

Natural obligations in Johannes Bassianus’ *Lectura Institutionum*

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1. Introduction

The early stages of the medieval reception of Roman law are particularly fascinating. They contain the beginning of the long bridge that connects Roman law with modern private law in several legal systems, both on the European continent and well outside it, like in South Africa, Japan and Latin America. The period before the formation of the Accursian Gloss is especially interesting, because so much remains to be discovered. The Gloss has come down to us in many manuscripts and in many early printed editions of the *Corpus Iuris Civilis* – it is eminently accessible. The same cannot be said for the works of the early Glossators, which were used by Accursius to select his commentary from. But they form an interesting world of contrasting opinions, about which we learn more every time one of these earlier works is discovered and edited. Six years ago, I had the good fortune of publishing the edition of the *Casus Codicis* of Wilhelmus de Cabriano¹, which made available the opinions of Wilhelmus’ master Bulgarus de Bulgarinis. Now I have a new project under way that this paper will serve to present. It is still in its early stages, so the reader will get a look at the problems that face the editor of a medieval Latin source text.

2. Johannes Bassianus’ *Lectura Institutionum*

Johannes Bassianus was – like Wilhelmus de Cabriano – a pupil of Bulgarus, and in turn was the master of Azo and of Nicolaus Furiosus, who was *reportator* of Johannes’ classes on the *Digestum novum*. Johannes Bassianus therefore belongs to the mainstream of Bolognese

¹ T.WALLINGA, *The Casus Codicis of Wilhelmus de Cabriano*. Frankfurt/Main 2005.

glossators². Another pupil of his, Karolus de Tocco, mentions Cremona as Johannes' place of birth, as does Odofredus. Apart from the fact that he died late in the twelfth or early in the thirteenth century, we have little information about him other than his works, which include glosses, *summae* and *lecturae* on all parts of the *Corpus iuris civilis*. Whether he is the same person as the canonist Bazianus († 1197) is a hotly debated question³.

A *lectura* is essentially a report of classes given on a part of the *Corpus iuris*, written by a student of the professor who gave the classes. The earlier *lecturae* (sometimes called *commenta*) tend to summarise the words of the lecturer to some extent and concentrate on the most important parts of the lectures; younger *lecturae* tend to be more literal in the rendering of what was said during the lectures. This *Lectura Institutionum* of Johannes Bassianus appears to be of the older type⁴. It is not mentioned as one of Johannes Bassianus' works by Savigny in the *Geschichte des römischen Rechts im Mittelalter*. It was known to D'Ablain from one of his own manuscripts at least by 1888⁵. Cortese edited some texts of the *lectura* from this manuscript⁶. The other manuscripts that contain this *Lectura* – or at least a considerable part of it – have only come to light in the course of the

² U.GUALAZZINI, *Bassiano, Giovanni*, in: *Dizionario biografico degli Italiani* 7, Rome 1965, 140–142; L.MAYALI, *Johannes Bassianus – Nachfolger des Vacarius in England?*, ZRG Rom. Abt. 99 (1982), 317–325; A.BELLONI, *Baziano, cioè Giovanni Bassiano, legista e canonista del secolo XII*, TvR 57 (1989) 69–85; A.GOURON, *A la convergence des deux droits: Jean Bassien, Baccianus et maître Jean*, TvR 59 (1991) 319–332; repr. in: *Miscellanea Domenico Maffei dicata*, Goldbach 1995, Vol 1, 129–142; A.BELLONI, *Giovanni consulente*, Ius Commune 21 (1994) 78–148; A.GOURON, *Un juriste in utroque au XIIe siècle?*, Ius Commune 22 (1995) 17–33; CH.DONAHUE JR., *Bassianus, that is to say, Bazianus? Bazianus and Johannes Bassianus on Marriage*, RIDC 14 (2003) 41–82.

³ This introduction on Johannes Bassianus and his *Lectura Institutionum* is slightly adapted from: Tammo Wallinga, *The actio vi bonorum raptorum in the Early Reception of Roman Law*. In: *IUS ROMANUM – IUS COMMUNE – IUS HODIERNUM*. Studies in honour of Eltjo J.H.Schrage on the occasion of his 65th birthday, edited by Harry Dondorp, Jan Hallebeek, Tammo Wallinga & Laurens Winkel. Aalen 2010, 411–427, at 412–415.

⁴ Cf. WALLINGA (*supra* n.1), xxvii–xxxii.

⁵ W.M.D'ABLAING, *Zur Bibliothek der Glossatoren*, ZRG Rom. Abt. 9 (1888), 13–42, on p.32–35.

