IUS COMMUNE

Zeitschrift für Europäische Rechtsgeschichte

Veröffentlichungen des Max-Planck-Instituts
für Europäische Rechtsgeschichte
Frankfurt am Main

XXII

Herausgegeben von Dieter Simon
und Michael Stolleis

Vittorio Klostermann Frankfurt am Main
1995

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The anonymous commentum ad 'Sacramenta puberum' in Ms. Salzburg UB M. III 98

I. Introduction

It has been known for some time that there is an unedited early commentary upon the constitution 'Sacramenta puberum', which deserves our attention for several reasons. In the first place it may contribute to a better understanding of the genesis of the Ordinary Gloss upon this constitution, which was promulgated by Frederick Barbarossa (emperor 1152/55–1190) and afterwards enshrined in the *Corpus iuris civilis*, viz. as an *authentica* in the Codex (just after C. 2.27(28).1) and in the *Libri Feudorum* (LF. 2.53.10). Moreover, this commentary may enable us to evaluate the mutual coherence of other pre-Accursian commentaries upon the same text, which have been recently edited, like those of Azo Porcius (ca. 1150–1220),[1] Guizzardinus (d. 1222), Jacobus Balduini (d. 1235)[2] and Symon Vicentinus (Professor at Padua 1227–1230).[3]

The Leyden legal historian E. M. Meijers was one of the first to focus attention on the manuscript Salzburg Studienbibliothek Sign. V3 B19, which is nowadays known as Salzburg UB M. III 98. In an article published in 1934 and dealing with the glossators and the feudal law, he mentioned this manuscript of the *Libri Feudorum* and remarked

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[1] In J. HALLEBEEK, A commentary of Azo upon authentica 'Sacramenta Puberum', in: TRG 60 (1992), p. 289–310.

[2] In L. SORRENTI, L'Autentica 'Sacramenta puberum' nel esegesi dei dottori bolognesi del duecento: Guizzardino e Iacopo Baldovini, in: RIDC 2 (1991), p. 69–121.

[3] In J. HALLEBEEK, Symon Vicentinus' Quaestiones ad auth. Sacramenta Puberum, in: RIDC 3 (1992), p. 93–123. Henceforth the name Symon provided with a Roman numeral will refer to the question in this edition as indicated.

that it contains an anonymous commentary on 'Sacramenta puberum' composed of glosses by Pilius (Pilius de Medicina, ca. 1165–1207) and Albericus (Albericus de Porta Ravennate, ca. 1165–1194).[4] Subsequently, Cortese qualified this commentary as the possible source of the Ordinary Gloss (compiled by Accursius, ca. 1182–1263) ad LF. 2.53.10,[5] but this opinion was rejected by Chorus.[6]

Of all pre-Accursian commentaries on 'Sacramenta puberum' which have been investigated and edited, there is only one which pays special attention to the teachings of Pilius, viz. that of Symon Vicentinus. References to the opinion of Pilius can be found in five of his questions. Thus, even if the anonymous commentary in the Ms. Salzburg does not lie at the root of the Ordinary Gloss, it is by no means impossible that it did exercise some influence on other commentaries, such as the one of Symon Vicentinus. These considerations justify a closer look at the anonymous commentary and its content.

II. The constitution 'Sacramenta puberum'

The constitution 'Sacramenta puberum' was probably promulgated in the year 1155 by Frederick I. It was meant to settle a dispute among the glossators.

The Roman legal sources include a prohibition against selling or mortgaging certain estates owned by minors. This provision originates from the *Oratio Severi*, named after the Emperor Septimus Severus and dating from the year 195 A. D. In the days of Constantine exceptions to this prohibition were accepted. Contracts of sale were still void in case they were entered into without judicial decree (*sine decreto*), but the alienation of the minor's estate with judicial decree (*cum decreto*) was allowed.[7] Among the early glossators it was disputed whether a *pubes* (a minor over twelve or fourteen) could get round the prohibition

[4] See E. M. Meijers, Les glossateurs et le droit féodal, in: TRG 13 (1934), p. 129–149. This paper was adopted in Meijers' collected works: Études d'histoire du droit, Leyden 1959, part III, p. 261–277 (the anonymous commentary on 'Sacramenta Puberum' is mentioned in note 22 on p. 264).

[5] E. Cortese, La norma giuridica. Spunti teorici nel diritto comune classico, Rome ²1995, I, p. 7, note 13.

[6] J. M. J. Chorus, Handelen in strijd met de wet. De verboden rechtshandeling bij de Romeinse juristen en de glossatoren, Leyden 1976, p. 220, note 96.

[7] The matter can be traced in C. 5.71 (de praediis vel aliis rebus minorum sine decreto non alienandis vel obligandis) and D. 27.9 (de rebus eorum, qui sub tutela vel cura sunt, sine decreto non alienandis vel supponendis).

by taking an oath not to challenge the sale. Martinus Gosia (ca. 1120–1160) defended the validity of such an alienation, i. e. without judicial decree but confirmed by oath, and found a strong argument in the Roman texts themselves, viz. in C. 2.27(28).1 (the lex *Si minor*). By doing so he created, in fact, a method to adjust artificially the comparatively advanced age of full contractual capacity in Roman law (twenty five) to the existing practice of indigenous law and Canon law, which regarded twelve or fourteen as the age of full discretion. Bulgarus de Bulgarinis (d. 1166) rejected this view, referring to the provision of C. 1.14.5 (the lex *Non dubium*). There it was argued that oaths are not capable of getting round a prohibition by the law. The oath cannot validate the prohibited contract. As a consequence, the minor was still in a position to vindicate the estate even after conveyance. The only right abandoned by taking an oath was the privilege on the basis of nonage to demand *restitutio in integrum*. Frederick Barbarossa is said to have intervened in favour of Martinus, who stayed with his son at the emperor's court. During a ride, Martinus must have managed to convince the emperor and suggested that he should promulgate a constitution in order to settle the dispute.[8] According to the *noua constitutio Frederici* oaths of *puberes* concerning their own property are binding as long as they are not sworn under duress:

