

Charles Donahue, Jr., 'Bassianus, that is to say, Bazianus? Bazianus and Johannes Bassianus on Marriage', *Rivista internazionale di diritto commune*, 14 (2003) 41–82.

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Bassianus, that is to say, Bazianus? Bazianus and Johannes Bassianus on Marriage

Since Tommaso Diplovatizio's *De claris iurisconsultis*, scholarship has, for the most part, recognized the existence of two Bolognese glossators of the last quarter of the twelfth century with similar names, Johannes Bassianus and Bazianus (or Basianus)¹. The former was a civilian, who wrote numerous glosses on all parts of the *Corpus iuris civilis*, *summae* on titles of the Digest, Institutes and Code, *distinctiones*, *commenta*, *lecturae*, *quaestiones*, at least a few *consilia*, and a number of important procedural works². He was the teacher of, among others, Azo, and his opinions are frequently cited in the Accursian gloss. The latter was a canonist, largely known for his glosses on Gratian's *Concordance of Discordant Canons*, whose work is frequently cited in manuscripts that date from or are copies of works from the late twelfth and early thirteenth centuries, but whose work thereafter seems largely to have been forgotten³. Biographical details about both men are sparse. In the case of Bassianus, they consist largely of scurrilous anecdotes⁴. In the case of Bazianus, there is an inscription on what purports to be his tomb in the cathedral of Bologna, which gives, if it is to be believed, a few hints about his life, and a group of notarial documents concerning a case, part of which transpired in his *scholis* perhaps in 1193, and about which he and one *magister Lanfrancus* rendered a decision⁵. The first tells us that he was a doctor of both laws (*summus in alterutro doctoris iure peregit* /

* Copyright © 2003 Charles Donahue, Jr. This piece is dedicated to Manlio Bellomo and Jim Brundage.

¹ Thomas Diplovatius, *De claris iuris consultis*, ed. F. Schulz, H. Kantorowicz, and G. Rabotti (SG 10; 1968) 56, 59-62.

² U. Gualazzini, DBI, s.v. *Bassiano, Giovanni*. See, most recently, H. Lange, *Römisches Recht im Mittelalter*: 1. *Die Glossatoren* (München 1997) 215-26. For the *consilia*, see now A. Belloni, 'Giovanni Bassiano consulente', *Ius Commune* 21 (1994) 78-148.

³ F. Liotta, DBI, s.v. *Baziano*.

⁴ F.C. von Savigny, *Geschichte des römischen Rechts im Mittelalter* (Heidelberg 1850) 4.292-3 (reporting Gulliellmus de Pastrengo); U. Guallazini, 'Martino, Giovanni Bassiano, Azzone nella cronaca di Giovanni prete da Cremona (sec.-XII)', *RSDI* 29 (1993) 23-34.

⁵ A. Belloni, 'Baziano, cioè Giovanni Bassiano, legista e canonista del secolo XII', *TRG* 57 (1989) 69-70, 83-85.

hactenus officium), and if that is right, he is the first person known to have been such. On the basis principally, though not exclusively, of the second (the case was turned into an academic *quaestio* and reported under the name of Bassianus), it has recently been suggested that Bassianus and Bazianus were, in fact, the same man⁶.

The basic arguments against this suggestion can be briefly outlined. First, the *sigla* used to identify the work and opinions of the civilian (Io., Iob., Io. Ba., etc.) are not the same as those used to identify the canonist (b., Baz., bas., baç., bar., etc.)⁷. This could, however, be the product of different scribal traditions in the two disciplines⁸. The differentiation

⁶ Belloni, 'Baziano', above, note 5; A. Belloni, 'Giovanni Bassiano "Bononiensis ecclesie canonicus et iuris canonici magister dictus" giudice e "arbiter"', *Ius Commune* 21 (1994) 45-77; cf. D. Maffei, 'Fra Bologna, Montpellier et Palencia: Studi su Ugolino de Sesso', RIDC 1 (1990) 13 n. 16, who offers further evidence. *Wahrscheinlich*, P. Weimar, *Lexikon des Mittelalters* 5 (München 1990), s.v. *J. Bassianus*. Dubitans, Lange, above, note 2, at 217-218; E. Cortese, *Il diritto nella storia medievale 2: Il basso medioevo* (Roma 1995) 156-157 and n. 27. *Contra*, R. Weigand, 'Frühe Kanonisten und ihre Karriere in der Kirche', ZRG(KA) 107(76) (1990) 155 n. 97; A. Gouron, 'À la convergence des deux droits: Jean Bassien, Baccianus, et maître Jean', TRG 59 (1991) 319-332, *Miscellanea Domenico Maffei Dicata* 1 (Goldbach 1995) 129-42; R. Weigand, *Die Glossen zum Dekret Gratians*, (SG 26; 1991) 618 n. 75; Gualazini, 'Martino', above, note 4, at 34-37; R. Weigand, 'Bazianus und sein Werk', in W. Aymans and K.-T. Geringer, eds., *Iuri Canonico Promovendo: Festschrift für Heribert Schmitz zum 65. Geburtstag* (Regensburg 1994) 710-711; W. Müller, *Huguccio: The Life, Works, and Thought of a Twelfth-Century Jurist* (Studies in Medieval and Early Modern Canon Law 3; Washington, DC 1994) 98 n. 137; A. Gouron, 'Un juriste bolonais docteur in utroque au XII^e siècle?' *Ius commune* 22 (1995) 17-33. So far as I am aware, Professor Bellomo has not opined in print on the topic, but in one study published before the current debate broke out he dated Bassianus's death to 1197, the date on the tomb inscription and ten years after the date normally given for Bassianus's death. M. Bellomo, 'Il medioevo e l'origine dell'Università', in L. Stracca, ed., *L'Università e la sua storia* (Torino 1979/80) 13-25; in M. Bellomo, *Medioevo edito e inedito* 1 (Roma 1997) 17.

⁷ Compare Belloni, 'Baziano', above, note 5, at 72 n. 16, with Liotta, 'Baziano', above, note 3, at 314. Weigand, 'Bazianus und sein Werk', above, note 6, seems to have regarded this argument as decisive, and Gouron, 'Juriste bolonais' 18-21, clearly regards it as important.

⁸ References to the civilian do appear in canonistic glosses on the *Decreta*, but they are rare: E.g., Weigand, *Glossen*, above, note 7, 487 no. 70 (C.2 q.6 d.p. c.41 "io.b."); 496 no. 93 (C.4 q.2 et 3 d.p. c.23, "Jo. b."); 510 no. 122 (C.10 q.2 c.2 § 10 "Io. B."); 529 no. 161 (C.16 q. 3 d.p. c.15 § 1 "ut dicit bul. pla. Io.b.") (all in the apparatus *Ordinaturus magister*); 894 (Paris, MS. lat. 3905 B "Jo. bo.") (probably the same as the first cited). The first two are procedural, as is the fourth. The third deals with an addition that Irnerius made to the text of Nov. 7. The Paris manuscript does not seem to contain any glosses of Bazianus; hence, the apparatus *Ordinaturus magister* is the only apparatus in which we have to posit

could even have been separate the work of a n two disciplines. Indeed, twelfth-century canonist, family name or toponym⁹. were trying to distinguish work was already firmly a

Second, the civilian p inscription seems to give inscription, however, is s have been applied to one years teaching in Bologna

Third, in the Latin a Italian) *Bassianus* and *I* intermediate consonantal wide variations in the spe Boxianus vs. Basinus, Bosianus) suggest that 1 names were pronounced.

Fourth – and perhaps located in Bologna after died in England, whereas dates between 1192 and 1 died in 1197 and that his died in Bologna)¹⁰. The

that scribes were consciously man. Huguccio's *Summa* al note 6, *loc. cit.*, although I eleven.

⁹ This is not to say that "Cardinalis" is a title; "Pau may be. The canonists, of course distinguished.

¹⁰ See L. Mayali, 'John England?', ZRG(RA) 99 (198 dominus Johannes, the chap whom Mayali, with due caution He is John of Exeter, a clerk where Baldwin had previously Jones, *English Episcopal Acts* and documents listed in the argument, which I find plausible doctor in utroque in the sense century (see Gouron, 'Docteur somewhat later date for the t

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stic glosses on the *Decreta*, but 7, 487 no. 70 (C.2 q.6 d.p. c.41 510 no. 122 (C.10 q.2 c.2 § 10 icit bul. pla. Io.b.”) (all in the lat. 3905 B “Jo. bo.”) (probably procedural, as is the fourth. The o the text of Nov. 7. The Paris sses of Bazianus; hence, the *status* in which we have to posit

could even have been conscious, as authors and scribes sought to separate the work of a man who may have been the first to operate in two disciplines. Indeed, Bazianus is one of the few, perhaps the only, twelfth-century canonist, who is known only by what seems to be a family name or toponym⁹. This is just what we would expect if the scribes were trying to distinguish the canonistic work of a man whose civilian work was already firmly associated with his Christian name.

Second, the civilian probably came from Cremona, whereas the tomb inscription seems to give the canonist Bolognese origins. The tomb inscription, however, is sufficiently vague (*flos roseus patrie*) that it could have been applied to one who, though born in Cremona, had spent many years teaching in Bologna.

Third, in the Latin and Italian of the twelfth century (as in modern Italian) *Bassianus* and *Bazianus* or *Basianus* are not homonyms,¹ the intermediate consonantal sound being quite different. Unfortunately, the wide variations in the spellings of the two names (*Bassianus*, *Bossianus*, *Boxianus* vs. *Basinus*, *Bassianus*, *Baxianus*, *Bazan*, *Bazianus*, *Bosianus*) suggest that there was no consistent tradition of how the names were pronounced.

Fourth – and perhaps most telling – Bassianus cannot be firmly located in Bologna after the mid-1180's, and there is evidence that he died in England, whereas the documents in the name of Bazianus refer to dates between 1192 and 1194, and the tomb inscription says that that he died in 1197 and that his mortal remains are within (suggesting that he died in Bologna) ¹⁰. The dates, however, of Bassianus's sojourn in

that scribes were consciously distinguishing different types of work of the same man. Huguccio's *Summa* also distinguishes the two. Müller, *Huguccio*, above, note 6, *loc. cit.*, although Bazianus is cited only three times, and Bassianus eleven.

⁹ This is not to say that all the others are known by their Christian names. “Cardinalis” is a title; “Paucapalea” is probably a nick-name, and “Benencasa” may be. The canonists, of course, had a number of other *Johannes* who had to be distinguished.

¹⁰ See L. Mayali, 'Johannes Bassianus – Nachfolger des Vacarius in England?', ZRG(RA) 99 (1982) 317-25. We can be reasonably certain that the *dominus Johannes*, the chancellor of Archbishop Baldwin of Forde in 1189/90, whom Mayali, with due caution, suggested might be Johannes Bassianus, is not. He is John of Exeter, a clerk whom Baldwin brought with him from Worcester, where Baldwin had previously served as bishop. See C.R. Cheney and B.E.A. Jones, *English Episcopal Acta II: Canterbury 1162-1190* (London 1986) xxiv, xxvi, and documents listed in the index *s.v.* Exeter, John of. Interestingly, the argument, which I find plausible, that Bassianus/Bazianus could not have been a *doctor in utroque* in the sense that that term came to be used in the thirteenth century (see Gouron, 'Docteur', above, note 6, at 22) is also an argument for a somewhat later date for the tomb inscription.

England, if such it was, are uncertain, and it may be that the inscription is of a later date (or even that his remains were shipped from England to Bologna in the late thirteenth century)¹¹.

Fifth, the identity of the case described in the notarial documents and that reported in the *quaestio* is not certain. The names do not completely correspond (but they could have been changed), nor do the legal issues¹². But the issues, too, could have been changed as the case was transformed from a real case into an academic exercise.

Finally – and this argument does not seem to have been made before – the known product of Bassianus is quite large. One really has to wonder whether a man who produced as much as Bassianus did on the basic corpus of Roman law and Romano-canonical procedure, and seems to have had a command of the *Libri feudorum*, as well, would also have had the time to lecture on the *Decreta* and produce the not inconsiderable number of glosses that are attributed to Bazianus¹³. Even this argument has a counter-argument. The large amount of work attributed to

¹¹ See above, note 10; Belloni, 'Baziano', above, note 5, at 81. A recent biography of the English canonist Gerard Pucelle suggests that academics of the late twelfth century could do a remarkable amount of traveling. See C. Donahue, 'Gerard Pucelle as a Canon Lawyer: Life and the Battle Abbey Case', in R. Helmholz, P. Mikat, J. Müller, and M. Stolleis, eds., *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag* (Paderborn 2000) 333-348. Bassianus could have traveled to England more than once.

¹² This is a major point of contention between Belloni, 'Giovanni Bassiano', and Gouron, 'Juriste bolonais', both above, note 6. I am less impressed than Gouron seems to be with the differences in the names (e.g., the people described in Bassianus's *consilium*, below, text and notes 145-153, were clearly not named Titius, Seius, and Gaius) and more impressed than Belloni seems to be with the difference in the issues. But see the next sentence in the text. Of course, the less certain the identification of the *quaestio* with the case in the notarial documents, the more that the lynchpin of Belloni's argument begins to wiggle. The remaining texts cited by Belloni and Maffei (and a couple offered in Weigand, 'Bazianus und sein Werk', at 726-727) are, to my mind (save for the *Quaestiones Gratianopolitanae* where Gouron seems to have the better of the argument that *magister Johannes* is neither Bassianus nor Bazianus, but a southern French *maître Jean* [Gouron, 'Convergence', at 132-135]), suggestive of different interpretations. It could be that a few scribes knew that the two were the same and were trying to tell us that, or it could be that a few scribes thought they were the same when they were not.

¹³ That Bazianus taught the *Decreta* rather than just writing glosses on it seems clear not only from the fact that he produced students who seem to have been responsible for the *Summa Casinensis* and for transmitting *quaestiones* under his name (see Weigand, 'Bazianus und sein Werk', at 709-10, 727 n. 28 [with references]) but also from the style of his glosses. See below, text and note 156.

Bassianus is principally, though not exclusively, reports of his teaching by his students¹⁴.

In the absence of further discoveries in documents or manuscripts, it seems unlikely that progress on the issue is going to be made by pursuing the admittedly scanty evidence of the lives of the two men. There is now, however, a rather large body work that has been quite firmly identified as that of the civilian and the canonist, respectively¹⁵. More careful examination of that work may cast light both on the question why the civilian's work continued to be respected and that of the canonist did not, and on the question whether the style and opinions of the two are sufficiently consistent that they could have been the same man. This is a large undertaking. The known corpus of work of both men is quite large, and much of it is unpublished¹⁶. It is also a delicate undertaking, because both style and opinions can change over a long career, and opinions reported in the name of a jurist may not correspond to what he actually held¹⁷. Nonetheless, I would like to make a start here, first by examining what is known of the canonist's views on the topic of marriage, and then, those of the civilian¹⁸. This examination will not prove that the two are not the same man, but it will suggest that they probably are not.

