Chapter 9

Toleration without representation: Albericus de Rosate

Innocent's concept of toleration would have a crucial influence in the civil lawyers' interpretation of the *lex Barbarius* through the work of Baldus. This of course does not mean that, before Baldus, Innocent was not well known to civil lawyers. From at least the late thirteenth century, Innocent's work was sufficiently well known among the *Citramontani*. Whether the same is also true for the *Ultramontani*, and especially the Orléanese jurists, is not entirely clear – although it would seem likely. Ravanis had some knowledge of canon law,[1] and Innocent was among the canon lawyers most cited by Bellapertica.[2] The point, however, is not whether civil lawyers knew of Innocent, but whether they relied on his ideas when commenting on the *lex Barbarius*. Thirteenth-century canon law was in many respects remarkably more sophisticated than civil law, and Innocent's legal reasoning was often remarkably more advanced than most coeval canon lawyers. Adapting Innocent's ideas to civil law might appear easy only with the benefit of hindsight.

To better appreciate the point, before turning to Baldus we shall briefly look at Albericus de Rosate, perhaps not the most original thinker but an influential and widely known jurist nonetheless. His position on the *lex Barbarius* is neither particularly coherent nor remarkably subtle. For our purposes, its main interest lies in that it is one of the earliest attempts of a civil lawyer to use the canon law

1 Some scholars, relying especially on late fifteenth- and sixteenth-century sources, attributed to Ravanis a profound knowledge of canon law. This in particular was the position of Maffei, relying on several sources: Casalupis (Gian Battista Caccialupi, c.1420–1496) called Ravanis 'in theologia magister'; Trithemius (Johannes Tritheim, 1462–1516) spoke of him as 'sacrae paginae professor'; Diplovatatius similarly said that he was *magister theologiae* before starting to teach civil law. Maffei (1967), p. 55. Admittedly, such terms would seem to refer to someone other than the person described in Bezemer's brilliant portrait of Ravanis – a Roman law professor who knew some canon law but was hardly an expert on it: Bezemer (1997), pp. 4–6. Cf. also Bezemer (1990), pp. 10–11, and Bezemer (1994), p. 104.

2 In his study on Bellapertica, Bezemer counted twelve passages in which he referred to Innocent IV: Bezemer (2005), p. 118; cf. *ibid.*, p. 123. But such passages are only in Bellapertica's commentary on the Code and in some *repetitiones* on it. Whether Bellapertica also looked at Innocent when commenting on the Vetus, and especially on the *lex Barbarius*, we do not know.

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concept of toleration in the elaboration of the *lex Barbarius*. This short analysis of Albericus will serve mainly to better understand the difference between him and Baldus (to whom we shall devote far more attention).

Albericus relies on toleration without a clear understanding of it. Innocent subordinated toleration to confirmation: the unworthy or incapable of holding an office may be tolerated in it only if confirmed by the superior authority. Albericus however seems to consider the possibility that the superior authority might confirm the unworthy as sufficient to tolerate him in office. This way, Innocent's concept of toleration becomes a variation on the theme of Ravanis' view of the sovereign's role: the deeds of Barbarius are valid because his incapacity to serve as praetor could have been cured by the subject who appointed him. Albericus' similarity with Ravanis might not be fortuitous: among the *Ultramontani* who wrote on the *lex Barbarius*, Albericus seems to be familiar only with Ravanis.[3] While the result is admittedly far from impressive, Albericus' position attests to the growing attention of civil lawyers towards the canonists' notion of toleration in office.[4]

3 See next note (4).

4 For this reason, it might be interesting to look at his sources on Barbarius' case. Albericus de Rosate gave ample space to the *lex Barbarius*, both in its *sedes materiae* (Dig.1.14.3) and in his commentary on the slave-arbiter (Cod.7.45.2). In so doing, he relied on a large number of jurists, both civilians and canon lawyers. Among the civil lawyers, his sources are remarkably variegated: apart from frequent references to the Gloss (often to criticise it), he cites Ubertus de Bobio, Gabrielis de Ofelettis, Albertus Galeottus Parmensis, Martinus Syllimani, Raynerius de Forlì, Azo, Jacobus de Arena and Jacobus de Belviso, his former teachers Richardus Malumbra and Oldradus da Ponte (cf. Lange and Kriechbaum [2007], p. 666, text and note 7), Guilelmus Durantis, Odofredus, Butrigarius, Suzzara, Dynus de Mugello (quoted both for his civil and his canon law works), Ravanis and Bellapertica. Among them, Albericus relied mainly on Belviso and Durantis (whose *Speculum* he mentioned twenty times). While his references to other *Citramontani* tend to be sufficiently accurate, the extent of his knowledge of the *Ultramontani* is less clear. Albericus shows good knowledge of Ravanis (and this will be important in examining his approach to the *lex Barbarius*), whereas he might have only indirect and partial access to Bellapertica. In comparison with Ravanis, Bellapertica is quoted considerably fewer times, and on one of these few occasions the reference is indirect: 'it is said that Petrus de Bellapertica was of this opinion' (*et in ista opi(nione) dicitur fuisse Pe. de Bel.*), Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 71*ra*, n. 33). Cynus is not mentioned, and Cugno is quoted very sporadically, and always together with other jurists – typically Ravanis. In comparison with the civil lawyers, the canon lawyers quoted by Albericus de Rosate on the *lex Barbarius* are fewer, but some of them appear with remarkable frequency. The author most quoted is surely Innocent IV with seventeen different passages of his commentary on the *liber Extra*. That however does not take into account the passages cited more than once, in particular Innocent's comment on X.1.29.23,

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If we are to believe Albericus, not only Jacobus de Arena, Oldradus da Ponte and Richardus Malumbra were against Barbarius' freedom, but 'nearly all the *Citramontani* and the *Ultramontani*'.[5] Whether or not this position was so widespread, Albericus surely agrees with it, invoking the traditional objections to Barbarius' freedom[6] and especially the Romans' lack of intention to set Barbarius free due to their ignorance as to his servile status.[7] At the same time (and, again, unlike the Gloss) Albericus also dismisses the relevance of Barbarius' putative freedom. Such a *de facto* possession of freedom remains legally irrelevant because it was acquired in bad faith.[8] If Barbarius remained a slave, then, the only way to argue for the validity of his praetorship would be invoking the sovereign's absolute power (i. e. loosed from the constraints of positive law)[9]

X.3.36.8, and especially on X.1.6.44 (a comment of extreme significance for the toleration principle, which Albericus quotes five times in his discussion of Barbarius' case). After Innocent IV, the canon lawyer on whom Albericus relies the most is Guido de Baysio (whom he mentions ten times). The other canon lawyers cited by Albericus are Hostiensis (five times), Bernardus Papiensis and Johannes Andreae (four times each), Bernardus Compostelanus (Antiquus) (twice) and Bartolmaeus Brixiensis (once).

