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SPECIFIC PERFORMANCE IN OBLIGATIONS TO DO ACCORDING TO EARLY MODERN SPANISH DOCTRINE

1. Introduction

Spanish legal doctrine of the sixteenth century is usually considered to have been of great importance for the schools of Natural Law that emerged in Northern Europe in the course of the seventeenth century. Grotius (Hugo de Groot, 1583-1645), for example, is said to have been influenced by a number of sixteenth-century Spanish scholars,¹ probably through the teachings of Lessius (Lenaert Leys, 1554-1623). In this contribution we will focus on the question of whether influence from the early modern Spanish doctrine can be shown as regards the issue of specific performance and more specifically on the question of whether obligations to do can be enforced or whether, by contrast, the debtor can discharge himself by offering damages.

As regards obligations to do, there had been a longstanding debate in legal scholarship as to what should be considered the general rule. As described in the previous contribution, the majority of glossators, followed by Accursius (1182-1263), had taught that obligations to do could be enforced specifically.² The Gloss also mentions a deviating view, *viz.* that the creditor is only entitled to specific performance if the act that the debtor is obligated to perform can only be accomplished by the debtor himself. Thus the principal rule was that no one can be compelled to act specifically. It was only later, in the era of the commentators, that the majority of learned jurists accepted as a general rule for contractual obligations that no one could be compelled to act specifically.³ A consistent theory was developed by Bartolus de Saxoferrato (1314-1357), whereby, as a principal rule, the obligation of the seller to transfer possession to the buyer could be enforced specifically, but

¹ See, for example, Feenstra 1973.

² See for the interpretation of the Accursian Gloss: Fischer 1934, p. 132-133 (especially as regards the obligation of the seller to deliver); Dilcher 1961, p. 285-286; Reppen 1994, p. 89-114, and the contribution on medieval scholarship in this volume.

³ The famous maxim *nemo potest praecise cogi ad factum* was phrased at the beginning of the seventeenth century by Antoine Favre (1557-1624) in his *Rationalia in pandectas* ad D. 8.5.6.2. Some scholars read the origin of this maxim in the gloss *Obligationibus* ad D. 42.1.13.1.

obligations to perform a *factum nudum* could not. At the same time it was acknowledged that there were important exceptions to this rule.

The discussion continued in Spanish legal scholarship of the sixteenth century. However, we do not encounter it as a central issue in the doctrine of Early Modern Scholasticism. The term 'Early Modern Scholasticism' is used here to indicate those scholars who in the sixteenth and seventeenth centuries unfolded their legal theories by interpreting and elaborating *De iustitia et jure*, i.e. the part of *Summa Theologiae* of Thomas Aquinas (1225-1274) dealing with the virtue of justice.⁴ From the beginning of the sixteenth century the use of the *Summa Theologiae* as a textbook, especially in theological education, had increasingly become common practice in Salamanca and other academic centres in Spain and Portugal. However, dealing with the question of specific performance was not a very obvious element of commenting on Aquinas. In Aquinas' teachings, the central notion is *restitutio*, which covers only a limited number of contractual obligations. Aquinas distinguished between restoring 'because of a thing' (*ratione rei*), i.e. because a person has something among his belongings to which another person is entitled, and restoring 'because of having received something' (*ratione acceptionis*), i.e. because a person received something in the past that has not yet been restored. Only when an obligation can be seen as a form of 'giving back', such as in the case of a loan and deposit, may it be considered as a kind of *restitutio*.⁵ The contractual performance owed by the debtor is generally termed *solutio*, not *restitutio*, and, as just seen, only in exceptional cases will the *solutio* coincide with a specific kind of *restitutio*. Not every *solutio* is a restitution. We perform (*solutio*) what we owe because of a promise or oath or out of charity or compassion. When we restore (*restitutio*), we give back, either in itself or in an equivalent, the object we received previously or the object that we have among our belongings and to which another person is entitled. Thus, giving back something deposited is *restitutio* rather than *solutio*.⁶

Unlike the medieval canonists and theologians, early modern scholastics sometimes acknowledged a rather extensive meaning of the notion of restitution, which, besides restitution *ratione rei* and *ratione acceptionis*, also included a third category, viz. restitution out of contract (*restitutio ex contractu*). In other words, an obligation resulting from stipulation or an obligation to pay the selling price. However, such obligations do not result from a kind of receipt and, although sometimes termed as restitution, they do not belong to the two categories dealt with by Aquinas.⁷ Though early modern scholastics discuss the question of whether restitution should take place *in specie* or in damages,⁸ this discussion does not include the question of specific performance in contractual obligations, except those resulting from loan

⁴ *De iustitia et jure* was not an independent treatise, but an integral part of the *Secunda secundae*, the second part of the second part of the *Summa Theologiae*. It covered questions 57 to 80.

⁵ In the *Summa Theologiae* this is not a restitution *ratione rei*, but a restitution *ratione acceptionis*. Moreover, in these cases (loan and deposit) the receipt took place in conformity with the owner's wishes. Aquinas speaks in this respect of *absque iniuria, cum voluntate scilicet eius cuius est res*. See ST II-II q. 62 art. 6 co.

⁶ See, for example, Lessius 1696, Lib. 2, cap. 7, dubitatio 4 (p. 62).

⁷ Lessius 1696, Lib. 2, cap. 7, dubitatio 5 (p. 63).

⁸ See Nufer 1969, p. 51-52.

and deposit. Restitution applies primarily to cases of delict and cases where something has to be given back to its owner. Of all the early modern scholastic writers, i.e. in the sense of having commented on the *Summa Theologiae*, it is only Molina who explicitly deals with specific performance in the case of obligations to do, as will be shown below.

Apart from the writers we class nowadays as belonging to Early Modern Scholasticism, there were also academic jurists in Spain who argued much more along the lines of the medieval commentators. They sometimes called themselves *bartolisti* and may be considered as Spanish counterparts of the *mos italicus*. Many of them treat the Roman sources as living law, as if these texts were of indispensable relevance for both legal doctrine and legal practice, although national, i.e. royal, legislation and not the *Corpus iuris* was indisputably in force in Spain. Only a handful of these jurists, however, seem to have continued the medieval debate on specific performance.

In European legal doctrine of the following centuries, both Natural Law and the *usus modernus pandectarum*, we find references to only three Spanish writers from the sixteenth century who discussed the question of whether the obligation to do (*obligatio faciendi*) could be precisely enforced, viz. Covarruvias, Gómez and Molina. In his *De iure belli ac pacis* Grotius did not even consider the question. There is only one, isolated remark in his *Inleidinge tot de Hollandsche rechtsgeleerdheid*, and this does not include any references to authoritative writers: according to Natural Law the debtor has to perform as promised whenever he can do so, whereas in civil law he can discharge himself by compensating damages or paying the contractual fine.⁹

Covarruvias (Diego de Covarruvias y Leyva, 1512-1577), Professor of Law at Salamanca and later Bishop of Segovia, deals with the question of whether a seller who is still in the position to deliver can be compelled to do so in his *libri variorum resolutionum*, which were first published in 1552. He examines the question of whether a contractual obligation to do is enforceable if confirmed by oath in his work *In caput Quamvis pactum, De Pactis, Lib. VI Decretalium Relectio*, which is a commentary on a provision (VI 1.18.2) of the *Liber Sextus* and was first published in 1553. Antonio Gómez (1501-1562/1572), who also taught in Salamanca, discusses the enforceability of the obligation to do in his *Commentariorum variarumque resolutionum iuris civilis communis et regii tomi tres*. This work deals with the law of succession, the law of contract and the law of delict and was first published in 1572. The Jesuit Luis de Molina (1535-1600), who for many years taught in Évora (Portugal), examines the same subject in the second treatise, published in 1597, of his *De justitia et iure*. The title of this work suggests it is a commentary on Aquinas' doctrine of restitution. Indeed the book is strongly related to specific issues discussed in the *Summa Theologiae*, such as eternal law (*lex aeterna*) and its obligatory character and

