

Chapter 5

Close Reading of the Case Statements

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[Introduction to comparative translations of the Sg and Friedberg (vulgate) texts of the case statements or *themata*.]

The rationale for using Friedberg as the baseline for comparison is that Winroth's edition in progress of the first recension is not yet complete enough for the purpose. As of the most recent, 22 April 2019, version, eight case statements (for cases 1-3, 9, 15, 24, 30, and 34) appear to have a complete critical apparatus. An addition six case statements (for cases 4-7, 10, and 11) have an incomplete critical apparatus that records variant readings from Fd only. The critical apparatus for the case statement for case 35 records a single variant reading from Aa. The remaining 21 case statements (for cases 8, 12-14, 16-23, 25-29, 31-33, and 36) have no critical apparatus at all.

Fortunately, the text of the case statements is fairly stable over the course of development of the *Decretum* between its first recension and vulgate versions. Winroth in the appendix to *The Making of Gratian's Decretum*¹ reports only one significant variant reading for a case statement. The first-recension version of C.19 d.init. omits the phrase "unus relictus propria ecclesia eo inuito, alter dimissa regulari canonica cenobio se contulit." That the vulgate supplies

¹ Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000), 216.

the missing phrase is meaningful because it makes sense of the fact that there are two clerics in the story, an otherwise inexplicable feature of the first-recension and Sg versions of the case statement. Textual differences between the first-recension and vulgate versions of the other case statements are relatively minor. (e.g., “episcopus minime concurrit” AaBcFdP versus “episcopus minime occurrit” Fr. in C.4 d.init.)

This approach—applying the variants recorded in Winroth’s appendix to Friedberg’s vulgate text to generate a stand-in or proxy for the first recension—is consistent with the approach I have taken throughout my dissertation project. Winroth himself took a similar approach when he created the baseline text for the edition in progress of the first recension (although he imposed a set of orthographic conventions different from Friedberg’s on the resulting text). Regardless of how Winroth conceptualized what he was doing, it is an approach that is well-theorized in a Digital Humanities context as an example of “deformance.” The term, proposed by Lisa Samuels and Jerome McGann in “Deformance and Interpretation” (1999), conflates the words “deformation” and “performance”, and describes a process through which a text is transformed by the application of a series of deformances to generate a “paratext”.² The paratext is different from the original text, but defined by the deformances through which it was generated from it, and can be analyzed for otherwise unavailable insights into the original text.

² Lisa Samuels and Jerome McGann, “Deformance and Interpretation,” *New Literary History* 30, no. 1 (1999): 25–56.

Sg

The primary focus of my dissertation has been on the textual relationship between the case statements in Part II of Gratian's *Decretum* and the first-recension *dicta*. As I have discussed at some length in Chapter 4 above, the author of the case statements appears unlikely to have been the same person as the author of the first-recension *dicta*, the person we usually think of as Gratian. The text of the case statements is relatively stable over the course of the development of the *Decretum* from the first recension to the vulgate. There is, however, another version of the text of the case statements that needs to be considered, the one found in the Sankt Gallen Stiftsbibliothek 673 (Sg) manuscript of the *Decretum*.

The version of the *Decretum* preserved in Sg contains around a thousand canons, and it is therefore considerably shorter than either the first recension (1,860 canons) or the vulgate (3,945) versions of the text.³

Formally, Sg is not divided into parts; all of its content is presented in the form of cases. The first case, however, unique to Sg and referred to as Causa Prima to distinguish it from Causa I found in the first recension and vulgate versions, contains a subset of the canons found in Part I in other versions of the *Decretum*. Sg has 33 cases, adding Causa Prima and omitting cases 24, 25, 26, and 28.

³ See Carlos Larrainzar, "El Borrador de La 'Concordia' de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg)," *Ius Ecclesiae: Rivista Internazionale Di Diritto Canonico* 11, no. 3 (1999): 593–666 for number of canons in Sg, emphasizing that it is approximate. Pennington has 1,050. See Winroth, *The Making of Gratian's Decretum* for number of canons in first recension. 3,945 is a conventional number.]

