NEW STUDIES ON THE ROMAN LAW IN GRATIAN'S DECRETUM

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I

THE recent celebrations of the eighth centenary of the Decretum Gratiani at Bologna and Rome, 17-22 April 1952, have focused once more the interest of legal historians on the all-important work of the “Father of the Science of Canon Law.” The fact that after nearly four hundred years of canonistic erudition since the days of the Correctores Romani we still do not have a satisfactory critical edition of the Concordia discordantium canonum has been often lamented; and the resolutions taken at the commemorative convention give promise for the first time of an organized, international cooperation of scholars toward this formidable task. Encouragement for such an enterprise came from the lips of Pope Pius XII in his allocution of 22 April 1952:

... It is evident that the edition of the Correctores Romani should remain in the large collection which constitutes the Corpus Juris Canonici. But there is nothing to prevent the preparation for printing of a new critical edition, as certain scholars have laudably proposed; in fact, it is altogether de-

1 Cf. the present writer’s “De Gratiani opere noviter edendo,” Apollinaris 21 (1948) 118-28.

2 Cf. The Jurist 12 (1952) 396 f.

3 Acta Apost. Sedis 44 (1952) 375; English text from The Jurist 12.270 f. The translation in The Jurist is based on the Latin text which appeared in L’Osservatore Romano on 23 April 1952, and consequently repeats some of the minor verbal mistakes of this printing, which later were corrected in the official text of the Acta (where, however, the allocution is erroneously dated of 29 April). It should therefore be mentioned that the Holy Father, in treating of the decretists of the twelfth and thirteenth centuries, spoke of “the Bolognese, French, Anglo-Norman (not: Anglo-Saxon, as in trans. p. 267), and Spanish schools”; and again, of “the golden age... of classical canon law, especially in Bologna, Paris (not: Pavia, as in trans. p. 269), and other Universities.”
sirable... Such a critical edition should be prepared in keeping with the demands of present-day scholarship, since the edition of Friedberg, notwithstanding its undeniable merits, no longer measures up to the wants of ranking experts in the history of canon law...

_Prouit nunc temporis ars et ratio exigit_: textual criticism in many fields of medieval research has come to recognize that the really intricate problems are presented not so much by the corruptions of a finished text at the hand of later copyists as by the "internal" history of a given text. We may be faced, e.g., with successive editions published by the author; with works that show traces of rewriting, or of substitution or interpolation of fresh matter by the author in the course of revising again and again his first draft (here Peter Lombard ⁴ or Bracton ⁵ come easily to mind); with publication by pupils from lectures which the master never cast into definite literary form, etc. Phenomena of this kind are by no means unknown to students of ancient literature—Aristotle's _Metaphysics_ are a case in point ⁶—but occur far more often in medieval writing, particularly with works of the schoolmen, in the wider meaning of the term, destined for the classroom or practical consultation. ⁷ In their case, matters are further complicated by the fact that we have to do with _textes vivants_, upon which the author himself and subsequent generations of scholars and scribes felt free to "improve" by addition or subtraction.


⁶ W. Jaeger, as cited by F. Schulz, _History of Roman Legal Science_ (Oxford 1946) 157 n. 1; I do not feel competent to pass judgment on Schulz's brilliant thesis (p. 160 ff.) which regards the _Institutes_ of Gaius as lecture notes published after Gaius' death.

⁷ Cf. e.g. E. Gilson, "Doctrinal History and Its Interpretation," _Speculum_ 24 (1949) 486 f.
The history of the *paleae*, for instance, in Gratian’s *Concordia* reflects to a large extent the critical attitudes of the several schools of decretists of the twelfth and thirteenth centuries towards the work of the Master; attitudes expressed both by the addition of new authorities (at first in marginal notes, comparable to the *Authenticae* of Irnerius and his school, entered in the manuscripts of the Code) and by marking off or omitting duplications and other “chaff” among Gratian’s texts.  

The more we realize that Gratian’s work is not likely to have been composed and published in one magnificent thrust, the less can we share the optimism of earlier generations of scholars who believed that one may easily arrive at the “original” shape of the book by merely counting and tabulating the *paleae* in the manuscripts. Such reasoning must fail in particular since we have to reckon with an early beginning of the process of eliminating original duplicates, and no criteria for distinguishing these from intruded-and-dropped ones have as yet been evolved. While the heuristic value of manuscripts with a low number of *paleae* remains unquestionable, the critical problems that arise in the twilight zone between original revisions and early accretions cannot be solved by them alone. To find here the golden mean between a mechanical tabulation of variants and the flight of fancy—which elsewhere has so often discredited higher criti-

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9 Vetulani, in RHD 4 15.355 f.

cism—is not always easy. At times, nothing but internal criteria will remain to establish the traces of an early reworking undergone by the extant text. Thus, e.g., the dictum of Gratian after c.3 D.25 shows an original plan of proceeding as follows:

Nunc autem per singulos gradus ordine recurrentes, qui, ex quibus ordinibus, in quem gradum conscendere possint; qui post lapsum ualeant reparari, uel non; quibus culpis a proprio gradu mereantur deici; quo accusante, quibus testificantibus possint conuinci; cuius sententia sint soluendi uel dampnandi, breuiter consideremus,

—a plan which must have been abandoned at an early stage of the work. The inconsistency of the dictum with the actual shape of part I was of course noticed by the glossators; but there exists no shred of evidence that Gratian ever got to the point of drafting a treatise corresponding to the program he announced. Any attempt at reconstruction would be foolhardy.

Or again, at the end of D. 31 Gratian interprets a number of canons, as is his wont, quoted in the preceding discussion; the last of these, however (“Illud quoque Martini papae: Si subdiaconus secundam duxerit uxorem, non dissimiliter intel-

11 Summa Parisiensis ad loc.: “... quae diligentius in causis quam in distinctionibus exsequetur” (ed. T. P. McLaughlin, Toronto 1952, p. 26); cf. F. Gillmann, “Einteilung und System des Gratianischen Dekrets ...,” AKKR 106 (1926) 525, where many other relevant texts are cited passim; see esp. Huguccio ad loc. (pp. 562-3; also on D.60 pr.: p. 565), on whom the Glossa ord. here is based (p. 572). For the text of Summa Antiquitate et tempore see AKKR 112 (1932) 519 n.2. On Gratian’s word breuiter, Huguccio and Gloss. ord. note ironically: “i.e. usque ad xii. causam.”

12 While the first items of the proposed disposition may be recognized in portions of pt. I (qui: D. 25-49, D. 51-59; ex quibus ordinibus: D.60-61; reparatio post lapsum: D. 50), the rest has been submerged in the superimposed order of negotia in pt. II. Of the culpaes deserving deposition only simony has remained (C. 1); accusers and witnesses are dealt with in the course of C.2-6 (on procedure), and the competent judge, in C. 7-11 (on bishops). An untenable interpretation of our dictum is found in R. Sohm, Das alka-tholische Kirchenrecht und das Dekret Gratians (Leipzig 1918) 28 ff.
ligendum est”), has up to this point not been seen by the reader and is found only as D.34 c.17: an incongruity which prompted the author of the *Summa Parisiensis* to consider this sentence as added by Gratian after the completion of his book.\(^{13}\) Then, there is the epilogue of pt. I, D. 81-101, with its ample reconsideration of matter already treated, thus indicating a rather fitful working method.\(^{14}\) But who will say that there ever existed one finished copy not containing it? The prudent critic will do well to limit conjectural reconstruction to the instances in which internal evidence is borne out by some external signs of textual or transcriptional disturbance in the manuscripts.\(^{15}\) Without such restraint, he might find himself easily presenting hypotheses as facts.

Such disturbances have been found of late, e.g., by Mme. Rambaud and by the Abbé Guizard in a number of Paris manuscripts with regard to the transmission of both the *tractatus de poenitentia* and the *tractatus de consecratione*.\(^{16}\)

\(^{13}\) “... datur intelligi quod post ordinationem huius operis quasdam apposuit determinationes” (p. 31 McLaughlin, cf. introd. p. xi). Elsewhere the *Summa* considers part of a dictum (C.35 q.2 & 3 p. c.21) as added by the masters of Bologna (cf. pp. 262, xi); probably a conjecture based on a misunderstanding of the commentaries ad loc. of Rolandus Bandinelli (*Stroma* ed. F. Thaner, Innsbruck 1874, p. 214), Rufinus (*Summa* ed. H. Singer, Paderborn 1902, p. 519), Stephen of Tournai (ed. Schulte, Giessen 1891, p. 253).

\(^{14}\) See Rufinus’ criticism of Gratian, ad D.51 pr. (p. 170 f. Singer), and the rejoinder by the *Summa Antiquitate et tempore* (quoted by Gillmann, in AKKR 112.525 n. 1).

\(^{15}\) A case in point: C.13 q.2 p.c.7, in discussing funeral rights and bequests, Gratian refers to a specific rule *secundum Leonem* as if known to the reader, i.e., to Leo IX’s decretal *Relatum* (JL 4269), which must have been somewhere near this point in his original draft and is indeed found here (in varying positions) in several manuscripts, but not in the best ones nor in the vulgate tradition. Other manuscripts, however, insert here, or after c.12, the decretal of Urban II, *Mortuorum* (JL 5775); cf. *Notae Corr. Rom.* and Friedberg (n.90) *ad locc.* The matter puzzled the early glossators (cf. testimonies collected by McLaughlin, *Sum. Par.* p. xiv, to which add Rufinus, C.13 q.1, p. 334 Singer) as well as the *Correctores*. We have to do with obvious traces of multiple recension.

