

**The introduction to the *Tractatus Coniugii*  
and the case relating to the prosecution  
of clerics in the *Discordantium Canonum*  
*Concordia* of Schäftlarn**

José Miguel Viejo-Ximénez

Sometime between 1165 and 1170, priest Adalbert copied the *Concordia canonum discordantium* (CDC) in the Norbertine monastery of Schäftlarn. After the secularization of 1803, the copy passed to the Bavarian State Library, where it remains today under the acronym Clm 17161.<sup>1</sup> Emil Friedberg used this codex to prepare his *editio lipsiensis secunda* of the Gratian Decretum (DG).<sup>2</sup>

Adalbert's work lasted for two years. Throughout that period, and shortly after, the copy was corrected and improved.<sup>3</sup> On the one hand, the spaces between lines and the side margins were used to replace words and complete

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<sup>1</sup> Cf. E. KLEMM, *Die romanischen Handschriften der Bayerischen Staatsbibliothek*, II. *Die Bistümer Freising und Augsburg, verschiedene deutsche Provenienzen. Textband*, KIHBSM 3/2, Wiesbaden 1988, p. 85; and S. KELLNER – A. SPETHMANN, *Historische Kataloge der Bayerischen Staatsbibliothek München, Münchner Hofbibliothek und andere Provenienzen*, Wiesbaden 1996, p. 438–440.

<sup>2</sup> Ae. FRIEDBERG (ed.), *Corpus Iuris Canonici. Editio Lipsiensis secunda post Aemilii Ludouici Richter curas librorum manu scriptorum et Editionis Romanae fidem recognouit et adnotatione critica instruxit Aemilius Fridberg*, I. *Decretum Magistri Gratiani*, Leipzig 1879 (Graz 1959): Clm 17161 is the manuscript C of his *apparatus criticus* (p. XCV–XCVI).

<sup>3</sup> Cf. Ch. JAKOBI-MIRWALD, *Die Schäftlarnener Gratian-Handschrift Clm 17161 in der Bayerischen Staatsbibliothek*, MJBK 58, 2007, p. 23–70, p. 25, and, of the same author, *Gratian in Schäftlarn*, in: *Ausbildung des Rechts Systematisierung und Vermittlung von Wissen in mittelalterlichen Rechtshandschriften*, ed. K. Böse – S. Wittekind, Frankfurt am Main–Berlin–Bern–Bruxelles–New York–Oxford–Wien 2009, p. 82–97, p. 97.

omissions in the inscriptions, the summaries, and the text of the *auctoritates* and *dicta*. On the other hand, the side margins of Clm 17161 testify an updating activity: *auctoritates* have been copied therein which belonged to the tradition of the DG – 15 *paleae* and one fragment of Roman law plus an additional authority. It is likely that these corrections and improvements – except for the copy of the additional chapter – are the result of comparison with a second model; that is, another copy of the DG.<sup>4</sup>

Adalbert was a singular copyist. He knew the particular Canon law of the ecclesiastical province of Salzburg on the ordinations, which he inserted between D.75 c.4 and c.5.<sup>5</sup> He presented Gratian's C.27–C.36 with a short introduction, *De matrimonio et quid ipsum sit*.<sup>6</sup> He wrote a case – *Quidam nobilis laicus periurus* – on the prosecution of clerics, and some distinctions on the first sections of the *de legibus* (D.1–D.20), which he sandwiched between C.3 and C.4.<sup>7</sup> A scribe would have these initiatives only if he enjoyed of certain authority, if he had enough resources, and if he had some training in, or a minimal knowledge of the ecclesiastical discipline.

In Schäflarn, the making of Clm 17161 aroused interest in the CDC. In the margins of the codex, the same Carolingian handwriting that copied, corrected and improved Gratian's text, it also wrote glosses-headings (*Rubrikenglosse*) and other auxiliary elements. This copyist explained the most complex expressions by definitions. He clarified the meaning of some terms with alternative simpler items. He delimited the scope of the *auctoritates* with warnings (*glossae*) on its legal validity and extent. He analysed the influence of the vow of virginity in marriage.<sup>8</sup> These activities – which sometimes echo the comments of the first decretists – were common in the teaching of Canon law in the mid-twelfth century. If any teaching based on the DG took place in Schäflarn, its duration was short-lived and its results modest. These include the introduction to marriage law and the case relating to the accusation of clerics, both the subject of this study.

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<sup>4</sup> Cf. J. M. VIEJO-XIMÉNEZ, *Anotaciones marginales en la Discordantium canonum concordia del monasterio de Schäflarn (München, Bayerische Staatsbibliothek, lat. 17161)*, FThC, supplementum, 2016, p. 245–274.

<sup>5</sup> Adrian IV, JL 10364, January, 2th, 1157–1158, to Eberard, archbishop of Salzburg (1147–1164), an *auctoritas* that does not belong to DG. Cf. W. STELZER, *Gelehrtes Recht in Österreich. Von den Anfängen bis zum frühen 14. Jahrhundert*, Wien u. a. 1982, p. 20, footnote 13.

<sup>6</sup> Cf. R. WEIGAND, *Die Glossen zum Dekret Gratians: Studien zu den frühen Glossen und Glossenkompositionen*, SG 25–26, Roma 1991, p. 853.

<sup>7</sup> Cf. F. KUNSTMANN, *Zur Geschichte des Gratianischen Dekrets*, AKKR 10, 1863, p. 337–345, p. 339–340; and S. KUTTNER, *Some unrecorded Quaestiones*, *Traditio* 13, 1957, p. 507–508.

<sup>8</sup> Cf. J. M. VIEJO-XIMÉNEZ, *Anotaciones marginales*, sections IV and V.

## I. *De matrimonio et quid ipsum sit*

This piece does not belong to the literary history of the CDC. In Clm 17161, the same hand that copied Gratian's text placed *De matrimonio et quid ipsum sit* (DM) at the end of f. 132vb, after C.26 q.7 c.18.<sup>9</sup> Contrary to his usual rule, Adalbert wrote the closing clause of C.26 – “Finitur xx. vi. cause.” – after the last text of the introduction (cf. Appendix I).

Introductions or forewords to Gratian's *tractatus coniugii* (C.27–C.36) occur in the decretists' *Summae*, which sometimes take as reference the collections of sentences and the *Summae* written by theologians of the Laon and Paris schools. The *Summa Quoniam in omnibus* (SQO) comment on C.27 begins with some paragraphs on (i) the causes of marriage, (ii) the definition and (iii) the prohibitions of contracting matrimony, which have been shaped from Walter of Mortagne and the Etymologies of Isidore of Seville, and where it is also possible to distinguish other pieces repeated by the Bolognese glossators of Roman law.<sup>10</sup> The prologue *Pertractatis his* on the treaty on marriage by master Roland is organized around the marriage institution – “a quo sit institutum et ubi et quando et quare” –, the definition, the necessary elements to get married, the impediments, and the theological reflection on “quod ibi sacramentum et res sacramenti”.<sup>11</sup> Before commenting on the content of C.27 q.1, Rufin explains the definition, the institution, the reasons why a person gets married, the legitimate persons, and the goods of marriage.<sup>12</sup> Stephen de Tournai's

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<sup>9</sup> Friedberg did not record the shape of the text in C.

