

Creating and Sharing Legal Knowledge in the Twelfth Century

Sankt Gallen, Stiftsbibliothek, 673 and Its Context

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The *Exserpta* in the Origins of the Science of Canon Law

José Miguel Viejo-Ximénez

1 Introduction

Who used the *Exserpta ex decretis Sanctorum Patrum* preserved in the codex Sankt Gallen, Stiftsbibliothek, 673? When? Where? The spaces between the lines and the margins of the manuscript register the characteristic activities of a teaching centre: there are both interlinear and marginal glosses, as well as additional texts.¹ Some of the glosses and added texts are close to the crafting of the copy, since they come from the hand(s) of the main scribe(s).² Others are subsequent, and in some cases even much later. There are also corrections that reveal diverse timid attempts to align redirect the 33 causes of the *Exserpta* with the systematic structure of the *Decretum vulgatum* and, in some

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- 1 Carlos Larrainzar, “El borrador de la Concordia de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg),” *Ius Ecclesiae* 11 (1999), 593–666 counted 56 additions going with the *Exserpta* (plus 4 in the second part of the manuscript), and 200 glosses (14 in the second part) (662–663); Kenneth Pennington, “The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The *Authenticae*,” *Rivista Internazionale di Diritto Comune* 22 (2011), 35–53, studied the marginal *authenticae* as well as José M. Viejo-Ximénez, “Las Novellae de la tradición canónica occidental y del Decreto de Graciano,” in *Novellae Constitutiones. L’Ultima legislazione di Giustiniano tra Oriente e Occidente da Triboniano a Savigny*, ed. Lucca Loschiavo, Giovanna Mancini, Cristina Vano (Naples, 2011), 207–279.
 - 2 Philipp Lenz, Stefania Orтели, *Die Handschriften der Stiftsbibliothek St. Gallen Band 3 Abt. V: Codices 670–749 Iuridica. Kanonisches, römisches und germanisches Recht* (Wiesbaden, 2014), 17–20: after having distinguished four main hands (from 1. *Hauptband* to 4. *Hauptband*, 17) and six marginal hands (from 1. *Marginalienhand* to 6. *Marginalienhand*, 18), they concluded: “1. *Marginalienhand*, wohl identisch mit der 2. *Hauptband*” (18). Marina Bernasconi Reusser, “Considerazioni sulla datazione e attribuzione del Decretum Gratiani Cod. Sang. 673: un manoscritto di origine italiana in terra nordalpina,” in *Schaukasten Stiftsbibliothek St. Gallen. Abschiedsgabe für Stiftsbibliothekar Ernst Tremp*, ed. Franziska Schnoor, Karl Schmuki, Silvio Frigg (Sankt Gallen, 2013), 142–147: the red and black *Nota* signals and some *marginalia* “sembrino contemporanei al lavoro di copia e forse di mano del primo copista” (145).

cases, with the text of their *dicta* and *auctoritates*. Here, my focus will be on the glosses.³

During the manuscript's making and just after the copying was concluded it was used in an academic milieu. As far as I know, I think it is possible to distinguish at least six people whose work on the codex begins between the end of the 40s and the end of the 60s of the twelfth century.⁴ The first person who worked on the *Exserpta* was not far from master Gratian, and his notes reflect a level of knowledge that places him close to the origins of the science of canon law.⁵ I do not find any evidence that leads me to place his comments outside of the Bolognese context. I also do not think that the comments of those who came after him could have been composed elsewhere.

From the quantitative point of view, the glosses of *Sg* are few and do not form a systematic whole: they are occasional glosses because they do not cover all the sections of the *Exserpta*.⁶ They are anonymous and they were not written at the same time: the handwriting and ink, as well as the cross-references allow the modern reader to establish the relative chronology of these comments.

3 Rudolf Weigand, "Die Dekretabbreviatio 'Quoniam egestas' und ihre Glossen," in *Fides et Ius. Festschrift für Georg May zum 65. Geburtstag*, ed. Winfried Aymans, Anna Egler, Joseph Listl (Regensburg, 1991), 249–265, printed two glosses to C.27 (*Sg* p. 165ab) and three glosses to C.30 q.4 (*Sg* p. 174a); he concluded: "Die Glossen dieser Handschrift wurden von mehreren Händen eingetragen" (265). Larrainzar, "El borrador de la Concordia de Graciano (n. 1)," counted 215 glosses and edited ten to C.2 q.7 d.p.c.27, C.12 q.2 d.p.c.56, C.24–27, C.27 q.1, C.27 q.2 *pr.*, C.29 q.2 c.4, C.30 q.3 c.1, C.32 q.6 c.1, and C.35 qq.1–2 *pr.* (two glosses). José M. Viejo-Ximénez, "Non omnis error consensum euacuat. La C.26 de los Exserpta de Sankt Gallen (*Sg*)," in *Iustitia et Iudicium. Studi di Diritto Matrimoniale e Procesuale canonico in onore di Antoni Stankiewicz*, ed. Janusz Kowal, Joaquín Llobell (Vatican City, 2010), 617–641 edited two glosses to C.29 q.2 (637–638).

4 See Lenz, "The Codicology (in this volume)."

5 As an autonomous scientific discipline, canon law began with the *Decretum*: Stephan Kuttner, "The Father of the Science of Canon Law," *The Jurist* (1941), 2–19; Peter Landau, "Bologna. Die Anfänge der europäischen Rechtswissenschaft," in *Stätten des Geistes – Große Universitäten Europas von der Antike bis zur Gegenwart*, ed. Alexander Demandt (Köln, Weimar, Wien, 1999), 59–74. The very origins of the science of canon law should be placed during Gratian's life, but nothing is sure about the master: José M. Viejo-Ximénez, "Graciano," in *Diccionario General de Derecho Canónico*, ed. Javier Otaduy, Antonio Viana, Joaquín Sedano (Pamplona, 2012) IV: 239–46. For Gratian's work Kenneth Pennington, "La Biografia di Graziano, il Padre del Diritto Canonico," *Rivista Intenzionale di Diritto Comune* 25 (2014), 25–60 suggests a timespan of about 15 years, from 1125 to 1140.

6 Rudolf Weigand, "The Development of the *Glossa Ordinaria* to Gratian's *Decretum*," in *The History of the Medieval Canon Law in the Classical Period, 1140–1234*, ed. Winfried Hartmann, Kenneth Pennington, History of Medieval Canon Law 6 (Washington, D.C. 2008), 55–97, distinguishes between "gloss composition" and "apparatus of glosses" (58). The glosses of *Sg* do not form a "composition," nor an *apparatus*.

From the qualitative point of view, most of the glosses are *Allegationen*, *Nota* and *Rubrikenglossen*. There is a significant number of *Wörterklärungen* (explanations of words) and some *diskursive Erörterung* (discursive discussion). Therefore, the majority of glosses in *Sg* belong to the primitive set that Kuttner called the *erste Typus* of *vor-johanneischen* (pre-John) glosses, which are distinctive of the *erste Glossenkomposition* (first composition of glosses) described by Weigand.⁷ These glosses are linked to the school of Bologna and date to the 40s and 50s of the twelfth century when the first decretists, of whom we only know the name of *Paucapalea*, picked up the baton from Gratian. That said, while some glosses of *Sg* are prior to the *erste Glossenkomposition*, others should be dated to the 60s of the twelfth century.

The selected examples discussed below are arranged into six sections: *Allegationen*, *Nota* and *Rubrikenglossen*, interlinear glosses, marginal definitions, the *erste Glossenkomposition* and glosses related to the *Stroma Rolandi*.

2 *Allegationen*

The oldest pre-John glosses are the *Allegationen*, that is, quotations of parallel and opposite *auctoritates*.⁸ When they are compared with the manuscripts that contain the *erste Glossenkomposition*, the *Allegationen* of *Sg* are scarce in number and simple in their formulation. These cross-references do not lead anywhere outside the *Exserpta* or the *Decretum*. From the reference systems it is possible to distinguish two successive series of *Allegationen* (Appendix 1).⁹ Some are contemporary or very close to the copy of the *Exserpta* because they identify Gratian's *auctoritates*, taking as reference 33 causes.¹⁰ On the other hand, the *Allegationen* of the second series quote the *auctoritates* according

7 Stephan Kuttner, *Repertorium der Kanonistik (1140–1234). Prodomus Corporis Glossarum* (Vatican City, 1937), 3–9: glosses written before Johannes Teutonicus' *apparatus*. The *Erste Glossenkomposition* has been described by Rudolf Weigand, *Die Glossen zum Dekret Gratians. Studien zu den frühen Glossen und Glossenkompositionen*, *Studia Gratiana* 25/26 (Rome, 1991), 401–425; and idem, "The Development (n. 6)," 58–59.

8 Kuttner, *Repertorium* (n. 7), 3. Philipp Lenz, "Die Glossierung und die Glossen in den frühesten Handschriften des *Decretum Gratiani*," *BMCL* 35 (2018), 41–184.

9 Larrainzar, "El borrador de la Concordia de Graciano (n. 1)," 617; Lenz, Ortelli, *Die Handschriften* (n. 2), 18.

10 The author of the *Exserpta* arranged his materials into 33 *Causae*: Larrainzar, "El borrador de la Concordia de Graciano (n. 1)," 653–662. The headings of the pages, with the original numbering of the *Causae*, were changed twice: Viejo-Ximénez, "Non omnis error consensus euacuat (n. 3)," n. 6.

to the *distinctiones* and *causae* of the *Decretum vulgatum*.¹¹ The *Allegationen* of both series constitute closed systems of cross-references. Unlike the *Allegationen* appearing in *Omnibene's* abbreviation, those of *Sg* do not mention any decretal of the *ius novum*, nor any parallel or contrary authority of the *Corpus Iuris Civilis*.¹²

The probability that they were written later in a teaching centre far from the Bolognese epicentre is very unlikely because the copy of some of the Roman fragments that appear in the margins of *Sg* is contemporary with those *Allegationen*. The knowledge of the *Corpus Iuris Civilis* and its gloss that these marginal additions reveal could hardly be acquired in a modest provincial study centre.¹³ Weigand suggested that the *Allegationen* in the margins of the abbreviation *Exceptiones Ecclesiasticarum* could come from the margins of the *Decretum* preserved in Sankt Florian, III.5.¹⁴ On the contrary, the two series of *Allegationen* in *Sg* are not a copy of the *Allegationen* written in the margins of one alleged model – a *Concordia* or a *Decretum vulgatum* – used by the author or the users of the *Exserpta*. Since some of the *Allegationen* of *Sg* mention other glosses, or *auctoritates* and *dicta* of the *Exserpta*, they serve as a milestone to establish a chronology of the scribal history of the manuscript.¹⁵ The *Allegationen* show a systematic understanding of the work, a particular skill of

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- 11 In the present essay, *Exserpta* means the work copied in the first part of *Sg*; *Concordia* is the work known thanks to the manuscripts *Aa Bc Fd P Pr*; *Decretum vulgatum* is the work attributed to Gratian that circulated from the mid-twelfth century. Carlos Larrainzar, “L’edizione critica del Decreto di Graziano,” *Folia Canonica* 9 (2006), 69–92 and idem, “Métodos para el análisis de la formación literaria del Decretum Gratiani. ‘Etapas’ y ‘esquemas’ de redacción,” in *Proceedings of the XIIIth International Congress of Medieval Canon Law*, ed. Peter Erdö, Anzelm Szuromi (Vatican City, 2010), 85–115, offers a more detailed description of Gratian’s *Redaktionsgeschichte*.
- 12 Rudolf Weigand, “Die Dekret-Abbreviatio Omnebenes und ihre Glossen,” in *Recht als Heildienst. Mathias Kaiser zum 65. Geburtstag gewidmet*, ed. Winfried Schulz (Paderborn, 1989), 271–287, at 275–281. Rudolf Weigand, “Die frühen kanonistischen Schulen und die Dekretetabbreviatio Omnebenes,” *AKKR* 155 (1986), 79–91, at 91: “1156 entstandenes oder abgeschlossenes Werk.”
- 13 Kenneth Pennington, “The Big Bang: Roman Law in the Early Twelfth Century,” *Rivista Internazionale di Diritto Comune* 18 (2007), 43–70. From the additional texts, the glosses and the cross-references, Pennington concluded that *Sg* was used to teach canon law and that the “manuscript could not have been the product of a provincial school” (64).
- 14 Rudolf Weigand, “Die Dekretabbreviatio ‘Exceptiones ecclesiasticarum regularum’ und ihre Glossen,” in *Christianità ed Europa: Miscellanea di studi in onore di Luigi Prosdocimii*, ed. Cesare Alzati (Milano, 1992), 1:511–529, at 523–524.
- 15 *Cod. Just.* 9.46.10 was copied twice on the margins of *Sg* by the same hand: next to C.2 q.8 c.4 (p. 66a) and to C.32 q.6 c.1 (p. 179a). The second marginal addition ends with: *R. supra in causa iii. circa finem*. The person behind this hand (1. *Marginalienhand* according to Lenz, Orтели, *Die Handschriften* (n. 2), 18) used *Sg's* original division into 33 *Causae*.

the interpreters and lectures of legal texts. The presence of this academic tool in the margins of *Sg* suggests that the *Exserpta* were used in the classroom.

