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Vittorio Klostermann Frankfurt am Main

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## Actio ex Iuramento

## The legal enforcement of oaths

## I

One of the main innovations in the mediaeval Roman Law of obligations was the development of a general system of contract. According to the literature, the oath played an important part in this development. Taking an oath was regarded as a universal way of confirming natural obligations. As a result any agreement, even a *nudum pactum* could be made enforceable.<sup>1</sup> In the commentary of Bartolus the oath is already classed as a *pacti vestimentum*, although restricted to special cases.<sup>2</sup> It confirms the preceding transaction so as to settle any dispute. Such an oath is clearly enforceable. In this respect Bartolus even used the word *obligatio*<sup>3</sup> here, and placed the oath in the category of the *vestimenta* of civil law. This approach was to be generalized in later Canon Law. According to Nicholas of Tudeschis there were many ways in which an oath can be legally enforced. He was even willing to grant a civil action, viz. a *condictio ex lege*, based on D. 2,14,6.<sup>4</sup> The result of this is that an oath confirming a natural obligation, will give rise to an action "secundum utrumque ius", according to both Roman and Canon Law. However, this doctrine was not generally accepted in earlier times. It was for

<sup>1</sup> E. C. KARSTEN, Die Lehre vom Verträge bei den italienischen Juristen des Mittelalters, Rostock 1882, p. 133 n. 29.

<sup>2</sup> BARTOLI, Prima in Digestum Vetus, Lugduni 1555, fol. 99ra: De iure vero civili pacta vestiuntur nomine, et forma: ut in contractibus inductis a iure civili ... Item iureiurando in casu singulari: ut l. ut iurisiurandi infra de ope. liber. et l. fi. infra de lib. cau.

<sup>3</sup> BARTOLI, Commentaria in secundam infortiati, Lugduni 1555, fol. 204rb/va: Quandoque iusiurandum praestatur super preterito ad litis decisionem: et tunc dabitur actio et obligatio: ut supra de iureiurando per totum. Quoddam iuramentum interponatur ad confirmationem contractus: ut in auth. sacramenta puberum, C. si adver. ven. Quoddam est iuramentum quod interponitur mere ad introducendam obligationem ut si iurem me tibi daturum centum vel aliquid facturum: tunc non introducit obligationem, nisi in liberto ...

<sup>4</sup> PANORMITANI, Commentarium in tertium decretalium librum, Venetiis 1591, fol. 52ra: Quarto puto, quod possit agi actione civili. idest conditione ex lege. Probo per l. legitima conventio, ff. de pac. ubi dicit text. quod ex omni conventionem a lege approbata potest agi: sed iuramentum licitum est approbatum, nedum canonica lege, sed etiam divina: ergo ex illa potest agi, ...

example still rejected by Jacques de Révigny<sup>5</sup> as well as Cinus de Pistorio.<sup>6</sup> On the other hand it may go quite a long way back. In the Accursian gloss 'Quinimo' ad D. 2,14,7,5 the six ways are mentioned by which an agreement becomes a *pactum vestitum*, probably based on Azo.<sup>7</sup> But at this point the gloss goes on to add another two ways. One of them is the oath. In this respect the gloss refers to the exceptional case of the *ius-iurandum libertini*. In view of the words 'secundum quosdam' it is possible that Accursius himself did not agree with this vision. I will return to this point later.

the gloss 'Quinimo' ad D. 2,14,7,5

... Possunt addi duo modi scilicet legis auxilio quod potest dici in omni nudo pacto quod actionem parit ut dixi supra proximi par. Item secundum quosdam vestitur iureiurando ut infra de oper. liber. l. Ut iurisiurandi [D. 38,1,7].<sup>8</sup>

This doctrine has to be seen against the background of the efforts of Canon Law to consider every agreement as enforceable in principle as soon as one of the parties had relied on it, or had 'shown consideration', as English lawyers were to put it later. This was summed up in the maxim 'pacta sunt servanda'.<sup>9</sup> It was not easy, however, to find a basis for this in Roman Law. Although the classical system had already been relaxed somewhat by Justinian, there were still traces of a limited number of specific, enforceable contracts. Given the mediaeval practice of taking oaths in almost every important legal transaction, the discussion of a general theory of contract could be transferred to this context. To avoid too much loss of face for Roman Law, it could be centered around the effects of the oath. If the oath was able to make the agreement enforceable, the problem would have been solved. The real aim was to interpret the Roman sources in the light of the demands of Canon Law. Such

<sup>5</sup> IACOBUS DE RAVANIS, *Lectura super Codice* (= *Opera iuridica rariora*, t. 1), Bologna 1967 (Reprint of the Paris edition 1519, entitled: PETRI DE BELLA PERTHICA, ... *Super prima (secunda) parte Codicis*), fol. 100va: Item tale pactum (lege: iuramentum) non est modus vestiendi pactum, nisi in uno casu speciali ut in operis a liberto patrono promissis ...

<sup>6</sup> CYNII PISTORIENSIS in *Codicem et aliquot titulos primi Pandectorum tomi*, id est *Digesti veteris doctissima commentaria*, Augustae Taurinorum (Reprint of the Frankfurt am Main edition 1578), t. I p. 98vb: quia de iure nostro iuramentum regulariter non obligat nec vestit pacta ...

<sup>7</sup> *Summa Codicis* 2,2 § 15, AZONIS *Summa super Codicem, Instituta, Extraordinaria*, Augustae Taurinorum 1966 (Reprint of the Pavia edition 1506). *Corpus glossatorum juris civilis*, t. 2, p. 24b the six ways are: re, verbis, consensu, litteris, contractus coherentia and rei interventu. Azo will add - mirabile intellectu - another way, viz. rei principio.

<sup>8</sup> ACCURSIUS, *Glossa in Digestum Vetus* [*Corpus glossatorum juris civilis* t. VII], Augustae Taurinorum 1969 (Reprint of the Venice edition 1487) fol. 38ra.

<sup>9</sup> *Pacta quantumque nuda seruanda sunt* (X 1,35,1 = 1 Comp. 1,26,1).

an approach is characteristic of the scholarly method of the mediaeval jurists.

