Chapter 5

A fragile synthesis: Bartolus de Saxoferrato

As already said, the last important defender of the Gloss on the *lex Barbarius* after Butrigarius was the most illustrious of his students and the most famed of all commentators: Bartolus de Saxoferrato. By Bartolus' time, the importance of the *Ultramontani*'s arguments on the *lex Barbarius* could no longer be ignored. Commenting on it, Bartolus had a double purpose – defending the Gloss from the *Ultramontani*'s attack while at the same time applying their conclusions so as to extend the scope of the *lex Barbarius*. Taken at their face value, these two purposes would hardly seem compatible with each other. This might well account for the ambiguity in his use of some previous jurists, whose position needed some slight reinterpretation to fit in his overall scheme.

5.1 A strategic defence of the Gloss

Just like Cynus, Bartolus also opens up his *lectura* with Barbarius' case, recalling the different position of the Gloss from that of the Orléanese jurists.[1] Then he provides a brief summary of what the Orléanese said. To do so, however, he reports only Ravanis' reading (without mentioning him): Ulpian's solution (validity *de aequitate*) would depend both on public utility and on the power of the sovereign.[2] Ascribing Ravanis' position to all the *Ultramontani* (without even sufficiently explaining it) might seem curious, all the more since Bartolus shows good knowledge of Bellapertica's reading of the *lex Barbarius* (and also, in other parts of his opus, of Cugno's), but not of Ravanis'. On the contrary, there is no other element in the whole of Bartolus' opus to suggest similar knowledge of Ravanis' position on Barbarius' case. As such, Bartolus' emphasis on the role that

1 Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria* … Basileae, Ex officina Episcopiana, 1588, p. 113, n. 1): 'Haec est bona et subtilis et solemnis lex et legitur dupliciter. Uno modo s(cilicet) glo(sa), alio modo secundum vltramontani.'

2 *Ibid.*, p. 114, n. 2: 'Et secundum hoc diuiditur haec lex in quinque partes. Nam in prima ponitur quoddam thema. In 2 quaedam circunferentia ad q(uestionem) mouendam. In 3 ponitur quaestio. In 4 questionis solutio. In 5 ponuntur due rationes. In summa, hoc dicit, secundum hanc lec(turam): agitata coram pretore minus idoneo propter publicam vtilitatem et propter auctoritatem creantium eum in pretorem tenent et valent. Hoc dicit. Et sic differt a lect(ura) glo(sae) quia hic non dicit, quod fuit liber uel praetor.' Cf. *supra*, last chapter, note 87.

'the authority of those who made him praetor'[3] had for the *Ultramontani* might appear somewhat ambiguous.

Later in the *lectura*, however, Bartolus is more precise. Most probably relying on Cynus' summary, he divides the *Ultramontani* according to whether public utility alone suffices, or superior authority is also necessary. Since Bartolus' summary was probably based on that of Cynus, it was a summary of a summary. Cynus himself, as we have seen, was not particularly accurate to begin with: he treated Cugno's requirement of a formally valid appointment as ultimately the same as Ravanis' 'power of the appointer', and invoked Dynus' authority in support of the opposite position of Bellapertica. As a result, Bartolus classified the position of the detractors of the Gloss on the *lex Barbarius* according to whether public utility sufficed, or whether the presence of superior authority was also necessary. Cugno and Ravanis required both elements, whereas Bellapertica, Cynus and Dynus thought that public utility alone would do. As Cynus used some of Suzzara's examples but did not quote him, Bartolus did not enlist him in either group. Syllimani was not used in Cynus, so did not appear in Bartolus either.[4]

This second occasion where Bartolus refers to the *Ultramontani* shows that the first one, based only on Ravanis, was not very punctual. A slightly imprecise citation would be hardly remarkable if it were not for the fact that Bartolus deliberately uses the two different references for very different purposes, as we will see when discussing the last part of his *lectura* on Barbarius' case.

The first time that Bartolus refers to the *Ultramontani*, he does so to compare their position with that of the Gloss as to the validity of Barbarius' praetorship. In so doing, as we have seen, Bartolus ascribes to all of them the position of Ravanis. In Bartolus' short summary, however, Ravanis seems to emphasise the role of the sovereign authority more than he actually did: exercising their sovereign power ('propter auctoritatem creantium eum in pretorem'), the

3 *Ibid.*, p. 114, n. 2.

4 *Ibid.*, p. 114, n. 5: 'Quero que est ratio quod acta per iudicem minus idoneum ualent? Iac(cobus) de Raua(nis) et Gul(ielmus) dicunt quod hic est duplex ratio. Prima, auctoritas Principis uel populi, creantis hunc praetorem: ut in uersi(culo) "cum etiam" [cf. Dig.1.14.3: 'cum etiam potuit populus Romanus servo decernere hanc potestatem']. Secunda ratio fuit publica utilitas, nec tot acta coram eo pereant. Et haec secunda ratio probatur ibi: "an fore", etc. [cf. Dig.1.14.3: 'An fore propter utilitatem eorum, qui apud eum egerunt vel lege vel quo alio iure?']. Petrus et Cy(nus) post eum tenent, quod fuerit una ratio, s(cilicet) publica utilitas, ne actorum multitudo periret. Et huic opinioni applaudit Dyn(us) ut in c. i in 7 quaestio(ne) extra de reg(ulis) iur(is) li. vi (VI.5.13.7).' The reference was wrong but in that *regula* Dynus discussed an issue of ecclesiastical prebends and the *causa finalis* of the grant of a prebend – which might explain the reason for the mistake.

Roman people appointed Barbarius as praetor.[5] As a result, the reader is left to ponder the reason for the *Ultramontani*'s disagreement: if they accepted that the sovereign appointed Barbarius as praetor, then it would be difficult to understand why they also denied the validity of such an appointment. Their objections are thus reduced only to very specific issues deriving from entirely different sources. The problem – one might be tempted to conclude – thus becomes a question of detail more than of substance. It might not be ruled out that the *Ultramontani*'s posthumous reputation – quibblers fond of petty sub-distinctions – also has something to do with the way they often appear in fourteenth-century *Citramontani*, who criticised their approach while often using it.[6]

To understand Bartolus' approach, it is also important to highlight something rather obvious: like most Italians, he followed the order of the Gloss. So, in discussing the *lex Barbarius*, he first looked at the issue of the praetorship and only then at that of Barbarius' freedom. The *Ultramontani*, as we have seen, inverted the order in which the validity of the praetorship and freedom appeared in the *lex*, starting with the latter. It was on the basis of Barbarius' lack of freedom that they denied the validity of the praetorship. The main arguments against the latter were therefore developed in the critique against the former. The point is more important than it might seem. Comparing the position of the Accursian Gloss with that of the *Ultramontani* according to the exact order in which each subject appeared in the Gloss meant giving to the Gloss a great advantage: rather weak opposition to the first subject. In the first part of his *lectura* on Barbarius, Bartolus discusses the validity of the praetorship, paying little attention to the *Ultramontani* and focusing mainly on the Gloss (as interpreted by Butrigarius). Later, when finally recalling some of the more substantial arguments of the *Ultramontani*, Bartolus could dismiss them by simply inviting his reader to look back at what had already been said on the subject of Barbarius' praetorship.[7] Whether or not deliberate, his approach

5 Compare Bartolus' summary (*supra*, this chapter, note 2) with Ravanis' own position (*supra*, last chapter, esp. note 59). The more pronounced role of the superior authority in Bartolus' summary of Ravanis does not match the summary provided by Cynus, who simply spoke of 'the authority of the person who bestowed [the title]' ('authorita[s] concedentis', *supra*, last chapter, note 136), not of the rather more specific 'authority of those who created him praetor'.

6 A somewhat emblematic case, for instance, is Albericus de Rosate's full-scale attack on the subtleties of the 'modern doctors', which opens his commentary on the *Vetus*. See recently Padovani (2017), pp. 5–9.

7 Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria*, cit., p. 114, n. 4): 'Et ex his concludunt contra glo(sam). Dico tamen, quod gl(osa) bene loquitur. Non ob(stante) contrarium primum,

would strengthen the impression – especially in a reader who did not have the text of the *Ultramontani* at hand – of the futility of such arguments. The only objection of the Orléanese that he briefly discusses with regard to the praetorship was that based on the literal tenor of Pomponius' statement: that the slave Barbarius 'exercised the praetorship'. To dismiss their objection (mere exercise *de facto*), Bartolus stresses a point already made by Butrigarius: it is not acceptable to say that Pomponius simply wanted to state a fact, for that fact was so obvious that it would make Pomponius' statement look ridiculous.[8] Much on the contrary, Bartolus adds, as a jurist Pomponius did not state facts but assigned a normative qualification to them.[9] Once again, looking for petty arguments, the *Ultramontani* missed the main point.

On both praetorship and freedom, Bartolus does little more than report Butrigarius' position. So, for instance, the objection about the *lex Iulia de ambitu* is solved in the same way as Butrigarius did – asking publicly is valid, asking secretly is not.[10] Bartolus' lengthy discussion of the applicability of the *lex Iulia* also reports some very specific – and, this time, approving – references to the

l. Herennius (Dig.50.2.10), quia solue ut in glo(sa). Ad l. moueor (Cod.4.55.4pr) responde ut glo(sa) … Non ob(stante) quod ipsi dicunt, quod acta de rigore ualerent, nedum de aequitate, si fuisset praetor: quia respondeo, ut in praecedenti quaestione' [i. e. on the validity of the praetorship].

8 Butrigarius, *ad* Dig.1.14.3: 'Item probat dictum Ulp(iani), quod dixit preturam eum functum et si dicas et gessisse offitium pretoris. Sed non fuisse pretorem hoc uidetur derisio: quis ei dubitabat quod fuit functus officio hoc?' (Bologna, CS 272, *fol. 7vb*; the statement is not present in the printed edition, but it is exactly the object of Bartolus' reference).

