Chapter 4

Ultramontani & Co.

At this point, we might go slightly back in time, and deal with the earliest full-scale attacks on the Gloss. In so doing we will follow neither a strictly chronological order nor a geographical one. Rather, we will try to show how similar ideas in the late thirteenth century were circulating more widely than is often assumed.

Around the same years as Odofredus was seeking to provide a better defence of Accursius' conclusions than Accursius' own, other jurists started a frontal attack at the tradition of literal exegesis embodied in the Gloss. We have seen how Odofredus (who had already detached himself from that tradition), noted in passing how 'others' would deny the validity of Barbarius' praetorship, but he did not say who they were.[1] The point is worth mentioning because both Odofredus and those 'others' might have differed as to the conclusion on Barbarius' case, but they shared the same dialectical method. If Odofredus reached the same conclusions as Accursius, he did so in a manner that was much less subservient to the text of the *lex* – and was in some parts even critical of the Gloss. Some of his contemporaries went beyond him, applying the same dialectical approach to argue against the core of the Accursian reading of the *lex Barbarius*. Among the first to do so was one of the first teachers of the Orléanese School, Johannes de Monciaco (Jean de Monchy, d. c.1266).

It is not entirely clear whether Monciaco studied under Jacobus Balduini, as Odofredus surely did.[2] While far from established,[3] such a possibility would be

1 *Supra*, §3.1, text and note 10. Cf. also Suzzara, *ad* Dig.1.14.3: 'quidam dicunt quod dic(it) glo(sam) quod non, et hoc est uerum licet glo(sa) dicat eum fuisse pretorem et male dicit', *infra*, Appendix, ll.2–3.

2 On Balduini see *supra*, last chapter, note 1. There is little doubt that Odofredus studied under Balduini, as he said himself in several parts of his work. Cf. e. g. Spagnesi (2013), p. 1450.

3 Probably the scholar most confident that Monciaco did study under Balduini was Lefebvre (1958), p. 301, although he offered little concrete evidence. Other scholars seemed less certain. Waelkens in particular observed how one of the few sources on Monciaco (a *repetitio* on Dig.1.3.32 preserved in Florence, BML, AeD 417) ascribed to Balduini an opinion (on the time needed for the introduction of a new custom) that was different from that of Balduini himself (twenty-five years instead of the ten years he required). This seems not to have been a typo, for a

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tempting, given their (insofar as we know of Monciaco) fairly similar approach to the sources – *lex Barbarius* included. The critique of the approach based on a literal interpretation (and so, against the greatest monument to that tradition – the Gloss of Accursius) spread mainly through the school of Balduini. His teaching methods did not influence only his own students, but were in turn used by those students to train new generations. So, for instance, when the most illustrious student of Monciaco – Jacobus de Ravanis[4] – skipped some texts in class, he would tell his students to look them up in Odofredus' commentary.[5] Ravanis was notoriously opposed to Accursius. While he did not agree with Odofredus on the interpretation of the *lex Barbarius*, they both shared a more flexible attitude to the sources.

Later jurists typically ascribed the origins of the 'revolt' against the Accursian Gloss to the *Ultramontani*, especially to the law professors of the School of Orléans. The *lex Barbarius* is no exception: the debate as to its precise meaning was fuelled by the Orléanese dissent, and from Cynus and Bartolus onwards it became traditional to distinguish two opposite interpretations of Barbarius' case: that of the *Citramontani* and that of the *Ultramontani*. This opposition may be found in any legal history textbook, and of course it is to a certain extent the product of a grand narrative that was often rather liberal with facts. According to this narrative the *Citramontani* were mainly the Bolognese and their sympathisers, while the *Ultramontani* came to be identified with the jurists of Orléans. We have already seen some *Citramontani* who did not behave according to this scheme, and we will see more of them. Similarly, not all the French jurists would have enjoyed roasting Accursius alive.[6] Looking specifically at the *lex Barbarius*, the very fact that some of the first opponents of Accursius studied or taught in Bologna is already significant. In the long run, the same Bolognese tradition would start bending towards Balduini's new method and progressively detach itself from the old one of Accursius. With hindsight, that was perhaps inevitable: with the passing of time, the limitations of a literal interpretation became increasingly manifest.

further version of the same text (BNF, Lat. 4488, the text was likely not written by Monciaco himself, though) said as much. Waelkens (1984), pp. 19–20 and 25–26 respectively. On the mistake as to the length of time required for a new custom in Balduini see *ibid.*, pp. 18 and esp. 250.

4 Mejiers identified three cases in Ravanis' work where he referred to Monciaco as his teacher: Meijers (1959*a*), p. 61, note 230. Far more frequent are the occasions where Ravanis simply wrote 'dominus meus'. See further Feenstra (1986*a*), pp. 48–49.

5 Bezemer (2005), p. 22.

6 E. g. Chevrier (1968), pp. 979–1004.

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4.1 Jean de Monchy

Not much is known of Monciaco:[7] he taught in Orléans until the early 1260s[8] and died a few years later, likely in the late 1260s.[9] What is known of his thinking comes mainly from Jacobus de Ravanis. This is also true of Monciaco's reading of the *lex Barbarius*. Ravanis reports mainly the fact that Monciaco rejected the validity of Barbarius' praetorship: Barbarius' jurisdiction was *ipso iure* void, Monciaco maintained, just like that of an excommunicated judge. In both cases, all it would take to expose their legal incapacity would be a single litigant recusing their jurisdiction because of their true status.[10] Succinct as it is, this second-hand information is extremely interesting, especially the parallel between the slave-judge and the excommunicated judge. In a game of academic genealogy, it would be interesting to know whether the critique of Accursius – and the parallel with the excommunicate – derived even in part from Balduini himself. That might also help to establish (or to exclude) a link with the doubts of Azo and Ugolino as to the the presumed will of the people,[11] for Balduini was Azo's student.[12] Unfortunately I was unable to find any significant gloss of Balduini on the *lex Barbarius*.[13]

7 Most of the (scant) information that we have on Monciaco comes from research by Meijers, especially Meijers (1959*a*), pp. 39–43.

8 *Ibid.*, p. 39. Monciaco might have started teaching in Orléans around 1235: Lefebvre (1958), pp. 296–297.

9 The last evidence on Monciaco that Meijers could find dates to 30.4.1265, during the final phases of the negotiation between the pope and Charles of Anjou on the Kingdom of Sicily. On that day Monciaco, who had also taken part in the earlier negotiations, witnessed the document in which Charles accepted the crown of Sicily from the pope's legate. Meijers (1959*a*), p. 41. A later document reports the day and month of his death (3 February) but not the year (*ibid.*).

10 Ravanis, *ad* Dig.1.14.3 (Leiden, Abl.2, *fol.* 18*rb*): 'dominus mei dicebat in ista questione quod non fuit pre(tor) quando fuit creatus possit surgere vnius de populo et dicere: tu es suspensus ipso iure, nec videtur quod actum est. Vnde sic si excommunicatus eligetur non valet ipso iure sic nec cum iste eligitur quod seruus est.'

11 *Supra*, §2.4, text and notes 90–91.

12 Cf. Odofredus, *ad* Cod.3.36.24, § *Filium quem habentem* (*Odofredi … in primam Codicis partem … Praelectiones …* Lvgdvni, 1552; anastatic reprint, Bologna: Forni, 1968, *fol.* 180*vb*): 'dominus Ja(cobus) bal(duinus) qui militum persequebatur doctorem suum dominum Az(onem) dicebat …'). The link between Azo and Balduini was highlighted by Savigny (1829), vol. 5, pp. 96–97, text and notes 17–18 (pp.105–106, notes *b* and *c* in the 2nd edn of 1850) and never questioned thereafter. Among the most recent studies highlighting the point see Conte and Loschiavo (2013), p. 137.

13 Equally interesting would be to know the position on the *lex Barbarius* of the other jurists of the 'first generation' of the Orléanese law professors who are known to have studied in Italy, Guido de Cumis, Simon of Paris and Pierre of

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Although Ravanis' references to Monciaco are not particularly elaborate, they are sufficient at least to wonder whether Monciaco might have commented extensively on the *lex Barbarius.* Ravanis referred to his teacher both for his rejection of Barbarius' praetorship and for the parallel with the excommunicate. In his comment on the *lex Barbarius*, Ravanis also mentioned Monciaco when discussing whether a single person could take advantage of the common mistake. On this last occasion he referred mainly to what Monciaco had said, without adding much.[14] This last case was a rather specific problem, found only in the most elaborate (and lengthy) discussions as to the scope of the common mistake in the *lex Barbarius*. If Monciaco drew a parallel between Barbarius and the excommunicate appointed as judge and also ventured into sub-distinctions as to the validity of the common mistake, it would seem very unlikely that he did so in a few lines. A different explanation of course might be that Monciaco discussed the individual knowledge of a common mistake, not with regard to the *lex Barbarius* but with regard to customary law. But in that case we should also imagine a second rather unlikely event: that Ravanis decided to shift a specific and detailed point on the problem of the validity of a new custom from its *sedes materiae* (Ravanis' *repetitio*[15] on Inst.1.2.9) to a different subject, also moving his teacher's discussion there. It would just seem more likely that Ravanis referred to Monciaco when commenting on the *lex Barbarius* because it was there that his teacher had discussed the matter. If this conjecture were true, it would make Monciaco's lost commentary on the *lex Barbarius* one of the most detailed of his times, perhaps on the same level as that of Odofredus.

The analogy between Barbarius and the excommunicate would have great success among civil lawyers, but it was not new. As we will see, canon lawyers had already drawn it long before Monciaco.[16] Any discussion as to the influence

Auxonne (on whom see esp. Meijers [1959*a*], pp. 30–35, 36–38 and 43–44 respectively). Unfortunately, my attempts to find any significant gloss of these jurists on the *lex Barbarius* have proven similarly unsuccessful. Among those three jurists, the most renown was doubtless Guido de Cumis. On his life and works, apart from the above-mentioned study of Meijers (which remains fundamental), mention should be made at least of Feenstra (1996), pp. 26–27; Feenstra (1974), pp. 260–266; Cortese (2013), pp. 1094–1095. More literature on Cumis esp. in the above-mentioned article of Feenstra (1996), p. 26, note 4, and Feenstra (1986*b*), p. 17.

14 *Infra*, this chapter, note 60.

15 The *repetitio* was a special lecture – we might say, a *lectio magistralis*– on a specific *lex.* On the point see Bellomo (1995), pp. 137–139; Dondorp and Schrage (2010), p. 27; Waelkens (2015), p. 103. The precise relationship between *lectura* and *repetitio* in the sources is of course far more complex: see e. g. Bellomo (1995), pp. 145–147, and esp. Bellomo (2000), pp. 404–424; cf. also *infra*, this chapter, note 66.

16 *Infra*, pt. II, §6.

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of canon lawyers on first Orléanese law professors about the *lex Barbarius* (and, probably, also beyond it), however, would be mere speculation. Besides, it is more likely that the origin of the parallel with the excommunicate came from the civil law tradition, as we shall see. The widespread use of such a parallel among the *Ultramontani* and their Italian sympathisers might have facilitated the reception among civil lawyers of what the canonists had to say on the matter. We will come back to the point.

4.2 Jacques de Révigny

Shortly before Monciaco concluded his Orléanese teaching, one of his former students, Jacobus de Ravanis (Jacques de Révigny, c.1230–1296),[17] became his colleague. In the space of a few years (he taught in Orléans until 1270)[18] his teaching would acquire great fame and prestige, leaving a strong mark both in France and on the 'other side' of the Alps. Meijers identified two manuscripts reporting Ravanis' *repetitiones* on the Vetus: one in Leiden, the other in Naples.[19] Later scholars added others,[20] but not for the *lex Barbarius*. Of the two manuscripts of Meijers, however, only the Leiden one also contains his *repetitio* on the *lex Barbarius*.[21]

In his comment on the *lex Barbarius*, Ravanis cites only Monciaco. It is however likely that he knew at least some among the earlier jurists mentioned so far.[22] For instance, the way Ravanis introduces Barbarius' case strongly reminds one – if in a somewhat less colourful manner – of Odofredus.[23] The extent to which Monciaco's teaching influenced Ravanis on Barbarius' case is far from clear. Ravanis quoted Monciaco only twice during his remarkably long *repetitio*, and the peculiarities of his reasoning (together with the full-scale attack on the Gloss) would strongly suggest a remarkably original approach. History, however,

17 On the life and works of Ravanis see Meijers (1959*a*), pp. 59–80; van Soest-Zuurdeeg (1989), pp. 1–10, and especially Bezemer (1987), pp. 1–4, and Bezemer (1997), pp. 139–143.

18 Waelkens (1984), p. 1.

19 Meijers (1959*a*), p. 71.

20 See esp. Bezemer (1987), pp. 116–117.

21 Leiden Abl.2, *fols.* 17*vb*–18*va.* The Naples manuscript skips the *repetitio*: see Napoli, Branc.III.A.6, *fol.* 13*r–v.* See also Lepsius (2008), p. 242, note 52.

22 On Ravanis' sources see esp. van Soest-Zuurdeeg (1989), pp. 64–67.

23 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 17*vb*): 'tale barbarius philippus seruus fugitiuus fugit a domino suo et iuit ad ciuitatem romanam et gessit se pro libero homine. Cum vacaret pretura petijt preturam ab imperatore et pretor designatus est. Exercuit officium suum, multa decreuit, multa iudicauit. Deinde venit dominus eius et dixit ei: nescio quae facis tu et vult ipsum retrahere, et sic detectum est ipsum fuisse seruum.' Cf. Odofredus, *supra*, §3.1, note 8.

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is always written posthumously. Ravanis' efforts to produce a remarkably original piece of legal thinking were soon frustrated by the usual 'transmission chain', Bellapertica–Cynus–Bartolus. Bellapertica (who relied abundantly on Ravanis) sought to downplay Ravanis' originality, possibly so as to enhance his own. Cynus reproduced Bellapertica's *repetitio* almost without change, and Bartolus relied mainly on Cynus for the position of the Orléanese jurists. Most later authors simply read Bartolus. As a result, Ravanis was remembered for having based his interpretation on both public utility and the authority of the sovereign. According to this reading of Ravanis, his position differed from that of the Gloss only in that he treated those two requirements independently from each other, so that one could be present and the other missing. Allegedly, for Ravanis, it was only when the two elements were both present that the deeds would be valid, as in Barbarius' case.[24] This summary did little honour to its author. What Ravanis did say was something different, and remarkably subtler.

Ravanis' position on the *lex Barbarius* does not diverge from that of the Gloss only in its conclusion, but starts with its approach to the text itself. The analysis of specific words or excerpts no longer follows the order in the source. Far from providing a textual exegesis, Ravanis restructures the text so as to better match the general point he seeks to make. The great advantage of a non-literal interpretation of the text lies in its flexibility: it becomes possible to reach new conclusions, different from and even contrary to those found in the text itself.[25]

Ravanis opens his comment on the *lex Barbarius* by rejecting the approach of the Gloss: the *lex* deals neither with Barbarius' praetorship nor with his freedom, but only with the validity of Barbarius' deeds.[26] To deny the validity of Barbarius' praetorship, Ravanis inverts the order of the Gloss and discusses Barbarius' freedom first.[27] The rearrangement is not to make it more logical but to make it functional to the purpose that Ravanis seeks to achieve. If Barbarius' freedom is a prerequisite for the validity of his praetorship, then disproving the one becomes instrumental in denying the other. Having denied both points, Ravanis however allows for the validity of the acts of the slave who became neither free nor

24 For Bellapertica and Cynus see *infra*, this chapter, note 136. In his summary of Cynus, Bartolus was more succinct: *infra*, §5.1, note 4.

25 See esp. *infra*, this paragraph, note 56.

26 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fols.* 17*vb*–18*ra*): 'Ex isto themate tria queruntur s(ecundum) glo(sam). Iste erat seruus, nunquam factus est pretor de iure, quia planum est quod de facto fuit. Item nunquam valet quod [MS: qui] iudicauit, et item nunquam est liber. Ad primam non respondet, sed glo(sa) dicit quod quamdiu latuit sua seruitus fuit pretor … Dico glosa in l(ege) ista non querit nec vnum, de edictis et sententijs vtrum teneant.'

27 See *infra* in this paragraph.

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praetor. The *lex Barbarius*, says Ravanis, affirms their validity in pursuance of public utility considerations, so as not to prejudice all the parties who transacted business before Barbarius in the mistaken belief that he was truly praetor. Both in rejecting the tripartition of the Gloss and in approving only of the validity of the deeds, Ravanis (or Monciaco before him?) set an example that would be followed by the other *Ultramontani* that we will look at.

Public utility, says Ravanis, allows for the validity of what is done under a mistaken belief.[28] To be able to trigger public utility considerations (and so to produce valid legal effects), however, a mistake must be common.[29] In case of a single person's mistake, truth prevails.[30] In saying as much, Ravanis of course does not mean that the mistake of an individual may never excuse him. When his ignorance is justifiable, the single person may well invoke it – but only to bar the application of the rule in that specific case. Thus, the individual mistake may prevent the production of specific effects of a rule or contract.[31] The common mistake works exactly in the opposite sense: it bestows validity upon something that would otherwise be void. To do that, it is necessary that both the mistake and, especially, the utility be common. So for instance, continues Ravanis, the excommunicate appointed to hear a single case cannot pronounce a valid decision, although he was widely reputed to be in communion with the Church.[32]

28 *Ibid.*, *fol.* 18*ra*: 'Item colligit<ur> hoc quod propter multitudinem permittitur aliquid quia multa decreuit si retractarent multi ledentur … ad hoc est ar(gumentum) quod propter tumultum populi euitandum fit quod alias non fieri, i(nfra) ad l. cor(neliam) de sic(ariis) l. qui cedem (Dig.48.8.16).'

29 On the problem of individual knowledge of the common mistake see *infra* in the text, and esp. note 60.

30 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'Dicunt hoc colligitur quod opinio prefertur veritati. Dico debet colligi quod opinio non singularis sed communis. Item si consonet veritati, preferitur veritati ut i(nfra) ad acquir(enda) her(editate) l. cum quidem, § dicitur (Dig.29.2.30.3).'

31 *Ibid.*: 'Error probabilis excusat, etiam singularis. Statutum est in ciuitate ista quod qui vadit de nocte soluat tantum. Tu uenis de nouo ad istam ciuitatem, vadis de nocte. Nonne excusaret te error tuus singularis? Certe sic, quia statuta ciuium non liga<n>t ignorantem, i(nfra) de decret(is) ab ordi(ne) faciend(is) l. vlt(ima) (Dig.50.9.6); ad hoc est i(nfra) de iur(is) et fac(ti) ig(norantia) l. i § i (Dig.22.6.1.1).' Cf. Bezemer (1994), p. 102, note 92.

32 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra–b*: 'pone quod imperator deleget excommunicatum: videtur non versatur utilitatis publica, sed sola litigatorum. Ideo dico in illis questionibus quod sententia non valet immo nulla est ipso iure, quia a non suo iudex lata ut C. si n(on) a <com>pe(tenti) iudi(ce) (*sic*) per totum (Cod.7.48).' The Accursian Gloss mentioned the mistake of single litigants when discussing the incompetent judge in Cod.7.48.2, § *Si militaris* (Parisiis 1566, vol. 4, col. 1674).

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The same public utility allows one to consider Barbarius' deeds as valid. This, argues Ravanis, is what Ulpian meant when he said that it was the more human solution ('humanius') to Barbarius' case.[33] To prove the point Ravanis gives several examples, two of which are particularly interesting. The first is, once again, about the excommunicated judge. If an excommunicate is appointed judge on the common but mistaken assumption that he was not excommunicated, says Ravanis, his decisions would be valid, just as those of the slave appointed praetor.[34] In the previous example, the excommunicate was appointed to hear a single case: in the absence of common utility, Ravanis denied the validity of the sentence despite the common mistake.[35] In the second case, on the contrary, the excommunicate was in the same situation as Barbarius: that of an ordinary judge. The parallel between the excommunicated judge and the slave-judge is not new: we have already seen how Monciaco used the same image to stress the precariousness of Barbarius' jurisdiction. Ravanis seeks to strengthen the similarity between Barbarius and the excommunicated judge using one of those subtle arguments that would incense so much later *Citramontani*: the excommunicate is a criminal (*delinquens*); the criminal is called 'enslaved to the punishment' (*servus poenae*); so the *excommunicatus* is a *servus*.[36] In other words – as most other jurists would have put it – the excommunicate loses his legal capacity, becoming similar to a slave.

33 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'Tertio subicitur questio nunquid edicta <et> decreta ab eo tenebunt. Dicit iuris consultus quod sic et hoc est humanius alias ledentur qui coram eo litigauerunt.' *Ibid.*, *fol.* 18*rb*: 'Item dicit litera "humanius est" ut eius decreta teneant si esset vere pretor … Possit dicere quod non fuit pretor et quamquam (*sic*) sint sententie late a non suo iudice ualent tantum ex equitate, vnde licet non teneant de rigore valent de equitate, et hoc innuit illud verbum "humanius est" etc., et sic illa litera "sed nihil" etc. usque in "quid dicemus" etc.' Cf. Dig.1.14.3: '… Sed nihil ei servitutem obstetisse ait Pomponius, quasi praetor non fuerit: atquin verum est praetura eum functum. Et tamen videamus: si servus quamdiu latuit, dignitate praetoria functus sit, quid dicemus? Quae edixit, quae decrevit, nullius fore momenti? An fore propter utilitatem eorum, qui apud eum egerunt vel lege vel quo alio iure? Et verum puto nihil eorum reprobari: hoc enim humanius est.'

34 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'Pone excommunicatus impetratus est iudex, imperator ignorabat et credebatur communiter quod non esset. Excommunicatus iudicauit, nunquid valebit sententia? Videmus quod sic per l. istam [*scil.*, the *lex Barbarius*], excommunicatus seruus est quia delinquens seruus est delicti, C. de sen(tentiam) pas(sis) l. ult(ima) (Dig.48.23.4). Sic ergo valet quod decreuit barbarius seruus qui credebatur communiter liber in sententia lata ab excommunicato, de quo communiter credebatur quod esset liber valebit.'

35 *Supra*, this paragraph, note 32.

36 *Supra*, this paragraph, note 34.

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Allowing the validity of decisions issued by an excommunicate, however, does not mean supporting the validity of the excommunicate's own jurisdiction. If Ravanis takes Monciaco's example of the excommunicate who is appointed judge, he insists that the appointment as judge took place after the excommunication, not before it. The point is important: it is not a question of determining whether further deeds could be valid even after the excommunication, but whether any decision could be valid at all, despite the fact that this judge never had any jurisdiction. To strengthen the point, Ravanis provides another example: that of the *praeses provinciae* who, unaware that his successor had already arrived to replace him, continued to exercise his office despite his jurisdiction having expired (Dig.1.18.17).[37] Ravanis is not the first to notice the similarity between this case and that of Barbarius: when commenting on Dig.1.18.17, the Accursian Gloss also referred to the *lex Barbarius*.[38] But the reason Ravanis refers to this text when discussing Barbarius is very different from the use made in the Gloss. The Gloss simply observed how 'someone who is unaware can do what someone who is aware could not do'.[39] Ravanis on the contrary wants to show that, aware or not, the old *praeses* could not possibly exercise his jurisdiction – just as an excommunicate sitting on the bench. The question is simple: since the new *praeses* was already in the province, the mandate of the old one could not be prorogated. Doing so would amount to suspending the jurisdiction of the new magistrate. Nonetheless, the Digest considered the deeds of the old *praeses* to be valid. The reason for their validity is found in a second text that Ravanis cites immediately thereafter. This text came slightly earlier in the order of the first book of the Vetus, and it looked at the opposite scenario: the new proconsul was yet to arrive when the mandate of his predecessor expired. Here there was little difficulty in prorogating the jurisdiction of the old proconsul. In so doing, the

37 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'Ecce alia <quaestio> (s)i videtur uel dicitur quod iudex ordinarius finito tempore sui regiminis ignorat [MS: ignorant] aduentus successoris iam erat successor in prouincia et iudicat videtur et hoc est vi ignorantiae ut i(nfra) de off(icio) presi(dis) l. si forte (Dig.1.18.17) et de of(ficio) procon(sulis) l. meminisse (Dig.1.16.10pr).' The same solution is then applied in case of delegated jurisdiction (the proconsul on the contrary had ordinary jurisdiction), when the mandate of the delegate judge is revoked unbeknownst to the parties. *Ibid.*, *fol.* 18*ra*: 'et hoc dicunt ipsi in simili questione: quidam est delegatus, reuocatur eius mandatum, partes ignorant reuocationem, litigant partes coram eo et dicat sententiam. Dicunt quod valet sententia per l(egem) istam et per l(egem) perall(egatam) i(nfra) de of(ficio) presi(dis) l. si forte (Dig.1.18.17) et facit i(nfra) de sol(utionibus) l. vero procuratori (Dig.46.3.12).' The text of Dig.1.18.17 is reported *supra*, §2.5, note 101.

38 *Supra*, §2.5, note 102.

39 *Ibid*.

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text also gave a clear explanation: the prorogation was needed for the 'utilitas provinciae'.[40] Public utility was of course also the reason for the validity of the deeds of the old *praeses* in the first case – but the text did not say as much expressly. What Ravanis needed was a clear statement that public utility could be invoked to bestow validity on the deeds without necessarily acknowledging the legitimacy of their source. In the case of the old *praeses provinciae* the relationship between public utility and validity of the deeds is immediate. The common mistake as to the status of the ex-*praeses* triggers public utility considerations that allow for the validity of his deeds without at the same time prorogating his jurisdiction.

Having found a foothold in the sources allowing for the desired solution of Barbarius' case, Ravanis moves on to explain its working. This explanation is probably the most interesting part of his commentary on the *lex Barbarius*. Its first part consists of a peculiar interpretation of the effects of the common mistake. On the point Ravanis' analysis is relatively short but remarkably complex.

For Ravanis, a common mistake bestows validity on something that would otherwise be void, but only so long as the mistake itself is not uncovered. Uncovering the mistake also means removing its effects. The uncovering of the mistake, in other words, operates retrospectively. Since mistakes do not make law, a mistake may only inhibit the application of some particular rules so long as it lasts. Applied to Barbarius, this means that his mistaken status allowed him to act as if he were truly praetor – so long as the mistake lasted. But the moment the truth is uncovered, the effects of the mistake should fade away together with the mistake itself. All Barbarius' deeds should therefore be considered according to his true legal status, and so be declared void.[41]

40 Dig.1.16.10pr (Ulp. 10 de off. procon.): 'Meminisse oportebit usque ad adventum successoris omnia debere proconsulem agere, cum sit unus proconsulatus et utilitas provinciae exigat esse aliquem, per quem negotia sua provinciales explicent: ergo in adventum successoris debebit ius dicere.' The reference to the *utilitas provinciae* was obviously interpreted as common utility: cf. Gloss *ad* Dig.1.16.10, § *Debet ius* (Parisiis 1566, vol. 1, col. 140).

