Chapter 12

Baldus and the *lex Barbarius*

12.1 A different perspective

In the traditional reading of the Gloss, as we have seen, the validity of the deeds had to follow on from the legitimation of their source: Barbarius becomes free and a true praetor, hence his deeds are valid. This approach, still applied in the early fourteenth century by Butrigarius, did not consider the person of Barbarius and the office of praetorship as two wholly different subjects. Either Barbarius is fully praetor, or no deed of the office of praetor can be valid. The *Ultramontani* reached the opposite conclusion, especially in the interpretation of Bellapertica, but they implicitly moved from the same premise. It was precisely because Barbarius did not enjoy a valid status that the validity of the acts could not be ascribed to their source. As such, the reason for their validity had to be found elsewhere, outside of the source itself. So public utility would operate directly on the acts, skipping their source entirely – which therefore remained invalid. This opposite approach implicitly shared the same view as to the source of the acts: ultimately, it implied that agent and office substantially coincided. If the two approaches did not share this common premise, Bartolus could not have used them together. So long as it was possible to hold the act valid by validating the position of Barbarius, for Bartolus the Accursian Gloss sufficed. Where this could not work, Bartolus followed Bellapertica and invoked public utility directly on the acts. The office – as a subject different from its incumbent – never came into the picture.

Just as rescuing the person of Barbarius meant validating the exercise of his office, so leaving him a slave amounted to the full rejection of his praetorship. Barbarius was not an individual person acting as representative of the office of praetorship. The office was ultimately a *dignitas* vested in the individual person. As such, either that person became fully legally capable, or the office remained wholly unable to produce valid acts. This bi-dimensional approach, which levels the office to the person, does not mean that the above jurists did not know or that they disapproved of the concept of *persona ficta*.[1] They simply did not make

1 For the *Ultramontani* see first of all Feenstra (1956) pp. 381–448. The author first provides a transcription of the final part of Bellapertica's comment on

systematic use of it. More exactly, it is only with hindsight that individual office and collegiate body should both necessarily be construed as legal persons (or at least as different subjects from those of their physical representatives). Speaking of public office did not necessarily entail a full separation between office and person. We have seen that when looking at Bartolus' treatment of the notary: the public notary exercises a public office. But this public office is a *dignitas* vested in the individual person, and ascribed to that person *qua* individual. Corporations were different: there, the distinction between person and office was more immediate – it was plainly visible. Moreover, it was necessary. The late medieval urban world is a system of corporations. The city itself is ultimately a corporation. Most jurists lived in cities, often self-governing ones. This led them to focus on the mechanism of representation: how could the actions of the single be imputed to the whole.[2] This way, they looked increasingly at canon law,

Cod.1.3.31(32) (*ibid.*, p. 424: the text is taken from Firenze, BML, Plut. 6, sin. 6, *fol.* 30*v*), then looks at Ravanis. While Ravanis did not use the term *persona representata* in his comment on the same *lex* of the Code, he did so on other occasions, especially in his comment on Dig.3.4.7.2, which is entirely based on the concept of representation (Feenstra also provides a critical edition of this comment from the only two known manuscripts of Ravanis' *lectura* on the Vetus, the Neapolitan and Leiden MSS [cf. *supra*, pt. I, §4.4, text and note 21], *ibid.*, pp. 425–427. From Ravanis' comment on Dig.3.4.7.2 it appears that the term *persona representata* was already used by his teacher Monciaco (*ibid.*, p. 428). Feenstra does not mention Cugno, but also this jurist used the concept at least in his *lectura* on Dig.3.4.7, whose most relevant part is transcribed in D'Urso (2000), p. 530, note 56. The same D'Urso gives a partial transcription of Revigny's *lectura* on Dig.3.4.7 and on Dig.4.2.9.1 (*ibid.*, p. 529, note 55, and p. 539, note 80 respectively). On the subject of representation, the passage of Bartolus that attracted most scholarly attention is probably his comment on Dig.48.19.16.10: see esp. Navarrete (1962), pp. 351–360 and 366–372 (the last pages focusing in particular on Bartolus' comment on Dig.41.2.1.22); D'Urso (2000), pp. 542–548; Walther (2005), pp. 196–200. Legal personality was a concept not unknown to the glossators either. For instance, the glossators most frequently cited in the first part of this work, Bassianus, Azo, Hugolinus and Accursius, all dealt with the imputability of certain deeds of the individual to the *universitas*: see e. g. D'Urso (2000), pp. 524–531. For a useful synthesis see Mehr (2008), pp. 216–232. Cf. also the next two notes.

2 On the subject, a starting point is still the work of Michaud-Quantin (1970), pp. 305–326. Cf. Coing (1985), pp. 262–268; Quillet (1971), pp. 186–189. See also some short but extremely acute observations of Nörr (1992), pp. 194–197; Tierney (2016), pp. 62–63; A. Black (1990), xiv–xxx; A. Black (2003), pp. 16–31; Birocchi (1995), pp. 414–415, where further literature is listed; Cortese (1995), vol. 2, pp. 238–240; Todescan (1982/83), pp. 63–64; H. Hofmann (1974), pp. 152–165 (this last one however pays little attention to the glossators). See also Cortese (1964), vol. 2, pp. 110–122 (although he writes about the will of the

adapting many principles devised for canonical elections to the secular sphere.[3] Within this relationship individual–*universitas* civil lawyers even discussed the problem of the criminal liability of the corporation for the deeds of its individual members.[4] So they did work with the concept of agency, but mainly where the principal was a collectivity, not an individual office. The similarity between representative of a corporation and bearer of an individual office would strike only a modern as self-evident. In itself, it is not necessarily so obvious.

Both Innocent's profound influence and his own legal training in canon law made Baldus more aware of the similarity between collegiate bodies and individual public offices. In both cases the question was one of representation, and so the same principles developed for ecclesiastical offices could be applied to secular ones. This is what makes Baldus' approach to the *lex Barbarius* so different from that of previous civil lawyers. The relationship is no longer between two parties (the Romans and Barbarius) but between three, for the office of the praetor is not the same subject as the individual who occupies it.

Baldus' reading of Barbarius' case is based on the full separation of office and person. In so doing he openly relies on Innocent's position, by far the most quoted author by Baldus in his *lectura* and especially in both *repetitio* and *addition* on the *lex Barbarius*.[5] It was because of Innocent's elaboration that Baldus could arrive at a wholly new reading of it. The crucial difference with the previous interpretations did not lie in the distinction between validity of deeds

universitas on the introduction of a custom, Cortese's observations can be easily applied to our subject, as the author himself suggests). As with many other public law subjects, legal personality in medieval civil law has not received overwhelming attention by legal historians. This sometimes led medieval jurists to be read through the lens of political thinkers or philosophers. A well known example is the recurring temptation to invoke Ockham (especially as filtered through the works of Michel Villey) to interpret the approach of medieval lawyers to the subject of corporations in a remarkably restrictive fashion. On the problem, see e. g. Kriechbaum (1996), pp. 38–39; Nörr (1992), pp. 194–196.

3 See for all the recent and magistral study of Christin (2014).

4 See e. g. Ullmann (1948), pp. 77–96, Michaud-Quantin (1970), pp. 327–330, and in particular Chiodi (2001), pp. 100–127. Cf. also Quaglioni (2002), pp. 418–420. In his excellent essay, Chiodi also casts a different light on the well-known gloss of Accursius on Dig.3.4.7.1, where he famously stated that 'vniversitas nil aliud est nisi singuli homines qui ibi sunt' (Gloss *ad* Dig.3.4.7.1, § *Non debetur*, Parisiis 1566, vol. 1, cols. 409–410). The statement is traditionally read as an unequivocal rejection of the legal capacity of the *universitas*. Reading the same words within their broader context, however, it would seem that Accursius was simply seeking to exclude the vicarious liability of the town for the damages directly imputable to its individual members. Chiodi (2001), pp. 117–119, where ample literature is mentioned.

5 Cf. *supra*, last chapter, note 4.

and invalidity of their source (that was already achieved with the *Ultramontani*). The difference lay in the concept of office itself, which should be fully distinguished from the person discharging it. In so doing, Baldus inverted the (already revolutionary) position of Bellapertica: the source of the deeds is not Barbarius but the praetorship. So both deeds and praetorship are valid. It is the person of Barbarius that remains a slave.

This conclusion presupposes complex reasoning, which we will now explore in some detail. But it also shows a distance with Innocent on the specific case of Barbarius. If the slave remains a false incumbent, then Barbarius' case does not fall within the scope of toleration. And indeed Baldus' solution on this case builds on what was already said in the previous chapter, especially on the shift from proper toleration to lawful possession of the office. It is precisely this twist to Innocent's doctrine that paved the way for the later theory of *de facto* officer and, moreover, the possibility of distinguishing between internal and external validity of agency.

Baldus' position entails a clear rupture with the previous civil law tradition. The *lex Barbarius* is not just a clear example of the application of public utility to public law issues. It describes an extreme case of agency in public law.

For the Gloss and its followers, reasons Baldus, the only way to bestow validity upon Barbarius' deeds was to consider their source as legitimate: 'the deeds depend on the status, for if [Barbarius] was not praetor and free, his deeds would not be valid. Hence he is praetor and free, so that his deeds be valid.'[6] All the jurists who followed the Gloss invoked the healing effects of the common mistake to the person of Barbarius first, and only then also to his deeds. To save the validity of the acts, in other words, it was necessary to rescue their source. The problem that earlier civil lawyers, especially of the Bolognese school, encountered here was that they could not keep the issue of the validity of the acts separate from that of the validity of the appointment. And the fact that Ulpian spoke in positive terms about the validity of the acts was taken as confirmation as to the validity of their source too. Their reasoning is clear: how could one insist on the validity of the acts while denouncing as invalid the source from which they flowed? The position of the Gloss was straightforward – too much so, Baldus observes. More than simple, it was in fact simplistic. 'If the opinion of the gloss were true – he notes sarcastically – there would be no reason for fatiguing [on this text], for Barbarius would have been true and lawful praetor.'[7]

6 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 57vb*, n. 10: '… gesta dependent a statu, quia si non esset praetor et liber, non ualerent acta per eum, vt ergo ualeant acta per eum, ideo est praetor et liber.'

7 *Ibid.*, n. 12: 'si uera esset opi(nio) gl(osae) non esset opus laborare, quia Barbarius fuisset verus, et legitimus praetor.' Cf. further *infra*, next paragraph, note 30. Similarly – as already noted by all the *Ultramontani* – the solution of the Gloss

While Baldus is not as critical of the *Ultramontani* as he is of the Gloss, he does not accept their reading either.[8] Ravanis' position, sophisticated as it was, remained fragile: it rejected the Gloss and yet its conclusion was – at least to some extent – fairly close to it. The stance of Bellapertica was uncompromising, but for that reason it could not have boundaries: equitable considerations always apply and always suffice. This bypassed representation altogether, and that alone suffices for Baldus to reject it *in toto*. Cugno's views, perhaps, could have been more easily adapted to Innocent's approach – especially in Baldus' interpretation of it. But in his writings on the *lex Barbarius* Baldus quotes Cugno just once, and even that single reference is rather ambiguous.[9] Even if Baldus knew Cugno's *lectura* on the *lex Barbarius* (which is far from clear), he did not use it.

12.2 Barbarius and the problem of toleration

Applied to the relationship between agent and office, toleration means highlighting the enduring legal representation despite the unfitness (*indignitas*) of the agent. This is already visible at the beginning of Baldus' *lectura* on the *lex Barbarius*, with regard to the prohibition of the *lex Iulia de ambitu*. Simony is prohibited by divine law for ecclesiastical offices, says Baldus, not temporal ones. As for temporal offices, surely no prohibition would apply to the prince, who is above the (civil) law. The same goes for the pope when conferring temporal

would make Barbarius' acts valid *de iure*, whereas the *lex Barbarius* clearly speaks of validity *de aequitate*: 'Item oppo(nitur) si Barbarius fuit praetor, *ergo gesta* per eum *valent* de rigore. Sol(utio) *eadem* aequitate, quia est praetor in habitu, exercet in actu, quia ab vna causa, et ratione procedit *et* esse et operari secundum Iac(obum Butrigarium)' (*ibid.*, *fol. 57va*, n. 9).

8 Baldus often quotes the *Ultramontani* in his opus. While sometimes he acknowledges the worth of their observations, in other occasions (and probably more often) he does not seem particularly impressed with them, occasionally showing his disapproval in rather vocal terms. One of such occasions is his *tractatus de Pactis* (Venetiis, 1577, *fol. 5ra*, n. 84): 'these jackasses of *Ultramontani* have no other joy than confuting the Gloss' ('isti asini Ultramon(tani) non habeant aliam beatitudinem nisi in reprobando glos(am)'). Cf. Meijers (1959*a*), p. 119.

9 Baldus recalled how both Cugno and Cynus maintained that the *lex Barbarius* would apply on the basis of both public utility and superior authority (not a very accurate statement). Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 57vb*, n. 10–11: 'Item non deberemus implicare tot inconuenentia, quid dicemus? Dicit Guil(elmus de Cugno) et Cy(nus de Pistoia) hic quod hic Barbarius non fuit praetor verus, sed putatiuus, et secundum hoc haec l(ex) dicit hic, propter publicam vtilitatem, et superioris autoritatem, et errorem communem valent gesta, etiam a minus legitimo praetore. Et hoc solum determinat haec l(ex) de valentia actuum exercitorum, quandiu latuit inhabilitas Barbarii, et alia quae dicit circunferentia, sunt rationes ad probandum gesta ualere secundum eos.'

dignities.[10] But then, asks Baldus, what about the *lex Iulia de ambitu*? Duly revised, the traditional explanation in the Gloss – so much criticised by the *Ultramontani* – could prove useful. The Gloss argued for the validity of the appointment made in violation of the *lex Iulia* on the basis of the effects of putative freedom: 'it should not happen, but if it did, it would hold' ('fieri non debuit: factum tamen tenuit').[11] Baldus recalls that maxim but explains it in a completely different way. The reason why 'it would hold' does not depend on the effects of apparent status (i.e. putative freedom),[12] but rather on toleration. Precisely with regard to the *lex Iulia* (and so, in case of simony), the maxim could be used to highlight the most striking case of toleration: that of the occult simoniac. As Innocent had it, Baldus recalls, 'anything is tolerated because of the office that one exercises'.[13] Simony is no exception: so long as he is tolerated, the occult simoniac is the unworthy but lawful representative of the office, and so his (jurisdictional) deeds are valid.[14] Thus, Baldus' conclusion is a frontal attack

10 Id., *lectura ad* Dig.1.14.3, cit., *fol. 55ra*, n. 10: '… immo si Principi datur pecunia pro officio suo, ista non est simonia, quia istud non est prohibitum in officiis secularibus iure diuino, sed iure civili, cui Caesar non subest, ergo et Papa sua temporalia potest vendere absque aliqua pravitate.'

11 *Supra*, pt. I, §2.2, note 36.

12 *Supra*, pt. I, §2.3.

13 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 54vb*, n. 6: 'opp(onitur) et videtur quia etiam temporalem non liceat administrationem postulare, quoniam incidit in l. Iul(iam) de ambitu, quae impedit promouendum, vt i(nfra) ad l. Iuli(am) de ambi(tu) l. i (Dig.48.14.1.1). Respondent quidam quod fieri non debet: factum tamen tenet, donec per superiorem toleratur in officio. Et sic simoniaca promotio in temporalibus est aliqua, quamdiu superior eam non rescindit, vt i(nfra) de decre(tis) ab or(dine) fa(ciendis) l. ambitiosa (Dig.50.9.4pr). Nam multa non debent fieri: tamen facta tenent, i(nfra) quando app(ellandum) sit l. i § biduum (Dig.49.4.1.5). Omnia enim tolerantur propter officium quod administrat, ut no(tat) Inn(ocentius) extra, de accu(sationibus) c. qualiter et quando (X.5.1.24), in gl(osa) magna, ver(siculum) "sed non"." Cf. Innocent IV, *ad* X.5.1.24, § *et famam*, *supra*, pt. II, §7.3, note 23.
Incidentally, Baldus seems among the very few civil lawyers not particularly impressed with the old argument of Bassianus' students (*supra*, pt. I, §2.2) that seeking an office to help out the others is to be praised. Baldus, cons.2.53 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini*, cit., *fol.* 12*ra*): 'certe non est ambitio virtutibus quaerere honores, vt l. Barbarius Philippus ff. de off(icio) praet(orum) (Dig.1.14.3).'

14 Id., *lectura ad* Dig.1.14.3, cit., *fol. 55ra*, n. 7–8: 'et hoc verum in his quae ille simoniacus gerit temporaliter, vt hic: secus, si spiritualiter, nam nemo dat quod non habet. In spiritualib(us) n(am) potius veritas quam opi(nio) ponderatur i q. i c. Daibertum (*rectius*, C.1, q.7, c.24), et no(tandum) per Inn(ocentium) de rest(itutione) spo(liatorum) c. olim col(umna) iii [cf. Innocent IV, *ad* X.2.13.12, esp. § *Conditione*, in *Commentaria Innocentii Quarti*, cit., *fols.* 230*vb*–231*ra*, n. 3] … sed in temporalib(us) valent omnia quae faciunt administrando temporaliter, quamdiu ab ecclesia tolerantur. Immo contra temporalia exigentes

against nearly two centuries' discussion of the relationship between the *lex Iulia* and Barbarius' case.

The reference to occult simony (and, with it, to Innocent's position) is particularly appropriate for introducing the toleration principle on Barbarius' case. We have seen Baldus' distinction between manifestness and notoriety. In lay terms, occult is the opposite of manifest: the first conveys the idea of something hidden, the second means plainly visible.[15] But when the defect in the office holder is legally ascertained, from occult it becomes not just manifest but notorious. When deriving from a legal decision, notoriety is stronger than widespread opinion (*fama*): it is legal truth – both notorious and manifest.[16] Just as occult *indignitas* is no obstacle to the exercise of the office because of the confirmation of the superior authority, therefore, so condemnation by a superior authority both deprives the office holder of his confirmation, and also renders his *indignitas* manifest and presumptively known (or rather, it does not excuse its ignorance). When occult unfitness is judicially ascertained, the effects of the initial confirmation – or approbation – of the superior authority cease altogether, thereby preventing any further valid exercise of the office.

If the debate on the *lex Iulia* served to introduce the concept of toleration, it remained to be seen how to apply this concept to the analysis of the *lex Barbarius*. Speaking of toleration exclusively on the basis of canon law could undermine its strength in civil law: some references to Roman sources ought to be provided. Therefore, immediately thereafter, Baldus lists a number of cases that might serve the purpose. The most relevant are two texts of the Digest (Dig.1.5.20, and Dig.39.5.15).[17] The first text reads: 'Anyone who becomes insane is considered to retain both the position and *dignitas* he previously held, and his magistracy and authority; just as he retains the ownership of his property.'[18] In his comment on this text, Baldus observes that since the insane keeps his *dominium*, he also

non potest excipi quod fuerint promoti per simoniam: quia in arbitrio superioris est tolerare eos, vnde inferior de iure superioris non potest opponere, vt no(tatur) per Inn(ocentium) extra, de simonia c. per tuas, in princ(ipio) gl(osae) quae incipit, "Quicunque n(am)." Cf. Innocent IV, *ad* X.5.3.35, § *Vitium simoniae* (*Commentaria Innocentii Quarti*, cit., *fol.* 502*rb*, n. 1).

15 *Supra*, last chapter, note 105.

16 *Ibid.*, note 107.

17 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 54*vb*, n. 6: '… idem dicimus in his quae ratione officii, etc. Et hoc probatur ex coniunctione duarum legum, supra de sta(tu) ho(minum) l. qui furere (Dig.1.5.20), et de don(ationibus) l. post contractum (Dig.39.5.15).'

18 Dig.1.5.20 (Ulp. 30 ad Sab.): Qui furere coepit, et statum et dignitatem in qua fuit et magistratum et potestatem videtur retinere, sicut rei suae dominium retinet.'

retains his *iurisdictio*.[19] The fact that he may no longer exercise it does not undermine the point, because 'the exercise of jurisdiction does not pertain to the substance of jurisdiction.'[20] So the insane magistrate would retain his *iurisdictio* even if unable to exercise it. The principle is the secular equivalent of the canon law rule on the insane bishop.[21] Just like the servile condition, insanity was a defect in the person that prevented his valid appointment to an office – so much so that the two defects appeared together in the often quoted *dictum* of Gratian *Tria* (C.3, q.7, p.c.1).[22] The reference to insanity has clear limits: Dig.1.5.20 was a case of supervening incapacity,[23] whereas Barbarius was already a slave (and so legally incapable) when elected praetor. Hence Baldus quotes a second text, Dig.39.5.15. According to it, 'donations made after the accusation of a capital crime are valid, unless the defendant is convicted'.[24] Just as Barbarius was a slave when elected to the praetorship, so the donor had already committed a capital crime when he made the donation. Admittedly, also this second text could offer limited help: the donation would be invalidated if the donor were eventually found guilty of the charge, whereas (as we shall see) Baldus will argue for the enduring validity of Barbarius' deeds. Despite neither text could offer a watertight foothold for the application of the toleration principle to Barbarius' case, their combined reading would serve the purpose. On the one hand, the objections that Baldus' reader would raise when mentally comparing the *lex Barbarius* to one text would be (prima facie) overcome when moving to the other. On the other, moreover, Baldus' intention is not to persuade his reader

19 Baldus *ad* Dig.1.5.20, § *Qui furere* (*In Primam Digesti Veteris Partem Commentaria*, cit., *fol.* 33*ra*): 'Sicut retinetur dominium, ita et iurisdictio.'

20 *Ibid.*, 'No(tatur) quod exercitium iurisdictionis non est de substantia iurisdictionis, quid patet, quia licet furiosus non exerceat, tamen retinet iurisdictionem in habitu, etiam si staret per longissimum tempus.'

21 *Supra*, last chapter, note 70.

22 Cf. *supra*, pt. II, §6.2, text and note 26.

23 A similar case was that of the short fragment of Dig.5.1.6 (Ulp. 6 ed.: 'Caecus iudicandi officio fungitur'). The Gloss was clear in stating that the praetor who became blind could continue to exercise his office, but only because it was a condition supervenient to his appointment. Gloss *ad* Dig.5.1.6, § *Caecus* (Parisiis 1566, vol. 1, col. 677): 'Titius dum esset in officio constitutus, habebat ordinariam vel delegatam iurisdictionem: et ita morbo superueniente lumen amisit. Nunquid postea suo fungi poterit officio, vt poterat a principio? Et dicit quod sic. Sed videtur quod non: vt supra de postu(lando) l. i § casum (Dig.3.1.1.3), quae videtur contraria, sed non est: quia ibi a principio erat caecus, hic postea.' Cf. *ibid.*, § *Fungitur*: 'cum ante esset iudex quam esset caecus: sed de nouo fieri non potest; secus in postulatore: vt supra de postu(lando) l. i § casum (Dig.3.1.1.3).'

24 Dig.39.5.15 (Marcianum, ad 3 Inst.): 'Post contractum capitale crimen donationes factae non valent ex constitutione divorum Severi et Antonini, nisi condemnatio secuta sit.'

that the toleration principle, as defined by Innocent, fully applied to Barbarius' case. Baldus simply wants to highlight the similarity between the *lex Barbarius* and the concept of toleration. To that end, however, he faces a formidable problem: relying on Innocent's idea of toleration while skipping its cornerstone – confirmation by the superior authority.

We have amply seen how toleration depends on confirmation. If even a perfectly worthy (*dignus*) person could not exercise the office without confirmation, the requisite was all the more essential for the unworthy. So long as the elected is confirmed by the superior authority, the invalidity of the election for the defect in the person of the elected is no obstacle to the valid exercise of the office. Similarly, supervening unworthiness does not remove the confirmation as long as the *indignitas* remains occult.