⁶ E.CORTESE, *La norma giuridica. Spunti teorici nel diritto comune classico I–II* [Ius Nostrum 6,1–2], Milan 1962–1964, repr. 1995; two longer fragments on Inst.1.1 and Inst.1.2 are in part II, 410–415.

work on the *Repertorium der Legistik* at the Max-Planck-Institut in Frankfurt am Main around 1970⁷. Apart from the Leiden manuscript already mentioned, there are: Leipzig, Universitätsbibliothek 921; New Haven, Connecticut, Yale University, J.C. 817 no. 1, and Admont, Stiftsbibliothek 234, which appears to contain a more limited amount of text. Short fragments are preserved in two further manuscripts: London BM, Harley 4967 (fol. 2) and London BM Royal 4.B.II. I will provide basic information about each of them in turn.

*Leiden, Universiteitsbibliotheek, D'Ablaing 3 (Ld)*⁸.

This thirteenth-century manuscript of 56 folia contains the following works: the beginning of Pilius' *Quaestiones* (fol. 1ra–2rb), Johannes Bassianus' *Lectura Institutionum* (fol. 2va–20v), the *Summa Digestorum* of Hugolinus (fol. 21ra–40vb); the introduction to Johannes Bassianus' *Summa Authenticorum* (fol. 40vb), an anonymous *Summula* with the rubric *De agricolis et censitis* (fol. 40vb–41rb) and the *Summa trium librorum* of Placentinus, continued by Pilius (fol. 42ra–56rb).

In this Leiden manuscript, Johannes' *Lectura* appears as a continuous text, stretching over a total of 74 columns. The columns have 52 lines each. This corresponds to a modern edition of an estimated 100–150 pages, including the critical apparatus. Hopefully, it should not take more than two to three years to edit, even if three more manuscripts are involved. This, incidentally, is a blessing, because the quality of the text in the Leiden manuscript is not particularly good; in fact there are nothing but rather critical remarks about it in the secondary literature⁹. However, the presence of the other manuscripts should make it possible to emend the most obvious mistakes.

⁷ See P. WEIMAR, *Zum forschungsgeschichtlichen Ort und zum wissenschaftlichen Auftrag der Arbeitsgruppe "Legistik"*. *Ius Commune* 4 (1972) 28–50

⁸ W.M. D'ABLAING, *Zur Bibliothek der Glossatoren* (*supra* n.5); P.C. BOEREN, *Catalogue des manuscrits des collections D'Ablaing et Meijers*, Leiden 1970, 15–16.

⁹ D'ABLAING (*supra* n.5), 33: "Die Untersuchung wird erschwert durch den sehr fehlerhaften Text, in welchem besonders viele Auslassungen vorkommen, obwohl er sonst deutlich geschrieben ist". This is confirmed by P. TORELLI, *Glosse preaccursiane alle Istituzioni. Nota seconda: glosse di Bulgaro*, *Rivista di storia del diritto italiano* 15 (1942) 3–71, repr. in: P. ROTONDI, *Scritti di storia del diritto romano*, Milan 1959, 95–166, on 104 n.25, 124 n.102, 127 and 133; Cortese (*supra* n.6), vol. 2, 411 and 414.

Leipzig, Universitätsbibliothek, 921 (Lp)¹⁰

An Italian thirteenth-century manuscript containing Roffredus' *Libelli de iure civili* (2ra–104v); Johannes Bassianus' *Arbor actionum* (106v–107); Johannes de Blanoso's *Lectura Institutionum De actionibus* (108r–139v); Bagarottus' *Cavillationes* (140r–145r); his *Tractatus de falsis vel suspectis instrumentis* (145r) and his *Repetitiones* (145r–148v); finally the *Institutiones* with *authenticae* and glosses. The Institutes are on fol. 151ra–187ra. There are, in principle, only a few glosses, and up to fol. 156r the original older glosses have been erased to make room for the Glossa Ordinaria, which was however only written on the first page (151r). The original marginal text next to the Institutes appears to consist mainly of Johannes Bassianus' *Lectura*, written in the form of glosses, though some other glosses are present as well.

New Haven, Connecticut, Yale University, Law Library, J.C. 817 no.1 (N)¹¹

This early thirteenth-century manuscript contains the *Volumen parvum*: Authenticum (fol. 1ra–95vb), books 10–12 of the Codex Justinianus (fol. 96ra–143vb), and the Institutes (fol. 144ra–186ra), all with glosses. In the part containing the Institutes, the *Lectura Institutionum* of Johannes Bassianus has been added wherever the glosses left some room.

