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Studi per il settantesimo compleanno di Mario Ascheri

LA FORMAZIONE DEL DIRITTO COMUNE

Giuristi e diritti in Europa (secoli XII-XVIII)

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The Law's Delays

Two Chapters in the Thirteenth-Century History of S. Maria de Lorvão

by Peter Linehan

mit Bemerkungen zu einer Extravagante Gregors IX.

von Martin Bertram*

As Antonio García himself remarked, the survival of even fragmentary records of ecclesiastical litigation from medieval Spain is very rare[1]. For Portugal this is somewhat less the case, however[2], with one of the exceptions being provided by the monastery of Lorvão, an ancient monastic establishment in the diocese of Coimbra appropriated in 1205-6 by the Infanta Teresa, daughter of King Sancho I, as a retirement home close to court after the annulment of her incestuous union with Alfonso IX of León[3]. In securing this outcome the

* The present study was originally intended for Antonio García y García on his 85th birthday (7 January 2013), who meanwhile has left us for ever (†8 July 2013). We are sure that Mario Ascheri will join us commemorating Father Antonio, revered master, generous colleague and dear friend of all three of us: *requiescat in pace*!

[1] «Encontrar en los archivos españoles las actas de un proceso eclesiástico del medievo es algo muy excepcional, y encontrarlas completas es algo todavía más difícil»: *El proceso canónico en la documentación medieval leonesa, El Reino de León en la Alta Edad Media*, II. *Ordenamiento jurídico del reino*, León 1992, pp. 565-655 at pp. 568. For a rare exception see A. García y García, *Un proceso ante juez conservador pontificio, Santiago de Compostela, 1334*, in «Bulletin of Medieval Canon Law», N.S., 19 (1989), pp. 55-59.

[2] As well as the present case, the following (all publ. in P. Linehan, *Portugalia Pontificia* [=*PP*], Lisbon 2012) may be noted: nos. 284: Bishop Pedro Salvadores of Porto *vs* King Sancho II (1237); 422a: church of Coimbra *vs* monastery of S. Cruz de Coimbra, (1253); 490a: Petrus Petri precentor of Viseu *vs* Mattheus Martini bishop-elect of Viseu *et al.* (1255-59); 927: rector and clergy of Azambuga *vs* abbot and monastery of Alcobaça (1306); 993: dean and chapter of Braga *vs* D. João Afonso, bastard son of D. Dinis (1318-19); 1003: chapter of Porto *vs* mendicant orders of the city (1320).

[3] For this process, one in which Zamora judges were much implicated see M.A.F. Marques, *Inocêncio III e a passagem do mosteiro de Lorvão para a Ordem de Cister*, in «Revista portuguesa de história», 18 (1980), pp. 231-279, esp. pp. 265-275; M. Cocheril, *Les infantes Teresa, Sancha, Mafalda et l'Ordre de Cîteaux au Portugal*, in «Revista portuguesa de história», 16 (1976), pp. 33-49 at pp. 40-42. Cf. P. Linehan, *An Impugned Chirograph and the Juristic Culture of Early*

brutality of the king's treatment of the local bishop was matched only by the unparalleled arrogance of his letter to Innocent III on the subject (to judge by the thunderous reproof that it elicited)[4]. The particulars of that scalding pontifical denunciation (regarding the king's alleged retention of a witch as his special advisor, for example and including Innocent's reminder to the monarch of the fate of the Old Testament King Uzziah, smitten with leprosy for usurping the functions of the priests in the Temple)[5] may suggest the need to modify some of the particulars regarding the abbot of Lorvão's appointment of the parish priest at S. Maria de Abiul in 1195 as described in the royal chancery's memorandum of the matter. By that account, the king had resisted all attempts by outsiders (not least an intriguingly described 'decretist' fresh from the Roman curia) to influence the process[6] before the abbot was prevailed upon by Sancho's sons and clients to fill the vacancy with one of their own number[7]. An ancient house was being fattened for the plucking: a process continued four years later by the purchase, for the huge sum of one thousand *morabitini*, «de illa hereditate quam habuimus in Abiul»[8].

Although the elements of the story of her father's asset-stripping of a thriving monastic community and its conversion into a house of Cistercian nuns have long been available, the moral of the tale may need to be drawn, if only to render intelligible the series of events described in what follows. By both papal and extra-papal means, for upwards of forty years after 1205-6 the Infanta Teresa proved a doughty defender of the Lorvão convent whose abbess she became in 1228. Thus, in September 1245 the archbishop of Braga and the bishop of Coimbra were recruited to resist molestors of the convent's property, notwithstanding the latter's losses to the nuns over the previous generation[9]. For, as the precentor of Coimbra to whom this letter was addressed for action was later to testify, for the church of Coimbra its bishop's concessions to the convent had

Thirteenth-Century Zamora, in *Manoscritti, editoria e biblioteche dal Medio Evo all'Età contemporanea. Studi offerti a Domenico Maffei per il suo ottantesimo compleanno*, edited by M. Ascheri and G. Colli, Rome 2006, pp. 461-513, esp. pp. 470-471. For the earlier monastic establishment there (since the late ninth century), see the contributions of M.J. Branco and A.A. Nascimento to *Liber Testamentorum Coenobii Laurbanensis (Estudios)*, León 2008.

[4] «Sane nullus principum quantumlibet magnus nisi forsan haereticus aut tyrannus tam irreverenter et arroganter nobis aut praedecessoribus nostris scribere attentavit propter eius reverentiam et honorem cuius repraesentamus in apostolatu personam» (23 Feb. 1211): ed. A.J. da Costa, *Bulário português: Inocêncio III (1198-1216)*, Coimbra 1989, no. 154.

[5] This letter probably arrived after Sancho's death some four weeks later and the succession of Afonso II who was to die of leprosy in 1223.

[6] «Magister decretista Petrus, qui noviter uenerat a Romana Curia (…) dolose atemptabat decipere regem dicens: 'Domine mi rex, est hic quedam ecclesia quam habeo in prestimonium ab episcopo ecclesie sedis Colimbrie: mihi si uobis placet dominium quod ibi est residuum condonetis'»: *Documentos de D. Sancho I (1174-1211)*, ed. R. de Azevedo, A.J. da Costa and M. Pereira, I, Coimbra 1979, no. 231.

[7] «Qui consentit. Et ex consensu regis statim electus est, tali pacto quod ipse et pater suus semper obedientes essent monasterio»: *ibidem*.

[8] «cum domibus et cum uineis et cum omnibus suis pertinentiis et terras (*sic*) ruptas et non ruptas, montibus, fontibus, pascuis per ubi illam(?) melius potueritis inuenire»: *ibidem*, no. 233.

[9] Innocent IV, rescript *Quia nonnulli*, 28 Sept. 1245: Lisbon, Instituto dos Arquivos Nacionais: Torre do Tombo [=IAN/TT], Mosteiro de Lorvão, docs. eclesiásticos, mç. 1, no. 32 (*PP*, no. 360), endorsed «cantori Colimbrien. vel episcopo Colimbrien. ut det eas sibi».

been «inique et dampnose»[10]. That was in 1253 (probably), eight years after Afonso III, a monarch with an agenda very different from that of his predecessors, had replaced Sancho II on the Portuguese throne. Together with the change of ruler, the death of the Infanta Teresa in June 1250 served to release the repressed pressures of the lengthy interim[11]. Indeed within just a few months evidence of this was apparent.

Such was the context of the challenge mounted at the papal court in December 1250 by Vicente Dias *miles*. At issue was possession of patronage of the church of Abiul, a claim referred in that month to three Coimbra judges, the prior of S. Cristóforo (F. Pelagii) and the *magister scolarum* and treasurer of the cathedral church (P. and J. Martini). On the following April 13 the judges summoned the parties for a hearing at Coimbra on 7 June, on the eve of which, at the defendants' behest, a postponement until 19 August was secured. After a further delay, on 21 August the other two judges received the proctors of the two parties, Domingos Salvadores *presbiter* for Lorvão, and Sebastião, *civis* of Coimbra, for Vicente Dias[12], whereafter debate ensued as to whether anything could be done without the third judge, the prior of S. Cristóforo, who had been called away by the bishop of Viseu «et necesse habet ire» (lin. 82)[13]. By the 26th all three judges were present and accepted Vicente Dias's *libellus*, whereupon his opponent, as well as formally denying the judges' authority, denounced the previous *acta* as invalid and invalidating what followed *inter alia* on the grounds that two of them without the third could not proceed: «quod vos duo in nullo potestis procedere» (lin. 95). It was not sufficient that the prior had absented himself *viva voce*, informally and without documentation. On 30 August an interlocutory judgment in favour of proceeding was issued, at which the protesting Domingos Salvadores adopted a new tack, namely that it was harvest time when no legal business could be done («in quo nemo compellitur causam agere secundum iura canonica et civilia»: lin. 238-239), adducing the unpacking of all the harvest paraphernalia («dolia et vasa necessaria ad vina colligenda»: lin. 241-242). Harvest was a movable feast. As all the world knew (as he announced with a classicizing flourish)[14] in order to prevent a loss of crops it might come either earlier or later, and anyone with any knowledge of the matter knew this[15]. There followed extended debate between the parties as

[10] IAN/TT, Sé de Coimbra, 1ª inc., docs. particulares, caixa 26, rolo 4, testimony of Pedro Rodrigues.
[11] Rescripts *Sua nobis*, 9 Jan. 1252, at behest of bishop of Coimbra regarding episcopal rights allegedly breached by Lorvão in churches «de Boton, de Caria, de S. Martino in Campo, de Vilela, de Figuera et de Serpiis»: IAN/TT, Cabido da Sé de Coimbra, 1ª incorp., docs. eclesiásticos, mç. 2, no. 88; *Piis meritis*, 9 Dec. 1255, Alexander IV beseeches Afonso III to refrain from molesting the convent: IAN/TT, Mosteiro de Lorvão, docs. eclesiásticos, mç. 1, no. 35 (*PP*, nos. 418, 508). (The second letter's various lapses – «Cisterciensis ordinis» etc. – would have enabled the king to ignore its content with a clear conscience).
[12] *Procuratorium* dated «apud Bracaram mense augusti era M.CC.LXXX.IX» (IAN/TT, Most. de Lorvão, cx. 89, rolo 2 (see Appendix), lin. 58. References to "lin." here and in the following are to the line numbers of the original, not to those of the section printed in the Appendix.
[13] «Ad sinodum», it was later revealed by the other two (*ibidem*, lin. 220).
[14] «Lippis et tonsoribus patet» (lin. 140) quoting Horace, *Satires*, 1.7.3, i.e. known to *everyone*.
[15] «Maxime cum annus ita sit temporaneus quod si ferie prorogantur usque ad terminum quem

to whether according to «consuetudo terre» (lin. 293) it really was harvest time at Coimbra, with Vicente Dias's man relying on both Gratian on the «communis utilitas civium» and the Liber Extra and insisting that it was not, that according to custom harvest time there started on the feast of St Cyprian (16 September)[16]. And initially he carried the day, winning the argument and securing an interlocutory judgment in his favour. But not for long. This was an *early* year, his opponent objected. If the recess were delayed, as the other side was demanding, the harvest would be lost. The next day, 4 September, Domingos Salvadores adopted a new ploy. The cantor of Coimbra, upon whose advocacy he had been depending, was doubled up in bed and unable to attend. (If the opposition doubted this they could go and check for themselves: lin. 319-28). Accordingly, he asked for a truce or adjournment. But Vicente Dias's man was having nothing of it[17]; whereupon his opponent declared his intention of appealing to Rome[18]. And that did it. The next day the judges declared that although they did not believe the nuns to have been in any way hard done by, because they were women and on account of their womanly ignorance they could have their way in the matter of a prorogation[19].