The Sg version of the text of the case statements has 3,226 words, shorter than but comparable to the first-recension and vulgate versions (3,605 words confirm). The text of the 32 directly corresponding case statements, removing C.Prima for Sg, and removing C.24, 25, 26, and 28 for the vulgate, is slightly more compact in Sg (3,173 words) than in the vulgate (3,312 words). **The Sg cases statements are not more “verbose” than their vulgate counterparts.**

There are, however noticeable differences in vocabulary.

Comparative Translation of C.4 d.init.

Sg text:

(72b) In excommunicatione quidam erat constitutus et episcopum accusare disponit; adolescentem infra annos xiiii secum ad asserendam causam adducit. Qui dum ab accusatione prohibeatur, facit se testem; et minorem accusatore minor vero accusatoris et testis personam gerere desiderat. Statuta die episcopus ad iudicium non venit suspenditur a communione. Renovato denuo iudicio accusator in accusatione culpabilis invenitur. Demum ad assertionem propriae causae procedit. Queritur ergo primo, an constitutus in excommunicatione possit alium accusare? Secundo, an infra xiiii annos in criminali (73a) causa quis testificari valeat? Tercio, an ab accusatione quis prohibitus testificantis vicem possit assumere? Quarto, accusator et testis an possit idem esse? Quinto, an quis non veniens die praestituta excommunicari debeat id est a communicatione privari? Sexto, si culpabilis quis in episcopali iudicio inveniatur ad assertionem propriae causae sit amplius admittendus?

Sg translation:

Someone was excommunicated and arranges to accuse a bishop; he brings in an adolescent under 14 years for the purpose of asserting the case with him. Who, when he is prohibited from accusation, makes himself a witness and the minor the accuser;⁴ but the minor wishes to perform the role of [both] accuser and witness. On the appointed day, the bishop does not come to court [and] is suspended from communion. After the court reconvened again,⁵ the accuser is found [to be] at fault in [bringing] the accusation. Finally, he proceeds to the assertion of his own case. It is asked therefore first whether an excommunicate can accuse another? Second, whether someone (*quis*) under 14 years is able to testify in a criminal case? Third, whether someone (*quis*) prohibited from accusation can assume the part of testifying? Fourth, whether the same person can be [both] accuser and witness? Fifth, whether someone (*quis*) not coming on the predetermined (*praestituta*) day ought to be excommunicated, that is, deprived of communion? Sixth, if someone (*quis*) found [to be] at fault in the episcopal court ought to be further (*amplius*) admitted to the assertion of his own case?

One of the apparent contrasts between the Sg and vulgate (Fr.) versions of C.4 d.init. is in their use of legal technical terms. The refusal of the accused bishop to appear before the court on the appointed day, presumably because he does not recognize its authority to try a case arising from an improper accusation, is described in the Sg version using everyday language:

“episcopus ad iudicium non venit (the bishop does not come to court).” Similarly in the fifth question arising out of his refusal: *“an quis non veniens die praestituta excommunicari debeat*

⁴ Reading here as *accusatorem*; presumably as a result of scribal error, Sg reads *accusatore*.

⁵ *lit.* “the court having been renewed again”.

(whether someone not coming on the predetermined day ought to be excommunicated).” The vulgate (Fr.) version of C.4 d.init., however, uses *minime occurrit* in place of *non venit* and *occurrens* in the place of *veniens* in a way that presumes that *minime occurrit* is a legal technical term with almost precisely the same meaning we use today when we say that a criminal defendant has been cited for failure to appear in court.⁶⁷

Excommunication is discussed in the Sg version of C.4 d.init. in a way that indicates that the concept is not an entirely settled one. On the one hand, the phrase *in excommunicatione constitutus* seems to be used in the Sg text of the case statement as a legal technical term: someone, like the accuser, who is said to be *in excommunicatione constitutus* seems to have been permanently excommunicated, while the accused bishop is said to have been *suspenditur a communione* (suspended from communion), by implication only temporarily, for his failure to appear in court. On the other hand, the Sg version of the case statement takes care to define excommunication: “*id est a communicatione privari* (that is, to be deprived of communion)”,

⁶ There is also a literary precedent for translating the somewhat opaque phrase *minime occurrit* as “does not appear” in the commentary of Maurus Servius Honoratus on Virgil: “*aut audire quod non dicitur, videre quod minime occurrit* (or to hear what is not spoken, to see what does not appear)”. **Add reference to critical edition of Servius.**

⁷ AaBcFdP reads *minime concurrit* rather than *minime occurrit*. It is not clear whether this variant is meaningful, or whether it simply perpetuates an error introduced into the hypothesized α hyparchetype from which all first-recension manuscripts are now thought to have been derived. **Add reference to Winroth article.**

something the composer of the vulgate (Fr.) version of the case statement does not find necessary.

