum pro pleniori huius doctrina potest sic distingui, **secundum Andream de Pisis** [Andreas Ciaffi (Pisanus)]. Quando peccatur in scriptura vel instrumento, aliquando omittendo, quandoque immutando.

- Primo casu [= *omittendo*] considera:
 - Aut scriptor omisit aliquid formale. Et tunc dic ut supra, proxime.
 - Aut omisit aliud.
 - Et tunc aut omisit literam vel syllabam. Et non nocet – ut probatur in **1. Qui habebat, in principio, ff. de manumissis testamento** [D.40.4.54pr.]
 - Aut omisit orationem. Et tunc nocet, si ex ea sensus alteratur, argumento eorum que infra dicentur.
- Secundo casu, quando immutavit et abradendo peccavit: et tunc aut est scriptura inclusa, aut aperta.
 - Primo casu [= *inclusa*] non nocet – **argumento ff. de his quae in testamento delentur, in 1. Cancellaverat** [D.28.4.2].
 - In secundo casu quando est aperta: tunc subdistingue, quia aut est rasura vel immutatio dictionis, aut syllabae.
 - Si dictionis, tunc suspecta redditur ipsa scriptura – ut **1. Edicto, et 1. iii., C. de edicto divi Adriani tollendo** [C.6.33.3]. Maxime quia iure canonico propter tenuem rasuram literae habentur suspectae – ut **extra, de crimine falsi, capitulo Licet § Quanta** [X.5.20.5].
 - Si vero sit mutatio seu rasura syllabae vel literae, tunc
 - aut illa talis rasura et mutatio habet alterare sensum, et dubitationem inducit: et tunc scriptura suspecta habetur, ut falsa praesumatur – ut **extra, de crimine falsi, in c. finali** [X.5.20.9].
 - Ubi vero non habet alterare sensum, nec dubitationem inducere: et tunc non nocet – ut extra, de fide instrumentorum, in c. Ex literis [X.2.22.3].

Si tamen ita rasura vel mutatio apparet esse facta per notarium qui rogavit instrumentum, sustineretur. De qua rasura ipse notarius debet facere mentionem in sua subscriptione – ut colligitur ex his quae notantur **in glossa in dicto c. Ex literis** [X.2.22.3], et in **c. Inter dilectos, extra, de fide instrumentorum** [X.2.22.6], et in **c. Cum venerabilis, extra, de religiosis domibus** [X.3.36.7], et in **c. Olim, extra, de rescriptis** [X.1.3.25], et plene **per Speculatorem in dicto titulo de instrumentorum editione, in § Restat videre, in principio, et in § Postremo, in versiculo “Item excipitur quod est vituperatum”**, etc. [Guilielmus Durantis, *Speculum iudiciale*]. Et quod notatur in dicta **1. Edicto** [C.6.33.3], et in **1. Errore, C. de testamentis** [C.6.23.7], cum similibus.

Edition used: Johannes Petrus de Ferrariis, *Practica singularis ac perutilis*. Lugduni 1515: ab Stephano Geynard, fos 60vb–64va.

[41] Guilielmus Durantis, *Speculum iudiciale* (cited in line 52, but already in line 38)

[42] Dinus de Mugello, *Consilium no. 13* (complete text of this legal opinion, cited in lines 52, 66)

Paraphrase: In the name of Christ, amen. The question [submitted to me] regards a public document in which an inconsistency was found: namely where the notary should have written “tax year no. 14”, in order to let the number of the tax year correspond to the year AD 1242 (then current), he wrote “tax year no. 15”. Hence it was doubted whether this incongruity rendered the instrument void.

At first sight, the instrument is indeed seen to be void because both the year date and the number of the tax year [*indictio*] are essential requirements for the form of an instrument, as noted in Auth.Coll. 5.3.1 = Nov. 47.1 and in Auth.Coll. 6.3 = Nov. 73. While conformity of tax year and year date AD would confirm authenticity, any inconsistency indicates discrepancy [*contrarietas*] – and voids everything [*totum*]: see D.50.17.188pr.

Moreover, it is clear that the document’s specifications of year date and tax year cannot both be true, thus one of them must be false. All discrepancies have in common that their alternatives cannot both be true, although they can both be false: see D.34.5.13.3. If [at least] one of them is thus false, then the false one is treated [by law] as not written and not suitable. See D.50.16.221 and parallel law texts. If [such specification] is treated as not written, then one essential form requirement for the document is not met. And any missing form requirement renders the document void. See Auth.Coll. 5.3.1 = Nov. 47.1, and D.2.15.8.17, and D.27.9.5.14.

The contrary must be held, however. The document is valid, despite the aforementioned inconsistency.

Firstly, it is clear that the error lay with the notary. It is established [*constat*] that what he wrote differs from what he should have written. This is established, and it should thus not prejudice the contracting parties: see D.50.17.92, and D.28.5.9.3, and C.6.23.7]

Moreover, when a party seeks to avert damage, it is established that an error about circumstances of a case does not prejudice [the person seeking to avert damage], as stated in D.12.6.22.1, and D.19.1.8, and D.22.6.8, and D.22.6.9.

Also when a party seeks to avert damage, an error in law does not prejudice: see D.22.6.4, and D.2.6.8.

Furthermore, where an error about circumstances is found, there intervenes an argument based on D.24.1.5.2. And commonly D.41.6.3 is called [to mind].

In addition, one can more easily and unscathed overcome another person’s ignorance than one’s own ignorance – as stated in D.41.10.5, and in D.36.1.25(?). From all these reasons, it follows that here the error should be overcome, since here we are dealing with a third person’s error, namely the notary’s, and it did not originate in the contracting parties.

Also when a party seeks to avert damage, a notary’s error should be overcome and should not prejudice any of the contracting parties, and it does not matter whether the notary erred on circumstances, or on law, or on both circumstances and law.

Moreover, an arithmetical error harms no-one: see C.2.5.2. And for this an argument can be based on C.1.18.4, and C.1.18.5, and C.1.18.7, and C.1.18.6, and C.1.18.8, and C.1.18.9. Seeing that he [i.e. the notary] did not err in calculating the year date AD <but merely in calculating the tax-year number>, it follows that his error shall not prejudice anyone.

Furthermore there is [a rule] that an error committed by a scribe shall not cause prejudice. This is mentioned above, and [it is] obvious from C.2.9.2, and results

from an argument based on D.28.5.49.3. [The reason is] that in those [elements of a document] which are usually not formulated by the parties but by the notary, such as the year date AD and the number of the tax year, it is not likely that the [respective] wording was stated by the parties. The law presumes that what habitually is done has [also] been done [in the case in question]. See D.48.18.10.3, and C.4.65.19, and D.21.1.31.20, and D.30.1.50.3, and D.32.1.75, and D.32.1.91.3, and D.32.1.91.4, and D.32.1.91.6, and D.33.7.7, and D.33.7.18.1.

Therefore, if it is presumed that the number of the tax year was brought in by the notary, it is thus presumed that the notary erred. And if it results that the notary has erred, it consequently remains [to declare] that this error shall not prejudice – as stated above.

It is likewise established that an inconsistency in a required element does not [always] void the document in question, although omission [of it] would [always] void it. This can be seen [*patet*] in testate succession, because if the name of the heir or legatee is omitted, and no other equally significant clue exists, then the testamentary disposition is void. But if [the identity of the heir or legatee] is expressed [somehow], but [the testator] errs in [the course of] his expression, his disposition is [nevertheless] valid. This argument can be based on D.28.5.9, and D.28.5.9.8, and D.28.5.9.9, and D.28.5.49.3, and Inst.2.20.29, and D.32.1.41.1(?), and D.45.1.32(?). Thus, even although an omission of the year date or number of the tax year would possibly void a document, if however a clue to it is expressed (although with an error annexed to it), it [i.e. the omission] must nevertheless not render the document void.

