THE INTELLECTUAL PREPARATION FOR THE CANON OF 1215 AGAINST ORDEALS

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Among the most important of the deliberations of the Fourth Lateran Council convened by Pope Innocent III in 1215 was canon 18, which dealt with the problem of ordeals.[1] In the general context of prohibiting clerics from involving themselves in judicial decisions which resulted in the shedding of blood, the pope and his assembled bishops spoke authoritatively against judicial proofs by ordeals. These practices were divided into two classes: the unilateral, represented by the hot and cold water and the hot iron trials, and the bilateral, represented by the judicial duel. The first category of unilateral ordeals was merely removed from ecclesiastical auspices by forbidding priests to bless or consecrate the elements. Their use, however, in secular justice was not specifically disallowed. In the second category of bilateral ordeals the Council renewed the censures of former councils against judicial duels.[2] In the light of canonical tradition this prohibition most likely envisaged secular as well as ecclesiastical justice.

Historians of ordeals generally consider the Council of 1215 to be the turning point in the disappearance of these customary practices from European law.[3] In the realm of legal practice the prohibitions of Innocent III had immediate and significant effect against certain unilateral proofs at least in England, Normandy, and Denmark.[4] Although such customary trials antedated the Christian era, in mediaeval practice the blessing and consecration of the elements by the clergy played an important part in their operation. Withdrawal of the clergy placed

[1] J. D. Mansi, *Sacrorum conciliorum nova et amplissima collectio* (Venice, 1778), XXII, 1006–1007. Other customary proofs not mentioned by the Council but found in practice are the unilateral walking on glowing coals and the eucharistic ordeal, and the bilateral cross ordeal.

[2] Apparently these censures refer to former prohibitions against tournaments: for example, c.14 of the Lateran Council of 1139 (Mansi, XXI, 530) and c.20 of the Lateran Council of 1179 (Mansi, XXII, 229).

[3] Of the numerous works on the general subject of mediaeval ordeals which serve as introduction to this study may be cited the older classic, Frederico Patetta, *Le ordalie* (Turin, 1890) and the recent and magisterial Hermann Nottarp, *Gottesurteilstudien*, Bamberger Abhandlungen und Forschungen, 2 (Munich, 1956). Nottarp makes abundant use of Petrus Browe, *De ordaliis*, Textus et documenta in usum excercitationum et praelectionum academicarum, Series theologica, 4 et 11 (Rome, 1932, 1933), a comprehensive collection of sources, which was not available to me. Kurt-Georg Cram, *Iudicium belli: Zum Rechtscharakter des Krieges im deutschen Mittelalter*, Beihefte zum Archiv für Kulturgeschichte, 5 (Münster-Cologne, 1955), is a recent work which treats judicial battle. Two monographs which concentrate on the ecclesiastical opposition to ordeals are S. Grelewski, *La Réaction contre les ordalies en France depuis le IX^e siècle jusqu'au Decret de Gratien*, Thesis, Faculty of Catholic Theology (Strasbourg, 1924), and Charlotte Leitmaier, *Die Kirche und die Gottesurteile*, Wiener rechtsgeschichtliche Arbeiten, 2 (Vienna, 1953).

[4] Thomas Rymer, ed., *Foedera, conventiones, litterae* (London, 1816), I, 154; *Très ancien coutumier*, ch. 38, 51, and 71, in E.-J. Tardif, ed., *Coutumiers de Normandie* (Rouen, 1881), I, 33, 42, and 67; Niels Skyum-Nielsen, ed., *Diplomatarium Danicum, 1211–1223* (Copenhagen, 1957), I Række, 5 Bind, 141.

serious handicaps on their popular effectiveness.[5] Trial by battle was practiced more tenaciously, particularly because it was the customary proof in cases involving serfdom,[6] but King Louis IX's famous ordinance abolishing judicial duels in the French domain was obviously inspired by ecclesiastical precedent.[7] Likewise, Emperor Frederick II forbade both kinds of customary proofs throughout his lands in Sicily, although religious influence is not immediately apparent.[8] To be sure, neither unilateral nor bilateral ordeals disappeared altogether from judicial practice; note the persistence of the water ordeal in witches' trials as late as the seventeenth century. Nor was the Lateran Council solely responsible for the disappearance of ordeals in practice. Their decline must be viewed in the context of a general movement towards more rational legal procedure as exemplified by the use of the inquest in ecclesiastical and French law, the development of jury trial in English law, and the appearance of merchant law throughout Europe.

In the development of the church's legal position towards ordeals the canon of 1215 has even greater significance. Prior to 1215 two points of view concerning the matter may be discerned in the canons of councils and the decretals of popes. Against such practices authoritative statements may be found as early as the popes of the ninth century[9] or the Emperor Constantine.[10] These prohibitions were renewed at various times by the councils and the papacy up through the twelfth century. On the other side, as early as the eighth century certain councils under the pressure of legal practice published a number of canons which permitted various types of ordeals and were preserved in collections of church law.[11] While succeeding popes and councils were usually unfavorable to these practices, on occasion they could be found admitting exceptions to the general prohibition. As late as the eleventh and twelfth centuries Popes Gregory VII,

[5] For the theoretical foundations which supported the practice of both bilateral and unilateral ordeals in mediaeval society see the discussion of Paul Rousset, "La croyance en la justice immanente à l'époque féodale," *Le Moyen Age*, LIV (1948), 235 ff.

[6] Pierre Petot, "La preuve du servage en Champagne," *Revue historique de droit français et étranger*, XIII (1930), 466–469; Paul Fournier, "Quelques observations sur l'histoire des ordalies au moyen âge," *Mélanges Glotz* (Paris, 1932), I, 374, 375.

[7] Jourdan, DeCrusy, Isambert, *Recueil général des anciennes lois françaises* (Paris, 1822), I, 284–290; Paul Viollet, ed., *Les Établissements de Saint Louis* (Paris, 1881), I, 483–493, II, 8 ff; Philippe de Beaumanoir, *Coutumes de Beauvaisis*, ed. A. Salmon (Paris, 1900), II, no. 1148. Cf. Nottarp, *Gottesurteilstudien*, p. 377.

[8] *Constitutiones regni Siciliae*, II, 31, 33, in J.-L.-A. Huillard-Bréholles, ed., *Historia diplomatica Frederici secundi* (Paris, 1854), IV(1), 102, 105, 106. Frederick called them superstitious and irrational.

[9] Among the more important examples, Pope Nicholas I in 867 prohibited the judicial duel in the affair of King Lothair II and Queen Teutberga, although he countenanced the ordeal of hot water. Jaffé-Loewenfeld, *Regesta pontificum Romanorum* (Leipzig, 1885), no. 2872; Gratian, *Decretum*, C.2 q.5 c.22 *Monomachiam* (references in Gratian will be cited, as here, solely by the method of allegation approved by the Institute of Research and Study in Medieval Canon Law). Pope Stephen V between 886 and 889 prohibited unilateral ordeals such as hot iron and cold water in a case of infanticide. Jaffé-Loewenfeld, no. 3443; C.2 q.5 c.20 *Consuluisti*. Although the pope actually misunderstood the nature of such ordeals, thinking them to be means of torture to produce confession rather than evidence in themselves, the wording of his decretal imposed a general censure.

[10] Constantine's prohibition of gladiatorial contests: *Cod.* 11.44.1 *Cruenta*.

[11] A convenient list of these councils may be found in Leitmaier, *Die Kirche*, pp. 38–40.

Eugenius III, and Alexander III permitted ordeals in special instances.[12] Even Pope Innocent III prior to the Council of 1215 was ambivalent on the subject.[13]

After the pronouncement of 1215, however, the authoritative stand of the church against customary proofs was firm.[14] In 1222 Pope Honorius III cleared up any ambiguity in the Lateran decrees by extending the prohibition of unilateral ordeals specifically into secular law.[15] It is true that the frequent reissuing of the censures by later popes and councils indicated that the church was having difficulty in enforcing its stand in practice, but in theory the official statements held true to the position of 1215. In theory, even more than in practice, the Fourth Lateran Council of Pope Innocent III may be considered as marking the beginning of the end of ordeals in European law.

The hesitant attitude of popes and councils towards ordeals before 1215 suggests a certain amount of debate within the intellectual circles of the church. The decisiveness of the position of 1215 suggests significant preparation by those who opposed the customary practices. Undoubtedly this intellectual debate and preparation took place in the growing movement of schools and universities in the twelfth century, particularly those at Bologna and Paris. To appreciate the issues of the debate and the solutions attained, let us examine the teachings of the faculties of Roman law, canon law, and theology at Paris and Bologna in the century preceding the Lateran Council. Such an inquiry will illuminate the intellectual background for the decree against ordeals in general and may offer some suggestions of influence on the rôle of Pope Innocent III in particular.

Since the revival of Roman law studies at Bologna in the early twelfth century the mediaeval Romanists generally ignored the whole problem of ordeals. Such customary proofs were non-Roman in origin and therefore of little interest to the student of Roman law. However, certain manuals on the procedure of judicial duels do appear among the writings of the Romanists. Among these are a treatise falsely attributed to Hugo of Porta Ravennate and another written by Roffredus of Benevento (d. 1248); both writings are clearly of Lombard origin.[16] From the early Middle Ages the Lombards were reputed to be strong advocates of combat as a means of deciding many legal points.[17] Both pseudo-Hugo and Roffredus appear to have written their treatises as Lombardists and, as far as is known, made

[12] Cf. Nottarp, *Gottesurteilstudien*, pp. 340–342. For additional references to Eugenius III and Alexander III, see below, n. 111, n. 97, n. 122, n. 123.

[13] Nottarp, *Gottesurteilstudien*, pp. 143, 144, 342, 343.

[14] An exception may be found in Pope Gregory IX's renewal of the statutes of Benevento which recognized trials of hot iron, water, and duels. *Ibid.*, p. 144.

[15] Pope Gregory IX, *Decretales* (hereafter cited as X), 5.35.3 *Dilecti filii;* Augustus Potthast, *Regesta pontificum Romanorum* (Berlin, 1874), no. 6910.

[16] *Summula de pugna et modis purgationum criminati* in Augusto Gaudenzi, *Bibliotheca iuridica medii aevi* (Bologna, 1888), I, 3–6; *Summa de pugna* in Patetta, *Le ordalie*, pp. 480–492. For a general discussion see Hermann Kantorowicz, "De pugna: La letteratura longobardistica sul duello giudiziario," *Studi di storia e diritto in onore di Enrico Besta* (Milan, 1931), II, 3–25.