¹⁴ Weimar, above, note 6, and sources cited.

¹⁵ For Bazianus, see, in addition to Weigand, *Glossen.*; J. von Schulte, *Die Glosse zum Decret Gratians von ihren Anfängen bis auf die jüngsten Ausgaben*, Denkschriften der kaiserlichen Akademie der Wissenschaften, Wien, Phil.-hist. classe, 21.2 (Wien 1872) 56-64; R. Weigand, 'Bazianus- und B.-Glossen zum Dekret Gratians', in S. Kuttner and A. Stickler, eds., *Mélanges G. Fransen*, vol. 2 (SG 20; 1976) 455-95. For Bassianus, see sources cited in Lange, above note 2, *loc. cit.*

¹⁶ G. Dolezalek, *Verzeichnis der Handschriften zum römischen Recht bis 1600* 3 (Frankfurt 1972), Auctores, sub *Iohannes Bassianus*, gives six pages of citations to manuscripts of his work, to which should be added those of his student, Nicolaus Furiosus, which are said to report Bassianus's *lecturae*. In the case of Basianus, what we have is principally what Weigand has published, and Weigand, quite understandably and for the most part, confined himself to particular sections of the *Decreta*.

¹⁷ Weigand, 'Bazianus und sein Werk', above, note 6, at 723-727, makes this point quite dramatically in the case of Bazianus. What follows will show that the same can be said of Bassianus.

¹⁸ Some work along these subject-matter lines has been undertaken by the participants in the debate outlined above, particularly in the area of procedure. I chose marriage rather than procedure because we know relatively little about the canonist's views on procedure.

Bazianus

We begin with two opinions of Bazianus that are cited in the *Summa* of Robert of Corson (1208 - 1212), a work that, so far as I am aware, has not previously been used as a source for the work of Bazianus¹⁹. Robert was a student of Peter the Chanter, the Paris moralist of the late twelfth century²⁰. How Robert acquired his knowledge of Bazianus's opinions we cannot say²¹. Neither of the opinions is recorded as such in the known glosses of Bazianus, but as we have noted, these glosses tended to be ignored by the subsequent canonists²². A clue as to why may be found in the fact that both times that Robert cites Bazianus it is to disagree with him.

The first disagreement is relatively minor: In expounding on the three Augustinian *bona* of marriage, Robert tells us²³:

Bazianus et sui sequaces exponebant hec negative, dicentes quod in matrimonio debet esse proles, id est animus non contrarius proli, et fides, ut neuter ad alienum thorum transeat, et sacramentum, ut nunquam divortium fiat. Sed sic non exponitur quid unumquodque istorum sit, et ideo nobis videtur aliter solvendum, ut dicamus quod proles hic dicitur spes prolis procreande ad cultum Dei, et fides observantia mutue servitutis et coniugal castitatis, et sacramentum matrimonii sanctitas sive firmitas, vel si mavis dicere inseparabilitas.

¹⁹ My knowledge of Corson's *Summa* is derived from the edition of the parts on marriage by Louis Malherbe in *Le mariage au début du XIII^e siècle d'après la Summa du Cardinal Robert de Courson* (s.l., [1924]), an unpublished thesis found in the library of the Institut Catholique in Paris (côte 9099DC.25). I am grateful to John Baldwin for having called my attention to this work and to Sarah Donahue for photocopying it.

²⁰ See J. Baldwin, *Masters, Princes and Merchants: The Social Views of Peter the Chanter and His Circle*, 2 vols. (Princeton 1970). For Corson, see, most recently, W. Maleczek, *Papst und Kardinalskolleg von 1191 bis 1216* (Wien 1984) 175-179, with ample references to previous literature.

²¹ The *Summa Casinensis*, which appears to be by a student of Bazianus, is incomplete in the versions yet discovered and does not contain the *causae* on marriage. See S. Kuttner, *Repertorium der Kanonistik* (Studi e Testi 71; Città del Vaticano 1937) 158, 166. That Robert derived his material from the *Summa*, or something like it (such as the *Quaestiones Casinenses II*, below, note 52) is made more likely by the fact that both times when he cites Bazianus, he says "Bazianus and his followers" (*Bazianus et sui sequaces* [var. *fili*]). Corson, *Summa*, tit. *De bonis matrimonii*; tit. *De secundo impedimento, scilicet de errore*, ed. Malherbe, above, note 19, at 19, 49.

²² For known glosses on these issues, see below, text and notes 33-37, 43-46.

²³ Corson, *Summa*, tit. *De bonis matrimonii*, ed. Malherbe, *Mariage*, above, note 19, at 19.

What is interesting about this is not so much that Robert disagreed with Bazianus, but that Bazianus dealt with the issue at all. Most of the canonists say little or nothing about the goods of marriage, leaving that topic to the writers of sentences. Huguccio does not deal expressly with the topic, nor do the *summae* of Bernard of Pavia or Tancred²⁴. When Raymond of Peñafort returns to the topic, he derives his material from Peter Lombard²⁵. It is only with Hostiensis that we find a canonist expounding once more on the goods of marriage, and Hostiensis's treatment may well come from his pastoral experience not from his canonic learning²⁶.

Robert's disagreement with Bazianus on this issue tells us something about the emerging divide between theologians and lawyers. Bazianus's negative definitions of the goods of marriage is more legal in two senses. First, they are closer to the text of Augustine's that is being expounded²⁷. Two of the three goods are there stated negatively²⁸. It is also more legal in that Bazianus was probably concerned about the minimum requirements for validity in marital consent. One cannot validly marry and exclude the possibility of offspring; one cannot marry

²⁴ See J. Roman, 'Summa d'Huguccio sur le Décret de Gratien d'après le Manuscrit 3891 de la Bibliothèque Nationale, Causa XXVII, Quaestio II', RHD 27 (1903) 757; Bernardus Papiensis, *Summa de matrimonio*, ed. E. Laspeyres, *Summa decretalium* (Ratisbon 1860) 287-306; Tancredus Bononiensis, *Summa de matrimonio*, ed. A. Wunderlich (Göttingen 1841). The ordinary gloss focuses on indissolubility, C.27 q.2 c.10 v^o *omne, sacramentum*, and *nullum divortium* (Venetiis 1572) 989a. It does not comment on the other two, other than to refute the opinion of Gandulphus that the other two are the only ones. The approximately 55 pre-Johanine glosses on C.27 q.2 c.10 reported in Weigand, *Glossen*, above, note 6, at 237-247 (nos. 1200-55), cover a wide range of topics, but the focus is on the marriage of Mary and Joseph, the possible contradiction in C.27 q.2 d.p. c.29, and the possible sinfulness of marital sexual intercourse.

²⁵ Raymundus de Peñafort, *Summa de poenitentia et matrimonio* 4.2.12 (Roma 1603) 518-19; cf. Petrus Lombardus, *Sententiae* 4.31, ed. PP. Collegii S. Bonaventurae Ad Claras Aquas, *Spicilegium Bonaventurianum*, 5, tom. 2 (Grottaferrata 1981), 442-451.

²⁶ Hostiensis [Henricus de Segusio], *Summa aurea*, tit. *De matrimoniis*, § *Et quare contrahatur* (Venetiis 1574), cols. 1257-1258, reads more like the outline of a homily of the archbishop of Embrun than it does like either a canonical or a theological treatise.

²⁷ C.27 q.2 c.10.

²⁸ Two of the surviving glosses (each in only one manuscript) carry this further. Weigand, *Glossen*, above, note 6, at 237 no. 1200.1; 241 no. 1222. The former simply glosses the initial word of the text *omne* as *totum legitur per negationem*. The latter (apparently on *proles*) tells us: *Ex nullius rei defectu bone que soleat provenire de nuptiis possunt parentes Christi notari, quia nec tunc ex defectu prolis nec fidei siue castitatis nec temporis discessions, et sic per negationem exponendum est quod quasi affirmando dictum est.*

on the understanding that one will be free to commit adultery; one cannot marry with the understanding that if it does not work out, one will divorce. Bazianus's statement of the *bonum prolis* also neatly sidesteps the difficulty of the validity of marriages of those who are beyond normal child-bearing age. Such people do not marry with an *animus contrarius proli*. It is just that they know that it is highly unlikely that they will have any.

Robert's positive conception of the *bona* of marriage fits much better with the sacramental theory that he and the sentence-writers espoused. Marriage involves the hope of procreating offspring for the service of God²⁹. It is a fulfillment of the command *crescite, et multiplicamini, et replete terram*³⁰. It involves a commitment to mutual servitude and conjugal chastity, and hence is the sacrament of the promise of redemption given to Abel³¹. It is holy and firm, as is the union of Christ and the church or the unity of humanity and divinity in Christ³². Robert's theology of marriage is sounder than what we find here reported in the name of Bazianus. Whether his theology is taking him beyond what is legally possible is a question about which we may have more doubt.

But did Bazianus actually hold the opinion that Robert ascribes to him? There is one reported gloss of Bazianus's on the topic, not where we would expect to find it at C.27 q.2 c.10, but at C.27 q.2 d.p. c.39, where Gratian tells us that that Mary and Joseph had a *perfectum coniugium*, *non ex officio, sed ex his que comitantur coniugium, ex fide uidelicet, prole et sacramento*. This prompts Bazianus to write³³:

Tria bona coniugii sunt in ipso matrimonio, aliquando secundum exigentiam tantum, aliquando secundum exigentiam et actum; dicitur enim proles matrimonio esse, non quod semper ibi sit proles, set natura et lex matrimonii hoc exigunt ut cum alio non coeatur. Sacramentum est Christi et ecclesie, non quod ipsa commixtio sit sacramentum Christi et ecclesie, secundum quod sunt qui dicunt, quia interdum fornicaria est, set ipsum, scil. matrimonium, est sacramentum Christi et ecclesie ratione commixtionis. Sunt autem quandoque hec tria bona actualiter in coniugio, puta quia nec cum alio coitur et proles suscipitur nec a se diuertunt. Dicas ergo quod inter Mariam et Joseph fuerunt bona coniugii tria saltem secundum exigentiam.

²⁹ Corson, *Summa*, tit. *De bonis matrimonii*, ed. Malherbe, *Mariage*, above, note 19, at 18, 19.

³⁰ Id., at 10.

³¹ Id., at 1 (a reference to Gn. 4:3).

³² Id., at 1, 19 (the first reference being to Eph. 5:32).

³³ Weigand, 'Bazianus- und B.-Glossen', above, note 15, at 472 no. 61.

The difficulties that writers on marriage in the twelfth century had with the marriage of Mary and Joseph are well known. Gratian's theory that marriages became indissoluble only when the couple had sexual intercourse created a considerable tension – as the tortured sentence of the master quoted above suggests that he was aware – with the traditional doctrine that Mary and Joseph were truly married and never had sexual intercourse. Hugh of St. Victor's theory of the dual sacramentality of marriage allowed the marriage of Mary and Joseph to be regarded as sacramental (by the exchange of consent), but still not doubly sacramental (and perhaps not indissoluble), because the sacrament of the union of Christ and the church was, since its announcement in the letter to the Ephesians (Eph. 5:31-32), firmly associated with *Genesis* 2:24 (*erunt duo in carne una*)³⁴. Bazianus's gloss solves none of these problems. He substitutes a distinction between "requirement" (*exigentia*) and "deed" (*actus*), for Gratian's distinction between "office" (*ex officio*) and "accompaniment" (*comitantur*). Bazianus's distinction does not work at all well with the good of offspring, because offspring are not required in order for there to be a marriage (as Bazianus recognizes), and the requirement that the couple not have intercourse with others is not the good of offspring, but the good of faith. Bazianus affirms that the sacrament of Christ and the church comes about by reason of a married couple's having sexual intercourse (and his distinction between the marriage being sacramental and the intercourse being sacramental is well enough taken), but that fails to explain how that sacrament was present in the virginal marriage of Mary and Joseph.

Whether Bazianus expounded the negative version of the goods of marriage that Robert ascribes to him (perhaps in a gloss on C.27 q.2 c.10 that has not survived with his *siglum* or in the proemium that the canonists wrote to Causa 27)³⁵, we cannot say. What we can say is that he did try his hand at a positive version at C.27 q.2 d.p. c.39, and that that version is positively bad³⁶.

³⁴ Hugh's views are most fully expounded in his *De beatae Mariae virginitate*, PL 176.860, 864, 874-875; cf. *De sacramentis Christianae fidei* 2.11.3, trans. R. Deferrari (Cambridge, MA 1951) 325-327.

³⁵ C.27 q.1 pr. vº *quidam votum* (Venetiis 1573) 970a-971a. The origins of this little introductory lecture have not been fully explored, but it clearly goes back to the early *summae* (e.g., Rufinus, *Summa decretorum* C.27 pr, ed. H. Singer [Paderborn, 1902], 430-435), and, ultimately, to the sentence-writers. In the version that we find in the ordinary gloss, the topic of the goods of marriage is covered in a single sentence that lists them and refers to C.27 q.1 c.10.

³⁶ Evaluation of arguments obviously runs the risk of anachronism, but I believe that I am applying standards that would have been recognized as such in the period.

The other place where Robert disagrees with Bazianus is on the argumentation to be used in a case involving the possible application of error of condition. A man marries a woman believing her to be of servile condition. She is, in fact, free. Is the marriage invalid because of error of condition? There are those who think that it is *quia ibi est dispar conditio, que impedit matrimonium, ergo nullum est ibi matrimonium*³⁷:

Sed contra: si debeo tibi centum et do tibi ducenta, absolutus sum a centum; pari ratione, si volo contrahere cum aliqua que est laudabilis conditionis et contraho cum illa que est duplo melioris conditionis, non defraudor in aliquo de proposito meo; ergo si staret matrimonium sic contractum cum ancilla, multo fortius debet stare contractum cum libera.

According to Robert, both he and Bazianus agree with this second conclusion. They disagree on how it is to be reached³⁸:

Bazianus tamen et sequaces eius volebant probare contrarium hac ratione inducti, quod si vendo tibi omne vinum meum preter acidum et muscidum³⁹ et interim totum fiat acidum, sic nihil vendidi. Si autem dicam econtra "Vendo tibi totum vinum meum quaecumque ipsum est," si totum acidum efficiatur constat quod talis tenet venditio. A simili, in contractu matrimonii, si melior est uxor quam credidi, tenet matrimonium.

Robert continues⁴⁰:

Argumenta a simili nunquam habent necessitatem, et ideo predictam rationem Baziani et similes exsuflandae iudicamus, dicentes quod ibi tantum error conditionis impedit matrimonium, ubi quis decipitur, credens se contrahere cum libera, contrahit cum ancilla. Sed cum econtrario sit, non decipitur. Unde cum aliquis contrahat de facto cum

³⁷ Corson, *Summa*, tit. *De errore*, ed. Malherbe, *Mariage*, above, note 19, at 49. See the discussion of this problem in Tancred, *Summa de matrimonio*, tit. 17, ed. Wunderlich, above, note 24, at 20, where the argumentation is also questionable.

