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2014

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### Recommended Citation

Kenneth Pennington, Gratian and Compurgation: An Interpolation, 31 BULL. MEDIEVAL CANON L. 253 (2014).

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## Gratian and Compurgation: An Interpolation

Kenneth Pennington

The search for the earliest manuscripts of the Vulgate text of Gratian's *Decretum* can be aided by two textual variants that are important guides to deciding which manuscripts are the earliest versions of his text. Undoubtedly with more research others will be found. The first was discovered more than 25 years ago. Gratian had included a small section of Justinian's *Institutes* in his *Tractatus de legibus*, D.12 c.6:

Diuturni mores consensu utentium approbati legem imitantur.

In the earliest manuscripts of the Vulgate, the text remained intact. Early on, however, the canonist interpolated the phrase, 'nisi legi sunt adversi', after 'mores'. Brendan McManus examined this textual addition in a short essay in 1988.<sup>1</sup> It has proven to be a secure guide to dating the earliest manuscript texts.

A second piece of textual evidence that is also a significant guide to establishing the earliest Vulgate text occurs at the end of *Causa* 6 where Gratian discussed the use of compurgation after a decision had been rendered in court. He had begun his treatment of compurgation in *C.2 q.5* with an introductory dictum taken from Roman law. This reference to Roman law is present in the earliest version of Gratian's *Decretum*.<sup>2</sup> Gratian returned to the issue at the end of *C.6 q.5*

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<sup>1</sup> Brendan J. McManus, 'An interpolation at D.12 c.6', *BMCL* 18 (1988) 55-57. In Barcelona, Arxiu de la Corona d'Aragó, Santa Maria de Ripoll 78, fol. 20r, the phrase is added as an interlinear gloss.

<sup>2</sup> Orazio Condorelli alerted me to this text in an email: 'A proposito di Graziano e il diritto romano: La settimana scorsa sono stato a Roma, per presentare il libro di Antonia Fiori sulla "purgatio canonica" (insieme a Cortese, Chiodi e Roumy). Nel libro, fra l'altro, è messo in evidenza che Graziano fa un riferimento implicito (ma certo) alla *lege Cogi* (Cod.3.31.11) nel dictum che apre *C.2 q.5*. Ho appena verificato che il riferimento è presente anche in Sg, p.50a: 'Deficientibus vero accusatoribus, non videtur esse cogendus ad purgationem. Nam sicut possessor actore deficiente sue

and posited an exception to the general rule that compurgation should not be imposed on a defendant who has been exonerated: Must a defendant prove his innocence if his accuser's proof fail? His conclusion was one that did not change from what may be his earliest version of the text until his final pen stroke. Gratian noted that normally a defendant was completely exonerated when his accusers could not prove his case. However, if the question before the court were an issue of public notoriety (*infamia*), then the defendant had to prove his innocence through oaths of compurgation.<sup>3</sup>

The jurists did not like Gratian's conclusion, and the early manuscripts of his text reflect their objections. They interpolated a sentence in a dictum that purported to be Gratian's words in which he explained that a defendant had only to prove exceptions and not his innocence:

*Accusatus non negationem sed exceptionem probare debet.*

Anonymous canonist(s) also added a text from Justinian's *Codex* that made the same point.<sup>4</sup>

*Actor quod asseuerat profitendo se probare non posse, reum necessitate monstrandi contrarium non astringit, cum per rerum naturam factum negantis probatio nulla sit.*

The text, 'Accusatus non negationem sed exceptionem probare debet', began life as a marginal gloss, as in Durham Dean and Chapter Library C.III.1, fol. 137r, after which it was placed into Gratian's text as a dictum of Gratian in early manuscripts. Friedberg was guided by the early manuscripts he used, which were early but not the earliest, to add the passage to his edition as a dictum of Gratian after C.6 q.5 c.1. The very earliest manuscripts, however, omit it, e.g. Biberach an der Riss, Spitalarchiv B 3515, fol. 159v, Bremen, Universitätsbibl. a.142, fol. 90r (French),<sup>5</sup> Brindisi, Biblioteca Annibale de Leo A/1, fol. 188v,

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possessionis titulum probare non cogitur (cfr. Cod.3.31.11), sic qui inpetitur ad innocentiam suam purgandam cogendus esse non conceditur. . . ?

<sup>3</sup> Antonia Fiori, *Il giuramento di innocenza nel processo canonico medievale: Storia e disciplina della 'purgatio canonica'* (Studien zur Europäischen Rechtsgeschichte 277; Frankfurt am Main 2013) 229-236.

<sup>4</sup> Cod. 4.19.23.

<sup>5</sup> Codex text added to margin by a later hand; the dictum is entirely missing.