[17] In 731 King Liutprand complained that he was powerless to abolish judicial duels because they were so deeply ingrained in Lombard custom. *Liutprandi Leges*, Anni XIX, c.118 in Franz Beyerle, ed., *Die Gesetze der Langobarden* (Weimar, 1947), 282. Cf. Nottarp, *Gottesurteilstudien*, pp. 52–53.

no attempt to incorporate this device into Roman legal procedure. Only Azo, writing at Bologna about 1205, granted judicial duels the slightest attention.[18] He definitely rejected them as legal proof, adopting as his authority Constantine's prescription against gladiatorial combats.[19] After 1215 the *Glossa ordinaria* of Accursius simply condemned them with theological arguments.[20] The Romanists of the twelfth and early thirteenth centuries were preoccupied with the re-establishment of ancient Roman jurisprudence. To them full and clear legal proof consisted mainly of written instruments and witnesses. Some discussion persisted as to the precedence of these two means. Certain writers followed Justinian's preference for documents, others favored witnesses,[21] but all of their discussions concerning proof were centered on the two factors.[22] The Romanists realized, however, that full proof was not always possible. Azo stated plainly that in criminal cases when the plaintiff was not able to establish complete evidence the defendant was immediately acquitted, because it was preferable to allow the guilty to escape than to punish unjustly the innocent.[23] In civil cases the Romanists generally recognized a category of semi-complete proof which included certain kinds of evidence, such as presumptions, notoriety, or one witness, instead of two, which constituted full proof. In the case of certain semi-complete evidence the judge could assign an oath (*iusiurandum*, *iuramentum*, *sacramentum*) to one of the parties, and the case would be decided on the basis of that oath.[24] Intricate rules were drawn up to determine whether the oath should be taken by the plaintiff or the defendant. By the time of Azo this judicial oath of the Romanists was called *purgatio* and contained marked similarities to the canonical purgation of the ecclesiastical courts. It is significant that within this fairly extensive scheme of full and semi-complete legal proof the Romanists of the twelfth and early thirteenth centuries made no mention of the contemporary practices of ordeals. One might say that, except for the bare references of Azo to Lombard duels, there was a conspiracy of silence against these non-Roman devices.

[18] Azo, *Lectura in codicem* to *armata vi: Cod.* 4.10.9 *Negantes* (Paris, 1581), p. 275; *ibid.*, to *athletis: Cod.* 8.17.5 *Spem*, p. 631.

[19] *Ibid.*, to *Cod.* 11.44.1 *Cruentes*, p. 769.

[20] Accursius, *Glossa ordinaria* to *nisi domino committente: Dig.* 9.2.7 *Qua actione*, par. 4.

[21] On the side of witnesses which was becoming increasingly characteristic of the mediaeval Romanists was Placentinus (d.1191), *Summa codicis*, IV, 20 (Mainz, 1536), 151. For the general problem see Jean Philippe Levy, "La formation de la théorie romaine des preuves," *Studi in onore di Siro Solazzi* (Naples, 1948), pp. 418–438.

[22] Among the many mediaeval discussions, Placentinus' statement may be taken as representative: "In summa notandum est quoque illud, quod et in accustationibus opus est probationibus luce clarioribus, sive instrumentis indubitatis, sive testibus viginti non minoribus." *Summa*, IV, 19, p. 151.

[23] Azo, *Summa codicis*, IV, 1 (Lyons, 1576), 60^{vb}, and *Lectura* to *testibus idoneis: Cod.* 4.19.25 *Sciant*, p. 286.

[24] For example: *Excerpta legum edita a Bulgarino causidico* (written before 1148), in Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter* (Innsbruck, etc., 1905–1931), IV(1), 11; Vacarius (*ca* 1149), *Liber Pauperum*, IV, 2, F. de Zulueta, ed. (London, 1927), p. 112; Hermann Fitting, ed., *Summa codicis des Irnerius* (*Summa Trecensis, ca* 1150), IV, 1 (Berlin, 1894), 70; Placentinus, *Summa*, IV, 1, p. 133; Azo, *Summa*, IV, 1, fol. 60va; *Lectura* to *Cod.* 4.1.3 *In bonae fidei*, p. 254.

During the twelfth and early thirteenth centuries an increasing amount of Roman law was incorporated into the legal system of the church. In the realm of precedure the canonists by 1215 had generally adopted the Romanist emphasis on written instruments and witnesses as principal means of proof. Where these means were lacking or insufficient the canonists possessed an ancient device known as purgation by oath or *purgatio*. The offer of an oath as evidence had its roots in the apostolic statement that "an oath for confirmation is to them an end of all strife"[25] and was utilized particularly in cases involving the clergy. Ecclesiastical use of such purgation undoubtedly encouraged similar practices in Roman law, but in both systems of jurisprudence it was regarded only as a last resort after all means of full proof by documents and testimony had failed.[26] On the other hand, the canonists fell heir to the practice of ordeals, which enjoyed the sanction of certain popes and councils in the past. Unlike the Romanists, the church lawyers were obliged to devote considerable attention to the problem.

The authoritative statements of the popes of the ninth century against ordeals were well known to the canonists of the twelfth century. Following the lead of the popes, the canonists of this period were on the whole hostile towards such customary practices. Ordeals were usually assigned to the category of purgations, that is, semi-complete proof only to be used when full proof was lacking. By the middle of the twelfth century they were termed common purgations (*purgationes vulgares*), i.e., originating from popular practice, to distinguish them from oaths or canonical purgations (*purgationes canonicae*), which arose from regular canonical tradition.[27] Sometimes they were identified as *iudicia peregrina* or judgments foreign to the law of the church.[28] Nonetheless, the collections of canon law contained a number of ancient canons and decretals permitting ordeals in certain cases. These statements were authoritative and could not be lightly dismissed. To the canonists therefore fell the task of reconciling these conflicting authorities. Moreover, certain popes and councils of the eleventh, twelfth, and early thirteenth centuries had countenanced such proofs on occasion, and the pressure of customary legal practices was still strong on the church. The problem of these conflicting sources and contemporary legal practices encouraged among the canon lawyers an attitude of hesitancy towards ordeals.

This ambivalent attitude may be found as early as Ivo (d. 1115), bishop of Chartres and an influential compiler of canon law. In his collection of church law

[25] Heb. vi. 16.

[26] For example: Bernard of Pavia (1191–1198), *Summa decretalium*, II, 12 and 17, E. A. T. Laspeyres, ed. (Ratisbon, 1860), pp. 43, 44, and 51, 52; Richardus Anglicus (1196), *Summa de ordine iudiciario* in Wahrmund, *Quellen*, II (3), 39–41; *Ordo "Invocato Christi nomine"* (*ca* 1200) in Wahrmund, *Quellen*, V (1), 91, 92, 120, 121; *Summa de ordine iudiciario* (attributed to Damasus, *ca* 1215) in Wahrmund, *Quellen*, IV (4), 40, 42.

[27] This distinction appears to have been introduced first by Rufinus (1157–1159), *Summa decretorum*, to C.2, q.5, H. Singer, ed. (Paderborn, 1902), p. 248. It was inspired by the terminology of C.2 q.5 c.7 *Mennam*. Cf. the explanation of Stephen of Tournai (*ca* 1160), *Summa decretorum* to C.2 q.5 c.7 *Mennam*, ed. J. F. von Schulte (Giessen, 1891), p. 170.

[28] For example, the decretal of Pope Lucius III (1184–1185) found in X 5.34.8 *Ex tuarum*. Cf. the explanation of *peregrina* in this decretal by Bernard of Parma (*ca* 1241) in the *Glossa ordinaria*.

Ivo assembled the principal authorities against ordeals, but he also included canons favorable to hot iron, boiling water, duels, and cross ordeals. That these compilations reflect Ivo's hesitations about customary proofs is confirmed by his letters. On five different occasions Ivo wrote letters attacking the practice of various ordeals. His most famous was a letter to Hildebert, bishop of Le Mans, urging the harassed prelate not to submit to the hot iron proof desired by his tormentor, King William Rufus.[29] On four other occasions Ivo condoned or permitted the use of ordeals; e.g., in a letter to the same Hildebert he approved of a hot iron trial of a man accused of carnal relations with the mother of his future spouse.[30] Generally hostile to ordeals, Ivo permitted them in cases where all normal means of proof had been exhausted.[31]

Ivo's hesitancy was reinforced by the authority of the *Decretum* of Gratian completed about 1140 at Bologna. Like Ivo, Gratian assembled the major authorities condemning ordeals. These included the decretal *Monomachiam* (867) of Pope Nicholas I, which prohibited judicial duels as tempting God, the Biblical example of David and Goliath notwithstanding;[32] the decretal *Consuluisti* (886–889) of Pope Stephan V, which condemned the trials of hot iron and water as superstitious inventions foreign to the traditions of the sacred canons and fathers;[33] and an excerpt from a decretal of Pope Alexander II (1063) which prohibited hot and cold water and hot iron proofs as customary and popular inventions and therefore devoid of canonical and apostolic sanction. This last authority Gratian confusingly joined to a decretal *Mennam* of Pope Gregory I.[34] In opposition Gratian included three authorities favoring certain kinds of ordeals: the canon *Sepe contingit* of the Council of Worms (868), which permitted the eucharistic ordeal to detect theft within a monastery;[35] the canon *Statuit* of the Synod of Seligenstadt (1023), which permitted a divine judgment in an accusation of adultery;[36] and the canon *Si episcopo* of the Council of Worms (868), which allowed bishops and priests to clear themselves of false accusations through the eucharistic ordeal.[37]

Later editors of the *Decretum* added to the original text further material known as *paleae*. By the time of Rufinus of Bologna (1157–1159) two *paleae* were inserted which supported Gratian's favorable tendencies towards ordeals.[38] These included the canon *Nobilis homo* of the Council of Tribur (895), which assigned purgation by oath to the freeborn and purgation by hot iron or water to the unfree,[39] and the canon *Qui presbiterum* from the Council of Mainz (847), which in

[29] Ivo of Chartres, *Epistolae*, no. 74 in *P.L.*, CLXII, 95–96.

[30] *Ibid.*, no. 232 in *P.L.*, CLXII, 235.

[31] This is the general conclusion of Grelewski, *La Réaction*, pp. 70–83, who has assembled and analyzed the material of Ivo of Chartres.

[32] C.2 q.5 c.22 *Monomachiam.*

[33] C.2 q.5 c.20 *Consuluisti.*

[34] C.2 q.5 c.7 *Mennam.*

[35] C.2 q.5 c.23 *Sepe contingit.*

[36] C.2 q.5 c.25 *Statuit.*

[37] C.2 q.5 c.26 *Si episcopo.*

[38] Rufinus appears to be the first to refer to these *paleae*, *Summa* to C.2 q.5, p. 248.