⁹ Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid* III.3.41 (ed. Dovring, Fischer & Meijers 1965, p. 214): Doch hoe wel nae 't aengebooren recht iemand die iet toegezeit heeft te doen, gehouden is zulcks te doen, ingevalle het hem doenlick is, zoo mag hy nochtans nae 't burgerrecht volstaen, mids voldoende den bedingher ofte aenneemer de waerde van 't gunt hem daer aen was gelegen, ofte de straffe zoo daer eenige is bedonghen by gebreck van de daed te voldoen.

the relationship between the moral concepts of good and evil. The second treatise, however, contains an extensive treatment of the law of obligations. There is also the legal practitioner Juan Gutiérrez (1535-1618), whose monograph on legal acts confirmed by oath, the *Tractatus de iuramento confirmatorio, et allis in iure variis resolutionibus*, was referred to several times by Molina. Lastly, Antonio Pérez (1583-1672), Professor of Law at Louvain University in the early seventeenth century, may also be taken into account in view of his descent – he was born in Alfaro – and his particular interest in developments in Spanish law. His commentary on the Codex, the *Praelectiones in duodecim libros Codicis Justiniani Imperatoris*, which appeared in 1626 – contains some fragments on our subject.

These Spanish jurists have in common that they usually say they are discussing the obligation to do (*obligatio faciendi*), although in fact they also discuss other duties to act, such as those based on the law of property or the law of succession or on provisions from the *Corpus iuris*. Secondly, it may be noted that it is always two options that are considered: the debtor can be forced (by the magistrate?) to perform specifically or he can discharge his obligation by paying damages. What the plaintiff had claimed is not taken into account. It may, however, be assumed that he sought performance in kind. Otherwise the question of whether the debtor can discharge his obligation by paying damages would not arise. Moreover, the writings of these jurists contain hardly any references to the *iusiurandum in litem*, i.e. the competence of the plaintiff entitled to specific performance to estimate the value of what is owed to him and to claim monetary compensation. It appears that the creditor is considered to prefer specific performance of an obligation to do, and the question is whether or not the debtor can be sentenced to actually perform what he promised to do and how this sentence can be executed.

2. What is the principal rule of early modern *ius commune* ?

The entire discussion in the sixteenth century concerning specific performance was restricted to obligations to do (*obligatio faciendi*). Again, we have to distinguish within this category between the obligation of the seller to transfer possession to the buyer (*tradere*), which is a specific kind of *obligatio faciendi*, and the obligation to perform a *factum nudum*, which exists in something the debtor had to do himself. There was hardly any debate on the obligation to give (*dare*), i.e. the obligation to transfer ownership. The reason for this may be that the jurists only discussed controversial issues. As we have seen in the contribution on medieval scholarship, the obligation to do was precisely such an issue, while the obligation to transfer ownership was not.

The object of the *obligatio faciendi* was qualified as *incertum*, that is as not being precisely laid down, since the quantity and nature of the performance could not be determined in detail. If the debtor did not act as promised, only damages, *viz.* the interest of the creditor in the performance that did not take place, but should have, were taken into account.¹⁰ In obligations to do, a penalty clause was consequently

¹⁰ Pérez 1653, ad C. 7.47, nu. 12 (p. 454), referring to D. 42.1.13 and D. 45.1.72.

usually inserted to cover the eventuality of non-performance because, in order to claim damages, the creditor had to prove the extent of his interest, and this was not always easy.¹¹

The majority of sixteenth-century Spanish jurists agree that, according to the principal rule of *ius commune*, the debtor in obligations to do can discharge himself from his obligation by offering damages instead of performing *in specie*. Only Molina defends a deviating opinion, as will be shown below.¹² The two most important texts substantiating the view that the debtor has to be sentenced to pay a certain amount of money are derived from the Digest. The jurists derived from D. 42.1.13.1 the statement that if a debtor has not acted as promised, he will be sentenced to pay an amount of money, as in all obligations to do.¹³ Similarly, from D. 45.1.72pr they derived the view that, in the case of non-performance of a stipulation to do something, money must be given. The latter case deals with stipulations to do something, such as to transfer possession (*tradere*) of a plot of land, to excavate a trench, to erect a building or to perform daily labour. Splitting up such obligations would make the stipulation void. Thus, in such cases the action can be awarded, based on an estimation of the value of the act that should have taken place.¹⁴

The jurists also refer to Bartolus de Saxoferrato for his opinion that the phrase '*Celsus ait posse dici iusta aestimatione facti dandam esse petitionem*' in D. 45.1.72pr can lead to only one conclusion, *viz.* that the promised act cannot be enforced. Bartolus' commentary on D. 45.1.72pr is, however, quite extensive, and the Spanish scholars refer only to a small part of it. This fragment deals with the four reasons why the obligation to do (*obligatio faciendi*) in the case of default (*mora*) is provided with an obligation for damages (*obligatio ad interesse*), whereas the obligation to give (*obligatio dandi*) is not. Bartolus is dealing here with obligations to do resulting from a contract, not those resulting from a last will or based on provisions from the *Corpus iuris*. According to Bartolus – but this is by no means always noticed by the Spanish jurists! – the *obligatio facti* will continue to exist, but an alternative *obligatio ad interesse* will come into existence alongside it.¹⁵ The four reasons Bartolus mentions are as follows:

¹¹ Pérez 1653, *ibid.*, referring to Inst. 3.15.7.

¹² See Covarruvias, *Relectio regulae 'Quamvis pactum'* in VI, Pars I, § IV nu. 11, in: Covarruvias 1679a, p. 350; Gómez 1572, cap. X, nu. 22 (fo. 236r-v); Gutiérrez 1597, Pars I, cap. XXXIX nu. 1 (fo. 150v); Molina 1614, disp. 542, nu. 10 (p. 767) and disp. 562, nu. 4 (p. 832); Pérez 1653, ad C. 4.49 nu. 3 (p. 228).

¹³ D. 42.1.13.1 (...) si minus, quia non facit quod promisit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus.

¹⁴ D. 45.1.72.pr. Stipulationes non dividuntur earum rerum, quae divisionem non recipiunt, veluti viae itineris actus aquae ductus ceterarumque servitutium. idem puto et si quis faciendum aliquid stipulatus sit, ut puta fundum tradi vel fossam fodiri vel insulam fabricari, vel operas vel quid his simile: horum enim divisio corrumpit stipulationem. Celsus tamen libro trigensimo octavo digestorum refert Tuberonem existimasse, ubi quid fieri stipulemur, si non fuerit factum, pecuniam dari oportere ideoque etiam in hoc genere dividi stipulationem: secundum quem Celsus ait posse dici iusta aestimatione facti dandam esse petitionem. Gómez also referred to D. 45.1.54.1 and D. 45.1.113.1.

¹⁵ Bartolus ad D. 45.1.72, nu. 35 (ed. Polara 1996b, fo. 30rb-va).

(i) Since performance in the case of obligations to give requires only a single moment of time, while performance in the case of obligations to do requires a considerable amount of time, enforcement of the obligation to do *in specie* would imply a kind of slavery (with reference to D. 43.29.1-2). This argument is said to have its origins in Dinus de Mugello (1253-1298).¹⁶

(ii) An obligation to give cannot be differentiated according to time or person. It does not matter when the performance takes place and by whom. Acts, however, have to be performed by day or by night, in sickness or in health and so on (with reference to D. 12.6.26.12).

