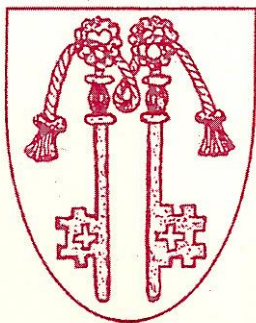


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NEW SERIES 2016 VOLUME 33

AN ANNUAL REVIEW



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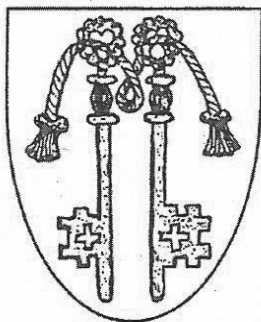


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Abbreviations

The following sigla are used without further explanation:

ACA	<i>Archivo de la Corona d'Aragon/Arxiu de la Corona d'Arago</i>
AHC	<i>Annuario historiae conciliorum</i>
AHDE	<i>Anuario de Historia del Derecho Español</i>
AHP	<i>Archivum historiae pontificiae</i>
AJLH	<i>American Journal of Legal History</i>
AKKR	<i>Archiv für katholisches Kirchenrecht</i>
ASD	<i>Annali di storia del diritto</i>
BAV	Biblioteca Apostolica Vaticana
BDHI	<i>Bibliothek des Deutschen Historischen Instituts in Rom</i>
BC	Bibliotheca/Archivio capitolare, capitular, kapitoly etc.
BEC	<i>Bibliothèque de l'Ecole des Chartes</i>
BIDR	<i>Bullettino dell'Istituto di Diritto Romano</i>
BISM	<i>Bullettino dell'Istituto Storico Italiano per il Medio Evo e Archivio Muratoriano</i>
BL	British Library
BM	Bibliothèque municipale, Stadtsbibliothek, Biblioteca comune, Landesbibliothek, civica, etc.
BMCL	<i>Bulletin of Medieval Canon Law</i> , New series
BNF/BN	Bibliothèque nationale de France / Biblioteca nazionale
BSB	Bayerische Staatsbibliothek
BU	Bibliothèque universitaire, Universitätsbibliothek, Biblioteca di Università, etc.
Cat. gén.	<i>Catalogue général des manuscrits des bibliothèques publiques de France (Départements</i> , octavo series, unless otherwise indicated)
CCL	<i>Corpus Christianorum, Series latina</i>
CCCM	<i>Corpus Christianorum, Continuatio mediaevalis</i>
CHR	<i>Catholic Historical Review</i>
CL	Cathedral Chapter Library
COD	<i>Conciliorum œcumenicorum decreta</i> , ed. Centro di Documentazione... (COD ³ : ed. 3)
COGD	<i>Conciliorum oecumenicorum generalium-que decreta</i> , 2.1: <i>The Oecumenical Councils of the Roman Catholic Church: From Constantinople IV to Pavia-Siena (869-1424)</i> ; 2.2: <i>From Basel to Lateran V (1431-1517</i> , edd. Alberto Melloni et alii (Corpus Christianorum; Turnhout 2013)
CSEL	<i>Corpus scriptorum ecclesiasticorum latinorum</i>

DA	<i>Deutsches Archiv für Erforschung des Mittelalters</i>
DBI	<i>Dizionario biografico degli Italiani</i>
DDC	<i>Dictionnaire de droit canonique</i>
DGDC	<i>Diccionario general del derecho canónico</i> , edd. Javier Otaduy, Antonio Viana, Joaquín Sedano (7 Volumes; Pamplona 2012)
DGI	<i>Dizionario biografico dei giuristi italiani (XII-XX secolo)</i> , edd. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletta (2 vols. Bologna: Mulino, 2013)
DMA	<i>Dictionary of the Middle Ages</i>
EHR	<i>English Historical Review</i>
HDIE	<i>Histoire du droit et des institutions de l'Eglise en Occident</i>
HJb	<i>Historische Jahrbuch</i>
HLF	<i>Histoire littéraire de la France</i>
HMCL 2	<i>The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX</i> , edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2008)
HMCL 3	<i>The History of Courts and Procedure in Medieval Canon Law</i> , edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2016)
HQLR 1-2	<i>Handbuch der Quellen und Literatur der Neueren Europäische Rechtsgeschichte, 1: Mittelalter (1100-1500): Die Gelehrten Rechte und die Gesetzgebung</i> , ed. Helmut Coing (Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, München 1973-1977)
HRG	<i>Handwörterbuch zur deutschen Rechtsgeschichte</i>
HZ	<i>Historische Zeitschrift</i>
IRMAe	<i>Ius romanum medii aevi</i>
JEH	<i>Journal of Ecclesiastical History</i>
JK, JE, JL	Jaffé, <i>Regesta pontificum romanorum ...</i> ed. secundam curaverunt F. Kaltenbrunner (JK: an. ?-590), P. Ewald (JE: an. 590-882), S. Loewenfeld (JL: an. 882-1198)
JMH	<i>Journal of Medieval History</i>
Kéry	Lotte Kéry, <i>Canonical Collections of the Early Middle Ages (ca. 400-1140): A Bibliographical Guide to the Manuscripts and Literature</i> (Washington DC 1999)
LHR	<i>Law and History Review</i>
LMA	<i>Lexikon des Mittelalters</i>
LThK	<i>Lexikon für Theologie und Kirche</i> (LThK ² : ed. 2)
Mansi	Mansi, <i>Sacrorum conciliorum nova et amplissima collectio</i>
Mazzatinti	G. Mazzatinti (continued by A. Sorbelli et al.), <i>Inventari dei manoscritti delle biblioteche d'Italia</i>

ABBREVIATIONS

vii

MEFR	<i>Mélanges de l'École française de Rome: Moyen âge – Temps modernes</i>
MGH	Monumenta Germaniae historica
• Capit.	Capitularia
• Conc.	Concilia
• Const.	Constitutiones
• Epp.	Epistolae (in Quart)
• Epp. saec. XIII	Epistolae saeculi XIII
• Epp. sel.	Epistolae selectae
• Fontes iuris	Fontes iuris Germanici antiqui, Nova series
• Ldl	Libelli de lite imperatorum et pontificum
• LL	Leges (in Folio)
• LL nat. Germ.	Leges nationum Germanicarum
• SS	Scriptores
• SS rer. Germ.	Scriptores rerum Germanicarum in usum scholarum separatim editi
• SS rer. Germ. N.S.	Scriptores rerum Germanicarum, Nova series
• SS rer. Lang.	Scriptores rerum Langobardicarum
MIC	Monumenta iuris canonici
MIÖG	<i>Mitteilungen des Instituts für österreichische Geschichtsforschung</i>
ML	Monastic Library, Stiftsbibliothek, etc.
NA	<i>Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde</i>
NCE	<i>The New Catholic Encyclopedia</i>
NDI	<i>Novissimo Digesto Italiano</i>
ÖAKR	<i>Österreichisches Archiv für Kirchenrecht</i>
ÖNB	Österreichische Nationalbibliothek
PG	Migne, <i>Patrologia graeca</i>
PL	Migne, <i>Patrologia latina</i>
Po.	Potthast, <i>Regesta pontificum romanorum</i>
QF	<i>Quellen und Forschungen aus italienischen Archiven und Bibliotheken</i>
RB	<i>Revue bénédictine</i>
RDC	<i>Revue de droit canonique</i>
REDC	<i>Revista español de derecho canónico</i>
RHD	<i>Revue historique de droit français et étranger</i> (4 ^e série unless otherwise indicated)
RHE	<i>Revue d'histoire ecclésiastique</i>
RHM	<i>Römische historische Mitteilungen</i>

RIDC	<i>Rivista internazionale di diritto comune</i>
RIS ²	Muratori, <i>Rerum italicarum scriptores: Raccolta degli storici italiani</i> , nuova edizione...
RQ	<i>Römische Quartalschrift für christliche Altertumskunde und Kirchengeschichte</i>
RS	Rolls Series (Rerum Britannicarum medii aevi scriptores)
RSCI	<i>Rivista di storia della Chiesa in Italia</i>
RSDI	<i>Rivista di storia del diritto italiano</i>
SB	Staatsbibliothek/Stiftsbibliothek
SCH	<i>Studies in Church History</i>
SDHI	<i>Studia et documenta historiae et iuris</i>
<i>Settimane</i>	<i>Settimane di studio del Centro italiano di studi Spoleto sull'Alto Medioevo</i>
SG	<i>Studia Gratiana</i>
TRE	<i>Theologische Realenzyklopädie</i>
TRG	<i>Tijdschrift voor Rechtsgeschiedenis</i>
TUI	<i>Tractatus universi iuris</i> (18 vols. Venice 1584-1586)
ZKG	<i>Zeitschrift für Kirchengeschichte</i>
ZRG Kan. Abt.	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung</i>
ZRG Rom. Abt.	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung</i>

The Proceedings of the International Congresses of Medieval Canon Law will be referred to as (e.g.): *Proceedings Boston 1965*. Standard works of the history of medieval law will be cited only as short titles: e.g. Maasen, *Quellen* and Schulte, *Quellen*, Savigny, *Geschichte*.

For the serial publications of the great academies:

Abh. Akad. ... followed by name of city, e.g. *Berlin, München*, etc. = *Abhandlungen der ... preussischen, bayerischen*, etc. *Akademie der Wissenschaften, philosophisch-historische Klasse*.

Similarly for *Mémoires, Memorie, Proceedings, Rendiconti, Sitzungsberichte*, etc. the abridged form is always understood as referring to the series covering philosophy and the humanities where several classes or sections exist in a single academy; e.g.

Mém. Acad. Inscr.

Rendic. Istit. Lombardo

Proceed. Brit. Acad.

Sb. Akad. Wien

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Beyond the Penitentials: Early Medieval Discourse on Penance

Abigail Firey

Sometimes the most obvious questions are the hardest ones to answer. For historians of early medieval confession and penance, one of the greatest puzzles has been the cultural context of the penitentials that have dominated, as essential sources, most discussions of early medieval penitential traditions. While there is excellent scholarship on the question of their institutional context—that is, whether they should be located in monastic, parochial, or sacramental settings (or overlapping and evolving contexts of this type)—there is still much work to be done on other, contemporary sources that might help us understand more fully the breadth and depth of penitential culture in the early Middle Ages. This paper explores three ideas: how sources other than the early medieval penitentials are, in fact, necessary to understanding early medieval penance; how, for example, the *Synonyma* of Isidore of Seville illuminate early medieval penitential discourse; how the imprint of the *Synonyma* as a penitential and pedagogical text is visible in glosses in a manuscript (Vatican City, Biblioteca Apostolica Vaticana, Reg. lat. 849) of a Carolingian prose treatise on penance.

Since the nineteenth century, the sources most frequently consulted as evidence for early medieval practices of penance and confession have been the penitentials.¹ These texts are concise descriptions of specific sins, with a corresponding prescription of specific penances, or ‘remedies’ for each of those sins. Their descriptions of sins includes such offences as losing a consecrated

¹ On the form, geographical and chronological distribution, characteristics, and editions of the penitentials, see Abigail Firey, ‘Penitenciales [Libros]’, DGDC 6.101-105. An older, lengthier description of the genre is Cyrille Vogel, *Les ‘Libri paenitentiales’* (Typologie des sources du Moyen Age occidental 27; Turnhout 1978). For a recapitulation of the traditional narrative and updating of earlier scholarship, see now Rob Meens, *Penance in Medieval Europe, 600-1200* (Cambridge 2014).

object (which receives seven days of penance) or eating meat that might be carrion (which receives four months of living on bread and water and the rest of the year without wine or meat).² The specified sins tend to be actions or events, usually in the areas of sex, food, violence, mishandling of sacraments or failures to conform to the rules for monastic or clerical life. Some penitentials do use a scheme of the seven or eight ‘deadly’ sins identified by John Cassian, to organize the sinful actions under an interior, spiritual vice, such as avarice, lust, hatred, anger, etc., but the format of the penitentials has sometimes led scholars to claim that early medieval Christianity was, in its apparent concern for external manifestations, primitive and lacking spiritual or theological depth.³

The penitentials have also been central to a powerful narrative about the history of penance and confession, because they were considered to be handbooks used by priests hearing confessions, that is, the precursors of the later medieval ‘summae confessorum’.⁴ Their chronological position between the practices of penance in the centuries of early Christianity and the Patristic period and the practices after the Fourth Lateran Council (A.D. 1215) seemed to coincide with the change that many scholars perceived from public (ceremonial, once only) to private (secret, repeated)

² Both examples are from the ‘Penitential of Cummean’. A convenient version of the Latin text and English translation is in Ludwig Bieler, *The Irish Penitentials* (Scriptores Latini Hiberniae, 5; Dublin 1975) 126-127.

³ On the influence of Cassian and the evolution of penitential remedies, see Rob Meens, ‘Remedies for Sin’, *Early Medieval Christianities, c.600-c.1100*, edd. Thomas F.X. Noble and Julia M.H. Smith (The Cambridge History of Christianity 3; Cambridge 2008) 399-415, 736-747, and Richard Newhauser, ‘Preaching the “Contrary Virtues”’, *Mediaeval Studies* 70 (2009) 135-162. For one of many examples of interpreting early medieval penance as oriented to external performance rather than interior remorse, see Charles M. Radding, ‘Evolution of Medieval Mentalities: A Cognitive-Structural Approach’ *The American Historical Review* 83 (1978) 577-597 at 588.

⁴ Pierre J. Payer, ‘The Humanism of the Penitentials and the Continuity of the Penitential Tradition.’ *Mediaeval Studies* 46 (1984) 340-354.

penance.⁵ A further layer of interpretation was that this change must have been initiated by some new impetus, from some new, non-Roman, but Christian population. The Irish were identified as the ‘missionaries’ to continental western Europe who brought these new practices and texts sometime in the sixth century.⁶

⁵ The narrative was definitively shaped by the work of Bernhard Poschmann in the early twentieth century, with the publication of his two works, *Die abendländische Kirchenbuße im Ausgang des christlichen Altertums* (Münchener Studien zur historischen Theologie 7; Munich 1928). See also his *Die abendländische Kirchenbuße im frühen Mittelalter* (Breslauer Studien zur historischen Theologie 16; Breslau 1930) and *Paenitentia secunda: Die kirchliche Buße im ältesten Christentum bis Cyprian und Origenes: Eine dogmengeschichtliche Untersuchung* (Theophaneia 1; Bonn 1940), and the translation into English, *Penance and the Anointing of the Sick* (1964). For discussion of Poschmann’s place in the context of the advent of the Second Vatican Council, see R. Emmet McLaughlin, ‘Truth, Tradition, and History: The Historiography of High/Late Medieval Penance and Early Modern Penance’, *A New History of Penance*, ed. Abigail Firey (Leiden-Boston 2008) 19-71 at 53-54. See also in the same volume Rob Meens, ‘The Historiography of Early Medieval Penance’ 73-95 at 73.

⁶ Especially influential in disseminating this idea was John T. McNeill and Helena M. Gamer, *Medieval Handbooks of Penance: A Translation of the Principal Libri Poenitentiales* (Columbia Records of Civilization 29; New York 1938; reprinted 1965 and 1990), which drew on the studies of McNeill, ‘The Celtic Penitentials and their Influence on Continental Christianity’ *Revue Celtique* 39 (1922) 257-300 and 40 (1923) 51-103, 320-341 (also published as a separate work with the same title in Paris 1923). The studies of Thomas P. Oakley contributed to the theme: ‘The Origins of Irish Penitential Discipline’ *CHR* 19 (1933) 321-332 and ‘Celtic Penance. Its Sources, Affiliations, and Influence’, *Irish Ecclesiastical Record* 52 (1938) 147-164, 581-601. These authors were the heirs of a dispute between Hermann Joseph Schmitz and Friedrich Wilhelm Hermann Wasserschleben. For Schmitz, see *Die Bussbücher und die Bussdisciplin der Kirche nach handschriftlichen Quellen dargestellt* (Mainz 1883) and *Die Bussbücher und das kanonische Bussverfahren nach handschriftlichen Quellen dargestellt* (Düsseldorf 1898; reprinted Graz 1958) for Wasserschleben, *Die Bussordnungen der abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung* (Halle 1851; reprinted Graz 1958). Wasserschleben’s commitment to the idea of Irish origins was then repeated in the influential work of Paul Fournier and Gabriel Le Bras, *Histoire des collections canoniques en Occident depuis les Fausses Décrétales jusqu’au Décret de Gratien* (2 vols. Paris 1931-1932) especially 1.50-62. For a fresh view of Insular ‘missionaries’ on the Continent (without reference to penitential practices),

This traditional narrative is now subject to new scrutiny, for a variety of reasons. First, scholars of the earlier centuries of Christianity now see much more variety in penitential practices than the simple model of a public ritual permitted only once after baptism and used only for the capital sins of adultery, idolatry, and homicide.⁷ Similarly, scholars of both the earlier and later Middle Ages see much more variety in penitential practices than the private confessions and formulaic penances assigned by priests.⁸ In addition, the manuscript transmission of the early medieval penitentials has received new attention, and raises new questions. None of the surviving manuscripts were written in Ireland; all were written on the continent during the eighth and ninth centuries or later. Recently, Michael Elliot has argued that the very term ‘paenitentiale’ occurs only after the mid-eighth century and that the texts we have been accustomed to think of as ‘penitentials’ are closely associated with

see James Palmer, *Anglo-Saxons in a Frankish World 690-900* (Turnhout 2009); for a piercing critique of earlier historiographic emphasis on ‘Irish’ aspects of Columbanian monasticism, see Yaniv Fox, *Power and Religion in Merovingian Gaul: Columbanian Monasticism and the Frankish Elites* (Cambridge 2014) 15-16, although still crediting practices of penance and confession to Irish origins while pointing to more nuanced, recent studies (p. 238).

⁷See, for example, Tim Vivian, ‘Monks, Middle Egypt, and Metanoia: The Life of Phib by Papohe the Steward (Translation and Introduction)’, *Journal of Early Christian Studies* 7 (1999) 547-571, and Claudia Rapp, ‘Spiritual Guarantors at Penance, Baptism, and Ordination in the Late Antique East’ *A New History of Penance*, 121-148, and in the same volume, Kevin Uhalde, ‘Juridical Administration in the Church and Pastoral Care in Late Antiquity’, 97-120.

⁸ The scholarly landscape was transformed especially by the publication of Mary Mansfield’s *The Humiliation of Sinners: Public Penance in Thirteenth-Century France* (Ithaca, NY 1995). See also Katherine Jansen, *The Making of the Magdalen: Preaching and Popular Devotion in the later Middle Ages* (Princeton 2000); Sarah Hamilton, *The Practice of Penance, 900-1050* (Royal Historical Society Studies in History; Rochester 2001). Such re-conceptions of penance as a social and political practice have found fruit, too, in important studies of the Carolingian era: see Mayke de Jong, *The Penitential State: Authority and Atonement in the Age of Louis the Pious, 814-840* (Cambridge 2009); Courtney M. Booker, *Past Convictions: The Penance of Louis the Pious and the Decline of the Carolingians* (The Middle Ages; Philadelphia 2009); Abigail Firey, *A Contrite Heart: Prosecution and Redemption in the Carolingian Empire* (Leiden-Boston 2009).

monastic communities and exceptionally devout laity, not with a general Christian population.⁹ One of the first texts to be called a ‘penitential’ by medieval scribes is the so-called ‘Penitential of Cummean’, which Rob Meens—who has studied it more than anyone—notes was not cited in the *Collectio canonum Hibernensis* or other early medieval Insular sources; it was transmitted in later works from the Continent. Meens states that, while Cummean’s ‘name is nowhere mentioned. . . <in the penitential of Theodore> his work was referred to as a ‘libellus Scottorum’, a booklet of the Irish.’¹⁰ The often-cited description of penitentials as ‘libelli Scottorum’ is, I have argued, derived from the expansion made by Hermann Wasserschleben of an abbreviation in a manuscript; he noted in a footnote that the abbreviated form was ‘sctorum’, which would normally be expanded as ‘sanctorum’.¹¹ In sum, there are many reasons to reconsider the dominant narrative of early medieval penance as based on a very particular (some would say, peculiar) genre of texts. Questions about the nature and origin of the penitentials are still very open for investigation; prominent scholars such as Meens still support the view that they were an Irish creation of the sixth century.¹²

More generally, interest in the penitentials—and they are interesting and important sources—requires techniques for viewing religious experience through the lens of lists: lists of sins, lists of prescriptions. I would like to suggest that we can enhance our understanding of the penitentials by studying other early medieval sources that offer prose (and sometimes poetic) explorations of penitential experience. Many of these sources have not yet been extensively considered as witnesses to theories

⁹ Michael D. Elliot, ‘Ecgerht, Theodore, Boniface, Bede, and the Beginning of the Penitential Genre’, paper delivered at the International Medieval Congress, Leeds, 2015, available at:

https://www.academia.edu/13928113/Ecgerht_Theodore_Boniface_Bede_and_the_Beginning_of_the_Penitential_Genre.

¹⁰ Rob Meens, *Penance in Medieval Europe* 57-60.

¹¹ Firey, *Contrite Heart* 66-67 n.8. The manuscript is of the Penitential of Theodore.

¹² Meens, *Penance in Medieval Europe* 37-88 *et passim*.

and practices of confession and penance; there is much research still to be done. Some of these sources will force us not only to look beyond the penitentials but also to look beyond the boundaries of the Frankish dominions in new ways. We should, no doubt, be looking eastward to Byzantium: in a review of a recent book by Derek Krueger, Young Richard Kim reports that:¹³

the Byzantine self that emerges in the pages that follow is spiritually broken and deeply remorseful over sin, but also hopeful, that through introspection and devotion, the scrutinized subject could experience forgiveness, moral growth, and a righteous standing in the presence of God. Indeed, the Augustinian West can no longer claim a monopoly on the remorseful sinner; the Byzantine Christian, it seems, had an equally guilty conscience.

Given the Justinianic reconquest of parts of the western half of the empire in the sixth century, and the sequence of Greek popes between the late seventh to early mid-eighth centuries, the question of intellectual and cultural exchange between Byzantium and the Latin West in spiritual matters in the early Middle Ages seems an important avenue for future research.¹⁴ The following pages, however, turn our attention in another direction, to Visigothic Spain.

One of the most popular — and least studied by modern scholars — works by Isidore of Seville (ca. 560-636) is his *Synonyma*.¹⁵ The extraordinary number of over 500 medieval manuscripts survive with the complete text; there are at least 81 with portions of it.¹⁶ Many are from the eighth and ninth centuries: the modern editor used 36 such manuscripts to establish the text.

¹³ Young Richard Kim, review of Derek Krueger, *Liturgical Subjects: Christian Ritual, Biblical Narrative, and the Formation of the Self in Byzantium* (Divinations: Reading Late Ancient Religion; Philadelphia 2014). The Medieval Review 15.10.35 (2015):

<https://scholarworks.iu.edu/journals/index.php/tmr/article/view/20178/26270>.

¹⁴ For English readers, a starting point is John A. McGuckin, *The Ascent of Christian Law: Patristic and Byzantine Formulations of a New Civilization* (Yonkers 2012). See also Andrew J. Ekonomou, *Byzantine Rome and the Greek Popes: Eastern Influences on Rome and the Papacy from Gregory the Great to Zacharias, AD 390-752* (Plymouth 2007).

¹⁵ The critical edition was made by Jacques Elfassi, *Isidori Hispalensis Episcopi Synonyma* (CCL 111B; Turnhout 2009).

¹⁶Elfassi, *Synonyma* xxiii.

These manuscripts are found across the Carolingian empire; there was also an important line of transmission in Anglo-Saxon England.¹⁷ The *Synonyma* are, on the one hand, exactly what the title suggests: they are gatherings of words and phrases that express the same concept in differing vocabulary and forms of expression. In this respect, they are primarily a pedagogical tool: they teach enriched Latin and supply rhetorical options.¹⁸ The structure of the *Synonyma* seems designed for memorisation: the collected words and phrases are arranged in the first of its two books as a dialogue between Man and Reason, and each speaker utters little bursts of declarations in synonyms; their speeches have notable rhythms and duplications of phonemes that make the text musical and good for oral recitation. What has impressed scholars who have studied this text, however, is that it is much more than a linguistic resource. It is a work of moral and spiritual instruction and is cast as a penitential lament.¹⁹ In the first of the work's two short books, Man, in the dialogue, cries out in remorse, guilt, suffering, and Reason answers with hope and the promise of

¹⁷ Jacques Elfassi, 'Les deux recensions des *Synonyma*', *L'édition critique des oeuvres d'Isidore de Séville, les recensions multiples: Actes du colloque organisé à la Casa de Velázquez et à l'Université Rey Juan Carlos de Madrid (14-15 janvier 2002)* (Collection des études augustiniennes: Série moyen âge et temps modernes 44; Paris 2008) 153-184; Geneviève Hasenohr, 'Isidore de Séville, auteur ascétique "français"?' *Romania* 128 (2010) 299-351 and 129 (2011) 23-56; Claudia Di Sciacca, 'The Manuscript Tradition, Presentation and Glossing of Isidore's "Synonyma" in Anglo-Saxon England: The Case of CCCC 448, Harley 110 and Cotton Tiberius A. iii', *Foundations of Learning: The Transfer of Encyclopaedic Knowledge in the Early Middle Ages* edd. Rolf H. Bremmer Jr and Kees Dekker (Mediaevalia Groningana, New Series 9, Storehouses of Wholesome Learning 1; Paris 2007) 95-124; idem, 'Isidorian Scholarship at the School of Theodore and Hadrian: The Case of the *Synonyma*', *Quaestio III: Selected Proceedings of the III Cambridge Colloquium in Anglo Saxon, Norse and Celtic* (Educating the Barbarian, Cambridge, 30 May 2002), ed. C. Jones (Cambridge 2002) 76-106.

¹⁸ Jacques Elfassi, 'Genèse et originalité du style synonymique dans les "Synonyma" d'Isidore de Séville' *Revue des études latines* 83 (2006) 226-245.

¹⁹ Jacques Elfassi, 'Les "Synonyma" d'Isidore de Séville: Un manuel de grammaire ou de morale? La réception médiévale de l'œuvre', *Revue d'études augustiniennes et patristiques* 52 (2006) 167-198.

redemption. In the second book, the typical sins, such as fornication, avarice, jealousy, pride, gluttony, hatred, are the topics of sections, as is intemperate speech. To give an example of the integration of the verbal training and the penitential discourse, I quote from Book One:²⁰

It is better to die well than to live badly; it is better not to exist than to exist unhappily. In comparison with my miseries, dead people are more fortunate than the living. Be merciful on my sadness, I beg, be merciful; forgive my grief, I beg. Give forgiveness to my anguish, be kind to my sorrows, do not move against me, who am in such great sadness. I bewail my disaster, I bemoan my calamity, I lament the familiar destruction of my misery, for sadness serves many things. I, wretched one, am not able to be consoled. My sadness is intolerable, my grief is infinite, in no way is my wound soothed, there is no moderation in my tears, there is no end of pains. Now there is no confidence of spirit, no longer can my spirit bear it, now my spirit collapses, overcome by miseries.' (Synonyma 1.21)

In the *Synonyma*, we see a text for Christian spiritual formation, fully framed in a discourse of penance and confession. The impact of this discourse, I suggest, was enormous. First, it reached beyond the auditors of sermons, or conversations between priest and penitent, or between monks and abbots: it reached into the schoolroom. The very study of language was infused with ever-repeated expressions of self-awareness of that 'spiritually broken' person in need of healing, in need of salvation. The relation of spiritual vices and their opposing virtues was clearly described, again in repetitive phrases that were both profound and easily memorized. This discourse had great potential to be both internalized and also communicated in a shared language to others.

The manuscript evidence for the extensive reach of this text might seem to be a sufficient argument, in itself, for its influence. We can, however, take a further step. We can associate the *Synonyma*, I think, with penitential discourse in the ninth century. Just

²⁰ Translation by Priscilla Throop, *Isidore of Seville's Synonyms (Lamentations of a Sinful Soul) and Differences: An English Translation of Synonyma (Liber lamentationum animae peccatricis) and De differentiis verborum (Liber differentiarum I) and De differentiis rerum (Liber differentiarum II)* (Charlotte-Vermont 2012) 17-18.

as the *Synonyma* themselves show their debt to preceding penitential discourse in the writings of Augustine, Ambrose, and Gregory the Great (most especially the *Moralia in Iob*), so too were they copied in manuscripts with a range of sources.²¹ Because the *Synonyma* is a fairly short text, it was often included in codices that contained a number of other texts. In some instances, it accompanies works by Caesarius of Arles, or Carolingian commentaries on biblical books, or Isidore's other works, or saints' lives. There is no single pattern. In some instances, the *Synonyma* are juxtaposed to works of penitential significance, such as John Chrysostom's *Epistula de paenitentia* (Paris, BNF lat. 14086) or Alcuin's *De virtutibus et vitiis*, in a late ninth-century manuscript that also contains penitentials (Paris, BNF lat. 2341).²² The manuscript discussed here, Vatican City, BAV, Reg. lat. 849 does not, in fact, contain the *Synonyma*. It contains one of the most popular canon law collections of the Carolingian era, the *Collectio Dacheriana*.²³ This canon law collection is sometimes copied with a Preface that states that the three books of the *Collectio Dacheriana* concern:²⁴

in the first book, those canons which are about penance and penitents, crimes and judgments; the second book is especially about those accused and accusers, judges and witnesses, with other canons pertaining to ecclesiastical regulations; the third book is about sacred orders, or

²¹ Elfassi, *Synonyma* xvi-xvii.

²² Ibid. xxiii-lviii. The two Paris manuscripts noted above are described on pp. xl, liii.

²³ The *Collectio Dacheriana* was edited by Luc D' Achery and Louis-Francois-Joseph de La Barre, *Spicilegium sive collectio veterum aliquot scriptorum qui in Galliae Bibliothecis delituerant* 1 (Paris 1723) 509-564. An online digitized version is at:

<http://www.ceec.uni-koeln.de/projekte/CEEC/texts/Achery1723/Achery1723-Inhalt.htm>.

For a register of the manuscripts and bibliography, see Kéry 87-92.

²⁴ 'Et primus quidem libellus continet ea quæ sunt de poenitentia et poenitentibus, criminibus atque iudiciis. Secundus maxime de accusatis et accusatoribus, iudicibus ac testibus, cum cæteris ad hæc pertinentibus Ecclesiasticis regulis. Tertius de sacris ordinibus, uel qui promouendi sunt ad Clerum, quiue remouendi a Clero, et de regulis ac priuilegiis omnium Clericorum et Præsulum.' D' Achery, *Spicilegium* 512.

who should be promoted in the clergy or who should be removed, and the regulations and privileges of all clergy and prelates.

The Preface itself is a little treatise ‘On the Utility of Doing Penance’, as the rubric in many manuscripts states. This Preface is a pastiche of carefully trimmed and fitted excerpts from Augustine’s writings, a text resembling Gennadius’s *De ecclesiasticis dogmatibus*, and Pseudo-Alcuin, *De diviniis officiis*. In modern typeface, it runs to about eight pages. It is not in all the oldest manuscripts of the *Collectio Dacheriana*; it also appears sometimes in an excerpted form as the Preface to the *Penitential* of Halitgar; it is transmitted independently in a late ninth- or tenth-century canon law manuscript from Bobbio (Vatican City, BAV lat. 5751).²⁵

The manuscript Vatican City, BAV, Reg. lat. 849 is interesting because it is one of a number of Carolingian manuscripts of canon law that contains Carolingian glosses on the texts. By studying these glosses, we can learn how Carolingian scribes and readers read canon law, and how they responded to it. This manuscript has fairly dense glossing on the Preface to the *Dacheriana*, so we can see how a scribe, probably a teacher, annotated a discursive text on penance in the Carolingian period. We see that the glosses are in Latin; this is not glossing to assist readers with translations to the vernacular. We also see that the glosses are not supplying simple words to explain complicated ones; the audience is expected to understand the language of the main text. What the glosses often seem to supply are synonyms, either as alternative words, or as short phrases.

For example, let us look at the first sentence of the Preface, taken from Augustine’s *Enchiridion*:

Excepto Baptismatis munere [gloss: dono], quod [gloss: scilicet baptismus] contra peccatum originale donatum est [gloss: scilicet a deo], unde incipit hominis renouatio, in qua [gloss: vel quo] soluitur [gloss: dimittitur a deo] omnis reatus [gloss: peccatum] et ingeneratus [gloss: quasi non generatus id est originale] et additus [gloss: actualis], etiam cætera uita iam ratione utentis ætatis [gloss: scilicet hominis], quantalibet præpoleonat [gloss: excellat emanat] fecunditate iustitiæ

²⁵ Raymund Kottje, *Bussbücher Halitgars von Cambrai und des Hrabanus Maurus : ihre Überlieferung und ihre Quellen* (Beiträge zur Geschichte und Quellenkunde des Mittelalters 8; Berlin-New York 1980) 73, 181-182.

[gloss: ubertate abundantia], sine remissione peccatorum non agitur [gloss: id est non sit]: quoniam filii Dei [gloss: omnes electi] quamdiu moraliter uiuunt [gloss: quamdiu in corpore sit], cum morte [gloss: cum uitii et peccatis] confligunt [gloss: certant pugnant]; et sic Spiritu Dei [gloss: dono Spiritus Sancti] excitantur [gloss: commoventur ad virtutes], et tamquam Filii Dei proficiunt [gloss: melio res fiunt] ad Deum, ut etiam spiritu suo [gloss: id est anima] aggrauante [gloss: de primo . . . <illeg.>] corruptili [gloss: quod corrumpit anima] corpore tamquam filii hominis [gloss: et ideo peccatores] in quibusdam hominis motibus [gloss: negotiis vel erroribus] deficiunt ad se ipsos, et ideo peccant.²⁶

[‘With the exception of the gift of baptism, which is given us against original sin, so that the beginning point of a man’s renewal, in which all guilt, inherited and acquired, is washed away, even the rest of life, from the age of accountability, no matter how vigorously we progress in righteousness, is not without the need for the forgiveness of sins. This is because the sons of God, as long as they live this mortal life, are in a conflict with death. And even as they are being led by the Spirit of God and, as sons of God, advance toward God, they are also being led by their own spirits so that, weighed down by the corruptible body and influenced by certain human feelings, they thus fall away from themselves and commit sin.’]²⁷

Not surprisingly, in some instances the glosses provide theological refinement or clarification, as when they specify that the dissolution of sin is effected by God, or that the ‘Spirit of God’ means ‘the gift of the Holy Spirit’, or that ‘reatus ingeneratus’ refers to original sin. In most cases, however, the glossator is supplying a very similar alternative to the original phrasing. Perhaps most noteworthy is the glossator’s habit of supplying two synonyms for the word in the text; in this he replicates Isidore’s common form of triads of words or phrases. For example, in the passage just quoted, the original word ‘fecunditate’ is glossed with the two synonyms ‘ubertate’ and ‘abundantia’; ‘præpolleat’ is glossed with the words ‘excellat’ and ‘emaneat’; ‘confligunt’ is glossed with the words ‘certant’ and ‘pugnant’. The word ‘motibus’ is glossed

²⁶ Fol. 16r. The text is an abbreviated and adapted excerpt of Augustine’s *Enchiridion*, for which the critical edition is E. Evans in CCL 46 (Turnhout 1969) 49-114. This passage is from 17.64, lines 5-7, 10-14, 16-23 (p. 84).

²⁷ I have consulted and adapted the translation of Albert C. Outler, Augustine, *Confessions and Enchiridion* (The Library of Christian Classics 7; Philadelphia 1955) widely published on the internet.

with two words, although they stretch—as did Isidore—the sense of ‘synonym’: ‘negotiis vel erroribus’. In glossing ‘cum morte’ as ‘cum vitiis et peccatis’, the glossator reminds readers (or auditors, if the texts and glosses were being read out loud) that for the Christian, sin is death, the true, essential, ultimate death of the soul. The linguistic iterations and transformations are a meditation upon meaning, a device for advancing to deeper understanding of the initial statement.

The glosses on the Preface to the *Collectio Dacheriana* in this manuscript do not transfer synonyms from Isidore’s *Synonyma*, but both the technique and penitential orientation evoke the *Synonyma*. This is not the only manuscript of the *Collectio Dacheriana* that has such glossing; in the future I shall be comparing the tenth-century glosses in the manuscript Wolfenbüttel, Herzog August Bibliothek, Helmst. 1062 with these in BAV Reg. lat. 849. Even this single manuscript, however, illustrates for us the possibilities for learning more about the significance of penance and confession in the formation of Christian tradition in Europe. It demonstrates how legal texts, such as those compiled in the *Collectio Dacheriana*, were not purely legalistic: they could be read in the light of spiritual reflection that drew upon Patristic discourse. It shows that penitential and legal concepts were not isolated in separate categories. Finally, it illustrates that discursive traditions extended over centuries. Authors such as Isidore and compilers such as the author of the Preface looked to writings from the past, and refreshed them with their own processes of selection, citation, and interpretation. We see how many processes converged to produce a manuscript that shows active participation in the creation of meaning: texts were gathered, copied, and then enhanced with additional ideas and language to add a further dimension to the written text, which may then have intersected with oral teaching and learning that was an education in penitential thought. Such evidence reveals some of the richness of the discourse of confession and penance that surrounded, and can help us better understand, the penitentials of the early Middle Ages.

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Alle origini dell'università di Bologna: L'insegnamento di Irnerio

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Le origini dello Studium di Bologna sono così riferite da Odofredo (†1265), il garrulo maestro che amava inframmezzare le lunghe lezioni sui testi di diritto romano con gustose narrazioni:¹

Or signori, dominus Yrnerius fuit apud nos lucerna iuris, fuit enim primus, qui docuit iura in civitate ista. Primo cepit studium esse in civitate ista in artibus, et cum studium esset destructum Rome, libri legales fuerunt deportati ad civitatem Ravenne et de Ravenna ad civitatem istam. De hoc studebantur in artibus libri legales, qui a civitate Ravenne fuerunt portati ad civitatem istam. Quidam dominus Pepo cepit auctoritate sua legere in legibus, tamen quicquid fuerit de scientia sua nullius nominis fuit. Dominus Irnerius docebat in civitate ista in artibus, cepit per se studere in libris nostris, et studendo cepit velle docere in legibus. Et ipse fuit maximi nominis et fuit primus illuminator scientie nostre, unde ipsum lucernam iuris nuncupamus.

[Or signori, Irnerio fu tra noi la lucerna del diritto, fu il primo ad avere insegnato in questa città. Una volta, a Bologna, esisteva uno studio di arti liberali. Quando lo Studium di diritto fu distrutto a Roma, i libri legali furono portati a Ravenna e poi a Bologna. Così i libri legali finirono per essere studiati nella scuola di arti liberali. Pepo cominciò con la sua autorità ad insegnare diritto ma, qualunque fosse la sua scienza, non ebbe alcuna fama. Irnerio insegnava arti liberali a Bologna quando vi furono trasferiti i libri legali. Cominciò a studiare per conto suo nei nostri testi, conseguì una grandissima fama e fu la

¹ *Domini Odoffredi in iure absolutissimi matura, diligentissimeque repetita interpretatio, in undecim primos pandectarum libros, iuris candidatis, propter exemplorum (quae rudiores movent) mirificam copiam, usui maximo futura. Huic accesserunt permultorum eruditissimorum virorum elucubrations diligentissimae* (Lugduni 1550) fol. 7ra n.1 a Dig. 1.1.6. Il testo fu edito criticamente da Hermann Kantorowicz, 'An English Theologian's View of Roman Law', *Medieval and Renaissance Studies* 1 (1941-1943) 238, ora in *Rechtshistorisches Schriften*, edd. Helmut Coing und Gerhard Immel (Karlsruhe 1970) 231-244 a 232. Cf. anche *Odofredi In primam Codicis partem Praelectiones* (Lugduni 1552) fol. 17ra n.3 a *Authentica Qui res* post Cod. 1.2.14: 'd. Yr. studuit per se sicut potuit, postea cepit docere in iure civili' e fol. 101va, n.1: 'Yr. quia logicus fuit et magister fuit in civitate ista in artibus, antequam doceret in legibus'.

prima luce della scienza giuridica. Poiché fu il primo a fare glosse sui libri di Giustiniano, lo ricordiamo come lucerna del diritto].

Su queste parole s'è esercitato l'acume di alcune generazioni di storici: ma di recente la discussione si è fatta ancora più accesa. Richard W. Southern, Johannes Fried ed Anders Winroth hanno ritenuto di potere demolire per intero la narrazione di Odofredo, testimone giudicato² troppo lontano dai fatti narrati e dunque inaffidabile.³ Il giurista duecentesco avrebbe così propalato un mito (ein Kunstprodukt und selbst ein Mythos) diffuso ad arte ai suoi tempi per nobilitare uno Studio già avviato, riconoscendo ad esso una fondazione remota. Secondo tale prospettiva Irnerio non avrebbe mai insegnato né sarebbe stato maestro di arti liberali; né, ancora, i quattro dottori—Bulgaro, Martino, Ugo e Iacopo—sarebbero stati suoi allievi. Con ciò dimenticando—lo rilevo

² Richard W. Southern, *Scholastic Humanism and the Unification of Europe, I: Foundations* (Oxford 1995) 278-282; Johannes Fried mit einem Exkurs von Gundula Grebner, "'auf Bitten der Gräfin Mathilde": Werner von Bologna und Irnerius', *Europa an der Wende vom 11. zum 12. Jahrhundert: Beiträge zu Ehren von Werner Goetz*, cur. Klaus Herbers (Stuttgart 2001) 171-206; Anders Winroth, 'Les deux Gratians et le droit romain', *RDC* 48 (1998) 285-299; idem, *The Making of Gratian's Decretum* (Cambridge 2000) 162-168; idem, 'The Teaching of Law in the Twelfth Century', *Law and Learning in the Middle Ages: Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History* 2005, cur. Helle Vogt and Mia Münster-Swedensen (København 2006) 41-62. Cf. pure Charles M. Radding, 'Vatican Latin 1406, Mommsen's ms. S, and the Reception of the Digest in the Middle Ages', *ZRG Rom. Abt.* 110 (1993) 501-551 a 534.

³ Una delle ragioni che fino ad oggi hanno indotto a dubitare delle affermazioni di Odofredo è costituita dalla menzione di una scuola di diritto a Roma, viceversa recentemente riproposta all'attenzione degli studiosi da Luca Loschiavo, 'Insegnamento del diritto e cultura giuridica a Roma da Teodorico a Carlo Magno: La scia dei manoscritti', *Ravenna capitale: Permanenze del mondo giuridico romano in Occidente nei secoli V-VIII: Instrumenta, civitates, collegia, studium iuris*, a cura di Gisella Bassanelli Sommariva (Collana Ravenna capitale 3; Santarcangelo di Romagna 2014) 9-50; idem, *L'età del passaggio: All'alba del diritto comune europeo (secoli III-VII)* (Torino 2016) 202-209. Per la scuola di diritto a Ravenna, sulla quale esistono meno dubbi, cf. almeno Orazio Condorelli, 'S. Pier Damiani e il diritto della Chiesa nella *societas christiana*', *Pier Damiani l'eremita, il teologo, il riformatore: 1007-2007*, a cura di Maurizio Tagliaferri (Ravennatensia 23; Bologna 2009) 325-364 a 347, n.70 con bibliogr.

subito—che già alcuni cronisti del XII secolo, Landolfo Iuniore e Ralph Niger, attribuirono senz'altro ad Irnerio l'appellativo di 'magister'.⁴ Per Winroth, addirittura, la scuola, a Bologna, sarebbe scaturita solo a seguito dell'insegnamento avviato dal canonista Graziano, l'autore della *Concordia discordantium canonum* (poi *Decretum* per antonomasia) dopo il 1139.

Ora, noi sappiamo che Irnerio appare in 14 documenti tra il giugno 1112 e il dicembre del 1125.⁵ Radi all'inizio e alla fine della serie, quando Irnerio appare come avvocato e giurisperito, gli atti si infittiscono tra il 1116 ed il 1118, allorché egli figura in veste di giudice, per lo più a placiti o arbitrati tenuti in diverse località dell'Italia Padana. Nel 1118 Irnerio è a Roma per eleggere l'antipapa Gregorio VIII: sicché l'anno seguente Callisto II lo scomunica, al concilio di Reims, insieme all'imperatore Enrico V ed ai suoi più alti aderenti. Può darsi che proprio questa condanna papale costituisca una delle ragioni per le quali Irnerio scompare dalla documentazione, ad oggi nota, fino al dicembre 1125. La sentenza resa in quella data a Casal Barbato, però, è di dubbia autenticità: se l'atto fosse davvero un falso, dovremmo concludere che la stagione bolognese di Irnerio si compì, con certezza, in un arco ristretto a soli sei anni.⁶ Esaurito il suo insegnamento e piegato da avvenimenti sfavorevoli egli avrebbe preso—come attesta una glossa torinese posteriore, di cui dovremo occuparci—la via di casa, in Germania.⁷

L'analisi dei documenti appena riferiti ha sollevato alcuni problemi. I critici di Odofredo affermano che nelle pergamene

⁴ *Landulphi Junioris sive de S. Paulo, Historia Mediolanensis ab anno MXCV usque ad annum MCXXXVII*, cur. C. Castiglioni (RIS² 3.3; Bologna, 1934) 28; Kantorowicz, 'An English Theologian's' 250-251.

⁵ Enrico Spagnesi, *Wernerius Bononiensis Iudex: La figura storica d'Irnerio* (Accademia Toscana di Scienze e Lettere 'La Colombaria', Studi 16; Firenze 1970).

⁶ Giuseppe Mazzanti, 'Un falso irneriano? Riconsiderazioni sul documento del 1125', *Il contributo del monastero di S. Benedetto Polirone alla cultura giuridica italiana (secc. XI-XVI): Atti del Convegno S. Benedetto Po, ex refettorio monastico – Piazza Matilde, 29 settembre 2007*, cur. Pierpaolo Bonacini e Andrea Padovani (San Benedetto Po 2009) 37-44.

⁷ Vedi oltre, n.9.

edite da Spagnesi Irnerio non è mai detto *magister*: titolo che gli doveva essere attribuito nel caso in cui egli avesse effettivamente insegnato. In realtà, trattandosi di placiti o giudizi, tale designazione dovette apparire, ai notai roganti, del tutto non necessaria. A giusta ragione essi preferirono—in quei contesti—gli appellativi ‘*causidicus*’ (1112, 1113) o ‘*iudex*’ (1116-1118): titolo, quest’ultimo, che lo stesso giurista appone di seguito alla propria firma.

L’occasionale presenza dell’aggettivo ‘*bononiensis*’ accanto a tali appellativi ha indotto alcuni studiosi ad ipotizzare la nascita del nostro giurista nella città emiliana. Deduzione assai discutibile, perché Irnerio poteva essere *causidico* o giudice bolognese pur avendo avuto i natali altrove. Così—giusto per fare pochi esempi—il vescovo Raterio, originario di Liegi, fu detto comunemente ‘*veronensis*’; Ugo di S. Vittore, sebbene sassone, ‘*parisiensis*’; Alberto, ‘*iudex mantuanus*’—negli stessi documenti editi da Spagnesi—fu in realtà di Casaloldo, in territorio bresciano. Senza dire che Lanfranco di Pavia in Francia passò per ‘*beccensis*’ (abate di Bec) e in Inghilterra per ‘*cantuariensis*’ (arcivescovo di Canterbury): e lo stesso, in parallelo, vale per Anselmo d’Aosta, che ripercorse le orme e le dignità del suo maestro Lanfranco.

Ulteriori perplessità ha destato la circostanza che il ‘*primus illuminator*’ si sottoscriva ‘*Wernerius*’ o ‘*Germerius*’ e che negli stessi documenti egli sia indicato come ‘*Guarnerius*’, ‘*Varnerius*’, ‘*Vuarnerius*’, ‘*Warnerius*’ o altrove, in fonti pressapòco coeve, ‘*Girnerius*’, ‘*Gwarnerius*’, ‘*Garnerius*’, ‘*Uuarnerius*’: mai come ‘*Irnerius*’. Tale designazione divenne abituale—per quanto ne sappiamo finora—solo più tardi, verso la fine del secolo XII. A ben vedere, la modificazione del nome—nella varietà delle sue flessioni, secondo una consuetudine ampiamente testimoniata nel medioevo—non presenta alcunché di inspiegabile. Dal punto di vista linguistico, almeno ‘*Germerius*’, ‘*Girnerius*’ e ‘*Garnerius*’ ammettono, in ambito italiano, la trasformazione in ‘*Yrnerius*’—*Irnerius*’ e di conseguenza, la formazione delle sigle ‘*y.*’ o ‘*i.*’ in testa o a chiusura delle glosse a lui attribuite. Mi pare dunque da escludere l’ipotesi di Gero Dolezalek che la sigla ‘*y.*’ sia

attribuibile all'intervento di alcuni copisti, colpevoli di avere frainteso il segno di paragrafo '§' anteposto alle glosse. Basterà infatti notare che quel medesimo segno di paragrafo, pur ovunque presente nei coevi manoscritti canonistici, non dette mai luogo all'errore nel quale si vorrebbe che fossero caduti i soli scribi di testi civilistici.⁸

I documenti in nostro possesso indurrebbero piuttosto a ritenere che il nome del 'primus illuminator' possa essere reso, nell'uso moderno, in Werner. Con buona probabilità, un tedesco: ciò che ben spiegherebbe—sia detto per inciso—gli stretti rapporti del nostro personaggio con Enrico V, notoriamente incline a privilegiare i propri conterranei. A conferma di questa supposizione soccorre l'appellativo 'theutonicus' assegnato a 'Garnerius' sia in una *Summa quaestionum monacense* del 1185-90, sia in una glossa torinese di un allievo di Francesco d'Accursio (†1293). Ormai anche Cortese, oggi, sostiene che l'origine germanica del giurista, o almeno della sua famiglia, sia sicura.⁹

Che, d'altronde, Wernerius fosse tedesco, anzi 'teutonico filosofo del 1120' lo sapeva ancora bene Ovidio Montalbani che, nel 1649, dettava il cartiglio apposto al busto di Irnerio nel Teatro anatomico dell'Archiginnasio. E lo stesso aveva affermato il collegio bolognese dei giuristi di diritto civile e canonico interpellato in merito, nel 1641, dall'olandese Bartold Nihus.

⁸ Andrea Padovani, 'Il titolo De Summa Trinitate et fide catholica (C. 1.1) nell'esegesi dei glossatori fino ad Azzone: Con tre interludî su Irnerio', *Manoscritti, editoria e biblioteche dal medioevo all'età contemporanea: Studi offerti a Domenico Maffei per il suo ottantesimo compleanno*, cur. Mario Ascheri, Gaetano Colli, Paola Maffei (3 vols. Roma 2006) 3.1075-1123. Cf. Rudolf Weigand, *Die Glossen zum Dekret Gratians: Studien zu den frühen Glossen und Glossenkompositionen* (SG 25-26; Romae 1991) ad indicem.

⁹ Knut W. Nörr, 'Zur Herkunft des Irnerius', *ZRG Rom. Abt.* 82 (1965) 327-329; Giacomo Pace, 'Garnerius Theutonicus: Nuove fonti su Irnerio e i "quattro dottori"', *RIDC* 2 (1991) 124-125 laddove si legge che Garnerius 'primo docuit novis temporibus' e che 'cum recedere vellet dominus Garnerius de Bon(onia) et ire ad domum suam' provvide ad assicurare il destino della propria scuola. Cf. Ennio Cortese, 'Irnerio', *DBI*, 62 (2004) 601; idem, 'Irnerio (XI sec.-1219 [sic, 1125 recte]...)', *DGI* 1109, riprodotto in 'Wernerius (Irnerio) (...1112-1125...)', *Autographa*, I.2: *Giuristi, giudici e notai (sec. XII-XV)*, cur. Giovanna Murano (Imola 2016) 3.

Testimonianze, entrambe, piuttosto significative (sebbene, certo, tarde) ove si pensi alla smania degli eruditi seicenteschi, in Italia, di rivendicare alla propria città qualsiasi personaggio in grado di attribuirle una patente di grandezza e pertanto di nobiltà. La rinuncia a considerare Irnerio cittadino bolognese doveva ben fondarsi su una tradizione ritenuta, allora, fondata ed inoppugnabile. Il mutamento (Irnerio bolognese) si registrò solo poco più di un secolo dopo, ad opera di Mauro Sarti e Mauro Fattorini, per via di quel ‘bononiensis iudex’ cui s’è già accennato.

Altro e spinoso problema affrontato dagli storici è quello posto da una ‘additio’ di Roberto di Torigni alla sua Cronica:¹⁰

Lanfrancus Papiensis et Garnerius socius eius, repertis apud Bononiam legibus romanis, quas Iustinianus Imp. Rom. anno ab incarnat. Dom. DXXX abbreviatis emendaverat, his, inquam, repertis operam dederant eas legere et aliis exponere. Sed Guarnerius in hoc perseveravit; Lanfrancus vero disciplinas liberales et literas divinas in Galliis multos edocens, tandem Beccum venit et ibi monachus factus est sicut in sequentibus potest reperiri.

Per redigere questa aggiunta il cronista normanno cancellò—quanto pare, di propria mano—un passo, riguardante certe vicende accadute nel 1032, che egli aveva tratto dalla Cronaca universale di Sigeberto di Gembloux. Proprio appigliandosi a questa data gli storici del diritto, fin da Savigny, ritennero impossibile un insegnamento coevo di Lanfranco, morto nel 1089, e di Irnerio, ben più giovane di lui. Da ultimo, Cortese ha rigettato con forza ogni tentativo di restituire credito a Roberto di Torigni, posto che nel 1032 Irnerio non era ancora nato. Il passo del cronista normanno sarebbe frutto di un errore dietro il quale potrebbe forse nascondersi il più anziano Gualcosio (Walcausa).¹¹ Supposizione a mio avviso poco credibile, dato che Roberto di Torigni dice che ‘legibus romanis . . . repertis’ Gualcosius (se dobbiamo credere ad uno scambio di persona, in luogo di Guarnerius) ‘perseveravit’

¹⁰ Roberti De Monte *Cronica*, ed. Ludwig C. Bethmann (MGH SS 6; Hannover 1843) 478; *The Chronicle of Robert of Torigni Abbot of the Monastery of St. Michel-in-Peril-of-the-Sea*, ed. Richard Howlett (4 vols. RS 82; London 1884-1889, reprinted Wiesbaden 1964) 4.25-26; *Chronique de Robert de Torigni Abbé du Mont-Saint-Michel*, ed. Léopold Delisle (Vol. 1; Rouen 1872) 32.

¹¹ Ennio Cortese, ‘Lanfranco di Pavia e la riscoperta del Digesto’, RIDC 25 (2014) 13-14; idem, ‘Wernerius (Irnerio)’ 6.

nell'«*eas legere et exponere*»: ciò che contraddice il pochissimo che sappiamo di Gualcosius/Walcausa, del quale—sono parole di Cortese—non si può minimamente ‘provare un suo insegnamento pavese del diritto romano’, cui dedicò solo qualche limitatissimo riferimento. Senza dire che il discepolato di Walcausa rispetto a Lanfranco manca di qualsiasi supporto documentario.

Traccia ben più consistente, per spiegare l'«*additio*» apposta sotto l'anno 1032 è offerta dall'incontro di Roberto con Vacario nel corso del concilio provinciale di Westminster (1175), evento sul quale mi sono già soffermato in altro scritto.¹² Si comprenderebbe, così, il motivo per cui il monaco di Mont-St.-Michel provvide a modificare il precedente testo di Sigeberto di Gembloux. La notizia appena data da Vacario—studente a Bologna negli anni '30 e certo ben informato su Irnerio—rivestiva una importanza eccezionale; per essa si doveva trovare assolutamente un luogo nel quale inserirla, a costo di forzare la trama narrativa della Cronica, ormai ultimata.

Ma dove, appunto? Non sotto l'anno 1034, ove Roberto aveva già parlato della fondazione di Bec ad opera di Erluino e della sua intenzione di associare al monastero Lanfranco; non sotto l'anno 1041, quando questi s'era fatto monaco; non sotto l'anno 1089, quando s'era trattato di ricordarne la morte a Canterbury. Restava il 1032, data in cui verosimilmente il maestro pavese aveva rintracciato, presso Bologna, quelle leggi romane nel cui studio ed insegnamento Irnerio, a suo tempo, avrebbe poi perseverato (a differenza di Lanfranco). Nel medesimo contesto—poiché si trattava di segnalare i punti di contatto e di distacco tra i due personaggi—Roberto ritiene necessario inserire un'altra notizia non meno importante della precedente: che Guarnerius, prima di eccellere nella scienza del diritto, era stato allievo (*socius*) di Lanfranco, come alcuni monaci normanni, tra i più anziani, ancora ricordavano. Allievo non già nelle leggi ma—come si vedrà tra breve—nelle arti liberali e nella teologia. In questo modo la narrazione (in maniera non dissimile da altre cronache coeve)

¹² Andrea Padovani, 'Roberto di Torigni, Lanfranco, Irnerio e la scienza giuridica anglo-normanna nell'età di Vacario', RIDC 18 (2007) 71-140 a 124-127. L'intero saggio sarà presto disponibile on line in lingua inglese.

risulta di tipo diacronico: eventi obiettivamente distanti nel tempo sono fusi insieme, ma collegati dalla identità dei protagonisti. Così come accade, ad esempio, in certe rappresentazioni iconografiche medievali, dove sono raffigurati insieme il viaggio dei Magi a Betlemme e l'adorazione del Bambino alla grotta, la tentazione di Eva da parte del serpente e la cacciata dei nostri progenitori dall'Eden. Ciò che, ai nostri occhi moderni, pare a prima vista incongruente, per un lettore del dodicesimo secolo (ed oltre) era del tutto normale.

Del resto l'annotazione di Roberto, forzatamente densa nella sua brevità (lo spazio per l'aggiunta è davvero ristretto, nel manoscritto), si regge su uno schema alternato di tipo dialettico: mentre Lanfranco, da giurista, si fa maestro nelle arti liberali e nelle Sacre Scritture, il discepolo si muove in senso opposto. La struttura binaria della 'additio'—costruita sulle due figure di Lanfranco ed Irnerio—si riproduce anche in altre opere di un certo successo. A distanza di pochi anni (verso il 1189) Ralph Niger accosterà Pepo ad Irnerio, assegnando a quest'ultimo il titolo di 'magister' e propagatore della 'iuris disciplina' (alla lettera: insegnamento), affermazione che, in sostanza, riecheggia il 'legere et aliis exponere' della Cronica di Roberto. Soprattutto, poi, i *Moralia Regum* del maestro inglese (ma docente a Parigi) anticipano in maniera impressionante la testimonianza di quell'Odofredo al quale Southern, Fried e Winroth si ostinano a negare credito per quanto riguarda l'attività di insegnamento del 'primus illuminator'. Roberto di Torigni, Ralph Niger ed Odofredo, indipendentemente l'uno dall'altro, convergono, oltre che nella struttura espositiva, su dati sostanziali che non possono essere in alcun modo trascurati.

Da parte sua il cronista normanno afferma qualcosa che gli altri due autori non potevano certo conoscere: che, insomma, Guarnerius era stato 'socius' di Lanfranco. 'Allievo', dunque, e in teologia, come ritengo di aver mostrato nel corso di una estesa ricerca alla quale debbo senz'altro rinviare per una analisi più dettagliata.¹³ Qui basti dire che il *Liber divinarum sententiarum*

¹³ Andrea Padovani, 'Matilde e Irnerio: Note su un dibattito attuale', *Matilde di Canossa e il suo tempo: Atti del XXI Congresso Internazionale di studio: San*

attribuito da Mazzanti a Guarnerius iurisperitissimus, riprende— nei titoli XXXVII De baptismo e XXXVIII De eucharistia—le tesi fondamentali esposte da Lanfranco nel corso della celebre contesa che lo oppose, intorno alla presenza reale di Cristo nell'eucarestia, a Berengario di Tours.¹⁴ Nella fedeltà al modello lanfranchiano Guarnerius/Irnerio ha compagni altri discepoli del maestro beccense: Ivo di Chartres e Guitmondo di Aversa. Nessun altro teologo, coevo o posteriore (a cominciare dai vari Wernerius cui, da alcuni studiosi, s'è voluta attribuire la paternità del *Liber divinarum sententiarum*) dimostra una affinità di vedute

Benedetto Po, Revere, Mantova, Quattro Castella, 20-24 ottobre 2015 (Spoleto 2016) 204-232.

¹⁴ *Guarnerius Iurisperitissimus, Liber divinarum sententiarum*, ed. G. Mazzanti (Spoleto 1999). Sulla paternità irneriana di questo scritto si è discusso—e ancora si discute—con opposte valutazioni. Accolta da Enrico Spagnesi, 'Irnerio teologo, una riscoperta necessaria', *Studi medievali* ^{3a} 42 (2001) 325-379; idem, 'Irnerio', *Enciclopedia Italiana: Il contributo italiano alla storia del pensiero: Appendice 8* (Roma 2012) 43-46, da Ronald G. Witt, *The Two Latin Cultures and the Foundation of Renaissance Humanism in Medieval Italy* (Cambridge 2012) 237, da Nicolás Álvarez de Las Asturias, 'Lanfranco di Bec nelle origini del "rinascimento" culturale del secolo XII', *La cultura giuridico-canonica medievale: Premessa per un dialogo ecumenico*, curr. Enrico De León-Nicolás Álvarez de Las Asturias (Milano 2003) 280, da Thorsten Behle, *Der Magister Walfred von Bologna: Ein Beitrag zu den Anfänge der Bologneser Rechtsschule* (Ius vivens, Rechtsgeschichtliche Abhandlungen 21; Wien-Zürich-Berlin-Münster 2008) 29, da Elisabeth Schneider, 'Naturae rationalis individua substantia: Eine theologische oder juristische Definition der Person?', *Boethius as a Paradigm of Late Ancient Thought*, curr. Thomas Böhm, Thomas Jürgasch und Andreas Kirchner (Berlin-Boston 2014) 245-272 a 252 n.30, nonché da Ovidio Capitani, 'La Chiesa di Bologna e l'ordine canonistico europeo', *La Chiesa di Bologna e la cultura europea: Atti del convegno di studi, Bologna, 1-2 dicembre 2000* (Istituto per la storia della Chiesa di Bologna: Saggi e ricerche 13; Bologna 2002) 15-26 a 18, che ritiene 'convincenti' le argomentazioni proposte da Mazzanti (cf., del medesimo autore, *Medievistica e medievisti nel secondo Novecento: Ricordi, rassegne, interpretazioni* [Spoleto 2003] 143-148), è stata (sbrigativamente) negata da Martin Bertram QF 80 (2000) 714-715. Perplexità, in merito alla attribuzione proposta da Mazzanti, ha espresso Ennio Cortese, 'Théologie, droit canonique et droit romain: Aux origines du droit savant (XIe-XIIe s.)', *Académie des Inscriptions et Belles-Lettres: Comptes rendus des Séances de l'année 2002* 146 (Paris 2002) 57-74 a 66-67; idem, 'Irnerio' 602; 'Irnerio (XI sec.-1219...)' 1110-1111; 'Wernerius (Irnerio)' 5.

accostabile, in qualche modo, a quella dei più stretti allievi di Lanfranco.

Un maestro, quest'ultimo, che non solo aprì al giovane discepolo le porte dell'imponente biblioteca di Bec (più di ogni altra ricca di testi patristici e agostiniani in particolare, che il *Liber* utilizza ampiamente), ma ancora lo istruì nella critica delle fonti bibliche sulla quale egli stesso s'era esercitato conseguendo, per quei tempi, risultati ragguardevoli. Se così fosse, si potrebbe, almeno in parte, spiegare l'abilità di Irnerio nella restaurazione dei testi giustinianeî.

Non nascondo il fatto che, con l'attribuzione del *Liber divinarum sententiarum* a colui che più tardi figurerà come 'iudex' di Enrico V dal 1116 al 1118, si aprono altri problemi, precisamente intorno allo status di Irnerio: ecclesiastico o laico? Sulla proposta avanzata da Mazzanti—che il Nostro sia da identificare con un 'Warnerius presbiter' o con un 'Guarnerius de Brigeii' attestati tra il 1095 e il 1106¹⁵—preferirei non pronunciarmi, trattandosi di ipotesi 'molto incerta'.¹⁶ Per Witt Irnerio apparterebbe a quel ristretto novero di laici—come Burgundio da

¹⁵ Giuseppe Mazzanti, 'Irnerio: Contributo a una biografia', *RDIC* 11 (2000) 117-182 a 154-156.

¹⁶ Così Carlo Dolcini, 'Lo Studium fino al XIII secolo', *Bologna nel medioevo*, cur. Ovidio Capitani (Storia di Bologna 2; Bologna 2007) 477-498 a 486. Perplexità avanzate anche da Cortese, 'Wernerius (Irnerio)' 6. L'eventuale rigetto delle identificazioni proposte da Mazzanti non demolisce del tutto l'ipotesi che Irnerio fosse un ecclesiastico e che di lui, appunto, si tratti in quell'obituario di S. Vittore a Parigi nel quale si legge che 'magister Garnerius Teutonicus' lasciò al monastero 'quinque libros optimos glosatos': forse, i cinque volumi in cui era suddiviso, nella tradizione scolastica, il *Corpus Iuris* di Giustiniano (Mazzanti, 'Irnerio' 127-139). Cortese ha ritenuto la proposta insostenibile 'perché all'epoca di I. le leges non erano ancora ripartite nei cinque tomi tradizionali' e poi 'perché gli apparati d'I. sono discontinui' ('Irnerio', 603. Giudizio sostanzialmente ripreso da idem, 'Irnerio (XI sec.-1219...)' 1111 e da idem, 'Wernerius (Irnerio)' 6. Ora, la prima affermazione di Cortese non trova consenzienti altri studiosi: cf. Peter Weimar, 'Die legistische Literatur der Glossatorenzeit', *HQLR* 1.159, con bibliogr.; riguardo alla seconda, la discontinuità non toglie nulla al valore della testimonianza dell'obituario, che parla semplicemente di testi 'optime glosatos'. L'indizio, anziché essere scartato a priori, dovrà essere pur tenuto presente da ulteriori, auspicabili ricerche.

Pisa, Mosè del Brolo, Ugo e Leone Eteriano—che si cimentarono con la teologia.¹⁷

D'altra parte, però, riesce abbastanza difficile ammettere che Irnerio, cresciuto intellettualmente in un grande centro monastico, ivi autore di un raffinato scritto teologico e a stretto contatto con una personalità forte come quella di Lanfranco, resistesse alla tentazione di avviarsi alla carriera ecclesiastica. Se egli realmente intraprese questa strada, si potrebbe supporre che—travolto dal clima infuocato della lotta per le investiture—perdesse, al pari di altri religiosi allineati con l'Impero, la sua dignità vedendosi costretto, per vivere, ad insegnare le arti liberali a Bologna, città che—per la sua politica filoimperiale—poteva costituire un luogo accogliente anche per un 'lapsus'.

Nel caso in cui, viceversa, Irnerio avesse conservato gli ordini ecclesiastici non dovette essergli preclusa a priori, nella incerta disciplina canonistica del tempo, la possibilità di divenire prima 'causidicus' e poi 'iudex'. La documentazione residua, dalla fine del secolo XI fin oltre la metà del seguente, offre esempi di chierici cui sono affidate pubbliche funzioni giudiziarie.¹⁸

Le vicende biografiche ed intellettuali di Irnerio che ho tentato di ricostruire sulla base di una nuova lettura delle fonti disponibili, può arrestarsi qui. Come sempre, un punto di arrivo costituisce anche—e soprattutto—un punto di partenza per altre esplorazioni,

¹⁷ Witt, *The Two Latin Cultures* 237-239.