Admont, Stiftsbibliothek 234¹²

This manuscript contains the text of the Institutes on fol. 97ra–178va. On 97ra there is a text in the upper margin from the very beginning of Johannes Bassianus' *Lectura* ("Iustinianus christianissimus imperator..."). However, there are considerable differences with the text of the other manuscripts, and it does not appear to continue on the following pages. Whether any more texts from the *Lectura* have been incorporated in this manuscript has yet to be determined by comparison with the full transcription of the Leiden manuscript.

Short fragments of what may have been full texts similar to Leiden, D'Ablaing 3 are preserved in two further manuscripts: London BM, Harley 4967 (fol. 2) and London BM Royal 4.B.II (fol. 1–2, used as fly-leaves for another work). D'Ablaing has already

¹⁰ D'ABLAING (*supra* n.5), 41–42; G.DOLEZALEK, *Verzeichnis der Handschriften zum römischen Recht bis 1600* [unter Mitw. von Hans van de Wouw], Frankfurt 1972, ad Leipzig UB 921.

¹¹ DOLEZALEK, *ibidem*, ad New Haven, Connecticut, Yale University, Law Library, J.C. 817 no. 1.

¹² DOLEZALEK, *ibidem*, ad Admont, Stiftsbibliothek 234.

noted¹³ that apparently Johannes' *Lectura* existed in two forms: as an independent, continuous text as in his own (now Leiden) manuscript, and in the form of glosses to the text of the Institutes, as in the Leipzig manuscript (which he had seen); the same is the case in the New Haven manuscript and – with considerably fewer glosses – in the Admont manuscript (neither of which he knew).

The state of the project as this paper is being written is as follows. A full transcription of the Leiden manuscript has been made. Microfilms of the New Haven, Leipzig and Admont manuscripts are available but still need to be compared systematically with the full transcription to see where they contain fragments of the *Lectura*. These fragments then need to be transcribed as well. After that comes the most time-consuming part of the project: trying to establish the best possible text on the basis of the manuscript evidence. This can only be done for small logical units of text at a time. In this paper, the *Lectura* on the title Inst. 1,21 *De auctoritate tutorum* will be edited as an example.

3. Natural obligations

The theme of the SIHDA-congress of 2011 was "*L'obligation dans les droits de l'Antiquité, de la source à l'exécution*". Against this background, I would like to give some attention to natural obligations, *obligationes naturales*, which are an intriguing phenomenon. In classical Roman law, in principle, there can only be an obligation if there is an action available to enforce it – the material right (the obligation) results from the procedural possibility, from the existence of an action. To that extent, a natural obligation, for which there is no action available, is something of an anomaly. Still, it had a very real existence, since it could be strengthened by a surety or a pledge, could be subject to *compensatio* or *novatio*, and discharging it could not be seen as payment undue. All this calls for a certain level of abstract thinking among Roman jurists and bears witness to their abilities. Not that all modern Romanists were keen to admit this. During the heyday of interpolation criticism there was a strong tendency to pass *obligationes naturales* off as a degenerate Byzantine invention. In his

¹³ D'ABLAING (*supra* n.5), 42.

dissertation on natural obligations of 1931, Scholtens¹⁴ noted that as a result of this interpolation criticism, much uncertainty existed about the natural obligations in classical Roman law, and as a result he happily went on to work on their medieval reception, which was a far less controversial – and far less studied – topic.

Nowadays there is no longer any serious doubt that certain cases of natural obligations were already recognised in classical Roman law¹⁵. Nevertheless, there was a development in terms of the situations that gave rise to an *obligatio naturalis*. The first recognised ones appear to have been the commercial transactions of people under another's authority. Slaves, children *in mancipio* and female persons under the authority (*potestas* or *manus*) of the *pater familias* cannot bind themselves under *ius civile*, but the debts resulting from their transactions are considered *naturales obligationes*. The praetor may grant *actiones adiecticiae qualitatis* against the *pater familias*. A son *in potestate* may bind himself and be convicted, but the conviction cannot be enforced because of the *patria potestas*; his debt also counts as a *naturalis obligatio*. Obligations of others towards persons under someone's authority, when the latter are unable to bring a claim or execute a judgment are also considered natural obligations. Then there are the cases of contracts between a *paterfamilias* and persons under his authority, or of the latter among themselves: they are not recognised by civil law, but count as *obligationes naturales* when there is a *peculium*¹⁶.

More cases of natural obligations are added to these in the course of the classical period of Roman law. The obligation incurred by a ward without the authority of his *tutor* is an *obligatio naturalis*, probably since a rescript of Antoninus Pius. The same goes for a debt extinguished by *capitis deminutio*. There are several cases in which an *obligatio naturalis* remains after the full force of an obligation has been canceled by some event, like the consumption of an action

¹⁴ J.E.SCHOLTENS, *De geschiedenis der natuurlijke verbintenissen sinds het Romeinsche recht*. Groningen-Den Haag-Batavia 1931, 2-7.