(iii) In the case of an obligation to give, it is always in the creditor's interest that the object due is delivered, whereas in obligations to do it is sometimes in the creditor's interest that actual performance takes place, but sometimes not. Thus the *obligatio facti* is provided with an *obligatio ad interesse* in order to avoid the creditor claiming something other than damages (i.e. his interest in the performance). This argument is said to derive from Pierre de Belleperche († 1308).¹⁷

(iv) An act is always *incertum* since it does not exist in the nature of things before it is carried out. Thus after default (*mora*), the *obligatio facti* will be provided with an *obligatio ad interesse* existing in a quantity that, in its certified presence, exists in the nature of things. In obligations to give, however, there is something *certum* from the very beginning, *viz.* the ownership of the object that exists in the nature of things. In the case of three of these arguments Bartolus maintains that they do not always apply to all obligations to do, especially not to the obligation to transfer possession.¹⁸

From Bartolus the Spanish scholars also adopt the rule that if the obligation to do something does not result from a human (contractual) provision, but instead from a provision of the *Corpus iuris*, the debtor can be compelled to perform. This can be found in a different fragment from Bartolus than the one referred to above and reflects the opinion of Jacobus de Arena († ca. 1296).¹⁹

The Spanish jurists agree that the creditor has an action at his disposal to make a claim for damages to the extent of his interest. For this opinion Bartolus seems once again to be the main authority,²⁰ more specifically his argument, mentioned above and ascribed to Pierre de Belleperche, that the *obligatio facti* will be provided

¹⁶ See for this view of Dinus de Mugello: Repgen 1994, p. 162.

¹⁷ Cf. for the view of Pierre de Belleperche: Repgen 1994, p. 148-156.

¹⁸ Bartolus ad D. 45.1.72, nu. 13 (ed. Polara 1996b, fo. 28va).

¹⁹ Bartolus ad D. 39.5.28 nu. 3 (ed. Polara 1996a, fo. 72va). See for this opinion of Jacobus de Arena: Repgen 1994, p. 159; the Spanish writers also refer for the opinion that the debtor cannot be compelled to perform to other commentators, such as Paulus de Castro (1360/62-1441), Alexander de Imola (1424-1477) and Iason de Maino (1435-1491).

²⁰ The reference to Bartolus can be found in Guttierrez, *op. cit.*, Pars I, cap. XXXIX nu. 2 (150v), who also referred to the French jurist Pierre Rebuffe (1487-1557), who taught canon law at Montpellier, Toulouse and Paris, as well as to the French jurist Jean Feu (Johannes Igneus, 1477-1549) and to the commentary on Inst. 4.6 (*De actionibus*) of Angelus de Gambilionibus.

with an *obligatio ad interesse*, whereas the *obligatio dandi* will not. The fundamental point in Bartolus' theory is that a person stipulates what is in his own interest and nothing else. If I promise you a horse, your interest is simply the value of the horse. And this value will without any doubt be included in the obligation. But if I promise to do something for you, your interest may not be the value of the act, unless it would coincide with this value. Thus you cannot compel me to act, because if you could, you would enforce more than your interest. To avoid this, the *obligatio facti* will be provided with an *obligatio ad interesse* and I will discharge myself if I provide adequate compensation.²¹

Having adduced a number of medieval and contemporary authorities to substantiate the opinion that, in contractual obligations to do, the debtor cannot be forced to perform specifically, Antonio Gómez presents as his own determinative argument – apart from all the provisions mentioned above – the fact that enforcement of the act infringes human liberty and is actually a kind of slavery. He supports his view by referring to D. 35.1.71.2.²² As discussed above, this argument was already mentioned by Bartolus, who maintained that it originated from Dinus de Mugello. It is an argument that can indeed be found in Dinus' writings.²³ Until the late Middle Ages this argument had played an important role in discussions of the enforcement of stipulations to do.

As stated above, it is only Luis de Molina who presents a deviating view, which was not defended by medieval scholars from the fourteenth and fifteenth centuries. According to Molina, it is questionable whether a debtor still capable of performing *in specie* can discharge himself, even against the creditor's wishes, by paying damages. Is he bound in such a way that it is the debtor's choice either to perform the act, for example to build a house for the creditor, as he had obliged himself towards the creditor to do, or alternatively to pay compensation in money?²⁴ The commentators maintained as their general opinion that he was not obliged to perform *in specie* and could discharge himself by paying damages. This was said to be confirmed by D. 45.1.72, as Odofredus († 1265) already maintained, as well as by D. 42.1.13 and other texts. At this point, however, Molina presents his own opinion.

²¹ Bartolus ad C. 7.47, nu. 28 (ed. Polara 1996c, fo. 74vb): (...) Ego dico quod glossa tua dicit veritatem cuius occasione debes videre rationem que est ratio quia in obligatione facti succedit obligatio ad interesse, in obligatione dandi non. Dico tibi stipulationes sunt invente ut unusquisque stipuletur sibi pro eo quod sua interesse modo. In obligatione dandi si promitto equum, interest tua habere equum simpliciter quantum ualet. Et ideo illud sine dubio est in obligatione. Sed si promisi tibi aliquid facere forte non interest tua quantum illud factum valet, nisi constaret. Et ideo non potes me precise compellere ad factum, quia si[c] compelleres me ultra quam interesse tua, ideo succedit obligatio ad interesse, dando tibi interesse liberor. Cf. Repgen 1994, p. 203, note 51.

²² Gómez 1572, cap. X, nu. 22 (fo. 236v).

²³ See Repgen 1994, p. 162. According to Repgen, Dinus, in his turn, had adopted it from Imerius (ca.1055-ca.1130).

²⁴ Molina 1614, disp. 562, nu. 4 (p. 832): (...) Caeterum dubium est, an, stando in iure communi, qui se obligauit ad factum, teneatur ad illud praecise, interim dum impleti illud potest; an vero satisfaciat, etiam invito creditore, solvendi ei interesse, ita quod in optione debitoris tunc sit, vel praestare factum, v.g. fabricare creditori domum, ut se illi obligauit, aut soluere illi interesse, prout debitor maluerit (...).

The only thing that can be derived from the provisions just referred to is that, if the debtor is in default (*mora*) or negligence (*culpa*), it is not he but the creditor who has a choice.²⁵ If the creditor prefers to claim damages, the act can be ‘split’ according to the interest to be estimated, although the obligation to act cannot itself be subdivided.²⁶ Molina subsequently maintained that if these imperial provisions were to imply that the debtor could change his mind afterwards and decide at his own discretion to pay damages instead of performing specifically, they would be entirely unreasonable, and would, without any interest for the state or common well-being, prescribe something contrary to the nature of the matter itself. A wise, equitable and just lawgiver would keep himself far away from such a thing. Moreover, if this were actually the meaning of these provisions, they should be abrogated and torn out from the *Corpus iuris*.²⁷

3. The eight exceptional cases discussed by Antonio Gómez

This contribution limits itself to discussing sixteenth-century Spanish jurists’ views on the controversial issues relating to the enforcement of obligations to do. It is appropriate, however, to note that having established the main rule of early modern *ius commune*, based on the *mos italicus*, various writers subsequently discuss the exceptions to the rule. The most clear overview can be found in Antonio Gómez, who describes eight cases in which the principal rule that the debtor cannot be compelled to perform the act he promised is put aside.²⁸ Again, it should be noted that these exceptions are not restricted to obligations to do. In fact all kinds of situations where an act (*factum*) can be enforced are described, including duties that cannot be classed as obligations to do. It is possible that the term *obligatio* is taken here in a wider sense than nowadays, i.e. including all legal duties that people create and not just the specific relationship between creditor and debtor resulting from a contract, quasi-contract, delict or quasi-delict. Moreover, these eight cases do not constitute an exhaustive list of all the exceptions that can be traced in the commentators’ lengthy discussions. A brief look at the commentary of Alexander Tartagnus on D. 45.1.72pr is enough to show that there are probably some more. Tartagnus mentioned examples not found in Gómez’s list, such as obligations to

²⁵ As previously assumed by Azo, Hugolinus and Accursius.

²⁶ Molina 1614, disp. 562, nu. 4 (p. 832): Neque enim ex illis iuribus, aliud colligitur, quam quod, quando debitor in mora, et culpa fuit, optio sit, non penes ipsum, sed penes creditorem, petere interesse, et quod quando ex parte creditoris interesse petitur, diuidi possit factum, quo ad interesse, in quo aestimatur, cum tamen obligatio ad factum sit in se indiuidua.