Besides, it is provided in the law that some essential elements have little weight, and their omission would not void the document in question. But there also exist elements which are neither essential nor of little weight, and [nevertheless] their omission voids a testament: see D.25.4.1.15.

Thus when the text of a contract clearly defines the contracting parties and the object on which the contract bears, and the underlying motivation [*causa*] for the contract, then all other things which are wont to be objected appear to be essentials of little weight. Consequently their omission must not void the document, since [by law] these sole three elements make a contract perfect.

Lastly, in a case of doubt, the occurrence of an error must more strongly be presumed in facts which are not commonly known, rather than in facts which are known to the most part [of the population]. This can be seen clearly [*patet*], because a person who does not know what is publicly known is presumed to have deliberately chosen not to take notice of it. This type of grossly careless conduct [*culpa lata*] can as well be categorised as malice [*dolus*]: see D.50.16.213.2, and D.50.16.223pr., and D.50.16.226, and D.14.3.11.3. In contrast, ignorance of facts which are rather unknown is tolerated, as stated in the aforementioned law text D.14.3.11.3, and in D.50.9.6. Yet, the year dates AD are publicly known, while the method [*inventio*] of calculating the number of the tax year is not a publicly known thing. Coming back to my statement that all error lay with the notary, it must be presumed that he erred in the number of the tax year, which is commonly less known. And from this conclusion [*hinc*] it follows that this presumed error can easily be corrected, because what should have been written must rank higher than what is found to have been

written: see D.1.5.8, and D.1.18.6.1, and C.4.22.5, and the entire title C.4.22, and C.7.16.16. Dynus.

[Explanation of Dinus's last paragraph: Dinus addresses the judge(s) in the law case in question. He wants them to find that the document is valid. The judge(s) shall thus decide that at least the year date in the document was correct. If merely the tax year was erroneous, then (as Dinus argues) this may easily be corrected. If, however, the judge(s) were to find that the year date was wrong, then they would probably conclude that the document is thus void (although Dinus attempted to suggest for this eventuality that the sole three elements "persons, object of the contract, and motivation for the contract" are nevertheless sufficient to create a validly binding obligation). To persuade the judge(s) not to doubt the year date, Dinus pictures to them the bad light this would cast on the notary (a professional lawyer, one of their peers) – namely, if the year date were wrong, there would (allegedly) arise a presumption in law that the notary had deliberately avoided correctly ascertaining the year date, and such gross carelessness was by law (allegedly) regarded as malice.]

Latin text: In Christi nomine, amen. Questio talis est: In quodam instrumento publico facto reperitur quedam varietas quia, quod notarius scribere deberet "indictione quarta decima", ut indictio conveniret annis domini qui tunc currebant millesimo ducentesimo quadragesimo secundo, scripsit "indictione decima quinta". Et dubitabatur utrum varietas [misprinted as "veritas"] ista reddat instrumentum inutile. [In place of the words "scripsit indictione decima quinta", the typesetter garbled them as "seu quinta decima".]

Et quod reddatur inutile prima facie videretur quia anni domini et indictio sint de substantialibus instrumenti, **ut colligitur et notatur in Aut. ut preponatur nomen imperatoris § Unde sancimus** [Auth.Coll. 5.3.1 = Nov. 47.1], et **in Aut. de instrumentorum cautela, circa prin.** [Auth.Coll. 6.3 = Nov. 73]. Cum ergo ex similibus reperiatur veritas, ex varietate videtur explicare contrarietas. Et ratione contrarietatis reddi totum inutile, **ut de reg. iur., l. Ubi repugnancia** [D.50.17.188pr.].

Item, cum certum sit scriptum de annis domini et de indictione non posse esse simul vera, ergo sequitur scripturam circa alterum esse falsam, quia omnes repugnanciam continentes ita se habent quod utraque non possit simul esse vera, licet utraque possit simul esse falsa, ut **ff. de rebus du., l. Si is § Utr.** [D.34.5.13.3]. Si ergo altera falsa, illa quae est falsa est pro non scripta et pro non apposita, ut **de ver. sig., l. Paulus** [D.50.16.221], cum similibus. Si pro non scripta, ergo deest aliquid de substantialibus instrumenti. Et defectus alicuius de substantialibus reddit instrumentum inutile: ut **dicto § Unde sancimus** [Auth.Coll. 5.3.1 = Nov. 47.1], et **de transact., l. Cum hii § Si praetor** [D.2.15.8.17], et **de rebus eorum, l. Magis § Si aes alienum** [D.27.9.5.14].

Item contrarium dicendum est: instrumentum valere, non obstante varietate praemissa.

Primo quia certum est errorem fuisse in tabellione scribente, quem constat <aliter> scribere debuisset quam scriptum reperiebatur. Ergo nulli contrahentium debet obesse, ut **de reg. iur. l. Si librarius** [D.50.17.92], et **de heredibus insti., l. Quot. § Sed si maiorem** [D.28.5.9.3], et **C. de testamentis, l. Errore** [C.6.23.7].

Praeterea ubi de dampno vitando agatur, constat quod error etiam propter facti <speciem> non nocet, ut **de condit. indebiti, l. Sed et si me putem § Cum**

iter [D.12.6.22.1], et **de act. empti, Si tibi liberum** [D.19.1.8], et **de iuris et facti ignorancia, l. Error** [D.22.6.8], et **l. Regula** [D.22.6.9].

Item ubi de dampno vitando agitur, error iuris non obest, ut **l. Iuris ignorancia** [D.22.6.4], et **l. Error facti, de iuris et facti ignorancia** [D.2.6.8].

Item ubi reperitur error facti, interveniret **argumentum ff. de donat. inter virum et ux., l. Si sponsus § Generalem** [D.24.1.5.2]. Et vocari solet **ff. pro dono, l. Si vir uxori** [D.41.6.3].

Item constat quod in alieno facto est tollerabilior ignorancia quam in proprio, ut **pro suo, l. ult.** [D.41.10.5], et **ad Trebell., l. Quem quam** [D.36.1.25?]. Ex quibus omnibus concluditur quod <error est tollerabilis>, cum in proposito agatur de errore et persona tercia, idest tabellionis, et non alicuius contrahentium originem habente.

Item, cum agatur de dampno, quod, sive tabellio erravit in iure, sive in facto, sive in iure et in facto, error sit tollerandus et obesse non debeat alicui contrahentium.

Praeterea error computationis nemini nocet, ut **C. de erro. cal., l. i.** [C.2.5.2], et **argumentum de iur. et fac. ig., l. Si post divisionem** [C.1.18.4], et **l. Cum falsa** [C.1.18.5], et **l. Error** [C.1.18.7], et **l. Si non transactionis** [C.1.18.6], et **l. Cum testamen.** [C.1.18.8], et **l. Non idcirca** [C.1.18.9]. Cum ergo nec in computatione dominicae incarnationis erraverit, <sed solum in computatione indictionis>, sequitur quod error eius praeiudicare non debeat.