3 *Nota and Rubrikenglosse*

Most of the glosses of *Sg* belong to the *Nota*-type.¹⁶ They appear in almost all sections of the *Exserpta*, although they are not contemporary since different users of *Sg* wrote *Nota*. This activity started immediately after the copy was finished: some *Nota* are written in red ink like many of the “R.’s” scattered throughout the manuscript.¹⁷ They both – the *Nota* and the “R.’s” – draw the reader’s attention to an *auctoritas* or a *dictum*.¹⁸ On four occasions the *Nota* symbol is accompanied by the word *distinctio*: *Nota distinctio*/*Nota distinctionem*.¹⁹ This more complex form can be equated with the five *Bona distinctio*,²⁰ the three

16 Acronyms of *Nota/Nota quod* on the margins. They could be considered schematic (sometimes ornamental) symbols on the margins that highlight relevant points of the text: Weigand, “The Development (n. 6),” 55–56.

17 Bernasconi Reusser, “Considerazioni (n. 2):” “quelli [*Nota*] in rosso sembrano contemporanei al lavoro di copia e forse di mano del primo copista” (145).

18 The meaning of “R.” is unclear: the symbol appears for the first time on p. 66a (next to C.2 q.8 c.3) and on p. 169a (next to C.27 q.2 c.37) for the last time. Two times the marginal “R.” corresponds with the abbreviation “R(espondetur)” inside the *Exserpta*: on *Sg* 126a a (red) marginal “R.” was written beside *Istis omnibus sic respondetur: Auctoritas illa Nicene synodi prohibet monachos ...* (C.16 q.1 d.p.c.12); on *Sg* 159a the (brown) marginal “R.” appears next to *Ad quod respondetur: Precepta patientie non tam corporis preparatione quam cordis sunt obseruanda* (C.23 q.1 d.p.c.1). As a rule, the symbol “R.” directs the reader’s attention to a significant sentence of the *Exserpta*: on p. 106b, for example, there are two “R.’s” beside *Episcopus rebus ecclesie tanquam commendatis non tanquam propriis utatur* and *Irrita enim episcoporum uenditio uel conmutatio rei ecclesiastice erit absque conniuentia et subscriptione clericorum* of C.12 q.2 c.52. A special case on *Sg* 155b is *R. Aliud est re, aliud ex modo iurandi illicitum* (dark brown ink) in the margin of C.22 q.4 d.p.c.23 §4 (*cum in re iurata uitium inuenitur*). On the “R,” see also the contribution by Larson, “Nota (in this volume).”

19 Next to C.2 q.6 d.p.c.10 (*Quidam tamen ita distinguere uolunt...*, *Sg* 54a), C.2 q.7 d.p.c.39 §3 (*Aliter quoque respondi potest: aliud est quod de discipline rigore seruare cogimur, aliud quod...*, *Sg* 61b), C.19 q.3 d.p.c.8 (*Sed aliud est de his qui monasterium ingressi se et sua tradiderunt, aliud de his, qui solitariam uitam ducentes se nulli ecclesie dedicauerint*, *Sg* 145b) and to C.32 q.1 d.p.c.13 (*Sed aliud est meretricem ducere aliud meretricem retinere*, *Sg* 178b). These four *Nota distinctio* were written by the same hand.

20 Next to C.1 q.1 d.p.c.39 (*Ad quod notandum quod sacramentorum alia sunt necessitatis alia dignitatis*, *Sg* 32a), C.1 q.4 c.12 (*Notandum quoque quod non omnis ignorantia excusat. Nam alia est facti alia iuris*, *Sg* 40a), C.2 q.1 d.p.c.16 (*Sciendum quoque est quod eorum que manifesta sunt alii sunt cogita iudici et alia incognita, alia sunt aliis manifesta et iudici occulta, alii et iudici et aliis sunt manifesta*, *Sg* 46b), C.15 q.1 pr. (*Sed hoc non de omnibus peccatis*

Bonum quod,²¹ and also with the two *Pulchra distinctio*.²² In these cases, the author(s) of the glosses highlight(s) the usefulness of a dialectical distinction within a *dictum* or an *auctoritas*.²³

A variety of these type of gloss is that in which the abbreviation *Nota* is followed by words sometimes taken from a *dictum* or an *auctoritas*: *Nota magnum quid*,²⁴ *Nota auctoritate*,²⁵ *Nota ignem*,²⁶ *Nota de his quibus sua suffici uiuere*,²⁷ *Nota appellatio*,²⁸ *Nota quod aliud est prodere et aliud accusare*,²⁹ *Nota quos infames uocatur*,³⁰ *Nota testes*,³¹ *Nota quod sit peccatum*,³² *Nota medianam*,³³ *Nota quartum digitum*,³⁴ *Nota uouentes*,³⁵ *Nota quantum debeat consanguinitatem firmare*,³⁶ *Nota iuramentum huiusmodi debet prestari in separatione consanguineorum*.³⁷ Some were written in red ink (*Nota quos infames uocatur*, *Nota quod sit peccatum*), indicating they would be contemporary to the making of the copy – like many other *Nota* symbols in red ink.³⁸ Most of these

uidetur intelligendum. Nam quod ait Augustinus de illo peccato intelligendum est quod sic est culpa quod non pena, Sg 119a) and C.22 q.5 d.p.c.13 (*Aliud est enim callida uerborum arte iurare aliud suam intentionem simpliciter iurando enuntiare, Sg 157b*). The word *Distinctio* was written in the margin of p. 42b close to C.1 q.7 d.p.c.5 (*Multorum enim crimina dampnabilia sunt que tamen ab ecclesia toleratur pro tempore pro persona intuitu pietatis uel necessitate aut etiam utilitatis*). The person responsible for the four *Nota distinctio* also wrote three *Bona distinctio* (*Sg 32a, 41b, 46b*) and one *Distinctio* (*Sg 42b*).

- 21 Next to C.16 q.2 c.1 (*Sg 133a*), C.16 q.3 c.13 (*Sg 136a*) and C.18 q.2 c.26 (*Sg 144a*). The first and the last were written by the same hand as the *Nota distinctio*, *Bona distinctio* and *Distinctio*.
- 22 Next to C.7 q.1 d.p.c.4 (*Inter eum autem quod necessitate hostilitatis et quod causa utilitatis transfertur...*, *Sg 83a*) and C.30 q.5 d.p.c.9 (*Illa coniugia que clam contrahuntur nec esse coniugia negatur nec dissolui iubentur si utriusque confessione probari poterunt, Sg 175b*) written by the same hand.
- 23 Or even a definition: on *Sg 66a* the words *Nota diffinitionem* next to C.29 q.2 pr. highlight the definition of marriage.
- 24 Next to D.63 d.p.c.34 (*Sg 25b*).
- 25 Next to D.63 d.p.c.34 (*Sg 25b*).
- 26 Next to C.1 q.1 c.29 (*Sg 31a*).
- 27 Next to C.1 q.2 c.6 (*Sg 36a*).
- 28 Next to C.2 q.6 d.p.c.31 (*Sg 55a*).
- 29 Next to C.2 q.7 d.p.c.27 (*Sg 58a*).
- 30 Next to C.6 q.1 c.17 (*Sg 77b*).
- 31 Next to C.14 q.2 pr. (*Sg 116a*).
- 32 Next to C.15 q.1 pr. §5 (*Sg 119a*).
- 33 Next to C.16 q.1 c.31 (*Sg 128a*).
- 34 Next to C.30 q.5 c.7 (*Sg 175a*).
- 35 Next to C.30 q.5 d.p.c.8 (*Sg 175a*).
- 36 Next to C.35 q.6 c.3 (*Sg 193a*).
- 37 Next to C.35 q.6 c.5 (*Sg 193b*).
- 38 On *Sg 37a* the *Nota*-symbol next to C.1 q.2 c.6 was written in red while the words *de his quibus sua suffici uiuere* were written in brown by another hand (the hand responsible for the glosses taken from the *Stroma Rolandi*, see below).

more complex *Nota* were written in brown ink and they are the work of the same hand that introduced other glosses immediately after the completion of the copy. This more elaborate variation approaches the *Nota* glosses to the *Rubrikenglossen*, that is, the calls of attention that are composed by words and sentences taken from a *dictum* or an *auctoritas*: *Secretorum cognitorem et iudicem Dominum esse*,³⁹ *Sacerdotes absconse criminaliter quotidie delinquentes per ieiunia et dignam satisfactionem spem ueniens de Dei misericordia consequi*,⁴⁰ *Presbiteros uel diaconus penitentiam solemnem facere non debere*,⁴¹ *Quod sicut nulli clericorum penitentiam agere conceditur post eadem penitentiam honorem clericatus acquirere*,⁴² *quando rectoribus ecclesiarum ab ingressuri aliquid accipere liceat*,⁴³ *Duo necessaria*,⁴⁴ *Neque emphyteotica pacta*,⁴⁵ *Episcopum potestas dispendendi Deo contemplante habet*,⁴⁶ *Rerum ecclesie uenditiones irrita esse*,⁴⁷ *Episcopum tertiam de rebus parochialium sibi debitam ecclesiarum cuilibet ecclesie dare posse*,⁴⁸ *de iure funerandi*,⁴⁹ *Leges uenerandas etiam*,⁵⁰ *per exorcismos*,⁵¹ and *Mundanis non constringitur legibus*.⁵² There are *Rubrikenglossen* written in red ink (*Secretorum cognitorem et iudicem dominum esse*, *Leges uenerandas etiam*), although most of them are written in brown ink (the brown being by different hands). Both the red and the brown *Rubrikenglossen* are not contemporary with the copying of the *Exserpta*.

The schematic symbols presented in the canonical manuscripts of the first Christian millennium would have been added by private users and do not reflect academic activity.⁵³ Manuscripts of Gratian's work dating back to the second half of the twelfth century that were used in the classrooms and whose margins are dotted with *Nota*-symbols and *Rubrikenglossen* are not rare.⁵⁴ The

39 Next to D.32 c.11 (*Sg* 7b).

40 The words belong to D.50 c.34 (*Sg* 17b). The opening "ss." refer to *Nota. Vitale capitulum* (*Sg* 17a).

41 To place beside D.50 c.65 (*Sg* 19a).

42 To place beside D.50 c.66 (*Sg* 19b).

43 At the beginning of C.1 q.2 (*Sg* 35ab).

44 Next to C.12 q.1 c.10 (*Sg* 101a).

45 Next to C.12 q.2 c.13 (*Sg* 104a).

46 Next to C.12 q.2 c.19 (*Sg* 104b).

47 Next to C.12 q.2 c.19 (*Sg* 104b).

48 To place beside C.12 q.3 c.4 (*Sg* 108a).

49 Next to C.13 q.2 d.p.c.5 (*Sg* 113b).

50 Next to C.16 q.3 c.17 (*Sg* 136b).

51 Next to C.33 q.1 c.4 (*Sg* 181b).

52 Next to C.33 q.2 c.6 (*Sg* 182b).

53 Weigand, "The Development (n. 6)," 56 n. 6: important words or clauses rewritten in the margins also testify to "individuals' personal use of the text."

54 There are *Nota*-symbols in *Aa* 23 and 43, *Bc* (fols. 79vb, 96rb, 121va, 123va, 125rb, 131rb, 140ra, 141va) and *Fd* (fol. 8ra, 98va). These symbols also appear in *Bi*, *Gf*, *Gg*, *Hk*, and *Mv* (abbreviations are taken from Weigand, *Die Glossen* (n. 7), xxi–xxiv).

Nota and the *Rubrikenglossen* of *Sg* are not far from the *Notabilien*, i.e., the marginal sentences arranged in staggered lines in the form of an inverted triangle that sometimes begin with the word/words *Nota/Nota quod* or even with the *Nota* symbol.⁵⁵ Along with the *Allegationen*, these *Notabilien* belong to the 1. *Glossenkomposition*.

The *Nota* and *Rubrikenglosse* show that the *Exserpta* could have been used by judges, lawyers, lecturers or students, that is, persons interested in doing quick searches. Other glosses and additions also point to a formal academic study centre as the locus in which the work was used.