> Item sacramenta puberum sponte facta super contractibus rerum suarum non retractandis inuiolabiliter custodiantur. Per uim autem uel iniustum metum, etiam a maioribus, maxime ne querimoniam maleficiorum commissorum faciant, extorta sacramenta nullius esse momenti iubemus.[9]

The text of the constitution was enshrined in the *Corpus iuris civilis* twice. Firstly it was adopted as an authentica in the *Codex Iustinianus* just after C. 2.27(28).1. In later times it found its way to the *Libri Feudorum*, where it can be traced as LF. 2.53.10.

III. The commentary on LF. 2.53.10

Fol. 51r–66v of the Ms. Salzburg UB M. III 98 contain the text of the *Libri Feudorum*, provided with an apparatus mainly derived from

[8] Sources recording the historical facts are mentioned in F. C. VON SAVIGNY, Geschichte des römischen Rechts im Mittelalter, Heidelberg 1850, Vol. IV, p. 183–192.

[9] Monumenta Germaniae historica, Legum sectio 4, Constitutiones I, Hanover 1893, p. 246.

Pilius.[10] It also includes fragments of Symon Vicentinus[11] and the Ordinary Gloss,[12] while some glosses display the siglum of an unknown *W.*[13] or *Gy.*[14] On fol. 61vb the anonymous commentary ad 'Sacramenta puberum' (LF. 2.53.10) can be found. It is part of a more comprehensive apparatus and consists of a series of glosses. The first three of them are provided with the siglum *al.* The others are anonymous. In two of them references are made, one time to the same *al.* (*secundum al.*) and one time to Pilius (*secundum py.*). As regards content these glosses mostly show some resemblance to passages in other pre-Accursian texts on 'Sacramenta puberum', like the commentaries of Azo,[15] Guizzardinus,[16] Roffredus Beneventanus (... 1222–1243 ...),[17] Jacobus Balduini[18] and Symon Vicentinus.[19]

1. Is the minor bound by his oath if the selling price is less than half of the fair price (*iustum pretium*)?

The first gloss deals with the problem of *laesio enormis*. The text is identical to a gloss in the Ms. München Clm 22. The latter, though, is

[10] G. Dolezalek, J. A. C. J. van de Wouw, Verzeichnis der Handschriften zum römischen Recht bis 1600, Frankfurt am Main 1972, Vol. II; P. Weimar, Die Handschriften des Liber feudorum und seiner Glossen, in: RIDC 1 (1990), p. 74 and 96.

[11] *Sy*-glosses can e. g. be found on fol. 51v–55v. For the attribution of those glosses to Symon Vicentinus cf. E. J. H. Schrage, Symon Vicentinus, un docteur très excellent du XIII[e] siècle, in: TRG 55 (1987), p. 300 and 307.

[12] *ac*-glosses can be traced e. g. on fol. 58v–60r.

[13] Cf. Weimar (note 10), p. 74.

[14] *Gy*-glosses appear at the end of the manuscript, viz. on fol. 63va and 64ra.

[15] An early commentary of Azo in Paris, BN, lat. 4546, recently edited (cf. note 2); Azo, Summa super Codicem, Instituta, Extraordinaria, Pavia 1506 (reprint Turin 1966), ad C. 2.27(28); Azo, Lectura super Codicem, Paris 1577 (reprint Turin 1966), ad C. 2.27(28).

[16] In Kassel, 2° Ms. Jurid. 4/4 fol. 46r–47v edited in Sorrenti (note 2).

[17] Roffredus Beneventanus, Libelli Iuris Civilis, Avignon 1500, P. VII, tit. Constitutio Fredericis imperatoris, (reprint Turin 1968, p. 296–299). The teachings on 'Sacramenta puberum' by a certain master Roffridus were quoted by Guido de Suzaria (d. 1293). Cf. F. Martino, Ricerche sull'opera di Guido da Suzzara le 'Supleciones', Catania 1981, p. 69–74.

[18] Handed down through two different *reportationes*. One is in Lucca, Biblioteca Capitolare Ms. 322 fol. 44v–45r is edited in Sorrenti (note 2). The other can be found in the Ms. Alba Iulia, Biblioteca Centrale de Stat MS II,4 fol. 35va–37rb.