¹⁵ An important work, critical about the extreme views of interpolation criticism, is A.BURDESE, *La nozione classica di naturalis obligatio*, Torino [1955]. See also P.Cornioley, *Naturalis obligatio. Essai sur l'origine et l'évolution de la notion en droit romain*. Genève 1964.

¹⁶ M.KASER, *Das römische Privatrecht*, Vol. 1, Munich 1971 (= KASER I), 204; 287; 343, 480-481; 605; 607.

through *litiscontestatio*, or after someone is wrongly acquitted in legal proceedings, or in cases of extinction of an obligation through *confusio*. *Obligatio naturalis* is also used, probably already in classical times, for a debt frustrated by an *exceptio*, e.g. in the case of the *SC Macedonianum*. The same is likely to be the case for the informal agreement to pay interest¹⁷.

In post-classical times, natural obligations became more important. This was caused on the one hand by the transition in procedural law to the *extraordinaria cognitio*, which was not determined by a series of specific actions, as the procedure *per formulas* had been; on the other hand, there was an important influence of ethics on law, which helped to give more consideration to legal relationships that were not obligations in strict civil law terms. There appears to be a distinct influence of the Eastern school of law here. Donations by way of reward were seen as *obligationes naturales* in this school. The old rule *nuda pactio obligationem non parit, sed parit exceptionem* applied less and less, as *pacta* came to be considered binding in some way more and more often. Finally, some purely moral duties came to be regarded as *naturales obligationes*, e.g. the duty to leave something to certain relatives in one's will¹⁸.

The *obligatio naturalis* became even more important during the reception of Roman law in the Middle Ages, in the time of the Glossators. The dissertation of Scholtens, already mentioned above, is a pioneering work on this topic. Scholtens notes that the Glossators turned the *obligatio naturalis* into a cornerstone of their doctrine on contractual obligations. They made a distinction between *obligatio naturalis* or *debitum naturale*, based on *ius naturale* or *ius gentium* on the one hand, and the *obligatio civilis* or *debitum civile*, based on the *ius civile*, on the other. This leads to four possible positions: either there is no obligation at all, neither *naturalis* nor *civilis*, or there is an obligation that is both *obligatio naturalis* and *civilis*, and there are the *obligatio naturalis tantum* and the *obligatio civilis tantum*. An example of the latter – though not all Glossators agree on this point – is the case of someone who, expecting to receive money as a loan, has already bound himself to pay back the loan by way of *stipulatio* or

¹⁷ KASER I, 481; 498; 532; 663 note 35.

¹⁸ M.KASER, *Das römische Privatrecht*, vol. II, Munich 1975 (= KASER II), 60-61; 335; 340 n.39; 364 n.19; 370; 400; 449 n.5; 516 n.8.

chirographum. As long as he has not received the money, he is bound *civiliter* but not *naturaliter*. The typical example of the *obligatio naturalis tantum* is the *pactum nudum*¹⁹. For most of the Glossators, the *pactum nudum* became the basis of their theory on contract law: in theory, it should be binding purely on the basis of *aequitas*, but the closed Roman contract system required an additional element if a civil action was to be granted. In the medieval view, a *pactum nudum* could be reinforced by a *causa*, which would add an *obligatio civilis* to the *obligatio naturalis* – Placentinus was to substitute the *causa pacti* by the *vestmentum pacti*, which had essentially the same effect.

Scholtens worked with medieval sources that had been edited in printed editions; he does not appear to have consulted any manuscripts. This implies that his work may be further elaborated and enhanced on the basis of manuscript sources not available to him at the time. The *lectura Institutionum* of Johannes Bassianus is one such source, and it will be interesting to see what it has to offer on the subject of natural obligations. This paper cannot treat more than one such case; this is the commentary on title Inst.1.21 *De auctoritate tutorum*. It is a short title which we will quote in full:

Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria. ut ecce si quid dari sibi stipulentur, non est necessaria tutoris auctoritas: quod si aliis pupilli promittant, necessaria est: namque placuit meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriore vero non aliter quam tutore auctore. unde in his causis, ex quibus mutuae obligationes nascuntur, in emptionibus venditionibus, locationibus conductionibus, mandatis, depositis, si tutoris auctoritas non interveniat, ipsi quidem qui cum his contrahunt obligantur, at invicem pupilli non obligantur. (1) Neque tamen hereditatem adire neque bonorum possessionem petere neque hereditatem ex fideicommisso suscipere aliter possunt nisi tutoris auctoritate, quamvis lucrosa sit neque ullum damnum habeat. (2) Tutor autem statim in ipso negotio praesens debet auctor fieri, si hoc pupillo prodesse existimaverit. post tempus vero aut per epistulam interposita auctoritas nihil agit. (3) Si inter tutorem pupillumve iudicium agendum sit, quia ipse tutor in rem suam auctor esse non potest, non praetorius tutor ut olim constituitur, sed curator in locum eius datur, quo interveniente iudicium peragitur et eo peracto curator esse desinit.

