



DISSERTATION / DOCTORAL THESIS

Titel der Dissertation /Title of the Doctoral Thesis

„Betrothal in Medieval Canon Law from *Decretum Gratiani*
(1140) to *Liber Sextus* (1298)“

verfasst von / submitted by

Oksana Bandrovskaja

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Doktorin der Philosophie (Dr. phil.)

Wien, 2016 / Vienna 2016

Studienkennzahl lt. Studienblatt /
degree programme code as it appears on the student
record sheet:

A 792 312

Dissertationsgebiet lt. Studienblatt /
field of study as it appears on the student record
sheet:

Geschichte

Betreut von / Supervisor:

emer. o. Univ.-Prof. Dr. Werner Maleczek

Abstract

The engagement was a very important tradition in the middle ages. Eventual bride and groom exchanged a solemn promise *in facie ecclesiae* and after considerable amount of time the wedding ceremony took place. My goal is to examine the phenomenon of betrothal in medieval canon law from *Decretum Gratiani* to *Liber Sextus* in comparison with the Germanic customary legal tradition.

The dissertation consists of 8 chapters written based on normative sources and their interpretation by canonists. The very first chapter is dedicated to displaying the phenomenon of engagement in the *opus magnum* of “father of the canon law” *Decretum Gratiani* or *Concordia discordantium canonum*. Gratian has paid considerable amount of attention to marriage (entire 9 cases from his second part of *Decretum* discuss marriage), but did not seem to be interested in the same way in betrothal. The latter for him is only interesting as he sees it and defines engagement as mere initiation of marriage *matrimonium initiatum*. Huguccio in his commentary to Gratian’s *opus* the *Summa decretorum* pays much more attention to engagement as such than Gratian. Huguccio defines betrothal through shifting it from Gratian’s *matrimonium initiatum* to *desponsatio de praesenti/de futuro*. Aside of defining engagement, Huguccio dedicates considerable amount of time and attention to classification of engagement into two kinds, and defining each one of them. Huguccio as well elaborates on the importance of subarration, and raises up the question of parental voice significance in contracting betrothal.

Betrothal does not seem to be of utmost importance for German customary law. This can be clearly traced from the analyzing *The Saxon Mirror*. The same is as well true for the commentary to the *Decretum* written by German canonist educated in Bologna Johannes Teutonicus in his *Glossa ordinaria*. Entirely new approach might be observed when one reads through the fourth book of the *Liber Extra* – the core book of papally-centered canon law -- *ius novum*. Betrothal in the *Liber Extra* and *Liber Sextus* is elaborated on the big extant. The Popes, while responding to the practical cases about validity of betrothals/marriages etc., sometimes tend not to draw a clear line between e.g. *desponsatio de praesenti* and *matrimonium per se*. Such Popes as e.g. Pope Gregory IX or Pope Boniface VIII have the strict paradigm how they solve cases about engagement or marriage; some Popes though, such as Pope Alexander III rather tend to not to have a single system, which allows him to solve the cases based on one betrothal/marriage paradigm as he elaborates on cases and solves them from cases to case, without the elaborated system.

Abstract

Die Verlobung wurde im Mittelalter zur wichtigen Tradition. Die Braut und der Bräutigam versprachen feierlich die Ehe *in facie ecclesiae*, wonach eine Trauung vorgenommen wurde. Das Ziel der wissenschaftlichen Arbeit ist, das Phänomen der Verlobung im mittelalterlichen Kirchenrecht von *Decretum Gratiani* bis *Liber Sextus* im Vergleich mit der deutschen rechtlichen Tradition zu untersuchen.

Die Dissertation besteht aus 8 Kapiteln, die auf den normativen Quellen und den Kommentaren von den mittelalterlichen Kanonisten aufgebaut sind. Das erste Kapitel stellt das Phänomen der Verlobung im *Decretum* oder *Concordia discordantium canonum* vom „Vater des kanonischen Rechts“ Gratian dar.

Gratian hat seine Aufmerksamkeit vornehmlich auf die Ehe gerichtet. Die Verlobung wurde weniger beleuchtet. Sie war zum Gegenstand des Interesses nur als das Anfangsstadium der Ehe *matrimonium initiatum*. Mehr Aufmerksamkeit auf die Verlobung ist bei Huguccio in seinem Kommentar zum Dekret *Summa decretorum* zu finden, wo er *desponsatio de praesenti/de futuro* statt Gratians *matrimonium initiatum* in den Mittelpunkt stellt. Die Verlobung als die Tradition hat im deutschen Gewohnheitsrecht keine wichtige Bedeutung, sowie auch im Kommentar zum Dekret *Glossa ordinaria* von Johannes Teutonicus, einem deutschen Kanonisten, der in Bologna ausgebildet wurde.

Der andere Zugang zur Problematik ist im vierten Buch *Liber Extra* und *Liber Sextus* zu beobachten, wo die Frage der Verlobung oft und ausführlich erörtert wird. Nicht immer werden *desponsatio de praesenti* und *matrimonium per se* deutlich abgegrenzt. Nicht immer ist es auch möglich, die klaren Ansichten von den Päpsten über die Frage der Verlobung oder der Ehe festzustellen. Dies betrifft insbesondere Papst Alexander III. Das bestimmte System der Regelung von den Familienbeziehungen wird aber bei den Päpsten Gregor IX. und Bonifatius VIII. entwickelt.

Table of Contents

Abbreviations.....	4
Acknowledgements.....	6
Introduction.....	7
Chapter I: Betrothal in Decretum Gratiani.....	12
1.1 Gratian and his Decretum.....	12
1.2 Marriage and Betrothal in Roman Law.....	15
1.3 Betrothal in Decretum Gratiani. Roman or Germanic Origin?.....	22
1.3.1 Conclusion	30
1.4 Who is consenting?	35
1.5 Conclusion	49
Chapter 2: Betrothal in the Commentary to Decretum: Summa decretorum of Huguccio	50
2.1 Life of Huguccio.....	50
2.2 Summa decretorum	52
2.3 Manuscript tradition.....	54
2.4 Betrothal in the Summa decretorum	55
2.4.1 From coniugium initiatum/coniugium ratum to desponsatio de futuro/de praesenti	57
2.4.2 Desponsatio de praesenti and de futuro	62
2.4.3 Should a bride be seen as a wife?.....	64
2.4.4 Betrothal and subarration.....	66
2.4.5 Mistakes in consenting to betrothal.....	67
2.4.6 Concealed betrothal.....	68
2.4.7 Parental role in contracting betrothals	71
2.5 Conclusion.....	74
Chapter 3: Engagement in German customary law: The Saxon Mirror.....	76
3.1 Eike von Repgow and his Sachsenspiegel	76
3.2 Marriage in the The Saxon Mirror.....	81
3.2.1 The concept of munt.....	81

3.3 Betrothal in The Saxon Mirror.....	84
3.4 Conclusion.....	88
3.5 Betrothal in the Summa decretorum and The Saxon Mirror: comparison.....	89
Chapter 4: Engagement in Glossa ordinaria.....	92
4.1 Life of Johannes Teutonicus and his Glossa ordinaria.....	92
4.2 Engagement in Glossa ordinaria	94
Chapter 5: Betrothal in the Liber Extra.....	99
5.1 Introduction.....	99
5.2 Pope Gregory IX.....	102
5.3 Raymund of Penyafort	104
5.4 The Liber Extra.....	105
5.4.1 St. Augustine Duobus modis [X 4, 4, 1].....	105
5.4.2 Ex Brocardo Accepisti [X 4, 4, 2]	108
5.4.3 Pope Hormisdas Tua fraternitas [X 4, 2, 1].....	109
5.4.4 Pope Eugene III Iuvenis [X 4, 1, 3]	110
5.4.5 Betrothal decretals of Pope Alexander III in the Liber Extra	112
5.4.6 Pope Urban III Ex literis tuae [X 4, 2, 11].....	169
5.4.7 Pope Clement III Duo pueri [X 4, 2, 12].....	171
5.4.8 Pope Innocent III	176
5.4.9 Pope Gregory IX.....	188
Chapter 6: Engagement in the Summa aurea of Hostiensis	201
6.1 Life of Hostiensis	201
6.2 Betrothal in the Summa aurea	202
6.2.1 Definition of engagement	202
6.2.2 Kinds of betrothal	203
6.2.3 Who can contract betrothal	211
6.2.4 The ways of contracting betrothal	214
6.2.5 The reasons why betrothal can be dissolved	216
6.2.6 De desponsatione impuberum	218
6.2.7 De clandestina desponsatione	220
6.2.8 De sponsa duorum.....	222
6.3 Conclusion.....	223
Chapter 7: Engagement in the commentary to the Liber Extra: Apparatus of Pope Innocent IV	224
7.1 Life of Pope Innocent IV.....	224
7.2 Betrothal in the Apparatus	226

7.2.1 Iuvenis [X 4, 1, 3]	226
7.2.2 Ad audientiam [X 4, 1, 4]	227
7.2.3 Ex litteris [X 4, 1, 7]	229
7.2.4 Gemma [X 4, 1, 29]	230
7.2.5 Tua fraternitas [X 4, 2, 1]	233
7.2.6 Litteras tuae fraternitatis [X 4, 2, 4]	236
7.2.7 Accessit ad praesentiam [X 4, 2, 5]	238
7.2.8 Duobus modis [X 4, 4, 1]	240
7.3 Conclusion	241
Chapter 8: Betrothal in the Liber Sextus	244
8.1 Life of Pope Boniface VIII	244
8.2 De sponsalibus et matrimoniis	246
8.2.1 Simple and conditional betrothals	250
8.3 De desposnacione impuberum	254
8.4 Conclusion	258
Conclusion	259
Bibliography	263
Manuscripts	263
Primary Sources	263
Encyclopedias	264
Reference list	265

Abbreviations

AHP *Archivum historiae pontificiae*

BMCL *Bulletin of Medieval Canon Law*

DDC *Dictionnaire de droit canonique*

DMA *Dictionary of the middle Ages*

HMCL *History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX., ed. by W. Hartmann and K. Pennington (Washington, DC 2008)*

HRG *Handwörterbuch zur deutschen Rechtsgeschichte*

It.pont. *Italia pontificia*

JL *Philipp Jaffé, Regesta pontificum romanorum, ed. secundam curaverunt S. Loewenfeld (JL: an.882-1198)*

LMA *Lexikon des Mittelalters*

MIC *Monumenta iuris canonici*

Potthast no. *Regesta pontificum romanorum, ed. August Potthast*

RDC *Revue de droit canonique*

Reg. Innoc.III. *Die Register Innocenz' III.*

RHE *Revue d'histoire ecclésiastique*

SG *Studia Gratiana*

WH 994 (a) *Enumeration of twelfth-century papal decretals established by Walther Holzmann; see Walther Holzmann, Studies in the Collections of Twelfth-Century Decretals MIC, Series B 3; Città del Vaticano 1979)*

ZKG *Zeitschrift für Kirchengeschichte*

ZSRGK *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*

Acknowledgements

Firstly, I would like to express my sincere gratitude to my advisor emer. o. Univ.-Prof. Dr. Werner Maleczek (University of Vienna) for his continuous support of my Ph.D., immense patience and great knowledge. The guidance and patience of Prof. Maleczek helped me in all the time of research and writing of this thesis. I could not indeed have imagined having a better advisor and mentor whose time and care helped keeping me going. I would like to thank Univ.-Prof., Dr. theol. Thomas Prügl (University of Vienna) for advising me especially at the very beginning of my Ph.D. as well as for his great deal of support. I also owe many thanks to Dr. Theol. Yury Avvakumov (University of Notre Dame) whose guidance and support prepared me for beginning Ph.D. program at the University of Vienna. My sincere thanks also goes to my friends who kept a sense of humour at the moments when I had lost mine. Last but not the least, I would like to thank my husband Andrew, who has shown a great deal of help, support, immense understanding and believing in finishing this dissertation.

Introduction

Sponsalia sunt mentio et repromissio nuptiarum futurarum.

D. 23, 1, 1

According to BGB (*Bürgerliches Gesetzbuch*) betrothal as such has no juridical binding power whatsoever. In contrast to marriage, which encompasses in itself both juridical and traditional elements, engagement in contemporary civil law belongs exclusively to traditions. For medieval canon law though, engagement played its significant role as one of the inevitable steps in the marital process. Marriage without engagement, which ensured both exchange of mutual consent of the partners, and the promise (be it for the future or in the present), was perceived void and illegal.

Contemporary marriage law based on monogamy, equality between men and women and presence of mutual free will consent originates in Roman law on the one hand, and, even more, in the ecclesiastical marriage law on the other, which was developing most vigorously starting from the mid-12th century till the mid-14th century. Although the main motivation for the expansion of the Church marriage laws, namely the biblically based principles of the indissolubility and sacramental character, ceased in the current secular law, the basics are still preserved in the legal systems of the Western world. In contrast, the matrimonial traces of customary law are largely gone. It refers to such phenomena as parental will in the daughter's consent to marriage, dowry, etc.

The canon law of marriage of the middle Ages in the so-called "classical" period of canon law has been a subject of intensive research. The 19th century is represented by works of Emil Friedberg (1864, 1865) and Rudolf Sohm (1875) that were followed by the opus of Joseph Freisen (1888), and also by representatives of the French canon law discipline, such as Jean Esmein (1891). The 20th century is presented by a comprehensive handbook

written with a perspective to the canon law under the impulse of Gabriel Le Bras, namely the book of Jean Dauvillier (1933); two revised volumes of Adhémar Esmein (1929-1935); written from the perspective of social and cultural history book by Georges Duby (1981). The Anglo-American medieval canon law discipline of the 20th century owes its efflorescence to the prominent figure of Stephan Kuttner (1907-1996). The researchers across the Atlantic combined the history of law with social history. Outstanding representatives of this younger generation are John T. Noonan (1965), Richard H. Helmholz (1974), James A. Brundage (1987), and especially David d'Avray (2005). In Germany Rudolf Weigand continues the tradition.

According to contemporary civil law the promise to marry someone has no juridical binding power whatsoever. Nowadays betrothal is incorporated into the wedding ceremony and tradition of betrothal does not have its separate existence apart from the wedding ceremony. Engagement was a very important tradition in the middle ages. Eventual bride and groom exchanged a solemn promise *in facie ecclesiae* and after considerable amount of time the wedding ceremony took place. My goal is to examine the phenomenon of betrothal in medieval canon law from *Decretum Gratiani* to *Liber Sextus* in comparison with the Germanic customary legal tradition. This area is still in need of some clarifications. The betrothal was playing a significant role in Roman as well as Germanic / German law. In Roman law, the betrothal (*sponsalia*) was a mutual promise of future marriage, but that was not legally applicable marriage and could, therefore, be easily - dissolved. Only in later Roman law this consent had a certain binding effect, but the bride's father or guardian had to agree to the bride's engagement.

In early medieval Germanic law engagement (*desponsatio*) appears to be a contract between the father or the guardian of the bride and the groom himself. Several

contributions, however, change this picture of contract between two men, namely: the girl has a right to object to the given engagement. The key of the marital contract between the father or the guardian of the bride and the groom was that the latter paid the dowry to the father/guardian of the bride.

In the canon law, there was a tendency to fix the phenomenon of contracted marriage to a certain point: either to mutual consent or to consummation. Therefore, the meaning of the betrothal *per se* appears to be not of a prime importance. Distinction between *verba de praesenti* and *verba de futuro* introduced by Peter Lombard gives greater significance to betrothal. With *verba de praesenti* the wedding vows were actually incorporated into betrothal, whereas *verba de futuro* stood for mere commitment to marry. Legal validity of these kinds of consent makes indistinctly broad area of research and tracks the papal decretal collections with great attention.

This dissertation consists of 8 chapters written based on normative sources and their interpretation by canonists.

The relevant texts are:

- *Decretum Gratiani* (C.27 - C.36);
- *Liber Extra* of 1234 (especially the fourth book);
- *Liber Sextus* of 1296 (also the fourth book).

The core and major focus of the dissertation is the examination of canonists' comments to the above listed normative texts:

- Huguccio (his main work has not yet been printed; the best surviving manuscript, which is located in the Abbey Library of Admont, has been used);

- Johannes Teutonicus (*Glossa ordinaria* to *Decretum*);
- Innocent IV, Hostienis, Bartholomeus of Brescia (*Glossa ordinaria* to *Liber Extra*).

The most important primary source for researching in the area of customary law is:

- The Saxon Mirror (*Sachsenspiegel*) (Eike von Repgow, 1220-1235).

The very first chapter is dedicated to displaying the phenomenon of engagement in the *opus magnum* of “father of the canon law” *Decretum Gratiani* or *Concordia discordantium canonum*. Gratian has paid considerable amount of attention to marriage (entire 9 cases from his second part of *Decretum* discuss marriage), but did not seem to be interested in the same way in betrothal. The latter for him is only interesting as he sees it and defines engagement as mere initiation of marriage *matrimonium initiatum*. *Magister Gratianus* does not go deeply into the discussion of betrothal *per se*, he is focused on the perfected and consummated marriage *matrimonium consummatum* (*perfectum/ratum*) as this ensures indissoluble marital bond. Huguccio in his commentary to Gratian’s *opus* the *Summa decretorum* pays much more attention to engagement as such than Gratian. Moreover, Huguccio as the commentator criticizes Master Gratian for his bad and inadequate understanding of the phenomenon of engagement. Huguccio defines betrothal through shifting it from Gratian’s *matrimonium initiatum* to *desponsatio de praesenti/de futuro*. Aside of defining engagement, Huguccio dedicated considerable amount of time and attention to classification of engagement into two kinds, and defining each one of them. Huguccio as well elaborates to the big extent on the importance of subarration, and raises up the question parental voice significance in contracting betrothal.

Betrothal did not seem to be of utmost importance for German customary law. This can be clearly traced from the analyzing *The Saxon Mirror*. The same is as well true for the commentary to the *Decretum* written by German canonist educated in Bologna Johannes Teutonicus in his *Glossa ordinaria*. Entirely new approach might be observed when one reads through the fourth book of the *Liber Extra* – the core book of papally-centered canon law – *ius novum*. Betrothal in the *Liber Extra* and *Liber Sextus* is elaborated on the big extent. The Popes while responding to the practical cases about validity of betrothals/marriages etc. sometimes tend not to draw a clear line between e.g. *desponsatio de praesenti* and *matrimonium per se*. Such Popes as e.g. Pope Gregory IX or Pope Boniface VIII have the strict paradigm how they solve cases about engagement or marriage; some Popes though, such as Pope Alexander III rather tend not to have a single system, which allows him to solve the cases based on one betrothal/marriage paradigm as he elaborates on cases and solves them from cases to case, without the elaborated system.

Chapter I: Betrothal in *Decretum Gratiani*

1.1 Gratian and his *Decretum*

Little is known about the life of the author of *Decretum*. Gratian was a canonists in Bologna. Sometimes he is identified as Francis Gratian, Johannes Gratian or Giovanni Gratian. The dates of his birth and death¹ are unknown. For a long time it was thought that he had been born at the end of 11th century in Cuzy and was tonsured in the Camaldulese monastery being later taught at the monastery of St. Felix, where he devoted his time to studying canon law. Researches of the end of the 20th century could not find a confirmation of these assumptions.² Since the 11th century Bologna had been the center of the canon and civil law study, which newly revived in Western Europe after the Roman civil law *Corpus Juris Civilis*.

Concordia discordantium canonum as “reconciliation of conflicting canons” for short *Decretum* is Gratian’s chief work. This work, which became the standard textbook, is the result of shaping the canon law material into a system that is eligible for both study and implementation. The date of the *Decretum* is shrouded in guesses. There are assumptions considering the date of the finished collection, the text of which includes the resolution of the Second Lateran Council, pointing to the year of 1140.³ Some scholars tend to claim that the above-mentioned year is an approximate date of finishing the *Decretum*.⁴ A totally new stage in understanding of Gratian and his work has begun with the publication of Anders

¹ As John Noonan assumes Gratian might have been already dead by 1159, as Paucapalea’s *Summa* was written around that time. (Noonan 1979, 145-72)

² (Landau 2008, 23-25); (Christensen 1993, ix-xxvii); (Winroth 2004). As for the discussion of assumption considering ecclesiastical career of Gratian, see (Noonan 1979, 147-155)

³ (Fransen 1956, 521-23); (Landau 2008, 25)

⁴ (Chodorow 1986, 413-417); (Kuehn 1986, 512-517); (Vetulani 1960)

Winroth's book.⁵ Winroth discovered an earlier recension of the *Decretum*. He claims that the collection had two "editors" and comprised of two stages. The first edition included documents of the Second Lateran Council in the period of the Papacy of Innocent II and was completed around 1139. The second was completed in 1145.⁶ There is also a disagreement on whether the *Decretum* was approved in 1150 in Farentino by Pope Eugene III or not.⁷

Decretum consists of three parts, each of which differs in structure and theme. The first part of "reconciliation of conflicting canons originally about natural law and regulations" (*Concordia discordantium canonum ac primum de jure naturae et constitutionis*) is divided into 101 distinctions: 1-20 distinctions are devoted to the definition of such categories as "law", "custom", and introduction to legal sources; 20-81 are on the appointment and ordination, and "those who pray" (*oratores*); 81-101 contain additional text on topics previously discussed. The second part of the *Decretum* (*Decreti pars secunda*) consists of 36 hypothetical *causae*, each of which represents a situation and a number of issues arising in accordance to the given situation. Each issue is addressed in the form of scholastic controversy, where the author cites authorities in support, as well in opposition, to a certain thesis. In *dictum* - text of Gratian, the author brings in his own position. Each cause is divided into questions, and then subdivided into canons. The second part of *Decretum* consists of 36 cases. 1-6 *causae* are dedicated to the clerical issues such as ordination and simony; the second cause discusses at length the question of heresy; 7-10 discuss constitutional law and church organizations: the rights of the bishop in the diocese etc.; 11-14 are devoted to property rights and the prohibition of usury; 16-20 are about monks and

⁵ (Winroth 2000)

⁶ (Winroth 2000, 3)

Peter Landau opposes Stanley Chodorow, and supporting the position of Anders Winroth: he confirms the two stages of finishing the collection, but offers an alternative version: the first version of the *Decretum* had been finished prior to the Concordat of Worms in 1122 as the canonical collections cited by the author are dated before that date. The second version lasted about 15 years - the whole *Decretum* was completed in 1140 year. (Landau 2008, 25)

⁷ (Noonan 1976) vs. (Classen 1978)

monasteries; 21-26 are concerned with spiritual hierarchy, vows, just war, and excommunication; 27-36 cases are dedicated to marriage. The third part of the *Decretum* is called *De consecratione* and is divided into five distinctions and is dedicated to ordinances: baptism and the sacrament of the Eucharist. In the third part of the *Decretum* there is no *dicta*. This suggests that this part of the *Decretum* was not completed by Gratian.⁸

For his *Decretum* Gratian used Biblical texts, papal decretals, council decrees, excerpts from the texts of the Fathers of the Church, and Roman law texts.⁹ Earlier scholars tended to believe that Gratian quoted the sources for his *Decretum* directly; Peter Landau came to the opposite conclusion: he demonstrated that the majority of the canons were inserted into *Decretum* from other earlier collections, but not from the original source, to which they belonged. Owing to the researches of Charles Munier and Peter Landau, one may assume in what collections Gratian obtained the texts for his *Decretum*: Anselm of Lucca's collection (c. 1083); *Collectio tripartita* and *Panormia* by Ivo of Chartres (c. 1095); Gregory of St. Grisogono's *Polycarpus* (completed after 1111); Collection in Three Books (1111-1139); *Glossa ordinaria* to the Bible; Isidore of Sevilla's Etymologies; Alger of Liège's *Liber de misericordia et iustitia*; *Sententiae Magistri A*.

⁸ (Landau 2008, 22-25)

⁹ As to the Roman law texts, the majority of texts are taken from the law of Justinian, in general 151 texts out of which 63 are from the Codex of Justinian, 45 from Digeste, and 43 from Novelle. For more see (Gaudemet 1965)

1.2 Marriage and Betrothal in Roman Law¹⁰

Marriage in Roman law according to Emil Sehling (1887) is launched with the ceremony of 'buying a woman,' or even stealing her, which often happened in older periods of Roman law history. A woman was deemed as a subject of selling-buying process. The author, in opposition to Freisen, who holds that in the oldest Roman law marriage was contracted through *copula*, states that it was based rather on *coemptio*. Later on the process of buying a woman was transferred into quasi-buying. At the early stage of Roman law at least the manus-marriages were prevailing. It also points out in the direction of quasi-buying contracts, within which a woman was transferred from the power of her own *pater familias* under the influence of her husband and his *pater familias*.¹¹ The author goes on to imply that the term *coemptio* alludes to woman's participation in the process. This is to claim that a woman is sold consenting to it *co-emptio*. As Sehling further states, the phenomenon of quasi-selling-buying together with *coemptio* at the period of classical Roman law¹² established marriage. By studying the texts of classical period jurists, Sehling demonstrates that marriage in Roman law was of a legal contract nature of. He proves a contractual nature of marriage by alluding to *manus* as a confirmation of contract. Despite the fact that manus lost its meaning later on (in the last centuries of the Republic) and was even acknowledged as licit, there was an essential shift in contractual development of marriage; it shifted from the formal contractual union to a consensual contract. As the author affirms, it was not a new step in the development of marriage relations as consent was already present in

¹⁰ This chapter is written based on the works by (Eisenring 2002); (Gottschalk 1866); (Hoermann 1891); (Huber 1977); (Loehning 1878); (Sehling 1887); (Scheurl 1877); (Reynolds 1994); (Treggiari 1993)

¹¹ (Sehling 1887, 1)

¹² Pre-classical Roman law (201-27 BC): one of the most prominent jurists of this period is Papinian (Amilius Papinianus); Classical period of Roman Law (the first 250 years of the current era): Gaius and Ulpian are presenting this period; post-classical period (vulgar law) (the third century onwards): the conditions for Roman law development became significantly less favourable

coemptio.¹³ In this way Roman law came to the prominent definition of *consensus facit nuptias*. Phenomenon of *deductio in domum* as the beginning of common life for spouses seems not to be an essential part in contracting marriage. It was usual that *coemptio*, which later on was replaced by exchange of consent, was followed by ‘*consortium omnis vitae*’; however, it can not be conferred that common life (*cohabitatio*) was essential for marriage establishment.¹⁴ If *cohabitatio* had a strength to create a marriage, and not a *coemptio* (and later *consensus*), then it would not appear possible to draw a clear line between marriage and concubinage. *Affectio maritalis* is an element, the presence of which is important for Roman law, as it defines whether or not the union of a man and a woman is marriage or concubinage. The first, as well as the latter, contains common life but only one of them involves *affectio maritalis*.¹⁵

In the text of Digeste on the betrothal Ulpian maintains that only consent is sufficient to constitute a betrothal.¹⁶ The majority of scholars agrees on the central role of consent and bases their assumption on Ulpian.¹⁷ The greater freedom, though, was allowed to widows (*viduae*) as they could display an initiative in order to find a husband. Usually responsibility for matchmaking was given to *paterfamilias* (sometimes to *materfamilias* if a woman was widowed, she would look for a bride for her son).¹⁸ In the Roman sense of the word, consent is to be deemed as agreement of not only future spouses, but also of those under whose

¹³ (Sehling 1887, 5)

¹⁴ (Sehling 1887, 8)

¹⁵ The origin of this term is not agreed upon among Roman law scholars: some tend to think it comes from the classical texts and appear to interpolate on Byzantine Christians; some appear to maintain that this term was used by the classical writers as well as by the compilers of Justinian. Aforementioned concept was included in the following contexts: to establish the marriage union, without any condition generally; to draw a clear line between concubinage and marriage in order to prohibit gifts between man and woman; to constitute the right of the children to inherit. It has been also deemed that phenomenon of the marital affection is nothing else but ‘durable continuing will’ to join the marriage, which actually had marriage-creative power. For more see: (Noonan 1967); (Sheehan 1996). *Affectio maritalis* is not an intention to be married with each other, but rather a reciprocal attitude to mutually regarding each other as spouses. If both considered each other as marriage partners, then the marriage had taken place, if there were no further impediments. (Treggiari 1993, 52)

¹⁶ Sufficit nudus consensus ad constituenda sponsalia. [D. 23, 1, 4pr]

¹⁷ (Hoermann 1891); (Huber 1977); (Loehning 1878); (Scheurl 1878); (Sehling 1887); (Treggiari 1993)

¹⁸ (Treggiari 1993, 135)

control they are.¹⁹ Moreover, it appears plausible to regard betrothal, as well as marriage, as very similar too each other, if not equal.²⁰ Consent as an element able to establish marriage is also claimed by Justinian.²¹ Therefore, it may be conferred that *deductio in domum*, as well as common life, are not sufficient for establishing marriage if there is lack of consent and *affectio maritalis*. In case when consent was exchanged and the partners were under marriagable age, some jurists would understand that marriage was contracted after both of the partners came to the age of 12 (for the girl) and 14 (for the boy). Justinian, though, sees it differently; namely, he states that it is not the age of 12 and 14, but the time when both realize the matter of consent. In other words, *sponsi* were supposed to be of an age to understand what they were promising.²²

Marriage was expected in two years, except if there were certain health conditions present that prolonged this period even up to four years between betrothal and marriage.²³ The betrothal normally preceeded the marriage. It is deemed to be a quasi-preliminary contract,²⁴ as well as a promise for future marriage. As Sehling states, betrothal follows development from formal contract (*coemptio*) to consensual contract (*consensus*).²⁵ Originally *sponsalia* were contracted through *formal contract*, later on *pacta* was established through *nudum pactum*. Juridically, consent was the element of the utmost importance in

¹⁹ Iustum matrimonium est, si . . . utrique consentiant, si sui iuris sunt, aut etiam parentes eorum, si in potestate sunt. [D. 5, 2]; (Treggiari 1993, 170)

²⁰ Sponsalia, sicut nuptiae, consensu contrahentium fiunt. D. de sponsal. [D. 23, 1, 11]

²¹ Sancimus, si quis nuptiarum fecerit mentionem in qualicumque pacto, quod ad dandum vel faciendum vel non dandum vel non faciendum concipitur, et sive nuptiarum tempus dixerit sive nuptias nominaverit, non aliter intellegi esse condicionem adimplendam vel extenuandam, nisi ipsa nuptiarum accedat festivitas, et non esse tempus inspiciendum, in quo nuptiarum aetas vel feminis post duodecimum annum accesserit vel maribus post quartum decimum annum completum, sed ex quo vota nuptiarum re ipsa processerint. Sic etenim et antiqui iuris contentio dirimetur et immensa librorum volumina ad mediocrem modum tandem pervenient. [C. 5, 4, 24]

²² (Sehling 1887, 17); (Hoermann 1891, 19)

²³ Saepe iustae et necessariae causae non solum annum vel biennium, sed etiam triennium et quadriennium et ulterius trahunt sponsalia, veluti valetudo sponsi sponsaeve vel mortes parentum aut capitalia crimina aut longiores peregrinationes quae ex necessitate fiunt. [D. 23, 1, 17]; (Treggiari 1993, 154)

²⁴ Sponsalia sunt mentio et repromissio nuptiarum futurarum. Ulpianus libro singulari de sponsalibus. Sponsalia autem dicta sunt a spondendo: nam moris fuit veteribus stipulari et spondere sibi uxores futuras. [D. 23, 1, 2]

²⁵ (Sehling 1887, 20)

constituting marriage. Sehling's claim is well proved by the statement: 'mere consent suffices to establish the betrothal.'²⁶ Therefore, it may be demonstrated by the author that betrothal is nothing else but a promise for upcoming marriage (*repromissio futurarum nuptiarum*); in practical terms, though, it is a preliminary marital contract. It is also known that betrothed couples were expected to get married in two years.²⁷ Sehling concludes that Roman marriage is to a large extent similar to Roman betrothal, since the conditions for legal marriage are similar to those for licit betrothal;²⁸ however, there is still a clear distinction between them. Scholars of Roman law see them from a different point of view: Sehling argues that betrothal is clearly distinguished from marriage by a contractual nature of betrothal and marriage – the first is mere a preliminary, so to say, introductory treaty (*Vorvertrag*), whereas the latter seems to be the contract itself (*Hauptvertrag*);²⁹ Scheurl maintains that *individua vitae consuetudo* (14. J. de patria pot. 1,9) and *consortium omnis vitae* (L.1 de ritu nupt. 23.2) are the elements that distinguish betrothal from marriage. At this very point, the views of Sehling (1887) and Scheurl (1877) are especially clashing, as for Sehling the only thing that matters for establishing marriage in Roman law is consent (*coemptio* in earlier period), not *deductio in domum* in the house of the betrothed man and *consortium omnis vitae consuetudo* with him; for Scheurl, by contrast, common life has significant meaning in establishing marriage because by *deductio in domum* followed by *individua vitae consuetudo*

²⁶ Sufficit nudus consensus ad constituenda sponsalia. [D. 23, 1, 4pr]

²⁷ Si is, qui puellam suis nubtiis pactus est, (intra) biennium exsequi nubtias supersederit eiusque spatii fine (decur)so in alterius postea coniunctionem puella pervene(rit, ni)hil fraudis ei sit, quae nubtias maturando vota sua diut(ius lu)di non passa est. [C. 3, 5, 4]

Imperator Constantinus. Si is, qui puellam suis nuptiis pactus est, intra biennium exsequi nuptias in eadem provincia degens supersederit, eiusque spatii fine decurso in alterius postea coniunctionem puella pervenerit, nihil fraudis ei sit, quae nuptias maturando vota sua diutius ludi non passa est. [C. 5, 1, 2]

²⁸ Modestinus libro singulari de enucleatis casibus

Tutor factam pupillam suam nec ipse uxorem ducere nec filio suo in matrimonio adiungere potest. Scias tamen, quod de nuptiis tractamus, et ad sponsalia pertinere. [D. 23, 1, 15]

Oratio imperatorum Antonini et Commodi, quae quasdam nuptias in personam senatorum inhibuit, de sponsalibus nihil locuta est. Recte tamen dicitur etiam sponsalia in his casibus ipso iure nullius esse momenti, ut suppleatur quod orationi deest. [D. 23, 1, 16]

(Sehling 1887, 22); (Scheurl 1877, 9)

²⁹ (Sehling 1887, 23)

marriage is deemed as contracted.³⁰ Moreover, according to Scheurl, as well as for Hoermann,³¹ as the marriage was launched by consent, it also can be dissolved by mutual consent.³² Therefore, following this point of view it might be concluded that betrothal itself is not binding.

Common life after leading the betrothed into the house of her future husband, is, according to Scheurl, an essential part of marriage, not of betrothal. For him consummation is not meant to be an act that perfects the marriage, but for Hoermann, alternatively, not *deductio in domum* and not establishing of common life, but *copula carnalis* perfects marriage and, therefore, makes it binding.³³ Both Scheur and Sehling point out to the famous phrase of Ulpian, *nuptias non concubitus, sed consensus facit*.³⁴ According to the notion of common life as prove of marriage beginning, there is no need to consider consummation necessary for contracting marriage. The notion of *individua vitae consuetudo* is sufficient as a step to perfect marriage, Scheurl demonstrates,³⁵ as in the cited texts there is no mentioning of consummation, but of leading the bride into the house of the groom and common life.³⁶

³⁰ (Scheurl 1877, 10) Virgini in hortos deductae ante diem tertium quam ibi nuptiae fierent, cum in separata diaeta ab eo esset, die nuptiarum, priusquam ad eum transiret et priusquam aqua et igni acciperetur, id est nuptiae celebrentur, optulit decem aureos dono: quaesitum est, post nuptias contractas divortio facto an summa donata repeti possit. Respondit id, quod ante nuptias donatum proponeretur, non posse de dote deduci. D. 24.1.66 de donat. Here: the betrothed is seen as a wife after she was led into the house of her fiancé.

³¹ (Hoermann 1891, 16)

³² Quod ait lex: "divortii faciendi potestas libertae, quae nupta est patrono, ne esto", non infectum videtur effecisse divortium, quod iure civili dissolvere solet matrimonium. Quare constare matrimonium dicere non possumus, cum sit separatum. Denique scribit Iulianus de dote hanc actionem non habere. Merito igitur, quamdiu patronus eius eam uxorem suam esse vult, cum nullo alio conubium ei est nam quia intellexit legis lator facto libertae quasi diremptum matrimonium, detraxit ei cum alio conubium. Quare cuicumque nupserit, pro non nupta habebitur. Iulianus quidem amplius putat nec in concubinato eam alterius patroni esse posse. [D. 24, 2, 11]

³³ (Hoermann 1891, 19). Hoermann goes further, claiming that establishing of common life is very similar to *copula carnalis*, as they go together, the latter follows the previous one. Actually, it is meant that if there was *deductio in domum*, it would necessarily be followed by *copula carnalis*.

³⁴ [D. 50, 17, 30]

³⁵ (Scheurl 1877, 11)

³⁶ Virgini in hortos deductae ante diem tertium quam ibi nuptiae fierent, cum in separata diaeta ab eo esset, die nuptiarum, priusquam ad eum transiret et priusquam aqua et igni acciperetur, id est nuptiae celebrentur, optulit decem aureos dono: quaesitum est, post nuptias contractas divortio facto an summa donata repeti possit. Respondit id, quod ante nuptias donatum proponeretur, non posse de dote deduci. [D. 24, 1, 66, 1]

Betrothal is not obliging, since it can be dissolved through mutual will, even if it is given (which was normal and widespread) that the betrothed is under the control of *pater familias*.³⁷ Despite that, betrothed ones are supposed to be faithful to each other: if they break the promise and have relations with the third person the fine for *infamia* is to be charged.³⁸

Betrothal was possible if partners were under marriageable age (under 12 and 14 years). Given that the betrothal is a promise of a future marriage, the legal position of the girl who had contracted before she turned 12 is to be considered a *sponsa*, and not yet a wife, as she was led into the house being not yet at the marriageable age according to Julian. According to Labeo and Papinian, if a formal betrothal took place, she is to be deemed as fiancée, or even as quasi-wife. If formal contract has not yet been preceded, she is neither a *sponsa*, as there was not betrothal between them, nor a wife, as she has not yet turned 12.³⁹

According to Roman law, in order to contract a marriage there is not only a free will of partners (which complies with *pater familias*'s will; it is understood that if *pater familias* is

³⁷ Ulpianus libro tertio disputationum In potestate manente filia pater sponso nuntium remittere potest et sponsalia dissolvere. [D. 23, 1, 10] (Scheurl 1877, 9); (Loehning 1878, 569); (Gottschalk 1866, 52). According to Gottschalk, betrothal in Roman law can be also dissolved if groom was away for a long time; if one of the partners died; if they mutually consented to dissolve each other of promises.

³⁸ Praetoris verba dicunt: " infamia notatur qui ab exercitu ignominiae causa ab imperatore eove, cui de ea re statuendi potestas fuerit, dimissus erit: qui artis ludicrae pronuntiandive causa in scaenam prodierit: qui lenocinium fecerit: qui in iudicio publico calumniae praevaricationisve causa quid fecisse iudicatus erit: qui furti, vi bonorum raptorum, iniuriarum, de dolo malo et fraude suo nomine damnatus pactusve erit: qui pro socio, tutelae, mandati depositi suo nomine non contrario iudicio damnatus erit: qui eam, quae in potestate eius esset, genero mortuo, cum eum mortuum esse sciret, intra id tempus, quo elugere virum moris est, antequam virum elugeret, in matrimonium collocaverit: eamve sciens quis uxorem duxerit non iussu eius, in cuius potestate est: et qui eum, quem in potestate haberet, eam, de qua supra comprehensum est, uxorem ducere passus fuerit: quive suo nomine non iussu eius in cuius potestate esset, eiusve nomine quem quamve in potestate haberet bina sponsalia binasve nuptias in eodem tempore constitutas habuerit. "[D. 3, 2, 1]; (Scheurl 1877, 9)

³⁹ Si quis sponsam habuerit, deinde eandem uxorem duxerit cum non liceret, an donationes quasi in sponsalibus factae valeant, videamus. Et Iulianus tractat hanc quaestionem in minore duodecim annis, si in domum quasi mariti immatura sit deducta: ait enim hanc sponsam esse, etsi uxor non sit. Sed est verius, quod Labeoni videtur et a nobis et a Papiniano libro decimo quaestionum probatum est, ut, si quidem praecesserint sponsalia, durent, quamvis iam uxorem esse putet qui duxit, si vero non praecesserint, neque sponsalia esse, quoniam non fuerunt, neque nuptias, quod nuptiae esse non potuerunt. Ideoque si sponsalia antecesserint, valet donatio: si minus, nulla est, quia non quasi ad extraneam, sed quasi ad uxorem fecit et ideo nec oratio locum habebit. [D. 24, 1, 32, 27]; (Treggiari 1993, 41)

not objecting against the decision of his daughter/son, it is meant they agree with his/her choice) needed, but also legal capacity. Taken that the latter is missing with slaves, they, according to Roman law, cannot contract marriage (*connubium*) but *contubernium*.⁴⁰ 'Like concubinage, contubernium might develop into marriage. If both partners were slaves and then both were freed and continued to live together, then they might be validly husband and wife. The change in the legal nature of their union depended on the acquisition of legal capacity --they had been freed and became Roman citizens--and also on their attitude (*affectio maritalis*),' affirms Treggiari (Treggiari 1993, 53). In this case, the author goes on, instead of co-consent of pater familias, they required at least tacit consent of the lord. The question on what kind of consent actually takes place in betrothal/marriage cases is answered by Treggiari by underlining continuous consent, 'A husband does not recover his wife by right of postliminium as a father recovers his son, but marriage is renewed by consent.'⁴¹ By the absence of partner, either because of captivity, or death, marital union is dissolved as consent is expected to be continuously confirmed, according to Roman law.

The idea of *Initialkonsens* and *Kontinuativkonsens* has been often discussed by scholars. The idea itself implies that Roman consent was of continuous nature, in opposition to canon law consent. Consent in Roman law, according to Manenti, is a cause, which inquires one more step in order to perfect marriage. Therefore, it is deemed as continuous one.⁴²

⁴⁰ Cum servis nuilum est conubium. [D. 5, 5]

Inter servos et liberos matrimonium contrahi non potest, contubernium potest. [D. 2, 19, 6] (Treggiari 1993, 52)

⁴¹ Dirimitur matrimonium divortio morte captivitate vel alia contingente servitute utrius eorum. [D. 24, 2, 1]; (Treggiari 1993, 44)

⁴² (Reynolds 1994, 36)

1.3 Betrothal in *Decretum Gratiani*. Roman or Germanic Origin?

In the first case dedicated to marriage Gratian discusses at length the inerrelation between the betrothal and marriage. In the second question of the 27th causa he asks whether a woman already betrothed to one man can vow to another one.⁴³ Gratian treated extensively in his *Decretum* the question of marriage as well as the question of its validity. In his scholastic manner he first posed the question and then gave the authoritative argumentation both to the thesis for and against, and finally attempted to bring different views into harmony through a distinction, namely that between *matrimonium initiatum* and *matrimonium ratum*.⁴⁴

Firstly, Gratian provides the arguments saying that betrothed are in fact married. These are from the 1st till the – 16th canon. In these 15 canons two of them are *paleae*,⁴⁵ therefore these cannot be considered as Gratian's intention to add more in order to back up his argumentation. In the first two canons Gratian seems to follow Roman law principles and backgrounds of marriage. Claiming that consent and will suffices for creating the bond, he simultaneously states that betrothal is marriage.⁴⁶ The principle *sunt enim nuptiae sive matrimonium viri mulierisque coniunctio, individuum vitae consuetudinem retinens*⁴⁷ is,

⁴³ (Qu. II.) Secundo, an liceat, sponsae a sponso recedere, et alii nubere? C. 27 q.2

⁴⁴ ...sciendum est, quod coniugium desponsatione initiatum, commixtione perficitur. Unde inter sponsum et sponsam est, sed initiatum; inter copulatos est coniugium ratum. C.27 q. 2 d.a.c. 34

⁴⁵ In (Rambaud-Buhot 1965, 42-43) these *paleae* (C.27 q.2 c.4; c.7) are considered to be simply added into the text of *Decretum* later on (*cap. incertum*). 7th cap. is also present in *Compilatio I*, as well as *Liber Extra* [1 Comp. 4, 5, 1; X 4, 5, 1]

⁴⁶ Fuit enim inter eos consensus, qui est efficiens causa matrimonii, iuxta illud Ysidori: "Consensus facit matrimonium." Item Iohannes Chrisostomus super Matheum: [id est auctor operis imperfecti, homil. XXXII. in Math.] "Matrimonium quidem non facit coitus, sed uoluntas ideo non soluit illud separatio corporis, sed uoluntatis. Ideo qui dimittit coniugem suam, et aliam non accipit, adhuc maritus. Nam etsi corpore iam separatus est, tamen adhuc uoluntate coniunctus est. Cum ergo aliam acceperit, tunc plene dimittit. Non ergo qui dimittit mechatur, sed qui alteram ducit." C.27 q.2 c.1. Item Nykolaus Papa. [ad consulta Bulgarorum, c. 3.] "Sufficiat solus secundum leges consensus eorum, de quorum quarumque coniunctionibus agitur. Qui solus si defuerit, cetera etiam cum ipso coitu celebrata frustrantur." C.27 q.2 c.2

⁴⁷ C. 27 q.2. 1

according to Gaudemet,⁴⁸ obviously similar to Roman *nuptiae sunt coniunctio maris at feminae et consortium omnis vitae, divini at humani iuris communicato*;⁴⁹ and *nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens*.⁵⁰

The first canon is by John Chrysostom commentary of Metthew and the second by Pope Nicholas to Bulgarians. Both of them, though, comply complying with Roman principle from classical Roman law of Ulpian *consensus facit nuptias*.⁵¹ Interestingly enough, Pope Nicholas alludes to the law mentioning ‘consent according to the law suffices’ *solus secundum leges consensus eorum*. This phrase might be linked to either customary law of Bulgarians, or to Roman law, according to which consent gives rise to establishing marriage. Gratian puts the further question, namely to what exactly two parties consent: whether to mere cohabitation or to carnal relation. If they consent to mere cohabitation, then how do they differ from brother and sister? If they agree to have carnal relation, it might be suggested that Joseph and Mary, for example, were not actually spouses.⁵² As an answer, Gratian replies that it is actually supposed to be the consent for cohabitation and common life and also explains what exactly he means.⁵³ Gratian’s inclination to underline an essential role of common life of spouses indicates the source of his inspiration, which undoubtedly is Roman law, and not German law. According to the latter, *deductio* and *traditio* eventually confirmed the marriage that was already contracted by betrothal.

⁴⁸ (Gaudemet 1967, 107)

⁴⁹ [D. 23,2,1]

⁵⁰ [Inst. 1, 9]

⁵¹ Consent, not coitus, makes the marriage. [D. 35, 1, 15]; Marital affection, not coitus, makes a marriage. [D. 24, 132, 13] (9). For additional discussion of *marital affection notion* see: (Noonan 1970); (Noonan 1967)

⁵² Cum ergo inter istos consensus intercesserit, qui solus matrimonium facit, patet hos coniuges fuisse. Sed queritur, quis consensus facit matrimonium, an consensus cohabitationis, an carnalis copulae, an uterque? Si cohabitationis consensus facit matrimonium, tunc frater cum sorore potest contrahere matrimonium; si carnalis copulae, inter Mariam et Ioseph non fuit coniugium. C. 27 q. 2 d.p.c. 2

⁵³ Consensus ergo cohabitandi et individuam vitae consuetudinem retinendi interueniens eos coniuges facit. Individua uero consuetudo est talem se in omnibus exhibere uiro, qualis ipsa sibi est, et e conuerso. C. 27 q. 2 c. 3

As to the fourth canon,⁵⁴ it seems unreasonable to include it into discussion as it appears evident that it was included later on. This *capitulum incertum*⁵⁵ is located in 8 manuscripts from the 13th century and in 17 manuscripts of the 14th centuries.⁵⁶ Therefore, there is a slight possibility indeed that it might be added even in within the second recension of *Decretum*. It appears more plausible that it was added much later.

Gratian tends to prefer the voice of Fathers of Church when listing the arguments that betrothed are already married and they are united not by physical but by the consensual union (e.g. John Chrysostomos,⁵⁷ Ambrose, and St. Augustine). By borrowing the text from Isidor, Gratian includes quite a direct thought into his *pro* arguments: ‘after the first oath to betrothal, they are called spouses.’⁵⁸ It is important to point out that the use of *cum initiatur coniugium* appears consistent with Gratian’s notion of *coniugium initiatum*. It might simply mean that by using the notion of initiated marriage he undermines nothing else but betrothal, since only by it there is a possibility to contract a marriage. This might be true at least for Roman law. *Pactio conjugalis* might allude to the contractual nature of initiated marriage/betrothal. The canon of Isidor is calls the betrothed *conjuges*, after the first pledge, even if there has not been an intercourse between them.⁵⁹

The origin of *palea* of the 7th canon⁶⁰ is not defined (*capitulum incertum*). It is present in 3 manuscripts of the 13th and 13 manuscripts of 14th century. It was as well included in

⁵⁴ C. 27 q. 2 c. 4

⁵⁵ This note stands for the origine of the excerpt, which is not defined.

⁵⁶ According to (Rambaud-Buhot 1965, 42-43). The excerpt is also present in Paris 14317 – the Mss. of the Sixth Gloss Composition.

⁵⁷ Discussion of John Chrysostomos: consent makes a marriage not consummation, see Weber, I. (Weber 2001, 37)

⁵⁸ Cum initiatur coniugium, coniugii nomen acciscitur. Non defloratio uirginitatis facit coniugium, sed pactio coniugalis. Denique cum iungitur uiro, coniugium est, non cum uiri admixtione cognoscitur. C. 27 q.2 c.5

⁵⁹ Item Ysidorus Ethimologiarum libro IX., c. 7. Coniuges uerius appellantur a prima desponsationis fide, quamuis adhuc inter eos ignoretur coniugalis concubitus. C.27 q.2 c.6

Compilatio I and Liber extra;⁶¹ therefore, there is no likelihood it could be inserted by Gratian.

There is no mentioning of the 8th canon (it is likely that it originated from African council), which evidently is *palea* as well, in the list of *paleae* made by Rambaud-Buhot; therefore, it does not appear reasonable to discuss it.

Augustine also considers a couple from the moment they pledged within *desponsatio* to be *coniunx*.⁶² The element that gives a reason to call the union of betrothed couple a marriage is *faith*. Even though they have not been yet united bodily, they have been bounded in their faithfulness. As this canon originates from St. Augustine's work *De bono conjugali*, there is a strong possibility that Augustine bases his approach on his threefold good of marriage (*triplex bonum matrimonii*) *fides, proles, sacramentum*. On the one hand, Gratian might well draw upon the idea of St. Augustine to introduce his threefold good of marriage in order to base his explanation of marital union of Mary and Josef on it; on the other hand, though, in the short run he might be strengthening Roman approach to marriage (where mere consent makes the marriage, in this case launching it through betrothal) by complying the approach of the Father of the Church. In the next canon the threefold good of marriage is perfectly incorporated in St. Augustine's paradigm.⁶³ In his *dicta* Gratian seems to allude to Jewish law as he extrapolates his *pro* argument that betrothed are to be deemed as married into the

⁶¹ 1 Comp. 4, 5, 1; X 4, 5, 1 as well as in Lips. 59.44; App. Lat. 6.5; Paris 14317 – the Mss. of the Sixth Gloss Composition. For more see (Rambaud-Buhot 1965, 42-43)

⁶² Item Augustinus de bono coniugalia. [lib. I. c. 11.] Coniunx uocatur a prima desponsationis fide, quam concubitu non agnouerat, nec fuerat cogniturus, nec perierat, nec mendax manserat coniugis appellatio, ubi nec fuerat, nec futura erat carnis ulla conmixtio. §. 1. Propter quod fidele coniugium ambo parentes Christi uocari meruerunt, non solum illa mater, uerum etiam ille pater eius, sicut et coniunx matris eius, utrumque mente, non carne. C. 27 q.2 c.9

⁶³ Omne itaque nuptiarum bonum inpletum est in illis parentibus Christi, fides, sacramentum, proles. Prolem cognoscimus ipsum Dominum, fidem: quia nullum adulterium; sacramentum: quia nullum diuortium... . C.27 q. 2 c.10

Deutoronomy verse.⁶⁴ It appears noteworthy to point out that after the Deutrtronomy verse Gratian mentions the phrase from Roman law,⁶⁵ where betrothed is supposed to mourn her betrothed after his death like a wife mourns her husband. The 11th canon seems also to be drawn from the Roman law, where betrothal gives rise of affinity matters, therefore, one cannot take the betrothed of his brother.⁶⁶

Three canons of Jerome (13th), Pope Gregory (14th), and Pope Julius (15th) could be generally characterised as those that consider betrothed as married. After presenting aforementioned authorities, Gratian goes on summarizing that all the authorities testify betrothed to be married,⁶⁷ and introduces the opposite approaches that are defending opposite arguments. In the 16th canon it is claimed clear that without a consummation there is no marriage.⁶⁸ As it is stated in the next canon of Pope Leo, this union of the husband and wife is called the sacrament which is also between the Christ and his Church.⁶⁹ The next canon (18th) appears to be a *palea*, which is included also in 1 mss. of the 12th century, 8 mss. of the 13th century, and 18 mss of the 14th century. Its origin is not certain.⁷⁰

Next 7 canons (19-26) deal with the prohibition to married couple to transefr to religious life or pursue continence, unless the other partner agrees on that. It is underlined that this it concerns a married couple in Gratian's meaning – marital union that had been consummated. It is also noted that although human law allows dissolution of marriage for

⁶⁴ Gratian. Item in Leuitico precepit Dominus Moysi, dicens: "Si quis sponsam alterius in agro oppresserit, morte moriatur, quia uxorem alterius uiolauit." C.27 q. 2 d.p. c.10

⁶⁵ Item in legibus principum sponsa iubetur lugere mortem sponsi tamquam uiri sui.(C. 5.9.2 following Noonan's assumption). C.27 q. 2d.p. c.10

⁶⁶ Si quis desponsauerit sibi aliquam, et preueniente mortis articulo eam cognoscere non potuerit, frater eius non potest eam in uxorem ducere. C.27 q. 2 c.11

⁶⁷ Gratian. His omnibus auctoritatibus probantur isti coniuges esse. C.27 q. 2d.p. c.15

⁶⁸ Non dubium est, illam, mulierem non pertinere ad matrimonium, cum qua docetur non fuisse conmixtio sexus. C. 27 q.2 c.16

⁶⁹ Item Leo Papa. Cum societas nuptiarum ita a principio sit instituta, ut preter conmixtionem sexuum non habeant in se nuptiae Christi et ecclesiae sacramentum, non dubium est, illam mulierem non pertinere ad matrimonium, in qua docetur non fuisse nuptiale misterium. C. 27 q.2 c.17

⁷⁰ (Rambaud-Buhot 1965, 42-43). It has been also included in Compilatio I [1 Comp. 4, 2, 1]

sake of religion, divine law prohibits this, unless the other spouse agrees on that.⁷¹ As to the opposite, a betrothed girl is said to be allowed to join a religious life, even though, as Pope Eusebius claims, she cannot be given by her parents to the other man than her fiancé.⁷² Gratian in his *dicta* clearly distinguishes how betrothal differs from marriage, namely betrothed are able to consider their continence, whereas the married couple is not supposed to do this, unless the other party assents.⁷³

In *dicta* Gratian defines that marriage is only launched by betrothal,⁷⁴ and by the authorities of Augustine and Jerome he confirms that it is completed by intercourse.⁷⁵ In order to remove any possible unclarities about the notion of marriage and betrothal, Gratian is explicitly pointing out that even though betrothal is called marriage by Fathers of the Church, it is not in reality the marriage *matrimonium ratum*⁷⁶ but only its beginning *matrimonium initiatum*. Therefore, it is marriage at its beginning, in other words betrothal.⁷⁷

⁷¹ Sunt qui dicunt, religionis causa coniugia debere dissolui. Verum sciendum est, quia, etsi hoc lex humana concessit, lex tamen diuina prohibuit. Per se enim ueritas dicit: "Quod Deus coniunxit homo non separet." Qui etiam ait: "Non licet dimittere uxorem, excepta causa fornicationis. ... Si uero utrisque conueniat continentem uitam ducere, hoc quis audeat accusare? Cum certum est, quia omnipotens Deus, qui minora concessit, maiora non prohibuit. Duobus enim modis sancti uiri etiam a licitis abstinere solent: aliquando, ut merita sibi apud omnipotentem Deum augeant; aliquando, ut anteactae uitae culpas detergant. §. 1. Proinde cum boni coniuges aut meritum augere desiderant, aut anteactae uitae culpas delere, ut se astringant, et meliorem uitam appetant, licet. Sic enim multos sanctorum nouimus cum suis coniugibus et prius continentem uitam duxisse, et postmodum ad sanctae ecclesiae regimina migrasse. Si uero continentiam, quam uir appetit, mulier non sequitur, aut quam appetit uxor uir recusat, diuidi coniugium non potest, quia scriptum est: "Mulier sui potestatem corporis non habet, sed uir; similiter et uir potestatem sui corporis non habet, sed mulier." C. 27 q.2 c.19

⁷² Desponsatam puellam non licet parentibus alii uiro tradere; tamen monasterium sibi licet eligere. C. 27 q.2 c.27

⁷³ Ecce, quod coniugati sine consensu alterius continentiam profiteri non possunt. Sponsi uero, etiam inconsultis quas sibi desponsauerunt, exemplis et auctoritate probantur continentiam posse seruare. C.27 q.2 d.p.c.26

⁷⁴ Ecce, quod in desponsatione coniugium initiatum, non perficitur. C.27 q.2 d.p.c.35

⁷⁵ In omni matrimonio coniunctio intelligitur spiritualis, quam confirmat et perficit coniunctorum conmixtio corporalis. C.27 q.2 c.36

"Quapropter in filiabus uestris fornicabuntur, et sponsae uestrae adulterae erunt." Notandum, quod in filiabus dicit futuram fornicationem, et in coniugiis adulteria, que sponsali conuentione initiantur, et conmixtione corporum perficiuntur. C.27 q.2 c.37

⁷⁶ The notion of *matrimonium ratum*, *matrimonium consummatum* (unlike *matrimonium initiatum*) stays in Codex juris canonici (c.1015, c.1118) standing for consummated marriage. (Gaudemet 1976, 544)

⁷⁷ Quomodo ergo secundum Ambrosium et reliquos Patres sponsae coniuges appellantur, et his omnibus argumentis coniuges non esse probantur? Sed sciendum est, quod coniugium desponsatione initiatum, conmixtione perficitur. Unde inter sponsum et sponsam coniugium est, sed initiatum; inter copulatos est coniugium ratum. C.27 q.2 d.a.c.35

Interestingly enough, Gratian refers to Ambrose, who claims that the couple is to be called married when it starts (starting from the betrothal), not after consummation.⁷⁸ This passage seems to be of a significant importance not only for Gratian as he adds his *dicta*⁷⁹ after the canon, but also for the reader, as this excerpt sheds much light on the terminology of betrothal in *Decretum*. It also explains Gratian's *matrimonium initiatum* instead of *desponsatio*.

If after being betrothed (*desponsata*) a woman is given to the (*tradita*), she is supposed to be called married. It seems hard to state if *tradita* also stands for *deductio in domum sponsi*, or it simply means handing over of a betrothed woman to a man by her father (guardian; parents).⁸⁰ There is a strong possibility that, taken that this canon is of the authorship of Ambrose, who inclines to call betrothed as married, betrothed is merely called married, so to say a betrothed wife, but it is still supposed to be considered betrothal.

Gratian turns to Jewish customary law in order to explain why betrothed are to be called married citing the Book of Genesis [C.27 q.2 c.41]. He also refers to the New Testament [C.27 q.2 c.41]. As Gratian summarizes, in the Scripture the betrothed are called married, and betrothed are called sons-in-law.⁸¹

In the 50th canon the line between betrothed girl who can be given to another man and betrothed girl who cannot have another betrothed as her fiancé. If a girl was veiled and blessed she cannot be given to a man other than her fiancé. It appears noteworthy to point

⁷⁸ Cum initiatur coniugium, coniugii nomen asciscitur, non cum puella uiri admixtione cognoscitur. C.27 q.2 c.35

⁷⁹ Ecce, quod in desponsatione coniugium initiatur, non perficitur. C.27 q.2 d.p.c.35

⁸⁰ Si quis desponsata sibi et tradita utatur coniugium uocatur. C.27 q.2 c.38

⁸¹ Unde datur intelligi, quod scriptura sponsos generos uocat. C.27 q.2 d.p.c.41

out that Gratian actually says that girl is supposed to be given by her parents. It seems reasonable to think that consent of the parents was required.⁸²

The 51st canon (*palea*) of the currently discussed case appears to be interesting: on the one hand, it is absolutely preceding Gratian's idea of betrothal and marriage and seems to be much closer to decretals of Pope Alexander III than to Gratian; on the other hand, it seems quite strange in the body of foregoing texts cited by Gratian and to the texts to which Gratian referred to while presenting his approach to betrothal. This canon-*palea* discusses the phenomena of *fides consensus* and *fides pactionis*.⁸³ If one contracts with *fides consensus*⁸⁴ twice he has to go back to the first spouse, but if he used *fides pactionis*⁸⁵ contracting the first bond, and *fides consensus* contracting the second, he must adhere to the second one.

Esmein⁸⁶ has pointed out that this *palea* was only attributed to St. Augustine; it could not be inserted by Gratian as it was found in the text of the Lateran council. According to Rambaud-Buhot research, though,⁸⁷ the origin of this *palea* is not certain (*capitulum incertum*), in opposite to Esmein's assumption. It is preserved in 1 mss. from the 12th

⁸² Sed auctoritate hac Siricii illa prohibetur ad secunda uota transire, que in propria domo est ducta, et cum sponso suo est uelata et benedicta. Talium discessione uiolatur benedictio, quam nupturae sacerdos inponit. Verum hanc necdum sponsus in suam duxerat, nec cum ea benedictionem acceperat. Nec ergo hac auctoritate huius copula prohibetur. §. 1. Item illud Eusebii Papae: "Desponsatam puellam non licet parentibus alii uiro tradere," similiter de huiusmodi desponsata intelligitur, que uidelicet cum sponso est uelata et benedicta. C.27 q.2 d.p.c.50

⁸³ For discussing these phenomena in terms of using them in later collections, see (Larrainzar 1981)

⁸⁴ Si autem fecerit *fidem consensus*, non licet ei aliam ducere. Si autem duxerit, dimittet ipsam, et adhaerebit uxori priori... Fides autem consensus est, quando, etsi non stringit manum, corde tamen et ore consentit ducere, et mutuo se concedunt unus alii, et mutuo se suscipiunt. Augustinus de fide pactionis et consensus. Contrahens successive per verba de praesenti cum duabus, tenetur adhaerere primae. Si autem primo contraxit per verba de futuro, secundo per verba de praesenti, adhaerebit secundae. C.27 q.2 c.51

⁸⁵ Si aliquis alicui mulieri *fidem* fecerit *pactionis*, non debet aliam ducere. Si aliam duxerit, poenitentiam debet agere de fide mentita; maneat tamen cum illa, quam duxit. Non enim rescindi debet tantum sacramentum. ...Est autem fides pactionis, quando aliquis promittit alicui fidem, quod eam ducet, si permiserit eum rem secum habere, vel etiam pro consensu. Augustinus de fide pactionis et consensus. Contrahens successive per verba de praesenti cum duabus, tenetur adhaerere primae. Si autem primo contraxit per verba de futuro, secundo per verba de praesenti, adhaerebit secundae. C.27 q.2 c.51

⁸⁶ (Esmein 1891, 115)

⁸⁷ (Rambaud-Buhot 1965, 43)

century, 18 mss. of the 13th century, 23 mss. of the 14th century; it was included in *Compilatio I* [1 Comp. 4, 4, 1] and *Liber Extra* namely *Duobus modis* [X 4, 4, 1].

This aforementioned excerpt, though, became the text of a significant importance for Bernard from Pavia and his *Compilatio I* and Raimond de Penyafort. The only difference starting from *Compilatio I* appears to be that *fides consensus* stood for *verba de praesenti*, whereas *fides pactionis* for *verba de futuro*.⁸⁸

1.3.1 Conclusion

After presenting the arguments that consent is a constitutive part of creating betrothal (imperfect marriage or initiated marriage), Gratian presents the other side. First, he cites the text claiming that without consummation there is no marriage.⁸⁹ Then,⁹⁰ the analogy between the union of Christ, His Church and the Christian marriage is confirmed by alluding to joining in one flesh. The passage, though, implies that coitus is a criterion for a perfected marriage. Though, consent seems to create marriage in the sense of betrothal, whereas the consummation perfects it. This first stage, called the initiated marriage or, in other words, betrothal, is followed by consummation that actually creates legal marriage (*matrimonium perfectum* or *matrimonium ratum*).⁹¹ Roman law held consent as essential for contracting betrothal/marriage. Notion of consent was so important that betrothed partners could dissolve it if they mutually consented to it. One finds similar idea in *Decretum*, where

⁸⁸ (Larrainzar 1981)

⁸⁹ Non dubium est, illam, mulierem non pertinere ad matrimonium, cum qua docetur non fuisse conmixtio sexus. C. 27 q.2 c. 16

⁹⁰ Cum societas nuptiarum ita a principio sit instituta, ut preter conmixtionem sexuum non habeant in se nuptiae Christi et ecclesiae sacramentum, non dubium est, illam mulierem non pertinere ad matrimonium, in qua docetur non fuisse nuptiale misterium. C. 27 q.2 c. 17

⁹¹ Matrimonium quidem non facit coitus, sed uoluntas ideo non soluit illud separatio corporis, sed uoluntatis. Ideo qui dimittit coniugem suam, et aliam non accipit, adhuc maritus. Nam etsi corpore iam separatus est, tamen adhuc uoluntate coniunctus est. Cum ergo aliam acceperit, tunc plene dimittit. Non ergo qui dimittit mechatur, sed qui alteram ducit. C. 31 q. 2 c. 1

it is fully possible to dissolve the betrothal if two assent for it because one of the spouses is aiming to transfer to religious life. Taken that couple is only betrothed, they are not supposed to await consent of the other party.

Consummation lacking consent does not create the marriage, the same is as well true speaking of consent lacking consummation. Those two building elements are necessary in order to create a legal bond. The conjugal debt is seen as a legal requirement based on the mutual promise.⁹² This example serves for illustrating that in consent for betrothal (initiated marriage) the couple consents not to mere cohabitation, but also to common life.

The betrothal in Gratian's view is actually *initiatio conjugii*; the mere beginning of the marital relation, which only with the consummation as well as followed by cohabitation and common life, will become perfected marriage. It has a practical meaning for Canon law, as only the second stage becomes indissoluble, for instance, when it deals with joining religious order, impotence, etc. These principles apply only in case of the first stage (betrothal or initiated marriage), but not in the second (perfected marriage).⁹³

As Romans did not regard betrothal as legally binding, either party to the agreement could withdraw without providing grounds for legal actions. Quite the opposite point of view is presented by Rudolf Sohm who suggests *desponsatio* to be more of Germanic origin than of Roman origin.⁹⁴ It seems that Gratian rather inherited the pattern of Roman Law. His betrothal (*matrimonium initiatum*) is quite close to the promise for marriage in the future (what in "Augustinian" sense would be later on called *fides pactionis*), that could be easily solved. Even by his own words Gratian confirms that betrothed are called *conjuges* as for the

⁹² ... ut uxor reddat debitum uiro, et uir uxori, nisi forte ex consensu ad tempus, ut expeditius uacent orationi. Unde datur intelligi, quod sine consensu alterius non licet alteri uacare orationi. C. 27 q.2 d.p.c. 18

⁹³ Cuncta ergo, que de non separando coniugio inducta sunt, de perfecto intelliguntur, quod sponsali coniunctione est initiatum, et offitio corporalis connixtionis est consummatum. Illa uero, quibus separabile coniugium ostenditur, de initiato intelliguntur, quod nondum offitio sui perfectum est. C. 27 q. 2 d.a.c. 39

⁹⁴ (Sohm 1879) vs. (Friedberg 1879)

future, not in the present.⁹⁵ He explicitly explains why he calls betrothal *matrimonium* by referring to Fathers of the Church and Scripture, where betrothed are usually called married. He adds that they are also called *conjugii* as marriage is started with betrothal, but not completed by it. Gratian's distinction between *matrimonium initiatum* and *matrimonium consummatum* has its roots in the law of Justinian, since the consent (either in future or in present tense) creates mere *matrimonium initiatum*, so to say the promise to marriage (to a perfected one).⁹⁶

Considering Gratian's understanding of marriage, the conjugal bond is a spiritual union, made through the mutual consent of the parties, and physical union created by the intercourse. Consummation and consent are two building and self depending elements.⁹⁷

A marriage that was simply initiated, but not consummated lacked the binding power of a consummated union. The fact that Gratian gave primary emphasis to consummation in constructing his marriage formation theory did not mean that he ignored or depreciated the importance of consent. On the contrary, consent was an essential element of his definition of marriage, as he was following Roman law. He discussed consent issues; essential was also the question -- whose consent was initiating the marriage and was held as legitimate.

The betrothal itself, according to Gratian, is only the beginning of marriage, so to say, the first stage of marriage, but is not marriage itself. Only through common life together and through consummation it is to become marriage. The former marriage is formed through the parties' simple consent. As the distinction between *sponsalia de praesenti* and *sponsalia*

⁹⁵ ...sponsas coniuges appellari spe futurorum, non re presentium. C. 27 q.2 d.p.c. 45

⁹⁶ For more see: Joyce (Joyce 1934, 88)

⁹⁷ sciendum est, quod coniugium desponsatione initiatur, commixtione perficitur. Unde inter sponsum et sponsam coniugium est, sed initiatum; inter copulatos est coniugium ratum. C. 27 q.2 d.p.c. 34

de futuro was unknown to Gratian, it appears that *consensus initiatum* included both agreements, whether in present or future tense, equally effective.⁹⁸

The most apparent difference between two kinds of Gratian's marriage models is that *matrimonium initiatum* (in other words *betrothal*) could be dissolved, whereas the perfected marriage (*matrimonium ratum*, *matrimonium perfectum* or *matrimonium consummatum*) could not be dissolved.⁹⁹

Without *conmixtio sexus*, according to Gratian and the case of St. Augustine, there are no relations of a married couple.¹⁰⁰ There is one exception, though, which is the marriage of Mary and Joseph. Gratian acknowledges this marriage as perfected one following St. Augustine, despite there was no consummation; it consisted of the three goods of marriage (*matrimonii triplex bonum*) (*fides, proles, sacramentum*) about which St. Augustine wrote in his *De bono conjugali*. As there was no adultery between them, they maintained faithfulness, they had an offspring, therefore, the principle of *proles* was also present. One may also assume that consent between Mary and Joseph was sufficient in order to create the

⁹⁸ For instance in this case: *Vir et mulier, si se coniunxerint, et postea dixerit mulier de uiro, quod non possit coire cum illa, si potest probare per uerum iudicium, quod uerum sit, accipiat alium. C.27 q. 2 d.a.c. 29.* Here it is not discussed through what kind of consent they are united, but rather if it appears to be the truth that a woman cannot be sexually known by a man, she can marry another man. Consummation is seen as a key element. It is a known fact that Peter Lombard was actually the first who introduced the distinction of *consensus de praesenti* and *consensus de futuro* in his *Sententiae* (1150-1152), therefore it seems quite vague if Gratian distinguished *betrothal consensus* from *marriage consensus*. What, in contrast, seems clear is that consent implies only to *conjugium initiatum*, in other words to *betrothal*, but not to the marriage in its full sense (*matrimonium ratum*).

⁹⁹ *Vir et mulier, si se coniunxerint, et postea dixerit mulier de uiro, quod non possit coire cum illa, si potest probare per uerum iudicium, quod uerum sit, accipiat alium. C.27 q. 2 d.a.c. 29.*

¹⁰⁰ "Non dubium est, illam mulierem non pertinere ad matrimonium, cum qua docetur non fuisse *conmixtio sexus*." Ad *matrimonium perfectum* subintelligendum est, tale uidelicet, quod habeat in se Christi et ecclesiae sacramentum. C.27 q. 2 d.a.c. 39.

It is also worth mentioning, that this perfected marriage is allegorically seen as the sacramental unity of Christ and his Church, whereas the consent and initiated marriage creates the sacrament, so to say unity of God and human soul. The author of this theological explanation is Hugo of St. Victor. For more see (Fransen 1988, 61)

sacramentum.¹⁰¹ As Gratian explains the issue himself: *sacramentum* in this case implies that there was no divorce between them, so to say, their marriage was indissoluble.¹⁰²

Gratian's inclination to the consummation theory of marriage does not make his view of marriage and, therefore, betrothal (*matrimonium initiatum*) very clear as in his *Concordia discordantium canonum* he examines both consent¹⁰³ and consummation¹⁰⁴ theories for a definition of marriage. By this scholastic discussion Gratian was merely trying to harmonize the discordant canons. Gratian's idea of initiated marriage does not appear to be a new one. It appears plausible to claim that Gratian's idea of initiated marriage is very much based on Roman law imagination of marriage. For Gratian, as well as for Roman law, betrothal is only the promise of future marriage. It is yet in no way a marriage until it is confirmed, by *deductio in domum*, *traditio* and consummation. It is hard to agree with some scholars who tend to compare betrothal in Gratianian sense to betrothal from rabbinic sources,¹⁰⁵ or to German betrothal.¹⁰⁶ German betrothal is deemed more as already contracted marriage only lacking *deduction in domum sponsi*, whereas Gratian seems to maintain his *conjugium initiatum* as a future promise to marriage. This puts betrothal in *Decretum Gratiani* much closer to Roman law than to German law.

¹⁰¹ "Inter Mariam et Ioseph fuit perfectum coniugium." Sed perfectum intelligitur non ex offitio, sed ex his que comitantur coniugium, ex fide uidelicet, prole et sacramento. C.27 q. 2 d.a.c. 39.

For further discussion of Mary and Joseph marriage see (Resnick 2000, 350-371)

¹⁰² Omne itaque nuptiarum bonum inpletum est in illis parentibus Christi, fides, sacramentum, proles. Prolem cognoscimus ipsum Dominum, fidem: quia nullum adulterium; sacramentum: quia nullum diuortium... . C.27 q. 2 c.10

¹⁰³ Matrimonium enim non facit coitus, sed uoluntas, et ideo non soluit illud separatio corporis, sed separatio uoluntatis. Ideo qui dimittit coniugem suam, et aliam non accipit, adhuc maritus est. Nam etsi corpore iam separatus est, tamen adhuc uoluntate coniunctus est. C.27 q. 2 c.4

Coniuges uerius appellantur a prima desponsationis fide, quamuis adhuc inter eos ignoretur coniugalis concubitus. C.27 q. 2 c.6

¹⁰⁴ Non dubium est, illam, mulierem non pertinere ad matrimonium, cum qua docetur non fuisse conmixtio sexus. C.27 q. 2 c.16

Cum societas nuptiarum ita a principio sit instituta, ut preter conmixtionem sexuum non habeant in se nuptiae Christi et ecclesiae sacramentum, non dubium est, illam mulierem non pertinere ad matrimonium, in qua docetur non fuisse nuptiale misterium. C.27 q. 2 c.17

¹⁰⁵ Resnick, I (2000: 365)

¹⁰⁶ Sohm, R. (1875: 78)

1.4 Who is consenting?

Consent apparently is one of the main elements of initiated marriage. Its contemporary meaning is portrayed in the 1983 Code of Canon law, ‘The consent of the parties legitimately manifested between persons qualified by law makes marriage; no human power is able to supply this consent.’¹⁰⁷

Following Anders Winroth’s study,¹⁰⁸ one may see the meaning of consent developing in three possible trends taken from the direct and indirect sources for *Decretum*: Roman law;¹⁰⁹ Germanic custom;¹¹⁰ custom of *traditio*.¹¹¹ It is now generally recognised that Gratian’s theory combines two stages, namely, the betrothal and consummation. It might seem plausible that he borrowed consent issue from Roman law, and consummational theory from Germanic custom, together with the custom of *traditio* and gift to the girl’s father, which were as well present in Germanic customary law. As it has been already mentioned above, Gratian combined these two stages: marriage is begun by consent, he says, and consummated by intercourse.¹¹² If one excludes the second stage, the brother and sister could possibly become

¹⁰⁷ Codex iuris canonici (1983), canon 1057 & 1

¹⁰⁸ (Winroth 2009, 112)

¹⁰⁹ The Roman jurist Ulpian said: “it is consent, not sleeping together, which makes a marriage ” (Dig. 35.1.15) Gratian could have not known Justinian’s Digest, which preserves Ulpian’s words. Still he might have been familiar with the idea, since early popes and Church Fathers , who had lived under Roman law and had been familiar with its rules, had mentioned it. It is also worth mentioning that consent in Roman Law did not necessarily excluded paternal control over the decision-making person. For more, see (Noonan 1973, 426)

¹¹⁰ Marriage begins with sexual intercourse between the parties. This was a widespread opinion, which is usually said to have its roots in Germanic custom.

¹¹¹ This practice existed in both Roman and Germanic law, and it was usually associated with the exchange of wealth, such as dowry, morning-gift and bride-price. Germanic law codes contain many regulations about such matters, but they seldom ask about the wishes of the bride. They were, however, adamant about respecting the wishes of bride’s father. As the example from Burgundian Code, ‘if any Burgundian of the highest or the middle class unites with the daughter of another (probably of the same class) without her father’s consent, we order that such a noble make a triple payment of one hundred fifty solidi to the father whose daughter he took, if he took her without stating his intentions in advance or seeking his consent; and let the fine be thirty six solidi.’ Fischer Drew, K. (1972; 85) The marriage without consent of bride’s father should result in a triple fine. That indicates quite clearly the tendency to limit bride’s will.

¹¹² Cum ergo inter istos consensus intercesserit, qui solus matrimonium facit, patet hos coniuges fuisse. Sed queritur, quis consensus facit matrimonium, an consensus cohabitationis, an carnalis copulae, an uterque? Si cohabitationis consensus facit matrimonium, tunc frater cum sorore potest contrahere matrimonium; si

husband and wife; if the second stage is excluded, Mary and Joseph could not be considered as a couple. Therefore, by these explanation, Gratian leads the reader to his two-stage theory. The consummated marriage is considered indissoluble,¹¹³ except the marriage of Mary and Joseph, which was not consummated, nevertheless it is deemed a marriage.¹¹⁴

The efficient cause of marriage, Gratian says, is consent, 'Consent makes marriage, not consummation;'¹¹⁵ this clearly indicates what actually initiates marriage, in other words, what makes betrothal legitimate. At this point Gratian is consistent. What he is not consistent about is whose consent it is supposed to be. Sometimes it is definite that a mere consent of spouses is applicable; therefore, a reader is tempted to suggest Gratian's extremely 'modern' way of thinking; sometimes, though, he stops short of demonstrating his 'modernity' and speaks about the parental assent to bride's choice.

carnalis copulae, inter Mariam et Ioseph non fuit coniugium. Vouerat enim Maria se uirgine perseueraturam. Unde ait angelo: "Quomodo fiet istud, quoniam uirum non cognosco?" id est, me non cognituram proposui. Neque enim quia tunc uirum non cognoscebat, necesse erat inquiri, quomodo posset habere filium, sed quia numquam se cognituram proposuerat. §. 1. Si ergo contra suum propositum postea consensit in carnalem copulam, rea facta est uoti uirginalis mente, etsi non opere uiolati. C. 27 q.2 d.p.c.2

¹¹³ Ecce, impossibilitas coeundi, si post carnalem copulam inuenta fuerit in aliquo, non soluit coniugium. Si uero ante carnalem copulam deprehensa fuerit, liberum facit mulieri alium uirum accipere. Unde apparet, illos non fuisse coniuges; alioquin non liceret eis ab inuicem discedere, excepta causa fornicationis; et sic discedentes oportet manere inuictos, aut sibi inuicem. C. 27 q.2 d.p.c.29

¹¹⁴ Gratian. Ex his omnibus apparet, sponsas coniuges appellari spe futurorum, non re presentium. Quomodo ergo coniuges a prima fide desponsationis appellantur, si ista, que sponsa asseritur, coniux esse negatur? Sed a prima fide desponsationis coniux dicitur appellari, non quod in ipsa desponsatione fiat coniux, sed quia ex fide, quam ex desponsatione sibi inuicem debent, postea efficiuntur coniuges, sicut per fidem dicuntur remitti peccata, non quod ante baptismum per fidem remittantur, sed quia fides est causa, quare in baptismo a peccatis emundamur. §. 1. Illud autem Iohannis Crisostomi: "Matrimonium non facit coitus, sed uoluntas;" item illud Ambrosii: "Non defloratio uirginitatis, sed pactio coniugalis matrimonium facit," ita intelligendum est: Coitus sine uoluntate contrahendi matrimonium, et defloratio uirginitatis sine pactione coniugali non facit matrimonium, sed precedens uoluntas contrahendi matrimonium, et coniugalis pactio facit, ut mulier in defloratione suae uirginitatis uel in coitu dicatur nubere uiro, uel nuptias celebrare. §. 2. Item Siricius Papa discessionem sponsae a sponso uocat coniugalem separationem. Sed talis discessio dicitur uiolatio coniugii non iam existentis, sed futuri, ut ex ipsa desponsatione sperabatur. Sic et diabolus dicitur cecidisse a beatitudine, non solum quam tunc habebat, sed etiam ad quam habendam creatus erat. Sic qui merito suae uitae uel scientiae in sacerdotem uel in episcopum eligitur, si interim electionem suam cassari meruerit, dicitur amittere sacerdotalem uel episcopalem unctionem, non quam iam acceperat, sed ad quam accipiendam electus erat. Non ergo illa auctoritate sponsa coniux potest probari. §. 3. Sed concedatur, quod sponsa non sit coniux, tamen queritur, utrum liceat ei renunciare priori conditioni? Hoc autem prohibetur auctoritate Anchiritani Concilii. C. 27 q.2 d.p.c.45

¹¹⁵ Matrimonium quidem non facit coitus, sed uoluntas C. 27 q.2 c.1

Anders Winroth explains such discrepancy by his already proved theory of two editions¹¹⁶ of *Decretum*, and divides two Gratian's views on consent:¹¹⁷ Gratian 1 was very 'modern-oriented,' and excluded family control as a possibility ; Gratian 2 (the addition of text after 1140) stepped back and admitted the role of parents to be important in marital decision-making.

In few cases Gratian seems to strongly believe in mere consent of couple, and not their families. Gratian devotes the question to the issue of whether a father may force his daughter to marry against her will; in other words, if a father can give her to a groom against her will. Gratian dedicates the entire second question of the 31th case to the consent issue.¹¹⁸

Starting his discussion, Gratian cites the commentary of Ambrose on the brief to Corinthians [7:39] stating that a widow has a privilege to choose her future husband by herself.¹¹⁹ This principle was usual for Roman law, since widows were considered as less desirable wives.

In the letter of Pope Urban it is maintained that the daughter of Prince Jordan of Capua, who claimed to have been forced to promise his little daughter's hand to Duke Rainald of Gaeta, is unwilling to marry. The girl is unwilling to marry Duke Rainald. Her mother and the relatives are against the union. Urban decided that if the girl, her father and mother, and also their relatives agreed to the marriage it could go forward. If not, she was not to be forced to marry Rainald. Interestingly enough, the position of the Pope is quite 'Roman,' he is not concentrated on bride's wish, but on the entire family point of view; whereas Gratian

¹¹⁶ (Winroth 2000)

¹¹⁷ (Winroth 2009, 115)

¹¹⁸ (Qu. II.) Secundo, an filia sit tradenda inuita alicui? C. 31 q.2

¹¹⁹ Quod autem aliqua non sit cogenda nubere alicui, Ambrosius testatur super primam epistolam ad Corinthios: "Nubat uidua cui uult: tantum in Domino;" C.31 q.2 d.a.c.1

thinks completely out of the Roman-law-frame concluding that ‘the father cannot compel a girl to marry one to whom she has never assented.’¹²⁰

Pope Urban pays attention to the will of the entire family. He seems to acknowledge the will of the girl but only complying with the will of the family. It is also noteworthy that it is mentioned that the girl was unwilling to marry, as well as her mother, and the family. It is composed in such a manner that the lack of girl’s consent would not be sufficient. Therefore, in the canon of Pope Urban the will of the girl is defended taking into account the will of her family.

The second canon is supposed to be contradicting to the previous one. It is a *palea*,¹²¹ which does originate from Pope Hormisdas. It is the answering letter to the Bishop Eusebius. The letter is asking if the father can contract marriage for his adult son, and is offering preliminary answer that if he is coerced, it cannot be done. As Pope Hormisdas responds, the father can make marriage arrangements for his minor son. As soon as the latter arrives to an adult age he might obediently agree.¹²² There is a slight likelihood that this canon had been included in *Decretum* until 1140; therefore, it seems unreasonable to include it in the entire discussion.

¹²⁰ Si uerum esse constiterit, quod nobis legati Iordanis principis retulerunt, scilicet, quod ipse coactus et dolens filiam suam infantulam nolentem, flentem, et pro uiribus renitentem, non assentientibus, sed ualde dolentibus matre et parentela, Rainaldo Rodelli filio desponsauerit, quoniam canonum et legum auctoritas talia sponsalia (ut infra ostenditur) non approbat, ne ignorantibus leges et canones nimis durum quod dicimus, ita sententiam temperamus, ut, si princeps cum filiae, matris, et parentelae assensu id, quod ceptum est, perficere uoluerit, concedamus. Sin autem, legatus noster utrasque partes audiat, et si nichil fuerit ex parte supradicti Rainaldi amplius, quod inpediat, ab ipso Iordane sacramentum, quod ita constant hec, ut dicta sunt, accipiat, et nos canonum ac legum scita sequentes deinceps non prohibemus, quin alii uiro, si uoluerit, predicta filia eius tantum in Domino nubat. C. 31 q.2 c.1

¹²¹ It is preserved in 9 mss. from XIIIth century, and in 18 mss. of XIVth century (Rambaud-Buhot 1965, 43)

¹²² Econtra Hormisda Papa scribit Eusebio Episcopo. Tua sanctitas nos requisiiuit, frater uenerande, de filio adulto, quem pater matrimonium contrahere uult, si sine uoluntate filii adulti facere potest. Ad quod dicimus, si aliquo modo non consentit filius, fieri non posse. Potest autem de filio nondum adulto, uoluntas cuius nondum discerni potest, pater eum, cui uult, in matrimonium tradere, et post, quam filius peruenerit ad perfectam etatem, omnino obseruare et adimplere debet. Hoc ab omnibus orthodoxae fidei cultoribus sancitum a nobis tenendum mandamus. C. 31 q.2 c.2

The third canon¹²³ is addressed to King Sancho of Aragon (*Sanctio, Regi Aragonum*), who had promised his unwilling niece in marriage. Urban frees her from fulfilling her uncle's promise and explains his decision: 'Those one in body should be one in spirit' (*Quorum enim unum corpus est, unus debet esse et animus*). He said, 'Where there is to be a union of the body, there ought to be union of the spirit; and therefore, no unwilling person is to be joined to another.'¹²⁴ The principle of uncoerced consent as a background for marriage is provided in this *dicta* concluded, 'by these authorities it is evident that no woman should be married to anyone except by her free will.'¹²⁵ As some scholars¹²⁶ claim, by this *dicta* Gratian demonstrates the idea of uncoerced consent. It appears, however, *libera voluntas* is not what it seems at the first sight. It might have been plausible to assume that Gratian freed the decision of the bride/groom from the coercion¹²⁷ of the father/guardian/family, but their consents were still to be present.

The first canon deals with the case where parents are considered guilty and should abstain from Communion, because they broke the betrothal of their children. Gratian adds in *dicta* that this is applicable only for parents with whose consent betrothal has been contracted.¹²⁸ This remark of Gratian might clearly indicate that betrothal with parents consent might have been quite widespread.

¹²³ Item Sanctio, Regi Aragonum. De neptis tuae coniugio, quam te cuidam militi daturum necessitatis instante articulo sub fidei pollicitatione firmasti, hoc equitate dictante decernimus, ut, si illa uirum illum, ut dicitur, omnino rennuit, et in eadem uoluntatis auctoritate persistit, ut uiro illi prorsus se deneget nupturam, nequaquam eam inuitam et renitentem eiusdem uiri cogas sociari coniugio. Quorum enim unum corpus est, unus debet esse et animus, ne forte, cum uirgo fuerit alicui inuita copulata contra Domini Apostolique preceptum aut reatum discidii, aut crimen fornicationis incurrat. Cuius uidelicet peccati malum in eum redundare constat, qui eam coniunxit inuitam. Quod pari tenore de uiro est sentiendum. C. 31 q.2 c.3

¹²⁴ si illa uirum illum, ut dicitur, omnino rennuit, et in eadem uoluntatis auctoritate persistit, ut uiro illi prorsus se deneget nupturam, nequaquam eam inuitam et renitentem eiusdem uiri cogas sociari coniugio. C. 31 q.2 c.3

¹²⁵ Gratian. His auctoritatibus euidenter ostenditur, quod nisi libera uoluntate nulla est copulanda alicui. C. 31 q.2 d. p. c.4

¹²⁶ (Noonan 1970, 278). Moreover the author maintains that this very opinion described in Gratian's *dicta* would be later on inherited by Pope Alexander III in his famous decretal *Veniens ad nos* [X 4, 1, 15]

¹²⁷ Roman law itself, while making consent central to marriage, did not employ the doctrine to prevent parental decision-making. The son was expected to obey his father's will. The notion that a boy or a girl must consent did not exclude their being made to consent. For more see (Noonan 1973, 426)

¹²⁸ Ecce, quod non licet parentibus sponsalia filiorum suorum frangere. Verum hoc de illis intelligendum est, que illorum consensu contrahuntur. C.31 q.2 d.p.c.1

The *traditio* taken either from Roman or from Germanic law tends to be quite often presented as one of the elements of marriage. In the text of *Decretum* it seems to be incorporated very naturally. It appears almost consistent with Gratian's idea of free will consent; in reality, though, it is not. The notion of *traditio* itself is the gesture of father's consent. Despite it is not verbalised in the text through father's assent, it is still displayed through the process of giving his daughter to a groom. *Traditio* per se includes his compliance with the choice of his daughter. Gratian appears to take for granted that normally bride's father would hand her over to groom, giving his consent; in other words, there is a possibility to assume that the only plausible consent of bride is supposed to comply with at least father's assent.¹²⁹ Importance of *traditio*, and, therefore, the parental consent as well is revealed when Gratian discusses the difference between *coniugium ratum* and *coniugium legitimum*. Marriages, where the bride is handed over to the groom by her parents, given the dowry by the groom, and blessed by a priest, are legitimate and validated. Those marriages missing solemnities would not be legitimate, but still in force.¹³⁰ *Traditio* together with solemn celebration tend to make the marriage legitimate; whereas, the consent, even without handing over the bride and blessing, makes it valid. The marriage is possible by initiating it only through the consent between spouses; in this case it is still valid, but not legitimate. Legitimate marriage, that is the one, contracted according to earthly law and custom, is contracted by following general rules, part of which is *traditio*. Some scholars tend to assume that solemnities were not necessary in order to create a marriage, even though not legitimate, but still valid. Therefore, the only thing that matters

¹²⁹ Anders Winroth has the opposite opinion on this issue; namely, he suggests that Gratian never says that these three elements are necessary for a valid marriage. They might be customary in some regions, but they are not required. In other words, *traditio* does not necessarily exclude free will consent; it is merely a custom. (Winroth 2009, 115)

¹³⁰ Horum quedam sunt legitima, ueluti cum uxor a parentibus traditur, a sponso dotatur, et a sacerdote benedicitur. Hec talia coniugia legitima et rata appellantur. Illorum uero coniugia, qui contemptis omnibus illis solemnitatibus solo affectu aliquam sibi in coniugem copulant, huiusmodi coniugium non legitimum, sed ratum tantummodo esse creditur. C. 28 q. 1 d.p.c. 17

in marriage is consent; even those who avoided solemnities are in fact married. Therefore, it might be concluded that only consent of bride and groom makes the marriage.¹³¹ Taking into account aforementioned opinion, it is hard to agree. If it is so and only consent of bride and groom matter in order to initiate marriage, it then seems quite inconsistent that Gratian devotes the entire question to clandestine betrothals.¹³² At the very beginning of discussion Gratian appears to strongly believe that marriages contracted through *traditio*, giving a dowry and solemn celebration, are to be deemed legitimate; otherwise, the union is rather adulterous than marital. Gratian supports the idea of solemnised marriage also in the second canon; quoting Pope Hormisdas, he says, ‘None of the faithful, of any condition, should secretly marry, but through accepting the blessing should marry publicly in the name of the Lord.’¹³³ In the answer to Bulgarian from Pope Nicholas, the entire ceremony of marriage is depicted: betrothal through future promise of marriage; consent of those who are involved in marital union; consent of those under whose control bride and groom are; marriage ring given to the bride; blessing in the Church in the name of the Lord. Interestingly enough, all the mentioned elements are to be considered as additional, and the Pope does not suggest it to be a sin, if these are missing.¹³⁴ According to Pope Leo, though, all the elements such as

¹³¹ (Winroth 2009,115)

¹³² Quinto, an clandestina desponsatio manifestae preiudicet? C. 30 q. 5

¹³³ Aliter legitimum non fit coniugium, nisi ab his, qui super ipsam feminam dominationem habere uidentur, et a quibus custoditur uxor petatur, et a parentibus propinquioribus sponsetur, et legibus dotetur, et suo tempore sacerdotaliter, ut mos est, cum precibus et oblationibus a sacerdote benedicatur, et a paranimphis, ut consuetudo docet, custodita et sociata, a proximis congruo tempore petita legibus dotetur, ac solempniter accipiatur, et biduo uel triduo orationibus uacent, et castitatem custodiant. Item: §. 1. Ita peracta legitima scitote esse conubia; aliter uero presumpta non coniugia, sed adulteria, uel contubernia, uel stupra, aut fornications potius, quam legitima coniugia esse non dubitate, nisi uoluntas propria suffragauerit, et uota succurrerint legitima. C. 30 q. 5 c. 1

Nullus fidelis, cuiuscumque condicionis sit, occulte nuptias faciat, sed benedictione accepta a sacerdote publice nubat in Domino. C. 30 q. 5 c. 2

¹³⁴ Item Nykolaus ad consulta Bulgarorum. [c. 3.] Nostrates, tam mares quam feminae, non ligaturam auream, uel argenteam, aut ex quolibet metallo conpositam, quando nuptialia federa contrahunt, in capitibus deferunt: sed post sponsalia, que futurarum sunt nuptiarum promissio, federa quoque consensu eorum, qui hec contrahunt, et eorum, in quorum potestate sunt, celebrantur; et post, quam arrhis sibi sponsam sponsus per digitum fidei annulo insignitam desponderit, doremque utrique placitam sponsus ei cum scripto pactum hoc continente coram inuitatis ab utraque parte tradiderit (aut mox aut apto tempore, ne uidelicet ante tempus lege diffinitum tale quid facere presumant), ambo ad nuptialia federa perducuntur, et primum in ecclesia Domini cum oblationibus, quas offerre debent Deo per sacerdotis manum, statuuntur, sicque demum

betrothal, handing over the bride to the groom by her parents, public marriage according to the law and following the Gospel; this marriage should not be separated, unless by mutual consent or through the call of the God. It is quite striking in this very case that public marriage is alluded not only to the customary law,¹³⁵ but also to the Gospel. Gratian then goes on, summarising quoted authorities, he says, ‘All these authorities prohibit secret marriages; marriages contracted against this principle are considered defective.’¹³⁶ Gratian also tends to mention the tradition of giving a dowry together with demand for marriage to be celebrated publicly. In the canon (excerpt from the decision of Council of Arles)¹³⁷ it is stated that no one is to be married without giving a dowry (*dos*) as well as without solemn celebration. Interestingly enough, though, is that Gratian imposes his own comment, ‘secret marriages are prohibited by these authorities.’¹³⁸ The dowry in the system of Roman law was the sign that actually distinguished marriage from concubinage. Gratian inserts one of the canons from the Council of Arles, hinting that not only solemn celebration brings legitimacy to marriage, but also dowry. This hint, though, is not confirmed in his *dicta* where he rather adheres to the prohibition of clandestine marriages, but does not mention the phenomenon of *dos* anymore. Thus, it might be inferred that Gratian is not following the Roman law scheme here.