The importance of confirmation as a necessary prerequisite of toleration explains why, for Innocent, Barbarius had to be confirmed by the prince. Whether or not he was deeply persuaded by the argument of the Gloss, it was necessary for Innocent to approve of it. Otherwise, that single Roman law text would have seriously undermined his entire elaborate reasoning. Accepting Barbarius' confirmation by the emperor was Innocent's solution to a very marginal problem in his overall theory, which therefore deserved only marginal attention. Barbarius' case, in other words, did not need to be fully explained. It had to be neutralised.[25]

Innocent's solution was however Baldus' problem. Confirming Barbarius in his praetorship would have meant accepting the reading of the Accursian Gloss, which was something that Baldus was not prepared to do. Hence Baldus sought to adapt Innocent's toleration theory: applying it to the *lex Barbarius* while leaving Barbarius in slavery. It is important to keep in mind the reason for Baldus' different approach. The somewhat paradoxical position he found himself into (to invoke Innocent on Barbarius' case it is necessary to forget what the pope said on Barbarius' confirmation) forced Baldus to be particularly explicit in stressing the difference between person and office. This makes his approach to the *lex Barbarius* all the more interesting: in no other part of his opus does Baldus describe the difference between agent and office so openly as in his comment on Barbarius.

The paradox was that the outcome of Accursius' position (though not of course the reasoning behind it) was perfectly suited to Innocent's representation theory – and indeed Innocent approved of it. Baldus however could not possibly accept the presumed will of the people as explained in the Gloss. Bartolus' lame attempt at reconciling the *Ultramontani* with Accursius was fragile enough

25 *Supra*, pt. II, §7.6.

without also taking into account canon law influences. Hence Baldus' dilemma. Accepting the intervention of the superior authority would be an excellent example of the virtues of confirmation – in principle. Specifically on Barbarius' case, however, that would lead to the wrong conclusions. Innocent himself tried to be as vague as possible on the matter – and he could afford to, because his focus was not on Barbarius. Baldus could not, for he sought to give a detailed analysis of the Barbarius text. And a close reading of the *lex Barbarius* could not escape the critique of the old opinion of the Gloss. Toleration was the best way to solve Barbarius' case, if only toleration could be somehow applied skipping its very precondition – confirmation.[26]

26 Before going any further, it should be said that Baldus was not always coherent on the point. On some occasions, he might have found Barbarius' case too useful to be overlooked. So Baldus sometimes relied on it as an example of confirmation of the *indignus* in office, typically following Innocent's reasoning. See Baldus *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis commentaria*, cit., *fol.* 219*ra*, n. 83): 'Nunc de octauo puncto, scilicet de obedientia et iurisdictione: an sit obediendum minus iusto prelato qui est in pacifica possessione officii sui: et an possit exercere iurisdictionem suam in rebelles? Et videtur quod sic: vt in d. l. barbarius; sed in illa l(ege) concurrebant tria, scilicet superioris summa auctoritas: error communis … et publica vtilitas.' Id., *ad* Cod.8.47.2pr, § *Impuberem* (*svper VII, VIII et Nono Codici*, cit., *fol.* 180*vb*, n. 4): 'Ibi pretorem vel pro quibus cauetur cognitionem pretor iniunxit ibi per populum romanum. Dicit glos(a) imo fortius valet apud cesarem quam olim apud populum et est propter fictionem quia fingitur maiorem partem populi ibi esse sed in principe nulla est fictio sed est voluntas mera clara et expedita, vt l. barbarius de offi(cio) preto(rum) (Dig.1.14.3).' Id., *ad* X.1.6.34, § *Venerabilem* (*Baldvs svper Decretalibvs*, cit., *fol.* 65*vb*, n. 14): 'si eligitur pretor per gentem que non recognoscit superiorem efficitur legitimus atque liber, quia propter inclytam virtutem etiam si populus erraret fingitur consensisse propter bonum publicum, ff. de offi(cio) pret(orum) l. barbarius philippus (Dig.1.14.3).' Id., *ad* X.1.6.44, § *nichil* (*ibid.*, *fol.* 69*va*, n. 4): 'Item ex dictis Inn(ocentii) collige quod nullus confirmatus in curia dicitur proprie intrusus quia authoritas confirmationis tuetur eum, ff. de offi(cio) preto(rum) l. Barbarius (Dig.1.14.3), qui proprie adaptatur confirmatis a supremo cardine, i(d est) a populo romano olim vel a principe.' *Ibid.*, *fol.* 69*vb*: 'l. barbarius … dicit quod propter publicam vtilitatem et authoritatem et propter publicum errorem et propter publicam authoritatem (*sic*) que constitunt in magistratibus creatis licet perperam valent gesta a minus iusto pretore nec possunt pretextu non iurisdictionis infringi; et adde quod dixi C. de test(amentis) in l. i (Cod.6.23.1) in lec(tione) mea.' *Ibid.*, *fol.* 69*vb*, n. 11: 'Sed hic quaeritur quare tenetur facta barbarij. Respondeo vel quia praefectus pretorio confirmauit vel quia non indiguit confirmatione quia totus populus eum elegit secundum Inno(centium).' See further Baldus, *ad* Cod.6.23.1, § *Testes* (*Baldi de Pervsio Ivrisconsvlti clarissimi, svper Sexto Codicis Iustiniani libro Commentaria luculentissima* … Lvgdvni, typis Gaspar & Melchior Trechsel, 1539, *fol.* 57*va*, n. 12): '… non ob(stante) l(ege) barbarius quia ibi interuenit decretum superioris.' See further *supra*, last chapter, note 115, and *infra*, next chapter, note 62. A last case is, once

Relying on canon law terminology (especially in its use by Innocent), Baldus often stated that Barbarius lacked *canonicum ingressum* and so was an *intrusus*.[27] The intruder, as we know, is the opposite of the tolerated in office. Hence Baldus' problem: how to apply toleration without confirmation?

In his commentary on the *lex Barbarius*, the first item in Baldus' agenda was to make sure to exclude the confirmation by the prince. So Baldus starts by recalling the main obstacles in the text to the validity of Barbarius' praetorship. A first obstacle is the classical *lex Herennius* (mere enlistment as decurion does not make one such),[28] and similar other *leges*.[29] Recalling a typical argument of

again, in Baldus' comment on Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis commentaria*, cit., *fol.* 218*va*, n. 73): when the defect in the election is latent, 'confirmatus … non repellitur quamdiu est in possessione autoritate superioris, ar(gumentum) de offi(cio) presi(dis) (*sic*) <l.> barbarius (Dig.1.14.3), de rescri(ptis) <c.> sciscitatus (X.1.3.13) per Innoc(entium).' The mistaken reference to the title on the *officium praesidis* instead of the *officium praetorum* happens rather frequently in Baldus, but only when he is just mentioning the *lex Barbarius* in passing. The same mistake is also found in Innocent (who similarly referred to the *lex Barbarius* in passing): see e. g. *supra*, pt. II, §7.6, note 123. This might strengthen the impression that, in such cases, Baldus' reference to the *lex Barbarius* was rather superficial and based on Innocent's writings. When discussing specifically on Barbarius' case, much on the contrary, Baldus is extremely clear in rejecting the confirmation by the prince. He excludes as much in *lectura*, *repetitio* and *additio* on the *lex Barbarius*. These three texts were not written at the same time, so they attest to the continuity of Baldus' position on the matter. As such, it would be very surprising if Baldus did change his mind on the subject, not to mention that the cases in which he hints at Barbarius' confirmation are vastly outnumbered by those in which he denies as much throughout his *opus*, as we will see throughout this chapter. Allowing for the ratification of Barbarius's position would have contradicted Baldus' entire reasoning. On the contrary, it was precisely the separation between person and office that allowed Baldus to distinguish between the invalidity of Barbarius' appointment and the validity of his deeds.

27 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 55*va*, n. 20; *fol.* 55*vb*, n. 23; *fol.* 56*vb*, n. 40; Id., *repetitio ad* Dig.1.14.3, cit., *fol.* 57*vb*, n. 10 and 12. We will deal with the most significant parts of the *additio* later in this chapter, especially towards the end.

28 Id., *lectura ad* Dig.1.14.3, cit., *fol.* 55*rb*, n. 14: '… opponitur et videtur quod Barbarius non fuerit verus praetor, sed putatiuus, vt i(nfra) de decur(ionibus) l. Herennius (Dig.50.2.10), nam qui secundum legem creatus non est verus praetor non est, sicut nec verus decurio, qui non est electus secundum legem quae loquitur de electione decurionum: adeo vt etiam si perceperit commodum officii, tamen officium non dicatur habere, vt ibi patet. Sol(utio) ibi percepit commodum officii, i(d est) salarium sine titulo: quia non erat electus, vt no(tatur) i(nfra) de fal(sis) l. eos § qui se (Dig.48.10.27.2), secundum gl(ossam) et de illo intelligitur quod incidit in crimen falsi.' Cf. Dig.50.2.10 (Mod. 1 Resp.): 'Herennius Modestinus respondit sola albi proscriptione minime decurionem

the *Ultramontani* Baldus also notes that, if Barbarius was truly praetor, then the whole issue as to the validity of his acts would make no sense.[30] Another point made by the Orléanese jurists is further used to highlight the difference between Pomponius' remarks on Barbarius and Ulpian's explanation:[31]

> you say that Barbarius became praetor by this *lex*, and this is false. It is true that Pomponius said that the servile condition was of no obstacle [to the praetorship]. However, Ulpian referred that only with regard to its exercise, and when he asked whether [the servile condition] prevented [the entitlement to] the true *dignitas*, he did not offer a solution. But in acknowledging that solution only as to the exercise [of the praetorship], he seems to deny as much for the rest.

Another favourite argument of the *Ultramontani* was that Ulpian's skills, remarkable and manifold as they were, failed short of reading people's minds. Baldus follows suit: 'who can read the mind of someone who keeps silent?' Ulpian's statement that the people would have set Barbarius free had they known of his servitude, he says, remains speculative.[32] Again after the *Ultramontani*, Baldus also reads the same statement of Ulpian *a contrario*. Ulpian said that if the people had known that Barbarius was a slave, they would have set him

factum, qui secundum legem decurio creatus non sit.' Baldus' reference on the false decurion's salary came from the Gloss: *supra*, pt. I, §2.2, text and note 45.

29 In the *lectura* on Barbarius' case (*lectura ad* Dig.1.14.3, cit., *fol. 55rb*, n. 15) Baldus refers in particular to Dig.49.1.12 (Ulp. 2 opin.), which stated that the *duumvir* appointed without the legal requirements but simply owing to popular demand is void.

30 Id., *repetitio ad* Dig.1.14.3, cit., *fol. 57vb*, n. 10: 'praeterea si Barbarius fuit praetor, queritur quare formatur quaestio de actibus exercitis, an valeant, quis dubitat valere, cum sint facta a iusto praetore.' Baldus also deliberately twists the Gloss' reasoning, with an irony that no contemporary jurist could have failed to notice. In the *repetitio ad* Dig.1.14.3 (cit., *fol. 57vb*, n. 11) he says: 'Item pro gl(osa) sic facit, quia si Barbarius esset minus legitima persona, ergo pro nulla deberet reputari, in quod cuiusque uni(versitatis) nom(ine) l. i § quod si nemo (Dig.3.4.1.2). Et confirmo gl(osam) tali ratione.' Clearly the Gloss said as much only to warn about the gravity of the consequences of denying the validity of Barbarius' praetorship. Instead, Baldus pretends to take the Gloss at its face value.

31 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55rb*, n. 15: 'tu dicis, quod Barbarius fuit praetor per hanc l(egem) et hoc videtur falsum. Nam licet Pompo(nius) dixerit "ei non obfuisse seruitutem", tamen Vlpian(us) exponit quo ad exercitium, sed quo ad veram dignitatem an obfuerit, quaerit, et non soluit. Quinimmo ex quo de exercitio tantum fatetur, de alijs negare videtur.'

32 *Ibid.*, *fol. 56rb*, n. 32: 'Quaeritur ergo, an Barbarius fuerit liber effectus? Et glo(sa) dicit quod sic in potestate enim, et voluntate simul concurrentibus proficitur omnis actus humanus … sed hic est potestas, et voluntas ficta circa libertatem conferendam, et hoc aperte dicit litera. Sed certe imo requiritur tertium, s(cilicet) scientia, quae hic non est, et licet iurisconsultus dicat, quod liberum fecisset, non loquitur de iure sed de facto, quando enim potest Iurisc(onsultus) scire intentionem populi, quis enim silentis novit mentem?'

free. But this could also mean that if they had ignored his servile condition they would have left him as a slave.[33]

As a matter of principle, there is little doubt that the emperor could have confirmed Barbarius despite his servile condition. The question is however whether he wanted to. Discussing the *lex Iulia de ambitu*, Baldus' *lectura* clearly accepts the (abstract) faculty of the superior authority to confirm the election of the unworthy – and so, of tolerating him in office. The point is further developed in the *repetitio*. Again, the argument moves from the analogy with the confirmation by the superior of a murderer or even an occult simoniac elected to an ecclesiastical office. In so doing, Baldus relies especially on Innocent IV and Guido de Baysio (who, on the matter, followed Innocent).[34] Despite the gravity of the personal condition, concludes Baldus, the confirmation by the superior bestows full validity on the appointment.[35]

We have seen earlier how the confirmation of the unworthy by the superior authority allows the object of the *dignitas* to shift from that of the unworthy to

33 *Ibid.*, n. 35: 'Et per hoc facit, quia litera videtur corrigere dictum Pomponii. Item, quia loquitur conditionaliter, s(cilicet), "si sciuisset", et arg(umentum) a contrario sensu sumpto ex illa conditionali: secus et, si ignorauit.' Baldus comes back to the subject in the *repetitio ad* Dig.1.14.3 (cit., *fol. 58ra*, n. 14–16), especially to look at the (theoretical) problem of the validity of Barbarius' emancipation in terms of expropriation of private property (Barbarius was a slave, so he belonged to his master). Baldus discusses the issue not because of a change of heart between *lectura* and *repetitio*, but only for the sake of completeness – just like the *Ultramontani* did (*supra*, pt. I, §4.4, note 88). On the point, Baldus' discussion is not dissimilar from that of the thirteenth-century Orléanese professors, with some obvious differences mainly due to the growth of natural law ideas during the century separating them.

34 *Supra*, pt. II, §8.3.

35 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 57vb*, n. 11: 'vbi est defectus solum in persona electi, confirmatio superioris tribuit ei ius, et idem est in promotione. Vn(de) si homicida, qui est irregularis, vel simoniacus confirmetur in Episcopum, valet confirmatio, et erit prolatus tuitione confirmationis superioris, arg(umentum) quod fal(so) tut(ore) autor(e) l. i § idem Pompo(nius) (Dig.27.6.1.5), *Arch(idiaconus) viii q. i c. in scriptis (C.8, q.1, c.9). Nam in eum hoc ius cadere potest, uirtute confirmationis. Inn(ocentius) ext(ra) de concess(ione) praeben(dae) c. cum in nostris in prin(cipio) (X.3.8.6). Sed certum est, quod promotio Barbarij habuit uim electionis et confirmationis.* Facit quod no(tat) Arch(idiaconus) lxiii dist. in synodo (D.63, c.23), cum alium actum non requirat, sed trahit secum suum effectum, sicut confirmatio, de condi(cionibus) et de(monstrationibus) l. publi(us) (Dig.35.1.36pr) et no(tatur) per Inn(ocentium) in c. cum nihil, de elec(tione) (*rectius* 'nihil est': X.1.6.44) c. cum inter canonicos (X.1.6.21) et c. cum dilectus (X.1.6.32), eo tit(ulo) per Inno(centium), et hoc verum in confirmatione Principis.' Innocent's statement should be referred only to the occult simoniac, not to the notorious one: cf. Innocent IV, *ad* X.1.6.44, § *administrent* (*Commentaria Innocentii Quarti*, cit., *fol. 75va*, n. 5).

that of the superior. This way, the symmetry between *dignitas* of the office and *dignitas* of its incumbent is kept: the unworthy sits in office not because of his own *dignitas*, but because of that of the authority who confirmed him. This symmetry however also requires the gravity of the *indignitas* to be matched by a correspondingly higher *dignitas* of the superior. Not any superior authority, in other words, may confirm a particularly serious defect (a 'vitium intolerabile') in the elected.[36] Moving to civil law, and transposing these canon law rules into secular ones, Baldus concludes by arguing that only the appointment by the sovereign authority can remove any legal obstacle deriving from the person of the appointed, even the most serious ones. The authority of the sovereign allows the unworthy to exercise his office validly, because it is almost as if the sovereign himself acted through him.[37] The *dignitas* of the office is therefore more than matched by the *dignitas* of the sovereign. The intervention of the prince does not cure the underlying *indignitas* of the appointee to the office. It replaces it with its own *dignitas*. Speaking of replacement and not of full healing entails a subtle but important difference: the *dignitas* of the superior authority takes the place of the *indignitas* of the office holder, but it does not heal it. The moment this approbation no longer holds, the incumbent in office loses the support of the superior *dignitas* and is left with his own *indignitas*, so that he is precluded from exercising his office any further.

36 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 57vb*, n. 11: 'sed confirmatio inferioris non valet, si in electione sit vitium intolerabile, ita intelligo Inn(ocentium) in d(icto) c. cum dilectus (X.1.6.32) et adde quod no(tat) Inn(ocentius) de dolo, <c.> cum olim (X.2.14.7), et facit de excu(sationibus) tut(orum) qui test(ament)o (Inst.1.25.18).' Cf. *ibid.*, *fol. 58rb*, n. 22: 'Sed quid si Papa ex certa scientia tales [indignos] promouet? Dico, quod dispensare videtur, de re iudi(cata) l. quidam consulebant (Dig.42.1.57) et no(tandum) in l. ii C. de diuer(sis) offi(ciis) lib. xii (Cod.12.59.2). Inferiores autem non dispensant nisi causa cognita, et in casib(us) permissis, vt in c. at si clerici, extra de iudi(ciis) (X.2.1.4) per Ber(nardum Papiensis) et per Inno(centium), *extra de fi(liis) presby(terorum) c. veniens (X.1.17.5)* ubi dicit quod *non potest haberi* pro legitima dispensatione factum temerarium *inferiorum*, quod est *valde no(tum)*.' See also Baldus' *lectura ad* Dig.1.14.3, cit., *fol. 56va*, n. 38–39.

37 Id., *lectura ad* Dig.1.14.3, cit., *fol. 56va*, n. 37–38: 'Et vt sparsi per oppositionem tituli in vnum distinctionis fontem colligant, dic quod aut quis promouetur a Principe, vel quasi, vt a populo, qui in sua viuit libertate, vt Romanus, et Gallicus. Et tunc aut proprio motu et omnia valent, quia proprius motus omnem obreptionem excludit, vt in c. si motu proprio, de praeben(dis) lib. vi. (VI.3.4.23) aut ad supplicationem alterius; et tunc aut quo ad fauorem aliorum multorum, vel Reipublicae, vt in balneis, et statuis; et valent omnia, non quasi ipse fecerit, qui indignus est, sed quasi fecerit Princeps, qui auctoritatem dedit. C. de ve(teri) iu(re) enu(cleando) l. i § omnia (Cod.1.17.1.14).'

So far, Baldus seems to be following Innocent's thinking closely. Baldus, however, must avoid its logical conclusion – without confirmation, the unworthy remains an intruder. Hence he continues his reasoning by introducing two problems. One is general, on the mechanism of the confirmation; the other is more specific, on the actual intention of the prince to confirm unworthy people such as Barbarius.

The general problem is that the confirmation of the superior is valid only if the superior knew of the defect of the person elected to the office. On the point Baldus has an easy card to play: because of his scant interest in the *lex Barbarius*, Innocent did not say expressly that the prince knew of Barbarius' defect when confirming him in office. Interpreting Innocent's own principles in the light of a different reading of the *lex Barbarius*, therefore, Baldus could use them against the validity of Barbarius' praetorship. Innocent was very clear on the need for knowledge: confirmation may even ratify an invalid election, but only if the superior acted 'with full knowledge' (*ex certa scientia*) of the cause of invalidity.[38] Baldus follows suit. In his *lectura* he moves from the case of the occult simoniac so as to draw – once again – an analogy with the case of Barbarius. The confirmation by the superior who has no knowledge of the underlying defect does not cure the simoniac election. By the same token, the confirmation of Barbarius cannot cure his servile status if it was not disclosed to the prince. In the *lectura* Baldus says as much in general terms.[39] In the *repetitio* he is more explicit: Barbarius was not confirmed by the prince, but even a hypothetical confirmation would be void, for it would be given without knowledge of the underlying defect.[40]

38 Cf. Innocent IV, *ad* X.1.6.32, § *Confirmauit* (*Commentaria Innocentii Quarti*, cit., *fol.* 63*ra*, n. 1, and *fol.* 63*rb*, n. 2), *supra*, pt. II, §7.1, notes 9 and 10 respectively. The above discussion of the confirmation of the unworthy and the *indignitas* of the confirmed might help us to better appreciate why confirmation required full knowledge of the underlying defect. As we have seen, the intervention of the superior authority replaced the *indignitas* (unworthiness and so unfitness) of the office holder with its own higher *dignitas*. On the basis of that higher *dignitas* the unworthy could be considered fit to exercise the office (and – from the outside – worthy of doing so). It is however not possible to imagine that the *dignitas* of the superior might replace the *indignitas* of the tolerated in office without the precise intention of the superior authority. And the superior could act intentionally only if fully aware of the underlying *indignitas*.

39 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 55*ra*, n. 9: '… aut nulla intervenit confirmatio, et nihil valet, nec ad liberandum, nec ad obligandum; aut intervenit confirmatio, sed invalida propter vitium latens, et tunc valent gesta ad liberandum, sed non ad obligandum ipsa<m> dignitatem, vel officium; aut intervenit confirmatio efficax, et tunc omnia valent, quia praetor suum factum tueri debet.'

40 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 57*vb*, n. 10: 'praeterea aut Barbarius est praetor de iure communi, aut dispensatiue: primo modo non, quia non capax, nec secundo, quia super defectu *praesumpto*, quia non intelligitur dispensatum,

The same conclusion may be reached through different and more general reasoning. There are four cases in which one seeks an office, says Baldus in the *lectura*: (1) when the office already belongs to someone (who is just seeking to recover its possession), (2) when one is elected but not yet confirmed and installed in office, (3) when one is unworthy of it or unable to exercise it, and (4) when none of the above cases applies. The choice of the superior authority as to the conferment of the office, explains Baldus, is only about this forth case – and so, on the request made by someone who is neither entitled nor unable to discharge an office. In the other three cases there is no choice to be made, either because it is only a question of enforcing or allowing a rightful claim (as in the first and second cases respectively),[41] or because the request is inadmissible and should not even be made (as in the third case). Barbarius' situation clearly falls in this third case, and a void request should not even be taken into account.[42]

Having ruled out the validity of a hypothetical confirmation in general terms, Baldus then seeks to dismiss the possibility that this might have occurred in practice. The fact that Ulpian contemplated such a possibility compels Baldus to discuss it, and he does so in several ways.

A first and rather direct way is turning the Gloss against itself. In the *lex Barbarius* the Gloss did not speak of a clear intention of the prince to ratify Barbarius' election, but assumed as much on the basis of the presumed will. Elsewhere, however, commenting on the *lex Quidem consulebat* (Dig.42.1.57), the Gloss was far more explicit. As we have seen in the analysis of the Gloss,[43] this *lex* drew a parallel between the minor chosen as *iudex* and appointed as

de re iudi(cata) l. quidam consulebant (Dig.42.1.57) et de excus(ationibus) tut(orum) <l.> idem (Dig.27.1.12pr), *et de nat(alibus) rest(ituendis) l. i (Dig.40.11.1)*, de pecu(lio) leg(ato) <l.> cum dominus (Dig.33.8.19pr).'