[19] An extensive commentary, recently edited (cf. note 3) after the Ms. Oxford, Bodleian Library, Laud. lat. 3, fol. 23ra–24vb and Sankt Gallen, Stiftsbibliothek 746, p. 426–428. It is partly preserved in a third manuscript, viz. Verona, Biblioteca Capitolare CLXXII (180), fol. 26vb–30rb. *Quaestio* XLVIII et seq. seem to be erased in this Ms.

not provided with a *siglum*.[20] The last line of the gloss contains the principal rule which can also be traced in many other commentaries. The wording, though, is not very clear. It is not possible that both *privilegium* and *ius commune* are the subject to the predicate *aufferatur*. Moreover, by comparing it with other sources it becomes clear, that not both are removed, or at least not in an identical way. Most of the time it is argued that the oath not to challenge the sale has a limited effect. It represents the minor as being a *maior* and deprives him of his privilege on the basis of nonage, viz. the possibility of demanding *restitutio in integrum*, but it does not deprive him of a general right (*ius commune*) everyone has at his disposal, e. g. the right to appeal to the rule on a fair price. Several similar phrasings of this view can be found with glossators such as Azo,[21] Symon Vicentinus,[22] Jacobus Balduini[23] and Roffredus.[24] The first gloss in the Ms. Salzburg therefore gives the impression of reflecting this principal rule, albeit in a rather corrupted version. Actually it should read: ... *quasi priuilegium ei aufferatur, <non autem> ius commune*.

The notion *ius commune* in these formulations is mostly used in a subjective sense. It does not denote the law as a body of legal rules, but rather a general right, a legal competence available to everyone irrespective of age.[25]

[20] The anonymous gloss .f. ad *puberum* (auth. post C. 2.27(28).1) in München Clm 22 p. 42a. It may belong to the second, continuous stratum of glosses in this manuscript (fol. 3ra–210va) which does contain some *al.*-glosses. Cf. G. Dolezalek, Repertorium manuscriptorum veterum Codicis Iustiniani, (Ius Commune Sonderheft 23), Frankfurt am Main 1985, I, p. 299–300.

[21] Azo, Summa Codicis (reprint p. 46a): quasi sacramentum preiudicauerit ei in iure speciali tantum non in iure communi; Azo, Lectura Codicis (reprint p. 130–131): religio sacramenti facille repellit aliquem a priuilegio ut hic sed a iure communi ... non repellitur.

[22] Symon, Quaestio XXVIII: ... licet enim sacramentum aliquem priuet a iure speciale, non tamen aliquem priuet a iure communi.

[23] Sorrenti (note 2), Jacobus Balduini [25], p. 111 (centre column): ... sacramentum enim positum repellit eum a suo beneficio restitutionis ... non autem a iure communi; Jacobus Balduini in Alba Iulia II,4 fol. 36r: ... sacramentum enim priuat eum a priuilegio suo scilicet restitutione ... non autem a iure communi.

[24] Roffredus (note 17), p. 298b: sacramentum ergo interpositum hoc operatur ut beneficium iuris specialis amittat non iuris communis.

[25] According to Chorus (note 6, p. 219–220) the oath would not deprive the minor of an appeal to the *ius commune* (in the objective sense). See for *ius commune* as a general right J. Hallebeek, Sacramenta puberum and laesio enormis. The oath non venire contra by a minor in contracts of sale according to some glossators, in: TRG 58 (1990), p. 63–64 and K. W. Nörr, Zur Frage des subjektiven Rechts in der mittelalterlichen Rechtswissenschaft, in: Festschrift für Hermann Lange, [s.l.] 1992, p. 203.

Only a minority of glossators may have attributed more effects to the minor's oath in the sense that by taking an oath not to challenge the sale he would also renounce his right to appeal to the remedy for *laesio enormis*.[26] A number of early glossators, however, do recognise the possibility of renouncing more general rights by explicitly declaring so in the wording of the oath or its record in a deed. The sources reveal that such a stand was defended by Azo and Jacobus Balduini.[27] It may have already been defended by Johannes Bassianus (d. 1197).[28] In the *Lectura Codicis* of Azo there is indeed a reference to notarial practice: the notary must insert a condition in the deed that the sale will not be challenged on the ground of *laesio*.[29] The first gloss of the commentary in the Ms. Salzburg mentions three grounds on which the minor could not challenge the sale: neither because of nonage, neither because of the loss of the selling price, nor on the ground that the selling price was not handed over. There was a dispute whether the minor could claim the selling price for a second time if he lost it. According to Pilius this was possible as long as the minor produced evidence that he had actually lost the selling price.[30] Symon Vicentinus took a similar stand. The minor is not challenging the sale by asking once more for the selling price. His oath merely confirmed the sale, not the receipt of the selling price. Symon Vicentinus therefore gave the buyer advice: the minor should confirm the payment by oath or payment should take place on the authority of a judge.[31] All in all, as regards content, the first gloss gives the impression of being kindred to the stand of Azo and Jacobus Balduini.

§ *Sacramenta puberum*. Sed et alia ratione minoris qui deceptus[a] est ultra dimidiam iusti pretii. Questio scolastica est. Vnde quidam addunt et bene in instrumentis: neque ratione etatis neque ratione pretii deperditi uel non soluti arg. ff. rem m. haberi l. iii. § ult. (D. 46.8.3.1) et arg. C. de iur. et facti igno. l. Quamuis (C. 1.18.11). Sed hoc non

[26] Hallebeek (note 25), p. 68–69 and Hallebeek (note 1), p. 299.

[27] Hallebeek (note 25), p. 66–67. See for Jacobus Balduini also Sorrenti (note 2), Jacobus Balduini [26], p. 112 (centre column).

[28] Cf. Jacobus Balduini in Alba Iulia, II,4 fol. 35v: ... nos dicimus contra secundum Az. cum Ioh. ut iustum pretium suppleatur uel restituatur ut ff. de ser. ur. pre. Si domus (D. 8.2.21), nisi expresse dictum esset quod iuraret se non uenturum contra ratione minoris etatis uel alia quacumque.