5 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 65*va* [*sed* 69*va*], n. 15): 'Iac(obus) de Are(na) Rich(ardus Malumbra) Old (radus de Ponte) et fere omnes citramontani, et ultramontani reprobant op(inionem) gl(osae) et dicunt, quod non fuit liber.' Cf. *supra*, pt. I, §3.2, note 34.

6 *Ibid.*, *fol.* 70*ra*, n. 20. This is particularly the case with the *leges Herennius* and *Moveor* (Dig.50.2.10 and Cod.4.55.4 respectively) and with the argument that Ulpian's reference on the validity of the acts *de humanitate* would be an implied confirmation of their invalidity *de iure*.

7 Albericus de Rosate, *ad* Cod.7.45.2 (*Alberici de Rosate Bergomensis ivrisconsulti clarissimi … In Secundam Codicis Part*[*em*] *Commentaria* …, Venetiis, 1585; anastatic reprint, Bologna: Forni, 1979, *fol.* 117*rb*, n. 9): 'Si vero peccatum est in qualitate: tunc est nulla, vt i(nfra) si seruus, aut liber ad dignitatem (*sic*) aspira(verit) l. 1 et 2 lib. 10 (Cod.10.33.1–2) … Non ob(stante) l Barbarius (Dig.1.14.3), quia non habuit dignitatem: quia populus ignorauit eum seruum: et sic non habuit animum dandi libertatem, argu(mentum) ff. de in ius vocan(do) l. sed si hac, § patronum (Dig.2.4.10.2) et de excu(sationibus) tu(to-rum) l. idem Vlp(ianus) § i (Dig.27.1.12.1) et s(upra) qui admitti ad bono(rum) posses(ionem) possunt l. bonorum (Cod.6.9.1).'

8 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fols.* 65*ra* [*sed* 69*ra*]–69*va*, n. 11): 'Item op(ponitur) quod nulla humanitas hic uersetur, quia de iure stricto hoc debet esse, quia Barbarius propter fugam erat in quadam possessione libertatis, ut i(nfra) de aedil(icio) edi(cto) l. qui sit fugutiuus § idem recte (Dig.21.1.17.10) … ergo omnia per eum fieri potuerunt et in eum cadere … Sed dic, quod illa quasi possessio erat dolosa et furtiua, vt C. de ser(vis) fug(itivis) l. i (Cod.6.1.1) et ideo commodum non affert.'

9 For an introduction to the subject of ordained and absolute power in both canon and civil law see Pennington (1993), pp. 106–118.

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to make an *ad hoc* exception to the rules. But that would be possible only with the precise intention of doing so:[10]

> There is no doubt that [Barbarius] was not free, as I just proved … so he could not be praetor. You might say that this is true unless he was made [praetor] by the prince or the people, but that is true only if the prince or the people knew that he was a slave and wanted to use their plenitude of power, otherwise it is not true. Since they ignored [about that], they did not intend to make him legally capable. Indeed it is only when they know that they are considered to enable (as in Dig.42.1.57).

We have seen that the Gloss' interpretation of Dig.42.1.57 built on the consent of the parties as to the jurisdiction of the minor to argue for the validity of his appointment to the praetorship with the consent of the prince.[11] The whole argument of the Gloss, however, relied on the clear intention to enable a minor to sit in judgment, and so first of all on the parties' knowledge as to his true age. Hence Albericus' reference to that case: the appointment of Barbarius by the Roman people or the prince could be seen as an exception to the law only if they knew of Barbarius' servile status. Further, even if the sovereign had the power to dispense with the requirements of the law, appointing a slave as praetor would have been 'dishonest', and this of course would strongly discourage a similar interpretation of the prince's presumed will.[12]

Ulpian's argument as to the presumed will of the people to set Barbarius free and consequently allow him to become praetor, reasons Albericus, was a conjecture built to reach a different purpose: bestowing validity on Barbarius' deeds because of the common mistake and public utility considerations. The way he seeks to prove as much, admittedly, is not particularly coherent. We might distinguish Albericus' approach in three phases: Albericus (1) highlights the effects of common mistake (following Butrigarius); (2) applies them to the

10 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*ra*, n. 20): 'Item non est dubium, quod non fuit liber, vt s(upra) proxi(ma) q(uaestione) probaui … Et si dicas uerum est, nisi factus fuisset a principe vel populo, dico hoc verum esse si princeps, vel populus sciuissent eum seruum, et uoluissent vti plenitudine potestatis: alias non, C. de legi(bus) l. digna uox (Cod.1.14.4) et de leg(atis) 3 l. ex imperfecto (Dig.32(.1).23), cum igitur ignorauerint non uidentur uoluisse eum habilitare, nam solum quando sciunt uidentur habilitare, i(nfra) de re iudi(cata) l. quidam consulebat (Dig.42.1.57).'

11 *Supra*, pt. I, §2.4.

12 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 65*vb* [*sed* 69*vb*], n. 17): '… Sed ad hoc posset respondere quod licet populus seruo, existenti seruo, potuerit conferre praeturam, non tamen honeste quia inhonestum est quod seruus praetor existat … et ea uidemur posse quae honeste possumus, ut i(nfra) de uer(borum) sig(nificatione) l. nepos Proculo (Dig.50.16.125), uidetur ergo populus uoluisse quod honeste potuit, s(cilicet) quod esset liber et praetor.'

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specific context of elections (after Belviso); and (3) finally interprets their consequences in terms of toleration (in a confused reading of Innocent IV, which in effect is more reminiscent of Ravanis). We shall now look at each 'phase' in turn.