41 Considering also the second case (that of the elected seeking confirmation in office) in terms of rightful claim might imply that confirmation is a right of the elected. The point was of course more complex, but Baldus' argument was instrumental to a different purpose – denying the validity of a possible petition by Barbarius.

42 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55ra*, n. 10: 'aut dignitas est sua, aut sibi debita ex praecedenti ordinatione, puta quia electus aut si indebita, puta quia inhabilis et indignus, aut neutro istorum modorum. Primo casu quis potest eam petere, et vendicare, extra de iudi(ciis) c. fi. (X.2.1.21). Secundo casu potest petere, vt confirmetur, et legitime inchoatum est sine debito, vt consumetur, extra, de elect(ione) c. cum inter canonicos (X.1.6.21). Tertio caso non potest petere, C. si seruus aut liber(tus) ad decu(rionatum) aspi(raverit) l. ii lib. x (Cod.10.33.2) … Quarto casu est in superioris arbitrio notare petentem de ambito, necne; et si superior admittit, non censetur impetrans ambitiosus, sed dignus.'

43 *Supra*, pt. I, §2.4.

magistrate. In the first case the validity depended on the consent of the parties; in the second, on the will of the prince. The Gloss remarked on the similarity between the legal incapacity of the minor and that of the slave, in order to highlight the will of the prince. If the prince could make up for the incapacity of the minor, why not also for that of the slave? The Gloss however did not push the equation as far as suggesting that the prince would deliberately appoint a slave as praetor. Rather, it used the analogy to argue that, in principle, the prince could heal the irregularity in Barbarius' praetorship.[44] In his *lectura*, much to the contrary, Baldus highlights the implicit innuendo in the Gloss, with the deliberate intent to weaken its conclusion. In the case of a minor, says Baldus, the only incapacity is the minor age. In the case of Barbarius, however, the incapacity is much more serious. It is therefore not possible to imagine that the prince would have appointed Barbarius despite his status as a slave. Doing so would amount to ascribing unworthy behaviour to the prince, 'for it may not be presumed that the prince wanted to infringe the *ius commune* (as in Cod.3.28.35pr),[45] nor that he wanted to promote odious and criminal people (as in Dig.31.1.88.11)'.[46]

The same point is further elaborated in the *repetitio*. There, not only does Baldus describe Barbarius as unworthy (*indignus*), but also refers this unworthiness – by extension – to the debate on his praetorship. The baseness of Barbarius makes it unworthy to even speculate about his possible freedom: 'arguing in favour of Barbarius, who deceived the people, would be unworthy (*indignum*),

44 *Ibid.*, esp. note 81.

45 Literally, the reference is to Cod.3.28.33pr (the *lex Si quis*), but that is very likely a typo for Cod.3.28.35pr (the *lex Si quando*): cf. Baldus, *ad* Cod.3.28.35pr, § *Si quando* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 195*ra*), n. 1: 'nota quod princeps sub verbis generalibus non intelligitur velle concedere illud quod est iniquum vel absurdum: vnde licet concedat alicui quod libere possit testar, tamen non potest filium praeterire vel exheredare sine causa.'

46 Id., *lectura ad* Dig.1.14.3, cit., *fol.* 55*va*, n. 16: 'Et si dicatur si Princeps hoc obtulisset, dispensasset. R(espondeo), hoc nego: quia non praesumitur quod Princeps velit infringere ius commune, C. de inof(ficioso) te(stamento) l. si quis in princ(ipio) (Cod.3.28.33pr, *sed* Cod.3.28.35pr) nec praesumit quod velit, promouere odiosos et multiplicter criminosos, arg(umentum) de leg(atis) ii <l.> Lucius § Lucius Titius damam (Dig.31.1.88.11).' This last *lex* (Scaevola 3 resp.) was one of the several Roman law texts that highlighted the importance of ascertaining the testator's precise will. But it was one of the few ones to make clear that, when the will had to be referred to specific facts or actions, it should be ascertained by looking at the precise moment when such facts or actions were committed. Applied to the appointment of Barbarius by the prince, this criterion would bar the Gloss' argument of presumed will (which sought to interpret the intention of the prince at the time of the appointment according to the future consequences that such an appointment would have).

first of all because, having committed a crime and being *infamis*, he did not enter lawfully in his office.'[47]

A second and more nuanced way to dismiss the actual occurrence of Barbarius' confirmation was introducing a semantic distinction. Allowing something, Baldus notes, might denote approbation or just forbearance. For instance, nothing could happen against God's will. But not everything happens because God wants it to. Sometimes God just allows things to happen without necessarily approving of them. In the same way, argues Baldus, when the prince allows something he might just suffer it to happen without endorsing it.[48]

Also on this point, Baldus goes further in the *repetitio*. There, he is determined not to allow even the mere possibility of a hypothetical confirmation.[49] To do so, he highlights the ambiguity of the final statement of the *lex Barbarius* – that the prince could set Barbarius free 'much more' (*multo magis*) than the people. From Azo onwards, as we have seen, this passage was always interpreted in a restrictive way: the sovereignty of the prince is the same as that of the Romans, but it is easier for a single individual to decide something than it is for a large group of people.[50] Baldus however exploits the ambiguity in the words 'multo magis' to turn the explanation of the Gloss against itself: while a single person might decide more swiftly than a whole people, it is much easier for a single individual

47 Id., *repetitio ad* Dig.1.14.3, cit., *fol.* 57*vb*, n. 10: 'Barbario autem fauere, qui decepit populum, indignum est, et maxime quia criminosus, et infamis non habuit canonicum ingressum.'

48 Id., *lectura ad* Dig.1.14.3, cit., *fol.* 56*va*, n. 38: 'Principe dico fecisse permissiue, non formaliter, sicut Deus permittit: tamen Deus non facit; aut loquimur ad fauorem obrepentis, et tunc quantum est in se, ipse non meretur honorem, sed pudorem.' To better explain Baldus' concept of forbearance, it might be useful to look at the related concept of *patientia superioris*. In Baldus, such a *patientia* would seem to entail tacit approbation through inertia. The difference with explicit approbation (i. e. confirmation/ratification) is that *patientia* of the superior authority does not produce the full consequences of confirmation, but it simply inhibits the effects of its absence. Unlike *patientia*, forbearance does not entail a judgment value, and so neither tacit approval. The concept of *patientia superioris* in Baldus is particularly clear in his main writing on tyranny, the commentary on the *lex Decernimus* (Cod.1.2.16). Tyrant, says Baldus, is only the usurper whom the prince is unable to subdue, not also the usurper whom the prince tolerates (*patitur*) because he rules well. It follows that the deeds of such a tolerated usurper are valid. Cf. Baldus, *ad* Cod.1.2.16, critical edition in Quaglioni (1980), p. 79, n. 2.

49 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*vb*, n. 30: 'nec possumus arguere in contrarium ex litera conditionali, quae dicit "si scisset", *quia verum si scivisset et creasset*; sed praesumitur non creaturus esse, si sciuisset indignum, quia non praesumitur id factum esse quod fieri non *debeat*.'

50 *Supra*, pt. I, §2.4.

to be mistaken than for the whole community.[51] So the interpretation of the Gloss is wrong. What the *lex* really meant, concludes Baldus, is that Barbarius would be in a stronger position if he was created emperor himself. For so long as one is Christian, no personal defect may be invoked to prevent his coronation as emperor.[52] The explanation is apparently eccentric in respect of the context. In fact, it purportedly undermines the strength of the whole passage. Clearly Barbarius was no emperor. So one may safely overlook the passage and, with it, the possibility of Barbarius' confirmation by the emperor. The difference with the Gloss could hardly be more pronounced: far from being the cornerstone of the whole reading of the *lex Barbarius*, the reference to the prince becomes a marginal curiosity.

In the *additio* on the *lex Barbarius* Baldus follows a different and more direct approach to adapting Innocent's conclusions on Barbarius (toleration because

51 It might be noted that, by Baldus' time, the possibilty that the prince made a mistake was discussed more openly than in the time of Accursius (cf. *supra*, pt. I, §2.5). So for instance Bartolus already said that, swhile not likely, the prince might well make a mistake: Bartolus, *ad* Dig.33.10.3.5, § *Sed et de his* (*In II. Partem Infortiati*, cit., p. 251, n. 3): 'non est uerisimile quod [princeps] erret, sed errare potest.' In stating as much, Bartolus was building on what Jacobus de Arena had already said: if the prince enacts a new provision in the mistaken belief that he was just applying an old one, the new provision is void: 'Finaliter Iac(obus) de Are(na), quem sequitur Old(radus de Ponte), dicit multum bene, iudicio meo: Quandoque Princeps uel alius qui habet ius condendi, errat in ipsa legis constitutione, quam in ueritate non intendit legem constituere sed utitur tanquam sit iam constitututum: tunc non facit ius talis error, quoniam deficit consensus' (*ibid.*, p. 250, n. 1).

52 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 58vb*, n. 30–31: 'Venio ad vltimam partem, dicitur hic quod multomagis in Imperatore. Contra, *quia* immo pari ratione, et *quia* pari potestate, et sicut in natura pari vnus alio maior non est {secundum August(inum)}, et no(tatur) de manu(missis) {vind(icta)} l. apud eum (Dig.40.1.14pr): ita nec id praesertim, quia a populo processit l. i de consti(tutionibus) prin(cipum) (Dig.1.4.1), l. ii § novissime, de orig(ine) iu(ris) (Dig.1.2.2.11). Sol(utio) verum ex parte potestatis, sed ex parte consensus facilius, et verius consentit vnus, quam *plures*, *ut l. i in fi(ne) in(fra) de acqui(renda) pos(sessione) (Dig.41.2.22)*; facit quod no(tat) Inn(ocentius) in c. *gravem* de sent(entia) excom(municationis) (X.5.39.53). *Secundo* opp(onitur) si errat Princeps, errat vnus, et non error communis: ergo multo minus debet dicere, non multomagis {Sol(utio), non attenditur hic error communis respectu creantis, sed respectu subditorum, et secundum h(oc) d(ictum) multomagis quam in populo, vel dic nouam expositionem multomagis} quam in Barbario, *et* sit sensus, vt si Barbarius fuisset creatus Imperator, minus noceret ei seruitus quam praetor, quia Imperatori nihil opponi potest, dummodo sit catholicus {sicut sunt Alamani, qui sunt optimo catholici, et fideles, sicut et Papae} *Expositione glo(sae)* {ergo} *loquit* in Imperatore creante, ergo etiam in Imperatore creato *quod no(tatur)*.'

confirmation by the prince) towards the desired outcome (toleration despite the lack of confirmation). This different approach is based on one of the most successful and widely employed legal techniques in the history of the *ius commune*: selective quotation. The selection in question comes from three comments of Innocent. In the first (his comment on X.1.6.28), the pope stated that some elections may not be confirmed and the acts remain void. In the second (his comment on X.1.6.32) – according to Baldus – Innocent changed his mind. There, the pope allegedly argued that even if the confirmation is void, nonetheless the acts carried out by the elected are valid on the basis of public utility and the common mistake as to the validity of the election itself. This, observes Baldus, is true if the defect lies only in the election, not also in the confirmation. Indeed, he concludes, Innocent himself said as much when commenting on X.1.6.17.[53]

The best lies always contain some truth. In the first passage (X.1.6.28) the pope distinguished between election carried out in violation of natural and positive law. As we have seen,[54] only the first kind is *ipso iure* void and therefore may not be confirmed. In such a case, the elected remains an intruder, so his deeds are void. We have also seen that the only example provided by Innocent was, somewhat ambiguously, that of simony.[55] The second passage of Innocent quoted by Baldus contains the most important comment on the *lex Barbarius* made by Innocent in his whole opus. The summary provided by Baldus is correct in its form, but misrepresents in the substance. Baldus refers only to the beginning of Innocent's reasoning. There, the pope was simply observing that, at first sight, the *lex Barbarius* might lend validity to the acts despite the lack of confirmation by the prince. Innocent said as much in canon law language: the confirmation might be void, and yet Barbarius seems to be tolerated in office, so his acts are valid.[56] Immediately thereafter, however, Innocent continued and said that a different explanation might well be that the *lex Barbarius* referred only

53 Id., *additio ad* Dig.1.14.3, *fol. 59rb*, n. 9: 'tamen hoc quod Inno(centius) dicit in c. quod sicut (X.1.6.28), modificat in c. cum dilectus, eo ti(tulo) (X.1.6.32), quod licet sit nulla confirmatio, acta valent fungente publica vtilitate et errore communi per hanc l(egem) [*scil.*, the *lex Barbarius*]. Ego dico hoc esse verum vbi delictum est in sola electione. Si autem est in confirmatione, dubito an acta valerent, et est arg(umentum) quod no(tatur) i(nfra) qui satis(dare) cog(antur) l. quotiens vitiose (Dig.2.8.6), cum si nam non valerent si nulla confirmatio esset facta, et no(tat) idem Inn(ocentius) de ele(ctione) qualiter (X.1.6.17) et ad l. nostram.'

54 *Supra*, last chapter, note 94.

55 *Ibid.* As said, it is possible that Innocent was only thinking in sacramental terms, not also in jurisdictional ones.

56 Cf. *supra*, pt. II, §7.6, note 113.

to cases where the confirmation by the prince was validly given.[57] This was clearly Innocent's choice, so he went on stressing the need of valid confirmation in any case.[58] Baldus however ignores the rest of Innocent's passage. To strengthen his conclusion, Baldus points to a third comment of Innocent (X.1.6.17). There, says Baldus, not only did Innocent affirm that the deeds of the elected are void if he is not confirmed in office, but he even gave Barbarius' case as an example of lack of confirmation. As a matter of fact, in that comment Innocent did say that the administration of the office is void without proper confirmation. And he also added that, on the contrary, proper confirmation cures the defect in the election. To stress the point, he reported two cases in the sources: the case where the confirmation cured the invalidity was precisely the *lex Barbarius*.[59]

12.3 Common mistake and public utility

Seeking to use toleration without confirmation, Baldus has to bar any route leading to the validity of Barbarius' praetorship. That means first of all excluding confirmation by the prince or the people, but also checking the consequences of the common mistake.

We have seen earlier how the Gloss coloured with intentionality the common mistake for the sake of public utility: the people's mistake as to Barbarius' status

57 *Ibid*.

58 *Ibid.*, text and note 116.

59 Innocent IV, *ad* X.1.6.17, § *Tenere* (*Commentaria Innocentii Quarti*, cit., *fol.* 48*ra*): 'quia non fuit electio confirmata: alias secus, ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3), *infra*, de iurepatro(natus) <c.> consultationibus (X.3.38.19).' Innocent recalled these two cases so as to oppose one to the other: the specific case of the patron (*patronus*) to which he referred was that of someone who was found to be the rightful patron (i. e. holder of the *ius patronatus*) in a legal decision, while in fact he was only in possession of the *ius patronatus* and, worse still, in a bad faith possession. Commenting on that case, Innocent drew a distinction between *ius patronatus* and public office: the patron in bad faith is still acting as a private person, not in the exercise of an office. The legal decision (wrongly) acknowledging his *ius patronatus*, therefore, does not count as confirmation in it: cf. Innocent, *ad* X.3.38.19, § *Consultationibus, ibid.*, *fol.* 442*va–b*, n. 1–3). This way, the contrast with the other case, that of Barbarius, becomes clear. Both the patron and Barbarius were in bad faith, but only the latter exercised a public office. Innocent therefore did not seek to narrow the effects of the confirmation of an invalid election. Rather, he applied the toleration principle on the basis of representation: in the case of the patron there was no legal representation, so the judicial decision acknowledging him as *patronus* could lead neither to toleration nor, consequently, to the validity of the acts.

is to be qualified as implicit consent for public utility considerations. So, while the people were not aware that they had elected a slave, they should be considered willing to set that slave free so as to ratify his acts as praetor. In the elaboration of the *Ultramontani*, the common mistake was described in terms of public utility. Cugno insisted that the common mistake ought to be read in the light of public utility, and should not be invoked alone. Bellapertica relied exclusively on public utility: for him, the only function of the common mistake was to trigger public utility considerations, and then to fade away. Bartolus' attempt to combine Bellapertica with the Gloss left little room for the common mistake as well. The validity of Barbarius' praetorship (which Bartolus described after the Gloss) depended on the presumed will of the people (where the mistake became presumed will, and so intentionality), while the validity of his deeds (on which Bartolus followed Bellapertica) derived exclusively from public utility.

Also in Baldus public utility is the ultimate reason for the validity of Barbarius' deeds. But – and quite unlike Bellapertica – public utility does not apply directly. It remains in the background. The mechanism by which the deeds become valid is an adaptation of Innocent's concept of toleration. Just as in Innocent, so in Baldus toleration ultimately furthers public utility. This however does not mean that toleration can be invoked for public utility considerations. Toleration must come first. Innocent spoke of public utility only after having clearly structured and fully explained his concept of toleration. This was deliberate: invoking a direct application of public utility would have led to obliterating the whole concept of representation. It was much safer to consider toleration as a manifestation (and so, an indirect application) of public utility, making sure that public utility would operate through toleration and not directly. Baldus does the same. With regard to the *lex Barbarius*, invoking public utility directly would lead either to the confirmation of Barbarius being presumed (as in Accursius), this way blurring the difference between intruder and lawful agent, or – even worse – to an unbridled and indiscriminate application of public utility (as in Bellapertica), and so, ultimately, to the denial of representation itself.

If not tamed, common mistake could become a problem. The main reason Baldus discusses it is therefore to bar its possible application either to the person of Barbarius (making him truly praetor and circumventing the role of the superior authority) or to his deeds (making them valid and skipping the whole representation issue). The first instance is to be completely excluded: common mistake must not lead to presumed will. The second one is of course different. Without common mistake, there would be no reason to invoke public utility to begin with. What must be avoided is a direct application of the common mistake to the deeds.

As Baldus says in the *repetitio*, the three reasons that traditionally supported Barbarius' praetorship – common mistake, confirmation by superior authority and public good – may not stand all together: one would exclude the other.[60] Highlighting their mutual incompatibility, Baldus seeks both to exclude the occurrence of confirmation and to narrow down the effects of the common mistake, subordinating it to public utility.

Public utility and ratification of Barbarius' position by the superior authority may well stand together – the former can be considered the reason for the latter. This is what the Gloss did: looking at the common mistake in the light of public utility, the Gloss qualified the mistake of the people as implied consent. Seeking to avoid that result, Baldus focuses more on the relationship between superior authority and common mistake, so as to play one against the other. An obvious way to do so is to recall the *Ultramontani*'s slogan on the opposition between consent and volition. Baldus does as much in the *lectura*: as mistake is the opposite of consent, a mistaken choice is no choice at all.[61] In the *additio* Baldus comes back to the point, but more subtly. The Gloss ascribed intentionality to the common mistake, and argued for presumed will to confirm Barbarius. In so doing, it focused almost exclusively on the common mistake and considered the

60 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*ra*, n. 17: 'Modo restat quaerere, an communis error populi, publica auctoritas, et communis vtilitas, omnia illa tria essentialiter requirantur ad *ualidationem* actorum? Et videtur quod sufficiat superioris auctoritas cum quasi possessione libertatis, vt C. de sen(tentiis) l. si arbiter (Cod.7.45.2). Econtra videtur quod propter periculum multorum dispenset haec lex, et sit finalis ratio, publica vtilitas {uel quasi}, econtra videtur quod sufficit solus error communis, quia facit ius, et maxime in iudice ordinario, *cui subditus nihil potest opponere*, ex quo est in pacifica quasi possessione iurisdictionis autoritate superioris, vt no(tat) Inn(ocentius) per hanc l. de offi(cio) dele(gatis) <c.> cum super (X.1.29.23), Arch(idiaconus) viii quaest(io) iiii c. nonne (C.8, q.4, c.1), vbi omnino vide(tur) nam quasi possessio non debet esse sterilis. Parit ergo vsum quendam, qui est exercere ipsam iurisdictionem, vt not(at) Inno(centius) de resti(tutione) spol(iatorum) c. literis (X.2.13.5).'

61 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 55*rb*, n. 12: 'error est contrarius consensui, et impedit actum, maxime iurisdictionalem, ut in de iu(risdictione) om(nium) iu(dicium) l. si per errorem (Dig.2.1.15).' Cf. Dig.2.1.15 (Ulp. 2 de omn. trib.): '… non consentiant qui errent: quid enim tam contrarium consensui est quam error …?' Baldus said something very similar in a *consilium*. The subject was a dispute as to the *ius patronatus* among the heirs of the founder of a charitable institution (*hospitale*) in the city of Arezzo. One party was mistakenly considered to be the sole *patronus*, and Baldus was probably advising his opponent. To exclude the legal relevance of the mistake, among other things, Baldus invoked the *lex Barbarius* 'secundum lectura modernorum, quae tenet, quod Barbarius non fuerit, vt supra praetor, ex eo quod populus si sciuisset, liberum effecisset.' Baldus, cons.2.399 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini*, cit., *fol.* 107*va–b*, n. 1).

will of the prince as flowing from it. But even if the prince had truly ratified Barbarius' election, says Baldus, the validity of his appointment would have depended on the prince's authority, not on the common mistake. In other words, there may be no direct relationship between common mistake and Barbarius' praetorship.[62] In the *repetitio* Baldus is more explicit: without the intervention of the superior authority (which, in the *lex Barbarius*, does not occur), it would be useless invoking the common mistake – whether of the whole people, or even 'of the whole world'.[63]

Having solved one problem, Baldus moves to the other: the relationship between common mistake and public utility. The Gloss emphasised the mistake not only to justify the validity of Barbarius' appointment, but especially to rescue his deeds. In so doing, it stressed the maxim 'common mistake makes law'. This maxim is clearly problematic, for it might well lead to the neglect, or even the implicit exclusion, of public utility – ultimately, the position of Odofredus. To avoid that result, Baldus seeks to emphasise the instrumentality of common mistake to public utility. Common mistake may produce legal effects only insofar as it furthers public utility, but not by itself.[64] The mistake may be

62 Baldus, *additio ad* Dig.1.14.3, cit., *fol. 59va*, n. 12: 'Ibi "Qui facit ius" [*scil.* Gloss ad Dig.1.14.3, § *functus sit*, 'hic autem est plus, scilicet communis error, qui facit ius', *supra*, pt. I, §2.2, note 45], hoc non videtur verum. Vnde quaero, si Barbarius fuit liber antequam praetor designaretur, et constat quod non, vt i(nfra) de prob(ationibus) <l.> circa eum (Dig.22.3.14), et l. moueor, in prin(cipio) (Cod.4.55.4pr) ergo error communis, qui tunc aderat ius libertatis non praestat, ergo glo(sa) male dicit. Nam posito quod esset praetor, hoc non facit error communis, sed auctoritas superioris; vnde error non est ratio immediata, etiam tenendo quod Barbarius fuerit praetor. Sed ratio est auctoritas superioris.' Cp. Bartolus, *supra*, pt. I, §5.3–4, notes 33 and 44.

63 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 58vb*, n. 29: 'Deinde quaero, quomodo colligitur hic, quod error communis facit ius? Nam si non interuenisset hic factum superioris, nedum error populi, sed {etiam} error totius mundi non *pareret* ius aliquod.'