¹⁹ SCHOLTENS (*supra*, n.14) 21-24. Bulgarus appears to have thought that a *stipulatio* always gave rise to both a natural and a civil obligation: *ibid.* 30-31.

This title makes four different point in as many paragraphs. The *principium* states that a ward sometimes needs the authority of his tutor, namely in order to legally bind himself. Reciprocal contracts made without this authority are not binding for the ward, only for the other party.²⁰ The ward may not accept an inheritance – either directly or through *fideicommissum* – or *bonorum possessio*, even if its sum is a profitable amount (§1). The tutor must be present when he provides his authority; he cannot do it after the fact nor by letter (§2). When legal proceedings between tutor and ward are necessary, a *curator* will substitute for the tutor with regard to the protection of the ward, only for the occasion (§3). We shall see what the *Lectura* of Johannes Bassianus has to say about this title.

4. Manuscript evidence for the *Lectura* on Inst.1.21

Ms. Leiden, D'Ablaing 3 contains the full text on fol. 5rb-va. There are a few passages that are difficult to read, and the text contains a number of imperfections. Ms. Leipzig does not contain any glosses to this title which is on fol. 155rb-155va; the margins originally had a full apparatus of glosses but this has been erased without any new material taking its place, at least for this title. Maybe consultation of the original will still yield some information, but on the basis of the microfilm it is impossible to get any useful contribution – supposing, which is not certain – that it was originally there. Ms. New Haven has no text of the *Lectura* on 149rb-va, where the text of title Inst.1.21 is found. Ms. Admont does have glosses on the relevant page (107va-b), but they are normal glosses, among which there is no trace of the text of the *Lectura* as we know it from the Leiden manuscript. In other words: for this title we must be content with the text of the Leiden manuscript, unless by sheer luck it would be on the few pages of the London manuscripts that remain. For the moment we shall see how far we can come towards a good text on the narrow basis of the Leiden manuscript.

²⁰ A situation which goes under the imaginative name of *negotium claudicans*. See about the ward who acts without the authority of his tutor: L.LABRUNA, *Rescriptum Divi Pii. Gli atti del pupillo sine tutoris auctoritate*. Napoli 1962.

In the presentation of the text, the lines are given as they begin and end in the manuscript. The critical apparatus shows where the text has been emended. References (*allegationes*) have been solved as much as possible; they are provided in a separate apparatus. Italics in the text indicate quotations from the text of the Institutes. Underlining indicates uncertain readings, that is, readings which are difficult to decipher and about which some uncertainty remains. The commentary in Johannes Bassianus' *Lectura Institutionum* runs as follows:

Joh. Bassianus, *Lectura Institutionum* ad Inst. 1,21 (Ms. Leiden D'Ablang 3, fol. 05rb-va)

DE AVCTORITATE TVTORVM *R*

- [vac. ca. 3] Quod dicitur, *neque enim hereditatis, ut in emptoribus et cet.*
 Nonne locupletior factus est pupillus in casu isto? Habet enim actionem contra alium, quia alius ei obligatur, ergo debet hoc nomine teneri naturaliter et ciuilit. Item infra quippe dicitur, *neque enim hereditatis conditio quamuis lucrosa et cet.* queritur quare non permittitur adire lucrosam. Resp. quia adeundo lucrosam posset contingere, quod in ^{||inc. fol. 5va} tantum in propriis rebus dampnum paterentur, § ff. de min. xxv. an. l. Minoribus.^{a)} Vel ideo: quia si hec permittentur posset contingere interdum <ut> occasione lucrose adiret mille dampnosas, secundum par. ff. de re militari l. Officium § Etsi.^{b)} Vel ideo: quia lucrosam etiam adeundo obligaretur creditoribus hereditariis, ut ff. quibus ex c. in pos. ea. l. iii. in fi.^{c)} et l. iii.^{d)} quod non deberet posse sine tutoris aucto<ritate>, plane quia hoc de obligatione ipsius pupilli agitur. Ad maiorem euidenciam sciendum quoniam pupillus contrahendo interdum obligatur
 15 naturaliter et ciuilit, interdum naturaliter tantum, interdum <ciuilit> modo, ueluti mutui
 datione: nam si unus tutorum det mutuam pecuniam pupillo auctore pupillus naturaliter et ciuilit obligatur {nisi locupletior sit factus: tunc enim}. Si autem ei crediderit sine alterius auctoritate, nullo modo obligatur, nisi locupletior sit factus: tunc enim manet
 20 obligatus naturaliter tantum saltem, ut ff. auc. tu. l. Pupillus.^{e)} Set cum tunc conueniri potest in quantum locupletior est, uidetur quod sic ciuilit et naturaliter obligatur, et hoc puto, arg. ff. commodati, Set mihi.^{f)} Vel mit<t>es punctum et tolles contrarium. Si plures autem sint tutores uno auctoris i nte licite contrahit cum alio pupillo, si
 25 palam sinat. Nam si contrahere contra eum presumitur, si autem cum alio
 et non cum auct(orit)ate tutoris interdum naturaliter obligentur, puta si sit proximus