¹⁸ Cf. Charles M. Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna 850-1150* (Yale-New Haven-London 1988) 223 n.291 (anni 98-1001): 'Leo archidiaconus et iudex sacrosancti palatii', *I placiti del Regnum Italiae*, ed. Cesare Manaresi (3 vols. Fonti per la storia d'Italia 92-95-97; Roma 1955-1960) 1.293 n.421 (Pisa, 31.8.1067): 'Teudinus clericus et misso domni regis'; *Die Urkunden und Briefe der Markgräfin Mathilde von Tuszien*, curr. Elke Goetz und Werner Goetz (MGH Laienfürsten- und Dynastenerkunden der Kaiserzeit 2; Hannover 1998) 374: 'Aldigherius can[onicus] iudex' (1105): A questi personaggi si potrebbe affiancare anche Sichelmo: Paolo Gherri, 'Sichelmo maestro di diritto romano (giustiniano) a Reggio nel secolo precedente Bologna', *RSDI* 84 (2011) 208-209. L'attribuzione di funzioni giurisdizionali ai vescovi è documentata fin dall'età ottoniana: François Bougard, *La justice dans le Royaume d'Italie de la fin du VIIIe siècle au début du XIe siècle* (Bibliothèque des Écoles Françaises d'Athènes et de Rome 291; Rome 1995) 287-288; 300; 303-304.

però illuminate (se non mi inganno), rispetto al passato, da qualche luce sopravvenuta. L'accettazione della testimonianza di Roberto di Torigni e la connessa riproposizione della paternità irneriana del *Liber divinarum sententiarum* possono aprire orizzonti imprevisi fino a pochi anni fa. Con l'avvertenza che tra il momento in cui Irnerio compone il suo scritto teologico e quello in cui glossa il *Corpus Iuris* di Giustiniano, molta acqua era fluita sotto i ponti, tante cose erano cambiate. Sicché non ci si potrà limitare, oggi, a cercare con ostinazione nel primo lavoro segnali e preludi del secondo. Lo ha fatto Gastaldelli, riuscendo qua e là convincente;¹⁹ lo stesso Cortese ha scritto che laddove il *Liber divinarum sententiarum* riproduce un testo dello ps. Crisostomo, 'rapportant que l'élection des rois est confiée au peuple et ou il est précisé qu'une fois celle-ci effectuée, le peuple n'a plus le droit de se libérer du joug royal', vi si ritrova 'la théorie qu' Irnerius juriste rattache à la lex regia dans une glosse célèbre'.²⁰ Forse, nel tentativo di rilevare una sorta di continuità tra il *Liber* e la posteriore esegesi di Irnerio giurista, si potrebbe piuttosto evidenziare l'uso della tecnica 'a mosaico', che nell'opera teologica connette i passi patristici 'paucis forte verbis alicubi interpositis', come afferma Burcardo, giusto a proposito del lavoro compiuto sui testi giustinianeî dal 'dominus Wernerius'.²¹ Indizio probabilmente non trascurabile, perché se su singole posizioni ideali si può certo ipotizzare un mutamento di giudizi, nel tempo la fedeltà a un metodo compositivo tende comunque a permanere, come un 'habitus' mentale.

Nell'intreccio di tante opinioni, spesso radicalmente e reciprocamente opposte tra loro, intorno alla personalità del

¹⁹ *Wilhelmus Lucensis, Comentum in tertiam ierarchiam Dionisii que est de divinis nominibus*, ed. Ferruccio Gastaldelli (Firenze 1983) XLVII-LIX.

²⁰ Cortese, 'Théologie' 67. Il riferimento è a Guarnerius Iurisperitissimus 175 n.178. Per la lex regia si v. oggi anche Berardo Pio, 'Considerazioni sulla lex regia de imperio (secoli XI-XIII)', *Scritti di storia medievale offerti a Maria Consiglia De Matteis*, cur. Berardo Pio (Spoleto 2011) 573-599.

²¹ *Burchardi praepositi Urspergensis Chronicon*, ed. Oswald Holder-Egger (2nd. ed. MGH SS Rer. Germ. n.s. 16; Hannover 1916) 15. Sul punto cf. Enrico Spagnesi, *Libros legum renovavit: Irnerio lucerna e propagatore del diritto* (Pisa 2013) 166 e Padovani, 'Irnerio e Matilde' 230.

‘primus illuminator’, prendiamo pur atto serenamente dell’esistenza di una vera ‘questione irneriana’, non meno contorta e affascinante di celebri questioni avviate intorno ad altri grandi—anzi, grandissimi—protagonisti della civiltà occidentale. Se ancora non vediamo il porto nel quale approderemo, ciò che ci resta è iniziare quella ‘seconda navigazione’ che—a detta di Platone—può procedere solo a forza di remi, con umile, perseverante fatica, fatta di pacato confronto ideale.

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La suma *Quoniam in omnibus* y las primeras *summae* de la Escuela de Bolonia*

José Miguel Viejo-Ximénez

Linda Fowler-Maggerl *in memoriam*

I. Introducción

Las ‘*summae*’ de las tres primeras décadas de la Escuela de Bolonia—años 1140, 1150 y 1160—han sido comparadas con los *apparatus* de glosas al *Decreto* de Graciano.¹ Estas obras, en efecto, se compusieron mediante la yuxtaposición de comentarios autónomos a una palabra o a un grupo de palabras de una ‘*auctoritas*’ o de un ‘*dicta*’.² Los comentarios siguen el orden de

* El autor quiere dejar constancia de su agradecimiento al personal de la Biblioteca de la Facultad de Ciencias Jurídicas y de la Biblioteca General de la Universidad de Las Palmas de Gran Canaria, así como a la Fundación Derecho y Europa (A Coruña, España) por la ayuda prestada para la elaboración de este estudio.

¹ Un manuscrito de la *Summa Quoniam in omnibus* comienza con la rúbrica *Glose Graciani super canon*, Stuttgart, BM, HB VI 62 (Weingarten H. 72), fol. 72ra). Por lo general, hoy se acepta la caracterización propuesta por Kuttner, *Repertorium*, para quien, en la Escuela de Bolonia, se distinguen dos tipos de ‘*summae*’: 1. ‘Die eigenartige Stilmischung zwischen Kommentar und Summa’ p. 124, que comienza con Paucapalea, se desarrolla en el *Fragmentum Cantabrigiense*, alcanza su primera perfección en Rufino, se consolida con Esteban de Tournai y Johannes Faventinus, y continúa con Simón de Bisignano y una serie de sumas anónimas hasta Huguccio (el *Commentum Atrebatense* y la *Summa Reginensis* pertenecen también a este sub-género boloñés, aunque carecen de prólogo). 2. Y ‘die Linie der eigentlichen, auf systematisch-didaktische Zusammenfassung beschränkten Summen’ 126, que estaría representada por las sumas *Quoniam status ecclesiarum* y *Cum in tres partes*, ambas dependientes de Esteban de Tournai, por la suma *De multiplici iuris divisione* y por la suma de Sircardo de Cremona; en este segundo sub-género hay también sumas sin prólogo, como por ejemplo *De multiplici iuris divisione* (ibid.).

² En los testimonios manuscritos de estas ‘*summae*’, las palabras del Decreto de Graciano aparecen subrayadas, una práctica habitual en las ‘*expositiones*’ de

la *Concordia discordantium canonum*, una obra que ya está dividida en tres partes y cuya primera parte se estructura en distinciones numeradas.

En el interior de estas ‘summae’, cada comentario es una unidad independiente, que tiene sentido en sí misma porque no forma parte de un relato. No es, sin embargo, un compartimento estanco: los comentarios no se agotan en la descripción sumaria (resúmenes) ni en la interpretación literal (exégesis), pues las referencias a lugares paralelos y contrarios —en forma de *allegationes*— dentro de la propia ‘summa’, o dentro de la *Concordia discordantium canonum*, ofrecen una comprensión sistemática de cada uno de los fragmentos analizados.

En las primeras ‘summae’ boloñesas hay tres elementos que dan unidad al conjunto y que diferencian los escritos pertenecientes a este género literario de los ‘apparatus glossarum’:

- a. un ‘proemium’, o prólogo, que, por lo general, consta de un ‘exordium iuris canonici’ y de un ‘accessus ad Gratianum’,³
- b. ‘transiciones’ o ‘continuationes’ al comienzo del comentario a cada una de las secciones del *Decreto* de Graciano, esto es, los

los comentaristas del antiguo y del nuevo testamento. Todas estas obras están relacionadas con un método de enseñanza oral, basado en la lectura y el comentario de libros.

³ En concreto: 1. *Quoniam in omnibus*, prólogo de la *Summa Quoniam in omnibus* y de la *Summa Alenconensis*; 2. *Sicut uetus testamentum*, prólogo de la *Summa Sicut uetus testamentum*; 3. *Quadrifido ciborum*, prólogo de la *Stroma ex decretorum corpore carptum (Stroma Rolandi)*; 4. *Ius aliud diuinum*, prólogo de la *Summa Ius aliud diuinum*; 5. *Sacrosancte romane ecclesie*, prólogo de la *Summa* de Rufino; 6. *Si duos ad cenam*, prólogo de la *Summa* de Esteban de Tournai: cf. Kuttner, *Repertorium* 125-136; y Stephan Kuttner, ‘Bernardus Compostellanus Antiquus’, *Traditio* 1 (1943) 277-340, en 279 nota 1. Otros dos escritos, que responden al esquema ‘exordium iuris canonici’ y ‘accessus ad Gratianum’, circularon de manera independiente: *Inter ceteras theologiae disciplinas* y *Sicut uetus testamentum in tria*: cf. Kuttner, *Repertorium* 127; Gérard Fransen, ‘La date du Décret de Gratien’, *RHE* 51 (1956) 521-531 en 524; y Gérard Fransen, ‘Manuscrits canoniques conservés en Espagne (III)’, *RHE* 51 (1956) 935-941 en 937-39. Por su parte, *Volens Gratianus formam* es un ‘accessus ad Gratianum’: cf. Kuttner, *Repertorium* 141-142.

párrafos de enlace que indican el contenido de la sección que se acaba de comentar y anuncian el de la siguiente;⁴ y

c. ‘introducciones’ especiales —a menudo en forma de ‘*summulae*’ o pequeños tratados— a algunas secciones relevantes, como el comienzo de las causas —la ‘*secunda pars*’— o el tratado sobre el matrimonio (C.27-C.35).⁵

La mayor parte de los comentarios que forman parte de estas ‘*summae*’ combinan elementos originales con materiales preexistentes. En este sentido las primeras ‘*summae*’ boloñesas son composiciones, o si se prefiere, textos prefabricados, algunos

⁴ En el comentario a D.101, Esteban de Tournai, explica que Graciano también utiliza este recurso retórico: ‘*Hactenus: Exornatione rhetorica utitur quae dicitur transitio, qua continuantur dicta dicendis et dicenda dictis*’, Johann F. von Schulte, ed. *Stephan von Doornick [Étienne de Tournai, Stephanus Tornacensis]. Die Summa über das Decretum Gratiani* [Giessen 1891, reimpr. Aalen 1965] 120.8-9). La *Summa Quoniam in omnibus* tiene estos párrafos de enlace (‘transiciones’ ó ‘continuationes’) al comienzo de los comentarios a propósito de algunas distinciones de la ‘*prima pars*’, al comienzo de los comentarios a todas las causas de la ‘*secunda pars*’ y al comienzo de los comentarios a las distinciones de la ‘*tertia*’ o ‘*ultima pars*’: cf. José Miguel Viejo-Ximénez, ‘Una composición sobre el Decreto de Graciano: La suma “*Quoniam in omnibus rebus animaduertitur*” atribuida a Paucapalea’, *Helmántica* 190 (2012) 419-473 en 434-35. Algunas de las ‘transiciones’ y ‘continuationes’ de la *Summa Quoniam in omnibus* son reconocibles en la *Summa Alenconensis* y en la *Summa Sicut uetus testatementum*.

⁵ Algunos ejemplos: 1. la introducción ‘*Videndum est quomodo causa—cuius thema tale est*’, al comienzo del comentario a la segunda parte del *Decreto* de Graciano en el *Fragmentum Wigorniese*, Worcester, Cathedral Library Q.70, fol. 20rb-20vb; 2. la introducción / ‘*summula*’, ‘*Pertractatis his que spectant ad statum ecclesiastice professionis—matrimonii contrahendi xi. sunt que impediunt*’, al comienzo del ‘*tractatus coniugii*’ en el *Fragmentum Cantabrigiense* (Cambridge, BU Addit. 3321, fol. 10r-11r); 3. el tratado ‘*Symonia est studiosa—quis neque sanctis*’, al comienzo del comentario a la segunda parte del *Decreto* de Graciano en la *Summa* de Rufino (Heinrich Singer, ed. *Rufinus von Bologna, Summa Decretorum* [Paderborn 1902, reimpr. Aalen 1963] 197-200); 4. el tratado ‘*Symonia est maleficium—mansuetudine tamen tollerari potest*’, de la *Summa Tria sunt per que religionis* (München, BSB lat. 16084, fol. 34rv); o también 5. el tratado ‘*Coniugium siue matrimonium—inter ea que impediunt matrimonium*’ de la *Summa* de Esteban de Tournai (München, BSB lat. 17162, fol. 149rb-149va).

de ellos ensamblados con la técnica de la redacción en mosaico. Las piezas que se distinguen en el interior de los comentarios son:

- a. ‘glossae’ pertenecientes a las primeras etapas de composición de glosas al *Decreto* de Graciano;
- b. ‘definitiones’ tomadas de las Etimologías de Isidoro de Sevilla, del ‘Elementarium doctrinae erudimentum’ de Papías, de otros vocabularios medievales, del Derecho romano, o también de los escritos de los primeros glosadores (legistas);
- c. ‘allegaciones’, es decir, remisiones a lugares paralelos o contrarios;
- d. ‘distinciones’;
- e. ‘historiae’ del antiguo testamento;
- f. enseñanzas de los decretistas, que normalmente se presentan mediante una tercera persona del plural;
- g. autoridades del *Decreto* de Graciano, o de otras colecciones canónicas, como, por ejemplo, el *Decreto* de Burcardo de Worms, o las colecciones atribuidas a Ivo de Chartres;
- h. fragmentos de Padres de la Iglesia y de escritores eclesiásticos;
- i. enseñanzas de teólogos de la primera escolástica, en especial, de la escuela de París, cuyos textos se copian sin destacar su carácter de cita;
- j. fragmentos de todos los libros del *Corpus Iuris Civilis*;
- k. enseñanzas de los legistas, cuyos nombres tampoco se citan;
- l. ‘summulae’, o pequeños tratados sobre materias especiales.

En ocasiones, los autores de estas piezas y los autores de las ‘summae’ —quienes, la mayoría de las veces, envuelven los préstamos con sus aportaciones personales— son personas distintas. Y las mismas piezas se repiten —a veces con pequeños retoques— en el interior de los comentarios de varias ‘summae’.

El presente estudio contempla el desarrollo de los métodos de la nascente ciencia del Derecho canónico desde esta perspectiva: descomponer los comentarios de las primeras ‘summae’ boloñesas a cuatro pasajes del *Decreto* de Graciano. La imagen que resulta de la identificación de los modelos, próximos o remotos, de cada pieza ensamblada —en especial de aquellas que se transcriben sin distinguirlas de las piezas que proceden del autor de la ‘summa’ (¿préstamos? ¿plagios?)—, así como de la comparación entre

pasajes ‘prima facie’ equivalentes, aconseja repensar la datación de estos escritos y sus relaciones mutuas, sobre todo a la hora de establecer, como suele ser habitual, influencias doctrinales, o incluso dependencias literarias. Cuando se ha intentado describir el origen y el desarrollo de este género literario, o cuando se ha querido valorar el papel que algunos maestros tuvieron en la Escuela de Bolonia no siempre se ha tenido en cuenta esta circunstancia: salvo del tratado sobre el matrimonio *Pertractis his* atribuido al maestro Rolando⁶ y de la *Summa* de Rufino⁷, no hay ediciones críticas, o al menos textos de trabajo fiables.

El caso de Paucapalea es paradigmático. De un lado, desde el siglo XIX, la bibliografía repite que la *Summa Quoniam in omnibus* es obra de Paucapalea, el primer discípulo de Graciano. De otro, cuando la *Summa Quoniam in omnibus* se ha comparado con la *Summa* de Rufino, o con la de Esteban de Tournai, se han destacado lugares paralelos,⁸ lo que ha llevado a asignar a Paucapalea un papel relevante en la autoría o, al menos, en la difusión de unas concretas enseñanzas. Hoy sabemos, sin embargo, que la *Summa Quoniam in omnibus* es una composición en mosaico, alguna de cuyas piezas ofrece explicaciones distintas a las que los decretistas atribuyeron a Paucapalea.⁹ Que el autor de la *Summa Quoniam in omnibus* no fue el primer decretista, porque

⁶ Kerstin A. Jacobi, ed. *Der Ehetraktat des Magister Rolandus von Bologna: Redaktionsgeschichtliche Untersuchung und Edition (Studienausgabe)* (Hamburg 2004) 265-510.

⁷ Singer, *Rufinus*. No puede, sin embargo, considerarse una edición crítica: Singer utilizó 8 manuscritos (hoy se conocen 12 completos y 10 fragmentarios) y su selección de variantes no es rigurosa.

⁸ Cf. Schulte, *Stephan* x-xi; y Singer, *Rufinus* cxii.

⁹ Cf. José M. Viejo-Ximénez, ‘La “Summa Quoniam in omnibus” de Paucapalea: Una contribución a la Historia del Derecho Romano-Canónico en la Edad Media’, *Initium* 16 (2011) 27-74 (reimpr. *Folia Theologica et Canonica* 1 [2012] 151-196); ‘Una composición sobre el Decreto de Graciano: La suma “Quoniam in omnibus rebus animaduertitur” atribuida a Paucapalea’, *Helmántica* 190 (2012) 419-473 (reimpr. Miguel A. Pena González, ed. *De la primera a la segunda ‘Escuela de Salamanca’: Fuentes documentales y líneas de investigación* [Salamanca 2012] 197-251); y ‘The “Summa Quoniam in omnibus” revisited’, *Folia Theologica et Canonica* 3 (2014) 153-169 (reimpr. *Proceedings Toronto 2012* 163-77).

se hizo eco de la opinión de otros comentaristas del *Decreto* de Graciano.¹⁰ Y que muchos de los pretendidos paralelismos entre la *Summa Quoniam in omnibus* y las ‘summae’ de Rufino y de Esteban de Tournai son más aparentes que reales, mientras que en otros casos habría que hablar de influencias remotas, o, a lo sumo, del recurso a materiales o enseñanzas difundidas en el círculo de una Escuela.

Las líneas que siguen presentan los resultados de la descomposición y posterior comparación de tres prólogos que encabezan otras tantas ‘summae’ y de tres comentarios a otras tantas secciones de la primera parte del *Decreto* de Graciano — D.22 c.3, D.23 d.p.c.20 y D.54 d.p.c.8—en algunas ‘summae’ boloñesas, desde la *Summa Quoniam in omnibus* hasta la *Summa* de Esteban de Tournai.

II. *Si duos ad cenam conuiuas*

El prólogo *Si duos ad cenam* es uno de los textos más estudiados de la decretística boloñesa.¹¹ Es la introducción de la *Summa* de Esteban de Tournai, aunque también circuló de manera independiente. Como otros prólogos de la Escuela, se divide en dos partes: un ‘exordium iuris canonici’ y un ‘accessus ad Gratianum’.

En la primera parte, el ‘exordium iuris canonici’ (cf. Apéndice I), los editores han querido ver un paralelismo con Paucapalea — es decir, con la *Summa Quoniam in omnibus*— y así lo han hecho constar en los respectivos aparatos de fuentes.¹² Después de explicar su particular modo de entender las relaciones entre sacerdocio y reino —en la misma ciudad, que es la Iglesia, Cristo es el rey, bajo cuyo gobierno existen dos pueblos (el orden de los

¹⁰ Cf. José M. Viejo-Ximénez, ‘Dos escritos de la decretística boloñesa: “Inter ceteras theologia disciplinas” y “Quoniam in omnibus”,’ REDC 71 (2014) 271-291.

¹¹ Se imprimió en 1855, junto con las cartas y sermones de Esteban, en PL 211.575-580.

¹² Cf. Herbert Kalb, ed. *Studien zur Summa Stephans von Tournai* (Innsbruck 1983) 114.26-36; y Schulte, *Stephan 2* nota 2.

clérigos y el orden de los laicos), dos vidas (la espiritual y la carnal), dos principados (el sacerdocio y el reino) y dos jurisdicciones (el derecho divino y el derecho humano)¹³—, el autor de *Si duos ad cenam* advierte que deja a un lado el ‘ius humanum’ para centrarse en el ‘ius diuinum’.¹⁴ A propósito del origen del derecho divino, que vincula al origen de la ‘litigandi’ o ‘placitandi forma’, o incluso al del ‘iudiciorum ordinem’ (en definitiva, del proceso), el autor de *Si duos ad cenam* refiere tres opiniones alternativas:

Primera: ‘quidam a principio mundi cepisse dicunt’,¹⁵ para lo que estos autores —no dice quiénes son— se remiten al pasaje del Génesis en el que Adán se defendió ante Dios y alegó una excepción (procesal), en forma de excusa: ‘la mujer que me diste por compañera me engañó y comí’ (en referencia a Gen. 3:12).

Segunda: ‘Alii dicunt, a ueteri lege iudiciorum ordinem initium habuisse’,¹⁶ si bien es cierto que, estos autores —también desconocidos—, alegan a continuación un pasaje del antiguo testamento —la frase del Deuteronomio en la que Moisés establece las condiciones de validez del testimonio (Deut 19:6)— y otro del nuevo —la recomendación paulina a la primitiva comunidad de Corinto para que nombraran jueces cristianos que resolvieran las ‘secularia iudicia’ entre cristianos (1 Cor 6:4).

Tercera: ‘Alii . . . diuini iuris originem a primitiua sumunt ecclesia’,¹⁷ pues este tercer grupo de autores (¿?) se remontan a la libertad concedida por Constantino a los cristianos, cuando se reunieron los concilios y se aprobaron cánones para cada uno de los ‘negotia ecclesiasticorum’.

Hasta aquí la parte del ‘exordium iuris canonici’ de *Si duos ad cenam* que se considera inspirado por Paucapalea y la *Summa Quoniam in omnibus*.

¹³ Kalb, *Studien* 114.18-24. En su opinión, esta eclesiología estaría inspirada por Hugo de San Víctor, *De sacramentis* 2.2.24.

¹⁴ ‘De iure humano uarie ac diffuse in constitutionibus principum et in responsis prudentium multa leguntur. De iure autem diuino dicendum est, . . .’ (Kalb, *Studien* 114.24-25).

¹⁵ Kalb, *Studien* 114.27.

¹⁶ *Ibid.* 115.32.

¹⁷ *Ibid.* 115.36.

Sin embargo, el autor del ‘exordium iuris canonici’ de *Quoniam in omnibus*, esto es, el prólogo de la *Summa Quoniam in omnibus* que se atribuye habitualmente a Paucapalea, y que es también el prólogo de la *Summa Alenconensis*, distinguió entre el origen de la ‘placitandi forma’ y el ‘de origine iuris’: ‘Placitandi forma in paradiso . . . De origine iuris restat dicendum’¹⁸ (cf. Apéndice II). Además tenía una visión progresiva, no excluyente, sobre la formación de la ‘*placitandi forma*’: ‘primum —primero— in paradiso uidetur inuenta’, ‘deinde —después— in ueteri lege nobis tradita dum Moyses’ y, por último, las causas y el modo de terminar los procesos quedaron definitivamente conformados con el consejo paulino a los cristianos de Corinto.¹⁹

Así pues, la afirmación ‘In sequentibus Paucapaleae summa utitur’ con la que el primer editor de la *Summa* de Esteban de Tournai presentó el párrafo de *Si duos ad cenam* sobre el origen del ‘ius divinum’²⁰ va más allá de lo que sugiere el análisis comparativo. Entre *Si duos ad cenam* y *Quoniam in omnibus* no hay otra relación que la propia de los escritos de Escuela. Es poco probable que el autor de *Si duos ad cenam* utilizara la *Summa* de Paucapalea, si que es que el autor del prólogo *Quoniam in omnibus* y el autor de la *Summa Quoniam in omnibus* fueron la misma persona, esto es: Paucapalea, el primer discípulo de Graciano. Lo que sí parece probable es que, estuviera quien estuviera detrás de la composición de *Quoniam in omnibus*, no fue el primer decretista en plantear el origen de la ‘placitandi forma’: este mérito debe atribuirse al autor del prólogo *Inter ceteras theologie disciplinas* (cf. Apéndice III).²¹ En suma, los primeros decretistas boloñeses —Escuela a la que pertenecieron Paucapalea, el autor de *Inter ceteras theologie disciplinas*, el autor de *Quoniam in omnibus*, el autor de la *Summa Quoniam in omnibus*, el autor de la *Summa Alenconensis*, el autor de *Si duos ad cenam* y Esteban de

¹⁸ Cf. Viejo-Ximénez, ‘Dos escritos’ 285.

¹⁹ Ibid. 285.

²⁰ Cf. Schulte, *Stephan* 2 nota 2. Cf. en el mismo sentido Kalb, *Studien* 114 nota a 26-36.

²¹ Cf. Viejo-Ximénez, ‘Dos escritos’ 282.

Tournai²²— conocían y discutían las enseñanzas de sus maestros y colegas, y tuvieron acceso a la misma biblioteca. Se formaron y trabajaron en un universo limitado de referencias intelectuales. Entre sus escritos, sin embargo, no es posible establecer dependencias literarias.

III. *Constantinopolitana noua Roma*

En ocasiones, los comentarios de las primeras ‘summae’ boloñesas transmiten interpretaciones o enseñanzas que eran lugares comunes en la Escuela. Esto no significa que unas procedan directamente de las otras. Así lo sugiere, por ejemplo, la descomposición y posterior comparación de las explicaciones a propósito de D.22 c.3.

El canon 5 del I Concilio de Constantinopla (381) concedió al obispo de esta ciudad un primado de honor después del obispo de Roma, porque, aunque no es sede apostólica, se trata de la ‘noua Roma’ (D.22 c.3). El título ‘nueva Roma’ despertó el interés de los maestros de Bolonia, donde, a partir de la ‘translatio imperii’, se elaboró, de manera progresiva, una enseñanza estandarizada. Las glosas más antiguas al *Decreto* de Graciano aportaron la idea inicial, que fue objeto de sucesivos enriquecimientos. Los comentarios a D.22 c.3 de las primeras ‘summae’ testimonian las etapas del proceso.

²² La composición de la *Summa Alenconensis* también está relacionada con la Escuela de Bolonia, como pone de manifiesto la utilización del prólogo *Quoniam in omnibus*, así como el que sus comentarios a numerosos pasajes del Decreto utilizan materiales que también se utilizaron para la *Summa Quoniam in omnibus*. Según Weigand, el autor de la *Summa Alenconensis* tomó la mayor parte de sus comentarios de la *Summa Quoniam in omnibus*, mientras que la otra parte procede de la primera etapa de composición de glosas: cf. Rudolf Weigand, ‘Paucapalea und die frühe Kanonistik’, AKKR 150 (1981) 137-157 en 153. Por otra parte, algunas piezas de *Quoniam in omnibus* también se emplearon para la composición de los prólogos *Sicut Vetus Testamentum* (Firenze, BN Conv. soppr. G.IV.1736, fol. 1r-1va) y *Sicut Vetus Testamentum in tria* (Madrid, BN C.87, fol. 3r).

En el comentario de la *Summa Quoniam in omnibus* a D.22 c.3 —que coincide sustancialmente con el comentario de la *Summa Alenconensis*— se distinguen tres piezas:

1. La primera frase, ‘Nova Roma – romanum imperium’,²³ explica la designación de Constantinopla como la nueva Roma a partir de la ‘translatio imperii’: Constantinopla, se afirma, es la nueva Roma porque Constantino trasladó allí el Imperio romano. Estas palabras se han tomado de una glosa, que solo aparece en los manuscritos del *Decreto* de Graciano que transmiten la primera etapa de composición de glosas.²⁴ El autor de la *Summa Quoniam in omnibus* utilizó una versión de la glosa más breve, anterior a esa

primera etapa: ‘Constantin<opolitana> noua <Ro>ma ideo di<citur> . . . nouiter ibi trans<latum> romanum im<perium>’.²⁵

2. A continuación, hay un breve relato de la donación de Constantino, que se ha elaborado a partir de diversos elementos, todos ellos reconocibles en la versión del *Constitutum Constantini* que transmiten las colecciones de la reforma gregoriana — Anselmo de Lucca (*Ans.* 4.33-34), *Deusdedit* (*Deus.* 4.1) o la segunda redacción del *Polycarpus* (*Pol.* [2R] 1.21.1 y 1.31.1), entre otras— y que más tarde llegó a las ‘paleae’ D.96 c.13 y c.14.²⁶ A la vista de estos modelos, en el resumen de la donación se distinguen tres partes:

²³ Schulte, *Paucapalea* 21.30-32.

²⁴ Cf. Rudolf Weigand, ‘Die ersten Jahrzehnte der Schule von Bologna: Wechselwirkung von Summen und Glossen’, *Proceedings Munich 1992* 445-465 en 448-449.

²⁵ Barcelona, Archivo de la Corona de Aragón, Ripoll. 78, fol. 37ra, margen izquierdo. Aunque en el microfilm no se entienden todas las palabras, la glosa de Barcelona 78 no tiene la remisión final ‘ut infra e<adem parte> Constantinus’, que fue añadida posteriormente, en la primera etapa de composición de glosas. Así pues, esta etapa sería posterior a la incorporación de las ‘paleae’ de D.96 al *Decreto* de Graciano.

²⁶ Cf. Johanna Petersmann, ‘Die kanonistische Überlieferung des *Constitutum Constantini* bis zum Dekret Gratians: Untersuchung und Edition’, DA 30 (1974) 356-449: la versión del *Constitutum Constantini* que utilizó Paucapalea (es decir, la *Summa Quoniam in omnibus*) conecta con la que circuló en las colecciones de la reforma gregoriana, pues tiene la rúbrica de Anselmo de Lucca y, además, utiliza ‘apostolico’ en lugar de ‘papa’ (p. 396). Los cotejos realizados para el presente estudio tienen en cuenta estas ediciones: Friedrich

a. *Constantinus*—*contulit* (Schulte, *Paucapalea* 21.32-33) : ex Ans. 4.33 (Thaner, *Anselm* 206.17-19) : ex Deus. 4.1 (Wolf von Glanvell, *Deusdedit* 397.6-8).²⁷

b. *in <quo>*—*dignitatem* (Schulte, *Paucapalea* 21.33-34) : ex Ans. 4.33 (Thaner, *Anselm*, 206.13-14) : sin correspondencia en Deus. 4.1²⁸ En esta parte del relato, la versión de *Summa Quoniam in omnibus* ofrece ‘enim imperator romanorum’, en lugar de ‘imperator’ (Ans.).

c. *<ipsumque> palatium—gloriam <tribuit>* (Schulte, *Paucapalea* 21.34-22.1): ex Ans. 4.33 (Thaner, *Anselm* 207.26 y 208.4), ex Deus. 4.1 (Wolf von Glanvell, *Deusdedit* 398.24 y 399.6).²⁹

3. El comentario de la *Summa Quoniam in omnibus* a D.22 c.3 continua con una frase, *Insuper quoque regnum ei dimisit* (Schulte, *Paucapalea* 22.1-2), que no tiene correspondencia en Ans. / Deus. / Pol. Luego viene un párrafo tomado del *Constitutum Constantini*:

a. *Congruum esse—potestatem habeat* (Schulte, *Paucapalea* 22.2-7) : ex Ans. 4.33 (Thaner, *Anselm*, 209.11-16) : ex Deus. 4.1 (Wolf von Glanvell, *Deusdedit*, 400.21-26).³⁰ Aquí, la versión de *Summa Quoniam in omnibus* tiene tres lecturas propias: (i) *esse perpeximus*, en lugar de *perspeximus* (Ans. Deus.);³¹ (ii) *caput a deo est institutum*, en lugar de *caput ab inperatore celesti constitutum est* (Ans. Deus.);³² y (iii) *ut ibi imperator terrenus sedeat et potestatem habeat*, en lugar de *ut illic inperator terrenus*

Thaner, ed. *Anselm II. Bischof von Lucca (Anselmus Episcopus Lucensis) Collectio canonum* (Innsbruck 1906-1917, reimpr. Aalen 1965); y Victor Wolf von Glanvell, ed. *Die Kanonessammlung des Kardinals Deusdedit* (Paderborn 1905, reimpr. Aalen 1967). No ha sido posible consultar la segunda redacción del *Polycarpus*, cuyos capítulos se numeran conforme a Linda Fowler-Magerl, *Clavis Canonum: Selected Canon Law Collections before 1140* (MGH *Hilfsmittel* 21; Hannover 2005). En cuanto al *Decreto* de Graciano, se utiliza la edición de Friedberg.

²⁷ Cf. D.96 c.14 palea.

²⁸ Cf. D.96 c.13 palea, con la lectura ‘imperator’ de Ans.

²⁹ Cf. D.96 c.14 §2 palea.

³⁰ Cf. ex D.96 c.14 §7 palea.

³¹ D.96 c.14 §7 lee ‘perpeximus’.

³² D.96 c.14 §7 lee ‘caput ab inperatore celesti constitutum est’.

habeat potestatem (*Ans. Deus.*).³³ Las colecciones canónicas no ofrecen una explicación para estas lecturas, que, por lo tanto, podrían atribuirse al autor de la *Summa Quoniam in omnibus*.³⁴

Del contraste de la edición de la *Summa Quoniam in omnibus* con las colecciones pregracianas, la composición del comentario a D.22 c.3 que transmite este escrito de la primera generación de decretistas de la Escuela de Bolonia se podría describir del siguiente modo: el autor de la *Summa Quoniam in omnibus* tomó la idea de la ‘*translatio imperii*’ de un ejemplar del *Decreto* de Graciano con glosas antiguas. Para apuntalar la explicación del título ‘*noua Roma*’ que circulaba entre sus colegas, acudió a una versión del *Constitutum Constantini* emparentada con la que llegó a las colecciones de la reforma gregoriana.³⁵ A partir de la colección de Anselmo de Lucca, elaboró un resumen del relato de la donación y copió un párrafo del *Constitutum Constantini*, que destaca el traslado del Imperio de Roma a Bizancio. En el texto del *Constitutum Constantini* dejó dos marcas personales: simplificó la expresión ‘emperador celeste’, pues escribió ‘Dios’; y reforzó la idea de la diferente localización geográfica de ambas potestades —el Papa en Roma, el Emperador en Constantinopla— mediante el verbo ‘sentarse’ (*sedeat*).

Ahora bien, los manuscritos de la *Summa Quoniam in omnibus* registran variantes que escaparon al escrutinio del editor. Las que ayudan a valorar el alcance de la aportación del autor de esta *Summa* a la interpretación del canon 5 del I Concilio de

³³ D.96 c.14 §7 lee ‘*ut illic inperator terrenus habeat potestatem*’.

³⁴ Cf. Petersmann, ‘*Die kanonistische*’ 442.271-443.276. Las variantes de la *Summa Quoniam in omnibus* tampoco se explican a partir de las diversas versiones del *Constitutum Constantini*: cf. Horst Fuhrmann, ed. *Das Constitutum Constantini Text* (MGH Fontes Iuris 10; Hannover 1968) 94.271-95.276.

³⁵ El ejemplar del *Decreto* de Graciano que utilizó el autor de la *Summa Quoniam in omnibus* no tenía las paleae D.97 c.13, c.14: cf. Schulte, *Paucapalea* 49, nota 1. En general, los estudiosos entienden que fue Paucapalea quien introdujo el *Constitutum Constantini* en el *Decreto* de Graciano, mediante las paleae D.96 c.13 y c.14, según algunos ‘*In aperta contraddizione con le concezioni del suo maestro*’, Domenico Maffei, *La Donazione di Constantino nei giuristi medievali* (Milano 1964, reimpr. 1969) 27.

Constantinopla aparecen en el párrafo del *Constitutum Constantini* que forma la tercera pieza del comentario a D.22 c.3.

En el párrafo del *Constitutum Constantini* que se transcribe en el comentario a D.22 c.3, todos los manuscritos de la *Summa Quoniam in omnibus* concuerdan en las dos primeras lecturas, esto es: en contra de la tradición canónica del *Constitutum Constantini*, todos leen 1. ‘esse perpeximus’ y 2. ‘caput a deo est constitutum’. Los códices se separan a propósito de la tercera lectura, 3. ‘ut ibi imperator terrenus sedeat et potestatem habeat’, por lo que conviene hablar de dos recensiones. En concreto:

a. La recensión mayoritaria —*Summa Quoniam in omnibus*¹, representada por 8 manuscritos y que no quedó reflejada en la edición de este escrito³⁶— respeta la lectura ‘ut illic imperator terrenus potestatem habeat’ propia de las colecciones canónicas, que es también la lectura del *Decreto* de Graciano.

b. La recensión minoritaria —*Summa Quoniam in omnibus*², representada por 6 manuscritos³⁷— modifica el final de la versión del *Constitutum Constantini* que circuló entre los canonistas gregorianos, y es la que coincide con la edición de la *Summa Quoniam in omnibus*: ‘ut ibi imperator terrenus sedeat et potestatem habeat’.

La coincidencia con sus modelos remotos daría la prioridad a la recensión mayoritaria *Summa Quoniam in omnibus*¹. La recensión minoritaria *Summa Quoniam in omnibus*² sería entonces una reelaboración, que podría tener su origen en las discusiones de

³⁶ Cf. Schulte, *Paucapalea* 22.6. Los manuscritos de la *Summa Quoniam in omnibus* que transmiten la recensión mayoritaria *Summa Quoniam in omnibus*¹ son: Admont, SB 389, fol. 13r: ‘ut illic terrenus imperator potestatem habeat’; Berlin, SB lat. 462, fol. 95ra; München, BSB lat. 15819, fol. 75vb; München, BSB lat. 18467, fol. 75ra; Paris, Bibliothèque de l’Arsenal, 93, fol. 165rb: ‘ut illic terrenus imperator potestatem habeat’; Wien, ÖNB 570, fol. 4vb; Wien, ÖNB 2220, fol. 7rv; Stuttgart, BM, HB VI 63, fol. 38ra.

³⁷ Cf. Schulte, *Paucapalea* 22.6. Los manuscritos de la *Summa Quoniam in omnibus* que transmiten la recensión minoritaria *Summa Quoniam in omnibus*² son: 3as, BM 170 (172), fol. 5va: ‘ut ibi imperator terrenus sedeat et habeat potestatem’; Grenoble, BM 627 (391), fol. 102ra: ‘ut ibi imperator terrenus sedeat et illic potestatem habeat’; London, BL Royal, 11 B. ii, fol. 6ra; Metz, BM 250, fol. 16r; Stuttgart, BM, HB VI 62, fol. 77va; Troyes, BM 695, fol. 4vb; Worcester, BC, Q.70, fol. 106rb.

la Escuela. Lo cierto es que las dos recensiones del comentario de la *Summa Quoniam in omnibus* a D.22 c.3 están documentadas por otras dos ‘summae’ de la primera generación de decretistas boloñeses. El comentario de la *Summa Sicut Vetus Testamentum* coincide con la recensión mayoritaria *Summa Quoniam in omnibus*¹, pues lee ‘ut illic imperator terrenus potestatem habeat’.³⁸ En el mismo pasaje, la *Summa Alenconensis* tiene, por el contrario, la recensión minoritaria *Summa Quoniam in omnibus*², ‘ut ibi imperator terrenus sedeat et potestatem habeat’.³⁹

Los manuscritos de la *Summa Quoniam in omnibus* no aportan información relevante en relación a la composición de las dos primeras partes del comentario a D.22 c.3: todos transmiten la glosa ‘noua Roma’ y el relato de la donación en términos similares a la edición impresa. Otro tanto ocurre con la *Summa Alenconensis* y la *Summa Sicut Vetus Testamentum*. Así pues, la eclesiología basada en la ‘translatio imperii’ es una aportación de los primeros glosadores de la *Concordia discordantium canonum*: los decretistas que trabajaron inmediatamente después de la confección de la obra, antes de la redacción de la *Summa Quoniam in omnibus* y de la primera etapa de composición de glosas. El autor de la *Summa Quoniam in omnibus* completó esta reflexión con un argumento histórico y otro de autoridad —más allá del c.5 de Constantinopla (D.22 c.3)— ambos inspirados en el *Constitutum Constantini*. Su ejemplo fue seguido por otros maestros de su generación, los autores de la *Summa Alenconensis* y de la *Summa Sicut Vetus Testamentum*. Esta explicación fue revisada —como ponen de manifiesto las versiones de *Summa Quoniam in omnibus*² y *Summa Alenconensis*— hasta que cristalizó como una enseñanza de Escuela sobre el orden de precedencia de las Iglesias: Roma, Constantinopla, Alejandría, Antioquía. En otro contexto distinto, el comentario a D.97, los autores de la *Summa Quoniam in omnibus* y de la *Summa Sicut Vetus Testamentum* acudieron también a la eclesiología de la ‘translatio imperii’ para ordenar las relaciones entre el Papa y el Emperador.

³⁸ Firenze, BN Conv. soppr. G.IV.1736, fol. 6va.

³⁹ Alençon, BM 134, fol. 166rb.

El autor de la *Summa Quoniam in omnibus* acudió al *Constitutum Constantini* para comentar D.97, aunque no parece que se inspirara en lo que había escrito a propósito de D.22 c.3.⁴⁰ De un lado, en el comentario a D.97, la ‘translatio imperii’ se utiliza para esclarecer las relaciones entre el sacerdocio y el imperio: así como el emperador no puede arrogarse (usurpare) los derechos del pontífice, afirma el autor de la *Summa Quoniam in omnibus*, el pontífice tampoco puede apropiarse (usurpare) los derechos del emperador;⁴¹ ahora bien, continua, donde el emperador confirió (contulit) toda su potestad (omnem suam potestaem) al sumo pontífice, es decir, en la ciudad de Roma, renunció (renuntiassse uidetur) a su dignidad y a su derecho.⁴² De otro, la comparación de ambos comentarios, el de D.22 c.3 y el de D.97, pone de manifiesto diferencias significativas:

<i>Summa Quoniam in omnibus</i> ad D.22 c.3, Schulte, <i>Paucapalea</i> 21.30-22.8	<i>Summa Quoniam in omnibus</i> ad D.97 Schulte, <i>Paucapalea</i> 49.5-16
<i>Const.</i> [c. 3.]. <i>Nova Roma</i> ideo dicitur, quia noviter illuc a Constantino translatum est romanum imperium. Constantinus enim imperator romanorum quarto die sui baptismatis privilegium romanae ecclesiae pontifici contulit, in quo coronam et omnem regiam dignitatem ipsumque palatium Lateranense omnemque suam gloriam tribuit. Insuper quoque regnum ei dimisit dicens: ‘Congruum esse perspeximus, nostrum imperium et regni potestatem orientalibus transferri regionibus et in Bizantiae provinciae optimo loco nomini nostro civitatem aedificari, et nostrum illic constitui imperium, quoniam, ubi principatus sacerdotum et christianae religionis caput a	Constantinus enim imperator quarto die sui baptismatis coronam et omnem regiam dignitatem in partibus occidentalibus apostolico eiusque successoribus contulit. Insuper donaria multa, ipsum quoque palatium Lateranense tradidit, et ut de clericis romanae ecclesiae consules ac patricios faceret, concessit. Tandem universum regnum ac propriam potestatem reliquit dicens: Congruum esse perspeximus, nostrum imperium et regni potestatem orientalibus transferre regionibus in Bizantiae provinciae optimo loco nomini nostro civitatem aedificari et nostrum illic constitui imperium, quoniam, ubi principatus sacerdotum et christianae religionis caput ab imperatore coelesti est

⁴⁰ Cf. Petersmann, ‘Die kanonistische’ 395 nota 117.

⁴¹ Cf. Schulte, *Paucapalea* 49.2-3 (= ex D.96 c.6 sumario).

⁴² Cf. Schulte, *Paucapalea* 49.3-5. El comentario de la *Summa Quoniam in omnibus* a D.96 es un resumen del *Decreto* de Graciano: los laicos, incluso los más piadosos, no tienen ninguna facultad de disposición sobre las cosas eclesiásticas, por lo que lo que los decretos de los príncipes dicen a propósito de las órdenes (sagradas) y las cosas eclesiásticas carece de toda autoridad (Schulte, *Paucapalea* 48.25-29, donde se parafrasea D.96 pr. y se remite a D.96 c.1) La única aportación del autor de la *Summa Quoniam in omnibus* es la definición de mausoleo—palabra que aparece en D.96 c.1—, tomada de Isidoro de Sevilla (Schulte, *Paucapalea* 48.29-32 = *Etim.* 15.11.3).

Deo est constitutum, iustum non est, ut ibi
imperator terrenus sedeat et potestatem
habeat. [vide c. 14 § 7. D.XCVI.]. *Hinc datur
intelligi* etc. [dict. Grat, ad c. 6.].

constitutum, iustum non est, ut imperator
terrenus habeat potestatem.

Así pues, en el comentario a D.97, el autor de la *Summa Quoniam in omnibus*:

1. No copió la glosa ‘noua Roma’ del comentario a D.22 c.3.

2. Ofreció un relato de la donación de Constantino más extenso y con cuatro lecturas propias, en concreto:

- ‘imperator’ (ad D.97), en lugar de ‘imperator romanorum’ (ad D.22 c.3).

a. ‘coronam et omniam regiam dignitatem in partibus occidentalibus apostolico eiusque successoribus contulit’ (ad D.97), en lugar de ‘privilegium romanae ecclesiae pontifici contulit in quo coronam et omniam regiam dignitatem’ (ad D.22 c.3).

b. ‘Insuper donaria multa ipsum quoque’ (ad D.97), en lugar de ‘Insuper quoque regnum ei dimisit’ (ad D.22 c.3).

c. ‘et ut de clericis romanae ecclesiae consules ac patricios faceret concessit’ (ad D.97), sin correspondencia en el comentario a D.22 c.3.

3. Introdujo la cita del *Constitutum Constantini* con la frase ‘Tandem universum regnum ac propriam potestatem reliquit dicens’ (ad D.97), que no tiene correspondencia en el comentario a D.22 c.3. A continuación copió un párrafo, que tiene la misma extensión que el que aparece en el comentario de D.22 c.3,⁴³ aunque entre ambos textos hay dos variantes significativas:

a. ‘ab imperatore celesti est constitutum’ (ad D.97), en lugar de ‘a deo est constitutum’ (ad D.22 c.3).

b. ‘imperator terrenus habeat potestatem’ (ad D.97), en lugar de ‘imperator terrenus sedeat et potestatem habeat’ (*Summa Quoniam in omnibus*² ad D.22 c.3).

En definitiva, la cita del *Constitutum Constantini* que aparece en el comentario de D.97 es más próxima a la versión que llegó al *Decreto* de Graciano a través de alguna de las colecciones de la reforma gregoriana. Los comentarios de la *Summa Quoniam in*

⁴³ ‘Congruum esse—habeat potestatem’: Schulte, *Paucapalea* 22.2-7 y 49.10-15.

omnibus a D.22 c.3 y a D.97 no están conectados: la eclesiología basada en la ‘translatio imperii’ se invoca con propósitos distintos y las citas del *Constitutum Constantini* son independientes.

El autor de la *Summa Quoniam in omnibus* no fue el único decretista de su generación que explicó la precedencia entre iglesias y las relaciones entre el Papa y el Emperador a partir de la cesión de soberanía temporal que implicaba esta interpretación de la ‘translatio imperii’ (*Constitutum Constantini*): el autor de la *Summa Sicut Vetus Testamentum* comentó D.22 c.23 y D.97 en términos similares.⁴⁴ Por el contrario, el autor de la *Summa Alenconensis* —quien también trabajó en los comienzos de la Escuela de Bolonia— no se interesó por la D.97 del *Decreto* de Graciano.⁴⁵ La siguiente generación de decretistas siguió el modelo de la *Summa Alenconensis*, no el de las *Summa Quoniam in omnibus* y *Summa Sicut Vetus Testamentum*: Rufino y Esteban de Tournai solo utilizaron la ‘translatio imperii’ (*Constitutum Constantini*) para explicar la posición de Constantinopla, una vez que esta Iglesia arrebató el segundo puesto a la de Alejandría.

Rufino no recurrió a la ‘translatio imperii’ para explicar la D.97.⁴⁶ Por lo demás, su comentario a D.22 c.3 tiene solo dos piezas, porque omite el argumento histórico, esto es, el relato de la *donatio Constantini*:

1. La primera pieza, ‘Noua Roma—a Constantino’ (Singer, *Rufinus* 48.7-9), es una versión ampliada de la glosa que abre el comentario a D.22 c.3 en la *Summa Quoniam in omnibus*. La *Summa* de Rufino introduce una aclaración a la palabra ‘noua’: el concilio de Constantinopla utilizó la expresión nueva Roma porque el traslado del Imperio se produjo en una fecha próxima a su celebración: ‘noviter quantum ad illud tempus, in quo hec dicebantur’.

⁴⁴ Firenze, BN Conv. soppr. G.IV.1736, fol. 12vb. Los comentarios de *Summa Sicut Vetus Testamentum* a D.96 y D.97 coinciden con los de *Summa Quoniam in omnibus*.

⁴⁵ Alençon, BM 134, fol. 172v, con los comentarios a D.88, D.89, D.90, D.92, D.93 y D.98.

⁴⁶ Cf. Singer, *Rufinus* 193. Según Petersmann, ‘Die kanonistische’ 396, nota 122, las *summae* de Juan de Faenza y *Antiquitate et tempore* transmiten el comentario a D.22 c.3 en la versión breve de Rufino.

2. La segunda pieza del comentario de Rufino a D.22 c.3, ‘Congruum esse perspeximus—habeat potestatem’ (Singer, *Rufinus* 48.9-15), es el párrafo del *Constitutum Constantini* que utilizó el autor de la *Summa Quoniam in omnibus*. La versión de Rufino está emparentada con la versión de *Summa Quoniam in omnibus*² y *Summa Alenconensis* a través de dos lecturas: ‘esse perspeximus’ e ‘imperator terrenus sedeat’

Sin embargo, Rufino se separa del comentario de la *Summa Quoniam in omnibus* y de la *Summa Alenconensis* a D.22 c.3 en cuatro pasajes:

a. ‘in orientales transferri regiones’ (Rufino), en lugar de ‘orientalibus transferri regionibus’ (*Summa Quoniam in omnibus* y *Summa Alenconensis*)

b. ‘principatus sacerdotii’ (Rufino), en lugar de ‘principatus sacerdotum’ (*Summa Quoniam in omnibus* y *Summa Alenconensis*)

c. ‘a Deo celesti imperatore constitutum est’ (Rufino), en lugar de ‘a deo est constitutum’ (*Summa Quoniam in omnibus* y *Summa Alenconensis*)

d. ‘ut illic . . . et illic’ (Rufino), en lugar de ‘ut ibi’ (*Summa Quoniam in omnibus* y *Summa Alenconensis*)

Según el editor de la *Summa*, Rufino tomó la cita de Paucapalea —esto es, de la *Summa Quoniam in omnibus*— porque su versión del *Constitutum Constantini* también tiene la lectura ‘sedeat et’, que falta en la versión de D.96 c.14 palea.⁴⁷ Si esto fuera así, Rufino manejó una copia de la recensión minoritaria *Summa Quoniam in omnibus*², o bien dispuso de la *Summa Alenconensis*. Ninguno de estos modelos —tampoco la *Summa Sicut Vetus Testamentum*, ni el *Decreto* de Graciano, ni el comentario de *Summa Quoniam in omnibus* a D.97— le pudo proporcionar las palabras ‘a Deo celesti imperatore constitutum est’.⁴⁸ Por esta razón, sería más prudente afirmar que, al igual que sus predecesores —Paucapalea (¿?) y otros decretistas boloñeses—

⁴⁷ Cf. Singer, *Rufinus* 48, nota a.

⁴⁸ Para la realización de este trabajo se han consultado dos manuscritos de la *summa* de Rufino, ambos conocidos por Singer: Paris, BNF lat. 4378, fol. 26v; y Paris, BNF lat. 15993, fol. 10va.

Rufino explicó la posición peculiar de la Iglesia de Constantinopla a partir de la ‘*translatio imperii*’. En su comentario a D.22 c.3 quedan algunas huellas de las matizaciones y precisiones que sufrió el texto del *Constitutum Constantini* a su paso por la Escuela.

Algo similar habría que decir de la *Summa* de Esteban de Tournai, quien tampoco utilizó la eclesiología de la ‘*translatio imperii*’ para analizar las relaciones entre sacerdocio y reino (D.97).⁴⁹ En su comentario a D.22 c.3 (cf. Apéndice IV), Esteban explicó primero el primado de honor de Constantinopla haciendo suya la razón que alegó el Emperador Justiniano en la Constitución *Deo auctore* (530): esta ciudad se fundó bajo mejores auspicios.⁵⁰ Esta perspectiva de análisis —basada en un argumento poco cristiano— es una novedad. El resto del comentario de Esteban tiene elementos más próximos a la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* y a la *Summa Alenconensis* que a Rufino. En efecto, Esteban:

1. copia la glosa ‘noua Roma’ sin la ampliación de Rufino;
2. ofrece un relato de la *donatio Constantini* emparentado con el de *Summa Quoniam in omnibus*, *Summa Sicut Vetus Testamentum* y *Summa Alenconensis*;⁵¹ y
3. transmite el mismo fragmento del *Constitutum Constantini* que el que ofrecen las primeras ‘*summae*’ de Bolonia.

En la última parte del comentario de Esteban a D.22 c.3, la lectura ‘*illic imperator terrenus potestatem habeat*’, hacia el final de la cita del *Constitutum Constantini*, parece emparentada con *Summa Quoniam in omnibus*¹ y *Summa Sicut Vetus Testamentum*, pues no tiene una justificación en *Summa Alenconensis*, como tampoco en Rufino. Esteban de Tournai, ¿conoció las enseñanzas boloñesas sobre el c.5 del Concilio de Constantinopla gracias a *Summa Quoniam in omnibus*? ¿consultó *Summa Sicut Vetus Testamentum*? El paradigma de las dependencias literarias no

⁴⁹ Cf. Schulte, *Stephan* 118.

⁵⁰ Cf. Schulte, *Stephan* 33.3-4. Schulte no editó el resto del comentario, porque, a su entender, ‘*Verbotenius ut apud Paucapaleam et Rufinum*’, nota 2.

⁵¹ Rufino tampoco utilizó el argumento histórico para explicar la ‘*translatio imperii*’.

explica las relaciones entre estos escritos, porque el cotejo de variantes no arroja resultados conclusivos.⁵² Las ‘summae’ no son colecciones de autoridades canónicas, ni constituyeron el único vehículo de transmisión de las enseñanzas de la Escuela de Bolonia.

IV. *Clerici comam nutrire prohibentur*

Los comentarios al d.p.c.20 de D.23 son otro ejemplo de enseñanzas de Escuela que se han elaborado a partir de materiales compartidos y cuya transmisión —no necesariamente escrita, pues hay que contar con una docencia basada en la ‘lectio’ oral— trajo como consecuencia enriquecimientos sucesivos.

Según Graciano, los clérigos tienen prohibido cuidar su cabello, ‘comam nutrire’, y la parte superior de su cabeza debe estar rasurada ‘in modum sphere’.⁵³ Los decretistas boloñeses reflexionaron con cierta extensión sobre este elemento del atuendo clerical. El comentario de la *Summa Quoniam in omnibus* a D.23 d.p.c.20 es una ‘Summula’ sobre la tonsura, que también fue utilizada por el autor de la *Summa Sicut Vetus Testamentum* y por el autor de la *Summa Alenconensis*.⁵⁴ El tratado comienza con un

⁵² En el comentario de D.22 c.3, las diferencias más relevantes son dos: i. ‘romano pontifici contulit’ (Esteban), en lugar de ‘romane ecclesie pontifici contulit’ (*Summa Quoniam in omnibus*, *Summa Alenconensis* y *Summa Sicut Vetus Testamentum*); ii. ‘palatium Lateranense contulit’ (Esteban), en lugar de ‘palatium Lateranense omnemque suam gloriam tribuit’ (*Summa Quoniam in omnibus* y *Summa Sicut Vetus Testamentum*) o ‘palatium omnemque suam gloriam tribuit’ (*Summa Alenconensis*).

⁵³ D.23 d.p.c.20. En el interior de D.23, dedicada al modo de proceder en la consagración de los órdenes eclesiásticos, la sección d.p.c.20-c.23 es una digresión sobre la tonsura, que llegó al *Decreto* de Graciano en las últimas etapas de redacción.

⁵⁴ *Summa Sicut Vetus Testamentum*: Firenze, BN Conv. soppr. G.IV.1736, fol. 6vab. *Summa Alenconensis*: Alençon, BM 134, fol. 166rb-166va. Antes del índice de la *Summula*, la *Summa Alenconensis* comienza el comentario a D.23 d.p.c.20 con una excepción a la prohibición de cuidar el cabello y de no llevar la cabeza afeitada, que se inspira en un pasaje de M. Anneo Lucano (*Farsalia*, 8.241) y en otro de Inocencio I (JK 303): Ibid. ‘*Clerici comam i<nfra> detondeantur*: [D.23 d.p.c.20 - 22] Nisi neccesitas aliud induxerit. In dubiis

índice de tres temas: 1. cuál es el origen del afeitado propio de la corona clerical; 2. cuál es su significado; y 3. por qué los clérigos ‘nos cortamos’ —pues, en efecto, el verbo está en primera persona del plural, ‘radimus’— la parte superior de los cabellos y sin embargo dejamos crecer la parte inferior.⁵⁵ Los comentarios de la *Summa* de Rufino repiten este índice, que no fue utilizado por Esteban de Tournai.⁵⁶ Rufino y Esteban aprovecharon algunos elementos de la *Summula*, pero sus comentarios a D.23 d.p.c.20 no dependen de los testimonios escritos por el momento conocidos de este producto temprano de la Escuela de Bolonia. Veámoslo con mayor detenimiento.

Los dos primeros temas, el origen y el significado de la tonsura, están íntimamente relacionados. Para explicar el primero, (i), el autor de la *Summula* que transmiten la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* y la *Summa Alenconensis* se inspira, sin citarlo, en un pasaje de la *Historia eclesiástica* de Beda el Venerable (672/673-735) según el cual, el primero en adoptar la tonsura fue el apóstol Pedro, quien deseaba tener siempre en la memoria la pasión de Cristo, mediante la representación de uno de sus instrumentos, la corona de espinas.⁵⁷

enim tutum est inopem simulare tiranno, sed cessante necessitate cessare debet quod urgebat. Non ergo comam relaxet maxime quoniam in ecclesia ministret ut infra c. Non liceat’ [D.23 c.31].

⁵⁵ ‘Vnde autem—relinquimus queritur’, Schulte, *Paucapalea* 22.21-23: El índice pone de manifiesto las cuestiones que, por lo general, preocupaban a quienes explicaron la tonsura clerical: cf. por todos Amalarío de Metz, *De ecclesiasticis officiis Libri IV*, 2.5 y 4.39 (PL 94.553 y 1234). El uso de la primera persona del plural se interpreta habitualmente de la siguiente manera: Paucapalea, autor de la *Summa Quoniam in omnibus*, era clérigo, probablemente monje (cf., por ejemplo, José Miguel Viejo-Ximénez, ‘Paucapalea’, DGDC 5.42-45 en 43). Ahora bien, los autores eclesiásticos en los que se inspiró el autor de la *Summula*—¿Paucapalea? ¿otro decretista?—también recurren, desde Beda el Venerable, a la primera persona del plural.

⁵⁶ Rufino: Singer, *Rufinus* 54.26-29. Esteban de Tournai: Schulte, *Stephan* 35. Una vez más, la decisión del editor de la *Summa* de Esteban de no ofrecer el comentario de Esteban por considerarlo tomado de Paucapalea—ad c.22: ‘longius de tonsura, respiciens ad ea quae Paucapalea habet’, *ibid.* 35 nota 3—fue poco acertada.

⁵⁷ Cf. Beda, *Anglo-Saxonis Historia Ecclesiastica*, 5.21 (PL 95.271). El pasaje de Beda también fue utilizado por Amalarío de Metz: cf. *De ecclesiasticis*

Quienes deseamos salvarnos, continua, llevamos esta corona para mostrar que estamos preparados a soportar irrisiones y afrentas.⁵⁸ En esta primera parte del razonamiento, la reflexión sobre el origen de la tonsura condiciona su significado, el tema segundo del índice.

A continuación, el autor de la *Summula* desarrolla una explicación alternativa sobre el significado de la tonsura —‘Vel ideo coronam gerimus’— que pone en juego cuatro referencias simbólicas: la tonsura misma, entendida como corona; el afeitado, en cuanto imagen del abandono de (todas) las cosas temporales; la cabeza, que representa la mente; y los cabellos, que son la imagen de los pensamientos mundanos.⁵⁹ Vale la pena seguir esta segunda parte del razonamiento, en la versión que transmiten la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* y la *Summa Alenconensis*. Los clérigos —comienza— llevamos la corona (tonsura) porque debemos ser reyes, que solo nos dejamos gobernar por las virtudes y tenemos nuestro reino en Dios; (en este sentido) el afeitado de la cabeza simboliza la renuncia —‘depositio’— a las cosas temporales.⁶⁰ Mientras que la cabeza —continúa— significa la mente, los cabellos simbolizan los pensamientos mundanos; nuestra mente, que debe pensar solo en las cosas celestiales, debe estar limpia de pensamientos mundanos, igual que la parte superior de nuestra cabeza está libre de

officis Libri IV, 4.39 (PL 94.1234). Si en este caso es posible invocar el principio de ‘economía de fuentes’, el autor de la *Summula* sobre la tonsura habría acudido a Amalario de Metz.

⁵⁸ *Summa Quoniam in omnibus*: Schulte, *Paucapalea* 22.23-29: ‘Petrus in—sufferre monstremus’. *Summa Sicut Vetus Testamentum*: Firenze, BN Conv. soppr. G.IV.1736, fol. 6vb: ‘Petrus in—sustinere monstremus’. *Summa Alenconensis*: Alençon, BM 134, fol. 166rb-166va: ‘Petrus in—sustinere monstremus’.

⁵⁹ *Summa Quoniam in omnibus*: Schulte, *Paucapalea* 22.29-23.6: ‘Vel ideo—nos trahant’. *Summa Sicut Vetus Testamentum*: Firenze, BN Conv. soppr. G.IV.1736, fol. 6vb: ‘Vel ideo—nos trahant ad secularia’. *Summa Alenconensis*: Alençon, BM 134, fol. 166va: ‘Vel ideo—nos trahant’.

⁶⁰ *Summa Quoniam in omnibus*: Schulte, *Paucapalea* 22.29-31: ‘Vel ideo—est depositio’. *Summa Sicut Vetus Testamentum*: Firenze, BN Conv. soppr. G.IV.1736, fol. 6vb: ‘Vel ideo—est depositio’. *Summa Alenconensis*: Alençon, BM 134, fol. 166va: ‘Vel ideo—est depositio’.

cabellos.⁶¹ La parte inferior de la cabeza tiene cabellos —concluye— porque al cristiano no se le ordena desentenderse absolutamente de las cosas temporales, sin las que no sería posible vivir; por tanto, conviene cuidar que los cabellos no crezcan hasta el punto de cubrir los oídos y los ojos, como también hay que impedir que las preocupaciones mundanas cierren los ojos y los oídos de nuestra mente y nos conduzcan a las cosas seculares.⁶²

Esta explicación alternativa sobre el significado de la tonsura no tiene una correspondencia exacta en ninguna obra anterior, aunque es el resultado de ensamblar —con las modificaciones oportunas— elementos presentes en modelos diversos. En efecto:

1. La segunda parte del ‘caput incertum’ C.12 q.1 c.7, que en el *Decreto* de Graciano se ha atribuido a San Jerónimo, afirma que los clérigos son reyes, que deben regirse por la virtud y que tienen su reino en Dios.⁶³

2. El mismo ‘caput incertum’ C.12 q.1 c.7 habla del afeitado clerical como imagen de la renuncia a las cosas temporales.⁶⁴

3. El *De ecclesiasticis officiis* de Amalario de Metz advierte que la cabeza es la mente, mientras que los cabellos son los pensamientos; distingue entre la parte inferior y superior de la cabeza; explica que a los cristianos no se les ordena desentenderse absolutamente de las cosas temporales, por lo que los cabellos

⁶¹ *Summa Quoniam in omnibus*: Schulte, *Paucapalea* 22.32-23.1: ‘Caput enim—debet cogitationibus’. *Summa Sicut Vetus Testamentum*: Firenze, BN Conv. soppr. G.IV.1736, fol. 6vb: ‘Caput enim—debet cogitationibus’. *Summa Alenconensis*: Alençon, BM 134, fol. 166va: ‘Caput enim—debet cogitationibus’.

⁶² *Summa Quoniam in omnibus*: Schulte 23.1-6: ‘Inferior vero—nos trahant’. *Summa Sicut Vetus Testamentum*: Firenze, BN Conv. soppr. G.IV.1736, fol. 6vb: ‘Inferior vero—nos trahant ad secularia’. *Summa Alenconensis*: Alençon, BM 134, fol. 166va: ‘Inferior vero—nos trahant’.

⁶³ Cf. C.12 q.1 c.7: ‘Hi namque—in capite’, que está relacionado con *Summa Quoniam in omnibus*, Schulte, *Paucapalea* 22.29-31: ‘Vel ideo—regnum habentes’ (y las frases paralelas de *Summa Sicut Vetus Testamentum* y *Summa Alenconensis*).

⁶⁴ Cf. C.12 q.1 c.7: ‘Rasio vero—omnium depositio’, que coincide con *Summa Quoniam in omnibus*, Schulte, *Paucapalea* 22.31: ‘Rasio vero—omnium est depositio’ (y las frases paralelas de *Summa Sicut Vetus Testamentum* y *Summa Alenconensis*).

permanecen en la parte inferior de la cabeza; advierte sobre la necesidad de cuidar los cabellos, para que no cubran los oídos y los ojos.⁶⁵

¿Quién fue el autor de esta explicación tan exhaustiva? ¿El autor de la *Summula* sobre la tonsura que utilizaron la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* y la *Summa Alenconensis* para comentar D.23 d.p.c.20? ¿El autor de la *Summa Quoniam in omnibus*? ¿El autor de la *Summa Sicut Vetus Testamentum*? ¿El autor de la *Summa Alenconensis*? Los paralelismos con C.12 q.1 c.7 sugieren una conexión con el taller de Graciano. Desde esta perspectiva, la *Summula* sería producto de las primeras enseñanzas sobre el *Decreto* de Graciano, una obra cuya D.23 ya tenía el excurso sobre la tonsura. En aquellos albores de la Escuela de Bolonia, los primeros decretistas acudieron a los escritores eclesiásticos: en la *Summa Quoniam in omnibus*, en la *Summa Sicut Vetus Testamentum* y en la *Summa Alenconensis*, la *Summula* termina con unas pocas frases sobre el por qué de la tonsura —el tercero de los temas enunciados en el índice (iii)—, que una vez más se inspiraron —directa o indirectamente— en el *De ecclesiasticis officiis* de Amalario de Metz.⁶⁶

En la siguiente generación de decretistas, Rufino también recurrió a la *Summula* sobre la tonsura —incluso mantuvo la primera persona del plural— aunque pudo conocer este pequeño

⁶⁵ Cf. Amalario de Metz, *De ecclesiasticis officiis Libri IV*, 2.5, donde hay un buen número de expresiones que también se utilizan en Schulte, *Paucapalea* 22.32-23.6 (y las frases paralelas de *Summa Sicut Vetus Testamentum Summa Alenconensis*). Algunos ejemplo: ‘Caput nostrum significat principale mentis nostrae . . . Capilli in capite significant cogitationes in mente . . . Inferior vero pars habet capillos, id est, multifluas cogitationes, in qua solemus de temporalibus saepe cogitare . . . Non enim praecipitur Christiano ne aliquando cogitet de temporalibus, sine quibus praesens vita non transigitur . . . Hoc praevidendum est ut ne ipsi capilli, id est curae hujus mundi, superflue crescant, ne aures cordis cooperiant, et oculos impediunt, quae solent saepe suffocare verbum seminantes’.

⁶⁶ *Summa Quoniam in omnibus*: Schulte, *Paucapalea* 23.6-8 y 8-11: ‘Superiorem partem—temporalia cogitamus’ y ‘Circulus vero—rationi convenerint’ (= *Summa Sicut Vetus Testamentum*, *Summa Alenconensis*). En esta ocasión se pudo echar mano de Amalario de Metz, *De ecclesiasticis officiis* 2.5.

tratado por otros cauces distintos a la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* o la *Summa Alenconensis*.

El comentario de Rufino a D.23 d.p.c.20 comienza con el índice de *Summa Quoniam in omnibus*, *Summa Sicut Vetus Testamentum* y *Summa Alenconensis*.⁶⁷ En relación al origen de la tonsura, la mayor parte de los manuscritos de la *Summa* de Rufino, ofrecen dos explicaciones alternativas. La primera —que no se menciona en la versión de la *Summula* que transmiten la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* y la *Summa Alenconensis*— retrasa el comienzo de la tonsura clerical hasta las costumbres de los nazarenos que relata el antiguo testamento, un ejemplo que más tarde siguieron Aquila y Priscilla, cuando aconsejaron a san Pablo que se afeitara la cabeza.⁶⁸ Aquí Rufino (¿?) parafreaseó el *De ecclesiasticis officiis* de Isidoro de Sevilla.⁶⁹

La segunda explicación sobre el origen de la tonsura, que la mayor parte de los manuscritos de la *Summa* de Rufino ofrecen como alternativa, es la que propone la *Summula* que recogen los comentarios de la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* y la *Summa Alenconensis* a D.23 d.p.c.20. En la *Summa* de Rufino, esta segunda explicación —que, como se dijo, se inspira en los escritos de Beda o Amalario— se presenta como la opinión mantenida por otros, ‘Vel sicut alii tradunt’,⁷⁰ e

⁶⁷ Singer, *Rufinus* 54.26-29: ‘Hic videndum—inferius relinquimus’. En contra de su costumbre, Singer no dejó constancia de los paralelismos con la *Summa Quoniam in omnibus* (tampoco con la *Summa Sicut Vetus Testamentum*, ni con la *Summa Alenconensis*).