What if the marriage is already contracted clandestinely: should it be dissolved or should it remain dissoluble? Gratian answers these questions by supporting already contracted marriage no matter if they it had been clandestine or solemnly celebrated. He also goes

benedictionem et uelamen celeste suscipiunt. Item: §. 1. Hec sunt, preter alia, que ad memoriam non occurrunt, pacta coniugiorum solemniora. Peccatum autem esse, si hec cuncta in nuptiali federe non interueniant, non dicimus. C. 30 q. 5 c. 3

¹³⁵ As Anders Winroth puts it, ‘Gratian never says that these three elements are necessary for a valid marriage. They might be customary in some regions, but they are not required.’ (Winroth 2009, 115)

¹³⁶ Gratian. His omnibus auctoritatibus occultae nuptiae prohibentur, atque ideo, cum contra auctoritatem fiunt nuptiae, pro infectis haberi debent. C. 30 q. 5 d.p.c. 4

¹³⁷ Item ex Concilio Arelatensi, c. 6. Nullum sine dote fiat coniugium; iuxta possibilitatem fiat dos, nec sine publicis nuptiis quisquam nubere uel uxorem ducere presumat. C. 30 q. 5 c. 6

¹³⁸ Gratian. His omnibus auctoritatibus occultae nuptiae prohibentur, atque ideo, cum contra auctoritatem fiunt nuptiae, pro infectis haberi debent. C. 30 q. 5 d.p. c. 6

back to the first canon of the fifth question and explains his position by quoting Pope Evaristus, 'they are not presumed marriages in any other way (if they are contracted clandestinely), unless by the own will of the two makes it legitimate.'¹³⁹ In the next dicta, Gratian goes further, and admits that secretly contracted marriage are not to be dissolved or broken down, if the confession may be proved. As the judge cannot prove the change of will or confession, these marriages are to be forbidden.¹⁴⁰ Therefore, clandestine marriages which were already contracted are not to be dissolved, but it is required to celebrate it publicly. It also might include the consent of the couple family to the marital union; which, to some extent, excludes Gratian's theory of free will consent despite its manifestation in *Decretum*. Free will mutual consent might appear sufficient for betrothal, but not for marriage itself, since it included *traditio* and public celebration that comply with the family consent. On the one hand, uncoerced consent free of family influence is demonstrated in *Decretum*; on the other hand, assent of family members is revealed through their participating in solemnised celebration as well as in *traditio*. Gratian, though, appears to reconcile the contradiction created by his own comments in the 31th case of *Decretum*. One of the clearest points he makes about parental consent is provided in his *dicta* saying, 'father's consent is wanted in marriage, and that without it there cannot be a legitimate marriage.'¹⁴¹ Parental consent plays a role of marriage validation, so to say, by approving bride's choice, her father participates in the legitimisation of her marriage. Two canons following also support the same idea. Legitimate marital union seems possible by complying

¹³⁹ Sic et clandestina coniugia contra leges quidem fiunt, tamen contracta dissolui non possunt, quia ex legitimo uoto subsequente corroborantur. Unde et Euaristus, cum dixisset: "aliter coniugia presumpta non sunt, sed adulteria;" addidit: "nisi uoluntas propria suffragauerit, et uota succurrerint legitima." C. 30 q. 5 d.p.c. 8

¹⁴⁰ Coniugia, que clam contrahuntur, non negantur esse coniugia, nec iubentur dissolui, si utriusque confessione probari poterunt: uerumtamen prohibentur, quia mutata alterius eorum uoluntate, alterius confessione fides iudici fieri non potest. Unde publice, cum alterius uota in alteram partem se transtulerint, pro priori coniugio, quod iudici incertum est, sententia ferri non poterit. C. 30 q. 5 d.p.c. 9

¹⁴¹ " datur intelligi, quod paternus consensus desideratur in nuptiis, nec sine eo legitimae nuptiae habeantur, iuxta illud Euaristi Papae: "Aliter non fit legitimum coniugium, nisi a parentibus tradatur." C. 31 q. 2 d.p.c. 12

with two following actions: handing over of the bride by her parents to the groom, and solemn celebration in the name of the Lord.¹⁴²

It seems reasonable to conclude that betrothal, and the consent as constitutive part of it, were not freed by the *Decretum Gratiani* from domination by the family, it was also subjected to regulation by the Church. It is hard to avoid the conclusion that uncoerced consent plays a significant role in contracting betrothal (initiated marriage); parental assent (transformed often into the ceremony of *traditio*), and solemnisation of the contracted marriage (perfected marriage) plays an essential role in contracting the actual marriage. This assumption seems to be strengthened by the next case: taken that a young girl has vowed to somebody and binds herself by an oath, while she has not yet reached the puberty, is not binding to fulfill the vows if her father is not agreed.¹⁴³ Undoubtedly, girl's consent is valid in the frame of betrothal, but it is not legitimate enough considering marriage. Conceivably, the key point here is bride's age of; but it is not said that after she reaches marriageable age she might either confirm or deny her promise; it is rather said that she needs her father's consent anyway. It seems worth mentioning one more case where betrothal by parents' consent is a central point: Gratian decides that it is unlawful for parents to break their children's consent, but this applies only to those betrothals contracted with parents' consent.¹⁴⁴ In other words, it is unlawful to break not only children's consent to betrothal, but also their own consent to betrothal.

¹⁴² ... si uult nubere, nubat, tantum in Domino; ut electionem mariti parentibus deferat... C. 31 q. 2 c. 13

¹⁴³ Mulier, si quippiam uouerit, et se constrinxerit iuramento, que est in domo patris sui, et in etate adhuc puellari, si cognouerit pater uotum, quod pollicita est, et iuramentum, quo obligauit animam suam, et tacuerit, non rea erit, quicquid pollicita est et iurauit, opere complebit. Sin autem statim, ut audierit, contradixerit pater, et uota et iuramenta eius irrita erunt, nec obnoxia tenebitur sponsioni eo, quod contradixerit pater. C. 31 q. 2 c.

¹⁴

¹⁴⁴ Gratian. Ecce, quod non licet parentibus sponsalia filiorum suorum frangere. Verum hoc de illis intelligendum est, que illorum consensu contrahuntur. C. 31 q. 3 d.p.c. 1

Gratian's claim about desired father's consent in the lawful marriage is deemed by some scholars¹⁴⁵ as nothing else but updating of the *Decretum* in about 1140s. It seems quite certain following aforementioned conclusions that *Decretum* (especially its second recension) requires parental consent for a marriage to be valid. As there is a great deal of inconsistency in *Decretum*, there is also disagreement between scholar authorities.¹⁴⁶

Gratian recognized certain limits on the choice of a marriage partner. Both parties must be of the age where they could give meaningful consent; at the very least this meant that both parties must have attained the age of seven before their consent could be considered binding.¹⁴⁷ Christian could not marry infidels or Jews.¹⁴⁸ Those bound to observe celibacy could not marry anyone at all.¹⁴⁹ No one could marry a person to whom she (he) was related within seven degrees of kinship by blood or affinity or baptism relationship.¹⁵⁰

¹⁴⁵ (Winroth 2009, 115)

¹⁴⁶ Brundage tends to assume that Gratian is defending free will consent, and for him the consent of the family is not important. Brundage's opinion is opposite to Sheehan's where both consents those of family as well as those for betrothed matter. 'Although he seems to have assumed that families would normally play an important role in the choice of marriage partner, he stopped short of making their consent essential to marriage.' (Brundage 1987, 238); '... it tends to be obvious that *Decretum* presumes a world where family usually plays an important role in the choice of marriage partner.' (Sheehan 2004, 165)

¹⁴⁷ Sponsalia ante septennium contrahi non possunt. Solo enim consensu contrahuntur, qui interuenire non potest, nisi ab alterutra parte id intelligatur, quod inter eos agitur. Probantur ergo sponsalia non posse contrahi inter pueros, quorum etatis infirmitas consensum non admittit. Testatur hoc idem Nikolaus Papa dicens: Ubi non est consensus utriusque, non est coniugium. Ergo qui pueris dant puellas in cunabulis, et e conuerso, nichil faciunt, nisi uterque puerorum post, quam uenerit ad tempus discretionis, consentiat, etiamsi pater et mater hoc fecerint et uoluerint. C. 30 q. 2

¹⁴⁸ Caue, Christiane, gentili aut Iudeo filiam tuam tradere, Caue, inquit, gentilem, aut Iudeam atque alienigenam, hoc est hereticam, et omnem alienam a fide tua uxorem accersas tibi. Prima coniugii fides gratia castitatis est. §. 1. Si Christiana sit, non est satis, nisi ambo initiati sitis sacramento baptismatis. Simul ad orationem nocte uobis surgendum est, et coniunctis precibus obsecrandus Deus. C. 28 q. 1 c. 15

Non oportet cum omnibus hereticis miscere conubia, et uel filios uel filias dare, sed potius accipere, si tamen se profitentur Christianos esse futuros et catholicos. C. 28 q. 1 c. 16

Si quis Iudaicae prauitati coniugali societate iungitur, siue Christiana Iudeo, siue Iudea Christiano mulier carnali consortio misceatur, quicumque eorum tantum nefas admisisse cognoscitur, a Christiano cetum atque conuiuio, et a comunione ecclesiae protinus segregetur. Gratian. Item illud Augustini: "Non est ratum coniugium, quod sine Deo est," non negat coniugium esse inter infideles. Coniugium enim aliud est legitimum et non ratum, aliud ratum et non legitimum, aliud legitimum et ratum. Legitimum coniugium est, quod legali institutione uel prouinciae moribus contrahitur. Hoc inter infideles ratum non est, quia non est firmum et inuolabile coniugium eorum. Dato enim libello repudii licet eis discedere ab inuicem, et aliis copulari lege fori, non lege poli, quam non secuntur. Inter fideles uero ratum coniugium est, quia coniugia, semel inita inter eos, ulterius solui non possunt. C. 28 q. 1 c. 17, d.p.c. 17

¹⁴⁹ Que Christo spiritualiter nubunt, si postea publice nupserint, non eas admittendas esse ad penitentiam censemus, nisi hii quibus se iunxerant, de mundo recesserint," eis, subaudiendum est, nubentibus. Tunc enim

Consent informed by marital affection¹⁵¹ overcame the fundamental law of the Roman Empire that a slave lacked civil capacity to marry.¹⁵²

There are some more limits to free will mutual consent that could hinder the legitimate betrothal to take place. This is namely the defect of consent. In the introductory case of the 29th *causa* Gratian tells about a noble woman who had consented to a man of an aristocratic origin, but then it turned out that for the wedding ceremony the slave showed up; afterwards it became known that she was actually tricked. Gratian poses two questions, mainly the first one asks whether she really got married to the imposter, and the second one, whether the servile status of the imposter gives the bride a right to divorce him.¹⁵³ In discussing the first question Gratian speaks at length not only about kinds of consent,¹⁵⁴ but

uiri de mundo recedunt, tunc defunguntur, cum ab eorum concupiscentia ipsae penitus se alienauerint, sicut mundus ei dicitur mortuus, quem suis illecebris non astringit, et ille perhibetur mortuus mundo, qui nichil mundi concupiscit. C. 27 q.1 d.p.c. 43

¹⁵⁰ Et item per alium Prophetam: "Vocabo non plebem meam plebem meam." In huius ergo rei sacramentum consanguineorum coniunctiones primum in populo permissae sunt, nunc autem prohibita. Et quia non in una tantum familia, sed in omni multitudine gentium fidelium populus inuenitur, non de propria cognatione, sed de qualibet alia cuique uxorem ducere conceditur. ... Consanguineorum ergo coniunctiones, quamuis euangelicis et apostolicis preceptis non inueniantur prohibita, sunt tamen fugiendae, quia ecclesiasticis institutionibus inueniuntur terminatae. C. 35 q. 1 d.p.c. 1. ... dum sexta generatione coniugium interdicatur, in septima permitti uidetur. C. 35 q. 2&3 d.p.c. 21

¹⁵¹ For more on *maritalis affectio* see (Noonan 1967)

¹⁵² Omnibus nobis unus pater est in celis, et unusquisque, diues et pauper, liber et seruus, equaliter pro se et pro animabus eorum rationem reddituri sunt. Quapropter omnes, cuiuscumque condicionis sint, unam legem quantum ad Dominum habere non dubitamus. Si autem omnes unam legem habent, ergo sicut ingenuus dimitti non potest, sic nec seruus semel coniugio copulatus ulterius dimitti poterit. C. 29 q. 2 c. 1

More on on marriage of the unfree person see (Winroth 2006, 97-109)

¹⁵³ Cuidam nobili mulieri nunciatum est, quod a filio cuiusdam nobilis petebatur in coniugem; prebuit illa assensum. Alius uero quidam ignobilis atque seruilis condicionis nomine illius se ipsum obtulit, atque eam in coniugem accepit. Ille, qui sibi prius placuerat, tandem uenit, eamque sibi in coniugem petit. Illa se delusam conqueritur, et ad prioris copulam aspirat. (Qu. I.) Hic primum queritur, an sit coniugium inter eos? (Qu. II.) Secundo, si prius putabat, hunc esse liberum, et postea deprehendit, illum esse seruum, an liceat ei statim ab illo discedere? C. 29 q. 1 & 2

¹⁵⁴ Ad hec, non omnis error consensum euacuat; qui enim accipit in uxorem, quam putat uirginem, uel qui accipit meretricem, quam putat esse castam, uterque errat, quia ille corruptam existimat esse uirginem, et iste meretricem reputat castam. Numquid ergo dicendi sunt non consensisse in eas? Aut dabitur utrique facultas dimittendi utramque, et ducendi aliam? Verum est, quod non omnis error consensum excludit; sed error alius est personae, alius fortunae, alius condicionis, alius qualitatis. Error personae est, quando hic putatur esse Virgilius, et ipse est Plato. Error fortunae, quando putatur esse diues qui pauper est, uel e conuerso. Error condicionis, quando putatur esse liber qui seruus est. Error qualitatis, quando utatur esse bonus qui malus est. Error fortunae et qualitatis coniugii consensum non excludit. Error uero personae et condicionis coniugii consensum non admittit. Si quis enim pacisceretur, se uenditurum agrum Marcello, et postea ueniret Paulus dicens se esse Marcellum, et emeret agrum ab illo, numquid cum Paulo conuenit iste de precio, aut dicendus est agrum sibi uendidisse? Item si quis promitteret, se uenditurum michi aurum, et pro auro offerret michi

also about the word *consentire* per se.¹⁵⁵ In the first question, Gratian begins with pointing that marriage, according to its definition, comes about through consent of both parties. Since both consented, it is taken that there is a marriage between them. Then Gratian objects since the woman made a mistake. As Gratian sees consent according to the first question of the aforementioned cause: the consent is legitimate when it is without mistake, consent itself is when two or more persons are thinking and assenting to the same object, but if they are mistaken, they are not consenting in the direct meaning of the word. Then following this given definition Gratian moves to distinguishing between different kinds of errors with explicit instances on each of them. Not all of the errors exclude the legitimate consent, as there is *error personae*, the other is *error fortunae*, also something different is

auricalcum, et ita me deciperet, numquid diceret consensisse in auricalcum? Numquam uolui emere auricalcum, nec ergo aliquando in illud consensui, quia consensus non nisi uoluntatis est. Sicut ergo hic error materiae excludit consensum, sic et in coniugio error personae. Non enim consensit in hunc, sed in eum, quem hunc putabat esse. §. 3. Sed obicitur: Iacob non consenserat in Liam, sed in Rachel septem quidem annis pro Rachel seruierat. Cum ergo eo ignorante Lia esset sibi subposita, non fuit coniugium inter eos, si error personae consensum excludit, quia, ut dictum est, non in eam consenserat, sed in Rachel. His ita respondetur: Consensus est alius precedens, alius subsequens. Precedit consensus, quando ante carnalem copulam in indiuiduam uitae consuetudinem uterque consentit; subsequitur, quando post concubinalem siue fornicarium coitum consentiunt in idem. Iacob ergo et Liam non fecit coniuges precedens consensus, sed subsequens; nec tamen ex primo concubitu fornicarii iudicantur, cum ille maritali affectu eam cognouerit, et illa uxorio affectu sibi debitum persoluerit, putans lege primogenitarum et paternis inperiis se sibi iure copulatam. §. 4. Quod autem error personae nonnullos excuset, illa auctoritate probatur, qua soror uxoris utroque inscio, sorore uidelicet et marito, in lectulum eius iisse, et a uiro suae sororis cognita perhibetur, que cum sine spe coniugii perpetuo manere censeatur, ille tamen, qui cognouit eam per ignorantiam, excusatur. Aliter etiam hoc probatur. Diabolus nonnumquam se in angelum lucis transformat, nec est periculosus error, si tunc creditur esse bonus, cum se bonum simulat. Si ergo tunc ab aliquo simplici quereretur, an suae beatitudinis uellet esse particeps, et ille responderet, se in eius consortium uelle transire, numquid dicendus esset consensisse in consortium diabolicae dampnationis, an non potius in participationem eterne claritatis? Item, si quis hereticorum, nomine Augustini, uel Ambrosii, uel Ieronimi, alicui catholicorum se ipsum offerret, atque eum ad suae fidei imitationem prouocaret, si ille preberet assensum, in cuius fidei sententiam diceretur consensisse non in hereticorum sectam, sed in integritatem catholicae fidei, quam ille hereticus se mentiebatur habere. Quia ergo hec persona decepta errore non in hunc, sed in eum, quem iste se mentiebatur esse, consensit, patet, quod eius coniux non fuerit. §. 5. Error fortunae et qualitatis non excludit consensum, ueluti si quis consentiret in prelaturam alicuius ecclesiae, quam putaret esse diuitem, et illa esset minus copiosa, quamuis hic deciperetur errore fortunae, non tamen posset renunciare prelaturae acceptae. Similiter, que nubit pauperi, putans illum esse diuitem, non potest renunciare priori conditioni, quamuis errauerit. Error qualitatis similiter non excludit consensum; utpote si quis emerit agrum uel uineam, quam putaret esse uberrimam, quamuis iste erraret qualitate rerum, rem minus fertilem emendo, non potest tamen uenditionem rescindere. Similiter, qui ducit meretricem in uxorem uel corruptam, quam putat esse castam uel uirginem, non potest eam dimittere, et aliam ducere. C. 29 q. 1

¹⁵⁵ Consensus est duorum uel plurium sensus in idem. Qui autem errat non sentit, non ergo consentit, id est simul cum aliis sentit. Hec autem errauit; non ergo consensit: non itaque coniux est appellanda, quia non fuit ibi consensus utriusque, sine quo nullum matrimonium esse potest. Sicut enim qui ordinatur ab eo, quem putat esse episcopum, et adhuc est laicus, errat, nec uocatur ordinatus, immo adhuc ab episcopo est ordinandus: sic ista errans nulli est copulata coniugio, immo adhuc est copulanda. C. 29 q. 1

error conditionis and *error qualitatis*. *Error personae* is when a person is deemed to be a Virgil, but in reality he is a Plato; *error fortunae* stands for a reach, who turned out to be poor, and vice versa; *error conditionis* undermines the poor who is pretending to be a rich one; *error qualitatis* signifies when the one is seen as a good personality, but in reality it turns to be a bad one. The errors of fortune and of quality do not exclude the consent, but the errors of the person and of the condition surely do. In order to clarify these decisions Gratian gives few instances for every kind of the mistake. Therefore, if it happens that *error personae*¹⁵⁶ or *error conditionis* took place the betrothal, through one of these defected consents, is null. Two other mistakes such as *error qualitatis* and *error fortunae* do not exclude the legitimate consent and, therefore, do not hinder in any way the legitimate betrothal.

¹⁵⁶ According to contemporary canon law due to C. 1097.1 error about the person also invalidates the marriage while error about the quality of the person (C. 1097.2) does not invalidate the marriage except under certain circumstances. For more see (Dacanay 2003, 77)

1.5 Conclusion

It seems reasonable to conclude that betrothal, and the consent as constitutive part of it, were not freed by the *Decretum Gratiani* from domination by the family, it also was subjected to regulation by the Church. It is hard to avoid the conclusion that consent plays a significant role in contracting betrothal (initiated marriage); parental assent (transformed often into the ceremony of *traditio*) and solemnisation of the contracted marriage (perfected marriage) play an essential role in contracting the actual marriage. There is also a strong possibility that the consent in betrothal has been made in *continuous* and not *initial*: as the first one needs to be confirmed (in the case of *Decretum* it might be confirmed by common life and consummation); whereas the initial consent does not necessarily need any other confirmation. Therefore, it might be conferred that consent in *Decretum* was much closer to *continuous* than to *initial* consent.

Chapter 2: Betrothal in the Commentary to *Decretum: Summa decretorum* of

Huguccio

2.1 Life of Huguccio

During the Middle Ages there generally were two distinct versions of Huguccio's biography. The oldest biographical tradition was developed at the school of Bologna and asserted that Huguccio was the bishop of Ferrara (1190-1210).¹⁵⁷ A rather contrasting picture was displayed by medieval chroniclers. The first chronicler was Friar Salimbene of Parma who in 1283 based his findings on the knowledge gathered by medieval canon lawyers. He marked the exact dates of Huguccio's bishopric activity (1 May 1190 – 30 April 1210) and addressed the authorship of the *Derivationes* to Huguccio. Additionally, Friar Salimbene claimed that the Ferrarese Bishop originally came from Pisa.¹⁵⁸ Research on Huguccio was initiated as early as late middle ages and continued being developed by Mauro Sarti (1769). Mauro Sarti was also the first to approach Huguccio of Pisa as a grammarian, canonist, and bishop. This approach was heavily criticized by J. Noonan¹⁵⁹ and reexamined by Wolfgang Müller by discussing respective links between canonist, bishop, and grammarian.¹⁶⁰ On the one hand, the traditional identification of Huguccio as a canonist and bishop is confirmed, but on the other, the commonly perceived authorship of the *Derivationes*¹⁶¹ and the *Summa* is not given

¹⁵⁷ Commentators like Goffredus of Trani, Bernardus of Parma were the first who spoke of the Ferrarese Bishop as "Master Huguccio"; Johannes de Deo introduced "Huguccio, bishop of Ferrara" as "Master", this link has been overtaken and perceived as a historical fact by Hostiensis and Johannes Andreae. (Müller 2008, 144)

¹⁵⁸ (Müller 2008, 144). According to C. Leonardi, the majority of manuscripts support the suggestion that Huguccio was born in Pisa, the Mss. Wien Nationalbibliothek 2339 confirms "Hugutio de Vercelli, recte Pisanus." (Leonardi 1956, 51)

¹⁵⁹ (Noonan 1979, 145-72)

¹⁶⁰ (Müller 1994)

¹⁶¹ Some scholars (Schizzerotto 1976, 800-802) perceive Huguccio's early career as a first rate grammarian approximately in 1160s. He is deemed to have produced an etymological dictionary *Derivationes* that was widespread in the late Middle Ages. In *Derivationes* there is also a mention of author's birthplace, namely Pisa (*De Huguccionis Pisani Derivationum latinitate earumque prologo*). (Marigo 1927, 97-106)

much credit. Müller's argument does not deny a possible connection between those two works but rather questions its nature.

Life of Huguccio may be generally divided into three main periods: Huguccio was born in Pisa, moved to Bologna early in his life and began to study liberal arts. Later, Huguccio appears to have turned to legal studies. By 1180 he had already been a prominent professor of canon law in Bologna. In about 1188-1190¹⁶² he finished his *Summa decretorum* that originally used to be his lecture material on the *Decretum Gratiani*. While still working on *Summa*, Huguccio was appointed bishop of Ferrara. He administered the diocese until his death on 30 April 1210.¹⁶³

¹⁶² There are several different approaches to considering dates of *Summa's* composition. According to Schulte, *Summa* was composed approximately in the span of time between 1185 and 1187. Gillmann points to the fact that Huguccio in C.12 q.2 c.16 mentions sultan Saladin (died in 1193) in the present tense. Moreover, Huguccio was working on *Summa* during pontificate of Pope Clemens III (which appears obvious from D. 89 c.5), taking into account the proves *tempus ad quem* would be 1188, *tempus a quo* 1190 for Huguccio's *Summa decretorum*. Gillmann strengthens Maassen's consideration that Huguccio was working on *Summa* being still a bishop. (Gillmann 1914, 238-245)

¹⁶³ (Müller 1994, 24). According to the date of death Müller is clearly following the finding of Friar Salimbene of Parma.

2.2 *Summa decretorum*

The *Summa decretorum* is a gloss on the *Decretum Gratiani*. By commenting on the *Decretum* Huguccio summarizes and evaluates about 50 years of ecclesiastical law.¹⁶⁴ The commentator was quoting decretals of Pope Alexander III, Lucius III (1181-1185), Urban III (1185-1187), and those of Pope Gregory VIII; the canons of the Lateran Council III (1179). As Maaßen suggests, the *Summa Decretorum* was finished after the *Compilatio I*.¹⁶⁵ Huguccio was following the way of citation employed by Bernardus Papiensis – by several launching words. This way of citing had surely been present before *Compilatio I*, but the consistency with which Huguccio was following this way of citing might be a proof of finishing *Summa* after *Compilatio I*.¹⁶⁶ The author never commented on one fragment from *Decretum Gratiani* namely C.23 q.4 c.34 – C.26. Johannes de Deo filled the gap left by Huguccio; he commented on cases from C.23 to C.26.¹⁶⁷

Huguccio did not follow the order of the *Decretum* composition; he was rather selective and would comment not peace by peace, but jumping from one abstract to another. According to Müller, the period of composition might be discerned into 5 stages. At the first phase, at the very beginning Huguccio followed the *Decretum* structure of composition: he commented on a hundred of Gratian's distinctions, and then he moved on turning right to the second part: C.1-C.22; C.27-C.33 q.2; C.33 q.4-C.36. During the second stage of composition, Huguccio turned to the first case, which had been omitted by him in the first stage. The third period started after discussing the first case and was focused on the third

¹⁶⁴ Works of Frederich von Schulte as well as this of Friedrich Maaßen contributed to the reestablishing of Huguccio's *Summa decretorum* in the history of canon law.

¹⁶⁵ (Maaßen 1857, 43)

¹⁶⁶ (Maaßen 1857, 44)

¹⁶⁷ (Schulte 1875, 103). Schulte showed and proved that actually Johannes had filled the gap and commented on those cases.

part of the *Decretum* (namely *De consecratione* by treating the concept of sacrament) as well as on the fourth one *De penitentia*. The fourth and fifth phases treated *De penitentia* as well as *Cause hereticorum* (C.23-C.23 q.4 c.33). The treatment of the skipped section (C.23-C.26) might have been done by the author¹⁶⁸ after the penitential part of the *Decretum*.¹⁶⁹

¹⁶⁸ It is considered that Johannes de Deo had continued work on *Summa* and had commented on the part skipped by Huguccio.

¹⁶⁹ (Müller 1994, 73-75)

2.3 Manuscript tradition

There are up to 42 manuscripts of *Summa* according to Müller;¹⁷⁰ two lists of copies presented in 1950s contain 41 and 43 manuscripts correspondingly, two out of those have been removed. 28 out of 42 manuscripts have been discerned in the frame of 5 stage-composition-process scheme.¹⁷¹

Summarizing the distinguishing features of these 28 manuscripts, Müller attests

Huguccio's final comment on Causa 23 (stage v), for example, appears in none of those MSS that contain only half or less of his (four) additions (groups II and III). ... whenever medieval scribes supplied later portions of Huguccio's *Summa*, they were likely to copy the oldest and omit the latest section. The paleographical evidence, moreover, seems to attest to the same fact by pointing up a correspondence between age and completeness.¹⁷²

In other words, more copies of the manuscripts were rendered; less new sections (such as commentary on C. 23) of the commentary have been preserved. The rest 14 manuscripts out of 42 are, according to Müller, too damaged and insufficient to be attributed to a certain period within the abovementioned scheme. As Müller points out, the copies of the manuscripts have been used by the intellectuals rather chaotically; therefore, their assertions appear quite inconsistent, even conflicting. Huguccio is thought to have taken a great deal of care in editing his explanations; therefore, it is assumed that the texts with the "prints" of the editorial work might be the closest to the original. Strictly speaking, the manuscripts representing the first stage of composition are of less interest, whereas the later copies with more attachments seem to be of a greater interest; the Admont, Stiftsbibl. 7 seems to be quite promising as a source material to work with.

¹⁷⁰ (Müller 1994, 75)

¹⁷¹ (Müller 1994, 76-79)

¹⁷² (Müller 1994, 80)

2.4 Betrothal in the *Summa decretorum*

Huguccio's point of view regarding betrothal and marriage is not coherent with Gratian's opinion. Moreover, Huguccio seems to criticize *Decretum* in quite a harsh way. The points where Gratian's opinion and his own assessment are opposite were marked by numerous evaluative expressions.¹⁷³ As Phillippe Antoine points out, Huguccio seems to criticize Master Gratian himself rather than the *opus* of his authorship.¹⁷⁴ Generally, Huguccio comments on Gratian's *Decretum* after he recaptures the content of the case and pro- and contra-arguments regarding the question he is dealing with; afterwards, he gives short remarks on how he understands both sides of argumenation. Subsequently, Huguccio presents the outcome of Gratian's interpretation conveyed in *dicta*. In majority of cases he criticizes either the way of argumentation employed by Master Gratian or claims a bad understanding of the authorities cited in the case, which brought Gratian to faulty results. After accomplishing the criticism part, Huguccio turns to displaying his own view of the issue by encompassing the very same excerpts of authorities Gratian used in his *Decretum*. To a certain degree Huguccio explicitly shows that by employing the same arguments embodied in *Decretum* he has come to the opposite conclusion.

¹⁷³ "Oppinio Gratiani veritati contraria reprobetur" (*Summa*, C.27 q.2 fol. 340 v), "hanc questionem [Gratianus] pertractat et determinat et male quod simpliciter proponuit" (*Summa*, C. 27 q.2 fol. 347 r), "primam questionem magister expedit non ponendo auctoritates quia non inveniebat, sed inducendo rationes quandoque feratur debiles" (*Summa*, C.29 q.2 fol. 353 v), "sed Gratianus pessime, immo nullo modo eam intellexit, et ideo male eam indixit" (*Summa*, C.27 q.2 fol. 345 r) "hic ex toto male determinat" (*Summa*, C.27 q.2 347 v) "ergo magister hic male dicit" (*Summa*, C.31 q.3 fol. 366 v), "sed si sic intellexit, pessime intellexit" (*Summa*, C.27 q.2 fol. 345 v). Additionally, Huguccio abundantly employs such adverbs as *male* and *pessime* in order to characterize the interpretation to which Gratian had come in his *dicta* or his way of argumentation.

¹⁷⁴ (Antoine 1992, 240)

The current chapter will cover the discussion of four cases (C.27 q. 2;¹⁷⁵ C.29. q. 1-2;¹⁷⁶ C.30. q. 5;¹⁷⁷ C.31 q. 2¹⁷⁸) that are dedicated to the question of betrothal and to the issues closely related to engagement.

¹⁷⁵ The second question of the twenty-seventh case is focused on the betrothal-marriage issues and argues whether the bride is to be seen already as a wife.

¹⁷⁶ The first and the second questions of the twenty-ninth case are covering the consensual mistakes that might take place while two parties are consenting to each other.

¹⁷⁷ The fifth question of the thirtieth case is dedicated to discussion of the concealed betrothal versus solemn celebrations.

¹⁷⁸ The second question of the thirty-first case comments on the parental role in contracting betrothal.

2.4.1 From *coniugium initiatum/coniugium ratum* to *desponsatio de futuro/de praesenti*

Master Gratian distinguished between initiated and consummated marriage. Through the carnal union between believers the consummated perfected marriage is contracted.¹⁷⁹ Taking into account this distinction between two kinds of marriage, Gratian calls betrothal to be a marriage, though an initiated one, this for Huguccio appears to be nothing less than “opposite to the truth.”¹⁸⁰

Huguccio in his *Summa* rejects this distinction made by Gratian by underlining the distinction between two kinds of betrothal: the one *de praesenti* and the other *de futuro*. The commentator, thus, is shifting attention from two kinds of marriage (this of Gratian) to two kinds of betrothal,¹⁸¹ which Huguccio defines as those that are expressed in the present tense¹⁸² and in the future tense.¹⁸³

The formulas presented above clearly demonstrate that the parental voice is present in the betrothal for the future; moreover, it appears to be one of the conditions that may hinder contracting the betrothal (*si tantum dederit mihi pater tuus*). In case where there was

¹⁷⁹ Sed sciendum est, quod coniugium desponsatione initiatur, commixtione perficitur. Unde inter sponsum et sponsam coniugium est, sed initiatum; inter copulatos est coniugium ratum. C.27 q.2 d.p.c. 34

¹⁸⁰ ex quibus capitulis Gratianus suam distinctionem et suas solutiones voluit habere et qualiter illa capitula alio modo intelligantur et qualiter tam distinctio quam opinio Gratiani veritati contraria reprobetur *Summa*, C. 27 q.2 fol. 340 v

¹⁸¹ His ergo rejectis et reprobatis dicimus [dicemus] quod desponsatio alia est de praesenti alia de futuro. Illa dicitur esse de praesenti que fit per verba praesentis temporis apta matrimonio contrahendo vel per vel alia talibus verbis equivalentia, ut est vir et mulier praesentialiter consentient inter se maritali effectum quam expriment signis vel verbis consuetis dicendo [dicende] invicem ego accipio te in meam uxorem et ego accipio te in meum virum ut in Ex. (Exemplum) Licet, Praeter Illa vero est [esse] de futuro que fit per verba future temporis ut promitto tibi quod accipiam uxorem vel in maritum post vel post ... sui usum [annum] ad Quadragesimam vel est veniens ad pubertatem vel si intervenit; talia si placuerit patri tuo vel meo si tantum dederit mihi pater tuus. *Summa*, C. 27 q.2 fol. 340 v

¹⁸² Betrothal in the present tense takes place before contracting a marriage, while man and woman presently exchange appropriate words or signs saying mutually *ego accipio te in meam uxorem et ego accipio te in meum virum*.

¹⁸³ Betrothal for the future is the promise to take someone as a wife/husband before the Lent, after one year or after one comes to the marriageable age, if only the father agrees on that.

betrothal in the present tense *desponsatio de presenti* – the marriage had taken place, and it could not be dissolved, except in the case of death of one of the partners or if one of them was willing to devote himself/herself to religious life. The peculiarity of betrothal in the present tense for Huguccio is in the nature of this bond: “this union is called betrothal, but called improperly, as the nature of this betrothal is more of a marriage” (... *talis desponsatio improprie dicitur desponsatio. Natura talis desponsatio magis proprie dicitur coniugium...*)¹⁸⁴ moreover, the so-called, *sponsi* are not eligible to be called properly as *coniuges* without betrothal for the future. In other words, there can be no betrothal without intention and promise to marry in the future.¹⁸⁵ Taking into account that there was a betrothal in the present tense, there was actually a marriage between those two parties rather than betrothal. Betrothal, however, might have taken place in case if there was *desponsatio de futuro*.¹⁸⁶

Huguccio translates Augustinian concepts of *fides consensus* and *fides pactionis* defining them relatively as *desponsatio de praesenti* and *desponsatio de futuro*.¹⁸⁷ Interestingly enough, where Augustine refers to *fides consensus*, he uses *non licet* when he writes about taking another woman, which might be literally translated as *not permitted*. Moreover, after breaking that warning one must go back to the first woman and leave the second one. This way of interpretation might have given Huguccio a hint, that actually *fides consensus* is

¹⁸⁴ Si ergo inter aliquos interveniat desponsatio de praesenti statim est matrimonium inter eos perfectum et integrum nec potuit [potest] solvi nisi forte [morte] vel transit ad religionem et tales dicuntur sponsi de praesenti sed improprie sicut et talis desponsatio improprie dicitur desponsatio. Natura talis desponsatio magis proprie dicitur coniugium. *Summa*, C.27 q.2 fol. 340 v

¹⁸⁵ tales sponsi non agitur proprie coniuges sive desponsatio de futuro interveniat inter aliquos, non ob hoc est inter eos coniugium et isti proprie dicuntur sponsi quasi promissi et hoc proprie dicitur desponsatio sine sponsalia que sunt intentio et repromissio futurarum nuptiarum *Summa*, C. 27 q.2 fol. 340 v

¹⁸⁶ Ergo inter sponsum et sponsam de praesenti est coniugium: quo casu intelliguntur illa capitula que dicunt coniugium esse inter sponsum et sponsam. De futuro non est coniugium *Summa*, C. 27 q.2 fol. 340 v

¹⁸⁷ et nota quod desponsatio de praesenti vocatur ab Augustino fides consensus, desponsatio de futuro fides rationis pactionis ut i.C. *Duobus modis...* *Summa*, C. 27 q.2 fol. 340 v

Augustinus de fide pactionis, et consensus. Duobus modis dicitur fides, pactionis et consensus. Si aliquis alicui mulieri fidem fecerit pactionis, non debet aliam ducere. Si aliam duxerit, penitentiam debet agere de fide mentita: maneat tamen cum illa, quam duxit. Non enim rescindi debet tantum sacramentum. Si autem fecerit fidem consensus, non licet aliam ducere. Si autem duxerit, dimittet eam, et adhaerebit priori. "Est autem fides pactionis, quando aliquis promittit fidem alicui, quod eam ducet, si permiserit ei rem secum habere, uel etiam pro consensu. Fides autem consensus est, quando, etiamsi non stringit manum, corde tamen et ore consentit ducere, et mutuo se concedunt unus alii, et mutuo se suscipiunt."]C. 27 q.2 c.51

correlated with *desponsatio de praesenti*, which he earlier described as “more of a nature of marriage.”¹⁸⁸ It appears worthy to underline the sentence of St. Augustine, which mainly states that *fides consensus*, however, does not restrain the hand.¹⁸⁹ Nevertheless, it restrains the heart and the mouth, and this kind of agreement consents to take one another as a spouse. This excerpt appears to be quite of a great significance here, as it still determines betrothal in the present tense as a mere betrothal, but not as a marriage. Huguccio seems not to pay attention to the above mentioned sentence of St. Augustine. For Huguccio, betrothal in the present tense is not equal to marriage, but is still more of a nature of marriage. *Fides pactionis* for Huguccio is nothing else, but *desponsatio de futuro*. Augustine in his text does not forbid to take another woman literally, saying *non debet* (*shouldn't*) and allows to stay with this second woman after undertaking the penitence for breaking the promise.

Huguccio defines betrothal through subarration,¹⁹⁰ which is to be performed through a ring. Huguccio appears to represent consensual theory of marriage, defending the point that consent and not consummation form the marriage itself. For him, marriage is something generated by the bond of will (the bond of minds),¹⁹¹ not by the bodily union. According to Huguccio, in contrast to Gratian, copulation neither is a marriage, nor does it make a marriage. Unions among adulterers as well as among fornicators are not marriages, since

¹⁸⁸ Si ergo inter aliquos interveniat desponsatio de praesenti statim est matrimonium inter eos perfectum et integrum nec potuit [potest] solvi nisi forte [morte] vel transit ad religionem et tales dicuntur sponsi de praesenti sed improprie sicut et talis desponsatio improprie dicitur desponsatio. Natura talis desponsatio magis proprie dicitur coniugium ... *Summa*, C. 27 q.2 fol. 340 v

¹⁸⁹ This might signify the wedding ring.

¹⁹⁰ ... ipsa subar[r]atio que fit per annuli inmissionem..., iste desponsat eam id est matrimonialiter copulat eam sibi vel desponsat eam id est suarrat quod autem differentiam sit inter desponsationem et sub subarrationem colligitur. *Summa*, C. 27 q.2 fol. 340 v

¹⁹¹ matrimonium est coniunctio voluntorum [animorum] non corporum. *Summa*, C.27 q.2 fol. 340 v

According to the MSS. Admont 7, it is *coniunctio voluntorum*, whereas following the transcript of the MSS. 3891 Bibliotheque Nationale of (Roman 1903) *coniunctio animorum*. The bond of will seems hardly to be equal to the bond of mind. Still as MSS. of Admont 7 is the source for this chapter, therefore, it appears appropriate to follow the text of the MSS. of Admont,; to see this bond rather as a union of will, than as a union of minds.

they are illegal.¹⁹² Huguccio acknowledges marriage through common life of spouses, which can be dissolved either by ecclesiastical decision or by mutual consent in order to practice complete abstinence.¹⁹³ Marriage for Huguccio is not one connection, but rather two connections, namely of the husband to his wife, and also link of the wife to her husband; shortly, marriage consists of two links.¹⁹⁴ Huguccio seems to support the principle offered in the canon of John the Chrisostom that as the marriage has been contracted through the will, it can be dissolved only through the will, since as the bodies are separated, the wills of two parties are not to be separated. Therefore, if one consented to be married to another person, he is already married.¹⁹⁵ The unity of the will (mind?), therefore, is in motion on the one hand; on the other hand, though, it preserves its character during the lifetime.

As Gratian shows marriage by dividing it into initiated and consummated marriage, through betrothal marriage is initiated and then perfected with marital consummation.¹⁹⁶

¹⁹² Coniunctio enim corporum nec est non esset matrimonium talis coniunctio. *Summa*, C. 27 q.2 fol. 340 v matrimonium nec facit matrimonium. ... Et quia hoc totum potest esse in coniunctione illegitima id est scilicet leges canonicas vel inter personis legitimas contracta ut sic excludatur coniunctio monachi in monacha vel alia femina vel adulter cum adultera vel fornicarius cum fornicaria et quia hoc totum posset esse inter personas legitimas et tamen

¹⁹³ Quia posset coniugium ad aliud subdividitur retinens vel retinendam exigens consuetudinem vite id est conversationis maritalis praesertim quoad mutuam servitutem corporis sibi invicem exhibendam et quoad ca... que impediunt talem servitutem. Individuum id est inseparabilem vel inperpetuum vel quousque interveniat divortium in iudicio ecclesiae [vel iudicium Ecclesiae] vel propria voluntate: scilicet cum pari consensus vovent castitatem et a mutua servitute se absolvint, ut XXXIII q. V *Quod Deo* [C.33 q.5 c.4]. *Summa*, C. 27 q.2 fol. 340 v Quod Deo pari consensu uoueratis perseueranter usque in finem reddere debuistis. A quo proposito si ille lapsus est, tu saltem instantissime perseuera. Quod non te exhortaret, nisi quia tibi ad hoc ipse consensit. Nam si numquam tenuisses eius assensum, numerus te nullus defendisset annorum. C.33 q.5 c. 4

¹⁹⁴ Et ideo, quia voluntas facit matrimonium, et est argumentum aliquid per ea dissolvitur per que contrahitur, ut in Causa (i.C.) *Omnis res*. Iohannes Chrisostomus, id est auctor operis imperfecti, homilia XXXII. in Matheum. Omnis res, per quascumque causas nascitur, per easdem dissolvitur. Matrimonium enim non facit coitus, sed uoluntas, et ideo non soluit illud separatio corporis, sed separatio uoluntatis. Ideo qui dimittit coniugem suam, et aliam non accipit, adhuc maritus est. Nam etsi corpore iam separatus est, tamen adhuc uoluntate coniunctus est. Cum ergo aliam acceperit, tunc plane dimittit. Non ergo qui dimittit mechat, sed qui alteram ducit.] C.27 q.2 c.4

¹⁹⁵ Dico, ergo, quod matrimonium non est aliquid sed alique; non est unum sed duo, scilicet vincula duorum unum est in viro et eo coniugitur et colligatur uxori; alterum est in uxore, et eo coniugitur viro.... matrimonium est coniunctio id est due coniunctiones, id est, duo coniugentia, scilicet duo vincula quorum uno iste colligatur illi, altero illa isti, et sic matrimonium est in pluribus et non in uno. *Summa*, C. 27 q.2 fol. 341 r

¹⁹⁶ Hinc Gratianus suam distinctionem sumpsit de coniugio initiato et secundum eum sic exponitur: *Initiatur*, id est, incipitur, quia primo incipitur per consensus deinde per carnis conmixtionem consummatur et ita secundum Gratianum per interstitia temporis habet suum esse. *Summa*, C. 27 q.2 fol. 341 r

Huguccio objects to Gratianian's point of view by stating that marriage is perfected by God in the Paradise, where there is no carnal union. Therefore, it appears that marriage is perfected even before consummation. It seems also that this initiated marriage is part of the entire marriage; accordingly, as it is not the whole marriage, it is not marriage at all.¹⁹⁷ For Huguccio, marriage is full in its integrity and also consummated, but not by its significance, rather by its essence. While for Gratian initiated marriage (contracted through betrothal)¹⁹⁸ is made by significance, in other words, this marriage that takes place before carnal union as the "beginning", for Huguccio "initiated" stands for an endeavor to begin in its essence.¹⁹⁹ Therefore, betrothal for Huguccio is perceived as marriage in its nature and essence, which takes place in Paradise – the key point of its integrity.

Cum initiatur coniugium, coniugii nomen asciscitur. Non defloratio uirginitatis facit coniugium, sed pactio coniugalitatis. Denique cum iungitur uiro, coniugium est, non cum uiri admixtione cognoscitur. C.27 q.2 c.5

Cum initiatur coniugium, coniugii nomen asciscitur, non cum puella uiri admixtione cognoscitur. C.27 q.2 c.35
Ecce, quod in desponsatione coniugium initiatur, non perficitur. C.27 q.2 d.p.c.35

¹⁹⁷ Item legitur quod matrimonium Deo auctore in Paradiso est (de) consummatum; sed ibi nulla carnis conmixtio fuit. Unde patet quod coniugium ante carnalem conmixtionem est perfectum et consummatum. Item pars coniugii est et non totum coniugium, et illa pars non est coniugium. *Summa*, C. 27 q.2 fol. 341 r

¹⁹⁸ ... quod in desponsatione coniugium initiatur... C.27 q.2 d.p.c.35

¹⁹⁹ [Hoc] determinabitur secundum modum istud potest intelligi: *incipiatur*, id est, incipitur non quo ad essentiam sui, sed quo ad significationem ei (eius?), quam non habet omnimodam ante conmixtionem, sed ego simpliciter dico: *cum incipitur*, id est, inonatur, incipit esse, primo enim contrahitur, id est, cum primo incipit habere et habet essentiam. *Summa*, C. 27 q.2 fol. 341 r

2.4.2 *Desponsatio de praesenti and de futuro*

Huguccio distinguishes between two kinds of bride: the one in the present tense and the one in the future tense. If the bride is betrothed to the first groom in the present tense, it does not matter whether she is betrothed to the second groom in the present or for the future, whether she is blessed and veiled, whether she is carnally known by the second groom and has children and whether she lives with him for a long period or only for a while; in any case she should abandon the second groom and return to the first one, unless he chooses a religious life.²⁰⁰ Betrothal in the present is for Huguccio nothing else but a marriage itself. In case the betrothal with the first groom is for the future, and with the second groom in the present tense, she is to be penalized for breaking the faith and should stay with the second one, as by contracting betrothal in the present she has contracted marriage, which cannot be said about the relationship with the first groom.²⁰¹ In this discussion Huguccio once again refers to the *palea Duobus*.²⁰² Huguccio specifies his understanding of betrothal for the future: if with the first groom betrothal for the future was not followed by present tense consent or carnal union and then she contracted with another groom without any of those mentioned consequences, she is obliged to return to her first groom. The “rule” is applied --

²⁰⁰ Hac ergo opinione cancellata, dico referre utrum sponsa sit de presenti vel de futuro. Si est de presenti sive sit desponsata a secundo de presenti sive de futuro, et sive sit a secundo inducta sive non, et sive benedicta et velata cum eo sive non, et sive sit cognita ab eo, sive non, et sive ex eo habuerit filios, sive non, et sive longo sive modico tempore staterit cum eo, detrahenda ei, id est, secundo et reddenda est primo, nisi forte primus transiverit sive ad religionem. Hoc dicunt aperte Omnia capitula consequential et Augustinus in sequenti *palea Duobus*. *Summa*, C. 27 q.2 fol. 347 r

²⁰¹ Si vero est sponsa de futuro et a secundo desponsetur de presenti, agat penitentiam de fide mentita, et remaneat cum secundo quia cum illo est matrimonium et non cum primo ... *Summa*, C. 27 q.2 fol. 347 r

²⁰² Duobus modis dicitur fides, pactionis et consensus. Si aliquis alicui mulieri fidem fecerit pactionis, non debet aliam ducere. Si aliam duxerit, penitentiam debet agere de fide mentita: maneat tamen cum illa, quam duxit. Non enim rescindi debet tantum sacramentum. Si autem fecerit fidem consensus, non licet aliam ducere. Si autem duxerit, dimittet eam, et adherebit priori. "Est autem fides pactionis, quando aliquis promittit fidem alicui, quod eam ducet, si permiserit ei rem secum habere, uel etiam pro consensu. Fides autem consensus est, quando, etiamsi non stringit manum, corde tamen et ore consentit ducere, et mutuo se concedunt unus alii, et mutuo se suscipiunt."] C.27 q.2 c.51

“a person that is prior in time has a priority in right” *prior est tempore potior est iure*; in other words, priority in time is equal to the preference in law, given the equal equities.²⁰³

Interestingly enough, Huguccio refers to *Duobus modis*²⁰⁴ many times. This text appears to be quite significant to him. The fact that he abundantly commented on this *palea* signifies that he commented on *Decretum* after this *palea* had been inserted into the main body of the text. According to P. Antoine, Stephen of Tournai, as well as Rufin, would have commented on that excerpt too, if they had been familiar with it or if they had found it in the entire *Decretum*.²⁰⁵ Huguccio uses this excerpt abundantly indeed. He acknowledged the uncertainty of it, as he doubted if these words really belonged to St. Augustine,²⁰⁶ but this excerpt was appreciated as it led to the truth.²⁰⁷ Huguccio acknowledged that the text he was about to comment was the *palea*; notwithstanding, this excerpt has priority even over the main text.²⁰⁸

Ultimately, Huguccio distinguishes between *desponsatio de presenti et de futuro* shifting attention from Gratian’s distinction of *conjugium initiatum et perfectum*. The commentator considers betrothal in the present tense to be “more of a nature of marriage,” whereas betrothal for the future appears to be a mere promise to keep faithfulness. Huguccio perceives the bond of the Holy Family as a marriage in its essence and nature, but not in its significance, as Gratian does. He claims betrothal to be a marriage in its essence and

²⁰³ This principle *prior est tempore potior est iure* is applicable only if cases are equal (*in paribus casis* [*casibus*]).

²⁰⁴ Augustinus de fide pactionis, et consensus. Duobus modis dicitur fides, pactionis et consensus. Si aliquis alicui mulieri fidem fecerit pactionis, non debet aliam ducere. Si aliam duxerit, penitentiam debet agere de fide mentita: maneat tamen cum illa, quam duxit. Non enim rescindi debet tantum sacramentum. Si autem fecerit fidem consensus, non licet aliam ducere. Si autem duxerit, dimittet eam, et adherebit priori. "Est autem fides pactionis, quando aliquis promittit fidem alicui, quod eam ducet, si permiserit ei rem secum habere, uel etiam pro consensu. Fides autem consensus est, quando, etiamsi non stringit manum, corde tamen et ore consentit ducere, et mutuo se concedunt unus alii, et mutuo se suscipiunt."] C.27 q.2 c.51

²⁰⁵ (Antoine 1992, 240)

²⁰⁶ Sed dubitabant quidam an ista verba sint Augustini inveniuntur *Summa*, C. 27 q.2 fol. 347 v

²⁰⁷ sed a quocumque veritas proferatur amplexanda est *Summa*, C. 27 q.2 fol. 347 v

²⁰⁸ *Duobus*, palea est, sed utilior quam granum. *Summa*, C. 27 q.2 fol. 347 v

integrity, as it is a unity of will and mind of the parties. It should be also remarked that Huguccio is not always clear in his distinction between two kinds of betrothal. Sometimes betrothal has a transitive meaning as it is defined through marital perspective.

Betrothed couple represents the unity of will and mind, not of their bodies (the latter is according to Master Gratian) and is to be united in Paradise. Given that in Paradise there is no carnal union, the unity of will and mind is to be considered perfected and integral. The bride, however, is deemed to be the bride until she gets transferred to her groom's house. The wedding present *dos* is seen not to be a necessity, as betrothal and subarration are discussed as two distinct concepts by Huguccio. The parental voice in betrothal negotiations is quite loud, to the extent that parental admission is advised.

2.4.3 Should a bride be seen as a wife?

The case dedicated to Christ's parents is the one, which to a great extent supports the persuasion of Huguccio, namely that the bride is to be deemed as the wife. It also supports Huguccio's view that betrothal is already a marriage in its essence, though not in its significance.

Even though Mary and Joseph are parents of Christ, they are such in mind, not corporally. Joseph is meant to be Christ's father according to care and love that Joseph is granting to his Christ-son.²⁰⁹ The unity of Mary and Joseph in mind is following Huguccio's model of mental and will unity.²¹⁰

²⁰⁹ Sed hoc capitulum aperte eos confutat. *Ambo*. Scilicet, Maria et Joseph. *Vocati* [vocari] *parentes* Christi: Joseph dilectionem et provisionem et etiam putatione unde [et] putativus pater Christi dictus est; uterque vocatus est Joseph, scilicet pater Christi et coniux Mariae. *Vite*, id est, dilectione et providentie et cura in

Therefore, it appears reasonable to assert that for Huguccio the union of will and union of minds are very close to each other in their meaning, if not equal.

vincula tamen coniugii erat coniux Marie. *Non carne*, id est, carnali conmixtione vel generatione [cognitione].
Summa, C. 27 q.2 fol. 341 r

²¹⁰ matrimonium est coniunctio voluntorum [animorum] non corporum. *Summa*, C. 27 q.2 fol. 340 v

2.4.4 Betrothal and subarration

Huguccio comments on the canon about betrothal and subarration²¹¹ by defining both concepts, where the first stands for mutual consent between two parties, and the second is contracted through the bestowal on the part of a groom on marriage gifts and a ring upon the bride. According to consent, Huguccio affirms, whether or not it took place, the subarration seems sufficient; notwithstanding, Huguccio remarks that he does not aim to assert that the marriage can be contracted without consent, but it is rather presumed that mutual consent was there, if only the contrary has not been proved.²¹² Huguccio tends to speak about betrothal and subarration separately while asking when it seems sufficient if betrothal is contracted without subarration and vice versa. He, therefore, separates these two concepts saying that subarration and betrothal are two different concepts that have been defined at the beginning of comment to current canon.²¹³ Thus, Huguccio declines Gratian's opinion that betrothal and subarration are equal, as Master Gratian puts them together as an alternative to one another (*Si quis desponsauerit uxorem uel subarrauerit*).

²¹¹ Si quis desponsauerit uxorem uel subarrauerit, et siue preueniente die mortis, siue irruentibus quibusdam aliis causis minime eam cognouerit, neque superstes eius frater, neque ullus de consanguinitate eius eandem sibi tollat in uxorem ullo umquam tempore. C.27 q.2 c.15

²¹² Sive subarratione, quod fit consensu utriusque interveniente, *vel subarraveris*, quod fit per immisionem annuli, vel per dationem aliarum arriarum vel aliarum arrarum vel aliarum insignium. Que subarratio, quando fit interveniente consensus, quando non interveniente. Sed sive consensus interveniat, sive non, sufficit qui constet de subarratione, non dico quod fit ibi matrimonium sine consensu, sed presumitur quod consensus intervenerit et matrimonium, nisi probetur in contrarium. *Summa*, C. 27 q.2 fol. 341 r

²¹³ Dico ergo que hic dicuntur disiunctive legenda sunt, quia utrum sufficit pro matrimoniu nisi aliud appareat. *Vel disponsaverit*, non interveniente subarratione. *Vel subarraverit* interveniente consensu sive desponsatione; et hinc patet quod sepe aliud desponsatio et aliud est subarratio, ut in principio huius questionis diximus. *Summa*, C. 27 q.2 fol. 341 r

2.4.5 Mistakes in consenting to betrothal

According to Gratian, *error fortune et error qualitatis* do not impede or solve marriage, whereas *error persone et error condicionis* do.²¹⁴ Huguccio also gives a reason why actually *error fortune et error qualitatis* do not impede the marriage: neither the first nor the second one changes the person in itself.²¹⁵ In relation to mistaken identity, Huguccio distinguishes between *error proprii nominis* and *error relationis (filiationis)* that, unlike *error persone*, do not impede or dissolve marriage.

As Huguccio remarks, it seems that Gratian did not distinguish the kinds of mistakes discussed by Huguccio. Nevertheless, they do not impede the eligibility consent, except of *error persone et error condicionis*.²¹⁶ Huguccio, in opposite to Gratian, believes that *error condicionis* does not impede the marriage more than *error fortune vel qualitatis*.²¹⁷

Huguccio minimizes the list of mistakes that might hinder the eligibility of consent and legality of betrothal. According to the commentator, there is only *error persone* that might impede contracting the marriage.

²¹⁴ Error fortunae et qualitatis coniugii consensum non excludit. Error uero personae et condicionis coniugii consensum non admittit. C.29 q.1

²¹⁵ Respondeo fortuna enim vel qualitas personam ... non mutat. *Summa*, C. 29 q.1 fol. 353 v

²¹⁶ Licet magister non distinguat, sed nullus impedit matrimonium nisi error persone et error conditionis. *Summa*, C. 29 q. 1 fol. 353 v

²¹⁷ Credo quod talis error non impediret matrimonium plusquam error fortune vel qualitatis nec impedit... . *Summa*, C. 29 q. 1 fol. 354 r

2.4.6 Concealed betrothal

Huguccio defines betrothal through *federa sponsalia* (*federa nuptialia* in *Decretum*), which for him is *sponsalia de futuro*. *Federa quoque consensus eorum* is for Huguccio either *sponsalia de futuro* or *de presenti*. Huguccio interprets the ring (*annulo fidei*) as a symbol of mutual love and conjugal faithfulness.²¹⁸ He also argues that the wedding can take place without the wedding gift, but giving the gift without solemnities can not take place. Huguccio specifies²¹⁹ that prohibition to celebrate betrothal without solemnities is more of a preventive character – to impede adulterers and fornicators from the marriage.²²⁰ Therefore, it seems that Huguccio sees the solemnities linked to betrothal and marriage as mere prevention of sinful bonds, rather than a requirement.

²¹⁸ Sed post sponsalia federa deferunt que federa sponsalia sunt ... hec est definitio sponsalium. Unde patet quod sponsalia proprie dicuntur ut promitto tibi quod accipiam te in uxorem, sed in proprie de presenti, quia tunc non sunt promissio futurarum nuptiarum, sed tunc ipse nuptie contrahuntur. Hic ergo debent intelligi sponsalia de futuro quidem patet ex eo quod dicitur futurarum et cet. Federa ... id est sponsalia sive de futuro sive de presenti, annulo fidei id est qui significat mutuum amorem et fidem coniugalem esse servandam inter eos *Summa*, C. 30 q. 5 fol. 361 r

²¹⁹ Aliter legitimum non fit coniugium, nisi ab his, qui super ipsam feminam dominationem habere videntur, et a quibus custoditur uxor petatur, et a parentibus propinquioribus sponsetur, et legibus dotetur, et suo tempore sacerdotaliter, ut mos est, cum precibus et oblationibus a sacerdote benedicatur, et a paranymphis, ut consuetudo docet, custodita et sociata, a proximis congruo tempore petita legibus dotetur, ac solemniter accipiat, et biduo uel triduo orationibus uacent, et castitatem custodiant. Item: §. 1. Ita peracta legitima scitote esse conubia; aliter uero presumpta non coniugia, sed adulteria, uel contubernia, uel stupra, aut fornicationes potius, quam legitima coniugia esse non dubitate, nisi uoluntas propria suffragauerit, et uota succurrerint legitima. C.30 q.5 c.1

²²⁰ Quidam dicunt quod omissio dotis et donationis et benedictionis si qualiscumque ... adest peccatum est. Ego autem dico quod hoc in omnia alia sollempnia que adhibentur in matrimonio possunt omitti sine peccato, quia omnia de consilia suadentur et nullum illorum precipitur; nec illa adhibentur nisi ad decorem et sollempnitatem et licet dos non possint ob hoc minus est matrimonium, quia matrimonium solo consensu precipitur, nec illa adhibentur nisi ad decorem et sollempnitatem et licet dos non possit esse sine matrimonio, matrimonium tamen potest esse sine dote, ut *si quis divinis*. Sed obuiat illud capitulum III, q. IV consanguineorum ubi dicitur quidem si aliquis contrahit matrimonium sine dotali titulo et benedictione sacerdotis repellitur a testimonio et accusatione sacerdotum, et dicunt quidam esse derogatum illi capituli per hoc capitulum. Sed dico quod illud capitulum intelligitur in eodem casu in quo et illud capitulum s.c. *Aliter*, scilicet de occulte contrahentibus inter quos presumitur esse adulterium sive fornicatio, etiam ideo tales repelluntur propter presumptionem criminis, non quia hoc vel illud dimittant. *Summa*, C. 30 q. 5 fol. 361 r

While commenting²²¹ Huguccio reveals his understanding of marriage ceremony. The author interprets a veiled bride as the one who is not only veiled, but also blessed.²²² The phrase *uno vincula copulantur* stands for common life which is a link. Huguccio admits, however, that the exact ceremony of marriage is not familiar to him. As Ysidor writes, the wedding ring is to be put on the ring finger (*quartus a pollice digitus; quartus digitus*), since this finger is deemed to contain a cordial vein. As this vein leads to the heart, marriage is the connection of hearts.²²³ Huguccio objects, stating that every single finger contains the vein; therefore, it does not matter indeed on which finger the wedding ring will be worn.²²⁴ The commentator does not seem to be well familiar with tradition; he is focused more on destroying prevailing perceptions and creating new ones. Huguccio acknowledges²²⁵ that betrothal can be contracted between absent persons through a messenger or a brief.²²⁶ Huguccio compares betrothal to a buy/sell contract. Both of them, according to him, are possible to contract between absent persons, as both categories are to be contracted with

²²¹ Feminae, dum maritantur, ideo uelantur, ut nouerint, se semper uiris suis subditas esse et humiles. §. 1. Item, quod nubentes post benedictionem uitta inuicem, uno uinculo copulantur, uidelicet fit ideo, ne conpagem coniugalis unitatis dirumpant. §. 2. At uero, quod eadem uitta candido purpureoque colore permiscetur, candor quippe est mundicia uitae, purpura ad sanguinis posteritatem adhibetur, ut hoc signo et continentia et lex continendi ab utrisque ad tempus admoneatur, et posthec reddendum debitum non negetur. §. 3. Item, quod in primis annulus a sponso sponsae datur fit nimirum uel propter mutuae dilectionis signum, uel propter id magis, ut eodem pignore corda eorum iungantur. Unde et quarto digito annulus inseritur, ideo quod in eo uena quedam, ut fertur, sanguinis ad cor usque perueniat. C.30 q.5 c.7

²²² Velantur. Velo quodandum benedicuntur... . *Summa*, C. 30 q. 5 fol. 361 v

²²³ Unde et quarto digito annulus inseritur, ideo quod in eo uena quedam, ut fertur, sanguinis ad cor usque perueniat. C. 30 q.5 c.7

²²⁴ Sed ideo quod uena et cet. ponitur ergo et inferitur tali digito, scilicet quarto a pollice ad significandum quod ideo iungunt ut prolem relinquant et dicunt quedam phisici quod eandem rationem potuit reddere de quolibet digito, quia in quolibet est uena que procedit a corde. *Summa*, C. 30 q. 5 fol. 361 v

²²⁵ Ambrosius in libro de Patriarchis. III. Pars. Nec illud otiosum, quod cum Rebecca ueniret, uidit Ysaac deambulantem, et cum interrogasset quis esset, cognito, quod ipse esset, cui duceretur uxor, descendit et caput suum obnubere cepit, docens uerecundiam nuptiis preire debere. Inde enim et nuptiae dictae, quod pudoris gratia se puellae obnuberent. IV. Pars. Gratian. Sed obicitur premissis: Multa sunt, que prohibentur, que, si fiant, ex postfacto conualescunt. Prohibentur uouentes matrimonia contrahere, que tamen si contraxerint, inuiolata permanere oportet. Sic et clandestina coniugia contra leges quidem fiunt, tamen contracta dissolui non possunt, quia ex legitimo uoto subsequente corroborantur. Unde et Euaristus, cum dixisset: "aliter coniugia presumpta non sunt, sed adulteria;" addidit: "nisi uoluntas propria suffragauerit, et uota succurrerint legitima." C.30 q.5 c.8

²²⁶ The story of Rebecca [Genesis 24: 63-67] is employed as a biblical example.

the consent which can be transferred by a courier or by a brief.²²⁷ If after this kind of betrothal two persons were carnally united, their bond is to be considered a marriage.²²⁸

In sum, solemn betrothal is not required according to the *Summa decretorum*. It appears to be rather a ceremony of a preventive character in order to impede the upcoming marriage between adulterers or fornicators as upcoming marriage through a solemn celebration in the face of community and church might be revealed and hindered. Huguccio does not go into much details speaking about the ceremony; for instance, he makes no distinction on what finger the wedding ring should be worn. The author points out, however, that giving a gift during the wedding ceremony is not necessary, but giving a wedding gift without a ceremony is not possible. Moreover, betrothal can be contracted between absent parties through a messenger or a courier. Huguccio treats betrothal as a contract indeed; hence it requires consent of contracting parties, whereas their presence is not of a prime importance. Interestingly enough, the commentator adds one more distinction that helps to distinguish between betrothal in the present and betrothal for the future, as he asserts that only consent makes the marriage (in the *Summa* the betrothal in the present tense is deemed to be of a nature of marriage), and vows are applicable for betrothal for the future, since they are a mere promise for future contracts.

²²⁷ Dico ergo quod omnia que solo consensu contrahuntur inter absentes contrahi possunt et sic matrimonium, quia et ipsum solo consensu perficitur. Item dico quod ab absentes bene consentiunt inter se dummodo se noverint, collocuntur inter se, nutus faciunt inter se et hoc per nuntium vel per litteras. *Summa*, C. 30 q. 5 fol.

361 v

²²⁸ scilicet quod et corde consentit quod hoc totum facit absens per nuntium vel epistolam, sed ecce iste consentit in absentem et mittit nuntium suum ad illam postea illa consentit et tunc forte iste dormit, contrahitur matrimonium inter istos? Dico quod sic et ille consensus istius qui precessit et de futuro esse quod actus fuit et ille consensus femine qui nunc est faciunt matrimonium. *Summa*, C. 30 q. 5 fol. 361 v

2.4.7 Parental role in contracting betrothals

Parental marital agreement, according to Huguccio, is needed for contracting *sponsalia de futuro*. Therefore, if the bride willingly contracted betrothal, but later on was slightly forced and consented to marriage, it is considered to be a marriage. This is also true if the bride had consented to marriage and then was compelled to carnal union.²²⁹ The commentator discusses the case when the consent of children was absent or they simply objected to betrothal contracted by their parents; additionally, it matters if it took place while children were at under-marriageable age or already after seven years old. If after coming of age they do not consent to the party their parents betrothed them, this marriage is not to be considered valid.²³⁰

Betrothal, according to Huguccio, is arranged by parents themselves and also by children who are following the arrangements of their parents.²³¹ Huguccio asserts that those who have contracted *sponsalia de futuro* and are willing to cede the arrangement can do so; additionally, that those betrothed vowed not a simple faithfulness, but a mere promise to observe faithfulness, as it is better to break the promise than the vow.²³²

²²⁹ *Quod autem* at. II q. an aliquam sit cogenda alii nubere, id est copulari in matrimonium et price se dicendo quod nisi forte fecerit sibi pre iudicium per sponsalia de futuro. Si enim ea sponte contraxerit admonenda est postea et aliquantulum cogenda ut consentiat in matrimonium, non enim facit iniuriam aut iure suo utitur; nec esse inusta tale coactio cum processerit premissis. Item si sponte consenserit in matrimonium, cogenda est postea in carnalem commixtionem. Et hoc ad similitudinem illius quid dicitur quod nullus invitus est compellendus ad episcopatum, sed si sponte susceperit cogendus est administrationem *Summa*, C. 31 q. 2 fol. 365 r

²³⁰ Si vero sponsalia sint contracta a parentibus sine consensu filiorum sive filiis contradicentibus sive non sive ante septennium sive postea sive in adulta etate sive ante nisi filii postea consentiant nec valent nec tenent... . *Summa*, C. 31 q. 3 fol. 366 r-v

²³¹ Ego autem intelligo hoc capitulum in eo casu sum sponsalia filiorum sunt contracta a parentibus consensu filiorum iuramento interposito ab ipsis parentibus et forte a filiis *siqui parentes* pro nuptiis filiorum iuramentum prestantes. *Summa*, C. 31 q. 3 fol. 366 v

²³² Ubi ergo sunt qui dicunt quod illi qui contrahunt sponsalia de futuro et postea volunt se absoluere possunt sine peccato discedere; ipsi tamen dicunt ad hoc quod isti iuraverunt, sed nonne simplicem fidem, vel promissionem debet quis observare ut iuramentum. Utique ar. XXII, q.I *Hominis* et q.V *Iuramenti*. [C.22 q.5

If parents arranged the engagement while their children were still in the cradle, their arrangement should be confirmed by their offsprings as they come to the age of their own will. Huguccio takes into account the decision of Pope Alexander III²³³ stating that if before the adolescence the groom had carnally known the bride, and, afterwards, after arriving to the age of twelve she is willing to abstain from marriage, she is not allowed to do so, since after the betrothal for the future the act of carnal union contains consent in the present tense, which is already considered to be a marriage. Therefore, the parties can not be separated.²³⁴ Huguccio distinguishes two instances in this very case (*De illis*): the first is when two parties are both united in one body *si effecti sunt una caro*; the second case is when two parties are not at the age of adulthood, in other words, are not able to procreate.²³⁵ In the first case the marriage is considered to be contracted between them, whereas in the second case they have not contracted marriage, and one can leave another.²³⁶

Huguccio states that he does not believe that even though marriage is contracted with children's consent, and afterwards they object as well as parents do, marriage is considered

c.12] Item qualiter potius possunt absolvere a simplici promissione quam a iuramento... . *Summa*, C. 31 q. 3 fol. 366 v

Iuramenti huius causa est, quia omnis, qui iurat, ad hoc iurat, ut quod uerum est loquatur. Et ideo Dominus inter iuramentum et loquelam nostram nullam uult esse distantiam, quia, sicut in iuramento nullam conuenit esse perfidiam, ita quoque in uerbis nostris nullum debet esse mendacium, quia utrumque, et periurium et mendacium, diuini iudicii pena dampnatur, dicente scriptura: "Os, quod mentitur, occidit animam." Quisquis ergo uerum loquitur, iurat, quia scriptum est: "Testis fidelis non mentietur." C.22 q.5 c.12

²³³ Alexander III. Panormitano Archiepiscopo. *De illis* autem, qui prestito iuramentum promittunt se aliquas mulieres ducturos, et postea eis incognitis dimittunt terram, se ad partes alias transferentes, hoc tibi volumus innotescere quod liberum erit mulieribus ipsis si non est amplius in facto processum, ad alia se vota transferre, recepta tamen de perjurio poenitentia, si per eas steterit, quo minus fuerit matrimonium consummatum. X 4, 1,

²³⁴ Ecce aliquam ante pubertatem cognoscitur a sponso et postea in XII. anno uult separari ab eo poterit non obstante matrimonio. Alexander dicit quod non poterit, quia ex quo post deponsationem de futuro quis cognoscit sponsam suam. In ipso coitu presumitur intervenire consensus de presenti et ita presumitur intervenire matrimonium. Unde postea separari non possint ut in Ex. *De illis* [X 4, 1, 5]... . *Summa*, C. 31 q. 3 fol. 366 v

²³⁵ Gregorius Papa. *Manifestum* est eum puberem esse, qui gesticulatione sui corporis talis est, ut jam procreare possit licet ad metas legibus diffinitas non peruenierit. *Comp. I* 4, 2, 3

²³⁶ *De illis* credo tamen esse distinguendum, si effecti sunt una caro non possunt post ..., quia matrimonium est, vel presumitur esse inter eos. Et illa presumitur esse iuri potens, nam in quibusdam malitia supplet etatem. Et ante adultam etatem ad tale ... reperiuntur ydonei, ut in Ex. *Manifestum*. Si vero non sunt effecti una caro non fit ei pre iudicium ob hoc quin possit ab eo discedere sicut et si cognita non fuisset. *Summa*, C. 31 q. 3 fol. 366 v

to be void, unless children are adults. Huguccio accepts this principle for betrothal, though. He defends Ambrosius's point of view:²³⁷ not only minor, but also adult children are supposed to ask for parental consent and should trust the choice of husband to their parents. According to Huguccio, notwithstanding the fact that children had contracted betrothal without parental consent while being under the age of seven, Huguccio does not hold that parents can abolish the betrothal after children turn older than seven (*post tempus distinctionis*). The same is also true if children transferred themselves to the religious life while being older than seven.²³⁸

According to the *Summa decretorum*, betrothals are arranged by parents and only rarely by children themselves, who are required to follow parental arrangements. However, betrothal contracted by children may not be abolished by their parents. Huguccio also acknowledges that adulthood is not only connected to the exact age, but also to the time when parties are able to procreate.

²³⁷ Item Ambrosius in libro de Patriarchis. [id est lib. I. de Abraham, cap. ult.] "Honorantur parentes Rebeccae muneribus, consulitur puella non de sponsalibus (illa enim iudicium expectat parentum: non est enim uirginalis pudoris eligere maritum), sed iam desponsata uiro de profectionis consulitur die, nec inmerito dilationem non attulit. Iure etenim properare debuit ad maritum. Unde illud Euripideon, quod mirantur plerique, unde translatus sit manifestum est. Ait enim in persona mulieris, que tamen maritum uolebat relinquere, et ad alias petebatur nuptias: 'sponsaliorum meorum pater meus curam subibit. Hoc enim non est meum.' Ergo quod et ipsi philosophi mirati sunt seruare uirgines. Sed etiam, si qua mulier amisso cito marito adolescentula laqueum infirmitatis suae timet incidere, si uult nubere, nubat, tantum in Domino; ut electionem mariti parentibus deferat, ne appetentiae estimetur auctor si ipsa de nuptiis suis electionem sibi uendicet. Expetita magis debet uideri a uiro, quam ipsa uirum expetisse. Verecundiam premittat ante, quam nubat, quo ipsum coniugium plus commendat uerecundia." C.32 q.2 c.13

²³⁸ Sed queritur uter filii teneantur exigere in sponsalibus consensum parentum et quidem honestum est ut exigant et hec persuadetur et consulitur eis ab Ambrosio non solum minoribus, sed etiam maioribus ut paternum consensum exquirant et electionem mariti parentibus deferant, ut XXXII, q.II *Cum ergo* [C. 32 q.2 d.p.c. 10] sed non est necessitum, ar[gumentum] XXVII, q.II l. *Sufficiat* [C.27 q.2 c.2] unde quamvis sint infra adultram etatem et contraxerint sponsalia sine consensus parentum non tamen credo, quod parentes possint ea revocare dummodo sint contracta post septennium, scilicet post tempus distinctionis. Idem dico si monasterium intraverint sine consensus parentum post septennium. *Summa*, C. 31 q. 3 fol. 366 v

2.5 Conclusion

Huguccio differentiates between *desponsatio de presenti* and *de futuro* by shifting attention simultaneously from Gratian's distinction of *conjugium initiatum et perfectum*. The commentator considers betrothal in the present tense to be "more of a nature of marriage," whereas betrothal for the future appears to be a mere promise to keep faithfulness. Despite a clear distinction between betrothal in present and future tense, Huguccio does not always differentiate between betrothal and marriage. It is displayed in his way of characterizing betrothal for the present with marital rhetoric. One of the plausible reasons might be that he himself was not sure about a distinction line between betrothal and marriage in some cases he has been commenting on.

Huguccio perceives the bond of the Holy Family as a marriage in its essence and nature, but not in its significance, as Gratian does. He claims betrothal to be a marriage in its essence and wholeness, as it is the unity of mind and will. Moreover, a betrothed couple represents the unity of will and mind and not of their bodies (this latter according to Master Gratian) and is to be united in Paradise. The unity of will is to be considered perfect and integral. According to the *Summa*, there is only one mistake that might lead to the marriage impediment – *error persone*.

The solemn betrothal is not necessary according to the *Summa decretorum*, it appears to be rather a ceremony of a preventive character in order to impede the upcoming marriage between adulterers or fornicators, since through a solemn celebration in the face of community and church the sin of fornication and adultery might be revealed and thus hindered. Huguccio does not go into much details speaking about the ceremony; for instance, he makes no distinction on what finger a wedding ring should be worn. The author

points out, however, that giving a gift during the wedding ceremony is not necessary, but giving a wedding gift without a ceremony is not possible.

Additionally, betrothal can be contracted between absent parties through a messenger or a courier. Huguccio treats betrothal as a contract indeed; hence it requires consent of contracting parties while their presence is not of a considerable importance. The commentator adds one more distinction that helps to distinguish between betrothal in the present tense and betrothal for the future, as he asserts that only consent makes the marriage (in the *Summa* the betrothal in present tense is deemed to be of a nature of marriage), and vows are applicable for betrothal for the future, since they are a mere promise for future contracts. According to the *Summa decretorum*, betrothals are arranged by parents and only rarely by children themselves, who are required to follow parental arrangements. However, betrothal contracted by children may not be abolished by their parents. Huguccio also acknowledges that adulthood is fixed not only to a certain age, but also to the time when parties are able to procreate.

Chapter 3: Engagement in German customary law: *The Saxon Mirror*

3.1 Eike von Repgow and his *Sachsenspiegel*

The Saxon Mirror by Eike von Repgow is probably one of the most important sources for historical research in the field of law, apart from Roman and Canon law. On the one hand, it represents a written form of the customary law of the Central Europe, on the other hand, though; it shows the influence on the law of Prussia, Silesia, Poland, Ukraine, Hungary and Bohemia.²³⁹ It is said that *The Saxon Mirror* marks the beginning of German jurisprudence, because of its widespread influence and the amount of surviving manuscripts; not to mention that it is the first customary law collection in German speaking territories. In some territories, such as Prussia, for instance, it had still been valid until 1794, when the official Land law was established.²⁴⁰ Scholars agree on the name of the author: Eike von Repgow is assured to be the one who composed the first customary law written in vernacular language in the frame of prose.²⁴¹

Eike's date of birth could be supposedly determined about 1180; and his death after 1233. Presumably he belonged to the family of so-called *Schöffenbarfrei*,²⁴² the lowest level of nobility capable of performing judicial functions. According to Karl Kroeschell, these nobles kept the right to their allodial goods and lands, simultaneously being eligible to perform their functions as a judge (*Schöffe*) while becoming ministerials.²⁴³ Biographical tradition of Eike originated from six manuscripts,²⁴⁴ where name of *Eico de Repechowe* was mentioned

²³⁹ (Lück 1995, 37-49)

²⁴⁰ (Dobozy 1995, 1)

²⁴¹ (Homeyer 1856, 2-37); (Maritz 1867); (Brunner 1903); (Amira 1913); (Huebner 1918); (Eckhardt 1955); (Planitz 1971, 137-139); (Lieberwirth 1980); (Kroeschell 1991, 231-245); (Landau 2005: 73-101)

²⁴² (Zallinger 1887)

²⁴³ (Dobozy 1995, 2)

²⁴⁴ Urkunde a. 1209; 1215 Febr. 21; 1218; 1219 April 2; urk. a. 1224; urk. a. 1233. (Zallinger 1887, 203-204)

among the noble witnesses. According to those 6 manuscripts (1209-1233), he is represented as a witness in the cases in cities between Magdeburg and Halle.²⁴⁵ The fact of the vassal relationship of Eike to the Count Hoyer of Falkenstein, who is deemed to be an advocate of the ecclesiastical foundation in Quedlinburg,²⁴⁶ is not accepted by all scholars,²⁴⁷ even though the author remarks that *Sachsenspiegel* was written at the behest of Count Hoyer of Falkenstein, his lord.²⁴⁸ Being a layman Eike received quite a solid education in liberal arts, possibly near Magdeburg²⁴⁹ or in Halberstadt, in one of monastery schools²⁵⁰ or even in Halle.²⁵¹ It is also deemed that Eike was trained in law.²⁵² This latter assumption is not to be seen as a proved one, whereas the fact that he is at least to be characterized as *literatu* and that he was familiar with essentials of law is not to be underestimated.²⁵³

Eike von Repgow started writing his *The Saxon Mirror* at the behest of Count Hoyer, according to the preface, shortly after 1220. Apart from Count Hoyer von Falkenstein's command, there might be one more reason remarked in the rhymed preface: changibility of customary law inforced Eike to write it down in order to keep it for future generations.²⁵⁴ Eike's first version of *The Saxon Mirror* was written in Latin and thereafter translated into

²⁴⁵ Lieberwirth, R. [2012:1287]

²⁴⁶ Dobozy, M. [1995: 2]

²⁴⁷ Johanek, P. [1985: 723]; Landau, P. [2005: 79]

²⁴⁸ Nu dankit al gemeyne deme von Valkensteyne, der greve Hoyer ist genant daz an dudisch ist gewant diz buch durch sine bête. SSp. Vorrede in Reimpaaren. Eckhardt, K. [1955: 14] Those who agree that Eike was a vassal of Hoyer von Falkenstein: Eckhardt, K. A. [1966: 66]; Lieberwirth, R. [1980]. According to Peter Landau's remark the argumentation is based on the v. 269-271 of the prologue verse:

... so groz dar zu des herren gere, do ne hatte her nicheyne were,

des herren lieve in gare virwan... SSp. Vorrede in Reimpaaren. Eckhardt, K. [1955: 14]

Therefore, the author speaks of the *des herren gere*, *des herren lieve* and not of the lord of *him*. Landau, P. [2005: 75]

²⁴⁹ Eckhardt, K. [1966: 61]; Dobozy, M. [1995: 3]

²⁵⁰ Lieberwirth, R. [1980: 20]

²⁵¹ Johanek, P. [1985: 727]

²⁵² Kroeschell, K. [1991: 236]

²⁵³ Lieberwirth, R. [2012:1287]

²⁵⁴ dat min scta under der erde mit me nicht verwerde

Van Goddes halven diu gnade min Scal alle del werlde gemene sin (v. 155-158)

SSp. Vorrede in Reimpaaren. Eckhardt, K. [1955: 14]

the German language. According to Dobozy,²⁵⁵ Eike borrowed the idea of the *mirror* from the earlier famous twelfth century *Speculum ecclesiae* of Honorius Augustodunensis. The *mirror* symbolizes the perfect example, which has been designed in order to follow it. To put it differently, it defines the comparison of the reality of practice with an ideal concept. Eike's book offers a comprehensive framework for customary law to the extent that it provides the collection of regulations considering the variety of cases. It adduces a set of rules that developed over time, rather than discusses the cases and their solutions. Customary law, embodied even in a written form, is constantly in flux, according to Dobozy,²⁵⁶ and each of the manuscripts²⁵⁷ presents one of the points of this flux.

As to the place where German version of *The Saxon Mirror* was actually written, scholars' opinions differ drastically. According to Karl August Eckhardt, the German version of the *The Saxon Mirror* was written in the Abbey of Quedlinburg in the span of 1223-1226, while count Hoyer von Falkenstein was the *vogt* of the Quedlinburger Stift.²⁵⁸ Considering this assumption of Eckhardt, Peter Landau proves that it is mostly unlikely that the German version of *The Saxon Mirror* was actually written in Quedlinburg as by 1225 its library had not listed any juristical works.²⁵⁹ Contrary to that, Johanek, represents the view that Eike was a monk in the order of cistercians in Altzelle, but this is not the place where he might have written the *The Saxon Mirror*.²⁶⁰ Landau agrees on the point that Eike profited from the Cistercian library of Altzelle²⁶¹ and proposes his list of sources used by Eike von Repgow in

²⁵⁵ Dobozy, M. [1995: 8]

²⁵⁶ (Dobozy 1995, 13)

²⁵⁷ According to evaluation, there are about 450 manuscripts of *Saxon mirror* preserved. There are also illuminated manuscripts among them. The illuminated manuscripts of the *Saxon mirror* are dated as follows Oldenburger manuscript (1336), Heidelberger manuscript (1300), Dresdner manuscript (before 1375), Wolfenbütteler manuscript (after 1375). (Lieberwirth 1980, 25)

²⁵⁸ [Eckhardt 1966, 62-68]

²⁵⁹ As to the list of the manuscripts listed in the Quedlinburger Library collection, see (Fliege 1982) Peter Landau underlines that Library Collection, aside of the *Saxon mirror*, does not include juristic works. See (Landau 2005, 74)

²⁶⁰ (Landau 2005, 78)

²⁶¹ (Landau 2005, 81)

order to compose the *The Saxon Mirror*. Those are the Bible,²⁶² to which Eike might have had an access in the collection of the Altzelle library;²⁶³ *Historia Scholastica* of Petrus Comestor, which was also part of Altzelle collection; manuscript of *Chronicles of Widukind*, copy of its manuscript was composed in 1220 in Altzelle and might have been used by Eike in the library of Altzelle;²⁶⁴ Origen is the only Church Father cited in the *The Saxon Mirror*;²⁶⁵ *Decretum Gratiani*; *Compilatio I*;²⁶⁶ *Collectio Appendix Lateranensis*;²⁶⁷ Roman law.²⁶⁸

Rolf Lieberwirth, however, tends to assert that Quedlinburg or even Reppichau (Repgow) could be the places where the *The Saxon Mirror* was written, whereas Peter Landau defends

²⁶² Guido Kisch is prominent for his work dedicated to the interrelation of Bible and Saxon mirror. The author proves the profound knowledge of the Bible which Eike had possessed. See (Kisch 1941, 89-114) Cited according to Landau's remark in Landau, P. (Landau 2005, 73-101)

²⁶³ (Landau 2005, 83)

²⁶⁴ (Landau 2005, 83)

²⁶⁵ There is no unity in scholars' opinion considering Origen as the source for the *Saxon mirror*. Ulrich Stutz in his research presents the opinion that the word „Origen“ is not the proper name of the author, but the title of the *Etymologiae* of Isidor of Sevilla. Stutz, U. 1890. *Das Verwandtschaftsbild des Sachsenspiegels und seine Bedeutung für die sächsische Erbfolgeordnung* / Ulrich Stutz. Unveränd. Nachdr. d. Ausg. Breslau 1890. - Aalen: Scientia 1973 - 84 S. - (Untersuchungen zur deutschen Staats- und Rechtsgeschichte ; 34). As the opposite, Roderich Schmidt in his PhD Greifswald, 1951 „Studien über Eike von Repgow und den Sachsenspiegel“ asserts that the title „Origenes“ was not used as a name for *Etymologiae* of Isidor of Sevilla; therefore, Origen was considered as the Origen. As to the newest research results, namely to the opinion of Peter Landau, the Origen is considered to be not the title of Isidor's *Etymologiae*, but the personal name of the Church Father. Peter Landau bases his arguments on the collection catalog of the library of Altzelle, which encompassed, in accordance with the list of the books, two codices with the homilies to Old Testament's Books of *Genesis*, *Exodus* und *Leviticus* of the authorship of Origen. (Landau 2005, 88)

²⁶⁶ There has been the point developed that Eike might have been acquainted with Johannes Teutonicus, the canonist from Halberstadt; therefore, there is a possibility that Eike might have known the three compilations out of five *quinque compilationes antike*. This was plausible as the structure of *Saxon mirror* and of the compilations right from the structure introduced by *Bernardus Paviensis* in his *Compilatio I*. (according to Theuerkauf). According to Landau's point of view, Eike was not acquainted with Johannes Teutonicus and, following the catalog of the library from the year 1524, there has been only the first compilation present in the library of Altzelle; therefore, only this one is listed as one of the sources for composing the *Saxon mirror*. (Landau 2005, 92)

²⁶⁷ Peter Landau bases the similarity of the structure of the *Saxon mirror* not on the first compilation of Bernard of Pavia, but rather on the *Collectio Appendix Lateranensis*. (Landau 2005, 94)

²⁶⁸ The case on the Carfania rage is the only one taken from the Roman law D. 3, 1, 1, 5. This case found its depiction in the Heidelberger manuscript, where Carfania for the shame she brought to her and to the king, as she was addressing him in anger, is displayed on the manuscript illumination with something like a hair brush on her back. Koschoereck, W. [1976: 80] (SSp. Landrecht 2.63.1) Iz ne mach nichen wiph vorspreche sin noch ane vormunde clagen; daz virlos on allen Calefurnia, de vor deme riche missebarde vor zorne, do ir wille an vorsprekene nicht ne muste vordgan. (Eckhardt 1955)

Eine Frau kann weder Vorsprecher sein noch ohne Vormund klagen. Dies hat Calefurnia für alle Frauen verloren, die sich vor dem Kaiser ungebührlich aufführte aus Zorn darüber, daß Ihr Wille ohne Vorsprecher nicht durchgehen durfte. (Schmidt-Wiegand 1984) More on Carfania's rage story, please see (Westphal 2002, 103-119)

the opinion represented by Johanek, that Alzelle and the library of the Cistercian monastery is the place of composing the first German prose work.²⁶⁹

²⁶⁹ (Lieberwirth 1980, 24); (Landau 2005)

3.2 Marriage in the *The Saxon Mirror*

3.2.1 The concept of *munt*

Marriage²⁷⁰ in Germanic customary law tradition is closely related to the concept of guardianship (*Vormundschaft*).²⁷¹ One may become the guardian *vormund*²⁷² as soon as he reaches the age of adolescence.²⁷³ The *The Saxon Mirror* is pointing to the exact age only once;²⁷⁴ the age of adulthood, according to text of *The Saxon Mirror*, is twelve years. The plausible explanation why the exact age is mentioned only once might be that this age was obvious at the time of composition of the *The Saxon Mirror*; therefore there was no additional need to mention it often. The adolescence for the boy is linked to the secondary sex features, such as growing beard, etc.²⁷⁵ *The Saxon Mirror* discusses different levels of age discretion. On the first age level – boys and girls are even, as they are children and both need their representatives. On the second level, they are coming to “their age” – “to iren

²⁷⁰ The cases dedicated to marriage were divided into five groups: introduction -- I. 3,3; contracting the marriage, couple property, divorce – I. 31, 2 – I. 52, 4; III. 45 2,3; children rights – I. 16,2; I. 37; I. 38, 3; II. 23; III. 27; III. 72; property issues by divorce I. 5,2; I. 25, 4; I. 31, 1; III. 38, 3 – 5; III. 72; III. 74; III. 75, 3; III. 76, 2 – 5; penal issues – II. 13,5.