³⁸ Corson, *Summa*, tit. *De errore*, ed. Malherbe, *Mariage*, above, note 19, at 49.

³⁹ *Muscidus* means "mossy" in classical Latin, but *muscus* comes to be applied to wine produced of the muscat grape in the 13th century. J.F. Niermeyer, *Mediae latinitatis lexicon minus* (Leiden 1976), s.v. Here, clearly, we are dealing with an undesirable quality, hence, probably, something smells or tastes musty or moldy when it should not. See Du Cange, s.v. *muscidus*.

⁴⁰ Corson, *Summa*, tit. *De errore*, ed. Malherbe, *Mariage*, above, note 19, at 49.

libera, credens eam esse ancillam, inconcussum stat matrimonium, quia tunc non errat sed scienter agit, in aliquo meliorans suam conditionem.

Both the argument reported in the name of Bazianus and that of Robert are fundamentally bad arguments. Bazianus's argument would seem to depend on the basic Roman law of sale about stipulations and errors of quality. If the quality is stipulated in the sale and then the goods delivered do not meet the stipulated quality, then the sale may be voided by the buyer. If, on the other hand, the quality of the goods is not stipulated, it is up to the buyer to determine their quality, and he takes the risk that they may go bad between the formation of the contract and the delivery⁴¹. This rule, of course, does not answer the question what is to happen if the quality of the goods is better than that stipulated or if the quality of the goods is better than what the parties thought it was, even though they did not stipulate. Even if we accept the analogy of marriage contracts to sales contracts (something which Robert seems unwilling to do), we need other rules of sales law to complete the analogy and justify the result⁴².

Once more we must ask whether Robert got Bazianus's argument right. The *Glossa Palatina*, reports Bazianus's opinion on this topic at C.29 q.2 pr.⁴³: *Et quia hic tractatur de errore conditionis, nota quod h. [Huguccio] dicit quod tantum deterior conditio impedit. baç [Bazianus] uero dixit quod et melior et deterior impedit; nam si seruus meus credit*

⁴¹ The text considerably oversimplifies because it combines the Roman rules about *error in substantia*, those about warranty (*dicta promissave*) and those about risk (*periculum*), none of which is as clear as what is stated, and all of which changed over time. See F. de Zulueta, *The Roman Law of Sale* (Oxford 1945) 25-28, 30-35, 46-51. The text does reflect, however, the doctrine that Bazianus seems to have been assuming. The first result that Bazianus states would apply only in the situation where the stipulation expressly referred to the time of delivery, unless the souring of the wine occurred through the fault of the seller. That qualification may have been in Bazianus's original statement of the analogy and ignored in Robert's restatement of it. It is also possible that Bazianus in the first example was thinking of a somewhat different sales doctrine: that the contract is not perfected until a specific quantity of goods is identified to the contract. Zulueta, *Sale*, at 14-15.

⁴² It is not at all clear what such rules might be. If we apply the doctrine of *error in substantia*, the contract is void from the beginning; there was no "meeting of the minds." Zulueta, *Sale*, above, note 41, at 26. If we apply the doctrine about stipulations of quality (express or implied), the delivery of goods better than what was stipulated might give rise to a rescission action on the part of the buyer (if he acted quickly), but it is hard to see why he would bring it. *Id.*, at 47.

⁴³ Ed. S. Kuttner, 'Bernardus Compostellanus Antiquus', *Traditio* 1 (1943) 297, repr. in S. Kuttner, *Gratian and the Schools of Law, 1140-1234* (London 1983) VII (with original pagination).

contrahere cum serua et contrahit cum libera, non est matrimonium. The opinion reported by Robert in the name of Bazianus fits better with what the *Glossa Palatina* (not quite correctly)⁴⁴ reports in the name of Huguccio. The situation, however, described in the *Glossa Palatina* is different from the one Robert puts (a slave contracts with a free woman thinking she is a slave vs. a free man contracts with a free woman thinking she is a slave). Hence, it is possible that Bazianus held to the opinion later reported in the *Glossa Palatina* under the name of “b.” (?Bernard of Pavia, ?Bernardus Compostellanus Antiquus), that both errors of “better” and “worse” condition impede, but not in the situation where the parties end up with a person of the same status as theirs⁴⁵. If he did so hold, it is difficult to see how he could have used Roman sales law to justify the result⁴⁶.

Robert’s argument is even worse. However much Robert would like us to believe that there is no deception in the case where a free man contracts with free woman whom he thinks is a slave (but there is where he contracts with a slave woman whom he thinks is free), that statement

⁴⁴ Huguccio, *Summa* ad C.29 q.2 pr. (Admont, MS. 7, fol. 154ra-b): *Notandum quod non cuiuslibet condicionis error impedit matrimonium, sed tantum servilis condicionis error. Nec semper talis error impedit matrimonium sed tantum tunc cum libera persona errat in tali condicione; ergo tantum error condicionis deterioris impedit matrimonium, non paris vel melioris. Qui enim errat in condicione meliori vel pari non intelligitur decipi nec ob hoc impeditur matrimonium; qui vero errat in deteriori intelligitur decipi et non contrahit; ergo secundum hoc libera persona potest dimittere servilem personam sed servilis persona nullam potest dimittere scilicet servilem vel liberam. Si enim servilis persona contrahit cum aliqua persona quam putat liberam personam et est servilis, non potest tali errore eam dimittere, quia est ibi matrimonium. Qui vero consentit in hominem alterius condicionis verisimile est quod libentius consentiat in [hominem condicionis] sue. Preterea neuter potest aliquid alteri obiicere sicut dicitur de duobus adulteris, ut [C.32 q.6 c.1], et sic talis error condicionis non impedit matrimonium cum sit error paris condicionis. Item si servilis persona contrahat cum libera persona quam putat esse servilem non potest eam dimittere pretextu talis erroris, quia meliorem condicionem invenit quam crederet. Et favorabilius est contrahere cum libera persona quam cum ancilla. Preterea verisimile est eum libentius consentire in liberam personam qui consentit in servilem. Et sic talis error non impedit matrimonium cum sit error melioris condicionis.* Hence, Huguccio’s position was that the impediment applied only when a free person made the error and only of “worse condition.” See note 51, below.

⁴⁵ Ed. S. Kuttner, above, note 43, loc. cit. Guido de Baysio reports “Baz.” as holding to the first view, but this could well have been derived from the *Glossa Palatina*. *Rosarium* (Lugduni 1549) fol. 337vb. The second view was ultimately adopted by both Johannes Teutonicus and Bartholomew of Brescia. C.29 q.2 pr. vº *secunda* (Venetiis 1572) 1018a.

⁴⁶ See note 42, above.

is simply wrong⁴⁷. In both cases the man is deceived (whether the woman contributed to the deception is an independent variable that is not discussed here), and in both cases he errs.

We can rescue the conclusion, but only if we offer a different argument, one based on what Robert had previously said in this section⁴⁸:

Dicimus quod servilis conditio, secundum legis fictionem et interpretationem iuris, ipsum servum facit non hominem reputari, quia sicut primus parens perdidit verum esse per servitutem peccati, ita qui efficitur servus liberum esse perdit, quia non habet potestatem sui corporis, sed dominus suus. Unde conditio refertur potius ad quid quam ad quale, sed ea que fortune et qualitatis sunt referuntur ad quale non ad quid.

Behind this effort to distinguish error of condition from error of quality, we can see why this impediment is sometimes called, even in Robert's time, *disparitas condicionis*. It refers to the fact that in Roman law a slave could not validly marry. Hadrian IV's decretal *Dignum est* had emphatically put an end to the church's acceptance of the Roman-law rule⁴⁹, but the notion that a slave had no power over his body remained (creating considerable moral difficulties that are explored both by Robert and Peter the Chanter)⁵⁰. In these circumstances it is understandable why the rule developed that one who married a slave must know that he or she was a slave. Such marriages might not be regarded as marriages by the secular law, and entrance into such a marriage was likely to cause considerable difficulty for both partners. No such difficulties would occur if someone thinking that he or she was marrying a slave in fact married a free person. Hence, there was no

⁴⁷ The same argument, among others, is made in Tancred, *Summa de matrimonio*, tit. 17, ed. Wunderlich, above, note 24, at 20. The source of both arguments is probably Huguccio, above, note 44, who, as we have seen, is more qualified (*non intelligitur decipi*). The *glossa ordinaria* gives Huguccio's exact words. C.29 q.2 pr, above, note 45, *loc. cit.*

⁴⁸ Corson, *Summa*, tit. *De errore*, ed. Malherbe, *Mariage*, at 45.

⁴⁹ X 4.9.1. See P. Landau, 'Hadrians Dekretale "Dignum est" und die Eheschliessung Unfreier in der Diskussion von Kanonisten und Theologen des 12. und 13. Jahrhunderts', SG 12 (1967) 513-53; A. Sahaydachny, *De coniugio servorum: A Study of the Legal Debate about Marriage of Unfree Persons among Decretists and Decretalists from A.D. 1140-1215*, Ph.D. dissertation, Columbia University (1994).

⁵⁰ Malherbe, *Mariage*, above, note 19, at 44 (briefly); Petrus Cantor, *Summa de sacramentis et animae consiliis: Liber casuum conscientiae* §§ 208, 274, ed. J.-A. Dugauquier, *Analecta mediaevalia namurcensia* 16 (Louvain 1965) (much more fully). The latter section also suggests that Peter did not accept the canonical notion of *error condicionis*.

reason to allow error of condition to void such a marriage. Hints of this argument are found in Robert's discussion of the problem. It is surprising that he was not able to tie it down⁵¹.

Most of the known glosses of Bazianus on marriage that were not reported in his name in the *glossa ordinaria* are quite short and technical⁵². A couple of them cast some light on his thought about marriage generally.

A passage from Gregory's *Moralia* quoted in D.13 c.2 expounds on 1 Cor. 7:6 (*Hoc autem dico [unusquisque suam uxorem habeat et unaquaeque suum virum habeat] secundum indulgentiam, non secundum imperium*)⁵³. Gregory puzzles over why Paul should have phrased this as a concession. Bazianus puts the problem more starkly⁵⁴:

Si matrimonium siue nuptiarum bonum semper est bonum ut ait Augustinus [C.27 q.1 c.41], numquid quod bonum erat permisit apostolus

⁵¹ Huguccio, as is frequently the case, does not disappoint, if we stick with him. After making the somewhat logic-chopping arguments quoted above, note 44, he goes on, in a passage too long to quote here, to consider why error of condition is an impediment. After considering a number of unsatisfactory views, he concludes that the impediment is a matter of positive law, introduced by a constitution of the church in favor of free men and women (*hoc esse factum in favorem liberorum et liberarum personarum*). This is why it only operates for the benefit of free people. Huguccio, *Summa*, above, note 44, *loc. cit.* As such, the church could change it. It could make it like error of fortune or quality (i.e., not impeding) or it could make error of fortune or quality like it (i.e., impeding). But the church could not make error of person non-impeding, for error of person, and only error of person, vitiates consent. We do not have to agree with this argument, but it explains Huguccio's position, and it makes sense. The argument about *favor libertatis* may be found in the *Fragmentum Catabridgiense* and may go back to Rolandus. Sahaydachny, above, note 49, at 76-77, 84.

⁵² I have gone through all the glosses of Bazianus on the topic of marriage reported in Weigand, 'Bazianus- und B.-Glossen', above, note 15, and in von Schulte, *Die Glosse*, above, note 15, at 56-64. Weigand, *Glossen*, above, note 6, does not add any on this topic. The two *quaestiones* reported under Bazianus's name in the *Quaestiones Cusanae* (11, 14, ed. G. Fransen, *Convivium utriusque iuris: Alexander Dordett zum 60. Geburtstag* [Wien 1976] 214, 215) add little, except that 11 and 35 (p. 221, not about marriage, and not necessarily by Bazianus) suggest an interest in what we would call moral questions. For other *quaestiones* of Bazianus, see below, note 98. Full study of Bazianus's *quaestiones* should await an examination of the *Quaestiones Casinenses II*, said to be from the school of Bazianus. Id. at 210; Kuttner, *Repertorium*, above, note 21, at 250; Weigand, 'Bazianus und sein Werk', above, note 6, at 727 n. 28.

⁵³ Whether Gregory was right in reading 1 Cor. 7:6 with 1 Cor. 7:2 (*unusquisque, etc.*) rather than with the immediately preceding verses need not detain us here. He did, and Bazianus assumes that that is the correct reading.

⁵⁴ Weigand, 'Bazianus- und B.-Glossen', above, note 15, at 460 no. 6.

“cum non sit sine uicio quod ignoscitur”⁵⁵ arg. [C.22 q.1 c.3?]⁵⁶ Nequaquam! Set dicitur matrimonium permisisse propter culpam ei coherentem, quia ipsa licita amixtio coniugum sine uoluptate carnis fieri non potest ut [C.33 q.4 c.7] et hic verbum “ut hoc etiam quod concesserat sine culpa [(quamvis minima) non esse monstraret]”⁵⁷ etcet.; uel permisit immoderatam exactionem carnalis debiti siue opus coniugale quod fit ex incontinentia ad illicitos concubitus euitandos quod etiam propter nuptiale bonum ueniale iudicatur ut [C.32 q.2 d.p. c.2], et [c. 3].

Bazianus here sticks close to Gregory’s text. He emphasizes, perhaps a bit more than does Gregory, the goodness of marriage (his source for this is Augustine). He adds, as Gregory does not, the possibility that the Apostle’s concession rendered venial the *immoderatam exactionem* of the debt. Although he does not say this, that possibility might make the “moderate” exaction of the debt not even venially sinful. This is not much from which to draw any firm conclusions, particularly when Bazianus does not purport to be giving his own opinion but that of Gregory and perhaps others (*dicitur*). It is perhaps enough that we can suggest that in the general effort to mollify the ancient rigorism about the sexual act that is characteristic of the twelfth-century canonists, Bazianus is to be found more in the vanguard than in the rearguard (a position that one might assign to Huguccio)⁵⁸.

The passage from Augustine cited in the previous gloss (C.27 q.1 c.41), becomes for Bazianus the occasion for a brief discussion of sins committed by intent alone. Augustine had argued that for those who have vowed chastity not only was contacting marriage sinful but also wishing to do so. Bazianus remarks⁵⁹:

Attende, quia ipsum contrahere peccatum non uidetur⁶⁰ sicut ex uerbis suprapositis deprehenditur, scilicet “non suscepicio” et “non nubendo”. Quid ergo sit ibi peccatum dubitatur. Et dici potest quod deliberatio ad contrahendum precedens que recte fidei fractio nuncupatur ut arg. [C.17

⁵⁵ A direct quotation of Gregory in D.13 c.2.

⁵⁶ The citation is odd, because there the argument is reversed. The passage explains the commandment *Non jurare omnino* [Mt. 5:35], on the basis of a desire to avoid perjury.