⁶⁸ Singer, *Rufinus* 54.29-55.2: ‘Tonsure igitur—hoc fecerunt’. El editor informa que esta primera explicación sobre el origen de la tonsura falta en los manuscritos Avignon, BM 661 y Troyes, BM 695 (Singer, *Rufinus* nota 53 ad locum).

⁶⁹ Singer, *Rufinus* nota e ad locum. El pasaje de Isidoro de Sevilla se transmitió a través de las colecciones canónicas: cf., entre otras, el *Decretum* de Ivo de Chartres 6.4 ‘Tonsure ecclesiastice—declaratum est’ (= Isidoro, *De ecclesiasticis officiis*, 2.4.1-5).

⁷⁰ El editor de la *Summa* de Rufino ofrece la lectura ‘Vel sicut alii tradunt, Petrus in memoriam. Sciendum est quod Petrus in memoriam dominicae passionis primus ita tonsus est’, Singer, *Rufinus* 55.2-4, aunque no se corresponde con alguno de los manuscritos que utilizó: cf., por ejemplo, Paris,

incluye también el párrafo sobre la corona, la mente, los cabellos y los pensamientos temporales de la *Summula* sobre la tonsura que aparece en el comentario a D.23 d.p.c.20 de la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* y la *Summa Alenconensis*.⁷¹ Cuando Rufino habla de ‘alii’ i.e. otros, ¿pensaba en Beda el Venerable y Amalario de Metz? ¿en el autor de la *Summula*? ¿en el autor de la *Summa Quoniam in omnibus*? ¿en el de la *Summa Sicut Vetus Testamentum*? ¿en el de la *Summa Alenconensis*? Ante la ausencia de evidencias, hay que concluir que Rufino refiere las enseñanzas, orales o escritas, de algún/os colega/s de la Escuela de Bolonia. En cualquier caso, cuatro variantes significativas excluyen que entre la *Summa Quoniam in omnibus*, *Summa Sicut Vetus Testamentum*, *Summa Alenconensis* y la *Summa* de Rufino hubiera una relación de dependencia directa, en concreto:

1. ‘uirtutibus regentes ac in deo regnum habentes. Rasio’, *Summa Quoniam in omnibus*, *Summa Sicut Vetus Testamentum* y *Summa Alenconensis*, frente a ‘uirtutibus regentes. Rasio’, en Rufino 55.10.

2. ‘i<d est> celestia, cogitat a secularibus mundari debet cogitationibus. Inferior’, *Summa Quoniam in omnibus*, *Summa Sicut Vetus Testamentum* y *Summa Alenconensis*, frente a ‘i.e. celestia cogitat inquinamenta secularium cogitationum a se opus est ut abstergat; inferior’, en Rufino 55.13-14.

3. ‘habet capillos, quia non precipitur christiano, ut aliquando ne cogitet de secularibus, sine quibus hec uita esse non ducitur, sed sicut’, *Summa Quoniam in omnibus*, *Summa Sicut Vetus Testamentum*, o ‘habet capillos, quia non precipitur christiano, ut aliquando ne cogitet de secularibus, sine quibus esse non potest. Sed sicut’, *Summa Alenconensis*, frente a ‘capillos habet, quia sic

BNF lat. 4378, fol, 30r: ‘Vel sicut alii tradunt Petrus in memoriam dominice passionis’. Las mismas palabras en Troyes, BM 683, fol. 21v: ‘Vel sicut alii tradunt Petrus in memoriam dominice passionis primus ita tonsus est’.

⁷¹ Singer, *Rufinus* 55.2-8 y 9-19: ‘Vel sicut—sufferre monstremus’ y ‘Vel ideo—spirituales premant’. En contra de su costumbre, Singer no dejó constancia de esta similitud entre la *Summa Quoniam in omnibus* y la *Summa* de Rufino.

terrenis occupari interdiciatur, ut carni nostre subvenire in necessariis minime vetemur. Sed sicut’, en Rufino 55.16-18.

4. ‘ne seculares cogitationes aures et oculos nostre mentis impediendo ad secularia nos trahant’, *Summa Quoniam in omnibus* y *Summa Alenconensis*, o ‘ne seculares cogitationes aures et oculos nostre mentis impediendo nos trahant ad saecularia’, *Summa Sicut Vetus Testamentum*, frente a ‘ne seculares cogitationes obediendi aures et intelligendi oculos spirituales premant’, en Rufino 55.20-21.

El comentario de Rufino a D.22 d.p.c.23 se completa con otros tres párrafos, de los que los dos primeros son también reconocibles en la *Summula* de *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* y en la *Summa Alenconensis*. Una vez más, algunas variantes significativas impiden establecer una relación de dependencia literal directa, como pone de manifiesto el siguiente cuadro comparativo:

Fontes	<i>Summa Quoniam in omnibus</i>	<i>Summa Sicut Vetus Testamentum</i>	<i>Summa Alenconensis</i>	Rufino
[Symphosii Amalarii Metensis Presbyter, <i>De ecclesiasticis officiis Libri IV</i> , 2.5]	[Schulte 23.6-8]			[Singer 55.19-20]
Superiorem partem capitis rasorio saepe renovamus, cum forti sollicitudine superfluas temporariasque cogitationes de superiore parte animi resecamus. In inferiore parte coronam portamus, cum ea quae secundum mundum necessario gubernare debemus, concorditer cum ratione aequamus.	Superiorem partem capitis rasorio saepe renovamus, cum superfluas cogitationes de mente resecamus. In inferiori parte coronam portamus, cum temporalia cogitamus.	Superiorem partem capitis rasorio saepe renovamus, cum superfluas cogitationes de mente resecamus. In inferiori parte coronam portamus, cum temporalia cogitamus.	Superiorem partem capitis rasorio saepe renovamus, cum superfluas cogitationes de mente resecamus. In inferiori parte coronam portamus, cum temporalia cogitamus.	Superiorem partem capitis saepe radimus, cum cogitationes superfluas de mente resecamus;

Circulus vero capillorum virtutem aequalitatis rationi undique consentientem significat. Tunc gubernantur bene res temporariae, si rationi conuenerint.	Circulus vero capillorum virtutem aequalitatis undique rationi consentientem significat. Tunc enim bene cogitantur res temporales, si rationi conuenerint.	Circulus uero capillorum uirtutem equalitatis undique rationi consentientem significat. Tunc enim bene cogitantur res temporales, si rationi conuenerint.	Circulus uero capillorum uirtutem equalitatis undique rationi consentientem significat. Tunc enim bene cogitantur res temporales, si rationi conuenerint.	Circulus vero capillorum equalis vel pene equalis convenientiam temporalium cogitationum ad rationem demonstrat: tunc autem res temporales cogitantur bene, si rationi eorum desideria et usus non aduersantur.
[ex Decretum Burchardi 8.97] Clericus si tonsura dimissa uxorem acceperit, qui quidem sit sine gradu nec ad monasterium aliquod a parentibus traditus, si uxorem habere permittitur, iterum tonderi cogatur, nec in vita sua tonsuram negligere audeat.	—	—	—	Denique sciendum est quia in tantum clerici comam nutrire prohibentur, quod si aliquis clericus infra sacros ordines uxore accepta tonsuram dimiserit, uxorem quidem habeat, sed iterum tondeatur nec in vita sua tonsuram audeat dimittere, ut est in Broc. libr. VIII. ex conc. Magonensi cap. Clericus si tonsura.

Rufino pudo conocer la *Summula* sobre la tonsura sin necesidad de consultar la *Summa Quoniam in omnibus*, la *Summa Sicut Vetus Testamentum* o la *Summa Alenconensis*. En una revisión de su comentario a D.23 d.p.c.20, él mismo, o alguno de sus discípulos, enriqueció la reflexión sobre los orígenes de esta parte constitutiva del atuendo clerical con nuevas razones tomadas, directa o indirectamente, de Isidoro de Sevilla.

Es poco probable que el comentario a D.23 d.p.c.20 de la *Summa* atribuida a Esteban de Tournai dependa de la *Summula* sobre la tonsura, de la *Summa Quoniam in omnibus*, de la *Summa Sicut Vetus Testamentum*, de la *Summa Alenconensis*, o incluso de

la *Summa* de Rufino.⁷² Esteban se inspiró en las referencias literarias que utilizaron sus predecesores (cf. Apéndice V). Sin embargo, tuvo acceso a materiales nuevos, lo que le permitió construir una reflexión más elaborada y, en ciertos aspectos, original. Formado en Bolonia, Esteban recordaría las lecciones de sus maestros y colegas —o los escritos sobre las que éstas descansaban—, aunque no las repitió mecánicamente, ni quedó condicionado por ellas.

Al igual que sus predecesores —la versión extensa de la *Summa* de Rufino sería una excepción— Esteban sitúa el origen de la tonsura en el apóstol Pedro, es decir: estaba familiarizado con la explicación que se remonta hasta Beda y Amalario.⁷³ Resumió esta enseñanza de la Escuela y la enriqueció con una nueva simbología: para los gentiles, dice, el afeitado de la cabeza era señal de oprobio e irrisión. Lo que los gentiles hacían como ofensa, continua, Pedro lo transformó en señal de humildad, como memoria de la Pasión. En el Calvario, concluye Esteban, el Señor llevó una corona de espinas, que se representa mediante el afeitado y el círculo de cabellos que rodean la cabeza, de manera que estamos preparados —los modelos remotos explican, una vez más, el uso de la primera persona del plural— para tolerar burlas (irrisiones) y oprobios (deshonores), como hizo el Señor por nosotros. La edición de la *Summa* de Esteban de Tournai, no permite valorar la aportación de este decretista, cuyo modelo no ha sido posible identificar.⁷⁴

Esteban completa su comentario a D.23 d.p.c.20 con tres reflexiones suplementarias —las dos primeras, son también una

⁷² El editor de la *Summa* de Esteban era de otra opinión: ‘ad c. 22 longius de tonsura, respiciens ad ea quae Paucapalea habet’, cf. Schulte, *Stephan* 35 nota 3.

⁷³ Cf. Apéndice V: ‘Quod clerici—simus tollerare’.

⁷⁴ La referencia al sentido que el afeitado tenía entre los gentiles aparece también en el comentario al libro de Iob (1, 20-21), que Pedro de Blois (c. 1130 – c. 1211) dedicó a Enrique II: ‘Quidam etiam gentiles Petro apostolo caput rasisse dicuntur in Christi opprobrium et contemptum; quod tamen ipse, non immemor spineae coronae Christi, patienter et prompta voluntate sustinuit. In hujus humilitatis memoriam Priscilla et Aquila se ipsos, sicut in Actibus apostolorum legitur, totonderunt’, *Compendium in Iob*, PL 207.810.

novedad en la Escuela— sobre el significado y el origen de la tonsura. Primero advierte que los clérigos son reyes y sacerdotes. Son reyes porque gobiernan sus sentidos y afectos, una idea que se mueve en el ámbito de referencias que inspiró la composición de C.12 q.1 c.7. Los clérigos son sacerdotes porque ofrecen sacrificios de inocencia. La redondez que resulta de afeitarse la parte superior de la cabeza representa el sacerdocio, pues en el Antiguo Testamento los sacerdotes llevaban un casquete de lana (pilleum), o cidario (cidaris). El círculo de cabellos que rodea la cabeza, por su parte, es la corona, que designa la condición real.⁷⁵ Los colegas de Esteban en Bolonia no habían prestado atención al gorro de los sacerdotes del Antiguo Testamento.

A continuación, Esteban considera el sentido moral de la tonsura.⁷⁶ Como era habitual, recuerda que la cabeza significa la mente. Pero, a diferencia de los maestros de Bolonia, la homilía de Gregorio I sobre Lc 21, 25-32,⁷⁷ le ayuda a desarrollar una reflexión más personal. Los cabellos —comienza— significan las riquezas temporales, pues éstas, como aquéllas, se encuentran fuera del cuerpo y pueden ser cortados sin lesión, ni dolor alguno.⁷⁸ La parte superior de la cabeza es la mente por excelencia. Debe afeitarse para que las cosas temporales no impidan la contemplación de las celestes. Ahora bien, puesto que a menudo debemos retener cosas temporales, pues son necesarias, en la tonsura queda un círculo de cabellos que se cortan por la parte inferior, con el objeto de que los bienes materiales no impidan la vista ni la escucha de las cosas espirituales.

⁷⁵ Apéndice V: ‘Vel in his duobus—ambitum designatur’.

⁷⁶ Apéndice V: ‘Vel ut moralium—temporalia perturbent’.

⁷⁷ Gregorio I, *Homiliae*, 1.1, PL 76.1079 (segundo domingo de Adviento).

⁷⁸ Los cabellos como imagen de cosas exteriores o superfluas—no solo de las ‘cogitationes saeculares’ (*Summa Quoniam in omnibus, Summa Sicut Vetus Testamentum* y *Summa Alenconensis*)—, que no tienen vida y que, por tanto, se pueden cortar, no era desconocida por los escritores eclesiásticos. Cf., por ejemplo, Beda, *In Psalmum LI*: ‘Per capillos enim exteriora atque superflua designantur. Verumtamen Deus non superfluos capillos fecit, quia ad ornamentum eos creavit. Sed ideo per capillos superflua terrena designantur, quia sicut capilli sine sensu, id est, sine dolore abscinduntur, ita haec terrena superflua ab his qui firmiter Deo mente inhaerent’, PL 93.756.

Esteban cierra su comentario a D.22 d.p.c.20 con lo que presenta como opinión de terceros: ‘Dicunt autem quidam tonsure’.⁷⁹ Serían aquellos autores —¿escritores eclesiásticos? ¿decretistas de Bolonia?— que se remontan a los nazarenos del antiguo testamento —quienes se cortaban los cabellos y los arrojaban al fuego del sacrificio (Num 6, 18)—, a las instrucciones que recibió el profeta Ezequiel (Ez 5,1), así como a los ejemplos neotestamentarios de Priscilla, Aquila y Pablo (Act 18,18), y de otros discípulos. Como se recordará, la versión extensa de la *Summa* de Rufino menciona estos precedentes, en un párrafo que procede del *De ecclesiasticis officiis* de Isidoro. ¿Conocía Esteban el comentario de Rufino? El comentario de Rufino ¿se revisó cuando Esteban trabajaba en la redacción de su *Summa*, para la que pudo consultar el tratado sobre los oficios eclesiásticos del santo obispo de Sevilla? La cuestión permanece abierta.

V. *Peculium proprie minorum est personarum*

Los comentarios a D.54 d.p.c.8 son un ejemplo de definiciones compartidas, pero también de los progresos en la reflexión doctrinal de la Escuela. Ponen de manifiesto las cautelas con las que hay que hablar de dependencias entre escritos.

Según el ‘dictum’ de Graciano, el siervo ordenado sacerdote sin haber conseguido la libertad de su señor será multado con la pérdida del peculio. En los comienzos de las lecciones sobre el *Decreto* de Graciano, los maestros boloñeses transmitieron diversas definiciones de esta institución, heredada del Derecho romano.⁸⁰

El comentario de la *Summa Quoniam in omnibus* a D.54 d.p.c.8 tiene dos partes:

⁷⁹ Apéndice V: ‘Dicunt autem—idem fecerunt’.

⁸⁰ El autor de la *Summa Alenconensis* comenta D.54 c.2, c.10, c.15 y c.23 (Alençon, BM 134, fol. 170vb-171ra), y no ofrece la definición de ‘peculium’. La definición tampoco aparece en el *Fragmentum Wigorniese*, cuyo autor comenta D.54 pr., c.2, c.7, c.9, c.10, c.11, c.13, c.15, c.20 y c.22 (Worcester, CL Q.70, fol. 12rb-13ra).

1. La primera se ha elaborado con las palabras de dos dichos gracianeos: el párrafo que introduce la distinción y el mismo *dictum* posterior al canon 8.⁸¹

2. La segunda parte contiene la definición de peculio.⁸² Aquí los manuscritos atestiguan la existencia de, al menos, dos recensiones (cf. Apéndice VI):

—la primera recensión, *Summa Quoniam in omnibus*¹, que está documentada por siete manuscritos, transcribe la definición y etimología de Isidoro de Sevilla: peculio es lo que poseen las personas menores o los siervos, lo que el padre o el dueño permiten que el hijo o el siervo empleen como propio; su nombre deriva de ‘pecus’, pues, los hombres de la antigüedad basaban toda su riqueza en el ganado (*Etim.* 5.25.5);

—el código de Londres ofrece una variante de la primera recensión, en la que la expresión ‘minorum personarum’ ha sido remplazada por la palabra ‘filiorum’;

—hay cinco testigos de la segunda recensión, *Summa Quoniam in omnibus*², que conserva la segunda parte de la cita de Isidoro, pero sustituye la primera parte por una definición nueva, que se ha podido elaborar a partir de las *Petri Exceptiones* (1.67)⁸³ —o del *Libellus de verbis legalibus*⁸⁴—, así como del comentario de Ulpiano al edicto que llegó a Dig. 15.1.5.3: se llama peculio, se dice ahora, a la riqueza de las personas que se encuentran bajo la potestad de sus dueños o de sus padres, y se le da este nombre porque se trata de un patrimonio muy pequeño. Entre las palabras de las *Petri Exceptiones* y las del *Digestum*, el autor de esta segunda recensión, *Summa Quoniam in omnibus*², ha intercalado la aclaración ‘et (ut) filiorum familias aut seruatorum’, una expresión que parece relacionada con las palabras ‘aliud filiorum familias, aliud servorum’ del pasaje paralelo de la suma a las

⁸¹ ‘Serui quoque—mulctatus maneat’: Schulte, *Paucapalea* 36.28-32.

⁸² ‘Peculium proprie—universa substantia’: Schulte, *Paucapalea* 36.32-37.3.

⁸³ Cf. Savigny, *Geschichte* 2.351 Anhang I.

⁸⁴ Cf. Singer, *Rufinus* 140, nota e; Hermann Kantorowicz, *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the Twelfth Century* (Cambridge 1938; reprint. Aalen 1969) 338 add. 171 (nota de Peter Weimar); y André Gouron, ‘Les sources civilistes et la datation des Sommes de Rufin et d’Étienne de Tournai’, *BMCL* 16 (1986) 55-70 en 59.

Instituciones *Justiniani est in hoc opere*.⁸⁵ Es poco probable, por tanto, que quien modificó *Summa Quoniam in omnibus*¹ fuera el autor de esta nueva definición de peculio. Por lo demás, los manuscritos de la *Summa Quoniam in omnibus* hoy en día conocidos sugieren que la revisión del comentario a D.54 d.p.c.8 no es contemporánea a la revisión del comentario a D.22 c.3: los códices no son homogéneos, pues relfejan etapas diversas del desarrollo de cada una de estas enseñanzas (cf. Apéndice VII), lo que plantea nuevos interrogantes sobre su autoría y transmisión.

Salvo pequeñas variantes, la primera parte del comentario de la *Summa Sicut Vetus Testamentum* a D.54 d.p.c.8 coincide con el pasaje paralelo de la *Summa Quoniam in omnibus*, mientras que la segunda parte conecta con la segunda recensión, *Summa Quoniam in omnibus*². Solo el análisis comparativo de ambos escritos en su conjunto aclarará sus relaciones mutuas.⁸⁶ En el comentario a D.54 d.p.c.8 las diferencias —*Summa Sicut Vetus Testamentum* lee ‘et aliquando’ en lugar de ‘et aliquo modo’; ‘pecunie’ en lugar de ‘peculii’; ‘seu filiorum familias’, en lugar de ‘et (ut) filiorum familias’; y ‘tractare permittit’ en lugar de ‘tractare patitur’— son poco relevantes. Sea como fuere, la *Summa Quoniam in omnibus*¹, la *Summa Quoniam in omnibus*² y la *Summa Sicut Vetus Testamentum* hablan de un progreso doctrinal, en la búsqueda de una mayor precisión terminológica sobre la institución del peculio, que pudo estar motivado por la consulta de los escritos de los glosadores civilistas.

⁸⁵ Gouron, ‘Les sources civilistes’ 59 y nota 9.

⁸⁶ Cf. Weigand, ‘Paucapalea’, quien discutió la tesis de Noonan (‘The True Paucapalea?’), *Proceedings Salamanca 1976* 157-186), para quien *Summa Sicut Vetus Testamentum* era obra de Paucapalea. La comparación de pasajes paralelos le llevó a concluir que la *Summa Sicut Vetus Testamentum* es una ampliación, una romanización y, al mismo tiempo, la expresión diferente de las opiniones que refleja el texto de Paucapalea. Para Weigand, la *Summa Sicut Vetus Testamentum* no sería obra de Paucapalea porque en el comentario a D.11 c.4 omite la opinión que el autor de la *Summa Parisiensis* atribuye al primer discípulo de Graciano, mientras que ésta si está en la *Summa Quoniam in omnibus*. En su opinión, la *Summa Quoniam in omnibus* (es decir, Paucapalea) es la fuente primaria de la *Summa Sicut Vetus Testamentum*.

A diferencia de la *Summa Quoniam in omnibus* y de la *Summa Sicut Vetus Testamentum*, el comentario de Rufino a D.54 d.p.c.8 no resume las palabras de Graciano.⁸⁷ A propósito de este pasaje del *Decreto* de Graciano, Rufino repite las explicaciones que circulaban en Bolonia desde la revisión de la *Summa Quoniam in omnibus*, o desde la redacción de la *Summa Sicut Vetus Testamentum*, esto es: su comentario es un mosaico que combina las *Petri Exceptiones*, las palabras de Ulpiano sobre el edicto y las etimologías de Isidoro de Sevilla.⁸⁸ ¿Cuál fue su modelo? El editor de la suma descartó la *Summa Quoniam in omnibus*, si bien es cierto que no conocía la segunda recensión del comentario a D.54 d.p.c.8, *Summa Quoniam in omnibus*², ni tampoco la *Summa Sicut Vetus Testamentum*.⁸⁹ Rufino, estudiante y maestro en Bolonia, tendría a su alcance las obras, canónicas y civiles, que se pusieron en juego para elaborar la definición de peculio. De hecho recurrió a ellas al comentar otros pasajes del *Decreto* de Graciano olvidados por la *Summa Quoniam in omnibus* o la *Summa Sicut Vetus Testamentum*. Así pues, en lugar de dependencia directa entre escritos, la prudencia aconseja hablar de enseñanzas compartidas.

Esteban de Tournai se distanció en parte de la tradición boloñesa sobre el ‘peculium’. Su comentario a D.54 d.p.c.8 es también una composición en mosaico que amplía el análisis sobre la institución. Su definición de peculio, con la que comienza el comentario, funde dos pasajes de Ulpiano.⁹⁰ En este punto no dependió de la *Summa Quoniam in omnibus*, de la *Summa Sicut Vetus Testamentum*, ni de la Suma de Rufino. A continuación, la advertencia sobre el carácter de ‘peculium’ de los bienes del ‘filius familias’ pone de manifiesto que conocía las lecciones boloñesas

⁸⁷ El comentario de Rufino a D.54 pr. es una *summula* sobre la servidumbre y su influencia en la recepción del sacramento del orden: ‘Tractaverit de curialibus—Gelasii abrogatum’ (Singer, *Rufinus* 136.25-139.9). A continuación, y siempre antes de D.54 d.p.c.8, Rufino comenta D.54 c.2 y c.4 (ibid. 139-140).

⁸⁸ ‘Ceterum usque—substantia consistebat’: Singer, *Rufinus* 140.20-28.

⁸⁹ Singer, *Rufinus* 140 nota e, ad finem.

⁹⁰ ‘Peculium autem—domino debetur’: Schulte, *Stephan* 79.5-8, ex Dig. 15.1.5.3 y 4.

de los decretistas, o de los civilistas.⁹¹ Las ‘summae’ de sus colegas canonistas, sin embargo, no le proporcionaron la inspiración para la parte final de su comentario: aquí Esteban desarrolla una detallada explicación de cuatro tipos de peculio — ‘paganum, non paganum, profecticum’ y ‘adventicium’— que combina con destreza hasta cinco títulos de la compilación justiniana.⁹²

⁹¹ ‘Quod etiam—peculium appellatur’: Schulte, *Stephan* 79.8-9.

⁹² ‘Est quoque—pater habet’: Schulte, *Stephan* 79.9-21. Las palabras de Esteban de Tournai son reconocibles en diversos fragmentos de Cod. 3.28, Inst. 2.9, Cod. 6.61(60), Dig. 49.17 y Cod. 2.7.

Resumen conclusivo

Las primeras ‘summae’ de la Escuela de Bolonia no son resúmenes del *Decreto* de Graciano. Estos escritos reúnen los comentarios exegéticos y sistemáticos a pasajes seleccionados del primer manual de derecho canónico. La selección de los ‘capitula’ y ‘dicta’ es decisión del autor de cada ‘summa’. El autor de una ‘summa’ no es siempre el autor de una enseñanza, cuyo autor, a su vez, no siempre es posible identificar. Estas enseñanzas de Escuela circularon en versiones distintas, que se corresponden a niveles de progreso en la reflexión doctrinal sobre un determinado problema. No todas las copias de una ‘summa’ son homogéneas, pues no siempre transmiten la misma versión de una enseñanza. Por lo demás, la ‘summae’ no son los únicos cauces de expresión de la primera decretística boloñesa. El análisis comparativo entre ‘summae’ que tome como referencia exclusiva las dependencias literarias ofrecerá una visión limitada de cuestiones tales como la autoría o la datación —de una enseñanza, o de una ‘summa’— y, en definitiva, de la formación de este género literario, íntimamente conectado con los métodos de enseñanza de la Escuela.

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Apéndice I

Un fragmento de *Si Duos ad cenam conuiuas*

De iure autem diuino dicendum est et quidem in primis de origine ipsius et processu. Diuini iuris originem quidam a principio mundi cepisse dicunt. Cum enim Adam de inobedientia argueretur a domino, quasi actioni exceptionem obiciens, relationem criminis in coniugem, immo in coniugis auctorem conuertit dicens: *'Mulier quam dedisti mihi sociam, ipsa me decepit, et comedi'*. Sicque litigandi uel ut uulgariter dicamus placitandi forma in paradiso uidetur exorta. Alii autem a ueteri lege iudiciorum ordinem initium habuisse. Ait enim Moyses in lege: *'In ore duorum uel trium testium stet omne uerbum'*. In nouo quoque testamento Paulus apostolus ait: *'Secularia igitur iudicia si habueritis contemptibiles qui sunt in ecclesia illos constituite ad iudicandum'*. Alii compendiosius ordientes diuini iuris originem a primitiua sumunt Ecclesia: cum enim cessante martyrum persecutione ecclesia respirare cepisset sub Constantino imperatore ceperunt patres secure conuenire, concilia celebrare et in eis pro diuersitate negotiorum ecclesiasticorum diuersos canones ediderunt et scripserunt.

Alençon, BM 134, fol. 1rab
 Alençon, BM 134, fol. 196vb-197ra
 München, BSB lat. 17162, fol. 1rb – 1va
 Schulte, *Stephan* 2.2-19

Apéndice II

Un fragmento de *Quoniam in omnibus*

Etenim sanctorum patrum decretis conciliorumque statutis mens auida eorum sanctiones facilius intelliget. Placitandi forma in paradiso primum uidetur inuenta dum protoplastus de inobedientie crimine ibidem a domino interrogatus criminis relatione siue remotione usus culpam in coniugem remouisse autumat dicens: *'Socia quam dedisti dedit mihi et comedi.'* Deinde in ueteri lege nobis tradita dum Moyses in lege sua ait: *'In ore duorum uel trium testium stabit omne uerbum.'* In nouo quoque testamento Paulus apostolus causas ordinemque terminandi insinuasse uidetur cum ad Corinthios in epistola ait: *'Secularia igitur iudicia si habueritis contemptibiles qui sunt in ecclesia illos constituite ad iudicandum.'* Sic utriusque testamenti auctoritate claret tam leges quam ipsa decreta placitandi causa formam ex canonica sumpsisse scriptura. De origine iuris restat dicendum. Sed quia ecclesiasticorum iurium aliud naturale aliud scriptum aliud consuetudinarium dicitur quo tempore horum quodque ceperit merito queritur.

Viejo-Ximénez, 'Dos escritos' 271-291, 285

Apéndice III

Un fragmento de *Inter ceteras theologie*

[I]nter ceteras theologie disciplinas sanctorum patrum decreta et conciliorum statuta non postremum obtinent locum. Si quidem ad ecclesiasticas agendas et res decidendas sunt pernecessaria ordine placitandi ex legibus translato. Videtur tamen placitandis forma in paradiso primo instituta dum primus homo de peccato ibidem requisitus relatione sine remotione criminis usus in uxorem culpam remouere contendit dicens: '*Mulier quam dedisti mihi dedit mihi et commedi.*' Post etiam in ueteri testamento nobis est tradita dum Moyses in lege sua ait: '*In ore duorum uel trium t(estium) o(mne) u(erbum).*' In nouo quoque testamento per quos cause sunt agende et quo ordine terminande P(aulus) apostolus uidetur insinuasse dum ait: '*Secularia si habueritis iudicia eos qui sunt inter uos eligite.*' Sic serie utriusque testamenti liquido constat tam leges quam ipsa decreta placitandi formam ex canonica sumpsisse scriptura.

Viejo-Ximénez, 'Dos escritos' 271-91, 282

Apéndice IV

Esteban de Tournai a D.22 c.3

München, BSB lat 17162, fol. 11rb

Constantinopolitana usque *noua Roma* que melioribus, ut ait Iustinianus¹, fundata est auguriis [*Deo acutore*, 18 de enero de 530: Cod. 1.17(20).1.10]. Dicitur autem noua Roma quia nouiter ibi translatum est imperium. Constantinus enim imperator quarto die baptismatis² sui priuilegium romano pontifici contulit, in quo coronam et omnem regiam dignitatem ipsumque palatium Lateranense contulit. Insuper quoque regnum ei dimisit dicens: 'Congruum esse perspeximus³ nostrum imperium et regni potestatem orientalibus transferre⁴ regionibus et in Bizantie prouincie optimo loco nomine nostro ciuitatem edificari, et nostrum illic constitui⁵ imperium. Quoniam ibi⁶ principatus sacerdotum et christiane religionis caput a Deo institutum, non est iustum⁷ ut illic Imperator terrenus potestatem habeat.'

¹ ut Iustinianus P ² baptismi M ³ esse duximus uel perspeximus P ⁴ preferre M^{ac}
⁵ construi M ⁶ ubi M P ⁷ a Deo est institutum, iustum non est M est a Deo institutum, iustum non est P

M = München, BSB lat. 14404, fol. 16v
P = Paris, BNF lat. 14609, fol. 6rb

Apéndice V

Esteban de Tournai a D.23 d.p.c.20

München, BSB lat 17162, fol. 12vb-13ra

Clerici comam. Quod clerici caput¹ radere desuper in modo sphere iubentur, a Petro apostolo dicitur initium habuisse. Cuius caput gentiles in opprobrium et de risum desuper rasisse dicuntur. Sed quod illi in contumelia² fecerunt, ipse ad humilitatem et dominice passionis memoriam conuertit, qui in caluaria spineam coronam portauit, quod et in rasura et circulo crinium significamus³: ut sicut ille⁴ pro nobis, ita et nos in illo⁵ irrisiones et opprobria parati simus tollerare.

Vel in his duobus (regnum)^{pc} et sacerdotium, clericis inesse ostenditur qui et reges, i<d est> sensus et affectus suos regentes, et sacerdotes, i<d est> uerum innocentium⁶ sacrificium offerentes, debent esse. In rotunditate namque superioris rasure sacerdotium signatur, pro eo quod in ueteri t<estamento> sacerdotes⁷ cidarim seu pilleum in capite gerebant. In circulo crinium corona⁸ regni que caput ambitum designatur.

Vel ut moralius aliquid dicamus, per caput mens intelligitur. Nam ut ait Gregorius [Gregorio I, *Homiliae*, 1.1], sicut capite⁹ reguntur membra, ita et mente cogi- [fol. 13ra] tationes disponuntur. Per capillos autem temporalis substantia significatur, quia qui extra naturam¹⁰ corporis abundant, etiam sine ipsius lesione et dolore tolli possunt uel incidi. Summitas ergo capitis eminentia est mentis. Que radi debet¹¹, ne mentem eius a contemplatione celestium temporalia impediunt. Sed quia saltem ad necessitatem temporalia retinere debemus¹², remanet circulus crinium circa temporalia, qui necessarius que tamen ne longius euagentur deorsum tonduntur¹³, ne oculos uel aures impediunt, ne¹⁴ uisum uel auditum spirituales temporalia perturbent.

Dicunt autem quidam tonsure ecclesiastice usum a nazareis exortum, qui prius crine seruato denique ob uite continentiam caput radebant et capillos in igne sacrificii ponebant [Num 6, 18], sicut ad Ezechiel¹⁵ [Ez 5, 1] dicitur: 'Fili hominis sume gladium acutum et duc super caput¹⁶ tuum et barbam'. In actibus uero apostolorum [Act 18, 18] Priscillam et Aquilam hoc fecisse legimus. Paulus quoque et alii discipuli hoc idem fecerunt.

¹ com caput M^{ac} ² contumeliam M P ³ significatum M ⁴ ipse M ⁵ pro illo M P ⁶ uere innocentie M uerum innocentie P ⁷ deest M ⁸ coronam M ⁹ in capite M^{ac} P^{ac} ¹⁰ /// Clm
¹¹ clerico debet M P ¹² debemus retinere M ¹³ tonduntur M P ¹⁴ i(d est) ne M P ¹⁵ Ezechielem P ¹⁶ deest M

M = Madrid, BN c.87, fol. 17v-18r

P = Paris, BNF lat. 14609, fol. 7rab

Apéndice VI

Comentarios a D.54 d.p.c.8

<i>Fontes</i>	<i>Summa Quoniam in omnibus</i> ¹ A D L M Ma Mb P Sa Tr Wc	<i>Summa Quoniam in omnibus</i> ² B C G Sb Wa Wb	Rufino Singer 140.20-28
—	[D.54 pr.] <i>Serui</i> ¹ quoque <i>ordinari prohibentur, nisi legitimam a dominis propriis</i> ² <i>libertatem consequantur.</i> ³ [D.54 d.p.c.8] <i>Si uero libertatem consecuti non fuerint et aliquo</i> ⁴ <i>modo ad ordines</i> ⁵ <i>ecclesiasticos irrepserint</i> ⁶ <i>presbyter</i> in eodem gradu <i>sola</i> ⁷ <i>peculii amissione mulctatus maneat.</i>	[D.54 pr.] <i>Serui</i> ¹ quoque <i>ordinari prohibentur, nisi legitimam a dominis</i> ¹ <i>libertatem consequantur.</i> ² [D.54 d.p.c.8] <i>Si uero libertatem</i> ³ <i>a dominis</i> ⁴ <i>consecuti non fuerint et</i> ⁵ <i>aliquo modo ad ordines sacros</i> ⁶ <i>irrepserint</i> ⁷ <i>presbyter</i> in eodem ⁸ gradu <i>sola</i> ⁹ <i>peculii</i> ¹⁰ <i>amissionem mulctatus</i> ¹¹ <i>maneat.</i>	—
[<i>Etim.</i> 5.25.5a] Peculium proprie minorum est personarum sive seruorum.	[A M Ma Mb P Sa Tr Wc] Peculium ⁸ proprie minorum ⁹ est personarum siue seruorum.	[L] Peculium proprie dictum est filiorum seu seruorum.	—
[<i>Petri Exceptiones</i> 1.67] Peculium dicitur substantia personarum in potestate dominorum vel parentum constitutarum. [ex <i>Dig.</i> 15.1.5.3] Peculium dictum est quasi pusilla pecunia sive patrimonium pusillum.	—	[B C G Wapc Wb] Peculium autem est ¹² substantia personarum sub potestate parentum ¹³ seu dominorum constitutorum. ¹⁴ Et ¹⁵ filiorum familias aut ¹⁶ seruorum. Et dictum ¹⁷ peculium quasi pussillum ¹⁸ patrimonium.	[D.54 d.p.c.8] <i>Ceterum</i> usque <i>peculii.</i> Peculium est substantia personarum sub potestate parentum seu dominorum constitutarum, ut filiorum familias et seruorum. Dicitur peculium quasi pusillum patrimonium;
[<i>Etim.</i> 5.25.5b] Nam peculium est quod pater	Nam peculium est quod pater uel ¹⁰ dominus filium	Nam peculium est quod pater aut ¹⁹ dominus	nam peculium est quod pater aut dominus

<p>vel dominus filium suum vel seruum pro suo tractare patitur. Peculium autem a pecudibus dictum, in quibus veterum constabat universa substantia.</p>	<p>aut¹¹ seruum¹² pro suo iure tractare patitur. Peculium¹³ autem dictum¹⁴ a pecudibus in quibus ueterum constabat¹⁵ uniuersa substantia.</p>	<p>filium²⁰ aut seruum²¹ suum²² pro iure²³ suo tractare patitur. Peculium autem²⁴ dictum²⁵ a pecudibus in quibus uniuersa²⁶ ueterum constabat substantia.²⁷</p>	<p>filium vel seruum suum pro iure suo tractare patitur. Peculium autem dictum est a pecudibus, in quibus uniuersa veterum substantia consistebat.</p>
	<p>¹ <i>Serui</i>] L. III. Serui P ² a dominis propriis] a dominis suis Tr ² a dominis propriis—libertatem consequantur] a dominis libertatem propriis consequantur Mb ³ <i>libertatem consequantur</i>] consequantur libertatem L ⁴ et aliquo] et aliquoque Ma ⁵ ordines] grados A ⁵ ordines ecclesiasticos] ecclesiasticos ordines M ⁶ irrepserint] irrepserunt Tr ire presumpserunt Wc ⁷ sola] deest L ⁸ Peculium] Quid peculium. Peculium P Peculium proprie dictum (uel dominorum)^{9c} est (uel personarum)^{9c} siue seruorum Sa ⁸ Peculium—seruorum] Peculium proprie dictum (siue)^{9c} est personarum siue seruorum Tr ⁹ minorum] dominorum A D M Ma Mb P Wc deest Sa (uel dominorum)^{9dd} int. Sa ¹⁰ uel] aut L Wc ¹¹ filium aut] filium suum Tr (uel seruorum)^{9dd} int. Sa ¹² seruum] seruum suum D P ¹³ Peculium—in quibus] dictum quibus utimur Ma ¹⁴ dictum] deest L Tr a pecudibus dictum D Mb P Sa Wc ¹⁵ ueterum constabat] constabat ueterum L</p>	<p>¹ <i>Serui</i>] Qui C ² dominis] propriis dominis G Wa dominis propriis Wb ³ consequantur] consequantur G ⁴ a dominis] deest Sb Wa Wb ⁵ consecuti non fuerint et] non fuerint consecuti G ⁶ ad ordines sacros] ordines sacros ordines G ad ordines ecclesiasticos Wa Wb ad ecclesiasticos ordines Sb ⁷ irrepserint] irrepserunt B ⁸ eodem] eadem B ⁹ sola] deest G ¹⁰ peculij] peculijis Wa ¹¹ multatus] multans G ¹² est] deest B ¹³ parentum— seruorum] parentum constitutarum seu dominorum uel filiorum familias et seruorum Sb ¹⁴ constitutorum] constitutarum Wb ¹⁵ et] ut Wb uel Sb ¹⁶ aut] uel C et Wa Wc ¹⁷ dictum] dictorum B ¹⁸ pussillum] paruum Sb ¹⁸ aut dominus filium] uel dominus filium Wa ²⁰ filium] filium suum G ²¹ aut seruum suum] deest G ²² suum] deest B Sb ²³ iure suo] suo iure Wa Wb ²⁴ Peculium autem—in quibus] Dictum quibus Ma ²⁵ dictum a pecudibus] dicitur a pecudibus C a (pecudibus)^{9c} dictum Wa a pecudibus dictum Wb ²⁶ uniuersa ueterum] ueterum constabat Wb ²⁷ substantia] uniuersa substantia Wa Wb (pecca)ac substantia Sb</p>	

A = Admont, SB 389, fol. 24v D = Darmstadt, BU 1416, fol. 2r B = Berlin, SB lat. 462, fol. 99va C = Carpentras, BM 170, fol. 10rb G = Grenoble, BM 627, fol. 106ra L = London, BL Royal, 11 B, ii, fol. 11ra M = Metz, BM 250, fol. 29rv Ma = München, BSB lat. 15819, fol. 79vab Mb = München, BSB lat. 18467, fol. 80rb-80va P = Paris, Bibliothèque de l'Arsenal, 93, fol. 169vb Sa = Stuttgart, BM, HB VI 62, fol. 82vb Tr = Troyes, BM 695, fol. 9rb Wa = Wien, ÖNB 570, fol. 8vb-9ra Wb = Wien, ÖNB 2220, fol. 14r Wc = Worcester, CL Q. 70, fol. 115rb

Apéndice VII
Recensiones de *Summa Quoniam in omnibus*

Comentarios	Recensión	Manuscritos															
		A	B		—				Ma	Mb	P		Sb		Wa	Wb	
a D.22 c.3	1																
	2			C		G	L	M				Sa		Tr			Wc
a D.54 d.p.c. 8	1	A			D		L	M	Ma	Mb	P	Sa		Tr			Wc
	2		B	C		G							Sb		Wa	Wb	

La diffusion de la collection de Gilbert l'Anglais dans la France du Nord

Anne Lefebvre-Teillard*

Dans l'enseignement qu'ils délivraient à Paris durant les premières années du XIII^e siècle, Petrus Brito et ses élèves faisaient une utilisation fréquente de la collection de Gilbert l'Anglais. C'est ce qui m'a incitée à m'intéresser de plus près à la diffusion de cette collection hors de Bologne. L'incitation était d'autant plus forte que deux des manuscrits de la collection de Gilbert qui nous ont été conservés, le manuscrit Lambeth Palace 105 et le manuscrit 1407-1409 de la Bibliothèque Royale de Bruxelles, contenaient également, comme j'ai pu antérieurement le démontrer, l'enseignement de ces maîtres parisiens sur la *Compilatio prima*.¹ Etait-ce un pur hasard ? On sait combien au fil des siècles et des événements, le hasard joue non seulement dans la conservation des manuscrits mais également dans le cheminement qui a conduit les 'survivants' à leur destination actuelle. Si l'on ajoute à cela l'intervention des relieurs qui assemblent parfois des manuscrits de nature fort différente, mais pas forcément de provenance différente, on aperçoit toute la difficulté qu'il y a à retracer l'histoire d'un manuscrit. C'est pourquoi on ne la connaît bien souvent, et encore, que dans ses grandes étapes. Néanmoins il y avait là une 'coïncidence' que je ne pouvais négliger. Elle m'a donc conduite à entreprendre cette étude sur la diffusion de la collection de Gilbert l'Anglais dans la partie septentrionale de la France. Seul ont été retenus, dans le cadre de cette recherche, les manuscrits ne contenant que la collection de Gilbert, à l'exclusion de ceux contenant à la fois celles de Gilbert et d'Alain l'Anglais.

* Cette étude reprend le texte de la communication qui a été présentée le 18 juillet 2016 à Paris lors du 15th Congress of medieval Canon Law dont les *Proceedings* seront publiés ultérieurement dans les *Proceedings Paris 2016*.

¹ Anne Lefebvre-Teillard, 'La lecture de la *Compilatio prima* par les maîtres parisiens du début du XIII^e siècle', *Proceedings Washington 2004* 223-250.

On sait très peu de choses au sujet de Gilbert si ce n'est qu'il était anglais et qu'il a enseigné à Bologne au tout début du XIIIe siècle. Grâce à l'étude fondamentale que Rudolf von Heckel lui a consacrée en même temps qu'à la collection d'Alain l'Anglais (circa 1206), on connaît mieux sa collection de décrétales dont les plus récentes datent de la fin de l'année 1202. Cette étude fondée essentiellement sur deux manuscrits provenant de l'abbaye de Weingarten, conservés à la Landesbibliothek de Fulda, a été publiée en 1940.²

C'est en partant d'elle que j'ai mené ma propre recherche. Elle a porté sur sept manuscrits dont les contenus ont été analysés par référence à l'édition d'Heckel. Nous examinerons, en premier, en quoi ces manuscrits sont, à des degrés divers, témoins de cette diffusion. Nous chercherons ensuite à en dégager les traits caractéristiques.

Les manuscrits témoins de cette diffusion

Ce sont, dans l'ordre alphabétique de leurs lieux de conservation actuels, les manuscrits suivants :

- * Bruxelles B.R. 1407-1409 fol. 93r-148v [Bx]
- * Douai BM 649 fol. 59v-67v + fol. 161r-162v [Do]
- * Durham Cathedral Chapter C.III.3 fol. 75r-121v [D]
- * London, Lambeth Palace 105 fol. 219r-267v [La]
- * London BL Harley 3834 fol. 140r-201v [H]
- * Paris BNF lat. 3922A fol. 227vb-234va [Gilbert R.]
- * Uppsala Universitetsbibl. C 551 fol. 1r-54vb [Upp.]

Cette liste n'est pas exhaustive. Elle comporte néanmoins un nombre respectable des exemplaires actuellement connus qui ne sont pas des manuscrits italiens, *id est* rattachables à l'Italie au point de vue codicologique, et donc 'importés'. Le critère est arbitraire car l'importation en elle-même témoigne déjà d'une

² Rudolf von Heckel, 'Die Dekretalensammlungen des Gilbertus und Alanus nach Weingartner Handschriften', ZRG Kan. Abt. 29 (1940) 116-357 (180-225: texte de la collection de Gilbert). On trouvera dans Kuttner, *Rep.* 313-313 un aperçu des recherches entreprises antérieurement sur ce sujet.

diffusion, mais il permet, me semble-t-il, de mieux mesurer la diffusion réelle de la collection de Gilbert en France.

En effet mon intention n'a pas été seulement d'analyser le contenu de chaque manuscrit, mais également de tenter d'en déterminer l'origine. Les catalogues des bibliothèques, anciens pour la plupart, donnent quelques indications sur les lieux où nos manuscrits ont pu être antérieurement conservés, mais ils n'en indiquent pas, sauf exception, l'origine : là où ils ont été produits. C'est pourquoi pour tenter d'en cerner l'origine, j'ai demandé son aide à la section de codicologie de l'Institut de Recherche et d'Histoire des Textes. Grâce notamment à Patricia Stirnemann que je remercie publiquement ici, cette origine a pu être, pour chacun d'entre eux, à peu près circonscrite.

Elle me permet de mettre immédiatement à part le manuscrit de Durham cathedral C.III.3 que j'ai toutefois analysé, à cause des liens étroits, soulignés jadis par Stephan Kuttner, qui unissent alors les cercles ecclésiastiques anglais et les écoles françaises.³ L'écriture y est celle d'une main anglaise ayant séjourné en Italie.⁴ La copie est parfois quelque peu désordonnée mais elle contient l'ensemble des textes y compris ceux situés 'extra titulos' dans l'édition d'Heckel.⁵ Ce manuscrit de Durham est un manuscrit très riche, notamment grâce aux compléments qui y sont apportés à la collection de Gilbert. J'aurai l'occasion de reparler de la série de décrétales qui la suit et qui constitue elle-même une

³ Cf. Stephan Kuttner and Eleanor Rathbone, 'Anglo-Norman Canonists of the Twelfth Century', *Traditio* 7 (1949-1951) 288-290; reprinted with addenda and corrigenda in *Gratian and the Schools of Law* (London 1983) VIII. Ces liens ne se démentiront pas durant les deux premières décennies du XIII^e siècle.

⁴ Dans son étude 'An Annotator of Durham Cathedral ms C.III.3, and unpublished decretals of Innocent III', *Collectanea Stephan Kuttner* (SG 11; Bologna 1967) 43, Christopher.R.Cheney attribuait également à une main anglaise la copie de la collection de Gilbert. Il notait (p.44) l'influence qu'un séjour en France ou en Italie avait pu avoir sur l'annotateur. L'influence italienne est la plus probable.

⁵ Les appendices no. 3,4,5 sont copiés deux fois: une fois sous le titre *De officio et potestate iudicis delegati* (1.13) et une deuxième fois sous le titre *De hiis qui vi metusve causa fiunt* (1.20). L'appendix 11 figure lui sous le titre *De renuntiatione* (1.5) et à nouveau sous le titre *De sententiis et re iudicata* (2.18).

collection à laquelle Christopher Cheney a donné le nom de *Dunelmensis secunda*, suivi en cela par Walther Holtzmann.⁶

Le second manuscrit témoin de cette diffusion est bien également connu d'un certain nombre d'entre vous, en particulier de Peter Landau et de Gisela Drossbach: il s'agit du manuscrit Paris BNF Latin 3922A. C'est lui aussi un manuscrit très riche puisqu'il permet de saisir sur le vif une méthode de compilation allant de la *Francofurtana* à la collection de Gilbert, compilation effectuée à Rouen sous l'égide de son archevêque et canoniste Walter de Coutances, dont le pontificat exceptionnellement long s'étend de 1185 à 1207. C'est un manuscrit exceptionnel, comme l'ont souligné tous ceux qui l'ont approché; un manuscrit dont on connaît de surcroît assez bien l'histoire.⁷ Il est passé de son lieu d'origine: Rouen à l'abbaye normande de Mortemer où il est probablement arrivé avant de figurer dans un inventaire du deuxième tiers du XIIIe siècle. Il y est demeuré jusqu'en août 1677, date à laquelle il est acheté par les 'rabatteurs normands de Colbert'. De la Bibliothèque de Colbert il passera ensuite à la Bibliothèque Royale puis Nationale où il figure aujourd'hui. C'est un manuscrit si riche, que j'ai voulu comprendre pourquoi la collection de Gilbert, dite 'Gilbert R.' par Walther Holtzmann, n'y figurait que partiellement. Je lui ai donc consacré une étude particulière dans laquelle j'ai cherché à mettre en évidence la

⁶ Comme il le note dans l'introduction à l'étude de Walther Holtzmann citée infra. Cette collection (fol. 123-158) était auparavant dénommée *Dunelmensis IV* y compris par Cheney, 'Annotator of Durham Cathedral' 41-45, dans laquelle il en analyse la composition. Il souligne (p.44) que la partie primitive de la collection ne contient pas de décrétales postérieures à 1204, l'œuvre de l'annotateur ne commençant qu'après 1205. Sur les décrétales ajoutées par l'annotateur à la collection de Gilbert, cf. ibidem, annexe 1, no. 24 à 51. Sur les décrétales qui figurent dans cette *Dunelmensis secunda*, cf. Walther Holtzmann, 'Durham Cathedral Library C.III.3 and Collectio Dunelmensis secunda', *Studies in the Collections of Twelfth-Century Decretals, from the Papers of the late Walther Holtzmann edited, revised and translated by C.R. Cheney and M.G. Cheney* (MIC Series B 3; Città del Vaticano 1979) 300-318. Les décrétales ajoutées par l'annotateur y sont signalées par un astérisque.

⁷ Cf. François Dolbeau, 'Trois catalogues de bibliothèques médiévales restitués à des abbayes cisterciennes (Cheminon, Haute Fontaine, Mortemer)', *Revue d'histoire des textes* 18 (1988) 81-108.

relation qui pouvait exister entre la collection de Gilbert et l'ensemble des compilations de décrétales qui la précédaient dans ce manuscrit et tenté une explication de ce caractère partiel. Pour ne pas être trop longue dans mon exposé on me permettra d'y renvoyer.⁸

Le troisième manuscrit retenu, actuellement conservé à la British Library, le manuscrit Harley 3834, est un manuscrit parisien d'origine. Il provient de l'abbaye royale de Saint Denis; sa présence dans la bibliothèque de l'abbaye est attestée dès le XIIIe siècle. Il y figure encore au XVe siècle. Au XVIIe siècle il fait partie de la collection de Nicolas Lefèvre puis probablement de la bibliothèque du Chancelier Séguier (†1672). Il sera enfin acquis par sir Harley le 5 septembre 1720.⁹ Ce manuscrit contient une copie, en pleine page, du *Breviarium* de Bernard de Pavie (fol. 1r-119v) suivie jusqu'au fol. 121v de quelques sermons,¹⁰ puis de deux *ordines iudicarii*: *Ulpianus de edendo* (fol. 122r-127v) et *Inter cetera studiorum* (fol. 128r-139v).¹¹ La copie de la collection de Gilbert toujours en pleine page s'étend du fol. 140r au fol. 201v. Elle est immédiatement suivie (fol. 202r-356v) de la copie de la *Compilatio romana* de Bernard de Compostelle.¹²

⁸ Anne Lefebvre-Teillard, 'De la Francofurtana à la collection de Gilbert: Une méthode de compilation saisie sur le vif', ZRG Kan.Abt. (2016) 23-72.

⁹ A la fin du XIIIe siècle les moines de St Denis ont décidé de procéder au recollement des ouvrages de leur bibliothèque, Cf. Donatella Nebbiai-Dalla Guarda, *La bibliothèque de l'abbaye de Saint Denis en France du IXe au XVIIIe siècle* (Documents, Études, Répertoires; Paris 1985) 77; notre manuscrit y figure sous la cote DH+, ibidem p.84. La présence dans la collection de Nicolas Lefèvre, conseiller d'Etat et historien mort presque centenaire en 1682, est attestée par une note figurant au fol. 358v, ibidem 190.

¹⁰ Ils figurent sur les folios laissés libres à la fin de la *Compilatio prima* comme l'atteste le chiffre V des fol. 120r et 121r.

¹¹ Sur ces deux ordines cf. Linda Fowler-Magerl, *Ordo iudiciorum vel ordo iudicarius: Begriff und Literaturgattung* (Ius commune Sonderhefte 19; Frankfurt am Main 1984) 65-73 pour *Ulpianus de edendo*(=Quoniam ea) et 84-86 pour *Inter cetera* (=Criminalia iudicia).

¹² Éditée d'après notre manuscrit par Heinrich Singer, 'Die Dekretalen-sammlung des Bernardus Compostellanus antiquus', *Sitzungsberichte Akad. Vienna* 171 (1914) 1-119.

Cette copie de la collection de Gilbert est forcément postérieure à 1205 puisqu'elle contient une décrétale d'Innocent III *Expectans expectavit* du 31 octobre 1205 (Po. 2602). Cette dernière est placée in fine de la collection sous un titre, *De depositione episcoporum*, qui n'appartient pas à la collection de Gilbert.¹³ Bien qu'elle intègre vingt quatre des trente deux textes situés 'extra titulos' dans l'édition d'Heckel,¹⁴ la copie est faite sur un manuscrit proche de la collection d'origine, car les décrétales sont copiées les unes à la suite des autres sans indication du titre auquel elles appartiennent.¹⁵ L'*inscriptio* est, sauf exception, présente (même s'il y a de nombreux 'idem'); la plupart du temps en revanche comme dans les manuscrits analysés par Heckel, l'adresse est absente: sur les 64 décrétales composant le livre I (dont 5 *appendices* et 2 ajouts), seulement six d'entre elles ont une adresse !¹⁶

Il y a entre notre manuscrit et le manuscrit de Lambeth Palace 105 qui constitue mon quatrième manuscrit une indéniable parenté qu'avait déjà relevée Stephan Kuttner dans son *Repertorium*.¹⁷

¹³ Cette décrétale figure dans la *Compilatio Romana* en 1.23.10 avec un explicit différent de celui contenu ici.

¹⁴ Les appendices 19,20,21,22, 23, 24, 25 et 29 n'ont pas été insérés dans le corps du texte.

¹⁵ Sauf très rare exception. Une main différente de celle du corps du texte essaie de réparer cette omission lorsqu'elle a assez de place pour inscrire le titre quitte à l'écourter ou à le placer en dessous ou au dessus de l'endroit où il devrait être.

¹⁶ Moins encore que dans l'édition d'Heckel! C'est un des 'graves défauts' de la collection de Gilbert souligné par Walter Holtzmann dans son étude sur 'La Collectio Seguntina et les décrétales de Clément III et de Célestin III', RHE 50 (1955) 400-453 il le lui reprochera, non sans raison (p.400-401). Ce défaut semble, cependant, avoir moins gêné les contemporains de Gilbert. Notre manuscrit contient parfois en revanche des inscriptions absentes de l'édition d'Heckel comme par exemple dans le titre *De institutionibus* (3.5): 'Ex concilio Arelatensi' pour la 1^{ère}, 'Eugenius papa' pour la 2^e et 'Clemens III' pour la 3^e, inscriptions qu'on retrouve également dans le manuscrit de Lambeth Palace 105. [See also Kyle C. Lincoln's essay in this volume KP]

¹⁷ Kuttner, *Rep.* 312-313. Le caractère également parisien ressort de son analyse codicologique qu'a bien voulu effectuer pour moi, Patricia Stirnemann. Le manuscrit de Lambeth Palace 105 est un manuscrit composite d'œuvres théologiques et canoniques; la partie canonique commence en fol.137 par la copie de la *Compilatio prima* (fol. 137r-213v) avec en marge de nombreuses

Cela ne tient pas seulement à la présence in fine de la décrétale *Expectans expectavit* sous un titre identique: *De depositione episcoporum*, mais également à plusieurs particularités communes aux deux. Même insertion partielle des appendices avec le même doublet de l'appendix 11 (*In nostra presentia*) présent en 1.5.5 et à nouveau en 2.18.6; mêmes ajouts: sous le titre *De procuratoribus* d'une partie de la décrétale *Coram dilecto* (1.18.5; Po. 1337) distincte de l'appendix 2 de Gilbert et en 1.20.5 de la décrétale d'Innocent III *Dilecti abbas*;¹⁸ même inversion dans le livre II du titre *De presumptionibus* placé après le titre *De iureiurando* et non avant; même réunion en un seul et même texte des décrétales no. 16 (Po. 700) et 17 (Po. 390) du titre *De sententia excommunicationis* (5.14). On pourrait multiplier les exemples. Mais il y a aussi des différences notables entre les deux à commencer par celle-ci: dans Lambeth, la copie de la collection de Gilbert suit (fol. 220vb-264vb), sans solution de continuité et par la même main, la copie (fol. 219ra-220vb) d'une lettre d'Innocent III adressée à Philippe Auguste concernant l'élection d'Otton à l'Empire, la seule valable pour Innocent III (26 mars 1202, Po.1649).¹⁹ Une configuration identique se retrouvera dans le

gloses tirées de Richard l'Anglais et de Petrus Brito, cf. mon étude 'Lecture de la *Compilatio prima*' 226-229. Elle est suivie (fol. 214r-218r) par un complément de quarante deux décrétales rapidement décrit par Walther Holtzmann dans ses *Studies* 217-218, complément auquel il a donné le nom de *Collectio Lambethana*. La collection de Gilbert vient ensuite. Ce manuscrit, pour la partie qui nous concerne, a probablement appartenu comme celle qui la précède à l'abbaye de St Edmund à Bury avant d'arriver à Lambeth Palace, cf. Montague R. James, *A Descriptive Catalogue of the Manuscripts in the Library of Lambeth Palace* (3 vols. Cambridge 1930-1932, reprint vol. 1, 2011) 2.177 dont l'auteur se plaint de n'avoir rien trouvé 'as usual' dans le catalogue de l'abbaye. ¹⁸(1202, Po 1749) sous le titre *De hiis qui metus vel causa qui vi congeruntur* dans Harley et *De hiis qui in metus vel causa congeruntur* dans Lambeth, bien différent de celui d'Heckel. Elle est sans adresse mentionnée dans l'un comme dans l'autre manuscrit, mais envoyée, on le sait, à 'cancellario et magistro Lothario canonicis Parisiensibus', ce qui peut expliquer sa présence. On la retrouve en 2 Rot. 1.34.3; 2 Dun145; Al.app. 17 et Bern. 1.30.un.

¹⁹ Elle débute sur un nouveau quaternion dont le parchemin est plus épais que le précédent. C'est une longue lettre d'Innocent III qui répond à une courte lettre de Philippe Auguste qui ne cachait pas son soutien à Philippe de Souabe et sa profonde inimitié à l'égard d'Otton (lettre 63, Migne PL.216.1068). On trouvera

manuscrit d'Uppsala Universitetsbibl.C.551. A l'autre extrémité si Lambeth contient in fine comme Harley la copie de l'importante décrétale *Pastoralis officii diligentia* (déc.1204) il y a une différence sensible entre les deux. Dans Harley, la copie de *Pastoralis* suit immédiatement *Expectans expectavit*; dans Lambeth en revanche la copie (fol. 264vb-267va) de huit décrétales, pour la plupart des *appendices* manquants, s'entrepasse entre la fin d'*Expectans* et la copie de *Pastoralis*.²⁰ D'une manière générale enfin le manuscrit de Lambeth, copié sur deux colonnes est beaucoup plus soigné qu'Harley.²¹

La tendance à incorporer dans la collection de Gilbert des textes qui lui sont étrangers, au lieu de les placer en complément soit in fine soit en marge, explose dans le manuscrit de la Bibliothèque Royale de Bruxelles 1407-1409 qui constitue mon cinquième manuscrit. Postérieur aux précédents mais toujours antérieur à la diffusion de la *Compilatio tertia*, il intègre à l'intérieur des

ibidem (col.1068-1072) le texte de la réponse du pape. La copie de Lambeth est plus fautive que celle d'Uppsala mais les deux sont identiques et se terminent par un paragraphe absent du texte publié par Migne: 'Ad hoc celsitudini tue graciarium exsolumus acciones quia dilectum filium nostrum magistrum Philippum notarium ob nostram et apostolicam sedis reverentiam benigne alacriter sicut ipse nobis per suas intimavit litteras recepisti et donec ipsi respondeat voluisti eum in Francia remanere cum sicut directe ad nos littere regie continebant antequam nuncii tui ab apostolice sede redirent ei plene non poteris respondere. Data littera (*sic*) Non.(*sic* !) Kal. April. pontificatus nostri anno quinto' (fol. 220vb; Uppsala fol. 2 va laisse un blanc avant la référence: kal. April.). La date donnée par Potthast est VII Kal. April.

²⁰ Ce sont en effet six décrétales extra titulos qui sont ajoutées (dans l'ordre: app. 23, 24, 29, 19, 22, 20) et deux décrétales d'Innocent III: la première: *Quoniam electus a vobis*, insérée entre l'appendix 29 et 19 débute comme Gilb.1.3.7 (Po. 836) mais contient dès la seconde ligne avec 'arbor que terram inutiliter occupat' et sa suite, le texte de *Veritatis est verbum organo*, Po. 933, Gilb.2.8.2=X 2.14.8. La seconde: *Per litteras* (Po. 1560) se situe in fine de ce 'complément'. La fin du fol. 267 va est blanc ainsi que le fol. 268; la copie de *Pastoralis* dont les différents paragraphes sont bien distingués, commence en fol. 269ra et se poursuit jusqu'à fol. 270vb.

²¹ Contrairement à ce dernier et sauf quelques exceptions (in Livre 4 notamment), les titres sont généralement présents et bien à leur place, l' 'inscriptio' également, seul les adresses sont encore trop souvent absentes.

différents titres pas moins de soixante dix huit textes, sans compter les décrétales 'extra titulos' de l'édition d'Heckel.²² La collection formée de sept quaternions dont la numérotation est assez bien visible, s'étend du fol. 93r au fol. 147v et se termine par la décrétale *Expectans expectavit* sous un titre identique: *De depositione episcoporum*. Il y a en effet des liens indéniables entre nos deux manuscrits précédents et le manuscrit de Bruxelles. Néanmoins ce dernier, par l'ampleur des textes ajoutés, même si certains ne sont que de courts extraits, constitue presque une collection à part, qu'on pourrait dénommer: *Collectio Bruxellensis*. On trouvera en annexe l'analyse de son contenu accompagnée de quelques annotations qui m'ont paru utiles à celle-ci.²³ L'écriture et l'ornementation de ce manuscrit sont françaises, d'une main de la France du Nord.²⁴

La copie du *Breviarium* qui la précède (fol. 1r-90rb) se termine par la copie (fol. 91ra-92rb) de *Pastoralis*. C'est un manuscrit de facture parisienne qui contient en marge la lecture faite par un des élèves de Petrus Brito.²⁵ En haut du fol. 1r figure la mention: *Liber de dulci valle* et en bas du fol. 92v un essai de plume qui permet d'affirmer que ce manuscrit était présent dans cette toute jeune

²² Il manque quatre de ces décrétales: *Cum instantia* (app. 20), *Ex parte tua* (app. 22); *Accedens ad presentiam* (app. 24) et *Licet ad regimen* (app. 29), alors pourtant que les appendices 22, 24 et 29 sont présents in fine de Lambeth.

²³ Cf. l'avertissement introductif à l'analyse. Notre travail complète, en la modifiant parfois, l'analyse qui avait été faite par Peter Clarke dans son étude: 'The collection of Gilbertus and the French Glosses in Brussels', ZRG Kan.Abt. 86 (2000) 157-180 (= Appendix 4).

²⁴ Je remercie, une fois de plus madame Patricia Stirnemann pour son analyse codicologique qui vient conforter les faibles indices tirés de quelques textes ajoutés par notre compilateur, probablement originaire du comté de Flandre, cf. par exemple les trois textes ajoutés sous le titre *De regularibus et transeuntibus ad religionem* (3.19).

²⁵ J'ai publié les gloses citant Petrus Brito contenues dans ce manuscrit dans ma première étude sur l'école parisienne: 'Petrus Brito legit ... Sur quelques aspects de l'enseignement du droit canonique à Paris au début du XIIIe siècle', RHD 79 (2001) 153-177, étude à laquelle bien des corrections et additions devraient être apportées.

abbaye dès l'époque de Grégoire IX.²⁶ Etait-il déjà accompagné par celui qui nous préoccupe présentement ? C'est fort probable mais non certain.²⁷ Après la destruction de l'abbaye à la fin du XVIe siècle, l'ensemble sera recueilli par le collègue jésuite de Bruges, avant de se retrouver, après la suppression de l'ordre des jésuites (1773) et la confiscation de leurs biens à la Bibliothèque Royale de Bruxelles.²⁸

²⁶ 'Sanctissimi patri ac domino Gregorio sacrosancte Romane ecclesie summo pontifici, W. Dei patientia Sancte Marie de Dulci Valle minister humilis Tornacensis dyocesis, devota pedum oscula beatorum. Cum tantum a luce...'. Je remercie monsieur Sebastien Barret membre de la section de diplomatique de l'IRHT, de m'avoir aidé à déchiffrer cet essai de plume difficile à lire. L'abbaye de chanoines réguliers de saint Augustin (de la congrégation d'Arouaisse) de Douxval a été fondée en 1215, édifiée et peuplée dans les années suivantes, grâce à l'aide de Conon, abbé d'Eeckhout à Bruges, cf. W.H. James Wheale, 'Notice sur la fondation de l'abbaye de Douxval et sur les abbés qui l'ont gouvernée', *La Flandre: Revue des monuments d'histoire et d'antiquités* 2 (1868-1869) 107-112. L'initial W. correspond au second abbé de Douxval, Walterus (†1237).

²⁷ Le maître qui lit sur la *Compilatio prima* semble bien avoir utilisé ce manuscrit car il renvoie à plusieurs reprises à des décrétales ajoutées dans ce manuscrit à la collection de Gilbert; en voici quelques exemples: *Licet Heli* (Bx 5.1.2*) citée sur *Veniens* (1 Comp. 2.13.9); *Cum Hugo* (Bx 1.10.6*) sur *Ad presentiam* (1 Comp. 1.9.2); *Ex officii sui* (Bx 3.26.5*) sur *De quarta* (1 Comp. 2.18.6); *Quam sit grave* (Bx 4.1.12*) sur *De cetero* (1 Comp. 3.2.10); *Ad audientiam* (Bx 3.17.11*) sur *Novum genus* (1 Comp.3.26.7).

On trouve également de sa main quelques gloses, en particulier sur le tout début de la collection avec un renvoi à 'supra', relevées par Peter Clarke, 'The collection' 155-157 (Appendix 3). Ici ou là figurent aussi des corrections apportées au texte à l'aide d'un autre manuscrit de la collection de Gilbert, cf. par exemple l'annotation relevée en marge de la décrétale *Cum utriusque* (1.3.8).