[39] C.2 q.5 c.15 *Nobilis homo.*

cases involving the murder of a priest similarly designated purgation by oath for free men and ordeal by fire for serfs.[40] Gratian's hesitancy was not merely a matter of assembling contradictory legal statements. After listing the decretal *Consuluisti*, which condemned hot iron and water proofs, Gratian asked whether this prohibition included all ordeals or merely the two specified.[41] He then inserted a Scriptural quotation from Numbers v.12–28 which described a proof designed for jealous husbands to test the fidelity of their wives by means of bitter waters administered by priests.[42] This Biblical example contained several features similar to an ordeal and thereby cast doubt on the universal character of the papal prohibition. Although Gratian's final judgment in this apparent conflict of authorities appears to have suppressed the Scriptural example in favor of the papal decree, nonetheless the whole question of these customary proofs was kept open.[43]

For the remainder of the twelfth century the *Decretum* of Gratian became the standard text of canon law. The canonists of this period devoted their writings to commenting on, teaching, and developing its main principles. In these works appeared the hesitations of the canonists engendered by conflicting texts and contemporary practice. As late as the 1160's the *Summa Parisiensis* was still considering Gratian's question whether the papal decrees against certain devices implied a general prohibition of all ordeals. In particular the author argued for the cold water trial.[44] In a similar manner the *Rhetorica ecclesiastica*, also from Paris (1160–1180), merely listed the authorities pro and con without coming to a certain decision.[45]

Strangely enough, the few types of customary proofs recognized by Gratian were generally disapproved by the consensus of later canonist opinion. The eucharistic ordeal, which was formerly permitted to monks, priests, and bishops, was ruled of no present force by a number of canonists beginning with Rufinus.[46] Only the Parisian *Summa: Tractaturus magister* (1175–1191), generally more lenient towards customary practices than others, declared this proof more effective for establishing innocence than guilt.[47] The divine judgment permitted in cases of adultery was considered abrogated by Rufinus and others.[48] Huguccio

[40] C.17 q.4 c.24 *Qui presbiterum.*

[41] *Dictum Gratiani post* C.2 q.5 c.20.

[42] C.2 q.5 c.21 *In libro.*

[43] *Dictum Gratiani post* C.2 q.5 c.21. Cf. Gabriel LeBras, "Les Écritures dans le Décret de Gratien," *Zeitschrift der Savigny Stiftung für Rechtsgeschichte*, Kanon. Abteilung, XXVII (1938), 66.

[44] *Summa Parisiensis* to C.2 q.5 *dictum post* c.20, T. P. McLaughlin, ed. (Toronto, 1952), p. 107.

[45] *Rhetorica ecclesiastica* in Wahrmund, *Quellen*, I (4), 59–60.

[46] Rufinus, *Summa* to C.2 q.5 c.23 *Sepe*, p. 250, 251; Stephen of Tournai, *Summa* to C.2 q.5 c.23 *Sepe*, p. 172; "Derogatum est hodie capitulo huic, cum sic faciendo videatur quis temptare deum. Preterea suspectis non videtur esse dandum viaticum." Huguccio (*ca* 1188), *Summa decretorum* to C.2 q.5 c.23 *Sepe*, Paris Bibl. Nat. Lat. 15396, fol. 114^{vb}; Alanus Anglicus, *Apparatus: Ius naturale* (1210–1215) to the same canon states the same as Huguccio, Paris Bibl. Nat. Lat. 15393, fol. 96va.

[47] "Si hac intentione ut probatus innocensque appareas: bonum. Si hac ut per hoc probetur furtum: malum." *Summa: Tractaturus magister* to *ad probationem:* C.2, q.5 c.23 *Sepe*, Paris Bibl. Nat. Lat. 15994, fol. 37va.

[48] Rufinus, *Summa* to C.2 q.5 c.25 *Statuit*, p. 250, 251; Stephen of Tournai, *Summa* to *si duo:* C.2 q.5 c.25 *Statuit*, p. 172; Johannes Faventinus (after 1171) merely copies Stephen, Paris Bibl. Nat. Lat. 14606, fol. 59^{vb} and 60ra.

at Bologna (about 1188) simply interpreted the term "divine judgment" as ecclesiastical judgment by oath or witnesses.[49] Perhaps such opinions suggest that these particular ordeals had actually disappeared in practice. Finally, the anonymous *Summa Coloniensis* (about 1169) found that the Council of Tribur, which published the *Palea Nobilis homo* permitting hot iron and water trials for servile classes, was schismatic and hence not of great authority.[50]

When the canonists of the twelfth century turned to those ordeals, such as the hot iron, cold water, and judicial duel, which were commonly practiced but strongly censured by some canonical authorities, they made occasional qualifications and exceptions. For example, the *Summa Parisiensis*, the *Rhetorica ecclesiastica*, and the *Summa Monacensis* (1175–1178), also of the French school, explained that these proofs arose from customary practices.[51] Stephen of Tournai and the *Summa: Tractaturus* maintained that they were instituted for deterring heinous crimes.[52] For this reason ordeals, especially those of the unilateral kind, were to be limited to the servile classes according to Rufinus, *Summa Monacensis*, *Tractaturus*, and the Bolognese Bernard of Pavia (1191–1198).[53] Finally, several of the canonists applied the Augustinian principle that no one should tempt God while he has rational means at his disposal. It could then be assumed that if rational means were not available, one might be justified in tempting God in certain cases.[54] At Bologna Simon of Bisignano (1177–1179) seems to suggest that one tempted God in judicial duels only when rational deliberation was available.[55] In a passage that is somewhat ambiguous the author of *Tractaturus*

[49] "Id est, ecclesiastico, scilicet, per iuramentum vel per testes." Huguccio, *Summa* to *divino iudicio:* C.2 q.5 c.25 *Statuit*, Paris Bibl. Nat. Lat. 15396, fol. 114^{vb}.

[50] "Triburiense tamen concilium hanc servis et liberis qui ita suspecti et viles facti sunt imponit. . . . [The text of the canon follows.] Hoc concilium quia sub scismate habitum est, ideo canones eius minus cogentem autoriatatem habent. In germania tamen nostra ubi concilium habitum est adhuc ita servatur." *Summa: Elegantius in iure divino vernantia* (*Summa Coloniensis*) to C.2, Paris Bibl. Nat. Lat. 14997, fol 58^{v}.

[51] *Summa Parisiensis* to C.2 q.5 *Dictum post* c.21, p. 107; *Rhetorica ecclesiastica* in Wahrmund, *Quellen*, I (4), 60; *Summa Monacensis*, see n. 63 below.

[52] Stephen of Tournai, *Summa* to *vulgarem:* C.2 q.5 c.7 *Mennam*, p. 170; "Et si alicubi aliud inveniatur; ad terrorem dicitur, vel de servilibus personis." *Summa: Tractaturus magister* to *nam ferri candentis etc.:* C.2 q.5 c.20 *Consuluisti*, Paris Bibl. Nat. Lat. 15994, fol. 37^{rb}.

[53] Rufinus, *Summa* to C.2 q.5, p. 248; "Sciendum est quod est purgatio dupplex vulgaris et canonica. Vulgaris est ubi ferri candentis iuditium et calide et frigide aque et vomerum candentium. Iste expurgationes penitus hodie in canonibus prohibuntur quia qui talia agit deum temptare videtur. Sunt tamen quedam capitula in burcardo et in libro conciliorum que talem expurgationem approbant. Dicimus illa esse antiquata vel solomodo de purgatione servorum et infamium esse intelligenda." *Summa Monacensis* to *Deficientibus:* C.2 q.5, Munich, Staatsbibl. 16084, fol. 18^{rb}; *Summa: Tractaturus magister*, see above, n. 52; Bernard of Pavia, *Summa*, v, 29, p. 259.

[54] Augustine, *In question. Genes.*, quest. 26, also found in C.22 q.2 c.22 *Queritur*.

[55] "Hinc collige monomachiam esse prohibitam cum deum temptare sit illicitum. Scriptum est enim: non temptabis dominum deum tuum, et hoc intelligas dum habent quod rationabili consilio faciant. . . . " Simon of Bisignano, *Summa decretorum* to *Deum solomodo temptare videantur:* C.2 q.5 c.22 *Monomachiam*, Paris Bibl. Nat. Lat. 3934A, fol. 66^{rb}. The *Summa* of Simon exists in two versions. The version of London, Brit. Mus. Addit. 24659, fol. 13^{rb}, does not contain the key phrase, "dum habent . . . faciant." The version, however, of Bamberg, Can. 38, p. 28^{a} agrees with the Paris

said that such ordeals are superstitious inventions if the verdict of the case is certain but may be necessary if the verdict is inconclusive.[56] Through such qualifications the canonists were perhaps indicating their difficulty in reconciling the discordant texts.

Because of the pressures of customary legal practice the church lawyers were forced to devote particular attention to the problem of judicial duels. The nature of these pressures is well illustrated by the career of the canonist Stephen of Tournai. In his *Summa decretorum*, written in the 1160's, Stephen made only a passing and neutral reference to the question of duels.[57] But in 1179, when a dispute arose between himself, as abbot of Sainte-Geneviève of Paris, and his tenants of Rosny-sous-Vincennes over the nature of their personal services, Stephen took the case before the court of King Louis VII. In the absence of authentic charters the king ordered a judicial duel "according to the custom of the Franks." When the champions of the men of Rosny, frightened by those of Sainte-Geneviève, retired from the field, the king confirmed the servile services owed by the losers of the ordeal. The affair was witnessed by an imposing array of the Parisian clergy, including the abbots of Saint-Germain-des-Prés and Saint-Denis and the dean and archdeacon of Notre Dame, and the decision was reconfirmed in charters from Popes Lucius III and Clement III.[58] In the twelfth and thirteenth centuries such an affair was not at all unusual in Paris.[59]

In general the canonists attributed the origin of judicial duels to customary or Lombard practices.[60] While none would go as far as to permit unequivocally these

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manuscript and then adds the phrase: "unde actori debent negari sacramenta non reo qui invitus ad pugnam accedit."

[56] "Est adinventio supersticiosa ubi certa est iuris censura, ut hic; necessaria ubi incerta . . . , utilis: et hec dispensationis: minuendo . . . provisionis: mutando . . . rigoris: addendo. . . . " *Summa: Tractaturus magister* to *supersticiosa adinventione:* C.2 q.5 c.20 *Consuluisti*, Paris Bibl. Nat. Lat. 15994, fol. 37^{rb}. The ambiguity of the passage lies in the term *censura iuris*, which I have interpreted to mean the "judgment" or "verdict" of the case in order to harmonize this passage with the principles of Augustine. This interpretation is further substantiated because the author of *Tractaturus* himself later quotes the principles of Augustine in the same passage: "*deum temptare.* dum habent quid faciant, *xxii q.ii queritur.*"

[57] "*Monomachiam*, id est, singulare certamen duorum. Monos namque unum, machia pugna interpretatur." Stephen of Tournai, *Summa* to C.2 q.5 c.22 *Monomachiam*, Paris Bibl. Nat. Lat. 3912, fol. 42^{vb}. This section, which is similar to that of Paucapalea (see below, n. 60), was omitted in the edition of Von Schulte.

[58] Stephen of Tournai, *Lettres*, J. Desilve, ed. (Paris, 1893), 421; Cf. J. Warichez, *Étienne de Tournai et son temps* (Paris, Tournai, 1936), pp. 53–56.

[59] For example, in Paris there was a case about 1152 concerning the abbey of Saint-Germain-des-Prés; cf. Jacques Bouillart, *Histoire de l'abbaye de Saint-Germain-des-Prés* (Paris, 1724), p. 89. In 1193 the chapter of Notre Dame of Paris claimed to use duels to defend its rights over the village of Viry-Noureuil in Vermandois; cf. B. E. C. Guérard, *Cartulaire de Notre Dame* (Paris, 1850), I, 234. As late as 1245 the papacy was asking Notre Dame to forego the judicial duels in favor of charters and witnesses. *Ibid.*, II, 394.