⁵⁷ Again, a direct quotation of Gregory in D.13 c.2.

⁵⁸ See J. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago 1987) 278-88, 323-4.

⁵⁹ Weigand, ‘Bazianus- und B-Glossen’, above, note 15, at 470 no. 54.

⁶⁰ One manuscript adds: *In coniugio enim lex est, non culpa*.

q.1 c.4]⁶¹, sicut etiam dicitur de praua intentione mercenarii ad solum lucrum, cuius tamen predicatio bona est, quia de ea gaudet apostolus dicens ad philipenses: "siue per occasionem siue per ueritatem Christus annuncietur in hoc gaudeo et gaudebo" [Phil. 1:18]. Et hoc de simpliciter uouentibus, secus autem de sollempniter.

This gloss is more peculiar than it looks at first glance. Gratian included Augustine's text at this point in order to show that Augustine did not invalidate the marriages of those who had taken vows. He did not, and so the passage was on point for his purposes. Augustine, however, clearly thought that getting married after one had taken a vow of chastity was sinful, more sinful, he says, than adultery. The rhetoric of the passages to which Bazianus refers is a bit tortured, but the meaning is clear enough: "undertaking [a marriage] is not condemned by the lesser good but by the ruin that comes out of the higher good;" faith is broken, "even if not by marrying, nonetheless by willing [marriage]"⁶². There is no way that the first passage can be read to hold that the undertaking of the marriage is not sinful, and while the second could be so read, it is probably better read in the context to say that the breach of faith occurs by willing marriage, even if the marriage does not take place (in which case we should translate "even if in not marrying they nonetheless will it").

Hence, the question is why does Bazianus, who normally sticks quite close to his texts, twist this one to say something that it almost certainly does not say? It is possible that he does so because he wants to bring to the fore the point that Augustine makes at the beginning of the passage: *Nuptiarum bonum semper quidem est bonum* ... That must mean that it can never be a sin to marry for one who is free to marry. But to state the principle is not to solve the problem at hand, for the question is whether those who have taken vows of chastity are free to marry. Augustine's answer seems to be that they are not, but the marriage is not invalid if they do. Bazianus seems reluctant to hold that a valid marriage is ever a sin, and so he turns his attention to the violation of the vow. That is what constitutes the sin, not the marrying. Once more, we may suggest that Bazianus is emphasizing the good of marriage.

A canon of uncertain origins is one, among many, that Gratian includes in C.27 q.2 in order to establish the proposition that a married person cannot take monastic vows without the consent of his or her spouse (c.22). This canon, speaking of the husband, warns that if the

⁶¹ The text is on point, though it is ambiguous (*arg.*) whether Bazianus thinks that the argument is made in the text or can be derived from the text. The latter is clearly the case; the former may be doubted.

⁶² *dampnatur non susceptio a bono inferiore sed [a] ruina ex bono superiore. ... fidem irritam fecerunt etsi non nubendo tamen uolendo.* C.27 q.1 c.41.

wife, remaining in the world, marries another, she is *proculdubio adultera*. Bazianus glosses⁶³:

Asseveres⁶⁴ indubitanter adulteram⁶⁵ in hoc casu a uiro posse dimitti, et si enim uir occasionem adulterii dederit, ipsa tamen nichilominus seruare fidem coniugii tenebitur. Quere hoc expressum in decretali Alex. Significasti nobis [X 4.19.4] et supra [C.27 q.2 c.21] ubi de fornicatione Agathose iubetur inquiri ut uirum suum reuocare non possit, quando tamen contra uoluntatem suam querebatur esse conversum⁶⁶. Set numquid sine licentia uxoris uiro conuerso poterit et mulier eo non requisito uel inuito conuerti? Utique! Non enim ei fides seruanda est ut arg. [C.28 q.2 c.2], cum et in arbitrio dimissi uideatur an uelit dimittentis conuersionem ratam habere ut [C.33 q.5 c.3]. Arg. optimum in extra proposito De illis [X 4.1.6]⁶⁷.

Most of this derivable from the well-known decretal of Gregory the Great that precedes this canon (C.27 q.2 c.21). In c.21, the delegate is to inquire into whether Agathosa consented to her husband's conversion and agreed at the time to her own conversion or whether she has committed "fornication"⁶⁸. In either event she is not to be permitted to recall him from the monastery. Otherwise she may, even if he is tonsured. That the argument that the husband's conversion gave the wife occasion to commit adultery is not to be countenanced is derived from a decretal of Alexander III, which states, pretty clearly, that this argument is not to prevail, not in the situation where one of the spouses has joined a monastery, but where both of them have committed adultery and

⁶³ Weigand, 'Bazianus- und B.-Glossen', above, note 15, at 471 no. 59.

⁶⁴ Reading *asseveres* for *asseveras*.

⁶⁵ Reading *adulteram* for *adulterium*.

⁶⁶ I have little confidence in this reading. Two of the three manuscripts have *quem* for *quando* and that would make sense (and fit better with the text of the case) if we left out *esse*: "whom she was seeking when he had been converted against her will."

⁶⁷ The identification is problematical (Weigand did not make it), and it ignores *proposito*, of which I can make little sense (perhaps the text should read *Argumentum optimum in eo proposito extra De illis*, taking the variant *eo*, and leaving in the *extra* but moving it). Of a number of decretals *De illis*, this is the only one out of which I can construct an *argumentum* that is relevant to the case at hand. See below.

⁶⁸ *Fornicatio* almost certainly because that is the word used in Mt 19:9. I am inclined to think that the better reading of Gregory's decretal is that the wife has to have committed adultery before the man entered the monastery. That is not, however, how Bazianus read it, and his contemporary Huguccio came to the same conclusion. Huguccio, *Summa* ad C.27 q.2 c.21, v^o *crimen fornicationis*, ed. Roman, above, note 24, at 773.

neither wants the other back. The application to this situation is not inevitable (in the decretal the couple were being forced to reunite, whereas here the man is being allowed to dismiss his wife and choose the monastic life, even though his initial entry was wrongful, illegal, and arguably occasioned the wife's adultery), but one can see how the extension was made. More strained is the citation of C.28 q.2 c.2, a text ascribed to Gregory the Great but in fact by Ambrose, on the topic of the "Pauline privilege" (1 Cor. 7:13). That faith is not to be kept to the pagan spouse of a convert to Christianity, when the pagan spouse engages in "contumely of the Creator" is one thing, that it is not to be kept to one who "espouses a higher life" is another. Even more troubling is the fact that it is a pagan marriage that is dissolved in 1 Cor. 7:13, while what we have here is a sacramental Christian marriage. Again, however, one can see how the argument was made. C.33 q.5 c.2 is also far from the point. In that case Alexander II holds that a man who extorted the consent of his wife to enter the monastery must return to her. It is Bazianus who derives from this decretal the proposition that since the consent to enter the monastery must be arrived at mutually between the spouses, if one enters without one's spouse's consent, the non-consenting spouse has discretion whether accept the act or not. The conclusion follows logically from the proposition that the consent must be mutual, so long as we do not require that the consent be mutual and simultaneous. Finally, the citation of the decretal *De illis* (if that is what it is) is the most strained of all. In that case, Alexander III holds that a woman whose fiancé has disappeared may marry another, although she is to do penance if it was her fault that the previous marriage was not consummated. The argument, I take it, is that just as the woman whose fiancé has disappeared may marry another, so too, a woman whose husband has entered a monastery without her permission may enter a monastery herself. The analogy is hardly "on all fours". The woman in *De illis* had engaged in what was, at most, a dissoluble initiate marriage, perhaps the obligation was only contractual; in the case at hand, we are dealing with an indissoluble sacramental marriage. *De illis* does not raise the question of what was to be done if the man was present but was simply delaying going through with the marriage. Presumably in that situation, his consent would have to be sought, although the engagement might be dissolved if he failed to consummate the marriage within a reasonable period of time. In the case at hand, Bazianus deems the husband's consent irrelevant.

While the argumentation of this gloss is problematical, its basic conclusions seem sound. This is because of a doctrine that is at least implied in a number of texts in the *Decreta* (and that had been

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resoundingly confirmed by Alexander III)⁶⁹ that the only way in which a married person whose marriage had been consummated could espouse the monastic life was if his or her spouse not only consented but also took a vow of chastity. Under Alexander's decretals, in most instances, the spouse also had to embrace the monastic life. Under these circumstances, one can easily see how the conversion of one spouse without the consent of the other would give the non-consenting spouse discretion. He or she could follow the other into the monastic life or call the other back. Those were the only possibilities. Once the first spouse had committed to the monastic life, he or she no longer had a choice. The choice rested with the non-consenting spouse.

Bazianus's gloss on C.27 q.2 c.24 – a text of Augustine's that says that a man who abstained from sexual relations with his wife without her consent gave her occasion to commit "fornication" and that her sin will be attributed to his abstinence – continues the previous discussion⁷⁰:

Supra [D.50 c.50]. Arg. qui occasionem dampni dat dampnum dedisse uidetur⁷¹. Dubitanti si adultera separata a uiro uel econuerso possit eo inuito conuerti, distinguendum est an ad tempus, puta ad agendam penitentiam, an in perpetuum separentur. Si ad tempus non potest, quia reconciliandi sunt penitentiae satisfactione completa ut [C.32 q.1 cc.4, 6]. Secus autem si in perpetuum. Nec hoc propter adulterium contingit, set quia in separatione uir iuri suo renunciauit, quia recipere non potest quod semel cessit ut [C.7 q.1 c.8].

The basic text could have been used to cast doubt on the proposition announced in the previous one that it makes no difference whether the husband gave his wife occasion to commit adultery. It was not. Rather, after a brief reference to a complicated and growing body of doctrine about the imputation of responsibility⁷², the text is used as a springboard for an issue that had not been previously discussed, whether the innocent party of a couple who are already separated because of the adultery of one them has to consent to the monastic profession of the guilty party. The answer seems straightforward enough: yes, if the separation was temporary; no, if it was permanent. When we look to the supporting texts, the conclusion becomes less straightforward. C.32 q. 1 cc.4, 6, are

⁶⁹ C.27 q.2 c.19; X 3.32.1, 4, 5.

⁷⁰ Weigand, 'Bazianus.- und B-Glossen', above, note 15, at 471-2 no. 60.

⁷¹ At least one manuscript adds *ut conuerti*, omitted here on the theory that the scribe mistakenly omitted all but the final word of the next phrase (which appears in only one of the two manuscripts).

⁷² On the importance of D.50 c.50 in this effort, see S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX* (Studi e Testi 64; Città del Vaticano 1935) 68, 202, 203, 213.

both texts from the early Middle Ages that say that a husband who has sexual relations with his wife after she has committed adultery and before she has completed her penance is himself to do penance (of two or three years). After this, they are to return to normal marital relations. While the texts do not say so, one could easily derive from this that the party doing penance could not unilaterally choose the monastic life. The citation of C.7 q.1 c.8 can only be regarded as bizarre. In it St. Cyprian warns that it is dangerous to cede one's rights in divine matters. He cites the example of Esau, whom he says *nec recipere postmodum potuit, quod semel cessit*. It is quite a step to go from that to the proposition that a husband who had separated from his wife on the ground of her adultery could not revoke that separation, and, so far as I aware, none of the other canonists said so. The couple were still married, and to deny the possibility of reconciliation would seem to violate not only the spirit but also the letter of 1 Cor. 7:11 (*si discesserit, manere innuptam, aut viro suo reconciliari*)⁷³.

There are three opinions of Bazianus's on the topic of marriage reported in the *glossa ordinaria* to the *Decreta*. Two of the three opinions that they report are both troubling and peculiar⁷⁴.

A canon from the Penitentials of Theodore, reported by Gratian under the name of a Pope Eusebius, is the principal authority, prior to the decretals of Alexander III, that an unconsummated "espousal" (interpreted by Alexander as an espousal of the present tense) may not be dissolved in preference to another espousal but may be dissolved by entry of one the parties into the religious life: *Desponsatam puellam non licet parentibus alii uiro tradere; tamen monasterium sibi licet exigere*⁷⁵. The ordinary gloss reports the opinion of Huguccio that if the man permits this, he too must enter the monastery, and the marriage is not dissolved⁷⁶. Bazianus apparently also held that the marriage was not

⁷³ I have not found the converse of this proposition until Raymond of Peñafort's *Summa de matrimonio*, tit. 22, § 6 (Roma 1603) 577: If a man dismisses his wife for adultery and then wishes to be reconciled to her, she may not, in Raymond's view, refuse to be reconciled, citing C.1.14.6 (*quod favore meo introductum est, in damnum meum retorqueri non debet*).

⁷⁴ The third one, C.27 q.2 c.30 v^o *qui dormierit*, is in the main stream. Bazianus agrees with Huguccio (and Johannes Teutonicus) that post-marital incest cannot deprive the innocent spouse of the right to require the debt, and hence marriages are not to be separated on that ground.

⁷⁵ C.27 q.2 c.27.

⁷⁶ Id., v^o *desponsatam (circa finem)* (Venetiis 1572) 995a: *Et dicit Hug. quod sponsus cum dat licentiam sponsae uel econverso intrandi monasterium matrimonium non soluitur, sed compellendus est et ipse intrare, et si contraxerit duos habet uiros mulier, uel uir duas uxores. Tu dic, quod siue ea volente siue inuita transeat alter non compellitur intrare monasterium. ... Ioan.* The opinion of Huguccio as we have it in the *Summa* is not quite the same as that reported here:

dissolved, but that the man was not to be compelled to enter a monastery, but could remarry, in which case he would have two wives.⁷⁷ The opinion of Johannes Teutonicus, which became the *communis opinio*, was that the marriage was dissolved, and hence the party remaining in the world could remarry⁷⁸.

The problem is a difficult one. If the exchange of present consent creates a marriage, why is one of couple allowed to enter religion without the permission of the other? If it does not create a marriage, then why is it indissoluble in all but a few circumstances? The opinion of Huguccio seems to be that the present-consent marriage is, at least under most circumstances, indissoluble. If one of the couple gives permission, then he or she must also enter religion, just as would be the case if the marriage had been consummated⁷⁹. Johannes Teutonicus, in what is certainly a

Item (si) sponsa de voluntate sponsi intrat monasterium, frangitur coniugium? Dico quod non. Imo videtur hoc ipso novisse sponsus [sponsam], unde compellendus est ut, vel intret monasterium si est juvenis, vel saltem promittat perpetuam continentiam si est senex. Si tamen expresse dicat nolo continere, et volo contrahere, credo quod tunc frangitur conjugium, illa intrante, quia non videtur intrare eo volente. Huguccio, *Summa* ad C.27 q.2 c.24, ed. Roman, above, note 24, at 781. That consenting to one's fiancée's entry into a monastery should be regarded as the equivalent of having intercourse with her is peculiar, but that seems to be what it says.