9 Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria*, cit., p. 114, n. 4): 'Non ob(stat) tex(tus) dum dicit, eum functum praetura: quia secundum do(minum) Iacob(um) est quaedam decisio: quia bene sciebamus, quod ipse erat functus praetura, ut in tex(to). Dicere enim, quod non iure fuit usus praetura, esset stultitia: imo fuit creatus pretor: et Iurisconsultus respondet ad ius, non ad factum, et dicit quod fuit praetor.'

10 On the point, Bartolus refines Ravanis' approach (ascribing his position to Butrigarius, however): the *lex Iulia* does not apply in Rome because the magistrates are not elected by the people but rather appointed by the prince, who is incorruptible. This makes sense, reasons Bartolus, but it requires the presence of the prince in Rome. In his absence (in practice, most of the time), the *lex Iulia* would on the contrary still apply. As such, Bartolus concludes, it is necessary to distinguish between public and secret requests, just as the Gloss said following Bassianus. *Ibid.*, p. 113, n. 1: ' Venio ad glo(sam) … dicitur hic quod barbarius petijt pretoriam dignitatem et pretor fuit immo incidit in l. iuliam ambitus (Dig.48.14) vnde ob(stat) l. i et per totum i(nfra) ad l. iul(iam) amb(itus) (Dig.48.14) et C. ad l. iul(iam) ambitus per totum (Cod.9.26). Glo(sa) soluit multis modis. Vna so(lutio) est quod licet non debuerit peti, tamen petita valeat et teneat, ar(gumentum) l. i § i quando appel(landum) sit (Dig.49.4.1pr). Hec so(lutio) videtur contra l. si quenquem C. epis(copis) et cle(ricis) (Cod.1.3.30);

Ultramontani. This seems to strengthen the impression that omitting such references from the overall discourse on the validity of the praetorship was deliberate.[11] We will come back to the point.

vel dic dicit glo(sa) quod hic barbarius petit officium publice et palam non tacite vel simoniace, et ideo non incidit in l. iul(iam) ambi(tus) ar(gumentum) l. i § i de pollici(tationibus) (Dig.50.12.1.1). Hoc videtur bona l(ectura), glo(sa) eam non teneat. Vnde dicit quod officium fuit petitum in ciuitate romana, in qua l. iulia ambitus non habet locum: vt l. i i(nfra) ad l. iul(iam) de ambi(tu) (Dig.48.14.1). Tu dic quod hic so(lutio) optime qu(ando) princeps esset in vrbe et officium peteretur ab eo, quia in eo nulla cadit suspicio: ita debet intelligi l. i(sta) secundum Ja(cobum) bu(trigarium); secus si peteretur a populo vt ibi, quia tunc obtineret secunda solutio huius glo(sae), que est Io(hanni Bassiani)' [i. e. the distinction between asking publicly vs. secretly: *supra*, §2.2, note 36].

11 Having concluded, after the Gloss, that seeking an office publicly was no offence, it remained to be seen whether it was lawful to couple such a public request with money. Clearly that was out of the question for ecclesiastical offices. But for secular ones Bartolus approvingly recalled Bellapertica's position (possibly through Cynus, who reported it integrally). According to Bellapertica, if an office entailed jurisdictional powers then no money could be offered, lest the subjects be unlawfully squeezed to recover the expense. Cf. *supra*, last chapter, notes 92 and 126 (on Bellapertica and Cynus respectively). Both Bellapertica and Cynus, however, stated as much to insist on the applicability of the *lex Iulia* against Barbarius, whereas Bartolus sought to reach the opposite result. The point is also interesting because it would strengthen the impression of Bartolus' selective approach to the *Ultramontani*'s critique. Bartolus did not mention them when discussing the validity of Barbarius' praetorship. But the very detailed reference to their distinction of secular offices (with or without jurisdictional powers) might suggest that the omission was intentional. Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria*, cit., p. 113, n. 1): 'Op(ponitur) dicitur hic quod non incidit in l. iuliam ambitus si a principe petatur, immo a quolibet petere non l(icet) vt l. si quemquem C. de epis(copis) et cle(ricis) (Cod.1.3.30). So(lutio) ibi loquitur in dignitate spirituali, predicta in temporali. Op(pono) ad hoc de § cogitatio, vt iudi(ces) sine quoquo suffra(gio) coll(atio) ii [Coll.2.2pr=Nov.8pr§1; cf. Gloss *ad* Coll.2.1pr, § *Cogitarent*, Parisiis 1566, vol. 5, col. 83], et ideo dicas quod aut petitur publice et bona fide et sine pecunia et tunc est licitum vt hac l. Aut petitur dignitas et pecunia promittitur et tunc aut queris de dignitate spirituali aut de dignitate temporali. Primo casu non est licitum ut dicta l. si quemquem (Cod.1.3.30) et quomodo oportet epi(scopos) § i, coll(atio) i (Coll.1.6.1[=Nov.6.1]). Secundo casu aut dignitas habet secum iurisdictionem annexam aut non. Primo casu non est licitum petere neque pecuniam promittere, vt d(ictum) § i (Coll.1.6.1 [=Nov.6.1]), et § cogitatio (Coll.2.2pr[=Nov.8pr§1]). Secundo casu dignitas peti potest et pro ea pecunia dari vt in de polli(citationibus) l. i § i (Dig.50.12.1.1). Et ideo inter hos casus videtur quod quando dignitas habet iurisdictionem in se annexam praesumitur quod propter pecuniam promissam grauaret subiectos suos, quod non est in alio casu vt colligitur in d(icto) § i (Dig.50.12.1.1) secundum Pe(trum).'

Discussing the validity of Barbarius' praetorship, Bartolus also looks at the central issue of the common mistake. Again, he bases his solution entirely on Butrigarius, providing a summary of his scheme on the common mistake (and avoiding any mention of that of Jacobus de Arena, which would not lead to the desired pro-Gloss conclusion). When the common mistake furthers public utility, therefore, the mistake should be kept.[12] Further objections, which the *Ultramontani* discussed at length, are dismissed in a rather superficial manner.[13]

Having concluded in favour of the validity of Barbarius' praetorship, Bartolus turns to the issue of his freedom. Just as the *Ultramontani* found it useful to deny his freedom first and to use that conclusion to deny the praetorship later, so Bartolus finds it convenient to keep the order of the Gloss and use the conclusion on the validity of the praetorship to secure Barbarius' freedom as well. Moving from the validity of Barbarius' praetorship, Bartolus could easily dismiss the contrary examples in the sources invoked by the *Ultramontani*. Those examples[14] were all about slaves who unlawfully exercised public office: not only did they

12 *Ibid.*, pp. 113–114, n. 1–2: 'Op(pono), dicitur hic quod agitata coram eo valent, immo videtur quod non, et error communis non facit ius vt sub de legi(bus) l. quod non ratione (Dig.1.3.39). So(lutio) hoc contingit propter publicam vtilitatem vt colligitur hic. Op(ponitur), immo error facit ius etiam si non sit communis, vt i(nfra) ad maced(onianum) l. iii in prin(cipio) (Dig.14.6.3pr). Pro cuius sol(utio) dic secundum Ja(cobum) bu(trigarium) quod aut publica vtilitas suadet quod error communis habeatur pro veritate, et tunc facit ius vt hic. Aut publica vtilitas suadet quod communis error non habeatur pro veritate, et tunc non facit ius vt d(icta) l. quid non ratione (Dig.1.3.39). Aut publica vtilitas non suadet pro vel contra, tunc autem errans vult damnum euitare pretextu erroris et tunc communis error facit ius et pro veritate habetur vt d. l. iii in prin(cipio) ad macedo(nianum) (Dig.14.6.3pr), ad idem l. zenodo(rus) C. ad maced(onianum) (Cod.4.28.2). Aut illius qui errat interest potius quod error non habetur pro veritate, et tunc pro veritate non habetur, vt l. i § si quando actio de peculio est annalis (Dig.15.2.1.10) et l. fi. de here(dibus) insti(tuendis) (Dig.28.5.93(92))'. Cf. also Id., *ad* Dig.33.10.3, § *Sed et de his* (*In II. Partem Infortiati Bartoli a Saxoferrato Commentaria* … Basileae, ex officina Episcopiana, 1588, p. 251).

13 Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria*, cit., p. 114, n. 2): 'Opp(onitur) quod immo acta coram eo non valeant, vt l. qui alienam § quidquid i(nfra) de neg(otis) gest(is) (Dig.3.5.30(31).6). So(lutio) hic fuit legitime factum secundum gl(osam) et ideo facta coram eo valent, ibi non erat legitime factum quia ibi non erat tutrix. Opp(onitur) dicitur hic quod non retractantur l(icet) postea seruus appareat immo ex casu superuenienti debet retractari, cum ad eum casum prouenit a quo incipere non potuisset vt i(nfra) de <receptis qui> arbi(trium) l. non distinguemus § sacerdotio (Dig.4.8.32.4). So(lutio) vt dixi sub de his que sunt sui vel alieni iuris l. patre furioso (Dig.1.6.8pr).' Cf. Bartolus, *ad* Dig.1.6.8, § *Patre furioso* (*ibid.*, p. 84, n. 3): '… Item quod legitime factum est non retractatur ex facto superuenienti.'