[60] Paucapalea (1140–1148), *Summa decretorum* to C.2 q.5 c.22 *Monomachiam*, J. F. von Schulte, ed. (Giessen, 1890), p. 60; *Summa Monacensis*, see n. 63 below. "Quod dicitur in hoc capitulo et in illo supra eadem questione *Consuluisti* videtur contrarium conseutudini ecclesie que penitentiam dat pugnatoribus et benedicit ferrum vel aquam benedictione ad hoc instituta." *Summa: Tractaturus*

means of proof in canonical courts for ecclesiastical cases, the Bolognese Master Simon of Bisignano and the French Master Sicard of Cremona (1179–1181) suggested that they were not forbidden to secular justice.[61] The Parisian *Summa: Tractaturus* permitted them to ecclesiastics who exercised temporal rights.[62] While the Parisian *Summa Monacensis* eventually rejected the legitimacy of battle under any circumstances, in the course of its discussion it enumerated a number of current arguments which would permit these trials in church as well as secular courts.[63] Even if it were agreed that canonical authority generally made judicial duelling unlawful, there remained the special case of the defendant. What if one were accused in law and the plaintiff offered to prove his case by battle or the judge imposed this means of resolving the litigation? Although the accuser or the judge might be wrong, could it be said that the defendant was sinning mortally if he were forced to defend his cause or his person? This exception to the general prohibition against judicial duelling arose in the discussions of the canonists by the time of Huguccio in the late twelfth century, and it received sympathetic treatment from Bernard of Pavia and Alanus Anglicus (1210–1215).[64] Finally,

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magister to *in lege:* C.2 q.5 c.22 *Monomachiam,* Paris Bibl. Nat. Lat. 15994, fol. 37^{rb}; Peter of Blois (*ca* 1180), *Speculum iuris canonici,* c.16, T. A. Reimarus, ed. (Berlin, 1837), pp. 40–41; Bernard of Pavia, *Summa,* V. 12, p. 226.

[61] "Scilicet, in personis ecclesiasticis, quibus arma movere non licet . . . et secundum hoc non peccant principes qui hoc fieri mandant." Simon of Bisignano, *Summa* to *in lege non assumimus:* C.2 q.5 c.22 *Monomachiam,* Paris Bibl. Nat. Lat. 3934A fol. 66^{rb} and Bamberg, Can. 38, p. 28^{a}. Not found in the version of London, Brit. Mus. Addit. 24659. "Queritur si seculares iudices licite vulgaribus utantur purgationibus. Videtur tum propter consuentudinem, tum propter institutam ab ecclesia benedictionem. Respondeo: laudarem si non fieret, quia deus ibi temptari videtur, cum etiam apostolus dicat: Iuramentum est finis omnis controversie." Sicardus of Cremona, *Summa decretorum* to C.2 q.5, Paris Bibl. Nat. Lat. 14996, fol. 50^{r} and Vatican Pal. Lat. 653, fol. 80ra.

[62] "Sed hoc toleratur in laicis et etiam precipitur a clericus (secundum quarumdam ecclesiarum consuetudines que dicunt se habere ius utriusque gladii) illud etiam aliquando precipitur personis servilibus vel quasi." *Summa: Tractaturus magister* to *in lege:* C.2 q.5 c.22 *Monomachiam,* Paris Bibl. Nat. Lat. 15994, fol. 37^{rb}.

[63] "Queri potest an seculares iudices licite utantur illa vulgari purgatione scilicet monomachia. Quibusdam videtur quoniam illicitum sit, quoniam videtur per hoc dominus temptari. Alii, ne contra multarum regionum conseuetudinem aliquid dicere videantur, dicunt quod in his constitutionibus nihil aliud prohibetur nisi ne in ecclesiastico iuditio hoc fiat. In seculari autem licite hoc fit. Unde et sacerdotes ad exorcismum aque vel ferri licenter accedunt, nam in antiquis canonibus inveniuntur statua. Unde et ecclesia in iudiciis suis admittebat ea; quod postea correctum est, sed non prohibitum est quia sacerdotes ad huius examinis exorcismum veniant ut secularis iudex eo postea utatur. Sed opponitur quod nec factum est c. u. c. d. qd'. Sed sciendum est quod necessitas alia tolerabilis alia intolerabilis. Tolerabilis est que rem illam facit licitam, et sic intercedit ad veniam sicut impellit ad culpam. Intolerabilis est que accedens non facit rem licitam. Unde dicendum est quod nullus mortale peccatum debet facere aliqua neccesitate cogente. Quare nullus monomachiam intrare debet quia temptatio dei est, quia introducta est invidia fabricante, que quia respuitur et eius effectus respuendus est? Precise ergo dicimus quod potius quilibet debet resignare querelam quam ingrediatur monomachiam." *Summa Monacensis* to C.2 q.5 c.22 *Monomachiam,* Munich, Staatsbibl. 16084, fol. 18^{vb}.

[64] Huguccio rejected this exception in law although he made some concessions in practice. See n. 74 below. Bernard of Pavia, *Summa,* v, 12, p. 226; "Peccat ergo quicumque monomachiam committit, quia nulli tali monomachiam ingredienti eucharistia danda est. Quidem tamen dicunt quod defensor

the author of the *Apparatus: Ecce vicit leo*, of the French school of the early thirteenth century, compared trial by battle with single combat which decided the outcome of a war between two contending monarchs. He could see no real difference between a judicial duel and such combat, which was justified on the same grounds as a just war, and for this reason he was doubtful of the general rule against trial by battle.[65]

Hesitancy, then, was characteristic of the attitude of many canonists towards the prohibition of ordeals in the twelfth and early thirteenth centuries. Influential writers such as Gratian, Rufinus, Simon of Bisignano, Bernard of Pavia,[66] and Alanus Anglicus of the Bolognese school, and Ivo of Chartres, Stephen of Tournai, Sicard of Cremona, the anonymous authors of the *Summa Monacensis*, *Summa Parisiensis*, the *Rhetorica ecclesiastica*, *Tractaturus magister*, and the *Apparatus: Ecce vicit leo* of the French school all made exceptions and qualifications to the general canonical prohibition. It seems as if the discrepancies among the authorities and the confusion of contemporary practice hindered them from arriving at an unequivocal solution. Possibly the author of the *Summa Coloniensis* was referring to the problem of ordeals when he complained; "When the canons are in such disagreement, it is no wonder that the opinions of the masters are so varied."[67]

By the end of the twelfth century there is evidence that some canonists were interpreting the traditional prohibitions with greater rigor. In the French school Peter of Blois, the younger (1180), considered the general problem of rival jurisdiction between secular laws and sacred canons. While as a rule canons do not supersede secular laws in affairs between secular persons, in the specific case of practices such as hot water and iron and duels this principle does not hold. These customary proofs cause their participants to sin by tempting God and are abrogated by the canons even in purely secular justice. In a fairly extensive discussion Peter of Blois admitted no exception to the ecclesiastical prohibition of ordeals.[68]

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non peccat. Licitum est enim unicuique se defendere sicut se redimere. . . . " Alanus Anglicus, *Apparatus: Ius naturale* to C.2 q.5 c.22 *Monomachiam*, Paris Bibl. Nat. Lat. 15393, fol. 96^{rb} and Paris, Mazar. 1318, fol. 129^{rb}.

[65] "Credo quod si rex habet bellum, et ille et adversarius velint mittere duos ad omne bellum faciendum, non credo quod sit monomachia. Licetne idem regi sine peccato? Videtur quia potest generale bellum etiam iusta causa sine peccato exercere. Quare scilicet monomachia non potest? Si dicatur quod potest, hoc est prohibitum. Ergo peccat in dicendo. Si non potest, ratio diversitatis non videtur posse assignari. Propter hoc mihi dubita." *Apparatus: Ecce vicit leo* to C.2 q.5 c.22 *Monomachiam*, Paris Bibl. Nat. nouv. aq. Lat. 1576, fol. 153^{rb}.

[66] It is true that, after discussing exceptions to the general rule at considerable length, Bernard states that common purgations should not be admitted today with any person. But the attention devoted to the exceptions and a lack of specific refutation still indicates that they were important issues. Bernard of Pavia, *Summa*, v, 29, 30, pp. 259–260.

[67] "In tanta canonum dissonantia, non est mirum si magistrorum diverse sunt sententie." *Summa: Elegantius in iure divino vernantia* (*Summa Coloniensis*) to C.2, Paris Bibl. Nat. Lat. 14997, fol. 58^{r}. This sentence is found in a passage which generally treats the canon *Mennam*. It is possible that the comment refers to the question of the number of oath helpers required in the canonical purgation of ecclesiastics which is also treated in the canon.

[68] Peter of Blois, *Speculum*, c.16, pp. 40–41.

Among the canonists at Bologna during the twelfth century the greatest figure was Huguccio, and his *Summa decretorum* marked a highpoint in the development of canonistic jurisprudence. Not only did Huguccio consider invalid those canons which permitted certain kinds of ordeals, as we have already seen,[69] but he also sharpened and reinforced the terminology of those authorities which attacked the customary practices.[70] His significant contribution was to take up and answer at length some of the more important exceptions offered by previous canon lawyers to the general prohibitions. Many of these solutions were then adopted by succeeding writers. Similar to Gratian's problem of whether the canons which attacked specific ordeals could be applied generally to all ordeals was the question of whether new legal devices not covered by existing canonical authority should thereby be condoned. Against these exceptions Huguccio applied the legal principles that all is prohibited which is not explicitly commanded or permitted and that interpretations or exceptions not found in the canons are not to be admitted.[71]

To the more important distinction offered by the *Summa: Tractaturus magister* that customary proofs, although superstitious, may also be necessary, Huguccio replied at length. In a discussion perhaps influenced by the *Summa Monacensis* he defined the categories of superstitious, necessary, and useful. Ordeals were definitely relegated to the status of the superstitious because they were superfluous novelties created by new laws in an area already covered by canonical legislation. In contrast to other legal inventions which could be necessary or useful, these superstitious devices should be rejected.[72] Concerning the more specific

[69] "Ergo derogata sunt illa capitula que videntur indicere vulgarem purgationem." Huguccio, *Summa* to *prohibemus:* C.2 q.5 c.7 *Mennam*, Paris Bibl. Nat. Lat. 15396, fol. 114^{vb}. See n. 46 above.

[70] "Immo prohibuerunt." *Ibid.* to *non censuerunt:* C.2 q 5 c.20 *Consuluisti*, fol. 114^{rb}. "Scilicet, prohibitio hic facta de purgatione vulgari que canonum documento sanctita non est. *Purgationis*, vulgaris, scilicet, ut quelibet prohibita intelligantur." *Ibid.* to *hoc autem:* C.2 q.*5 post* c.20, fol. 114va.