⁷⁷ (Venetiis 1572) 995a-b: *Baz. dicit quod non soluitur, nec intrare compellitur, et si contraxerit habet duas uxores. Tu dic quod non compellitur intrare, quia cum ei dat licentiam intelligitur dare autoritate et iure illius canonis* [X 3.32.7 (Alexander III)] *et dissolvitur matrimonium. ... Ioan.* That this was what Bazianus held seems reasonably clear, because the opinion is repeated in C.32 q.7 c.2 vº *nunquam* (id.) 1071b: *[D]icit Baz. quod matrimonium non solvitur ingressu monasterii quia dicitur hic quod sola morte solvitur matrimonii sacramentum.* This latter gloss also suggests that these opinions arose in the context of a *quaestio* about the raising of Lazarus. (What would have been the law if Lazarus's wife had remarried between the time that he died and the time that he was raised?)

⁷⁸ Johannes goes on to deal with the troublesome novel of Justinian on the topic (Nov. 123.35), a novel that still seemed to be causing difficulty later on if the unsigned addition to the gloss (probably by Bartholomew of Brescia) is any indication.

⁷⁹ Many of those who espoused a consensualist view of marriage sought to restrict the ability of an espoused unilaterally to choose the religious life. Peter the Chanter, for example, took the two-month period that Alexander III set in X 3.32.7 (where the woman had been contumacious) as stating a rule of law (she may not do so after two months). Petrus Cantor, *Summa* § 314, above, note 50, at 366. Huguccio is more nuanced (*Summa* ad C.27 q.2 c.6, ed. Roman, above, note 24, at 756), but his technique, like the Chanter's, may be described as "limiting the case to its facts."

better reading of Alexander, holds that an unconsummated marriage can be dissolved, even if the party remaining in world gives permission.

Both opinions are possible. Johannes's certainly seems to fit better with the authorities. What are we to say of Bazianus's position? Surely, his suggestion, though a logically possible resolution of the problem at hand, must be regarded as bizarre. If there was any principle that was firmly established about marriage in the late twelfth century it was that one could not have two living wives (or husbands). To hold as Bazianus holds is to violate the principle of monogamy in order to solve a relatively minor problem in reconciling conflicting decretals.

The other opinion also concerns entry into religion, this time after the consummation of the marriage. A canon of the council of Compiègne (757) provided: *Mulier, si sine licentia mariti sui uelum in caput miserit, si uiro placuerit, recipiat eam iterum ad coniugium*⁸⁰. The proposition was clear enough and had been established from at least the time of Gregory the Great: a spouse who had professed religion without the consent of the other could be called back from religion by the non-consenting spouse. But that raised the question how long did the non-consenting spouse have to exercise his or her option⁸¹? Some said a year and a day, citing a canon of Tribur that held that if a girl under the age of twelve took the veil, her parents or guardians had a year and day to nullify the act⁸². Some said that he could call her back when he first had the power to do so, citing a decretal of Innocent I (404) that held that someone who had been ordained unwillingly by heretics was to be received in his orders if he escaped as soon as he could⁸³. The glossator (probably Johannes Teutonicus) thinks that he could do it whenever he would, citing the succeeding canon in which Augustine, writing about the same situation, says to a woman: *Nam si numquam tenuisses eius assensum, numerus te nullus defendisset annorum*⁸⁴. Bazianus, again, attempts a middle ground, saying that the husband may seek her back so long as he does it within three years, citing a canon attributed to a council of Toledo (but in fact a slight reworking of the *Epitome* of Nov. 123.35)⁸⁵. This text is, in fact, quite analogous. It says that monasteries are not to give the habit to strangers for three years. During that period anyone can claim the erstwhile monk as (in the original) a *servus*, a *colonus*, or an *adscriptus*.

⁸⁰ C.33 q.5 c.3.

⁸¹ Id., v^o *coniugium* (Venetiis 1572) 1202a-b.

⁸² C.20 q.2 c.2.

⁸³ C.1 q.1 c.111.

⁸⁴ C.33 q.5 c.4.

⁸⁵ C.33 q.5 c.3, v^o *coniugium*, above note 81: *Ba. dicebat quod intra triennium* [C.17 q.2 c.3].

Before we consider what these examples tell us about Bazianus generally, we may ask what they tell us about his views on marriage. In the great debate of the day between Gratian's view of marriage formation and that of the Parisian sentence-writers (ultimately, with some qualifications, accepted by Alexander III), Bazianus seems to have taken the latter view. He did not make much of a contribution to the debate, but it seems reasonably clear from his position on the topic of the dissolution of an unconsummated present-consent marriage by entry into religion that he adopted the Parisian view⁸⁶. The unconsummated present-consent marriage is a marriage, which, as he says at one point, can be dissolved only by the death of one of the parties⁸⁷. He also, as we have already noted, seems to have emphasized quite firmly the goodness of marriage and may have taken a somewhat liberal (or laxist) view of the sinfulness of marital intercourse⁸⁸.

For the rest, it is difficult to characterize his thought. Five of the eight opinions reported deal with vows or entry into the religious life, a fact that may indicate a personal interest in the problem⁸⁹. The overall direction of his thought on this issue, however, is by no means clear. In two instances he compromises, and his compromises ultimately proved to be untenable⁹⁰. In two others he seems at pains to allow a married person to make a unilateral choice of the religious life, admittedly in somewhat narrow circumstances⁹¹. And in one he simply follows the view that had prevailed since Gratian that solemn vows impede a marriage but simple vows do not⁹².

⁸⁶ Above, text and note 77.

⁸⁷ Above, note 77.

⁸⁸ Above, text and notes 53-61. To this may be added his unwillingness, which he shared with a number of other canonists, to enforce the ancient incest penalty on those who commit incest after marriage. Above, note 74.

⁸⁹ Having been married, did he become a canon of the cathedral of Bologna? That he was a canon has been suggested on the basis of the tomb inscription and now seems reasonably certain as result of the discovery of an arbitral sentence of 1192 of *Bazianus Bononensis ecclesie canonicus et iuris canonci magister*. A. Belloni, 'Giovanni Bassiano', above, note 6, at 77. That Johannes Bassianus was married has received some recent confirmation in Guallazini, 'Martino', above, note 2, at 30-34, though I must confess that, despite Guallazini's arguments, I find that evidence less reliable. The story of the student who married (or tried to marry) his teacher's widow is at least as old as the Babylonian Talmud (*Bava Metzia* 84B), where it is told of Rabbi Elazar son of Rabbi Shimon and Rabbi Yehudah the Prince.

⁹⁰ Above, notes 77, 85.

⁹¹ Above, following notes 63, 70.

⁹² Above, following note 59.

One more example, not about marriage, and we will be in a position to essay some more general conclusions: The ordinary gloss on the rubric of *De penitentia, distinctio 1*, tells us⁹³:

[I]n prima distinctione tractatur an sola cordis contritio debeat peccatum, vel confessio post contritionem. Baz. dixit quod sola contritio non debeat peccatum, ubi copia sacerdotis habeatur. ... Et in hoc videtur Gratianus declinare ... , licet in precedenti sectione dicat hoc esse lectoris arbitrio relinquendum. Sed quidquid dicat Bar., dic quod nec cordis contritione nec oris confessione peccata dimittuntur, sed tantum gratia Dei.

The overall picture that emerges here is of a lawyer who sticks close to expounding his texts⁹⁴. Bazianus's statement about the necessity for auricular confession is, as Johannes Teutonicus admits, probably a faithful reflection of what Gratian meant⁹⁵. Bazianus's negative statement of the goods of marriage is closer to Augustine's text than is Robert of Corson's positive one⁹⁶. Bazianus's ruling that a non-consenting spouse has three years to recall his spouse from a monastery has a solid base in one of Gratian's authorities⁹⁷. In two instances Bazianus seems to have Roman law more in mind than do his contemporaries dealing with the same problem⁹⁸. Although the doctrine of error had a Roman-law base from the time of its appearance in Gratian⁹⁹, Bazianus has what seems to be specific reference to Roman sales law in his attempt solve the problem of an error of condition that does not harm. We cannot be sure that he knew that the text that Gratian ascribes to a council of Toledo

⁹³ *De pen.* D.1, rubr v^o *utrum* (Venetiis 1572) 1091a.

⁹⁴ Already noted in Weigand, 'Bazianus- und B.-Glossen', above, note 15, at 475.

⁹⁵ Above, text at note 93.

⁹⁶ Above, text and notes 23-32.

⁹⁷ Above, text at note 85.

⁹⁸ The strongest evidence of Bazianus's acquaintance with Roman law is not in any of the glosses but in two *quaestiones* reported in his name. G. Fransen, 'Les canonistes médiévaux et les problèmes de leur temps: Quelques *Quaestiones disputatae*', *Mélanges offerts à Jean Dauvillier* (Toulouse 1979) 313-316 nos. 4-5. Both questions, particularly no. 5, have extensive citations to Roman law. In no. 5, too, Bazianus is described: *utriusque iuris clipeo se tuetur*.

⁹⁹ See J. Gaudemet, 'Droit canonique et droit romain: à propos de l'erreur sur la personne en matière de mariage (C. XXIX, qu. 1)', SG 9 (1966) 47-64, repr. in Id., *Sociétés et mariage* (Strasbourg 1980) 320-37. Interestingly, this passage, with its heavy basis in Roman law, appears to have been in the "first recension" of Gratian's work. A. Winroth, *The Making of Gratian's Decretum* (Cambridge Eng., 2000) 222.

was, in fact, a well-known text in Justinian's Novels¹⁰⁰, but the fact that it is may account for the fact that he prefers this authority to the ones on which others were relying to set the limit on calling a spouse back from the religious life.

Bazianus's mastery of theology seems to have been, to put it charitably, imperfect. Robert of Corson has a much more fruitful exposition of the goods of marriage. Johannes Teutonicus's rebuke of Bazianus on the question of penance is well taken. The distinction that Bazianus draws between *exigentia* and *actus* in the case of the goods of marriage just does not work. The proposition that someone whose spouse is living might take a second spouse is both theologically and canonically startling¹⁰¹. Bazianus's analogy to the Pauline privilege in the case of entry into the monastic life suggests an insensitivity to the fundamental distinction between sacramental and non-sacramental marriages, and his analogy (if that is what it is) in the same situation to Alexander's decretal *De illis* suggests an insensitivity to the distinction between sacramental marriages and mere promises to marry¹⁰².

Nor, in some instances, does Bazianus seem to have been a very good lawyer. Admittedly, in the case of Robert's report of his argument about error of condition, the argument might have been more sophisticated than Robert's report of it. What we have of it, however, does not give us much confidence in Bazianus's lawyerly skills. The same might be said of Bazianus's espousal of the notion that an unwilling spouse has three years to call his errant spouse back from a religious house. If their marriage is indissoluble (as Bazianus clearly held it was), then we can certainly see the force in Johannes Teutonicus's argument that there is no limit of time on the unwilling spouse's power to recall¹⁰³. In a strikingly large number of instances, Bazianus makes analogies that are quite strained. All the glossators do this, but normally it is in the service some overall goal that makes sense. Most of Bazianus's goals seem reasonably sensible, but his torturing of his texts sometimes leads him to create larger problems than the ones he set out to resolve. This is particularly noticeable in the case of the adulteress choosing the monastic life, where, in his effort to allow her do so unilaterally, he argues that a separation once ordered cannot be revoked and in one case

¹⁰⁰ Of course, if Bazianus and Johannes Bassianus are the same, he would have known this, because Bassianus wrote on the *Authentica*. But that is *petitio principii*.

¹⁰¹ Above, text and note 77.

¹⁰² Above, text following note 68.

¹⁰³ It is possible, however, that Bazianus was more influenced than most of the canonists were by the need to put some end to rights of this kind, or that he was accepting Justinian's (decidedly non-canonical by Bazianus's time) views on the possibility of divorce and remarriage.

of entry into religion, where he argues that a man may have two living wives¹⁰⁴.

All of these characteristics of Bazianus's thought may go some way toward explaining why he was so quickly forgotten. They are also consistent with, though they do not prove, the hypothesis that Bazianus was a civilian who dabbled in teaching the canons and incurred the wrath of the canonists (and of the Paris moralists) because he had not totally mastered their discipline as they saw it. This, in turn, is consistent with his being the same person as Johannes Bassianus, but they do not show that he was. The hypothetical career outlined for the canonist could have been that of a civilian other than Bassianus, who "converted" to being a canonist.

Bazianus does, however, have his moments. If he made the negative argument about the goods of marriage that Robert ascribes to him, it was a good legal argument, both because it allows one to focus on the essential conditions for a marriage to be a marriage, and also because it solves the difficult problem of the marriage of the elderly. His emphasis on the good of marriage resonates with modern thought on the topic and with some twelfth-century thought (such as that of Hugh of St. Victor). It is possible that that emphasis is also a reason why Bazianus was forgotten. The dominant figure in his period was his contemporary Huguccio, who had a decidedly darker view of marriage.

Johannes Bassianus

Now let us look briefly at the opinions of the civilian Johannes Bassianus on the topic of marriage¹⁰⁵. We begin with his commentary on the *regula: nuptias non concubitus sed consensus facit*¹⁰⁶:

Statim enim ex quo sponsa ducta est, et nuptie perfecte sunt et manent perfecte, licet nullus interveniat concubitus; set cum ductione perficiantur nuptie, tamen consensu fieri dicuntur, quia ex consensu solo ductio matrimonium facit.

¹⁰⁴ Above, text and note 73; text and note 77.

¹⁰⁵ A careful examination of both printed and unprinted material would almost certainly reveal more than what is reported here, but this is enough for our purposes.

¹⁰⁶ D.35.1.15 = D.50.17.30. Ed. S. Caprioli, in 'Quem Cuiacius Iohanni tribuerat', *Annali di Storia di Diritto* 7 (1963) 149, separately published: Johannes Bassianus, *De regulis iuris*, ed. S. Caprioli and F. Treggiari, (Pubblicazioni della Facoltà di giurisprudenza di Perugia 29; Rimini 1983). The attribution to Bassianus is not completely certain, but the arguments for the attribution are, at least to me, convincing.

The commentary shows obvious evidence of Gratian's influence and none at all of Alexander's. Suppose we look at the texts of Roman law in the light of Gratian's distinction between *matrimonium initiatum* and *matrimonium ratum* or *perfectum*, Johannes seems to say. We find support for Gratian's view that marriage is initiated by consent, but we find nothing to support Gratian's view that it is perfected by intercourse. Rather, in the Roman texts marriage is perfected by the *ductio*. This, of course, is not to say that a *ductio* without marital consent makes a marriage, any more than intercourse without marital consent makes a marriage in Gratian's scheme¹⁰⁷.