²⁷¹ In the *Saxon mirror* the notion of guardianship is signified as *vormuntscap*.

²⁷² There is diversity of definitions of the *munt* concept. According to Wilhelm Kraut *munt* (*althochdeutsch*), *mund* (*altnordisch*) is the relation of defense of one person towards another. Kraut, W. T. [1835: 5]. A. Heusler interrelated the meaning of the word with Latin *manus* and *Mittelhochdeutsch munt*. (Heusler 1885, 55). The Langobardic version of perception of the word *munt* at the beginning was linked exclusively to the marital control over the woman and was determined as *Geschlechtsvormundschaft*. As the concept was developing, it encompassed the control over the minor children, in this version it was overtaken by the closely related tribe of Saxons. (Molitor 1944, 122). For detailed discussion of the concept development, please see (Grimm 1854); (Rive 1866, 56-61); (Amira 1913, 161-162); (Huebner 1918); (Kraut 1835); (Molitor 1944); (Rummel 1987, 42-94)

²⁷³ Swen daz kint zu sinen jaren komen iz, so mut is wol vormunde sinis wibes sin” Ssp. I.42.2 (Eckhardt 1955) Wenn ein junger Mann zu seinen Jahren gekommen ist, so muß er Vormund seiner Frau sein. Ssp. I.42.2 (Schmidt-Wiegand 1984)

²⁷⁴ Over en unde twintich jar so is de man to sinen tagen komen... . Ssp. I.42.1 (Eckhardt 1955) Mit einundzwanzig Jahren ist der Mann zu seinen Tagen gekommen... Ssp. I.42.1 (Schmidt-Wiegand 1984)

²⁷⁵ Swelkes mannes alder men nicht ne weiz, hat her har in dem barde unde nedene inde under iewelkeme arme, so sal men wizzen, daz her zu sinen tagen comen is. Ssp. I.42.1 (Eckhardt 1955). Wenn man das Alter eines Mannes nicht kennt und hat er Haare am Bart, an den unteren Körperteilen und unter den Achseln, so soll man daran erkennen, daß er volljährig ist. Ssp. I.42.1 (Schmidt-Wiegand 1984)

jaren komen,”²⁷⁶ whereas before they were “binnen iren jaren.”²⁷⁷ Therefore, according to *The Saxon Mirror*, twelve years is the adult age for the boy.²⁷⁸ The man who has arrived to this age is eligible to go out of someone else’s guardianship,²⁷⁹ to marry and to become the guardian for his wife.²⁸⁰

The age of adult brings such benefits as eligibility of the boy to become the *Vormund* for his wife, for any other person and even to be a representative in the court.²⁸¹ As to the girl, her age is not of a prime importance. The only factor that may get her out of the father’s

²⁷⁶ Swen daz kint zu sinen jaren komen iz, so mut is wol vormunde sinis wibes sin” Ssp. I.42.2 (Eckhardt 1955) Wenn ein junger Mann zu seinen Jahren gekommen ist, so muß er Vormund seiner Frau sein. Ssp. I.42.2 (Schmidt-Wiegand 1984)

²⁷⁷ Er sinen dagen unde na sinen dagen mut de man wol vormunde hebben, of he is bedarf, unde mut it wol umberen, of he wel. Over en unde twintich jar so is de man to sinen tagen komen. Over sestich jar so is he boven sine dage komen, alse he vormunde hebben scal, of he wel, unde krenket dar mede sine bute nicht noch sin wergelt. Swelkes mannes alder men nicht ne wet, hevet her har in dem barde inde nedene unde under iewelkeme arme, so scal man weten, dat he to sinen dagen komen is. SSp. I.42.1 (Eckhardt 1955) Bevor er zu seinen Tagen gekommen ist und danach kann ein Mann wohl einen Vormund haben, wenn er dessen bedarf, und kann seiner entbehren, wenn er es will. Wer seinen Vormund nicht zur Hand hat, der soll ihn am nächsten Tag, der vor seinen des Gerichts wegen seiner Klage angesetzt wird, beibringen. Mit einund einundzwanzig Jahren ist der Mann zu seinen Tagen gekommen. Über sechzig ist er mehr als dieß, so daß er einen Vormund haben soll, wenn er es will ohne daß damit seine Buße oder sein Manngeld gemindert werden. Wenn man das Alter eines Mannes nicht kennt und hat er Haare am Bart, an den unteren Körperteilen und unter den Achseln, so soll man daran erkennen, daß er volljährig ist. SSp. I.42.1 (Schmidt-Wiegand 1984)

²⁷⁸ Over en unde twintich jar so is de man to sinen tagen komen... SSp. I.42.1 (Eckhardt 1955) Mit einundzwanzig Jahren ist der Mann zu seinen Tagen gekommen... Ssp. I.42.1 (Schmidt-Wiegand 1984)

²⁷⁹ Swar die sone bynnen iren jaren sin, ir eldeste swertmach nmt daz herwede alleyne, unde is der kinder vormunder dar ane, wante sie zu iren jaren komen, so sal her iz in weder geben, dar zu al ir gut, her ne kunne sie bereden, swar her iz in ir bederf virtan habe, oder iz ime rofleke, oder von ungelucke unde ane sine schult gelosit si. Ssp. I. 23.1 (Eckhardt 1955) Wenn die Söhne noch nicht zu ihren Jahren gekommen sind, so nimmt der älteste Verwandte von Vaterseite die Heereausrüstung allein und ist der Vormund der Kinder daran. Wenn sie zu ihren Jahren gekommen sind, so soll er sie ihnen wieder herausgeben und dazu all ihr Gut. Es sei denn, er kann ihnen darlegen, daß er es für ihre Bedürfnisse ausgegeben oder durch Raub oder anders Unglück ohne seine Schuld verloren hat. Ssp. I. 23.1 (Schmidt-Wiegand 1984)

²⁸⁰ Swen daz kint zu sinen jaren komen iz, so mut is wol vormunde sinis wibes sin” Ssp. I.42.2. (Eckhardt 1955) Wenn ein junger Mann zu seinen Jahren gekommen ist, so muß er Vormund seiner Frau sein. Ssp. I.42.2 (Schmidt-Wiegand 1984)

²⁸¹ Swen das kind to sinen jaren komen is, so mut it wol vormunde sinis wibes sin unde to swes he scal, of he wel unde san to kampe wart, als si it binnen sinen dagen; went als he sek selven mut verstan, alse mut he sine mundelen wol verstan. Ssp. I. 42.2 (Eckhardt 1955) Wenn ein junger Mann zu seinen Jahren gekommen ist, so muß er der Vormund seiner Frau sein und dazu, wessen es nötig ist, wenn er es will, bis hin zum Zweikampf, auch innerhalb seiner Tage. Denn wenn er sich selbst vertreten kann, so darf er auch seine Mündel vertreten. Ssp. I. 42.2 (Schmidt-Wiegand 1984)

guardianship (*mundium*) is her marriage as the rule of *heirat macht mündig*²⁸² seems to be still applicable. In Germanic customary law there is a distinction between *Altersvormundschaft* and *Geschlechtsvormundschaft*; as for the boy these two concepts are distinguished; considering the girl, despite her adult age, she is under her father's power until she is not married. Therefore, this aforementioned distinction does not make clear difference for the girl there.

The power of *mundium* starts with exchange of consent and can be solved by divorce or marriage annulment. Consent is a tool for the bride to enter the *mundium* relations, whereas *copula carnalis* signifies her entrance to the clan.²⁸³ The *mundium* power signifies not only control over the woman, but also a way of representing her in juridical cases and her defense²⁸⁴ in society.²⁸⁵ It is suggested to consider control and defense as two different concepts in the *mund* system: control over the woman is said to be the inside relation, whereas defense is to be seen as the outwards relation. In other words, the husband is suggested to be in control relation to his wife and as her defense and representative in the society.²⁸⁶

Starting from Friedberg's work²⁸⁷ the discussion was raised about what had launched the importance of *copula carnalis* in marriage, whether the Germanic law had influenced the canon law or vice versa.²⁸⁸ In canon law study it is generally known that in the 13th century there were two main branches developed: the one originated from Bologna and stated that *copula carnalis* created marriage; the other, namely a French branch, asserted that it was consent that made marriage the decretal letters of Pope Alexander III were among the most

²⁸² (Rummel 1987, 50)

²⁸³ (Sohm 1875, 98)

²⁸⁴ (Sohm 1875, 93)

²⁸⁵ (Maritz 1867, 84)

²⁸⁶ (Rummel 1987, 45)

²⁸⁷ (Friedberg 1865)

²⁸⁸ (Friedberg 1865); (Friedberg 1876) vs. (Sohm 1876)

prominent representatives of this so called consensual theory of marriage. According to the *The Saxon Mirror* only *copula carnalis* makes the marriage; moreover, the consummation signifies the entrance of the spouses into relation of common property and the woman becomes a companion (*Standesgenossin (notinne)*) a companion and even²⁸⁹ (*evenborgich md. mnd.*) to her husband.²⁹⁰ Therefore, by marriage ceremony the husband becomes the guardian for his wife *Vormund*, whereas *copula carnalis* legalizes equity between husband and wife. The consummation also gives rise to the *Vormundschaft* right,²⁹¹ as it is customary that relation of *mundium* is applicable for those who are even.²⁹² In contrast to canon law, marriage is a subject to divorce and can be dissolved; however, the husband who has abandoned his legal wife is to be penalized in the name of ceasar.²⁹³

3.3 Betrothal in *The Saxon Mirror*

The concept of betrothal does not appear to be a constant value in the text of *The Saxon Mirror*. The question has been raised²⁹⁴ whether the concept of betrothal is directly presented in Eike's text. According to Maria Rummel, the noun *Verlobung* is not directly encountered in the text of *The Saxon Mirror*, but the verb *loven (mnd. md.)* may well

²⁸⁹ The equality in the *Saxon mirror* is not used in its classical meaning. As Maria Rummel points out, this concept of equality (*Daz wiph is ouch des mannis notinne*) is well seen through the text of Eike "die man is ouch vormunde sinis wibis, zu hant also se yme getruwet is. Daz wiph is ouch des mannis notinne, zu hant also se in sin bette trid; na des mannes tode is se ledich von des mannis rechte. Ssp. III, 45.3" means only that the husband is *Vormund* of his wife and this relation of "equal *mundium*" starts with the consummation and ends with husband's death. The woman is a subject to the legal status of her husband. (Rummel 1987, 79)

²⁹⁰ Dat wiph ist ouch des mannis notinne, zu hant also se in sin bette trid. Ssp. III. 45. 3; Al ne si eyn man sime wibe nicht evenbordich, her is doch ir vormunde, unde sie is sin genottine, unde trit in sin recht, swen sie in sin bette geit. Ssp. I. 45. 1 (Eckhardt 1955) Wenn ein Mann seiner Frau nicht eben bürdig ist, so ist er doch ihr Vormund und sie seine Standesgenossin, und tritt in sein Recht ein, sobald sie mit ihm zu Bett geht. (Schmidt-Wiegand 1984)

²⁹¹ (Rummel 1987, 77)

²⁹² (Kraut 1835, 60); (Heusler 1885, 157); (Rummel 1987, 77)

²⁹³ Den keyser ne mut der pabes noch neman bannen seder der zit daz her gewiet is, ane umme dri sache: ob her an deme rechten gelouben twizvelit, oder sin echte wiph lezt, oder gottes hus zustoret. Ssp. III. 57. 1

²⁹⁴ (Rummel 1987, 77)

represent the action of binding promise.²⁹⁵ It appears common, at least for *The Saxon Mirror* that the bride is promised to the groom by the third person.²⁹⁶ Moreover, betrothal in *The Saxon Mirror* bears economical features, as for the *mundium* and power over a bride a groom is about to acquire, he is obliged to provide her with guarantees by granting the *Leibzucht* that will serve as a financial support in case the bride becomes a widow. Betrothal, according to *The Saxon Mirror*, is a binding promise. In case the groom takes another woman as a bride, this action will lead to divorce.²⁹⁷

Agreements of engagement dealt mainly with property relations of future couple. Therefore, such medieval economic phenomena as *Leibzucht*,²⁹⁸ *Morgengabe*, and²⁹⁹ *Ursale* might have been negotiated on engagement level. These financial contributions on groom's part had replaced *Brautgabe* by the 12th century and were of utmost importance especially for bride's kin, as they were a guarantee for a bride in case of divorce or death of her husband.

²⁹⁵(Rummel 1987, 77)

²⁹⁶ ... men sol ir ouch weder lazen unde geben, swaz se zu yrme manne brachte, oder also vele des mannes gudes, also ir gelobit wart, do se zu samene quamen. Ssp. III. 74 The use of passive voice reveals the third party as an active part. In other words, the bride is to be promised to the groom by her *Vormund*.

²⁹⁷ Wirt eyne wif mit rechte von yrme manne gescheiden, se behalt doch ir lipgetzucht, die her ir gab an sineme eigene, unde ir gebuw daz da upphe stat. Daz ne mut aber se nich uph brechen noch danne vuren; anderes ne blibit ir nichen buw, noch nicht der morgengabe. Ir rade behalt se unde ir musdele... Ssp. III. 74

²⁹⁸ Leibzucht, the land given to the wife by her husband, is considered as the financial assurance in case she becomes a widow. Like to the *Morgengabe*, wife does not have a right of possession over Leibzucht. According to Maritz, F. (1867: 193) *Leibzucht ... deutet auf die Zucht, d.h. den Unterhalt der für die Dauer des Lebens jemandem gewährt wird*. As to exact presents given as *Leibzucht*, it should be the land, even with people born on this land *lute von deme gute wise, die zu deme gute geboren sin* (Liphtzucht ne kan den vrowen nieman brechen, neweder naboren erve, noch nieman opphe den daz gut irstirft, se ne virwerket selbe, so daz se overtome ophowe, oder lute von deme gute wise, die zu deme gute geboren sin, oder zu swelker wis se ir liphtzucht uz von iren weren lezt... Ssp. I. 21. 2) or buildings *gebuw* (Hat ouch eyne wif libgetucht an eigene oder an lene, swaz se buwes da upphe hat swenne se stirft, daz ne erst se nicht an iren naesten mach; iz nimt die, deme daz gut ledich wirt. Ssp. II. 21. 3). This property, together with its buildings established on it, remains in wife's hands in case of divorce (Wirt eyne wif mit rechte von yrme manne gescheiden, se behalt doch ir lipgetzucht, die her ir gab an sineme eigene, unde ir gebuw daz da upphe stat. Ssp. III. 74)

²⁹⁹ *Morgengabe* is a present given to the wife after the wedding night by her husband, but this present, whatever it might be, belongs to the husband. Fricke, F.W. [1978: 30]. In the Ssp. I.20.1 Eike goes into detail to specify what exactly is given as *morgengabe*: animals, horses, cattle, goats and pigs; gift of a servant girl that is *binnen iren jaren*. Nu vernemet way iewelk man van ridderis art moge geben sime wibe zu morgengabe. Des morgenes, als her mit ir zu dische gat, vor ezzene, an erven gelof so mach her ir geben eyne knecht oder eyne maget die binnen iren jaren sint, unde tune unde tymber unde veltgende ve. Ssp. I.20.1

Brautkauf and consequently *Kaufpreis* were replaced by presents given to the bride;³⁰⁰ nevertheless, even *The Saxon Mirror* refers to an old custom, since according to it, in return for his present at marriage ceremony the groom obtains the right of guardianship *Vormundschaft*. The process of exchange takes place during the solemn marriage ceremonial act of giving the bride to the groom as an exchange for the so called *muntschatz*.³⁰¹ The marital guardianship is not only the power of control and defense executed over the wife, it is also a right assured to husband by custom, and, as a consequence, by its written form, which is *The Saxon Mirror*.³⁰² Guardianship over the wife launched after consummation points outwards, as it tends to give the husband the right to defend his wife and represent her rights, which she shares with him from now on.³⁰³ This endowment of the husband, however, is limited to representing in court.³⁰⁴

Suggestion that betrothal in Germanic customary law already contracts marriage belongs to Rudolph Sohm and it is the answer to opposite view presented by Emil Friedberg.³⁰⁵ Later researches argue that the difference between betrothal and marriage consists mainly of the

³⁰⁰ (Maritz 1867, 87)

³⁰¹ Die man is ouch vormunde sinis wibis, zu hant also se yme getruwet is. Ssp. III. 45. 3 (Eckhardt 1955) Jeder Mann ist Vormund seiner Frau, sobald sie ihm angetraut ist. Ssp. III. 45. 3 (Schmidt-Wiegand 1984)

³⁰² Swen eyne man wyph nimt, so nimt her in sine were al ir gut zu rechter vormundschaft... Ssp. I. 31. 2 Eckhardt, K. A. [1955] Wenn ein Mann eine Frau zur Ehe nimmt, so nimmt er all ihr Gut zu seinen Besitz zu rechter Vormundschaft. Ssp. I. 31.2 (Schmidt-Wiegand 1984)

An nothaftiger clage, dar sie nicht zu campe geit, mut wol de richtere vormunde geben den vrowen, unde in aller hanthaften tad, dar se ires rechten vormunden nicht ne hat zu hant. Geit aver die clage zu kamphe wart, so mut och wol ir vormunde sin iewelk ir evenburdige swertmach. Ssp. I. 43 Claget och maget oder wedewe zu lantrechte over iren rechten vormunden, daz er ir ir gut neme, zu der clage sal se daz gerichte vormunden, unde dar ir ire man gift eigen in ursale oder zu ir liebe. Ssp. I. 44 Swar iz den vrowen zu eiden kumt, den solen se selben tun, undenicht ir vormunde. Ir rechte vormunde sal ouch gewere vor se loven unde untfan unde liesten. Ssp. I. 47. 1 Die vormunde van gerichtes halben sal ouch gewere vor se geloven unde untfan, unde seder nicheine not dar umme liden, went daz her der warheit bekenne, swen her iz von gerichtes halben gevreget wirt... Ssp. I. 47. 2

³⁰³ Al ne si eyne man sime wibe nicht evenbordich, her is doch ir vormunde, unde sie is sin genotinne, unde trit in sin recht, swen sie in sin bette geit. Ssp. I. 45. 1

³⁰⁴ Maget unde wiph muzen vormunde haben an iewelker clage, durch daz men sie nicht verzugen ne mach, des sie vor gerichte spreket oder tud. Ssp. I. 46

³⁰⁵ (Friedberg 1876); (Sohm 1876)

bride's right to be an active part by contracting the engagement, which is not the case in marriage.³⁰⁶

³⁰⁶ (Rummel 1987, 78)

3.4 Conclusion

Engagement in Germanic customary law is first of all a contract between the groom and the bride's guardian. It anticipates that the groom is ready to bestow his bride with financial contribution that will assure her future in case of divorce or marriage annulment. The groom becomes the bride's guardian as betrothal is contracted, but only with consummation two parties become even in sense of common property. However, the latter is rather theoretical as the wife has no right to control any property without her husband's agreement. The age when a future groom may contract is set to be twelve years. The bride seems quite voiceless as *The Saxon Mirror* speaks about betrothal; moreover, she is said to be promised to the groom. The presents to the bride are of prime importance, as they are her financial support in her future without her husband. The financial negotiations over the sum and size of the present appear to be important first of all for bride's family, as these presents given to her are her guarantee. Consent of two parties contracting the betrothal, namely the guardian of the bride and groom, is the notion that creates the engagement with following bestowal, whereas consummation marks the beginning of marriage itself. Betrothal is to be seen as the first step in the row of actions that lead to a marriage, such as giving the bride to the groom, her entrance into the house of the groom and consummation. The latter appears to be the point when property rights are legalized.

3.5 Betrothal in the *Summa decretorum* and *The Saxon Mirror*: comparison

Comparing the notion of betrothal discussed in *Summa* and *The Saxon Mirror* one may discern such criteria as: betrothal vs. marriage relation; role of parental control and consent; age of the person eligible to contract; role of bestowal.

Betrothal vs. marriage relation can be well examined on the basis of two mentioned sources. In two cases the issue of interrelation of betrothal to marriage is clearly presented. Huguccio's point of view may be conveyed first of all by his preferences considering authorities. He is surely a supporter of Pope Alexander III decretals as well as an Augustinian follower. Commentator of *Decretum* differentiates two kinds of betrothal: the one in the present and the other in the future tense. Huguccio considers betrothal in the present tense to be of a marital nature, since it is constructed on consent which is given by both parties. For him the unity of mind and will forms the marital bond by itself. This unity is confirmed in Paradise, and, according to Huguccio, there is no need to wait until consummation to perfect the marriage, as Gratian suggests. Marriage is being established as a concept when the consents are exchanged and the unity of will is confirmed in its integrity. Considering *sponsalia de futuro*, it may be conferred that this kind of betrothal is suggested to be a mere promise to marry, in its classical meaning, the engagement itself. According to Huguccio, the vows of faithfulness and promise are not eligible to create a marriage (in this case the notion that Huguccio calls marriage is to be deemed as *sponsalia de presenti*), but only consent is to be deemed such. In sum, Huguccio discerns two kinds of betrothal following a mainstream of consensual theory, namely *sponsalia de presenti et sponsalia de futuro*. The first one is created by consent, which is determined through unity of will and mind, and is suggested to be "more of a nature of marriage." The latter, in

opposite, contains no consent so far, but only a vow of mutual faithfulness and is seen as a mere promise while being clearly of engagement nature.

The Saxon Mirror discusses betrothal briefly indeed. Engagement is considered as an introductory phase leading to marriage. During engagement the negotiations about financial contributions such as *Leibzucht* and *Morgengabe* are present. This appears to be quite a serious issue for bride's family as these presents given to her during upcoming marriage ceremony are her financial guarantee in case she becomes a widow or the marriage is dissolved. Betrothal in *The Saxon Mirror* is a contract, as it involves negotiation over the price (the presents to the bride) of guardianship transferred from her father or guardian (the closest male relative) to the groom. Engagement also starts the guardianship of the groom over the bride, whereas consummation that determines the beginning point of the marriage launches the common possession of the property of both parties. Theoretically, after the consummation the wife becomes even with her husband, but practically this only means that she enters to the set of her husband's rights; moreover, her property is not included into the circle of her possessions – she is not eligible of selling it or giving it away. Betrothal, according to *The Saxon Mirror*, is a contract as its primary goal is to settle future financial condition of the bride who is expected to become a wife after a wedding ceremony. It also sets the payprice of the *Vormundschaft*. Comparing to Huguccio's *Summa*, where one kind of betrothal is labeled as marriage and the other is an engagement in its classical meaning; Saxon betrothal is a mere introductory phase of a two-stage marital process and determines the financial sides of a marital contract.

Evaluation of parental role in the process of engagement turned to be a fairly complicated task to render. According to *Summa*, parents seem to be seen as the ones who actually make all the agreements and the consent of children is expected. There might be also the case that

children contract, but this is possible with their parents' consent as well. However, parents' consent is said to be not necessary, but required. *The Saxon Mirror* has quite a clear position as to the mentioned point. The bride is promised to the groom during betrothal; moreover, marital negotiations are the business of bride's guardian and the groom. It appears; therefore, that consent of the bride is at least absent, despite the opinion that in betrothal negotiations in Germanic tradition the bride still has a right to object. In sum, consent seems to be restrained to a greater extent in *The Saxon Mirror* than in *Summa*.

The age of adulthood in two sources is different. They differ in years, since according to *Summa* the age of a boy ready to marry is twelve years old. Considering betrothal, it is said that there are different conditions for the one who is under or over the age of seven. If the person is under seven, he/she is betrothed exclusively by his/her parents and may object or reaffirm after reaching the age of seven. Beside the exact years, Huguccio refers to *tempus distinctionis*, which is comprehended as the time when the party is able to procreate. As to *The Saxon Mirror*, it mentions once in its text the age of twelve as the time when a boy may go out of his father's guardianship and become a *Vormund* for his wife or some other person. Additionally, *sinnen jaren* is mainly the age when secondary characteristics are present, such as a growing beard, etc. Considering female age policy, it is not discussed as there is no need for it – the girl normally moves from one guardianship to another – from this of her father to this of her groom, and later on, husband. Consequently, the exact age may differ with the *tempus distinctionis* and secondary features being among determining factors.

Bestowal is very important for *The Saxon Mirror* and is, moreover, necessary. The same can not be said about *Summa*. According to Huguccio, the ceremony may omit giving a *dos*, which is not of a big importance, but giving a *dos* without a ceremony is not possible at all.

Chapter 4: Engagement in *Glossa ordinaria*

4.1 Life of Johannes Teutonicus and his *Glossa ordinaria*

Johannes Teutonicus (Zemeke, Semeca) is perceived to be born near Halberstadt. He studied law in Bologna, where he also taught Canon law ca. 1170-1245. Johannes's collection *Compilatio quarta* was included into *Compilationes antiquae*. Johannes as well wrote gloss-apparatus to it. He departed from Bologna and was nominated *scholasticus* in 1220, in 1223 a provost, and in 1235 the dean at S. Maria in Halberstadt. In 1241 Johannes became the provost of the cathedral of Halberstadt. He remained the provost till his death. He died on April 25th, 1245.³⁰⁷ His seal is a little oval which can be found on the document dated November 26th, 1238 related to the dispute in St. Boniface chapter; the document calls him *Mag. Joh. Decanus*. The seal portrays vertically posed snake on the background and the bird on the foreground with the words JOHANNES DEI...³⁰⁸ Johannes succeeded in combining the contributions of Laurentius, Huguccio as well as Ordinaturus magister apparatus within his gloss to *Decretum Gratiani* – *Glossa ordinaria*. There was a great debate over the date when the *Glossa* to *Decretum* was finished. The turning point for terminus ad quem et terminus a quo is to be seen the Fourth Lateran Council (1215). According to earlier studies, the view that *Glossa* must have been finished prior to the Fourth Lateran Council belongs to Schulte, and the opposite opinion is presented by Gillmann and followed by newer studies of Rudolph Weigand,³⁰⁹ not without criticizing and arguing against this terminus ad quem.³¹⁰

³⁰⁷There were doubts whether he died in 1245 or 1246, though it is certain that on the 7th of October, 1245 he was not a provost any more and he died either in 1245 or 1246. (Schulte 1881, 119) According to newer research results, namely this of Kenneth Pennington, it is taken that Johannes died in 1245.

³⁰⁸ (Schulte 1881, 120)

³⁰⁹ (Weigand 2008, 84)

³¹⁰ According to (Schulte 1881), *Glossa ordinaria* had been finished before the beginning of the Fourth Lateran Council. This argument proposed by Schulte was not supported by Gillmann, as according to his study of Cod. Bamberg, Can. 13 Johannes appeals to the council decisions several times. (Gillmann 1920, 185-212)

According to newer studies, it is also not excluded that Johannes revised his *Gloss* after it had been finished.³¹¹ In the current text one of the 15th century print digitized by Bavarian State Library was used,³¹² that is one of the copies of revised recension of *Glossa ordinaria*, namely under the authorship of Bartholomeus Brixienensis. The most important editorial work of Bartholomeus was to change all the citations of papal decretals from Johannes' references to them in the *Compilationes antique* to new arrangements in the *Decretals of Pope Gregory IX*. Bartholomeus updated the apparatus including discussions of those decretals that appeared after 1217. He often agreed with Johannes, whose glosses were marked by Bartholomeus as Jo, and often, but not always, disagreed with Huguccio (H.). Glosses of Bazianus (Baz.) are also often present and thoroughly marked by editor.³¹³

³¹¹ (Weigand 2008: 84)

³¹² Gratianus <de Clusio>: Decretum mit der Glossa ordinaria von Johannes Teutonicus in der Bearbeitung von Bartholomaeus Brixienensis. Venedig 1477

³¹³(Weigand 2008, 89)

4.2 Engagement in *Glossa ordinaria*

Johannes Teutonicus pays relatively little attention to betrothal, to the extent that one may claim he is not really interested in betrothal *per se*. For him, betrothal is interesting only from the perspective that betrothal opens up the way to marriage. In other words, betrothal initiates marriage,³¹⁴ but only by its significance, not by its essence, as marriage already exists in its perfection and plenitude in its meaning as sacrament. Despite little interest given to betrothal, there are still a few comments dedicated to betrothal. Johannes distinguishes between promise to marry in the present and for the future. The promise to marry for the future, given at the age before seven, is perceived to be a betrothal and is termed *sponsalia*.³¹⁵ Betrothal contracted before the age of discretion is expected to be confirmed after parties have arrived to the marriageable age; nonetheless, the absence of dissent is automatically perceived as consent to the marital bond.³¹⁶

³¹⁴ Cum initiatur quo ad significationem, nam quo ad essentiam statim plenum est perfectum, quia simplex est sicut et omne sacramentum. Johannes. *Glossa ordinaria* [1477: 604]

³¹⁵ Ubi, hoc causa et de matrimonio et de sponsalibus intelligi potest, secundum quod de sponsalibus, dicit coniugium, id est, promissio futuro coniugii intra c. q.V *Nostrates*. [C.30 q.5 c.3]. *Glossa ordinaria* [1477: 621]

³¹⁶ Consentiant, argumentum quod sequens ratihabitio confirmat prius factum invalidum extra *de iurepa. Cura pastorale*. XVI, q. I *Quicumque* [C.16 q.1 c.44] sed esto quod aliqui ante VII annum contrahant sponsalia post septennium non contradicunt, nec est expresse consentiunt, nunquid sunt sponsalia confirmata? Vel pone quod aliqui ante puberes annos contraxerunt sponsalia post pubertatem non contradicunt nec est (esset?) expresse consentiunt, nunquid sunt sponsalia confirmata per talem taciturnitatem? Videtur quod adhuc inquerendum sit ab eis, an perdurent in priori consensu, XX, q. I *Illud* [C. 20 q.1 c.10] et XXVIII de *his econverso* videtur sufficere quod non contradicant, ut *De desponsatione impuberum. De illis* [X 4, 2, 7] et c. *Literas* [X 4, 2, 4] c. *Accessit* [X 4, 2, 5]. Dico quod si simul habitabant, et non contradicunt post etatem legitimam matrimonium est confirmatum, ut *ff. De ritu nuptiarum. Minorem* [D. 23, 2, 4] secus si seorsum habitabant, extra *De desponsatione impuberum. Attestationes* [X 4, 2, 10]. *Glossa ordinaria* [1477: 621]
Item consensus, ut XXVII, q. II *Sufficiat* [C. 27 q. 2 c. 2] intelligitur autem consentire nisi expresse dissentiat...
Glossa ordinaria [1477: 615]

Betrothal in Johannes's understanding has a binding influence, as the groom is expected to give the permission to his bride if she is willing to enter the monastery.³¹⁷ Dowry is an important element in betrothal, as in the *Glossa* it is clearly stated that in case of poverty at least salt or even one denarius should be given as a dowry.³¹⁸ A negative answer is given to the question if the bride is to be coerced to the matrimony, because in marriage the spirit of liberty is supposed to be celebrated.³¹⁹ In case when one betrothes in the present tense and the groom dies, his brother is not allowed to take his bride as a wife. Interestingly, the bride in the present tense is already called a wife, whereas it is inappropriate that the bride in the future tense is called a wife.¹⁵ Johannes does not seem to draw a clear line between marriage and betrothal in case of conditional marriages. By distinguishing between honest (essential and not essential) and dishonest conditions under which the marriage or betrothal is to be contracted, he does not distinguish between marriage and betrothal whatsoever. Meanwhile, he pays an abundance of attention to different kinds of conditions under which marriage/betrothal is to be contracted, thoroughly discussing dishonest conditions that are present before contracting betrothal or marriage.³²⁰ In other words, with the honest

³¹⁷Ad hoc dico, quod si sine licentia uxoris transit ad religionem non habebit tempus probationis nisi duos menses fiant de eius voluntate transit tenetur continere usque quo fit clapsus tempus probationis et quidem dicit decr. Extra *De conversione conjugatorum. Ex publico*. [X 3, 32, 7] quod duo menses tantum dantur assumenti habitum religionis, intelligas illo qui sine voluntate uxoris transit, similiter distingue in clerico transeunte ad religionem, ut si de licentia episcopi transeat quod possit petere tempore probationis priora stipendia, secus si sine licentia, quid iuris sit de hoc in questionibus notatur, lex tamen dicit quod si alter dat licentiam alteri non intelligitur dedisse, nisi secundum quod de jure debet habere, scilicet usque ad duos menses. Sed quod si non vult eligere monasterium sed in propria domo vult habitum sumere vel continentiam vovere? Dicimus quod non potest, ut habens extra *De conversione conjugatorum. Ex parte*. [X 3, 32, 16]. Et dicit Huguccio quod sponsus cum dat licentiam sponse vel econverso intrandi monasterium matrimonium non solvitur, sed compellendus est et ipse intrare, et si contraxerit, duos habet viros mulier vel vir duas uxores. Tu dicis quod sive ea volente sive invita transeat non compellitur intrare monasterium. Jo[hannes]. *Glossa ordinaria* [1477: 603]

³¹⁸ Dos, ex hoc dicunt quidam quod semper aliquid dandum est in dotem: etiam si nimia pauperitas cogat, saltem dabis unum denarium, quod non concedo et hoc est consilium. *Glossa ordinaria* [1477: 625]

³¹⁹ Quod autem. Hic queritur, an aliqua sit cogenda nubere et respondendum est quod non, quia in matrimonio animus debet gaudere plena libertate... *Glossa ordinaria* [1477: 629]

³²⁰ Si quis hoc capitulum intelligitur de sponsa de presenti, aliter non faceret ad propositum, quia sponsa de futuro non est uxor, quidem tamen sequitur quia non possit duci a futuro (?) optinet enim in sponsa de futuro, dum tamen post VII annos facta sit desponsatio, alias secus extra *De desponsatione impuberum. Literas* [X 4, 2, 4] et c. *Accessit* [X 4, 2, 5]. Et hoc casu est impedimentum publice honestatis iustitia non affinitatis, quia illa non est nisi interveniat carnalis copula XXVII, q. II *Lex divine*. [C.27 q.2 c. 18] *Glossa ordinaria* [1477: 599]

condition marriage may (if the condition is not essential) or may not (if condition is essential) be contracted; whereas, while talking about dishonest condition both marriage and betrothal are not to be contracted, in this case there is no clear line drawn between those.³²¹ Dishonest conditions influence betrothal substantially, as these conditions exclude legally contracted betrothal. Such matters as sterility given as a precondition, murder or robbery belong to the dishonest conditions.³²² In case if betrothal was followed by consummation, it automatically canceled the existence of this dishonest condition.³²³ In sum, betrothal in Johannes's understanding may be perceived as next. Solemnities in betrothal are seen as necessary, as well the dowry. Consent does not include parental coercion; moreover, a silent dissent is perceived as a mere consent to the upcoming marital bond.

It appears worthy to draw a parallel line between Johannes's origin and his extremely low interest in betrothal. While discussing marriage, consent for marital bond, triple marital good, etc. at quite a length in his *Glossa*, he stops short when it comes to betrothal. A plausible reason for this kind of perception may well be in his origin. As Johannes is perceived to be born in Halberstadt, he was well acquainted with the Germanic customary law. According to the latter, betrothal was very a important step in the row of marital solemnities (it is to be followed by *traditio*, *deductio sponsae in domum sponsi* (*domum deductio*) and *consummatio* which altogether created the marital bond), to the extent that it insured the contract between bride's father and the groom, which enclosed, apart of transferring the power executed over the bride, financial guarantees of this marital bond.

³²¹ Similiter inhonesta duplex est ... nam matrimonium vel sponsalia sic contracta non tenent... . C.32 q.2 c.6, cited after (Weigand 1963, 380)

³²² Contraho tecum si procuraveris venena sterilitatis; si furtum vel homicidium feceris. C.32 q.2 c.6, cited after (Weigand 1963, 380)

³²³ Nisi cum sponsalia contracta sunt sub conditione. Tunc enim per cohitum receditur a conditione, ut extra De sponsal. De illis.[X 4, 1, 5] C.27 q.2 c.1 cited after (Weigand 1963, 383)

Within the betrothal *dos* was of a prime importance.³²⁴ The consummation was necessary for accomplishing the marital process and confirmation of the marriage; according to *The Saxon Mirror*³²⁵ the woman consummating the marital bond enters under the guardianship of her husband. As Johannes Teutonicus is originally perceived to have come from the territory where the Germanic tradition held valid and, additionally, to have been trained in Bologna, in the center where consummation theory had been developed, it makes it plausible to assume that Johannes is to be seen as one of the followers of the consummation theories, according to which consummation is a key element, which legalizes marriage. From this point of view, betrothal is not to be seen as an important element of marital process, it is important as it encloses giving the dowry. Apart from this fact, betrothal is only one of the steps that lead to consummation, which is perceived as a culminating point from the legal point of view. In other words, betrothal has only an indirect meaning and only to the extent that it embodies the dowry. The dowry in Germanic tradition, in contrast to medieval Canon law, has a great deal of importance. In accordance with Johannes's statement it is similarly important to him.

In his *Gloss* he combined two approaches that are to be traced in some moments – this originated from Germanic tradition and Canon law influences.

The dowry in case of Germanic customary tradition the dowry has a leading role in betrothal. For instance, the marriage contracted without betrothal is perceived to be illegal to the extent that the children born within this kind of marital bond are to be deemed as offsprings born outside of the marital wedlock. This “defect” could be easily removed by giving the *dos*. Moreover, the presents given to the bride during the betrothal had been perceived as her financial guarantee in case of the divorce or death of the husband. His little

³²⁴ (Friedberg 1965, 21)

³²⁵ I, 45 § 1; III, 45 § 3

attention to betrothal *per se* is to be traced from his Bologna influence and his attention to dowry as an important element in the marital process – from his belonging to Germanic tradition to the extent that betrothal in Germanic tradition is mainly a financially based contract. Betrothal in Germanic tradition also had a certain binding effect. By contracting betrothal the groom was committed to take the bride to his house and in this way to proceed to *traductio in domum* and consummation. In a way, betrothal had a binding influence, as according to *The Saxon Mirror* if contracted betrothal had not been followed by next steps of the marital process, the groom was expected to pay the fine. This aforementioned binding effect of betrothal may be limited by two key elements: firstly, it initiates the row of solemnities that altogether create the marital bond; secondly, it encloses an important part of marital process, namely, the dowry.

Chapter 5: Betrothal in the *Liber Extra*

5.1 Introduction

There is at least one milestone document dividing medieval canon law into two separate “laws,” viz. into *ius antiquum et ius novum*. This is over centuries celebrated *Concordia discordantium canonum* of Master Gratian, which marks *terminus a quo* for *ius antiquum* and *terminus ad quem* for evolution of the new papal oriented law viz. *ius novum*. The latter has been developing continuously starting from the mid-twelfth century and has been formed by the increasing amount of papal regulations³²⁶ flowing from the Chancery with different density, but without interruption. Legislation of the Catholic Church resulted from interrelation between two sources: achievements of the scholastic milieu and papal regulations. This way of melting of two sources that were developing simultaneously over time is contrary to the evolution of Roman law. The constitutions of the emperors became a predominant source for law at the time when classical jurisprudence had ceased to be a main legal source; whereas legislative activity of learned interpreters and lawyers was at its culmination when the papal activity was as well flourishing.³²⁷

There is one more milestone document, which has a crucial meaning for development of the new law. *Decretales Gregorii IX*³²⁸ is to be claimed to have the same meaning for *ius novum*

³²⁶The decretal (*constitutio, consultatio, provocatio*) is to be defined as the letter, which proceeds from the Pontiff to the bishop, which is the answer given to the requested case presented also in the body of this letter. It might be a request for issue examination or judicial appeal as well. Decretal, in its broad meaning as a letter from Pope to the representative of the church hierarchy, leads its history from the Late Antiquity and from Pope Siricius (384-99) with his letter to the bishop of Gaul. The resemblance of the letter to imperial rescripts shows in direction of rooting the decretal character in Roman law. Rescript, as well as decretals could be used not only as a text that could be applied to solve a juridical issue, but also as a source of law. (Fransen 1972, 12-15)

³²⁷ (Kuttner 1990, 394)

³²⁸ Selective bibliographical list of literature dedicated to *Liber Extra* stretches from the 19th century till nowadays. (Schulte 1877, 3-25); (Stickler 1950, 237-251); (Le Bras and Lefebvre 1965, 133-139); (Bertram 2002, 61-

as *Decretum* has for *ius antiquum*.³²⁹ *Decretum* systematized previous materials into a certain framework; similarly *Decretales* provided an authoritative collection for practicing law. *Liber Extra* was not the first collection to be promulgated: the pioneer in this field was the relative of Pope Gregory IX, Pope Innocent III, who officially promulgated a collection containing the selection of decretals from the first 12 years of his pontificate in 1209-1210.³³⁰ But *Liber Extra* had its priority in its universal legislative authority within the Catholic Church, which juridically became the papal-led Institution.

Collection of decretals was commissioned by Pope Gregory IX (the third in the canon law history, as similar collections had appeared during pontificates of Pope Innocent III and Pope Honorius III) in order to excise *prolixitas*, *contraritas* and *similitudo*³³¹ out of decretals put together under a common title *Quinque compilationes antiquae*. The structure and order of the collection is mainly followed as it is in five books of decretal compilations. Considering the sources, almost 90 % of chapters are taken from *Quinque compilationes antiquae*. General amount of chapters (1971) are divided into five books that are subdivided into 185 titles. The decretals of Pope Innocent III are widely represented in the amount of 638 chapters. 195 chapters belong to the authorship of Pope Gregory IX. According to Martin

86); (Bertram 2006, 1-44); (Wetzstein 2006, 355-391); (Reno 2011); (Nieuwenhuisen 2012, 136-158); (Bertram 2014)

³²⁹ (Reno 2011, 5)

³³⁰ Notwithstanding the fact that Pope Innocent III was the first to promulgate official collection of decretals, the approach according to which Roman Pontiff authorizes the collection in order the latter is to be perceived "canonical" and official, is a tribute to Pope Gregory VII and the 17th canon of the well known *Dictatus papae* saying that no book is to be considered canonical without pontifical confirmation.

³³¹ This aim was clearly declared by Pope Gregory IX in his bull *Rex pacificus* dated by the 5th of September, 1234. On that very day in Spoleto, where the curia made the stop on the way from Rieti to Perugia, the famous *Rex pacificus* papal bull was released, which is also an introduction to the collection. This bull was nothing else but a papal mandate, which forbade to use prior collections in the universities, courts and schools, that had to be replaced by the new one. The collection did not receive the original title; the title used in the papal bull *Rex pacificus hec compilatio* duplicated the one used by Bernard of Pavia, Pope Innocent III and Honorius III. This also shows that this collection demonstrated continuity of tradition and was rendered within the formal characteristics of canonistic collections. The title *Liber Extra (vagantes)* is rooted in the Middle Ages, but this name of the collection has become popular only in modern times. (Bertram 2002, 63)

Bertram, who renewed the list of the manuscripts of *Liber Extra*,³³² there are 675 manuscripts that are fully preserved and available nowadays. Therefore, taking into account the number of surviving manuscripts, the collection of *Decretales* is the most famous law book of the middle Ages. As mentioned above, 195 chapters belong to Pope Gregory IX; one part of this bulk of letters is taken from the first 12 years of pontificate, while the other part was written specifically for the Gregorian decretal collection.³³³ The first book *iudex* includes, according to the study dedicated to Pope Gregory's influence on the mendicant order,³³⁴ 64 decretals of Pope Gregory IX, out of which approximately 30 have the features of directly formulated law texts. In the second book *iudicium*, there are 45 decretals, 1/3 of which have the character of directly formulated law texts. In the third *clerus* – 18 texts out of 41 Gregorian texts are law excerpts; in *connubia* there are 10 Gregorian decretals; *crimen* encompasses 35 chapters.

³³² (Bertram 2014)

³³³ (Maleczek 2011, 134)

³³⁴ (Maleczek 2011, 134-135)

5.2 Pope Gregory IX

Notwithstanding the fact that only about 10 % of the general amount of decretals belongs to the authorship of Pope Gregory IX,³³⁵ it appears reasonable to pay some attention to his personality and his pontificate. Hugolinus of Segni³³⁶ was born in Anagni in about 1170. He was originally coming from the surrounding of the barons of Campagna and was the son of an influential feudal lord from the line of Segni earls. The third grade of consanguinity to Pope Innocent III can be neither proved, nor denied. Hugolinus of Segni has studied in Paris, where he dedicated his time to liberal arts and theology. It can not be proved though the fact that he was surely studying Canon law in Bologna; this fact is taken retrospectively considering his legal activity during his career³³⁷. He received his appointment as papal legate and soon became a papal chaplain. In 1198 he was employed by Pope Innocent III to be *auditor causarum*. He was as well the first cardinal-protector of Franciscan order. The next day after the death of Pope Honorius III on the 19th of March, 1227 Hugolinus, Bishop of Ostia and Velletri, was elected the Pope.³³⁸ One year later, in 1228-1229, Dominican Raymund of Penyafort accompanied Cardinal Johannes de Abbeville during his Spanish legation as preacher and penitentiary, afterwards following him to curia, where he got to be introduced by Johannes de Abbeville to Pope Gregory IX. The latter had already decided to reorganize the decretals; it seems the Pope found the right person for implementing this

³³⁵ (Brem 1911); (Maleczek 1984); (Maleczek 1985); (Maleczek 2011)

³³⁶ He always called himself Hugo. (Brem 1911)

³³⁷ His role in papal curia during the pontificate of Pope Innocent III was quite essential. In 1206 he was promoted to a Cardinal Bishop of Ostia. While being in this office he was a legate to Germany in 1207 and 1209. From this time on Hugolinus was one of the most privileged counselors of Pope Innocent III. Role of Hugo became even more influential during the pontificate of Pope Honorius III. The Pontiff delegated him to Pisa, Genoa, Lucca and Volterra in 1217; by the end of the same year Hugolinus had returned back to Rome. In 1218 Hugo was back to the Northern Italy in order to recruit the nobility for the crusade, to settle peace and to arrange church concerns. The next mission to Italy took place in 1221. Pope Honorius III was very content of cardinal's diplomatic skills. (Maleczek 2011, 129-131)

³³⁸ (Schulte 1877, 3-7); (Maleczek 1984, 126-133)

task. It was a Dominican Raymund of Penyafort, who shortly after his acquaintance with the Pope became papal penitentiary.

5.3 Raymund of Penyafort

Raymund of Penyafort was born in about 1180 in the noble family at Vilafranca del Penedès (by Barcelona). He was closely related to the conte of Barcelona and probably also to the king of Aragon. He visited the cathedral school in Barcelona where he obtained his *trivium* and *quadrivium*. He studied law in Bologna, where he visited the lectures of professors whose names had been known by that time, including Tancred, Petrus de Vigne, Sinnebaldo Fieschi (Innocent IV), Rolandus of Cremona, etc. He remained in Bologna on order to continue working in the field of canon law, but from that moment on as a professor. In 1218 Beranger de Palou came to Barcelona hoping to meet St. Dominic. In Barcelona he got acquainted with Raymund; as a result, both of them left Bologna for Viterbo at the end of October, 1219 united by a common wish – to meet St. Dominic, who resided by a pontifical curia of Pope Honorius III. By that time Raymund had already been a provost of the cathedral of Barcelona. Beranger and Raymund gathered several brothers around them and started their journey to Viterbo, where they arrived at the beginning of 1220. Raymund abandoned secular clergy in order to join the Dominican order. His *Summa iuris canonici*, written during his career in Bologna as *professor iuris canonici* in 1221, had not gained recognition, as distinct from the *Summa de poenitentia* which was successful in Barcelona. The *Summa de poenitentia* was the work that made its author one of the most prominent canonists of his time.³³⁹

Raymund of Penyafort was commissioned by Pope Gregory IX to compose the collection that became a turning point and a milestone document for development of a distinct period of medieval canon law creating the *new law*.

³³⁹ (Bertram 2002, 63)

5.4 The *Liber Extra*

In *Liber Extra* there are in general 25 decretals dedicated to engagement, not taking into account cases that deal with consanguinity and affinity matters. The provenance of the decretals predominantly belongs to papal chancery (the authorship of Popes St. Hormisdas,³⁴⁰ St. Eugenius,³⁴¹ Alexander III,³⁴² Urbanus III,³⁴³ Clemens III,³⁴⁴ Innocent III,³⁴⁵ and Gregory IX³⁴⁶); there is one decretal coming from St. Augustine of Hippo³⁴⁷ and one from the *Brocarda*.³⁴⁸ Considering the chapters of papal chancery provenance, it might be concluded that the majority of chapters belong to the chancery of Pope Alexander III (12 chapters): 7 chapters are to be found under first title *De sponsalibus et matrimoniis*;³⁴⁹ 4 are encompassed in the second *De desponsatione impuberum*;³⁵⁰ 1 in the fourth title *De sponsa duorum*.³⁵¹

5.4.1 St. Augustine *Duobus modis* [X 4, 4, 1]

St. Augustine's authorship of *Duobus modis*³⁵² was questioned by Huguccio in his *Summa decretorum*.³⁵³ Notwithstanding his doubt, Huguccio appreciated those words of the bishop

³⁴⁰ X 4, 2, 1 (Fr. 673-674)

³⁴¹ X 4, 1, 3 (Fr. 661-662)

³⁴² X 4, 1, 2 (Fr. 661); X 4, 1, 4 et 5 (Fr. 661-662); X 4, 1, 7-8 (Fr. 663-664); X 4, 1, 10 (Fr. 664); X 4, 1, 15 (Fr. 671-672); X 4, 2, 4-5 (Fr. 673-674); X 4, 2, 7-9 (Fr. 675-676); X 4, 4, 3 (Fr. 679-680)

³⁴³ X 4, 2, 11 (Fr. 676)

³⁴⁴ X 4, 2, 12 (Fr. 677)

³⁴⁵ X 4, 1, 22 (Fr. 671-672); X 4, 2, 13 et 14 (Fr. 677-678)

³⁴⁶ X 4, 1, 29 (Fr. 671); X 4, 1, 31-32 (Fr. 671-672)

³⁴⁷ X 4, 4, 1 (Fr. 679-680)

³⁴⁸ X 4, 4, 2 (Fr. 679-680)

³⁴⁹ X 4, 1, 2 (Fr. 661); X 4, 1, 4 et 5 (Fr. 661-662); X 4, 1, 7-8 (Fr. 663-664); X 4, 1, 10 (Fr. 664) X 4, 1, 15 (Fr. 671-672)

³⁵⁰ X 4, 2, 4-5 (Fr. 673-674); X 4, 2, 7-9 (Fr. 675-676)

³⁵¹ X 4, 4, 3 (Fr. 679-680)

³⁵² *Contrahens successive per verba de praesenti cum duobus, tenetur adhaerere primae. Si autem primo contraxit per verba de futuro, secundo per verba de praesenti, adhaerebit secundae. Augustinus de fide pactionis et consensus. Duobus modis dicitur fides pactionis, et consensus. Si aliquis alicui mulieri fidem fecerit pactionis, non debet aliam ducere. Si aliam duxerit, poenitentiam debet agere de fide mentita: maneat tamen*

of Hippo as those words which had led to the truth.³⁵⁴ *Duobus modis* made its way to *Decretum Magistri Gratiani* and was added to a later edition of this *opus magnum* as *palea*. This excerpt was important not only for Gratian and Bernard of Pavia (as this excerpt was included in *Compilatio I*, through which it was overtaken by Raymund of Penyafort to *Liber Extra*); but also for commentator of *Decretum*, namely Huguccio. The latter referred to *Duobus modis* multiple times while commenting on engagement and marriage matters in his *Summa*. For Bernard of Parma *Duobus modis*, unlike for Huguccio, did not present a significant interest, but there were some comments on it.

According to St. Augustine, there are two kinds of conjugal contracts: *fides pactionis* et *fides consensus*. If someone gives a woman *fidem pactionis*, he should not take another woman. However, if he does so, she may stay, and he is expected to be penalised for the broken vow *sed agat poenitentiam de fide mentita*. If *fidem consensus* is given, he should not marry another woman. If he does so, though, the second woman should be abandoned and he should stay with the first one. *Fides pactionis* is a mere promise that a man will take certain woman as a wife. *Fides consensus* takes place when the couple mutually consents to marry in the present tense. A stronger bond solves a weaker one: conjugal contract for the present *fides consensus* resolves previous promise to contract a marriage e.g. *fides pactionis*.³⁵⁵

cum illa, quam duxit. Non enim rescindi debet tantum sacramentum. Si autem fecerit fidem consensus, non licet aliam ducere. Si autem duxerit, dimittet eam, et adhaerebit priori. Est autem fides pactionis, quando aliquis promittit fidem alicui, quod eam ducet, si permiserit ei rem secum habere, vel etiam pro consensu. Fides autem consensus est, quando, etiamsi non stringit manum, corde tamen et ore consentit ducere, et mutuo se concedunt unus alii, et mutuo se suscipiunt. X 4, 4, 1 (Fr. 680)

³⁵³ Sed dubitabant quidam an ista verba sint Augustini inveniuntur... . *Summa*, C. 27 q.2 fol. 347 v

³⁵⁴ ... sed a quocumque veritas proferatur amplexanda est *Summa*, C. 27 q.2 fol. 347 v

³⁵⁵ CASUS. Augustinus in capitulo isto ostendit, quod fides coniugal contractus duplex est. Est enim fides pactionis, et fides consensus. Si aliquis dedit alicui mulieri fidem pactionis, non debet aliam ducere, si autem duxerit, valet, sed agat poenitentiam de fide mentita. Si autem fidem consensus, non debet aliam ducere, et si duxerit, dimittat illam, et adhaerebit priori. Est autem fides pactionis, quando aliquis promittit alicui mulieri quod eam ducet, si permiserit cum rem secum habere, vel etiam pro consensu. Fides autem consensus, quando per mutuum consensum de praesenti adinvicem consentiunt, et mutuo se suscipiunt. Nota quod duobus modis dicitur fides pactionis, scilicet et consensus. Item adveniente fortiori vinculo rumpitur minus fortius. Item post sponsalia de praesenti non debet quis contrahere, et si contrahat, debet redire ad primam. Gl. ad X 4, 4, 1 [1595: 1040]

Augustinian concepts of *fides pactionis* and *fides consensus* distinguished between a mere promise *fides pactionis* and a vow *fides consensus*. In other words, promise, as well as oath, should not be broken as they both are binding. The only difference between both kinds of contract is that they have different levels of indissolubility: the first one, *fides pactionis*, has no consequences in case if it has been broken besides penitence, whereas the second one, *fides consensus*, has a constant value and, if broken, another conjugal bond may not be contracted.

Anonymous commentator clearly defines *fides pactionis et fides consensus* as relatively *desponsatio de futuro et de praesenti*.³⁵⁶ *Fides pactionis (desponsatio de futuro)* is defined as a promise for the future to marry, whereas *fides consensus*, even though without an engagement ring given as a sign of mutual love which might be a tradition to some places, binds the heart with the mutual agreement to marry in the present tense.³⁵⁷ In his commentary Bernard of Parma refers to the *Decretum* (C.30 q.5 c.7) and to the exchange of engagement rings, which is not obligatory in betrothal for the present as this tradition is locally dependent.

In sum, both contracts are binding because breaking of any of those has certain consequences. The contract for the future should not be broken as the contract for the present; moreover, both contracts see marriage as the consequence. The constitutive difference between those two engagements is that penalties for breaking the promise (in case of *desponsatio de futuro*)/ the vow (in matter of *desponsatio de praesenti*) are varying. The penalty *per se* for breaking the promise suffices by having no consequences for further contracting with another partner, whereas the penalty for breaking the oath is a prohibition

³⁵⁶ Pactionis, hoc est dicere, una est fides desponsationis de futuro, et altera consensus de praesenti. Gl. ad X 4, 4, 1 [1595: 1040]

³⁵⁷ dilectionis est, vel forte alludit consuetudini alicuius loci. Ber[nardus] Gl. ad X 4, 4, 1 [1595: 1040]

to marry another partner. There is also one more essential difference, the first bond does not maintain consent in itself, whereas the second one does. This might be the key element that differentiates two kinds of engagement – for the future and for the present. Anonymous glossator clearly and definitely determines *fides pactionis* for betrothal for the future, and *fides consensus* as engagement for the present. Exchange of the rings does not seem to be of utmost importance for Bernard of Parma in contracting engagement for the present. Nothing at all was mentioned about dowry and subarrhation; in a way, traditional and ceremonial part of the betrothal did not draw attention of commentators, as well as it appears not to be a focus of interest for St. Augustine of Hippo in his prominent *Duobus modis*.

5.4.2 *Ex Brocardo Accepisti* [X 4, 4, 2]

The case of *Accepisti* [X 4, 4, 2]³⁵⁸ is a logical continuation of *Duobus modis*, as it is dedicated to the prohibition to marry somebody else's bride, who became a bride through a present tense contract.³⁵⁹ If someone still marries the bride of another person, he is expected to abandon her and to be penalised for 40 days. The marriage between a man and somebody else's bride is from the very beginning not valid, and it does not gain any validity with time.³⁶⁰ According to *Accepisti* [X 4, 4, 2], as well as following *Duobus modis* [X 4, 4, 1] engagement for the present is the bond which is practically indissoluble. The commentator refers to Augustinian *Duobus modis* [X 4, 4, 1] deliberately, alluding in this way to a binding

³⁵⁸ Ponit Et si non stringit manum, forte per annuli immissionem 30 q.5 *Femine* [C.30 q.5 c.7] Cum enim stringit manum, signum poenitentiam illius, qui alterius sponsam de praesenti sibi accepit in uxorem: nec unquam in uxorem eam habere potest, h.d. iuxta litteram. Accepisti illam in uxorem tibi quam alter sibi desponsatam habuerit. Dimitte illam, quia nunquam potest tibi fieri legitima, et XL. dies in pane et aqua, quod carinam vocant, cum septem sequentibus annis poeniteas. X 4, 4, 2 (Fr. 680)

³⁵⁹ Desponsatam, per verba de praesenti, ut supra capitulo proximo [X 4, 4, 1]. Gl. ad X 4, 4, 2 [1595: 1041]

³⁶⁰ CASUS. Si aliquis contraxerit cum aliqua, qua sit alteri desponsata per verba de praesenti, illam dimittat, quia eius uxor esse non potest, et xi. Dies poeniteat. Nota quod ab initio non valet, tractu temporis non conualescit. Gl. ad X 4, 4, 1 [1595: 1041]

legal power of engagement for the present tense, which in Augustinian model is called *fides pactionis*.

5.4.3 Pope Hormisdas *Tua fraternitas* [X 4, 2, 1]

The letter of Pope Hormisdas is dedicated to the question of free will in marital contracts. Pope Hormisdas distinguishes between coercion in minor and adult age: being minors sons and daughters are subjects to parental will, unlike in adulthood, when they are not to be compelled by their families to contract marital unions. Coercion is absolutely excluded in case when betrothal has been contracted between adults. Bernard of Parma comments extensively on phenomenon of assent. He refers to instances from Roman law considering it not a free consent, but rather a one “freed” from the parental coercion. Examples in glossa taken from the *Liber Extra* are making their point to a certain degree in the same direction as Roman law instances do – consent of two adults, who are contracting parties, should not be under coercive power of their families.³⁶¹ Following the letter of Pope Hormisdas to bishop Eusebius,³⁶² the father wants that his son contracts with certain woman; the son (who is by that time adult) is unwilling to do so. It is asked if the father may compel him. If the son has not consented to this union, his father cannot compel him. If the son is not adult at the moment of contracting, his father may contract marital union of his son with whomever

³⁶¹ Consentit, si coactione paterna ductus consentiret in aliquam, quam alias non esset ducturus, eam voluisse videtur, et est matrimonium ff *De ritu nuptiarum*. Si patre [D. 23, 2, 22] cogi tamen non debet, ff *Eodem*. [De ritu nuptiarum]. Non cogitur [D. 23, 2, 21] C. *De nuptiis*. Ne filium [C. 5, 4, 12] nec potest eum compellere invitum ff *De spon[salibus]*. Filio familias [D. 23, 1, 13], quia invitae nuptiae difficiles exitus consueverunt habere, supra ti[tulo] prox[imo] *Requisivit* [X 4, 1, 17], et 31 q.2.1 [C.31 q.2 c.1] secus videtur de filia secundum leges, nam illa contradicere non potest, nisi pater dederit ei turpem, vel moribus suis indignum ff *De spon[salibus]*. Sed quae patris [D. 23, 1, 12pr] secus tamen secundum canones [Neque est a sanctione canonum recedendum, quicquid leges civiles iubeant] supra ti[tulo] prox[imo] *Cum locum* [X 4, 1, 14] et 27.q.2. *Sufficiat* [C.27 q.2 c.2]. Ber[nardus] Gl. ad X 4, 2, 1 [1595: 1029]

³⁶² Pater pro filio impubere sponsalia contrahit, pro pubere vero non, nisi consentiat. Hormisda Eusebio episcopo. *Tua fraternitas* requisivit de filio adulto, quem pater matrimonium vult contrahere, si sine voluntate adulti filii facere potest. Ad quod dicimus, si aliquo modo non consentit filius, fieri non posse. Potest autem filium nondum adultum (voluntas cuius discerni non potest) pater, cui vult matrimonio tradere. Et postquam filius pervenerit ad perfectam aetatem, omnino debet hoc adimplere. X 4, 2, 1 (Fr. 672)

he wishes, as on the ground of minor age the son is not yet able to discern. Nonetheless, after arrival to the legitimate age, he may ratify his father's decision if he wishes so, but he may not be compelled after arriving to legitimate age. It has been noted that free will should be present in contracting marital bonds, though if the son is not adult, he is to be expected to be subject to his father's will. Equally, the father cannot compel his adult son to contracting either engagement or betrothal, but he may do so if his son has not yet reached legitimate age.

5.4.4 Pope Eugene III *Iuvenis* [X 4, 1, 3]

Engagement with the relative of the previous bride/groom and public honesty³⁶³ impediment was as well discussed in the *Liber Extra* in the decretals of the following Pope – Pope Alexander III. The latter held the engagement contracted until the age of seven as null; therefore, he accepted consequent marital bonds with relative on the ground of nullity of the previous union. Unlike Pope Alexander III, Pope Eugene III forbade any consequent marital unions with relatives of the previous bride/groom despite the minor age of contracting parties in their first betrothal. The age appears to be unimportant in this case for Pope Eugene III.

The decretal of Pope Eugene III to the prebyter Aesculap has not been dated yet. It is dedicated to Levitian barrier and public honesty matter. Following the content of the decretal, a certain young man contracted betrothal with a girl close to the age of seven without completing it with the intercourse. The groom has abandoned her before she

³⁶³ Affinity that has arisen when one of the partners has carnal relations with the relative of the other. If one of contracting parties was willing to betroth/marry a blood relative of the other, the canon law perceived it as an impediment to the upcoming engagement/marriage. Marrying a mother of the bride was seen as a scandal, therefore this impediment acquired a name of *public honesty*. (Donahue 2008: 31)

consented to the contract after reaching the age of seven. The man married (according to the text of the decretal he contracted marriage; following the commentary, a relative was only a bride)³⁶⁴ a relative of his previous bride. The question is if the man may remain with his wife who is a relative to his previous bride. The response is that they are to be separated on the ground of public dishonesty. It appears to be certain that union between a relative of the previous bride and the man is to be dissolved.³⁶⁵ Commentator reminds the reader about similar cases *Litteras tuae fraternitatis* [X 4, 2, 4] *Accessit ad praesentiam* [X 4, 2, 5] treated by Pope Alexander III, where those were responded as opposite – engagement contracted prior to the age of seven were held null and subsequent marriages with relatives were allowed. But there is also a possibility that a bride consented after her arrival to the age of seven; in this case the engagement was legally contracted and all subsequent marriages with her relatives were excluded.³⁶⁶

There is as well another point to consider: the age of the previous bride as the one who has not yet reached the age of seven *qui [iuvenis] puellam nondum septennem duxit*. Neither the Pope, nor the commentator speak about proximity to the age of seven as equal to the actual age of discretion, but this practice of equalising approximate age to the actual one was seen

³⁶⁴ Coniux, id est sponsa. Gl. ad X 4, 1, 3 [1595: 1012]

³⁶⁵ Si maior septennio duxit in uxorem minorem septennio, et eam traduxit ad domum, oritur ex tali contractu publicae honestatis iustitia. Eugenius Papa. Iuvenis *ille*, qui puellam nondum septennem duxit, quamvis aetas repugnaret, ex humana tamen fragilitate forsitan tentavit quod complere non potuit. Quia igitur in his, quae dubia sunt, quod certius existimamus tenere debemus, tum propter honestatem ecclesiae, quia ipsa coniux ipsius fuisse dicitur, tum propter predictam dubitationem, mandamus *tibi*, quatenus consobrinam ipsius puellae, quam postmodum duxit, divides ab eodem. X 4, 1, 3 (Fr. 661); JL 9655 (6685)

³⁶⁶ Dubia, Quia ex toto ante septennium ducta fuit, et post vii. annum non consensit, vel ante recessit, res non est dubia, sed certa, quia non impeditur matrimonium cum consanguinea, etiam cum matre infra tit[ulo] proxi[mo] *Litteras* [X 4, 2, 4] et c. *Accessit* [X 4, 2, 5], si post septimum annum consensit, sponsalia tenuerunt, et ita non est res dubia, infra eodem *Sponsam* [X 4, 1, 8], et infra tit[ulo] proxi[mo] *Continebatur* [X 4, 2, 6]. Si vero Solut .. (?) Sic intellige, puella istapost vii. annum non consensit, vel non constabat de consensu, quia statim recessit ab eo, vel mortua est, verumtamen, quia tentavit forsitan quod complere non potuit, praesumitur quod erat doli capax, sive quia malitia supplebat aetatem quo ad sponsalia, sicut supplet malitia quo ad matrimonium infra tit[ulo] proxi[mo] *De illis* [X, 4, 2, 7], et c. ult[imo] *[Tuae nobis exhibitae]* [X 4, 2, 14] unde propter hoc dubium, tumquam hoc plene hoc plene non constabat, tum etiam propter honestatem ecclesiae, non potest habere consobrinam illius, infra c[apitulo] proxi[mo] *[Ad audientiam]* [X 4, 1, 4] argumentum, alias non videtur, quod posset stare illa littera, si diceremus, quod post vii. annos consensit, ut dixit Tanc[redus], quia sic non esset res dubia. Gl. ad X 4, 1, 3 [1595: 1012]

in the decretals of the following Pope Alexander III. Be it so or not, in current decretal of Pope Eugene III proximity to the age of seven gives rise to impediment of public dishonesty when the same man is trying to marry the relative of his previous bride.

5.4.5 Betrothal decretals of Pope Alexander III in the *Liber Extra*

³⁶⁷ 7 out of 12 discussed Alexandrine decretals, dedicated fully or partially to engagement, were distributed in the frame of Dauvillier's periodisation of 47 decretals of Pope Alexander III, which was revised by Charles Donahue.³⁶⁸ 4 decretals³⁶⁹ were dated and ascribed to "solemnity period" (1173-1177) and 3³⁷⁰ to "definitive period" (1177-1181). There have been multiple attempts made to enframe marriage decretals of Pope Alexander III into a certain pattern.³⁷¹ There are some other claims in discussing marriage doctrine, some of which present Pope Alexander III as a creator of medieval Christian law of marriage,³⁷² whereas others do not view *Alexandrine legislation on matrimony* as entity.³⁷³ It could be confidently asserted that despite all the opposite evaluations of Alexandrine marriage decretals, there is no traceable pattern of papal doctrine that would seem right and applicable to every issue throughout 12 decretals discussed below. Papal flexibility and practical mind treats every single issue separately, moving from case to case.

Extensive attention is geared on betrothals for the future. Those can be easily resolved by mutual consent of spouses,³⁷⁴ if it happens that one of them abandoned the country for

³⁶⁷ X 4, 1, 4 (Fr. 661); X 4, 1, 7 (Fr. 663); X 4, 2, 4-5 (Fr. 673-674); X 4, 2, 7-8 (Fr. 675), X 4, 4, 3 (WH 620(a)

³⁶⁸ (Donahue 1982)

³⁶⁹ X 4, 1, 7 (WH 439); X 4, 2, 4 (WH 631); X 4, 2, 5 (WH 12); X 4, 4, 3 (WH 620(a)

³⁷⁰ X 4, 1, 4 (WH 41 (a)); X 4, 1, 10 (WH 442); X 4, 2, 8 (WH 4(a)

³⁷¹ (Dauvillier 1933); (Donahue 1976); (Donahue 1982)

³⁷² (Brundage 1986, 59)

³⁷³ (Duggan 2012, 404)

³⁷⁴ X 4, 1, 2 (Fr. 661)

considerable amount of time,³⁷⁵ taken that at the moment of dissolving engagements both reached the age of adulthood.³⁷⁶ Going through decretals, might have given a doctrinal pattern of Pope Alexander III, but there is at least one letter where betrothal for the future contracted by parents for their children should be compelled by papal decision in order to proceed to marriage.³⁷⁷ Levitian barrier and public honesty impediment play an important role in all the engagement decretals treated by Pope Alexander III. The Pope does not always respond negatively to contracting with relatives of the previous partner – the age of the contracting parties in the first union is what makes the entire difference in papal responses. Levitian barrier impeedes contracting further marital unions with relatives of one of the partners.³⁷⁸ Age plays the determining role in those cases: the engagements contracted at the minor age (prior to the age of seven) are always considered in Alexandrine decretals to be null. Those betrothals depending on the age of the contracting parties (before or after age of seven) either might or might not respectively give rise to public honesty impediment.³⁷⁹ Betrothal for the present has, according to Alexandrine perception of Christian engagement, priority over betrothal for the future. The latter followed by intercourse, though, is seen as not only binding, but as well strictly indissoluble.³⁸⁰

5.4.5.1 *Praeterea* [X 4, 1, 2]

For Pope Alexander III betrothal for the future seems to be a union which could be easily dissolved, taken that it has been contracted “purely” – without any condition. It is literally claimed by Pope Alexander III that dissolving of this engagement may be tolerated *hoc*

³⁷⁵ X 4, 1, 5 (Fr. 662)

³⁷⁶ X 4, 2, 7-8 (Fr. 675-676)

³⁷⁷ X 4, 1, 10 (Fr. 664)

³⁷⁸ X 4, 1, 4 (Fr. 661)

³⁷⁹ X 4, 1, 7-8 (Fr. 663-664); X 4, 2, 4-5 (Fr. 673-674)

³⁸⁰ X 4, 1, 15 (Fr. 671-672)

possit in patientia tolerari. This phrase shows neither betrothal for the future as being binding, nor being a contract to be dissolved easily. What it does, though, is to merely open a possibility to tolerate dissolving of betrothal for the future. Yet it is far too courageous to claim that betrothal for the future is to some extent less important in comparison to engagement for the present. In the discussion of the following cases it will become clear that even betrothal for the future has a capacity to impede further unions, e.g. in the context of marrying the relative, which is banned through Levitical barrier.

Praeterea [X 4, 1, 2]³⁸¹ was wrongly ascribed to Pope Innocent III, while in fact it was addressed from Pope Alexander III to the bishop of Exeter. According to this decretal those, who contracted betrothal for the future without any condition, may dissolve their engagement if they do not want to proceed with marriage. An anonymous commentator alleged to the *Decretum*³⁸² in order to confirm his point that betrothal contracted without any condition may be as well solved on the unconditional ground.

In the glossa: *sine conditione promittuntur, sine conditione solvuntur*³⁸³

In the *Decretum*: *nulla condicione rumpenda sunt, que sine ulla condicione uouerunt*³⁸⁴

³⁸¹ Sponsalia de futuro dissolvuntur, si sponsi se dissolvunt, etiamsi fuerint iurata. Innocentius III [Alexander III] Exonensi Episcopo. *Praeterea* hi, qui de matrimonio contrahendo pure et sine omni conditione fidem dederunt [aut] iuramentum fecerunt, commonendi sunt et diligentius exhortandi, et modis omnibus inducendi, ut praestitam fidem vel iuramentum factum observent, et se, sicut promiserint coniugant. Si autem se adinvicem admittere noluerint; ne forte deterius inde contingat, ut talem scilicet ducat, quam [semper] odio habet; videtur, quod ad instar eorum, qui societatem iuramento vel interpositione fidei contrahunt, et postea eandem sibi remittunt, hoc possit in patientia tolerari. X 4, 1, 2 (Fr. 661) JL 13903 (8967)

³⁸² Non solum mechandum non est, (quod faciunt quidam, sed omnis, qui dimittit uxorem suam, et ducit alteram, etsi propterea duxerit, ut Christianam faciat,) sed etiam quisquis non alligatus uxori continentiam Deo uouit, nullo modo debet ista compensatione peccare, ut ideo credat uxorem sibi esse ducendam, quia promisit que nuptias eius appetit, futuram se esse Christianam. Quod enim cuiquam ante, quam uouisset, licebat, cum id se numquam facturum uouerit, non licebit: si tamen id uouerit, quod uouendum sit, sicuti est perpetua uirginitas, uel post experta conubia solutis a uinculo coniugali uidualis castitas, seu ex consensu uouentibus et carnalia debita sibi inuicem relaxantibus fidelibus castisque coniugibus (quod alterum sine altera, uel alteram sine altero uouere fas non est) iugis continentia. Hec ergo, et si qua alia sunt, que rectissime uouentur, cum homines uouerint, nulla condicione rumpenda sunt, que sine ulla condicione uouerunt. C. 32 q. 8 c. UN (Fr. 1147-1148)

³⁸³ ... sine conditione promittuntur, sine conditione solvuntur 32. q. ult[imo] c. ult[imo] [C.32 q.8 c. UN] et 22. q.4 inter cetera [C.22 q.4 c.22]. Gl. ad X 4, 1, 2 [1595: 1011]

From those two citations it may be clearly seen that attention is not focused on mutual consent in contracting and dissolving engagement for the future, which might be expected. The attention of the glossator is focused on absence of the condition. Condition-free contract is easier to be dissolved, though under no circumstances might it be perceived as a non-binding union.

Another reference to *Inter cetera* [C.22 q.4 c.22] from the *Decretum* is not necessarily relevant to unconditional betrothal, but it rather speaks about unlawful oaths.

The commentator brings up one decretal under the same title – *Ex litteris venerabilis* [X 4, 1, 10] – of Pope Alexander III to the bishop of Poitiers, advising to compel to promised marriage; and two – *Requisivit* [X 4, 1, 17] of Pope Lucius III to the bishop of Rapallo and *Praeterea* [X 4, 1, 2]³⁸⁵ of Pope Alexander III to the bishop of Exeter, advising that to warn is better than to compel and no compelling at all, respectively. These examples are quite relevant to the planned arguments. Commentator closes his discussion referring to the decretal he comments on – *Praeterea*, by which he confirms that betrothals for the future contracted “purely” (without any preconditions) can be solved as well as those which are condition-free. Therefore, according to the text of decretals together with added commentaries, betrothal for the future, even together with an oath, may be easily dissolved in a way it was contracted, id est without any condition. Decretal mentions promise and vow to the union, but neither Pope Alexander III, nor the commentator seem to be concerned with consent.

³⁸⁴ C. 32 q. 8 c. UN (Fr. 1147-1148)

³⁸⁵ Inducendi, et etiam compellendi si iurassent infra eodem *Ex litteris* [X 4, 1, 10] propter periculum iuramenti, argumentum contra eodem *Requisivit* [X 4, 1, 17] et solvitur ibi. Sed contra videtur infra eodem capitulum. Gl. ad X 4, 1, 2 [1595: 1011]

5.4.5.2 *Ad audientiam* [X 4, 1, 4]

Unlike previous decretal, current one discusses engagement for the future with a given precondition. In *Ad audientiam* [X 4, 1, 4], the decretal addressed to the bishop-elect of Pavia³⁸⁶ named Lanfranc in c.1178,³⁸⁷ Hugo, an inhabitant of Pavia, had promised that if he could not marry his daughter to one of the sons of fellow Pavian named Landacon, he would marry her to the other Landacon's son. After the espousals were made with the first son, an objection was raised. As a result, Hugo, as promised before, attempted to give his daughter to another Landacon's son, a half brother of the first. Pope Alexander III forbade the second union, as the Scripture does not allow a brother to marry his brother's spouse. Hugo was supposed to be punished for an illicit vow. This decretal serves as a brilliant instance of betrothal for the future, which, at the first sight might be seen as a mere promise. Despite this fact, it has a capacity to ban the subsequent marriage to a relative of the first groom. In decretals of Pope Alexander III transition between engagement and marriage is not always clearly stated. This decretal is also an example of a limited clarity as to whether marriage or engagement is at the core of the papal letter. In this matter it seems reasonable to turn to a comentator who remarks a kind of union Pope Alexander III discusses in his decretal. In the first part of *Ad audientiam* the word *uxor*, not *sponsa*, is used, while describing the case. It is

³⁸⁶ Ex sponsalibus, contractis cum consanguinea, oritur publicae honestatis iustitia. Ad audientiam nostri apostolatus pervenit, quod, quum H. Albericus, Papiensis civis, filiam suam cuidam filiorum L. dare vellet uxorem, iuravit, quod, si ille, cui desponsabatur, eam habere casu aliquo interveniente non posset, alteri filio, quem de alia uxore genuerat, eandem puellam matrimonio copularet. Contractis autem a filio priore sponsalibus, quidam, ad ecclesiam accedentes, consanguinitatem inter eos esse iuramentis interpositis firmaverunt. Ideoque praefatus H. eandem feminam dare alteri filio nititur, ut iuravit. Sed quoniam scriptum est, quod sponsam fratris frater habere non potest, discretioni tuae per apostolica scripta praecipiendo mandamus, quatenus eum suum implere propositum, quod canonicae rationi obviat, non permittas, sed ut poenitentiam agat de illicito iuramento, monitione praemissa, ecclesiastica districtione compellas. X 4, 1, 4 (Fr. 662); JL 13137 (8613); WH 41 (a) 1180

³⁸⁷ X 4, 1, 4 (Fr. 662); Lanfranco electo Papiensi, scribit de filia Hugonis Albertii (al. Alberici) Comp. 4, 1, 1; X 4, 1, 4 JL 13137 (8613)

Alex. III papiensie ep. (al. I Papien. electo) : mandat, quatenus H(ugonem) Alberici, Papiensem civem, qui cum filiam suam cuidam filiorum L(andacon) dare vellet uxorem, iuravit, quod, si ille cui desponsabatur, eam habere casu aliquot interveniente non possit, alteri filio, quem de alia uxore genuerat, eandem puellam matrimonio copularet, suum implere propositum, quod canonicae rationi obviat, non permittat, sed, ut poenitentiam agat de illicito iuramento, ecclesiastica districtione compellat. It. pont. 6, no. 48

only at the end of the letter that *sponsa* appears in the conclusive part where it says “*quod sponsam fratris, frater habere non potest*” Leviticus. [18:16].³⁸⁸ It is a reference to *Decretum*, where *uxor* and *sponsa* are used synonymically. Therefore, one may confer that Pope Alexander III meant engagement, not marriage, and used *uxor* in the same way Gratian did in relevant chapters.³⁸⁹ It appears reasonable to note that the age of the parties was not mentioned in the text of decretal and does not seem to be important in this issue, unlike in further cases of similar content that are part of the *Liber Extra* and which were used by the comentator in the glosses to this papal letter. It may well be said that the commentator goes beyond the content of the letter by specifying the age factor.

This decretal played a prominent role four centuries later in solving Henry VIII's first marriage with his wife Catherine of Aragon in favor of his mistress Anne Boleyn, as Catherine of Aragon has been prior betrothed and married to Henry's brother Arthur, who

³⁸⁸ Vide Levit. c. 10 & Matt. c. 14 sed haec non de sponsa verum de uxore fratris loquuntur, forte ergo respexit Papa hic ad illa decreta, quae assert Gratianus C.27 q.2 c.10-14. Gl. ad X 4, 1, 4 [1595: 1012]

³⁸⁹ Item in eodem. [lib. et capite] Omne itaque nuptiarum bonum inpletum est in illis parentibus Christi, fides, sacramentum, proles. Prolem cognoscimus ipsum Dominum, fidem: quia nullum adulterium; sacramentum: quia nullum diuortium; solus ibi nuptialis concubitus non fuit, quia in carne peccati fieri non poterat sine pudenda concupiscentia carnis, que accidit ex peccato, sine qua concipi uoluit qui futurus erat sine peccato. Gratian. Item in Leuitico precepit Dominus Moysi, dicens: "Si quis sponsam alterius in agro oppresserit, morte moriatur, quia uxorem alterius uiolauit." §. 1. Item in legibus principum sponsa iubetur lugere mortem sponsi tamquam uiri sui. C.27 q.2 c.10 (Fr. 1065-1066)

Si quis desponsauerit sibi aliquam, et preueniente mortis articulo eam cognoscere non potuerit, frater eius non potest eam in uxorem ducere. C.27 q.2 c.11 (Fr. 1065-1066)

Item Gregorius Mauricio Imperatori, ob quendam comitem, qui nepotis sui mortui desponsatum duxit uxorem. Qui desponsatam puellam proximi sui acceperit in coniugium, anathema sit ipse, et omnes consentientes ei, quia

secundum legem Dei mori decernitur. §. 1. Nam diuinae legis mos est, sponsas appellare coniuges, ut in euangelio:

"Accipe Mariam coniugem tuam," et illud in Deuteronomio: "Si quis cuiuslibet hominis desponsatam puellam in agro uel in quolibet loco oppresserit, uel adduxerit in domum suam, moriatur, quia uxorem proximi sui uiolauit;" non que iam uxor erat, sed que a parentibus uxor fieri debebat. Et infra: §. 2. Sicut nulli Christiano licet de sua consanguinitate uel quam cognatus habuit in matrimonium assumere, ita et de consanguinitate uxoris suae. C.27 q.2 c.12 (Fr. 1065-1066)

Item Ieronimus. Additur aliud quartum legitimum coniugium. Dum mortua fuerit uxor cuiuslibet, licet illi accipere aliam, sed non repudiatam, nec desponsatam uiro, sed liberam; similiter et mulier debet. Unde et Paulus ait: "Mulier, que sub uiro est, ligata est sub lege uiri, quamdiu uiuit uir eius." Viro igitur uiuente uocabitur adultera, si iuncta fuerit alteri uiro. Si autem mortuus fuerit uir eius, liberata est a lege uiri ita, ut non sit adultera, si iuncta fuerit alteri uiro. C.27 q.2 c.13 (Fr. 1065-1066)

Item Gregorius. Si quis uxorem desponsauerit, uel eam subarrauerit, quamquam postmodum preueniente die mortis eius nequiuert eam ducere in uxorem, tamen nulli de consanguinitate eius licet accipere eam in coniugio, et si inuentum fuerit factum, separetur omnino. C.27 q.2 c.14 (Fr. 1065-1066)

died five months after the marriage ceremony. It was held that marriage with Arthur was not consummated. This prior betrothal and presumably unconsummated following marriage (it was asserted by the Henry's proponents, though, that marriage of Catherine and Arthur had not only been contracted and solemnized, but also consummated), impeded legality of subsequent marriage to Arthur's brother on the basis of public honesty (taken that the first union had not been consummated, it had been a mere betrothal) and affinity (if the carnal knowledge was the fact). In the relevant document *A Compendious Annotation of Such Points and Articles as Seemeth Most Vehemently to Impugn the Matrimony Between the King's Highness and the Queen's Grace*³⁹⁰ there is a clear reference to *Ad audientiam* in the sense that in this very decretal, despite the fact that the first union had only been an espousal, the principle taken from Leviticus bars the subsequent union.³⁹¹

In order to receive an entire picture of this papal letter to the bishop-elect of Pavia, it seems reasonable to look through the glosses to this decretal. The text of the decretal deals with two unions; apparently, with betrothals. Pope Alexander III does not seem to be distinguishing between espousals and matrimony, at least in this letter. Often, it is only from case to case when one is able to confer whether the letter considers betrothal or marriage.

³⁹⁰ ... that the brother may not marry his brother's wife. Which prohibition extendeth not only to that wife whom the brother hath carnally known, but also to that woman with whom the brother contracted spousals, although he never carnally knew her, he openly married her, like as the Pope manifestly declareth in the chapter *Ad audientiam* in the title *De sponsalibus et matrimoniis* where he writeth these words following "Scriptum est quod sponsam fratris frater habere non potest" understanding that not only when the brother still liveth, but also after his death. So as between the brother and the brother's wife, where espousals or matrimony hath been contract, and carnal knowledge hath ensued upon the same, be two impediments in the law of like strength and effect; that is to say, of the contract, *publica honestas*, and of the carnal knowledge, affinity. *Compendious Annotation*, (Kelly 2004, 69)

³⁹¹ Turpitudinem uxoris fratris tui non revelabis: quia turpitudine fratris tui est. Leviticus [18: 16]; Dicebat enim Ioannes Herodi: "Non licet tibi habere uxorem fratris tui" Mark [6: 18]. There is a possibility that Pope Alexander III was influenced by Gratian's *dictum* Item in Leuitico precepit Dominus Moysi, dicens: "Si quis sponsam alterius in agro oppresserit, morte moriatur, quia uxorem alterius uiolauit."C. 27 q.2 d.p.c.10, where Leviticus is cited by identifying *sponsa* and *uxor*. (Kelly 2004, 69)

Glosses to the decretal confirm the assumption that this decretal deals not with marriage, but rather with engagement. For instance, engagements that are null serve as an impediment to contract marriage with relatives of the nulled engagement parties on the ground of public honesty.³⁹² The mere presupposition that under certain circumstances Hugo may marry his daughter to the other Landacon's son is void per se, if one refers to the *Decretum*³⁹³ where it is claimed that the lady who has been betrothed to one should not marry any of her groom's relatives, no matter if the latter is alive or dead. In case it does happen, the parties have to be separated.³⁹⁴ The only possibility when the subsequent union with one of the family members is not to be banned and separated³⁹⁵ is when the engagement with the first party was made while this party was in the age less than 7, and by the moment of contracting with one of the family members has still not reached the age of seven.³⁹⁶ For discussing this issue three decretals should be referred to: two of Pope

³⁹² Nota, quod sponsalia quae nulla sunt, impediunt matrimonium contrahendum cum consanguinea alterius: sed hoc facit sola publicae honestatis iustitia. Gl. ad X 4, 1, 4 [1595: 1012]

³⁹³ Quod si ille, haec condition nulla fuit, ex quo desponsatur uni fratri, alius habere non potest 27. q.2 *si quis* [C. 27 q.2 c. 14] et cap. seq. [C. 27 q.2 c. 15]... Gl. ad X 4, 1, 4 [1595: 1012]

³⁹⁴ Item Gregorius. Si quis uxorem desponsauerit, uel eam subarrauerit, quamquam postmodum preueniente die mortis eius nequiverit eam ducere in uxorem, tamen nulli de consanguinitate eius licet accipere eam in coniugio, et si inuentum fuerit factum, separetur omnino. C. 27 q.2 c. 14 (Fr. 1065-1066)

Item Iulius Papa. Si quis desponsauerit uxorem uel subarrauerit, et siue preueniente die mortis, siue irruentibus quibusdam aliis causis minime eam cognouerit, neque superstes eius frater, neque ullus de consanguinitate eius eandem sibi tollat in uxorem ullo umquam tempore. C. 27 q.2 c. 15 (Fr. 1065-1066)

³⁹⁵ ... nisi forte ante septennium contracta essent sponsalia infra titulo proximo *litteras* [X 4, 2, 4] et c. *accessit* [X 4, 2, 5] et c. *duo pueri* [X 4, 2, 12] ... Gl. ad X 4, 1, 4 [1595: 1012]

³⁹⁶ Litteras tuae fraternitatis accepimus, ex quarum tenore perpendimus, quod, quum quidam *parochianus tuus A. nomine* esset perfectae aetatis, quondam puellam in cunabilis desponsavit; procedente vero tempore *idem A.* matrem puellae cognovit et eam in uxorem accepit. *Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo* Consultationi tuae taliter respondemus, quod si praefatus matrem *prefatae* puellae antequam *puella ipsa* septimum annum complisset in uxorem accepit, matrimonium *ipsum* non dissolvas *sed eundem virum praefatam mulierem, sicut uxorem, libere tenere permittas*, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam *praefata* puella septimum complevit, praedictus vir matrem eius accepit in uxorem, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem in uxorem habere permittas. X 4, 2, 4 (Fr. 673), JL 13947(9009); WH 631 1177

Accessit ad praesentiam nostrum *nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubilem annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nolles, eum sollicitate monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutes sua nobis assertionem proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea*

Alexander III *Litteras tuae* [X 4, 2, 4] *Accessit ad praesentiam* [X 4, 2, 5] and one of Pope Clement III *Duo pueri* [X 4, 2, 12]. These three letters proceed to the argument they aim to present: they claim a betrothal contracted at the age under 7, unless confirmed after arriving to aforementioned age, to be void; therefore, they impede no kind of subsequent marital bonds. In other words, those papal letters create a so called “loophole” or exception out of Levitical restriction Leviticus [18:16] that found its place in the *Decretum*, to which a

[vero], *antequam ad nobiles annos pervenisset, noluit aliquatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W. in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patre puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam idem W., ut Discordia orta inter consanguineos suos et consanguineos mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod praefata puella non esset septennis quando praememorato G. desponsata fuit, et postea in eum non consenserit, et quod idem G. ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia ante septem annos fieri non possunt praesertim si consensus postea non accedit. Sane si praefata puella ante [huiusmodi] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paterna vel materna, hereditatis prohiberi non possunt.* X 4, 2, 5; (Fr. 674); JL 13887(8952); WH 12 c.1173

Duo pueri Guilielmus et Guilielma in tua diocese quemadmodum accepimus matrimonialiter sunt coniuncti, puero VI., puella vero VII. annum agente, qui simul per tres annos manserunt. Tunc vero pater puellae, subtrahens eam sponso suo, ipsam alteri, M. nomine, copulavit, cum quo per VII. annos quiete permansit. Ipse vero tunc reliquit eandem, quia credebatur, eam alium virum habere, illum scilicet, cui prius fuerat desponsata. Prior autem sponsus, ad annos discretionis perveniens, a P. praedecessore tuo contrahendi cum alia licentiam impetravit, qui quondam nomine S. consobrinam prioris in uxorem accepit, et cum ea per aliquod tempus existens, eam tamen, ut ipse fatetur, carnaliter non cognovit, licet illa se ab eo cognita asseveret. Quum autem pater memoratae Guilielmae eam vidisset a secundo viro relictam, vi praenominatum Guilielmum, cui prius eam desponsaverat, compulit, ut S. neptem suam omnino dimitteret, et ad Guilielmam suam desponsatam rediret: qui postmodum per biennium cohabitavit eidem, ut fertur. Quia igitur in his quid tibi faciendum sit, postulas edoceri, breviter respondemus, quod impediens puerili aetate matrimonium inter G. et G. non fuit. Et licet idem, postquam illa nupsit alii, potuerit aliam ducere in uxorem, tamen quia dictam S. duxit consobrinam mulieris eiusdem, sive eam cognoverit sive non, non debet tamen cum eadem S. propter publicae honestatis iustitiam remanere, nec ac primam habere regressum, quia alteri fuit legitime copulata. (Et infra) Quum vero vir caput sit mulieris, et Guilielmus dicat, se non cognovisse prius. S. supra dictam: aliam, si voluerit, poterit ducere in uxorem, et S. viro legitime copulari; post separationem vero pro vitando populi scandalo utrique ad tempus est poenitentia iniungenda. Si vero legitime contraret, ipsam S. ab eo sive post sive antea cognitam extitisse, neutri vivente altero dabitur licentia contrahendi. Remanebit ergo Guilielma cum M. imposita tamen ipsi M. ad tempus poenitentia competenti, qui pro sua opinione sola Guilielmam, iudicio ecclesiae non requisito, perniciose dimisit. X 4, 2, 12 (Fr. 677) JL 16614 (10246)

commentator often refers³⁹⁷ in this very matter.³⁹⁸ The age of seven as a line, after which the age of discretion comes around, is a specification of the commentator in this very case, as it was not mentioned in the original text of papal letter.