On 21 October battle was rejoined, with on this occasion the nuns represented by João Peres, cleric of the dean of Porto[20]. On the 23rd the plaintiff specified the properties which he claimed to be unjustly occupied by the ladies. The list of landed property was substantial. In addition to patronal rights in the church of Abiul, it comprised:

> terciam partem duorum molendinorum que sunt meo palatio de Abiul, que molendina sunt in una domo. Item unum fundum qui iacet inter ipsa molendina et meum ortum. Item campum vel hereditatem que vocatur Campus de Onego et est in termino de Abiul. Item hereditatem que vocatur Vallis Mouram et iacet in termino de Abiul. Item adegam que est in Abiul que fuit domini Didaci et domine Exemene. Item terciam partem vinee que fuit domini Didaci et domine Exemene et est in termino de Abiul,

and damages in the sum of two hundred marks in respect of crops lost (rolo 3, lin. 20-32).

ponunt adversarii, omnes fructus perirent, quod scire poteritis a quolibet qui scientiam habent huius rei» (lin. 304-7).

[16] D.4 c.2 (Friedberg, I. 5); X 1.4.8 (Friedberg, II. 39-41); lin. 276-358.

[17] «Maxime cum habeat secum advocatum quem ab initio cause habuit et qui in presenti illas inducias petit pro ea et proponit et allegat in iudicio sedendo coram nobis» (lin. 330-333).

[18] «Quia pro advocato quem casualiter contigit incidere in lectum egritudinis tante quod a lecto non potest surgere nec levare nisi cum clamoribus et gemitibus magnis non vultis mihi dare indutias ad querendum advocatum» (lin. 341-344).

[19] «Licet non credamus in aliquo gravare partem monasterii de Lorbano propter sexum tamen mulierem et ignoranciam dominarum et quia in brevi occurrunt ferie vindemiarum ex habundanti damus eis indutias usque ad terciam diem post festum beati Luce proximo venturum…» (21 Oct.): lin. 352-356. The citation at a later stage of the process (rolo 2, lin. 386-387) of the Roman Law principle «quod ignorancia iuris excusat milites, rusticos et feminas» is to be noted: cf. *Dig*. 2.1.7.4; 22.4.9.1, 3, with *Cod*. 5.13.1.1 (*fere*). «Contra iura», it would be alleged in 1297 of the associates of the renegade Maiora Domingues, in dispute with the prior and convent of Santa Cruz de Coimbra, «quia mulieres et simplices ut sunt insciti et ignari simplicitate et ignorancia tantummodo excusantur»: Braga, Arquivo Distrital, Gav. Religiões etc., 136, lin. 993-995.

[20] IAN/TT, Most. de Lorvao, cx. 89, rolo 3, lin. 8.

But these allegations had not been made in the plaintiff's initial deposition, João Peres protested[21], and *varietates* and *mutaciones* could not be introduced after the *litis contestacio* – a restriction, he observed, on which Azo, Accursius, Master Tancred, Bernardus Parmensis «et alii iuris civilis et canonici professores» were all in agreement (lin. 35-46). Bad faith on the part of Vicente Dias and the intention to weary the nuns *laboribus et expensis* were alleged (lin. 52). According to João Peres, at this stage of the case Vicente Dias was not at liberty to extend the issue[22].

Now, the phrase *laboribus et expensis* was not without significance, for it occurs in *Romanus pontifex*, the constitution of Gregory IX designed to deal with precisely the situation which now arose at Coimbra, requiring that particular matters – *nomina et res* –be specified «in prime citationis edicto»[23].

> To which it was responded thus on behalf of the monastery: as to the assertion of the proctor of D. Vicente that the decretal entitled *Romanus pontifex* cannot be said to prejudice his case because he believes it not to be a decretal or, if it be so, not yet to have been solemnly published, *unde rem que culpa caret etc.*, the proctor of the monastery responds and states both that *Romanus pontifex* is indeed a decretal and secondly that, being solemnly published, is as deserving as any other decretal of being complied with in the schools and in judgments in every part of the province of Spain. Nor since it is exceedingly stupid and supine does the ignorance of the proctor of D. Vicente damage our case (lin. 188-195).

To which fighting talk Vicente Dias's proctor objected that the rule of *ius commune* was that such particulars had to be specified not in the edict of citation but rather, as in this case, in the subsequent *libellus*. Anyway, he urged, *Romanus pontifex* was not applicable in Portugal because it had not yet been «insinuated» or published there[24]. His case could not be prejudiced by this «novella constitucio».

Far from it, his opponent countered.

> To the allegation that in order for the provincials to be obliged to obey it a new constitution has to be sent around the provinces *ad hoc*, the monastery's proctor replies and says that it is not necessary for a constitution to be sent to every part of a province. In the case of a province's *studium* or *studia* it is sufficient for it to be publicly read in the schools and applied in judgments, and he offers to prove that it was thus done in the case of the aforementioned decretal *Romanus pontifex*. *Item*, he says that it is not necessary when a constitution is solemnly edited and publicly promulgated by the Roman pontiff

[21] Which, in the words of the papal rescript, had been «super iure patronatus dicte ecclesie, terris, redditibus, debitis, possessionibus et rebus aliis iniuriantur eidem»: rolo 2, lin. 6-7.

[22] «Item dico quod amodo per rescriptum apostolicum super rebus in eodem contentis in genere monasterium non poterit conveniri nec per illud rescriptum procedi cum easdem res in genere comprehensas dominus V. Didaci in prime citacionis edicto non duxerit exprimendas» (rolo 3, lin. 76-79).

[23] For text see Appendix.

[24] Note that this 'response' of Vicente Dias's proctor (lin. 116) is the record's first reference to *Romanus pontifex*. The allusion to it, by João Peres to which it responds, is not recorded: an absence which may account for the lost week in the record between 21 October, when the hearing was to have resumed, and 28 October when, on the evidence of the sequence of dates terminating at the beginning of membrane 5 («Sequenti feria VI^{a}, scilicet tercio nonas novembris», i.e. 3 November: see Appendix), it appears in fact to have done so. In that case, the 'lost week' was perhaps occupied with the presentation of *Romanus pontifex* by João Peres.

> that it be brought to the notice of every single province. It is sufficient that it be sent to the *studia generalia*, as is proved in the case of the decretals compiled by Pope Gregory (lin. 226-237).

That *Romanus pontifex* was current at the papal court he undertook to demonstrate. The constitution had achieved validity not two months after its becoming current in the provinces but two months after its publication at the Roman curia (this by analogy with the time-scale established by legislation of Alexander III at the Council of Tours and Honorius III, *Super specula*, concerning religious who abandoned the cloister for the study of *leges mundiales* or physic). «Et sic intelligit Vincentius et Goffredus et alii iuris civilis et canonici professores». Moreover, even if the two-month calculation had to be made from the later date, the same conclusion would obtain and the plaintiff would be caught by its requirement regarding the completeness of the first citation.

And now the monastic proctor went onto the attack, raising the objection that on account of his sacerdotal status his opposite number, Master Sebastião, was inadmissible as Vicente Dias's proctor[25]. This consideration led on to debate as to whether the word *sacerdos* applied to *minores presbiteri* and how *presbiteri* both major and minor fitted into the clerical scheme of things[26]. This was not a case for judicial discretion, the monastic proctor insisted. The judges were obliged to act, even if the other side had failed to prosecute the matter[27]. Amidst the etymological logic-chopping (e.g. «patet quod hoc nomen sacerdos proprie ad episcopos pertinet, non ad presbiteros»: lin. 331-332) his opponent responded that after almost a month of litigation it was rather late in the day to be introducing this objection,

> per hoc quod in prima sessione egisti et respondisti et litigasti mecum per XIIII dies coram istis iudicibus et per allegationes meas et rationes meas late fuerunt multe interlocutorie contra te et quedam pro te et super multis littem contestatus fuisti mecum. Item quia in ista secunda sessione iam per XIII dies litigasti mecum et littem contestatus es super publicatione illius quam dicis constitutionem, scilicet *Romanus pontifex* (lin. 342-347).

In any case, it had been no secret in Coimbra that he was a priest. He had been so for many years, and Coimbra was scarcely three leagues distant from

[25] «Petit procurator monasterii quod vos domini iudices non audiatis magistrum S(ebastianum) advocantem pro domino Vincentio cum sit sacerdos et in tali casu non possit suum patrocinium inpertiri» (lin. 264-267). Two months earlier Sebastião had been described as a layman (*civis*) of Coimbra (above, text corresponding to note 12).

[26] «Dicit procurator monasterii de Lorbano (…) Pluries postmodum publice sacerdotis officium fuerit executus ita quod remotis necdum vicinis potuerit esse notum. Respondet et dicit monasterii procurator quod etiam si hec omnia vera essent nil tamen domino Vincentio prossunt. Nam quedam sunt que possunt per pacienciam aut consensum, quedam vero que nullatenus relaxari, verbi gratia si aliquis coram iudice quatenus(?) cum adversario convenit, suscepit actionem fideicommissi et aliis defensionibus usus fuerit et nullam suspicionis causam contra iudicem assignaverit amplius ad hanc reverti non potest» (lin. 268-285).

[27] «Sic vos domini iudices advocatum domini Vincentii ex officio vestro, licet pars monasterii hoc omisserit reppellatis; et quod hoc facere debeatis probat lex manifeste que loquitur in hoc casu. Ait enim quod si aliqui per edictum vel constitucionem sunt prohibiti postulare, etiam si adversarius sciat et consentiat, iudex eos admittere non debet, maxime ubi adversarii per ignoranciam excusantur, maxime ubi adversarii per ignoranciam excusantur» (lin. 306-311).

Lorvão. An objection on that score was not to be raised at this stage of the proceedings[28]. Moreover, to litigate before a judge implied consent to his authority and withdrawal of such reservations[29]. On these grounds[30] Master Sebastião asked the judges to declare the nuns contumacious and to find in his favour with costs. But the judges declined to admit the exception (lin. 431-432), whereupon the nuns' proctor urged that Vicente Dias (not Vicente Dias's proctor, be it noted) be required to swear the oath *de calumpnia* concerning that exception, his opponent rejoined by demanding that his opponent do so *de malitia*, and the judges determined that both proctors swear[31] (but which oath?) and on 7 November adjourned proceedings for two months, meanwhile referring to judges at Salamanca determination of the crucial question whether *Romanus pontifex* had been published «in Hispanorum provinciis» and that accordingly Vicente Dias had been obliged to state his case at the outset[32].

The judges appointed for this task – the examination of certain *probationes* on the subject provided by the nuns and the provision of answers to an appended questionnaire[33] – were, as chosen by the contestants, the dean (later bishop) of Salamanca, Domingo Martín, and the archdeacon of Viseu, Lorenço Eanes. But what that examination comprised and what those answers were we know not, for although the article *Intendit probare* makes clear that Lorvao sought permissioin to present further evidence for the validity of *Romanus pontifex*, nothing further remains of the 1251-2 stage of the struggle for S. Maria de Abiul. On this occasion the Lorvão convent's ordinarily meticulous retention of its estate papers appears to have failed.

Thirteen years later when the matter of Abiul next returns to view Vicente Dias had disappeared from the scene and the rector of Abiul was Pascásio Godinho who, being an undispensed pluralist (as dean of Lamego as well as rector of two other Coimbra churches, Santa Justa and São Julião «de Foce

[28] «Et ad id quod dicis quod potes si de novo pervenit ad te exceptio, quod hoc non habet locum in eis que publice fiunt quia ea que publice fiunt non licet alicui ignorare, et ita licet ad eum de novo pervenisset non posset eam proponere sicut hic, scilicet quod ego sum presbiter est publicum a multis annis in civitate Colimbrie que non distat a monasterio de Lorbano nisi per tres leguas, et ideo abbatissa et suus conventus non possunt hoc ignorare» (lin. 355-362).