Once it became apparent that the canon law was not going to follow what the civilian glossators thought was the Roman law about the formation of marriage, they had three alternatives open to them: they could have continued to state the Roman law as they perceived it, with or without recognition that the canon law differed; they could have attempted to argue that the canon law was wrong, as they had to some extent in the case of Gratian; or they could have tried to reconcile their texts with the canon law. They chose the last course¹⁰⁸. We may see the beginnings of this process already in a *Summa Codicis*, that has been variously ascribed to Johannes Bassianus, Hugolinus, and the youthful Azo, and that probably was written between 1185 and 1190¹⁰⁹. All three may have had a hand in it, and we cannot be sure that the following passage is by Bassianus, but it certainly could have been, or have been reflecting his thought, since he was Azo's teacher. The possibility of Bassianan authorship of this particular *summula* is rendered more likely by the fact that just prior to this passage, the manuscript gives an opinion in the first person that we know was an opinion of Bassianus's¹¹⁰.

¹⁰⁷ See C. Donahue, 'The Case of the Man Who Fell into the Tiber: The Roman Law of Marriage at the Time of the Glossators', *American Journal of Legal History*, 22 (1978) 15.

¹⁰⁸ *Id.*, at 28.

¹⁰⁹ Brussels, Bibliothèque Royale, MS. 131-134, fols. 62r-103v. On the attribution and date see P. Weimar, in H. Coing, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 1 *Mittelalter* (1100-1500) (München 1973) 202; literature cited in Dolezalek, *Verzeichnis*, above, note 16, vol. 1, *sub ms. cit.*

¹¹⁰ For the opinion, see below, text following note 130. The following quotation is from MS. 131-134, above, note 109, fol. 81rb. I have been unable to compare the Ollmütz manuscript (Státní oblastní Archiv, C. O. 398), for which see P. Weimar, 'Zur Entstehung der Azoschen Digestensumme', in J.A. Ankum, J.E. Spruit, F.B.J. Wubbe eds., *Satura Roberto Feenstra* (Fribourg 1985) 372. Weimar's argument (above, note 109) for the sole authorship of Azo of this *Summa Codicis* fails to come to grips with the fact that a number of titles in the Brussels manuscript end with Bassianus's *siglum*. This, however, is not one of them.

Item quando perficiatur matrimonium? Si verba de presenti intercedunt, puta "accipio te in meam," et "in meum" a parte uxoris¹¹¹. (Et hoc est quod dicit lex, solo consensu contrahitur matrimonium, ut [D.50.17.30].) Sive sponsalia de futuris nuptiis interceduntur, non sit matrimonium nisi est ductio in domum mariti presentis vel absentis. Maritus vero non est licet in domum absentis mulieris ducatur. Et hoc est quod dicitur de ductione, "non [in uxoris domum, quasi in domicilium matrimonii]" ut [D.23.2.5]¹¹².

The suggestion, then, is that the civilians will accept the canon-law scheme, save that the *ductio* rather than intercourse will perfect a marriage begun by future consent.

Johannes Bassianus's commentary on D.50.17.30 shows, I would suggest fairly clearly, that he knew of Gratian's work, and that he sought to reconcile it with the Roman law to the extent that he could. If he wrote the relevant passage in the anonymous Brussels *Summa*, it would seem that he later attempted to reconcile the Roman law with the emerging consensus among the canonists who followed Alexander III.

There is one more piece of evidence that suggests that he did¹¹³. The Accursian gloss on Nov. 22.3 (*Nuptias itaque affectus alternus facit dota-*

¹¹¹ Cf. Alexander III's decretals, *Licet praeter solitum*, X 4.4.3, and *Significasti*, 1 Comp. 4.4.6(8).

¹¹² The passage continues: *Item quod dicitur a quibusdam esse opus scripturi in nuptiis concubine falsum reputo quod dic ut diximus in [JI.1.10.13]*. Lacking the gloss on JI.1.10.13, we cannot be sure what Bassianus said there, but it was probably what Azo said, and what the Accursian gloss follows, namely, that the dotal instrument required in that passage was for legitimating the *antenati* of the concubine and not for validating the marriage. Azo, *Summa Codicis* 5.4.18 (Venetiis 1610) col. 474; JI.1.10.13 v^o *instrumentis*, ed. P. Torelli (Bononiae s.d. [?193?]) col. 74-5. That the *quidam* are, above all, Placentinus is clear enough from Torelli's quotation from Placentinus's *Summa codicis*, *id.*, at n. 19: *sunt certi casus in quibus circa nuptiis scriptura necessaria est, veluti... si concubinam uxorem tibi facere volueris...*. In the light of what we read above, the Azonian gloss that Torelli quoted in *id.* from Bamberg, MS jur. 4 and which he hesitated to punctuate should read: *Sed numquid sine instrumento non est matrimonium? Respondeo: est quidem, sed filius non est legitimus. Iob. Aldricus. Contra dicunt quidam: sine his non constare matrimonium. Aq.* For the glossators efforts to limit the number of situations in which *scriptura* or *dos* was required, and hence to make the Roman law conform more to the canon, see below, note 113. Donahue, "Tiber", above, note 107, at 31 n. 132, should be modified in the light of this.

¹¹³ I omit here the *summa* (perhaps more correctly the *Collectio summularum*) that is frequently attributed to Johannes and is found at the end of most printed editions of Azo's *Summa codicis*. The printed editions normally describe this as *Summa secundum Iohannem cum additionibus domini Accursii in librum Novellarum seu Authenticorum* (which Accursius is not said, but the elder is

lium non egens augmento) reads¹¹⁴:

probably meant, since Franciscus is normally distinguished). E.g., ed. H. Dräesius (Venetiis, 1610), col. 1219. Many of the additions in the printed text cannot be by either Accursius because they cite authors who were not alive in the Accursius' time. More light is cast on this problem by the title that is found underneath the main title in at least some of the printed editions: *Proemium secundum Johannem in librum Novellarum seu Authenticorum cum additionibus Accursii*. If this is right, then the only part by Johannes is the brief *materia* that appears at the beginning of the text. All the title summaries are by Accursius. That this is, in fact, the case is also suggested by the fact that one manuscript that contains a great deal of material by Johannes Bassianus (Napoli, Biblioteca nazionale, MS. Brancacciano IV.D.4) gives the *materia* under his name and nothing else of the *summa*. See E. Meijers, 'Sommes, lectures, et commentaires (1100 à 1250)', *Atti del Congresso Internazionale di Diritto Romano: Bologna 1* (Pavia 1934) 483, in Id., *Etudes d'histoire du droit 3* (Leiden 1956) 253; Weimar, in Coing, *Handbuch*, above, note 109, at 213. The Ollmütz manuscript does the same. See Weimar, 'Azosche Digestensumme', above, note 110, at 373. The question cannot be closed until more manuscripts are checked (a conclusion with which Lange, above note 2, at 220-1, 342-3, seems to agree). *Proemium cum additionibus* is certainly an odd way to describe a work that is 98% by the author of the *additiones*. One manuscript, Cambridge, MA, Harvard Law School MS. 89, a manuscript of Azo's *Summa Codicis et Institutionum* in a form quite similar to the printed editions, however, tends to support this view as to authorship, because it uses a title like the one found second in the printed editions: *Incipit prohemium ad aut' secundum Johannem cum additionibus domini Accursii*. (This is, I believe, an Italian manuscript of the late thirteenth century; it is unfoliated, but the *summa* begins on fol. 7rb of the next-to-last quire.)

Whoever wrote it, the *summa* is of some interest. In commenting on the Novel *De nuptiis*, it says: *Nuptias autem facit solus consensus per verba de praesenti, sive dos sit ibi sive non, ut* [Nov. 22.3; C.29 q.2 c.3; C.27 q.2 c.2; D.50.17.30.] *At sponsalia fiunt per verba de futuro, ut* [D.23.2.1, 2]. *Summa in Authentica*, coll. 4, tit. 1 (= Nov. 22), ed. cit., col. 1246. The first string of citations is telling. D.50.17.30 has been dealt with above. C.27 q.2 c.2 is from the famous letter of Nicholas I to the Bulgarians (*sufficit solus secundum leges consensus eorum, de quorum quarumque coniunctionibus agitur*). C.29 q.2 c.3 is reported by Gratian as being a decretal of Pope Julius, but is, in fact, as the author of the *summa* almost certainly knew, a quotation from a constitution of Justinian's (C.5.4.26). It says, among other things, *ex affectu fiunt omnes nuptiae*. Nov. 22.3, in addition to suggesting that marriages are made by affect, orders that the same dissolution procedures be followed whether the marriage is accompanied by dowry or not. (Justinian's law required dowry in certain situations, e.g., marriage of the highest dignitaries. Nov. 74.4.1, 117.4.) The summist recognizes this requirement, but he does his best to limit it. *Summa*, coll. 6, tit. 1 [= Nov. 74], ed. cit., col. 1257; coll. 8, tit. 13 [= Nov. 117], ed. cit., col. 1277.) The only thing in the quotation above that is not supported by the citations is the reference to *verba de praesenti* and *de futuro*, and that, of course, is pure Alexander III.

¹¹⁴ Authen. 4.1, v° *affectus* (Venetiis 1489) fol. 31vb, cf. (Lugduni 1604) col. 163.

Facit [D.50.17.30]¹¹⁵. Et hoc si interveniant verba de presenti ut haec: vis esse uxor mea? respondeat, volo, et econtra illa interroget. Secus si de futuro: voles esse uxor mea? Nam erit uxor tunc demum quando ducetur ad domum mariti, ut [D.23.2.5, 1]¹¹⁶. Quid si vadat sponsus ad domum sponsae cum per verba futuri temporis fuit celebratum matrimonium? Respondeo non ideo fit matrimonium, ut [D.23.2.5], quia hoc raro fit, unde non curatur a legislatoribus ut [Nov. 22.35¹¹⁷; D.1.3.5]. Item domus mariti est domicilium uxoris, sed non econtra, ut [D.50.1.38.3; D.5.1.65]. In casu tamen illo et quandoque hoc fit ut maritus ducatur ab uxore, ut [C.5.18.3], et hoc secundum Ioan[nes] Bassianus]. Sed Placentinus] semper exigebat ductione in domum mariti, licet sint verba de praesenti, et ad hanc legem sic respondet: debet solus consensus, i.e. etiam sine festivitate et solemnitate, instrumentorum et annulorum datione, et aliis pompis, matrimonium potest fieri, ut [C.5.4.22].

As we intimated above, the civilian glossators prior to Bassianus had tended to require a *deductio in domum mariti* in order to perfect a marriage, without regard to the form of marital consent¹¹⁸. Placentinus was particularly firm in this regard, and the opinion reported here under his name goes further than what we find in the printed *Summa Codicis*, which can be read as accommodating C.5.18.3 (a strange case in a woman is said to have *duxit* a slave, not knowing that he was a slave) to the requirement of the *ductio*. Otherwise, the report of his opinion is quite

¹¹⁵ Showing that the civilian glossators equated Justinian's *affectus* with the *consensus* of D.50.17.30. This may not be right as an historical matter (see E. Albertario, 'Honor matrimonii e affectio maritalis', in Id., *Studi di diritto romano* 1 [Milano 1933] 195-210; J. T. Noonan, 'Marital Affection in the Canonists', SG 12 [= Collectanea Stephan Kuttner 2; 1967] 479-509), but history was not the glossators' long suit.

¹¹⁶ This citation is odd and is not normally found among those that support a requirement of a *deductio*. Perhaps the focus is on the *coniunctio maris et feminae* of Modestinus's definition, but this was normally interpreted to refer to mental rather than physical union. See, e.g., Donahue, 'Tiber', above note 107, at 18.

¹¹⁷ *infra ut matres debitori § j* (Venice 1489); *infra ut matres et deb. § j* (Lugduni 1604), neither of which corresponds to anything in the Authentic. The suggestion that Nov. 22.35 (incipit: *mater tamen donans aliquid*) is meant is based on the gloss v^o *nisi tamen* on that text (Lugduni, 1604, col. 191) which says that the restriction on revocations of gifts described in that chapter does not apply to men who remarry because *non est verisimile quod mutet voluntatem propter uxorem sicut uxor propter virum*.

¹¹⁸ Donahue, 'Tiber', above, note 107, at 13-23.

close to what we have¹¹⁹. Azo dropped the *ductio* requirement in the case of present-consent marriages, though he may have retained it for purposes of marital property. He retained it in the case of future-consent marriages, where he substituted it for the intercourse requirement in Alexander III's scheme¹²⁰. Accursius dropped the requirement entirely in the case of present-consent marriages, except, perhaps, as evidence of present consent¹²¹. What he does with it in the case of future-consent marriages is stated no place more clearly than here¹²².

Accursius puts three situations: (1) An exchange of present consent creates a marriage without more, though he acknowledges that Placentinus thought otherwise. (2) An exchange of future consent in the house of the woman does not create a marriage. The *ductio* must be to the house of the man, for that is the domicile of the marriage and the laws are adapted to those things that happen most often. (3) An exchange of future consent followed by a *ductio* to the house of the man creates a marriage, and also, at least according to Johannes Bassianus, if it is followed by a *ductio* to the house of the woman, citing C.5.18.3.

What Accursius has done, quite subtly, is to tame the unambiguous requirement of D.23.2.5: *deductione enim opus esse in mariti non in uxoris domum, quasi in domicilium matrimonii*. He applies it to the situation where the man has gone to the woman's house not for the purpose of beginning marital life but for the purpose of exchanging future consent. It is to this situation that he applies the argument (and

¹¹⁹ Placentinus, *Summa Codicis* 5.4.7, ed. G. B. Palmieri, 'Rogerii Summa Codicis', BIMA I, 2nd ed. (Bologna 1913) 139, discussed in Donahue, 'Tiber', above, note 107, at 19-21.

¹²⁰ Id., at 29-31. In addition to the material cited there, see Azo, *Lectura in Codicem* 5.3.6, v^o *uxor enim fuisti* (Parisiis 1577) 370: *Per hanc legem voluit dicere P[la]centinus quod solo consensu non contrahitur matrimonium, imo necessaria est deductio in domum, secundum nos contra, ut [D.50.17.30], et etiam sibi contradicit ff. de ritu nup. in libere [D.23.2.24, an odd citation for this point; we would expect D.23.2.6; perhaps Placentinus contradicted himself in an otherwise unknown gloss on D.23.2.24]. Et hic non erat consensus de praesenti, sed de futuro cum contraherentur sponsalia et sponsalia sunt mentio et repromissio futurarum nuptiarum [see D.23.1.1]. Praesumitur ergo contractum si mulier deducatur in domum viri, non autem econverso, ut hic et [D.23.2.5]. Vel si vero esset de praesenti, contraheretur matrimonium sine deductione in domum, vel etsi contrahatur matrimonium consensu, non tamen quoad hoc ut non valeat inter virum et uxorem donatio. Dic ergo quod necessaria est deductio in domum ad hoc quod non valeat donatio. Et intellexit P. quod dicitur solo consensu contrahi matrimonium, id est, quod non est necessaria scriptura vel pompa et similia, non quod excludatur in domum deductio. Sed hoc falsum est, ut supra dixi.*

¹²¹ Donahue, 'Tiber', above, note 107, at 32-33.