In order to have a detailed overview it seems reasonable to go through those three papal letters. *Litteras tuae* [X 4, 2, 4]³⁹⁹ was addressed from Pope Alexander III to the bishop of Hereford in 1177. A certain man named A., being in the adult age, betrothed the girl while she was in cradle. After some time he took the girl's mother as a wife and carnally knew her. Pope Alexander III answers to the bishop that there might be two solutions dependent on the age of the girl at the moment when A. married her mother. If the girl had not yet reached the age of 7 when A. married her mother, the marriage is not to be separated, as the engagement done in the cradle is null. If marriage took place when the girl had turned 7 or more, they are to be divorced, and the man can have neither daughter, nor mother. The age of one of the spouses taking part in the betrothal is determining whether or not previous engagement is an impediment of public honesty for the second union. According to the

³⁹⁷ Quod si ille, haec condition nulla fuit, ex quo desponsatur uni fratrum, alius habere non potest 27. q.2 si quis [C. 27 q.2 c. 14] et cap. seq. [C. 27 q.2 c. 15] nisi forte ante septennium contracta essent sponsalia infra titulo proximo *litteras* [X 4, 2, 4] et c. *accessit* [X 4, 2, 5] et c. *duo pueri* [X 4, 2, 12] cessante eo quod dicitur supra titulo proximo 27 q.2 si quis desponsaverit [C. 27 q.2 c. 15]. Gl. ad X 4, 1, 4 [1595: 1012]

³⁹⁸ Item Gregorius. Si quis uxorem desponsauerit, uel eam subarrauerit, quamquam postmodum preueniente die mortis eius nequiuert eam ducere in uxorem, tamen nulli de consanguinitate eius licet accipere eam in coniugio, et si inuentum fuerit factum, separetur omnino. C. 27 q.2 c. 14 (Fr. 1065-1066)

Item Iulius Papa. Si quis desponsauerit uxorem uel subarrauerit, et siue preueniente die mortis, siue irruentibus quibusdam aliis causis minime eam cognouerit, neque superstes eius frater, neque ullus de consanguinitate eius eandem sibi tollat in uxorem ullo umquam tempore. C. 27 q.2 c. 15 (Fr. 1065-1066)

³⁹⁹ *Litteras tuae* fraternitatis accepimus, ex quarum tenore perpendimus, quod, quum quidam *parochianus tuus* A. nomine esset perfectae aetatis, quondam puellam in cunabilis desponsauit; procedente vero tempore idem A. matrem puellae cognovit et eam in uxorem accepit. Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo Consultationi tuae taliter respondemus, quod si praefatus matrem praefatae puellae antequam puella ipsa septimum annum complisset in uxorem accepit, matrimonium ipsum non dissolvas sed eundem virum praefatam mulierem, sicut uxorem, libere tenere permittas, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam praefata puella septimum complevit, praedictus vir matrem eius accepit in uxorem, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem in uxorem habere permittas. X 4, 2, 4 (Fr. 673); JL 13947(9009); WH 631 1177

point of view verbalized by Pope Alexander III in *Litteras tuae* [4, 2, 4], betrothals held in cradle are null; therefore, they raise no impediment for another marital bond.

Considering *Accessit ad presentiam* [X 4, 2, 5]⁴⁰⁰ the letter sent from Pope Alexander III to Roger archbishop of York circa 1173, the noble man William, son of someone called G., betrothed a daughter of another noble man, while she was at the minor age (according to William's words, she was under 7 years old). Consequently, she did not assent to the betrothal. Before she arrived to her marriageable age, betrothal had been publicly separated. With time, the girl's father passed away and William married her mother, without ecclesiastical contradiction, and had children with her, while the daughter married another man. As it is stated in the response to the archbishop of York given from Pope Alexander III, if she was under the age of 7 at the time betrothal was contracted and afterwards did not assent to it, the marriage of William and her mother is legal, and children born in this

⁴⁰⁰ *Accessit ad praesentiam nostram nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubiles annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nolles, eum sollicite monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutes sua nobis assertione proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea [vero], antequam ad nubiles annos pervenisset, noluit aequatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W. in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patre puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam idem W., ut Discordia orta inter consanguineos suos et consanguineous mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod praefata puella non esset septennis quando praememorato G. desponsata fuit, et postea in eum non consenserit, et quod idem G. ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia ante septem annos fieri non possunt praesertim si consensus postea non accedit. Sane si praefata puella ante [huiusmodi] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paternae vel maternae, hereditatis prohiberi non possunt. X 4, 2, 5; (Fr. 674); JL 13887(8952); WH 12 c.1173*

marital bond are legal as engagement contracted at the age under 7 cannot be contracted, especially if bride has not consented to it. Obviously, if she reached the age of 7 when William contracted betrothal with her, despite the fact that she dissented to it, it does not seem to Pope Alexander to be right that the man marries the mother of the girl. The Pope ultimately remarks that if it appears to Roger, archbishop of York, that the man should remain with the girl's mother, he may tolerate this union, the children of which are not to be deprived of their hereditary rights. Pope Alexander appears to be much more flexible in this decretal in comparison with the papal letter *Litteras tuae* [X 4, 2, 4].

Accessit ad praesentiam [X 4, 2, 5] issued to Roger, archbishop of York, is in many ways similar to the papal letter issued to the bishop of Hereford *Litteras tuae* [X 4, 2, 4]. In *Accessit ad praesentiam* [X 4, 2, 5] there is consent of the bride added, which in this very case was absent. In both abovementioned cases the age, unlike consent, is what has a priority in determining whether betrothal is legally valid or null. Consent does not fully lose its importance, it has its “added value”, but “constant value” determining those two issues, is, eventually, the age.

The third decretal *Duo pueri*,⁴⁰¹ to which the commentator refers, belongs to Pope Clement III and is addressed to an unknown bishop. This decretal letter presents rather a

⁴⁰¹ Duo pueri Guilielmus et Guilielma in tua diocese quemadmodum accepimus matrimonialiter sunt coniuncti, puero VI., puella vero VII. annum agente, qui simul per tres annos manserunt. Tunc vero pater puellae, subtrahens eam sponso suo, ipsam alteri, M. nomine, copulavit, cum quo per VII. annos quiete permansit. Ipse vero tunc reliquit eandem, quia credebat, eam alium virum habere, illum scilicet, cui prius fuerat desponsata. Prior autem sponsus, ad annos discretionis perveniens, a P. praedecessore tuo contrahendi cum alia licentiam impetravit, qui quondam nomine S. consobrinam prioris in uxorem accepit, et cum ea per aliquod tempus existens, eam tamen, ut ipse fatetur, carnaliter non cognovit, licet illa se ab eo cognita asseveret. Quum autem pater memoratae Guilielmae eam vidisset a secundo viro relictam, vi praenominatum Guilielmum, cui prius eam desponsaverat, compulit, ut S. neptem suam omnino dimitteret, et ad Guilielmam suam desponsatam rediret: qui postmodum per biennium cohabitavit eidem, ut fertur. Quia igitur in his quid tibi faciendum sit, postulas edoceri, breviter respondemus, quod impediante puerili aetate matrimonium inter G. et G. non fuit. Et licet idem, postquam illa nupsit alii, potuerit aliam ducere in uxorem, tamen quia dictam S. duxit consobrinam mulieris eiusdem, sive eam cognoverit sive non, non debet tamen cum eadem S. propter publicae honestatis iustitiam remanere, nec ac primam habere regressum, quia alteri fuit legitime copulata. (Et infra) Quum vero vir caput sit mulieris, et Guilielmus dicat, se non cognovisse prius. S. supra sictam: aliam, si

complicated issue. The bishop reported to Pope Clement III about Wilhelm (6 years old) and Wilhelma (7 years old), who had been in matrimonial union for three years. Though, as it was instructed by Pope Clement III, minor age impeded marriage contracting. After those three years the father of the girl betrothed her to another man, named M. with whom she was staying for seven years; afterwards M. abandoned her as he thought she had another one, the one to whom she had been previously engaged. After arriving to the age of discretion (presumably 7 years) the groom (Wilhelm) asked the previous bishop, a certain P., for permission to contract with another woman, namely with S., who happened to be a cousin of Wilhelma, his previous bride. Wilhelm remained with S. for some time, not knowing her carnally, despite the fact that S. witnessed the opposite. As Wilhelma's father observed, she had been abandoned by M.. He tried to make Wilhelm to return to Wilhelma; afterwards they cohabitated for two years. The papal response states that due to their minor age, the union of Wilhelm and Wilhelma (being aged 6 and 7 respectively), is claimed to be null. Despite this fact, after she got espoused to another man, he (Wilhelm) can have any other woman as a wife except S. according to public honesty impediment, as she is related to Wilhelma. Wilhelm also cannot return to Wilhelma as she is now legitimately with another man. As husband is believed to be the head of his wife, and Wilhelm said he had not known S. carnally, he can have another woman as a wife. Simultaneously, S. can have another man after they are separated from each other. Moreover, in order to avoid public scandal, they should penalize. If Wilhelm and S. contracted the union and he knew her carnally, as S. witnessed, none of them (if the other is still alive) can have permission to contract. As to Wilhelma's destiny, it is suggested that she should stay with M. Decretal letter of Pope

voluerit, poterit ducere in uxorem, et S. viro legitimo copulari; post separationem vero pro vitando populi scandalo utrique ad tempus est poenitentia iniugenda. Si vero legitime contraret, ipsam S. ab eo sive post sive antea cognitam extitisse, neutri vivente altero dabitur licentia contrahendi. Remanebit ergo Guilielma cum M. imposita *tamen* ipsi M. ad tempus poenitentia competenti, qui pro sua opinione sola Guilielmam, iudicio ecclesiae non requisito, *perniciose* dimisit. X 4, 2, 12 (Fr. 677) JL 16614 (10246)

Clement III seems stricter in comparison with those two decretals of Pope Alexander III. Despite the fact that minor age impedes contracting betrothal or marital union (it is not always clear especially in *Duo pueri* if Pope Clement III speaks of mere engagement or marriage), it still gives rise to public honesty impediment, which, in other words, bans any marital relations with relatives of one of the parties. Insofar as *Litteras tuae*, *Accessit ad praesentiam* and *Duo pueri* are concerned, in comparing the issue of public honesty and minor age the first two, those of Pope Alexander III, mainly claim that espousals made at the minor age under 7 do not give rise to public honesty impediment and do not exclude the possibility to marry relatives of one of the spouses. The same cannot be true of Clement's III letter *Duo pueri*, where the Pope takes a tough stance and claims that even null betrothals contracted at the minor age impede contracting with relatives. Therefore, the argument used in the glossa⁴⁰² is supported by cases from *Litteras tuae* and *Accessit ad praesentiam*, which adhere to the opinion that betrothal contracted in the minor age do not impede contracting with relatives and do not cause public honesty impediment; whereas *Duo pueri* is not really relevant to this argument as the conclusion it contains speaks rather in unison with *Ad audientiam* [X 4, 1, 4], but taking into account age matter, so that even betrothals contracted at the minor age are null, they still give rise to public honesty impediment.

The commentator⁴⁰³ also gives *pro*⁴⁰⁴ and *contra*⁴⁰⁵ arguments to the claim that one cannot have his brother's wife. Nonetheless, Leviticus impediment does not seem to be applicable

⁴⁰² Quod si ille, haec condition nulla fuit, ex quo desponsatur uni fratrum, alius habere non potest 27. q.2 *Si quis* [C. 27 q.2 c. 14] et cap. seq. [C. 27 q.2 c. 15] nisi forte ante septennium contracta essent sponsalia infra titulo proximo *Litteras* [X 4, 2, 4] et c. *Accessit* [X 4, 2, 5] et c. *Duo pueri* [X 4, 2, 12] cessante eo quod dicitur supra titulo proximo 27 q.2 *Si quis desponsaverit* [C. 27 q.2 c. 15]. Gl. ad X 4, 1, 4 [1595: 1012]

⁴⁰³ Sponsam fratris, 26 dist. cap. *Una tantum* [Dist. 26 d.p.c 4] & Ioannes. 27 q.2 *Si quis desponsaverit* [C.27 q.2 c.11]

]. Argumentum contra 8 q.1 *Olim* [C.8 q.1 c.8] et infra de divortii cap [itulo] ult[imo][X 4, 19, 9]. ... illud mysticum fuit, et obtinuit fratre sine sobole defuncto, hodie secus. Gl. ad X 4, 1, 4 [1595: 1012]

⁴⁰⁴ Item Ambrosius in libro de offitiis. [lib.I. c. ult. 80.] Una tantum, nec repetita nobis copula permittitur, et in ipso coniugio lex est, non iterare coniugium, nec secundae coniugis coniunctionem. Quod plerisque mirum uidetur, cum etiam ante baptismum iterata coniugia electioni muneris et prerogativae ordinationis

here, as there is one more impediment that bars legal betrothal, namely consanguinity matter.

Bernard's of Parma comments refer to Leviticus prohibition to have a bride/wife of the brother. He considers pro and contra arguments to this suggestion and eventually offers his final solution to this dilemma.⁴⁰⁶ The first line of argumentation aims to show that the first betrothal was not legally contracted as an impediment of consanguinity was present; therefore, technically this union was not contracted. Following cited excerpts from Roman law, mainly claiming that contract with an impediment is void⁴⁰⁷ or, according to decretal of

impedimenta generent, cum etiam delicta obesse non soleant si lauacri remissa fuerint sacramento. Sed intelligere debemus, quia baptismo culpa dimitti potest, lex aboleri non potest. In coniugio non culpa, sed lex est. Quod culpa est igitur, in baptismo relaxatur: quod legis, in coniugio non soluitur. Quomodo autem potest hortatory esse uiduitatis, qui ipse coniugia frequentauerit? Gratian. Iohannes etiam Baptista, dum Herodem ab incest prohiberet dicens: "Non licet tibi habere uxorem fratris tui," euidenter ostendit, inter infideles coniugia esse. Unde datur intelligi, quod bigami dicuntur non solum qui post baptismum coniugia frequentant, sed etiam qui ante baptismum unam, et post baptismum alteram habuisse probantur. §. 1. Bigamus uero in sacerdotem ordinari non debet, non quia deliquerit secundam accipiendo uxorem, sed quia prerogatiua exutus est sacerdotis. D.26 c.4 (Fr. 591-592)

Si quis desponsauerit sibi aliquam, et preueniente mortis articulo eam cognoscere non potuerit, frater eius non potest eam in uxorem ducere. C.27 q.2 c.11 (Fr. 1065-1066)

⁴⁰⁵ II. Pars. Olim iussus est frater premortui fratris uxorem ducere, ut non sibi, sed illi suscicaret sobolem, eiusque

nomine uocaret quod inde nasceretur. Quod si recusaret, discalciatus uno pede conspui solebat in facie. Nunc euangelii quisque predicator ita debet in ecclesia laborare, ut defuncto fratri, id est Christo, suscitet semen, qui pro nobis mortuus est, et quod suscitatum fuerit eius nomen accipiat. At uero qui electus ab ecclesia ministerium euangelizandi rennuerit, ab ipsa ecclesia digne meritoque contempnitur. Qui enim et sibi prodest, et ecclesiae, bene intelligitur utroque pede calciatus. Unde illud: "Quam speciosi pedes euangelizantium bona." Qui autem lucratorum curam refugit aliorum, discalciati illius non figuratum significauit, sed in se inpletum portauit obprobrium. C. 8 q.1 c.8 (Fr. 591-592)

⁴⁰⁶ Habere non potest, sed videtur, quod haec ratio nulla fuerit, quia inter eos nullum obligatorium vinculum de iure fuit contractum, consanguinitate impediens, quia impossibile nulla est obligatio. *Inst [itutiones] De inuti[libus] stip[ulationibus] & si impossibillis* [Inst. 3, 19] et *ff quae sent[entiae] sine app[ellatione] rescin[datur]* Paulus. [Dig. 49, 8, 3] Sed impossibile est id quod contra bonos mores est. *ff De condi[tionibus] inst[itutionum] Filius fa[milias]* [Dig. 28, 7, 1] et 22 q.2 *Faciatur homo* [C.22 q.2 c. 15] et eius quod esse non potest nulla est promissio *Ins [itutiones] De inuti[libus] stip[ulationibus] & 1 Omnis res* [Inst. 3, 19] in decr[etali] Gregorii supra *De pact[is] c[apitulo] ult[imo]* [X 1, 35, 8] ergo hic nulla sponsalia fuerunt que sunt promissio futurarum nuptiarum, 30. q. 5 *Nostrates* [C. 30 q.5 c.3] *ff De spon[salibus]* [Dig. 23.1.5] ergo nulla fuerunt praedicta sponsalia: ergo non praestant impedimentum quo minus illa possit contrahere cum alio fratre infra titulo proximo *Litteras* [X 4, 2, 4] et *Accessit* [X 4, 2, 5]. Sed contra, matrimonium plerumque attenditur, considerato facto, non iure... . Quid ergo respondes? Potest dici, quod publicae honestatis iustitia impedit, ut supra c[apitulum] proximum [X 4, 1, 5] et 27. q.2 *Si quis desponsauerit* [C.27 q.2 c.11]. Ber[nardus Parmensis/Bottonius] Gl. ad X 4, 1, 4 [1595: 1013]

⁴⁰⁷ Si impossibilis condicio obligationibus adiciatur, nihil valet stipulatio. impossibilis autem condicio habetur, cui natura impedimento est quo minus existat, veluti si quis ita dixerit: SI DIGITO CAELUM ATTIGERO, DARE SPONDES? at si ita stipuletur, SI DIGITO CAELUM NON ATTIGERO, DARE SPONDES? pure facta obligatio intellegitur ideoque statim petere potest. Inst. 3, 19

Pope Gregory IX, the contract which is impossible *de iure* or *de facto* is as well void.⁴⁰⁸ Therefore, contracting with a brother gives no rise of public honesty impediment.⁴⁰⁹ Despite the opposite argument that marriage relies upon facts, not upon law, it is finally decided that according to impediment of public honesty brother cannot have his bride; therefore, Bernard of Parma, through referring to Roman law (that in this case proved that the first contract was void) and decretals (that partially suggested nullity of the first contract), ended up with reference to the *Decretum*⁴¹⁰ and by this agreed to Levitian barrier, which gives rise to public honesty impediment.

It might seem that *Ad praesentiam* is a contrary decretal to previously discussed *Praeterea*. The latter displays betrothal for the future with a promise to marry and an oath to do so, which appears to be not binding; whereas, *Ad praesentiam* shows binding relationship between two parties that have consented to the union. There are two elements that shed more light on the opposite opinions that represent those two decretals. *Praeterea* does not speak about consent; it mentions vow and promise for a future marriage without any condition, taken into account the age of the parties. *Ad praesentiam* mentions consent and the impediment, which rises after family members may have been involved in contracting betrothal with the same person. Therefore, on the one hand impression of the opposition of those two decretals does not seem to reflect reality, as these two papal letters have two different data sets, different reasoning and, therefore, different holdings in their responses.

Paulus respondit impossibile praeceptum iudicis nullius esse momenti. D. 49, 8, 3

Filius familias et servus alienus et postumus et surdus testamenti factionem habere dicuntur: licet enim testamentum facere non possunt, attamen ex testamento vel sibi vel aliis acquirere possunt. D. 28, 7, 1

⁴⁰⁸ Pactiones factae a vobis, ut audivimus, pro quibusdam spiritualibus obtinendis, quum in huiusmodi omnis pactio omnisque convention debeat omnino cessare, nullius penitus sunt momenti. Quod etiam de aliis est dicendum, quae observatae vergunt in animae detrimentum. Nam etiam iuxta legitimas sanctiones pactum turpe, vel rei turpis aut impossibilis de iure vel de facto, nullam obligationem inducit. X 1, 35, 8; (Fr. 205-206); Potthast no. 9568

⁴⁰⁹ ... ergo non praestant impedimentum quo minus illa possit contrahere cum alio fratre infra titu[lo] proxi[mo] *Litteras* [X 4, 2, 4] et *Accessit* [X 4, 2, 5]. Gl. ad X 4, 1, 4 [1595: 1013]

⁴¹⁰ Si quis desponsauerit sibi aliquam, et preueniente mortis articulo eam cognoscere non potuerit, frater eius non potest eam in uxorem ducere. C.27 q.2 c.11 (Fr. 1065-1066)

There is a certain discrepancy between the text of the decretal and the gloss. Decretal is focused on Levitian barrier impediment, which has been given rise by an engagement for the future with the relative. It does not say a word about the consent or the age of those parties contracting the union. The gloss shifts its attention to the age and reserves considerable amount of time and space in order to comment extensively on the age and legality or voidness linked to this factor in relation of the first betrothal. It appears quite reasonable to claim that the commentator goes far beyond the content of the original text. Even by referring to the papal letter of the same Pope Alexander III, he discusses what the Pope did not mention in this letter, e.g. the age issue.

5.4.5.3 *De illis* [X 4, 1, 5]

Engagement for the future in the decretals of Pope Alexander III show great scale of flexibility, as they may be dissolved if one of spouses abandons the country. In this letter the Pope seems to follow Roman law principle, according to which the absence of the groom for three years makes it possible to cancel contracted betrothal.

In the letter from Pope Alexander III to the Archbishop of Palermo⁴¹¹ the case of the betrothal for the future is discussed. The question is asked about the case when one had promised to take a woman as a wife and before marrying her left his land. It is inquired whether the bride can have another man as her husband; the positive response is given to

⁴¹¹ De illis autem, qui praestito iuramento promittunt se aliquas mulieres ducturos, et postea eis incognitis, dimittunt terram, se ad partes alias transferentes, hoc tibi volumus innotescere, quod liberum erit mulieribus ipsis (si non est amplius in sacro processum) ad alia se vota transferre, recepta tamen de periurio poenitentia, si per eas steterit, quo minus fuerit matrimonium consummatum. *Si vero etc.* (cf. c. 3. de cond. app. IV. 5.) [X 4, 5, 3] Si vero aliquis sub huiusmodi verbis iuramentum alicui mulieri praestiterit: "Ego te in uxorem accipiam, si tantum mihi donaveris" reus periurii non habebitur, si eam, nolentem sibi solvere quod *iuramento* sibi dari petiit, non acceperit in uxorem, nisi consensus de praesenti aut carnalis sit inter eos commixtio subsequuta. X 4, 1, 5 (Fr. 662) JL 14043 (9105)

this question. A commentator puts an addition⁴¹² that emphasizes the span of time after which the bride is free to go into another marriage. It is mentioned that three years of waiting is supposed to be the time as it is indicated in Roman law.⁴¹³ A commentator also gives chapters that show the matter in engagement for the present tense, which, as it in fact is shown in those decretals, is already the marriage,⁴¹⁴ and is not necessarily relevant and applicable to this case.

5.4.5.4 *Ex litteris* [X 4, 1, 7]

It is not always easy, as in the current decretal, to draw a clear line between engagement and marriage in decretals of Pope Alexander III. This pattern may well be observed in relation to the previous instances. The current chapter, which is to be discussed below, is one of the bright instances of vague (or even non-existent) distinction between marriage and betrothal. The Pope is not interested in the kind of conjugal union, be it engagement or marriage; papal attention is fully and undividedly concentrated on the determining factor for both of those bonds – the age of the contracting parties. In a way, papal attention is focused on the age of discretion as a defining element of legitimate contract, avoiding distinction between

⁴¹² Liberum erit, post tres annos secundum leges *C. de repu[diis et iudicio de moribus sublato]* l.2 Et hoc intellige de sponsa de futuro, de qua hic loquitur secus in sponsa de praesenti infra eodem *in praesentia* [X 4, 1, 19] et infra *de secun[dis] nup[tiis]* [X 4, 21, 2] Gl. ad X 4, 1, 4 [1595: 1013]

⁴¹³ Liberum est filiae tuae, si sponsum suum post tres peregrinationis annos expectandum sibi ultra non putat, omitta spe huius coniunctionis matrimonium facere, ne opportunum nubendi tempus amittat, cum posset nuntium remittere, si praesente eo consilium mutare voluisset. * valer. et gallien. aa. et valer. c. paulinae. * <a 259 pp. VII k. april. aemiliano et basso cons. > C. 5, 17, 2

⁴¹⁴ In praesentia nostra *positus a nobis* quaesivisti, quid agendum *tibi* sit de *quibusdam* mulieribus *in tua diocesi constitutis*, quae *quum*, viros suos causa captivitatis vel peregrinationis absentes *iam* ultra septennium praestolatae fuerint nec certificari possunt de vita vel de morte ipsorum, licet super hoc sollicitudinem adhibuerint diligentem, et pro iuvenili aetate seu fragilitate carnis nequeunt continere, petentes alii matrimonio copulari. *Quum autem dicat Apostolus: "Mulier tam diu alligata est viro, quam diu vir eius vivit,"* Consultationi ergo tuae taliter respondemus, quod, quantocunque annorum numero ita remaneant viventibus viris suis non possunt ad aliorum consortium convolare, nec *tu eas* auctoritate ecclesiae permittas contrahere, donec certum nuntium recipiant de morte virorum. [*Dat. Laterani*] X 4, 1, 19 (Fr. 668)

Dominus ac redemptor noster, sane, super matrimoniis quae quidam ex vobis nondum habita obeuntis coniugis certitudine contraxerunt, id vobis *auctoritate apostolica* respondemus, ut nullus ex vobis amodo ad secundas nuptias migrare praesumat, donec et *firma certitudine* constet, quod ab hac vita migraverit coniux eius. Si vero aliquis vel aliqua id hactenus non servavit, et de morte prioris coniugis adhuc sibi existimat dubitandum, ei quae sibi nupsit, debitum non deneget postulanti, quod a se tamen noverit nullatenus exigendum. Quodsi post hoc de prioris coniugis vita constiterit, relictis adulterinis *illicitisque* complexibus ad priorem *sine dubio* coniugem revertatur. X 4, 21, 2 (Fr. 730)

marriage and engagement. It appears quite plausible to claim that the Pope deliberately makes no distinction between two kinds of bond as a determining factor – *aetas*, age together with ability to discern *scientia/discretio et aetate* – is equally important for both betrothal and marriage. Beyond determining factor, which defines legitimacy of the contract, age and ability to discern, nothing seems to play an important role: neither consent nor obscure words with which this assent has been verbalised, nor the kind of contract that has been arranged. It seems that legitimacy of consent to the bond is defined rather through the age at which the person is able to discern rather than through exact words. The latter are not important, at least in this decretal.

The seventh chapter of the first title⁴⁴⁵ is addressed from Pope Alexander III to the archbishop of Canterbury between 1174/75 and 1181. This chapter is dedicated to the issue of contracting engagement/marriage (whether it is an engagement or a marriage is not clearly stated in the text).⁴⁴⁶ Providing a brief outline of this decretal, it might be observed that a union was contracted between a certain young man named E. and a woman named Mary, a daughter of Gilbert. Given that one of the couple did not understand what the other had

⁴⁴⁵ Si aliqui, apti ad matrimonium, contrahunt per verba obscura, communem verborum, intellectum sequi tenentur. Idem Cantuariensi Archiepiscopo. Ex litteris, quos super causa matrimonii cuiusdam iuvenis E. nomine, et Mariae filiae Gileberti de sancto Leodegario transmisisti, sollicitudo nobis innotuit, quam in ipsius negotii examine servasti. Quia vero absentibus partibus veritatem nequivimus plenarie indagare, nec causam ipsam ad te remittere, a quo pars mulieris ad audientiam nostram noscitur appellasse: eam venerabilibus fratribus nostris Wintoniensi, Herfordensi et Bathoniensi episcopis duximus committendam. Ideoque fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus partes adire eorum praesentiam, quum ab eis fuerint evocatae, ei quod ipsi iudicaverint inviolabiliter observare contradictione et appellatione cessante compellas. De hoc autem, quod consulisti, quid debeat observari, quando inter aliquos sponsalia contrahuntur, nec intelligit alter quod alter proponuit: Respondemus, quod inspiciendum est iudici, si matrimonium contracturi ad id faciendum sint idonei scientia et aetate: quo cognito, si alter non intellexerit quod alter proposuit, ad communem verbi intelligentiam recurratur, et cogatur uterque verba prolata in eo sensu retinere, quem solent recte intelligentibus generare. Quod vero quaesivit, an debeat appellationi deferri, ubi sub eius praetextu noscitur adulterium vel aliud crimen commitendum consultationi tuae breviter respondemus, quod ubi notorium esset adulterium vel aliud crimen commitendum, si appellationi interpositae deferretur, deferri nollemus. Nolumus enim incestus vel adulterii materiam aliquibus ministrare. X 4, 1, 7 (Fr. 663); JL 13793 (8860); WH 439 1174/75-1181

⁴⁴⁶ ...quando inter aliquos sponsalia contrahuntur, nec intelligit alter quod alter proponuit: Respondemus, quod inspiciendum est iudici, si matrimonium contracturi ad id faciendum sint idonei scientia et aetate... X 4, 1, 7 (Fr. 663); JL 13793 (8860); WH 439 1174/75-1181

proposed, if both of them were at the age when the person is able to discern, it is to be perceived as the common words were exchanged. As to the glosses to this decretal, they explain separate words and expressions that are essential for understanding this chapter. According to the content of decretal, following the text given by Friedberg, it is not clear, as it has already been mentioned, whether the case deals with an engagement or with a marriage.⁴¹⁷ If attention is geared more on the glosses, at the beginning one tends to read rather a betrothal contracting than a marriage union out of its text; for instance, in describing the case itself, one reads *some man and some woman contracted betrothal*,⁴¹⁸ but with a continuation of explanation in the same commentary one reads *Please note that in marriage the ability to discern and the age should be taken into attention and consideration*.⁴¹⁹ Therefore, according to the text of the anonymous glossator, the union is equally to be called a betrothal as well as a marriage. An important precondition for solving the case is to detect if the contracting parties have arrived to the age of discretion by the time when they say they did not understand each other; in other words, one did not understand what the other had proposed.⁴²⁰ Essential terms that strive for additional explanation are *scientia*, *discretio* and *aetas*. If we compare two text excerpts that include these terms: the one from decretal and the other from glossa, it will shed some light on their meaning; at least it will show how the commentator defines those notions.

⁴¹⁷ ...quando inter aliquos **sponsalia contrahuntur**, nec intelligit alter quod alter proponuit: Respondemus, quod inspiciendum est iudici, si **matrimonium contracturi** ad id faciendum sint idonei scientia et aetate... . X 4, 1, 7 (Fr. 663); JL 13793 (8860); WH 439 1174/75-1181

⁴¹⁸ CASUS. Quidam vir et mulier contraxerunt sponsalia... Gl. ad X 4, 1, 7 [1595: 1013]

⁴¹⁹ CASUS. ... Nota quod in matrimonio discretio et aetas est attendenda et consideranda. ... Gl. ad X 4, 1, 7 [1595: 1014]

⁴²⁰ CASUS. Quidam vir et mulier contraxerunt sponsalia, nec alter intellexit quod alter proposuit, et dicebant se non intellexisse: Quaerebatur quid deberet observari? Respondet Papa: iudex primo debet videre utrum contrahentes sint idonei ad hoc discretionem et aetate, ut per hoc praesumatur pro eo quod dicunt, vel contra: quo facto seu cognito, si alter non intellexit, quod alter proposuit, recurrendum est ad communem intelligentiam verborum, et uterque compellatur verba prolata in eo sensu retinere, quem solent recte intelligentibus generare. Nota quod in matrimonio discretio et aetas est attendenda et consideranda. Item verba obscure prolata ad communem intelligentiam sunt reducenda. Gl. ad X 4, 1, 7 [1595: 1014]

In the text of decretal:

*Respondemus, quod inspiciendum est iudici, si matrimonium contracturi ad id faciendum sint idonei scientia et aetate*⁴²¹

In the text of glossa:

*Respondet Papa: iudex primo debet videre utrum contrahentes sint idonei ad hoc discretione et aetate*⁴²²

Given these abovementioned premises, it appears plausible to confer that *scientia* is to be synonymized with the notion of *discretio*. Moreover, if we read the explanation given to the notion of *scientia* by the commentator, we receive the same definition; namely, the glossator is defining *scientia* through *discretio*, adding that an insane person is not able to contract as this person does not have consent.⁴²³ In this case the canon from *Decretum* is followed.⁴²⁴ The example discussed above, does not perfectly match this issue. It matches only at the beginning, where it is stated that an *insane person is also not able to contract*, but as it goes further it does not explain the case; moreover, it contradicts the issue discussed: *but if they contract they should not be separated*. Gratian concludes afterwards that *from this it is to be conferred that this [man] should not abandon his wife and take another one*. The beginning of this canon from *Decretum* gives theoretical premises for the glossator in order to highlight that ability to decide and to discern is essential for contracting betrothal or marriage. Though, if one reads its text to the end, it becomes clear that the bonds contracted, given

⁴²¹ X 4, 1, 7 (Fr. 663); JL 13793 (8860); WH 439 1174/75-1181

⁴²² Gl. ad X 4, 1, 7 [1595: 1014]

⁴²³ Scientia, id est, discretione: Nam furiosus contrahere non potest, quia non habet consensum. 32.q.7[C. 32 q.7 c. 26] *Neque furiosus* et infra eo. [X 4, 1, 24] *Dilectus* nisi per intervalla dilucida laboraret 7. q.1 *Quamvis triste* [C. 7 q. 1 c. 14] 3.q. 9 *Indicas* [C. 3 q. 9 c. 14]. Gl. ad X 4, 1, 7 [1595: 1014]

⁴²⁴ Item Fabianus Papa. Neque furiosus, neque furiosa matrimonium contrahere possunt; sed si contractum fuerit, non separentur. VII. Pars. Gratian. Ut ergo ex premissis colligitur, non licet huic dimissa uxore sua aliam ducere. Manet enim inter eos quoddam uinculum coniugale, quod nec ipsa separatione dissolvitur. C. 32 q. 7 c. 26 (Fr. 1147-1148)

that one was insane, are still to be seen as indissoluble. In other words, this canon states the opposite to what the glossator is about to say. The commentator goes further as he is willing to differentiate between continuous insanity and insanity with the intervals of clarity. According to the commentator if the continuous insanity is the case, then they cannot contract; moreover, if they did, the bond is indissoluble, as it is the issue in *Dilectus* [X 4, 1, 24],⁴²⁵ because the legal consent to the bond could not take place on the grounds of insanity. If there are times of mental clarity, this rule does not seem to be applicable. The continuous insanity is also the case particularly referred to in the glossa. *Quamvis triste*⁴²⁶ from the *Decretum* deals with the issue when bishopric office is led by the person who is not able to serve at this position. If it is the case that the insanity is a constant issue, another person is to be elected who is suitable for ecclesiastical government and for taking care of the welfare of the souls. It may seem to be not a relevant allegation, but in fact it is. It was St. Augustine who, in his *De bono coniugali*, compared marital bond with priesthood in a sense that both pass through certain *sacrament* over lifetime duration. Marital contract, according to St. Augustine, is not a *sacrament* itself (as the part of *matrimonii triplex bonum: fides, proles and sacramentum*, which was as well addressed in the *Decretum* several times), but rather *cujusdam sacramenti res*,⁴²⁷ which is simultaneously a certain kind of sacrament and a result of the sacrament. St. Augustine compares *sacramentum* with priesthood, where the person who once became a priest, deacon or a bishop remains in this status during his lifetime and

⁴²⁵ Furiosus matrimonium contrahere non potest. Dilectus filius R. Miles Alexandrinus proposuit coram nobis, quod Rufinam filiam suam cuidam Opizoni Lancaveclae matrimonialiter copulavit, ignorans, quod Opizo esset furiosus. Unde humiliter postulavit a nobis, ut tam eidem quam ipsius filiae consulere dignaremur. Quum autem eadem mulier cum ipso viro, qui continuo fu rore laborat, morari non possit, et propter alienationem furoris legitimus non poterit intervenire consensus, fraternitati tuae per apostolica scripta mandamus, quatenus, inquisita plenius veritate, si rem noveris ita esse, praefatis personas cures sublato appellationis diffugio ab invicem separare. X 4, 1, 24 (Fr. 670), Potthast no. 2634

⁴²⁶ Enimuero si nullo tempore ad sanae mentis redit offitium, persona fidelis ac uitae probabilis est eligenda, que ad regimen ecclesiae idonea possit existere, atque de animarum utilitate cogitare, inquietos sub disciplinae uinculo constringere, ecclesiasticarum rerum curam gerere, et maturum atque efficacem in omnibus se exhibere, qui etiam episcopo, qui nunc egrotat, superstes, loco eius debeat consecrari. C.7 q. 1 c.14 (Fr. 571-572)

⁴²⁷ Usque adeo foedus illud initum nuptiale cuiusdam sacramenti res est DBC 6, 6

this status remains with him until the time of the Last Judgment.⁴²⁸ According to official doctrine of the Catholic Church, only three sacraments have lifelong duration without any repetition: Baptism, Confirmation and Holy orders (Deacon, Priest and Bishop). These sacraments with those characteristics can be found in the *Summa theologiae* of Thomas Aquinas; those were as well confirmed at the Council of Trent. Four other sacraments - Eucharist, Marriage, Anointing of the sick and Penance of Reconciliation can be repeated. If we go back to St. Augustine and to his comparison, the allegation in the gloss to the ecclesiastical office of the bishop by explaining marital bond appears to be reasonable. Considering the legitimate age eligible for contracting a marital bond, a woman is expected to arrive to the age of 12, while a man - to the age of 14 in order to be able to contract betrothal/marriage.⁴²⁹ In the comment about the age, decretals from the second title *De desponsatione impuberum* of *Liber Extra* are addressed; logically enough, as this title predominantly deals with engagements and marriages contracted at undermarriageable age. In *Attestationes*⁴³⁰ (the decretal addressed from Pope Urban III to the Bishop of Le Mans) the case is about a certain young man who has not yet reached the age of 12 and took a woman as a wife, while the woman believed she remained virgin. It is responded that if the

⁴²⁸ Quemadmodum si fiat ordinatio cleri ad plebem congregandam, etiamsi plebis congregatio non subsequatur, manet tamen in illis ordinatis sacramentum ordinationis; etsi aliqua culpa quisquam ab officio removeatur, sacramento domini semel imposito no carebit, quamvis ad iudicium permanente. DBC 24, 32

⁴²⁹ Aetate, xii annorum in muliere et xiiii annorum in viro infra titulo proximo *Attestationes* [X 4, 2, 10] et c. *Continebatur* [X 4, 2, 6] vel cum malitia supplet aetatem infra titulo proximo *De illis 2* [X 4, 2, 7; X 4, 2, 9] et c[anone] ulti[mo] [X 4, 2, 14] Gl. ad X 4, 1, 7 [1595: 1014]

⁴³⁰ Contractus ante pubertatem, etiam cum nisu carnalis copulae, non facit matrimonium. Urbanus III. Cenomanensi Episcopo. *Attestationes super causa matrimonii*, quae inter H. iuvenem et G. mulierem vertitur, *a tua nobis fraternitate transmissus* accepimus, et, ipsis *diligenter inspectis et plenius intellectis, manifeste* nobis innotuit, quod praedictus iuvenis nondum duodecimum annum attigerat, quum praefatam G. accepit' uxorem. Et licet nisu fuisset, sicut uterque confessus est, ipsam corrumpere, mulier tamen credit, se virginem evasisse. Verum ipse, antequam ad annum XIV. pervenisset, a memorata muliere recessit, quem, quum XVII. annos habeat, eadem pro viro sibi vindicare contendit, *Sed quum vir XVII annos habeat, ipsam recipere contradicit. Unde, quia, donec nos super causam ipsam consuleres non duxisti in prolatione sententiae procedendum.* Consultationi tuae taliter respondemus, quod, si mulier per idoneos testes probare nequiverit, quod post XIV. annum aetatis suae vel circa finem XIV. anni praedictus iuvenis consensisset in eam, ab ipso iuramento recepto, quod, postquam ad legitimam aetatem pervenit, ipsam habere non consensit in uxorem, ab impetitione mulieris eum potes et debes absolvere, et ad alia vota utrique dare licentiam transeundi. X 4, 2, 10 (Fr. 676); JL 15729 (9870)

woman is not able to prove with honorable witnesses that after the young man (aged by this time 14 or about 14) consented to take her as a wife, taking into account his testimonies, that after he reached the legitimate age [of 14] he has not assented to take her as a wife. Given those premises they should be absolved. This decretal deals exclusively with marriage, not betrothal, but this is not relevant as it speaks mainly about legitimate age. The age serves as an inevitable precondition to be fulfilled in order for the person to be able to consent; otherwise, this consent is claimed to be void. Or, as it is the case in *Attestationes*, consent given before the legitimate age can easily be canceled by the decision of the same person after he/she arrives to the legitimate age. Another citation from *Continebatur*⁴³¹ (decretal addressed from Pope Alexander III to the Bishop of Norwich) represents the instance for the legitimate age of woman [12 years]. As the case goes, the girl being at undermarriageable age was given to a certain man as a wife and was led into the house of the man; it was asserted by parents that she had reached legitimate age. She, after coming of age, asks for permission to marry another man, saying she had not consented to the one by whom she was *traducta*. The man, conversely, claims that this lady had not yet reached the age of 12 when she became his wife, but she was coming to this age (*usque adeo tamen aetati fuit proxima*) and that he knew her carnally, though the woman declines the above testimony. The response

⁴³¹ Si impubes, desponsata et traducta, petit licentiam pubes facta alteri nubendi, non auditur, si vir iurat, so eam cognovisse; nec auditur, si nondum pubes, sed proxima pubertati probetur cognita. Et ex sponsalibus, contractis cum impubere maiore septennio, oritur publica bonestas. Idem [Alexander III] Norvicensi Episcopo. Continebatur in literis tuis, quod, quum quaedam puella infra nobiles annos cuidam viro in uxorem tradita fuerit, et ab ipso traducta, suis parentibus asserentibus, eam legitima aetatis exsistere, haec, ad nobiles annos perveniens alii nubendi licentiam postulavit, asserens, se in eundem virum nullatenus consensisse. Praedictus vero vir econtra proponit, quod, licet eadem puella nondum forte annum XII. attigisset quum ei tradita fuisset in uxorem, usque adeo tamen aetati fuit proxima, quod ipsam carnali commixtione cognovit. Inde esi, quod, quum ipsa dicit ab eodem viro se incognitam, et tu nos consuluisti, utrum alii possit nubere. Consultationi tuae taliter respondemus, quod, quum in decretis habeatur expressum, quod, si vir dixerit, quod uxorem suam cognoverit, et mulier negaverit, viri standum est veritati, unde praefato viro, qui dicit, se mulierem ipsam cognovisse, fides est adhibenda, si id firmaverit iuramento. Si autem fuerit aetati proxima, ut in undecimo vel circa XII. annum, et cum suo assensu et voluntate parentum desponsata et benedicta fuerit, et cognita ab eodem viro, separari non debet, praesertim quum parentes eius ipsam fuisse aetatis legitima faterentur. Si vero puella infra nobiles annos el aetati proxima alicui desponsata fuerit, benedicta atque traducta, non licei alicui de consanguinitate ipsius, cui desponsata fuerit, eam ducere in uxorem, nec fas est eidem sponso de consanguinitate sponsae sibi aliquam [matrimonio] copulare. X 4, 2, 6 (Fr. 674-675); JL 14032 (9096); WH 204 1173-76

states that if she was 11 or 12 (in this case the age of approximate adulthood and the age of adulthood are assimilated) and, being engaged with her own and her parents' consent, was blessed and carnally known, they are not to be separated. Nevertheless, if she was betrothed being under marriageable age (before 12 or at approximate legitimate age of 11), blessed and led into the house of the groom, no one of his consanguineous relatives should contract with her. This decretal makes it clear that even if the woman is aged 11 (she has not yet arrived to the age of 12, but is in proximity to her legitimate age), engagement is seen to be legal and valid. These two abovementioned decretals (*Attestationes and Continebatur*) dealing with contracting at minor age⁴³² give consideration to marriage, not betrothal, whereas other three decretals⁴³³ discuss betrothal, as they mainly speak about age inequities between parties and the notion of *malitia supplet aetatem*⁴³⁴ – 'malice supplies the age'. The age is what defines whether it is a marriage or a betrothal contracted in those three decretals. The first decretal to be discussed for this matter, namely *De illis*⁴³⁵, is addressed from Pope Alexander III to the Bishop of Bath. According to this decretal, if the person is above seven and contracts betrothal (not the marriage as he/she is not at the marriageable age) and one

⁴³² X 4, 2, 10 (Fr. 676); JL 15729 (9870)

X 4, 2, 6 (Fr. 674-675); JL 14032 (9096); WH 204 1173-76

⁴³³ X 4, 2, 7 (Fr. 675); JL 13767 (8842)

X 4, 2, 9 (Fr. 676); JL 13969 (9031)

X 4, 2, 14 (Fr. 678-679); Potthast no. 2775

⁴³⁴ Roman law legal principle, according to which the minor who had intentionally deceived someone about his age could not take advantage of his lack of capacity to detach himself from the contract. The emperors Maximian and had invoked this notion in IV century in relevance of criminal responsibility, this principle may well be used also at the beginning of Roman Empire. Later on, appeal to *malitia supplet aetatem* has led to assimilation of *pubertati proximus* into adulthood itself. Cipriani, D. [2009: 73]

⁴³⁵ Si maiores septennio contrahunt sponsalia, neuter ante pubertatem resilire potest. Hoc primo. Et ille, qui primo fit pubes, alterum expectabit. Hoc secundo. Quod si tempore contractus alter erat pubes, non ille, sed alter, factus pubes resilire potest. Hoc tertio. Idem [Alexander III.] Bathoniensi Episcopo. De illis qui infra annos aptos matrimoniis *contrahendis [existentes]* sponsalia contrahunt, sive uterque sive alter reclamet antequam ad annos matrimoniis *contrahendis* aptos pervenerint, et postulent separari non sunt ullatenus audiendi. Si vero alteruter istorum ad annos pubertatis pervenerit, infra eosdem annos altero existente, quum eadem sponsalia contrahuntur; si is qui minori s aetatis est, quum ad annos illos pervenerit, reclamaverit, nec in alterum voluerit consentire, iudicio ecclesiae poterunt ab invicem separari. Mulier autem que postquam annos nubiles attingit, ei qui nondum ad annos aptos matrimoniis *contrahendis* venerat, nupsit, quum in eum semel consenserit, amplius non poterit *aliquatnus* dissentire *vel divertere*, nisi forte ipse, cui nupsit, postquam ad legitimam aetatem pervenerit, in eam suum, *omnino* negaverit praestare consensum. X 4, 2, 7 (Fr. 675); JL 13767 (8842)

of two parties or both of them are willing to separate, they are not to be heard until they are adult. If they are not at the even age, the one who first arrives to the age of adulthood is awaiting for the consent from the other party or for the resignation from the betrothal, as in order to assent or dissent the other party should also be at the legitimate age. In case one of the parties is contracted being an adult and the other being a minor, only the first can resign, not the other who is not an adult yet. Another example, notably *De illis*,⁴³⁶ addressed from Pope Alexander III to the Archbishop of Genoa, deals with *malitia supplet aetatem*. The case is dedicated to those who engaged being at the minor age and, afterwards, are willing to separate appealing to the age and to the force applied by parents. The following solution was offered: if this is done close to the age close when they are able to consummate the union, they should not be separated, taking into account the age when they consented and despite their youthfulness. But they can be separated if the consent was given by force or violence. Therefore, in this case age also determines the kind of contract – it is not yet a marriage, but an engagement. It took place despite the young age *malitia supplet aetatem*. It is also important that two parties cannot be resolved from each other when they are at the age proximate to adulthood.

It appears plausible that proximity to the legitimate age and legitimate age are treated equally. In other words, legitimate age and approximately legitimate age are both relevant when it comes to contracting marriage. Taking into consideration two decretals *De illis* [X 4, 2, 7] [X 4, 2, 9] discussed above, it may well be presumed that the age proximate to

⁴³⁶ Minores, apti ad matrimonium, ex contractu matrimonii obligantur, nisi violentia intercedat. Idem [Alexander III.] Genuensi Archiepiscopo. De illis autem, qui in minori aetate desponsantur, traduntur et coniuguntur, et processu temporis divortium postulant, minorem allegantes aetatem, aut vim sibi a parentibus factam, hoc inquisitioni tuae presentibus literis Respondemus, quod, si ita fuerint aetati proximi, quod potuerint copula carnali coniungi, minoris aetatis intuitu ab invicem separari non debent, si unus in alium visus fuerit consensisse, quum in eis aetatem supplevisse malitia videatur. Sed cuiusunque sint aetatis, se possunt per illatam violentiam excusare, nisi post violentiam consensus accedat. X 4, 2, 9 (Fr. 676); JL 13969 (9031)

adulthood and age of adulthood have assimilated. The age which is under aforementioned age of adulthood is mostly relevant when the issue deals with the betrothal in those three decretals. While the matter of age was seen by Pope Alexander III quite flexibly (meaning proximity to adulthood), the matter of a free will consent remains constant – presence of force in the consent makes the assent to the bond automatically void. The last decretal⁴³⁷ that deals with age is addressed from Pope Innocent III to the Bishop of Halberstadt. The case describes how a certain noble man betrothed his daughter, who was about 12 years old at that time, to a certain noble man. The mutual consent took place, as well as subarration. After this man had passed away, the uncle of the girl gave her to another man in marriage. The case was resolved in the following way: if at the time of the contract the girl was at the marriageable age and the consents for the present tense were exchanged between the parties, taken there was no doubt about it, it is perceived to be a marriage despite the lack of consummation. If she was not at her marriageable age, the contract is to be seen as a mere

⁴³⁷ Si quis per verba de praesenti contrahit cum impubere, in qua aetatem malitia non supplet, intelligitur non matrimonium, sed sponsalia contraxisse, etiamsi subarratio intercesserit. Idem [Innocentius III] Episcopo Abbatensi. Tuas nobis exhibitae litterae continebant, quod quidam *vir nobilis* filiam suam, circiter XII. annos habentem, cuidam viro nobili desponsavit, qui subarravit eandem consensu mutuo accedente. *Sed nuptiis aliquantulum prorogatis, pater puellae viam est universae carnis ingressus. Eo autem rebus humanis exempto, puellae avunculus supra dictae ipsam alteri matrimonio copulavit, et ille, qui prius desponsaverat eandem, cum ipsius matre contraxit. Tuus autem praedecessor attendens, quod cum eam non poterat permanere, cuius filiam legitime desponsaverat, inter eos divortii sententiam promulgavit. Postmodum autem mortuo viro secundo, qui supra dictam puellam duxerat in uxorem, ipsa se tertio copulavit, illo vivente, qui eam primitus desponsarat. Ceterum tam ipsa, quam idem te duxerunt humiliter consulendum, utrum licite [simul] valeant commorari; tu vero, deliberatione habita, respondisti, quod sponso primo vivente, alteri non potuit legitime copulari. Sed quia tua ecclesia postulavit, ut super hoc apostolicam sedem consuleres, procedere ulterius distulisti, nobis humiliter supplicans, ut super hoc tibi rescribere dignaremur. Quia vero per ea, quae superius sunt expressa, nobis pro certo constare non potuit, cuius aetatis esset puella, quum eidem viro extitit desponsata, quum dicatur, quod circiter XII. annos habebat utrumne prud entia tunc in illa suppleret aetatem: fraternitati tuae taliter respondemus, quod, si puella tunc nubilis erat aetatis, et inter eam et primum virum legitimus intervenit de praesenti consensus, absque dubio inter eos erat legitimum matrimonium contractum, etsi carnalis commixtio non fuerit subsequuta. Si vero puella nubilis non erat aetatis, quum saepe fatus vir desponsavit eandem, et aetatem in ea prudentia non supplebat, procul dubio inter eos non coniugium, sed sponsalia contracta fuerunt, quamvis ab ipso viro eadem puella fuerit subarrhata. Quocirca si iuxta primum modum matrimonium cum illo contraxit: eo vivente non potuit rite cum alio foedus contrahere coniugale; quod si iuxta modum secundum sponsalitia solummodo contracta fuerunt coniugium, quod inter illam et alium extitit celebratum, debet legitimum reputari, dummodo alium canonicum non obsistat. X 4, 2, 14 (Fr. 678); Potthast no. 2775; Reg. Innoc. III. 9; no. 70*

betrothal; regardless of the fact that subarration took place. This decretal, this time addressed by Pope Innocent III, displays a pattern relevant to predecessing two decretals of Pope Alexander III; namely, the age of contracting parties is of utmost importance as it predefines the kind of contract made – a person at minor age contracts betrothal, whereas an adult person contracts marriage, even though this bond has features of betrothal and has not yet been consummated. The decretal of Pope Innocent III is relevant in relation to the importance of the age factor to the kind of union. It is not relevant, though, in a sense of proximity to the age of discretion or adulthood: in *Tuae nobis exhibitae* [X 4, 2, 14] Pope Innocent III distinguishes sharply the periods before and after the age of seven and does not take into consideration age proximity. Therefore, out of those three above mentioned decretals, only two (belonging to Pope Alexander III) prove the point the commentator was making, namely, the age of adulthood or age of proximity to this legitimate one is important as only at this age a marriage is contracted, not an engagement. It appears plausible to claim that uncertainty about a type of contract in the seventh chapter [X 4, 1, 7] is related to the age, which is not defined in the case itself, and, therefore, the kind of contract remains undefined.

By not “understanding”⁴³⁸ it is meant that one does not understand the other party personally or through the translator. Furthermore, a contrary point of view is presented by the allegation from Roman law saying that even the interval of “not understanding” followed by clarity cannot void the contract.⁴³⁹ An extensive gloss may be found concerning the

⁴³⁸ Intellexerit, id est, si dicat se non intellexisse sive per se, sive per interpretem ff. *De verborum obli[gationibus] l.I. in fi[ne]* [D. 45, 1, 1, 1] cum tamen contrarium praesumatur, cum sint eiusdem vulgaris. Gl. ad X 4, 1, 7 [1595: 1014]

⁴³⁹ Ulpianus 48 ad sab. Qui praesens interrogavit, si antequam sibi responderetur discessit, inutilem efficit stipulationem: sin vero praesens interrogavit, mox discessit et reverso responsum est, obligat: intervallum enim medium non vitiavit obligationem. D. 45, 1, 1, 1

meaning and understanding of common words,⁴⁴⁰ If the verbal ambiguity takes place in the juridical case or contract, the core of which is a controversy, the contracting parties are taken more into consideration than the subject of the contract *plus creditur auctori and quam reo*. The allegation to this part of the gloss is taken from the *Digesta* that gives definitive verbal formulas from Roman law that ensure any kind of *dolum* in the contract in the future between contracting parties as well as between their heirs.⁴⁴¹ This excerpt from Roman law does not appear very relevant to the issue, only considering the focus not on the subject of the contract itself, but on the contracting parties and definitive verbal formulas. The commentator goes on distinguishing between valid and void contracts – the first are the *onesto* which the parties consented; the latter are those from which they dissent. The allegations from the *Digesta*,⁴⁴² the *Decretum*⁴⁴³ and the comment of Johannes Andreae⁴⁴⁴ are applied to prove this point. Roman law allegation compares betrothal/marriage to a selling/buying contract and claims that clearly consent is essential to a contract as any

⁴⁴⁰ Intelligentiam, huiusmodi ambiguitas verborum quandoque incidit in iudiciis, quandoque in contractibus: In iudiciis circa litis exordium [De resti[tutione] spol[iorum] Io[hannes] And[reae].] plus creditur auctore, quam reo ff De Ver[borum] obli[gationibus]. Inter stipulantem [D. 45, 1, 83 pr.] In contractibus et pactis distinguitur; aut certum est quod consenserunt, et tunc valet quod agitur: aut non consenserunt, et tunc non valet quod agitur ff De contrahen[da] emp[tione] et [et de pactis inter emptorem et venditorem compositis et quae res venire non possunt]. In venditionibus [D. 18, 1, 9 pr.] et 30 q.2 Ubi [Grat. 30, 2, 1] aut dubitatur quid senserint, et tunc subdistingue: qua aut valet intellectus secundum unam partem, aut secundum utranque: si secundum unam partem, commodius est id accipi, ut res de qua agitur magis valeat, quam pereat ff De verb[orum] oblig[ationibus]. Quotidiens. [D. 45, 1, 80] ... Si secundum utranque, tunc id quod verisimilius est, accipiendum est ff De verbo[rum] oblig[ationibus]. Eum qui Calendis. et Quod quinque consuevit accidere. ... et secundum promissiorem sit interpretatio: quia liberum fuit stipulatori verba late concipere ff De verb[orum] oblig[ationibus]. Quidquid. [D. 45, 1, 99] Gl. ad X 4, 1, 7[1595: 1014]

⁴⁴¹ Paulus 72 ad ed. Inter stipulantem et promittentem negotium contrahitur. itaque alius pro alio promittens daturum facturumve eum non obligatur: nam de se quemque promittere oportet. et qui spondet " dolum malum abesse a futurumque esse", non simplex abnutivum spondet, sed curaturum se, ut dolus malus absit: idemque in illis stipulationibus " habere licere" item " neque per te neque per heredem tuum fieri, quo minus fia t". D. 45, 1, 83 pr.

⁴⁴² Ulpianus 28 ad sab. In venditionibus et emptionibus consensum debere intercedere palam est: ceterum sive in ipsa emptione dissentient sive in pretio sive in quo alio, emptio imperfecta est. si igitur ego me fundum emere putarem cornelianum, tu mihi te vendere sempronianum putasti, quia in corpore dissensimus, emptio nulla est. idem est, si ego me stichum, tu pamphilum absentem vendere putasti: nam cum in corpore dissentiat, apparet nullam esse emptionem. D. 18, 1, 9 pr.

⁴⁴³ Ante tempus consentiendi coniugium contrahi non potest. Ubi non est consensus utriusque, non est coniugium. Ergo qui pueris dant puellas in cunabulis, et e conuerso, nichil faciunt, nisi uterque puerorum post, quam uenerit ad tempus discretionis, consentiat, etiamsi pater et mater hoc fecerint et uoluerint. C.30 q.2 c.1 (Fr. 1099-1100)

⁴⁴⁴ Sequitur utriusque consensus necessarius est, sed si in venditione dissentiunt in pretio vel corpore, imperfecta est emptio. Io[hannes] A[n]dreae Gl. ad X 4, 1, 7 [1595: 1014]

inconveniences or dissentments between contracting parties in price, subject (Johannes Andreae recites the same principle) or mistake in the names of the contracting parties will make the contract void. As to the *Decretum*, quotation out of this *opus magnum*, applies directly to the marital bond contracted in the cradle, which necessarily has to be consented by the bride and groom after their arriving to the age when they are able to decide; their decision is crucial to the contract, as without their consent even the will of the parents is not to be counted.

In case there is a doubt whether the consent took place, it has to be distinguished if it is stated by one of the parties or by both. If this doubt concerns one contracting party, the Roman law principle *magis valeat, quam pereat* is to be applied; in other words, if it is unclear if one party has consented, it is to be understood so for the law to be used, rather than ignored. The allegation from the *Digesta* presents a similar statement.⁴⁴⁵ If it is the case that the consent from both sides is doubtful, the most believable answer is to be accepted. For proving this the chapters from the 45th book of the *Digesta*⁴⁴⁶ are addressed that cannot be found there.

In sum, at least in this decretal consent and its verbal formula is entirely neglected. It is not even important if contracting parties have fully understood each other. What is of utmost importance is the ability to decide and to discern. Age *per se* is not a determining factor, even if it may seem so at the first glance, but age is an important feature that defines whether or not the capacity to distinguish is present or not. It appears plausible to conclude that the Pope avoided discussing verbal consensual form as for him a determining factor for contracting legal bond is person's ability to discern and distinguish, which finds its

⁴⁴⁵Ulpianus 74 ad ed. Quotiens in stipulationibus ambigua oratio est, commodissimum est id accipi, quo res, qua de agitur, in tuto sit. D. 45, 1, 80

⁴⁴⁶*Eum qui calendis* and *Quod quinque consuevit accidere* are not to be found in book 45, under the promised title *De verbo[rum] obli[gationibus]*.

characteristics at the age of discretion (7), adulthood (12/14) or proximity to the given age. It might be herein noted that the Pope tends to avoid some elements of conjugal union in order to highlight the importance of others.

5.4.5.5 *Sponsam* [X 4, 1, 8]

Levitian barrier has already been discussed in this chapter in relation to *Ad audientiam* [X 4, 1, 4], which forbade any conjugal bonds with relatives of the partners without specifying the age of contracting parties. *Sponsam* [X 4, 1, 8] goes beyond that. As it has been observed in the discussion of the previous decretal, consent itself is not influential in contracting engagement. What is determining is the age of discretion, as it sets a line, below which engagement is perceived as null, and, above which it becomes legal. Similarly to *Ad audientiam* [X 4, 1, 4], *Sponsam* [X 4, 1, 8] has one “constant value,” on which the outcome of the matter depends. Age is such an important value that even the proximity to it matters.

Sponsam [X 4, 1, 8],⁴⁴⁷ from Pope Alexander III to the bishop of Norwich, deals with Levitian barrier claiming that none groom’s relatives can have his bride as a marital partner. This decretal not only declares a Levitian barrier, but also specifies the age of the bride which has to be “marriageable,” which is seven years or close to this age in the comments.⁴⁴⁸ Notion of “marriageable age” is discussed⁴⁴⁹ as it matters what was bride’s age at the moment of contracting betrothal, as the age determines whether or not this liaison is active in a legal sense. There were instances when the bride was in the cradle at the moment of contract and

⁴⁴⁷Inter sponsam et consanguineos sponsi oritur impedimentum publicae honestatis, impediens et dirimens matrimonium inter eos contrahendum. Idem [Alexander III] Vigiliensi [Norvicensi] Episcopo. Sponsam autem alterius, maxime si est nubili aetati, proxima nullus consanguineorum aliquo modo sibi potest matrimonio copulare. X 4, 1, 8 (Fr. 663)

⁴⁴⁸CASUS. Sponsam, dicitur in hoc capitulo quod sponsam alterius maxime nubilem et septennem, nullus de consanguinitate viri ducere potest in uxorem. Nota, quod sponsam consanguinei consanguineus habere non potest. Gl. ad X 4, 1, 8 [1595: 1014]

⁴⁴⁹Nubili, illud, maxime, ponitur proprie comparative, quia ex quo habet septem annos tenent sponsalia et ita nullus consanguineorum potest eam habere infra titu[lum] proxi[mum] *Litteras* [X 4, 2, 4] et cap. *Accessit* [X 4, 2, 5]. Ergo multo fortius impedit, cum est proxima nubili aetati. Idem videtur si est proxima septennio, et doli capax supra eodem *iuvenis* [X 4, 1, 3]. Bernardus. Gl. ad X 4, 1, 8 [1595: 1014]

the bond was considered null; therefore, the consanguineous contract was held legal. According to the point of view of Pope Alexander III verbalized in *Litteras tuae* [X 4, 2, 4],⁴⁵⁰ betrothals held in cradle are null; therefore, they raise no impediment for another marital bond (Pope Alexander III to the bishop of Hereford (1159-1181)). According to *Accessit ad presentiam*,⁴⁵¹ the letter sent from Pope Alexander III to Roger, the archbishop of York, engagement contracted at the age under 7 cannot be contracted, especially if the bride has not consented to it; therefore, this bond is also not legal. These two above mentioned letters discuss cases when the bride is under the age of seven. The next one, to which Bernard of

⁴⁵⁰ *Litteras tuae fraternitatis accepimus, ex quarum tenore perpendimus, quod, quum quidam parochianus tuus A. nomine esset perfectae aetatis, quondam puellam in cunabilis desponsavit; procedente vero tempore idem A. matrem puellae cognovit et eam in uxorem accepit. Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo Consultationi tuae taliter respondemus, quod si praefatus matrem praefatae puellae antequam puella ipsa septimum annum complisset in uxorem accepit, matrimonium ipsum non dissolvas sed eundem virum praefatam mulierem, sicut uxorem, libere tenere permittas, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam praefata puella septimum complevit, praedictus vir matrem eius accepit in uxorem, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem in uxorem habere permittas. X 4, 2, 4 (Fr. 673), JL 13947(9009); WH 631 1177*

⁴⁵¹ *Accessit ad praesentiam nostrum nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubiles annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nolles, eum sollicitate monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutes sua nobis assertionem proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea [vero], antequam ad nubiles annos pervenisset, noluit alequatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W. in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patre puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam idem W., ut Discordia orta inter consanguineos suos et consanguineous mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod praefata puella non esset septennis quando praememorato G. desponsata fuit, et postea in eum non consenserit, et quod idem G. ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia ante septem annos fieri non possunt praesertim si consensus postea non accedit. Sane si praefata puella ante [huiusmodi] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paternae vel maternae, hereditatis prohiberi non possunt. X 4, 2, 5 (Fr. 674) JL 13887(8952); WH 12 c. 1173*

Parma refers, deals with the age close to seven.⁴⁵² According to the decision made by Pope Eugenius, if one older than seven takes a bride who is not yet arrived to the mentioned age and afterwards takes one of relatives of the girl, he and her relative have to separated. With this decretal it becomes evident that proximity to the age of seven is treated similarly to the actual age of seven. As a result, the previous bond the groom has contracted impedes contracting with relatives on the ground of public honesty.

5.4.5.6 *Ex litteris* [X 4, 1, 10]

It has been already remarked at the beginning of this chapter that it is not possible indeed to encompass Alexandrine marriage/betrothal doctrine into the single paradigm. Current letter is a good example of discrepancy between two decretals of the same Pope in *Liber Extra*. Unlike [X 4, 1, 2], where dissolving of betrothal mutually decided between contracting parties makes it relatively easy to dissolve an engagement for the future, *Ex litteris* [X 4, 1, 10] claims betrothal for the future, even contracted by the parents while their children were at the minor age, to be binding. *Ex litteris* [X 4, 1, 10] outstands from the frame of previously regarded ideas. It is also undated and, therefore, makes it hard to be placed into any timespan designed by Dauvillier, which, thereafter, has been revisited by Donahue. What could be surely stated is that this decretal of Pope Alexander III shows clearly the wave of fluctuation and flexibility of papal thought. The only reason that might have given the Pope a goal to compel this contract to proceed to marriage might be that this engagement has been contracted hoping to reconcile two families *spe pacis inter eos conciliandae*.

⁴⁵² Si maior septennio duxit in uxorem minorem septennio, et eam traduxit ad domum, oritur ex tali contractu publicae honestatis iustitia. H.d. inhaerendo literae. Panorm. Eugenius Papa. Iuvenis *ille*, qui puellam nondum septennem duxit, quamvis aetas repugnaret, ex humana tamen fragilitate forsan tentavit quod complere non potuit. Quia igitur in his, quae dubia sunt, quod certius existimamus, tenere debemus, tum propter honestatem ecclesiae, quia ipsa coniux ipsius fuisse, dicitur, tum propter praedictam dubitationem, mandamus *tibi* quatenus consobrinam ipsius puellae, quam postmodum duxit, dividas ab eodem. X 4, 1, 3 (Fr. 661); JL 9655 (6685)

Ex litteris [X 4, 1, 10] from Pope Alexander III to the bishop of Poitiers,⁴⁵³ on the one hand, shows that betrothal vows are binding; on the other hand, this papal response raises the question of parental consent. According to the case, two noble men G. and B., having children of the minor age, agreed that they will marry their children in the future; they both promised to do so, as well as their children. Afterwards, the son of G. wanted to take another lady as his wife. In accordance with the response given, he is to be compelled to marry the first girl. Bernard of Parma extensively comments on the oath of parents and their children and on the matter of its viability. Considering parental assent to betrothal⁴⁵⁴ (as it is the oath for the future matrimony), Bernard of Parma starts with a “positive” evaluation and confirms his argument with the decree from Synod of Elvira *Concilium Eliberritanum*, which found its way into the *Decretum*.⁴⁵⁵ According to this canon from Synod of Elvira, parental consent is awaited in contracting marital bonds; it is also claimed that parents who did not keep the promise to a certain betrothal of their children should abstain from the

⁴⁵³ *Ex litteris venerabilis fratri nostri Siluani episcopi accepimus, quod cum duo nobiles viri sui episcopatus G. scilicet de Monstra, et B. de Mauritania filios et filias impubescentes haberent, et spe pacis inter eos conciliandae ita inter se conuenerunt, quod eos adinvicem matrimoniis copularent, et hoc tam patres, quam filii, sub iuramento se promiserunt facturos, inter quos siquidem G. filiam alterius consentiente patre, semel et iterum se iuravit ducere in uxorem, quo volente ad alia vota migrare, eum episcopus compellere voluit, ut quod iuraverat, adimpleret. Ipse ad audientiam nostram appellavit, et altera parte nuncium suum ad nos, destinante ipse nec venit, nec responsalem aliquem pro se transmisit. Quia igitur praedicto G. periculosum est contra suum iuramentum venire. Fraternitati tuae per apostolica scripta praecipiendo mandamus quatenus, quum exinde fueris requisitus, utramque partem ante tuam convoces, praesentiam et rationibus hinc inde plenius auditis et agitis si hoc tibi constiterit, eum moneas, et si non acquieverit monitis, ecclesiastica censura compellas, ut ipsam, nisi rationabilis causa obstiterit, in uxorem recipiat, et maritali affectione pertractet. Si vero rationabilem causam praetendere voluerit, eam cum omni diligentia et studio audias, et fine canonico omni appellatione cessante decidas. Ceterum si legitime monitus iudicio tuo parere contemserit eum, et patrem, si fovere ipsum in sua malitia praesumserit, excommunicationis vinculo astringas et in tota terra ipsorum omnia divina praeter baptismum parvulorum et poenitentias morientium prohibeas officia celebrari. X 4, 1, 10 (Fr. 664); JL 14059 (9118); WH 442 undated*

⁴⁵⁴ Tam patres, simi. 31.q.3. *Si qui parentes* [C. 31 q.3 c.un]. Sed videtur, quod istud iuramentum non valeat, et sit anceps periurium, cum sit de facto alterius ff. rer. amot. Marcellus (?) et ff. de in lit[em] iur[ando]. Videamus [D. 12, 3, 4]. Et argumentum ad hoc ff. De verbo[rum] obliga[tionibus]. Stipulatio ista [D. 45, 1, 38] quia ut ibi dicit, qui alienum factum promittit, non obligatur, tamen hic factum suum potius promiserunt, ut procurent bona fide, quod filii contraherent, ut eadem lege et in illa stipulatione. Bernar[dus]. Gl. ad X 4, 1, 10 [1595: 1015]

⁴⁵⁵ Si qui parentes fidem fregerint sponsaliorum, triennii tempore a comunione abstineant. Si uero idem sponsus uel sponsa in illo graui crimine non fuerint deprehensi, excusati erunt parentes. Si uero in eodem fuerint uicio, et polluerint se consentiendo, superior sententia seruatur. Gratian. Ecce, quod non licet parentibus sponsalia filiorum suorum frangere. Verum hoc de illis intelligendum est, que illorum consensu contrahuntur. C. 31 q.3 c.un (Fr. 1115-1116)

communion three times. In other words, this canon confirms papal response that expresses that betrothal has a legal binding force. Bernard claims that this oath described in *Ex litteris* [X 4, 1, 10] is void; he maintains his argument by texts from the *Digesta*: the first text claims the oaths made at minor age to be void⁴⁵⁶ and the second one mainly states that one who has promised is not obliged to do so, but it is better to do so in order to keep a “good faith.”⁴⁵⁷

Bernard comments⁴⁵⁸ even more extensively on the validity of children’s oath. He starts with their age, which impedes legal vow to happen, and refers to the canon of the Synod of

⁴⁵⁶ Videamus in tutelari causa quis iurare et adversus quem possit. et quidem ipse pupillus, si impubes est, non potest: hoc enim saepissime rescriptum est. sed nec tutorem cogendum vel matrem pupilli admittendam, etsi parata esset iurare, divi fratres rescripserunt: grave enim videbatur et ignorantes et invitos tutores sub alieni compendii emolumento etiam periurium anceps subire. curatores quoque pupilli vel adulescentis non esse cogendos in litem iurare rescriptis imperatoris nostri et divi patris eius continetur. si tamen tantam affectionem pupillo suo vel adulescenti tutores vel curatores praestare volunt, auctoritas iuris non refragabitur, quin iudicio, quod inter ipsos acceptum est, finis eiusmodi possit adhiberi. non enim ad suam utilitatem iurisiurandi referenda aestimatio est, sed ad domini, cuius nomine tutelae ratio postulatur. adulescens vero si velit iurare potest. D. 12, 3, 4

⁴⁵⁷ Stipulatio ista: " habere licere spondes?" hoc continet, ut liceat habere, nec per quemquam omnino fieri, quo minus nobis habere liceat. quae res facit, ut videatur reus promisisse per omnes futurum, ut tibi habere liceat: videtur igitur alienum factum promisisse, nemo autem alienum factum promittendo obligatur, et ita utimur. sed se obligat, ne ipse faciat, quo minus habere liceat: obligatur etiam, ne heres suus faciat vel quis ceterorum successorum efficiat, ne habere liceat. D. 45, 1, 38

⁴⁵⁸ Quam filii, sub iuramento, isti erant impuberes, unde non tenuit iuramentum. 22. q. 4 *Parvulis* et c. *Pueri* (?) et 4. q.3 cap.1 [C.4 q.3 c. 1]. Sed illa intelliguntur cum ad testimonium perhibendum inducuntur, sed alias si sint doli capaces, bene tenet iuramentum. ... Hic posuit Laur[entius] talem questionem: aliquis iuravit accipere in uxorem unam de filiabus Titii, et postmodum dormivit cum una illarum, quaeritur an praecise debeat compelli eam ducere, cum aliam ducere non possit? Argumentum quod sic ff *De contrahen[da] emp[tione]* [et de pactis inter emptorem et venditorem compositis et quae res venire non possunt] *Si emptio* [D. 18, 1, 34] et ff *De solut[ionibus et liberationibus]*. *Stichum aut Pamphilum* [D. 46, 3, 72] et ipse se ad hoc arctavit ff *Si quis cau[tionibus in iudicio sistendi causa factis non obtemperaverit]*. *Sed et si*. [D. 2, 11, 2] *Quaesitum* [D. 2, 11, 4] et ff *De usu fruc[tu adcrecendo]*. [D. 7, 2, 1]. Quidam dixerunt [Hoc tenent Vinc[entius Hispanus?] et Phil[ip] qui dicunt eum praecise non compellendum, et poenitentiam sibi praecise debere imponi de periurio, quia per eum statit. Argumentum supra eodem *de illis* [X 4, 1, 5] Jo[hannes] And [reae]] dixerunt eum non compellendum, quia invitae nuptiae, et c.31 q.2 cap.1 [C.31 q.2 c.1] et supra eodem *praeterea* [X 4, 1, 2]. Sed contrarium est verum, quod debeat compelli. Sed videtur, quod non sit compellendus eam recipere, quia in veritate nec sponsalia precesserunt, nec matrimonium, quia cum dixit: volo accipere unam de filiabus Titii, nulla cum aliqua illarum sponsali contracta sunt, quia in personam certam consentire debuit, et incerta sponsalia non sunt sponsalia, argumentum 30 q.5 *nostrates* [C. 30 q.5 c.3] et argumentum ff *De testamen[taria] tut[ela]*. *Duo sunt Titii* [D. 26, 2, 30] et si dico: exhaeredo unum de filiis meis, cum plures habeam, nullus est exhaeredatus ff *De lib[eris] et postum[is]* [heredibus instituendis vel exheredandis]. *Nominatim* [D. 28, 2, 2] et certus debet esse haeres, alias non valet testamentum ff *De haered[ibus] insti[tuendis]*. *In tempus* [D. 28, 5, 63pr] et *Quotiens* [D. 28, 5, 63, 1] et ff *De manumis[sis] testam[ento]*. *Cum ex pluribus* [D. 40, 4, 31]. Dico quod non compellitur ex vi sponsaliorum, sed propter iuramentum forte debet compelli, licet ad illam recepiendam non se obligaverit directe, nisi deterius inde contingeret, ut nota supra eodem *Praeterea* [X 4, 1, 2]... . Ber[nardus] Gl. ad X 4, 1, 10 [1595: 1015]

Carthage, which found its way into the *Decretum*⁴⁵⁹ claiming that testimonies and oaths before the age of 14 are not to be seen as valid. But it is to be understood when they are brought forward to witness and are capable of guilt (*doli capaces*); in this case they can hold the oath. The incapability to intent evil or crime is connected with the minor age, therefore according to this principle only adults are to be responsible for criminal acts. Bernard of Parma questions the presupposition (raised by Laurentius Hispanus(?)) that the man who had promised to take one of Titius's daughters as a wife and afterwards spent the night with another daughter should be compelled to take the first one as a wife and prohibited to marry the other. There are pro and contra arguments as to the point presented. The arguments that claim the same ideas as presuppositions are taken from the *Digesta*.⁴⁶⁰ The contra argument that the man should not be compelled to marriage he had promised, but should only receive the penitence for the broken vow, is presented by Johannes Andreae

⁴⁵⁹ Testes autem ad testimonium non admittendos esse censemus, qui nec ad accusationem admitti iussi sunt, uel

etiam quos ipse accusator de domo sua produxerit. Ad testimonium autem intra annos quatuordecim etatis suae constituti non admittantur. C. 4 q. 3 c. 1 (Fr. 537-538)

⁴⁶⁰ Si emptio ita facta fuerit: "est mihi emptus stichus aut pamphilus", in potestate est venditoris, quem velit dare, sicut in stipulationibus, sed uno mortuo qui superest dandus est: et ideo prioris periculum ad venditorem, posterioris ad emptorem respicit. sed et si pariter decesserunt, pretium debetur: unus enim utique periculo emptoris vixit. idem dicendum est etiam, si emptoris fuit arbitrium quem vellet habere, si modo hoc solum arbitrio eius commissum sit, ut quem voluisset emptum haberet, non et illud, an emptum haberet. D. 18, 1, 34

Stichum aut pamphilum stipulatus sum, cum esset meus pamphilus: nec si meus esse desierit, liberabitur promissor pamphilum dando: neutrum enim videtur in pamphilo homine constitisse nec obligatio nec solutio. sed ei, qui hominem dari stipulatus est, unum etiam ex his, qui tunc stipulatoris servi erant, dando promissor liberatur: vi quidem ipsa et hic ex his dari stipulatus est, qui eius non erant. fingamus ita stipulatum: "hominem ex his, quos sempronius reliquit, dare spondes?", cum tres sempronius reliquisset, eorumque aliquem stipulatoris fuisse: num mortuis duobus, qui alterius erant, supererit ulla obligatio, videamus. et magis est deficere stipulationem, nisi ante mortem duorum desierit esse reliquus servus stipulatoris. D. 46, 3, 72

Sed et si quis rei capitalis ante condemnatus iudicio sistere se non potuit, merito huic ignoscitur: rei capitalis condemnatum accipere debemus, qui morte exiliove coercitus est. dixerit aliquis, quo ergo haec exceptio damnato? sed respondebitur fideiussoribus eius esse necessariam: aut si forte in exilium salva civitate abiit, ubi defensori eius exceptio ista proderit. D. 2, 11, 4pr

Quaesitum est an possit conveniri, ne ulla exceptio in promissione deserta iudicio sistendi causa facta obiciatur: et ait atilicinus conventionem istam non valere. sed ego puto conventionem istam ita valere, si specialiter causae exceptionum expressae sint, quibus a promissore sponte renuntiatum est. D. 2, 11, 4

Quotiens usus fructus legatus est, ita inter fructuarios est ius adcrendi, si coniunctim sit usus fructus relictus: ceterum si separatim unicuique partis rei usus fructus sit relictus, sine dubio ius adcrendi cessat. D.

7, 2, 1

referring to *De illis* [X 4, 1, 5]⁴⁶¹ This very decretal is not an accurate reference, as it allows the bride to marry whoever she wishes if the groom is somewhere else for a considerable amount of time and there is only betrothal for the future without consummation between them. Bernard of Parma gives more relevant texts: one decision of Pope Urban from the *Decretum*,⁴⁶² where the oath of the parents should not be binding for children unless the latter have not consented to it (here there is also a percentage of inaccuracy as in the glossed letter children vowed as well as their parents, therefore they at least were aware of their betrothal); and the other, namely a decretal, wrongly ascribed to Pope Innocent III and proven to be of Pope Alexander III *Praeterea* [X 4, 1, 2],⁴⁶³ which is mostly relevant to the argument that the man should not be made marry the one he has promised to do so. After discussing those pro and contra arguments Bernard of Parma insists on the pro- part, in particular claiming that it is true that the man should be compelled to marry the one he has promised. Bernard of Parma does not abandon the the Titius's daughter's case: as there is

⁴⁶¹ Si sponsus de futuro ante copulam ad remota se transfert, sponsa libere cum alio contrahit: si tamen per eam stetit, quo minus matrimonium perficeretur, sibi poenitentia imponitur. Idem [Alexander III] Panormitano Archiepiscopo. De illis autem, qui praestito iuramento promittunt se aliquas mulieres ducturos, et postea eis incognitis, dimittunt terram, se ad partes alias transferentes, hoc tibi volumus innotescere, quod liberum erit mulieribus ipsis (si non est amplius in sacro processum) ad alia se vota transferre, recepta tamen de periurio poenitentia, si per eas steterit, quo minus fuerit matrimonium consummatum. *Si vero etc.* (cf. c. 3. de cond. app. IV. 5.) [X 4, 5, 3] Si vero aliquis sub huiusmodi verbis iuramentum alicui mulieri praestiterit: "Ego te in uxorem accipiam, si tantum mihi donaveris" reus periurii non habebitur, si eam, nolentem sibi solvere quod *iuramento* sibi dari petiit, non acceperit in uxorem, nisi consensus de praesenti aut carnalis sit inter eos commixtio subsequuta. X 4, 1, 5 (Fr. 662) JL 14043 (9105)

⁴⁶² Iuramento patris non cogitur puella nubere, cui numquam assensum prebuit. Item Iudicium Urbani Pape. Si uerum esse constiterit, quod nobis legati Iordanis principis retulerunt, scilicet, quod ipse coactus et dolens filiam suam infantulam nolentem, flentem, et pro uiribus renitentem, non assentientibus, sed ualde dolentibus matre et parentela, Rainaldo Rodelli filio desponsauerit, quoniam canonum et legum auctoritas talia sponsalia (ut infra ostenditur) non approbat, ne ignorantibus leges et canones nimis durum quod dicimus uideatur, ita sententiam temperamus, ut, si princeps cum filiae, matris, et parentelae assensu id, quod ceptum est, perficere uoluerit, concedamus. Sin autem, legatus noster utrasque partes audiat, et si nichil fuerit ex parte supradicti Rainaldi amplius, quod inpediat, ab ipso Iordane sacramentum, quod ita constent hec, ut dicta sunt, accipiat, et nos canonum ac legum scita sequentes deinceps non prohibemus, quin alii uiro, si uoluerit, predicta filia eius tantum in Domino nubat. C. 31 q.2 c. 1 (Fr. 1113-1114)

⁴⁶³ Sponsalia de futuro dissolvuntur, si sponsi se dissolvunt, etiamsi fuerint iurata. Innocentius III [Alexander III] Exonensi Episcopo. Praeterea hi, qui de matrimonio contrahendo pure et sine omni conditione fidem dederunt [aut] iuramentum fecerunt, commonendi sunt et diligentius exhortandi, et modis omnibus inducendi, ut praestitam fidem vel iuramentum factum observent, et se, sicut promiserint coniugant. Si autem se adinvicem admittere noluerint; ne forte deterius inde contingat, ut talem scilicet ducat, quam [semper] odio habet; videtur, quod ad instar eorum, qui societatem *iuramento* vel interpositione fidei contrahunt, et postea eandem sibi remittunt, hoc possit in patientia tolerari. X 4, 1, 2 (Fr. 661)

uncertainty to which of several daughters of Titius one is betrothed, he is not betrothed to any because a vague and undefined betrothal is not a betrothal at all. *Nostrates* [C.30 q.5 c.3]⁴⁶⁴ indirectly confirms this opinion, mainly stating that not by gold or silver or any other metal the couple is united in betrothal, which is a promise of the future marriage, but by the consent of those contracting and also of those in whose power they are. By this example Bernard of Parma reassures that only consent of children and parents makes betrothal legal and by this supports the response of Pope Alexander III. Chapter from the *Digesta* shows that uncertainty in person makes any arrangement void.⁴⁶⁵ The instances from Roman law are taken showing that the expression *I deprive my son of the heritage* is null in case if there are several sons and the actual name of the son is not mentioned.⁴⁶⁶ In sum, Bernard agrees with the decision of Pope Alexander III that the man should be compelled to a promised marriage. The commentator specifies the reason: not on the ground of contracted betrothal, but rather on the ground the oath,⁴⁶⁷ as the first one is not binding, according to already discussed *Praeterea* [X 4, 1, 2], where betrothal for the future can be dissolved at the wish of the parties.

⁴⁶⁴ Item Nikolaus ad consulta Bulgarorum. [c. 3.] *Nostrates*, tam mares quam feminae, non ligaturam auream, uel argenteam, aut ex quolibet metallo compositam, quando nuptialia federa contrahunt, in capitibus deferunt: sed post sponsalia, que futurarum sunt nuptiarum promissio, federa quoque consensu eorum, qui hec contrahunt, et eorum, in quorum potestate sunt, celebrantur; et post, quam arrhis sibi sponsam sponsus per digitum fidei annulo insignitam desponderit, dotemque utrique placitam sponsus ei cum scripto pactum hoc continente coram inuitatis ab utraque parte tradiderit (aut mox aut apto tempore, ne uidelicet ante tempus lege diffinitum tale quid facere presumant), ambo ad nuptialia federa perducuntur, et primum in ecclesia Domini cum oblationibus, quas offerre debent Deo per sacerdotis manum, statuuntur, sicque demum benedictionem et uelamen celeste suscipiunt. Item: §. 1. Hec sunt, preter alia, que ad memoriam non occurrunt, pacta coniugiorum solempnia. Peccatum autem esse, si hec cuncta in nuptiali federe non interueniant, non dicimus. C. 30 q. 5 c. 3 (Fr. 1105-1106)

⁴⁶⁵ Duo sunt titii, pater et filius: datus est tutor titius nec apparet, de quo sensit testator: quaero, quid sit iuris. respondit: is datus est, quem dare se testator sensit: si id non apparet, non ius deficit, sed probatio, igitur neuter est tutor. D. 26, 2, 30

⁴⁶⁶ Nominatim exheredatus filius et ita videtur " filius meus exheres esto", si nec nomen eius expressum sit, si modo unicus sit: nam si plures sunt filii, benigna interpretatione potius a plerisque respondetur nullum exheredatum esse. D. 28, 2, 2

⁴⁶⁷ Dico quod non compellitur ex vi sponsaliorum, sed propter iuramentum forte debet compelli, licet ad illam recipiendam non se obligauerit directe, nisi deterius inde contingeret, ut nota supra eodem *Praeterea* [X 4, 1, 2]... . Ber. Gl. ad X 4, 1, 10 [1595: 1015]

It seems noteworthy to mention that this final comment that betrothal should be compelled, not on the ground of contracted engagement, but on the ground of oath, is in a way an “artificially drawn” argument. *Ex litteris* [X 4, 1, 10] clearly contradicts *Praeterea* [X 4, 1, 2], and the commentator seems to try to find any possible bridge between those two decretal decisions. It appears quite plausible that those two aforementioned letters are absolutely opposite, and the last argument of the glossator is not relevant.