\(^{16}\) J. Rambaud-Buhot, “Plan et méthode de travail pour la rédaction d’un catalogue des manuscrits du Décret de Gratien,” *Revue d’histoire ecclésias-
They bear out the misgivings scholars have felt, almost since the earliest times, about the disproportionate length and digressive nature of the De poenitentia, which throws C.33 q.3 out of all balance; similarly, the serious discrepancies in the manuscript tradition of the De consecratione 17 should be viewed in conjunction with the well-known fact that this treatise (pt.III) differs from the rest of Gratian's work by the absence of all paragraphi, i.e., by altogether abandoning the dialectical procedure of concordia discordantium canonum. The French scholars’ new researches, then, allow us a glimpse into early stages of recension in which, to say the least, neither C.33 q.3 nor the matter following upon C. 36 had as yet been given their present form.

The most remarkable methodical advance, however, and the most startling discovery which modern decretist scholarship has made to date came from the enforced leisure of a distinguished Polish scholar in a Swiss internment camp during World War II: this is Adam Vetulani’s article on “Gratien et le droit romain,” which appeared in 1947 18 and has opened up entirely new roads to an understanding of the composition of the Decreta. With little else but a copy of Friedberg’s edition at his disposal, Vetulani was able to demonstrate that, contrary to the traditional view, an extensive direct use of the sources of Roman law was not part of Gratian’s original plan, and that the numerous excerpts from Justinian’s codification were inserted only at a late stage of redaction. Further, since the composition of these texts shows the skill of a trained civilian, the question arises whether in its final shape Grat-
tian's book must not be considered the work of a team rather than an individual—a hypothesis not to be rejected a limine, as Pius XII has said, but for which no direct proof can be expected to be forthcoming from our sources, whereas sufficient internal and external evidence is on hand to warrant Vetulani's conclusions regarding the late introduction of the Roman law matter. It is worth while to recapitulate the main lines of his argument.

II

If we eliminate the surprisingly few Roman texts Gratian took over from intermediary sources, i.e., from previous canonical collections (Vetulani counts 22 fragments altogether), there remains some 200 fragments of Justinian law, distributed in 46 original units of composition, i.e., 46 capitula or dicta (paragraphi) as they appear in the early manuscripts, not in the arbitrary division and numbering of the printed editions. (E.g., cc.126-130 of C.1 q.1 are actually one with c.125; or C.3 q.7 dict. p.c.1—c.2—dict.p.c.2 are one, etc.) Some of these original chapters follow each other immediately (Nos.1-2, 10-13, 36-37, 42-43 of the chart): this means that the Roman texts are actually concentrated in only 40 places. The fragments all come from the Digest, the Code, and the Authenticae of the Bolognese vulgate of the Code; none from the Epitome Iuliani and the Institutes; one exceptional chapter from the Authenticum (2 q.6 c.28: Nov.23 = Auth. 4.2). The texts are often put together, mosaic-fashion, from

19 Allocution of 22 April (n.3 supra), Acta AS 44.373; Jurist 12.266.

20 In the following, Vetulani's basic article (n.18 supra) will be referred to by initial and page; the supplementary article, "Encore un mot sur le droit romain dans le Décret de Gratien," Apollinaris 21 (1948) 129-34, by the siglum Ap. and page.

21 See the chart; the difference in numbers from Vetulani's original 42 (V. pp. 16-28) is explained below, IV A. The 22 texts from pre-Gratian collections are listed in V. p. 14 (correct there Ivo, Panormia VI, 127-131 to IV, 127-131).

22 Cf. on this below, IV C.
various fragments widely scattered in the sources, which the
compiler feels at liberty to paraphrase, abridge, reshuffle, and
combine, much more so than he ever does with the canon law
texts. This technical skill in composing what one may call
*summulae*, and the use of the *Authenticae* point to the Ir-
erian school; however, for the inscriptions of the several
fragments, a style of citation prevails which differs from that
current among the Bolognese glossators.\(^{23}\)

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<thead>
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<td>—— c.46</td>
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<td>(3)</td>
<td>D.54 c.20</td>
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<td>(4)</td>
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<td>—— c.41-p.c.41</td>
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<td>16 q.1 p.c.40 (al. c.40 §13-4)</td>
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<td>16</td>
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<td>—— p.c.16</td>
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<td>21</td>
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<td>— q.9 p.c.15</td>
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<td>32 q.1 p.c.10</td>
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<td>22</td>
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<td>De poen. D.1 cc.6-21</td>
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<td>23</td>
<td>(21)</td>
<td>— q.11 c.2</td>
<td>46</td>
<td>(41)</td>
<td>36 q.2 c.3</td>
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In pt.I the small number of Roman law texts is striking: 3
from earlier canonical collections, and 3 directly taken from
the Roman sources; and of the latter, one is even suspect as
an intruded gloss and a second, as coming perhaps from an

\(^{23}\) V. pp. 29-30.
intermediary collection. At any event, there is no direct quotation where one should expect it most: in his treatise on the sources of law (D.1-15) Gratian relies for his information on leges and constitutiones entirely on Isidore's Etymologies and canonical collections, without attempting to use the pertinent opening titles of the Digest.

In pt. II one notices a heavy concentration of Roman law texts in the sections dealing with procedure: they account for two thirds (29 out of 43) of all passages. Moreover, of the 14 passages concerned with other branches of the law, 5 may in Vetulani's opinion come from intermediary collections, 3 may be later intrusions or glosses, and 1 cluster of texts belongs to the tract. de poen., the original composition of which, as we know, presents problems of its own. If one accepts these conjectural eliminations, the ratio of procedural to non-procedural texts becomes even more impressive (although it seems somewhat exaggerated to dismiss the latter as "infinitesimal in number," "insignificant" and "of little importance," especially since some of them deal with basic topics such as alienation of ecclesiastical goods [No.32], or præscriptio [No.39]).

If Gratian refrains from more abundant quotation of Roman texts on all except procedural topics, this reserve cannot stem from lack of knowledge: witness the workmanlike composition of the passages that do quote Roman sources. But if not lack of competence, there must be another, intentional reason for this attitude: the compiler appears to have con-

24 V. pp. 31-32; but see below, IV B (No. 1), F (No. 2).

25 V. p. 33; cf. J. Gaudemet, "La doctrine des sources du droit dans le Décret de Gratien," Revue de droit canonique 1 (1951) 5-31, for the material used by Gratian.

26 V. pp. 33-38 (counting 12 non-procedural passages); the 14 are Nos. 5-7, 32, 35, 38-46, and the suspected ones are Nos. 33, 42, 43, 44, 46, Nos. 5, 6, 35, and No. 45, respectively.

27 But see below, IV B (No. 35), E (Nos. 42, 43), F (Nos. 44, 46).

28 V. pp. 34, 38.
ceived of a plan to supplement the ecclesiastical rules on judicial procedure by the pertinent, and technically more advanced, texts and doctrines of Roman law, but to forego, on the whole, major Romanistic borrowings in regard to other topics. The resulting lack of balance in the use of Justinian’s texts leads to the obvious question: was this the original scheme of Gratian’s work? 29 Vetulani points to the following signs that it was not, and that a revision must have taken place at a late stage of composition:

(a) Terminal position: in 14 instances the Roman law fragments are placed together in one cluster at the end of the quaestio, often without regard to the line of argument, whereas normally Gratian does not practice—different in this from, e.g., Ivo of Chartres—arrangement by “masses”; 30

(b) Mechanical attachment: in 11 cases the Roman law fragments are tacked onto the preceding canon without interruption, and without fitting always the rubric of that canon; 31

(c) Lack of rubrics: in contrast to Gratian’s usual method of introducing a canon, the Roman law fragments are nearly always—there are but 5 exceptions—presented without a rubric of their own; 32

(d) Transcriptional disturbance: in numerous instances the Roman Law passages are found to be of uncertain position in the manuscripts, or absent from some manuscripts; 33

(e) Material and formal inconsistency: there are several instances—and these are perhaps the most interesting cases—of Roman law texts quoted in a wrong context, or adduced by way of afterthought, or leaving even jarring inconsistencies

30 V. p. 40: Nos. 4, 6, 7, 9, 15, 17, 18, 24, 25, 26, 27, 30, 31, 41 of our list.
32 V. p. 41 f., counting four exceptions, but see below, IV C.
33 Discussed in V. passim; also Ap. 131-3; more below, IV E.
with a preceding or following dictum, inscription, or rubric; 34

(f) Glossators' critique: a Bolognese tradition, which can be traced back to Johannes Faventinus, asserted that the lengthy *summula de praescriptione* in C.16 p.3 p.c.15-p.c.16 (No.39) was not Gratian's own work but had been supplied "ab alio"—perhaps, as the *Glossa Palatina* and the *Glossa ordinaria* have it, but without proof, by the civilian glossator Jacobus. 35

The cumulative force of the evidence assembled is, I believe, overwhelming in favor of Vetulani's thesis up to this point. We may leave aside his further speculation as to the identity of the "redactor"—here, as in other cases of work that grew by accretion in the original shop, caution seems indicated, and Vetulani himself is not eager, for instance, to give too much credit to Johannes Faventinus' story on the *De praescriptione*, even though it was told by a near-contemporary. As to the main issue, however, while some points of detail may be questioned, the soundness of Vetulani's conclusions appears clearly established by his material and may be corroborated by further observations. But before we turn to such critical and supplemental notes (below, IV), a more exciting question has to be discussed: the traces that exist of at least one manuscript which represents a stage of Gratian's work before the final redaction.