²⁸ Incendiée par 'les Gueux' en 1578, l'abbaye a été supprimée par Philippe II et ses biens donnés aux jésuites de Bruges, cf. W.H. James Wheale 'Notice' 112. Comme l'atteste la mention figurant fol. 1r: 'Coll[egium] societatis Jesu Brugensis' nos deux manuscrits, probablement déjà reliés ensemble, en faisaient partie. En 1773, la suppression de l'ordre des Jésuites par Clément XIV, est suivie de la même mesure et d'une confiscation de leurs biens par le pouvoir séculier: tous les manuscrits se trouvant alors dans les collèges et maisons de l'ordre aux Pays Bas sont réservés à la Bibliothèque Royale de Bruxelles, cf. 'Esquisse d'une histoire de la Bibliothèque Royale', in *Bibliothèque Royale: Mémorial 1559-1969* (Bruxelles 1969) 38. C'est donc par ce canal que notre

La plupart des textes insérés figurent déjà dans des collections antérieures, nous en reparlerons. Les textes figurant uniquement dans Alain (1206) ou Bernard (1208) sont en effet peu nombreux et quelque fois connus par une autre voie que celle de ces deux collections : tel est par exemple le cas d'*Expectans expectavit* ou encore, sous le titre *De electione*, de *Bone memorie C.*(1.3.9*).²⁹ Notre compilateur enfin ne se contente pas d'insérer des textes étrangers à la collection de Gilbert en les rangeant parfois sous un titre également étranger à la collection, comme le *De officio archidiaconi* (1.14), mais il déplace des décrétales ou en copie certaines à deux endroits différents.³⁰

Mon sixième manuscrit, actuellement conservé par la Bibliothèque universitaire d'Uppsala sous la cote C.551,³¹ apparaît de prime abord comme le frère jumeau du manuscrit de Bruxelles. En effet tous les textes ajoutés dans ce dernier y figurent; mais l'apparence, on le sait, est parfois trompeuse. La main et l'ornementation appartiennent à la France de l'Est, probablement à la région de Reims.³² Le manuscrit débute (fol. 1r) comme dans Lambeth Palace 105, par la copie de la lettre

manuscrit est arrivé à Bibliothèque Royale de Bruxelles où il figure dans l'inventaire de 1862.

²⁹ C'est également le cas en 3.26.5 de la décrétale *Cum ex officii* adressée à l'évêque de Paris, Cf. en annexe les observations sous ces décrétales; la présence de Prévotin, ancien 'scolasticus maguntinus', comme chancelier de l'évêque de Paris entre 1206 et 1210, n'est certainement pas étrangère à l'intérêt qui est porté à *Bone memorie C[onrado]*. Ce sont dix sept textes au total sur soixante dix huit dont 2 figurent également dans la collection de Rainier qui semble avoir circulé de bonne heure. Le dernier texte ajouté (5.2.14*, Po 710) est étranger à Alain ou Bernard; il est extrait de Rainerius 11,4 qui figure également dans Rainier R (Paris BNF lat. 3922A fol. 237vb) et parallèlement en 2 Dun59.

³⁰ Cinq décrétales déplacées et quatre doublets. Il y a également quelques omissions, cf. infra Annexe I.

³¹ Margarete Andersson-Schmitt, Hakan Hallberg et Monica Hedlund, *Mittelalterliche Handschriften der Universitätsbibliothek Uppsala: Katalog über die C Sammlung*, 6: C 551-935 (Acta Bibliothecae R. Universitatis Upsaliensis 26.6; Uppsala 1993) 5.

³² Toujours d'après l'analyse codicologique effectuée par Patricia Stirnemann, ce que tend à confirmer certains ajouts propres à ce manuscrit.

d'Innocent III à Philippe Auguste dont j'ai déjà parlé.³³ Fol. 2va à la fin de cette lettre, après la mention : 'datum Laterani [un blanc] Kal.aprilis, pontificatus nostri anno quinto', commence, sur la même ligne et de la même main, une copie de la collection de Gilbert fortement apparentée à celle de Bruxelles (fol. 2va-51rb). Néanmoins elle comporte, outre la présence de cette lettre à Philippe-Auguste, plusieurs particularités qui l'en distinguent.³⁴ C'est notamment à partir du titre *De testibus* (2,13) le renvoi occasionnel par ce compilateur à un *quaternium* (écrit presque toujours *quaternum*) qui se situe in fine de notre manuscrit mais dont il manque aujourd'hui plusieurs folios (fol. 51rb-54vb). Il se dispensait ainsi de recopier le texte qui figurait dans ce 'Quaternum'.³⁵ C'est ensuite dans le livre V des ajouts propres à Uppsala. A la différence en effet de Bruxelles qui n'ajoute plus de textes à partir du titre 3 *De iudeis et saracenis*, à l'exception in fine d'*Expectans expectavit*, ces ajouts sont très nombreux dans Uppsala qui ne comporte pas en revanche cette dernière décrétale. Ceux-ci sont au nombre de dix-neuf dont seulement cinq sont des décrétales d'Innocent III. Uppsala n'est donc pas 'copié' sur Bruxelles, mais les deux utilisent vraisemblablement comme source un même manuscrit aujourd'hui disparu.³⁶

³³ Supra note 19.

³⁴ Notamment un certain nombre de titres qui lui sont propres comme par exemple dans le Livre 1, le titre *De officio vicarii* composé d'une seule décrétale, *Dilecti filii nostri*, qui dans Bruxelles figure en tête du titre suivant: *De officio iudicis delegati*. A l'inverse le titre *De capellis monachorum* manque dans Uppsala, mais les deux décrétales qui le composent sont placées en tête du titre *De iure patronatus* qui le suit. Les particularités d'Uppsala s'accroissent au cours du Livre 4 et surtout du Livre 5.

³⁵ Seize renvois essentiellement situés sur les livres 4 et 5. Il semblerait que notre compilateur n'ait pas eu connaissance dès le départ de ce 'Quaternum' car sous le titre *De officio archidiaconi* il copie *Statuimus* (1.14.1) qui figure également dans le 'Quaternum' no. 18.

³⁶ Cette hypothèse est confortée par le fait que la décrétale *Cum quidam* qui ne figure que dans Uppsala (5.11.1*) est néanmoins citée par l'auteur de la lecture faite sur la *Compilatio prima* dans le manuscrit de Bruxelles. Il y renvoie (fol. 11ra) sur la décrétale *Tua nos*, au titre *De clericis peregrinis* (1 Comp. 1.14.1) s.v. *episcoporum*: 'XCVIII Transmarinos (c.2). Si vero dubitetur de sigillum non admittans, extra. Alexander III. Cum quidam (Gilbert Upp. 5.11.1*)'.

Ce sixième manuscrit se retrouvera ensuite, je ne puis dire comment, en Pologne comme l'indique la mention ultérieure portée en haut du fol. 1r: 'Liber biblioth. Varmiensis'. Warmia est un des quatre diocèses de l'ordre des chevaliers teutoniques dont l'évêché sera sis à Frauenburg, l'actuelle Frombork.³⁷ De là il passera ultérieurement en Suède.

Je ne dirai qu'un mot de mon septième et dernier manuscrit, le manuscrit de Douai 649 qui provient de l'abbaye bénédictine de Marchiennes. C'est un manuscrit formé de plusieurs pièces (fin XIIe- début XIIIe siècle) qui ont été reliées ensemble au début du XVIe siècle.³⁸ Il comporte une 'abbreviatio' de la collection de Gilbert qui vient à l'appui d'une *abbreviatio* de la *Compilatio prima*.³⁹ Son auteur⁴⁰ dispose d'une collection de Gilbert apparentée aux précédentes puisqu'il fait référence sous le titre *De*

Même référence à *Cum quidam* dans la lecture sur cette décrétale *Tua nos* dans Lilienfeld 220 fol. 7va s.v. *testimonio* et dans St Omer 107 fol. 14va s.v. *episcoporum*. Or cette décrétale (JL14197) qui figure généralement sous l'incipit *Quia quidam* (Brug.11.15; Chelt. 18.9; 1Rot.5.3) et exceptionnellement sous celui de *Quoniam quidam* dans l'*Appendix Lateranensis* (26.26), est copiée dans Uppsala sous le titre *De eo qui ordines furtive recepit* avec *Cum quidam* pour incipit.

³⁷ Cf. le catalogue cité supra n.31. Le premier évêque de la Warmie (en français), Ermland (en Allemand) est établi en 1242. La mention 'Liber biblioth. Varmiensis' appartient à une main postérieure.

Le manuscrit a été utilisé dans ses marges, après la parution des décrétales de Grégoire IX, pour une sorte de mise en conformité 'quoniam constitutio apostolice Gregorii IX sedis omnes astringit et nichil debet obscurum vel ambiguum continere...' (fol. 1va), mais on y trouve aussi un ordo (fol. 14 rb). Ces textes mériteraient à eux seuls une étude que nous n'avons pas pu faire.

³⁸ Reliure encore présente. J'espère pouvoir publier bientôt une étude sur le contenu de ce manuscrit dont plusieurs pièces sont en relation avec l'école parisienne.

³⁹ fol. 59v-67v+fol. 161r-162v. Pour chacun des titres de la *Compilatio prima*, on trouve d'abord une 'abbreviatio' des décrétales qui la composent, puis une 'abbreviatio' de celles du titre correspondant dans Gilbert (pas forcément de toutes les décrétales pour l'une comme pour l'autre). Ici aussi la décrétale *Pastoralis officii* est copiée en entier fol. 67va-68vb.

⁴⁰ Il est, d'après son écriture, originaire du sud de la France; il a également composé une de la *Compilatio romana* fol. 158v-160r, malheureusement fragmentaire.

officio archidiaconi à *Statuimus* propre à ces deux dernières;⁴¹ mais une collection différente puisqu'il fait par exemple référence sous le titre *De institutionibus* à une décrétale *Ea est* qui leur est étrangère, tout comme le titre *De pactis* sous laquelle il la place.⁴² Un extrait de cette décrétale qui figure dans la *Seguntina* sous le titre *De transmutatione ecclesie in monasterium* a du être introduit dans la collection de Gilbert dont il se sert.⁴³

Il y a donc eu en circulation dans la moitié Nord de la France plusieurs manuscrits de la collection de Gilbert ainsi augmentée. C'est l'une des principales caractéristiques de cette diffusion, caractéristiques auxquelles nous allons à présent nous intéresser.

Les traits caractéristiques de cette diffusion

Le désir d'accroître sa connaissance de la législation pontificale en supplémentant les textes que l'on possède déjà n'est pas chose nouvelle. Le *Supplementum* apporté à la *Collectio Francofurtana* par le manuscrit de Rouen en est un bel exemple, tout comme le sera celui de la *Dunelmensis secunda*, ce complément à la collection de Gilbert contenue dans le manuscrit de Durham. Les deux d'ailleurs seront eux-mêmes complétés par des mains

⁴¹ Sur ce texte, cf infra en annexe l'observation sous 1.14.1.

⁴² Douai, BM 649, fol. 63vb: '*De institutionibus* [1 Comp.3.7] excommunicantur qui ecclesias recipiunt sine assensu episcopi vel eius officialis ut e. Ex frequentibus (1), immo irritatur institutio ab archidiacono sine assensu episcopi facta ut e. Ad aures (2) et in monasteriis non amplius suscipiatur de fratribus quam quibus bona monasterii possunt sufficere ut e. l. ii. Non amplius (Gilb. 3.5.1) unde ubi monachi substituuntur clericis, tot substituuntur quot possit honeste de bonis ecclesie sustentari, ut e. l. ii. Ea noscitur (Gilb.3.5.4) tamen videtur contra e. l. ii. De pactis *Ea est*; Quod numerus clericorum potest supplendus per numerum monachorum et fratres qui iuraverunt quod certum clericorum numerum habent, non possunt per fratres laicos numerum illum supplere ut e l ii In ecclesia (Gilb. 3.5.3)'.

⁴³ Cf. *Seguntina* no. 48 (WH 420) dont le texte a été publié par Holtzmann, dans son étude 'Collectio Seguntina' 432-433. Elle fait référence in fine au pouvoir de l'évêque de suppléer '*ad numerum constitutum ...ex religiosis personis eiusdem ordinis... non obstante illicito pacto quod monachi de non supplendo numero cum quodam laico contraxisse dicuntur*'.

différentes.⁴⁴ Dans nos autres manuscrits, le procédé paraît plus singulier: les textes sont ajoutés à l'intérieur des différents titres, sans que rien ne les différencie des décrétales prises à la collection de Gilbert: ni l'emplacement, puisqu'ils sont incorporés dans la collection, ni l'écriture, puisqu'il s'agit de la même main. Timide encore avec Harley et Lambeth, le procédé prend une nette expansion avec Bruxelles et Uppsala. C'est une pratique qu'on retrouvera à propos de certains manuscrits de la *Compilatio tertia* étudiés par Ken Pennington et qu'on peut qualifier avec lui de 'française'.⁴⁵

Plus important que la forme sous laquelle ils se présentent, ces textes ajoutés à la collection de Gilbert ont en commun d'être très majoritairement constitués par des textes provenant de collections antérieures à cette dernière. C'est un des traits caractéristiques de sa diffusion en France comme en Angleterre. Bâtie sur le même plan que la *Compilatio prima*, la collection de Gilbert est reçue comme une compilation importante, une *nova Compilatio* que l'on tend même à qualifier de *secunda*.⁴⁶ Mais elle ne doit pas faire oublier certains textes qui ne se trouvent ni dans l'une ni dans l'autre; des textes qui conservent aux yeux de nos compilateurs toute leur importance, soit en raison de leur teneur, soit en raison du destinataire. Des deux, c'est la première raison qui prime comme l'avait déjà remarqué Christopher Cheney à propos de la *Dunelmensis secunda*.⁴⁷ Nos compilateurs agissent ici comme

⁴⁴ Dans le *Supplementum* (= *Rotomagensis prima*) ces textes ajoutés sont indiqués par un astérisque dans l'étude de Holtzmann, 'Collectio Rotomagensis prima', *Studies* 160-207. Ce sont des décrétales d'Innocent III qui sont surtout rajoutées dans le manuscrit de Durham CIII.3, cf. Cheney 'An annotator' et dans le manuscrit BNF lat. 3922A, cf. du même auteur: 'Decretals of Innocent III in Paris B.N. LAT. 3922A', *Traditio* 11 (1955) 149-162.

⁴⁵ Pennington, 'The French Recension of *Compilatio tertia*', *BMCL* 5 (1975) 53-68. Cette manière d'agir se retrouvera également pour la *Compilatio secunda*, comme on peut l'observer dans le manuscrit de Saint Omer BM 107 fol. 119-166.

⁴⁶ Cf. infra note 71.

⁴⁷ Encore sous le nom de *Dunelmensis IV*, Cheney, 'An annotator' 42.

l'avait fait lui-même Gilbert et comme le fera à son tour Alain.⁴⁸ Ils empruntent à ces collections de la fin du XIIe siècle la très grande majorité des textes qu'ils ajoutent à la collection de Gilbert: cinquante neuf des soixante dix huit textes ajoutés dans la collection de Bruxelles en proviennent. L'*Abrincensis*, cette collection de la toute fin du XIIe siècle contenue dans le manuscrit d'Avranches 149 (fol. 79r-109r) en fournit un certain nombre, en particulier dans le livre 3. Elle est issue de la *Sangermanensis* dont elle reprend les textes qui ne figurent pas dans la *Compilatio prima*.⁴⁹ Mais la *Sangermanensis* a été elle-même alimentée par différentes collections dont, via la *collectio* Tanner, l'*Appendix Concilii Lateranensis* (vers 1184), une collection anglaise bien connue, et la *Brugensis* (vers 1187), une collection, également bien connue, originaire de Reims.⁵⁰ La décrétale *Constitutus* placée sous le titre *De regularibus et transeuntibus ad religionem* (3.19.9*) offre un bel exemple de cette utilisation directe de l'*Abrincensis* par nos compilateurs. Figurant dans la *Brugensis* 14.5 dont le texte a été transcrit par Friedberg,⁵¹ cette décrétale d'Alexandre III adressée 'abbati et capitulo S. Bartholomei Noviomensi' est reprise par la *Sangermanensis* 3.6.4, puis par

⁴⁸ C'est pourquoi plusieurs de nos textes pris à ces collections se retrouvent également dans Alain qui ne paraît pas avoir été une source utilisée par nos compilateurs.

⁴⁹ Toutes deux datent des environs de 1198. Sur elles, cf. Heinrich Singer, 'Neue Beiträge über die Dekretalensammlungen vor und nach Bernhard von Pavia', *Sitzungsberichte Akad. Vienna* 171 (1913). L'auteur y analyse successivement le contenu de la *Collectio Sangermanensis* puis celui de l'*Abrincensis* en renvoyant à la précédente.

⁵⁰ Sur ces différentes collections et les liens qu'elles entretiennent entre elles, je ne peux que renvoyer à l'article fondamental de Peter Landau, 'Die Entstehung der systematischen Dekretalensammlungen und die europäische Kanonistik', *ZRG Kan. Abt.* 65 (1979) 120-148, reprinted in *Kanones und Dekretalen* (Biblioteca eruditorum 2; Goldbach 1997) 227-255. L'*Appendix Concilii Lateranensis* a été éditée par Mansi 22.248-453 d'après l'édition de Crabbe (2^e éd. Cologne 1551) qui reposait sur un manuscrit aujourd'hui perdu. La *Brugensis* a été analysée par Emil Friedberg, *Die Canones Sammlungen zwischen Gratian und Bernhard von Pavia* (Leipzig 1897; reprinted Graz 1958).

⁵¹ Friedberg, *Canones-Sammlungen* 146.

l'*Abrincensis* 3.3.4. L'auteur de cette dernière, comme l'avait remarqué Singer, non seulement en écourte le texte mais en modifie l'adresse qui devient 'abbati et capitulo et (sic) Sancti Benedicti'.⁵² C'est ce texte écourté dont il modifie à son tour l'adresse en 'Sancti Bertini' qui figure dans Bruxelles.⁵³

L'*Abrincensis* est loin d'être la seule collection dont les textes ajoutés ont pu être tirés. De toute évidence, en cette fin de la première décennie du XIII^e siècle, nos compilateurs ont disposé de plusieurs sources où puiser. Sans être exhaustif le relevé effectué pour chacun de ces ajouts, révèle la multiplicité des collections dans lesquels figuraient déjà l'un ou l'autre de ces textes.⁵⁴ Il semble bien y avoir eu alors, notamment à Paris, en raison peut-être de l'afflux de clercs anglais causé par l'interdit qui frappe alors l'Angleterre,⁵⁵ une intensification de la circulation des textes. C'est ce qui expliquerait la diversité des antécédents relevés et la présence, dans la *Dunelmensis secunda*, de nombre de ces textes.⁵⁶ Si trois de ces textes ne figurent que dans la *Seguntina*, il est probable qu'ils ont été tirés d'une collection faite, comme elle, d'extraits des registres de Clément III et Célestin III et non directement de celle-ci.⁵⁷ En revanche la *Collectio*

⁵² Cf. Singer, *Neue Beiträge* 155 n.11.

⁵³ Comme j'ai pu m'en assurer en comparant le texte d'Avranches BM 149 fol. 86ra avec Bx et Upp., ce que je n'ai pu faire pour l'ensemble des dix neuf textes qui semblent empruntés à cette collection et dont on trouvera les références en annexe.

⁵⁴ Cf. l'analyse de la collection de Bruxelles mise en annexe.

⁵⁵ Sur cet interdit lancé en 1207-1208 et sur le long conflit qui s'en suit entre Innocent III et Jean sans terre, cf. Christopher R. Cheney, *Innocent III and England* (Päpste und Papsttum 9; Stuttgart 1976) 298.

⁵⁶ C'est pourquoi la référence à 2 Dun est notée dans l'analyse mise en annexe. Ces textes sont ceux de la partie primitive de la *Dunelmensis* (=avant 1205), sur celle-ci cf. Cheney, 'An annotator' 44. La référence que j'ai pu ajouter, le cas échéant, à la *Cheltenhamensis* (1187), grâce à la parution récente de l'ouvrage de Gisela Drossbach, *Die Collectio Cheltenhamensis: Eine englische Decretalensammlung* (MIC Series B 10; Città del Vaticano 2014) montre, si l'en était besoin, que cette circulation des textes n'est pas nouvelle.

⁵⁷ Comme peut le laisser penser notamment le fait que la décrétale *Non sine provide* (WH 674a) qui figure en Bx 4.7.7*, est présente à la fois dans la *Seguntina* (no. 71) et dans la *Remensis* (no. 43). Son texte a été édité par Holtzmann, 'La Seguntina' 439.

Remensis, dont il ne reste malheureusement que quelques folios, semble avoir directement alimenté quatre d'entre eux⁵⁸ et la *Brugensis* quatre autres.⁵⁹ Plusieurs textes de la *Francofurtana* voire même de la *Parisiensis prima*,⁶⁰ se retrouvent directement ou indirectement parmi les textes ainsi ajoutés.⁶¹

Il y a parmi ces ajouts présents en Bruxelles et Uppsala, un dernier texte sur lequel j'aimerais attirer votre attention parce qu'il est cité dans l'apparat au Décret *Ecce vicit leo*.⁶² Il s'agit d'un

⁵⁸ Cf. infra in annexe 2.17.8*; 4.1.9*;4.7.7*;5.2.11.* La *Remensis* figure également dans les antécédents de 4.7.6* et 4.14.4.* Sur cette collection conservée dans le manuscrit de Reims BM 692, cf. Holtzmann, 'Collectio Remensis', *Studies* 279-283. Trois d'entre elles seront également présentes dans la *Dunelmensis secunda*.

⁵⁹ Dont deux figurent également dans 1Rot. Cf. infra in Annexe 1.23.2*; 3.12.2*, 3.19.10*; 3.26.2.*

⁶⁰ Sur la *Francofurtana*, cf. Peter Landau und Gisela Drossbach, *Die Collectio Francofurtana: Eine französische Decretalensammlung* (MIC Series B 9; Città del Vaticano 2007) Bx 3.24.2* paraît avoir été directement pris à cette collection, d'autres de manière indirecte par l'intermédiaire de la *Brugensis* notamment. La *Collectio Parisiensis prima* figure parmi les antécédents pour 4.14.5* et 5.2.10.*

⁶¹ La *Collectio Rotomagensis prima* dans laquelle figurent plusieurs de nos textes, semble bien être la source directe de 1.18.1* et avoir par ailleurs assuré la transmission de deux textes de l'*Appendix Concilii Lateranensis* en 1.15.1* et 2.15.1.*

⁶² Sur la D.94 c.3 dans le manuscrit de Sankt Florian, comme l'avait relevé Kuttner, *Rep.* 61. En voici le passage qui fait référence, de manière assez approximative, à *Statuimus*: 'si ecclesia ei non sufficit ad dandam ei procuracionem, alie vicine ecclesie debent ponere in procuracionem per partes suas ut extra tituli in turonensi concilio statuimus in quo et ex rotomago fideliter (fiducialiter ?) quod archidiaconus debet habere tantum II solidos andevagensis monete. Sed alii dicunt quod in necessitate potest archidiaconus subditos taliare sicut episcopus (fol. 32rb, s.v. *censum exigent*). La référence au concile de Rouen présente dans Laon BM 371 bis (fol. 27rb) et dans Vendôme BM 242 (fol. 16r) disparaît dans Paris BNF n.a.l. 1576 (fol. 130va) qui garde la référence au concile de Tours. On peut néanmoins y lire dans l'interligne au dessus de 'sicut episcopus' écrit d'une autre main: 'extra ii. De procuracionibus, Statuimus...'. En revanche sur ce dernier titre ou sur le titre *De officio archidiaconi*, il n'y a pas de référence à *Statuimus* dans les gloses à la *Compilatio prima* écrites par les élèves de Petrus Brito. Sur Petrus Brito en tant qu'auteur de l'apparat *Ecce vicit leo*, cf. notre étude: 'Petrus Brito auteur de l'apparat *Ecce vicit leo* ?', *Proceedings Esztergom 2008* 117-135.

texte tiré du c. 12 du concile de Rouen de 1190, tenu sous la présidence de Walter de Coutances, pour la mise en œuvre des décisions prises à Latran III.⁶³ Nos compilateurs l'ont placé sous un titre *De officio archidiaconi* (1.14), titre absent de la collection de Gilbert, mais présent dans la *Compilatio prima* et dans la *Compilatio Romana* de Bernard de Compostelle l'Ancien qui fournit le second texte placé sous ce titre, le c. *Significasti*.⁶⁴ Il semble bien en effet que Bernard soit la source à laquelle nos compilateurs ont puisé, lorsqu'ils n'en ont pas une connaissance directe, les quelques décrétales d'Innocent III qu'ils ajoutent à Gilbert.⁶⁵ Cela repousserait le terminus *a quo* de nos deux manuscrits au-delà de 1208. Ce qui est encore plus vrai pour la partie qui nous intéresse dans le manuscrit de Douai, puisqu'elle contient une *abbreviatio* de la *Romana*.⁶⁶

Enfin, je tiens à signaler que tous les manuscrits ci-dessus analysés, sauf Uppsala, contiennent la copie intégrale de la décrétale *Pastoralis officii* (déc.1204),⁶⁷ abondamment citée dans les gloses parisiennes à la *Compilatio prima*.

⁶³ Mansi 22.583-584. Le début du canon 'Sicut in Lateranensi concilio cautum est' est supprimé par nos compilateurs qui débentent avec le mot qui suit: 'statuimus'. Le texte de nos compilateurs reste proche de sa source dont ils omettent cependant le passage 'et ut sex vel septem equorum numerum non excedant' concernant le nombre de chevaux autorisé à l'archidiacre pour ses visites, mention qui figurait pourtant dans le c.4 du Concile de Latran repris in 1 Comp. 3.34.6=X 3.39.6.

⁶⁴ Po. 835, Bern. 1,19 un; même explicit: 'convolare'; le texte est également présent dans Alain sous le titre *De vita et honestate clericorum* (3.1.2) avec un explicit différent.

⁶⁵ Cf. supra note 29. Aucun doute lorsque le texte est absent d'Alain comme *Licet in tantum* (1.3.11*) ou *Veniens ad presentiam* (4.6.4*) ou éventuellement situé en appendix sous un titre différent comme pour *Pastoralis officii debitum* (2.7.6*). En revanche il est plus difficile de se prononcer lorsqu'il s'agit du court extrait d'une décrétale figurant chez l'un et chez l'autre comme pour *Ex eo quod* (5.2.13*) extrait de *Sicut nobis* (Po. 820). Il semble que la collection de Bernard se soit mieux diffusée en France que celle d'Alain.

⁶⁶ Cf. supra note 40.

⁶⁷ Le caractère actuellement restreint du manuscrit d'Uppsala (54 folios) explique sans doute cette absence. Dans Harley (fol. 199v-201v) et Lambeth Palace (fol. 269ra-270vb), comme dans Paris BNF lat. 3922A (fol. 243ra-243vb), la copie de *Pastoralis* se situe après celle de la collection de Gilbert;

Un dernier trait caractéristique de cette diffusion de la collection de Gilbert dans la France du Nord est l'absence de gloses marginales. Si certains manuscrits de la collection comme Fulda D.14 ou Durham C.III.3 en contiennent un nombre respectable, il n'en va pas de même pour nos manuscrits qui dans l'ensemble en sont dépourvus, à l'exception de quelques gloses éparses dans le manuscrit de Bruxelles.⁶⁸ Faut-il s'en étonner quand on sait que la *Compilatio prima* reste le 'manuel' de base de l'enseignement du *ius novum*, même après la parution de la *Compilatio tertia* comme l'illustre notamment un des manuscrits de l'École parisienne actuellement conservé à la Bibliothèque Municipale de St Omer ?⁶⁹

La collection de Gilbert sert à enrichir les gloses de l'École sur la *Compilatio prima*. De là les nombreuses références qu'on y trouve, références qui revêtent plusieurs formes, au grès du maître ou du *reportator*. Si trop souvent ils se contentent de la mention 'infra, extra' suivie du nom du pape et de l'incipit,⁷⁰ ils font aussi

dans Bruxelles (fol. 91ra-92 rb), elle se situe avant in fine de la copie de la *Compilatio prima*. Dans Durham C.III.3, elle est copiée (fol. 151vb-152vb) à l'intérieur de la *Dunelmensis secunda* qui se termine au fol. 158 et dont elle constitue la plus récente décréte. Dans Douai 649 elle figure (fol. 67va-68vb) dans un espace laissé momentanément libre par la copie de l'*abbreviatio* (interrompt fol. 67 ra sur le titre *De Symonia* 5.2).

⁶⁸ Sur les quelques gloses figurant dans Bruxelles, cf. Peter Clarke, 'The collection' 155-157. Pour Uppsala que je laisse pour l'instant de côté sur ce point, cf. supra note 37.

⁶⁹ Il s'agit du manuscrit St Omer BM 107 qui contient des références aux 3 Comp. et 2 Comp., soit in fine de sa seconde couche de gloses (sur elle cf. mon étude: 'Magister A : Sur l'école de droit canonique parisienne au début du XIIIe siècle', *Panta rei: Studi dedicati a Manlio Bellomo*, ed. Orazio Condorelli [5 vols. Roma 2004] 3.499-514), soit en marge. Le manuscrit Paris BN Latin 9632 offre un exemple encore plus caractéristique de cette volonté, cf. 'Un curieux témoin de l'École de Petrus Brito: Le manuscrit Paris BN latin 9632', *BMCL* 26 (2004-2006) 125-152.

⁷⁰ En voici néanmoins un exemple intéressant parce qu'il est tiré du manuscrit de Lambeth Palace et fait référence à un des ajouts contenus dans la *collectio Bruxellensis* (ce qui ne veut pas dire qu'elle a été forcément prise dans cette dernière, cf. l'exemple cité supra, n.36): 'videtur quod infames non admittuntur in crimine simonie licet contra videantur LXXIX [d.] Si pape [c.10]... sed innocentius dicit quod ratione illius criminis potest quis repelli ab

référence de manière plus précise au titre de la collection de Gilbert auquel il est renvoyé.⁷¹ Enfin et surtout on voit apparaître dans certaines de ces *lecturae*, en particulier dans celle de Bruxelles, la mention d'*extra secunda* pour désigner la collection de Gilbert⁷² ou encore, comme dans l'*abbreviatio* du manuscrit de Douai, celle de *Liber II*, une dénomination que l'on trouve également sous la plume d'Alain l'Anglais.⁷³ La collection de

accusatione symoniaci, extra Licet [Gilb. Bx, 5.1.2*] .p. intelligit id quando alie fuerint probationes et hoc in detestationem criminis quam iuste est quod nunquam infames admittantur in testimonium' (ms Lambeth Palace 105 fol. 158va, sur *Veniens* (1 Comp.2.13.9) s.v. *infectus erat crimine*).

⁷¹ On trouvera dans mes études de ces 'lecturae' parisiennes sur la *Compilatio prima* d'assez nombreux exemples de cette forme de renvoi. En voici trois tirés du ms de St. Omer BM 107 sur le livre 4: fol. 74ra, sur *De illis* (1 Comp. 4.1.4), v. *carnalis copula*: 'set hec solutio improbatur per capitulum extra t.e. Veniens (Gilb.4.1.1)'; fol. 86ra sur *Accepesti* (1 Comp. 4.16.1) s.v. *parvo tempore*: 'b'[=brito] idem approbat expressum extra titulo eodem Cel[estinus] III Laudabilem § ult. (Gilb.4.9.1)'; fol. 86va sur *Litteras* (1 Comp. 4.16.4) s.v. *compellas*: 'alii [dicunt] quod hic non steterint per terminum simul quod debent facere secundum leges in authenticum col.iiii. De nuptiis § Per occasionem [Nov.22.6] quam etiam approbat Cel[estinus] iii., extra. titulum eodem Laudabilem [Gilbert 4.9.1] ut supra diximus eodem c.i. . . . Sed essetne idem de arcta? Videtur quod sic arg. extra Cel[estinus] iii. Consultationi [Gilbert 4.9.3]'.

⁷² En voici quelques exemples tirés du Bruxelles B.R. 1407-1409: fol. 6vb, glose sur *Ad presentiam* (1 Comp. 1.9.2) s.v. *in sacerdotio genitus*: 'supple maxime . . . quod filius non potest habere prebendam quam pater proximo habuit, credimus quod ita... extra secunda De filiis presbyterorum, Cum hugo (Gilb. Bx 1,10.6*)'; fol. 14vb, in fine de la summa sur le titre *De procuratoribus* (1 Comp. 1.29): 'nota quod dicitur extra secunda de procuratoribus quod infirmus non tenet mittere procuratorem'; fol. 23vb sur *Cum quidam* (1 Comp.2.17.11) s.v. *vindicandum*: '... Dicit p. B. quod non quia in depositione episcopi exigitur speciale mandatum domini pape cum specialiter ad eum pertineat iii. q.vi. Quamvis etc. Dudum (c.7 et 9) et extra. secunda De officio delegati Prudentiam (Gilb. 1.13.2)'; fol. 29ra sur *Constitutis* (1 Comp. 2.20.37) s.v. *cum assensu*: 'quia semper ratum est a maiori parte statutum est, infra De his que fiunt a maiore parte capituli, capitulo unico (3.30.1) nec auditur minor pars contradicens nisi rationem contradictionis assignaverit extra secunda De electione Cum ex utriusque (Gilbert 1.3.8)'.

⁷³ Comme le notait Stephan Kuttner dans 'Bernardus Compostellanus Antiquus', *Traditio* 1 (1943) 30 n.27, reprinted in *Gratian and the Schools of Law* (1140-1234) (London 1983) no. VII. Cette observation vient à l'occasion de son analyse du manuscrit de la *Compilatio Romana* in London BL Royal 9.B.xi,

Gilbert est donc bien apparue aux yeux des contemporains comme la *Compilatio secunda*, une caractéristique qui permet de comprendre pourquoi celle effectuée par Pierre de Bénévent a été qualifiée de *Compilatio tertia*. Mais elle n'est en rien une compilation officielle, c'est pourquoi, nos compilateurs en usent librement, parfois en l'enrichissant, parfois en en faisant au contraire une copie sélective, comme dans le manuscrit Paris BNF Latin 3922A.

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329-330, manuscrit dans lequel le scribe renvoie dans le livre 1 le lecteur à 'extra secunda', pour des décrétales déjà présentes dans la collection de Gilbert. Ce renvoi, comme il le note également semble viser les manuscrits H et La (cf. 330 n.26). Cette pratique, autant que j'ai pu m'en rendre compte en consultant les livres 2 et 3 du manuscrit Royal 9.B.xi (desormais conservé dans la British Library), ne semble pas avoir perduré au-delà du premier livre.

ANNEXE

Collectio Gilberti Bruxellensis
(Bibliothèque Royale de Bruxelles fol. 93ra-148vb)

Avertissement : Le contenu de la collection est analysé par référence à l'édition de Rudolf von Heckel, 'Die Dekretalensammlungen des Gilbertus und Alanus nach Weingartner Handschriften', ZRG Kan. Abt. 29 (1940)180-225 = Heckel. Les textes ajoutés par le compilateur sont indiqués par un astérisque. Pour ces derniers figurent entre parenthèses, in fine de chaque texte, les références aux collections dans lesquelles il figure, en particulier les collections antérieures à celle de Gilbert (énumération non exhaustive). En voici les références:

- Abr.** = *Collectio Abrincensis*, éd. Heinrich Singer, *Neue Beiträge über die Dekretalensammlungen vor und nach Bernhard von Pavia* (Sitzungsberichte Akad. Vienna 171 [1913]) 355-400.
- Al.** = *Collectio Alani Anglici*, éd. Heckel, 'Dekretalensamm-lungen' 226-334.
- App. Lat.** = *Appendix Concilii Lateranensis*, éd. Mansi (d'après l'éd. de Crabbe) Mansi 22.148-453.
- Bern.** = Bernardus Compostellanus : *Compilatio Romana*, éd. Heinrich Singer, *Die Dekretalensammlung des Bernardus Compostellanus antiquus*, Sitzungsberichte Akad. Vienna 171 (1914) 1-119.
- Brug.** = *Collectio Brugensis*, éd. Friedberg, *Canones-Sammlungen* 136-170.
- Chelt.** = *Collectio Cheltenhamensis*, éd. Gisela Drossbach, *Die Collectio Cheltenhamensis: Eine englische Decretalensammlung* (MIC Series B 10; Città del Vaticano 2014).
- 1 Dun** = *Collectio Dunelmensis prima*, éd. Walther Holtzmann in Christopher R. Cheney and Mary G. Cheney, *Studies in the Collections of Twelfth-Century Decretals, from the Papers of the late Walther Holtzmann* (MIC Series B 3; Città del Vaticano 1979) 75-99.
- 2 Dun** = *Collectio Dunelmensis secunda*, éd. Holtzmann, *Studies* 300-318.
- Frcf** = *Collectio Francofurtana*, éd. Peter Landau et Gisela Drossbach, *Die Collectio Francofurtana: Eine französische Decretalensammlung* (MIC Series B 9; Città del Vaticano 2007).
- Lamb.** = *Collectio Lambethana*, éd. Holtzmann, *Studies* 217-218.
- Lips** = *Collectio Lipsiensis*, éd. Friedberg, *Canones-Sammlungen* 115-130.
- Par I** = *Collectio Parisiensis prima*, éd. Friedberg, *Canones-Sammlungen* 45-63.
- Rain.** = *Collectio Rainerii*, éd. Migne (d'après l'éd. de Baluze), PL 216.173-1272.
- Rain.R** = Extraits de la *Collectio Rainerii* contenus dans Paris BNF lat. 3922A, éd. Holtzmann, *Studies* 159.
- Rem.** = *Collectio Remensis*, éd. Holtzmann, *Studies* 279-283.
- 1 Rot.** = *Collectio Rotomagensis prima*, éd. Holtzmann, *Studies* 169-207.

2 Rot. = *Collectio Rotomagensis secunda*, éd. Anne Lefebvre-Teillard, ZRG Kan. Abt. 102 (2016) 31-61.

Sang. = *Collectio Sangermanensis*, éd. Singer, *Neue Beiträge* 117-354.

Seg. = *Collectio Seguntina*, éd. Walther Holtzmann, 'La *Collectio Seguntina* et les décrétales de Clément III et de Célestin III', *Revue d'Histoire de l'Église* 50 (1955) 400-453.

I Vict. *Collectio Victorine prima*. Paris, BNF 14938 fol. 226r-263r.

WH = Walther Holtzmann, *Regesta Decretalium*, accessible uniquement sur Internet: Stephan Kuttner Institut of Medieval Canon Law, Munich = <http://www.kuttner-institute.jura.uni-muenchen.de/>

<> Texte absent in manuscrit.

Liber primus de constitutionibus

fol. 93ra

<Titre 1> *De constitutionibus*

1. Clemens tertius. A. Contano episcopo, pars c. Significavit.⁷⁴ Preterea de lege illa—destinare.

<Titre 2> *De rescriptis*

1. Alexander III. Cum ordinem cistrensiu—teneamini respondere.
2. Lucius III. Ad hoc sumus etc. proinde significatum est—prohibeas.
3. Innocentius III. Ad audientiam nostram te significante—in constructione peccatum.
- 4.* Alexander III. Cantuariensi episcopi. Ad hec presentium (pars c.Dilecti)—non attemptent.⁷⁵
- 5.*⁷⁶ Alexander III. Wigornensi episcopo et Abbati de herincfam (*sic*=Evesham). Scripsimus vobis—imponatis.⁷⁷
6. Idem. Lundunensi et Conventrensi episcopis. Ex litteras quas—imponi (= Gilb. 2.15.1).

⁷⁴ L'inscriptio, l'adresse et 'pars c. significavit' surmontent l'indication Liber I° De constitutionibus.

⁷⁵ WH 65a, texte publié in Stanley Chodorow and Charles Duggan, *Decretales ineditae saeculi XII* (MIC Series B 4; Vatican City 1982) 69 no. 41.

⁷⁶ Fol. 93va.

⁷⁷ JL 14035, App. Lat. 36.1; 1Rot. 26.12 (fol.165rb-165va); Sang. 5.3.29; Abr. 5.3.1.

- 7.*Celestinus papa. N. canonico Andegavensi. Sciscitatus est—interesse. (=JL 17668, 2 Rot.1.21.25; 2 Dun 158 [fol. 154vb-155ra]; Al. 1.3.6; 2 Comp. 1.2.9 [= X 1.3.13]).⁷⁸

<Titre 3>⁷⁹ *De electione et electi potestate*

1. Alexander III. Suffraganeis alicuius metropolitani—conferre.
 2. Clemens III. Cum te audieremus—indulgentas.
 3. Celestinus III. Cum monasterium de Pellis—communimus.
 4. Idem. Cum terra que funiculus hereditatis domini censebatur et infra. Sicut autem—impediri.
 5. Idem Eliensi electo in eodem. Transmissam dudum sicut—facultatem.
 6. Innocentius III. Cum ad nostram nuper notitiam—irritari.
 7. Innocentius III. Quoniam enim ante confirmationem—irritandam.⁸⁰
 8. Innocentius III. Cum ex utriusque partis—committentes.⁸¹
- 9.*⁸² Innocentius episcopus servus servorum Dei venerabilibus fratribus H. Hudonensi (*sic*) Patenb' (=Paderburnensi) episcopis et dilecto filio abbati de Corbeia salutem et apostolicam benedictionem. Bone memorie C. archiepiscopo Maguntino episcopo Saburensi (*sic*= sabinensi) viam universe carnis ingresso, cum vota canonicorum ecclesie maguntine se in varia dividissent quibusdam petentibus Warmaciensem episcopum, quibusdam vero venerabilem fratrum nostrum Sifride nunc archiepiscopum tunc sancti Petri Prepositum Maguntini sibi eligentibus in pastorem; dilectus filius magister P(repositinus)

⁷⁸ *Sciscitatus* figure également in fine de la C.1a dans St Omer 107 (fol. 116r) et en ajout, d'une main postérieure, dans Lambeth Palace 105 fol. 220va en bas.

⁷⁹ Fol. 94ra.

⁸⁰ Incipit différent de La mais explicit idem.

⁸¹ 'exercendam' absent comme dans D. H et La.

⁸² Fol. 95vb, en fol. 95va, en marge de *Cum ex utriusque*, s.v. 'quod in presenti nullus suum preberet consensum', on peut lire de la main de l'annotateur: 'quod in presentia nostra suum vellet ei prebere consensum, alia littera'.

scolasticus Maguntinus cum quibusdam aliis pro illis qui Warmaciensem episcopum postulaverunt procurator ad apostolicam sedem accessit—Unde⁸³ nobilis viris comitibus ministerialibus clero et populo maguntinis per scripta vobis mandamus eidem archiepiscopo debitam exhibent reverentiam et honorem et ei tanquam patri et pastori suo devote et reverentia intendant alioquin discretioni vestre per apostolica scripta precipiendo quod si predicti nobiles viri, clerici ministeriales et populis quod mandamus neglexerint adimplere, nos eos ad id, ammonitione premissa, per excommunicationis sententiam et si necesse fuerit eosdem clericos per subtractionem beneficiorum suorum, sublato appellationis obstaculo, compellatis. Quod si non omnis hiis exequendis poteritis interesse duo verum ea nichilominus exequantur. Datum lat. IIII Kal. Aprilis pontificatus nostri anno quinto.⁸⁴

10.* Idem. I.card. Sancti S[tephani]. Quod sicut ex litteris tuis et infra. Si autem prefati—facere videatur (= extrait de Po. 1735 [1202]; Al. 1.6.8; Bern. 1.7.14; 3 Comp. 1.6.13 [= X 1.6.28]).⁸⁵

11.* Idem. Berberg. (sic= Bamberg.) episcopo. Licet in tantum et infra. Nec illa episcopus felicis recordationis—transire

⁸³ Fol. 97ra.

⁸⁴ Comme l'avait déjà souligné Heckel en note sous Alain 1.5.2, l'adresse est absente dans le registre pontifical correspondant dont le texte a été publié par Othmar Hageneder, Christoph Egger, Karl Rudolf et Andrea Sommerlechner, *Die Register Innocenz' III. 5: 5. Pontifikatsjahr, 1202/1203* (Wien 1993) no. 14, p. 30-35; c'est une main postérieure qui y a ajouté 'adresse : 'canonicis maguntinis' laquelle est présente dans le ms de Bernard BL Harley 3834 fol. 22 r. La longue décrétale Po. 1647 (mars 1202) utilisée par Alain 1.5.2 explicit: 'confirmaret' et par Bernard 1.8.8, explicit: 'confirmandam' est la source de notre texte jusqu'en fin de 96vb [= p. 33 du texte publié par Hageneder et aliis]. Mais il devient différent en 97ra. Les quelques lignes qui le terminent, empruntent, non sans liberté, au premier § de la p. 34, et se termine rapidement.

⁸⁵ Le texte ne peut pas avoir été pris à Alain dont l'explicit est bien antérieur à toute la fin de notre texte.

(extrait de Po. 942 (1200); Bern. 1.7.4; 3 Comp. 1.5.4 [= X 1.7.4]).⁸⁶

<Titre 4>⁸⁷ *De usu pallii*

1. Innocentius (Clemens *recte*) III. Cum super aliqua re—debeas.⁸⁸
2. Celestinus III. Ad hec quia quesitum est—sepelliri.

<Titre 5> *De renuntiatione*

1. Alexander III. Linconiensi electo. De multa liberalitate credimus provenisse—revocare.
2. Clemens III. Ex insinuatione tua—vindicare.
3. Clemens III. Super hoc quod sciscitaris—opinionem et relationem.
4. Innocentius III. Quod in dubiis etc. et infra. Hii preterea qui beneficii—firmitatem.
- 5.* Alexander III. Belvacensi episcopo et decano Remensi. Ad noticiam vestram volumus pervenire—concedere. (Sang. 3.8.8; Abr. 3.4.2, texte in Singer, *Neue Beiträge* 160-161).
6. Cum ex illo et infra. Usque movemur quod cum in paniensem—super hoc aliud statuamus. (= Gilb. 1.5.5).

<Titre 6>⁸⁹ *De translatione prelatorum*

1. Idem. Inter corporalia et spiritualia—Sane nos—gubernari.⁹⁰

<Titre 7>⁹¹ *De supplenda negligencia clericorum*

1. Innocentius III. Quoniam diversitatem corporum—assumant.

⁸⁶ Non seulement notre compilateur saute tout la première partie de la décrétale telle qu'elle figure chez Bernard mais également écourte la deuxième.

⁸⁷ Fol. 97va.

⁸⁸ 'cant.' ajouté en marge par la main de l'annotateur.

⁸⁹ Fol. 98vb

⁹⁰ Un gros rajout en marge toujours par la main de 95va, le copiste ayant sauté après 'deus coniugium' la suite : 'quod inter episcopum et ecclesiam suo tantum reservavit iudicio dissolvendum qui dissolutionem carnalis coniugii' pour reprendre avec 'quod est inter virum et mulierem...'. 'Hii preterea pars c. *Quod in dubiis*' (Gilb. 1.6.2) est absente ici comme dans D. H. et La car elle est dans l'édition d'Heckel un doublet de 1.5.4.

⁹¹ Fol. 99ra.

2. Idem. Audivimus quod venerabilis frater N episcopus carnotensis—generetur.
3. Innocentius III. Sicut nobis tua fraternitas—in posterum preiudicium generetur.

<Titre 8>⁹² *De temporibus ordinationum*

1. Clemens III. pars c. Cum in dandis ('dampnis' in H, La). Tua quidem significatione—obviare.
2. Celestinus III. Ydrontino archiepiscopo. Cum secundum ecclesiasticas regulas—dispensandum.
3. Innocentius III Mutinensi episcopo et magistro Huberto. Litteras vestras recepimus—publicari.

<Titre 9>⁹³ *De etate et qualitate et ordine perficiendorum*

1. Clemens III. Ad aures nostras te significante—non ascendas.
2. Idem. Ex tue fraternitatis consulto—ministrent.
3. Idem. Cum sacrosancta romana ecclesia etc. Alios autem—ordinari.
4. Celestinus III. Cum bone memorie clemens—mandatum.
5. Innocentius III. Petrus diaconus et monachus sancti iohannis de pinna—vindictam.
6. Celestinus III. Intimatum est nobis—promoveri.
7. Innocentius III. Ex litteris dilectorum—omittat.

<Titre 10>⁹⁴ *De filiis presbiterorum*

1. Clemens III. Casinensi episcopo. Ad hec ex tua parte—obtinere.
2. Celestinus III. Michael presbiter de sancto romano—imponatis (La: postponas).
3. Idem. Litteras vestre dilectionis accepimus—promoveri.
4. Innocentius III. Innotuit olim nobis—procuret.
5. Clemens III. Sagonensi episcopo. Ad audientiam nostram—emendare (=Gilb. 3.3.1)

⁹² Fol. 99vb.

⁹³ Fol. 100rb.

⁹⁴ Fol. 101ra.

- 6.* Alexander tercius. Decano Vinsar (*sic*).⁹⁵ Cum Hugo esset in presentia nostra—molestare. (JL 14098, App. Lat. 25.3; Chelt. 16.22; 1 Rot. 8.3; 1 Dun 3.39; Sang. 4.4.1; Abr. 4.4.3).
- 7.* Alexander III. Cantuariensi archiepiscopo. Ad extirpandas successiones—videatur (JL 13802, App. Lat. 50,60; Frcf R 12.4; Sang. 4.8.14; Lamb. 3; Al. 1.9.1, *explicit*: 'noscatur').

<Titre 11>⁹⁶ *De corpore viciatis*

1. Celestinus III. Varmensi episcopo. Ex parte bartholomei monachi—indulgemus.

<Titre 12>⁹⁷ *De bigamis*

1. Ex litteris tue fraternitatis—pacifice possidere.
2. Innocentius⁹⁸ [Tertia pars c. Nuper a nobis] Tertius et ultimus—subsecuto.

<Titre 13>⁹⁹ *De clericis ignotis* (titre propre à Bx)

- 1.* Celestinus III. Petitorio nobis porrecto—cohercere. (Seg. no. 67; Al. app. 64 sous le titre *De clericis peregrinis*).¹⁰⁰

⁹⁵ Dans toutes ces collections la décrétale est adressée: 'decano et capitulo Saresberiensis', et non 'decano Vinsar'.

⁹⁶ Fol. 102rb.

⁹⁷ Fol. 102va.

⁹⁸ 'Innocentius' ajouté dans l'interligne par l'annotateur.

⁹⁹ Fol. 102vb.

¹⁰⁰ C'est également sous ce dernier titre qu'elle figure dans la *Collectio Seguntina*.

<Titre 14> *De officio archidiaconi* (titre propre à Bx)

1.* Statuimus et firmiter observari precipimus ne archidiaconi per archidiaconatum suum incedentes subditis honerosi existant, nec ab aliquo clericorum procuracionem accipiant nisi ab hiis qui competentes redditus habuerint. Statuimus etiam a nullo clericorum penes quem honeste hospitari sine magno gravamine non valent, non nisi tres solidos andevagensis monete in recompensatione hospitii sui percipiant. Si vero apud pauperes clericos hospitari decreverint vel propter loci amenitatem vel propter negotiorum que tractant comoditatem, statuimus ut quinque aut quatuor ad minus de vicinioribus clericis beneficia habentibus honera ipsius hospitii communiter supportent.¹⁰¹

2.* Idem. (*sic*) Tarvisinensi episcopo. Significasti nobis et infra. Interdicās—convolare. (Po. 835 (1199), Bern. 1.19.1, sous ce titre avec un explicit identique; Al. 3.1.2 sous le titre *De vita et honestate clericorum*, explicit 'interdicās'; 4 Comp. 1.11.2 [= X 1.23.8].

<Titre 15>¹⁰² *De officio iudicis delegati*

1.* Dilecti filii nostri abbas—terminetis. (JL 13729; App. Lat. 4.2; Frcf 50.3; Chelt. 6.17; 2 Dun 90 (fol. 144ra) et Al. 2.15.1: *inscrip.* Alexander III. abbati Leicestrie; 2 Comp. 2.18.1 [= X—]).

2.* Idem. Episcopo Lugdunensi (*sic*= Lundunensi) et abbati S.Albani. Ex litteris Wigorniensis episcopi accepimus—debito terminetis (Frcf 39.1; Brug. 46.4; Chelt. 6.11; 2 Dun

¹⁰¹ Texte tiré du c.12 du concile de Rouen 1190 réuni par l'archevêque Walter de Coutances et destiné à faire appliquer dans son diocèse les canons de Latran III (cf. Mansi 22.583).

On trouve un texte plus succinct également tiré de ce capitulum 12, dans Durham Cath. Library C.III 3 (= *Collectio Dunelmensis secunda*) fol. 154vb attribué à Innocentius 3 (*sic*), il a été transcrit comme capitulum incertum par Holtzmann dans son étude sur cette collection, *Studies* 314 no. 154. Ce texte figure également dans Uppsala Universit t bibl. C.551 non seulement sous ce titre mais  galement dans le 'Quaternum' no. 18.

¹⁰² Fol. 103 ra.

- 97 [fol.146ra-146rb]; texte [Brug. 46.4] in Friedberg, *Canones-Sammlungen* 163).¹⁰³
- 3.* Gregorius <VIII.> Quoniam ad episcoporum maxime spectat officium—laborare. (JL 16056; App. Lat. 49.2; 1 Rot. 20.3* [fol. 161ra]; 2 Clar.21 [Troyes BM 944, fol. 95ra]; Al. 1.3.5; 2 Comp. 1.2.7 [= X —]).
 - 4.Celestinus III. Prudentiam tuam etc. et infra. Nobis proposita—exercebunt. (= Gilb. 1.13.2)¹⁰⁴
 - 5.Innocentius III.¹⁰⁵ Licet is cui causa committitur appellatione remota—diffiniri. (= Gilb. 1.13.3).
 6. Innocentius III. Alberto presbitero [sancte Marie de porta Ravenna]. Coram dilecto etc. et infra Item ferrariensis solus procedere—non erat hactenus deferendum. (App. 2).
 - 7.Celestinus <III.> Toto ar. (*sic* = Rotomagensi ar.) Ad eminentiam etc. et infra Sicut autem—acceptos (= ‘adeptos’ Gilb. 5.14.9).¹⁰⁶

<Titre 16>¹⁰⁷ *De officio iudicis ordinarii*

1. Celestinus III. Significavit nobis tua fraternitas—apostolica sede mandatum.
2. Innocentius III. Duo simul consultationem scilicet—specialiter sit indultum.

<Titre 17>¹⁰⁸ *De maioritate et obediencia*

1. Celestinus III. pars c. Si mandatis. Sane dilecto filio—impetratis.

¹⁰³ Le texte dans Bx est plus succinct que dans la *Collectio Brugensis* ou la *Collectio Dunelmensis secunda*.

¹⁰⁴ Qui commence à Quinto loco alors qu’ici le compilateur saute directement à Sexta : *Nobis proposita* cf. X 1.29.21.

¹⁰⁵ Cant. en marge d’Innocentius.

¹⁰⁶ *Cum te consulente* (Gilb. 1.13.1) absente.

¹⁰⁷ Fol. 104ra.

¹⁰⁸ Fol. 104rb.

<Titre 18>¹⁰⁹ *De transactionibus*¹¹⁰

- 1.* Idem. Norwicensi episcopo. Preterea cum inter laicos et viros religiosos de presentatione alicuius—religiosi debent nullum commodum invenire. (JL 15186; 1 Rot 18.5 [fol. 160ra]; Al. 1.17.2; 2 Comp. 1.16.4 [= X 1.36.9]).¹¹¹
2. Idem. Veniens ad presentiam nostram V. clericus—faciatis.
3. Celestinus III. [pars c. Bone memorie]. Preterea quarto loco—putetur.

<Titre 19>¹¹² *De officio advocatorum*

1. Celestinus III.¹¹³ Universis iudicibus beneventanis. Vt in civitate—obligatus (= Gilb.1.17.1).

<Titre 20> *De procuratoribus*

1. Alexander III. Querelam A clerici accepimus—differatis. (= Gilb. 1.18.1)
2. Clemens tertius. Ex insinuatione dilecti filii—decernatis. (=Gilb.1.18.3)
3. Innocentius III. Cum pro causa—accessisse. (=Gilb. 1.18.4)
4. Clemens III. Si matrimonii causa— procedatur. (=Gilb.1.18.2)

<Titre 21> ¹¹⁴ <*De eo qui gerit vicem alterius*>

1. Innocentius III. Turonensi archiepiscopo. Quod sedem apostolicam—non obsistat.

<Titre 22> *De hiis qui vi metusve causa fiunt*

1. Clemens III. Ad aures nostras te significante—irritanda.
2. Innocentius III. Ligonensi episcopo. Ad audientiam nostram dilecto filio He—restitui faciatis (= app. 3).

¹⁰⁹ Fol. 104va.

¹¹⁰ Titre en marge, main du correcteur.

¹¹¹ Elle remplace Super hoc, Gilb. 1.16.1.

¹¹² Fol. 105ra.

¹¹³ Inscriptio et adresse en 104vb dernière ligne.

¹¹⁴ Fol. 105va.

3. Idem. Massiliensi et Agathensi episcopis. Cum dilectus filius abbas de Florentino etc. et infra, Quia constitit nobis—duximus specialiter imponendi (app. 4).

<Titre 23>¹¹⁵ *De arbitris*

1. Innocentius III. Cum causa per confessiones—generari (app. 5: quia tam per confessiones, pars c. Cum tempore).
 2.* Alexander III. Exoniensi episcopo. Pervenit ad nos quod cum W—convenire (JL 13918; Brug.17.9: texte in Friedberg, *Canones-Sammlungen* 149; 1 Rot.18.7 [fol. 160ra]; 2 Dun 176 [fol. 156ra]; Al. 1.20.2; 2 Comp.1.20.2 [= X 1.43.3]).

Liber II¹¹⁶

<Titre 1>¹¹⁷ *De iudiciis*

1. Clemens III. Cum non ab homine etc. A nobis itaque fuit—inferatur.
 2 Innocentius III. Cum ab omni specie mala etc. Licet autem—legibus reprobentur [même explicit que D, H, La. Heckel: 'improbentur'].

<Titre 2>¹¹⁸ *<De foro competenti>*

1. Alexander III. Licet universis etc. Perlatum est—legitimo terminetur.¹¹⁹

<Titre 3> *De mutuis petitionibus*

1. Clemens III. Rothomagensi decano. Prudentiam tuam—respondere.

¹¹⁵ Fol. 106ra.

¹¹⁶ En marge.

¹¹⁷ Fol. 106rb

¹¹⁸ Fol. 106va.

¹¹⁹ Toujours des corrections apportées au texte par la main du fol. 95.

<Titre 4> *De dilacionibus*

1. Celestinus III. pars c. Plurimi (*sic*). Preterea in tuo petitorio—imponendum (= Gilb.2.4.1).
- 2.*¹²⁰ Quod clericus cuiuslibet ordinis trahi non debeat ad secularem iudicium, non solum seculares leges verum etiam sacri canones protestantur. Ut enim lex edocet principalis, nullus episcoporum vel clericorum ad iudicia secularia est trahendus. Habent autem illi suos iudices nec quicquam hiis publicis est commune cum legibus. Bonifacius vero papa, Gelasius et alii plures antecessorum nostrorum antiquioribus conciliis consonantes sicut bene patet utriusque iuris peritis id ipsum in sacris constitutionibus tradiderunt. Hac ergo ratione inducti per apostolica scripta precipiendo mandamus quia causas si quas inter se clerici scolares Parisius commorantes habuerint contra alios aut aliqui contra illos, appellatione remota, iure canonico decidatis nec permittatis iuri scripto consuetudinem prevalere.¹²¹

<Titre 5> *De feriis*

- 1.* Idem. Significantibus nobis viris religiosis—punire (JL 13851; Sang. 5.4.7; Abr. 5.5.4; Al. 2.3.1; 2 Comp. 2.5.1 [= X —]).
2. Capellanus tuus frater episcopo—celebrari.

<Titre 6>¹²² *De causa proprietatis*¹²³

1. Clemens III. pars c. Bone memorie. Ad ultimum interrogati sumus—respondemus.
2. Idem. Archipresbitero et canonicis Sutrunis. Dilecti filii clerici—impotentes (app. 1).

¹²⁰ Fol. 107ra.

¹²¹ Cette décrétale de Célestin III (JL 17673: Quod clericis) adressée à l'évêque de Paris figure partiellement dans 2 Dun 157 (fol. 154vb qui reprend le tout début puis saute au dispositif: 'Per apostolica scripta mandamus ... prevalere) et dans Alain (2.1.5 qui débute à Nullus episcoporum); 2 Comp. 2.2.5 (= X 2.2.9).

¹²² Fol. 107rb.

¹²³ Comme H, La.

<Titre 7>¹²⁴ *De restitutione spoliatorum*

1. Celestinus III. Gravis nos querela etc. et infra. Ideo fraternitati vestre—infrangi.
- 2.* Alexander III. Cantuarensi archiepiscopo. Conquerente nobis R.---- terminandam. (JL 13795; Lips. 39.6 (inscrip. 'Wigornensi ep. '); Chelt. 13.5 ('Cantuarensi archiep. '); Al. 2.5.1 ('Cantuarensi archiep. '); 2 Comp. 2.7.1 (= X 2.13.7).
- 3.* Innocentius III. R<egistro>. Bituricensi episcopo. Litteras tuas nuper recepimus—restituenda viro. (Po. 1560 (1201); ajoutée in fine de la collection de Gilbert Lambeth Palace 105 [app. 8]; Al. 2.5.4; Bern. 2.6.3).¹²⁵
4. Idem Burgensi et Palenti episcopis. Olim nobis (*sic* = vobis) dedisse—alienis (app. 6).
5. Idem Naverecen. (= Narneren.) episcopo. Dilectus filius noster abbas de ferentino— non habentur. (app. 7).
- 6.* Pastoralis officii debitum (Po. 1683 (1202); 2 Dun 142 (sans inscriptio ni adresse fol. 153ra-153rb); Al. app. 20: 'Noviomensi episcopo' sous le titre *De consuetudine*; Bern. 2,5,3 : 'ep. Noviomensi' sous le titre *De causa possessionis et proprietatis*; et en ajout sous le titre identique à ce dernier dans la *Compilatio prima* contenue dans Paris BNF lat. 3922A fol. 214va-214vb avec 'no' en marge); 2 Comp. 2.5.3 (= X 2.12.5).

<Titre 8>¹²⁶ *De dolo et contumacia alterius partis puniendo*

1. Innocentius III. Abbati sancti Pertuli et magistro Lanifranco. Ad hoc deus in apostolica sede, etc. Ad apostolatus alterius partis quippe—innodari.
2. Idem. Veritatis est verbum organo—potius quam preesse.

<Titre 9>¹²⁷ *De eo qui mittitur in possessionem causa rei servande*

¹²⁴ Fol. 107vb.

¹²⁵ En marge le 'correcteur' a écrit: 'idem c. in apostolice'.

¹²⁶ Fol. 109rb.

¹²⁷ Fol. 110rb.

1. Clemens III. M. episcopo et archidiacono Abrincensibus et priori de Luc'. Cum sicut accepimus—processuri.
- 2.* Alexander III. Eb<oracensi> episcopo. Cum venisset ad nos dilectus filius noster G. canonicus—terminetis. (JL 13933; Sang. 2.6.8 et Abr. 2.4.1: 'Lincolnensi episcopo et abbati de Forde'; 2 Dun 73 [fol. 141rb]: 'Bathoniensi episcopo et abbati de Forde'; Al. 2.6.1: 'Exonensi episcopo et abbati de Forde'; 2 Comp. 2.7.4 [= X 2.13.9]).

<Titre 10>¹²⁸ *Ut lite pendente nichil innovetur*

1. Alexander III. A memoria nostra exciderit—de iure habere.
2. Celestinus tertius. Laudabilem etc. et infra. Queris iterum quando—privari non possit.

<Titre 11>¹²⁹ <*De probationibus*>

1. Clemens III. pars c. Bone memorie. Tercio quippe a nobis—esse censendum.
2. Clemens III. Aquinati episcopo. Iuravit quidam, ut asseris—non possit.

<Titre 12>¹³⁰ *De exceptionibus*

1. Innocentius tertius. Turonensi archiepiscopo. De testibus qui ad exceptionem—vel depositiones testium fuerint publicate. Illi vero qui ad purgandam alicuius infamiam iudicuntur, id solum tenetur iurando firmare quos veritatem eum credant iuramento dicere qui purgantur.¹³¹
2. Celestinus III. pars c. Laudabilem, Denique quod in dicta—contingere non videtur.
3. Innocentius III. Finem litibus cupientes—exceptiones opponat.

¹²⁸ Fol. 110vb.

¹²⁹ Fol. 111rb.

¹³⁰ Fol. 111va.

¹³¹ Cette dernière phrase, 'Illi vero ... purgantur (purgatur)', sera détachée de la décrétale par Pierre de Bénévent et placée par lui sous le titre *De purgatione canonica* dans sa 3 Comp. 5.17.4 dont la disposition sera reprise en X 5.34.13.

- 4.* *Idem. Conventi sancti Leofredi. Cause suspitionis in iure propositae frivole videbantur quas tanquam dilatorias ante litis ingressum opponere debuissent quibus coram delegatis eisdem subeundo iudicium renuntiassae videtur.*¹³²

<Titre 13>¹³³ *De testibus et attestationibus*

1. Clemens III. Series tui scripti—non omittas.
2. Celestinus III. pars c. Laudabilem. Preterea cum quis—confirmabit.
3. Clemens III. Pervenit ad nos—arbitrio duximus relinquendum. (= Gilb. 2.13.4).¹³⁴

<Titre 14>¹³⁵ *De testibus cogendis vel non*

1. Significavit. Preterea si testes—intervallum. (= Gilb. 2.13.3)
2. *Idem.* pars c. Significavit, Ceterum quod super—penitus fateatur.

<Titre 15> *De fide instrumentorum*

- 1.* Alexander III. Nos universa privilegia de quibus absentium nomina ipsis ignorantibus vel non consentientibus scripta sunt vel a modo subscribentur irrita esse decernimus et nullius firmitatis roboris habere censemus (extrait de *Quanto maiori* JL 11868; App. Lat. 50.19; 1 Rot. 30.5 (fol. 166ra-166rb) dont il correspond aux quatre dernières lignes en 166rb).
2. Alexander III. Ex litteris quas—abradi incunctanter.

¹³² Court extrait d'*Inter monasterium*, Po. 730 (1199) se trouve in fine de cette longue décrétale. 1 Rot. 17.11* (159ra-159rb); Al. 2.15.9; Bern.1.4.10; 3 Comp. 2.18.10 (= X 2.27.20).

¹³³ Fol. 112ra.

¹³⁴ Explicit différent de Heckel, D, H et La, mais semblable à 1 Rot. 25,5. A noter également le report de la décrétale de Gilbert 2.13.3 en tête du titre suivant.

¹³⁵ Fol. 112va.

<Titre 16>¹³⁶ *De presumptionibus*

1. Alexander III. Pervenit ad audientiam—appellatione remota.
2. Idem. Litteris tue fraternitatis receptis—sine coniugii spe maneat.

<Titre 17>¹³⁷ *De iureiurando*

1. Clemens III. Veritatis amica simplicitas—a fidelitatis observatione imminere.
2. Gregorius VIII. Ex administrationis etc. Quoniam igitur creditores—severitate cogatis.
3. Clemens III. pars c. Cum non ab homine. Verum in ea—crimine puniendi.
4. Celestinus III. pars c. Significavit. Item si quis iuravit—cum secunda manebit.
5. Urbanus tercius. Sicut ex litteris—portione privetur.
6. Innocentius tercius. Brevi sedem apostolicam—potius infeditur ('irritetur' Heckel).
7. Idem. Ad nostram noveris audientiam—non omittes.
- 8.* Celestinus tercius. Carotensi (*sic* = Carnotensi). Tua nos duxit et infra. Preterea quia occasione iuramenti quod de rebus ecclesie non alienandis te asseris prestitisse—studeas salubriter providere. (JL 17660, 2 Dun 159 (fol. 155ra); Rem. 6 (sans adresse); Al. 3.23.3 (sans adresse); 2 Comp. 3.26.5 (= X 3.48.6).
- 9.* Idem. Sicut consuetudo laudabilis—sancimus (JL 14189; Brug. 41.1; Sang. 6.4.1 (attribuée à Alexander III); Abr. 6.4.1; 2 Dun 167 (fol. 155va, attribuée à Clemens III); Al. 2.9.1 (attribuée à Alexandre III); 2 Comp. 2.10.1 (= X 2.19.2).
10. Innocentius III. Illustri regi Aragonum. Ex tenore litterarum tuarum—et iuramentum servari (= app. 8).

¹³⁶ Fol. 112vb.

¹³⁷ Fol. 113ra.

<Titre 18>¹³⁸ *De sententia et re iudicata*

1. Clemens tercius. Tenor tuarum litterarum—cognoscere parentelam.
2. Idem. Consanguinei E. latoris presentium—ei videris imponendam.
3. Innocentius tercius. Quid ad consultationem etc. et infra. Ei autem¹³⁹—canonicus excedatur.
- 4.* Idem. Canonicis Novariensibus. Licet ex parte Al—confirmare. (extrait de *Causam que inter*, Po. 461 [1198]; Al. 2.15.6; Bern. 2.17.5; 3 Comp. 2.18.4 [= X 2.27.14]).
5. Innocentius III. decano et cancellario londonensis. Sicut a nobis—legitime processisse (app. 9).
6. Idem. Abbati et conventui s. Zenonis. Cum inter vos ex una parte etc. et infra. Quantum ad litigantes—per omnia celebrata. (app. 10).
7. Idem Archiepiscopo cantuariensi. In nostra presentia etc. et infra. Licet igitur iudex—imponendum duximus. Volumus auctoritate etc. (app. 11).