(1) For the role of the common mistake, Albericus elaborates on the scheme provided by Butrigarius:[13]

> If you speak of a single mistake, it does not make law (as in Dig.41.1.13 and Dig.2.1.15) but it excuses from punishment if the mistake was a likely one … If we speak of a common mistake, the mistake of the collectivity, then we should distinguish according to whether keeping it as if it were the truth does further public utility or not. If it does, then the mistake makes law and is considered true as in the present case [i. e. Dig.1.14.3] and in Dig.33.10.3.5. This, as noted in the Gloss on Dig.34.2.37,[14] applies so long as the mistake is not detected. Once found out, however, the mistake does not apply to future cases, as proven in the *leges* above.
>
> So long as the mistake is not detected, we should ask ourselves whether public utility is served by the opposite solution, that is, by arguing that the common mistake does not make law. If that is the case, then the common mistake is not to be held as true, nor does it make law (as in Dig.1.3.39 and Cod.1.2.16). If the common mistake neither furthers public utility nor goes against it, then we should enquire whether holding the mistake as true would benefit the person who is erring or not. If it would, then the mistake makes law and is to be kept as

13 *Ibid.*, *fol.* 65*rb* [*sed* 69*rb*], n. 9. The translation is rather free. The text reads: 'So(lutio) aut loqueris de errore singulari, et talis error non facit ius, ut de acqui(rendo) re(rum) do(minio) l. si procurator (Dig.41.1.13) et de iur(isdictione) om(nium) iud(icium) l. si per errorem (Dig.2.1.15), talis tamen error si sit probabilis excusat a pena … aut loquimur de errore communi, vel universitatis, tunc aut utilitas publica suadet errorem pro veritate servari: et tunc facit ius et pro veritate servatur ut hic et in de supel(lectili) leg(ata) <l.> 3 § si ubi de hoc (Dig.33.10.3.5) et l. Labeo in fin(e) (Dig.33.10.7.2), et de errore universitatis not(atur) in gl(osa) in(fra) de aur(o) et ar(gento) le(gatis) l. ornamentorum [Dig.34.2.37, on which see next note] quod verum est, donec error latet, sed eo detecto non, quo ad futura, ut dictis l(egibus) probatur. Et hic dum dicit "quamdiu latuit", aut publica utilitas suadet contrarium, s(cilicet) errorem communem ius non facere, et tunc nec pro veritate non servatur nec facit ius, ut l. quod non ratione (Dig.1.3.39) et l. decernimus (Cod.1.2.16), aut publica utilitas nec suadet, nec dissuadet, et tunc aut expedit erranti, quod error pro veritate servetur, et faciat ius et servatur, et facit ius ut in ad Macedo(nianum) l. si quis patrem (Dig.14.6.3) et C. eod(em) [titulo] l. Zenodorus (Cod.4.28.2). Si autem expediat erranti, quod error communis non faciat ius, non facit, ut in ad Macedo(nianum) l. fi. (Dig.14.6.20) et de haere(dibus) insti(tuendis) l. fi. (Dig.28.5.93(92)).' Cf. Butrigarius' scheme of the common mistake, *supra*, pt. I, §3.3, note 82.

14 Gloss *ad* Dig.34.2.37, § *Heredis* (Parisiis 1566, vol. 2, col. 1280): '… qui soluit, vel fuit confessus extra ius muliebrem vestem … Item nec testatoris error facit ius … sed vniversitatis sic vel principis, vt s(upra) de offi(cio) p(retorum) l. fi. (Dig.1.14.3).'

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true (as in Dig.14.6.20 and Cod.4.28.2). If the person who is erring is better served by arguing that the common mistake does not make law, then we should argue accordingly (as in Dig.28.5.93).

We have previously seen how Butrigarius built on Jacobus de Arena's scheme, but replaced the absence of harm with the presence of utility. Butrigarius did so to colour with intentionality the acts carried out under a mistake (where the mistake would benefit someone who went along with it).[15] Albericus follows Butrigarius, but detaches implied will from common mistake. This way, his scheme on the role of the common mistake ends with a different conclusion:[16]

> the law presupposes the will in the person who promulgates it (as in Dig.1.4.1pr and Inst.1.2.4). As the error removes the will, it takes away the force of the law. Hence I say that a mistake does not make law … but it produces some legal effect, which the legal system would not otherwise acknowledge.

(2) Having established that the common mistake could result in legally relevant effects, Albericus seeks to ascribe those effects directly to Barbarius' deeds, and not to his person. To do so, he turns to the specific cause of invalidity in the *lex Barbarius*: a mistake in the condition of the elected, and so an *error in qualitate*. On the subject, Albericus follows closely the position of Jacobus de Belviso. We might want to briefly look at it (also because, we shall see, it is the same scheme used by Baldus, who ascribed it to Raynerius de Forlì).[17] Belviso first distinguished according to whether the statute or the law regulating the election

15 *Supra*, pt. I, §3.1.

16 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol. 65rb* [*sed 69rb*]), n. 9: '… ius praesupponit voluntatem in promulgantem ut sub de consti(tutionibus) prin(cipum) l. 1 (Dig.1.4.1pr) et Insti. de iure natu(rali) § lex (Inst.1.2.4), error autem non stat cum voluntate, imo tollit legis effectum ut d(icta) l. quod non ratione (Dig.1.3.39); dico quod error non facit ius … sed facit de iure aliquid efficaciam sortiri, quod alias non sortiretur iure communi.' Cf. Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 116*va*, n. 2): 'uidendum est ergo, an sit uerum quod communiter dicitur et allegatur, s(cilicet) quod error communis faciat ius aliquo casu, et dicendum quod non: quia error est contrarius consensui, ut ff. de iurisdi(ctione) om(nium) iudi(cium) l. si per errorem (Dig.2.1.15) et in iure constituendo requiritur consensus tacitus, uel expressus, ut ff. de legibus l. sed ea, et s(upra) de legi(bus) l. humanum (Cod.1.14.8) et ff. de legi(bus) l. i (Dig.1.3.1).'

17 *Infra*, §12.4.1. Our interest in elections is strictly limited to Barbarius' case. Hence the absence of specific references to medieval elections, not least as the electoral systems were numerous and different from each other. For a specific example see the procedure introduced by the Florentine 1328 reform, on which a good account in English may be read in the classic study of Najemy (1982), pp. 99–125, esp. 102–110. For an introduction to procedural law in medieval Italian cities see Vallerani (2005), pp. 19–73, which may be also read in the English translation (2012), pp. 12–71. More in general see Christin (2014).

