Charles Donahue, Jr., ‘Some Thoughts on Michigan’s Copy of the Argentoratene Gratian’, *Law Quadrangle Notes*, 17 (Fall, 1972) 8–11.

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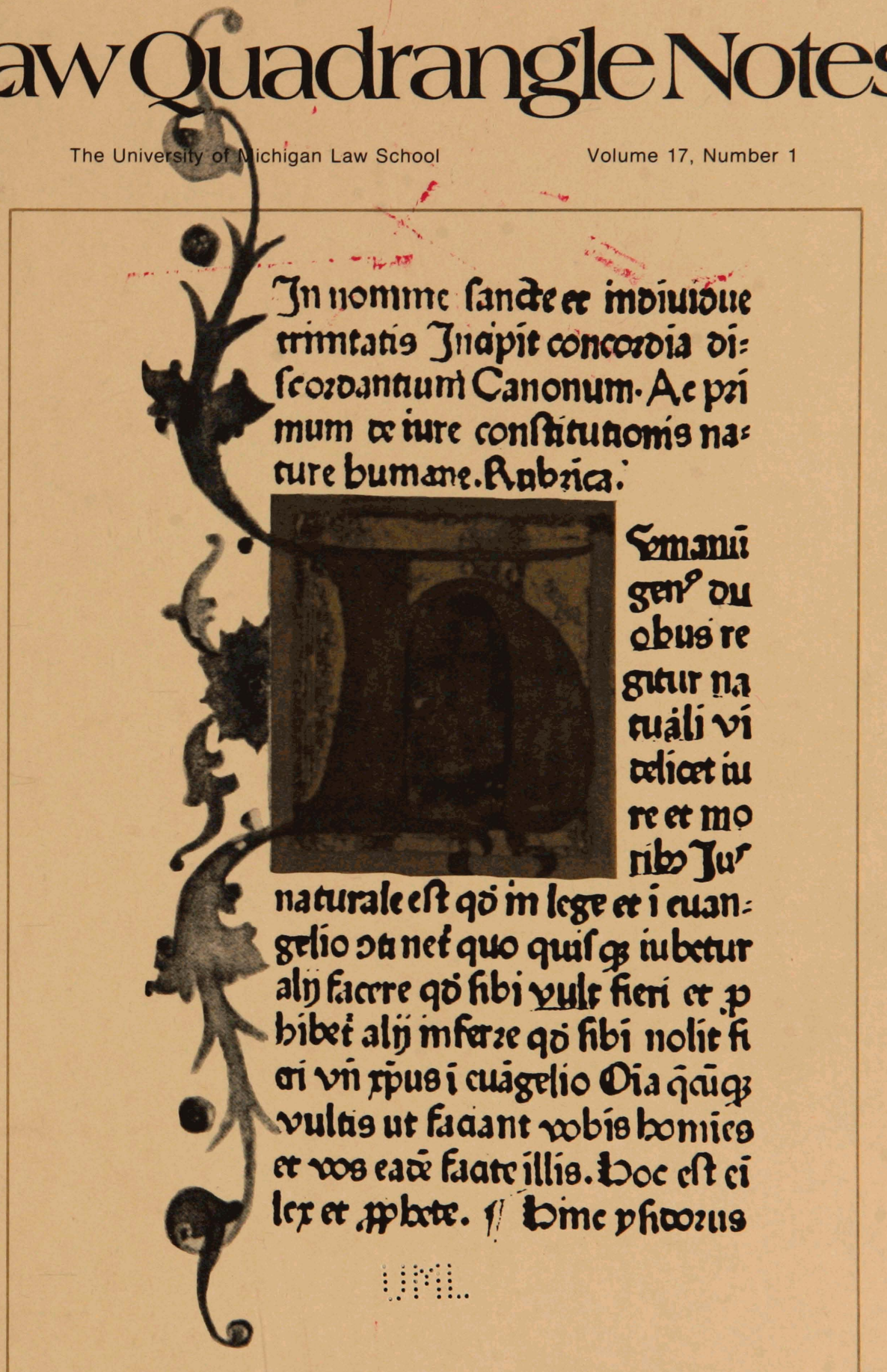

CONTENTS **law quad notes**

Cover: This issue of the *Notes* contains two stories about a book—a rather valuable book which now rests in the Michigan Law Library. A copyrighted piece by Prof. Donahue deals with its contents and another story by G. Kenneth Boyce speaks about the book itself. The book is handsome, with several illuminated letters—and the cover is our attempt to illustrate just one of them.