²⁷ Molina 1614, disp. 562, nu. 4 (p. 832): Ac certe, si iura illa Caesarea, vel quaecunque alia, intendissent, quod, quando quis obligatus esset ad factum, in opinione ipsius postea esset, non id praestare, sed solum interesse, irrationabilia prorsus essent, & quae sine ullo reipublico commodo, ac bono, contrarium eius statuerent, quod habet, ac postulat natura ipsa rei, quod longe alienum est a prudente, aequo, ac iusto legislatore, essentque proinde abroganda, a corporeque iuris praescindenda.

²⁸ Gómez 1572, cap. X, nu. 22. The cases are described from the words ‘*conclusio generica fallit in aliquibus casibus, in quibus debitor praecise cogitur facere: primus est quando*’ (fo. 236va) until the passage starting with ‘*Advertendum tamen quod licet quis possit promittere*’ (fo. 237rb).

perform of a religious or charitable nature (a *pia causa*).²⁹ The same exception is mentioned by Gutiérrez, who refers to D. 45.1.122.2 and to the *De privilegiis piae causae tractatus* of André Tiraqueau (1488-1558).³⁰

Some of the exceptions discussed by Gómez can hardly be seen as exceptions. If the obligation to do is confirmed by oath, the debtor can be compelled to perform, but according to many jurists this is because the secular courts, too, have to apply Canon Law in such cases.³¹ Moreover, the seller's obligation to provide the buyer with possession of the thing he bought is often seen as an exceptional subcategory of the *obligatio facti*. The eight exceptions, which were already acknowledged as such in medieval doctrine and are discussed by Gómez on the basis of existing opinions of the commentators, are the following:

- *Casus primus*. The first exception deals with duties that are not always obligations in the strict sense of the word, i.e. where the party obliged is someone's debtor. These duties have a specific nature and all exist exclusively in a judicial setting. A procurator is obliged to defend the case of his absent principal, and thus can be compelled to consent in the litigation (D. 3.3.35.3). A debtor can be compelled in court to specify his debt (D. 42.2.6.1), while in criminal proceedings someone can similarly be forced through torture to tell the truth. The obligation to perform certain acts in litigation *in specie* was already mentioned by Bartolus.³² In Baldus de Ubaldis (1327-1400), judicial acts already developed into a kind of category where enforcement of the obligation to do was allowed in view of the public character of those acts or the common interest.³³ The exception of D. 3.3.35.3 as a specific case was already mentioned by Dinus.³⁴

- *Casus secundus*. The second exceptional category consists of the duties prescribed by law, i.e. resulting from provisions of the *Corpus iuris*. As seen above, Jacobus de Arena already considered these obligations enforceable *in specie*, unlike those resulting from a human (contractual) provision. One of the examples given by Gómez was already explicitly mentioned by Jacobus de Arena: if a neighbour has the right to prohibit building on a plot of land and he orders (*nunciatio*) the owner to stop building, the owner may continue building after giving certain guarantees. But if the owner loses his case against the neighbour, the latter can compel him to take down what was built and does not have to accept damages (D. 39.1.21.4).³⁵

- *Casus tertius*. If a duty results from a last will, it can be enforced. If someone is ordered by testament to perform a certain (public) work, but wants instead to pay an amount of money so that the public authorities themselves can perform this

²⁹ Imola 1528, ad D. 45.1.72, nu. 27 (fo. 53v). See also Repgen 1994, p. 276-277.

³⁰ Gutiérrez 1597, Pars I, caput 39, nu. 4 (fo. 150vb).

³¹ For the binding force of the oath in Canon Law see Dondorp 2009, p. 141-143.

³² Repgen 1994, p. 197-198.

³³ Repgen 1994, p. 234.

³⁴ Repgen 1994, p. 163. In the case of D. 3.3.35.3 the enforceable act results from a *cautio de defendendo* (stipulation). Earlier glossators already pointed out that this act could be enforced.

³⁵ Repgen 1994, p. 83 and 159.

work, his claim will be dismissed since it was the testator's wish for the work to be performed personally by the heir (D. 32.11.25). This opinion was already defended by Bartolus.³⁶

- *Casus quartus*. The fourth case deals with promises to do confirmed by oath, which are discussed below (§ 5).

- *Casus quintus*. The fifth case concerns situations where someone is obligated to act because of the existence of a real right, for example if an owner vindicates his property. In such cases the court has coercive means at its disposal to enforce restitution of the disputed object (D. 6.1.68). Gómez refers here to Bartolus, although the latter explicitly qualified the defendant in such cases as someone who was not obligated in the sense of the legal relationship between the creditor and debtor in an obligation.³⁷ A person sentenced under the *actio confessoria* will also be compelled precisely to accept the exercise of a servitude (D. 8.5.7). Again Gómez refers here to Bartolus.³⁸

- *Casus sextus*. It is possible that the promised act does not involve any monetary interest or benefit, as, for example, when someone has promised to lecture in a certain discipline in return for a salary (*honorarium*) or to teach children grammar, or similar things. For reasons of public interest a person cannot discharge himself in such cases by monetary compensation. For the origin of this opinion Gómez refers to Bartholomaeus de Salyceto (ca. 1330-1411).³⁹

- *Casus septimus*. The seventh case concerns the obligation of the seller to deliver the objects sold, which is regarded as a specific subcategory of the obligation to do (*tradere*) and is dealt with below (§ 4).

- *Casus octavus*. If someone can be sued, not only by a real action, but also by a personal action to restore things he borrowed or received in deposit, while the other party retained ownership, the obligation to do can be enforced specifically, as long as the debtor is capable of performing. Again, the main argument is derived from

³⁶ Repgen 1994, p. 197 and 288.

³⁷ Bartolus ad D. 45.1.72pr, nu. 37 (ed. Polara 1996b, fo. 31ra): (...) aut contra eum qui non est obligatus, ut cum agitur reali. (...) Secundo casu, quando agitur contra eum qui non est obligatus. Et tunc dic ut supra per Petrum, quia aut agitur ad factum propter interesse ut principaliter et liberatur prestando interesse ut l. Paulus § i. supra quibus mo. pig. uel hyp. solu. (D. 20.6.13) aut ad factum principaliter et tunc compellitur precise ut l. Qui restituere (D. 6.1.68) (...). Cf. Repgen 1994, p. 343.

³⁸ Bartolus ad D. 45.1.72pr, nu. 37 (ed. Polara 1996b, fo. 31ra): (...) Idem dico quando agitur confessoria, ut reus cogatur precise pati, et sic bene loquitur glossa, que est super si. ser. uen. l. Harum (D. 8.5.7), in glossa super verbo 'iubeat' (...). Cf. Repgen 1994, p. 343.

³⁹ See Salyceto 1541, ad C. 7.47 nu. 25 (fo. 48va): (...) quia aut factum est tale, quod non potest explicari per alium, quia non est sibi similis qui id facere sciret. Et tunc precise compelli possit. Et est ratio quia tacite sic videtur actum et Pe. dixit et maxime quando interesse non stat in pecuniario commodo, quia factum fiendum non concernit commodum bursale, ut si promisit quis pueros tuos erudire in grammatica vel arte (...). See also Repgen 1994, p. 257.

D. 6.1.68. This view – in other words, that in this kind of obligation to restore, which appears to be considered a subcategory of obligations to do, the debtor’s act can be enforced – had already been the prevailing view since the days of Bartolus.⁴⁰

4. Can the seller be compelled to deliver?

In Roman law the seller was not obliged to transfer ownership of the sold object to the buyer (*dare*), but instead to transfer possession (*tradere*). In the *Corpus iuris*, this performance is mainly qualified as a kind of doing (*facere*), but sometimes as a category of its own (*praestare*). In many texts in the Digest the only distinction drawn was between *dare* (transferring ownership) and *facere* (doing something), as in D. 45.1.2.pr. Only sporadically, as in D. 38.1.37pr, do we find a tri-partition between *dare* (to transfer ownership), *facere* (to perform a mere act) and *praestare* (to transfer possession). As seen in the previous contribution, this performance *praestare*, usually termed as *tradere*, was regarded in the Middle Ages as a kind of *facere*. However, even if the early modern maxim *nemo praecise potest cogi ad factum* was applicable to obligations to do, it would be questionable whether it also applied to the obligations of the seller. After all, the seller’s performance deviated from many other kinds of *facere*. In many respects it much more closely resembled the transfer of ownership (*dare*), as was the common view of the jurists since Bartolus. Conveying possession was no laborious undertaking, as could be the case in other (mere) acts, and it would only take a single moment, comparable to the moment required for transfer of ownership.