14 Esp. Cod.7.16.11; Cod.10.33(32).1–2; Cod.12.33(34).6.

remain slaves, but they were also punished for their crime. Having already settled the issue of the praetorship in advance, however, Bartolus could easily dismiss those cases as irrelevant. Quite unlike those slaves, Barbarius exercised his office lawfully.[15]

Another advantage of anticipating the discussion about the validity of the praetorship and the role of common mistake becomes evident when it comes to disproving one of the main arguments in the Orléanese arsenal: the fact that Ulpian spoke of *humanitas* to argue for the validity of Barbarius' deeds. We have seen that the *Ultramontani* argued the implied invalidity *de iure* from the validity *de aequitate*. If the deeds are *de iure* void, they reasoned, that must depend on the fact that Barbarius was not free – and so, consequently, that neither was he praetor. Law, however, is not maths: changing the order of the addends does change the result. Once again, Bartolus' strategic ordering of the issues at stake plays a key role in their outcome. Of course Barbarius is free *de aequitate*, he argues. But that does not prove much, since his praetorship is also valid *de aequitate*. For the common mistake triggers public utility considerations, and on the basis of the same equitable considerations Barbarius becomes free. Ulpian's statement is now a good ally of the Gloss, not a danger to it.[16]

15 Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria*, cit., p. 114, n. 3): 'Ultramon(tani) vt Pe(trus) et Ja(cobus) de ra(vanis), Cy(nus) et Guil(elmus) de cu(gno) tenent contra gl(osam). Primo, per l. i et ii C. si servus ad decu(rionatum) aspi(raverit) li. xii (Cod.10.33(32).1–2). Preterea dicunt, quod est casus de hoc in l. non mutant C. de libe(rali) cau(sa) (Cod.7.16.11). Item et si seruus militat non est liber, l. super seruis C. qui mili(tare) non pos(sunt) (Cod.12.33(34).6) … Quid dicendum? Dico quod glo(sa) bene dicit: et Iacob(us) But(rigarius) tenet eam hic. Non obs(tante) l. i et ii C. si ser(vus) aut liber ad decu(rionatum) aspi(raverit) (Cod.10.33(32).1–2) et est ratio: quia hic fuit liber propter auctoritatem pop(uli) Rom(ani) uel Principis, qui hoc ex causa potuit facere: ut dixi in contrario. Sed in l(ege) contraria seruus aspirauit ad dignitatem sine auctoritate alicuius superioris, et in l(ege) nostra hoc operatur publica utilitas, et superioris auctoritas. Et eodem modo responde ad l(egem) non mutant (Cod.7.16.11) et ad l(egem) super seruis (Cod.12.33(34).6).'

16 *Ibid.*, p. 114, n. 3: 'Praeterea [according to the *Ultramontani*] si fuisset iste liber, fuisse uerus praetor, et acta coram eo, de rigore iuris ualerent: et tamen text(us) hic dicit, quod de aequitate ualent. Et ex hoc ipso [Ultramontani] concludunt, quod non fuerit liber, et hoc est fortius contrarium … Non obst(ante) quod ibi dicunt, quia si fuisset liber, de rigore iuris agitata ualuissent … quia de aequitate dicitur liber et praetor fuisse, et eadem equitate, agitata coram eo ualent: ut in gl(osa) et text(o).'

5.2 Legal ecumenism

So far, Bartolus' position would appear a slightly revised version of Butrigarius, meant to confute the *Ultramontani*'s objections (which Butrigarius did not mention). Butrigarius however was adamant in insisting that the validity of Barbarius' deeds should follow on from the validity of his appointment. So he did not refer the common mistake to what Barbarius did, but to his ability to serve as praetor. Much unlike Butrigarius, however, Bartolus meant to extend the application of the *lex Barbarius* to those cases where public utility had to be invoked directly – and exclusively – with regard to the deeds, not also to their source. Here, Butrigarius was of little help. The only time Butrigarius mentioned the notary condemned for forgery, for instance, he simply said that the instruments made before the conviction were valid, and those made thereafter were void: precisely what Accursius had already said a century before him.[17]

To extend the *lex Barbarius* beyond its 'natural' borders (that is, those of the Gloss), it was necessary to build on what the Orléanese had said. Moving to the issue of the validity of Barbarius' deeds, Bartolus recalls a second time the general position of the *Ultramontani*. This time, however, the summary is more accurate. But it does not threaten the interpretation of the *lex Barbarius* in the Gloss. For the subject is now the validity of the deeds, and 'on this everybody agrees', says Bartolus.[18] Among the *Ultramontani*, Bartolus recalls, Ravanis and Cugno maintained that Barbarius' deeds were valid both because of public utility and because of the superior authority of the people or prince. Bellapertica, followed by Cynus and Dynus, argued that public utility alone would suffice.[19] Bartolus had earlier provided a summary of the *Ultramontani*'s position in his *lectura* on Barbarius. That summary, as we know, was entirely based on Ravanis, and was used to criticise the *Ultramontani* to the benefit of the Gloss. Bringing up the internal division of the French at this point of the *lectura* would make sense only if Bartolus sought to take sides against the first group (Ravanis and Cugno), and in favour of the second one (Bellapertica and his sympathisers). Which is exactly what he did. Although for different reasons, neither Ravanis nor Cugno would allow an indiscriminate extension of the *lex Barbarius*. And that was precisely what Bartolus had in mind.

17 Cf. Butrigarius, *ad* Cod.2.4.42, § *Si ex falsis* (*Iacobus Butrigarii … super Codice*, cit., *fol.* 60*va*).

18 Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria*, cit., p. 114, n. 4): 'Quero nunquid acta coram eo valeant ista quaestio non est dubia, quia acta ualent: ut hic uidetur per tex(tum). Et in hoc omnes concordant.'

19 *Supra*, this chapter, note 4.

Having reported the two different positions of the *Ultramontani* (without apparently taking sides), Bartolus proceeds to explore some different cases where the *lex Barbarius* might be invoked. The first of them is that of the false notary. Are the instruments made by someone who is commonly but mistakenly believed to be notary valid?[20] Bartolus recalls how Ravanis and Cugno opposed this solution, whereas Bellapertica embraced it. Bartolus dismisses the objection of the first two French jurists in a rather perfunctory way,[21] and approves of

20 Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria*, cit., pp. 114–115, n. 6): 'Et sumit argumentum ad q(uestionem). Pone aliquis gessit se diu pro tabellione, et multa instrumenta et acta confecit; postea apparet ipsum non fuisse tabellionem, quia non habebat priuilegium: an facta per eum valeant?'

21 According to Bartolus' reconstruction, Cugno argued against the validity of the deeds of the false notary on the basis of a provision on the *actuarii* (i. e. quartermasters). The text in Cod.12.49(50).7.1 required imperial approbation for their appointment. Since the same title of the Code dealt both with *actuarii* and *tabularii*, Cugno – again, according to Bartolus – insisted that only the emperor could create a *tabularius* (a notary) and so denied the validity of the instruments of the false notary, despite the public utility requirement. Elsewhere, Bartolus shows good knowledge of Cugno's actual position (see *infra*, this chapter, note 26), but when commenting on the *lex Barbarius* he prefers to overlook some details. Cugno sought to highlight the difference between mistakes as to the appointment procedure and mistakes as to the legal status of the appointed. Reporting that reasoning, however, would have highlighted the difference between the deeds of the false praetor and the instruments of the false notary – exactly what Bartolus would rather avoid. As such, he seeks to shift the focus of Cugno's objection to a wholly different subject. The case of the *actuarii*, says Bartolus, is a very specific one, for it is about tax collectors who have to be appointed by the prince. Further, he says (through a cross-reference to his comment on a different *lex*), it is not true that only the emperor may appoint a notary. A judge may well depose a notary: since deposing is the other face of appointing ('eius est creatio, cuius est remotio'), normally those who have the power of deposing someone can also appoint him. Bartolus, *lectura ad* Dig.1.14.3, *ibid.*, p. 115, n. 6: 'Dic s(ecundum) Iacob(um) de Rauan(is) et Guilelmum de Cugn(o) hic, qui dicunt quod hic fuit duplex ratio, quare instrumenta facta et acta per eum non ualent: quia licet fuerit una ratio, s(cilicet) publica utilitas, tamen alia cessat, ut auctoritas eius qui potuit hunc creare tabellionem. Pro hoc allegat Gul(ielmus) l. actuarios C. de numera(riis) li(ber) 12 (Cod.12.49(50).7pr) … Non ob(stante) l. actuarios, quia loquitur in certis exactorib(us) pecuniae publicae, qui sine licentia Principis hoc non possent. Et ita eam intellexit Guli(elmus de Cugno) s(upra) de adop(tionibus) l. non aliter (Dig.1.7.18). Et ibi dixi, et in l. nec ei § eorum (Dig.1.7.17.1).' Cf. Bartolus, *ad* Dig.1.7.17.1 (*ibid.*, pp. 88–89, n. 6): 'quaero, quis possit istos tabelliones creare? Et uidetur, quod solus Princeps: ut l. actuarios C. de nume(rariis) et actuar(iis) lib. 12 (Cod.12.49(50).7pr). In contrarium facit, quod imo etiam magistratus: ut in Aut. de defen(soribus) ciui(tatum) § ex prouinciali (Coll.3.2.4[=Nov.15.3.1]), et eius est creatio, cuius est remotio. Sed magistratus potest remouere [*scil.*,

Bellapertica's opinion in a similarly questionable manner.[22] The interest was clearly not much in their reasoning, but simply in the fact that some of them –

tabelliones] propter eorum delictum: ut in Auth. de armis, in fi(ne) [Coll.6.13 *in fine*=Nov.85.5; cf. Gloss, ad Coll.6.13, § *Solicitudine*, Parisiis 1566, vol. 5, col. 345] et in Auth(entica) de tabellio(nibus), § pe(nultimo) (Coll.4.7.1[=Nov.44.1§4]). Ergo et creare, et habes C. de magi(stratibus) con(veniendis) l. fi. (Cod.5.75.6), et est expressum C. de suscep(toribus) et arca(riis) l. duos, lib. 11 (*sed* Cod.10.72(70).13) et hoc tenet Guil(elmus). Non ob(stante) l. actuarios (Cod.12.49(50).7pr), quia ibi est speciale in his, qui exigebant publicam pecuniam: et ciuitas hoc non potest allegare.' As a matter of fact, Bartolus was trying to use Cugno's own argument against him. The whole argument, based as it was on the parallel between bestowing an office and removing it, was elaborated by Cugno, not Bartolus. Cugno sought to legitimise the appointment of notaries by cities and lords, something routinely done in practice but not fully in line with the *ius commune* (in principle, only the emperor could appoint a notary). Cugno's parallel with the power of the judge to depose the notary was meant to reject the claim that the notary's appointment was the exclusive prerogative of the emperor. Cugno, *ad* Dig.1.7.18, § *Non aliter* (Lucca 373, *fol. 9ra*, transcription in Valentini [1965–1966], pp. 88–89, note 12): '… Ego dico quod [tabelliones] possunt creari per alios quam principe, quod aprobo; si solus princeps crearet tabelliones, ipse solus privaret eos ab officio, non alius, in auth(entica) de defensoribus civitatum, § interim, in fine (Coll.3.2.1[=Nov.15.1.1]). Sed ego habeo casum quod judices puniunt tabellionem, ut infra (*sed* C.) <de> decurionibus, <l.> quilibet (Cod.10.32.40).' Cugno's argument, it might be noted, was perfectly compatible with his stance on the *lex Barbarius*: appointment by a superior authority is always necessary.