[29] «Sicut et qui litigat coram iudice intelligitur in eum consensisse et recusationibus renunciare si quas habebat contra eum» (lin. 348-349).

[30] «Quia a vobis citate non comparuerunt nec comparent in iudicio coram vobis, quia actorem vel sindicum pro se non constituerunt nec procuratorem facere potuerunt, quia universitas non facit procuratorem sed sindicum vel actorem» (lin. 425-428). Thus, Tancred, *Ordo iudiciarius*, 3.2.4. and 1.7.1, ed. F.C. Bergmann, *Pillii, Tancredi, Gratiae libri de iudiciorum ordine,* Göttingen 1842, pp. 204-205, 123-124.

[31] «Iudices interloquti sunt hoc modo: 'Nos iudices dicimus quod procuratores partium iurent et quod pars monasterii probet si vult ea que dixit super illa quam vocat decretalis *Romanus pontifex*'» (lin. 489-491).

[32] «Intendit probare pars monasterii de Lorbano quod illa decretalis *Romanus pontifex* ita secundum ius et de iure in Hispanorum provinciis extitit publicata, quod adversa pars necesse habuit eam in primo citatorio observare» (lin. 511-514).

[33] «Quapropter rogamus discretionem vestram, vobis nihilominus auctoritate apostolica iniungentes quod probationes ex parte monasterii coram vobis vel vestrum altero super hoc productas recipiatis et interrogetis secundum interrogatorium quod vobis mittimus interclusum, attestationes ipsas nobis transmittentes sub vestris sigillis interclusas» (lin. 507-510).

Mondeti»), had recently been deprived by Clement IV of the benefice of Abiul; whereupon at the behest of the abbess of Lorvão (Marina Gomes) on 3 April 1265 Bishop Egas of Coimbra had ordered his removal and replacement by Master Durão Martins, the bishop's 'medicus' and cleric[34].

What then ensued was a different sort of cat-and-mouse game with Pascásio deploying all manner of Fabian tactics in order to keep one jump ahead of his prosecutor and – by dint of denying the bishop's authority in the matter[35] as well as receipt of any summons from him (to which Master Durão responded that he had been prevented from delivering it and that Pascásio Godinho had been in hiding, which was stoutly denied)[36], and asserting that he had been required to appear at two different places on one and the same day[37] as well as to not being summoned at all to a meeting at which he was actually present[38]) – to maintain his hope of staving off the inevitable. The standard objection that particular days were ferial having failed him[39], the defendant was then offered alternative procedures by the opposition. «Propter bonum pacis et concordie» and in order to avoid the inescapable thickets of legal procedure let the matter be referred either to local arbiters for an equitable solution[40] or to Johannes de Deo and the bishop of Évora, or even to other bishops and other *litterati* outside the kingdom[41].

[34] Rolo 4, lin. 4-15. For Pascásio Godinho's *cursus honorum* see M. do R. B. Morujão, *A Sé de Coimbra. A instituição e a chancelaria (1080-1318)*, Lisbon 2010, p. 146 n. 328.

[35] «Quod si per litteram illam domini episcopi citari posset, quod non credit, per illam litteram non fuit citatus cum illa littera non pervenit ad eum» (lin. 90-91).

[36] «Quod publicavi citacionem ante domum suam coram hominibus de domo sua et coram multis aliis quia non fui permissus ab hominibus suis quod intrarem domum suam; … hoc fuit quod latitavit taliter quod ego eum invenire non potui» (lin. 103-106); «nec mihi obest si ea lecta coram meis hominibus, quod non credo, cum ego in illa die fuerim in ecclesia cathedrali et in civitate Colimbriensi et discurri per vicos et plateas, et fui in domibus predicatorum ac etiam minorum» (lin. 143-145).

[37] «Cum dicti termini (…) ad eundem diem concurrant et loca sint diversa, quibus causis et terminis personaliter occurrere non possum cum in arduis causis nemo teneatur procuratorem constituere» (lin. 52-53).

[38] «Non fuit expressus certus locus in quo partes debeant coram episcopo comparere», to which his opponent responded «quod certus locus fuit per dominum episcopum assignatus, scilicet locus S. Martini de Cauto in quo dictus P. Godini in termino sibi assignato comparuit et proposuit que voluit. Item dicit quod dictus P. Godini petiit quod dictus episcopus diceret eum non fuisse citatum» (lin. 212-217).

[39] «Videlicet quod clerus et populus civitatis et diocesis Colinbriensis generaliter colebat, quare dominus episcopus in eo de quo agitur procedere non debet nec potest de iure in eodem die» (lin. 202-213).

[40] Namely, «in cantorem (…) Visensem, d. Menendum de Vearia, mag. Nicholaum canonicum Colimbriensem, Gunsalvum Gunsalvi porcionarium S. Jacobi Colimbriensis, advocatos dicti P. Godini decani Lamecensis et Gunsalvum Gunsalvi cantorem et Johannem Vincentii archidiaconum et Gunsalvum Menendi canonicum Colimbriensem et in priorem S. Bartholomei Colimbriensis et in religiosos viros dominos Rodericum Johannis propositum et magistrum Michaelem canonicum monasterii S. Crucis Colimbriensis et in Pascasium Nuni portionarium Colimbriensem advocatum suum in hunc modum, videlicet quod isti prestarent iuramentum ad sancta evangelia quod receptis et auditis rationibus, defensionibus, allegationibus et iuribus omnibus utriusque partis que omnia in scriptis quibuslibet partium de plano et sine strepitu iudicii daret supranominatis ipsi deliberarent inter se et deliberatione habita super premissis omnibus quod ipsi diffinirent val maior pars eorum in scriptis darent domino episcopo et dominus episcopus diffinitum per eos pronunciaret pro sentencia inter partes…» (lin. 300-312).

[41] «Vel cum omnibus munimentis, iuribus et rationibus utraque parti suffragantibus ambe partes mitterent unum virum litteratum vel duos ad episcopum et ad magistrum Johannem de Deo archidi-

Johannes de Deo was the celebrated canonist[42] and the bishop of Évora was Martinho Pires de Oliveira[43], both discernible figures in the half-light of the third quarter of Portugal's thirteenth century. Durão Martins was well connected. Because in 1265 he was also Bishop Egas of Coimbra's favourite or *familiaris*[44], however, Pascásio Godinho objected to the bishop's judicial involvement in the Abiul litigation. But it was too late to raise that objection, Durão riposted. That needed to have been done within twenty days «a tempore libelli»[45]. Moreover, as to the charge of partiality, there was significantly greater affection between the bishop and Pascásio than between the bishop and him. Pascásio had received more benefices from the bishop than he had, was more intimate with him and had been in his service longer[46].

By that reckoning, and because Pascásio was the bishop's canon, Durão would have better cause than Pascásio for recusing him as judge[47]. With Pascásio persisting in this course however, after consultation with his *iurisperiti* in late May 1265 the bishop remitted the matter to the papal court at Perugia (lin. 417).

Thither Durão went too and on 19 March 1266, with strife between Afonso III and the papacy about to erupt, judgment was delivered in his favour. The papal mandate conveying that outcome, *Dudum dilecte*, had reached Portugal by mid-September when its executors, the dean and *magister scolarum* of Guarda, P. Martini and G. Michaelis, summoned Pascásio to attend them within sixty days[48]. Thereupon the dean of Lamego, although declared contumacious, embarked upon a succession of recusations and exceptions, commencing with a (reported) act of espionage and over the next nine months deployed every stratagem that the

aconum Ulixbonensem et ad episcopum Elborensem. Item ad episcopos Portugalensem, Visensem, Egitaniensem, Civitatensem, Salamantinum vel alios litteratos extra regnum Portugalie et quicquid supradicti vel aliqui ex eis deliberato consilio responderent dominus episcopus pronunciaret inter partes et pro sententia haberetur» (lin. 313-18).

[42] Cf. A.D. de Sousa Costa, *Um Mestre português em Bolonha no século XIII, João de Deus. Vida e obras*, Braga 1957, but without reference to this matter.

[43] H. Vasconcelos Vilar, *As dimensões de um poder. A diocese de Évora na Idade Media*, Lisboa 1999, pp. 44-56.

[44] In March 1268 he would be at the Montpellier deathbed of Egas (by now archbishop of Compostela) who bequeathed him the nag he rode and £110: IAN/TT, Cabido da Sé de Coimbra, 1ª incorp., docs. particulares, mç. 18, no. 3 (*PP*, no. 712). (He is to be distinguished from Durão Pais, by then established as bishop of Évora).

[45] «Item cum iam libellus noster fuerit in iudicio exibitus et iam in actis insertus et de eo copiam petierit et habuerit et ultra quam viginti dies a tempore libelli exibiti sint elapse infra quos dictam suspitionem si sic competebat proponere debuisset, dico quod amodo de ipsa excipere non potest»: rolo 4, lin. 351-354.

[46] «Item super eo quod dicit quod ego sum familiaris vester [*scil.* episcopi] et ideo habet vos suspectum, dico quod maior affectio et dilectio presumitur esse inter vos et eum quam inter vos et me, et hoc ex multis causis: plura enim beneficia recepit a vobis quam ego, et diucius conversatus est vobiscum in domo vestra quam ego, et ipse plus servivit vobis quam ego cum serviendi vobis maiorem habuerit facultatem et quandoque ei placuit et placet est familiaris vester et domesticus et etiam commensalis et consiliarius. Ex quibus omnibus et singulis presumitur maior affectio et dilectio esse inter vos et eum quam inter nos et me» (lin. 354-60).

[47] «Ergo minor affectio presumatur ex causis predictis inter vos et me quam inter vos et ipsum. Dico quod per hanc exceptionem non potest vos recusare. Ego autem de iure possem vos recusare seu merito habere suspectum, cum ipse sit canonicus vester et per vos habuerit canoniam, ex qua causa vobis ipse est specialiter obligatus et vos ei» (lin. 361-365).

[48] IAN/TT, Most. de Lorvão, docs. eclesiásticos, mç. 1, no. 36 (*PP*, no. 672); rolo 5, lin. 68-73.

system provided and some that it didn't[49]. It would be wearisome and is hardly necessary to follow the nimble dean's every «frivolous» (lin. 897) sophistry and contortion. However, the effect of his denial of receipt of documentation is not to be ignored, for it was paralysing[50]. So too was his unfailing capacity to remain undiscoverable. When in late March 1267 he was yet again summoned to attend the judges within sixty days, in Lamego «ignorabatur ibi ubi tunc esset» (lin. 728).

In the event, as the watertight terms of the compromise into which in April 1267 he eventually entered with the two Guarda judges demonstrates, after more than two years it was only his willingness to accept such a settlement and to surrender Abiul «gratis, pure et simpliciter» by breaking the Laocoon-like toils with which the system of delegate jurisdiction had by this date bound itself that brought the matter to a conclusion «de plano et absque iudicii strepitu», as the papal judgment of the previous year had prescribed[51]. In circumstances such as these, any litigant worth his salt and capable of evaporating at the approach of his adversary might prevail by a process of exhaustion.