<Titre 19>¹⁴⁰ *De appellationibus*

1. Alexander tercius. Consuluit nos tua—debeas abstinere.
2. Alexander tercius. De priore qui—non audeant impetrare.
3. Idem. Super eo quod—fuisse interpositam.
4. Celestinus tertius. Significavit nobis tua—pareant equitati.
5. Idem. Tenor litterarum tuarum—consecrationis insigne.
6. Idem. Cum in ecclesia etc. et infra. Accepimus autem de fratre—in sua libertate consistet.
7. Idem. Licet appellationis remedium—fuerit ostensa.
8. Celestinus tercius. pars c. A nobis fuit. Preterea inquisiti fuimus—debeat impedire.
9. Quia requisisti a nobis fili preposite—ecclesie competentis.
10. Directe tue nobis—et scita canonum terminare.

¹³⁸ Fol. 114rb.

¹³⁹ Comme D, H, La au lieu de 'Ad id autem'.

¹⁴⁰ Fol. 115ra.

11. Celestinus III. pars c. Prudentiam.¹⁴¹ Secundo requiris—citius absterneat.
12. Celestinus III. An sit deferendum—deferendum censemus.
13. Innocentius III. Sepe contingit quod—volumus observari.
14. Idem. Sancti Augustini et sancti Gregorii prioribus cantuariensibus. Dilecti filii I. et H.—excommunicationis vinculo non teneri (app. 12).
15. Idem. Abbati de Melon. Cum dilecti filii etc. et infra. Si vobis constiterit—penitus absolvatis (app. 13).
16. Idem Altissiodorensi episcopo. Cum tibi de benignitate—non videtur decedere <intestatus>. (app. 14).
- 17.* Idem. De hoc vero quod postea quesisti utrum excommunicationis sententia suspendatur si statim [post dies decem] quis vocem appellationis emiserit, taliter respondemus quod appellatio post X dies facta est irrita cum sententia ex ipso sit temporis spacio confirmata sed etiam etsi statim appellatio fiat non idcirco excommunicationis sententia suspendetur cum ipsa executione non egeat sed ex quo lata fuerit, debeat observari (WH 189; 2 Dun 169 [fol. 155va]; Abr. 2.7.3 [pars de Sang.8.21 : ‘De hoc quod consulere voluisti’]; texte in Singer, *Neue Beiträge* 361).¹⁴²
- 18.* Alexander III. Genensi episcopo. Ad hec sicut asseris—quod mandatur. (JL 13968; 2 Dun153 [fol. 154vb]).

<Titre 20>¹⁴³ *De confirmatione utili vel inutili*

1. Celestinus III. Bone memorie Alanus—plenior haberetur.

¹⁴¹ En marge avant le texte.

¹⁴² Le même texte figure en 2 Dun 78 (fol. 142vb) lettre adressée par Alexander III à l’archevêque de Canterbury, avec l’indication: ‘pars c. De hoc quod consulere voluisti’.

¹⁴³ Fol. 117rb.

Liber III¹⁴⁴

<Titre 1> *De vita et honestate clericorum*¹⁴⁵

- 1.* Ad maiorem autem domus Dei decorem—recipiatur (= Concile de Reims de 1148, c.4 Mansi 21.714; Sang. L.I concilium Remense (1148) c.19 et Abr. L.I Remense concilium c.21).

<Titre 2> *De cohabitatione clericorum et mulierum*

1. Lucius tercius. Vestra duxit devotio—ecclesiastica sacramenta.
2. Innocentius III. Tua nos duxit—animadversione punire.

<Titre 3>¹⁴⁶ *De clericis coniugatis*

1. Clemens III. Ea sedis apostolice—temerario venire presumunt.

<Titre 4>¹⁴⁷ *De prebendis*¹⁴⁸

1. Clemens III. Ad audientiam nostram—poteris emendare.¹⁴⁹

<Titre 5>¹⁵⁰ *De clerico egrotante*

1. Idem. Wigornensi et Norinensi episcopo (*sic*).¹⁵¹ Significavit nobis R archiepiscopus—concedas.
2. Celestinus III. Tua nos duxit fraternitas consulendos etc. et infra. De sacerdote vero—quamdiu vixerit ministrentur.

¹⁴⁴ En marge du titre et en rouge.

¹⁴⁵ Titre absent de Gilbert.

¹⁴⁶ Fol. 117vb.

¹⁴⁷ Fol. 118ra.

¹⁴⁸ Titre en marge.

¹⁴⁹ Déjà présente en 1.10.5.*

¹⁵⁰ Fol. 118rb.

¹⁵¹ Adresse différente de celle figurant dans Heckel.

<Titre 6>¹⁵² *De institutionibus*

1. Ex concilio Arelatensi.¹⁵³ Non amplius suscipiantur—absque penuria possunt.
2. Eugenius I <II>.¹⁵⁴ In congregandis clericis—sufficere possit.
3. Idem. In ecclesia vestra—in canonicos admittatis.
4. Idem. Ea noscitur et infra. Ad audientiam nostram—duxeris statuenda.
- 5.*Clerici qui ab alienis ecclesiis dominorum—in integra restituant. (=Concile de Reims 1148 c.2, Mansi 21.718 (collectio auctior) et Abr. L.I Remense concilium c.2 (*Clericus qui*).¹⁵⁵
- 6.*Idem. Wigitorien. (*sic*= Wigornensi) episcopo. Ex transmissa conquestione R—veritati (JL 14134; App. Lat. 37.1; Chelt. 13.12; 1 Rot. 31.2 [fol. 166 rb-166va]; Sang. 4.7.1; Abr. 4.6.1; Al. 3.7.1; 2 Comp.3.7.1 [X —]).
- 7*Alexander III. Episcopo Hereforti et a.d. Ad aures nostras e. clerico. etc. et ita. Mandamus quatenus si prefatus I. a vobis requisitus—et eius curam sunt iuris et moris est ei committat (Extrait de JL 13952, App. Lat. 47.10; 1 Rot. 31.25 [fol. 167ra]; Sang.7.36).¹⁵⁶
- 8* Celestinus III Cistrensi episcopo. In eminenti specula sedis apostolice—pacifice possidere. (JL 17618, Sang.3.6.5; Abr. 3.3.5; texte in Singer, *Neue Beiträge* 155-156).¹⁵⁷

¹⁵² Fol. 118va.

¹⁵³ Inscriptio absente d'Heckel.

¹⁵⁴ Inscriptio absente d'Heckel.

¹⁵⁵ Sur la provenance anglaise de ce canon, cf. Christopher N.L. Brooke, 'Canons of English Church Councils in the early Decretal Collections', *Traditio* 13 (1957) 471-480.

¹⁵⁶ Un trait de liaison pour indiquer que l'exposé des faits est placé en 3.7.1.

¹⁵⁷ Loewenfeld, sous JL 17618 renvoyait au manuscrit Paris BNF lat. 16992, fol. 251. La décrétale qui s'y trouve, adressée 'Cistrensi et Wintonensi episcopis', est un peu plus développée que dans la *Collectio Abrincensis* à laquelle notre compilateur l'a empruntée.

<Titre 7>¹⁵⁸ *De concessione prebende non vacantis*

1. Lucius III. Ad aures nostras e. clerico insinuante pervenit quod
Ws. presbiter in ecclesia beate marie ante portam—si aliud
non est quod eius institutionem impediatur impedire: (Gilb.
3.6.1).¹⁵⁹
2. Ea noscitur (Gilb. 3.6.2): *capitulum déplacé en tête du titre
suivant.*

<Titre 8> *De his, que fiunt a prelato sine consensu clericorum*

1. Clemens tertius. (*sic* = Celestinus III *recte*) Ea noscitur etc. et
infra. Ex tua siquidem—aliquatenus impediri. (= Gilb.
3.6.2)
2. Idem. P. sancte Marie in via lata diacono cardinali et sedis
legato. Quia et infra. Venientem ad apostolicam sedem W.
fratrem nostrum Eboracensem archiepiscopum benigne
recepimus etc. quere alibi (*sic!*).¹⁶⁰
3. Celestinus III. Ea dinoscitur (*sic*) etc. et infra. Ex tua
siquidem—requiri consensum. (=Gilb. 3.7.1.). (*En marge* :
'*hic poni debet c.sequens*').
- 4.* Idem. Sogobensi episcopo. Sicut nobis etc. et infra. Quod si
aliqui forte se duxerint absentandos dum volueris in huius-
modi ordinatione procedere et accedere, vocati noluerint
eorum appellatione seu contradictione nequaquam obstan-
te nostra fretus auctoritate procedas.¹⁶¹

¹⁵⁸ Fol. 119rb.

¹⁵⁹ Un signe de renvoi en marge rb pour indiquer que la 2^e partie de la décrétale est copiée en 3.6.7.* Alors qu'Alexander était écrit en toute lettre supra en ra, conformément à l'attribution contenue dans 1 Rot.31.25 et App. Lat. 47.10, notre compilateur reprend ici le texte de Gilbert qui attribue à Lucius III cette décrétale comme dans Chelt.7.17.

¹⁶⁰ Extrait de Po. 678. Le compilateur renvoie, mais sans aucune précision, au texte de Gilbert 1.7.1 dans lequel cette décrétale d'Innocent III figure en entier.

¹⁶¹ Extrait de Po. 272 (1198) 'Cum a nobis petitur etc.—Sicut nobis etc.' dont il constitue la dernière phrase; texte complet in Othmar Hageneder und Anton Haidacher, *Die Register Innocenz' III. 1: 1 Pontifikatsjahr* (Graz-Köln 1964) no. 285, pp. 395-396.

Rien à voir avec Al. 2.1.4 = Po. 271 dont l'incipit est le même. Pas mal de désordre à cet endroit en partie causé par le trouble éprouvé devant les deux extraits de la décrétale *Ea noscitur* qui se suivent dans Gilbert sans appartenir

<Titre 9>¹⁶² *De his, que fiunt a maiori parte capituli*

1. Idem. Andevagensi episcopo. Fraternitatis tue prudentiam etc. et infra. Secundum tue questionis—per eius misericordiam extendetur.¹⁶³
2. Celestinus III. Gilaberto Claramontensi episcopo. Quesivit a nobis—in excedente repertum.

<Titre 10>¹⁶⁴ *De rebus ecclesie alienandis vel non*

1. Idem. Ravenensi archiepiscopo. Et super aliqua re posite questionis dubietas—concedimus facultatem.¹⁶⁵

<Titre 11>¹⁶⁶ *De emptione et vendicione*

1. Celestinus III. Pervenit ad nos—ulterius fatigari.

<Titre 12> *De locatione et conductione*

1. Celestinus tercius. Ex rescripto litterarum—confirmationis infringere.
- 2.*Celestinus III. Exoniensi episcopo. Ad audientiam nostram pervenit quod quidam de canonicis erenensis ecclesie inconsultis aliis—et non possit eidem ecclesie incommoditas provenire (JL 17624; Brug. 17.10 dont le texte est édité par Friedberg, *Canones-Sammlungen* 149; Chelt. 11.3; 1 Rot.18.9 [fol. 160 ra-160rb]; Al. 3.10.1; 2 Comp. 3.10.2 [= X 3.13.9]).

<Titre 13> *De permutatione rerum ecclesiasticarum*¹⁶⁷

1. Urbanus III. Quesitum est ex parte—utilius exercere.

au même titre et commençant tous deux par: *Ex tua siquidem*. Dans H et La les deux extraits d'*Ea noscitur* se suivent.

¹⁶² Fol. 119vb

¹⁶³ Dans la marge: 'supra poni debet c. sequens'.

¹⁶⁴ Fol. 120ra.

¹⁶⁵ Texte complété par un § 'illos insuper—supponas' absent de Gilb. 3.9.1. Ce § appartient en réalité à cette décrétale, comme le montre la *Collectio Seguntina* no. 106b. Notre compilateur a donc complété le texte de Gilbert.

¹⁶⁶ Fol. 120rb.

¹⁶⁷ Titre en marge à l'encre noire.

2. Clemens III. Lud' (=Lugdunensi) archidiaconi (*sic*: archiepiscopo) Registro.¹⁶⁸ Ad questiones solvendas que per fratres et coepiscopos nostros apostolice sedi porriguntur etc. et infra. Intelleximus—sibi invicem misceantur.
3. Innocentius III. Archiepiscopo et preposito sancti Andree.¹⁶⁹ Cum universorum fidelium etc. Intelleximus siquidem dilecto filio nostro G—possessionem gaudere.

<Titre 14>¹⁷⁰ <De pignoribus>

1. Idem. Significante dilecto R—obstaculo compellatis.

<Titre 15>¹⁷¹ *De testamentis*

1. Alexander III. Ad audientiam apostolatus nostri—differat assignare.

<Titre 16>¹⁷² *De sepulturis*

1. Clemens III. Certificari voluisti—pro locorum diversitatibus attendatur.
- 2.*Eugenius <III>. Vniverso clero. De hiis qui alienas vis parrochias invadere presumunt et alienos parrochianos contra canonum statuta recipiunt, auctoritate romane ecclesie sancimus scilicet ut quicumque de cetero hoc committere probatus fuerit, dandi penitencias, omnino potestatem amittat et ecclesiasticum beneficium donec per manum pontificis ei restituatur. (JL 9508; App. Lat. 34.1; Chelt. 8.5; 1 Dun 2.20b; Sang 4.12.9, cf. texte in Singer, *Neue Beiträge* 207-208)

¹⁶⁸ Adresse absente dans Heckel 3.12.2 et incipit moins complet. Il est fort possible que l'adresse et l'incipit aient été pris à 1 Rot. 18.1.*

¹⁶⁹ Adresse absente dans Heckel. L'adresse est présente dans Rain. 17.2 et dans la collection de Gilbert R (Paris, BNF lat. 3922A fol. 228vb).

¹⁷⁰ Fol. 121ra.

¹⁷¹ Fol. 121rb.

¹⁷² Fol. 121va.

<Titre 17> <De parrochiis et aliis parrochianis>

1. Celestinus III. Significavit nobis venerabilis—respondere cogantur.

<Titre 18>¹⁷³ De decimis¹⁷⁴

1. Celestinus III. Non est in potestate—debita persolvatis.
- 2.* Innocentius III. Aabbati et conventui Leuvinensi. Tu nobis filius abbas in presentia nostra constitutus exposuisti quod—vel sumptibus colitis nullas a vobis exigere decimas vel extorquere presumat.¹⁷⁵
3. Idem. Vercellensi episcopo. Tua nobis fraternitas—sed potius instringenda (app. 16).
4. Idem. Pastoriensi episcopo. A nobis tua fraternitas—ab huiusmodi sint immunes (app. 17).
5. Idem. Ex parte dilectorum—pesumptione attemptent.
6. Alexander III. Quamvis sit grave—iaceat prostratus.
7. Celestinus III. Pervenit ad audientiam—compellatis.
8. Alexander III. Cum apostolica etc. et infra. Sane sicut exlitteris— de manu laicali ei recipere.
- 9.* Lucius III. Mar. episcopo. Cum sint homines—videantur. (JL 14012, Chelt.7.15; Sang. 4.9.11; Abr. 4.8.2; Al. 3.15.1)
- 10.* Alexander tertius. Cum Ws. clericus de Eden. sicut asseritis—eandem tenere sententiam non curetis. (Sang. 4.10.23; Abr. 4.9.6, texte in Singer, *Neue Beiträge* 204-205).
- 11.*Idem decano de sancto Walerico et R. canonico Rotomagensi. Ad audientiam nostram noveris pervenisse quod iudei cupiditate dampnabili—donec que prediximus fuerint adimpleta. (JL 17646; Seg. no. 103; texte in Chodorow

¹⁷³ Fol. 121vb.

¹⁷⁴ Titre en marge.

¹⁷⁵ Extrait de Po. 1044 non identique à App. 15; Rain.11.6, Al. 5.3.4 et Bern. 3.2.3 dont les textes qui commencent avec 'Exposuisti' continuent après 'presumat' par un long paragraphe qui se termine par: 'minime denegentur' comme dans Gilbert app. 15.

and Duggan, *Decretales ineditae* 36-38 no. 20 § ii à v inclus).¹⁷⁶

- 12.* Idem Senonensi archiepiscopo. Conquestus est in presentia nostra Ws. [G in Frcf] presbiter quod licet de his qui bona sua detinent—ob ecclesiastica censura compellas quousque ad satisfactionem congruam accedat.¹⁷⁷
- 13* Alexander III. Abbati de Traforde et priori de Eseu. Veniens ad apostolice sedis clementiam frater noster magister W. de Flavilla, sua nobis assertione monstravit quod monachi—cum secundum compositionis tenorem solvere tenerentur.¹⁷⁸

<Titre 19> *De regularibus et transeuntibus ad religionem*

1. Cum virum te—non cogitur voluntatem.
2. Cum simus etc. et infra. Sane auribus nostris—recte proveniunt postulare.
3. Innocentius <III>. Ad apostolicam sedem etc. et infra. Ex parte siquidem tua—valeat remanere.
4. Idem. Porrectum nobis ex parte—non immerito compellendus.
5. Idem. Sicut nobis est ex parte tua propositum—valeat allegare.
6. Idem. Referente (*sic*= Deferente *recte*) dilecto filio—redeundi.

¹⁷⁶ Le texte complet se trouve également dans Gilbert R, Paris BNF lat. 3922A fol. 220vb en ajout à 3.26.30. Walther Holtzmann en a donné une édition dans son article 'Zur päpstlichen Gesetzgebung über die Juden im 12. Jahrhundert', *Festschrift Guido Kisch: Rechtshistorische Forschungen anlässlich des 60. Geburtstags* (Stuttgart 1955) 217-235 at 234 n.4.

¹⁷⁷ Très proche de Frcf 20.4 dont le texte ajouté dans Paris BNF Latin 14610 au titre *De appellationibus* de la 1 Comp. 2.20.47ter) a été publié par Gérard Fransen dans son étude: 'Les diverses formes de la *Compilatio Prima*', *Scrinium Lovaniense: Mélanges historiques, historische opstellen Étienne van Cauwenbergh* (Recueil de travaux d'histoire et de philologie 24; Louvain 1961) 235-253 at 246-247; 1 Clar.2).

¹⁷⁸ Extrait de JL14102, 1 Dun 2.2 (sans adresse, explicit: 'compellas') 2 Dun71 (sans adresse, explicit: 'cogas'); Sang. 4.10.22; Abr. 4.9.5 (sans adresse, explicit: 'cogas'); Al. 1.17.1 (Abbati de Stanford'et priori de Esebi, explicit: 'cogatis'); 2 Comp. 1.16.3 [= X 1.36.8]).

NB Ex transmissa (Gilb.3.17.5) est absente.

7. Idem. Ex parte nostra (*sic*= tua) nostro—libere exequi permittatis.
8. Idem. Sicut tenor litterarum—professionem fecerit monachalem.
- 9.*Idem. Abbati et capitulo sancti Bertini. Constitutus in presentia nostra I. canonicus vester supplici nobis insinuatione monstravit—et fraterna caritate tracteris. (Brug. 14.5; Sang. 3.6.4; Abr. 3.3.4).¹⁷⁹
- 10.*Urbanus III. A[t]rebatensi episcopo. Ex insinuatione A. subdiaconi presentium latoris accepimus—et in pace dimitti. (Texte extrait de Brug. 24.4, édité par Friedberg, *Canones-Sammlungen* 152-153).¹⁸⁰
- 11.* Idem. Ambienensi episcopo. Significavit nobis noster frater venerabilis Tornacensis episcopus etc. et infra. Per abbatem, priorem et fratres et per alios—merito prohiberi. (Brug. 19.19; Sang. 3.16.16; Abr. 3.12.9).¹⁸¹

¹⁷⁹ Le texte est celui du manuscrit A (Avranches BM 149= *Collectio Abrincensis*) extrait de la *Collectio Sangermanensis* (ms. S=Paris BNF lat. 12459). L'adresse dans ce manuscrit A diffère de celle du S comme le notait Singer, *Neue Beiträge* 155 note 10. Il porte en effet 'Al. III abbati et capitulo et (*sic*) sancti Benedicti' au lieu d' 'abbati et capitulo S. Bartholomei Noviomensi' qui est également celle du texte dans la *Collectio Brugensis* édité par Friedberg, *Canones-Sammlungen* 146. L'adresse du ms A a été ici remplacée par 'abbati et capitulo sancti Bertini'. Le texte est surtout, comme dans le ms A, écourté par la suppression de la phrase 'Volumus tamen—copiosas agamus' et dans le dernier § par la suppression des noms des arbitres parisiens désignés et par celle des directives concernant la procédure à suivre (cf. Singer, *Neue Beiträge* 155 note 11).

¹⁸⁰ Notre compilateur s'est arrêté à 'dimitti', laissant de côté les deux courtes phrases qui terminent le texte dans la *collectio Brugensis*. Dans Paris BNF lat. 16992 fol. 182v, on trouve la copie d'une décrétale dont la teneur est extrêmement proche (même casus et même solutio) mais qui est attribuée à Alexandre III et adressée à l'évêque de Salisbury.

¹⁸¹ Notre texte est à peu près identique à celui de la *Collectio Abrincensis* (fol. 89vb). Il correspond au dernier tiers de la décrétale figurant dans Brug. 19.19 et éditée par Friedberg, *Canones-Sammlungen* 151. Nos compilateurs en suppriment notamment la phrase : 'et ab impetitione predicti militis appellatione cessante super hoc porsus' qui se référait à un fait exposé dans la partie supérieure non reprise.

12. Quod dei timorem—quam solatio perfrueris (=app. 18).

<Titre 20> <*De conversione coniugatorum*>

1. Celestinus III. Karissimus in Christo filius noster R. illustris rex suevorum (comme dans Heckel) appellatui nostro litteris et nuncio humiliter intimavit—maritali affectione tractare.
2. Clemens III.¹⁸² Consuluit nos G—decrevimus dirimendum.
3. Celestinus III. Placet nobis et tuam—credimus non cogendam.

<Titre 21>¹⁸³ *De conversione infidelium*

1. Clemens III.¹⁸⁴ Interrogatum est a nobis—turpitudinem revelarent.
2. Idem. Laudabilem etc. et infra. Quod enim interrogasti de saracenis—Si quidem iuris erit in sequenti casu—casu legitimi censeantur.¹⁸⁵
3. Idem. Quanto te magis etc. et infra. Sane tua nobis fraternitas—redire cogatur.
4. Idem. De infidelibus ad fidem—matrimonium inter eos.
5. Innocentius III. Gaudemus in domino—fuerit fornicata.

<Titre 22>¹⁸⁶ <*De voto et voti redemptione*>

1. Clemens III. Perpendimus etc. Ceterum de voto—Ierosolimam subministret.

<Titre 23> *De statu regularium*¹⁸⁷

1. Alexander III. Si cum aliquo—in campis deponatur.
2. Clemens III. Super quodam canonico regulari—in similibus agendum.

¹⁸² Inscriptio omise Heckel.

¹⁸³ Fol. 127rb.

¹⁸⁴ Celestinus III dans Heckel; inscriptio omise dans H et La.

¹⁸⁵ A partir de 'Si quidem', cette dernière partie est détachée dans H et La pour former un no. 3.

¹⁸⁶ Fol. 128vb.

¹⁸⁷ Titre en marge.

- 3.* Alexander III. Vniversis abbatibus in capitulo Cistrensi congregatis. Recolentes qualiter—fieri cariores.¹⁸⁸
- 4.* Idem. Omnibus episcopis et aliis ecclesiarum prelatibus. Dilectos filios nostros—commendari. (JL 13850; App. Lat. 27.6; Sang. 3.15.2; Abr. 3.11.1; Al. 3.19.2; 2 Comp. 3.22.3).
- 5* Idem. Eisdem. Quanto nos fidem et devotionem—incurrere. (JL 13852; Sang. 3.15.3; Abr. 3.11.2; 2 Comp. 3.22.4).
- 6.* Idem. Abbatibus universis. Quia Deus nos elegit—non recuset. (JL 11632; Sang. 3.15.6; Abr. 3.11.5; 2 Dun 173 [fol. 155vb]; Al. 2.16.1 et 1.7.1; 2 Comp. 2.19.3 et 1.6.1 [= X 2.28.32 et 1.10.1]).

<Titre 24>¹⁸⁹ *De capellis monachorum*

1. Celestinus III. De minori possemus sollicitudine—maliciose differre.
- 2.* Urbanus III. (*sic*= II) In registro. Iustis votis assensum prebere iustis—sapienter administrantur. (JL 5729; Frcf 55.1).

<Titre 25>¹⁹⁰ *De iure patronatus*

1. Alexander III. Dilectus filius noster S.—gravari permittas.
2. Clemens III. Nobis fuit etc. Preterea quesivisti—in sacris canonibus est constitutum.
3. Innocentius tercius. Per nostras postulasti litteras—adiuvetur studiis et meritis.
4. Idem. Cum propter discordias—qui ius evicerit patronatus.

<Titre 26>¹⁹¹ <*De censibus*>

1. Clemens III. Gravis admodum et correctione—censura canonica puniatis.

¹⁸⁸ JL 13847; Sang. 3.12.1; Abr. 3.8.1; 2 Dun 172 (fol. 155vb) plus court que le texte ci-dessus, lui-même plus court que les précédents, notre compilateur laissant de côté la dernière phrase: 'Sane si super—beneficiis indulgere'; Al. 3.19.1; 2 Comp. 3.22.2 (= X 3.35.3).

¹⁸⁹ Fol. 129vb.

¹⁹⁰ Fol. 130ra.

¹⁹¹ Fol. 130rb.

- 2.* Lucius III. Significavit nobis T. rector—vexentur. (JL 14964; Brug. 17.6; 2 Dun75 [fol. 141va-141vb]; Al. 3.22.1; 2 Comp. 3.25.1 [= X 3.39.13).
- 3.* <V>rbanus III. A magistro scholarum Remensi. Querelam B. sancti Iacobi—contemptos (JL 15745; Brug. 18.2; Sang. 2.6.6; 2 Dun 171 [fol. 155vb]; Al. 3.2.2; 2 Comp. 3.25.3).
4. Idem. Abbati et conventui Belleville. Quanto cantori (*sic*= creatori) et infra. Accepimus a vobis—expensarum. (app. 19).
- 5.* Innocentius III. Parisiensi episcopo. Cum ex officii—spiritualia, etc. Cum nemo cogatur—ignorat. (Po. 1778 (28 nov. 1202); vraisemblablement prise sur l'originale ou une copie; Al. 3.22.3; Bern. 1.25.7 et 2.15.6; 3 Comp. 2.17.6 [= X 2.26.16).

<Titre 27>¹⁹² *De xenodochiis*¹⁹³

1. Alexander III. pars c. Ad petitionem. Si hospitale in—in omnibus servata.
2. Idem. Sunt (=Inter) alia que—auferatur (app. 21 sous le titre *De immunitate ecclesie*).

Liber IIII¹⁹⁴

<Titre 1>¹⁹⁵ *De sponsalibus et matrimonio*

- 1 Innocentius tertius. Veniens ad nos W lator—facias adherere.
2. Clemens III. Sicut ex litteris—comparternitas est contracta.
3. Idem. Inter opera caritatis—proficiat peccatorum.
4. Idem. Nobis ex tuarum innotuit—ulterius immiscere.
5. Idem. Ad id quod—uterque transivit.
6. Clemens III. pars c. Martinus Bertam. Tertio loco questionis—solutis sponsalibus separantur.
7. Innocentius III. Cum apud sedem—valeat declarare.

¹⁹² Fol. 131rb.

¹⁹³ *De ecclesiis edificandis* Heckel.

¹⁹⁴ Titre en marge.

¹⁹⁵ Fol. 131va.

8. Innocentius III. Numquam (*sic*= Alioquin) etc. A nobis inquirere—absque aliqua hesitatione processus.
- 9.* Celestinus III. Cenomanensi episcopo. Tua nos duxit fraternitas consulendos etc. et infra. Super mulieribus insuper quarum consortio viri ad partes remotas transeuntes evitant et post VII. annorum decursum viris aliis nubere non formidant tue industrie respondemus quod eadem femine tam diu debeant ab aliorum coniugio vel carnali consortio abstinere donec certam de morte virorum noticiam habeant. (WH1034a; Rem. 33; 2 Dun163 (fol. 155 rb, texte proche).
10. Clemens III. R. tituli sanctorum Marcelli et P. presbytero cardinali et cassinensi abbati (adresse absent in Heckel, présente in 1 Rot.) Tenor litterarum—parentelam (= Gilb. 2,18,1).¹⁹⁶
- 11.* Idem. Significasti nobis per litteras—facultatem.¹⁹⁷
- 12.* Idem archiepiscopo sancti Andree de Palliam. Quam sit grave—maritale.¹⁹⁸

<Titre 2>¹⁹⁹ *De desponsatione impuberum*²⁰⁰

1. Clemens III. Episcopo Claromotensi.²⁰¹ Duo pueri W. et Uillelma—minime requisito.
2. Idem. [R.tituli] sanctorum Mar. P. et P. presbitero cardinali.²⁰² Super hoc quod litteras tu intimasti nobis de quadam parrochiana C. etc. ut supra e. Ad id (4.1.5).

¹⁹⁶ Décrétale placée sous le titre *De matrimonio* in 1 Rot.1.57 (fol. 151rb-151va) avec en marge l'indication suivante: *De re iudicata*; c'est bien sous ce titre qu'on la retrouvera ensuite dans Gilbert.

¹⁹⁷ Po. 22 (1198); Rain. 40.3; Al. app. 22; Bern. 4.1.2; 3 Comp. 4.1.2 (X —). Texte in Hageneder et Haidacher, *Register Innocenz' III.* 1.30-31 (no. 22).

¹⁹⁸ Po. 164 (1198); 2 Dun 19 (fol. 126ra-126rb); Rain. 20.3 et Rain.R fol. 239vb; Al. 4.1.2; Bern. 2.16.1; 3 Comp. 5.14.2 (= X 5.31.9). Texte in Hageneder et Haidacher, *Register Innocenz' III.* 1.208-209 (no.143).

¹⁹⁹ Fol. 133ra.

²⁰⁰ En marge main annotateur.

²⁰¹ Adresse ajoutée par l'annotateur.

²⁰² Cf. adresse supra en 4.1.10.

<Titre 3>²⁰³ *De clandestina desponsatione*

1. Idem. Ex litteris tuis accepimus—facias pertractari.
- 2.* Alexander III. Exoniensi episcopo. Commissum—intervenisse. (JL 13905; 2 Dun 180 [fol. 156rb]; 2 Comp. 4.1.4 [= X 4.1.16]).
3. Idem. Significavit. Item si quis iuravit—cum secunda maneat. (JL 17658; doublet de Gilb. 2.17.4).

<Titre 4>²⁰⁴ *Qui clerici vel voventes matrimonia contrahere <non> possunt*

1. Celestinus III. Fraternitatis tue receptis litteris— a consortio suo dimittat.

<Titre 5> *De eo qui duxit in matrimonium quam polluit per adulterium*

- 1.* Clemens III.²⁰⁵ Ex tenore tuarum litterarum percepimus quod quidam in minoribus ordinibus constitutus—si tue placuerit voluntati.²⁰⁶
- 2.* Rursus quidam ut dicis—contineret (pars de *Laudabilem*, JL 17649; Seg.91d; 1 Rot. 1.40 [fol.150ra]; Al. 4.4.1; 2 Comp. 4.4.2 [= X 4.6.6]).
3. Clemens III. Ex litterarum tuarum insinuatione—poterit ducere in uxorem.
- 4 Celestinus III. Cum G. haberet uxorem—necessaria subministrant.
5. Innocentius III. Significastis nobis per litteras—iuxta formam ecclesiasticam impensuri.

²⁰³ Fol. 133va.

²⁰⁴ Fol. 134ra.

²⁰⁵ Ajouté par l'annotateur.

²⁰⁶ WH 492a, texte publié in Chodorow and Duggan, *Decretales ineditae* 179 no. 102.

<Titre 6>²⁰⁷ *De cognatione spirituali*²⁰⁸

1. Clemens III. Martinus Bertam in uxorem duxit—noscitur extitisse.
2. Idem. Contracto matrimonio inter P. de Rigale—in sua firmitate durante.
3. Celestinus III. Laudabilem etc. et infra. <inscriptio mais sans le texte!>.
- 4.* Idem. Episcopo Linconensi et decano Hun<teon>. Veniens ad nostram presentiam G.—ut an cum secunda legitime commorari decernamus.²⁰⁹

<Titre 7>²¹⁰ *De eo qui cognovit consanguineam uxoris*

1. Celestinus III. Transmissee nobis littere tue—sine spe coniugii permanebit.
2. Idem. pars c. Martinus Bertam. Super alio vero—matrimonium irritare.
3. Alexander III. Super eo quod sollicitudo—quod in priori observatur.
4. Idem. De illo autem—plectendi.
- 5.* Eugenius papa (*sic*). Spalenensi episcopo. Continebatur in litteris quas tua fraternitas destinavit quod quidam parochianus tuus cum multis lacrimis et suspiriis publice confessus est in quamdam mulierem pollutionem illicitam commississe et sororem eius matrimonio copulasse—imponere non postponas. (JL 14101, Frcf. 4.8; Chelt. 9.45; Brug. 43.1; Sang. 8.81; Abr. 8.6.6; 2 Dun 186 [fol. 156vb]).
- 6.* Clemens III. Ex litteris tue discretionis—abstinere. (JL 16624; 1 Rot.1.54 [fol. 151rb]; 2 Dun 164 [fol.155rb]; Lamb.17; Rem. 34; Al. app. 27).

²⁰⁷ Fol. 134vb.

²⁰⁸ Titre placé après 4.5.3 mais emplacement corrigé en marge.

²⁰⁹ Po. 388 (1198); Bern. 4.8.1: 'ut an cum secunda valeat legitime commorari, veritate cognita, decernere valeamus' (London, BL Harley fol. 320r). Texte in Hageneder et Haidacher, *Register Innocenz' III.* 1.375 no. 380.

²¹⁰ Fol. 135rb.

7.* Idem. Non sine provide considerationis—nubendi habeat potestatem.²¹¹

<Titre 8>²¹² *De consanguinitate et affinitate*²¹³

1. Celestinus III. Quod dilectio tua etc. Quesisti autem a nobis—adhibita statuendum.

<Titre 9>²¹⁴ *De frigidis et maleficiatis*²¹⁵

1. Celestinus III. Laudabilem etc. et infra. Sollicite quoque ad ultimum—ad priora conubia redire.

2. Alexander III. Ex litteris quas nobis tua fraternitas destinavit (Heckel: Ex litteris tuis accepimus)—cum multis peccare.

3.* Alexander III. Velimano (sic= Verulan.) episcopo Quia nobis. Supra in decretalibus (1 Comp. 4.15.2 [X —]).

4. Celestinus III. Senonensi ep. Dilectus filius noster—permanere (=Gilb. 4.12.2 sans inscriptio et sans adresse; JL 16612; 2 Comp. 4.12.2).

<Consultationi (Gilb. 4.9.3) est absente.>

<Titre 10>²¹⁶ *De matrimonio contra interdictum contracto*²¹⁷

1. Celestinus III.²¹⁸ Atrebatensi episcopo.²¹⁹ Consuluit nos discretio tua—incidenda.

²¹¹ WH 674a: Celestinus III; Rem. 43; Seg. no. 71: 'Idem Rutenensi episcopo, in eodem libro', éditée par Holtzmann, 'La collectio Seguntina' 439 qui en note renvoie à Gilb.Bx.

²¹² Fol. 136rb.

²¹³ Titre en marge, main annotateur.

²¹⁴ Fol. 136va.

²¹⁵ Titre en marge, main annotateur.

²¹⁶ Fol. 136vb.

²¹⁷ Titre en marge main annotateur; titre différent d'Heckel.

²¹⁸ Heckel: Clemens III. *Cum sis predictus*.

²¹⁹ Adresse absente d'Heckel, présente en 1 Rot.1.45a où la décrétale est attribuée à Celestinus III.

<Titre 11>²²⁰ *Qui filii sint legitimi*

1. Innocentius III. Per tuas nobis litteras intimasti—inviolabiter observari.
- 2.* Idem.²²¹ Linconensi episcopo. Pervenit ad nos ex insinuatione Lucie inter patrem et matrem eius matrimonium fuisse legitimum celebratum et quamdiu vixerunt in ipso matrimonio sine cuiuslibet accusatione permanserunt. Post illorum decessum, Ws Paries et b. filius eius asserantes illam de non legitimo matrimonio susceptam, etiam litibus et sumptibus iniuste fatigant et tanquam non legitimam, amovere a paterna hereditate cognantur. Mandamus itaque quatenus si vera sunt que premisimus, dictam viduam auctoritate nostra legitimam iudicetis et ab indebita vexatione predictorum virorum appellatione remota absolvatis.²²² (JL 17633; Seg. no. 83; Al. 4.12.4; 2 Comp. 4.11.2 (= X 4.17.11, texte un peu différent).
3. Idem. Ian. (*sic* pour Viennensi) et Burdeg. episcopis. Ad nostram noveritis—censeatur (app. 25).

<Titre 12>²²³ *Qui matrimonium accusare <non> possunt*

1. Clemens III. Ex litteris tue—apostolica auctoritate imponens.
2. Celestinus III. pars c.Laudabilem. Insuper adiecisti quod aliquis—ambigitur indixisse.
3. Idem. Sicut ex litteris—a quoquam admitti.

<*Dilectus filius* (Gilb. 4.12.2) figure supra en 4.9.4. *A nobis* (Gilb. 4.12.4) manque.>

²²⁰ Fol. 137ra.

²²¹ Au lieu de Celestinus III.

²²² Le texte tiré du deuxième registre des lettres de Célestin III a du circuler de bonne heure, ce qui expliquerait les différences.

²²³ Fol. 137va.

<Titre 13>²²⁴ *De divorciis*

1. Alexander III. Ad aures etc. et infra. Fraternitati tue—probetur commisisse.
2. Clemens III. Comes Willelmus de rumare²²⁵—debitum amisisse.
3. Celestinus III. Plerumque accidit ut proponis—requirere non potest (= Gilb. 4.13.3 et 2.4.1: texte complet de JL 17052).
4. Innocentius III. De prudentia tua (*sic*= vestra). Valde—non moretur.

<Titre 14>²²⁶ <*De secundis nuptiis*>

1. Alexander III. Capellanum nichilominus qui—destinare postponas.
2. Idem. Preposito sancte Marie Maglig. (*sic*; Heckel: Madeburg.). Discretionem tuam in domino—distinguendum. (app. 23).
- 3.* Latrix presentium A. lacrimabili nobis—si inventus fuerit, redire (WH 608, 1 Rot. 1.15* [fol. 148va qui se termine à 'dedisse']; Sang. 8.66).
- 4.* Clemens III. In presentia nostra constitutus A.—de morte virorum (JL 16370, 1 Rot.1.51 [fol. 151rb]; Rem. 29; 2 Dun 162 [fol. 155ra-155rb]; Lamb.15).
- 5.* Idem (*sic* = Alexander III) Exoniensi episcopo in gestis (*sic*). Causam super crimine non consuevimus alicui committere nisi persona in nostra presentia appareat que personam super eodem crimine valeat impetere.²²⁷
- 6.* Ex concilio parisiensi. Maritis sane—de adulterio (1 Comp. 5.13.5 [= X 5.16.4]).

²²⁴ Fol. 138ra.

²²⁵ Comme dans D, H et La.

²²⁶ Fol. 138va.

²²⁷ Extrait de JL 13919, Par. I 1.36; 2 Dun 175 (fol. 156ra); texte édité par Friedberg, *Canones-Sammlungen* 54.

<Liber quintus>²²⁸<Titre 1>²²⁹ *De accusationibus*

1. Alexander III. Meminimus iam pridem tibi precipiendo—non differas impertiri.
- 2.* Innocentius priori sancti Victoris. Licet Heli summus sacerdos etc. et infra. Sicut accusatio—recipere procuretis. (Po. 888 (1199); Rain. 22.1; 2 Dun 147 [fol. 153vb]; Al. app. 29; Bern. 5.3.4; 3 Comp. 5.2.3 [= X 5.3.31]).

<Titre 2>²³⁰ *De symonia*

1. Innocentius III (*sic*=Alexander III). Veniens ad nos F. presbiter simplici nobis—studeat deservire.
2. Celestinus III. Super eo vero quod voluisti—non debeat impedire.
3. Innocentius III. Quamvis ad abolendam symoniacham pravitatem—quilibet admittatur.
4. Idem. De regularibus canonicis—poteris collocare.
5. Alexander III. Ex tue fraternitatis literis—non postponas.
6. Celestinus III. Nobis fuit ex parte tua—de iure non debet.
7. Alexander tertius. Pervenerunt ad apostolicam sedem etc. et ita (rien de plus).
8. Innocentius III. pars c. Quamvis ad abolendam. Significasti siquidem nobis—apostolica facultatem.
- 9.* Ex concilio Toletano XI.²³¹ Multe super hoc capitulo patrum sententie emanaverunt—restaurandi sunt. (Sang. 2.1.14; Abr. 2.1.3; texte in Ives de Chartres, *Decretum* 5.127, Migne 161.366).
- 10.* Idem. Abbatibus.²³² Consuluit nos dilectio vestra super quodam cum fratre nostro quod cum esset in seculo c. solidos pro ordinatione dedisset, statim post quam delicti quanti-

²²⁸ Liber absent, 'v' étant écrit dans un espace in fine de la première ligne de *Meminimus*.

²²⁹ Fol. 139ra.

²³⁰ Fol. 139vb.

²³¹ L'inscriptio correspond au ms A (=Collectio Abrincensis).

²³² 'Alexander III. Abbati et fratribus Trium fontium' dans JL 14119.

tatem cognovisset, penitentia ductus religioni vestre se contulit. Nos igitur questioni vestre satisficientes litteris presentibus vobis significamus quod ordine taliter suscepto carere meruerit nec ad superiores promoveri. Verum tamen in ordinibus quos prius receperat ex dispensatione domini poterit deservire (JL 14119 Par. I 1.142; Wig. 2.5; 1 Vict. 87).

- 11.*Idem. Eboracensi archiepiscopo. Ad audientiam apostolatus—dubitatur. (JL 13889; Rem 30; 2 Dun 83 (fol. 143rb); Al. 3.16.1).
- 12.* Cum te habeamus virum providum—valeat denigrare (WH 315a, texte in Chodorow and Duggan, *Decretales ineditae* 180 no. 103).
- 13.*Idem. Abbati Gle<m>bacensi. Ex eo quod contra prohibitionem et voluntatem tuam—quominus reportaret (court extrait de *Sicut nobis* Po. 820 (1199); Al. 5.2.4; Bern. 5.3.5; 3 Comp. 5,2,5 [= X 5.3.33]).²³³
- 14.*Idem. Episcopo.²³⁴ Ex parte etc. et infra. Domini prediorum ortorum et molendinorum ipsi tradunt sarracenis in grave detrimentum eorum et preiudicium excolenda et infra. Mandamus nisi sarraceni illi ad commotionem vestram cum ea integritate qua christiani solvebant predictas decimas ecclesiis noluerint exhibere, eis facias conventionem super mercimoniis a christianis rerum venalium et aliis penitus denegari, christianos illos qui talibus contra formam apostolici mandati convincere presumpserint a sua presumptione per censuram ecclesiasticam, appellatione remota compescens (extrait de Po.710 (1199); 2 Dun 59 [fol. 133rb-133va]; Rain. 11.4: 'Abulensi ep.').

²³³ Texte entier dans Othmar Hageneder, Werner Maleczek et Alfred A. Strnad, *Die Register Innocenz' III. 2. Pontifikatsjahr* (Rom-Wien 1979) 314-316 no. 163 (172) à 316.

²³⁴ Rien d'autre.

<Titre 3>²³⁵ *De iudeis et saracenis*

1. Alexander III. Consuluit etc. Iudeos etiam de novo—observantiis tolerantur.
2. Clemens III. Quam sit laudabile etc. et infra. Tuis frater episcopo—apostolica facultatem.
3. Idem. Significavit nobis—ab excommunicationis vinculo non absolvit.

<Titre 4>²³⁶ *De hereticis*²³⁷

1. Innocentius III. Vergentis in senium etc. Nos autem—sed in progeniem dampnatorum.²³⁸

<Titre 5>²³⁹ *De homicidio voluntario vel casuali*

1. Clemens III. Ad audientiam apostolatus nostri—divina officia celebrare.
2. Idem. Cum monasterium et infra Super eo vero quod—purgationem iniungas.
3. Idem. Scripsisti nobis fili—recompensationem congruam expensarum.
4. Idem. Suggestum est auribus nostris—fuerit faciendum.
5. Clemens III. Inspectis litteris quas—dedisse videtur.
6. Celestinus III.²⁴⁰ Dilectus filius noster capellanus—possit celebrare (= app. 26).

²³⁵ Fol. 141rb.

²³⁶ Fol. 141va.

²³⁷ Titre en marge main de l'annotateur.

²³⁸ En marge fol. 141vb, juste avant 'In terris nostris', l'annotateur sur le mot 'excommunicatur' note: 'alia littera: anathematis se noverit sententiam incurrisse'.

²³⁹ Fol. 142ra.

²⁴⁰ *Sic* comme dans La).

<Titre 6>²⁴¹ *De clericis pugnantis <in duello>*²⁴²

1. Celestinus III. Clericus²⁴³ presbiter lator presentium—miseri-
corditer dispensare.
2. Idem. Cum²⁴⁴ suscepti regiminis—aliquatenus tolerare.
3. Innocentius III. Quod in dubiis etc. et infra. Quia vero tam sacer-
dotes—omnes deponendos.

<Titre 7>²⁴⁵ *De falsariis*²⁴⁶

1. Lucius III. Improba pestis falsifitatis—suis auctoritatibus con-
dempnetur.
2. Urbanus III. Ad audientiam nostram te significante—abire per-
mittas.
3. Celestinus III. Per falsarios qui nuper—volumus revocari.
4. Innocentius III. Cum sepe mandata etc. et infra. Accidit enim
nuper—preiudicium generare etc. et infra. et portitores—
beneplacitum voluntatis.
5. Idem. Ad falsariorum maliciam confundendam—malitia gravius
quam negligentia puniatur.

<Titre 8>²⁴⁷ *De clerico percussore*²⁴⁸

1. Clemens III.²⁴⁹ Continentia literarum vestrarum—altaris
ministerium exercere.

<Le titre *De clerico maledico* manque ici comme dans H, alors qu'il est présent dans D et La comme dans l'édition d'Heckel avec *Innotuit nobis.*>

²⁴¹ Fol. 143ra.

²⁴² Titre en marge main annotateur.

²⁴³ *Sic* comme dans La, Heckel: Ulricus.

²⁴⁴ *Sic* comme dans La, Heckel: Cura.

²⁴⁵ Fol. 143rb.

²⁴⁶ Titre en marge main annotateur.

²⁴⁷ Fol. 143vb.

²⁴⁸ Comme D, H et La; Heckel: *De clericis pugnantis*; titre en marge main annotateur.

²⁴⁹ Comme dans La, Heckel: Celestinus III.

<Titre 9>²⁵⁰ *De eo qui ordines furtive suscepit*²⁵¹

1. Idem. Cum H.lator presentium—poterit ordinibus dispensare.
2. Idem. Innotuit nobis ex tenore—tribuas facultatem.

<Titre 10> *De excessibus prelatorum <in subditos>*²⁵²

1. Innocentius III. Cum ad quorundam maliciam—non tenere.
Nulli ergo etc.

<Titre 11>²⁵³ *De privilegiis*²⁵⁴

1. Innocentius III. De causa illa unde nobis—dictante diffiniri.
2. Idem archiepiscopo Lugdunensi. Quarum (*sic*=Tuarum) nos
tenor litterarum edocuit—impedimento compellas (=app.
30).²⁵⁵

<Titre 12>²⁵⁶ *De usuris*²⁵⁷

1. Innocentii tercii. (*sic*). Mutinensi episcopo. Dudum ex parte—
molestari. (= app. 27)
2. Idem. Narbonensi episcopo. Post admirabile etc. et infra. Iudeos
ad remittendas usuras—denegari. (app. 28)

<Titre 13>²⁵⁸ *De penitentiis et remissionibus*²⁵⁹

1. Alexander III. De muliere que ut nobis—divina gratia suffra-
gante.
2. Clemens III. Quesitum est a nobis—a celebratione missarum.

²⁵⁰ Fol. 144ra.

²⁵¹ Titre en marge, main annotateur.

²⁵² Titre en marge, main annotateur.

²⁵³ Fol. 144rb.

²⁵⁴ Titre en marge, main annotateur.

²⁵⁵ Les app. 27 et 28 qui dans H et La suivent immédiatement, sont correctement placés dans Bx sous le titre *De usuris* sous lequel ils figurent en appendix dans l'édition d'Heckel.

²⁵⁶ Fol. 144va.

²⁵⁷ Titre en marge, main annotateur.

²⁵⁸ Fol. 144vb.

²⁵⁹ Titre en marge, main annotateur.

3. Celestinus III. Perpendimus ex litteris tuis—competentem iniungas.

<Titre 14>²⁶⁰ *De sententia excommunicationis <et absolutione>*²⁶¹

1. Celestinus III. Ea noscitur etc. Quod utique fraternitas—super talibus recepturi.
2. Clemens III. Inspectis litteris quas—sedem apostolicam visitabunt.
3. Clemens III. Cum non ab homine et infra A nobis itaque—sollicitudinis innovasse.
4. Idem. Cum desideres quid tua—ut supradictum est absolutus.
5. Idem. Veniens ad apostolicam sedem—nullatenus videamus detineri.
6. Idem. Pervenit ad nos etc, Illos qui valitudine—duximus committendum.
7. Idem. Significavit nobis etc. et infra. Verum clericos qui—litterarum tuarum transmitti.
8. Idem. Tua nos duxit—ad sedem apostolicam laborare.
9. Celestinus III. Ad eminentiam sedis apostolice—absolutionis adeptos.
10. Celestinus III. Universitatis vestre consultationem—nequaquam evadant.
11. Idem. In audientia nostra talis—habere non debent.
12. Idem. Quod de hiis—debeat visitare.
13. Idem. Rothomagensi decano.²⁶² A nobis fuit ex parte tua quesitum—auctoritas delegantis.
14. Innocentius III. Cum illorum absolutio qui—abusi fuerint potestate.
15. Innocentius III. A nobis est sepe—per distractionem ecclesiasticam compellantur.
16. Idem. Nuper a nobis tua fraternitas requisivit quid sit de illis—sententiam excommunicationis incurrunt.²⁶³

²⁶⁰ Fol. 145ra.

²⁶¹ Titre en marge, main annotateur.

²⁶² Comme dans La; adresse absent Heckel).

²⁶³ Comme dans H. et La, 16 et 17 ne forment ici qu'une seule et même décrétale: après 'a suo absolvatur episcopo vel proprio sacerdote' (fin de 16) le

<Titre 15>²⁶⁴ *De sententia interdicti*²⁶⁵

1. Idem. Cum in partibus vestris—debeat observari.
2. Innocentius III. Gravis ex parte vestra fuit in auditorio nostro querela proposita—Officia celebretis.²⁶⁶
3. Idem. Officii nostri debitum—compellere et arctare.

<Titre 16>²⁶⁷ *De pueris baptizandis*²⁶⁸

1. Alexander III. Si quis sane puerum—est puer baptizatus.
2. Idem. De quibus dubium est—ego te baptizo etc.<Sans solution de continuité et de la même main>
3. Idem. De cetero (*sic*= decreto) bononiense. Inter alia que venerabilis frater noster Raveniensis archiepiscopus dudum a prelaturi nostro fecit proponi humiliter—responsum non fuit. (= app. 31 sous le titre *De sententia excommunicationis*).
4. Idem. Archiepiscopo, decano et precentori Lugdunensis. Cum pro causa que inter—appellatione remota cogatis (= app. 32 sous le titre *De sententia excommunicationis*).
5. Celestinus III. Abbatisse de Apia. Recte agis et discrete—poterit relaxare.²⁶⁹

copiste enchaîne avec ‘nec excommunicato licet quod stet mandato ecclesie—incurrunt’ (=17).

²⁶⁴ Fol. 147vb.

²⁶⁵ Titre en marge, main annotateur.

²⁶⁶ Cette décrétale est placée dans l’édition d’Heckel in fine du titre 14 dont elle est le no.18.

²⁶⁷ Fol. 148ra.

²⁶⁸ Titre en marge, main annotateur.

²⁶⁹ = Al. app. 48 transcrite par Heckel. Elle figure dans H, La et in fine de la Collection de Gilbert dans Paris BNF lat. 3922A. Dans Alain après l’adresse, figure une indication absente ici comme dans les autres manuscrits ci-dessus cités: ‘Cum pro causa que inter dilectos filios et infra’. Ces ajouts sont identiques à La.

<Titre 17>²⁷⁰ *De depositione episcoporum*²⁷¹

- 1.*Idem. Archiepiscopo et decano et archidiacono Bituricensibus. Expectans expectavit²⁷² diutius apostolica sedes, si forsitan infructuosa illa ficulnea—removentes omnino et Burdegalensi capitulo iniungentes ut sibi aliam personam ydoneam per electionem canonicam preficiant in pastorem. (Po. 2602, 31 oct. 1205).²⁷³

²⁷⁰ Fol. 148va. De la même main, à la suite.

²⁷¹ Titre étranger à Gilbert mais qui figure en H et La.

²⁷² Incipit peu lisible très abrégé.

²⁷³ Explicit différent de Bern.1.23.10 qui s'arrête à removentes (London BL Harley fol. 237r). Même texte en H. et La. Une main postérieure a ajouté en Bx la mention finale: 'Quodsi non omnes etc. Tu frater archiepiscopo, cum eorum altero etc.' Cf. texte dans Othmar Hageneder, Andrea Sommerlechner, Christoph Egger, Rainer Murauer, et Herwig Weigl, *Die Register Innocenz' III.: 8. Pontifikatsjahr 1205/1206* (Wien 2001) 266-267 no. 151 (150).

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- Ad audientiam apostolatus 5.2.11*
 Ad audientiam nostram noveris
 3.18.11*
 Ad audientiam nostram pervenit
 3.12.2*
 Ad aures nostras e. clerico 3.6.7*
 Ad extirpandas successiones
 1.10.7*
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 Ad hec sicut asseris 2.19.18*
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 Nos universa privilegia 2.15.1*

 Pastoralis officii debitum 2.7.6*
 Pervenit ad nos 1.23.2*
 Pervenit ad nos ex insinuatione
 Lucie 4.11.2*
 Petitorio nobis porrecto 1.13.un.*
 Preterea cum inter laicos 1.18.1*
 Preterea quia occasione (pars du
 c. Tua nos duxit) 2.17.8*

 Quam sit grave 4.1.12*
 Quanto nos fidem 3.23.5*
 Querelam B sancti Iacobi 3.26.3*
 Quia Deus nos elegit 3.23.6*

Quia nobis 4.9.3*	Significasti nobis per litteras 4.1.11*
Quod clericus cuiuslibet 2.4.2*	Significavit nobis noster frater 3.19.11*
Quod sicut ex litteris 1.3.10*	Significavit nobis T rector 3.26.2*
Quoniam ad episcoporum 1.15.3*	Statuimus 1.14.1*
Recolentes qualiter 3.23.3*	Super mulieribus (pars du c. Tua nos duxit) 4.1.9*
Rursus quidam (pars du c. Laudabilem) 4.5.2*	Tu nobis filius abbas 3.18.2*
Sciscitatus est 1.2.7*	Veniens ad apostolice sedis clementiam 3.18.13*
Scripsimus 1.2.5*	Veniens ad nostram presentiam G. 4.6.4*
Sicut consuetudo 2.17.9*	
Sicut nobis (pars du c. Cum a nobis) 3.8.4*	
Significantibus nobis 2.5.1*	
Significasti 1.14.2*	

A Note on the Authorship of the *Collectio Seguntina*

Kyle C. Lincoln*

The history of Sigüenza's manuscript, Archivo Catedralicio 10, is, mostly, a mystery. Since it was brought to international scholarly attention by Gérard Fransen and studied by Walther Holtzmann, scholarly consensus has usually mentioned the text only as another in a long list of local appendices to the *Quinque compilationes antiquae*, in this case the *Compilatio prima*, noting that the text appears to have several decretals copied from the now-lost registers of Clement III or Celestine III.¹ To date, however, the compiler of the 121 entries that comprise the *Collectio Seguntina* has yet to be identified. This study proposes that Rodrigo de Finojosa, bishop of Sigüenza from 1192-1218, should be identified as the most likely compiler of the collection, based both on the historical context of the compilation and on the contents of the *Seguntina* itself. In doing so, it also adds the name of yet another bishop to the roll call of prelates whose canon law literacy was on the rise near the end of the long twelfth century, further underscoring the importance of canon law to the history of the medieval church.

The connection between Rodrigo de Finojosa and the *Collectio Seguntina* is primarily supported by the decretal letters copied into the collection. Of the 116 items enumerated by Holtzmann, nine

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¹ Fransen, 'Manuscrits canoniques conservés en Espagne (II)', RHE 49 (1954) 152-156; Holtzmann, 'Le Colleccion Seguntina et les décrétales de Clément III et de Célestin III', RHE 50 (1955) 400-53; Antonio García y García, 'Manuscritos jurídicos medievales de la Catedral de Sigüenza', *Xenia Medii Aevi historiam illustrantia oblata Thomae Kaeppli O.P.* edd. Raymond Creyten and Pius Kunzle (2 vols. Storia e Letteratura: Raccolta di Studi e Testi 141-142; Rome 1978) 1.27-50; Charles Duggan, 'Decretal Collections from Gratian's *Decretum* to the *Compilationes antiquae*: The Making of the New Case Law', *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2008) 290-291.

are addressed to Castilian prelates (nos. 1, 3-6, 9, 27, 29, and 65) and one to Sigüenza itself (no. 9). Those figures increase if the additions to the collection, numbers 117-121, are included, given that two of these (Nos. 117 and 118) are addressed to Sigüenza.² Comparatively, the contents of the *Compilatio prima* contain 943 chapters, only five of which were addressed to Castilian clerics, and even then, only to the archbishop of Toledo.³ These facts suggest that the owner of the manuscript needed, in addition to texts from the whole of Christendom, Castilian precedents for usage, and the prevalence of Seguntine privileges suggests that the owner of the text was most likely from Sigüenza. The copy of the *Compilatio prima* that comprises the first half of Sigüenza, Archivo Catedralicio 10 is a copy in a late twelfth- or early thirteenth-century hand, and the *Collectio Seguntina* can be given a firm 'terminus post quem' of 1197, given that the latest text appended to the codex is a letter from Celestine III, dated 7 June, 1197.⁴ This dating range places the manuscript directly within the years of Rodrigo's episcopate. An inventory, in an early thirteenth-century hand, of Rodrigo's books, preserved as a pastedown in Sigüenza, Archivo Catedralicio 38, noted that a certain Bishop Rodrigo possessed, among other texts, 'Decretales'.⁵ Of the 176 folios that comprise manuscript 10, the copy of the *Compilatio prima* spans 1v-135v, with the *Seguntina* occupying 137r-177v; the division of quires suggests that the texts were composed at roughly the same time, and the hand appears consistent across both texts.⁶ Further, a 1242 inventory notes that

² Holtzmann, 'Collectio Seguntinal' 422-451.

³ 1 Comp. 1.7.1, 2.20.16; 3.16.24; 5.2.10; 5.23.4

⁴ Fransen, 'Mansucrits canoniques' 155-156; Holtzmann, 'Collectio Seguntina' 450; García y García, 'Manuscritos jurídicos' 41.

⁵ José Rius Serra, 'Inventario de los Manuscritos de la Catedral de Sigüenza', *Hispania Sacra* 3 (1950) 431-465 at 432. The usage of *Decretales* in the inventory is consistent with the distinction made by contemporary Castilian clergy between Gratian's *Decretum* and decretal collections, as the will of the treasurer of the cathedral chapter of Toledo from 1193 demonstrates: Ángel Barrios García, ed. *Documentos de la Catedral de Ávila (Siglos XII-XIII)* (Fuentes históricas abulenses 57; Ávila 2004) 84.

⁶ Fransen, 'Mansucrits canoniques' 156. Holtzmann believed that the copy of the *Compilatio prima* and the *Seguntina* were done by the same scribe:

a copy of the ‘*Primus et secundus decretalium*’ were present in the cathedral archive; a simple error—conflating the *Seguntina* with a copy of the *Compilatio secunda*—in the compiler of the inventory would explain the misidentification of the *Seguntina* and place the *Seguntina* at Sigüenza in the context of the generation after Rodrigo de Finojosa’s episcopate.⁷ Thus, the *Collectio Seguntina* most likely belonged to Rodrigo de Finojosa, since no other bishop Rodrigo served at Sigüenza until the late fourteenth century.⁸

Since the manuscript likely belonged to Rodrigo de Finojosa, the pertinent corollary question seems to be whether he compiled the *Seguntina*. In this regard, an examination of the contents of the collection makes clear that Rodrigo’s hand was clearly behind the selection of the texts in the compilation, even if his was not the scribal hand that copied the letters from Clement’s and Celestine’s registers. Two examples demonstrate that the hand of the bishop was behind the selection of the texts, a conflict with the clergy of Medinaceli and the murder case brought against Rodrigo in 1209. These two cases also provide a span within which we can better date the compilation of the *Seguntina*.

The quarrels between the bishops of Sigüenza and the clergy of Medinaceli surely began long before a Seguntine cleric was attacked on the road to Medinaceli in 1178-1179, but the incident inspired a renewed episcopal effort to control the nearby town’s

Holtzmann, ‘*Collectio Seguntina*’ 408-409. On the matter contemporaneousness of both the copy of the *Compilatio prima* and the *Seguntina*, García y García noted: ‘Ambas pieza son de la misma mano, o por lo menos del mismo escritorio. Escritura gótica libraria, de la primera mitad del s. XIII’. García y García, ‘Manuscritos jurídicos’ 41.

⁷ Rius Serra, ‘Inventario’ 3. This interpretation—that the *Liber decretalium* was a copy of 1 Comp. or 2 Comp.—was that of García y García, ‘Manuscritos jurídicos’ 28.

⁸ Toribio Minguella y Arnedo, *Historia de la diócesis de Sigüenza y de sus obispos* (3 vols. Madrid 1910-1913) 1.175-198; Felipe-Gíl Peces Rata, *Los obispos en la ciudad del Doncel (589-2012)* (Sigüenza 2012) 54-55. In an unpublished flyleaf that is contained in Codex 10, Fr. Peces Rata, the current canon-archivist, noted that the text was a treasure that certainly belonged to the early thirteenth century and to the tenure of Bishop Rodrigo.

inhabitants.⁹ The local royal law-code, called a *fuero*, issued in the early twelfth century during the resettlement of Sigüenza, gave the bishops lordship of the city and its dependent territories.¹⁰ As a result, the question of Medinaceli's obedience was doubly dangerous—jurisdictionally and economically—to the bishops, and Martín de Fojosa, Rodrigo's uncle and predecessor, pursued their obedience with vigor.¹¹ Although specific culprits are never named in the preserved texts, the recognition of episcopal rights in the town took nearly a decade of efforts by Martín de Fojosa.¹² In the early years of Rodrigo's episcopate, Celestine III ordered the clergy of Medinaceli to be obedient to the bishop, and a few years later, Rodrigo recalled that Cardinal Gregory of Sant' Angelo had ordered the same obedience during his second legation.¹³ Only in 1198 was another compromise with the town completed, and even then only with significant assistance by the archbishop of Toledo and the abbot of Fitero.¹⁴

⁹ Pedro Olea Álvarez, *Sigüenza entre las dos Castillas y Aragón: Historia social, política y religiosa de las tierras de su obispado hasta 1300* (Sigüenza 2009) 207-208. For example, Archbishop Celebruno of Toledo had attempted to settle the issue of Medinaceli's obedience to Sigüenza at a synod in 1170 at Osma: Archivo Catedralicio de Burgo de Osma, Codices 8, fol. 202r. Thirty years before that, a compromise over episcopal rights in the town of Medinaceli had been reached, but seems to have fallen by the way-side, Minguella y Arnedo, *Diócesis de Sigüenza* 1.370-371.

¹⁰ Julia Sevilla Muñoz, 'Una consecuencia de la reconquista de Guadalajara: La repoblación de Sigüenza por un obispo aquitano', *Wad-al-Hayara: Revista de estudios de Guadalajara* 12 (1985) 43-54. The *fuero* granted to Sigüenza was that of Medinaceli, originally granted by Alfonso I 'the Battler' of Aragon and Navarra, and is edited by Tomás Muñoz y Romero, *Colección de fueros municipales y cartas pueblas de los reinos de Castilla, León, Corona de Aragón y Navarra* (Madrid 1847) 435-443. Alfonso VII of León-Castile extended Medinaceli's *fuero* to Sigüenza and its diocesan jurisdiction in 1138: Minguella y Arnedo, *Diócesis de Sigüenza* 1.371-372.

¹¹ Minguella y Arnedo, *Diócesis de Sigüenza* 1.455-6.

¹² Martín even sought confirmation of the process of arbitration from Urban III, whose rescript was quoted in full by Martín in 1187: Minguella y Arnedo, *Diócesis de Sigüenza*, 1.455-6.

¹³ *Ibid.*, 1.478; *ibid.*, 1:482-484.

¹⁴ *Ibid.*, 1.494-495, 1.499-503, 1.524.

The influence of the conflict with Medinaceli likely influenced the inclusion of 32 items in the *Collectio Seguntina*. The conflict with Medinaceli included, amongst other incidents, assaults against clerics or violence regarding clerics, which were mentioned in at least 8 chapters in the *Seguntina*.¹⁵ Obedience to the bishop, too, was an important factor in the disputes with Medinaceli, and texts covering the role of the bishop in dioceses and his relationship to clerics under his charge comprised 24 chapters in the *Seguntina*.¹⁶ In sum, about a quarter of the *Seguntina* had relevance for the conflict with Medinaceli and may have been compiled in part to deal with it.

Not all the decretals in the *Seguntina* could be found in the region, however. Duggan, following Holtzmann's observations, hypothesized that the *Seguntina* contained decretals copied directly from Clement III and Celestine III's registers. Gaining access to papal decretals not held in local archives presented a difficult task, and Duggan, following Holtzmann's observations, hypothesized that the *Seguntina* contains decretals copied directly from Clement III and Celestine III's registers.¹⁷ If Rodrigo de Finojosa was behind the compilation of the *Seguntina*, then he must have been present in Rome to copy those texts from the registers before they were lost. The most likely period for this activity is during Rodrigo's trip to Rome to clear his name of homicide charges in late 1209.¹⁸ We know that Rodrigo was personally present for his appeal in November, 1209, as a letter from Innocent III attests.¹⁹ According to papal rescripts

¹⁵ Specifically, Nos. 23, 28, 34, 43c, 63, 94, 101, and 114: Holtzmann, 'Collectio Seguntina' 422-451.

¹⁶ Namely, nos. 5, 19, 21, 22, 24, 34, 43, 45, 49, 54, 55, 63, 65, 66, 69, 77, 80, 81, 84, 89, 102, 108, 109, and 116, *ibid.*

¹⁷ Duggan, 'Decretal Collections' 290-291.

¹⁸ The royal charters of Alfonso VIII in late 1209 do not preserve the witness lists of the prelates between early October, 1209 and early January, 1210. The letters from Innocent that attest to Rodrigo's presence in Rome date to 24 November 1209: Julio González, *El Reino de Castilla en la época de Alfonso VIII* (Textos: Escuela de Estudios Medievales 25-27; Madrid 1960) 3.491-509; Demetrio Mansilla Reoyo, *La documentación pontificia hasta Inocencio III: 965-1216* (Rome 1955) 431-434.

¹⁹ Mansilla, *La documentación* 431-3.

concerning the case, one day in the cathedral at Sigüenza a mob turned on Rodrigo; the bishop went to defend himself with his crozier, striking a young man in the head in the process. The youth later died. The murder case against Rodrigo was dismissed, largely because the surgeon charged to treat the young man injured by Rodrigo was blamed for botching the surgery and causing the youth's death.²⁰ Although his acquittal would appear to be a victory for Rodrigo, the case seems to have left a deep impression on the *Seguntina's* contents.

It is at this point that the clearest evidence for Rodrigo's involvement with the *Seguntina* appears. The very first item in the collection is rubricated 'de homicidio casuali' and the third item bears the same inscription, as does item eleven. Beyond just the first chapters, a total of seven chapters cover the particulars of homicide and an additional eight concern crimes caused by clerics.²¹ The combination of these two categories is significant, given that they comprise a total of 15 of the 116 items in the *Seguntina*.

Given that Bishop Rodrigo de Finojosa was the probable owner of the *Collectio Seguntina*, that it was compiled during his episcopate, and that it contained many titles that appear directly connected to cases handled by Rodrigo during his episcopate, it appears that he was, most likely, the author/compiler of the *Collectio Seguntina*. However, determining whether he was directly at work in the compilation of the collection is a more difficult question. We know little about Rodrigo's educational background. He may have attended lectures in Paris, as his cousin Rodrigo Ximénez de Rada did, or he may have attended the more local *studium* at Palencia, where masters may have been teaching

²⁰ Ibid. Both Linehan and Reilly have narrated this incident, so a thorough repetition here is unnecessary: Peter Linehan, *History and the Historians of Medieval Spain*, (New York 1993) 248; Bernard Reilly, 'Alfonso VIII, the Castilian Episcopate, and the Accession of Rodrigo Jiménez de Rada as the Archbishop of Toledo in 1210', *CHR* 99 (2013) 437-454 at 444.

