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## Grotius' Doctrine on "adquisitio obligationis per alterum" and its Roots in the Legal Past of Europe

### 1. *Introduction*

Modern systems of law are familiar with the principle that one can be obligated to a third person not being a party to the contract entered into. Various legal concepts are nowadays recognized as achieving this. Firstly, there is the cession of claims. Even without my consent, I can become bound to a third person by the fact that my creditor assigns his claim against me to this person. Moreover, I myself can have the desire to be obligated to a third person. This can be realized in various ways through an intermediary, which brings us to the remaining two possibilities. I can enter into a contract in favour of a third person. In this case, the intermediary is party to the contract entered into, although he stipulates that something is performed for an absent beneficiary. The third possibility is agency. I can become bound through an intermediary who acts as the direct representative of the third person. In the latter case the intermediary himself will derive no right whatsoever from the contract, only the third party will become my creditor.

These three modern concepts, i.e. cession, contract in favour of a third party and agency, have one thing in common. They clash with the fundamental rules of Roman law, firmly rooted in the Institutes of Justinian (482-565). According to the Institutes, it is impossible to acquire rights through an *extraneus*, i.e. an outsider, somebody who is not one's slave or one's child under paternal control<sup>1</sup>. Moreover, it is impossible to stipulate that something be given to another person, or as the Roman maxim reads *alteri*

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<sup>1</sup> "Per extraneam personam nihil adquiri posse" (Inst. 2.9.5). This rule is similarly phrased in Paul D. 45.1.126.2 and Diocl. C. 4.27.1pr. The context of the maxim in the Codex indicates that it is not only impossible to acquire real rights, but that one cannot even acquire personal rights through a free person as intermediary.

*stipulari nemo potest*<sup>2</sup>. Roman law did know some exceptions to the latter rule. The stipulator could enforce the promise made to him, if he had an actionable interest of his own or if he used a *stipulatio poenae*. In such cases the *stipulatio alteri* would not be without effect<sup>3</sup>. Both rules of law, i.e. that one cannot acquire rights through an *extraneus* and that one cannot stipulate a performance which exclusively benefits a third person, may be based upon an even more fundamental Roman principle. The Romans could only bind themselves by entering into one of a limited number of contracts which were acknowledged as a source of obligation and the only person to whom one would be bound by so doing, was the party to the contract himself. The entire Roman law of contracts was predominated by the idea that parties, when they entered into a contract, solely represented themselves and acquired what was in their own interest or, as the classical jurist Paul stated, “Whatever we agree has no effect, unless the origin of the obligation lies in ourselves”<sup>4</sup>. Obviously contracts created a very personal bond between parties and excluded outsiders.

In their rejection of the *acquisitio obligationis per alterum*, the legal sources of Roman antiquity do not distinguish between cession, contract in favour of a third party and agency. If in later times – either in learned law or in indigenous law – it is accepted that one is capable of obtaining a right through an intermediary, we cannot describe such developments in modern terms, viz. as acknowledging the validity of contracts in favour of a third party or agency, if the legal scholarship of the day had not yet discerned the modern distinctions upon which these qualifications are based.

A case in point are the writings of the Dutch jurist, philologist, historiographer and poet Hugo Grotius (De Groot, 1583-1645). In his work *De iure belli ac pacis* (1625), Grotius distinguished between, on the one hand, the promise (worded as addressed) to an absent beneficiary (*promissio in nomen eius cui danda est res*), which was accepted by someone present, and, on the other, the promise (to give something to a third person) addressed to and accepted by the person present (*promissio mihi facta de re danda alteri*)<sup>5</sup>. Some legal historians see in these differently worded promises the origin of the distinction between agency and contracts in favour of a third party, thereby presuming that the person accepting the first kind of promise, i.e. the

<sup>2</sup> Inst. 3.19.19.

<sup>3</sup> Inst. 3.19.20, Paul. D. 2.14.23pr, Ulp. D. 45.1.38.17, Ulp. D. 45.1.38.22 and Diocl. C. 8.38(39).3.

<sup>4</sup> Paul D. 44.7.11: “Quaecumque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostra persona obligationis initium sumant, inanem actum nostrum efficiunt: et ideo neque stipulari neque emere uendere contrahere, ut alter suo nomine recte agat, possumus”.

<sup>5</sup> See Hugo Grotius, *De iure belli ac pacis*, Lib. II, cap. xi, § 18 [1-2], in the edition B.J.A. de Kanter-Van Hettinga Tromp (Leyden 1939; reprint with additions Aalen 1993) 337-338.

one worded as addressed to the absent beneficiary, was acting in the name of the latter<sup>6</sup>.

Although Grotius' *De jure belli ac pacis* is characterized by a Natural Law approach, there are present a number of elements, derived from existing traditions, e.g. Roman law, canon law, indigenous law and moral theology. Grotius' distinction between promises (worded as addressed) to the absent beneficiary and promises to give to a third person, but made (worded as addressed) to someone present, could well be derived from or inspired by earlier scholars.

This brings us to the central question of this contribution for a volume, dedicated to a scholar renowned for his expertise in the various traditions of learned and indigenous law, which eventually produced our present-day continental European private law. Upon which ideas and concepts were Grotius' teachings on the *adquisitio obligationis per alterum* based? What is their origin? Which elements concerning this concept, *adquisitio obligationis per alterum*, can be discerned previous to the days of Grotius?

Our starting point lies in the fourteenth century in Castile. It consists in a provision which played a dominant role in the scholarly debate concerning the *stipulatio alteri* on the threshold of Grotius' Natural Law doctrine. We will investigate in which way this provision deviated from learned law and from the existing indigenous law of Castile, which in the thirteenth century had already been affected by an early reception of Roman law. Secondly, we will pay attention to the role this provision, together with elements derived from medieval learned law, played in the sixteenth century doctrines of contract law which may have influenced Grotius. In the third and last part we will analyse Grotius' teachings on the *adquisitio obligationis per alterum* and ask ourselves which elements and principles can be discerned, and whether or not they were derived from or inspired by previous legal thinking.

## 2. *The ley 'Paresciendo'*

In his work *Europäisches Privatrecht (1500-1800)* Helmut Coing emphasized the importance of the legislation of King Alfonso XI of Castile

<sup>6</sup> See J.A. Ankum, *De voorouders van een tweehoofdig twistziek monster; Beschouwingen over de historische ontwikkeling van het beding ten behoeve van een derde* (Zwolle 1967) 28; U. Müller, *Die Entwicklung der direkten Stellvertretung und des Vertrages zugunsten Dritter; Ein dogmengeschichtlicher Beitrag zur Lehre von der unmittelbaren Drittberechtigung und Drittverpflichtung* (Beiträge zur neueren Privatrechtsgeschichte, 3; Stuttgart 1969) 128; R. Zimmermann, *The law of obligations; Roman foundations of the civilian tradition* (Capetown - Wetton - Johannesburg 1992) 45.

(1311-1350) for the development of our modern concept of contract<sup>7</sup>. The specific provision Coing had in mind, was the *ley 'Paresciendo'* in *capítulo 29* of the *Ordenamiento de Alcalá*, promulgated on 28 February 1348. Three years afterwards, when the *Ordenamiento de Alcalá* was revised on the instructions of King Pedro I ('*el Cruel*', 1334-1369), the provision found its way into *capítulo (título) 16*<sup>8</sup>. In both versions of the *Ordenamiento de Alcalá*, the *ley 'Paresciendo'* was the sole provision (*ley unica*) in a title dealing with entering into obligations. The provision ruled that the one who intended to enter into an obligation, whether this was achieved by promise, contract or in any other way, would be obliged to fulfil the commitment he had made. This purport of the *ley 'Paresciendo'* also follows from the fact that it explicitly denied the promisor the possibility of blocking the creditor's claim by stating that no obligation had come into being, because the promise was not formulated as prescribed by the law or because the parties, i.e. promisor and beneficiary, had not come together to conclude the contract or enter into the obligation.

*Ordenamiento de Alcalá (1348), capítulo 29*

If it appears that someone intends to bind himself to another through a promise, or through a contract, or in any other manner, he is obligated to perform what he promised to do, and he cannot bring as a defence, that no stipulation had taken place, i.e. no promise was made in conformity with the

<sup>7</sup> H. Coing, *Europäisches Privatrecht*, Part I, *Älteres Gemeines Recht (1500-1800)* (Munich 1985) 400.

<sup>8</sup> The *Ordenamiento de Alcalá* is handed down through many manuscripts and in two editions. In 1774 the text was edited by I. Jordán de Asso y del Río and M. de Manuel y Rodríguez [*El Ordenamiento de leyes que don Alfonso XI hizo en las Cortes de Alcalá el año de mil trescientos y cuarenta y ocho* (Madrid 1774; reprint Valladolid 1983); see about this edition: E. Conde Naranjo, *Medioevo Ilustrado; La edición erudita del Ordenamiento de Alcalá (1774)* (Sevilla 1999)]. In 1861 it was incorporated in the edition *Cortes de los antiguos reinos de León y de Castilla publicadas por la Real Academia de la Historia I* (Madrid 1861) 492-593. In the transcriptions of manuscripts we consulted and which according to F. Waltman, *Textos y Concordancias del Ordenamiento de Alacalá* (Madison 1994), 23 contain the revised version of 1351 (Madrid, Biblioteca Nacional, Vit. 15-7 and Res. 9), the *ley 'Paresciendo'* can be found in *capítulo 16*, just as in the edition of 1774, whereas in the edition of 1861 it has its place in *capítulo 29*. As regards contents the text has not been altered, although there are considerable differences in spelling and sometimes also in the wording between the several manuscripts and editions. A modern, textcritical edition is still lacking. See for the origin and tradition of the *Ordenamiento de Alcalá*: G. Sánchez, 'Sobre el Ordenamiento de Alacalá (1348) y sus fuentes', *Revista de Derecho Privado* 9 (1922) 353-369, especially 357; E.N. van Kleffens, *Hispanic law until the end of the Middle Ages* (Edinburgh 1968), 218-228; A. Pérez Martín, 'El Ordenamiento de Alcalá (1348) y las glosas de Vicente Arias de Balboa', *Ius commune* 11 (1984) 55-215, especially 55-60.

formalities of the law, or that the obligation was entered into or the contract was concluded between absent persons.

Concerning the promise to give something to an absent beneficiary, which was accepted by someone who was present, the *ley 'Paresciendo'* subsequently ruled the following:

[neither can he bring the defence] that between absent persons [the promise<sup>9</sup> to give to the other<sup>10</sup>, was made in the presence of a public clerk or someone else, a private person, or that he promised to one person, to give something to or to do something for another person.

Beyond doubt the obligation or contract is valid, no matter the way it was entered into, if it appears that someone intended to bind himself to some other person by concluding a contract with him<sup>11</sup>.

As we shall see below, the *ley 'Paresciendo'* explicitly excluded two kinds of defence which Roman law and, because of the early reception of Roman law in Castile, also Castilian law offered the promisor. Both resulted from the Roman principles *per extraneam personam nihil adquiri posse* and *alteri stipulari nemo potest*. For this reason the provision, promulgated in 1348, was not only of great significance for the emergence of our modern concept of contract, but also for developments which eventually led to the acceptance of contracts in favour of a third party and direct representation, as we find these in most modern systems of private law in continental Europe<sup>12</sup>.

<sup>9</sup> See for the problem whether we should read here the word 'promysion' or the words 'obligación o contrato': § V of this contribution (Direct representation acknowledged?).

<sup>10</sup> The *ley 'Paresciendo'* speaks about the promise "in the name of another", [la promysion] en nombre de otro. The same phrasing is used in Partidas 5.11.7 (see note 23 and 27). There, the words are meant to indicate that something will be given to the absent beneficiary, i.e. a person other than the stipulator. The same holds good for the *ley 'Paresciendo'*. The words "in the name of another" cannot be adopted in the sense that it is the other, the one in whose name the promise was made, who has to perform something.

<sup>11</sup> Ordenamiento de Alcalá, c. 29 (edition *Cortes de los antiguos reinos (...)*, I, 514): "Paresciendo que se quiso alguno obligar a otro por promysion o por algun contrato o en otra manera, sea tenudo a aquellos a quien se obligó et non pueda ser puesta excepcion que non fue fecha stipulacion que quier dezir prometimiento con çierta solepnidad del derecho, e que fue fecha la obligacion o el contrato entre absentes, o que fue fecha a escrivano publico o a otra persona privada en nonbre de otro entre absentes, o que se obligó a vno de dar o de fazer alguna cosa a otro: mas que sea baledera la obligacion o el contrato que fueren fechos en qual quier manera que paresca que alguno se quiso obligar a otro o fazer contrato con el".

<sup>12</sup> The *ley* is mentioned by J.C. de Wet, *Die ontwikkeling van die ooreenkomst ten behoeve van 'n derde* [dissertation Leyden 1940] (Leyden 1940) 85 and Müller, *Die*

### 3. *The promise to give something to an absent person*

The first part of the *ley 'Paresciendo'* dealt with the situation where there were two parties involved, who were entering into an obligation by making a promise, concluding a contract or in any other way. One party committed himself to give something to the other, who may, therefore, be called the 'beneficiary'. Although the parties are usually termed the 'promisor' and the 'stipulator', since in this situation the stipulator is the beneficiary, we prefer to use the terms 'promisor' and 'beneficiary', since we will later also discuss in detail the case where the stipulator and the beneficiary are not the same person.

Was the fact that the promisor intended to obligate himself to the other, sufficient to constitute an enforceable right for the beneficiary? First, there was the question, if the promisor committed himself by means of a promise, "Was it necessary for him to observe certain formalities?". The second question is "Must parties come together in order to conclude a contract or enter into an obligation?". In general terms the *ley 'Paresciendo'* maintained that an obligation will arise, as soon as someone appeared to be intending to commit himself to another by means of a promise (*promission*), a contract or in any other manner<sup>13</sup>.

Obviously there were no formalities required to obligate oneself by means of a promise. This followed from the fact that – as the *ley 'Paresciendo'* stated – the promisor could no longer block the beneficiary's claim by stating that he was not bound by his word, since the Roman law formalities for the *stipulatio* had not been observed. Thus through the introduction of the *Ordenamiento de Alcalá*, Castilian law started in this respect to deviate from Roman law, which required that the promise (*promissio*) was the answer to the beneficiary's oral question: do you promise me (*promittis mihi*) to give me something or to do something for me? Question and answer together constituted the *stipulatio*. According to the *Corpus iuris*, a promise to donate something or to grant a credit could only become enforceable if it took the form of a *stipulatio*. However, in legal practice the *stipulatio* was used for several more purposes. This followed from the fact that in post-classical law

*Entwicklung* 98. According to Müller the *ley 'Paresciendo'* – although the provision was never quoted or referred to – may have influenced legal doctrine in the Southern Netherlands, which were during the sixteenth and seventeenth centuries under Spanish dominion.