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SOME THOUGHTS ON MICHIGAN'S COPY OF THE ARGENTORATENE GRATIAN

by
Professor Charles Donahue, Jr.

The five hundredth birthday of anything calls for a celebration. Certainly the five hundredth anniversary of a book as extraordinary as the Michigan Law Library's copy of the Argentoratene edition (so called from the Latin name of the city of Strassbourg where the book was printed) of Gratian's *Decretum* calls for some sort of memorial. Kenneth Boyce's piece, which follows this one, tells something about the book itself, where it came from and how it got to Michigan. This piece deals with its contents.

In the Middle Ages the canon law was more than a series of rules about the internal governance of the Church. In England, for example, the canon law courts had jurisdiction over marriage, wills, libel and slander, many minor criminal offenses (much of what later came to be "morals" offenses), church property (largely), the crimes of clerics (basically anyone who was literate), and, in some areas, contract matters as well. This extensive jurisdiction was administered through a system of local and diocesan courts from which appeals could be taken to the two archbishops at York and Canterbury and, ultimately, to the Pope in Rome.

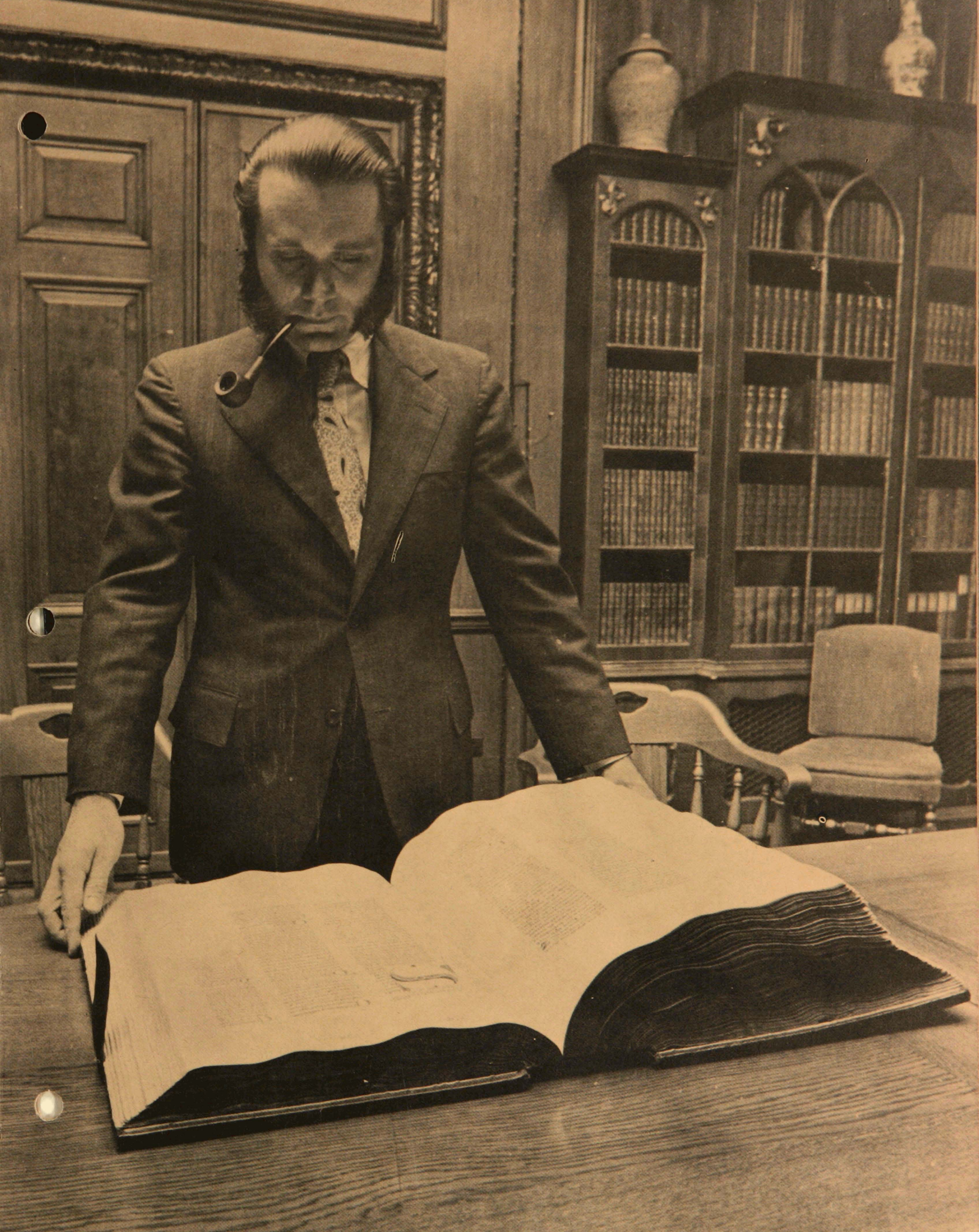
To get a full picture of the workings of law in medieval society, it is plain that we cannot ignore the canon law. The canon law is interesting as well because of its early use of the basic techniques of legal reasoning, techniques which we still employ today. Further, the canon law of the Middle Ages provides an excellent paradigm for comparative study. It is sufficiently different from our own law to give us distance, and yet it is clearly within the Western legal tradition, so that there are no insuperable barriers of access to it.