[29] Hallebeek (note 25), p. 67–77.

[30] Cf. Pilius Medicinensis, Quaestiones Sabbatine, Rome 1560 (reprint Turin 1967), nr. CXVIII. Cf. also a question by Pilius edited in A. Belloni, Le questioni civilistiche del secolo XII, (Ius Commune Sonderheft 43], Frankfurt am Main 1989, p. 117 (Pilius 118).

[31] Symon, Quaestio XXVII.

adiecto, admictatur, quia sacramentum facit eum maiorem[b] quasi priuilegium ei aufferatur, <non autem> ius commune. al.

[a] deceptus *scripsi*: de exceptus *cod.* [b] maiorem *scripsi*: minorem *cod.*

2. Should the oath be taken at the moment the contract of sale is entered into, or is it allowed to do so at an earlier or later point in time?

The Accursian Gloss reveals that Azo discussed this question. In his opinion the moment the oath was taken is irrelevant.[32] The other commentaries merely pose the question whether it is possible to confirm the alienation afterwards, with the lapse of time (*ex intervallo*). According to Guizzardinus this is possible. After all, at the moment of reaching majority the minor is capable of validating those contracts, which were originally void, even without taking oaths.[33] This reasoning is clear. Taking an oath has the same effect as reaching majority. The minor is represented as a *maior* and being a *maior* one can validate the contract entered into during minority if this contract is void on the basis of nonage, like the sale of certain estates without judicial decree, as prohibited by the *Oratio Severi*. The same view can be traced in Jacobus Balduini,[34] Symon Vicentinus[35] and the Accursian Gloss upon the *Libri Feudorum*.[36] In this second gloss, with siglum *al.*, the same opinion seems to be expressed. The oath need not be taken in connection with the agreement itself (*in ipsa substantia uenditionis*), nor should it be taken in the act of selling (*in ipso actu uenditionis*). It should, though, refer to the contract (*super contractu*). This reasoning is in conformity with the phrasing of the constitution. It reads *super contractibus*, not *in contractibus*. The formulation of the problem in this gloss demonstrates a strong affinity to the view of Azo as handed down through the Accursian Gloss. In the last line the author refers to a gloss he probably produced on Gratian's Decretum.[37]

[32] The Accursian gloss *super* ad auth. post C. 2.27(28).1: siue in ipso contractu, siue prius siue post etiam quandocumque secundum Azo. Cf. the gloss *super contractibus etc.* ad auth. post C. 2.27(28).1 in Wien ÖNB lat. 2267 fol. 35vb: siue ante contractum siue intra siue post interueniat ut supra de pactis Petens (C. 2.3.27).

[33] Sorrenti (note 2), Guizzardinus [22], p. 109–110 (first column).

[34] Alba Iulia II,4 fol. 36v.

[35] Symon, Quaestio XXXII.

[36] The gloss *super contractibus* ad LF. 2.53.10.

[37] The words *quod singulariter* appear in D. 23 c. 6. See e. g. the Summa „Magister Gratianus in hoc opere" (1165–1170) on this capitulum: ... in case someone did not take

§ Secus si per uim uel metum. Et hoc est quod ponitur infra eadem „per uim autem uel per iustum etc." et C. de transacti. Interpositus (C. 2.4.13). Queritur quomodo debeat intelligi „super contractibus", ita scilicet quod sacramentum in ipsa substantia et in ipso actu uenditionis debeat fieri? Resp. Immo potest fieri ante uenditionem et post, sed per dictum <debeat> sacramentum fieri super <cont>ractu et tenebit ut dixi in illa glosa Quod singulariter. al.

3. The sale of another's property

If the minor swears to sell property belonging to someone else, he does not seem to be bound, because the constitution 'Sacramenta puberum' reads *rerum suarum*. But subsequently the text adopts the opposite view, i. e. that the oath is binding unless it would refer to contracts of others (*in alienis*).

Most glossators interpreted the term *rerum suarum* rather broadly as indicating the minor's private as well as his communal property.[38] If the object sold is not even his communal, but another's property, two different solutions are offered. Firstly it is argued that the constitution does not refer to the alienation of another's property. As a consequence the prohibited contract remains void and unenforceable because 'Sacramenta puberum' has no effect. But it is also reasoned that the minor should be treated as a *maior* in similar circumstances. Thus the oath does have some effect in spite of the fact that another's property is sold. The words *rerum suarum* are extensively interpreted as if the constitution would read *contractibus suis*,[39] and as if there would be no classification of the general notion *res* into several categories.[40] This second option seems to be defended in the third gloss, which is the last one provided with the siglum *al.*

Quid si iurauit se alienam rem <uendere>? Et uidetur quod non teneatur, quia lex dicit „rerum suarum". Videtur econuerso, quod secus sit in alienis. al.

a vow of chastity on the occasion of being ordained subdeacon, he will nevertheless be bound by an additional vow, because as a subdeacon he should lead a chaste life. T. P. McLaughlin, The Summa Parisiensis on the Decretum Gratiani, Toronto 1952, p. 23.

[38] Sorrenti (note 2), Jacobus Balduini [18] p. 106 (centre column) and Guizzardinus [34] p. 116 (first column); Symon, Quaestio LV and the Accursian gloss *super contractibus* ad LF. 2.53.10.

[39] Sorrenti (note 2), Guizzardinus [35], p. 117 (first column); Symon, Quaestio LVI; Roffredus (note 17), p. 297; the Accursian gloss *super contractibus* ad LF. 2.53.10.