5.4.5.7-Veniens ad nos [X 4, 1, 15]

In one matter that deals with engagement for the future Pope Alexander III tends to have a strict paradigm – engagement contracted for the future tense, subsequently followed by the intercourse is both binding and indissoluble. In *Veniens ad nos* [X 4, 1, 15] (letter from Pope Alexander III⁴⁶⁸ to the bishop of Exeter)⁴⁶⁹ text speaks about a certain G. who was living with a woman whom he had promised to marry with the promise being given for the future in the presence of witnesses. They had a child. Afterwards, the man spent a night with neighbor’s daughter in his neighbour’s house. The neighbour made him promise to marry his daughter – in the present tense. Alexander’s solution in *Veniens ad nos* [X 4, 1, 15] is based on whether a certain G. had the intercourse with his first partner after making his future-tense promise of marriage to her. If there was an intercourse after the promise for the future, then two were married and his present-tense consent to marry the neighbor’s daughter is null. If there

⁴⁶⁸ According to JL 13902 (8966) the letter is addressed to the bishop of Exeter; according to JL 14159 (9230) it has been sent to the bishop of Worms. Professor Anne J. Duggan in her article *Master of the Decretals: A Reassessment of Alexander III’s Contribution to Canon Law* claims that *Veniens ad nos G.* (1176-81) is addressed to John of Norwich (WH 1071). (Duggan 2012, 394)

⁴⁶⁹ Sponsalia de futuro, si secuta est copula, non solvuntur per sponsalia de praesenti; alias tenent sponsalia de praesenti, nisi per metum, qui potuisset cadere in cinstantem virum, contracta sint. Idem [Alexander III]. *Veniens ad nos G. lator presentium* sua nobis relatione monstravit, quod in domo sua mulierem quandam recepit, de qua prolem habuit, et cui fidem coram pluribus praestitit, quod eam duceret in uxorem. Interim autem, quum apud domum vicini sui pernoctaverit, eius filia nocte illa secum concubuit, quos pater puellae simul in uno lecto inveniens, ipsum eam per verba de praesenti desponsare coegit. *Qui nuper in presentia nostra, constitutus nos consuluit cui potius adhaerere deberet. Quia vero nequaquam innoluit nobis, utrum post fidem praestitam primam cognoverit. Ideoque mandamus quatenus rei veritatem diligenter inquiras, et, si inveneris, quod primam post fidem praestitam cognoverit, ipsum cum ea facias remanere; alioquin secundae, nisi metu coactus, qui posset in virum constantem cadere, eam desponsaverit, adhaerere facias ut uxori.* X 4, 1, 15 (Fr. 666); JL 13902 (8966)

was no intercourse between the first couple, then consent for the present tense is binding. This decretal serves as a brilliant example of Pope Alexander III being flexible between consensual and consummational theories of marriage creation. As James Brundage claims:

The issue of whether marital consent was cast in the future or in the present tense was certainly important in Alexander III's notion of marriage; but, regardless of the future or present tense of the words of agreement, Alexander's decretals still required consummation if the marriage was to become in a strict sense indissoluble.⁴⁷⁰

Betrothal even for the future followed by the intercourse without any ceremony of marriage is a legal binding union as it has been consummated, and even betrothal for the present cannot overrule betrothal for the future as the latter has been consummated; thus, from this point on it is deemed as marriage. The commentator calls the first woman, whom he received in his house, promised to marry for the future in the presence of witnesses and subsequently had a child with, *concubina*.⁴⁷¹ The commentator does not call her a bride, as she has been living with a man, but has been betrothed, and not yet married. Bernard of Parma clearly defines the first union as betrothal for the future,⁴⁷² but this kind of betrothal followed by consummation turns to valid marriage "automatically". Two decretals refer to the same issue, when consummation after engagement for the future would make a legal marital bond, in particular a decretal of Pope Gregory IX to the bishop of Le Mans⁴⁷³ and from Pope Alexander III to the bishop of Palermo.⁴⁷⁴

⁴⁷⁰ (Brundage 1986, 76)

⁴⁷¹ *Recepit, ut concubinam*. Gl. ad X 4, 1, 15 [1595: 1018]

⁴⁷² *Praestitit, post prolem susceptam, et sic sponsalia de futuro contracta fuerunt, unde si postea antequam contraheret cum alia, illam cognovit, inductum fuit matrimonium praesumptum, contra quam praesumptionem probatio in contrarium non admittitur infra eodem is qui* [X 4, 1, 30], *et de condi[tionibus] appo[sitis in desponsatione vel in aliis contractibus] de illis* [X 4, 5, 3]. Ber[nardus]. Gl. ad X 4, 1, 15 [1595: 1018]

⁴⁷³ *Sponsalia de futuro transeunt in matrimonium per carnalem copulam subsequutam, sed non per nium carnalis copulae tantum. H. d. cum c. fin. Idem [Gregorius IX] Episcopo Cenomanensi. Is, qui fidem dedit M. mulieri super matrimonio contrahendo carnali copula subsequuta, etsi in facie ecclesiae ducat aliam et*

Fear is presented as an impediment for contracting a legitimate marital union.⁴⁷⁵ Pope Alexander III is very accurate about the definition of *metus* as he defines it as a force that makes a steady man fall. According to the text of *Veniens ad nos* [X 4, 1, 15], force and fear are reasons for annulment of any marital union, betrothal or marriage that would be otherwise valid.⁴⁷⁶ There are two different views on Pope Alexander III's consistency emphasising free consent of the parties and his deliberate policy to "undermine the web of social and political authority."⁴⁷⁷ Scholars Donahue and Brundage⁴⁷⁸ voiced for this deliberately mastered policy as opposed to Duggan's presupposition that Pope Alexander III did not comment explicitly about restructuring social order and institutions in order to free betrothal and marriage of parental control, influence of relatives and lords. Moreover, *desponsatio impuberum* was not freed from parental influence and control.⁴⁷⁹

In sum, it appears to be far too courageous to draw conclusions from this single decretal in direction of papal decision to free a person from family influences or to state that Pope Alexander III was mastering his own distinct marital policy. According to *Veniens ad nos* [X 4, 1, 15], it can merely be stated that the Pope forbade implementation of violence in contracting conjugal binds; the Pope was quite explicit explaining the niveau of *metus* (to

cognoscat, ad primam redire tenetur, quia, licet praesumptionem tamen huiusmodi non est probatio admittenda. Ex quo sequitur quod nec verum nec aliquod censetur matrimonium quod de facto est postmodum subsecutum. X 4, 1, 30 (Fr. 672); Potthast no. 9661

⁴⁷⁴ Qui iuravit aliquam id uxorem accipere, si centum sibi donaverit, centum non datis, recipere non tenetur, nisi postea pure consenserit, vel eam cognoverit. Alexander III. Archiepiscopo Panormitano. De illis (*Et infra*) [*cf. c. 5 de spons. IV. 1*] [X 4, 1, 5] De illis autem, qui praestito iuramento promittunt se aliquas mulieres ducturos, et postea eis incognitis, dimittunt terram, se ad partes alias transferentes, hoc tibi volumus innotescere, quod liberum erit mulieribus ipsis (si non est amplius in sacro processum) ad alia se vota transferre, recepta tamen de periurio poenitentia, si per eas steterit, quo minus fuerit matrimonium consummatum. Si vero aliquis sub huiusmodi verbis iuramentum alicui mulieri praestiterit: "Ego te in uxorem accipiam, si tantum mihi donaveris" reus periurii non habebitur, si eam, nolentem sibi solvere quod *iuramento* sibi dari petiit, non acceperit in uxorem, nisi consensus de praesenti aut carnalis sit inter eos commixtio subsecuta. X 4, 5, 3 (Fr. 682) JL 14043 (9105)

⁴⁷⁵ ... nisi metu coactus, qui posset in virum constantem cadere... X 4, 1, 15 (Fr. 666); JL 13902 (8966)

⁴⁷⁶ (Duggan 2012, 406)

⁴⁷⁷ (Duggan 2012, 407)

⁴⁷⁸ (Donahue 1976, 252); (Brundage 1987, 332-3)

⁴⁷⁹ (Duggan 2012, 407)

the level when the fear makes a steady man fall down). Nonetheless, excluding violence can in no way be equalised to freeing the person from family influences in making marital decisions. Furthermore, previously discussed *Ex litteris* [X 4, 1, 10] illustrates the opposite papal decision – contracting parties were expected to be compelled to proceed to marriage from parentally contracted betrothal for the future. These arguments give one more proof that there is neither a single deliberately made consistent conjugal doctrine of Pope Alexander III, nor an attempt, on his behalf, to free a person from family influences.

5.4.5.8 *Litteras tuae fraternitatis* [X 4, 2, 4]

Next two decretals to be discussed, namely *Litteras tuae fraternitatis* [X 4, 2, 4] and *Accessit ad praesentiam* [X 4, 2, 5], reestablish “constant value” of age that determines whether an engagement is to be taken null or legal. This interdependence is very closely related to a Levitian barrier. First betrothal declared null (contracted under the age of seven) does not impede contracting conjugal bond with a relative; but the same engagement serves as an impediment if it has been created after the age of seven. Similar to the provisions of chapters *Ad audientiam* [X 4, 1, 4] and *Ex litteris* [X 4, 1, 7] discussed above, Levitian barrier belongs to a strict paradigm, which the Pope does not shift in *Litteras tuae fraternitatis* [X 4, 2, 4] and *Accessit ad praesentiam* [X 4, 2, 5]. What he does is to specify the age, his determining “constant value” that entirely defines the outcome of the decretal.

The decretal *Litteras tuae fraternitatis* [X 4, 2, 4]⁴⁸⁰ was addressed from Pope Alexander III to Robert Foliot, the bishop of Hereford, on the 6th of March 1177,⁴⁸¹ in which a certain man

⁴⁸⁰ Ex sponsalibus, contractis cum minore septennio, non oritur impedimentum publicae honestatis; secus, si cum maiore vel minore, consentiente post septennium. Et affinitas, sequens dissolvit sponsalia praecedentia de futuro. Alexander III Herefordensi Episcopo. Litteras tuae fraternitatis accepimus, ex quarum tenore perpendimus, quod, quum quidam *parochianus tuus A. nomine* esset perfectae aetatis, quondam puellam in cunabilis desponsavit; procedente vero tempore *idem A.* matrem puellae cognovit et eam in uxorem accepit. Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo Consultationi tuae taliter respondemus, quod si praefatus matrem *prefatae* puellae antequam *puella ipsa* septimum annum complisset in uxorem accepit, matrimonium ipsum non dissolvas sed eundem virum

A., being an adult, betrothed a girl, being in the cradle. In some time the man had carnally known the mother of the girl and married her. It is replied to the plea that if A. had taken the girl's mother as a wife before her daughter reached the age of seven, their marriage should remain valid as betrothals made in cradle are null. In case if marriage with the mother happened after or at the time when the girl turned seven, he cannot marry either of them. Engagement of those under the age of 7 is a nullity, and this union, which is void, seems not to give rise to impediment of public honesty. Commenting on this decretal, anonymous glossator presupposes that betrothals contracted *de facto* do not give rise to public dishonesty. He claims this according to decretal he comments on, *Litteras tuae fraternitatis* [X 4, 2, 4], while being aware of other decretals of Pope Alexander III *Ad audientiam* [X 4, 1, 4]⁴⁸² and Pope Eugene⁴⁸³ that present contra arguments. Those arguments suggest that betrothal for the future contracted even at a minor age impede contracting with relatives of one of the parties on the ground of public dishonesty.⁴⁸⁴ Betrothal, in commentator's

praefatam mulierem, sicut uxorem, libere tenere permittas, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam praefata puella septimum complevit, praedictus vir matrem eius accepit in uxorem, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem in uxorem habere permittas. X 4, 2, 4 (Fr. 673); JL 13947(9009); WH 631 6 March

1177

⁴⁸¹ (Donahue 1982, 79)

⁴⁸² Ex sponsalibus, contractis cum consanguinea, oritur publicae honestatis iustitia. Alexander III. Papiensi Episcopo. Ad audientiam nostri apostolatus pervenit, quod, quum H. Albericus, Papiensis civis, filiam suam cuidam filiorum L. dare vellet uxorem, iuravit, quod, si ille, cui desponsabatur, eam habere casu aliquo interveniente non posset, alteri filio, quem de alia uxore genuerat, eandem puellam matrimonio copularet. Contractis autem a filio priore sponsalibus, quidam, ad ecclesiam accedentes, consanguinitatem inter eos esse iuramentis interpositis firmaverunt. Ideoque praefatus H. eandem feminam dare alteri filio nititur, ut iuravit. Sed quoniam scriptum est, quod sponsam fratris frater habere non potest, discretioni tuae per apostolica scripta praecipiendum mandamus, quatenus eum suum implere propositum, quod canonicae rationi obviat, non permittas, sed ut poenitentiam agat de illicito iuramento, monitione praemissa, ecclesiastica districtione compellas. X 4, 1, 4 (Fr. 662); JL 13137 (8613); WH 41 (a) 1180

⁴⁸³ Si maior septennio duxit in uxorem minorem septennio, et eam traduxit ad domum, oritur ex tali contractu publicae honestatis iustitia. H. d. inherendo litarae. Panorm. Eugenius Papa [Aesculapo presbytero]. Iuvenis ille, qui puellam nondum septennem duxit, quamvis aetas repugnaret, ex humana tamen fragilitate forsantentavit quod complere non potuit. Quia igitur in his, quae dubia sunt, quod certius existimamus tenere debemus, tum propter honestatem ecclesiae, quia ipsa coniux ipsius fuisse dicitur, tum propter praedictam dubitationem, mandamus tibi quatenus consobrinam ipsius puellae, quam postmodum duxit, divides ab eodem. X 4, 1, 3; (Fr. 661); JL 9655 (6685)

⁴⁸⁴ Dissolvas, argumentum quod sponsalia contracta de facto non inducunt publicae honestatis iustitiam, argumentum contra supra titulo proximo Ad audientiam [X 4, 1, 4], ubi de hoc, et c. Iuvenis [X 4, 1, 3]. Gl. ad X 4, 2, 4 [1595: 1030]

perception, is primarily a contract which can be made at the minimum age of seven.⁴⁸⁵ The author of the commentary is not being very accurate as in the example he refers to the case dealing with marriage *coniugium*, not engagement.⁴⁸⁶ Union contracted after the mentioned age of seven is to be approved by custom and ratified as engagement, unless the age of the parties has been denied to be seven. One more peculiarity is added: engagement is to be confirmed by cohabitation.⁴⁸⁷ By this way of argumentation the commentator seems to show that this union is not an actual betrothal in reality; therefore, by not being such it does not give rise to public dishonesty. If it were a betrothal, it would surely give rise to public dishonesty; therefore, he is allowed to have neither the daughter on the ground of affinity, nor the mother on the ground of public dishonesty.⁴⁸⁸

5.4.5.9 *Accessit ad praesentiam* [X 4, 2, 5]

The same issue of Levitian barrier is discussed in the following decretal, where age is a determining factor. According to *Accessit ad praesentiam* [X 4, 2, 5],⁴⁸⁹ the decretal sent

⁴⁸⁵ Extunc, scilicet post septem annos. 30 q.2 c.ult [C.30 q.2 c.1]

⁴⁸⁶ Ante tempus consentiendi coniugium contrahi non potest. Ubi non est consensus utriusque, non est coniugium. Ergo qui pueris dant puellas in cunabulis, et e conuerso, nichil faciunt, nisi uterque puerorum post, quam uenerit ad tempus discretionis, consentiat, etiamsi pater et mater hoc fecerint et uoluerint. C.30 q.2 c.1 (Fr. 1099-1100)

⁴⁸⁷ Placere consueverint, et si placuerint, sola ratihabitione confirmantur, licet ab initio nulla fuissent, et intelliguntur ratum habere, nisi expresse contradixerint aetate legitima adueniente, ut hic colligitur, sed intelligo, quod sponsalia debeant placere, cum simul cohabitant, quia tunc intelliguntur consentire, ex quo non contradicunt *ff De ritu nup[tiarum]*. *Minorem* [D. 23, 2, 4] secus credo si seorsum habitant: quia tunc non intelliguntur consentire, nisi vel verbo vel ipso facto, puta quia vadit ad domum suam, vel dat aliqua munuscula et consimilia, que sponsi facere consueverunt, argumentum ad hoc infra c[apitulo] prox[imo] in prin[cipio] [X 4, 2, 5], ubi dicit, et postea in eum non consenserit. Gl. ad X 4, 2, 4 [1595:1030]

⁴⁸⁸ Filiam, quam habere non potest propter affinitatem supervenientem 35 q.3 *Nec eam quam* [C.35 q.2 c.10] nec matrem propter publicae honestatis iustitiam, ut infra capitulo proximo [X 4, 2, 5], et supra titulo proximo *Ad audientiam* [X 4, 1, 4], et infra eodem *Continebatur* [X 4, 2, 6]. Ber[nardus]. Gl. ad X 4, 2, 4 [1595:1030]

⁴⁸⁹ *Accessit ad praesentiam nostrum nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubiles annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nolles, eum sollicitate monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutes sua nobis assertione proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea [vero], antequam ad nubiles annos pervenisset, noluit alequatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W.*

from Pope Alexander III to Roger, the archbishop of York, perhaps circa 1173, a certain man named G. betrothed a girl at the minor age. Subsequently, she did not assent to him and engagement was dissolved by the archbishop. Afterwards, G. married her mother and had children in this marriage. Pope Alexander III gives his response to dispel doubts of the archbishop of York as to which union is to be legitimate and whether children are legitimate. If it is known that the girl had not yet reached the age of seven at the time when betrothal with G. was contracted, marriage of the man with her mother is legitimate as well as the offsprings of this marriage. If the girl had reached the age of seven before contacting betrothal, despite her unwillingness to contract with G., the man is not to be allowed to have girl's mother as his wife; they, therefore, should be divorced; his betrothal with the girl should be also dissolved as she had not consented to it. Betrothal is claimed to be null when contracted at the minor age (under the age of seven) and, therefore, this null betrothal does not impede marriage with relative of the bride, in this case, the mother. Therefore, *desponsatio impuberum* impedes unions with relatives through public honesty as long as contracting parties in the first union are more than 7 years old. This decretal is ascribed by Dauvillier, and reassured by Donahue, to the "solemnity period," as there is a strong reliance

in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patrem puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam idem W., ut Discordia orta inter consanguineos suos et consanguineous mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod praefata puella non esset septennis quando praememorato G. desponsata fuit, et postea in eum non consenserit, et quod idem G. ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia ante septem annos fieri non possunt praesertim si consensus postea non accedit. Sane si praefata puella ante [huiusmodi] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paternae vel maternae, hereditatis prohiberi non possunt. X 4, 2, 5 (Fr. 674) JL 13887 (8952); WH 12 c.1173

on judgements and even the mention of the power of the ordained person to dispense from the impediment of public honesty in *Accessit ad praesentiam* [X 4, 2, 5].⁴⁹⁰

While interpreting the meaning of consent (which may be either verbally or silently expressed) in this chapter, Bernard of Parma refers to *Continebatur* [X 4, 2, 6]⁴⁹¹ where absence of consent, additionally to the minor age, creates no betrothal.⁴⁹² According to *Continebatur* [X 4, 2, 6], betrothal contracted after the age of seven gives rise to public dishonesty, and, therefore, bans any marital relations to relatives of the bride/groom. By alluding to *Continebatur* [X 4, 2, 6], Bernard of Parma underlines the importance of age, which defines whether public dishonesty takes place or not, resulting from legal or null betrothal. As a result, according to *Accessit ad praesentiam* [X 4, 2, 5], betrothal contracted before seven, which has not been confirmed by consent of one of the parties after arrival to the age of seven, is null. Thus, it does not impede any marital relations with relatives of this party by absence of public dishonesty. According to *Continebatur* [X 4, 2, 6], marriage (in decretal *Continebatur* [X 4, 2, 6] marriage is discussed, rather than betrothal) created after the age of seven, whether or not reaching the age of 12 (or close to this age 11) impede any

⁴⁹⁰ (Donahue 1982, 89)

⁴⁹¹ Si impubes, desponsata et traducta, petit licentiam pubes facta alteri nubendi, non auditur, si vir iurat, so eam

cognovisse; nec auditur, si nondum pubes, sed proxima pubertati probetur cognita. Et ex sponsalibus, contractis cum impubere maiore septennio, oritur publica bonestas. Idem [Alexander III] Norvicensi Episcopo. Continebatur in literis tuis, quod, quum quaedam puella infra nubile annos cuidam viro in uxorem tradita fuerit, et ab ipso traducta, suis parentibus asserentibus, eam legitimae aetatis existere, haec, ad nubile annos perveniens alii nubendi licentiam postulavit, asserens, se in eundem virum nullatenus consensisse. Praedictus vero vir econtra proponit, quod, licet eadem puella nondum forte annum XII. attigisset quum ei tradita fuisset in uxorem, usque adeo tamen aetati fuit proxima, quod ipsam carnali commixtione cognovit. Inde esi, quod, quum ipsa dicit ab eodem viro se incognitam, et tu nos consuluisti, utrum alii possit nubere. Consultationi tuae taliter respondemus, quod, quum in decretis habeatur expressum, quod, si vir dixerit, quod uxorem suam cognoverit, et mulier negaverit, viri standum est veritati, unde praefato viro, qui dicit, se mulierem ipsam cognovisse, fides est adhibenda, si id firmaverit iuramento. Si autem fuerit aetati proxima, ut in undecimo vel circa XII. annum, et cum suo assensu et voluntate parentum desponsata et benedicta fuerit, et cognita ab eodem viro, separari non debet, praesertim quum parentes eius ipsam fuisse aetatis legitimae faterentur. Si vero puella infra nubile annos el aetati proxima alicui desponsata fuerit, benedicta atque traducta, non licet alicui de consanguinitate ipsius, cui desponsata fuerit, eam ducere in uxorem, nec fas est eidem sponso de consanguinitate sponsae sibi aliquam [matrimonio] copulare. X 4, 2, 6 (Fr. 674-675); JL 14032 (9096)

⁴⁹² Consenserit, dic super hoc, ut supra c[apitulo] proxi[mo]. Gl. ad X 4, 2, 5 [1595: 1031]

Accedit, tacite vel expresse, ut dictum est supra c[apitulo] proxi[mo]. Gl. ad X 4, 2, 5 [1595: 1031]

relations of a marital nature with relatives on the ground of public dishonesty. Bernard of Parma is not being quite accurate by referring to *Continebatur* [X 4, 2, 6] as it speaks about marriage, whereas the decretal he comments on discusses engagement. This is also confirmed by the age difference: in *Accessit ad praesentiam* [X 4, 2, 5] the bride is about 7 years; whereas, in *Continebatur* [X 4, 2, 6] – she is 12 or close to that age.

In another place of the text of decretal an anonymous commentator seems to pay attention to consent, but from the perspective different from that of Bernard of Parma. According to the text of decretal, in case if betrothal was contracted after the girl had turned seven, but she did not consent to it, this engagement should be dissolved by law.⁴⁹³ The author of the anonymous comment claims it to be an inappropriate understanding of treating these issues, as there is no need to dissolve engagement as it is not legal, but null on the ground of absent consent.⁴⁹⁴

In this decretal the absence of bridal consent to the betrothal was mentioned. Interestingly enough, in papal response the consent failed to find reflection and influence for the decision. The main and determining role in finding solution for the case was played by the age of the bride, not by the presence or absence of her consent. The Pope does not seem to take the latter into consideration. What does take into account is the age of the bride. The commentators (Bernard of Parma and anonymous glossators), in opposite, paid considerable amount of attention to consent by going into detailed examination of verbal and silent forms of assent in decretals other than the *Liber Extra*. This sheds even more light on

⁴⁹³ Sane si praefata puella ante [*huiusmodi*] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit... . X 4, 2, 5 (Fr. 674) JL 13887 (8952); WH 12

⁴⁹⁴ Ipso iure, hoc ideo dicit, quia cum maior contrahit sponsalia cum minore, adveniente aetate, si minor noluerit consentire in matrimonium, ab ecclesia debet absolvi, et quia illa noluit consentire, fuit absolutus ab episcopo. Nec intelligas ipso iure, id est, sponsalia nulla fuerunt ipso iure, ut quidam [Tanc[red]] dixerunt, quia ipsa non consensit in sponsalibus, sed hoc stare non potest, quia si hoc fuisset, non separaretur matrimonium contractum cum matre, cum nulla fuissent sponsalia, ut patet per princ[ipio] c[apitulo] [X 4, 2, 1] ubi non separantur. Gl. ad X 4, 2, 5 [1595: 1031]

Alexandrine evaluation of free will consent – the Pope does not seem to be preoccupied with consent, where the determining factors show in direction of null/legal betrothal.

5.4.5.10 *De illis* [X 4, 2, 7]

Following the logic that the age defines legitimacy or nullity of an engagement, it might be suggested that only upon arrival to the adult age the contracted betrothal may be dissolved. Both decretals *De illis* [X 4, 2, 7] and *A nobis* [X 4, 2, 8] are based on the objective age criterium taken from Roman law (12 years for a man/ 14 years for a woman). It is no wonder that commentators have referred in such cases to the *Digesta* very often.

De illis [X 4, 2, 7]⁴⁹⁵ is addressed from Pope Alexander III to Reginald,⁴⁹⁶ the bishop of Bath (1174-1181). According to this decretal, if the person is older than seven and contracts betrothal (not the marriage as he/she is not at the marriageable age), and one of two parties or both of them are willing to separate, they are not to be heard until they are adult. If they are not at the even age, the one who first arrives to the age of adulthood is waiting for the consent from the other party or to the resignation from the betrothal; in order to assent or dissent the other party should also be at the legitimate age. In case if one of the parties contracted is already an adult and the other is not, the first one can resign, though not the one who is not yet adult. Therefore, betrothals of *impuberes* (children under 7) are not valid, unless confirmed by consent after age of 7.

⁴⁹⁵ Si maiores septennio contrahunt sponsalia, neuter ante pubertatem resilire potest. Hoc primo. Et ille, qui primo fit pubes, alterum expectabit. Hoc secundo. Quod si tempore contractus alter erat pubes, non ille, sed alter, factus pubes resilire potest. Hoc tertio. Idem [Alexander III.] Bathoniensi Episcopo. De illis qui infra annos aptos matrimoniis *contrahendis* [existentes] sponsalia contrahunt, sive uterque sive alter reclamet antequam ad annos matrimoniis *contrahendis* aptos pervenerint, et postulent separari non sunt ullatenus audiendi. Si vero alteruter istorum ad annos pubertatis pervenerit, infra eosdem annos altero existente, quum eadem sponsalia contrahuntur; si is qui minori aetatis est, quum ad annos illos pervenerit, reclamaverit, nec in alterum voluerit consentire, iudicio ecclesiae poterunt ab invicem separari. Mulier autem que postquam annos nobiles attingit, ei qui nondum ad annos aptos matrimoniis *contrahendis* venerat, nupsit, quum in eum semel consenserit, amplius non poterit *aliquatenus* dissentire vel *divertere*, nisi forte ipse, cui nupsit, postquam ad legitimam aetatem pervenerit, in eam suum, *omnino* negaverit praestare consensum. X 4, 2, 7 (Fr. 675); JL 13767 (8842); WH 4 (b)

⁴⁹⁶ (Donahue 1982, 74)

The commentary of Bernard of Parma considering minor age, being in which a person who contracted betrothal is not able to cancel it due to the minor age, is made with quotations.⁴⁹⁷ The first reference deals with those who, by will of their parents, are preparing themselves to clerical office; their will should be inspected when they arrive to the age of 8-10.⁴⁹⁸ The next reference comes from the *Decretum* stating that if children enter religious life at minor age, at the age of 15 they should be asked if they are willing to stay.⁴⁹⁹ References to Roman law deal with a contract which is to be reconfirmed after the person comes to the age of adulthood.⁵⁰⁰

⁴⁹⁷ Ullatenus audiendi, propter fragilitatem aetatis, et est argumentum quod impubes de eo, quod facit ante pubertatem, reclamare non valet, argumentum 28. dist. *De his* [dist 28 c 5] et 20. q.1 *illud* [C.20 q.1 c.10] *ff De nego[tiis] gest[is]*. Pomponius [D. 3, 5, 8], et argumentum ad hoc *ff De mino[ribus] viginti quinque annis*. *Denique* 1 [D. 4, 4, 3, 1]. Ber[nardus] Gl. ad X 4, 2, 7 [1595: 1032]

⁴⁹⁸ Item ex Concilio Tolletano II. [c. 1.] IV. Pars. De his, quos uoluntas parentum a primis infantiae annis clericatus offitio manciparit, id statuimus obseruandum, ut mox detonsi, uel ministerio lectorum contraditi, in domo ecclesiae sub episcopali presentia a preposito sibi debeant erudiri. At ubi octauum decimum etatis suae compleuerint annum, coram totius cleri plebisque conspectu uoluntas eorum de expetendo coniugio ab episcopo perscrutetur; quibus si gratia castitatis (Deo inspirante) placuerit, et promissionem castimoniae suae absque coniugali necessitate se spoponderint seruatuuros, qui tanquam appetitores arctissimae uiae lenissimo iugo Domini subdantur, ac primum subdiaconi ministerium, habita probatione professionis suae, a uicesimo anno suscipiant. Quod si inculpabiliter ac inoffense uiginti quinque annos peregerint, ad diaconii offitium (si adimplere posse ab episcopo probantur), promoueri debent. Cauendum tamen est his, ne quando suae sponsionis inmemores aut ad terrenas nuptias aut ad furtiuos concubitus ultro recurrant. Quod si forte fecerint, ut sacrilegii rei ab ecclesia habeantur extranei. Quibus autem uoluntas propria interrogationis tempore desiderium nubendi persuerit, concessam ab Apostolo licentiam auferre non possumus, ita ut, cum proeactae etatis in coniugio positi, renunciatuuros se pari consensus operibus carnis spoponderint, ad sacros ordines aspirent. D.28 c. 5 (Fr. 101-102)

⁴⁹⁹ Illud autem statuendum esse censemus, ut, si in minori etate filii monasterio obliti fuerint, et sacram tonsuram uel uelamina susceperint, dignum quidem duximus, ut XV. anno a prelati moniti inquirantur, utrum in ipso habitu permanere cupiant, an non? Si uero permanere professi fuerint, ulterius penitendi locum minime amplecti possunt. Sin autem ad secularem habitum reuerti uoluerint, redeundi licentia nullo modo denegetur, quia satis inutile est, ut coacta seruitia Domino prestentur.] III. Pars. Gratian. Velamen autem uirginibus inponi non licet, nisi certis diebus. Unde Gelasius Papa omnibus Episcopis: [per Lucaniam, c. 14. et 15.]. C.20 q.1 c.10 (Fr. 845-846)

⁵⁰⁰ Si quis cum minore contraxerit et contractus inciderit in tempus quo maior efficitur: utrum initium spectamus an finem? et placet, ut est et constitutum, si quis maior factus comprobauerit, quod minor gesserat, restitutionem cessare. unde illud non ineleganter celsus epistularum libro undecimo et digestorum secundo tractat, ex facto a flavio respecto praetore consultus. minor annis viginti quinque, annos forte viginti quattuor agens, iudicium tutelae heredi tutoris dictauerat: mox factum ut (non finito iudicio iam eo maiore effecto viginti quinque annis) tutoris heres absolutus proponeretur: in integrum restitutio desiderabatur. celsus igitur respecto suasit non facile hunc quondam minorem in integrum restitui, sed si ei probaretur calliditate adversarii id actum, ut maiore eo facto liberaretur: neque enim extremo, inquit, iudicii die videtur solum deceptus hic minor, sed totum hoc structum, ut maiore eo facto liberaretur. idem tamen confitetur, si leuior sit suspicio adversarii quasi dolose versati, non debere hunc in integrum restitui. D. 4, 4, 3, 1

According to comment⁵⁰¹ to *De illis* [X 4, 2, 7], betrothal [for the future] may be dissolved by ecclesiastical court, unless there is a stronger liaison of the matrimony to another person or solemn vows. The commentator refers to *Si inter* [X 4, 1, 31]⁵⁰² where engagement for the present cannot be dissolved by following marriage with another partner, but betrothal for the future can easily be dissolved by subsequent engagement for the present with another party. Quotation of St. Augustine⁵⁰³ is alluding to the same principle; the only difference is that betrothal for the present followed by the engagement for the present (marriage is discussed instead in *Si inter* [X 4, 1, 31]) as well, makes the one second void. In both instances

⁵⁰¹ Iudicio ecclesiae, sic infra c[apitulo] prox[imo]. Et ita patet, quod sponsalia dissolvi debent iudicio ecclesiae tantum, nisi fortius vinculum superveniat, puta matrimonium cum alio, vel votum solemne, quia tunc ipso iure soluta sunt argumentum supra tit[ulo] prox[imo] *Si inter* [X 4, 1, 31] et infra *De sponsa duorum* c. 1 [X 4, 4, 1]. Argumentum contra infra eo[dem] *Ex litteris* [X 4, 2, 11] ubi solvuntur sponsalia antequam alter perveniat ad aetatem. Sed non est contra, quia ibi non tenuerunt sponsalia, ut patet ex fine, hic vero tenuerunt. Item simi[liter] supra tit[ulo] prox[imo] *Praeterea* [X 4, 1, 2] et c. *Requisivit* [X 4, 1, 17] ibi similiter solvuntur sponsalia, ne deterius inde contingat et ita sponsalia contrahentes, si nolunt uterque, vel alter perficere matrimonium, non sunt compellendi, ut colligitur per hec iura. Sed contra est expressum, quod omnino sunt compellendi per ecclesiasticam censuram supra tit[ulo] prox[imo] *Ex litteris* 2 [X 4, 1, 10] et *Sicut* [X 4, 1, 22]. Quid ergo respondebis? Dicas, quod illa decre[ta] *Ex litteris* 2 [X 4, 1, 10] et *Sicut* [X 4, 1, 22] loquuntur quoniam iuramentum interveniat, licet illi etiam essent impuberes, sed erant doli capaces, ita quod tenuit iuramentum, unde propter periculum iuramenti compelli debent ad contrahendum, et illa decre[ta] *Requisivit* [X 4, 1, 17] reducitur ad illam *Ex litteris* [X 4, 1, 10] ut ibi plene dictum est, et quid dicit illa decre[ta] *Praeterea* [X 4, 1, 2] potius est dispensatio, ut dictum est: et quia uterque dissentiebat, ideo facilius toleratur; hic ergo loquitur de sponsalibus minorum. Si ergo iuramentum interveniat, compellendi sunt perficere matrimonium, sive sint maiores, sive minores, dum tamen fuerint doli capaces, quia aetas illa plena est periuriis infra *De delict. pue. Pueris*. [?] Si vero iuramentum non intervenit in sponsalibus, non sunt inviti compellendi, quia invitae nuptiae difficiles exitus consueverunt habere, et ita planum est ex causa tamen compelluntur, ut dictum est supra *De sponsa [duorum]*. *Ex litteris* 2 [X 4, 1, 10]. Gl. ad X 4, 2, 7 [1595: 1032]

⁵⁰² Sponsalia de praesenti non solvuntur per sequens matrimonium, etiam carnali copulata consummatum; sed sponsalia de futuro etiam iurata solvuntur per sequentia de praesenti. Idem [Gregorius IX.]. Si inter virum et mulierem legitimus consensus interveniat de praesenti ita, quod unus alterum mutuo consensu, verbis consuetis expresso, recipiat, utroque dicenti “ego te in meam accipio,” et “ego te accipio in meum” vel alia verba consensum exprimentia de praesenti, sive sit iuramentum interpositum sive non, non licet alteri ad alia vota transire. Quod si fecerit, secundum matrimonium de facto contractum, etiamsi sit carnalis copula subsecuta, separari debet, et primum in sua firmitate manere. Verum si inter ipsos accessit tantummodo promissio de futuro, utroque dicente alteri “ego te recipiam in meam,” et “ego te in meum” sive verba similia, si alias mulierem illam per verba de praesenti desponsaverit, etiamsi inter ipsam et primum iuramentum intervenerit, sicut diximus, de futuro: huiusmodi desponsationis intuitu secundum matrimonium non poterit separari, sed eis est de violatione fidei poenitentia iniungenda. X 4, 1, 31; (Fr. 672); Potthast no. 9662

⁵⁰³ Contrahens successive per verba de praesenti cum duobus, tenetur adhaerere primae. Si autem primo contraxit per verba de futuro, secundo per verba de praesenti, adhaerebit secundae. Augustinus de fide pactionis et consensus. Duobus modis dicitur fides pactionis et consensus. Si aliquis alicui mulieri fidem fecerit pactionis, non debet aliam ducere. Si aliam duxerit, poenitentiam debet agere, de fide mentita; maneat tamen cum illa, quam duxit. Non enim rescindi debet tantum sacramentum. Si autem fecerit fidem consensus, non licet ei aliam ducere. Si autem duxerit, dimittet ipsam, et adhaerebit uxori priori. Est autem fides pactionis, quando aliquis promittit alicui fidem, quod eam ducet, si permiserit eum rem secum habere, vel etiam pro consensu. Fides autem consensus est, quando etsi non stringit manum, corde tamen et ore consentit ducere, et mutuo se concedunt unus alii, et mutuo se suscipiunt. X 4, 3, 1 (Fr. 680)

sponsalia de futuro may be dissolved if followed by *sponsalia de praesenti*. Engagement may also be dissolved when one of the parties has not yet arrived to the age of adulthood taken that an adult partner contracted betrothal unwillingly. This kind of contract is easy to cancel as it is not legally contracted on the ground of lack of consent.⁵⁰⁴ Similar cases relevantly used in this matter are decretals *Praeterea* [X 4, 1, 2]⁵⁰⁵ and *Requisivit* [X 4, 1, 17]⁵⁰⁶ that allow (contrary to a beginning argument) to solve engagements contracted condition free and those that are not to be compelled being unwilling to proceed to the marriage from betrothal. The anonymous commentator links the decision on whether or not one should be compelled to proceed with marriage after being engaged to a present vow, which is directly connected with age and notion of *doli capax*. If the vow has taken place, no matter if the person is a minor or an adult, on the ground of present vow he/she is to be compelled to

⁵⁰⁴ Si maior invita contraxit sponsalia cum minore, non tenetur ipsum expectare, donec veniat ad aetatem adultam. Idem [Urbanus III] Pisano Archiepiscopo. Ex literis tuae fraternitatis accepimus, quod puella quedam anno XII. iurata fuit et desponsata cuidam puero IX. Vel X. annorum, et tempore procedente de voluntate parentum potius, quam de sua sicut asserit, ad domum patris *praedicti* pueri adducta, ubi nolens et invita, *sicut ab ore ipsius te audisse proponis, et tam persuasionibus quam* minis parentum impulsu, moram fecit per annum et amplius, et tandem inde recedens, ad domum propriam est regressa. *Commonita vero matre sua, et a te postmodum, sicut asseris, ad eum redire penitus contradicit, asserens, quod nunquam eum voluit, nec vult in virum habere, sed nubendi alii, postulat facultatem.* Quum autem iam dictus puer, *sicut tuae literae continebant, nondum* ad XIV. annum *aetatis suae* pervenerit, nec unquam ad eandem puellam carnaliter accessum habuerit, discretioni tuae taliter respondemus, quod, si *memorata* puella *per te ad hoc* studiose commonita, ut, donec, compleat idem puer annum XIV. annum *suae aetatis*, expectet, *ad commonitionem tuam* non duxerit expectandum, ei secundum ea, quae proposita sunt, accipiendi alium virum *in maritum auctoritate nostra* liberam tribuas facultatem. X 4, 2, 11; (Fr. 677)

⁵⁰⁵ Sponsalia de futuro dissolvuntur, si sponsi se dissolvunt, etiamsi fuerint iurata. Innocentius III [Alexander III] Exonensi Episcopo. Praeterea hi, qui de matrimonio contrahendo pure et sine omni conditione fidem dederunt [*aut*] *iuramentum fecerunt*, commonendi sunt *et diligentius exhortandi*, et modis omnibus inducendi, ut praestitam fidem *vel iuramentum factum* observent, *et se, sicut promiserint coniugant*. Si autem se adinvicem admittere noluerint; ne forte deterius inde contingat, ut talem scilicet ducat, quam [*semper*] odio habet; videtur, quod ad instar eorum, qui societatem *iuramento vel* interpositione fidei contrahunt, et postea eandem sibi remittunt, hoc possit in patientia tolerari. X 4, 1, 2 (Fr. 661) JL 13903 (8967)

⁵⁰⁶ Qui iuravit cum aliqua contrahere, moneri potius debet, quam compelli, ut contrahat. H.d. inhaerendo literae. Lucius III. Rapalensi Episcopo. Requisivit a nobis tua fraternitas, qua censura mulier compelli debeat, quae iurisiurandi religione neglecta, nubere renuit cui se nupturam, interposito iuramento firmavit. *Quaesivisti etiam, utrum ea, cuius vir matris torum poluit ad alia vota, quum mater fieri desideret, viro posset vivente transire.* Ad quod tibi breviter respondemus quod, *mulier, quae se nupturam iuravit*, quum libera debeant esse de iure matrimonia, monenda est potius, quam cogenda, maxime quum coactiones [*huiusmodi*] difficiles soleant exitus frequenter habere. *Illa sane, cuius vir cum matre adulterium et incestum commisit, nec viro suo coniungi carnaliter, nec eo vivente cum alio matrimonium inire debet.* X 4, 1, 17; (Fr. 667)

proceed with the marriage from betrothal. But if betrothal has not maintained a vow, the parties should not be constrained to marry.⁵⁰⁷

5.4.5.11 *A nobis* [X 4, 2, 8]

A nobis [X 4, 2, 8],⁵⁰⁸ from Pope Alexander III to the bishop of Bath (sent between 1174 and 1181), is dedicated to cancelling betrothal for the future if the parties are unwilling to contract anymore,⁵⁰⁹ which is to be done only after arriving to legitimate age, unless the union has been consummated. According to Charles Donahue, there is a tension in the classical canon law between measuring puberty on the basis of objective criteria taken from Roman law (12 years for man and 14 for woman) and measuring it on the basis of subjective approach, namely the physical capability of an individual.⁵¹⁰

Commentator Alanus (chronologically Alanus Anglicus as well as Alanus de Lille do not fit) claims that the couple, who is said to have contracted betrothal, has created neither marriage, on the ground of minor age impediment, nor engagement, on the ground of unwillingness. Alanus alludes to the *Digesta* where betrothal appears to be legal after

⁵⁰⁷ Quid ergo respondebis? Dicas, quod illa decre[ta] *Ex litteris* 2 [X 4, 1, 10] et *Sicut* [X 4, 1, 22] loquuntur quoniam iuramentum interveniat, licet illi etiam essent impuberes, sed erant doli capaces, ita quod tenuit iuramentum, unde propter periculum iuramenti compelli debent ad contrahendum, et illa decre[ta] *Requisivit* [X 4, 1, 17] reducitur ad illam *Ex litteris* [X 4, 1, 10] ut ibi plene dictum est, et quid dicit illa decre[ta] *Praeterea* [X 4, 1, 2] potius est dispensatio, ut dictum est: et quia uterque dissentiebat, ideo facilius toleratur; hic ergo loquitur de sponsalibus minorum. Si ergo iuramentum interveniat, compellendi sunt perficere matrimonium, sive sint maiores, sive minores, dum tamen fuerint doli capaces, quia aetas illa plena est periuriis infra *De delict. pue. Pueris*. [?] Si vero iuramentum non intervenit in sponsalibus, non sunt inviti compellendi, quia invitae nuptiae difficiles exitus consueverunt habere, et ita planum est ex causa tamen compelluntur, ut dictum est supra *De sponsa [duorum]*. *Ex litteris* 2 [X 4, 1, 10]. Gl. ad X 4, 2, 7 [1595: 1032]

⁵⁰⁸ Impuberes, sponsalia contrahentes, ante pubertatem separari non debent, sed post pubertatem possunt, si contradieunt sponsalibus, nisi copula carnalis intervenerit. Idem [Alexander III] eidem [Bathoniensi Episcopo]. *A nobis* tua discretio requisivit, utrum iis qui infra annos nobiles, matrimonii nomine coniuguntur, vel eorum alteri, antequam ad annos aptos matrimonio perveniant, liceat a matrimonio tali discedere. Ad quod *inquisitioni tuae taliter* respondemus, quod pro eo, quod ante nobiles annos coniugalem consensum *de sanctorum Patrum* non habent *auctoritate*, usque ad legitimam aetatem expectare tenentur, et tunc aut confirmetur matrimonium, aut, si simul esse noluerint, separentur; nisi *forte* carnalis commixtio ante intervenerit, quum interdum illa tempus anticipare soleat pubertatis. *Si vero alter eorum ad annos etc. ut supra prox. c. 9* ([X 4, 2, 9]) X 4, 2, 8 (Fr. 676) JL 13765 (8840); WH 4 (a) 1174-1181

⁵⁰⁹ Matrimonii nomine, scilicet, futuri, quia loquitur de sponsalibus supra c[apitulo] proxi[mo] [X 4, 2, 7]. Gl. ad X 4, 2, 8 [1595: 1033]

⁵¹⁰ (Donahue 1982, 90)

deductio in domum sponsi.⁵¹¹ According to *Codex*, after the dowry,⁵¹² on condition that the will of both parties still remains the same; the couple may proceed to marriage after arrival to legitimate age (12 years according to reference to *Digesta*).⁵¹³ Prior to this age it is useless to confirm marriage verbally or silently, as it has been already shown in *De illis* [X 4, 2, 7].⁵¹⁴ Alanus finalizes his commentary by claiming that this betrothal has been contracted by “force of law” confirming his way of thinking by alluding to *Attestationes* [X 4, 2, 10]⁵¹⁵ and *Duo pueri* [X 4, 2, 12].⁵¹⁶ According to those, marriage is not to be contracted at the minor

⁵¹¹ Quaesitum est apud iulianum, an sponsalia sint, ante duodecimum annum si fuerint nuptiae collatae. et semper labeonis sententiam probavi existimantis, si quidem praecesserint sponsalia, durare ea, quamvis in domo loco nuptae esse coeperit: si vero non praecesserint, hoc ipso quod in domum deducta est non videri sponsalia facta. quam sententiam papinianus quoque probat. D. 23, 1, 9

⁵¹² Multum interest, utrumne uxore tua comparante pecuniam numerasti eique possessio tradita est, an contractu emptionis a te nomine tuo habito tantum uxoris nomen post instrumentis scribi feceris. C. 4, 50, 6pr

⁵¹⁴ Si maiores septennio contrahunt sponsalia, neuter ante pubertatem resilire potest. Hoc primo. Et ille, qui primo fit pubes, alterum expectabit. Hoc secundo. Quod si tempore contractus alter erat pubes, non ille, sed alter, factus pubes resilire potest. Hoc tertio. Idem [Alexander III.] Bathoniensi Episcopo. De illis qui infra annos aptos matrimoniis *contrahendis* [existentes] sponsalia contrahunt, sive uterque sive alter reclamet antequam ad annos matrimoniis *contrahendis* aptos pervenerint, et postulent separari non sunt ullatenus audiendi. Si vero alteruter istorum ad annos pubertatis pervenerit, infra eosdem annos altero existente, quum eadem sponsalia contrahuntur; si is qui minori aetatis est, quum ad annos illos pervenerit, reclamaverit, nec in alterum voluerit consentire, iudicio ecclesiae poterunt ab invicem separari. Mulier autem que postquam annos nubiles attingit, ei qui nondum ad annos aptos matrimoniis *contrahendis* venerat, nupsit, quum in eum semel consenserit, amplius non poterit *aliquatnus* dissentire *vel divertere*, nisi forte ipse, cui nupsit, postquam ad legitimam aetatem pervenerit, in eam suum, *omnino* negaverit praestare consensum. X 4, 2, 7 (Fr. 675); JL 13767 (8842)

⁵¹⁵ Contractus ante pubertatem, etiam cum nisu carnalis copulae, non facit matrimonium. Urbanus III. Cenomanensi Episcopo. Attestationes super causa matrimonii, quae inter H. iuvenem et G. mulierem vertitur, a tua nobis fraternitate transmissus accepimus, et, ipsis *diligenter* inspectis *et plenius intellectis*, manifeste nobis innotuit, quod praedictus iuvenis nondum duodecimum annum attigerat, quum praefatam G. accepit uxorem. Et licet nisu fuisset, sicut uterque confessus est, ipsam corrumpere, mulier tamen credit, se virginem evasisse. Verum ipse, antequam ad annum XIV. pervenisset, a memorata muliere recessit, quem, quum XVII. annos habeat, eadem pro viro sibi vindicare contendit, *Sed quum vir XVII annos habeat, ipsam recipere contradicit. Unde, quia, donec nos super causam ipsam consuleres non duxisti in prolatione sententiae procedendum.* Consultationi tuae taliter respondemus, quod, si mulier per idoneos testes probare nequiverit, quod post XIV. annum aetatis suae vel circa finem XIV. anni praedictus iuvenis consensisset in eam, ab ipso iuramento recepto, quod, postquam ad legitimam aetatem pervenit, ipsam habere non consensit in uxorem, ab impetitione mulieris eum potes et debes absolvere, et ad alia vota utrique dare licentiam transeundi. X 4, 2, 10 (Fr. 676); JL 15729 (9870)

⁵¹⁶ Duo pueri Guilielmus et Guilielma in tua diocese quemadmodum accepimus matrimonialiter sunt coniuncti, puero VI., puella vero VII. annum agente, qui simul per tres annos manserunt. Tunc vero pater puellae, subtrahens eam sponso suo, ipsam alteri, M. nomine, copulavit, cum quo per VII. annos quiete permansit. Ipse vero tunc reliquit eandem, quia credebat, eam alium virum habere, illum scilicet, cui prius fuerat desponsata. Prior autem sponsus, ad annos discretionis perveniens, a P. praedecessore tuo contrahendi cum alia licentiam impetravit, qui quondam nomine S. consobrinam prioris in uxorem accepit, et cum ea per aliquod tempus existens, eam tamen, ut ipse fatetur, carnaliter non cognovit, licet illa se ab eo cognita asseveret. Quum autem pater memoratae Guilielmae eam vidisset a secundo viro relictam, vi praenominatum Guilielmum, cui prius eam desponsaverat, compulit, ut S. neptem suam omnino dimitteret, et ad Guilielmam suam desponsatam

age, but only betrothal for the future, which is to be confirmed by cohabitation after arriving to the age of seven. Though, in both cases betrothal for the future is easily overruled by that for the present.

5.4.5.12 *De illis* [X 4, 2, 9]

In the next decretal two factors determine the legitimacy of contracted engagement: the age and absence of force/violence in decision to contract the union. It appears worthy to underline that absence of the violence cannot be equalised with free will consent. Pope Alexander III precisely defines when the bond may not be dissolved and when such a possibility is still open depending on the age. He also distinctly shows that force or violence can impede a legal contract to happen. Though, the latter is still not enough to claim that the Pope tends to underline or support free will consent.

De illis [X 4, 2, 9]⁵¹⁷ is addressed from Pope Alexander III to the archbishop of Genoa. This decretal is dedicated to those who have been betrothed (together with *deductio in domum sponsi*)⁵¹⁸ at minor age, and, afterwards, want to separate mutually. By his approach to the

rediret: qui postmodum per biennium cohabitavit eidem, *ut fertur*. Quia igitur in his quid tibi faciendum sit, postulas edoceri, breviter respondemus, quod impediens puerili aetate matrimonium inter G. et G. non fuit. Et licet idem, postquam illa nupsit alii, potuerit aliam ducere in uxorem, tamen quia dictam S. duxit consobrinam mulieris eiusdem, sive eam cognoverit sive non, non debet tamen cum eadem S. propter publicae honestatis iustitiam remanere, nec ac primam habere regressum, quia alteri fuit legitime copulata. (*Et infra*) Quum vero vir caput sit mulieris, et Guilielmus dicat, se non cognovisse prius. S. supra sictam: aliam, si voluerit, poterit ducere in uxorem, et S. viro legitimo copulari; post separationem vero pro vitando populi scandalo utrique ad tempus est poenitentia iniungenda. Si vero legitime contraret, ipsam S. ab eo sive post sive antea cognitam extitisse, neutri vivente altero dabitur licentia contrahendi. Remanebit ergo Guilielma cum M. imposita *tamen* ipsi M. ad tempus poenitentia competenti, qui pro sua opinione sola Guilielmam, iudicio ecclesiae non requisito, *perniciose* dimisit. X 4, 2, 12 (Fr. 677) JL 16614 (10246)

⁵¹⁷ Minores, apti ad matrimonium, ex contractu matrimonii obligantur, nisi violentia intercedat. Idem [Alexander

III.] Genuensi Archiepiscopo. De illis *autem*, qui in minori aetate desponsantur, *traduntur et coniuguntur, et processu temporis divortium postulant, minorem allegantes aetatem, aut vim sibi a parentibus factam, hoc inquisitioni tuae presentibus literis* Respondemus, quod, si ita fuerint aetati proximi, quod potuerint copula carnali coniungi, minoris aetatis intuitu *ab invicem* separari non debent, si unus in alium visus fuerit consensisse, quum in eis aetatem supplevisse malitia videatur. Sed cuiuscunque sint aetatis, se possunt per illatam violentiam excusare, nisi post violentiam consensus accedat. [*Illud quoque etc. (cf c. de praes. II 23)*] X 4, 2, 9 (Fr. 676); JL 13969 (9031); It. pont. 6.2: 274 no. 35

⁵¹⁸ Desponsatur, et traducuntur in domum, postea allegant minorem aetatem vel violentiam. Gl. ad X 4, 2, 9 [1595: 1033]

case the Pope suggests that if the couple was betrothed at the age close to that when they are able to consummate the union, they should not be separated; but they can be separated if the consent was given under force or violence. In this decretal the age is a determining factor: betrothal contracted close to adulthood may not be resolved, as proximity to adulthood is understood as adulthood itself.

Therefore, in this case age also determines the kind of contract – it is not yet a marriage, but an engagement. It still took place despite the young age *malitia supplet aetatem*. It is also important that the two parties cannot be resolved from each other when they are at the age proximate to the adulthood. It appears plausible that both proximity to the legitimate age and legitimate age are treated equally. In other words, legitimate age and approximately legitimate age are both relevant when it deals with contracting marriage. Bernard of Parma pays attention to the kind of consent in this decretal and its relation to implemented violence. When followed by cohabitation expressed or presupposed consent, even interrelated with violence or force, is taken as consent without violence.⁵¹⁹ This opinion of Bernard of Parma is relevantly confirmed by the decretal of Pope Clement III *Ad id quod* [X 4, 1, 21],⁵²⁰ which discusses the same principle. The allusion to *Significavit* [X 4, 7, 2]⁵²¹ is not relevant, as this decretal speaks about unconsummated marriage followed by a

⁵¹⁹ Consensus, expressus vel praesumptus, ut si patienter cohabiter illis, talis violentia transit in consensum supra tit[ulo] proxi[mo] *Ad id quod* [X 4, 1, 21], et infra *Qui cle[rici] vel vo[ventes] matrimonium contrahere possunt* [Insinuante [X 4, 6, 7] *De his quae vi metu[sve] cau[sa] gesta sunt*] l.2 [C. 2, 19, 2] infra *De eo qui dux[it] in mat[r]imonio] quam polluit per adulterium. Significavit* [X 4, 7, 2] *Qui mat[r]imonio] accu[sare] poss[unt] vel contra illud testari* [Insuper [X 4, 18, 4] Ber[nardus] Gl. ad X 4, 2, 9 [1595: 1033]

⁵²⁰ Matrimonium, per vim contractum, cohabitatione spontanea conualescit. H.d. et quotidie allegatur. Idem [Clemens III]. *Ad id quod per tuas literas nobis intimasti de quadam parochiana tua, quam suus vitricus cuidam Teutonico matrimonialiter copulavit, taliter respondemus, quod, quamvis undecim annos, adhuc habens, ab initio invita fuisset ei tradita, et renitens, tamen, quia postmodum per annum et dimidium sibi cohabitans consensisse videtur, ad ipsum est cogenda redire. Nec de cetero recipiendi sunt testes, si quos memorata mulier ad probandum, quod non consenserit in eundem, nominaverit producendos, quam mora tanti temporis huiusmodi probationem excludat. Mandamus igitur, ut propter hoc non omittas, quo minus appellatione remota per censuram ecclesiasticam utrumque compellas ad alterum maritali affectione tractandum, nisi forte vellent ad religionem pariter convolare, poenitentia eis iniuncta, pro eo quod ad alienos et illicitos concubitus uterque transivit.* X 4, 1, 21 (Fr. 669)

⁵²¹ X 4, 7, 2 (Fr. 687)

consummated one. *Insuper* [X 4, 18, 4]⁵²² perceives unwillingly contracted betrothal followed by cohabitation as being a consented union; this decretal is accurately relevant to the argument Bernard of Parma makes, namely dissent in betrothal is balanced by a following cohabitation.

5.4.5.13 *Licet praeter solitum* [X 4, 4, 3]

Betrothal for the future that has been extensively discussed above has many preconditions depending on those it does or does not perceive as legally contracted. Betrothal for the present, in comparison with this for the future tense, has much clearer and simpler paradigm. Engagement contracted for the present tense includes the idea that partners are adults and consent to the bond mutually (it is unimportant if family assent is included, as in the decretals of Pope Alexander III this matter is not always clear). Engagement for the present has certainly a stronger bond than that for the future, and presently contracted conjugal union cannot be overruled by the subsequent marriage with another person despite consummation.

Licet praeter solitum [X 4, 4, 3]⁵²³ is addressed in 1169-1179⁵²⁴ from Pope Alexander III to Romuald, archbishop of Salerno. It is dedicated to betrothal for the present tense expressed

⁵²² X 4, 18, 4 (Fr. 719)

⁵²³ Sponsalia de praesenti non solvuntur per sequens matrimonium, etiam carnali copula consummatum. Alexander III. Archiepiscopo Salernitano. *Licet praeter solitum, et amplius solito multis simus et variis negotiis praepediti ita, quod non sit nobis facile aliquorum consultationibus respondere, illa tamen speciali gratia, quam ad personam tuam habemus, et caritate cogimur fraterna, quid sentiamus de his, super quibus consuluit nos prudentia tua, tibi, quantumcunque aliis simus intenti, praesentibus literis aperire. Consuluit nos siquidem, utrum, si inter virum et mulierem, praestito vel non praestito sacramento, legitimus consensus intervenerit de praesenti, carnali copula non secuta, liceat mulieri alii nubere, vel si nupserit alii, et carnalis fuerit copula subsecuta, an ab ipso debeat separari. Super hoc autem Consultationi tuae taliter respondemus, quod si inter virum et mulierem legitimus consensus sub ea solennitate, quae fieri solet, praesente scilicet sacerdote aut etiam notario, sicut etiam in quibusdam locis adhuc observatur, coram idoneis testibus interveniat de praesenti, ita quidem quod unus alterum in suo mutuo consensu verbis consuetis expresse, recipiat utroque dicente "ego te accipio in meam" "ego te accipio in meum," sive sit iuramentum interpositum, si ve non non licet mulieri alii nubere. Et si nupserit, etiamsi carnalis copula sit secuta ab eo separari debet, et, ut ad primum redeat, ecclesiastica districtione compelli, quamvis alii aliter sentiant, et aliter etiam a quibusdam predecessoribus nostris sit aliquando iudicatum. Verum etc. (cf. c. 2 de conv. coni. III. 32.) X 4, 4, 3; (Fr. 681); JL 14091 (9141); WH 620 (a)*

verbally with a specific verbal formula. According to the text, enagement for the present cannot be canceled by the following matrimony with another partner, even though it has been consummated. While glossing the text of decretal on this issue an anonymous commentator refers to *Inter* [X 4, 1, 20],⁵²⁵ which is irrelevant to the discussed matter, as it speaks about contracting marriage with a sinful woman. The glossator makes an important remark at the end claiming that betrothal for the present tense is a marriage itself, and that is why it cannot possibly be dissolved.⁵²⁶

5.4.5.14 Concluding remarks

The majority of Alexandrine decretals discussed above are dedicated to engagement for the future. It may be claimed that it is almost not possible to trace one pattern in papal regulations to the pleas dealing with *desponsatio de futuro*, but there are at least three punchlines to be found. Those three “constant values” that determine whether this engagement is legal or null or whether it may be dissolved or not, are the age and ability to discern, absence or presence of violence in consent and consummation. In evaluating the age Pope Alexander III tends to choose an objective criterium of Roman law, rather than to look in direction of subjective approach to evaluate adulthood by the ability of procreation. It is as well important for the Pope to have a decision to conjugal union freed from force and violence. Though, it is far too courageous to state that Pope Alexander III was aiming to free a couple from a family influence in their matrimonial decisions. Consummation is important as an element in comparison of two kinds of engagements *desponsatio de futuro* and *desponsatio de praesenti*. Consummated engagement for the future overrules subsequent

⁵²⁴ It. pont. 8: 358 no. 45

⁵²⁵ X 4, 1, 20 (Fr. 668)

⁵²⁶ CASUS. Dicitur, in hoc cap[itulo], quod si aliquis contraxerit cum aliqua per verba de praesenti, dicendo sic: “recipio te in meam”, et illa: “recipio te in meam” (etiam si non iuraverint) non possunt ad alia matrimonia convolare, et si fecerit, separari debent a secundis, et ad primum matrimonium redire quamvis carnalis copula sit secuta. Idem haberes supra *De spon[sationis et matrimoniis]*. *Inter* [X 4, 1, 20]. Nota, quod sponsalia de praesenti matrimonia sunt, unde postea dissolvi non possunt. Gl. ad X 4, 4, 3 [1595: 1041]

betrothal for the present with another person, but the latter overrules unconsummated engagement for the future as well.

The distinction between engagement and marriage is not often clearly stated in the decretals of Pope Alexander III in the *Liber Extra*. The Pope appears to be concentrated on one key issue in his letter, while other elements are to be seen as derivative and dependent on the main argument. Subarration as such, together with dowry, or procedure of giving the engagement ring does not appear to be an important or determining element for Pope Alexander III. In some cases, glossators shift a focus the Pope gave in his decretal. It might be illustrated by the instance when the Pope defines the age of the contracting parties and their ability to discern as determining elements in order to decide whether or not engagement is legal/null. The glossator elaborates on the matter of age, but additionally discusses consent. In the majority of cases when the Pope speaks about the age and capacity to decide the commentator refers to the *Digesta* or to the *Institutiones* in that way alluding, following the Pope, to an objective criterium of age, which originally belongs to Roman law. In the cases that predominantly deal with Levitian barrier and public dishonesty the anonymous commentator, as well as Bernard of Parma, especially refer to another decretal from the *Liber Extra* that is often ascribed to the same Pope, but sometimes to Pope Clement III, Pope Innocent III or Pope Gregory IX.

5.4.6 Pope Urban III *Ex literis tuae* [X 4, 2, 11]

The age of the contracting parties seems to be as much important for Pope Urban III, as for Pope Alexander III, but Pope Urban III includes another important element by means of which legality or voidness of the contact is to be found, that is consummation. Consent plays a secondary role depending on two main elements, namely depending on age and

consummation. It may well be stated that age defines the weight and validity of the given/ungen consent, whereas consummation (when absent) gives the entire power of decision to the so called *constant value* of age.

Ex literis tuae was sent from the chancery of Pope Urban III in 1185-1187.⁵²⁷ A certain girl aged 12 was betrothed to a boy aged 9-10; afterwards she was introduced to the house of the groom against her will, but according to her father's decision and was compelled by the threats of her parents to stay there for a year. Later, she returned to the house of her parents, saying she had never consented to the groom and was unwilling to do so; moreover, she was seeking for allowance to contract with another man. The Pope responds that taking that the boy had not yet reached the age of 14, when the bride did not consent to the union, and they did not consummate the engagement, she is free to contract with another man, as engagements contracted under the force are void; therefore, she receives the permission to contract with another man. The cohabitation for one year (without intercourse) is not sufficient for matrimonial consent if there is unwillingness in contracting betrothal.

In this decretal the age component defines whether engagement is legal or void. As the case states, the bride was led into the house of the groom against her will. Her unwillingness,⁵²⁸ combined with the minor age of the groom, makes this union void, notwithstanding the fact of *traductio in domum sponsi*. From this decretal it is clearly seen

⁵²⁷ Si maior invita contraxit sponsalia cum minore, non tenetur ipsum expectare donec veniat ad aetatem adultam. Urbanus III. Pisano Archiepiscopo. Ex literis tuae fraternitatis accepimus, quod puella quaedam anno XII. iurata fuit et desponsata cuidam puero IX. Vel X. annorum, et tempore procedente de voluntate parentum potius, quam de sua, sicut asserit, ad domum patris *praedicti* pueri adducta, ubi nolens et invita, *sicut ab ore ipsius te audisse proponis, et tam persuasionibus quam* minis parentum impulsa, moram fecit per annum et amplius, et tandem inde recedens, ad domum propriam est regressa. *Commonita vero a matre sua, et a te postmodum*, sicut asseris, ad eum redire penitus contradicit, asserens, quod nunquam eum voluit, nec vult in virum habere, sed nubendi alii postulat facultatem. Quum autem iam dictus puer, *sicut tuae literae continebant*, nondum ab XIV. annum *aetatis suae* pervenerit, nec unquam ad eandem puellam carnaliter accessum habuerit, discretioni tuae taliter respondemus, quod si *memorata* puella *per te ad hoc studiose commonita*, ut, donec compleat idem puer annum XIV. *suae aetatis*, exspectet, *ad commonitionem tuam* non duxerit expectandum, ei secundum ea, quae proposita sunt, accipiendi alium virum *in maritum auctoritate nostra* liberam tribuas facultatem. X 4, 2, 11 (Fr. 676); JL 9882; It. pont.3: 329 no. 52

⁵²⁸ Desponsata, ea non consentiente. Gl. ad X 4, 2, 11 [1595: 1034]

that *traductio* and cohabitation⁵²⁹ (without carnal union)⁵³⁰ is seen as unimportant in comparison with the age factor. The age determines legality or voidness of the contract.

In sum, in the perception of Bernard of Parma, cohabitation (with intercourse), despite the unwillingness of the bride, might have changed the final decision of Pope Urban III. There are three definitive elements: age, consent and carnal union. Consent plays an important, but still a “derivative”, role. The “constant value” roles are played by age and carnal union. Consent is seen as important when the person is adult and when the carnal union has not yet been perfected. Therefore, the key elements that define legality or voidness of the engagement are age and consummation; whereas consent plays its role only depending on two main values – age and consummation. According to the opinion of David d'Avray:

These and other papal decretals sought to reconcile the requirement that children's consent to betrothal and marriage be freely given against the children's natural obligation to obey the wishes of parents and kinsmen.⁵³¹

5.4.7 Pope Clement III *Duo pueri* [X 4, 2, 12]

Public honesty issues have been already discussed in decretals of Pope Eugene III and in those of Pope Alexander III multiple times. The letter from Pope Clement III to a certain bishop is as well dedicated to this matter.

⁵²⁹ Per annum, si hoc fecisset sponte, sic tenuissent sponsalia ex patientia consequentis temporis supra titu[lo] proxi[mo] *Ad id quod* [X 4, 1, 21], et sic non fuisset ista mulier audita, quousque alter pervenisset ad aetatem supra eodem *De illis* [X 4, 2, 7]. Gl. ad X 4, 2, 11 [1595: 1034]

⁵³⁰ Bernard of Parma comments on absence of carnal union: if carnal union happened, it would automatically stand for consenting to the engagement.

Carnaliter, quod si fecisset, statim praesumeretur consensisse infra *De qui duxit in matrimonio quam polu per adulterium significavit*. Ber[nardus] Gl. ad X 4, 2, 11 [1595: 1034]

⁵³¹ (Avray 2015, 27)

The decretal of Pope Clement III to an unknown bishop⁵³² discusses engagement of minors, which ratified by cohabitation impedes further contracting with relatives of previous spouse, but can be dissolved by marriage for the present tense. As the content of the matter goes, two children, G (William) aged 6, and Wilhelma aged 7, contracted matrimonial union; afterward they stayed together for three years. The father of the girl then gave her to another man named M., with whom she stayed for seven years. In seven years she abandoned M. and returned to G. because she believed she was engaged to another man (William). The latter, though, after arriving to the age of discretion asked for permission to contract with another woman. After receiving such allowance, he contracted with S. (relative of Wilhelma) and cohabitated with her for a while without consummation (according to his words, which is opposite to the words of S., who claims to be known carnally by him). The father of Wilhelma then compelled William to abandon S. (his niece) and return to Wilhelma with whom William cohabitated two more years. Pope Clement III responds to the given matter that there has been no marriage contracted between William and Wilhelma on the ground of a minor age of both of them. William is allowed to marry another woman, except S., relative of Wilhelma, on the ground of public dishonesty impediment, he, as well, cannot

⁵³² Duo pueri Guilielmus et Guilielma *in tua diocese quemadmodum accepimus* matrimonialiter sunt coniuncti, puero VI., puella vero VII. annum agente, qui simul per tres annos manserunt. Tunc vero pater puellae, subtrahens eam sponso suo, ipsam alteri, M. nomine, copulavit, cum quo per VII. annos quiete permansit. Ipse vero tunc reliquit eandem, quia credebat, eam alium virum habere, illum scilicet, cui prius fuerat desponsata. Prior autem sponsus, ad annos discretionis perveniens, a P. praedecessore tuo contrahendi cum alia licentiam impetravit, qui quondam nomine S. consobrinam prioris in uxorem accepit, et cum ea per aliquod tempus existens, eam *tamen*, ut ipse fatetur, carnaliter non cognovit, licet illa se ab eo cognita asseveret. Quum autem pater memoratae Guilielmae eam vidisset a secundo viro relictam, vi praenominatum Guilielmum, cui prius eam desponsaverat, compulit, ut S. neptem suam omnino dimitteret, et ad Guilielmam suam desponsatam rediret: qui postmodum per biennium cohabitavit eidem, *ut fertur*. Quia igitur *in his* quid tibi faciendum sit, postulas edoceri, breviter respondemus, quod impediens puerili aetate matrimonium inter G. et G. non fuit. Et licet idem, postquam illa nupsit alii, potuerit aliam ducere in uxorem, tamen quia dictam S. duxit consobrinam mulieris eiusdem, sive eam cognoverit sive non, non debet tamen cum eadem S. propter publicae honestatis iustitiam remanere, nec ac primam habere regressum, quia alteri fuit legitime copulata. (*Et infra*) Quum vero vir caput sit mulieris, et Guilielmus dicat, se non cognovisse prius. S. supra dictam: aliam, si voluerit, poterit ducere in uxorem, et S. viro legitimo copulari; post separationem vero pro vitando populi scandalo utrique ad tempus est poenitentia iniungenda. Si vero legitime contraret, ipsam S. ab eo sive post sive antea cognitam extitisse, neutri vivente altero dabitur licentia contrahendi. Remanebit ergo Guilielma cum M. imposita *tamen* ipsi M. ad tempus poenitentia competenti, qui pro sua opinione sola Guilielmam, iudicio ecclesiae non requisito, *perniciose* dimisit. X 4, 2, 12 (Fr. 677) JL 16614 (10246)

return to Wilhelma, as she has already contracted legally with another man named M. As he claimed not knowing S. carnally (relative of Wilhelma), they both can have other partners. If he knew her carnally, both of them are prohibited to marry other partners as long as the other one lives. Wilhelma should remain with M. Public dishonesty impedes contracting the upcoming betrothal and voids the one already contracted.

The first union (between William and Wilhelma) is to be seen as engagement,⁵³³ ratified by cohabitation during three years⁵³⁴ and confirmed by paternal assent.⁵³⁵ Public dishonesty issues were discussed many times especially in the decretals of Pope Alexander III, e.g. *Ad audientiam* [X 4, 1, 4],⁵³⁶ *Sponsam* [X 4, 1, 8],⁵³⁷ *Litteras* [X 4, 2, 4],⁵³⁸ *Accessit* [X 4, 2, 5],⁵³⁹ and in the decretal of Pope Eugene III *Iuvenis* [X 4, 1, 3].⁵⁴⁰ It appears to be deliberate that the commentator chose those four Alexandrine decretals and one of Pope Eugene III in order to elaborate on public dishonesty issue in *Duo pueri* [X 4, 2, 12] of Pope Clement III.⁵⁴¹ The commentator gives the variety of instances, where betrothal of minors impedes contracted and to be contracted unions with relatives on the ground of public dishonesty. In

⁵³³ This conjugal bond between those two parties was perceived as betrothal, not marriage on the ground of the age of contracting parties (6 and 7 years old). As contracting a marriage prior to puberty is not possible, the bond is to be seen as betrothal by the commentator Bernard of Parma. *Matrimonialiter, id est matrimonialiter iungeretur aetate adveniente, sed sponsalia contrahendo. [Immo contraxerunt per verba de praesenti, per que intelliguntur contraxisse sponsalia, ut infra nota, et per que matrimonium praesumptum inducitur, si propter pubertatem interveniat tentatio, ut nota supra eodem Attestationes [X 4, 2, 10] (Fr. 676) secundum Hostiensis. Iohannes Andreae] Ber[nardus] Gl. ad X 4, 2, 12 [1595: 1035]*

⁵³⁴ *Per tres annos, et ita tenuerunt sponsalia rati habitatione sequenti supra eodem Ex litteris [X 4, 2, 11] patri in sponsalibus non contradicit, consentire videtur ff De sponsalibus [D. 23,1, 12pr]. Ber[nardus] Gl. ad X 4, 2, 12 [1595: 1035]*

⁵³⁵ Absence of paternal denial to this engagement is seen as paternal consent, following *Digesta*. *Sed quae patris voluntati non repugnat, consentire intellegitur. D. 23,1, 12pr*

⁵³⁶ X 4, 1, 4 (Fr. 662); JL 13137 (8613); WH 41 (a) 1180

⁵³⁷ X 4, 1, 8 (Fr. 663)

⁵³⁸ X 4, 2, 4 (Fr. 673); JL 13947(9009); WH 631 1177

⁵³⁹ X 4, 2, 5 (Fr. 674); JL 13887(8952); WH 12 c. 1173

⁵⁴⁰ X 4, 1, 3 (Fr. 661); JL 9655 (6685)

⁵⁴¹ *Publice honestatis iustitia, que impedit etiam matrimonium contrahere dum, et dirimit iam contractum, quare ille Guilielmus non potest habere aliquam de consanguinitate Gulielmae supra titulo proximo Ad audientiam et c. Iuvenis et c. Sponsam et supra eodem Accessit et c. Litteras. In quibusdam tamen sublata est publicae honestatis iustitia, ut in sobole suscepta ex secundis nuptiis, et in secundo et tertio genere affinitatis infra De consanguinitate et affinitate non debet. Gl. ad X 4, 2, 12 [1595: 1035]*

reality, not all of the decretals listed in the gloss and mentioned above have the same opinion as displayed in *Duo pueri* [X 4, 2, 12]. *Iuvenis* [X 4, 1, 3] of Pope Eugene III is the closest to the response of Pope Clement III: both decretals *Iuvenis* [X 4, 1, 3] and *Duo pueri* [X 4, 2, 12] hold betrothal for the future of minors as legal engagement, and therefore, impeding on the ground of public dishonesty. *Sponsam* [X 4, 1, 8] of Pope Alexander III deals with engagement after the age of seven, and, therefore, is not perfectly relevant to the given glossa, as it neither confirms nor denies the conclusion, to which Pope Clement arrived in *Duo pueri* [X 4, 2, 12]. In the list of examples there are also two decretals that offer an approach absolutely opposite to the one suggested by Pope Clement III: both Alexandrine decretals *Litteras* [X 4, 2, 4] and *Accessit* [X 4, 2, 5] claim betrothal of minors to be null, giving, therefore, no impediment of public dishonesty. In this way, there are at least those two decretals, *Litteras* [X 4, 2, 4] and *Accessit* [X 4, 2, 5], that contradict papal resolution of *Duo pueri* [X 4, 2, 12].

Approach of Pope Clement III to Levitian barrier and impediment of public honesty is very much similar to this of Pope Eugene III. Those two Popes have much stricter view of this matter, as compared to that of Pope Alexander III: for Pope Clement III the age of contracting betrothal, which impedes any subsequent marital relations with relatives, does not matter: even engagement of minors is to be seen as legal and impedes any conjugal bonds with relatives. The same opinion is prevailing in the decretal of Pope Eugene III in *Iuvenis* [X 4, 1, 3]. Unlike those rigorous views, Pope Alexander III emphasizes the age matter: engagement of minors does not impede further contracts with relatives as it is null; whereas, betrothal contracted after the age of seven forbids any subsequent contracts on the ground of public honesty.

In sum, engagement for the future of two minor contracting parties is a legal union and impedes any following marital unions with relatives, according to Pope Clement III. Together with unimportance of age, consent does not seem to be a defining element either. The glosses do not mention consent of two children was, but they do comment on assent of their parents – a plausible reason for this might be their minor age at the time of the contract. Cohabitation has certain legalising power in this engagement. Viewing engagement of minors as impeding, Pope Clement III has the same approach as Pope Eugene III, which has already been discussed above; those approaches are stricter in contrast to the view of the Pope Alexander III on Levitian barrier, where engagements impede marital unions with relatives only if they were contracted after the age of seven, while engagements contracted prior to this age are to be held null.

5.4.8 Pope Innocent III

5.4.8.1 *Sicut ex literis tuae* [X 4, 1, 22]

The interrelation between two kinds of engagement has been already discussed in one of the decretals of Pope Alexander III – engagement for the present overrules the one contracted for the future, as the papal conclusion for this matter suggests. In the current decretal *Sicut ex literis tuae*, Pope Innocent III reached the same result. *Sicut ex literis tuae* [X 4, 1, 22]⁵⁴² was addressed from Pope Innocent III to the [Berard] bishop of Ferrara at the beginning of papal pontificate in 1198.

According to the text of this decretal, a man named Laur[entius] had vowed to take a woman named P. as a wife. Similarly, the father of P. oathed that he will give his daughter to Laurentius as his wife. In 4 or 5 years, Laurentius got betrothed by *verba de praesenti* with woman E. It is asked which of those two women he should have as his wife on the basis of those two betrothals he had contracted. Pope Innocentius III responds and asks local bishop of Ferrara to research. If Laurentius betrothed the first woman with *verba de futuro* and the

⁵⁴² Sponsalia de futuro etiam iurata, solvuntur per secunda sponsalia de praesenti, non autem per secunda de praesenti. Innocentius III Fernatini episcopo. Sicut ex literis tuae fraternitatis accepimus, quum L. parochianus tuus P. mulierem se ducturum in coniugem, in manus patris eiusdem P. iurantem, quod eam sibi traderet, in uxorem, proprio firmaverit iuramento, nec per virum steterit, sed per mulierem potius, quo minus inter eos matrimonialis solennitas sit secuta, quatuor postmodum vel quinque annis elapsis, idem L. E. mulierem per verba de praesenti, ut eius consanguinei asserunt, desponsavit, *propter quod frater praedictae P. suam deposuit in tua praesentia quaestionem. Quia vero, quid super his agendum sit, nostro postulas responso edoceri.* Postulationi tuae taliter respondemus, quod si tibi constiterit, quod idem L. P. mulierem per verba de futuro, E. vero desponsaverit per verba de praesenti, imposita ei poenitentia competenti, qui primam fidem irratam fecit, nisi forsan in iuramento suo certum terminum, infra quem dictam P. duceret in uxorem, praefixit, nec per eum stetit, quin ad statutum terminum matrimonium consummaverit, matrimonium secundo loco contractum, legitimum indices, et ad illud servandum *si opus fuerit, ecclesiastica districtione* compellas eundem, *nisi forsan aliud quid obstiterit, quod ipsum debeat impedire.* Quodsi forte per verba de futuro sponsalia cum utraque contraxit, iuramentum primum, sicut licite factum est, ipsum servare compellas, de secundo ei poenitentiam iniuncturus. Quodsi de his tibi non constat ad plenum, tamdiu adhuc cognoscas de causa, donec super his sufficienter instruaris. *Quod enim in attestationibus quas ad sedem apostolicam destinasti de paternitate habetur non facit ad causam quum neutra contrahentium sit illa persona qua mediante inter parentes eorum paternitas est contracta.* [Dat. Lat. V. Kal. Martii Pont. Nostr. Ao. I. 1198]. X 4, 1, 22 (Fr. 669); Potthast no. 24

other with *verba de praesenti*, the second union is to be proceeded by marriage and the man should be penalised for breaking his first vow. In case if the second betrothal was contracted for the future, the first union has a priority, and he should be penalised for contracting the second betrothal. Therefore, if two vows are of equal meaning [two betrothals for the future], the first prevails over the second.

According to the text of the letter, Laurentius vowed to take P. as his wife in the future; meanwhile P. herself did not oath, instead, her father promised in return to Laurentius's oath. Bernard of Parma comments⁵⁴³ on this oath. According to *Institutiones*,⁵⁴⁴ no one can contract for the other during the latter's absence; but if the person for whom the contract has been created is present, and it is done in order to protect this person, the contract appears to be valid. Considering excerpt from the *Digesta*,⁵⁴⁵ the contract cannot be created between deaf, mute or infant. If one contracts for the slave, the latter is expected to be present. Bernard moves to a final comment about oath stating that if the girl is not willing to marry, it is not to be said that her father broke the vow. Bernard of Parma refers to *Ex litteris*

⁵⁴³ Iurantis, hic videtur promitti factum alterius, et quod alteri possit stipulatio fieri. Sed contra *Inst[itutiones] De inuti[libus] stipu[lationibus]* Alteri [Inst. 3, 19] *ff De verb[orum] obli[gationibus]*. Stipulatione [D. 45.1.1pr.], et si puella nollet illi nubere, non dicitur pater periurius, dummodo per patrem non stet, quia hoc solum intelligitur iurare de facturum et curaturum, ut illa contrahat cum illo si poterit, alias esset periurius. De hoc dicitur supra eodem *Ex litteris* [X 4, 1, 10]. Ber[nardus] Gl. ad X 4, 1, 22 [1595: 1022]

⁵⁴⁴ Alteri stipulari, ut supra dictum est, nemo potest: inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum si alii detur, nihil interest stipulatoris. plane si quis velit hoc facere, poenam stipulari conveniet, ut, nisi ita factum sit ut comprehensum esset, committatur poenae stipulatio etiam ei cuius nihil interest: poenam enim cum stipulatur quis, non illud inspicitur, quid intersit eius, sed quae sit quantitas sita in condicione stipulationis. ergo si quis stipuletur Titio dari, nihil agit; sed si addiderit poenam NISI DEDERIS, TOT AUREOS DARE SPONDES? tunc committitur stipulatio. Sed si quis stipuletur alii, cum eius interesset, placuit stipulationem valere. nam si is qui pupilli tutelam administrare coeperat, cessit administratione contutori suo et stipulatus est, rem pupilli salvam fore, quoniam interest stipulatoris fieri quod stipulatus est, cum obligatus futurus esset pupillo si male res gesserit, tenet obligatio. ergo et si quis procuratori suo dari stipulatus sit, stipulatio vires habebit. et si creditori suo, quod sua interest, ne forte vel poena committatur, vel praedia distraherentur quae pignori data erant, valet stipulatio. Versa vice qui alium facturum promisit, videtur in ea esse causa ut non teneatur, nisi poenam ipse promiserit. Inst. 3, 19

⁵⁴⁵ Stipulatio non potest confici nisi utroque loquente: et ideo neque mutus neque surdus neque infans stipulationem contrahere possunt: nec absens quidem, quoniam exaudire invicem debent. si quis igitur ex his vult stipulari, per servum praesentem stipuletur, et adquiret ei ex stipulatu actionem. item si quis obligari velit, iubeat et erit quod iussu obligatus. D. 45.1.1pr.

[X 4, 1, 10],⁵⁴⁶ according to which betrothals are binding unless the impediment has been risen. It appears plausible that with this final quote Bernard claims as well that betrothal contracted between the groom and the bride's father is to be seen as binding too. As to the time that has passed after the betrothal,⁵⁴⁷ Bernard objects to the time during which the groom has been waiting, in *Codex* two years is stated as a period during which betrothal should be proceeded to marriage,⁵⁴⁸ but if the term of awaiting was set before and has been complied to, the vow is valid.

5.4.8.2 *Ad dissolvendum* [X 4, 2, 13]

Pope Innocent III, when he deals with *aetas discretionis*, takes the side of Pope Alexander III, rather than that of Pope Eugene III and Pope Clement III. According to Pope Alexander III and Pope Innocent III, betrothal contracted prior to the age of discretion (7 years) is held to be null; in contrast, Pope Eugene III and Pope Clement III both tend to perceive contracts made prior to the age of 7 as legal, as they have a capacity to impede subsequent bonds with relatives of the previous partner.

⁵⁴⁶ Ex litteris venerabilis fratri nostri Siluani episcopi accepimus, quod cum duo nobiles viri sui episcopatus G. scilicet de Monstra, et B. de Mauritania filios et filias impubescentes haberent, et spe pacis inter eos conciliandae ita inter se conuenerunt, quod eos adinvicem matrimoniis copularent, et hoc tam patres, quam filii, sub iuramento se promissere facturos, inter quos siquidem G. filiam alterius consentiente patre, *semel et iterum* se iuravit ducere in uxorem, quo volente ad alia vota migrare, eum episcopus compellere voluit, ut quod iuraverat, adimpleret. Ipse ad audientiam nostram appellavit, et altera parte nuncium suum ad nos, destinante ipse nec venit, nec responsalem aliquem pro se transmisit. Quia igitur praedicto G. periculosum est contra suum iuramentum venire. Fraternitati tuae per apostolica scripta praecipiendo mandamus quatenus, quum exinde fueris requisitus, utramque partem ante tuam convoces, praesentiam et rationibus hinc inde plenius auditis et agitis si hoc tibi constiterit, eum moneas, et si non acquieverit monitis, ecclesiastica censura compellas, ut ipsam, nisi rationabilis causa obstiterit, in uxorem recipiat, et maritali affectione pertractet. Si vero rationabilem causam praetendere voluerit, eam cum omni diligentia et studio audias, et fine canonico omni appellatione cessante decidas. Ceterum si legitime monitus iudicio tuo parere contemserit eum, et patrem, si fovere ipsum in sua malitia praesumerit, excommunicationis vinculo astringas et in tota terra ipsorum omnia divina praeter baptismum parvulorum et poenitentias morientium prohibeas officia celebrari. X 4, 1, 10 (Fr. 664); JL 14059 (9118); WH 442 undated

⁵⁴⁷ Quinque annis, non tenebatur sponsus tamdiu expectare, nisi vellet. C. de spon[salibus et arris sponsaliciis et proxeneticis]l.2 [C. 5, 1, 2] nisi causa subesset ... sed hoc verum est, si terminus fuisset appositus, ut infra sequitur, ubi iuramentum intervenit. Ber[nardus] Gl. ad X 4, 1, 22 [1595: 1022]

⁵⁴⁸ Si is, qui puellam suis nuptiis pactus est, intra biennium exsequi nuptias in eadem provincia degens supersederit, eiusque spatii fine decurso in alterius postea coniunctionem puella pervenerit, nihil fraudis ei sit, quae nuptias maturando vota sua diutius ludi non passa est. * const. a. et const. c. ad pacatianum pu. * <a 332 d. prid. id. april. marcianopoli pacatioano et hilarianoconss.> C. 5, 1, 2

Ad dissolvendum [X 4, 2, 13]⁵⁴⁹ was addressed from Pope Innocent III to Corrad and Peter in 1198. A certain man, named John, contracts marriage with some girl S. (under the age of seven). Afterwards marriage (betrothal?) was accused of consanguinity, confirmed by witnesses' voices. According to Pope Innocent III, neither marriage nor betrothal was contracted, as the girl had not yet reached the age of seven. Therefore, this accusation may not take place as she was under the age of seven at the time of contract. It is mentioned that under the age of seven neither marriage nor betrothal can be contracted. Therefore, the marriage, which is null, cannot possibly be accused, as it has not legally happened.

This decretal in the main body of its text speaks about marriage, but it is relevant to current paper, as commentary to this papal letter contains glosses on engagement.⁵⁵⁰ The commentator holds the age of contracting parties as an important element that defines whether the contract is legal or void. According to the first referred instance in anonymous commentary, mere transfer of the woman to the house of the man is not enough without

⁵⁴⁹ Accusari non potest matrimonium, quod non est, ut si cum minori septennio sit contractum; denunciari tamen potest impedimentum, ne contrahantur in posterum. Innocentius. III. C[orrad]o et P[eter]o quondam filiis Malebrancae. *Ad dissolvendum* quod factum fuerat inter I. *filiū nobilis viri Leonis [de Monumento] et S. filiam quondam Mathaei [De Fortebrachio] super matrimonio contrahendo, in nostra et fratrum nostrorum praesentia fuit ex porte vestra propositum, quod, quum dicta puella nondum ad septennium pervenisset, cum ipsa nec matrimonium contrahi nec sponsalia potuere. Defuit etiam consanguineorum assensus, qui praecipue sunt in talibus requirendi. Quodsi et aetas sufficiens exstisset et consanguineorum intervenisset assensus, personae tamen non sunt legitimae ad matrimonium contrahendum, linea consanguinitatis obstante. Accusatione vero, pro puella super consanguinitate proposita, et tam ex parte puellae consanguinitatis gradibus computatis, quum eam vellet idoneis testibus comprobare, praefatus I. multas exceptiones proposuit, per quas nitebatur vos ab accusatione multipliciter remove. Quumque super exceptionibus ipsius fuisset utrinque diutius disputatum, auditis et intellectis, quaecunque fuerunt hinc inde proposita de consilio fratrum nostrorum. Interloquendo pronunciamus, inter dictos iuvenem et puellam nec matrimonium, nec sponsalia fuisse contracta, quum constet, puellam nondum ad septennium pervenisse. Quocirca nec accusatio locum habebat, quum non esset quod posset legitime accusari; denunciari tamen poterat consanguinitas, ut interdicere matrimonium contrahendum. Ad denunciationem ergo legitime probandum festum omnium Sanctorum, proxime venturum terminum assignamus salvis exceptionibus, non solum propositis, sed etiam proponendis. Ne vero quicquam in puellam interim attentetur, auctoritate apostolica interdicimus firmiter, ne in ipso negotio de novo procedatur ulterius, donec vel a denunciatione cessetur, vel ea probata ordine iudiciario procedatur. Quodsi contra interdictum nostrum in praeiudicium ipsius aliquid fuerit attentatum, id irritum esse decernimus et viribus carere. X 4, 2, 13 (Fr. 678); Potthast no. 535*

⁵⁵⁰ Matrimonium, similiter supra *De restit[utione] spol[iatorum]*. *Ex parte* [X 2, 13, 14] nec consensit post vii. annum, quia si post consensisset, tenuissent sponsalia, nisi consanguinitas impediret supra eodem *Litteras* [X 4, 2, 4] *Accessit* [X 4, 2, 5] supra *De iudi[ciis]*. *Examinata* [X 2, 1, 15] sic isti ineptam proposuerunt accusationem manifeste, et ideo statim debent repelli, ut ibi dicitur, unde adhuc possunt proponere aptam, scilicet denunciare. Gl. ad X 4, 2, 13 [1595: 1036]

preceeding engagement or with the void betrothal.⁵⁵¹ Therefore, betrothal is an inevitable step in the way to legitimate marriage; it even cannot be replaced by traditional *traductio in domum sponsi*. Engagement in the view of the commentator is seen as consenting to the union after arriving to the age of seven: if assent has taken place, engagement has been legally held, unless consanguinity matters impede contracting, as they did in *Litteras* [X 4, 2, 4]⁵⁵² and *Accessit* [X 4, 2, 5].⁵⁵³ In other words, if action or intention to action are inadequate, the guilty should be released from the vow he has given to take those actions.⁵⁵⁴

⁵⁵¹ X 2, 13, 14 (Fr. 288); Potthast no. 3598 (11 January, 1209)

⁵⁵² Ex sponsalibus, contractis cum minore septennio, non oritur impedimentum publicae honestatis; secus, si cum maiore vel minore, consentiente post septennium. Et affinitas, sequens dissolvit sponsalia praecedentia de futuro. Alexander III Herefordensi Episcopo. Litteras tuae fraternitatis accepimus, ex quarum tenore perpendimus, quod, quum quidam *parochianus tuus A. nomine* esset perfectae aetatis, quondam puellam in cunabilis desponsavit; procedente vero tempore *idem A.* matrem puellae cognovit et eam in uxorem accepit. Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo Consultationi tuae taliter respondemus, quod si praefatus matrem *praefatae* puellae antequam *puella ipsa* septimum annum complisset in uxorem accepit, matrimonium ipsum non dissolvas sed eundem virum *praefatam mulierem, sicut uxorem, libere tenere permittas*, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam *praefata* puella septimum complevit, praedictus vir matrem eius accepit in uxorem, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem in uxorem habere permittas. X 4, 2, 4 (Fr. 673); JL 13947(9009); WH 631 6 March 1177

⁵⁵³ Accessit ad praesentiam nostrum nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubiles annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nolles, eum sollicite monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutes sua nobis assertionem proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea [vero], antequam ad nubiles annos pervenisset, noluit aequatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W. in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patre puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam *idem W.*, ut Discordia orta inter consanguineos suos et consanguineos mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendum mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod praefata puella non esset septennis quando praememorato G. desponsata fuit, et postea in eum non consenserit, et quod *idem G.* ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia ante septem annos fieri non possunt praesertim si consensus postea non accedit. Sane si praefata puella ante [huiusmodi] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque

5.4.8.3 *Tuae nobis exhibitiae* [X 4, 2, 14]

Interrelation between betrothal for the future and betrothal for the present has been already discussed in *Sicut ex literis tuae* [X 4, 1, 22], which belongs to chancery of Pope Innocent III. According to *Sicut ex literis tuae*, engagement for the present prevails over engagement for the future. In the current decretal of the same Pope *Tuae nobis exhibitae* [X 4, 2, 14] the interrelation between engagement and marriage is the main theme. According to *Tuae nobis exhibitae* [X 4, 2, 14], marriage overrules previously contracted engagement for the present. Pope Innocent III, similarly to Pope Alexander III, sees age (in this case *aetas adolescendi*) as a determining issue in deciding whether engagement or marriage has been contracted. *Tuae nobis exhibitae* [X 4, 2, 14] is similar to *Ex litteris* [X 4, 1, 7] of Pope Alexander III: both decretals deal with the age of contracting parties as determining element for defining the kind of marital bond with only one difference. Pope Alexander III discusses *aetas discretionis* in *Ex litteris* [X 4, 1, 7], whereas Pope Innocent III resolves the case, when one of the parties is close to *aetas adolescendi*. Despite this difference, those two Popes have a common approach, namely, they have chosen the same approach defining what kind of marital bond has been contracted, by choosing one single criterion, which is the age.