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contained any provision avoiding the choice made against its requirements. If so, then the common mistake could not be invoked and anything done by the elected would be void. The effects of the mistake could be taken into account only in the absence of a similar provision. In Aristotelian fashion, Belviso grouped invalid elections in four kinds, depending on whether the invalidity lay in form, matter, accident or quality.[18] For Albericus' purposes, the most important kinds of defect were those in the form of the election and in the condition of the elected – the interpretation of the former would strongly condition that of the latter. When the defect is *in materia* (such as not having an election), explains Albericus, the common mistake cannot produce any effect. By contrast, a defect *in forma* (that is, in the modalities prescribed for the election) is not as serious: there, common opinion acquires more relevance. In turn, a defect *in qualitate* (such as the eligibility of the elected) is even less serious than one *in forma*. If it is possible to cure the defect *in forma*, therefore, there is even less need for the defect *in qualitate* to be prejudicial to the validity of the election.

The precondition for ratifying the defect *in forma*, Albericus explains, is that the vitiated election be made by the subject who had the right to elect. The implied argument is that, if the elector knew of the defect, he could make up for it.[19] That however is not the case when the right to elect does not belong to the

18 Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 116*vb*, n. 6): '… Ipse Iac(obus de Belviso) distinguit, aut in statuto, uel lege, ex cuius uirtute erat facienda electio, uel collatio continetur, quod quicquid secutum fuerit, nullius sit ualoris, et tunc gesta non ualent, et error communis nihil operatur, ut d. l. actuarios (Cod.12.49(50).7), et s(upra) de legi(bus) l. non dubium (Cod.1.14.5), et ad hoc facit dictio quicquid, quae est signum distributiuum, ut ff. de here(dibus) insti(tuendis) l. hoc articulo (Dig.28.5.29) … et illa uerba secutum fuerit, quae comprehendunt non solum actum praesentem sed omnes posteriores, ut d(icta) l. non dubium (Cod.1.14.5). Si uero illa uerba non sunt, in l(ege), constitutione uel statuto, tunc aut peccatum est in electione, uel collatione, uel in forma, uel materia: aut in accidenti, aut in qualitate.'

19 *Ibid.*: 'si quidem est in forma, ut puta, quia non est seruata solennitas in eligendo: tunc, aut competit a iure electoribus ius eligendi, aut ab homine. Primo casu, ut quia facta est electio a populo, uel capitulo, et peccatum est in sola forma, et secuta confirmatio solennis et consecratio, ubi est necessaria, tunc gesta valent.' In his commentary on the *lex Barbarius* Albericus de Rosate clarifies that the validity of such an election (i. e. when the electors did not exercise a delegated power but their own) would also depend on whether any of such electors opposed the election. Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 71*ra*, n. 35): 'Aut in electione non fuit limitatio: tunc aut est peccatum in forma electionis, ut in solennitate eligendi: tunc aut electoribus competebat ius eligendi a lege aut ab homine. Primo casu tenent acta et gesta, si nullus ab initio extitit contradictor; alias secus.' See further Id., *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 116*vb*, n. 6): 'et error communis prodest, non tamen est necessarius, et hoc quando ab initio

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elector, but it is simply delegated to him. In such a case, violation of the prescribed modalities would necessarily void the election.[20] According to Albericus, the difference may be easily explained referring to natural law. For natural law, clear intention would suffice. The formal requisites prescribed to manifest such an intention are not part of natural law, but only added by positive (i. e. civil) law.[21] The same difference, continues Albericus, may be clearly seen in a will made without the required formalities: so long as the will of the testator is clear, the bequest made in accordance with the invalid testament would stand.[22] By contrast, compliance with the formal requirements is necessary if the

nullus extitit contradictor, ut dicta l. fina. § item rescripserunt <ff.> de decu(rionibus) (Dig.50.2.12.3).' The reference was particularly appropriate. We have already seen how the title *de Decurionibus* was often invoked with regard to the *lex Herennius* (Dig.50.2.10) to argue that mere enlistment as *decurio* did not make one such *de iure*. But this other text, found just after the *lex Herennius*, specified that if a person had consented to the appointment of someone else as *decurio*, he could not invoke a legal obstacle against the appointment afterwards.

20 Id., *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 71*ra*, n. 35): 'Secundo casu non valent acta per illum, quia electio seu collatio non habuit radicem nec fundamentum, ar(gumentum) d(icta) l. actuarios (Cod.12.49(50).7) et C. si a non compe(tenti) iud(ice) per totum (Cod.7.48) et extra de hereti(cis) c. fraternitatis (X.5.7.4).' See further Id., *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fols.* 116*vb*–117*ra*, n. 6): 'Si autem electoribus competat ius eligendi ab homine, ut puta ex compromisso vel alia concessione facta ab homine: tunc si peccatum est in forma eligendi, non valet electio nec prodest confirmatio, et gesta non valent et error nihil operatur, quia hoc casu non habet aliquod fundamentum: vt d. l. actuarios (Cod.12.49.7) et in q. i c. principatus (C.1, q.1, c.25), extra de haereti(cis) c. fraternitatis (X.5.7.4), et 12 q. 2 <c.> alienationes (C.12, q.2, c.37).'

21 Id., *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*ra*, n. 6): 'Et ratio diuersitatis inter hunc et praecedentem casum est: quia in superiori casu interuenit consensus legitimus eligentium et electi, qui solus de iure naturali ad electionem, et alios contractus sufficit: vt extra de transla(tione) c. inter corporalia (X.1.7.2), et ff. de pact(is) l. i in prin(cipio) (Dig.2.14.1pr).'

22 *Ibid.*, *fol.* 117*ra*, n. 7: 'sic etiam dicimus de testa(mento) non solemni: quia voluntas est legitima de iure naturali potest per haeredem impleri: vt s(upra) de fideicom(issis) l. 2 et l. veritas (Cod.6.42.2 and.23).' The first *lex* invoked (Cod.6.42.2) prohibited the general heir from suing the beneficiary of the *fideicommissum* that was void because lacking the prescribed requirement, if the *fideicommissum* had already received execution. In executing the *fideicommissum*, the executors had carried out the will of the testator. While the Roman text stressed the importance of both the actual will of the testator and its execution according to the conscience of the executors, the Gloss focused exclusively on the former. In so doing, it highlighted the opposition between form and substance, so that the violation of the formal requirement clearly appeared a simple procedural obstacle to executing the testator's unambiguous will. Cf. Gloss *ad* Cod.6.42.2, § *Etsi inutiliter* (Parisiis 1566, vol. 4, col. 1388): 'Testamentum minus solenne fecisti, heredem instituisti, fundum per fideicommissum mihi reliquisti,