The Sg version of C.4 d.init. uses the present tense, possibly intended to be understood as historical present, consistently throughout the case statement.

“After **sī**, **nīsī**, **num**, and **nē**, all the **ali**-’s drop away.” Moreland and Fleischer, 217. See also Gildersleeve and Lodge, §107; Allen and Greenough, §310a.

Fr. text:

(Fr. 536) Quidam in excommunicatione constitutus episcopum accusare disponit; adolescentem infra decimum et quartum etatis suae annum ad assertionem suae causae adducit; prohibitus ab accusatione adolescentem accusatorem et se testem facit; adolescens personam accusatoris et testis gerere cupit; die statuta ad electorum iudicium iudicium episcopus minime occurrit; a communione suspenditur; tandem renouato iudicio accusator culpabilis in accusatione inuenitur; demum ad assertionem propriae causae procedit. Hic primum queritur, an in excommunicatione constitutus alium accusare ualeat? Secundo, an infra decimum quartum annum in criminali causa testari quis possit? Tertio, utrum ab accusatione prohibitus personam testificantis possit assumere? Quarto, an idem possit esse accusator et testis? Quinto, an die constituta non occurrens a communione **ait** remouendus? Sexto, si in episcoporum **indicio** accusatoris persona culpabilis inuenta fuerit, an ad assertionem propriae causae de cetero sit admittenda?

The MGH e-text edited by Reuter and Silagi introduced the OCR errors **ait** into the text of the fifth question (*Quinto, an die constituta non occurrens a communione **ait** remouendus?*) and



indicio into the text of the sixth question (*Sexto, si in episcoporum **indicio** accusatoris persona culpabilis inuenta fuerit ...*). The printed version of Friedberg correctly reads *a communione **sit** remouendus* and *in episcoporum **iudicio***.

Fr. translation:

Someone permanently excommunicated (*in excommunicatione constitutus*) arranges to accuse a bishop; he brings in (*adducit*) an adolescent under fourteen years of age to the assertion (t.t.) of his case; prohibited from accusation, he make the adolescent the accuser and himself the witness; the adolescent wishes to conduct/perform (*gerere*) the role (*personam*) of [both] accuser and witness; on the appointed day, the bishop does not appear before (*lit. to*) the court of the judge-electors; he is suspended from communion; at last, after the court reconvened [*lit. the court having been renewed*], the accuser is found [to be] at fault in [bringing] the accusation; finally he proceeds to the assertion (t.t.) of his own case.

AaBcP text:

Quidam in excommunicatione constitutus episcopum accusare disponit; adolescentem infra xiiiium etatis sue annum ad assertionem sue cause adducit. Prohibitus ab accusatione adolescentem accusatorem et se testem facit. Adolescens personam accusatoris et testis gerere cupit; die statuta ad iudicium electorum iudicum episcopus minime concurrit; a communione suspenditur; tandem renouato iudicio accusator culpabilis in accusatione inuenitur; demum ad assertionem proprie cause procedit. Hic primum queritur, an in excommunicatione constitutus alium accusare ualeat? Secundo, an infra xiiiium annum in criminali causa testari quis possit? Tercio, utrum ab accusatione prohibitus personam testificantis possit assumere? Quarto, an

idem possit esse accusator et testis? Quinto, an die constituta non occurrens a communione sit remouendus? Sexto, si in episcoporum iudicio accusatoris persona culpabilis inuenta fuerit, an ad assertionem proprie cause de cetero sit admittenda?