Tuae nobis exhibitae [X 4, 2, 14]⁵⁵⁵ was sent on 10th of May, 1206 by Pope Innocent III to [Konrad] the bishop of Halberstadt. A certain girl aged almost 12 was betrothed to a noble

consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paternae vel maternae, hereditatis prohiberi non possunt. X 4, 2, 5 (Fr. 674) JL 13887 (8952); WH 12 c.1173

⁵⁵⁴ X 2, 1, 15 (Fr. 245); Potthast no. 3061 (24 May, 1207)

⁵⁵⁵ Si quis per verba de praesenti contrahit cum impubere, in qua aetatem malitia non supplet, intelligitur non matrimonium, sed sponsalia contraxisse, etiamsi subarrhatio intercesserit. Idem [Innocentius III] Episcopo Abbatensi. *Tuae nobis exhibitiae* literae continebant, quod quidam vir nobilis filiam suam, circiter XII. annos habentem, cuidam viro nobili desponsavit, qui subarrhavit eandem consensu mutuo accedente. *Sed nuptiis aliquantulum prorogatis, pater puellae viam est universae carnis ingressus. Eo autem rebus humanis exempto, puellae avunculus supra dictae ipsam alteri matrimonio copulavit, et ille, qui prius desponsaverat eandem, cum ipsius matre contraxit. Tuus autem praedecessor attendens, quod cum eam non poterat permanere, cuius filiam legitime desponsaverat, inter eos divortii sententiam promulgavit. Postmodum autem mortuo viro secundo, qui supra dictam puellam duxerat in uxorem, ipsa se tertio copulavit, illo vivente, qui eam primitus desponsarat.*

man with subarration and mutual consent. Afterwards, she married another man. It is asked with whom she is supposed to be staying as a wife. Pope responds that it is not surely defined at what age the girl was at the moment of contracting with the first man, when it says *circiter duodecim annos habebat* and it is not known if *malitia suppleret aetatem*. If the girl was not at her marriagable age [had not yet reached the age of 12], she contracted a mere betrothal; even taken that *malitia non suppleret aetatem*, undoubtedly not a marriage, but an engagement, was contracted between them even if subarration has also taken place within this contract. Therefore, she should stay with the second man with whom she contracted being at her legitimate age [exactly 12 years or above]. According to the text of decretal, a marital union contracted at the legitimate age [marriage], dissolves betrothal contracted at minor age.⁵⁵⁶

Ceterum tam ipsa, quam idem te duxerunt humiliter consulendum, utrum licite [simul] valeant commorari; tu vero, deliberatione habita, respondisti, quod sponso primo vivente, alteri non potuit legitime copulari. Sed quia tua ecclesia postulavit, ut super hoc apostolicam sedem consuleres, procedere ulterius distulisti, nobis humiliter supplicans, ut super hoc tibi rescribere dignaremur. Quia vero per ea, quae superius sunt expressa, nobis pro certo constare non potuit, cuius aetatis esset puella, quum eidem viro extitit desponsata, quum dicatur, quod circiter XII. annos habebat utrumne prud entia tunc in illa suppleret aetatem: fraternitati tuae taliter respondemus, quod, si puella tunc nubilis erat aetatis, et inter eam et primum virum legitimus intervenit de praesenti consensus, absque dubio inter eos erat legitimum matrimonium contractum, etsi carnalis commixtio non fuerit subsequuta. Si vero puella nubilis non erat aetatis, quum saepe fatus vir desponsavit eandem, et aetatem in ea prudentia non supplebat, procul dubio inter eos non coniugium, sed sponsalia contracta fuerunt, quamvis ab ipso viro eadem puella fuerit subarrhata. Quocirca si iuxta primum modum matrimonium cum illo contraxit: eo vivente non potuit rite cum alio foedus contrahere coniugale; quod si iuxta modum secundum sponsalia solummodo contracta fuerunt coniugium, quod inter illam et alium extitit celebratum, debet legitimum reputari, dummodo alium canonicum non obsistat. X 4, 2, 14 (Fr. 678); Potthast no. 2775; Die Register Papst Innocenz' III., 9. Band no. 70

⁵⁵⁶ CASUS. Quidam filiam suam circiter xii. Annos habentem, desponsavit cuidam nobili, qui subarrhavit eandem per annuli immissionem, consensu mutuo accedente, postmodum puella ipsa fuit alteri copulata. Dubitatum fuit, utrum illa puella deberet remanere cum secundo, an deberet redire ad illum, cui fuit primo desponsata. Consulens Papa respondet, quod non constitit ei cuius aetatis esset puella, quando cum primo viro extitit desponsata, cum dicatur, quod circiter xii. annos habebat, vel utrum malitia suppleret aetatem. Dicit quod si puella nubilis non erat aetatis, cum viro extitit desponsata, et malitia non suppleret aetatem, proculdubio inter eos non matrimonium, sed sponsalia fuerunt contracta, quamvis ab ipso viro eadem puella fuerat subarrhata, et ita remanere debet cum secundo viro, cum quo contraxit in etate legitima. Nota quod malitia supplet aetatem circa matrimonium contrahendum. Item matrimonium contractum in aetate legitima, soluit sponsalia in minori aetate contracta. Gl. ad X 4, 2, 14 [1595: 1037]

Subarration was mentioned in the text of decretal by Pope Innocent III and it was responded to by an anonymous commentator with an extensive gloss.⁵⁵⁷ The commentator refers firstly to *Decretum*, where marriage [or putative marriage] and subarration are synonymised put on the same level. Two instances⁵⁵⁸ to which the author alludes are not necessarily relevant as they discuss Levitical barrier; therefore, appealing to those examples appears helpful only in defining contracting a putative marriage through subarration. Subarration itself may well be done through giving a ring or some other thing; it may as well be combined with expressed consent or without any consent. It is important that the subarration that has taken place presupposes a marriage or at least a putative marriage to take place. Afterwards, the commentator presents arguments that are contrary to defining [putative] marriage through subarration. In reaction to this matter it relevantly refers to *Nostrates* [C.30 q.5 c.3],⁵⁵⁹ according to which betrothal (defined as promise of the future marriage), seen as the first

⁵⁵⁷ Subarrhavit, sic 27.q.2 *Si quis uxorem* [C.27 q.2 c.14] et c[apitulum] seq[ue]nte [C.27 q.2 c.15]. Et haec subarrhatio fit quandoque, per immissionem annuli, iuxta illud “annulo suo subarrhavit me” quandoque per dationem aliarum rerum, vel aliorum insignium, et quandoque fit talis subarrhatio interveniente consensu expresso, ut hic, quandoque etiam non interveniente, sed sive interveniat sive non, dummodo constet de subarrhatione, praesumitur matrimonium donec probetur contrarium, argumentum 30.q.5 *Nostrates* [C.30 q.5 c.3], et c. *Femine* [C.30 q.5 c.7] 27. dist. *Quod interrogasti* [Dist. 27 c.6] et supra *De sponsalibus et matrimoniis. Is qui* [X 4, 1, 30], quia nihil interest an facto an verbo quis declaret voluntatem suam 43. dist. C. I. ibi [?] Pastorem recta loqui timuisse, quod aliud est dicere, quam terga tacendo praeuisse? Vel ibi, vestimenta sacerdotis, quid aliud quam recta opera, et c. *Ubi* [X 4, 2, 2] de hoc, ff. *De leg[ibus] senatusque consultis et longa consuetudine*. *De quibus* [D. 1, 3, 32], et supra *De reg[ularibus] et transeuntibus ad religionem* [X 3, 31,], et si fiat a patre, praesumuntur matrimonium, ut hic in fi[ne] nisi consuetudo in contrarium esset, argumentum esset, argumentum supra de praesumptio *illud*. Gl. ad X 4, 2, 14 [1595: 1037]

⁵⁵⁸ Si quis uxorem desponsauerit, uel eam subarrauerit, quamquam postmodum preueniente die mortis eius nequiverit eam ducere in uxorem, tamen nulli de consanguinitate eius licet accipere eam in coniugio, et si inuentum fuerit factum, separetur omnino. C. 27 q.2 c.14 (Fr. 1065-1066)

Si quis desponsauerit uxorem uel subarrauerit, et siue preueniente die mortis, siue irruentibus quibusdam aliis causis minime eam cognouerit, neque superstes eius frater, neque ullus de consanguinitate eius eandem sibi tollat in uxorem ullo umquam tempore. C. 27 q.2 c.15 (Fr. 1065-1066)

⁵⁵⁹ Item Nikolaus ad consulta Bulgarorum. [c. 3.] *Nostrates*, tam mares quam feminae, non ligaturam auream, uel argenteam, aut ex quolibet metallo compositam, quando nuptialia federa contrahunt, in capitibus deferunt: sed post sponsalia, que futurarum sunt nuptiarum promissio, federa quoque consensu eorum, qui hec contrahunt, et eorum, in quorum potestate sunt, celebrantur; et post, quam arrhis sibi sponsam sponsus per digitum fidei annulo insignitam desponderit, dotemque utrique placitam sponsus ei cum scripto pactum hoc continente coram inuitatis ab utraque parte tradiderit (aut mox aut apto tempore, ne uidelicet ante tempus lege diffinitum tale quid facere presumant), ambo ad nuptialia federa perducuntur, et primum in ecclesia Domini cum oblationibus, quas offerre debent Deo per sacerdotis manum, statuuntur, sicque demum benedictionem et uelamen celeste suscipiunt. Item: §. 1. Hec sunt, preter alia, que ad memoriam non occurrunt, pacta coniugiorum solempnia. Peccatum autem esse, si hec cuncta in nuptiali federe non interueniant, non dicimus. C.30 q.5 c.3 (Fr. 1105-1106)

stage of contracting marriage together with the mutual consent, makes a legal marriage. Following this excerpt of the *Decretum*, it may be inferred that subarration is not of the first level importance for creating marriage, rather these are betrothal and consent. It is not clearly seen what the glossator was trying to say by referring to *Femina* [C.30 q.5 c.7].⁵⁶⁰ The chapter of the *Decretum* speaks about blessings and veiling the woman by the ceremony of marriage. The only possible answer might be that blessings are invincible and necessary steps in the marital ceremony. Therefore, it is hardly possible that this instance from the *Decretum* might be seen as accurately applicable. *Quod interrogasti* [Dist.27 c.6]⁵⁶¹ does not show any relevance to the discussed matter either, as it speaks about a widow who enters the monastery. Reference to *Is qui* [X 4, 1, 30]⁵⁶² sent from chancery of Pope Gregory IX to the bishop of Le Mans is very well applicable, as it sees betrothal for the future followed by intercourse as a legal marriage. In sum, it appears that the commentator prefers betrothal, together with consent followed by consummation, as those parts that create marriage, against subarration with consent as forming parts of marriage liaison. According to the last

⁵⁶⁰ *Feminae, dum marituntur, ideo uelantur, ut nouerint, se semper uiris suis subditas esse et humiles. §. 1. Item, quod nubentes post benedictionem uitta inuicem, uno uinculo copulantur, uidelicet fit ideo, ne conpagem coniugalis unitatis disrumpant. §. 2. At uero, quod eadem uitta candido purpureoque colore permiscetur, candor quippe est mundicia uitae, purpura ad sanguinis posteritatem adhibetur, ut hoc signo et continentia et lex continendi ab utrisque ad tempus admoneatur, et posthec reddendum debitum non negetur. §. 3. Item, quod in primis annulus a sponso sponsae datur fit nimirum uel propter mutuae dilectionis signum, uel propter id magis, ut eodem pignore corda eorum iungantur. Unde et quarto digito annulus inseritur, ideo quod in eo uena quedam, ut fertur, sanguinis ad cor usque perueniat. C.30 q.5 c.7 (Fr. 1106)*

⁵⁶¹ *Quod interrogasti de femina, que post obitum mariti sui sacrum uelamen super caput suum inposuit, et finxit se sub eodem uelamine sanctimoniale esse, postea uero ad nuptias rediit: bonum mihi uidetur, quia per ypocrisim ecclesiasticam regulam conturbare uoluit, et non legitime in uoto suo permansit, ut penitentiam agat de illusionem nefanda, et reuertatur ad id, quod spondit, et in sacro ministerio permaneat, quod inchoauit. Dist. 27 c.6 (Fr. 99-100)*

⁵⁶² *Sponsalia de futuro transeunt in matrimonium per carnalem copulam subsecutam, sed non per nism carnalis copulae tantum. H. d. cum c. fin. Idem [Gregorius IX] Episcopo Cenomanensi. Is, qui fidem dedit M. mulieri super matrimonio contrahendo carnali copula subsecuta, etsi in facie ecclesiae ducat aliam et cognoscat, ad primam redire tenetur, quia, licet praesumptionem tamen huiusmodi non est probatio admittenda. Ex quo sequitur quod nec verum nec aliquod censetur matrimonium quod de facto est postmodum subsecutum. X 4, 1, 30 (Fr. 672); Potthast no. 9661 (Episcopo Cenomanensi, 1227 Mart.21-1234 Sept.4)*

reference taken from the *Digesta*,⁵⁶³ it is presupposed that customs and traditions of the place are to be followed as well in this matter. Subarration does not appear to be a determining element neither for Pope Innocent III, nor for the commentator. Despite minor significance of subarration for contract definition, it still remains important; it has its role depending on the age of contracting parties: subarration that has taken place at the age prior to *aetas adolescendi* leads to engagement; subarration at/after arriving to the age of adulthood leads to marriage. In other words, the age criterion has a constant value, whereas subarration possesses a mere derivative value. As a result, subarration and consent depend on the age of contracting parties. This can be claimed according to the text of decretal. As we refer to the text of the commentary, the age is to be seen as criterion to determine whether betrothal or marriage has been created.⁵⁶⁴ The union, contracted prior to the age of 12/14 for girl/boy correspondingly, is defined to be an engagement; whereas the one created after the mentioned age is to be seen as a marriage. As a reference, which was referred to by a commentator, namely *Ubi* [X 4, 2, 2],⁵⁶⁵ states a marriage can be contracted exclusively after or at the marriageable age. Additionally, subarration done at the undermarriageable age leads to betrothal, not marriage.⁵⁶⁶

At the first glance it may seem that the decretal *Tuae nobis exhibitae* [X 4, 2, 14] discusses marriage, though there are two key words that determine this marital union to be a betrothal rather than a marriage: *circiter duodecim annos habebat*; therefore, despite

⁵⁶³ De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs roma utitur, servari oportet. D. 1, 3, 32pr

⁵⁶⁴ Nubilis, nota nubilus aetas in viro est xiiii annos, in femina xii, ut dixi supra eodem c. *Ubi* [X 4, 2, 2], et ita si non fuit talis, non fuit matrimonium inter eos, sed sponsalia tantum, nisi malitia suppleret aetatem, ut infra sequitur. Gl. ad X 4, 2, 14 [1595: 1037]

⁵⁶⁵ X 4, 2, 2 (Fr. 673)

⁵⁶⁶ Subarrhata, et ita collige, quod per subarrhationem contrahitur matrimonium verum vel praesumptum, ut dixi in princip[io] nisi aetas repugnet, ut hic patet, et est hic argumentum manifestum, quod si minor in contrahendo utatur verbis pertinentibus ad matrimonium contrahendum, contrahit sponsalia. Gl. ad X 4, 2, 14 [1595: 1037]

subarration took place, the girl was betrothed, but not yet married on the ground of her age. Pope Innocent III, unlike some of his predecessors, Pope Eugene III and Pope Alexander III, was very accurate and sharp about the age, as in his accuracy he did not perceive proximity to the age as the actual age. Pope Eugene III in his decretal *Iuvenis* [X 4, 1, 3]⁵⁶⁷ equalised proximity to the age of seven with an actual *aetas discretionis*. In the decretals of Pope Alexander III in *Continebatur* [X 4, 2, 6]⁵⁶⁸ and *De illis* [X 4, 2, 9]⁵⁶⁹ proximity to adulthood and actual *aetas adolescendi* are assimilated. Pope Innocent III in *Tuae nobis exhibitae* [X 4, 2, 14], in contrast, draws a clear line which is *aetas adolescendi*, as a *terminus*; depending on the time of creating a marital contract the kind of marital liasion is to be defined. In sum, considering aforementioned decretals of Pope Innocent III inserted in the *Liber Extra*, engagement for the present prevails over betrothal for the future, the same as marriage

⁵⁶⁷ Si maior septennio duxit in uxorem minorem septennio, et eam traduxit ad domum, oritur ex tali contractu publicae honestatis iustitia. H. d. inherendo litarae. Panorm. Eugenius Papa [Aesculapo presbytero]. Iuvenis ille, qui puellam nondum septennem duxit, quamvis aetas repugnaret, ex humana tamen fragilitate forsantentavit quod complere non potuit. Quia igitur in his, quae dubia sunt, quod certius existimamus tenere debemus, tum propter honestatem ecclesiae, quia ipsa coniux ipsius fuisse dicitur, tum propter praedictam dubitationem, mandamus tibi quatenus consobrinam ipsius puellae, quam postmodum duxit, divides ab eodem. X 4, 1, 3; (Fr. 661); JL 9655 (6685)

⁵⁶⁸ Si impubes, desponsata et traducta, petit licentiam pubes facta alteri nubendi, non auditur, si vir iurat, soeam cognovisse; nec auditur, si nondum pubes, sed proxima pubertati probetur cognita. Et ex sponsalibus, contractis cum impubere maiore septennio, oritur publica honestas. Idem [Alexander III] Norvicensi Episcopo. Continebatur in literis tuis, quod, quum quaedam puella infra nubile annos cuidam viro in uxorem tradita fuerit, et ab ipso traducta, suis parentibus asserentibus, eam legitimae aetatis exsistere, haec, ad nubile annos perveniens alii nubendi licentiam postulavit, asserens, se in eundem virum nullatenus consensisse. Praedictus vero vir econtra proponit, quod, licet eadem puella nondum forte annum XII. attigisset quum ei tradita fuisset in uxorem, usque adeo tamen aetati fuit proxima, quod ipsam carnali commixtione cognovit. Inde esi, quod, quum ipsa dicit ab eodem viro se incognitam, et tu nos consulisti, utrum alii possit nubere. Consultationi tuae taliter respondemus, quod, quum in decretis habeatur expressum, quod, si vir dixerit, quod uxorem suam cognoverit, et mulier negaverit, viri standum est veritati, unde praefato viro, qui dicit, se mulierem ipsam cognovisse, fides est adhibenda, si id firmaverit iuramento. Si autem fuerit aetati proxima, ut in undecimo vel circa XII. annum, et cum suo assensu et voluntate parentum desponsata et benedicta fuerit, et cognita ab eodem viro, separari non debet, praesertim quum parentes eius ipsam fuisse aetatis legitimae faterentur. Si vero puella infra nubile annos el aetati proxima alicui desponsata fuerit, benedicta atque traducta, non licei alicui de consanguinitate ipsius, cui desponsata fuerit, eam ducere in uxorem, nec fas est eidem sponso de consanguinitate sponsae sibi aliquam [matrimonio] copulare. X 4, 2, 6 (Fr. 674-675); JL 14032 (9096); WH 204 1173-76

⁵⁶⁹ Minores, apti ad matrimonium, ex contractu matrimonii obligantur, nisi violentia intercedat. Idem [Alexander III.] Genuensi Archiepiscopo. De illis autem, qui in minori aetate desponsantur, traduntur et coniuguntur, et processu temporis divortium postulant, minorem allegantes aetatem, aut vim sibi a parentibus factam, hoc inquisitioni tuae presentibus literis Respondemus, quod, si ita fuerint aetati proximi, quod potuerint copula carnali coniungi, minoris aetatis intuitu ab invicem separari non debent, si unus in alium visus fuerit consensisse, quum in eis aetatem supplevisse malitia videatur. Sed cuiuscunque sint aetatis, se possunt per illatam violentiam excusare, nisi post violentiam consensus accedat. X 4, 2, 9 (Fr. 676); JL 13969 (9031)

overrules betrothal for the present; engagement of minors contracted prior to the age of seven is held null; subarration and consent are important, but in relation to the age of contracting parties; the main and defining criterion in decretals of Pope Innocent III is not subarration or consent, despite their importance, but the age of contracting parties.

5.4.9 Pope Gregory IX

5.4.9.1 *Gemma* [X 4, 1, 29]

According to a current Gregorian decretal *Gemma* [X 4, 1, 29],⁵⁷⁰ engagement of minors prior to the age of seven is to be penalised and to be held void, unless it was confirmed after arrival to the age of seven. The age of contracting parties is a constant value for this papal letter, but not the only one. The second value is a consent freed from any coactions and enforcements. It may be claimed that papal focus on the age of contracting parties and free consent is equally elaborated in the commentaries of Bernard of Parma; in other words, the points of interest of the Pope and of the commentator are the same, which happens not that often, as could be already seen in the papal letters discussed above.

Teberga, a daughter of Gemma, being under the age of seven contracted betrothal with Peter, a son of B. Parents and children were penalized. Afterwards, Teberga contracted marriage with another man, named C. The Pope claims that either marriage or engagement should be free of personal violence or money enforcements; if those have influenced contracting, the promise to the contract is to be held void. Bernard of Parma comments specifically on the age matter,⁵⁷¹ which, following the text of decretal, states that the age of the bride at the time of contracting was less than seven years. Betrothal created prior to the age of seven is held to be null and void, this is confirmed by two decretals of Pope Alexander III: the one *Litteras* [X 4, 2, 4],⁵⁷² sent to the bishop of Hereford in 1177; and the other –

⁵⁷⁰ X 4, 1, 29 (Fr. 671), Potthast no. 9660

⁵⁷¹ *Infra septennium, unde non tenuerunt sponsalia, infra tit[ulo] proximo Litteras* [X 4, 2, 4] *Accessit* [X 4, 2, 5] *supra De restit[utione] spol[iorum]*. *Ex parte* [X 2, 13, 14] *ergo nec poena si licita fuisset, alias non tenuit, quia si principale non tenuit, nec accessorium supra De re... iud... Cum inter [?] et C. De legi[bus et constitutionibus principum et edictis]* [C. 1, 14, 5pr] *cum suis concor.*, sed si post vii. annos forte consenserunt sponsalia, poena tamen non tenuit. Ber[nardus] Gl. ad X 4, 1, 29 [1595: 1027]

⁵⁷² *Litteras tuae fraternitatis accepimus, ex quarum tenore perpendimus, quod, quum quidam parochianus tuus A. nomine esset perfectae aetatis, quondam puellam in cunabilis desponsavit; procedente vero tempore idem A. matrem puellae cognovit et eam in uxorem accepit. Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo Consultationi tuae taliter respondemus, quod si*

Accessit [X 4, 2, 5],⁵⁷³ addressed to [Roger] the archbishop of York. Both of those texts claim betrothals made in cradle or prior to the age of seven are null. Similar situation was presented in *Ex parte* [X 2, 13, 14],⁵⁷⁴ from Pope Innocent III to the bishop of Volterra in 1209, according to which, *deductio in domum* is void without betrothal or with invalid one, the latter is void according to the age under seven. For this the couple and the parents are to be penalised. They should not be penalised, if engagement contracted under the age of seven was confirmed after arrival to the mentioned age.

praefatus matrem *praefatae* puellae antequam *puella ipsa* septimum annum compleret in uxorem accepit, matrimonium *ipsum* non dissolvas *sed eundem virum praefatam mulierem, sicut uxorem, libere tenere permittas*, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam *praefata* puella septimum complevit, praedictus vir matrem eius accepit in uxorem, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem in uxorem habere permittas. X 4, 2, 4 (Fr. 673); JL 13947(9009); WH 631 1177

⁵⁷³ *Accessit ad praesentiam nostrum nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubiles annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nolles, eum sollicitate monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutes sua nobis assertionem proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea [vero], antequam ad nubiles annos pervenisset, noluit aequatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W. in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patre puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam idem W., ut Discordia orta inter consanguineos suos et consanguineos mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod praefata puella non esset septennis quando praememorato G. desponsata fuit, et postea in eum non consenserit, et quod idem G. ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia ante septem annos fieri non possunt praesertim si consensus postea non accedit. Sane si praefata puella ante [huiusmodi] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paternae vel maternae, hereditatis prohiberi non possunt. X 4, 2, 5; (Fr. 674); JL 13887(8952); WH 12 c.1173*

⁵⁷⁴ [X 2, 13, 14] (Fr. 288); Potthast no. 3598

For the decretal of Pope Gregory IX free will consent appears to be extremely important, as it has to be freed from all kinds of coactions and enforcements.⁵⁷⁵ *Quum locum* [X 4, 1, 14]⁵⁷⁶ from Pope Alexander III to the bishop of Pavia states that consent does not take place where fear and violence do, and *Requisivit* [X 4, 1, 17]⁵⁷⁷ of Pope Lucius III to the bishop of Rapallo considers that to warn is better than to compel. An anonymous commentator refers to those two examples in order to interpret the free will consent of Gregorian decretal.

In this decretal the contract *stipulatio* is not penalised on the ground of its nature, but rather on the ground of dowry *arrhas* given in order to perfect the contract.⁵⁷⁸ Excerpts from Roman law are being referred to in order to show that contract with penalty is to be seen as void. It is said to be disgraceful that penalty limits marriage either already created or upcoming one.⁵⁷⁹ It is generalised as well that contracts with penalties are seen to be void.⁵⁸⁰

Gregorian *Gemma* [X 4, 1, 29] fits into the paradigm of the decretals, where the age (whether *aetas discretionis* or *aetas adolescendi*) determines legality or nullity of contracted union.⁵⁸¹ Together with this common feature (age defining the status of the marital bond), Gregorian *Gemma* differentiates itself from other papal letters, as in Gregorian letter free will consent

⁵⁷⁵ Libera debeant, ab omni coactione supra eodem *Cum locum* [X 4, 1, 14] et c. *Requisivit* [X 4, 1, 17], etiam a poena pecuniaria, ut hic patet. Gl. ad X 4, 1, 29 [1595: 1027]

⁵⁷⁶ X 4, 1, 14 (Fr. 666)

⁵⁷⁷ X 4, 1, 17 (Fr. 667)

⁵⁷⁸ Stipulatio, stipulatio poenae in sponsalibus apposita non tenet propter rationem, quae redditur in littera, sed arrhas datas pro sponsalibus perficiendis amittit, qui resilit sine iusta causa C. *De spon[salibus et arris sponsaliciis et proxeneticis]*. l. ult. [C. 5, 1, 5, 6], *De verb[orum] oblig[ationibus]*. Titia [D. 45, 1, 134pr] unde haec decret. s. umpta fuit C. *De inutilis stip[ulationibus]* l.2 [C. 8, 38, 2] et hic. Sed videtur, quod idem fit in arrha quod dicitur de poena, quia eadem est ratio utrobique, ergo eadem debet esse prohibitio, et idem ius supra *De confir. Cum dilecta* [?] cum aliis concor. Ibi positus, et supra *De transla. Inter corporalia*. Sed secus est secundum leges, ut dicit lex praedicta *De sponsa* in C. Gl. ad X 4, 1, 29 [1595: 1027]

⁵⁷⁹ Titia, quae ex alio filium habebat, in matrimonium coit gaius seio habente familiam: et tempore matrimonii consenserunt, ut filia gatii seii filio titiae desponderetur, et interpositum est instrumentum et adiecta poena, si quis eorum nuptiis impedimento fuisset: postea gavius seius constante matrimonio diem suum obiit et filia eius noluit nubere: quaero, an gatii seii heredes teneantur ex stipulatione. respondit ex stipulatione, quae proponeretur, cum non secundum bonos mores interposita sit, agenti exceptionem doli mali obstaturam, quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive iam contracta. D. 45, 1, 134pr

⁵⁸⁰ Libera matrimonia esse antiquitus placuit. ideoque pacta, ne liceret divertere, non valere et stipulationes, quibus poenae inrogarentur ei qui divortium fecisset, ratas non haberi constat. C. 8, 38, 2

⁵⁸¹ X 4, 1, 3; X 4, 2, 6; X 4, 2, 9; X 4, 2, 14

is elaborated much more distinctly than in other letters fitting into the aforementioned paradigm.

As David d'Avray notes, *Gemma* [X 4, 1, 29] is to be seen as *locus classicus* for discussing *arrhae*,⁵⁸² despite the text of the decretal has nothing specific to say about the *arrhae per se*.⁵⁸³ In his decretal Pope Gregory IX highlighted the principle of freedom of contracting marriage and put the prohibition to compel the unwilling partner by the threat of penalty. The Pope as well prohibited the father of the groom to extract and agreed penalty from the bride's mother *Gemma* on those grounds that the marriage was contracted after *sponsalia* had been contracted.⁵⁸⁴ The case and papal response are patterned after *Titia* [D. 45, 1, 134].⁵⁸⁵ According to this excerpt from the *Digesta*, when either partner refuses to proceed from betrothal to marriage, a penal stipulation linked to a betrothal is to be seen as void. It is reasonably noted by David d'Avray that in the text of decretal *sponsalia* is seen as completed, but the contracting parties have not yet reached the minimum age of seven years.⁵⁸⁶ Bernard of Parma, while commenting on *c.Gemma*, is concentrated rather on *sponsalia* and on the impossibility to contract it prior to the age of seven.⁵⁸⁷ Together with

⁵⁸² *c. Gemma* [X 4, 1, 29] (Fr. 671) is been called *locus classicus* for discussing *arrhae* by David d'Avray. (Avray 2015, 32)

⁵⁸³ In matrimoniis et sponsalibus debet esse libertas, unde in eis promissio poenae non obligat. Gregorius IX. *Gemma* mulier nobis exposuit, quod, quum T[eberga] filia eius cum C. contraxit matrimonium, B. de Alferio ea occasione, quod inter P. filium suum et praedictam puellam infra septennium constitutos sponsalia contracta fuerunt, poenam solvendam a parte, quae contraveniret in stipulatione appositam, ab ipsa nititur extorquere. Quum itaque libera matrimonia esse debeant, et ideo talis stipulatio propter poenae interpositionem sit merito improbanda, mandamus, quatenus, si est ita, eundem B., ut ab extorsione praedictae poenae desistat, ecclesiastica censura compellas. X 4, 1, 29 (Fr. 671); Potthast no. 9660

⁵⁸⁴ (Avray 2015, 32)

⁵⁸⁵ *Titia*, quae ex alio filium habebat, in matrimonium coit gaio seio habente familiam: et tempore matrimonii consenserunt, ut filia gatii seii filio titiae desponderetur, et interpositum est instrumentum et adiecta poena, si quis eorum nuptiis impedimento fuisset: postea gaius seius constante matrimonio diem suum obiit et filia eius noluit nubere: quaero, an gatii seii heredes teneantur ex stipulatione. respondit ex stipulatione, quae proponeretur, cum non secundum bonos mores interposita sit, agenti exceptionem doli mali obstaturam, quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive iam contracta. D. 45, 1, 134pr

⁵⁸⁶ (Avray 2015, 32)

⁵⁸⁷ Infra septennium, unde non tenuerunt sponsalia, infra tit[ulo] proximo *Litteras* [X 4, 2, 4] *Accessit* [X 4, 2, 5] supra *De resti[tutione] spol[iorum]*. *Ex parte* [X 2, 13, 14] ergo nec poena si licita fuisset, alias non tenuit, quia si principale non tenuit, nec accessorium supra *De re... iud...* *Cum inter* [?] et C. *De legi[bus] et constitutionibus*

gearing his attention on betrothal, Bernard as well discusses *arrha* in the relation to freedom⁵⁸⁸ of contract:⁵⁸⁹ on the one hand, the custom of giving *arrha* is present in the commentary; on the other hand, though, the Roman principle of free marital contracts is seen. It is referred to excerpts from Roman law in order to show that contract with penalty is to be seen as void. It is said to be disgraceful that penalty limits marriage either already created or upcoming one.⁵⁹⁰ Additionally, it is generalised that contracts with penalties are seen to be void.⁵⁹¹ David d'Avray displays this phenomenon of ambiguity or rather double understanding of Bernard in the following manner:

While the pope looked ahead to marriage, Bernardus of Parma in his gloss to c. *Gemma* looked back to sponsalia, asking whether or not *arrhae* are compatible with the principle of freedom of marriage. Torn between a theological principle and an institution sanctioned by Roman law, and compelled to take into account the custom of giving *arrhae*, his gloss is a conceptual jumble and amounts to little more than a convenient repository of opinions that could be helpful to canonists.⁵⁹²

principum et edictis] [C. 1, 14, 5pr] cum suis concor., sed si post vii. annos forte consenserunt sponsalia, poena tamen non tenuit. Ber[nardus] Gl. ad X 4, 1, 29 [1595: 1027]

⁵⁸⁸ Libera debeant, ab omni coactione supra eodem *Cum locum* [X 4, 1, 14] et c. *Requisivit* [X 4, 1, 17], etiam a poena pecuniaria, ut hic patet. Gl. ad X 4, 1, 29 [1595: 1027]

⁵⁸⁹ Stipulatio, stipulatio poenae in sponsalibus apposita non tenet propter rationem, quae redditur in littera, sed arrhas datas pro sponsalibus perficiendis amittit, qui resilit sine iusta causa C. *De spon[salibus et arris sponsaliciis et proxeneticis]*. l. ult. [C. 5, 1, 5, 6], *De verb[orum] oblig[ationibus]*. Titia [D. 45, 1, 134pr] unde haec decret. s. umpta fuit C. *De inut[il]is stip[ulationibus]* l.2 [C. 8, 38, 2] et hic. Sed videtur, quod idem fit in arrha quod dicitur de poena, quia eadem est ratio utrobique, ergo eadem debet esse prohibitio, et idem ius supra *De confir. Cum dilecta* [?] cum aliis concor. Ibi positus, et supra *De transla. Inter corporalia*. Sed secus est secundum leges, ut dicit lex praedicta *De sponsa* in C. Gl. ad X 4, 1, 29 [1595: 1027]

⁵⁹⁰ Titia, quae ex alio filium habebat, in matrimonium coit gaio seio habente familiam: et tempore matrimonii consenserunt, ut filia gatii seii filio titiae desponderetur, et interpositum est instrumentum et adiecta poena, si quis eorum nuptiis impedimento fuisset: postea gavius seius constante matrimonio diem suum obiit et filia eius noluit nubere: quaero, an gatii seii heredes teneantur ex stipulatione. respondit ex stipulatione, quae proponeretur, cum non secundum bonos mores interposita sit, agenti exceptionem doli mali obstaturam, quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive iam contracta. D. 45, 1, 134pr

⁵⁹¹ Libera matrimonia esse antiquitus placuit. ideoque pacta, ne liceret divertere, non valere et stipulationes, quibus poenae inrogarentur ei qui divortium fecisset, ratas non haberi constat. C. 8, 38, 2

⁵⁹² (Avray 2015, 32)

5.4.9.2 *Si inter* [X 4, 1, 31]

The relation of two kinds of betrothal are discussed in one of the decretals of Pope Innocent III *Sicut ex literis* [X 4, 1, 22], according to which, the same as following current Gregorian decretal *Si inter* [X 4, 1, 31],⁵⁹³ engagement for the present overrules betrothal for the future.

If consent of the present tense takes place between a man and a woman in the form of the following words: “I take you as mine,” or by other words expressing consent, no matter if there was an oath or not, it is prohibited to take another woman as a wife. If the groom marries another woman, despite consummation of the second union, he is supposed to return to the first woman. In case if the first promise to marry was expressed for the future: “I will take you as mine,” the second union is not to be separated.

According to the text of Gregorian decretal, engagement contracted for the present has a priority over betrothal for the future.

The anonymous commentator glosses to the text in the decretal, where it is said that consent is supposed to be verbalised.⁵⁹⁴ This opinion is to be confirmed by authority of Pope

⁵⁹³ Sponsalia de praesenti non solvuntur per sequens matrimonium, etiam carnali copula consummatum, sed sponsalia de futuro etiam iurata, solvuntur per sequentia de praesenti. Idem [Gregorius IX.]. Si inter virum et mulierem legitimus consensus interveniat de praesenti, ita quod unus alterum mutuo consensu, verbis consuetis expresso, recipiat, utroque dicente, ego te in meam accipio, et ego te accipio in meum, vel alia verba consensum exprimentia de praesenti, sive sit iuramentum interpositum, sive non, non licet alteri ad alia vota transire, quod si fecerit, secundum matrimonium de facto contractum (etiam si sit carnalis copula subsequuta) separari debet, et primum in sua firmitate manere. Verum si inter ipsos accessit tantummodo promissio de futuro, utroque dicente alteri: ego te recipiam in meam, et ego te recipiam in meum, sive verba similia, si alius mulierem mulierem illam per verba de praesenti desponsaverit, etiam si inter ipsam et primum, iuramentum intervenerit (sicut diximus) de futuro, huiusmodi desponsationis intuitu, secundum matrimonium non poterit separari, sed eis est de violatione fidei poenitentia iniungenda. X 4, 1, 31 (Fr. 672); Potthast no. 9662

⁵⁹⁴ Dicente, ergo altero loquente tantum non est matrimonium, quia non loquens suum consensum non exprimit argumentum 30 q.2. c. 1 [C.30 q.2 c.1]. Item argumentum quod qui tacet, non consentit, quia verba sunt necessaria consensum exprimentia supra eodem *Tuae* [X 4, 1, 25[X 4, 13, 10]] ff *De procu[r]atoribus et defensoribus* [D. 3, 3, 8pr] inuitum [Dicitur procurator invitatus, qui expresse non consentit. Io. Andrae], et si consensum exprimat alter aliquo signo vel nutu, licet nihil exprimat ore, satis videtur idem. Argumentum contra, quod non sit matrimonium, quia stipulatio non contrahitur nisi utroque loquente, etiam si annuat sine verbis ff *De verb[orum] oblig[ationibus]* l.1 [D. 45, 1, 1pr] *Si quis ita* [D. 45, 1, 1, 2] ergo idem in matrimonio argumentum istius litterae, utroque dicente, muti tamen sine ista forma contrahere possunt, dum tamen consensum expriment signis supra eodem *Quum apud* [X 4, 1, 23] ff *De iu[re] dot[ium]* *Mutus* [D. 23, 3, 73pr] argumentum *De tute[liis]* *Muto* [D. 26, 1, 6pr.], et illa signa aequipollent huic formae, et ita non refert

Nicholaus saying that no marriage is to be created without consent of both parties.⁵⁹⁵ It should be noted, though, that this reference is not very relevant, as it speaks about consent necessary for marriage, but it does not articulate it has to be consent expressed verbally. In other words, it does not clearly exclude silent consent, for instance. The second inconsistency appears to be that in the text of decretal marriage is mentioned when it deals with consent for the present, but there is also *promissio de futuro* presented, which is unlikely to be a marriage, but rather an engagement. In the reference to the *Decretum* is clearly referred to marriage, as well as consent of both parties, though it is undefined whether it is a verbalised or silent consent; therefore, it seems to be not necessarily relevant to the comment. More relevant reference related to the point that consent has to be expressed verbally is made to decretal of Pope Innocent III to the bishop of Brescia in 1206,⁵⁹⁶ as papal decision claims that words are necessary in order create a contract, or, additionally, that deaf and mute persons may contract by exchanging equivalent signs. The same cannot be said about excerpt from the *Digesta*,⁵⁹⁷ which has nothing to do with expressed or silent consent. The argument that exclusively through spoken assent the contract may be created is accurately supported by excerpts from the *Digesta*.⁵⁹⁸ Possibility

dummodo consensus exprimatur, etiam in loquente subsecuta subarrhatione per immissionem annulli, nam multae propter verecundiam annuunt potius quam loquantur, maxime praesentibus parentibus 32.q.2 *Honorantur* [C.32 q.2 c.13] (Fr. 1123-1124) Gl. ad X 4, 1, 31 [1595: 1028]

⁵⁹⁵ Ubi non est consensus utriusque, non est coniugium. Ergo qui pueris dant puellas in cunabulis, et e conuerso, nichil faciunt, nisi uterque puerorum post, quam uenerit ad tempus discretionis, consentiat, etiamsi pater et mater hoc fecerint et uoluerint. C.30 q.2 c.1 (Fr. 1099-1100)

⁵⁹⁶ X 4, 1, 25 (Fr. 670); Potthast no. 2656

⁵⁹⁷ Filius familias et ad agendum dare procuratorem potest, si qua sit actio, qua ipse experiri potest: non solum si castrense peculium habeat, sed et quivis filius familias: ut puta iniuriam passus dabit ad iniuriarum actionem, si forte neque pater praesens sit nec patris procurator velit experiri, et erit iure ab ipso filio familias procurator datus. hoc amplius iulianus scribit et si filio familias patri per filium eius in eadem potestate manentem fiat iniuria neque avus praesens sit, posse patrem procuratorem dare ad ulciscendam iniuriam, quam nepos absentis passus est. ad defendendum quoque poterit filius familias procuratorem dare. sed et filia familias poterit dare procuratorem ad iniuriarum actionem. nam quod ad dotis exactionem cum patre dat procuratorem, supervacuum esse valerius severus scribit, cum sufficiat patrem dare ex filiae voluntate. sed puto, si forte pater absens sit vel suspectae vitae, quo casu solet filiae competere de dote actio, posse eam procuratorem dare. ipse quoque filius procurator dari poterit et ad agendum et ad defendendum. D. 3, 3, 8pr

⁵⁹⁸ Stipulatio non potest confici nisi utroque loquente: et ideo neque mutus neque surdus neque infans stipulationem contrahere possunt: nec absens quidem, quoniam exaudire invicem debent. si quis igitur ex his

for mute and deaf to contract marriage is displayed by decretal sent from chancery of Pope Innocent III to [Umberto] the bishop of Arles on the 7th of July in 1198,⁵⁹⁹ according to which mute and deaf persons, unless being under a prohibition, can contract a marriage by mediation of signs. This principle is as well being verbalised before pontificate of Pope Innocent III, already in the *Digesta*.⁶⁰⁰ Therefore, exchange of signs equivalent to expressed assent followed by subarration in the form of putting on the ring is an acceptable form to contract marriage/engagement.

The verbalised form, mentioned in the decretal, namely *ego te accipio in meam/meum* and *ego te recipiam in meam/meum*, is not the only possible expressed form. Other words⁶⁰¹ are as well acceptable in contracting marriage (it appears that consent for the present creates marriage, whereas assent for the future creates engagement). In both examples to those it was referred *Ex parte* [X 4, 1, 9], and *Si quis divinis* [C.30 q.5 c.9] there are no exact words mentioned the exchange of which will imply contracted marriage/betrothal; therefore, those instances may well be considered as suitable.

Betrothal for the future may well be dissolved, but with penalty.⁶⁰² Therefore, according to *Si vir* [D.27 c.3]⁶⁰³ three years of penance should take place for breaking the engagement.

vult stipulari, per servum praesentem stipuletur, et acquirat ei ex stipulatu actionem. item si quis obligari velit, iubeat et erit quod iussu obligatus. D. 45, 1, 1pr

Si quis ita interroget "dabis?" responderit "quid ni?", et is utique in ea causa est, ut obligetur: contra si sine verbis adnuisset. non tantum autem civiliter, sed nec naturaliter obligatur, qui ita adnuit: et ideo recte dictum est non obligari pro eo nec fideiussorem quidem. D. 45, 1, 1, 2

⁵⁹⁹ X 4, 1, 23 (Fr. 699); Potthast no. 329

⁶⁰⁰ Mutus surdus caecus dotis nomine obligantur, quia et nuptias contrahere possunt. D. 23, 3, 73pr

Muto itemque mutae impuberibus tutorem dari posse verum est: sed an auctoritas eis accommodari possit, dubitatur. et si potest tacenti, et muto potest. est autem verius, ut iulianus libro vicesimo primo digestorum scripsit, etiam tacentibus auctoritatem posse accommodare. D. 26, 1, 6pr

⁶⁰¹ Alia verba, supra eodem *Ex parte* [X 4, 1, 9] et 30.q.5 *Si quis divinis* [C.30 q.5 c.9] (Fr. 1107-1108) Gl. ad X 4, 1, 31 [1595: 1028]

⁶⁰² Non poterit separari, quia fortius vinculum supervenit, et sic solvuntur sponsalia, non obstante iuramento, sic et votum simplex solvitur superveniente matrimonio 27. distinct. *Si vir* [D.27 c.3], et 27. q.1 *Nuptiarum* [C.27 q.1 c.41], et minus punitur propter bonum matrimonii subsequentis, ut cap. *Si vir* [D.27 c.3]. Ber[nardus] Gl. ad X 4, 1, 31 [1595: 1028]

This Gregorian decretal actually repeats the response of Pope Innocent in his decretal *Sicut ex literis* [X 4, 1, 22]: the engagement of the present prevails over betrothal for the future, but with attention to a consent and its verbal formulas.

5.4.9.3 *Adolescens* [X 4, 1, 32]

The following papal letter is similar to the previous one in its content. This Gregorian decretal⁶⁰⁴ is dedicated to engagement for the future, which, if not followed by consummation, can be easily overruled by marital contract created through *verba de praesenti*. The papal letter considers the case when an adult man betrothed a woman for the future, and, afterwards, betrothed another one, but this time for the present tense. He is supposed to stay with the second woman, as he created neither a real marriage, nor a putative one with the first woman. The anonymous commentator discusses⁶⁰⁵ the first union, which is claimed to be neither a real, nor a putative marriage. A real marriage might have been contracted for the present, whereas a putative one should have been followed by consummation. In the situation which is described by the decretal neither of those two preconditions took place. The commentator refers to two instances: one of them, *Is qui* [X 4, 1, 30], is quite suitable to current discussion, as it considers betrothal for the future followed by intercourse to be a marriage [putative]. The same may not be claimed about *Si quis uxorem* [C.27 q.2 c.14],⁶⁰⁶ which discusses rather Levitical barrier than betrothal or marriage.

⁶⁰³ Si uir uotum uirginitatis habens adiungitur uxori, postea non dimittat uxorem, sed tribus annis peniteat. D.27 c.3 (Fr. 99-100)

⁶⁰⁴ Nisus ad copulam non facit sponsalia de futuro transire ad matrimonium. Idem [Gregorius IX.] Adolescens, qui desponsatam sibi per verba de futuro, licet saepe nisus fuerit, carnaliter non cognoscens, cum alia postmodum per verba de praesenti contraxit: non primam, cum qua nec fuit verum matrimonium ex forma contractus, nec praesumptum, cum conatus non habuisset effectum, sed secundam deuit habere uxorem. X 4, 1, 32 (Fr. 672); Potthast no. 9663

⁶⁰⁵ Nec praesumptum, verum non fuit, quia ibi non fuit, quia non fuit carnalis copula subsequuta. De praesumpto matrimonio habes supra eodem *Is qui* [X 4, 1, 30] supra *De re iudicata et de effectu sententiarum et de interlocutionibus*. Tenor.[?] [D. 42, 1, ?] ubi de hoc, et 27. q.2 *Si quis uxorem* [C.27 q.2. c.14]. Gl. ad X 4, 1, 32 [1595: 1028]

⁶⁰⁶ Item Gregorius. Si quis uxorem desponsauerit, uel eam subarrauerit, quamquam postmodum preueniente die mortis eius nequiuert eam ducere in uxorem, tamen nulli de consanguinitate eius licet accipere eam in

Bernard from Parma comments on betrothal for the present that prevails over engagement for the future,⁶⁰⁷ as it has already been shown in previous Gregorian decretal, *Si inter* [X 4, 1, 31]. Bernard also alludes to famous St. Augustine's *Duobus* [X 4, 4, 1],⁶⁰⁸ according to which by contracting *fides pactionis* one is obliged to marry the woman, with whom he has contracted this kind of union; by *fides consensus* there is no such obligation: the man may marry another woman after receiving penalty for breaking his promise. In other words, *fides consensus* might be seen as engagement for the future, whereas *fides pactionis* as betrothal for the present.

The text of decretal, as well as glosses, is not clear on whether marriage or betrothal is the core of dispute. It surely may be claimed, though, that contract with the first woman appears to be a betrothal and not a marriage, as, considering the text of decretal and gloss, it constitutes neither a real, nor a putative marriage. There is one more hint, which shows in the direction of an engagement, and not a marriage, when we discuss the first contract (the one contracted for the future), namely, when Bernard of Parma states that contract for the present tense dissolves prior betrothal.⁶⁰⁹ Therefore, at least one contract may surely be claimed to be an engagement, and not a marriage.

In order to conclude about engagement in Gregorian decretals discussed above, the following should be stated. Pope Gregory IX appears to have at least two constant values that define his responses, unlike e.g. Pope Eugene III, Pope Alexander III and Pope Innocent

coniugio, et si inuentum fuerit factum, separetur omnino. Supra visum est de sponsalibus in genere, nunc de eis submittit in specie, scilicet de illis, que contrahuntur per impuberes. Vel aliter, et sic, quia ad sponsalia contrahenda, certa aetas determinata est a iure, ideo subicitur ista rubrica, in qua tractat de aetate habili ad sponsalia, ideo, et cet. C.27 q.2 c.14 (Fr. 1065-1066)

⁶⁰⁷ De praesenti contraxit, et sic soluta fuerunt priora sponsalia supra c. *proxi[mo]* [X 4, 1, 31], et *De sponsa duorum. Duobus* [X 4, 4, 1] (Fr. 668), et sic remanebit cum secunda, et aget poenitentiam de fide mentita, ut dicit cap. *Duobus* [X 4, 4, 1]. Ber[nardus]. Gl. ad X 4, 1, 32 [1595: 1028]

⁶⁰⁸ X 4, 4, 1 (Fr. 668)

⁶⁰⁹ De praesenti contraxit, et sic soluta fuerunt priora sponsalia... . Gl. ad X 4, 1, 32 [1595: 1028]

III: in addition to the age, consent, freely and strictly formulated, is of utmost importance for him. Engagements contracted prior to the age of discretion are held null. Betrothals are expected to be created without coercion and enforcement; those for the present prevail over contracts for the future.

5.4.9.4 Concluding remarks

In order to trace the development of the paradigm (despite multiple exceptions within decretal frame of some Popes, e.g. Pope Alaxander III, decretal letters of whom do not allow to establish one single doctrinal line) of engagement in the *Liber Extra*, it appears reasonable to draw a line of doctrinal evolution of betrothal from St. Augustine to Pope Gregory IX. Augustinian theory of *fides pactionis et fides consensus* is perceived in the *Liber Extra* as introducing the theory of two kinds of engagement: *desponsatio de futuro et desponsatio de praesenti* with a restriction for the spouses for the present to marry other partners. If one observes the development of the idea of engagement throughout papal responses, it cannot be left unnoticed that not the consent, subarration or consummation play the most important role in solving those above discussed cases, but the age. The latter plays a determining role in almost all the cases that deal with engagement, especially with betrothal for the future, as the age presents itself as a so called *constant value* in relation to other elements such as consent and subarration. The age is what defines the kind of union, the legality or validity of the consent and, thereafter, determines whether or not public honesty impediment takes place.

5.4.9.5 The age

In order to see the trace of development of age as a defining element, it seems noteworthy to look at *aetas discretionis et aetas adolescendi* as being the main papal line of resolving decretal cases. For Pope Hormisdas the age of contracting parties is very significant. Age

defines other elements such as consent, which is to be perceived differently depending on the age when the consent was exchanged; therefore, for Pope Hormisdas the partners' age has a features of constanta, whereas consent plays a derivative and depending role: e.g. the paternal coercion of the minor children is acceptable, whereas it is excluded at the adult age.

If we keep in mind the engagement paradigm of Pope Eugene III, the age ceases to be of utmost importance for this Pope. This can be inferred from his view of public honesty impediment: no matter at what age the betrothal is contracted, before the age of discretion or after, it still impedes any subsequent marital unions with blood relatives of the other partner.

The age becomes extremely important in Alexandrine "doctrine": age for this Pope is perceived as a defining element for understanding and meaning of both consent and subarration; betrothals contracted prior to the age of discretion are to be held null and those that give no impediment of public honesty; consent has to be freed from force and fear that *makes a steady man fall*, which shows in the direction of limited freedom of will of consenting parties. Subarration and consent both have a secondary meaning in relation to the age; the only case when consent plays a definitive and main role is in matters of *desponsatio de futuro et de praesenti*, as in those cases promise and vow respectively define whether engagement for the future or for the present has been contracted.

For Pope Urban III age determines the validity of consent.

Pope Clement III is very close to the approach of Pope Eugene III in his evaluation of age: for Pope Clement III age is not important, unlike e.g. for Pope Alexander III. Pope Clement III, as well as Pope Eugene III, has taken the stricter side in comparison with Pope Alexander III,

despite the minor age of contracting parties, their union impedes any subsequent conjugal bond with the relative of the other on the ground of public honesty.

Pope Innocent III approaches the age as a definitive element; he actually continues the line of Pope Alexander III while resolving cases dealing with *aetas discretionis*, by holding engagements for the future contracted before the age of seven as null and void, as well as using age for defining what kind of marital contract has been created (an engagement or a marriage). Pope Innocent III tends to take a stricter side considering the age in comparison with Pope Alexander III and Pope Eugene III. Pope Innocent III is very clear and accurate about the age, and he does not accept assimilation between proximity to the age and the actual age, whereas Pope Eugene III, as well as Pope Alexander III, tends to follow Roman law practice of assimilating proximate and actual age.

Pope Gregory IX continues the line of Pope Alexander III and Pope Innocent III – the age of contracting parties has a significant importance in solving the cases; engagement of minors prior to the age of seven is held to be null and void. Pope Gregory IX has as well a distinct feature in his approach to betrothal: for him a consent plays a much more important than for his predecessors.

In the *Liber Extra* it is clearly seen that Roman law objective approach of evaluating discretion and adulthood by the objective criterion of age is followed, rather than canon law approach, which evaluates adulthood by the physical capacity to procreate.

Chapter 6: Engagement in the *Summa aurea* of Hostiensis

6.1 Life of Hostiensis

Cardinal Hostiensis is seen as one of the most distinguished canonists of the 13th century. Henry was born in Susa *Segusia* circa 1200 and died in Lyons. He began his career in around 1235 as the prior of Antibes; from 1244 to 1250 he was a bishop of Sisteron; in 1250 he became the Archbishop of Embrun; in 1262 he was named the Cardinal of Ostia. In the 1220's he was a student of law at Bologna, where his teachers included Jacob Balduinus and Homobonus as instructors in Roman law and Jacob of Albenga as an instructor in Canon law. The public career of Hostiensis was patronated by Count Raymond Berenguer V of Provence and his wife, Beatrice of Savoy. Hostiensis went to England accompanying their daughter Eleanor, the wife of Henry III; he travelled to Rome several times on behalf of his Savoy patrons and as the agent of Henry III in the Henry III's opposition to the election of William Raleigh as the bishop of Winchester, being known as one of the Raleigh's chief adversaries. In 1239 Hostiensis taught in Paris. He had begun his works *Summa aurea* and *Lectura in quinque libros decretalium*. The *Summa* published in 1253 is a masterpiece integrating Roman law and Canon law in the service of canonical doctrine.⁶¹⁰ During the papacy of Urban IV Hostiensis became Cardinal-bishop of Ostia in 1262. The *Summa* was finished circa 1253, while Hostiensis was the archbishop of Embrun. The name *Summa aurea* was given after Roman edition in 1477, whereas the manuscripts mention it as *Summa copiosa* or *Summa*. The work on *Summa* was finished by 1235.⁶¹¹

⁶¹⁰ (Vodola 1985, 300)

⁶¹¹ (Pennington 1993)

6.2 Betrothal in the *Summa aurea*

6.2.1 Definition of engagement

Hostiensis appears to be a persuaded Romanist while defining betrothal through quoting the *Digesta*.⁶¹² Betrothal for one of the most famous canonists of the 13th century is a mutual promise to marry in the future.⁶¹³ The meaning of the word *sponsalia* derives from the word *spondere*,⁶¹⁴ as promise was an important part of the custom in creating ancient contracts⁶¹⁵ and guaranteeing a man that a certain woman will become his wife in the future.⁶¹⁶ The same is true for *sponsus* and *sponsa*, the man and the woman who promise to marry; moreover, not only promise, but as well consent for the upcoming marriage.⁶¹⁷ It is throughout possible that mutual exchange of promise and consent are equalised, following the approach of the *Digesta* and respectively representing the Hostiensis' point of view. Engagements can be contracted between two present parties through exchanging the pledge to take each other as a spouse, by a given verbal form or by any familiar verbal form expressing mutual consent. There is an open possibility to contract betrothal among absent persons, mediating the process of contracting with a letter; this can be done only when both parties are aware that they are contracting engagement, because their consent suffices for contracting engagement, despite their absence.⁶¹⁸

⁶¹² *Sponsalia sunt mentio et repromissio nuptiarum futurarum.* D. 23, 1, 1

⁶¹³ *Mentio et repromissio futurarum nuptiarum, ut ff Eodem [De sponsalibus]* [D. 23, 1, 1]. *Summa aurea*, 1093

⁶¹⁴ *Et quidem a spondendo, id est, promittendo, nam moris fuit veteribus stipularibus et spondere sibi uxores futuras* [D. 23, 1, 2]. *unde et sponsi et sponsae appellatio nata est* [D. 23, 1, 3], *ut ff Eodem [De sponsalibus] l.4* [D. 23, 1, 4]. *Summa aurea*, 1094

⁶¹⁵ *Sponsalia autem dicta sunt a spondendo: nam moris fuit veteribus stipulari et spondere sibi uxores futuras.* D. 23, 1, 2

⁶¹⁶ *Unde et sponsi sponsaeque appellatio nata est.* D. 23, 1, 3

⁶¹⁷ *Sufficit nudus consensus ad constituenda sponsalia.* D. 23, 1, 4

⁶¹⁸ *Contrahuntur etiam per se inter praesentes per haec verba Accipiam te in meam, et accipiam te in meum: vel alia verba familia, consensum exprimentia de futuro. ... Sed in absentia contrahuntur per litteras, per nuncium: constat enim absentem absenti desponsari posse, si absens hoc sciat: puta, quia nuncium misit, vel de*

Betrothal for Hostiensis consists of at least two essential elements: a promise for the future and a mutual consent. Henry of Segusio put emphasis exclusively on Roman law and the *Digesta* in defining betrothal. Roman influence can be as well seen through the importance of the consent, which suffices for contracting betrothal of absent parties.

6.2.2 Kinds of betrothal

There are two kinds of betrothal following *Summa*: a the simple one and an ambiguous so called *complex engagement*.⁶¹⁹ Simple betrothals are those where a groom simply promises a bride that he will marry her, and she promises the same in return. While defining a simple betrothal Hostiensis alludes to his own *opus* as well to the work he is commenting on – the *Liber Extra*. A simple verbal form he seems to mean is taken from his *Summa*⁶²⁰ as well as from two decretals *Si inter* [X 4, 1, 31]⁶²¹ and *Ad audientiam* [X 4, 1, 4].⁶²² Citation of his own

conscientia sua fit, vel postea ratum habeat, subaudi, quamvis de hoc ab initio nihil sciret: et hoc quotidie fieri videmus, nec refert, utrum scriptura interveniat, vel non ff *Eodem* [De sponsalibus]. Sufficit. [D. 23, 1, 4]. *Summa aurea*, 1097

⁶¹⁹ Duae, nam alia est nuda et simplex, alia firmata et duplex. Nuda et simplex dicitur, cum sponsus sponsae nude et simpliciter promittit, quod eam ducet in uxorem et econverso, ut *supra eodem* & *Quid sint sponsalia* [Summa aurea, 1093]; *infra eodem* [De desponsatione et matrimoniis] c. *Ad audientiam* [X 4, 1, 4] (Fr. 662) et c. *Si inter* [X 4, 1, 31] (Fr. 672). *Summa aurea*, 1095

⁶²⁰ ... *Accipiam te in meam, et accipiam te in meum*: vel alia verba familia, consensum exprimentia de futuro.

Summa aurea, 1097

⁶²¹ Sponsalia de praesenti non solvuntur per sequens matrimonium, etiam carnali copulata consummatum; sed sponsalia de futuro etiam iurata solvuntur per sequentia de praesenti. Idem [Gregorius IX.]. Si inter virum et mulierem legitimus consensus interveniat de praesenti ita, quod unus alterum mutuo consensu, verbis consuetis expresso, recipiat, utroque dicenti “ego te in meam accipio,” et “ego te accipio in meum” vel alia verba consensum exprimentia de praesenti, sive sit iuramentum interpositum sive non, non licet alteri ad alia vota transire. Quod si fecerit, secundum matrimonium de facto contractum, etiamsi sit carnalis copula subsecuta, separari debet, et primum in sua firmitate manere. Verum si inter ipsos accessit tantummodo promissio de futuro, utroque dicente alteri “ego te recipiam in meam,” et “ego te in meum” sive verba similia, si alias mulierem illam per verba de praesenti desponsaverit, etiamsi inter ipsam et primum iuramentum intervenerit, sicut diximus, de futuro: huiusmodi desponsationis intuitu secundum matrimonium non poterit separari, sed eis est de violatione fidei poenitentia iniungenda. X 4, 1, 31; (Fr. 672); Potthast no. 9662

⁶²² Ex sponsalibus, contractis cum consanguinea, oritur publicae honestatis iustitia. Ad audientiam nostri apostolatus pervenit, quod, quum H. Albericus, Papiensis civis, filiam suam cuidam filiorum L. dare vellet uxorem, iuravit, quod, si ille, cui desponsabatur, eam habere casu aliquo interveniente non posset, alteri filio, quem de alia uxore genuerat, eandem puellam matrimonio copularet. Contractis autem a filio priore sponsalibus, quidam, ad ecclesiam accedentes, consanguinitatem inter eos esse iuramentis interpositis firmaverunt. Ideoque praefatus H. eandem feminam dare alteri filio nititur, ut iuravit. Sed quoniam scriptum est, quod sponsam fratris frater habere non potest, discretionis tuae per apostolica scripta praecipiendo

Summa defines verbal form of mutual promise for the future tense,⁶²³ whereas referring to *Si inter* [X 4, 1, 31] opens up the possibility to include promise in the present as well.⁶²⁴ Both of the verbal forms additionally include other verbalised variations of promise for the future/present that express consent. Considering another decretal – *Ad audientiam* [X 4, 1, 4] – it appears that this citation is irrelevant: it neither maintains the verbal form of contracting any kind of betrothal – for future or for the present, nor does it speak about consent. The only possible reason why Hostiensis included this decretal in his *Summa* is that it does speak about betrothal (in the context of Levitian barrier). Nevertheless, if one reads thoroughly the text of *Ad audientiam* [X 4, 1, 4], it might become evident that the text does not, in fact, discuss the actual simple betrothal examined by Hostiensis (a simple betrothal, which is contracted by the mutual exchange of consents). Instead, the text of decretal deliberates over the case of Alberic, a Pavian citizen, who is willing to betroth his daughter to one of the sons of a certain L., but it is not possible on the ground of public honesty impediment as she has been already betrothed to his other son. Therefore, this decretal does not seem to be fitting into the frame of a simple engagement, as for Hostiensis a simple betrothal presupposes to be contracted by the contracting parties and not by parents.

Complex betrothals⁶²⁵ are contracted with giving a dowry *arrha*⁶²⁶ and by subarration, where subarration is clerally distinguished by Hostiensis from betrothal, since the *arrha* and

mandamus, quatenus eum suum implere propositum, *quod canonicae rationi obviat*, non permittas, sed ut poenitentiam agat de illicito iuramento, monitione praemissa, ecclesiastica districtione compellas. X 4, 1, 4 (Fr. 662); JL 13137 (8613); WH 41 (a) 1180

⁶²³ ... *Accipiam te in meam, et accipiam te in meum*... . *Summa aurea*, 1097

⁶²⁴ Si inter virum et mulierem legitimus consensus interveniat de praesenti ita, quod unus alterum mutuo consensu, verbis consuetis expresso, recipiat, utroque dicenti “ego te in meam accipio,” et “ego te accipio in meum” vel alia verba consensum exprimentia de praesenti, sive sit iuramentum interpositum sive non, non licet alteri ad alia vota transire. X 4, 1, 31; (Fr. 672); Potthast no. 9662

⁶²⁵ Firmata vero est duplex: alia fit arris intervenientibus vel pignoribus loco arrarum datis... . Alia interveniente annuli subarratione, ut 27 q.2 *Si quis uxorem* [C. 27 q.2 c.14] (Fr. 1065-1066) et *Si quis desponsavit* [C.27 q.2 c.15] (Fr. 1065-1066). Et notandum, quod aliud est desponsatio, et aliud annuli subarratione cum in dictis c.

subarration is a nuptial present, which is to be given according to a local custom; and betrothal itself is a nuptial contract. As complex betrothals include the dowry, it is reasonable to pay attention to understating of *arrha* in Hostiensis's *Summa*.

In the addition⁶²⁷ to Hostiensis's *Summa aurea*, excerpt explaining complex betrothals (with *arrha* and subarration)⁶²⁸ *arra* is being discussed taking into account the glossa to *Gemma* [X 4, 1, 29].⁶²⁹ Breaking the promise to marry according to Roman law, unlike English common law, was not actionable. In the *Codex* [C. 5, 1, 1]⁶³⁰ the bride already betrothed is not prohibited to marry another man and to withdraw from her previous betrothal promise. Simultaneously, Roman jurists, preventing breach of betrothal promise, required *sponsus* or his family to put up *arrae sponsaliciae*.⁶³¹ As David d'Avray notes, *Gemma* [X 4, 1, 29] is to

disjunctive ponantur, argumentum *De rescriptis. Inter cetera* [X 1, 3, 4] (Fr. 17) desponsatio autem consistit in pactio sponsaliorum; subarratio autem in sponsalitia datione d qua dic, ut nota infra *De donatione inter vir et uxor. Sub rubric. De donatio propter nupt.* [Summa aurea, 1250] fit etiam aliquando hac subarratio, intervenientibus donis, et munribus secundum morem terrae infra *De matrimonio contracto contra intrdictum ecclesiae c.1* [X 4, 16, 1] (Fr. 708) Summa aurea, 1095

⁶²⁶ Arrarum petitio [Additiones], Adde an in matrimonio, vel sponsalibus possint arrae intervenire, et quid operetur? Vide glossa in c. *Gemma. De sponsalibus*. [X 4, 1, 29] (Fr. 671-672) In *l. ult. De sponsalibus*. [X 4, 1, 32] (Fr. 672) *Doct. In l. Titia ff De verborum obligationibus*. [D. 45, 1, 134pr] et de materia arrarum, vide in *l. Quod saepe* et ibi glo. *ff De contrahenda emptione [et de pactis inter emptorem et venditorem compositis et quae res venire non possunt]*. [D. 18, 1, 35pr.] et per Bal. in *l. Mulier C. De sponsalibus*. [?] Summa aurea, 1095

⁶²⁷ Arrarum petitio [Additiones], Adde an in matrimonio, vel sponsalibus possint arrae intervenire, et quid operetur? Vide glossa in c. *Gemma. De sponsalibus*. [X 4, 1, 29] (Fr. 671-672) In *l. ult. De sponsalibus*. [X 4, 1, 32] (Fr. 672) *Doct. In l. Titia ff De verborum obligationibus*. [D. 45, 1, 134pr] et de materia arrarum, vide in *l. Quod saepe* et ibi glo. *ff De contrahenda emptione [et de pactis inter emptorem et venditorem compositis et quae res venire non possunt]*. [D. 18, 1, 35pr.] et per Bal. in *l. Mulier C. De sponsalibus*. [?] Summa aurea, 1095

⁶²⁸ Firmata vero est duplex: alia fit arris intervenientibus vel pignoribus loco arrarum datis... . Alia interveniente annuli subarratione, ut 27 q.2 *Si quis uxorem* [C. 27 q.2 c.14] (Fr. 1065-1066) et *Si quis desponsavit* [C.27 q.2 c.15] (Fr. 1065-1066). Et notandum, quod aliud est desponsatio, et aliud annuli subarratione cum in dictis c. disjunctive ponantur, argumentum *De rescriptis. Inter cetera* [X 1, 3, 4] (Fr. 17) desponsatio autem consistit in pactio sponsaliorum; subarratio autem in sponsalitia datione d qua dic, ut nota infra *De donatione inter vir et uxor. Sub rubric. De donatio propter nupt.* [Summa aurea, 1250] fit etiam aliquando hac subarratio, intervenientibus donis, et munribus secundum morem terrae infra *De matrimonio contracto contra intrdictum ecclesiae c.1* [X 4, 16, 1] (Fr. 708) Summa aurea, 1095

⁶²⁹ Stipulatio, stipulatio poenae in sponsalibus apposita non tenet propter rationem, quae redditur in littera, sed arrhas datas pro sponsalibus perficiendis amittit, qui resilit sine iusta causa C. *De spon[salibus et arris sponsaliciis et proxenetis]*. *l. ult.* [C. 5, 1, 5, 6], *De verb[orum] oblig[ationibus]*. *Titia* [D. 45, 1, 134pr] unde haec decret. s umpta fuit C. *De inut[ilis] stip[ulationibus]* l.2 [C. 8, 38, 2] et hic. Sed videtur, quod idem fit in arrha quod dicitur de poena, quia eadem est ratio utrobique, ergo eadem debet esse prohibitio, et idem ius supra *De confir. Cum dilecta* [?] cum aliis concor. Ibi positus, et supra *De transla. Inter corporalia*. Sed secus est secundum leges, ut dicit lex praedicta *De sponsa* in C. Gl. ad X 4, 1, 29 [1595: 1027]

⁶³⁰ Alii desponsata renunciare condicioni ac nubere alii non prohibetur. C. 5, 1, 1

⁶³¹ (Avray 2015, 29)

be seen as a classical case for discussing *arrhae*,⁶³² despite the text of the decretal has nothing specific to say about the *arrhae per se*.⁶³³ In his decretal Pope Gregory IX highlighted the principle of freedom of contracting marriage and put the prohibition to compel the unwilling partner by the threat of penalty. The Pope as well prohibited the father of the groom to extract and agreed penalty from the bride's mother Gemma on grounds that the marriage was contracted after *sponsalia* had been contracted.⁶³⁴ The case and papal response are patterned after *Titia* [D. 45, 1, 134].⁶³⁵ According to this excerpt from the *Digesta*, when either partner refuses to proceed from betrothal to marriage, a penal stipulation linked to a betrothal is to be seen as void. It is reasonably noted by David d'Avray that in the text of decretal *sponsalia* is seen as being completed, but the contracting parties have not yet reached the minimum age of seven years.⁶³⁶ While commenting on *Gemma* [X 4, 1, 29] Bernard of Parma is concentrated on *sponsalia* and on the impossibility to contract it prior to the age of seven.⁶³⁷ Together with gearing his attention on betrothal, Bernard also discusses *arrha* in relation to freedom⁶³⁸ of contract.⁶³⁹ on the one hand, the custom of

⁶³² c. *Gemma* [X 4, 1, 29] (Fr. 671) is been called *locus classicus* for discussing *arrhae* by David d'Avray. Avray, D. [2015: 32]

⁶³³ In matrimoniis et sponsalibus debet esse libertas, unde in eis promissio poenae non obligat. Gregorius IX. Gemma mulier nobis exposuit, quod, quum T[eberga] filia eius cum C. contraxit matrimonium, B. de Alferio ea occasione, quod inter P. filium suum et praedictam puellam infra septennium constitutos sponsalia contracta fuerunt, poenam solvendam a parte, quae contraveniret in stipulatione appositam, ab ipsa nititur extorquere. Quum itaque libera matrimonia esse debeant, et ideo talis stipulatio propter poenae interpositionem sit merito improbanda, mandamus, quatenus, si est ita, eundem B., ut ab extorsione praedictae poenae desistat, ecclesiastica censura compellas. X 4, 1, 29 (Fr. 671), Potthast no. 9660

⁶³⁴ (Avray 2015, 32)

⁶³⁵ Titia, quae ex alio filium habebat, in matrimonium coit gaio seio habente familiam: et tempore matrimonii consenserunt, ut filia gatii seii filio titiae desponderetur, et interpositum est instrumentum et adiecta poena, si quis eorum nuptiis impedimento fuisset: postea gavius seius constante matrimonio diem suum obiit et filia eius noluit nubere: quaero, an gatii seii heredes teneantur ex stipulatione. respondit ex stipulatione, quae proponeretur, cum non secundum bonos mores interposita sit, agenti exceptionem doli mali obstaturam, quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive iam contracta. D. 45, 1, 134pr

⁶³⁶ (Avray 2015, 32)

⁶³⁷ Infra septennium, unde non tenuerunt sponsalia, infra tit[ulo] proximo *Litteras* [X 4, 2, 4] *Accessit* [X 4, 2, 5] supra *De resti[tutione] spol[iorum]*. *Ex parte* [X 2, 13, 14] ergo nec poena si licita fuisset, alias non tenuit, quia si principale non tenuit, nec accessorium supra *De re... iud...* *Cum inter* [?] et C. *De legi[bus et constitutionibus principum et edictis]* [C. 1, 14, 5pr] cum suis concor., sed si post vii. annos forte consenserunt sponsalia, poena tamen non tenuit. Ber[nardus] Gl. ad X 4, 1, 29 [1595: 1027]

⁶³⁸ Libera debeant, ab omni coactione supra eodem *Cum locum* [X 4, 1, 14] et c. *Requisivit* [X 4, 1, 17], etiam a poena pecuniaria, ut hic patet. Gl. ad X 4, 1, 29 [1595: 1027]

giving *arrha* is present in the commentary, on the other hand, though, the Roman principle of free marital contracts is seen. Excerpts from Roman law is referred to in order to show that contract with penalty is to be seen as void. It is said to be disgraceful that penalty limits marriage either already created or upcoming one.⁶⁴⁰ It has been generalised as well that contracts with penalties are seen to be void.⁶⁴¹ David d'Avray displays this phenomenon of ambiguity or rather double understanding of Bernard in the following manner:

While the pope looked ahead to marriage, Bernardus of Parma in his gloss to *Gemma* [X 4, 1, 29] looked back to sponsalia, asking whether or not *arrhae* are compatible with the principle of freedom of marriage. Torn between a theological principle and an institution sanctioned by Roman law, and compelled to take into account the custom of giving *arrhae*, his gloss is a conceptual jumble and amounts to little more than a convenient repository of opinions that could be helpful to canonists.⁶⁴²

Hostiensis, following the addition to his *Summa* considering *arrha*,⁶⁴³ appears to accept Bernard of Parma point of view, where the contract *stipulatio* is not penalised on the ground of its nature, but rather on the ground of dowry *arrhas* given in order to perfect the

⁶³⁹ Stipulatio, stipulatio poenae in sponsalibus apposita non tenet propter rationem, quae redditur in littera, sed arrhas datas pro sponsalibus perficiendis amittit, qui resilit sine iusta causa C. *De spon[salibus et arris sponsaliciis et proxeneticiis]*. l. ult. [C. 5, 1, 5, 6], *De verb[orum] oblig[ationibus]*. Titia [D. 45, 1, 134pr] unde haec decret. s. umpta fuit C. *De inut[ilis] stip[ulationibus]* l.2 [C. 8, 38, 2] et hic. Sed videtur, quod idem fit in arrha quod dicitur de poena, quia eadem est ratio utrobique, ergo eadem debet esse prohibitio, et idem ius supra *De confir. Cum dilecta* [?] cum aliis concor. Ibi positus, et supra *De transla. Inter corporalia*. Sed secus est secundum leges, ut dicit lex praedicta *De sponsa* in C. Gl. ad X 4, 1, 29 [1595: 1027]

⁶⁴⁰ Titia, quae ex alio filium habebat, in matrimonium coit gaio seio habente familiam: et tempore matrimonii consenserunt, ut filia gatii seii filio titiae desponderetur, et interpositum est instrumentum et adiecta poena, si quis eorum nuptiis impedimento fuisset: postea gaius seius constante matrimonio diem suum obiit et filia eius noluit nubere: quaero, an gatii seii heredes teneantur ex stipulatione. respondit ex stipulatione, quae proponeretur, cum non secundum bonos mores interposita sit, agenti exceptionem doli mali obstaturam, quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive iam contracta. D. 45, 1, 134pr

⁶⁴¹ Libera matrimonia esse antiquitus placuit. ideoque pacta, ne liceret divertere, non valere et stipulationes, quibus poenae inrogarentur ei qui divortium fecisset, ratas non haberi constat. C. 8, 38, 2

⁶⁴² (Avray 2015, 32)

⁶⁴³ Arrarum petitio [Additiones], Adde an in matrimonio, vel sponsalibus possint arrae intervenire, et quid operetur? Vide glossa in c. *Gemma. De sponsalibus*. [X 4, 1, 29] (Fr. 671-672) In *l. ult. De sponsalibus*. [X 4, 1, 32] (Fr. 672) *Doct. In l. Titia ff De verborum obligationibus*. [D. 45, 1, 134pr] et de materia arrarum, vide in *l. Quod saepe et ibi glo. ff De contrahenda emptione [et de pactis inter emptorem et venditorem compositis et quae res venire non possunt]*. [D. 18, 1, 35pr.] et per Bal. in *l. Mulier C. De sponsalibus*. [?] *Summa aurea*, 1095

contract.⁶⁴⁴ In other words, *arrha* is seen as an incentive for proceeding from betrothal to marriage – this idea is as well articulated by David d’Avray, where *arrha* is perceived (in Bernard’s of Parma, as well as in Hostiensis’s opinioin) as favorable custom for proceeding to marriage.⁶⁴⁵ For Hostiensis, following the opinion of David d’Avray, where *arrhae* are to be treated differently from penalty:

arrhae were tacitly permitted, a penalty explicitly forbidden. The reason to treat *arrhae* and a penalty differently was that *arrhae* are actually conveyed and upon conveyance one may make an agreement that the receiving party may retain them if marriage is not celebrated. But in a penal stipulation nothing is conveyed, and since there is no conveyance no agreement may be made as to penalty’s disposition. ... The *arrhae* serve as an amicable incentive to contract marriage; the penalty induces fear, which abolishes free consent *liber consensus*.⁶⁴⁶

Together with an understanding of *arrha* as a nuptial present, which has a financial value, and is to be given according to a local custom, Hostiensis draws a very clear line between subarration and betrothal. The first is, according to the *Summa*, a spousal present, whereas the second has a nature of contract.⁶⁴⁷

⁶⁴⁴ Stipulatio, stipulatio poenae in sponsalibus apposita non tenet propter rationem, quae redditur in littera, sed arrhas datas pro sponsalibus perficiendis amittit, qui resilit sine iusta causa C. *De spon[salibus et arris sponsaliciis et proxeneticis]*. l. ult. [C. 5, 1, 5, 6], *De verb[orum] oblig[ationibus]*. Titia [D. 45, 1, 134pr] unde haec decret. s umpta fuit C. *De inutilis stip[ulationibus]* l.2 [C. 8, 38, 2] et hic. Sed videtur, quod idem fit in arrha quod dicitur de poena, quia eadem est ratio utrobique, ergo eadem debet esse prohibitio, et idem ius supra *De confir. Cum dilecta* [?] cum aliis concor. Ibi positus, et supra *De transla. Inter corporalia*. Sed secus est secundum leges, ut dicit lex praedicta *De sponsa* in C. Gl. ad X 4, 1, 29 [1595: 1027]

⁶⁴⁵ “Yet Hostiensis thought that not only giving, but also asking for restitution of *arrhae* was favorable (*favorabilis*) to marriage. His ingenuous explanation works only if marriage follows the *sponsalia*, for then the law presumes that the parties are included to contract marriage by the hope of gain and fear of loss. ” (Avray 2015, 32)

⁶⁴⁶ (Avray 2015, 34)

⁶⁴⁷ Firmata vero est duplex: alia fit arris intervenientibus vel pignoribus loco arrarum datis... . Alia interveniente annuli subarratione, ut 27 q.2 *Si quis uxorem* [C. 27 q.2 c.14] (Fr. 1065-1066) et *Si quis desponsavit* [C.27 q.2 c.15] (Fr. 1065-1066). Et notandum, quod aliud est desponsatio, et aliud annuli subarratione cum in dictis c. disjunctive ponantur, argumentum *De rescriptis. Inter cetera* [X 1, 3, 4] (Fr. 17) desponsatio autem consistit in pactio sponsaliorum; subarratio autem in sponsalitia datione de qua dic, ut nota infra *De donatione inter vir et*

Now that the understanding of *arrha* by Hostiensis has been already discussed as a constitutive element for complex betrothals, it is time to display Hostiensis's view of complex betrothals as such. Hostiensis understands complex betrothals through subarration, and, in order to give reasons for this, he quotes the *Decretum*,⁶⁴⁸ where betrothal and subarration may be seen almost as synonyms. Nonetheless, Hostiensis does not leave any loophole for those who might be willing to think in the way that betrothals are to be perceived the same as subarration: he clearly distinguishes subarration from betrothal.⁶⁴⁹ Hostiensis refers to his own *Summa* explaining his understanding of subarration, which is to be given to the bride by the groom or on his behalf; subarration as well can be done before or after marital contract,⁶⁵⁰ but it is to be done following the customs and traditions of the region.⁶⁵¹ Subarration is discussed by Hostiensis in his

uxor. Sub rubric. De donatio propter nupt[iis et sposnalityis]. [Summa aurea, 1250] fit etiam aliquando hac subarratio, intervenientibus donis, et muneribus secundum morem terrae infra *De matrimonio contracto contra intrdictum ecclesiae c.1* [X 4, 16, 1] (Fr. 708) Summa aurea, 1095

⁶⁴⁸ Item Gregorius. Si quis uxorem desponsauerit, uel eam subarrauerit, quamquam postmodum preueniente die mortis eius nequiverit eam ducere in uxorem, tamen nulli de consanguinitate eius licet accipere eam in coniugio, et si inuentum fuerit factum, separetur omnino. C. 27 q.2 c.14 (Fr. 1065-1066)

Item Iulius Papa. Si quis desponsauerit uxorem uel subarrauerit, et siue preueniente die mortis, siue irruentibus quibusdam aliis causis minime eam cognouerit, neque superstes eius frater, neque ullus de consanguinitate eius eandem sibi tollat in uxorem ullo umquam tempore. II. Pars. Gratian. His omnibus auctoritatibus probantur isti coniuges esse. Sed Augustinus contra testatur, dicens: C. 27 q.2 c.15] (Fr. 1065-1066)

⁶⁴⁹ ... desponsatio autem consistit in pactio sponsaliorum; subarratio autem in sponsalitia datione... . Summa aurea, 1095

⁶⁵⁰ Quae fit donatio, propter nuptias. Illa quam sponsus sponsae facit, vel alius eius nomine, et alii nomine sponsae fieri potest, ut ff *De iure dot[um]*. *Profecticia*. [D. 23, 3, 5pr] *Responsio*. I. § *Quod si quis patri*. Et § *Sed et Si curator* [D. 23, 3, 5, 3] § *Sed et Si proponas* [D. 23, 3, 5, 4] § *Sed et Si pater* [D. 23, 3, 5-7] sicut ergo marito datur dos, nec aliqua dos est sine matrimonio, ut dicam infra *De dotibus promittendis* sic uxori datur donatio propter nuptias: nec sine matrimonio esse potest, unde haec donatio antipherna vocatur, ab anti quod est contra, et pherna, quod est donatio, sive dos, ut C. *Eodem*. [De donationibus ante nuptias vel propter nuptias et sponsaliciis.] l. ult. [C. 5, 3, 20, 9] et infra *Eodem* [De naturalibus liberis et matribus eorum et ex quibus casibus iusti efficiuntur.]. *Nuper*. [C. 5, 27, 11] *In fi.*. Summa aurea, 1250

Qualiter fiat donatio propter nuptias. Et quidem fieri potest ante nuptias, vel post, marito dicente, *Tale quid dono tibi propter nuptias vel in dotalium* et sufficit, quod in possessionem mulier inducatur, non tamen perciperet fructus: immo maritus ad sustentationem sui, et uxoris. Alias cum aequilitas hincinde requiratur, nullam utilitatem consequeretur maritus ex dote recepta, cum tantundem perciperet mulier de suo, et sic dos non sustineret onera matrimonii quod esse debet, ut ff *De iure dot[um]*. *Sed is*. § *Ibi* [D. 23, 3, 67] infra *De usuris*. *Salubriter* [X 5, 19, 16]⁶⁵⁰ (Fr. 815) quinimo dico sufficere, quod nudo, solenni tamen verbo fiat donatio, quia stipulatio sola requiritur Summa aurea, 1251

⁶⁵¹ ... fit etiam aliquando hac subarratio, intervenientibus donis, et muneribus secundum morem terrae infra *De matrimonio contracto contra intrdictum ecclesiae c.1* [X 4, 16, 1] (Fr. 708) Summa aurea, 1095

*Summa*⁶⁵² with an extensive use of Roman law. *Profecticia dos* is a kind of dowry that is given on behalf of the groom or from his name by e.g. his father;⁶⁵³ if the groom happens to be insane, the dowry given by his *curator* is still taken as a betrothal gift and is the same as *profecticia dos*;⁶⁵⁴ the promise to give a dowry is already seen as an obligation to give a dowry.⁶⁵⁵

Matrimonium, contra interdictum ecclesiae vel iudicis factum seu contractum, propter hoc solum non dirimitur, imponitur tamen poenitentia sic contrahentibus, et separantur, donec cognoscatur de causa interdicti. H.d. in effectu totu iste titulus. Alexander III. Paduano Episcopo. Literae, quas tua nobis fraternitas destinavit, expresse declarant, quod, quum, quidam *parochianus tuus*, sororem suam iam nubilem cuidam se daturum in uxorem ea praesente et consentiente, praestito juramento firmasset, et illa, non post multos dies dona et munera viri secundum morem terrae sponte suscipiens, ipsum tanquam proprium virum saepe amplexata fuisset, tandem mortuo fratre a proprio viri sui fratre se desponsari permisit, et, quod ab illo cognita fuisset, mendaciter asseverat. Quumque ei prohibuisse publice, ne cui illorum vel, alicui se copularet: ipsa spretis monitis tuis, alii nubere non expavit. Demum quum *utrumque ante te convocasses*, et mulieri praecipisses, ut ad domum matris rediret, ipsa ad nostram audientiam appellavit. *Verum quoniam sollicitudini nostrae incumbit excessus et enormitates aliorum corrigere, et ad modum et ad formam rectitudinis revocare, fraternitati tuae per apostolica scripta*, mandamus, quatenus, si est ita, *ut superius est enarratum* praefatam mulierem, ne mandatum tuum contemptibile esse videatur, ad domum matris *omni appellatione et excusatione cessante* redire compellas, et imposita sibi de tanto excessu poenitentia condigna, postquam ea in domo materna per mensem steterit, ad tertium reverti permittas, *et legitime sibi coniungi*. X 4, 16, 1 (Fr. 708)

⁶⁵² Quae fit donatio, propter nuptias. Illa quam sponsus sponsae facit, vel alius eius nomine, et alii nomine sponsae fieri potest, ut *ff De jure dot[ium]*. *Profecticia*. [D. 23, 3, 5pr] *Responsio*. I. *\$ Quod si quis patri*. Et *\$ Sed et Si curator* [D. 23, 3, 5, 3] *\$ Sed et Si proponas* [D. 23, 3, 5, 4] *\$ Sed et Si pater* [D. 23, 3, 5-7] sicut ergo marito datur dos, nec aliqua dos est sine matrimonio, ut dicam infra *De dotibus promittendis* sic uxori datur donatio propter nuptias: nec sine matrimonio esse potest, unde haec donatio antipherna vocatur, ab anti quod est contra, et pherna, quod est donatio, sive dos, ut *C. Eodem*. [De donationibus ante nuptias vel propter nuptias et sponsaliciis.] l. ult. [C. 5, 3, 20, 9] et infra *Eodem* [De naturalibus liberis et matribus eorum et ex quibus casibus iusti efficiuntur.]. *Nuper*. [C. 5, 27, 11] *In fi.*. Summa aurea, 1250

Qualiter fiat donatio propter nuptias. Et quidem fieri potest ante nuptias, vel post, marito dicente, *Tale quid dono tibi propter nuptias vel in dotium* et sufficit, quod in possessionem mulier inducatur, non tamen perciperet fructus: immo maritus ad sustentationem sui, et uxoris. Alias cum aequilitas hincinde requiratur, nullam utilitatem consequeretur maritus ex dote recepta, cum tantundem perciperet mulier de suo, et sic dos non sustineret onera matrimonii quod esse debet, ut *ff De jure do[tium]*. *Sed is*. *\$ Ibi* [D. 23, 3, 67] infra *De usuris*. *Salubriter* [X 5, 19, 16]⁶⁵² (Fr. 815) quinimo dico sufficere, quod nudo, solenni tamen verbo fiat donatio, quia stipulatio sola requiritur ... Summa aurea, 1251

⁶⁵³ *Profecticia dos* est, quae a patre vel parente profecta est de bonis vel facto eius. D. 23, 3, 5pr

⁶⁵⁴ *Sed et si curator furiosi vel prodigi vel cuiusvis alterius dotem dederit, similiter dicemus dotem profecticiam esse*. D. 23, 3, 5, 3

⁶⁵⁵ *Sed si pater dotem promisit et fideiussorem vel reum pro se dedit, ego puto profecticiam esse dotem: sufficit enim, quod pater sit obligatus sive reo sive fideiussori*. D. 23, 3, 5, 7

6.2.3 Who can contract betrothal

Hostiensis equalizes marriage with betrothal in the sense that those who are able to contract marriage can as well contract betrothal.⁶⁵⁶ In order to understand who can contract betrothal it is necessarily important to see who can contract marriage.⁶⁵⁷ Hostiensis implies *edictum prohibitorium* describing groups that are allowed to contract marriage, which simply means that anyone who is not prohibited to do so, may contract marriages. This principle does not belong to Hostiensis, but is taken from the *Liber Extra*.⁶⁵⁸ In the frame of *edictum prohibitorium* all the persons who are able to consent (excluding mentally insane, as they are not able to consent as such) can contract matrimonial bond (including deaf and

⁶⁵⁶ Is qui matrimonium. Ut nota, infra *Eodem sub rubric. De matrimoniis. & Quis possit contrahere* [Summa aurea, 1108] ubicunque etiam prohibetur et sponsalia ff *Eodem* [De sponsalibus] Oratio [D. 23, 1, 16] sed et aetas minor attenditur quam in matrimonio, quia in septimo anno sponsalia contrahi possunt et forte citra, si malitia suppleat aetatem, et mulier tentata fuerit, ut patet infra *Eodem. c. Iuvenis* [X 4, 1, 3] (Fr. 661)... alias autem ante septimum annum contrahentes nihil agunt, nisi postea ratificent 30 q.2 ubi non est C.30 q.2 c.1 (1099-1100) unde nec possunt sponsalia ante septimum annum accusari, licet denunciatio admittatur X 4, 2, 13 (Fr. 678), sed contra quia in sponsalibus non est determinata aetas, ut in matrimoniis ff *Eodem. In sponsalibus.2. in princip.* [D. 23, 1, 7, 1]. Respondeo: Verum est quod non tentata, cum in sponsalibus sufficiant septem anni ut in fin. ejusdem vel non in matrimoniis: quia in sponsalibus una et eadem aetas est, tam in masculo quam in faemina, scilicet septennium, sed in matrimoniis est diversa: quia duodecim anni spectantur in muliere, quatuordecim in viro... Summa aurea, 1097

⁶⁵⁷ Quis possit contrahere matrimonium. Et quidem quaelibet persona habilis ad consentiendum, et exactum debitum persolvendum, hoc enim edictum prohibitorium est, id est, omnis qui non prohibetur, admittitur, et contrahere potest, ut infra *Eodem. Cum apud*. [X 4, 1, 23] (Fr. 669) ... puer ergo, vel qui genitalibus caret, non potest contrahere. Sed mutus et surdus potest, infra *Eodem. cap. Cum apud* [X 4, 1, 23] (Fr. 669) *cap. Tuae* [X 4, 1, 25] (Fr. 670) infra *De frigidi[s][et] malefici[at]is*. Quod sedem [X 4, 15, 2] (Fr. 705) dicitur autem hic puer impubes, quod dic, ut nota infra *De desponsatione impuberum. § Que sponsalia*. [Summa aurea, (1125)?...] Item furiosus non potest contrahere, quia non potest consentire infra *Eodem. Dilectus*. [X 4, 1, 24] (Fr. 670); 33[32!] q.7 *Neque furiosus* [C. 32 q. 7 c. 26] (Fr. 1147-1148) hoc autem intelligas de continuo furioso, qui loco absentis et dormientis ubique habetur ff *De arbitr. Diem. Proferre coram* [D. ?]. *De acquirend[a] [vel amittenda] possessione* [De acquirenda vel amittenda possessione. Leg.I. § Furiosus [D. 41, 2, 1, 3] ...]. Sed nunquid meretrix potest contrahere matrimonium? Sic, si se velit corrigere 32 q.1 *Non est culpandum* [C.32 q.1 c. 14] (Fr. 1119-1120) infra *Eodem. Inter opera*. [X 4, 1, 20] (Fr. 668), secus si non fit corrigibilis 32 *questione 1* [C.32 q.1] (Fr. 1115). Et breviter, quilibet potest contrahere matrimonium nisi prohibeatur, ut nota supra *Eodem. § In prin.* [Summa aurea, ?]. Qui autem sint, hi qui prohibentur vide infra *Eodem. § Qualiter impediatur*. [Summa aurea, 1122]. Summa aurea, 1109

⁶⁵⁸ Mutus et surdus, et omnes, qui non prohibentur, matrimonium contrahere possunt. Idem [Innocentius III.] Arelatensi Episcopo. Quum apud sedem apostolicam, cui licet immerit, praesidemus totius ecclesiasticae disciplinae resideat magistratus, dignum et consonum est rationi, ut, quoties circa negotia varia et diversa quicquam dubitationis emergerit, ad ipsius iudicium recurratur, quae disponente Domino inter omnes ecclesias obtinere meruit principatum. Sane, consuluisti nos per nuncios et litteras tuas, utrum mutus et surdus alicui possint matrimonialiter copulari. Ad quod fraternitati tuae taliter respondemus, quod quum prohibitorium sit edictum de matrimonio contrahendo, ut, quicunque, non prohibetur, per consequentiam admittatur, et sufficiat ad matrimonium solus consensus illorum, de quorum quarumque coniunctionibus agitur, videtur, quod, si talis velit contrahere, sibi non possit vel debeat denegari, quum quod verbis non potest signis valeat declarare. X 4, 1, 23 (Fr. 669); Potthast no. 329

mute), except those who are prohibited to do so those who are at undermarriageable age or those physically incapable to perfect the marriage through carnal union. The list of those who are part of *edictum prohibitionum* is limited by those who are prohibited to contract – there are 13 impediments, according to *Summa*.⁶⁵⁹ Therefore, everyone can contract

⁶⁵⁹ Qualiter impediatur. Hic sciendum est, quod 13. sunt impedimenta, quae impediunt matrimonium contrahendum semper, et dirimunt cum distinctione, nam si praecedant consensum conjugalem, tunc dirimunt: sed si sequantur ipsum consensum, non dirimunt, verbi gratia. Furiosus matrimonium contrahere non potest, et si contraxerit, nullum est matrimonium. Si tamen aliquis sanae mentis contraxerit, et post contractum in furorem inciderit non dirimitur matrimonium jam contractum 32 q.7 *Neque furiosus* [C. 32 q.7 c. 26] (Fr. 1147-1148). Item qui omnino sectus est, contrahere non potest, sed si secetur post matrimonium non dissolvitur 32 q. 7 *Illi qui sani* [?]. Item affinitas praecedens matrimonium impedit, et dirimit: secus si sequatur contractum etiam ante carnis copulam infra *De eo qui cognovit consanguineam uxoris suae vel sponsae. c. Discretionem et c. Tuae* [X 4, 13, 6] (Fr. 698) ; c. *Tuae* [X 4, 13, 10] (Fr. 700) et hoc idem de alliis est intelligendum. Quae autem sint haec impedimenta his versibus comprehendae:

*Error, Conditio, Votum, Cognatio, Crimen,
Cultus disparitas, Vis, Ordo, Ligamen
Honestas, Dissensus, Et affinis, Si forte coire nequibus
Hac socianda vetantconnubia (intelligas indistincte)
facta retractant; subaudias, si praecedant.*

Primo ergo occurrit error personae... . Secundo, conditio, id est conditionis error, quae impedit et dirimit, ut si credo contrahere cum libera, et contraho cum ancilla... . Tertio, votum duplex, scilicet solenne, quod impedit et dirimit... . Quarto, cognatio triplex, et utraque impedit et dirimit, scilicet carnalis, quae hodie usque ad quartum gradum tantum extenditur; item spiritualis, quam triplex est – una dicitur paternitas, alia fraternitas, alia compaternitas...; item legalis, quae similiter multiplex est. Quinto crimen triplex, quod impedit et dirimit, si quis aliquam per adulterium polluerit: et fidem dederit, quod post mortem primae eam in uxorem ducat; secundum si de facto contraxit, et polluit, probantur haec duo infra *De eo qui ducit in matrimonium quam polluit in adulterium. Cap. ulti.* [X 4, 7, 8] (Fr. 690); tertio, si machinatus est in mortem prioris uxoris ad hoc ut secundam haberet... . Sunt et alia quedam crimina, quae impediunt, sed non dirimunt, unde versus:

*Incestus, raptus, Sponsata, Mors mulieris
Susceptus propriae sobolis, Mors presbyteralis* [Summa aurea, 1120]

Sexto, cultus disparitas, ut si unus sit Judeus, alter Paganus, vel Christianus 28 q.1 *Per totum.* [C.28 q.1 ?]. Septimo, vis, quia in matrimonio requiritur liber consensus supra *Eodem. Qualiter contrahatur. Versicul. Quid si praemittat* [Summa aurea, 1114]. Sed hoc intelligas de vi sive de metu, qui cadit in constantem...; et notatur, quod si mulier veniat benedicenda ante valvas ecclesiae, si postea negat se consensisse, marito legitime probante contrarium, non auditur mulier sine teste, nec testis recipitur, si carnaliter cognita fuerit infra *Qui matrimonium accusare possunt [vel contra illud testari]. Insuper.* [X 4, 18, 4] (Fr. 719)... . Sed nunquid coactio parentum impedit matrimonium et dirimit? Ad hoc dixerunt quidam, quod si patre cogente consensit filius, matrimonium erit ff *De ritu nuptiarum. Si patre.* [D. 23, 2, 22], quia non est cogendus ff *De ritu nuptiarum. Non est.* [D. 23, 2, 43, 5] imputer ergo sibi, si consensit, cum contradicere posset, secus in filia, quae contradicere non potest, nisi pater dederit ei turpem sponsum, vel moribus suis indignum, ut ff *De sponsalibus. Sed quae patris.* [D. 23, 1, 12 pr] et ideo minae parentum ipsam excusare videntur infra *Tit. I Ex litteris* [X 4, 2, 11] (Fr. 676-677) et *De illis 2* [X 4, 2, 9] (Fr. 676) [Summa aurea, 1121]. Octavo, ordo, scilicet, sacer[dotalis], nam in minoribus ordinibus non impeditur, ut infra *Qui clerici vel voventes [matrimonium contrahere possunt].* Nono, ligamen, id est vinculum prioris matrimoniis, quia ligatus uni, alteri conjungi non potest. Decimo, honestas, id est publicae honestatis iustitia, quae duplex consuevit esse, una proveniens es dispensacione quae tenuit, quod dic, ut nota supra *Eodem. § Sub rubricella. De sponsalibus. Quis sit effectus. Versic. Etiam is est* [Summa aurea, 1099] et *Sequent.* [Summa aurea, 1101]. Undecimo, sensus, scilicet deficiens, ut in furioso, sicut dixi supra *Eodem. § In prin.* [Summa aurea, ?] et habes infra *Eodem. Dilectus* [X 4, 1, 24] (Fr. 670). Duodecimo, affinis, affinitas enim primi generis, sicut et consanguinitas impedit et dirimit, usque ad quartum gradum, sed secundum genus, et tertium sunt remota infra *De consanguinitate [et affinitate]. Non debet* [X 4, 14, 8] (Fr. 703). Tertiodecimo, si forte coire nequibus quod dic, ut nota infra *Tit. De frigidi[s]/[et] malefici[at]is.* [X 4, 15]. Sunt

marriage, except 13 cases when the marriage is impeded; those cases are – *error personae* (when it is thought that the man marries Gemma, but in reality the woman's name is Berta); *error conditionis* (when it is perceived that the man marries a free woman, but in reality she is of an unfree condition); *cognatio carnalis/spiritualis/legalis* (two persons between whom there is a consanguinity up to the fourth grade or the connection of godparent and godchild, etc.); *votum*; *crimen* – when a man marries another woman while his wife is alive; *cultus disparitas* – when partners are from different religions; lack of a free will consent; belonging of one of the partners to a religious order; previous marital union; *publicae honestatis justitia*; insanity; *affinitas*; incapability to consummate the marriage. From the entire list of *impedimenta* two appear to be important in sense of their relevance to betrothal: free will consent and public honesty impediment. The impediment of *publicae honestatis justitia* is relevant to the current discussion, as in commenting on this impediment Hostiensis gives consideration to betrothal.⁶⁶⁰ The betrothal can be contracted by anyone who can contract marriage,⁶⁶¹ except those 13 impediments listed above; moreover, engagement can be

etiam duo impedimenta, quae impediunt matrimonium contrahendum, sed non dirimunt jam contractum, unde versus:

*Ecclesiae vetitum, nec non tempore feriatum
Impediunt fieri, permittunt facta teneri.*

[Summa aurea, 1122]

⁶⁶⁰ Effectus etiam is est, ut generet quandam publicae honestatis justitiam, qua impediente nullus de consanguinitate sponsi sibi sponsam poterit copulare infra *Eodem. Sponsa* [X 4, 1, 8] (Fr. 663) 27, 2 *Si quis* [C.27 q.2 c.11] 1. et 2. [C. 27 q.2 c.1-2] quod si scienter tales inter se contraxerint, filii suscepti ex hoc matrimonio illegitimi censebuntur infra *Qui filii sint legitimi. Referente.* [X 4, 17, 10] (Fr. 713) et hoc verum est, etiamsi circa septimum annum sponsalia contracta fuerint, malitia supplente aetatem et puella tentate infra *Eodem. Iuvenis* [X 4, 1, 3] (Fr. 661) alioquin contractus sponsaliorum circa septimum annum habitus nullus esset, nec pareret aliquam publicae honestatis justitiam, nisi in septimo ratificetur infra *De desponsatione impuberum* c.2 [X 4, 2, 2] et c.3 [X 4, 2, 3] et *Duo* [X 4, 2, 12] (Fr. 677) super quo vide infra *Eodem. Quis possit contrahere.* [Summa aurea, 1099]. Summa aurea, 1099

Sed quamvis prima sponsalia inter majores septem annorum contracta nulla sint, consanguinitate impediente nihilominus oritur hic justitia, ut infra *Eodem. Ad audientiam* [X 4, 1, 4] (Fr. 662). Summa aurea, 1101

⁶⁶¹ Quis possit contrahere matrimonium. Et quidem quaelibet persona habilis ad consentiendum, et exactum debitum persolvendum, hoc enim edictum prohibitorium est, id est, omnis qui non prohibetur, admittitur, et contrahere potest, ut infra *Eodem. Cum apud.* [X 4, 1, 23] (Fr. 669) simile nota *De procurat.* 1. 38 § *Quisquis* [Summa aurea, ?] puer ergo, vel qui genitalibus caret, non potest contrahere. Sed mutus et surdus potest, infra *Eodem. cap. Cum apud* [X 4, 1, 23] (Fr. 669) *cap. Tuae* [X 4, 1, 25] (Fr. 670) infra *De frigidi[s]/[et] malefi[ciatis]*. *Quod sedem* [X 4, 15, 2] (Fr. 705) dicitur autem hic puer impubes, quod dic, ut nota infra *De desponsatione impuberum.* § *Que sponsalia.* [Summa aurea, (1125)?...] Item furiosus non potest contrahere, quia non potest consentire infra *Eodem. Dilectus.* [X 4, 1, 24] (Fr. 670); 33[32!] q.7 *Neque furiosus* [C. 32 q. 7 c. 26] (Fr. 1147-1148)

contracted by the minors, because betrothal can be contracted starting from the age of seven. Marital unions contracted prior to the age of seven are void, if they are not confirmed after arriving to the age of seven, as before seven an engagement cannot be as well dissolved. For contracting engagement the age is to be the same for both partners – 7 years, which is not true for the marriage – 12 for a woman and 14 for a man.⁶⁶² Therefore, the only difference that may distinguish marriage from betrothal is the age, marriage is only possible to contract after the age of 14/12 for man/woman respectively, whereas the betrothal can be contracted from the age of seven onwards.