Covarruvias presents as the general opinion the view that the seller’s obligation to deliver the goods he sold is a ‘mixed’ obligation and neither an obligation to give nor one to do. If the seller owns the goods and is in a position to transfer ownership to the buyer through conveyance, he can be compelled to do so. If, however, he does not have the goods, he is obliged, in conformity with the opinion of the early glossator Martinus, to compensate the buyer’s interest.⁴¹ According to Covarruvias, this opinion was followed by Bartolus (ad D. 12.1.9 and ad D. 45.1.72 q. 8 nu. 38), who also stated that this was the general rule, as well as by others.⁴² Subsequently Covarruvias mentions a different view, *viz.* that the seller is entitled to discharge himself by paying damages, which doctrine, he says, was extensively taught by the Italian humanist jurist Andrea Alciato (1492-1550), in his commentary on C. 7.47.⁴³

Gómez presents as the unanimous opinion of all jurists that, if the seller is still in a position to transfer possession of the object sold, the principal rule that the debtor cannot be compelled to perform the act is put aside. He refers for this opinion to sources such as the gloss *Tradatur* ad Inst. 3.23.1 and the commentary of Bartolus on D. 19.1.1 (nu. 12) and D. 45.1.72pr (nu. 39), as well as to the *Tractatus de*

⁴⁰ See Reppen 1994, p. 199-200.

⁴¹ With references to the Gloss ad D. 19.1.1 and ad Inst. 3.23.1.

⁴² With references to Alexander de Imola, Panormitanus, Felinus Sandaeus, Iason de Maino, Pierre Rebuffe (1487-1557) and to the work *De emptione et venditione* of Antonio de Burgos (1455-1525).

⁴³ See Covarruvias, *Variarum resolutionum* II, cap. 19 nu. 1, in: Covarruvias 1679b, p. 264-265.

emptio et venditio eorumque omnium quae ad eadem materiam pertinent of the canonist Fabiano Giocchi, who practised in Rome (Fabianus Giocchis de Monte Sancti Savini, 1421-1498), and to the *Lectura super titulo de actionibus institutionum* of Angelus Aretinus (de Gambilionibus), who lectured at the Institutes in Ferrara and Bologna between 1441 and 1445.⁴⁴

This unanimous opinion concerning the seller's obligation is also recorded by Antonio Pérez, who follows the medieval jurists in their opinion that the obligation of the donator, too, can be enforced. Pérez rejects some of the arguments used to question the enforceability of the seller's performance. In the first place he follows the opinion of Bartolus. In other words, the view that what the seller has to do is some kind of obligation midway between *dare* and *facere* (Bartolus ad D. 19.1.1). Thus, according to Pérez, the solution is also midway: on the one hand the seller is compelled to perform, but, on the other hand, only providing he is capable of doing so. If not, he can discharge himself by offering damages (D. 19.1.1 and D. 19.1.11.9). One has to realize that the seller's performance is not a pure act (*merum factum*), but an act that also contains the title of the goods or of their ownership, as in a case, such as D. 45.1.52.1, where someone promises to convey free possession (*vacua possessio*). If the seller himself is the owner, delivery will make the buyer the owner. If the seller himself is not the owner, delivery will make the seller liable for eviction.⁴⁵ Secondly, Pérez does not see any objection in the imperial rescript of C. 4.49.4, which rules that if the seller does not comply with his contractual duty out of impudence (*procacia*), the interest of the buyer that no breach of contract has taken place has to be estimated. According to Pérez, such non-performance may occur, just as sometimes the seller performs too late out of impudence. In the latter case, too, the buyer will have a claim for damages. Lastly, the statements in C. 4.49.10 and 12 – that the buyer has an action for damages – do not imply that the seller may not be compelled to perform *in specie*. In all the cases referred to, the seller is no longer in a position to hand over possession: the wine or the meat perished during default (*mora*) or were sold for a second time and subsequently conveyed to the second buyer, or it was the buyer who preferred monetary compensation instead of performance *in specie*.⁴⁶

5. The obligation to do, confirmed by oath

Among the Spanish jurists there was a common opinion that if the debtor confirmed his contractual obligation to do something by oath, he could be compelled to perform what he promised. The main argument to substantiate this view derives from the Accursian Gloss, or rather the way in which the Gloss has been interpreted since the days of Bartolus. In D. 12.4.5pr someone received a sum of money to travel

⁴⁴ Gómez 1572, cap. X, nu. 22, *casus septimus* (fo. 237rb).

⁴⁵ Pérez 1653, ad C. 4.49 no. 4 (p. 228), with references to the *Coniecturae iuris civilis* and the *De erroribus pragmaticorum et interpretum iuris* by Antoine Favre (Antonius Faber, 1557-1624), to the *Miscellanea iuris civilis* by Jean de Coras (Corasius, 1515-1572) and the commentary of Jacques Cujaz (Cujacius, 1522-1590) and Hugues Doneau (Donellus, 1527-1591) on D. 45.1.72.

⁴⁶ Pérez 1653, ad C. 4.49 nu. 4 (p. 228).

to Capua. The journey was subsequently cancelled because of bad weather or the debtor's health. Could the money then be reclaimed? This could not be done if the arrangements that had been made were such that it was necessary for the journey to be undertaken. The text of the Digest is not clear as to what these arrangements were, but the Gloss gave an example to explain how such necessity could have come into existence: 'as in the case he had sworn to go'.⁴⁷ Thus, according to the Gloss, the promise to do something confirmed by oath makes the journey necessary. Bartolus concluded from this statement that the person who took the oath could be obliged to perform the act specifically. Further support for this opinion is found in commentators as Baldus de Ubaldis (1327-1400), Alexander de Imola (1424-1477) and Iason de Maino (1435-1491).⁴⁸ This opinion is described as the prevailing view among late medieval and contemporary jurists. In this respect Gutiérrez refers to a *consilium* of the French jurist Nicolas Bohier (1469-1539), who even maintained that, if an oath is taken to perform an act, paying damages implies committing perjury.⁴⁹

Despite the existence of a prevailing doctrine, there were certainly also jurists who did not agree. Covarruvias, for example, mentions a *consilium* of Pier Filippo Corneo (Corneus, 1420-1492), the commentary on X 5.4.4 of Giovanni d'Anagni (Anania, † 1457) and a case recorded in the *Decisiones Neapolitanae* of Matteo d'Afflitto (1448-1528).⁵⁰ Moreover, two counterarguments are explicitly refuted. Gómez discussed the text of C. 4.30.16, which was said to imply that the oath always had to be interpreted in conformity with the nature of the contract it confirmed, while this act or contract could be ineffective because of a lack of consent between parties. Thus, in such cases, neither the act nor the oath confirming it would have any effect. In the case Gómez has in mind, however, there is sufficient consent between parties and thus the oath has the effect of providing the contract with an obligation to perform *in specie*.⁵¹ Covarruvias discusses a similar argument, which is said to have been brought up by Filippo Decio (Decius, 1454-1535) in his commentary on the *Liber Extra*.⁵² According to this argument, a person who swears to do something takes this oath in accordance with the qualities ascribed by law to the promise that it confirms, in other words, with the competence to discharge himself by paying damages if he does not want to perform the act. According to Covarruvias, however, this argument can easily be invalidated. By its very nature a promise to do something includes the consent and necessity to perform precisely. This results from the very phrasing of the promise. Only secondarily (*ex accidenti*),

⁴⁷ The gloss *Necesse habeas* ad D. 12.4.5pr: ut quia iurasti.