## II

In spite of the fact that this doctrine may have had an old origin and that it probably became the prevailing view in later centuries, the writings of the Glossators show a different approach. Most of them are not willing to accept any substantive law consequences of the oath in civil law. I will explain this more fully. Both in classical and Justinianic Roman Law, there are a limited number of sources from which obligations can result. In the Institutes and Digest several schemes can be found e.g. D.44,7,52pr which mentions: *re, verbis, consensu, lege, iure honorario, necessitate* and *peccato*. A more general notion such as 'promises must be fulfilled' is lacking. There is no such general rule even for promises under oath. Does this mean then, that the idea of the enforcement of promises under oath was totally unknown to Roman Law? By no means. There are a number of texts in which this idea does appear. Time and again the Glossators are in the position to make a choice. They can qualify these individual cases as exceptions to the general rule, or they can also emphasize these texts so strongly that the well-known mediaeval process will turn these exceptions into a new rule and as a result the former rule will become an exception. Most of the Glossators stick closely to the Roman sources, which enumerate a limited number of specific cases where oaths will be enforced. Apart from these they argue, on the basis of D.50,16,19, that only certain contracts enumerated in Roman Law can result in reciprocal obligations. For this reason they do not attribute any legal effect to the oath. It is not able to create or nullify an obligation.<sup>10</sup> The exceptional cases in Roman Law where an oath can be enforced are suppressed, although, as we shall see, the Glossators were aware of their existence. The following passage, taken from the Ordinary Gloss, might serve as an example of this view. Similar opinions can be found in the commentaries upon 'Sacramenta puberum'<sup>11</sup> of Symon Vicentinus<sup>12</sup> and Jacobus Balduini.<sup>13</sup>

<sup>10</sup> In the same way the content of an obligation cannot be increased by taking an oath. Cf. E. CORTESE, *La norma giuridica. Spunti teorici nel diritto comune classico* (Ius nostrum ... Università di Roma 6.1 and 2), Milano 1962, I p. 10 n. 21.

<sup>11</sup> The origin of this *authentica* will be discussed later. The text can be found in note 23.

<sup>12</sup> Oxford BL Laud. lat. 3 fol. 24rb-24va, St. Gallen 746 p. 428a.

Accursius – the gloss ‘Querimoniam’ ad LF. 2,53,3<sup>14</sup>

... Questio. Set in isto queritur quare magis tollitur iuramentum ipso iure quam contractus? Resp. quia iuramenti effectus debiliior est. Ex eo enim nulla inducitur obligatio, set robur quoddam quod praestat contractui cui accedit, scilicet ut possit efficaciter conueniri, quod alias non poterit, auxilio restitutionis obstante, si sponte interponatur: hic ergo effectus quasi debiliior tollitur ui uel metu illato. Quod non est in effectu qui ex contractu inducitur quasi fortior: quia ex eo inducitur ultro citroque obligatio ut ff. de uer. si. l. Labeo [D. 50,16,19]. Et supra dictam lecturam lego secundum literam talem quam habebam: “per uim autem et iustum metum” subaudi sacramenta interposita, scilicet a puberibus de quibus dictum est. “a maioribus maxime” si maiores, id est potentiores uim uel metum intulerunt. “ne maleficia commissa extorta . . .” Uel potest legi secundum aliam (St.O.: bonam) literam aliter: per uim et iustum metum etiam a maioribus et maxime “ne querimonia maleficiorum commissorum fierent extorta etc.”.

A similar approach can be found e.g. in the apparatus ‘Animal est substantia’ on Gratian’s Decretum. This commentary dates from the beginning of the thirteenth century (c. 1210), has a distinct Parisian origin, and is characterized by pronounced romanizing tendencies. The author refers to Roman Law in order to make it clear that the oath is not able to create a civil obligation for the *jurans*. The latter can bind himself, but the effect is a very personal one.<sup>15</sup> Thus we encounter in this fragment the general opinion of Canon Law that the oath does have certain consequences for the law of procedure. I will return to this later.

Animal est substantia ad C. 22 q.1 c.1<sup>16</sup>

... Notandum quod iuramentum dicitur iurantis actio. Dicitur etiam quoddam uinculum quo obligatur homo, proueniens ex illa actione. Nec iuramentum facit obligationem, set factam consolidat; quod ubi (om. Bamberg) non ualet pactum, nec iuramentum co. de legibus Non dubium [C. 1,14,5]. Et sicut dictum est de uoto ita dici potest de iuramento, sc. quod lex est. Unde non obligat (Unde ... obligat: om. Bamberg). Unde non tenetur successor ex iuramento. Unde si capitulum iurauit aliquid, successores non obligantur ...

<sup>13</sup> Alba Iulia II,4 fol. 37r; Cf. also an unknown Jacobus in the Ms. Göttingen 2° Jurid. 26 fol. 25rb.

<sup>14</sup> Paris Bibl. Nat. lat. 15419 fol. 199va, Paris Bibl. Nat. lat. 16905 fol. 227rb, Saint Omer Bibl. municip. 464 fol. 223rb, Bibl. Apost. Vat. Borg. lat. 435 fol. 291ra. The last lines are lacking in most of the printed editions.

<sup>15</sup> This personal character also appears from other texts, although in this respect the verb ‘obligare’ is sometimes used in Canon Law. Cf. also X 1,43,9 = 4 Comp. 1,18,2 ... , quia iuramento suo seipsum personaliter non ecclesiam poterat obligare. The gloss ‘Per tuas’ ad X 1,43,9: ... Item iuramentum personale est et ideo non obligat alium quam iurantem (in the Paris edition 1585 of the Decretals of Gregory IX column 513).

<sup>16</sup> Bamberg Staatsbibl. can. 42 fol. 111ra, Bernkastel-Kues Nosocomium Sci. Nicolai 223 fol. 156va.

As we can see the view that by taking an oath, the *nudum pactum* becomes enforceable, mentioned by Accursius, is not yet a general doctrine in the thirteenth century. It is not even accepted by later jurists such as Jacques de Révigny and Cinus de Pistorio. From the commentaries upon 'Sacramenta puberum' it appears that the Glossators in fact have been discussing different issues e.g. is it possible to take an oath in all legal transactions, even those which are void or prohibited by law? In addition they pose the legal problem of an oath which does not confirm an agreement between two parties, but consists of a simple unilateral promise. We will investigate these issues more closely.

### III

In the thirteenth century extensive commentaries upon 'Sacramenta puberum' one of the main questions is whether the words 'super contractibus' may be considered to apply to all contracts, even those which are prohibited by the law. This needs explanation. In the Code the *lex Non dubium* (C. 1,14,5) states that it is not possible in legal proceedings to refer to the fact that an oath has been taken when any legal transaction is prohibited by law. This text does not pronounce upon the validity of those legal transactions or the validity of the oath itself, it simply states that one can not get around the prohibition by taking an oath; to put it differently, the oath may be valid but can never be effective. One of the void contracts is the alienation of certain kinds of property of a minor without judicial permission which was discussed in two titles, one in the Code<sup>17</sup> and one in the Digest.<sup>18</sup> This prohibition originated from the so-called 'Oratio Severi', dating from 195 a. C.<sup>19</sup> Does the *lex Non dubium* however refer to this forbidden alienation as well? In the Code there was another text, the *lex Si minor* (C. 2,(27)28, 1), which stated that when a minor had sold an estate and had taken an oath not to challenge the contract, he lost his right to demand restitution. The *Oratio Severi* was originally only applicable to the alienation of certain kinds of property, the 'praedia rustica' or 'suburbana'. In the case of C. 2,(27)28,1 however, there is no indication that such an estate is involved and for this reason

<sup>17</sup> C. 5,71 De praediis vel aliis rebus minorum sine decreto non alienandis vel obligandis.