Praeterea dum sit errorem scribentis obesse non debere, ut dictum est, et aperte patet **de erro. advoca., l. ii.** [C.2.9.2], et **argum. ff. de hered. insti., Hiis verbis § ult.** [D.28.5.49.3], quia in hiis quae non solent a partibus exprimi, sed a tabellione, ut est annus dominicae incarnationis et indictio, non est verisimile verba fuisse a partibus expressa, quia lex praesumit illud factum fuisse quod ex consuetudine fieri solet, ut **ff. de questio., l. De minore § Tormenta** [D.48.18.10.3], et **C. locati, l. Circa locationes** [C.4.65.19], et **de aedil. e., l. Quod si nolit § Quia assidua** [D.21.1.31.20], et **de leg. i., Si servus plurium § ult.** [D.30.1.50.3], et **de leg. iii., l. Nummis** [D.32.1.75], et **l. Praediis § Titio** [D.32.1.91.3], et **§ Balneas** [D.32.1.91.4], et **§ ult.** [D.32.1.91.6], et **de fun. instructo l. Seie § Tiranne** [D.33.7.7], et **l. Cum de lanionis § i.** [D.33.7.18.1].

Si ergo praesumitur a tabellione prolata <indictio>, praesumitur quod erravit tabellio. Et si sequitur tabellionem errasse, consequenter relinquitur errorem illum obesse non debere, ut dictum est.

Praeterea constat quod variatio quae est circa illud quod est de substantialibus non reddit inutilem rem de qua agitur, licet omissio inutilem redderet, ut patet, quia si heredis vel legatarii nomen omittitur, nec aliud signum equipollet, dispositio nulla. Et tamen, si exprimatur et in expressione errat, dispositio valet: **argum. ff. de hered. instit., l. Quot., in principio** [D.28.5.9], et **§ Si quis nomen** [D.28.5.9.8], et **§ Heres** [D.28.5.9.9], et **l. Si hiis verbis § Si in patre** [D.28.5.49.3], et **Inst. de leg. § Si quis in nomine** [Inst.2.20.29], et **argum. C. de le. i., Si Fortunatium** [D.32.1.41.1?], et **de ver. o., Si in nomine** [D.45.1.32?]. Licet ergo forte omissio annorum domini vel indictionis instrumentum viciaret, nihilominus expressio, habens errorem annexum, viciare non debet.

Praeterea lege cavetur quod quaedam sunt substantialia levia, et illorum omissio non viciaret rem de qua agitur. Quaedam non sunt substantialia et non levia, et illorum omissio viciat: ut **ff. de ven. inspi., l. i. § ult.** [D.25.4.1.15].

Cum ergo per verba contractus constet de personis contrahentium et de re in contractum deducta, et de causa contractus, cetera que opponi solent, videntur esse substantialia levia. Ergo instrumentum per ipsorum omissionem viciari non debet, cum illa sola, scilicet persona, res et causa, contractum perficiant.

Praeterea error in dubio potius debet presumi circa ea quae communiter sunt incognita quam circa ea quae sunt cognita apud maiorem partem. Quod patet, quia circa ea quae sunt publice nota, in ignorante praesumitur esse lata culpa quae dolo aequipollet, ut **ff. de ver. sig., l. Cedere § ult.** [D.50.16.213.2], et **l. Latae** [D.50.16.223pr.], et **l. Magna** [D.50.16.226], et **de institoria, l. Sed et si pupillus § Proscribere** [D.14.3.11.3]. In hiis vero quae sunt magis incognita, ignorantia tolleratur, ut **dicto § Proscribere** [D.14.3.11.3], et de decre. ab ordi. faci., l. ult. [D.50.9.6]. Sed anni dominicae incarnationis sunt publice noti, ut inventio vero indictionis non est publica nota. Ergo ex quo dixi omnem errorem tabellionis fuisse, dicendum est quod praesumatur circa indictionem quae est communiter magis incognita. Et hinc presumptus error potest facile corrigi, quia plus valere debet quod vere scribi debuit quam quod scriptum reperitur: ut **ff. de sta. ho., l. Imperator** [D.1.5.8], et **de of. praesi., l. Illicitas § Veritas** [D.1.18.6.1], et **C. plus val. quod agitur, l. v.** [C.4.22.5], et **per totum <titulum>** [C.4.22], et **de liber. ca., l. Nec ommissa** [C.7.16.16]. Dynus.

Edition envisaged to be used: Dinus de Mugello, *Consilia*. Lugduni: apud haeredes Jacobi Giuntae 1551, fos 21ra–22rb. In this Appendix II, however, my transcription is from a thirteenth-century manuscript: Biblioteca Apostolica Vaticana, MS Borghese lat. 274, fo. 2rb–vb.

[43] C.9.22.21 “Si quis decurio”. LAW TEXT (cited in line 53)

My paraphrase: If some lower-grade officer [*decurio*] has written a testament, or a codicil [*codicillos*], or has recorded in any other form the will of a person near to death [*deficientis*], or has loaned his services in writing public or private documents, if then an inquiry of forgery is opened, he will be interrogated under torture, if the case requires this – notwithstanding his honourable status as a “*decurio*”.

Full text: Imperator Constantinus. Si quis decurio testamentum vel codicillos aut aliquam deficientis scripserit voluntatem vel conscribendis publicis privatisque instrumentis praebuerit officium, si falsi quaestio moveatur, decurionatus honore seposito quaestioni, si ita poposcerit causa, subdatur.

Edition used: as before; see no. [1].

[44] C.6.23.7 “Errore”. LAW TEXT (cited in lines 53, 61)

My paraphrase: An error of a scribe who pens a testament can never damage its legal validity, when it appears that less was written than what was enunciated. And therefore when [in this respect] a testament has validly been made, and an heir exists, it is consequent that the bequests [*legata*] or other bestowals [*fideicommissa*] must be handed out according to the will of the testator – even when the testament lacks the formula “I appoint him as heir” [*heres esto*].

Full text: Imperatores Diocletianus, Maximianus. Errore scribentis testamentum iuris sollemnitatis mutuari nequaquam potest, quando minus scriptum, plus nuncupatum videtur. Et ideo recte testamento facto, quamquam desit “heres esto”, consequens est existente herede legata sive fideicommissa iuxta voluntatem testatoris oportere dari.

Edition used: as before; see no. [1].

[45] X.2.19.11 “Quoniam contra falsam”, LAW TEXT (cited in line 55)

My paraphrase: Because an innocent party, against whom a sentence was pronounced by an unfair judge, can at times not prove the verity of his denial against the judge’s false assertions of facts, because it is in the nature of things that persons who deny a fact cannot directly prove their averment, [we seek] to hinder falsehood obviating verity, or iniquity prevailing over equity, and we therefore ordain [*statuimus*], that any judge, equally in ordinary procedure [on complaint] as also in extraordinary procedure, must always resort to a public person, if he can get one, or resort to two qualified men [instead of a notary], who shall trustworthily [*fdeliter*] write records of all judicial proceedings, to wit: summons, adjournment, “*recusatio*” [of judges], exceptions, petitions, answers, interrogations, confessions, witnesses’ testimonies, lodging of documents, interlocutions, appeals, waiver, closure of proceedings, and so on. And all of what has occurred shall be recorded in due order, with mention of places, times, and persons [involved]. And copies of all these records shall be handed out to parties, but the originals shall remain with the writers, so that, when a contention about a judge’s procedure will have arisen, the actual course of procedure can clearly be ascertained by these writings, and with these arrangements the matter can be transferred to such honest and conscious judges, that justice over innocent people will no longer be subverted by careless and unfair judges. A judge, however, who will neglect to obey this constitution, will duly be punished by the superior judge when a difficulty has arisen because of his negligence. And the presumption that his judicial procedure was in order will henceforth merely apply to those steps of procedure whose course can duly be checked by means of lawful records.