Quidam] AaBc *om.* P **excommunicatione]** AaBc excommunicatione P **adolecentem]** AaP adulescentem Bc **etatis...annum]** BcP annum etatis sue Aa **die]** AaBc di P **iudicium]** AaP iuditium Bc **iudicum]** AaBc iudicium P **concurrit]** AaBcP occurrit Fr. **suspenditur]** AaBc suspendere P **iudicio]** AaP iuditio Bc **an]** AaBc autem P AaBc infra P **criminali]** AaBc criminari P **ab]** AaBc *om.* P **an...Quinto,]** AaBc *om.* P **an]** AaBc aut P **iudicio]** AaP iuditio Bc

Comparative Translation of C.6 d.init.

Sg text (93 words):

(77a) Fornicatores quidam et notati infamia episcopum quendam de symonia nituntur inpetere. Expetit reus iudicium alterius archiepiscopi provinciae, accusatores tandem in probatione deficiunt, ad suae innocentiae assertionem cogitur reus. Queritur ergo utrum crimine irretiti seu infamia notati, ad huiusmodi accusationem sint admittendi? Secundo, an episcopus si in eos accusationem retorquere voluit, an simplici assertioni suae cedendum sit? Tercio, si liceat sibi expetere iudicium archiepiscopi alterius provinciae? Quarto, cuius sibi iudicium sit expetendum, si circa suam sententiam conprovinciales episcopi discordes extiterint. Quinto, si in probatione deficit accusator, an cogendus sit reus ad probationem suae innocentiae?

Sg translation:

Certain fornicators also noted with infamy strive to accuse a certain bishop concerning simony. The defendant seeks out the court of the archbishop of another province, [but] in the end the accusers fall short in proof, [and] the defendant is summoned to the assertion of his innocence. It is asked therefore whether (*utrum*) [those] caught in a net by crime or (*seu*) noted with infamy, ought to be admitted to an accusation of this kind? Second, whether the bishop if he wished to turn back the accusation against them, whether it ought to be yielded from his plain assertion. Third, if it is allowed to him (*sibi*) to seek out the court of the archbishop of another province? Fourth, whose court ought to be sought out for him (*sibi*), if co-provincial bishops *extiterint* discords about his sentence? Fifth, if the accuser falls short in proof, whether the defendant ought to be summoned to proof of his innocence?

Fr. text (95 words):

(Fr. 553) Duo fornicatores et infamia notati quendam religiosum⁸ episcopum de symonia accusare nituntur; reus alterius prouinciae archiepiscopi iudicium

⁸ Does the adjective *religiosum* indicate that the accused bishop is a member of the regular as opposed to the secular clergy? What difference if any does this make with respect to the legal issues raised by the case statement?

expetit; tandem in probatione deficit accusator;⁹ reus cogitur ad innocentiae suae assertionem. (Qu. I.) Primo queritur, an crimine irretiti uel infamia notati ad huiusmodi accusationem sint admittendi? (Qu. II.) Secundo, si episcopus in eos accusationem uertere uoluerit, an simplici assertioni suae sit fides habenda? (Qu. III.) Tertio, si liceat sibi expetere iudicium archiepiscopi alterius prouinciae? (Qu. IV.) Quarto, cuius iudicium sibi sit expetendum, si circa suam sententiam episcopos suae prouinciae discordare contigerit? (Qu. V.) Quinto, si in probatione deficit accusator, an reus sit cogendus ad probationem innocentiae suae?

Fr. translation:

Two fornicators also noted with infamy strive to accuse a religious bishop concerning simony; the defendant seeks out the court of the archbishop of another province; [but] in the end the accuser falls short in proof; [and] the defendant is summoned to the assertion of his innocence. First it is asked, whether [those] caught in a net by crime or (*uel*) noted with infamy ought to be admitted to an accusation of this kind? Second, if the bishop wished to turn the accusation against them, whether confidence ought to be held from his plain assertion? Third, if it is allowed to him (*sibi*) to seek out the court of the archbishop of another province? Fourth, whose court ought to be sought out for

⁹ It is not clear why *accusator* is singular in Fr., especially since the logic of the case statement leads the reader to expect a plural reading. Verified as singular in Fr. (553), Ka (124vb), and Kb (117va).

him (*sibi*), if it happened that the bishops of his province disagree about his sentence? Fifth, if the accuser falls short in proof, whether the defendant ought to be summoned to the proof of his innocence?

Comparative Translation of C.7 d.init.