4 ciuilit *scripsi*; uiriliter Ld 6 contingere *scripsi* (cf. vers. 8); accingere Ld 12 in fi. *bis* Ld 16 datione] datonione Ld 19 nisi *scripsi*; ubi Ld 22 Set] Si Ld 24 uno *scripsi*; imo Ld 25 sinat *scripsi*; sitiati Ld

a) D.4.4.6 b) D.49.16.12.1 i.m. c) D.42.4.3.3 d) D.42.4.3.4. e) D.26.8.5pr. f) D.13.6.3pr.

pubertati. Item domino nullo modo ut si sit proximus infanti: tunc enim nullo modo obligari potest, quia nullius sit intellectus capax, ut ff. auct. et con. Pupillus,^{g)} ut ff. ad Trebell. Si eius in principi.^{h)} et
 30 ff. quando di. l. c. Cum illudⁱ⁾ § et ff. si certum p. Certi, Idem erit si pupilli^{k)} et ff. de do. l. s. et de do.^{l)} et ff. depositi l. i. § An in pu.^{m)} Si autem contrahens sit factus locupletior obligatur ciuilitur et naturaliter. Set hec distinctio melius, nota, repperitur ff. de act. et o. super l. Pupillusⁿ⁾ secundum quod sic incipit Cum Muciana idcirco obmitto. Set
 35 preter hoc sciendum est quod ubi tutoris auctoritas est necessaria statim impleto negotio debet auctor fieri, nam post tempus imposita tutoris auctoritas post interposita nihil facit. Set contrarium est ff. de acquiren. heredi. Si quis bona fide § Iussum.^{o)} Solutio: tutoris auctoritas post interposita nihil f(acit) <ut> ex pristina obligatione teneatur pupillus,
 40 facit tamen quod ad hoc ut ex nouo obligetur, auct(oritate) interposita; uel alicuius auctoritas longe post interposita nihil facit, set statim postea etiam impleto negotio aliquid facit, arg. ff. de usu cap. Non unquam.^{p)} Nam alias pacta facta statim postea etiam completo negotio intelliguntur facta in continenti et ipso contractu, adeo ut etiam inesse dicantur, ut ff. de pact. l. Iuris § Set cum,^{q)} § Adeo.^{r)}

27 pubertati Ld 32 locupletior] lodupetitor Ld 33 distinctio *scripsi*; distractio Ld.
 g) D.26.8.5 h) D.36.1.66(64)pr. i) D.36.2.25 k) D.12.1.9.5 l) D. ...??... m) D.16.3.1.15
 n) D.44.7.58(59) o) D.29.2.25.4 p) D.41.3.31pr. q) D.2.14.7.4 r) D.2.14.7.6.

The commentary

These 45 lines of commentary in the manuscripts cover two of the four paragraphs of the title in the Institutes: par. 1 and 2; nothing is said about the *principium* nor about par. 4. Lines 1-34 concern par. 1 and lines 34-45 are about par. 2. The imperfections of the Leiden manuscript are particularly noticeable in this title, and several issues remain, even though I have already endeavoured to emend the most glaring mistakes. I will go through the entire title and first comment on some mistakes and emendations, before treating the contents of the different passages.

Starting with the text of lines 1-34: most of line 1 is an apparent quotation from or reference to the text of the Institutes: these words are underlined, which in all parts of the Leiden manuscript seems to indicate words borrowed from the text of the Institutes. The latter, however, reads *Neque tamen hereditatem* rather than what we find here: *neque enim hereditatis*. This is followed by another three underlined words: *ut in emptoribus*, which are not in the text of Inst. 1.21 at all. They are most likely a corruption of *in emptionibus* a few lines above in the *principium*, and are meant to highlight the contrast between the position of a ward in a sale compared to that in

accepting an inheritance. The quotation in lines 4-5 is not entirely accurate either.