Full text: Innocentius III in concilio generali [= *Concilium Lateranense IV, AD 1216*]. Quoniam contra falsam assertionem iniqui iudicis innocens litigator quandoque non potest veram negationem probare, cum negantis factum per rerum naturam nulla sit directa probatio, ne falsitas veritati praeiudicet, aut iniquitas praevaleat aequitati, statuimus, ut tam in ordinario iudicio quam extraordinario, iudex semper adhibeat aut publicam, si potest habere, personam, aut duos viros idoneos, qui fideliter universa iudicii acta conscribant, videlicet citationes, dilationes, recusationes, exceptiones, petitiones, responsiones, interrogationes, confessiones, testium depositiones, instrumentorum productiones, interlocutiones, appellationes, renunciationes, conclusiones, et cetera, quae occurrerint, competenti ordine conscribenda, loca designando, tempora et personas. Et omnia sic conscripta partibus tribuantur ita, quod originalia penes scriptores remaneant, ut, si super processu iudicis fuerit suborta contentio, per hoc possit veritas declarari, quatenus hoc adhibito moderamine sic honestis et discretis deferatur iudicibus, quod per improvidos et iniquos innocentium iustitia non laedatur. Iudex autem, qui constitutionem ipsam neglexerit observare, si propter eius negligentiam quid difficultatis emerit, per superiorem iudicem

animadversione debita castigetur, nec pro ipsius praesumatur processu, nisi quatenus in causa legitimis constiterit documentis.

Edition used: as above; see no. [6].

[46] X.2.19.11, *Repetitio* by Lanfrancus de Oriano, “*Practica iudiciaria*” (*cited in line 55*)

Full standardised title: Lanfrancus de Oriano (Brixienensis), *Repetitio* X.2.19.11 c. Quoniam contra falsam “*Practica iudiciaria*”

My paraphrase: I raise now a useful and daily occurring question, namely whether a notary may correct his error. Be attentive, because only few people know how to determine this point well. Bartolus on D.50.17.92 states one thing, and not perfectly. But Baldus on C.4.21 approaches it differently, and also not perfectly. Yet, if we combine the statements of these authors and take them together, we obtain a perfect doctrine. And therefore, combining everything, state the position as follows:

Either no contention [*quaestio*] has arisen between the parties about the error, or there is a contention.

- In the first case, when no contention has arisen, the judge can *ex officio* compel the notary to correct his error. Yet, it is doubtful whether the notary may also correct [his documents] on his own authority. But say equally: when a notary erred about things which belong to his function, for instance the year date, and the tax-year figure [*indictio*], and the names of the witnesses, and similar [details], then he may correct this anyway, be it after summoning the parties, be it without, and whether he will return a [newly written] document to the party, or not. But when he erred about essential contents of the subject matter, then he cannot correct this without having taken out a summons of the party. And this is what Bartolus says on the aforementioned law text D.1.14.3. And Angelus de Ubaldis on the aforementioned law text C.6.23.7.
- Or a contention has indeed arisen about the error. And then the notary cannot correct his error, not even after summoning the party – unless a judge authorises him. And this is what Baldus says, on the rubric of C.4.21.

All these teachings only apply where it is not contended that the document is a forgery: namely where it is contended that the document is false, the notary can never correct his error – neither after summoning the party, nor with authorisation by a judge. And the reason is that in this case he cannot correct, since on account of this falsity he will be deprived of his office, as noted in D.2.13.6.1. This point, made by Bartolus on C.4.21, is unique. And so you have now a discourse on the topic which is more complete than what you can find in the writings of some law teachers.

Excerpt: Quero nunc de utili questione et quotidiana, nunquid notarius possit corrigere errorem suum. Attendite, quia sunt pauci qui sciant in isto articulo bene determinare. **Bartolus in l. Si librarius, ff. de regu. iur.** [D.50.17.92] dicit uno modo, et non perfecte. **Baldus autem in rubrica C. de fide instrumentorum** [C.4.21] dixit alio modo, et non perfecte. Sed si coniungimus omnium praefatorum doctorum

sententias, simul perfectam habebimus doctrinam. Et ideo simul coniungendo dicite sic:

Aut non est orta quaestio erroris inter partes, aut est orta.

- Priore casu, quando non est orta, iudex ex officio suo potest compellere notarium corrigere errorem suum. Sed an notarius possit de per se corrigere, est dubium. Sed dicite, si notarius erravit circa ea quae spectant ad officium suum, veluti est in annis domini, et in indictione, et in nominibus testium, et in similibus, tunc potest corrigere indistincte, sive parte citata sive non, sive etiam restituerit parti instrumentum sive non. Si autem erravit circa substantiam negotii, et tunc non potest corrigere nisi parte citata. Et ita vult **Bart. in dicta l. Si Barbarius** [D.1.14.3]. Et **Angelus in dicta l. Errore** [Angelus de Ubaldis, on C.6.23.7].
- Aut est orta quaestio erroris: et tunc non potest notarius corrigere errorem suum, etiam parte citata – nisi iudice mandante. Et ita vult **Baldus in rubrica C. de fide instrumentorum** [C.4.21].

Quae omnia procedunt ubi instrumentum non redarguitur falsum. Ubi autem redarguitur falsum, tunc numquam potest notarius corrigere errorem suum – nec parte citata, nec iudice mandante. Et est ratio quod non possit corrigere hoc casu, quia propter istam falsitatem venit notarius privandus officio suo, ut notatur in **l. Si quis ex argentiis, in § Coguntur, ff. de edendo** [D.2.13.6.1]. Ita tenet singulariter **Baldus in rubrica C. de fide instrumentorum** [C.4.21]. Et sic habetis nunc plenius expeditum articulum quam reperiatur per aliquos doctores.

Edition used: *Aurea practica iudicialis ad c. Quoniam contra falsam* [X.], *de probationibus ... cum apostillis domini Benedicti de Vadis de Foro Sempronii et Celsi Hugonis Dissuti Cavilloni Celte* [thus edited by Celsus-Hugo Dissutus, French name: Descousu]. Lugduni: Jacobus Giuncta 1539, fos lxv–lxvi, no. 30.

[47] X.2.22.3, Commentary by Antonius de Butrio (*cited in line 56*)

My paraphrase: I ask whether a notary can for any reason correct an error in his document. On this topic, see the Archdeacon [Guido de Baisio] on Decr.Grat. C.35 q.9 c.1. And the *Speculum iudiciale* [“Mirror of Court Practice” by Guilielmus Durantis] ..., and there Johannes Andreae in his pertinent Addition to the *Speculum*.

[*Error in the date and place name:*]

Johannes Andreae comes here to the affirmative conclusion, when the notary erred in [not] mentioning the [correct] year date and place name in a document, and he had it in his notarial protocol book, and [his protocol book] records the date.

He makes a rule to the negative when the notary wants to add the date and place name without any other proof, simply wishing to attest [and be believed] that this was so – because a notary is not believed on matters which have been negotiated before him unless he has produced a written record of it – see the [analogous] rule for a sole arbiter, in C.2.55.4.5 [to wit: A person who avers to have been appointed as an arbiter and states what he has decided, is not believed if there exists no full proof

in writing]. And this [rule] shall accomplish [*fungatur*] a twofold duty [*officium*] – as in Auth.Coll. 1.2.2 [That law text – so says Emperor Justinian, accomplishes a twofold duty: it punishes an undutiful heir, and it helps to fulfil a deceased person's last will].

[*Other errors:*]

If the notary can otherwise show that he omitted something by error, or even knowingly, he may add it. But the *Speculator* [Guilielmus Durantis] advises that this should be done with authorisation by a judge. And Nicolaus de Matarellis holds that authorisation by a judge is necessary when a contention [*quaestio*] on the date has arisen between the parties. Already Johannes Andreae recommends this advice, and particularly on account of the law text D.48.10.27. ...