Florence, Bibl. Laur. Santa Croce 1 sin.1, fol. 143r (Italian), Munich, BSB Clm 28161, fol. 114r (Italian), Mainz, Stadtbibl. II.204, fol. 100v (Italian),<sup>6</sup> Paris, BNF, nov. acq. lat. 1761, fol. 132va (Italian) and the two other manuscripts of the earlier, pre-Vulgate recension (Florence and Admont). As with the additional phrase in D.12 c.6, Barcelona, Arxiu de la Corona d'Aragó, Ripoll 78, fol. 149v added both texts to the margin, which is an indication how early these two additions to Gratian's text began to circulate.

The text of Justinian's *Codex* made it clear that a defendant was not encumbered if a plaintiff had not proven his case.<sup>7</sup> This example is a good piece of evidence that shows Gratian did not understand the full ramifications of replacing Germanic modes of proofs, like compurgation, with the *ordo iudiciarius*. He still found older ideas of justice attractive and did not fully accept the Roman jurisprudence that regulated procedure. In Gratian's defense, the jurisprudence of procedure was still in its infancy, and the ordeal was far from dead.<sup>8</sup>

Following Friedberg's use of fonts to distinguish between Gratian's words (Italics) and the wording of the texts (Roman), the end of Causa 6 as it left Gratian's desk read:<sup>9</sup>

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<sup>6</sup> Both texts added to margin by later hand.

<sup>7</sup> C.6 q.4 attached to the end of c.7. Friedberg noted that Bickel erred because he thought the *Codex* text was a *palea*. Bickel was not wrong. If we define 'palea' as a text added to the *Decretum* after Gratian finished his work, he was right. It was not a part of Gratian's original text, see the edition below.

<sup>8</sup> Franck Roumy, 'Les origines pénales et canoniques de l'idée moderne d'ordre judiciaire', edd. Orazio Condorelli, Franck Roumy, and Mathias Schmoeckel, *Der Einfluss der Kanonistik auf die europäische Rechtskultur, 1: Zivil- und Zivilprozessrecht* (Norm und Struktur: Studien zum sozialen Wandel in Mittelalter und Früher Neuzeit 37.1; Köln-Weimar-Wien 2009) 313-349 at 335-342, where he lists a number of papal letters in which the term 'ordo iudiciarius' indicated the procedure used in the case or the idea that the norms of the 'ordo' should be followed, i.e. due process of law in English. For more examples, see my 'Due Process, Community, and the Prince in the Evolution of the *Ordo iudiciarius*', *RIDC* 9 (1998) 9-47 at 12-15.

<sup>9</sup> The text is based on Brindisi = Bm, with readings from the Biberach = Bi, Bremen = Br, Florence = Fs, Mainz, Stadtbibl. II.204 = Mz and Munich 28161 = Mk manuscripts. These five manuscripts are very good witnesses to the

<C.6 q.4>

*In renouatione iudicii beati Petri memoria est habenda,*

*Item ex concilio Sardicensi*

<c.7> Osius episcopus dixit: quod si aliquis episcopus adiudicatus fuerit in aliqua causa et putat se bonam causam habere, alterum iudicium renouetur, si uobis placet. Sancti Petri apostolicam memoriam honoremus ut scribatur uel ab his qui examinauerunt uel etiam ab aliis episcopis<sup>a</sup> qui in prouincia proxima morantur romano episcopo. Et si adiudicauerit<sup>b</sup> renouandum esse iudicium renouetur et det iudices. Si autem probauerit talem causam, ut ea non refringantur<sup>c</sup> que acta sunt que decreuit romanus episcopus confirmata erit. Si hoc ergo<sup>d</sup> omnibus placet statuatur. Sinodus respondit: Placet.

<sup>a</sup> uel etiam ab aliis episcopis BmBrMkMz: uel ab aliis etiam episcopis BiFs

<sup>b</sup> iudicauerit FsMkMz    <sup>c</sup> refringantur BrMkMz    <sup>d</sup> ergo hoc tr. BiBrFs

### Questio V

§ *Quod autem deficiente accusatore reus non sit cogendus ad probationem auctoritate Gregorii probatur, qui scribens Maximo ait: Honus probationis reo non incumbit.*

<c.1> Quod autem postulas ut illuc personam dirigere debeamus qua<sup>a</sup> de his que dicuntur, possit esse probatio, esset utcumque excusabile, si umquam ratio ei qui accusatur necessitate probationis imponeret. At postquam non tibi set accusantibus hoc honus incumbit, ad nos sicut prefati sumus dilatione cessante uenire non desinas. § *Hoc autem seruandum est: quando reum publica fama non uexat. Tunc enim auctoritate eiusdem Gregorii propter scandalum remouendum famam reum purgare oportet.*<sup>10</sup>

<sup>a</sup> qua BiBrFsMkMz: quo Bm Cf. Johannes Teutonicus, *Glossa ordinaria* s.v. *qua*: 'id est, per quam'.

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earliest tradition of Gratian's Vulgate text and, with the exception of Mz, to the earliest layer of glosses that circulated with the Decretum.

<sup>10</sup> Gratian refers to C.2 q.5 c.5 of Pope Gregory II and seems not to know that the pope of C.2 q.5 c.5 was not Gregory I, the author of C.6 q.5 c.1.