[71] "Argumentum contra: quosdam qui novas et superstitiosas adinventiones de ingenio suo faciunt. . . . Item argumentum eo ipso aliquid videri inhibitum quia non est preceptum vel permissum. . . . Item: argumentum quod interpretatio vel exceptio que non habetur in canone non est admittenda. . . . " *Ibid.* to *sancitum non est:* C.2 q.5 c.20 *Consuluisti*, fol. 114^{rb}. "Argumentum aliquid esse inhibitum eo ipso quod non est concessum. . . . Argumentum ubi lex vel canon non excipit, non excipiendum esse." Alanus Anglicus, *Apparatus: Ius naturale* to *presumendum:* C.2 q.5 c.20 *Consuluisti*, Paris Bibl. Nat. Lat. 15393, fol. 96ra and Paris, Mazar. 1318, fol. 129va.

[72] "Non removet utilem vel necessariam adinventionem. Est enim triplex adinventio, scilicet, superstitiosa, necessaria, utilis. Superstitiosa est cum super id, de quo canones aliquid statuerunt, de novo aliquid superflue invenitur, et hoc fit duobus modis: scilicet, vel novum ius infaciendo, sicut est probatio ferri candentis vel aque ferventis, ut hic, vel vetus ius male interpretando. . . . Necessaria est cum super eo, de quo canones nichil dixerunt, aliquis de novo statuitur, sicut sepe fit a domino pape ad diversorum consultationes respondendo. Utilis est quando circa illud, de quo canones aliquid statuerunt, aliquid immutatur. Et hoc fit in tribus modis: vel corrigendo, ut cum aliquid per errorem introductum, postea per manifestationem veritatis corrigetur . . . vel detrahendo, ut cum aliquid de rigore iuris per misericordiam dispensative relaxatur . . . vel addendo, et hoc duppliciter: scilicet, vel addendo religioni . . . vel addendo gravamini penarum. . . . Et nota quod adinventio que fit corrigendo dicitur correctionis, que fit detrahendo dicitur misericordie vel dispensationis, que fit addendo dicitur provisionis. Omnis ergo talis adinventio probatur. Preter superstitiosam hec enim reprobatur." Huguccio, *Summa* to *superstitiosa*: C.2 q.5 c.20 *Consuluisti*, Paris Bibl. Nat. Lat. 15396, fol. 114va. Prior to Huguccio the *Summa Monacensis* had discussed the problem in similar terms:

question of judicial duels, Huguccio followed the suggestion of the canon *Monomachiam* and disallowed any legal justification to be gained from the Biblical combat of David and Goliath. Their duel was permitted by special divine inspiration and, like the conduct of many Old Testament personages or more recent saints, their example should not set a precedent.[73] Firmly convinced of the moral guilt of a plaintiff who voluntarily offered battle, Huguccio also turned to the more thorny question of the defendant faced with such a trial. Despite the penalty of automatic loss of one's cause, Huguccio urged the defendant not to submit to battle. Under no circumstances could judicial duels be justified by reason of customary or frequent practice, any more than fornication or usury. Why then, one may ask, does the pope know about and yet not disapprove of such trials? He may tolerate judicial duels in practice, concluded Huguccio, just as he tolerates prostitutes and usurers in Rome, but this does not justify these practices in law.[74] In his answers to these practical questions Huguccio represents the

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"Adinventio quedam est superstitiosa, quedam neccesaria, quedam utilis. Superstitiosa quando id quod canonibus sufficienter statutum est, aliquis novitate quadam ostentationis aut presumptionis causa immutare querit, ut de ista vulgari purgatione que fit aqua vel igne. Necesaria est illa adinventio que eam rem, super qua nihil cautum est lege vel canone, novum aliquid constituendo diffinivit. Utilis est illa que ius pridem constitutum cum cause cognitione aliquatenus immutat addendo vel detrahendo aut commutando. Et ipsa triplex est nam aut est misericordie aut veritatis aut accelerate provisionis: quandoque enim misericordie causa a generali iure recedimus per dispensationem, quandoque veritate manifestata quod per errorem male constitutum erat corrigitur, quandoque pena legibus inserta pravitas hominun non reprimitur. Ideoque penis aliud addendum nova constitutione . . . " to C.2 q.5 c.20 *Consuluisti*, Munich, Staatsbibl. 16084, fol. 18^{vb}. For the somewhat ambiguous text of the *Summa: Tractaturus* see n. 56 above.

[73] "Argumentum non esse argumentandum ab exemplis . . . non exemplo et presertim veteris testamenti. . . . Item: argumentum non omnia exempla vel facta sanctorum patrum esse trahenda ad consequentiam; nec in omnibus sanctos esse imitandos, ut ideo nos faciamus aliqua quia ipsi fecerunt talia. . . . Sed numquid peccavit david in tali pugna? Credo cum inde commendaretur quod non peccaverit in hoc, quia divina inspiritione hoc fecit, et ideo excusatur, sicut sanson. . . . " Huguccio, *Summa* to *licet iniisse*: C.2 q.5 c.22 *Monomachiam*, Paris Bibl. Nat. Lat. 15396, fol. 114va. This interpretation of the Biblical incident was followed by many succeeding canonists. For example, see Bartholomew of Brescia, *Glossa ordinaria* to C.2 q.5 c.22 *Monomachiam*.

[74] "Ex hoc capitulo aperte colligitur quod monomachia est res illicita et prohibita. Mortaliter ergo peccat qui eam precipit, qui eam facit. Nec danda est eucharistia volentibus illam committere. De actore nullus dubitat, sed et reo non debet dari. Cum enim sit illicitum et contra deum, potius debet tollerare quelibet mala quam hoc facere. Nec potest quis defendi vel excusari consuetudine, cum sit contraria rationi. Numquid defenditur aliquis a peccato fornicationis vel usure propter multorum consuetudinem? Item: nec defenditur quis ratione multitudinis, quia non minus quis pecat fornicando quia pauci inveniuntur sine tali delicto. . . . Sed numquid papa scit talem consuetudinem et non improbat? Scit quidem et improbat de iure . . . sed non improbat de facto. Immo tolerat, sicut tolerat meretrices et usurarios in civitate, sed numquid ideo excusantur meretrices et usurarii?" Huguccio, *Summa* to *temptare:* C.2 q.5 c.22 *Monomachiam*, Paris Bibl. Nat. Lat. 15396, fol. 114^{vb}." Resume sponte, quoniam si periculum corporis vel rerum, nisi susceperit, evadere non potuit. Secundum quosdam licite suscipit, quod enim quisque facit ob suam defensionem licitum iudicatur. . . . Sed magis placet quod nulla necessitate possit clericus monomachiam suscipere, nec etiam laicus. Est enim generaliter in iure prohibitum . . . et pocius est omne malum sustinere quam malo consentire. . . . Contrarium tamen facientes propter generalem consuetudinem aliquantulum excusantur." Alanus Anglicus (1201–1210), *Apparatus* to *susceperit: 1 Comp.* 5.12.1 *Porro si*, Paris Bibl. Nat. Lat. 3932, fol. 62^{rb} and Melk 518, fol. 85ra. Also found in Tancredus (1210–1215), *Glossa ordinaria* to *1 Comp.*, Paris Bibl. Nat. Lat. 3931A, fol. 69ra.

first significant canonist to take a rigorous and uncompromising line against ordeals.

The theologians took notice of the problem of ordeals as early as the Carolingian era. The fiery Agobard, archbishop of Lyon (d. 840), subjected customary proofs of all kinds to a blistering attack,[75] but his opinions were opposed by the authority of Hincmar, archbishop of Reims (d. 856), who advocated their use in the case between King Lothair II and Queen Teutberga.[76] From the ninth century to the end of the twelfth century little attention was paid to the question by the theologians.[77] The revival of theological studies at the beginning of the twelfth century by such writers as Abelard was occupied chiefly with speculative issues, and it was not until the end of the century that theologians turned to more practical affairs. At this time a group of theologians appeared in Paris who were concerned primarily with Biblical studies and questions of practical moral behavior. Prominent among them was Peter the Chanter (d. 1197). Born to a noble family at Gerberoi in the diocese of Beauvais and schooled at Reims, Peter appeared in Paris around 1170 as a lecturer in theology. By 1184 he assumed the dignity of chanter at the cathedral of Notre Dame.[78] His writings appear to be the authorized notes of his lectures delivered at Paris in the mediaeval manner of *reportationes* and consist chiefly of a great mass of Scriptural commentaries, the *Verbum abbreviatum* (1191, 1192), devoted to moral theology, and the *Summa de sacramentis et animae consiliis* (1192–1197), concerned with dogmatic theology and cases of conscience.[79] A conscientious professor, Peter occasionally rewrote his lectures, and his written works may be found in several versions. His important *Verbum abbreviatum*, for example, exists in at least three different recensions.[80]

The problem of ordeals was a crucial issue for Peter the Chanter and one in

[75] Agobard of Lyons, *Liber contra judicium dei*, *P.L.*, CIV, 249–268; *Liber adversus legem Gundobadi*, *P.L.*, CIV, 113–126. The fullest discussion of Agobard may be found in Grelewski, *La Réaction*.

[76] Hincmar of Reims, *De divortio Lothari et Teutbergae*, *P.L.*, CXXV, 659 ff.

[77] Occasionally one finds references to ordeals among the theological literature but these appearances are brief and sporadic. For example, the anonymous writer found among the works of Hugh of Saint Victor, *Exegetica, Questiones in epistolam ad Hebraeos*, 65, *P.L.*, CLXXV, 624.

[78] F. S. Gutjahr, *Petrus Cantor Parisiensis: Sein Leben und seine Schriften* (Graz, 1899), pp. 11–17.

[79] For a recent discussion of the dates of the *Verbum* and *Summa*, see Damien Van den Eynde, "Précisions chronologiques sur quelques ouvrages théologiques du XII siècle," *Antonianum*, XXVI (1951), 235–239.