Why then should the likes of Pascásio Godinho have ever agreed to such extra-judicial settlement? In the present case, the formal reason for the compromise arrived at 'amicabiliter' was stated to be, to a degree, altruistic[52]. In reality, it was the practical terms of the settlement, as stipulated by the vicar general of Coimbra (João Martins, archdeacon of Coimbra in Penella) and the abbess and convent of Lorvão that carried the day: namely, the life grant to Pascásio Godinho of eighty pounds-worth of Abiul rents[53]. (Master Durão had recently

[49] When the bishop's courier came to Lamego in search of him, again the dean (here described as «Lamecensi vel Visensi decano») could not be found, but the letter of citation affixed to the cathedral door (or possibly the door itself) was reportedly sabotaged («quidam clericus filiavit eam et frangit eam») and the messenger threatened «valde male» (lin. 159-180).

[50] «cum citacio sit fundamentum tocius ordinis iudiciarii, qua omissa judicium nullum, controversie nulle, processus nullus ut multibus iuribus comprobatur, maxime cum litis contestacio esset facta super vocatione de qua agitur et a vobis terminus prefixus fuisset ad litigandum»: lin. 456-459.

[51] «videlicet quod quicquid iidem judices retenta sibi nihilominus delegata jurisdictione arbitrentur, staterent, diffinirent, sententiarent, laudarent, mandarent, providerent et etiam disponerent inter partes, lite contestata vel non contestata, diebus feriatis vel non feriatis, stando, procedendo sive sedendo, in scriptis vel sine scriptis, una die sive diversis, partibus presentibus vel absentibus, sive altera parcium absente et altera presente, ipse partes acceptarent, adimplerent et etiam observarent, promittentes se contra arbitrium, diffinitionem, sententiam, laudum, mandatum, provisionem et etiam dispositionem sive ordinationem predictorum judicum et arbitorum ‹*sic*› seu arbiterorum vel amicabilium compositorum sub pena ducentarum marcharum argenti hinc inde per stipulationem premissa aliquatenus non venire, se ad hoc per predictam penam sub ypoteca rerum suarum et sub religione ad sancta dei evangelia iuramenti corporaliter prestiti astringentes» (lin. 905-921).

[52] «pro bono pacis et utilitatis et quia nobis constitit quod per industriam, laborem et expensas non modicas eiusdem P. Godini multa eidem ecclesie fuerant comoda acquisita et redditus non modicum agmentari volentes insuper per hoc vitare scandala plurimorum et credentes in posterum magis providere ecclesie quam persone» (lin. 1041-1046).

[53] «ut de redditibus dicte ecclesie de Abiul idem Paschasius octuaginta libras Portugalensis monete nomine beneficii perpetui in vita sua in salvo percipiat annuatim per loca de Almoster et de Candaal que sibi assignamus tenenda ac etiam possidenda, ita tamen quod si quid de redditibus predictorum locorum superfuerit priori predicte ecclesie [Abiul] qui pro tempore fuerit vel eius procuratori restituat sive restitui faciat annuatim». If those rents proved insufficient the prior of Abiul was to make good the shortfall. The necessary *computationes* were to be done at harvest time: of wheat in late August, of wine in late September (lin. 1049-1066).

estimated his expenses in the case as one hundred marks of silver)[54]. Moreover, Pascásio might expect to be received at Abiul 'honourably' – at any rate on two occasions *per annum*[55].

The 1251 hearing concerning S. Maria de Abiul was not the only case of an uncodified decree being used in these parts in the aftermath of the Count of Boulogne's expulsion of Sancho II. In January 1247 (or 1248) in the course of the long-running dispute between the clergy of Leiria and the prior and convent of Santa Cruz de Coimbra, the Leiria proctor, Pedro Anes, had written to the dean of Lamego, D. Pedro, to explain why he was unwilling to comply with a summons for the clergy to appear at a hearing of the matter at Britiande (*inter alia* on the grounds that Britiande was «locus vilissimus»). It is not necessary here to enter into the details of the matter; suffice it to note that, of the six authorities prayed in aid by Pedro Anes, three (marked * here) were decrees of the recent Lyons Council (not the *León* Council, as interestingly the copyist first wrote)[56]; and that five of these had either been incorporated in Gratian or would be in an official compilation[57], but that the sixth was not[58]. It may also be worthy of note that one of those present at Britiande when Pedro Anes presented his credentials was Pascásio Godinho, canon of Lamego, later dean of that church and in 1265-7 the foil of Master Durão[59].

The main interest of the above, however, is perhaps as an example of a lengthy legal procedure and the expenditure of so many thousands of words followed by capitulation on such generous terms as well as the evidence it supplies regarding theory and practice of the process of dissemination of papal legislation in a particular period and a particular area of Christian Europe.

[54] Lin. 863.

[55] «Si contingat d. Pascasium semel vel bis in anno ad predictam ecclesiam accedere eidem deferatur et honorifice procuretur» (lin. 1077-1079). But not more than twice for, as would be spelled out in the complaints conveyed to Nicholas IV at the conclusion twenty years later of the strife with Rome that was about to commence in 1267, guests' concept of hospitality did not always coincide with that of their hosts: *Reg. Nich. IV*, no. 1353; P. Linehan, *Patronage and Indebtedness: Portugal, Castile and the Papal Court Around the Year 1300*, in «Historia. Instituciones. Documentos», 34 (2007), pp. 147-158 at p. 147.

[56] On this evidence described by L. Ventura and S.A. Gomes, *Leiria na crise de 1245-1248: documentos para uma revisão crítica*, in «Rev. Portuguesa de História», 28 (1993), pp. 159-197 at p. 186, as «um homem profundo conhecedor da terminologia juridical, de ambos os Direitos, das constituições conciliares ou papais», though the case for his acquaintance with Roman Law is not substantiated there.

[57] C.33 q.2 c.4 (Friedberg. I, col. 1151); X 2.28.47 (II. 428); *Novellarum Collectio I c.1 (*Cum in multis*, ed. COD, p. 284) = VI 1.3.2 (II. 938); X 1.4.7 (II. 39); *Nov. Coll. I c.16 (*Cordi*, ed. COD, p. 289) = VI 2.15.1 (II. 1014). The proctor's letter is printed, though with some errors and without identification of these authorities, in Ventura and Gomes, *Leiria*, pp. 195-197.

[58] «Nova constitucio concilii supradicti quod judices non tenentur per partes vocare nisi ad civitates vel loca magna et insignia ubi valeat haberi copia peritorum quorum consilio cause agitentur ut legitur in constitutione *Presenti decreto*», referring to *Nov. Coll. I c.2 (*Presenti*, ed. COD, p. 284), which was not included in *Liber Sextus*. The reference to *Cum in multis* (see previous note) reads: «Nam dicit nova constitucio generalis concilii celebrati apud (*del.* Legionem) Lugdunum quod cum aliquis litteram (…) generalis clausula ponitur pluralitatem continens ultra tres vel quatuor propter illam clausulam (…) non trahantur».

[59] For his family connexions see Ventura and Gomes, *Leiria*, p. 197n.

APPENDIX

The materials used above are derived from four parchment *rolos* in the fonds of the monastery of Lorvão, all in documentary cursive hands of the period, now at Lisbon, Instituto dos Arquivos Nacionais: Torre do Tombo [IAN/TT], Mosteiro de Lorvão, namely: *rolo* 2, covering the period 13 April to 6 September 1251, comprising five membranes and containing 358 lines (*c.* 4110 words), ed. *PP* (see above, note 2), 407a), *rolo* 3, covering the period 21 (or 28?; see note 24) October to 7 November 1251, comprising seven membranes and containing 514 lines (*c.* 6100 words); ed. *PP*, 413a), *rolo* 4, covering the period 3 April to 27 May 1265, comprising five membranes and containing 432 lines (*c.* 7800 words) and *rolo* 5, covering the period 14 September 1266 to 16 June 1267, comprising thirteen membranes and containing 1092 lines (*c.* 12000 words).
The excerpt which follows is a continuous section from *rolo* 3, lines 116-260 (membranes 2-4). It covers the hearings of 24 to 26 October (or 31 Oct. to Nov. 2?) 1251 regarding the validity and the legal significance of the constitution *Romanus pontifex*. As already mentioned (note 24) this constitution had been introduced in defense of Lorvão in a motion presented by Joao Peres, unfortunately not recorded in the document. The section commences with the allegations *in contrarium* presented by Master Sebastião (Sebastianus Johannes) on behalf of Vicente Dias.
Our transcript retains the orthography of the original; with only the consonants u and ci normalised as v and ti. Evident errors of the scribe are corrected in the main text and indicated in the critical apparatus.

Ad illam, scil. *Romanus pontifex*, ubi dicitur quod res exprimantur in primo citatorio, respondet procurator domini Vincentii quod non continet ius commune cum de iure communi res exprimantur[1] in libello. Item secundum hoc nunquam offerretur libellus in causis, quod est contra aucten. *Offeratur libellus*[2]. Item secundum hoc omnia iura absorberentur per istam constitutionem, que loquuntur de specificationibus in libello contra id quod dicit papa quod non vult iura absorbere per suam constitutionem ut C. de precibus imperatori offerendis *Quotiens*[3].
Item si est nova constitutio, cum in ea non fiat mentio quod extendatur ad preterita, non extenditur ad rescriptum nostrum nec ad causam nostram.
Item per istam constitutionem non est procedendum in causis, quia nove constitutiones non valent nisi post insinuationem et pubblicationem ut in aucten. ut sunt nove constitutiones in rubro et in nigro[4].

Et iudices interloquti sunt hoc modo: Pronuntiamus nos iudices partem d. Vincentii ad interesse condempnandam non esse monasterio nisi contra ipsam aperte malitia probaretur.

Item sequenti feria Va procurator domini Vincentii contra oppositionem factam superius de novella constitutione *Romanus pontifex* respondet in hunc modum: Procurator domini V. dicit quod per illam[a] quam adversa pars vocat constitutionem *Romanus pontifex*, non debet sibi preiudicari cum eam edictam ignoret et credat si edicta fuit non esse solleniter pubblicata. Unde rem que culpa caret non convenit in dampnum revocari, ut habetur de constitutionibus *Cognoscentes*[5], ubi dicitur quod quando novum ius statuitur ita solet legem imponere futuris, ut ignorantes illud non possint