On the specific problem of who may appoint the notary, however, Bartolus is more precise elsewhere. There, however, he refers mainly to Innocent IV (and Durantis, who in turn relied on the pope), who never said that a judge could appoint a notary. At the most (though somewhat reluctantly), Innocent IV allowed that some lords other than the emperor might appoint notaries with the implicit approbation of the emperor. Bartolus, *ad* Coll.4.7.2(=Nov.44.2), § *Illvd* (*Svper Avthenticis et Institvtionibvs, Bartoli a Saxoferrato Commentaria* … Basileae, ex officina Episcopiana, 1588, p. 60, n. 4): 'Quaero, quis possit tabellionem creare? Et de eius officio, et de ipsius instrumentis: dic per Inno(centium) in c. i et 2, ext(ra) de fi(de) instr(umentorum) (X.2.22.1–2), et uide quod ipse no(tat) in c. pen(ultimo) et fi. [cf. *infra*, pt. II, §7.5, note 74 and §8.4, note 59 respectively], et uide Spe(culum) post eum, de instru(mentorum) caus(a) (*sic*), § restat, uer(siculum) "sed si quis potest". Cf. *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8 § *Restat*, *infra*, pt. II, §8.4, notes 58 and 61 respectively.

22 Bartolus, *lectura ad* Dig.1.14.3 (*Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria*, cit., p. 115, n. 6): 'Tu dic, quod instrumenta ualeant, tenendo opin(ionem) Pe(tri), quam in simili tenet Dyn(us) [*sed* Cynus: see e. g. Milan 1490 edition of Bartolus' *lectura*, *fol.* 30*v*] in c. i (Cod.12.49(50).7.1). Pro hoc uidetur tex(tus) in auten(tica) de tabel(lionibus) § pe(nultimum) in fi., ibi documentis propter utilitatem contrahentium non infirmandis: ut in Auth(entica) de tabel(lionibus) collat. 4 (Coll.4.7.1[=Nov.44.1§4]).' We have seen

Bellapertica and Cynus – allowed for the desired extension of Barbarius' case. Following their reasoning, Bartolus closes his *lectura* on the *lex Barbarius* applying the same rationale as the false notary also to the excommunicated judge and to the false prelate.

If a judge renders many decisions but he is later found to be excommunicated, public utility cannot be invoked to lift the excommunication, but it may well make the decisions valid. The problem is even more acute in the case of a prelate exercising an office for a long time, only to be finally exposed as a false prelate. What happens to the deeds he has already made? Again, moving from the traditional interpretation of the *lex Barbarius* in the Gloss (or even from that of Ravanis), the solution should be against the validity of those deeds. The people who went along with the common mistake clearly lacked the power to make him truly a prelate. Following Bellapertica's reasoning, however, public utility could be referred directly to the deeds without passing through their source.[23]

Seeking to remove any limit to the applicability of the *lex Barbarius*, Bellapertica rejected the position of the Gloss on Barbarius' status: the source remains invalid, and public utility intervenes directly on the status of the deeds. Bartolus intends to reach the same result without jettisoning the Gloss. So long as it is viable, Bartolus sees public utility as validating both source (Barbarius' status) and deeds (his judgments). When that cannot be achieved, then the same public utility applies directly to the deeds, skipping their source. In spite of all his

earlier that the Authentica required the notary to draft the instruments himself and prohibited his clerks to do so, but for the sake of public utility it did not void the instruments drafted by the clerk (*supra*, §2.6, note 131). Clearly the Authentica referred to the clerk of a true notary, not of an impostor. The Gloss, however, disapproving of the permissive attitude of the Authentica (only the notary may draft the instrument), used the public utility argument to make sure of something rather obvious – that the instruments drafted by the (true) notary before his dismissal from office also remained valid thereafter (*supra*, §2.6, text and note 132). When writing in favour of the validity of the false notary's deeds, Bellapertica was therefore not referring to the same case as the Gloss.

23 *Ibid.*, p. 115, n. 7: 'Item predicta sunt in argu(mento) ad q(uestionem) quod si coram iudice sunt multa agitata, licet postea apparet excommunicatus, acta ualeant. Et idem in praelato, qui multa administrat, ut ualeant quae facit: licet appareat postea, ipsum non fuisse idoneum. Vide quae dixi in l. 2 C. de senten(tiis) (Cod.7.45.2) et no(ta) in c. sciscitatus de rescri(ptis) (X.1.3.13).' The reference to the *praelatus non idoneus* would point to a true prelate who could not be appointed to an office because of some personal incapacity. That was not the rationale of Bellapertica's and Cynus' example, however: they referred to the most blatant case of false prelate they could think of – a false bishop. As we will see, Bartolus was probably only trying to improve their example, not to replace it with an entirely different one. Also in Bartolus, in other words, the *inidoneitas* of the prelate should be ascribed not to his office but to his very consecration, making him a false prelate.

efforts, however, there was no easy way to square the circle. The two interpretations – that of the Gloss and of Bellapertica – remained incompatible with each other. What Bartolus did was to draw a line between the *lex Barbarius* and its further applications: each segment was coherent so long as not considered together with the other. One could look at what lay beyond the line, or at what came before it. But not at both together.

If the circle could not be squared, however, its contours could be blurred. Seeking to reconcile the Gloss with its most fierce opponent, Bartolus' 'ecumenical' approach made Bellapertica's extensions of the *lex Barbarius* (especially on false notary and false prelate) remarkably ambiguous.

5.3 Ambiguous notaries

If Bartolus approves of Bellapertica's extensions to the scope of the *lex Barbarius*, it is possible that he might have followed a slightly different route to reach the same conclusion.

Elsewhere, commenting on a wholly different subject found in the Authenticae (Coll.2.1=Nov.7, Justinian's Novel prohibiting the alienation of ecclesiastical estates), Bartolus wonders whether the instruments of a false notary who exercised his office for a long time – and so drafted many deeds – could be considered valid on the basis of common mistake and public utility. Bartolus here tells his reader not to look at the position of Jacobus de Belviso, but rather to focus on Durandis' *Speculum* and – interestingly – also on Cugno's reading of the *lex Barbarius*. Belviso – at least according to Bartolus – argued for the validity of the false notary's instruments.[24] Durandis, as we will see more in detail later, said the opposite: only a true notary may draft valid instruments. His argument was similar to that of Cugno: a false notary is an impostor who lacks the all-important formal requirement of having been appointed. Cugno, as we already know, applied the same reasoning to distinguish false notary from slave-praetor. Unlike the self-styled notary, Barbarius was appointed to his office, and the appointment was formally correct.[25]

24 In fact, Belviso referred to Innocent IV to argue for the right of the king (and not just of the emperor) to appoint notaries. Jacobus de Belviso, *ad* Auth. de tabellionibus, Coll.4.7(=Nov.44) (*Commentarii in Avthenticvm*, cit., *fol.* 36*ra*): 'Queritur octauo quis possit facere tabellionem et de eius officio et de ipsius instrumentis: et dic vt notatur per innocen(tium) extra de fi(de) instru(mentorum) c. i et ii et c. penul(timo) et c. fi. (X.2.22.1–2, 15–16) [cf. *infra*, pt. II, §7.5, note 74, and §8.4, note 59], et est argumentum quod superior possit suum subditum tabellionem creare vt hoc titulo § vt tamen (Coll.4.7.1[=Nov.44.1§4]).'

25 Bartolus *ad* Coll.2.1.1(=Nov.7.1), § *Alienationis* (*Svper Avthenticis et Institvtionibvs, Bartoli a Saxoferrato Commentaria*, cit., p. 28, n. 3): 'secundum Iacob(um) de

This specific reference to Cugno is of course different from the short references that Bartolus provided in his *lectura* on the *lex Barbarius*. There, Cugno is always associated with Ravanis and with the latter's requirement of the sovereign will. It is of course possible that Bartolus commented on a specific text of the Authenticae at a very different time from his *lectura* on the *lex Barbarius*. But it may not be ruled out that he knew of Cugno's position on the *lex Barbarius* when writing about it, and simply preferred not to use it for contingent reasons – it did not help his overall point.[26] Either way, Bartolus' conclusion on the instruments of the false notary would seem completely different depending on where one looks. He approves of the instruments' validity when commenting on the *lex Barbarius*, and he denies as much when looking (slightly) more deeply at the same matter elsewhere.

A third and final text – by far the longest on the subject that may be found in Bartolus' opus – might offer an explanation, but it also complicates the matter further.