<sup>10</sup> Cf. J. F. von SCHULTE (ed.), *Die Summa des Paucapalea über das Decretum Gratiani*, Giessen 1890 (Aalen 1965), p. 110–111. On the SQO as a composition and the pieces to be distinguished in the comment on C.27 cf. J. M. VIEJO-XIMÉNEZ, *La «Summa Quoniam in omnibus» de Paucapalea: una contribución a la historia del Derecho romano-canónico en la Edad Media*, *Initium* 16, 2011, p. 27–74, p. 68–70 (=FCTh 2, 2013, p. 151–196); IDEM, *Una composición sobre el Decreto de Graciano: la «summa Quoniam in omnibus rebus animaduertitur» atribuida a Paucapalea*, *Helmantica* 190, 2012, p. 419–473, p. 447–48 (=M. A. Pena [ed.], *De la primera a la segunda «Escuela de Salamanca»*, Salamanca 2012, p. 197–251); IDEM, *Dos escritos de la decretística boloñesa: «Inter ceteras Theologie disciplinas» y «Quoniam in omnibus»*, *REDC* 71, 2014, p. 271–291, p. 276; and IDEM, *The «Summa Quoniam in omnibus revisited»*, *FCTh* 3, 2014, p. 153–169, p. 159–160.

<sup>11</sup> Cf. F. THANER (ed.), *Papst Alexander III. Summa Magistri Rolandi*, Innsbruck 1874 (Aalen 1973), p. 113–115; and K. A. JACOBI (ed.), *Der Ebetraktat des Magister Rolandus von Bologna. Redaktionsgeschichtliche Untersuchung und Edition (Studienausgabe)*, Hamburg 2004, p. 265–268.

<sup>12</sup> Cf. H. SINGER (ed.), *Die Summa Decretorum des Magister Rufinus*, Paderborn 1902, p. 429–435.

introduction follows an index of seven issues: definition, efficient cause, the reasons why one gets married, legitimate people, impediments, the goods of marriage, and the distinction between *res* and *sacramentum*.<sup>13</sup>

The scheme of DM matches with *Pertractatis his* (PH) – that is, the prologue of the treaty on marriage by master Roland and the *Stroma Rolandi* (SR) –, although the topic sequence has been slightly altered: first comes the definition, then the institution and, finally, the requirements for contracting a legitimate marriage. A section on the reasons of the institution is missing in DM (“quare” in PH / SR).

DM provides the Justinian’s definition of marriage (*Inst.* 1.9.1), yet replacing the word *continens* with *retinens*. In DM, there is no wording on the legitimacy of the marital union, as there is in PH / SR.<sup>14</sup> On the second issue, the institution, according to DM, marriage was introduced by God in Paradise, on the sixth day of creation, a statement that agrees with the PH / SR and that is illustrated by the same biblical authority: Gen 1, 28. Finally, in DM / PH / SR the requirements for marriage are three: “consensus, pactio coniugalis et idoneitas personarum”.

Master Roland alludes to these three requirements in his collection of theological sentences and again in PH / SR.<sup>15</sup> In relation to the first two, DM refers to the same canonical authorities as PH / SR do: Nicholas I (C.27 q.2 c.2: *ex JE* 2812) and Ambrose of Milan (C.27 q.2 c.5: *De virginibus*, 6). However, when talking about the suitability of the brides, DM does not use the word «impediment» nor explain the scope and appropriateness of this suitability, two topics present in PH / SR.<sup>16</sup> According to DM, there are eight circumstances that affect the suitability of a bride:

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<sup>13</sup> Cf. J. F. von SCHULTE (ed.), *Stephan von Doornick (Étienne de Tournai, Stephanus Tornacensis), Die Summa über das Decretum Gratiani*, Giessen 1891 (Aalen 1963), p. 231–233.

<sup>14</sup> Cf. K. A. JACOBI (ed.), *Der Ebetraktat*, p. 267.

<sup>15</sup> Collection of theological sentences: “Tria siquidem sunt necessaria ad matrimonium contrahendum consensus (...) pactio coniugalis (...) idoneitas personarum”; K. A. JACOBI (ed.), *Der Ebetraktat*, p. 213, footnote 948. PH / SR: “Tria siquidem sunt necessaria: Consensus, pactio coniugalis, idoneitas personarum”; K. A. JACOBI (ed.), *Der Ebetraktat*, p. 267.

<sup>16</sup> Cf. K. A. JACOBI (ed.), *Der Ebetraktat*, p. 268, where PH / SR explain: “Idoneitas personarum ualde est necessaria, sine qua consensus et pactio penitus probantur inania. Nisi enim persone fuerint idonee ad matrimonium inter se contrahendum, consensus et pactio earum nullius erunt momenti”.

PH / SR K. A. JACOBI (ed.), <i>Der Ebetraktat</i> , p. 268	DM Appendix I
Circa quam multa considerantur: Votum, solutio uel ligatio, dissimilitudo fidei, error, conditio, spiritualis proximitas, etas, enormitas delicti, impossibilitas coeundi, consanguinitas uel afinitas nec non et uiolentia.	In personarum autem idoneitate sunt consideranda octo. Etas. Consanguinitas, uel affinitas. Votum. Potentia coeundi. Conditio. Sacramenti dignitas. Solutio. Enormitas delicti, nec non et fidei similitudo.

DM has a distinctive category, the *dignitas sacramenti*,<sup>17</sup> and does not consider *error*, *spiritualis proximitas*, or *uiolentia*. Whilst the list of impediments in PH / SR respects the order of the topics covered in C.27–C.36,<sup>18</sup> the list in DM has an original structure, the internal logic of which is not easy to unravel. The canonical authorities that prove each of these circumstances are cited in the last part of DM. All of them belong to the DG. The author of DM does not transcribe their texts and refers to the chapters of the DG through a quotation system that uses the numbering of the distinctions of the first part. Since the first part of the CDC of Schäftlarn is not divided into distinctions, and marginal notes only mark their beginnings sporadically,<sup>19</sup> it is unlikely that DM was drawn up at this scriptorium.

<sup>17</sup> Later called *De sacramento pactionis*, and which corresponds to the impediment of sacred order (D.27 c.8 and D.28 c.9).

<sup>18</sup> Cf. C. LARRAINZAR, *Sistematizaciones antiguas sobre el régimen del matrimonio*, in: *Iustitia et Iudicium. Studi di Diritto Matrimoniale e Processuale Canonico in onore di Antoni Stankiewicz*, ed. J. Kowal – J. Llobell, I., Città del Vaticano 2010, p. 387–410, p. 392–396.