4 *Worterklärungen: Interlinear Glosses*

Those who worked on *Sg* took advantage of the spaces between the lines and the margins to introduce *Worterklärungen*. Interlinear *Worterklärungen* explain the meaning of a word with a synonym or with another word that has been omitted in the text, but this new word does not belong to its canonical tradition (or to the *Redaktionsgeschichte* of the *Decretum*, namely the evolution of its different recensions). Marginal *Worterklärungen* are definitions; more elaborate interlineal clarifications are scarce.⁵⁶

Simple interlinear glosses can be found, for example, in the discussion on simony, C.1 q.1 d.p.c. 22 (p. 30a), where the following objection is posed: While it is true that prophecy is a gift of the Holy Spirit, the Old Testament mentions how holy men used to profit from it. Saul, for example, rewarded Samuel's prediction with presents. Jeroboan's wife approached the man of God with offerings. An interlinear gloss explains that this "man of God" was Elisha: *i(d est) Eliseum*. The *dictum* continues with a third, less fortunate example as the connection with simony is unclear: "Christ healed the ear of the servant" (p. 30a). An interlineal gloss gives the name of this servant: *s(cilicet) Malchi*. The answer to this objection, which offers examples that seem to legitimize simony, comes in the form of a quotation from Jerome, who, in his commentary on Micah, called those who accepted these offerings "evil." An interlinear gloss over the word *malos* in the Jerome passage clarifies who is evil by adding *prophetas*

55 *Nota liber Clementis ab hereticis sub nomine eius compositum et dicitur itinerarius quod actibus Petri et Dei uia sua ibi agit* (Hk fol. 25rb, next to D.16 c.3).

56 Some interlinear glosses are *Allegationen*: (i) over *Quapropter* (C.2 q.7 c.47): *s. c. ii.* (*Sg* 64b); (ii) over *Si quid* (C.2 q.7 c.48): *s. c. ii.* (*Sg* 64b); (iii) over *aliorum rerum* (C.6 q.4 c.1): *cc. c. iii c. non liceat* (*Sg* 79a); (iv) over *aliquibus iudicatis* (C.6 q.4 c.2): *c. iii. q. ui /// ///* (*Sg* 79a); (v) over *pruilegium* (C.9 q.3 c.4): *c. xu. i. q. u. ii. episcopus* (*Sg* 89a). The present essay does not consider marginal and interlinear corrections.

(p. 30b). Next, a fragment of the third chapter of Jerome's commentary is copied. It begins with these words: *Duces inquit* (C.1 q.1 c.23). An interlineal gloss says: *Micheas*.⁵⁷

Some interlinear *Wörterklärungen* are more extensive. In the next chapter, C.1 q.1 c.23, the same hand makes two comments. The first comment is about the words *Ierusalem ut custodia pomerii erit* and says: *amodo urbis Iero* (p. 30b, marg.). The second comment explains the meaning of the sentence *Spiritus enim sanctus nec uendi nec emi potest* with *i(d est) dona Spiritus Sanctus uendere non debet uel ipse S(piritus) S(anctus) in essentia sua uendi non potest* (p. 30b, intl. and marg.). These explanations do not appear in the *Summa Quoniam in omnibus* attributed to *Paucapalea*, the *Summa Alençonensis*, the *Summa Sicut Vetus*, the *Stroma Rolandi*, nor in the *Summae* of Rufinus nor in the *Summae* of Etienne de Tournai.

At least one interlinear *Wörterklärung* is repeated in the margin. On p. 43a, the word *incuria* (negligence) of C.1 q.7 c.12 – a fragment of Pope Gelasius I's letter to Italian bishops (J³ 1270: JK 636, 494) – is the object of a comment in the space between the lines: *i(d est) dissuetudine* (disuse). The gloss is duplicated on the right margin of the same folio: *Incuria i(d est) dissuetudo* (p. 43b marg.). Palaeography will determine if both glosses come from the same hand.⁵⁸ The person who wrote the interlinear gloss of C.1 q.7 c.12 repeated it again on p. 135a, with regard to the expression *per incuriam* of C.16 q.3 d.p.c.7: *i(d est) dissuetudinem*.⁵⁹ The author of the marginal gloss on p. 43 is also the person who copied some of the definitions in the margins of the *Exserpta*.

57 Stephen of Tournai commented C.1 q.1 c.23 as follows: *Verba sunt Micheae usque nemo. sup. dom. requiesc, i. e. gratiam eius habebant, sicut ipsi dicebant; vel sub obtentu domini, cui placere credebant deliciis afluebans* (Stephan von Doornick [Étienne de Tournai, Stephanus Tornacensis], *Die Summa über das Decretum Gratiani*, ed. Johann F. von Schulte (Giessen, 1891, repr. Aalen, 1963), 127).

58 The marginal gloss belongs to 1. *Marginalienhand*: Lenz, Orтели, *Die Handschriften* (n. 2), 18.

59 This hand made the following interlinear glosses: (i) over *pergrauari* (C.2 pr.): *a sententia prouocatum* (Sg 45a); (ii) over *depositione* (C.2 q.1 c.7): *uel deporta(tione)* (Sg 45b); (iii) over *in accusatione* (C.2 q.3 pr.): *de pena* (Sg 49a); (iv) over *sciens* (C.2 q.6 d.p.c.31): *uel scenciens* [!] (Sg 55a); (v) over *et oppido* (C.2 q.7 c.5): *i(d est) multum* (Sg 56b); (vi) over *Ecce puer meus* (C.2 q.7 d.p.c.41 §8): *e. l. t. q.* (Sg 63a); (vii) over *dumtaxat* (C.2 q.7 c.47): *i(d est) tantummodo* (Sg 64b); (viii) *Vbi q(ui) ad annum x. iiii. non peruenit nec accusator nec testis esse possit* (C.4 qq.2–3 c.1 summarium: in Sg these words are not in red ink): *titulus* (Sg 73a); (ix) over *cum legibus* (C.11 q.1 c.5): incomprehensible interlinear gloss (Sg 93a); (x) over *impossibilitate* (C.33 q.1 d.p.c.3): *frigiditate uel |||*; and (xi) over *munia ecclesiastica* (C.33 q.1 c.4): *offitia* (Sg 181b).

5 *Wörterklärungen: Marginal Definitions*

In the margins of the *Exserpta* there are 17 definitions. At first glance they come from four different hands:⁶⁰

a) 1. *Marginalienhand*: *Causa* (p. 3b), *Calumpniari* (p. 46a), *Preuaricari* (p. 46b), *Tergiuersari* (p. 46a), *Manumissio* (p. 106a), *Prescriptio* (p. 134a), *Primogenitura* (p. 153b), *Sponsalia* (p. 165ab), *Nuptie* (p. 165b), *Coniugium* (p. 166ab), *Coniugium* (p. 166ab), *Cognatio* (p. 187b), *Affinitas* (p. 187b), and *Affinitas* (p. 188a).

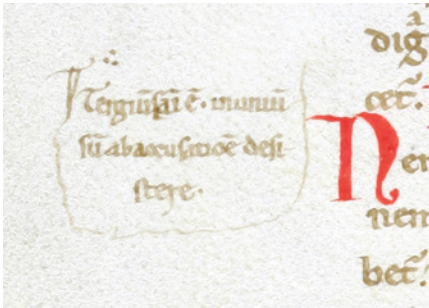


FIGURE 9.1 *Sg 46a left margin: 1. Marginalienhand* (see below [4])

- [1] *Causa* est res que habet in se controuersiuam in dicendo positam cum certarum personarum interpositione. (*Sg 3b*)
- [2] *Calumpniari* est falsa crimina intendere. (*Sg 46a*)
- [3] *Preuaricari* est uera crimina abscondere. (*Sg 46b*)
- [4] *Tergiuersari* est in uniuersum ab accusatione desistere. (*Sg 46a*)
- [5] *Manumissio* est datio i(d est) detectio libertatis. Tecta est enim naturalis libertas. Quod non habent dari non possunt. Naturaliter enim omnes homines sunt liberi. Iure uero ciuili non. (*Sg 106a*)
- [6] *Prescriptio* siue exceptio est actionis exclusio. (*Sg 134a*)
- [7] *Primogenitura* autem uestis erat sacerdotalis qua maiores natu cum benedictione patris induti uictimas Deo uelut pontifices offerebant. (*Sg 153b*)
- [8] *Sponsalia* sunt mentio et compromissio futurarum nuptiarum. (*Sg 165ab*)

⁶⁰ Lenz, Ortelli, *Die Handschriften* (n. 2), 18.

- [9] Ex libro constitutionum. Nuptie siue matrimonium est uiri mulieris coniunctio indiuiduam uite consuetudinem continens. (Sg 165b)
- [10] Coniugium est manifestus consensus legitimarum personarum. (Sg 166ab)
- [11] Vel coniugium est legitima federatio maris et femine per quam sine culpa ad usum carnis commisceri possunt. (Sg 166ab)
- [12] Cognatio est diuersarum personarum (ab una stipite descendentium)]^{gloss} per nationem coniunctio. Dicta sit quasi communis natio. Fit autem dupliciter uel tripliciter. Aut enim tu ab illo nationem traheris uel econuerso aut cum illo ab alio. (Sg 187b)
- [13] Affinitas est regularitas personarum ex nuptiis nobis coniunctarum omni carens parentela. (Sg 187b)
- [14] Affinitas est regularitas personarum ex nuptiis nobis coniunctarum omni carens parentela. (Sg 188a)

b) 5. Marginalienhand: *Linea* (p. 187b), *Gradus* (p. 187b).

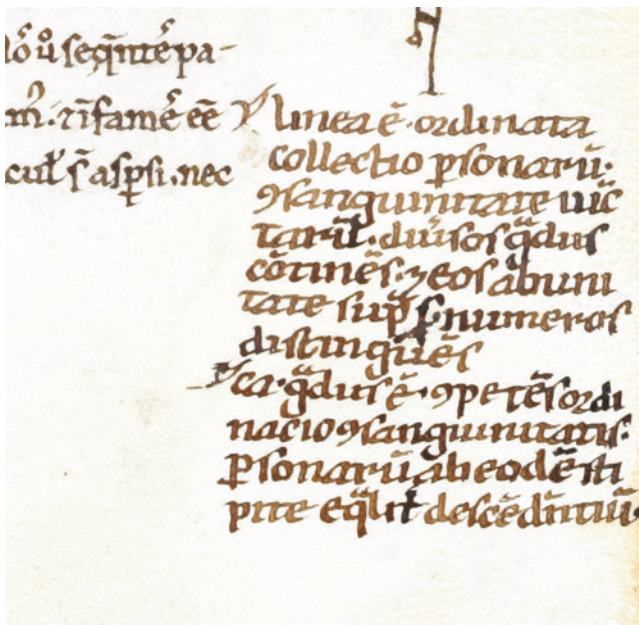


FIGURE 9.2 Sg 187b lower margin: 5. Marginalienhand

- [15] Linea est ordinata collectio personarum consanguinitate iunctarum diuersos gradus continens et eos ab unitate /// secundum numeros distinguens. (*Sg* 187b)
- [16] /// gradus est competens ordinatio consanguinitatis personarum ab eodem stipite equaliter descendentium. (*Sg* 187b)

c) Hand A: *Originarii* (p. 20b).

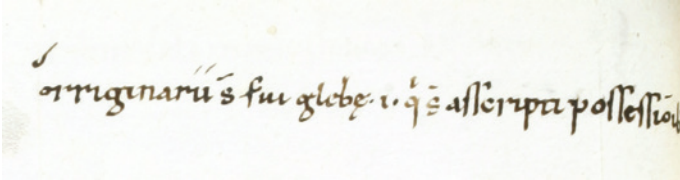


FIGURE 9.3 *Sg* 20b upper margin: Hand A

- [16] Originarii sunt serui glebe i(d est) qui sunt ascripti possessionibus. (*Sg* 20b)

d) 2. *Marginalienhand* (?): *Tergiuersator* (p. 46a).

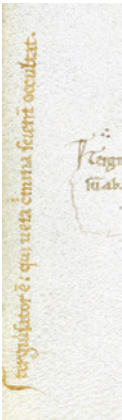


FIGURE 9.4

Sg 46a left margin: perpendicular gloss, 2. *Marginalienhand*?

- [17] Tergiuersator est qui uera crimina scienter occultat. (p. 46a)

Except for “hand A,” the rest of the hands add *auctoritates* and *dicta* and make other glosses to the *Exserpta*.⁶¹ The person behind 1. *Marginalienhand*, for example, copied four fragments of Roman law: *Cod. Just.* 9.46.10 on p. 66a and again on p. 179a; auth. *Ei qui* (*ex Nov.* 49 pr. et c.1: *Aut.* 58 pr. et c.1: *Coll.* 5.11. pr: *inserta* in *Cod. Just.* 7.63.2) on p. 68a; auth. *Ad hec* (*ex Nov.* 22.11: *Auth.* 4.1: *inserta* in *Cod. Just.* 7.6.1.9) on p. 171ab; and *Cod. Just.* 9.9.2 and 5 on p. 178.⁶² This hand is also responsible for some corrections and other glosses. The 5. *Marginalienhand* copied *Cod. Just.* 5.18.3, on p. 171b.⁶³ The person responsible for 5. *Marginalienhand* worked after the person responsible for 1. *Marginalienhand* (see Figure 9.5).