The title of the Digest on the *lex Iulia repetundarum* (a law dealing with extortion by magistrates and other civil servants) prohibited those found guilty of the *crimen repetundae* from testifying, judging or prosecuting a crime.[27]

> Belu(iso) … si tabellio fuerit longo tempore in quasi possessione tabellionatus, et publicum officium exercuit, et multa instrumenta confecit, quod talia instrumenta ab eo confecta debeant ualere: remittit ipse ad id quod no(tatur) in cap. i. de fid(e) instru(mentorum) (Coll.6.3.1[=Nov.73.1]) et ad id quod habetur in l. Barbarius ff. de offic(io) praeto(rum) (Dig.1.14.3); sed tu dic de hac quaestione, ut not(at) Spec(ulum) de instru(mentorum) edi(tione) § restat, uersic(ulum) "quod si is qui non est notus ei" [*Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8. § *Restat*, cit., vol. 1, pp. 661–662, n. 32]. Uide Guliel(mus de Cugno) in d. l. Barbarius (Dig.1.14.3).'

26 This impression is strengthened by Bartolus' reading of Cod.12.50.7 – the same *lex* he invoked when writing about the *lex Barbarius* to dismiss Cugno's arguments (*supra*, this chapter, note 21). When writing on Cod.12.50.7 Bartolus reached the same conclusion as Cugno and he also quoted him openly. Bartolus, *ad* Cod.12.50.7, § *Actuarios* (*In II. et III. partem Codicis Bartoli a Saxoferrato Commentaria* …, Basileae, Ex officina Episcopiana, 1588, p. 143): 'Ex fi(ne) l(egis) not(atur) quod licet aliquis habeatur et reputetur per publico officiali, et reuera non sit, ex eo quod non fuerit legitime ordinatus, uel quia reputatur tabellio cum non sit, uel iudex cum non sit: quod acta facta per eum, nullius sint momenti, et ipse faciens punitur. Nec obstat l(ex) Barbarius ff. de off(icio) praesi(dis) (*sic*) (Dig.1.14.3) quia quandoquem quis est electus solenniter, tamen propter defectum personae non potest esse: et tunc facta per eum, ualent, cum sint publica: ut ibi. Quandoque quis potest esse, sed non electus secundum formam debitam, et tunc facta per eum non ualent: ut hic, et ita tenet Guli(elmus) de Cug(no) in d. l. Barbarius.'

27 Dig.48.11.6.1 (Venuleius Saturninus, 3 publ. iudic.): 'Hac lege damnatus testimonium publice dicere aut iudex esse postulareve prohibetur.'

Commenting on this prohibition, Bartolus looks at the old problem already debated by Azo and Accursius: are the instruments of a notary condemned for forgery valid? Bartolus was not speaking of forgery but, more generally, of a condemnation 'for any reason that made him *infamis*'.[28] The general reference was appropriate: the subject matter was the prohibition from acting as a witness, not forgery. Yet the main reason for excluding a testimonial deposition lay in the *infamia* of the witness, and the foremost ground for the notary's *infamia* was forgery. Even before Bartolus' time, there was little doubt that the notary was not only a respectable person but also someone with the power to confer *fides publica* to a deed.[29] The problem therefore was whether the prohibition from acting as a witness in court should also entail prohibition from drafting a notarial instrument. The solution to this case would prima facie seem pretty obvious: how could the word of an *infamis* have more value on paper than in court? Moreover, if the notary exercises a public office, and the *infamis* is excluded from any public office, then clearly the *infamis* cannot exercise the office of notary.[30]

Bartolus' conclusion, however, is different. The role of the notary, he says, is not always a public office (a *dignitas*).[31] Sometimes it may just be a simple task (*munus*). True, he concedes, there are sources referring to notaries appointed by the prince. Those sources would clearly point to a public office (and so, to a *dignitas*), and clearly the *infamis* cannot exercise the office of a notary public ('notarius ad banchum').[32] But this does not mean that anyone simply writing

28 *Infra*, this paragraph, note 30. See also note 33.

29 Cf. e. g. Bambi (2006), pp. 34–35: what the author says – on the thirteenth century – may *a fortiori* be applied to the fourteenth.

30 Bartolus, *ad* Dig.48.11.6.1, § *Hac lege* (*In II. Partem Digesti novi Bartoli a Saxoferrato Commentaria* … Basileae, Ex officina Episcopiana, 1588, pp. 513–514, n. 2–3): 'Quaero simpliciter, vtrum notarius damnatus ex aliqua causa, quae eum facit infamem, possit conficere instrumenta publica? Videtur quod non. Nam notarius uidetur quodammodo testis: l. Domitius s(upra), de testa(mentis) (Dig.28.1.27). Sed infamis non potest testificari … ergo etc. Pro hoc l. secunda § miles s(upra) de his qui not(antur) infam(ia) (Dig.3.2.2.3) et ibi gloss(a) quae dicit ibi, quod infamis repellitur ab omni dignitate, et ab omni officio publico [cf. Gloss *ad* Dig.3.2.2.3, § *Sacramento*, Parisiis 1566, vol. 1, col. 341]. Sed notariatus est officium publicum … Praeterea, dicitur in l. i C de man(datis) Princ(ipum) (Cod.1.15.1) quod tabellioniatus est dignitas. Sed infamis repellitur ab omni dignitate: ut l. ii C. de dig(nitatibus) lib. 12 (Cod.12.1.2) ergo, etc.'

31 On the concept of *dignitas* as public office see *infra*, §11.1.

32 Bartolus, *ad* Dig.48.11.6.1, § *Hac lege* (*In II. Partem Digesti novi Bartoli a Saxoferrato Commentaria*, cit., p. 514, n. 3–4): 'In contrarium facit, quod alibi dicitur, quod officium tabellioniatus non est dignitas, sed est munus: l. fin. in princ(ipio) C. qui milit(are) non poss(unt) lib. 12 (Cod.12.33(34).7pr) et ibi gl(osa) [cf. Gloss *ad* Cod.12.33(34).7pr, § *Si quis-Dominio servi*, Parisiis 1566,

down what the parties have agreed to is discharging such an office. Two individuals, says Bartolus, may simply ask someone to carry out the task (*munus*) of writing down something for them. Whom they choose for the job is their exclusive concern. For the same reason, he continues, an *infamis* may well be an arbiter. Two individuals may decide to ask an *infamis* to render a verdict between them – once again, their choice is their private concern. After all, Bartolus opines, a witness is called by one party against the other. By contrast, a notary (not in the sense of *public* notary) simply drafts a private contract at the request of both parties. Furthermore, he adds, if neither party recused the judge for his *infamia*, then the decision would hold: why should the position of the notary's instrument be any different? After this string of counter-arguments, Bartolus finally touches a point of particular importance for us. The above considerations, he concludes, apply all the more when a notary, despite being *infamis*, is still discharging his office and enjoys a good reputation. In such a case, Bartolus concludes, because of their large number, the instruments are valid – just as in the *lex Barbarius*.[33]

> vol. 5, col. 276], sed infamis non repellitur a muneribus: l. nec infames. C. de decuri(onibus) lib. 10 (Cod.10.32.12) … Praeterea uideo, quod infamis potest esse procurator et arbiter: ut Institu. de excep(tionibus) § fin. (Inst.4.13.11(10)) et l. Paedius s(upra) de <receptis qui> arbit(rium) (Dig.4.8.7) … Quid dicemus? … finaliter dico sic: Ante omnia scias, quod tabellionatus officium non est dignitas, sed munus: l. fina. in princip(io) cum sua gloss(a) C. qui milit(are) non possunt [Cod.12.33(34).7pr; Gloss cited above in this note] et d(icta) l. i C. de man(datis) Princ(ipum) (Cod.1.15.1) loquitur de notario Principis assumpto ad scribendum negotia Principis: tunc ille notarius qui eligitur per Principem, habet dignitatem; non tamen officium notariatus in se est dignitas, simpliciter sumendo notarium. Dico ergo, quod infamis non potest exercere officium tabellionatus, quod habeat in se dignitatem: l. 2 Codic. de digni(tatibus) (Cod.12.1.2) uel quod haberet officium aliquod iniunctum ex publico, ut quod esset notarius ad banchum, uel similia: ut not(atur) in d(icta) l. 2 § miles s(upra) de his qui not(antur) infam(ia) (Dig.3.2.2.3).'

33 *Ibid.*, p. 514, n. 4: 'Sed si ipse a partib(us) uolentibus assumatur, ut faciat publicum instrumentum, non uideo quid repugnet, quin dicatur publicum munus infamibus non remittitur sed eis magis competit: et sicut potest assumi arbiter a partibus uolentibus, ita potest assumi notarius a partibus uolentibus. Item sicut infamis assumptus iudex a partibus uolentibus et non opponentibus, ualet eius iudicium: ut dixi in l. quidam consulebant s(upra) de re iudic(ata) [i. e. the parties did not recuse the judge before the joining of the issue: cf. Bartolus, *ad* Dig.42.1.57, *In I. Partem Digesti novi Bartoli a Saxoferrato Commentaria* …, Basileae, ex officina Episcopiana, 1588, p. 377, n. 7] … hoc autem maxime puto esse uerum, quando non obstante infamia ipse est in possessione notariatus, et bonae famae: tunc propter multitudinem gestorum per eum debet ualere: l. Barbarius s(upra) de offic(io) praetor(um) (Dig.1.14.3) et Cod. de sentent(iis) l. 2 (Cod.7.45.2). Nec obst(at) quod infamis non potest esse testis: quia in testimonium quis uocatur ab una parte, alia inuita: sed nos loquimur in contractu, qui celebratur utraque parte mandante.'