III

The slender pamphlet with the title page reading, "Dio-
medis Brava/ Patricii Tranensis/ Disquisitio Critical de In-
terpolatione / Gratiani/ Bononiae Apud Haeredes Benatii/ 1694./ Super. permissu," (pp.xxiv), was already in Sarti's

34 V. pp. 42-47, discussing Nos. 22, 25, 28, 33, 34; cf. also pp. 16, 31 (No. 1), 18 (No. 7); more below, IV H.

day a great bibliographical rarity. 36 I have seen a microfilm of the copy owned by the University Library of Pisa. 37 Two eighteenth-century reprints, however, are of easier access: one, in Justus Henning Boehmer’s edition of the Corpus iuris canonici, with the editor’s notes; 38 the other, in Paul Riegger’s Dissertatio de Decreto Gratiani, with Boehmer’s and Riegger’s notes. 39

Behind the pseudonym, Diomede Brava, and the false imprint one of the representative figures of that great age of polyhistors is hiding: Gratian’s confrere, the Camaldulese Guido Grandi (1671-1742), who died as professor of Mathematics in Pisa and whose work in the mathematical sciences appears to be better remembered than his numerous writings on topics of history, philosophy, theology, hagiography, etc., 40 though his share in the discussion of the littera Pisana will be recalled by the student of the textual transmission of the Digest. 41 The Disquisitio was actually printed in Pisa, in 1730, and Don Guido always stoutly denied having written it; 42 but he adopted a number of “Brava’s” arguments on interpolation when—under another pen-name again—he wrote his

36 M. Sarti et M. Fattorini, De claris Archigymnasii bononiensis professoribus (Bologna 1769-72) I 274 = 2nd ed. (Bologna 1888-96) I 346 f.

37 Shelf-mark A-Y9-58, bound after Guido Grandi’s Epistola de Pandectis (Florence 1727) and his Vindiciae pro sua Epistola de Pand. (Pisa 1728). I wish to thank Dom Anselm Strittmatter, O.S.B., for his kind help in locating this rare copy and having it microfilmed for me.


40 See the brief notice by A. Agostini in Enciclopedia Italiana 17.718 and the bibliography listed in L. Ferrari, Onomasticon (Milan 1947) 373.

41 Cf. for instance C. F. von Savigny, Geschichte des Römischen Rechts im Mittelalter (2nd ed. Heidelberg 1834-51) III 462 etc. (see Index s.v.); B. Kübler, Geschichte des Römischen Rechts (Leipzig 1925) 408 n. 4. See n. 37 supra, 43 infra for titles.

42 J. B. Mittarelli et A. Costadoni, Annales Camaldulenses VIII (Venice 1761) 622; cf. G. M. Mazzucchelli, Gli scrittori d’Italia II. iv (Brescia 1763) 2038.
Nuova Disamina della Storia delle Pandette Pisane.\textsuperscript{43} There were not many to follow him.\textsuperscript{44} The veil of mystification thrown around himself and his printer unduly discredited Brava in the eyes of Sarti; and Sarti remained, it seems, the only scholar after Boehmer and Riegger seriously to discuss Grandi’s interesting observations: the great modern authorities on Gratian do not even mention the Disquisitio.

The striking discovery on which “Brava” reported in detail was a manuscript of Gratian’s book, identified as “in bibliotheca monasterii S. Blasii apud Vesontionem diu seruatum, nunc in suburbano amici praesulis musaeo posatum.” He describes it as consisting of 340 folios, and containing neither \textit{paleae} (but see below) nor glosses; above all, he records the absence of many texts never before—and, we may add, except for Vetulani never since—suspected. A comparison shows that of the 46 items of our list only 14 appear to be present in Brava’s manuscript (\textit{=Br}): Nos. 2, 3, 11-14, 16, 20, 21, 23, 33, 39, 40, 44. \textit{Br} omits 30 pieces altogether, while in 2 instances constitutions from the \textit{Codex Theodosianus}, i.e. from the tradition of the Visigothic Breviary, take the place of the usual quotations from Justinian’s Code: Nos. 36, 42.\textsuperscript{45} In a good many cases Brava supports the external evidence by arguments of internal criticism, scrutinizing the accepted text of Gratian for signs of “interpolation”; the point is nearly always well taken.\textsuperscript{46}

\textsuperscript{43} Bartolo Luccaberti, \textit{Nuova Disamina . . .} (Faenza 1730); cf. Mittarelli \textit{loc. cit.}; Sarti I 274 and note \textit{d} (2nd ed. 347 and n. 2, where the pseudonym is wrongly given as Luchetti).

\textsuperscript{44} See however J. B. Bartholus (Bartoli), \textit{Institutiones iur. can.} (Augsburg [Borgo di Val Sugana] 1749) 501 f.; cf. Sarti \textit{loc. cit. n. e} (n. 3).

\textsuperscript{45} Cf. below, IV E, IV G (d). Brava claims to have seen also in other manuscripts Justinian law replaced by Theodosian law: (No. 4) C.1 q.1 c.126; CTh. 9.27.6 for CJ. 9.27.4; (29) 5.q.6 p.c.3: CTh. 11.39.10 (Brev. 11.14.5) for CJ. 1.3.8; (30) 6 q.1 cc.22-23: CTh. 9.14.3, 9.35.1 for CJ. 9.8.5, 4; (43) 25 q.2 p.c.16 § 4: CTh. 1.2.6 (Brev. 1.2.4) for CJ. 1.22.4; (45) (46) De poen. D.1 c.6 = 36 q.2 c.3: CTh. 9.25.2 (Brev. 9.20.2) for CJ. 13.5. See Brava §§ 31, 52, 53, 75, 81, 84; all these are texts absent from \textit{Br}.

\textsuperscript{46} Nos. 1 (see below, IV B), 7 (IV D), 8 (IV C), 19, 25, 28 (IV H), 31 (IV D), 34, 38 (IV H), 46 (IV F).
Sarti (and, to a lesser extent, Boehmer) discounted the evidence of Br—since no further corroborating manuscript turned up—by arguing that the scribe of this unique codex must have been an overscrupulous canonist, who on principle eliminated, wherever possible, Gratian’s genuine quotations from civil law. But this hypothesis is easily rebutted if we remember, (1) that in the two cases mentioned there is little to commend to an overzealous canonist the Theodosian Code instead of that of Justinian; (2) that by all standards of philological method at least in the cases of formal inconsistency the original absence of the suspect text is more plausible than its later elimination; (3) that Br includes nearly all those Roman law texts which Gratian took from intermediary canonical sources: of these 22 texts all but 2 are found in the manuscript, and the two significantly occur in contexts the omission of which in Br is borne out by other critical considerations.\(^4\)

The presence in Br of most of the second-hand Roman texts disposes not only of the theory of the anti-civilian "editor" of the manuscript, but also of the suspicion—not voiced in so many words by Sarti but still to be considered—that the whole "codex" of Brava might be a hoax, cleverly conceived on the basis of a merely conjectural elimination of certain Roman law texts. While misgivings are understandable, the intrinsic trustworthiness of Br cannot be impugned. In this connection, a second look at the texts from Justinian that are present (or at least not reported absent by Brava) is in order.

Of the 14 passages, the following 5 only are beyond suspicion: Nos. 2 (D.50 c.46: CJ. 9.16.5), 3 (D.54 c.20: 5 Authenticae of CJ. 1.3.36, 37), 14 (C.2 q.6 p.c.39: CJ. 7.70.1), 21 (3 q.9 p.c.15: Auth. Si debitum\(^4\)) CJ. 4.20.18), 44 (32 q.1

\(^4\) Below, IV H; above at n.34.

\(^4\) C.16 q.1 c.40 (bound up with No. 38, see below, IV H) and 19 q.3 c.10 (Epit. Jul. 115 cc.62-63, bound up with No. 41 [cf. V. p. 26 f. No. 38], which is absent from Br, see Brava §69).

\(^4\) Si enim scriptum sit debitum (Nov. 90.2-3), cf. Vacarius 4.17 n.5 (ed. F. de Zulueta, Publ. Selden Soc. 44; London 1927, p.126; p.lx No. B 16);
p.c.10: CJ. 9.9.2, 1). The other 9 can be attacked on various grounds and are, in part at least, on Vetulani's list of suspects.\textsuperscript{50} Had Brava-Grandi been out to invent a manuscript characterized by the absence of what he considered interpolations, he would at least have eliminated C.3 q.8 c.1 §2; 11 q.1 p.c.9; 16 q.3 p.c.15-p.c. 16 (Nos.20, 33, 39); for they would have been about the most convincing specimens to be had.\textsuperscript{51} That he remains silent about these, is perhaps the best indication of his sincerity: as elsewhere, so in the world of manuscripts reality is never as beautifully symmetrical as fiction.

This impression is confirmed if we test \textit{Br} for \textit{paleae}. By no means does the manuscript represent a particularly "pure" text. Instead of an expected low number of \textit{paleae}, over 60 seem to be present; and even if we take into account possible oversight in the case of \textit{paleae} not easily spotted (e.g. those appearing as a portion of text within a given canon),\textsuperscript{52} or a slackening of Grandi's interest as the survey went on, there remains a goodly number of cases in which it would have been tempting for him to assert absence of a given piece from his manuscript so as to enhance its age. Yet he himself points to the fact that many texts which \textit{in vulgatis} are marked as \textit{paleae} do appear in \textit{Br}.\textsuperscript{53} The manuscript thus

\textsuperscript{50}Vetulani, "Les Novelles de Justinien dans le Décret de Gratien," RHD\textsuperscript{a} 16 (1937) 472 f.

\textsuperscript{51}V. pp. 21, 46 (Nos. 23, 33 [21, 31]); Ap. 130, 132 (Nos. 39, 16, 20); and see below IV A (No. 40), IV B (Nos. 11-13), etc.

\textsuperscript{52}No.20 is a gloss slipped into the text of 3 q.8 c.1 (below, IV D: but Grandi might have merely overlooked this case), No.33, a glaring case of inconsistency of inscription caused by incomplete revision (V. p. 46), and No. 39 was suspected even by the early glossators (above, at n. 35; cf. below, IV E).

\textsuperscript{53}They are (numbers refer to Friedberg's list of \textit{paleae}, col. xiii f.) Nos. 2, 6, 7, 11, 53, 77, 106, 121, 148, and C.22 q.4 c.19 §1 (on this \textit{palea} see Vetulani, ZRG Kan. Abt. 22 [n.8 supra] 363; Ullmann, \textit{Stud. Grat.} I 198).