The manuscript reading *uiriliter* in line 4 is surely wrong; it sounds almost like a joke by the scribe. The correct reading next to *naturaliter* must be *ciuiliter*.

In line 6, *accingere* cannot be correct. The obvious emendation is *contingere*, which makes sense, is found again a few lines further down, and could well have been corrupted into *accingere* if a scribe misunderstood the abbreviation for *con* at the beginning of the word. The following "t" may easily have become a "c"; these two letters are often confused in manuscripts.

As far as the contents are concerned, the first thirteen lines still contain a few problems. The principal question asked is why the ward is not allowed to accept an inheritance, even if it is profitable as a whole. There are three possible answers. The first is that he might still suffer some damage to his own property. The second is less clear; what is meant with *dampnosas* in line 9? Still, the essence seems to be that accepting a profitable inheritance could entail some form of disadvantage to the ward. The third answer is straightforward: he would become bound to the creditors of the inheritance, which is contrary to the idea that he can only bind himself on the authority of his tutor.

The following passage from line 13 to line 23 is probably the most interesting part of the entire commentary. There are some problems with the contents of the provisionally corrected text, for which I have found possible solutions. To highlight the problems, the text has been left for the moment in the relatively uncorrected state in which it was presented at the SIHDA-conference in Liège. The problems concern the whole passage, but especially the expression *pupillo auctore* in lines 16-17.

To start with the latter: this reading is obviously wrong; the *auctor* must be the tutor, not the ward himself. A simple solution would be to insert *altero* before *auctore*: the situation is that there are more tutors than just one, and one of them lends money to the ward, which is fine so long as the other tutor lends his authority. This interpretation gets support from the passage one line below: *Si autem ei crediderit sine alterius auctoritate*, which evidently refers back to a situation where the other tutor *did* lend his authority.

Immediately after this reading we run into a really problematic passage. The situation described from line 13 onwards initially seems clear enough, once we incorporate the emendation <altero>: the ward is bound *naturaliter et civiliter*. But then the manuscript adds the qualification: *nisi locupletior sit factus*. This makes no sense; why would he not be bound when he is enriched? A simple solution could be to read *ubi* for *nisi*: the two words when abbreviated look very much alike: they can easily be confused. But even then we do not have a text that makes sense, because why would he only be bound when enriched, if his tutor lent his authority? Moreover, the sentence breaks off at *tunc enim*, after which something would appear to have dropped out. Those words, however, are followed by an almost perfectly understandable sentence, provided the manuscript reading *nisi locupletior* is emended to *ubi locupletior*: the ward is not bound if no authority is provided by a tutor, unless he is enriched.

The solution must be that here, unusually, nothing has in fact dropped out – the contrary has happened. The problematic passage up to *tunc enim* in line 18 was erroneously written by the scribe, who had looked too far ahead: from *obligatur* in line 17 to *obligatur* in line 19, continuing the sentence after the first *obligatur*, where we should put a full stop. Instead, the scribe copied *nisi locupletior sit factus; tunc enim* before he realised his mistake and picked up the correct text at *Si autem ei crediderit* (line 18), without however properly cancelling out the passage wrongly copied. This has now been put in braces, to show it does not belong in the text.

These emendations leave the text in lines 13-23 in a readable state. It is an interesting passage, where a short *excursus* is given about the possibility to be bound under either *civiliter* or *naturaliter* or both ways at the same time; this is then applied to the text. It is a typically medieval way of looking at the obligation of the ward who acted without the authority of his tutor. The key parallel text given by the *allegatio* is :

D.26.8.5pr. (Ulp. 40 ad Sab.):

Pupillus obligari tutori eo auctore non potest. plane si plures sint tutores, quorum unius auctoritas sufficit, dicendum est altero auctore pupillum ei posse obligari, sive mutuam pecuniam ei det sive stipuletur ab eo. sed si cum solus sit tutor mutuam pecuniam pupillo dederit vel ab eo stipuletur, non obligatus erit tutori: naturaliter tamen obligabitur in quantum locupletior factus est: nam in pupillum non tantum tutori, verum

cuivis actionem in quantum locupletior factus est dandam divus Pius rescripsit.

This is the text that says that the ward is bound *naturaliter* to the extent that he is enriched. We should note that it does not mention the civil obligation. Moreover, the medieval commentary does not just introduce the dichotomy *naturaliter* – *civiliter*, but interprets the obligation of the ward differently. Initially it is in line with the *allegatio* in assuming only a natural obligation when the ward is enriched – although the *allegatio* then goes on to state that there is an action available in this situation, based on a rescript of Antoninus Pius. This is an inconsistency, at least in the medieval view, which linked the action with the *obligatio civilis* only. Consequently, the conclusion in the *Lectura* is that the ward who is enriched is bound both *naturaliter* and *civiliter*, because there is an action available. To further support this conclusion, it invokes another *allegatio*:

D.13.6.3pr. (Ulp. 28 ad Ed.)