[80] The *Verbum abbreviatum* is important for the problem of ordeals and therefore the major versions should be specified: (1) The shortest version, edited in 1639 by Georgius Galopinus from three Belgian manuscripts and reprinted in *P.L.*, CCV, 21–370. (2) Marginal additions to the shortest version, best represented by such manuscripts as Paris, Mazar. 773 and Paris Bibl. Nat. Lat. 3246. Some of these additions are included in Galopinus' notes reprinted in *P.L.*, CCV, 369–528. (3) The longest version, best represented by Paris, Sainte-Geneviève 250 (Part I), Paris, Mazar. 772 (Part II), and Vatican Reg. Lat. 106 (complete). A fragment of this version (cap. 66–80) was edited by Galopinus and reprinted in *P.L.* CCV, 527–554. Because of the abundance of anecdotes concerning Reims, Van den Eynde believes that this last version was made by an interpolator working at Reims around 1200. Cf. Damien Van den Eynde, "Notices sur quelques 'Magistri' du XII^{e} siècle," *Antonianum*, XXIX (1954), 133–134. If we accept Peter's residence and studies at Reims, the Reims material should not disprove Peter's authorship of this version.

which he took characteristic personal interest. Perhaps his interest was prompted by the contemporary French school of canonists represented by the authors of the *Summa Monacensis*, *Summa Parisiensis*, *Summa: Tractaturus magister*, and *Rhetorica ecclesiastica*, who were having difficulties in taking a rigorous stand against these customary practices. We have evidence that at least one student either heard the lectures or at least knew the work of both the Chanter and the author of the *Rhetorica ecclesiastica*.[81] Often Peter was consulted at Paris in specific cases involving moral questions. We have the report of a man who was accused of murder and against whom there were strong presumptions. Offered the chance of clearing himself by the cold water trial, he sought the counsel of the Chanter. Peter advised him not to submit to the test and was rewarded for his good advice by seeing the unhappy defendant carted off to the gibbet.[82] The Chanter referred constantly to the problem of ordeals in his lectures, and we find discussions of the question scattered throughout his writings. Even when involved in Biblical exegesis[83] or sacramental theology[84] he raised the issue. An anonymous *florilegium* which excerpted the opinions of a number of masters of theology at the turn of the twelfth and thirteenth centuries reported a statement on ordeals as characteristic of the Chanter.[85] Peter's fullest and most comprehensive treatment of the problem may be found in the various versions of the *Verbum abbreviatum*.[86] In terms of length and intensity of interest he offered the most important discussion of ordeals to be found in the twelfth century.[87]

[81] M.S. Zürich, Zentralbibliothek C.58 appears to consist of the notebook of an anonymous German cleric who studied at Orléans and Paris. Among the rules of grammar, poetry on women, love, and saints, lecture notes, etc., appear a condensed version of the Chanter's *Verbum abbreviatum*, fol. 102^{va}–105^{va}, and the *Rhetorica ecclesiastica*, fol. 78^{rb}–102^{va}. The literary portions of the manuscript, excluding the *Verbum* and *Rhetoricia*, have been edited in Jakob Werner, *Beiträge zur Kunde der lateinischen Literatur des Mittelalters* (Aarau, 1905). Werner did not identify the *Rhetorica*; it was identified later by A. M. Stickler, "Iter Helveticum," *Traditio*, XIV (1958), 480–481.

[82] The anecdote is found only in Paris Bibl. Nat. Lat. 14521, fol. 154^{ra} and ^{rb} of the manuscripts of the *Summa de sacramentis*. It has been printed in Charles V. Langlois and C. Miroux, "Les manuscrits du 'Verbum abbreviatum' de Pierre le Chantre," *Journal des savants*, XIV (1916), 313.

[83] For example in commenting on the Biblical phrase, "Ye shall not tempt the Lord your God," Deut. vi. 16: " . . . sed numquid temptat qui etiam se sciens immunem a peccato se committit candenti ferro? Nonne hoc ipso quod deum sic temptat reus efficitur, et sacerdos de sua confidens coninuratione? Numquid deum videtur temptare?" Peter the Chanter, *Commentary* to Deut. vi, Paris, Arsenal 44, p. 307^{b} and Oxford, Balliol Col. 23, fol. 69^{ra}.

[84] For example, in discussing excommunication: Peter the Chanter, *Summa de sacramentis et animae consiliis*, par. 147, J. A. Duguaquier, ed., Analecta medievalia Namurcensia, 7 (Louvain-Lille, 1957), II, 355–358.

[85] "Et promotus et promovendus iudicio sanguinis potest interesse ad defendendam innocentiam, ad temperandum rigorem, ut retardet sentencie precipitationem, ut testes diligentius examinet vel examinari doceat, si iudex odit accusatum, si facto interfuit tempore, ut ex hoc sciat an iuste vel iniuste accusetur, et quanta pena sit dignus sic[ut] fecit daniel [et] nicholaus, quod de sigillo superius diximus. Idem de litteris omnes peregrini iudicii [*sic*] ut ignis, aque, monomachie, sortilegii, maleficii intelligimus." Paris Bibl. Nat. Lat. 14883, fol. 114^{v}. The opinion is identified in the margin with the seal *can.*

[86] Peter the Chanter, *Verbum*, ch. 78, *P.L.*, CCV, 226–233 (first version) and 542–548 (third version).

[87] The importance of the Chanter has been recognized by Leitmaier, *Die Kirche*, pp. 66–68 and especially Nottarp, *Gottesurteilstudien*, p. 360.

In the domain of moral theology Peter the Chanter considered ordeals clearly unlawful by Scriptural authority contained in both the Old and New Testaments: "Thou shalt not tempt the Lord thy God" (Deut. vi. 16 and Matt. iv. 7).[88] Ordeals require the miraculous intervention of God into the regular affairs of judicial procedure and constitute a flagrant tempting of God. As an exegete Peter demonstrated how a number of Biblical passages may not be interpreted to justify these customary proofs.[89] More important, he was obliged to explain how the numerous instances of divine intervention in the Old Testament did not constitute precedents for ordeals. For example, the Mosaic test of bitter waters for adultery, which caused Gratian so much trouble, was interpreted by Peter as a specific divine concession to the malice of the Jews, just as God had conceded the right of divorce.[90] The well-known miraculous stories of the Bible represent the privileges of a few and not general law.[91] Although miracles are certainly possible in our day, they are not always necessary, and therefore, ordeals are wrong because they constantly demand miracles in their administration.[92] God's promises of intervention apply only to the righteous and our present sins hinder the effectiveness of miracles today.[93] In general the New Testament has abrogated the ordeals of the Old.[94]

Although in theory Peter the Chanter condemned ordeals as immoral, it was from the realm of experience and practice that he drew the greater part of his arguments. According to the Scripture (Deut. xviii. 20, 21), if a man claims to be a prophet of God and prophesies a certain event and that event does not come to pass, that man is to be killed as a deceiver.[95] Applying this empirical test, the Chanter found ordeals wanting. To him it was a fact that customary trials often produced false judgments. In opposition to the vast mediaeval store of accounts drawn from popular lore and saints' lives which illustrated the effectiveness of miraculous ordeals, Peter began to collect accounts showing how these devices did not work.[96] Throughout his writings he delighted in telling anecdotes of the failures of ordeals. For example, Pope Alexander III once lost one of his precious vessels and forced a certain suspect to undergo the proof of the hot iron. The man was unfortunate, lost the judgment, and was compelled to make restitution,

[88] Peter the Chanter, *Verbum*, 226A and 542C.

[89] *Ibid.*, 228D and 544D; 231D and 547D; 544A.

[90] "Item hinc habemus argumentum quod sortes et huiusmodi probationes aque et ferri candentis licite sunt. Quod non est trahendum ad consequenciam, quia facta legis ammiranda et sepelienda sunt ad opera, nisi fuerunt moralia. Vel sustinuit hoc fieri dominus propter iudeorum maliciam ut libellum repudii." Peter the Chanter, *Commentary* to Num. v, Paris, Arsenal 44, p. 227^{b} and Oxford, Balliol Col. 23, fol. 14ra.

[91] Peter the Chanter, *Verbum*, 227C and 543D.

[92] *Ibid.*, 228A.

[93] *Ibid.*, 228B and 543D.

[94] *Ibid.*, 546C.

[95] *Ibid.*, 226B and 542D.

[96] For one of the larger collections in English of stories illustrating the efficacy of ordeals, see that indefatigable compiler of anecdotes, Henry C. Lea, *Superstition and Force* (Philadelphia, 1878), ch. ii and iii.

but more unfortunate was the pope when the stolen vessel was later found in the hands of the true thief.[97] A similar case happened in Orléans, but this time the falsely convicted victim was hanged before the true thief was discovered.[98] Perhaps the most striking case was the story of two English pilgrims who were returning from Jerusalem. The one diverted his path to the shrine of Saint James of Compostella; the other, on arriving home first, found himself accused by his former companion's kinsmen of having murdered him. He was put to the water test, failed, and was promptly hanged. To the amazement of all, the "murdered" companion returned home shortly thereafter.[99]

Another argument from experience was based on the manner in which ordeals were administered. In trial by battle the participants invariably chose their champions according to skill in arms. Why didn't they choose aged and decrepit men to demonstrate clearly the miracle?[100] It is no marvel that of three men accused of the same crime and therefore compelled to carry the same hot iron, the last man has the best chance to prove his innocence. Innocence is too closely connected with calluses![101] Perhaps the cold water probe was susceptible to greatest manipulation. Controversy prevailed as to the standard of judging innocence. Must the victim sink to the bottom or merely be totally submerged? Some contended that his hair need not be submerged because this did not constitute the substance of his body. A participant could be taught to blow out the air from his mouth and nose and thus sink. Finally, there was the case of the father compelled to defend his inheritance by such means through one of his sons. He privately confided to the Chanter that he had tested all of his sons before the ordeal and found one that was certain to win.[102] In a manner which anticipated the discussions of the Emperor Frederick II, Peter concluded that it was only reasonable to respect the natural properties of heat and water and not to expect through them the demonstration of the miraculous.[103]

If miraculous proofs were effective, queried the Chanter, why were they not used by the church in important affairs? Despite certain Biblical precedents, prelates and popes, on whom depend the salvation of their charges, are not chosen through lots but through the more rational procedure of election.[104] Through a single trial of the hot iron would not the church be able to prove the truth of its faith and convert the unbelievers? Peter cited the incident of a severe drought

[97] "Tamen alexander iii amiserat vas preciosum et cogit quendam suspectum purgare se iudicio ferri candentis. Ipse incidit in iudicium et cogebatur reddere usque ad novissimum quadrantem. Postea inventum est vas illud in manu alterius et compertum est priorem omino fuisse immunem. Percussit alexander iii pectus suum dicens: Bone iesu! quis diabolus decepit me ut ego miser [usus sim] diabolico illo iudicio?" Peter the Chanter, *Summa*, Paris Bibl. Nat. Lat. 14521, fol. 154^{rb} and ^{va}.

[98] Peter the Chanter, *Verbum*, 230C and 546C.

[99] *Ibid.*, 230D, 231A, and 547A.

[100] *Ibid.*, 233A and 548B.

[101] *Ibid.*, 233B and 548A.

[102] *Ibid.*, 233B and 548C.

[103] *Ibid.*, 227D, 228A and 544B. For the comparison between the Chanter and Frederick II, see Nottarp, *Gottesurteilstudien*, pp. 383, 384.

[104] Peter the Chanter, *Verbum*, 227B,C, and 543C.

that afflicted the city of Reims. In solemn procession the faithful of both sexes and all ranks carried the sacred relics around the city to gain divine favor and relief from the drought. When not the slightest cloud appeared after three days, the leader of the synagogue proposed that the Jewish torah be paraded in a similar manner. If after three days rain did not fall, the Jewish community would embrace Christianity. A number of the faithful were disposed to accept the challenge, but Master Albericus of Reims put a stop to the whole matter. Even the seductive prospect of converting the Jewish community, he contended, did not justify jeopardizing the true faith through such presumptuous means. For similar reasons Peter concluded that the church cannot entrust its position to the uncertainties of the hot iron.[105]

To be consistent the Chanter had to oppose the use of ordeals in the trial of heretics. How can the heart, where matters of faith lie, be examined by such proofs? He deplored the practice of the princes and prelates who took no notice of the confession of orthodox faith of an accused heretic but demanded the hot iron trial. Such a case happened at Paris in the presence of the king, princes, and prelates of France. The accused consented to bear the hot iron to confirm his orthodox beliefs only if the assembled churchmen could assure him that this act would not tempt God. Despite the protests of a certain Cistercian monk, Gerardus, the prelates kept their silence, and the man was speedily assigned to the flames. In general Peter vigorously opposed the death penalty in convictions of heresy; rather, he approved of the example of Samson, archbishop of Reims (1140–1161), who merely imprisoned a confessed Manichean in order to prevent him from contaminating the faithful. The combined effect of proof by ordeals and an immediate death penalty produced many abuses in the treatment of accused heretics. Cathari were not granted the customary reprieve of thirty days to reconsider their errors, and decent women in Flanders who refused to yield to the lusts of priests were inscribed in the records as Cathari and immediately executed.[106]

Peter the Chanter underscored the essential relationship between the practice of ordeals and the church. Churches lend relics and books for the consecration of the elements, and churchmen contribute the sanction of their presence.[107] As a matter of fact, without the priesthood ordeals would not be possible.[108] The obvious line of the Chanter's attack was to prohibit the clergy from any participation in these affairs. Peter had the support of canonical tradition, which forbade the participation of clerics in any affair immediately involving the shedding

[105] *Ibid.*, 229C and 546A,B.