\textsuperscript{53}Brava §16: "... nam quandoque capita quaedam quae in vulgatis \textit{paleae} nomine recensentur, hic inserta vidi, suppresso tamen \textit{paleae} vocabulo." In the case, e.g., of several \textit{paleae} following each other immediately in the vulgate text, one would expect total absence or total presence in a given manuscript. Not so in \textit{Br}, where of such pairs or triplets we sometimes find one single
represents indeed a textual tradition of curiously mixed ancestry: on the one hand, a stage earlier than the last original revision; on the other, a text already enlarged by numerous additions to the completed book.

Under these circumstances it is exasperating that Grandi remained so vague about the provenance and location of his source. A monasterium S. Blasii does not seem to have existed near Besançon; could one assume that the manuscript came from Sankt Blasien in the Black Forest—where so many celebrated codices now scattered in various libraries originated—and had traveled via Besançon to Italy? And where should one place the musaeum suburbanum amici praesulis? Not at Trani in Apulia, to be sure, the home of "the Patrician Brava"; but could it be Florence, or Pisa, where the true author of the Disquisitio critica spent his academic years? A scrutiny of the largely unedited correspondence and other papers of Grandi in the University Library of Pisa\textsuperscript{54} may or may not lead us onto the trace of the manuscript. If it still exists, it will eventually be reached by the group of researchers now engaged\textsuperscript{55} in the project of a catalogue raisonné of all the manuscripts of Gratian. But Br may be lost, just as another, famous codex Vesontinus—the one from which Cujas was able to supply certain portions of the Sententiae of Paulus—is lost,\textsuperscript{56} and in that case no one will ever answer the riddle of its origin.

\textit{palea} present (here indicated by italics): Friedberg's Nos. 4-5 (Dist. 9 cc.1-2), 22-24 (Dist. 35 cc.5, 6, 7), 20-28 (Dist. 38, cc. 13, 14, 15), 60-82 (Dist. 88 cc.11, 12, 13), 142, 143, 144 (C. 23 q.8 cc.1, 2, 3).

\textsuperscript{54} Agostini, Enciclop. Ital. 17.718.

\textsuperscript{55} Cf. Mme. Rambaud, "Plan et méthode" (n. 16 supra) 211.

\textsuperscript{56} Jac. Cuiacius, Observationes 21.13 ff.; cf. G. Haenel, Lex Romana Visigothorum (Berlin 1849), praef. pp. xvii, lxxxix; P. Krüger, Collectio librorum iuris anteist. II (Berlin 1878) 44; A. Berger, in Pauly-Wissowa, RE 10.732; \textit{id.}, "In tema di derelizione" (1914), Bullettino dell'Istituto di diritto romano 32 (1922) 151, with further bibliography in n.1.
The observations that follow here are offered by way of a supplement to Vetulani.

A. Number of passages from Roman law. In the article of 1946/7 this was given as 42 units; two more were discussed in Apollinaris in 1948 (Nos. 16, 20 of our list); and Vetulani’s No. 39 should have been counted as two according to his own principle, since in the manuscripts cc.14-15 and dict. p. c. 16 of C.25 q.2 are two distinct units (Nos. 42, 43 of our list).

To be added is the following:

(40) C.17 q.4 p.c.29, on punishment in secular law of various species of sacrilege. Sources: (pr.:) CJ. 1.3.10, paraphrased (“... sicut in primo libro Codicis legitur titulo de episcopis et clericis et lege Si quis in hoc genus sacrilegii pro-ruperit”) and with the addition of a garbled reference, “et in Digestis tit. ad legem Julianam pecuniarum repetundarum, l. ultima”; (§1:) CJ. 9.29.1-3, paraphrased (“... lib.ix. Codicis tit. de crimine sacrilegii”).—The first part of the dictum duplicates a quotation found as early as Gregory the Great’s famous commonitorium to the defensor Johannes (JE 1912: ep. 13.50 in MGH Epp. 2.415 lin.10-18), cf. C.2 q.1 c.7 §7; but, as the form of reference shows, neither this text nor Anselm of Lucca 4.23 (ed. Thaner, Innsbruck 1906-15, p. 201) 57 were Gratian’s source. The form of reference in both paraphrases from the Code is in keeping with a style found elsewhere in Gratian (see below, B) but the reference to the Digest is given in the “Irnerian” style, i.e. by citing only rubric and lex.

The glossators had no difficulty observing that the reference was wrong. 58 Dig.48.11.9 (de lege Julia repetundarum l.

57 Gregory the Great cites “Cod. lib. primo tit. tertio const. undecima, Imperatores Archadius et Honorius Augusti Theodoro p. p.”; Anselm of Lucca omits all reference to the Code, giving only the inscription (Imperatores etc.). The text occurs also in Coll. Caesaraugustana (cf. Savigny, Geschichte II 491) but no details are known.

58 Glossa Palatina ad loc.: “Hic falsum dicit, quia hoc non dicitur in illo tit. ff. ad leg. iul. repe. set in illo tit. ff. ad leg. iul. peculatus, sacrilegii (7, al. 6)
ult.) makes no sense whatever in the context, but the nearby Dig. 48.13.7(6) does; this is ad legem Juliam peculatus l. Sacrilegii (not the last of the title), which treats of punishments for various forms of sacrilege. A rubric as cited by Gratian does not even exist; the wording “ad l. Jul. pecuniarum repetundarum” points to original contamination, and a misreading or dittography of some abbreviation for “peculatus” (such as pecul’t’) might account for the otherwise incomprehensible “l. ult.” (which in turn would have led to the dropping of the initial word, Sacrilegii, of the lex actually meant). Such heavy textual disturbance indicates intrusion of a marginal note in the final stage of redaction. If such a note began with “et repetas” or the like, this could be one way of explaining the strange aberration to the Julian law on repetundae:

et repetas in Dig. tit. ad l. Jul. pecul’t’. Sacrilegii
et in Dig. tit. ad l. Jul. pec. repet. l. ult.

Another explanation could be offered by the fact that the first mistake (“ad l. Jul. pecul’t’. l. ult.”) led to a text (fr.16, al. 14) in which “publica iudicia peculatus et de residuis et repetundarum” are jointly named.

B. Critical value of inscriptions. The foregoing may be added to the cases, discussed by Vetulani, in which Irnerian style of reference can be taken as a sign of late intrusion. This much, however, should be clear: (a) If Gratian, as a rule, does use a different style for the inscriptions he gives the texts from Justinian’s law, this does not mean that he “n’a pas subi—au moins dans cette direction—l’influence de l’Ecole de Bologne” (V. p.31), but is to be explained by the fact that the brief Irnerian style (rubric of title and initium of lex), while sufficient in glosses and references for identify-

et l. sacrilegii capite (11, al. 9). Errauit ergo in titulo, et utinam in hoc solo errasset” (MS Pal. 658, fol. 61rb); Glos. ord. ad loc.: “Magister errauit in nomine huius tituli...”

59 Hence the Roman edition omits the word “pecuniarum,” but cf. Friedberg n. 293 ad loc. for the MSS.
ing a passage, is not per se a satisfactory way of introducing a passage quoted in a collection of auctoritates; (b) In the early generations of Inerius' school, so uniform a style of reference as postulated by Savigny did not exist; (c) Variety of style is found also in Gratian's inscriptions to a larger extent than Vetulani admits; e.g., in inscriptions of constitutions from CJ. the name of the issuing emperor is often but not always given.

Suspicion against texts introduced in the Inerian style is borne out by other signs of disturbance in the following cases:

(1) D.50 c.45: material inconsistency, variations of inscription, cf. V. pp. 16, 31 n.3; Brava §19.

(5) 1 q.4 p.c.9 (al. c.6): missing in some MSS, designated as palea in others, variations of position, cf. V. pp. 17, 36.

(6) 1 q.4 p.c.12 §3 fin.: reference to CJ. 8.4.7, which in the vulgate MSS follows as palea, cf. V. pp. 18, 34, 36; the entire sentence, "Nam si putat" rell. is lacking in many MSS, cf. Friedberg n. 133 ad loc.

(19) 3 q.7 p.c.1-c.2: formal inconsistency of dict. p.c.2, see below, H.

(22) 3 q.9 p.c.18: modifying but inconsequential afterthought, missing in one of Friedberg's MSS, cf. V. pp. 41, 45; reported as marginal gloss in another MS by Brava §46.

(35) 15 q.1 c.2: variations of position, cf. V. pp. 25, 37.

(40) 17 q.4 p.c.29: contamination, see above, A.


Except for No. 40, they all are absent from Brava's manuscript; Nos. 5 and 6 should probably be classed as paleae. In the other cases, however, one would hesitate to say with


61 Cf. Nos. 17, 18, 22-24, 29 of Vetulani's (Nos. 18, 19, 24-26, 31 of our) list, and No. 40 (above, A).

Vetulani that "il s'agit ici, à coup sûr, d'intercalations postérieures dues aux décrétistes" (V. p.30). While it is very likely for these texts to have originated in marginal notes—hence the Irnerian form of reference instead of inscriptions proper—there is no reason why the transference from margin to text could not have taken place during some stage of original revision. The disturbances are no greater in these than in many other texts from Roman law that have the "right" kind of inscription. Also the fact that many of these passages were glossed unsuspectingly by the earliest decretists would seem to corroborate our explanation.

(11, 12, 13) Of the series C.2 q.6 cc.29-31, not criticized in this context by Vetulani, the first (c.29) is inscribed in Friedberg's best manuscripts: "Digest. tit. Quando appellandum sit, lege I." (Dig.49.4.1); the subsequent chapters have no inscriptions but instead the rubrics, c.30: "De appellationibus recipiendis uel non," c.31 pr.: "De libellis dimissoriis," c.31 §1 (separate chapter in the oldest MSS): "Titulo Nichil nouari," which are actually verbatim the rubrics of the respective titles of the Digest (Dig. 49.5, 6, 7) 63 from which Gratian's texts were taken—that is, they are not rubrics proper, i.e., summarizing statements of Gratian's own making, but "Irnerian " references turned into "rubrics." If we notice further that cc.29-31 are a consecutive series of excerpts from Digest 49.4-7, their origin from a marginal notation seems obvious. Other traces of this may be found: in c.30 some MSS offer readings closer to the Digest than to Gratian's text; 64 some glosses have crept into the text of c.29; 65 posi-

63 The title of 49.7 *Nihil innovari* (al. *novari*) *appellatione interposita* is shortened by haplography, since c.31 §1 (Dig.49.7.1) begins, "Appellatione interposita . . ."