incurrere detrimentum; igitur cum dictus procurator ignoret dictam constitucionem, non debet per eam incurrere detrimentum.
Item dicitur in decretali de postulationibus *Ad hec*[6] quod constitutio sollepniter edicitur ac pubblice promulgatur. Hoc solum sufficit ut illi ad eius observantiam teneantur qui noverunt sollepniter edictam ac pubblice promulgatam. Sed cum memoratus procurator ignoret eam sollepniter edictam ac pubblice promulgatam, ad eius observantiam non tenetur. Et tunc est sollepniter edicta ac pubblice promulgata[7], cum manifeste in commune facta est et in aliquo loco et ibi manifeste promulgata, ut in acten. ut sunt nove constituciones c. *Sancimus igitur*[8]. Non tamen propter hoc intelliguntur promulgate[b] in provinciis, sed cum directe[c] sunt per metropolitanos et palam facte, ut eodem c.[9] et non ante nisi post duos menses post insinuationem in provinciis valere, ut eodem c. et post insinuacionem in loco ubi promulgata est valere, sed in provinciis ex quo directa fuerit et palam facta in unaquaque[d] metropoli ac alia civitate[e] et tunc non recte ignorabitur, ut in c. *Ne igitur*[10] et in c. sequenti *Si vero*[11], ubi dicitur quod nova constitutio mittenda est et insinuanda in provinciis, ubi sic habetur: "Si vero nondum hactenus in omnibus provinciis destinata est, velociter et eam et[f] alias que[g] non misse sunt adhuc aut[h] etiam[h] postea comicctante Deo a nobis faciendas[i] mitti nunc vel mittendas esse quatenus nostre[j] constitutiones in metropolitanis[12] civitatibus fiant vel faciende sint[k] manifeste, provinciarum vero presides ipsos mittere eas et missuros[l] esse per omnes civitates sub unaquaque[m] provincia[m] constitutas, ut nullus de cetero occassionem summat cuiuslibet ignoracionis." Unde dicit quod preteritum omne iustam habuit veniam, cum iustam habuerit causam ignorandi, et istam conclusionem ponit acten. in c. *Quam ob rem*[13], ubi dicitur: "Quam ob rem ab initio factam recte non arbitramur postea mutari aut aliquo modo infringi, sed immaculatam manere que tunc placuit sententiam valideque[n] servare. Erit namque absurdum, ut quod factum est recte, ex eo quod tunc non erat factum, postea immutetur." Et idem dicitur lxxxii distinctione c. *Proposuisti*[14] quod nova constitutio ad omnes provincias deberet mitti, alias eam ignorantibus venia non negabitur, ut in littera eiusdem capituli que talis est: "Nam si constitutio Ciriaci que ad omnes provincias commeavit ad aliquas non probatur pervenisse venia non negabitur." Et ita secundum acten. et istud capitulum nova constitutio per provincias mittenda est et insinuanda, alias non preiudicat ignoranti et quod facit propter eam non mutatur.
Item dicit Bernaldus in glossis[o] suis[15], quod ideo scolaribus comorantibus Bononie vel Parisius papa decretales suas mittit, quia ibi sunt de cunctis[p] provinciis, per quod innuit quod constitutiones sunt in provinciis pubblicande ut dicit acten. Et dicitur in capitulo predicto quod quia adhuc non factum est de illa *Romanus pontifex* nec continet ius commune, non est secundum illam iudicandum nec in causa procedendum.
Et dicitur ab adversario quod si non est consona iuri, consulatur super ea superior, ut de fide instrumentorum *Pastoralis*[16]; respondet quod non est consulendus quia illa *Pastoralis* loquitur quando illa constitutio de[q] qua dubitatur est in compilatione.[q] Sed ista *Romanus pontifex* in nulla adhuc est compilatione, et ideo super ea non est superior consulendus. Unde cum illa, scilicet *Romanus pontifex*, nondum sit pubblicata per provincias, ut dicit acten. et c. *Proposuisti* nec saltim in scolis Bononien. vel Parisien. nec sit consona iuri nec super ea sit consulendus superior, quia in aliqua compilatione non continetur, peto quod vos, domini iudices, pronuntietis secundum illam non esse procedendum nec iudicandum.

Ad[17] quod pro parte monasterii responsum est ut sequitur:
Ad hoc quod dicit procurator domini V. quod decretalis que incipit *Romanus pontifex* non debet sibi preiudicium generare quia eam decretalem esse non credit vel si sit, adhuc non est sollepniter publicata, unde rem que culpa caret etc., respondet monasterii procurator et dicit quod *Romanus pontifex* est decretalis et est adeo sollepniter publicata quod in omni parte Hispanorum provincie debet tamquam alia decretalis in scolis et in iudiciis observari. Nec nocet ignorantia procuratoris domini V. cum sit crassa quamplurimum et supina. Postquam enim constitucio seu decretalis sollepniter editur ac publice promulgatur, non est necesse ipsius noticiam per speciale mandatum vel litteras singulorum auribus inculcare, sed id solum sufficit, ut quis ad eius observantiam teneatur, quod fuerit sollepniter edita ac publice promulgata; et hoc probatur in corpore actenticorum et decretali epistola domini Innocentii. Et quod ignorantia eum nequeat excusare, probo hoc modo: dicit canon[18] de his qui decreta edita in Sardicen.

concilio non recipiebant, quod amodo eis super hoc non est fides aliqua adhibenda cum decreta illa per civitates et vicinas ecclesias observentur, et in constitutione Magni Gregorii[19] legitur quod propinquos in vicino latere non potuit, quod ad remotiores in longinquo pervenit.

Item dicit canon[20] quod quilibet presumitur scire sententiam proprii sacerdotis. Cum igitur Christianorum omnium Romanus pontifex sit sacerdos, nullus eius sententiam debuit ignorare, maxime in loco in quo a vicinis et aliis qui erant in provincia sciebatur et etiam servabatur. Et hoc iura dicunt.

Item dicit lex[21] quod si de aliquo institore "palam proscriptum est ne[r] cum eo contrahatur, is loco prepositi non habeatur." Unde si postmodum quis cum eo quasi cum institore contraherit, dominus non tenetur, quoniam nemo excusari potest, ut eadem lege cavetur, ignorantia litterarum cum heedem prohibitionis littere lecte fuerint et ostense; unde super hoc in eadem lege dicitur non est ullatenus audiendus.

Item nullus ignorantiam pretendere seu allegare potest circa ea que plerique sciunt et publice sunt facta, quoniam esset crassa omnimodo et supina et ita neminem excusaret prout utroque iure manifestissime comprobatur.

Item dicit Innocentius[22] quod si aliquis existens in diocesi in qua fiebat denunciatio super matrimonio contrahendo, post matrimonium illud contractum apparet acusator, non est ullatenus audiendus, cum, quod denunciatio illa ad eius aures in diocesi existentis pervenerit presumatur.

Item dicit Agustinus in canone[23] de Paulo qui dixerat principi sacerdotum: "Percutiat te Deus, paries dealbate' et circumstantes dixerunt: "Iniuriam facis principi sacerdotum?" etc. et Paulus ait: "Nescivi, fratres, quod princeps est", cum tamen ut ibi[s] dicit Agustinus "Nescire illum principem sacerdotum non posset, qui in eodem populo creverat et in lege eorum fuerat eruditus". Igitur manifeste probatur per iura superius allegata quod circa decretalem *Romanus pontifex* nulla amplius ignorantia poterit allegari.

Item ad hoc quod dicit quod nova constitutio per provincias sit mittenda ad hoc ut provinciales ad eius observantiam teneantur, respondet et dicit monasterii procurator quod non est necesse quod ad quemlibet provincie partem constitutio sit mittenda. Sed id solum sufficit quod in studio vel studiis in eadem habito vel habitis publice legatur in scolis et in iudiciis observetur, et quod ita factum fuerit de decretali *Romanus pontifex* supperius allegata se offert legitime probaturum.

Item dicit quod non est necesse quando a Romano pontifice constitutio sollepniter editur ac publice promulgatur quod singulorum provincie auribus inculcetur, sed id solum sufficit ut ad studia generalia transmittatur ut probatur in constitutione decretalium per Gregorium compilatam *Gregorius* etc.[24]

Item ad hoc quod dicit domini V. procurator quod superior non est consulendus super aliqua que tanquam decretalis allegatur, si super ea merito dubitetur nisi in compilatione scripta fuerit, respondet et dicit procurator monasterii quod hoc non est verum; immo dicit quod sive sit in compilatione sive non sit, dummodo super ea a iudicibus dubitetur semper est superior consulendus; et maxime cum decretalis *Romanus pontifex* supra seppius allegata scripta sit in compilatione que modo habetur in curia et inter constitutiones que facte fuerunt in concilio et etiam post concilium Lugdunense. Et hoc se offert legitime probaturum.

Item ad hoc quod dicitur quod post duos menses valeat constitutio post eius publicationem, respondit et dicit monasterii procurator quod illi duo menses sunt computandi a tempore quo fuit in Romana curia et non in provincia publicata; et hoc probat hoc modo: videmus enim quod per Alexandrum in Turonen. concilio[25] et Honorium in sua decretali epistola[26] prohibetur, ne religiose persone seu presbiteri aut alii dignitates habentes vel personatus profficiscantur ad leges mundiales aut phisicam audiendam, quod si fecerint, nisi infra duorum mensium spatium destiterint sicut excommunicati ab omnibus evitentur. Et illi duo menses non ab huius constitutionis publicationis[t] tempore, sed claustri[u] exitus et quo audire phisicam aut leges ceperint computantur. Et sic intelligit Vincentius[27] et Goffredus[28] et alii iuris civilis et canonici professores.

Item si dicatur quod duo menses sint computandi postquam constitutio in provincia publicatur, dicit et respondet monasterii procurator quod si etiam ita esset, quod tamen non concedit, iam plures dies quam duo menses elapsi sunt quod hec constitucio *Romanus pontifex* in Hispanorum provinciis ita secundum[v] ius et[v] de iure extitit publicata, quod necesse habuit V. Didaci eam in primo citatorio observare.

Ex adverso procurator domini Vincentii littem contestando respondet non esse verum.

Iudices[29] interloquti sunt hoc modo: Nos iudices dicimus quos procuratores partium iurent et quod pars monasterii probet si vult ea que dixit super illa quam vocat decretalis *Romanus pontifex*.

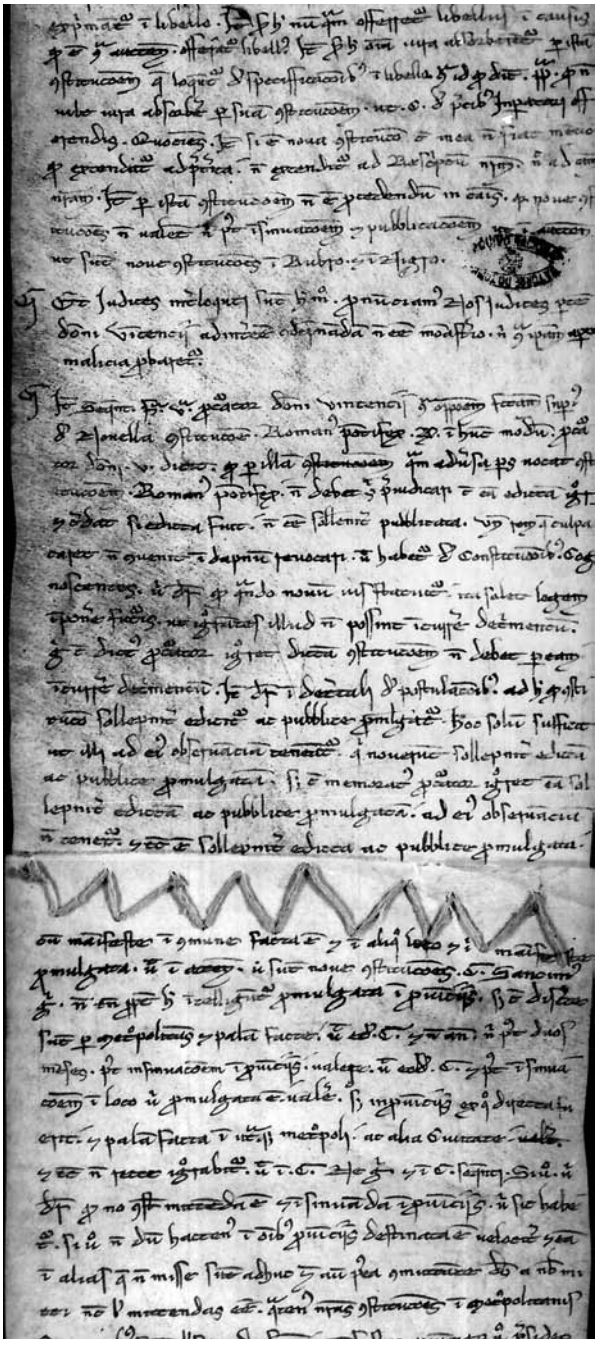
Et terminus fuit partibus assignatus, scilicet feria IIa prima post festum Apparitionis Domini[30] ad comparendum et procedendum tam super exceptione proposita quam super principali causa.

Et pars monasterii xv die ante festum Natalis Domini[31] debet apud Salamancam comparere coram decano Salamantino et Laurencio Iohannis archidiacono Visensi, vel altero eorum si ambo interesse non possunt, et probaciones suas producere coram eis.