<sup>19</sup> Marked distinctions are: «D. I.», up to the current D.1 pr. (f. 6rb, marg. right); «D. II.», up to the current D.2 c.3 (f. 6va, marg. left); «D. III.», up to the current D.4 pr. (f. 6va, marg. left); «D. XI.», up to the current D.11 pr. (f. 8rb, marg. right); «D. XX.VIII.», over the current D.29 pr. (f. 16rb, top marg. right); «D. XXX.», up to the current D.30 pr. (f. 16rb, marg. right); «D. XXX. V.», within columns, up to the current D.35 pr. (f. 18rab); «D. XXX. VII.», up to the current D.37 pr. (f. 18va, marg. izdo); «D. XXX. VIII.», up to the current D.38 pr. (f. 19ra, marg. left); «D. XXX.VIII.», up to the current D.39 pr. (f. 19va, marg. left); «D. xxx. iii.» (sic), up to the current D.43 pr., over the marginal addition of the *paleae* D.42 c.6 and c.7 (f. 20rb, marg. right); «D. xl. v.», up to the current D.45 pr. (f. 21ra, marg. left); «D. xlvii.», up to the current D.47 pr. (f. 22ra, marg. left); «D. xl. viiii.», up to the current D.49 c.1 (f. 22vb, marg. right); «D. l. vii.», up to the current D.57 pr. (f. 28ra, marg. left); «D. l. viiii.», up to the current D.59 (f. 28ra within columns); «D. LX.», up to the current D.60 pr. (f. 28rb, marg. right); «D. lxii.», in the main text, between the end of D.61 c.19 and D.63 pr. (f. 29ra); «D. lxvi.», up to the current D.66 pr. (f. 31va, marg. left); «D. lxvii.», up to the current D.67

Since the mid-twelfth century, in addition to monographic collections of theological sentences, canonical treaties and introductions on marriage inspired by master Roland's teachings circulated throughout southern Germany.<sup>20</sup> The introduction *Gratianus xii. dicit esse* was composed – or copied (?) – in the Norbertine monastery of Windberg: it focusses on the impediments and follows the structure of PH / SR.<sup>21</sup> The library of the Collegiate Church of the Canons Regular of Saint Nicholas in Passau, founded by St. Altmann between 1067 and 1073, preserved one of the two recensions of *Videndum est quid sit matrimonium* (VE), a treaty composed between c. 1150-1160 and inspired by PH / SR.<sup>22</sup> This treaty follows a similar order of issues:

Clm 16084, f. 29r

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§ Videndum est quid sit matrimonium, et a quo institutum, et ubi et quando, que sint necessaria ad matrimonium contrahendum, que dirimant contractum quod sit sacramentum quod res sacramenti.

After the definition and the institution, VE repeats Roland's doctrine on the three requirements for marriage:

Clm 16084, f. 29r

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§ Ad matrimonium contrahendum necessaria sunt consensus, pactio coniugalis et idoneitas personarum (...) Circa idoneitate personarum xii. considerantur: uotum, uoto adnexum, ligatio uel solutio, dissimilitudo fidei, error conditionis, spiritualis proximitas, etas, delicti enormitas, coeundi impossibilitas, consanguinitas uel afinitas, uiolentia uel raptus.

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pr. (f. 31va, marg. left); «D. Lxviii.», in the main text, between D.67 c.2 and D.68 pr. (f. 31 va); «D. lxx.», up to the current D.70 pr. (f. 31vb, marg. right); «D. lxxi.», up to the current D.71 pr. (f. 32ra, marg. left); «D. lxx.», (sic) up to the current D.72 pr. (f. 32rb, marg. right); «D. l. xx. iii.», up to the current D.73 pr. (f. 32rb, marg. right); «D. lxxi.» (sic.), up to the current D.76 c.1 (f. 33rb, marg. right).

<sup>20</sup> Cf. R. WEIGAND, *Kanonistische Ebetraktate aus dem 12. Jabrbundert*, in: Proceedings of the Third International Congress of Medieval Canon Law. 3–6 Strasbourg 1968, ed. S. Kuttner, MIC, C, vol. 4, Città del Vaticano 1971, p. 59–79 (=R. WEIGAND, *Liebe und Ehe im Mittelalter*, Goldbach 1998, p. 37–57).

<sup>21</sup> Cf. C. LARRAINZAR, *Sistemizaciones antiguas*, p. 393–396. The introduction of Windberg is today in München, BSB, lat. 22289, f. 74rv.

<sup>22</sup> Today München, BSB, lat. 16084, f. 29r-31r: cf. K. HALM – G. von LAUBMANN – W. MEYER, *Catalogus codicum latinorum Bibliothecae Regiae Monacensis*, II/3 *Codices num. 15121–21313 complectens*, Monachii 1878 (Wiesbaden 1969), p. 50. On the treaty cf. R. WEIGAND, *Kanonistische Ebetraktate*, p. 69–71, footnote 56, with the list of manuscripts; and S. KUTTNER, *Did Rolandus of Bologna write a “Stroma ex Decretorum corpore carptum”*, JLR 11, 1994–1995, p. 267–269, p. 269.

The only testimony of *Pertractatis aliis sacramentis*<sup>23</sup> comes from the Augsburg Library, a codex that was drafted in Italy or northern France, and that among other pieces of the twelfth century has several writings related to master Roland.<sup>24</sup> The treaty *Pertractatis aliis* (PA) follows a scheme similar to SR / PH:

Clm 3525 f. 36r

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Pertractatis aliis sacramentis superest ut de sacramento matrimonii disputemus. De quo primo queritur quid sit. Secundo a quo sit institutum. Tertio quando. Quarto ubi. Quinto quare. Sexto quod sit necessaria ad matrimonium contrahendum. Septimo quid ibi sacramentum et res sacramenti. Octavo quod habeat effectum.

In the footsteps of master Roland, PA analyses the three things that are necessary for marriage:

Clm 3525 f. 36r

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Tria siquidem sint necessaria ad matrimonium contrahendum. Consensus pactio coniugalis et idoneitas personarum. Consensus iuxta illud Nicolai 'Sufficit solus secundum leges eorum consensus de quorum quarumque coniunctione agatur qui solus si defuerit cetera cum ipso coitu celebrata frustrantur'. Pactio coniugalis iuxta illud Ambrosius 'non defloratio uirginitatis set pactio coniugalis matrimonium facit'. Idoneitas personarum ad hoc enim ut sit ratum /// necessarium est ut persone fit idonee ad matrimonium inter se contrahendum. Circa quod idoneitatem x. i. impedimenta sunt consideranda. Votum. Ligatio. Fidei dissimilitudo. Error. Spiritualis /// Enormitas delicti. Impossibilitas coeundi. Consanguinitas. Affinitas. Raptus.

In short, the first part of *De matrimonio et quid ipsum sit* copied in Clm 17161 is inspired by master Roland's teachings, which circulated throughout southern Germany during the mid-twelfth century. Who the author of DM was,

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<sup>23</sup> Today in München, BSB, lat. 3525, f. 36r-40v: cf. E. RAUNER, *Katalog der lateinischen Handschriften der Bayerischen Staatsbibliothek München. Die Handschriften aus Augsburger Bibliotheken*, I. Stadtbibliothek, Clm 3501–3661, Wiesbaden 2007, p. 109. On this treaty cf. R. WEIGAND, *Kanonistische Ehetraktate*, p. 78–79.