64 On this basis Baldus rejects (without mentioning him expressly) one of the arguments advanced by Bartolus, based on the analogy with the failure of the parties to recuse the incompetent judge. In that case, observes Baldus, the reason for the validity of the decision of the incompetent judge depends on the parties' negligence in not having objected to his jurisdiction prior to the joining of the issue. By contrast, in the *lex Barbarius* the problem is not the people's negligence but their ignorance based on a mistaken belief. Besides, the text of the *lex Barbarius* speaks of the validity of both Barbarius' decisions and his statutes (on which *supra*, pt. I, §2.1, note 24), and clearly the simple lack of objections as to the validity of the source cannot lead to the validity of a new statute. So, argues Baldus, the validity of the deeds of Barbarius cannot depend on omitting to raise an exception against his person ('in exceptione omissa') but on the validity of the office ('in creatione officii'), which ultimately depends on public utility. Baldus,

invoked to uphold the deeds of Barbarius only through public utility. This is possible only if the mistake is a common one: a mistake of the whole people affects the entire commonwealth and so triggers public utility considerations. Highlighting the universality of the mistake therefore means invoking public utility considerations.[65] In the Roman law sources, Baldus observes, there are cases where the mistake invalidates even the deeds of public authorities. But in these cases, he argues, the deeds were made for the sake of individuals, not for the common good.[66] This strengthens the need to subordinate common mistake to public utility. Shifting the discussion from common mistake to public utility has the further advantage that it implicitly answers (in the negative) the question of whether the common mistake makes law, without at the same time contradicting the rationale of the whole *lex Barbarius*. The idea that a mistake may create law is hardly appealing to Baldus. In his *repetitio* he deals with some passages in the sources that might lead to that conclusion, only to qualify them as specific exceptions made on equitable grounds.[67] Normally, he notes, the

lectura ad Dig.1.14.3, *fol. 55vb*, n. 25: 'contra hoc opponitur, et videtur quod acta coram Barbario teneant de iustitia rigoris, quia cum nihil fuerit obiectum contra iurisdictionem: ergo mero iure tenet processus, C. de excep(tionibus) l. si quia (Cod.8.35.12) omissio exceptionis declinatoriae personam iudicis legitimat. Sol(utio) istud est verum quando exceptio omittitur per negligentiam, sed hic non fuit negligentia sed ignorantia, vel error. Praeterea l. nostra loquitur non solum in processibus, sed etiam in statutis, in quibus nulla prorogatio interuenit: vnde l. nostra non fundatur in excep(tione) omissa, sed in creatione officii, quia haec l. iustificat non ex persona, sed ex causa, s(cilicet) publicae vtilitatis.'

65 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55rb*, n. 12: 'Sol(utio) ibi in errore privatae personae, hic in errore publico, i(d est) populi, vel publicae personae, hoc est Caesaris. Actus nam quod publicae auctoritati innititur, validior esse debet propter publicum favorem.' Cf. also Id., *ad* Dig.2.1.15, § *Si per errorem* (*In Primam Digesti Veteris Partem*, cit., *fol.* 80*rb*).

66 Id., *lectura ad* Dig.1.14.3, cit., *fol. 55rb*, n. 12: 'Sol(utio) in illis l(egibus) tractatur de commodo priuatorum, hic de vtilitate vniuersorum saltem potentia, et aptitudine.'

67 The reference is mainly to the third party in good faith, who is allowed to recover his debt despite the senatus consultum Macedonianus. At first sight, this might seem a case where common mistake would suffice despite the lack of common utility. On the contrary, explains Baldus in his *repetitio*, the protection of the third party in good faith depends on a specific exception to the senatus consultum itself. Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 58vb*, n. 29: 'Sed opponitur, et videtur quod non solum in facto communi, et generali, sed etiam in facto contractu speciali communis error ius facit inter partes, vt ad Maced(onianum) l. iii (Dig.14.6.3) et C. ad Maced(onianum) l. Xenodorus (Cod.4.28.2). Sol(utio) istud speciale *hodie in exceptione macedoniani*. Nam ille qui credit eum cui mutuat, esse patremfa(milias) non contemnit Macedonianum. Et ideo {contemnendus} non est {nec} damnificandus in amissione pecuniae mutuatae, quia agit de damno vitando, vbi error facti non nocet.'

opposite is true: when the belief is against the truth, truth prevails. Barbarius' case is rather peculiar, he concedes, but that does not mean that mistake could make law – let alone make Barbarius a true praetor.[68]

Speaking of common mistake, Baldus introduces the most important element of his reading of the *lex Barbarius*: the difference between person and office. Among the many reasons against the validity of Barbarius' election a first and obvious one is Barbarius' fraud. Posing as a suitable candidate to the praetorship, observes Baldus in the *lectura*, is clearly *dolus causam dans* (i. e. the kind of fraud without which something – in this case, the election – would have not occurred), leading to the invalidity of the appointment.[69] While useful in rejecting the validity of Barbarius' praetorship, however, the argument of *dolus causam dans* might also reach his deeds and similarly void them. To avoid that, Baldus comes back to the point in his *repetitio*, where he recalls the case of the

68 *Ibid.*, n. 30: 'In l(ege) nostra apparet quod opinio communis praeualet veritati. Alibi vero nihil valet, nisi cum veritate concurrat, de acqui(renda) here(ditate) l. cum quidam § quod dicitur (Dig.29.2.30.1). Alibi *dicitur* veritas opinioni praefertur, i(nfra) de iniur(iis) l. eum qui § fi. (Dig.47.10.18.5), gl(osa) i(nfra) de haere(dibus) insti(tuendis) *l. Tiberius Caesar* (Dig.28.5.42) dicit quod *ubi ignoramus certitudine vountatis veritas preferenda est* [cf. Gloss *ad* Dig.28.5.42, § *Et hoc titum*, Parisiis 1566, vol. 2, col. 481]; immo *Inn*(*ocentius*) dicit quod veritas regulariter est preferenda. Fallit quandoque vt hic cum simi(libus) *vt notatur per* Inn(ocentium) de biga(mis) <c.> nuper (X.1.21.4), *in isto* generali non insisto *ad praesens*. Deinde no(tat) gl(osa) quod legitime actum {est}, ex supervenienti casu non retractatur, et colligitur istud notabile quo ad acta, quia legitime processerunt, non quo ad *effectum* Barbarii, quia non processit legitime secundum verum intellectum.' Cf. Innocent IV *ad* X.1.6.32, § *Confirmauit* (*supra*, pt. II, §7.6, note 120).

69 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55va*, n. 16–17: 'Item dolus Barbarii dedit causam electioni: quia simulauit se dignum. Ergo electio non valuit, de nata(libus) resti(tuendis) l. i (Dig.40.11.1). Item dignitas non cadit in servo. Item errans non consentit. Item error in qualitate substantiali videtur esse error finalis causae, C. de haer(edibus) insti(tuendis) l. si pater (Cod.6.24.4). Item Barbarius, quia seruus, non potest esse in possessione praeturae, ergo nec in proprietate, qua iuris est … Item ubi non est consensus, ibi non est ma(teria) et per consequens nec forma et sic deficiunt prima principalia fiendi et effendi.' Cf. Gloss *ad* Dig.40.11.1, § *Principe* (Parisiis 1566, vol. 3, col. 329): 'Quidam seruus iuit ad principem, et dixit ei se fuisse natum ex ingenua matrem tamen postea effectus erat seruus aliqua ex causa iusta: et impetrauit a principe se restitui natalibus. Dicitur quod cum appareat eum natum ex ancilla, non tenere hoc rescriptum. Fran(ciscus) Accur(sius).' Baldus' reference to Cod.6.24.4 was also very appropriate: according to that text, the appointment of an heir made in the mistaken belief that he was the testator's son is void if the mistake was the sole reason for the appointment.

suitor approaching the peregrine praetor in the mistaken belief that he was the urban praetor (as the text of Dig.2.1.15 was commonly interpreted).[70] The text of this *lex* was clear: the mistake in the person invalidates the jurisdictional act.[71] Hence the risk that this *lex* could be extended also to Barbarius' case. To avoid that risk, the Gloss stressed the difference between common and individual mistake: while in the case of the peregrine praetor it was only a single claimant to be mistaken, in that of Barbarius it was the whole people. The two mistakes are therefore different, and so are their consequences.[72] Baldus agrees as to the difference between the two cases, but he suggests a different explanation for it. In one case the claimant relied on the jurisdiction of the wrong praetor; in the other, on the validity of the acts of the false praetor. In Barbarius' case therefore the accent is no longer on the source (the person) but on the act (the sentence). So, concludes Baldus, when the Gloss spoke of common mistake (and thus of implicit consent), this should be referred to the acts of Barbarius, not to Barbarius himself.[73]

The point is more important than it might appear at first sight. So long as the person of Barbarius coincides with the *dignitas* of the praetorship, referring the common mistake to the deeds and not to their source would make little sense – for it is obvious that the mistake was about the praetor. This is why the Gloss highlighted the difference between the two cases in terms of quantity, not of quality. A large number of people were mistaken as to the person of the praetor Barbarius, whereas in the case of the peregrine praetor the mistake was of a single individual. Baldus on the contrary moves from the distinction between person and office. Unlike the claimant approaching the wrong praetor, those approaching Barbarius were mistaken as to his legitimation to exercise his office, not as to the office itself.

70 Cf. Gloss *ad* Dig.2.1.15, § *Si per errorem* and § *Detegit* (Parisiis 1566, vol. 1, cols. 172 and 173 respectively).

71 The text of Dig.2.1.15 is reported *supra*, pt. I, §2.5, note 103.

72 Gloss *ad* Dig.2.1.15, § *Nihil* (*ibid.*, note 105).

73 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*ra*, n. 13–14: '… Item oppo(no) dicitur hic, in alia ratione literae, quod error habetur pro consensu. Imo contrarium tenet gl(osa), s(cilicet) quod pro dissensu, ut l. si per errorem, de iur(isdictione) om(nium) iu(dicium) (Dig.2.1.15). Sol(utio) ibi error vnius personae, hic populi secundum gl(osam). Vel ibi error dat causam actui exercitio: hic est error incidens, quia habebat hic populus in latenti qualitate personae, non autem fuit dolo inductus *ad eligendum*. Tu autem dic quod error non habetur pro consensu quo ad Barbarium *immo nec acta indigent fictione, sed ualent ex aequitate quam habent in seipsis*.'

12.4 From Innocent to Barbarius: Baldus' three-step approach

Having dismissed the possibility that Barbarius did become praetor, Baldus can proceed in his reconstruction of the *lex Barbarius* in terms of legal representation, applying Innocent's concept of toleration and thereby justifying the validity of the deeds. The problem now is how to apply Innocent's concept of toleration without its key component of confirmation.

If Barbarius was not confirmed in office, how could he be tolerated in it? Formulated in such a direct way, the question could have only a negative answer. Hence Baldus dances around the issue, dealing with it several times, and each time looking at a particular facet of the question. The only undisputed part of the *lex Barbarius* was the fact that Barbarius exercised the office of praetor – and so, enjoyed possession of that office (whether or not that possession was lawful). Baldus' problem is how to make Barbarius' possession of the praetorship sufficient for the production of similar effects as (proper) toleration in office. He does so in a rather complex way, which may be summed up in three steps: voidable election, legitimate possession of the office, and external validity of agency.

Baldus' approach is of paramount importance, as it serves as a bridge between the Innocentian concept of toleration and the modern concept of *de facto* officer. In so doing, Baldus arrives to explain the difference between internal and external validity of agency. It is therefore important to look at each of Baldus' three steps in detail. Given the complexity of Baldus' reasoning, however, we might want first to understand why such a complex discourse was needed. If the only clear element in Barbarius' case was that he discharged the praetorship, then why not focus directly on the exercise of the office?

As a matter of principle, the simple exercise of praetorship remains *de facto* possession, not *de iure* entitlement to the office. Mere possession of office without any right to it qualifies the possessor as intruder.[74] The exercise of the office by such an intruder would amount to mere *de facto* possession, which does not suffice to create any link between agent apparent and office.[75] Nor could the

74 Id., *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs*, cit., *fol. 69vb*, n. 7): 'Item potest dari hec regula quod intrusus dicitur omnis qui interrogatus cur possideat non potest aliter respondere nisi quia possideo.'

75 Such possession would amount to just *actus* and not *habitus* – or, more originally (though the metaphor is of Innocent), to displaying the insigna of an office without the right to exercise it. Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 57ra*, n. 43: 'Vlterius quaero, an quis possit intitulari in eo quod non posset possidere? Et videtur quod sic, nam ita fuit de Barbario. Sed certe hoc fuit de facto, arg(umentum) de acquir(enda) posse(ssione) l. i § si vir vxori (Dig.41.2.1.4), et sic Barbarius habuit iurisdictionem actu, et non habitu, actus in factum sonat, habitus vero ius designat.' *Ibid.*, *fol. 56va*, n. 35: 'Barbarius insigna habuit sine

common mistake be invoked in support of the *de facto* possession. Full separation of public utility from legal representation would mean allowing the intruder to represent the office he unlawfully seized. This would be, more or less, a plain admission that the end justifies the means – if the intruder did well, then public utility could be invoked to ratify what was void. That is not something Baldus is prepared to accept: it would deny the entire concept of representation as elaborated by Innocent. Baldus seeks to build on Innocent's ideas and adapt them to a secular context. He has no intention of undermining them.

The first step in Baldus' approach is aimed at distinguishing Barbarius from a mere intruder in office. To do so, Baldus seeks to provide a veneer of validity to Barbarius' appointment by qualifying his election not as utterly void but as voidable. Then, importantly, Baldus does not proceed directly to invoke public utility on the deeds, but insists on Barbarius' lawful possession of the office first. The distance between Barbarius' position and the application of public utility is deliberate. Speaking of public utility before – at the second stage – would have meant bestowing validity on Barbarius' precarious praetorship (if not *de iure*, at least *de aequitate*). Doing as much would have led to denying Innocent's concept of toleration, and ultimately also of representation.

The ultimate purpose of Baldus' approach is not to find an indirect way of vesting Barbarius with the praetorship, but to ascribe Barbarius' deeds to the office – and so make them valid. Hence, the precarious validity of Barbarius' office (i. e. the first step) is used exclusively to cast a different light on his possession of the jurisdiction of the praetor: not *de iure* entitlement, but not *de facto* seizure either. That suffices to speak of lawful possession. This is Baldus' second step. Enjoying legitimate possession of ordinary jurisdiction of course does not amount to full entitlement to it, but does at least justify its exercise. Focusing on the exercise of jurisdiction of the office, in turn, allows movement from the relationship between agent and office to that between the office and the third parties. This is the beginning of the third and last step in Baldus' approach. Having established a link between Barbarius and the jurisdiction flowing from the office, it is finally possible to invoke public utility. At this point, however, the object of public utility is not Barbarius' entitlement to discharge the office, but

> dignitate, nam insigna differunt a dignitate, de offi(cio) proc(onsulis) l. i (Dig.1.16.1).' Here, the parallel is with the proconsul leaving Rome towards the province assigned to him. According to Dig.1.16.1 (Ulp. 1 Disp.), although he is entitled display the insigna of his rank from the moment he walks out of Rome, he may not exercise the related *potestas* until he reaches his province. See also on the point Baldus' *repetitio ad* Dig.1.14.3, cit., *fol. 57va*, n. 9. Cf. Innocent, *supra*, pt. II, §7.3, note 24, where the image of the *insigna* of the office may be found immediately after the reference to Barbarius (*ibid.*, note 23).

directly the exercise of the jurisdiction flowing from the office. This way, public utility is not in direct relationship with Barbarius but with the exercise of the office, an exercise directed to those third parties subjected to the office's jurisdiction. If we think back of the 'agency triangle', this means invoking public utility not with regard to the relationship between agent and office (internal validity of agency), but only to that between office and third parties (external validity of agency). This way, public utility can be used not to ratify Barbarius' position, but only the validity of the acts towards their recipients. Having briefly explained Baldus' three-step approach, we may turn analysing each part of it.

12.4.1 Voidable election

As said, the first step in Baldus' complex argument is qualifying Barbarius' election not as thoroughly void but simply as voidable. On the subject, Baldus recalls the distinction made by Raynerius de Forlì (Raniero Arsendi, d.1358),[76] who in turn probably adapted the scheme of Belviso that we saw in Albericus de Rosate.[77] If the statute did not expressly provide for its violation, Raynerius would distinguish between defects in form, substance, accident and quality.[78] Although our interest in the subject is instrumental to understanding Baldus' reasoning, it has little to do with election practice at large,[79] nor does it depend on Raynerius' reading of the *lex Barbarius* (which likely had little to do with toleration and legal representation).[80] As such, we shall limit ourselves to a brief

76 Raynerius was one of the great fourteenth-century civilians, but his fame was soon eclipsed by that of Bartolus. Cf. most recently Belloni (2014), pp. 577–578. In his *repetitio* Baldus quoted Raynerius extensively, but only on general issues related to elections – not on his position on the *lex Barbarius* (which was possibly very different from his own: see *infra*, this paragraph, note 80).

77 *Supra*, §9.

78 The main (but just formal) difference with Belviso's scheme, therefore, is that Raynerius' defect *in substantia* is Belviso's defect *in materia*.

79 Cf. *supra*, §9, note 17. While filtered through Raynerius, the use of Aristotelian language in Baldus is of some interest also because of its public law context. Although Baldus made frequent use of Aristotelian language in (what we would consider as) different branches of the law, the analysis of modern lawyers has typically focused on private law, contracts in particular (especially that of sale): see for all the work of James Gordley, especially Gordley (1991), pp. 50–61; Gordley (2000), pp. 108–114; Gordley (2004), pp. 444–445. Cf. Berman (1983), pp. 246–247. See further Canning (1989), pp. 104–113; Walther (1990), pp. 126–127; Walther (1992), pp. 122–126.

80 According to Albericus de Rosate, Raynerius held Barbarius' deeds as valid out of fairness towards their recipients while denying the *de iure* validity of both his praetorship and his freedom. Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff.*

summary of Raynerius' scheme of invalidity in the elections. *i. Form*: the validity of an election held in violation of a formal requirement (e. g. some specific modalities prescribed for it) depends on whether the elector had also the power to amend the rules of the election. If so, then the elector could also ratify its violation. *ii. Substance:* the violation of a substantive requirement provided for the election (e. g. carrying out the election, or allowing to vote those who had no right to do so, etc.) voids the election, together with any act made by the person unlawfully elected.[81] *iii*. *Accident*: violations of prescriptions not pertaining to

Veter. part. commentarij, cit., *fol.* 70*rb*, n. 20): '… Ray(nerus) in utraque q(uaestione) dubitando tamen dicit posse dici, quod durante errore populi non fueri praetor nec liber: et ideo eius conditione detecta acta per eum non ualent de rigore, sed de aequitate.' Although somewhat cryptic, Albericus' observations on Raynerius might suggest some affinity with the *Ultramontani*, Ravanis in particular. A short gloss of Raynerius on the *lex Barbarius*, however, would suggest otherwise: 'Constituentis autoritas error communis … libertatem valere quod alias non valeret' (Vat. lat. 1141, *fol.* 15*rb*, § *Barbarius*, transcription in Martino [1984], p. 156). The gloss is admittedly too short to draw any firm conclusion, but the reference to the common mistake – and not to public utility – might suggest to interpret the 'constituentis autoritas' as something different from Ravanis' 'potentia committentis'. In any case, it would seem that Raynerius did not require a second element beyond the common mistake. According to Baldus (often a source more reliable than Albericus), Raynerius distinguished on the basis of whether the common mistake preceded the election or was itself a consequence of the election (just as Belviso did before him: *supra*, pt. III, §*9*, text and note 27). Only in the first case, held Raynerius, is the mistake legally relevant: Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 56vb*, n. 40: 'do(minus) Rayn(erius) de Forlì … sic notabiliter ait, dicens circa errorem communem distingue, quia aut error communis praecessit electionem, seu collationem dignitatis, vel officii, et tunc an valeat electio, et collatio, et probetur communis error, et valent acta et gesta: quia lex tollit omnem defectum, ut hac l. Barbarius (Dig.1.14.3) et l. 2 C. de sententia (Cod.7.46.2), 3 q. 7, c. tria (C.3, q.7, p.c.1).'

81 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 56vb*, n. 40–41: 'Secundo vero distingue si quaeratur an teneant acta, et gesta per non iure electum, dic aut in electione est clausula quae retractat expresse quicquid fuerit aliter secutum, aut non. Primo casu non tenent acta per eum per d(ictam) l. in his, et per l. actuarios (Cod.12.49.7) et per auth. cassa, C. de sacrosan(ctis) eccl(esiis) (Auth. *ad* Cod.1.2.12[=Frid.2.1]). Secundo casu, aut est peccatum in forma electionis, vt quia in ea non est solemnitas obseruata, et tunc aut electoribus competit ius a lege, et sic suo iure, aut ab homine, et sic alieno. Primo casu tenent acta, et gesta, si nullus ab initio extitit condictor: alias secus … Secundo casu non valent acta per eum: quia electio, seu collatio non habuit radicem, nec fundamentum, arg(umentum) d(icta) l. actuarios (Cod.12.49.7), et C. si a non competen(ti) iud(ice) per totum (Cod.7.48) et extra, de haere(ticis) c. fraternitatis (X.5.7.4). Si aut peccatur in materia, puta quia nulla facta est electio, quia electoribus nullum competit ius eligendi; tunc error communis nil operatur, nec tenent acta per illum vt l. Herennius (Dig.50.2.10), C. de sac(rosanctis) eccl(esiis) l. decernimus (Cod.1.2.16), et in de reb(us) eor(um) l. qui necque (Dig.27.9.8) cum simi(libus),

the substance of the election, but often equally important to its validity and so typically not ratifiable.[82] *iv. Quality*: violations of the requirements as to the person of the elected. Where the personal defect in the elected was manifest, the election could not be ratified and all the deeds of the elected are void. Where on the contrary his defect was concealed (and thus a case of common mistake), then it is possible to hold the acts of the elected as valid if that would further public utility.[83]

Raynerius' four-fold distinction allows Baldus to qualify Barbarius' election as voidable, and not *ipso iure* void. Barbarius' election was formally valid but

et hoc no(tat) Inno(centius) extra de elec(tione) c. fi. et c. quod sicut (X.1.6.60 et 28).'

82 It is the case of an election bought with money. If we are to believe Baldus, the validity of such an election or appointment is (conditionally) admitted by canon lawyers but denied by civil lawyers. For the civil lawyers (and Baldus among them), the election is void and the common mistake may not be invoked, so the acts of the person so elected are invalid. For the canon lawyers, especially after Innocent IV, the election is valid provided that the simony is occult and that the election is confirmed by the superior authority. Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 56vb*, n. 41: 'aut est peccatum in accidenti, puta quia electio est facta per pecuniam, et sic simoniaca; et tunc dicunt quidam quod error communis nihil operatur et acta non tenent, quia talis electio processit a radice auaritiae, quae est mater omnium malorum … alii dicunt quod electio praedicta habuit radicem et fundamentum, et valent acta, et gesta, vt no(tat) Io(hannes Teutonicus) 1 q. 1 c. cito [C.1, q.1, c.16: cf. its gloss § *Multiplici*, Basileae 1512, cit., *fol.* 105*va*], et c. omnis (C.1, q.1, c.112). Inno(centius) vero dicit quod si talis electio fuit confirmata per superiorem, et crimen est occultum, quod tunc valent acta, et gesta, cum ex confirmatione potestatem recipiat administrator, extra, de electio(ne) c. transmissa (X.1.6.15), vt ipse videtur notare in d. c. vlt. (*ibid.*) et c. quod sicut (X.1.6.28) … Prima opinio tenent legistae, et Iacob(us) de Bel(viso); opinio Inno(centii) tenent canonistae.' In singling out Belviso, Baldus would seem to consider him not fully in line with most civil lawyers in other respects. This is probably due to Belviso's allegedly different stance on the relationship between public utility and common mistake. At least according to Baldus, Belviso held that common mistake sufficed, even without public utility: see next note.