Most of the law which the canon courts were applying in the Middle Ages may be found in the *Corpus Juris Canonici*, a massive work of which Gratian's *Decretum* constitutes the first and largest part. The *Corpus* is available in a two-volume nineteenth century edition by Aemilius Friedberg. Friedberg's edition, however, does not contain the glosses (of which more later). For a glossed edition of the *Corpus* one must have reference to an early printed edition like the Argentoratene *Decretum*. Thus, in addition to providing one with a sense of union with the past, the Michigan *Decretum* also has material in it which cannot be found in modern printed editions.

But just what is Gratian's *Decretum* and what is in it? There are annoying gaps in our knowledge about the *Decretum* (as there are about many medieval works). Even its title is unsure, some manuscripts calling it the *Decretum*, others the *Concordance of Discordant Canons*, a title which aptly describes the nature and methodology of the work.

We know practically nothing about the life of Gratian, the author of the *Decretum*. His birth date is unknown. He became a Camaldolese monk (a variety of Benedictine) of the monastery of Saints Nabor and Felix in Bologna. He taught law at the monastery, and it is generally thought that he finished writing his *Decretum* around the year 1140. He probably died before 1159, the year in which his pupil, Rolando Bandinelli, became Pope Alexander III. That Gratian became bishop of Chiusi after he wrote the *Decretum* is probably legendary. That he was the half-brother of Peter Lombard and Petrus Comestor is certainly legendary, although this latter legend does indicate the significance of these three figures in twelfth century intellectual history—Gratian for law, Lombard for theology, and Comestor for ecclesiastical history.

Gratian's connection with Bologna is also significant, for it was in Bologna, approximately two generations before Gratian's time, that the *Codex Florentinus*, a manuscript of the *Digest* of Justinian's *Corpus Juris Civilis* had been discovered. (The Michigan Law Library has a handsome photographic copy of the *Codex Florentinus*.) The *Digest* is a huge collection of excerpts of the writings of the Roman jurists, principally from the se-



cond and third centuries A.D. Its rediscovery in the eleventh century after it had been virtually lost to the Western world for some four hundred years produced an extraordinary revival of legal studies at Bologna.

The Romanists of Bologna analyzed the Roman texts by the use of glosses. Because of the lack of books medieval teachers read aloud the text of the work about which they were lecturing to their students. They then commented to the students on the text. As this commentary became solidified, the teachers wrote it down in the margin of the text. These marginalia were called "glosses." Other teachers read these glosses and added glosses of their own, until many folios of medieval manuscripts contained more marginal commentary than text.

The content of the glosses varies widely. Some contain simple cross-references to other passages on the same issue. Many, however, are more complex, seeking to define the underlying rationale of the text, to distinguish it from other inconsistent texts, or to elaborate on the rule of the text in the light of specific factual circumstances. By such devices the academic Roman law developed until the raw mass of texts in the *Digest* had been sufficiently rationalized that the book could be employed in the decisions of actual litigated cases or in the resolution of specific governmental problems.

Canon law study lagged behind the study of Roman law, at least in part because there was no definitive text of canon law like the *Digest*. The texts of canon law were scattered in the legislation of the councils of the Church, the decretal (opinion) letters of the popes, and the writings of the fathers and the theologians of the Church from almost the time of Christ into the eleventh century. Collections existed, perhaps the most famous being those of Burchard of Worms (c. 1010) and Ivo of Chatres (c. 1095), but little effort had been made to rationalize the texts, to reconcile their inconsistencies, and to elucidate their underlying rationale.