⁴⁸ See Covarruvias, *Relectio regulae 'Quamvis pactum'* in VI, Pars I, § IV nu. 11, in: Covarruvias 1679a, p. 350; Gómez 1572, *Casus quartus* (fo. 236vb) and Gutiérrez 1597, Pars I, caput 39 nu. 6 (p. 151-152).

⁴⁹ Gutiérrez 1597, Pars I, caput 39, nu. 6 (p. 152); cf. Boerius 1554, *consilium* 14, nu. 9 (fo. 46v).

⁵⁰ Covarruvias, *Relectio regulae 'Quamvis pactum'* in VI, Pars I, § IV nu. 11, in: Covarruvias 1679a, p. 350.

⁵¹ Gómez 1572, *Casus quartus* (fo. 236vb-237ra), with a reference to Alexander Tartagnus and Iason de Maino.

⁵² The actual reasoning in Decio is complicated. The central question is whether the oath adds something new to the act it is confirming, for example validity that did not yet exist. See Decius 1564, ad X 2.1.1 nu. 23 (fo. 144va-145ra).

i.e. in a case of default (*mora*) where the debtor does not want to act, is he liable to pay damages. The oath has to be understood, however, as confirming the obligation according to its principal nature.⁵³

Apart from all these arguments, used in the theory of civil law, some jurists consider Canon Law applicable whenever a contract is confirmed by oath. Since, under Canon Law, the debtor can be compelled to perform (see below), the same holds good for the person confirming the obligation to do something under oath. Secular courts, too, should apply Canon Law in such cases because of the spiritual character of the oath.⁵⁴ It is also reasoned that, because of the conflict between imperial law and papal law, it is papal law that should prevail. The conclusion should therefore be that, if an obligation to do is confirmed by oath, the debtor can be compelled to perform what he promised under oath, providing he is capable of so doing.⁵⁵

6. What is the rule of early modern Canon law ?

According to Covarruvias, as followed by Gutiérrez, Canon Law has as a principal rule that, unlike in the *ius commune*, debtors of obligations to do can be compelled to perform specifically what they promised.⁵⁶ This view is derived from X 1.35.1, the famous decretal *Antigonus*, and also X 1.35.3, which prescribes that courts must strive for actual observance of promises. This principal rule of Canon Law, whereby the debtor can be compelled to perform what he promised independent of an oath, can also be found in various medieval jurists, such as Ludovicus Romanus (Pontanus, 1409-1439)⁵⁷ and Nicolaus de Tudeschis (Panormitanus, 1386-1445). In his commentary on the *Corpus iuris*, Ludovicus maintained that, according to Canon Law, the debtor may be compelled to perform *in specie* if he is still capable of so doing.⁵⁸ For this opinion he adduced two arguments. In X 1.35.3 the Pope stated in

⁵³ Covarruvias, Relectio regulae 'Quamvis pactum' in VI, Pars I, § IV nu. 11, in: Covarruvias 1679a, p. 350.

⁵⁴ Molina 1614, disp. 562, nu. 4 (p. 832).

⁵⁵ Covarruvias, Relectio regulae 'Quamvis pactum' in VI, Pars I, § IV nu. 11, in: Covarruvias 1679a, p. 350, referring to *consilium* 12 of Aymo Cravetta a Saviliano (1504-1569).

⁵⁶ Covarruvias, Relectio regulae 'Quamvis pactum' in VI, Pars I, § IV nu. 11, in: Covarruvias 1679a, p. 350 and Gutiérrez 1597, Pars I, caput 39, nu. 4 (fo. 150vb).

⁵⁷ Pontanus 1547, ad D. 45.1.72pr, nu. 76 (fo. 82va): Decima conclusio probabilis esse potest, quod equitate canonica indistincte obligatus ad factum, si impleri potest, debet compelli ad faciendum, et propter hoc duo. Primo per doctrinam tex. in c. Qualiter de pact., ita formaliter dicentis: studiose agendum est ut ea, que promittuntur opere impleantur. No. ergo quod papa loquens de promissione in genere desyderat implementum formale et specificum ut in uer. opere. Secundo quia inter simplicem loquelam et iuramentum quo ad effectum implendi Deus non facit differentiam xxii q. v. c. Iuramenti. Sed si promissio facti fuerit iurata, cogitur iurans precise ad faciendum (...).

⁵⁸ This fragment was quoted by Iason. See Maino 1590, ad D. 45.1.72pr, nu. 33 (fo. 92va): (...) Alio modo limitat Lud. Rom. ut ista regula non procedat de aequitate canonica, ut obligatus ad factum, indistincte potest compelli praecise ut faciat si potest adimplere per c. Qualiter de pac. et quia inter simplicem loquelam et iuramentum Deus non constituit differentiam 22 q. 5 c. Iuramenti, sed ubi in obligatione facti adest iuramentum, cogitur praecise ad faciendum (...).

general terms (and not just for oaths!) that a promise must be fulfilled, while in C.22 q.5 c.12 God is said not to draw any distinction between a simple statement and a promise under oath as regards its observance. Thus in the case of a simple promise, the creditor may indeed demand performance *in specie*. If, however, the promise is confirmed by oath, the performance always has to be enforced. If not, the debtor will commit perjury. According to Tudeschis, an important and influential canonist from the fifteenth century, the rule as formulated by Bartolus for the *ius commune* was not the valid principle for Canon Law or Divine Law. The stipulation was introduced by civil law so that a person could stipulate what was in his own interest and could acquire such interest. What Bartolus said is based on this nature of the stipulation. According, however, to Divine Law and Canon Law, a person is bound to fulfil his promise even if it has not been confirmed by oath because acting against a promise involves a sin.⁵⁹

There were also, however, some deviating opinions among the canonists, with the most important being that defended by Johannes Andreae (ca. 1270-1348) and Felinus Sandaeus (1444-1503). In their opinion a debtor could not be forced to act as he promised according to Canon Law, since X 1.43.4 (X 1.43.9 is probably meant) implies that a debtor is capable of discharging himself by paying damages. Covarruvias and Gutiérrez, however, saw an alternative obligation in this decretal. If the debtor had promised to do something under penalty of a contractual fine, he could in that case pay the fine instead of performing the promised act, but not in other cases.⁶⁰ To support his view, Gutiérrez also refers to some authoritative texts from beyond the sources of Canon Law: D. 2.15.16 and the Gloss and the scholars on this text and Part. 5.11.34. The latter text will be dealt with below.

Lastly, Gutiérrez refers to the deviating view of Hieronymus Zanettinus (1457-1493). This jurist from Bologna was again more inclined to the opinion of Johannes Andreae. The view that a simple promise to do something (without oath) would also bind the debtor to perform *in specie* would contradict X 1.43.4. Following the prevailing view of the canonists implied that Canon Law deviated from civil law in two respects, *viz.* firstly that one could have a remedy based on a *pactum nudum*, and secondly that one could be compelled to act as promised, contrary to the civil law provision of C. 5.11.1. Zanettinus thus rejected the opinion of Ludovicus Romanus and concluded that a person could not be compelled under Canon Law or civil law to perform the promised act *in specie*, whether it was promised by nude pact or by stipulation.⁶¹

⁵⁹ Panormitanus 1547, ad X 2.24.16 nu. 9 (fo. 171va).

⁶⁰ Covarruvias, *Relectio regulae 'Quamvis pactum'* in VI, Pars I, § IV nu. 11, in: Covarruvias 1679a, p. 350: (...) Iure canonico promissorem facti omnino liberari, si velit praestare id quod interest: nec cogendum esse praecise facere, per text. in dict. cap. dilecti de arbitris: cui respondetur ibidem, ideo non cogi quem praecise ad factum, sed liberari praestatione poenae: quia alternatiue consetur obligatus ad factum, vel ad poenam, qui facere sub poena promisit; see also Gutiérrez 1597, Pars I, caput 39, nu. 4 (fo. 150vb).