83 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 56vb*, n. 41: 'Aut est peccatum in qualitate, puta in persona electi, et tunc aut vitium est manifestum, aut occultum. Primo casu non valent acta et gesta, vt d. c. nihil (X.1.6.44), et C. si a non compet(enti) iudic(e) per totum (Cod.7.48): quia non suffragatur error communis, quid est necesse, vt hac l. Barbarius (Dig.1.14.3). Secundo casu tenent acta, et gesta, si est error probabilis, vt sub dixi. Et hoc tenet Iac(obus) de Belu(iso), tamen Vltramon(tani) et nos legistae tenemus, quod ibi requiratur aliud, s(cilicet) publica vtilitas multorum, videtur sub saepius dixi. Et hoc probatur in litera l. nostrae et per hoc intelligas quod no(tatur) in d. l. iusiurand(um) l. i in de iureiur(eiurando) (Dig.12.2.2) et quod not(atur) in Spe(culo) de actore §1 ver(siculum) "Sed pone, quidam dicens se Episcopum" [*supra*, pt. II, §8.4, note 49].'

substantively flawed. As Baldus puts it, Barbarius was elected *rite* but not *recte*. Baldus highlights the point, contrasting Barbarius' case with that in the *lex Actuarios* (Cod.12.49(50).7), on the invalidity of the appointment of an official because his nomination was reserved to the prince.[84] In so doing, Baldus provides the same interpretation as Cugno (without however mentioning him).[85] The appointment of the officials in the *lex Actuarios* was not *rite*: the election was done by someone who lacked the power to elect (in Raynerius' scheme, a defect *in substantia*). That suffices to contrast the *ipso iure* invalidity of the appointment of the officials with the voidability of Barbarius' election, done by the rightful elector according to the prescribed formalities.[86] Until revoked, therefore, Barbarius would have a title of sort, and his praetorship would be a true one – it would be 'vera'. The result is an ambiguous position – neither entitlement to the office, nor plain intrusion: precisely what Baldus wanted to achieve. This ambiguity is the result of the combination of a formally valid election (and so, 'rite') with an occult defect in the person of the elected (which makes the election 'non recte'). As a consequence, says Baldus, the praetorship of Barbarius is 'true but revocable':[87]

> if the question is whether Barbarius had a firmly rooted (*radicatam et incommutabilem*) praetorship, the answer is no. But the answer is different if the question is whether he had a true and revocable praetorship though unworthily (*indigne*) received, all the more as long as the defect remains hidden.

84 *Supra*, pt. I, §4.2, note 211.

85 Cf. *supra*, pt. I, §4.2.

86 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55vb*, n. 22: 'opponitur non valeant gesta a minus legitime electo, ut l. actuarios, C. de nume(rariis) et actuar(iis) lib. xii (Cod.12.49(50).7) et ibi no(tatur) ergo non valent gesta Barbarii. So(lutio) Barbarius fuit rite assumptus, licet non recte, sed in l. contraria non fuit rite electus, quia per non habentes potestatem, et quare non seruata forma a superiore praefixa, et sic non ob(stat), quia rite factum non valet ipso iure, sed rite factum licet non recte per eum, qui habet potestatem, valet, licet debeat cassari, si debito modo cassatio petitur.' The distinction between *rite* and *recte* election was not new. See e. g. Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 117*ra*, n. 8): 'Item non ob(stat) d(icta) l(ex) fi. § Item rescripserunt, de decu(rionibus) (Dig.50.2.12.3) quia ibi [*scil.*, in Barbarius' case] electio facta erat rite: licet non recte, vt ibi patet in litera, inter quae est differentia, vt no(tatur) ff. de inof(ficioso) test(amento) l. 2 (Dig.5.2.2) et sic ibi habuit fundamentum: alias secus esset, vt eo ti(tulo) l. Herennius (Dig.50.2.10).'

87 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55va*, n. 20: '… aut quaeritur, vtrum Barbarius habebat praeturam radicatam, et incommutabilem; et dico quod non, aut vtrum habebat veram praeturam reuocabilem, tamen tanquam collatam indigne: et videtur quod eam (sic) fortius est quandiu latuit vitium, et defectus.'

To better understand Baldus' statement, we might look at another example that he gives on the election held in violation of the requisites prescribed for the person of the elected:[88]

> The Florentine law provides that only a true Guelph of Guelph descent may be elected as *podestà* of Florence, otherwise the election would be *ipso iure* void. Now, the Florentines elected some Ghibelline, who was mistakenly accepted by the people and discharged his office. When eventually he claimed his salary, it was objected to him that he was not true *podestà*, and so he was not entitled to the salary, for to receive the salary truth must be followed (as in Dig.50.1.36pr). He replied that he was true *podestà*, that he was considered as such, and that he performed that office – just as the Gloss has it here [i. e., in the *lex Barbarius*]. He also argued that, while his election was illegitimate (*incompetenter*) at first, for his electors lacked the power to do so and infringed the law, nonetheless the people were considered to have ratified it on the basis of the present *lex*. Much on the contrary, it is not plausible that the people wanted to derogate from their laws, and this is the true opinion, for the electors could have not bound the city without complying with the form of the law (as in X.1.6.52). This applies if [the defect] was notorious, or clear to these electors. In doubt, however, it should be presumed that [the election] was done in good faith, and so it does not appear to be done wrongly but correctly (as in D.35.1.32 and D.17.1.30).

The example seems to build on Guido de Suzzara's issue of the salary of the banished elected to a magistracy.[89] The occult Ghibelline is well suited to

88 *Ibid.*, *fol. 56ra*, n. 27–28: 'Statuto Florentiae cauetur quod nullus possit eligi in potestatem Florentiae nisi sit Guelphus verus, et de domo Guelpha. Et si secus fiat, electio non valeat ipso iure, modo electionarii elegerunt quendam Gibellinum, quis per errorem populi fuit receptus, et gessit officium tandem ille petit salarium, obiicitur ei quod non fuit verus potestas. Ergo salarium habere non debet, quia in praeceptione salarii veritas debet attendi in ad munici(palem) l. Titio cum esset (Dig.50.1.36pr). Econ(tra) ipse dicit, quod fuit verus potestas, et ita habitus et reputatus, et quod fuit officio functus, vt hic s(ecundum) gl(osam) et licet fuerit electus a principio incompetenter a non habentibus mandatum, et contra formam statuti: tamen populus fingitur ratificasse, arg(umentum) huius l. in ver(siculo) "nam et si placuisset" [cf. Dig.1.14.3], sed certe immo non est verisimile quod populus velit derogare suis statutis, et ista videtur vera opi(nio) quia electores non poterunt obligare commune, forma non servata, de elect(ione) c. cum in veteri (X.1.6.52); et hoc si erat notorium, vel certum istis electoribus, sed in dubio praesumitur factum bona fide, et ideo non videtur factum male, sed bene, ar(gumentum) in(fra) de condi(cionibus) et dem(onstrationibus) l. quamuis (Dig.35.1.32) et in man(dati) l. si hominem (Dig.17.1.30).'

89 Cf. *supra*, pt. I, §4.3, text and note 153. While Baldus does not mention Suzzara, during the fourteenth century the association between banished and reward became rather popular. Baldus could easily have found it, for instance, in the same Raynerius de Forlì: cf Raynerius' *repetitio ad* Dig.1.1.9 (*Repetitionum seu commentariorum in varia iurisconsultorum responsa*, Lugduni, Apud Hugonem à Porta, & Antonium Vincentium 1553, vol. 1, *fol. 7vb*, n. 57).

Barbarius' case: whether the Florentine are fully sovereign or not, surely it lies within their power to scrap the exclusion of Ghibellines from their city statutes. In Baldus' text, the Ghibelline claiming his salary as *podestà* is almost reading from the Accursian Gloss on the *lex Barbarius*. With this example, therefore, Baldus can better highlight the difference between his approach and that of the Gloss. Both Barbarius' and the Ghibelline's elections are formally correct (*rite*), and in both cases the elector could remedy the defect by ratifying the election. Just as in Barbarius' case, however, the hidden defect in the podestà does not entail the implied will of the Florentines to condone it. *Pace* Accursius, a voidable election cannot be considered as tacitly ratified. Moreover, in this example the validity of the election is clearly related to the enduring condition of the defect as occult. The problem with the salary, which brings up the underlying issue of the validity of the appointment, emerges only when the defect becomes manifest. So long as the true colours of the elected remained hidden, the common mistake of the electors would suffice to consider the election as provisionally valid: not *ipso iure* void, but voidable. Precisely the condition of Barbarius: 'true and revocable praetorship … as long as the defect remains hidden'.[90]

12.4.2 Possession of ordinary jurisdiction

A voidable election confers a 'true but revocable praetorship'. Baldus however does not focus on the provisional validity of the praetorship, but only on the entry of Barbarius into office. Focusing on the voidability of Barbarius' praetorship would ultimately lead to acknowledging its validity until the eventual deposition. That would be a variation on the approach of the Gloss: even if the validity of Barbarius' position remained precarious, it would still be the reason for the validity of his deeds. But this is not Baldus' intent. In speaking of voidable praetorship, Baldus only sought to justify Barbarius' entry into office, thereby distinguishing him from a simple intruder.[91] To acquire lawful possession of the office, says Baldus, 'three things are required, that is, election, acceptance and entry into office. Thereafter, one is [already] in possession even before doing anything'.[92] In Roman law, the lawfulness of possession is determined by

90 *Supra*, this paragraph, note 87.

91 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 55*vb*, n. 23: 'notandum tamen est quod propter bonum agere non iustificat intrusus, quia nec Barbarius iustificat omnino in semetipso, dato quod non esset proprie intrusus.'

92 *Ibid.*, 'et certe tria requirunt, scilicet electio, acceptatio, et ingressus officii, i(nfra) de condit(ionibus) et de(monstrationibus) l. publius (Dig.35.1.36), quo facto etiam ante quam aliquid gerat, est in possessione.'

looking at the moment of its acquisition. If the election of Barbarius was voidable, then he entered office holding a title (revocable, but provisionally valid). That would suffice to qualify his possession of the office as lawful – and so to distinguish him from an intruder. Legitimate possession of the office, it may be recalled, was the second step in Baldus' reading of the *lex Barbarius*. But why was it so important for Barbarius to have lawful possession of the praetorship, if this never became legal entitlement? The answer depends on the specific office of the praetor – an office entailing jurisdiction. Possession of the office of praetor also meant possession of the jurisdiction flowing from it. Lawful entry into office would entail legitimate possession of the office, and so also of its jurisdiction. In medieval law, jurisdiction (*iurisdictio*) meant power.[93] Possessing jurisdiction meant exercising power. Hence the importance of qualifying Barbarius' possession of the office as lawful: legitimate possession of jurisdiction meant legitimate exercise of power. Distinguishing Barbarius from an intruder, therefore, would ultimately allow entry into office without acknowledging its full validity.

To better understand the point, we should look at the difference between possession of things and of offices. The Roman praetor, we have often noticed, is an ordinary judge and so has ordinary jurisdiction. In medieval civil law, ordinary jurisdiction is normally referred to the territory. So for instance a lordship would typically entitle someone to the exercise of jurisdiction within it. In case of the office of the ordinary judge, on the contrary, the jurisdiction pertains to his person – the territory is relevant only to delimit the boundaries of his jurisdiction, not to allow its exercise. Otherwise stated, the powers of the judge depend on the right to exercise his office, not on the lawful control of a territory. As Baldus has it, 'with regard to the judge, office and jurisdiction are almost one and the same'.[94] Possession of an office therefore amounts to

93 As is known, the medieval concept of *iurisdictio* derived from the conflation of two distinct categories, *iuris-dictio* (to 'say' the law) and *iuris-ditio* (the 'power' of the law). Of the two, medieval jurists considered the latter (*iuris-ditio*) to be the general one. Understood as a general category, therefore, *iurisdictio* had no jurisdictional meaning, but simply meant 'authority'. See e. g. Gloss *ad* Dig.2.1.3, § *Mixtum est* (Parisiis 1566, vol. 1, col. 164): 'dicitur enim iurisdictio a ditione, quod est potestas, et iuris, q(uod) d(icit) legitima potestas.' Cf. *supra*, pt. I, §2.1, note 25.

94 Baldus, *ad* Cod.2.46(47).3, § *Cum scimus esse* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 156*rb*, n. 2): 'No(tandum) istum tex(tum) propter quem dicunt doc(tores) quod iurisdictio ordinaria et contentiosa inheret territorio et quod limites iurisdictionis sunt secundum limites territorij: et hoc et verum quod iurisdictio est in territorio tanquam in re. Sed in iudice est tanquam in persona. Et respectu iudicis iurisdictio et officium iudicis vniuersaliter consideratum est quasi vnum et idem. Unde tituli qui tractant de officiis magistratuum nomine

possession of its jurisdiction. This is Baldus' goal: using the concept of possession to argue for the validity of Barbarius' jurisdiction, while at the same time denying his full entitlement to the office of judge.

Lawful possession, working as a bridge between simple facts and proper rights, can often become an ambiguous concept. When applied to incorporeal entities this ambiguity is all the more acute, because of the difficulty in clearly distinguishing between their lawful and unlawful possession. Offices are incorporeal, hence their possession is often described as *quasi possessio* – just like the possession of other incorporeals, first of all servitudes.[95] Following Innocent, Baldus affirms that (quasi-)possession of the office does not allow its valid exercise – it must be confirmed by the superior authority.[96] At the same time, however, the fact that the office is incorporeal does not entail different degrees of possession: either there is full possession of the office or there is not. Dignities, says Baldus, are formal entities – they have form but no specific matter. Their form is given by the law, according to the purpose for which they are established.[97] Speaking of unlawful but legally relevant possession, therefore, is only possible for corporeals – not also for incorporeals, and especially not for dignities. Because of the relationship between representative and individual office, possessing a dignity has a stronger meaning than possessing a thing. It means vesting the representative with the office. With an office, therefore, either

officii assumunt per iurisdictione.' On the relationship between jurisdiction and territory in medieval learned law see Siméant (2011), esp. pp. 119–122, where further literature is listed.

95 Cf. *supra*, pt. I, §5.4, note 42.

96 This is particularly clear in Baldus' *repetitio*, where he relies on Innocent IV's distinction between cases of *quasi possessio* in which no confirmation is required and cases in which it is needed. Clearly Innocent had in mind ecclesiastical offices, but the distinction is useful for Baldus so as to deny the full validity of Barbarius' appointment. Baldus, *repetitio ad* Dig.1.14.3, *fol.* 58*ra*, n. 12–13: 'Item opp(onitur) et videtur quod acta valeant *de rigore iuris* ex quo barbarius erat in quasi possessione officii. Nam sola quasi possessio sufficit in *temporalibus*, extra de iure pat(ronatus) c. consultationibus (X.3.38.19). Sol(utio) dicit Innocen(tius) quod illud est verum in his quasi possessionibus in quibus non requiritur decretum superioris, vel in quasi possessione iuris eligendi, et praesentandi; secus vbi requiritur auctoritas superioris. Nam si illa sit interposita de iure, valet quod fit de rigore. Si autem de facto, loquitur haec lex, et Inno(centius) de elec(tione) c. nihil (X.1.6.44).'

97 On the point see esp. Baldus, *ad* Cod.2.18.20, § *Tutori vel curatori* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 142*ra*, n. 1): 'Tutor vel curator differunt a gestore: quia primorum officium est necessarium et finitur necessitate cessante. sed officium simplicis gestoris est voluntarium et voluntate propria terminatur … Officium quod habet formam a iure sumit effectum vel finem secundum dispositionem legalem. Sed officium quod suscepit quamlibet formam secundum voluntatem gerentis regulatur ab ipsa.'

there is full possession or there is not. One may not be an 'almost bishop' (*semiepiscopus*), says Baldus to state a crucial concept: possession of an office pertains to the law, not to the realm of facts.[98] Possession of a *dignitas* is another way of describing the lawful exercise of the office. Indeed, says Baldus – following Innocent once again – 'dignity, administration, jurisdiction and office are mutually connected and almost inseparable'.[99] This way, it becomes

98 Id., *ad* Cod.3.34.2, § *Si aquam*, *ibid.*, *fol.* 218*rb*, n. 64–65: 'Nunc de quarto puncto dicendum est s(cilicet) qualiter possessio perdatur. Circa quod dicendum est quod duplex est possessio. Quedam est enim indiuisibilis, vt ecce papa et imperator possident plenitudinem potestatis, ecclesia et imperium se non secat in partes: nec diuidit se. Item dignitates sunt indiuisibiles: vnde non potest quis esse semiepiscopus vel semidoctor. Item et seruitutes vnde non potest quis habere semiuiam et semiusum. Sunt enim omnes seruitutes in forma indiuisibili constitute: que forma nisi per perfectione haberi non potest vnde entibus imperfectis non proprie conuenit forma ff. ad l. falci(diam) l. si is qui quadringenta § quedam (Dig.35.2.80.1). Quedam sunt possessiones diuidue, vt possessio agri et possessio vsufructus: quia vsufructus non solum est qualis sed est quantus … Item no(tatur) quod quedam sunt possessiones quae constitunt officio vel dignitate et sic constitunt in iure, et iste statim perduntur quod quis est priuatus dignitate: vt no(tat) Inno(centius) de conces(sione) preben(dae) c. cum nostris (X.3.8.6) … quedam sunt possessiones que constitunt in facto vt possessio fundi: tunc requiritur amotio facti nec sufficit amotio iuris …'

99 *Ibid.*, *fol.* 217*va–b*, n. 48: 'Nunc accedamus ad Inno(centium) in c. ex literis, de resti(tutione) in integrum (X.1.41.4), et ibi tractat Inno(centius) qualiter acquiratur possessio generalis et specialis in iuribus et in rebus … Primo ergo queritur qualiter acquiratur possessio iuris episcopalis vel archidiaconalis … dicit Inno-c(entius) quod possessio generalis iuris episcopalis acquiritur per installationem factam in sede deputata in tali dignitate, ar(gumentum) C. de offi(cio) prefec(ti) aug(ustalis) l. i (Cod.1.37.1) … secundum Inno(centium) intellige quod acquiratur generalis possessio dignitatis et administrationis et iurisdictionis: nam dignitati inest administratio et administrationi inest iurisdictio: vnde sunt annexa et quasi inseparabilia dignitas et administratio et iurisdictio et officium, s(upra) vbi et apud quos l. fi. (Cod.2.46(47).3).'Similar reasoning might be found in Bartolus. Significantly enough, however, in Bartolus the object of *quasi possessio* was not the office of the judge, but simply his jurisdiction. A forged rescript of the prince, says Bartolus, is clearly not sufficient to bestow jurisdiction. But if it looks genuine, then it suffices to give *quasi possessio* of jurisdiction, and so to allow its recipient to render valid decisions. Bartolus, *ad* Cod.1.22.2 (*Primam Partem Codicis Commentaria*, cit., Basileae 1588, p. 110, n. 6): 'Quaero utrum rescriptum omnino falsum quod nunquam emanavit de cancelleria Principis tribuat iurisdictionem? … Mihi videtur quod, si quidem rescriptum non habet manifestam falsitatem, ipse iudex, cui videtur dirigi, potest de ista falsitate cognoscere et pronunciare se esse vel non esse iudicem. Ita intelligo *infra* l. prox(imam) [*scil.*, Cod.1.22.3], ubi coram eodem iudice potest opponi de falsitate. Ratio: quia illud rescriptum, licet ei non det iurisdictionem, tamen constituit eum in quasi possessione iurisdictionis, propter uod habet iustam cognitionem et pronunciationem.'

extremely difficult to distinguish clearly between lawful exercise of jurisdiction and valid administration of the office: precisely Baldus' purpose.

The great paradox of the *lex Barbarius* was that a slave exercised ordinary jurisdiction (*iurisdictio ordinaria*). The authority – thus the legal strength – of that position did not derive from any delegation, but from the office itself. Yet slaves are the living embodiment of *indignitas*. A slave is the most *indignus*, as we have seen, both in the sense of moral worthiness and in that of legal incapacity. For Innocent (and for Baldus) confirmation of the unworthy produced valid legal effects because of the higher *dignitas* of the superior authority. Thus, the presence of confirmation shifted the focus from the *indignitas* of the person who was confirmed to the higher *dignitas* of the person who confirmed him. The same mechanism (the shift of focus from the *indignitas* of the inferior to the *dignitas* of the superior) also applies in the distinction between the exercise of ordinary and delegated jurisdiction.

Delegated jurisdiction does not presuppose any *dignitas* in the person who receives it. Its recipient, the delegate, simply exercises it on behalf of the delegator. 'Delegated jurisdiction' says Baldus, 'is simply some task pertaining to a slave, and its exercise is valid because the delegated acts as servant and *exercitor* of the jurisdiction of another person, the ordinary [judge] who delegated him'.[100] The use of the term *exercitor* is interesting. Properly speaking, it was the technical term for designating the person responsible for the ship in a commercial context, typically a slave. Hence the reference to the slave. In stating as much, of course, Baldus did not intend to say that one would typically delegate his jurisdiction to a slave. He wanted to stress the difference between ordinary and delegated jurisdiction. The source of the jurisdiction of the delegate lies elsewhere – in the person of the delegator. As such, it does not require any *dignitas* in the delegate, either in terms of worthiness or, especially, of legal capacity – even a slave could do it! The 'proper' office of the judge is only that of the ordinary one. Ultimately, therefore, the delegate judge does not exercise the office of the judge, he simply does the (ordinary) judge's bidding.

Having explained delegated jurisdiction, Baldus moves on to the ordinary form. Ordinary jurisdiction, he says, must 'take root' in its incumbent.[101] It is

100 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55va*, n. 19: '… iurisdictio delegata non est aliud, nisi quoddam exercitium quod seruo competit: quia cum sit minister, et exercitor iurisdictionis alienae personae ordinarii, quam delegauit, inspecta, et repraesentata, valere debet quod agitur, arg(umentum) i(nfra) de dona(tionibus) inter vir(um) et vxo(rem) l. <si> mulier (Dig.24.1.9).' The translation is somewhat liberal.

101 On the point, canon law has not changed much over the centuries. A good way of explaining Baldus' statement could be comparing it with the 1917 Canon Law Code, can.197§1: 'Ordinary power of jurisdiction is that which is automatically

difficult to think of a stronger metaphor to signify the compenetration between office and its representative. The strength of the metaphor is used to exclude the *inhabilis*: because the slave is legally incapable, *iurisdictio ordinaria* cannot 'take root' in a slave.[102] So, as we have seen, for Baldus the slave Barbarius could not have a 'rooted' (*radicata*) praetorship: 'rooted' is tantamount to 'unalterable' (*praetura radicata et incommutabilis*), whereas Barbarius' praetorship was 'revocable' (*revocabilis*).[103] Just as Barbarius could not have a 'rooted' praetorship, he could not enjoy 'rooted' ordinary jurisdiction deriving from that office. But Baldus did not seek to 'root' the praetorship in Barbarius (that is, to make him *de iure* praetor), only to make his possession of the praetorship legitimate. This is why he remarks that Barbarius' revocable praetorship was 'true'.[104] Toleration could not be invoked on the basis of a voidable election that was not confirmed by the superior authority. But the deep relationship between office and possession allows possession to be qualified in the light of that – fragile but legally relevant – link with the office. If the praetorship is 'true', in other words, then possession of the jurisdiction flowing from it cannot be unlawful.

As we have seen in the first part of this work, most civil lawyers dealing with the case of the slave-praetor also referred to that of the slave-arbiter (Cod.7.45.2, the *lex Si arbiter*). Sometimes they did so in order to remark the similarity of the two cases (the validity of the deeds despite the servile condition of the two slaves). At other times, and more often, they sought to highlight their difference (plurality of decisions and public utility in the case of Barbarius vs. single decision and private utility in that of the arbiter). Also Baldus highlights the difference between the two cases. Only, he does so not on the basis of the number of decisions (and so, of the distinction public vs. private utility), but rather according to the different kinds of jurisdiction exercised by the two slaves – ordinary vs. delegated.