Gratian's *Decretum*, then, served two functions. It gathered together in one place a comprehensive collection of canon law texts arranged by subject matter in the manner of the *Digest*, and it provided a commentary in the manner of the glossators of Roman law which sought to distinguish and reconcile the texts, and elucidate the basic principles at stake in those texts. Gratian's method was to collect a group of canons on a topic, indicating by rubrics at the beginning what he thought the principle of each canon was. Each text or group of texts he followed with material of his own—the so-called *dicta Gratiani*, the sayings of Gratian. It is in these *dicta* that Gratian's chief contribution is to be found, for it is in these *dicta* that we generally find Gratian's reconciliation of inconsistent canons and his version of the underlying principles.

The following material from Case 27 of the *Decretum* (translated by the author) illustrates well Gratian's method. It is taken from the second and longest book of the *Decretum* which is organized around thirty-six hypothetical cases. Gratian sorts these cases into issues posed in question form which he then seeks to answer with his authorities and *dicta*.

Case 27

A certain man who has taken the vow of chastity espouses a wife; she, renouncing the previous match, goes to another and marries him; he seeks after her to whom he was previously espoused.

1. The first question is whether there can be marriage between those who have taken a vow of chastity?

2. Second, is it permitted for one who is espoused to leave the one to whom he is espoused and marry another?

[The consideration of the first question is omitted.]

. . . The second question follows in which we seek to discover whether a woman espoused to one man can renounce the previous match and transfer her vows to another. First, we shall see whether they are married, second whether they can depart from each other. That they are married is easily shown by the definition of marriage and by the authority of many writers. Matrimony or nuptials is the matrimonial joining of man and woman maintaining indivisible intimacy. Moreover, there was a marriage between this couple which required indivisible intimacy, for there was between them consent which is the efficient cause of matrimony. According to Isadore of Seville [d. c. 636], "consent makes matrimony."

[Canon 1 is omitted.]

Canon 2. *Pope Nicholas* [I (d. 867)]*in canon 3 of the Bulgarian Council:* Consent alone conforming to law among the parties suffices when the question is whether parties are married. If that alone is lacking, anything else, even if accompanied by intercourse, is frustrated.

* * * * * * *

Gratian: They are also proved by authority to be married. For Ambrose [d. 397] says in his book on virgins:

Canon 5: When the marriage begins, the name marriage is taken. The deflowering of virginity does not make a marriage, but the conjugal pact. Therefore, there is marriage when a virgin is joined to a man, not when she is known by the man.

* * * * * *

. . . Gratian: By all these authorities these people [i.e., the ones in the hypothetical case] are shown to be married, but Augustine [d. 430] testifies to the contrary saying:

Canon 16: There is no doubt that a woman who has not had intercourse is not a married woman.

[The succeeding canons deal with the question of married parties taking up the religious life. While the canons are by no means consistent, Gratian resolves the differences in the following dictum:]

Gratian: Since it does married parties no good to offer continence to God without each other's consent, and since, (although a husband does not have power over his body but his wife has it) nonetheless, espoused women may choose the monastic life and espoused men may with benefit take up the better life without seeking the consent of their espoused, it is apparent that there is no marriage between espoused parties.

[There follows material concerning impotence, also not completely consistent, which Gratian resolves thusly:]

Gratian: See, the impossibility of intercourse, if it arises after intercourse has occurred between the parties, does not dissolve the marriage, but if it arises before intercourse has occurred, then the woman is free to marry another. Whence it is apparent that the parties were not married otherwise they would not be permitted to part from each other except on account of fornication, and if they parted, they would be obliged to remain unmarried or to reconcile themselves with each other.

* * * * * *

Canon 34: *From the Council of Toledo* [c. 790]: It was decreed by the council that if a man took another's espoused by force, he should be punished with public penance and should remain without hope of marriage. If the woman did not consent to the same crime, she should not be denied the privilege of marrying another. But if after these things had happened the guilty parties had presumed to marry each other, both should be anathematized.

. . . Gratian: It appears therefore, that she [the woman in the hypothetical case] is not a married woman, since the privilege of marrying another is not denied to her who is espoused to a living man. How, therefore, according to Ambrose and the other fathers, are those espoused [*sponsae*] called married [*conjuges*] when by all these arguments they have just been shown not to be married? But it ought to be known that marriage is begun by espousal but is perfected by intercourse. For this reason there is marriage between those espoused, but it is marriage initiate

[*conjugium initiatum*]; between those who have had intercourse there is valid marriage perfected [*conjugium ratum*]. When Ambrose says:

Canon 35: When marriage is begun, the name of marriage is taken, not when the woman is carnally known by the man.