<sup>18</sup> D. 27,9 De rebus eorum, qui sub tutela vel cura sunt, sine decreto non alienandis vel supponendis.

<sup>19</sup> Cf. D. 27,9,1.

it is questionable whether the rule of the *Oratio Severi* is applicable. It is true that in later times the Emperor Constantine (306–337) had extended the rule to alienations of all estates and even valuable movables.<sup>20</sup> The Glossators, however, connected the prohibition of the *Oratio Severi* with the lex *Si minor*, although this text had been written before Constantine. This interpretation was not due to a lack of knowledge about the genesis of the texts in the Code. The Glossators knew which emperors had lived in the third century and which in the fourth. But Justinian himself had ordered that all texts should have equal legal authority, irrespective of when they were written.<sup>21</sup> This was the reason why the Glossators had to discuss the problem whether C. 2,(27)28,1 contradicts C. 1,14,5. In the fragment below, Symon Vicentinus mentions a very restrictive interpretation of C. 2,(27)28,1 given by Bulgarus, which reduces the application of this text to cases which were not in conflict with C. 1,14,5.<sup>22</sup> On the other hand, Martinus Gosia had interpreted C. 2,(27)28,1 more generously: any alienation, even without judicial decree, must be upheld if the minor has taken an oath not to challenge it. This interpretation had been confirmed by the *authentica* ‘Sacramenta puberum’ of Frederick I (emperor 1152/55–1190),<sup>23</sup> which seems to acknowledge a general principle of Canon Law: all sworn promises given by minors over fourteen have to be respected. The case in C. 2, (27)28,1 was just one special case under this general principle. Thus the question became urgent as to how this principle could be reconciled with the contrasting principle in C. 1,14,5. Now it was obvious that C. 2,(27)28,1 had to be interpreted as Martinus had proposed. This resulted clearly from the history of ‘Sacramenta puberum’. Symon Vicentinus pointed this argument out. The new imperial constitution would have been redundant if C. 2,(27)28,1 was to be interpreted as Bulgarus had wanted. One possible way to reconcile the contrasting texts was to state that taking an oath in alienations without judicial permission was no longer against the law because ‘Sacramenta puberum’ had approved it. This answer can be

<sup>20</sup> CT 3,32,1 from the year 332, Cf. also C. 5,71,18.

<sup>21</sup> In the introductory constitutions of the Codex Iustinianus.

<sup>22</sup> This opinion also appears in other glosses. See e.g. Montecassino 49, fol. 65rb: hoc ita intelligendum est ut uenditio de iure ualeret, facta uel ... (?) cum interpositione decreti, nam si uenditio effectum de iure non habuit, nec ualet, nec iuramentum ob id interpositum tenet ut supra de leg. et con. Non dubium [C. 1,14,5].

<sup>23</sup> Aut. post C. 2,(27)28,1 (= LF. 2,53,3) Nova constitutio Frederici. Sacramenta puberum sponte facta super contractibus rerum suarum non retractandis inuolabiter custodiantur. Per vim autem vel per iustum metum extorta etiam a maioribus (maxime ne querimoniam maleficiorum commissorum faciant) nullius esse momenti iubemus ...

found in the sources but Vicentinus and Accursius<sup>24</sup> offer an alternative answer: that the *lex Non dubium* gives a general rule for the contracts prohibited for all kinds of reasons (in *contractibus iure communi prohibitis*) whereas the *lex Si minor* gives a special rule for a particular kind of prohibited contract (*iure speciali*), viz. an alienation without judicial permission, a case where the contract is prohibited because of nonage alone. Commenting upon 'Sacramenta puberum', one of the first issues discussed by the Glossators is the question, can an oath be taken in every contract even when it is one prohibited by the law, like the alienation without judicial decree? As a specimen of their approach the following fragment taken from the 'Commentarius ad Authenticam Sacramenta puberum' of Symon Vicentinus might serve. This fragment is more comprehensive than corresponding parts in other commentaries. But it is representative because the author sticks closely to the standard opinion, which can also be found e.g. in Accursius,<sup>25</sup> in an unknown Jacobus<sup>26</sup> and in Jacobus Balduini.<sup>27</sup>

Symon Vicentinus – Commentarius ad 'Sacramenta puberum'<sup>28</sup>

Q.XXIII *Super contractibus etcetera*. Hic primo queritur utrum hoc intelligatur de omnibus contractibus, etiam per leges interdictis. Resp. Nequaquam. Nam iuramentum contra legem interpositum de iure non ualet ut supra de legi. et consti. l. Non dubium [C. 1,14,5] et ff. de pactis Iuris gentium § Et generaliter [D. 2,14,7,16] et de obsequiis libero l. penult. [D. 37,15,10] et ff. de legatis i l. Si quis inquilinos § ult. [D. 30,1,112,4] et in aut. scenicas non solum in V. coll. [Aut. 5,4 = Nov. 51]. Nec obstat quia (lege: quod) contra sacramentum facit, hoc enim ex concessa causa facit. Merito (St.G.: Ergo) licet sacramentum deserat, non uideatur pejerare ut ff. qui satisda. coguntur l. ult. [D. 2,8,16].

Set opponitur nonne contractus alienationis praedii minoris sine decreto fit contra legem, ut infra de administratione tuto. Lex que tutores [C. 5,37,22] et per

<sup>24</sup> In the gloss 'Super contractibus' ad LF. 2,53,3: ... Ergo nec sacramentum ullius debet esse momenti? Resp. non est contra legem cum hac lege Frederici sit approbatum: hac scilicet 'Sacramenta puberum' etcetera. Vel illud in contractibus interdictis iure communi (Paris Bibl. Nat. lat. 15419 fol. 198vb, Paris Bibl. Nat. Lat. 16905 fol. 227rb, Saint Omer Bibl. municip. 464 fol. 222va, Bibl. Apost. Vat. Borg. lat. 435 fol. 290va) Cf. also Azo, op. cit. (Summa Codicis), p. 46a: ... et ideo sive cum decreto sive sine decreto contrahat, repellitur a privilegio quod habet ratione etatis, sed non repellitur a iure communi ...

<sup>25</sup> The gloss 'Super contractibus' ad LF. 2,53,3 (for the manuscripts see the previous note). It is striking that the Accursian gloss 'Contractibus' ad 'Sacramenta puberum', aut. post C. 2,(27)28,1 starts with the remark: 'etiam si ipso iure non valeant'. This gives the impression of a clash with the gloss on LF. 2,53,3. Apart from this, the Ordinary Gloss on LF. 2,53,3 is much wider than on aut. post C. 2,(27)28,1.