In the *lex Si arbiter*, the arbiter was a slave but, unlike Barbarius, he exercised only delegated jurisdiction. As such, Baldus notes, he was acting on the instructions of someone who did possess (valid) ordinary jurisdiction. The validity of the decision of the slave-arbiter, therefore, depended both on the

attached to an office; delegated power is that which is committed to a person' (*Potestas iurisdictionis ordinaria ea est quae ipso iure adnexa est officio; delegata, quae commissa est personae*). The current version (in the 1983 Code, can.131§1) is slightly less evocative of its medieval roots (*Potestas regiminis ordinaria ea est, quae ipso iure alicui officio adnectitur; delegata, quae ipsi personae non mediante officio conceditur*). Cf. Deutsch (1970), p. 183.

102 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55va*, n. 19: '… sed iurisdictio ordinaria debet esse radicata, sed in seruo non potest radicari.'

103 *Supra*, last paragraph, note 87.

104 *Ibid.*

common mistake as to his true status and on the delegation of authority. As we have seen earlier, in the Roman sources there were three main cases where a slave was mistaken for a freeman. Besides the arbiter and the praetor, the third case was that of the slave, widely reputed to be free, who witnessed a testament. Unlike the other two, the slave-witness performed a private act.[105] In that case, reasons Baldus, common mistake alone sufficed to guarantee the validity of the deed.[106] If so, he concludes, the mistake should produce effects all the more when coupled with delegated jurisdiction, for the delegate simply acts on behalf of the ordinary judge who gave him that power – not on his own authority.[107] This parallel between slave-witness and slave-arbiter serves to build a crescendo, which culminates with the slave-praetor. As a matter of principle, says Baldus, delegated jurisdiction should be interpreted restrictively. Yet the decision of the false arbiter is kept despite the personal *inhabilitas*. Unlike the slave who acted as arbiter, he continues, the slave who acted as praetor exercised ordinary jurisdiction, and *iurisdictio ordinaria* should on the contrary be interpreted extensively. So, concludes Baldus, quashing the false praetor's decisions but keeping the false arbiter's verdict would be illogical.[108]

105 Like most other jurists, when discussing the slave-witness case Baldus referred exclusively to the passage in the Code (Cod.6.23.1) and overlooked the one in the Institutes (Inst.2.10.7). When looking at the Gloss, we have seen how the former referred exclusively to the common mistake, whereas the latter said that the validity of the testament depended on the generosity of the prince (*supra*, pt. I, §2.3).

106 It may be recalled that the case of the slave-witness was progressively read as based exclusively on a common mistake (as in Cod.6.23.1), and not on the generosity of the prince, who ratified the will *ex sua liberalitate* (Inst.2.10.7). *Supra*, pt. I, §2.3, text and notes 57–59.

107 Baldus, *repetitio ad* Dig.1.14.3, *fol.* 58*ra*, n. 13: 'respectu delegantis iurisdictio delegata est ordinaria … ordinaria iurisdictio est publica auctoritate, et vtilitate respectu iurisdictionis in seipsa, idem in l. munerum § *iudicandi*, de mu(neribus) et ho(noribus) (Dig.50.4.18.*14*). Respectu vero actus exerciti inter Titium et Seium, non attenditur qualitas iurisdictionis, quia non denominatur a priuatis, vt l. i § publicum, de iust(itia) et iu(re) (Dig.1.1.1.2). Cy(nus) vero dicit quod lex contraria loquitur in liberto, non in seruo, quod nihil est, quasi in id quod non est iurisdictio, valeret propter communem errorem vt l. *i* C. de test*a*(mentis) (Cod.6.23.1), multo magis quod est iurisdictionis, quia est magis fauorabile.' Cynus' argument, as we know, came from Bellapertica: *supra*, pt. I, §4.6, note 110.

108 Baldus, *repetitio ad* Dig.1.14.3, *fol.* 58*ra–b*, n. 17–18: 'sol(utio), credo quod *potissima* [cp. Baldus' 1577 edition: 'pessima'!] ratio sit error communis, et superioris autoritas, vt d(icta) l. si arbiter (Cod.7.45.2). Nam ita debet illa lex intellegi, quod ibi communi errore pro libero habebatur. Item ibi, interuenit superioris autoritas, i(d est) delegatio superioris; et sic est illud in iurisdictione delegata, quae est extraordinaria, et odiosa, vt C. de dila(tionibus) l. si quando

It is now clear why Baldus followed the traditional interpretation of the Gloss on the slave-arbiter, and not that of Bellapertica and Bartolus. The arbiter rendered his judgment while secretly a slave, and was found out (and brought back to servitude) only thereafter.[109] If the arbiter was a freedman who would relapse into servitude after having given the decision (the other reading of the *lex Si arbiter*), the whole point of the two slaves exercising different kinds of jurisdiction would be lost.[110]

The closeness between lawful possession of a public office and its exercise also meant that the possessor does not need to justify his possession. The Accursian Gloss held that the judge does not need evidence to prove what is notorious (and so known to all), but he does to prove what is known to him personally.[111] Baldus applies the same principle also to the exercise of an office. Reiterated and unchallenged exercise of a public office means notorious exercise of it. Widespread reputation as the rightful representative of a public office, therefore, exonerates the incumbent from having to prove his entitlement. Notorious

(Cod.3.11.2), *ergo idem* in iurisdictione ordinaria, quae est fauorabilis, necessaria, et amplianda, l. i § cum vrbem, de off(icio) praef(ecti) urb(i) (Dig.1.12.1.4).'

109 *Supra*, pt. I, §2.3, text and notes 63–64.

110 Even in that case, however, the different interpretations would not seriously undermine Baldus' argument. Whether the arbiter was a slave or a freedman when he rendered his decision, says Baldus, what matters is that he received jurisdiction from the ordinary judge. As such, the sentence of the slave-arbiter would be valid regardless of the interpretation of 'in servitutem depulsus' in Cod.7.45.2. Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 56va*, n. 35–36: 'Vnum non omitto quod Cy(nus) dicit hic, quod l. ii C. de senten(tiis) et interlo(cutionibus) om(ium) iudic(icium) (Cod.7.45.2) non habet locum in seruo: quia ibi non versatur publica vtilitas, cum sit factum singulare. Nam male loquitur, quia iurisdictio est iuris publici in vniuersali, et singulari, quam in quolibet suo singulari a publico fonte auctoritate, et vtilitate procedit, sub de iu(stitia) et iure, l. i § publicum (Dig.1.1.1.2), et ideo etiam in seruo ibi loquitur.' The more emphasis is on the *delegans*, in other words, the less the legal capacity of the *delegatus* becomes relevant. Elsewhere Baldus compares the delegate judge to a messenger (*nuntius*). Baldus, *ad* X.1.3.22, § *Quum dilecta* (*Baldvs svper Decretalibvs*, cit., *fol. 35va*, n. 6): 'Et not(andum) quod iudex delegatus equiparatur nuntio, quia nunquid sit dominus litis et in nullo debet excedere vires mandati, i(nfra) de offi(cio iudicis) deleg(ati) <c.> si pro debilitate (X.1.29.3), ff. de verb(orum) obli(gationibus) <l.> qui rome § callimachus, in fi(ne) (Dig.45.1.122.1).'

111 Gloss *ad* Cod.2.41(42).1, § *In consilio* (Parisiis 1566, vol. 4, col. 378): 'i(d est) in arbitrio siue deliberatione iudicis. Et no(tatur) quod iudex potest iudicare siue attendere id quod ei est notum vt notorium: etiam si ei non probatur ab aliqua partium. Erat enim hic notorium eum fuisse decurionem. Secus si est notum non vt notorium, sed vt priuato: quia tunc magis ad probationem respicit: vt ff. de offi(cio) praesi(dis) l. illicitas § veritas (Dig.1.18.6.1), et i(nfra) de his qui ve(niam) aeta(tis) impe(traverunt) l. ii (Cod.2.44(45).2).'

possession would therefore presumptively suggest *de iure* entitlement to the office.[112]

The public nature of the office should trigger representation, shifting the analysis from the person as individual to the person as agent of the office. When lawful possession of the office is not based on *de iure* entitlement to it (as in the case of Barbarius), proper representation may not occur. Nonetheless, this possession still leads to a shift in perspective, albeit a partial one: from individual person, if not to lawful incumbent, at least to lawful possessor of the office. This shift is extremely important: possession of a public office leads to the presumption of valid representation.[113] Until this presumption is disproved, the exercise of jurisdiction is therefore valid. It follows, says Baldus, that Barbarius is fully entitled even to punish those who would recuse his jurisdiction – unless of course they were able to prove his servile status.[114] Barbarius' power to impose

112 Baldus, *ad* Cod.2.41(42).1, § *In consilio* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fols.* 154*vb*–155*ra*, n. 7): 'Tertio opp(onitur) quando enim iudex hic considerat publicum officium cum de hoc non esset aliquid sibi probatum ab aliqua partium respondet glo(sa) quod hoc erat notorium. Ubi ergo officium est notorium non est necessaria probatio, gl(osa) loquitur in officio ordinario. Si ergo quis publice gessit se pro potestate vel vicario licet non appareat de electione tamen semper presumitur pro ordinaria iurisdictione. Item si quis se gessit pro priore vel consule mercatorum et sic fuit reputatus publice, facit l. barbarius de of(ficio) preto(rum) (Dig.1.14.3). Facit etiam l. ciues et incole i(nfra) de ap(pellationibus) (Cod.7.62.11). Sufficit ergo quod sit notorium quod aliquis gessit se pro potestate priore vel consule … in notoriis iudex supplet defectum probationis partium.'

113 Id., *lectura ad* Dig.1.14.3, cit., *fol.* 56*va*, n. 35: '… Et no(tatur) quod materia l(egis) nostrae habet locum in his, quae sunt ratione publici officij, non in alijs, extra de consuet(udine) c. <cum> dilectus (X.1.4.8) secundum Innoc(entium), et in his quae tangunt ius aliorum, non solius facientis, vel patientis, extra, de procu(ratoribus) <c.> consulti (X.1.38.15) per Inno(centium). Illud est no(tandum) quod pro eo qui in possessione iurisdictionis ordinarie inuenitur, praesumitur, licet hic status naturaliter inesse non possit, de offi(cio iudicis) deleg(ati) <c.> cum in iure (X.1.29.31), per Inno(centium) etc. … arg(umentum) contrarium: quia nemo praesumitur officialis, nisi probetur, l. prohibitum C. de iur(e) fi(sci) lib. x (Cod.10.1.5), vide Cy(num) C. vbi causa sta(tus) l. i [cf. *Cyni Pistoriensis In Codicem*, cit., *ad* Cod.3.22.1, *fol.* 152*rb*, esp. n. 7]. Et no(tatur) quod lex loquitur de eo, qui non debuit admitti ad officium: tamen admissus est.'

114 *Ibid.*, *fol.* 55*vb*, n. 26: 'Et adde, quod ille qui sine causa declinat iurisdictionem, potest puniri de contemptu, 2 q. 7 c. Metropolitanum (C.2, q.7, c.45) … et Inn(ocentius) dicit quod potest verus contumax reputari, quia non videtur stetisse declinans suam iurisdictionem, secundum Innocentium, et ideo Barbarius potuisset punire friuole declinantes suam iurisdictionem, puta quia opponebatur alia exceptio quam seruitutis, vel obiecerunt de servitute, et non probauerunt.' On the subject see also Baldus, cons.2.178 (*Consiliorvm sive*

his jurisdiction on litigants is not mutually incompatible with the litigants' ability to disprove his jurisdiction: the moment Barbarius' jurisdiction is successfully recused, his possession of the office changes from notorious (and so, presumptively lawful) to manifestly unlawful.[115]

Until disproven, notorious possession of a public office suffices as to its exercise. This conclusion might appear very similar to proper toleration, but – at least in principle – it is not. The recusation issue mentioned above helps bring to light the underlying difference. When the office is 'rooted' in the person, his supervening incapacity is of no obstacle to the enduring legal representation of the office: the friction between incapacity as an individual and capacity as a representative is precisely the core of the toleration principle. So those subjected to the (jurisdiction of the) office may not recuse its legal representative because of his personal unworthiness.[116] By contrast, mere possession of the same office creates a more fragile link with it: the moment the personal incapacity of the possessor is unveiled, the link between possession and lawful exercise of the office is severed. The difference is clear in principle, but rather opaque in practice. Baldus made deliberate use of this ambiguity so as to shift the focus towards toleration – without saying so openly.

Ultimately, lawful possession of the office without proper toleration reaches the same result as the case of the occult deposition that we encountered in the last chapter.[117] In both cases there is not (or no longer) proper representation, and so neither is there toleration. The validity of the deeds depends on lawful

Responsorvm Baldi Vbaldi Pervsini, cit., *fol.* 48*rb*). Asked whether the *Anziani* of Bologna had the power to jail someone despite lacking *iurisdictio*, Baldus answers that they did: just like Barbarius, the *Anziani* had *quasi possessio* of this kind of jurisdiction, and that was sufficient as to its valid exercise. 'D(omini) Antiani sunt in quasi possessione istius iurisdictionis, quod sufficit ad eius exercitium, vt ff. de offi(cio) prae(torum) l. Barbarius (Dig.1.14.3).' Recently Jane Black argued that Baldus applied the notion of *quasi possessio* also to the concept of plenitude of power: J. Black (2009), p. 65, note 183 (relying on BAV, Barb. Lat. 1408, *fol.* 137*v*).

115 Baldus makes the same point (though in a less elaborate fashion) when discussing possessory matters, so as to distinguish between *falsus praelatus* in unchallenged possession of the office and simple intruder. Baldus *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 218*ra*, n. 62): 'Aut quis est in possessione sed non est verus prelatus: et tunc aut possidet pro prelato ita communiter reputatur, aut pro possessore quia inuasit de facto officium prelati. Primo casu agere potest nisi aduersarius probet eum non prelatum: quia pro eo presumitur qui in pacifica possessione reperitur.'

116 Baldus, *ad* X.1.3.13, § *Sciscitatus* (*Baldvs svper Decretalibvs*, cit., *fol.* 28*ra–b*, n. 8): 'Quero an <iudici> ordinario possit opponi exceptio quod est homicida vel adulter. Respondeo non secundum Inn(ocentium) quia autoritas ordinarij officij non excluditur per solam infamiam facti superuenientem officio iam radicato.'

117 *Supra*, last chapter, §11.6.

possession of the office. In the case of the secretly deposed, possession is lawful because of the occult character of the deposition – the superior authority deprived the incumbent of his right to the office, not of his possession of it. To deprive the incumbent of his lawful possession, physical dispossession would have been unnecessary: all that it was needed was to render the deposition notorious. Leaving the old incumbent in possession without issuing a formal sentence of deposition, as Baldus had it, left a 'vestige' of the initial confirmation in office.[118] Something similar happened in the case of Barbarius. Baldus said that Barbarius enjoyed a 'true praetorship', not that he was 'true praetor' – neither *de iure* (with ratification by the prince or the people) nor *de aequitate* (invoking public utility directly on his personal condition). Barbarius remains a slave, and so legally unable to represent the office validly. Nonetheless, the mistake *in qualitate* (in his personal status) makes the election voidable, because this *qualitas* (slavery) is occult. The precarious validity of the election suffices for Barbarius to lawfully enter the office, and so to acquire lawful possession of it. The implicit argument is that, when the defect became manifest, he would lose possession of the office – just as the occult deposed would when his deposition becomes manifest. Until that moment, however, both slave and deposed would retain lawful possession of an office to which neither is entitled.

Possession is the visible face of the underlying real right. It does not look at the inner relationship between person and thing, but at its external manifestation. It should project to the outside world the consequences of that entitlement – that is, the right to enjoy the thing – in our case, to exercise the office validly. Speaking of possession of the office – and, even more, of the jurisdiction of the office – Baldus highlights the external face of representation without bestowing validity on the internal relationship between person and office. Applied to the agency triangle of the last chapter, that means shifting the focus from the internal side (person–office) to the external one (office–thirds). Precisely what Baldus did with regard to the occult deposed.

We have seen how Baldus relied on the element of possession to argue for the validity of the acts of the occult deposed without however qualifying that case as toleration (and so, legal representation). This way, the occult deposed was neither fully intruder nor properly tolerated in office. Playing (in a very un-Innocentian way) with the occult character of the deposition, Baldus sought to highlight the (limited) lingering effects of the confirmation. This way he could push the occult deposition outside the threshold of proper representation – but not too far from it. In the case of Barbarius, Baldus moves from the opposite direction to get to the same point of arrival: he pulls Barbarius' case towards representation,

118 *Ibid.*, text and note 115.

coming as close as possible to its threshold without crossing it, and so without reaching the scope of proper toleration. In practice, the outcome is very similar to qualifying Barbarius as being tolerated in office. But, in legal terms, the difference between title and possession remains clear. This avoids plain self-contradiction: toleration presupposes confirmation, but confirmation would lead to the acceptance of Accursius' position. Stressing the element of possession of the office, and especially of its ordinary jurisdiction, Baldus reaches nearly the same result in practice – but not in law.

Just after stating that Barbarius had a 'true and revocable praetorship … as long as the defect remains hidden',[119] Baldus' *lectura* continues as follows:[120]

> therefore the deeds are valid as if [done] by the true praetor, albeit unworthy, who is to be stripped of his praetorship by the superior. The same applies to any *dignitas*, whether secular or ecclesiastical, because of the jurisdiction that attaches to it (as in Innocent's comment on X.1.3.13).

Baldus' reference to Innocent does not point to the concept of toleration, but rather to its procedural consequences. According to Innocent, as we have seen, the parties cannot raise any objection against the ordinary judge on the basis of his status. First, said the pope, the judge must be deposed from office.[121] Baldus' approach is remarkably subtle. For Innocent, the validity of the jurisdictional deeds of the ordinary judge is a consequence of his toleration in office. Innocent moved from the internal relationship between agent and office towards its external manifestations. As toleration in office entails the right to exercise it, in order to prevent external manifestations of agency it is necessary to cut the (internal) link between agent and office first. For Innocent, therefore, lawful possession of ordinary jurisdiction is only an external consequence of the underlying agency relationship. By contrast, relying on the simple (but legitimate) possession of the office, Baldus jumps directly to the lawful possession of ordinary jurisdiction, thereby skipping the underlying agency relationship.

In the *repetitio* Baldus comes back to the point so as to explain it better. In principle, possession should be the tangible manifestation of the underlying right. Barbarius lacks that right, but he has lawful possession of the office. In Baldus' words, he is not *de iure* entitled to the office, but neither does he exercise it only *de facto*. Barbarius has 'coloured possession' of the office. In Baldus'

119 *Supra*, this chapter, note 87.

120 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55va*, n. 20: 'et ideo valent gesta tanquam a vero praetore, licet minus digno, et cui praetura per superiorem esset interdicenda. Et idem dico in omnibus dignitatibus, quia est annexa iurisdictio, sive sint seculares vt hic, siue sint ecclesiasticae, hoc sensit Inn(ocentius) extra de rescri(ptis) c. sciscitatus (X.1.3.13).'

121 Cf. Innocent, *supra*, pt. II, §7.4, note 45.

words, Barbarius is 'one who never was in office *de iure*, but *de facto* in coloured possession'.[122] Possession of the office is therefore not a manifestation of the underlying entitlement to it – that would amount to sitting in the office *de iure*. The dichotomy *de iure* / *de facto* does not leave room for a third genus: ultimately, Barbarius is still praetor only *de facto*. But because Barbarius entered into office lawfully, through a voidable election, he is no intruder either. Qualifying him simply as *de facto* possessor would have implied that Barbarius lacked 'canonical entry' into office. Hence the reference to coloured possession – a lawful possession of the office that, from the outside, would point to the underlying right of the incumbent. Possession looks at the external manifestations of that right, at the exercise of the office towards third parties. It presupposes a title that *de iure* does not exist in Barbarius' case. 'Coloured possession' of the office is ultimately an indirect route towards Innocent's concept of toleration.

This indirect (and rather opaque) approach towards toleration is clearly visible in Baldus' three-fold distinction of unjust exercise of an office:[123]

> Sometimes one was never in office *de iure*, but *de facto* in coloured possession – as in our *lex*. Other times one was in office both *de iure* and *de facto*, but he should be deprived of it, for instance because he obtained the office fraudulently. In such case the deeds are valid even as to those who knew [of the fraud], because he was truly [the representative of the office], and he dealt as true [representative] – until removed by the superior. Other times still one used to sit in office, but he no longer does. In this case, the deeds are void if he is judicially deposed.

It might be noted how this distinction does not match Innocent's one. For Innocent the first case (*de facto* exercise of office with coloured possession) is tantamount to the third one (exercise of office after formal deposition). In both cases the person exercising the office is but an intruder, and this bars representation. As the concept of toleration is rooted in legal representation, only the second case can be described as toleration (thus valid exercise of the office). Also in Baldus the first of the three cases (coloured possession) is in principle different from the second (proper toleration), but in practice it leads to the same consequences with regard to the exercise of the office. The opposition is now between first and second cases on the one side, and third case on the other. This

122 See next note.

123 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 58va*, n. 27: 'Conclude tres casus. Quandoque quis nunquam fuit in officio de iure, sed de facto in colorata possessione, et loquitur l(ex) nostra [*scil*., Dig.1.14.3]. Quandoque fuit de iure et facto, tamen erat priuationi subiectus, {vt} quia dolo obtinuerat officium *vel dignitatem*; et tunc valent interim gesta et quo ad scientes, quia vere est talis, et pro *quali* se gerit, donec per superiorem remoueatur. Quandoque quis iam fuit in officio, sed hodie non est: *tunc an valeant gesta? Si quidem per sententiam sit amotus non valent*.'

stinction between coloured possession and proper toleration remains, but it is now of little significance in practice. Immediately after the passage above, Baldus continues:[124]

> If in our *lex* some deeds were made after that a sentence of deposition was passed against Barbarius, then they would not be valid (as noted by Innocent in X.5.1.24). But if his jurisdiction is revoked for the mistake as to himself, the deeds done so far are tolerated.

The reference to Innocent was to the passage where the pope wrote most clearly on the strength of toleration: 'anything is tolerated because of the office that one exercises'[125] – a statement that Baldus had already reproduced literally in his *lectura*.[126] Innocent's statement, however, referred exclusively to the true incumbent in office (i. e. the unworthy confirmed and not yet deposed). Speaking of coloured possession Baldus shifts the focus from the internal relationship (Barbarius–praetorship) to the external one (exercise of praetorship–third parties). Innocent always required symmetry between the two relationships. For the pope, it was always the person of the unworthy that was to be tolerated, not his deeds. The validity of the deeds was the consequence of the toleration of the unworthy in office. In the text quoted by Baldus, Innocent said that after the deposition the prelate may no longer be tolerated, but he should be considered an intruder. It followed, concluded the pope, that any further decision 'would not hold' (*non tenet*).[127] In recalling Innocent's text, on the contrary, Baldus applies the concept of toleration not to the person but directly to the acts. Thus, in the span of a few lines, the concept of coloured possession of the office moved from a qualified case of *de facto* possession to an explicit application of the toleration principle.