Rhetoric, Roman law and theology are the main sources of inspiration for the cultivated person behind 1. *Marginalienhand*. The notion of *Causa* comes from Cicero’s *De inventione*, although it could be borrowed from some of the medieval commentaries to the *Rhetorica prima*, such as *Ut ait Petronius* written by Thierry de Chartres in the 30s of the twelfth century.⁶⁴ The first marginal *Wortklärung* of *Sg* (*Causa*) precedes the *erste Glossenkomposition* where the definition has been enriched with the distinction of four types of causes – *iudicium*, *iustitia*, *negotium*, *lis* –, according to Isidore of Seville (*Etim.* 18.15.2–4). In the manuscripts of the *Decretum* with the *erste Glossenkomposition* the gloss reads as follows:⁶⁵

61 Hand “A” has not been described by Lenz, Orтели or Bernasconi.

62 Larrainzar, “El borrador de la Concordia de Graciano (n. 1),” 663–665; Viejo-Ximénez, “Las Novellae (n. 1),” 246, 277–79; Pennington, “The Big Bang (n. 13),” 60–61, 64–65, and n. 66, 67, 72, 74, 84, 85, 88. The person behind 1. *Marginalienhand* copied 6 *dicta* and *auctoritates*: C.20 q.1 c.10 *palea* (*Sg* 146a), C.27 q.2 c.21 (*Sg* 167b), C.29 q.2 d.p.c.7–c.8 (*Sg* 171b), C.31 q.2 c.2 *palea* (*Sg* 172a) and C.36 q.2 c.3 (*Sg* 199b). He could also be responsible for C.16 q.7 c.4, c.5 and c.3a (*Sg* 138a).

63 Viejo-Ximénez, “Non omnis error consensum euacuat (n. 3),” 638.

64 José M. Viejo-Ximénez, “Cicerón y Graciano,” *BMCL* 31 (2014), 23–55, at 46.

65 From the manuscripts with the *erste Glossenkomposition* listed by Weigand (*Die Glossen* (n. 7), 401–425; “The Development (n. 6),” 58, and Placidus Kuhlkamp (“Die erste Glossenkomposition zu C.16 des Decretum Gratiani,” in *Ius et Historia. Festgabe für Rudolf Weigand zu seinem 60. Geburtstag von seinen Schülern, Mitarbeitern und Freunden*, ed. Norbert Höhl, Forschungen zur Kirchenrechtswissenschaft 6 (Würzburg, 1989), 102–120) the following have been used: *Bc* = Barcelona, Archivo de la Corona de Aragón, Ripoll, 78; *Bi* = Biberach an der Riss, Spitalarchiv, B 3515; *Gf* = Grenoble, Bibliothèque municipale, 11 (474); *Gg* = Grenoble, Bibliothèque municipale, 34 (475); *Hk* = Heiligenkreuz, Stiftsbibliothek, 44; *Mc* = München, Bayerische Staatsbibliothek, lat. 4505; *Mv* = Montecassino, Biblioteca Abbaziale, 64; *Pk* = Paris, Bibliothèque nationale de France, lat. 3890. Rudolf Weigand, “Die ersten Jahrzehnte der Schule von Bologna: Wechselwirkung von Summen und Glossen,” in *Proceedings of the IXth International Congress of Medieval Canon Law*, ed. Peter Landau, Jörg Müller (Vatican City, 1997), 445–465, edited the gloss on C.1 (451–452,

Causarum alia dicitur iudicium alia iustitia alia negotium alia lis. Causa est res que habet in se controuersiam in dicendo positam cum certarum personarum interpositione.

Bc Bi Gf Gg Hk Mc Mv1 Mv2 Pk

dicitur] deest *Mv2*

iudicium alia iustitia alia negotium] iudicium alia negotium alia dicitur iustitia *Gg Mv*

negotium] negotium alia iurgium *Bi Gf Hk Mc Mv2*

alia lis] aliam autem dicimus litem *Bi /// Hk*

est res] est ius *Gf^{ac}*

que habet in se] /// *Hk*

positam] depositam *Mv*

certarum] ceterarum *Gg*

The author of the *Summa Quoniam in omnibus* opened his comment to C.1 with the quadripartite division of the *Etymologie*, which goes before the definition taken from the Ciceronian *Rhetorica prima*.⁶⁶

Ceterum quia causarum alia iudicium, alia iustitia, alia negotium, alia iurgium, alia lis vocatur, horum uniuscuiusque vocabulorum definitionem utile existimo ignorantibus aperire. Causa est res habens in se controuersiam in dicendo positam cum certarum personarum interpositione. Aliter causa est impulsus animi ad aliquid agendum. Causa vocata a casu, qui evenit. Est enim materia et origo negotii necdum discussionis examine facta. Quae dum proponitur causa est, dum discutitur iudicium est, dum firmatur, iusticia est. Vocatum autem iudicium quasi iuris dictio, et iustitia quasi iuris status. Negotium vero multa significat, modo actum rei alicuius, cui contrarium est otium, modo actionem causae, quod est iurgium litis. Et dictum negotium, quod sit sine otio. Negotium autem in causis, negotium in commerciis dicitur, ubi aliquid datur, ut maiora lucrentur. Iurgium dictum quasi iuris garrum, eo quod bi qui causam

31 manuscripts). Viejo-Ximénez, "Cicerón (n. 64)," 43, transcribed the gloss from *Bc. Mv* transmits two versions of the gloss: *Mv1* next to C.1 pr. and *Mv2* next to C.1 q.1 c.1.

66 José M. Viejo-Ximénez, "Una composición sobre el Decreto de Graciano: la suma 'Quoniam in omnibus rebus animaduertitur' atribuida a Paucapalea," *Helmántica* 190 (2012), 419–473, edited *Paucapalea's* comment to C.1 on 454–455.

agunt, iure disceptant. Lis a contentione limitis nomen sumpsit, de qua Virgilius: Limes erat positus litem ut disceret agri.⁶⁷

Causa est – interpositione : Cicero., *De inv.* 1.8 (=Thierry de Chartres, *Ut ait Petronius*, 74.18–29)

Aliter causa – agendum : Thierry de Chartres, *Ut ait Petronius*, 60.30–31

Causa vocata – agri : Isidore, *Etymologiarum*, 18.15.2–4

The evidence shows the date of the activity of the 1. *Marginalienhand* (literally translated: first marginalia hand) to be around the end of the 40s or at the beginning of the 50s of the twelfth century.

It does not seem that the work of the 1. *Marginalienhand* – when adding texts and making glosses – was conditioned by the structure or by the content of the *Decretum vulgatum*, nor by the comments of the early decretists. The marginal definitions of *Calumpniari*, *Praevaricari* and *Tergiversari* are the consequence of the misuse of the word *tergiuersatio* in C.2 q.1 d.p.c.16: when the crime is evident, says Gratian, the criminal cannot hide it by distorting the facts, that is, by forcing their sense to deceive. Whoever knew the meaning of *tergiuersari* in the field of lawsuits would be confused by this vulgarism. The person behind 1. *Marginalienhand* remembered the comment *ad senatus consultum Turpillianum* by *Marcianus*: *tergiuersare* means to withdraw absolutely from the exercise of a criminal action. Hence, this glossator copied the technical definition in the left margin of p. 46a, and he completed it with the definitions of *Calumpniari* and *Praevaricari* at the top of the same page.⁶⁸ Later, the person behind 2. *Marginalienhand* offered a definition of *tergiuersator* which recovers the vulgar meaning: *tergiuersator* is the person who intently conceals a crime.⁶⁹

The three definitions of *Marcianus* were subsequently included in C.2 q.3 d.p.c.8.⁷⁰ It is improbable that the person behind 1. *Marginalienhand* took

67 *Die Summa des Paucapalea über das Decretum Gratiani*, ed. Johann F. von Schulte (Giessen 1890, repr. Aalen 1965), 51.

68 Also taken from *Dig.* 48.16.1.1 (*Marcianus libro singulari ad senatus consultum Turpillianum*): *Calumpniari est falsa crimina intendere, praevaricari vera crimina abscondere, tergiuersari in universum ab accusatione desistere.*

69 José M. Viejo-Ximénez, “La composición del Decreto de Graciano,” *Ius Canonicum* 45 (2005), 431–485, comments the four glosses on 459–460.

70 José M. Viejo-Ximénez, “El Derecho romano nuevo en el Decreto de Graciano,” *ZRG.KA* 119 (2002), 1–19, and idem, “Las etapas de incorporación de los textos romanos al Decreto de Graciano,” in *Proceedings of the Eleventh International Congress of Medieval Canon Law*, ed. Manlio Bellomo, Orazio Condorelli (Vatican City, 2006), 139–152.

them from a *Decretum vulgatum* for two reasons: first, when he transcribed other Roman fragments in the margins of *Sg*, he showed great detachment and independence;⁷¹ and second, it is very likely that the *Corpus Iuris civilis* was at his fingertips.⁷² Indeed, the definitions of *Manumissio* (p. 106a), *Prescriptio* (p. 134a), *Nuptie* (p. 165b), and *Affinitas* (p. 187b) – also written by *1. Marginalienhand* – are related to the *Institutiones* by Justinian.

The marginal gloss to the word *manumissio* of C.12 q.2 d.p.c.56 begins with the short version of Ulpian's definition which ended up being included in the *Institutiones*: *Manumissio autem est datio libertatis*.⁷³ The marginal annotation of *Sg* incorporates the gloss *id est detectio*, a common interlinear clarification in the medieval copies of Justinian's handbook.⁷⁴ In *Sg*, the definition is expanded with considerations on natural freedom and the civil law that echo some of the issues that appear in the glosses of *Inst.* 1.3 and *Inst.* 1.5.⁷⁵ The decretists of the first generation of the Bologna School did not explain the meaning of the word *manumissio*.⁷⁶

The person behind *1. Marginalienhand* could also borrow the definition of *Prescriptio* (*Sg* p. 134a) from a commented copy of the *Institutiones*. In the title *De exceptionibus* (*Inst.* 4.13), the interlinear gloss to the word *defendendorum*

71 On *Sg* 66a and 179a *1. Marginalienhand* copied *Cod. Just.* 9.46.10, a fragment that never found its place in the *Decretum* (José M. Viejo-Ximénez, "Accusatio in scriptis semper fieri debet. A propósito del método de trabajo de y sobre Graciano," *Revista Española de Derecho Canónico* 64 (2007), 309–338, 330 and n. 29). On *Sg* 178a he copied *Cod. Just.* 9.9.2 and 5; while the first fragment was included in the *Decretum* (C.32 q.1 d.p.c.10), the second one is unknown to Gratian (Pennington, "The Big Bang (n. 13)," 65 and n. 86–87). The person behind *1. Marginalienhand* was not conditioned by the Roman law included in the *Decretum vulgatum*.

72 When copying *Cod. Just.* 9.46.10 – a fragment that never arrived to the *Decretum vulgatum* –, *1. Marginalienhand* added a gloss taken from his exemplar of the *Codex: In viiii. l. cod. t. de calumpniatoribus. Impp. Hon. et Th. Quisquis crimen intendit, non impunitam noverit fore licentiam menciendi, cum calumpniantes (in priuatis uero uel extraordinariis criminibus calumpniosi extra ordinem pro qualitate admisi ponuntur)*^{gloss intl ad uindictam poscat similitudo supplicii} (*Sg* 66a). In the margin of *Sg* 68a, auth. *Ei qui* has an inscription – *De his qui ingrediuntur ad appellat(ionem)* – that is missing in C.2 q.6 c.41.

73 *Inst.* 1.5 pr.: *Manumissio autem est datio libertatis. Dig. 1.1.4 (Ulpianus libro primo Institutionum): Est autem manumissio de manu missio, id est datio libertatis.*

74 For instance in München, Bayerische Staatsbibliothek, lat. 3509, fol. 2rb: *uel detectio*.

75 Severino Caprioli, Victor Crescenzi, Giovanni Diurni, Paolo Mari, Piergiorgio Peruzzi, *Glosse preaccursiane alle Istituzioni. Strato Azzoniano. Libro primo* (Roma, 1984), glosses nn. 134, 135, 138 and 165.