<sup>26</sup> Jacobus? – Repetitio ad Authenticam 'Sacramenta puberum' Göttingen 2<sup>o</sup> Jurid. 26 fol. 25rb.

<sup>27</sup> Jacobus Balduini – Commentum ad Auth. 'Sacramenta puberum', Alba Iulia II,4 fol. 36r.

<sup>28</sup> Oxford BL Laud. lat. 3 fol. 23va, compared with St. Gallen 746 p. 427va.



totum et in C. et ff. de praediis minorum [C. 5,71 and D. 27,9]. Et tamen ualet si iuramentum interueniat ut in prima lege huius tituli [C. 2,(27)28,1]. Resp.: Hic non fit alienatio contra legem set contra formam legis. Nec enim prohibet lex praedium minoris uendi set prohibet ne sine forma uendatur idest sine decreto quod ob es alienum interponitur, ut infra de praediis minorum l. Ob es [C. 5,71,12]. Et ideo sacramento interposito ualet secundum M. Vel secundum B.: fuit interpositum decretum, unde uenditio tenet, set si lesum est minor restituitur ut infra de praedi. minorum Si quidem [C. 5,71, 11]. Set iuramento interposito tollitur restitutio. Nam iuramentum tollit speciale auxilium ut in hac lege ueteri et infra si minor ma. se dixerit l. iii. in fine [C. 2,42,3,3].

Set obiicitur quia per hanc nouam legem (Sacramenta puberum) tenet uenditio etiam sine decreto. Resp.: Hic non interponitur contra legem, immo secundum legem, cum iam lege Frederici sit approbatus talis contractus.

Uel ut omnibus superioribus sit una solutio: dic quod illud intelligitur in contractibus iure communi prohibitis. Hic autem iure speciali prohibetur, scilicet iure minoris etatis.

Igitur trahenda est lex ista etiam ubi fit sine decreto alienatio. Alioquin esset superflua, cum etiam lege ueteri ualere alienatio cum decreto, sicut denegetur restitutio interueniente iuramento ar. ad hoc ut ff. ad municipal. l.i in fine [D. 50,1,1,2].

Apparently the lex *Non dubium* remains the principle rule. It cannot be said that this text regarding prohibited contracts had been corrected by the constitution 'Sacramenta puberum'. The lex *Non dubium* refers in general to all sorts of prohibited legal transactions, thus to a general principle of law (*ius commune*), whilst 'Sacramenta puberum' refers to special legal transactions prohibited according to special principles of law (*ius speciale*) on the basis of nonage. As long as there is no curator, Vicentinus stuck to this view consistently as will appear from a single example below.

#### IV

As we will see the application of 'Sacramenta puberum' is not only discussed in relation to the alienation of immovables, although this seems to be the main issue in the commentaries, but also in connection with all kinds of legal transactions.

A person still under the *potestas* of his *pater familias* will need his father's permission to borrow money irrespective of his age. As a consequence an oath cannot validate the prohibited contract here. Since age is of no importance this prohibition is a general one belonging to the '*ius commune*' and thus the lex *Non dubium* has to be obeyed. This case shows how a contract which is prohibited by nonage alone can become

enforceable. This is due to a legal fiction, which was based on C. 2,42,3.<sup>29</sup> The minor who takes an oath is considered to be a *maior*.<sup>30</sup>

Symon Vicentinus – Commentarius ad 'Sacramenta puberum'<sup>31</sup>

Q. IX Item quid si filius familias minor mutuam accipiat pecuniam et iuret. Resp. non tenebitur quia etiam si esset maior non teneretur et hoc sacramentum hoc operatur quia eum maiorem representat. Item non ualet quia sacramentum contra legem est interpositum et ideo non seruandum ut supra de legibus et consti. l. Non dubium [C. 1,14,5] et ff. de pactis l. Iuris gentium § Et generaliter [D. 2,14,7,16] et ff. de legi. l. Si quis inquilinus § ult. [D. 30,1,112,4].

Just as a *filius familias* is not able to enter into a contract of *mutuum*, a woman under age is not able to act as a guarantor by taking an oath, because the SC Velleianum prohibits every woman from acting as a guarantor, even those over twenty-five. On the other hand, when she takes an oath, she will be considered to be a *maior* and in that case it is possible to renounce her privilege, just as any *maior* can.

Symon Vicentinus – Commentarius ad 'Sacramenta puberum'<sup>32</sup>

Q. XXXVIII § Item quid si mulier minor pro alio intercessit et iuravit. Resp. non ualebit, quia nec etiam maior teneretur propter Velleianum. Set si renunciavit et iuravit tenetur, quia maior renunciare potest ut ff. ad uellea. l. ult. § penult. [D. 16,1,32,4], cum sit sui fauore inducta. Sic et minor renunciavit et iurans tenebitur. Sy.

There is however a later decretal of Pope Boniface VIII (1294–1303) which suggests that it is possible to validate an agreement which is prohibited by law. D. 38,16,16 and C. 6,20,3 prohibited the renunciation of rights of inheritance on provision of a dowry. In the Middle Ages such 'disinheritance by agreement' as well as disinheritance by will because of the provision of a dowry were nevertheless widely accepted in practice.<sup>33</sup> Although the words 'Quamvis improbet lex civilis' suggest a direct contrast with Roman Law, this is somewhat mitigated by the gloss 'Quamvis pactum'.<sup>34</sup> It is held to be immoral to make an agreement con-

<sup>29</sup> Possibly it also has foundations in Canon Law.

<sup>30</sup> Not in the sense that the custodial care would be terminated by taking an oath. This problem is discussed by Vicentinus in Q. XLVIII of his commentary. For this reason he is not willing to use the word fiction. The fact that the minor is presented as a *maior* only means that he can be compelled to perform as if the contract was entered into by a *maior*.

<sup>31</sup> Oxford BL Laud. lat. 3 fol. 23rb, compared with St. Gallen 746 p. 426b.

<sup>32</sup> Oxford BL Laud. lat. 3 fol. 24ra, compared with St. Gallen 746 p. 427b.

<sup>33</sup> L. MAYALI, Droit savant et coutumes. L'exclusion des filles dotées XIIème–XVème siècles (Ius Commune. Sonderheft 33), Frankfurt am Main 1987, pp. 11 ff.

<sup>34</sup> The gloss 'Quamvis pactum' ad VI 1,18,2 (in the Paris edition 1585, column 277).

cerning the inheritance during the testator's lifetime.<sup>35</sup> Where a dowry is provided this objection is not so strong, because the daughter has no interest at all in the moment of the testator's decease. The Pope simply formulates two criteria to test the sworn agreement. It may not endanger eternal salvation and it may not cause someone else loss. Whenever these terms are observed, there is no objection to take an oath.