Sg text:

(79b) Episcopus quidam infirmitate longa detentus rogavit alium sibi substitui, precibus cuius pontifex romanus annuit, et quod rogavit ei concessit; postea convaluit episcopus idem, et quod prius fecerat rescindi cupit. Movet questionem contra qui succasserat. Reposcit (80a) cathedram suam tamquam sibi debitam. Queritur ergo an episcopo vivente alius in eadem possit ecclesia ordinari? Secundo, an cathedram iste reposcere valeat, quam aliter intercessione propria interceptit?

Sg translation:

A certain bishop held down (*detentus*) by a long infirmity asked that another be substituted (*substitui*) for himself, through whose prayers the Roman pontiff approved, and what [the bishop] asked [the pope] granted to him; afterwards the same bishop recovered, and what he had previously done, he wishes to be annulled (*rescindi*). He moves a question against [him] who had succeeded (*succasserat*). He demands back his see as if a debt to himself. It is asked therefore whether (*an*), the bishop [still] living, someone can be ordained into the same church? Second, whether he is able to demand back (*reposcere*) a see which *intercepit* otherwise through his own intercession?

Fr. text:

(Fr. 566) Quidam longa inualetudine¹⁰ grauatus episcopus alium sibi substitui rogauit, cuius precibus summus Pontifex annuit, et quod rogauerat ei concessit. Postea uero conualuit idem episcopus, et quod prius fecerat cupit rescindi; aduersus eum, qui sibi accesserat, questionem mouet, suam cathedram tamquam sibi debitam reposcit. Hic primum queritur, utrum uiuente episcopo alius possit in ecclesia eadem ordinari? Secundo, an iste ualeat reposcere cathedram, quam sua intercessione alter accepit?

Fr. translation:

A bishop burdened (*grauatus*) by a long sickness (*inualetudine*) asked that another be substituted (*substitui*) for himself, through whose prayers the supreme pontiff approved, and what [the bishop] had asked [the pope] granted to him. But afterwards the same bishop recovered, and what he had previously done, he wishes to be annulled (*rescindi*); against him, who had acceded (*accesserat*) to him, he moves a question [and] demands back his see as if a debt to himself. Here it is first asked whether (*utrum*), the bishop [still] living, someone can be ordained into the same church? Second, whether he is able to demand back (*reposcere*) a see which another received through his intercession?

¹⁰ *inualetudine*: Fr. (566), Aa (156r), Bc (150ra), and Fd (36rb) read *inualitudine* or *invaliditudine*. There is an OCR error (*inualetudinem*) in the MGH e-text. Ka (127va), Kb (120rb), and Sg (79b) read *infirmirate*. **Check P.**

quidam: translate *quidam* as a demonstrative adjective (“a certain X”) when it follows the noun it modifies; translate *quidam* as an article (“an X”) when it precedes the noun it modifies, as is the convention in modern European languages.

substitui and *rescindi*: 3rd conjugation present passive infinitives.

possit and *valeat*: translate *possit* as “he can”; translate *valeat* as “he is able to”.

Movet questionem, questionem movet: legal t.t., reappears in C.14 d.init.

Square brackets enclose words supplied in the translation.

There are eight noun-adjective pairs in the text of C.7 d.init. In the Sg version of the text, the adjective follows the noun in all but one instance: *Episcopus quidam, infirmitate longa, pontifex romanus, episcopus idem, cathedram suam, episcopo vivente, eadem ... ecclesia*, and *intercessione propria*. In the Fr. version of the text, the adjective precedes the noun in all but one instance: *Quidam ... episcopus, longa inualetudine, summus Pontifex, idem episcopus, suam cathedram, uiuente episcopo, ecclesia eadem*, and *sua intercessione*.

Comparative Translation of C.19 d.init.

Sg text:

(144b) Volunt duo clerici ad monasterium transire. Petiit uterque ab episcopo suo licentiam. Unde queritur, an debeat episcopus permittere, ut propria ecclesia relicta, clericus monachus fiat? Secundo, si episcopus dare licentiam noluerit, an eo invito monasterium adire possit? Tertio, si contigerit ipsos regulares canonicos fuisse, utrum monasterii ingressus eis esset concedendus?