⁶¹ Hieronymus Zanettinus, *De differentiis inter ius canonicum et civile*, in: *Tractatus* 1584, fo. 197vb-208va, differentia 66 (nu. 120-121, fo. 203va): (...) et quod etiam posset precise ad factum compelli contra dispositionem iuris civilis, contra. l. j. C. de dot. promis., ex quo remanet conclusio contra Lud. quod promittens factum praecise non potest compelli ad illud, siue
→

7. What can be said about Castilian law ?

Three Spanish writers, Gómez, Gutiérrez and Molina, discuss whether the *ius commune* was amended by Castilian law, i.e. whether the rule that the debtor could not be compelled to do as he promised was set aside by specific royal legislation. The principal source of law they investigate is the *Siete Partidas* (1265), which as a source of law came only in third place after the *Ordenamiento de Alcalá* (1348) and the various *fueros*. In many fields of the law, however, the *Partidas* were of great importance since they dealt with all kinds of questions that were not as such treated in more prevalent sources of law.

Only Gómez attempted to overcome the differences between *ius commune* and Castilian law and to interpret the *Partidas* in conformity with the *Corpus iuris*. The other two jurists mentioned above maintained that the Roman rule on enforcing obligations to do was definitely derogated by royal legislation. Under Castilian law, too, the obligation to do would therefore be enforceable *in specie*. They derived this view from a number of texts from the *Partidas*. In two of these cases, Part. 5.11.13 and Part. 5.11.35, this seems to follow quite easily, while two other texts, Part. 5.14.3 and Part. 3.27.5, are more complicated and have been subject to scholarly debate.

Part. 5.11.13 prescribes that as long as a debtor is still capable of doing what he promised, he can be forced by the local court to act.⁶² Part. 5.11.35 deals with a debtor who is obligated to do something or alternatively to pay a contractual fine. The most important words in this text are (...) *tenudo es de pechar la pena, o de dar, o de fazer lo que prometio qual mas quisiere* (...). These words are interpreted to mean that the choice is up to the stipulator. Thus, the debtor can be forced to act if the stipulator desires him to do so. In this respect the text deviates from the *ius commune*, a fact that was also noticed by the Gloss of Gregorio Lopez de Tovar (1496-1560) on this text.⁶³

More controversial is Part. 5.14.3, which prescribes (starting from the words *Otrosi dezimos*) that a person who is no longer capable of doing something in the way he promised should meet the creditor's demand in another way according to the discretion of the local court. Moreover, such person should also pay additional damages since his performance was not identical to what he promised.⁶⁴ Gutiérrez

promittat pacto nudo, siue stipulatione, tam de iure canonico, quam de iure ciuili.

⁶² Part. 5.11.13: (...) deue le apremiar el iuez del logar que lo cumpla alli (...); see Gutiérrez 1597, Pars I, caput 39, nu. 5 (fo. 151ra).

⁶³ See the gloss *Qual mas quisiere* ad Part. 5.11.35: (...) *tu ergo tene menti istam legem partitarum, contra communem opinionem*; see also Gutiérrez 1597, Pars I, caput 39, nu. 5 (fo. 151ra).

⁶⁴ Part. 5.14.3 *Como deuen fazer la paga o el quitamiento, e a quien, e de que cosas*. Pagamiento de las debdas deue ser fecho a aquellos que las han de recibir, e deue se fazer de tales cosas como fueron puestas e prometidas en el pleyto quando lo fizieron, e non de otras, si non quisiere aquel a quien fazen la paga. Pero si acaesciesse que el debdor non pudiesse pagar aquellas cosas que prometiera, bien puede dar le entrega de otras a bien vista del judgador. Otrosi dezimos que si el que ouiesse fecho pleyto de fazer alguna cosa, e non lo pudiesse fazer en la manera qua auia prometido, que deue cumplir de otra guisa el pleyto, segun su aluedrio del judgador del lugar. E deue pechar le el daño e el menoscabo que le vino por razon que non fizo aquella cosa, así como prometio (...).

takes this text to mean that if the debtor is indeed capable of performing the act he promised, he can be compelled to perform. This follows from an *a contrario* interpretation of the text. Gutiérrez comes to exactly the same conclusion, albeit through a different kind of reasoning. The text says that the a person who cannot perform the act he promised must fulfil his promise in a different way and, apart from that, should pay damages. But if a person who is still capable of performing the act he promised were able to discharge himself by just paying damages, this would imply that the latter was obligated to a much lesser extent than the person no longer capable of performing. This would be contrary to the law, and so the person who can perform his promise should be compelled to do so.⁶⁵ The same would result from Part. 5.11.35, which maintains that, whenever a promise is made to do something, the debtor can be required to act as promised and will be liable for all the damages and interest resulting from the fact that he acted in a different way than promised.⁶⁶ It follows from the last lines of this provision that if the debtor does not perform before joinder of issue, he will be liable for the performance or its equivalent, as well as for damages and interest.⁶⁷ Thus, according to Gutiérrez, the debtor can be compelled to act as promised and royal provisions must have altered the *ius commune*.⁶⁸ This was also the opinion of Lopez in his Gloss.⁶⁹

The fourth and last text presented by Gutiérrez as evidence for his opinion that, under Castilian law, the debtor can be enforced to perform as obliged is a fragment derived from Part. 3.27.5.⁷⁰ It deals with a defendant who is sentenced because he had to do something. According to the *Partidas* he has to be compelled to perform the act exactly as it was determined or he promised. Gutiérrez interprets this as a clear confirmation of what is stated in Part. 5.11.13 and so reads into the text that, as a general rule, the court will sentence the debtor to act as he promised. Gómez, however, defends a different opinion: these lines of the *Partidas* are in conformity

⁶⁵ Gutiérrez 1597, Pars I, caput 39, nu. 5 (fo. 151ra): Ergo a contrario sensu (quod argumentum est fortissimum in iure, innuit lex illa) quod si potest facere, cogitur praecise facere et non liberatur soluendo interesse: quod etiam alia inductione probatur in d. l. 3. nam si liberaretur soluendo interesse etiam eo casu, quo posset facere, lex illa non eum obligaret in casu impotentiae ad faciendum alio modo arbitrio iudicis ultra damna et interesse, ut expresse lex obligat, quia alias in plus teneretur et compelleretur, qui non posset factum adimplere, quam qui posset: quod non est dicendum, quia est contra ius: igitur obligatus ad factum tenetur praecise implere et ad id cogendus est si potest facere.

⁶⁶ Part. 5.11.35: (...) quel puede demandar, lo que le fue prometido, con todos los daños, e los menoscabos, que recibio por razon que non cumplio aquello que prometio (...).

⁶⁷ Part. 5.11.35 (...) Pero si el que fizo la promision, quisiere luego començar a cumplir lo que auia prometido en ante que respondiesse, al otro en juyzio, deue le ser cabido. E si lo cumpliere, entonce non seria tenuto de pechar los daños nin los menoscabos que de suso diximos.

⁶⁸ Gutiérrez 1597, Pars I, caput 39, nu. 5 (fo. 151rb).

⁶⁹ The gloss *Pudiesse fazer* ad Part. 5.14.3: Innuit quod si posset facere cogitur praecise facere et non liberaretur soluendo interesse. Et idem videtur probari in .l. 13. et in .l. 35. supra titul. vndecimo. eadem partita. Et sic de iure isto partitarum, non procedet communis opinio Bartoli et aliorum (...).