<sup>13</sup> For example by means of a last will. Cf. Vicente Arias de Balboa, the gloss *E an otra manera sea tenuto ad Ordenamiento de Alcalá* cap. 16: "Scilicet in ultima uoluntate, nam in hoc fieri potest, ut lege Ex sententia Digesto de testibus (D. 26.2.29)". The gloss was edited in A. Pérez Martín, 'Las glosas de Arias de Balboa al Ordenamiento de Alcalá', *Aspekte europäischer Rechtsgeschichte; Festgabe für Helmut Coing zum 70. Geburtstag* (Ius commune Sonderhefte 17; Frankfurt am Main 1984) 276-277 (nr. 43) and in Pérez Martín, *El Ordenamiento de Alcalá*, 174 (nr. 81).

various agreements were drawn up in instruments, using the wording of the *stipulatio*. In Late Antiquity, a corresponding oral wording of question and answer was no longer required, although it was still necessary that the parties were present in order to conclude the contract. From a theoretical viewpoint the *stipulatio* continued to be an oral contract (*contractus verbis*), but actually it was always encapsulated in an instrument. Consequently the *stipulatio inter absentes* was not effective, even if the promise in the instrument was correctly worded (*promittis ... ? promitto*).

The presence of promisor and beneficiary at the moment the *stipulatio* was entered into was the main formal requirement which the medieval jurists derived from the *Corpus iuris civilis*<sup>14</sup>. In regions where the reception of Roman law took place, this requirement was adopted in indigenous law. This also holds good for Castile, as appears from the *Siete Partidas*, the compilation King Alfonso X (1221-1284) in 1265 declared to be applicable for all inhabitants of his realm<sup>15</sup>. However, the presence of parties was not the only formality derived from Justinianic law. *Partidas* 5.11.1 required, both that the beneficiary be present and that the promise be the answer to the beneficiary's question. As a consequence, inserting the promise in an instrument – also a common practice during the Middle Ages! – was insufficient to make the promise enforceable. The beneficiary had to be present at the moment the instrument was composed. Thus, until 1348 a *stipulatio inter absentes* had no binding force<sup>16</sup>.

We should realize that the *ley 'Paresciendo'* was not restricted to stipulations but covered all kinds of agreements. For this reason, the introduction of the *Ordenamiento de Alcalá* modified existing Castilian law in another respect. As was shown above, the *ley 'Paresciendo'* no longer required the beneficiary to be present at the moment the promise was pronounced. Roman law, however, required the presence of the parties not only for the *stipulatio*, but also for other agreements, especially the four real contracts (*contractus re*). Only in case of *contractus consensu*, i.e. the contracts entered into by mere consent (sale, rent, partnership and mandate), Roman law acknowledged that the contract could come into being by means of a letter or a

<sup>14</sup> Cf. R. Trifone, 'La "stipulatio" nelle dottrine dei glossatori', *Studi di Storia del diritto in onore di Enrico Besta per il XL anno del suo insegnamento*, I (Milan 1939) 171-198 [= *Scritti minori* (Bari 1966) 167-190].

<sup>15</sup> In the literature there is debate as to whether the *Partidas* were actually applied in legal practice as a code of law. The *Partidas* may have served much sooner as a book of reference. The *Ordenamiento de Alcalá* explicitly declared the *Partidas* to be an (additional) source of law.

<sup>16</sup> Cf. *Partidas* 5.11.1. If one of the parties did not speak the language used, it sufficed that he was present and endorsed what his *trujamana* (interpreter) had promised or stipulated.

messenger (*nuntius*)<sup>17</sup>. Thus in Castile, after an early reception of Roman law had taken place through the *Partidas*, major parts of the indigenous law of contract were characterized by certain formalities which had to be observed, in particular the presence of the parties to the contract. However, the Roman law rulings were not infrequently applied by persons who were not master of the ancient formalities and this resulted in the invalidity of many legal acts<sup>18</sup>. The Ordenamiento de Alcalá obviated this problem<sup>19</sup>. As stated above, from 1348 onwards it was no longer required that the promise (*promission*) was formulated as *Partidas* 5.11.1 prescribed, i.e. as an answer to the question: do you promise me ... ?, but neither was there a need to come together in order to enter into the contract or obligation.

In theory the question could also arise whether the law of Castile had, by introducing the *ley 'Paresciendo'*, acknowledged the unilateral statement as a source of obligation, thereby again deviating from learned law. The *ley 'Paresciendo'* itself did not pronounce upon the question whether the promise had to be accepted<sup>20</sup>. Could the *ley 'Paresciendo'* be interpreted to imply that the promise once expressed, could no longer be revoked, even if it had not yet been accepted by the beneficiary? Such questions were extensively discussed in the sixteenth century commentaries. However, in earlier sources such as, for example, the gloss of Vicente Arias de Balboa († 1414) on the *Ordenamiento de Alcalá* not a single trace of this discussion can be found<sup>21</sup>.

#### 4. *The promise to give something to a third person*

The second part of the *ley 'Paresciendo'* dealt with the situation, where three persons were involved, viz. the person who committed himself to give something to an absent beneficiary, the actual beneficiary of that promise,

<sup>17</sup> Cf. E. Bussi, 'La rappresentanza negli atti "inter vivos" dei nascituri non concepti e delle persone assenti secondo il diritto comune', *Rivista di Diritto Privato* (1933), II, 3-26.

<sup>18</sup> At any rate according to Pérez Martín, 'El Ordenamiento de Alcalá' 80-81, referring in note 100 (p. 81) to D. 2.14.7.4-5.

<sup>19</sup> According to Marichalar and Manrique the *ley 'Paresciendo'* banished all the Roman formalities concerning stipulations as to be found in the *Partidas*. However, the authors did not refer to specific provisions in the *Partidas*. See A. Marichalar - C. Manrique, *Historia de la legislación y recitaciones del derecho civil en España*, III (Madrid 1862), 226.

<sup>20</sup> De Wet maintained erroneously (De Wet, *Die ontwikkeling* 85) that the *ley 'Paresciendo'* "n actie gee ex nudo pacto". He based this opinion on the commentary of Diego Pérez de Salamanca on Ordenanzas reales de Castilla 3.8.3. However, Pérez's remark "lex ista ... fundamentum habet a capitulo primo de pactis (X 1.35.1)" must be evaluated against the background of sixteenth century debate. Cf. p. § VI (The unilateral promise as source of obligation) of this contribution.

<sup>21</sup> These glosses were edited by Pérez Martín; cf. notes 8 and 13.



and someone else who was present at the moment the promise was made and had accepted it. In the terminology of Roman law the latter, i.e. the one who accepted the promise, would be termed the 'stipulator'. He is the one who stipulated that something be given to the beneficiary. To put it differently, the *ley 'Paresciendo'* dealt with the *stipulatio alteri*, the contract to give something to or do something for a third person. Usually the *stipulatio alteri* is described as a stipulation 'in favour of a third party'. However, such a stipulation or pact in Roman law and in the *ius commune* can easily be identified with the modern concept of the contract in favour of a third party (*Vertrag zugunsten Dritter, contratto a favore di terzi*). In order to avoid this modern term, we prefer to use the Latin *stipulatio alteri*.

The *ley 'Paresciendo'* explicitly excluded two defences resulting from the rule *alteri stipulari nemo potest*, which maxim in the *ius commune* also covered the principle that no rights can be acquired through an *extraneus*. The promisor could not block the beneficiary's claim by stating that the latter was not entitled to send another in his place to accept the promise. Nor could he object that no obligation had come into being, because the stipulator and the beneficiary were not one and the same person. This is another respect in which the law of Castile after 1348 deviated from Roman law, which was willing to grant the beneficiary an action only in a limited number of cases, viz. when his son or slave had stipulated on his behalf, and in a restricted number of other specific cases, as comprehensively listed by Accursius († 1263) in the gloss *Nihil agit ad Inst. 3.19.4*.

Moreover, according to Inst. 3.19.19-20 (*alteri stipulari nemo potest*) even the stipulator could not enforce the promise to give something to another person<sup>22</sup>, which in the *ius commune* was understood as a consequence of the fact that the stipulator had no financial interest in the performance for the other. The procurator, however, who acted on the instructions of the beneficiary, held a special position. If he stipulated that something be given to his principal, this resulted in an obligation, albeit not between the promisor and the beneficiary (the procurator's principal), but between the promisor and the stipulator (the procurator). In regions, where a reception of Roman law had taken place, this exceptional position of the procurator can also be traced in indigenous law. As we will see below, this also holds good for Castile.

As a basic rule the *Siete Partidas* contained a provision reminiscent of Inst. 3.19.4, namely that no one is capable of accepting the promise that

<sup>22</sup> However, a *stipulatio poenae* would be enforceable. In the gloss *Supra dictum est ad Inst. 3.19.19* (see note 72), Accursius prescribed in which way the penalty clause had to be phrased in order to be effective. Furthermore, this gloss mentioned a specific formula, which a procurator and which a manager of another's affairs could use when they stipulated that something be given to their principal. In all these cases the third person had no direct action.

something will be given to another person<sup>23</sup>. The stipulator of a *stipulatio alteri* is not capable of enforcing the promise, neither is the beneficiary. Having this said, the *Partidas* mentioned a number of exceptions, listed below, in which the beneficiary did acquire an action. In some of these cases he acquired it through ‘assignment’ by the stipulator. Moreover, it should be noted that the *Partidas* mentioned fewer cases than the sixteen recorded by Accursius in the gloss *Nihil agit* ad Inst. 3.19.4<sup>24</sup>. These cases in which the beneficiary had an action at his disposal, were the following.

(i) the promise to a son, slave<sup>25</sup> or conventual

According to *Partidas* 5.11.7 a son, slave and conventual were capable of accepting the promise to give something to a third person (*promission en nome de tercera persona*), viz. a father, an owner and a superior. This third person would have an action<sup>26</sup>.

(ii) the promise to a magistrate or court clerk

A tutor would, on the occasion of his appointment, promise the magistrate or the court clerk to administer his pupil’s patrimony well. Similarly, in a reconciliation procedure one could promise not to revenge the delict on the offender’s family<sup>27</sup>. The first example is derived from D. 46.6.1-4, where the tutor made this promise to a *servus publicus*<sup>28</sup>. The pupil would

<sup>23</sup> See *Partidas* 5.11.7: “Un ome non puede rescebir promission de otro en nome de tercera persona so cuyo poder no fuesse. E seria como si dixesse el uno al otro, prometes me que des a fulan tal cosa, e el otro respondiessse prometo”.

<sup>24</sup> Compared to *Partidas* 5.11.7-9, the *Corpus iuris* acknowledged another eight cases, as e.g. the pact to restore to a third person the dowry or the object lent or deposited and the granting of a gift under the condition to transfer the object donated after a lapse of time to a second donee (*donatio sub modo*). In all these cases the third beneficiary could sue the promisor.

<sup>25</sup> After the victory over the Moors at las Novas de Tolosa (1212) a few thousand Islamic prisoners of war were sold as slaves. The same occurred after the battle at Jerez de la Frontera (1231) and the attack on Córdoba (1236). Prisoners of war had the choice between returning to their home against payment or being sold as slaves. Cf. C. Verlinden, *L’esclavage dans l’Europe médiévale*, I (Péninsule Ibérique. France) (Bruges 1955) 546-561.

<sup>26</sup> Cf. *Partidas* 5.11.7. This is in conformity with learned law, which in such cases also granted an action to the beneficiary. Cf. the gloss *Si quis* ad Inst. 3.19.4 of Accursius, which mentions, apart from a son and slave, the monk.

<sup>27</sup> *Partidas* 5.11.7: “(...) E aun dezimos que los judgadores e los escriuanos de concejo, que escriuen con ellos, pueden rescebir promission en nome de otro. E esto seria, si la rescebiessen en nome de algund huerfano prometiendole el guardador que lealmente guardasse a la persone del huerfano e a sus bienes. E si la rescebiesse en juyzio de la una parte en nome de otro, sobre algun pleyto, que oviesse entre ellos. O si la rescibiessen, tomando tregua de vno en nome de otro”.

<sup>28</sup> Cf. *Partidas* 5.11.7: “(...) por que estos oficiales atales, son como siervos publicos, del concejo do biven, por razon de las cosas que han de fazer, que pertenescen a su

have an action on reaching majority. In this respect Castilian law did not deviate from the *ius commune*, which also acknowledged that promises to magistrates and court clerks give rise to an action<sup>29</sup>.

(iii) the promise to a tutor or curator

A promise could also be made to a tutor or a curator. In such a case the beneficiary, i.e. the person confined to the tutor or curator's care, could enforce what was promised as soon as he acquired procedural capacity<sup>30</sup>.

(iv) the promise to a *personero*

As regards the *personero*, the *Partidas* drew a distinction between *personeros* of administrative authorities (*personero del Rey, o del comun, de alguna cibdad, o villa, o de alguna tierra*) and *personeros* of a private citizen. Where the administrative authorities had acted through a *personero*, they themselves acquired an action, just as in Roman law the *municipium* derived an action from the contract entered into by its *actor municipum*. The position of the *personero*, appointed by a private citizen, in order to take care of the latter's affairs during his absence<sup>31</sup>, on the other hand, was quite similar to that of the procurator in Roman law. When acting on behalf of his principal, it was the *personero* who acquired the action, which he later had to 'assign' to the principal, i.e. by authorizing him to bring this action against the promisor<sup>32</sup>. Only in exceptional cases, did a private person acquire an action which was not 'assigned' to him by his *personero*. The *Partidas* mentioned two cases, both derived from learned law. The principal had a direct action, if the *personero* had stipulated a performance, related to his principal's property<sup>33</sup>,

oficio". *Partidas* 5.11.7 mentioned also a different explanation: parties were subjected to the magistrate's authority.

<sup>29</sup> Accursius, gloss *Nihil agit* ad Inst. 3.19.4: "(...) item fallit in iudice uel notario uel simili persona publica ex quorum pactis in stipulationibus alteri queritur. ut ff. rem pu. sal. fore l.ii. iii. et iiii. (D. 46.6.2-4)".