<sup>24</sup> Clm 3525, f. 40v-49v: *Questiones e schola Rolandi et Metelli*: Cf. E. RAUNER, *Katalog der lateinischen Handschriften*, p. 110; and R. WEIGAND, *Quaestiones aus der Schule des Rolandus und des Metellus*, AKKR 138, 1969, p. 82–94. Clm 3525, 49v-51v: "Rolandus canonista (?), Excerpta ex Fragmento Cantabrigiensi ut dicitur"; Cf. E. RAUNER, *Katalog der lateinischen Handschriften*, p. 110–111.

where it was composed, and how it came to Adalbert remain open questions.<sup>25</sup> The most original facet of DM is the provision of a classification of the impediments to marriage that does not follow the order of Gratian's *tractatus coniugii* (C.27–C.36).

## II. *Quidam nobilis laicus periturus*

Between quires «viii» (f. 57r–64v) and «viii» (f. 67r–74v) of Clm 17161, a supplementary sheet of four unnumbered pages has been introduced, which today form f. 65r–66v. The outer faces (f. 65r and 66v) are empty. Several pieces – some of them related to the CDC – have been copied on to the two inner faces (f. 65v and 66r). The sheet has been placed between C.3 and C.4, according to this sequence:<sup>26</sup>

- f. 64vb: ends with «(...) dilationis exordium» = the ending of C.3 q.11 c.4. Unlike what happens in most of the sections of the *secunda pars* of CDC, the ending of C.3 and the beginning of C.4 are not indicated in red ink;
- f. 65r: empty;
- f. 65va: a case, *Quidam nobilis laicus periturus*, that ends in f. 66ra lin. 17. The case is written by the same hand that copied the manuscript, and the style of the initial «Q» is similar (same colours, same figures) to the historiated initials of the causes;
- f. 66ra: distinctions in diagram form (lin. 18–39);
- f. 66rb: the summaries of some DG chapters, sometimes accompanied by inscriptions or the related *incipit* (lin. 1–23), and the *palea* D.73 + D.72 pr. (lin. 24–45).
- f. 66v: empty;
- f. 67ra: beginning of C.4.

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<sup>25</sup> In the side margins of Clm 17161, a gloss on C.18 q.2 d.p.c.1 echoes the distinction between monasteries *privilegiata* / *non privilegiata* that occur in Roland's comment on C.16 q.2: "Secundo quaeritur, an per episcopum Abbas sit eligendus et ordinandus, an tantummodo a propriis fratribus sit instituendus. Ad quo notandum, quod monasteriorum alia sunt privilegiata et a iurisdictione omnium episcoporum exempta, alia vero non (...)"; F. THANER (ed.), *Papst Alexander III. Summa Magistri Rolandi*, p. 63. Cf. J. M. VIEJO-XIMÉNEZ, *Anotaciones marginales*, p. 271, footnote 92.

<sup>26</sup> The description made by J. SYDOW, *Die Dekret-Handschriften der Bayerischen Staatsbibliothek im München*, SG 7, 1959, p. 175–232, p. 208, should be replaced by the here proposed new one.



The case *Quidam nobilis laicus periurus* (QN), here edited for the first time, has been considered a «case» or even, seeking greater technical precision, a *quaestio*.<sup>27</sup>

Historians of the Literature on the DG reserved the word *quaestio* for the (collections of) «*Quaestiones der Dekretisten*».<sup>28</sup> In the medieval teaching of Canon law, it is said, the *quaestiones* are legal issues not directly taken into account by the law, and decided after weighing diverse counter solutions. The usual form of a *quaestio*, although not the only possible one, was: forming the factual situation and proposing one or more questions, which were answered by reasoning developed through the scheme arguments in favour, arguments against, and a solution, and, in the case of more complex problems, by distinctions.<sup>29</sup> In short, *quaestiones decretales* were an academic exercise, originally oral, a minor genre of *quaestiones disputatae*, which were also put in writing and are well known thanks to a considerable number of collections.<sup>30</sup>

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<sup>27</sup> “Case”: cf. F. KUNSTMANN, *Zur Geschichte des Gratianischen Dekrets*, AKKR 10, 1863, p. 337–345, p. 339–340: he copied the case (*Fall*) and then warned: „Hierauf folgt nur die Vertheidigung des angeklagten Priesters, nicht die Entscheidung des Falles.“; p. 340. *Quaestio*: cf. S. KUTTNER, *Some unrecorded Quaestiones*, p. 507–508; J. SYDOW, *Die Dekret-Handschriften*, p. 208; and R. WEIGAND, *Die Glossen*, p. 853.

<sup>28</sup> Cf. S. KUTTNER, *Repertorium der Kanonistik (1140–1234)*, Città del Vaticano 1937, p. 243–256. Cf. K. PENNINGTON – W. MÜLLER, *The Decretists: The Italian School*, in: *The History of Medieval Canon Law in the Classical Period, 1140–1234*, ed. W. Hartmann – K. Pennington, Washington 2008, p. 121–173, p. 164–170.

<sup>29</sup> Cf. S. KUTTNER, *Repertorium*, p. 243, who differentiates the *quaestiones* in the strict sense from the *Lehrfragen*, whose substrate is the content of a normative source.

<sup>30</sup> Cf. the works of G. FRANSEN, *Les «Questions» des canonistes: Essai de dépouillement et de classement*, I., *Traditio* 12, 1956, p. 566–569; IDEM, *Les «Questiones» des canonistes*, II., *Traditio* 13, 1957, p. 481–501; IDEM, *Les «Questiones» des canonistes*, III., *Traditio* 19, 1963, p. 516–531; IDEM, *Les «Questiones» des canonistes*, IV., *Traditio* 20, 1964, p. 495–502; IDEM, *Deux collections de «questiones»*, *Traditio* 21, 1965, p. 492–510; IDEM, *Le structure des «Questiones Disputatae» et leur classement*, *Traditio* 23, 1967, p. 516–534. Cf. also R. WEIGAND, *Quaestiones aus der Schule des Rolandus und Metellus*, *Traditio* 25, 1970, p. 517; and G. FRANSEN, *Les questions disputées dans les facultés de Droit*, in: *Les questions disputées et les questions quodlibétiques dans les facultés de Théologie, de Droit et de Médecine*, ed. B. Bazàn et al., TSMÃO 44–45, Turnhout 1985, p. 223–277; IDEM, *Questions Barcinonenses breues*, BMCL 15, 1985, p. 31–49; IDEM, *Questions Aschaffenburgeneses*, BMCL 16, 1986, p. 71–86; IDEM, *Questionum fragmentum Sedunense*, BMCL 17, 1987, p. 65–75; IDEM, *Questiones Vindobonenses*, in: *Studia in honorem eminentissimi cardinalis Alphosi M. Stickler*, ed. R. I. Castillo de Lara, STHIC 7, Roma 1992, p. 115–136.