⁷⁰ Part. 3.27.5: (...) E si la sentencia fuesse dada contra el demandado, en razon de alguna cosa que deuiesse fazer, deue lo apremiar que lo faga assi como fue puesto, o lo prometio (...). NB. Gutiérrez quotes this fragment as Part. 3.27.4, Gómez as Part. 5.27.3. We follow the Salamanca 1555 edition with the Gloss.

with the *ius commune*. The fragment is supposed to refer to such (exceptional) cases where the debtor, also according to the *ius commune*, could be compelled to perform.⁷¹ Gómez does not give any examples here, but these could include a debtor who not only promised to do something, but was also sentenced to perform. According to the *ius commune*, such a defendant could sometimes be compelled to act *manu militari*. In other words, to restore something or to hand over possession. Gutiérrez rejects this interpretation by Gómez in two ways. Firstly, the words ‘he has to be compelled’ (*deuelo apremiar*) are phrased generally and not just for the specific kind of performance Gómez has in mind. Such words cannot be found in D. 45.1.72pr, which contains the basic rule of *ius commune*, i.e. that the debtor can discharge himself by paying damages. Secondly, the words ‘he has to be compelled to do’ (*deuelo apremiar que lo faga*) have to be read in direct connection with the rest of the sentence: ‘just as it was determined or he promised it’ (*assi como fue puesto, o lo prometio*). Thus, this provision from the *Partidas* prescribes explicitly and formally that performance should take place as promised. Consequently, performing an equivalent is not allowed, as is allowed in the customary laws of the various nations (*iura vulgaria*).

Having rejected the interpretation of Gómez, Gutiérrez deals with another objection to his own view, *viz.* that Part. 3.27.5 is restricted to cases where the defendant is sentenced to perform. Some writers come to this conclusion in view of the phrase ‘if the defendant was sentenced in view of a thing he had to do’ (*E si la sententia fuisse dada contra el demandado, en razon de alguna cosa que deuiesse fazer*). In the case of a sentence to perform a certain act, the *ius commune*, too, would sometimes compel the defendant to act *precise*. This follows from D. 6.1.68, confirmed by the Gloss and the scholars on that text, as is also mentioned by Gómez⁷² and Rodrigo Xuárez (1440/60-1500/20). However, according to Gutiérrez, Part. 3.27.5 not only refers to a person who is sentenced to do something, but also to a person who just promised to do something. This view results from the words ‘or promised it’ (*o lo prometio*). Gutiérrez’s final conclusion coincides with the opinion of the Lopez gloss mentioned above. In other words, under the royal legislation of Castile, the debtor can be compelled to act as promised and in this respect the *ius commune* is derogated from by the *Partidas*. Gutiérrez refers to two other jurists for support. The first is Juan de Matienzo (1520-1579), who maintains in his commentary on the *nueva recopilación* that, according to royal legislation, a debtor can always be compelled to act and that the restricted interpretation by Gómez of Part. 3.27.5 is not necessary.⁷³ The second jurist that Gutiérrez refers to is Juan Gracián Falconi (*saec.* XVI).⁷⁴

⁷¹ Gómez 1572, cap. X, nu. 22 (fo. 236va): Nec corrigitur ista communis opinio per notabilem legem partite. 5. tit. 27.3. par. ubi dicitur, quod si senten. est lata contra debitorem facti compellatur per iudicem facere, quia illa lex debet intelligi, ut debitor compellatur eo modo, quo de iure communi tenetur, et compelli poterat, scilicet, ut faciat, alias soluat interesse.

⁷² Gómez 1572, cap. X, nu. 22, Casus quintus (fo. 237ra).

⁷³ See Matienzo 1597, Lib. 5, tit. 16, l. 2 glos. 6, nu. 2 (fo. 422vb-423ra). In this way the old doctrine of Martinus de Fano († after 1272) is said to be confirmed again. See Reppen 1994, p. 134 for this opinion of Martinus de Fano. Sixteenth-century jurists knew this opinion only through secondary sources such as the commentaries on the *Corpus iuris* of Bartolus and Bartholomeus →

Gutiérrez concludes his explanation of specific performance of obligations to do in the law of Castile with some remarks on legal practice. Domestic servants (*ministrales*) in particular were sometimes forced to perform specific acts as part of their duties. The court could sentence them to imprisonment if they did not fulfil their promises or otherwise satisfy the other party. In two respects, however, legal practice has somewhat modified the application of this rule. Firstly, if the plaintiff's interest in specific performance did not exceed the payment of damages, the court could allow the defendant to offer monetary compensation if the defendant confirmed that performance *in specie* was difficult for him. Secondly, the rule did not apply if performance was impossible, as noted above.⁷⁵

8. Conclusions

The question of specific performance was debated to a limited extent by sixteenth-century Spanish jurists in the tradition of the *mos italicus*. The only early modern scholar who pronounced on the subject seems to have been Luis de Molina. What the writings of these jurists reveal concerning specific performance is far more a useful survey of late medieval thinking, seen from their sixteenth-century perspective, and a summary of the status quo in legal doctrine than a development of new legal arguments and dogmatics. The jurists examined restrict themselves to recording the opinions of the commentators and canonists from the fourteenth and fifteenth centuries, together with some references to contemporary writers. Usually this is achieved, probably for didactical reasons, in a simplified manner. When discussing the obligation to do in general, they refer to passages where Bartolus deals with obligations to do resulting from contract. We do find traces of a scholarly debate, but not as many detailed and deviating views as must have actually existed. Thus, the Spanish jurists of the sixteenth century who dealt with this topic reflected much more on the past and the actual situation rather than attempting to develop new theories or to innovate existing law.

Almost all the jurists examined discuss the principal rule of *ius commune* that, in view of D. 42.1.13.1 and D. 45.1.72pr, the debtor cannot be compelled to act as he promised, and they accept this opinion as the majority stance of the commentators. At the same time, however, this legal principle of the *ius commune* seems to be pushed aside by the opposite rule that the debtor can be compelled to perform the promised act whenever this is still possible. Within the *ius commune* itself the principal rule is sometimes put aside in favour of the opposite rule, not only in some minor exceptional cases, but also in respect of the seller's obligation to deliver and if the obligation to do is confirmed by oath. Outside the *ius commune*, i.e. in Canon Law and under the specific legislation of Castile (the *Partidas*), the opposite rule prevailed.

The clause 'whenever performance is still possible', as we find in Canon Law and Castilian law, is not insignificant. Within the civilian tradition it is applied only

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⁷⁴ Reference to his *Quingentarum regularum utriusque iuris (...) liber unus*, regula 184, nu. 3.

⁷⁵ Gutiérrez 1597, Pars I, caput 39, nu. 5 (fo. 151rb-151vb).

to the obligation of the seller, but not to obligations to do in general. A seller can be forced to deliver 'whenever performance is still possible'. In the case, however, of an obligation to perform a *factum nudum*, the debtor cannot be compelled to act even if he is still capable of doing so. Molina introduces this clause in his teachings on the enforcement of obligations to do according to the *ius commune*. In this way, this clause starts to constitute the border line between, on the one hand, the rule that obligations to do cannot be enforced (the principal rule of the *ius commune*) and, on the other, the rule that obligations to do can be enforced (the exceptional rule of the *ius commune* and the principal rule of Canon Law and Castilian Law). In the case of the *ius commune* it constitutes the exception to the principal rule that performance cannot be enforced because, at least according to Molina, performance can be enforced whenever it is still possible. Molina also rejects the possibility of appealing to D. 45.1.72pr in such a situation, i.e. allowing the debtor to change his mind and to decide at his own discretion not to perform specifically, but instead to pay damages. In the cases of Canon Law and Castilian law, this clause was a condition for applying the rule that performance could indeed be enforced. Through this way of reasoning Molina interprets the *ius commune* in conformity with the prevailing views outside the sphere of the civilian tradition, i.e. in conformity with Canon Law and Spanish indigenous law. In his *Inleidinge tot de Hollandsche rechtsgeleerdheid*, Grotius adopted the opinion of Molina as being in force only for Natural Law. In his description of the law of the Province of Holland, Grotius continued to adhere to the pecuniary sentence instead of enforcing obligations to do specifically but, as will be discussed in the next contribution, it is questionable whether this view of Grotius had not already in his own days been superseded by the explicit provisions on civil custody that were adopted in the late sixteenth-century procedural instructions for the higher courts of the province.

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