6.2.4 The ways of contracting betrothal

Simple betrothals can be contracted by mere exchange of mutual consent for the future or by any words that express consent. It is possible to contract with an absent partner through a messenger or through a letter. There is a peculiarity in contracting with an absent person: only a man can send his messenger with a letter to a woman in order to contract betrothal over a distance distance. The messenger transmits the will of his lord to betroth the woman and she accepts or denies it in her response. The messenger is sent with one aim - to

hoc autem intelligas de continuo furioso, qui loco absentis et dormientis ubique habetur ff *De arbitr. Diem. Proferre coram* [D. ?]. *De acquirend[a] [vel amittenda] possessione [De acquirenda vel amittenda possessione. Leg.I. § Furiosus* [D. 41, 2, 1, 3] Sed nunquid meretrix potest contrahere matrimonium? Sic, si se velit corrigere 32 q.1 *Non est culpandum* [C.32 q.1 c. 14] (Fr. 1119-1120) infra *Eodem. Inter opera*. [X 4, 1, 20] (Fr. 668), secus si non fit corrigibilis 32 *questione 1* [C.32 q.1] (Fr. 1115). Et breviter, quilibet potest contrahere matrimonium nisi prohibeatur, ut nota supra *Eodem. § In prin.* [Summa aurea, ?]. Qui autem sint, hi qui prohibentur vide infra *Eodem. § Qualiter impediatur*. [Summa aurea, 1122]. Summa aurea, 1109

⁶⁶² Is qui matrimonium. Ut nota, infra *Eodem sub rubric. De matrimoniis. & Quis possit contrahere* [Summa aurea, 1108] ubicunque etiam prohibetur et sponsalia ff *Eodem [De sponsalibus] Oratio* [D. 23, 1, 16] sed et aetas minor attenditur quam in matrimonio, quia in septimo anno sponsalia contrahi possunt et forte citra, si malitia suppleat aetatem, et mulier tentata fuerit, ut patet infra *Eodem. c. Iuvenis* [X 4, 1, 3] (Fr. 661)... alias autem ante septimum annum contrahentes nihil agunt, nisi postea ratificent 30 q.2 *ubi non est* C.30 q.2 c.1 (1099-1100) unde nec possunt sponsalia ante septimum annum accusari, licet denunciatio admittatur X 4, 2, 13 (Fr. 678), sed contra quia in sponsalibus non est determinata aetas, ut in matrimoniis ff *Eodem. In sponsalibus.2. in princip.* [D. 23, 1, 7, 1]. Respondeo: Verum est quod non tentata, cum in sponsalibus sufficiant septem anni ut in fin. ejusdem vel non in matrimoniis: quia in sponsalibus una et eadem aetas est, tam in masculo quam in faemina, scilicet septennium, sed in matrimoniis est diversa: quia duodecim anni spectantur in muliere, quatuordecim in viro... Summa aurea, 1097

contract betrothal; secondly, the messenger pledges in the name of his lord, not in his own name. If the sender of the messenger repents, despite the woman's consent to the messenger, the betrothal has not happened as one consent is missing.⁶⁶³ Engagement for the future can be contracted through the messenger with a certain verbal formula, as well as betrothal for the future. As to the contract in the present tense, it seems that for Hostiensis engagement for the present does not seem to exist as he calls it *matrimonium de praesenti*.⁶⁶⁴ Parents can contract engagements for their minor children,⁶⁶⁵ but with their consent; moreover, the lack of expressed dissent to the betrothal is to be understood as consent, according to Roman law.⁶⁶⁶ According to the church law, the consent of the persons who are actually contracting marital union is as well required in betrothal as well as

⁶⁶³ Contrahuntur etiam per se inter prasentes inter haec verba *Accipiam te in meam, Accipiam te in meum* vel alia verba similia consensum exprimentia de futuro ut infra eodem *Is qui fidem* [X 4, 1, 30] et c. *Si inter* [X 4, 1, 31] et infra *De sponsa duorum* c.1 [X 4, 4, 1]. Sed in absentia contrahuntur per litteras vel nuntium: constat enim absentem absenti desponsari posse, si absens hoc sciat puta quia nuncium misit, vel de conscientia sua fit, v[er]o postea ratum habeat, subaudi, quamvis de hoc ab initio nihil sciret, et hoc quotidie fieri videmus, nec refert utrum scriptura intervniat vel non ff *Eodem. Sufficit.* [D. 23, 1, 4pr] l. *Sequit.* [D. 23, 1, 4, 1] et *In sponsalibus* 3 [23, 1, 14], ut infra *De cler[ici] vel voventes matrimonium contrahere possunt. Veniens* [X 4, 6, 5] (Fr. 686) *De conversione coniugatorum. Ex parte.* [X 3, 32, 16] (Fr. 585); 30 q.5 *Ne illud (?)*; 32 q.2 *Honorantur (?)*; Infra *De matrimonio contracto contra interdictum ecclesie* C.1 et 2 [X 4, 16, 1-2]. Hoc tamen notandum circa hanc materiam, quod licet maritus per nuncium suum possit uxorem ducere, mulier tamen per proprium nuncium non potest nubere, sed et ubi maritus per litteras, vel nuncium contrahit, non videtur uxor esse, nisi deducatur in domum viri, sicut dicit lex ff *De ritu nuptiarum. Mulierem.* [D. 23, 2, 5] et c. *Sequit.* [D. 23, 2, 6]. Summa aurea, 1097

⁶⁶⁴ Ubi vero per nuncium contrahuntur sponsalia, haec verba satis videantur congrua *Promitto tibi de mandato talis domini mei et nomine eiusdem quod ipse ducet te in uxorem* et hoc in animam suam versa vice puella nuncio respondebit *Promitto tibi nomine domini tui recipienti et sibi per te quod ego ducam ipsum in virum nisi per ipsum steterit et hoc juro.* Et si fit matrimonium de praesenti poterit sic dicere nuncius puellae *Talis dominus meus salutatur te et mandat tibi quod ipse per me, sive me mediante, et tibi nunciante accipit te in suam et consensit tanquam in uxorem.* Econtra puella poterit respondere *Et ego te mediante, recipio dominum tuum in meum, cum ipse me in suam (te renunciante) recipiat.* Summa aurea, 1098

⁶⁶⁵ Contrahuntur etiam ita demum inter filiosfamilias si parentes, in quorum sunt potestate, consentiant: qui videntur consentire, si scientes non contradicant ff *Eodem. Sponsalibus* 1. & in *sponsalibus vero* [D. 23, 1, 7pr] unde et pater filiam despons. Infra *De matrimonio contracto contra interdictum ecclesie. Ex litteris.* [X 4, 16, 2] (Fr. 708) sed illud intelligitur, quando postea consensit filia, ut ibi nota per magistros. Potest autem filia dissentire, si sponsum dignum sibi eligat, vel moribus suis indignum; sed que non contradicit consentire videtur ff *Eodem. In sponsalibus.* [D.23,1, 7, 1], *Sponsalia.*[D. 23, 1, 1]*Sed quae patris* [D. 23, 1, 12pr] *Filio* [D. 23, 1, 13] nec semper sequenda est voluntas mulieri contra voluntatem patris, quia plerumque ipsius femina consensus invenitur adversus... Summa aurea, 1098

⁶⁶⁶ In sponsalibus etiam consensus eorum exigendus est, quorum in nuptiis desideratur. intellegi tamen semper filiae patrem consentire, nisi evidenter dissentiat, iulianus scribit. D. 23, 1, 17, 1 Sed quae patris voluntati non repugnat, consentire intellegitur. D. 23, 1, 12pr Filio familias dissentiente sponsalia nomine eius fieri non possunt. D. 23, 1, 13

in marriage. Consent of parents only makes neither engagement, nor marriage, as the awareness of partners that they are contracting betrothal is required for a contract.⁶⁶⁷

6.2.5 The reasons why betrothal can be dissolved

The betrothal can be dissolved if the appointed time, after which the marriage should come, has run out.⁶⁶⁸ Secondly, the betrothal is to be dissolved due to physical weakness.⁶⁶⁹ The third reason to dissolve the betrothal is affinity.⁶⁷⁰ The fourth reason to dissolve the contract

⁶⁶⁷ ... sed quae non contradicit, consentire videtur ff *Eodem. Sponsalibus*.1 [D. 23, 1,7,1], *Sponsalia* [D. 23,1,11], *Sed quae patris* [Dig. 23.1.12pr.], *Filio* [Dig. 23.1.13] nec semper secunda est voluntas mulieris contra voluntatem patris, quia plerunque ipsius foeminae consensus invenitur adversus propria commoda laborare *C. eod. L.pen* (?) [*De sponsalibus et arris sponsaliciis et proxeneticis.*] sic videtur requirendus consensus parentum, alioquin nulla videntur facta sponsalia, etiam secundum canonum, ut 35[30] q.5 *Nostrates* [C.30 q.5 c.3] et c. sequent [C.30 q.5 c.4], 32 q.2 *Cum dicitur* (?) et c. sequent (?) , 32 q.3 c.1 infra *Eodem. Ex litteris*.2 [X 4, 1, 10] (Fr. 664), *Sicut ex litteris* [X 4, 1, 22] (Fr. 669); infra *De desponsatione impuberum. Continebatur* [X 4, 2, 6] (Fr. 674), 22 q.4 *Tribus* [C.22 q.4 c. ?] et q. ulti. *C. pueri* (?) idem videtur de tutore 20 q.2 c.1 et 2 [C.20 q.2 c.1-2]. Sed hec omnia intelligas vera secundum leges, secus, secundum canones, ut argumentum expressum infra *Qui matrimonium accusare possunt vel contra illud testari. Videtur* [X 4, 18, 3] (Fr. 718) ibi secundum legem, quod aliud secundum canones, qui tamen in hic sequendi sunt, nam matrimonia jure poli, non jure fori reguntur 2 q.3 *hoc distinguendum* (?) vel hoc intelligas de honestate: de necessitate enim non requiritur secundum canones nisi consensus personarum, de quarum coniunctione quaeritur 27 q.2 *Sufficiat* [C.27 q.2 c.2] (Fr. 1063-1064); 32 q.2 c. ult [C.32 q.2 c.16] (Fr. 1123-1124); infra *Eodem. Cum locum* [X 4, 1, 14] (Fr. 666) *Cum apud* [X 4, 1, 23] (Fr. 669), et sine ipso nihil agitur , quantumcunque etiam pater et mater consentiant 30 q.2 *Ubi non est* [C.30 q.2 c.1] (Fr. 1099-1100); supra *De restitut[ione] spol[iatorum]. Ex parte M. Mulieris* [X 2, 13, 14] (Fr. 288) nisi forte ipsi filii voluntati parentum se subdiciant, et tunc non dicitur liber consensus infra *De conditionibus appositis. Per tuas.* [X 4, 5, 6] (Fr. 683) consensus enim illarum personarum requiritur in sponsalibus, qui in matrimoniis ff *Eodem. In sponsalibus* 1 [D. 23, 1,7,1] et *Sponsalia* [D. 23,1,11] ergo sicut consensus parentum solus non faceret matrimonium inter filios, sic neque sponsalia: quia necesse est, quod is cuius nomine sponsalia contrahuntur, hoc sciat et consentiat, vel ratum habeat, ut nota supra *Eodem. & respons.* 1 et haec intelligas esse vera, etiamsi filii sint in cunabulis. Sed contra infra *Eodem.c.1* [X 4, 1, 1] (Fr. 661), *De regularibus et transeuntibus. Cum simus* [X 3, 31, 14] (Fr. 573); C.20 q.1 *Addidistis* [C.20 q.1 c.2] (Fr. 843-844), et trib. cap. seq. C.20 q.1 c.3, 4, 5 (Fr. 843-844) de hoc dic, ut infra *De desponsatio impuberum.& Que sponsalia. Vers. Ex his patet* [Summa aurea, 1125] aliquando etiam contrahuntur pure, aliquando sub conditione... . Summa aurea, 1099

⁶⁶⁸ Per lapsum temporis, scilicet si certum tempus appositum fuit, et elapsum fit nam postea is, per quem non stet , impune nubit, sed aliis datur poenitentia de fide mentita infra *Eodem. Sicut ex litteris.* [X 4, 1, 22] (Fr. 669). Quid si terminus appositus non fit? Videtur expectandum tempus legale... . Summa aurea, 1101

⁶⁶⁹ Item secundo solvuntur propter infirmitatem supervenientem corporalem, talem quae inhabilem reddit puta quia nasum amisit sponsa, vel facta est leprosa, vel aliud simile, vel spiritualem, puta fornicata est, ut supra *De iurejurando. Quemadmodum.Repon.*1 [X 2, 24, 25] (Fr. 368) infra *De conjugio Lepros[orum].c. fin.* [X 4, 8, 3] (Fr.)

⁶⁷⁰ Item tertio propter affinitatem supervenientem infra *De eo qui cognovit consanguineam uxoris suae vel sponsae.* C.2 [X 4, 13, 2] (Fr. 696) et c. *Fraternitati* [X 4, 13, 7] (Fr. 698-699) et c. *Ex litteris* [X 4, 13, 8] (Fr. 699). In quo casu si sponsalia firmata erant, ad minus duo testes idonei exiguntur, aliquoin se.sc.?(secundum) si non erant firmata, ad dictum unius solvuntur supra *De testibus. Supra eodem \$ Unico.* (Summa aurea, ...), et intelligunt quidam firmata per iuramentum, ut infra *Eodem. Praeterea.*2 [X 4, 1, 12] (Fr. 665), et intelligunt hoc dictum on reverentiam iuramenti argumentum supra *De iurejurando. C. Si vero* [X 2, 24, 8] (Fr. 361) c. *Verum* [X 2, 24, 15] (Fr. 364), et sic quamvis Deus non faciat differentiam inter simplicem loquelam, vel iuramentum 22

is the flee of the groom who remains abroad or in another province and cannot return.⁶⁷¹

The fifth ground is when betrothal for the present follows betrothal for the future, the latter is to be dissolved.⁶⁷² The sixth reason is when the groom enters the religious order.⁶⁷³ The seventh is when betrothals are contracted at the minor age and after arriving to puberty are not confirmed by consent.⁶⁷⁴ The eighth is when it has been mutually decided by the partners to dissolve the engagement.⁶⁷⁵ The ninth is when there is a gossip about canonical impediment between them and this gossip is confirmed.⁶⁷⁶

q.5 *c.juramenti* [C.22 q.5 c.12] ecclesia tamen facit, tu dic firmata per verba de praesenti, nam etsi juramentum intercesserit, posset illud deterius contingere, quod in veritate non esset uxor, et sic eadem ratio manet, ergo idem jus juramentum supra *De constitutionibus. Translato*. [X 1, 2, 3] (Fr. 8) infra *De consanguinitate [et affinitate]. Tua*. [X 4, 14, 7] (Fr. 703) sic subaudiendum est maxime infra *Eodem. Praeterea.2* [X 4, 1, 12] (Fr. 665) ubi juramentum intervenisset... Summa aurea, 1102

⁶⁷¹ Item quarto propter fugam sponsi, si transulerit se vir ad aliam provinciam, nec inveniri possit, ut infra *Eodem. De illis*. [X 4, 1, 5] (Fr. 662)... . Summa aurea, 1102

⁶⁷² Item quinto, propter fortius vinculum superveniens, ut si sponsus contraxerit cum alia verba de praesenti, nisi sponsam antea carnaliter cognovisset, ut infra *Eodem. C. Veniens* [X 4, 1, 13] et *c. Is qui* [X 4, 1, 30] et *c. Si inter* [X 4, 1, 31] et infra *De sponsa duorum c.1* [X 4, 4, 1] quod si adolescens sponsam de futuro tentaverit, non tamen cognoverit, et subsequenter cum alia per verba de praesenti contraxerit, adhuc solvuntur sponsalia, quia nihil obfuit conatus sine effectu adolescentis. Quid si prima sponsalia nuda sunt, secunda juramento firmata? Videtur quod secunda praejudicent primis infra *Eodem. Praeterea 2* [X 4, 1, 12] (Fr. 665) dic contrarium nisi forte carnalis copula intervenerit, quia tunc cesset matrimonium praesumptum infra *Eodem. c. Is qui fidem* [X 4, 1, 30] (Fr.) et *c. Si inter* [X 4, 1, 31] (Fr.). Sed si eadem carnalis copula praecedens sponsalia nihil operetur infra *Eodem. Veniens.2* [X 4, 1, 15] sic juramentum non solvit sponsalia praecedentia, nisi aliud jungatur, quia non est vinculum iniquitatis, ut supra *De jurejurando. Quanto* [X 2, 24, 18] (Fr. 365) et *C. 22 q.4 c. In malis* [C.22 q.4 c.5] et q.5 *Iuramenti* [C.22 q.5 c.12] multo minus praejudicant, si prima juramento fuerint confirmata infra *Eodem. Ex litteris*. [X 4, 1, 7]. Summa aurea, 1102

⁶⁷³ Item sexto, si sponsus ad religionem transeat, ut infra *Eodem. Comissum* [X 4, 1, 16] (Fr. 667) Summa aurea, 1102

⁶⁷⁴ Item septimo, quando sponsalia contracta sunt in pupillari aetate, et veniens ad pubertatem contradicit infra *De desponsatione impuberum. C. De illis*. [X 4, 2, 7] et *c. A nobis*. [X 4, 2, 8]. Summa aurea, 1102

⁶⁷⁵ Item octavo, de communi dissensu eorum, qui consenserunt, dissolvuntur, sicut et societas communi dissensu dissolvitur ff *Pro socio. Utrum*. [D. 17, 2, 52, 2]; *l. Actione* [D. 17, 2, 65pr]; *l. Diximus* [D. 17, 2, 65, 3] Et hoc intelligas, etiamsi fides data fit, ut infra *Eodem. Praeterea1* [X 4, 1, 2] (Fr. 661) quam decretum intelligo de jure communi, secundum T[ancred] et Gott[ridus] quamvis Hug[uccio] sequentes ipsum intellexerint de comparativa permissione, quod dicit in fin. quod hoc potest in patientia tolerari, juxta illud. Multa per patientiam tolerantur, et supra *De praebendis et dignitatibus. Cum iam dudum. in fin.* [X 3, 5, 18] (Fr. 471) unde et scripserunt, quod Papa in dicta decret. *Praeterea*, non papaliter, sed magistraliter respondeat, sed tu dic, quod papaliter respondit, et de jure: sicut enim communi consensu contraxerunt, sic communi dissensu, possunt se absolvere auctoritate ecclesiae infra *De regul. Jur. Omnis res (?)* et nota de simili materia supra *De jurejurando. § Quot comites. vers. penult.* (Summa aurea, ...) et *De conversione conjugatorum § fin. vers. Sed quare magis. Et seq.* et infra *De sponsa duorum. § De quibus. Vers. Aut utraque de praesenti.* (Summa aurea, ...), nisi forte impuberes sint, quod dic, ut nota infra *De desponsatione impuberum. § fin vers. Si vero et sed pro Deo* (Summa aurea, ...)... . Summa aurea, 1103

⁶⁷⁶ Item nono, si fama habet, quod inter ipsos sit canonicum impedimentum, et de fama vel scandalo doceatur infra *Eodem. Cum in tua*. [X 4, 1, 27], infra *De consanguinitate et affinitate. C.2* [X 4, 14, 2], supra *De testibus [et attestationibus]. Super eo*. [X 2, 20, 13] (Fr. 319). Et nota quod in quinto casu, scilicet quando contrahit cum secunda, per verba de praesenti, et in sexto, scilicet quando transit ad religionem ante carnis copulam

The tenth case is when an already married man promises to marry another woman after the death of his wife or kills his first wife.⁶⁷⁷ The ten cases when betrothal can be dissolved are not the only ones, according to Hostiensis, which are enumerated in the verse.⁶⁷⁸

6.2.6 *De desponsatione impuberum*

Minors can contract betrothals, but only for the future, after arriving to the age of seven. Betrothal with minors deters the marital bond with the relatives of the bride/groom on the ground of impediment of public dishonesty discussed above. This obstacle impedes marriage with the daughter achieving her 7th year and consequently any marital union with her mother as those bonds are impediments to one another.⁶⁷⁹ Betrothal of minors can as well serve for preservation of peace between families.⁶⁸⁰

solvuntur sponsalia ipso jure, in nullo autem alio casu sine auctoritate episcopi solvi possunt argumentum infra *De desponsatione impuberum*. Accessit [X 4, 2, 5] et *Continebatur* 1. [X 4, 2, 6] *Respon.* Et c. *De illis*. 1. [X 4, 2, 7] et § *Si vero alterutrum* et c. *Duo pueri* [X 4, 2, 12] et nota infra in *vers. seq.* (Item decimo ...) et vide quod nota supra *Eodem. vers. Item tertio*. Summa aurea, 1103

⁶⁷⁷ Item decimo, ubi aliquis uxoratus juravit alicui mulieri ipsam post mortem uxoris suae ducere in uxorem, et postea ipsam polluit, vel propriam uxorem occidit, ut illa, cui fidem dederat posset ducere in uxorem. Idem si mulier machinata est mortem, ut eum habere posset: nam et hi casus dirimunt matrimonium jam contractum... Summa aurea, 1103

⁶⁷⁸ ... et sic si diligenter computaveris, non solum octo casus, quos notaverunt antiqui Doctores, sed quatuordecim, in quibus solvuntur sponsalia, poteris numerare et possunt his versibus comprehendere.

Crimen, dissensus, fuga, tempus, et ordo secunda.

Morbus, et affinis, vox publica cumque reclamant.

Quodlibet istorum sponsalia solvit eorum. Summa aurea, 1104

⁶⁷⁹ Et que sponsalia in impuberem cadant. Et quidem de futuro tantum, non de praesenti, si pulillus sit, in infanthen vero nulla cadunt sponsalia, id est minorem 7. annis, ut nota supra *De sponsalibus*. § *Quid sit effectus*. [Summa aurea, 1099] prohibetur tamen districtem, ne conjugantur ante pubertatem... prohibitum etiam per verba de futuro, et est ratio prohibitionis, quia non potest ratificari usque ad pubertatem, ut patet infra *Eodem. Quid juris* [Summa aurea, 1134] unde si non sequerentur sponsalia, adolescens forte multas amisit uxores, et puella multos viros, cum hinc inde tota consanguinitas denegetur, ut supra *De sponsalibus*. § *Quis sit effectus*. [Summa aurea, 1099] et patet infra *Eodem. Continebatur. In fin.* [X 4, 2, 7]. Et hoc nota quod si sponsa minor 7. annis traducatur in domum sponsi, et ibidem 7. annos adimpleat tacite ratificantur sponsalia, quamvis antequam expleverit, sponsus carnaliter cognoverit matrem sponsae, quare si post 7. annos impletos cum matre sponsae sponsus contraxerit, debet inter ipsos divortium celebrari. Et sic patet quod affinitas praecedens sponsalia sequentia non impedit, quo ad generandum justitiam publicae honestatis, et sic unum est impedimentum alterius, quo ad hoc, intelliguntur solvi sponsalia sicut nota supra *De sponsalibus*. § *Qualiter dissolvantur. Vers. Item tertio* [Summa aurea, 1102] quod intellige secundum quod hic notatur. Sin autem sponsus cum matre sponsae contrahat, antequam sponsa septem adimpleverit, sponsalia solvuntur, et sic non possunt subsequenter ratificari, ne tacite, nec expresse; idem est si non traducatur, dum tamen simul maneat secundum Johannes Andree, et potest esse illa ratio: quia circa illam aetatem aliquoties tentant infantes, quod

Parental consent, according to Hostiensis, does not suffice for contracting betrothal of their children; taken that the children have not consented to the betrothal contracted by their parents, they are not obliged to proceed to marriage from this betrothal, despite the fact it is legally contracted.⁶⁸¹ But if the children have vowed to the union contracted by their parents and they want to dissolve this betrothal, they are to be penalised for breaking the oath, not their parents, because although the parents have vowed they are not expected to be an active part of the contract.⁶⁸² Consent of the children plays a very important role, it has to be ratified by children if only parents have consented to the union. In this way the children become an active part of the contract.

forte adimplere non possunt supra *De sponsalibus et matrimoniis. iuvenis [impuberum]. C. Adolescens.* [X 4, 1, 32] (Fr. 672); infra *Eodem. Attestationes.* [X 4, 1, 3] (Fr. 661) facit optime ad hoc infra *De eo qui cognovit consanguineam uxoris suae vel sponsae. Veniens.* [X 4, 13, 2] (Fr. 696) *ibi ex conversatione diutiva (?)* de hoc dic ut nota infra *Eodem. versicul. Ex his patet* [Summa aurea, 1130] quod si sponsus sponsam suam minorem septem annis non traduxerit, sed in domum patris, vel matris sive sponsae maneat, secundum Joannem, si septem annos adimpleverit, nunquam ratificantur sponsalia, nisi sponsus in sponsam iterum expressim consensit, anno septimo adimpleto: sic intelligo et diversifica infra *Eodem. Litteras.* [X 4, 2, 4] quae in primo casu loquuntur et c. *Accessit.* [X 4, 2, 5] quod exaudias in secundo. Summa aurea, 1130

⁶⁸⁰ Verum est, quod prohibentur sponsalia contrahi ante pubertatem..., nisi justa causa instet, puta bonum pacis, ut infra *Eodem. c. Ubi* [X 4, 2, 2] unde versus: *Ut pax servetur, moder amen iuris habetur.* Summa aurea, 1131

⁶⁸¹ Ubi vero traditi non sunt nec expressim nec tacite consenserunt, non puto ipsos aliquatenus obligari: immo ideo valida sunt sponsalia, quod nec publicae honestati iustitia oritur ex eisdem et vide super hoc quod nota supra *De sponsalibus. § Qualiter contrahantur. Versicul contrahuntur* et secundum hoc quod hic nota intelligas jura ibidem posita pro et contra. Alii dicunt, quod illud quod legitur infra *Eodem. c.1* [X 4, 2, 1] omnino debet hoc ratum habere, intelligendum est de honestate non de necessitate. Alii asserunt, quod sponsalia contracta per parentes nomine filiorum impuberum, ipsos filios omnino obligant, et sine consensu parentum contracta non valent, ad quod pertinet quod notatur supra *De regularibus. § Qualiter. Obligetur et § Vel revocari et supra de sepulchris § apud quam ecclesiam ff De ritu nuptiarum. Si ita pater* [D. 23.2.10], *Quod si filius* [D. 23, 2, 11], *Filius emancipatus* [D. 23, 2, 25]... Summa aurea, 1132

⁶⁸² Quid ergo, si nomine impuberis filii consentientis, vel ratificantis pater sponsalia contraxerit? Et quidem filius nubere non debet: si tamen nupserit, tenet matrimonium, ut infra *Eodem. Duo pueri.* [X 4, 2, 12]. Sed si filius hoc juraverat, est ei danda poenitentia de fide mentita non parentibus. Nam etsi parentes hoc juraverunt, non tenentur ad aliud, nisi quod bona fide curent, et laborent quod matrimonium sequatur, cum enim alienum factum promittant, dicendum est ipsos ad hoc tantum, et non ulterius obligari ut *ff De verborum obligationibus. In illa stipulatione.* [D. 45, 1, 50pr], *Quotiens quis alium* [D. 45, 1, 81pr], *Inst. De inutilibus stipulationibus. Si quis alium* [Inst. 3, 19], supra *De sponsalibus. Ex literis.*² [X 4, 1, 10], infra *De matrimonio contracto contra interdictum ecclesiae. Capitulo primo.* [X 4, 16, 1], vigesima secunda questione ultim. capitulo unico [C.22 q.5 c.1] (Fr. 883-884). Summa aurea, 1135

6.2.7 *De clandestina desponsatione*

At the beginning of his article *Marriage ceremonies and the Church in Italy after 1215* David d'Avray questioned if the presence of the priest was required at the marriage under pain of sin by the general law of the western church after the Fourth Lateran Council. It was not a question of validity, but rather a question of validity and sin. Two further questions were as well posed by David d' Avray:

Was a marriage clandestine if it was not held in church (or at the church door)? Was it clandestine if no priest was present?⁶⁸³

Following Hostiensis's *Summa*, where he enumerates at least 4 kinds of clandestine betrothals including marriages for the presente tense, certain solemnities can be omitted as their purpose is respect that the benediction will be given in front of the church door or in the presence of the community.⁶⁸⁴ Important is that engagement lacking blessing in the presence of the church community is to be seen as *desponsatio clandestina*, which is not a sin when blessing or dowry is missing; it only means this betrothal is to be seen as *desponsatio clandestina*.⁶⁸⁵ Hostiensis clearly states that omitting solemnities such as

⁶⁸³ (Avray 2015, 107)

⁶⁸⁴ (Avray 2015, 112)

⁶⁸⁵ Primo, quia omittuntur solemnitates quaedam, quae ibi requiruntur de honestate, scilicet quod benedictio detur in facie ecclesiae et ut sponsa ab his, sub quorum dominio, et potestate est, petatur et recipiatur, et dotetur, et cum ducta fuerit, biduo, vel triduo, sponsi orationibus vacent castitatem custodiant: aliter enim sponsalia contracta adulterina creduntur: non tamen est peccatum si omnia haec non interveniant, ut c.30 q.2 c.1, 2 [C.30 q.5 c.1] [C.30 q.5 c.2] et 3 [C.30 q.5c.3] & *Per totum* [?]. Secundo, matrimonia dicuntur clandestina, quia clam contrahuntur sine aliquibus testibus, ut infra *Eodem*. c.1 [X 4, 3, 1] et c.2 [X 4, 3, 2] prohibetur autem ne quis sine dote, juxta possibilitatem, et publice nuptiis, id est conviviis, vel testibus publice vocatis contrahat, ut 30 q.5 *Nullum* [C.30 q.5 c.2] (Fr. 1105-1106), et junge quod nota *De sponsalibus. Sub rubricam. De matrimoniis. Quid si matrimonium sine dote*. [Summa aurea, ...]. Tertio modo dicitur clandestinum, quando aliquis contrahit sine licentia episcopi, ex quo semel legatus fuit alicui, etiam per verba de futuro: multo fortius si per verba de praesenti, et hoc dixit supra *De sponsalia. Vers. fin.* [Summa aurea, ...], quod intelligo fieri non debere etiam si banna, de quibus sequitur, proposita forent, ut sic differat a sequenti. Hunc tamen modum non notaverunt Doctores, et hoc intellige etiam de majori, id est pubere: secus de impubere ille enim prima sponsalia non debet facere sine licentia episcopi, et is potest dici quintus modus, argumentum supra *titulum I. c. Ubi* [X 4, 2, 2] (Fr. 673) et c. *Accessit* [X 4, 2, 5] (Fr. 673-674) c. *Continebatur* [X 4, 2, 6] (Fr. 674-675) c. *Duo pueri responsio*

blessings and dowry does not make such a union sinful. The prohibition to contract betrothals clandestinely and against the will or without allowance of the representative of ecclesiastical power sounds explicit in the case when minors contract betrothal for the

[X 4, 2, 12] (Fr. 677). Item quia contra interdictum ecclesiae, ut infra *De matrimonio contracto contra intrdictum ecclesiae*, et junde quod nota infra *De eo, qui furt. Ord. Susc.* §1 et is potest dici sextus modus. Quarto, quia licet ab episcopo licentiam impetraverit contrahendi, ut nota supra *titulum I Accessit*. [X 4, 2, 5] (Fr. 673-674) *Continebatur*. [X 4, 2, 6] (Fr. 674-675) *De illis 1. §1*. [X 4, 2, 7] (Fr. 675-676) *Duo pueri* [X 4, 2, 12] (Fr. 677), non tamen debet contrahere, nisi praemissis bannis ecclesiae, ut in consilio generali infra *Eodem. Cum inhibitio* [Summa aurea, ...] cujus verba sunt haec. Unde praedecessorum nostrorum vestigiis inherens clandestina conjugia penitus inhibemus: prohibentes etiam, nequis sacerdos talibus interesse praesumat. Quare specialem quorundam locorum consuetudinem ad alia generaliter prorogando statuimus: ut cum matrimonia fuerint contrahenda, in ecclesiis per presbyteros publice proponatur competenti termino praefinito, ut infra illum voluerit et valuit, legitimum impedimentum apponat, et ipsi presbyteri nihilominus investigunt utrum aliquod impedimentum obsistat. Cum autem apparuerit conjectura probabilis contra copulam contrahendi contractus, interdicatur expresse, donec quid fieri debeat super eo, manifestis constiterit documentis exponamus singula. Unde praedecessorum nostrorum vestigiis inhaerendi in his, que rite statuerunt, ut hic supra *De juraemento calumn. Cap.1* [?] sed ea que male dixerunt corrigere possumus, cum non habeat imperium par in parem, ut nota supra *De elect[i]one et electi poestestate*. *Innotuit*. [X 1, 6, 20] (Fr. 61-63), quia salva honoriscentia Conjugia, id est, matrimonia de praesenti haec enim verba matrimonium, conjugium, synonyma sunt, ut nota supra *De matrimonio. § Unde dicatur*. [Summa aurea, ...]. Quid ergo de sponsalibus? Non videtur, quod ad ea haec constitutio se extendat, et est verum quo ad verba cum in nullo loco istius constitutionis loquatur, nisi de matrimonio, vel conjugio, per verba de praesenti contrahendo ut apparet in litera I. Per totum sed puto, quod mens aliud velit quae sequenda est, ut *ff De excus. Tut. Scire oportet. Graeca est. § Aliud*. Et ideo ex mente, dico, sponsalia clandestina, sicut conjugia, vel matrimonia prohibenda, vel non bene provideretur periculis animarum, cum multis modis sponsalia firmentur, et postea aequiparentur matrimonio, ut nota supra *De matrimonio. § Ult. Sub. § Ut autem. Ver praesumptorum* [Summa aurea, ...] et infra *Eodem. Utrum clandestina. Ver. Quid di mulier*. [Summa aurea, ...], et ideo dixi in rubrica de clandestina desponsatione, non de clandestino matrimonio, ut utrunque includerent, et ad hoc infra c.1 [X 4, 4, 1] (?), secundum hoc exposui uno modo infra *Eodem. § Utrum* [Summa aurea, ...] et patet supra in princ. Summae istius titul. Est et alia ratio ne videlicet homo admittat multas uxores, et mulier multos viros, secundum ea que nota supra *De desponsatione impuberum. § Quae sponsalia*. [Summa aurea, ...], quia sicut in *Eodem § Continentur* [Summa aurea, ...], quamvis consanguinitas probetur et sic solvantur sponsalia, nihilominus publice honestatis justitia intelligitur generata, quare consanguinitas hinc inde impedit, haec tamen de consuetudine non servantur, et junde quod infra *Eodem. Commento* [Summa aurea, 1141] super verbo contractus interdicatur expresse. Penitus inhibemus, et infra poena apponimus supra si quis vero et sequen. Ne quis sacerdos etiam si parochialis non fit, sed et parochialis hoc prohibere debet, nec regularis aliquis debet interesse, ut infra *Eodem. § Sane* [Summa aurea, ...]. Ex hoc autem quod sacerdotibus, et regularibus hoc specialiter prohibetur, videtur quod alii possunt ibidem interesse argumentum *ff De jud. L. Cum pretor*. [?] Talibus, scilicet matrimoniis, vel sponsaliis clandestinis, praesumat sed potius firmiter prohibeantur contrahi, quousque fuerint publicata. Quare scilicet, quia ipsa praecipimus publicari, ne pericula animarum inde proveniant, si clandestine contrahantur. Speciale quorundam locorum, puta Belvacensis ecclesiae, et quorundam aliarum, ut supra *De spon. Cum in tua* [X 4, 1, 27] (Fr. 671) infra *Qui matrimo[nium] accusare possunt vel contra illud testari* [X 4, 18, 6] (Fr. 719). Consuetudinem, de specali consuetudine et specialissima generali, et generalissima dic, ut supra *De consuetudine § et De virtute* [?]. generaliter prorogando, et si haec consuetudo hodie facit jus, approbatur quia rationabilis visa est, ut supra *De consuetudine. Cap. ult.* [X 1, 4, 11] (Fr. 41). Statuimus id est firmum jus facimus, ut cum matrimonia subaudi sive sponsalia, ut dixi supra, super illo verbo conjugia. In ecclesiis, non ergo in aliis locis, argumentum supra *De rescriptis. Cum dilecta. Prope finem* [1, 3, 22] (Fr. 25-28) vel dic, quod hic non est vis, dummodo parochianis hoc publicet simul vocatis et coadunatis, sicut dixi supra *De electio. § Ubi fieri debet* [Summa aurea, ...?]. Ideo enim dicit in ecclesiis, qui ibi etiam non vocati coadunantur singulis diebus dominicis et festivis, ut supra *De paroch. Et Diebus Dominicis*. [?] ... Summa aurea, 1141

future.⁶⁸⁶ Betrothals for the future, or moreover, for the present, contracted against the will of the bishop are as well seen as secret betrothals. From this comparison it may well be said that betrothal for the present has a stronger bond and is more strictly forbidden to contract without the allowance of the bishop. The minors, though, are prohibited to contract betrothal without allowance of their bishop.

6.2.8 *De sponsa duorum*

Two ways of engagements are clearly distinguished: the one contracted through *verba de futuro – fides pactionis* and the other contracted through *verba de praesenti – fides consensus*. The first stands for the promise to take a woman as a wife in the future; and the second is a present tense betrothal followed by *copula carnalis*.⁶⁸⁷ If two engagements are contracted for the future – the first prevails over the second, even if each of those engagements contain the vows, the previous contract has a preference over the following one. If engagements are contracted for the present, the previous prevails over the following, notwithstanding if the second is contracted with the pledge and confirmed by an intercourse.⁶⁸⁸

⁶⁸⁶ Tertio modo dicitur clandestinum, quando aliquis contrahit sine licentia episcopi, ex quo semel legatus fuit alicui, etiam per verba de futuro: multo fortius si per verba de praesenti... . Summa aurea, 1139
... secus de impubere, ille enim prima sponsalia non debet facere sine licentia episcopi, ... arg. Tit.I (II) *Ubi* [X 4, 2, 2] (Fr. 673) et c. *Accessit* [X 4, 2, 5] (Fr. 673-674) c. *Continebatur* [X 4, 2, 6] (Fr. 674-675) c. *Duo pueri responsio I* [X 4, 2, 12] (Fr. 677). Summa aurea, 1140

⁶⁸⁷ ... fide pactionis inteveniente, puta per verba de futuro; aut fide consensus scilicet de praesenti tempore, hinc inde concessa, et mutuo suscepta. Est ergo fide pactionis, quando fidem alicui mulieri do, quod eam ducam in uxorem, quae aliquando transit in fidem consensus, scilicet carnali copula subsequente, *eodem ca.1* [X 4, 4, 1] ... Summa aurea, 1150

⁶⁸⁸ Quae quibus praejudicent. Et quidem aut utraque sunt de futuro, aut utraque sunt de praesenti. Aut prima de praesenti, et secunda de futuro. Aut prima de futuro, et secunda de praesenti: si utraque sunt de futuro, priora praejudicant posterioribus, si tamen in utriusque fides, vel iuramentum intervenerit, quia semper prius iuramentum servandum est, ut notatur supra *De iuramento*. \$ *Quotcomites. Versicu.* [Summa aurea, ...] item si duo iuramenta, quod si in altero tantum fides data fuit, vel iuramentum, illud alteri praejudicat quodcumque illud, sive prius, sive posterius, ut supra de sponsalibus, sicut secundum quosdam: tu dic, ut notatur supra *De sponsalibus* \$ *Qualiter. Versi. Item quinto et Sequent.* [Summa aurea, ...] et [Summa aurea, ...], et infra *Eodem. Versic. Aut primo de futuro* [Summa aurea, 1150] supra *De sponsalibus. De matrimoniis. fin. sub \$ ut autem.*

6.3 Conclusion

Hostiensis follows Roman law in defining betrothal, which for him is a mere promise of the upcoming marriage. This promise together with mutual consent are two essential elements of *sponsalia*. Hostiensis distinguishes between two kinds of betrothal: a simple and a complex one. A simple betrothal is contracted through the exchange of promise to marry someone in the future or in the present. A complex betrothal is contracted including subarration, where for Hostiensis *arra* has a favorable character for proceeding to marriage, rather than the character of threat of penalty. The betrothal can be contracted by anyone can contract marriage, with one difference: marriage is possible to contract at the age starting from 12/14 respectively for a man/woman, whereas betrothal is possible to contract as soon as each party turns 7 years old. Age and consent of two contracting parties are highly important for Hostiensis: betrothal contracted under the age of seven is null, and consent or confirmation from the children is required in case, when betrothal has been contracted by the parents. Clandestine betrothals, depending on kind of clandestinely contracted betrothal, may or may not be perceived as sinful: engagements contracted with avoidance of solemnities and blessings in front of the church doors or in the presence of community are not perceived as sinful, but betrothal of minors contracted without allowance of their bishop, or against his will, are strictly prohibited, according to Hostiensis.

Versic. Praesumptorum [Summa aurea, ...]. Aut utraque de praesenti, et in casu isto quocunque casu interveniente, priora praejudicant posterioribus: quamvis secunda jurata fuerint, vel carnali copula roborata, non obstante responsione Apostolicorum contraria, ut infra *Eodem. Licet* [X 4, 4, 3] (Fr. 680-681) vel consuetudine, ut infra *Eodem. cap. ulti.* [X 4, 4, 5] (Fr. 681-682), et dixi supra *De matrimoniis. § Qualiter impediatur. Versicul. Ligamen* [Summa aurea, ...], sed videtur, quod si secunda uxor primo sit cognita, prior sit in jure, quam prima, sicut consuetudo Mutinensis tenebat, ut infra *cap. fin.* [X 4, 4, 5] (Fr. 681-682) cum enim matrimonium solo consensu contrahatur, ut ibidem debet esse potior illa, cui potius traditur possessio corporalis Summa aurea, 1150

Chapter 7: Engagement in the commentary to the *Liber Extra: Apparatus* of Pope

Innocent IV

7.1 Life of Pope Innocent IV

On 25 June 1243 in the Cathedral of Anagni Sinibaldo Fieschi was elected to be a Pope and took the name of one of the dominating popes of the Middle Ages – Innocent III; the pontificate of the Pope Innocent IV had begun. Sinibaldo Fieschi was born in Genoa in 1180-1190 in the Fieschi family of the Count of Lavagna⁶⁸⁹ – one of the most influential noble houses in the eastern part of Liguria. Sinibaldo studied in Parma and then in Bologna. His teachers were Johannes Teutonicus, Accursio, Jacob Balduini and Jacob of Albenga. In November 1216 Sinibaldo was already a canon in the cathedral of Parma and retained this position until the end of 1224. In 1223 after finishing his canon law studies he became the subdiacon of Pope Honorius III. Under the patronage of Hugo of Ostia, future Pope Gregory IX, Sinibaldo was promoted to the judge *auditor* of papal curia in 1226 and to vice-chancellor and cardinal in 1227, as well to rector of the march of Ancona.⁶⁹⁰ Pope Gregory IX had, to say the least, conflicting relations with emperor Frederick II Hohenstaufen during his pontificate: starting from 1238 Frederick II was claiming his power over the central Italy and Rome; as a result, the Pope called the council in Rome in order to solve the situation with emperor Frederick. The latter captivated two cardinals that had been heading to Rome from Genoa with the purpose to participate in the general council on the 3rd of May 1241. On 17 July 1245 the council deposed Emperor Frederick II.

⁶⁸⁹ (Piergiovanni 1969, 129)

⁶⁹⁰ (Vodola 1985, 466)

Three official collections were created by the Pope during his pontificate. The first one, with twenty two canons from the Council of Lyons, were sent on 25 August 1245 to the universities of Bologna and Paris. The second one, promulgated in 1246 forbidding excommunication of corporate group of people. More importantly, though, Pope Innocent IV is the author of *Apparatus in quinque libros decretalium* finished in 1253. He might have been working on his commentary prior to his pontificate and kept working on his *opus magnum* throughout his papal career. *Apparatus* was found difficult to understand, even by Innocent's contemporaries; nevertheless, it is one of the treasures of the medieval canon law. It was first published in Strasburg in 1477 and afterwards reprinted.

7.2 Betrothal in the *Apparatus*

7.2.1 *Iuvenis* [X 4, 1, 3]

The decretal of Pope Eugene III *Iuvenis* [X4, 1, 3] is devoted to Levitian barrier and impediment of public honesty: a young man contracted betrothal with a girl close to her age of seven, not perfecting it by the intercourse. The groom has abandoned her before she consented to the contract after arriving to her age of seven. The man, then, married a relative of his previous bride. It is asked, if he may stay with his wife, who is a relative to his previous bride. It is responded that they are to be separated on the ground of public dishonesty. It appears to be certain that union between a relative of the previous bride and the man is to be dissolved.⁶⁹¹

The impediment of *publice honestatis iustitiam* is risen from the betrothal of two persons aged seven and under seven. This impediment, according to the Pope Innocent IV, is created on grounds of intention to contract betrothal. The Pope mentions the point of view presented in *Duo pueri* [X 4, 2, 12],⁶⁹² where engagement of minors ratified by cohabitation

⁶⁹¹ Si maior septennio duxit in uxorem minorem septennio, et eam traduxit ad domum, oritur ex tali contractu publicae honestatis iustitia. Eugenius Papa. *Iuvenis ille*, qui puellam nondum septennem duxit, quamvis aetas repugnaret, ex humana tamen fragilitate forsitan tentavit quod complere non potuit. Quia igitur in his, quae dubia sunt, quod certius existimamus tenere debemus, tum propter honestatem ecclesiae, quia ipsa coniux ipsius fuisse dicitur, tum propter predictam dubitationem, mandamus *tibi*, quatenus consobrinam ipsius puellae, quam postmodum duxit, divides ab eodem. X 4, 1, 3 (Fr. 661); JL 9655 (6685)

⁶⁹² Duo pueri Guilielmus et Guilielma *in tua diocese quemadmodum accepimus* matrimonialiter sunt coniuncti, puero VI., puella vero VII. annum agente, qui simul per tres annos manserunt. Tunc vero pater puellae, subtrahens eam sponso suo, ipsam alteri, M. nomine, copulavit, cum quo per VII. annos quiete permansit. Ipse vero tunc reliquit eandem, quia credebat, eam alium virum habere, illum scilicet, cui prius fuerat desponsata. Prior autem sponsus, ad annos discretionis perveniens, a P. praedecessore tuo contrahendi cum alia licentiam impetravit, qui quondam nomine S. consobrinam prioris in uxorem accepit, et cum ea per aliquod tempus existens, eam *tamen*, ut ipse fatetur, carnaliter non cognovit, licet illa se ab eo cognita asseveret. Quum autem pater memoratae Guilielmae eam vidisset a secundo viro relictam, *vi* praenominatum Guilielmum, cui prius eam desponsaverat, compulit, ut S. neptem suam omnino dimitteret, et ad Guilielmam suam desponsatam rediret: qui postmodum per biennium cohabitavit eidem, *ut fertur*. Quia igitur *in his* quid tibi faciendum sit, postulas edoceri, breviter respondemus, quod impediante puerili aetate matrimonium inter G. et G. non fuit. Et licet idem, postquam illa nupsit alii, potuerit aliam ducere in uxorem, tamen quia dictam S. duxit consobrinam mulieris eiusdem, sive eam cognoverit sive non, non debet tamen cum eadem S. propter publicae

impedes further contracting with relatives of a previous spouse, but can be dissolved by marriage for the present tense. Therefore, Pope Innocent IV takes intention to contract betrothal and betrothal of minors under seven years as impeding for contracting with relatives of the betrothed partner on the ground of *publice honestatis iustitiam*.⁶⁹³

7.2.2 *Ad audientiam* [X 4, 1, 4]

According to the text of *Ad audientiam* [X 4, 1, 4],⁶⁹⁴ Hugo, an inhabitant of Pavia, promised that if he would not be able to marry his daughter to one of the sons of fellow Pavian resident Landacon, he would marry her to another Landacon's son. The espousals were made with the first son and an objection was raised against this union; as a result, Hugo, as promised before, attempted to give his daughter to another Landacon's, a half- brother of the first one. Pope Alexander III forbade the second union, as the Scripture does not allow a brother to marry his brother's spouse. Hugo was supposed to be punished for an illicit vow.

honestatis iustitiam remanere, nec ac primam habere regressum, quia alteri fuit legitime copulata. (*Et infra*) Quum vero vir caput sit mulieris, et Guilielmus dicat, se non cognovisse prius. S. supra sictam: aliam, si voluerit, poterit ducere in uxorem, et S. viro legitimo copulari; post separationem vero pro vitando populi scandalo utrique ad tempus est poenitentia iniugenda. Si vero legitime contraret, ipsam S. ab eo sive post sive antea cognitam extitisse, neutri vivente altero dabitur licentia contrahendi. Remanebit ergo Guilielma cum M. imposita *tamen* ipsi M. ad tempus poenitentia competenti, qui pro sua opinione sola Guilielmam, iudicio ecclesiae non requisito, *perniciose* dimisit. X 4, 2, 12 (Fr. 677) JL 16614 (10246)

⁶⁹³ *Iuvenis* nondum septennem, sed septennio proximam, *infra Eodem. Sponsam* [X 4, 1, 8] (Fr. 663) puta, quia erat sex annorum et dimidii, vel amplius argumentum *infra ti. Prox. Attestationes* [X 4, 2, 10] (Fr. 676) *Inst. De obligationibus quasi ex contractu*. [Inst. 3, 13]⁶⁹³... *ff. De mu. et ho. ad rem et doli capacem*... quo ad sponsalia, sic enim oritur publice honestatis iustitia, *infra tit. Proxi. Litteras* [X 4, 2, 4] Vel dic, quod ducta fuit ante septennium, sed de domo intenta post septennium, *Infra tit. Proxi. Duo* [X 4, 2, 12] si autem non esset septennis, nec proxima, nec in domo post septennium detenta, bene posse ducere consobrinam, ut *infra tit. Proxi. Litteras* [X 4, 2, 4] et *Duo* [X 4, 2, 12]. (Dubitationem) licet non sit verisimile, quia tamen tutius est, praecavendum est, vel dic non esse verisimile, quod eam corruperit, sed quod malitia supplet aetatem, et quod aliquid intendunt de sponsalibus, et ideo oritur publicae honestatis iustitia. Apparatus X 4, 1, 3 [1570: 463]

⁶⁹⁴ Ex sponsalibus, contractis cum consanguinea, oritur publicae honestatis iustitia. Ad audientiam nostri apostolatus pervenit, quod, quum H. Albericus, Papiensis civis, filiam suam cuidam filiorum L. dare vellet uxorem, iuravit, quod, si ille, cui *desponsabatur*, eam habere casu aliquo interveniente non posset, alteri filio, quem de alia uxore genuerat, eandem *puellam* matrimonio copularet. Contractis autem a filio priore sponsalibus, quidam, *ad ecclesiam accedentes*, consanguinitatem inter eos esse iuramentis interpositis firmaverunt. Ideoque praefatus H. eandem *feminam* dare alteri filio nititur, ut iuravit. Sed quoniam scriptum est, quod sponsam fratris frater habere non potest, *discretionem tuam per apostolica scripta praecipiendo* mandamus, quatenus eum suum implere propositum, *quod canonicae rationi obviat*, non permittas, sed ut poenitentiam agat de illicito iuramento, monitione praemissa, ecclesiastica districtione compellas. X 4, 1, 4 (Fr. 662); JL 13137 (8613); WH 41 (a) 1180

This decretal serves a brilliant instance of betrothal for the future, which, at the first sight might be seen as a mere promise; despite this fact, it has a capacity to ban the subsequent marriage to a relative of the first groom. In decretals of Pope Alexander III transition between engagement and marriage is not always clearly stated.

Public honesty impediment works in both cases when contracting parties understand that they are contracting a betrothal, as in the case of *De illis* [X 4, 1, 5];⁶⁹⁵ and when they are still children, as in *Litteras* [X 4, 2, 4]⁶⁹⁶ and *Accessit* [X 4, 2, 5].⁶⁹⁷ In both those arguments

⁶⁹⁵ De illis autem, qui praestito iuramento promittunt se aliquas mulieres ducturos, et postea eis incognitis, dimittunt terram, se ad partes alias transferentes, hoc tibi volumus innotescere, quod liberum erit mulieribus ipsis (si non est amplius in sacro processum) ad alia se vota transferre, recepta tamen de periurio poenitentia, si per eas steterit, quo minus fuerit matrimonium consummatum. *Si vero etc.* (cf. c. 3. de cond. app. IV. 5.) [X 4, 5, 3] Si vero aliquis sub huiusmodi verbis iuramentum alicui mulieri praestiterit: "Ego te in uxorem accipiam, si tantum mihi donaveris" reus periurii non habebitur, si eam, nolentem sibi solvere quod *iuramento* sibi dari petiit, non acceperit in uxorem, nisi consensus de praesenti aut carnalis sit inter eos commixtio subsequuta. X 4, 1, 5 (Fr. 662); JL 14043 (9105)

⁶⁹⁶ Litteras tuae fraternitatis accepimus, ex quarum tenore perpendimus, quod, quum quidam *parochianus tuus* A. nomine esset perfectae aetatis, quondam puellam in cunabilis desponsavit; procedente vero tempore *idem* A. matrem puellae cognovit et eam in uxorem accepit. Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo Consultationi tuae taliter respondemus, quod si praefatus matrem *praefatae* puellae antequam *puella ipsa* septimum annum complisset in uxorem accepit, matrimonium ipsum non dissolvas sed eundem virum *praefatam* mulierem, sicut uxorem, libere tenere permittas, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam *praefata* puella septimum complevit, praedictus vir matrem eius accepit in uxorem, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem in uxorem habere permittas. X 4, 2, 4 (Fr. 673); JL 13947(9009); WH 631 1177

⁶⁹⁷ Accessit ad praesentiam nostrum nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubiles annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nolles, eum sollicitate monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutus sua nobis assertionem proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea [vero], antequam ad nubiles annos pervenisset, noluit aequatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W. in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patre puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam *idem* W., ut Discordia orta inter consanguineos suos et consanguineos mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendum mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod *praefata* puella non esset septennis quando *praememorato* G. desponsata fuit, et postea in eum non consenserit, et quod *idem* G. ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia

impediment of *publicae honestatis justitia* prevents them from further marital contracts with the relatives of their previous partner. Therefore, for Pope Innocent IV the betrothal contracted in the cradle *Litteras* [X 4, 2, 4], *Accessit* [X 4, 2, 5], or contracted by a person, who is prohibited to contract such as monk, priest or *frigidus*, despite the nullity of the previous contract, still gives rise to the *publicae honestatis justitia* and; therefore, bars any subsequent marital union with the relative of the previous partner.⁶⁹⁸

7.2.3 *Ex litteris* [X 4, 1, 7]

Ex litteris [X 4, 1, 7]⁶⁹⁹ is dedicated to the issue of contracting engagement/marriage (whether it is an engagement or a marriage is not clearly stated in the text).⁷⁰⁰ This decretal

ante septem annos fieri non possunt *praesertim* si consensus postea non accedit. Sane si praefata puella ante *[huiusmodi]* desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paternae vel maternae, hereditatis prohiberi non possunt. X 4, 2, 5 (Fr. 674); JL 13887(8952); WH 12 c. 1173

⁶⁹⁸ *Honestas publica est, quando contrahentes intelligunt quid agatur, licet illud non teneat.* Ad audientiam (quod si ille) haec adiectio nihil facit. (Implere propositum) impediens publice honestatis justitia, ut nota supra c. proximi. [X 4, 1, 5]. Et nota quod ubi contrahentes intelligunt quod agatur, licet illud non teneat, fugit tamen inde publicae honestatis justitia, ut hic dicitur, ubi autem non intelligunt secus infra tit. Proxi. *Litteras* [X 4, 2, 4] et *Accessit* [X 4, 2, 5]. Idem intelligo si frigidus contraxit, quia nullus consanguineus eius eam habere poterit 27 q.2 *Quidam desponsavit* [C.27 q.2 c.15] (Fr. 1065-1066) et idem forte dicendum est in monacho et sacerdote et aliis huiusmodi. Apparatus X 4, 1, 4 [1570: 464]

⁶⁹⁹ Si aliqui, apti ad matrimonium, contrahunt per verba obscura, communem verborum, intellectum sequi tenentur. Idem Cantuariensi Archiepiscopo. *Ex litteris, quos super causa matrimonii cuiusdam iuvenis E. nomine, et Mariae filiae Gileberti de sancto Leodegario transmisisti, sollicitudo nobis innotuit, quam in ipsius negotii examine servasti. Quia vero absentibus partibus veritatem nequivimus plenarie indagare, nec causam ipsam ad te remittere, a quo pars mulieris ad audientiam nostram noscitur appellasse: eam venerabilibus fratribus nostris Wintoniensi, Herfordensi et Bathoniensi episcopis duximus committendam. Ideoque fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus partes adire eorum praesentiam, quum ab eis fuerint evocatae, ei quod ipsi iudicaverint inviolabiliter observare contradictione et appellatione cessante compellas.* De hoc autem, quod consuluisti, quid debeat observari, quando inter aliquos sponsalia contrahuntur, nec intelligit alter quod alter proponuit: Respondemus, quod inspiciendum est iudici, si matrimonium contracturi ad id faciendum sint idonei scientia et aetate: quo cognito, si alter non intellexerit quod alter proposuit, ad communem verbi intelligentiam recurratur, et cogatur uterque verba prolata in eo sensu retinere, quem solent recte intelligentibus generare. *Quod vero quaesivit, an debeat appellationi deferri, ubi sub eius praetextu noscitur adulterium vel aliud crimen committendum consultationi tuae breviter respondemus, quod ubi notorium esset adulterium vel aliud crimen committendum, si appellationi interpositae deferretur, deferri nollemus. Nolumus enim incestus vel adulterii materiam aliquibus ministrare.* X 4, 1, 7 (Fr. 663); JL 13793 (8860); WH 439 1174/75-1181

concentrates on the case where a union was contracted between a certain young man named E. and a woman named Mary, a daughter of Gilbert. Given that one of the couple did not understand what the other had proposed, if both of them were at the age when the person is able to discern, it is to be perceived that common words were exchanged. Pope Innocent IV does not pay great deal of attention to consent in betrothal, but in commenting to *Ex litteris* [X 4, 1, 7]⁷⁰¹ he appears to object to Pope Alexander III's opinion (given that one of the parties had not understood the words of consent, but both were in the age of discretion, the betrothal is seen as contracted) and claims that there can be no consent, where there is no understanding.⁷⁰²

7.2.4 *Gemma* [X 4, 1, 29]

⁷⁰⁰ ...quando inter aliquos **sponsalia contrahuntur**, nec intelligit alter quod alter proponuit: Respondemus, quod

inspiciendum est iudici, si **matrimonium contracturi** ad id faciendum sint idonei scientia et aetate... X 4, 1, 7 (Fr. 663); JL 13793 (8860); WH 439 1174/75-1181

⁷⁰¹ *Ex litteris*. (Intelligit) haec decret[eta], loquitur quando aliqui intendebant sponsalia contrahere, sed non intelligebant vires, et effectus sponsalium, vel quia pro eodem reputabant sponsalia et matrimonium, vel quia non credebant per sponsalia se ligatos, quin cum aliis contraherent, vel alia huiusmodi quidam etiam intelligunt, quando secundum diversa vulgaria loquebantur, nec se invicem intelligebant. Sed hoc non videtur verum, quia qui non intelligit, non consentit infra *De bap[tismo et eius effectu]*. *Majores. Circa prin.* [X 3, 42, 3] (Fr. 644). Nec est mirum, si est aliud quando non intelligit vim datam verbis et effectum datum a jure, quia nemini licet ignorare jus, et maxime jus sponsalium non licet ignorare contrahentibus, sed factum vel vulgare alterius bene licet ignorare, tamen et illa expositio potest sustineri, quando diversa vulgaria habebant contrahentes: nec unus vulgare alterius intelligebat, nec valet, quod dicit, quod non potest esse consensus, si se non inteligit, quia haec decret[a] loquitur quando tractatus praecessit de matrimonio contrahendo, et in hoc ipsum consentiebat, et hoc agebatur, et tunc ex quo uterque dicit verba in suo vulgari, quae sonant praesentem consensum sufficit. (Intelligit), ut dicit cum tamen praesumatur intelligere, cum sint ejusdem vulgaris. (Sciat) quod non furiosi (aetate) quia non minores. (Quo cognito), scilicet, quod sunt idonei, scientia et aetate (non intellexerit), id est, si dicat se non intellexisse, cum tamen contrarium praesumatur. (Intelligentiam) non solum quam poterat ex verbi proprietate, sed etiam a jure propria sibi (solent) ff *De leg. 3. Non aliter* [?] *De verborum significatione*. *Intelligentia* [?]. Apparatus X 4, 1, 7 [1570: 464]

⁷⁰² quia qui non intelligit, non consentit infra *De bap[tismo et eius effectu]*. *Majores. Circa prin.* [X 3, 42, 3] (Fr. 644). Nec est mirum, si est aliud quando non intelligit vim datam verbis et effectum datum a jure, quia nemini licet ignorare jus, et maxime jus sponsalium non licet ignorare contrahentibus, sed factum vel vulgare alterius bene licet ignorare, tamen et illa expositio potest sustineri, quando diversa vulgaria habebant contrahentes: nec unus vulgare alterius intelligebat, nec valet, quod dicit, quod non potest esse consensus, si se non inteligit, quia haec decret[a] loquitur quando tractatus praecessit de matrimonio contrahendo, et in hoc ipsum consentiebat, et hoc agebatur, et tunc ex quo uterque dicit verba in suo vulgari, quae sonant praesentem consensum sufficit. Apparatus X 4, 1, 7 [1570: 464]

According to the current Gregorian decretal *Gemma* [X 4, 1, 29],⁷⁰³ engagement of minors prior to the age of seven is to be penalised, and to be held void, unless it was confirmed after arrival to the age of seven. The age of contracting parties is a constant value for this papal letter, but not the only one. The second value is the consent freed from any coactions and enforcements. It may be claimed that papal focus on the age of contracting parties and free consent is equally elaborated in the commentaries of Bernard of Parma; in other words, the points of interest of the Pope and of the commentator are the same, which happens not that often, as could be already seen in the papal letters discussed above.

Teberga, daughter of Gemma, being under the age of seven, contracted betrothal with Peter, a son of B. Parents and children were penalized. Afterwards, Teberga contracted marriage with another man, named C. The Pope claims that either marriage or engagement should be free of personal violence or money enforcements; if those have influenced contracting, the promise to the contract has been held void.

In the process of commenting *Gemma* [X 4, 1, 29],⁷⁰⁴ Pope Innocent IV refers exclusively to Roman law, avoiding any reference to canon law while in discussion of *arra*. In the *locus*

⁷⁰³ In matrimoniis et sponsalibus debet esse libertas, unde in eis promissio poenae non obligat. Gregorius IX. *Gemma* mulier nobis exposuit, quod, quum T[eberga] filia eius cum C. contraxit matrimonium, B. de Alferio ea occasione, quod inter P. filium suum et praedictam puellam infra septennium constitutos sponsalia contracta fuerunt, poenam solvendam a parte, quae contraveniret in stipulatione appositam, ab ipsa nititur extorquere. Quum itaque libera matrimonia esse debeant, et ideo talis stipulatio propter poenae interpositionem sit merito improbanda, mandamus, quatenus, si est ita, eundem B., ut ab extorsione praedictae poenae desistat, ecclesiastica censura compellas. X 4, 1, 29 (Fr. 671); Potthast no. 9660

⁷⁰⁴ *Gemma* mulier (Stipulatio) pro P. (Poenae ff *De ver. oblig. Titia* [D 45, 1, 134] in princip. secus enim dicimus in arris, nam si per dantem arras remaneat matrimonium amittit eas, si vero per recipientem reddit duplicatas, nisi expresse dictum sit, quo quadruplicatas reddat C. *De spons. Mulier. Respons.* 1 [C. 5, 1, 5pr] § quadruplici, et idem dicimus in pignoribus cum pignora arrae dicantur C. *De re. pig. L.1* [?] cessat autem haec poena arrarum si intra biennium non exequitur nuptias C. *De spons. Si is.* [C. 5, 1, 2] ff *De spons. Saepe* [D. 23, 1, 17]. Item propter mortem sponsi vel sponsae ff *De sponsa.* [C. *De sponsalibus et arris sponsaliciis et proxeneticis.*] *Arrae* [C. 5, 1, 3] [?]. Item propter personam sponsi, cum quo matrimonium interdicitur C. *De spon[salibus et arris sponsaliciis et proxeneticis]. Mulier* [C. 5, 1, 5pr] § *Qui vero [Sin vero]* [C. 5, 1, 5, 4] et § *His quoque [Hoc quoque]* [C. 5, 1, 5, 3]. Item propter minorem aetatem, unde securius est parentibus dare. C. *De spons. L. ult.* [C. 5, 1, 5, 6]. Apparatus X 4, 1, 29 [1570: 466]

*classicus*⁷⁰⁵ in his speculations over *arrhae* David d'Avray claims that Pope Innocent IV takes a Romanist side while discussing *arrhae*.

In his commentary to *Gemma* [X 4, 1, 29] Pope Innocent IV appeared to be more of a Romanist than the Romanists themselves. Although he addresses the delicate theological issue of freedom of marriage, he disregarded the *Glossa* piling up citations of Roman law without a single reference to canon law. On grounds of *Titia* [D. 45, 1, 134] penalties are forbidden, but *arrhae* are permitted. On grounds of *Mulier* [C. 5, 1, 5pr] the party who gives the *arrhae* loses them in case, due to the party's fault, the marriage is not contracted, while the party who receives them must return double or fourfold if the marriage is not contracted through its fault. On grounds of *Si quis* if the pledge (*pignus*) is given, it should be treated like *arrhae*. On grounds of *Si is, qui* [C. 5, 1, 2] and *Saepe* [D. 23, 2, 17] if within two years after the *sponsalia* marriage is not contracted, the disposition on *arrhae* becomes ineffective, and the *sponsa* is free to marry another person. Similarly, on grounds of *Arris* [C. 5, 1, 3] if marriage is prevented by the death of one of the parties, the dispositions on *arrhae* are inapplicable. On grounds of *Hoc quoque* [C. 5, 1, 5, 3] and *Sin vero* [C. 5, 1, 5, 4] the same applies if there is a lawful impediment to marriage.⁷⁰⁶

Unlike Hostensis, who based his discussion on the gloss of Bernard of Parma to *Gemma* [X 4, 1, 29] while additionally referring to Roman law and to *Titia* [D. 45, 1, 134] among other citations from the *Digesta*, Pope Innocent IV completely neglected reference to canon law and was guided exclusively by Roman law discussing *arrha*. Discussing *arra* in his comments to *Gemma* [X 4, 1, 29] the Pope refers to *Arris* [C. 5, 1, 3] in both cases.

⁷⁰⁵ c. *Gemma* [X 4, 1, 29] (Fr. 671) is been called *locus classicus* for discussing *arrhae* by David d'Avray (Avray 2015, 32)

⁷⁰⁶ (Avray 2015, 33)

7.2.5 *Tua fraternitas* [X 4, 2, 1]

The letter of Pope Hormisdas *Tua fraternitas*⁷⁰⁷ is dedicated to the question of free will in marital contracts. Pope Hormisdas distinguishes between coercion at minor and adult age: at the minor age a son/daughter is subject to parental will, unlike at adult age, when they are not to be compelled by their families in contracting marital unions. Coercion is absolutely excluded in the case when betrothal is contracted between adults. As the case goes, the father wants that his son contracts with a certain woman, the son (who is by that time adult) is unwilling to do so. It is asked if the father may compel him. If the son has not consented to this union, the father cannot compel him. If the son is not adult at the moment of contracting, the father may contract marital union of his son with whomever he wishes, as on the ground of minor age the son is not yet able to discern. Though, after arrival to the legitimate age, he may ratify his father's decision if he wishes so, but he may not be compelled after arriving to a legitimate age. It is noted that free will should be present in contracting marital bonds, but if the son is not adult, he is to be expected to be subject to his father's will. Equally, the father cannot compel his adult son to contracting either engagement or betrothal, but he may do so if his son has not yet reached a legitimate age.

It is discussed by Pope Innocent IV in his commentary⁷⁰⁸ to *Tua fraternitas* [X 4, 2, 1], according to which, following the text of commentary, the betrothal or marriage can be

⁷⁰⁷ Pater pro filio impubere sponsalia contrahit, pro pubere vero non, nisi consentiat. Hormisda Eusebio episcopo. *Tua fraternitas* requisivit de filio adulto, quem pater matrimonium vult contrahere, si sine voluntate adulti filii facere potest. Ad quod dicimus, si aliquo modo non consentit filius, fieri non posse. Potest autem filium nondum adultum (voluntas cuius discerni non potest) pater, cui vult matrimonio tradere. Et postquam filius pervenerit ad perfectam aetatem, omnino debet hoc adimplere. X 4, 2, 1 (Fr. 672)

⁷⁰⁸ *Honestas publica impedit matrimonium cum consanguineis. Consensus tacitus in sponsalibus non habet locum, nisi in parte.*

Tua nos. (Adulto), id est, pubere. (Contrahere) matrimonium, vel sponsalia, si autem esset major septennio, sed impubes etiam si contracta sponsalia sint ea inscia, tamen publicae honestatis iustitia impedit matrimonium cum consanguineis infra *Eodem. Accessit* [X 4, 2, 5]. Alii contra eum, non enim non fuerunt

contracted after the age of seven, but not prior to the age of seven; this contract impedes marriage with the relatives on grounds of *publice honestatis justitia*, as in *Accessit* [X 4, 2, 5]⁷⁰⁹ (the contract with the girl prior to her age of seven does not impede contracting with her mother). According to Innocent IV's point of view, it is not possible to contract betrothal without expressed or silent consent; therefore, such kind of union contracted without

sponsalia, nisi tacite vel expresse consenserit, ideo nec publice honestatis justitia impedit contrahere cum consanguineis, et hoc magis placet. (Consentit) tacite saltem non contradicendo cum praesens esset ff *De spons. Hoc si. [Haec ita]* [D. 23, 1, 5] necessarium esse, quod in matrimonio expresse consentiat supra *titu. proxi. Tuae* [X 4, 2, 14] (Fr. 678). Item in sponsalibus tacitus consensus non videtur habere locum, nisi in parte argumentum supra *De spons. § ult.* [D. 23, 1, 18] et *l. Sed quae* [D. 23, 1, 12pr] in aliis autem, et si pro aliis contrahere possunt, est tamen necessarius consensus expressus, vel ratihabitio supra *tit. proxi. Ad id praelleg.* [X 4, 1, 13] *l. hoc si* [D. 23, 1, 5] nota infra *De ma[trimonio] con[tracto] contra interdi[ctum] ec[clesiae]* c.1 [X 4, 16, 1] immo nec ratihabitio tacita sufficit supra *De resti[tutione] spo[liatorum]*. *Ex parte* [X 2, 13, 14] (Fr. 288) (posse) et forte in hoc casu non impediens publice honestatis justitia, poterit cum consanguineis contrahere. (Filius) adultus. (Voluntas) puta quia si minor 14. An. Quod in matrimonium consentire non potest. (Tradere), id est tradendum promittere, et sic contrahuntur sponsalia. Apparatus X 4, 2, 1 [1570: 467]

⁷⁰⁹ *Accessit ad praesentiam nostrum nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubilem annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nolles, eum sollicitate monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutus sua nobis assertionem proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea [vero], antequam ad nubilem annos pervenisset, noluit aequatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W. in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patre puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam idem W., ut Discordia orta inter consanguineos suos et consanguineos mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod praefata puella non esset septennis quando praememorato G. desponsata fuit, et postea in eum non consenserit, et quod idem G. ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia ante septem annos fieri non possunt praesertim si consensus postea non accedit. Sane si praefata puella ante [huiusmodi] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paternae vel maternae, hereditatis prohiberi non possunt.* X 4, 2, 5 (Fr. 674) JL 13887(8952); WH 12 c. 1173

consent at the age prior to seven does not impede any subsequent marriages with the partner's relatives on grounds of *publice honestatis iustitia*.⁷¹⁰

Publice honestatis iustitia is discussed by Pope Innocent from a variety of angles. The above mentioned impossibility to contract a legal betrothal prior to the age of seven on grounds of lacking consent, which does not give rise to *publice honestatis iustitia*,⁷¹¹ appears to be rather an exception than a rule.

⁷¹⁰ ... sed impubes etiam si contracta sponsalia sint ea inscia, tamen publicae honestatis iustitia impedit matrimonium cum consanguineis infra *Eodem. Accessit* [X 4, 2, 5]. Alii contra eum, non enim non fuerunt sponsalia, nisi tacite vel expresse consenserit, ideo nec publice honestatis iustitia impedit contrahere cum consanguineis, et hoc magis placet. Apparatus X 4, 2, 1 [1570: 467]

⁷¹¹ ... sed impubes etiam si contracta sponsalia sint ea inscia, tamen publicae honestatis iustitia impedit matrimonium cum consanguineis infra *Eodem. Accessit* [X 4, 2, 5]. Alii contra eum, non enim non fuerunt sponsalia, nisi tacite vel expresse consenserit, ideo nec publice honestatis iustitia impedit contrahere cum consanguineis, et hoc magis placet. Apparatus X 4, 2, 1 [1570: 467]

7.2.6 *Litteras tuae fraternitatis* [X 4, 2, 4]

According to *Litteras tuae fraternitatis* [X 4, 2, 4],⁷¹² a certain man A., being adult betrothed a girl being in the cradle. In some time the man carnally knew the mother of the girl and married her. As it is replied to the plea, if A. had taken the girl's mother as a wife before her daughter reached the age of seven, their marriage should remain, as betrothals made in cradle are null. In case if marriage with the mother happened after or at the time when the girl had turned seven, he cannot marry either of them. Engagement of those below the age of 7 is nullity, and this union, which is void, seems not to give rise to impediment of public honesty.

Pope Innocent IV consistently emphasizes the impossibility to contract betrothal prior to the age of seven, unless this union is confirmed after arriving to the aforementioned age. He refers to two Alexandrine decretals where null betrothal contracted prior to the age of seven gave no impediment of *publice honestatis justitia* and no prohibition to marry relatives of the previous partner, as the prior unions were null.⁷¹³ His final decision was, though, that despite the nullity of the previous contract, the man cannot have the daughter on grounds of affinity and the mother on grounds of *publice honestatis justitiam* as it is in *Iuvenis* [X 4, 1,

⁷¹² Ex sponsalibus, contractis cum minore septennio, non oritur impedimentum publicae honestatis; secus, si cum maiore vel minore, consentiente post septennium. Et affinitas, sequens dissolvit sponsalia praecedentia de futuro. Alexander III Herefordensi Episcopo. *Litteras tuae fraternitatis* accepimus, ex quarum tenore perpendimus, quod, quum quidam *parochianus tuus A. nomine* esset perfectae aetatis, quondam puellam in cunabilis desponsavit; procedente vero tempore *idem A.* matrem puellae cognovit et eam in uxorem accepit. Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo Consultationi tuae taliter respondemus, quod si praefatus matrem *praefatae* puellae antequam *puella ipsa* septimum annum complisset in uxorem accepit, matrimonium ipsum non dissolvas sed eundem virum *praefatam* mulierem, sicut uxorem, libere tenere permittas, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam *praefata* puella septimum complevit, praedictus vir matrem eius accepit in uxorem, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem in uxorem habere permittas. X 4, 2, 4 (Fr. 673); JL 13947(9009); WH 631 6 March 1177

⁷¹³ *Litteras tuae* (Postquam) licet enim a principio non tenuerint sponsalia nisi tamen post contradixerunt si sciverunt in 7. confirmantur infra c. proximi [X 4, 2, 5] (Fr. 674) et c. Duo [X 4, 2, 12] (Fr. 677). X 4, 2, 4 P. 467

3].⁷¹⁴ Therefore, the voidness and impossibility to contract betrothal prior to the age of seven, unless confirmed afterwards, does not exclude the impediment of *publice honestatis iustitiam*, according to Pope Innocent IV.⁷¹⁵

⁷¹⁴ (Filiam) filiam enim habere non potest, impediēte affinitate 30 q.3 [C.30 q.3] nec eam nec matrem propter publicae honestatis iustitiam supra *Iuvenis* [X 4, 1, 3]. Apparatus X 4, 2, 4 [1570: 467]

⁷¹⁵ Literas tuae (Postquam) licet enim a principio non tenuerint sponsalia nisi tamen post contradixerunt si sciverunt in 7. confirmantur infra c. proximi [X 4, 2, 5] (Fr. 674) et c. *Duo* [X 4, 2, 12] (Fr. 677). (Filiam) filiam enim habere non potest, impediēte affinitate 30 q.3 [C.30 q.3] nec eam nec matrem propter publicae honestatis iustitiam supra *Iuvenis* [X 4, 1, 3]. Apparatus X 4, 2, 4 [1570: 467]

7.2.7 Accessit ad praesentiam [X 4, 2, 5]

According to *Accessit ad praesentiam* [X 4, 2, 5],⁷¹⁶ a decretal sent from Pope Alexander III to Roger, the archbishop of York, perhaps circa 1173, a certain man named G. betrothed a girl at minor age. Subsequently, she did not assent to him, and engagement was dissolved by the archbishop. Afterwards, G. married her mother and had children in this marriage. Pope Alexander III gives his response to dispel doubts of the archbishop of York as to which union is to be legitimat, and whether children are legitimate,. If it is known that the girl had not yet reached the age of seven at the time when betrothal with G. was contracted, marriage of the man with her mother is legitimate as well as offsprings of this marriage. If the girl had reached her age of seven before contacting betrothal, despite her unwillingness to contract with G., the man is not to be allowed to have the mother of this girl as his wife. They,

⁷¹⁶ *Accessit ad praesentiam nostrum nobilis vir W. filius G. cum literis tuis, ex quarum tenore perpendimus, quod, quum filiam cuiusdam nobilis viri, dum esset minoris aetatis, desponsasset, et postmodum ipsa assensum in hac parte non praebente, antequam ad nubiles annos pervenisset, celebratum est inter eos divortium. Procedente vero tempore, defuncto patre puellae, matrem eius praedictus W. sibi matrimonio copulavit. Quod quidem factum quum sustinere nollens, eum sollicitate monuisti ut ipsam dimitteret, et quia monitis tuis in hac parte noluit acquiescere, ipsum excommunicationis vinculo innodasti. ... Verum praefatus W. in nostra praesentia constitutes sua nobis assertione proposuit, quod puellam ipsam, dum esset infra septimum annum, desponsavit postea [vero], antequam ad nubiles annos pervenisset, noluit aequatenus consentire, ut praefatum W. in virum acciperet, et ita cum patre suo, in cuius potestate remanserat et cum praefato W. ad praesentiam tuam accessit. Et quum ab ore puellae audisses, et per eam cognosceres et per patrem eius quod memoratum W. in virum nolebat, statim illum in plena synodo ab huiusmodi desponsatione publice absolutum denunciasti. Elapsis vero pluribus annis post, mortuo etiam patre puellae carissimus in Christo filius noster H. Anglorum rex matrem supradictae puellae memorato W. tradidit in uxorem, quam idem W., ut Discordia orta inter consanguineos suos et consanguineos mulieris sopiretur, accepit et solemniter desponsavit et sine contradictione ecclesiae duxit, et ex ea liberos procreavit, et puella fuit alteri viro copulata. Verum licet contineatur in literis tuis quod puella ipsa erat minoris aetatis, quando huiusmodi desponsatio facta fuit, tamen refert, utrum, quum esset minoris aetatis [fuerit] proxima aetati aptae matrimonio, aut infra septem annos. Ideoque Fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus, rei veritate inquisita diligenter et cognita, si tibi constiterit, quod praefata puella non esset septennis quando praememorato G. desponsata fuit, et postea in eum non consenserit, et quod idem G. ab huiusmodi desponsatione per te fuerit absolutus matrimonium inter eundem G. et matrem puellae celebratum, praecipias inviolabiliter observari, et eorum prolem denuncies esse legitimam, quia sicut discretion tua non ignorant, desponsationes et matrimonia ante septem annos fieri non possunt praesertim si consensus postea non accedit. Sane si praefata puella ante [huiusmodi] desponsationem septimum annum compleverat, licet praedictus vir a desponsatione ipsius puellae ipso iure fuerit absolutus, quum ea in eum consentire noluerit, inhonestum tamen videtur, ut matrem eius habeat, cuius filia fuit sibi desponsata. Verum si tibi visum fuerit, ut cum matre puellae remaneat, ne discordia inter utriusque consanguineos olim exorta nunc autem sopita denuo suscitetur id dissimulare poteris et aequanimiter tolerare. Filii autem quos de ipsa suscepit, si eam tolerante ecclesia in uxorem duxit a successione paternae vel maternae, hereditatis prohiberi non possunt. X 4, 2, 5 (Fr. 674); JL 13887 (8952); WH 12 c.1173*

therefore, should be divorced; his betrothal with the girl should be also dissolved as she has not consented to it. Betrothals are claimed to be null when contracted at the minor age (under the age of seven). Therefore, this null betrothal does not impede marriage with a relative of the bride, in this case, the mother. Therefore, through public honesty *desponsatio impuberum* impedes unions with relatives as long as contracting parties in the first union are more than 7 years old. This decretal is ascribed by Dauvillier to the “solemnity period”, which is confirmed by Donahue, as there is a strong reliance on judgements and even the mention of the power of the ordained person to dispense from the impediment of public honesty in *Accessit ad praesentiam* [X 4, 2, 5].⁷¹⁷

Innocent IV, as well as Hostiensis, holds betrothal contracted before the minor age of seven as void unless confirmed by the consent of the contracting parties, which, if objection was not expressed after arriving to the age of seven, is perceived as given.⁷¹⁸

⁷¹⁷ (Donahue 1982, 89)

⁷¹⁸ *Accessit*. (Non consenserit) expresse vel tacite lapso enim septennio si scivit, nisi contradicat consensisse videtur in sponsalia infra c. *Duo* [X 4, 2, 12] (Fr. 677). (Absolutus) antequam ad 7. an. pervenisset, sed et sine absoluteione crederetur sufficere, si in septennio alter protestetur se nolle consentire. Apparatus X 4, 2, 5 [1570: 467]

7.2.8 *Duobus modis* [X 4, 4, 1]

According to St. Augustine, there are two kinds of conjugal contracts *fides pactionis* et *fides consensus*. If someone gives a woman *fidem pactionis*, he should not take another woman, but if he does, she may stay, and he is expected to be penalised for the broken vow *sed agat poenitentiam de fide mentita*. If the *fidem consensus* was given he should not marry another woman, if he does, though, the second woman should be abandoned and he should stay with the first one. *Fides pactionis* is a mere promise that a man will take certain woman as a wife. *Fides consensus* takes place, when the couple mutually consents to marry in the present tense. A stronger bond cancels a weaker one: conjugal contract for the present *fides consensus* abolishes the previous promise to contract a marriage e.g. *fides pactionis*.⁷¹⁹

⁷¹⁹ Contrahens successive per verba de praesenti cum duabus, tenetur adhaerere primae. Si autem primo contraxit per verba de futuro, secundo per verba de praesenti, adhaerebit secundae. Augustinus de fide pactionis et consensus. Duobus modis dicitur fides pactionis, et consensus. Si aliquis alicui mulieri fidem fecerit pactionis, non debet aliam ducere. Si aliam duxerit, poenitentiam debet agere de fide mentita: maneat tamen cum illa, quam duxit. Non enim rescindi debet tantum sacramentum. Si autem fecerit fidem consensus, non licet aliam ducere. Si autem duxerit, dimittet eam, et adhaerebit priori. Est autem fides pactionis, quando aliquis promittit fidem alicui, quod eam ducet, si permiserit ei rem secum habere, vel etiam pro consensu. Fides autem consensus est, quando, etiamsi non stringit manum, corde tamen et ore consentit ducere, et mutuo se concedunt unus alii, et mutuo se suscipiunt. X 4, 4, 1 (Fr. 680)

7.3 Conclusion

For Pope Innocent IV there are four kinds of betrothal: the first one contracted through a mere promise for the future; the second one contracted with the words for the present; the third kind is to be contracted by giving the *arra*; and the fourth – with exchange of the engagement rings. For the first two listed ways of contracting betrothal the Pope alludes to the *Liber Extra*, whereas for the last two the Pope refers to Roman law and to the *Decretum Gratiani*. The second kind of betrothal is not clearly distinguished from contracting marriage; moreover, it is mentioned that this kind of betrothal is contracted through the words applicable to marriage, as it is contracted in the present tense.⁷²⁰ This scheme of different kinds of betrothal overlaps with Hostiensis's scheme, where two kinds of betrothal – simple and doubled one⁷²¹ are described respectively as contracted through simple

⁷²⁰ *Sponsalia quod modis contrahuntur. Cum in sponsalibus apponitur conditio, tamen intelliguntur contracta sponsalia. Matrimonium ratificari dicitur per subsequentem copulam. Signum expressum matrimonii contracti est manum stringere annulo. Duobus modis. (Fides) quo ad sponsalia contrahenda vel matrimonium. (Pactionis), scilicet per verba de futuro. (Et consensus), scilicet per verba de praesenti. (Ducet) quatuor modis contrahuntur sponsalia, scilicet, nuda promissione, scilicet cum dicit unus alteri, accipiam te in meam uxorem, et econtra, vel aequipotentia infra c.1, et hic. Idem etiam credimus, si inhabiles ad contrahendum matrimonium verbis utantur matrimonio aptis, scilicet accipio te in meam, et econverso, argumentum supra *De desponsatione impuberum. Attestationes* [X 4, 2, 10] (Fr. 676), *Duo* [X 4, 2, 12] et *A nobis* [X 4, 2, 8] (Fr. 676). Ibi enim dicit matrimonialiter coniungebantur. Item datis arris sponsalitiis C. *De spon. Arris* [C. 5, 1, 3]. Item annuli subarratione 27 q.2 *Si quis desponsaverit* [C.27 q.2 c.15]. Sed aliter melius probari videtur, quod per anulum tantum sponsalia contrahuntur, quia matrimonia non contrahitur nisi verbis aptis matrimonio intervenientibus, dummodo contrahentes loqui possint supra *De sponsa. Tu[ae]* [X 4, 1, 25] (Fr. 670). Item iuramento contrahuntur sponsalia supra *De spon. De illis* [X 4, 2, 7] (Fr. 675). Si permiserit hic satis expresse habes, quod sponsalia intelliguntur contracta, quando conditio in sponsalibus apponitur, hic enim constat, quod ante adventum conditionis, id est, antequam eam cognosceret fuerunt sponsalia de futuro, postea enim fuit matrimonium supra *De spon. Is qui fidem* [X 4, 1, 30]. Item talia sponsalia inducunt publicae honestatis iustitiam supra *De spon. Ad audientiam* [X 4, 1, 4] (Fr. 662)*

(Consensu) obtinendo non obtento, id est, si in me consenseris ego consentiam in te, vel si dederis centum ego accipiam te in meam. (Stringit) annulo, et sic videtur quod manum stringere annulo fit expressius signum matrimonii contracti, quam aliquid aliud, sed certe hoc vult dicere, quia et si consuetudo sit, quod quando matrimonium contrahitur, quod mulier subarratur annulo, tamen et si subarratione annuli fit matrimonium solo consensu, et verbis de praesenti. Apparatus X 4, 4, 1 [1570: 470]

⁷²¹ Duae, nam alia est nuda et simplex, alia firmata et duplex. Nuda et simplex dicitur, cum sponsus sponsae nude et simpliciter promittit, quod eam ducet in uxorem et econverso, ut supra eodem & *Quid sint sponsalia* [Summa aurea, 1093]; infra eodem [*De desponsatione et matrimoniis*] c. *Ad audientiam* [X 4, 1, 4] (Fr. 662) et c. *Si inter* [X 4, 1, 31] (Fr. 672). Summa aurea, 1095

promise⁷²² or subarration and giving an *arra*.⁷²³ Both jurists, Pope Innocent IV and Hostiensis, refer to the same place in *Decretum* while discussing subarration,⁷²⁴ but *arra* is seen differently by two canonists.