QN is a singular *quaestio*. The comparison between QN and the *Quaestiones Stuttgardenses*, one of the oldest collections,<sup>31</sup> shows notable differences. First, the 36 questions of the manuscript of Stuttgart (QS) sketch out the discussed case and then always raise three *quaestiones* that, except in QS XXVII to XXXII, are introduced with these or other similar clauses: “In hoc autem themate tres quaestiones formantur (...)” (*Quaestio XI*), “Thema tale est in quo tres formantur quaestiones (...)” (*Quaestio XV*), “In serie ista verborum tres quaestiones videntur posse formari” (*Quaestio XXIV*), or “Hic tria quaerentium” (*Quaestio XXVI*). The structure and the terminology of these *quaestiones* are similar to the structure and the terminology of the *continuationes*, i. e., the opening comments to Gratian’s causes in the *Summa Quoniam in omnibus* attributed to *Paucapalea*.<sup>32</sup> Meanwhile, QN sets out the case and, without interruption, proposes four questions.

There are further differences. While QN copies the full text of the biblical and canonical authorities, QS only quotes them by means of a short referencing system. Moreover, the first three *quaestiones* of QN have a clear correspondence in the DG, i. e.: they posed legal problems foreseen by the law (if the DG can be considered a legal collection). The first question of QN is inspired by C.2 q.7:

C.2 pr.	Septimo si laici monachi uel quelibet inferiorum ordinum in accusatione maiorum sunt audiendum?
C.2 q.7 pr.	Quod uero laici in accusatione episcoporum non sunt audiendi (...)
QN q.1	Hic primo queritur an laici sint in accusationem sacerdotum admittendi

The second question of QN is modelled on C.6 q.1:

C.6 pr.	Primo queritur an crimini irretiti uel infamia notati ad huiusmodi accusationem sint admittendi
C.6 q.1 pr.	Quod autem crimini irretiti alios accusare non possunt (...)
QN q.2	Secundo utrum periurii et facinorosi uel symoniaci aduersus aliquem sint audiendi

<sup>31</sup> Composed c. 1153 and edited by F. THANER (ed.), *Die Summa Magistri Rolandi*, p. 237–303.

<sup>32</sup> On the *continuationes* of the SQO cf. J. M. VIEJO-XIMÉNEZ, *Una composición*, p. 434–435. On the *thema* cf. J. M. VIEJO-XIMÉNEZ, *Cicerón y Graciano*, FThC 1, 2013, p. 191–214 (=BMCL 31, 2014, p. 23–55) footnotes 15, 51 and 55.

The third question of QN is related to C.3 q.5:

C.3 pr.	Quinto an testes de domo accusatorum sint producendi uel inimicorum uxor sit audienda?
C.3 q.5	Quod uero testes de domo accusatorum producendi non sint et quod inimicorum uox audienda non sit (...)
QN q.3	Tercio an familiares accusatoris testificari possint uel de eadem domo in testimonium produci

The fourth question of QN has no correspondence in the DG, but is resolved by some authorities of C.3 q.9 and C.4 qq.2-3.

More than a *questio*, QN seems a cause of the *secunda pars* of the DG:<sup>33</sup>

#### QN

A lay nobleman, perjurer and offender, also tainted by a simoniac promise, intends to charge a religious priest with simony. He acts as accuser and proposes as witnesses against the cleric several accomplices of his misdeeds.

The priest complains of enmity, as well as of the illegitimacy of the accuser and the witnesses.

On this subject it is asked, first, whether or not accusations made against priests by laymen should be admitted.

Secondly, whether or not to admit the accusations that a perjurer, an offender or a simoniac can make against anyone.

Third, if the close friends of the accuser can testify, or whether or not the statement of a person of one's own home can be presented as evidence.

Fourthly, what should each one testify.

The four *quaestiones* of QN are the items of the plea of the cleric accused of simony: "Sacerdos per se responsurus, in generali sinodo talia prosequitur. Iudicium et misericordiam a iudice serenissimo suppliciter imploro (...)". For this reason, the responses do not follow the pattern «pro et contra» typical of the *quaestiones*: they merely provide arguments supporting the defendant.<sup>34</sup> Nor is there a *solutio* of the matter: in QN, no *quaestio* ends with an abstract statement, but a claim relating to the case:

<sup>33</sup> Cf. J. M. VIEJO-XIMÉNEZ, *Cicerón*, o. c., sections II and III. Gratian's causes were not inspired by the *quaestiones* of the Roman law glossators.

<sup>34</sup> Cf. F. KUNSTMANN, *Zur Geschichte des Gratianischen Dekrets*, p. 340.

QN q.1:	Porro si aliquo pacto laico fideli daretur licentia sacerdotem accusandi, que tamen non datur, (...)
QN q.2:	Hec igitur duo inconuenientia (...) aduersarium meum ab accusatione repellunt.
QN q.3:	Promisit quidem se aduersarium probaturum me simoniam admisisse. Quod cum probare non potuerit, audiamus decreta, quid super hoc decernant (...)
QN q.4:	Cum ergo hi falsi testes minime probare possint se audisse uidisse uel interfuisse his que imponunt iuxta ueritatis tenorem abiciendi sunt.

The author of QN does not seek the (doctrinal) interpretation, *enodatio*, of a DG section.<sup>35</sup> Nor is his intention comparable to the purpose of the «teaching questions» (*Lehrfragen*) of Sicard of Cremona's *Summa*.<sup>36</sup> The causes of the second part of the CDC are his sole source of inspiration. One of them, C.13, was based on a forensic writing, whose protagonist(s) defend(s) their interest(s) in a tithes claim process. So it is evidenced by this brief selection:

C.13
Quod priori ecclesie hec omnia iure persoluenda sint, actores his argumentis probare contendunt [ex C.13 q.1 pr.]
Quia ergo predia hec intra terminos nostre diocesis continentur, et prouentus decimationum nobis legitime assignatus nostre persolendus est ecclesie [ex C.13 q.1 d.p.c.1]
Quia ergo nos seruimus Domino in tabernaculo, offerendo pro istis preces et sacrificio, et ipsi deberent nobis persolvere decimas et primicias [ex C.13 q.1 d.p.c.1]
Quia ergo nos intra muros urbis istorum sedemus, et eis habitatione iuncti sumus, rite ab eis decimas accipimus. [ex C.13 q.1 d.p.c.1]
Nos plantauimus uineam, et uos uultis edere fructus eius? (...) Hec messi nostra est, et uso ultis in eam falcem mittere? (...) Nos sumus boues triturantes: queritis uos alligare os nostrum et de nostra tritura uictum uobis queritis? [ex C.13 q.1 d.p.c.1]

<sup>35</sup> Cf. K. PENNINGTON – W. MÜLLER, *The Decretists*, p. 165.

<sup>36</sup> Cf. S. KUTTNER, *Repertorium*, p. 152–153 and 244.

C.13 could have been designed in light of a real case. What it was and who the author of the cause was both remain unanswered questions. The only thing that seems clear is that the ancient manuscripts of the CDC do not transmit its first draft.<sup>37</sup> Is the cause QN of Schäftlarn inspired by a real case? Although the defendant represents himself before a «general synod», the news of the councils held in the *Salisburgense* ecclesiastical province during the XII century does not provide sufficient information to furnish evidences.<sup>38</sup> Unlike those involved in the case that gave rise to C.13, the actor of QN alleges Gratian's authorities, i.e., the CDC inspired the editor of QN, and not vice-versa. In the absence of an alternative explanation, the fact that QN comes from the hand of Adalbert – just like the other materials of the supplemental booklet – grants momentarily this singular copyist the privilege of the authorship of this cause.