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elector is simply delegated to carry out the election, because in this case the form in which the election should take place is an integral feature of the delegation itself.[23]

In the case of Barbarius, the defect was not in the form of the election but in the condition of the elected.[24] As said, a defect *in forma* is more serious than one *in qualitate*.[25] It follows that, when the defect lies in the condition of the elected

heres tuus restituit, et decessi herede relicto: an heres tuus heredi meo de precio mouere possit quaestionem, quaeritur? Respond(endum) quod non, cum voluntati tuae in fideicommis(so) praestando satisfactum videatur.' Also the second *lex* cited by Albericus (Cod.6.42.23) needs to be read according to the interpretation provided in the Gloss. Unlike in the first *lex* (Cod.6.42.2), in the text of Cod.6.42.23 the actual will of the testator was not clear, and so the heir could not be compelled to give execution to the bequest unless he bound himself to. The Gloss followed the (rather unequivocal) meaning of the text, but added that the heir might also be forced to execute the bequest if the actual will of the testator could be somehow ascertained. Cf. Gloss *ad* Cod.6.42.23, § *Si veritas* (Parisiis 1566, vol. 4, col. 1398): 'Si nullum testamentum fectisti, vel fecisti, sed minus solenne, et in eo legata reliquisti: an compellendus sit heres ea praestare, quaeritur? Respond(etur) quod non: nisi causa transactionis promisisset: *vel alio modo eus voluntatem agnouisset*' (emphasis added).

23 Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*ra*, n. 7): 'quod non est, quando eis competit ius eligendi ab homine, quia cum receditur a forma eis tradita, nullum ius transfertur in electum: vt ff. quod cuiusque (*sic*) vniuersi(tatis) l. item eorum § si decuriones, versi(culum) hoc si ita [*sed* 'sed si ita', Dig.3.4.6.1].' Admittedly, the reference was perhaps not the strongest. The second part of Dig.3.4.6.1, to which Albericus expressly referred, simply stated that one may not appoint an arbiter to decide on a possible future controversy that, at the time of the appointment, had not yet occurred. The Gloss gave the same interpretation, such that Accursius used this passage to highlight the difference between delegation and mandate (*ad* Dig.3.4.6.1, § *Decretum*, Parisiis 1566, vol. 1, col. 408).

24 Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 116*va*, n. 2): 'Item error, ille ab ipso initio fuit in conditione personae, et in dignitate praeturae. Item ibi interuenit omnis solennitas in electione: nisi in defectu personae electi.' Cf. *ibid.*, *fol.* 117*ra*, n. 7: '… nec ob(stat) l. Barbarius (Dig.1.14.3) quia ibi electio habuit fundamentum: nec defectus aliquis fuit, nisi in persona electi: qui seruus erat … Item in l. Barbarius error populi sumpsit originem ab ipso principio, in personam electi, qui putabatur liber.'

25 *Ibid.*, *fol.* 117*ra*, n. 7: '… et maius est peccatum formae quam personae: nam sententia si est nulla propter formam non confirmatur, vt s(upra) de testa(mentis) l. non dubium (Cod.6.23.16). Sed si est nulla propter personam, sic, vt not(atur) ff. de appel(lationibus) l. si expressim (Dig.49.1.19).' It might be noted that Albericus de Rosate does not specify what exactly such a defect in the quality of the person might be. Nor did the text he invokes in support of his thesis suggest anything the like. Dig.49.1.19 simply stated that when a decision goes directly against the law ('Si expressim sententia contra iuris rigorem data fuerit'), it may never become res judicata. Cf. Gloss *ad* Dig.49.1.19, § *Si expressim* and

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and the elector did not act upon a mandate, then the common mistake may be invoked to make up for the defect. To do so, however, Albericus (again following Belviso) requires two further elements, both deriving from the need that the mistake be justifiable and widespread. First, the defect in the elected must be occult; second, the common opinion as to the lack of such a defect must be formed prior to the election. Requiring that the defect in the elected be occult is rather obvious: a notorious impediment would make the mistake inexcusable.[26] The second requirement makes sure that the mistake as to the status of the elected is genuinely common. A mistake on the legal capacity of the elected that does not predate the election is probably a consequence of the election, not its

§ *Praescriptione* (Parisiis 1566, vol. 3, col. 1597). When the invalidity is *in materia* the election is 'turpiter facta', and so void not only for the civil law but even for the natural law. Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*ra*, n. 9): 'Si vero peccatum est in materia, puta quia nulla facta est electio, vel ab electoribus non habentibus ius eligendi, et talis tanquam legitime electus multa gessit, tunc gesta a tali non valent, nec error communis facit ius: quia non habet fundament(um) vt d(icto) c. principatus (C.1, q.1, c.25) … talis enim electio, licet non sit turpis, nec de re turpi, tamen est turpiter facta, et ipso iure non tenet, etiam de iure naturali, vt not(atur) per Inno(centium) d(icto) c. quod sicut (X.1.6.28) [cf. Innocent IV, *ad* X.1.6.28, § *Propter bonum pacis*, *Commentaria Innocentii Quarti fol.* 59*va–b*, n. 8–10] et ar(gumentum) ff. de pac(tis) l. si unus § pacta quae turpem (Dig.2.14.27.4) … Et ideo nihil valet quod sequitur ex ea, vt d(icta) l. actuarios (Cod.12.49.7) et s(upra) de legi(bus) l. non dubium (Cod.1.14.5).' Cf. Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 71*ra*, n. 35): 'Aut est peccatum in materia, puta quia nulla est facta electio, vel electoribus non competebat ius eligendi, tunc error communis nihil operatur nec tenent acta per illum vt d. l. Herennius, de decur(ionibus) (Dig.50.2.10) et C. de sacrosan(ctis) eccle(siis) l. decernimus (Cod.1.2.16) et i(nfra) de rebus eorum, qui sub tute(la) l. qui neque (Dig.27.9.8), ubi de hoc et pro hoc facit quod no(tat) Inn(ocentius) extra de elec(tione) c. nihil et c. quod sicut (X.1.6.44 et 28).'