Iste est articulus. Intendit probare pars monasterii de Lor. quod illa decretalis *Romanus pontifex* ita secundum ius et de iure in Yspanorum provinciis extitit publicata, quod adversa pars necesse habuit eam in primo citatorio observare.

[a] constututionem *add. et canc.* [b] promulgata [c] discrete [d] utraque [e] valere *add. et canc.* [f] in [g] forte *add. ed.* [h-h] etiam aut [i] *om.* [j] nostras [k] sunt [l] missuras [m-m] unamquamque provinciam [n] validemque [o] gro. [p] cuntis [q-q] est in compilatione de qua dubitatur *cum signo inversionis* [r] nec [s] ubi [t] *suppl. inter lin.* [u] clastri [v-v] *suppl. inter lin.*

[1] Beginning of reproduction [2] Auth. post Cod. 3.9 un.; cf. Nov. 53.3 § 1, ed. p. 301 [3] Cod. 1.19.2 [4] Auth. 5.16; cf. Nov. 66, titulus, ed. p. 340: Ut factae novae constitutiones [5] X 1.2.2 [6] X 1.5.1 [7] Beginning of membrana 3 [8] Auth. 5.16 c.1 princ.; cf. Nov. 66.1, ed. p. 340 [9] l. c., ed. p. 340 lin. 28-31 [10] c. 1.1, ed., p. 341 lin. 32-39 [11] c. 3, ed. p. 342 lin. 23-32 [12] End of reproduction [13] Auth. 5.16 c. 4; cf. Nov. 66.4, ed. p. 343 lin. 14-20 [14] D. 82 c.2 [15] Gl. Ord. ad X, salutatio v. Bononie commorantibus; see below: Bemerkungen, note 25 [16] X 2.22.8 [17] Beginning of membrana 4 [18] D. 16 c. 14 [19] X 2.23.8 [20] C.12 q.2 c.24 [21] Dig. 14.3.11 § 2-4 [22] X 4.18.6 [23] C.23 q.1.c.2 [24] X, *Rex pacificus* [25] X 3.50.3 [26] X 3.50.10 [27] Vincentius Hispanus, Apparatus X 3.50.10; see below: Bemerkungen, note 23 [28] Goffredus Tranensis, Apparatus X 3.50.10; see below: Bemerkungen, note 24 [29] membrana 7, nov. 7: conclusion of this round of hearings [30] jan. 7, 1252 [31] dec. 10, 1251



Lisboa, Instituto dos Arquivos Nacionais/Torre do Tombo,
Mosteiro de Lorvão, cx. 89, *rolo* 3, membrane 2-3 = Appendix lin. 3-42

Bemerkungen zu einer Extravagante Gregors IX. und zu ihrer Verwendung im Lorvão-Prozeß

1. *Wortlaut, Form und Inhalt*

> Romanus pontifex qui iura tuetur sic[a] intendit annuere petitionibus singulorum, ut eius gratia nequiter uti non debeant impetrantes, nec illos malitiose vexare contra quos nichil[b] credunt[c] habere[d] questionis. Cum igitur nonnulli pretextu[e] illius clausule generalis[f] quidam alii, quam in litteris ab[g] apostolica sede[g] obtentis apponi procurant, diversos diversis temporibus[h] fatigant laboribus et expensis, Nos nolentes quod[i] malitia prevaleat equitati et quod de[j] cetero[j] occasione[k] predicte[l,m] clausule[m] alicui[n] pateat aditus malignandi, statuimus ut illi tantummodo et[o] super illis rebus valeant conveniri quorum nomina et res in prime citationis litteris[p] exprimuntur[q].

Mischtext nach den Hss. **C** = BAV, Chigi E.VIII.237 (italienisch, Ende 13. Jh.; integraler Bestandteil einer Novellensammlung) fol. 281r-v., inscr.: *Gregorius nonus*; **P** = BAV, Pal. lat. 325 (nordalpin, Ende 13. Jh.; Nachtrag des Schreibers zu einer Extravaganten-Sammlung) fol. 127v marg. inf., ohne inscr.; **V** = Vat. lat. 10270 (französisch, s. XIII.2; Extravaganten Innozenz' IV. und Gregors IX. als Anhang zu einer Novellensammlung) fol. 257va, inscr.: *Idem* (sc. *Gregorius*)
Gedruckt bei J.F. Schulte, *Die Dekretalen zwischen "Decretales Gregorii" und "Liber Sextus Bonifacii VIII"*, in «Sitzungsberichte Wien phil.-hist.», 55 (1867), S. 701-797, hier S. 727f. aus Hs. Prag, Narodní Muzeum XVII.A.15 (Ende 13. Jh., vielleicht Padua; in einer Extravagantensammlung) fol. 79rb, inscr.: *Urbanus*

[a] *parum* folgt **V** [b] fehlt **C**, *non* **V** [c] *creduntur* **C** [c-d] *habere credunt* **V** [d] *aliquid* folgt **C** [e] *occasione* **C** [f] *videlicet et* folgt **C, V** [g-g] *a s. a.* **C** [h] *fraudulenter* folgt **V** [i] *ut* **C, V** [j-j] fehlt **C** [k] *pretextu* **C** [l] *illius* **C** [m-m] *clausule predicte* **V** [n] *de cetero* folgt **C** [o] fehlt **C** [p] *edicto* **P** [q] *exprimantur* **P**

Das tragende Verb *statuimus* zeigt an, daß *Romanus pontifex* eine *constitutio* im technischen Sinn ist, d. h. eine gesetzliche Regelung, die *motu proprio* ergeht, und weder einen konkreten Fall entscheidet noch an einen individuellen Empfänger gerichtet ist, sondern in abstrakter Formulierung allgemeine und dauernde Gültigkeit beansprucht. Dieses legislative Instrument, das am ehesten dem abstrakten Gesetzesbegriff der Moderne entspricht, hat bei dem Papsttum eine jahrzehntelange Entwicklungsphase durchgemacht, die mit vereinzelten Beispielen in der zweiten Hälfte des 12. Jh. begann, sich unter Innozenz III. verdichtete, aber erst mit den *Ad perpetuam*-Konstitutionen Alexanders IV. eine

feste Form fand[1]. Bezeichnenderweise fehlt eine solche in unserem Fall noch, den man insofern als Beispiel für die Formierungsphase der päpstlichen *constitutio* auffassen kann. Der Text besteht nur aus zwei schnörkellosen Sätzen. Der erste liefert mit einer schlichten Arenga eine allgemeine Motivierung der gesetzgeberischen Maßnahme, der zweite deren sachliche Veranlassung, ihr Ziel und die normative Aussage: *ut illi tantummodo et super illis rebus valeant convenire quorum nomina et res in prime citationis litteris exprimuntur*. Die Phraseologie nimmt offensichtlich Formulierungen aus einer einschlägigen Dekretale Innozenz' III. auf[2], die inzwischen kanonistisches Allgemeingut geworden waren.

2. *Herkunft und Überlieferung*[3]

Romanus pontifex ist ohne Datum überliefert und erscheint nicht im Register Gregors IX.[4] Der Text ist aber auffallend massiv in der kanonistischen Überlieferung vertreten: mehr als 41 Handschriften der Dekretalen Gregors IX. (*Liber Extra*) enthalten ihn am Ende des Titels *de rescriptis*, und zwar mehrheitlich (mindestens 32) als integralen Bestandteil des Haupttexts. In mindestens 10 weiteren *Extra*-Hss. ist er an derselben Stelle am Rand nachgetragen. In der inserierten Form mußte die Extravagante wie ein förmlicher Bestandteil der offiziellen *compilatio* wirken und ist damit der einzige Versuch eines nicht autorisierten Eingriffs in die Sammlung Gregors IX. Die große Mehrheit (32) der durch *Romanus pontifex* erweiterten *Extra*-Handschriften trägt die Grußadresse Paris[5]. Zu der Überlieferung im *Liber Extra* kommen dann noch 28 weitere Abschriften im Verbund mit den Novellen Innozenz' IV.[6] sowie acht weitere im Rahmen von sonstigen Extravagantensammlungen[7].

Die Urheberschaft Gregors IX. wird durch ausdrückliche Zuschreibungen in diesen Handschriften bestätigt, darunter sogar wiederholt: *Gregorius in registro*[8]. Wie schon gesagt, wird diese Behauptung durch die vorhandenen

[1] Vgl. M. Bertram, *Die Konstitutionen Alexanders IV. (1255/56) und Clemens IV. (1265/1267). Eine neue Form päpstlicher Gesetzgebung*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kan. Abt.» (= ZRG, Kan. Abt.), 88 (2002), S. 70-109; M. Bertram, *Von der* decretalis epistola *zur* constitutio*: Innozenz IV. und Alexander IV.*, in *Kuriale Briefkultur im späteren Mittelalter. Gestaltung-Überlieferung-Rezeption*, hrsg. von T. Broser, A. Fischer, M. Thumser, Wiesbaden 2014, S. 263-272.
[2] X 1.3.15 wie unten Anm. 14 zitiert.
[3] Vorläufige Hinweise schon bei M. Bertram, *Die Extravaganten Gregors IX. und Innozenz' IV.*, in «ZRG, Kan. Abt.», 92 (2006), S. 1-44, hier S. 18f. Nr. 19.
[4] *Les Registres de Grégoire IX*, ed. L. Auvray, 4 Bände, Paris 1898-1955.
[5] Nur fünfmal Bologna, davon dreimal ersatzweise auf Rasur oder mit *alias* eingefügt, einmal *Parisiis et Bononie*, einmal *Andegavis*, zweimal nicht erkennbar.
[6] 16 davon schon bei P.-J. Kessler, *Untersuchungen über die Novellen-Gesetzgebung Papst Innozenz' IV.*, I. Teil, in «ZRG, Kan. Abt.», 31 (1942), S. 142-383, hier S. 282 und 284.
[7] Vgl. Bertram (wie Anm. 3).
[8] Berkeley, Law School, Robbins MS *100 fol.? (inseriert); Lucca, Bibl. Capitulare *139 fol. 228v (hinten nachgetragen); Paris, BNF lat. *13664 fol. 13v (am Rand nachgetragen); lat. *14323 fol.? (inseriert); lat. *15406 fol.? (inseriert).

Registerbände nicht bestätigt; und gelegentlich finden sich sogar zeitgenössische Zweifel an der Zuschreibung[9], die aber schon von dem singulären Überlieferungsbild widerlegt werden. Dazu kommt noch als gewichtiges Zeugnis die ausdrückliche Bestätigung seitens des gut unterrichteten Autors der von Peter-Josef Kessler entdeckten *Glossa novellistica*[10], der die Zuschreibung an Gregor IX. explizit feststellt, aber darauf hinweist, daß die fragliche Konstitution nicht bulliert und nicht offiziell versandt wurde, was auch andernorts bemerkt wurde[11]. Abgesehen davon erscheint aber Gregor IX. als Autor gesichert, sodaß sich ein Datierungsrahmen von der Publikation des *Liber Extra* (5. Sept. 1234) bis zum Tod des Papstes (22. Aug. 1241) ergibt.

3. *Die clausula* quidam alii *und ihre Bedeutung*

Gegenstand ist die *clausula generalis 'quidam alii'*, die auf Veranlassung der Petenten in die päpstlichen Delegationsmandate eingefügt werden konnte[12]. Sie erlaubte dann dem Petenten/Kläger bei Vorlage des Mandats bei dem oder den delegierten Richter/n, zusätzlich zu dem namentlich benannten Beklagten noch eine zunächst unbestimmte Anzahl von weiteren Personen seiner Wahl vorladen zu lassen[13]. Diese Option ist offenbar massiv und in mannigfacher Weise mißbraucht worden[14]. Dagegen versuchte man sich einerseits

[9] Hs. Kremsmünster CC 336 fol. 187ra (in einer Extravagantensammlung): «Gregorius nonus, Innocentius iiii secundum alios; hec est decisa»; Hs. Paris, BNF *3949 fol. 249va marg. inf. (Nachtrag am Ende eines *Liber Extra*) mit der Bemerkung «dicit Petrus de Sampsona quod hec constitutio fuit Gregorii viiii et non fuit missa sub bulla, alii dicunt quod fuit Innocentii iiii».

[10] P.-J. Kessler, *"Glossa novellistica". Supplementum novellisticum II*, in «ZRG Kan. Abt.», 68 (1982), S. 188-199, hier S. 198 Zeile 17f. und S. 199 Zeile 3: «et ad hoc concordat quedam constitutio quam fecit Gregorius ix que incipiebat Romanus pontifex (...) et tamen illa constitutio bullata non fuit nec missa».

[11] Vgl. Anm. 9.

[12] Vgl. die Musterformulierung, die Innozenz III. in der berühmten Dekretale *Pastoralis* (1204 an den Bischof von Ely: *Die Register Innocenz' III.*, ed. O. Hageneder, 7. Band, Wien 1997, S. 298-304 Nr. 169, hier S. 300 Zeile 4-6; Comp. III 1.2.3; X 1.3.14) erläutert: «Causam quam talis adversus talem et quosdam alios super hoc et quibusdam aliis se habere proponit, tibi duximus committendam»; vgl. auch *Sedes apostolica* wie Anm. 14 zitiert.

[13] Konkrete Beispiele bei J. Sayers, *Papal Judges Delegate in the Province of Canterbury 1198-1254*, Oxford 1971, S. 67-69; H. Müller, *Päpstliche Delegationsgerichtsbarkeit in der Normandie (12. und 13. Jahrhundert)*, Bonn 1997, Band I, S. 50 Anm. 12; *Registres de Grégoire IX* (wie Anm. 4), Band IV: *Tables*, Paris 1955, S. 247 s. v. Clausula generalis; *Les Registres d'Innocent IV*, ed. É. Berger, Band IV: *Index*, Paris 1911, S. 380, s. v. Quidam alii. Zwei Kanzleiformeln bei U. Pfeiffer, *Untersuchungen zu den Anfängen der päpstlichen Delegationsgerichtsbarkeit im 13. Jahrhundert. Edition und diplomatisch-kanonistische Auswertung zweier Vorläufersammlungen der Vulgatredaktion des* Formularium audientie litterarum contradictarum, Città del Vaticano 2011, S. 190f. Nr. 66 und S. 331 Nr. 382. - In den modernen Darstellungen des römisch-kanonischen Prozessrechts bleibt unsere Klausel trotz ihrer offenkundigen praktischen Bedeutung unberücksichtigt; vgl. die Ausführungen über die Ladung durch delegierte Richter bei W. Litewski, *Der römisch-kanonische Zivilprozeß nach den älteren* ordines iudiciarii, Kraków 1999, Bd. I, S. 259 und S. 263f. sowie K.W. Nörr, *Romanisch-kanonisches Prozessrecht, Erkenntnisverfahren erster Instanz* in civilibus, Heidelberg 2012, S. 68-72.

[14] Vgl. Innozenz III., *Sedes apostolica* (1203 an den Bischof von Sens: *Die Register* [wie Anm. 12], 6. Band, 1995, S. 313 Zeile 3-314 Zeile 5; Comp. III 1.2.4; pars decisa in X 1.3.15): «Quidam

mit Hilfe spezieller Exemption zu schützen, indem einzelne Personen oder Personengruppen Indulgenzen erwarben, mit denen ausgeschlossen wurde, daß sie mit Hilfe der *clausula generalis* belangt wurden[15]. Andererseits führten mehrfache Interventionen des Gesetzgebers zu einer schrittweisen Begrenzung des Anwendungsbereichs. Schon Innozenz III. hatte betont, dass der delegierte Richter, seine *iurisdictio* erst nach namentlicher bzw. sachlicher Spezifizierung der Generalklausel ausüben darf[16]. Dann bestimmte Gregor IX. mit unserer Konstitution, daß die Konkretisierung der *clausula generalis* schon in den Ladungsschreiben erfolgen mußte, mit denen der delegierte Richter das Verfahren eröffnete, und zwar sollten nicht nur sämtliche Beklagte namentlich benannt werden, sondern auch die Streitgegenstände (*res*)[17]. Nur wenig später reduzierte Innozenz IV. mit der Konzilskonstitution *Cum in multis*[18] die bis dahin unbegrenzte Anzahl der Personen, die mit der Klausel *quidam alii* belangt werden konnten auf *tres vel quatuor*, und bestätigte die Vorschrift, daß der Kläger diese Personen in der ersten Ladung namentlich benennen muss. Mit der Motivierung *ut omnino in hac parte via fraudibus precludatur* schob Alexander IV. ein Jahrzehnt später noch eine *declaratio* nach, die weiter präzisierte, dass die Beklagten in jedem einzelnen der Ladungsschreiben benannt werden müssten, und setzte zugleich Geldstrafen bei Nichtbeachtung nicht nur für den Kläger sondern auch für den zitierenden Richter fest[19]. Während die Vorschriften Gegors IX. und Alexanders IV. in Vergessenheit gerieten[20], wurde

enim malignari volentes in commissionibus nostris minores et viliores personas propriis nominibus exprimunt, maiores autem et digniores specialibus vocabulis non designant, sed sub quodam generalitatis involucro comprehendunt ut commissiones ipsas a nobis facilius impetrent sub hac forma: Conqueritur talis de isto vel illo et aliis quibusdam propriis nominibus exprimendis, qui eis super tali negotio et quibusdam aliis rebus iniuriosi nimis et graves existunt».

[15] Vgl. nur Register Gregors IX. (wie Anm. 4) Nr. 900: «sorores penitentes sancte Marie in Alemania»; 1389: «cancellarius et universitas scolarium Cantabrigie»; 1713: «abbas Praemonstratensis et coabbates eius»; 1866: «abbas et conventus sancti Dionysii in Francia» usw.

[16] *Pastoralis* wie Anm. 12: «Sed antequam exprimantur persone vel res, delegatus nequit iurisdictionem huiusmodi exercere».

[17] Unglücklicherweise bietet die Hs. Angers 379, die Kessler (wie Anm. 10) seiner Edition der *Glossa Novellistica* zugrunde gelegt hat, an der in unserem Zusammenhang entscheidenden Stelle (ed. S. 198 Zeile 18-S. 199 Zeile 1, im Anschluss an den oben Anm. 10 zitierten Text) eine falsche Lesart: «Sed ibi plus dicebatur, quod 'etiam tres' exprimere[n]tur in prima citatione»; die richtige Lesart *etiam res* der Hs. Wien 2089 erscheint als Variante im kritischen Apparat.

[18] Conc. Lugd. I (1245); Coll. Novellarum I.1 (Conciliorum oecumenicorum decreta ed. G. Alberigo, Bologna 1973, S. 283f.); Coll. Novell. III (1253) c. 1; Sextus 1.3.2.

[19] *Cum per illam generalem clausulam*, 1256 März 24, Text in *Les Registres de Alexandre IV*, ed. C. Bourel de La Roncière, Paris 1902, Nr. 1326; vgl. Bertram, *Die Konstitutionen* (wie Anm. 1), S. 88 Nr. 14.

[20] *Romanus pontifex* wird noch beiläufig erwähnt von Bernardus Compostellanus Iunior in seinem Glossenapparat (sog. *Glossa ordinaria*) zu den Novellen, c. *Cum in multis* (wie Anm. 18), v. nomina, Hs. BAV, Chigi E.VIII.237 fol. 81ra: «Et eandem expressionem credo faciendam de causis quas aliquis intendit movere contra aliquem per clausulam illam ‚et rebus aliis' sicut et de reis eadem ratione in quadam decretali que incipit *Romanus*». – Guilelmus Duranti, *Speculum iudiciale* II.1, rubr. De citatione, § Contra citationem, ed. Basel 1574, ND Aalen 1975, Band I, S. 427a: «Item debet etiam res exprimere super quibus intendit agere per clausulam illam, et rebus aliis'; et postmodum super aliis non audietur ut eodem titulo *Romanus* et in c. *Pastoralis*». Zu *Romanus* bemerkt Johannes Andreae in einer *additio*: «Quam etiam non habemus».

Cum in multis in den *Liber Sextus* übernommen und damit bleibendes Kirchenrecht. Für die Kanonisten waren die beiden Dekretalen Innozenz' III. und *Cum in multis* sedes materiae für die einschlägigen Erörterungen. Obwohl in *Cum in multis* nicht ausdrücklich erwähnt, wurde dabei allgemein angenommen, daß in den Ladungsschreiben neben den Namen der Beklagten auch die Streitgegenstände (*res*) bezeichnet werden müßten[21]. Insbesondere durften höherwertige Ansprüche nicht nachträglich zu einem späteren Verfahrenstermin geltend gemacht werden, wenn in der Ladung nur minderwertige erwähnt worden waren.

4. *Verwendung im Lorvão-Prozess*

Den Kontext unseres Auschnitts aus dem Verfahren hat Peter Linehan oben erläutert. Wie schon gesagt, fehlt in den erhaltenen Protokollstücken der Teil, in dem die Partei des Beklagten (Kloster Lorvão) kurz zuvor *Romanus pontifex* als Argument gegen den Kläger (Vicente Dias) eingeführt hatte: dieser habe entgegen der Bestimmung von *Romanus pontifex* die beanspruchten Sachen (*res*) nicht in der *prima citatio* vom 13. April 1251 spezifiziert, sondern erst in einer *petitio* vom 21. (28.?) Oktober, das heißt erst nach der förmlichen Eröffnung des Verfahrens (*litis contestatio*). Damit habe er wissentlich und arglistig das Kloster getäuscht und geschädigt: *per fraudem et malitiam procuravit ut monasterium maioribus expensis et laboribus fatigaret*. An diesem Punkt beginnt eine mündliche Auseinandersetzung über die Verbindlichkeit von *Romanus pontifex*, die zwei Verhandlungstage in Anspruch nahm (24 und 26 Okt. [oder 31. Okt. und 2. Nov., mit Pause an Allerheiligen?]).

Der Kläger beantragt, daß *Romanus pontifex* aus den folgenden Gründen in dem Verfahren nicht berücksichtigt werden darf:
- die Konstitution entspricht nicht dem *ius commune*, das vorsieht, daß die streitigen *res* erst in der Klagschrift (*libellus*) dargelegt werden sollen (Zeile 2-7);
- eine *nova constitutio* gilt nicht rückwirkend (Zeile 8-9);
- eine *nova constitutio* gilt erst nach *insinuatio* und *publicatio* und zwar mit einer Legisvakanz von zwei Monaten (Zeile 10-12);
- die angebliche *nova constitutio* ist dem Kläger unbekannt (Zeile 21-26);
- eine *nova constitutio* muß nach römischem Recht förmlich und öffentlich publiziert werden (Zeile 27-33);
- sie muß in alle Provinzen geschickt werden (Zeile 33-59);
- da es sich nicht um eine amtlich publizierte Norm handelt, trifft die Regel, daß über Interpretationszweifel (*dubia*) der *superior* zu konsultieren ist, nicht zu (Zeile 62-66);
- die angebliche Konstitution ist in keiner *compilatio* enthalten, sie wurde weder in den Provinzen, noch *in scolis Bononien. vel Parisien.* publiziert (Zeile 66-69).

[21] So z.B. Goffredus Tranensis, Apparatus X 1.3.14 v. examinantur (*lies*: exprimuntur), Hs. Montecassino 266 p. 7b, online <http://mosaico.cirsfid.unibo.it/266/montecassino>: «Est ergo res que petitur exprimenda; alias nec reus deliberare posset incertus super quo conveniatur ut infra de appell. *Significantibus*, ff de rei vindic. l. *Si in rem,* nec iudex procedere posset ut hic, nec sententiam ferre super incerto ut Inst. de actionibus § *Curare*». - Eine ausführliche Erörterung dann bei Hostiensis, *Summa*, tit. de rescr. § Quod continet ius commune, vers. Non solum autem, ed. Lugduni, ex officina Theobaldi Pagani, 1537 (ND Aalen 1962) fol. 14ra.

Dagegen trägt der Vertreter der Beklagten vor:
- die Unkenntnis des Klägers ist als *ignorantia crassa et supina quae non excusat* nach herrschender Lehre irrelevant (Zeile 78-110);
- es ist weder nötig noch üblich daß neue Konstitutionen in den einzelnen Provinzen publiziert werden; vielmehr genügt es, daß sie in den lokalen Rechtsschulen bekannt sind und gelesen sowie von den örtlichen Gerichten befolgt werden (Zeile 111-120);
- *Romanus pontifex* ist sowohl in der maßgeblichen Dekretalensammlung (*compilatio que modo habetur in curia*) enthalten wie auch in den Konstitutionen des Konzils von Lyon; deshalb gilt auch die Regel, daß bei Auslegungszweifeln der *superior* zu konsultieren ist (Zeile 121-127);
- die zweimonatige Legisvakanz läuft vom Tag der Publikation an der römischen Kurie, nicht erst nach Bekanntmachung in den Provinzen (Zeile 129-139);
- abgesehen davon ist die Befristung der Legisvakanz irrelevant, da *Romanus pontifex* in Spanien schon seit mehr als zwei Monaten bekannt ist; deshalb mußte die Ladung schon gemäß ihren Bestimmungen abgefaßt werden (Zeile 140-144).

Dem Antrag des Beklagten, ihm Gelegenheit zu geben, diese Artikel zu beweisen, wird in einer *sententia interlocutoria* stattgegeben. Die Beweise sollen am 10. Dezember in Salamanca vorgelegt werden. Nach der Beweiswürdigung soll das Hauptverfahren am 7. Januar 1252 fortgesetzt werden (Zeile 146-155).

Wie man sieht wurde die Auseinandersetzung auf beiden Seiten mit einem beträchtlichen Aufwand an professionellem juristischen *know-how* geführt, das nicht nur die Quellen, sondern auch die Literatur beider Rechte umfaßte: Lorvão hatte sich schon zuvor auf Azo, Accursius, Tankred und Bernardus Parmensis berufen[22], und führt nun noch Vincentius Hispanus[23] und Goffredus Tranensis[24] ins Feld, während der Kläger seinerseits Bernardus Parmensis zitiert[25]. An diesem Punkt wären noch mancherlei Fragen zu formalen und inhaltlichen Einzelheiten der Diskussion zu untersuchen: sind die protokollierten Zitate philologisch und sachlich korrekt?, wie weit sind die aus ihnen gezogenen Argumente juristisch haltbar, logisch passend, verfahrenstaktisch geschickt?

Vorläufig begnügen wir uns mit der Feststellung, daß hier in der wissenschaftlichen Provinz und auf der unteren Ebene der Rechtspraxis ein fundamentales Problem der gesamten mittelalterlichen Rechtsgeschichte erstaunlich konkret, anschaulich und kompetent zur Sprache gebracht wird: wie konnte unter den damaligen Kommunikationsbedingungen der Wille des Gesetzgebers

[22] Membrane 1: Lorvão argumentiert, daß nach der *litis contestatio* keine neuen Tatsachen vorgebracht werden dürfen: «Post vero litis contestationem hoc non licet. Et dicunt Ac. et Ac. et magister T. et Bernaldus et alii iuris civilis et canonici professores quod hec variatio sive mutatio fieri potest sine preiudicio adversarii scilicet ut varians seu mutans ad interesse teneatur eidem».
[23] Appendix, Zeile 138, Vincentius, Apparatus X 3.50.10 v. duorum mensium, Hs. Paris, BNF 3967 fol. 156v: «Queritur quando incipient isti menses; dico in exitu ipsius monasterii hac de causa».
[24] Appendix, a. a. O., Goffredus, Apparatus X 3.50.10 v. spatium, Hs. Montecassino 266 p. 215, online (wie Anm. 21): «connumerandum a tempore publicationis ut not. supra de const. c. ii in glosa que incipit *Ignorante*».
[25] Appendix Zeile 57-59, mit geschickter Anpassung der zitierten Äußerung des Bernardus Parmensis, X Proemium *v.* in villa ista, ed. Venedig 1514, Sp. 1b: «Sed propter studium quod est Bononie communius et generalius precipue in utroque iure et ibi quasi de omnibus partibus mundi sunt studentes, ideo Bononie diriguntur (*sc.* Decretales); et ita omnes tenentur hanc compilationem observare que nec possent nec debent singulorum auribus intimari».

bekannt gemacht und verbreitet werden? Die Diskussion zeigt, daß beiden Parteien das Publikationsverfahren der justinianischen *missio in provincias* ebenso geläufig ist wie die kanonistische Zusendung an die Universitäten, auch wenn sie naturgemäß konträr interpretiert werden, wie es den entgegengesetzten Interessen entsprach. Die grundsätzliche Erörterung der einschlägigen Stellen beider Rechte, die schon ansich erstaunlich genug ist, wird schließlich durch die spezifische Bezugnahme auf *Romanus Pontifex* zu einem Paradestück für die Problematik der sog. Extravaganten, die bekanntlich die gesamte Kanonistik nach Gratian durchzieht. Von dem Bereinigungsversuch Gregors IX. nur vorläufig unterbrochen, geht sofort danach die alte Zweigleisigkeit von unqualifizierter päpstlicher Normsetzung und auswählender Rezeption durch die Kanonisten weiter.[26] Im Fall von *Romanus pontifex* setzten sie sich bedenkenlos über das gregorianische Ausschließlichkeitsgebot, das von uneinsichtigen modernen Rechtshistorikern nach wie vor überschätzt wird, hinweg, indem sie die *nova constitutio* nicht nur einfach abschrieben, sondern überraschend häufig als integralen Bestandteil in den *Liber Extra* einfügten. In unserem portugiesischen Prozess präsentirt sich der Widerspruch zwischen fehlender Autorisierung und unbefangener kanonistischer Rezeption in klarster Anschaulichkeit: das Argument des Beklagten (Lorvão), *Romanus pontifex* sei in der aktuellen Dekretalensammlung und unter den Konstitutionen des Konzils von Lyon enthalten[27] und müsse deshalb als in *omni parte Hispanorum provincie* publiziert gelten[28], wird von dem dargelegten handschriftlichen Befund exakt bestätigt[29]. Andererseits kann auch der Kläger (Vicente Dias) mit guten Gründen die Auffassung vertreten, dass *Romanus pontifex* niemals förmlich publiziert worden sei[30] und damit nicht als gemeinrechtlich bindend gelten könne. Es ging also um das altbekannte und mit dem *Liber Extra* keineswegs erledigte Problem der *constitutiones et decretales que tamquam incerte frequenter in iudiciis vacillabant*[31]. Nach herrschender Lehre war in diesem Fall ausschlaggebend, ob die fragliche Verlautbarung dem *ius commune* entsprach oder nicht[32]. Genau diese Frage wurde von dem Beklagten bejaht und von dem

[26] Vgl. die klare Unterscheidung, die Innozenz IV. 1253 in dem Versendungsmandat zur Collectio III traf, ed. P.J. Kessler, *Untersuchungen über die Novellen-Gesetzgebung Papst Innozenz' IV.*, I. Teil, «ZRG, Kan. Abt.», 31 (1942), S. 142-320, hier S. 199: «Verum sicut accepimus eisdem constitutionibus et decretalibus quedam alie sub nostro confecte nomine ab aliquibus inseruntur quas nostre approbationis eo non provexit auctoritas, ut cum aliis quas locum habere censuimus in iudiciis et in scolis debeant eisdem iuris vinculis contineri».
[27] Appendix, Zeile 125-127: «cum decretalis *Romanus pontifex* supra seppius allegata scripta sit in compilatione que modo habetur in curia et inter constitutiones que facte fuerunt in concilio et etiam post concilium Lugdunense».
[28] Appendix, Zeile 76-78 und 156-158.
[29] Ergänzend sei noch angemerkt, dass von den *Extra*-Hss. mit inserierter Konstitution immerhin vier in spanischen Bibliotheken liegen: Barcelona, Capit. 93; Madrid, Academia de la Historia, Cogolla 66; Madrid, Bibl. Nacional 6512; Urgell 2013.
[30] Vgl. die Nachrichten über die fehlende Bullierung oben Anm. 9 und 10.
[31] So die Formulierung Gregors IX. im Versendungsmandat des *Liber Extra*, ed. Friedberg, S. 2.
[32] Vgl. Innozenz IV., Apparatus zu X 2.22.8, ed. Frankfurt 1570, ND Frankfurt 1568, fol. 277va, v. decretalis: «Que non est posita in corpore decretalium, sed tamen advocati eam pro decretali

Kläger verneint; und die vorgetragenen Argumente für oder gegen die Pflicht, den *superior* zu konsultieren[33], entsprachen präzise den von Innozenz IV. und Hostiensis angebotenen Optionen für *decretales vacillantes*. Bedauerlicherweise erfahren wir nicht mehr, was aus dem von Lorvão beantragten Beweisverfahren geworden ist[34]. Aber schon mit seinem dokumentierten Ausschnitt liefert der portugiesische Prozess ein eindrucksvolles Zeugnis dafür, daß das anhaltende Dilemma der nicht autorisierten Extravaganten keineswegs nur die Schulstuben beschäftigte, sondern auch die Praktiker im wissenschaftlichen Hinterland. Auf dieser rechtsgeschichtlichen Bühne haben sich unsere Provinzadvokaten mit Bravour geschlagen.

allegant»; v. consulat: «Nota decretalem contrariam iuri non statim rejici, sed papam consuli; est enim presumptio pro ea, quia posita est inter alias decretales vel etiam advocati in iudicio eam allegant». – Wörtlich übernommen von Hostiensis, Lectura zu X 2.22.8 v. aliqua decretalis, ed. Venedig 1581, fol. 116ra: «Que non est posita in corpore decretalium, sed tamen advocati eam pro decretali allegant; unde si non sit contraria iuri, non est statim reiicienda, sed papa super ea consulendus ut sequitur (…) secundum dominum nostrum cuius est mens totius huius glose». Anschließend erläutert Hostiensis die Optionen unter Bezugnahme auf andere nachgregorianische Extravaganten, v. merito dubitet, zitiert von K. Pennington, in «Bulletin of Medieval Canon Law», 17 (1987), S. 70 Anm. 11: «Sed et quia contingit quandoque extravagantia vacillare, alii dicunt quod est extravagans, alii quod non, ut patet in prohemio § *Sane*. Sed si extravagans quod allegatur omnino concordat iuri (…) tunc iudex secundum ipsum non timeat iudicare, infra eodem § i. Si vero super ipso materia ipsius occurrant multa iura contraria et diverse opiniones (…) consulatur princeps, infra eodem § finali».

[33] Beklagter (Lorvão): Appendix, Zeile 121-125; Kläger (Vicente Dias): Appendix, Zeile 62-68.

[34] Appendix, Zeile 157-159.