The same use of the concept of 'coloured possession' may be found in Baldus' commentary on the *Liber Extra*. It may be recalled Innocent's uncompromising stance on the need of confirmation prior to administration: without it, any deed

124 *Ibid.*, *fol.* 58*va–b*, n. 27–28: 'Nam si in l(ege) nostra [*scil.*, Dig.1.14.3] *essent gesta postquam depositionis sententia esset lata contra barbarium, et tunc gesta non valerent*, ut no(tat) Inno(centius) de accu(sationibus) c. qualiter (X.5.1.24) in glo(sa) magna. Si*n* autem est *alias* adempta iurisdictio propter errorem ipsius, adhuc acta tolerantur, de resti(tutione) spol(iatorum) c. audita (X.2.13.4) et de hoc tangitur i(nfra) si cer(tum) pet(etur) l. *eius*, in princ(ipio) (Dig.12.1.*41*) et facit quod no(tatur) i(nfra) de condi(cione) inde(biti) l. si non sortem § qui filio (Dig.12.6.26.8).' Cf. Innocent, next note.

125 *Supra*, §7.3, note 23. In saying as much, Innocent recalled the *lex Barbarius* (but, as we have seen, he approved of the Accursian Gloss and so of Barbarius' confirmation by the prince).

126 Cf. Baldus, *supra*, last chapter, §11.2, text and note 13.

127 *Supra*, pt. II, §7.3, note 24.

would be void. The point where his position conflicted most acutely with that of most canonists was on the case of the suffragan bishop-elect: being too distant from his metropolitan to wait for confirmation, this suffragan took up his pastoral duties without it. For Innocent, 'possession of the bishopric' (*possessio episcopatus*), even if lawfully acquired, was not sufficient for the validity of the acts.[128] This conclusion, as we have seen, was criticised as it subordinated the welfare of the Church to legal subtleties.[129] But Innocent (at least in principle) had a point: invoking equitable considerations to make up for the lack of confirmation would undermine legal representation. To strengthen his conclusion, the pope dismissed the most dangerous case found in the sources – that of Barbarius. The slave, said Innocent, was confirmed in office – so that case could not be invoked in support of the bishop-elect.[130] Baldus does not intend to follow the pope in his uncompromising position, but neither does he want to weaken Innocent's concept of representation (or to recant his own different reading of the *lex Barbarius*).[131] Hence he resorts to the 'coloured possession' of the office. Although not confirmed, Baldus maintains, the suffragan was lawfully elected bishop – so he had canonical entry. This possession is lawful but does not derive from *de iure* entitlement to the exercise of the office: just as with Barbarius, it is *possessio colorata*. Coloured possession must suffice in this case, lest the administration of the diocese be paralysed (the main point of Innocent's critics on the bishop-elect's case).[132] Stating as much, Baldus strengthens the concept of coloured possession implicitly invoking public utility. He would do the same in the *lex Barbarius*, but in much more explicit terms, as we are now going to see.

12.4.3 Public utility and representation: internal vs. external validity

In the tripartition of Baldus' approach (voidable election, possession of jurisdiction, and validity of acts), it remains now to look at the third step. It is only at

128 *Supra*, pt. II, §7.6, text and note 124.
129 *Supra*, pt. II, §8.1, text and notes 15 and §8.5, note 75.
130 *Supra*, pt. II, §7.6, text and note 123.
131 Although, admittedly, some short statements earlier in the same comment might give that impression: *supra*, this chapter, note 26.
132 Baldus, *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs*, cit., *fol. 69vb*, n. 11): 'Sed si ad exercendum iurisdictionem non sufficeret possessio colorata sequeretur inconueniens quod interim in re publica ius non redderetur et fieret spelunca latronum. Oportuit ergo mediam iuris dispositionem inueniri propter emergentes casus quae dilationem non recipiunt et non expectant plene discutionis euentum super proprietate ipsius iurisdictionis, istud est naturaliter certum quod facte cause: v*er*bi gratia si latro interim suspensus est non possunt retractari quia non possunt reduci in pristinum statum.'

this point, it may be recalled, that Baldus invokes the concept of public utility explicitly. As any public office, that of praetor aims at furthering public good. It follows that:[133]

> Barbarius was not promoted for his own benefit, but for the sake of the public good, of which the magistracies are a manifestation (as in Dig.1.1.1.2), and that final cause is true.

It is here that Baldus introduces the concept of public utility. If the final cause of public offices is furthering public good, then their exercise should be inspired to fairness (*aequitas*), because fairness furthers public good:[134]

> All that is useful to the commonwealth is equitable. Equity is nothing but a certain piety, which must be kept especially on what concerns the commonwealth, as the author of the *Somnium Scipionis* states at the beginning, when he says 'foster justice and piety'.

The point is more specific than it might seem. Stressing the relationship between fairness and public good means analysing equity in teleological terms. Most Roman law sources described fairness in terms of balance between the parties: equity (*aequitas*) aims towards balance (*aequilibrium*).[135] In a public law context however there are not two parties but a single one: the *res publica* or commonwealth. This does not mean that Roman sources did not impose private sacrifices for the sake of common good.[136] It means that they did not consider the position of the collectivity (whose common utility should be furthered) and that of the individual (which might be sacrificed) as equals, as the scales of the balance to be levelled. In a public law context, fairness was not applied to the zero-sum game of the private law context. Without a counterparty to consider, in other words, equity could be applied in a far more pronounced, goal-oriented manner.

133 Id., *lectura ad* Dig.1.14.3, cit., *fol. 55vb*, n. 23: 'Barbarius non fuit promotus propter seipsum, sed propter bonum publicum, quod repraesentatur in magistratibus, vt l. i § publicum, ff. de iusti(tia) et iur(e) (Dig.1.1.1.2), et illa causa finalis fuit vera.' Cf. Dig.1.1.1.2 (Ulp. 1 Inst.): '… Publicum ius in sacris, in sacerdotibus, in magistratibus constitit.'

134 *Ibid.*, *fol. 55ra–b*, n. 11: 'Omne n(am) quod in publico utile est, id aequum est. Aequitas n(am) nihil aliud est, nisi quadam pietas quae maxime debet esse circa Reipub(licam), vt ait auctor in prin(cipio) de somnio Scipio(nis), ibi dum dicit: "Iustitiam cole et pietatem" [Cicero, *De Re Publica*, 6.15], etc.'

135 The Roman law concept of *aequitas* is complex, and scholarly literature on it is exceedingly vast. As the subject falls entirely outside the scope of the present work, it would make little sense to provide specific references. For its shift towards medieval law suffice it to recall Gaudemet (1951), pp. 465–499, and Cortese (1962), vol. 1, pp. 47–53 and 66–71; Cortese (1999), pp. 1038–1043. Cf. more recently also Zwalve (2013), pp. 15–37.

136 E. g. Cod.10.44.2; Cod.11.4.1.1; Cod.11.4.2; Cod.12.29.2.1.

Baldus looks at Barbarius' case from this perspective, just as Ulpian did. Keeping the validity of Barbarius' deeds is 'more humane' (*humanius*) both for the Roman jurist and the medieval one. The difference lies in the possibility of fully separating representative from office. If the person does not coincide with the office, the source of the deeds is not Barbarius, but the praetorship. This is why, as we have seen, Baldus speaks of 'true praetorship' and not of 'true praetor',[137] and why he refers the concept of toleration directly to the deeds and not to Barbarius.[138] Public utility may bestow validity on the source of the deeds. That source, however, is no longer Barbarius, but the office itself:[139]

> you may on the contrary say that he enjoyed a true praetorship because of this *lex*, for this *lex* is based on considerations of equity and public utility. Those considerations however support the acts of Barbarius, not Barbarius himself. Therefore his acts are valid, but Barbarius is not praetor. Just as it is possible to have the exercise of a *dignitas* where there is no *dignitas*, so it is possible to discharge the office of guardian without true wardship because of the uncertainty as to the [validity of the] appointment (as in Cod.3.31.6).[140] Equity does not favour the person of Barbarius nor his personal status. This is clear both from the fact that, running away, Barbarius became a thief and a criminal (as in Cod.6.1.1),[141] and from the fact that he sneaked up on the people hiding his incapacity.

This passage explains why Baldus is always so careful in distinguishing entitlement from possession of the office. The accent is on the exercise of the office, which is valid for public utility reasons. But public utility is invoked for the benefit of the commonwealth, to make the acts valid. Qualifying the acts as valid for the sake of public utility means applying public utility directly to the relationship between office and third parties (the people). The Gloss and its followers did the same but, moving from the assumption that person and office coincided, they could not distinguish the valid exercise of the office from the

137 *Supra*, this chapter, §12.4.1, text and note 87.

138 *Supra*, this chapter, §12.4.2, text and note 124.

139 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55rb*, n. 15: 'aut dicit eum fuisse in vera praetura per rationem huius l(egis) tunc cum ratione huius l(egis) sit aequitas, et publica vtilitas, et illae rationes faueant actib(us) Barbarii, sed non Barbario; ergo acta valent, sed Barbarius non est praetor, et sic inuenitur administratio dignitatis, ubi non est dignitas, sicut invenitur administratio tutelae, absque vera tutela ratione dubii, vt C. de peti(tione) hae(reditatis) l. si putas (Cod.3.31.6), quod enim aequitas non faueat personae Barbarii, nec eius statui (*sic*), apparet, quia fugiendo erat fur et criminosus, C. de ser(vis) fu(gitivis) l. i (Cod.6.1.1) et quia obrepsit populo tacendo suam inhabilitatem.'

140 Cf. Id., *ad* Cod.3.31.6, § *Si putas* (*svper Primo, Secvndo et Tertio Codicis*, cit., *fol.* 201*ra*, n. 6).

141 Cod.6.1.1 (Diocl. et Maxim. AA. Aemiliae) stated that the runaway slave commits the theft of himself.

lawful position of Barbarius – the latter was necessarily instrumental to the former. Ravanis' 'power of the appointer' was ultimately based on the same premise. Because that premise was also unavoidable for Bellapertica and Cynus, they rejected any link between deeds and their source.

Public utility justifies the 'exercise of the *dignitas* where there is no *dignitas*', says Baldus. The ambiguity is intentional, and it would be lost had he spoken of office (*officium*). Referring to *dignitas* for both office and Barbarius, Baldus highlights their contrast. The slave remains legally incapable of lawfully representing the office, he is *indignus* of that *dignitas* first of all in the 'technical' sense of legal incapacity. Immediately after the above passage, Baldus continues to play with the ambiguity of the term *dignitas*. This is the only time in the *lectura* on the *lex Barbarius* where he associates Barbarius with the adjective 'worthy' (*dignus*). In so doing, Baldus does not seek to justify Barbarius' exercise of the office, but to invoke a punishment on him for it: 'Barbarius was liable of several crimes, so he is worthy [*dignus*] of punishment'.[142] This way the two-sided concept of *dignitas* strengthens the contrast between Barbarius and the office.

Importantly, this contrast does not abate with the intervention of public utility. On the contrary, public utility makes it even stronger, for it highlights the difference between the two faces of the agency triangle.[143] Public utility intervenes directly on the external side, to justify the validity of the exercise of the office for the sake of the recipients of the acts (the commonwealth). Also Bellapertica invoked a teleological approach to public utility. But he did so to skip entirely the relationship between acts and their source – because the source was the person of Barbarius, unlawfully vested with the office.[144] Baldus' different perspective, on the contrary, allows public utility to be invoked not just towards the third parties, but primarily in favour of the validity of the relationship between office and third parties. Ultimately, the acts are still valid because of public utility considerations. But those considerations operate in favour of the external side of agency: the office–thirds relationship.

Looking at the external side of agency, in turn, calls for the internal one. This leads to the most innovative element of Baldus' approach, namely considering the exercise of the office by the unworthy who cannot lawfully (*de iure*) represent

142 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55va*, n. 16: 'Barbarius plura delicta cumulauit, vnde poena dignus est.' In stating as much, it may not be excluded that Baldus implicitly referred to Suzzara's argument on the paradox of rewarding Barbarius (as he would do shortly thereafter, in a more pronounced manner, when speaking of the salary of the Florentine Ghibelline elected *podestà*: *supra*, this chapter, §12.4.1, text and note 89). On Baldus' use of *dignitas* against Barbarius see also the *repetitio*, *supra*, §12.2, note 47.

143 Cf. *supra*, last chapter, §11.6.

144 *Supra*, pt. I, §4.6.

it as valid for the recipients of the acts issued by the office, but not for the unworthy himself:[145]

> as there may be found nothing in Barbarius but for coloured title and coloured possession, then he is praetor with regard to the others, but not to himself.

Baldus' concept of 'coloured title' has little to do with its use in common law (the appearance of legal entitlement to possession or property). Rather, it is the transposition of the 'coloured possession' to the internal side of the agency relationship. Strictly speaking, coloured title does not exist. The title looks at the inner relationship between office and incumbent – either there is title or there is not. Hence Baldus normally speaks only of coloured possession of the office,[146] for possession looks at the external side of agency. The peculiarity of the present case – and its difference from the others – lies in that, invoking public utility, Baldus intentionally highlights the contrast between the two faces of agency. He wants to make sure that his complex elaboration would not be misinterpreted by associating public utility and the validity of the acts with Barbarius' personal status – after all, this was still the position of jurists such as Bartolus. What allowed Barbarius to exercise the office was the element of lawful possession without the underlying title – thus, coloured possession. Because of public utility considerations, this sufficed to produce valid legal effects on third parties – that is, as to the relationship between office and the people. This is what Baldus ultimately means when he says that Barbarius had 'true and revocable praetorship', albeit not 'rooted' in his person.[147] Barbarius' *indignitas* prevented the office from 'taking root' in him and made the praetorship revocable, so the title remains only a coloured one.

Seen from the internal side of agency, a revocable praetorship is no praetorship at all – again, coloured title is no title. This is why Baldus looks at the internal side of agency, the legal entitlement to sit in office, only after insisting on the strength of its possession. Because the moment the focus shifts towards the relationship between agent and office, there is only one possible conclusion –

145 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 55*rb–va*, n. 15: 'vnde nihil videtur in Barbario reperiri nisi coloratus titulus, et colorata possessio: est ergo praetor quo ad alios, non quo ad se.'

146 *Supra*, this chapter, notes 123 and 132.

147 *Supra*, this chapter, §12.4.1, text and note 87. Cf. also Baldus, *ad* X.1.3.14, § *Quoniam autem* (*Baldvs svper Decretalibvs*, cit., *fol.* 29*va*, n. 2): 'Item quod qui demonstrat non datur quod iurisdictio potest esse absque exercitio ff. de stat(u) ho(minum) l. qui furere (Dig.1.5.20), sed interdum est exercitium absque natura et radicabili iurisdictione, ff. de offic(io) preto(rum) l. barbarius (Dig.1.14.3). Ibi exercitium in possessione fundatur imo in publica vtilitate saltem aptitudine.'

lack of agency. Baldus states as much at the same time, as he stresses the effects of public utility on the relationship between office and third parties:[148]

> It is not important to the commonwealth that Barbarius is made praetor, but that the deeds are valid because of the common mistake. So we may conclude that Barbarius did not enjoy a true praetorship but a putative one, and that he was praetor only in name and in the exercise [of the office] with regard to the others and not to himself, for he did not have a true *dignitas*.

This passage explains further what said in the previous, shorter one. It moves from public utility – triggered by the common mistake and so by the risk of harming the commonwealth – to reach both sides of agency. The internal side is rejected: Barbarius was praetor only 'in name', and did not have a true *dignitas*. But the external side of agency is upheld: stating that Barbarius was praetor as to 'the exercise' of the office means qualifying that exercise as valid. Coupling together the – mutually opposing – conclusions as to internal vs. external sides of agency, the result is that 'he is praetor with regard to the others, but not to himself'.[149]

This crucially important conclusion[150] is better explained in Baldus' *repetitio*. If 'the deeds depend on the status',[151] then public utility should necessarily be invoked with regard to the person of Barbarius (the old position of the Gloss: the validity of the acts depends on that of their source). However, distinguishing between person and office and stressing the importance of lawful possession of the office, Baldus may come to the opposite conclusion without jeopardising the public utility argument:[152]

148 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 55va*, n. 15–16: 'Item non interest Reipublicae quod Barbarius fit praetor, sed quod acta valeant propter communem errorem bene interest Reipublicae: quare concluditur, quod Barbarius non sit in vera praetura, sed putatiua, et quod ipse fuit praetor nomine et administratione quo ad alios non quo ad se: quia non habuit veram dignitatem.'

149 *Supra*, this paragraph, note 145.

150 It may not be ruled out that Baldus derived this point (adapting it to a very different context) from Bellapertica. Rejecting the validity of the source and focusing exclusively on the validity of its acts, Bellapertica looked at the relationship between act (the sentence) and third party (the litigant parties). This let him to consider the act to be unlawful (*non legitime factum*) as to Barbarius, but lawful as to its recipients: *supra*, pt. I, §4.6, note 108. Among the commentaries of the Orléanese jurists on the *lex Barbarius*, it may be recalled, Bellapertica's was the main – perhaps even the only – one used by Baldus in his work on the *lex Barbarius*: *supra*, §10.2, text and note 57.

151 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 57vb*, n. 10, *supra*, this chapter, note 6.

152 *Ibid.*: '… licet non esset praetor de iure, sufficit quo ad litigantes quod erat praetor de facto, C. de senten(tiis) l. si arbiter (Cod.7.45.2) et ar(gumentum) l. i de testa(mentis) (Cod.6.23.1). Si ergo dicis Barbarium esse praetorem, et

> although he was not praetor *de iure*, it is sufficient for the parties that he was praetor *de facto* … Therefore, if you said that Barbarius was praetor, and that his appointment had validity in itself, that would be unnecessary, for it would go to the private benefit of Barbarius, not to the common good … In respect of public utility, maintaining that Barbarius was praetor would be in vain: the opposite solution would suffice as to the validity of the deeds and the preservation of public utility.

For the validity of the deeds – that is, for the external side of agency – Barbarius' factual exercise of the praetorship would suffice. It would, because Barbarius was not a mere intruder: Baldus saw to that by stressing the importance of the voidability of the election. This, as we have seen, gave Barbarius coloured possession of the office, thus lawful possession of ordinary jurisdiction. Barbarius received a 'true and revocable praetorship':[153] while this did not amount to *de iure* entitlement, it allowed mention of coloured possession. Not being an intruder, Barbarius was not a false praetor. At the same time, however, he was legally incapable of representing the office. This opposition is the key to separating external from internal validity of agency:[154]

> if we maintain that [Barbarius] was not praetor as to himself but that he should be considered praetor as to the others, it is necessary to explain something. One thing is to object 'you have not been created', another is to say 'you cannot be'. Where there is neither fact nor law, it is possible to raise the exception of falsehood. Where on the contrary something is true as to the facts but not as to the law, one cannot be considered as false [*falsus*], but legally incapable [*inhabilis*]

Properly speaking, Barbarius was not *falsus praetor* because he was formally elected. What he lacked was not the fact of the election to praetorship, but rather the legal requirements allowing that fact to result in his *de iure* entitlement to the office. The issue therefore is not of *falsitas*, but of *inhabilitas*. *Inhabilis* is someone who lacks *dignitas* in its 'technical' sense of legal capacity. This way, the question becomes very similar to that of the incompetent judge (another reason Baldus elaborates the distinction between fact and law in terms of *exceptio*). We have seen earlier in Baldus' *lectura* that the possession of ordinary jurisdiction allowed

creationem suam habere ualentiam in seipsa, hoc redundat ad priuatam vtilitatem Barbarij, non ad bonum publicum … praesupponere Barbarium praetorem esset fustra respectu publica vtilitatis, quia licet sit oppositum, valerent gesta, et *seruatur* publica vtilitas.'

153 *Supra*, this chapter, §12.4.1, text and note 87.

154 Baldus, *repetitio ad* Dig.1.14.3, *fol. 57vb*, n. 12: 'sed tenendo, quod quantum ad se non fuerit praetor, sed quo ad alios praetor debeat reputari, tunc oportet soluere, quae alia est exceptio "tu non es creatus", alia "tu non potest esse". Nam vbi abest factum et ius est exceptio falsi, et hoc non hic, quia non erat defectus in facto sed in iure, vbi vero adest veritas facti sed non iuris, iste non dicitur falsus sed inhabilis, vt no(tatur) in(fra) de proc(uratoribus) *l. quae omnia* (Dig.3.3.*25*).'

Barbarius to impose his jurisdiction over the parties, so long as the underlying defect of servitude (thus the legal incapacity) remained hidden or anyway not proven.[155] Barbarius was not truly an ordinary judge, but he appeared as such to the litigants: the question is not simply a difference between appearance and reality, but between lawful possession and legal entitlement.[156] Barbarius was not a true praetor, but he had lawful possession of the praetorship because he entered into office after being elected and while the *inhabilitas* (the defect *in qualitate*) remained occult.[157] The difference between 'true praetor' and 'true praetorship' is relevant only as to the inner relationship between person and office. From the outside, 'true praetorship' would suffice as to the validity of the deeds, because the deeds are not those of Barbarius but of the office. Saying that Barbarius' deeds are valid only 'as to the others' denies the agency relationship with the office, and links the office directly to those subjected to its jurisdiction (i. e. the third parties).

The distinction between internal and external validity of agency in Baldus' reading of the *lex Barbarius* is strictly dependent on the separation between person and office. This separation is always present in Baldus' elaboration of the *lex Barbarius*: there are never two parties (Barbarius and the people) but always three. Barbarius is the agent, but the agent remains distinct from the office he represents. The presence of a third subject between Barbarius and the people allows the common mistake to be qualified as pertaining to the office–third parties relationship, not to the agent–office relationship. The question therefore is not whether the agent is entitled to represent the office validly, but whether the office could validly issue the acts towards the third parties. Arguing for the validity of the relationship between office and thirds (because of public utility triggered by the common mistake) does not imply also ratifying the relationship between office and agent:[158]

155 *Supra*, this chapter, note 114.

156 Baldus, *repetitio ad* Dig.1.14.3, *fol.* 58*ra*, n. 16: '… Et sic dicatur quod Barbarius non fuit liber nec praetor, ergo fuit iudex incompetens: quo(modo) acta valent? Respondeo quo ad subditos iudex competens esse videtur, ut s(upra) dixi; sed in seipso secus. Sicut ergo non potest habere dominum, ita non potest habere iurisdictionem, ar(gumentum) de statu ho(minum) l. qui furere {§ in verbo habitu} (Dig.1.5.20).'

157 Cf. the four-fold division of defects in the election, *supra*, this chapter, §12.4.1.

158 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 219*ra*, n. 85): 'communis autem opi(nio) licet firmat gesta barbarij: non autem firmat eius preturam, quia detecta veritate est amouendus de officio, et sic aliis prodest: sed barbario non prodest de quo formatur ibi questio et non soluitur secundum verum intellectum: de hoc in d(icto) c. in literis (X.2.13.5) per Inn(ocentium).' Cf. Innocent, *ad* X.2.13.5, § *In literis* (*Commentaria Innocentii Quarti*, cit., *fols.* 226*vb*–227*ra*, n. 3 and § *Prius, ibid.*, *fol.* 228*ra*, n. 8).

> while common opinion strengthens (*firmat*) the deeds of Barbarius, it does not strengthen (*firmat*) his praetorship: when the truth is uncovered he is to be removed from office

Firmare means both strengthening, hardening, as well as confirming, establishing. Common opinion does not establish the validity of Barbarius' praetorship because, as we know, the *dignitas* of ordinary jurisdiction may not 'take root' in a slave.[159] Hence the praetorship remains 'revocable' (*revocabilis*) and not 'rooted' (*radicata*).[160]

Barbarius, says Baldus elsewhere with metaphysical transport, 'was not in the true substance of the office'. And truth, he continues, is the other face of being.[161] It would follow that Barbarius was nothing. This, however, applies only to the inner relationship between Barbarius and the office, not to the external relationship between office of ordinary judge and parties of a lawsuit:[162]

> Barbarius was nothing as to himself, but he was something as to the parties litigant.