64 Gratian's text (pr.), "... sed et si mater ex pietate prouocauerit, dicendum est," cuts short the emendations attempted by the vulgate MSS of the Digest in the corrupt passage Dig. 49.5.1.1 (for which see Mommsen's apparatus *ad loc.*); the readings of Friedberg's MSS *EGH* (n.333), *CEG* (n.356) follow in a garbled fashion the Digest vulgate. Also, some MSS supply Dig. 49.5.3 (Gratian's c.30 has: 49.5.1, 2, 4), before or after c.30 §2 (fr.4), see Friedb. n.363 (*EH, C*).

65 Cf. *Notae Correctorum* c.29; *Summa Parisiensis, ad loc. v. cum quis:* "hoc est glossa" (p.110 ed. McLaughlin).
tional uncertainty is evinced by the Cracow MS, where the entire series cc.29-31 is repeated after c.41.  
Finally, some MSS have a rubric (preceding the inscription) for c.29: “Forma uero appellationis hec est,” which makes no sense in this place, as c.29 treats of tempus, not of forma appellationis. It can be only explained by contamination with the first sentence of dict. p.c.31 (“Forma apostolorum hec est...”), and this must have occurred in the archetype when cc.29-31 were still in the marginal stage and the words in question followed immediately upon c. 28.

Yet in Br the three chapters are not only present but even provided with inscriptions in the “correct” Gratian style instead of the title rubrics, and the same is found in some of Friedberg’s MSS. The verdict, then, again must be: original revision, not interpolation.

C. Critical value of rubrics. Vetulani notes the extremely rare occurrence of rubrics for the texts quoted directly from Justinian; of the four cases he cites (Nos. 8, 10, 12, 13), two have just been discussed and should be eliminated as being merely miscarried inscriptions. Instead, No. 37 should be added. Vetulani considers at least one of the texts in question (No.10) as taken from an intermediary canonical collection, not from the Roman source directly, and hence, he believes, it is possible that the others too may turn out to belong to that category (V. pp.19, 42). The argument, not


67 Friedberg, n. 283 ad loc. (The rubric given in the Roman edition is of later making).

68 appellationum AD, appellationis B; Friedb. n.385 ad loc.


70 Cf. his nn. 349, 359, 361 (c.30), 365, 376 (c.31).
compelling in itself, fails with regard to the two texts that came from a series of marginal references (Nos. 12, 13, discussed above); it can be disproved for the others as well.

(10) C.2 q.6 c.28 is Gratian's only quotation of a Novel from the *Authenticum* (Nov.23: Auth.4.2), a unique departure from his regular practice to quote from the *Authenticae* of the Code. Therefore Vetulani in an earlier article had postulated a hypothetical, intermediary collection as source;\(^71\) in the article of 1946/7 the hypothesis is treated more or less as an established fact.\(^72\) But the absence from *Br* of the chapter and of the preceding dictum indicates on the contrary the introduction of this text in a late stage of revision (later, perhaps, than the series cc.29-31 from the Digest?), and it cannot be overlooked that the chapters now stand in a substantially wrong order: for the dictum and Nov.23, in which (to use Gratian's words) "Justinianus in constitutionibus suis corrigens, infra decem dies appellationis remedium cuique dandum decreuit," should logically have followed rather than preceded the text from the Digest, which supposes a *biduum vel triduum*. The whole juxtaposition remains clumsy; in Gratian's workshop two sets of marginal notes may have been made, one from the Digest and one from the *Authenticum*, to modify the abstracts from the *Theodosiani leges* (i.e. from the *Sententiae* of Paulus with the Visigothic *interpretatio*) which Gratian here in cc.22, 24-27 had taken over from Ivo, *Panormia* 4.127-131.\(^73\)

(8) C.2 q.1 c.14 (Dig.48.2.8-11, 13) with the rubric "Qui ab accusatione prohibeantur et qui recipiuntur" is placed at the end of the affirmative part of q.1 (V.p.18); in the Cracow MS it has been supplied in the margin without rubric (*Ap. p.131*),

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71 "Les Novelles ..." (n.49 *supra*) 476 f.

72 V. pp. 19, 42.

73 On Ivo as Gratian's source for these texts see *Summa Parisiensis*, C. 2 q.6 c.25 (p.109 McLaughlin), a passage of great interest for the history of the transmission of the Theodosian Code; cf. *inter al.* Mommsen, *Proleg. Theod.* (Berlin 1905) pp. lxxviii, cv.
and it is absent from *Br*. The chapter does not properly fit its place, as was justly observed by Grandi (Brava §35), for C.2 q.1 deals with the observance of *ordo iudiciarius* (cf. dict. pr. and p.c.14), not with the question of capacity of accusation, which is considered *ex professo* under various aspects in C.2 q.7; 3 qq.4, 5; 4 qq.1-5; 6 q.1; 15 q.3. All this suggests late insertion.74

(37) C.15 q.3 c.4 (CJ. 1.3.30.5) with the rubric “Lese maiestatis et publicorum iudiciorum et symonie accusatio equaliter proponatur” (not discussed by Vetulani) is absent from *Br*. The text from the Code serves Gratian’s argument (equal right of accusation in cases of simony and lèse ma-jesté) only by a *tour de force*, since it treats chiefly of the equality of punishment. Gratian’s unusual interpretation would explain why he found it necessary to underscore his point by a special rubric. Significantly the same text with the same interpretation is referred to in the dictum p.c.22 of C.6 q.1 (No.30), where the traces of late insertion are quite obvi-ous (see below, E).

D. Revision or interpolation? In addition to some texts already discussed (above, B), the following have been suspected as being inserted by the schools after Gratian, i.e., equal to paleae:

(16) C.2 q.8 c.2 (CJ.4.19.25) is found as only a marginal entry in some of the oldest and best MSS (Ap.p.132), yet seems to be present in *Br*.75

(20) C.3 q.8 c.1 §2: the brief quotation from CJ. 7.45.14 interrupts the canonical text of Ps.-Zephyrinus and is obviously intruded from the margin; it has a very irregular tradi-tion in the MSS and was criticized early by the glossators.76

74 Bohmer’s note 41 on Brava *ad loc.* erroneously asserts that the text came from the Panormia.

75 Also Ullmann, *art. cit.* (n.8 supra) 177 remains in doubt.

But Friedberg's best MSS have the text and Brava remains silent (or did he overlook the matter because it concerns a passage in the middle of a canon?).

(31) C.6 q.4 c.7 fin. (al. c.4 fin., al. q.5 c.2) shows uncertainty of position even in the best MSS (V.p.23, A.p.p.132); it is absent from Br and others. Suspicions voiced by earlier writers are borne out by the designation as palea in several MSS studied by Mme. Boulet-Sautel.

Two of these three cases show the difficulty of finding a sharply defined demarcation line between interpolation and original revision. But there are also some instances in which we find the two stages side by side. Nos.4, 7, 18, 25, 32 of our list are present in all manuscripts but not in Br. and must be considered late original insertions. They attracted further additions in the schools as follows:

(4) 1 q.1 cc.126-130: in some MSS c.127 is enlarged by CJ. 9.27.2, 3 (to be added to Friedberg's list of paleae).

(7) 1 q.7 c.26: palea c.27 follows, and according to Summa Parisiensis a further palea, CJ. 1.3.30, was read here by some.

(18) 3 q.3 p.c.4: palea c.4 precedes and palea p.c.4 §7 follows.

(25) 4 q.2 & 3 p.c.2-c.3 (see below, H): palea c.2 precedes.

(32) 10 q.2 cc.1-3 (see below, E): first portion of c.3 is palea.

To these may be added Gratian's Romanizing dictum in C.1 q.4 p.c.12 §§2-3, to which the reference No.6 (§3 fin.: probably palea, see above, B) and palea c.13 are attached; §§2-3 are not found in Br. (see below, G).

E. Transcriptional disturbances. Uncertainty in the position of the Roman texts, or omission in some manuscripts,

77 Art. cit. (n.62 supra) 151 f. For the Cambridge MSS, see Ullmann 176 f.; for MSS used by different glossators, e.g., Singer, Rufinus p.249 note b; McLaughlin, Sum. Paris. p.xiv.

78 Cf. Boulet-Sautel p.152; Friedberg ad c.128, n.1793.

79 Ed. McLaughlin p.100; cf. p.xii. (The passage stands in need of emendation.)
with or without later correction, was reported by Vetulani in various cases, some of which have been examined above. The following observations may be added to illustrate two symptoms of revision, not discussed by Vetulani, which we may characterize as “internal duplication” and “split-and-shift.”

(26) C.4 q.4 dict. p.c.2, originally attached without interruption to c.2 (Ps.-Damasus, JK †243 c.15 fin.-c.16 med.: ed. Hinschius p.504), is absent from Br. In the vulgate MSS, c.2 §1 “Inscriptio semper fiat—dampnari, cum et seculi leges hee eadem retineant,” is followed by:

(a) three vague references to the Code, “Codice libro ix. titulo de accusationibus, Codice libro ix. de adulteriis, titulo de abigeis et inscriptionibus” (Friedberg n.27 relegates the last two words in the apparatus) = CJ. 9.2, 9.9, 9.37;

(b) Gratian’s own words, “Aliquando etiam sine inscriptione accusatio fieri potest” (dict.§1);

(c) abstracts and paraphrases from the titles referred to in a, without any inscriptions and separated only by “item”: CJ.9.2.7, first sentence; 9.9.6 paraphr. (§2); 9.37 un. (§3); 9.2.8 (§4); 9.2.16, first sent. (without “item”: §5).