76 It does not appear in the manuscripts with the *erste Glossenkomposition* nor in the *Summae* attributed to *Paucapalea*, Roland, Rufinus or Etienne de Tournai.

says: *quia exceptio est actionis exclusio contra quem excipit agitur ut. d. e. l. i. ii.*⁷⁷ As the appendices to the *Petri Exceptionum legum romanorum*, the *Libellus de verbis legalibus*, the *Ulpianus de edendo* and the *Summa Quoniam in omnibus* show, the definition was common among jurists, both civilists and canonists.⁷⁸

The rubric *Ex libro constitutionum* that introduces the definition of *Nuptie*, next to C.27 q.1 c.20, also refers to the Institutions (*Inst.* 1.9.1). The definition that the person behind *l. Marginalienhand* has copied in the margin of *Sg* retains the original *continens*.⁷⁹ Some canonical collections picked up Justinian's definition with the same rubric as the gloss of *Sg*.⁸⁰ However, the principle of economy of sources can be applied to this case: a few pages later, the person behind *l. Marginalienhand* copies the definition of affinity twice, which is a marginal gloss to *Inst.* 1.10.6:

Gloss to <i>Inst.</i> 1.10.6 (Clm 3509, fol. 3vb) ⁸¹	Gloss to C.35 qq.2–3 c.1 <i>Sg</i> 187b	Gloss to C.35 qq.2–3 c.3 <i>Sg</i> 188a	<i>Summa</i> <i>Quoniam in</i> <i>omnibus</i> Comment to C.35 pr. ⁸²
<i>Adfinitas.</i> Affinitas est regularitas regularitas personarum ex nuptiis nobis adiunctarum, omni carens parentela	Affinitas est regularitas personarum ex nuptiis nobis coniunctarum omni carens parentela	Affinitas est regularitas personarum ex nuptiis nobis coniunctarum omni carens parentela	Affinitas est regularitas personarum ex nuptiis proueni- ens omni carens parentela

77 München, Bayerische Staatsbibliothek, lat. 3509, fol. 41rb. The gloss could have been inspired by *Dig.* 44.1.2 pr. (Ulpianus libro 74 ad edictum): *Exceptio dicta est quasi quaedam exclusio, quae opponi actioni cuiusque rei solet ad excludendum id, quod in intentionem condemnationemve deductum est.*

78 Examples taken from José M. Viejo-Ximénez, "La Summa Quoniam in omnibus de Paucapalea: una contribución a la Historia del Derecho Romano – Canónico en la Edad Media," *Folia Theologica et Canonica* 1 (2012), 151–196, at 189–190 (n. 98 should say Clm 3509, not Clm 4505).

79 The definition also reads *continens* in the text of *Sg* (C.29 q.1): Viejo-Ximénez, "Non omnis error consensum euacuat (n. 3)," 622–623.

80 Viejo-Ximénez, "Non omnis error consensum euacuat (n. 3)," n. 18 registers 6 Italian and 8 transalpine collections.

81 Caprioli et al., *Glosse preaccursiane* (n. 75), n. 268.

82 Schulte, *Die Summa* (n. 67), 137.

As the words *nuptiis nobis coniunctarum* show, it is very unlikely that the definition on the margins of *Sg* came from the *Summa* attributed to *Paucapalea*.

The definition of *cognatio* (p. 187b) is similar to the definition transcribed by the author of the *Summa Quoniam in omnibus*, but the gloss written by the person behind 1. *Marginalienhand* is longer than the definition of the *summa* attributed to *Paucapalea*:⁸³

Gloss to C.35 q.1 <i>Sg</i> 187b	<i>Quoniam in omnibus</i> Comment to C.35 pr. ⁸⁴	<i>Per tractatis his</i> to C.35 q.1 ⁸⁵	Rufinus to C.35 qq.2–3 ⁸⁶	Etienne de Tournai to C.35 ⁸⁷
Cognatio est diuersarum personarum (ab una stipite des[cendentium]) gloss per nationem coniunctio. Dicta sit quasi communis natio. Fit autem dupliciter uel tripliciter. Aut enim tu ab illo nationem traheris uel econuerso aut cum illo ab alio.	Vel cognatio est diuersarum personarum per nationem coniunctio. Dicta cognatio quasi communis natio.	Est ergo consanguinitas diuersarum personarum uinculum ab eodem stipite descendenti-um carnali propagatione contractum.	Est ergo consanguinitas diuersarum personarum uinculum ab eodem stipite descendenti-um, carnali propagatione contractum.	Consanguinitas est uinculum diuersarum personarum ab eodem stipite procedenti-um carnali propagatione contractum.

Again, the first *Summae* of the Bologna School could not be the source of inspiration for the person behind 1. *Marginalienhand*.

The definition of *Sponsalia* (p. 125ab) taken from the *Digestum* is another example of the skill with Roman law possessed by the person behind

83 The remote source of inspiration could be *Dig.* 38.8.1.1: *Cognati autem appellati sunt quasi ex uno nati, aut, ut Labeo ait, quasi commune nascendi initium habuerint.*

84 Schulte, *Die Summa* (n. 67), 137.

85 Kerstin A. Jacobi, *Der Ehetraktat des Magister Rolandus von Bologna. Redaktionsgeschichtliche Untersuchung und Edition (Studienausgabe)* (Hamburg, 2004), 440–441.

86 *Die Summa decretorum des Magister Rufinus*, ed. Heinrich Singer (Paderborn, 1902), 510.

87 Schulte, *Stephan* (n. 57), 247.

1. *Marginalienhand*.⁸⁸ However, his knowledge also encompassed the ordinary gloss to the Bible and other theological writings. As it is well known, Jacob snatched the birth right from Esau (Gen. 25.29–34; 27). According to C.22 q.2 d.p.c.22, when Jacob appeared before his father saying that he was Esau, he did not lie because he did not claim to be a firstborn by birth but by right, that is, he was protected by the right that he had bought from his brother in exchange for lentil stew. The expression *ius primogeniture* provoked the person behind 1. *Marginalienhand* to copy the definition of *primogenitura* in the margin of *Sg* p. 153b. He took this definition from the gloss to Gen. 25.31–32.⁸⁹ No decretist was interested in this detail.

The theological inspiration of the person behind 1. *Marginalienhand* can also be recognized in the two definitions of *Coniugium* that comprises the gloss on p. 166ab. Each one emphasizes a different dimension of the marital union. The first one defines marriage from its efficient cause: *Coniugium est manifestus consensus legitimarum personarum*. The treatise *In coniugio figure et uestigium* from Anselm of Laon's school enumerates the three causes that make marriage, the first one being *manifestus consensus legitimarum et presentium personarum*.⁹⁰

The second definition of *coniugium* in the margins of *Sg* focuses on the moral issue, since it highlights the legitimacy of the connubial intercourse: *Vel coniugium est legitima federatio maris et femine per quam sine culpa ad usum carnis commisceri possunt*. This subject appears in the *Epitome theologiae christianae* attributed to Peter Abelard: *Coniugium est maris et feminae foederatio legitima, propter quam licet eis sine culpa commisceri*.⁹¹ The author of the gloss of *Sg* was not the only one who considered these two dimensions of marriage jointly: both the legal and the moral aspects appear in the commentary to the concord of the four Gospels by the Premonstratensian Zacharias Chrysopolitano (c.1150), *In unum ex quatuor sive de concordia*, 1.29: *Est autem coniugium viri et feminae foederatio legitima, per quam licet eis ad usum carnis permisceri, secundum divinas et humanas leges.... Coniugium vero facit manifestus consensus legitimarum personarum*.⁹²

88 *Dig.* 23.1.1 (Florentinus libro tertio institutionum): *Sponsalia sunt mentio et repromissio nuptiarum futurarum*. Paucapalea (Schulte, *Die Summa* (n. 67), 121), Rufinus (Singer, *Die Summa* (n. 86), 445) and Etienne de Tournai (Schulte, *Stephan* (n. 57), 236) knew the definition. The fragment of the *Digestum* was copied next to C.27 q.2 c.13 in the margin of *Mv*, a manuscript with the *erste Glossenkomposition*: *Sponsalia sunt mentio et repromissio futurarum nuptiarum ut ff. de sponsalibus l. i. ...* (fol. 411r).

89 *Glossa ordinaria* to Gen. 25.31–32: *Primogenitura autem uestis erat sacerdotalis, qua induti maiores natu cum benedictione patris uictimas Deo, uelut pontifices, offerebant: hoc dono, terreni amoris desiderio, caruerunt Iudaei, cum gloria futuri regni* (PL 113.147B).

90 Franz P. Bliemetzrieder, *Anselm von Laon systematische Sentenzen* (Münster, 1919), 112–113.

91 PL 178.1745C.

92 PL 186.131D and 132A.

Definitions and etymologies are characteristic of the propaedeutic phase of any teaching activity. *Ulpianus* advised those who apply themselves to the study of law that they should know from whence the word *ius*/law is derived. Since the law obtains its name from justice, the great Roman jurist defined this virtue: “Justice is the constant and perpetual desire to give to everyone that to which he is entitled.”⁹³ In the middle of the twelfth century in Bologna, Gratian’s direct disciples used the same tools. The first comprehensive comment to the *Decretum* begins with a reflection on hermeneutics: as the force of a verb or a noun is linked to its origin, the interpreter’s task is to discover and express its etymology.⁹⁴ Included in the *Summa Quoniam in omnibus* are etymologies and definitions.⁹⁵ The definitions with which the person behind the *1. Marginalienhand* explained the meaning of some words of the *Exserpta* are typical of a teacher, not of a judge or a lawyer. If this person was actually responsible for the materials copied in p. 135a–203a, the making of the *Exserpta* could be located in an academic environment.⁹⁶ Moreover, those who used the *Exserpta* after *1. Marginalienhand* were not disconnected from the teachings of the masters of Bologna.

6 The Erste Glossenkomposition

As it was said above, the person behind *5. Marginalienhand* wrote the definitions of *Linea* (*Sg* p. 187b) and *Gradus* (*Sg* p. 187b). This person was working after *1. Marginalienhand*, since he also wrote a gloss on the definition of *Cognatio* added by *1. Marginalienhand* on the same page:

93 *Dig.* 1.1.1 pr. (*Ulpianus libro primo Institutionum*) and 1.1.10 (*Ulpianus libro secundo regularum*).

94 Schulte, *Die Summa* (n. 67), 4: *Est enim etymologia origo vocabulorum cum vis nominis et verbi per interpretationem colligitur*, taken from Isidore, *Etymologiarum*, 1.29.1 (PL 82.105B).

95 Definitions, *inter alia*: *Hostes sunt, quibus bellum publice populus romanus decrevit, vel ipsi populo romano, ceteri latrunculi vel praedones appellantur* (Schulte, *Die Summa* (n. 66), 7). Etymologies, *inter alia*: *Vel ideo liberi dicti sunt, quia ex libero matrimonio sunt orti* (Schulte, *Die Summa* (n. 66), 5); *Depositum est pignus commendatum ad tempus quasi diu positum. Deponere autem quis videtur, cum aliquid metu furti, incendii, naufragii apud aliam custodiam causa deponit* (Schulte, *Die Summa* (n. 66), 6).

96 The long *diskursive Erörterung* on C.15 q.5 d.p.c.14 by *1. Marginalienhand* also points to the classrooms: *Salomon. ‘Qui de rapina dat pauperibus ac si mactet filium ante patrem’. Quidam dicunt quod nullus potest saluari nisi reddat quod rapuit, uerum quidem est, si bene intelligatur. In ‘reddere’ intelligitur si possit. In ‘posse’ duo. Si habet unum reddat, si cui reddat sciat. Si non habet unum, peniteat et reddat in corde quod redditio longe meliorem est quia sine ista non saluaretur cum ipso, cum alia possit dampnari. Si habet unum reddat et possit ne scit cui debeat reddere, reddat ecclesie et consulat eam et secundum eius consilium det pauperibus et quod sibi unum igitur faciat* (*Sg* 118a).