Johannes Andreae, while commenting on the phrase “Data ...” in VI.5.13.88, states that in practice it is observed that, after a document has been handed out, the notary, if he does not want to be punished for forgery, cannot correct an error without authorisation of his judge, or of an office-holder who is appointed to this task.

Earlier in the text, he states that in practice it is observed that, when the notary has handed out a document, from there onward he no longer corrects [on his own authority]. If he has not yet handed out a document, and the notary who wrote [the document] is still alive, he may correct the error. Otherwise he cannot correct an error – see the *Speculator*, as cited above.

When the notary is no longer alive who wrote the document, and one can inspect his notarial protocol book, by which the error [clearly] appears, another [notary] can correct, with authorisation by a judge, so that one will rely on the protocol book – see Auth.Coll. 4.7.2. And note the text passage in the *Speculum iudiciale* ... (*details of citation*).

But if he erred in writing, he can add, with adaptation of texts to each other [*concordando*], writing end-clauses [*terminando*] and returning a non-flawed copy [*reddendo*] – see see D.28.4.2. He must however state at the end of the document: “I made an erasure in that and that line”, or “I made this interlinear addition”. And these details are noted by the Archdeacon [Guido de Baisio], on Decr.Grat. C.35 q.9 c.1. ...

I put [against X.2.22.3] the law text C.6.33.3 which states that an erasure vitiates a document, because documents must remain in pristine state [*integra*], “not struck out”, and not in any text passage “vitiated”. Solution: an erasure vitiates when it is situated in a suspected place. This rule is expressed in the pope's answer [in the last phrase of X.2.22.3]. It is different when the error is situated in a narration of facts, because this does not pertain to law – see C.6.23.12.1. And a document is not suspected when it appears that the erasure was made [and rewritten] by the same hand. ...

Therefore here [in the present text X.2.22.3] it must be understood to apply in cases where one can ascertain its trustworthiness by means of some other writing elsewhere, or when the correction appears to have been made by the same hand, or when the erasure's rewritten text is doubtless trustworthy in view of text passages which precede or follow, namely when it is congruent to preceding or following passages – as noted in the *glossa ordinaria* on X.3.36.7, in the gloss on the words “*propter praedicta*”, in the middle of that gloss. Or at times one adds [a correction] to determine a meaning more precisely [*additur super*

intellectu], for instance when a necessary accessory or consecutive determination is added.

And be on your guard, because a document already becomes “false” by erasure of one minimal character in a suspected text passage, and it “wobbles” [*vacillat*, i.e. the document is no longer stable and reliable], as noted on X.2.22.6 – although this is different in a mere omission, see X.2.22.11.

Excerpt: (Fo. 68ra–b) *Quero an notarius aliqua causa possit corrigere errorem sui instrumenti. De hoc per Archidiaconum xxxv. q. ix. § i.* [Guido de Baisio, on Decr. Grat. C.35 q.9 c.1; in his commentary this is § 1]; in **Speculo, de instru. editione, § Instrumentum, versiculus “Nunquam confecto”** [Guilielmus Durantis, *Speculum iudiciale*], et ibi **Joannes Andreae in additione** [ad *Speculum iudiciale*].

[*Dies, locus:*]

Concludit ipse [= i.e. Joannes Andreae] quod [*add here:* sic], si erravit in ponendo diem et locum in instrumento, et habebat in prothocollo, et [*add here:* prothocollum] recordatur de die.

Facit regulam quod [*add here:* non], si vult addere diem et locum non aliter probando, sed attestando sic fuisse

- quia non statuitur dicto notarii de his quae coram eo acta sunt, nisi reduxerit ad scripturam
- sicut nec soli arbitro: **C. de arb. l. Ne in arbitris** [C.2.55.4.5]. Et fungatur duplici officio: **in Auct. de heredi. et Fal. § Sicut vero** [Auth.Coll. 1.2.2 = Nov. 1.2.2].

[*Aliud:*]

Si tabellio aliter potest ostendere se per errorem vel ex certa scientia aliud omisisse, poterit illud addere. Sed consulit **Speculator** [Guilielmus Durantis, *Speculum iudiciale*] quod hoc fiat iudicis auctoritate. Et **putat Nyco. Mat.** [Nicolaus de Matarellis (Mutinensis)] licentiam [= i.e. iudicis] necessariam, quando de die foret quaestio inter partes. Iam hoc consilium commendat **Joannes Andreae**, maxime propter illud quod dixit **l. Eos, ff. de fal.** [D.48.10.27]. ...

Joannes Andreae in Data Sexti [VI.5.13.88, finis] dicit quod de facto servatur quod post porrectionem instrumenti notarius non potest corrigere errorem absque auctoritate iudicis sui, vel officialis ad hoc constituti, absque pena falsi.

Ante autem dicit servari quod, si dedit copiam parti, adhuc non corrigit. Si non dedit copiam parti, et exstat notarius qui confecit, potest corrigere errorem. Alias non potest corrigere errorem: **in Speculo, loco praeallegato** [Guilielmus Durantis, *Speculum iudiciale*].

Si non exstat notarius qui confecit, et potest videri eius prothocollum, per quod apparet error, corrigere potest alius, de iudicis auctoritate, ut stabitur prothocollo: **in Auct. de tabelli. § Illud** [Auth.Coll. 4.7.2 = Nov. 44.2]. Et nota **in Speculo, de instru. editione § Instrumentum, versiculo “Quid ergo si in nota”** [Guilielmus Durantis, *Speculum iudiciale*]. ...

Sed si erraverit in scribendo, potest addere concordando et terminando et reddendo: **ff. de his quae in testa. delen. l. Cancellaverat** [D.28.4.2]. Debet tamen dicere in fine instrumenti tale verbum: “Abrasi in tali linea”, vel: “Talem intelineaturam

feci”. Et sic de singulis notat **Archidiaconus xxx.(!) q. ix. § i.** [Decr. Grat. C.35 q.9 c.1] ...

(Fo. 68rb in fine, to fo. 68va = photographs 527–8) Oppono quod rasura viciat instrumentum, quia debet esse “integrum”, “non cancellatum”, nec in aliqua sui parte “viciatum”: **C. de edic. di. Adri. tol. l. finalis** [C.6.33.3]. Solutio: rasura viciat quando est in loco suspecto. Hoc est ut in responsione Papae [*to wit: in the last phrase of X.2.22.3*]. Secus si ibi factum recitatur, quia hoc [*add here: non*] pertinet ad ius: **C. de testa. l. Si unus** [C.6.23.12.1]. Et non est suspectum instrumentum, si rasura apparet de eadem manu ...

Unde oportet quod hic intelligatur quando per aliam scripturam veritas scripti detegitur, vel correctio apparet facta ex eadem manu, vel quando ex praecedentibus et sequentibus constat de veritate scripturae vel scripti in abraso loco, et consonat praecedentibus et sequentibus: ut notat **glossa de religiosis domibus, Cum venerabilis** [X.3.36.7], in glossa in verbo “propter praedicta”, ad medium glossae. Vel quandoque additur super intellectu, ut in aliquo accessorio vel consecutivo necessario ...

(Fo. 68va = photograph 528) Et adverte quia etiam per rasuram minimae literae in loco suspecto instrumentum est falsum et vacillat: ut notatur **infra, eodem, Inter dilectos** [X.2.22.6] – licet secus in obmissione: **infra, eodem, Ex parte** [X.2.22.11].

Edition used: Antonius de Butrio, *Commentarius in Decretales*. Venetiis 1578.

[48] Libri Feudorum, De pace Constantiae, § “Acta”, LAW TEXT (cited in line 57)

My translation: Negotiated in the year 1183 of the Lord’s incarnation, first year of the current tax-year cycle, under the reign of Frederick most glorious emperor of the Romans, in the thirty-second year of his reign, but twenty-ninth year of his emperorship. Given at Constance in a solemn assembly of the Court, on the seventh day before the Kalends of July [25 June 1183].

Full text § 19: Acta sunt haec anno dominicae incarnationis 1183, indictione prima, regnante domino Friderico Romanorum imperatore gloriosissimo, anno regni eius xxxii., imperii vero xxix. Datum apud Constantiam in solenni curia, vii. Kalend. Iulii.

Edition used: “Acta de pace Constantiae”, in: *Corpus juris civilis, ediderunt fratres Kriegeli, pars III. a D. Eduardo Osenbrüggen recognita*. 17th edn, Stuttgart 1890, pp. 888–93.

[49] Libri Feudorum, De pace Constantiae, § “Acta”, commentary by Baldus (cited in line 57)

My paraphrase: § TRANSACTED. ... Now, when form requirements [*solennitates*] are written, and an error occurs in one such requirement, can then the notary emend the charter [*exemplum*], when he erred in the date, or in specifying the place name? I answer, when a contention [*quaestio*] has arisen about the date, or place name, he cannot emend [on his own authority], because the erasure would be situated in a suspected text passage. However, if the erasure is elsewhere, and when no contention is pending in court, then he may emend, and erase the wrong word, and put the right word in – as can be read and is noted in and on C.6.23.12.1.

If he did not err in a form requirement, but the error concerns essential facts of the subject matter [*qualitas facti*], then, after a charter of the document has been redacted, and published, he cannot emend anything on his own authority, but he must do the correction with authorisation by a judge, according to Cinus de Pistorio, who notes this on D.1.5.8.

Or say: if it is a harmful error, he cannot emend it without mandate by a judge. It is different when [the error] is not harmful for the party, because the party has no interest [in such correction] since the document is just as useful without such emendation – see C.6.23.24, and C.6.23.25, C.6.23.7 and D.50.17.92.

It is clear that there is a difference between form requirements [*solemnitates*] of a document, and its subject matter [*negotium*] – as noted at the end of the *glossa ordinaria* to D.2.13.1.2.

Excerpt: § ACTA. ... Nunquid si apponuntur solemnitates, cum erratur in una, utrum tabellio potest propria auctoritate emendare exemplum, si erravit in die, vel in appositione loci? Respondeo, si est quaestio super die, vel loco, non potest emendare. Nam rasura caderet in loco suspecto. Si autem alibi, [*add here: et ubi*] non pendet quaestio, tunc emendare potest, et radere verbum erroneum et ponere verbum verum, ut legitur et notatur **C. de testam. Si unus** [C.6.23.12.1].

Si autem non erravit in solemnitate instrumenti, sed in qualitate facti, tunc, postquam instrumentum est redactum in mundum [*the typesetter wrongly typed* “modum”] et publicatum, nihil sua auctoritate emendare potest, sed debet facere correctionem [*the typesetter wrongly typed: error*] de mandato iudicis, **secundum Cy., qui ita notat ff. de sta. hom. l. Imperator** [Cinus de Pistorio, on D.1.5.8].

Vel dic: si est talis error qui noceat, non potest emendare sine iussu iudicis. Secus si non officit parti, quia partis non interest, cum et sine tali emendatione valeat instrumentum, ut **C. de testamen. l. Ambiguitates** [C.6.23.24] et **l. Praeposteri** [C.6.23.25], **l. Errore** [C.6.23.7], et **ff. de regulis iuris l. Si librarius** [D.50.17.92]. Illud constat quod aliae sunt solemnitates instrumenti, aliae negotii, ut notatur **ff. de edendo, l. i. § Editiones** [D.2.13.1.2], **in fine glossae**.

Edition used: Baldus de Ubaldis, *Commentaria in Usus Feudorum*, Lugduni 1535 (fo. 93rb–va). Garbled passages were repaired by comparison with Baldus’s commentary printed in the margins of “Liber de pace Constantiae”, *Volumen legum parvum*, Venetiis 1581, part 3, pp. 125–45.

[50] VI.5.13.88, phrase “Data Romae”. LAW TEXT (cited in line 58)

Full translation: Given in Rome at Saint Peter’s cathedral, the fifth day before the Nones of March, in our pontificate’s fourth year [3 March 1298].

Full text: Data Romae apud sanctum Petrum, quinto Nonas Martii, pontificatus nostri anno quarto.

Edition used: as above; see no. [6].

[51] VI.5.13.88, phrase “Data Romae”, commentary by Albericus de Rosate (cited in line 58)

My paraphrase: GIVEN IN ROME ... (Fo. 80vb) And what about when the tax-year figure is not congruent to the year date? About this, see X.2.22.6.

Goffredus de Trano in his “Questions”, question no. 1, doubted whether a privilege, rescript or document is valid when it lacks the name of the reigning pope or emperor, and/or the year of pontificate or empire. And he holds the negative, on account of the law texts which I will cite below ... [*citations follow here*].

(Fo. 81ra, no. 7) Given, on account of the aforementioned citations, that the tax-year figure appears to belong to the essential elements of a document, it must be said that [a document] is not valid without it. ...

(Fo. 81ra–b, no. 8) In addition, Johannes Andreae says that, when a document has been delivered, and thereafter it appears that the notary erred, for instance he wrote a wrong tax-year figure [*indictio*], or he omitted it altogether, or similar things, the notary will not correct it, that is to say, supplement it, without authorisation by a judge. Otherwise one could reproach him for having falsified – see D.48.10.27pr. Yet, before delivery of a charter to a party, if the notary sees that he erred, he can correct his error without authorisation by a judge. And this is done in practice. And this is confirmed in the *Speculum iudiciale* [by Guilielmus Durantis] ...

If the notary who should make a correction is no longer alive, and upon inspection of his protocol book it clearly shows the error, one will rely [*stabitur*] on the protocol book – see Auth.Coll. 4.7.2. And see what is noted in the *Speculum iudiciale* ..., and the law texts which are cited there. To this point, see the law text X.2.22.15. And for this reason the notaries also swear an oath to keep a protocol book, as I have written on X.3.50.8. And this is noted in the *Speculum iudiciale* in the aforementioned text passage.

But I ask: what shall be done if no protocol book can be inspected, and [the parties concerned] cannot even be helped by witnesses who might remember the year date, and the document contains no other element [*aliud*] by which the trustworthiness of the year date might be confirmed? Such confirmation might for instance be offered by a mention of a consul or praetor whose office lasted but one year. When all these means fail, I would think that any incongruence between the tax-year figure and the year date vitiates the document – according to the references cited for this topic by Dinus de Mugello.

Excerpt: DATA ROMAE ... (Fo. 80vb) Et quid si indictio discordat ab annis domini? De hoc vide **de fide instrumentorum, Inter dilectos** [X.2.22.6].

Gof. [Goffredus de Trano] **in quaestionibus suis, quaestione prima**, querebat de nomine papae vel imperatoris, anno pontificatus vel imperii, an fidem faciat privilegium, rescriptum, vel instrumentum in quo predicta deficiunt. Et tenet quod non, per iura quae statim allegabo ... [*citations follow here*].

(Fo. 81ra, no. 7) Cum ergo per prius allegata appareat indictionem esse de substantialibus instrumenti, dicendum est sine illa instrumentum non valere. ...

(Fo. 81ra–b, no. 8) Ultra dicit ipse **Jo.** [Joannes Andreae] quod, si post productionem instrumenti apparet error notarii in omissione vel falsitate indictionis, vel similibus, non corrigit notarius, [sci]licet supplebit sine iudicis autoritate. Alias sibi posset impingi falsum: **supra, de fal., l. Eos qui, in principio** [D.48.10.27pr.]. Si vero, antequam parti tradat instrumentum, videt notarius se errare, potest sine iudicis autoritate suum errorem corrigere. Et sic servatur. Ad hoc facit quod notatur in **Specu. de instru. edi. § Postquam, ver. “Sed nunquid”, et ver. “Ubi autem”, et**

§ **Instrumentum, ver. “Sed nunquid confecto”** [Guilielmus Durantis, *Speculum iudiciale*].

Si non extat notarius qui corrigat, et potest videri eius protocollum, per quod appareat de errore, illi stabitur: **in Aut. de tabel. § Illud** [Auth.Coll. 4.7.2 = Nov. 44.2]. Et vide quod notatur **in Spe., dicto § Instrumentum, ver. “Quid ergo”, et ver. “Si vero”** [Guilielmus Durantis, *Speculum iudiciale*], et iura ibi allegata. Facit de fide instru., Cum P. [X.2.22.15]. Et propter hoc etiam iurant notarii protocola tenere, ut scripsi **Ne clerici vel mo., Sicut te** [X.3.50.8]. Et notatur **in Spec. dicto titulo § Restat videre** [Guilielmus Durantis, *Speculum iudiciale*].

Sed quaero: fiat quid, si [*instead of “fiat quid si”, the typesetter misread abbreviated words in a manuscript and typed:* sub quasi] nec protocollum videri potest, nec per testes coadiuventur qui recordentur de anno, nec aliud est in instrumento per quod appareat veritas anni? Quod esse posset si esset expressum nomen consulis vel praetoris qui erat annalis. His deficientibus, putarem contrarietatem illam indictionis et anni instrumentum vitiare, per **allegata per Dy.** [Dinus de Mugello], ad partem istam.

Edition used: Albericus de Rosate, *De regulis iuris*. Lugduni: apud Guilielmum de Guelques 1543, fos 80rb–81rb. Digitised by Bayerische Staatsbibliothek MDZ (... bsb10183027_00003.html – 00280.html).

[52] **Guilielmus Durantis, *Speculum iudiciale* (cited in line 59, but already in line 38)**

[53] **D.1.5.8 “Imperator”. LAW TEXT (cited in line 60)**

My paraphrase: Emperor Titus Antoninus directed that the status of children shall not be degraded on account of badly expressed wording in a document.

Full text: Imperator Titus Antoninus rescripsit non laedi statum liberorum ob tenorem instrumenti male concepti.

Edition used: as before; see no. [1].

[54] **D.1.5.8, Commentary by Bartolus (cited in lines 60, 64, 65)**

My paraphrase: I ask whether a notary may still correct his error even after he has published [i.e. handed out] a document. And at first sight, the positive appears, as here [i.e. in D.1.5.8], and in the saying “Besides, it would be better to correct one’s error than ...”, as stated in Auth.Coll. 9.7 [*this text by Emperor Justinian begins as follows:* “We do not shrink from emending our legislation, which is everywhere directed to find the best [rules] for the benefit of our subjects ...” etc. *After this preface, Justinian corrects inconsistencies in his legislation on intestate succession*]: “We thus order, correcting rightfully ...”, “We also deem that some other points merit correction ...”, etc.

From the contrary side, the negative appears, because a notary can be put on a par with a witness – see D.28.1.27. But a witness cannot correct his error after the protocol of witness statements has been published. Therefore, etc., as in Auth.Coll. 7.2.4.

Solution: Some authors say, if the notary wants to correct a mere error in grammar, he may do so – argument inferred from D.42.1.46. But if he wants to add something, or take away, he cannot do so, because in effect it comes down to writing

a new document, see D.1.1.6 – unless the interested party agrees, as in Auth.Coll. 4.7.1. He may however declare [that he erred] – argument inferred from D.28.1.21.1. You shall say what Guilielmus de Cugno said, namely after a document has been published, i.e. after a copy of its text has been handed out, the notary can no longer correct his error, on the same reasons which we have explained for witnesses, see the aforementioned law text Auth.Coll. 7.2.4, and there the commentators note it. And there he cannot even declare [that he erred], because it would cast suspicion on his impartiality [*quia praesumeretur suspectus*], as it happens with a witness.

The law text D.28.1.21.1 [on testaments] is no obstacle, because a testator can at any time write a new testament, without need to ask assent by anyone. But a notary cannot write a new document without the parties' consent.

Guilielmus Durantis in his *Speculum iudiciale* raises the question whether a notary who produced a document without date and name of the ruler [*sine die et consule*] may rewrite his document and add the missing data, if he remembers them well ... [*Bartolus copied here the respective passages from Guilielmus Durantis, and he continued doing so, up to "Consulo tamen sibi quod de licentia iudicis illud faciat". Thereafter:*] By the aforementioned arguments it clearly appears that it is wrong what certain notaries do: namely when they have omitted something in a document, they add it afterwards in the margin, and they write at the end of the document "What I have omitted above, by error ...", etc. That is to say, an error cannot be corrected so thoughtlessly [*inconsulte*]. I advise, however, that the notaries shall seek authorisation by a judge, to do such corrections.

Excerpt: Quaero, nunquid tabellio possit suum errorem corrigere, post publicationem instrumenti? Et videtur quod sic, ut hic. "Praeterea melius esset suum errorem corrigere quam", etc., ut **in Auth. ut fratrum filii, in principio** [Auth.Coll. 9.7, praefatio = Nov. 127. Textus: "Nostras leges emendare nos non piget, ubique utilitatem subiectis invenire volentes" ... "Hoc itaque iuste corrigentes sancimus ut ..." "Illud quoque dignum correctione aliqua esse iudicantes ..." , etc.].

In contrarium videtur quod non, cum tabellio aequiparetur testi: ut **infra, de testamentis, l. Domitius** [D.28.1.27]. Sed testis non potest corrigere suum errorem post publicationem attestationum – ergo, etc., ut **in Co. de testibus § Quia vero** [Auth.Coll. 7.2.4 = Nov. 90.4].

Solutio: Dicunt quidam quod, si vult corrigere errorem in grammatica, potest: argumentum **infra, de re iudicata, l. Actorum verba** [D.42.1.46]. Si vero aliquid vult addere, vel minuere, tunc non potest, quia novum instrumentum facere videretur: ut **supra, de iustitia et iure, l. Ius civile** [D.1.1.6] – nisi consentiat pars: ut **in Co. de tabellionibus § i.** [Auth.Coll. 4.7.1 = Nov. 44.1]. Declarare autem potest: argumentum **l. Haeredes palam § Sed et si notam, infra, de testamentis** [D.28.1.21.1, medies]. Tu dic **secundum Gul. de Cug.** [Guilielmus de Cugno] quod post instrumentum publicatum, et postquam esset facta copia parti de eo, tabellio suum errorem corrigere non potest: argumento eius quod dicimus de teste, **in dicto § Quia vero** [Auth.Coll. 7.2.4 = Nov. 90.4], et ibi notatur. Nec etiam potest ibi declarare, quia praesumeretur suspectus, sicut in teste.

Non obstat **§ Sed et si notam** [D.28.1.21.1, medies], quia sine consensu alterius condere poterat testamentum. Sed tabellio non potest facere instrumentum sine consensu partium: ut **dicto § i. de tabell.** [Auth.Coll. 4.7.1 = Nov. 44.1].

Guliel. in Spec., De instrumentorum editione, § Postremo, versiculo “Sed nunquid” [Guilielmus Durantis, *Speculum iudiciale*], subiicit talem quaestionem: nunquid tabellio qui fecit instrumentum sine die et consule hoc poterit reficere, et ea apponere, si bene recordetur? ... [*here follow texts copied from Guilielmus Durantis*] ... Per praedicta apparet quod male faciunt notarii quidam qui aliquid in instrumento omittunt, et postea, cum in margine adiiciunt, illud in fine dicunt, scilicet “Quod supra per errorem omisi”, etc. Non enim potest corrigi error ita inconsulte. Consulo tamen quod auctoritate iudicis illam correctionem faciant.

Edition used: Bartolus a Saxoferrato, *Opera quae nunc extant omnia ... Tom. I.1–2*, Basileae: ex officina Episcopiana 1589, fos 75–6.

[55] **C.6.23.7 “Errore”, LAW TEXT (cited in line 61, but already in line 53)**

[56] **C.6.23.24 “Ambiguitates”, LAW TEXT (cited in line 62)**

My translation: We deem that uncertainties, which arise from the inexperience or laziness of scribes who write testaments, must be curbed. And, no matter whether an appointment of heirs is written after the granting of bequests, or any other scrupulousness is omitted, not by wish of the testator but by mistake of the notary or other person who writes the testament, we give no-one freedom to subvert or diminish on this pretext the will of the testator.

Full text: Imperator Justinianus. Ambiguitates, quae vel imperitia vel desidia testamenta conscribentium oriuntur, reseandas esse censemus. Et, sive institutio heredum post legatorum dationes scripta sit vel alia praetermissa sit observatio non ex mente testatoris, sed vitio tabellionis vel alterius qui testamentum scribit, nulli licentiam concedimus per eam occasionem testatoris voluntatem subvertere vel minuere.

Edition used: as before; see no. [1].

[57] **C.6.23.24, Commentary by Baldus (cited in line 62)**

My paraphrase: But let us see, can a notary correct himself on his own authority? Jacobus de Belviso says: No, not after he has delivered a charter, but he needs to seek authorisation from his superior, and he must beforehand take out a summons for all persons who must be summoned here [*citatis citandis*] [i.e. all the interested parties] – see Auth.Coll. 7.8.2. Other authors say that a well-reputed notary can supply on his own authority what is missing – argument from Decr.Grat. Dist.37 c.11. However, after some time has gone by, he cannot correct himself, namely there applies here the same rule as in testaments. Thus say here what I have said [in my commentary] on D.1.5.8, and see D.50.17.92 and D.31.1.64. And see the commentary by Bartolus on the aforementioned law text D.50.17.92.

Excerpt: Sed nunquid notarius sua auctoritate possit seipsum corrigere? Dicit **Jac. de Bel.** [Jacobus de Belviso] quod non, postquam tradidit instrumentum, sed debet hoc facere mandato superioris, citatis citandis, ut **in Auth. de aequa. dotis § Illud** [Auth. Coll. 7.8.2 = Nov. 97.2]. Alii dicunt quod si notarius est bonae famae, quod potest ea quae desunt supplere propria auctoritate: **xxxv.(!) Dist. c. Qui de mensa** [Decr.

Grat. Dist.37 c.11]. Tamen ex intervallo se corrigere non potest, ad instar testamenti, quod dic ut dixi in **I. Imperator, ff. de statu ho.** [D.1.5.8], et **I. Si librarius, ff. de reg. iu.** [D.50.17.92], et **I. Cum proponebatur, ff. de leg. ii.** [D.31.1.64]. Et vide in dicta lege **Si librarius, per Bartolum** [Bartolus de Saxoferrato, on D.50.17.92].

Edition used: Baldus de Ubaldis, *In sextum Codicis librum commentaria*, Venetiis 1577.

[58] **D.1.5.8, Commentary by Bartolus** (*cited in line 64, but already in line 60*)

[59] **C.6.44.2 (lex secunda). LAW TEXT** (*cited in line 66*). *It continues C.6.44.1. So, read both together.*

My paraphrase C.6.44.1: The words from the testament which you have cited [in your report] either declare that the debtor had meanwhile repaid the money which he owed to the testator, or they manifestly show that the testator wished to free the debtor from this debt. And therefore, either the debt can no longer be claimed because it was repaid, or the debtor can sue the heir to free him from the debt, on account of a bequest – unless it can clearly be proved that the testator did not actually want to free the debtor, but that he erroneously thought that the money had meanwhile been repaid.

My paraphrase C.6.44.2: Even if the narration about the debt is not correct, a mere false expression of facts does not remove a bequest, and the legatee can claim it on account of the testament.

Full text C.6.44.1: Imperator Antoninus. Verba testamenti, quae inseruisti, aut solutam pecuniam debitam testatori declarant, aut voluntatem eius, liberare volentis debitorem, manifeste ostendunt. Et ideo aut peti quod solutum est non potest, aut ex causa fideicommissi, ut debitor liberaretur, agendum est, nisi liquido probari possit eum non liberari debitorem voluisse, sed errore lapsum solutam sibi pecuniam existimasse.

Full text C.6.44.2: Imperator Alexander Severus. Etiam si veritas debiti non subest, falsa demonstratio non perimit legatum, et ex testamento eius quoque nomine competit actio.

Edition used: as before; see no. [1].

[60] **C.6.44.2, Commentary by Baldus** (*cited in line 66*)

My paraphrase: (No. 4) From the words stated above, I draw the conclusion that a testator's erroneous narration of facts [by which he intended to explain his motivation for a bequest] vitiates the bequest when verity of these facts was essential for the testator's motivation. But a mere false expression [of true facts] does not vitiate. This is the message of the entire law text.

(No. 5) Furthermore, a falsity in the date renders the entire document false – as in the law text “*Cum Johannes eremita*” [X.2.22.10] ... But an error in the date does not vitiate a public document, although it is different when no date at all is given – according to Dinus [de Mugello] in his legal opinion [no. 13]. Solution: consider,

- either the date is affixed for some future activity, and then a wrong date vitiates, as in the law text “*Si vitem*”, last paragraph (D.43.24.22.5).

- Or affixed to another kind of activity where it may be essential. If so, then
 - if the date belongs to the formal requirements: same consequence [i.e. the wrong date vitiates].
 - Or it does not belong to formal requirements and merely serves for description of facts, and then neither a wrong description nor a wrong motivation for it vitiates – as here [*in the law text C.6.44.2*]. And see for the latter case the law text “*Scio*” [D.49.1.3].

Excerpt: ... (No. 4) Ex praedictis infero talem consequentiam, quod falsa relatio, cuius veritas esset de substantia legati, vitiat legatum; sed falsa enunciatio non vitiat. Hoc dicit tota lex.

(No. 5) Item falsitas in die reddit totum falsum, ut in **c. Cum Johannes eremita, de fide instrumentorum** [X.2.22.10] ... Item error diei non vitiat publicum instrumentum, licet secus sit si dies non apponatur, **secundum Dynum in consilio** [Dinus de Mugello, Consilium no. 13].

Solutio: considera,

- aut dies apponitur actui fiendo, et tunc alia dies vitiat, ut **1. Si vitem § fi.** [D.43.24.22.5],
- aut alicui facto qui habet in se essentiam: et tunc:
 - aut expressio temporis est de forma, et idem;
 - aut non est de forma, sed venit per modum demonstrationis, et tunc nec falsa demonstratio nec falsa causa vitiat, ut hic. Et pro hoc **ff. de appella. 1. Scio** [D.49.1.3].

Edition used: Baldus de Ubaldis, *In sextum Codicis librum commentaria*, Venetiis 1577, fo. 162va–b.

[61] **Dinus de Mugello, Consilium no. 13** (*cited in line 66, but already in line 52*)