A number of MSS repeat here c.2 §1 “Inscriptio—retineant,” but some of the best MSS have it only here, thus clearly indicating that the cluster of Roman law texts was in a first stage of composition inserted—most probably by expanding a marginal note—between the two sections of the Pseudo-Damasus and gradually shifted to the end of the canon. (After the last quotation from the Code, the vulgate

80 E.g., Nos. 5, 11-13 (above, B), 8 (C), 16, 20, 31 (D).

81 Source: CTh. 9.1.11 Interpr.

82 More in one of Boehmer’s MSS (cf. his n. 46 ad loc.).

text concludes with another sentence of Gratian's, "De domo etiam—incidat iudex," and c.3, from Nicholas I, JE 2796—both, however, are missing here and transferred to the end of q.6 in some of the oldest MSS.) Even apart from these positional variations the awkward make-up of the passage is telling. The series of references at the beginning—obviously the original nucleus of the dictum—should have been distributed and prefixed by way of inscriptions to the several texts in dict. §§1-5. As it stands now, it leaves the impression of unfinished, untidy work, and the nonsensical reading "de accusationibus. . . de abigeis et inscriptionibus" at the beginning, which is even in the best MSS, suggests that possibly a first, correct reference "Cod. lib.ix tit. de accusationibus et inscriptionibus" was subsequently split by the additional references to the titles de adult. and de abigeis.

Early copyists made things worse by prefixing the particle ut to the initial references, thus making the words "ut Codice..." appear as though they were meant to corroborate the preceding c.2 §1 ("... quia ante inscriptionem nemo debet iudicari uel dampnari" etc.) while on the contrary they introduce the exceptions (accusatio sine inscriptione) to this rule. Yet this became the common Bolognese reading; hence the lame explanation in the Glossa ordinaria: "istud ut respicit uerba sequentia."

(30) C.6 q.1 cc.22-23. For the sources of this summula on accusation for lese majesté, originally part of the dictum p.c.21, see V.p.23. In Br. the whole series, with Gratian's introductory observation, "Hec licet ratione. . ." (dict.p.c.21 §1), is missing. Within this summula one passage (p.c.22) shows marks of having been split by an interpolated reference; it reads in Friedberg's edition (italics mine):

84 Friedberg n. 40 ad dict.p.c.2; cf. also Rambaud, "Plan et méthode . . ." (n. 16 supra) 220 for MS Paris 3888.

85 Ed. Rom.; Friedberg's MS D (n.22); cf. also the casus of Bartholomaeus Brixiensis v. Inscriptio, where the difficulties felt by Huguccio and Benencasa ("Beneuen." ed.Rom.) are reported.
Porro symonie accusatio ad instar lese maiestatis procedere debet, sicut Leo in imperator in I. libro Codicis decreuisse legitur, tit. de episcopis et clericis, I. Si quenquam procedere debet. Quod de accusatione, non de pena intelligi oportet.

The lex referred to is CJ. 1.3.30, the pertinent part of which (§5... Sane quisquis hanc sanctam) Gratian quotes in 15 q.3 c.4, proposing the same interpretation (No.37, see above, C). The constitution does of course not begin “Si quenquam procedere debet,” but nearly all of Friedberg’s MSS have this dittoographic nonsense (so does one early 13th-cent. MS in the Library of Congress), whereas the vulgate text (—ed.Rom.) tacitly corrects the passage by suppressing the second “procedere debet.” At least one other MS of the 13th cent. replaces the reference by quoting the fragment itself (“Quisquis igitur sanctam—retrahatur”). The key to the correct reading is found in the Cologne MSS, which Friedberg should have followed instead of merely reporting on them (nn.281, 282 ad loc):

Porro symonie accusatio ad instar lese maiestatis—sicut Leo imp. in I. lib. Cod. decreuisse legitur, tit. de epis. et cler. I. Si quenquam uel in hac urbe—procedere debet. Quod...

(32) C.10 q.2 p.c.1-c.3, originally part of c.1: an important summula on alienation of ecclesiastical goods, made up from fragments of CJ.1.2.21 and 1.2.14, with a number of traditional Authenticae. Here we have again positional uncer-

86 The full text was read by some as palea at the end of 1 q.7, see at n.79 supra.

87 Law Library of Congress MS G.71 (from Weissenau) fol.98 va.

88 Ibid. MS 67, fol.144va-b; formerly Phillips MS 14953, the whereabouts and contents of which were given as uncertain in my Repertorium der Kanonistik (Città del Vaticano 1937) 320. The MS was acquired in 1948 from Christensen, Bloomfield, N. J.

89 This is the correct initium of CJ. 1.3.30.

90 For the sources in detail see V.p. 24; but add Auth. Perpetua quoque and Qui rem huicemodi (c.2 §§6-7). The sentence “Sed melius dictur...” (§10), which V. attributes to Gratian, is part of the Auth. Qui res iam dictas (§9) as formulated by Irnerius; cf. Glos. ord. ad loc. v. Sed melius.
tainty, causing a split of the original canon to which these Roman texts were attached: in the vulgate tradition the canon (c.7 of the Council of Agde) begins as c.1 “Casellas—presumant” and continues in c.3, after the Roman texts (CJ. 1.2.14.9-10, Auth. Hec usus, Auth. Quibuscumque: c.3 pr.-§2), with the words “Quodsi necessitas—permittimus” (§2 fin.-§3). But already the Correctores noted that “in aliquot melioribus codd.” the two sections of the canon are given together as c.1 and that it was thus read by the author of the casus on c.1. So also two of Boehmer’s, and several of the MSS employed by Friedberg, who consequently prints it that way (though his account of the MSS in the apparatus remains somewhat confused).92 Yet the splitting of the canon Agathensis is the only arrangement that yields a point of contact for the series of Roman texts: they begin after c.1 with a brief clause, “excepta uidelicet causa captiuitatis,” quoted from CJ. 1.2.21;93 and the exception here stated to the prohibition of alienation—viz. redeeming of prisoners, later on amply documented in 12 q.2 cc.13-16, 70, etc.—becomes incomprehensible if it is read after the permissive (c.1 fin. Friedberg “... in usum prestare permittimus” = c.3 vulg.) instead of the prohibitive part of the canon (“... neque ... alienare presumant” c.1 vulg.). In Br. cc.2-3 are omitted, but Brava remains silent as regards the short dictum p.c.1, although its origin in a marginal note seems obvious.

(39) C.16 q.3 p.c.15-p.c.16: the celebrated summula de praescriptione, which an early Bolognese tradition—or gossip?—declared to be interpolated by someone else,94 but which is

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91 The preceding portion of §9 is a palea.

92 Friedberg n.9 ad loc. seems to imply that ABC—his oldest MSS—offer the vulgate position. So does MS Paris 3888, cf. Rambaud, art. cit. 220.

93 According to V.p.24 this fragment is found before Gratian, in Anselm of Lucca 4.22 and in Polyc. But the excerpt from CJ. 1.2.21 in Anselm (pr.-§1 v. “... in factum actionem”) stops short before the passage employed by Gratian. The Polycarpus is not accessible to me.

94 Cf. at n.35 supra.
found in all manuscripts, including Br. Commenting on p.c.15, dict.pr.,

Huius ergo longi temporis prescriptio auctoritate Gelasii et secularium legum ecclesiis obici non potest,

i.e. before the beginning of the Romanistic distinction (dict. §1) "Prescriptionum alie," the glossators advised to continue reading farther down, after the end of the long summula (p.c.16 §4 Auth. Quas actiones), at the words,

sed sola prescriptio xxx. annorum et deinceps, a qua tamen prescriptione priuilegia Romane ecclesie sunt exclusa rell.,

with the subsequent c. *Nemo* (17), thus implying that here Gratian's original text had been split. The *Correctores Romani* observed that one of their MSS repeats after Auth. Quas actiones the passage, "Huius ergo—non potest," thus reconnecting by duplication the end of the dictum with its beginning; Friedberg lists three such MSS. The uncertainty of the reading, "sed sola prescriptio" (which fits the end of dict.pr.) or "sed sola prescriptione" (which fits the end of Quas actiones), points in the same direction. Multiple recension is further suggested by two internal duplications: p.c.15 §6 briefly cites Quas actiones and the initial words of Epit. Jul. 119.6; the first of these reappears in a longer excerpt at the end of the summula, p.c.16 §4, and the other—which comes from an intermediary collection, *Polycarpus* 3.12.34—reappears paraphrased in full as q.4 c.3 of the same Causa.

(42, 43) C.25 q.2 cc.14-15, p.c.16: a *summula* on rescripts, divided by c.16 (Pelagius I: JK 1033) and made up of fragments from CJ. 1.19, 1.22, and 1.23, some of which are found


96 Ibid. and Friedb. n. 251.

97 Cf. Glos. Pal. (n. 35 supra) and Glos. ord. p.c.15 v. non potest: "... quod etiam conicitur [convincitur ed. Rom.] ex eo quod ille concordantie bis ponuntur."
also in collections prior to Gratian (V. pp.35, 37; however, no material for collations is available). The whole cluster of texts, including the decretal of Pelagius, is not in its usual place in several of the oldest MSS,\(^{98}\) and in Friedberg's best MSS the rubric of c.16 is missing.\(^{99}\) All this points to origin in a marginal notation on c.13, a fragment from Gregory the Great's _ep._ 9.197 (JE 1724), which expressly refers to _imperialis constitutio_ for the maxim, "ut ea que contra leges fiunt non solum inutilia sed etiam pro infectis habenda sint" (actually quoted from CJ. 1.14.5.1). Among the parallel texts, cc.14-16, suggested to Gratian by this maxim, Pelagius' decretal JK 1033 is itself a summary of what "clementissimus princeps generalibus legibus constituit," and thus in turn prompted the compilation of the Roman fragments p.c.16.\(^{100}\) In Br. this latter _summula_ is lacking, and instead of c.14 (CJ. 1.19.3) Constantine's _Contra ius rescripta_ (CTh. 1.2.2 [Brev. 1.2.1]) is read.