<sup>30</sup> Cf. *Partidas* 5.11.8; this was also the case in learned law; cf. the gloss *Nihil agit* ad Inst. 3.19.4.

<sup>31</sup> When the principal was present at the moment the procurator or *personero* accepted the promise in his favour, he would have an action against the promisor, both according to Roman law (D. 45.1.79) and Castilian law (*Partidas* 5.11.9).

<sup>32</sup> Cf. *Partidas* 5.11.8: "(...) pero non puede demandar, aquel en cuyo nome fue fecha, que le de, o quel fagan lo que es prometido, fasta que el *personero*, que la rescibio por el: le otorgue poder: que la pueda demandar".

<sup>33</sup> Cf. *Partidas* 5.11.8: "(...) si la promission es fecha sobre cosa que fuese suya, propria de aquel cuyo *personero* es". J.A. Arias Bonet, 'Estipulaciones a favor de tercero en los glosadores y en Las Partidas', *Anuario de Historia del Derecho español* 34 (1964), 235-248, maintains erroneously that the principal would have a direct action whenever the *personero* had acted within the limits of the mandate he received (see p. 248).

e.g. to pay the rent to the principal himself<sup>34</sup>. The other exception concerned a specific case, where the principal had a great interest that the action was ‘assigned’ to him, but the stipulator (procurator) refused to do so, viz. where the latter appeared to be insolvent. In such a case the principal could even without ‘assignment’ of his procurator’s action sue the promisor<sup>35</sup>. Thus, the position of the *personero*, appointed by a private citizen, was similar to that of the procurator in Roman law<sup>36</sup>.

Thus, according to the *Partidas*, the beneficiary could enforce the promise, stipulated by his son, slave or conventual, the promise stipulated by magistrates, by his tutor and curator, and, after ‘assignment’ of the action also the promise stipulated by his *personero*. As seen above, these were exceptions to the general rule, stated in *Partidas* 5.11.7, viz. that nobody can accept a promise to give something to a third person, for it would be, as if he had stipulated: do you promise me, to give something to a third person? To put it differently, the *stipulatio alteri* had no effect. Neither the beneficiary nor the stipulator could enforce it. However, since 1348 the *ley ‘Paresciendo’* explicitly excluded the two defences based upon the Roman law principles *per extraneam personam nihil adquiri potest* and *alteri stipulari nemo potest*. It ruled that the promisor could no longer bring the defences (...) that between absent persons [the promise] to give to the other, was made in the presence of a public clerk or some private person; or that he promised one person, to give something to or to do something for another person<sup>37</sup>.

In the first place the promisor could no longer maintain that the claim of the beneficiary should be dismissed, because not the beneficiary himself, but another person, a notary or a private person, had been present, when the promise was made. In the fourteenth century it was the practice, especially in

<sup>34</sup> Cf. Accursius, gloss *Ex re domini* ad D. 3.3.68 and *Partidas* 5.11.8.

<sup>35</sup> Cf. *Partidas* 5.11.8; the same holds good for the institor in Roman law; see D. 14.3.1-2.

<sup>36</sup> Learned law has strongly influenced the provisions of *Partidas* 5.11.9. In the gloss *Nihil agit* ad Inst. 3.19.4 Accursius mentioned three exceptions to the rule that the principal can derive no rights from the pact stipulated by the procurator in his favour. Two of these were also mentioned in the *Partidas*, i.e. the principal being present at the moment the procurator stipulated in his favour and the procurator acting as the principal’s representative in legal proceedings. For a third exception Accursius referred to the procurator *uendentis* in D. 19.1.13.25: the one on whose mandate the procurator had sold an object could claim the selling price directly from the purchaser. This seems to indicate, that there is no room in the texts of the *Partidas* to presume a more extensive application of the *personería*, as was maintained by Arias Bonet, *Estipulaciones a favor de tercero*, 245-248.

<sup>37</sup> *Ordenamiento de Alcalá*, c. 29 I (edition *Cortes de los antiguos reinos (...)*, 514: “(...) oque [la promysion] fue fecha aescruano publico oaotra persona priuada en nonbre de otro entre absentes, o que se obligó a vno de dar ode fazer alguna cosa aotro (...)”.

case of donations, to embody the promise to give something to an absent beneficiary in a notarial instrument. In the instrument the promise was formulated as a *stipulatio*. The notary stipulated that something be given to an absent beneficiary and the promisor gave his consent. Certain questions arose. Was this practice in conformity with the *ius commune*? Should the notary, who often acted without the beneficiary's mandate, e.g. in case of a donation to an unborn child, be rated among the exceptional cases, where it was indeed possible to stipulate that something be given to another? Moreover, could the notary be compared to the Roman *servus publicus*, who was capable of stipulating for any other person<sup>38</sup>? In Castilian law the promisor could simply bring as a defence, at any rate previous to the introduction of the *Ordenamiento de Alcalá*, that the *Partidas* only gave effect to promises made to a public clerk in his capacity as court clerk, not to promises made before public clerks in general<sup>39</sup>. As seen above, this defence also covered the case where the promise was made in the presence of a private person, who obviously had accepted it. In neither situation could the promisor block the beneficiary's claim. In theory this stipulator could be the beneficiary's *personero*, accepting the promise 'in his name', but the text of the *ley 'Paresciendo'* simply speaks about 'another', including those persons acting without the beneficiary's mandate.

The second defence, viz. that the defendant had promised to one person, to give something to or to do something for another person, is directly derived from Inst. 3.19.19: No obligation can arise, when one promises that something is given to another<sup>40</sup>. As a consequence, in Justinianic law neither the

<sup>38</sup> Baldus de Ubaldis approved of this development. He considered the notary to be comparable in this respect to the *servus publicus*. Cf. Baldus, ad D. 12.1.9.8: "Communis practica et consuetudo simpliciter approbat quod si notarius pro alio receipt, queritur alteri sine cessione, quia est publica persona (...)".

<sup>39</sup> Cf. *Partidas* 5.11.7 (see note 27). This was defended for canon law by Innocent IV († 1254). Cf. Innocentius IV, ad X 3.3.2.20. A reference to Innocent can be found in Gregorio López de Tovar (1496-1560), gloss *Semejante ad Partidas* 5.11.7 (*Quinta Partida*, Salamanca 1555, fol. 63va). Cf. R. Núñez Lagos, *La estipulación en las Partidas y el Ordenamiento de Alcalá* (Madrid 1950), 60. In sixteenth century legal scholarship, it was apparently beyond dispute that the promise to an absent person in the presence of a public clerk was binding. That could be the reason why in later compilations the *ley 'Paresciendo'* has an alternative reading, viz. that the promisor cannot object that the promise "was not made in the presence of a public clerk". Cf. *Nueva Recopilación* 5.16.2, (Madrid 1640; reprint Madrid 1982), V, fol. 45r: "(...) o que no fue hecho ante escrivano publico, o que fue hecha a otra persona privada en nombre de otros entre ausentes (...)".

<sup>40</sup> A different opinion was defended by Núñez Lagos, *La estipulación* 63. He understood the words "o que se obligó uno de dar, o de facer alguna cosa a otro" (from the 1774 edition which he used) as the promise that something is given or done by the other (por otro). His interpretation may be based on the phrasing of the *ley 'Paresciendo'* after it was adopted in later compilations, such as in the *Ordenanzas*

beneficiary nor the stipulator had at his disposal an action which he might 'assign' to the beneficiary. This was apart from the exceptional cases mentioned above.

The text of the *Ordenamiento de Alcalá* may create the impression that the third party acquired a direct claim based on the *stipulatio alteri*, but we will see below whether this is in accordance with the words of the text or not<sup>41</sup>. Baldus de Ubaldis (1320-1400) acknowledged that local legislation may deviate from the *ius commune* and attribute an action to the third party in order to enforce the performance. However he did not mention the *ley Paresciendo*' as an example<sup>42</sup>.

Apart from the cases listed in the gloss *Nihil agit*, the *ius commune* always required an 'assignment' of the claim, i.e. that, where the stipulator, e.g. a procurator, had an action at his disposal, he appointed the beneficiary as *procurator in rem suam*<sup>43</sup>. The question whether the absent beneficiary would not in general be entitled to a direct action, had in earlier times been disputed by the glossators and the canonists. In the twelfth century it was the glossator Martinus Gosia († before 1166) who had maintained, that every beneficiary had an action based on equity<sup>44</sup>, but hardly any other glossator followed this view. All later glossators followed the opinion of Bulgarus de Bulgarinis († 1166), as expressed by one of his students, Wilhelm de Cabriano (*saec.* XII), viz. that the texts in the *Corpus iuris*, where the third party has an action, should be considered as exceptions to the general rule. As a

reales de Castilla (1484) composed by Alonso Díaz de Montalvo (1405-1499) on the instructions of the Reyes Católicos and in the Nueva Recopilación (1567), since a similar interpretation can be found in sixteenth century authors in their commentary on Ordenanzas reales 8.3.8. The words just quoted were now replaced by the phrase "o que se obligo alguno que dara otro, o de hazer alguna cosa". Also in the wording of Nueva Recopilación 5.16.2 ("o que se obligo alguno que daria otro, o haria alguna cosa") one can read a *stipulatio alieni facti*.

<sup>41</sup> See § V (Direct representation acknowledged?) of this contribution, in fine.

<sup>42</sup> Cf. Baldus de Ubaldis, *In decretalium volumen commentaria* (Venice 1595), ad X 1.2.7 nr. 71 (fol. 17v): "(...) Sed numquid ex pacto uasalli (...) acquiratur actio proprietario? Videtur quod sic. ff. depo. Publia (D. 16.3.26*pr*), quia ista personalis obligatio est unita cum realitate feudi, arg. C. per quas personas nobis acquiratur l. fi. (C. 4.27.3). Item quia paciscitur super re sua, l.i. C. de dona. que sub modo (C. 8.53(54).1) et quia consuetudo feudorum ita disponit, que firmat pactum. Et sic lex municipalis posset statuere quod alter alteri posset stipulari et quod non requiretur cessio. i. q. vii. Quoties cordis (C.1 q.7 c.9)". Later Jason de Maino (1435-1519), *In secundam Digesti Novi partem Commentaria* (Turin 1623), ad D. 45.1.38.17 nr. 2 (fol. 64r) and Gregorio López (see note 59) referred to this passage.

<sup>43</sup> Cf. K. Luig, *Zur Geschichte der Zessionslehre* (Forschungen zur Neuren Privatrechtsgeschichte, 10; Cologne-Graz 1966) 12-16.

<sup>44</sup> This appears from a *dissensio dominorum* ascribed to Hugolinus († after 1223): "Item dicit M(artinus) quod ex alieno pacto utilis actio datur ei in cuius persona conceptum est". Cf. G. Haenel, *Dissensiones dominorum*, (Leipzig 1834; reprint Aalen 1964), Hugolinus, § 256 (428-429).

consequence these exceptional cases should not be generalized or regarded as the application of a general principle<sup>45</sup>.

Similarly, medieval canon law granted the third party a remedy only in exceptional situations and by no means as generally as Martinus<sup>46</sup>. It may seem that in the apparatus on Gratian's Decretum (ad C.1 q.7 c.9)<sup>47</sup> by Laurentius Hispanus († 1245) and Johannes Teutonicus (ca. 1170-1245), who adopted Laurentius' commentary in the Ordinary Gloss on Gratian's Decretum, the third party would derive a right from the *stipulatio alteri*. However, these canonists merely stated that the promisor was bound, without pronouncing upon the question to whom he was bound, the stipulator or the beneficiary. Moreover, none of the other canonists deduced from C.1 q.7 c.9 that the third person would have an action at his disposal<sup>48</sup>. It is clear that in canon law the Roman law principle *alteri stipulari nemo potest* was no longer in force. If someone intended to donate something by means of a performance by another person (the promisor), he could stipulate that something be given to a third person, the beneficiary. For example, a lessor could stipulate that part of the rent be paid not to himself, but to a charitable fund. This pact would give rise to an obligation between the stipulator and the promisor, in spite of the fact that the stipulator had no actionable interest in the performance for the third person. However, there was dispute as to whether this obligation could be enforced and in which way.

##### 5. *Direct representation acknowledged?*

In the secondary literature it is maintained that *Partidas* 5.11.8 had acknowledged agency for cases of legal representation<sup>49</sup>. As regards voluntary

<sup>45</sup> Wilhelm de Cabriano, *Casus Codicis* ad C. 4.27.1; cf. J. Hallebeek, *Audi domine Martine; Over de aequitas gosiana en het beding ten behoeve van een derde* (Amsterdam 2000) 4-5.

<sup>46</sup> Cf. A. Padoa Schioppa, 'Sul principio della rappresentanza diretta nel Diritto canonico classico', *Proceedings of the Fourth International Congress of Medieval Canon Law* (Monumenta Iuris Canonici, Series C, subsidia 5; Città del Vaticano 1976) 107-131.

<sup>47</sup> Glosa Palatina, ad C.1 q.7 c.9 (edited in Padoa Schioppa, 'Sul principio della rappresentanza' 116): "(...) Sed credo iure canonico me teneri si ego promitto tibi me daturum Titio decem. xxii q.v Iuramenti (C.22 q.5 c.12), maxime ubi interuenit sacramentum. arg. ff. de const. pecu. l.i. (D. 13.5.1pr)".

<sup>48</sup> Antonius de Butrio († 1408) and Nicolaus de Tedeschis († 1445) maintained that *via denunciacionis evangelicae* the promisor could be compelled to perform. Baldus, on the other hand, saw the text of C.1 q.7 c.9 as a ground for assuming that the *lex municipalis* can grant the beneficiary an action. See note 42.

<sup>49</sup> *Partidas* 5.11.8 maintained that a tutor and curator can stipulate for the person confined to their care. However, there is no ground for the presumption that the *Partidas* in this respect wanted to deviate from Roman law and to grant an action

representation *Partidas* 5.11.8 would be inclined to do the same, at any rate to a greater extent than the *ius commune*, whereas the *ley 'Paresciendo'* is said to have acknowledged agency (direct representation) once and for all<sup>50</sup>.