Gratian: See, in espousal marriage is initiated not perfected.

* * * * * *

Canon 45: *Gregory* [d. 604] *in his homily on the Gospel "when it was late on that day:"* Thus He permitted the disciple to remain in doubt, just as before His birth He wished Mary to have an espoused who nonetheless did not attain his nuptials. For it came about that the doubting apostle became a living witness of the true resurrection just as the man who was espoused of His mother became a guardian of her inviolate virginity.

Gratian: From all these things it appears that those espoused are called married by a hope of future things not by the fact of present things. How, therefore, can they be called married from the time of the first oath of espousal, if that joining which they assert at the espousal may be denied? But, from the first oath of espousal, it may be called marriage, not because there is a marriage in the espousal, but because of the faith which they owe another because of the espousal that they afterwards will become married. In the same way sins are said to be forgiven by faith not because they are forgiven by faith before baptism but because faith is the cause by which we are cleansed from our sins in baptism. For this reason John Chrysostom [d. 407] says "Intercourse does not make matrimony, but will." and Ambrose says "Not the deflowering of virginity but the conjugal pact makes matrimony." This is to be understood as: intercourse without the will to contract matrimony and the deflowering of virginity without conjugal pact does not make matrimony, but the will to contract matrimony and the conjugal pact make it so that a woman in the deflowering of her virginity or in intercourse is said to be married to a man or to celebrate the nuptials. Thus, Pope Siricius [d. 399] calls the departing of espoused persons a marriage separation. But such parting is not a violation of a present marriage but a future one, one hoped for because of espousal. Thus, even the devil was said to have fallen from beatitude not that the beatitude which he then had but that beatitude for which he was made. Thus also, a man who by the merit of his life and his learning is elected as a priest or bishop, if in the meantime he should deserve to be deprived of his election, is said to lose the priestly or episcopal oil, not that which he has received, but that which he was elected to have. Therefore, by this authority, an espousal cannot be called a marriage.

[Having decided that espousals are not marriages, Gratian finally comes to the question of whether an espoused can renounce her espoused and marry another. Clearly he can find no authority for the proposition other than what he has already brought to bear. He does, however, distinguish a number of canons. The first two canons deal with the problem of the espoused who simply goes off and has intercourse with another. These compel the return of the espoused to her original espoused.]

Gratian: But it is one thing to renounce a previous marriage contract and marry another; it is quite another thing to engage in illicit debauchery.

[Gratian still isn't over the hurdle. He has to deal with a canon of Pope Siricius which forbade espoused parties from going to another marriage.]

Gratian: But by this authority Siricius prohibits a woman from going to second vows who has been led to her espoused's house and with her espoused has been veiled and blessed. The divorce of such partners violated the blessing which the priest has placed on those about to be married. And therefore the marriage we are talking about in the instant case is not forbidden by this authority.

The solution which Gratian arrived at in the foregoing passage was not to last. His own pupil, Alexander III, abandoned the distinction between *conjugium initiatum* and *conjugium ratum* as the means of reconciling the authorities and of determining when a marriage is formed and substituted in its stead a distinction between present and future consent, the former making a valid and normally indissoluble marriage, the latter merely a contract to marry which could be called off if the other party gave cause. Later still, the Council of Trent (1563) required as a condition of validity that the present consent be exchanged in the presence of a priest after the promulgation of banns.

Gratian's contribution remained significant, however. He was the first one to assemble the multifarious authorities on espousals and to recognize their inconsistency. He realized too that what lay at the heart of these authorities was the question of consent, and he developed a means for resolving the authorities which took into account the diverse contexts in which they arose: the question of entering the religious life, the theological discussion of the marriage of the Virgin, the problem of impotency, and finally the simple question of one espoused who wishes to marry someone else.