41 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*rb*): 'barbarius fuitne pretor quamdiu latuit sua seruitus? videtur quod n(on). L(ex) dicit perceptio salarij non facit aliquem decurionem, ut i(nfra) de decurio(nibus) l. herennius (Dig.50.2.10). Vnde si quis credeatur canonicus et non est, si percipuit distributiones et stipendia hoc non facit ipsum canonicum. Queritur et si iste barbarius se habuit ut pretor et salarium recep(it) tamen ex quo non est electus legitime non est pretor. Item l. dicit C. si servus export(andus) l. moueor (Cod.4.55.4) qualiter est nec aliquis fingitur fuisse retro sed detecta seruitute est seruus, ergo fingitur retro fuisse seruus et sic non potuit esse pretor.' Cf. *ibid.*, *fol.* 18*ra*: 'Item ad notabile quod error communis facit ius verum est quousque error sit detectus, vnde quousque latuit seruitus est iudex, sed detecta seruitute non est iudex.' Ravanis'

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Ravanis' position on the common mistake is remarkably refined; at least intellectually, more so than that of his contemporary, Jacobus de Arena. Arena insisted on the effects of a common mistake, but did not explain its nature, let alone the relationship between the essence and effects of the common mistake. He simply sought to limit the scope of the common mistake, and found it in unfair prejudice. Where the common mistake would lead to the unjustified prejudice of the person who went along with the mistake, or of a third party, then it does not produce effects.[42] If compared with Odofredus,[43] this is clearly an improvement: at least, it imposes a limit to the scope of common mistake. But the underlying principle seems to be the same: if common, a mistake is tantamount to truth, and so can have legal effects – unless equitable considerations inhibit its application to a specific case. Ultimately, the widespread character of the mistake remains the reason for its equiparation to the truth and so the production of valid legal effects. Seeking to provide a more robust argument for this equiparation than Odofredus', Arena drew on several passages in the Roman sources, each one dealing with a specific case on common mistakes. Thus Arena's rule was the product of inductive reasoning: easily applicable to other, discrete cases by way of analogy, but a weak basis for a general, abstract principle.[44] This way, the (logical) explanation for the legal effects of the common mistake remained somewhat ambiguous.

Also for Ravanis common mistake is potentially all-encompassing. But, and much unlike Odofredus and Arena, for Ravanis it may never be assimilated to the truth. The common mistake is structurally incapable of 'making law' because it may confer only a veneer of validity. So long as the mistake endures, it bestows validity only because it inhibits the application of the underlying cause of invalidity. Uncovering the mistake therefore means exposing the invalidity of the deeds. While the scope of application of the common mistake is unrestricted, in other words, its precarity leaves it fragile.

Applied to the *lex Barbarius*, however, the fragility of the common mistake also becomes its strength. And here lies Ravanis' genius. The effects of the common mistake may be ephemeral, but they allow an inverted approach to the validity of Barbarius' deeds. The whole issue of the *lex Barbarius* no longer revolves around the bestowal of validity upon some void deeds. Now the operation is exactly the opposite: depriving the deeds of their previous (albeit

restrictive interpretation of the *lex Moveor*, functional to his approach as to the consequences of the mistake, would seem in open contrast with that of the Gloss (*supra*, §2.3).

42 *Supra*, §3.2.

43 *Supra*, §3.1.

44 Cf. Gordley (2010), esp. pp. 89–100.

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apparent) validity. We have already seen this logical inversion (from valid to void) in the approach of the Gloss on the effects of putative freedom, and it cannot be ruled out that Ravanis took inspiration from it.[45] But we have also seen how the second part of the Gloss on the *lex Barbarius* changed its overall position on the matter.[46] In subordinating the validity of the deeds to that of their source, Accursius' problem was how to confer validity on Barbarius' deeds. Ravanis' concern is precisely the opposite: how the same deeds could be seen to retain their initial validity. The point is very important: Ravanis does not need to make something valid that is void. He must prevent the apparent validity of the deeds from yielding to their true condition when the common mistake is uncovered. It is only at this stage – and for this reason – that Ravanis introduces the other element of his theory, the role of superior authority. The inversion of perspective as to the validity of the deeds also impacts on the role of the superior authority. In Ravanis, the superior authority is invoked not to bestow validity on the deeds, but to ensure that the deeds could retain their initial validity.

Before invoking the superior authority, however, Ravanis had to make sure that its intervention would not apply to the person of Barbarius (as it does in the Gloss) but only to his deeds. It was therefore necessary first of all to disprove Accursius' theory on the presumed will.

The Roman people (or, after the *lex Regia*, the emperor) surely had the power to set Barbarius free or even to appoint a slave as praetor.[47] But it does not follow that they wanted to exercise this power. That, says Ravanis, was the mistake of the Gloss. The Gloss 'jumps' to a conclusion that was not supported by the text of the *lex Barbarius*.[48] Nor is it possible to invoke Pomponius' remarks on the validity of Barbarius' position. What Pomponius said, argues Ravanis, belongs to the facts of the case ('de themate'), not to their legal outcome.[49] In other words,

45 *Supra*, §2.3. Even if the approach was similar, the consequences of the mistake (especially for putative freedom) were not: *supra*, this paragraph, note 41.

46 *Supra*, §2.4.

47 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'populus romanus olim cum apud populum romanum residebat imperium potuit seruo etsi manenti seruo decernere istam dignitatem et abrogare [MS: arrogare] l(egem) quod dicit seruum non posse esse pretorem uel iudicem. Item populus romanus olim si sciuisset eum seruum potuisset ipsum facere [MS: fecisse] liberum, quare si hoc posset populus romanus olim cum apud eum residebat imperium multo fortius imperator in quem translatum est imperium hoc potest uel potuit.'

48 *Ibid.*, *fol.* 17*vb*: 'istam questionem legit litera per saltum post illa uerba "designatus est".'

49 *Ibid.*, *fol.* 18*ra*: 'Dixit iuris consultus pomponius non nocet ei seruitus quin pretor fuit prefectura functus est, hoc sit per l(egem) istam quod fuit vere pretor. Possent legi verba ista quod essent de themate, et sic denotarent factum non ius.'

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according to Ravanis, Pomponius simply said that Barbarius exercised the praetorship, not that his praetorship was valid. Much to the contrary, for Ravanis the legal outcome of the *lex Barbarius* is a clear denial that Barbarius ever became praetor. Barbarius was not praetor because he did not become free.[50] The best evidence for this is Ulpian's remark that the people would have set Barbarius free had they known of his servile condition. This remark, says Ravanis, is not tentative evidence of Barbarius' hypothetical freedom, but clear proof of his enduring servitude.[51]

50 For Ravanis, the invalidity of Barbarius' praetorship has little to do with any obstacle other than his own personal status. That is particulary the case for the *lex Iulia de ambitu*, which no longer applies in Rome. The point might seem marginal, but in the discussion of previous and coeval jurists on Barbarius' case the *lex Iulia* acquired a remarkable (at times, somewhat disproportionate) importance, and this strengthened the impression that the fate of Barbarius' praetorship would depend on its interpretation. Looking at Dig.48.14.1pr (Mod. de poen. 2), Ravanis could easily argue that the *lex Iulia* no longer applied in Rome from the moment that the prince started to appoint magistrates, previously elected by the people. Leiden Abl.2, *fol.* 18*rb*: 'Hic dicitur quod barbarius prefecturam petijt et designatus est pretor. Contra, non debuit designari ex quo petijt immo incidit in l. iul(iam) ambitus i(nfra) ad l. iul(iam) ambi(tus) l. unica (Dig.48.14.1). Dicunt quidam verum est si petet clam incidet in l. iul(iam) ambi(tus) nec designaretur pretor, si palam coram omnibus licet et sic non incidit in l(egem) iul(iam) ambi(tus), vnde licet ad palam quod clam non licet, ar(gumentum) i(nfra) de administr(atione) tuto(rum) l. non existimo (Dig.26.7.54) et est casus l. i(nfra) de pollicit(ationibus) l. i § si quid ob honorem (Dig.50.12.1.1). Dico ali(ter). Dicit glo(sa) [Barbarius] petijt in vrbe romana, vnde qui petit incidit s(cilicet) in iul(iam) ambi(tus). Verum est si alius quam in vrbe, sed barbarius in vrbe petijt et ibi cessat l. iul(ia) ambi(tus) ut i(nfra) e(odem) l(ege) i(nfra) (*sic*) ad l. iul(iam) ambi(tus) l. unica (Dig.48.14.1). Dicit glo(sa) quod lex iul(ia) ambi(tus) cessat in urbe romana. Pessime intelligit l(egem) quod hoc dicit i(nfra) ad iul(iam) ambi(tus) l. unica. Dicit l. illa l. iul(ia) ambi(tus) cessat in vrbe quia datio magistratum pertinet ad principem. Antequam spectaret datio magistratuum ad principem, illi quibus spectabat corrumptebantur. Sed hodie dicit l. illa ex quo spectat ad principem non est verisimile quod sit corruptibilis princeps, immo incorruptibilis. Vnde cessat l. iul(ia) ambi(tus) in vrbe, quia cessat delictum. Sed non dicit possit licite dari pecunia in vrbe roma pro acquirendo magistratu.'

51 On this point, Ravanis is particularly meticulous in his reconstruction of the exact meaning of the text. *Ibid.*, *fol.* 18*va*: 'Item pro hoc est litera, dicit in fine "sed etsi scivisset" populus romanus "seruum esse liberum fecisset"; hoc dicit "etsi" implicat "sed etsi si sciuisset", quod dicit idem est et cum ignorasset ipsum esse seruum, quod ipsum fecit populus liberum. Dico quod non est liber, et hoc dicit litera in hoc "cum humanius est", cum etsi potuit populus romanus seruo l(ibertatem) decernere habuit potestatem ad ar(gumentum) glose, quod dicit hoc verbo "etsi" implicat "sed etsi si sciuisset". Dico quod non est in "etsi" sed in "etsi uel sic". Dicit litera "sed et si sciuisset seruum liberum fecisset". Hoc dicit et hoc

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Having excluded the application of the sovereign power to the person of Barbarius, Ravanis seeks to link that power directly to Barbarius' deeds. The operation presents an obvious difficulty: the actual exercise of the sovereign power would entail the ratification of Barbarius' position. Hence Ravanis invokes that power, but not its exercise. He does so stressing two elements. First, the mistake itself was only partial: the people, says Ravanis, were mistaken only as to the condition of Barbarius, not about his person. The mistake, in other words, was not on the identity of the elected but only on his status. The people wanted Barbarius as praetor – only, they were not aware of his servile condition. Thus, reasons Ravanis, although the will of the people is vitiated, it is still present. The second reason is rather obvious: the people (or the prince) are sovereign. This clearly magnifies the consequences of their volition, because it allows the production of legal effects that a non-sovereign volition (i. e. the will of anyone below the law, not above it as the *princeps*) could not have.[52]

implicat, hoc videtur ignorauit populus cum fecit serum pretorem, sed et si sciuisset eum esse seruum fecisset eum liberum, q(uod) d(icit) non sol(um) pretorem. Vnde si sciuisset eum seruum et liberum et pretorem fecisset, et quod non fuit liber quia imperator hoc non agebat optime facit i(nfra) de in ius vo(cando) l. sed si hoc lege § patronum (Dig.2.4.10.2). Sed si sciuisset eum seruum, fecisset eum liberum, ar(gumentum) C. qui admi(tti) ad bo(norum) pos(sessionem) l. bonorum (Cod.6.9.1).'

52 *Ibid.*, *fol.* 18*rb*: 'dico licet fuit pretor quod [MS: quia] tamen detecta seruitute videbantur acta sua non valere, quia dampnato actore dampnantur ea quae egit ut C. de her(eticis) l. dampnato et l. ii (Cod.1.5.6pr and 2). Hic tamen vides contrarium. Videtur dicendum quod fuit pretor quia si non face<re>t eum imperator pretorem aut hoc esset propter errorem aut propter iuris prohibicionem. Propter iuris prohibicionem non, quia iuris innhibitio (*sic*) non ligat imperatorem ut s(upra) de legi(bus) l. princeps (Dig.1.3.31); propter errorem non, quia fuit error in condicione persone et talis non impedit ut i(nfra) de iud(iciis) l. ii (Dig.5.1.2pr) et i(nfra) de iur(isdictione) o(mnium) iu(dicium) l. si per errorem (Dig.2.1.15). Ex hoc se(quitur) quod quos deliget imperatorem uel populum quod teneat ipso iure quia iuris prohibicio [*scil.*, against electing praetor a slave] nichil operatur in principem, sed possit dicere quod cum hoc fuit publica vtilitas, vnde ista<e> duo r(ationes) faciunt, communis vtilitas et committentis po(tentia).' The opposite case may be found in Ravanis' *repetitio* on Inst.1.2.9, on the validity of a new custom introduced by mistake. What if the inhabitants of a city followed a behaviour in the mistaken belief that it was legally required? As a matter of principle, since they observed this behaviour for a sufficiently long time, its observance should lead to the creation of a (legally binding) custom, for 'mistake makes law'. However, since the people lacked the will to introduce this new custom, their mistake does not point to implicit consent but rather to the lack of it. Being mistaken, their power to change the law could not be invoked to keep the custom. On the contrary, their ignorance is considered proof of utter lack of consent. And so, concludes Ravanis, the custom is void. Ravanis, *repetitio ad* Inst.1.2.9 ('ex non scripto') (BNF, Lat. 4488,

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These two arguments must be read together: the will of the Romans is relevant because they are a sovereign people. Alone, the formal validity of the appointment would not suffice as to the valid exercise of the office. So for instance, says Ravanis, if it was not the Roman people who had elected a slave as praetor but rather a bishop who had appointed an excommunicate as judge, the deeds of the judge would clearly remain void.[53] The emphasis, in other words, is not on the appointment but on the person who made it.

In turn, this difference would seem to depend on Ravanis' theorisation of the common mistake. Not providing a specific, normative explanation for the validity of what is done under common mistake, Odofredus and Arena could be rather liberal with the use of the expressions such as 'common mistake makes law'. By contrast, the only time in Ravanis' commentary on the *lex Barbarius* (far longer than those of the two Italians combined) where he says that the common mistake 'makes law', he adds immediately that 'this is true until the mistake is uncovered'.[54] The lack of a clear definition of the common mistake in the thinking of those jurists entailed its potentially unlimited scope. The definition provided by Ravanis, on the contrary, set clear boundaries to the common mistake. These boundaries, however, also limited its strength, and called for stronger reasons in support of the validity of the acts. If the effects of the common mistake should fade away with the mistake itself, then the simple formal validity of the appointment might not suffice to keep them alive. Hence

fol. 303*rb*, transcription in Waelkens [1984], pp. 445–446, ll.1–9, 21–36): 'Queritur sexto utrum usus non erroneus exigatur ad consuetudinem inducendam. Pone exemplum. Populus totus huius ciuitatis uel maior pars est usus tali modo quod credebat esse legem et tanto tempore quod sufficit ad consuetudinem inducendam et non est lex. Numquid erit consuetudo? Videtur quod sic, quia error communis facit ius: ff. de officio pretorum l. Barbarius (Dig.1.14.3); de supellecti(li) legata l. Labeo, ad fi. (Dig.33.10.7.2 *sed* Dig.33.10.5.3); ergo et consuetudinem … Set et populus ex certa scientia potest tollere legem et contrariam legem facere, ergo multo fortius et consuetudinem. Set ad istam rationem dicendum est quod ubi est error, non est consensus in eo in quo est error. Vnde si populus utitur sic, set mouetur in alia ratione, consentit in hoc ut sit ius in futurum, set in ratione decipitur nec in illa consentit … Requiritur consensus ad consuetudinem. Ergo usus populi errantis eam non inducit.' Cf. Waelkens (1984), p. 240. On the problem of the dialectic mistake-consent in the formation of customs see more generally Cortese (1964), vol. 2, pp. 104–110.

53 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'Pone quod episcopus huius ciuitatis committit excommunicato; certe ipse non posset hoc facere quod excommunicans possit iudicare.' The example might not be entirely felicitous, since in most cases the bishop could lift the sentence of excommunication. Ravanis might have thought of some particularly serious cases of excommunication, or of some jurisdictional reason why the bishop could not have lifted it (say, it was issued by his metropolite).

54 *Supra*, this paragraph, note 41.

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the need to recur to the much-criticised Accursian solution of the will of the people, albeit shaped differently.

In so doing, Ravanis' conclusion might seem at first sight somewhat paradoxical. He criticised the presumed will of the people in Accursius more harshly that any previous jurist (so far as we know), only to use it himself. And, when using it, he seemed content with the mere possibility of something that surely did not happen. The harsh critique of Accursius might well depend precisely on the fact that Ravanis did not want to dismiss his solution entirely, but to apply it to a different object (the deeds, not the person). Because Ravanis intended to keep its fundament alive, in other words, it was essential to disprove Accursius' application in the strongest possible terms. Further, Ravanis' tantalising approach to a will that does not materialise (the will to appoint someone as praetor without the intention of actually dispensing from his incapacity) is itself the product of his peculiar position on the common mistake. Ravanis does not need to envisage a positive intervention of the sovereign because of the initial validity of the deeds. As said, his problem is not to ascribe validity to something that is void, but simply to retain a pre-existing validity once the mistake is clarified. Hence Ravanis could consider sufficient the simple fact that the choice of Barbarius was made by the same subject who had the power to dispense with the incapacity, all the more given that the sovereign was mistaken only as to the condition, not also the identity, of the person elected.[55]

Since the sovereign's intervention remains only potential – it gives strength to the election without in effect materialising – Ravanis considered it as only an element in support of the public utility argument invoked by Ulpian. This can be seen in Ravanis' division of the text of the *lex Barbarius*: first, Pomponius describes the subject matter (Barbarius' discharge of the praetorship), and then Ulpian explains the underlying issue (whether the deeds are valid), and finally provides an answer to it (the deeds are valid out of fairness towards the people, given their common mistake). Ulpian's rhetorical questions (it would be unfair for the people to suffer harm from an election whose invalidity they could easily

55 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'confirmat [Ulpianus] suam solutionem duabus rationibus quia valuerunt quae dixit et quae decreuit, propter potenciam eius qui commisit ei iudicari, et istam potenciam committentis ostendit duabus rationibus. Ecce prima: populus romanus olim cum apud eum erat imperium posset ei manenti seruo dare preturam, abrogando l(egem) quod dicit quod seruus iudex esse non potest nec pretor. Ergo imperator hoc multo fortius hoc possit. Secunda ratio est si populus romanus sciuisset eum seruum potuisset eum facere liberum et pretorem. Ergo si hoc olim potuit facere populus multo fortius potest hodie imperator, et sic concludit potencia committentis. Et sic ex potestate committentis et propter vtilitatem valent sua decreta. Et sic vnum queritur et vnum soluitur.'

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have corrected) are only meant to strengthen the answer he has already provided.[56]

That, at least, was Ravanis' intention when insisting that the full 'power of the appointer' (*potentia committentis*) did not need to be exercised. Downplaying the power of the sovereign, however, was easier said than done. Pointing out that the people had the power to make good their mistake could overshadow the public utility argument. This is probably why Ravanis insisted on requiring the presence of both sovereign power and public utility. Without public utility, says Ravanis, the *potentia committentis* does not suffice. If the prince were to delegate an excommunicate to pronounce on a single case, the decision would be void. In this case, he explains, there is no public utility, only private one.[57] At the same time, however, public utility without *potentia committentis* is of no effect either. Let us suppose, says Ravanis, that the same excommunicate was appointed not as a delegate but as an ordinary judge (so presiding over a number of disputes). If the appointment were made by a bishop, despite the presence of public utility, it would not suffice as to the validity of the decisions.[58] The *lex Barbarius* should therefore be interpreted to say that the common mistake will prejudice the validity of the deeds unless public utility and the sovereign 'power of the appointer' are both present.[59]

The emphasis on the 'power of the appointer' might also explain Ravanis' hesitation in rejecting as invalid what done by someone who was aware of the common mistake. If the common mistake on the status of the person elected can produce valid effects not just because of fairness considerations but also because the specific will of the prince towards that person, then denying the validity of his deeds would become problematic even with regard to someone who was fully aware of the underlying incapacity of the elected. Hence Ravanis does not

56 *Ibid.*: 'primo ponit thema, secundum quid conferencia ad questionem mouendam, tercio elicit questionem ex themate, quarto res(pondet), quinto confirmat responsionem duabus rationibus, vltimo concludit.'

57 *Supra*, this paragraph, note 32.

58 *Supra*, this chapter, note 53.

59 Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'quod dicemus? Dico quod [MS: quia] l. ista habet singularem rationem. Ego considero potentiam committentis: imperator si vellet et populus possent facere seruum preto(rem). Item utilitatis communis quia plures litigauerunt coram eo. Ista duo, scil(icet) utilitas communis et potentia committentis, faciunt quod condicio seruitutis non noceat.' The importance of the *potentia committentis* in Ravanis might explain the most conspicuous omission in his discussion: the case of the notary. Not all notaries were appointed by the sovereign. Stating openly that a slave could act as praetor but not as notary was perhaps best avoided. Hence Ravanis entirely skips a point that is found in the work of nearly all other jurists who wrote on our subject.

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say that the single person who knew of Barbarius' state could not avail himself of the common mistake, but simply points out the immorality of such behaviour.[60]

4.3 Martinus Syllimani

Before moving on to the next (and last) Orléanese jurist to be studied, mention should be made of a Bolognese law professor, Martinus Syllimani

60 On the subject, Ravanis mainly discusses the problem of the individual knowledge of the immorality of a custom. Is it acceptable to avail oneself of such a custom in full knowledge of its wickedness? The discussion terminates without a clear answer, though Ravanis' personal position seems clear enough: one should not avail himself of an unethical custom. At the end of that discussion, seemingly by analogy, Ravanis recalls the problem of common mistake and individual knowledge. Is it legally admissible to invoke a common mistake with full knowledge of the truth? Again, while the law seems to allow as much, Ravanis' personal opinion is against that. Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'Sed si scientes excusaretne eum communis error? Dominus meus quesiuit a multis religiosis. Est quedam consuetudo contra rationem que potius est corruptela quam sit consuetudo. Pone gratia exempli quod maior natu totum habeat. Quidam peritus qui [MS: quia] maior natu totum occupat. Vnde scit et hoc est error et contra rationem laborat in extremis. Sunt religiosi a dextris et a sinistris. Quid debent tamen sibi consulere? Dicit ille peritus: totam terram teneo, que est contra ratione. Consulitis uos michi quia ego moriar in isto statu? Excusabitne ipsum error communis? Hoc petijt dominus meus a religiosis, et vnus respondit affirmatiue, alter negatiue. Quod excuset communis error est arg(umentum) i(nfra) ad maced(onianum) l. iii (Dig.14.6.3) et C. de pigneraticia l. pignus (Cod.4.24.9). Tamen credo quod non excusat scientem.' The wrong custom that Ravanis had in mind was male primogeniture. See in particular Bezemer (1994), pp. 102–104, text and notes 92–93. See also, more briefly, Bezemer (1990), p. 13, and Bezemer (1997), pp. 6–7. Cf. Meijers (1959*a*), p. 59, note 223. Ravanis' (or rather, Monciaco's) moral dilemma was then also reported by Albericus de Rosate. Albericus however multiplied the number of *religiosi* who sided against the bad custom, and so he turned Ravanis' doubts into moral certainty. Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*rb*, n. 22–23): '… Et praedicta faciunt ad quaestionem quam hic tangit Ia(cobus) de Ra(vanis) et dicit dominum suum quaesiuisse a multis religiosis. Consuetudo est ultra montes, quod primogenitus succedat in totum. Aliquis primogenitus erat magnus iurisperitus, et sciebat quod talis consuetudo erat contra ius scriptum, et de hoc habebat conscientiam laesam: an excuset eum consuetudo, ut possit omnia bona paterna retinere, uel teneatur dare fratribus partem eorum? Quidam dicebant, quod sic; quidam, quod non. Tamen plures concordabant, quod ex quo sciebat consuetudinem iniquam, et habebat conscientiam laesam, quod teneretur dare fratribus partem suam, et magis sequi conscientiam, quam consuetudinem.'

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(c.1250–1306).[61] The scholar who contributed the most to the 'rediscovery' of the School of Orléans, Meijers, argued that Syllimani was the first Italian jurist who knew of Ravanis.[62] At least with regard to the *lex Barbarius*, this seems probable. Ravanis' position on the *lex Barbarius* had a profound influence on Syllimani.

Syllimani taught in Bologna for a long time (at least from 1276 to 1304), and enjoyed remarkable reputation as a scholar.[63] His reputation in Bologna, it would seem, did not suffer from his criticism of the Gloss, which at times led Syllimani to accept the solution of the Orléanese jurists.[64] The point is all the more interesting since Syllimani was probably Butrigarius' teacher,[65] and Butrigarius – as we have seen – was the staunchest defender of the Gloss on Barbarius' case. This might perhaps serve as a reminder that the simple student–teacher relationship does not suffice to presume continuity of thought until proven otherwise.

The main source on Syllimani's reading of the *lex Barbarius* is BAV, Pal. lat. 733, *fol.* 24*ra–b*, which provides a shortened summary of what must have been a rather lengthy *additio* (or perhaps a *lectura per viam additionum*).[66] While in this

61 On Syllimani's life and work see Semeraro (2013), pp. 1296–1297, where further literature is mentioned. See also some interesting, if short remarks of Savigny (1829), vol. 5, pp. 373–376 (pp. 417–420 in the 2nd edn. of 1850).

62 Meijers (1959*a*), p. 118, text and note 418. According to Meijers, Syllimani was already acquainted with the work of Ravanis by 1285 (*ibid.*, note 418).

63 It might be interesting to note that he was specifically exempted from the banishment of the pro-Ghibelline Bolognese professors (which occurred when the Lambertazzi government was overthrown) at the request of the university. Cf. Semeraro (2013), p. 1296; Savigny (1829), vol. 5, p. 374 (p. 418 in the 2nd edn. of 1850). Other jurists whom we have already encountered did not have the same good fortune. In particular, Jacobus de Arena was probably forced to leave Bologna because of his Ghibelline sympathies: Marcello (1928), p. 854 (as reported by Quaglioni [2013], p. 1100 – I was not able to read Marcello's study).

64 Waelkens (1984), p. 153, text and note 15 (on the number of deeds necessary to introduce a new custom; Syllimani's position was reported by Butrigarius).