However, these views may be doubted. Present day law attaches specific legal consequences to the pact and promise in the name of another, viz. that the third person in whose name the intermediary acted, directly and exclusively acquires all rights and obligations. In such a case we speak about agency or direct representation<sup>51</sup>. There are in the *Corpus iuris* some texts, in which a procurator *nomine tertii* entered into a contract<sup>52</sup>, although the third party in whose name he acted did not derive exclusive rights and obligations from this contract. The medieval jurists deduced from these texts that a procurator could stipulate *nomine domini* that something be given to his principal. According to Accursius, the correct wording of the stipulation to be used in such a case was *promittis quod dabis mihi recipienti nomine eius?* (do you promise to give to me, receiving in his name?)<sup>53</sup>. Odofredus de Denariis († 1265) formulated this stipulation in a slightly different way, which stated exactly what the procurator was accepting on behalf of his principal, viz. the promise: *promittis mihi recipienti nomine domini mei quod restitueres rem*<sup>54</sup>?

A similar idea is expressed in the *Partidas*, which, by the way, did not speak about stipulating, but about accepting a promise, described as *promission en nome de tercera persona*. One would perhaps expect this phrase to indicate that the promise was specifically worded as addressed to the absent beneficiary as if the stipulator had asked 'do you promise Titius (the absent beneficiary) to give him?' and subsequently had accepted the promise in Titius' name. This is, however, not the case. The promise could as well have been addressed to the stipulator, as if he had asked: do you promise me to give to Titius<sup>55</sup>?

exclusively to the pupil or curandus, while the *Partidas* did not pronounce upon the pact stipulated by a father for his child under paternal control.

<sup>50</sup> Cf. Núñez Lagos, *La estipulación* 48 and 60; Arias Bonet, *Estipulaciones a favor de tercero* 248 and note 24.

<sup>51</sup> Cf. the description in Padoa Schioppa, 'Sul principio della rappresentanza' 107.

<sup>52</sup> Cf. for bringing an action *nomine tertii* and acquiring possession *nomine tertii*: S.U. Kahn, 'Bedeutungswandel von "nomine" in den Rechtsquellen der Westgoten und der Spanier der "Reconquista"', *Ius commune* 11 (1984) 217-230, especially p. 217.

<sup>53</sup> Cf. Accursius, gloss *Supra dictum est* ad Inst. 3.19.19 (see note 72).

<sup>54</sup> Cf. Odofredus, *Lectura Codicis*, (Lyons 1562; reprint Bologna 1968), ad C. 4.27.1 nr. 4 (fol. 225r): "(...) Interdum promissionem et restitutionem concipiendo in sua persona nomine domini, uerbi gratia, promittis mihi recipienti nomine domini mei quod restitueres rem, dicit ille, promitto, ualet ista stipulatio: quia acquirit sibi actionem sed domino tenetur cedere".

<sup>55</sup> In the *Partidas* the 'promission en nome de tercera persona' is made to a stipulator being present and accepting the promise, as appears from *Partidas* 5.11.10: "Debda de dineros, o de otra cosa deviendo un ome a otro si este debdor rescibiesse



The *Partidas* attached various effects to the acceptance of a *promission en nome de tercera persona*. Sometimes the principal acquired a claim, such as the father whose son had accepted a promise in his father's name<sup>56</sup>. Sometimes it was not the beneficiary, but the stipulator who acquired the claim, for example the debtor who stipulated that something be paid to his creditor. Further if the *personero* accepted in the name of his principal, this distinction existed. If he represented the king or another administrative authority, his position was comparable to that of the *actor municipum* in Roman law. *Partidas* 5.11.8 granted an action to the one in whose name the promise was accepted, i.e. the king, the city, the community, etc. As stated above, the *personero* of a private person himself acquired the action, when he accepted in the name of his principal, but was obliged to 'assign' this claim to his principal, by appointing him *procurator in rem suam*.

Can we trace in *Partidas* 5.11.7-10 an inclination to acknowledge direct representation in the modern sense, i.e. that acceptance 'in his name' by the intermediary resulted in a direct and exclusive obligation between the absent third party and the promisor? The *Partidas* quite often speak about acceptance in the name of a third party. May we assume this is representation, i.e. the acceptance in the name of the beneficiary, by which the beneficiary acquired a right? Did the magistrate represent the beneficiary? Was an action denied to the beneficiary, if the promise was not accepted in his name?

It cannot be deduced from the texts in the *Partidas* that through the stipulation of a son, slave or conventual an exclusive and direct right was acquired by the father, master or superior, although, according to the *ius commune*, this should have been the case. As we will see below, according to the Accursian Gloss, it was of no importance in which way sons under paternal control and slaves formulated the stipulation for their father or master, viz. either as a promise to their father or master or as a promise to themselves. Thus, if we presume that the *Partidas* were strongly influenced by the *ius commune*, in Castilian law too the father, master or superior would acquire a right, but we should not attach too much importance to the fact that

promission de otro, en nome de aquel: cuyo debdor es, diziendo assi, prometes me que dedes a sulano tantos maravedis, o tal cosa que le devo yo" (...).

<sup>56</sup> *Partidas* 5.11.7-10 spoke about acceptance in the name of another (recebir en nome de otro), when a son, slave or conventual stipulated that something be given to his father, master or superior. Similarly, when a magistrate, tutor or curator had stipulated, the beneficiary would, as in Roman law, acquire an action, if such persons had stipulated in their capacity as mentioned. From the gloss *Supra dictum est ad Inst. 3.19.19* (see note 72) it follows that they could, unlike procurators, verbally stipulate in the name of their father, master etc. that something be given to him: *promittis illi quod dabis ei?* See § VII of this article (The contract in favour of a third as source of obligation).

the *Partidas* spoke about an acceptance ‘in the name’ of father, master and superior.

The *Partidas* do not offer any evidence to suggest that someone who accepted the promise that something be given to his pupil, principal or creditor<sup>57</sup>, by stipulating ‘in the name of the other’ could bring it about that only the beneficiary was entitled to claim what was promised. As in the *ius commune*, in such cases it was the relationship between stipulator and beneficiary and not the use in the stipulation of the words “who accepts the promise in the name of the beneficiary” which determined whether the beneficiary had a claim or not. This leads to the conclusion that the *Partidas* do not provide sufficient unambiguous material to support the opinion in the secondary literature that the *Partidas* were inclined to acknowledge agency.

Did the *ley ‘Paresciendo’* acknowledge direct representation? As we have seen above, this provision excluded the defence “*que fue fecha a escribano publico o otra persona privada en nombre de otro entre absentes*”. Unfortunately, the subject of this sentence is lacking and has to be supplied. If one reads here – as De Wet, Núñez Lagos, Arias Bonet and Pérez Martín<sup>58</sup> obviously do – the words *la obligación o el contrato*, an obligation between absent persons (the promisor and the beneficiary) will come into being, if the obligation is entered into in the name of the beneficiary by (*por*) a public clerk or some other person. But the text of the *ley ‘Paresciendo’* does not read *por escribano publico o por otra*, but *a escribano publico o otra*. The sentence only becomes comprehensible, if we assume the word promise (*la promission*) to be its subject. The promisor cannot block the claim of the beneficiary by stating that he is not bound to the promise made to a public clerk or to some other person to the effect that he will give something to the beneficiary who at that moment was absent. In such a reading, the *ley ‘Paresciendo’* does not state whether or not a direct obligation between promisor and beneficiary will come into being. To put it differently, one cannot deduce from the text whether the beneficiary acquires a right without ‘assignment’ of the stipulator’s action. It is possible to read the text in this way<sup>59</sup>, but there are no cogent arguments in

<sup>57</sup> Partidas 5.11.10 ruled that the promise to give something to the stipulator’s creditor (en nome de aquel cuyo deutor es) cannot be enforced by the creditor, in whose name the promise was accepted (en cuyo nome la rescibio). This is explained as follows. The agreement has no other effect than a stipulation formulated as ‘do you promise me to give him the money or the object I owe him?’. This promise merely resulted in a claim for the debtor.

<sup>58</sup> Cf., e.g., A. Pérez Martín, ‘Mandato y representación en el derecho histórico’, *Anales de Derecho* (Universidad de Murcia) 12 (1994), 205-164, 250: “(...) cuando establece que la obligación es válida (...) si la obligación se contrajo frente a ‘otra persona privada en nombre de otro entre absentes’”.

<sup>59</sup> Such an interpretation can be found in Gregorio López, gloss *Tercera persona* ad Partidas 5.11.7 (*Quinta Partida*, fol. 63ra): “(...) Posset tamen lege municipali statui, quod alter alteri posset stipulari et quod acquiratur actio sine cessione, ut notat Baldus in c. Quae in ecclesiarum col. pe. in prin. de constitu. (X 1.2.7) quod allegat. c.

favour of so doing. The text does not speak about promises accepted "in the name of the absent beneficiary". This leads to the conclusion that the *ley 'Paresciendo'* is not restricted to cases where the stipulator acted on request (as a direct or indirect representative). It refers to all cases, where it is stipulated that something be given to someone else.

#### 6. *The unilateral promise as source of obligation*

As stated above, the first part of the *ley 'Paresciendo'* dealt with the situation, where two persons were involved, i.e. the promisor who intended to bind himself and the beneficiary. It ruled that parties no longer had to come together in order to conclude a contract or to enter into an obligation. If it appeared that someone intended to bind himself by means of a promise, a contract or in any other way, he would be obliged to perform what he promised to do. This might imply that the unilateral promise (which was not yet accepted) should be considered a source of obligation. In the sixteenth century the question arose whether the *ley 'Paresciendo'* should be interpreted in this way.

According to the *ius commune*, the promise to a person being absent – the promise the authors had in mind here was usually the promise to donate something – would result neither in a civil nor in a natural obligation. In this respect the jurists seemed to have been in agreement, whereas amongst the moral theologians there was no unanimity<sup>60</sup>. The unilateral promise was defined as the *pollicitatio*, which the *Corpus iuris civilis* stated was not effective<sup>61</sup>. Since the sources of canon law did not include authoritative texts on the issue, the canonists followed the opinion of the civilians<sup>62</sup>.

Quotiens cordis oculus 1. q.7. (C.1 q.7 c.9). Hodie de lege regni huius statutum est in dicta lege Paresciendo tit. de las excepciones libro. 3 ordi. rega. (Ordenanzas reales 3.8.3) per quam legem etiam directa actio dabitur ei cuius nomine fuit facta promissio, ut notat Bartolus in l.i. § Sublata in fi. ff. ad Trebell. (D. 36.1.1.3) et uid. per Bal. in l. Si genero C. de iure dotium (C. 5.12.26)".

<sup>60</sup> Cf. J. Gordley, *The philosophical origins of modern contract doctrine* (Oxford 1991) 80 ff.

<sup>61</sup> Except for the *pollicitatio* to the municipal community to erect a building or to pay a certain amount by the one who stood up for an office. This unilateral and informal promise was of a statutory nature and could be enforced; cf. Ulp. D. 50.12.1pr and Ulp. D. 50.12.6.1.

<sup>62</sup> Nicolaus de Tedeschis taught (ad X 1.35.3) that every promise, including the *pollicitatio* or *nuda promissio unius*, would result in an obligation and that the magistrate had to see that is performed what was promised. According to C.22 q.5 c.12 for God there is no difference between a simple statement and an oath. In both cases one commits a sin by not performing what was promised, although the non-observance of an oath is much more serious. In this passage Tedeschis emphasized the moral obligation of the promisor and the moral task of the magistrate. It cannot be said for

An obligation only came into being when both parties consented, i.e. at the moment when the beneficiary accepted the promise. According to Roman law, the parties had to come together and observe the oral formalities of the *stipulatio* in order to make the promise enforceable. One could not establish a *stipulatio* by sending a letter or a messenger (*nuntius*). Canon law, on the other hand, did not require that the parties came together. Nor did it require that they observed the Roman law formalities. However, the mere fact that someone had been informed that another wanted to grant him a donation, did not allow him to conclude that such a promise had indeed been made and that he could accept it. To put it differently, the promisor had to intend that the promise reach the beneficiary and ensure that appropriate means were employed to achieve this<sup>63</sup>.

As seen above, after the promulgation of the *Ordenamiento de Alcalá* (1348), in Castile the promise was binding, even if the formalities prescribed by the law were not observed. The promisor could not block the beneficiary's claim by stating that the latter had not been present at the moment the promise was made. According to Antonio Gómez (*saec. XVI*), this implied that even without any acceptance the promisor was bound by his unilateral statement.

Antonio Gómez, *Variae resolutiones*, Tom. II, cap. XI, nr. 18

Note well, that nowadays in Castile the unilateral informal promise (*nuda pollicitatio*) will give rise to an action deriving from the *ley 'Paresciendo'* and that the entire Digest title concerning *pollicitationes* has been corrected<sup>64</sup>.

When the *ley 'Paresciendo'* is interpreted in this way, the unilateral promise was in Castile regarded as binding and it was impossible to revoke it. According to Gómez, this goes further than canon law which did not grant an action on the grounds of a unilateral statement<sup>65</sup>. This idea, viz. that the

sure whether he regarded the *pollicitatio* as the source of a legal obligation. Cf. Panormitanus, *Secunda pars super primo Decretalium* (Lyons 1534) fol. 132vb.

<sup>63</sup> Cf. L. Molina, *De iustitia et iure*, II (Venice 1614), disp. 264, nr. 1 (30); Leonardus Lessius (1554-1623), *De iustitia et iure* (Brescia 1697), Lib. II, cap. 18, dub. 6, nr. 34 ff. (174); these authors required that the promise was delivered by a letter or messenger to the beneficiary in person, who had to reply in a similar way.

<sup>64</sup> Antonius Gomezius, *Variae resolutiones*, II, cap. XI, nr. 18 (in the edition *Opera Omnia*, Pars I, Antwerp 1693, p. 248-249): "(...) sed etiam quando simpliciter et nuda pollicitatione quis promittit absenti, ita aperte disponit praedicta lex (sc. Paresciendo) ex qua bene nota, quod hodie in nostro regno ex nuda pollicitatione oritur actio et corrigitur totus titulus de pollicitationibus". For this opinion of Gómez Luis Molina also refers to Tom. II, cap. IV, nr. 3 and Tom. II, cap. IX, nr. 3. Cf. Molina, *De iustitia et iure*, disp. 263 n. 9 (25).

<sup>65</sup> Gomezius, *Variae resolutiones*, Tom. II, cap. IX, nr. 1 (213); Molina, *De iustitia et iure*, disp. 263, nr. 9 (265).

unilateral promise would result in an obligation, was also defended by a number of other authors, albeit merely concerning Castile, not other regions<sup>66</sup>.