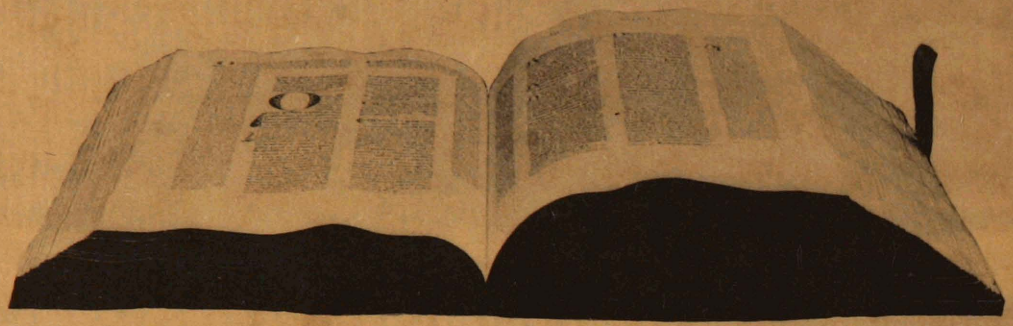
Gratian's mammoth work needed digestion, clarification, and refinement. The School at Bologna had written glosses on the text of the *Digest*; it was only natural that glosses should be written on the *Decretum* both at Bologna and elsewhere. Johannes Teutonicus (John the German) probably in the second decade of the thirteenth century wrote a gloss on the *Decretum* that was so comprehensive and authoritative that it became known as the *glossa ordinaria*, the ordinary gloss. This gloss is included in the Michigan Argentoratene edition of Gratian.

Canon law in the Middle Ages was not, however, confined to the academies. Medieval bishops and popes were called upon to decide cases and the opinions, particularly of the latter, were collected in much the same way as we today collect and publish the opinions of judges. The most famous collection of decretal letters, as these opinions were called, was promulgated by Pope Gregory IX in 1234. It contained excerpts, rather than the full text of the letters, arranged according to subject matter by the scholar Raymond of Penifort. By and large only opinions after Gratian's time were included, and the size and scope of the work gives a good idea of how enormously productive of decretal letters the papal chancery was during the 100 year period between Gratian and Gregory.

After the publication of the *Decretals of Gregory IX*, a new edition of the *Decretum* and its *glossa ordinaria* was obviously needed, since much in the *Decretum* has been changed, if subtly, by this vast outpouring of papal opinion-writing. The new edition was undertaken by Bartholomaeus Brixiensis (Bartholomew of Brescia) who added his own glosses, usually signed "Bart. Brix.," to those of Johannes Teutonicus. Bartholomaeus' glosses are also included in the Argentoratene edition of Gratian.

Thus, the Michigan Argentoratene *Decretum* contains a significant portion of the achievement of what is known as the classical period of canon law. In the later Middle Ages the popes continued to write decretals and the academics continued to write commentary, although this commentary, as time went on, tended to be in treatise rather than gloss form. I think it is fair to say, however, that the later Middle Ages never equalled in sheer intellectual achievement the work of the period from Gratian to Gregory IX. It is not until the Council of Trent in the mid-sixteenth century that major developments were again forthcoming, but by this time the canon law of Rome had ceased to be the law of all Christians, though it remained of vital importance to Roman Catholics.

A CLOSE LOOK AT A "CRADLE BOOK"



by
G. Kenneth Boyce,
former Chief Catalogue Librarian
University of Michigan Law Library

Gratian's *Decretum* had been a standard work for nearly three centuries before the invention of printing, and hundreds of copies had been laboriously made in manuscript to serve the needs of lawyers, scholars, and all who were concerned with canon law. Because of its popularity, the *Decretum* was among the first books issued by Europe's earliest printing presses. It was printed for the first time in the city of Strassburg by Heinrich Eggestein in 1471. That edition must have sold well, for Eggestein issued the same text again the following year. The University of Michigan Law Library copy is of this second printing, dated 1472.

This date, it should be observed, is less than twenty years after the publication of the first book printed in Europe, the "Gutenberg" bible. Our Gratian is therefore a true representative of the "incunabula," those productions of the infancy of printing, between the years c. 1455 and 1500, which are appropriately called "cradle books."

Both Eggestein editions of Gratian are very rare books. Five copies of the 1471 editio princeps are recorded as being now in North America (the State of Michigan can boast possession of one of these copies also, at the Detroit Institute of Arts), only four of the 1472 edition. Of the latter, in addition to the Michigan Law Library copy, there is one each at the Library of Congress, The Pierpont Morgan Library in New York City, and McGill University in Montreal. Thirty-eight other copies are recorded as being in libraries in Europe.

Though so few copies of the two Strassburg editions of Gratian are known today, it does not follow that all editions which were printed during the incunabula period are similarly rare. Since the *Decretum* was popular with readers and book purchasers of the fifteenth century, publishers kept reissuing it, with the result that within thirty years after Eggestein printed his text in 1471 and 1472, no fewer than forty-six other editions appeared.

