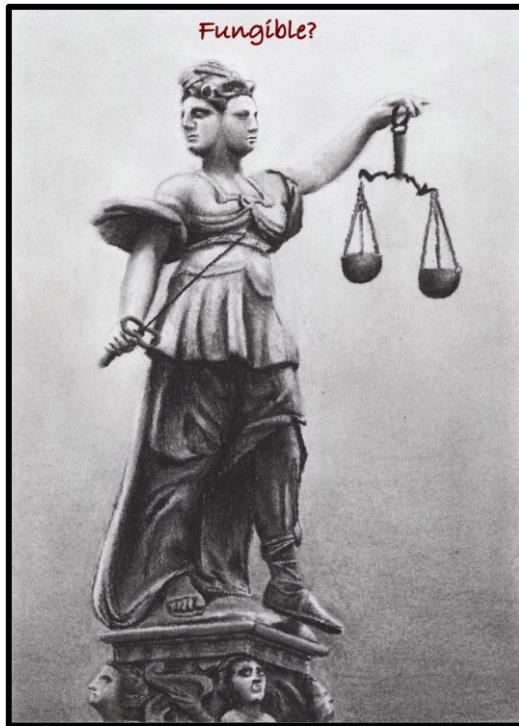


## Chapter One

# The Role of Faith in Adjudication

For the past twenty centuries, faith was placed in judges to impartially examine the evidence and announce the decision. Originally, this faith was based upon divine intervention and then on a presumption of impartiality, guarded by an oath and procedural structures developed over time, to ensure judicial impartiality. However, the reality of adjudication raises serious questions about judicial impartiality, the ostensible fungibility of judges, and the effectiveness of those oaths and structures.



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<sup>1</sup> This charcoal drawing was made by Graphicus Persona Inc., and licensed, without cost, to the author for this book. See Graphicus' artistic and legal work at <[www.graphicuspersona.com](http://www.graphicuspersona.com)>.

## 1. Trial by Ordeal: Faith in the Divine

The Holy Roman Emperor's wife (the Empress), daughter of the King of Aragon, made sexual advances to the Count of the Imperial Court in the tenth century.<sup>2</sup> The Count declined and the Empress promptly accused him of improper advances towards her. The Emperor, Otto III, immediately beheaded the Count based on the Empress' accusation.<sup>3</sup>

The *Count's wife* appealed to the *Emperor* and requested an opportunity to prove her husband's innocence. As a result, the *Count's wife* voluntarily underwent an *ordeal by fire* by holding a piece of *red-hot iron* in her hand. She survived the test unharmed and, consequently, the *Empress* was convicted of making a false accusation, and was burned alive.

The ordeal was based on faith in God. If the accused was innocent, it was believed that God (or another deity) would intervene and cause the wound to heal quickly. Typically, there was a waiting period of three days after the ordeal was commenced. Although God was the presumed

<sup>2</sup> The origins of this tale can be traced to a twelfth-century chronicle by Godefroy, Bishop of Viterbo. Modern accounts of Otto III fail to mention his brief marriage or the trial of the Count. Nonetheless, the tale provides an accurate description of the trial by ordeal process. See also Emil Kren and Daniel Marx, "Biography of Dieric Bouts the Elder", online: Web Gallery of Art <<http://www.wga.hu/index1.html>>.

<sup>3</sup> Emil Kren and Daniel Marx, "Biography of Dieric Bouts the Elder", online: Web Gallery of Art <<http://www.wga.hu/index1.html>>.

intervener, a human judge would actually examine the burn after the passage of the healing time, to interpret the severity of the wound and, thereby, determine the guilt or innocence of the accused.<sup>4</sup>

The adjacent oil painting,<sup>5</sup> entitled *Faith and Ordeal* shows the Count's wife holding her husband's head in her right hand and the red-hot iron in her left hand. She is kneeling before the Emperor and in the background is the fire in which the Emperor's wife was burnt alive. Did you mentally envision the same images as seen on this painting, when reading the italicized words of the story on page three of this chapter?



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<sup>4</sup> Robert Bartlett, *Trial By Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986) at 1 [Bartlett].

<sup>5</sup> “*Faith and Ordeal*” is a painting created by Graphicus Persona for this book and was inspired by “*The Ordeal by Fire*” by Dieric Bouts the Elder (1460).

If the burn remained severe, the judge would issue a guilty verdict. However, if the wound healed, the accused was declared innocent. Judicial accountability was entrenched in the system because everyone saw the same visual evidence, the burn on the hand, rather than a textual description of the burn (a point we will return to in this book in the last chapter).

Trial by ordeal was not the first resort, but typically the last.<sup>6</sup> In twelfth-century England, the law on ordeal was that the “ordeal of hot iron [was] not to be permitted except where the naked truth [could not] otherwise be explored ...”.<sup>7</sup> “It has sometimes been asserted, and probably rightly, that the increase in the use of documents over the course of the Middle Ages resulted in a diminution of the number of cases involving the ordeal, since where written testimony was available the ordeal was redundant”.<sup>8</sup> The very nature of evidence evolved from demonstrative and oral to primarily, if not exclusively, documentary and oral.<sup>9</sup>

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<sup>6</sup> Bartlett at 26.

<sup>7</sup> Bartlett at 26.

<sup>8</sup> Bartlett at 27, citing Richard Southern, *The Making of the Middle Ages*, in which Southern wrote that “with the greater abundance of written evidence ... disputed facts about ownership, which had been one of the most fertile sources of appeal to the ordeal, became amendable to the test of human testimony”.

<sup>9</sup> Bartlett at 27.