The opposition between internal and external validity of agency – the invalidity of the praetorship as to himself and its validity as to the others – is not to be found in previous civil lawyers. To reach it, Baldus builds on Innocent's separation between person and office.[163] Between Baldus and the pope, however, there is a crucial difference: for Innocent the external validity of agency (the validity 'as to the others') always depends on its internal validity (validity 'as to himself'). Toleration allows the *indignitas* of the person *qua* individual to be overcome, focusing on the person *qua* agent. And it is on that basis that the office could act validly towards the thirds. In order to highlight the distinction between individual and agent, Innocent brings the person *qua* agent as close as possible to the office. If this closeness allows the emphasis to be shifted from the unworthiness of the individual to the enduring legal capacity of the agent, at the same time it does not leave much room to the office as a different subject

159 *Supra*, this chapter, note 102.

160 *Supra*, this chapter, note 87.

161 Baldus *ad* Cod.7.45.2, § *Si arbiter* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol. 52va*, n. 16): 'Et ideo dicunt doc(tores) in l. barbarius (Dig.1.14.3), quod licet valeant gesta tanquam solenniter facta: tamen barbarius non erat in vera substantia officij. Concordat regula philosophi dicentis: quod ens et verum conuertuntur, et vnum quodque sicut se habet ad esse sic ad veritatem, secundo metaphi(sicae).' Cf. Horn (1967), p. 148.

162 Baldus, *repetitio ad* Dig.1.14.3, *fol. 58ra*, n. 16: 'Concludamus ergo tres finales conclusiones. Prima est de Barbario quod non fuit praetor. Secunda de actib(us) exercitis quod valuerunt. Tertia quod barbarius nihil fuit *quod ad se, sed quo ad litigantes aliquid fuit*. Et sic casu, et fortuna populus Romanus fuit seruus, et *subiectus suo*. {Nempe fortuna in omni re dominatur}.'

163 Cf. Rampazzo (2008), pp. 433–434.

from the agent that represents it. Hence the need of symmetry between internal and external validity of agency: the relationship between office and thirds is functionally the same as the one between agent and office. Keeping agent distinct from office, Baldus could go beyond that, and fully separate the two 'sides' of agency.

The difference between internal and external validity of agency is particularly evident in Baldus' *additio* on the *lex Barbarius*. There, Baldus moves from the invalid election of the prelate whose incapacity remains however occult, to look at Barbarius' case from the perspective of the commonwealth – and so, from the external side of agency:[164]

> I rather think that the deeds are valid if [Barbarius] is in possession, and the common mistake and public utility both argue for this. I prove it this way. A prelate is bound to his subjects to render them justice, and may be compelled to do as much … This is an obligation *in rem* [*realis*], for the *dignitas* itself is bound to its subjects to do as much, and that amounts to a real right. So it is as if the collectivity of the subjects had *quasi possessio*[165] of this right … Hence I argue that this possession of the subjects justifies the legal proceedings in their favour because of their good faith, given that the prelate was in bad faith. The subjects possess this right as a collectivity, not as individuals, otherwise there would be infinite possessions. As there is but one possession for all of them together, a decision passed against some of them as individuals does not harm the whole of them (as in Dig.1.8.6.1).

Invoking public utility directly on the external side of agency, and fully distinguishing between obligations of the office and those of the person, Baldus can even speak of a real right of the third party towards the office. The obligation of the office of the judge is to grant justice to those under its jurisdiction.

164 Baldus, *additio ad* Dig.1.14.3, cit., *fol. 59rb–va*, n. 9–10: 'Verius credo quod valeant gesta, si est in possessione, et communis error et publica vtilitas hoc suadent. Hoc probo. Prelatus est obligatus subditis ad faciendum eis iustitiam, et potest ad hoc cogi, in Auth. de quaestore § super hoc [Coll.6.8, § super hoc(=Nov.80.7); cf. also Coll.9.14.9, § super hoc(=Nov.128.23)]. Item est obligatio realis, nam ipsa dignitas est obligata subditis ad hoc, et sic ex hoc resultat ius reale. Igitur quasi possidetur hoc ius ab vniuersitate subditorum. … Ex hoc concludo quod ista quasi possessio subditorum iustificat processum in eorum fauorem propter eorum bonam fidem, dato quod prelatus habeat malam fidem, dico etiam quod istud ius possidet vniuersitas subditorum, non singuli, quia sic infinite essent possessiones, cum non sit nisi vna in omnibus, et ideo sententia aliquorum singulorum non noceret etiam eis, vt l. in tantum, § vniuersitatis (Dig.1.8.6.1).' Cf. esp. Id., *additio ad* Dig.1.8.6.1, § *Vniuersitatis* (*In Primam Digesti Veteris Partem*, cit., *fol. 49vb*).

165 Baldus writes of *quasi possessio* both because that specific right lacks a corporeal dimension (cf. *supra*, pt. I, §5.4, note 42), and especially because a collectivity may not possess in the same way as an individual person: cf. e. g. Id., *ad* X.2.14.9, § *Contingit* (*Baldvs svper Decretalibvs*, cit., *fol. 156vb*, n. 38).

Described this way, the obligation clearly refers to the office, not to the person who exercises it. Hence Baldus qualifies it as a real right – a right against a thing, not a person. The holder of that right is the commonwealth (the collectivity of those under the office's jurisdiction), and the presence of the commonwealth allows public utility considerations. In suing before the illegitimate agent (Barbarius or the prelate), the people are exercising their right against the office. The simple possession of the office (instead of full *de iure* entitlement) by the prelate or Barbarius suffices as to its valid exercise because of the good faith of the people (which triggers public utility). But the validity is only towards the commonwealth (external validity), not to the false agent (internal validity). Looking at the commonwealth as a collectivity (*universitas*) not only avoids logical problems (the 'infinite possessions'), but especially strengthens the public utility considerations. Any single decision that harms an individual member of the commonwealth 'does not harm the whole'. So the administration of justice always goes to the benefit of the commonwealth, and even what is prejudicial to the individual furthers public utility.

Immediately after this passage, Baldus adds something else. If the rationale of public utility lies in the right of the people to receive justice, it follows that the scope of the *lex Barbarius* should only encompass the acts issued by the praetor at the parties' request, although the text of the *lex* says otherwise.[166] Baldus does not elaborate further on the point – the *additio* groups together a series of short glosses. Does that mean that the other deeds of Barbarius should be void? The text of the *lex Barbarius* referred both to legislative and judicial deeds,[167] and that was also the interpretation of the Accursian Gloss.[168] Even so, the possibility that Baldus did intend to restrict the validity of Barbarius' deeds only to those that could be issued at the party's request is not based only on a few lines in the *additio*.

In the preamble to the *lectura* on the same *lex Barbarius*, summing up the position of the Gloss, Baldus seems to imply a correlation between the kind of acts that Barbarius could issue and the difference between internal and external validity of agency. According to the Gloss, he says, the validity of the acts would depend on the fact that Barbarius became true praetor for equitable reasons (*de aequitate*). The same equitable reasons, he goes on, would also entail the validity of all his acts, whether legislative or jurisdictional – and, within the latter, both

166 Id., *additio ad* Dig.1.14.3, cit., *fol. 59va*, n. 10: 'Ista ratio concludit quod gesta per Barbarium valuerunt, de rigore quidem videtur contra tex(tus). Sol(utio) fateor quod ratio concludit in his, quae gesta sunt ad petititonem subditorum; sed litera loquitur etiam de alijs, in quibus cessat dicta ratio: certe nunquam cessat. Bal(dus).'

167 Cf. Dig.1.14.3: '… Quae edixit, quae decrevit, nullius fore momenti?'

168 *Supra*, pt. I, §2.1, note 24.

those at the party's request (*ad petitionem partis*), and those of the court's own motion (*ex mero officio*). Finally, he continues, the Gloss concludes that Barbarius' praetorship was *de iure* valid both 'as to himself' and 'as to the others'.[169] This summary seems to imply a crescendo: the validity of Barbarius' praetorship is initially affirmed on equitable grounds, but the breadth of the deeds that he is able to issue is such as to presuppose the *de iure* validity of his praetorship (and so, both internal and external validity of agency). The position of this summary of the Gloss – at the very beginning of Baldus' *lectura* – signals the difference with Baldus' own interpretation. Indeed, towards the end of the same *lectura*, Baldus reaches a different conclusion. The exercise of a public office is both the reason and the limit of the validity of Barbarius' deeds: the validity does not extend to what he may do outside of the exercise of the office.[170] The rationale is the same as that of Innocent's toleration – indeed, Baldus quotes the comment of

169 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 54*vb*, pr: '… Et ratio quare gesta valuerunt est, quia de aequitate fuit verus praetor: et quia aequum est acta valere propter publicam vtilitatem, et communem errorem: et hoc est verum tam in iudicando, quam in statuendo, et tam in gestis ad petitionem partis, quam ex mero officio. Ergo concluditur quod praetura fuit functus et quo ad se, et quo ad alios non solum de facto, sed de iure.'

170 While Baldus clearly follows Innocent IV on the subject (toleration does not operate outside public offices), he is more careful about the possible repercussions of this conclusion (especially when the deed is to be considered as *actus necessarius*, and in case of good faith possession of fruits). Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*ra*, n. 20: 'Sed quid dicemus in his, quae non fiunt per modum iurisdictionis vt in contractibus, an de aequitate valebunt facti contractus *stricti iuris* a minus legitimo prelato, sicut est intrusus de facto? Non valent xii q. ii <c.> alienationes (C.12, q.2, c.37). Si vero auctoritate superioris, tamen illa auctoritas non valuit, quia confirmatus erat excommunicatus, qui habetur pro mortuo quo ad spiritualia *pro non confirmato*, vt not(at) Innoc(entius) in c. nihil est (X.1.6.44), tamen subdistingue: aut est actus necessarius et valet, arg(umentum) de mino(ribus) l. ait pretor § permittitur (Dig.4.4.7.2), et de pro(curatoribus) *l. procurator* totorum in fine (Dig.3.3.63), et arg(umentum) huius l(egis) quia iurisdictio est necessaria, et debet subditis impartiri, ut in autentica de quaestore, § sup(er) hoc (Coll.6.8, § super hoc[=Nov.80.7]); aut est actus voluntarius, et tunc aut concernit proprietatem rerum, aut fructus. Primo casu non valet contractus, arg(umentum) C. de his qui pro tuto(re) l. ii (Cod.5.45.2), de iureiu(rando) *l. iusiurandum* §1 (Dig.12.2.17.1); secundo casu *valet si erat in bona fide quod administrationem facti*, licet non habeat ius plenum, arg(umentum) extra, de elec(tione) <c.> querelam (X.1.6.24), ne praela(ti) vices suas c. fin. (X.5.4.4).' But even this last exception is to be qualified, as in some situations it should not apply. This is particularly the case with illegitimate wardens, for they cannot prejudice the ward's property. The *repetitio* continues (*ibid.*): 'Et hoc in prelatis; secus in tutoribus non legitimis, qui nihil possunt nec in iudicio, nec extra in praeiudicium domini, vt l. qui neque, de reb(us) eo(rum) (Dig.27.9.8), nam dominus in eorum administratione non succedit, nec cogitur ratum habere, vt l. filiae, de sol(utionibus) (Dig.46.3.88).'

the pope that most highlights the difference between acts done in the exercise of the office and those done as a private individual.[171] Innocent however did not intend to restrict the scope of the acts that the unworthy tolerated in office could carry out. At the same time, the distinction between internal and external validity is not to be found in Innocent either. The two points might be related to each other. For Innocent, the toleration of the occult unworthy validates the internal side of agency: the tolerated is legally entitled to represent the office validly. The external validity – the validity of the acts towards their recipients – is but a consequence of the internal validity. Baldus' distinction between validity 'as to the others' and invalidity 'as to himself' is ultimately the consequence of lack of confirmation. Because Barbarius is not confirmed in office, he lacks the right to represent it validly. If we wanted to credit Baldus with remarkable coherence and continuity in his thinking, even if possibly elaborated over a span of many years, we might therefore read the *lectura* in the light of what said in the *additio*, and so narrow the validity of the acts of the apparent judge – who has coloured possession of the office – only to those that require a lawsuit. The point however remains unclear.[172]

The distinction between validity of the acts for their recipient and invalidity of the same acts for the person who carried them out was not new. It was an old sacramental problem. Are the sacraments celebrated by the heretic valid? In answering that question, one of the great canon lawyers of the early thirteenth century, Johannes Teutonicus, used the same distinction as Baldus. Teutonicus, it will be recalled, was hardly sympathetic to the jurisdictional applications of the concept of toleration. But he had to make sense of an apparent contradiction in Gratian's *Decretum*. There, at a short distance from each other, a first passage stated that the sacraments are not defiled by the impure (C.1, q.1, c.30), and a second, on the contrary, held that the impurity of the soul does pollute the sacrament (C.1, q.1, c.61). The most common explanation was to distinguish between sacraments of necessity and those of dignity.[173] But Teutonicus added

171 Id., *lectura ad* Dig.1.14.3, cit., *fol. 56va*, n. 35: 'no(tandum) quod materia literae nostrae habet locum in his, quae fiunt ratione publici officii, non in alijs, extra de consuet(udine) c. <cum> dilectus (X.1.4.8), secundum Innoc(entium), et in his quae tangunt ius aliorum, non solius facientis, vel patientis, extra, de procu (ratoribus) <c.> consulti (X.1.38.15), per Inno(centium).' Cf. Innocent, *ad* X.1.38.15, § *Sententia*, cit. *supra*, pt. II, §7.5, notes 63–66.

172 The case, discussed in the next chapter, of the legislation issued by the unworthy bishop tolerated in office may not be applied, even by analogy, to the present scenario. Quite unlike Barbarius, this is a proper case of toleration (where the external validity of the acts is supported by the internal validity of the appointment). *Infra*, §13.1.

173 *Supra*, pt. II, §6.1.

two further possibilities, both seeking to narrow the scope of the first text. One explanation could be that the first text referred to priests ordained by those tolerated by the Church. Given his scarce approval of toleration, however, Teutonicus added that such ordinations were only 'imagined' (*ficte*). But there could be a second explanation, which would better ensure the consistency of the two texts. Stating that the sacraments were not contaminated by the impure who celebrated them, continued Teutonicus, the text might have meant that the sacraments would be polluted (and so void) only for the priests administering them, and valid for the faithful receiving them.[174] Whether or not Baldus looked at this passage is not clear (although, being part of the Ordinary Gloss on the *Decretum*, it would be surprising if he did not know of it). But its importance lies not in a hypothetical influence on Baldus, which may not be proven. Rather, it lies in the alternative solution: either the impure priest was tolerated, or the sacrament he celebrated was pure for its recipients and polluted for him. Unwittingly, Teutonicus showed the limits of toleration: being tolerated would entail the validity of the act both for the others (*ad alios*) and also for the person who issued it (*ad se*). By contrast, limiting the validity to the recipients amounted to an implicit denial of toleration.

Baldus applies the same reasoning – and so the distinction between *se* and *alios* – to the occult excommunicate: 'while the occult excommunicate is not excommunicated as to the others, nonetheless he is excommunicated as to himself [*ad seipsum*], that is, to his own damage and not to the detriment of the others [*ad alios*]'.[175] In this case, the excommunicate was tolerated in office because of his confirmation.[176] This is why Innocent's comment on the same passage said nothing of the distinction *ad se/ad alios*, and focused only on the validity of the excommunicate's acts.[177] From an ecclesiological perspective,

174 Teutonicus, *ad* C.1, q.1, c.30, § *Transiens* (Pal. Lat. 624, *fol.* 75*vb*; cf. Basileae 1512, cit., § *Transit*, *fol.* 108*ra*): 'i(nfra) c. sic populus (C.1, q.1, c.61) contra [cf. Gloss *ad* C.1, q.1, c.61, § *Sic populus* (Basileae 1512, cit., *fol.* 110*vb*)]. Solutio hic de sacramentis necessitatis que semper habent effectum, nisi culpa suscipientis impediat: ibi de sacra(mentis) dignitatis, uel hic de ficte ordinatis ab hiis quos ecclesia tolerat, uel dic quod sunt polluta quantum ad illos vt xlviiii. di. c. vlt. (D.49, c.2) Jo(hannes).' Cf. *supra*, pt. II, §6.4.

175 Baldus, *ad* X.2.27.24, § *Ad probandum* (*Baldvs svper Decretalibvs*, cit., *fol.* 234*rb*, n. 1): '… licet occultus excommunicatus non sit excommunicatus quo ad alios est tamen excommunicatus quo ad seipsum, i(d est) ad damnum suum non alterius: nam sicut vulnus dicitur quod videtur, vlcus dicitur quod intus latet ita iste vlceratus est licet alius quam ipse non videat maculam.'

176 *Ibid.*, *fol.* 234*rb*, pr.

177 Contrast Baldus' position (*supra*, this paragraph, note 175) with that of Innocent, *ad* X.2.27.24, § *Infirmandam* (*Commentaria Innocentii Quarti*, cit., *fol.* 314*va*).

surely the pope did not condone the excommunication of the prelate. But the reprobation pertained to his condition as an individual, so it was of no consequence when he acted as representative of his office. The fact that Baldus also brought up the distinction *ad se/ad alios* in this context reveals a different approach to toleration: even when looking at the person as representative of the office, Baldus never reaches the same degree of identification between incumbent and office as Innocent did. Ultimately, this is what allowed Baldus to consider the external validity of agency as something different from, and potentially even in contrast with, its internal validity.

Toleration presupposes full integration between unworthy incumbent and office. This is the logical consequence of Innocent's concept of representation, where the representative tends to identify with his office. There is however a subtle line between integration and assimilation. For Baldus, the office is never thoroughly assimilated with the person. Even when the office remains in the background and the agent is in front, the stage, so to speak, is always three-dimensional. Highlighting the direct imputation of legal obligations to the office, its separation from the agent lingers even when the agent has full title to exercise the office. So, we have seen, even the king cannot bend the office of the Crown into doing something that would defile its *dignitas*.[178] This was something that Innocent never said.[179] When the acts detract from the *dignitas* of the office, therefore, they remain the acts of a private individual and may not be imputed to the office. The *dignitas* of the supreme office of the Crown relates to the commonwealth: the direct relationship between office and the people (the external side of agency) works as a constraint on the relationship between agent and office (the internal side of agency). Hence the main obligation of the king was preserving the state of the commonwealth (*status regni*), because that obligation was first and foremost of the Crown towards the commonwealth, to the point that it even defined the Crown itself.[180] The external side of agency, the relationship between office and third parties, helps to define the nature of public offices, and it colours that relationship with public utility.

178 *Supra*, last chapter, §11.4.

179 Admittedly, however, the image of the king acting as a tyrant was a topos, but that image was not easily transferred to the pope. Rather, the problem in canon law was whether the heretical pope could be deposed – and, especially, by whom (D.40, c.6). It was not (or not directly) whether his acts prior to the deposition were valid. Cf. esp. Moynihan (1961), pp. 68–69, 80, 84–85 and 90–91; Tierney (1998), pp. 117–120.

180 See first of all the classical work of Post (1964), esp. pp. 269–290. It is significant that, in his discussion, Post associates the concept of *status regni* with that of the inalienability of those Crown's rights considered necessary for public utility reasons (*ibid.*, esp. pp. 280–282).

Highlighting the external side of agency, and the public utility underpinning the relationship between public office and commonwealth, Baldus underplays the invalidity of the internal side. Invoking public utility when looking at the relationship between commonwealth and praetorship, as Baldus does, means highlighting the obligation of the office of the judge towards the commonwealth. The strength of that obligation allows the wanting status of the agent – Barbarius – to be overcome. Both in the case of the Crown and in that of the office of ordinary judge the principal relationship is between office and people; the one between office and agent becomes somewhat secondary. And the same rationale used to deny the validity of the acts of the true agent (the king lawfully sitting on the throne) is ultimately applied to ascribe valid effects to those of the false agent (the slave unlawfully sitting on the bench).

The role of public utility, and its importance in the relationship between *dignitas* and commonwealth, can also be seen in the issue of Barbarius' freedom. The point is not of importance as to the conclusion – for Baldus, Barbarius remains a slave. But it is of interest to appreciate the extent of the separation between internal and external sides of agency: Baldus even wonders whether the strength of the external validity might make up for the weakness of the internal validity.

Unlike the validity of both deeds and praetorship, Barbarius' freedom was the only issue that Ulpian left unsolved: the text, says Baldus, is 'open' on the matter. Even allowing for the validity of the praetorship would not necessarily entail the freedom of the slave-praetor.[181] The Accursian Gloss meant as much when it said that the prince could have appointed Barbarius as praetor without making him free.[182] But if the two issues are not necessarily related, it might well be possible to reach the opposite result: that Barbarius became free without enjoying a valid praetorship. As said, the argument is merely speculative, but the reasoning is nonetheless interesting. We have seen how, for Baldus, Barbarius was not *dignus* of the praetorship, which was 'unworthily received'.[183] The way in which he exercised his praetorship, however, somewhat cleansed this initial unworthiness. One might not be worthy to become an Apostle of the Lord, argues Baldus referring to St Paul,[184] and yet his acts may be worthy of the apostolate all the same. More importantly, Baldus continues, the fact that the *dignitas* of praetor-

181 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 56rb*, n. 32: 'Viso de praetura, et de gestis Barbarii, videamus nunc de eius libertate, quam, vt dixit, potest esse praetura circumscripta libertate, vt videtur textus apertus, et ideo praetura non arguit de necessitate in libertate.'

182 *Supra*, pt. I, §2.4, note 83.

183 *Supra*, this chapter, note 87.

184 1 Cor. 15:9.

ship falls on someone unworthy of it does not tarnish the office. On the contrary, it is for the office to clean the baseness of the person who exercises it, so long as this exercise is worthy of the office.[185] Since Barbarius proved himself worthy of the *dignitas* of the praetorship, such a *dignitas* might cleanse its holder of his personal *indignitas*. 'Indeed, as he did what was useful to the commonwealth, he deserves a reward.'[186] This was an intentional twisting of a previous statement in the same *lectura* (Barbarius deserves only punishment).[187] This passage might have even induced some later hand in the *repetitio* to colour with reluctance Baldus' conclusion against Barbarius' freedom.[188] The whole reasoning had a predetermined end (Barbarius remains a slave), but it would have been unthinkable in Innocent: not just for the unholy parallel between a deceitful slave and the Apostle of the gentiles, but especially because of the relationship between person and office. Moving from the external side of agency Baldus reached the internal one. This time, however, the purpose was not to keep internal invalidity fully separate from external validity, but to wonder whether the external side might influence – and even heal – the internal one.

185 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 56*rb*, n. 33: 'erit ergo ratio: quia expedit honori Reipublicae regi per dignum receptum, aut factum, sicut Apostolatus aut dignum recipit, aut dignum facit, et sic dignitas non vilis sit in persona vili. Et sic aufert sordem ab ipsa.'

186 *Ibid.*, n. 34: 'nam faciens in publico quod vtile est, meretur praemium, de haer(edibus) insti(tuendis) l. testamento domini (Dig.28.5.91), et ad Sil(anianum) l. si quis in graui § hi quoque (Dig.29.5.3.15).'

187 *Supra*, this paragraph, text and note 142.

188 '{Concedo} et idem dico quod Barbarius non fuit liber', Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*ra*, n. 15. The verb 'concedo' is not to be found in any edition of the 'Bartolian' *repetitio* on the *lex Barbarius.* Incidentally, this use of the verb *concedere* is somewhat alien to Bartolus' own style. Ascribed to Baldus, however, it would sound more plausible, as he used it other times to narrow down his conclusions, especially on debated and complex issues. See e. g. Baldus *ad* Cod.6.44.1 (*svper Sexto Codicis Iustiniani*, cit., *fol.* 155*ra*, n. 17).