65 The main source on the point is Baldus' commentary on Dig.2.8.11 (*Baldi Vbaldi Pervsini … In Primam Digesti Veteris Partem Commentaria …* Venetiis [apud Iuntas], 1577, *fol.* 99*va*, n. 6): 'Ia(cobus) Bu(trigarius) secundum doct(orem) suum Mar(tinum) Sil(limanum).' Cf. Meijers (1959*a*), p. 117, note 415.

66 Having provided a summary of the traditional division of the *lex Barbarius* in the Gloss, the hand introduced the different approach of Syllimani: 'Econtra dominus M(artinus) sy(llimani) aliter intellexit l(egem) istam' (*ibid.*, *fol.* 24*ra*). The hand further reports the different sub-distinction of the *lex* by Syllimani (*ibid.*, *infra*, note 71), and jumps to what might have been (for a *Citramontanus*) the most innovative part of Syllimani's *lectura* (*infra*, note 72). On Syllimani's reading of the *lex Barbarius* see also some notes in Siena, H.IV.18, *fol.* 16*va–b* (which however mainly reports Syllimani's *lectura* on Dig.1.15). On the *lecturae*

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manuscript the gloss is of excellent quality, the annotations of Syllimani were added later, quite possibly by some student more interested in the substance than in the form.[67] The result is somewhat wanting: it gives a general idea of Syllimani's own position, but it leaves many questions unsolved.

As with the *Ultramontani*, for Syllimani the *lex Barbarius* would also pose only one question – whether the deeds of Barbarius were valid. Syllimani's reading of the *lex Barbarius* rules out both the validity of his praetorship and a grant of freedom. The distance from the Gloss is particularly evident in his approach to Barbarius' violation of the *lex Iulia de ambitu*. We have seen how Accursius commented on the fact that Barbarius sought the praetorship, condemning that behaviour but retaining its outcome ('fieri non debuit, factum tamen tenuit').[68] Syllimani replies that the rule was in fact the opposite: neither seeking the praetorship is lawful nor is the election valid ('fieri non debet nec factum tenet').[69] While some – admittedly, rather tenuous – textual elements in Syllimani's remarks on the *lex Iulia* might suggest familiarity with the approach of other contemporary Italians – Guido de Suzzara in particular[70] –, his entire *additio* would seem strongly influenced by that of Ravanis.

per viam additionum see esp. Bellomo (1997*a*), pp. 7–8, and, in more depth, Bellomo (2000), pp. 404–424.

67 Pal. lat. 733 reports a gloss of Syllimani (*fol.* 24*ra*, upper margin), a summary of his position (*fol.* 24*ra*, bottom), and a shortened version of Syllimani's own *lectura* (*fol.* 24*ra–b*, lower margin).

68 *Supra*, §2.2, note 30.

69 Syllimani, *ad* Dig.1.14.3, § *Designatus* – *factum tamen tenuit* (Pal. lat. 733, *fol.* 24*ra*): 'qu<a>e so(lutio) non placet, nam ista est reg<u>la quod fieri non debet nec factum tenet ut i(nfra) de iudic(iis) <l.> si praetor § marcellus (Dig.5.1.75) et C. quando prouoc(are) non est nece(sse) l. uenales (Cod.7.64.7) et C. de leg(ibus) et con(stitutionibus) l. non dubium (Cod.1.14.5) sed fallit i(nfra) de iureiur(ando) <l.> nam postea(quam) § si dampnetur (Dig.12.2.9.2) et i(nfra) quando ap(pellandum) sit l. i § biduum (Dig.49.4.1.5) et i(nfra) de interdictis et releg(atis) l. relegatorum § ad tempus (Dig.48.22.7.4) et i(nfra) de condict(ione) in(debiti) l. eleganter § si quis post (Dig.12.6.23.3). M(artinus) Sy(llimanus).' This is the only gloss of Syllimani on the *lex Barbarius* that the hand in Pal. lat. 733 reported in addition to the summary of his *additio*. In reporting the *additio*, the same hand was somewhat less clear on the point: 'Item alia ratione quia delinquit petendo preturam et indicit in l(egem) miscellam [Cod.6.40, *sed* 'Iuliam de ambitu', Dig.48.14.1] sic ergo ex delicto non debet habere premium, ut i(nfra) de reg(ulis) iur(is) non fraudantur § i (Dig.50.17.134)', *ibid*. Associating Barbarius' violation of the *lex Iulia de ambitu* with the need not to reward his delict seems to echo Suzzara's discussion of the salary of the bannitus elected to a municipal magistracy (*infra*, §4.6, text and note 153).

70 *Supra*, last note.

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The probable influence of Ravanis appears in most of Syllimani's arguments, starting with the division of the text of the *lex*. Also for Syllimani the beginning of the text introduces the subject ('ponitur unum themam'), from which a single question emerges – that of the validity of Barbarius' deeds. The solution is found on the basis of fairness ('de humanitate'). The text then adds two reasons to this solution (both based on the power of the people), and a final note extending the same conclusion to the power of the prince.[71] Also the arguments that were used to deny Barbarius' freedom and praetorship would seem to be a summary of those of Ravanis. Pomponius' statement, says Syllimani, simply described the fact that Barbarius exercised the praetorship: Ulpian's conclusion as to the *de humanitate* validity of Barbarius' deeds would clearly rule out their *de iure* validity.[72] The people had no intention of setting Barbarius free. Perhaps, Syllimani even suggested, the moment the Romans realised their mistake they might have deposed him.[73] It is true, Syllimani concedes, that the slaves who wore the *pileus* in the funeral procession of the old master became free even against the true intention of the master, so as not to deceive the people (cf. Cod.7.6.1.5). *Pace* Accursius, however, that text does not dispense with the will of the master, but rather presupposes it. After all, concludes Syllimani, it was because of their master's command that the slaves wore the *pileus* and took part in the funeral procession.[74] The will of the people (or of the prince) cannot

71 Syllimani, *ad* Dig.1.14.3 (Pal. lat. 733, *fol.* 24*ra*): 'et in prima parte ponitur unum themam quod incipit "barbarius fil(ippus) se(ruus) fugitiuus" etc. Ex dicto themate procedit una sola questio s(cilicet) an gesta per barbarium ualeant, et soluit quod ualent de humanitate. Et subiciuntur due rationes solutionis: vnae ibi "cum etc. potuit" etc. [cf. Dig.1.14.3: 'cum etiam potuit populus Romanus servo decernere hanc potestatem'], alia est ibi "sed et scisset" [cf. Dig.1.14.3: 'sed et si scisset servum esse, liberum effecisset'], et videtur quamuis potuit idem imperatore (*sic*) non ergo querit hic an fuerit pretor. Item no(n) querit an fuerit liber.' Cf. Ravanis, *supra*, this chapter, note 56.

72 Syllimani, *ad* Dig.1.14.3 (Pal. lat. 733, *fol.* 24*ra*): 'Vltimo querimus de utroque s(cilicet) an fuit pretor et an fuit liber, et dico non fuisse pretorem ea ratione quia dic gesta per eum ualere de humanitate ergo non fuit pretor: nam si fuisset ualerent gesta de ipso rigore et non de humanitate … Item in testu non dicitur eum fuisse pretorem sed preturam functum, s(cilicet) de facto … Item non e(st) liber quia casus est i(n) C. de liber(ali) ca(usa) l. non mutant (Cod.7.16.11).'

73 *Ibid.*: 'et forte fuit reiectus a populo cum temp(ore) sci(ent)e eum seruum. Item e(st) casus in C. si seruus aut liber etc. decurionatum aspi(raverit) in fi(ne) (Cod.10.33.2).'

74 *Ibid.*, *fol.* 24*ra–b*: 'Item non ob(stat) C. de lat(ina) lib(terate) tol(lenda) l. unica § sed qui domini (Cod.7.6.1.5), ubi dicit seruos qui erint pileati efici liberos ne decipiatur populus uel gentes qui credebant eos esse liberos, quia hoc contingit propter uolu<m>ptatem testatoris uel heredis qui hoc iussit uel passus e(st) ut irent pileati ad funus.' Cf. Ravanis, *infra*, note 88.

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therefore be presumptively ascribed, and in Barbarius' case it is clearly absent.[75] This is why the *lex* says that Barbarius discharged the office of praetor while hiding his true condition.[76]

The relevance of Syllimani's interpetation of the *lex Barbarius*, however, does not lie in a few succinct notes on its *pars destruens* (denying the validity of praetorship and the freedom of Barbarius). Rather, it depends on the reasons for the validity of the deeds. And here, despite the abbreviated and somewhat confusing manner in which Syllimani's thinking is reported in the sources, Ravanis' influence seems remarkably clear. The common mistake is interpreted in the same (and rather singular) way as Ravanis, and it is on that basis that the role of the sovereign is invoked.

Saying that the common mistake makes law, argues Syllimani, does not mean that it bestows legal validity, but only that it prevents the defect from invalidating the deed. The underlying invalidity, in other words, remains present albeit in latent form.[77] Thus the common mistake makes law, but only so long as the mistake perdures.[78] If the validity of the deeds rests on the enduring effects of the common mistake, it should follow that the uncovering of the truth would void them.[79] And so, when the mistake as to the true status of Barbarius is found out, as a matter of principle everything he did should be void.[80]

75 Syllimani, *ad* Dig.1.14.3 (Pal. lat. 733, *fol.* 24*ra*): 'Item quia populus hoc non gerebat s(cilicet) eum fecit liberum sic nec imperator gerit in libertum alienum per obreptionem coram se arrogatum libertum ingenuum ut i(nfra) de in ius uoc(ando) l. sed si hac l(ege) § patronum (Dig.2.4.10.2).'

76 *Ibid.*: 'per hoc dicit in testu quod latuit in dignitate ergo non dicit lib(erum).'

77 *Ibid.*, *fol.* 24*rb*: 'Sed quero contra p(raedic)ta utilitate quod fuit seruus non revocatur gesta per eum. Respo(ndeo) quia populus errauit et communis populus error facit ius ut hic et i(nfra) de supell(ectili) le(gata) l. iii (Dig.33.10.3.5). Sed uidetur errorem populi reuocari patefacta utilitate ut i(nfra) de h(ered)i(bus) instit(uendis) l. ult(ima) § i (Dig.28.5.93(92)) et i(nfra) de inof(ficioso) te(stamento) l. mater in fin(e) (Dig.5.2.19), et ad hoc distingue error singularis persone non facit ius ut i(nfra), in contra(rium) ille l(eges), sed allego unam i(nfra) de iur(isdictione) omnium iu(dicium) l. si per errorem (Dig.2.1.15).'

78 *Ibid.*: 'Error populi communis quamdiu durat facit ius ut in l. nostra et i(nfra) de suppell(ectili) le(gata) l. iii in fin(e) (Dig.33.10.3.5) C. de testis l. i [Cod.4.20.1 *sed* 'de test<ament>is', Cod.6.23.1].' The typo 'de testis' instead of 'de testamentis' will be noted more than once in the course of this work.

79 *Ibid.*: 'sed re patefacta tunc ille error populi quod [MS: qui] dabat ca(usam) alicui negotio reuocatur ut in dicta l. contractus (Dig.44.7.54?) et de heredibus instit(uendis) l. f. (Cod.6.24.14).'

80 *Ibid.*, *fol.* 24*ra*: 'Gesta s(cilicet) per eum medio tempore quamdiu latuit eius condicio ualent ut predict(um).' Incidentally, it might be noted how Syllimani's adherence to Ravanis on the effects of the common mistake is in open conflict with Jacobus de Arena's scheme (*supra*, §3.2, text and note 43).

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Alone, therefore, common mistake is not sufficient. But in Barbarius' case there is also another element – public utility. This, argues Syllimani, is why Ulpian said that holding Barbarius' deeds is 'the more humane view to take'.[81] The public utility to which Syllimani refers, however, is not the abstract concept but its practical application: not 'publica utilitas' but rather 'favor gestorum'.[82] This *favor* depends not only on considerations of public welfare, but primarily on the sovereign will of the people. The mistake of the people, says Syllimani, is not in the person of Barbarius but only in his status: 'the people were not mistaken in the person but in the quality of the person, for they thought him free while he was a slave'.[83] This is why, at the beginning of his *additio*, Syllimani refers to the will of the people as the reason for the solution of Barbarius' case. The reference to 'favor gestorum' is not present in Ravanis, but it is a good way of combining Ravanis' references to 'utilitas communis' and 'potentia committentis' as the reasons for the validity of the deeds.[84] While Syllimani (or rather, the abridged version of his *additio*) does not quote Ravanis, it seems difficult to doubt his influence: no other known jurist gave a similar explanation of the *lex Barbarius*.

4.4 Pierre de Belleperche

We may now go back to France to look at another important jurist of Orléans, Ravanis' younger colleague, Petrus de Bellapertica (Pierre de Belleperche, c.1230–1308).[85] While Ravanis highlighted the central role of public utility, Bellapertica did not consider it sufficient. Bellapertica's great novelty was to dispense with the requisite of appointment by the sovereign power. With hindsight, it might be tempting to conclude that he was simply bringing the discussion to its natural outcome: the superior authority that played the part of

81 Dig.1.14.3.

82 Syllimani, *ad* Dig.1.14.3 (Pal. lat. 733, *fol.* 24*rb*): 'et hic immo re patefacta non reuocatur gesta quia hic duo concurrunt et communis error et fauor gestorum.'

83 Unfortunately the last few lines of Syllimani's comment are heavily shortened in the manuscript (*ibid.*): 'et errauit hic populus non in personam sed in qualitate persone quia putauit liberum cum esset seruus quia [MS: qui] error non impedit dominii translationem ut i(nfra) si certum pe(tetur) l. cum fundus § seruum (Dig.12.1.31.1) nec etc. iurisdictionis translationem hic etc. in glo(sa) st(at) alia utilia et no(n). Et ista sufitiant ad materiam l(egis) nostre. M(artinus) Sy(llimani).' Cf. Ravanis ('propter errorem non, quia fuit error in condicione persone et talis non impedit'), *supra*, this chapter, note 52.

84 *Supra*, this chapter, note 59.

85 On the life and work of Bellapertica see Meijers (1959*a*), pp. 95–106, and especially Bezemer (2005), where the life of the author is very often examined through his work.

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the *deus ex machina* in Accursius had already been demoted to a subservient role by previous Orléanese jurists, so now it might easily disappear altogether. Much to the contrary, the position of Bellapertica was revolutionary: he did what Ravanis was not prepared to do.

The only known version of Bellapertica's *repetitio* on the *lex Barbarius*, preserved in Madrid,[86] does little honour to its author. The hand (or some previous manuscript) would appear to have understood little of the text, which hardly motivated it to be accurate. The last part of the text acquires particular relevance – where Bellapertica criticises Ravanis' solution and proposes a new and different one. In the text, Bellapertica's own theory is remarkably short and not particularly well elaborated either. That is somewhat frustrating: most of Bellapertica's lengthy *repetitio* on the *lex Barbarius* (more than four-fifths of it) is quite similar to that of Ravanis[87] – except for what is really important. The last part of Bellapertica's text, where he diverges from Ravanis, starts with the adverb *breviter* ('in short') and, unfortunately, is true to its word. While it is possible to ascribe this brevity to Bellapertica himself, it is difficult. Many of the examples he uses throughout the text come from Ravanis, but they are significantly more elaborated – and so much longer.[88] The text adds some more examples that are

86 Madrid, BN 573, *fols.* 85*vb*–86*va*.

87 Beginning with the internal division of the text of the *lex*:

Bellapertica (Madrid, BN 573, *fol.* 85*vb*)	Ravanis (Leiden Abl.2, *fol.* 18*ra*)
'Primo ponit thema, secundo ponit circumferencias ad questionem, tercio ponit questionem, quarto ponit responsionem, quinto ponit rationes responsionis'	'primo ponit thema, secundum quaedam [MS: quid] conferencia ad questionem mouendam, tercio elicit questionem ex themate, quarto res(pondet), quinto confirmat responsionem duabus rationibus, vltimo concludit'

The 'last' part to which Ravanis alludes ('vltimo concludit') was simply the equiparation of the emperor to the people (cf. Dig.1.14.3: 'Quod ius multo magis in imperatore observandum est'), which could be safely ignored – especially if the sovereign will was of no importance to the solution of the text, as in Bellapertica.

88 An example is the case of the bestowal of the freedom cap (*pileus*) on the slaves attending their old master's funeral in Cod.7.6.1.5 (a case already discussed in the analysis of the Gloss, *supra*, §2.4):

Bellapertica (Madrid, BN 573, *fol.* 86*ra–b*)	Ravanis (Leiden Abl.2, *fol.* 18*va*)
'Sed nunquid medio tempore fuit liber? Uidetur quod sic iura dicunt quod si dominus seruum suum permittat incidere pileatum autem funus suum per hoc sibi uidetur libertatem concedere ne homines decipiantur: tunc arguo quamcumque potestatem habet dominus eandem	'quod si dominus voluit seruum precedere funus [MS: funius] suum pileatum, pileus signum est libertatis, liber est ne omnes decipiantur C. de lati(na) lib(ertate) toll-e(nda) l. unica <§> sed et a domini (*sic*) (Cod.7.6.1.5) sic ne omnes decipientur iste fuit liber.'

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not present in Ravanis, even if they have little to do with the solution to the case.[89] This unnecessary length was a sign of higher polish: Bellapertica intended

> potestatem habet populus, tunc populus uidetur sibi libertatem concedere ut hic ad fi(nem) ergo etc. ar(gumentum) C. de lat(ina) lib(ertate) tollen(da) l. i § sed et qui domini (Cod.7.6.1.5) … Responde si dominus permittat seruum incedere pileatum uidetur sibi concedere libertatem ergo etc. Hoc est verum si populus sciens eum seruum hoc fecisset liber esset, et sic intelligo § all(egatum). Sed si dominus nisi dominus (*sic*) sciente faciebat ar(gumentum) i(nfra) de re iu(dicata) <l.> quidam (Dig.42.1.57).'

Another example is the discussion of the (hypothetical) compensation to Barbarius' master for the expropriation of his servant if the people were to set him free. Ravanis dealt with the matter briefly, requiring compensation for an expropriation done for public utility in most cases. By contrast, the same abstract possibility (like Ravanis, Bellapertica also denies Barbarius' freedom) is treated remarkably at length in Bellapertica's *repetitio*. Bellapertica highlights the need of *iusta causa* (which in Ravanis was implicit), since private property is part of natural law, not civil law. As such, the prince could dispense with private property not because he is above the (civil) law, but only for public utility considerations. This way, what in Ravanis occupied just a couple of lines became in Bellapertica a lengthy discussion. Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*ra*): 'No(ta) quod olim quod populus romanus dum imperium erat apud ipsum uel imperator hodie potest auferre rem meam et alii dare: iste seruus meus erat tamen populus illum potuit decernere pretorem et libertatem ei concedere ut hic … non credo quod de iure possit sine causa iusta sed cum causa possit; sic intelligo l(egem) istam, iusta causa fuit ubi non potuit ydoneus inueniri quod seruus manifestetur ut hic et i(nfra) de euic(tionibus) l. lucius (Dig.21.2.11) … sed sine ca(usa) non possit: ius ciuile iura naturalia inmutare non potest, inst. de iure na(turali) § sed naturalia (Inst.1.2.11) cum presumitur quod iuste facit ut supra de const(itutionibus) princ(ipium) l. i (Dig.1.4.1).' Further, the exception mentioned in Ravanis for a specific case (the servitude of *iter*) became in Bellapertica the centre of a discussion that was even longer than the one above. *Ibid.*, *fol.* 86*rb*: 'supponit quod populus uidetur serui libertatem, dare nunquid res publica domino debet reddere estimacionem serui? Hoc est, quaero cum [MS: nec] res publica aufert dominium alicuius a se nunquid sibi tenetur estimacionem reddere? Uidetur quod sic ut C. pro q(uibus) cau(sis) seruus pro p(remio) li(bertatem) l. antepenultima (Cod.7.13.2). Uidetur contra, ager meus iuxta uiam publicam est, aq(ua) deuastauit uiam et ager meus erit uia nec estimacionem agri a re publica recipiam ut i(nfra) quemadmodum seru(itutes) a(mittuntur) si locus § p(enultima) (Dig.8.6.14.1?). Dico supposita glosa quod estimationem domino de(bet) restituere, ar(gumentum) iurium pro parte ista alle(gatum) ad contrarium. Respondo quod si ager meus commutatur in uiam publicam non habeo estimacionem agri, quia per hoc facit commodum possum

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to write a long, complex and exhaustive commentary on the *lex Barbarius*. This makes it somewhat less probable to argue that its almost abrupt conclusion was intentional.

recipe(re): quia si dimittet certam aliquam tamen accrescerit, ar(gumentum) ad solutionem infra [MS: supra] de resti(tutionibus in) integrum in prin(cipio) (Dig.4.1.1) ideo etc., ar(gumentum) i(nfra) de ad(quirendum) re(rum) do(minio) l. ma<r>tius (Dig.41.1.38) et i(nfra) de reg(ulis) iur(is) l. si nemo (Dig.50.17.181).' Cf. Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*rb*, partial transcription also in Bezemer [1987], p. 116): 'Supponamus quod sit liber, nonne domino dabitur de precio? Ar(gumentum) C. in qui(bus) ca(usis) s(erui) pro p(remio) lib(ertatem) ac(cipiunt) l. ii (Cod.7.13.2), et sic regulariter videtur: quis amittit pro vtilitate publica rem suam, restituitur sibi precium, nisi in casu si habeat quis fundum iuxta via<m> publica<m> et via publica deficiat, accipietur de fundo suo et habeatur via publica nec aliquid ei restituetur, et est valde notabile i(nfra) quemadmodum serui(tutes) amit(tuntur) l. sed si locus (Dig.8.6.14pr).' Incidentally, it might be noted that the importance of the division between civil-law and natural-law rights, especially on matters of expropriation, was already present from the first generation of the Orléanese school. See e. g. Monciaco's comment on Cod.1.22.6, transcription in Lefebvre (1958), pp. 303–305.

89 For instance, Bellapertica looks at the case of a slave who becomes bishop: his election to the episcopal see entails the concession of freedom. Since the praetor has higher jurisdiction than the bishop (for, maintains Bellapertica, the decisions of the bishop can be appealed before the praetor), it follows that the appointment to the praetorship should entail emancipation. However, concludes Bellapertica, the case of the bishop cannot be applied by analogy, for it is specifically thought in favour of the Church. Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*ra–b*): 'Pone si servus alicuius episcopus factus fuerit consequitur libertatem, tunc arguo pretor maior est episcopo quia appellatur ab episcopo ad pretorem et sic uidetur quod sit liber in aut(entica) de sanc(tissimis) e(piscopis) § si et hoc quidem tamen (Coll.9.15.24[=Nov.123.24]), et in e(odem) ti(tulo) § si quis alius contra [*rectius*, si quis contra aliquem, Coll.9.15.21(=Nov.123.21pr)]. Responde si seruus sit factus episcopus consequitur libertatem ergo etc. Dico non sequitur ista statuit fauore cleri(ci) sic intelligo § alle(gatum) sed hic quidem ar(gumentum) i(nfra) de re(ligiosis) et sump(tibus) fu(nerum) l. sunt persone (Dig.11.7.43)'. Cf. Dig.11.7.43 (Papin. 8 quaest.): '… nam summam esse rationem, quae pro religione facit'. The statement that the decisions of the bishop may be appealed before the praetor would seem to be based on Coll.9.15.24(=Nov.123.24), where Justinian stated that the alleged crimes of any bishop dwelling in Constantinople would be tried before the praetorian prefect. The Gloss did not give much weight to the point since it was a corollary of the prefect's jurisdiction on Constantinople (cf. esp. Gloss *ad* Cod.1.3.32.2, § *in tua*, Parisiis 1566, vol. 4, col. 80). Commenting on the same *novella* cited by Bellapertica, the Gloss explained better the issue: the bishop is equal in rank to the prefect. Any difference depends on the specific jurisdictional provisions of the emperor (in the case under discussion, the special jurisdiction granted to the *defensor civitatis*). Gloss *ad* Coll.9.15.21[=Nov.123.21pr], § *contradicat*, Parisiis 1566, col. 521.

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Just like Ravanis, Bellapertica also inverts the order of the Gloss:[90] he first denies Barbarius' freedom, then uses his servile status against the main tenet of the Gloss – Barbarius' praetorship – and finally moves to the validity of his deeds. His overall scheme is therefore extremely similar to that of Ravanis. What is surprising, however, is that Ravanis is not mentioned, neither in the lengthy parts where Bellapertica borrows so much from him, nor in the last part where he harshly criticises Ravanis' conclusions. In both cases the silence could easily be intentional. Bellapertica's relationship with Ravanis was notoriously difficult, and the *lex Barbarius* was no exception: not naming Ravanis when demolishing his approach piece by piece might have been the sensible thing to do. As to the rest of his *repetitio*, Bellapertica's silence on Ravanis might, on the other hand, depend on the similarity of their positions, which at times – and especially in their critique of the Accursian Gloss – are almost identical. If Bellapertica used Ravanis' text as a blueprint for his own, he might have been reluctant to openly acknowledge as much. The particularly wanting condition of the manuscript containing Bellapertica's *repetitio* on the *lex Barbarius* does not allow us to exclude another possibility: Bellapertica might have mentioned Ravanis, but the hand made some confusion. At least on one occasion the hand ascribes to the Gloss what was clearly the position of Ravanis.[91]

The similarity of many of Bellapertica's arguments (even in their order in the text) to those of Ravanis makes it unnecessary to look at them specifically. Similarity however does not necessarily mean identity. This is particularly the case for Bellapertica's elaborated discussion of the applicability of the *lex Iulia de ambitu* to Barbarius' case, where Bellapertica reaches the same conclusions as

90 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 85*vb*): 'Nec est difficilis sed male intelligitur secundum glosam: ponit tres questiones et ad unam non respondet, an pretor sit non respondet, et an decreta teneant et an liber sit, et istas respondeo secundum quod glosa ponit, quia positio glose non est amica literis et ideo pono casum secundum quod dixi.'

91 *Infra*, this chapter, note 136. While not likely, it may not be excluded that the fault lies (at least partially) with the *reportator* of Bellapertica's lecture. As already noted by Meijers, the text of the Orléanese law professors of this period was usually written down by a student acting as reporter (*reportator*), and not by the teacher himself: Meijers (1959*a*), p. 61, note 230. This practice is already visible in the first generation of Orléanese law professors: for Guido de Cumis see esp. Bernal Palacios (1986), pp. 270–271. For Bellapertica we even know the name of his main reporter – the Englishman William of Braundeston: Bezemer (2005), pp. 161–162 (including further literature on the point at p. 161, note 9). Braundeston (or some colleague of his) left clear traces of his presence in other texts, including some other *repetitiones* on the Vetus preserved in the same Madrid manuscript (such as the *repetitio* on Dig.2.9.2.1), but not in the *repetitio* on the *lex Barbarius*. See again Bezemer (2005), p. 161, note 12.