Sg translation:

Two clerics want to transfer to a monastery. Each sought permission from his bishop. Whence it is asked whether a bishop ought to permit a cleric to become a monk after leaving his own church? Second, if the bishop did not wish to give permission, whether the cleric can enter a monastery against his wishes? Third, if it happened that they had been canons regular, whether entry to a monastery should have been granted to them. (Sg)

Fr. text:

(Fr. 839) Duo clerici ad monasterium transire uolunt; uterque licentiam ab episcopo suo petiit; unus relicta propria ecclesia eo inuito, alter dimissa regulari canonica cenobio se contulit. Modo queritur, si episcopus debeat permittere, ut relicta propria ecclesia clericus monasterium ingrediatur? Secundo queritur, si episcopus licentiam dare noluerit, an eo inuito monasterium possit adire? Tertio, si contigerit ipsos regulares canonicos fuisse, utrum concedendus esset eis monasterii ingressus?

Fr. translation:

Two clerics want to transfer to a monastery; each sought permission from his bishop; one after leaving his own church against the wishes of his bishop, the other *dimissa regulari canonica* betook himself to a monastery. Now it is asked if a bishop ought to permit a cleric to enter a monastery after leaving his own church? Second it is asked, if the bishop did not wish to give permission, whether the cleric can enter a monastery against his wishes? Third, if it happened that they had been canons regular, whether entry to a monastery should have been granted to them?

Incipits to first questions

Sg

[Fully one-third—11 out of 33—of the incipits to first questions in the Sg version of the case statements are unique. The Friedberg (vulgate) and Sg versions of incipits to first questions are identical in only three out of 32 directly comparable case statements (those for C.30 d.init., C.32 d.init., and C.33 d.init.).]

Primum ergo queritur (4), Queritur ergo (4), Unde queritur (4), Queritur igitur (3), Unde primo queritur (3), Queritur igitur primum (2), Queritur (2), Hic primum queritur (1), Hinc queritur (1), Primum igitur queritur (1), Queritur ergo primo (1), Queritur ergo primum (1), Unde modo queritur (1), Unde primo dubitatur (1), Unde primum queritur (1), Unde prius queritur (1), Unde queri potuit (1), Unde questio primum proponitur (1)

Fr.

Hic primum queritur (15), Queritur (8), Modo primum queritur (3), Nunc primum queritur (3), Primo queritur (2), Primum queritur (2), Hic primo queritur (1), Modo queritur (1), Queritur autem (1)

	Sg	Fr.
C.Prima	Queritur igitur	
C.1	Primum ergo queritur	Hic primum queritur
C.2	Primum igitur queritur	Hic primum queritur
C.3	Queritur igitur primum	Hic primum queritur
C.4	Queritur ergo primo	Hic primum queritur

C.5	Unde primo dubitatur	Primo queritur
C.6	Queritur ergo	Primo queritur
C.7	Queritur ergo	Hic primum queritur
C.8	Unde questio primum proponitur	Hic primo queritur
C.9	Unde queri potuit	Queritur
C.10	Primum ergo queritur	Modo primum queritur
C.11	Queritur ergo primum	Hic primum queritur
C.12	Queritur igitur primum	Modo primum queritur
C.13	Primum ergo queritur	Modo primum queritur
C.14	Unde primum queritur	Queritur
C.15	Unde primo queritur	Queritur autem
C.16	Primum ergo queritur	Hic primum queritur
C.17	Queritur ergo	Hic primum queritur
C.18	Unde queritur	Queritur
C.19	Unde queritur	Modo queritur
C.20	Queritur igitur	Nunc primum queritur
C.21	Unde primo queritur	Queritur
C.22	Queritur ergo	Primum queritur
C.23	Queritur igitur	Hic primum queritur
C.24		Hic primum queritur
C.25		Nunc primum queritur
C.26		Primum queritur
C.27	Unde prius queritur	Hic primum queritur
C.28		Hic primum queritur

C.29	Unde queritur	Hic primum queritur
C.30	Queritur	Queritur
C.31	Unde modo queritur	Queritur
C.32	Hic primum queritur	Hic primum queritur
C.33	Queritur	Queritur
C.34	Unde primo queritur	Nunc primum queritur
C.35	Unde queritur	Hic primum queritur
C.36	Hinc queritur	Queritur

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