26 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 71*ra*, n. 37): 'aut est peccatum in qualitate personae electi: tunc aut uitium est manifestum, aut occultum. Primo casu non ualent gesta, ut d(ictum) c. nihil (X.1.6.44) et C. si a non compe(tenti) iudi(ce) per totum (Cod.7.48), quia non suffragatur error communis, quod est necesse ut hac l. Secundo casu tenent gesta si est error probabilis, ut hac l. secus si non probabilis, ut s(upra) dixi. Et hoc tenet Iac(obus) de Bel(viso) qui de hoc satis not(atur) d(icta) l. 2 C. de sententiis (Cod.7.45.2), licet alii etiam aliud requirant, s(cilicet) utilitatem publicam multorum, vt s(upra) dixi.' Cf. Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*ra–b*, n. 9): 'Si vero peccatum est in qualitate, puta in persona electi, aut vitium est notorium, et non valent gesta, vt i(nfra) si a non competen(ti) iud(ice) per totum (Cod.7.48): quia hoc casu error non potest esse, quod est necessarium, vt l. Barbarius (Dig.1.14.3) et d. c. nihil (X.1.6.44). Si occultum, et error probabilis, gesta valent, vt d(icta) l. Barbarius. Secus si error non esset probabilis, et communis.'

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cause. Provided that the mistake is common, 'through such a plausible mistake the law supplies to the defect and bestows validity [on the election] as if the defect did not exist'.[27] If on the contrary the common mistake is formed after the election, then it is not excusable: 'the law does not make up for the defect'.[28]

(3) If Belviso's scheme was useful in highlighting the relevance of the common mistake, however, it would also lead to the validity of Barbarius' election – and not just of his deeds. Belviso considered the power of the electors to ratify the election as a necessary precondition for the relevance of their common mistake, but he did so only to limit the scope of the mistake. So long as the ratification was within the electors' powers, then the common mistake sufficed to bestow validity on the election itself. This is why Albericus de Rosate seeks to detach himself from Belviso: to ratify the election made under common mistake, argues Albericus, the electors should actually confirm the elected in his place – the abstract power to do so is not sufficient.

This way, Albericus divides the deeds of the elected under common mistake into three groups: (1) the electors lack the power to ratify the election; (2) they have the abstract power to do so; (3) they proceed with the actual ratification. On the one hand, this distinction allows a rejection of the argument that public utility alone would suffice to bestow legal strength on the common mistake.[29] On the other hand, and crucially, the same distinction allows detachment from Belviso's conclusion: the abstract power to ratify the source, if coupled with common mistake and public utility, suffices as to the validity of the deeds but not also of their source.[30]

27 Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*ra–b*, n. 9): 'Sic ergo distinguit ipse Ia(cobus de Belviso) aut ante electionem, vel collationem dignitatis, honoris, vel officij, error communis, habebat originem, aut post. Primo casu, quia per talem errorem ab ipso principio putabatur valere electio, vel collatio, gesta valent: quia per talem errorem probabilem lex supplet defectum, et facit valere ac si defectus non existeret, vt hac l. (*scil.*, X.1.6.44) et d(icta) l. Barbarius (Dig.1.14.3), cum concor(dat) sic, et in l. 3 § fi. de suppel(lectili) leg(ata) (Dig.33.10.3.5) praecesserat error testamentum, uel contractum.'

28 *Ibid.*, *fol.* 117*rb*, n. 9: 'Si vero error communis incipit habere originem post electionem, vel collationem, tunc postea superueniens, non potest facere gesta valere: quia ingressus est vitiosus, et error, licet communis, est improbabilis: quia debuit veritas exquiri. Et ideo lex hoc casu non supplet defectum, ar(gumentum) ff. de iuris(dictione) om(nium) iudi(cium) l. si per errorem (Dig.2.1.15).'

29 Id., *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*rb*, n. 25): 'quidam tamen dicunt sola<m> publicam utilitatem sufficere, ut gesta quae erant multa ualeant de humanitate.'

30 Id., *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 116*vb*, n. 3): 'error non facit ius: sed quando error causatur a facto populi, praesumpta uoluntas populi concurrens cum errore probabili, facit ius: si ad hoc concurrat

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The abstract power of the superior authority to ratify the position of the elected seems to recall Ravanis. But Albericus de Rosate prefers to invoke the canon law concept of toleration. For our purposes, this is the most interesting part of his whole reading of the *lex Barbarius*: so long as he is tolerated by the authority who had the power to confirm him, says Albericus, the secretly ineligible person acts validly.[31]

publica, uel communis utilitas, et talis sit defectus qui potuisset suppleri per populum, et ita loquitur l. Barbarius … Si uero error populi non causatur a facto populi: sed alterius, tunc nec error, nec uoluntas populi facit ius.' Cf. *ibid.*, *fol.* 116*va*, n. 2: 'Et quod error communis faciat ius solet allegari haec l(ex) (i.e. Cod.7.45.2) cum concor(dat) quod praeal(legatam) l. Barbarius (Dig.1.14.3), cum concor(dat) ubi de hoc not(atur) in gl(osa) et per Doct(ores) et quae est canonizata <in> d(icto) c. tria, 3 q. 7 (C.3, q.7, p.c.1). Sed aduertendum est, quo casu loquantur d(ictae) l(eges) [*scil.*, Cod.7.45.2 et C.3, q.7, p.c.1] et l. Barbarius, loquitur in electione facta a populo romano, uel Principe, et sic interuenit ibi error probabilis, causatus a facto populi, seu principis. Item interuenit publica utilitas, quia [Barbarius] fecit edicta et decreta, ut ibi potest, quae sunt leges generales, ut Instit. de iure natu(rali) § praetorum quoque edicta (Inst.1.2.7). Interuenit et(iam) communis utilitas, quia [Barbarius] multa alia gessit ad communem utilitatem spectantia. Item populus Romanus, uel princeps, potuissent omnem defectum supplere, quia uerisimile est populum fecisse, si eum seruum sciuisset, quia liberum fecisset, ut ibi in litera dicitur.' To argue as much, Albericus also recalls the case of the funeral procession of the slaves wearing the felt cap (the *pileus*, representing the concession of freedom) without their master intending to actually set them free. In that case there was both common mistake and public utility (preventing people from being deceived), but – importantly – their master also had the power to emancipate the slaves. *Ibid.*, *fol.* 116*va*, n. 2: '… l. i § sed et qui pileati s(upra) de lati(na) lib(ertate) tollen(da) (Cod.7.6.1.5) loquitur, ubi populus errat: sed dominus erat sciens, qui poterat seruis dare libertatem, et ideo ne populus decipiatur, liberi fiunt.' Incidentally, it might be noted that the remark that the master 'poterat seruis dare libertatem' is not to be found in the Gloss. Cf. Gloss *ad* Cod.7.6.1.5, § *Sed et qui* (Parisiis 1566, vol. 4, col. 1528).