[40] Sorrenti (note 2), Jacobus Balduini [19] p. 106–107 (centre column): ... non habita disctinctione super rebus.

4. Is the constitution 'Sacramenta puberum' effective in the case of a loan of money?

A loan of money (*mutuum*) is strictly speaking not a contract concerning the minor's own goods as 'Sacramenta puberum' requires: ... *contractibus rerum suarum*. From the Institutes it appears that the recipient acquires ownership of the money handed over (Inst. 3.14 *pr*). Nevertheless the constitution will have effect, i. e. the oath confirming a loan of money is binding. The words *rerum suarum* are once more interpreted rather extensively, viz. as not only referring to the minor's own goods, but also to the minor's own interest. Symon Vicentinus discussed the same problem and took a similar stand.[41] The question whether the oath is binding where the minor borrowing the money is not *sui iuris* but a *filius familias* will be discussed below.

> Quid autem si res non sua ut si mutuum ei fiat? Resp. Idem. Et ita intelligas licteram istam „rerum suarum". Subaudias scilicet ad suas res seu ad utilitatem pertinentium.

5. Is the oath confirming just one particular transaction sufficient?

None of the other commentaries known to us deals with the question of whether the oath confirming only one particular transaction is sufficient. They all take this for granted and deal with a different problem: is it possible to swear to confirm all contracts entered into? Would such a general oath have implications for other contracts? According to the early commentary of Azo, a challenge to other contracts would still be allowed. The agreement with one party cannot benefit another, third party.[42] The pupils of Azo, though, deviated from this view. Both Guizzardinus and Jacobus Balduini considered the general oath somehow to be effective: it is certainly possible to refer in a contract to a previous general oath, a practice which seems to be recognised by customary law.[43] Symon Vicentinus spoke more specificly about the custom of the Bolognese.[44] He himself, though, preferred the original

[41] Symon, Quaestio XXXV.

[42] Hallebeek (note 1), p. 300.

[43] Sorrenti (note 2), Guizzardinus [21], p. 108–109 (first column) and Jacobus Balduini [28], p. 113–114 (centre column): (...) et ita etiam uideamus de consuetudine obseruari.

[44] Symon, Quaestio XXXI: ... et hoc etiam bononienses de consuetudine seruant.

approach in the early commentary of Azo.[45] When a general oath is taken, it only affects the present agreement and not others. He found a convincing argument in the text of C. 4.29.21: when a woman renounces her privilege under the *SC Velleiani* in one contract, she does not abandon the same privilege in other contracts. This very text is cited in the concise gloss in the Ms. Salzburg, while posing the question of whether it is satisfactory to swear to ratify a particular transaction as in the case of C. 4.29.21. The answer to this question is not offered, but the binding force of such an oath – at least for the parties to the specific contract – was not queried in pre-Accursian commentaries.

> Sed numquid sufficit si singulariter iuret se ratum habiturum ut C. auelleia. l. Iubemus (C. 4.29.21)?

6. The selling price is less than half of the fair price (*iustum pretium*)

The question of *laesio enormis* is introduced once more. This time the oath is not phrased in a specific way in order to renounce explicitly the right to appeal to the rule on a fair price. It is simply sworn not to challenge the sale. As we know there was some disagreement concerning the question whether an appeal to the remedy for *laesio* would still be allowed after such an oath. According to Placentinus (d. after 1181) and Pilius this was indeed the case. They argued that the minor does not challenge the sale by appealing to the *iustum pretium*-rule, because he demands either rescission of the contract or the fair price itself, the choice being with the buyer. Johannes Bassianus is said to have followed this view, albeit for a different reason, viz. because of the limited effect of the oath as mentioned above. It deprives the minor of a privilege on the basis of nonage, not of the competence he has, irrespective of age, to appeal to the rule on a fair price.[46] Azo would have rejected the view of Placentinus and Pilius. By appealing to the remedy for *laesio* the seller would indirectly force the buyer to rescind

[45] The view of Azo was followed by Roffredus (note 17, p. 298b). The Ordinary Gloss adopted the later opinion of Guizzardinus and Jacobus Balduini in the gloss *super contractibus* ad LF. 2.53.10. The gloss *contractibus* ad auth. post C. 2.27(28).1 is less clear.

[46] Hallebeek (note 25), p. 62–63. Cf. for the opinion of Pilius also: Quaestiones Sabbatinae XX. There are even arguments supporting the view that the minor still can ask for *in integrum restitutio*. Cf. a question edited in U. Nicolini, Una sconosciuta raccolta di „Quaestiones dominorum", in: Studi di storia e diritto in onore di Enrico Besta, Milan 1937–1939, Vol. II, p. 60, *Quaestio* XXIX.

the sale.[47] In the early commentary of Azo such a rejection cannot yet be found. There he merely followed the opinion of Johannes Bassianus.[48] Roffredus did the same and was willing to grant the minor a *condictio ex lege Rem maioris*.[49] The fragment in the Ms. Salzburg gives the impression that Albericus adopted the view of Placentinus and Pilius. Moreover, the opinion of Johannes Bassianus is linked to their argument. As seen above, both views lead to the same solution.