²¹ On the question of murder charges, see nos. 1, 3, 11, 18, 20, 98, and 101. Other crimes that clerics could be accused of were mentioned in nos. 6, 21, 43, 45, 77, 80, 92, 97; Holtzmann, 'Collectio Seguntina' 421-455

Roman or canon law as early as the 1180s.²² We know that he had been the prior of his cathedral chapter under his litigious uncle, Martín de Finojosa, but what qualifications recommended him to that post (nepotism aside) we cannot say. There were only two clerics at Sigüenza during Rodrigo's episcopate that subscribed charters using the title *magister*, Fortún and Benito, in 1197 and 1198, respectively.²³ Although their appearance fits into the very earliest part of the time during which the *Seguntina* was composed, very little is known about either of these two men. Their disappearance from the cathedral chapter records of Sigüenza makes it far less likely that they participated in the compilation of the *Seguntina* during the more likely period of its compilation by a Seguntine cleric in Rome during Rodrigo's journey to the curia in 1209. The approval of *Compilatio tertia* provided updated material in 1210, and it is possible that several codices held in the cathedral archive of Sigüenza from the early thirteenth century represent Rodrigo's attempts to acquire canonical materials after his return from Rome in 1209 in order to supplement the *Seguntina*.²⁴ Furthermore, the compilation of the earliest known cartulary of Sigüenza was carried out directly at Rodrigo's order, which suggests a larger interest in the collection and codification of important documents, despite the difference in these two types of collections.²⁵

Although he was hardly a famous canonist by the standards of turn-of-the-thirteenth century Iberia, Rodrigo's compilation of the *Collectio Seguntina* attests to the rising importance of canon law in the regular operations of diocesan governments of Castile.²⁶ If

²² Adeline Rucquoi, 'La double vie de l'université de Palencia (c.1180-1250)', SG 29 (1998) 723-748 at 725-728. Rodrigo appears as prior of the chapter at Sigüenza in 1191, Minguella y Arnedo, *Diócesis de Sigüenza* 1.473-474.

²³ Minguella y Arnedo, *Diócesis de Sigüenza* 1.482-484, 1.494-496; 1.504.

²⁴ García y García, 'Manuscritos jurídicos' 33-50.

²⁵ Carlos Sáez, 'Orden, conservación y ostentación: El cartulario de la catedral de Sigüenza (c. 1212)', *Anuario de estudios medievales* 36 (2006) 171-199 at 192-193.

²⁶ The best treatments of the lives of Iberian canonists is still García y García's: Antonio García y García, 'La canonística Ibérica (1150-1250) en la investigación reciente', BMCL 41 (1981) 41-75.

my attribution of the *Seguntina* to Rodrigo is correct, then the collection should be dated quite confidently to c.1209/10. The attribution would also add strength to the recent portrayal of numerous bishops of the period who actively kept track of decretal collections being made in Bologna at the heart of canon law studies and who eagerly took the initiative to supplement those collections to have material on hand that was of particular relevance for their diocese. These late-twelfth and early-thirteenth-century bishops, as well as canonists (and the two categories are not mutually exclusive), helped preserve papal decretals and shape canon law.

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Transmissibility of Delictual Claims

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Introduction: Three questions

In his magisterial survey of the law of obligations Reinhard Zimmermann writes that ‘the canonists have always recognized the passive transmissibility of delictual claims’.¹ In elucidation he quotes Henry of Susa’s (Hostiensis) lecture on the *Liber extra*, completed about 1270: ‘According to canon law the heir is liable as a consequence of the deceased’s wrong, even if proceedings against him had not reached the stage of joinder of issue . . . and the crime does not benefit the heir’.²

The text, he recites, raises the first question. Have the canonists always recognized the passive transmissibility of delictual claims? For the text seems unresponsive. Note the different perspective. Zimmermann argues that a wronged person could bring a delictual claim against the wrongdoer’s heirs. Hostiensis wrote that the heirs are liable as a consequence of a wrong, even though the culprit died before the joinder of issue, and despite the fact that they are not enriched by the wrong. Hostiensis thus contrasted canon law with the Roman rule as stated in *Codex* 4.17.1. This constitution of emperors Diocletian and Maximian, promulgated

¹ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town 1990; reprinted Oxford 1996) 1021.

² *Ibid.*: <A>secundum canones tenetur haeres ex delicto defuncti, etiam si cum ipso lis non fuerit contestata . . . et quamvis ex delicto nihil peruenerit ad eosdem’. Zimmermann combines two passages from Hostiensis’ lecture. See Hostiensis, *Commentaria* (Strassburg 1512 [=S] Venice 1581; reprinted Turin 1965 [=V]) S fol. 295ra and V fol. 54va to X 5.17.5 (Ex litteris) s.v. *et haeredes eius* <A> and S fol. 100rb and V fol. 94ra to X 3.28.14 (Parochiano tuo) s.v. *haeredes* . In the first recension (ca. 1262-1265) of Hostiensis’ *Commentaria* to X 5.17.5 in Oxford New College 205 [=O], fol. 213r: <A> ‘sic secundum canones tenetur heres ex delicto defuncti, [*om. etiam si—contestata*] quod dic ut plene notavi supra de sepulturis c. finali (X 3.28.14)’. In his first recension commentary to X 3.28.14 in O fol. 144rb is the same as in the second recension.

in 294 AD, declared: The law is very absolute, that if a person, who was guilty of violence, extortion, or other offense, dies after joinder of issue, his successors are held liable for the whole sum due (in solidum), otherwise only for their gain (id quod ad eos pervenit), so that they may not be enriched by the crime of another person.³

Zimmermann and Hostiensis seem to describe two sides of the same coin: if heirs are liable ‘in solidum’, a delictual claim is brought against them. But in the eyes of the medieval jurists the heirs’ liability and claimant’s action were not that closely linked. Their exceptions to the rule in Cod. 4.17.1 indicate a different reading of Diocletian’s constitution. If, for instance, a tenant had set fire to his dwelling, his heirs are liable against the landlord for the whole sum due. If someone had stolen a thing, his heirs are liable for the whole sum due that the owner claims under the ‘condictio ex causa furtiva’.⁴ Cod. 4.17.1 was read as a general rule, limiting the extent of the heirs’ liability to their enrichment by their testator’s wrong, unless explicitly stated otherwise.

The fact that the canonists referred to a different rule in canon law, does not imply, that they recognized the passive transmissibility of delictual claims, as Zimmermann asserts. In 1903, the Austrian canonist Johann Haring (1867-1945)⁵ already

³ Cod. 4.17.1: ‘Post litis contestationem eo qui vim fecit vel concussionem intulit vel aliquid deliquit defuncto successores eius in solidum, alioquin in quantum ad eos pervenit conveniri iuris absolutissimi est, ne alieno scelere ditentur’. Consulted are the English translation by Blume, published at:

www.uwyo.edu/lawlib/blume-justinian and the Dutch by Jop Spruit, Jeroen M.J. Chorus, René Forrez, and Luuk de Ligt, *Corpus Iuris Civilis: Tekst en vertaling: Codex Justinianus* (3 vols. Amsterdam 2003-2010).

⁴ See e.g. Wilhelmus de Cabriano, casus to Cod. 4.17.1, *The Casus Codicis of Wilhelmus de Cabriano*, ed. Tammo Wallinga (Studien zur europäischen Rechtsgeschichte 182; Frankfurt 2005) 256: ‘Ex delictis defunctorum . . . in quantum quod ad eos pervenit tenentur (heredes) . . . nisi tale sit delictum in quo condictio furti locum habeat, ut rapina et furtum, tunc enim siue lis contestata fuerit siue non, siue ad heredes pervenerit siue non, conditione furtiva nihilominus tenentur. At in contractibus delictum admissum heredem etiam obligat’.

⁵ On Haring see, Willibald M. Plöchl, ‘Haring, Johann’, *Neue Deutsche*

noted that Hostiensis' teacher, Sinibaldo Fieschi (Innocent IV), had reported several other interpretations of the papal decretals.⁶ Consequently, the first aim of this paper is to verify Zimmermann's assertion. What was the majority view among the medieval canonists?

The second question concerns his explanation, as to why the canonists recognized the passive transmissibility of delictual claims. Adopting the view of Johan Scott, Zimmermann expounds:⁷

The reason for this is quite interesting. Commission of a delict, of course, constituted a sin. Remission from this sin, according to canonist doctrine, required restitution ('peccatum non dimittitur nisi restituatur ablatum' VI De regulis iuris 4). The deceased wrongdoer was, unfortunately, no longer able to effect such restitution, and thus it was incumbent (at least 'in conscientia') on his heirs to save his soul from a prolonged sojourn in purgatory.

In substantiation he quotes from Justus Böhmer's *Ius Ecclesiasticum Protestantium*, published in 1715:⁸

Because the Roman church accepts as true that sins are not only purged in this life but also after death, as the doctrine of purgatory and offerings for the dead presupposes, the popes have also ruled, that

Biographie 7 (1966) 673, available online at: www.deutsche-biographie.de/pnd137082959.html.

For the biographies of the Italian jurists mentioned in this essay see the entries in DGI; for all others DDC or HMCL 2.

⁶ Johann B. Haring, *Die Schadenersatzpflicht des Erben für Delikte des Erblassers nach kanonischem Rechte; Unter Berücksichtigung der Bestimmungen des römischen und germanischen Rechtes* (Theologische Studien der Leo-Gesellschaft 6, Wien 1903) 41.

⁷ Zimmermann, *Law of Obligations* 1021 citing Scott in note 150 and 153. See Tobias Johan Scott, *Die geskiedenis van die oorerflikheid van aksies op grond van onregmatige daad in die Suid-Afrikaanse reg* (Pretoria 1976) 58.

⁸ My translation. Zimmermann, *Law of Obligations* 1021: 'Quia uero ecclesia Romana non tantum in hac vita, sed etiam post mortem peccata dimitti credit, ceu doctrina de purgatorio et de offertorio pro defunctis praesupponit, inde etiam ex hoc principio constituerunt pontifices, haeredes in genere ob damnum a defuncto per delictum datum obstringi in conscientia ad id restituendum, quod absque hoc medio in altera vita peccatum dimitti non possit'. See Justus Henning Böhmer, *Ius ecclesiasticum protestantium usum hodiernum iuris canonici: Tomus V* (2nd ed. Magdeburg 1744) 246-247 to X 5.17 § 132).

heirs, because of the damage caused by the deceased's wrong, are in conscience bound to restitution, without which his sin cannot be purged in the next life.

Again, it is the text he quotes, which raises a second question. Have the medieval canonists argued as Böhmer and Zimmermann assert? For certain, the maxim taken from Augustine, was well known. Gratian had copied it into his *Decretum*: 'Sin is not forgiven unless that what has been (wrongly) taken is restored, if this can be done'.⁹ An untimely death, however, may prevent confessants from restoring stolen goods to their owners or even from guaranteeing their compensation. In other words, the wrongdoer cannot make restitution himself. In such situation pope Eugene III (1143-1153) had sanctioned that priests imparted absolution, for his decretal *Super eo vero* (X 5.17.2) declares that manifest robbers who had delayed confession until their deathbed were to receive the Eucharist. They were denied funeral rites, however, if their heirs and relatives refused to make amends in their stead. How did the canonists interpret Eugene III's ruling and similar texts?

The third question relates to how the canonists kept canon law in concord with Roman doctrine. Zimmermann describes the process as follows:¹⁰

The deceased would have received absolution before his death. Absolution required a confession of sins on the part of the dying person, and this confession could be construed as containing a tacit guarantee to redress all wrongs. The wrongdoer's obligation had thus been converted into a contractual one and contractual obligations were passively transmissible.

Is this construction adequate to bring canon law into line with Roman law? The tacit promise is made to the priest, not to the persons wronged. Would not granting them a claim be contrary to the principle 'Nemo alteri stipulari potest'?

⁹ C.14 q.6 c.1: 'Si autem veraciter agitur non remittitur peccatum, nisi restituatur ablatum, si, ut dixi, restitui potest'.

¹⁰ Zimmermann, *Law of Obligations* 1021.

Status quaestionis

Throughout the last century the heirs' liability for their predecessor's wrongs had been studied only sporadically. In 1903, Johan Haring's work appeared, entitled *Die Schadenersatzpflicht des Erben für Delikte des Erblassers nach kanonischem Rechte. Unter Berücksichtigung der Bestimmungen des römischen und germanischen Rechtes*.¹¹ Johan Scott, professor of private law at Pretoria, devoted a chapter of his Leyden dissertation to canon law. The chapter was published in English in 1978 under the title 'Passive Transmissibility of Delictual Actions in Old Canon Law'.¹² Haring's study seems to have been unknown to Scott. Recently, in 2015, the Parisian legal historian René Rempelberg published his 'Remarques sur l'influence canonique en matière de transmissibilité passive des obligations délictuelles', primarily discussing the view of Nicolò de Tudeschi (Panormitanus, 1386-1445).¹³ All three studies are based upon printed sources, published in Renaissance printings. They describe, therefore, the doctrine of the canonists who glossed the *Liber extra*. My paper 'Die Haftung für Delikte des Erblassers nach klassischem kanonischem Recht'¹⁴ supplements their survey with glosses to Gratian's *Decretum* and the *Compilationes antiquae*, handed down in manuscripts. From the latter it can be concluded that around 1200 Huguccio, Ricardus, and Alanus still believed Canon and Roman to be in concord, and interpreted the papal decretals accordingly. The canonists have, for certain, not always recognized the passive transmissibility of delictual claims.

As Scott remarked, Bernard of Parma, whose *apparatus* to the Gregorian decretals became the *Glossa ordinaria*, argued that wronged persons brought a delictual claim against the heirs: 'et ita

¹¹ See Haring, *Schadenersatzpflicht* 39-51 chapter 8 entitled *Die rechtliche Begründung der kanonischen Vorschrift über die vermögensrechtliche Haftung der Erben für die Delikte des Erblassers*.

¹² *Acta iuridica* 15 (1978) 15-28.

¹³ René-Marie Rempelberg, 'Remarques sur l'influence canonique en matière de transmissibilité passive des obligations délictuelles', *Plenitudo Juris: Mélanges en hommage à Michèle Bégou-Davia* (Paris 2015) 475-488.

¹⁴ *Österreichisches Archiv für Recht und Religion* 62 (2015) 1-23.

ex hoc capitulo et illo patet quod haeredes conueniuntur ex maleficio defuncti'.¹⁵ In direct response to his teaching Sinibaldo Fieschi, Pope Innocent IV, wrote in his *Apparatus*, completed 1250-1251: 'Hic non agitur contra haeredes ex delicto defuncto'.¹⁶ His pupil, Henry of Susa, Hostiensis, reported both views in his lecture on the Gregorian decretals¹⁷, while adding a third explanation, as to why the heirs were liable.¹⁸ Scott related a fourth construction 'ingeniously applied by Johannes Andreae . . . (which) succeeds in bringing the canon law rule in unison with that of Roman law'.¹⁹ Haring and Rempelberg report, that Panormitanus used the same construction a century later.²⁰ In the meantime Giovanni da Legnano, Pietro d'Ancarano, Antonio da Butrio, Francesco Zabarella, and Giovanni d'Anagni had published their commentaries to the decretals, but these have not yet been studied. Was Bernard's stand the majority view?

¹⁵ Scott, 'Passive Transmissibility' 25 note 25 citing Bernardus Parmensis, gloss s.v. *Et eius heredes* ad X 3.28.14. Haring seems to be of the same opinion. Cf. Haring, *Schadenersatzpflicht* 39: 'Die älteren Schriftsteller lassen sich ähnlich wie die Glosse auf eine weitere Begründung kaum ein. Die vermögensrechtliche Repräsentation des Erblassers durch den Erben hat zur Folge, dass letzterer für Kontraksverbindlichkeiten und für Schadenersatzansprüche aus Delikten des Erblassers aufzukommen hat'.

¹⁶ Dondorp, 'Haftung für Delikte' 20 referring to Innocent IV, gloss *heredes* ad X 3.28.14. Haring, passing over Innocent IV's gloss to X 3.28.14, erroneously considers him undetermined. See Haring, *Schadenersatzpflicht* 41: 'Er gibt zwar zu, dass nach kanonischem Rechte eine Klage ex maleficio defuncti möglich sei, jedoch bietet er nach dem Geschmacke der damaligen Zeit bei Erklärung von X 5.17.5 noch vier andere Lösungsversuche'.

¹⁷ Dondorp, 'Haftung für Delikte' 22 citing Hostiensis' report of Bernard's teaching in his *Lectura super X 3.28.14* s.v. *et heredes* and Innocent's view, *ibid.* s.v. *compellendi*.

¹⁸ See *infra* note 27.

¹⁹ Scott, 'Passive Transmissibility' 18 citing Johannes Andreae, *Novella* to X 3.28.14.

²⁰ Haring, *Schadenersatzpflicht* 44 quoting Panormitanus, ad X 3.28.14; Rempelberg, 'Remarques' 481.

Scott argued that the maxim ‘Peccatum non dimittitur nisi restitatur ablatum’ could ‘just as well be utilized to explain the liability of heirs’. He explained:²¹

The Church was of the opinion, that it is a natural duty of the heirs, owed to the deceased, to fulfil his delictual obligations in order to accomplish this advantage for his soul. This obligation is denoted as an *obligatio in conscientia*.

In his footnotes Scott cited Böhmer and the early-modern canonists Domenico Toschi (1535-1620), and Heinrich Pirhing (1606-1679)²² but no medieval canonists on this point.²³ Rampelberg quotes Panormitanus, saying: ‘Cum ergo de iure canonico agatur contra haeredem solum ratione peccati’.²⁴ Has Panormitanus said so for the abovesaid reason?

The canonists proposed several constructions to keep canon law in line with the Roman rule regarding delictual claims being passively intransmissible. The first was by Sinibaldo Fieschi: If wronged persons can bring a claim, this claim must be contractual, viz. based upon a ‘stipulatio alteri’ in their favor, concluded between confessor and excommunicate.²⁵ He argued that

²¹ Scott, ‘Passive Transmissibility’ 18.

²² Scott, ‘Passive Transmissibility’ 25-26 notes 28-33. In note 33 he quotes Böhmer: ‘Do not think that this obligation in conscience is imperfect, for the popes also write laws for her and adds external compulsion’. My translation. See Böhmer, *Ius ecclesiasticum* 247 to X 5.17 § 132: ‘Neque putandum hanc obligationem in conscientia imperfectam esse, quod illi etiam leges scribat ius pontificium necessitatemque externam ei addat’.

²³ See, however, Scott, ‘Passive Transmissibility’ 27 note 65 quoting Hostiensis ad X 5.19.9 in support of his assertion (at page 21), that ‘the performance of the heirs in casu is generally regarded as originating from the *obligatio in conscientia*, effected by application of the simple rules of justice’. The text quoted from Hostiensis’ *Lectura* does not demonstrate what Scott argues. Here, Hostiensis discusses a different issue. Vincent of Spain had argued that successors of an usurer were not proportionally liable (according to their share) but in full. Vincent’s view seemed ‘favorabilis quantum ad animas’, but Hostiensis preferred to distinguish between heirs and other successors: ‘gravius est tot animas condemnare’.

²⁴ Rampelberg, ‘Remarques’ 478 note 12 quoting Panormitanus, to X 3.28.14 no. 6.

²⁵ Dondorp, ‘Haftung für Delikte’ 20 citing Innocentius, gloss s.v. *heredes* to X 3.28.14.

excommunicates must guarantee satisfaction according to their confessor's instructions before the excommunication can be lifted and the sin forgiven.²⁶ This guarantee to redress his wrongs amounts to a contract in favor of a third party. Where the promise is made to a priest, a 'publica persona', Roman law grants third parties, the wronged persons in whose favor the contract is concluded, a claim against the promisor and his heirs.²⁷ Hostiensis offered another argument, also intended to keep canon law in line with the Roman rule. He argued as follows: A considerate priest has ordered satisfaction, because sin is not forgiven unless what is taken away be restored (C.14 q.6 c.1). Hostiensis equated the priest's instruction to a court-sentence, so that both laws were in concord.²⁸

Problematic is the situation, where a contrite person died without confession, or a confessant gained absolution without prior guarantee to make amends. Why were their heirs compelled by ecclesiastical courts to redress their wrongs? With regard to the heirs of the latter, Innocent IV denied that their liability could arise from a tacit guarantee. Wronged persons cannot base their claim upon a non-existing 'stipulatio alteri'.²⁹ Innocent IV suggested another reason why ecclesiastical courts compelled heirs to redress

²⁶ Rampelberg erroneously speaks of compensation of damages. Cf. Rampelberg, 'Remarques' 481: '[L]e prêtre qui reçoit la confession d'un moribond excommunié ne doit pas l'absoudre s'il n'a pas réparé les dommages causés à autrui, ou s'il n'a pas pris l'engagement de les faire réparer. Cf. Hostiensis, ad X 3.28.14 no. 12: 'Nisi prius satisfaciat, vel saltem caveat de satisfaciendo'.

²⁷ Jan Hallebeek, 'Ius Quaesitum Tertio in Medieval Roman Law', ed. Eltjo J.H. Schrage, *Ius quaesitum tertio* (Comparative Studies in Continental and Anglo-American Legal History 26; Berlin 2008) 61-107 at 87.

²⁸ Dondorp, 'Haftung für Delikte' 22 quoting *Hostiensis*, *Lectura super X 3.28.14 S fol. 100ra and V fol. 94ra s.v. absolutus*: 'Ergo, si discretus fuit sacerdos, iniunxit ei siue precepit quod satisfaceret uel alias non dimitteretur peccatum. xiiii. q.vi. Si res (C.14 q.6 c.1), infra de usu. Cum tu § i. in fine (X 5.19.5), sic ergo fuit condemnatus. arg. infra de uerb. sign. In his (X 5.40.15). Ergo etiam secundum leges in hoc casu tenentur heredes'. Same text in O fol. 144rb.

²⁹ Dondorp, 'Haftung für Delikte' 20; Rampelberg, 'Remarques' 481 note 32 quotes Hostiensis. In fact, his report is of Innocent IV's teaching.

their testator's wrongs. His penance entailed a tacit order to his heirs to do satisfaction: 'videtur heredes iniunxisse ut satisfacerent et ideo compellendi sunt'.³⁰ Scott cites the report by Johannes Andreae:³¹

His penance is the reason why heirs must be compelled, for he, because he cannot repent without satisfaction, appears to have ordered his heirs to do satisfaction.

The canonists' intermittent use of the Latin terms 'mandare' and 'iniungere' may have prompted Scott's mistaken assertion, that 'this construction succeeds in bringing the rule of canon law into unison with that of Roman law, according to which contractual claims ('ex mandato' in this case) are passively transmissible.³² The wronged persons are not party to the contract. Could the heirs' liability, perhaps, be construed as deriving from quasi-contract? Rampelberg suggests that Nicolaus de Tudeschis may have thought so, but he leaves it open.³³

Compelled by Shame

Several twelfth-century decretals suggest that heirs and relatives should help a penitent confessant to redress his wrongs, but were not always bound to do so. The decretal *Super eo quod* (JL 9656; 1 Comp. 5.14.5 [X 5.17.2]) of Pope Eugene III (1145-1153) dealt with confessions of manifest robbers. In this letter, written 1150-1152³⁴ to Cardinal Corrado della Suburra (the future

³⁰ Dondorp, 'Haftung für Delikte' 21; Rampelberg, 'Remarques' 481 cites Hostiensis and Johannes Andreae.

³¹ My translation. Scott, 'Passive Transmissibility' 18 citing Johannes Andreae, *Novellae* to X 3.28.14: 'Et est ratio quia ex quo poenitet et aliter paenitere non potest nisi satisfaciatur, videtur haeredibus mandasse quod satisfaciant et ideo sunt cogendi'. The passage is, in fact, a report of Innocent IV's teaching, for it ends with his siglum.

³² Scott, 'Passive Transmissibility' 18.

³³ Rampelberg, 'Remarques' 483: 'Est-ce un quasi-contrat que doit honorer sa succession? Cf. Panormitanus to X 3.28.14 no. 6: 'nec agitur mere ex delicto: sed ex contractu, vel quasi'.

³⁴ Walther Holtzmann, Kartei, *Regesta decretalium saeculi XII*, nr. 1139 published online at www.kuttner-institute.jura.uni-muenchen.de/Walther-Holtzmann-Kartei.

Pope Anastasius IV (1153-1154), the pope denied them funeral rites, unless they, while confessing in view of death, had given sureties to guarantee compensation of the stolen goods.³⁵ If they could not guarantee restitution, their penance was of little avail, the pope wrote, though they would receive the Eucharist (viaticum).³⁶ This was said, Alanus Anglicus explained 1205-1210, because the confessants' contrition sufficed to escape eternal punishment, but to be freed from temporal punishment they had to make amends (satisfacere).³⁷ If satisfaction was not completed in their lifetime by correcting the wrong, robbers expiated their sins in purgatory.³⁸

The early decretalists interpreted the decretal to mean that these robbers were to be buried in unconsecrated ground, if their heirs made no amends. Ricardus Anglicus (Richard de Morins), in his apparatus to the *Compilatio prima*, composed 1191-1198,³⁹ expounded that it was presumed that these penitent robbers would have been able to redress their wrong, if they had asked their heirs, who seeing that their testators' remains were to be buried in the fields, would be shamed into recompensing the stolen goods.⁴⁰ A gloss of Alanus simply stated that they were buried in

³⁵ X 5.17.2: 'securitatem ac fideiussores, sicut diximus, praestare'. Italics are in Friedberg's text. They indicate that the words 'ac fideiussoribus, sicut dicimus' which were in 1 Comp. 5.14.5 were left out in the *Liber extra*, apparently because bondsmen were no longer required'.

³⁶ X 5.17.2: 'Qui autem in sanitate obstinata mente non poenituerit vel emendaverit, et in morte securitatem ac fideiussores, sicut diximus, praestare nequiverit, solennitas poenitentiae quidem parum prodesse videtur, sicut credimus; sed de peccato contrito viaticum non negetur, ita tamen, ut nullus clericorum sepulturae illius intersit, nec eius eleemosynam praesumat accipere'. Italics are 'partes decisae' in Friedberg.

³⁷ On Alanus see HMCL 79-80, 219-226.

³⁸ See Appendix no. 2 s.v. *poenitentiae parum prodesse*. Tancred copied this gloss (see Appendix no. 4), so did Goffredus Tranensis. Cf. his gloss s.v. *benefitium* to X 5.17.2 in Montecassino, Biblioteca Abbazia 266, fol. 264vb and Madrid, BN 420, fol. 92va; See also Bernardus Parmensis, gloss *parum prodest* to X 5.17.2.

³⁹ On Ricardus see HMCL 172-173, 199-200, 215-218.

⁴⁰ See Appendix no. 1 s.v. *In morte poenitentias dare*.

unconsecrated ground because the heirs were unwilling to perform satisfaction.⁴¹ Tancred inserted both glosses in his apparatus,⁴² composed 1210-1215 and revised after 1220.⁴³

Several letters of Pope Alexander III (1159-1181) concern the same issue. In 1176-1177,⁴⁴ in answer to a question of Richard of Dover, the archbishop of Canterbury, he acknowledged that creditors can forestall the burial of a debtor until his heirs or kin have guaranteed payment⁴⁵ by oath or with sureties.⁴⁶ In their glosses to the *Compilatio prima* — in the *Liber extra* this part of the letter is left out — the early decretalists explained that this was not the general rule, for contractual debts were no reason to delay burials. Tancred brought the decretal into line with canon law by limiting its application to delictual debts of notorious usurers and robbers, who, unwilling to make amends had delayed their confession until their deathbed.⁴⁷

⁴¹ See Appendix no. 2 s.v. *sepeliri*.

⁴² On Tancred see Andrea Bettetini, 'Tancredi da Bologna', DGI 2.1930-1931.

⁴³ See Appendix no. 4 s.v. *sepeliri*.

⁴⁴ Charles Duggan, 'St. Thomas of Canterbury and Aspects of the Becket Dispute in the Decretal Collections', Coloman E. Viola (ed), *Medievalia Christiana, XIe-XIIIe siècles: Hommage à Raymonde Foreville de ses amis, ses collègues et ses anciens élèves* (Paris 1989) 87-135 at 121 nr. 34; also in his: *Decretals and the Creation of 'New Law' in the Twelfth Century: Judges, Judgements, Equity and Law* (Collected Studies; Aldershot 1998).

⁴⁵ X 2.28.25: '*Super eo uero quod defuncto aliquo interdum religiosae personae, interdum ecclesiasticae interdum seculares postulant, sibi debita solvi, quae defuncti ipsis debeat et nisi solvantur ne corpus defuncti sepulturae tradatur vocem appellationis emittunt, hoc tuae fraternitati duximus respondendum quod nisi eis de solutione debitorum dummodo sit soluendo ab herede uel consanguineis defuncti sufficiens cautio detur, corpus eius post appellationem non est tradendum sepulturae*'. Italics Friedberg.

⁴⁶ X 2.28.25 (sufficiens cautio). Elisabeth Vodola, 'Legal precision in the Decretist Period: A Note on the Development of the Glosses on 'de consecratione with Reference to the Meaning of "cautio sufficiens"', BMCL 6 (1976) 55-63.

⁴⁷ See Appendix no. 4 s.v. *Non est tradendum sepulturae*. William Lyndwood (1375-1446) refers to this gloss in his *Provinciale seu Constitutiones Angliae* (Oxford 1679) 278.

The early decretal collections also contain a letter to the bishop of Lucca, which suggests that heirs were admonished to make amends but not censured, if they failed to do so. The bishop of Lucca had asked how to proceed if someone who is excommunicated because of crimes like manslaughter, arson, incest, and violence against clerics and churches, received absolution on his deathbed. In the decretal *Consuluit*, Alexander III said to admonish his heirs and relatives to make amends. If they did, the absolved excommunicate could be buried in the cemetery. If not, he was denied a Christian burial, for his sin was not yet purged.⁴⁸

Another letter concerns the case of an heir willing to make amends.⁴⁹ His father, a Norman knight, guilty of many crimes, had set fire to churches, for which he had been excommunicated. On his sickbed he confessed to his chaplain, who lifted the excommunication (*sententia anathematis*⁵⁰) and gave absolution. When he was denied a Christian burial (the reason is not mentioned) his son turned to the pope. In the decretal *In litteris*, Alexander III instructs the bishop of Clermont to bury the absolved knight⁵¹ and to compel his heirs to satisfy those who suffered loss because of his crimes,⁵² so that he would be freed from his sin (*ut sic a peccato valeat liberari*).⁵³ The canonists commented that venial sins can be expiated after death, but mortal sins not. Hence, what is meant, they wrote, is freedom from punishment in purgatory for the mortal sin of which he is

⁴⁸ 1 Comp. 5.14.7 (X —) JL 14005.

⁴⁹ See Appendix no. 4 s.v. *sepultura*.

⁵⁰ Alanus posed the question, whether his crime incurred automatic excommunication. See Appendix 2, gloss s.v. *Anathematis*. Tancred held the opposite opinion. See Appendix 4, s.v. *nunciatis*.

⁵¹ It is not said that the bishop must first bury the knight and subsequently compel his heirs.

⁵² The mode of compelling is not expressed. Originally it might have been the burial's delay until the heir had guaranteed satisfaction, in the context of the *Liber extra*. it was excommunication.

⁵³ 1 Comp. 5.14.6 (X 5.17.5) JL 13855; for text see no. 5 in Appendix.

absolved.⁵⁴ In his apparatus to the *Liber extra*, completed 1250-1251, Innocent IV added that satisfaction made by an heir on his own initiative had no such effect: he must do so upon his predecessor's request.⁵⁵

A letter of Alexander's successor Clemens III (1187-1191) describes a case in which such order is given to the heirs. A mortally wounded knight had confessed to an abbot to have incarcerated a bishop and his men, and to have tortured a priest - mortal sins, which incur automatic excommunication and of which absolution is reserved to the Holy See.⁵⁶ The confessant had ordered his heirs to make amends according to the abbot's instructions, and given bondsmen who had sworn payment. The abbot, having heard his confession and the sureties' promises, imparted absolution, received him as monk, and buried him in the monastery's cemetery. The question arose, whether the abbots' absolution had any effect, because the knight had not earlier shown remorse gone to Rome to gain absolution. Was it permissible to receive alms and pray for his soul?⁵⁷ Clemens III's answer is in the affirmative. He added that the heirs and sureties who had committed to make amends in his stead, were to be compelled under pain of excommunication so to do.⁵⁸

Some years later, in the decretal *A nobis* of 1199, Pope Innocent III dealt with the controversial issue of *post mortem* absolution of

⁵⁴ Appendix 2, s.v. *liberari*. Tancred copied this gloss. See also Ricardus, Appendix 1 s.v. *a peccato*; Bernardus Parmensis, s.v. *liberari* to X 5.17.5; Abbas Antiquus, to X 5.17.5 s.v. *peccato*, 'id est poena peccati'.

⁵⁵ Innocentius IV, s.v. *et heredes* ad X 5.17.5 (Frankfurt 1570; reprinted Frankfurt 2008 fol. 515rb): 'Vel loquitur quando testator mandavit satisfieri de rapina a se facta et hoc uidetur sonare finis decretalis 'ut sic a peccato ualeat liberari' quantumcumque enim haeres soluerit non liberaretur raptor nisi mandasset de restituendo'.

⁵⁶ Second Lateran II, c.15; C.17 q.4 c.29. On excommunication *latae sententiae* see: Peter Huizing, 'The earliest Development of Excommunication *latae sententiae* by Gratian and the earliest Decretists', SG 3 (1955) 277-320; Elisabeth Vodola, *Excommunication in the Middle Ages* (Berkeley 1986) 28-35; Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens 1996) 383-385.

⁵⁷ 2 Comp. 5.18.2. Text in Friedberg's edition.

⁵⁸ *Ibid.*

excommunicates who died contrite but unabsolved. In the case put by an abbot, someone had used violence against a priest: a mortal sin of which absolution was reserved to the Holy See. He had sworn to go to Rome, but was murdered before he went on his way. His family wished his reburial because he was buried in unconsecrated ground.⁵⁹ The case prompted a general ruling, pertaining to all cases in which an untimely demise had forestalled a contrite person's confession and absolution. Innocent III sanctioned posthumous absolution by those who would have been competent to impart absolution during his lifetime.⁶⁰ Concomitantly, he obliged the heirs to make amends.⁶¹

Clemens and Innocent seem stricter than Alexander III, because these heirs risk excommunication if admonition fails to have effect.⁶² Alexander III's letter to the bishop of Lucca suggested that heirs of contrite excommunicates were not compelled under pain of excommunication, if their predecessors received absolution on their deathbed. Here, if their predecessors were absolved posthumously, it is certain they were.

The decretal *Parochiano tuo* of Pope Gregory IX (1227-1241) put an end to this difference. In this letter the pope instructs a bishop to bury his parishioner, who had been excommunicated because of crimes like manslaughter, arson, incest, and violence against clerics and churches, and confessing in danger of death had

⁵⁹ 3 Comp. 5.21.2 (X 5.39.28) Po. 690.

⁶⁰ The canonists explained this was an exception to the principle that criminal proceedings end at the death of the defendant. Cf. Vincentius Hispanus, s.v. *absoluendum* (see Appendix no. 3). Johannes Teutonicus and Tancred copied his gloss. See Johannes Teutonicus, gloss *heredes* in Admont, Stiftsbibliothek 22 (ed. Pennington at: www.legalhistorysources.com; Tancredus, s.v. *absoluendum* ad 3 Comp. 5.21.2. See also Bernardus Parmensis, s.v. *mortuos* to X 5.39.28.

⁶¹ According to Vodola, *Excommunication* 38, the decretal declared that the heirs 'would be compelled to satisfy the court so that he could be absolved post mortem'.

⁶² X 5.39.28: 'heredes quoque ipsius ad satisfaciendum pro ipso, si monitione praemissa noluerint, per districtiorem ecclesiasticam compellantur'.

been absolved of his sins.⁶³ The list of crimes ‘manslaughter, arson, incest, and violence against clerics and churches’ equates the list in Alexander III’s letter to the bishop of Lucca. Pope Alexander III made the absolved burial dependent upon his heirs’ willingness to make amends in his place. Gregory IX considered the two unrelated.

Consequently, in the new 1234 compilation of papal decretals, the *Liber extra*, its compiler, Raymond of Peñafort left out the outdated decretals that sanctioned delaying a Christian burial because of the deceased’s delictual debts, e.g. Alexander III’s answers to the archbishop of Canterbury and to the bishop of Lucca.

Heirs must pay delictual debts

In his *Summa de casibus poenitentiae*, a manual for confessors, composed between 1224-1226,⁶⁴ Raymond of Peñafort (ca. 1175-1275) a Dominican friar who taught canon law at Bologna, stated that canon law binds heirs to pay *all* debts of the decedent in full, whether arising from contract, quasi-contract, delict or quasi-delict.

Such a general liability for debts of one’s testator diverged from the Roman law rule that heirs are not bound to pay private fines (poenae) for wrongs committed by the deceased, unless he had

⁶³ X 3.28.14: ‘Parochiano tuo, qui excommunicatus pro manifestis excessibus, videlicet homicidio, incendio, violenta manuum iniectio in personas ecclesiasticas, ecclesiarum violatione vel incestu fuit, dum ageret in extremis, per presbyterum suum iuxta formam ecclesiae absolutus, non debent coemeterium et alia ecclesiae suffragia denegari, sed eius heredes et propinqui, ad quos bona pervenerunt ipsius, ut pro eodem satisfaciant, censura sunt ecclesiastica compellendi’.

⁶⁴ The edition used two manuscripts of the first version; cf. Raimundus de Pennaforte, *Summa de poenitentiae*, edd. Xaviero Ochoa et Aloisio Diez (Universa Bibliotheca Iuris I.B; Rome 1976) cii-ciii, Barcelona, BU 746 and Oxford Bodleian Library 146. The critical apparatus refers to them as BO; cf. on the recensions Stephan Kuttner, ‘Zur Entstehungsgeschichte der Summa de casibus poenitentiae des hl. Paymond von Penyafort’, ZRG Kan. Abt. 39 (1953) 419-434. Antonio García y García and Pennington list ten more first recension manuscripts in *Traditio* 22 (1966) 468-469 and 26 (1970) 438, 461 n.13.

departed this life after joinder of issue.⁶⁵ Roman law, as Raymond noted, distinguishes with regard to the transmission of delictual debts, whether or not trial has reached the stage of the ‘*litis contestatio*’, when the parties formally commence trial. Canon law, he asserted, binds heirs to pay all debts of the deceased, delictual debts included, irrespective of whether the wrongdoer dies before or after joinder of issue (*litis contestatio*) and regardless of whether or not his heirs have benefitted from the crime.⁶⁶

Raymond cited several papal decretals to plead his case. Where a priest who had pawned a silver chalice died before he repaid his debt, Alexander III had decided that his son must do so. In analogy, he had ruled that a bishop must repay the loan his predecessor had contracted on behalf of his church. In answer to a question of Richard of Dover, the archbishop of Canterbury, he had confirmed that a burial may be postponed until the heirs have promised to pay the deceased’s creditors. He had answered Tedaldo, the bishop of Piacenza, that he should compel the heirs of usurers to make restitution, and wrote to the bishop of Clermont that he should compel the heirs of an arsonist to make amends. In 1234, revising the text of his *summa* because of the promulgation of the *Liber extra*, Raymond added the decretal *Parochiano tuo* of pope Gregory IX, who decided similarly in a case where the deceased had committed atrocities like manslaughter, arson, incest, and violence against clerics and churches.⁶⁷

⁶⁵ On ‘*litis contestatio*’, see James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago-London 2008) 433-435.

⁶⁶ Raimundus de Pennaforte, *Summa* 2.5 § 24 (ed. Ochoa-Diez, c.498): ‘De heredibus autem raptorum, licet secundum leges aliter distinguatur, dico iure canonico eos teneri ad omnia debita defunctorum in quorum loco succedunt. Vt autem circa heredes materia latior habeatur, nota quod quilibet heres siue filius siue extraneus non distincto utrum raptoris uel alterius, tenetur iure canonico ad omnia debita defuncti persoluenda, siue fuerit ex contractu uel quasi, siue ex maleficio uel quasi, siue peruenerit res illa pro qua debitum fuit contractum ad eum siue non, siue lis fuit contestata cum defuncto siue non’.

⁶⁷ *Ibid.*: ‘16 q.6 Si episcopum (C.16 q.6 c.2(3)), extra. de pign. Ex presentium (1 Comp. 3.17.3 [X 3.21.3]) et de solut. c.i. (1 Comp. 3.19.1 [X 3.23.1]) et de

The last two decretals centre on the question whether the Church may deny a Christian burial to those excommunicated because of their crimes, who repent on their death-bed, and confess their sins and gain absolution. In the first version of his summa, written 1224-1226, Raymond had written that manifest robbers and excommunicates who had been absolved on their deathbed, were buried in unconsecrated ground, if their goods sufficed to make amends and their heirs refused to do so (*dum tamen habeant unde satisfaciant et heredes nolint satisfacere*). Their burial was delayed, he said, to compel the heirs to pay, as in the decretal *Qua fronte* (1 Comp. 2.20.41), Alexander III's letter to Richard of Dover, the archbishop of Canterbury.⁶⁸ In the revised, 1234 version of his *Summa de paenitentiae* Raymond added, that Gregory IX's new decretal *Parochiano tuo* (X 3.28.14) confirmed a different interpretation of Alexander III's ruling in the decretal *Qua fronte*. He had merely sanctioned a local custom in England.⁶⁹ In case of deathbed confessions, incomplete satisfaction is no reason to delay a burial.⁷⁰ As the decretal *Parochiano tuo* implies, the absolved deceased should be buried without deferral.⁷¹ If needed, the ecclesiastical court will

usur. Tua nos (1 Comp. 5.15.11 [X 5.19.9]), de rapt. In litteris (1 Comp. 5.14.6 [X 5.17.5]), de sepult. c.ult. (X 3.28.14), [BO *add.*: de appel. Qua fronte (1 Comp. 2.20.41)], de sent. excom. A nobis ii. (3 Comp. 5.21.2 [X 5.39.28]); arg. ff. de conduct. furt. Si pro fure § Conductio (Dig. 13.1.7.2)'.
⁶⁸ Raimundus de Pennaforte, *Summa* 1.6 § 2 (ed. Ochoa-Diez, c.434): 'Item (sepultura) prohibetur usurarii manifesti, item praedones manifesti, etiam si paenitentes moriantur, dum tamen habeant unde satisfaciant, et heredes nolint satisfacere. Et hoc fit in confusionem heredum, ut facilius compellantur. extra. de rapt. Super eo (1 Comp. 5.17.5 [X 5.17.2]) et secundum hoc potest intelligi extra. de appel. Qua fronte (1 Comp. 2.20.41)'.

⁶⁹ Tancred referred to this interpretation in his gloss s.v. *non est tradendum sepulturae* to 1 Comp. 2.20.41. He himself was of the same opinion as Raymond. See Dondorp, 'Haftung für Delikte' 12 note 51.
⁷⁰ Save perhaps in case a robber, who is able to make amends, delays confession until his death-bed, and dies impoverished. Cf. *infra* note 71.
⁷¹ Raimundus de Pennaforte, *Summa* 1.6 § 2 (ed. Ochoa-Diez, c.434): 'Vel dic utramque localem uel quando illi non paenituerant. Videtur enim de iure nouo quod si aliquis esset etiam pro huiusmodi criminibus excommunicatus, et, dum in extremis ageret, iuxta formam ecclesiae absolutus, non debent coemeterium

subsequently compel heirs and relatives who inherited his estate, to make amends. They are not obliged *in conscience*, however, to use their own funds.⁷²

In 1224-1226, shortly prior to Gregory IX's pontificate, Raymond wrote that the vast majority of the canonists of his time taught that canon law binds heirs to pay delictual debts of the deceased in full (in solidum), for instance Laurentius Hispanus, Johannes Teutonicus, and Tancred.⁷³

Ten years earlier, about 1216, at the end of Innocent III's office (1198-1216), Johannes Teutonicus had said the same in his *Apparatus* on Gratian's *Decretum*.⁷⁴

Keep in mind, that heirs are bound by contracts of the deceased and by his wrongs, irrespective of whether or not they benefitted from it, and regardless of whether proceedings against him had reached the stage of joinder of issue before his death.

In his *Apparatus* to the *Compilatio prima*, written before 1215 (and revised in the 1220's) Tancred seems of the same opinion. Glossing the decretals *Qua fronte*, Alexander III's letter to the

et alia suffragia denegari, sed eius heredes et propinqui, ad quos bona peruenerunt ipsius, sunt censura ecclesiastica compellendi. extra. eodem Parochiano (X 3.28.14) quam require inter nouas constitutiones'. BO *om.* Videtur—constitutiones.

⁷² Raimundus de Pennaforte, *Summa* 2.5 § 2 (ed. Ochoa-Diez, c.466): 'Sed quid si <raptor> non habet unde reddat, nec heredes nec propinqui uolunt satisfacere, nec tenentur de suo nisi uelint, ille tamen bene fuit contritus et fecit quod potuit, licet tarde, numquid priuabitur sepultura? Expresse uidetur dicere illa decretalis Super eo (1 Comp. 5.14.5 [X 5.17.2]) quod sic. Et ita sentiunt fere omnes doctores. Et fit ad terrorem sicut supra de torneamentis (2.2). Vel dic ut dixi supra de sepulturis. § Prohibentur (116 § 2)'

⁷³ Raimundus de Pennaforte, *Summa* 2.5 § 24 (ed. Ochoa-Diez, c.498): 'Hanc opinionem tenuerunt omnes doctores mei, uidelicet Laurentius, Tancredus, Joannes et alii quam plures. Alanus uero distinxit secundum leges, quod non approbo, maxime in iudicio animae'.

⁷⁴ Cf. gloss s.v. *ab heredibus* to C.12 q.2 c.34, *Corpus iuris canonici emendatum et notis illustratum* (Rome 1582) c. 1326, The edition is published online at www.digital.library.ucla.edu/canon-law. The early-modern printed editions contain his apparatus as revised by Bartholomeus Brixiensis after the promulgation of the *Liber extra*. Manuscripts with Johannes Teutonicus' original version contain the same gloss. See Dondorp, 'Haftung für Delikte' note 61.

archbishop of Canterbury, and *In litteris*, his letter to the bishop of Clermont, Tancred had inserted glosses of the (lost) apparatus of Laurentius Hispanus (ca. 1180-1248). They state that delictual claims can be brought against heirs of wrongdoers.⁷⁵

Laurentius discussed the same issue in his *Apparatus* on Gratian's *Decretum*, called *Glossa Palatina*, composed 1210-1215, in his glosses to texts that state that heirs must restitute what has been wrongfully taken (male ablata), as for instance, Gregory I in a letter to subdeacon Peter.⁷⁶ Laurentius argued that heirs, like successors of thieves and robbers are bound to recompense stolen goods they do not possess, must restitute the 'male ablata' they have not gained, because heirs are presumed to benefit from the crimes of their predecessor.⁷⁷ Laurentius, in his turn, may have been influenced by Bernardus Compostellanus Antiquus,⁷⁸ whose

⁷⁵ See Appendix no. 4 s.v. *compellas*. See also his gloss s.v. *ab herede* ad 1 Comp. 2.20.41, published in Dondorp, 'Haftung für Delikte' note 53.

⁷⁶ C.16 q.6 c.2[3]: 'Si autem dicitur, quia Comitius defunctus est, ab herede eius que ab illo iniuste ablata sunt sine excusatione reddantur'.

⁷⁷ *Glossa Palatina*, s.v. *reddantur* ad C.16 q.2 c.2 (3) Vatican City, BAV, Pal. lat. 658, [= P] fol. 59va; Reg. 977 [=R], fol. 167ra: 'Et si ad eum nichil peruenerit, tenetur pena defuncto debita secundum canones. extra. de pig. c. ult. (1 Comp. 3.17.3 [X 3.21.3]), arg. xcvi. Bene quidem (D.96 c.1) extra. de raptio. Litteris (1Comp. 5.14.6 [X 5.17.5]). Et sic heres defuncti tenetur condicione furtiua. ff. de c. fur. Si pro fure § Conductio (Dig. 13.1.7.2) ff. ui bonorum rap. l.ii. § ult. (Dig. 47.8.2.47), quia non oritur ex maleficio, etiam si lis cum defuncto contestata non sit. immo presumitur peruenerit ad eum ex quo ex quo in uniuersum succedit. arg. extra. de usur. Tua nos (1 Comp. 5.15.11 [X 5.19.9]). Secundum leges autem'.

See also: *Glossa Palatina*, s.v. *qui uero (filios)* to C.12 q.2 c.34 P fol. 51ra; R fol. 144ra: 'Et tenentur secundum ius canonicum etiam si lis contestata non est xvi. q.vi. Si episcopum (C.16 q.6 c. 2 [3]) extra. i. de rapt. Litteris (1 Comp. 5.14.6 [X 5.17.5]). Et hoc in delictis que non procedunt ex contractu, nam in delictis [que-delictis om. R *hoiomotel.*] que procedunt ex contractu idem est secundum leges et canones, ut teneatur heres etiam lite non contestata. C. de hered. tu. l. ult. (Cod. 5.54.4) ff. de reg. iur. Ad ea § Ita in contractibus (Dig. 50.17.157.2), idem act. et obl. Ex depositi (Dig. 44.7.12).

⁷⁸ On Bernardus Compostellanus Antiquus, see Kenneth Pennington, 'The Decretalists 1190-1234', HMCL 211-245 at 221-224.

See also: *Glossa Palatina*, s.v. *qui uero (filios)* to C.12 q.2 c.34 P fol. 51ra; R fol. 144ra: 'Et tenentur secundum ius canonicum etiam si lis contestata non

gloss to Gratian's Dictum after C.1 q.4 c.11 he copied. It ends: 'De canonico aequitate semper tenetur, etiam si nihil ad eum peruenit ex maleficio. b(ernardus)'.⁷⁹

Restitution or satisfaction

Raymond's view on the heirs' liability was very influential. Henry of Susa (Hostiensis) quoted him verbatim, while discussing inheritance law, as John of Freiburg in 1297-1298 reported in his elaboration of Raymond's *Summa de poenitentia*.⁸⁰ In his Rosarium, completed in 1300, Guido de Baysio (Archidiaconus, c. 1250-1313)⁸¹ supplemented the Glossa ordinaria to Gratian's Decretum with Raymond's text, where the gloss stated that on the grounds of canonical equity heirs were liable in full (in solidum) for their predecessors wrongs.⁸²

Raymond had maintained that heirs must pay all the deceased's debts in full, also those arising from a delict or quasi-delict (debita

est, xvi. q.vi. Si episcopum (C.16 q.6 c. 2 [3]) extra. i. de rapt. Litteris (1Comp. 5.14.6 [X 5.17.5]). Et hoc in delictis que non procedunt ex contractu, nam in delictis que procedunt ex contractu idem est secundum leges et canones, ut teneatur heres etiam lite non contestata. C. de hered. tu. l. ult. (Cod. 5.54.4) ff. de reg. iur. Ad ea § Ita in contractibus (Dig. 50.17.157.2) , idem act. et obl. Ex depositi (D. 44.7.12)'. que—delictis om. R977 *hoiomotel*.

⁷⁹ *Glossa Palatina*, s.v. *Item peccato Israelitarum* ad C.1 q.4 §.3 d.p.c.11 P fol. 28rb; R 84vb: 'Idem est de usura. extra. i. de usur. Cum tu (1Comp. 5.15.11 [X 5.19.5]). Et est ratio quia in uitium succedunt parentium, ff. de diuers. et temp. praescr. Cum heres (Dig. 44.3.11). Nam turpia lucra ab heredibus etc. ff. de calum. l. In heredem (Dig. 3.6.5). Arg. contra C. ne ex delict. defunct. l.u. (Cod. 4.17.1). Sed de canonico aequitate semper tenetur, etiam si nihil ad eum peruenit ex maleficio. b(ernardus)'. See also Johannes Teutonicus, s.v. *male acquisita* ad C.1 q.4 § 3 d.p.c.11. His gloss ends: 'ut dixi 16 q.6 Si episcopum (C.16 q.6 c.2[3])' referring to his gloss *reddantur* to C.16 q.6 c.2[3].

⁸⁰ Johannes de Friburgo, *Summa confessorum* (Augsburg 1476) no fol. (de raptoribus, rubricella de bellis, questio 91): 'Idem etiam Ho(stiensis) l.iii. rubrica xxvi. de testamentis §. x ad quit v. tenetur etiam'. See Hostiensis, *Summa Aurea* (Venice 1574), c. 1054 (summa X 3.26).

⁸¹ On Guido de Baysio, see F. Soetermeer, 'Guido de Baysio', *Biographisch Bibliografisches Kirchenlexikon* 22 (2003) 466-471.

⁸² Guido de Baysio, *Rosarium* (Strasbourg 1473) fol. 128va (ad C.1 q.4 DG § 3 p.c.11) s.v. 'in i. glo.' (s.v. *male acquisita*) s.v. *ab heredibus*.

ex maleficio uel quasi), even if they had not inherited that what had been taken away. His phrasing ‘debita ex maleficio’ left open whether heirs of wrongdoers were obliged to pay fines. This is also a question that the *Glossa ordinaria* was silent upon, but Vincent Hispanus, Goffredus de Trano and Hostiensis had addressed the issue in their commentaries to *Parochiano tuo*, Gregory IX’s decretal that stated that heirs must redress wrongs like murder, incest and sacrilege.⁸³ Their glosses are reported by Johannes Andreae, who in his *Novella*, completed in 1338, supplemented the *Glossa ordinaria* with useful material of other canonists:⁸⁴

The killing of a slave can be recompensed by paying his value to his owner, but the price of a free man is not estimated, as Dig. 9.1.13 expresses. Hence, his killing cannot be compensated by the damage done. The heirs may, however, like their testator, be compelled to pay a fine (poena), either because local custom thus provides, as in the decretal Referente (X 5.23.2) where the bishop is entitled to ten ‘solidi’ when his serf is killed, or because of a special rule, such as in Dig. 9.1.3.2, which states that 50 ‘aurei’ must be paid to the heirs of a passer-by killed by an object thrown out of an apartment.

Johannes Andreae assumed his readers knew what the crime was for arson and violence against clerics and churches.⁸⁵ The works of Goffredus de Trano and Hostiensis, of which he made use, referred to C.17 q.4 c.21 § 3-4.⁸⁶ Here, Gratian cited pope John

⁸³ Their glosses are published in Dondorp, ‘Haftung für Delikte’ note 70.

⁸⁴ Johannes Andreae, *Novella* to X 3.28.14 s.v. *satisfaciant* (Venice 1581; Turin 1963) fol. 131vb: ‘Pro homicidio possent heredes satisfacere, si servus fuisset occisus, ff. ad l. aquil. Qua actione. § Si quis (Dig. 9.2.7.2). Liberum autem corpus non recipit estimationem, ff. si qua. pau. fe. di. l. Ex hac (Dig. 9.1.3). Posset tamen teneri heres ad penam consuetudinariam, de qua (infra) de delict. pu. Referente (X 5.23.2) uel aliam (poenam) de qua not. (at glossa) infra de iniur. c.i. (X 5.37.1)’. See Bernardus Parmensis, gloss s.v. *operas eius et impensas* to X 5.36.1 in fine: ‘Tamen, si liber homo periiit, 50 aureorum sit condemnation, ut dicto § Sed cum liber homo (Dig. 9.3.1.3). Illud fit pro poena, non pro estimatione’.

⁸⁵ *Ibid.* ‘Pro incendio, violatione (ecclesie) et manuum iniectioe patet ad quid tenetur (heres)’.

⁸⁶ Goffredus Tranensis, s.v. *satisfaciant* to X 3.28.14 Montecassino 266, fol. 184vb and Madrid BN 420, fol. 92va: ‘Item pro incendio et ecclesiae uiolatione sicut aliis dampnis datus tenetur principalis pecunialiter et eius heredes, ut de rapt. In litteris (X 5.17.5), xvii. q.iiii. Si quis domum (C.17 q.4 c.21 § 3-4);

VIII's ruling that those who violate the sanctity of the Church are denied the Eucharist until they render satisfaction, that is, return the objects they took by force, compensate their damage nine fold, and amend the sacrilege itself with a threefold of their value.⁸⁷ Arsonists must make restitution, but those who set fire to churches, must finance their rebuilding and give the same sum to the poor (C. 17 q.4 c.14). Raymond of Peñafort had cited the same decretals in his *Summa de poenitentia*, discussing the satisfaction for violence against clerics and other forms of sacrilege. Satisfaction for these crimes involved apparently not only restitution, but the payment of a fine as well.⁸⁸

A general discussion of the question, whether heirs must pay fines, can be found in Henri Bohic's *Distinctiones super quinque libris decretalium*, completed in Paris in 1349.⁸⁹ In his commentary to the decretal *Parochiano tuo* (X 3.28.14) he posed

Hostiensis, *Lectura* to X 3.28.14 (S fol. 100rb and V fol. 94r) s.v. *satisfaciant*: 'Item pro incendio et uiolatione ecclesiae sicut in similibus, ut xvii. q. iv. Si quis ecclesiam (C.17 q.4 c.14). Item pro uiolenta manu iniectione. infra de sent. excom. Eo noscitur. resp. i. et c. A nobis ii. in fine'.

⁸⁷ C.17 q.4 c.21 § 4: 'Hii qui monasteria, et loca Deo dicata, et ecclesias infringunt, et deposita uel alia quelibet exinde abstrahunt, dampnum nouies componant, et emunitatem tripliciter, et uelut sacrilegi canonicae sententiae subigantur'. See also Johannes Teutonicus, s.v. *tripliciter* to C.17 q.4 c.21: 'Ecce triplex poena qua punitur sacrilegus, quia iudici dabit xxx. libras, item damnum novies componet et immunitatem tripliciter, similiter corporalem poenam substinebit ut supra eod. Attendendum. (C.17 c. 4 c.13). jo(hannes)'. See also Guido de Bayso, *Rosarium* fol. 263rb C.17 q.4 c.20 s.v. *componat*: 'Circa hanc materiam distingue planius, cum uiolatur emunitas ecclesie, aut persona inde abstrahitur aut res, aut neque persona neque res. Si persona abstrahitur locum habet quod dicitur in c. xxi., scilicet xxx. librae examinati argenti componat. Si autem res extrahitur inde, tunc omne componat dampnum, infra eod. Si quis domum in fine (C.17 q.4 c.21 § 4) et hoc si manifesta uiolentia irruerit quis auferendo sacrum de loco sacro'.

⁸⁸ Raimundus de Pennaforte, *Summa* 1.13 § 3 (ed. Ochoa/Diez, c. 402): 'Pecuniaria <poena> qualis et quanta sit et cui persoluanda, tam pro sacrilegio commisso in persona quam commisso in rebus, legitur 17 q.4 Si quis in atrio, Si quis contumax, Quisquis inuentus, Si quis deinceps (C.17 q.4 c.14, 20-22)'.

⁸⁹ On Henri Bohic see J-L. Deuffic, 'Au service de l'Université et au conseil du duc ... Notes sur le canoniste breton Henri Bohic', *Pecia* 4 (2004) 47-102.

the question whether heirs are punished for their predecessor's wrongs. He distinguished between corporeal and pecuniary punishment. Heirs were to pay the fines of their testator's for convicted crimes and for those he had confessed in court (whether or not under torture) before his demise.⁹⁰ In this respect both laws are in concord. If he had died before joinder of issue, the Roman and Canon rule differed. Roman law limited the heirs' liability to compensation of stolen goods or to their enrichment by the crime. Quoting Raymond of Peñafort⁹¹ Henri Bohic taught that canon law obliged heirs to fulfil the deceased's delictual debts to the extent of the inheritance.⁹² He did not distinguish between fines and compensation of damages.

Bartolus de Saxoferrato (1313-1357) made such a distinction. In his commentary to a *Digest* text stating that civil law prescribes that heirs shall not be liable to penal actions (Dig. 47.1.1pr) Bartolus contraposed civil and natural law.⁹³ Accursius had claimed that both were in concord, but Bartolus, who seems to equate natural and canon law, maintained that both laws differed, because the decretals declared that heirs were bound to make amends (*satisfacere*). To explain this difference, Bartolus used a distinction rooted in Azo's teaching. Some penal actions are penal on both sides, when the claim is not meant to recover any loss or to undo an unjust enrichment. Heirs of wrongdoers are not liable to claims for mere fines. In this respect Roman and canon Law

⁹⁰ Henricus Bohic, *In quinque libris decretalium commentaria* (Venice 1576) 488 to X 3.28.14: 'aut defunctus in vita fuit condemnatus uel confessus in iudicio, et tunc tenentur heredes, nam ex confessione datur actio ac si sententia lata fuisset'. Bohic cites Dig. 9.2.25.2, Dig. 15.1.3.11, Dig 11.1.11.1, and Guillelmus Durantis, *Speculum iudiciale* (Basle 1574, reprinted Aalen 1975) 3.1 no. 25 and 2.1 § 2 no. 4.

⁹¹ Bohic copied the passage quoted above, note 71, citing the decretals summed up in note 72.

⁹² Henricus Bohic, *ibid.* 'Si queritur de iure canonico tunc, aut queritur utrum ex delictis defuncti heres tenetur usque ad uires et secundum uires hereditatis, et dic quod sic, licet ad eum nihil exinde peruenerit'.

⁹³ Of the printed editions consulted the editions Tours 1577 and Basle 1588 contrapose civil and canon law, the majority contrapose civil and natural law. ed. Venice 1473, 1482, 1491, and 1499, Parma 1478, Lyon 1493 and 1523,

were in concord, Bartolus wrote.⁹⁴ Other penal actions were ‘reipersecutory’ for the plaintiff, viz. meant to compensate his damage. Heirs were liable to those actions in a court of canon law. Roman law limited their liability to their enrichment.⁹⁵

The fourteenth-century Italian canonists Pietro d’Ancharano and Francesco Zabarella merely reported Bartolus’ teaching.⁹⁶ Nicolaus de Tudeschis (Panormitanus) who studied canon law under Zabarella, also reviewed Bartolus’ description of the canon law rule. Panormitanus said the *Glossa ordinaria* supported his interpretation, because it stated that there is no obligation, in conscience, to pay mere fines.⁹⁷ The decretal *Parochiano tuo*, however, declares that heirs must redress crimes like murder and incest. Making amends for these crimes cannot exist in compensation of damages, as Johannes Andreae has argued. It seems, therefore, that heirs are bound to pay mere fines as well.⁹⁸ To

⁹⁴ Bartolus, *Lectura super secunda parte digesti novi* (Tours 1577 and Basle 1588) to Dig. 47.1.1pr: ‘Item hic dicitur ciuilis consitutio est, quero quid de iure canonico. Dicit glosa idem. Contra hoc uidetur quod de iure canonico teneantur heredes satisfacere de delicto defuncti ut extra. de rapt. c.i. (X 5.17.5) et de sepult. c.i (X 3.28.14) et not. in c. Quamquam de usur. 1.6 (VI 5.5.2). Solutio: Quedam sunt actiones penales ex utraque parte et ille non transeunt contra heredes Quedam sunt actiones penales ex utraque parte et ille non transeunt contra heredes aliquo iure nisi secundum distinctionem precedentem’.

⁹⁵ Ibid. ‘Quedam sunt actiones penales ex parte rei sed persecutorie ex parte actori. tunc hoc casu differt ius ciuile a canonico, nam iure ciuili non datur nisi quatenus ad heredem peruenit, sed de iure canonico datur in solidum, ut dictum c.i. de rap. (X 5.17.5) et quod ibi per doctores notatur’.

⁹⁶ Petrus de Ancharano to X 3.28.14; Francesco Zabarella to X 3.28.14.

⁹⁷ Panormitanus, *Commentaria in decretales* (Venice 1570-1571) vol. 2, fol. 177va to X 3.28.14 s.v. : ‘Sed aduerte. Nam primum dictum Bartolis, quatenus uult quod actio ex utraque parte penalis non transeat in haeredem etiam de iure canonico, uidetur posse optime iuuare per glosam not. in c. Fraternitas xii. q.ii (C.12 q.2 c.11) ubi dicitur quod in foro conscientiae non iniungitur ut quis soluat poenam delicti. Cum ergo de iure canonico agatur contra haeredem solum ratine peccati, ergo non debet contra haeredem agi, nisi pro satisfactionem interesse seu damni proprii’. Rampelberg, ‘Remarques’ 478 quotes this passage.

⁹⁸ Ibid. ‘Sed contra hoc dictum alle. tex. hic. Nam hic agebatur ut satisfacerent haeredes de homicidio et incestu, et ut dicit hic Johannes Andreae, non potest satisfieri de homicidio nisi quia aut interfectus fuit seruus aut agebatur ad penam

solve this contradiction, Panormitanus limits the decretal's application to heirs of absolved excommunicates.

Panormitanus distinguished between excommunicates and others. The decretals *Parochiano tuo*, *In litteris*, and *A nobis* all concern persons who had been excommunicated because of their crimes and had subsequently received absolution, either in this life or post-mortem. Their heirs are not only bound to compensate wrongful damage, but also to pay the fines their testator must promise so that the excommunication may be lifted, and his mortal sin absolved.⁹⁹ Heirs of others are bound to compensate the damage done.

The legal basis of the heirs' liability

Johannes Andreae supplemented the Glossa ordinaria's comments on the foundation of the heirs' liability. Bernard of Parma had concluded from the decretals *Parochiano tuo* and *In litteris* that a delictual claim could be brought against heirs.¹⁰⁰ Innocent IV and Hostiensis had reasoned differently. Most likely that is why Johannes Andreae reported their views. Innocent IV had taught that the heirs' liability arose not out of delict, but from a 'stipulatio alteri', which, in Andreae's account of his teaching, could be assumed to exist.¹⁰¹ Hostiensis had equated the

consuetudinariam, nam in aliquibus locis soluitur poena applicanda laeso seu heredibus suis'.

⁹⁹ Ibid.: 'saluando utrumque dictum distinguerem quod aut quis fuit excommunicatus quia non satisfaciebat de delicto et absolutus maxime cum cautione. Et tunc procedit dictum huius c. (X 3.28.14), quia non pure agitur in foro poenitentiali, nec agitur mere ex delicto, sed ex contractu uel quasi prout supra dixi'.

¹⁰⁰ Above, at note 14.

¹⁰¹ Johannes Andreae, *Novella* to X 3.28.14 s.v. *in glosa ultima ibi* (conueniuntur ex maleficio) *defuncti* (ed. Venice 1581 Turin 1963, vol. 3, fol. 131vb): 'Vel hic non agitur contra heredes ex delicto defuncti, set sacerdos non absoluit excommunicatum, nisi caueat de satisfaciendo, de app. Qua fronte § Sane (X 2.28.25 in medio), et ex illa stipulatione agent quorum interest ff. rem pup. sa. fol. Non quasi (Dig. 46.6.2) et plus dicimus, quod si obmitatur cautio tamen intelligitur apposita, ff. de adop. His uerbis (Dig. 1.7.19). Et est ratio quia ex quo penitet et aliter penitere non potest nisi satisfaciatur, uidetur heredibus

confessor's satisfaction-order to a court-sentence.¹⁰² In an addition to the *Speculum iudiciale* Johannes Andreae described the effects of such reasoning: The bishop (iudex ordinarius) to whom someone had confessed to have robbed a thousand pounds from various people and who had promised him to satisfy the victims, could without a trial order his heirs to pay a hundred to someone who swore to have been robbed by the deceased.¹⁰³

The various interpretations of the decretal *Parochiano tuo* remained well known throughout the Middle Ages. Johannes de Lignano (c. 1320-1383), for instance, reported both attempts to keep canon law in line with the Roman rule,¹⁰⁴ while preferring

mandasse quod satisfaciant et ideo sunt cogendi. Inno<centius>'. His account of Innocent IV's teaching is flawed, for Innocent added, that no claim could be based upon a non-existing stipulation. See above, at note 28.

¹⁰² Ibid. 'Dicebat Hostiensis quod dici poterat hoc casu non solum lis contestata sed etiam sententia lata ex eo, scilicet quod precipit sacerdos ut satisfacian(!)t. Dicit tamen finaliter quod quicquid uoluatur ex delicto tenentur heredes secundum canones non secundum leges'.

¹⁰³ Johannes Andreae, *additio g* super *Speculum* 2.3 de appel. § 2 uers. *sed numquid confessus*: Guillelmus Durantis, *Speculum iudiciale* vol. 1, 831: 'Ad declarationem eius quod ibi et hic dicitur queritur quid iure de herede confessi, an apellet? Propter quod narrabo questionem Nicol<ai> Mat<arelli> que incipit "Quidam ueniens ad poenitentiam", quam format de penitente confesso coram ordinario se rapuisse mille et solemniter promittente illa restituere quibus debebantur ad ipsius mandatum et iuravit renuntiando omnibus exceptionibus etc. Quo mortuo A. coram ordinario petiit centum sibi per eum rapta. Ordinarius sine libello et sine litis contestatione, receptis et argumentis et indiciis de rapina et iuramento petitoris de quantitate rapta, pronunciauit heredem debere restituere illa centum'.