[106] *Ibid.*, 229D, 230A,B, 231B, and 545A–D. The example of Samson was further recorded by Alberic of Trois Fontaines, *Chronica, anno* 1148, *M.G.H., SS*, XXIII, 840.

[107] "Item incidenter adiunxit de eo quod quedam ecclesie adhibent presentiam suam iudiciis peregrinis, hoc habentes ex consuetudine, non dico tamen auctoritatem et assensum, ut comodando librum et reliquias ad sacramenta et benedictiones. Sed etiam presentiam suam adhibent quedam persone in duellis immo et auctoritatem in iudicando duellis." Peter the Chanter, *Summa*, Troyes, 276 fol. 96va and ^{b}, Paris Bibl. Nat. Lat. 9593, fol. 121^{vb}. *Verbum*, 548D.

[108] *Ibid.*, 548C.

of blood. Clearly, then, priests are forbidden to extend their blessing to judicial duels, where the shedding of blood is inevitable.[109] He specifically complained about the custom of permitting champions to attend mass, although not to communicate, before the conflict. How can this practice be justified when each participant has the intent to kill his opponent? No exception should be made for the defendant who also harbors this intention and should therefore be excluded from the divine offices.[110] Particularly vexing was the custom of holding judicial duels in cases involving serfs in the very courtyard of the archdeacon of Paris. The Chanter's reply to this practice would be unmistakable if it were not for the sanction of Pope Eugenius III, who permitted it on the basis of custom.[111]

Canonical tradition further prohibited the participation of clerics in any judgment which eventually resulted in the shedding of blood. Archbishop Samson of Reims, although permitting the single practice of the water ordeal, forbade any clerical participation unless the temporal authorities furnished guarantees that the affair would not result in mutilation or the shedding of blood.[112] The Chanter constantly warned the clergy about the relationship between ordeals and the shedding of blood.[113] In a practical manner priests tend not to remain neutral

[109] *Ibid.*, 232C.

[110] "Preterea hodie est consuetudo quod campionibus conducticiis non datur eucharistia. Audiunt tamen missam antequam pugnent, et si alter occidatur in duello arcetur a terra benedicta. Que est ista particularis consuetudo [*mss.* communio] quod iste recipiebatur prius ad missam modo arcetur a sepultura? Forte fit ad terrorem. Item: si aliquis pugnaret pro capite suo defendendo, ita quod necessario oporteret eum mori vel se defendere, dubitarem an ei, si peteret, esset danda eucharistia, quia vix posset pugnare contra aliquem ad mortem nisi haberet fraternum odium quod est peccatum in spiritum sanctum. Tamen tales confitentur sacerdotibus. Unde mirum est quod consilium dent eis sacerdotes, cum impenitentibus penetentia non debeat iniungi. Ipsi autem impenitentes sunt, cum habeant propositum et voluntatem occidendi." Peter the Chanter, *Summa*, Troyes 276, fol. 122^{vb}, and Paris Bibl. Nat. Lat. 9593, fol. 146ra.

[111] "Item: quedam ecclesie habent monomachias et iudicant monomachiam debere fieri quandoque inter rusticos suos. Et faciunt eos pugnare in curia ecclesie in atrio episcopi vel archidiaconi, sicut fit parisius. De quo consultus papa eugenius respondit: Utimini consuetudine vestra. Sed cum clericus indicat monomachiam debere fieri, ex qua sequitur dampnatio alterius et mors, nonne cum iudicat ad antecedens, iudicat ad consequens? Scio quid dicerem, nisi papa ita respondisset." Peter the Chanter, *Summa*, Troyes 276, fol. 140va and Paris Bibl. Nat. Lat. 9593, fol. 164ra. This passage was noticed by J. LeBeuf, *Histoire de la ville de Paris* (Paris, 1883), I, 9–10. See n. 122 below.

[112] Peter the Chanter, *Verbum*, 230A and 545B. Samson did forbid, however, the hot iron trial.

[113] *Ibid.*, 227B and 543C. "Sicut etiam dicitur in decretis quod iudex ecclesiasticus non debet discutere de crimine seculari ad delegationem principis nisi prius princeps prestiterit iuratoriam cautionem quodsi ille qui accusatur iudicetur reus ab ecclesiastico iudice, et non condempnet eum ultimo iudicio. A simili videtur nobis quod etiam si peregrina ista iudicia vera essent, non deberet ecclesiastica persona interesse vel ministerium suum exibere, nisi prius prestita cautione de indempnitate corporis, si incideret reus in iudicium, sed traderetur in perpetuum carcerem, vel proscriberetur, vel exheredaretur, vel alio modo sine sanguine puniretur." Peter the Chanter, *Summa*, Paris Bibl. Nat. Lat. 14521, fol. 154va. "Item: constat quod omnia peregrina iudicia, ut iudicium aque frigide vel ferri candentis et similia, a diabolo sunt inventa. Nonne peccat ergo sacerdos benedicens aquam aut ferrum? Nonne ipse prebet ministerium suum ad effusionem sanguinis? Preterea si accusaret sacerdos aliquem ad mortem in hoc solo peccaret quod accusaret. Nunc autem dupliciter peccat quia prestat auctoritatem suam illi iudicio diabolico, et quia per ministerium suum ita facit hominem mori sicut si accusaret eum. Cum enim accusat, incertus est hinc inde utrum dampnabitur

throughout the procedure of the ordeal, but to become involved in the decision and thereby implicated in the condemnation.[114] Just as one sins by furnishing the occasion for fornication, so priests are guilty who bless the customary proofs which eventually produce the shedding of blood. Neither can the frequency of the practice remove the blame any more than in the case of adultery.[115]

Peter the Chanter approved of the example of Archbishop Samson as far as it went, but he himself went further by holding that priests were forbidden to participate in ordeals even when there was no chance of the eventual shedding of blood.[116] By the unequivocal removal of the priesthood, he hoped to deal a final blow to the practice of ordeals. Despite the contrary examples of populace, priests, and popes, the Chanter's position was clear: "Even if the universal church under penalty of anathema commanded me as a priest to bewitch the iron or bless the water, I would quicker undergo the perpetual penalty than perform such a thing."[117]

Not all of Peter's theological colleagues at Paris shared his unequivocal attitude towards the ordeals. It is true that Radulphus Ardens, probably inspired by Peter himself, came out strongly against them in his *Speculum universale* (1193–1200).[118] But Magister Martinus, that elusive figure of the early thirteenth century, in a few passing remarks was content to quote the canonist Sicardus of Cremona in a passage which seemed to grant their use in secular justice.[119] More

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reus quia possunt testes eius deficere. Ergo minus peccaret in accusando, quod ego credo. Nescio ergo quomodo sancta ecclesia sustineat sacerdotes benedicere aquam in tali iudicio, cum ipsi exhibeant ministerium suum effusioni sanguinis et quodam modo homicide efficiantur." *Ibid.*, Troyes 276, fol. 140ra and Paris Bibl. Nat. Lat. 9593, fol. 164ra.

[114] "Hic autem, preter hoc quod canones dampnant talia peregrina iudicia et dicunt ea diabolica inventione inventa, quia per illa temptatur deus, potest opponi in hunc modum. Si queretur a sacerdote utrum factum alicuius rei presentis esset simplex furtum vel rapina, et sciret quod pro rapina dampnaretur, pro furto minime, nullatenus discuteret hoc in iudicio, quia si sacerdos iudicaret . . . esse rapinam statim per consequens iudicaret istum condempnandum. A simili ex quo iste sacerdos benedicendo aquam et [. . .] ministerium prebet eis discunt utrum iste sit reus huius criminis an non. Per consequens iudicat eum absolvendum vel condempnandum ultimo supplicio, et ita si in discussione illa ostendit sacerdos istum esse rerum, condempnat eum morta et ita deberet degradari." *Ibid.*, Paris Bibl. Nat. Lat. 14521, fol. 154^{rb}.

[115] Peter the Chanter, *Verbum*, 232B and 548C.

[116] *Ibid.*, 227B.

[117] *Ibid.*, 543A. The editor, Galopinus, doubted the authenticity of this remarkable passage, which is found only in the third or longest verion of the *Verbum abbreviatum*. It is found, however, also in Vatican Reg. Lat. 106, fol. 97ra, accompanied with the marginal notation: *verba magistri*. The passage bears the characteristics of a *reportatio*.

[118] Radulphus Ardens, *Speculum universale*, Lib. X, Vat. Lat. 1175 (Part II), fol. 194^{rb}–195ra. For example, Radulphus cites the examples of the two English pilgrims and the theft at Orléans. For recent discussion of the date of the work, see Van den Eynde, *Antonianum*, XXVI (1951), 241–243.

[119] "Item: Queritur si seculares iudices licite vulgaribus purgationibus utantur, quod videtur tum propter consuetudinem tum propter institutam ab ecclesia benedictionem. Respondeo: laudarem si non fieret quia deus ibi temptari videtur, cum apostolus dicat: Iuramentum est finis omnis controversie. . . . Iudicium autem ferri candentis et ferventis aque reprobant sancti canones. Unde nicolaus papa: iudicium ferri candentis et ferventis aque examinatione confessionem extorqueri ab aliquo non

significant was the attitude of Robert of Courson, an acknowledged student of the Chanter's. In his *Summa*, composed at Paris between 1204 and 1207, Robert presented at least three difficult cases of conscience concerning the practice of ordeals.[120]

The first was an unhappy case, similar to the one with which the Chanter dealt, of a man accused of murder who suffered martyrdom for the cause of resisting ordeals.[121] The second involved a perplexing situation faced by a bishop who held the rights of both spiritual and temporal justice and before whom was brought a man of importance accused by public notoriety of a gross crime, such as heresy. The bishop could not convict the accused through normal means. Because of his great influence no one would personally testify against him. On the other hand, the bishop could not dismiss the case because of the great presumptions involved and because of the scandal of appearing to submit to bribery. The recourse to canonical purgations or the swearing of seven compurgators was held of no popular repute, and common purgation through ordeals was forbidden by the canons. Robert offered two solutions. On the basis of public defamation the bishop could imprison the accused on bread and water until enough evidence or a confession had been secured to produce a conviction, and thus popular opinion would be satisfied. Or the bishop could offer purgation through an ordeal, on the grounds that when no legitimate proof was available, such means did not constitute a tempting of God. In support of the second alternative Robert cited the responses of Pope Alexander III to Bishop Baldwin of Noyon (1167–1175), including the decretal *Ad abolendam*, which advised the bishop to follow the custom of the realm in such cases, although Robert conceded that this advice evoked great scandals.[122] The third case was similar to the first and involved the dilemma of a

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censent sacri canones. Quod autem legibus diffinitum non est superstitiosis; non sunt presumenda adinventionibus." Magister Martinus, *Summa*, Paris Bibl. Nat. Lat. 14526, fol. 118va. P.S. Moore has identified him as Martin of Fougères, *The Works of Peter of Poitiers* (Notre Dame, Indiana, 1936), p. 39. For the passage of Sicardus see n. 61 above.