F. *Intermediary sources?*_ For a number of texts Vetulani contemplates the possibility of Gratian's having taken them, at least in part, from earlier canonical collections rather than directly from the Roman sources. Some of these have been disposed of above;\(^{101}\) one will be considered in connection with formal signs of double recension (below, H: No.38); there remain Nos. 2, 44, 46.

\(^{98}\) Ap. 132 (MSS of Cracow and Plock); Rambaud, _art.cit._ 221 (Paris 3888); Friedberg n.85 _ad_ c.12 (MSS EG).

\(^{99}\) Friedberg n.98 _ad_ c.16.

\(^{100}\) CJ. 1.22.2-6 and 1.23.3, 4, 7. It is worth noting that modern authorities who discuss the imperial constitutions Pope Pelagius had in mind cite no other texts than those quoted here by Gratian: see M. Conrat, _Geschichte der Quellen und Literatur des Römischen Rechts im früheren Mittelalter_ (Leipzig 1891) 6 n.5, Nos.4-5 (also the fragment left by Conrat of a second edition, which H. Kantorowicz published in ZRG Rom. _Abt._ 34 [1913] 29 n.1, No. 5); V. Wolf von Glanvell, _Die Kanonessammlung des Kardinals Deusdedit_ (Paderborn 1905) 444 n. 7 on Deusd. 4.99 (JK 1033).

\(^{101}\) Nos. 8, 10, 12, 13: above, IV C; Nos. 42, 43: IV E.
(2) D.50 c.46: the mere fact that this piece from CJ. 9.16.5 occurs also in the *Collatio legum Mosaicarum et Romanarum* (V. p.32) does not suffice to support the suggestion of a possible canonical intermediary, especially since Gratian’s readings are those of Justinian’s Code.

(44) C.32 q.1 p.c. 10: CJ.9.9.2, 1;

(46) C.36 q.2 c.3: CJ. 1.3.5; absent from Br. Even if part of these texts can also be found before Gratian (V. pp. 27-28, 35, 37), no conclusion is justified unless we have a connection positively established by textual comparison. Friedberg’s apparatus offers no material, and the collation of the first part of No.44 (CJ.9.9.2) with the printed text of Ivo, *Decr.* 8.266 remains inconclusive. In any event, an argumentum e continuo for the rest of the dictum is hardly admissible.

G. *Implied proficiency in Roman law.* For this aspect of Gratian’s work, which was not discussed by Vetulani, only a few examples will be given in the present paper.

(a) D.5 pr., on Natural law: “… cepit enim ab exordio rationalis creature, nee variatur tempore sed immutabile permanet”; D.6 p.c.3 §1: “Naturale ergo ius ab exordio rationalis creature incipiens, ut supra dictum est, manet immobile.” Gaudemet, in his excellent analysis of the opening sections of the Decretum, finds here a Ciceronian influence, but the glossators were nearer the truth when they noted such parallels as Inst.Just. 2.1.11 (“… a vetustiore iure incipere: … vetustius esse naturale ius, quod cum ipso genere humano rerum natura prodiit. . .”); Dig. 41.1.1. pr. (“… et quia antiquius ius gentium cum ipso genere humano proditum est. . .”); Inst. 1.2.11 (“Sed naturalia iura. . . semper firma

102 The wrong assumption (V. p.27) that this fragment occurs also in the *Coll. Caesaraugustana* is based on the poorly aligned tables in A. Theiner’s *Disquisitiones criticae* (Rome 1836) 265; cf. instead, Savigny, *Geschichte II*, 491 and 514.

103 Gaudemet, *art. cit.* (n. 25 supra) 25 n.2, referring to *De republ.* 3.22.33 ("lex diffusa in omnes”).

atque immutabilia permanent...""). Gratian's definition may of course be based on an intermediary source, especially since no direct use by him of the Institutes is otherwise known. Still, it is skilfully composed and in its marked Roman character cuts sharply across Gratian's original definition, D.1, pr., which equates *ius naturale* with the divine law "quod in lege et euangelio continetur" (also D.5 pr. after "immutabile permanet"): "Sed cum naturale ius lege et euangelio supra dicatur esse comprehensum...""). This juxtaposition of concepts was to create certain difficulties of interpretation for the early decretists.¹⁰⁵

(b) D.34 p.c.3: Gratian's definition of concubine,

Concubina autem hic ea intelligitur que cessantibus legalibus instrumentis unita est et coniugali affectu asciscitur; hanc coniugem facit affectus, concubinam uero lex nominat,

contains civilian terms not derived from the canons he quotes (cc.4, 5) but from the *Auth. Licet* of CJ. 5.27.8 ("... concubina... quae sola fuerat ei indubitato affectu coniuncta," ex Nov. 89.12.4) and CJ. 5.27.10 ("... minime dotalibus instrumentis compositis, postea autem ex eadem adfectione etiam ad nuptialia pervenerit instrumenta..."),¹⁰⁶ quite possibly by way of one of the collections of legal definitions current at the time.¹⁰⁷ Gratian's speaking of *legalia instrumenta* instead of *dotalia* or *nuptialia instrumenta* indicates, however, that he had not fully grasped the precise technical meaning. The dictum shows further marks of incomplete revision in that the beginning, "... hic ea intelligitur" has no point of refer-


¹⁰⁶ Nov. 18.5 (Epit. Jul. 118) adduced in the *Nota Corr.* is much less likely and has no verbal parallels.

¹⁰⁷ "That floating mass of legal glossaries"—Kantorowicz, *Studies* (n. 60 *supra*) 18, with bibliography in nn.7, 8.
ence in the immediately preceding canon D.34 c.1 (cc.2-3 are *paleae*); hence the glossators referred *hic* back to D. 33.  
This saves the meaning but certainly does violence to the words, for Gratian always uses "illud Gregorii" or similar expressions when he wants to point back to an earlier text. The solution seems to be given in *Br.*, where between D.34 c.1 and *dict.p.c.1* Brava read a canon, "Ex concilio Bituricensi: Presbyteri et diacones et subdiaconi, sicut lex canonum praecepit, neque uxores neque concubinas habeant," which must have disappeared during the process of revision.

(c) C.1 q.4 p.c.12: In Gratian's important distinction of *ignorantia facti* and *iuris*, the subdivisions of *ignorantia facti* are based on theological criteria and illustrated by biblical examples; the discussion of *ignorantia iuris*, however, subdivided into *ign. iuris naturalis* and *iuris civilis*, is entirely built upon civilian conceptions, but without direct quotation (leaving aside the dubious last sentence, probably a *palea*). The distinction was quite possibly modelled upon Bulgarus' *Summula de iuris et facti ignorantia*, as Kantorowicz has shown. In respect of *ignorantia facti*, the Romanistic criteria of *ign. crassa et supina*, *ign. quae caderet in virum discretum*, *ign. probabilis*, were introduced in the teaching of the canonists only after Gratian.  
It is therefore interesting to

108 Cf. Rufinus *ad loc.* ("... in superioribus capitulis," p.80 ed. Singer); *Summa Paris. ad loc.* (p.33 ed. McLaughlin; emend as follows: "quod autem dicit 'concupina hic intelligitur,' i.e. precedenti decreto secundo [== c.7 D.33]; *hic*, i.e. supra"); *Glos. ord. ad loc.* ("hic respicit id quod dixi supra proxima dist. cap. i.").

109 Brava §12; Council of Bourges 1031 c.5, first sentence: Mansi 19.503.


111 Above, IV B, No.6.

112 Studies 79 f.—The problem of identifying other civilian glossators who may have influenced Gratian in one or another of his Romanizing dicta cannot be examined in the present paper. For No. 39 cf. above, II (f) at n.35; for No.15 (C.2 q.6 dict. fn.) see *art.cit.* (n.1 supra) in *Apollinaris 21.127* at n.41 (Bulgarus? Inerius? Henricus de Bayla?).

113 *Kanon. Schuldlehre* 145 f., 154 ff.
learn (Brava §33) that in Br. the entire subdistinction of ign. iuris is absent, i.e. that the earliest recension seems to have had no Roman law whatever in this context.

(d) C.15 q.3 pr.: In discussing the question, "an mulier sacerdotem accusare ualeat," Gratian argues for the negative by saying, *inter al.*:

> Legibusquo cautum est ut ob uerecundiam sui sexus mulier apud pretorem pro alio non intercedat, nisi forte suas uel suorum iniurias persequi maluerit...

The first part of the passage is apparently based on Dig. 50.17.2 ("... Feminae ... nec postulare nec pro alio intervenire nec procuratores existere. ...”); Dig. 3.1.1.5 ¹¹⁴ ("... dum feminas [praetor] prohibit pro aliis postulare. ... ne contra pudicitiam sexui congruentem alienis causis se immiscat; ... improbissima femin a quae inverecunde postulant. ...”); the nisi-clause is borne out by the texts subsequently quoted in cc.1, 2 §1, 3 §2 (CJ. 9.1.12; Dig. 48.2.1; CJ. 9.1.4). But again, we notice confusion as to technical language: *intercedere pro alio* is an undertaking of surety or, generally, of an obligation for others; should Gratian have misunderstood the famous opening sentence of Dig. 16.1, "Senatusconsulto Velleiano plenissime comprehensum est ne pro ullo feminae intercederent," so as to mean prohibition of acting and pleading in court, i.e., as equal to the passages quoted above which speak of *postulare* and *intervenire pro alio?* The confusion of terms is understandable inasmuch as *intervenire* in the Roman sources covers either meaning,¹¹⁵ and Dig. 50.17.2 "nee pro alio intervenire" was indeed construed by some glossators as referring to the *sc. Velleianum* ¹¹⁶

¹¹⁴ Quoted in 3 q.7 c.2 (No. 19: below, H).