31 See esp. Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*va*, n. 28): 'Arch(idiaconus) uidetur sentire, quod gesta valeant quousque tollerantur, ut no(tatur) per eum 62 dist. c. fin. (D.62, c.3) [*supra*, pt. II, §8.3, note 41]. Immo quod plus est dicit idem in intruso, ut no(tatur) per eum 12 q. 2 <c.> alienationes, in prin(cipio) (C.12, q.2, c.37) [*supra*, pt. II, §8.3, note 39], ad hoc extra de elect(ione) c. nihil est (X.1.6.44), cum ibi no(tatur) per Ber(nardum Parmensis) [*supra*, pt. II, §8.1, note 12] … Et uide Inn(ocentium) plenissime extra de rest(itutione) spo(liatorum) c. in literis (X.2.13.5) [on the invalidity of the acts done by the person who entered in possession of a benefice with violence, unless he was subsequently confirmed in it], et de relig(osis) do(mibus) c. cum dilectus (X.3.36.8) [on the invalidity of jurisdictional acts by the possessor not confirmed in office], et in Spe(culo) de act(ore) ver(siculo) "sed pone quidam dicens se episcopum" [*supra*, pt. II, §8.4, note 49]. Et ad praedicta etiam facit quod not(atur) per … Inn(ocentium) de relig(iosis) do(mibus) c. cum dilectus (X.3.36.8) [*supra*, pt. II, §7.6, note 126].'

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Despite the large number of citations of Innocent IV and other canon lawyers applying Innocent's concept of toleration,[32] Albericus de Rosate shows little understanding of it. And without a clear understanding of toleration, in effect, Ravanis' idea of the 'power of the appointer' (*potentia committentis*) might look sufficiently close to the abstract notion of tolerating someone in office. Ravanis' appointer (who could make up for the defect of Barbarius) thus becomes very similar to Innocent's superior authority (who tolerates the unworthy in office). Of course the two positions are hardly similar: Innocent's tolerance is the product of legal representation, which presupposes the (actual) confirmation. The mere possibility that the unworthy could be confirmed would clearly not suffice for the validity of the deeds. But Albericus takes the concept of toleration at its face value: forbearance. This way, tolerating Barbarius in office means allowing him to discharge the office of praetor without actually confirming him in that position. Toleration, in other words, has little to do with the distinction between person and office. It is another way of expressing the theoretical possibility that the superior authority would ratify the invalid position of the person who discharges the office – a variation on the theme of Ravanis, just with more canon law references.

Ravanis' 'power of the appointer', as we have seen, was somewhat ambiguous: if the appointer had the power to ratify the choice made under common mistake, then either that power is presumed as actually exercised or it is irrelevant. Indeed Belviso's solution was not too dissimilar from that of Accursius. Albericus sought to avoid it without falling into the ambiguity shown by Ravanis. Hence the idea of toleration (in the sense of forbearance), for it lies between full exercise of the 'power of the appointer' (i. e. ratification) and non-exercise of that power. For Albericus, toleration seems to imply some degree of acceptance without its full consequences.

The closeness with Ravanis can be seen from the examples provided by Albericus de Rosate – some of them are strongly reminiscent of the Orléanese jurist. If a bishop or a count appointed a slave as his vicar without knowing of his true condition, says Albericus, the deeds of this slave-vicar would be void: unlike the Roman people and the prince, neither bishop nor count have the power to cure the underlying defect.[33] 'What lacks any ground may not be confirmed',

32 *Supra*, this chapter, note 4.

33 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*rb*, n. 24–25): 'Modo ueniamus ad ultimum, et adducamus hanc l(egem) et eius materiam ad plures quaestiones de facto occurrentes. Et primo quaero quidam episcopus uel comes quendam seruum constituit uicarium suum ignorans eum seruum: nunquid ualebunt, gesta per eum? Videtur quod non, quia licet uersetur publica utilitas, tamen deficit potestas constituendi seruum

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holds Albericus, and so is not tolerated either.[34] So the deeds of the false prelate shall be void,[35] as well as those of the putative papal legate[36] and, of course, the instruments of the notary apparent.[37] Alone, common opinion does not suffice,[38] even if supported by public utility.

uicarium, quae potestas erat in l(ege) ista in populo, et principe.' Cf. Ravanis, *supra*, pt. I, §4.4, text and note 53.

34 Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*ra*, n. 8): 'Item hoc casu [i.e. the formal invalidity of the election made by the delegate] non obstat confirmatio: quia illud quod non habet aliquod fundamentum, non potest confirmari, vt potest in pro non scripto, caduco, et quasi, s(upra) de cad(ucis) tol(lendis) § in primo et § pro secundo vbi de hoc (Cod.6.51.1.3–4).'

35 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*va*, n. 27–28): 'quaero generaliter, an gesta per eum, qui credebatur praelatus cum non esset, valeant. Gl(osa) videtur tenere quod non, C. de eo, qui pro tut(ore) neg(otia) gess(it) l. 2 (Cod.5.45.2) … Et quod non ualeant bene facit i(nfra) de reb(us) eorum, qui sub tutela sunt, l. qui neque (Dig.27.9.8) … et i(nfra) de iureiur(ando) l. iusiurandum quod ex conuentione § i (Dig.12.2.17.1).' The two passages in the Gloss to which Albericus referred stated that a void appointment invalidates all the deeds made by the person so appointed: Gloss *ad* Cod.5.45.2, § *Exceptione* (Parisiis 1566, vol. 4, col. 1121: 'Etiam post litem contestatam: quia similis est exceptioni falsi procuratoris: vt supra de procura(toribus) l. licet (Cod.2.12(13).24), et idem in praelato vt possit repelli si quoquo modo possit vitiari eius electio, vt exceptione repellatur'), and Gloss *ad* Dig.12.2.17.1, § *Non competit* (1566 Parisiis, vol. 1, col. 1284: 'sic ergo not(andum) bonum arg(umentum) in omnibus contractibus quos ineunt hi qui non iure sunt electi: vnde omnia cassantur, vt hic, et C. de sacrosanc(tis) eccles(iis) <l.> decernimus (Cod.1.2.16) … Sed arg(umentum) contra s(upra) de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3). Si vero tenuit ab initio institutio, sed postea aliquo casu cassatur, secus'). Commenting on those passages (especially on the first one, Cod.5.45.2) Albericus distinguished an appointment to a secular office from one to an ecclesiastical one. In so doing, he showed good acquaintance with the mainstream decretists' position on the toleration principle. Cf. Id., *ad* Cod.5.45.2 § *Cum non vtiliter* (*Alberici de Rosate … In Primam Codicis Partem Commentarij* …, Venetiis, 1586; anastatic reprint, Bologna: Forni, 1979, *fol.* 276*vb*).