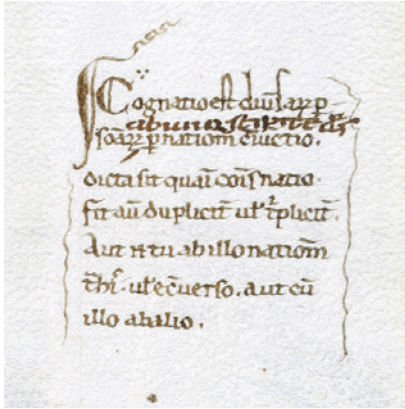


FIGURE 9.5
 Sg 187b upper margin: gloss by 5.
 Marginalienhand on another gloss written by 1.
 Marginalienhand

The definitions of *Linea* and *Gradus* can be traced back to the *erste Glossenkomposition*, from which the gloss on the definition of *Cognatio* could also have been taken. The manuscript of Biberach, for example, has the definitions of *Consanguineum* and *Linea*:

Gloss beside C.35 qq.2–3 c.2 Sg 187b	Glosses below C.35 qq.2–3 c.1 Bi fol. 318vb
–	§ Consanguineum diuersarum personarum ab eodem stipite descendentium carnali propagatione contractum
Linea est ordinata collectio personarum consanguinitate iunctarum diuersos gradus continens et eos ab unitate /// secundum numeros distinguens	§ Linea est ordinata collectio personarum consanguinitate coniunctarum diuersos gradus in se continens et eos secundum diuersos numeros ab unitate stipitis distinguens

The activity of the person behind the 5. *Marginalienhand* begins on p. 97b, where he corrected C.11 q.3 c.47, and extends to p. 187, where he wrote a couple of glosses to C.35 qq.1–3. On the one hand, 5. *Marginalienhand* copied 16 texts taken from *dicta* and *auctoritates* that belong to the *Decretum vulgatum*: C.21 q.1 d.p.c.4 (p. 148b, top margin); C.21 q.2 d.p.c.4–c.5 (p. 148b, lower margin); C.22 q.5 c.1b (p. 156b, top margin); C.22 q.5 c.2 and c.3 (p.156b, lower margin); C.30 q.1 d.p.c.7 (p. 173a, lower margin); C.30 q.4 pr. (p. 173b); C.32 q.2 pr.–c.1a, d.p.c.1, c.2, d.p.c.2, d.p.c.4 and d.p.c.16 (p. 178ab, lower margin); and C.32 q.8 pr.–c. un.

(p. 180ab, lower margin). On the other hand, he wrote 19 glosses to the following sections of the *Exserpta*: C.22 q.5 c.1 (p. 156b), 1 interlinear gloss; C.29 q.2 c.4 (p. 171ab), 1 gloss; C.29 q.2 c.4 (p. 171b, lower margin), 1 gloss; C.30 q.1 d.p.c.2 (p. 172b), 1 gloss; C.30 q.3 c.1 (p. 173b), 1 gloss; C.30 q.4 c.4 (p. 174a), 2 glosses; C.30 q.4 c.5 (p. 174a), 1 gloss; C.31 q.1 c.1 (p. 176a), 1 gloss; C.31 q.1 d.p.c.2 (p. 176b, top margin), 1 gloss; C.31 q.3 c.1 (p. 177a), 1 or 2 gloss(es); C.32 pr. (p. 177b), 2 glosses; C.32 q.1 c.2 (p. 178a), 2 glosses; C.32 q.1 c.3 (p. 178a), 1 gloss; C.33 q.1 d.p.c.3 (p. 181b), 1 gloss; and C.35 qq.2–3 c.2 (p. 187b), 2 glosses.

5. *Marginalienhand*'s glosses agree with the glosses of the *erste Glossenkomposition*.

Within C.29 q.2 c.6, the decision taken by the council celebrated *apud Vermeriam* (753) allows whoever has married a slave girl thinking that she was free to redeem her or to marry another woman.⁹⁷ Should he have known that she was a slave, he would have her as his legitimate wife. The person behind the 5. *Marginalienhand* makes two comments: first, it is not a precept, but an advice; and second, the children will be *spurii et ingenui* and will receive their dowry from the asset (of the mother), just as it was established by a constitution of the Emperor Antoninus of the year 215 (*Cod. Just.* 5.18.3). Both comments appear in the manuscripts with the *erste Glossenkomposition*, for example in *Mc*:

Glosses to C.29 q.2 c.4
Sg 171ab

Glosses to C.29 q.2 c.4
Mc fol. 265ra marg.

n(on) est h(oc) p(receptum) set
c(onsilium)

Consilium esse non preceptum⁹⁸

Filii uero spurii et ingenui erunt et
ex peculio eius dotem recipiunt ut C.
soluto matrimonio l. ii.

Filii uero spurii et ingenui erunt et
ex peculio eius dotem recipiunt ut C.
soluto matrimonio l. ii⁹⁹

The gloss to C.30 q.1 d.p.c.2 also belongs to the *erste Glossenkomposition*. With regard to spiritual kinship, the first two *auctoritates* of the question – C.30 q.1 c.1,

97 C.29 q.2 c.4. The canon belongs to the early versions of Gratian's *Decretum*: José M. Viejo-Ximénez, "La redacción original de C.29 del Decreto de Graciano," *Ius Ecclesiae* 10 (1998), 149–185.

98 *Bi*: *Consilium esse et non preceptum*. *Gf*: *Concilium non potest esse preceptum*. *Hk*: *Concilium est preceptum <sic>*. *Pk*: *Consilium est non preceptum*.

99 *Bi*: *Filii uero spurii et ingenui erunt et ex peculio eius dotem recipiunt*. *Vt C. Solutio matrimonio l. ii*. *Gf*: *uero spurii et ingenui erunt et ex peculio dotem receperint*. *Vt C. Solutio matrimonio l. ii*. *Hk*: *Filii uero spurii et ingenui erunt et ex peculio eius dotem recipient*. *Vt C. Solutio matrimonio*. *Pk*: *Filii uero spurii ingenui erunt et ex peculio eius dotem recipient*. *Vt C. Solutio matrimonio l. iii*.

Deusdedit (J³ †3203; JE †2003, 615–618) and C.30 q.1 c.2, Council of Compiègne (757), c.15 – forbid the man who godparented to his son to give the marital duty (*sue uxore debitum reddere non ualeat*). This prohibition (known as *cognatio spiritualis superueniens*) seems to go against the following *auctoritates* cited by Gratian: *E contra uero ...* (d.p.c.2). The master solved the apparent contradiction – *separe(n)tur*: C.30 q.1 cc. 1 and 2; *non separe(n)tur*: cc. 3, 4, 6, 7 – in C.30 q.1 d.p.c.10 without giving a proper explanation. Gratian did not respond to all heterogeneous situations considered by his predecessor popes, bishops and councils, because he confined himself within the limits of the original question.¹⁰⁰ The person behind 5. *Marginalienhand* suggested a starting point for the harmonization of the contradicting authorities: *supra dicta rigorem seruant, sequentia temperant* (p. 172b). This gloss to C.30 q.1 d.p.c.2 appears, for instance, in *Bi Gf (conseruant) Hk Mc*.¹⁰¹

Canon 4 of the council of Tribur (895) – that is, C.30 q.4 c.4 – allows the male to marry his deceased godfather's wife, as long as there is no other impediment, such as consanguinity or spiritual kinship. The person behind 5. *Marginalienhand* makes two comments: *subaudi ex quodam marito* and *Quia postea eam accepit, uel postea rem cum ea non habuit*. Both glosses belong to the *erste Glossenkomposition*, such as found in *Mc*:

Glosses to C.30 q.4 c.4
Sg 174a

Glosses to C.30 q.4 c.4
Mc fol. 258rb

subaudi ex quodam marito

Subaudi ex eodem marito¹⁰²

100 Enrique de León, *La "cognatio spiritualis" según Graciano* (Milano, 1996), edits C.30 qq.1, 3 and 4 (138–168), and analyses the intricate content of the *auctoritates* of C.30 q.1 (241–247).

101 On *Sg* 173a lower margin, 5. *Marginalienhand* copied C.30 q.1 d.p.c.7, although he indicated that it should be inserted before c.6. Larrainzar, "El borrador de la Concordia de Graciano (n. 1)," 660, describes the structure and content of C.30 q.1 in *Sg*.

102 Weigand, *Die Glossen* (n. 6), gloss n. 1500a. *Bi*: although the microfilm is not clear, the gloss *Subaudi* could go before *Commatrem*; there is no trace of *Qui postea*. *Gf*: the order of the three glosses is *Subaudi*, *Quia postea* and *Commatrem*. *Hk*: has the glosses *Subaudi* and *Commatrem*, but the copyist wrote *Commatrem* beside C.30 q.4 c.5. *Mv*: glosses *Subaudi* and *Commatrem*; *Subaudi ex eodem filio marito* /// (Weigand, *Die Glossen* (n. 7), gloss n. 1500b); *Compatrem uiduam sui compatris post eius mortem licite posse ducere*. *Pk*: *Quia postea eam accepit, uel postea rem non habuit. Commatrem uiduam sui compatris post eius mortem licite ducere non posse*. Weigand, "Die Dekretabbreviatio Quoniam (n. 3)," 265, found *Subaudi* in 19 manuscripts.

103 Weigand, *Die Glossen* (n. 7), gloss n. 1482.

104 Weigand, *Die Glossen* (n. 7), gloss n. 1468. Weigand, "Die Dekretabbreviatio Quoniam (n. 3)," 265, found *Quia postea* in 15 manuscripts.

table (*cont.*)

–	Commatrem uiduam sui compa- tris post eius mortem licite posse ducere ¹⁰³
Quia postea eam accepit, uel postea rem cum ea non habuit	Qui postea eam accepit, uel postea rem non habuit cum ea ¹⁰⁴

Appendix 2 offers more examples of the relationship between the glosses made by the person behind 5. *Marginalienhand* and the glosses of the *erste Glossenkomposition*. This correspondence places his corrections and comments on the *Exserpta* in the early 50s of the twelfth century.¹⁰⁵ Unlike 1. *Marginalienhand*, 5. *Marginalienhand* could have had a glossed copy of the *Decretum vulgatum* close at hand. This person, however, was not the last one that worked on the *Exserpta* of *Sg*.

7 The *Stroma Rolandi*

The hand that on *Sg* p. 20b comments the word *originarios* of D.54 c.11 worked after the 5. *Marginalienhand*. The definition *Originarii sunt serui glebe i(d est) qui sunt asscripti possessionibus* does not belong to the *erste Glossenkomposition*: at least it does not appear in *Bc Bi Gf Gg Hk Mc Mv Pk*. In *Bi* an interlinear gloss to D.54 c.11 says: (*originarios*) *qui serui glebe dicitur*. The manuscripts *Hk Mv* share the following gloss to the words *filia originarii* of C.32 pr.: *Originarius seruus uel seruus ab origine*. In Bologna, the author of the *Summa Quoniam in omnibus* and *Rufinus* explained the word *originarii* of D.54 c.11 by means of its relationship with the ground (*gleba*), but they do not use the more abstract expression *possessionibus* as the gloss of *Sg* does.¹⁰⁶ When commenting on the C.32 pr., Etienne de Tournai preferred the word *colonus*: *Est enim originarius colonus qui natus est in gleba et eius cognatio agriculturam peragit*.¹⁰⁷ The person behind the hand who copied the definition of *originarii* in *Sg* could also

105 Weigand, “The Development (n. 6),” 58, dates the *erste Glossenkomposition* to “about 1150.”

106 Schulte, *Die Summa* (n. 67), ad D.54 c.11: *Originarii idem sunt qui et ascripticii, eo quod glebae ita sunt ascripti, ut eam sine dominorum voluntate deserere non possint. Dicti originarii, quia terram alicuius ab ipsa origine patris vel avi aut proavi ad conditionale servitium reddendum retinent. Qui vulgo manentes a manendo, secundum leges vero servi glebae appellantur* (37). Singer, *Die Summa* (n. 86), ad D.54 c.11, 141: *Rufinus* used the same words.

107 Paris, Bibliothèque nationale de France, lat. 14609, fol. 254ra; and München, Bayerische Staatsbibliothek, lat. 17162, fol. 162rb.

be responsible for the glosses to C.1 q.1 c.2, c.3 and c.12 on p. 29b. I have not yet found any evidence to date these glosses:

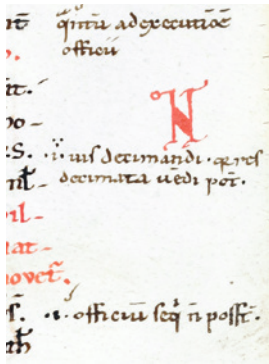


FIGURE 9.6

Sg 29b glosses to C.1 q.1 c.2, c.3 and c.12

On the contrary, two glosses in the margins of *Sg* agree with the comments of Master Rolandus.¹⁰⁸ These annotations belong to 3. *Marginalienhand*, the person who marked some *distinctiones* and *questiones* and whose *Allegationen* mention the numbering of the *distinctiones* and *causae* according to the *Decretum vulgatum* (Appendix 1).¹⁰⁹ The first gloss by 3. *Marginalienhand* refers to C.4 and the second one to C.16:

FIGURE 9.7 *Sg* 73ab upper margin 3. *Marginalienhand*

Can one excommunicated person accuse another one? It is the first question that Gratian poses in the prologue of C.4. The master denies this possibility quoting two *auctoritates*, c.1 and c.2 of the VII Council of Carthage (419), and the response of Pope Nicholas I to Emperor Michael (J³ 5980: JE 2796, 865).¹¹⁰ Only the Council of Carthage's canon appears in the *Exserpta*. The author of the *Summa Quoniam in omnibus* accepted Gratian's explanation and even added new *auctoritates* in its favour.¹¹¹ On his part, the author of the gloss of

108 At least with the *recensio mixta* (3, 4, 5 recensions) of his *Stroma: Die Summa magistri Rolandi, nachmals Papstes Alexander III*, ed. Friedrich Thaner (Innsbruck, 1874).