[120] For the dates of Robert and his relation to Peter, see Marcel and Christiane Dickson, "Le Cardinal Robert de Courson, sa vie," *Archives d'histoire doctrinale et littéraire du moyen âge*, IX (1934), 64–83.

[121] "*Casus notabilis de quodam cui oblatum est peregrinum iudicium cum contraheretur ad furcas. . . .* " Robert of Courson, *Summa*, Paris Bibl. Nat. Lat. 3259 fol. 2ra and ^{rb}. See n. 82 above.

[122] "*Quid faciendum episcopo habenti utrumque gladium cum aliquis prepotens ducitur ad forum eius quem fama publica accusat sed nemo audet accusare eum personaliter propter potentiam eius.* Item: de facto sepe accidit quod prepotentes infames aut per usuram aut per rapinam aut per heresim accusantur a publica infamia. Sed non est aliquis propter potentiam eorum qui audeat prosilire in accusationem eorum, et tu es episcopus loci habens utrumque gladium. Adducitur aliquis talis potens ad forum tuum. Tu propter tantam eius infamiam retrudis eum in carcerem quo usque purget se vel quo usque accusetur ab aliquo. Quid facies in hoc articulo de illo? Tu non dimittes eum duplici de causa: tu cognivisti quod hereticus est, et scis quod si tu dimitteris eum, tota regio scandalizaretur, credens te dimisisse eum ad interventum pecunie. Respondeo: ita ne omnes scandalizes non potes eum dimittere. Item: non potes eum condempnare, quia neque convictus neque confessus est in iure. Item: si tu pro purgatione facta septima manu dimittes eum, nulla erit talis purgatio, quia per illam non satisfaciet populo, quia inveniet talis centum purgatores qui nichili reputant sacramenta nostra.

priest faced on one hand with pressure from his temporal and spiritual superiors and the custom of the land to bless the ordeals, and on the other, with the knowledge of their immoral nature. Again Robert's eventual solution to the dilemma was to accede to the force of custom sanctioned by the decretal *Ad abolendam.*[123]

These three cases present not the determined opposition and rigorous consistency of the master, Peter the Chanter, but rather the perplexities reminiscent of the canonists of the twelfth century. In 1212 Pope Innocent III rewarded Robert with the cardinal's hat and later commissioned him as papal legate in France to preach the crusade, reform the church, and prepare for the great Lateran Council of 1215. When presiding over the Councils of Paris (1212) and Rouen (1214), Robert did not come out fully against ordeals but merely banished them from cemeteries and other sacred places.[124]

Perhaps the debate over the question of ordeals in the faculties of canon law and theology at Bologna and Paris was reflected in the hesitant attitude of Pope Innocent III during the early years of his pontificate. At some point prior to 1215, however, Innocent made up his mind definitely against these practices and declared himself unmistakably in the Fourth Lateran Council. Was there any rela-

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Sed quid si offerat se ad iudicium ferri vel aque, contra canones que illi detestantur? Solutio: in tali articulo non debet prelatus dimittere talem et tam [*sic?*] infamem. Immo tam vehemens potest esse presumptio contra ipsum, quod non debeat dimittere, sed inter duos muros in aqua tribulantionis et pane angustie, tam diu recludere quo usque aliquis ad eius accusationem accedat vel quo usque crimen confiteatur, et peniteat vel aliquam condignam purgationem subeat, ut populo vel eccelsie satisfaciat. *Respondeo: si ipse iudicium ferri vel aque petat, officialis episcopi ei non debet denegare. Videlicet ubi nullum aliud invenitur remedium, quia tunc non temptatur deus, quia papa alexander fertur respondisse balduino noviomensi episcopo petenti quid fieret de talibus. Sequere consuetudinem regni. Respondeo: hoc [*sic?*] elicitur ex illa decretali, Ad abolendam. Hec de scandalo et de omni diversitate scandalorum dicta sufficiant." *Ibid.*, Paris Bibl. Nat. Lat. 3259, fol. 113^{ra-va}. At this point (*) the scribe protested with a marginal comment: "alii dicunt contrarium." I have not been able to find either this decretal of Alexander III or that of Eugenius III (see n. 111 above) in the printed collections of papal decretals. Communications from Professor J. Ramackers of Aachen and Professor Walther Holtzmann of Rome advise me that the texts of these decretals have yet to be discovered.

[123] "*De sacerdote cui princeps et episcopus precipiunt et consulendo inducunt ut benedicat ferrum vel aquam ad iudicia quibus temptatur deus.* De perplexitate quam incurrit sacerdos cui ex una parte precipit et princeps [*mss.* principes] et episcopus suus et consuetudo regni eum ad hoc inducit, ut ferrum candens vel aquam benedicat ad iudicia illa quibus deus temptatur, que sunt diabolice adinventiones. Respondeo: gregorius, immo tota ecclesia precipit ei contrarium cum facientes et consentientes et precipue cooperantes par pena constringat. Satis diximus superius in tractatu de penitentia, et illo qui impetitur super homidicio vel alio crimine quod ipse patravit et confessus est et contritus sufficienter de eo, an sacerdos debeat ei consulere ut subeat iudicium illud maledictum, an inhibere ne subeat. Nam si dicat, sibi iudicium illud oportet eum iurare quod non occidit eum de quo impetitur, et sic de consilio sacerdotis periurium incurret. Si autem dicat, noli subire iudicium, satrape regis statim parati erunt qui rapiant eum nolentem subire iudicium et totam eius parentelam ad furcas. Ad respondendum primo articulo recurre ad illam decretalem, Ad abolendam, et ad responsionem alexandri pape qui dixit noviomensi episcopo querenti quid super purgandis per tale iudicium esset ei faciendum: sequere inquiens consuetudinem regni tui," *Ibid.*, Paris Bibl. Nat. Lat. 3259, fol. 117^{rb} and ^{va}.

[124] C.15 of the Council of Paris (1212), Mansi, XXII, 842 and c.15 of the Council of Rouen (1214), *ibid.*, XXII, 920.

tion between his final decision and the teaching at the universities? It is, of course, possible that he read or was influenced by the works of Peter of Blois, Huguccio, Peter the Chanter, or perhaps others, but it is also highly probable that the influence of these men was more direct. Although much of Innocent's life prior to his elevation to the papacy remains unknown, we do know that as a young man Lothario di Segni studied at Rome, Paris, and Bologna.[125] Apparently at Bologna between 1187 and 1189 he read law with such masters as Bernard of Pavia and, especially, Huguccio. Later, as pope, he expressed his gratitude to his former teachers by conferring on them ecclesiastical dignities; Huguccio he raised to the see of Ferrara.[126] Very likely the great canonist's theories influenced the pope on the subject of ordeals as they did in other areas. Prior to 1187 Lothario prepared himself in philosophy and theology at the schools of Paris, where, he later confessed, he had received the gift of knowledge.[127] His one acknowledged master of theology at Paris was Peter of Corbeil, to whom he, as Pope Innocent III, later granted the archbishopric of Sens (1200).[128] Peter was known especially for his Scriptural studies, but unfortunately none of his academic works has so far been identified.[129] It is also known that while at Paris Lothario was acquainted with Robert of Courson, Stephen Langton, and Jean de Toucy (afterwards abbot of Sainte-Geneviève, 1192–1222). The position of Robert on ordeals was uncertain; the other two are not known to have discussed the matter.

The important question is whether Lothario knew Peter the Chanter and his work. As pope from 1198 to 1216 Innocent made no direct mention of Peter, but the Chanter was already dead by 1197. Lothario was certainly in Paris (a few years before 1187) at a time when Peter was at the height of his academic career, exercising then the dignity of chanter of Notre Dame (by at least 1184). Peter gave to the question of ordeals the fullest treatment of the twelfth century. His consistent and rigorous opposition to these practices contrasted markedly with the perplexities of many of his colleagues in the faculties of canon law and theology. Of greater significance, the Chanter emphasized two aspects of the problem which also dominated the formulation of Innocent's decrees in the Lateran Council of 1215. Both the Chanter and the Pope clearly related the practice of ordeals to the question of clerical involvement in affairs which resulted in the shedding of blood, and both centered their attack against these abuses by energetically

[125] *Gesta Innocentii III*, c.2, *P.L.*, CCXIV, xvii. The most recent study of Innocent's early life is Michele Maccarrone, "Innocenzo III prima del pontificato," *Archivio della R. deputazione romana di storia patria*, LXVI (1943), 59–134, whose conclusions have been adopted in the general study of Helene Tillmann, *Papst Innocenz III.* (Bonn, 1954).

[126] Tillmann, *Innocenz*, pp. 8, 9; Maccarrone, *Archivio*, LXVI, 79–81; and Achille Luchaire, *Innocent III* (Paris, 1905), I, 6.

[127] Letter to King Philip Augustus, 1198, *P.L.*, CCXIV, 148.

[128] *P.L.*, CCXIV, 444; *Gallia christiana* (Paris, 1770), XII, 57.

[129] Cf. Fridericus Stegmüller, *Repertorium biblicum medii aevi* (Madrid, 1954), IV, 300, 301. A commentary on the Apostle found in Paris Bibl. Nat. Lat. 15603, fol. 168–173 and 176–187 was claimed for Peter of Corbeil by H. Denifle, *Die abendländischen Schriftausleger bis Luther*, (Mainz, 1905), p. 90, but this attribution has been disputed by A. Landgraf, "Die Schriftzitate in der Scholastik um Wende des 12. zum 13. Jahrhundert" *Biblica*, XVIII (1937), 91–92.

prohibiting further participation to the clergy. Is it not possible that Innocent was first influenced by the Chanter's teachings at Paris, later received confirmation and legal clarification from Huguccio at Bologna, and finally after a period of hesitation translated these principles into action in Canon 18 of the Lateran Council of 1215? Huguccio's influence on Innocent is more certain, but the Chanter's remains a strong probability. In the light of the circumstantial evidence and with the absence of significant alternatives, might we hazard the conclusion that Peter the Chanter, theologian at Paris, and Huguccio, canonist at Bologna, were the moving spirits behind the canon of 1215 which marked the beginning of the end of ordeals in European society?

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