This last reference seems somewhat ambiguous – in the *lex Barbarius* the slave surely discharged a public office (a *dignitas*), not a private task (a *munus*). If we assumed that Bartolus did not change his mind between his comment on the false notary in the Authenticae and on the *infamis* notary in the Digest, he would seem to be intentionally playing with the ambiguity between the two kinds of notaries, downplaying the emphasis on the public nature of the *office* of notary and highlighting the private law profiles of the *task* of the scrivener.

This ambiguity might also help to make sense of Bartolus' sudden interest in Bellapertica in his *lectura* on the *lex Barbarius*. So long as he is discussing Barbarius' praetorship and freedom, Bartolus rejects the *Ultramontani*'s position. Once arrived at the validity of Barbarius' deeds, however, he invokes Bellapertica to extend the same *lex* to other cases, first of all that of the notary. In the light of these considerations, Bartolus' choice of the notary as the first extension of the *lex Barbarius* does not seem fortuitous. As already stated, Bartolus was most probably following Cynus' exposition of Bellapertica, and thus provided a summary of the application of the *lex Barbarius* according to Cynus' elaboration. In his turn, Cynus was following very closely the order of Bellapertica. Possibly because the issue was not mentioned in Ravanis, however, Bellapertica did not mention the false notary. Cynus realised the omission, and filled the gap at the very end of his *lectura*: what was said about the other cases should also apply to the 'usual question' of the false notary.[34] Somewhat surprisingly, Bartolus however decides to invert the order of Cynus' exposition on the point – and only on it. So the cases of the excommunicated judge and of the false prelate now come after that of the notary, not before him. Moreover, while Cynus openly treated the notary's case as a further application of the rationale laid out in the other two instances, Bartolus does precisely the opposite: the solution to the notary's case should also apply to the excommunicated judge and the false prelate.

The double dimension of the notary (public office and private task) makes the passage from the Gloss to Bellapertica somewhat smoother – or at least less dramatic. If considered from the perspective of the *munus* (and not of the official *dignitas*), there is nothing wrong in holding the (private) deeds of the notary/scrivener as valid despite his legal incapacity to discharge the (public) office of *tabellio*. Once the point was established, however, it was easy to implicitly extend it to the other kind of notary – the public official. This way it was possible to

34 Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 14*vb*, n. 19): '… per haec quae dicta sunt, patet, quomodo debet responderi ad quaestionem consuetam, de eo qui se pro tabellione gessit, et non erat, et instrumenta confecit, quae propter authorem, in dubium reuocantur.'

reach the desired outcome circumventing the main obstacle – the need of formal appointment.

An obvious critique of this conclusion on Bartolus' janus-faced notion of notary lies in the weakness of evidence in its support. The point of course stands, and the conclusion itself is offered only as a mere possibility. And yet, what incensed Baldus the most in Bartolus' reading of the *lex Barbarius*, as we shall see later, was precisely his ambiguous, two-sided interpretation of the notary.

5.4 Bartolus *ultramontanus*?

If the validity of the deeds should always depend on that of their source, then Barbarius' case might, perhaps, reach the notary (understood as private scrivener), but surely neither the excommunicated judge nor the false prelate. In stating the opposite, Bartolus does not reject the Gloss, but seeks to reconcile it with Bellapertica's conclusions, showing (or trying to show) how both approaches would ultimately follow the same rationale. The Gloss says that, for equitable considerations, Barbarius becomes free and so also truly praetor. Consequently, his deeds are also valid. Conveniently skipping Bellapertica's reasoning on both the invalidity of Barbarius' praetorship and his enduring status as slave, Bartolus highlights the Frenchman's position on the deeds of Barbarius: on equitable grounds they are valid. Both in the Gloss and in Bellapertica, therefore, fairness is invoked not to prejudice the commonwealth, because of the large number of acts carried out by Barbarius. The exact way in which fairness operates is prudently omitted.

The same ambiguous 'ecumenism' can be seen in Bartolus' reading of the slave-arbiter (Cod.7.45.2). As we know, the difficulty of that text lay in that the slave mistakenly thought to be free pronounced a single decision that would exclude public utility considerations, and yet that decision was valid. The Gloss solved the problem relying on putative freedom.[35] But that was a dangerous example to follow: insisting on the effects of the slave's putative freedom would implicitly undermine the *de iure* validity of his appointment.[36] If the arbiter was truly a slave, the only alternative to the Gloss was Odofredus' position: common mistake, even without public utility, is sufficient to bestow validity on the (single) deed.[37] If Bartolus was reluctant to follow the solution of the Gloss, he clearly could not follow Odofredus either. The only alternative left was opting for a different interpretation of the *lex* itself, the same interpretation chosen by

35 *Supra*, §2.3, text and notes 63–64.

36 That, as we have seen, was the main reason for the friction between the two parts of the Gloss on the *lex Barbarius*: *supra*, §2.3–4.

37 *Supra*, §3.1, text and note 29.

Bellapertica: the arbiter is not a slave but a freedman, brought back to servitude only after having rendered the decision.[38] While Bellapertica sought to dismiss a threat to his approach to Barbarius, however, Bartolus sees an opportunity to strengthen the position of the Gloss. Unlike the *lex Barbarius*, he observes, the text of the *lex Si arbiter* does not say that the slave eventually became free. This, Bartolus concludes, depends on the fact that one slave rendered a single decision, the other slave many.[39] Thus, twisting Bellapertica's underlying argument, Bartolus reaffirms the Gloss' solution: for reasons of public utility Barbarius becomes free and praetor, so that his deeds may be valid.

Bartolus' comment on the slave-arbiter is also interesting because it follows the same structure as in his reading of the *lex Barbarius*. Having insisted on the equitable considerations that make Barbarius free (and so praetor), he extends the same considerations to one of the last cases briefly mentioned in his *lectura* on Barbarius: the excommunicated judge. So long as the judge is widely believed not to be excommunicated, he says, his decisions would be valid.[40] The same, he concludes, applies to the *infamis* judge[41] and to any other who, because of some legally relevant impediment, may not serve as such. So long as the impediment (be it excommunication, *infamia* or other) is not publicly known, public utility considerations prevail and the acts carried out by the false judge may be held as valid.[42]

38 *Supra*, §4.6, text and note 110.

39 Bartolus, *ad* Cod.7.45.2, § *Si arbiter* (*In II. et III. partem Codicis Bartoli a Saxoferrato Commentaria*, cit., p. 190): 'Ista lex habet duas lecturas. Secundum primam, communis error excusat. Secundum secundam, casus superuenientes in personam iudicis, sententiam non extinguit. Oppono et uidetur quia ex hac electione effectus sit liber: ut l. Barbarius ff. de off(icio) praeto(rum) (Dig.1.14.3). Sol(utio) ibi propter publicam utilitatem, quia multa gessit, et multa fecit: hic solum unam sententiam dedit.'

40 *Ibid.*: 'Iuxta hanc legem quaero, quid in iudice excommunicato, an eius sententia ualeat? Respondo, debemus distinguere ut ex hac l(ege) colligitur: aut publice reputabatur non excommunicatus, aut erat excommunicatus publice. Primo casu ualet sententia. Secundo casu non, ut extra de re iud(icata) c. ad probandum (X.2.27.24).'

41 *Ibid.*: 'Et idem possumus quaerere in iudice infami, an eius sententia ualeat? Et distingue, aut erat publice infamis aut habebatur ab omnibus hominibus bonae famae. Primo casu non ualet, secundo sic, per hanc legem. Et quod no(tatur) per gl(ossam) ff. de test(amentis) <l.> cum lege in fi. (Dig.28.1.26), extra de rescr(iptis) c. sciscitatus (X.1.3.13).' Cf. Gloss *ad* Dig.28.1.26, § *Putant*, in fine (Parisiis 1566, vol. 1, col. 378): 'Item videtur hic quod infamis non potest esse testis in testamento, sed falsum est: quia et seruus, nisi constet apud omnes. Accursius.'

42 Bartolus, *ad* Cod.7.45.2, § *Si arbiter* (*In II. et III. partem Codicis Bartoli a Saxoferrato Commentaria*, cit., p. 190): 'Idem in alijs defectibus, ex quibus

At least for the case of the excommunicated judge, it would seem that Bartolus invoked public utility considerations directly to the deeds, bypassing their source. Even there, however, Bartolus sought to explain the point highlighting the procedural dimension (and so downplaying the substantive element). Not recusing the *infamis* judge prior to the joining of the issue entails acceptance of his jurisdiction. We have seen that Bartolus hinted at the point in his discussion of the validity of the instruments drafted by the *infamis tabellio*.[43] In his reading of the *lex Si arbiter* he was more open on the matter.[44]