# VI 1,18,2

Quamvis pactum, patri factum a filia, dum nuptui tradebatur, ut dote contenta nullum ad bona paterna regressum haberet, improbet lex civilis: si tamen iuramento non vi nec dolo praestito firmatum fuerit ab eadem, omnino servari debet, quum non vergat in aeternae salutis dispendium, nec redundet in alterius detrimentum.

Although the commentaries of the Glossators upon 'Sacramenta puberum' have a distinct casuistic character, I was not able to trace any discussion of this case, which might also have had a social interest. On the other hand we can find discussion on issues which seem to be purely theoretical. In the *Lex Aelia Sentia* (4 a. C.) it was laid down that the manumission of a slave over thirty by someone younger than twenty was void. In this rule we see that again age plays a part. If the rule, developed for example by Vicentinus, that a minor who takes an oath is always to be considered a *maior* were to be applied consistently in this case, we should come to the conclusion that the prohibition of the *Lex Aelia Sentia* is not applicable any time a minor takes an oath. Vicentinus indeed followed the opinion of Pilius, that the words 'super contractibus' – Pilius quotes 'super alienationibus'<sup>36</sup> – may be interpreted broadly to include manumissions. Therefore his approach to this legal act is identical to the one he took towards the alienation of property.<sup>37</sup>

Symon Vicentinus – Commentarius ad 'Sacramenta puberum'<sup>38</sup>

Q. XLIIII § Item quid si minor XX annis seruum inter uiuos manumisit et iurauit quod non contra ueniret. Resp. Hec est questio scolastica. Et uidetur ut non ualeat manumissio quamuis iuramentum interuenerit, quia facta est contra legem Eliascentiam ut in Inst. qui ma. non licet § Eadem [I. 1,6,4]. Set Py. dicit ut

<sup>35</sup> The gloss 'Improbet' ad VI 1,18,2 referring to C. 3,28,1; C. 2,3,15 and 30; C. 6,20,3 (column 277 in the Paris edition 1585).

<sup>36</sup> PILII MEDICENSIS, Quaestiones Sabbatinae, Augustae Taurinorum 1967 (Reprint of the Rome edition 1560). Corpus glossatorum juris civilis, t. 4, fasc. 1, Quaestio CXXX, p. 225.

<sup>37</sup> Regarding this issue Pilius and Vicentinus seem to be deviating from the opinion as ascribed to Azo in Paris Bibl. Nat. lat. 4546 fol. 25va: "Item quid si minor libertatem prestitit contra legem Eliascentiam et iurauit. An ueniet contra? Resp. ita."

<sup>38</sup> Oxford BL Laud. lat. 3 fol. 24ra, compared with St. Gallen 746 p. 427b.

ualeat manumissio propter hanc legem. Quod et ego puto uerum, quia tantum propter minorem etatem fit contra legem. Set sacramentum eum majorem representat et sic lex Eliascencia locum non habet, ut notauit supra in hac eadem lege de alienatione predii minoris.

Summarizing, we can say that the law can prohibit certain legal transactions on many grounds. The normal consequence is that the transaction remains void and that according to the lex *Non dubium* one cannot get round the prohibition by taking an oath. This rule is not affected by 'Sacramenta puberum'. The lex *Non dubium* remains the principle rule, but is interpreted as convening general prohibitions, whilst 'Sacramenta puberum' concerns special cases. After all, it only states that the oaths of *puberes* should be respected. In prohibitions on the basis of nonage the oath does take effect. In those special cases the law treats the minor as if he were older than twenty-five. For this reason he cannot appeal any more to privileges such as *in integrum restitutio*. According to Jacobus Balduini, Symon Vicentinus and Accursius the consequences of the oath are limited to the law of procedure. The oath can sometimes take effect because appeal to a special privilege is not possible. They are not willing to accept such consequences in the substantive law of obligations. For this reason we can determine that in these commentaries no starting-point can be found for the doctrine that by taking an oath the *pactum nudum* becomes a *pactum vestitum*.

## V

In some of the commentaries upon 'Sacramenta puberum' the case of an oath taken to hand over a certain amount of money is discussed. Since this promise to give cannot be qualified as some kind of contract or *pactum*, it is questionable whether it nevertheless will create a civil obligation or whether it is legally enforceable. In a fragment adopted from the commentary of Martinus de Fano the argument can be found that the words of 'Sacramenta puberum' themselves prescribe that oaths should be observed (an argument, by the way, which will be rejected). As a general rule it is stated that the oath is not able to create a civil obligation. It is striking that the word *actio* is replaced by *obligatio*. This implies that the author is not giving his opinion about actual enforcement. One of the few pegs in Roman Law to hang the idea that an oath might create an obligation is the oath taken by a slave on the occasion of his manumission, by which he declares that he will perform certain duties

(*operae*) in the future. We know that performance could be enforced by the *patronus* by means of the *actio operarum* solely on the basis of the oath. Moreover the words of D. 38,1,7 do qualify this legal relationship as an obligation. Martinus de Fano takes this datum for an exception.

Martinus de Fano – Quaestiones ad Auth. 'Sacramenta puberum'<sup>39</sup>

§ Set pone quod minor pormittit michi X dare, non paciscendo. Nunguic erit tale iuramentum seruandum? Et dicunt quidam quod sic, quia hec littera dicit iuramentum seruari. Set contrarium est, quia ex iureiurando non oritur actio(exp.) obligatio, nisi in casu puta cum aliquis manumittit seruum suum et in ipsa manumissione prestat ius iurisiurandi de operibus prestandis. Tunc bene obligatur, ut ff. de operis l. Iurisiurandi [D. 38,1,7].

A similar fragment can be found in the commentary of Jacobus Balduini. He pays more attention to the word 'contractibus'. Naturally the unilateral promise to give a certain amount cannot be considered a *pactum*, much less a contract. Moreover, the number of ways to create obligations is fixed. A fair number are enumerated in D. 44,7,52, but the oath is nowhere recognized as an independent source of obligations.

Jacobus Balduini – Commentum ad Auth. 'Sacramenta puberum'<sup>40</sup>

Questio. Set quid si minor iurauit se daturum X nulla intercedente obligatione. Numquid tenebitur? Resp. non. nam hic loquitur de contractibus. Preterea non inuenimus ut ex iuramento quis obligetur ut notatur supra infra de operibus l. i [C. 8,11,1?] nisi in casu ut ff. de libe. ca. l. f. [D. 40,12,44] ff. de operis libe. Ut iurisiurandi [D. 38,1,7]. Certi enim sunt modi quibus quis obligatur: ff. de act. et oi. Obligamur [D. 44,7,52]. Non obstat hec constitutio, quia dicit super contractibus in ... [?] potius ... [?] arg. pro nobis est. Item non obstat infra de iur. Actori [C. 4,1,8], quia ibi loquitur quando sacramentum cedit (lege: cadit?) loco probationis, secus cum loco caueret (lege: contractus?).