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Ravanis following a different route.[92] With very few exceptions, it is difficult to find something in Bellapertica that had not already been discussed in Ravanis.[93]

92 Bellapertica's discussion of the *lex Iulia de ambitu* is fairly similar to that of Ravanis: both authors discuss the various opinions mentioned in the Gloss, as well as the theoretical possibility that the bribe was paid by a third party unbeknownst to the candidate. Like Ravanis, Bellapertica also observes that, when the power to appoint the magistrates passed from the people to the prince, the *lex Iulia de ambitu* ceased to apply in Rome. But its abrogation (or disapplication) hardly entailed permission to bribe one's way to public office. On this note, Ravanis concluded his observations on the *lex Iulia* (*supra*, this chapter, note 50). But Bellapertica – so far just following Ravanis – adds something interesting. He looks at the reality of his times: not all the offices entail public powers. Or rather, not all *dignitates* also have *iurisdictio*. As such, the reason one should not give bribes is no longer the risk of interfering with free elections, since the elections are no longer free anyway (they are appointments by the prince or the superior authority). Clearly one should not think that the offer of some money might corrupt the prince (a point already made by Ravanis: *supra*, this chapter, note 50). Although of course the prince cannot be corrupted, continues Bellapertica, he could appoint someone regardless of the money received from that person. If the appointment is to an office with *iurisdictio*, there is the risk of the appointee using his power to recover the expenditure – plus interest. That, reasons Bellapertica, would mean that the bribe would ultimately be paid by those subjected to the appointee's jurisdiction. Hence, he concludes, although the *lex Iulia* is no longer applicable, the prohibition of offering money for appointment to a secular office with jurisdiction still holds. Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*ra*): 'Hodie distinguitur aut est dignitas cui non est iurisdictio annexa ut quod sit aduocatus et tunc potest ut l. all(egata) § si quis (Dig.50.12.1.6), aut habet iurisdictionem annexam ut quod sit pretor et tunc non licet, sicut prohibitum faciunt qui assumunt prepositurам (*sic*) donec non curamus quantum damus, duplum exigemus, et ideo statutum fuit quod non possit petere uel per illa(m) dare quia alias subiecti pauperes fierent et ideo etc.' Bellapertica's solution was reported almost literally by Cynus (*infra*, this chapter, note 126), but it might also have proven popular in France. For instance, it is also applied by the Toulouse law professor Scaraboti (Arnald Escharbot, fl.1335), *ad* Dig.1.14.3, BNF, Lat. 4462, *fol.* 15*va*. See more broadly Post (1964), pp. 361–362.

93 The main exception is whether Barbarius could be considered as domiciled in Rome. It is perhaps worth mentioning this (otherwise marginal) point, as in Bellapertica's discussion of the domicile of Barbarius it is possible to find some very fine exemplars of what Bezemer called 'lingua Bellapertiana' (Bezemer [2005], pp. 189–190). Arguing against Barbarius' domicile in Rome, says Bellapertica, is a cheap argument ('trufe', lit. 'fraud'), a lie as black as coal ('eburneus'): clearly Barbarius lived long enough in Rome to be domiciled there. Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*ra*): 'ad l. istam signantur contra dicitur hic quod iste seruus fugitiuus rome accessit et ibi pretor decretus est. Contra, pretor non potest esse nisi fuit ciuis romanus, et sic opponitur C. e(odem titulo) l. ii (Cod.1.14.2). Dicit glosa quod verum est, sed hic fuit constitutus pretor scienter ideo etc. Trufe sunt, dico eburneus quod [MS:

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The similarity with Ravanis is particularly evident in Bellapertica's approach to the text of the *lex*, especially in highlighting the contrast between Pomponius' remark and Ulpian's comment on it. Pomponius' observation that Barbarius exercised the praetorship does not mean that he was praetor. To this purpose, following Ravanis, Bellapertica invokes the classical example of the false decurion (the *lex Herennius*). Just like the false decurion, Barbarius is a false praetor. This is why Ulpian said that it is 'more human' to hold his deeds as valid – for clearly they were not so *de iure*. Pomponius' remark – that Barbarius' servile condition was no obstacle to his exercise of the praetorship – hardly proves the validity of his appointment. Otherwise it would be difficult to understand why Herennius did not become a true decurion even though he was widely believed to be such. Similarly, and again following Ravanis, if a false prelate receives a prebend, reasons Bellapertica, that does not make him a true one.[94] What Pomponius said, in other words, is simply a description of the problem, a 'circumstantial comment to the question' (*circumferencia ad quaestionem*), not an

qui] ibi non habet domicilium, non potest pretor decerni qui<a> non habet ibi domicilium originale uel constitutum, sed dico iste ibi uixit diu ideo domicilium habet per adquisicionem, ideo etc. sic intelligo l. istam.'

94 Bellapertica, Madrid, BN 573, *fol.* 86*rb*

'Tercio queritur uideo quod non fuit liber, nunquid fuit praetor? Uidetur quod non, quare non iure datur [MS: dant] si quis percipiat salaria decurionum qui non erat decurio propter hoc non erit decurio ergo etc. ar(gumentum) i(nfra) de decur(ionibus) <l.>heren<n>ius (Dig.50.2.10); per hoc uidetur litera innuens quia dicit«humanius est" ut ualeant quae decreuit. Si in ueritate esset pretor, tunc de rigore iuris ualerent. Contra dicitur "nichil ei obfuit" etc., ergo in ueritate fuit pretor: glo(sa) dicit quod fuit pretor probatus error comunis facit ius ergo etc., ut i(nfra) de suppele(ctili) le(gata) l. iii ad fi(nem) (Dig.33.10.3.5) … Dico quod tantum ad exercitium fuit pretor sed de iure non habuit ueram pretoriam dignitatem, ut si populus credat decurionem et ideo ut l. all(egata) herennius (Dig.50.2.10) sicut si cum populum permittet quod recipet quis canonicas distribuciones non propter hoc est canonicus.'

Ravanis, Leiden Abl.2, *fol.* 18*rb*

'Restat ad uidere [MS: uedere] ad duo dubia qu<a>e relinquit lex ista: barbarius fuitne pretor quamdiu latuit sua seruitus? videtur quod n(on): l(ex) dicit perceptio salarij non facit aliquem decurionem, ut i(nfra) de decurio(nibus) l. herennius (Dig.50.2.10). Vnde si quis credebatur canonicus et non est, si percipuit distributiones et stipendia hoc non facit ipsum canonicum.'

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answer to it.[95] Much to the contrary, the remark of Ulpian (validity *de aequitate* vs. implied invalidity *de iure*) does not aim at describing the question but rather at solving it. Barbarius is not praetor, but his deeds should be valid on equitable grounds.[96] Public utility therefore allows us to separate the validity of the deeds from that of their source. It is not possible to say, as the Gloss does, that the uncovering of Barbarius' true status amounts to a supervening event that ought not to prejudice the pre-existing validity of the deeds.[97] For this would imply the initial *de iure* validity of such deeds, and so ultimately postulate the actual intervention of the prince – as in Accursius.

Ravanis' solution to the *lex Barbarius* was to emphasise that the choice of Barbarius as praetor was made by the sovereign, and that the same sovereign was mistaken only as to the status of Barbarius (slave rather than free), not as to his identity. This way, supported by public utility considerations, the sovereign's will to appoint Barbarius allowed retaining the validity of Barbarius' deeds once the common mistake as to their source (Barbarius' praetorship) had faded away. As we have seen, Ravanis probably invoked the will of the sovereign because of his

95 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*rb*): 'dico hic non respondit questioni sed ponit circumferencia ad questionem.' Cf. Ravanis (Leiden Abl.2, *fol.* 18*rb*): 'videtur dixi quod potest legi ut ibi tangat quaedam conferencia ad questionem mouendam (*sic*), et sic ius denotant.'

96 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fols.* 85*vb*–86*ra*): 'No(tandum) quod equitas preferenda rigori, de iuris rigore ea que decreuit non ualent ut i(nfra) de iud(iuciis) l. cum pretor (Dig.5.1.12pr) ideo non conuertitur ut hic et C. de iud(iciis) <l.> placuit (Cod.3.1.8), et est racio propter publicam utilitatem, quia est iudex ordinarius … multa non transirent nisi propter communem utilitatem, iuxta hoc ob populum multum crimen pertransit in tumultum ut i(nfra) ad l. cor(neliam) de sic(ariis) <l.> qui cedem (Dig.48.8.16).' Cf. Ravanis, *supra*, this chapter, note 28.

97 Bellapertica, Madrid, BN 573, *fol.* 85*vb*

'Secundo no(tatur) quod legitime factum est ex casu non debet reuocari tempore quo seruus fuit, multa iudicauit propter errorem quod credebatur liber ex causa superuenienti non retractabuntur ut hic <et>ut i(nfra) de in(stitoria) ac(tione) quicumque l. i ad fi. et l. se(cunda) (Dig.14.3.5.1–2) et C. de admi(nistratione) tu(torum) <l.> sancimus (Cod.5.37.28pr) et adu(ersum) iudicem notabile uidetur quibusdam non colligi ab inicio non potest pretor esse cum seruus fuit.'

Ravanis, Leiden Abl.2, *fol.* 18*ra*

'primum est quod legitime factum est ex causa superuenienti non retractari, vnde detecta seruitute barbarij eius edicta non retractatur et ad hoc est i(nfra) de in(stitoria) acti(one) <l.> quicumque prepositus l. i ad fi. et l. s(ecunda) (Dig.14.3.5.1–2). Debent illa colligi quod ab inicio factum est ratum legitime stat ex post facto non fuit factum legitime ex quo erat seruus servitutem (*sic*) et seruus iudex esse non potest: dicit quod legitime factum est propter ignorantia.'

Cp. Accursius' gloss § *Reprobari* (*supra*, §2.3, note 68).

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refined approach as to the common mistake. The individual error does not bestow validity upon what is done under mistake, it only provides an excuse to the individual who has participated in the error. By contrast, public utility allows the common mistake to create a veneer of validity – so long as the mistake itself lasts. But public utility cannot entirely make up for the inner caducity of the common mistake: this forced Ravanis to look for something else in support of public utility, the sovereign will.

Bellapertica does not share Ravanis' subtle distinction between common and single mistake: a mistake may simply excuse the errant, whether it is a single person or a whole community. Thus, the common mistake 'makes law' only in the sense that it extends the applicability of the excuse, not that it alters its substance. Whether general or individual, therefore, the mistake can only give rise to a defence. What is void may not become valid, not even for a while.[98] The ambiguous role of the 'power of the appointer' in Ravanis was deeply connected to his peculiar interpretation of the common mistake. Rejecting the latter removed the logical basis for the former. As such, having denied Ravanis' interpretation of the effects of the common mistake, Bellapertica proceeds to a full-scale critique of Ravanis' position on the will of the sovereign.

The core of his critique lies in a simple but powerful argument: it is not possible to separate mistake from volition in Barbarius' election. What the people wanted was to elect the praetor. Since a slave is ineligible, their mistake about Barbarius' personal status becomes a mistake in the final cause of the election,[99] not just in the quality of the elected. It follows that the people's will was utterly vitiated and so could not produce any valid effect.[100]

98 Regrettably, the manuscript is somewhat fragmentary on the point. Madrid, BN 573, *fol.* 85*vb*: 'Verum est facit ius et excusat generaliter et ideo error singularis singulariter excusat ar(gumentum) i(nfra) de dec(retis) ab or(dine) fac(iendi) l. ult(ima) (Dig.50.9.6) et C. de tabul(ariis) <l.> generali l(ege) (Cod.10.71(69).3), vel dic error communis communiter ius facit: hoc est verum excusat errantes, pone communiter in barbario errabatur.' *Ibid.*, *fol.* 86*rb*: 'Responde immo communis error facit ius ita est hic ergo etc. Dico communis error excusat errantem ut i(nfra) de sup(pellectili) le(gata) l. iii (Dig.33.10.3.5), sed non facit quod illud quod nullum est ualeat ut hic ad l(egem) istam.' *Ibid.*, *fol.* 86*rb*: 'Respondo ad ar(gumentum) communis error facit ius: dico non facit ius sed quod errantes excusantur.'

99 On the 'confusion between *intentio* and *utilitas* on the one hand, and *causa finalis* on the other': Cortese (1962), vol. 1, p. 186. More specifically, the same Cortese highlighted how in Bellapertica (and, before him, Cumis), the difference between *causa impulsiva* and *causa finalis* lies in the person in whose favour the obligation is undertaken. If the obligation is undertaken for the beneficiary's sake, then the *causa* is *impulsiva*. If on the contrary the obligation goes to the benefit of the person who undertook it, then it is *finalis*. *Ibid.*, pp. 226 and 237. Unlike Cumis, however, Bellapertica considered this division between utility of

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In stating as much, Bellapertica invokes two main texts, Cod.6.24.4 and Dig.35.1.72.6. The first text stated that the appointment of the heir made in the mistaken belief that he was the testator's son is void if that belief was the only reason for the appointment.[101] Ravanis used this text to distinguish between bequests to legitimate and illegitimate offspring. If the testator instituted the illegitimate son heir 'for what he could receive', and the legitimate 'for the rest', then clearly everything would go to the legitimate son. Bellapertica introduced a subtle difference between illegitimate offspring and people legally prohibited from receiving anything. Ravanis' solution, argued Bellapertica, would clearly apply to the latter, but not necessarily also to the illegitimate son.[102] Hence the reason for referring to this *lex* in Barbarius' case: the testator's causa finalis was clearly lacking in the bequest to the 'false' son who was legally incapable of receiving anything.

The second text (the *lex Cum tale*, Dig.35.1.72.6) strengthened the conclusion of the first one. This time however Bellapertica did not need to complicate Ravanis' position – it was sufficient to recall it. The text of the *lex Cum tale*

the obligor and of the obligee as only giving rise to a (rebuttable) presumption, not a legal rule. Compare the comment of Cumis on Cod.6.44.1 with that of Bellapertica on Cod.1.3.52 (transcription in Meijers [1966], pp. 120 and 120–121 respectively; Meijers did not indicate the source for his transcription of Cumis' *quaestio*. The editors of Meijers' studies, Feenstra and Fischer, tentatively opted for Bod. Laud. lat. 3: *ibid.*, p. 120.). See more broadly Cortese (1962), vol. 1, pp. 183–225 (a short mention also in Cortese (1960), pp. 542–543); Meijers (1966), pp. 115–124, and more recently, though perhaps using a different approach, Volante (2001), pp. 294–300.

100 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*rb*): 'probatur errabat populus quare illum in pretorem elegit in causa finali, quia aliter non fuisse pretor; ergo effectus erroneus est et ita ullus sit C. de her(edibus) insti(tuendis) <l.> si pater (Cod.6.24.4) et i(nfra) de condi(cionibus) et de(monstrationibus) <l.> tale § falsam i. (Dig.35.1.72.6).'

101 Cod.6.24.4 (Gordianus A. Ulpio. PP.): 'Si pater tuus eum quasi filium heredem instituit, quem falsa opinione ductus suum esse credebat, non instituturus, si alienum nosset, isque postea subditicius esse ostensus est, auferendam ei successionem divi severi et antonini placitis continetur.'

102 The discussion is summed up by Cynus of Pistoia, *ad* Cod.6.24.4, § *Pater* (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi*, cit., *fol.* 371*ra–b*): 'In hac l(ege) ponit Iaco(bus) de Ra(vanis) sic exemplum. Testator habens duos filios, vnum legitimum, et alium spurium, sic dixit: "Spurium haeredem instituo, in eo, quod poterit capere, legitimum in residuo." Legitimus totum habebit, et hoc dixit haec l(ex), sed si dixit: "instituo spurio in vncia, et legitimum in residuo", forte fiscus habebit tunc illam vnciam, secundum Ia(cobum) praedictum. Pet(rus de Bellapertica) facit differentiam, inter eum qui ipso iure habere non potest, et eum qui est indignus, vt in primo non intersit, per quae verba fiat institutio in sua persona. Nam semper institutus in residuo, totum habebit. In secundo vero refert, per quae verba procedat institutio, vt supra dictum est.'

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allowed the heir not to execute the testator's legacy if he could prove that it was made on the sole basis of a false motive.[103] Ravanis invoked this *lex* to argue against the validity of a custom that lacked *causa finalis*.[104] Bellapertica used Ravanis' own argument against him: it is precisely because Barbarius' election could not lead to his exercise of the praetorship that the will of the people lacked final cause. Ravanis' distinction between mistake and intention, concludes Bellapertica, has no place in the *lex Barbarius*: the lack of final cause leaves no residual validity to the vitiated will of the sovereign.[105]

Ravanis, it will be recalled, argued for the validity of Barbarius' deeds on two grounds: the public utility of preserving what was done under common mistake and the authority of the sovereign power. Bellapertica removes entirely the sovereign from the equation and downplays the effects of the common mistake. What is left is public utility, and public utility alone.[106] As already observed, the remarkable brevity of Bellapertica's explanation on the role of public utility might depend on the poor quality of the manuscript source. This makes it difficult to extrapolate the original meaning of Bellapertica from its wording in the manuscript.[107]

103 Dig.35.1.72.6 (Pap. 18 quaest.): 'Falsam causam legato non obesse verius est, quia ratio legandi legato non cohaeret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.'

104 See Ravanis' *repetitio ad* Dig.1.3.32 (the *lex De quibus*) (Napoli, Branc.III.A.6, *fol. 7rb*, transcription in Waelkens [1984], p. 526, ll.49–52): 'Pone testator legauit errans. Queritur an ualeat legatum. Distinguitur: si fuit error in causa impulsiua ualet, si in causa finali non ualet, ut *infra*, de condi(cionibus) et de(mostratio-nibus) l. cum tale § Falsam (Dig.35.1.72.6).'

105 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*rb*): 'Item est error in persona. Item est error in condicione persone, sed error in condicione nunquid impedit actum agendum: mutuo tibi tamquam liber et es seruus, nichilominus contrahitur mutuum ergo etc., ar(gumentum) i(nfra) de furtis <l.> si quis uxori § si seruus (Dig.47.2.52.28). Dico quod error in condicione persone nunquid actum impedit quam potest cadere in persona illa uera et opinata ut mutuo tibi pecuniam quia inspecta opinata condicione quod es liber potest contrahi. Item inspecta uera condicione quod es seruus nichilominus tibi mutuari potest, sic loquitur l. contraria, sed ubi inspecta condicione nota non potest ille actus geri per eum uel in eo cadere, tunc impedit actum. Seruus non potest esse pretor ut ff. de regulis iuris l. quod attinet (Dig.50.17.32) et ideo impedit actum illum quia [MS: quod] non potest esse actus in eo cadere inspecta uera condicione.' Cf. Schermaier (2000), pp. 70–71, where further literature is listed.

106 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*va*): 'Breuiter non credo quod sint due rationes, sed una ratio est quare ualeant, solummodo fit communis utilitas, et non plus dictum fuit principi<s>. Ecce mirabilis causis iudicatur seruus iste barbarius nullus casus iudicauit de rigore non ualent. Sed cum tunc multa restaurari, ideo propter utilitatem statutum est quod de equitate ualeant omnes.'

107 The manuscript gives remarkably little weight to the most salient feature of the whole *repetitio* – the entire point is just summed up in a few lines. If it was not

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Ravanis denied the validity of Barbarius' praetorship, but he did not explain the validity of the deeds exclusively on the basis of public utility. Rather, he highlighted the sovereignty of the same people so as to enhance the importance of their volition despite the invalidity of the election. In requiring something in addition to public utility, however, Ravanis could not sever the deeds entirely from their source. This is the most revolutionary aspect of Bellapertica's position: the validity of the deeds has nothing to do with the position of him from whom they emanate. This leads Bellapertica to state something that would acquire crucial importance later, in the all-important comment of Baldus de Ubaldis: the validity of Barbarius' decisions in any legal proceedings may be argued in favour of the parties, not also of himself.[108] Predicating the validity of the deeds on a teleological basis, the utility of the commonwealth, Bellapertica could be selective in its application. The public utility supporting the common mistake does not also cover the source of the deeds, only its recipients.

Just like Ravanis, Bellapertica also maintains that the common mistake may not be invoked by whoever was aware of the truth. Not sharing Ravanis' distinction between mistake and volition in Barbarius' election, however, Bellapertica could be more open on the matter than his senior colleague. It is not possible to invoke the common opinion when one is aware that it is false, says Bellapertica. In his reasoning, the moral reproach of Ravanis for such a case becomes firm denial on a legal basis.[109]

A difficulty with Bellapertica's interpretation of the *lex Barbarius*, however, lies in the text of the slave-arbiter (Cod.7.45.2), for the delegate judge

for the importance that the meaning of those lines had among later authors, one might take little notice of them.

108 *Ibid.*, *fol.* 85*vb*: 'Dico immo licet ex parte ipsius non legitime fecit, tamen ex parte litigantium sic, ideo etc. Nam error communis excusat ideo etc. iuxta illud error comunis facit ius ut hic et i(nfra) de sup(pellectili) l(egata) l. iii (Dig.33.10.3) et C. de testis l. i [Cod.4.20.1, *sed* 'de test<ament>is', Cod.6.23.1].' On the possible influence of this statement by Bellapertica on Baldus see *infra*, pt. III, §11.4.3, note 150.

109 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 85*vb*): 'Quidam errant ibi qui sciebant nunquid illos scientes excusat ut ratum sit inter eos? Uidetur quod sic ut hic dico istud non est verum, errantes excusat non autem scientes ut i(nfra) de ad(quirenda) haer(editate) <l.> cum quidam § quod dicitur (Dig.29.2.30.3) modo ista similis questio est. Consuetudo est contra rationem, immo corruptela est quod primogenitus totam successionem habeat. Si communiter errarent excusantur, ut ar(guitur) i(nfra) de supe<l>le(ctili) le(gata) l. iii ad fi(nem) (Dig.33.10.3.5). Pone est ubi unius qui scit quod consuetudo est erronea, nunquid potest mori cum toto patrimonio patris suis sine peccato? Credo quod ex quo corruptela est, debet diuidere cum fratribus, ar(gumentum) l. alle(gata) i(nfra) de ad(quirenda) haer(editate) cum quidam § quod dicitur (Dig.29.2.30.3).' Cf. Bezemer (2005), p. 88.

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pronounced a single decision, and yet that single decision was valid. Bellapertica solves the problem by interpreting the crucial verb in that *lex* ('depulsus sit') in the opposite way from the Gloss. For Bellapertica the text dealt with a freedman brought back in servitude after he gave the decision, not with a slave pretending to be free while sitting in judgment.[110] This way, incidentally, Bellapertica's interpretation becomes much closer to the original meaning of the Roman source. The only alternative (chosen by the other jurist who had the same problem as Bellapertica, Odofredus) would have been preferring common mistake to public utility – that is, linking the validity of the deeds directly to the common mistake, without requiring that both the mistake and the utility be common.[111]

The above mention of Odofredus is not fortuitous. Despite its different approach, the position of Bellapertica on the scope of the *lex Barbarius* is very similar to that of Odofredus – there is no outer boundary to its application. Among them, Odofredus' reasoning appears more linear: common mistake is always sufficient as to the validity of what should be void. If public utility played any role in Odofredus, that role was markedly ancillary to that of common mistake. In Bellapertica, by contrast, the relationship between common mistake and public utility is the opposite: what really matters is public utility. At first sight, this would attest to a more profound elaboration of the normative issues. In fact, Bellapertica's conclusion is even more problematic than that of Odofredus. Refusing any further ground for the validity of Barbarius' deeds other than public utility leads to an obvious paradox: if public utility is triggered by the number of people potentially affected by the mistake, then the more void acts are performed the stronger they become. Bellapertica is perfectly conscious of the point, and he explains it very well – only he does not find it paradoxical.

Just like slaves, excommunicates lack legal capacity. Let us suppose, says Bellapertica, that a judge is excommunicated but that the people are not aware of that. If this judge were to hear a single dispute, his decision would surely be void because of his lack of valid jurisdiction. But, continues Bellapertica, if the same excommunicate were to pronounce many decisions, their number would trigger public utility considerations. Therefore, while each of those decisions – taken in isolation from the others – would remain void, all of them together would become valid for equitable consideration.[112] The example of the excommunicate

110 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*va*): 'Dico non est verum si seruus unam sententiam tulit non ualet, sed l. illa [*scil.,* Cod.7.45.2] loquitur in liberto et retrusus in seruitute, non debet quod legitime factum est retractari.'

111 *Supra*, §3.1, text and note 29.

112 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*va*): 'tunc per istam racionem determinari questionem de quibus queritur. Aliquis iudex excommunicatus

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does not seem fortuitous. Ravanis, it will be recalled, used it to distinguish between the invalidity of a single sentence[113] and the validity of a large number of them – so long, however, as the appointment was made by the sovereign.[114] The continuity between Bellapertica and Ravanis (and perhaps also Monciaco), however, is only apparent. In Bellapertica, the only reason for the validity of the decisions of the excommunicate lies in the number of people affected by the mistake as to his status. If uncovering the mistake would harm the commonwealth, public utility ought to be invoked.

The same principle may be applied outside the law court. If a false prelate, widely believed to be a genuine one, is elected to some office, will his deeds be valid? For Bellapertica the solution depends exclusively on the kind of office: if the office is such as to give power over a large number of people – Bellapertica gives the example of the false bishop – then the requirement of public utility is fulfilled. Here as well the consequence is paradoxical: the higher the office and the broader its jurisdiction, the stronger the (in principle, void) deeds would become. But, again, that does not seem to trouble Bellapertica, who on the contrary observes approvingly that a false bishop could do what a false priest of a small parish could not.[115]

The distinction between sporadic versus regular exercise of invalid jurisdiction is further elaborated in another example, that of the revocation of delegated jurisdiction. The Gloss dealt with this issue on the basis of the subjective knowledge of the judge. If the judge was aware that his mandate had expired,

procedit in causa, partes ignorant, nunquid decreta ualent? Uidetur quod sic, quia excommunicatus seruo equiparatur ut C. de sen(tentiam) pas(sis) l. ult(ima) (Cod.9.51.13), sed lex dicit si seruus ita processit ualet ergo etc. ut C. de sen(tentiis) l. ii (Cod.7.45.2) pro rationem quam dixi potest id [MS: is] respondere: aut unam sententiam tantum tulit inter partes, et tunc dico quod non ualet supposito quod excommunicatus non potest sententiam proferre; sed si plura decreuit ut officialiter huius nullo est excommunicatus plura decreuit ea de equitate ualebunt sic est in l. ista [*scil.*, Dig.1.14.3]. Responde excommunicatus seruo equiparatus etc. ut l. all(egata) (Cod.9.51.13) et i(nfra) qui et a qui(bus) li(beri) ma(numissi) fi(unt) l. competit (Dig.40.9.19).'