¹⁰⁴ Johannes de Lignano, to X 3.28.14, Munich, BSB Clm 14257, fol. 210ra and Madrid, BN 583, fol. 86va: 'In glosa *similem casum* (ibi 'ad ipsum peruenit' M). Lege ciuili non conuenitur heres ex delicto defuncti, nisi factus sit locupletior uel lis fuerit contestata cum defuncto. Iure tamen canonico est secus; etiam iure ciuili, ubi etiam lis contestata cum defuncto non conuenitur heres ex delicto defuncti. de quo not. de restit. spol. Cum ad sedem (X 2.13.15). Sed numquid lege canonica tenetur heres ex delicto defuncti? Dicunt aliqui quod non, nam hic presbiter absoluit ipsum defunctum ut heres teneretur quia cauit. . . Item dicit Hostiensis quod non solum lis cum isto fuerat contestata, immo sententia lata fuerat, quia mandauerat et dederat cautionem ad executionem confessionis'.

Innocent IV's reasoning.¹⁰⁵ In his commentary to Justinian's *Codex*, Bartolomeo de Saliceto (†1411) repeated Innocent's doctrine.¹⁰⁶ His report was recited by Johannes de Anania (1393-1457).¹⁰⁷ Petrus de Ancharano (ca. 1333-1416) who taught at Padua and Ferrara from 1392, copied Innocent IV's gloss, so did Francesco Zabarella (1360-1417)¹⁰⁸ while Antonio de Butrio used Andreae's report.¹⁰⁹ In contrast to Zabarella who preferred Innocent IV's line of thought, Antonio da Butrio taught that a delictual claim was brought.

¹⁰⁵ Ibid. 'Primum dictum forte uerius quia potest agi ex stipulatione quam presbiter recepit. Nam forte ista confessio non multum iuuabat quia non fuerat facta in figura iudicii'.

¹⁰⁶ Bartholomeus de Saliceto, *In tertium et quartum codicis libros commentaria* (Lyon 1549) fol. 122rb (to Cod. 4.17.1 nr. 8); also in his *Opera omnia* (Frankfurt 1615) vol. 2.2, c.573.

¹⁰⁷ Johannes de Anania, *Lectura super prima et secunda parte libri quinti decretalium* (Milan 1497) vol. 1, to X 5.17.5) sine pag.: 'Saly(cetus) in dicta lege unica (Cod. 4.17.1) in vii. col. uers. Oppone fortius de c. Parochiano et c. In litteris refert dictum Innocentii in dicto capitulo fin. (X 3.28.14) quod si cautio uel promissio fuit facta parochiano de damnis per incendium uel rapinam illatis, quod ex illa possunt heredes conueniri, licet ad eos nihil peruenerit ex delicto, quia conueniuntur ex illo contractu. Vbi autem dicta cautio non interuenit, tunc iudicis officio compelluntur heredibus. ut sentit littera hic. Et est ratio quia ex quo poenituit et aliter poenitere non poterit nisi satisfecerit, uidetur iniunxisse heredibus ut satisfaciant'.

¹⁰⁸ Petrus de Ancharano, *Super tertio decretalium facundissima commentaria* (Bologna 1581) 311 to X 3.28.14 no. 6); Francesco Zabarella, to X 3.28.14 no. 8 (Venice 1512) fol. 159rb.

¹⁰⁹ Antonius de Butrio, *Super libro tertio decretalium commentaria* (Venice 1578 Bologna 1967) vol 5, fol. 121va to X 3.28.14 nr. 14 collated with Würzburg M.ch.fol. 179: 'Soluendo aliquialiter contrarium soluunt aliqui, si heredes conueniantur immediate ex delicto defuncti conueniri non possunt nisi ut leges declarant, hic non (*ed. autem*) conueniebantur immediate ex delicto sed ex contractu, cum articulo mortis cauerit uel iurauerit de restituendo, licet habuerit originem a causa delicti. Immo dicunt aliqui quod si haec esset obmissa, intelligeretur apposita sicut et alias, ff. de adopt. l. His uerbis. (D. 1.7.19), quia ex quo penitet et aliter penitere non potest, nisi satisfaciat, mandare uidetur heredibus ut satisfaciant, et sic heredes immediate ex contractu conueniuntur'.

In his report of Hostiensis' teaching Petrus de Ancharano confused the satisfaction order of the confessor with the confessant's mandate to his heirs to make amends.¹¹⁰ He therefore erroneously attributes to Hostiensis a third attempt to bring canon law into with civil law.¹¹¹

A third attempt to keep canon law and Roman law in concord

Francesco Zabarella, who taught canon law at Florence and Ferrara 1385-1410, rejected Bernard's assertion in the *Glossa ordinaria*, that delictual claims are passively transmissible. He preferred Innocent IV's line of thought but construed a quasi-contractual liability: 'Ex quo dic quod hic heredes tenentur ex quasi contractu'.¹¹²

The notion of quasi-contract he seems to have taken from Johannes Andreae, who in an *additio* to Durantis' *Speculum iudiciale* had written that the heirs' liability derived not from their testator's wrongdoing, but from his confession and promise to

¹¹⁰ Johannes de Lignano had already confused the two. See above, note 103. Zabarella and Antonio da Butrio recited him correctly. Cf. Franciscus Zabarella, to X 3.28.14, Venice 1512, fol. 159vb: 'Hostiensis dicit quod hoc casu tenetur heres, quia non solum fuit lis contestata sed etiam sententia lata ex eo quod sacerdos precipit ut satisfaceret'. Antonius de Butrio, to X 3.28.14 (Venice 1578, reprinted Bologna 1967) vol 5, fol. 121va.

¹¹¹ Petrus de Ancharano, to X 3.28.14 (Bologna 1581) 311: 'Hostiensis dicit quod talis cautio, scilicet de satisfaciendo praestita sacerdoti, non solum habet vim litis contestationis sed etiam (quod plus est) habet vim sententiae et cuiusdam quasi contractus, ut actio fiat transmissoria ad heredes, ut no. Spe. in tit. de interrog. § 2 uers. Quid si is (*Speculum* 2.1. de interrog. § 2 no. 24)'. Many printed editions of Panormitanus' *Commentary* also seem to attribute this doctrine to Hostiensis. Cf. Panormitanus, to X 3.28.14 no. 5 in Venice 1475, Rome 1480, Basle 1482, Venice 1483, Lyon 1527: 'Dicit etiam quod si quis fuerit confessus sacerdoti et decessit lite non contestata, potest agi contra heredem ex delicto defuncto ex quasi contractu'. The editor of the Venice 1581 printed 'Dicas etiam' instead of 'Dicit etiam'.

¹¹² Francesco Zabarella, to X 3.28.14 (Venice 1512) fol. 159rb: 'Generaliter tamen dicit <Hostiensis> ueram esse solutionem glosae quod aliud secundum leges aliud secundum canones. Dic uerius esse quod predixi secundum Innocentem; ex quo dic quod hic heredes tenentur ex quasi contractu'.

make amends.¹¹³ Some canonists argued that the testator's confession constituted a quasi-contract, but Zabarella characterized as such his tacit promise to make amends in the excommunicate's promise, to hence force follow the church's precepts.¹¹⁴ So did Panormitanus.¹¹⁵

The argument that confessions constitute a quasi-contractual liability stems from the glossators discussing the effects of judicial confessions. In his *Margarita* or *Summula questionum*, composed while teaching in Modena, Albertus Galeotti (1225-c.1285) had argued that his heirs are liable, if an 'actio furti' is brought against a thief who having admitted the theft dies prior to the joinder of issue.¹¹⁶ Guillelmus Durantis inserted the question into his

¹¹³ Ibid.: 'Et hoc tenet Johannes Andreae in Spec. de app. §. In quibus uers. Sed numquid hec'. See Johannes Andreae, *additio g* to *Speculum* 2.3 de appel. § 2 (Basle 1574) 1.831) in fine: 'Hic addo quod hoc procedit etiam si in hereditate nil est de praeda. Ex confessione enim et promissione conuenitur heres, non simpliciter ex delicto, quo casu procederent notata secundum leges in decret. ult. de sepul. (X 3.28.14) et 12 q. 2 c. Episcopus qui filios (C.12 q.2 c.31). Et uide supra de inter. § secundo uers. (Quid) si is. (*Speculum* 2.1 de interrogationibus § 2 no. 4) cum sua remissio'.

¹¹⁴ Ibid.: 'Et dic quod iste quasi contractus surgit propter absolutionem factam in forma ecclesie secundum quam quasi contrahit qui absoluitur, quia iurat stare mandatis ecclesie'.

¹¹⁵ Panormitanus to X 3.28.14 (Venice 1570-1571) vol. 3, fol. 177v no. 6: 'Aut quis fuit excommunicatus quia non satisfaciebat de delicto et absolutus maxime cum cautione, et tunc procedit dictum huius capituli, quia non pure agit in foro poenitentiali, nec agit mere ex delicto sed ex contractu uel quasi prout supra dixi'. See also ibid. no. 5. Rampelberg 'Remarques' 482 mistakenly interprets these passages: 'Le Panormitain, plus ferme, semble vouloir réduire la responsabilité des héritiers au titre du délit'.

¹¹⁶ Albertus Galeottus, *Aurea margarita* (Cologne 1595) 92 (Cap. 16 no. 7): 'Pone quod conueni Titium actione furti, confessus est se furtum fecisse, decessit ante litem contestatam, numquid tenetur haeres? Videtur quod non, ut C. ne ex delict. defunt. l.i. (Cod. 4.17.1). Sed dic quod sic, quia in iudicio quasi contrahitur. ut ff. de pecul. l. Licet §. Idem scribit (D. 15.1.3.11) et tenetur quis quando confitetur formiter crimen ex quasi contractu, ff. de interrog. in iure fac. l. De etate § i. (Dig. 11.1.11.1)'.

Speculum iudiciale.¹¹⁷ With regard to confessions in a criminal procedure, he used a question posed by Odofredus de Denariis (†1265).¹¹⁸ Lecturing on Cod. 4.17.1 Odofredus had put the following case: Someone has stolen something from me or set fire to my property. Accused of robbery or arson, he is put to trial. Being a notorious robber and arsonist, he is questioned under torture, and confesses the crime I have accused him of. Subsequently, he does not retract his confession but perseveres in his statement. Finally, he dies before is convicted.¹¹⁹ Odofredus argued that I can sue his heirs, for he is bound by quasi-contract because of his confession:

¹¹⁷ Guillelmus Durantis, *Speculum* 2.1 de interrogationibus § 2 no. 4, 1.545: ‘Quid si is qui confessus est se furtum commississe decedit ante litis contestationem? Respon. non uidetur quod eius heres teneatur, C. ne ex delict. defunct. l.i. (Cod. 4.17.1) Sed dic contra quia in iudiciis quasi contrahitur, ff. de pecul. l. Licet §. Idem scribit (D. 15.3.11) et tenetur quis quando confitetur crimen ex quasi contractu, ff. de interrog. in iure fac. l. De etate § i. (Dig. 11.1.11.1)’. See also Johannes Andreae, additio x super *Speculum* 3.1 de accu. nr. 25 (Basle 1574) 2.7): ‘Ponitur eadem questio post Alber. Gal. supra de interrog. § ii. ueri. Quid is is qui (2.11 de interrog. § 2 no. 4)’.

¹¹⁸ Johannes Andreae, *additio* to *Speculum* 3.1 de accusatoribus no. 25, 2.7: ‘habeo post Odof. super l. una C. ex delict. defunc. an here con. (Cod. 4.17.1) eandem questionem tamen aliter formatam quam hic uel ibi’. The difference seems to be that Odofredus put the case where someone confessed the robbery and arson I have accused him of. Guillelmus Durantis put the case, where amongst other crimes he confessed a theft I have not (prior) accused him of. See Guillelmus Durantis, *ibid.*: ‘Quid si latro famosus in tormentis positus confessus est mihi furtum fecisse et post tormenta in confessione perseuerauit, sed tamen prius quam condemnetur mortuus est uel propter asperitatem tormentorum, uel forte ex alia causa, queritur an heredes illus teneantur et conueniri possint occasione furti predicti?’.

¹¹⁹ Odofredus de Denariis, *Lectura super Codice* (Lyons 1552 reprinted Bologna 1968) vol 1, fol. 206 to Cod. 4.17.1 no. 11: ‘Signori, ultimo formo super legem istam questionem talem Quidam fecit mihi furtum uel commisit incendium; delatus de furto uel incendio uenit ad iudicium; quia dicebatur quod famosus latro erat uel incendiarius, subiectus est questionibus; confessus est de intentione mea, de quibus depositus postea dudum persuerauit in confessione sua, quia hoc necesse est ad hoc ut talis confessio preiudicet. ut ff. de questioni. (Dig. 48.18); antequam sentiaretur super intentione mea, ipse decessit, numquid potero conuenire heredes suos?’

‘quia ex quasi contractu tenetur ex confessione sua’. Hence, he said, I can bring an ‘actio confessoria in factum’ against his heir.¹²⁰

Because of Guillelmus Durantis’ phrasing of the question he took from Alberto Galeotti ‘What if someone who has confessed to have committed theft dies before the joinder of issue’,¹²¹ he seems to discuss confessions in general, even though a judicial confession is meant in this context (*de interrogationibus*). Johannes de Lignano distinguished between confessions and judicial confessions.¹²² Petrus de Ancharano taught that the confession to a priest on one’s deathbed had the same effect as a joinder of issue and a quasi-contract:¹²³

nam sola confessio delinquentis habet vim litis contestationis et cuiusdam quasi contractus, ut actio fiat transmissoria ad heredes.

It made the delictual claim passively transmissible.

Absolved, contrite, and obdurate decedents

Despite the various doctrines as to why heirs of a wrongdoer are liable, the outcome was the same if he had departed this life in state of grace. They were obliged to correct the wrongs their predecessor had committed. Heirs must, therefore, honor his eventual arrangements made by way of bequest or ‘*stipulatio alteri*’. Such bequest or contract gave rise to a claim by the victims. Medieval last wills evidence, that bequests pro ‘*male ablatis*’ in view of one’s soul were quite common. They provided for restitution of unlawfully obtained goods, including usurious

¹²⁰ Ibid.: ‘Sed certe in quaestione ista potest dici quod possum conuenire heredes suos, non quia lis sit contestata cum defuncto, sed quia ex quasi contractu tenetur ex confessione sua. Vnde datur actio confessoria, id est in factum, ex tali confessione contra heredes suos. ut ff. de interrog. act. (Dig. 11.1) et ff. ad l. Aquiliam Proinde § Si procurator (Dig. 9.2.25.2). Item hec confessio quam ipse fecit declarat ipsum furem esse, sed heres furis tenetur conditione furtiva l. Si pro fure (Dig. 13.1.7.2) in fine et simile alias quia actio non daretur prius in partem de peculio datur postmodum ratione sententiae late, qua in iudicio quasi contrahitur, ut ff. de pecul. l. Licet § Idem (Dig. 15.1.3.11)’.

¹²¹ Quid si is qui confessus est se furtum commississe decedit ante litis contestationem. Cf. above, note 116

¹²² See above, note 104.

¹²³ See above note 110.

interest, and compensation of wrongful damage. In 1275, for instance, Lambertino de' Paci bequeathed fifty Bolognese pound to the Comune of Bologna, because of the damage he inflicted the previous year as ambassador of his city.¹²⁴ The last will of Pietro Maranesi, a public notary, dated 5 October 1300, ordered to make amends for his obtaining parts of his neighbor's land.¹²⁵ In 1333 Filippo Gentili, a citizen of Palermo, arranged to pay six 'tarenì' he owed to Simone di Cerami 'pro male ablatis' without specifying the wrong done to her. 'Pro male ablatis incertis' a sum of 46 'tarenì' to the poor.¹²⁶

Even if the deceased had made no arrangements, his heirs were liable, if a priest had heard his deathbed-confession and imparted absolution. The *Glossa ordinaria* said that a delictual claim could be brought against the heirs, Innocent IV had argued that the ecclesiastical court compelled heirs 'ex officio' to execute the confessant's tacit order to his heirs to do satisfaction.

It seems to have been disputed, whether the same was true, if one's untimely death prevented his receiving absolution. If his contrition was certain, Bernard of Parma had argued that his heirs must make the amends he had been prevented from performing himself.¹²⁷ In his glosses to the decretals *Parochiano tuo* (X 3.28.14) and *A nobis* (X 5.39.28) Innocent IV seems to distinguish between heirs of wrongdoers who died in state of grace, as the absolved excommunicates in *Parochiano tuo*, and those in state of sin, as the contrite excommunicates in *A nobis*. Heirs of absolved

¹²⁴ Massimo Giansante, 'Male ablata, La restituzione delle usure nei testamenti bolognesi fra XIII e XIV secolo', RIDC 22 (2011) 183-216 at 208.

¹²⁵ Ibid. 209.

¹²⁶ Orazio Condorelli, 'Consuetudini delle città di Sicilia e restituzione dei "Male ablata" tra "ius proprium" e "utrumque ius",' *Recto ordine procedit magister: Liber amicorum E.C. Coppens*, edd. Louis Berkvens, Jan Hellebeek, et alii (Iuris scripta Historica 28; Brussels 2012) 55-91, at 78.

¹²⁷ Bernardus Parmensis, s.v. *heredes quoque* to X 5.39.28: 'Quia cum iste penituerit et contritus fuerit, quantum in se fuit satisfaciet et per eum non stetit, unde heredes ad quos bona peruenerunt ipsius, compellendi sunt satisfacere pro ipso. et sic intellige illud c. supra de sepul. c.ult. (X 3.28.14) supra de rapt. In litteris (X 5.17.5)'.

excommunicates were to redress all his wrongs, those of contrite but non-absolved excommunicates were to amend the crime he had been excommunicated for.¹²⁸ Nicolaus de Tudeschis (Panormitanus) applied the doctrine that Innocent IV had limited to those absolved. He construed a tacit satisfaction-order, which heirs of a contrite sinner must comply.¹²⁹

Heirs of an obdurate decedent, who had died without penance, were liable in as far as they themselves were enriched by their predecessor's wrong. This only seems contested because Zabarella and Panormitanus, who studied under him, wrongly reproached Hostiensis for a view that he, in fact, did not hold. Misinterpreting his lecture on the decretal *A nobis* they thought that Hostiensis considered heirs of obdurate wrongdoers liable to the extent of inheritance.¹³⁰ This was a view Panormitanus strongly rejected.¹³¹

Conclusions

The canonists have not always recognized the passive transmissibility of delictual claims, even though all from about

¹²⁸ Innocentius IV, s.v. *ad satisfaciendum* to X 5.39.28 (Frankfurt 1570) fol. 550rb: 'De eo pro quo erat excommunicatus et sic excommunicatio reputatur pro litis contestatione ut teneantur haeredes satisfacere. et sic intelligitur de rapt. In litteris. Vel dic ut notatur ibi'.

¹²⁹ Panormitanus to X 5.39.28 no. 5 (Venice 1570-1571) vol. 3 fol. 222va: 'Vnde nota ex fine literae unum casum generalem in quo ecclesia exercet iurisdictionem in laicos, uidelicet compellendo haeredes ad satisfaciendum pro defuncto, quantumcunque defunctus expresse non mandauerit satisfactionem, sufficit tamen eum fuisse contritum, nam tacite uidetur mandasse haeredibus ut satisfaciant. Vnde ratione peccati quod committunt in non satisfaciendo, et quia actus est pius ut satisfiat animae defuncti, ecclesia compellit haeredes etiam laicos. Hostiensis tamen dicit hic idem, si defunctus non fuit contritus, quia res transit ad haeridem cum onere suo, ut in c. Ex literis de pign. (X 3.21.5)'.

¹³⁰ Francesco Zabarella to X 5.39.28 (Venice 1512) fol. 138ra no. 5: 'Dic idem si non poenituerit, quod tenentur heredes secundum Host. de hoc supra de sepult. c.fin. (X 3.28.14) quod res transit cum onere suo'. Panormitanus, to X 5.39.28 no. 5 above, note 128 in fine.

¹³¹ Panormitanus to X 5.39.28 (Venice 1570-1571) vol. 3, fol. 222va no. 5: 'Primo enim ecclesia non debet se intrmittere ex quo desperatur de defuncto, unde non uersatur amplius pia causa, nam ex quod decessit in peccato mortali ecclesia non impedit amplius se de illo'.

1210 agreed that canon law diverged from the ‘absolute rule’ in *Codex* 4.17.1, that heirs of a wrongdoer are merely liable for what they gain from his wrong.

Roman law itself recognized exceptions to this rule. Heirs of thieves and robbers, for instance, were liable to a ‘*condictio ex furtiva causa*’. They must not only return the stolen goods they possess but compensate the owners of all stolen goods. Roman law could also be used to argue that heirs of usurers must return usurious interest, as having been paid without owing (*indebitum solutum*).¹³² In both situations, the wrongdoer’s heir is not liable to a penal action, but a ‘*condictio*’. Canon law texts stating that heirs must compensate stolen and embezzled goods expressed the same rule. Problematic was Alexander III’s decretal *In litteris*, because it said, that heirs of arsonists must satisfy those who suffer loss. Roman law denied the victims of arson a claim for damages. In his gloss to this decretal Innocent IV immediately dismissed the idea that an ‘*actio legis Aquiliae*’ might lie.¹³³ Similarly challenging was Gregory IX’s decretal *Parochiano tuo* because it implied that heirs of murderers — more precisely, heirs of those who had been excommunicated because of manslaughter and had been absolved on their deathbed — must satisfy the victims. This entails the payment of a fine, as Goffredo da Trano noted in the earliest *Apparatus* on the Gregorian decretals. In his *Glossa ordinaria* Bernard of Parma interpreted these two decretals to mean that heirs were liable for a delictual claim. In other words, he recognized the passive transmissibility of delictual claims. So did Antonio de Butrio, and, perhaps, Henri Bohic. Many canonists, however, followed Innocent IV’s example and construed a contractual or quasi-contractual liability. In their view, the heirs’ liability is based only indirectly upon their testator’s wrong. Passive transmissibility of delictual claims remained disputed.

¹³² *Glossa ordinaria*, s.v. *reddantur* to C.16 q.6 c.2 (3).

¹³³ Haring, *Schadenersatzpflicht* 41 quoting Innocentius IV, gloss s.v. *et heredes* to X 5.17.5.

Telling is Nicolaus de Tudeschis confusion at the end of the surveyed period:¹³⁴

In the normal situation, if someone dies in state of grace without prior excommunication, what Bartolus taught could apply, namely that a delictual claim for damages can be brought against his heirs. If we, however, maintain that the claim arises (not from delict) but from quasi-contract because of the wrongdoer's confession, I don't see how Bartolus can be right (in limiting the heirs' liability to damages). He relates, however, to the majority view of the canonists, that a delictual claim is brought against the heirs.

The maxim 'peccatum non dimittitur nisi restituatur ablatum' played a minor role in the discussion. C.14 q.6 c.1 is referred to only once.¹³⁵ Instead, the canonists' focus on the heir's duty to perform satisfaction. Their context differs from the situation above since the decretals *Parochiano tuo* and *In litteris* apply to the case, where someone dies absolved after a prior excommunication. The satisfaction he promises his confessor, so that his excommunication be lifted, may include the payment of a fine.

This satisfaction-promise constituted a third-party contract, on the basis of which beneficiaries could bring a claim against the heirs. It was a construction that kept canon law in line with Roman rule. But no such formal promise was necessary in deathbed confessions of those not excommunicated. Hence, the canonists used other constructions to explain why the decretals declared heirs liable. Most prominent was the argument that a contrite person must have wished to correct his wrongs, and therefore, tacitly ordered his heirs to complete his satisfaction. Is this construction sufficient to keep canon law in line with the Roman

¹³⁴ My translation. Panormitanus to X 3.28.14 (Venice 1570-1571) vol. 3, fol. 177v no. 6): 'aut simpliciter quis decessit sine excommunicatione et absolutione sequenti, et tunc forte possit procedere sententia Bartolis, intelligendo quod tunc agatur ex delicto. Sed si teneremus quod agatur tunc ex quasi contracto propter absolutionem praestitam non uideo quod posset tolerari. Sed ipse habet respectum ad communem opinionem canonistarum ut agatur ex delicto. Sed ego tenui'. See infra, note 135.

¹³⁵ See above, note 27.

intransmissibility of penal claims? Panormitanus' conclusion is again illuminating:¹³⁶

But I have always maintained, that there no difference between Canon and Roman law. For the decretals *Parochiano tuo*, *In litteris* and *A nobis* ponder that the decedent was contrite in view of death, and is assumed to have ordered his heirs to do satisfaction. If these requirements are not met, for instance, because he dies unconfessed, I do not see, that a delictual claim can be brought against heirs other than to the extent (of their enrichment as) in Roman law.

Here, Nicolaus de Tudeschis used a procedural subtlety: Canon law and Roman law are in concord, because the wrongdoer's heirs are not liable for a delictual claim. At the same time, they are liable 'ratione peccati' in a court of canon law because they sin if they obstruct the satisfaction their testator wished to perform, and disobey his order to complete his satisfaction.¹³⁷

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¹³⁶ My translation. Panormitanus to X 3.28.14 fol. 177v no. 6: 'Sed ego semper tenui, quod nulla in hoc sit differentia inter ius canonicum et ius ciuile. Nam istud capitulum (X 3.28.14) et c. *In litteris de rapt.* (X 5.17.5) et c. *A nobis* (X 5.39.28) ponderant quem fuisse contritum in morte, et uidetur tacite mandasse satisfactionem haeredibus, ubi enim ista cessarent, ut quia decessit sine confessione, non uideo quod possit agi contra haeredem ex delicto defuncti, nisi quatenus potest agi de iure ciuile'.

¹³⁷ See above, note 23 and 128

APPENDIX OF GLOSSES AND TEXTS

1. Ricardus Anglicus, s.v. *in morte penitentias dare* to 1 Comp. 5.14.5 Vatican City, BAV, Pal. 696, fol. 105va; Worcester, Cathedral Library, F. 122, fol. 79ra; Admont SB 22, fol. 76va, Bamberg, SB can. 19, fol. 69va: ‘Sed qualiter dabitur eucharistia ubi negatur penitentia? Item uitam adimit quisquis morienti penitentiam denegauerit, xxvi. q.vi. Agnouimus (C.26 q.6 c.13) ‘quemquem intus deus suscitauit, ecclesia’ reconciliare debet, ut xxvi. q.vi. Ecce (C.26 q.6 p.c.11). Resp. Hoc capitulo intelligitur de illis de quibus presumitur quod possint satisfacere si heredes rogare uoluerint, set quia de eorum facultate dubitatur ideo uiaticum non negatur, nec etiam penitentia, id est, peccatorum remissio, set negatur personis sollempnis reconciliatio ad uerecundiam heredum, ubi nichil eis anime deperit, nam cum uiderint ossa eius per campos sepelliri studebunt citius satisfacere rubore confecti. § Immo quod melius est reffert singula singulis, ergo quod dicit ‘penitentia’ refert ad eos qui in sanitate petunt penitentiam et nolunt satisfacere’. R<icardus>. ‘Immo—satisfacere’ om. W

s.v. *a peccato* to 1 Comp. 5.14.6: ‘di. xxxv. Qualis (D.25 c.4) contra. Solutio: ibi de his qui decedunt cum mortali peccato, hic de his qui decedunt cum contritione. Pena mortalis peccati nondum expleta uiuus pars superstes redimi potest per elemosinas’

2. Alanus, s.v. *penitentiae parum prodesse* to 1 Comp. 5.14.5 Paris, BNF 3932, fol. 63rb and Munich, BSB, Clm 3879, fol. 87vb: ‘Hoc quantum ad penam temporalem que pro peccato debetur. Pro omni enim peccato mortali duplex pena debetur: eterna et hec sola cordis contritione remittatur, ut de pen. di.i. in principio (De pen. D.1 c.1). xxvi. q.vi. Agnouimus (C.26 q.6 c.13), temporalis que exteriori satisfactione remittatur. que satisfactio, si in uita isti completa non fuit, in purgatorio suppletur, ut xxiii. q.v. Quid ergo (C.23 q.5 c.6). Dicit ergo quod parum ualet penitentia quantum ad penam purgatorii. Valet tamen quoad penam eternam’.

s.v. *liberari* to 1 Comp. 5.14.6 ‘Sed xxv. di. Qualis (D.25 c.4) contra. Solutio: a uenialibus et a temporali satisfactione pro mortali post mortem liberatur ut hic dicitur, a mortali autem uel a poena aeterna nequaquam. ut ibi’.

s.v. *sepeliri* to 1 Comp. 5.14.6: ‘Supra c. prox. (1 Comp. 5.14.5 [= X 5.17.2]) contra. Solutio: istius heredes pro isto satisfacere uoluerunt, pro illo nequaquam’.

s.v. *anathematis* to 1 Comp. 5.14.6 in fine: ‘Sed an ipso iure per canonem sit excommunicatus queritur? Non puto, arg. xxiii. q. ult. Pessimam (C.23 q.8 c.32), infra eod. prox. (1 Comp. 5.14.7) contrarium argumentum ex exemplo isto’.

3. Vincentius Hispanus, s.v. *absoluendum* to 3 Comp. 5.21.2 Vatican City, BAV, Vat.lat. 1378, fol. 105rb: ‘Si agitur contra personam uel de persona tantum, post mortem nichil requiritur (lege queratur), quia crimina morte extinguantur. xxiii. di. Quorumdam (D.23 c.14) et Cod. si accus. uel reus mort. l.i. (Cod. 9.6.1), nisi in casu ut hic. Si uero agitur contra bona uel contra personam et bona, post mortem agi potest. C. si pend. appel. mors inter. l. Quamuis. (Cod. 7.66.5). vinc<entius>’

4. Tancredus, s.v. *non est tradendum sepulturae* to 1 Comp. 2.20.41 Vatican city, BAV Borgh. 264 [=B] fol. 28va (first version), Vat.lat. 1377 [=V] fol. 69v; Rouen, BM 706 [=R] fol. 29va: ‘Et hic dominus papa respondet secundum consuetudinem anglicorum. Et hoc notauunt R(icardus) et Ala(nus) quibus tam quam Anglicis est credendum. . . . Ego credo quod hic dicitur locum habere quando defunctus fuit condempnatus in uita de furto, rapina uel usura, uel crimen eius erat notorium et noluit satisfacere in uita, et quod in contrariis dicitur optinet regulariter, hic autem casuale et locale. t<ancredus>’.

s.v. *parum prodest* to 1 Comp. 5.14.5 B fol. 65rb, V fol. 175; R fol. 71vb: ‘Hoc quantum ad penam temporalem que pro peccato debetur. Pro omni enim peccato mortali duplex pena debetur: eterna et hec sola cordis contritione remittatur, ut de pen. di.i. in principio (De pen. D.1 c.1). xxvi. q.vi. Agnouimus (C.26 q.6 c.13), temporalis que exteriori satisfactione remittatur. que satisfactio, si in uita isti completa non fuit, in purgatorio suppletur, ut xxiii. q.v. Quid ergo (C.23 q.5 c.6). Dicit ergo quod parum ualet penitentia quantum ad penam purgatorii. Valet tamen quoad penam eternam’.

s.v. *liberari* to 1 Comp. 5.14.6: ‘Sed xxv. di. Qualis (D.25 c.4) contra. Solutio: a uenialibus et a temporali satisfactione pro mortali post mortem liberatur ut hic dicitur, a mortali autem uel a poena aeterna nequaquam. ut ibi’;

s.v. *sepeliri* to 1 Comp. 5.14.6: ‘Supra c. prox. (1 Comp. 5.14.5 [= X 5.17.2]) contra. Solutio: istius heredes pro isto satisfacere uoluerunt, pro illo nequaquam’.

s.v. *compellas* to 1 Comp. 5.14.6 ‘Qualibet enim actio ad heredem transfunditur ut C. quando actiones ab heredibus et contra heredes (Cod. 4.11) et in delictis licet ad eum nihil peruenerit, arg. i. q.iiii. Item peccato, ibi maxime cum ex eo utilitas (C.1 q.4 § 3 d.p.c.11). La<urentius>’.

s.v. *sepultura* to 1 Comp. 5.14.7: ‘Isti denegatur ecclesiastica sepultura, licet absoluto et contrito. Supra eod. prox. (1Comp. 5.14.6 [X 5.17.5]) contra. Sed hinc non erant heredes qui satisfacerent, scilicet suspecti erant propter potentiam uel aliam causam quare non satisfacerunt, ibi secus. Sed quare denegatur ei sepultura . . . hoc ad terrorem statutum est et quia fuit in mora dum uiueret. lau<urentius>’

s.v. *nuncietis* to 2 Comp. 5.18.11 B fol. 106ra V fol. 87 R fol. 124rb: ‘Arg. quod sacrilegi ipso iure sunt excommunicati. Quod credo uerum esse de uiolatoribus ecclesiarum et combustoribus

earum et non de aliis, arg. xi. q.iii. Canonica (C.11 q.3 c.107) xvii. q.iv Omnes ecclesiae (C.17 q.4 c.5) sicut uiolenter manum iniectores in clericos uel conuersos. t<ancredus>’.

5. 1 Comp. 5.14.6 (X 5.17.5) JL 13855: ‘In literis tuis, *quas I. lator praesentium exhibuit*, continebatur, quod, quum H. multis fuisset criminibus irretitus, qui ecclesiarum incendium diabolo instigante commiserat, tandem in *ultima* aegritudine constitutus, se confessus est peccatorem, et, accepta poenitentia de commissis, per manum capellani sui fuit a sententia anathematis absolutus, sed moriens ecclesiasticam sepulturam habere nequirit. Quapropter, si ita res se habet, *fraternitati tuae per apostolica scripta praecipiendo* mandamus, ut corpus eiusdem *patris I. supra dicti* appellatione cessante facias in coemeterio sepeliri, et heredes eius moneas et compellas, ut his, quibus ille per incendium vel alio modo damna contra iustitiam irrogauerat, iuxta facultates suas condigne satisfaciant, ut sic a peccato valeat liberari’. Friedberg’s italics.

Ecclesiastical Liberty on the Eve of the Reformation

Kenneth Pennington

For the five centuries after Pope Gregory VII put ‘libertas ecclesiae’ in the center of the debates over the relationship of the Church to secular power and authority, much of the conflict within the Christian world revolved around one issue: what is the proper legal relationship between the ecclesiastical and secular institutions. The question that Gregory posed was ‘could laymen have any jurisdiction or authority within the Church?’¹ By the thirteenth century the focus had shifted from the big issue of ‘Church and State’ to the relationship between the clergy and the laity. The terminology also changed. ‘Libertas ecclesiastica’ replaced ‘libertas ecclesiae’ in the writings of medieval and early modern jurists .

The ramifications of this change have not yet been studied. I can make a few preliminary remarks about this intriguing development in terminology. Both terms can be traced back to the patristic age. Saint Hilary of Poitiers (Hilarius Pictaviensis) seems to have been the first to use ‘libertas ecclesiae’ in his commentary on the Psalms.² Pope Leo the Great was the first to write about ‘libertas ecclesiastica’ in a letter to Bishop Leo Anatolio about the difficulties in Alexandria at the time of the death of the Emperor Marcianus.³ ‘Libertas ecclesiae’ was, however, the preferred phrase in the early Middle Ages. In the twelfth century, the Father of Canon Law, Gratian, did not include any canons with the phrase ‘libertas ecclesiae’. He did include one canon with the phrase

¹ Brigitte Szabó-Bechstein, ‘Libertas ecclesiae vom 12. bis zur Mitte des 13. Jahrhunderts: Verbreitung und Wandel des Begriffs seit seiner Prägung durch Gregor VII.’ *Die Abendländische Freiheit vom 10. bis zum 14. Jahrhundert: Der Wirkungszusammenhang von Idee und Wirklichkeit im europäischen Vergleich*, ed. Johannes Fried (Vorträge und Forschungen 39; Sigmaringen 1991) 147-175.

² PL 9.333.

³ PL 54.1115.

‘*libertas ecclesiastica*’.⁴ ‘*Libertas ecclesiae*’ appears in only a handful of decretals included in the collections of canon law after Gratian.⁵ With his emphasis on papal monarchy and the importance of the Roman church, Pope Innocent III introduced ‘*libertas Romanae ecclesiae*’ into a decretal, and the phrase was repeated by popes Nicholas III and Boniface VIII in their decretals.⁶

If one judges only by the texts in the books of law that were taught in the schools and used in the courts, ‘*Libertas ecclesiastica*’ supplanted ‘*libertas ecclesiae*’ after the twelfth century. The decretal collections from Innocent III’s pontificate and after pullulate with ‘*libertas ecclesiastica*,’ although Raymond de Peñafort excised some of the passages containing the phrase in his editorial work on the *Decretals of Gregory IX*.⁷ Linguistic usages and evolutions over time may not be explainable but are intriguing.

Consequently, in the centuries before the Fifth Lateran Council ‘*libertas ecclesiastica*’ had become the touchstone defining the relationship between the clergy and the laity. Pope Innocent III embraced the term early in his pontificate. In 1198 Innocent’s curia rendered a decision, *Magnae devotionis*, that gave a different spin on the issue of ecclesiastical liberty.⁸ *Magnae devotionis* became a key text in canonical jurisprudence for establishing the pope’s prerogative to commute crusading vows. That papal right had nothing to do with ecclesiastical liberty. Although papal power became the decretal’s calling card, a bishop’s duty to defend the liberty of his church was just as significant. Garnerius, bishop of Troyes, had had a problem. His church was being afflicted by grave but unspecified difficulties that damaged the

⁴ D.25 c.1; the ‘*correctores Romanae*’ changed ‘*ecclesiastica*’ to ‘*ecclesia*’ for reasons that are not clear.

⁵ X 2.27.20 (1199) but in the ‘*partes decisae*’ of Raymond de Peñafort and consequently unknown to later canonists and VI 5.11.7, in Friedberg’s footnote.

⁶ X 5.33.12, VI 1.6.17, 5.7.10, 5.12.2.

⁷ The decretals that Raymond shortened and cut out ‘*libertas ecclesiastica*’ are: X 2.1.21, 2.28.25; it was also cut from VI 1.8.2. Raymond cut ‘*libertas ecclesiae*’ from X 2.27.20.

⁸ 3 Comp. 3.26.2. (X 3.34.7) (1198).

ecclesiastical liberty of his church. He decided that Henry II of Champagne, recently elected the king of Jerusalem, was, as his temporal lord, the only person to whom he could turn. He and some of his clerics made a remarkable decision. They took a vow of pilgrimage to go to the Holy Land and implore Henry to help protect the church at Troyes. When he reached Piacenza, Garnerius learned that Henry had died. The main purpose of the pilgrimage disappeared. Garnerius asked Innocent III to commute their vows.⁹ After much complicated argumentation that would live on in the jurisprudence governing vows and other decisions by corporations, Innocent granted Garnerius and his clerics a commutation of their vows.¹⁰ Innocent never detailed which rights of the church of Troyes were being threatened nor how they were endangered nor by whom. Nevertheless, the decretal remained a key text that obligated bishops to petition secular rulers to protect diocesan ecclesiastical liberties and rights for centuries.¹¹

At the end of his pontificate, Innocent and the Fourth Lateran Council promulgated two canons whose contents were based on the principle of ecclesiastical liberty. In *Sicut volumus*, canon 42, he established that laymen should not usurp clerical jurisdiction and clerics should respect lay rights.¹² In canon 44, *Cum laicis*,

⁹ Henry died September 10, 1197. He had participated in the Third Crusade.

¹⁰ James A. Brundage, *Medieval Canon Law and the Crusader* (Madison-Milwaukee-London 1969) 78-81, 118. Innocent's 'deceat, licet, expedit' that he most likely borrowed from Bernard of Clairvaux, *De consideratione* 3.4.15, became a touchstone for making decisions and its principles were carried over into many other areas of law; see e.g. Brian Tierney, 'Hostiensis and Collegiality', *Proceedings Toronto 1972* 401-409 at 405 citing Hostiensis to X 3.10.4 or Antonio Augustin, *Opera omnia* (Vol. 2; Lucca 1766) 446 to his commentary on Justinian's 'De regulis iuris' 186 (*recte* 144).

¹¹ E.g. Emanuele González Téllez, *Commentaria perpetua* (Venice 1766) to X 3.34.7 fol. 431: 'ex causa episcopum votum emisisse . . . ut de libertate ecclesiae Trecensis ageret cum comite Campaniae'.

¹² Antonio García y García, ed. *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum* (MIC Series A: Corpus Glossatorum 2; Città del Vaticano 1981) 82-83. Canon 42 was not accepted into the body of canon law: 'Quod circa universis clericis interdiciamus ne quis pretextu ecclesiastice libertatis suam de cetero iurisdictionem extendat in preiudicium iusticie secularis'.

Innocent proclaimed a fundamental principle of ecclesiastical liberty: the property of churches could not be alienated by laymen. Fiefs possessed by a church or all other ecclesiastical properties were immune from lay power.¹³

The old issue of immunity of clerics from lay judicial power also raised the theme of ecclesiastical liberty. A decretal of Pope Honorius III dealt with Hildebrand, bishop of Fiesole, who had been condemned and banned from Florence by a Florentine court even though the court had not followed the strict rules of judicial procedure when it summoned witnesses outside of the courtroom.¹⁴ For that violation of judicial procedure, Honorius revoked the secular court's decision and fined Florence 1000 pounds for damaging ecclesiastical liberty.¹⁵ As Bernardus Parmensis pointed out in his *Ordinary Gloss* a secular judge may not burden a cleric 'with his law' and must therefore be considered to have committed a sacrilege and violated ecclesiastical liberty. Because of his sacrilege he had been condemned to a monetary fine.¹⁶ Although the facts of the case were complicated, the principle was clear: secular rulers and courts had no jurisdiction over clerics.

Pope Gregory IX rendered a decision that laymen were forbidden to participate in elections held in collegiate churches. Gregory declared that even if a lay patron, the prelate, and the chapter of the church agreed that the patron could elect a member of the chapter, that agreement was not valid. A layman should not possess the right of election because it would be a pernicious

¹³ 4 Comp. 3.5.1 (X 3.13.12). See also Maria Pia Alberzoni, 'Innocenzo III e la difesa della "libertas ecclesiastica" nei comuni dell'Italia settentrionale', *Innocenzo III: Urbs et orbis: Atti del congresso internazionale*, ed. Andrea Sommerlechner (2 vols. Nuovi studi storici 55; Rome 2003) 2.837-928, at 838-839.

¹⁴ 5 Comp. 5.11.1 (X 5.36.7).

¹⁵ At the Council of Vienne Pope Clement V again condemned the practice of subjecting clergy to the ban in secular courts, Clem. 5.8.1. See Peter R. Pazzaglini, *The Criminal Ban of the Sienese Commune 1225-1310* (Quaderni di 'Studi senesi' 45; Milan 1979) and Christian Zendri, *Banniti nostri temporis: Studi su bando e consuetudine nel diritto comune* (Collana della Facoltà di Giurisprudenza dell'Università degli Studi di Trento 9; Napoli 2016).

¹⁶ Bernardus Parmensis, *Ordinary Gloss* to X 5.36.7 s.v. *banniuerit*.

example and a loss of ecclesiastical liberty.¹⁷ Previous canon law gave a patron the right to select a cleric in a church in which he had a right of election (*ius eligendi*). Later canonists explained this contradiction by distinguishing between the right to present a candidate and the right to elect.¹⁸

A significant piece of legislation governing ecclesiastical liberty in the *Corpus iuris canonici* was a mandate of Pope Nicholas III in 1280 that he promulgated as a general constitution to the entire church. It was later included in Boniface VIII's *Liber sextus*.¹⁹ At issue was the common practice of swearing oaths to uphold the statutes and customs in both the ecclesiastical and secular polities by clerics and secular magistrates. Nicholas warned them both that when they take such oaths they should always swear that they except all things that are 'illicit, impossible, or contrary to ecclesiastical liberty'.²⁰ Johannes Andreae made two points when he discussed the decretal. First the magistrates in charge of promulgating statutes (*statutarii*) who publish statutes contrary to ecclesiastical liberty will be excommunicated if they do not delete the offending statutes within two months,²¹ and second, the jurisprudence of the *Ius commune* should regulate all oaths.²² That jurisprudence clearly established that oaths cannot bind those who do not know that what they swear to is contrary to

¹⁷ X 1.6.51 (ca. 1227-1234).

¹⁸ See the *Ordinary Gloss* on X 1.6.51 s.v. *in laicum* and, much later, Emanuele Gonzalez Tellez, *Commentaria* (Venice 1766) vol. 1, pp. 224-225. On 'Ius patronatus' see the fundamental work of Peter Landau, *Ius patronatus: Studien zur Entwicklung des Patronats im Dekretalenrecht und der Kanonistik des 12. und 13. Jahrhunderts* (Köln-Wien 1975).

¹⁹ VI 2.11.1, *Contingit in nonnullis ecclesiis*, which was printed from an original bull sent to Lübeck, *Codex diplomaticus lubecensis*, ed. Wilhelm Leverkus (2 vols. Oldenburg 1856) 1.267-268.

²⁰ *Ibid.* 267 'qualitercumque et sub quacumque uerborum forma prestita uel prestanda ad licita possibilis et libertati ecclesiastice non obuiantia tantum extendi'.

²¹ Johannes Andreae, *Ordinary Gloss* (Venice 1476) to VI 2.11.1 s.v. *libertati*.

²² *Ibid.* s.v. *Declaramus*: 'Posito tamen quod in genere iuret: fit tamen secundum ius commune interpretatio iuramenti, et probatur hoc satis per decretalem supra eodem Ad nostrum iii. (X 2.24.21) et supra de verb. sign. Super quibusdam (X 5.40.26)'.

law.²³ Guido de Baysio summed up what constituted ‘*libertas ecclesiastica*’ in a gloss to the same decretal with a quotation taken from Pope Innocent IV:²⁴

Ecclesiastical liberty is contained in privileges in spiritualities and in privileges in temporalities. Again it is found in general privileges granted to the church and in each privilege granted to individual churches.

Innocent had listed a number of ecclesiastical liberties in his commentary on the *Decretals of Gregory IX*: especially the church’s freedom to collect tithes, first fruits, and offerings. He repeated the well-established principle that only the clergy can exercise authority over the church, and forbade violence against clerics. Innocent noted that ecclesiastical liberty permitted the clergy to make testaments with only two witnesses.²⁵

Another striking instance of papal legislation occurred in a decretal included in the *Liber sextus*. Pope Boniface VIII warned all lay lords that they should never forbid their subjects from selling to or buying goods from clerics or ecclesiastical persons. If they presumed to do so, they would damage ecclesiastical liberty and would be punished with excommunication.²⁶ Johannes Andreae pointed out this is an unusual infringement of ecclesiastical liberty but can be explained by understanding that the decretal forbade indirect fraud between persons. He gave the example that if one prohibited the transport of material for repairing a road, one prohibited the repair and indirectly the right to repair.²⁷ He noted that the Italian city states often promulgated

²³ Ibid. ‘aut nesciebat <statuta illicita> nec id in mente gerebat. Et tunc non peccavit et solum ad licita obligatur’.

²⁴ Guido de Baysio, *Apparatus ad Sextum* (Milan 1490) to VI 2.11.1 s.v. *ecclesiastice libertati*: ‘quod ecclesiastica libertas consistit in privilegiis super spiritualibus et in privilegiis super temporalibus. Item consistit in privilegiis generalibus ecclesie concessis et in privilegiis singularibus concessis cuique ecclesie quod prosequere, ut plene notatur Innocentius in predicto capitulo Noverit (X 5.39.49)’.

²⁵ Innocent IV, *Commentaria* (Venice 1495) to X 5.39.49 s.v. *libertatem*.

²⁶ VI 3.23.5.

²⁷ Johannes Andreae, *Ordinary Gloss* (Venice 1476) to VI 3.23.5 s.v. *libertatis*, the repairing of a road example is given in an addition to his text in his *Ordinary Gloss* (Basel: 1500); see my essay ‘Johannes Andreae’s Additiones to the

statutes that restricted the buying or donating of goods that were given to ecclesiastical institutions.

‘*Libertas ecclesiastica*’ also attracted the attention of jurists outside the *Corpus iuris canonici*. The earliest treatise on ‘*libertas ecclesiastica*’ that I have found was written by a Portuguese jurist, Egas, a canon of the cathedral of Viseu who became its bishop in 1288 and died in 1313.²⁸ His tract did not circulate widely. It is preserved in five Iberian manuscripts.²⁹ He probably wrote it ca. 1300.³⁰

Because we talk about ecclesiastical liberty frequently, let’s see what it is and how we can define it and what the penalties are for those who violate it. Ecclesiastical liberty is the immunity of ecclesiastical persons, places and property established by the holy fathers and the Catholic princes. This definition has been established by the Fourth Lateran Council’s canon *Cum laicis* (c.44 = X 3.13.12).

Egas was most concerned about violence against clergy as attacking a fundamental ecclesiastical liberty. A text from the Second Lateran Council (1139) that Gratian included in his *Decretum* laid down the norm: if a person attacked a cleric he was *ipso facto* excommunicated. Only the pope could absolve the perpetrator.³¹ Egas added a number of reasons, people, and

Decretals of Gregory IX’, ZRG Kan. Abt. 74 (1988) 328-347 at 346-347; Johannes expanded his commentary on this decretal in his *Novella in Sextum* (Lyon: 1550) fol. 99rab, where he noted Italian legislation: ‘Sepe in Italia interdicitur per statuta civitatum vel dominorum ne quis vendat vel donet rem immobilem alicui non existenti de iurisdictione statuentium vel non subeunti onera communium vel dominorum, et irritant venditionem et donationem, et infligunt penam ante, scilicet. includantur venditiones vel donationes in ecclesiam’.

²⁸ Antonio García y García, *Estudios sobre la canonística portuguesa medieval* (Monografías 29; Madrid 1976) 126-127.

²⁹ *Ibid.* 249-255.

³⁰ *Ibid.* 257. See also Paulette L. Pepin, ‘The Council of Peñafiel 1302: The Castilian Church’s Reassertion of its *libertas ecclesiastica*’, *On the Social Origins of Medieval Institutions: Essays in Honor of Joseph F. O’Callaghan*, ed. Donald J. Kagay (The Medieval Mediterranean 19; Leiden-Boston 1998) 243-262, who gives some context to the Iberian situation that Egas was addressing.

³¹ Richard H. Helmholz, “‘Si quis suadente’ (C.17 q.4 c.29): Theory and practice’, ed. Peter Linehan *Proceedings Cambridge 1984* 426-438, discusses

grounds not covered explicitly by the canon for imposing a ban of excommunication on violators of all sorts: If a person could have defended a cleric and did not. The person who ordered attack. People who kicked, poured water, or tore the clothing of clerics. If someone locked clerics in their home and would not let them out.³²

Egas added many other cases when ecclesiastical liberty was violated. Many of his examples were drawn from the decretals that we have just discussed. He added a few interesting cases. If men violated a female cleric who wore a habit, they and any other participants in the crime will have their goods confiscated. The goods will be bestowed on the monastery of the victim.³³ Further, perpetrators will be condemned to death. He also laid down the norms governing sanctuary, which had become a principle of ecclesiastical liberty. Churches, monasteries, and their cemeteries could provide immunity to free persons or slaves if they fear death or torture. They cannot be taken from these places unless they were public and well-known criminals.³⁴

There seems to have been a hiatus between Egas' monograph and the tracts of jurists who began to explore 'libertas ecclesiastica' intensively during the last quarter of the fifteenth century. This monographic literature burgeoned into a substantial series of texts that defended clerics and churches from secular authorities until well into the eighteenth century.³⁵ The first

the first comprehensive canon on lay violence against the clergy at the Second Lateran Council, c.15 in modern editions.

³² García y García, *Estudios* 258-259.

³³ *Ibid.* 262.

³⁴ *Ibid.* 268. See Karl Blaine Shoemaker, *Sanctuary and Crime in the Middle Ages: 400-1500* (Just Ideas: Transformative Ideals of Justice in Ethical and Political Thought (New York 2011) and William Chester Jordan, 'A Fresh Look at Medieval Sanctuary', *Law and the Illicit in Medieval Europe* edd. Ruth Mazo Karras, Joel B. Kaye, Ann Matter (The Middle Ages; Philadelphia 2008) 1-6.

³⁵ Perhaps one of the most important of these texts was Alessandro Ambrosini's (ca. 1608), who wrote a detailed commentary on a decretal of Pope Gregory XIV, *Commentaria in bullam Gregorii XIV De immunitate et libertate ecclesiastica* (Parma 1608, reprinted in 1612 and 1621). I have not found any literature on Ambrosini even though he also published cases that were heard in the episcopal court of Perugia, *Decisiones fori episcopalis perusini* (Venice 1610).

printed tract on ‘*Libertas ecclesiastica*’ was probably written by Heinrich Urdemann (ca. 1420-†1485) in the form of a dialogue between Hugo, Cato, and Oliverius.³⁶ It was printed for the first time in 1477 and seems to have become a popular tract since it was reprinted in 1478, 1479, 1482-1483, 1484-1488. Urdemann constructed a debate about ecclesiastical privileges that had been given to institutions in the small Belgian town of Tienen.

Nicholas (†1480), bishop of Modruš in Croatia a few years later wrote a tract he entitled *Defensio libertatis ecclesiasticae*.³⁷ Nicholas dedicated the tract to Cardinal Raffaello Riario and wrote it circa 1479.³⁸ Later he willed his library to Pope Sixtus IV (1471-1484).³⁹ In his tract Nicholas deplored the mistreatment of ecclesiastical prelates and praised popes who had fought (decertare) for ecclesiastical possessions, and especially Sixtus’s deeds and his war against the Turks.⁴⁰ He concluded his treatise with a section filled with fulsome praise for Sixtus’ pontificate.⁴¹

Why was ecclesiastical liberty an important theme at the Fifth Lateran Council when earlier councils between Lateran IV and Lateran V had ignored the issue? An easy explanation of these changes would be the turmoil and anxieties about schism and heresies at the dawn of the Reformation. However, as Johannes Andreae noted, Catholic princes and governments could be just as troublesome for the Church as entrenched dissenters. Certainly, religious dissent in the early sixteenth century helped to shape the agenda at the Fifth Lateran Council. However, Catholic lay resistance to ecclesiastical authority had been prevalent in the

³⁶Hubert Höing, ‘Dr. jur. Heinrich Urdemann (ca. 1420-1485: Kuriensprokurator, Offizial, Stiftsdechant und kaiserlicher Rat: Zur Karriere eines voreformatorischen Klerikers in Bocholt, Köln und Rom’, *Annalen des Historischen Vereins für den Niederrhein* 218 (2015) 105-150.

³⁷ Giovanni Mercati, ‘Notizie varie sopra Niccolò Modrussiese’, *Opere minori*, 4: 1917-1936 (Studi e testi 79; Città del Vaticano 1937) 205-267.

³⁸Ibid. 207, 211 My thanks to Professor Antonin Kalous, University of Olomouc for drawing my attention to this tract and giving me his notes on Vat. lat. 8092, fol.1r-68r.

³⁹ Mercati, ‘Notizie’ 208-212; see Egmont Lee, *Sixtus IV and Men of Letters* (Temi e testi 26; Roma 1978) 115, 195.

⁴⁰ Vat. lat. 8092, fol. 2r-5r, 14v.

⁴¹ Ibid. fol. 65r-68r

fifteenth century. Several fifteenth-century councils legislated against Catholic infringements of ecclesiastical liberties.⁴² Even so, as one wades through the canons and text of previous councils and the texts of canon law one could not foresee the vigorous emergence of the theme of ecclesiastical liberty at the Fifth Lateran Council.

The *Pragmatic Sanction of Bourges* was certainly one of the reasons, perhaps the primary reason, that was responsible for ‘ecclesiastica libertas’ becoming a prominent issue at Lateran V. A council of French clergy in Bourges gathered with the purpose of reforming the French church. The prelates and clergy drew upon the canons promulgated at the Council of Basel (1431-1438) as a source for their reforms. King Charles VII of France was pleased with the results and incorporated their decisions into a royal ordinance on July 7, 1438 that was entitled the *Pragmatic Sanction of Bourges*. When Pope Julius II summoned the Church to a council at the Lateran one of his primary preoccupations was the Pragmatic Sanction and its damage to ecclesiastical liberties.

Julius’ distaste for the *Pragmatic Sanction* is palpable in the letter, *Saluti gregis*, that he addressed to the Council’s fourth session on the 10th of December 1512.⁴³ The king’s use of the term, ‘pragmatica sanctio,’ was a poke in the papal eye. The terminology evolved in late Roman law and defined a law that was issued to a public, not private, group or institution; in this case the ordinance was promulgated for the Kingdom of France.⁴⁴ Julius complained that for a long time French prelates and noble laymen had infringed on the liberty and authority of the pope, the Roman church, and the sacred canons because of the *Pragmatic Sanction*. Although King Louis XI had revoked it, Julius did not consider the royal revocation enough because it had not been confirmed by French parlements. The pope posted his summons to the French

⁴² Council of Angers 1448 (secular legislation), Mansi 32.89-90; Council of Toledo (transitus [travel] and ecclesiastical property) 1471, Mansi 32.398-400; Council of Senones 1485 (rights), Mansi 32.409; Council of Magdeburg 1489 (protection from secular authorities), Mansi 32.458, 473.

⁴³ Fifth Lateran’s proceedings are edited by Nelson H. Minnich, ‘Concilium lateranense V 1512-1517’, COGD 2.2.1317-1455 at 1349-1351.

⁴⁴ Justinian, *Codex* 1.23.7.2 and passim.

and his condemnation of the ordinance on the doors of the churches in Milan, Asti, and Pavia, because, as he explained, France was too dangerous for representatives of the pope.⁴⁵

Four years later Pope Leo X returned to the issue of the *Pragmatic Sanction* on December 19, 1516 at the eleventh session of the Council.⁴⁶ In *Pastor aeternus* Leo repeated Julius' condemnation and railed again against the ordinance's violation of ecclesiastical liberty. His letter then took another turn. Leo admitted that the summons posted on the doors of three Italian churches were not adequate legally. He had probably been told by his curial jurists that Julius' summons did not conform to the norms of canonical jurisprudence. A summons, the canonists had agreed for three centuries, could not be omitted under any circumstances because it was required by natural law. Leo explained that the prelates, clergy, monasteries, and chapters claimed various impediments that prevented their obedience. Leo and his jurists knew that their claims could not be ignored. Canonical jurisprudence forbade it. Leo claimed that after Julius' death the summons to the French were 'legitimately' repeated but gave no proof that they now conformed to canonical norms.⁴⁷ Nonetheless, he annulled the *Pragmatic Sanction*. He noted that no council had been legitimately held in the seventy years since the *Sanction* had been promulgated. Consequently, the Fifth Lateran Council was the first opportunity the Church had to abrogate the decree. He based his authority to abrogate the *Sanction* on Pope Boniface VIII's decretal *Unam sanctam*.⁴⁸ He tempered his claim with the same caveat that the French Pope Clement V used to placate King Philip the Fair in 1306, a decretal with the incipit *Meruit carissimi filii*.⁴⁹ Clement had assured Philip that *Unam sanctam* did not prejudice the relationship of the Kingdom of France to the Roman church. The relationship between the kingdom and Rome would remain the same as it had

⁴⁵ COGD 2.2.1349-1351 lines 625-631, 654-658.

⁴⁶ COGD 2.2.1434-1442.

⁴⁷ COGD 2.2.1436, lines 3503-3504: 'citatio legitime executi'.

⁴⁸ *Extravagantes communes* 1.8.1.

⁴⁹ *Extravagantes communes* 5.7.2.

been before *Unam sanctam*. Leo made the same promise. What did Clement's and now Leo's promise mean in the sixteenth century? We will never know because no canonist ever glossed *Meruit*. In any case, the Fifth Lateran Council was the first and the last council to cite Boniface's controversial decretal.

Leo closed his letter with a list of people and offices who would be subject to a major excommunication if they respected or adhered to the terms of the *Pragmatic Sanction* directly or indirectly. Ecclesiastical liberty was preserved. As Minnich's new edition of the Council's proceedings illustrates, Leo simultaneously issued the *Concordat of Bologna* to define the relationship between the papacy and France.⁵⁰ At the end of his letter on the *Concordat*, Leo concluded that if there were any customs, statutes, or practices in the Kingdom of France that infringed upon ecclesiastical liberty, this agreement did not approve them.⁵¹

In session nine that was held on May 5, 1514, Pope Leo dealt with another important issue: the safety of ecclesiastics and others who travelled to the Council. The legal concept, safe conduct (*salvusconductus*) and freedom of passage seems to have been born in the customary law of Northern Europe and did not enter the *Ius commune* until the late fourteenth century. The term, *salvusconductus* did not exist in earlier Roman and canon law.⁵² The idea that all human beings should have the right to travel to any place they wished to go was very old.⁵³ However, it had not been an issue for those who had been summoned to church councils or to secular representative assemblies. The Church had long struggled with lay princes who detained, captured, or

⁵⁰ COGD 12.2.408-1434.

⁵¹ COGD 2.2.1429, lines 3264-3269.

⁵² In a decretal of Pope Innocent III in 1205, the same concept is expressed as 'securus conductus', 3 Comp. 2.3.4 (X 2.6.4).

⁵³ See Pennington, 'Sovereignty and Rights in Medieval and Early Modern Jurisprudence: Law and Norms without a State', *Roman Law as Formative of Modern Legal Systems: Studies in Honour of Wiesław Litewski*. Edd. J. Sondel, J. Reszczyński, and P. Ściślicki. (2 Volumes. Kraków 2003) 2.25-36 at 29-32.

imprisoned papal legates travelling in their territories.⁵⁴ In spite of these occasional difficulties, the idea of granting papal legates, bishops, or clerics a right of safe conduct seems never to have arisen. The issue of safe passages at Constance and Basel was not to protect ecclesiastical liberty but was a legal solution for bringing religious dissenters to the councils. Canonical norms dictated that they could not, as we have seen, be judged in absentia. The Emperor Sigismund gave John Hus a vaguely worded safe conduct for the Council of Constance.⁵⁵ The Council of Basel gave safe conduct passes in their decrees to representatives from Bohemia and Constantinople to attend its sessions.⁵⁶ Rather than being examples of ecclesiastical liberty, Constance and Basel were attempts to conform conciliar actions and proceedings to the strict norms of canonical procedure. Their cases could not be heard and decisions could not be rendered at the council without their presence.

The development of 'salvusconductus' seems to be an example of practice preceding theory. If we can trust the sources it was an important royal instrument from the twelfth century on in Northern Europe. A very early example of a safe conduct being given dates to 1189. Roger of Hoveden reported that Philip of Flanders granted King Richard of England a safe conduct to Calais.⁵⁷ The records of the Tower of London record many safe conducts granted for various reasons in the early fourteenth century. The earliest is dated 1311.⁵⁸ John, the abbot of Cluny,

⁵⁴ Papal legates constantly faced secular violence in the period from 1000-1500, e.g. Trevor Dean, 'Rise of the signori', *The New Cambridge Medieval History, c.1198- c.1300*, ed. David Abulafia (Volume 5; Cambridge 1999) 459-460 and in other essays of the volume pp. 136, 387, 392.

⁵⁵ Thomas A. Fudge, *The Trial of Jan Hus: Medieval Heresy and Criminal Procedure* (Oxford 2013) 260, with the literature he cites.

⁵⁶ CODG 2.2778-782, 981-986.

⁵⁷ *Chronica Magistri Roger de Houedene*, ed. William Stubbs (3 vols. Cambridge 2012) 3.28; see also 215, 244.

⁵⁸ *Rotuli scotiae in turri londinensi et in domo capitulari westmonasteriensi asservari, 1: Temporibus regum Angliae Edwardi I. Edwardi II. Edwardi III.* (London: 1814) 108, 120, 125, 127, and passim. The 'rotuli' records numerous examples from 1215 to the reign of King Henry V († 1422), see *Mémoires de*

asked for a 'salvus conductus' for his monks who were to negotiate a contract with Sir Gilbert Talbot in Calais 1392. He asked that Talbot petition a safe conduct from King Richard II or from the governor of Calais.⁵⁹ Baldus de Ubaldis (†1400) is the earliest jurist known to me who used 'salvusconductus' in the legal literature of the *Ius commune* before Constance. In an undated consilium Baldus wrote about a case in which the city of Asti had issued a safe conduct to Thomas and Manfredus that they could enter the city with an armed retinue. Later Manfredus sent his wife into the city with another armed band of retainers. She was arrested and her followers' weapons and goods confiscated. Baldus wrote a consilium in the wife's defense and concluded that a safe conduct covered the wife citing primarily Roman law principles.⁶⁰ Baldus' conclusion that a safe conduct covered wives was expanded in Lateran V's decree to include all members of a traveler's household.⁶¹ If Asti was issuing safe conducts, other Italian cities also were. In any case these documents and Baldus' consilium is evidence that the legal instrument for protecting litigants was fairly commonplace by 1400.

The safe conduct that Pope Leo mandated in session nine at the Fifth Lateran opened a completely new legal issue. The safe conduct was no longer only a protection provided to litigants or travelers who could be arrested or imprisoned without one, it was also a benefit or a grace bestowed by the prince on his subjects. The Council of Trent granted safe conducts to German Protestants who wished to attend the Council.⁶² These safe conducts were not the same general grants of privilege that Lateran V had inaugurated. Later criminal jurists concentrated on defining safe

la Société des Antiquaires de la Normandie (2nd Series, 5th vol. Paris 1846) 157, 216-234 and passim.

⁵⁹ *Charters and Records among the Archives of the Ancient Abbe of Cluni* (sic), from 1077 to 1534, ed. G.F. Duckett (sine loco 1888) volume 1.135-136.

⁶⁰ BAV Barberini lat. 1406, fol. 5r-5v; printed in volume one of his consilia (Milan 1494) number 109 (unfoliated).

⁶¹ Prospero Farinacci, *Fragmentorū variorū quaestionum et communium opinionum criminalium pars secunda* (Nürnberg ca. 1690) 90 number 607.

⁶² Council of Trent, Session 15, January 25, 1552 and Session 18, February 26, 1562.

conducts almost entirely as a part of criminal proceedings, especially connected to a summons to attend a trial.⁶³ However, the safe conduct as a protection for legates, ambassadors, and travelers gradually evolved into diplomatic immunity that is a key element of international law today.⁶⁴ Lateran V can take some credit for playing a part in that development.

In session nine, the problem of lay violence against the clergy was again broached. As we have seen, the Church had struggled with lay violence against clergy and against ecclesiastical property for centuries.⁶⁵ It had been a key issue for ecclesiastical liberty since the twelfth century. During the Second Lateran Council of 1139 Pope Innocent II (1130-1143) promulgated *Si quis suadente* that was immediately incorporated into the last recension of Gratian's *Decretum*.⁶⁶ Johannes Teutonicus, who wrote the *Ordinary Gloss* to the canon (ca. 1217), compiled a laundry list of exceptions to the norm that a layman could not attack a cleric. Self-defense was the most important. A layman could always justly defend himself against an attack by a cleric. A layman could attack a cleric if he found his wife, mother, sister or daughter in bed with a cleric. In those and other cases Johannes thought a layman could strike a cleric with impunity.⁶⁷ Later jurists posed even more subtle questions. At the end of the thirteenth century Guido de Baysio asked if a layman should be excommunicated if

⁶³ The literature is extensive. See e.g. Marcantonio Savelli, *Summa diversorum tractatum* (4 vols. Venice 1715) 4.73-76; Jacobus Menochius, *De arbitrariis iudicium, quaestionibus et causis* (Cologne 1630) 612-617 (consilia 436-437)

⁶⁴ See Albericus Gentilis, *De iure belli libri tres*, ed. Thomas Erskine Holland (Oxford 1877) 185-192 and Willem van der Meulen's extensive commentary on Grotius, Hugo Grotius, *De iure belli ac pacis libri tres* (Amsterdam 1704) 3.14, p.271; Montell Ogdon, 'The Growth of Purpose in the Law of Diplomatic Immunity', *American Journal of International Law* 31 (1937) 449-465; for a general history of the subject see Marsha L. Frey and Linda Frey, *The History of Diplomatic Immunity* (Columbus 1999). The legal background and sources of diplomatic immunity have not yet been studied.

⁶⁵ Richard H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (The Oxford History of the Laws of England, 1; Oxford 2004) 505-508 and his earlier study cited above.

⁶⁶ Second Lateran c.15 = C.17 q.4 c.29.