Legal enforceability was positively denied in a commentary upon 'Sacramenta puberum', ascribed to Azo. Because the oath itself should be regarded as a *nudum pactum*, it is not able to give rise to an action. The fact that this view is no longer defended in the later commentaries may possibly be due to the promulgation of the *compilatio tertia* in the year 1210. The decretal 'Novit ille'<sup>41</sup> of Pope Innocent III (1198–1216) laid down that oaths could be enforced in the ecclesiastical courts.

<sup>39</sup> Assisi 220 fol. 26vb.

<sup>40</sup> Alba Iulia II,4 fol. 35v.

<sup>41</sup> 3 Comp. 2,1,3 = X 2,1,13.

Azo – Commentum ad Auth. 'Sacramenta puberum'<sup>42</sup>

*Rerum* generaliter posuit ut ff. si ce. pe. li [D. 12,1,1]. Hoc autem sacramentum indicimus obesse minori si alia causa precessit. Nam cum sacramentum sit nudum pactus (lege: pactum), agi non possit ex eo, cum non sit uestitum aliquo (lege: aliqua) ui uestimentorum ar. ff. de donat. Nuda [D. 39,5,26] ff. de acqui. rer. do. Numquam [D. 41,1,31].

Jacobus Balduini on the other hand was apparently well aware of the fact that in Canon Law the judge will compel the *jurans* to perform what was sworn. For example the Pope, when asked to intervene as judge, would grant a *rescriptum delegationis*, because he did not want anybody to remain in mortal sin. For this reason Jacobus Balduini continues<sup>43</sup>:

Set dominus papa bene concederet rescriptum ut aliquis compelletur quia non uult ut aliquis stet in mortali peccato.

The standard text for a papal delegation rescript, by which means fulfilment of the oath could be enforced, is contained in the curial formula books.<sup>44</sup> The enforcement of this unilateral promise confirmed by oath was described by Kunkel as a doctrine of Canon Law, which would have helped pave the way for the acceptance of the formless contract in the doctrine of the Commentators.<sup>45</sup> This leads us to the possible influence of Canon Law.

## VI

In Theology and thus in Canon Law it is regarded as a severe sin not to fulfil an oath.<sup>46</sup> In general every oath creates a moral duty. This is expressed for example in the 'Summa Theologiae' of Thomas Aquinas (1225–1274).

<sup>42</sup> Paris Bibl. Nat. lat. 4546 fol. 25va.

<sup>43</sup> Alba Iulia II,4 fol. 35v.

<sup>44</sup> This rescript is discussed in P. HERDE, Audientia litterarum contradictarum, Tübingen 1970, Part I, p. 241 and the formula can be found in Part II, p. 114 (K 15c).

<sup>45</sup> W. KUNKEL, Das Römische Recht am Vorabend der Rezeption, in: L'Europa e il diritto Romano. Studi in memoria di Paolo Koschaker, Milan 1954, Vol. I, p. 5: 'Aber auch im Privatrecht sind die Einflüsse des kanonischen Rechts überall zu finden . . . weniger geläufig ist uns vielleicht die Tatsache, daß der kanonistische Satz, eine formlose Zusage werde durch Hinzufügen eines Eides bindend, schon im Postglossatorenrecht den Durchbruch zum formfreien Vertrag wenigstens vorbereiten half'.

<sup>46</sup> Although there were degrees of perjury Cf. X 2,24,15 = 2 Comp. 2,16,6.

Thomas Aquinas – 009(ST3)89.7.co<sup>47</sup>

Sic ergo dicendum est quod quicumque iurat aliquid se facturum, obligatur ad id faciendum, ad hoc quod veritas impleatur, si tamen alii duo comites adsint, scilicet iudicium et iustitia.

In this moral duty two aspects must be discerned. There is a twofold obligation: one to God and one to the person to whom the promise is made. If there is only a human beneficiary and the purpose of the oath was not meant to do honour to God, it is possible to be dispensed from the oath by the person involved. This view can be found in the writings of Thomas Aquinas but also among canonists such as Raymund of Peña-fort (ca.1180–1275).

Thomas Aquinas – 009(ST3)89.9.ra<sup>48</sup>

Ad secundum dicendum quod homo potest alteri promittere aliquid sub iuramento dupliciter. Uno modo, quasi pertinens ad utilitatem ipsius: puta si sub iuramento promittat se servitutum ei, vel pecuniam daturum. Et a tali promissione potest absolvere ille cui promissio facta est: intelligitur enim iam ei solvisse promissum quando facit de eo secundum eius voluntatem. Alio modo promittit aliquis alteri quod pertinet ad honorem Dei vel utilitatem aliorum, puta si aliquis iuramento promittat alicui se intraturum religionem, vel aliquod opus pietatis facturum. Et tunc ille cui promittitur non potest absolvere promittentem, quia promissio non est facta ei principaliter, sed Deo: nisi forte sit interposita conditio, scilicet, si illi videbitur cui promittit, vel aliquid aliud tale.

Raymund of Peña-fort – Summa de poenitentia I,9,17<sup>49</sup>

Item pone quod aliquis iuramento tenetur aliquid facere; petit dilationem vel absolutionem et obtinet ab eo cui tenebatur; quaerabitur, utrum sit ex toto absolutus a iuramento . . .

si vero in favorem hominis, si ille sponte absolverit, postea non tenetur . . .

The two aspects are obvious whenever the oath is taken under duress. In that case fulfilment of the oath may not be demanded by the beneficiary. But according to Huguccio, facing God one cannot appeal to an 'exceptio quod metus causa'.<sup>50</sup> One is not supposed to decide oneself whether or

<sup>47</sup> S. Thomae Aquinatis opera omnia ut sunt in indice thomistico additis 61 scriptis ex aliis medii aevi auctoribus, Stuttgart, Bad Cannstatt 1980, t. II, p. 643. This passage is taken from the 'Secunda secundae' of the 'Summa Theologiae', which was written in Paris, probably between the beginning of 1271 and spring 1272. Although compared to Gratian's Decretum and the Decretals of Gregory IX this work is rather young, it denotes a much older and widely spread opinion.

<sup>48</sup> Op. cit. t. II p. 644.

<sup>49</sup> Ed. X. OCHOA, A. DIEZ, Rome 1976, pp. 378–379.