Sed mihi videtur, si locupletior pupillus factus sit, dandam utilem commodati actionem secundum divi Pii rescriptum.

This text, incidentally, explains why D.26.8.5pr. – it refers to the same case decided by Antoninus Pius²¹ – can grant an action where there is just an *obligatio naturalis* and no *obligatio civilis*: the *actio utilis* is not an action based on civil law, but is granted by the praetor in special cases; it is not a civil but a praetorian action²². Hence the granting of this action does not imply an underlying *obligatio civilis* in classical Roman law. Without any doubt such dogmatic niceties of classical Roman law were lost on the Glossators; consequently, the difference between a civil and a praetorian obligation plays no part whatsoever in this *Lectura*. Johannes Bassianus comes to the conclusion that there is a double obligation: the *obligatio naturalis* based on the agreement as such, and an *obligatio civilis* to the extent that the ward is enriched as a result of it, since an action is granted for the amount of the enrichment. This is the typical double legal tie that is found in the works of all the Glossators²³.

²¹ This appears very likely, even if the paligenetic context is inconclusive. Labruna has no doubt: *supra* n.20, 3.

²² M.KASER/K.HACKL, *Das römische Zivilprozessrecht*. München ²1996, 329-330.

²³ SCHOLTENS (*supra* n.14), 30.

The passage in lines 23-34 still requires some work. The first sentence *Vel mittes punctum et tolles contrarium* seems to refer to the possibility of eliminating a *contrarium* through a change in the punctuation, but which *contrarium* exactly? Then there are a couple of difficult, uncertain readings in lines 24 (*inte?*), 25 (*contrahere?*) and 27 (*domino?*), and a thus far unsolved *allegatio* in line 31. The obvious emendation for *domino* would be *econtrario*, given the contrast between *proximus pubertati* in lines 26-27 and *proximus infanti* in line 27, but this still leaves the text far from perfect. Nevertheless the general idea of this passage is clear: a ward who has several tutors may conclude a binding agreement on the authority of one of them; failing that authority, he can create a natural obligation if he is old enough, but if he is too young, no obligation at all results.

The passage in lines 34-45 comments on § 2 of the text of the Institutes. It does not contain too many textual difficulties. *Post interposita* in line 37 appears to be redundant after *post tempus imposita* one line above. The insertion of *ut* after *facit* in line 39 improves the sentence, but there are no other issues with the transmitted text.

The contents of this passage are clear: the authority of the tutor has to be provided immediately, not after an interval. An *allegatio* provides some discussion:

D.29.2.25.4 (Ulp. 8 *ad Sab.*)

Iussum eius qui in potestate habet non est simile tutoris auctoritati, quae interponitur perfecto negotio, sed praecedere debet, ut Gaius Cassius libro secundo iuris civilis scribit: et putat vel per internuntium fieri posse vel per epistulam.

The relevance of this *allegatio* concerns not so much in the difference between *iussum* and *auctoritas* as the fact that this text seems to state that the *auctoritas* is provided when the deal has already been made (*perfecto negotio*) and not as a part of it. Two solutions are given: either the authority, if it is provided after the deal has been made, creates a new obligation – a civil one, is the implication – or there is a difference between authority provided immediately after the deal was made, which has an effect, and authority provided only at a later stage, which is pointless.

5. *Conclusions*

This paper presents a fragment of a text that is still work in progress, both as a whole and in terms of this particular fragment. Most of the difficulties in the text of Johannes Bassianus' *Lectura* on Inst.1.21 have been solved, but some remain, at least for the moment. Nevertheless, the text is in a condition that allows us to understand it pretty well. Its most interesting passage concerns the application of the distinction between *obligatio naturalis* and *obligatio civilis* to the case of a ward who has acted without the authority of his tutor. This is in line with the general use of this distinction by many medieval jurists as signalled by Scholtens: any agreement will produce an *obligatio naturalis*, but the possibility to bring an action is connected with the *obligatio civilis*. The application of this distinction is not triggered by the text of the Institutes itself, but rather by the *allegatio* D.26.8.5pr. The latter text, however, treats the situation differently and assumes only an *obligatio naturalis* to the extent that the ward is enriched – the approach by Johannes Bassianus is different, and essentially medieval, with the double legal tie in the form of both a natural and a civil obligation that the Glossators are so fond of. No doubt, as the edition of his *Lectura Institutionum* progresses, there will be many more of these interesting insights in the medieval reception of Roman law.