Gregorio López de Tovar (1496-1560), Diego Covarruvias y Leyva (1512-1577) and Juan Gutiérrez (1535-1618) interpreted the *ley 'Paresciendo'* in conformity with canon law. In their view the *ley 'Paresciendo'* did not imply more than it explicitly stated, viz. that there were no legal formalities to be observed when making a promise and that the promise might be accepted later and in a different place. In this interpretation the promise to give something to the other party constituted an offer, which the beneficiary could accept. If he did so, the parties entered into an obligation. The lawgiver intended to abolish the formalities of the Roman *stipulatio*. He did not intend to derogate from the rule that the consent of both parties is needed. Parties could enter into an obligation without coming together. In that case the obligation came into being at the moment the beneficiary accepted the promise<sup>67</sup>. Until the promise was accepted, it could be revoked. The lawgiver

<sup>66</sup> According to Luis Molina, Rodrigo Xuárez, Diego Pérez de Salamanca and Pedro de Dueñas endorsed this view. Cf. Molina, *De iustitia et iure*, disp. 263, nr. 9 (25) and Ludovicus Molina, *De Hispanorum primogeniorum origine ac natura libri quatuor* (Cologne 1605), Lib. IV, c. 2, nr. 59 (461). For the opinion of Diego Pérez, Molina referred to his commentary on the Ordenanzas reales de Castilla. However, what Diego Pérez there emphasized was the moral obligation resulting from the promise. He considered it a sin if the promisor did not resign himself to his statement and revoked the promise before it was accepted. But for the existence of a legal obligation Diego Pérez required consent between parties. Cf. Didacus Perez, *Commentaria in quatuor priores libros ordinationum regni Castellae* (Salamanca 1575), ad Ordenanzas reales 3.8.3, nr. 8 (612): "(...) contractus enim non potest esse sine aliquo medio coniungente uoluntatem contrahentium, puta nuntius uel epistola. (...) Sed in pollicitatione nullum istorum interuenit, cum fiat absenti, uel presenti non consentienti, ergo non est contractus, ex quo producatu obligatio naturalis seu actio aduersus promissorem. Nec obstat lex ista, dicens 'o en otra manera' nam est dicendum scilicet similis superioribus, et sic obligatoria". According to Paul Scholten (1875-1946), Antoine Favre (1557-1624) considered the unilateral promise to be binding. Acceptance was not required. Cf. P. Scholten, 'Het beding ten behoeve van derden; Historische interpretatie', in G.J. Scholten e.a. (eds), *Verzamelde geschriften van Prof. Mr. Paul Scholten*, deel IV (Zwolle 1954) 268-290, especially p. 275: "Aanneming door den begiftigde acht hij (sc. Favre) niet noodig". Scholten referred here to *décade 47.2*. Probably the fragment is based on Antonius Faber, *Pars secunda de erroribus pragmaticorum et interpretum iuris* (Genova 1622), *Decadis XLVII*, error 2, nr. 4 (1132), where Favre stated that the action of the donee is not based on a cession or on the stipulation by the notary in his favour, but on Justinian's constitution C. 8.53(54).35.5a. However, previous to this passage (in *Decadis XLVII*, error 2, nr. 3, p. 1132), Favre had explained that the third beneficiary had to ratify the notary's stipulation in order to acquire an action, although the donor was no longer capable of revoking the promise he had made in the notary's presence.

<sup>67</sup> Cf. Didacus Covarruvias y Leyva, *Relectio c. Quamvis de pact. lib. 6* (VI. 1.18.2), pars 2, § IV, nr. 25 (edition *Opera omnia*, Tom. I, Antwerp 1638, p. 296): "His accedit,

had no intention of derogating from the rule that a promise to grant a donation could be revoked by the donor, until this promise was accepted by the beneficiary<sup>68</sup>.

Although Luis Molina (1535-1600) was inclined to follow the reasoning of Covarruvias, he maintained that the promise to donate, at any rate in Castile, resulted in an obligation and could not be revoked. He reasoned as follows: According to the *ley 'Paresciendo'* the promisor is bound, if it appears he intended to obligate himself to another through a promise, a contract or in some other manner. Thus, the promise must be regarded as a separate legal act, not a kind of contract. If someone wanted to donate something, his intention was not dependent on the beneficiary's acceptance. The promise itself clearly indicated that he wanted to bind himself to the other. Learned law might deny that the promise itself was binding and consider the donation to be revocable, but particular, local law could deviate from this view. There were no grounds to assume that the *ley 'Paresciendo'* had merely abrogated the formalities of the *stipulatio*, and not the requirement that the promise had to be accepted<sup>69</sup>.

quod ex unius promissione absenti facta nihil ei quaeritur et potest reuocari promissio. (...) et fortassis etiam l. Regia premissa que tertia est tit. 8 lib. 3 ordin. (Ordenanzas reales 3.8.3) non esset admittenda opinio prior contra communem, si consideremus eam constitutionem tractare de ea promissione, quae absentis sit utilitate, alicui tamen presenti. Aliis uidebitur, et id iure aequissimo, lege Regia probari priorem Abbatis opinionem et ex ea dari actionem pollicitationi, naturalemque obligationem oriri". Cf. also note 79. In his commentary on Nueva Recopilación 5.16.2 Gutiérrez maintained that until the donation was accepted, it could be revoked; see Joannes Gutierrez, *Practicarum quaestionum civilium liber III, IV & V*, (Antwerp 1618), Lib. V, quaestio 96, nr. 6 (302), see also Lib. V, quaestio 97, nr. 7 (303-304). In his consilium 20, nr. 1-2 Gutiérrez disagreed with the opinion of Gómez, Pérez de Salamanca and Dueñas (the donation cannot be revoked) and with the opinion of Jacobo de Villapando (no acceptance is required); see Joannes Gutierrez, *Consiliorum sive responsorum volumen unum* (Antwerp 1618) 74. In his consilium 41 nr. 13 he maintained that even if statutory law prescribes that one will acquire an obligation through another, it is still required that the promise be accepted by the absent beneficiary; see Gutierrez, *Consiliorum... volumen unum*, 74: "(...) quia licet statuto caueatur, ut alteri per alterum acquiratur obligatio, illud tamen intelligitur ac procedit interueniente absentis acceptatione (...)", with references to Paulus de Castro († 1441) and Phillipus Decius (1454-1536).

<sup>68</sup> Except for the case where the donor had indicated in his promise, that he was not going to revoke it. In such a case it was clear that he wanted to bind himself through the promise. Cf. Molina, *De iustitia et iure*, disp. 263, nr. 9 (265) and Gregorio López, the gloss *No lo puede fazer* ad Partidas 5.4.4 (*Quinta Partida*, fol. 11rb). However, in his gloss *Gran pro* ad Partidas 5.11.1 (*Quinta Partida*, fol. 61ra) López stated, that in Castile the unilateral promise gave rise to an action.

<sup>69</sup> Cf. Molina, *De iustitia et iure*, disp. 263, nr. 9 (25-26): "(...) Iuxta haec, licet quondam in Couarruuias opinionem proponderim, modo tamen plus in aliorum opinionem inclino, ... quoniam id perspicue lex illa significat et quoties in ea mentio sit

### 7. *The contract in favour of a third party as source of obligation*

As just seen, the scholars of the sixteenth century disagreed with each other about the question regarding the effects which, in Castile, should be ascribed to the promise made to an absent beneficiary. Where this promise was accepted by someone else, i.e. some other than the beneficiary himself, there seems to have been more unanimity, albeit based on divergent grounds.

Antonio Gómez, who defended the argument that in Castile the promise to an absent beneficiary even without acceptance was binding, also logically assumed that this was the case, if another, being present at the moment the promise to the absent beneficiary was made, had accepted it. For promises to an absent person to be enforceable, Castilian law no longer required that these promises were made in the presence of his son, slave, tutor, curator or in the presence of the *personero* of the administrative authorities.

Gómez introduced a distinction which was not yet known in the *ley 'Paresciendo'*. According to Gómez, the latter provision would only apply, when the promise was formulated in the same way as was the stipulation: do you promise Titius (the one absent) to give to him (...)? In this wording of the stipulation, the promise to give something to the third party, was formulated as addressed to the absent beneficiary himself, although the promise was accepted by a stipulator not mentioned in the formula. In this case the beneficiary would, according to Gómez, have a direct action against the promisor. On the other hand, if the promise to give something to an absent beneficiary was worded as addressed to the stipulator, the beneficiary would have no direct action. This promise (do you promise me to give (...) to Titius?), would result in an obligation between promisor and stipulator. The absent beneficiary could merely enforce performance by the promisor, if the stipulator authorized him to sue the promisor in his place. Gómez mentioned two categories of such stipulators to whom the promise could be addressed, viz. the beneficiary's procurator and the manager of the beneficiary's affairs. Such persons had to 'assign' their action to the their principal<sup>70</sup>.

contractus adiungitur uerbum *o obligacion*, que ex simili promissione et ex quouis alio capite profiscitur".

<sup>70</sup> The opinion of Gómez was followed by Alfonso de Olea (saec. XVII) and José Fernández de Retes (saec. XVII). Cf. Alphonsus de Olea, *Tractatus de cessione iurium et actionum* (Venice 1664), Tit. IV, quaestio 9, nr. 41 (142) and Josephus Fernandez de Retes, *Repetita praelectio ad titulum Dig. de verborum obligationibus*, Pars I, Tractatus II, Consectarium VI (§ 42), *Novus Thesaurus juris civilis et canonici*, VII (The Hague 1753) 397. Müller, *Die Entwicklung*, maintained (74 and footnote 4) erroneously that the opinion of Gómez was followed by Francisco Ramos del Manzano († 1683), thereby referring to H. Buchka, *Die Lehre von der Stellvertretung bei Eingehung von Verträgen; Historisch un dogmatisch dargestellt* (Rostock-Schwerin 1852). Buchka, however (157 and footnote 15), in this respect did not refer to Ramos del Manzano, but to the passage by Fernández de Retes just mentioned.

Antonio Gómez, *Variae resolutiones*, Tom. II, cap. XI, nr. 18

Moreover, the afore-mentioned *lex Regia* should be understood [to apply], when the words of the promise are addressed to the absent person; it is quite different, however, if they are addressed to the procurator or the manager of the other's affairs, because I believe that in such cases if the engagement is broken a cession is required<sup>71</sup>.

The distinction Antonio Gómez employed here was derived from learned law. This has to be explained more fully. In answering the stipulator's question, a promisor would always promise someone to perform something for someone. Normally these 'someones' were one and the same person. The stipulator accepted a promise addressed to himself that something was to be performed for him. In legal scholarship the part of the stipulation, which indicated to whom the promise was made, was termed *verba promissoria*, whereas the part of the stipulation, containing what had to be given or done and to whom, was termed *verba executoria*. As a basic rule for stipulations, it was held that the *verba promissoria* should be addressed to the stipulator himself. A *stipulatio inter absentes* was ineffective. In principle also the *verba executoria* should mention the stipulator as beneficiary – this followed from the maxim *alteri stipulari nemo potest* – but, as we have seen, the *verba executoria* could mention another person instead, if the stipulator had an actionable interest in the performance.

From Accursius' gloss *Supra dictum est ad Inst. 3.19.19*<sup>72</sup> it followed that there were also exceptions to the first principle, viz. that the *verba promiss-*

<sup>71</sup> Antonius Gomezius, *Variae resolutiones*, II, Cap. XI, nr. 18, *Opera Omnia*, Pars I, (Antwerp 1693) 248-249: "Item adde, quod praedicta lex Regia debet intelligi, quando verba promissionis diriguntur in tertium absentem; secus vero, si dirigantur in personam procuratoris, vel negotiorum gestoris, quia tunc credo quod requiritur cessio rupta conclusione".

<sup>72</sup> Accursius, the gloss *Supra dictum est ad Inst. 3.19.19*: "supra eod. § Si quis alii (Inst. 3.19.4). Hoc tamen fallit in multis casibus ut ibi diximus. Et nota quod hic tribus modis alteri stipulamur. Nam interdum directam acquirimus actionem, subaudi alteri stipulando, ut filius patri, seruus domino et econtra. ut supra eod. § Si quis alii et § Ei uero qui (Inst. 3.19.4), quandoque utilem ut tutor pupillo et in similibus ratione officii, ut seruus publicus ut ff. de consti. pec. l. Eum qui § pen. (D. 13.5.5.9) et ff. rem pu. sal. fo. l.iiii. (D. 46.6.4); interdum nullam acquirimus actionem, et tunc necessaria est poena, ut hic dicitur. Item nota quod hoc ultimo casu uerba stipulationis et sortis et poene possunt formari tribus modis. Aut enim sic dico promittis mihi quod dabis illi et eodem modo poenam? aut sic promittis illi, quod dabis ei et eodem modo poenam? Et in his duobus casibus non ualet neque sortis neque poene promissio. Sed aliud quando deberet utilis uel directa acquiri, ut in primis duobus casibus. ut ff. de constit. pec. l. Eum § Si actori (D. 13.5.5.9) et § Iulianus (D. 13.5.5.1) et hic. aut sic promittis mihi quod dabis illi aut penam mihi, tantum stipulor, quia et tunc habet locum quod hic dicitur. aut quarto modo dico, promittis quod dabis mihi recipienti nomine eius? quo



*soria* had to contain the name of the stipulator. In instances where a beneficiary could acquire a direct action, i.e. an action other than one 'assigned to him' by the stipulator, the *verba promissoria* might also mention the name of the beneficiary himself. The situations, in which this was the case, were enumerated in another gloss referred to by Accursius, the gloss *Nihil agit* ad Inst. 3.19.4. The main categories have been discussed above, viz. stipulations by a son, slave or conventual, stipulations by magistrates, the *actor municipum*, a curator and a tutor. The gloss *Supra dictum est* ad Inst. 3.19.19 also dealt with the phrasing of the stipulation to be used in the exceptional cases. When a son stipulated for his father, a tutor for his pupil, an *actor municipum* for his *municipium* etc., in short in all cases where the *Corpus iuris* granted the third party a claim, it did not matter which person was mentioned in the *verba promissoria*. A son could stipulate: do you promise me to give to Titius (my father)?, but also: do you promise Titius (my father) to give to him<sup>73</sup>? However, in case of a *stipulatio alteri* by an *extraneus*, not belonging to the categories just mentioned (son, slave, conventual, etc.), the *verba promissoria* had to contain the name of the stipulator, the *verba executoria* the name of the third person, the beneficiary. Even this was not sufficient. If the *extraneus* wanted his *stipulatio alteri* to have some effect, he had two options, viz. the addition of a *stipulatio poenae* and the use of a different, very specific phrasing of the stipulation. In case of a *stipulatio poenae*, the *verba promissoria* had to mention the stipulator (the *extraneus*), the *verba executoria* had to contain an alternative performance mentioning the name of the third person as regards the performance to give something and the name of the stipulator (the *extraneus*) as regards the payment of a penalty in the eventuality of the performance to the third person failing to occur (do you promise me, to give (...) to Titius or to pay a penalty of (...) to me?). Having used this formula, the stipulator himself could claim the *poena*, if performance did not take place. If formulated differently, the *stipulatio alteri* would have no effect. Apart from adding a penalty-clause in the *stipulatio alteri*, the *extraneus* could also use the phrasing: do you promise to me, who accepts (this promise) in the name of Titius, to give him (...) <sup>74</sup>? In such a case the *extraneus* acquired an action which he had to 'assign' to the third party. It is doubtful, though, whether every *extraneus* was entitled to use this formula, including those without any actionable interest who were stipulating for a third person out of mere generosity. In Roman law, such persons, lacking an actionable interest would have no action at their disposal. A later *additio* to the gloss *Supra dictum est* ad Inst. 3.19.19 explained what the Gloss intended here. The specific formula was not meant to be used by

casu ualet utrunque et ego illi cedam cuius nomine stipulatus sum. ut ff. mandat. Si procur. § fin. (D. 17.1.8.10)".