<sup>50</sup> S. KUTTNER, Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX, Città del Vaticano 1935, p. 324 and CORTESE, op. cit. I, p. 16 n. 37.

not to fulfil this oath, but to ask the church for exemption.<sup>51</sup> The next question is whether this moral duty can be judicially enforced in Canon Law. The Glossators did not pay much attention to this issue. We know that in exceptional cases the oath might have effects for the law of procedure. The minor who took an oath not to challenge the contract of sale was no longer able to appeal for *in integrum restitutio* anymore. A similar principle can be found in Canon Law. The decretal 'Cum venissent'<sup>52</sup> of Pope Innocent III points in this direction. It considers the following case. In a long and continuous tradition two rights were granted to the archdeaconry of Richmond, which according to Canon Law belong to the competency of the diocesan, viz. the right to institute persons (*institutio personarum*) and the right to attend to churches which fell vacant (*custodia ecclesiarum vacantium*). According to the present archdeacon these rights were granted for perpetuity on the humble request of Henry I (King of England 1100–1135). This was voluntarily done with approval of the chapter of York. On the occasion of the appointment of the present archdeacon, the archbishop had reserved these rights again. When the archdeacon nevertheless tried to exercise the rights his predecessors always had, he was compelled to renounce them. According to the archdeacon this was done by a simple deed, but the archbishop of York maintained that an oath was taken as well. In his judgement Pope Innocent commands that the archdeacon should be restored in the disputed rights until it is proved that their award was occasional or that they were indeed renounced by oath. If one of these facts is proved on the other hand, silence should be imposed upon the archdeacon. We have seen that a minor cannot appeal any longer for *in integrum restitutio*, once he takes an oath not to challenge the contract of sale. Because of the oath he is deemed to be a *maior*. So he only lost a remedy which was at his disposal being a minor. In the same way the archdeacon of Richmond cannot claim the rights he had at his disposal being the archdeacon of Richmond if he had renounced them by oath. The fact that an oath had been sworn blocks access to the court for *this* archdeacon. His successor, if he avoids such an oath, may raise his voice and claim those rights. In the same way, in other legal transactions in which no oath is taken, the *minor* can still appeal for *in integrum restitutio*. Apart from these effects in procedural law, the oath can also be enforced. This is not

<sup>51</sup> X 2,24,8 = 1 Comp. 2,17,4.

<sup>52</sup> X 3,7,6 = 3 Comp. 3,7,3.



often discussed by the Glossators, which might be due to the fact that because of the religious and ethical aspects, vows and oaths belong to the jurisdiction of the ecclesiastical courts. According to Canon Law, which was shown e.g. in the fragment from 'Animal est substantia', the oath is not able to create a civil obligation, but rather a moral duty. But in a conflict between two christians concerning the fulfilment of an oath, Canon Law has its own means of enforcement e.g. by *denuntiatio evangelica* and even intervention of the Pope by giving a delegation rescript. Therefore we can say that according to Canon Law, fulfilment of oaths can be enforced and this was also laid down as a general rule.<sup>53</sup> According to the Decretals of Gregory IX the ecclesiastical court was competent e.g. by the way of *denuntiatio evangelica* to deal with perjurers, even if they did not belong to the clergy.<sup>54</sup>

## VII

Investigating the commentaries upon 'Sacramenta puberum', I could trace among the Glossators only one early move towards the enforcement of oaths. In the Ms. Paris Bibl. Nat. lat. 8940 an addition can be found ascribed to a certain Gydo. In this commentary, which takes the literary form of a consilium, the enforcement of oaths is defended by appealing to the Roman sources alone. The starting point is the well-known case about a promise to 'decem dare' confirmed by oath as discussed by Martinus de Fano and Jacobus Balduini. Can this oath be enforced?

Gydo? – additio ad Auth. 'Sacramenta puberum'<sup>55</sup>

§ Pone quod tu iurasti te daturum mihi decem, daturne actio mihi ex tuo iuramento?

At this point the general opinion of the 'doctores' is recapitulated, which Gydo ascribes to them all and which he will reject later. On the basis of C. 4,1,2 it is argued that the oath merely creates a moral duty, that is, an obligation only from the religious point of view. It is sufficient that God

<sup>53</sup> E.g. ANTONIUS DE BUTRIO (†1408): ... et est communis opinio canonistarum scilicet quod iuramento agi potest et etiam ex pacto. ANTONIUS A BUTRIO, In Librum Tertium Decretalium Commentarii, Torino Bottega d'Erasmus 1967 (Reprint of the Venice edition 1578) fol. 47vb.

<sup>54</sup> X 2,1,13 = 3 Comp. 2,1,3 Cf. also VI 2,2,3 and the fragment from 'Animal est substantia' quoted above.

<sup>55</sup> Paris Bibl. Nat. lat. 8940 fol. 39r.

will punish the perjurer. It is not necessary for the judge to use force against him too. This opinion however cannot be found explicitly in the commentaries upon 'Sacramenta puberum'. These simply deny that the oath would have consequences in civil law by creating an obligation. On the other hand legal enforcement could be traced in the sources of Canon Law. Albericus de Rosate suggests that on the question of enforcement there was a difference between Roman Law and Canon Law.<sup>56</sup> The fact however that the Glossators I investigated do not discuss the issue can also be explained by the fact that fulfilment of oaths was regarded as coming under the jurisdiction of the ecclesiastical courts. Only the early commentary of Azo seems to back up the opinion of Albericus. The doctrine according to which a *nudum pactum* could become a *pactum vestitum* was rejected by the 'doctores'. The oath by a slave on manumission must be regarded as an exceptional case. Moreover D. 37,15,10 shows that a *filius familias* is not able to bind himself by oath to his father. Also Accursius had mentioned the doctrine in the gloss 'Quinimo'. It was indeed rejected in the commentaries upon 'Sacramenta puberum' of Accursius, Jacobus Balduini and Symon Vicentinus and even by Jacques de Révigny and Cinus de Pistorio. They all assume that the oath has no legal consequences in civil law.

Doctores sunt in ea opinione quod non detur, et hec per legem C. de rebus cre. et iureiurando l.ii [C. 4,1,2], ibi: "satis Deum habet" etcetera. Item quia nudum pactum est, nec uestitur iuramento nisi ut in casu ut ff. de operis libertorum l. Ut iurisiurandi [D. 38,1,7] et hoc dicunt de (iure) speciali in inpositione operarum et in liberto per legem ff. de obsequiis l. penult. [D. 37,15,10], quia filius ex iuramento suo patri non obligatur. Set libertus manumissori iuramento obligatur ut in l. predicta. Et hec secundum omnes.

In Gydo's own opinion the oath does have some effect: the judge will enforce the promise if asked to do so. There are three reasons for this. First of all D. 11,1,11,1 shows that when someone questioned by the magistrate declares that he is an heir to part of the inheritance, while in reality he is not heir at all, he can be summoned and his statement will be held against him. Secondly Gydo adheres to a very literal interpreta-

<sup>56</sup> ALBERICUS DE ROSATE... Dictionarium iuris tam civilis tam canonici, Venetiis 1573 (Reprint Turin 1971), pp. 406b-407a: Iuramentum de iure ciuili non obstat efficaciter, ut ex eo agatur. not. C. de op. lib. l. j. [C. 6,3,1] sed de iure canonico bene inducitur efficax obligatio. c. per tuas. extra de arbit. [X 1,43,9] de iureiur. c. cum contingat. [X 2,24,28] Ioan. bap. castel. Ex iuramento praestito, ubi nulla praecessit obligatio naturalis, licet non detur actio de iure civili, potest tamen de iure canonico agi multis modis. de quibus per Abb. in c. cum venissent. de insti. in fi. [X 3,7,6] Ioan. bap. castel.

tion of the words of 'Sacramenta puberum', that oaths should be respected (*custodiantur*), which he takes to imply that legal remedies are available. In the third place D. 12,2,13,5 states that when someone takes an oath by which he declares an estate mortgaged for a debt of ten, he can only make use of the *actio pignoratitia* to regain the estate after the debt of ten has been paid, but he can also be summoned to pay the amount of ten on the basis of his oath. Besides, it is argued that C. 4,1,2 does not state the contrary. The words "It is enough that God" there only refer to the question whether the judge should punish the perjurer.

Gydo contra, quia secundum eum actio michi datur ex iuramento tuo et hoc tribus rationibus. Prima per legem ff. de interrogatoriis actionibus l. De etate § i [D. 11,1,11,1], quia interrogatus an heres ex parte sit, respondit se heredem. Si postea conueniatur fides ei contra se habenda est. Secunda per uerba autentice C. Si aduersus uenditionem aut. Sacramenta, ubi dicit "custodiantur". Ergo per actionem et exceptionem ut ff. de acquirendo rer. do. l. Statuas [D. 41,1,41] et ff. de famil. herces. l. Inter coheredes § i [D. 10,2,44,1] et ar. ff. de lega. iii l. Cum quis § Nuptura [D. 32,1,37,4]. Item tertia ratione per legem ff. de iureiurando l. Si duo § Marcellus [D. 12,2,13,5], quia si quis iurauerit se ob decem pignori dedisse predia non aliter agere potest quam si decem soluat. Potest etiam et ad decem ex iuramento quod iurauit conueniri ut in dicta lege. Et ita secundum eum datur mihi actio ex iuramento tuo. Nec obstat l. C. de rebus cre. l. ii [C. 4,1,2], que dicit "satis Deum" etcetera: Uerum est quoad penam corporalem.

At this point, the general opinion of the 'doctores' is disputed with several arguments. Gydo admits that the oath cannot be considered to make the *nudum pactum* enforceable, but for a different reason. It is valid by itself because it gives rise to an action even without any *pactum*. Besides, if a stipulation can bind, how much more should an oath. Moreover, the oath of the slave on manumission cannot be seen as an exceptional case. After all, the slave has taken the oath or repeated it after the manumission according to D. 38,1,7,2 and D. 40,12,44, otherwise the oath would not be binding. Thus if in this case a free man is bound by his oath, why should there be a difference with other cases? Finally, it is a misinterpretation of D. 37,15,10 to believe that fathers may never require their sons to perform oaths. They cannot normally demand that their sons work for them and they are not allowed to induce them to take an oath to do so. For this reason D. 37,15,10 states that this oath shall not be enforced. If this were not the case, it would have been perfectly valid to bind oneself in this way.

Item nec alia ratio doctorum obstat, quod iuramentum non uestit pactum, nisi in casu l. ff. de obsequiis l. Ut iurisiurandi [D. 38,1,7] prout ipsi dicunt, quod Gy non admittit. Immo dicit quod iuramentum non est uestimentum pacti, set est efficax ex seipso ut sine omni pacto pereat (lege: prestat) actionem. Cum ex stipulatione datur actio, multo magis ex uerbalis sacramenti conceptione. Nec est speciale secundum eum in l. Ut iurisiurandi, quia quod dicit "libertum esse oportet". Dic: id est non seruus, quia seruus non obligatur ex iuramento ad operas, quia post manumissionem debet iurare ut in dicta lege § ii. [D. 38,1,7,2] et ff. de liberali causa l. ult. [D. 40,12,44]. Et ad hoc quod ipsi dicunt per l. de obsequiis l. penult. [D. 37,15,10] quod filius non obligatur patri ex iuramento. Responde quod hoc est ideo quia illud sacramentum est illicitum et contra leges, scilicet de operis inponendis filio a patre emancipatore, quod esse non potest ut pater inponat filio operas, "nam pietatem filii, non operas debent", ut in dicta lege. Unde si licitum esset iuramentum, bene patri obligaretur filius secundum Gydonem, qui ista recitauit super aut. Sacramenta puberum.

## VIII

I should like to come to a few conclusions. Among the Glossators there was a difference in opinion about the legal consequences of an oath. The opinion that it would bring about substantive changes in the legal position of the persons involved was not generally accepted. The view that a *nudum pactum* will become enforceable by taking an oath was rejected by Accursius. The other commentaries upon 'Sacramenta puberum' I investigated took the same stand and the fact that Gydo ascribes the rejection of any substantive consequences of an oath to all the 'doctores' points in the direction that this doctrine was only defended by a small minority in the thirteenth century.

Both the Glossators and the Canonists were willing to accept certain consequences of the oath in the law of procedure. Renouncing special privileges by oath was allowed. In Civil Law this was consolidated (perhaps unnecessarily) by the constitution 'Sacramenta puberum' for cases in which the performance normally could be nullified by making use of a special remedy on the basis of nonage. Where an oath was taken not to challenge the alienation this remedy could not be granted any more.<sup>57</sup> A similar abandonment of privileges occurred in Canon Law in the case of the decretal 'Cum venissent'.

<sup>57</sup> Cf. the often quoted gloss ad C. 2,(27)28,1: Praetor suum non tuum tibi denegat auxilium ('suum auxilium' means *in integrum restitutio*).

The enforcement of oaths was mainly developed in Canon Law. Most of the Glossators do not discuss this issue which might be due to the fact that in view of X 2,1,13 this matter was probably within the jurisdiction of ecclesiastical courts. Whether the Glossators would have denied it as Albericus de Rosate later suggested, is doubtful. Only the commentary of Azo, which possibly came into being before the promulgation of X 2,1,13 points in this direction. In the addition ascribed to Gydo it appears that the Glossators were in a position to defend enforcement of oaths solely by making use of arguments derived from Roman Law. Gydo suppresses the existence of the *lex Non dubium*. He takes the exceptional case of the *iusiurandum libertini* as foundation of the new rule. He drags in some texts from the Digest, which might have a similar tendency and he clings to a very literal interpretation of the phrasing of 'Sacramenta puberum', just because this happens to correspond with his own view.

This method, used by Gydo, is typical of the mediaeval jurists' technique when they want to develop new law. But it is not really a question of developing new law, rather a matter of interpreting the ancient sources of Roman Law in a socially acceptable way, a matter of searching for a Roman explanation of what Canon Law actually does.<sup>58</sup>

<sup>58</sup> I would like to thank my friend Grant McLeod, lecturer of Civil Law at the University of Edinburgh for correcting the English of my text.