¹²² I did not know this text when I wrote Donahue, 'Tiber.'

the citation) of Azo: *quia hoc raro fit, unde non curatur a legislatoribus ut* [D.1.3.5]. But Azo used this argument (and Rogerius before him probably had) to reject the possibility that there could be a *deductio* of the man into the house of the woman, and hence a perfection of a future consent marriage by this means. In short, Azo rejected the applicability of C.5.18.3 to this situation¹²³. In the situation, however, where there is a *deductio* of the man into the house of the woman, Accursius cites the opinion of Bassianus, who, he says, used C.5.18.3 to show that this could happen. Accursius's view, then, comes as close as one can to accommodate the Roman texts (which are quite emphatic that sexual intercourse has nothing to do with creating a marriage) to the canon-law alternative type of marriage formation (future consent plus intercourse). Quite understandably he does not tell us what a *deductio in domum uxoris* looks like. He had never seen one, and he, like us, had no idea what Caracalla meant when he said to Hostilia *si ignorans statum Erotis ut liberum duxisti...*. He opened the way, however, for any situation in which a fiancé and fiancée began marital life together to be regarded as a *deductio*.

The question, of course, is how much of this can we attribute to Bassianus? We must be careful. Accursius twisted Azo's argument (though he does not cite him), and he may have twisted Bassianus's as well. There is nothing in the anonymous Brussels *Summa* that suggests that Bassianus had anything but traditional views on what constituted an acceptable *deductio*. The Brussels *Summa* does suggest, however, that Bassianus, perhaps toward the end of his life, may have attempted to accommodate the emerging canon law with the Roman. What is said in the Brussels *Summa* can be reconciled with what is attributed to Bassianus here if we assume that Bassianus confined D.23.2.5 to the situation that it is describing, marriage between absents.

Perhaps what Bassianus said about C.5.18.3 is not so important as what Accursius says by implication about his views here. Accursius contrasts Bassianus's views with those of Placentinus in that he puts Bassianus in the camp of those who require the *deductio* only in the case of marriages by future consent. That would confirm the suspicions that we formed on the basis of the Brussels *Summa* that Bassianus applied

¹²³ [Q]uia domus mariti est quasi domicilium matrimonii, et ad ea quae sepius contingunt, aptantur iura. Azo, *Summa Codicis* 5.4.15 (Venetiis 1610) col. 474. The final phrase is taken from D.1.3.5, and its application to this situation is suggested in a gloss attributed to R[ogerius]. D.23.2.5, vº *per literas eius* (Lugduni 1612) col. 2137-8. "R." could also be Roffredus Beneventanus, but it seems unlikely that an argument that was already in Azo would be attributed to a glossator later than he.

the distinction between present and future consent to the Roman texts, and he may have been the first mainstream Bolognese civilian to do so¹²⁴.

So far as I am aware, there is only one gloss attributed to Bassianus in the printed edition of the *glossa ordinaria* on titles 1-2 of book 23 of the Digest (*De sponsalibus* and *De ritu nuptiarum*), but it is an important one. Digest 23.1.11-12 is a *catena* of texts on the topic of parental consent. Digest 23.1.11 reports the opinion of Julian on the basic principle: *Sponsalia sicut nuptiae consensu contrahentium fiunt: et ideo sicut nuptiis, ita sponsalibus filiam familias consentire oportet*. Ulpian, however, in his monograph on espousals qualifies this: *Sed quae patris voluntati non repugnat, consentire intelligitur. Tunc autem solum dissentiendi a patre licentia filiae conceditur, si indignum moribus vel turpem sponsum ei pater eligat*. The contrast between the two passages is quite stark, and the fact that they are in a *catena* shows that the contrast was perceived by the compilers of the Digest, if not before.

The gloss begins by stating the obvious inference: *Ergo si dignum eligat pater, contrahuntur sponsalia sine voluntate filiae. Secus tamen asseritur in filio* [D.23.1.13 (*Filiofamilias dissentiente sponsalia nomine eius fieri non possunt.*)]¹²⁵ Bassianus rejected this conclusion: *Jo[hannes Bassianus], tamen, dicit idem in filia quod in filio: ut numquam consistant sponsalia sine voluntate filiorum et filiarum. Sed tamen ubi dignum eligat pater, contrahit causam ingratitude, nisi consentiat ut sit in aliis causis* [Nov. 115.3.11 (listing the *causae ingratitude*, i.e., situations in which a parent may deny his or her child a *legitima portio* of the inheritance)]¹²⁶. It should not surprise us that a man who wrote on

¹²⁴ He was, to some extent, anticipated by Vacarius. See Donahue, 'Tiber', above, note 107, at 23-26.

¹²⁵ D.23.1.12 vº *eligat* (Lugduni 1604) col. 2105; (Venetiis 1488) fol. 329vb.

¹²⁶ Id. The 1488 edition (Baptista de Tortis) has *indignum* for *dignum*, but that cannot be right. It is corrected in the 1604 edition (Godefroy). The Novel is squarely on point, though it does add that the daughter must not only refuse to accept an appropriate match, but also choose instead a life of debauchery. My previous account of this gloss is wrong. Donahue, 'Tiber', above, note 107, at 44.

The rest of gloss is also of some interest, but we cannot be sure that it is by Bassianus. It considers whether C.5.4.18 (*viduae intra quintum et vicesimum annum degentes, etiam si in emancipationis libertate gaudent, tamen in secundas nuptias sine patris sententia non convenient*) is *contra* in that it implies that the daughter must accept the father's choice even if he chooses someone unworthy, and concludes (at least in the 1488 ed.) that the two texts may be reconciled either on the ground that C.5.4.18 concerns an emancipated daughter and D.23.1.12 one in power, or on the ground that D.23.1.12 denies the daughter power to choose only where she has chosen someone unworthy (and, presumably, the father someone worthy). The first distinction is specious. The daughter should have more power, not less, if she is emancipated. The second distinction does have some support in the text of C.5.4.18.1 (*quod si in condicionis delectum*

the Novels should come up with a citation to them that resolved a difficult problem¹²⁷.

As I have argued previously, the issue being considered here is an important one in the relationship of Roman and canon law with regard to marriage¹²⁸. The Roman law texts are quite clear that the consent of the father must be obtained for the marriage of children in power, and some texts, of which D.23.1.12 is one of the more important, suggest that a daughter in power had little to say about it. The emerging canon law in the late twelfth century gave no legal role to the consent of the father and emphasized the equal choice of the bride and groom. The civilian glossators never abandoned their requirement of parental consent, but they did yield to the canon law in that they interpreted the Roman law texts as requiring that both the bride and groom consent. Johannes Bassianus's gloss was an important step in this latter process.

Another opinion of Bassianus's on the topic of marriage is not reported in the *glossa ordinaria* but is reported in Azo's *lectura* on the Code 5.4.1. The text reads in its entirety: *Cum de nuptiis puellae quaeritur nec inter tutorem et matrem et propinquos de eligendo futuro marito convenit, arbitrium praesidis provinciae necessarium est*. Azo glosses the first three words¹²⁹:

Scilicet, futuris, non praesentibus. Cum enim sit minor xii annis non poterit contrahere matrimonium, et ita durante tutela non contrahitur matrimonium, ut [I.1.10pr]. Sponsalia tamen contrahi possunt, ut [D.23.1.14]. Set posset quaeri, si aliqua non peruenerit ad legitimum tempus, et contrahat cum aliquo, et cognouit eam infra illud tempus, utrum teneat matrimonium. Et voluerunt forte Decretistae dicere quod sic, quasi, videatur, usus felici diplomate. Et ita induxerunt pro se in argumento [D.45.1.137.2]. Io[hanni Bassiano] tamen visum fuit contra. Non enim videtur nupta quae virum pati non potest [D.36.2.30]. Unde si aliquis contraxit ante legitimum tempus et cognouit eam, tenetur de stupro. Quare intelligendum est quod hic dicitur de nuptiis futuris non praesentibus.

mulieris voluntas repugnat sententiae propinquorum, placet admodum, ut in virginum coniunctionibus sanctum est, habendo examini auctoritatem quoque iudiciariae cognitionis adiungi, ut, si pares sunt genere ac moribus petitores, is potior aestimetur, quem sibi consulens mulier adprobaverit.)

¹²⁷ See above, text at note 2, and note 126.

¹²⁸ Donahue, 'Tiber', above, note 107, at 34-41.

¹²⁹ Azo, *ad C.5.4.1 vº cum de nuptiis* (Parisiis, 1577, repr. Torino, 1966) p. 372.

The Brussels *Summa Codicis* reports the same opinion as that ascribed to Bassianus here, this time in the first person. The text may be corrupt, but its overall import is relatively clear¹³⁰:

Item qui possunt contrahere nuptias? Et quidem maiores xii vel xiiii, quod dic ut in [JI.1.10pr]. Quid ergo si ante ducitur? Respondeo non est matrimonium nisi est legitimum tempus impletum, ut [D.23.2.4]. Quid ergo si ante fuit cognita? Dicunt quidem tenere matrimonium quia¹³¹ felici diplomate est usus [D.45.1.137.2]. Sed ego contradico quia sicut cognatio¹³² impedit matrimonium ita et etas certe; immo debet puniri quia eam violavit. Que non dicitur nupta que virum pati non potest¹³³ ad idem recidit, quia nec ipsa videtur posse pati¹³⁴ propter etatem etiam si prolem habeat.

The glossators made a fundamental mistake about Code 5.4.1¹³⁵. At the time that it was written (A.D. 1199), Roman law recognized, at least formally, the perpetual tutelage of women¹³⁶. The fact that she has a *tutor* is therefore no reason why the *puella* in question needs be under the age of puberty¹³⁷. That a girl under the age of puberty could contract *spōnsalia* is, however, recognized in the cited text, D.23.1.14¹³⁸. The problem that Azo then posits could, however, only have arisen after it became clear, as a result of the decretals of Alexander III, that future consent followed by intercourse made an indissoluble marriage¹³⁹. That intercourse by a *sponsus* with a *sponsa* under the age of twelve could give rise to such a marriage is recognized by a number of the Alexander III's decretals, although one seems to hold that where this occurs in the situation where the girl *virum pati non potest* no marriage has been formed¹⁴⁰. Whether the canonists of Azo's period ever used D.45.1.137.2

¹³⁰ Above, note 110, *loc. cit.*

¹³¹ MS. redundant *tenere*.

¹³² MS. *conguo*.

¹³³ A reference to D.36.2.30, though it is not cited.

¹³⁴ MS. *qz n' ipa' v' p'se pati*. For an attempt at a translation of this last sentence, see below text following note 143.

¹³⁵ The mistake is repeated in the ordinary gloss both in the *casus* of Vivianus Tuscus and in the gloss vº *de nuptiis* (Lugduni 1604) col. 1018.

¹³⁶ For the qualification, see GI.1.189-90.

¹³⁷ That she is called *puella* and that the text speaks of *futuro marito* is some reason for so thinking.

¹³⁸ Though some have doubted whether fixing the age at seven is classical. See the Mommsen-Krüger edition.

¹³⁹ E.g., *Veniens ad nos*, X 4.1.15.

¹⁴⁰ For the basic doctrine, see Alexander III, *Continebatur*, *A nobis*, and *De illis*, X 4.2.6, 7-8, 9. For cases seemingly to the contrary, see *De muliere quam infra*, ed. W. Holtzmann, *Kanonistische Ergänzungen zur Italia pontificia*

to support the general conclusion that a marriage had been formed, I do not know. The text is cited in the ordinary gloss to JI.1.10pr, where it is used to support that conclusion, but the gloss then adopts the contrary opinion of Bassianus without mentioning his name¹⁴¹.

What is interesting is that Bassianus dissented. He based his opinion on D.36.2.30, which holds that the condition of a legacy to an orphan girl (perhaps the testator's daughter) that it be given *quandoque nupserit* was not fulfilled if she married before she was *viripotens*. *Non potest videri nupta*, the text concludes, *quae virum pati non potest*. He also held that a *sponsus* who has sexual intercourse with his *sponsa* before she reaches the age of puberty has committed *stuprum*¹⁴².

Bassianus's argument, as reported by Azo, does not quite come to grips with that which Azo ascribes to the canonists. The ages of "reason" (seven for both genders) and "puberty" (twelve for girls and fourteen for boys) that both the civilians and the canonists derived from Roman law are proxies for much more complicated and variable psychological and physical realities. If a girl does reach the age of puberty before she is twelve and she has sexual intercourse with her *sponsus*, should not the proxy give way to the fact? For this proposition, D.45.1.137.2 is quite good support. If, the text says, we are trying to figure out what a reasonable time is for someone to get from Rome to Ephesus, we should have regard to what a careful person can normally achieve under the circumstances, but if someone uses the imperial post or arrives early as a result of particularly fortunate winds, then we look to what actually happened not what normally happens. Bassianus seems simply to assume that a girl under the age of twelve is not *viripotens*. That assumption is not correct in all cases.

(Tübingen 1959) (= repr. from *Quellen und Forschungen aus italienischen Archiven und Bibliotheken*, 37-38) no. 204; cf. *Ex litteris quas tua*, X 4.15.3. For a sense of where the doctrine had reached a generation later, see Raymundus de Peñafort, *Summa de sacramentis et de matrimonio* 4.1.5 (Roma 1603) 506b-507a. The doctrine did not apply where either party did not consent to the intercourse, and some of the doctors held that it did not apply if either of the parties was more than six months younger than the fixed ages.

¹⁴¹ I.1.10pr v° *viripotentes*, ed. Torelli, above, note 112, col. 62: *Item, quid si aliquis [femina] antequam istud tempus [maior xii annis] sit, invenitur sufficiens ad matrimonium? Videtur quod nubere possit, ut [D.36.2.30], quasi felici diplomate usus [D.45.1.137.2]. Sed contra dico immo lege Iulia De Adulterio [et stupro commisso], poterit puniri ut [D.48.5.6pr] et pro hoc [D.25.7.1.4].*

¹⁴² His support for that proposition is not given in either Azo's report or the Brussels manuscript; support is given in the gloss in the *Institutes*, above, note 141. Neither citation seems particularly apt, though there is some support in D.25.7.1.4: *Cuiuscumque aetatis concubinam habere posse palam, nisi minor annis duodecim sit.*

The only hint as to what his argument might have been is in the tortured and possibly corrupt last sentence of the Brussels manuscript¹⁴³. Bassianus has set it up by his citation of D.23.2.4, which says flatly: *Minorem annis duodecim nuptam tunc legitimam uxorem fore, cum apud virum explesset duodecim annos*. A girl under twelve who goes through a marriage ceremony and lives with her husband is still not a "wife" until she reaches the age of twelve. There is no suggestion here that physical maturity or the physical ability to have sexual intercourse has anything to do with it. It is in the light of this text that we must interpret what JI.1.10pr means when it refers to *feminae viripotentis*, and the best text for doing so is D.36.2.30, which, although it is not cited, is clearly the text that Bassianus has in mind in the last sentence: "She who is not said to be *nupta* who cannot tolerate a man falls into the same position (*ad idem recidit*) [as the woman in this case], for she too (*nec ipsa*) [i.e., the woman in this case] does not seem to be able to tolerate [a man] on account of her age, even if she has a child". The argument, it would seem, is not about physical capability, which Bassianus seems to concede can be present in girls below the age of twelve. Perhaps the argument is psychological; that is at least suggested by the use of the word *pati*. Perhaps, too, it is a matter of decency, humanity if we will, a value that Bassianus could have absorbed from his long exposure to juristic texts¹⁴⁴.