109 Lenz, Ortelli, *Die Handschriften* (n. 2), 18. The person behind 3. *Marginalienhand* also copied 8 *dicta* and *auctoritates* that belong to the *Decretum vulgatum*: D.28 c.12 (*Sg* 4a); D.34 c.13 (*Sg* 10ab, top margin); D.61 c.4 (*Sg* 22a); ex C.3 q.5 c.13 (*Sg* 69b, top margin); ex C.3 q.5 c.10 (*Sg* 69b, top margin); ex C.15 q.6 c.2 (*Sg* 123a, top margin); C.30 q.4 c.3 (*Sg* 174a) and C.30 q.4 c.6a (*Sg* 174a, lower margin). He also could be responsible of C.6 q.3 c.4 (*Sg* 79a, top margin) and C.6 q.4 c.5b (*Sg* 79b).

110 C.4 q.1 c.1 and c.2.

111 *Quarum prima est*, an in excommunicatione constitutus alium accusare valeat? *Quod autem excommunicatus ad accusationem non admittatur, auctoritate Nicolai*,

Sg remembered three exceptions, also found in *Master Rolandus*: when the accuser was accused either of the same crime as the one accusing the accused, or of the crime of simony, or of the crime of heresy:

Gloss to C.4 q.1

***Sg* 73 upper margin**

/// fieri docetur nisi eodem uinculo foret annexus s(iue) crimine simonie aut hereseos esset perplexus

Comment to C.4 q.1

***Stroma Rolandi*¹¹²**

Hic primum quaeritur, an aliquis in excommunicatione constitutus alium valeat accusare. Hoc fieri minime debere multis auctoritatibus docetur, nisi eodem vinculo foret annexus, vel crimine simoniae aut haeresos esset perplexus

While Rufinus seemed more interested in explaining what an ecclesiastical crime is, Etienne de Tournai followed the teachings of *Rolandus*, although he added the crime of lese majeste.¹¹³

The second gloss inspired by the teachings of *Master Rolandus* is one of the rare *Diskursive Erörterung* of *Sg*:

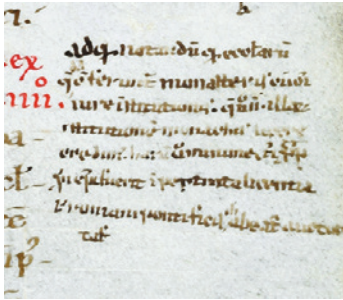


FIGURE 9.8

Sg 133b gloss beside C.16 q.2 (q.5) c.9 (c.2) 3.

Marginalienhand

The issue discussed in C.16 q.2 is whether monks are granted the investiture of those who are going to take charge of the pastoral care in the churches of

Carthaginensis concilii, Stephani, Fabiani aliorumque multorum declaratur (Schulte, *Die Summa* (n. 67), 68).

¹¹² Thaner, *Die Summa* (n. 108), 19–20.

¹¹³ Rufinus: *Crimen ecclesiasticum illud dicitur, cuius examinatio et condempnatio pertinet tantum ad iudicem ecclesiasticum, ut crimen symonie, hereseos, periurii et adulterii* (Singer, *Die Summa* (n. 86), 274). Etienne de Tournai: *Sed sunt tamen casus, in quibus credimus, etiam in excommunicatione positos accusare posse, ut in crimine simoniae, haeresos, laesae maiestatis* (Schulte, *Stephan* (n. 57), 200).

their property. According to c. 34 of the IV Council of Toledo (633), the newly built basilicas belong to the bishop, which seems to give him the right of appointment.¹¹⁴ The gloss of *Sg* and *Master Rolandus* propose the following distinction: while some churches are entrusted to the monks solely, in other cases the concession does not include the right of institution. They read as follows:

Gloss beside C.16 q.2 (q.5) c.9 (c.2) <i>Sg</i> 133b	Comment to C.16 q.2 <i>Stroma Rolandi</i> ¹¹⁵
Ad quod notandum quod ecclesiarum quedam conferuntur monasteriis cum omni iure institutionis, quedam uero non. Illarum institutione monachis licere credimus, harum uero minime nisi proprii episcopi fuerit impetrata licentia uel Romani pontificis habeatur auctoritas	Ad quod notandum quod ecclesiarum quaedam conferuntur monasteriis cum omni iure institutionis, quaedam uero minime. Illarum institutionem licere monachis credimus, harum uero minime, nisi proprii episcopi fuerit impetrata licentia uel Romani pontificis habeatur auctoritas

Master Rolandus was active in the 50s or even in the early 60s of the twelfth century which could provide a *terminus a quo* to date these comments on the *Exserpta*¹¹⁶ Two additional glosses written by the person behind 3. *Marginalienhand* would also belong to this modern stage.

The first additional gloss refers to the word *parentes* of C.3 q.5 c.1:¹¹⁷

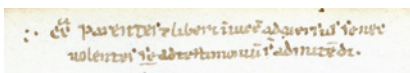


FIGURE 9.9 *Sg* 69a upper margin: gloss to C.3 q.5 c.1 3. *Marginalienhand*

- 114 C.16 q.2 (q.5) c.9 (c.2). Glosses of the *erste Glossenkomposition* link the appointment to the possession: *Cuius est possessio eius sit institutio* or *Eidem esse institutionem cuius possessionem* (Kuhlkamp, "Die erste Glossenkomposition (n. 65)," gloss n. 37 to C.16 q.2 c.1).
- 115 Thaner, *Die Summa* (n. 108), 46. *Rufinus'* comment was more accurate: *Sciendum quod capelle alie traduntur monachis ab episcopis cum omni iure suo; alie sunt, quas ipsi monachi suis possessionibus edificant: prime capelle per monachos instituende sunt, secunde per episcopos* (Singer, *Die Summa* (n. 86), 357).
- 116 Rudolf Weigand, "Magister Rolandus und Papst Alexander III," *AKKR* 149 (1980), 3–44; idem, "Glossen des Magister Rolandus zum Dekret Gratians," in *Miscellanea Rolando Bandinelli Papa Alessandro III*, ed. Filippo Liotta (Siena, 1986), 389–423; and idem, *Die Glossen* (n. 7), 570–572.
- 117 This hand is also responsible for the addition of C.3 q.5 c.13 and C.3 q.5 c.10 on *Sg* 69b upper margin.

The author of the comment noticed the contradiction between the decretal of Pope Calixtus I (J³ †162: JK †86, 217–222), who allowed the *parentes* to testify against each other – *si uoluerint et inuicem consenserint* –, with the fourth book of the Code of Justinian, where parents are forbidden to testify – *nec volentes* – against each other or their children (*Cod. Just.* 4.20.6 [Diocletianus et Maximianus, 286] = C.4 qq.2–3 c.3).¹¹⁸ The author of the gloss of *Sg* did not solve the dilemma. *Rufinus* and Etienne de Tournai proposed a broad interpretation of the term *parentes*: Pope Calixtus, they both state, does not speak of parents, but of relatives (*consanguinei*):

Gloss to C.3 q.5 c.1 <i>Sg</i> 69 upper margin	Comment to C.3 q.5 c.1 <i>Rufinus</i> ¹¹⁹	Comment to C.3 q.5 c.1 Etienne de Tournai ¹²⁰
Contra: parentes et liberi inuicem aduersus se nec uolentes se ad testimonium sunt admitendi	Consanguinei (usq.) inter se, i. e. contra se inuicem, parentes, i. e. consanguinei, sicut vulgo dicitur; nam si proprie hic intelligantur parentes, occurret tibi quoddam legis contrarium, ubi dicitur quod parentes et liberi inuicem aduersus se nec volentes ad testimonium sunt admitendi, ut infra Ca. IV. q. III. Item in criminali. Nisi forte diceretur illud in criminali, hoc in civili causa exaudiendum fore	c. 1. <i>parentes</i> . largo modo intellige, sicut vulgariter dicitur, i. e. qui sunt de eadem parentela, ne si proprie dixeris <i>parentes</i> , contrarium sibi occurrat illius legis de testibus, quae prohibet parentes et liberos inuicem aduersus se nec volentes ad testimonium admitti. <i>inter se</i> , i. e. alter contra alterum. <i>et non in alteros</i> , i. e. non pro altero contra extraneos

The person behind 3. *Marginalienhand* would also be the author of the second additional gloss:

118 A gloss of the *erste Glossenkomposition* alludes here to *Cod. Just.* 4.20.3 (*Valerianus et Gallienus*, 255): *C. de testibus etiam* (*Gf Gg Hk Mc Mv Pk*).

119 Singer, *Die Summa* (n. 86), 267.

120 Schulte, *Stephan* (n. 57), 195.

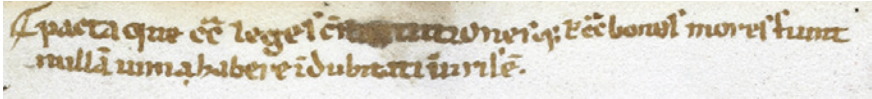


FIGURE 9.10 Sg 154 upper margin: gloss on C.22 q.4 c.12 and c.13 3. *Marginalienhand*

While reading C.22 q.4 on illicit oaths – the story thread of the question is *illicita iuramenta seruare non liceat* –, the person responsible for this gloss had a rule in mind: *Pacta que contra leges, constitutiones uel contra bonos mores fiunt nullū uim habere indubitatū iurē* (*Cod. Just.* 2.3.6, Antoninus, 213). He placed the rule on the margin of the *Exserpta* after a series of ten conciliar canons and fragments of the Church Fathers from which Gratian concluded: *iuramenta illicita laudabiliter soluta, dampnabiliter obseruantur* (C.22 q.4 d.p.c.19).¹²¹ The person behind 3. *Marginalienhand* reinforced the canonical *auctoritates* with the Roman law.

The marginal annotations by 3. *Marginalienhand* result in the following photofit portrait: this person knew the structure and content of the *Decretum vulgatum*, was aware of the explanations of the first generation of Bolognese teachers on certain sections of Gratian's work, and he was skilled enough to relate canon and Roman law. These are traits distinctive of someone that frequented classrooms, not of someone engaged in lawsuits. His brief activity on the *Exserpta* is subsequent to the *Stroma Rolandi* from the late 50s or the early 60s of the twelfth century, but it is unlikely that it should be dated in the following decades when the great commentaries on the *Decretum* were widespread.

8 Conclusive Summary

The glosses to the *Exserpta Sanctorum Patrum* collect a handful of teachings from the masters of the first two generations of Bolognese decretists. From the notes made on Gratian's *auctoritates* and *dicta* that were copied in the first part of Sg, those attributed to the marginal hands 1, 5 and 3 have a special significance when answering the questions initially raised: who used the *Exserpta* preserved in Sankt Gallen and also where and when did they use it?

¹²¹ Structure of C.22 q.4 according to the *Exserpta*: C.22 q.4 c.1 (VIII Toletanus, c.2), c.2 (Ambrosius, *De Offitiis*, 1.50), c.3 (Augustinus, *Sermo* 308), c.5 (Ysidorus, *Sinonimiis*, 58), c.6 (Beda, *Hom.*, 43), c.8 (Ambrosius, *De Offitiis*, 3.12), c.11 (*Ylerdensi*, c.8), c.12 (Ambrosius, *De Offitiis*, 3.12), c.13 (Ysidorus, *Sententiarum*, 2.31), c.17 (*Eliberitano*, c.1), d.p.c.19, c.21 (Augustinus, *De bono coniugale*, c.4), d.p.c.21, c.22 (Augustinus, ?), d.p.c.22, c.23 (Ambrosius, *De Offitiis*, 3.10) and d.p.c.23: Larrainzar, "El borrador de la Concordia de Graciano (n. 1)," 660.

1. *Marginalienhand*'s definitions correspond to a primitive state of the decretistic: they reflect a level of development of the reflections on Gratian that is previous to the first comprehensive commentaries of the school of Bologna, the *Summa Quoniam in omnibus* and the glosses of the *erste Glossenkomposition*. Since this person also collaborated in the copying of the *Exserpta*, the making and the first use of this singular work took place in an academic environment. In this initial phase, the reading of some sections of the first part of *Sg* provoked the copying of a few fragments of Roman law and some canonical texts. These supplements were not taken from a *Decretum vulgatum*. Nor do they come from an old version of the *Decretum* of which the first part of *Sg* would be an abbreviation. Whoever was the author of the glosses and the additions to the 1. *Marginalienhand* – the same copyist-glossator? a teacher whose lectures he heard? – his work took place in a study centre led by people who were familiar with the liberal arts, theology and Roman law. The Justinian fragments that he transcribed point unequivocally to Bologna.