**Appendix I**  
**The Introduction to C.27–C.36**  
***De matrimonio et quid ipsum sit***  
**Clm 17161, fol. 132vb**

**[fol. 132vb]** <C.26 q.7 c.18> *Item Iero(nimus)*. SINE INCANTATIONE HERBAS VEL PETRAS LICET HABERE. Demonium sustinenti licet petras uel herbas habere sine incantatione.

DE MATRIMONIO ET QUID IPSVM SIT

De matrimonio tractaturi quid ipsum sit uideamus, et per quem institutum, et ubi, et quando. Coniugium siue matrimonium est uiri mulierisque coniunctio, indiuiduam consuetudinem retinens. Per Dominum in paradiso sexta die est institutum dicentem: 'Crescite et multiplicamini' et c(etera)<sup>1</sup>. Sed quando matrimonium non legitime contractum quandoque dissoluitur, que in legitimo coniugio contrahendo sint necessaria uideamus.

In omni matrimonio tria admodum sunt necessaria: consensus, pactio coniugalís, et idoneitas personarum. Consensus, iuxta illud Nicolai: 'Sufficiat solus consensus' et c(etera)<sup>2</sup>. Error enim per consensum excluditur. Pactio, iuxta illud Ambrosii 'Non defloratio' et c(etera)<sup>3</sup>.

In personarum autem idoneitate sunt consideranda octo. Etas. Consanguinitas, uel affinitas. Votum. Potentia coeundi. Conditio. Sacramenti dignitas. Solutio. Enormitas delicti, nec non et fidei similitudo. Quorum omnium nisi sollicite habeatur discretio, facile delinquitur in matrimonio contrahendo.

<sup>37</sup> Cf. J. M. VIEJO-XIMÉNEZ, «*Costuras*» y «*descosidos*» en la versión divulgada del Decreto de Graciano, IE 21, 2009, p. 133–154.

<sup>38</sup> Cf. F. DALHAM, *Concilia Salisburgensia Provincialis et Diocesana*, Augustae apud Vindelicos 1788, p. 66–93.

Quod autem predictorum discretio sit necessaria diuersis probatur auctoritatibus. De etate: Ca(usa) xx. cap(itulo) i.<sup>4</sup> Item: xxx. q(uestione) ii. Nich(olai) ‘Vbi non est consensus’ et c(etera)<sup>5</sup>. De consanguinitate uel affinitate: Ca(usa) xxxv. q(uestione) iii. ‘Progeniem suam’ et c(etera)<sup>6</sup>, ‘In copulatione’ et c(etera)<sup>7</sup>, ‘Nulli ex propinquitate’ et c(etera)<sup>8</sup>. De uoto: Ca(usa) xxvii. q(uestione) i. ‘Nubendi licentiam’ et c(etera)<sup>9</sup>. Item: ‘Quotquot uirginitatem’ et c(etera)<sup>10</sup>. Item: Parte i. di(stinctione) xxvii. ‘Vouentibus’ et c(etera)<sup>11</sup>. De impossibilitate coeundi: Ca(usa) xxvii. q(uestione) ii. ‘Quod autem interrogasti’ et c(etera)<sup>12</sup>, ‘Si quis accepit’ et c(etera)<sup>13</sup>, ‘Si per sortiaras’ et c(etera)<sup>14</sup>. De conditione: Ca(usa) xxviii. q(uestione) ii. ‘Si quis ingenuus’ et c(etera)<sup>15</sup>. De sacramento pactionis: I<sup>(d)</sup> di(stinctione) xxvii. ‘Presbiteris’ et c(etera)<sup>16</sup>. Item: di(stinctione) xxviii. ‘Presbiter si uxorem’ et c(etera)<sup>17</sup>. Item: di(stinctione) xxxi. ‘Episcopos, presbiteros’ et c(etera)<sup>18</sup>. Item: di(stinctione) xxxii. ‘Eos qui post diaconatum’ et c(etera)<sup>19</sup>. De solutione uidelicet ut nullus eorum qui copulantur matrimonii uinculo teneatur astrictus: Ca(usa) xxxii. q(uestione) vii. cap(itulo) i.<sup>20</sup> iii.<sup>21</sup> iiii.<sup>22</sup> v.<sup>23</sup> vi.<sup>24</sup> vii.<sup>25</sup> et viiii.<sup>26</sup> De fidei similitudine: Ca(usa) xxviii. q(uestione) i. ‘Iudei’ et c(etera)<sup>27</sup>, ‘Si quis iudaice’ et c(etera)<sup>28</sup>. Enormitas delicti: iuxta illud Magonciensis concilii ‘Si quis uiduam’ et c(etera), Ca(usa) xxxii. q(uestione) vii.<sup>29</sup> Item: ‘Qui dormierit’<sup>30</sup>, et illud Gregorii: ‘Hi uero’<sup>31</sup>. Idem: decreto Zacharie ‘Concubuisti’ et c(etera)<sup>32</sup>.

FINITVR XXVI. CAUSA.

<sup>1</sup>) Gn 1, 28. – <sup>2</sup>) C.27 q.2 c.2. – <sup>3</sup>) C.27 q.2 c.5. – <sup>4</sup>) C.20 q.1 c.1. – <sup>5</sup>) C.30 q.2 c.un. – <sup>6</sup>) C.35 qq.2-3 c.16. – <sup>7</sup>) C.35 qq.2-3 c.18. – <sup>8</sup>) C.35 qq.2-3 c.19. – <sup>9</sup>) C.27 q.1 c.20. – <sup>10</sup>) C.27 q.1 c.24. – <sup>11</sup>) D.27 c.4. – <sup>12</sup>) C.27 q.2 c.29. – <sup>13</sup>) C.33 q.1 c.3. – <sup>14</sup>) C.33 q.1 c.4. – <sup>15</sup>) C.29 q.2 c.4. – <sup>16</sup>) D.27 c.8. – <sup>17</sup>) D.28 c.9. – <sup>18</sup>) D.31 c.3. – <sup>19</sup>) D.32 c.10. – <sup>20</sup>) C.32 q.7 c.1. – <sup>21</sup>) C.32 q.7 c.3. – <sup>22</sup>) C.32 q.7 c.4. – <sup>23</sup>) C.32 q.7 c.5. – <sup>24</sup>) C.32 q.7 c.6. – <sup>25</sup>) C.32 q.7 c.7. – <sup>26</sup>) C.32 q.7 c.9. – <sup>27</sup>) C.28 q.1 c.10. – <sup>28</sup>) C.28 q.1 c.17. – <sup>29</sup>) C.32 q.7 c.20. – <sup>30</sup>) C.32 q.7 c.21. – <sup>31</sup>) C.32 q.7 c.22. – <sup>32</sup>) C.32 q.7 c.23.