I must confess some sympathy with Bassianus's argument. Coming from a culture that is convinced of the deleterious effects of sexual intercourse on children who are not ready for it and also that such intercourse is quite common, I can see why Bassianus wanted to draw a "bright line". To have sexual intercourse with a girl below the age of twelve, even if she is your *sponsa*, is not marriage, it is *stuprum*, or, as we would say, rape, even if she seems to consent, even if she subsequently gives birth to a child.

One of the recently published *consilia* of Bassianus contains, in passing, a ruling on marriage¹⁴⁵. The case is a complicated one about dowry, and although the editor has done a fine job of reconstructing it from a *codex unicus* that was used for binding other manuscripts, we may doubt whether we can be completely sure that we know why Bassianus held as he did¹⁴⁶. Fortunately, the part of the opinion that concerns marriage is relatively straight-forward. Alda had espoused

¹⁴³ Above, text at notes 133-134.

¹⁴⁴ Of a large literature, see especially, F. Schulz, *Principles of Roman Law* (Oxford 1936) 189-222.

¹⁴⁵ Belloni, 'Giovanni Bassiano consulente', above, note 2, at 133-139.

¹⁴⁶ I find particularly troubling the citation of D.23.3.21-2 (id., at 138), because those texts seem to me to call for the opposite result from the one that Bassianus seems to be reaching. There are also a number of sentences of which I can make no sense. E.g., the one that carries over from p. 137 to 138.

Seius, and Titius had promised a dowry, which may have been in discharge of an obligation that he owed Alda. Alda then married Gaius, but that marriage was dissolved, probably because of consanguinity¹⁴⁷. Alda then apparently married Seius, who, in turn, sought the dowry from Titius, and the opinion goes down in Seius's favor.

On the question whether the marriage of Alda and Gaius discharged Titius's obligation to endow Alda in a marriage with Seius, there is one direct, though imprecise, citation to canon law. It makes no difference, Bassianus tells us, that the children of the marriage between Alda and Gaius were said to be legitimate, because *fit enim hoc ex gratia, ut testatur Alexander in Decretali sua, et alias in* [Nov. 117.7]¹⁴⁸. The editor thinks that the decretal referred to is *Cum inter I.* (X 4.17.2), and it certainly could be, since that decretal announces the legitimacy of children of a putative marriage, though no reference is made to it being done *ex gratia*.

More difficult to determine is the relationship of canon law to the overall thrust of the passage. It is apparently assumed, at least for purposes of the argument here¹⁴⁹, that if the marriage between Alda and Gaius had been valid, that would have voided the agreement between Seius and Titius¹⁵⁰. The text, as edited, reads¹⁵¹:

Videamus an intercesserint alie [n]uptie, [cum] quidem olim diverse fuerint opiniones prudentium et cum tum desiit dubitari [ibi] esse matrimonium, scilicet putari sibi fuerint con<un>cte quas prohibent copulari: nam, si matrimonium [esset], non liceret viro eam dimittere, nisi causa fornicationis secundum evangelicam auctoritatem, [id]est non liceret alterutri eorum altero vivente alii copulare. ... Dicimus igitur non fuisse matrimonium: intrigaverunt sibi alii, licet [videntu]r stare in facie sive in conspectu ecclesiae, cum nunc appareat inter eos parentela [f]uisse.

¹⁴⁷ *inter eos parentela fuisse*. Id., at 137. Whether Seius also married a woman named *Sibilla* (ibid.) and that marriage, too, was dissolved, I must confess myself agnostic. Elsewhere (id., at 138), *Sibilla* seems to be a mistake for *Alda*.

¹⁴⁸ Id., at 137.

¹⁴⁹ Later (id., at 138), Bassianus seems to make a kind of *tour de force* argument, that since the condition of the first promise was fulfilled, nothing else counts, not the waiver that Seius made nor the marriage even if it were valid, citing D.35.1.10, which deals with a legacy to be given when a woman marries.

¹⁵⁰ Possible grounds for this are an *ipso fortiori* argument from D.23.3.21-2 (id., at 138), where an obligation to constitute a dowry is dissolved if the man repudiates the match, even though the couple later marry.

¹⁵¹ Id., at 137.

(and there are hints of this later in the opinion), that any express renunciation of the obligation made because the obligee intends to marry another should be deemed to be subject to the implied condition that the other marriage is valid.

If this is what Bassianus is saying – and that he is saying this must be speculative granted the state of the text and my failure to discover textual evidence of the *diverse opinionones* of which he speaks¹⁵⁴ – it represents a quite sophisticated accommodation to the legal realities of the late twelfth century. Neither Justinian's law about prohibited degrees nor that about divorce is any longer in force, as a matter of legal reality. His law about dowry needs to be adjusted in order to achieve justice in an actual case that is governed by these new realities.

Conclusion

Johannes Bassianus thus emerges as a quite important figure in the overall effort that the Roman-law glossators made to come to grips with the emerging canon law of marriage. That a man who did this should also have turned his attention to the canons more generally toward the end of his life is certainly possible.

Nonetheless, on the basis of what is admittedly a limited body of evidence, I am inclined to think that Bassianus and the man who wrote the Bazianus glosses are not the same man. In the first place, the style of the two as glossators is quite different¹⁵⁵. Bassianus's product, at least as we have it now, is a written product. That of Bazianus shows obvious evidence of the class room. Exhortations to the reader and interjections abound¹⁵⁶. This may be the result of the fact that in the case of the canonist we are looking more directly at what he said in the classroom

¹⁵⁴ It is possible that he is referring to *diverse opinionones* about whether a marriage entered into in good faith and which later turns out to have been prohibited because of some relationship prohibited by positive canon law and not by Biblical law should be dissolved. There are hints of such a debate in Peter the Chanter (Petrus Cantor, above note 50, § 287, App. § 27, ed. Dugauquier, 315-317, 742-743), and Alexander himself seems to have refused to dissolve marriages in which the relationship was greater than the fourth degree (e.g., X 4.14.1). On balance, however, I am inclined to think that Bassianus is referring to more basic principles.

¹⁵⁵ Obviously, this cannot be based entirely on what is offered above, but space does not permit extensive citations of sources. Further research would be necessary to confirm that these characterizations are correct, but they seem worth putting forward, at least tentatively.

¹⁵⁶ See, e.g., in addition to the glosses quoted above following notes 54, 59, 63, see Weigand, 'Bazianus- und B.-Glossen', above, note 15, at 470 no. 54.

It will be noted that the first sentence is corrupt; we need either to read *quae prohibentur* or to supply something like *leges* or *canones* after *prohibent*. We probably should also supply something like *quod persone* after *putari*. We may then translate: "Let us see if other nuptials intervened, since there were indeed at one time differing opinions among the *prudentes* and since now there has ceased to be doubt whether there was matrimony there [i.e., there was not], that is to say, we [no longer] think that persons who are prohibited to couple are joined to each other [for any legal purpose]". In the second sentence *intrigaverunt sibi alii* is probably better taken as a parenthetical, and we translate: "We say therefore that there was no matrimony – others got entangled with them – although they seemed to stand [validly married] in the face and sight of the church, since it now appears that there was [a prohibited] relationship between them"¹⁵².

The question, of course, is what is the issue about which there used to be diverse opinions but which now cannot be doubted? Justinian's law allowed divorce in a number of situations in which twelfth-century canon law did not, but it is hard to see how that, by itself, is relevant to the issue at hand. Twelfth-century canon law also had a much more extensive incest prohibition than did Justinian's law, but if that were the issue, it is hard to see why the indissolubility of non-prohibited marriages, so emphatically announced in the middle phrase (*nam, si*, etc.) would be relevant. If we combine the two differences, however, we may be able to speculate about what the previous opinion was. At least some thought that under Justinian's law any marriage that appeared valid under the rather relaxed rules for validity that prevailed in his time would serve to dissolve the obligation to constitute a dowry for another marriage. If the couple then divorced, the obligation would not revive. Under today's law, that is to say, canon law, by which, as Bassianus later tells us, "cases of marriage are governed"¹⁵³, the danger that the couple will later divorce is much less, because a valid marriage is indissoluble. But the danger that a marriage will be declared invalid for reasons that the couple did not know of at the time of the marriage is greater. Hence, a couple who engage in a putative marriage that turns out to be invalid under canon law should not be presumed to have waived the obligation of another to constitute a dowry for a previous marriage that, in fact, takes place after the annulment. Perhaps the rule should be

¹⁵² For reasons suggested by the translation, I think it unlikely that Bassianus has a specific decretal in mind, and there is no particular reason for thinking that if he does it is *Ex litteris tuis* (X 4.14.1 = 1 Comp. 4.15.2 [miscited both times it is cited]). The canonic propositions on which Bassianus was relying (indissolubility of a valid marriage, invalidity of a marriage of close relatives) are commonplace enough.

¹⁵³ *iure canonico quo cause matrimoniorum hodie gubernantur*. Id., at 138.

whereas in the case of the civilian we are looking at it at some remove, but the differences in style are there.

Turning from style to method, Bassianus's mastery of Roman law was comprehensive. He had the entire corpus at his fingertips. Bazianus did know some Roman law. There was a tradition that he was learned in it, and what we have seen shows evidence of knowledge of Roman law, though what we have seen does not suggest that it was particularly profound. If Bassianus and Bazianus were the same man, we would expect to find in Bazianus more references to Roman law than we do. Citations to Roman law in the canonic glossatorial tradition were just beginning in this period, but they were beginning. Weigand's collection of glosses has a number of direct citations to Roman law, but none are found in the known glosses of Bazianus. If, as Weigand suggests, there were *Romanisierungstendenzen* in the canonic glossators of this period, we would expect that Bassianus/Bazianus would have been leading the way¹⁵⁷. That is not our Bazianus.

Indeed, what characterizes the glosses of Bazianus is not a large number of citations of Roman law but a fairly large number of citations of the Bible¹⁵⁸. Bazianus is, of course, not alone in this regard in this period, and there is no reason to believe that some civilians did not have a quite profound knowledge of the Bible, but citations of, and quotations from, the Bible are not common in civilian literature. Nor are they common in all the canonists, but they are in some. If Bassianus is Bazianus, he not only changed his focus when he moved from one discipline to another, he also changed his method. That is possible, but it does not seem likely.

Also on the question of method, Bassianus introduced a new method of teaching in the Bolognese schools; he made considerable use of the "new logic" in his teaching and writing¹⁵⁹. There is no, or little, evidence

¹⁵⁷ R. Weigand, 'Romanisierungstendenzen im frühen kanonischen Recht', ZRG(KA) 100(69) (1983) 200-49.

¹⁵⁸ See Weigand, 'Bazianus- und B.-Glossen', above, note 15, at 463 no. 20 (Ps. 98:6), 466 no. 40 (Eph. 5:18), 468-9 no. 48 (Mt. 18:15-17), at 470 no. 54 (which is particularly telling because it involves a combination of a citation to and quotation from Phil. 1:18 and a reminiscence of Jn. 10:12-13 [*mercennarii*]) 471 no. 57 (2 Tim. 2.24).

¹⁵⁹ See Cortese, above, note 6, at 155-157 and nn., 178, 179 n. 81, 186-189. For remarkable evidence of Bassianus's method (a *lectura* on D.34.5.13(14).3) and a much more positive assessment of his contribution than those offered below, note 161, see V. Colli, 'Una lectura di Giovanni Bassiano: "Dialectica disputatio" ed esposizione didattica nella esegesi di un passo dell'Infortiatum', *Ius commune* 11 (1984) 37-53 (with citations to previous literature). More hesitant, but in the same direction, M. Bellomo, 'Legere, repetere, disputare', id., *Aspetti dell'insegnamento giuridico nelle Università medievali* 1 (Reggio Calabria 1974) 13-81; id., *Medioevo edito e inedito*, above, note 6, at 76 & nn.

of either of Bassianus's teaching method or of the "new logic" in the material of Bazianus that we have examined.

Turning from method to substance, it seems unlikely, though not impossible, that the Bassianus who wrote about the Roman law of marriage in the way that he did is also the Bazianus who wrote about the canon law texts on the same topic. There are no striking inconsistencies, situations in which Bassianus espoused one view and Bazianus the opposite. One would expect, however, that the Bassianus who had made contributions to such topics as the moment of the formation of marriage, the necessity of parental consent, and to the relationship between marriage law and that of dowry would, as Bazianus, have talked about the same issues. There is nothing in the known glosses of Bazianus on the topic of parental consent; there are none that I know of on the topic of dowry. There is one gloss reported under the name of Bazianus that is relevant to the question of the moment of marriage formation, and it is an important one, but it seems most likely that this is, in fact, a gloss of Cardinalis, which, if the attribution is correct, Bazianus shortened (and somewhat garbled)¹⁶⁰.

Finally – and this point must obviously be the most subjective but to me it is the most telling – Bassianus had a sharp legal mind. He is not easy to read. His distinctions are multiple and subtle and what he is saying is not always completely clear, but if one spends time with him one comes away with the impression that a powerful intellect was at work there¹⁶¹. Bazianus, by comparison, is second-rate. It is hard to believe that the man who wrote the apparatus on D.50.17, the *materia ad Pandectas*, and the *ordines Quicumque vult* and *Quoniam omnium legumlatorum*¹⁶² is also the author of what goes under the name of Bazianus.

¹⁶⁰ Compare Weigand, 'Bazianus- und B.-Glossen', above, note 15, at 471 no. 58, with Weigand, *Glossen*, above, note 6, at 216 no. 1077a.

¹⁶¹ Gualazzini, above, note 2, at 140-141, offers a more qualified assessment, but he seems to be reacting to the same characteristics that I have noted. Meijers' negative assessment (above, note 113) and the more nuanced one of Lange (above, note 2) are, in both cases, influenced by their preference for Placentinus and the Martinian school. That Bassianus had strict law rather than equity more often in mind may be true, but that is also characteristic of Huguccio. That does not prevent either of them from being first-class legal technicians. (My acquaintance, I should add, with Bassianus, other than Bassianus on marriage, comes principally, though not exclusively, from the procedural works.) For more positive assessments, see above, note 159.

¹⁶² Above note 106; in Azo, *Summa Codicis* (Venetiis 1610) cols. 1142-1144 (for the importance of which, see Bellomo, above, note 159, loc. cit.); ed. L. Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter* 4.2 (Innsbruck 1925); ed. J. Tamassia and J. B. Palmieri, *BIMAE* II (Bologna 1892) 225b-229a.