⁷²² ... *Accipiam te in meam, et accipiam te in meum*: vel alia verba familia, consensum exprimentia de futuro. Summa aurea, 1097

⁷²³ Firmata vero est duplex: alia fit arris intervenientibus vel pignoribus loco arrarum datis... . Alia interveniente annuli subarratione, ut 27 q.2 *Si quis uxorem* [C. 27 q.2 c.14] (Fr. 1065-1066) et *Si quis desponsavit* [C.27 q.2 c.15] (Fr. 1065-1066). Et notandum, quod aliud est desponsatio, et aliud annuli subarratione cum in dictis c. disjunctive ponantur, argumentum *De rescriptis. Inter cetera* [X 1, 3, 4] (Fr. 17) desponsatio autem consistit in pactio sponsaliorum; subarratio autem in sponsalitia datione d qua dic, ut nota infra *De donatione inter vir et uxor. Sub rubric. De donatio propter nupt.* [Summa aurea, 1250] fit etiam aliquando hac subarratio, intervenientibus donis, et munribus secundum morem terrae infra *De matrimonio contracto contra intrdictum ecclesiae c.1* [X 4, 16, 1] (Fr. 708) Summa aurea, 1095

⁷²⁴ C.27 q.2 c.15 (Fr. 1065-1066)

Betrothal contracted under a certain condition, according to Pope Innocent IV, is claimed null, and, therefore, as such that gives no impediment of public honesty.⁷²⁵

⁷²⁵ Si permiserit, hic satis expresse habes, quod sponsalia intelliguntur contracta, quando conditio in sponsalibus apponitur, hic enim constat, quod ante adventum conditionis, id est, antequam eam cognosceret fuerunt sponsalia de futuro, postea enim fuit matrimonium supra *De sponsalibus. Is qui fidem* [X 4, 1, 30] (Fr. 672). Item talia sponsalia inducunt publice honestatis iustitiam supra *De sponsalibus. Ad audientiam*. [X 4, 1, 4] (Fr. 662). Apparatus X 4, 4, 1 [1570: 470]

Chapter 8: Betrothal in the *Liber Sextus*

8.1 Life of Pope Boniface VIII

Benedetto Gaetani was born in Anagni c.1235 in the noble family. He studied law in Todi, Spoleto and Bologna. In 1264 he entered papal service. In 1281 Benedetto became a cardinal-deacon during the papacy of Martin IV and following the resignation of Pope Celestine V was elected pope on the 24th of December 1294.

Pontificate of Pope Boniface VIII was clouded by a controversy with Philip IV about papal and temporal power and gained its culmination in 1302 with the promulgation of bull *Unam Sanctam*, according to which spiritual power was claimed to be supreme in comparison to earthly power. Pope Boniface was held prisoner in Anagni after denial to resign from papacy under the pressure of Wilhelm Nogaret and Giacomo Colonna. In three years he was released and moved to Rome, where he died on the 11th of October, 1303.

The *Liber Sextus* was promulgated by the Bull *Sacrosanctae* on the 3rd of March, 1298. Assignment to select and edit the texts for collection was entrusted to three canonists, namely Bérenger Fredoli, Bishop of Béziers, Wilhelm of Mandagout, Bishop of Embrun, and Riccardo Petroni of Siena, vice-chancellor of the Pope. The *Liber Sextus* was perceived as a supplement to five books of *Decretales Gregorii IX*; therefore, it found its name as *Sext.* Pope Boniface VIII personally gave the name to his collection *Liber Sextus* and meant it to be a supplementary collection to the *Liber Extra*. *Liber Sextus* is divided, as well as the *Liber Extra*, into five books; the collection contains 76 titles and 359 chapters. The 88 *regulae juris* borrowed from Roman law and added at the end of the *Liber Sextus* belong to Dino de Rossoni, professor of civil law at the University of Bologna. The sources for the codification

of Pope Boniface VIII are First and Second Councils of Lyons, the *Liber Extra* and decretals of Pope Boniface VIII. About 2/3 of decretals belong to Pope Boniface VIII.

8.2 De sponsalibus et matrimoniis

In the *Liber Sextus* there are only two decretals discussing engagement: *Ex sponsalibus* [Sext. 4, 1, 1] and *Si infantes* [Sext. 4, 2, 1]. The first decretal *Ex sponsalibus* [Sext. 4, 1, 1]⁷²⁶ is dedicated to discussing two kinds of betrothal, simple and conditional, as well as the one with the impediment of public honesty. Its content is divided into two parts:⁷²⁷ the first part of papal decretal treats simple betrothal generally,⁷²⁸ and, afterwards, specifically;⁷²⁹ the second part of the decretal discusses conditional betrothal.⁷³⁰ In order to gain a better understanding of perception of *Ex sponsalibus* by canonists, it appears reasonable to pay attention to glosses and explanations by the later canonists and decretalists. In the print edition of 1595⁷³¹ the comments and glosses belong to Johannens Andreae, Dominicus de

⁷²⁶ Sponsalia pura et certa, ex consensu valida, licet alias nulla inducunt publicam honestatem, quae habet dirimere sequentia sponsalia, sed non praecedentia. - §1 Publicam honestatem non inducunt sponsalia conditionalia ante conditionis eventum. H.d. [Hic dicit] Ioannes Andreae. Bonifacius VIII. Ex sponsalibus puris et certis etiamsi consanguinitatis, affinitatis, frigiditatis, religionis, aut alia quavis ratione sint nulla, dummodo non sint nulla ex defectu consensus, oritur efficax ad impedimentum et dirimendum sequentia sponsalia vel matrimonia, non autem praecedentia dissolvendum impedimentum iustitiae publicae honestatis. Quare ille, qui sponsalia pure ac determinate cum aliqua muliere contraxit, et postmodum cum secunda prioris consanguinea idem fecit, priorum sponsaliorum vigore, quibus per publicae honestatis iustitiam ex secundis sponsalibus subsecutam minime derogatur, ad matrimonium contrahendum cum prima remanet obligatus. § 1 Ille vero, qui sponsalia cum aliqua muliere sub conditione contraxit, si postmodum ante conditionibus eventum cum alia, prioris consanguinea, per verba contraxerit de praesenti, cum secunda remanere debebit, quum ex sponsalibus conditionalibus ante conditionem exstantem, sicuti consensum non habentibus et incertis, nulla publicae honestatis iustitia oriatur. Sext. 4, 1, 1 (Fr. 1065-1066)

⁷²⁷ Ex sponsalibus, Sunt duae partes Prima tractat de sponsalibus puris: Primo in genere: Secundo in specie: ibi, *Quare*. Secunda tractat de conditionalibus: ibi, *Illi vero*. Ioan[nes] Andr[ae]. Gl. ad Sext. 4, 1, 1 [1595: 406]

⁷²⁸ Ex sponsalibus puris et certis etiamsi consanguinitatis, affinitatis, frigiditatis, religionis, aut alia quavis ratione sint nulla, dummodo non sint nulla ex defectu consensus, oritur efficax ad impedimentum et dirimendum sequentia sponsalia vel matrimonia, non autem praecedentia dissolvendum impedimentum iustitiae publicae honestatis. Sext. 4, 1, 1 (Fr. 1065-1066)

⁷²⁹ Quare ille, qui sponsalia pure ac determinate cum aliqua muliere contraxit, et postmodum cum secunda prioris consanguinea idem fecit, priorum sponsaliorum vigore, quibus per publicae honestatis iustitiam ex secundis sponsalibus subsecutam minime derogatur, ad matrimonium contrahendum cum prima remanet obligatus. Sext. 4, 1, 1 (Fr. 1065-1066)

⁷³⁰ Ille vero, qui sponsalia cum aliqua muliere sub conditione contraxit, si postmodum ante conditionibus eventum cum alia, prioris consanguinea, per verba contraxerit de praesenti, cum secunda remanere debebit, quum ex sponsalibus conditionalibus ante conditionem exstantem, sicuti consensum non habentibus et incertis, nulla publicae honestatis iustitia oriatur. Sext. 4, 1, 1 (Fr. 1065-1066)

⁷³¹ Liber Sextus decretalium d. Bonifacii Papae VIII. Una cum Clementinis, et Extravagantibus earumque Glossis restitutus. Suae integritati. Venetiis, Apud Iuntas, 1595 (MDXCV)

Sancto Geminiano and Johannes Monachus. There are as well glosses that have no *sigla* at the end; therefore, those glosses are perceived as anonymous.

The key matter in this decretal appears to be not the betrothal, but rather public honesty impediment, which may or may not rise from betrothal.⁷³² As to the content *per se* Dominicus de Sancto Geminiano in his gloss considers the following case, while retelling papal decretal: Titius and Berta contracted betrothal promising mutually and vowing to marry each other in the future. In some time Titius betrothed another woman, a relative of his previous bride. This union is impeded on grounds of *publice honestatis iustitiam* between Titius and relatives of Berta; and between Berta and relatives of Titius. It is asked whether Titius can contract betrothal with the second woman, a relative of the previous bride. The answer negative: on grounds of public honesty impediment he cannot contract with the second woman. Nevertheless, he can contract with the first one (Berta), provided that Titius betrothed Berta under certain conditions and afterwards contracted marriage for the present with her relative. It is asked whether this marriage dissolves previous betrothal. The question is responded positively, because conditional betrothals do not give rise to *publice honestatis iustitia*. Otherwise, if betrothal was contracted free of any conditions, marriage for the present does not dissolve previous betrothal. Moreover, Titius is to be compelled to stay with his first bride. An important requirement for betrothal to be impeding on grounds of *publice honestatis iustitia* is that the contract has to be without preconditions. Null betrothals, unless they are null on grounds of lacking consent, still give rise to public

⁷³² Pro intellectu huius cap[itul]um] praesupponendum est quid sit publicae honestatis iustitia. Unde iustitia publicae honestatis est quoddam impedimentum quod impedit matrimonium contrahendum, et dirimit iam contractum, quod oritur ex consensu praestitio in sponsalibus, ut si monachus contrahat cum aliqua, tunc consanguineus monachi non poterit contrahere cum illa: publice enim, honestum est, ex quo monachus consensit in illam, quod aliquis consanguineus eam habere non possit et fuit introductum hoc impedimentum propter honestatem duntaxat de hoc per Panor[mitanus]. in c.*Iuvenis. Eodem. tit. in antiq.* [X 4, 1, 3] (Fr. 661). Gl. ad Sext. 4, 1, 1 [1595: 406]

honesty impediment. For instance, if a monk or a priest contracts betrothal, no one of his relatives can contract with his *sponsa*, while this bond is seen as null *propter susceptionem sacri ordinis*, not on grounds of lacking consent: a monk or a priest has the ability to consent, since the latter is in natural law.⁷³³ If one contracts *sponsalia de futuro*, and afterwards contracts another *sponsalia per verba de praesenti* with a relative, he should stay with the first one. In case the second union has been consummated, he may stay with neither of them on grounds of affinity. If someone contracts betrothal with a licit condition (illicit conditions make this union automatically simple – *quasi* free of conditions), the condition suspends the effect. Therefore, if the man contracts *per verba de praesenti* with a relative of his previous bride, he should stay with the second person; if he contracts *per verba de futuro*, the situation is similar, because there is no public honesty impediment.⁷³⁴

⁷³³ Et est pactio duorum pluriumve in idem placitum et consensus. D. 2, 14, 1, 2

⁷³⁴ Casus. Aliquis Titius contraxit sponsalia cum aliqua Berta, dicendo: Promitto et iuro quod ego te accipiam in uxorem: et econverso illa Berta promisit et iuravit illum Titium accipere in virum: tractu temporis Titius contraxit secunda sponsalia cum consanguinea Bertae: et sic orta fuit iustitia publicae honestatis inter Titium et consanguineas ipsius Bertae, et inter Bertam et consanguineos Titii: quaeritur utrum Titius poterit contrahere matrimonium cum ista secunda sponsa? Respondetur quod non, obstante impedimento iustitiae publicae honestatis, quod est sufficiens impedimentum ad impediendum matrimonium contrahendum: et si de facto contraheret cum secunda, derimeretur istud matrimonium vigore istius impedimenti: et non obstante ista secunda, sponsa poterit et debet Titius contrahere cum Berta. Sed quid, ponamus quod Titius contrahit sponsalia cum Berta sub aliqua conditione: postea pendente conditione contraxit matrimonium de praesenti cum consanguinea Bertae: utrum per istud matrimonium de praesenti fuerint soluta priora sponsalia? Respondetur quod sic: quia per sponsalia conditionalia non contrahitur iustitia publicae honestatis: Secus si sponsalia essent certe et pure contracta: quia cum ex illis oriatur iustitia publicae honestatis, non frangerentur priora sponsalia: immo Titius compelleretur contrahere cum Berta, cum qua primo contraxit sponsalia: ut dictum fuit in prima parte huius capituli. Nota primo, quod publica honestas impedit matrimonium contrahendum, et dirimit iam contractum. Nota quod antequam ex sponsalibus oriatur iustitia publicae honestatis, requiritur quod sponsalia sint pura et certa. Nota quod ex sponsalibus nullis, dummodo non sint nulla ex defectu consensus, oritur publice honestas: ideo si monachus vel presbyter contraheret aliquis ex consanguineis monachi, vel presbyteri non posset eam habere in uxorem: ex quo illa sponsalia non fuerunt nulla ex defectu consensus: quia monachus habet consensum: quia consensus est de iure naturali. in l.i. ff *De pact[is]*. [D. 2, 14, 1, 2] ideo illa sponsalia non sunt nulla ex defectu consensus: sed sunt nulla propter susceptionem sacri ordinis. Nota, quod si quis contraxit sponsalia de futuro, et postea contrahat per verba de praesenti cum consanguinea primae sponsae: debet remanere cum prima. Sed quid si ipse cognovit secundam? Dicendum quod neutram debet habere, non primam, propter affinitatem subsecutam: quia contrahendo cum secunda, et eam cognoscendo contracta fuit consanguinitas cum prima. Et licet affinitas superveniens non dirimat matrimonium: tamen dirimit sponsalia: nec habebit secundam propter impedimentum publicae honestatis. Nota ulterius ibi, *Ille vero* quod si quis contrahat sponsalia conditionalia, quia promisit aliquam accipere in uxorem sub aliqua conditione honesta, et licita: (quia si esset conditio turpis, tunc sponsalia remanerent pura) ista conditio honesta, et licita suspendit effectum. Si ergo suspensus contrahat per verba de praesenti cum consanguinea primae sponsae, habebit secundum, puta consanguineam primae sponsae: quia fuit

In order to get a deeper understanding it seems reasonable to discuss simple and, afterwards, conditional betrothals.

contracta publica honestas. Sed quid si contraxit cum consanguinea primae sponsae per verba de futuro: quia si contraxisset per verba de praesenti cum ista secunda, non est dubium, quia debeo habere istam secundam, et non primam? Respondet glossa, quod idem esset sicut si contraxissem cum secunda per verba de praesenti: quia ex quo inter me, et secundam non est impedimentum, sum obligatus secundae, et non primae. Nota quatuor impedimenta, quae inducunt nullitatem sponsaliorum respectu vinculi matrimonialis. haec sunt expressa in textu. Nota quod affinitas inducit nullitatem, sicut consanguinitas de quo de consan[guinitate] et affi[nitate] non debet. Domin[icus de Sancto Geminiano] Gl. ad Sext. 4, 1, 1 [1595: 406]

8.2.1 Simple and conditional betrothals

As mentioned above, simple (unconditional),⁷³⁵ and definitive⁷³⁶ betrothals, according to Pope Boniface VIII, give rise to public honesty⁷³⁷ impediment,⁷³⁸ which is explicitly shown by reference to the relevant examples from the *Decretum*⁷³⁹ and the *Liber Extra*.⁷⁴⁰ Pope Boniface VIII sees betrothals that are null on grounds of consanguinity,⁷⁴¹ affinity,⁷⁴² frigidity,⁷⁴³ religion,⁷⁴⁴ etc.⁷⁴⁵ (except on grounds of lacking consent) as impeding by *publice*

⁷³⁵ Puris, conditionalia non inducunt publicae honestatis iustitiam, ut dicitur in fine. Gl. ad Sext. 4, 1, 1 [1595: 406]

⁷³⁶ Certis, ut si promisit ducere Bertam filiam Titii: incerta sunt quando promisit ducere unam ex filiabus Titii *ad hoc supra Eod.cap. Ex litteris*.2 [X 4, 1, 10] (Fr. 664). Gl. ad Sext. 4, 1, 1 [1595: 406]

⁷³⁷ Publicae honestatis, *supra Eodem. Sponsam* [X 4, 1, 8] (Fr. 663) Publicae enim honestatis est, ex quo consanguineus meus vivens, vel mortuus consenserit in Bertam, quod ego illam habere non possum. Additio. Vide quod scripsi de hoc impedimento publicae honestatis in tractatu super ipso habito in concilio Lugdunensi. *in decr. Non debet. De consang[uinitate] et affi[nitate]*. [X 4, 14, 8] (Fr. 703) super glo[ssam] ut melius. Gl. ad Sext. 4, 1, 1 [1595: 407]

⁷³⁸ Ex sponsalibus, emanavit ad declarationem eorum quae not. 27.q.2. *Si quis desponsaverit* 2 [C. 27 q.2 c. 15] (Fr. 1065-1066) *supra Eodem.tit[tulum]. Ad audientiam*. [X 4, 1, 4] (Fr. 662)

⁷³⁹ Si quis desponsauerit uxorem uel subarrauerit, et siue preueniente die mortis, siue irruentibus quibusdam aliis causis minime eam cognouerit, neque superstes eius frater, neque ullus de consanguinitate eius eandem sibi tollat in uxorem ullo umquam tempore. C. 27 q.2 c.15 (Fr. 1065-1066)

⁷⁴⁰ Ex sponsalibus, contractis cum consanguinea, oritur publicae honestatis iustitia. Alexander III. Papiensi Episcopo. Ad audientiam nostri apostolatus pervenit, quod, quum H. Albericus, Papiensis civis, filiam suam cuidam filiorum L. dare vellet uxorem, iuravit, quod, si ille, *cui desponsabatur*, eam habere casu aliquo interveniente non posset, alteri filio, quem de alia uxore genuerat, eandem *puellam* matrimanio copularet. Contractis autem a filio priore sponsalibus, quidam, *ad ecclesiam accedentes*, consanguinitatem inter eos esse iuramentis interpositis firmaverunt. Ideoque praefatus H. eandem *feminam* dare alteri filio nititur, ut iuravit. Sed quoniam scriptum est, quod sponsam fratris frater habere non potest, *discretioni tuae per apostolica scripta praecipiendo* mandamus, quatenus eum suum implere propositum, *quod canonicae rationi obviat*, non permittas, sed ut poenitentiam agat de illicito iuramento, monitione praemissa, ecclesiastica districtione compellas. X 4, 1, 4 (Fr. 662); JL 13137 (8613); WH 41 (a) 1180

⁷⁴¹ Consanguinitatis, scilicet infra gradum quartum *supra de consan.* non debet et iste erat casus *supra eod. Ad audientiam* [X 4, 1, 4] (Fr. 662). Gl. ad Sext. 4, 1, 1 [1595: 406]

⁷⁴² Affinitas, in primo genere et quarto gradu, vel citeriori *supra De consan[guinitate] et affi[nitate]. Non debet* [X 4, 14, 8] (Fr. 703) et tunc talis affinitas annullat matrimonium quando praecessit: secus si secuta fuerit *De eo qui cogn[ovit] consang[uineam] ux[or]ae suae vel sponsae. Discretionem*. [X 4, 13, 6] (Fr. 698) Gl. ad Sext. 4, 1, 1 [1595: 406]

⁷⁴³ Frigiditatis, *supra De frigid[is] et maleficiatis et impotentia coendi] per totum*. Additio. Et vide distinctionem, quam scripsi *Eodem. tit. De frigid[is] et maleficiatis et impotentia coendi] Fraternitatis* [X 4, 15, 6], in fine. Io.And. Gl. ad Sext. 4, 1, 1 [1595: 406]

⁷⁴⁴ Religionis, praecedentis *sup. De vo[to] et voti redemptione]. c. unico*. [X 3, 34, 1] quia tunc nullum est matrimonium vel sponsalia si sequitur, tunc dissolvit sponsalia, ut *supra De conver[sione] coniugatorum]. Ex publico*. [X 3, 32, 7] (Fr. 580-581) et cap.2 [X 3, 32, 2] (Fr. 579). Gl. ad Sext. 4, 1, 1 [1595: 406]

⁷⁴⁵ Alia quavis. Sicut dicebat praedictus canon. 27.q.2. *si quis desponsaverit*. [C.27 q.2 c.15] (Fr. 1065-1066). Et multae aliae causae reperiuntur: pura votum solemne, cognatio spiritualis, et regalis, et reliqua impedimenta, ut dixi in summa. 4. lib. Gl. ad Sext. 4, 1, 1 [1595: 407]

honestatis iustitia – in other words, the subsequent *sponsalia* with the previous partner is impeded, whereas preceeding *sposnalia* should not be dissolved.

Provided that previous betrothal was contracted free of any conditions, and afterwards the man contracted marital union with a relative of his bride, and consummated the second union, he is forbidden to have either of two women: the first, according to the impediment of affinity, which solves *sponsalia de futuro*; the second, on grounds of *publice honestatis iustitia*.⁷⁴⁶

There are two key elements in the abovementioned comment of an anonymous glossator: consent and consummation. Betrothal for the future is a mutual promise of the upcoming marriage. The constitutive element of such *sponsalia* is neither the ring nor some other present, but rather mutual consent and promise.⁷⁴⁷ The author of this glossa refers to *Digesta* and to *Decretum*. In the point of Romanist view of *sponsalia* the glossa overlaps with Hostiensis's understanding of simple betrothal in his *Summa aurea*.⁷⁴⁸ It might well be the

⁷⁴⁶ Idem fecit, scilicet quia sponsalia contraxerit. sponsalia vero sunt futurum nuptiarum promissio ff *Eodem. tit. l.I.* [D. 23, 1, 1] 30.q.5. *Nostrates* [C.30 q.5 c. 3] (Fr. 1105-1106) unde adverte si cum prima contraxerit de futuro, et postmodum cum secunda conconsanguinea in prohibito gradu eodem modo contraxit, et secundam cognovit, nec primam habere poterit propter affinitatem supervenientem: quae solvit sponsalia de futuro, ut supra *De eo qui cogn[ovit] consang[uineam] uxor[ae] suae. Veniens.* [X 4, 13, 2] (Fr. 696-697). et c. *Ex litteris* [X 4, 13, 8] (Fr. 699) secundam habere non poterit: quia publicae honestatis iustitia illum contractum impedit et dirimit, ut sup[ra] prox[imo] respon[sio] [Derogatur, nota quod licet superveniens affinitas dissolvat sponsalia de futuro: superveniens tamen iustitia publicae honestatis ipsa non dissolvit, et merito: secunda enim sponsalia tolluntur per publicae honestatis iustitiam ex primis inductam: non ergo ex secundis potest esse honestas, quae tollat primam et est si. 57. dist. *Si quis.* [D.57 c.1] (Fr. 223-224) Gl. ad Sext. 4, 1, 1 [1595: 407]]. Gl. ad Sext. 4, 1, 1 [1595: 407]

⁷⁴⁷ Sponsalia sunt mentio et repromissio nuptiarum futurarum. D. 23, 1, 1

Item Nykolaus ad consulta Bulgarorum. [c. 3.] Nostrates, tam mares quam feminae, non ligaturam auream, uel argenteam, aut ex quolibet metallo conpositam, quando nuptialia federa contrahunt, in capitibus deferunt: sed post sponsalia, que futurarum sunt nuptiarum promissio, federa quoque consensu eorum, qui hec contrahunt, et eorum, in quorum potestate sunt, celebrantur; et post, quam arrhis sibi sponsam sponsus per digitum fidei annulo insignitam desponderit, dotemque utrique placitam sponsus ei cum scripto pactum hoc continente coram inuitatis ab utraque parte tradiderit (aut mox aut apto tempore, ne uidelicet ante tempus lege diffinitum tale quid facere presumant), ambo ad nuptialia federa perducuntur, et primum in ecclesia Domini cum oblationibus, quas offerre debent Deo per sacerdotis manum, statuuntur, sicque demum benedictionem et uelamen celeste suscipiunt. Item: §. 1. Hec sunt, preter alia, que ad memoriam non occurrunt, pacta coniugiorum solempnia. Peccatum autem esse, si hec cuncta in nuptiali federe non interueniant, non dicimus. C. 30 q. 5 c. 3 (Fr. 1105-1106)

⁷⁴⁸ Mentio et repromissio futurarum nuptiarum, ut ff *Eodem [De sponsalibus]* [D. 23, 1, 1]. *Summa aurea*, 1093

case that *sponsalia pura*⁷⁴⁹ et certa by Pope Boniface VIII has the same meaning and definition as *sponsalia nuda et simplex*⁷⁵⁰ by Hostiensis. The consummation in this very case appears to be a constitutive element giving rise to additional impediment of affinity, since *copula carnalis* of the second union with the previous partner's relative excludes every possibility to stay with this previous partner on grounds of risen affinity impediment, as well as excludes possibility to stay with the second partner on grounds of *publice honestatis iustitia* impediment.

The second part of decretal *Ille vero* is dedicated to conditional betrothals⁷⁵¹ that do not give rise to public honesty impediment, as opposite⁷⁵² to the view of Pope Innocent IV, who claims in his *Apparatus* conditional betrothals as such that give rise of *publice honestate iustitia*.⁷⁵³ If a man contracts with a relative of his first sponsa conditional betrothal, and the

⁷⁴⁹ Sponsalia pura et certa, ex consensu valida, licet alias nulla inducunt publicam honestatem, quae habet dirimere sequentia sponsalia, sed non praecedentia. - §1 Publicam honestatem non inducunt sponsalia conditionalia ante conditionis eventum. H.d. [Hic dicit] Ioannes Andreae. Bonifacius VIII. Ex sponsalibus puris et certis etiamsi consanguinitatis, affinitatis, frigiditatis, religionis, aut alia quavis ratione sint nulla, dummodo non sint nulla ex defectu consensus, oritur efficax ad impedimentum et dirimendum sequentia sponsalia vel matrimonia, non autem praecedentia dissolvendum impedimentum iustitiae publicae honestatis. Quare ille, qui sponsalia pure ac determinate cum aliqua muliere contraxit, et postmodum cum secunda prioris consanguinea idem fecit, priorum sponsaliorum vigore, quibus per publicae honestatis iustitiam ex secundis sponsalibus subsecutam minime derogatur, ad matrimonium contrahendum cum prima remanet obligatus. § 1 Ille vero, qui sponsalia cum aliqua muliere sub conditione contraxit, si postmodum ante conditionibus eventum cum alia, prioris consanguinea, per verba contraxerit de praesenti, cum secunda remanere debebit, quum ex sponsalibus conditionalibus ante conditionem exstantem, sicuti consensum non habentibus et incertis, nulla publicae honestatis iustitia oriatur. Sext. 4, 1, 1 (Fr. 1065-1066)

⁷⁵⁰ Duae, nam alia est nuda et simplex, alia firmata et duplex. Nuda et simplex dicitur, cum sponsus sponsae nude et simpliciter promittit, quod eam ducet in uxorem et econverso, ut *supra eodem & Quid sint sponsalia* [Summa aurea, 1093]; *infra eodem [De desponsatione et matrimoniis] c. Ad audientiam* [X 4, 1, 4] (Fr. 662) et c. *Si inter* [X 4, 1, 31] (Fr. 672). Summa aurea, 1095

⁷⁵¹ Ille vero, qui sponsalia cum aliqua muliere sub conditione contraxit, si postmodum ante conditionibus eventum cum alia, prioris consanguinea, per verba contraxerit de praesenti, cum secunda remanere debebit, quum ex sponsalibus conditionalibus ante conditionem exstantem, sicuti consensum non habentibus et incertis, nulla publicae honestatis iustitia oriatur. Sext. 4, 1, 1 (Fr. 1065-1066)

⁷⁵² Ille vero, reprobat opinio Innoc. nota *De sponsa duorum* c.I. [Apparatus X 4, 4, 1 [1570: 470]] ubi dicebat, quod per sponsalia sub contradictione contractata inducitur publicae honestatis iustitia. Host. contra *sup. Eod. Ad audientiam* [X 4, 1, 4] (Fr. 662). Io. And. Gl. ad Sext. 4, 1, 1 [1595: 407]

⁷⁵³ Si permiserit, hic satis expresse habes, quod sponsalia intelliguntur contracta, quando conditio in sponsalibus apponitur, hic enim constat, quod ante adventum conditionis, id est, antequam eam cognosceret fuerunt sponsalia de futuro, postea enim fuit matrimonium *supra De sponsalibus. Is qui fidem* [X 4, 1, 30] (Fr. 672). Item talia sponsalia inducunt publice honestatis iustitiam *supra De sponsalibus. Ad audientiam.* [X 4, 1, 4] (Fr. 662). Apparatus X 4, 4, 1 [1570: 470]

second contract *de praesenti*⁷⁵⁴ had been created before the condition was fulfilled, the man should stay with the second woman, unless the first union has been consummated.⁷⁵⁵

Pope Boniface VIII distinguishes between simple and conditional betrothals. The first kind of engagement is free of any conditions and gives rise to public honesty impediment, unless it is lacking consent of the contracting parties. Conditional betrothals do not impede any subsequent marital bonds with the partner's relatives, according to Pope Boniface VIII. This approach is opposite to the view of Pope Innocent IV, according to which conditional betrothal is seen as impeding on grounds of *publice honestatis iustitiam*.

⁷⁵⁴ Praesenti, quid si contrahit cum consanguinea primae, de qua loquitur littera per verba de futuro: nunquid soluta sunt prima sponsalia conditionalia? Credo quod sic: si enim prima sponsalia inducunt publicae honestatis iustitiam, per iustitiam publicae honestatis supervenientem, ex secundis non solvuntur, ut inf. *proxi responsio* [Conditionem, Gl. ad Sext. 4, 1, 1 [1595: 407] sed si per prima non inducitur iustitia, puto, quod per iustitiam supervenientem ex secundis bene solvantur prima, licet in veritate prima sponsalia dicenda non sint ex quo consensus defecerat, ut hic sic enim est in aliis impedimentis supra *De eo qui cog[novit] consanguinea uxore [rae] suae. Veniens.* [X 4, 13, 2] (Fr. 696-697) cum si. unde si post secundum contractum superveniat conditio: dico quod primum matrimonium consummare non potest: publica enim honestas non insurgit a dic contractus, sed a dic conditionis, et ideo publica honestas, quae praevenit conditionem, habet matrimonium impedire, et dirimere, ut supra *prima respondeo* [Puris, conditionalia non inducunt publicae honestatis iustitiam, ut dicitur in fine. Gl. ad Sext. 4, 1, 1 [1595: 406]] cum per hoc reddatur inhabilis primae *De iureiu[rando]. Quemadmodum.* [X 2, 24, 25] (Fr. 368). Gl. ad Sext. 4, 1, 1 [1595: 407]

⁷⁵⁵ Conditionem, haec vera intelligas nisi interveniat carnis copula, quia tunc receditur a conditione *De condi[tionibus] appo[sitis in desponsatione vel in aliis contractibus]. De illis* [X 4, 5, 3]. Et de hoc satis eodem tit. *Per tuas.* [X 4, 5, 6] (Fr. 683) Et sic esset ibi consensus, et matrimonium: unde tum propter affinitatem, tum propter iustitiam non teneret matrimonium postea cum consanguinea contractum: et intellige de conditione honesta, non de tali quae habeatur, pro non adiecta *sup. De condi[tionibus] appo[sitis in desponsatione vel in aliis contractibus]. cap. ult.* [X 4, 5, 7] (Fr. 684), quia illa inducerent publicam honestatem, ac si pure contracta fuissent, [Idem intelligas de conditione de futuro, non de praesenti, ve praeterito. quod probat Io[nnes] Monac[hus]. per hanc litteram quae dicit, ante conditionem, et c.] et nota Hostien[sis] *supra. Eodem. Ad audientiam* [X 4, 1, 4] quod si quis sub tali conditione contrahat, cum aliqua, promitto, quod te ducam in uxorem si Deo et Ecclesiae placuerit: postea comperto impedimento, et solutis sponsalibus contrahat cum consanguinea illius: tenet contractus et licet haec conditio intelligatur etiam si non apponatur: tamen quando non exprimitur, consensus purus remanet: conditiones enim tacitae non faciunt obligationem conditionalem *ff De condi[tionibus] inst[itutionum] filius fa[miliis]* et demonstra. l. *Conditiones extrinsecus* [D. 28, 7, 9] et nota *De iureiu[rando]. Quemadmodum.* [X 2, 24, 25] (Fr. 368) tacitum tamen si exprimatur, facit rem conditionalem *ff De leg[ibus] senatusque consultis et longa consuetudine]. l. si ita legatum, § l. ubi conditio* [D. 1, 3, ?] *si volet*, posita in persona legatarii facit conditionale legatum, vide quod nota *ff De condi[tionibus] inst[itutionum] filius fa[miliis]* l. *Aliquando.* [D. 28, 7, ?] Et expressa nocent, quae non expressa non nocent, *ff De reg. iu. Expressa* [?]. Gl. ad Sext. 4, 1, 1 [1595: 407]

8.3 De desponsatione impuberum

Si infantes [Sext. 4, 2, 1]⁷⁵⁶ is divided into three parts: the first part *Si infantes* [Sext. 4, 2, 1]⁷⁵⁷ deals with the *sponsalia* contracted by children at the even age; the second part *Idem quoque* [Sext. 4, 2, 1]⁷⁵⁸ is about marriage contracted by minors; the third part *Porro* [Sext. 4, 2, 1]⁷⁵⁹

⁷⁵⁶ *Sponsalia* amborum infantium, vel alterius tantum, per supervenientiam maioris aetatis non validantur nec publicam honestatem inducunt, nisi fuerint ratificata tacite vel expresse. H.d. usque ad § *Idem quoque* Domin. § *Sponsalia*, per verba de praesenti contracta inter impuberem et puberem, vel inter impuberes, non proximos pubertati, valent ut sponsalia de futuro; nec in matrimonium transeunt ex sola perseverantia aetatis, nisi aliter approbentur; inducunt tamen publicam honestatem. H.d. Domin. -- §2 *Sponsalia* pro absentibus filiis non tenent, nisi ipsis praesentibus, vel nisi approbaverint tacite vel expresse ex postfacto. H. d. Domin. Bonifacius VIII. *Si infantes* ad invicem, vel unus maior septennio, et alter minor, sponsalia contraxerint ipsi, vel parentes pro eis, nisi per cohabitationem eorum mutuam, seu alias verbo vel facto ipsorum liquido appareat, eosdem in eadem voluntate factos maiores septennio perdurare: sponsalia huiusmodi, quae ab initio nulla erant, per lapsum dicti temporis minime convalescunt, et ideo, quum sint nulla, ratione defectus consensus publicae honestatis iustitiam non inducunt. § 1 *Idem quoque*, si pubes et impubes, vel duo impuberes non proximi pubertati, et in quibus aetatem malitia non supplebat, per verba contraxerint de praesenti. Sponsalia enim illa, quae iuris interpretatione tantum fuerunt sponsalia de futuro licet verba consensum exprimentia de praesenti haberent, et matrimonium contrahere intenderent contrahentes, per adventum pubertatis in matrimonium non transeunt de praesenti. Nec matrimonium, quod ut matrimonium aetate non tenuit prohibente, per lapsum dicti temporis convalescit, nisi per carnis copulam subsequutam, vel aliquem modum alium contrahentes eosdem cum eiusdem per severantia voluntatis ad pubertatis tempora pervenisse constiterit evidenter; per dictum tamen contractum, qui valuit, ut potuit, non sicuti agebatur, publicae honestatis iustitia est inducta. §2 *Porro* ex sponsalibus, quae parentes pro filiis puberibus vel impuberibus plerumque contrahunt, ipsi filii, si expresse consenserint vel tacite, ut si parentes fuerint, nec contradixerint, obligantur et ex eis oritur iustitia publicae honestatis. Et est idem, si filii, tempore sponsaliorum absentes, et etiam ignorantes, eadem sponsalia post scientes ratificaverunt tacite vel expresse; alias ex sponsalibus, contractis a parentibus pro filiis, nec ipsi filii obligantur, nec publicae honestatis iustitia inde surgit. Sext. X 4, 2, 1 (Fr. 1066-1067)

⁷⁵⁷ *Si infantes* ad invicem, vel unus maior septennio, et alter minor, sponsalia contraxerint ipsi, vel parentes pro eis, nisi per cohabitationem eorum mutuam, seu alias verbo vel facto ipsorum liquido appareat, eosdem in eadem voluntate factos maiores septennio perdurare: sponsalia huiusmodi, quae ab initio nulla erant, per lapsum dicti temporis minime convalescunt, et ideo, quum sint nulla, ratione defectus consensus publicae honestatis iustitiam non inducunt. Sext. X 4, 2, 1 (Fr. 1066-1067)

⁷⁵⁸ *Idem quoque*, si pubes et impubes, vel duo impuberes non proximi pubertati, et in quibus aetatem malitia non supplebat, per verba contraxerint de praesenti. Sponsalia enim illa, quae iuris interpretatione tantum fuerunt sponsalia de futuro licet verba consensum exprimentia de praesenti haberent, et matrimonium contrahere intenderent contrahentes, per adventum pubertatis in matrimonium non transeunt de praesenti. Nec matrimonium, quod ut matrimonium aetate non tenuit prohibente, per lapsum dicti temporis convalescit, nisi per carnis copulam subsequutam, vel aliquem modum alium contrahentes eosdem cum eiusdem per severantia voluntatis ad pubertatis tempora pervenisse constiterit evidenter; per dictum tamen contractum, qui valuit, ut potuit, non sicuti agebatur, publicae honestatis iustitia est inducta. Sext. X 4, 2, 1 (Fr. 1066-1067)

⁷⁵⁹ *Porro* ex sponsalibus, quae parentes pro filiis puberibus vel impuberibus plerumque contrahunt, ipsi filii, si expresse consenserint vel tacite, ut si parentes fuerint, nec contradixerint, obligantur et ex eis oritur iustitia publicae honestatis. Et est idem, si filii, tempore sponsaliorum absentes, et etiam ignorantes, eadem sponsalia post scientes ratificaverunt tacite vel expresse; alias ex sponsalibus, contractis a parentibus pro filiis, nec ipsi filii obligantur, nec publicae honestatis iustitia inde surgit. Sext. X 4, 2, 1 (Fr. 1066-1067)

treats betrothal contracted by parents for their children.⁷⁶⁰ This decretal displays⁷⁶¹ the principle *ubi non est consensus utriusque, non est conjugium*,⁷⁶² and claims betrothal of children, not confirmed by them verbally or through the sign after their arrival to the age of seven, as such that gives no rise to impediment of public honesty.⁷⁶³

The case discussed in the decretal gives an account of two children who contracted betrothal *per verba de futuro*. This betrothal is seen as void on grounds of their minor age. Despite the flow of time and their arrival to the age of eight, this betrothal still requires their consent and confirmation by words or signs, because betrothal of minors is not to be seen as ratified automatically upon coming of age. In some countries groom is usually expected to give his bride a bridal gift, which as well may be seen as confirmation. If parents contract betrothal for their children, the children should not be obligated to proceed to marriage without confirming and consenting to it because betrothal null on grounds of lacking consent can not be automatically confirmed with by time and age above seven. If betrothal is contracted in the presence of the children and they do not contradict, it is to be preceived

⁷⁶⁰ *Si infantes* adinvicem, sunt tres partes. Prima tractat de sponsalibus contractis per infantes ambos vel alterum: Secunda: ibi, *Idem quoque*: de matrimonio contracto per impuberes. Tertia ibi, *Porro* de sponsalibus contractis per parentes pro filiis, et istud sufficiat pro divisione et summa: quia summando non potest brevius recitari. Gl. ad Sext. 4, 2, 1 [1595: 408]

⁷⁶¹ Additio. Realem enim et pulcherrimam formam habuit haec decretalis determinat autem principium nota 30.q.2. ca.unico [C.30 q.2 c.1] (Fr. 1099-1100) et supra *Eodem. Litteras* [X 4, 2, 4] (Fr. 673) aliae diversae determinationes infra *ponuntur* in glo. Ioan. And. Gl. ad Sext. 4, 2, 1 [1595: 408]

⁷⁶² *Ubi non est consensus utriusque, non est coniugium*. Ergo qui pueris dant puellas in cunabulis, et e conuerso,

nichil faciunt, nisi uterque puerorum post, quam uenerit ad tempus discretionis, consentiat, etiamsi pater et mater hoc fecerint et uoluerint. C. 30 q.2 c. 1 (Fr. 1099-1100)

⁷⁶³ *Litteras* tuae fraternitatis accepimus, ex quarum tenore perpendimus, quod, quum quidam *parochianus tuus* A. nomine esset perfectae aetatis, quondam puellam in cunabilis desponsavit; procedente vero tempore *idem* A. matrem puellae cognovit et eam in uxorem accepit. *Unde quia dubitas, an huiusmodi matrimonium stare debeat, a nobis exinde consilium postulasti. Super quo* Consultationi tuae taliter respondemus, quod si praefatus matrem *prefatae* puellae antequam *puella ipsa* septimum annum complisset in uxorem accepit, matrimonium *ipsum* non dissolvas *sed eundem virum praefatam mulierem, sicut uxorem, libere tenere permittas*, quum desponsationes huiusmodi nullae sint, quae in cunabulis fiunt. Verum si postquam *praefata* puella septimum complevit, paretus vir matrem eius accepit *in uxorem*, quum sponsalia ex tunc placere consueverint, inter eos sententiam divortii non differas promulgare, nec ipsum filiam seu matrem *in uxorem* habere permittas. X 4, 2, 4 (Fr. 673); JL 13947(9009); WH 631 1177

as silent consent, and, therefore, as confirmed enagement.⁷⁶⁴ The betrothal not confirmed by children is null; therefore, this union does not give rise to *publice honestatis justitia* impediment.⁷⁶⁵

⁷⁶⁴ Sponsalia, contracta per parentes et idem eadem ratione intelligas de quolibet alio supra *De spon[salibus et matrimoniis]*. *Ad id quod*. [X 4, 1, 21] (Fr. 668-669) et supra *De matrim[onio] contract[o] contra interdict[um] eccles[iae]*. *capitu.* [X 4, 16, 1] (Fr. 708) quod huic bene concor. et hoc ibi tenet Hostien[sis] sed Innocen[tius] ibi nota contrarium: dicens speciale in patre, ut nomine filiae praesentis et non contradicens possit sponsalia contrahere ff *De spon[salibus] Sed quae patris* [D. 23, 1, 12pr] et *l.seq.* [D. 23, 1, 12, 1] C. *De nup[tiis]*. *Viduae* [C. 5, 4, 18pr] secus in tutore ff *De spon[salibus]*. *Si puellae* [D. 23, 1, 6] et non obstare *De spon[salibus et matrimoniis]*. *Ad id quod*. [X 4, 1, 21] (Fr. 668-669) [haec loquitur in vitrico, sequens in fratre, decret. *Ex parte* [X 4, 1, 9] (Fr. 663-664) superius allegata in patruo. Ioan.And.] quia ibi intervenit carnalis copula: alias secus secundum eum, sed verius videtur quod dicit Host[iensis] licet Bernar. videatur ibi tenere opinionem Innocen[tii] et quod decretalis illa non loquatur de expreso consensu probatur: quia quare posuisset Papa ibi verba quae sapiunt tacitum consensum. Item non invenimus quod paternus consensus aliquid in contractu matrimoniali impuberis opereretur, alias quam in praecedentibus casibus. Gl. ad Sext. 4, 2, 1 [1595: 409]

⁷⁶⁵ Casus. Duo infantes contraxerunt sponsalia per verba de futuro: puta masculus promisit quod feminam acciperet in uxorem, et faemina promisit quod masculum acciperet in virum: certum est quod non tenent sponsalia propter defectum aetatis. Sed quid? ponamus quod ipsi infantes sic steterunt usque ad octavum annum: utrum ex cursu temporis validentur sponsalia? Respondetur, quod ex solo cursu temporis sponsalia non assumunt vires, nisi verbo fuerint validata, ut quia masculus vocat eam sponsam, et econverso illa vocat masculum sponsum: et tunc verbo validantur sponsalia: vel etiam facto validantur: quia in illis partibus sponsus consueverat dare aliqua iocalia sponsae: et istud faciebant isti iuvenes: tunc enim ratificantur sponsalia et assumunt vires. Idem dicendum est de impuberibus respectu matrimonii, quando isti impuberes sunt tales, in quibus aetas non supplet malitiam: nam solo cursu temporis non ratificatur matrimonium: nisi verbo fuerit validatum matrimonium, puta quia masculus vocabat eam uxorem, vel osculabatur, vel alia faciebat, quae solent facere vir et uxor: tunc enim ex illo actu matrimonium assumit vires. Sed quid? ponamus quod pater Titii contraxit sponsalia pro filio suo: utrum filius sit obligatus, et utrum ex illis sponsalibus oriatur ius publicae honestatis, ac si filius contraxisset in eius propria persona? Respondet Romanes Pontifex cum distinctione: aut filius ratificavit illa sponsalia, et tunc oritur ex illa ratificatione impedimentum publicae honestatis, ac si fidem filius personaliter contraxisset: aut filius non ratificavit illa sponsalia, et sic non consensit expresse nec tacite, et tunc non est obligatus, nec oritur ius publicae honestatis. Nota primo quod minores septennio, et sic infantes non possunt contrahere sponsalia per verba de futuro: multo minus matrimonium contrahere possunt. Et ratio huius est: quia in sponsalibus requiritur consensus: modo infantes non habent consensum: quia aetas illa quid videat, ignorat. l.1C. *De fal[sa] moneta* [C. 9, 24, 1] Nota sponsalia nulla ex defectu consensus, non convalescunt per diuturnitatem temporis, nisi fuerint ratificata verbo, vel signo. Nota quod impuberes non possunt contrahere per verba de praesenti: fallit si malitia supplet aetatem. Quaeritur qualiter potest cognosci, quod malitia supplet aetatem? Dicit Hostien. quod requiritur quod se cognoscant carnaliter, sed istud non placet glossae nec doctoribus: quia potest esse quod aliquis invenis intra XIV annum cognovit alias mulieres carnaliter, et ista sponsa fuit cognita ab aliis masculis: et sic constat quod isti iuvenes sunt potentes ad coitum: nec refert an sponsa fuerit cognita per sponsum, vel non. Nota quod matrimonium non assumit vires adveniente pubertate, nisi per aliquod signum appareat de ipsorum consensu. Nota quod si pater contrahat matrimonium pro filio praeseute, et non contradicente, videtur consentire: et sic tacens videtur consentire: licet agatur de actu oneroso. Regulariter autem in actu oneroso tacens non habetur pro consentiente l. *Filius familias* ff. *De procurat[ionibus]*. [D 3, 3, 8] sed tamen hic licet agatur de actu oneroso: tacens habetur pro consentiente. Unde sicut existens in mari exponit se infinitis periculis, similiter contrahentes matrimonium exponunt se infinitis periculis. Nota quod pater non potest filium ignorantem vel invitum obligare, nec ex illo contractu oritur aliqua actio contra filium. Nota quod ubi datur permissio habilis cum inhabili, vitiatur actus quando requiritur concursus habilitatis in utroque *de quo infra in regu. utile. de reg. iu.* Nota tres modos quibus probantur minores ratificare sponsalia, quae non tenuerant. Dom[inicus]. Gl. ad Sext. 4, 2, 1 [1595: 408]

The minors (persons under seven)⁷⁶⁶ cannot contract betrothal, according to the gloss of Johannes Andreae, who refers to Roman law, as well as to *Decretum*.⁷⁶⁷ Though, after arriving to the age of seven they can be called as bride and groom.⁷⁶⁸

⁷⁶⁶ Septennio, nota quod licet quo ad pubertatem sit in sextu differentia in numero annorum, supra *Eodem. Puberes* [X 4, 2, 3] (Fr. 673) et cap. *Continebatur* [X 4, 2, 6] (Fr. 674-675), quo ad infantiam secus: quia uterque infans minor septennio, ut hic et supra *Eodem. Litteras* [X 4, 2, 4] (Fr. 673) et c. *Accessit* [X 4, 2, 5] (Fr. 673-674). Gl. ad Sext. 4, 2, 1 [1595: 408]

⁷⁶⁷ Infantes, hi sponsalia contrahere non possunt: cum aetas illa quid videat, ignoret *C. De fal[sa] mone[ta]*. l.1. [C. 9, 24, 1] ad hoc *C. De iure deliberandi [et de adeunda vel acquirenda hereditate]. Si infanti.* [C. 6, 30, 18pr] et 30. q.2. et §1 [C.30 q.2 c.1] (Fr. 1099-1100). Ioan.And. Gl. ad Sext. 4, 2, 1 [1595: 408]

⁷⁶⁸ Verbo, quia post septennium adinvicem vocant se sponsos. Gl. ad Sext. 4, 2, 1 [1595: 408]

8.4 Conclusion

For Pope Boniface VIII, betrothal lacking consent or contracted with the condition is null; therefore, such kind of union has no impeding power on ground of public honesty. Consent appears to be crucially important, as it is the constitutive element of engagement, without which the union has no legal influence. Following the approach of Pope Boniface VIII, it might be concluded that even betrothal of the monk contracted with consent impedes any subsequent marital unions with his partner's relatives, whereas regular betrothal lacking consent does not impede following engagement/marriage with a relative of the former bride/groom. Betrothal lacking consent has no legal power for Pope Boniface VIII. Betrothal contracted unconditionally and with consent impedes any subsequent marital unions with the partner's relatives on grounds of *publice honestatis justitiam*. Conditional betrothal is as well null as the one lacking mutual consent of the contracting parties. Therefore, being null the engagement contracted conditionally does not impede following marital contract with the relatives of the partner. This point of view of Pope Boniface VIII is opposite to the view of his predecessor Pope Innocent IV, according to whom, conditional betrothal as well impedes on grounds of public honesty.

Conclusion

The betrothal in Gratian's view is actually *initiatio conjugii*; the mere beginning of the marital relation, which will become the perfected marriage only with the consummation followed by cohabitation and common life. It has a practical meaning for canon law as only the second stage becomes indissoluble, for instance, when it deals with joining religious order, impotence, etc. These principles apply only in case of the first stage (betrothal and initiated marriage), but not in the second one (perfected marriage). Engagement in Gratianian sense lacked the binding power in comparison to his model of marriage. In engagement, a marriage that was simply initiated, but not consummated lacked the binding power in comparison with a consummated union. The fact that Gratian gave primary emphasis to consummation in constructing his marriage formation theory did not mean that he ignored or depreciated the importance of consent. On the contrary, consent was an essential element of his definition of marriage, as he was following Roman law. In his discussion of consent issues he raised a question of whose consent initiated the marriage and was held as legitimate. The most apparent difference between two kinds of Gratian's marriage models is that *matrimonium initiatum* (in other words *betrothal*) could be dissolved, whereas the perfected marriage (*matrimonium ratum*, *matrimonium perfectum* or *matrimonium consummatum*) could not be dissolved. For Gratian, as well as for Roman law, betrothal is only the promise of future marriage. It is in no way a marriage yet, until it is not confirmed by *deductio in domum*, *traditio* and consummation. This puts betrothal in *Decretum Gratiani* much closer to Roman law than to German law. Engagement with consent being its constitutive part was not freed by the *Decretum Gratiani* from domination of the family. Consent surely plays a significant role in contracting betrothal

(initiated marriage), whereas parental assent (transformed often into the ceremony of *traditio*) and solemnisation of the contracted marriage (perfected marriage) play an essential role in contracting the actual marriage. There is a strong possibility that the consent in betrothal is made in *continuous* and not *initial*: the first one needs to be confirmed (in the case of *Decretum* it might be confirmed by common life and consummation), whereas the initial consent does not necessarily need any other confirmation.

Huguccio differentiates between *desponsatio de presenti et de futuro* by simultaneously shifting attention from Gratian's distinction of *conjugium initiatum et perfectum*. The commentator considers betrothal in the present tense to be "more of a nature of marriage," whereas betrothal for the future appears to be a mere promise to keep faithfulness. Consent is considered to be the unity of will and mind. According to *Summa*, there is only one mistake related to consent that might lead to the marriage impediment – *error personae*, whereas in *Decretum* *error conditionalis* is also present as an engagement-impeding error. The solemn betrothal is not a necessity according to *Summa decretorum*, it appears to be rather a ceremony of a preventive character in order to impede the upcoming marriage between adulterers or fornicators. Huguccio, as well as Master Gratian, acknowledges the family influence and considers engagements contracted by parents as binding.

The line of doctrinal evolution of engagement is to be observed in *Liber Extra* from St. Augustine to Pope Gregory IX. If one observes the development of the idea of engagement throughout papal responses, it cannot be left unnoticed that not the consent, subarration or consummation play the most important role in solving those above discussed cases, but the age. The age is what defines the kind of union, the legality or validity of the consent, and thereafter determines whether or not public honesty impediment takes place. The age becomes extremely important in Alexandrine decretals as well as in those written by Popes

Urban III, Clement III, Innocent III, and Gregory IX. Legality and binding power of the engagement is strongly influenced by the age of the partners at the moment of contracting betrothal. In *Liber Extra* it is clearly seen that Roman law objective approach of evaluating discretion and adulthood by the objective criterion of age is followed, rather than canon law approach, which evaluates adulthood by the physical capacity to procreate.

Hostiensis follows Roman law in defining betrothal, which for him is a mere promise of the upcoming marriage. This promise and mutual consent are two essential elements of *sponsalia*. Hostiensis distinguishes between two kinds of betrothal: simple, and complex one. The simple betrothal is contracted through the exchange of promise to marry someone in the future, or in the present. Complex betrothal is contracted including subarration, where for Hostiensis *arra* has a character favorable for proceeding to marriage, rather than the character of threat of penalty. Age, and consent of two contracting parties are highly important for Hostiensis: betrothal contracted under the age of seven is null, and consent or confirmation from the children is required in case, when betrothal has been contracted by the parents.

Engagement for Pope Innocent IV, and for Pope Boniface VIII are strongly depending on consent, which for contracting legal and binding betrothal, has to be free of conditions and given at the age above seven.

In sum, from *Decretum Gratiani* to *Liber Sextus* phenomenon of engagement was developing vigorously. Gratian considered betrothal as a part of the two-stage marriage process, where engagement is perceived as an initiated marriage, and as a promise of the future marital bond. Engagement in *Decretum* does not include a binding power. The consent plays an essential role in contracting engagement. The assent is required to be free of *error personae* and *error conditionis*, and includes parental control over the contracted bond. Huguccio in

his commentary to *Decretum* shifts from *matrimonium initiatum* to distinguishing between *desponsatio de futuro et de praesenti*, following Peter Lombard. Solemnity does not appear to be a necessity to Huguccio, and to Master Gratian. The commentator, unlike Gratian, considers only *error personae* as impeding to a valid engagement. Dowry and subarration seem to be of a minor importance to both Gratian and Huguccio; the same, nevertheless, cannot be stated about another commentator of *Decretum*, Johannes Teutonicus, who follows *The Saxon Mirror* perception of the dowry as an important part in contracting engagement. For Gregorian collection *Liber Extra*, age is a constant value, which defines the validity of consent, and, thereafter, binding power of engagement itself. The age is closely related to notion of discretion, and ability to discern and decide. Commenting on *Liber Extra* in his *Apparatus* Pope Innocent IV goes further in distinguishing between kinds of engagement and considers subarration an essential element in betrothal. For him, as well as for Pope Boniface VIII, consent of the parties, given at the age above 7, and free of conditions creates valid engagement, which has a binding power, and, thereafter impedes any further unions on grounds of *publice honestatis iustitia*. From c. 1140 (*Decretum*) until 1298 (*Liber Sextus*) engagement made its way from family controlled union to a free will contract. The age has played the significant role in its process, as being a constant value it ensured a consent freed from family control.

Bibliography

Manuscripts

Admont, Stiftsbibliothek MS 7 [*Summa decretorum*]

Primary Sources

1. *Apparatus in quinque libros Decretalium*. Frankfurt, 1570.
2. *Corpus iuris canonici*. ed., Emil Friedberg. 2 vols. Leipzig, 1879-1881 (Graz, 1955-1959).
3. *Decretales de Gregorii Papae IX. suae integritati una cum glossis restitutae*. Luca Antonio Giunta [printer]. Venetiis, 1595.
4. Eike von Repgow. *Der Sachsenspiegel Landrecht*, ed. K.A. Eckhardt. Göttingen, 1973.
5. Eike von Repgow. *Der Sachsenspiegel*. Übersetzt von Ruth Schmidt-Wiegand und Clausdieter Schott. Zürich, 1984.
6. Gratianus <de Clusio>: *Decretum mit der Glossa ordinaria von Johannes Teutonicus in der Bearbeitung von Bartholomaeus Brixiensis*. Venedig, 1477.
7. *Henrici a Segusio Cardinalis Hostiensis. Aurea summa*. Niccolò Soranzo; Lazarus Zetzner [printers]. Coloniae, 1612.
8. *Liber Sextus decretalium d. Bonifacii Papae VIII. Una cun Clementinis, et Extravagantibus earumque Glossis restitutus. Suae integritati*. Venetiis, 1595.

Encyclopedias

1. Bornstein, Diane. 1983. Betrothal. In *DMA* 2: 207-8.
2. Chodorow, Stanley. 1986. Law, Canon: after Gratian. In *DMA* 7: 413- 17.
3. Höhl, Norbert. 1992. Johannes Teutonicus. In *LMA* 5: 608.
4. Kölzer, Theo. 1995. Gregor IX. In *LThK* 6: 1019.
5. Kroeschell, Karl. 1999. Verlobung. Verlöbnis. In *LMA* 8: 1549.
6. Kuehn, J. 1986. Law Schools. In *DMA* 7: 512- 17.
7. Kuttner, Stephan. 1974. Johannes Teutonicus. In *Neue deutsche Biographie* 10: 571-73.
8. Le Bras, Gabriel. 1937. Bernard de Pavie. In *DDC* 2: 782-89.
9. Liotta, Filippo. 1967. Bernardo di Pavia. In *DBI* 9: 279-84.
10. Paravicini Bagliani, Agostino. 2004. Innocenzo IV. In *DBI* 62: 435-40.
11. Pennington, Kenneth. 2002. Innocent IV. In *The New Catholic Encyclopedia* 7:473-6.
12. Roberg, Bukhard. 1989. Gregor IX. In *LMA* 4:1671-2.
13. Schmidt, Tillmann. 1983. Bonifatius VIII. In *LMA* 2: 414-6.
14. Schott, C. 1986. Ehe. Deutsches und germanisches Recht. In *LMA* 3: 1629-30.
15. Stelling-Michaud, Sven. 1957. Jean le Teutonique. In *DDC* 6: 120-2.
16. Vodola, Elizabeth. 1985. Hostiensis. In *DMA* 6: 298-9.
17. Vodola, Elizabeth. 1985. Innocent IV, pope. In *DMA* 6: 465-7.
18. Vones, Ludwig. 1994. Bonifatius VIII. In *LThK* 2: 579-81.

19. Wolter, Hans. 1981. Bonifatius VIII. In *TRE* 7: 66-68.
20. Wood, Charles. 1982. Boniface VIII, Pope. In *DMA* 2: 323-4.
21. Zapp, Hartmut. 1983. Bartholomeus Brixiensis. In *LMA* 2: 1494.

Reference list

1. Alesandro, John. 1971. Gratian's Notion of Marital Consummation. Excerpts from a Dissertation submitted in partial fulfillment of the Requirements for the Degree of Doctor of Canon Law. PhD diss., Rome: Università Gregoriana Editrice.
2. Amira, Karl. 1913. *Grundriss des germanischen Rechts*. Strassburg: Verlag von Karl J. Trübner.
3. Antoine, Philippe. 1992. *Le mariage: droit canonique et coutumes africaines*. Collection *Théologie historique* 90. Paris: Beauchesne.
4. Avray, David. 2002. Marriage Ceremonies and the Church in Italy after 1215. In *Marriage in Italy 1300-1650*, ed. Trevor Dean, and K. J. P. Lowe, 107-116. Cambridge: University Press.
5. Avray, D avid. 2015. Making and Breaking Betrothal Contracts (*Sponsalia*) in Late Trecento Florence. In *Marriage, Dowry and Citizenship in Late Medieval and Renaissance Italy*, ed. Julius Kirshner, 20-55. Toronto: University of Toronto Press.
6. Bertram, Martin. 1985. Angebliche Originale des Dekretalenapparats Innocenz IV. *Proceedings of the Sixth International Congress of Medieval Canon Law. MIC, Series C.7*: 41-8
7. Bertram, Martin. 2002. Die Dekretalen Gregors IX. (1234): Kompilation oder Kodifikation? In *Magister Raimundus: Atti del Convegno per il IV centenario della*

Canonizzazione di San Raimondo de Penyafort (1601-2001), ed. Carlo Longo. Roma: Institutum Historicum Fratrum Praedicatorum.

8. Bertram, Martin. 2002. Zwei vorläufige Textstufen des Dekretalenapparats Papst Innozenz IV. In *Juristische Buchproduktion im Mittelalter*, ed. Vincenzo Colli, 431-479. Frankfurt am Main: Klostermann.
9. Bertram, Martin. 2006. Die Extravaganten Gregors IX. und Innocenz' IV. *ZRGKA*, 92: 1-44
10. Bertram, Martin. 2014. Signaturenliste der Handschriften der Dekretalen Gregors IX.: (*Liber Extra*). Neubearbeitung April, 2014. Accessed March 10, 2013. Available from http://www.dhi-roma.it/bertram_extrahss.html .
11. Brem, Ernst. 1911. *Papst Gregor IX. bis zum Beginn seines Pontifikats. Ein biographischer Versuch*. Seidelberg: Karl Winter's Universitätsbuchhandlung.
12. Brooke, Christopher, N.L. 1989. *The Medieval Idea of Marriage*. Oxford: University Press.
13. Brundage, James. 1986. Marriage and Sexuality in the Decretals of Pope Alexander III. *Miscellanea Rolando Bandinelli Papa Alessandro III*, ed. Filippo Liotta, 59-83. Siena.
14. Brundage, James. 1987. *Law, Sex, and Christian Society in Medieval Europe*. Chicago: The University of Chicago Press.
15. Brundage, James. 1993. Implied Consent to Intercourse. In *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, ed. Angeliki E. Laiou, 245-256. Washington, D.C: Dumbarton Oaks Research Library and Collection.
16. Brundage, James. 2011. *E pluribus unum: Custom, the Professionalization of Medieval Law, and Regional Variations in Marriage Formation*. In *Regional*

- Variations in Matrimonial Law and Custom in Europe, 1150-1600*, ed. Mia Korpiola, 21-43. Leiden: Brill.
17. Brunner, Heinrich. 1903. *Grundzüge der deutschen Rechtsgeschichte*. Leipzig: Verlag von Duncker & Humblot.
 18. Cantelar, F. Rodriguez. 1969. Bernardus Papiensis: "Doctor meus Hugo": Huguccio of Pisa or Hugo de San Victor? *ZRG*, 55: 448-457.
 19. Carlyle, J. Alexander. 1928. *A History of Medieval Political Thought in the West. Volume V: The Political Theory of the Thirteenth Century*. Edinburgh and London: W. Blackwood and sons.
 20. Catalano, Gaetano. 1954. Contributo alla biografia di Ugucione Pisano. *Il diritto ecclesiastico*, 65: 3-67.
 21. Christensen, Katherine. 2012. *The Treatise on Laws (Decretum DD. 1-20) with the Ordinary Gloss. Studies in Medieval and Early Modern Canon Law*. Washington: The Catholic University of America Press.
 22. Cipriani, Don. 2009. *Children's Rights and the Minimum Age of Criminal Responsibility. A Global Perspective*. Burlington: Ashgate Publishing Company.
 23. Classen, P. 1978. Das *Decretum Gratiani* wurde nicht in Farentino approbiert. *BMCL*, 8: 38-40
 24. Dauvillier, Jean. 1933. *Le mariage dans le droit classique de l'Eglise, depuis le Decret de Gratien (1140), jusqu'à la mort de Clement V (1314)*. Paris.
 25. Dobozy, Maria. 1999. *The Saxon Mirror: A "Sachsenspiegel" of the Fourteenth Century*. Philadelphia, Pennsylvania: University of Pennsylvania Press.

26. Donahue, Charles Jr. 2007. *Law, Marriage, and Society in the Later Middle Ages: Arguments About Marriage in Five Courts*. New York: Cambridge University Press.
27. Donahue, Charles Jr. 1976. The Policy of Alexander the Third's Consent Theory of Marriage. *MIC*, Series C 5: 251-81.
28. Donahue, Charles Jr. 1982. The Dating of Alexander the Third's Marriage Decretals: Dauvillier Revisited after Fifty Years. *ZRG Kan.*, 68: 70-124.
29. Donahue, Charles. 1996. The Monastic Judge. *SG* 27: 49-60.
30. Donahue, Charles Jr., 2006. Jr. Johannes Faventius on Marriage. (With an Appendix Revisiting the Question of the Dating of Alexander III's Marriage Decretals). In *Medieval Church Law and the Origins of the Western Legal Tradition. A Tribute to Kenneth Pennington*, ed. Wolfgang P. Müller, and Mary E. Sommar, 179-200. Washington, D.C: The Catholic University of America Press.
31. Duggan, Anne. 2012. Master of the Decretals: A Reassessment of Alexander III's Contribution to Canon Law. In *Pope Alexander III (1159-1181). The Art of Survival*, ed. Peter D. Clarke, and Anne J. Duggan, 365-417. Burlington: Ashgate Publishing Company.
32. Eckhardt, Karl August. 1966. *Eike von Repgow und Hoyer von Valkenstein*. Göttingen.
33. Eisenring, Gabriela. 2002. *Die römische Ehe als Rechtsverhältnis*. Wien: Böhlau.
34. Esmein, Adhémar. 1891. *Le mariage en droit canonique*. Paris: Larose et Forcel.
35. Fansa, Mamoun. 1995. *Der sassen Speyghel. Sachsenspiegel-Recht-Alltag. Band 2: Beiträge und Katalog zur Ausstellung aus dem Leben geggriffen – ein Rechtsbuch spiegelt seine Zeit*. Oldenburg.

36. Fischer, Katherine Drew. D. 1976. *The Burgundian Code: Book of Constitutions or Law of Grundobad. Additional Enactments*. Pennsylvania: The University of Pennsylvania Press
37. Fischer, Andreas. 2013. Personelle Verflechtung und politisches Handeln: zur Wahrnehmung und Funktion Kardinalizischer Beziehungen im 13. Jahrhundert. In *Die Kardinäle des Mittelalters und der frühen Renaissance*, ed. Ralf Lützelshwab, 15-36. Firenze: Edizioni del Galluzzo.
38. Fliege, Jutta. 1982. *Die Handschriften der ehemaligen Stifts- und Gymnasialbibliothek Quedlinburg in Halle*. Halle
39. Foley, Michael. 2003. Betrothals: their past, present and future. *Studia liturgica: An international Ecumenical Review for Liturgical Research and Renewal* 33 (1): 37-61.
40. Fransen, Gérard. 1971. La formation du lien matrimonial au moyen-âge. *RDC* 21: 106-126.
41. Fransen, Gérard. 1956. La date du Decret de Gratien. *RHE* 51: 521-31.
42. Fransen, Gérard. 1965. La tradition manuscrite de la "Compilatio prima." *MIC* 1: 55-62.
43. Fransen, Gérard. 1972. *Les décrétales et les collections de décrétales. Typologie des Sources du Moyen Âge occidental* 2. Turnhout.
44. Freisen, Joseph. 1961. *Geschichte des Canonischen Eherechts bis zum Verfall der Glossenlitteratur*. Tübingen: Verlag und Druck von Franz Fues.
45. Friedberg, Emil. 1865. *Das Recht der Eheschließung in seiner geschichtlichen Entwicklung*. Leipzig.

46. Friedberg, Emil. 1876. *Verlobung und Trauung, zugleich als Kritik von Sohm: Das Recht der Eheschließung*. Leipzig.
47. Gastaldelli, Ferruccio. 1977. Le Sententiae di Pietro Lombardo e l'Epositio de symbolo apostolorum di Uguccone da Pisa. *Salesianum* 39: 318-21.
48. Gaudemet, Jean. 1961. Das römische Recht in Gratians Dekret. *Österreichisches Archiv für Kircherrecht* 12: 177-91.
49. Gaudemet, Jean. 1967. La définition romano-canonique du mariage. *Speculum Iuris et Ecclesiarum. Festschrift für Willibald M. Plöchl zum 60. Geburtstag*, ed. Hans Lentze und Inge Gampl, 107-114. Vienne :VerlagHerder.
50. Gaudemet, Jean. 1976. Sur trois “dicta Gratiani” relatifs au “matrimonium ratum”. *Études de droit et d’histoire: Mélanges Mgr. H. Wagnon*, 543-55. Leuven/Louvain-La Neuve: Facultée internationale de droit canonique.
51. Gaudemet, Jean. 1987. *Le mariage en occident. Les moeurs et le droit*. Paris: Cerf
52. Gaudemet, Jean. 1966. Droit canonique et droit romain. A propos de l’erreur sur la personne en matière de mariage (C. XXIX, qu. 1). *SG* 9: 47-64.
53. Gaudemet, Jean. 1965. Le droit romain dans le pratique et chez les docteurs aux Xle et XII e siècles. *Cahiers de Civilisation médiévale* 8, no. 3: 365-80.
54. Gillmann, Franz. 1914. Die Abfassungszeit der Dekretsumme Huguccios. *AKKR* 94: 233-51.
55. Gillmann, Franz. 1920. *Zur Lehre der Scholastik vom Spender der Firmung und des Weihesakraments*. Padeborn: F. Schöningh.
56. Gillmann, Franz. 1936. Wer ist der Verfasser der Compilatio IV? *ZSRGK* 116: 127-57.

57. Gillmann, Franz. 1937. Hat Johannes Teutonicus zu den Konstitutionen des 4. Laterankonzils (1215) als solchen einen Apparat verfaßt? *ZSRGK* 117: 453-66.
58. Gottschalk, Gustav. 1997. *Über den Einfluss des römischen Rechts auf das kanonische Recht : resp. das kanonische Rechtsbuch*. Aalen: Scientia.
59. Grimm, Benno. 1989. *Die Ehelehre des Magister Honorius: Ein Beitrag zur Ehelehre der anglo-normannischen Schule*. Roma: Libreria Ateneo Salesiano.
60. Grimm, Jacob. 1854. *Deutsche Rechtsalterthümer*. Göttingen: In der Dietrichschen Buchhandlung.
61. Hanenburg (Sneak) Jacoba J. H. M. 1966. Decretals and Decretal Collections in the Second Half of the twelfth century. *TRG* 34: 552-99.
62. Helmholz, Richard H. 1974. *Marriage Litigation in Medieval England*. Cambridge: Cambridge University Press.
63. Heusler, Andreas. 1885. *Institutionen des deutschen Privatrechts*. Leipzig.
64. Homeyer, Karl Gustav. 1856. *Die deutschen Rechtsbücher des Mittelalters und ihre Handschriften*. Berlin: Dümmler.
65. Hörmann, Walther. 1891. *Die desponsatio impuberum. Ein Beitrag zur Entwicklungsgeschichte des canonischen Eheschliessungsrechtes*. Innsbruck: Verlag der Wagnerschen Universitäts-Buchhandlung.
66. Huber, Josef. 1977. *Der Ehekonsens im Römischen Recht. Studien zu seinem Begriffsgehalt in der Klassik und zur Frage seines Wandels in der Nachklassik*. Roma: Università Gregoriana Editrice.
67. Huebner, Rudolf. 1918. *A History of Germanic Private Law. Translated by Francis S. Philbrick*. Boston: Little, Brown, and Company.

68. Izbicki, Thomas M. 1988. The Problem of Canonical Portion in the later Middle Ages: The Application of *Super cathedram*. *Proceedings of the Seventh International Congress of Medieval Canon Law*. MIC Series C 8: 459-73.
69. Joyce, Hayrward Joyce. 1934. *Die christliche Ehe. Eine geschichtliche und dogmatische Studie*. Leipzig: Verlag von Jacob Hegner.
70. Karras, Ruth M. 2006. The History of Marriage and the Myth of Friedelehe. *Early Medieval Europe* 14: 119-51.
71. Kay, Richard. (1971). *Ad nostram praesentiam evocamus*. Boniface VIII and the Roman convocation of 1302. *Proceedings of the Third International Congress of Medieval Canon Law*. MIC Series C 4: 165-84.
72. Kejř, Jirí. 1965. La genèse de l'apparat 'Ordinaturus' au Décret de Gratien. *Proceedings of the Second International Congress of Medieval Canon Law*. Boston College, 1963. MIC Series C 1: 45-53.
73. Kelly, Henry Ansgar. 2004. *The Matrimonial Trials of Henry VIII*. Eugene, Oregon: Wipf and Stock Publishers.
74. Koschoereck, Walter. 1993. *Der Sachsenspiegel in Bildern aus der Heidelberger Bilderhandschrift*. Leipzig: Insel.
75. Kraut, Wilhelm Teodor. 1847. *Die Vormundschaft nach den Grundsätzen des deutschen Rechts*. Göttingen.
76. Kroeschell, Karl. 1991. Der Sachsenspiegel im Neuen Licht. In *Rechtsgeschichte in den beiden deutschen Staaten. Parallelen, Beispiele, Positionen*, ed. Hanz Mohnhaupt, 231-45. Frankfurt am Main: Klostermann.

77. Kuttner, Stephan. 1932. Eine Dekretsumme des Johannes Teutonicus. *ZSRGK* 21: 141-89
78. Kuttner, Stephan. 1982. Raymond of Penyafort as editor: The "decretales" and "constitutiones" of Gregory IX'. *BMCL* 12: 65-80.
79. Kuttner, Stephan. 1960. *Harmony from Dissonance: An Interpretation of Medieval Canon Law*. Latrobe, Pennsylvania: St. Vincent Archabbey Press.
80. Landau, Peter. 2005. Der Entstehungsort des Sachsenspiegels Eike von Repgow, Alzelle und die anglo-normannische Kanonistik. *Deutsches Archiv* 61: 73-101.
81. Landau, Peter. 1999. Patristische Texte in den Beiden Rezensionen des Decretum Gratiani. *BMCL* 23: 77-84.
82. Larrainzar, Carlos. 1981. La distinction entre "fides pactionis" y "fides consensus" en el "Corpus iuris canonici." *Ius canonum* 21: 31-100.
83. Le Bras, Gabriel and Lefebvre, Charles. 1965. *L'age classique 1140-1378. Sources et théorie du droit, tome 7*. Paris: Sirey.
84. Leonardi, C. 1956. La vita e l'opera di Ugucione da Pisa decretista. *SG* 4: 39-120.
85. Liotta, Filippo. 1971. *La Continenza dei Chierici nel Pensiero Canonistico Classico, da Graziano a Gregorio IX*. Milano: Dott. A. Giuffrè Editor.
86. Loehning, Edgar. 1878. *Das Kirchenrecht im Reiche der Merowinger*. Strassburg: Verlag von Karl J. Trübner.
87. Maleczek, Werner. 1984. *Papst und Kardinalskolleg von 1191-1216. Die Kardinäle unter Coelestin III. und Innocenz*. Wien: Verlag der Österreichischen Akademie der Wissenschaften.

88. Maleczek, Werner. 1985. Das Papstum und die Anfänge der Universität im Mittelalter. *Römische Historische Mitteilungen* 27: 85-143.
89. Maleczek, Werner. 2011. *Gregorio IX e gli ordini mendicanti. Atti del XXXVIII Convegno internazionale. Assisi, 7-9 ottobre 2010*. Spoleto : Fondazione Centro italiano di studi sull'Alto Medioevo.
90. Muldoon, James. 1971. Boniface VIII's Forty Years of Experience in the Law. *The Jurist* 31: 449-477.
91. Nieuwenhuisen, Kathleen. 2012. The Consent in Pictures. Marriage Representations in Medieval Manuscripts of the Liber Extra (1250-1400). In *Decretales pictae. Le miniature nei manoscritti del le Decretal i di Gregorio IX (Liber Extra)*. Atti del colloquio internazionale tenuto all'Istituto Storico Germanico Roma 3-4 marzo 2010, ed. Martin Bertram, Silvia Di Paolo, 136-158. Roma: Università degli Studi Roma Tre.
92. Noonan, John T. Jr. 1967. Marital Affection in the Canonists. *SG* 12: 479-509.
93. Noonan, John T. Jr. 1973. Power to Choose. *Viator* 4: 419-43.
94. Noonan, John T. Jr. 1997. *Canons and Canonists in Context*. Goldbach: Keip.
95. Noonan, John T. Jr. 1970. The Steady Man: Process and Policy in the Courts of the Roman Curia. *California law Review* 58: 628-700.
96. Noonan, John. T. Jr. 1976. Was Gratian Approved at Farentino? *BMCL* 6: 15-27.
97. Noonan, John T. Jr. 1979. Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law. *Traditio* 35: 145-72.

98. Pacaut, Marcel. 1960. L'Autorité pontificale selon Innocent IV. *Moyen-âge* 66: 85-119.
99. Pennington, Kenneth. 1983. Johannes Teutonicus and Papal legates. *AHP* 21: 183-94.
100. Pennington, Kenneth. 1993. *Popes, Canonists, and Texts, 1150-1550*. Oxford: Routledge.
101. Pennington, Kenneth. 1983. The epitaph of Johannes Teutonicus. *BMCL* 13: 61-2.
102. Pennington, Kenneth. 2008. *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*. Washington, D.C.: The Catholic University of America Press.
103. Piergiovanni, Vincenzo. 1969. Sinibaldo Fieschi decretista. *SG* 14: 125-54.
104. Plöchl, Willibald Maria. 1955. *Geschichte des Kirchenrechts. Bd. 2. Das Kirchenrecht der abendländischen Christenheit 1055 bis 1517*. Wien: Verlag Herold.
105. Puttkamer, Gerda. 1930. *Papst Innocenz IV. Versuch einer Gesamtcharakteristik aus seiner Wirkung*. Münster: Helios Verlag.
106. Rambaud-Buhot, Jacqueline. 1963. Les paleae dans le Décret de Gratien. *Proceedings of the Second International Congress of Medieval Canon Law. Boston College, MIC Series C* 1: 23-44
107. Reno, Edward Andrew. 2011. The Authoritative Text: Raymond of Penyafort's editing of the Decretals of Gregory IX. PhD. Diss., Columbia University.

108. Resnick, I. M. 2000. Marriage in Medieval Culture: Consent Theory and the Case of Joseph and Mary. *Church History* 69, no. 2: 350-71.
109. Reynolds, Philip. L. 1994. *Marriage in the Western Church. The Christianization of Marriage during the Patristic and Early Medieval Periods*. New York: E.J. Brill.
110. Scheurl, Adolf. 1877. *Die Entwicklung des kirchlichen Eheschließungsrechts*. Erlangen: Deichert.
111. Schmidt, Tilmann. 1992. Papst Bonifaz VIII. als Gesetzgeber. *Proceedings of the Eighth International Congress of Medieval Canon Law. MIC Series C* 9: 227-45.
112. Schulte, Friedrich Johannes. 1877. *Die Geschichte der Quellen und Literatur des canonischen Rechts von Papst Gregor IX. bis zum Konzil von Trient. Band.II*. Stuttgart: Verlag von Ferdinand Enke.
113. Schulte, Friedrich Johannes. 1881. Johannes Teutonicus (Semeca, Zemeke). *ZKG* 16: 107-32.
114. Sehling, Emil. 1887. *Die Unterscheidung der Verlöbnisse im kanonischen Recht*. Leipzig: Veit
115. Sheehan, Michael M. 1996. *Maritalis affectio* Revisited. In *Marriage, Family, and Law in Medieval Europe: Collected Studies*, ed. J.K. Farge, 262-77. Toronto: University of Toronto Press.
116. Sheehan, Michael M. 1996. Theory and Practice: Marriage of the Unfree and the Poor in Medieval Society. In *Marriage, Family, and Law in Medieval Europe: Collected Studies*, ed. by J.K. Farge, 211-46. Toronto: University of Toronto Press.

117. Sheehan, Michael M. M. (1996). Choice of Marriage Partner in the Middle Ages: Development and Mode of Application of a Theory of Marriage. In *Marriage, Family, and Law in Medieval Europe: Collected Studies*, ed. by J.K. Farge, 87-117. Toronto: University of Toronto Press.
118. Sohm, Rudolf. 1875. *Das Recht der Eheschließung*. Weimar: Hermann Böhlau.
119. Sohm, Rudolf. 1876. *Trauung und Verlobung*. Weimar: Hermann Böhlau.
120. Somerville, Robert. 2006. A Fragment of Compilatio prima at Columbia University. In: *Medieval Church Law and the Origins of the Western Legal Tradition*, ed. Wolfgang P. Müller, and Mary E. Sommar, 154-59. Washington, D.C.: The Catholic University of America Press.
121. Treggiari, Sarah. 1993. *Roman Marriage. Iusti Coniuges from the Time of Cicero to the Time of Ulpian*. Oxford: Clarendon Press.
122. Ulmann, Walter. 1976. Boniface VIII and His Contemporary Scholarship. *The Journal of Theological Studies* 27: 58-87.
123. Vetulani, Adam. 1990. Autour du Décret de Gratien. In *Sur Gratien et Décrétales*, éd. W. Uruszczak, 43-58. Norfolk: Great Yarmouth.
124. Vetulani, Adam. 1948. Encore un mot sur le droit romain dans le Décret de Gratien. *Apollinaris. Commentarius iuris canonici* 21: 129-34.
125. Vetulani, Adam. 1990. Gratien et le droit romain. Autour du Décret de Gratien. In *Sur Gratien et Décrétales*, éd. W. Uruszczak, 11-48. Norfolk: Great Yarmouth.
126. Vogel, Peter. 1939. Nikolaus von Calvi und seine Lebensbeschreibung des Papstes Innozenz IV. Mit besonderen Berücksichtigung der

Friedensverhandlungen zwischen Papst Innozenz IV. und Kaiser Friedrich II. in den Jahren 1243-44. PhD. Diss, Münster.

127. Waley, Daniel. 1961. *The Papal State in the Thirteenth Century*. London: Macmillan.
128. Watt, John A. 1965. *The Theory of Papal Monarchy in the Thirteenth Century. The Contribution of the canonists*. New York: Fordham University Press.
129. Weber, Ines. 2001. ‚*Consensus facit nuptias*‘. Überlegungen zum ehelichen Konsens in normativen Texten des Frühmittelalters. *ZRG* 87: 31-66.
130. Weigand, Rudolf. 1970. Unauflöslichkeit der Ehe und Eheauflösungen durch Päpste im 12. Jahrhundert. *RDC* 20: 44-64.
131. Weigand, Rudolf. 1963. Die bedingte Eheschliessung im kanonischen Recht. *Münchener Theologische Studien* 16: 241-60.
132. Weigand, R Rudolf. 1963. Johannes Teutonicus. *Münchener Theologische Studien* 16: 379-87.
133. Weigand, Rudolf. 1967. Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus. *Münchener Theologische Studien* 26: 215-23.
134. Weigand, Rudolf. 1976. Bazianus- und B.-Glossen zum Dekret Gratians. *SG* 20: 477-90.
135. Weigand, Rudolf. 2008. The Development of the Glossa ordinaria to Gratian's Decretum. Glossa ordinaria of Johannes Teutonicus. The Revised Recension of the Glossa ordinaria by Bartholomaeus Brixiensis. In *The History of*

- Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Kenneth Pennington, 83-91. Washington, D.C.: The Catholic University of America Press.
136. Weigand, Rudolf. 1976. Die Glossen zum Dekretum Gratians. *SG* 26: 608-12.
137. Wemple, Suzanne Foney. 1993. Consent and Dissent to Sexual Intercourse in Germanic Societies from Fifth to the Tenth Century. In *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, ed. Angeliki E. Laiou, 227-43. Washington D.C. Dumbarton Oaks Research Library and Collection.
138. Westphal, Sarah. 2002. Bad Girls in the Middle Ages: Gender, Law, and German Literature. *Essays in Medieval Studies* 19: 103-19.
139. Wetzstein, Thomas. 2006. Resecatis superfluis? Raymund of Peñafort und der *Liber Extra*. *ZRGKA* 92: 355-91.
140. Winroth, Anders. 2006. Neither Slave nor Free: Theology and Law in Gratian's Thoughts on the Definition of Marriage and Unfree Persons. *Medieval Church Law and the Origins of the Western Legal Tradition*, ed. Wolfgang P. Müller, and Mary E. Sommar, 97-110. Washington, D.C.: The Catholic University of America Press.
141. Winroth, Anders. 2000. *The Making of Gratian's Decretum*. Cambridge: Cambridge University Press.
142. Winroth, Anders. 2004. Recent Work on the Making of Gratian's Decretum Lecture given at the XII International Congress of Medieval Canon Law. Washington D.C. *BMCL* 26: 1-29.

143. Winroth, Anders. 2009. Marital Consent in Gratian's *Decretum*. In *Readers, Texts and Compilers in the Earlier Middle Ages. Studies in Medieval Canon Law in Honour of Linda Fowler-Magerl*, ed. Martin Brett and Kathleen Cushing, 111-21. Burlington: Ashgate.
144. Zallinger, Otto. 1887. *Die Schöffenbarfreien des Sachsenspiegels*. Innsbruck: Wagner Verlag.
145. Zurowski, M. 1977. Les développement de la notion canonique de la celebration conditionelle du mariage. *Studia Canonica* 11, no. 1: 85-113.