36 Id., *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*va*, n. 12): '… Quarto si aliquis tanquam legatus sedis apostolicae se gessit, et multa fecit, nunquid valebunt si de eius legatione non fiat fides, de hoc in Specu(lo) de legato, § superest videre, versi(culum) quid si quis se pro legato [*supra*, pt. II, §8.4, note 66], et plenissime dixi s(upra) de manda(tis) prin(cipum) l. vnica (Cod.1.15).' Cf. Albericus de Rosate, *ad* Cod.1.15, § *Si quis adserat* (*Alberici de Rosate … In Primam Codicis Partem Commentarij*, cit., *fol.* 54*rb*, n. 3): 'Iudicio meo quicquid dicatur, opus est de iure probari delegationem, et legatione, vel saltem quasi possessionem legationis.'

37 Id., *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*vb*, n. 31–32): 'Item quaero, an instrumenta confecta per eum qui publice credebatur tabellio cum non esset ualeant. Et idem potest quaeri de illo, qui exercuit officium

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The most interesting aspect of Albericus' approach to the *lex Barbarius* lies not in his misunderstanding of toleration, but in his attempt to subsume the office

iud(icis) cum iudex non sit uidetur, quod sic per l(egem) istam et C. de tabula(riis) l. generali li. 10 (Cod.10.(69).3), et pro hoc etiam in Aut(hentica) de tabel(lionibus) § pen(ultimo) (Coll.4.7.1[=Nov.44.1§4]), ubi dicitur quod tabellio non debet facere instrumenta per substitutum, sed cum faciat ualent. Vltramontani tenent contrarium quia dicunt esse peccatum in forma, quia supponitur, quod non fuit iudex nec tabellio, sed in l(ege) ista peccatum est in materia, quia hic electio facta erat per illos qui eligere potuerant et peccatum materiae facilius excusatur, quam peccatum formae, arg(umentum) i(nfra) de const(ituta) pec(unia) l. i § eum qui inutiliter (Dig.13.5.1.4), et de accep (tilatione) l. an inutilis (Dig.46.4.8), et ad hoc allegant pro casu praeall(egato) l. actuarios C. de num(erariis) li. 12 (Cod.12.49(50).7) … non ob(stante) § penul (timo) de tabel(lionibus) (Coll.4.7.1[=Nov.44.1§4]) quia ibi substitutus habebat authoritatem, et commissionem ab eo, qui facere poterat instrumenta per se, et ideo ibi ille error sustinetur, sed in quaestionem praedicta<m> a nullo habebat authoritatem, et ideo gesta non ualent.' See also Id., *ad* Dig.50.2.8, § *Decurionibus* (*Alberici de Rosate … In Secundam ff. Noui partem Commentarij …*, Venetiis, 1585; anastatic reprint, Bologna: Forni, 1982, *fol.* 232*ra*, n. 1–2): 'No(tatur) … si quis sit in quasi possessione tabellionatus, et multa fecerit instrumenta, vel sit inscriptus in matricula tabellionum, quod hoc non sufficiat, nec teneant instrumenta per eum facta, nisi doceat se creatum tabellionem ab eo, qui super hoc habuerit potestatem, et quod talia instrumenta non valeant: facit sup(ra) de eo qui pro tuto(re) nego(tia) gerit l. 2 (Dig.27.5.2) … et quia in ista quasi possessione tabellionatus videtur esse malae fidei, et quia de tabellionatu debet probare per literas, arg(umentum) C. de mand(atis) princ(ipum) l. i (Cod.1.15.1) et sup(ra) de offi(cio) praesi(dis) [*sed* 'proconsulis'] l. nec quicquam § ubi decretum (Dig.1.16.9.1) et quia est praesumptio contra eum, et ideo probare tenetur, ut C. de prob(ationbus) l. siue possidetis (Cod.4.19.16). Sed quod instrumenta teneant, videtur per l. Barbarius (Dig.1.14.3).'

38 Common opinion alone can at the most invert the burden of proof as to the validity of the appointment. On the point Albericus follows Innocent IV closely. Cf. Abericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*va*, n. 12): '… Secundo quod si aliquis longo tempo(re) habitus est pro rite ordinato, praesumitur legitime ordinatus, sine alia probatione, vt no(tatur) per Inno(centium) d(icto) c. innotuit, de eo, qui furtiue ordines suscepit (X.5.30.3), quae glo(sa) notabilis est ad istam materiam praesumptionum [Cf. Innocent IV, *ad* X.5.30.3, § *Innotvit nobis* (*Commentaria Innocentii Quarti*, cit., esp. *fol.* 523*ra*)]. Shortly thereafter, in the same commentary on Cod.7.45.2, Albericus continues on the subject. Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*va*, n. 12): '… Item si aliquis gessit se pro praelato, vel aliquis tenuit aliquam tanquam vxo(rem) nunquid sufficiat sine alia probatione, dic vt no(tatur) per Innoc(entium) de praesump(ionibus) c. illud (X.2.23.11), de praelato videtur tenere gl(osam) quod non sufficiat: imo etiam post litem contest(atam) videtur posse opponi talis exceptio, tu non es praelatus, s(upra) de eo, qui pro tutore negotia gerit, l. ii (Cod.5.45.2) et dic, vt ibi dixi.' Cf. Innocent IV, *ad* X.2.23.11, § *Ilud quoque* (*Commentaria Innocentii Quarti*, cit., *fols.* 281*vb*–282*ra*, n. 3).

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within the person. Innocent's position was based on the separation between the office and its holder, and so on the distinction between the person as individual and the person as representative. What is tolerated is not the individual, but the legal representative of the office. Removing the notion of representation from the equation, Innocent's concept of toleration might well be seen as the canon law equivalent of Ravanis' 'potentia committentis'.

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