## Appendix II

### The Cause *Quidam nobilis laicus*

#### CIm 17161, fol. 65va – 66ra

**[fol. 65va]** *Quidam nobilis laicus periurus et facinorosus symonie quoque tabe pollittus, quendam religiosum sacerdotem de symonia accusare nititur. Se accusatorem, et quosdam sue iniquitatis complices, testes aduersus eum producit. Sacerdos de inimicitia conqueritur accusatoris, et testium inconuenientia.*

*Hic primo queritur, an laici sint in accusationem sacerdotum admittendi. Secundo, utrum periurii, et facinorosi, uel symoniaci aduersus aliquem sint audiendi. Tertio, an familiares accusatoris testificari possint, uel de eadem domo in testimonium produci. Quarto, quid quisque testari debeat.*

*Sacerdos per se responsurus, in generali sinodo talia prosequitur. Iudicium et misericordiam a iudice serenissimo suppliciter imploro, quia ‘insurrexerunt in me testes iniqui et mentita est iniquitas sibi’.<sup>1</sup> Intelligat et uideat omnis hec ecclesia et fidelium conuentus, hoc aduersarium meum alterum esse Doeck idomeum, qui querit sanguinem innoxium, qui irruit in sacerdotes Domini, cui non est pars in Domino, sed hereditas eius obprobrium et maledictio.<sup>2</sup>*

<q.1> *Quod autem laici non solum contra sacerdotem sed etiam in nullius ecclesiastice persone iniuriam sint audiendi, ueteris et noui testamenti auctoritatibus asseuerare possumus. Ait enim David propheta: 'Nolite tangere christos meos et in prophetis meis nolite malignari'.<sup>3</sup> Quia uero christorum nomine reges et sacerdotes, idest uncti et sanctificati Domini sint intelligendi, passim inuenitur in scripturis.*

*Porro si totam ueteris testamenti seriem euoluamus, nusquam sacerdotes accusandi alicui legimus adtributam libertatem, sed sanctificatos Domino honorificatos in populo certissime comperimus.*

*Primus sacerdos Melchisedech decimas accepit ab Abraham, non contumeliam uel iniuriam.<sup>4</sup> Aaron frater Moysi, sumus sacerdos a nullo legitur accusatus, quamuis uitulum conflauerit.<sup>5</sup> Filius eius Eleazar nec non et Finees nusquam accusati nusquam contumeliis uel iniuriis lacessiti reperiuntur.<sup>6</sup> Si dixerint de Dathan et Chore quia insurrexerunt aduersus Aaron, nouerint eos terre biatu consumptos.<sup>7</sup> Si proponunt pastorem mularum Saul occidisse sacerdotes Domini, audiant in eum iniectionem psalmiste in psalmo quinquagesimo primo: 'Quid gloriaris in malicia qui potens es iniquitate?'<sup>8</sup> Nec unum quis poterit producere in medium, non dico solum laicum sed nec quemuis alium qui manus miserit in sacerdotes Domini et ministros sanctuarii Dei qui non penam debite ultionis exceperit.*

*Transimus ad nouum testamentum, de umbra ad ueritatem, de lege ad gratiam, de littera ad spiritum, ostendentes ex decretis sanctorum pontificum nullum laicum aduersus sacerdotem audiendum.*

*Vnde Siluester papa: 'Laico non liceat quemlibet accusare clericum'.<sup>9</sup> Item, Marcellus papa: 'Nullus laicus clerico audeat crimen inferre'.<sup>10</sup> Item, in Nicena synodo: 'Laicos non accusare debere episcopos uel clericos hactenus obseruatum et constitutum est, quia non sunt eiusdem conuersationis, et oppido eis quidam infesti sunt'.<sup>11</sup> Item, Fabianus episcopus urbis Rome: 'Sicut sacerdotes et reliqui clerici a laicorum excluduntur accusatione, ita et laici ab eorum sunt excludendi et alienandi criminatione'.<sup>12</sup> Item, Clemens: 'Sacerdotes et reliqui ecclesie ministri omnisque plebs episcopos suos diligere debent, si ipsi aliter quam debent quod absit agant'.<sup>13</sup> Idem: 'Si Cham quia non operuit pudenda patris maledictus est, multo ampliori condemnatione digni sunt, qui sacerdotibus legatione Dei fungentibus contumeliam inferunt'.<sup>14</sup>*

*His igitur patet auctoritatibus quod laicus aduersus sacerdotem non est audiendus. Porro si aliquo pacto laico fideli daretur licentia sacerdotem accusandi, que tamen non datur, qua ratione periuro et faci [fol. 65vb] noroso huiusmodi libertas adtribuat.*

<q.2> *Nam quod facinorosi minime debeant impetere sacerdotem, multis auctoritatibus edocere possumus.*

*Vnde Anacletus papa: 'Sacerdos nullatenus a criminosis accusari aut calumniari permittitur'.<sup>15</sup> Item, Adrianus papa: 'Indignum est ut illi accusent sacerdotes, qui esse non possunt quod ipsi sunt'.<sup>16</sup> Item, ex epistola quam scribit Clemens papa Iacobo Hierosolimorum episcopo, inter alia et hoc inuenitur: 'Laicos a sacerdotum accusatione et uexatione et omnes infames esse repellendos'.<sup>17</sup> Item, Adrianus papa: 'Qui crimen intendit sacerdoti agnoscendum est, si ipse antea criminosis non fuerit'. Et infra: 'Testes autem sint absque omni infamia'.<sup>18</sup> Item, Telesphorus, papa: 'Sacerdotes qui proprio ore corpus domini conficiunt ab omnibus sunt obaudiendi et timendi, non lacerandi, uel detrahendi'.<sup>19</sup>*

*Hi uero sunt qui infames dicuntur, qui et ab accusatione sacerdotum repelluntur, de quibus Stephanus papa scribit Hilario episcopo dicens: 'Infames eas personas esse dicimus, que pro aliqua culpa notantur infamia: fures, sacrilegos, et omnibus capitalibus*

criminibus irretitos, incestuosos, homicidas, periuros, raptos, adulteros, quos omnes lex ecclesiastica repellit ab accusatione sacerdotum'.<sup>20</sup> *Item, dicit dominus per Ysaïam: 'Facinorosus qui sacrificat mihi uitulum, quasi qui canem occidit'.<sup>21</sup> Cum ergo oblatio eorum respuat a Domino, patet quod nec in ecclesia aduersus quempiam eorum recipienda est accusatio.*

*Hec igitur duo inconuenientia, scilicet: quod laicus est, et quia periurus et facinorosus est, aduersarium meum ab accusatione repellunt. Et quia symonie munuscula semper secutus est et quesiuit retributionem.*

<q.3> *Accedit et tertium inconueniens: quod pro denegatis a me sibi symonie muneribus odio me persequitur, et cum accusator non sit idoneus, de domo sua quoque contra canonum scita testes producit, non idoneos, sed suos complices, sue malicie consentaneos.*

*Quod ne fieri debeat, testatur Euaristus papa, dicens: 'Si qui sunt uituperatores aut accusatores episcoporum uel aliorum sacerdotum, non oportet eos a iudicibus ecclesie audiri, ante quam eorum discutiatur estimationis suspicio, qua intentione, qua fide, qua temeritate, si pro Deo, aut pro uanagloria, aut pro inimicitia, uel odio ista presumpserint'.<sup>22</sup> Item, Calixtus papa: 'Querendum est in iudicio, cuius fit conuersationis et fidei, is qui accusat, et is qui accusatur'.<sup>23</sup> Item, Sixtus papa: 'Accusatio aduersus sacerdotes non est facile recipienda, dicente Domino: non accipias uocem mendacii, et apostolus inquit aduersus presbiterum inscriptionem non esse recipienda, absque duobus uel tribus idoneis testibus'.<sup>24</sup> Item, Anacletus papa: 'Accusatores et testes esse non possunt, qui ante hesternum diem aut nudius tercius inimici fuerunt, ne irati nocere cupiant, ne lesi se ulcisci uelint'.<sup>25</sup> Item, Simmachus papa: 'Accusatoribus inimicis uel de inimici domo prodeuntibus uel qui cum inimicis morantur, aut suspectis non credatur'.<sup>26</sup>*

*Cum ergo constet aduersarium meum iam in me multociens uerborum iecisse contumeliam, profecto nec audiendus est, nec testes ab eo producti recipiendi sunt. Legibus enim et sacrorum decretis pontificum cautum est nullum accusatorem et testem esse posse quod iste et per se et per alios nititur. Item: Quod 'de eadem domo testes producendi non sint, nec etiam ab ipso iudice causa suspensionis euitande',<sup>27</sup> luce clarius constat. Item, Fabianus, papa, distinguit 'in omni iudicio quattuor personas esse necessarias: iudices electos, accusatores idoneos, defensores congruos, atque testes legitimos'.<sup>28</sup>*

*Quibus cum accusatorem egere constet, scilicet: quod nec idoneus est, nec testes sunt legitimi, tertium istud inconueniens aduersario merito debet refragari. Promisit quidem se aduersarium probaturum me simoniam admisisse. Quod cum probare non potuerit, audiamus decreta, quid super hoc decernant.*

*At enim Adrianus papa: 'Omnis qui aliis falsa intulerit puniatur, et pro falsitate ferat infamiam'.<sup>29</sup> Item, Gregorius: 'Qui calumniam illatam non probat, penam debet incurrere, quam si probasse, reus utique sustineret'.<sup>30</sup> Item, ex decreto Adriani papa: 'Delatori aut lingua capuletur, aut conuicto caput amputetur'.<sup>31</sup> Item, ex concilio Agathensi: 'Si quis per calumniam clericum fatigauerit, et personam innocentis falso crimine macullauerit, excommunicetur'.<sup>32</sup> Hec igitur omnia redundabunt in caput mentientis, [fol. 66ra] hoc dabitur ei et apponetur ad linguam dolosam.*

<q.4> *Miror autem quarto loco testium impudentiam, qui testimonium de hoc fert: quod non nouerunt.*

*Nam si canones et decreta pontificum et leges principum considerentur, 'in testibus considerandum est qui simpliciter dicant, utrum unum eundemque sermonem afferant, an ad ea que interrogantur ex tempore ueri similia respondeant'.<sup>33</sup> 'Serui enim neque*



pro domino, neque aduersus dominum, sed pro facto suo interrogari possunt'.<sup>34</sup> *Item, quod nullus testari possit nisi ea que uiderit et audierit, et quibus presens interfuerit, Calixtus papa testatur dicens: 'Testes per quamcumque scripturam testimonium non proferant, sed de his que uiderent et nouerint ueraciter testimonium proferant, nec dicant de aliis causis uel negociis testimonium, nisi de his que sub eorum presentia acta esse noscuntur'.<sup>35</sup>*

*Cum ergo hi falsi testes minime probare possint se audisse uidisse uel interfuisse bis que imponunt iuxta ueritatis tenorem abiciendi sunt. Conuictis igitur falsis testibus porrigat angelis Domini gladium iudici sententiam uerbi Dei qui secet eos per medium, et eripiat sanguinem innoxium.*

**[pr]** <sup>1</sup> Ps 27 (26), 12. — <sup>2</sup> 1 Sam 22, 18.      **[q.1]** <sup>3</sup> Ps 104 (105), 15. — <sup>4</sup> Gen 14, 18-20. — <sup>5</sup> Ex 32. — <sup>6</sup> cf. Num. — <sup>7</sup> Num 16. — <sup>8</sup> Ps 52 (51), 3. — <sup>9</sup> C.2 q.7 c.3b [ex *Marcellus* JK †159], *sed inscriptio* ex c.2. — <sup>10</sup> C.2 q.7 c.2 [ex *Silvester* JK post †175], *sed inscriptio* ex c.3. — <sup>11</sup> C.2 q.7 c.5a [ex *Eusebius* JK †163], *sed inscriptio* = *incipit* c.4. — <sup>12</sup> C.2 q.7 c.6a [ex *Fabianus* JK †93]. — <sup>13</sup> C.2 q.7 c.8a [ex *Clemens I* JK †10]. — <sup>14</sup> C.2 q.7 c.9b [ex *Clemens I* JK †11].      **[q.2]** <sup>15</sup> ex C.6 q.1 c.1a [ex *Anacletus* JK †3]. — <sup>16</sup> C.6 q.1 c.2b [ex *Capitula Angilramni* 18]. — <sup>17</sup> ex C.6 q.1 c.5 [ex *Clemens I* JK †10]. — <sup>18</sup> C.6 q.1 c.6a [ex *Capitula Angilramni* (2) 11a + 13b]. — <sup>19</sup> C.6 q.1 c.8a [ex *Telesphorus* JK †34]. — <sup>20</sup> ex C.6 q.1 c.17 [ex *Stephanus I* JK †130]. — <sup>21</sup> Is 66, 3.      **[q.3]** <sup>22</sup> C.2 q.7 c.17 [ex *Euaristus* JK †20]. — <sup>23</sup> C.2 q.7 c.18a [ex *Calixtus* JK †86]. — <sup>24</sup> C.2 q.7 c.19 [ex *Sixtus II* JK †134]. — <sup>25</sup> C.3 q.5 c.2 [ex *Anacletus* JK †4]. — <sup>26</sup> C.3 q.5 c.3a [ex *Symmachus* JK post 472]. — <sup>27</sup> de eadem — euitande ex C.4 q.4 d.p.c.2. — <sup>28</sup> C.4 q.4 c.1 [ex *Fabianus* JK †93]. — <sup>29</sup> C.5 q.6 c.1 [ex *Capitula Angilramni* (2) 37]. — <sup>30</sup> C.5 q.6 c.2 [ex *Iobannes Diaconus*, *Vita Greg. M.*, 4.32]. — <sup>31</sup> C.5 q.6 c.5a [ex *Capitula Angilramni* (2) 44b]. — <sup>32</sup> C.5 q.6 c.8-c.7 [ex *Agathensis* (506), 32 + *Isidorus Hispalensis*, *Regula monachorum* 17], *sed inscriptio* ex c.8.      **[q.4]** <sup>33</sup> in testibus — respondeant: C.4 qq.2-3 c.3 §27 [ex *Dig.* 22.5.3.1]. — <sup>34</sup> Serui — possunt: C.4 qq.2-3 c.3 §36 [ex *Cod. Just.* 4.20.8]. — <sup>35</sup> C.3 q.9 c.15 [ex *Calixtus I* JK †86].