Chapter 11

The anatomy of representation

To make sense of Baldus' reading of the *lex Barbarius* we should be mindful that, for Baldus, Barbarius' case is a problem of legal representation. Barbarius exercised an office he was not entitled to. The question is therefore whether he could be tolerated in that office. Dealing with Barbarius' case, Baldus ultimately explores the limits of representation. It is therefore with it that we must begin, for Baldus' reading of the *lex Barbarius* can only be understood if we have a clear idea about his concept of representation, especially with regard to public offices. Having examined the 'mechanism' of representation in Baldus (and the crucial influence of the Innocent IV's thinking), we will then proceed, in the next chapter, to Baldus' reading of *lex Barbarius*. Finally, we will look at the further extensions of this *lex* (or rather, at other and more direct applications of the concept of toleration), especially on excommunicated judges, illegitimate prelates and, moreover, false notaries.

In this chapter we will look at representation, especially with regard to public offices. Ultimately, the main difference between Baldus and Innocent lay in Baldus' more flexible approach: for Baldus, representation did not necessarily entail full identification between the office and its incumbent. We have seen how Innocent based his concept of toleration entirely on representation. Baldus followed suit, but his more flexible approach to representation also allowed him to reach different conclusions from those of Innocent on toleration and so, ultimately, on the *lex Barbarius*. This is not necessarily an apologia for Baldus: flexibility, as we will see, sometimes came at the price of ambiguity.

As just said, Innocent's influence led Baldus to consider the concept of toleration as a specific application of representation. This chapter will seek to explain the relation between the two concepts in Baldus' thinking. What might appear a long detour is in fact necessary to fully appreciate Baldus' remarkably complex approach to the *lex Barbarius*. Thus, the relevance of this apparent digression will become progressively clear towards the end of this chapter, and especially in the next one.

To understand the relationship between incumbent and office, we will start with the concept of *dignitas* (of both person and office). Then we shall seek to distinguish them, focusing especially on the difference between obligations of the office and obligations of the person. Having clarified the difference, we will look at both outer and inner limits of representation. In some cases, especially for collegiate offices, no single person is entitled to act on behalf of the office –

and so, strictly speaking, no individual person is the legal representative of the office. But there are also situations where the representative of an individual office (and so, the incumbent) may not 'force' the office to assume certain obligations. An analysis of such situations is important to better understand the difference between person and office.

Thereafter, we will finally move to Baldus' concept of toleration. There, we will use some concepts previously elaborated with regard to representation, to see whether and to what extent Baldus' notion of toleration – and, especially, its scope – matched that of Innocent. In so doing, we will be able to appreciate how the subtle difference between Baldus' and Innocent's positions on representation influenced their notion of toleration. Toleration tests the boundaries of representation. In highlighting the difference between incumbent and office, Baldus' notion of representation led him to develop a subtly different analysis of toleration from that of Innocent. This way, Baldus came very close to the modern idea of 'agency triangle' (or rather, to the concept behind this modern image),[1] highlighting the dychotomy between the internal and the external validity of agency (on which see *infra*). The modernity of these ideas is as alluring as it is dangerous. When a concept is found in both contemporary and older sources, there is always a temptation to interpret its 'old' meaning through our understanding of the 'new' one. This is why we shall endeavour to follow Baldus' own examples and reasoning as much as possible: doing so might prove a good antidote against that temptation (or at least limit the damage).

In this chapter, some key concepts will be recalled time and again. This is not meant to test the patience of the reader. These concepts are as important as they are multifaceted, and that makes it necessary to build on what has been said previously – or rather, to 'dig' increasingly deeper into those concepts, reaching one layer after another. To understand Baldus' approach to the *lex Barbarius*, the last and longest paragraph of this chapter is by far the most important. But it would not make sense without the previous ones.

Innocent IV and Baldus de Ubaldis are probably the favourite medieval authors of historians of political thought. The former developed a legal doctrine of corporation as a 'fictive person' (*persona ficta*), the latter used it to provide a legal vest to the notion of kingdom.[2] While of course there might always be something more to add, the matter has little to do with our subject. Except for one, crucial aspect: the influence of Innocent on Baldus' concept of office

1 On the relationship between representation and agency in this part of the book see *infra*, in this paragraph.

2 See first of all Canning (1983), p. 24, and esp. Canning (1989), pp. 185–197. More recently see also, *inter multos*, Tuner (2016), pp. 18–20, and Lee (2016), pp. 74–77.

occurred in terms of both general principles and of a specific legal approach (provided that the two can actually be separated). Adapting Innocent's concept to (slightly) different purposes, Baldus also imported its ultimate rationale – representation. Much has been written on the subject,[3] but not from a legal perspective. This has resulted in some omissions, some of them crucial for our purposes. Historians stressed the complementariety between person and office. In so doing, however, they left aside cases where the person cannot act for the office. Those cases are of particular interest, because it is only there that some legal problems emerge clearly. To make full sense of these problems, in turn, it is necessary to look in more depth at the legal position of the office not just as different from that of its representative, but as opposed to it. The case of Barbarius is precisely one of them – or rather, is the case where Baldus dealt more deeply with the opposition between office and incumbent.

In this chapter we will often note Innocent's influence on Baldus. Previous civil lawyers did refer to Innocent. More often than not, however, such references tended to be either generic (a specific point of Innocent was quoted without full understanding of its deeper meaning or of its broader implications), or just made *ad abundantiam* (the jurist had already made his point and simply sought confirmation from some high authorities). The approach of Albericus de Rosate provides a good example in this sense. On the contrary, Baldus relies on Innocent in a much more informed, profound and systematic way.[4] This influence does not mean that he had a submissive attitude towards the pope. Baldus simply found most of Innocent's arguments persuasive. At times, however, he could be sharply critical of him. Occasionally he went as far as remarking how other civil lawyers praised the 'Innocentian dialectics' (*dialectic*[*a*] *Innocentian*[*a*])[5] more out of reverence for his high office than because of the quality of his arguments.[6] Baldus' writings on the *lex Barbarius* showed his reliance on Innocent, but also its limitations.

3 On the *dignitas* of the crown and the role of the king the literature is bountiful. With specific reference to Baldus, it suffices to cite E. Kantorowicz (1957), pp. 291–302, 336–338, 397–401, and Canning (1989), pp. 86–90. Cf. also Riesenberg (1956), pp. 150–157; Wahl (1970), pp. 326–328; J. Black (2009), pp. 63–67; Canning (2014), pp. 156–157.

4 It has been argued that, together with Johannes Andreae, Innocent IV was the most quoted author in Baldus, not just for his commentaries on canon law, but also for those on civil law and even feudal law: Bertram (2002), p. 451, note 66.

5 See esp. Baldus, *ad* Cod.7.55.1, § *Si non singuli* (*super VII, VIII et Nono Codicis*, cit., *fol.* 87*rb*, n. 19): 'venio ad dialecticam Innocentianam.'

6 It is difficult to render the subtle irony of the Latin text in English: 'Concludo igitur quod dictum Inno(centii) potius processit de plenitudine potestatis quam de iudicii rigore: licet alii doctores applaudant Innocentio propter reuerentiam et auctoritatem papatus. Ad pleniorem autem intelligentiam oportet inquirere

A final note on terminology. In discussing representation issues, this and the next few chapters will sometimes refer to agency. So far, the discourse on representation has focused on the right of the incumbent to discharge the office. Especially when looking at canon lawyers, the question has therefore been whether and to what extent legal representation applied. In this part of the work, however, the distinction between agent and principal will acquire an increasingly central role, and especially the relationship between principal, agent and third parties. This three-sided relationship, often known as an agency triangle, is key to understanding Baldus' approach to the *lex Barbarius*, and more in general to his assessment of the validity of the acts carried out by the person who lacks the right to validly represent the office. This way, thinking in terms of a principal–agent relationship helps to gain a better insight into a rather complex reasoning.

11.1 *Dignitas*: worthiness and aptitude

To look at the relationship between office and incumbent, we should start with the concept of *dignitas*. *Dignitas* has two different meanings – or rather, two different objects: it can be referred both to an office and to a person. This is still visible in modern English, where 'dignity' signifies both the quality of being worthy of honour and an honourable position. These two meanings are complementary: only someone worthy of honour should occupy an honourable position; in turn, the honourable position attests to the honour of its holder. This circularity depends on the complexity of the concept of *dignitas* as applied to a person, for it means at the same time worthiness and aptitude – both the ethical condition of the person and his legal capacity to receive or hold something.[7]

While complex, *dignitas* is not a bicephalous concept. Rather, it is a single concept with both an ethical and a legal meaning, which complement each other. The medieval world fully accepted the Pauline argument that any power is ordained by God[8] – both in the sense that it comes from God and that its specific

de veritate et de iudicio' (*ibid.*, *fol.* 87*va*). The reference to the plenitude of power (*plenitudo potestatis*) had precious little to do with Innocent's argument (cf. Innocent, *ad* X.2.27.26[=VI.2.14.3], § *Iudicium*, in *Commentaria Innocentii Quarti*, cit., *fol.* 316*ra–vb*), but more to do with Innocent himself. In other words, Baldus mischievously suggests that many jurists might have accepted the pope's interpretation of the law because the pope could change the law. The implied argument of course is that, unless the pope did actually change the rule, his interpretation was totally wrong.

7 Rossi (2012), pp. 150–152, where further literature is listed.

8 Rom. 13:1: 'non est potestas nisi a Deo; quae autem sunt, a Deo ordinatae sunt.' Cf. Aquinas (Cai [ed., 1953]), vol. 1, c.13, lect.1, §1021, p. 190. The literature on

hierarchical position depends on His will. The jurists found a clear confirmation of this in the Roman sources. Roman law was the product of a society of unequals, where it was perfectly normal that the *dignores* would occupy a higher rank in society. Their social privileges, importantly, were also legal ones. The medieval reinterpretation of Roman law through the lens of Christian thought led to the justification of the social hierarchy in terms of authority (the will of God), and to its rational explanation in terms of the superior moral qualities of those higher up the social ladder.

The concept of *dignitas* is vast, but we shall focus only on what Baldus says. The easiest way to do this is to look at some practical examples of the combination between the subjective and objective, and the moral and legal elements of *dignitas*, as referred both to people and to offices.

An easy starting point in the sources is the Digest's title on the senators (by definition the highest Roman class). The Romans considered of consular rank not only men, but also women – for instance, a senator's wife. But clearly a man of consular rank took precedence over a woman of the same rank (Dig.1.9.1).[9] Commenting on this text, Baldus notes that, as a general principle, 'the man is worthier [*dignor*] than the woman'.[10] And he proceeds immediately to apply this moral distinction of *dignitas* to legal scenarios. The patron (*patronus*) of an ecclesiastical benefice normally has the right to present a cleric to be appointed to that benefice when it becomes vacant. What happens, asks Baldus, if the heirs of the patron cannot agree among themselves as to the next cleric to present? If the heirs are a son and a daughter, the solution is simple: 'the voice of the man is to be preferred to that of the woman, because it is worthier'.[11] A first and foremost consequence of this higher *dignitas* of the male, continues Baldus, is the *lex Salica* (agnatic succession to the throne).[12] It is difficult to find a stronger link between subjective and objective meanings of *dignitas*.

Dignitas, as said, is not a concept referred just to persons. It also designates offices. The same dialectic between moral and legal qualities informing personal *dignitas* is also found in the idea of office as *dignitas*. Going back to the 'worthier voice' of the man, the text immediately following it in the Digest provides an

the medieval reading of the Pauline passage is bountiful. On its application to our subject, see for all Costa (1969), pp. 383–385.

9 Dig.1.9.1pr (Ulp. 62 ed.): 'Consulari feminae utique consularem virum praeferendum nemo ambigit. Sed vir praefectorius an consulari feminae praeferatur, videndum. Putem praeferri, quia maior dignitas est in sexu virili.'

10 Baldus, *ad* Dig.1.9.1 § *Consulari* (*In Primam Digesti Veteris Partem Commentaria*, cit., *fol.* 49*va*, n. 1): 'Dignior est vir quam foemina.'

11 *Ibid.*, 'Item facit quod si patronus ecclesiae decessit superstite filio, et filia, et discordant in presentando quod debet preferri voc masculi tanquam dignior.'

12 *Ibid.*, *fol.* 49*va*, n. 2.

excellent example. It speaks of a senator expelled from the senate for his unworthiness (*ex turpitudine*). This ex-senator in disgrace may not judge or give witness. On the basis of that text, Baldus wonders whether the supervening *indignitas* should also prevent someone from deposing as witness.[13] Being witness, says Baldus, 'is itself a *dignitas*'.[14]

Depending on its owner, a voice may be worthier (*dignor*). Applied to a specific legal function, the same voice becomes an office (*dignitas*). The higher *dignitas* of the man explains why in some countries the supreme *dignitas* – the Crown – is precluded to those less worthy (women). The higher the office (*dignitas*), the more worthiness (*dignitas*) one needs to possess.

If *dignitas* is a personal quality, a legal requirement and an office, then – going back to the image of the worthier voice – the voice is even stronger when its possessor occupies an office himself. So, says Baldus, the testimony of 'the person who holds an office' (*qui est in dignitate*) is stronger than that of someone who does not.[15] This depends both on the fact that holding a *dignitas* (office) is proof itself of the *dignitas* of its holder, and on the fact that the deposition is not just that of the person, but of the *dignitas* of his office.

On the same basis, Baldus could well say that 'the worthier should occupy a higher rank', and the higher rank is determined by its closeness to that of the master – in the specific case, the proconsul.[16] The highest dignities may be conferred only by the worthiest person – the prince (who in turn occupies the highest *dignitas* of all).[17] The higher the *dignitas* of the office, the higher the personal *dignitas* that is required to hold it. Since the higher rank is worthier, its incumbent should possess a higher *dignitas* in moral, social and legal terms – each of the three both requires and explains the others. Their mutual dependence is shown clearly by the fact that the holder of a superior *dignitas* should not only

13 As Bartolus informs us, witnesses enjoyed different degrees of attendibility according to their *dignitas*, for at the same time the judge had to assess 'quanta fides habenda sit testibus, qui et cuius dignitatis et cuius existimationis sint' (Bartolus, *Tractatus testimoniorum*, in Lepsius [ed., 2003], vol. 2, p. 234, § *Testium*).

14 Baldus, *ad* Dig.1.9.2 § *Cassius Longinus* (*In Primam Digesti Veteris Partem Commentaria*, cit., *fol.* 49*vb*, n. 2): 'Item testimonium est dignitas i(d est) status illaesus absque macula.'

15 Id., *ad* Dig.22.5.3pr, § *Testium fides* (*Baldi Vbaldi pervsini Ivrisconsvlti … In Secundam Digesti vet*[*eris*] *partem Commentaria …* Venetiis, 1586, *fol.* 179*va*, n. 1): 'magis creditur ei, qui est in dignitate, quam ei qui non est in dignitate.'

16 Id., *ad* Dig.1.16.4.3, § *Antequam vero* (*In Primam Digesti Veteris Partem Commentaria*, cit., *fol.* 62*ra*, n. 3): 'dignores debent altiori loco sedere, et altior locus est, qui est domino magis propinquus.'

17 Id., *ad* Dig.2.1.3, § *Imperium* (*ibid.*, *fol.* 73*ra*, n. 7): 'solus Princeps confert magnas dignitates.'

be worthier (*dignor*), but also appear such. So, for instance, the abbot should be dressed better than the monk because, explains Baldus, he is worthier (*dignor*) than him.[18] Referred to a person, *dignitas* is ultimately a question of proportionality between moral worthiness and legal aptitude. When the person holds an office, the same question of proportionality arises: the personal *dignitas* (in both its meanings) must be commensurate to the *dignitas* of the office.

The correspondence between inner and outer *dignitas* is not just a question of appearances. It points to the symmetry between *dignitas* of the person and *dignitas* of the office. In the typical scholastic fashion of *disputatio*, the Gloss posed a paradox. The emperor is unworthy of being just a governor (*praeses*). But the office of the governor is clearly lower than that of the emperor. If the emperor is not worthy of being a governor, does that mean that he is unworthy of the empire too? The answer was of course negative: the lower rank was unworthy of the prince, not vice versa.[19] But the point is interesting: the incompatibility between the lower rank of the office and the higher status of the person implied that also the office had a *dignitas*, which could be described both in terms of worthiness and of aptitude. Baldus elaborates much on this gloss: 'the pope is not worthy [*dignus*] of being chaplain', just as 'Caesar is not worthy [*dignus*] to be a decurion'.[20] With these examples Baldus captures the relationship between the worthiness and aptitude of the person, and their reflection on the office. Moral worthiness entails legal aptitude. But the opposite is also true. The suitability to exercise a certain position is also related to the moral worthiness of its holder, for it measures it. Pope and emperor would be 'overqualified' for those minor offices, and so unsuitable to them.[21] To associate them with those lower ranks would be even offensive: in a world of 'ordained

18 Id., *ad* Dig.7.1.15.2, § *Sufficienter* (*ibid.*, *fol.* 317*vb*, n. 2): 'abbas debet esse melius vestitus quam monachus, quia dignor.'

19 Gloss *ad* Dig.1.9.4, § *Qui indignus* (Parisiis 1566, vol. 1, col. 120): '… Imperator indignus est quod sit praeses: ergo indignior imperio? Respon(deo) minores ordines sunt indigni eo: non ipse eis.'

20 Baldus *ad* Dig.1.9.4, § *Qui indignus* (*In Primam Digesti Veteris Partem Commentaria*, cit., *fol.* 50*va*, n. 2): 'Opponit gl(osa) Papa non est dignus esse cappellanus, ergo non est dignus esse Papa. Respon(deo) omnia continet sub se dignitas suprema. Vel aliter, Papa non est dignus plebanus villae Canalis, ergo non est dignus papatu. Nam illa est falsa: quia Papa dignus est, sed villa Canalis indigna, nec est tanti capax. Et idem in Imperatore: nam Caesar non est dignus esse Decurio, i(d est) decurionatus non est dignus Caesare, nec aliqua inferior dignitas ratione proportionis digna est amplecti quod supremus est.'

21 Hence the association often found in medieval jurists between *dignitas* and *idoneitas*. E. g. Rossi (2012), p. 151. See more broadly Peltzer (2015), pp. 23–37. The reverse, as usual, is true: *inidoneitas* also means *indignitas*. See for all Peters (1970), esp. pp. 116–134.

powers' (*potestates ordinatae*), the specific position of each person attests to a higher or lower degree of personal worthiness. The *dignitas* of the office should be commensurate with the *dignitas* of the person holding it. The reason why pope and emperor are not worthy of lower offices is that the *dignitas* of those offices is itself lower than that of the person of the pope or the prince. Those lower offices are not able to accommodate those two supreme dignities. The term chosen by Baldus to signify this inability is 'non capax'.[22] Just like 'capacity' in modern English, *capax* meant both ability and spaciousness. A lower *dignitas* cannot accomodate the 'size' of the supreme one, nor would it be worthy of a higher *dignitas* to be 'squeezed' into a lower one.

11.2 Office and incumbent

Having briefly looked at the concept of *dignitas* in its ramifications (person and office, and – within each – worthiness and aptitude), it is now important to look at the difference between office and incumbent in Baldus. To do so, we may distinguish four levels, four degrees of separation between person and office. First, obligations of person vs. obligations of the office. Second, individual offices vs. collegiate bodies. Third, individual offices where the person is worth of the *dignitas* but seeks to exercise it in a way that is unworthy of the office. Fourth, individual offices where the person representing the office is unworthy of it. Thus, beginning with agency, we will conclude with toleration.

Quite understandably, Innocent IV elaborated the concept of the legal person mainly with regard to ecclesiastical issues. Baldus adapts that concept to secular matters, first of all the notion of kingdom. Hence the famous image of the king as guardian of the Crown. That image has been more often looked as a metaphor than as a specific legal reference. Describing the prince as a guardian, as Reisenberg famously said, allows a distinction between the 'abstraction of sovereignty and its momentary possessor'.[23] This powerful metaphor is in effect also a specific legal reference. Few medieval lawyers were also great poets (Cynus is of course the proverbial exception). In juridical discourse metaphors have legal consequences, because they are legal analogies. The description of the prince as guardian and the Crown as ward is often found in Baldus, especially in some of his more politically minded *consilia*. It was one of them[24] that prompted Reisenberg's statement. In that same *consilium*, a few lines after the metaphor of the king-guardian, Baldus points to the passage in the Digest (Dig.34.9.22)

22 Rossi (2012), p. 151.
23 Riesenberg (1956), p. 97.
24 Baldus, cons.3.159 (Venetiis 1580), *infra*, this chapter, note 35.

that emphasises the most difference between the person of the guardian and the quality of being guardian. Obligations, duties and liabilities assumed by the guardian in the exercise of the wardship, states that text of the Digest, may not be imputed to the guardian as a person.[25] Indeed in Roman law the punishment for the guardian's misconduct was precisely to lift this separation and condemn the guardian to pay those debts out of his own pocket.

The Crown is immortal, and it always needs a king. When the old king dies, the new one is born – 'the king is dead, long live the king!' Kantorowicz famously analysed the point.[26] Commenting on Baldus in particular, he gave a masterful description of the image of the king as phoenix.[27] The parallel was probably not a creation of Baldus, but he found it very apt to explain the relationship between king and Crown. Just like the emperor, there is only one phoenix at any given time. In the phoenix, a single individual and an abstract category coincide. This makes the metaphor even stronger: although the only living phoenix dies, the phoenix does not. The strength of the metaphor makes it particularly suited to describe the king–Crown relationship. In his capacity as representative of the Crown, the previous individual to wear it is in no way different from the next – just as the new phoenix will be physically identical to the old one. The phoenix dies but at the same time it dies not, and so does the king.[28]

Poetry, alas, lasts only for a brief spell – it serves a precise purpose. So, immediately after the phoenix metaphor, Baldus goes back to business: the legal proceedings entrusted to the holder of an office pass on to the next incumbent, he says, for his predecessor was not given the task as an individual but as representative of his office.[29] In their quality of representative of the office, old

25 Cf. Dig.34.9.22 (Tryphon. 5 disput.). The passage is both long and remarkably complex – further comments on it would risk shifting the focus of the present analysis and so will be omitted.

26 E. Kantorowicz (1957), chapters 6 and 7, esp. pp. 291–313, 318–342, 409–413. Cf. Meder (2015), pp. 46–47 and 49–53, where ample literature is mentioned.

27 E. Kantorowicz (1957), pp. 388–390.

28 Baldus, *ad* X.1.29.14, *Quoniam abbas* (*Baldvs svper Decretalibvs* … Lugduni, excudebat Claudius Seruanius, 1564, *fol.* 89*va*, n. 2): 'Dicit ber(nardus parmensis) quod dignitas non moritur sed persona quia indiuidua sepe pereunt quod summis dignitatibus non est concessus.'

29 *Ibid.*, *fol.* 89*vb*, n. 3: 'Dicit In(nocentius) quod quando causa committitur loco vel dignitati mortuo commissario vel remoto transit delegatio ad ipsam dignitatem.' Cf. Innocent IV, *ad* X1.29.14, § *Quoniam Abbas* (*Commentaria Innocentii Quarti*, cit., *fol.* 123*ra*, n. 1): 'successores procederent in causa, cum sit iurisdictio penes loca et dignitates, et non penes personas.' For this reason the new incumbent is considered the same person as the old one. Innocent elaborated further on the point in his discussion of the dispossession of the right to make an

and new incumbent are precisely one and the same – just like the phoenix. Leaving aside political thought, we should focus on the 'legal side' of the phoenix. Somewhat prosaically, the question might very well be: when a phoenix dies, does the mortgage on the nest pass on to the new bird? Baldus' concept of legal representation in (to use an anachronism)[30] public law is best explained through the example of the king as representative of the Crown. To better understand that concept, our focus should be more on the obligations of the office. This would provide important insights as to the 'mechanism' of representation and, at the same time, on its limitations.

One of the classical texts of Baldus on the immortality of the *dignitas* is his *consilium* on whether the obligation assumed by the old king binds his successor. Baldus' answer is based on the distinction between obligations undertaken by the king as a person and obligations assumed in the name of the Crown.[31] When the prince dies, it is only the representative who dies – not the *dignitas* itself. To stress the difference between the eternal *dignitas* of the Crown and the mortal nature of its incumbent, Baldus sometimes speaks of 'office' to describe the position of the latter. So for instance, at the beginning of his commentary on the Code he states that the 'the *office* of the emperor is for the term of his life'.[32] Had he spoken of *dignitas*, the statement would have made considerably less sense.

An even better example – both in absolute terms and also for historical reasons (by the late fourteenth century the empire had seen better days) – is that

appointment (cf. *infra*, this chapter, note 94). When the election was made by someone other than the rightful elector, he could demand its annulment. If the rightful elector died, the faculty to demand the annulment would pass on to his successor, because the harm was done not to his person, but rather to the office he represented. Hence the successor is considered ('fingitur') one and the same person with his predecessor ('finguntur enim eodem personae cum praedecessoribus'). That, however, does not apply to collegiate offices: the members of the chapter can be replaced, but they do not *succeed* to one another in the sense of being identified with the predecessor. This identification can happen only through the office, but no single member of the chapter represents it individually ('sed in canonicis secus. Nam canonici qui substituuntur, canonicis non succedunt in honore et onere, sed capitulum eis succedit'). Innocent, *ad* X.1.6.28, § *Propter bonum pacis* (*Commentaria Innocentii Quarti*, cit., *fol.* 58*vb*, n. 5).

30 Cf. Chevrier (1965), pp. 841–859.

31 Baldus, cons.3.159 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini* …, Venetiis, apud Dominicum Nicolinum, et Socios, 1580, *fols.* 45*rb*–46*va*). See for all Canning (1989), pp. 86–90.

32 Id., *ad* Const. *De novo codice componendo*, § *Oportet preuenire* (*Baldi de Pervsio … svper Primo, Secvndo & Tertio Codicis commentaria luculentissima* … Lvgdvni [typis Gaspar & Melchior Trechsel], 1539, *fol.* 2*vb*, n. 8): 'officium imperatoris est ad vitam', emphasis added.

of the papacy, the 'supreme dignity' (*dignitas suprema*).[33] The pope may die, says Baldus, but the papacy does not. The question is therefore to see what obligations incurred by the previous pope (or prince) are transferred to the new one.[34] If the obligation was undertaken by the office (through the person of its previous incumbent), then the simple change in the person of the incumbent would not extinguish it. In law, there is no change in the person of the obligor: it is always the office.[35] Thinking in terms of a transfer of obligation is therefore misleading: we should think in terms of a change in the person of the legal representative.

The *dignitas* does not suffer. Baldus famously said as much contrasting the emperor Constantine, who allegedly suffered from leprosy until healed by pope Sylvester I, with his imperial '*dignitas*, which does not die nor suffer'.[36] The *dignitas* may neither feel nor will: properly speaking, volition pertains only to the physical person representing it.[37] If the *dignitas* can only will through the person of its representative, it also needs the same person to act. Alone, the *dignitas* may not act.[38] Although rather self-evident, this is nonetheless important. Because

33 Id., *ad* Dig.1.9.4, § *Qui indignus* (*In Primam Digesti Veteris Partem Commentaria*, cit., *fol.* 50*va*, n. 2).

34 Id., cons.3.159 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini*, cit., *fol.* 45*va*, n. 3): 'imperator in persona mori potest: sed ipsa dignitas, seu imperium immortalis est, sicut et summus Pontifex moritur, sed summus Pontificatus non moritur, et ideo quae procedunt a persona, et noua fede, personalia sunt, si a successiua uoluntate dependent. Si autem statim transferunt secum in plenum tunc mors collatoris non impedit beneficium, quin duret tempore successorio.'

35 *Ibid.*, *fol.* 45*vb*, n. 4–5: 'in contractib(us) Regum est expressum, quod contractus transeunt ad successores in regno, si celebrati sunt nomine dignitatis, extra, de re iud(icata) c. abbate in prin(cipio) lib. 6 (VI.2.14.3), et extra de iureiur(ando) c. intellecto per Inn(ocentium) [cf. Innocent, *ad* X.2.24.33, § *Intellecto, Commentaria Innocentii Quarti*, cit., *fol.* 289*va*], nec mirum, quia in regno considerari debet dignitas, quae non moritur … unde cum intellectu loquendo, non est mortua hic persona concedens, s(cilicet) ipsa reipublica regni, nam uerum est dicere, quod respublica nihil per se agit, tamen qui regit rempublicam, agit in uirtute reipublicae, et dignitatis sibi collatae ab ipsa republica. Porro duo concurrunt ut in Rege: persona, et significatio. Et ipsa significatio, quae est quoddam intellectuale, semper est perseuerans enigmatice, licet non corporaliter: nam licet Rex deficiat, quod ad rumbum, nempe loco duarum personarum Rex fungit, ut ff. de his, quib(us) ut indi(gnis) l. tutorum (Dig.34.9.22), et persona Regis est organum, et instrumentum illius personae intellectualis, et publicae.'

36 Baldus, *proemium* ad Digestum Vetus (*In Primam Digesti Veteris Partem Commentaria*, cit., *fol.* 3*ra*, n. 38): 'dignitas qua non moritur, nec patitur.'

37 Id., *ad* Dig. 1 Const. *Omnem*, § 7, *Haec autem tria* (*ibid.*, *fol.* 5*vb*, n. 6): 'volunctas proprie attribuitur personae: sed improprie attribuitur dignitati. Et ideo si verba in dignitate non sonant, in dubio praesumuntur sonare in personam.'

38 Id., *repetitio ad* Dig.4.4.38.1, § *Item quod dicitur* (*ibid.*, *fol.* 246*rb*, n. 45): 'ecclesia sine Papa nihil agit: ideo oportet quod per alium regatur, sicut et regitur minor.'

the opposite is not true: the person may well act not as representative of the office but as individual. The problem, as Baldus puts it, is that in both cases the person is always the 'immediate cause' (*causa immediata*) of an act. This makes it difficult to determine when the act should be ascribed to the office and not to the individual person. It is not fortuitous that the most important comments of Baldus on the difference between person and office deal with succession – first of all, to the throne. Because the most efficient way to divide person from office is to remove the physical person from the picture, so as to determine which obligations and rights should pass on to the next incumbent in office.[39]

The difference between a direct and an indirect relationship between the person and the office appears most clearly in the opposition between Caesar and his wife. One of the most quoted texts of Baldus on the immortality of the Crown deals with succession. 'The *dignitas* does not die' (*dignitas non moritur*), so the new prince takes the place of the old one. In effect, Baldus' text dealt with a slightly different and rather more technical matter. Baldus was commenting on the second of the two books of the Digest devoted to legacies (Dig.31). This book contained two texts, one after the other, on which medieval jurists usually commented together (Dig.31(.1).56–57).[40] The first text stated that, if the testator left a bequest to the prince but the emperor died before the testator,

39 See esp. Id., cons.3.121 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini*, cit., *fol.* 34*ra*, n. 6): 'quaedam sunt, quae competunt personae in dignitate, ita quod persona sit causa immediate: dignitas autem sit causa remota. Quaedam uero sunt, quae competunt dignitati principaliter, et quia dignitas informat suum subiectum competunt personae: quia dignitas sine persona nihil agit, in primis extincta persona, quae erat finale subiectum actus: expirat ipse actus pendens, quia persona facit locum actui … Et ideo quaecunque sunt singularis fidei, et industriae, tanquam singulares animi passiones morte annihilantur et non transmittuntur, vnde fidem, et industriam nemo transmittit. In secundis autem, quae competunt dignitati per prius, et personae in dignitate positae per posterius, et per sic necesse esse, quia (ut dixi) iurisdictio sine persona nil agit, ut ff. de origi(ne) iur(is) l. 2 § post originem iuris (Dig.1.2.2.13). Ibi attendimus dignitatem tanquam principalem: et personam tanquam instrumentalem. Vnde fundamentum actus est ipsa dignitas, quae est perpetua, extra de offic(io iudicis) deleg(ati) c. quoniam abbas (X.1.29.14). Cf. Id., cons.3.217 (*ibid.*, *fol.* 63*va*, n. 3): 'Cum persona sit assumpta loco finalis causae prorograndi ab alio non futuro, personalis, quae est alia in substantia hominis, et non persona idealis, quae est dignitas, ipsa facit locum prorogationi, et non dignitas, igitur extincta persona extinguitur prorogatio.'

40 E. g. Vivianus Tuscus, *ad* Dig.31(.1).56, *casus ad* § *Quod principi* (Parisiis 1566, vol. 2, col. 901): 'Legaui imperatori, et ipse decessit ante diem legati cedentem, id est ante mortem meam: certe ad sequentem imperatorem transmittur. Secus autem esset in Augusta, cui legatum esset et h(oc) d(icit) l(ex) seq(uens) (i. e. Dig.31(.1).57). Vivianus.'

then the bequest would go to the next emperor.[41] The second text looked at the bequest to the Augusta (the emperor's wife) and stated the opposite: if the testator bequeathed something to the Augusta but she predeceased him, then the bequest would be void.[42] The Gloss sought to explain the difference: the Augusta enjoys most of Caesar's privileges, but not all of them. So for instance she cannot legislate.[43] Clearly the Gloss said nothing on legal representation – the contrary would be surprising.[44] In his comment on the same text, Bartolus went a step beyond the Gloss: a bequest left to the incumbent in an office goes to the successor only if the link between person and office is direct (as in the case of Caesar), not also when the link is indirect (like that of Caesar's wife).[45] It follows that a bequest to the bishop not as a specific person but as incumbent in the office does pass on to his successor. But, Bartolus observed, the same does not apply to his vicar: the vicar of the bishop is not the representative of the office, but rather the representative of the person – the bishop – who acts as representative of the bishopric.[46]

In his turn, Baldus goes a step beyond Bartolus. This however is a very significant step, for it would establish an important principle. The difference between Caesar and his wife is that the *dignitas* – in the sense of office – is attached only to the prince. The wife of the incumbent has a *dignitas* simply by association. The *dignitas* of the office does not die. So the bequest to Caesar is always valid, because it was meant to the office, not the specific incumbent (or rather, the recipient was determined by reference to the office, which is immortal). But the Augusta has a *dignitas* only in the sense of social (and so, moral) standing, not also in the sense of legal representation (and so, of office).

41 Dig.31(.1).56 (Gaius, 14 Iul. et Pap.): 'Quod principi relictum est, qui ante, quam dies legati cedat, ab hominibus ereptus est, ex constitutione divi Antonini successori eius debetur.'

42 Dig.31(.1).57 (Mauricius, 2 Iul. et Pap.): 'Si Augustae legaveris et ea inter homines esse desierit, deficit quod ei relictum est, sicuti divus Hadrianus in Plotinae et proxime imperator Antoninus in Faustinae Augustae persona constituit, cum ea ante inter homines esse desiit, quam testator decederet.'

43 Gloss *ad* Dig.31(.1).56, § *Si augustae* (Parisiis 1566, vol. 2, col. 901): '… tu dic eadem priuilegia, sed non omnia: nam nec legis condendae.'

44 Looking at what the most renown jurists between the Gloss and Baldus wrote on the subject might easily provide a good basis for a prehistory of representation theory in civil law, but that would go far beyond our purposes.

45 Bartolus, *ad* Dig.31(.1).56, § *Quod Principi* (*in II. partem Infortiati*, cit., p. 105, n. 1): 'Relictum sub nomine dignitatis, transit ad successorem in dignitate, si dignitate, quis habet per se: secus si per consequentiam alterius.'

46 *Ibid.*, n. 3: 'Et sic facit ista lex, quod si relinquitur episcopo sub nomine dignitatis, transit ad successorem: secus si relinqueretur uicario: quia tunc non transit in sequentem uicarium.'

She is Augusta simply by association with the incumbent on the throne, so when she dies her (personal) dignity dies too. 'Such a *dignitas* dies with the person', and a new one is created by association with the ever-existing office of the Crown: 'with a new Augusta, a new *dignitas* is created'.[47] It is in the light of this explanation that Baldus recalls Bartolus' example of the bequest to the bishop and to his vicar. The different perspective also leads to a different explanation of the same example. Just like Caesar, says Baldus, the office of the bishop is immortal and always the same: since it does not die, the bequest may well be received by the next incumbent. But the office of the vicar, he continues, is closer to the dignity of the Augusta: just as a woman becomes Augusta only when she is married to the representative of the Crown, so a man is episcopal vicar only when another man becomes representative of the bishopric and appoints him.[48]

The same difference between person as individual and person as legal representative is clearly visible in Baldus' comment on another text, this time in the Code. There, the emperor decreed that provincial governors could refer criminal cases to him only after having notified the parties.[49] Commenting on this text, Baldus wonders what would happen if the governor did consult the prince, but the prince died before he could reply. Should the governor start the

47 Baldus, *ad* Dig.31(.1).56, § *Quod Principi* (*Baldi Vbaldi … In Primam et Secvn*[*dam*] *infortiati partem, Commentaria …* Venetiis [apud Iuntas], 1577, *fol.* 151*vb*): 'Relictum dignitati, qua quis habet per se, non potest effici caducum, quia dignitas non moritur: secus si relinquatur dignitati, quam quis habet per alium, quia talis dignitas moritur cum persona, et facit hoc ad rationem quam assignat tex(um) extra, de praeben(dis) c. dilecto (X.3.5.25), et no(tatur) quod in l. quod Princi(pi) (31(.1).56) dignitas vacat, et l. si Augusta (Dig.31(.1).57), dignitas desinit. In tex(tu) constitutionis tamen, non continet haec constitutio ius singulare, sed commune, quia Imperium, et dignitas semper est et non moritur; et facit quod no(tatur) s(upra) de pac(tis) l. tale pactum, in fi(ne) (Dig.2.14.40.3). In l. si Augusta (Dig.31(.1).57), Augusta non habet dignitatem ex se, sed per modum cuiusdam dependentiae, i(d est) accessionis, et ideo in tali dignitate non habet successorem, vnde sua dignitas eius morte finitur, et cum noua Augusta noua dignitas creatur.'

48 *Ibid.*, 'et ideo dicit Bar(tolus) quod si relinquitur Episcopo, et Episcopus moritur, viuo testatore, quod debetur successori; secus, si relinquitur Vicario, et Vicarius moritur viuo testatore, quia Vicarius de nouo creatus non habebit istud legatum secundum Bar(tolum). Item no(tatur) in l. quod Principi (Dig.31(.1).56), quod legatum quod immortali relinquitur non potest effici caducum, vel quasi: vnde quando relinquitur pauperibus in genere, quia genus non potest perire, istud legatum non potest effici caducum.'

49 Cod.7.61.2 (Valentinianus and Valens AA. ad Viventium PP.): 'Super delictis provincialium numquam rectores provinciarum ad scientiam principum putent esse referendum, nisi ediderint prius consultationis exemplum. Quippe tunc demum relationibus plena maturitas est, cum vel adlegationibus refelluntur vel probantur adsensu.'

procedure anew or could the next prince just reply to the petition addressed to his predecessor? The petition was addressed to the prince in his capacity as representative of the Crown and not as a private individual, reasons Baldus. And the governor is awaiting a reply from the Crown, not from the private person who wears it. Hence Baldus concludes that the new incumbent may reply to the petition addressed to the Crown in the person of the previous emperor. This text of the Code (especially in its medieval interpretation) referred to the decisions rendered by the emperor in his quality of highest judge. Clearly the decision of this supreme judge did not depend on the personal qualities of the physical prince, but from the position of the emperor as the apex of the hierarchical jurisdictional structure.[50] This strengthens Baldus' conclusion: the petition of the governor is clearly addressed to the Crown, he says, because in its decision is 'engraved' the *dignitas* of the Crown itself ('illa dignitas imprimit in actu quam gerit').[51] This powerful image helps to clarify further the difference between acts of the person and of the office.

Once the rule is neatly described, Baldus applies it to more complex cases. What if the testator appointed as executor the prior of the Dominicans, and the prior died before he could carry out the task? The choice of the Dominican prior, argues Baldus, is dictated by the *dignitas* of his office: the testator appointed him 'as a person made perfect in Christ'. The *dignitas* of that position attests to the moral worthiness of its incumbent. So the choice was not dictated by the specific qualities of the individual, but rather by the qualities needed to hold that office. The appointment as executor therefore passes on to the next prior. The opposite solution, adds Baldus, would apply if the incumbent in an office were to be appointed as *arbiter*, since the choice of the *arbiter* depends on personal considerations. As such, explains Baldus, even if the person appointed as *arbiter* were to hold an office, that would not add anything to the verdict: 'the *dignitas* would not bestow anything on the deed'. Unlike the decision of the prince in the

50 Incidentally, it might be noted that the higher jurisdiction of the emperor is strictly related to his *dignitas*. To have jurisdiction over the parties, the judge had to enjoy a higher status – he should be superior to them. Hence the supreme *dignitas* of the emperor entailed the highest degree of jurisdiction.

51 Baldus, *ad* Cod.7.61.2, § *Super delictis* (*svper VII, VIII et Nono Codicis*, cit., *fol. 99rb*, n. 3): 'Quero si preses consuluit principem et princeps moritur an debeat expectari responsum successoris. Respondeo quia consultatio concernit principaliter dignitatem que non moritur vt l. quod principi, de leg(atis) ii (Dig.31.(1).56) licet persona sit organum ipsius dignitatis sine quo dignitas nil facit … aut tanquam dignitas non expirat aut tanquam persona in dignitate: et tunc illa dignitas imprimit in actu quam gerit aut demostrat cum quo geratur. Primo casu commissio est realis, secundo est personalis: quia prima persona est immediata causa commissionis.'

text of the Code, in other words, the *arbiter*'s office would not 'engrave' its *dignitas* on the verdict.[52]

While much of Baldus' thinking on representation is based on Innocent IV, sometimes he builds on other pre-eminent canon lawyers, chiefly Johannes Andreae.[53] One of these cases is particularly relevant for our purposes. Johannes Andreae wondered whether the oath to a prelate would still bind even after the prelate's deposition from office. He answered in the negative on the basis of the reverse situation: if the prelate swore as representative of the office ('if the *praelatus* swore as *praelatus*'), then his *persona* would not be bound once divested from that office.[54] The juxtaposition between *persona* and *praelatus* (and the image of the *persona* divesting itself of the *praelatura*) is further developed by Baldus. If the prelate tendered his oath 'not as himself in his own person, but as someone else in the person of the church', then the dismissal from office or its renunciation would release him from the obligation. In this case, Baldus relies on the prohibition on enforcing a judgment against the guardian (*curator*) of the insane after the death of the insane person.[55] Just as the ex-guardian, reasons Baldus, the prelate is no longer bound because he ceased to represent the office for which he swore the oath. The solution of course would be the opposite, he continues, if the prelate incurred in the debt not 'for the utility or necessity of

52 *Ibid.*, 'Respon(deo) aut fides sumitur ratione officii vt quando testator reliquit executorem priorem predicatorum et transit ad successorem: ei enim committitur tanquam persone perfecte in Christo … aut dignitas actu nihil confert: et tunc expirat vt in compromissa: quia compromittere est quod personale.' This discourse is further elaborated in the *lectura institutionum* that bears the name of Baldus, but it is not reported here, for the author of that work is in fact Bartolomeo da Novara: cf. Maffei (1990), pp. 5–22. Compare Innocent IV, *ad* X.1.29.43, § *Eligere* (*Commentaria Innocentii Quarti*, cit., *fol.* 144*va*, n. 3) with the comment on Inst.2.16.7, § *Substituitur*, found in *Baldi Vbaldi Pervsini … Praelectiones In quatuor Institutionum libros* …, Venetiis, 1577 (*fol.* 26*rb–va*, n. 2–5).

53 *Supra*, this chapter, note 4.

54 Johannes Andreae, *ad* X.1.6.34, § *Iuramentum huiusmodi* (*In primum Decretalium librum Nouella Commentaria*, *fol.* 108*vb*, n. 38): 'et sic not(andum) quod si iuro alicui praelato, ipso deposito, non teneor personae ratione iuramenti … pari ratione videtur, quod si praelatus vt praelatus denarios, vel quicquid aliud dare iurauit, dimissa praelatura, persona non remanet obligata, i(nfra) de no(vis) ope(ris) nun(ciatione) c. 2 (X.5.32.2) …, et hoc est verum, quod de pecunia dictum est, si in vtilitatem praelaturae pecunia fuit versa: aliter secus …'.

55 Dig.26.9.5pr (Papin. 5 resp.): 'Post mortem furiosi non dabitur in curatorem qui negotia gessit iudicati actio, non magis quam in tutores, si modo nullam ex consensu post depositum officium novationem factam et in curatorem vel tutorem obligationem esse translatam constabit.'

the church, but for his own business'.[56] The most interesting part of this passage – something that is not found often in Baldus – is the description of the way in which the incumbent assumes an obligation for the office. When the prelate tenders his oath for the church, says Baldus, it is not the person of the prelate who does so: the prelate acts 'as someone else' (*tamquam alius*). Hence the relationship with the case of the ex-guardian: after the death of the insane, the guardianship is extinguished. So it is not possible to enforce a judgment against the guardian: the guardian, reasons Baldus, no longer exists. What is left is only the individual who used to exercise that role. And this individual is liable only for his own obligations.

11.3 Collegiate bodies and possessory issues

Just as the Crown needs the king, so the church needs the prelate: 'the church may do nothing without the prelate, nor the prelate can do anything without the church'.[57] The metaphors of the phoenix and of the wardship, previously used for the Crown, are here replaced by the ecclesiological concept of 'mystical body' where the prelate, becoming one with the church, is considered almost as the 'true soul' (*vera anima*) that directs the 'true body' (*verum corpus*) of the church.[58] But here as well the purpose is eminently practical: to explain – and circumscribe – the concept of representation. Without the 'body' (the church), the prelate would be, so to speak, 'pure soul': he could not act. This is because his action would not be that of the representative, but of a private individual – and so, ultimately, not done as prelate.[59]

Between Crown and church, however, there is an important difference. Not all ecclesiastical dignities are individual offices. It is only when the office is

56 Baldus, *ad* X.1.6.34, § *Venerabilem* (*Baldvs svper Decretalibvs*, cit., *fol.* 65*vb*, n. 14): 'Quero prelatus nomine prelature iurauit aliquid soluere debere tandem vitio suo depositus est ab officio, vel renuntiauit in manibus superioris, vtrum sit liberatus a vinculo iuramenti, dicit Io(hannes) an(dreae) quod sic, quia non iurauit tanquam ipse in propria persona, sed tanquam alius in persona ecclesie [cf. *supra*, this paragraph, note 54], ff. quando ex facto tutorum, <l.> vel post mortem (Dig.26.9.5), quod verum est si debitum erat contractum pro vtilitate vel necessitate ecclesie secus si pro negotiis proprijs.'

57 Id., *ad* X.2.13.5, § *Item cum quis* (*ibid.*, *fol.* 150*ra*, n. 5): 'Ultimo no(tatur) quod ecclesia sine prelato nihil agit nec prelatus sine ecclesia sicut tutor onerarius non habens administrationem, vt ff. de sol(utionibus) l. quod si forte § i (Dig.46.3.14.1).'

58 *Ibid.*, 'Ex his apparet quod ecclesia et prelatus sunt vnum corpus misticum sicut verum corpus et vera anima ipsius sunt vnum quid naturale.' Cf. Meder (2015), pp. 44–46.

59 *Supra*, this paragraph, note 57.

represented by a single person that proper representation occurs. A typical example is that of the bishop: whenever the bishop exercises his jurisdiction, he does not do so as an individual person, but rather as the incumbent of the *dignitas* he represents.[60] The image of the bishop is also useful for introducing another figure, that of the cathedral chapter that should elect him.[61] Unlike the episcopal *dignitas*, the chapter is a collegiate body: no private individual in a collegiate body may be considered to act as its legal representative. We have seen that the office does not will. But the formation of its volition may be entrusted to a single person or to a plurality of individuals. In this second case, the will of no single individual translates directly in the volition of the office. This is why the case of the chapter was a favourite of Innocent for highlighting the difference between the two instances.

Baldus elaborates on the point when looking at issues of the possession of incorporeals. As no one may take possession of what has no body, in Roman law a servitude is typically lost through non-use. Some servitudes, however, are not meant to be used. They are called negative servitudes. In the case of negative servitudes, the right is lost through passive acceptance of a behaviour that is incompatible with the servitude itself. So, for instance, the right to a view is lost when the owner of the building that enjoys that servitude lets his neighbour build up without doing anything. Could the right of election be lost in the same way? Except for servitudes, a right is not lost by simple non-use. But, on a practical level, the possession of that right might. Therefore, asks Baldus, if an appointment is made by someone other than the person who has the right to do it without opposition, does this inertia lead to the loss of the possession of the right? The answer, explains Baldus, depends on whether the person who did not

60 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 217*vb*, n. 53): 'Sed pone quod episcopus vtatur iurisdictioni episcopali: quero an dicatur in episcopali possesione sine ecclesia uel persona. Dicit Inno(centius) quod ecclesia, quia is possidet cuius nomine possidetur, vt no(tat) Inno(centius) de reli(giosis) do(mibus) c. cum dilectus (X.3.36.8). Intellige quod non possidet persona, s(cilicet) nomine suo proposita; sed si nomine appellatiuo possidet, bene possidet.' We have seen how Innocent relied on X.3.36.8 to highlight the difference between *de facto* exercise of jurisdiction and *de iure* representation *supra*, pt. II, §7.6.

61 It should however be noted that, by the second half of the fourteenth century (when Baldus was writing), the role of the chapter in the episcopal election was more important in theory than in practice: by then, episcopal elections were mostly papal appointments. In the period between Innocent's and Baldus' times, the old practice of the election had progressively been eroded by the increasing intervention of a series of popes (starting with Innocent IV himself). This effectively made a good part of the complex set of provisions on elections in canon law somewhat obsolete. Cf. most recently Larson (2016), pp. 75–76, text and note 4, where ample literature is listed.

oppose the usurpation of the right represented the office by himself, or was simply one of the individuals who contributed to form the office's will. In other words, if the right to make the election belonged to an individual office, then the office would lose the possession of that right through the inertia of its representative. If however the right belonged to a collegiate office (such as the chapter), then the solution would be the opposite. The reason, concludes Baldus, is that the persons who make the election act 'as a chapter' (*ut capitulum*), not 'as single individuals' (*ut singuli*). Given the collegiate nature of the office, the inertia of any single person may not be imputed to the office itself.[62] In stating as much Baldus relies openly on Innocent (who, admittedly, was perhaps clearer on the point).[63] Later, when writing his commentary on the *Liber Extra* (and so, interestingly, during the Great Schism)[64] Baldus would apply the same reasoning to the cardinals' possession of the right to elect the pope: the cardinals hold that right not in their own name, but for the universal Church. As such, he argues, even if they were to lose possession of that right, the Church would still retain it.[65]

62 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 117*rb*, n. 42): 'Queritur an negligens perdiderit possessionem. Sol(utio), secundum Innoc(entium) aut electio erat penes capitulum aut penes istum negligentem tanquam penes singularem personam. Primo casu aut eodem iure spectabat electio ad omnes, et tunc non perditur possessio. Et ratio est ista: quia ille potest perdere possessionem qui eam haberet; sed iste non habet possessionem, sed capitulum: ergo eam perdere non potest. Capitulum vero eam retinet: quia eligentes eligent vt capitulum, non vt singuli.'

63 Innocent IV, *ad* X.1.6.24, § *Qvaerelam* (*Commentaria Innocentii Quarti*, cit., *fol.* 54*va*, n. 3): 'Et not(atur) quod licet per vnum annum, vel plures ego omiserim ex causa petere debitam pensionem, vel si vna vice omisi interesse electioni, non propter hoc amitto possessionem, quae sine animo non amittitur, sed quando petam pensionem, si denegetur, tunc amitto possessionem, argu(mentum) C. de ser(vitutibus) et aqua l. fin. (Cod.3.34.14) et tunc possum vti interdicto recuperandae possessionis … Et hoc verum est, quando sum in possessione interessendi electioni, sed secus esset si essem in possessione, quod solus eligerem, quia tunc si alius eligat, et pro electo habeatur a subditis bene amitto possessionem, quia non videor habere animum retinendi possessionem, cum electum ab alio patiar vti dignitate sua, sed cum debeo interesse electioni electio, non fit nomine cuiuslibet canonici singulariter, sed nomine capituli, et ideo non priuatur possessione ille qui contemnit et qui non interest, quia capitulum quod est in possessione eligendi, non priuatur possessione eligendi, nec etiam ille, qui non interest, quia ille non suo nomine hoc ius possidebat, sed capituli'.

64 Baldus wrote his commentary on the *Liber Extra* (rather, on the first two books and the beginning of the third) in the last decade of the fourteenth century: see esp. Colli (2005), pp. 77–79. Cf. Canning (1989), p. 9, note 30.

65 Baldus, *ad* X.1.3.25, § *Olim ex literis* (*Baldvs svper Decretalibvs*, cit., *fol.* 38*ra*, n. 21): 'sive per veros cardinales sive per falsos papa eligatur ecclesia semper retinet

Other possession-related issues help to gain further insights into the matter. If a prelate loses possession of his office, asks Baldus, should he act in his own name or in the name of the office he represents? Relying once again on Innocent, Baldus opines that the prelate might well act in either capacity – as a private person or as the lawful representative of the office. Acting as a private person would be easier, for he should only prove the dispossession. Acting as the representative of the office would also be possible, just slightly more complex, since the prelate should first of all prove his right to represent the office.[66] In relying on Innocent, Baldus omits a detail in the pope's reasoning. That detail is trivial in itself, but interesting for our purposes. Also for Innocent the dispossessed prelate could act either in his own name or – with a slightly more complex procedure – in the name of the office (just as Baldus reports). But then, added Innocent, it would be perhaps better that the prelate acted in his own name. For the intruder sought to deprive the incumbent of his office, not to dispossess the office itself.[67] The comment was only apparently a sophism: in

possessionem vt l. quesitum [*sed* 'l. Qui fundum'] ff. quemadmodum ser(vitudes) amit(tuntur) (Dig.8.6.12), nec potest ecclesia vniuersalis desinere possidere quia non potest expelli. Ita quia in iuribus incorporalibus nemo mero iure eiicitur vt ff. de vsu(rpationibus) l. sequitur § si viam (Dig.41.3.4.26), et si expellerentur cardinales tamen quia ipsi non possident nomine suo sed nomine totius catholice ecclesie ipsa vniuersalis ecclesia non perdit possessionem eligendi.' Cf. Tierney (1998), p. 195; Wilks (1963), p. 511, note 5.

66 Id., *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 218*ra*, n. 60–62): 'Item queritur an prelatus expulsus aget interdicto recuperande possessionis vel ex canone reintegranda suo nomine an nomine dignitatis. Respondeo: restitutione possessionis prelature et iuris episcopale et generaliter et in genere petit suo nomine: sed restitutione fundi vel domus petit nomine ecclesie. Officium enim est proprium persone ipsius; res autem et possessio iterum est ecclesie non persone, vt in c. <in> literis (X.2.13.5) per Inno(centium). Iuxta hoc queritur an prelatus suo nomine habeat aliquam possessionem rerum ecclesie. Dicit Inno(centius) quod suo nomine habet naturalem sed nomine ecclesie habet naturalem et ciuilem in d. c. in literis (X.2.13.5), ergo duo possident naturaliter s(cilicet) prelatus et ecclesia quod est impossibile. Item si prelatus suo nomine possidet, ergo suo nomine agit quod s(upra) ipse negasse videtur, sed respondet utroque modo potest agere, sed consultius facit agere nomine proprio: quia si ageret nomine ecclesie haberet necesse se probare canonicum vel prelatum esse nec sufficeret sibi esse in possessione … Sed si agit nomine suo sufficit sibi probare de nuda possessione secundum Inn(ocentium). Aperte dicit ergo hic Innoc(entius) quod agenti nomine ecclesie non sufficit probare de possessione: sed debet probare de canonica installatione.'

67 Innocent, *ad* X.2.13.5, § *Prius* (*Commentaria Innocentii Quarti*, cit., *fol.* 228*ra–b*, n. 8): 'Sed alijs qui nituntur authoritate superioris, et ius habent in dignitate, vt sunt confirmati, non est vtile proponere interdictum recu(perandi) pos(sessione) suo nomine ad recuperandam possessionem rerum ablatarum, quae ad dignita-

fact, it was a subtle point. Dispossession of lands, buildings or rights pertaining to ecclesiastical offices was common practice (and a very frequent cause of legal disputes). In those cases the offence was clearly addressed to the office, which would suffer a prejudice. But it is difficult to see exactly why dispossessing the person should amount to a prejudice to the office. Hence Innocent's point.

11.4 Incumbent versus office

The most interesting pages of Baldus on representation issues are on individual offices, not collegiate ones. Here lies Baldus' most original contribution to Innocent's theory: the inner limits of the validity of the commands of the incumbent. In this regard, the description of *officium* in terms of *dignitas* is of particular importance. We have seen that the double meaning of *dignitas* – moral and legal – does not apply only to the person holding the office, but also to the office itself. The office is a *dignitas* not only in the legal sense of a *persona ficta*. The Pauline image of the world as a concentric series of 'ordained powers' that we saw earlier[68] coloured the office with both legal and moral values. So for instance the *dignitas* of the papacy is supreme, not just because it is placed at the apex of the jurisdictional pyramid, but also because it embodies Christian values in their highest degree. And this higher moral worthiness justifies the exercise of a jurisdiction higher than any other. The same goes for the *dignitas* of the (imperial) Crown. The two meanings of *dignitas* (legal and moral) are closely related with each other, but the person of the incumbent can be easily separated from the office he represents. The office acts only through its legal representative, but not all the legal consequences of the person's acts (in terms of legal obligations) are to be referred to the office. We have already seen as much.

In particular cases, it is even possible to separate (at least in part) the legal meaning of *dignitas* from the moral one. The typical example in medieval canon

> tem pertinent, quia non possidet pertinentia ad dignitatem nomine suo, sed nomine dignitatis, nomine ergo dignitatis quae est expoliatio intendet possessorium, vel petitorium. Si tamen vellet suo nomine petere restitutionem possessionis in genere iuris canonicalis episcopalis generaliter, et in genere bene faceret, quia illud in genere possidet nomine suo tantum, et quia spoliator ipsum spoliare intendebat, non ecclesiam, sup(ra) de caus(a) pos(sessionis) <c.> cum super (X.2.12.4). Tamen ad hoc, vt possit petere restitutionem possessionis generaliter, oportet quod superioris authoritate eius, scilicet, ad quem pertinet ex officio habuit possessionem generalem dignitatis, scilicet, per installationem, vel alium modum consuetudinarium, vel etiam sententiam, vt hic et inf(ra) sequitur.' By contrast, when it is the intruder who is deprived of possession, he may seek to be reinstated but can only act as a private individual ('et agatur proprio nomine tanquam spoliati possessione iuris canonici', *ibid*).

68 *Supra*, this chapter §11.1, text and note 8.

law is that of the insane bishop. The mentally ill bishop cannot be forced to resign from his *dignitas*, but he may be deprived of its exercise because of his incapacity.[69] We have already seen the opposition between subjective and objective *dignitas* with regard to unworthy prelates – schismatics, heretics and the like. In such cases the prelate was morally unworthy, and that ethical baseness ought to translate into legal incapacity. So the heretic was fully *indignus* – both unworthy and, in principle, also unfit. In the case of the insane bishop, much to the contrary, the lack of legal fitness to exercise his office has nothing to do with the underlying moral worthiness. This separation between the two faces of the personal *dignitas* entails a similar division with regard to the office. While retaining the *dignitas* of his office (he is still the head of the diocese), explains Baldus, the bishop however loses the power to act for it.[70] The interest in this case lies ultimately in that the symmetry of the *dignitas* of person and office is maintained. The bishop remains morally worthy, but he is now legally unfit. Consequently, he is still worthy of the *dignitas* of his office, but is unable to exercise it.

We have previously seen how Baldus separated the person from the office and distinguished between obligations of the person *qua* individual and *qua* representative. If we coupled this distinction with the symmetry between the *dignitas* of the person and of the office, we may reach a further degree of separation between representative and office in Baldus – something that is not to be found in Innocent. The act of the king that goes against the *dignitas* of his office, says Baldus, is void.

To explain this point, we might go back to the image of the king as custodian of the Crown. The separation between person and office allowed a distinction between the personal obligations of the king and the undertakings of the Crown. But the same separation leads to another and more difficult issue: the validity of the acts carried out by the person of the sovereign against the Crown. The most important canon law source on the subject is probably Honorius III's decretal *intellecto* (X.2.24.33), which Baldus cites when distinguishing between the obligations of the person and those of the Crown.[71] The decretal absolved

69 D.7 q.1 c.14. On the point see most recently Parlopiano (2015), pp. 96–98, text and notes.

70 Baldus, *ad* Dig.26.5.8.1, § *Si praetor* (*In Primam et Secvn*[*dam*] *infortiati partem*, cit., *fol.* 29*rb*): 'Furor vel dementia superueniens non tollit dignitatem, sed administrationem sic. H(oc) d(icit) in tex(to) "momenti": per hunc § determinatur quod si Episcopus fiat furiosus, licet remanet Episcopus, non potest conferre praebendam quasi propter furorem sit priuatus exercitio dignitatis.' Cf. Dig.26.5.8.1 (Ulp. 8 de omn. trib.): '… quamvis enim praetor vel praeses sit nec furor ei magistratum abroget, attamen datio nullius erit momenti.'

71 *Supra*, this chapter, note 35.

the king of Hungary from his oath to keep the previous alienations of the Crown's rights. The oath should not be kept, said Honorius, because it was incompatible with the crowning oath that the king had sworn beforehand, when he undertook to preserve the rights of the Crown.[72] The case has been widely studied,[73] but it is mentioned here for a different reason. It is on that decretal that Baldus builds the distinction between valid and invalid commands of the king. Baldus could have looked at the canon law sources prohibiting the incumbent from acting against the utility of the Church, but such examples might have not been useful with regard to the prince – just as they were not particularly elaborate with regard to the pope.[74] Hence he opts for a reference to natural law: the orders of the person of the king that detract from the *dignitas* of the Crown are 'contra ius naturale' and so void. So the king may not order a subject to sacrifice his life for nothing, for that would go against natural self-preservation. By contrast, when the same sacrifice is requested for the sake of the kingdom, then the command is valid.[75] For our purposes, the most relevant

72 X.2.24.33: 'Intellecto iamdudum, quod carissimus in Christo filius noster Hungariae rex illustris alienationes quasdam fecerit in praeiudicium regni sui et contra regis honorem, nos, super hoc affectione paterna consulere cupientes, eidem regi dirigimus scripta nostra, ut alienationes praedictas, non obstante iuramento, si quod fecit de non revocandis eisdem, studeat revocare, quia, quum teneatur, et in sua coronatione iuraverit etiam, iura regni sui et honorem coronae illibata servare, illicitum profecto fuit, si praestitit de non revocandis alienationibus huiusmodi iuramentum, et propterea penitus non servandum.'

73 While the literature on the decretal *Intellecto* is vast, mention should be made at least of the classical work of Riesenberg (1956), pp. 48–58 and esp. 113–144 and 161–175, together with that of Post (1964), pp. 393–401 (where, significantly, the author ascribes the inalienability clause to the *dignitas* of the kingdom). For a more specific focus on the decretal as studied against the background of the relationship between the Hungarian Crown and the papacy see in particular Sweeney (1975), pp. 235–251, and Sweeney (1976), pp. 89–96. See also more recently Štulrajterová (2011), pp. 219–250, where further literature is listed.

74 In principle, even Innocent IV accepted that the pope could not act in a manner prejudicial to the 'general state of the Church'. But that limit proved a rather narrow one – particularly in Innocent, who clearly stated that the pope's command must be obeyed even if unjust. See esp. Innocent, *ad* X.5.39.44, § *Mortale* (*Commentaria Innocentii Quarti*, cit., *fol.* 555*rb*, n. 3): '… Sed quid si papa iniustum praecipiat, qui superiorem non habet, cum quo agi possit, potest dici, quod si de spiritualibus vel ecclesiasticis personis aliquid praecipit, etiam iniustum illud seruandum est, quia nemini licet de eius factis iudicare, 40 distin. <c.> si Papa (D.40, c.6), 11 quaestio 3 <c.> cuncta (C.11, q.3, c.17).' On the point see e. g. Tierney (1998), pp. 82–83, text and note 6, and esp. Buisson (1982), pp. 260–265 (where the passage of Innocent – here abridged – is reported in full, p. 262 note 134).

75 Baldus, cons.3.159 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini*, cit., *fol.* 46*rb*, n. 7–8): '… dumtamen non faciat aliquid, per quod minuatur honor

element of Baldus' argument is not the reliance on natural law as an inner constraint on the power of the king,[76] but rather, and once again, the distinction between representative and office. The command of the incumbent is void because it cannot possibly be imputed to the office he represents. So it remains the simple volition of someone who, as an individual, has no authority over the

coronae, uel status Regni, ut extra de iureiu(rando) c. intellecto (X.2.24.33) et ex hoc sequitur, quod donatio facta Titio militi ualuit. Secundo, praemittendum est, quod praeceptum Regis est seruandum, dum tamen sit iustum, uel saltem non iniustum. Unde si Rex praeciperet subdito suo, quod interficeret seipsum, uel iret ad locum, in quo trucidaretur ab hoste, uel mitteret filium suum ad uictimam, in hoc non est parendum Regi: quia talia mandata sunt contra ius naturale. Sed si mandat alicui, quod defendat patriam, et honorem Regis, etiam si hoc non posset fieri sine periculo, parendum est Regi: quia hoc ius regni erit etc. … Per hoc reuertor ad propositum, si Rex mandauit, quod miteret filium suum pro obside, unus Christianus in manus saracenorum, uel crudelis tyranni, non ualeret mandatum: ut l. ut uim, ff. de iust(itia) et iu(re) (Dig.1.1.3) et ff. de cap(tivis) et <de> postl(iminio) reuer(tis) (*sic*), l. postliminium § filius (Dig.49.15.19.7), et totum hoc redigendum est ad arbitrium boni uiri; et per hoc apparet, utrum illi praecepto de mittendo filium in obsidem debuerit parere, uel non, ar(gumentum) ff. quod me(tus) ca(usa) l. isti quidem in fi. (Dig.4.2.8.3).' While the reference to Dig.1.1.3 was fairly obvious, that to a text as specific as Dig.49.15.19.7 was probably suggested by the comment in the Gloss, which linked *patria potestas* with natural affection, thereby suggesting (especially to a later jurist like Baldus) the connection with natural law. Cf. Gloss *ad* Dig.49.15.19.7 § *Charitas* (Parisiis 1566, vol. 3, col. 1673): 'id est patria potestas, quae fuit inducta propter affectionem liberorum iure ciuili Romanorum.' A similar position, although less elaborate, may be found in some passages of Baldus on the *Liber Extra*, especially *ad* X.2.19.9 (*Baldvs svper Decretalibvs*, cit., *fol.* 170*va*, n. 7): 'non tamen posset imperator donare claues imperii, sicut ille qui tenet claues portarum tenetur eas resignare successori, alias potest dici proditor vt no(tatur) C. de acq(uirenda) pos(sessione) l. fi. (Cod.7.32.12), ff. de le(gats) ii l. cum pater § pat(er) pluribus (Dig.31(.1).77.21). Item non potest viscera imperii euiscerare: quia esset homicida sue dignitatis.' The text is translated in English by Canning (1989), p. 87. Somewhat surprisingly, Baldus' comment on the decretal *Intellecto* itself is not particularly useful for our purposes, apart from its opening words: 'Rex debet esse tutor regni non depopulator nec dilapidator' (Baldus, *ad* X.2.24.33, *Baldvs svper Decretalibvs*, cit., *fol.* 214*va*, n1). See also Id., cons.1.271 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini*, cit., *fol.* 81*vb*, n. 3), on the relationship between prince and fisc. Cf. E. Kantorowicz (1953), p. 184; Riesenberg (1956), p. 18, note 31, and p. 150, note 13; Post (1964), pp. 345 and 388, note 51; Wahl (1970), pp. 320–324; Canning (1989), p. 216, note 38. The same Canning recently translated into English the most relevant part of the above-mentioned *consilium* on the fisc: Canning (2015), p. 115.

76 The subject clearly borders on the vast theme of the progressive emergence of natural law principles as a constraint on the power of the ruler, a complex and manifold subject that may not be discussed here. For its application in Baldus see e. g. Pennington (1993), pp. 207–210.

commonwealth. Otherwise stated, the king is the 'procurator maximus', chosen for his qualities: his higher *dignitas*, meant primarily in terms of moral worthiness, makes him especially suitable – *dignus* – for the role.[77] But he is still a *procurator*. And so the same legal mechanism applies as for any other kind of representation. Just like any other representative, the king's jurisdiction derives from the right to exercise his office. When he gives a command that cannot be ascribed to the office, the command is void. After all, as Baldus says elsewhere, it is the king who is 'bound to his office', not the other way round.[78]

Assessing the validity or invalidity of the ruler's command, therefore, does not involve – at least directly – moral judgments, but legal representation. However, retaining the representation of the office – so *de iure* jurisdiction over the subjects – does not mean being able to do anything with the office. The proportionality of the *dignitas* of the incumbent to that of the office also works as a constraint on his actions. The more the office acquires specific and autonomous features (its own *dignitas* in both its moral and legal meanings), the more the principle of non-contradiction enters the picture: the office cannot act against itself. When the *causa immediata* of the act – the will of the incumbent – would lead to that, his volition may not be referred – as *causa remota* – to the office. It follows that an order of the king that would detract from the *dignitas* of his office cannot be ascribed to the office itself. In this case the order is void because it is not given by the king as representative of the royal *dignitas* but as a private person. The ward–guardian relationship is particularly useful for this purpose, for it presupposes the full separability between the two persons. And only a full separation between king and Crown could allow the case of a king to go purportedly against the interest of the Crown. To explain the point, once again Baldus uses the metaphor of the king as warden of the Crown. But, as always, the metaphor is a legal analogy: just as the guardian cannot kill the ward, so the prince may not

77 Baldus, cons.1.327 (*Consiliorvm sive Responsorvm Baldi Vbaldi Pervsini*, cit., *fol.* 101*vb*, n. 7): 'Imperator est procurator maximus, tamen non est proprietatis imperii dominus, sed potius officialis ex eius electa industria, vt ff. de curatore furiosi, l. cuius bonis (Dig.27.10.9).' The *lex Cuius bonis* explained that the heir of the *curator* should not succeed him because he might not be suitable for the role. Cf. Dig.27.10.9 (Nerat. 1 membr.): '… Nam et tunc ex integro alius curator faciendus est neque heres prioris curatoris onerandus, cum accidere possit, ut negotio vel propter sexus vel propter aetatis infirmitatem vel propter dignitatem maiorem minoremve, quam in priore curatore spectata erat, habilis non sit.' In recalling that *lex* in the present discussion, Baldus highlights the role of the prince as *procurator* as opposed to *dominus*: he is elected to the office because he possesses the required qualities, not because he is entitled to it.

78 Baldus, *ad* X.2.24.33, § *Intellecto* (*Baldvs svper Decretalibvs*, cit., *fol.* 214*vb*, n. 5): 'Imperator rei sue potest dare legem quam vult et non obligatur homini sed deo et dignitati sue, que perpetua est.'

be 'the murderer of his *dignitas*' (*homicida su<a>e dignitatis*).[79] The guardian must act in the interest of the ward. When he clearly does not, he is not acting in his capacity of guardian. The same applies with ecclesiastical offices: when the prelate acts in the name of the church he represents, he should not cause harm to the church.[80] The resulting invalidity of the act is of great interest: the deed is void despite the presence of valid legal representation. Valid representation, therefore, does not necessarily ensure the validity of the deed.

Incidentally, it might be noted that the reason why Baldus does not follow Bartolus' famous distinction of tyrants between usurpers and despots[81] lies precisely in his more elaborate notion of representation and its inner constraints. The moral unworthiness of the despot (who however holds a valid title) is not sufficient to sever the link with the office. The despot, in other words, still retains full jurisdiction because he continues to be the lawful representative of the office. So his subjects may not rebel against him as if he were a usurper.[82] At the same time, however, this ruler may not invoke his valid title to impose on the office a will that would defile its *dignitas*. The prince acting for his private advantage and not in the interest of the commonwealth, says Baldus, would be 'almost a tyrant' (*quasi tyrannus*).[83]

11.5 Confirmation in office

We have said earlier that the last degree of separation between person and office in Baldus was the case of the individual office where the person representing the office is unworthy of it. This is in effect very close to Innocent's doctrine of toleration, which will be of extreme importance in the analysis of Baldus'

79 *Ibid.*, *ad* X.2.19.9, *supra*, this paragraph, note 75.

80 See e. g. Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 218*va*, n. 73): '… si [praelatus] contraxerit nomine ecclesie vel dignitatis cum ius sit quesitum ecclesie non potest preiudicare ecclesie.'

81 *Supra*, pt. I, §4.4.

82 Baldus, *ad* Dig.1.1.5, § *Ex hoc iure* (*In Primam Digesti Veteris Partem*, cit., *fol.* 11*rb*, n. 6–8): 'Secundo quaeritur, an regem propter suas iniustitias intolerabiles, et facientem tyrannica subditi possint expellere? … Contrarium est verum, quia subditi non possunt derogare iuri superioris: vnde licet de facto expellant: tamen superior non amittit dignitatem suam'. Cf. Canning (1988), pp. 463–464, and Canning (1989), pp. 218–219.

83 Id., *ad* Feud.1.13(14)pr (*Lectura super Usibus feudorum*, Papiae [Birreta et Girardengus], 1490 [*fol.* 26*ra*]): '… Unde imperator quasi tyrannus esset si non tanquam respub(lica) gereret se: et multi alij reges qui priuate sue vtilitati negociant(ur), quia predo est qui non vtilitatis domini sed proprie studet.' Cf. Canning (1989), pp. 90–91.

reading of the *lex Barbarius*. Before looking at toleration in Baldus, therefore, it is important to briefly mention his stance on the role of confirmation.

We have often remarked how closely Baldus' doctrine of representation followed that of Innocent. When looking at Innocent, we have seen how the pope emphasised – more than most canon lawyers – the role of confirmation. Not only is confirmation always necessary to represent the office validly, but it may even cure the invalidity of the appointment itself. Just as the invalid election followed by confirmation leads to its full validity, however, so for Innocent the valid election without confirmation entails the invalidity of the exercise of the office – without exception.

Baldus also follows Innocent on the importance of confirmation. Finding a foothold in the Roman sources was not easy, but Baldus manages to identify an (admittedly, loose) parallel with canon law sources in the title of the Code on the guardianship of high-ranking wards (Cod.5.33). One of its provisions allowed the 'old laws' to be followed and a number of suitable persons to be selected, among whom the pretorian prefect would choose one.[84] This two-step procedure of selection and appointment in Roman law might somehow recall the two-phase procedure of election and confirmation in canon law.[85] Having found proof of a sort that confirmation also applied to secular offices, it remains to be seen whether it would also produce the same effects in civil law.

Innocent made sure to put as much distance as possible between the true and the false incumbent. He did so both highlighting the healing effects of confirmation on the underlying defects of the elected, and levelling the accusation of being an intruder at anyone who administered the office without

84 Cod.5.33.1.1 (Valentinianus, Theodosius et Archadius AAA. Proculo PU.): 'Et si regendis pupillaribus substantiis singuli creandorum pares esse non possunt, plures ad hoc secundum leges veteres conveniet advocari, ut, quem coetus ille administrandis negotiis pupillorum dignissimum iudicabit, sola sententia obtineat praefecturae, super cuius nomine, sollemnitate servata, postea per praetorem interponatur decretum.'

85 Baldus, *ad* Cod.5.45.2, *§ Non vtiliter* (*svper Quarto, et Quinto Codicis*, cit., *fol.* 199*vb*): 'videtur quod prelatus non admittatur ad agendum nisi faciat fidem de sua prelatione, i(d est) quando sit electus et confirmatus quod est no(tatum) s(upra) de tu(toribus) et cu(ratoribus) illu(strium) perso(narum) l. 1 (Cod.5.33.1).' Both *leges* (the one commented upon, Cod.5.45.2, and the one just referred to, Cod.5.33.1) would strengthen Baldus' argument on the necessity of the confirmation, and could be opposed to others stating 'quod sufficit esse in possessione pacifica et quod publice reputatur pro prelato, et not(atur) in c. querelam, de elect(ione) (X.1.6.24)', *ibid*. On the contrary, the *leges* above are clear: 'ubi requiritur confirmatio tutoris, et non est facta: ibi non tenet iudicium', *ibid*.

first being confirmed. Baldus follows Innocent – almost – to the letter.[86] Any defect in the person who is in possession of the office can be divided into two kinds, according to whether or not he is confirmed in office. Without confirmation, the possessor (whether validly elected or not) is an intruder, and so an 'utterly false prelate' (*funditus falsus praelatus*). Even if the pope himself was found to be an intruder, says Baldus, not only all his spiritual deeds, but also his temporal ones would be quashed.[87] His sentences would have the same strength as of those of a false judge – that is, none.[88] The intruder in office is the opposite of its legal representative. Absence of confirmation amounts to lack of representation: 'anyone who is not confirmed is an intruder'. The legal inability to represent the office entails the invalidity of any deed made in the name of the office.[89]

By contrast, someone who is confirmed is never 'utterly' a false prelate and so neither is he an intruder.[90] Confirmation is different from election, says Baldus,

86 The only exception is the validity of the administration done by the bishop-elect (that is, after the election but before the confirmation). The position of Innocent was uncompromising (*supra*, pt. II, §7.6, text and note 124), but in the Gloss of Parmensis that position was accused of subordinating the good of the Church to legal subtleties (*supra*, pt. II, §8.1, note 15). On the matter, Baldus sides against Innocent: seeking to apply the law to the letter, he argues, would do more harm than good. Baldus, *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs*, cit., *fol.* 69*vb*, n. 10): 'illi qui nunquid habuerunt canonicam possessionem quia non intrauerunt per ostium dicuntur intrusi, inde confirmatio superioris administrationem eorum tuetur fauore ecclesie et contrahentium secum: quia non expedit ecclesie in omni contractu de iuris apicibus disputare et quia exercitium possessionis est sicut quoddam ire et agere quod competit ex natura possessionis.'

87 Perhaps to avoid the problem about the precise boundaries between *ordo* and *iurisdictio*, Baldus often prefers to speak of spiritual and temporal spheres: see esp. *infra*, this chapter, §11.7.

88 Baldus, *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs*, cit., *fol.* 70*va*, n. 13): 'Quia modo dubitatur si papa est intrusus tamen hic est dubium vtrum valeant gesta per eum. Dicit Inn(ocentius) quod nullus intrusus potest exercere spiritualia licet communis opinio laboret pro ipso: vnde licet interim conniuentibus oculis transeamus tamen decreta veritate quicquid ad spiritualia pertinet cessabitur et etiam alienationes temporales et omnes sententie ab eo prolate precedentes tanquam a iudice incompetenti, immo tanquam a falso iudice late.' The point is interesting also because Baldus wrote this text during the Great Schism: *supra*, last paragraph, note 64.

89 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 219*ra*, n. 84): 'Omnis enim non confirmatus intrusus est: et ideo nec ei nec gestis ab eo ius ciuile fauet nec patrocinatur: et nil valet in his quae facit temporaliter vel spiritualiter.'

90 *Ibid.*, *fol.* 218*va*, n. 73: 'quandoque ille qui est in possessione est funditus falsus prelatus: et talis possessio non patrocinatur: vt not(atur) in l. ii ff. alias C. quando

but it presupposes it.[91] It follows that an *ipso iure* void election cannot be confirmed.[92] On the matter, once again, Baldus builds on what Innocent said. Innocent distinguished invalid elections according to the kind of rule that was violated. If it was a rule of natural law (which for him ultimately meant, of divine law),[93] then the election was *ipso iure* void and it could not be confirmed. By contrast, when the invalidity depended from the violation of a rule of positive law, the election could be confirmed.[94]

Regrettably, Innocent did not explain this difference in detail. More precisely, he did not say which rules in the election process were of natural law and which of positive law. The main example he gave of an election made in breach of natural law was remarkably ambiguous, for he referred to simony. Simoniacal elections are void also for natural law, said Innocent, so the elected ought not to

ex fac(to) tu(toris) (Dig.26.9.2; Cod.5.39.2), quandoque non est funditus falsus, quia habet confirmationem superioris.' This *confirmatio*, explains Baldus, 'valet licet confirmatus sit indignus', *ibid*.

91 Baldus, *ad* X.2.13.5, § *In literis* (*Baldvs svper Decretalibvs*, cit., *fol.* 149*va*, n. 5): 'confirmatio … est actus diuersus, et per se fiens: non tamen per se stans.'

92 *Ibid.*, n. 6: 'Quero aliquis est intrusus fuit confirmatus per superiorem an teneat confirmatio: respondeo non.' In this case Baldus referred to the *intrusus* to signify someone who was not even elected.

93 See for all the simple but profound introduction of Kuttner (1949–1950), esp. pp. 87–105.

94 Innocent IV, *ad* X.1.6.28, § *Propter bonum pacis* (*Commentaria Innocentii Quarti*, cit., *fol.* 59*rb–va*, n. 8–9). The importance of this passage for Baldus' approach to the *lex Barbarius* (both here and in the next chapter) suggests to report the most important parts of it: 'vix est electio, nisi omnia iura solennia obseruentur, et tamen ideo non est nulla, nec cassatur electio. In alio autem casu, scilicet, quando ea interueniunt, quare est nulla electio de iure positiuo, sed alia de iure naturali, tunc distingue: quia si dolus vel delictum electi, vel eligentium fecit, quod electio sit nulla etiam de iure naturali, vt quia intrusus est vel simoniace electus, tunc semper habet locum regula praedicta, scilicet, quod deponatur ordinans et ordinatus, nec tenent ordinationes eorum, quod ad executiones, 62 distinct. c. i (D.62, c.1) … si autem dolus vel delictum non fuit tale, quod electionem faceret nulla, sed annullandam, vt contemptus alicuius qui electioni interesse debet, tunc non debet renunciare beneficium si quaesitum, nec peccat tenendo contra voluntatem contempti, nisi prohibeatur a iudice … si autem delinquit tacendo irregularitatem suam, tunc omnibus modis debet offerre renunciationem suam, et peccat tacendo beneficium, sed tamen dispensabit superior in aliquibus irregularibus.' The distinction seems based on the opposition between voidness and voidability: when the election is made in violation of a human rule (i. e. of positive law) but not of natural law, then it is necessary to pronounce such an election void. The pronouncement is constitutive: it avoids the election. The point is of great importance: so long as not formally pronounced void, the voidable election also confers *executio*. This is the case, for instance, of the elected who would not disclose his personal incapacity. In

be confirmed, but rather deposed together with the electors.[95] The ambiguity lies in that arguing that simoniacal elections remain *ipso iure* void would clash with all the cases where the same Innocent used the occult simoniac confirmed in office as an example of toleration. While the point remains unclear (Baldus would later say that Innocent simply changed his mind),[96] it would seem that Innocent was focusing on the issue of *ordo*, not of *iurisdictio*. Indeed, he continued saying that the ordinations made by those who bought their election would not hold, for they lacked *executio ordinis*.[97] It might well be, therefore, that Innocent simply referred to the invalidity of sacramental acts performed by the simoniac, not to his jurisdictional powers.[98]

Let us leave for the moment the case of *ipso iure* invalidity of the election. The image of the *intrusus* who did not have canonical entry derived from the Gospel: the Lord is the Door ('Ego sum ostium'), and those who enter through that Door shall be saved. By contrast, he who does not enter through that Door does not

this and similar cases, concludes the pope, 'ordinationes eius executionem habent, quia non erat nulla electio de iure naturali, sed deponendus erat' (*ibid.*, *fol.* 59*va*, n. 8).

95 *Ibid*. Commenting on the same subject (but before distinguishing between violations of natural law and of positive law) Innocent also considered *ipso iure* void the election of the bishop made by the emperor or a king (*ibid.*, *ad* X.1.6.28, § *infirmanda*, *fol.* 58*va–b*, n. 3–4). Such an election may be quashed even after the confirmation, argued Innocent, despite the formal validity of both confirmation and consecration ('licet confirmatio et consecratio rite factae sint', *ibid.*, *fol.* 58*vb*, n. 4).

96 *Infra*, next chapter, note 53.

97 *Supra*, this paragraph, note 94. The only reference provided by Innocent on the consequences of simoniacal elections in this passage was a text of the *Decretum* (D.62, c.1), which argued for the invalidity of the simoniacal election of a bishop, and similarly avoided the ordinations made by such *pseudoepiscopi*. Dealing only with sacramental issues, however, the text left untouched the validity of the administrative (and so, jurisdictional) deeds of those 'pseudo-bishops'.

98 This was also the impression of later civil lawyers, who read Innocent as allowing the confirmation of the occult simoniac – and criticised him for that. See for instance Albericus, reporting the thinking of his teacher Jacobus de Belviso: '… secundum Inno(centium) si est confirmatus per superiorem et est occultus de symonia, valent gesta: quia ex confirmatione accipit potestatem administrandi, <extra> de elect(tione) c. transmissa (X.1.6.15), et not(atur) per d(ictum) c. quod sicut et c. nihil (X.1.6.28 and 44) et ar(gumentum) ff. quod falso tutore autho(re) l. i § pen(ultimo) (Dig.27.6.1.5) … quod non placet Ia(cobo) praedicto: quia in § pe(nultimo) (Dig.27.6.5) praetor decreuit se ratum habiturum, quod plu(s) operatur quam simplex confirmatio.' Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*], cit., *fol.* 117*ra*, n. 9).

come from Christ, and seeks only to steal and kill.[99] To stress Innocent's point on the strength of the confirmation, Baldus looks back at the origin of the metaphor of the intruder and gives an extreme case: what if the intruder himself was elected by those who steal and kill – that is, by robbers? Not only is this prelate a robber (according to the image in the Gospel), but he is actually appointed by other robbers. The strength of this image gives the measure of the strength – and the scope – of confirmation itself. The election by the robbers is surely voidable, says Baldus, but it is not *ipso iure* void. If this prelate were to be confirmed by the superior authority, therefore, even such a repugnant election would hold.[100]

11.6 Toleration and representation

The intruder is someone who is not confirmed by the superior authority. When the superior authority removes the lawful incumbent from office, it also removes the confirmation previously bestowed upon him. This way, from Innocent's perspective, the status of the deposed is ultimately the same as that of the non-confirmed.

As deposition severs the link between incumbent and office, it does not operate retroactively. Whatever was done between confirmation and deposition was done by the lawful representative, and so remains valid even after his deposition.[101] In severing the link between person and office, however, the

99 John, 10:9–10. Cf. Baldus, *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs*, cit., *fol. 69va*, n. 3): 'Intrusus enim dicitur omni qui non intrat per ostium id est qui non habet canonicum ingressum.'

100 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 219*ra*, n. 81): 'Sed quid si electus a predone est confirmatus a superiore? Respon(deo) omnes ei tamquam legitimo respondebunt: propter vim confirmationis facte cum ordine iuris: ut no(tatur) in d(icto) c. in literis (X.2.13.5) per Innoc(entium). Nam electio facta a predone non est nulla ipso iure, sed debet cassari postquam constet quod inique possidet, et non ante. Et ideo in re dubia tenet confirmatio, vt d(ictum) c. in literis (X.2.13.5) per Inno(centium). Innocent stated the rule (*supra*, pt. II, §7.1, notes 7–8), but the example of the robbers was from Baldus.

101 The point is particularly clear in the case of the confirmation of someone who could not be confirmed. The *Liber Extra* provided for the deposition of both the confirmed and the person who confirmed him. This way, the problem of the validity of the acts became particularly acute. Baldus *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs*, cit., *fol. 69va*, n. 2): 'In gl(osa) magna [*scil.*, Innocentii] ibi "sed pone" querit gl(osa) nunquid facta ab eo qui administrabat vt prelatus qui tamen postea est remotus valeant [cf. Innocent, *ad* X.1.6.44, §, *Administrent* (*Commentaria Innocentii Quarti*, cit., *fol.* 74*vb*, n. 3), *supra*, pt. II, §7.6, note 121] … et dic quod si status remotionis non apponitur ad principium tituli sed ad ius iam

deposition prevents the continuation of the representation mechanism: the deposed is no longer entitled to act in the name of the office. If he continued to occupy it, that would just amount to undue ('abusiva') possession. Deposition, says Baldus, 'changes the cause of possession from something into nothing'.[102] Any further deed would therefore be void.[103]

While the status of the acts carried out by the intruder or the deposed is clear – in both cases they are void – the problem is to qualify the acts of someone who is neither an intruder nor fully legitimate to exercise the office. On the point, it is important to recall what was said earlier on the concept of *dignitas*. The relationship between *dignitas* of the office and *dignitas* of its holder renders all the more acute the problem of the *indignitas* of the person. If *dignitas* means both moral worthiness and legal fitness, those *non digni* are (morally) unworthy as much as they are (legally) unfit. Because of their *indignitas*, they are precluded from reaching higher offices.[104] Letting the *indignus* occupy a *dignitas* would be a contradiction in terms. But what if it happens? As we have seen, Innocent's answer was based on the concept of toleration. In turn, toleration was built on the confirmation of the superior authority and the distinction between apparent fitness and occult unworthiness of the confirmed in office.

quesitum non reuocatur gesta bona fide … Tu dic standum esse huic decretali que tradit mediam iuris dispositionem vt valeant cetera preter alienationes: iste enim qui est in isto medio statu non dicitur intrusus sed quasi quidam curator bonorum.'

102 Baldus, *ad* X.1.6.44, § *nichil* (*Baldvs svper Decretalibvs*, cit., *fol.* 69*vb*, n. 10): 'Adde quod nullus habens canonicum ingressum ad titulum et possessionem est intrusus nisi sit depositus vt hereticus vel per sententiam superioris quia depositio mutat causam possessionis de aliqua in nulla, siue de canonica in abusiuam, etiam si de facto possessio continuetur.'

103 On the point, Baldus might have misread a passage of Innocent. Baldus reports – disapprovingly – of the pope's insistence that the deposed should also be dispossessed, lest he validly continue to take part in the formation of the will of the office. Innocent however was only referring to possessory matters without any reference to representation issues. Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 218*rb*, n. 66): 'Sed hic queritur an canonicus priuatus canonicatu per sententiam perdat ipso iure stallum in choro et locum in capitulo: an vero opus quod distalletur per superiorem. Dicit Inno(centius) in c. in literis (X.2.13.5) quod requiritur distallatio sicut degradatio secundum Innocen(tium). Sed ego credo quod etiam si esset in possessione nullos actus potest interim facere in choro vel capitulo' (*ibid.*, *fol.* 219*ra*, n. 84–85). Cf. Innocent, *ad* X.2.13.5 (*Commentaria Innocentii Quarti*, cit., *fol.* 228-*ra–va*, n. 8–11).

104 Baldus, *ad* Dig.3.1.7, § *Quos prohibet* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 171*ra*, n. 2): 'inhabiles ad honoribus, et dignitatibus repellantur ex officio superioris.'

Toleration in office is not Christian forbearance but legal representation. Stressing the *dignitas* of the office, it is possible to overlook the *indignitas* of someone who occupies it, so long as that *indignitas* remains occult. This is not pragmatism – one would expect anything of Innocent but that. The apparent contradiction of the *indignus* enjoying a *dignitas* in fact attests to the crucial importance of confirmation, and explains its link with the toleration principle. The *indignus* could hold a *dignitas* and exercise the office because someone worthier (*dignor*) than him allowed as much by confirming him in that office. This way the requirement of confirmation by the superior authority shifts the focus from the *indignitas* of the person confirmed to the superior *dignitas* of the authority who confirmed him. We have seen how for Innocent only the occult unworthy could be tolerated in office. Limiting the scope of toleration only to occult *indignitas* is deeply connected with this shift of focus towards the higher *dignitas* of the superior authority, because only the latter is manifest. The occult *indignitas* of the individual is therefore contrasted with the manifest *dignitas* of the person who confirmed him in office. This contrast ultimately highlights the distinction between person *qua* individual and person *qua* incumbent. Confirmation in office gives a legal basis to this distinction and strengthens the opposition between hidden moral unworthiness and visible legal capacity. The defect in the individual is hidden, the approbation of the incumbent by the superior *dignitas* (i. e. his confirmation in office by him who holds a higher office) is manifest. Confirmation thus shifts the accent from the person to the representative: it bestows jurisdictional powers upon the incumbent but does not heal his hidden unworthiness as a person. So long as the defect remains occult, the person continues to exercise the office validly, because the identification between person and office allows an exclusive focus on the representative of the office and not on the person of the representative.

It may be recalled that, for Innocent, toleration would cease both when the crime of the unworthy became widely known and when it was legally ascertained. Baldus explains the affinity between these two cases (widespread knowledge and legal decision) by distinguishing between notorious and manifest crimes. A manifest crime is a plainly visible one, whereas a crime is notorious when either widely known or presumedly known. A crime may become plainly visible, for instance, when 'self-evident and irrefutable evidence' emerges during the trial. This also means that the manifest crime could be occult at the beginning. By contrast, says Baldus, the notoriety of the crime is such both 'at the beginning and the end'.[105] Notoriety, however, has less to do with actual

105 Id., *ad* X.3.2.8, § *Tua* (*Baldvs svper Decretalibvs*, cit., *fol.* 260*rb*, n. 22): 'Hec est differentia inter notorium et manifestum: quia notorium est in prin(cipio) et in

'irrefutable evidence' and more with presumptive status. Notoriety may well derive from a widespread rumour. Rumours point towards a certain conclusion, but they are not full proof. In the words of Innocent (recalled by Baldus), they do not establish the truth, but provide a further reason to look for it.[106]

A legal decision goes in the same direction; only with more strength. What if, asks Baldus, a crime is not clearly ascertained (since there is no conclusive evidence) and yet the defendant is condemned all the same? Baldus' answer is that the crime would not be manifest but it would be notorious. In this case the notoriety does not derive from a widespread rumour but from legal truth, 'from the authority of the decision, which is taken as truth'.[107] Unlike the notoriety of a rumour, legal truth couples presumption of knowledge (as the rumour) with a sort of 'presumed manifestness'. The crime is not manifest in itself, but it is presumed to be such. And this presumption is irrebuttable. The sentence of deposition of the unworthy, therefore, operates on two levels: it both makes the *indignitas* notorious and it establishes its truth judicially. Judicial condemnation makes the indignity both notorious and manifest. Hence the impossibility of tolerating the deposed from office. The requirement that the defect be occult means that toleration in office does not apply either in a case of supervening manifest *indignitas* (i. e. after the confirmation) or in a case of supervening manifestation of a pre-existing *indignitas*.

On the subject of toleration, Baldus relies on Innocent as usual. But he does not always reach the same solution, nor does he provide exactly the same explanation when he agrees with the pope. In particular, Baldus stretches the boundaries of toleration further than Innocent. He does so, as we shall see, by highlighting the importance of the possession of the office and downplaying the difference between possession and entitlement.

fi(ne), manifestum autem potest esse occultum in prin(cipio) quod sit manifestum in fine litis per probationes apertissimas et inexpugnabiles.'

106 Id., *ad* X.3.2.7, § *Vestra* (*ibid.*, *fol.* 259*rb*, n. 2): '… et iste est casus in quo probatur notorium et non probatur factum scilicet in notorio fame (*sic*) que describitur grosso modo vox populi et in vulgari dicimus vox populi vox dei, quia opi(nio) in qua omnes concurrunt vel maior pars, presumitur in se habere rationem … et tamen per istam famam non probatur veritas, sed est quoddam motiuum ad inquirendum, secundum Inno(centium) i(nfra) eo [titulo] c. fi. [*sed* X.3.2.8, § *Notorium*; cf. Innocent IV, *Commentaria Innocentii Quarti*, cit., *fol.* 320*ra–vb*, n. 1–4].'

107 Baldus, *ad* X.3.2.7, § *Vestra* (*Baldvs svper Decretalibvs*, cit., *fol.* 259*rb*, n. 2): 'Sed pone quod nullo modo factum [*scil.*, the fornication committed by a priest] est probatum, et tamen sententia condemnatoria est lata: nunquid crimen dicatur notorium? Respondeo sic, propter authoritatem sententie que habetur pro veritate, vt ff. de re(gulis) iur(is), l. res iud(icata) (Dig.50.17.207).'

Possession is a very malleable legal concept. Jurists often found it more useful than the black-and-white notion of right, especially in medieval public law. Innocent was not fond of ambiguities: any 'grey area' in the law ought to be reduced to its ultimate components, so as to be able to choose between them – either black or white. Many practical situations, however, are intrinsically ambiguous. In such cases, forcing the application of general principles would mean squeezing the facts into neat legal categories. Baldus shows more interest in those 'grey areas'. The *lex Barbarius*, as we shall see, is one of such cases. This explains Baldus' greater emphasis on the concept of possession than on that of right.

The first and foremost consequence of the toleration principle is that the supervening invalidity, so long as it is occult, does not result in the automatic deposition of the incumbent from his office. It follows that even if the incumbent used his office to commit an offence, he would still retain the right to exercise it – until deposed by a legal decision. The Accursian Gloss discussed this specific matter especially with regard to the church's steward (*oeconomus*) who alienated ecclesiastical land in violation of an imperial edict.[108] The Gloss reached the conclusion that the steward was not automatically deposed from office because of the particular wording of the edict itself.[109] Recalling that case, on the contrary, Baldus insists – as Innocent did – on the need for a specific sentence of condemnation in order to divest the incumbent of his office.[110] Unlike the Gloss, for Baldus the need for a legal sentence to depose the incumbent does not depend on the wording of a specific provision. Even if the law established the automatic dismissal from office for certain offences, so long as the offence remained occult the office holder would be able to exercise it validly. This is particularly clear in Baldus' discussion of the notary who lets his clerk draft the instrument.[111] Since the offence is not manifest, says Baldus, the notary may continue to hold his office until deposed with a legal decision.[112]

108 Cod.1.2.14.3 (Leo et Anthem. AA. Armasio PP.).

109 See next note.

110 Baldus, *ad* Cod.1.2.14.3, § *Sane* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fols.* 23*vb*–24*ra*, n. 2): 'Non obst(ante) quod sit priuandus officio: quia quamdiu non priuatur per sententiam retinet officium et exercitium officij: quod est notandum. Conclude ex hoc quod licet quis delinquerit in officio, tamen quamdiu superior non amoueat eum valent gesta per eum … Quinto querit glo(ssa) in § economus nunquid iste economus sit priuatus vel priuandus dicit glo(ssa) quod est priuandus per sententiam propter verbum priuetur. Secus si dixisset priuatus sit.' Cf. Gloss *ad* Cod.1.2.14.3, § *Oeconomus* (Parisiis 1566, vol. 4, col. 35).

111 *Supra*, pt. I, §2.6.

112 Baldus, *ad* Cod.1.2.14.3, § *Sane* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 24*ra*, n. 2): 'Adde tamen quod vbi non requiritur sententia dispositiua: si

The conclusion is a rather sensible one: as the offence is not known, the automatic deposition would create chaos, for it would entail the *ipso iure* invalidity of any deed done between the commission of the offence and its eventual ascertainment. Baldus' reasoning, however, is not based on common sense but on the Innocentian concept of toleration. Yet Baldus adds something more than Innocent: the reason the person of the notary is still the legal representative of his office even having committed an offence that calls for his removal from it is that he remains in *quasi possessio* of the office.[113]

In this case, possession of the office (the *quasi* is due to the fact that the office is incorporeal)[114] works as a bridge between proper toleration and deposition. It is here, in this grey area, that Baldus' position begins to diverge from that of Innocent. To appreciate the point – and make sense of this difference – we should look at the case of the incumbent who is secretly removed from office (*occultus exhautoratus*). The case is very similar to that of the occult excommunicate: when looking at canon lawyers, we have seen how problematic that case was. Just as Innocent applied the toleration principle to the occult excommunicate, so Baldus argues that the person secretly removed from office should be allowed to continue representing it. In principle, the solution should be the opposite: the deposed should be equiparated to the intruder. However, argues Baldus, the fact that the deposition is secret also means that the deposed is left with unchallenged possession of his office. Just as the case of the notary, therefore, if any deed of the incumbent done after his secret deposition were to be void, this would create a series of retroactive invalidities (or rather, postponed declarations of nullity) for any transaction relying either directly or indirectly on such deed. Again, chaos. However, Baldus adds, the explanation for the validity of the deeds might be elsewhere: the superior authority secretly deprived the person of his entitlement to represent the office, but left him in possession of it. This means that 'some vestiges' (*reliqui<a>e qu<a>edam*) of the initial confirmation still remain.[115]

> tamen factum reuocatur in dubium requiritur sententia declaratoria … facit quod not(atur) in aut(hentica) de tabel(lionibus) § penul. (coll.4.7.1 [=Nov.44.1§4]), vbi dicit gl(ossa) quod si tabellio per sententiam legis est priuatus officio tabellionatus, hoc tamen non est declaratum per sententiam hominis, sed est occultum. Et iste tabellio exercet officium quia est quasi in possessione officii quod valent instrumenta sua quod alibi in iure ciuili non habes.' Cf. *supra*, pt. I, §2.6, note 131.

113 Baldus, *ad* Cod.1.2.14.3, § *Sane* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 24*ra*, n. 2).

114 On the concept of *quasi possessio* see *supra*, pt. I, §5.4, note 42. We will look at its use in Baldus' reading of the *lex Barbarius* next chapter, esp. note 96.

115 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 219*ra*, n. 83–84): 'Nunc de octauo puncto, scilicet de obedientia et iurisdictione: an sit obediendum minus iusto prelato qui est in pacifica possessione

Possession of the office by the secretly deposed is admittedly ambiguous, as it lies between judicial deposition and 'proper' toleration. It is neither of them: this is an important difference with Innocent, who on the contrary made secret excommunication and occult deposition the standard bearers of the toleration principle. The legal implications of rejecting both conclusions – neither full deposition nor full toleration – are explained in Baldus' commentary on the *Liber Extra*.

In his Ordinary Gloss on the *Liber Extra*, Bernardus Parmensis disagreed with Laurentius Hispanus and Johannes Teutonicus, who both argued for the validity of administration by those suspended from office. The case might appear somewhat ironic, considering that, as we have seen, Hispanus and Teutonicus were among the most vocal opponents of the toleration principle. In fact, it made perfect sense: neither of them had a fully developed notion of representation with regard to individual offices. Their scant sympathy for toleration is therefore perfectly compatible with their position on the effects of suspension from office. Much to the contrary, for Bernardus the suspended from office could not validly exercise it. So long as the suspension lasted, for Bernardus it would entail the same effects as actual deposition from office.[116] Innocent IV concluded

officii sui: et an possit exercere iurisdictionem suam in rebelles et videtur quod sic: vt in d(icta) l. barbarius (Dig.1.14.3). Sed in illa l(ege) concurrebant tria, scilicet superioris summa auctoritas, error communis qui idem operatur quod veritas i(nfra) de test(amentis) l. i (Cod.6.23.1) et publica vtilitas … Idem si concurrerent alia duos, s(cilicet) error communis et publica vtilitas, licet cesset superioris auctoritas: ut p(atet) in occulto exautorato, vt no(tatur) in aut(hentica) de tabel(lionibus) § pe(nultimo) (coll.4.7.1[=Nov.44.1§4]). Sed potest dici quod in exautorato adhuc remanent reliquie quedam: vt not(atur) de aucto(ritate) tut(orum) l. si pluribus (Dig.26.8.4). Secus ergo in eo qui nunquam fuit auctoritate superioris fretus seu prelatus, sed forte per falsas literas obtinuit reputari prelatus, ar(gumentum) ff. de iudi(ciis) <l.> non idcirco § cum postea (Dig.5.1.44.1), et quod not(at) Inno(centius) in c. in literis, de resti(tutione spoliatorum) [Innocent, *ad* X.2.13.5, *infra*, this paragraph, note 125].' The reference to Barbarius' confirmation is not to be taken too seriously: here, Baldus mentioned Barbarius' case in general terms: see *infra*, next chapter, note 26. As we will see shortly, on the contrary, when commenting on the *lex Barbarius* Baldus is extremely clear in denying as much.

116 Bernardus Parmensis, *ad* X.1.4.8, § *A suspensis* (*Decretalium domini pape Gregorij noni compilatio*, cit.): 'suspensus enim non potest eligere nec eligi … Sed nonne iudicare et praebendas dare est iurisdictionis? vti quia i(nfra) de elec(tione) <c.> nosti (X.1.6.9), et excommunicare, i(nfra) de elec(tione) <c.> transmissam (X.1.6.15), nunquid suspensus potest huiusmodi iurisdictionem exercere? Dicunt quidam quod episcopus suspensus potest excommunicare, et praebendas dare: et respondent illi decre(tali) quia diuersitatem (X.3.8.5) quod ille episcopus erat ab officio suspensus et iurisdictione. Sed dicunt quod canonicus suspensus eligere non potest: quia cum sit suspensus nihil officii retinet. Secus est in praelato …

in the same way as Bernardus, but with more precision: suspension might just refer to the enjoyment of the prebend associated with the office (a rather common form of punishment). That could not be equated to deposition, for it would not deprive the suspended of the right to represent the office. It is only when the suspension is from the exercise of the office, clarified Innocent, that 'suspended' may be equiparated to 'deposed': in both cases the representation mechanism is severed, whether temporarily or permanently.[117]

At this point, however, Innocent looked at the case where the suspension from office is not known, and the prelate is commonly believed not to be suspended. Are the deeds he carries out in the exercise of the office valid? Some, Innocent said, would argue as much, especially in case of a suspension occurring *ipso iure* and not flowing from a judicial condemnation (unlike the violation of some law or canon, a sentence is irrebuttably presumed to be known).[118] In that case, their conclusion would be that the suspended is tolerated in office because of ignorance as to his true status. This, however, was not the correct solution for Innocent. Arguing that toleration in office may occur out of mere ignorance would amount to watering down the legal meaning of the toleration principle itself. More specifically, it would mean replacing representation with common mistake: the validity of the deeds would no longer depend on legal representation but on the dubious brocard that common mistake makes law. Hence Innocent disagreed with this solution not as to its outcome, but as to the legal principles invoked to reach it.[119]

> Alii dicunt et melius quod episcopus suspensus non potest excommunicare, nec interdicere, nec dare prebendas, i(nfra) de exces(sibus) prela(torum) c. vlti(mo) (X.5.31.18) … Joh(annes) et Lauren(tius) hoc concedunt, quod suspensus ab officio tamen potest excommunicare et praebendas dare: et intelligunt illam decre(talem) quia diuersitatem (X.3.8.5) cum erat suspensus ab officio et iurisdictione. Ego autem non credo quod suspesus ab homine possit dare praebendas: vt hic dicitur, licet Lau(rentius) et Joh(annes) concedant quod possit excommunicare et praebendas dare.'

117 Innocent IV, *supra*, pt. II, §7.5, note 104.

118 Cf. Baldus, *supra*, this paragraph, note 107.

119 Innocent IV, *ad* X.1.4.8, § *Suspensus* (*Commentaria Innocentii Quarti*, cit., *fol.* 34*rb*, n. 4): '… Item dicunt quidam quod licet non valeat in spiritualibus, quod facit excommunicatus vel suspensus, valet tamen in temporalibus quamdiu toleratur ex ignorantia, quia forte sunt suspensi a iure, non per sententiam, et ideo omnia eius facta tenent arg(umentum) 8 q. 3 <c.> nonne (*rectius*, C.8, q.4, c.1). Sed hoc verum non credimus in his quae ratione publici officii faciunt, argu(mentum) ff. de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3).'

Baldus devotes only a few lines to the matter – few but crucial. First, he reports the different positions (without quoting anyone by name).[120] Then he concludes by saying something extremely important:[121]

> the person who is occultly suspended may do anything as to the others, but not as to himself. In other words, he can grant to anyone but he cannot have something granted unto himself.

The secretly suspended from office may exercise his office validly – but only towards third parties, not himself. In stating as much, Baldus shows that the separation between internal and external validity in the agent–principal relationship is not a modern concept. The above quotation from Baldus seems to fully presuppose it. As we shall see, this was one of the cases in which Baldus did not follow Innocent. The opposition between internal and exernal validity of agency lies at the very core of Baldus' reading of the *lex Barbarius* – and it would later provide the basis for the development of the *de facto* officer doctrine. Baldus' solution depends on the combination of two factors: first (as in Innocent), the separation between person and agent; second (and quite unlike the pope), the legal relevance of the possession of the office by the secretly suspended or deposed.

When distinguishing between obligations of the person *qua* individual and *qua* representative of the office, as we have seen, Baldus relied on practical examples involving a third party. As the examples always dealt with some kind of obligation, the presence of third parties might appear a truism. Even so, it is an important truism. Applied to principal–agent situations, the obligation against third parties creates a triangle: agent, office and third party. Just like the dychotomy between the internal and external validity of the acts, the 'agency

120 Baldus, *ad* X.1.4.8, § *Suspensus* (*Baldvs svper Decretalibvs*, cit., *fol.* 47*va*, n. 17): 'In gl(ossa) suspensus enim queritur vtrum suspensus possit iudicare prebendas dare vel iurisdictionem aliquam exercere, quidam dicunt quod sic licet non possit eligere nec eligi; gl(ossa) finaliter tenet contrarium et intelligit hoc verum in suspensis ab homine nisi sit minor suspensio i(n) partecipatione excommunicati. Alij dicunt quod ea que competunt ratione officii non potest facere qui suspensus est ab officio sed ea que competunt ratione beneficii potest facere sicut potest locare predia beneficii sui.' It seems likely that the gloss *suspensus* to which Baldus referred was that of Innocent and not that of the Ordinary Gloss. In both the *lectura* and the *repetitio* on the *lex Barbarius* