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EXCEPTIONS TO THE APPLICATION OF THE RULE *TESTIS UNUS TESTIS NULLUS* IN THE CANONICAL PROCESS

WYJĄTKI W STOSOWANIU ZASADY *TESTIS UNUS TESTIS NULLUS* W PROCESIE KANONICZNYM

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Abstract

Canon 1573 of the 1983 Code of Canon Law confirms the validity of the evidentiary rule *testis unus testis nullus* in the canonical process. However, the requirement of two concurring witnesses is not absolute. The legislator provided for two exceptions. The first one is the deposition by a qualified witness concerning matters carried out *ex officio*. The second exception is when the circumstances of things or persons suggest otherwise. These are objective circumstances that reasonably make the judge to believe that the deposition of a single witness in the case can be accepted and that it can amount to full proof. The author takes a closer look at these two exceptions, with a special focus on their historical aspect, the jurisprudence, and the canonical case-law.

Keywords: qualified witness, circumstances of persons and things, single testimony, *testis unus testis nullus*

Abstrakt

Kan. 1573 Kodeksu Prawa Kanonicznego z 1983 r. potwierdza obowiązywanie dowodowej zasady *testis unus testis nullus* w procesie kanonicznym. Niemniej wymóg dwóch zgodnych świadków nie ma charakteru absolutnego. Ustawodawca wskazał dwa wyjątki. Pierwszym jest zeznanie *świadka kwalifikowanego* złożone w związku ze sprawowanym urzędem. Drugim sytuacja, gdy *okoliczności rzeczy lub osób sugerują inaczej*. Są to obiektywne okoliczności, które kreują w racjonalny sposób przekonanie sędziego tak, że uzasadnione jest przyjęcie w sprawie zeznania

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jednego świadka zwykłego i nadanie mu waloru pełnego dowodu. Niniejszy artykuł stanowi analizę wspominanych dwóch wyjątków z uwzględnieniem ich aspektu historycznego i odwołaniem do jurysprudencji oraz judykatury kanonicznej.

Słowa kluczowe: świadek kwalifikowany, okoliczności rzeczy i osób, pojedyncze świadectwo, *testis unus testis nullus*

Introduction

In accordance with Canon 1573 of the 1983 Code of Canon law, "The deposition of one witness cannot amount to full proof, unless the witness is a qualified one who gives evidence on matters carried out in an official capacity, or unless the circumstances of persons and things persuade otherwise."[1] In this canon, the legislator confirmed the centuries-old tradition manifested in the procedural rule of *testis unus testis nullus* applied in the canonical process. The requirement of two and concurring witnesses, stemming as far as from the sources of the Old[2] and the New Testament[3] and Roman law,[4] certainly had a natural and continuous impact on the ecclesiastical legislator, primarily in the procedural aspect, but at the same time, being a valuable inspiration across many other domains of human activity not even closely related to the judiciary. The rule embedded in general procedural regulations served as a model for ecclesiastical judges exercising judicial power. It was primarily intended to ensure the procedural guarantees of the accused, particularly by preventing false or erroneous accusations to be levelled at them. The two-witness requirement also increased the chance of a fair trial and disclosure of the truth. This evidentiary rule remained linked to the principle of legal assessment of evidence. Yet, it

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[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [hereinafter: CIC/83].

[2] See Deuteronomy 19:15; Deuteronomy 17:6-7; Numbers 35:30.

[3] See Matthew 18:19-20; Luke 10:1; John 8:17; John 18:21; Matthew 18:16; Matthew 26:60-65; Mark 14:55-59; Luke 22:71; Matthew 17:1-3; 2 Corinthians 13:1; 1 Timothy 5:19-20; Hebrews 10:25-29; Revelation 11:3-4; 7-8; Acts 6:13.

[4] *Codex Justinianus*, in: *Corpus Iuris Civilis*, vol. II, eds P. Krüger, Berolini 1954, C. 4.20.9; *Theodosiani libri XVI cum Constitonibus Sirmondianis et Leges novellae ad Theodosianum pertinentes Consilio at auctoritatae Academiae litterarum regiae borussicae*, eds by Th. Mommsen, P.M. Meyer, and J. Sirmond, Berolini 1905, Th. 11.39.3. For more on the origins of the procedural rule *testis unus testis nullus* see Adamczewski 2022, 9ff.

should be stressed that it has never been of an absolute character. Over the centuries, the ecclesiastical legislator granted exceptions to its application [Myrcha 1936, 149-51].

Today, the rule *testis unus testis nullus* is not absolute, either. The legislator carved out two exceptions to it. A single deposition is admissible in a case, but only if it is submitted by a qualified witness and is related to the office held by that witness. The other exception concerns the deposition of a private or official witness, yet unrelated to their current function. The deposition is supplemented by the judge with circumstances related to the person or act, so that he has substantial evidence to make his decision [Bettetini 2018, 53-54]. The canon contains an expression, "circumstances of persons and things persuade otherwise." This phrase is not only a premise for the application of the other exception. It also indicates a significant role of the judge in making a proper assessment of the circumstances of the case [Arroba Conde 2006, 464].

Interestingly, the list of exceptions used to be longer in the past. The law in force before the first codification awarded a full evidentiary value to the testimony of the Bishop of Rome, due to his authority and position in the structure of the Roman Catholic Church [Myrcha 1936, 149]. Cardinal enjoyed a similar privilege. Their single-handed deposition was considered fully credible and with full evidentiary weight. The 1917 Code of Canon Law of 1917 provided a detailed list of privileges exercised by cardinals. Canon 239 § 1, 17º read, *Fidem faciendi in foro esterno*, *de oraculo ponitificio testantes*.[5] Consequently, with regard to papal statements, cardinals were able to, if necessary, certify them to the binding and valid effect. Testimonies provided by rulers with no authority above them, e.g. an emperor or a king, had the unquestionable value of full proof [ibid., 152].

In addition to the situations outlined above, the two codes also pointed to other exceptions, although not directly related to proceedings. They pertained to the credibility of events that were likely to fall under the broadly understood canonical proceedings. For example, if an authentic document was missing, and assuming that no damage was done to third parties as a result, the legislator allowed the testimony of one sworn and credible

[5] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, p. 1-593 [hereinafter: CIC/17].

witness as full proof to establish the existence of certain facts [Chiappetta 1986, 1118]. The list of special circumstances in which *testimonium unius* sufficed included: the fact of conferring baptism (see Canon 876 CIC/83; Canon 779 CIC/17), confirmation (see Canon 894 CIC/83; Canon 800 CIC/17), consecration or dedication of a holy place (see Canon 1209 CIC/83; Canon 1159 § 1 CIC/17). Also, if it was necessary to prove that a person on the verge of death expressed remorse for crimes perpetrated before his death, the perpetration of which resulted in the refusal of a Catholic funeral, it was enough to resort to a single testimony. Relying on the opinions of respected representatives of the doctrine, J. Grzywacz argued that numerous deviations from the rule of *testis unus thesis nullus*, understood in a broader context, had not be anything unusual. Especially in cases of minor significance and when obtaining witnesses' testimonies would have been impossible or troublesome [Grzywacz 1985, 34-35]. This argument is even more significant as it was considered indirectly influencing the recent reform of matrimonial law in 2015 [Dappa 2016, 30-31]. The result of the modification of the process to declare nullity of marriage was the publication of, but not only, two apostolic letters *motu proprio*: *Mitis Iudex Dominus Iesus*[6] for the Latin Church and *Mitis et misercors Iesus*[7] for the Eastern Churches. Both papal regulations also imply the ancient rule and, somewhat unexpectedly, provide that in cases for the declaration of nullity of marriage, the testimony made by only one witness may enjoy full evidentiary value, if appropriate pre-conditions are met. However, the general requirement of *testimonium unius* contained in Canon 1573 CIC/83 remained unaltered.[8]

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[6] Franciscus PP., Litterae apostolicae motu proprio datae *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de causis ad matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 107 (2015), p. 958-70, Canon 1678 § 2.

[7] Franciscus PP., Litterae apostolicae motu proprio datae *Mitis et misercors Iesus* quibus canones Codicis Canonum Ecclesiarum Orientalium de causis ad matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 107 (2015), p. 946-57, Canon 1364 § 2.

[8] This article casts some light on two exceptions to the rule *testis unus testis nullus* expressed in Canon 1573 CIC/83 and applied in the general canonical process. The analysis of the rule and its exceptions in relation to special canonical processes, among them the process concerning the declaration of nullity of marriage, is secondary.

1. Deposition by a qualified witness

The first exception to the rule *testis unus testis nullus* provided by the ecclesiastical legislator in the code is the deposition by a qualified witness. It is worth noting that the meaning and wording of the canon converge both in CIC/83 (Canon 1573) and in the Code of Canons of the Eastern Churches.[9] A similar regulation was also contained in Canon 1791 § 2 CIC/17.

Within the elaborate structure of division of personal evidence in canon law, canon law names an ordinary and a qualified witness [Del Amo 2011, 1181-182]. In the procedural sense, witness is a person who is not directly involved in a dispute but supplies objective information about facts or circumstances which are crucial for the judge and are likely to determine the outcome of the case. Credibility would always be a fundamental quality of any witness. This feature was used to describe people who, knowing the truth, wanted and, importantly, were able to share it before the court. Hence, the doctrine also referred to witness's deposition as certification [Grabowski 1927, 625].

A qualified (official) witness was a person who, in connection with holding a specific office, made a deposition about actions performed by or against him or her [Karłowski 1964, 396]. Therefore, the relationship between the facts contained in the deposition and the office held, and actions performed thereunder, was paramount. Consequently, two conditions had to be met at the same time. The witness held some public office, ecclesiastical or lay, and at the same time, testified about what they had done *ex officio* [Fąka 1978, 197]. The two conditions met together ranked the person among qualified witnesses (not the same as private witnesses). They were private or even public persons, yet testifying about facts or activities that were not official in the strict sense [Grabowski 1927, 625]. A parish priest had the capacity to act as an official witness. He was able, for example, to certify that he had assisted at a marriage [Pawluk 1990, 260]. As a result, no other certification was required in the case because the priest's deposition sufficed as full proof, and at the same time, was enough for the judge

[9] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), p. 1045-363, Canon 1254.

to settle the dispute [Karłowski 1964, 397]. In matters concerning the operation of the curia, a vicar general, official, or notary public were competent to issue the certificate. A qualification certificate could also be drawn up, for example, by a doctor or a midwife in the scope of their medical activity [Fąka 1978, 197]. I. Grabowski spoke about the role and importance of an official witness as follows, "Testimony by one witness, even if very credible, does not make full proof; however, if he or she is a qualified witness and testifies about their official work, they can be given full evidentiary value. Therefore, a notary who certifies files that belong to his or her office should be trusted, and the same is true about an apparitor who summons others to court, or a bishop or parish priest who gives testimony [Grabowski 1927, 630]. This definition is almost one century old, but it must be recognized for embracing the concept of official witness extremely well and, what is more, it still remains valid.

A. Myrcha underlined that the deposition of a qualified witness was equal to full proof, but it was required of him or her to be credible. In other words, they had to be free from incapacity, unfitness, or suspicion. In addition, A. Myrcha explained that the deposition of a qualified witness should cover their actions performed *ex officio* and be based on information obtained through their own observations, i.e. *de scientia propria*. Therefore, the *de scientia propria* approach was a key element determining the nature of the deposition, as opposed to *credulitate*, i.e. deliberation or reasoning that typify an expert [Myrcha 1936, 150].

I. Grabowski discussed an interesting case of a physician to illustrate the role and value of depositions concerning the area of professional activity. The physician examined a patient. The patient was reasonably presumed of suffering from sexual impotence. When consulting this problem during one of the appointments, the patient directly confessed to the doctor that he was unable to have intercourse with his wife. At the same time, a process for the declaration of nullity of marriage in which the patient acted as the defendant had already been underway. The doctor's deposition concerning his patient's condition before the court was qualified as full evidence, but, as it was rightly emphasized, to the extent confirming the fact that the defendant was being treated for this affliction. Still, that did not mean that he was actually impotent. In this case, it was reasonably

assumed that the doctor acted as an official witness and not as a medical expert [Grabowski 1927, 197].

Recognizing the qualified witness's deposition as full evidence is rested on justified and profound grounds. The doctrine points to three key circumstances that should be considered together. These are: holding an office, oath, and presumption of law. Holding a public office required a person to take an appropriate oath. It obliged them to perform their entrusted duties loyally and conscientiously. The legislator empowered a qualified witness to formally certify any matters related to the office. The third element, presumption of law, naturally derived from the first two. It provided that the witness duly performed their duties and was able to bring forth previously known facts before the court [Fąka 1978, 197]. The fact that a person holding a public office and testifying in connection with actions carried out *ex officio* was obliged to tell the truth under pain of legal liability was also of significance [Myrcha 1936, 150-51].

2. "Circumstances of persons and things"

Convincing the judge of the sufficiency of proof furnished by a single witness based on specific "circumstances of persons and things" is the other exception to the requirement of having two witnesses in a canonical process [Arroba Conde 2006, 464]. In other words, if there was an ordinary or qualified witness testifying but one that did not testify in connection with their office, and each of them raised no objections of the court, and additionally the deposition was adequately supplemented, so that the judge was able to reach moral certainty as to the facts, then the full value of proof offered in the case was recognized [Del Amo 2011, 1182].

It should be emphasized that this legal construct was not present in CIC/17. However, it was incorporated into the currently binding code as an undoubtedly innovative solution. It seems that the idea was to offer a judge to act more freely and more flexibly in an examined case. It is likely that the ecclesiastical legislator's intention was to apply this solution in situations that were non-standard and did not fit into the established strict procedures [Sztychmiler 2007, 229]. The doctrine unanimously agreed that the introduction of this regulation was a manifestation of the legislator's greater trust in witnesses and judges [Leszczyński 2000, 111, 122].

For example, it was pointed out that the deposition of a single, yet very credible witness relying on their knowledge possessed while there was no suspicion yet, i.e. when the parties did not even intend to take their case to court, qualified as an exception to *testis unus* and complied with the provision of Canon 1573 CIC/83 [Sztychmiler 2007, 229]. Another example from court practice is a single testimony corroborated by circumstantial evidence or ancillary measures. They could be, e.g. declarations of both parties or one of them or testimony of hearsay witnesses [Karłowski 1964, 396].

By requiring the application of the rule *testis unus testis nullus*, the legislator stressed the need to observe the criterion of the number of witnesses. The number is at least two people, although, at the same time, the legislator did not qualify it as the most relevant attribute. No less important were the concurrency and credibility of witnesses [Del Amo 2011, 1181-182]. Of course, more witnesses was a great advantage if their depositions met the two conditions mentioned above. Otherwise, when the witnesses lied, were wrong, or disagreed with one another, their large number was not an asset and did not contribute to the truth coming to light. Moreover, it would give rise to reasonable suspicions of scheming and manipulation [Fąka 1978, 196-97]. Old works on witnesses highlighted that one credible witness could have a greater evidential value than several dozen or even several hundred witnesses giving false and contradictory testimony. It was rightly argued that in such circumstances the large number was irrelevant. Conflicting depositions proved completely useless in terms of evidentiary value, unlike one credible testimony, which, having the attribute of incomplete proof, was likely to be given the value of full proof after being supplemented [Myrcha 1936, 137].

The insights of St Thomas Aquinas seem valuable in the context of this discussion. In the part devoted to passing judgements based on submitted evidence and judge's own belief in the truth of established facts, Thomas Aquinas notes that there are situations in which proof is furnished in an untruthful manner by false witnesses [Thomas Aquinas 2016, 189-90]. In his opinion, the judge should not be guided only by the outcomes of collected evidence, but, having in mind his duty to establish the truth, he should pass a judgement aligned with the objective state of affairs and

based on his internal conviction, even if the proofs seem to contradict it.[10] Further, St Thomas teaches that proofs were legitimately required in a process to help the judge establish the true state of affairs. However, according to the saint, in most common cases, the proceedings were not even necessary. Because if, as he justifies, the judge knew the truth, then he was not bound by the evidence. However, this did not entail the reduction of evidence or diminishing its importance. The point was to pursue the fundamental task of exposing the truth [ibid., 190].

Considering the problem of accepting a single testimony by the judge on the basis of "circumstances of persons and things," there is an irresistible impression that this type of concept adopted in canon law was inspired by the long and rich tradition going back to the period of the early Church. This concept seems to have surfaced especially in the teaching of St Paul. In his first letter to Timothy, the apostle writes with eloquence and in an uncompromising manner, "The faults of some people are obvious long before they come to the reckoning" (1 Timothy 5:24).

3. "Circumstances of persons and things" in the case-law of apostolic tribunals

The discussed approach of the ecclesiastical legislator has made its way into the contemporary court practice [Pinto 2001, 908]. When studying the case-law of the Roman Rota, particularly cases involving the simulation of marital consent in connection with Canon 1101 § 2 CIC/83, I. Zuanazzi pointed out that the "circumstances of persons and things" may primarily generate an auxiliary value, as a means of confirming, interpreting, or supplementing the parties' declarations or witnesses' depositions. She noted that in certain situations *adiuncta causae* could even acquire independence and underlay the presumption of an advanced thesis. According to the Italian researcher, these circumstances might even be regarded as having a decisive value for supplying full proof, even if other typical evidence for the simulation of matrimonial consent is absent. Combined with

[10] The discussed issue reveals an important problem of defining and maintaining the relationship between seeking the substantive truth and formal truth. It remains topical and applies not only to matrimonial processes under canon law but also to the secular justice system in general. See more in: Mierzejewski 2013, 141-43.

other evidentiary material, the clues (*indica*) relating to *adiuncta causae,* which were incomplete or insufficient, gained a full proof value and were sufficient to achieve moral certainty in the case [Zuanazzi 2011, 221-22].

An example that exposes the mechanism of this construct well, considered the "circumstances of persons and things" in connection with a single testimony, is a criminal case investigated by the Supreme Apostolic Tribunal of the Dicastery for the Doctrine of the Faith. The case concerned a member of the clergy who was accused of committing *delictum versus sextum cum minore*. He was eventually found guilty and sentenced. The provisions that were relied upon as the legal basis for the judgement and its justification were contained in Canon 1720, 3º and Canon 1573 CIC/83 and Article 6 § 1, no. 1.[11]

The decree emphasized an extremely interesting aspect that even the victim's testimony alone may suffice for conviction. The grounds for the judgement were also significant. The Apostolic Tribunal confirmed the principle of judicial freedom in canonical processes. Consequently, after a fair assessment of the credibility and strength of the depositions, the judge may also rest his decision on the testimony of a single witness if, in accordance with Canon 1573 CIC/83, the relevant "circumstances of persons and things" so persuade. This is even more relevant because, as it was duly pointed out, such crimes are very rarely committed in the presence of witnesses. The tribunal further argued in the grounds that if this exception provided for in Canon 1573 CIC/83 regarding the admissibility of a single witness had not been applied in this type of case, the perpetrators of such crimes would have almost always avoided punishment [Papale 2021, 93].

In this case submitted to examination by the Dicastery for the Doctrine of the Faith, it was noted that the statements of the accused also represented a certain evidentiary value. Hence, they could also be used as the basis for shaping the judge's free opinion on the case. Although they cannot match the impact of the witness's testimony, they can still be treated as a source of evidence if thoroughly inspected for subjective credibility beforehand. In the discussed case, the tribunal also demanded *ex officio* that

[11] Congregatio pro Doctrina Fidei, *Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra fidem necnon de gravioribus delictis* (21.05.2010), AAS 102 (2010), p. 419-34 [hereinafrer: SST].

psychological examination be carried out of the alleged victim. As a result, their credibility and capacity to testify were confirmed. The person was also trusted as perceiving facts correctly, as well as being able to provide an adequate and correct account thereof [ibid.]. In conclusion, the determination of "circumstances of persons and things," as provided in Canon 1573 CIC/83, in the highlighted case will pertain to the hearing of the accused and psychological examination of the accused and the victim, and to some extent, to the nature and circumstances of the perpetrated crime.