<sup>73</sup> Ankum did not take notice of this exception to the principal rule *alteri stipulari nemo potest*. Cf. Ankum, *De voorouders* 18.

<sup>74</sup> On this stipulation see also § V above (Direct representation acknowledged?).

each and every *extraneus*, but only by procurators acting on the instructions of their principal and managers of the principal's affairs, acting at their own initiative<sup>75</sup>.

According to learned law, an *extraneus* could not stipulate that something be given to a third party, if the *verba promissoria* mentioned the third party's name. According to Gómez, however, in Castile such a stipulation was allowed and even resulted in a direct action for the absent beneficiary in order to enforce what was promised. The reason was presumably that every promise to an absent person is binding. If, on the other hand, the promise to give to the third party was worded as addressed to the stipulator (i.e. the *verba promissoria* contained his name), according to Gómez the *ley 'Paresciendo'* did not apply. Obviously in such cases the *ius commune* was applicable.

From the gloss *Supra dictum est ad Inst. 3.19.19* Gómez argued that the *verba promissoria* can be worded in two different ways, viz. as a promise to the stipulator and as a promise to the third party. Moreover, he developed these two formulations into two fundamentally different categories of promise. According to the *ius commune*, it was the relationship between the stipulator and the beneficiary which determined whether or not the beneficiary had an action. In the situation where the third party acquired an action (the father of a stipulating son, the master of a stipulating slave, etc.), it did not matter whether the promise was worded as addressed to the stipulator or as addressed to the third party. In Castile, on the other hand, at any rate according to Antonio Gómez, every promise in favour of a third party would be effective, but the precise consequence of the promise was dependent on the *verba promissoria*. If they contained the name of the absent beneficiary, he himself had the direct action. If they contained the name of the stipulator, this stipulator had at his disposal an action, which he had to 'assign' to the third party.

Through a different kind of reasoning Diego Covarruvias y Leyva came to a similar conclusion. As stated above, he taught that the *ley 'Paresciendo'* implied that the promise to an absent beneficiary became enforceable at the moment it was accepted. He acknowledged the pact (*pactum*) as a source of obligation, not the unilateral statement (*pollicitatio*). If the beneficiary was able to enforce the performance after accepting it, what was the effect when someone else accepted in his place? According to Covarruvias such an acceptance made the promise irrevocable.

The arguments for this view were derived from the doctrines of the commentators concerning a certain kind of the so-called *donatio sub modo*: a

<sup>75</sup> Thereby referring to Johannes Faber († c. 1340) and Angelus de Ubaldis (1328-1417); cf. *Institutionum (...) libri quatuor* (Lyons 1550) 169: "Et hoc est uerum, siue sim procurator habens mandatum siue negotiorum gestor, siue saltem generalis, ut mihi acquiram et postea cedam, sicut procurator cum ratihabitione etc. ut l. fina. C. ad Macedonia. (C. 4.28.7) et l. Si ego ff. de nego. gest. (D. 3.5.23(24)) ut per Ioan. Fab. et Angelum hic".

donor donates a certain thing to a donee, while prescribing that after a certain lapse of time (or when a certain condition is met) the donated object shall be acquired by a third party. According to C. 8.54(55).3, the third party has an action against the donee to enforce his right. This constitution from the *Codex Justinianus* in some degree resembled the *ley Paresciendo*. According to C. 8.54(55).3 it was not necessary for the absent beneficiary to be present at the moment of the donation in order to acquire a right against the donee, just as in Castilian law the beneficiary could be absent when something was promised to him. The absent beneficiary (in the *ius commune* the beneficiary of the *modus*, in Castilian law the beneficiary of the promise) could therefore acquire a claim without 'assignment'. What was the source of this obligation? From the *modus* (restriction) attached to the donation – Covarruvias termed it the condition or pact attached to the contract of donation between donor and donee<sup>76</sup> – it appeared that the donor had wanted to grant the third party a right and indeed this right was acquired at the moment the third party ratified the act in his favour.

In order to make the *modus* enforceable, it was not necessary that it was laid down in the form of a *stipulatio* by a notary, but what would be the effect if this nevertheless occurred? According to Covarruvias this would make the *modus*, which in principle was revocable, irrevocable<sup>77</sup>. This idea was derived from Jason de Maino (1435-1519). Jason taught that the *modus* could not be withdrawn, if at the moment the donation took place it had already been accepted by the notary, the donee or someone else for the absent beneficiary or

<sup>76</sup> Didacus Covarruvias y Leyva, *Variarum resolutionum* Lib. I, cap. 14, nr. 11, *Opera omnia*, II (Antwerp 1638) 72: "Quarto praemissa d.l. Quoties (C. 8.54(55).3) uera interpretatione, ut modus appositus donationi in fauorem tertii ualidus omnino censeatur, etiamsi id pactum eaeue conditio a nemine absentis nomine acceptata fuerit, ut Iason explicat in d. § Flauius (D. 45.1.122.2) nr. 22. (...)". It may be noted, that Andrea Fachinei († 1607) considered Covarruvias' teachings on the donatio sub modo in chapter 14 of the *Variarum resolutionum* Lib. I too complicated to deal with. Cf. Andreas Fachineus, *Controversiarum iuris libri decem* (Cologne 1604), Liber VIII, cap. 89, 273.

<sup>77</sup> Covarruvias referred to the commentary of Bartolus de Saxoferrato (1313-1357) on D. 45.1.122.2. Cf. Bartholus de Saxoferrato, *Commentaria*, VI (Venice 1526; reprint Rome 1996), fol. 49va. Bartolus dealt in this passage with the question whether someone who donated a plot of land to another under the *modus* that this plot of land after a lapse of time should belong to the Church, could withdraw the *modus*. Bartolus came to the conclusion that the donor is indeed entitled to do so. He found his main argument in D. 18.7.3. This text prescribed that when a slave was sold under the condition that after a certain period he had to be manumitted, this slave would be a free man, even when no manumission had taken place, if at least the vendor persisted in his desire that the slave should be free. From the latter requirement it was apparently deduced that the vendor could change his mind until the moment the prescribed period had lapsed.

in the name of this beneficiary<sup>78</sup>. According to Covarruvias, King Alfonso XI prescribed two things in the *ley 'Paresciendo'*. Firstly, one can acquire an obligation through (the acts of) another person, even if the formalities of the Roman *stipulatio* were not observed, and, in the second place, the promise to an absent beneficiary is effective, even if this promise was not accepted by someone in the name of the absent beneficiary, provided that it is clear that the promisor had the intention of binding himself<sup>79</sup>. However, what would be the effect of the stipulator's acceptance of the promise? And should the absent beneficiary also express his consent?

Covarruvias, *Variarum resolutionum Lib. I*, cap. 14, nr. 13

(...) This must be understood even without 'cession', at least provided that the promise is followed by an acceptance or ratification [by the absent beneficiary]. If this has not yet taken place, no action is acquired, and, based on the foregoing, this obligation is not considered to be suitable for bringing actions, although it cannot be revoked, in particular where the contract or donation had been accepted in the name of the absent person by a notary, official or private person, who according to the *ius commune* or particular law has the competence so to do<sup>80</sup>.

It may seem here, as if the beneficiary, who was absent at the moment the promise was made, even without any 'assignment' (*sine cessione*) acquired an action, as soon as he accepted the promise<sup>81</sup>. That was indeed the case, if

<sup>78</sup> In such cases the beneficiary had entered into a contract with the donor as through a servant (*minister*). Cf. Iason de Maino, *In secundam digesti novi partem commentaria* (Venice 1590), ad D. 45.1.22.2 n. 19 (fol. 138vb): "Secundo limita nisi notarius uel ipsemet donatarius uel alius tertius tempore dicto donationis recepisset talem donationem stipulando pro ecclesia seu nomine ecclesiae, tunc non posset donans reuocare, quia tunc ecclesia intelligitur per ministrum contrahere et sic mediante facto suo sibi acquirere, ergo ea inuita non potest habere locum penitentia".

<sup>79</sup> Covarruvias, *Variarum resolutionum Lib. I*, cap. 14, nr. 13 (73): "Ex quo infertur uerus intellectus ad Regiam constitutionem quae 3. est tit. 8 lib. 3 ordinationum (Ordenanzas reales 3.8.3) qua rex Alfonsus XI (...) sanciuit alteri per alterum in hoc regno, etiam absque ulla stipulationis solemnitate, obligationem acquiri absentique promissionem fieri posse cum effectu, etiam nemine absentis nomine acceptante, modo animus obligandi appareat".

<sup>80</sup> Covarruvias, *Variarum resolutionum Lib. I*, cap. 14, nr. 13 (73): "(...) Id enim intelligendum est, etiam sine cessione, dum tamen rati habitio aut acceptatio secuta fuerit; ea etenim nondum secuta, nec actio quaeritur nec illa obligatio firma ad agendum sine cessione censetur ex praemissis, tametsi reuocari non possit. Praesertim ubi notarius, publica uel periuata persona, quae iure communi, uel speciali possit id agere, nomine absentis contractum uel donationem acceptauerit".

<sup>81</sup> De Wet apparently reads: *sine cessione per alterum*, although the text merely states: *sine cessione*. Cf. De Wet, *Die ontwikkeling* 92: "Uit hierdie lex lei hy af dat een persoon "sine cessione per alterum" kan verkry, d.w.s. deur middel van 'n vertegenwoordiger".

the promise had not yet been accepted previously by someone else in his name. Acceptance by the beneficiary would then make the promise irrevocable and enforceable. The underlying thought was probably that only consent between parties can give rise to an obligation. As shown in the previous paragraph, this interpretation of the *ley 'Paresciendo'* was in conformity with canon law. Did the beneficiary also acquire a claim without 'assignment', if the promise was accepted by someone else, who was present at the moment it was made? This would seem to be the case for two reasons. In the first place, as mentioned above, the beneficiary acquired a direct claim, if he accepted the promise that something would be given to him, if this promise had not previously been accepted by someone else. Why should we come to a different conclusion, if the promise had already been accepted by another? In the second place, Covarruvias saw an analogy between C. 8.54(55).3 and the *ley 'Paresciendo'*. According to this constitution (C. 8.54(55).3), acceptance by another (the notary) did not result in the acquisition of a right. The mere result was that an act, viz. the donor's decision, became irrevocable. Similarly, in the case of the *ley 'Paresciendo'* it would be the promisor's decision which became irrevocable.

However, this is not the reasoning we find in Covarruvias, who obviously drew a different analogy between the *donatio sub modo* and the *stipulatio alteri* as one of his premises. He seems to be comparing the decision of the donor in the case of *donatio sub modo*, viz. that the beneficiary would acquire the donated object after a lapse of time, to the stipulator's decision in the case of the *ley 'Paresciendo'*, viz. to accept that the promisor will give something to the beneficiary. This reasoning can be derived from what Covarruvias stated in one of his other works, viz. his commentary on the *capitulum 'Quamuis'* in the *Liber Sextus* (VI. 1.18.2). There what the beneficiary accepted, was not the promise. Rather he accepted what the stipulator had done in his interest, by giving consent to the stipulation. This acceptance did not immediately result in the acquisition of an action. The only consequence was that after the beneficiary's acceptance the stipulator was held to 'assign' his remedy to the beneficiary. According to Covarruvias, the *ley 'Paresciendo'* had to be understood in this way<sup>82</sup>.

<sup>82</sup> Covarruvias, *Relectio c. Quamuis de pact. lib. 6*, pars 2, § IV, nr. 13 (294): "Ipse opinor iure pontificis alteri per alterum posse stipulari uerbis promissionis in praesentem directis, secundum auctoritatem glosae et eorum qui eam sequuntur in dicto capitulo Quoties cordis oculis (C.1 q.7 c.9). Et praeterea ratione, quod iure canonico ex pacto nudo actio oriatur. cap. i de pactis (X 1.35.1) atque ideo ob eandem aequitatem haec stipulatio erit iure pontificis admittenda in hoc sensu, ut ualida sit et secuta absentis acceptatione, eiusque praestito consensu teneatur praesens stipulator ei actionem cedere. Sic etenim intelligo glossam in d. cap. Quoties (C.1 q.7 c.9) ex his, quae ipse adnotauit in d. c. 14 lib. 1 Variar. resolut. num. 13 (Variarum resolutionum Liber I, cap. 14, nr. 13). Idemque et Iure Regio respondendum erit propter l.3 titul. 8 lib. 3 Ordina. (Ordenanzas reales 3.8.3)".

Covarruvias did not draw a distinction, as Gómez did, between promises in words addressed to the stipulator and promises in words addressed to the absent beneficiary. Covarruvias considered it only possible to make a promise addressed to the stipulator, as did the *ius commune*.

## 8. *Grotius*

At the end of chapter XI (*De promissis*) of the Second Book of *De iure belli ac pacis*, Grotius discusses situations in which someone not being the beneficiary has accepted a promise. In such a case three persons are involved: the promisor, the stipulator – Grotius speaks about the one who accepts – and the beneficiary. Before dealing with this case, Grotius discusses more generally the question of the effect of promises. There he posed the same questions as late scholastic authors: does the beneficiary derive a right from the promise itself? Can the promised be revoked?