> Sed quid si deceptus est ultra dimidiam iusti precii? Resp. Secundum al. aget ut rescindatur uenditio uel ut[a] legictimum pretium persoluatur, quia nil aliud operatur sacramentum nisi quod eum maiorem representat ut C. de rescin. uen. l. ii. (C. 4.44.2). Sed hec questio scolastica est.
>
> [a] uel ut *scripsi*: ut uel *cod.*

7. Can the minor demand supplementary payment in case of *laesio enormis*?

There must have been an opinion among pre-Accursian glossators that the minor is capable of demanding supplementary payment in the case of *laesio enormis* and that he would not renounce this right by taking an oath, although a *maior* is not allowed to ask supplementary payment.[50] Jacobus Balduini ascribed this doctrine to the anonymous *magistri*, but stated that Azo had rejected it.[51] This seems to be confirmed by the early commentary of Azo in the Ms. Paris BN, lat. 4546, but according to a more extensive *quaestio*, edited by Belloni, Azo would still have allowed the minor to claim the price in spite of his oath.[52] Symon Vicentinus beyond any doubt repudiated this possibility. The oath represents the minor as a *maior*. Because the latter cannot demand supplementary payment, neither can the minor who confirmed the contract by oath.[53] The gloss in the Ms. Salzburg mentions both opinions. The first one is ascribed by name to Pilius. In a *quaestio*, edited by Belloni, Pilius indeed seems to grant the minor a *condictio ex lege* or the *officium iudicis* in order to obtain a supplementary pay-

[47] Hallebeek (note 3), p. 101–102.
[48] Hallebeek (note 1), p. 298.
[49] C. 4.44.2; Roffredus (note 17), p. 298b.
[50] It was possible to renounce the right to ask supplementary payment by swearing not to challenge the sale on the basis of nonage or any other reason. See note 28.
[51] Hallebeek (note 1), p. 303.
[52] Belloni (note 30), p. 162–163 (Azo C19).
[53] Symon, Quaestio XXIX.

ment.[54] The second opinion, the one which may have been defended by Azo at some time, is ascribed to the anonymous *alii*.

> Item quid si sit deceptus infra dimidiam iusti pretii. Numquid aget ad supplementum? Resp. Vtique secundum py. arg. ff. de iur. patro. Adigere § i. (D. 37.14.6.1) et de condic. instit. Que sub in prin. (D. 28.7.8*pr*). Alii contra quia sacramentum etiam per omnia maiorem representat.

8. Can the minor be compelled to convey the object sold?

According to the following fragment the minor can certainly be compelled to convey the object sold if this had not yet been done. Apparently the oath not to challenge the sale implies that the obligations resulting from the contract can be enforced.[55]

> Item si nondum tradidit numquid tradere compellitur? Resp. Vtique.

9. Can the object delivered be reclaimed if payment is not forthcoming?

Subsequently the question is brought up what to do if the object sold is conveyed, but payment does not follow. Here it appears that the minor can merely sue the buyer for the selling price, but is not allowed to reclaim the object conveyed.

> Item quid si tradidit sed pretium ei nondum solutum est numquid repetet rem uel aget ad pretium? Resp. Ad pretium tantum agi posset arg. C. de contrahen. emp. l. Si donationis[a] (C. 4.38.3).
>
> [a] Si donationis *scripsi*: Si non donationis *cod.*

10. Transfer of ownership in the case of an alienation without judicial decree (*sine decreto*)

In some of the commentaries, the question of whether ownership is transferred to the recipient depends on the validity of the contract. Here we again come upon the old controversy between Bulgarus and

[54] Belloni (note 30), p. 100 (Pilius 20[16]). See also p. 78–79 (Barc 6) where the *actio ex vendito* or the *condictio ex lege* are granted.

[55] Only Symon Vicentinus discussed this issue as a separate question: Symon, Quaestio XXV.

Martinus. According to Bulgarus the minor would still have the *rei vindicatio* at his disposal. The oath merely deprives him of the right to demand *restitutio in integrum*. Martinus Gosia, though, rejected this and held that the oath could serve to validate the alienation of the minor's estate without judicial decree.[56] The constitution 'Sacramenta puberum' would have supported the view of Martinus by proclaiming that oaths of *puberes* should be treated as binding.[57] Azo still stuck to the old view of Bulgarus. The minor is not capable of transferring ownership. If the buyer had lost possession of the object, he has no remedy whatsoever. This opinion was not followed by the pupils of Azo. According to Jacobus Balduini the constitution 'Sacramenta puberum' refers to both the sale with and without judicial decree. Otherwise it would have been redundant.[58] The majority of glossators in the first half of the thirteenth century considered the sale without judicial decree but sanctioned by oath as valid, because the constitution 'Sacramenta puberum' approved it. Roffredus explained that before the promulgation of the constitution the minor could vindicate the property conveyed where the sale took place without judicial decree, but nowadays the oath confirming such a contract is binding.[59] The majority stand was eventually adopted in the Ordinary Gloss.[60] The author of the following fragment in the manuscript also declares that the minor is capable of transferring ownership when the alienation took place without judicial decree, but was sanctioned by oath.

[56] Hallebeek (note 1), p. 294–295.

[57] The constitution 'Sacramenta puberum' is taken to apply to the alienation of movables as well. Cf. the gloss .R. of Cyprianus (12th century) ad C. 2.28(29).2 in München Clm 22, p. 42a: ... Si fiat uenditio sine decreto ipso iure non ualet. Si cum decreto, tenet, set si lesus est restituitur (...). Set hodie idem est in mobilibus (...), nisi tales sunt que seruando seruari non possint ut infra de administra. tu. l. ult. (C. 5.37.28) in fine ubi cessat restitutio (...). Set hodie per legem frederici si iuret minor ualet uenditio et sine decreto ut in illa lege Sacramenta. Cy.