To modern eyes accustomed to books of a more manageable size, the 1472 Gratian seems a ponderous tome, which indeed it is. A large folio measuring nearly 19 inches in height, it is made up of 459 leaves of paper printed on both sides. Much of the weight and bulk of the volume is due to the heavy handmade, all-rag paper which Eggestein used. Though cumbersome, that paper is very durable and remains today in almost as good condition as when it was made 500 years ago. The binding is original, apparently placed on the volume shortly after the date of printing (but more of the binding later).

A notable feature of the 1472 Gratian is the lack of a title page—a feature that was common to practically all books of so early a date, for the title page was not used (with rare exceptions) until later. The information which we are accustomed to find today on a title page appeared in a paragraph which the printer added at the end of the text, known as the "colophon." The colophon on the final leaf of the 1472 Gratian runs (transcription is literal, except that the abbreviations have been expanded; capitalization is modernized):

> Presens Gratiani Decretum unacum apparatu Domini Johannis Theuthonici atque additionibus Bartholomaei Brixiensis in suis distinctionibus causis et consecrationibus bene visum et correctum, artificiosa adinventione imprimendi absque ulla calami exaratione sic effigiatum et ad laudem Omnipotentis Dei est consumatum per venerabilem virum Heinricum Eggesteyn Artium Liberalium Magistrum civem inclite civitatis Argentinae anno Domini MCCCClxxii.

This may be freely rendered:

> The present *Decretum* of Gratian, with the commentary of Johann the German [Semeca] and additions of Bartholomew of Brescia, well revised and corrected in [its several sections], has been produced by the ingenious invention of printing without a single stroke of the pen and brought to completion to the praise of Almighty God by the worthy man Heinrich Eggestein, Master of Liberal Arts, citizen of the renowned city of Strassburg in the year of Our Lord 1472.

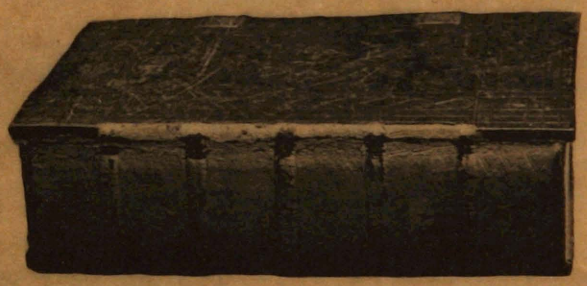
It is interesting to note that although Eggestein had already printed four or five texts before the Gratian, he was still so close to the beginnings of printing that he had not ceased to marvel at the new-found ability to reproduce an entire book "without a single stroke of the pen" thanks to the "ingenious invention of printing."

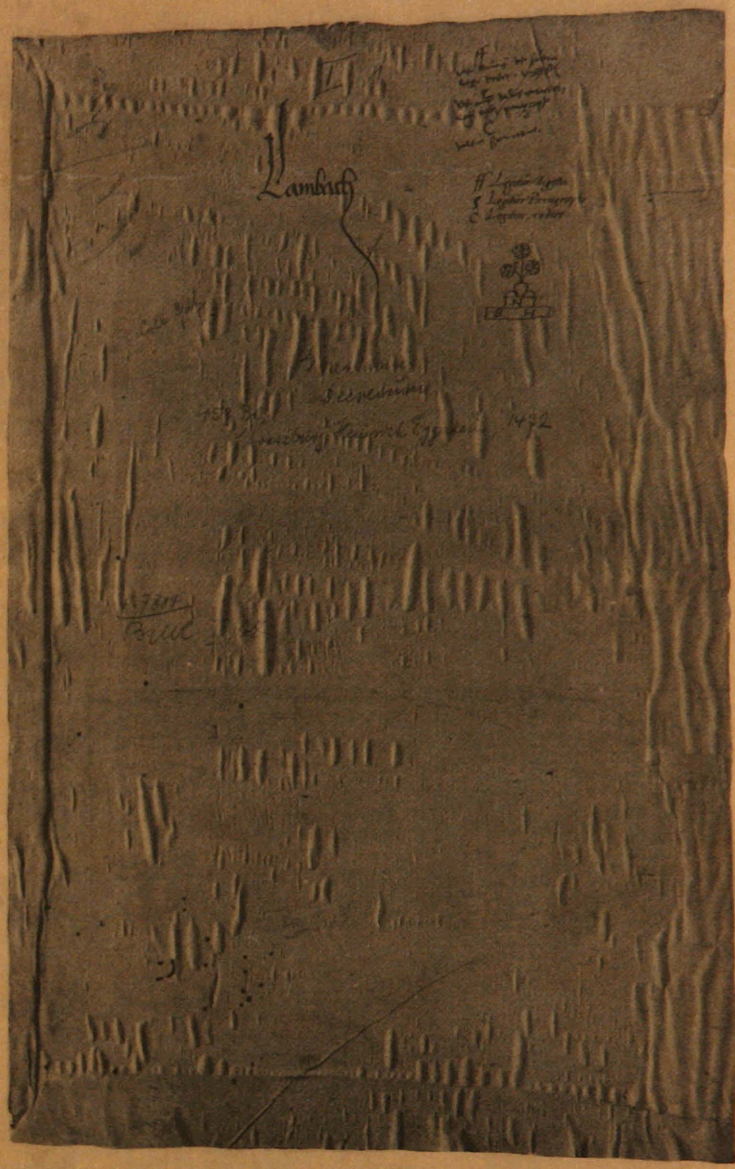
The Michigan copy still has the original binding which was apparently placed on it sometime in the latter part of the fifteenth century. Such a Heavy volume required a stout binding which this certainly is: dark brown leather drawn over heavy wooden boards and fitted with two stiff thongs with brass clasps to keep the volume closed. The surface of the leather is decorated on both covers and on the spine with a simple design stamped in blind, composed of panels formed by multiple fillets and filled in with individual stamps many times repeated, an ivy-like leaf and a rosette being the commonest of the stamps used. The craftsmanship of the binding is good, that of the ornamentation is second-rate.