### (i) *The promise as source of obligation in the works of Grotius*

It should be noted that in *De iure belli ac pacis* Grotius, as regards statements that something will be done in the future, made a distinction between three degrees. The first was nothing more than the expression of the actual state of mind which might or might not change in the future. The second was the *pollicitatio*, the statement in which the promisor clearly (*signo sufficiente*, with an adequate sign) indicated that he was not going to retract his promise in the future. Such a promise was – if we disregard positive law – binding, but not enforceable. If the promisor fulfilled his promise, the recipient was entitled to retain what he received, but natural law could not force the promisor to abide by his word<sup>83</sup>. The third degree was the so-called *promissio (perfecta)*, by which the promisor indicated – again by means of a sign – that he intended to grant the beneficiary a right. This promise could be accepted by the beneficiary, who at the moment of acceptance acquired the right. Until that moment it could be revoked.

Grotius did not explain what we should understand by the term ‘sign’ (*signum*) with which someone indicated his intention to grant another a right. He did point out that “in the nature of things there are other signs that someone has made up his mind, apart from stipulation or something similar

<sup>83</sup> Cf. Grotius, *De iure belli ac pacis*, Lib. II, cap. xi, § 3 (329): “(...) Et haec pollicitatio dici potest, quae seposita lege civili obligat quidem, (...) sed ius proprium alteri non dat. Multis enim casibus euenit, ut obligatio sit in nobis, et nullum ius in alio (...). Itaque ex tali pollicitatione res pollicitantis retineri, aut is ipse qui pollicitus est ad implendam fidem cogi iure naturae non poterit”.

required by positive law to give rise to an action”<sup>84</sup>. Following Covarruvias, Grotius maintained that the beneficiary had to accept the promise in order to acquire the right. It cannot be maintained that according to nature the mere act of the promisor, i.e. his statement, would suffice<sup>85</sup>.

(ii) *The promise accepted by one other than the beneficiary*

Acceptance of the promise by the beneficiary also appears to be relevant where the beneficiary was absent at the moment the promise was made, and another accepted it. Concerning this situation, Grotius drew a distinction which is reminiscent of the ways in which, according to Gómez, the promise could be formulated. In the first place, Grotius mentioned the promise made to the stipulator who was present. Secondly, there was the promise worded as addressed to the absent beneficiary<sup>86</sup>. Modern literature is inclined to identify this difference with the distinction between the promise accepted by the stipulator in his own name and the promise accepted by the stipulator in the name of the beneficiary<sup>87</sup>. In modern law, the latter distinction constitutes the

<sup>84</sup> Cf. Grotius, *De iure belli ac pacis*, Lib. II, cap. xi § 4 [3] (330): “Possunt autem naturaliter deliberati animi alia esse signa praeter stipulationem, aut si quid ei simile ad actionem pariendam lex civilis postulat (...)”. See also F. Dovring - H.F.W.D. Fischer - E.M. Meijers (eds), Hugo de Groot, *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (Leyden 1965), Boek III, deel I, § 49 (202), where Grotius used the terms “uitdruckelicke toezegging” and “toezegging door wetduiding”. The latter covered, according to Grotius, the obligations positive law attached to contract, guardianship, unauthorized administration, etc. The “uitdruckelicke toezegging” could be expressed orally and in writing (*Inleidinge* Boek III, deel I, § 50, p. 202). In Holland there existed no formal requirements. Neither was it necessary that parties came together (*Inleidinge* Boek III, deel I, § 52, p. 203). Cf. about these texts R. Feenstra, ‘Die Klagbarkeit der nuda pacta’, R. Feenstra-R. Zimmermann (eds), *Das römisch-holländische Recht, Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (Schriften zur Europäischen Rechts- und Verfassungsgeschichte 7; Berlin 1992) 123-144, especially 136.

<sup>85</sup> Cf. Grotius, *De iure belli ac pacis*, Lib. II, cap. xiv, § 14 (335-336): “(...) Ut autem promissio ius transferat, acceptatio hic non minus quam in domini translatione requiritur (...)”; cf. also *Inleidinge tot de Hollandsche Rechts-Geleerdheid*, Boek III, deel 1, § 10 (195-196).

<sup>86</sup> Cf. Grotius, *De iure belli ac pacis*, Lib. II, cap. xi, § 18 [1] (337): “Solent et controuersiae incidere de acceptatione pro altero facta: in quibus distinguendum est inter promissionem mihi factam de re danda alteri, et inter promissionem in ipsius nomen collatam cui res danda est”.

<sup>87</sup> Cf. Müller, *Die Entwicklung* 128 stated: “Für ihn (sc. Grotius) stellte sich nunmehr die Frage, da er sich nicht mehr an das Prinzip des *alteri stipulari* gebunden fühlte, ein ganz anderes Problem, nämlich, welche Rechtsfolgen sich im einzelnen aus dem Auftreten des Annehmenden ergeben sollten”. We still followed this view, albeit erroneously, in H. Dondorp - J. Hallebeek, ‘Het derdenbeding bij Voorda en Moltzer’,

basis for distinguishing between contract in favour of a third party and agency. If it is clear to both parties that the stipulator has received no mandate, he will act in his own name and enter into a contract in favour of the third party. If, on the other hand, the stipulator indicates that he is acting in his capacity as representative of the third party and he has received a mandate, we speak about direct representation. However, such a distinction between acceptance in one's own name and acceptance in the name of a third party cannot yet be found in Grotius.

First we will examine the second category mentioned, thereafter we will deal with the promise made to the stipulator who is present. According to Grotius, where the promise was formulated as addressed to the absent beneficiary, the question whether the stipulator, who accepted the promise, had received a mandate or not was of the utmost importance<sup>88</sup>. If he accepted with a mandate, the beneficiary acquired the right (*puto promissionem perfici*).

Deviating from Roman law, Grotius maintained that not only slaves for their masters, sons for their fathers, etc. but anyone who received a mandate could accept a promise worded as addressed to the absent beneficiary (i.e. when the *verba promissoria* or *verba promissionis* mentioned the latter's name). In such cases the beneficiary acquired a right through an intermediary. He was presumed to endorse the decision taken by the intermediary he had appointed. This construction came very close<sup>89</sup> to direct representation in the modern sense: the act of the representative who accepts the promise worded as addressed to the absent beneficiary, is considered to be that of the latter, the principal. The acceptance by the intermediary directly and exclusively produced certain legal consequences for this absent principal, because the promise is addressed to the latter and not to the intermediary<sup>90</sup>. For this line of reasoning there were, indeed, certain starting points in the *ius commune*<sup>91</sup>, but the idea that the absent beneficiary could use anyone – not

*Pro Memoria; Bijdragen tot de rechtsgeschiedenis der Nederlanden* 4.1 (2002) 49-67, note 33 on 58-59.

<sup>88</sup> Grotius, *De iure belli ac pacis*, Lib. II, cap. xi, § 18 [2] (338): “Quod si promissio in nomen eius collata est cui danda est res, distinguendum est an qui acceptat, aut speciale mandatum habeat acceptandi, aut ita generale ut talis acceptatio ei inclusa censi debeat, an uero non habeat.”

<sup>89</sup> Cf. Müller, *Die Entwicklung* 131: “[E]r kam der Figur der direkten Stellvertretung sehr Nahe”. To the differences depicted by Müller, it should be added that Grotius did not distinguish between acceptance in one's own name and acceptance in the name of the other.

<sup>90</sup> It does not follow from the text that the intermediary accepted “im fremden Namen” as stated by Müller, *Die Entwicklung* 130.

<sup>91</sup> Some commentators considered consensual contracts, made by one's *procurator*, as entered into through a messenger (*nuntius*), although in case of stipulations this only held true, if the principal had been present. Only in such a case the procurator could stipulate: do you promise Titius (his principal who was present) to give him? Cf.



just his son, slave, etc. – as intermediary, was novel. In the *ius commune* an *extraneus* could not stipulate: do you promise Titius (the absent beneficiary) to give him? Nor could he enter into a different contract in the name of the beneficiary, in such a way that the name of the mandator was inserted in the instrument as a party to the contract.

Subsequently Grotius dealt with the instance, where someone accepted the promise worded as addressed to a third beneficiary, albeit without any mandate for doing so. To put it differently, someone stipulated, at his own initiative, that something be given to the absent beneficiary and the promise was worded as addressed to this absent person<sup>92</sup>. In the *ius commune* this stipulation (do you promise Titius to give him?) would be ineffective, both for the stipulator (who accepted it) and the beneficiary (who ratified it)<sup>93</sup>. According to the *ius commune* the promisor could retract his words immediately. However, Grotius did not share this view. His opinion was that such revocation would be considered an act contrary to good faith, even although it did not violate another's right.

Hugo de Groot, *De iure belli ac pacis*, Lib. II, cap. xi, § 18 [2]

If another, to whom the promise was not made, accepts the promise without any mandate to do so, but with the promisor's approval, the effect will be that the promisor is not allowed to revoke his promise before he, to whom the promise is addressed, has ratified or nullified it, in such a way that in the meantime he who accepted the promise, cannot remit it, because the promise

Müller, *Die Entwicklung* 83 notes 54 and 55. Also some Spanish authors maintained that the absent beneficiary stipulates through an intermediary, his servant (*minister*), if the latter stipulated: do you promise Titius (the beneficiary who was absent) or me to give? Cf. Gómez, *Variae resolutiones*, II, cap. XI, nr. 20 (249-250) and Gutiérrez, *Practicarum quaestionum civilium liber III, IV & V*, Lib. V, quaestio 97. nr. 8 (304).

<sup>92</sup> Although the promise is formulated as 'in eius nomen cui danda est res', one should not presume, as did Müller, that the stipulator was acting "in fremdem Namen". Moreover, Müller assumed – also erroneously – that Grotius' teachings on the acceptance of a promise worded as addressed to the absent beneficiary, merely referred to unauthorized representation. Cf. Müller, *Die Entwicklung* 132. An opinion, similar to the one of Müller, can be found in Ankum, *De voorouders* 28 note 97. However, acceptance of a promise addressed to another, may also refer, at least in the fragment of Grotius as discussed, to cases we would nowadays qualify as contract in favour of a third person. Grotius merely indicated that 'parties' (i.e. promisor and stipulator) agreed, that one of them promised that something be given to a third person (the absent beneficiary). It could well be that both parties were aware of the fact that the stipulator was acting without any mandate. At the apportionment of an estate the heirs, for example two brothers, could agree that one of them would pay annually a certain amount to their sisters. This example is derived from contemporary case law of the Supreme Court of Holland. Cf. E.M. Meijers e.a. (eds), Cornelis van Bijkershoek, *Observationes Tumultuariarum*, III (Haarlem 1946), nr. 2792 (569).

<sup>93</sup> Again except for the case the stipulator was the beneficiary's son or slave, the actor municipium of the municipium, etc.

is used here not in order to acquire a right, but in order to bind the promisor to keep his word regarding granting a benefit, so that if the promisor himself revoked his promise, he would be acting contrary to good faith<sup>94</sup>.

What is the effect of accepting, without any mandate to do so, the promise (worded as addressed) to a third party? As stated above, if there was a mandate to accept, acceptance by the intermediary resulted in a right for the third party. Through acceptance without a mandate, however, no one acquired a right. The beneficiary did not, because he had not yet ratified the stipulator's act, the stipulator did not, because the promise was not made to him. And yet the promisor was no longer entitled to revoke the promise to the absent beneficiary, while the stipulator could not release him from this promise. Grotius explained this situation by emphasizing that the agreement between promisor and intermediary was not aimed at granting the stipulator a right of his own, but to secure that the promisor would abide by his word<sup>95</sup>.

The situation was quite different when the promise was not worded as addressed to the beneficiary, but as made to the stipulator (the first category mentioned by Grotius)<sup>96</sup>. If the stipulator was promised that something would be given to an absent beneficiary<sup>97</sup>, the stipulator acquired, according to Grotius, a *ius efficiendi ut ad alterum ius perueniat, si et is acceptet* and this even if he himself had no financial interest in the performance. In this situation the stipulator was able to release the promisor from his promise<sup>98</sup>.

<sup>94</sup> Grotius, *De iure belli ac pacis*, Lib. II, cap. xi, § 18 [2] (338): "Deficiente autem mandato, si alius cui promissio facta non est acceptet uolente promissore, tunc erit effectus, ut promissori reuocare promissionem non liceat antequam is quem spectat promissio eam ratam habuerit aut irritam: sic tamen ut medio illo tempore is qui acceptauit remittere promissum non possit, quia hic non adhibitus est ad ius aliquod accipiendum, sed ad adstringendam promissoris fidem in sustentando beneficio: ita ut promissor ipse, si reuocet faciat contra fidem, non contra ius proprium alicuius".

<sup>95</sup> To a certain extent this situation is comparable to the *pollicitatio*, since the promise is binding, but cannot be enforced.

<sup>96</sup> Grotius dealt with this case in *De iure belli ac pacis*, Lib. II, cap. xi, § 18 [1] (337-338).

<sup>97</sup> In a note Grotius referred to Covarruvias, *Relectio c. Quamvis de pact.*, pars 2, § IV, nr. 13. Apparently he has in mind the following fragment from nr. 13 (293): "Quandoque stipulatio concipitur simpliciter uerbis principalibus directis in personam stipulantis hunc in modum: Promittis mihi dare Titio centum? (...) Deinde in praedictis iuris ciuilibus responsis, maxime in d. l. Stipulatio ista § Alteri (D. 45.1.38.17) et in d. § Alteri de inutil. stipul. (Inst. 3.19.19) haec stipulatio improbatu eo, quod ipsius stipulantis nihil intersit, non autem ex defectu formulae conceptae. Qua ratione foret reprobanda, si uerba ipsius promissionis non dirigerentur in praesentem".

<sup>98</sup> Grotius, *De iure belli ac pacis*, Lib. II, cap. xi, § 18 [1] (337): "Si mihi facta est promissio, omisa inspectione an mea priuatim intersit, quam introduxit ius Romanum, naturaliter uidetur mihi acceptanti ius dari efficiendi, ut ad alterum ius perueniat, si et is acceptet: ita ut medio tempore a promissore promissio reuocari non possit; sed ego cui facta est promissio eam possim remittere".