[58] Alba Iulia II,4 fol. 35va: Hec constitutio locum sibi uindicat siue contractus sit celebratus cum decreto sine non. Aliter nullus esset eius effectus. Nam si diceres quod altero tantum casu locum haberet, non fuisset necessarium hec constitutio et quia per legem C. hoc idem erat. Vnde intelligendam est in utroque casu siue igitur tenet contractus siue non propter defectum decreti. Locum habet quod dicitur hic quod autem ita eam recipere debeamus. Est arg. ff. de l.i. Si quando (D. 30.1.109) et ff. ad munic. l. i (D. 50.1.1) et infra de thesauris l. ii (C. 10.15.1.2).

[59] Roffredus (note 17), p. 296b (the last lines of the previous title), 298b and 299b. Cf. also the commentary on 'Sacramenta puberum' in Bamberg Jur. 21 fol. 41va–vb, which is provided with the siglum *Iac.* (Jacobus Balduini?).

[60] Hallebeek (note 1), p. 303–304.

IV. Conclusions

1. The author of the commentary

Sigla like *a.*, *al.* or *alb.* in early manuscripts are considered to indicate Albericus de Porta Ravennate. Meijers identified the siglum *al.* as Albericus, but Albericus de Porta Ravennate need not be the author of the entire commentary. Only the first glosses are provided with the siglum *al.* Moreover, the author would not present his own view as *secundum al.* It is known that Albericus wrote an apparatus on the *Authenticum*, but in his days the tenth collatio had not yet been added. The first commentary on the *Libri Feudorum* is said to have been produced by Pilius at Modena around 1200.[67] On the other hand the glosses ad LF. 2.53.10 in the Ms. Salzburg may originally have been written as Codex-glosses ad C. 2.27(28).1 or the following *authentica*, and in later times inserted in a manuscript of the *Libri Feudorum*. After all, the apparatus in the Ms. Salzburg cannot have been compiled in Albericus' or Pilius' days, since it even contains parts of the Ordinary Gloss. So we must assume an indirect tradition of the text. It is known that Albericus produced glosses on the Codex[68] and it cannot be excluded that a student recorded his glosses on auth. post C. 2.27(28).1, which, provided with additions, could serve as the source for the anonymous commentary to be appended to the text of LF. 2.53.10 in the Ms. Salzburg UB M. III 98.

Apart from Albericus, there are not many other possibilities to identify the siglum *al.* There was also an early glossator known as Aldricus (12th century). According to a *distinctio* of Hugolinus de Presbyteris (d. after 1233) this Aldricus would have followed the teachings of Martinus, just like Albericus.[69] In view of the fact that the glossator indicated as *al.* apparently produced a gloss on Gratian's Decretum, the possible authorship of a decretist such as Albertus Beneventanus (Pope Gregory VIII, d. 1187) or Alanus Anglicus (... 1192–1238) cannot be excluded. It is very hard, though, to pronounce upon this possibility with more certainty.

[67] According to Weimar in H. Coing, Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte I: Mittelalter (1100–1500), München 1973, p. 210.

[68] See Savigny (note 8), p. 299.

[69] G. Haenel, Dissensiones dominorum, Leipzig 1834, p. 568.

2. Dating the commentary

The text of the commentary is rather cryptic. The style is terse; the questions are hardly intelligible for readers not familiar with the issues concerned. It is striking that only two early glossators are mentioned by name, viz. Albericus and Pilius. In the later commentaries of Guizzardinus, Jacobus Balduini and their contemporaries, the doctrine of Azo, that by appealing to the rule on a fair price the seller would indirectly force the buyer to rescind the sale, was always brought up. Strangely enough, this doctrine is lacking in Azo's own commentary in the Ms. Paris, BN, lat. 4546, but for totally different reasons this commentary could be dated as rather early, in any event not later than the year 1210.[70] The possibility cannot be excluded that Azo started to reject the opinion of Pilius and Placentinus concerning the appeal for the remedies of *laesio* only in his later teachings. In the Ms. Salzburg this opinion of Placentinus and Pilius is followed by Albericus. In addition, we find the other, but not contradictory view of Johannes Bassianus. The absence of Azo's later teachings, so predominantly present in the writings of his pupils and their contemporaries, can be taken as an indication for a rather early origin somewhere at the beginning of the thirteenth or even at the end of the twelfth century. This confirms the possible authorship of one of Albericus' students.

3. Main-stream and dissenting glossators

The commentary may be related to the more dissenting line of glossators who adopted their views from the teachings of Martinus rather than from those of Bulgarus. Both Albericus and Pilius, the only glossators mentioned by name in the text, are said to belong to this tradition. The opinion of Placentinus and Pilius, that an appeal to the rule of a fair price may not be qualified as challenging the sale, is explicitly ascribed to Albericus in the commentary. Moreover, it defends the validity of the contract of sale confirmed by oath without judicial decree. This was in fact the doctrine of Martinus approved by the constitution 'Sacramenta puberum'. In spite of the promulgation of this constitution some glossators still stuck to the opinion of Bulgarus. They considered 'Sacramenta puberum' as merely referring to contracts of sale with judicial decree (*cum decreto*). This view was not to become the

[70] Hallebeek (note 1), p. 306.

majority stand in the thirteenth century. All pupils of Azo agree that if 'Sacramenta puberum' was interpreted in such a restrictive way, it did not add anything new to the already existing and unchallenged provisions of the *Corpus iuris*. Beyond any doubt, contracts of sale *cum decreto* have always been considered perfectly valid. In earlier times such a generally accepted view among the glossators was not yet present. This appears, for example, from the writings of Azo, who still defended the view of Bulgarus that contracts of sale without judicial decree will remain void in spite of the oath. The fact that this anonymous and early commentary regards such contracts as valid, giving rise to enforceable obligations and providing a sufficient title for the transfer of ownership, is once more an indication that the author may have been related to the more dissenting line of glossators.