detegitur aliquem non esse iudicem, sufficit quem esse in quasi possessione iurisdictionis, et illum defectum non esse publice notum: ut hac l(ex) cum l(ege) super alleg(ata) (Dig.28.1.26).' The meaning of the term 'quasi possessio', especially in Bartolus' approach to our subject, is not always immediate: at times, it is not easy to say with accuracy whether the 'quasi' is used in a 'technical' sense or it betrays a negative undertone. So, for instance, Belviso's false notary (at least, as reported by Bartolus), being in *quasi possessio* of the office, would point to the fact that he is not *de iure* entitled to that office (cf. *supra*, last paragraph, text and notes 25–26). At other times, however, Bartolus speaks of *quasi possessio* for different and more technical reasons. This is especially the case when he refers to the possession of jurisdictional prerogatives. *Quasi possessio* was often used in relation to incorporeal things since, strictly speaking, they could not be possessed. *Iurisdictio* was among them. As Bartolus has it, 'iurisdictio est quoddam ius incorporale. in iure enim consistentia incorporalia sunt: ut ff. de rer(um) diui(sione) l. i § i (Dig.1.8.1.1) ergo vendicari non potest, cum ea vendicantur, quae possidentur' (Id., *Tractatus de iurisdictione*, in *Bartoli a Saxoferrato Consilia, Quaestiones, & Tractatus* … Basileae, ex officina Episcopiana, 1588, p. 393, n. 6). The concept of *quasi possessio* was elaborated in relation to the problem of usucapion of servitudes. Writing on servitudes (incorporeal rights *par excellence*), Bartolus says: 'in istis iuribus incorporalib(us) non cadit aliqua possessio, sed quasi possessio, quae dicitur patientia aduersarii: ut l. pen(ultima) ff. de serui(tutibus) (Dig.8.1.19)' (Id., *ad* Cod.3.34.1, § *Si quas*, *In I. partem Codicis Bartoli a Saxoferrato Commentaria*, cit., p. 365, n. 5). By the same token, even the exercise of jurisdiction on the basis of a forged document of the prince confers *quasi possessio* of jurisdiction, which allows its recipient to pronounce a valid sentence: cf. Bartolus, *ad* Cod.1.22.2 (*ibid.*, p. 110, n. 6). The first civil lawyer known to have applied the concept of *quasi possessio* to jurisdiction is Pillius de Medicina. According to Pillius, the possessor could use an *actio negatoria utilis* – shaped after that on usufruct – to retain his jurisdiction. *Celeberrimi Ivre cons(ulti) ac Glosatoris vetustissimi D. Pilei Modicensis Qvaestiones avreae* [Romae, 1560], q.102, pp. 178–179. In canon law, the principle that one may have *quasi possessio* of *iurisdictio* came with the decretal *Conquestus* of Gregory IX (X.2.2.16, cf. Potthast [1874], p. 818, n. 9583).

43 *Supra*, last paragraph, note 33.

44 Bartolus, *ad* Cod.7.45.2, § *Si arbiter* (*In II. et III. partem Codicis Bartoli a Saxoferrato Commentaria*, cit., p. 190): 'Et ex his apprehende, qualiter debeat formari exceptio contra iudicem. Non enim sufficit dicere "Dico te non esse iudicem meum," sed debeo adijcere "Et te non esse in possessionem iurisdictionis, uel te ab omnibus reputari non iudicem", ut hac lege probatur [*scil.*

If procedure could be used to blur the underlying issue between validity of the source (as in the Gloss) and direct application of public utility considerations to the deeds (as in Bellapertica), the same was not possible with the false prelate. There, Bartolus might have opted for the same ambiguity as in the case of the notary. As we have seen, the false notary in Bartolus' reading of the *lex Barbarius* lay on the very line he drew between the solution for Barbarius' specific case and its further applications. Seen as the last element before that line (i. e. within the scope of the Gloss), the task of the notary would actually refer to the *munus* of the scrivener; interpreted in the light of what comes after it (i. e. the selective endorsement of Bellapertica), it would rather point to the *dignitas* of the notary public. Bartolus' reference to the prelate would seem similarly ambiguous.

As stated, Bartolus closed his reading of the *lex Barbarius* by approving of Bellapertica's argument in favour of the deeds of the prelate who exercised an office for a long time that he was legally incapable of holding (*non idoneus*).[45] The exact qualification of this *prelatus non idoneus* seems as janus-faced as that of the notary: depending on the exact meaning of 'non idoneus', the case might fall within one 'segment' of his analysis or the other. A true priest invalidly appointed to a specific office would look closer to Barbarius' case – ratifying his position would lead to the validity of his deeds. A false priest, on the contrary, would fall on the other side of the line – public utility may rescue the deeds, but not his personal position. While a literal interpretation would point to the first solution, Bartolus' use of the same case in several other parts of his opus would rather suggest the opposite conclusion.

The two most important cases where Bartolus looks at the deeds of the false prelate mistakenly thought to be a true one are both found in connection with guardianship. The first case is the voidability of the contract of the ward who tenders an oath without his guardian's consent (Dig.12.2.17.1).[46] Commenting

Cod.7.45.2], et de testa(mentis) l. i (Dig.28.1.1).' Cf. Bartolus, *ad* Dig.42.1.57 (*In I. Partem Digesti novi Bartoli a Saxoferrato Commentaria*, cit., p. 377, n. 7): 'Quandoque exceptio concernit personam iudicis: et tunc quandoque sugillat famam, seu honorem ipsius iudicis: ut quia opponitur quod est infamis, uel seruus, ideo non potest esse iudex … sed si haec exceptio non proponitur, procedit, et ualet iudicium: l. 2 C. de sentent(iis) (Cod.7.45.2).' Bartolus' reliance on this procedural point might explain why, in his reading of the slave-arbiter case, he extends the solution thought for the excommunicated judge also to the *infamis* judge but – this time – keeps silent on the *infamis* notary: cf. *supra*, this paragraph, note 41.

45 'Et idem in praelato, qui multa administrat, ut ualeant quae facit: licet appareat postea, ipsum non fuisse idoneum', *supra*, this chapter, note 23.

46 Dig.12.2.17.1 (Paul 18 ed.): 'Pupillus tutore auctore iusiurandum deferre debet: quod si sine tutore auctore detulerit, exceptio quidem obstabit, sed replicabitur, quia rerum administrandarum ius ei non competit.'

on it, the Gloss made a general statement: any contract made by those who are not validly appointed may be voided. In stating as much, the Gloss recalled the contrary case of Barbarius.[47] Commenting on the same text, Bartolus first recalls the Gloss and notes how canon law provided for a similarly broad conclusion with regard to the deeds of the heretic. Then he reconciles the Gloss' opposition between its general statement and the case of Barbarius: unlike other deeds, which should be voided, those made by Barbarius remain valid because of the common mistake as to his status – and so as to the validity of his appointment. Immediately thereafter, perhaps because of his previous canon law reference, Bartolus applies the same rationale as for Barbarius' deeds also to those of the false prelate. If he is widely believed to be a true prelate, says Bartolus, then his deeds are equally valid.[48] By contrast, he concludes, if someone behaved as a prelate but was not such either in truth or at least in the common opinion, the deeds would remain void.[49] Taken at its face value, Bartolus' comment would seem to follow Bellapertica's position: common mistake, supported by public utility, allows for the validity of the deeds without passing through the ratification of their source.

In the second case, however, Bartolus seems to say the opposite, although in a rather indirect way. This case concerned the warden who did not provide the required surety for his administration of the ward's estate. This led to the invalidity of his appointment and, consequently, also of his deeds (Cod.2.40(41).4).[50] Here as well, the Gloss recalled the different case of the *lex*

47 Gloss *ad* Dig.12.2.17.1, § *Non competit* (Parisiis 1566, vol. 1, col. 1284): 'in omnibus contractibus quos ineunt hi qui non iure sunt electi: vnde omnia cassantur … Sed arg(umentum) contra(rium) supra de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3).'

48 Bartolus was likely referring to the administration of the office, not to sacramental acts (on the distinction see *infra*, pt. II, §6–7).

49 Bartolus, *ad* Dig.12.2.17.1 § *Pvpillvs* (*In II. Partem Digesti veteris, Bartoli a Saxoferrato Commentaria* … Basileae, Ex officina Episcopiana, 1588, p. 87, n. 6): 'Vltimo inducit gl(osa) in arg(umentum) hanc legem in omnibus contractibus, quos ineunt omnes hi qui non sunt iure electi, ut omnia cassentur [*supra*, this paragraph, note 47] … facit ad hoc extra de haeret(icis) c. fraternitatis (X.5.7.4) … Sed contra praedicta argum(enta) facit de offic(io) praet(orum) l. Barbarius Philippus (Dig.1.14.3). Respon(deo) quod ibi fuit error communis quod facit ius, ut ibi; uel dic, quod si probabiliter dubitatur, quia omnes credunt eum esse praelatum, tunc tenet factum cum eo; alias si nec praelatus est, nec probabiliter creditur, non ualet gestum ab eo, licet se pro praelato gerat: et sic concorda praedicta iura.'

50 Cod.2.40(41).4 (Diocl. and Maxim. AA.): 'Si tutor tuus, qui pro tutelari officio non caverat, iudicio expertus est, contra eum lata sententia iuri tuo officere non potuit, nec ea quae ab eo gesta sunt ullam firmitatem obtinent. Frustra igitur in

Barbarius, and also reported the opinion of Johannes Bassianus. Bassianus seems to have drawn a parallel between the invalidly appointed warden and the priest consecrated *non legitime*: in both cases the defect in the 'appointment' would prevent the acquisition of the status. Just as the first is not a warden, in other words, the other is not a priest.[51] Bassianus' parallel between the invalid appointment to a secular office and the invalid ordination of a priest prompts Bartolus' question: is it possible to extend the *lex Barbarius* also to the administration of the office by the false priest?[52] Instead of providing an answer, he invites the reader to look 'first and foremost' at Innocent IV's gloss on an important text of the *Liber Extra* (X.1.6.44). 'In the last part of the gloss', says Bartolus, 'much of the rationale of the *lex Barbarius* may be seen'.[53] This reference to Innocent IV might explain the ambiguity as to the precise object of the invalidity (was it the consecration of the priest or his appointment to the office?). In his gloss, Innocent IV dealt with the unworthy prelate, but he also included heretics and even schismatics. It was easy, especially for a civil lawyer, to assume that the case was about a false priest appointed to an ecclesiastical office. The reference to Innocent IV seems to betray a certain circularity in Bartolus' argument. Innocent's gloss (especially its final part, and so precisely the object of Bartolus' reference) stressed the crucial importance of the confirmation of the prelate by the superior authority. Even if the election to an office was invalid, held Innocent, confirmation in the office would cure the underlying defect and

integrum restitutionis auxilium desideras, quando ea, quae ab eo gesta sunt, qui legitimae administrationis personam sustinere non potuit, ipso iure irrita sunt.'