An explanation as to why the stipulator could do this, is lacking, but obviously this had to do with the fact that, since the promise was made to him, he acquired the right "to bring it about that the beneficiary obtained a right, if the latter also accepted". According to the literature the right here acquired by the stipulator was the right to claim performance of what was promised for the third party<sup>99</sup>. In such an interpretation, the doctrine of Grotius was in conformity with the *ius commune*, which acknowledged that, as long as the stipulator had a financial interest in the performance, he had a claim which he could 'assign' to the beneficiary, provided he had stipulated: do you promise me, to give to Titius?

One may, however, ask whether the *ius efficiendi ut ad alterum ius perueniat si et is acceptet* was indeed meant to indicate such a claim. The text itself does not offer any clues. It is striking that Grotius did not use the word 'assignment' (*cedere, cessio*), whereas all late-scholastic authors did. It is clear, though, that Grotius followed the canonists, by explicitly dropping the requirement that the stipulator should have a financial interest in the performance for the third party. In the *ius commune* this requirement existed, because it was useless to stipulate something, which, for lack of interest, could not be enforced. The fact that in Grotius' doctrine there was no longer room for this requirement, might indicate, that the right acquired by the third party was something quite other than a remedy 'assigned' to him by the stipulator. An intermediary without financial interest acquired no claim, and one who had no claim at his disposal, could not allow another to enforce this claim. Furthermore the corresponding fragment in Grotius' *Inleidinge tot de Hollandsche Rechts-Geleerdheid*, which was composed a few year earlier (between 1619 and 1621), points in this direction. The third party did not derive his claim from an 'assignment' by the stipulator. It was the act between parties, the promisor and the stipulator, which resulted in a promise to the third party which he might accept<sup>100</sup>.

(iii) *The modus attached to a promise as an example of contracting in favour of a third party*

Grotius argued that where someone had promised his party to the contract to give something or to do something, the promisor was entitled to

<sup>99</sup> Cf. Ankum, *De voorouders* 29 and Müller, *Die Entwicklung* 128: "Durch die Annahme eines Versprechens im eigenen Namen für einen anderen, erwarb nach Grotius der Annehmende das Recht zu verlangen, daß an den Dritten geleistet werde".

<sup>100</sup> *Inleidinge*, Boek III, deel III, § 38 (213): "(...) Maer alzoo by ons meer werd gezien op de billickheid, als op scherpheid van rechten, zoude oock buiten deze uitzonderingen een derde de toezegginge moghen aenneemen, ende alzoo recht bekoomen; ten waer den toezeggher voor de aenneeming van de derde zulcks hadde wederroepen".

attach a *modus* (restriction) to his promise until the moment it was accepted by the other. According to Grotius, this followed from the cases he discussed above<sup>101</sup>. The attached *modus* to the promise, could also be revoked<sup>102</sup>. If the attached *modus* would benefit the third party, it could no longer be revoked from the moment the beneficiary had accepted it.

Hugo de Groot, *De iure belli ac pacis*, Lib. II, cap. xi, § 19

The *modus* in favour of a third party, attached to the promise, can be revoked, as long as it is not yet accepted by the third party<sup>103</sup>.

Here Grotius dealt with a problem, which in the *ius commune* was specifically discussed in connection with a *modus* attached to donations. Until which moment could the promisor attach as a condition a certain performance in return (e.g. that after a lapse of time the donated object be given to a third party)? Could he revoke this *modus*? The three persons involved will be identified as follows: the donor (instead of the general term promisor), the donee, and the beneficiary, i.e. the one who benefited by the *modus* attached to the promise to donate.

Obviously Grotius regarded the *modus* as a promise by the donor to give something to the absent beneficiary. He did not specify exactly how this promise was to be formulated, but in view of the context it had to be a promise (worded as addressed) to the beneficiary, who at that moment was absent. Thus there was nobody present to accept the donor's promise at the moment it was made, for although the donee was present, he could not be presumed to

<sup>101</sup> Until acceptance by the party himself or by an intermediary on his behalf. Cf. Grotius, *De iure belli ac pacis*, Lib. 2, cap. xi, § 19 (338): "Ex superioribus intelligi potest, quid sentiendum sit de onere adiecto promissioni. id enim fieri poterit quamdiu promissio completa nondum est per acceptationem, nec fide interposita facta irrevocabilis". In the legal practice of Holland this was the same for promises to grant a donation, as appears from Grotius, *Inleidinge*, Boek III, deel II, § 2 (203).

<sup>102</sup> It was also possible to revoke the *modus*, attached as a condition to the promise, after the promise had been accepted by the other party. By such revocation the latter was relieved from an obligation to the beneficiary (the third). Some later authors were of the opinion that it is also possible that the other party himself had an interest that the obligation, resulting from the *modus*, is nevertheless performed. For such a situation, some maintained that revocation was only possible if the other party consented. An argument against this opinion would be, however, that the other party was under all circumstances free to perform voluntarily. In such a case a donation took place, at any rate when the beneficiary was willing to accept. Grotius did not deal with such problems.

<sup>103</sup> Grotius, *De iure belli ac pacis*, Lib. II, cap. xi, § 19 (338): "(...) Onus autem in commodum tertii adiectum promissioni reuocari poterit, quamdiu a tertio acceptatum non erit." In a note Grotius referred to C. 8.54.4 and the commentary of Bartolus on D. 45.1.122.2.

have accepted this promise in favour of the absent beneficiary<sup>104</sup>. As stated above, it was disputed whether the *modus* in favour of a third party, which the donor had attached to his promise to donate, could be revoked. Following Covarruvias, Grotius considered the *modus*, attached to a gift<sup>105</sup>, to be an example of a promise (by the donor), which the beneficiary had to accept. As a consequence of such acceptance, the *modus*, as any promise, could no longer be revoked. In the *Inleidinge*, where he dealt with the *modus* attached to the donation itself, Grotius reached the same conclusion. This time he added that the situation is quite different, if a notary had accepted the *modus*. As stated above, it had for centuries been the practice in continental Europe to insert the *modus* in instruments of donation in the form of a stipulation, by which the notary accepted the promise, i.e. the *modus*, for the beneficiary. A mandate to accept was in many cases lacking, e.g. when the *modus* was attached in favour of an unborn child. However, the notary was capable of accepting the promise (*toezegging*) at his own discretion (*op sijn welbehagen*), as Grotius expressed it<sup>106</sup>.

In secondary literature it is argued that in such passages Grotius was acknowledging the contract in favour of a third party in its modern sense<sup>107</sup>, but this does not follow from the fragment from *De iure belli ac pacis* as discussed above. Grotius only saw a certain analogy between, on the one hand, the *modus* attached to a donation and, on the other, the promise to an

<sup>104</sup> For this reason Müller erroneously concluded (*Die Entwicklung* 130): "Mit dieser Konstruktion war es Grotius gelungen die in dem Dreiecksverhältnis zwischen Versprechendem, Versprechensempfänger und Dritten bestehenden Rechte und Pflichten aufzuzeigen". Three persons are involved: donor, donee and beneficiary, but it cannot be maintained that the donee accepted the *modus* for the beneficiary. The donor was the "Versprechende", the beneficiary was the "Dritte", but the donee was **not** the "Versprechensempfänger". If that would be the case, we should conclude that the promisor is no longer capable of revoking. If there was indeed someone who accepted at the moment the *modus* was attached to the promise, as maintained by Müller, the donor would no longer be entitled to revoke. Which phrasing was used for the promise ('mihi' or 'in eius nomen collata cui danda est res'), would not matter.

<sup>105</sup> This contract – as stated, Grotius did not confine himself to donation – could be concluded through an intermediary. The *modus* could be attached, as Grotius argued, "quamdiu promissio completa nondum est per acceptationem, nec fide interposita facta irrevocabilis" (*De iure belli ac pacis*, Lib. II, cap. xi, § 19, 338). In view of the context, 'acceptatio' refers to acceptance by the donee himself or by another on his authority. 'Fide interposita' refers to acceptance by someone acting without mandate.

<sup>106</sup> *Inleidinge*, Boek III, deel II, § 12 (205): "Schenckinge (volghens het gunt hier vooren in 't gemeen van toezegging is gezeit) vereischt aevaerdinghe, de welcke (...) Kan oock geschieden tusschen afwezende door brieven: als oock door gemachtigden van weder-zijde, welverstaende dat voor de aenvaerding des toezeggers last geen voortgang en heeft, indien hy die wederroep oft te vooren komt te sterven: ten waer een beampete-schrijver de toezegging voor een ander hadde aengevaert op sijn welbehagen".

<sup>107</sup> Cf. Ankum, *De Voorouders* 28; Müller, *Die Entwicklung* 130.

absent beneficiary. Only in the *Inleidinge* did he discuss the case, where someone other than the beneficiary, viz. the notary, had accepted the *modus* at the moment the donation was incorporated in an instrument. He restricted himself to the problem whether or not the *modus* could be revoked.

Grotius did not deal with the question, why in this case the beneficiary had an action against the donee [!] in order to enforce compliance of the *modus*. In later times it was argued that the donee would have made a promise, which had been accepted by the donor (or by the notary). This explanation may be in agreement with Grotius' line of reasoning, but was not yet explicitly stated.

## 9. Conclusions

The *ley 'Paresciendo'* is not only relevant for the historical development of our modern concept of contract, but also for the development of what nowadays is termed contract in favour of a third party. The introduction of the *ley 'Paresciendo'* in Castile implied that, in conformity with canon law, the nude pact (*nudum pactum*) was acknowledged as a source of obligation. Moreover, some sixteenth century scholars derived from the text of the *ley 'Paresciendo'* evidence that even a unilateral promise resulted in an enforceable obligation, at any rate if the circumstances of the case showed that the promisor had intended that his statement would have such a consequence. The authors who defended this view, viz. that the unilateral promise can be the source of enforceable obligations, admitted that in this respect the law of Castile deviated not only from Roman law, but also from canon law.

The acknowledgment of the *nudum pactum* as a source of obligation implied that parties no longer had to come together in order to conclude the contract. As a consequence, the promise (*promissio*) by letter or messenger, addressed to someone absent, which in Roman law was ineffective unless it was used to express a wish to enter into one of the four consensual contracts, acquired the character of an offer which could also be accepted after a certain lapse of time. A second consequence existed in the fact, that the beneficiary could also accept the promise, offered to him by the promisor, but initiated by someone else. In terms of the *ius commune*, the latter case involved a *stipulatio alteri*, a stipulation that something be given to another, i.e. an absent beneficiary.

Obviously the Castilian lawgiver realized, that, acknowledging the *pactum nudum* as a source of obligation and accepting the possibility of concluding a contract *inter absentes*, had important repercussions on the Roman law defences which in the *ius commune* the promisor could still derive from the maxim *alteri stipulari nemo potest*. This was considered to encompass the principle that no rights could be acquired through an *extraneus*, i.e. someone not being a son under paternal control. If the

beneficiary was entitled to accept the promise that something would be given to him at a later date, it was for the promisor pointless to object that it had previously been accepted by an *extraneus*, who according to the *ius commune* lacked the authority to accept on his behalf. Similarly, it would be pointless to bring as a defence that the stipulator, i.e. the one who initiated the promise, and the beneficiary were not one and the same person. Thus, both defences were explicitly excluded.

The *ley 'Paresciendo'* did not pronounce upon the question whether the beneficiary had to accept the promise in order to render it enforceable. This allowed the sixteenth century scholars to dispute what exactly constituted the source of obligation. Was it the (unilateral) promise itself, the *stipulatio alteri* between stipulator and promisor, or the pact between promisor and beneficiary once the latter had accepted it? The importance of the *ley 'Paresciendo'* for the development of our modern concept of agency lies specifically in the fact that this provision caused the Spanish moral theologians to deal with the precise consequences of a promise. Which promises could be revoked? Which promises were enforceable?

In the *ius commune* this question had been less pressing, since only in exceptional cases did the stipulation that something be given to another have the effect that the third party acquired a claim. The opinion of the early glossator Martinus that the beneficiary "*in cuius persona (pactum) conceptum est*" always had an action, had, from the twelfth century, been rejected by all other civilians. The question, whether promises could be enforced by absent beneficiaries, simply did not occur.

In order to find an answer Antonio Gómez drew a distinction between promises (worded as addressed) to the absent beneficiary and promises to the present stipulator. Both kinds of promises were accepted by the stipulator, but in the first category an obligation came into being between the promisor and the beneficiary, in the second category between the promisor and the stipulator. In later times Grotius employed the same distinction. Dealing with Natural Law in his *De iure belli ac pacis*, he distinguished between the *promissio in nomen eius collata cui danda est res* and the *promissio mihi data*. In this distinction, derived from Gómez, Grotius incorporated the teachings of Covarruvias concerning the revocability of promises. Covarruvias saw an analogy between the way the *stipulatio alteri* was embodied in the *ley 'Paresciendo'* and what was prescribed in C. 8.54(55).3 concerning the donation under a *modus*. Building on arguments derived from the commentators' discussion concerning the revocability of the *modus*, he came to the conclusion that the *promissio* can be revoked until the moment it was accepted by the beneficiary, unless it had previously been accepted by someone else, i.e. the stipulator. Grotius appears to derive elements for his theory on the *stipulatio alteri* both from Gómez and Covarruvias. Following Antonio Gómez he maintained, that *verba promissoria* may contain the name of the beneficiary. Surely, it is possible to stipulate: do you promise Titius to give him? From Covarruvias Grotius derived the idea that promises become

irrevocable, as soon as they are accepted by someone other than the beneficiary.

By drawing a distinction within the category of promises (worded as addressed) to the absent beneficiary, viz. between situations where the stipulator acted with and situations where the stipulator acted without a mandate, the modern concept of agency becomes apparent. The commentators and the moral theologians of Spanish late scholasticism had only offered some starting points for developing this concept. The final step was made in Grotius' *De iure belli ac pacis*. If the stipulator acted with a mandate to accept the promise for the beneficiary, the latter, being his principal, acquired a claim. This also applied to the one in the care of a tutor or curator. Acceptance by the stipulator is regarded as acceptance by the beneficiary. This view of Grotius constitutes the basis of our modern concept of direct representation<sup>108</sup>.

<sup>108</sup> Unfortunately secondary literature has not adequately recognized that Grotius made no distinction between acceptance 'in name of the third' and acceptance 'in one's own name'. Consequently, it may erroneously seem that Grotius already acknowledged the modern concepts of unauthorized representation and contracts in favour of a third party.