4. Influence of this commentary on later generations

Some issues brought up in the commentary were not discussed any longer by the pupils of Azo. As a consequence, they did not find their way into the Ordinary Gloss. The question, for example, whether it is sufficient to take an oath in view of one particular transaction and not more generally phrased, cannot be traced in other commentaries. There the approach is totally different. The gloss in the Ms. Salzburg seems to be concerned about the possibility of sticking to the Roman principle that just one specific oath can bind the parties involved, thereby disregarding the customary practice of general oaths. All the later commentaries seem to be concerned about the binding force of the customary general oath, because it is hardly compatible with the Roman maxim „alteri stipulari nemo potest". Some glossators, like Azo and Symon Vicentinus, merely accepted the binding force of the generally phrased oath for the parties involved, but Guizzardinus and Jacobus Balduini opted for an adjustment to customary law, which was in fact acquainted with a certain external effect of general oaths, and their view was enshrined in the Gloss.

Some of the issues which did not find their way into the Gloss can be traced in the writings of other pre-Accursian civilians such as Symon Vicentinus. He still discussed the question whether a contract of *mutuum* may be sanctioned by oath.[71] For glossators such as Guizzar-

[71] Symon, Quaestio XXXV; the question was even brought up by Martinus de Fano (d. 1272) in the Ms. Assissi 220 fol. 26va.

dinus and Jacobus Balduini this was apparently so obvious that they merely discussed the problem of whether the minor can abandon his right to appeal to the *exceptio non numeratae pecuniae* by taking an oath.[72] Also, the question concerning the minor who makes improper use of the money received is lacking in the commentaries of Azo, Guizzardinus, Jacobus Balduini and Roffredus, as well as in the Gloss. Originally it must have been a matter in dispute between Bulgarus and Placentinus. But among the later generations of glossators only Pilius and Symon Vicentinus pay some attention to it.

Other opinions did find their way into the Gloss. The possibility of renouncing the right to appeal to the rule on a fair price by explicitly abandoning this right in the wording of the oath, was followed by Azo and Jacobus Balduini and can be traced in the gloss *iudicis* ad C. 4.44.2. The view that the sale of another's property confirmed by the minor's oath will give rise to a civil obligation was adopted in the gloss *suarum* ad LF. 2.53.10. The opinion that the oath not to challenge the contract of sale can be taken before or after the sale actually took place can be found in the gloss *super* ad auth. post C. 2.27(28).1. The view that the oath can validate contracts of sale without judicial decree has its roots in the teachings of Martinus. It was still rejected by Azo, but came to prevail in later times and was adopted in the gloss *contractibus* ad auth. post C. 2.27(28).1 and the gloss *super contractibus* ad LF. 2.53.10. Thanks to the constitution 'Sacramenta puberum' this was in fact one of the few doctrines of Martinus Gosia not to be rejected by the Accursian Gloss.

V. Epilogue

In the foregoing conclusions the concept of main-stream and dissenting glossators was introduced. Yet some restraint in the use of these terms is appropriate. It is beyond any doubt that there was a difference of opinion between Martinus and Bulgarus on numerous issues. It is questionable, though, whether later generations of jurists can be split up into two separate camps with the main-stream, following Bulgarus, on the one hand, and the dissenting line, following Martinus, on the other.[73] The commentary investigated does not display a glaring

[72] Sorrenti (note 2), Guizzardinus [27] p. 113 (first column); Jacobus Balduini in Alba Iulia II,4 fol. 36v.

[73] Cf. E. J. H. Schrage, Utrumque Ius, Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts, Berlin 1992, p. 56–64.

contrast. We should realise that it stands on the threshold of a long scholastic tradition at Bologna of commenting upon 'Sacramenta puberum'. Starting from the idea that this commentary or part of it indeed reflects the opinion of Albericus, we are probably dealing with one of the earliest texts on the constitution, which itself is not older than the year 1155. The author, possibly a student of Albericus, takes an unprejudiced and benevolent approach towards the teachings of Martinus, Placentinus, Albericus and Pilius, which may confirm his affinity to the dissenting line of glossators. On the other hand, some of his views can be traced in the writings of Azo, who is rated among the main-stream glossators. At the same time he defends opinions which were radically rejected by Azo, but which eventually came to prevail and were adopted in the Ordinary Gloss. All this might show that qualifying the glossators as either belonging to the main-stream or to the dissenting line can entail a certain risk.

Beyond any doubt, the anonymous commentary in Ms. Salzburg UB M. III 98 ad 'Sacramenta puberum' did not serve as the source of the Ordinary Gloss ad LF. 2.53.10, and in this respect Chorus was quite right to challenge Cortese's suggestion.[74]

[74] I would like to thank Dr. M. J. Schermaier (Salzburg) for his help in acquiring a copy of Ms. Salzburg UB M. III 98 and Prof. E. C. Coppens (Catholic University Nijmegen) for his useful remarks on the draft version of this paper.