113 *Supra*, this chapter, note 32.

114 *Supra*, this chapter, note 34.

115 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*va*): 'Item alia questio determinatur: aliquis fuit electus et non fuit in ueritate prelatus, iudicauit multa, nunquid ualent? Dico aut erat episcopus qui populum gubernat, et tunc propter communem utilitatem ualebunt, sed si preesset duobus uel tribus non ualent sententiae, sic intelligo l(egem) istam. Sciui doctores qui contradirent: ea que prelatus facit, si apparet illum non fuisse prelatum, non uale<n>t, ut C. de her(eticis) et ma(nicheis) l. dampnata (Cod.1.5.6). Dico verum est: de iure non debent acta eius approbari cuius actor reprobatus; dico tamen de equitate ualebunt ut hic.'

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held the Gloss, the proceedings were void; if not, they were valid.[116] Building on what has already been said, however, Bellapertica maintains the opposite. The fact that the judge is aware of the revocation of his jurisdiction puts him in the same position as Barbarius, the excommunicate and the false bishop. They all exercised in bad faith a jurisdiction they knew they did not have, and yet their deeds are valid all the same. Such a validity, therefore, cannot possibly depend on the subjective status of the source of the deeds. Accordingly, concludes Bellapertica, when the mandate of the delegate judge is revoked, the validity of his decisions would depend only on their sheer number.[117]

4.5 Cynus of Pistoia

As a rule of thumb, it is often said, the easiest way of knowing what Bellapertica might have said on something is to look at Cynus of Pistoia (1270–1336/37).[118] *Clichés* are misleading, yet seldom completely unfounded. While it would be profoundly unjust to consider Cynus as an imitator of Bellapertica, it is true that on our subject he was not particularly original either. It is however important to recall his position on the *lex Barbarius*: it was mainly through Cynus that the thinking of Orléanese jurists on the *lex Barbarius* came to be known to most Italian jurists. This makes particularly important to look at what Cynus reported of the Orléanese position, and especially how. For this reason (besides the very poor quality of Bellapertica's manuscript on the *lex Barbarius*), some passages of Cynus will be transcribed and translated in the main text even if they are clearly inspired by Bellapertica.

116 Gloss *ad* Dig.3.3.65, § *mutata voluntate* (Parisiis 1566, vol. 1, col. 398), and esp. *ad* Cod.2.56(57).1, § *Noluerit* (Parisiis 1566, vol. 4, col. 416).

117 Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*va*): 'Item potest determinari alia quaestio. Causa commissa est delegato, reuocacione facta procedit, nunquid ualet processus? Uidetur quod sic ar(gumentum) huius l. [*scil.*, Dig.1.14.3]. Quidam modum distingunt aut ille iudex sciebat se reuocatum et tunc non tenet processus, aut partes sciebant eum reuocatum et tunc non valet, aut alter sciuit et tunc tenet in preiudicium scientis non in eius utilitatem ar(gumentum) l. que in procuratore reuocato loquit et ita distinguit i(nfra) de procurat(oribus) l. si procuratorem (Dig.3.3.65) et C. de satisdando l. una (Cod.2.56(57).1). Dico indistincte. Respondo de iure uero per l. istam aut ille iudex processit partibus scientibus et non ualet tunc ut C. de sen(tentiis) (Cod.7.45) et in iur(isdictione) om(nium) iu(dicium) l. priuatorum (Cod.3.13.3), aut illis ignorantibus et tunc aut multa decreuit ita quod si reuocatur ledentur [MS: ledetetur] commune totum tunc ualent aut inter priuatos statuit vnum, et dico quod non tenet.'

118 The accusation started already with Bartolus: see Maffei (1963), p. 49 n. 137. On the point see esp. Gordon (1974), pp. 105–117, and Bezemer (2000), pp. 433–454.

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Cynus opens his *lectura* on the *lex Barbarius* observing that it may be read in two ways: either with the Gloss, or after the 'moderns'.[119] On the subject Cynus was very modern himself: Barbarius was neither free nor praetor.[120] As with the *Ultramontani*, also for Cynus the text of the *lex Barbarius* would pose only one question: whether the deeds of Barbarius are valid.[121] Whether to disprove the posthumous criticism of plagiarism of Bellapertica or because of the weight of the tradition, however – like most *Citramontani* but much unlike the Orléanese – Cynus discusses first and at length the issue of Barbarius' praetorship and only then, briefly, that of his freedom.

As already said, most of Cynus' arguments follow Bellapertica's *repetitio*. With regard to the invalidity of Barbarius' praetorship, this may be seen in the implicit opposition between validity *de humanitate* and validity *de iure*,[122] and especially on the *lex Iulia de ambitu*. Here in particular Cynus follows Bellapertica not only in dismissing the difference between acting secretly and publicly[123] as well as that between soliciting one's own appointment and that of someone else,[124] but

119 Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 13*va*, n. 1).

120 *Ibid.*, *fol.* 14*ra–va*, n. 12–14.

121 *Ibid.*, *fol.* 14*va*, n. 14: '… non ob(stat) haec lex, quia dico, quod hic non est nisi vna quaestio, scilicet, an acta valeant?'

122 *Ibid.*, *fol.* 14*ra*, n. 12: 'Et primo probatur per hanc leg(em) quae dicit, acta per Barbarium de humanitate, seu aequitate seruari, vel tenere propter communem vtilitatem, contra rigorem iuris. Sed si ipse fuisset Praetor, nulla humanitate, vel aequitate opus esset: quia tenerent de rigore Iuris.'

123 *Ibid.*, *fol.* 13*vb*, n. 9: '… Alij dicuunt, quod nullus per ambitum debet eligi. Verum est, clandestine, sed palam sic. Nam multa licent palam, quae non licent clam, vt inf(ra) de admi(nistratione) tuto(rum) l. non existimo (Dig.26.7.54) et no(tandum) C. de contrahen(da) emp(tione) l. cum ipse (Cod.4.38.5). Ista solut(io) simili modo est nulla, quia contra praedictam leg(em) si quenquam (Cod.1.3.30).'

124 *Ibid.*, *fol.* 13*vb*, n. 9–10: 'Aliqui dicunt, quod nullus per ambitum debet eligi ad dignitatem, verum est, ponendo eam per se, sed bene per alium. Ista solutio supponit quod beneficium per symoniam acquisitum per alium, potest quis retinere, quod est falsum: ad quod inducitur, infr(a) de <receptis qui> arbi(trium) l. 3 (Dig.4.8.3).' Cf. Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*ra*): 'Istud nichil est nec licet dignitatem petere clam nec palam ut in l(ege) all(egata) quemquam (Cod.1.3.30(31)), quare dicunt alii ipsemet non petet et sic intelligitur l. contraria. Sed per alium potest petere ut si amicus meus dignitatem per me petat istud ualet. Dicit l. ista quod alius petiit dignitatem pro isto non ualet plus nec potest retinere beneficium per simoniam acquisitum et facit C. de arb(itrium) l. iii [Cod.2.55(56).3, *sed* de <receptis qui> arbi(trium) l. 3, Dig.4.8.3], quare dicunt alii verum est non licet petere dignitatem uerbis expressis ut in l. contraria, sed bonis meritis quod se ostendat ualide ut i(*infra*) ad l. Iul(iam) repe(tundarum) l. ult(ima) (Dig.48.11.9). Credo quod istud non esse proprie petere quod ostendat se morigeratum quod tunc glo(sa) approbat

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also in maintaining, against widespread opinion, that the *lex Iulia* would also apply in Rome. The association between Rome and simony is of course too good to be missed by a staunch Ghibelline like Cynus, who allows himself a little digression to note how this false interpretation of the *lex Iulia* has greatly favoured simoniacal practices within the Church.[125] Having duly attacked the papacy, Cynus goes back to the main subject and continues with his report of Bellapertica's position, down to the most specific observations.[126] Similarly, when discussing the (theoretical) question of whether Barbarius' master ought to be compensated if the people were to set his slave free, Cynus gives a lengthy summary of Bellapertica's (particularly exhaustive) discussion, making a point not to omit a single detail.[127]

non licet pro dignitate dare aliquid extra ciuitatem romanam et sic lo(quitur) l. contra(ria).'

125 Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 13*vb*, n. 10–11): '… Alij dicunt, et tenet hoc glo(sa), quod non licet petere dignitatem alibi, sed Romae: quia alibi non habet locum l. Iul(ia) ambitus, vt in dicta l. vnica (Dig.48.14.1) patet. Et de hoc gaudent symoniaci curiales, dicentes quod in curia Romana non committitur symonia: quia non vendicat ibidem locum sibi ambitio. Sed certe sicut videtur, lupanarij et tonsores, et totus mundus Romae, et in Romana curia viget omnis ambitus, et omnis symonia.' Cf. *ibid.*, *fol.* 14*ra*, n. 12: 'Hoc male seruat curia Romana, quae vendit praesidatus suos, in quibus Iustitia est, propterea venalis, sic videmus in ducatu Marchiae et Romandiolae.'

126 Especially on the modern ('de iure novo') distinction between offices that carry jurisdictional powers with them and offices that do not: *ibid.*, *fol.* 14*ra*, n. 12: 'quaeritur nunquid dignitatem licet petere, et pro ea pecuniam dare? Distinguo secundum Pe(trum) … De iure nouo subdistinguendum est. Nam aut dignitas cui non est iurisdictio annexa, verbi gratia, quod sit aduocatus: tunc licet, vt dicto § sed et si quis (Cod.7.6.1.5): aut habet iurisdictionem annexam, verbi gratia, quod sit Praetor, et magistratus: et tunc nec clam nec palam licet, quia lex praesuponit, quod Rempublicam grauaret, vt in Authen. vt iudi(ces) sine quo(quo) suf(fragio) §1 (Coll.2.2pr[=Nov.8pr§1]) et § cogitandum (Coll.2.2.1 [=Nov.8.1]).' Cf. Bellapertica, *supra*, this chapter, note 92.

127 Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 13*vb*, n. 6–7): 'Quarto et vltimo not(andum) quod populus Romanus, dum erat imperium apud eum, et similiter hodie, potest auferre alicui rei suae dominium. Quod intelligendum est, causa subsistente, vt infr(a) de euicti(onibus) l. Lucius (D.21.2.11pr). Causa autem potuit hic esse, scilicet, defectus aliorum, vt inf(ra) de mu(neribus) et ho(noribus) l. vt gradatim in fi(ne) (Dig.50.4.11.4). Alias sine causa non posset: quia Imperator constitutit ius ciuile, et ius ciuile naturalia iura tollere non potest, ut no(tatur) sup(ra) de consti(tutionibus) prin(cipum) l. i (Dig.1.4.1) … Tamen vnum est proprium in Principe, quia semper praesumitur cum causa facere, vt plene dixi C. de pre(cibus) Impera(tori) offe(rendi) l. rescripta (Cod.1.19.7)' Cf. *ibid.*, *fol.* 14*va*, n. 14: 'Tertio quero, posito quod Imperator faceret eum liberum et Praetorem potest, nunquid tunc debetur praecium eius dari? Videtur quod sic, vt

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Cynus also follows Bellapertica closely on the issue of Barbarius' freedom, and there he seeks to strengthen the Orléanese's conclusion. His reasoning is (slightly) more original with regard to Barbarius' praetorship. In order to disprove Ulpian's argument on the implied will of the people, Bellapertica invoked (among many other texts), also Dig.2.4.10.2. This text stated that the adoption of a *sui iuris* (i. e. *adrogatio*) made without knowledge that the adoptee was a freedman does not make him also freeborn.[128] To strengthen the parallel with Barbarius' case, Cynus also refers to Dig.40.12.28.[129] This text clearly stated that a slave could acquire his freedom only with the consent of his master, but the master's acquiescence would not amount to consent when the master was not even aware of being the owner of that slave.[130] The reference, not present in Bellapertica (or, it would seem, in the work of other jurists), strengthens the overall argument ('et ista est veritas').[131] The prince or the Romans might well have set Barbarius free, says Cynus, but only if they acted with full knowledge as to his true status.[132] Since they did not, Barbarius

C. qui(bus) ex cau(sis) ser(vi) pro prae(mio) l. 2 (Cod.7.13.2). Videtur contra, inf(ra) quemad(modum) seruui(tutes) amit(tunt) l. si locus § fi. (Dig.8.6.14.1). Sol(utio) dicendum est, precium a fisco praestandum, vt dicta l. 2 (Cod.7.13.2). Non ob(stante) dicta l. si locus § fi. (Dig.8.6.14.1) quia et ibi praestandum est precium, secundum Ia(cobum) de Ra(vanis) et Pe(trum de Bellapertica). Ratio est, quia vicinus eius agri, cedente materia, debet sibi computare incommodum commodo, quod euenire potest, recedente familia, vel per alienationem sibi acquirere, inf(ra) vt de acqui(rendo) re(rum) do(minio) l. Martius (Dig.41.1.38).' Cf. Bellapertica, *supra*, this chapter, note 88.

128 Dig.2.4.10.2 (Ulp. 5 ed.): 'Patronum autem accipimus etiam si capite minutus sit: vel si libertus capite minutus, dum adrogetur per obreptionem. Cum enim hoc ipso, quo adrogatur, celat condicionem, non id actum videtur ut fieret ingenuus.' Cf. Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*rb*).

129 Dig.40.12.28 (Pomp. 12 ad Q. Muc.): 'Non videtur domini voluntate servus in libertate esse, quem dominus ignorasset suum esse: et est hoc verum: is enim demum voluntate domini in libertate est, qui possessionem libertatis ex voluntate domini consequitur.'

130 Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 14*rb–va*, n. 14): 'Quarto probatur, quod non fuerit liber ista ratione: quia dum populus vel Imperator decerneret sibi Praeturam, hoc non agebat, vt liberum faceret: ergo etc. Optimum ar(gumentum) ad hoc inf(ra) de in ius vo(cando) l. sed si haec § patronum (Dig.2.4.10.2), et videtur casus ff. de li(berali) cau(sa) l. non videtur (Dig.40.12.28), et ista est veritas.'

131 *Ibid*.

132 *Ibid*., *fol.* 14*rb*, n. 13: 'Tertio ad illud quod op(ponitur) quod iuris prohibitio non tenet principem. Respondeo quod verum est, quando scienter facit. Se hic non fecit scienter talem esse conditionem eius, ergo etc., et per hoc inf(ra) de re iudi(cata), l. quidam (Dig.42.1.57) et C. qui admi(tti) ad bo(norum) pos(sesionem) l. bonorum (Cod.6.9.1).'

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remained free only *de facto*.[133] This, concludes Cynus, is how Pomponius' statement should be interpreted: simply stating a fact (Barbarius' exercise of the praetorship), not suggesting the *de iure* validity of such an exercise.[134]

His wholehearted support of Bellapertica, rather unsurprisingly, leads Cynus to choose his approach over that of Ravanis. The way he does so, however, would cast some doubts as to his knowledge of what Ravanis actually said. Cynus repeats almost verbatim Bellapertica's crucial observation against Ravanis (the mistake of the people did not lie just in Barbarius' status, but in the final cause of his election), but he seems to consider it only as another argument against Barbarius' praetorship.[135] Not elaborating much on Ravanis' position, Cynus does not fully explain the reason for rejecting it. The main (and only) occasion on which he describes the position of both jurists, Cynus simply repeats something he found in Bellapertica:[136]

133 *Ibid.*, *fol.* 14*va*, n. 14: 'Non fuit ergo Barbarius de iure Praetor, sed de facto liberorum ostensum est.'

134 *Ibid.*, *fol.* 14*ra*, n. 12: 'Solut(io) ad istam literam qua dicit "ei nihil seruitutem obstetisse" etc., respondetur quod ista litera non dicit "eum fuisse Praetorem" sed dicit "eum functum fuisse officio Praetoris". Nec est verum, quod ibi respondetur quaestio, sed ponit differentiam ad quaestionem mouendam, dicendo quod nihil obfuit seruitus: quasi Praetor non fuerit, et Praetoria functum esse de facto, et hoc negari non potest, quin ita non fuerit. Non autem dicit, decidendo quaestionem.'

135 Cynus, *ibid.*, *fol.* 14*ra*, n. 12

'populus, qui eum elegit, errauit in causa finali, cum alias non fecisset eum Praetorem, nisi liberum putaret. Ergo effectus erroneus est, et ita nullus, vt C. de haere(dibus) insti(tuendis) l. si pater (C.6.24.4), et *infra* de condi(cionibus) et de(mostrationibus) l. cum tale § falsam (Dig.35.1.72.6).'

Bellapertica, *ad* Dig.1.14.3 (Madrid, BN 573, *fol.* 86*rb*) *supra*, this chapter, note 100

'errabat populus quare illum in pretorem elegit in causa finali, quia aliter non fuisse pretor; ergo effectus erroneus est et ita ullus sit C. de her(edibus) insti(tuendis) <l.> si pater (Cod.6.24.4) et i(nfra) de condi(cionibus) et de(monstrationibus) <l.> tale § falsam (Dig.35.1.72.6).'

136 Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 14*va–b*, n. 16): 'Ia(cobus) de Ra(vanis) dicit, quod duplex est ratio, vna est propter authoritatem concedentis, vt populi vel principis; et altera est propter communem vtilitatem: quia multi eorum, et sic intelligit legem istam. Hinc est, quod si altera istarum rationum deficiet, non valet illud quod agitur. Vnde si Epis(copus) huius ciuitatis quendam seruum decreuerit officialem, non valebunt acta coram eo: quia non est haec causa magna authoritas concedentis. Vel pone quod Papa vel Princeps credens seruum liberum delegauit eum inter duos homines: Certe non valebit processus, quia hic deficit publica vtilitas, secundum eum. Pet(rus de Bellapertica) vero dicit, et melius, quod non est duplex ratio imo vna tantum, scilicet communis vtilitas, quae facit hic decreta et gesta per istum seruum valere: nam hic Barbarius multa

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> Jacobus de Ravanis argues that the reason is twofold. One lies in the authority that bestows [the office], the people or the prince. The other depends on common utility: there were many of them [who were mistaken]. This is how he understands this *lex*. It follows that, without either of these reasons, the deeds are void. So, if the bishop of this city appointed some slave as civil servant, anything transacted before him would remain void, for the office was not bestowed by a high authority. Or imagine that the pope or the emperor, thinking that a slave is free, would delegate him to decide the controversy of two people. Surely the proceedings will be void, for there is no public utility, according to Jacobus. Petrus de Bellapertica however argues, and more persuasively, that there is just one reason why the decrees and the acts done by this slave are valid: common utility. Indeed, this Barbarius established and decided many things that would be void from a strictly legal standpoint, but are valid out of fairness, because of common utility, so as not to void many legal proceedings.

Ravanis' interpretation of the role of the sovereign power, as we have seen, was deeply connected with his elaboration of the common mistake. If Cynus was superficial with the former, he did not even look at the latter. This would have important consequences for future developments of the debate on the *lex Barbarius*, for it was mainly through Cynus that the position of the Orléanese jurists on Barbarius' case came to be known to most Italian jurists. Thus, Cynus' omission of Ravanis' ingenious interpretation of the common mistake might have significantly contributed to its oblivion – later jurists commenting on the same *lex* would seem to have ignored it. Ravanis' approach to the superior

> decreuit et determinauit, quae de rigore non valent, sed propter communem vtilitatem, ne rescindatur tot processus, de aequitate valent et tenent.' As said earlier, Cynus' passage was based on a very similar one of Bellapertica. Because of the very poor quality of Bellapertica's Madrid manuscript, however, that passage should be interpreted in the light of that of Cynus (and not the other way round). In the Madrid text of Bellapertica, the position of Ravanis is attributed to the Gloss, and then even endorsed by Bellapertica himself. Madrid, BN 573, *fol.* 86*rb–va*: 'Iuxta hoc quero quarto nec est pretor nec liber, tamen que decreuit ualent de equitate qua est racio dicit glosa, quia communis error facit ius … ista est racio duplex, una propter auctoritatem concedentis et alia propter publicam utilitatem, seu communem populi auctoritatem, quia populus istum seruum decreuit pretorem et ideo ualent. Alia est racio propter utilitatem communem, quia ex quo multi coram eo litigauerunt ualet propter utilitatem communem. Sic intelligo l. istam in medio et in fine, et hoc se(quitur) quod si altera istarum deficiat, quod non ualet. Pone episcopus quendam [MS: quoddam] seruum decreuit officialem tunc que ipse decreuit non ualent, uel po(ne) populus uel princeps credens seruum liberum delegauit eum inter duos; ipse cognouit, nunquid ualet processus? Uidetur quod non, quia publica utilitas deficit ergo etc.' There can be little doubt as to the real meaning of this passage, and the mistakes may be easily explained since they are only in the person (of Ravanis, not Accursius and even less Bellapertica) to whom the reasoning is attributed, not in the reasoning itself. Bartolus in his turn summed up Cynus' summary: *infra*, next chapter, note 4.

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authority was not forgotten but misunderstood. Relying on Cynus, later jurists would typically remember only that Ravanis somehow required the intervention of the superior authority, not the reasons why, let alone the specific modalities in which that intervention would (or rather, would not) take place.

By contrast, the position of Bellapertica is reported faithfully in all its parts. As with Bellapertica, for Cynus a mistake – whether individual or common to all – can only excuse the person who makes it, but it does not produce any further consequence:[137]

> It is said that common mistake makes law. I reply that a common mistake does not make law, but it provides an excuse to those who fall in it … A common mistake excuses those who err, but it does not bestow validity on what does not exist.

On this basis Cynus – again, just like Bellapertica – rejects the opinion that the common mistake would suffice even without public utility considerations. A common mistake may be taken into account only insofar as public utility is concerned:[138]

> What is the logic of holding that, although Barbarius was not praetor, his decrees are still valid on fairness grounds? The Gloss says that the reason lies in the common mistake making law (as in Dig.33.10.3.5, Cod.6.23.1 and Dig.14.6.3pr), and on this basis some modern jurists argue that his decrees would be valid even without public utility, having regard only to the common mistake. But Petrus de Bellapertica argues against this because, as I said earlier, the common mistake does not make law, bestowing validity upon what does not exist, but rather excuses those who err.

Coupling common mistake with public utility also means excluding from the scope of the *lex Barbarius* the case of individual knowledge of a common mistake. Public utility does not operate without good faith. So if a single person is aware of the truth, he may not benefit from the fact that most people are

137 Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 14*rb–va*, n. 14): 'non obstante quod dicitur, quod communis error facit ius, quia respondeo quod communis error non facit ius, sed facit quod errantes excusantur … Communis error excusat errantem: non tamen facit, quod illud quod nullum est, valeat.'

138 *Ibid.*, *fol.* 14*va*, n. 15–16: 'quaeritur, iste Barbarius nec fuit Praetor, tamen quae decreuit valent de equitate, sed quae est ratio huiusmodi? Dicit glo(sa) quod ratio huius est, quia communis error facit ius, vt infr(a) de sup(pellectili) le(gata) l. 2 [*sed* 'l. 3': Dig.33.10.3.5] C. de test(amentis), l. i (Cod.6.23.1), ad Mace(donianum) l. 2 [*sed* 'l. 3': Dig.14.6.3], et secundum hoc etiamsi non esset publica vtilitas, valerent, inspecto solo communi errore, quod tenent quidam moderniores. Sed Pe(trus) dicit, quod istud nihil est, quia sicut ego dixi sup(ra) communis error non facit ius, vt valeat quod nullum est, sed excusat errantes.'

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not.[139] It follows that Barbarius' decisions should be held valid only against such a person and not also to his advantage.[140]

Rejecting the necessity of the superior authority's intervention (if only to approve of Barbarius' election, as in Ravanis), Bellapertica did not place any limit on the scope of public utility. This way, as we have seen, the approach became exclusively quantative: the larger the number of void deeds commonly believed valid, the stronger the harm that the commonwealth would suffer, and so the more pressing the public utility considerations. Cynus follows suit, providing the same examples as Bellapertica – the excommunicated judge, the false bishop, and the revocation of the mandate of the delegate judge:[141]

139 *Ibid.*, *fol.* 13*vb*, n. 4: 'quia communis error … excusat ignorantes, non autem scientes, vt inf(ra) de acqui(renda) haere(ditate) l. cum quidam § quod dicitur (Dig.29.2.30.1). Vnde primogenitus, qui secundum consuetudinem Angliae totum patrimonium retinet, si scit consuetudinem illam erroneam esse, peccat.'

140 *Ibid.*, *fol.* 14*va*, n. 14–15: 'Quarto quaeritur, po(ne) quod aliqui litigauerunt coram eo suam conditionem scientes, an valeant acta? Videtur quod sic, propter communem errorem et vtilitatem. Item, quia potius error vniuersitatis, quam singulorum debet spectari, inf(ra) quod cuiusque vniuersi(tatis) l. i (Dig.3.4.1). Item … de doli excep(tione) l. apud Celsum, § aduersus et § Marcellus (D.44.4.4.13 and 16). Item probatur ex hac lege: quia hic dicitur, quod valent de aequitate, sed quae equitas esset, quod valeat inter scientes? Certe nulla. Sol(utio) dicunt quidam, quod acta valent contra scientes, sed non pro eis, C. de procu(ratoribus) l. non eo minus (Cod.2.12(13).14), et C. de incest(is) nupt(iis) l. qui contra (Cod.5.5.4) quod verum est, si scientes poterant bene, et sine suo periculo remanere, alias si iuste timebant, tunc excusantur …'

141 *Ibid.*, *fol.* 14*vb*, n. 16–18: 'Et ex isto intellectu potest responderi ad plures quaestiones de facto. Ecce, aliquis iudex excommunicatus processit partibus ignorantibus, nunquid valeat processus? Respondeo per rationem praedictam, aut vnam sententiam tantum tulit inter duos, aut plures sententias tulit inter plures, et plura decreuit, tunc de aequitate valebunt … Eodem modo respondetur ad aliam quaestionem. Ecce, aliquis fuit electus, et in veritate non fuit praelatus, iudicauit, et cognouit: numquid valebit? Dicendum est, aut iste qui gerebat se pro Praelato, erat Episcopus, qui cognouit multa inter multos, et tunc valebunt eius processus de aequitate: aut erat alius Praelatus, qui praeerat duobus, vel tribus, tunc non valebit sententia vel processus eius, per ratione, praedictam. Sed dices tu modo, at vbi gerebat se pro Praelato, erat Episcopus multorum, et multa decreuit, non valent. Eo postea remoto, quia damnato authore, etc. argu(mentum) C. de haereti(cis) l. damnato (Cod.1.5.6). Respondeo, damnato authore reprobantur acta sua: verum est de rigore, sed de aequitate valent, per hanc legem. Item determinatur et alia quaestio: Ecce quidam delegatus post reuocationem mandati processit, nunquid valet? Respondeo breuiter, aut procedit partibus scientibus, et non valet, vt C. de iuris(dictione) om(nium) iudi(cum) l. priuatorum (Cod.3.13.3): aut partibus ignorantibus, tunc refert: aut multa decreuit, ita quod si retractarentur, laederetur totum: et tunc valet; aut inter paucos cognouit, vel statuit vnum: et tunc non valet.' I am translating 'refert' as 'take note', yet the point is open to interpretation.

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> Moving from this rationale, it is possible to answer several questions of fact. Imagine that an excommunicated judge heard a case in which the parties were not aware of his condition. Are the legal proceedings valid? Let me answer applying the same reasoning: either the judge rendered a single judgment to just two parties, or he decided many cases involving many parties. In the second case, his judgments are valid out of fairness … The same solution applies to a different question. Suppose that one is elected [to an ecclesiastical office], but in truth he was not a prelate. He judged and decided on many things: are his deeds valid? The answer should be that, if the ecclesiastical office held by this person was that of a bishop, who settled many things among many people, then his judgments would be valid out of fairness. But if the office was such that gave him authority only on two or three people, then his decision or judgment would not be valid for the same reason. You might however say that, even if he behaved as a prelate, was the bishop of many people and decided upon many things, the deeds are invalid when he is removed from that position: condemned the author, the deeds are rejected (as in Cod.1.5.6). To this I reply that it is true according to the strictness of the law, but out of fairness his deeds are valid, according to this *lex* [*Barbarius*]. This way we can solve also another case: imagine that someone that was delegated were to carry out his mandate after its revocation: are the deeds valid? Let me answer shortly: if the parties knew [of the revocation], then the deeds are not valid (as in Cod.3.13.3). If they did not know, then take note: if he heard many cases, revoking all the judgments would harm all the people involved, and so the deeds are valid. But if he heard few cases, or issued a single decree, then the deeds are not valid.

To some extent, Cynus' reliance on Bellapertica in approaching the *lex Barbarius* would vindicate the strength of *clichés*. The importance of Cynus to our subject, however, does not lie just in his faithful – often verbatim – report of Bellapertica, which contributed greatly to the latter's renown among many *Citramontani*. It also lies in how Cynus reported the position of other jurists – as we shall see, not just that of Ravanis.

4.6 Guido da Suzzara

Before moving on to a last important *ultramontanus* in our story, Guilelmus de Cugno, it may be useful to take a step back and look at another Italian jurist writing a few decades before Cynus: Guido da Suzzara (c.1220–1293).[142] Suzzara's commentary on the *lex Barbarius* is probably the earliest known frontal attack on the Gloss on Barbarius' case by an Italian jurist. Alone, this would

142 Suzzara is recorded as *legista* in 1247, and as *doctor legum* three years later, in 1250 (Mazzanti [2003], p. 421). This led scholars to date his birth approximatively to the early 1220s. The remarkable success of Suzzara as a jurist as well as a law professor led him to several academic appointments, especially Modena, Bologna and Naples. See further Mazzanti (2003), pp. 421–426, and Benatti (2013), pp. 1093–1094, where ample literature is listed.

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make it worth looking at. But our reason for doing so also depends on the crucial influence that Suzzara had on Cugno's position.

While Suzzara shows little hesitation in attacking the Gloss openly, he prefers to follow the order in which the Gloss discussed the main issues of the *lex Barbarius*. This way, very unlike the *Ultramontani*, he focuses on the praetorship first, and only then on the issue of Barbarius' freedom. As he excluded the validity of both, it would have probably been easier to deny the freedom first so as to reject the praetorship next, as a logical consequence – just as the Orléanese were doing at the time. But the strength of the traditional approach must be taken into account: Suzzara's students might have expected him to follow the order of the text.

It is one thing however to respect the order of the text, but another not to take liberties in its interpretation. And here Suzzara's approach seems remarkably closer to that of his Orléanese colleagues. Instead of interpreting Pomponius' remark in the light of Ulpian's elaboration, Suzzara plays one against the other. He reads Pomponius' observation (that Barbarius discharged the duties of the praetor) as ascribing full validity to Barbarius' praetorship. This way Ulpian's reasoning becomes an open critique of Pomponius' assertion. It was because Ulpian 'was not happy with his [i. e. Pomponius'] answer' (*sua responcione contentus non fuit*), says Suzzara, that he suggested the validity of Barbarius' deeds *ex humanitate*. Read this way, Ulpian would implicitly deny both the freedom and the praetorship of Barbarius.[143]

This critical approach to Ulpian's text was not new: Odofredus had already observed that the Roman people could not have set Barbarius free because they were not aware that he was a slave.[144] Suzzara however goes beyond Odofredus. Looking at the specific situation of Barbarius' election, he agrees that Ulpian's conclusion (all the more in the interpretation of the Gloss) was speculative as it lacked any evidence. But moving to a more abstract and general level, he could affirm that the solution should be the very opposite one. As a matter of principle, mistake is the opposite of consent. It follows that the people's mistake on Barbarius' status is in itself sufficient ground to dismiss any attempt at validating his position.[145]

143 Suzzara, *ad* Dig.1.14.3, *infra*, Appendix, ll.5–10: 'Vnde licet pomponius dixerit eum fuisse praetorem iuxta consilium ulpiani sua responcione contentus non fuit, vnde quesiuit audita responsione pomp(onii) vnde innuit eum non fuisse pretorem et ita nec liberum, cum ea que coram eo acta sunt valeant humanitatis racione tantum ut sequitur, vnde innuit eum non fuisse pretorem et ita nec liberum.'

144 *Supra*, §3.1, text and note 15.

145 Suzzara, *ad* Dig.1.14.3, *infra*, Appendix, ll.19–24: 'Item licet populus romanus sciuisset eum seruum fecisset eum liberum uel potuisset seruo decernere hanc

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Having denied Barbarius' freedom (and so also his status as praetor), Suzzara however shows little interest in explaining why his acts should be valid. He simply observes in passing that all jurists agreed on the point.[146] Suzzara might have taken the point for granted – very unlike the modern jurist, no medieval felt the need for complex discussions in support of the common opinion. It is however also possible that Suzzara's approach was more complex and his reasoning was shortened in the extant sources.[147] Both possibilities would make sense in a context where no jurist doubted the validity of Barbarius' deeds. In any case, the rationale of Suzzara's position will soon become clear in his discussion of the scope of the *lex Barbarius*.

In accepting the validity of Barbarius' deeds while at the same time denying the validity of Barbarius' praetorship (and of his freedom), Suzzara might be following the same approach as the gloss attributed to Azo: approving of Barbarius' putative freedom so as to uphold his deeds while rejecting the putative will of the people to confirm Barbarius in his praetorship.[148] Also for Suzzara the legitimacy of the source is not essential to the production of valid legal effects. To strengthen this point, Suzzara looks at some other texts allowing for the production of valid legal effects without at the same time acknowledging the validity of their source. He gives only two examples, but very significant ones, both on the deeds of a slave commonly believed free. We have already seen them: one is on the manumission of a slave by someone later on pronounced slave himself (Dig.40.9.19), and the other on the slave acting as a witness to a testament (Cod.6.23.1 and Inst.2.10.7). In both cases the common opinion about the slave's freedom is sufficient as to the validity of the deeds, but it does not change the slave's own position. The first case, argues Suzzara, shows that putative freedom is sufficient ground to bestow freedom upon others – but not

potestatem, hoc est uerum si sciuisset. Sed hic errabat populus quia credebat eum liberum et in ueritate erat seruus. Vnde non uidetur populus ei dedisse libertatem cum nichil tam contrarium sit consensui quam error ut i(nfra) iur(isdictione) o(mnium) iu(dicium) <l.> si per errorem (Dig.2.1.15). Vnde breuiter dicatis eum non fuisse pretorem nec liberum ut iam dictum est.'

146 *Ibid.*, ll.24–26: 'Facta tamen ab eo valent nec obstant l(eges) all(egatae) in gl(osa) immo per hoc faciunt omnes ut dixi.' Cf. Ravanis, *ad* Dig.1.14.3 (Leiden Abl.2, *fol.* 18*ra*): 'Et secunda questio etc. est ista: nunquid detecta seruitute quod seruus faciat edicta sua desinunt valere. Ad istam respondet secundum omnes quod edicta sua et sententie sue tenent ne qui litigauerunt coram eo ledentur.'

147 When observing that all jurists are in agreement as to the validity of Barbarius' deeds, Suzzara seems to refer to what he previously said on the point ('immo per hoc faciunt omnes ut dixi'). However, the only previous passage in his *lectura* where he raised the issue was extremely brief ('Et hoc dico, in l(ege) quod ea que fecit debeant valere, non autem erit ipse pretor uel liber'). *Infra*, Appendix.

148 *Supra*, §2.4, text and note 91.

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to acquire it.[149] The other case, he continues, allows for the validity of the testament, but not also for the freedom of the slave who acted as witness.[150] It is probably not fortuitous that Suzzara's harsh critique of the presumed will of the people comes just after these remarks: since the validity of the deeds may be preserved independently of the validity of their source, there is no reason to impose on the Roman people a will they did not possess.

The reason for the validity of Barbarius' deeds, which Suzzara affirms but does not explain, is better understood in the second part of his comment, by far the most important: the boundaries within which the *lex Barbarius* may be applied. Suzzara provides two examples, one on the appointment of someone who could not be validly elected, and the other on the deeds made by someone falsely believed to have been appointed. The first case looks at someone ineligible because banished; the second case focuses on the false notary. It should be noted that the approach of Suzzara is more rhetorical than didactic: the first example is meant to build momentum, and so it finds an explanation only in the discussion of the second one. We have therefore to look at them together.

Let us suppose, says Suzzara, that a banished (*bannitus*) is elected to some magistracy in a city whose statutes prohibit the election of *banniti*.[151] Are his decisions valid? In principle, since his election is void, he could not discharge the office. But applying the *lex Barbarius*, argues Suzzara, it is very possible to

149 Here Suzzara might have been playing with the ambiguity of the term 'pronuntiari' in that text: *supra*, §2.3, text and notes 50–52.

150 Suzzara, *ad* Dig.1.14.3, *infra*, Appendix, ll.11–18: 'Et hoc dico, in l(ege) quod ea que fecit debeant valere, non autem erit ipse pretor uel liber, quia dicit lex quod competit libertas data ab eo qui postea seruus pronunciatus est ut i(nfra) qui et a quibus ma(numissi) li(beri) no(n) fi(unt) l. competit (Dig.40.9.19). Non autem erit ipse liber. Item non obstat quod seruus qui tempore test(ament)i creditur liber seruus est si testis adhibeatur in test(ament)o testim videtur quia ist<a>e l(eges) per hoc faciunt. Nam ex hoc ipso libertatem non consequitur ut iam dixi et ill<a>e l(eges) allegate sunt in glosa hic et C. de testa(mentis) (Cod.6.23.1) et insti. l. de test(amenti) § si cum aliquis (Inst.2.10.7).'

151 Suzzara does not clarify whether the banishment was a general one (and so the subject in his example was a *bannitus imperii*) or just from a specific city. Both solutions are possible. Someone banished from a single city would lose his citizenship (and typically his estate within that city) but retain his legal capacity, whereas the *bannitus imperii* would lose any right pertaining to the civil law (and so also his legal capacity). Suzzara mentions the case of Cod.10.33.1.2 (a slave posing as *aedilis*) when referring to the possibility that the prohibition of electing a *bannitus* was not in the municipal statutes but in the law itself (Appendix, ll.27–28). This might point to a general banishment – entailing *capitis deminutio maxima* – and so equiparating the *bannitus* to a slave. The only clear element is that this *bannitus* was not a citizen of the city where he was elected, otherwise the mistake would not be justifiable (let alone plausible).

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conclude for the validity of his deeds.[152] Just like in the case of Barbarius, however, Suzzara is clear in rejecting the validity of the banished's appointment. This has very practical consequences: because the election is void, he says, the banished is not entitled to the salary due to the office he discharged. The alternative, argues Suzzara in a statement that would be often cited by later jurists, would mean rewarding someone for breaking the law.[153]

While of remarkable actuality in the coeval city-state scenario of northern Italy, this example does not clarify the scope of the *lex Barbarius*. In particular, it does not answer a fundamental question: does common mistake alone suffice for the production of valid legal effects? To answer this question, Suzzara gives a second and final example, that of the false notary. A notary lacking title cannot make any valid instrument, he says, despite being widely believed to be a true one.[154] It is only at this point that Suzzara explains the scope of the *lex Barbarius*.

152 Suzzara, *ad* Dig.1.14.3, *infra*, Appendix, ll.27–35: 'Quid si statutum est in ciuitate ut bannitus non eligatur ad dignitatem, vel l(ex) hoc iubet ut iam dixi de seruo et de liberto (cf. Cod.10.33.1.2), iste eligitur ad aliquam dignitatem populo ignorante. Cum esset bannitus nunquid ualet sententia ab eo lata? Videtur quod non, quia est lata a non competenti iudice, vnde non valet ut C. si a non compe(tenti) in l. fi. (Cod.7.48.4). Item quia nominaciones in quibus solempnitates deficiunt sicut hic in questione proposita quia ineligibilis erat et tamen electus fuit non valent ut C. de appell(ationibus) l. nominaciones (Cod.7.62.27). Econtra videtur quod sententia ab isto lata valeat ut in ista l(ege) in glo(sa) all(egata), et hoc ultimum verum est ut hic probatur. G(uido).'

153 *Ibid.*, ll.36–41: 'Sed nunquid salarium habebit iste bannitus qui fuit electus? Et videtur quod sic ar(gumentum) i(nfra) ad munic(ipalem) l. ticio (Dig.50.1.36pr). Econtra uidetur quod non quia sciebat se ineligibilem. Vnde delinquit dignitatem suscipiendo ex quo delicto premium consequi non debet ut i(nfra) de neg(otiis) g(estis) l. siue hereditaria (Dig.3.5.21(22)), et i(nfra) de int(erdictis) et re(legatis) l. relegatorum § ad tempus (Dig.48.22.7.4) et istud ultimum verum est. Guido.' The paradox of receiving a reward for having committed a delict is the main thing for which Albericus de Rosate would recall Suzzara in his *lectura* on the *lex Barbarius*. Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*rb*, n. 24): 'Item quaerit an istae (*sic*) Barbarius eo detecto seruo debeat habere salarium, quod dabatur alijs praetoribus. Uidetur quod sic, i(nfra) ad munici(palem) l. Titio (Dig.50.1.36), et idem uidetur posse dici in omnibus officialibus non legitime administrantibus. Gui(dus) de Suz(aria) tenet contrarium, quia [Barbarius] sciebat se seruum, et intelligibilem: et ideo ex eius dolo non debet praemium reportare, sed poenam, ut l. siue haereditaria de neg(otis) ge(stis) (Dig.3.5.21(22)) et de int(erdictis) et re(legatis) l. relegatorum § fin. (Dig.48.22.7.22).' The same image will also be used in Baldus, but this time precisely for the opposite reason: the reward might be due for having furthered public utility: *infra*, pt. III, §12.4.3, note 186.

154 Suzzara, *ad* Dig.1.14.3, Appendix, ll.42–46: 'Quid de tabellione qui se gerit ut tabellio et non est sed creditur, nunquid valent instrumenta ab eo facta? Videtur quod sic ar(gumentum) huius l(egis) et facit ad hoc i(nfra) de iur(e) fisci l. sed si

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The difference between false notary and false praetor, he reasons, lies in that only the latter was elected. Barbarius' election was invalid; nonetheless, the invalidity did not depend on the lack of passive legitimation of the electors or on the absence of a regular election, but only on the status of the elected. In other words, as Suzzara puts it, 'this Barbarius Philippus was made praetor by those who could make him such, that is, by the people.'[155] The same, he continues, also applies for the already-mentioned case of the slave-witness: his intervention as witness was requested 'by the person who had the power to make a valid will'.[156] The reference to the slave acting as witness does not only strengthen the example of the banished (and so, ultimately, the interpretation of Barbarius' case), but also better explains its meaning. The power of the people to make Barbarius praetor, says Suzzara, is what allows a distinction between an appointment of the ineligible (as the banished) and a lack of appointment of the impostor (as the false notary). But, so far, this power had been understood as sovereign power: whether presumptively exercised (as in the Gloss) or not (as in Ravanis), the special position of the sovereign made its will qualitatively different from that of any other elector – hence the 'power of the appointer' (*potentia committentis*) of Ravanis. Because sovereign, the 'appointer' of Barbarius had a different kind of 'power' from that of anyone else.[157] Hence the point made by Ravanis: if the mistaken appointment was made not by the king but by the bishop, then nothing done by the person so appointed could be held valid.[158]

Putting on the same level the appointment (of the praetor) made by the sovereign people and the appointment (of the witness) made by the testator, Suzzara qualifies the 'power of the appointer' in a very different way. The testator neither intended nor had the power to set the slave-witness free.[159] He only had the power to make a valid will – his own. By linking the appointment of the slave-praetor and that of the slave-witness Suzzara shifts the emphasis from the

accepto (Dig.49.14.32) et C. de testa(amentis) l. i (Cod.6.23.1) et instit. de test(amentis) § sed si aliquis (Inst.2.10.7). Vos dicatis quod instrumenta ab eo facta non valent ut i(nfra) de rebus eorum l. qui (Dig.27.9.8pr).'

155 *Ibid.*, ll.46–47: 'iste barbarius philippus fuit a tali creatus in pretorem qui eum creare poterat, s(cilicet) a populo.'

156 *Ibid.*, ll.48–49: 'Item et in illis duabus l(egibus) C(odicis) et instit(utionum) (Cod.6.23.1 and Inst.2.10.7) fuit seruus qui credebatur tempore test(ament)i lib(erum) esse adhibitus a tali qui testare poterat'.

157 *Supra*, this chapter, §4.2.

158 *Ibid.*, text and note 53.

159 Nowhere in the sources – or in any comment of the jurists – may be found the suggestion that the slave acting as witness while thought to be free belonged to the testator. Perhaps the reason why no jurists argued as much was that such an interpretation would have weakened the testator's case, not added strength to it. See *supra*, §2.3.

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quality of the person who made the appointment to the procedure followed in the appointment. In both the case of Barbarius and in that of the banished, the procedure followed in their election was perfectly valid. The only ground for invalidity lay in the personal quality of the elected and of the witness – which was precisely the object of the common mistake.

Much unlike the slave-praetor and the slave-witness, however, the problem with the notary did not lie in some hidden personal incapacity preventing his valid appointment, but in the absence of any appointment. Unlike the other cases, the notary was an impostor.[160] In opposing the case of the banished magistrate to that of the false notary, therefore, Suzzara distinguishes between invalidity and inexistence. The election of the banished ought to be classified among those 'appointments where formal requirements are lacking'[161] (*nominaciones in quibus solempnitates deficiunt*), just like the appointment of the slave-praetor and that of the slave-witness. But in all such cases the appointment took place, and was made by the rightful appointer. The appointment of the notary, by contrast, is not just vitiated by some procedural defect: it never took place. If the people had no power to elect Barbarius, therefore, his election could not be invoked as the distinguishing feature between his case and that of the false notary. Lacking the power to elect, in other words, the election would have been as good as if it had never happened, and so the same solution for the *falsus tabellio* should also apply to the *falsus praetor*. Because the election did in fact take place and was made by the rightful elector, the *praetor* is not *falsus* in the same way as the *tabellio* is. Hence the common mistake may be invoked to strengthen the – so far, precarious – validity of the deeds made by him. But the common mistake alone may not bestow full validity. This was the solution of Odofredus: the common mistake as to the appointment is sufficient as to the validity of the deeds.[162] To reach this conclusion, it may be remembered, also Odofredus looked at the case of the false notary. The fact that Suzzara opts for the very same example, therefore, does not look fortuitous. Odofredus' approach to the false notary opened a Pandora's box, for it removed any limit to the scope of the common mistake. Using the same example to set precise boundaries to the common mistake meant opposing Odofredus' solution in very clear terms.

The importance of Suzzara's comment is unfortunately matched by its brevity. This necessarily leaves many important questions unanswered. Let us just mention two of them, beginning with the distinction between inexistence

160 *Ibid.*, ll.50–51: 'sed uero a nemine creatur tabellio et instrumenta conficit illa instrumenta non valent ut jam dixi. Guido.'

161 'Item quia nominaciones in quibus solempnitates deficiunt sicut hic in questione proposita quia ineligibilis erat', *supra*, this paragraph, note 152.

162 *Supra*, §3.1, text and note 30.

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and invalidity: where should the line between election in violation of procedure and absence of election be drawn? Is the right to elect mentioned as just one of the main requisites for the existence of the election, although vitiated, or does Suzzara consider the whole procedure that the rightful elector has to follow as subordinate to (and so less important than) the legitimation of the elector? A second problem is about the relationship between common mistake and public utility. Nowhere in his short comment on the *lex Barbarius* does Suzzara mention public utility: is that intentional? Should we conclude that, at least on this point, Suzzara agrees with Odofredus as to the limited importance of public utility? Or is he just taking the presence of public utility for granted?[163]

4.7 Guillaume de Cunh

An influential French jurist often grouped together with the main Orléanese ones was Guilelmus de Cugno (Guillaume de Cuhn, d.1336). Despite his importance as jurist and law professor, more is known of Cugno's political and ecclesiastical career than of his scholarly one.[164] It is known, however, that he taught in Toulouse in the middle of the 1310s. Indeed his *lectura* on the Vetus dates to the academic year 1315/1316.[165] There, a remarkably interesting and elaborated *lectura* on the *lex Barbarius* may be found. For our purposes, its chief interest lies in that that it would seem to betray Suzzara's profound influence, developing his conclusions and solving most of the unanswered questions listed above. In probably building on Suzzara, Cugno would also seem to provide an

163 The scope of the two above-mentioned issues would become even broader if we were to combine them together. Among the possible combinations of these two issues, one of the most obvious is the case in which the hidden defect was not in the elected but in the elector. In such a case, would Suzzara still qualify the election as having taken place but being invalid, or would he just deem it as non-existent? In the first case, would the public utility considerations, coupled with the common mistake as to the status of the elector, be sufficient to bestow validity on the deeds of the person so elected?

164 On the life and work of Cugno see Brandi (1892) (a work that is dated but still very useful, although it seems now established that Cugno had little to do with Bologna: Meijers, *infra*, note 166); Meijers (1959*b*), pp. 185–189; Fournier (1921), pp. 361–385, esp. 372–385; Krynen (2015), pp. 295–296; Gilles (1971), pp. 217–218, including further literature at p. 217, note 310.

165 Brandi (1892), p. 64. The *lectura* on the Vetus, the *reportator* notes the date of 3 February 1316: Meijers (1959*b*), p. 187, note 161. Cugno's *lectura super Digesto veteri* is known in six manuscripts. As the purpose of the next few pages is not to provide a critical edition of Cugno's *lectura* on the *lex Barbarius* but only to appreciate its meaning, all quotations will follow only one of these manuscripts, that preserved in Vienna, ÖNB 2257, *fol.* 74*rb–vb*. The exemplar preserved in Forlì 143, *fol.* 14*v*, does not show significant differences.

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implicit reply to the Orléanese jurists, and especially the solution proposed by Ravanis.[166]

In his *lectura*, Cugno does not mention any other jurist. Nonetheless, it would be surprising if he was not aware at least of the most influential authors who wrote on the subject. Besides, some textual elements in his *lectura* might suggest a good knowledge of authors such as Odofredus[167] and Bellapertica.[168]

As with Suzzara – and unlike the *Ultramontani* that we have seen so far – Cugno concedes that Barbarius' text posed three questions.[169] But his approach to the text is more liberal than Suzzara's (which was hardly a literal exegesis) and it would seem closer to that of the Orléanese jurists, first of all in the rearrangement of the order of the text: the issue of Barbarius' freedom now comes before

166 Meijers argued that Cugno knew no Bolognese jurist writing after the Gloss: Meijers (1959*a*), p. 122, note 443. At least on the *lex Barbarius*, this might not be entirely accurate.

167 Cugno's familiarity with Odofredus' comment on the *lex Barbarius* is chiefly suggested by the remarkable similarity of the two authors on the problem of the *lex Iulia de ambitu*: ÖNB 2257, *fol.* 74*rb–va*.

168 Cugno's knowledge of Bellapertica's *repetitio* on the *lex Barbarius* is suggested mainly by the remarkable closeness of the two jurists on the issue of Barbarius' domicile (the only point in Bellapertica not present in Ravanis: *supra*, this chapter, §4.4, text and note 93). It is worth looking in some detail at Cugno's treatment of the question of Barbarius' domicile to show his peculiar style and especially his independently-minded attitude towards the sources. In favour of Barbarius' domicile, Cugno observes, there are two main points. First, the requirement of the domicile, found mainly in Cod.1.39.2 (Valent. et Marcian. AA. Tatiano PU), was introduced by the emperor, whereas Barbarius' case took place during the Republic ('pot(est) dici quod istud habebat idem ante quam imperium translat(um) esset in imperatore'). If however Barbarius' case were to be considered as an appointment made under the empire, that might strengthen the same favourable conclusion, since the emperor (i. e. Antoninus) had granted Roman citizenship to those dwelling in the province of Rome ('uel dic quod iste barbarius transtulit se rome et uenit domicilium ergo non roma fuit seruus quod hodie clamasti quia qui in ciuitate romana moratur sit liber, ar(gumentum) s(upra) de sta(tu) ho(minum) l. in urbe (Dig.1.5.17)'). Cugno however dismisses both objections with the obvious fact that, properly speaking, a slave cannot have a domicile. Further, if Roman domicile entailed Roman citizenship, then acknowledging the validity of Barbarius' domicile would amount to manumitting Barbarius without providing any compensation to his master ('seruus iste non habet domicilium iuste cum nichil habet cum sit seruus et ideo quia fuga non debet esse dampnosa domino non potest ibi dici habere domicilium ut i(nfra) de pu(blicanis) l. fi. § ii (Dig.39.4.16.2?), C. de ser(vis) fu(gitivis) l. fi. (Cod.6.1.8).' All above quotations are in ÖNB 2257, *fol.* 74*vb*.

169 *Ibid.*, *fol.* 74*va*: 'utiliter uides in l(ege) ista quod iste barbarius petijt preturam et creatus est. Et ex hoc tres questiones insurgunt. Prima an ex hoc ademptus fuit libertatem (*sic*), secundo an fuit pretor, tertio an acta per eum ual<e>ant.'

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that of the validity of his praetorship. As with the Orléanese, the purpose of rejecting Barbarius' freedom was to bar the praetorship. Accordingly, Cugno opens his critique against the Gloss denying Barbarius' freedom in the strongest terms:[170]

> Was this Barbarius free? The Gloss says he was, so as to make him praetor and avoid that the people be deceived … But clearly there is no possible way to argue that he was free.

The reasons invoked by Cugno against Barbarius' freedom combine legal principles with textual analysis. Manumitting Barbarius, he says, is tantamount to donating his freedom. But, if that is a donation, then it is necessary to have the intention to donate (i. e. the *animus donandi*). Since it is clear that the Romans were not aware of Barbarius' servile condition, they could not have possibly had that intention.[171] When an appointment requiring the freedom of the person appointed is made in the false belief that latter is free, concludes Cugno, far from entailing the concession of freedom the appointment remains void.[172] The conclusion is somewhat abstract: to strengthen it, Cugno moves to a careful examination of the text, isolating and restructuring its components to reach the opposite result from the original text. In so doing, Cugno's flexible approach towards the text seems to go considerably beyond that of any jurist we have seen so far, Ravanis included.

The first part of Ulpian's argument plays a central role in Cugno's rearrangement of the text. It may be recalled how, in the text of the *lex Barbarius*, Ulpian first reported Pomponius' cryptic statement – Barbarius' servitude was not an obstacle to his exercise of the praetorship. Thereafter Ulpian observed that it was equitable to hold Barbarius' deeds as valid so as not to harm the commonwealth, all the more given that the same people who elected Barbarius without knowing of his servile condition would have likely set him free if they had known of it. Ulpian introduced his main argument with a question: 'if a slave, so long as he

170 *Ibid.*, *fol.* 74*va*: 'An ergo iste barbarius fuit liber? Glo(sa) dic<it> quod sic ut pretor esse possit et gentes no<n> decipiantur, C. de his qui ue(niam) eta(tis) l. i § in f(ine) (Cod.2.44(45).1). Sed certe hoc nullo modo potest substinere quod fuit liber.'

171 *Ibid.*: 'quod probo non potest dari libertas nisi sit animus donandi, C. de donat(ionibus) <l.> ignorans (Cod.8.53(52).10), de transact(ionibus) <l.> cum acquiliana (Dig.2.15.5).'

172 *Ibid.*: 'quando ergo hic potuit adipisci libertatem cum populus credebat liberum, ad quod facit quod dicitur in milite qui legat seruo qui dicit liberum nam non ideo sit liber, quod fieret si sciret seruum, de tes(tamento) mi(litis) <l.>idem § si seruum (Dig.29.1.30.3).' Cf. Dig.29.1.13 (Ulp. 45 ed.): 'Si servum proprium, quem liberum esse credidisset, miles heredem sine libertate instituit, in ea condicione est, ut institutio non valeat.'

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hid his condition, discharged the office of praetor, what are we to say?'[173] Cugno recalls the point,[174] and puts it to good use. First, he deliberately interprets the question in isolation from its context. Then he looks at the context, and reads a later statement of Ulpian in the light of his interpretation of the previous one. Ulpian's quotation above contained a temporal adverb, 'so long as' (*quamdiu*): the slave exercised the praetorship 'so long as he hid his condition'. Read within the context, the statement serves just to introduce the hidden personal incapacity of Barbarius. Isolated from the rest of the text, however, the same adverb would suggest a temporal correlation between the general ignorance about Barbarius' servile status and his exercise of the praetorship: Barbarius continued to hide his true condition for the whole time that he discharged the office of praetor. Having duly stressed the point, Cugno then looks at the context, quoting the later statement of Ulpian: the people would gladly have set Barbarius free, had they known that he was a slave.[175] At this point, Cugno combines Ulpian's two statements and suggests a meaning that went in the very opposite direction to that of the *lex* itself. Ulpian's second statement said that the people did not realise the servile condition of Barbarius while he sat as praetor;[176] the first one explained that Barbarius could exercise the praetorship for the whole time that his servitude remained unknown. In inverting their order, Cugno is also inverting Ulpian's reasoning: Barbarius remained a slave for the whole time that he exercised the praetorship. Furthermore, for Cugno the adverb 'quamdiu' would also suggest a temporal limit to the concealment of Barbarius' true condition. If Barbarius 'discharged the office of praetor' only 'so long as' his servile status remained hidden, argues Cugno, then he must have been brought back to servitude. But the text does not say that, when this happened, his freedom was revoked. It follows, he concludes, that Barbarius never received it.[177] Lastly, observes Cugno, putting the final nail in the coffin, if

173 Cf. Dig.1.14.3: 'Et tamen videamus: si servus quamdiu latuit, dignitate praetoria functus sit, quid dicemus?'

174 Cugno, *ad* Dig.1.14.3 (ÖNB 2257, *fol.* 74*va*): 'Item per hoc facit hic text(us), quia hic dic(it) "ta(men) uideamus quamdiu seruitute latuit functus pretura" ut hic in § uideamus.'

175 Cf. Dig.1.14.3: '… cum etiam potuit populus Romanus servo decernere hanc potestatem, sed et si scisset servum esse, liberum effecisset. …'

176 Cugno, *ad* Dig.1.14.3 (ÖNB 2257, *fol.* 74*va*): 'Item hoc dicit textus i(nfra) cum dicit "si populus sciuisset dedisset libertatem", cum ergo ignorauerit non dedit ei.'

177 *Ibid.*: 'Item non potest dici quod fuit liber, quia non reuocaretur libertas iste cum [MS: et] reuocatus in seruitute ut p(atet).' It might be interesting to compare Cugno's reasoning with that of Ravanis, *supra*, §4.2, text and esp. note 51; cf. also note 33.

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Barbarius did become free, there would be little point in discussing the validity of his deeds.[178]

Not being free, continues Cugno, Barbarius could not be praetor either.[179] This statement explains the decision to invert the order of the text and to start with the issue of freedom. To strengthen his conclusion, Cugno now looks at the beginning of the *lex Barbarius*, so as to exploit the ambiguity in Pomponius' remark 'it is true that [Barbarius] exercised the praetorship' (*verum est praetura eum functum*). The Gloss, explains Cugno, uses these words to argue for the validity of Barbarius' praetorship. But Pomponius simply stated that Barbarius truly discharged that office, not that he was truly praetor. In so doing, Cugno remarks, the text merely points to the validity of his deeds, not of his office.[180] Besides, Ulpian referred to the validity of the deeds in terms of fairness, not of strict law. That, argues Cugno following Ravanis, would imply the invalidity of Barbarius' praetorship: if he was praetor *de iure*, then his deeds could not be valid just *de aequitate*.[181]

Considering both the length and the complexity of the arguments used to disprove Barbarius' freedom and praetorship, it might come as a surprise that Cugno devotes little space to explaining the true reason for the validity of his deeds. A possible reason for that lies in the strong influence of Suzzara. As in Suzzara, the reason for the validity of Barbarius' deeds in Cugno's *lectura* is better

178 Cugno, *ad* Dig.1.14.3 (ÖNB 2257, *fol.* 74*va*): 'Item si liber esset quis dubitaret an acta per eum ualent non erat seruus [MS: seruum].'

179 *Ibid.*: 'Item non est dubium quod iste non fuit liber, ut probaui s(upra). Ergo non potuit esse pretor, i(nfra) de iudic(iis) cum pretor (Dig.5.1.12).' The power of the prince and the people to appoint a slave as praetor is easily dismissed on the basis of their ignorance as to Barbarius' slavery: 'Et si dicas non uerum est nisi factum esset a principe uel populo, dico quod uerum esset si princeps uel populus hoc scirent eum esse seruum, cum enim ignoret non uidetur facere liberum, cum enim princeps sciens bene uidetur libertate aliter non, i(nfra) de re iudi(cata) l. quidam consulebat (Dig.42.1.57), i(nfra) de excu(sationibus) tu(torum) (Dig.27.1), item ulp(ianus), de nata(libus) re(stituendis) l. i (Dig.40.11.1): non ergo fuit pretor' (*ibid.*).

180 *Ibid.*: 'Sed uideamus an fuit pretor et an habuit dignitatem pretoriam. Glo(sa) <dicit> quod sic, ad quod facit quod hic dicit verum est "tamen preturam functam" ut in § sed nihil [cf. Dig.1.14.3: '… Sed nihil ei servitutem obstetisse ait Pomponius, quasi praetor non fuerit: atquin verum est praetura eum functum …']. Sed tamen dico contrarium quod non fuit pretor, et intelligo quod dicit textus pretor fuit, uerum est de facto quo adhuc ut acta per eum ualeant.'

181 *Ibid.*: 'Tamen non fuit pretor quod probo: si fuisset pretor frustra quere(tur) an illa quae decreuit ualeant. Item dicit textus summarius est quod ualeant acta per eum: non ergo de rigore ualent, tamen si fuisset uerus pretor acta per eum de iure ualent ut s(upra) de ius(titia) et iur(e) l. p(enultima) (Dig.1.1.11).' Cf. Ravanis, *supra*, §4.2, text and note 33.

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explained in the discussion of the boundaries within which this case may be applied.

The validity of Barbarius' deeds, says Cugno, does not depend on his position: much unlike Accursius, there is no need to bestow legitimacy on the source so as to rescue the acts. The deeds are valid 'out of fairness because of the common mistake' (*ex <a>equitate propter communem errorem*).[182] Their validity, in other words, is based on public utility, which allows for the production of valid legal effects in the presence of common mistake. It is the condition of the mistake of being common (a fact) that allows public utility (a normative consideration) to be invoked. This means that public utility cannot be invoked in isolation from common mistake.[183] It follows that the mistake of a single individual may not lead to the validity of the acts carried out on the basis of that mistake (it could not 'make law').

While common utility presupposes common mistake, the opposite is not true: there can be instances where the common mistake has little to do with public utility. The typical case is the slave-arbiter of Cod.7.45.2. In that text, as we know, the slave was commonly believed to be free (so the mistake was common), but his decision affected only two people (hence there was no public utility). The difference with Barbarius' case does not lie in the different status of the judge (delegate vs. ordinary). On the point Cugno is very clear: in principle, the *lex Barbarius* applies to both.[184] Rather, the difference lies in the number of subjects affected by the common mistake. Discharging the office of praetor (by definition an ordinary judge), says Cugno, Barbarius might have rendered a thousand judgments: holding such judgments valid would obviously further public utility. But if Barbarius had rendered only a single decision as delegate judge, making that decision valid would only go to the benefit of a single person. That decision would therefore remain void.[185]

182 Cugno, *ad* Dig.1.14.3 (ÖNB 2257, *fol.* 74*va*): 'ut acta per eum et de(creta) sic ex equitate propter communem errorem.'

183 *Ibid.*: 'Sed dic(it) et ita bene acta per eum ualent sic in casu nostro et non fuit sola ratio utilitas publica, sed error communis quia ita bene erat in casu nostro, nam fuit quia communiter credebatur liber et talis error fac(it) ius i(nfra) de sup(pellectili) le(gata) l. iii § fi. (Dig.33.10.3.5) et per hoc fac(it) C. de tes(tamentis) l. i (Cod.6.23.1) i(nfra) ad maced(onianum) l. iii (Dig.14.6.3) et fac(it) s(upra) (*sic*) de sen(tentiis) et interlo(cutionibus) o(mnium) iudi(cium) l. si arbit(er) C. ii (Cod.7.45.2).'

184 *Ibid.*: 'Ergo communis sit hic di<c>tum quod acta per eum ualent, et ita intelligo l. istam non solum in ordinario sed in delegato.'

185 *Ibid.*: 'dico quod barbarius fuit iudex del(egatus) inter duos et congnouit, nunquid ualent acta per eum? Uidetur quod non, et hoc est ratio quia acta per eum ualent propter communem utilitatem quia forte tulit mille sententias. Econtra utilitas et error duorum priuatorum <non> potuit sic hoc facere. Sic

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Apart from highlighting the central role of public utility, the parallel between ordinary and delegate judge has another and perhaps even more important reason. Both in the case of the ordinary judge and in that of the delegate, the common mistake is based on the validity of the appointment – not on its occurrence. The question, in other words, is not whether the judge is appointed but whether his appointment would suffice as to the production of valid deeds.

The difference between mistaken appointment and mistaken validity of a (true) appointment is the key to understanding the scope of the *lex Barbarius* in Cugno – just as it was in Suzzara. To explain the difference, as we have seen, Suzzara gave two examples: the banished unlawfully elected to a magistracy, and the false notary. The approach of Cugno is very similar but not identical. On the one hand, it is less rhetorical: the rationale followed is already explained in the first example that he provides, and further clarified in the second one. On the other, moreover, it betrays the clear influence of the Orléanese jurists. In choosing his examples, Cugno retained the notary but replaced the banished with a different figure, which by then was the 'trademark' of the *Ultramontani* on the *lex Barbarius*: the excommunicate.

As a matter of principle, says Cugno, the legal position of a slave is the same as that of an excommunicate – neither has legal capacity. The sentence issued by a slave, he continues, should therefore be void just as that issued by an excommunicate.[186] Before looking more closely into the matter, however, we might want to focus a moment on the possible origin of this parallel between Barbarius and the excommunicate.

habes quod confessus duorum priuatorum non potuit facere iudicem qui non erat, sed uerus populus, et de iur(isdictione) o(mnium) iu(dicium) <l.> priuatorum (Cod.3.13.3) et l. fi. de emanci(pationibus) li(bertorum) l. i et l. fi. (*sic*) (Cod.8.49(48).6 and 1).'In this sense see also the comment of Panormitanus, who quoted Cugno so as to oppose him to Innocent IV. We will see later (*infra*, pt. IV, §14.3.1) that the only point in which Panormitanus disagreed with Innocent IV on the scope of the common mistake was the case of the delegate judge. Panormitanus, *ad* X.1.3.22, § *Quum dilecta* (Nicolaus [de Tudeschis], *Super Primum Decretali*[*um*] *Librum Commentaria*, Basileae, 1477): 'Inno(centius) ponit vnam singularem limitationem in hac materia, dicit enim quod materia legis barbarius non habet locum in delegato, ratio diuersitatis quia coram ordinario versatur vtilitas plurimorum cum multi ex necessitate habeant adire ordinarium et ideo communis error facit valere gesta sed in delegato non vertitur nisi vtilitas duorum seu partium. Guil(elmus) de cu(gno) secutus est hanc sententiam in delegato ad vnam causam secus in delegato ad vniuersitatem causarum.'

186 *Infra*, this paragraph, note 196.

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As said, this comparison was already present in canon law sources,[187] but it is more likely that the *Ultramontani* took it from the Gloss.[188] On the point, the Orléanese are remarkably unhelpful. As to Monciaco, we know that he was probably the first civil lawyer (at least in Orléans) to compare Barbarius to an excommunicate. But this is all we know: Ravanis did not provide further particulars as to the sources used by his old teacher. As to Bellapertica, everything he said on the subject was an adaptation (albeit to very different ends) of what Ravanis had already written. Looking at Ravanis for specific clues as to the origins of the parallel with the excommunicate, however, leaves us none the wiser. His *repetitio* mentions the excommunicate no less than eight times and in three different contexts. But the only source he mentions is a passage invoked just to score a point in sophistry.[189]

While there is little doubt that Cugno took the same example from the Orléanese, he is more helpful in understanding the possible origin of such a parallel.[190] One of the sources that he mentions in relation to the excommunicate,[191] Cod.1.18.1, opened the title 'on the ignorance of law and of fact' (*de iuris et facti ignorantia*). The text itself had little to do with the *lex Barbarius* – the emperor (Antoninus) allowed a soldier to raise an exception against a sentence because of the soldier's ignorance of proper pleading.[192] Commenting on this

187 As the second part of this work will amply show.

188 *Supra*, this chapter, §4.1.

189 Namely, if the *delinquens* is defined as 'enslaved [*servus*] to the punishment', and the excommunicate is a criminal, then the excommunicate is a slave – just as Barbarius. *Supra*, this chapter, note 34. More interesting is the reference to Cod.7.48.4, § *Et in priuatorum* (Parisiis 1566, vol. 4, col. 1674–1675), which Ravanis likely has in mind (though the reference in the manuscript is made to the whole Cod.7.48) when distinguishing private from public utility (*supra*, §4.2, text and esp. note 32).

190 *Infra*, this chapter, note 196.

191 Of the other sources mentioned by Cugno when drawing the parallel with the excommunicate, mention should be made of one in particular: Cod.9.51.13. Its relevance to our purposes, however, is mainly *a contrario*, for it dealt with a case where the invalidity of the deeds could not be cured invoking a common mistake. We have seen how the Gloss used the text of Cod.9.51.13 when discussing the validity of the instruments drafted by a notary subsequently deposed (*supra*, §2.6). The Gloss opposed that text to the *lex Barbarius*, remarking that the will made by someone who would subsequently lose his *sui iuris* status (the son whose father was later pardoned and restored to his former position) was void, whereas the deeds of Barbarius remained valid because of public utility and common mistake.

192 Cod.1.18.1 (Ant. A. Maximo mil.): 'Quamvis, cum causam tuam ageres, ignorantia iuris propter simplicitatem armatae militiae adlegationes competentes omiseris, tamen si nondum satisfecisti, permitto tibi, si coeperis ex sententia conveniri, defensionibus tuis uti.'

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second text, however, the Accursian Gloss listed some cases in which a party could bring forth a peremptory exception against the decision, and then excluded the possibility of raising other kinds of exceptions – unless of course the decision itself is void. And the decision is void, concluded the Gloss, when rendered by an incompetent or excommunicated judge.[193] It is possible that the reference to this gloss was suggested by the fact that one of the peremptory exceptions found there was the Macedonian senatus consultum: if the lender lost his suit because he forgot to raise the exception that allowed him to sue the son-in-power, commonly believed to be legally independent, he was still allowed to bring it forth.[194] The Gloss' short reference to the excommunicate perfectly suited Cugno's purposes: a decision rendered by an incompetent judge (such as a slave – the text of Dig.5.12.2 was clear on the matter)[195] is void, just as that of the excommunicate.

It is clear that this remains conjecture: there is no way to prove that this is the origin of Cugno's parallel between Barbarius and the excommunicate, let alone to suggest that the jurists of Orléans followed the same reasoning as Cugno. Still, between this hypothesis and one involving canon lawyers having a direct influence on a civil lawyer as early as Monciaco (and on a point both very specific and highly complex), however, the first one seems more plausible.

Having argued for the possible origin of this parallel, let us now focus on its use in Cugno. Do common mistake and public utility operate also in the decisions of the excommunicated judge? Let us suppose, says Cugno, that a baron appointed as judge someone who was widely believed not to be excommunicated, whereas in fact he was. Are the decisions rendered by this judge valid?[196]

193 Gloss *ad* Cod.1.18.1, § *Vti* (Parisiis 1566, vol. 4, cols. 158–159): '… Alius vbicunque dico iudicium nullum fuisse, quia iudex incompetens vel excommunicatus … alias autem praeter istos casus post sententiam opponi non potest.'

194 Dig.14.6.11 (Ulp. 29 ed.): 'tamen, si non opposita exceptione condemnati sunt, utentur senatus consulti exceptione: et ita Iulianus scribit in ipso filio familias exemplo mulieris intercedentis.' Incidentally, the association between the title *de iuris et facti ignorantia* and the exception to the Macedonian senatus consultum was also present in the Gloss on the same title of the Digest: *ad* Dig.22.6.3, § *Causa* (Parisiis 1566, vol. 1, col. 2097). Here, however, there was no connection with the excommunicated judge.

195 *Supra*, §2.1, note 2.

196 Cugno, *ad* Dig.1.14.3 (ÖNB 2257, *fol. 74va*): 'ponit ergo quidam baro creauit iudicem contra da(bat) seruum qui publice credebatur liber, sed [MS: uel] excommunicatus: nunquid debet habere [MS: habet] locum l(egem) ista? Uidetur quod non, cum nullus possit comp<ar>ari imperiali admi(stratione) C. ad l. a(nte) p(enultima) de nata(libus) resti(tuendis) queris, i(nfra) de nata(libus) re(stituendis) l. i § queris [*rectius*, Cod.6.8.2 and Dig.40.11.3 respec-

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The example is of particular interest especially if compared with that of Ravanis. Ravanis gave two different examples of mistaken appointments of an excommunicate as judge: the first time by the sovereign; the second by a bishop. Only in the first case would the decisions stand for Ravanis, since in the second scenario the 'power of the appointer' could not make up for the defect in the person appointed.[197] The approach of Cugno seems a deliberate critique of Ravanis' conclusion. If we were to take into account the power of the appointer, says Cugno, the occult excommunicate appointed by a baron would hardly be comparable with the occult slave appointed by the emperor. The baron could appoint a judge but not also lift the excommunication; on the contrary, the sovereign had the power to make Barbarius praetor *de iure*.[198] But is this distinction really necessary? If the whole purpose is not to ratify the position of the person invalidly elected but only to retain the validity of the deeds issued by such a person, then the 'power of the appointer' becomes considerably less important – whether or not such a power *is* exercised (as in the Gloss) or *can* be exercised (as in Ravanis). And the reason for the validity of the deeds is ultimately the common mistake, supported by public utility.[199]

Whether or not the appointor has the power to heal the underlying defect in the appointee, crucially, there has been an appointment. The occurrence of the appointment is necessary to prevent indiscriminate application of the *lex Barbarius*, but it does not constitute its main foundation. The *lex Barbarius*, says Cugno, does not rely so much on the superior authority of the appointor as on common mistake. The authority plays a role, but only an ancillary one:[200]

> the power to appoint the praetor is not the main ground [of the *lex Barbarius*]; the main ground lies in the common mistake.

tively – the references between the same title in Code and Digest are inverted], i(nfra) de postul(ando) l. i § de qu(a) (Dig.3.1.1.10) et hoc proba(tur) expresse ex isto textu, quod uale<n>t acta per barbarium: quia populus romanus uel princeps hic poterat eum facere iudicem, sed unus comes uel baro non possit dare istam potestatem seruo uel excommunicato. Et ideo in eo hoc locum habere non possit.'

197 *Supra*, §4.2, notes 34 and 53 respectively.

198 *Supra*, this paragraph, note 196.

199 *Supra*, this paragraph, note 182.

200 *Ibid.*, 'Quid dicen(dum)? Dico quod potest habere locum in quolibet alio, quia r(ati)o principalior (*sic*) hac l(ex) habet locum in casu nostro, s(cilicet) propter errorem communem in publico id autem quod sequitur, quia poterat dare pretorem, non est ratio principal(is): cum ergo ut dico ratio principalis sit communis error bene ualebit quod per eum actum est per iura, aliter C. de testis l. i [Cod.4.20.1, *sed* 'de test<ament>is', Cod.6.23.1] i(nfra) ad mac(edonianum) l. iii (Dig.14.6.3) C. [MS: §] de sen(tentiis) l. si arbit(er) (Cod.7.45.2), i(nfra) qui et a q(uibus) l. competit (Dig.40.9.19).'

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It follows that the simple fact that the baron had the power to appoint the judge is sufficient as to the validity of the decisions of such a judge. While he clearly lacked the power to appoint an excommunicate as judge, the person he appointed was commonly believed not to be such. This would suffice for the production of valid legal effects: the decisions of the excommunicated judge may stand even if the position of the judge himself does not.

While the role of the superior authority is subservient to that of the common mistake, this does not mean that it can be dispensed with altogether. To stress the point, Cugno moves on to the second example: the false notary. Just like Suzzara before him, Cugno uses this example to limit the scope of the common mistake. In so doing, however, he is considerably more refined (and exhaustive) than Suzzara.

Let us suppose, says Cugno, that someone posed as a notary in a city ('in this city' – perhaps he was referring to Toulouse itself)[201] and exercised that office, letting everyone believe that he was duly appointed by the competent authority. Would the instruments he drafted be valid? Instead of providing an answer, Cugno continues with another image: the false judge who sat on the bench for a long time and rendered many decisions. Are his decisions valid? In linking the self-styled notary with the self-appointed judge, Cugno is both focusing the attention on the scope of the *lex Barbarius* (as Suzzara did), and also clarifying that common mistake is not sufficient even when supported by public utility. Shortly beforehand, Cugno said that Barbarius might well have decided on a thousand cases.[202] Cugno did so to strengthen the importance of public utility and oppose the utility of many to that of two single litigants. The cases of the false judge and of the false notary, therefore, affect the commonwealth just as much as that of Barbarius. Nonetheless, Cugno's answer is the same as Suzzara's: the common opinion as to the appointment of a notary or a judge does not suffice for the validity of their deeds. It is also necessary that the appointment, albeit vitiated, did take place.[203]

201 Cf. Meijers (1959*b*), p. 188, and Krynen (2015), p. 295.

202 *Supra*, this paragraph, note 185.

203 Cugno, *ad* Dig.1.14.3 (ÖNB 2257, *fol.* 74*va*): 'Nunc uideamus si error communis facit id quod dicis. Ponit in ciuitate ista talis exercuit officium tabellionatus. Nunquid titius ab eo qui habet potestatem dandi credebat publice quod esset tabellio, et ita receperat plura instrumenta, nunquid istrumenta ista ulebunt? Uel pone quidam qui [MS: quod] nunquam fuit datus iudex exercuit iudicaturam per magna tempora, nunquid acta per eum ualebunt? Uidetur quod sic propter errorem communem et uidetur per hoc textum notabilem in tabellione qui non debet facere instrumenta per substitutum, in authe(ntica) <de> iudic(is) (Coll.2.2.1[=Nov.8.1]); si autem fec(it) propter uoluntatem communem istrumenta ualent in aut(hentica) de tabel(lionibus) § p(enultimo), ibi documentis

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To reach this conclusion, it will be remembered, Suzzara contrasted the vitiated appointment of the ineligible with the utter lack of appointment of the impostor. To clarify this difference, however, Suzzara only stressed that both slave-praetor and slave-witness had been appointed by the subject who had the right to do so. This left some ambiguity in Suzzara's conclusion: did he mention the right to appoint just as an example of the requirements for the formal validity of any appointment? Cugno clarified the point, distinguishing between defects *in forma* and *in materia*.

The appointment of Barbarius, says Cugno, was formally valid: the electors had the power to proceed with the election, and the election itself was regular. As Cugno has it, 'there was no other impediment but for the person of Barbarius'. Hence the only issue lay in the condition of the person appointed (i. e. in his personal status), a defect *in materia.* By contrast, continues Cugno, in the case of the false notary (as well as in that of the false judge) the defect was *in forma*: there was no appointment. Among the two, he observes, a formal defect is more serious: 'a defect *in materia* can be excused more easily than one *in forma*' (*peccatum materiae facilius excusa*(*ri*) *quam form*<*a*>*e*).[204]

While the distinction between legitimation of the elector and defect of the elected was not particularly original,[205] its application to Barbarius' case is far less documented. Cugno was among the first – if not the very first – to do as much. This might encourage a brief look at his sources, and the way he used them. When stating that the mistake *in materia* is not as serious as that *in forma*, Cugno referred to three texts, the first two from the Digest and the last one from the Code.[206] The two texts from the Digest dealt with the role of consent in the

etc. (Coll.4.7.1[=Nov.44.1§4]). Sed dico contra, quod nichil ualent acta per tales: in l. ista [*scil*., Dig.1.14.3] error communis et auctoritas eius qui hoc poterat dare non erat aliud impedimentum nisi in p(ersona) barbarij, et ita solus actus peccabat in materia. Cum ergo hic nulla<m> auctoritate<m> habebat talis, dico non uale(nt) acta per eum quia peccatum est in forma, cum nullo modo habeat iurisdictionem et peccatum materiae facilius excusa(tur) quam form<a>e, i(nfra) de consti(tuta) pec(unia) l. i § eum qui inutiliter (Dig.13.5.1.4), de accep(tilatione) <l.> an inutilis in prin(cipio) (Dig.46.4.8pr), et per hoc text(us) C. de nu(mer)ariis et actu(ariis) l. actuarios in fi(ne) (Cod.12.49(50).7.1).'

204 *Ibid*. On the need of proper appointment of the notary for the validity of his instruments see also Cugno's *lectura ad* Cod.4.21, § *Comparationes* (*Clarissimi iurisvtriusque … Guillielmi de cugno: alias de Cugno Lectura super Codice …* [Lugduni, 1513]; anastatic reprint, Bologna: Forni, 1968, *fol. 58vb*, n. 10).

205 See for instance the discussion of Jacobus de Belviso on the different categories of defects of an election or appointment *infra*, §9, text and note 18.

206 Cugno, *ad* Dig.1.14.3 (ÖNB 2257, *fol. 74va*): 'peccatum materiae facilius excusa(tur) quam form<a>e i(nfra) de consti(tuta) pec(unia) l. i § eum qui inutiliter (Dig.13.5.1.4), de accept(ilatione) <l.> an inutilis in prin(cipio) (Dig.46.4.8pr), et

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formation of contracts. When a *stipulatio* is void, stated the first text (Dig.13.5.1.4), the counterparty cannot enforce the promise made with the intent of receiving a counter-promise.[207] At most, concluded the Gloss, the promise could be used as a defence against the person who made it – but surely not as a claim against him.[208] If however the promise is made with full knowledge of its invalidity, it may not even give rise to a defence. That was the comment of the Gloss on the second case cited by Cugno (Dig.46.4.8pr).[209] If the formal release of a debt (*acceptilatio*) is void and the releasor is perfectly aware of its invalidity, the contract may not even be considered as a non-enforceable agreement (*nudum pactum*). The releasee would therefore not be able to use the void release even by way of defence, because the releasor did not consent to it.[210] The strong connection between subjective knowledge and the invalidity of the obligation seems to suggest the contrary argument in case of mistake: if the releasor was not aware of the invalidity of the *acceptilatio*, then the releasee might well use it as a valid *pactum*. The significance of these two texts to Cugno's purposes becomes clear looking at the third text, that in the Code, the only one dealing with appointments. It was a short text (Cod.12.49(50).7, the *lex*

per hoc text(us) C. de nu(mer)ariis et actu(ariis) l. actuarios in fi(ne) (Cod.12.49(50).7.1)', *supra*, this paragraph, note 203.

207 Dig.13.5.1.4 (Ulp. 27 ed.): 'Eum, qui inutiliter stipulatus est, cum stipulari voluerit, non constitui sibi, dicendum est de constituta experiri non posse, quoniam non animo constituentis, sed promittentis factum sit.'

208 The Gloss noticed that if the counter-promise was void the *stipulatio* was not enforceable, because the *stipulator* lacked the intention to bind himself without consideration. At the most, the *promissor* could invoke the *stipulator*'s promise as a defence against him (i. e. as an *exceptio*, not an *actio*). Gloss *ad* Dig.13.5.1.4, § *Eum* (Parisiis 1566, vol. 1, cols. 1393–1394): 'Arg(umentum) quod si non valet quod ago vt ago, nec valet vt ualere potest … Sed qualiter sciam quod stipulari sibi voluerit, non constitui: respondeo ex uerbis que praecesserunt … facilius exceptio quam actio paratur.'

209 Dig.46.4.8pr (Ulp. 48 ad Sab.): 'An inutilis acceptilatio utile habeat pactum, quaeritur: et nisi in hoc quoque contra sensum est, habet pactum. Dicet aliquis: potest ergo non esse consensus? Cur non possit? Fingamus eum, qui accepto ferebat, scientem prudentemque nullius esse momenti acceptilationem sic accepto tulisse: quis dubitat non esse pactum, cum consensum paciscendi non habuerit?'

210 Gloss *ad* Dig.46.4.8pr, § *An inutilis* (Parisiis 1566, vol. 3, col. 1207): 'Tu et ego facimus acceptilationem inutilem de aliquo debito. Quaeritur vtrum saltem talis acceptilatio habeat vim nudi pacti: vt sic virtute huius tollatur obligatio? Respon(deo) quod non. Diceret aliquis, quomodo potest fieri quod inter nos non fuerit saltem nudus consensus? Respon(deo) quod immo: quia ponamus quod ego sciebam nullius momenti fore acceptilationem quam faciebam: certe non habebit vim nudi pacti, cum nullum consensum habuerim paciscendi quando sciens fui.' Cf. also *ibid.*, *ad* Dig.46.4.8.1, § *Accepto*.

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Actuarios), where the emperor reminded the pretorian prefect that the appointment of certain officers (especially the quartermasters of the fleets) required his own approval. If any such officer had been otherwise appointed, the prefect ought to condemn him and to pronounce void all his deeds.[211] Instead of remarking on the obvious invalidity of appointments lacking imperial approbation, the Gloss focused on the consequence of such invalidity: 'what done by the person who was not validly elected is void'. In so doing, however, the Gloss added a contrary reference – to the *lex Barbarius*.[212] The outcome was the opposite (Barbarius' deeds were valid), but the case was different. And the difference could be interpreted in the light of the previous two texts. Unlike the officers in the text of the Code, Barbarius was appointed by the prince. The appointment followed the proper modalities (it was valid as to its *forma*), but it was vitiated because of the personal status of the elected (a defect *in materia*). Nonetheless, the authority with the power to make the appointment also had the intention to do so.

Although vitiated, the appointment is nonetheless legally relevant, as it removes the main obstacle to the validity of the deeds – the defect *in forma*. Unlike the cases of the false judge and especially of the false notary, in those of Barbarius and of the excommunicated judge the election did take place. The intervention of the authority with the power to make the appointment bestows what later on (from Baldus onwards) would be called coloured title – a formally valid but substantively flawed title to exercise the office.[213] It is however important to notice that, in Cugno, the presence of a coloured title does not constitute the rationale of the *lex Barbarius*, it simply marks the outer boundaries of its applicability. While Cugno requires both elements, he is very clear in subordinating the appointment to the common mistake. It is likely that Suzzara meant the same, but the shorter and much less elaborate way in which his thinking has arrived with us does not allow us to say so with certainty. As such, despite the clear influence of Suzzara, it is Cugno's comment on the *lex Barbarius* that should be considered as the earliest known formulation of the *de facto* officer doctrine. For the sake of public utility, it is possible to bestow validity on

211 Cod.12.49(50).7pr-1 (Theod. et Valentin. AA. Hierio PP.): 'Actuarios tam classium urbis Constantinopolitanae quam Thymelae equorumque curulium civitatum diversarum non aliter nisi, ut consueverat, manus sanxerit principalis, sublimitas tua praecipiat ordinari. Quod si quis talis sub tua fuerit iudicatione convictus, profectio irritis his, quae vetita contrectavit, etiam congruam indignationem incurret.'

212 Gloss *ad* Cod.12.49(50).7.1, § *Contrectauerit* (Parisiis 1566, vol. 5, col. 302): 'Not(atur) non valere quae fiunt a non iure electo, ar(gumentum) contra(rium) ff. de offic(io) praeto(rum) l. Barbarius (Dig.1.14.3).'

213 *Infra*, §12.4.3.

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the deeds of someone invalidly appointed to an office in the presence of two conditions: (1) if the invalidity depends only on the legal incapacity of the elected, and (2) if the appointment is on the contrary commonly believed to be fully legitimate.

Having explored both the working of the common mistake and the outer boundaries of its scope, Cugno then moves on to look at its inner boundaries. A mistake may well be common, he says, but not necessarily shared by all. If only one or two people knew of the true status of Barbarius, whereas everybody else thought that his praetorship was perfectly valid, would the decision of Barbarius be valid also in their specific case? In other words, asks Cugno, does the common mistake operate independently of the condition of any single individual, even in favour of anyone who knows the truth? This case in effect is the exact opposite of that previously discussed about the mistake involving only two people.[214] There, Cugno ruled out the validity of the deeds because of the lack of common mistake. Here on the contrary he excludes the applicability of the common mistake to the specific deeds of those who did not partake in it. The point is not as obvious as it may appear: as Cugno notes, there are some texts in the Digest allowing the production of valid legal effects exclusively when the mistake is individual and not common. Cugno's reference is to two texts dealing with a freeman selling himself into slavery (Dig.1.5.5.1 and Dig.40.12.7.3). It is possible that Cugno did not refer to them when speaking of the individual mistake (which does not produce valid effects) because these texts on the contrary argued for the validity of the transaction. The difficulty of the texts was that they did not simply look at the mistake of a single individual (the buyer), but positively required this mistake not be shared by others (the false slave and the seller) for the transaction to be valid. Unlike the individual mistake as to the jurisdiction of Barbarius, however, in those texts the mistake did not harm those who went along with it. On the contrary, it was precisely because of his ignorance as to the true status of the slave that the buyer could achieve his purpose – purchasing the slave.[215]

214 *Supra*, this paragraph, note 185.

215 The first, Dig.1.5.5.1 (Marcian. 1 Inst.), provided that it was possible to sell a freeman into slavery to divide the purchase price with him. The Gloss on this text (*ad* Dig.1.5.5.1, § *Venire*, Parisiis 1566, vol. 1, col. 88) listed four conditions for the validity of such a sale: first, that the freeman was at least twenty years of age; second, that the purchase price was divided between seller and the freeman sold into slavery; third, that the new slave would actually receive his part of the money; 'fourth, that he who buys believed him [to be] a slave' (*quarto, quod qui emit, credat eum seruum*). The first two conditions were present in the text of the Digest, the third was added *ad cautelam*. The fourth was not present, but it was a necessary addition to harmonise the text with the medieval legal system, which was much more reluctant to let someone sell himself into slavery than the

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The difference between Barbarius' case and the sale of the false slave allows Cugno to better explain his reasoning on the single individual seeking to exploit the common mistake. Clearly, the knowledge of a single person does not make the mistake any less common. But the reason why the common mistake as to Barbarius' status may produce valid legal effects depends on the public utility considerations underpinning it. Public utility is invoked so as not to prejudice the commonwealth unjustly. But a single person knowing the truth can hardly be considered as unjustly prejudiced. Arguing for the validity of the deeds even in his case, says Cugno, would therefore mean exploiting the fairness considerations for which public utility is invoked. As Cugno has it: 'in our *lex* the deeds are valid out of fairness: since this person knows [Barbarius' true status], fairness may not be provoked'.[216]

Roman one. This interpretation however added a paradoxical element to the text: for the sale to be valid, the buyer must be mistaken as to the quality of the object of the contract. But only the buyer must be mistaken. To emphasise the last point, the Gloss also reported the opinion of Bassianus, who added a fifth condition stating as much: the mistake must be only of the buyer, not also of the person selling himself ('secundum Ioan[nem Bassianum] potest addi quintum, quod is qui venditur, non sit ignarus suae conditionis'). Although immoral, selling oneself was regarded as valid in the Gloss. But, crucially, its validity depended on the mistake of the buyer alone: if also the seller or the false slave were mistaken, then the sale was void. The second text, Dig.40.12.7.3 (Ulp. 54 ed.), introduced a complication, and in so doing strengthened the glossators' interpretation of the first one. This time the buyers are two, but one of them is aware that the slave to be sold is in fact a freeman. Because of that, since the object of the sale cannot be split or divided pro rata, the text concludes in favour of the validity of the contract. Both the conclusion and the elegant style of the text left the glossators somewhat perplexed. The Gloss (*ad* Dig.40.12.7, § *Ignorans* (Parisiis 1566, vol. 3, cols. 332–333) reported two different opinions, siding with the second. The first interpretation was of Azo: reading the text as a (probably, rhetorical) question ('interrogatiue'), he concluded against the validity of the sale. The other interpretation was older (the Gloss ascribes it to 'Irnerius, Martinus and others') but proved more successful. Unlike Azo, those other jurists took the text at its face value ('legebant plane'). In so doing, they concluded for the validity of the sale: the co-buyer who knew of the free status of the person would benefit from the ignorance of the other ('et sic sciens habet partem propter ignorantiam'). The justification was found in the aim to punish the person who committed a crime in selling himself as a slave ('soluunt quod ignorantia vnius alteri prosit, propter delictum eius qui se vendit … et secundum hoc no(tatur) quod innocens nocentem excusat.'). Approaching this text to discuss the validity of the deeds done under mistake meant stressing that the mistake was of a single person alone. Despite the knowledge of both seller, person sold and co-buyer, the mistake of the other co-buyer sufficed as to the validity of the transaction.

216 Cugno, *ad* Dig.1.14.3 (ÖNB 2257, *fol.* 74*va–b*): 'ergo iste [Barbarius] fuit pretor et ualent acta per eum propter errorem. Sed pone duo uel tres fuerunt rome qui

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4.8 On the risk of being quoted by Cynus

If Cynus added little, if anything at all, to the debate on the *lex Barbarius*, his weight should not be underestimated, especially for its distorting effect as to the understanding that later jurists would have on the actual position of previous ones.

When looking at Cynus' treatment of the *lex Barbarius*, we have already noted the role he played in the progressive misunderstanding (and so, ultimately, oblivion) of Ravanis' ingenious approach.[217] Ravanis, however, was not the only victim of Cynus. As a matter of fact, the only position that Cynus managed to report correctly in his reading of the *lex Barbarius* was that of Bellapertica. Looking briefly at the way he reported (or not) the thinking of other jurists might be of some interest, especially with regard to three of them: Suzzara, Cugno and Dynus de Mugello.

If Cynus devotes little room to Ravanis, providing a grossly simplified account of his elaboration, he pays even less attention to Cugno:[218]

> some other moderns hold that, where there is no superior authority, the deeds are void because the defect is *in forma* and not just *in materia*.

Misunderstanding what Cugno said, Cynus does not give much thought to the matter: since the *lex Barbarius* is based on equitable considerations, there is little

> cognoscebant istum barbarium et sciebant eum esset seruum litigauerunt coram eo. Nunquid ualent acta per eum inter illos? Uidetur quod sic propter utilitatem communem et errorem. Item ex hoc quod error est in populo non potest inspici scientia aliquorum, ar(gumentum) s(upra) de re(rum) di(uisione) <l.> in tan (tum) § uniuersitatis (Dig.1.8.6.1) i(nfra) quod cuiusc(umque) n(omine) un (iuersitatis), <l.> sic(ut) muni(cipium) § i (Dig.3.4.7.1). Item pro hoc quod [MS: quia] si homo hominem liberum credens seruum officitur seruus, de statu ho(minum) <l.> et seruorum § i (Dig.1.5.5.1). Sed si scio liberum non uerum. Sed pone quod ego credo seruum, tu scis liberum: non ob(stante) tua scientia efficit seruus i(nfra) de lib(erali) ca(usa) <l.> lib(er)os § si duo (Dig.40.12.7.3) et per hoc i(nfra) de testibu(s) l. ii (Dig.22.5.2), i(nfra) quemad(modum) serui (tutes) amit(tuntur) <l.> si communem (Dig.8.6.10pr). Sed dico in casu isto quod non ualent acta inter istos: quia in casu nostre l(egis) ualent acta ex equitate: cum ergo iste sciat non debet equitatem irritari.'

217 *Supra*, §4.5, text and note 136.

218 Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 14*vb*, n. 16): 'Sed quidam modernorum dicunt, quod vbi deficit superiorum authoritas, non valent acta: quia peccatur in forma, non in materia sola, ergo, etc. vt inf(ra) de verb(orum) oblig(ationibus) l. i § quis (Dig.45.1.1) et de accept(ilatione) l. an inutilis, in princ(ipio), cum si (Dig.46.4.8pr).' While Cynus does not mention Cugno's name, his readers – starting already with Bartolus – had little doubt on the point: *infra*, next chapter, note 4.

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point in looking at formal requirements.[219] This way, the requirement that the appointment be made by the subject with the power to grant it (a requirement essential to distinguish invalidity from inexistence of the appointment) becomes a mere formality: a formality that can be easily dispensed with for the sake of public utility. In Cynus' minimalist interpretation, Cugno's insistence on the formal validity of the election becomes a sort of variation on the theme of Ravanis (whose position was in turn reduced to the simple intervention of the superior authority). This would soon lead to the assimilation of Cugno's position with that of Ravanis: they became the two *Ultramontani* who insisted on the double requirement of public utility and the authority of the sovereign.[220] *Sic transit gloria mundi*.

How well Cynus actually knew Cugno's *lectura* on the *lex Barbarius* is far from clear. What seems quite clear, however, is that he did know of at least one more of those 'modern' jurists who solved the *lex Barbarius* on the basis of the same distinction: Suzzara. Although Cynus does not mention him, most of the (few) things present in Cynus but not in Bellapertica may be found only in Suzzara. This is particularly the case with regard to Suzzara's example of the banished elected to a municipal magistracy. Both to distinguish the validity of his deeds from the invalidity of the appointment and to deny him the magistrate's salary, Suzzara used specific *leges* and used certain arguments that may not be found in other jurists – but for Cynus.[221]

219 Cynus, ad Dig.1.14.3 *(Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 14vb, n. 16): 'Sed certe cum hic operatur ratio aequitatis, non est multum curandum de pacto formae: quia vtrobique fuit aequitas. Et ideo no(tandum) est sententia Pe(tri), pro qua facit quod no(tat) Dy(nus) extra de re(gulis) iuris, cap. 1, l. 6 [Dynus, *De regulis iuris*, *ad*VI.5.13.6, § *Beneficium*, *infra*, next paragraph], ista est veritas.'

220 *Infra*, next chapter, §5.1, text and note 4.

221 So, for instance, to remark on how Barbarius' *de facto* exercise of his office did not grant him any right to it, Cynus quotes the (traditional) *lex Herennius* (Dig.50.2.10), but relies more on a short title in the Code dealing with a similar issue, Cod.10.33(32). Unlike the *lex Herennius*, Cod.10.33(32) referred expressly to slaves (or freedmen), and so was even more suited to Barbarius' case. This title of the Code only consisted of two *leges*, which were usually read together: the beginning of the second *lex* was considered the explaination of the first one. The first *lex* (Cod.10.33(32).1) stated that the slave was to be punished with the full might of the law; the (first part of the) second *lex* (Cod.10.33(32).2) explained that such a punishment was well deserved, since the slave had 'defiled the dignity' of the office. This title of the Codex is not to be found in Bellapertica's reading of the *lex Barbarius* (nor in that of Ravanis), but only in Suzzara's discussion of the scope of the *lex Barbarius*: cf. *supra*, this chapter, notes 151–152. Suzzara, as we have seen, allowed for the validity of acts carried out by the banished individual who is unlawfully elected to a municipal magistracy but

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When dismissing the objection of those 'modern' jurists obsessing with petty formalities such as Cugno, Cynus invokes the authority of the eminent jurist Dynus de Mugello (Dino Rosoni, c.1253–*post* 1298).[222] Dynus did not write on the *lex Barbarius* but only looked in passing at some specific applications of the common mistake.[223] Cynus' reference to Dynus was extremely short, but that did not prevent later jurists – starting with Bartolus – from enlisting Dynus in the same group as Cynus and Bellapertica on the interpretation of the *lex Barbarius*.[224]

The reference to Dynus was on a very specific point of his discussion of ecclesiastical appointments. Dynus was not looking at the invalidity of the appointment for some defect in the appointed, but rather for a defect in the appointer. While in principle the unlawful position of the person who made the appointment should invalidate it, says Dynus, nonetheless the appointment is valid if the appointer's position is held as valid by common mistake, and such a mistake preceeds the appointment itself (that is, it does not occur as a consequence of the appointment, but predates it). In such a case, concludes Dynus, the common mistake about the validity of the appointer's position would heal the invalidity of the appointment of the person he appointed.[225] One

denied him the right to claim the magistrate's salary (*supra*, this chapter, note 153). Cynus builds on these observations and uses them to strengthen Bellapertica's arguments against Barbarius' praetorship. Cynus, *ad* Dig.1.14.3 (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi* …, vol. 2, cit., *fol.* 14*ra–b*, n. 12): 'Tertio probatur, quia l. cauetur, quod licet seruus militet, non propterea sit liber, ergo etc. vt C. qui mili(tare) pos(sunt) l. super seruis, lib. 12 (Cod.12.33(34).6pr). Quarto probatur per l. i et 2 C. si ser(vus) ad decu(rionatum) as(piraverit) lib. 10 (C.10.33(32).1–2) … Quinto [*rectius*, 'sexto'] probatur, perceptio salarij fuit illicita, vt *infra* de decur(ionibus) l. et si Herennius [*rectius*, 'Herennius', Dig.50.2.10].'Another *lex* mentioned only by Suzzara was Dig.3.5.21 – a text on *negotiorum gestio*, which Suzzara used so as to deny to the *bannitus* the salary due to the magistrate. Cynus borrows the same argument in support of Bellapertica. Just as it would be absurd to let the *negotiorum gerens* recover his expenses if the estate was destroyed through his fault (this was the gist of Dig.3.5.21), reasons Cynus, so it would be unreasonable to reward Barbarius with the praetorship for having deceived the people and usurped that office. *Ibid.*, *fol.* 14*ra–b*, n. 12: 'Quinto probatur, quod hic Barbarius, vsurpando sibi illicite officium praefecturae delinquit, et falsum commisit, vt C. ad l. Viscel (liam) l. vnica (Cod.9.21.1) … Et sic quia debuit puniri, non debet praemium reportare: et sic non est Praetor, vt infr(a) de neg(otis) ge(stis) l. siue haereditaria (Dig.3.5.21).' *Supra*, §4.6, note 153.

222 *Supra*, this paragraph, note 219. On Dynus' life, works and bibliography see Padovani (2013), pp. 769–771.

223 *Ibid*.

224 *Infra*, next chapter, §5.1, and note 4.

225 *Dyni Myxellani … Commentaria in Regvlas Ivris Pontificii* …, Lvgdvni, apud Antonium Vincentium, 1558, reg.1, p. 24, n. 31–32: 'Septimo quaeritur, quid

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can now better understand why Cynus referred to his passage when arguing against Cugno's requirement of a formally valid appointment. Even if the superior authority had no right to appoint someone (and so, even when the defect is *in forma*), the common mistake could still be invoked. When speaking of invalid authority and common mistake Dynus refers to the person who made the appointment. But the same reasoning could be applied to the person appointed (and it would: we will see later the similarity of the position of two jurists writing shortly after Dynus, Jacobus de Belviso and Raynerius de Forlì).[226]

Despite the enthusiasm of Cynus, Bartolus and his followers to drag Dynus posthumously into the debate on Barbarius' case, Dynus is neither looking specifically at the *lex Barbarius*, nor is he interested in discussing the scope of public utility. His focus is only on the common mistake. Dynus discusses the common mistake, occasionally mentioning the *lex Barbarius*, also in other instances – but never in much depth. The fact that the mistake needs to be common to produce effects,[227] for instance, could also be applied to the problem of *ignorantia facti*, so as to distinguish between excusable and non-excusable ignorance. It is only when some fact is not commonly known, says Dynus, that one's ignorance may excuse him. Where on the contrary the fact is widely known, the contrast between common opinion and mistaken individual belief highlights the culpable ignorance and suggests *culpa lata*.[228] Thus the

> si credebatur instituentem instituendi habere ius, cum in veritate non haberet: an comperto errore institutio vitietur? Et videtur vitiari debere: quia factum illius qui credebatur esse tutor, et non erat, inutile est … Econtra videtur vitiari non debere de iure Canonico vel Ciuili, quia tenuit ab initio propter errorem communem qui pro veritate habetur, c. consultationibus, de iure patr(onatus) (X.3.38.19), de supel(lectili) leg(ata) l. iii § fi. (Dig.33.10.3.5), l. Labeo, in fi(ne) (Dig.33.10.7.2), et de offi(cio) praeto(rum) <l.> Barbarius Philippus (Dig.1.14.3), et C. de testa(mentis) l. i (Cod.6.23.1) et de sen(tentiis) interloc(utionibus) om(nium) iud(icium) l. si arbiter (Cod.7.45.2) et instit. de test(amentis) § sed cum aliquis (Inst.2.10.7). Et ideo liceat postea detegat veritas errori contraria, non vitiabitur institutio quae ab initio tenuit.'

226 *Infra*, pt. III, §9 and §12.4.1 respectively.

227 On the difference between common and individual mistake see *Dyni Myxellani … Commentaria in Regvlas Ivris Pontificii*, cit., esp. reg.1, p. 24, n. 33, referring to Dig.29.2.30.1 and especially to Dig.33.10.7 (where Celsus opposes the *opinio singulorum* to the *usus communis*: 'non enim ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere').

228 *Ibid.*, reg.13, pp. 88 and 91, n. 3 and 16 respectively. The point was not new. For instance, Bulgarus had already said that the consequences of a mistake depended on the position of the *errans* (especially on whether he was in good or bad faith) and the kind of mistake. So for instance a mistake on a fact made in good faith is sufficient to avoid its negative consequences. By the same token, although a mistake of law is more serious than a mistake of fact, a mistake of civil law is not as serious as a mistake of natural law. Bulgarus, *Summula de iuris et facti*

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communis opinio may both cure the invalidity and aggravate the individual liability.

The last time that Dynus refers to the *lex Barbarius* and the common mistake, he does so to juxtapose truth with appearance. When something occurs to make things appear different from how they truly are, says Dynus, one should not refer to the natural condition of things but to how they seem to be. Hence the people who approached Barbarius believing him true praetor should not be penalised for that.[229]

From this, it is difficult to think of Dynus as siding with Bellapertica and Cynus on the issue of public utility and the *lex Barbarius*. Yet this is how later jurists often remembered him, on the sole basis of Cynus' short remark.

ignorantia (BL, Royal 11.B.xiv, *fol.* 53*rb–vb*, esp. 53*va*). It is perhaps worth comparing Bulgarus' more general (and abstract) position with the more practice-oriented one of later glossators, which were centred on restitution. See first of all Ugolino's *distinctio in* Cod.1.18.10 (transcribed in Cortese [1964], vol. 2, pp. 421–422).

229 *Dyni Myxellani… Commentaria in Regvlas Ivris Pontificii*, cit., reg.8, p. 68, n. 3–4.

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