¹¹⁵ *Cf. Vocab. iurispr. rom. s.v.*

¹¹⁶ Bulgarus, *Ordo iudiciorum*, app. § Feminae (ed. Wahrmund, Quellen 4.1 [Innsbruck 1925] 13f.) "... nec postulare, nisi pro se tantum; neque intervenire, nisi cum suum negotium gerunt, ut cum intercedunt pro [nisi pro Wahrm.] creditor suo; nec procuratores [pro curatore Wahrm.; existere add.†]
—which, however, in the context could be of no interest to Gratian.

But there might be another explanation. Br. omits the series of texts from Cod. Just. and Digest in cc.1-3 (No. 36); instead of c.1 (CJ. 9.1.12) Brava read the constitution CTh. 9.1.3 (Brev. 9.1.2), followed immediately by Dig. 48.4.8 (= c.3 §§3-4). Now, in CTh. 9.1.3 the incapacity of women for criminal actions is formulated thus: "... ut intendendi criminis publici facultatem non nisi ex certis causis mulieres habeant, hoc est si suam suorumque iniuriam rell." A scribal mistake of intercedere for intendere would palaeographically be easy to explain, and this is how a first draft of Gratian's dictum might have developed into what we read now. His argument demands that criminal accusation be mentioned, and he may have written something like this: "... apud pretorem pro alio non interueniat nec publicum crimen intendat, nisi forte..." Once the second verb had been miscopied as intercedat, "emendation" and homoeography (inter-inter) would have done the rest.

(e) Ibid. dict. p.c.4: In the course of his tortuous and often criticized117 argument on parallels and differences between leges and canones in regard to the right of accusation, Gratian appeals to an analogy from the law of celibacy and states: "... legibus enim soli cantores et lectores, canonibus autem etiam acoliti uxores ducere possunt." The Correctores Romani wrote a long criticism of this passage—Gratian's line of reasoning is indeed specious, since acolythes were not an order in the East—and pointed to Nov.22.42 as a source. Gratian, we may add, probably read this Novel as Auth. Multo magis of CJ. 1.3.19. And it is even more astonishing that this Authentica is adduced here, where it fits exceedingly ill, but is

litigando, nisi causa cognita pro parente ..." (italics and emendations mine). See also the Accursian gloss ad loc. and Heumann-Seckel, Handlexikon s.v. intervenire.

117 Cf., e.g., Stephanus Tornacensis, Summa ad loc. ("... unde Gratianum hic aut errare puto aut vagari...", ed. Schulte [Giessen 1891] p. 221); Summa Paris. q.3 pr. (p. 175 McLaughlin), etc.
bypassed in the long tractate on celibacy, Dist. 26-34, where the differences between oriental and Roman discipline are repeatedly touched upon.\textsuperscript{118}

In any event, the weakness of Gratian's logic in dict. pr. and p.c.\textsuperscript{4}, as well as the considerable differences for cc.1-4 in \textit{Br.},\textsuperscript{119} point to a particularly inept ultimate recension of the entire \textit{quaestio.3}.

H. \textit{Formal inconsistencies.} In addition to the interesting cases discussed by Vetulani (Nos. 22, 25, 28, 33, 34)\textsuperscript{120} and the incidental observations made in the preceding pages, some further, striking instances of incongruities left untouched in the final revision should be noted.

\textbf{(19)} C.3 q.7 p.c.\textsuperscript{1}-c.2. After this long \textit{summula} composed from Digest and Code (for details see V.p.20f.) on disqualifications of judges, Gratian's words, "Idem testatur Felix papa et eisdem uerbis," make no sense. They were commonly referred by glossators and commentators to 3 q.5 c.\textsuperscript{11} (Ps.-Felix II, JK \textsuperscript{\textdagger}230 c.12 \S\textsuperscript{15} on the exclusion of \textit{servi, infames,} etc. from testimony and accusation), but this text admittedly did not use "the same words" as any portion, and in particular the end, of q.7 c.2. In \textit{Br.} however, the whole \textit{summula} is lacking and "Idem testatur..." follows immediately upon c.\textsuperscript{1}, quoted from \textit{Romana sinodus}, "Infamis persona nee procurator potest esse, nec cognitor," which is based on Angirl. c.\textsuperscript{4} (ed. Hinschius p. 759 at n.32; inser. "Sancta synodus Romana dixit," p. 758). And this text indeed is found \textit{eisdem verbis} in Ps.-Felix I, \textit{ep.2.13} (JK \textsuperscript{\textdagger}143, ed. Hinschius p.202). The \textit{Correctores Romani} in their note on c.\textsuperscript{1} came close to recognizing this truth, yet failed to draw the obvious conclusion and repeated (on dict.p.c.\textsuperscript{2}) the wrong reference to q.5

\small
\begin{itemize}
\item \textsuperscript{118} D.23 p.c.\textsuperscript{13} \S\textsuperscript{4}; D.31 p.c.\textsuperscript{13}; D.32 \textit{passim}, etc.
\item \textsuperscript{119} See above, \textit{d} for cc.1-3 (No. 36); IV C, for c.\textsuperscript{4} (No. 37).
\item \textsuperscript{120} V.pp.42-47; all but No.33 (11 q.\textsuperscript{1} p.c.\textsuperscript{9}; V.p.46) are absent from \textit{Br.} On Nos. 28 (5 q.\textsuperscript{3} p.c.\textsuperscript{1}) and 34 (12 q.\textsuperscript{2} p.c.\textsuperscript{55-c.60}) Brava's critical comments (\S\S\ 51,61) are identical with those by Vetulani (pp. 44, 46f.); for No. 25 see below.
\end{itemize}
c.11, as does also Friedberg (n.89 ad loc.). Brava §45 pointed to the incongruity of the vulgate text, but without adverting how neatly c.1 and p.c.2 agree.

(25) C.4 q.2 & 3 p.c.2-c.3 has been competently discussed by Vetulani, who points out (p.43) that this Romanistic *sum-mula* on witnesses belies Gratian’s dict.pr., “secunda autem et tertia questio *eodem concilio* [i.e., Carth. VII] *uno eodem-que capitulo* terminatur.” One might add, as did Brava §48, that the final dictum (p.c.3), “sed obicitur illud beati Bricii, qui uoce pueri triginta dies ab ortu habentis innocens probatus est,” with its solution,121 makes sense only if read as an objection to the last sentence of c.1, “... ad testimonium autem intra annos quatuordecim etatis sue constituti non ad-mittantur,” which it follows directly (c.2 is a *palea*) in Br.

(38) C.16 q.1 c.40-p.c.40, a series of texts on clerical and monastic immunity, is perhaps the only instance of double recension in which Roman materials were demonstrably added from intermediary canonical sources.

   c.40: C.J. 1.3.51, from the *Polycarpus*
   p.c.40 (c.40 §3 *ed. Rom.)*: CTh. 16.2.8 (not C.J. 1.3.1), from Ans. Luc. 4.13
   ——(ibid. §4): CJ. 1.2.5 (not CTh. 16.2.40), from Ans. Luc. 4.21

The proof for the derivative nature of the text122 is the unquestionably Theodosian reading “meruisse perhibemini” (CTh. Ans. Grat.) for “meruistis” (C.J.) in the first fragment of dict p.c.40. That Gratian’s text belonged to the tradition of Anselm of Lucca is further shown by the variant “fundos et mancipia” (Ans. Grat.) for the authentic “et uos et man-cipia” (CTh.J.; not noted in Friedberg).123 But Gratian did

121 Not properly understood in V. p.22.
122 For other considerations see V.pp. 26, 34, 37. The *Polycarpus* is not available to me for collations.
123 The *Correctores Romani* noted both variants (v. *meruisse*), but not their derivation from Anselm.
not follow Anselm's tacking onto the Theodosian text of the interpretation by Hincmar of Reims, "cum enim dicit—concluditur." Thus an intermediary source between Anselm and Gratian is likely; and this assumption is confirmed by some variants in the second fragment, especially by Gratian's reading with the original (CJ 1.2.5), "post debite ultionis," against Anselm "predicte ultionis" (not recorded by Friedberg).

What the presumable intermediary collection was we cannot say at present. But the entire series of Roman texts is of uncertain position in some manuscripts; it is not found at all in Br. Now, Gratian's own words which follow immediately (dict. p.c.40 ed. Rom.; dict. ps.II Friedb.), read thus:


and, as Brava §66 rightly observed, hoc idem can only refer to the end of the dictum preceding c.40, where the non-clerical status of monks in antiquity is discussed, but does not fit with the intercalated texts on immunity. The presence of the latter in this place is probably to be explained by the passage, "et praecipue monachos, licet non sint clerici" in CJ. 1.3.51: it provided Gratian with a civilian parallel for his remark p.c.39 §3, "monachos autem . . . monachos simpliciter et non clericos fuisse ecclesiastica testatur ystoria," and then by its context attracted the other material on immunities. After inserting the three pieces, Gratian forgot to change the wording of the first draft where he had interrupted himself; thus, the "seams" of double recension remain visible to the critical reader.

124 Hincmar's ep. ad Carolum imp. (Mansi 16.757), quoting CTh. 16.2.8, was Anselm's model, not the Theodosian Code (Brev.) itself, cf. the inscription of the chapter in the Coll. 74 tit., his immediate source; ed. Thaner, note b on Ans. 4.13 (p.197).

Summary list of texts discussed in this paper. (The letters A, B, C, etc. refer to the sections of pt. IV; other references are given by part and footnote.)

1 (B),  2 (F),  4 (D),  5 (B),  6 (B, cf. D, G[c]),  7 (D),  8,  10 (C);
11-13 (B),  15 (cf. G n.112),  16,  18 (D),  19 (H),  20 (D, cf. III n.51);
21 (cf. III n.49),  22 (B),  25 (H, cf. D),  26 (E),  28 (cf. H n.120),  29 (cf. III n.45),  30 (E);
31 (D),  32 (E, cf. D),  33 (cf. III n.51),  34 (cf. H n.120),  35 (B),  36 (cf. G[d]),  37 (C, cf. E at n.86),  38 (H),  39 (E),  40 (A);
41 (cf. III n.48), 42-43 (E),  44 (F),  45 (B),  46 (F).

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