In another case investigated by the dicastery under Canon 1339 § 1-3 and Canon 1717 CIC/83 and Article 6 § 1, no. 1 SST, the facts were similar on the face of it, but the tribunal's decision was different. A clergyman was accused of committing a crime *contra sexum* against two minors. One of the parents of the alleged victim filed a lawsuit. The accused denied the allegations vehemently. The tribunal was confronted with the charges only but lacked the victims' deposition. Accordingly, the dicastery refrained from a decision and requested the competent bishop to warn the accused and exercise supervision over him, in accordance with Canon 1339 § 1-3 CIC/83. In the grounds, the tribunal emphasized that the legal guardian of one of the minors who had brought charges was only a *de relato* and not *de visu et de auditu* witness.[12] For this reason, the bishop having jurisdiction over the accused was requested to hear the alleged victim. This, however, did not happen because one of the parents opposed. The other of the alleged victims did not agree to meet or disclose their personal details despite numerous attempts to establish contact. Therefore, the dicastery dropped the criminal case against the suspect. They only ordered the suspect's superior to issue a canonical warning and place him under constant supervision [Papale 2021, 49]. It seems that in the reviewed case, the firm denial of the accused, the absence of the accuser's consent to hear the alleged victim, failure to disclose the identity of the other one, and the *de relato* deposition of one of the guardians proved insufficient as grounds to resort to the provision of "circumstances of persons and things persuade otherwise" contained in Canon 1573 CIC/83.

[12] For more on the sources of witnesses' knowledge and the differences among them, see Grzywacz 1985, 28-29.

The discussed procedural construct of "circumstances of persons and things" found in Canon 1573 CIC/83 facilitated the occurrence of "natural space" for judge's flexible activity and relative freedom. The judge, based on one deposition in the case, is able to engage, based on the provision the said canon, in seeking and obtaining new means of evidence in order to finally compose full proof that would help settle the case [Bettetini 2018, 53-54].

Conclusion

When designing Canon 1573 CIC/83 and the evidentiary power of testimony in the canonical process, the legislator relied *expressis verbis* upon the ancient procedural rule *testis unus testis nullus*, which means that a single account of a single witness does not enjoy the status of full proof. Nevertheless, the same canon provides that the rule does not have an absolute character, and the legislator allowed for deviations in two indicated situations [Rozkrut 2015, 109-10].

At its core, the rule *testis unus testis nullus* expressed the negative will of the legislator. For long, it had distrusted the testimony of a single witness, especially when it was the only means of evidence afforded to the court. The regulation prohibiting the acceptance of a single testimony was intended to protect against excessive subjectivity or bias, often readily manifested by witnesses, and even directly against the risk of false accusations and other manipulation of evidence. In this context, the rule *testis unus testis nullus* was supposed to guarantee that the principle of objectivity be adhered to. Still, critics of the unconditional adherence to inadmissibility of a single testimony raise the concern of limited freedom of judges [Grzywacz 1985, 36-37]. In fact, the establishment of this requirement in Roman imperial law, which, after all, inspired the ecclesiastical legislator, too, was attributed to the actual transition to the legal assessment of evidence [Zilletti 1963, 150]. In consequence, it was argued that strict application of the rule was likely to create injustice, especially when key facts in the case could be confirmed by relying upon a single testimony, i.e. in the absence of any other evidence [Grzywacz 1985, 36].

No doubt, given the insights listed above, the role and responsibility of the judge is significant. He is required to adopt a very prudent and

cautious approach, as well as having appropriate experience to allow him to assess the circumstances properly and recognize grounds for accepting the testimony of one witness [Milotić 2019, 857].

The construct of "qualified witness" and "circumstances of persons and things persuade otherwise" found in Canon 1573 CIC/83 allows the judge to depart from the "rigid" application of the two-witness rule. It can therefore be viewed as an appropriate form of adjustment to the application of the rule *testis unus testis nullus* in the canonical process, while respecting its undeniable relevance and *ratio legis.* It seems that the exceptions proposed by the ecclesiastical legislator serve as a kind of "safety valve" in the canonical process and embody the principle of free assessment of evidence.

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