There are now no flyleaves to protect the first and last printed pages from the covers. It is probable that there were originally flyleaves but they have been removed in modern times. Discarded sheets of vellum or paper containing print or manuscript were commonly utilized for this purpose in early bindings and, though they were considered waste paper when the binding was made, they frequently have a special value today as specimens of early printing or for the texts which are preserved on them. Such flyleaves have frequently been removed by the booksellers through whose hands the early volumes have passed.

The white lining papers on the inside of both covers are certainly original. That on the reverse of the front cover bears a mark of previous ownership of the volume, the name "Lambach" written in ink in tall Gothic letters, probably contemporary with the binding itself. Beside it, in quite a different hand and ink, are jottings explanatory of the symbols commonly used in the text of the *Decretum*, and below is a rough drawing of three flowers arising from a base of two steps on which appear the letters: N S H. The significance of the drawing has not been determined. The only other markings are recent notations in pencil, in a German hand, recording bibliographical references of interest to booksellers.

The name "Lambach" tells us that the volume once formed part of the library of the Benedictine abbey of





that name in Upper Austria, on whose shelves it apparently rested from the fifteenth to the present century. Lambach Abbey, founded in the eleventh century, exerted considerable cultural influence in medieval times. It was the home of a notable school of manuscript illumination and its library, already rich in manuscripts, rapidly added fine specimens of printed books from the fifteenth century onwards. For a considerable period the abbey also operated its own printing press.

Lambach was fortunate in escaping the secularization which ended the cultural as well as the religious functions of most of the monasteries of central Europe. The abbey has survived and is active today, but as an institution, still under the supervision of the Benedictine Order, charged with furthering Austrian education. The library thrives and its present book collection is reported as about 50,000 volumes, of which 159 are incunabula, 873 manuscripts. These figures reflect the change in emphasis from historical and ecclesiastical scholarship to more utilitarian subjects. For, early in the present century, Lambach library was said to possess, among its 35,-000 volumes, 340 incunabula and 7,000 manuscripts, and the incunabula were prized as a particularly rich collection. But financial distress forced the abbey to sell many of its treasures in the period following World War I with the result that about half its incunabula and by far the greatest portion of its manuscripts were dispersed. Lambach's loss has meant a gain for many other libraries of the world, offering them the opportunity of acquiring for themselves rarities which had enriched the Austrian abbey for centuries. One of those rarities is the Michigan Law Library's 1472 Gratian. The Library acquired the volume in 1953 from the New York bookseller, Israel Perlstein, who reports that he had it from an unspecified book dealer in Prague. Of its journey from Lambach to Prague we know nothing. We do know that at least one other such volume has found its way from the shelves at Lambach to the United States, for Harvard Law Library possesses the Lambach copy of a later incunable edition of Gratian's *Decretum*, that printed at Basel in 1482.

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