⁶⁷ Johannes Teutonicus to C.17 q.4 c.29 s.v. *violentas manus*.

he seized a cleric's horse to escape his enemies by violently throwing him off it. Tancred of Bologna had thought the layman should be excommunicated, but his penalty should be milder and no penance should be imposed on him. Guido argued the layman had acted according to the law. He was under duress and in times of necessity all things were held in common.⁶⁸

By the beginning of the sixteenth century clerical immunity from lay violence was embedded deeply in the jurisprudence of the *Ius commune*. The Fifth Lateran canon, *Supernae dispositionis arbitrio* expanded clerical immunity and ecclesiastical liberty.⁶⁹ It renewed Pope Boniface VIII's decretal *Felicis recordationis* that dealt with violence against the cardinals and endorsed Pope Clement V's decretal, *Si quis suadente diabolo*, whose incipit echoed the beginning of the Second Lateran Council's canon, and which focused on violence against bishops.⁷⁰ From a legal point of view, renewing these two older decretals was redundant. They had attracted extensive commentaries and had been long included in the *Corpus iuris canonici*. Leo emphasized that he wished to renovate all the papal decretals that had been issued in favor of ecclesiastical liberty.⁷¹ He especially mentioned *In coena Domini* as being important for punishing the violators of ecclesiastical liberties.⁷²

It may have been Leo's primary purpose to insert *In coena Domini* into conciliar legislation. The bull was a cornucopia of ecclesiastical liberties and privileges that had the protection of the pope. First published by Pope Urban V in 1363, it was republished by Gregory XI (1372), Martin V (1420), and by Julius II just

⁶⁸ Guido de Baysio, *Rosarium* (Venice 1480) to C.17 q.4 c.29 unfoliated: 'Si quis nam necessitatis tempore debent omnia esse communia, xlvii. di. Sicut hi (c.8). preterea iste fecit ob tutelam corporis sui, ergo videtur iure fecisse. Ergo non dicitur fecisse diabolo suadente'. On the concept of 'communis omnium possessio', see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Emory University Studies in Law and Religion. Atlanta, Georgia 1997) 69-76.

⁶⁹ COGD 2.2.1389-1390.

⁷⁰ VI 5.9.5 and Clementines 5.8.1.

⁷¹ COGD 2.2.1389, line 1999.

⁷² *Ibid.* line 2001.

before he opened the Fifth Lateran Council. Although it had been published regularly by previous popes, the decree had never been incorporated into canon law. Pope Leo must have wanted its provisions to be a part of papal conciliar legislation. Besides renewing *Felicis recordationis* and *Si quis suadente*, the Fifth Lateran's canon also contained other ecclesiastical privileges. Secular authorities were forbidden to impose financial burdens on prelates and clerics and should not receive any contributions even if the clergy consented to the payment. If prelates consent to these financial payments they will be excommunicated and removed from office. Henceforth they were rendered incapable of any legal act and could not make a will.

A few years later Leo promulgated his version of *In coena Domini* in 1517. His list of ecclesiastical liberties for the clergy and prelates was extensive. He excommunicated those who impeded food destined for Rome and the Roman Curia and those who robbed, detained, abused, mutilated, or killed persons' exercising their offices in the Curia. Those persons who mutilated, wounded, killed, captured or detained patriarchs, archbishops, bishops were also excommunicated. He also excommunicated those who abused, mutilated, killed, or despoiled ecclesiastical or secular persons who had come to the Roman Curia to prosecute their cases. Their advocates, procurators, judges, or their delegates were also taken under the protection of the bull. The same protection was given to pilgrims who came to Rome. Like Lateran II's provision, these excommunications could only be lifted by the pope.⁷³ Leo's bull repeated previous provisions of *In coena Domini*, but he clearly intended that the bull should circulate widely. The printing press was an effective vehicle. For the first time in the history of this papal bull, Pope Leo had it printed in Rome during April of 1517.⁷⁴ The reissuing of *In coena Domini* continued until Pope Clement XIV stopped reaffirming its publication in 1770 because of opposition from Catholics and Protestants.

⁷³ Ibid. [pp.2-4] unpaginated.

⁷⁴ *Bulla in cena Domini* (Rome apud Iacobum Mazochium M.D.XVII. Die ix. Aprilis).

In the tenth session on May 4, 1515, the Council dealt with the issues of ecclesiastical exemptions for individuals and institutions, especially the exemptions from episcopal jurisdiction over monastic foundations and clerical crimes.⁷⁵ Bernard de' Rossi, bishop of Treviso, stepped up to the pulpit and read Leo's canon, *Regimini universalis ecclesiae*.⁷⁶ The letter was a very mixed message about ecclesiastical liberty. Bernard declared that the pope had discovered many reports of canons' having made claims of exemptions in various churches, secular and regular, from episcopal jurisdiction. Under the cloak of immunity from episcopal jurisdiction, clerics had, however, committed crimes because they did not fear episcopal discipline. Their crimes created scandal. These criminal clerics who had papal exemptions should be punished by delegated authorities, but if these papal delegates neglected their duties the local ordinaries may intervene after proper legal warnings had been given publicly.⁷⁷

The local bishops were given ambiguous instructions. They could proceed through the inquisitorial or the accusatorial modes of proof. They could not, however, use torture in their proceedings. They could examine the accused in person. All the testimony should be sealed and nothing should be made public, unless there was a complaint that a proper summons had not been served. The written documents should then be sent to Rome at the expense of the defendants.⁷⁸ Leo concluded by informing the local ordinaries that if the defendants were found to be guilty or if there

⁷⁵ This is an issue with a long history of canonical jurisprudence; see Pennington, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries* (The Middle Ages; Philadelphia: 1984) 154-189 especially at 177-186.

⁷⁶ *Sacrum lateranense concilium novissimum sub Iulio ii et Leone x celebratum*, ed. Antonio Maria Ciochi del Monte (Rome 1520) fol. 147v: 'Deinde reverendus pater Dominus Bernardus Episcopus Taruisinus ascendit ambonem et legit contra exemptos cedula[m] et alias materias ecclesiasticam libertatem et dignitatem episcopalem concernentes cuius tenor talis est'.

⁷⁷ COGD 2.2.1394-1400 at 1394-1395.

⁷⁸ COGD 1395-1396 lines 2208-2223.

were sufficient evidence to torture them to discover the truth, the local ordinary may render a decision according to what was just.⁷⁹

This was the first and only time that a papal council mandated or even mentioned torture. No council had ever declared that torture was a permissible procedure in ecclesiastical courts. Although ecclesiastical courts were not permitted to use severe forms of torture, there was a growing acceptance of the milder forms of torture in the inquisitions into heresy and in some other criminal cases.⁸⁰ There is some visual evidence that episcopal courts used torture in the fourteenth century. In a *Decretum* manuscript ca. 1300 that was produced in Southern France, there is a vivid illumination of a bishop conducting the torture on a tonsured cleric with a method of torture known as *La corda* (Figure 1).⁸¹ The torturer wears a lay person's hat. A cleric is shown being tortured. The division of the illumination into two spaces seems to imply that the judicial process took place in the episcopal court, while the cleric was tortured outside it. There are other Gratian manuscripts that illustrate the similar scenes.⁸² All the images employ *La corda*, which was the most commonly used form of torture in the judicial forum. We do not yet have studies

⁷⁹ *Ibid.* lines 2220-2222.

⁸⁰ See Henry Ansgar Kelly, 'Judicial Torture in Canon Law and Church Tribunals: From Gratian to Galileo', *CHR* 101 (2015) 754-793, argues that torture was used in ecclesiastical courts, especially in the case of heresy but also for other crimes in the fourteenth century on. He presents no evidence on its frequency but relies on inquisitorial manuals.

⁸¹ On *La corda* see Pennington, 'Women on the Rack: Torture and Gender in the *Ius commune*', *Recto ordine procedit magister: Liber amicorum E.C. Coppens*, edited by Jan Hallebeek, Louis Berkvens, Georges Martyn, and Paul Nève (*Iuris Scripta Historica* 28; Brussels 1212) 243-257 at 249.

⁸² Avignon, Bibliothèque de la ville 659, fol. 189v; Berlin, Staatsbibliothek, lat. Fol. 4, fol. 176r, Berlin, Staatsbibliothek Ham. 279, fol. 99v, Escorial, Real Biblioteca del Escorial, ç.I.4, fol. 205v. a London manuscript in private ownership, see Maria Alessandra Bilotta, 'Le Décret de Gratien: Un manuscrit de droit canonique toulousain reconstitué', *Art de l'emluminure* 24 (2008) 10, 40-41. Joanna Fronska and I are writing an essay on these illuminations.

exploring the frequency of torture in ecclesiastical courts.⁸³ We do know that secular courts employed torture infrequently.⁸⁴

Regimini universalis ecclesiae begs for interpretation. There was no existing jurisprudence in canon law that might have answered basic questions that the canon raised, e.g. which crimes fell under the canon and which clergy could be summoned are only the most elementary. There was a lot of jurisprudence on other questions. What type of evidence was necessary before a defendant could be tortured? Was ‘sufficiencia indicia,’ the terminology of *Regimini universalis ecclesiae*, different from the more standard terminology, ‘vehementes, indubitata, manifesta indicia?’ We will never know the answers to those questions because the council forbade every Christian from glossing and interpretation of the canons without papal approval under the penalty of automatic excommunication.⁸⁵ This prohibition was unprecedented. Not since Justinian had any ruler forbidden jurists to interpret legal texts.⁸⁶

At the end of *Regimini universalis ecclesiae* Leo turned from the rights of prelates and returned to the issue of ecclesiastical liberty of clerics.⁸⁷ Leo declared that no power (*facultas*) had been given to laymen that they might exercise over clerics or over ecclesiastical property. He renewed all the constitutions in the *Corpus iuris canonici* that dealt with tithes, plunders of ecclesiastical property, arsonists, pillagers of fields, laymen who seize cardinals, bishops, and other clerics, or anyone who took away the jurisdiction rights of clerics. He emphasized that laymen

⁸³ A court case in Perugia raised the question whether a cleric should be tortured in a case in which he had claimed self-defense. The argumentation in the case presumed that if the evidence were adequate, the cleric could be tortured. However, it is not clear from the decision if the cleric was in orders. See *Decisiones fori episcopalis perusini* 265-271.

⁸⁴ Pennington, ‘Torture and Fear: Enemies of Justice’, RIDC 19 (2008) 203-242. My thanks to Joanna Fronska for her comments on these illuminations.

⁸⁵ Session 12, March 16, 1517, COGD 2.2.1453 lines 4086-4089.

⁸⁶ With the exception of Pope Nicholas III who forbade that his constitution *Exiit qui seminat* (VI 5.12.3) be glossed; his prohibition was abrogated a short time later by Pope John XXII. See also Sinisi, ‘Tridentine Decrees’ 211-212 227-228 et passim below in this volume.

⁸⁷ COGD 2.2.1398-1399, lines 2303-2335.

should have no rights to compel or interfere with the bestowing of ecclesiastical benefices. All of these crimes damage ecclesiastical liberty. Therefore the pope ordered all secular rulers to obey these constitutions and to command their subjects to do the same. Any contrary customs were void. Leo's list of offences and references to earlier canonical norms would have given the teachers of canon law much to discuss if they had been permitted to do so.

What conclusions can be drawn from this evidence about the Fifth Lateran Council and its fostering of ecclesiastical liberties? Giuseppe Alberigo's short introduction to his edition of the Council's canons does not make any claims for its importance. In his introduction to the latest edition of the canons, Nelson Minnich points out that the abrogation of the *Pragmatic Sanction of Bourges* was Leo's success. However, he also notes that most bishops opposed the council's closure. They thought the work of the Council was not done. Minnich observes that Trent followed Lateran V by not permitting its canons to be glossed.⁸⁸ This prohibition led to a crucial change in the status and importance of the schools of canon law. From the point of view of a historian of canon law, Lateran V and its pedissequus Trent, were responsible for diminishing the importance of canonical jurisprudence as a source of law and as a source of norms and principles in the Church. It is not by chance that the last collection of papal decretals was published before Lateran V. All attempts to compile collections of papal legislation after Lateran V failed. Various jurists worked on a *Liber Septimus* of decretals.⁸⁹ Their efforts were not successful. These collections included canons from Lateran V and from Trent. That may be one reason for their

⁸⁸ COGD 2.2.1453, lines 4088 and Minnich's Introduction to his edition of the canons in COGD 2.2.1324.

⁸⁹ Elisabeth Dickerhoff-Borello, *Ein Liber Septimus für das Corpus iuris canonici: Der Versuch einer nachtridentinischen Kompilation* (Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht 27; Köln-Weimar-Wien 2002) and Lorenzo Sinisi, *Oltre il Corpus iuris canonici: Iniziative manualistiche e progetti di nuove compilazioni in età post-tridentina* (Collana della Facoltà di Giurisprudenza dell'Università degli Studi Magna Graecia di Catanzaro; Soveria Mannelli 2009).

failure.⁹⁰ In any case, Leo X's and Pope Pius IV's prohibitions against commentary and glossing of conciliar canons cast a pall over the future of canonistic jurisprudence. The damage has lasted for centuries. Creative canonical jurisprudence died as a source of law within the Church and as an influential system of jurisprudence outside it. It would take another essay to defend that last generalization. Its truth can be found in the scholarship of the last fifty years in which scholars have illustrated in great detail the importance of canonical jurisprudence for shaping the *Ius commune*, which in turn has formed the bedrock of modern jurisprudence.⁹¹

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⁹⁰ Dickerhoff-Borello, *Liber Septimus* 235-242, whose conclusions about the 'Interpretationsverbot' are opaque.

⁹¹ The list of scholars who have contributed to exploring and illustrating the importance of medieval canonical jurisprudence for shaping modern law is very long. To mention only a few names: Brian Tierney, Richard Helmholz, Ennio Cortese, Jean Gaudemet, Walter Ullmann, James Muldoon, John T. Noonan, Jr. Peter Landau and many others.



Figure 1. Gratian, *Decretum* C.15,
Amiens, Bibliothèque municipale 355, fol. 208v

The Commentaries on the Tridentine Decrees in the Sixteenth and Seventeenth Centuries: The First Remarks on a Category of ‘Prohibited’ Works*

Lorenzo Sinisi

The *Canones et decreta* of the Council of Trent were first officially published in Rome by Paolo Manuzio in March, 1564. They undoubtedly constituted a text of primary reference and played a central role within the framework of sources of canon law throughout the long period that extended from their publication to the creation of the first *Codex iuris canonici* almost a century ago.

This set of laws – particularly those of a disciplinary character, which were, for the first time, clearly separated from those of a dogmatic nature – was certainly not intended to overturn the system inherited from the mediaeval period, the essential basis of which was to be found in the collections of the *Corpus iuris canonici*. Nevertheless, it did not fail to innovate numerous points (over 200 according to a census made in the second half of the 18th century) of the law encompassed within those same collections. Thus, it soon came to constitute a revision of and a complement to them, becoming indispensable to teaching, judicial practice and the care of souls.¹

* This essay takes up the theme of a paper presented at the XVth International Congress of Medieval Canon Law held in Paris in July, 2016.

¹ For a detailed census of the individual points of the ancient ‘*ius decretalium*’ reformed by the Tridentine decrees, see the exhaustive lists inserted by Ubaldo Giraldi, an Italian canonist from Marche, in his edition of the volume of Remigius Maschat a S. Erasmo, *Institutiones canonicae* (ed. Ferrariae 1760) 175-190; on the genesis and main contents of the Tridentine reform, cf. Stephan Kuttner, ‘The reform of the Church and the Council of Trent’, 22 *The Jurist* (1962) 123-142; Paolo Prodi, ‘Il Concilio di Trento e il diritto canonico’, *Il Concilio di Trento nella prospettiva del terzo millennio: Atti del Convegno tenuto a Trento il 25-28 settembre 1995*, edd. Giuseppe Alberigo and Igino Rogger (Brescia 1997) 267-285; for a rapid overview of the innovative work implemented by the Council through its decrees *de reformatione*, cf. Felice M. Cappello, ‘Carattere e importanza della riforma tridentina’, *Gregorianum* 26

And yet, despite this evident central role in the juridical life of the Church, in the years following the Council – from the last decades of the sixteenth century to the middle of the seventeenth — we have no record of teachings devoted specifically to the ‘lectura’ of the Tridentine decrees in university and ecclesiastical institutions. Likewise, we have very few traces of exegetical and doctrinal works dealing with the decrees; and this in a period when publishers were already busily engaged in reproducing the text, possession of which had been prescribed by a considerable number of bishops in their synodal legislation as obligatory for the clergy.²

The reason for this anomaly is well known. It is to be found in a passage of the papal bull *Benedictus Deus*, whereby Pius IV confirmed all the Tridentine decrees, *en bloc* and without modifications, thereby meeting the request made by the assembly during the closing session of the Council,³ indeed, besides

(1945) 85-99; Adriano Prosperi, *Il Concilio di Trento: Una introduzione storica* (Piccola biblioteca Einaudi; Turin 2001) especially 73-87.

²Among the Diocesan Synods that obliged the clergy to keep an edition of the Tridentine decrees in their libraries, we may mention, for example, those of Aquileia (1564), Faenza (1569), Piacenza (1570) and Brescia (1575): see Roberto Rusconi, ‘Circolazione del libro religioso e pastorale ecclesiastica negli ultimi decenni del secolo XVI’, *Per il Cinquecento religioso italiano. Clero, cultura, società: Atti del Convegno internazionale di studi Siena, 27-30 giugno 2001*, ed. Maurizio Sangalli (2 vols. Rome, 2003) 1.145-147. For a preliminary, partial look at the frenetic publishing activity regarding the Tridentine decrees between the sixteenth and seventeenth centuries, cf. Generoso Calenzio, *Documenti inediti e nuovi lavori letterari sul Concilio di Trento* (Roma 1874) 439-519;

³On the confirmation of the decrees and, in particular, on the genesis and publication of the bull *Benedictus Deus*, see the still essential reconstruction by Hubert Jedin, *Geschichte des Konzils von Trient: Dritte Tagungsperiode und Abschluß: Überwindung der Krise durch Morone, Schließung und Bestätigung* (Vol. 4.2; Freiburg im Breisgau 1975) 229-233; the documentation concerning the long and tortuous genesis of the confirmation, including the text of the consistorial bull bearing the signatures of 27 cardinals alongside that of the pope, has been published in *Concilium Tridentinum Actorum pars sexta: Complectens acta post sessionem sextam (XXII) usque ad finem*, ed. Societas Görresiana (13 vols. in 18; Freiburg im Breisgau 1901-2001[= CT henceforth]) 9.1142-1159.

ratifying all the Council's rules and prescribing their full observance 'ab omnibus Christifidelibus', the pope approved a rigorous ban on writing and publishing 'commentarios, glossas, annotationes, scholia, ullumve omnino interpretationis genus super ipsius Concilii decretis' without express authorisation from the Apostolic See.⁴ Infringement of this ban would elicit severe punishment, including excommunication 'latae sententiae'. The stated purpose was therefore to prevent the reform delineated in the decrees from being adulterated or nullified by arbitrary interpretations.

This provision fits into a long-standing tradition of diffidence towards doctrinal 'interpretatio', as manifested not only in civil legislation, from the Justinian's texts up to the later medieval collections of 'ius proprium', but also in canon law, as clearly witnessed by Nicholas III's papal bull *Exiit qui seminat* of 1279.⁵ At the time when it was written, the ban issued by Pope Pius was much more restrictive than the one included in the 1279 bull, in that it made no reference even to the legitimacy of literal interpretation. However, it had consequences that were much more far-reaching. Indeed, it gave rise to a situation that was objectively unfavorable to the development of canonical doctrine by the traditional channels and methods. Moreover, it paved the way to the establishment of the Congregation of the Council, which, alongside its original executive duties of applying the Council reform, would very soon assume the prerogative to sanction an authentic interpretation of the disciplinary decrees.⁶ All of this

⁴ *Bulla confirmationis Concilii*, CT 9.1154 n. 21.

⁵ On Justinian's bans and on the theme of authentic interpretation in canon law, cf. Orio Giacchi, *Formazione e sviluppo della dottrina della interpretazione autentica in diritto canonico* (Milano 1935), especially 11-13, 48-72. On the bull issued by Nicholas III, see Andrea Bartocci, *Ereditare in povertà: Le successioni a favore dei frati minori e la scienza giuridica nell'età avignonese* (Napoli 2009) 73-75; considering the delicate matter dealt with (Franciscan poverty), in order to avoid arbitrary modifications due to interpretation, pope Nicholas had forbidden the doctors to make any explanatory comments other than those adhering to the text or suited to clarifying its meaning.

⁶ For some reflections on the impact of the confirmatory bull on developments in canonical doctrine, see Lorenzo Sinisi, 'La canonistica italiana fra XVI e

came about because, unlike the above-mentioned Justinian and statutory bans, which actually had very little effect, Pius' provision was perceived as something that really did have to be observed. At least this was so outside the reformed camp, in which markedly critical initiatives had flourished right from the outset, such as the comments of Martin Chemnitz and Innocent Gentillet.⁷ A deterrent that was even more effective than the gravity of the sanctions themselves was the fear of their implementation, which at the time seemed to be ensured through more rigid control over university teaching and book production, control that had for some time been exercised by a powerful Congregation of the Roman Curia, the Holy Inquisition, which was soon flanked by the Congregation of the Index.⁸

XVII secolo: Un periodo di decadenza? (note a margine di alcune voci del dizionario biografico dei giuristi italiani)', *Lavorando al cantiere del 'Dizionario biografico dei giuristi italiani (XII-XX sec.)'*, ed. Maria Gigliola di Renzo Villata (Milano 2013) 465-500. On the Congregation of the Council and the evolution of its tasks from its institution up to the first half of the 17th century, see Guillelmus I. Varsányi, 'De competentia et procedura Sacrae Congregationis Concilii ab origine ad haec usque nostra tempora', *La Sacra Congregazione del Concilio: Quarto centenario della fondazione (1564-1964): Studi e ricerche* (Rome 1964) 51-93. On the issue of commentaries on conciliar decrees see Pennington, 'Ecclesiastical Liberty' 204 above in this volume.

⁷ The polemical intent of these two works is immediately clear from the titles present in the title pages: Martinus Kemnicensis, *Examen decretorum Concilii Tridentini in quo ex Sacrae Scripturae norma, collatis etiam orthodoxis verae et purioris antiquitatis testimoniis ostenditur, qualia sint illa decreta et quo artificio sint composita* (Francofurti ad Moenum 1566) and Innocentius Gentilletus, *Examen Concilii Tridentini in quo demonstratur, in multis articulis hoc Concilium antiquis Conciliis et canonibus, Regiaeque auctoritati contrarium esse* (Genevae 1586).

⁸ Regarding the atmosphere of stifled freedom in Italian universities in the last decades of the sixteenth century, and more particularly on the effects of the prohibition contained in the bull *Benedictus Deus* on the teaching of canon law, see Paul F. Grendler, *The University of the Italian Renaissance* (Baltimore-London 2002) on all disciplines 186-195, on canon law 444-447. On the activity of the Church institutions charged with controlling the contents of books and the precise observance of the bans, see the papers published in *Church, Censorship and Culture in early modern Italy*, ed. Gigliola Fragnito (Cambridge Studies in Italian History and Culture; Cambridge 2001); on the

Thus was the climate when, in Venice in 1566, Giordano Ziletti printed an edition of the Tridentine decrees endowed with scant marginal notes that consisted of simple references to single passages of the Holy Scriptures, of patristic doctrine and of papal and synodal legislation, identified as inspirational sources for the Council Fathers in drawing up the decrees. The editor, Dionigi Atanagi, was careful to state prudently in his dedication that the young jurist who had written the notes, Orazio Luzi, ‘nullo prorsus interpretationis genere usum esse, ac nec unum quidem verbum addidisse de suo’.⁹ The success of this initiative was soon consolidated by the subsequent addition, beginning with the 1571 Antwerp edition, of further annotations of similar tenor by the Belgian theologian Jean Soteaulx. The result was a minimal ‘apparatus’ of notes which, being scant and not ‘interpretative’, was destined to be reprinted without too much trouble in most of the editions of the Tridentine decrees published up to the end of the eighteenth century.¹⁰

In the same period, however, the activity of the Holy Congregation of the Council took off. Indeed, during the pontificate of Pius V, and on express papal delegation, the

editorship of juridical books in particular, cf. Rodolfo Savelli, *Censori e giuristi: Storie di libri, di idee e di costumi (secc. XVI-XVII)* (Milano 2011).

⁹ *Canones et decreta Sacrosanti oecumenici et generalis Concilii Tridentini... cum citationibus ex utroque testamento et iuris pontificii constitutionibus aliisque Conciliis quae ab Ecclesia Romana, omnium Ecclesiarum matre et magistra, maxime probantur collectis* (Venetiis 1566), dedication by the editor to Cardinal Giovanni Morone, 2-3 n.n.; on Luzi (1541-1569), a cleric from Cagliari remembered as a competent jurist and an able collaborator of St. Carlo Borromeo in Milan, cf. Gaetano Colli, ‘Le edizioni dell’*Index librorum omnium* di Giovanni Battista Ziletti: Sulle tracce dei libri giuridici proibiti nella seconda metà del XVI sec.’, *Manoscritti, editoria e biblioteche dal medioevo all’età contemporanea: Studi offerti a Domenico Maffei*, ed. Mario Ascheri and G. Colli (3 vols. Roma 2006) 1. 204-244 at 218-219.

¹⁰ On the formation of this ‘apparatus’, only briefly grazed by the 1621 prohibition, which will be mentioned later, see Lorenzo Sinisi, ‘Le “imprudenze” di un grande canonista della prima metà del Seicento: Agostinho Barbosa e la Congregazione dell’Indice’, *Itinerari in comune: Ricerche di storia del diritto per Vito Piergiovanni*, edd. Roberta Braccia, Riccardo Ferrante, and Rodolfo Savelli (Università degli Studi di Genova, Annali della Facoltà di Giurisprudenza; Milano 2011) 307-386 at 335-336.

Congregation took on the task of settling doubts and controversies regarding the interpretation of the Tridentine decrees. One of the results of this work was the creation of a rich and authoritative case law. This soon gave rise to the need for further and more copious commentaries that could facilitate curial practice in the light of what henceforth was perceived as one of the most important channels of the development of Canon law.¹¹

One of the first to interpret this need was undoubtedly Antonio Carafa, a high-profile intellectual and scholar of classical languages, who had studied law in Padua. Having resumed his brilliant ecclesiastical career, which had been interrupted when the family circle of Paul IV, a distant relative of his, had fallen from grace, he became a member of various curial commissions under the papacies of Pius V and Gregory XIII. One of these was that of the *Correctores romani*. Another was the commission set up, in accordance with the wishes of Pope Boncompagni (Gregory XIII), in order to draw up a new official collection of church laws; under the title *Liber Septimus*, this was to complete and update the *Corpus iuris canonici*.¹² Having been created cardinal in 1568, in the same year he was appointed to the Congregation of the Council, of which he became Prefect in 1588; he led this important ministry until his death in 1591. It was probably at this time that he drew up what certainly is, to date, the most copious and complete known manuscript commentary on the Tridentine decrees; his authorship is easily recognisable on the basis of the title present on the first page of the BAV lat. 6326, which reported

¹¹ On this theme, see Varsányi, 'De competentia et procedura' 67-69; Sinisi, 'La canonistica italiana fra XVI e XVII secolo' 480-481.

¹² For biographical details of Antonio Carafa, see especially Giovanni Papa, 'Il cardinale Antonio Carafa prefetto della S. Congregazione del Concilio', *La Sacra Congregazione del Concilio*, 309-338; and Maria Grazia Cruciani Troncanelli, 'Carafa, Antonio', DBI 19 (1976) 482-485. On his presence in the commission for revising the text of the *Decretum Gratiani*, cf. Mary E. Sommar, *The Correctores Romani: Gratian's Decretum and the Counter-Reformation Humanists* (Berlin-Münster-Wien-Zürich-London 2009) 48-51; on his prominent role in the Gregorian commission for the creation of a new official collection of canon law, cf. Lorenzo Sinisi, 'On the tracks of the Liber Septimus of Gregory XIII', *Proceedings Toronto 2012* 257-273.

in practically coeval hand-writing the words ‘Scripta ill.mi et Rev.mi Antonii S.R.E. Cardinalis Carafae super Sacro Concilio Tridentino’.¹³

This manuscript was probably copied directly from Carafa’s original handwritten text, now lost. One indication of its date is the fact that, on at least two occasions, the reigning pope is referred to as ‘Sanctissimus Dominus Noster Sixtus V’, who died after a pontificate of about five years, in August 1590, a few months before Carafa himself.¹⁴ In this essay, I will outline only the main features of the text; a more thorough examination will be the subject of a monographic study, which I hope to publish in the reasonably near future. Written in a fairly uniform humanistic cursive and covering both sides of some 227 sheets numbered only on the *recto*, the manuscript contains an ample commentary that focuses above all on the disciplinary decrees of the Council. There are only somewhat rare and limited comments concerning the dogmatic decrees, the interpretation of which Sixtus V, through the constitution *Immensa aeterni Dei* of 1588, had rigorously restricted to the Apostolic See. To take just a few examples, while there are abundant exegetic annotations regarding the decrees *De reformatione* in general, and those formulated in the last five sessions under Pius IV in particular, there are absolutely no analysis of the decrees dealing with very delicate theological-dogmatic themes, such as original sin (Session V), justification (Session VI) and almost all those referring to the doctrine of the sacraments.¹⁵

¹³ BAV lat. 6326, fol. 1r n.n. This manuscript containing the annotations of Cardinal Carafa to the Tridentine decrees—which, as we will see later, had already been cited by Prospero Fagnani in his comment on the *Liber Extra*—was briefly mentioned in more recent times by Eugène Mangenot, ‘Carafa Antoine’, DThC 2.2 (1905) 1709, and was briefly reviewed by Sebastianus Tromp, ‘De manuscriptis acta et declarationis antiquas S. Congregationis Conc. Trid continentibus’, 2 *Gregorianum* 39 (1958) 111-112.

¹⁴ See, for example, BAV lat. 6326, fol. 46v, 105r.

¹⁵ While it is striking that about four-fifths of the text is mainly devoted to comments on the disciplinary decrees issued during the sessions from XXI to XXV (BAV lat. 6326, fol. 60r-227v), the scant attention to the dogmatic decrees is equally evident, being limited to can. IV and XI of the decree *De baptismo*,

As the text of the decrees that are the subject of exegesis, is not reported, references to each passage commented on are made in the customary style found in the commentaries of both civilians and canonists; that is to say, the most significant words of the text are written in larger characters and are followed by the closure of a round bracket in order to separate them from the text of the comment, which may be of variable length and is written in normal-sized characters.¹⁶ At the beginning of the comment on each decree, adoption of the traditional style is then indicated; already consolidated among both civilians and canonistic commentators, this involved indicating at the outset a ‘*divisio pro summario*’ of the text into its most important constituent parts.¹⁷

In his commentary on the bull of indiction of the Council, Carafa, taking his cue from some expressions contained in it, exploits the opportunity to proclaim forcefully the primacy of the Roman pope and to underline the exclusive power of this latter to summon the Council and confirm its decrees. In doing so, he makes frequent reference to the canons of the councils, both ancient and modern, and constantly cites individual texts of the *Corpus iuris canonici* and constitutions ‘extravagantes’, especially when he wishes to highlight the fact that a given decree

to can. I and III of the decree *De confirmatione* (sess. VII), to ch. III and VII of the *Doctrina de Sacramento Extremae unctionis* (session XIV), to ch. VI of the *Doctrina de Sacrificio Missae* (sess. XXII) and to the *Doctrina de Purgatorio* (sess. XXV), totalling only four sheets (cf. BAV lat. 6326, fol. 39r, 53r, 71r, 179rv).

¹⁶ For example, in ch. II of *De reformatione* from session VI on the obligation of holders of an ecclesiastical benefice to be residents, we find the comment divided into various sections, which begin, respectively, from the words: ‘*Episcopis inferiores*’), ‘*In titulum sive commendam*’), ‘*Ab eorum ordinariis*’), ‘*Privilegia perpetua*’), ‘*Residere cogantur*’), ‘*Nullique privilegia*’), ‘*Indulgentiis vero et dispensationibus*’), ‘*Ut per deputationem*’), and ‘*Congruae portionis*’ BAV lat. 6326, fol. 33v-35r).

¹⁷ An example can be seen in ch. I of the decree *de reformatione* from session V; at the beginning, we find the formula: ‘*Dividitur hoc decretum in tres partes*’, followed by the words cited, written in larger characters, which signalled the beginning of the main parts identified by the author in the subdivision: ‘*Episcopis*)...2a *Nullique*), 3a *Indulgentiis*’ (BAV lat. 6326, fol. 33v).

has renewed, broadened or modified the ‘*ius vetus*’.¹⁸ Thus, he drew abundantly on doctrinal authorities which, ranging from the Holy Scriptures themselves to both patristic and scholastic theology and to the best canonist and civilian literature, demonstrated the vastness of his non-sectorial know-ledge.¹⁹

These ‘*auctoritates*’ are then flanked by another source of reference, which becomes increasingly important from the exegesis of the disciplinary norms of the Fifth Session onwards. Destined gradually to predominate over the other sources as the author’s commentary continues, this source consists of the interpretative decisions of the Congregation of the Council. Carafa was very familiar with these, as he had often taken part in drawing them up and had easy access to them in view of his role in that committee. Indicated each time at the beginning by the typical formula ‘*Sacra Congregatio censuit*’, these are, however, very difficult to identify precisely; indeed, in keeping with the style adopted at least in the first decades of the Congregation’s activity, it was not yet customary to indicate the date of issue or the diocese of origin of the question that had given rise to the pronouncement.²⁰

¹⁸ See, for example, the first part of ch. IV of *de ref.* from session XXII, in which Carafa announces, ‘*innovatur et ampliatur—constitutio Concilii Viennensis, Clement. Ut ii qui, de aetat. et qualitate*’ (Clem. 1.6.2) regarding the position in the Cathedrals and Collegiate churches of those who had not yet received major orders (BAV lat. 6326, fol. 81r).

¹⁹ Among the theological sources cited, he most frequently refers to the works of such Fathers of the Church as St. Irenaeus, St. Augustin, St. Jerome, St. Gregory the Great, and those of scholastic theologians such St. Thomas Aquinas and *summistae* like St. Antoninus of Florence; among the jurists, canonists clearly prevail over civilians (among the few civilians cited, we may note Bartolo, Baldo, Alessandro Tartagni and Giason del Maino), with frequent mention of authorities such as Hostiensis, Innocent IV, Guillaume Durand, Giovanni d’Andrea, Nicolò de’ Tedeschi ‘*Abbas panormitanus*’ (the most often quoted of all), Juan de Torquemada and Felino Sandei; among the more recent authors mentioned are the theologians Tommaso de Vio ‘*caietanus*’, Domingo Soto, and Roberto Bellarmino, the great canonist and moralist Martin Azpilcueta ‘*navarrus*’ and the humanist jurist Guillaume Budé.

²⁰ An example can be seen in the first quotation of a pronouncement by the Congregation, which deals with the punishments prescribed in the concluding section of the decree *De canonicis scripturis* (Session IV) for those who dared

It is very likely that this work was chiefly prompted by the author's need for a handbook that could help him to tackle the daily problems concerning the practical interpretation of the Tridentine decrees. Indeed, the decrees were sometimes expressed in an intricate form and in a language that Carafa himself deemed somewhat stilted, which made them difficult to understand.²¹ What is certain, however, is that Carafa, aware that his efforts would prove useful to others, had not excluded publication of the work from the outset, though obviously 'cum licentia et beneplacito Romani Pontificis'. This emerges from the testament of the cardinal himself and from a folio added at the beginning of the same Vatican manuscript, which states that Antonio Carafa, aware that his end was drawing near, entrusted his friend Napoleone Comitolo, one of the executors of his will, with the task of revising and possibly publishing his work after his death. This operation, however, did not come to fruition owing to Comitolo's increasing commitments, first as Auditor of the Rota and later as Bishop of Perugia.²²

to alter the text of the 'Vulgate' through any arbitrary addition or modification. Here, Carafa simply repeated the content, without providing any chronological data that can identify it. However, thanks to a collection of 'declarationes' from the early seventeenth century (dealt with later in this paper), in which these data are often reported, we know that this pronouncement was issued by the 'Congregatio generalis', with the participation of Carafa himself, on 17th January, 1576 (cf. BAV lat. 6326, fol.18v and BAV lat. 15136, 'Declarationes Sacri Concilii Tridentini', fol. 1r). The reason why the date of these provisions was often omitted is clearly explained by an authoritative seventeenth-century canonist in the following terms: 'non estigitur opus ut declarationibus Sacrae Congregationis addiciatur tempus, aut locus, cum incipient obligare a tempore publicationis Concilii et qualitates omnes quae insunt Concilio, censeantur inesse illius declarationibus' (Prosperus Fagnanus, *Commentaria* X 1.2.13 [Venetiis 1709: 1.137]).

²¹ BAV lat. 6326, fol. 87v.

²² See Archivio Segreto Vaticano, A.A. Arm. I-XVIII, 1784 'Testamentum card. Antonii Caraffae in favorem Collegii Maronitarum', fol. 33rv and BAV lat. 6326, fol. 2 rv.n.. On Napoleone Comitolo, probable author of some of the margin notes present in the Vatican code, cf. Emanuel Cerchiarì, *Capellani Papae et Apostolicae Sedis auditorum causarum Sacri Palatii Apostolici seu Sacra Romana Rota ab origine ad diem usque 20 septembris 1870: Relatio historica-iuridica* (2 vols. Roma 1919-1921) 2. 117.

Comitolo finally handed the work over to Cardinal Scipione Cobelluzi, the Librarian of the Holy Roman Church, for safekeeping in the Vatican Library, where it remains to this day. The fame of this work, however, must have spread considerably, since various individuals soon felt the need to have copies made for themselves. Indeed, during the course of my research, I managed to locate other manuscript copies of Carafa's commentary in four different libraries. Previously unknown, these are more or less coeval and, generally speaking, faithful to the text that comes to us from the Vatican manuscript.²³

Added to these is the BAV Barb. lat. 885 preserved at the same Vatican Library, the initial pages of which are decidedly different from BAV lat. 6326 and other similar manuscripts, though more in form than in substance.²⁴ Dating back to the early years of the seventeenth century, this codex, in turn, gave rise to an autonomous manuscript tradition, as testified by at least two other manuscripts; one of these, which is now kept in the Vatican Archive, was already known to the scholarly community, as it was summarily reviewed as a probable unpublished work of Prospero Fagnani by Pietro Palazzini in his admirable study devoted to the

²³ These are: 1. Rome, Biblioteca Nazionale Vittorio Emanuele II, Sessoriano 190; 2. Parma, Biblioteca Palatina, parmense 904; 3. Madrid, Biblioteca nacional de España 9632, fol. 1r-337v; 4. Bologna, Biblioteca Universitaria 509, this latter coming from the private library of Pope Benedict XIV.

²⁴ The BAV Barb. lat. 885 is different from the incipit (BAV Barb. lat. 885, fol. 1r: 'Divino implorato auxilio. Bulla/ quaelibet litterae Summorum Pontificum, quibus aliquid praecipitur, vel statuitur plumbeis bullis obsignatae vulgo dicuntur bullae...'); BAV lat. 6326, fol. 1r: 'Bulla indictionis Sacri Concilii Tridentini. Indictionis sacri/ Usus Concilii una cum ipsa Ecclesia habuit originem, Act. Apost. in lect. Matt. ibidem c.')

to the subsequent pages concerning the comment on the bull summoning the Council. The text instead coincides substantially with that of BAV lat. 6326 from the comment on the First Session (BAV Barb. lat. 885, fol. 15r; BAV lat. 6326, fol. 8r) to the explicit, which, in both cases, cuts short the subject at the end of ch. XIV *De reformatione* of Session 25, thus proving identical ('Sexta pars, qua ponitur, quid agendum contra episcopos qui ab huiusmodi crimine non abstinerint', BAV Barb. lat. 885, fol. 354v; BAV lat. 6326, fol. 227v).

great seventeenth-century canonist.²⁵ Based on somewhat flimsy evidence, this attribution is, however, erroneous. This emerges, first of all, from the fact that it is substantially identical to the above mentioned Barb. lat. 885 and, except for the first pages, also to the other copies of Carafa's commentary. Moreover, it is clearly demonstrated by the fact that, if the author had really been Fagnani, its normative and doctrinal references would certainly not have been chronologically restricted to the penultimate decade of the sixteenth century.²⁶ In addition, the jurist himself did not claim authorship of a similar work in his important and imposing commentary on the *Decretals of Gregory IX*, which was first published in 1661. This latter clearly shows that he was well aware of the fact that Cardinal Antonio Carafa had written a commentary to the Tridentine decrees. Indeed, he makes explicit reference to it, indicating it as an example of a work that was exempt from the sanctions prescribed by Pius' IV's confirmatory bull. Two reasons for this exemption were cited: the fact that the work was intended for internal use and not to be published, and the fact that its creator was probably authorised to write it on account of his being an authoritative member of the Congregation charged by the Pope

²⁵ Apparently dating from the late seventeenth century, this codex, Archivio Segreto Vaticano, Congr. Concilio, Misc. cod. ext. 9, is untitled on the first page; on the parchment book spine, however, it bears the coeval script 'Fagnan', written in pen. This may have prompted its former owner, Card. Costantino Patrizi, to attribute it to Fagnani in the 'particola' inserted at the beginning of his will, an attribution taken up later by Pietro Palazzini, 'Prospero Fagnani, segretario della Sacra Congregazione del Concilio e i suoi editi ed inediti', *La Sacra Congregazione del Concilio* 374-375. The other testimony is constituted by an apparently coeval manuscript written in larger characters (hence divided into two tomes), which, under the title 'OPUS in Sacrum Concilium Tridentinum' on its two frontispieces, bears the script 'Authore Prospero Fagnani I[uris]. C[onsulto].', written by a later hand. Formerly part of Pope Benedict XIV's private library, the manuscript is now kept in the Bologna, Biblioteca Universitaria and listed as 'Ms. 542 1-2'.

²⁶ While not noticing that the manuscript was substantially identical to the work of Carafa contained in the Vatican codex, which he knew, Father Tromp had already cast doubt on the attribution to Fagnani on account of the dates of the references reported in the text; these suggested that it had been compiled 'ultimo decennio saeculi XVI' (Tromp, 'De manuscriptis acta et declarationes' 2. 96).

with solving the problems of interpretation arising from the application of the conciliar decrees.²⁷

In the same passage, Fagnani likened the situation of Carafa to that of another commentator of the Tridentine decrees, who held the position of Secretary of the Congregation of the Council more or less in the same period when the learned cardinal was Prefect.

This was the Calabrian Giovanni Paolo Marincola. Closely linked to Carafa, to whom he had been warmly recommended by Guglielmo Sirleto, Carafa's former teacher, Marincola was a doctor 'in utroque iure' and subsequently Bishop of Teano until 1588, when he was deposed for serious disciplinary reasons and relegated to a convent on the order of Sixtus V.²⁸ To date, we don't know any manuscript of the complete text of Marincola's commentary, or 'glossa'. However, thanks to the studies conducted by Father Sebastian Tromp in the 1950s, we can trace its contents in a singular printed edition that appeared in Lyons in 1633.²⁹ Printed by Laurent Durand, a well-known typographer, the volume appeared as an imprudent, unauthorized publication of hand-written material that was claimed (probably to attract and, at the same time, reassure possible purchasers) to have been taken

²⁷ Fagnanus, *Commentaria* X 2.1.12 (Venetiis 1709) 2.27.

²⁸ We have only scant and fragmentary biographical information on Marincola, whose dates of birth and death are unknown. What is certain is that he was born in Taverna in the Catanzaro district, that he was a doctor 'in utroque iure' and that, having taken Holy Orders, he was admitted to the 'familia' of Cardinal Antonio Carafa on the recommendation of his fellow Calabrian Cardinal Sirleto. He was Secretary of the Congregation of the Council from 1568 until 1575, when he was elected Bishop of Teano, an office from which he was obliged to resign in 1588 following a trial brought for scandalous behavior (cf. Sebastianus Tromp, 'De primis secretariis S. Congregationis Concilii', *Gregorianum* 40 [1959] 525-527. His connections with Cardinal Sirleto at the beginning of his career are documented in BAV lat. 6946, fol. 43).

²⁹ Sebastianus Tromp, 'De duabus editionibus Concilii Tridentini', *Gregorianum* 38 (1957) 70-93. According to a report in one of the indexes of an eighteenth-century edition of a celebrated work on the Council of Trent, a manuscript codex of the 'dissertazioni sopra I decreti del Sacro Concilio Tridentino' by Marincola had been kept for a certain period of time in the library of the cleric Michele Giustiniani, author of many erudite works, who died in Rome in 1680; cf. Sforza Pallavicino, Francescantonio Zaccaria and Ireneo Affò, *Istoria del Concilio di Trento* (Faenza 1792-1796) 5, Indice XXXIV, 94.

‘ex bibliotheca Illustrissimi cardinalis Roberti Bellarmini’. It consisted, on the one hand, of a ‘new’ collection of interpretative ‘declarations’ by the Congregation of the Council drawn up as an ‘apparatus’ of comments to the Tridentine decrees, and on the other of a series of anonymous ‘observationes doctrinae’ on the decrees; these latter, however, were easily attributable to their true author, Giovanni Paolo Marincola.³⁰ This clearly emerges when, for example, with reference to chapter VI of the disciplinary decree from Session XIII, in the doctrinal ‘observationes’ we find a revelatory recommendation to exercise greater caution in criminal proceedings against bishops, which concludes with ‘et ita consului ego Ioannes Paulus Marincola episcopus Theani’.³¹

The commentary, which is very rich and well-documented, displays a more marked juridical and doctrinal character than that of Carafa. It also cites a greater number of more recent civilians and canonists, among whom Martin Azpilcueta ‘navarrus’—referred to by the author with some pride as ‘amicus meus’—is particularly prominent. References to the interpretative decrees of the Congregation of the Council are decidedly fewer, though these are cited less generically.³² Completed about 20 years after that of Carafa, Marincola’s commentary was handed down—though only

³⁰ *Novae declarationes Congregationis S.R.E. Cardinalium ad Decreta Sacros. Concil. Tridentini iisdem Declarationibus conserta additis pereruditis observationibus, quibus Concilii praescripta affuso ubertim ex Theologia et Canonum disciplina lumine collustrantur* (Lyons, 1633).

³¹ Cf. *ibidem*. 131.

³² To comment on the individual passages of the decrees, the commentators’ technique is used; the text is always reproduced in the upper part of the page, and a lower-case Greek letter (α , β , γ , etc.) is placed next to the first words of the passage to be commented upon; in the lower part of the page, the same letter is placed next to the same words, which precede the actual comment. Among the more recent jurists cited in the ‘observationes doctrinae’, we may mention, besides ‘doctor Navarrus’, Stefano Quaranta (also called ‘amicus meus’), Giuseppe Mascardi, Antonio Gomez, Aimone Cravetta, Giulio Claro, Bartolomeo Bertazzoli, Vincenzo De Franchis, Cardinal Domenico Toschi etc.. Unlike Carafa, who never indicates the dates of issue of the numerous ‘declarations’ of the Congregation of the Council that he quotes, Marincola, though making far less use of this source, usually indicates the date in full (cf., for example, *Novae Declarationes, observationes doctrinae* 49, 53, 93).

very partially and with not a few variants—in three Gregorian University manuscripts; these are very similar, including the erroneous attribution to Cardinal Facchinetti, a jurist and former participant in the Council, who was Pope for only two months under the name Innocent IX.³³

The Lyons edition, though clearly contravening the ban on printing commentaries on the Tridentine decrees, which had been sanctioned by the bull *Benedictus Deus*, strangely escaped the attention of the censors. By contrast, a few years earlier, an editorial initiative that was in some respects less transgressive had been blacklisted. This was an edition of the Tridentine decrees published in Cologne in 1620 by Anton Hierat, which had been placed on the Index in 1621 on the request of the Congregation of the Council itself. Indeed, the Congregation had invoked the application of the ban sanctioned in the bull in order to protect itself from the uncontrolled diffusion of material concerning its activity, which circulated ‘ementito ipsius Congregationis nomine’.³⁴

³³ Some references to provisions dating from the first years of Paul V’s papacy (1605-1621) suggest that the work had a long period of gestation, at least from the years when Marincola was Bishop of Teano up to about 1608-1610 (cf. *ibidem*, 268, 559). Regarding the Gregorian manuscripts (Rome, Archivio della Pontificia Università Gregoriana 589, 592, FC 654), already meritoriously reviewed (cf. Sebastianus Tromp, ‘De manuscriptis acta et declarationibus antiquis S. Congregationis Con. Trid. continentibus’, 1: *Gregorianum*, 38 [1957] 482-484), a preliminary examination reveals that they reproduce a text that cannot be attributed to Facchinetti (as demonstrated by Tromp, cf. *ibidem*. 484-487); at the same time, however, they can only be partially likened to the commentary published in 1633, in that they do not report, for example, the initial part concerning the decrees of the first five sessions of the Council and they alternate parts in which the text is faithfully reported with others in which marked differences can be seen (cf. *ibidem*, 1-27, 47-58 and Rome, Archivio della Pontificia Università Gregoriana 589, fol. 1r-7r, for example); given the complexity of the problem emerging from the comparison of the two texts, this issue will be the subject of a specific study.

³⁴ This material was identified in the rich ‘apparatus’ reported alongside the Council legislation; the ‘apparatus’ consisted of an anonymous collection of ‘Declarationes’ of the Congregation of the Council, which had already been published separately in disguise (as vol. IV of a collection of ‘decisiones Rotae’ taken from the library of Prospero Farinacci) and therefore prohibited since

The practising barristers and judges of the ecclesiastical court found themselves in a paradoxical situation, especially in the first half of the seventeenth century. On the one hand, it was impossible for them to make reference to doctrinal commentaries on the Tridentine decrees, as these did not officially exist. On the other, it was difficult for them to become aware of authentic interpretations of the decrees issued by the Congregation. Indeed, unlike the case of the decisions of the Rota, there was no approved provision for printing the interpretative decrees of the Congregation. The result of this situation was the flourishing of an abundant production of manuscript texts regarding Council legislation, in addition to the printed editions, which, as we have seen, were treated differently by the censors more by chance than for reasons of merit. Thus, an abundance of collections of *Declarationes Sacrae Congregationis Concilii* are to be found in both Italian and European libraries—a fact which testifies to their widespread diffusion—in addition to other veritable commentaries, such as the one that came to light by chance in the Biblioteca Angelica in Rome during the course of the present research; I will deal elsewhere with this commentary, which is extremely rich in doctrinal references.³⁵ Like the commentaries,

1609, being unauthorised; to this, by way of a doctrinal appendix, had been added a work (exempt from censorship until then) by the Portuguese canonist Barbosa, which consisted of a collection of clear references ('remissiones') to doctrinal works that had incidentally dealt with the meaning of some Council decrees (for further information on this edition, cf. Sinisi, 'Le 'imprudenze' di un grande canonista' 332-353).

³⁵ Untitled and bereft of clues to the identity of the author, this small-format code is made up of 77 unnumbered sheets (154 pages); it was found by chance, in that it is bound together with a printed edition (Frankfurt am Main, 1610) of the above-mentioned 'pseudo-Farinacci' collection of 'declarationes' of the Congregation of the Council, which had already been prohibited in 1609 after its first appearance (Rome, Biblioteca Angelica St. PP.12.20); intact though unfinished—the copyist having suddenly stopped almost halfway down fol. 67v after indicating the section of the decree Tametsi (ch. 1 *De reformatione matrimonii*, session XXIV) that was to be commented on with the words 'Ad v(ersiculu)m Quod si aliquando usque ad versiculum qui aliter', although no written text follows—the commentary is noteworthy for its limited references to the pronouncements of the Congregation and, by contrast, for the wealth of

these collections generally follow the chronological order of the various sessions of the Council. However, they limit themselves to reporting under each chapter the texts of the various 'declarations', preceded by a questioning sentence to present the issue ('cum fuerit dubitatum an', or simply 'an') and followed by the interpretive text itself, often dated, introduced by the classic formula 'Congregatio censuit'.³⁶

These collections, some of which were more successful and hence are still to be found in several copies, were underpinned by a great deal of research and selection.³⁷ The material was gathered either directly from the archives of the Congregation itself or of a few ecclesiastical institutions, often thanks to privileged relationships that granted access, or else thanks to the scrutiny of doctrinal works by 'probati auctores' who, finding themselves in the position illustrated above, had included this material in their printed volumes. Among the most 'pillaged' of these authors, Nicolás García, the canonist from Avila, stands out. In his

doctrinal references, particularly to Spanish doctrine (chiefly Azpilcueta and Covarruvias, but also Soto, Vitoria, Diaz de Lugo, Ledesma, Miranda, Simancas etc.). Manuscripts dealing with conciliar legislation are to be found in various Italian, French and Spanish libraries; for a list, which has no claim to be complete, cf. Tromp, 'De manuscriptis acta et declarationes' 1.497-500.

³⁶ These collections can currently be divided into three types: chronological (usually numbered), alphabetical and systematic. Among these last, which are the most numerous, especially between the sixteenth and seventeenth centuries, and which report the various 'declarations' in the same order as the conciliar decrees to which they refer on the basis of the subjects dealt with, the above-mentioned (BAV lat. 15136) is noteworthy both for its order and precision in reporting the main points of the single pronouncements and for the fact that it had a fair circulation, as is proved by various manuscripts (cf., for example, Genoa, Biblioteca Civica Berio, BS. XVIII-103; Rome, Biblioteca Angelica, 356; Rome, Biblioteca Vallicelliana, K.27; Reggio Emilia, Biblioteca Panizzi Ms. vari, D. 6; Madrid, Biblioteca nacional de España 753).

³⁷ To date, we have had only a very partial idea of the abundance of such works conserved in various public and ecclesiastical libraries, both in Italy and abroad. This wealth of material eloquently demonstrates that the history of manuscript books is far longer than is commonly believed, extending well beyond the confines of a period—from the sixteenth to the seventeenth century—in which the art of printing had already become fully consolidated on a proto-industrial scale.

successful treatise on the issue of ecclesiastical benefices, he had made abundant use of a rich series of ‘declarationes’ of the Congregation of the Council, of which he had become aware during a stay in Rome. To explain his choice, he asserted what would soon become an acknowledged fact; that is to say, that such ‘declarationes’ should certainly not be regarded as simple ‘declarationes doctrinales, sicut latas a doctoribus et iurisperitis, ut aliqui theology perperam dicunt’, but rather as ‘declarationes definitivas, seu decisivas vim legis habentes et ut leges recipiendas utpote lata ex commissione Papae et a personis habentium interpretandi et respondendi facultatem a Principe’.³⁸ Given this situation, while doctrine slowed down considerably as a result of Pius’ ban, the circulation of interpretative and normative material referring to the activity of the Congregation of the Council (soon imitated by the congregations of Rites and of Bishops and Regulars) increased markedly, becoming an indispensable point of reference in curial and forensic practice in general.³⁹ Thus, the way of working of the canonists changed. Unable to utilise an important part of current law, constituted by the Tridentine decrees, as the central core of their ‘lecturae’, they had to limit themselves, at least until the last decades of the seventeenth century, to making only incidental references to these texts, accompanied by brief literal explanations, which were generally corroborated by copious references to the elucidatory decrees of the Congregations, of which they had become aware. This applied both to their teaching (still conducted mainly according to the organization of the *Liber Extra*) and to their writings.

The tendency to reduce the weight and range of pope Pius’ 1564 ban was already discernible in the work published by the above-mentioned Fagnani at the beginning of the 1660s. This

³⁸ Nicolaus Garcia, *Tractatus de Beneficiis amplissimus* (Cesaraugustae 1609), 1, fol. 2v n.n.

³⁹ These sources were variously named (*Declarationes, resolutiones, decisiones, decreta* etc.) but collectively defined as ‘jurisprudence administrative’, as opposed to the ‘jurisprudence judiciaire’ of the *decisiones* of the Rota (cf. Charles Lefebvre-Marcel Pacaut-Laurent Chevailler, *L’époque moderne 1563-1789: Les sources du droit et la seconde centralisation romaine* [HDIE 15.1; Paris 1976] 32-34).

paved the way for the publication, in the following decade, of a work which, despite the caution of its author, the future Cardinal Giovanni Battista De Luca, in claiming to be ‘a glossis tamen vel interpretationibus et commentariis omnino alienum’, clear signalled a turning point.⁴⁰ The *Annotationes practicae ad Sacrum Concilium Tridentinum* first appeared in 1672 as part V of book XIV of the monumental *Theatrum veritatis et justitiae* by the great jurist from Venosa. Though clearly constituting a brilliant commentary on a selection of the most important chapters of the disciplinary decrees alone, and drawn up in a ‘stylo forensi’ rather than a strictly exegetic form, they did not suffer any censorship.⁴¹ The only attempt at censorship was made a few years after the author’s death on the instigation of Pope Alexander VIII, a jurist like De Luca and a former keen rival of his in the College of Cardinals. This attempt came to nothing. However, it highlights the fact that the reason for possible censure was not an alleged transgression against the bull *Benedictus Deus*, but the presence of critical and disrespectful statements concerning the episcopacy and the Curia.⁴²

⁴⁰ Johannes Baptista De Luca, *Theatrum veritatis et justitiae*, Lib. XIV, Pars V, *Annotationes practicae ad Sacrum Concilium Tridentinum* (Venetiis 1706) disc. I, 1-2; on the person and the work of De Luca (1614-1683), rightly regarded as one of the leading jurists of the seventeenth century, cf. Aldo Mazzacane, ‘De Luca, Giovanni Battista’, DBI 38 (1990) 340-347 and Italo Birocchi and Ersilia Fabbriatore, ‘De Luca, Giovanni Battista’, DGI 1.685-689.

⁴¹ On the basis of his experience as a court lawyer, the jurist from Venosa does not fail to point out occasional difficulties in the acceptance and application of some decrees. Moreover, in his peculiar style, which distinguishes him from most of his contemporaries, he strictly limits his use of the doctrinal ‘allegationes’, focusing almost exclusively on the interpretative interventions of the Congregation of the Council; nor does he fail to praise the decision to grant the Congregation the exclusive right to interpret the disciplinary decrees, the meaning of which he recognises as sometimes being obscure, on account of the unfortunate fact that they were drawn up by men of letters, when it would have been far wiser to entrust this delicate task to ‘alicui Rotae auditori vel alteri perito canonistae qui in forensibus bene versatus esset’ (De Luca, *Annotationes practicae* 2).

⁴² See the observations of the lawyer of the Roman Curia, Scipione Zanelli, on the occasion of his vote cast between 1689 and 1690, as consultor of the

Further confirmation of the steady waning of observance of Pius' ban is provided by the fact that no prohibitive measures were taken against the volume entitled *Notes sur le Concile de Trente*, which came out anonymously in 1706 and contained far harsher criticism of the 'Cour de Rome'.⁴³ As demonstrated by this last vicissitude, a phenomenon which had had a considerable influence on the development of canonical doctrine in the early post-Tridentine period could be considered exhausted by the beginning of the eighteenth century.

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Congregation of the Index, 'in tractatum de matrimonio et adnotationes in Tridentinum cum supplementum' in ACDF, Index, Prot. ZZ, n. 15, fol. 332r-334v; on the various disagreements with Cardinal Pietro Ottoboni and the latter's subsequent interventions against De Luca, first in order to scuttle his appointment as a cardinal and, after becoming pope, in order to have his works condemned, cf. Giulio Signorotto, 'De Luca, Giovanni Battista', *Dizionario storico dell'Inquisizione*, edd. Adriano Prosperi, Vincenzo Lavenia and John Tedeschi (4 vols. Pisa 2010) 1.464.

⁴³ This work, which first appeared anonymously in Cologne in 1706 and was reprinted in Brussels in 1708 and 1711, is the result of an assemblage by the jurist and journalist Etienne Rassicod (1646-1718) of a few conferences on the Council of Trent held by four state counsellors: Luis François Lefèvre de Caumartin, Jérôme Bignon, Claude Le Pelletier and Claude Bazin de Bezons (cf. 'Eloge de M. Rassicod', *Journal de savans*, 20 juin 1718, 387-390). In this case, too, attention is focused exclusively on the disciplinary decrees, the exposition of which is accompanied by continual references to the peculiar situation of the French Church. Despite the criticisms—of a clearly Gallican cast—towards Holy See, the undisguised nature of commentary and the fact that the texts of the decrees examined (all up to session XIII and a selection of the subsequent ones) were translated into French, which (as for all languages other than the original Latin, unless specifically authorised) was expressly forbidden by a 1629 decree of the Congregation of the Council, the 'Notes' were never placed in the *Index librorum prohibitorum*.

A NOTE

Stephan Kuttner's last Discovery on Walter of Coutances: A Commemoration 110 Years after Kuttner's Birthday

Peter Landau

Stephan Kuttner (†1996) established the Institute of Medieval Canon Law at The Catholic University of America in 1955. He moved it to Yale University in 1964 and then to the University of California, Berkeley in 1969. It then was moved to Munich for almost twenty years and renamed the Stephan Kuttner Institute of Medieval Canon Law. In 2016 the Institute was transferred to Yale University under the direction of Anders Winroth. Kuttner was also the founder of this journal in 1971. Ludwig Schmugge has aptly dubbed him the 'Pope' of canon law studies during the twentieth century.

He was very active in his scholarly research until the final years of his life.¹ His last publication was probably an essay on the *Stroma* of the canonist Rolandus of Bologna published in 1990.² Working on a revised edition of his collection of articles with the title *Gratian and the Schools of Law 1140-1234* I used Kuttner's personal copy of this book with many additions of the author that he made in the margins after 1983. Studying these notes I found a typed text among his 'Retractationes' for p. 321 of his essay 'Anglo-Norman Canonists of the Twelfth Century' referring to bishop Walter of Lincoln. This text runs like this.

Walter bishop of Lincoln: This was Walter of Coutances (de Constantiis), archdeacon of Oxford 1175-82, bishop of Lincoln 1183, archbishop of Rouen from 1184 or 1185, who died in 1207. He addressed to the bishop of Exeter 'super negociis iuris librum unum', see John Bale 'Index Britanniae scriptorum', ed. R. L. Poole (Oxford 1902) 103. [A second edition, by Poole and M. Bateson, was published in Cambridge 1990.] I shall give a fuller bibliography and discuss the possibility of other writings by Walther of Coutances in an article planned for a Festschrift to appear in 1994.

¹ Ludwig Schmugge, 'Stephan Kuttner (1907-1996): The "Pope" of Canon Law Studies: Between Germany, the Vatican and the USA', *BMCL* 30 (2013) 141-165.

² Stephan Kuttner, 'Did Rolandus of Bologna write a "Stroma ex Decretorum corpore carptum"?', *BMCL* 20 (1990) 69.

In John Bale's Index the reference on p. 251 is formulated like this: 'In Summa legum continetur, in tractatu de actionibus'. The same formulation can be found in an anonymous *Ordo iudiciarius*, edited by Carl Gross in 1870 as a title for the second part of this 'ordo' dealing with actions.³

In an article I published in 2004 I conjectured that the work edited by Gross had been written by Walter of Coutances, who had started his career as teacher of canon law in Paris around 1165.⁴ He later became the archbishop of Rouen and was a learned canonist who inspired the Anglo-Norman school until his death.

My thesis on Walter as author of the 'ordo iudiciarius' *Tractaturi de iudiciis* was approved by the late André Gouron in his last volume of essays *Pionniers du droit occidental: 'proposée, avec un très haut degré de probabilité'*.⁵ I can now say that Kuttner also certainly discovered this forgotten author. I could not find out in which Festschrift Kuttner wanted to present the results of his research. But we can be sure that he still was still active and exploring canonical texts during the last years of his life between 1990 and 1994.

Munich.

³ *Incerti Auctoris Ordo Iudiciarius, Pars Summae Legum et Tractatus de Praescriptione*, ed. Carl Gross, (Innsbruck 1870) 1.

⁴ Peter Landau, 'Walter von Coutances und die Anfänge der anglo-normannischen Rechtswissenschaft', ed. Orazio Condorelli, *Panta rei: Studi dedicati a Manlio Bellomo* (5 vols. Roma 2004) 3.183-204.

⁵ *Pionniers du droit occidental au Moyen Âge* (Collected Studies 865; Ashgate 2006), Addenda et Corridenda p. 3.

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Abbreviated Titles

- Autographa I.2: Giuristi, giudici e notai (sec. XII-XV)*, ed. Giovanna Murano (Imola 2016) = *Autographa*
- Cathars in Question*, ed. Antonio Sennis (Heresy and Inquisition in the Middle Ages; Woodbridge 2016) = *Cathars in Question*
- A Companion to the Medieval Papacy: Growth of an Ideology and Institution*, ed. Keith Sisson and Atria A. Larson (Brill's Companions to the Christian Tradition 70; Leiden 2016) = *Companion to the Medieval Papacy*
- A Companion to Priesthood and Holy Orders in the Middle Ages*, ed. Greg Peters and C. Colt Anderson (Brill's Companions to the Christian Tradition 62; Leiden 2016) = *Companion to Priesthood and Holy Orders*
- Church and Belief in the Middle Ages: Popes, Saints, and Crusaders*, ed. Kirsi Salonen and Sari Katajala-Peltomaa (Crossing Boundaries: Turku Medieval and Early Modern Studies; Amsterdam 2016) = *Church and Belief in the Middle Ages*
- Guido Terreni, O. Carm. († 1342): Studies and Texts*, ed. Alexander Fidora (Textes et Etudes du Moyen Âge 78; Barcelona 2015) = *Guido Terreni*
- The History of Courts and Procedure in Medieval Canon Law*, ed. Wilfried Hartmann and Kenneth Pennington (Washington DC 2016) = HMCL 3
- Jews and Christians in Medieval Europe: The Historiographical Legacy of Bernhard Blumenkranz*, ed. Philippe Buc, Martha Keil, and John Tolan (Religion and Law in Medieval Christian and Muslim Societies 7; Turnhout 2016) = *Jews and Christians in Medieval Europe*
- La pathologie du pouvoir: Vices, crimes et délits des gouvernants: Antiquité, Moyen Âge, époque moderne*, ed. Patrick Gilli (Studies in Medieval and Reformation Traditions 198; Leiden 2016) = *Pathologie du pouvoir*

Political Society in Later Medieval England: A Festschrift for Christine Carpenter, edd. Benjamin Thompson and John Watts (Woodbridge 2015) = *Political Society in Later Medieval England*

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The Resources of the Past in Early Medieval Europe, edd. Clemens Gantner, Rosamond McKitterick, and Sven Meeder (Cambridge 2015) = *Resources of the Past in Early Medieval Europe*

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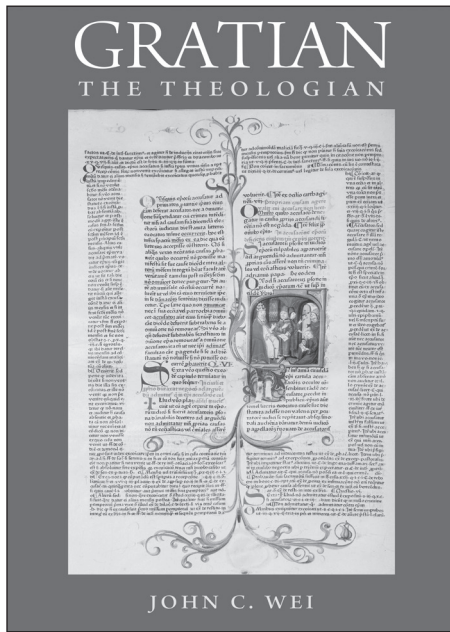
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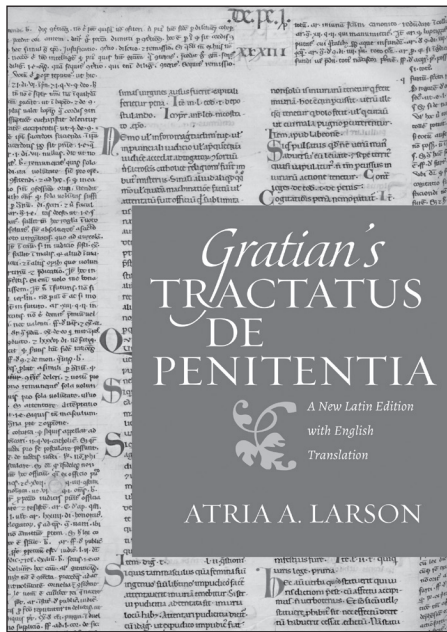


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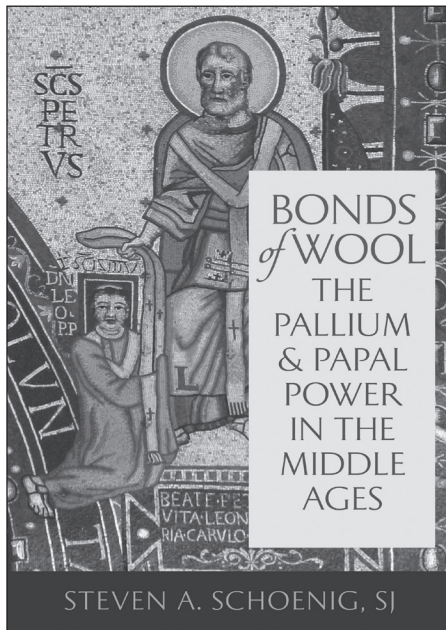


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