51 Gloss ad Cod.2.40(41).4, § *Firmitatem* (Parisiis 1566, vol. 4, col. 376): 'Sed ar(gumentum) contra(rium) ff. de off(icio) praeto(rum) l. Barbarius (Dig.1.14.3). Item not(andum) secundum Io(hannem Bassianum) quod non legitime ordinatus pro non ordinato habetur.'

52 Bartolus, *ad* Cod.2.40(41).4, § *Si tutor* (*In I. partem Codicis Bartoli a Saxoferrato Commentaria*, cit., p. 272, n. 4): 'Quaero, quid in praelato non legitime ordinato? Gloss(a) hic uidetur dicere idem. Facit i(nfra) de eo qui pro tutore l. 2 (Cod.5.45.2). Tangit gloss(a) ff. de iureiur(ando) l. iusiurandum quod ex conuentione § i (Dig.12.2.17.1). Tu dic plenissime ut ex(tra) de elect(ione) cap. nihil (X.1.6.44) in fin(e) gloss(ae) [cf. next note], et ibi apparet multum de intellectu l. Barbarius ff. de officio praetoris (*sic*) (Dig.1.14.3).'

53 *Ibid*. Taken literally, Bartolus' comment would point to the Ordinary Gloss on the *Liber Extra* (and so that of Parmensis), not to that of Innocent. The point is important, for the comment of the two canon lawyers were quite different from each other (as we will see later). All the other references of Bartolus to the same X.1.6.44, however, are either to the text itself or to the commentary of Innocent IV. Referring to Innocent's Gloss on the *Liber Extra* as 'the' gloss might not have been so unusual, at least among civilians. Baldus for instance did the same: *infra*, pt. III, §11.6, note 120, §12.2, note 13 and §12.4, note 124. On Parmensis' gloss on X.1.6.44 see *infra*, pt. II, §8.1, note 12.

bestow validity to the acts carried out in the exercise of that office.[54] In solving the problem of the validity of the false prelate's deeds with reference to a case in which his position was ultimately ratified, therefore, Bartolus seems to move away from Bellapertica – without expressly saying so.

The same ambiguity in Bartolus' position may be seen more clearly in yet another text on guardianship. Here, Bartolus distinguishes the case of the (true) prelate deposed from his office from that of the prelate who was subsequently found not to be a prelate at all. In this last case, there cannot be any doubt as to the illegitimate status of the source of the deeds. Are the deeds valid all the same? Bartolus answers in the affirmative, and he does so on the basis of four other cases: the two cases above on guardianship (the oath of the ward without his guardian's consent, and the guardian invalidly appointed), the *lex Barbarius*, and especially ('plene') the same gloss of Innocent IV on X.1.6.44.[55]

Looking beyond the hasty closure of Bartolus' *lectura* on Barbarius, Bartolus' interest in the approach of Bellapertica would seem just a roundabout way of affirming the position of the Gloss, not of departing from it. In a very different case, however, Bartolus was less ambiguous and did opt for Bellapertica's solution rather openly – only without mentioning him. It is Bartolus' treatise 'On the tyrant' (*De tyranno*). That is probably the clearest case in Bartolus' opus where public utility is invoked directly for the validity of the deeds without at the same time ratifying the invalid position of their source.

54 *Infra*, pt. II, §7.1, note 6.

55 Bartolus, *ad* Dig.29.2.44, § *Quotiens* (*In I. Partem Infortiati Bartoli a Saxoferrato Commentaria* … Basileae, ex officina Episcopiana, 1588, p. 476): 'No(tandum) quod facta a praelato, qui postea remotus est, ualent. Sed quid de factis a praelato, qui postea pronunciatus est non esse praelatus? Gl(osa) tangit in l. 3 C. in quib(us) cau(sis) in integ(rum) restit(utio) non est neces(saria) (*sed* Cod.2.40(41).4) et l. iusiurandum quod ex conuentione § pen. s(upra) de iureiu(rando) (Dig.12.2.17.1), et facit s(upra) de offi(cio) praet(orum) l. Barbarius (Dig.1.14.3), et quod ibi no(tandum) … et plene per Inn(ocentium IV) ext(ra) de elect(ione) c. nihil (X.1.6.44).' The same parallel may be found another time in Bartolus, though this time it is not clear whether the reference is to the false prelate or the prelate invalidly elected to an office (i. e. a prelate having a formally valid but substantially void title). Bartolus speaks only of an 'occult defect' preventing the valid exercise of the prelate's office – just as it should prevent the discharge of Barbarius' praetorship. And indeed Bartolus refers to the *lex Barbarius*, as well as Innocent IV's comment on X.1.6.44. Bartolus, *ad* Coll.1.6.8(=Nov.6.1.7), § *Igitur ordinandvs* (*Svper Avthenticis et Institvtionibvs, Bartoli a Saxoferrato Commentaria*, cit., p. 26, n. 4): 'An autem gesta per eum, cuius uitium est occultum, ualeant, uel non? Recurrendum est ad materiam l. Barbarius ff. de offic(io) praeto(rum), ad id quod no(tat) Inn(ocentius) in c. nihil ext(ra) de elect(ione) (X.1.6.44).'

As well known, in *De tyranno* Bartolus distinguished tyrants as despots and usurpers, according to whether they had a valid title or not. The longest part of the treatise is devoted to the problem of the validity of the acts done by the tyrant who usurped power.[56] There is little doubt that this usurper could not possibly exercise the high public office he had forcibly taken. As a matter of principle, therefore, all his deeds should be void. But this is precisely where public utility considerations come to play:[57]

> if the tyranny were to last for a long time in the city, should we say that everything done in court is void? That would be harsh.

Accordingly, Bartolus distinguishes on the basis of whether some deeds would have been made by the free people even without a tyrant, and especially whether the magistrates would have behaved the same way if they had been freely elected by the people.[58] It is however clear that, *de iure*, no such deed should stand. But, again, for the sake of public utility it is necessary to cure the underlying invalidity of the deeds by detaching them from their source.

The same problem of the validity of the tyrant's deeds is to be found in the other kind of tyrant – the despot who misused his lawful authority. In that case, one of the kinds of proceedings that were considered valid (although with some hesitation) in the case of the usurper is also deemed valid for the despot: legal proceedings against his own supporters ('contra intrinsecos'). It is only here that Bartolus recalls the *lex Barbarius*, to argue for the validity of those deeds. The reference to Barbarius' case for the validity of the despot's deeds (and its omission with regard to the deeds of the usurper) does not seem fortuitous, all the more since, aside from Barbarius, Bartolus also refers to other cases normally accompanying the *lex Barbarius*: the slave-arbiter and the slave-witness. The validity of those deeds would seem therefore connected with the mistaken validity as to their source (the tyrannical regime).[59] The link is expressly made by Bartolus: the tyrant's deeds are valid only 'so long as the tyrant is tolerated'. In stating as much, Bartolus recalled Innocent IV's comment on X.1.3.13, where

56 Bartolus de Saxoferrato, *De tyranno* (Quaglioni [ed., 1983], q.7, pp. 188–196, ll.266–442).

57 *Ibid.*, p. 189, ll.293–295: 'Preterea, insurgeret iniquitas: si enim in civitate duravit tyrannides longo tempore, dicemusne omnia celebrate et acta in curia esse nulla? Durum videtur.' Cf. Cavallar (1997), esp. pp. 303–304.

58 Bartolus, *De tyranno* (Quaglioni [ed., 1983], q.7, p. 190, ll.309–317). By contrast, the legal proceedings brought against the enemies of the tyrant are void (*ibid.*, p. 189, ll.296–301), whereas those against the supporters of the tyrant might be valid (*ibid.*, pp. 189–190, ll.302–309).

59 For an introduction to the subject see first of all Quaglioni (1983), esp. pp. 15–38. More recently see also Kirshner (2006), pp. 305–309, where ample literature is mentioned.

the pope dealt extensively with the jurisdiction of the *inhabilis* in connection with the idea tolerating invalid jurisdiction.[60]

This would seem the only place where Bartolus briefly touches on the link between apparent validity of the deeds and toleration of their source, a link that with Baldus would soon bring a completely different understanding of the *lex Barbarius*. To understand this link, we must now look to canon lawyers and especially Innocent IV himself.[61]

60 Bartolus, *De tyranno* (Quaglioni [ed., 1983], q.11, pp. 205–206, ll.615–622): 'Dico quod aut <tyrannus> fecit processus contra suos exititios et rebelles et non valent, quia non debuerunt comparere coram iudice sibi notorie inimico, ut dictum est in precedentibus; ea vero que ipse fecit contra intrinsecos valent donec ipse tolleratur in illa dignitate, ut l. Barbarius, ff. de officio pretorum (Dig.1.14.3), et C. de sententiis, l. si arbiter (Cod.7.45.2), et de testamentis, l. i (Cod.6.23.1), et extra, de rescriptis, c. sciscitatus (X.1.3.13), et ibi per Innocentium … Et hec vera donec tolleratur.'

61 Another and even more explicit reference to canon law with regard to the *lex Barbarius* and the validity of the deeds issued by the person unlawfully discharging an office may be found with regard to the notary. As we have seen, Bartolus applied the *lex Barbarius* to the *infamis* and excommunicated judge, as well as to the *infamis* notary. But he did not apply it to the excommunicated notary. The only time he mentioned the issue he simply told his reader to look at the decretists: 'finally, it remains to be seen whether the excommunicate may draft instruments. As to that, ask the canon lawyers.' Bartolus, *ad* Dig.48.11.6.1, § *Hac lege* (*In II. Partem Digesti novi Bartoli a Saxoferrato Commentaria*, cit., p. 514, n. 5): 'Vltimo esset uidendum, an excommunicatus possit instrumenta conficere? De hoc interrogabis Canonistas.'

Part II

Canon law and the development of the concept of toleration