The people who are behind the 5. and the 3. *Marginalienhand* thought that the glosses of the *erste Glossenkomposition* and the explanations of the *Stroma Rolandi* clarified the meaning of certain passages of the *Exserpta*. They also completed some sections of the work with canonical texts, for which they used a *Decretum vulgatum*. Whether they did this work in the classrooms or in the courts has less interest than the fact that in the 50s and beginning of the 60s of the twelfth century, the *Exserpta* were still being used to teach or apply canon law. In this late stage the attempts to redirect the structure and content of the work to the structure and content of the *Decretum vulgatum* were so timid that it is necessary to doubt that those responsible for these annotations – the few distinctions and questions marked by the 3. *Marginalienhand* and the few *auctoritates* copied by the marginal hands 1, 2, 3, 5 and 6 – had the purpose of doing so: no one intended to transform the *Exserpta* into a *Decretum vulgatum*.

All these facts, together with the coexistence of *Allegationen* prepared according to the structure of the *Exserpta* with *Allegationen* that follow the structure of the *Decretum vulgatum* – the work of the marginal hands 2 and 3 –, invite the modern reader to locate the elaboration and use of the first part of *Sg* to a time and a place close to the time and place where Gratian's work was composed and commented for the first time: the time and place in which modern scholars locate the origins of the science of canon law.

Within the family tree of Gratian's *Decretum*, the *Exserpta* of Sankt Gallen and the *Concordia* of *Aa Bc Fd P* are collateral relatives. They both transmit old material, so they can help in the search of the lost *Ur-Gratian*. Although the *Exserpta* did not have offspring, from the late 40s of the 12th century some teachers, students, or lawyers used the first part of the manuscript to write down the lectures of decretistic teachers. This fact gives a certain degree of

authority to the *Decretum Gratiani in fieri* that is preserved in Sankt Gallen, Stiftsbibliothek, 673.¹²²

Appendix 1: *Allegationen*

1. Old *Allegationen*

1	[p. 35b]	I. c. xiii. q. i. c. Illi autem qui tam	from C.1 q.2 c.2	to C.12 q.1 c.25
2	[p. 62a]	q. u. i. ii. c. negligere	from C. 2 q.7 d.p.c.41	to C.2 q.7 c.55
3	[p. 76a]	. c. iii. q u iii. c. negligere	from C.5 q.5 c.1	to C.2 q.7 c.55
4	[p. 90b]	I. i. c. xiii. q. iii. c. episcopus si tertiam	from C.10 q.1 c.7	to C.12 q.3 c.4
5	[p. 100a]	. c. iii. q u iii. c. negligere . c. ii. q. ii. c. ///	from C.11 q.3 c.100	to C.2 q.7 c.55 to ///
6	[p. 102a]	S. i. ca. de sym. Clericos autem q. iii. c. i.	from C.12 q.1 c.22	to C.1 q.2 c.6
7	[p. 104ab]	. c. xi. q. ii. c. capselas	from C.12 q.2 c.20	to C.10 q.2 c.1
8	[p. 111b]	i. c. xvii. q. i. c. Si quis laicus uel clericus	from C.13 q.1 d.p.c.1	to C.16 q.1 c.42
9	[p. 112a]	i. c. xvii.	from C.12 q.2 d.p.c.1	to C.16
10	[p. 115b]	S. c. ii. q. iii. c. Pastor ecclesie	from C.14 q.1 d.p.c.1	to C.1 q.2 c.7
11	[p. 126a]	S. i. xiiii ca. q. ii. c. Vbicumque temporum uel locorum	from C.16 q.1 c.16	to C.13 q.2 c.6
12	[p. 165b]	S. i. i. ca. q. i. c. ii.	from C.27 q.1 c.43	to D.27 c.3
13	[p. 166a]	S. c. i. q. i. c. ii.	from C.27 q.1 d.p.c.43	to D.27 c.3

2. *Marginalienhand* (cedilla under “q” of *quaestio*) wrote the *Allegationen* 1, 4, 6, 8, 9, 10, 11, 12 and 13.

3. *Marginalienhand* wrote *Allegationen* 2, 3, 5 and 7.

2. Modern *Allegationen*

14	[p. 7a]	S. e. d. px. c. vii.	from D.31 d.p.c.9	to D.28 c.14?
15	[p. 20b]	I. d. e. si serus. Hoc dicitur de /// qui factus est //aconus /// dictione domini ///	from D.54 c.11	to D.54 c.20
16	[p. 32b]	c. e. q. uii. quod pro re.	from C.1 q.1 c.41	to C.1 q.7 c.7

¹²² On the question whether *Sg* preserves a *Decretum Gratiani in fieri*, see also Winroth, “Sankt Gallen, Stiftsbibliothek, 673 in Context (in this volume).”

(cont.)

17	[p. 65b]	.c. u. q. u. c. non uso .c. i. q. i. i. c. clericus .et c. sicut inquit .c. ead. q. uii. c. petru.	from C.2 q.7 c.56	to C.5 q.5 c.1 to C.1 q.2 c.6 to C.2 q.7 c.46 to C.2 q.7 c.40
18	[p. 68a]	i. x.i. cp. ii.	from C.3 q.3 c.1	to C.11 ?
19	[p. 68a]	s. ii. q. uii. alieni	from C.3 q.4 c.1	to C.2 q.7 c.23
20	[p. 68ab]	i. xxxii. q. iii. c. ii.	from C.3 q.4 c.4	to C.32 q.3 c.2
21	[p. 68ab]	i. xi. q. i. contra si quis	from C.3 q.4 c.5	to C.11 q.1 c.10 or c.18
22	[p. 68ab]	i. xxx. q. u. iudicantem	from C.3 q.4 c.7	to C.30 q.5 c.11
23	[p. 68b]	qualiter coniungantur legitime ostenditur in ca(usa) xxx. cap. aliter	from C.3 q.4	to C.30 q.5 c.1
24	[p. 68b]	i. ui. q. i. infames	from C.3 q.4 c.6	to C.6 q.1 c.17
25	[p. 75ab]	Nullius accusatio per scripta sus- cipiatur /// c ii q u iii per scripta et c iii q u iiii absente	from C.5 q.2	to C.2 q.8 c.5 to C.3 q.9 c.3
26	[p. 75a]	S. c ii q i ///	from C.5 q.3 c.1	to C.2 q.1 c.10? to C.2 q.1 c.11? to C.2 q.1 c.12?
27	[p. 84a]	c. xu.i. q. i. c. monachi	from C.7 q.1 c.46	to C.16 q.1 c.33? to C.16 q.1 c.35?
28	[p. 89a]	c. xu. i. q. u. ii. episcopus	from C.9 q.3 c.4	to C.16 q.6 c.6? to C.15 q.7 c.7?
29	[p. 125a]	i. xviii. q. i. cap. i.	from C.16 q.1 c.3	to C.18 q.1 c.1,
30	[p. 125a]	s. vii. q. i. precepit hoc nequaquam	from C.16 q.1 c.4	to C.7 q.1 c.45
31	[p. 125a]	i. xxii. q. ii. in ipsarum	from C.16 q.1 dictum proprium	to C.22 q.2 c.7
32	[p. 125b]	i. xviii q. i.i. peruenit	from C.16 q.1 c.8	to C.18 q.2 c.20 (missing in <i>Sg</i>)
33	[p. 141a]	Sup. uel in ca. monachorum c. xui. c. xli.	from C.17 q.4 c.1	to C.16 q.1 c.61
34	[p. 142a]	i. c. x vi de monachis	from C.18 q.1 c.1	to C.16 q.1 c.3

2. *Marginalienhand* was responsible for nn. 29, 30 and 31. That nn. 14 and 33 belong to 2. *Marginalienhand* is not clear (Lenz, Orтели, *Die Handschriften* (n. 2), 18). The first *Allegation* on p. 125a could also belong to 2. *Marginalienhand*, but its meaning is unclear: *x v iiii? x iiii? q. ii. ubicumque* (from C.16 q.1 c.2 to C.13 q.2 c.6 or c.26?).

3. *Marginalienhand* was responsible for nn. 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 32 and 34.

The *Allegationen* written by 3. *Marginalienhand* on p. 69a, 73a, 79a, 89a, 123b, 134b and 144a are difficult to understand.

Appendix 2: Other Glosses by 5. *Marginalienhand*

<i>5. Marginalienhand</i>	<i>Erste Glossenkomposition</i>
[1] contra ea que ualent ad salutem iurat <i>Sg</i> 156b interlinear gloss next to C.22 q.5 c.1	Contra ea que ualent ad salutem iurare <i>Mc</i> marginal gloss to C.22 q.5 c.1 Contra ea que /// /// ad salutem <i>Pk</i> marginal gloss next to C.22 q.5 c.1
[2] non debet coniugium inter (tales) ^{pc} personas fieri sed si fiat non est separandum <i>Sg</i> 173 marginal gloss next to C.30 q.3 c.1	Non debet coniugium inter tales perso- nas sed si fiat non est separandum <i>Bi</i> marginal gloss next to C.30 q.3 c.5 Non debet coniugium inter tales perso- nas fieri sed si fiat non est separandum <i>Gf</i> marginal gloss to C.30 q.3 c.5 Non debet coniugium inter tales perso- nas fieri si fiat non est separandum <i>Hk</i> marginal gloss next to C.30 q.3 d.p.c.4 Non debet coniugium inter tales fieri sed si fiat non est separandum <i>Mc</i> marginal next to gloss to C.30 q.3 c.5 Non debet coniugium inter tales perso- nas fieri sed si fiat non est separandum <i>Pk</i> marginal gloss next to C.30 q.3 c.5
[3] duas tales quis habere potest quam alterius filium tenuerunt que quodam modo commatres dicuntur <i>Sg</i> 174a marginal gloss to C.30 q.4 c.5	Vel Triburiense concilium et Paschalis de illis loquitur que autem <sic> sunt commatres quam superest uir alteram accepit uxorem uel duas tales potest quis habere quam alterius filium tenuerunt que dicuntur quodam modo commatres <i>Gf</i> marginal gloss next to C.30 q.4 c.6 <i>Hk</i> marginal gloss next to C.30 q.4 d.p.c.5 <i>Mc</i> marginal gloss next to C.30 q.4 c.5 <i>Pk</i> marginal gloss next to C.30 q.4 c.1

(cont.)

<i>5. Marginalienhand</i>	<i>Erste Glossenkomposition</i>
[4] i(d est) uiro primo uiuente <i>Sg</i> 176a marginal gloss next to C.31 q.1 c.1	i(d est) uiuente uiro primo <i>Mc</i> marginal gloss next to C.31 q.1 c.1 uiuente uiro primo <i>Hk</i> interlineal gloss to C.31 q.1 c.1
[5] et in mortem uiri fuit machinata <i>Sg</i> 176b marginal gloss next to C.31 q.1 c.3	et in morte uiri est machinata <i>Gf</i> interlineal gloss to C.31 q.1 c.3 in morte uiro non est machinata <i>Hk</i> interlineal gloss to “coniugale debi- tum” C.31 q.1 d.p.c.2
[6] qui uoluntas sine effectu /// ecclesiam – periurii crimine non tenentur dum effectu tenentur <i>Sg</i> 177a marginal gloss next to C.31 q.3 c.1	–
[7] non si non est ibi spes continentie – <i>Sg</i> 177b marginal gloss next to C.32 pr	–
[8] corporis non mentis – <i>Sg</i> 177b marginal gloss next to C.32 pr.	–
[9] i(d est) illicitum facit – <i>Sg</i> 178a interlineal gloss to C.32 q.1 c.2 (Sola fornicatio est que uxoris uincit affectum)	–
[10] i(d est) manifesta <i>Sg</i> 178a interlineal gloss to C.32 q.1 c.2 (uel fornicationis suspitio)	manifeste legitimis testibus <i>Gf</i> gloss interlineal to C.32 q.1 c.2 manifeste legitimis testibus comprobare <i>Hk Mc</i> interlineal gloss to C.32 q.1 c.2

(cont.)

<i>5. Marginalienhand</i>	<i>Erste Glossenkomposition</i>
[11] si cum ea postea dormierit ex quo eum adulterium cognouerit <i>Sg</i> 178a marginal gloss next to C.32 q.1 c.3	Si cum ea postea dormierit ex quo fecit eum adulterium <i>Gf</i> interlinear gloss to C.32 q.1 c.3 Si cum ea postea dormierit ex quo sit enim adulterium <i>Mc</i> marginal gloss next to C.32 q.1 c.3
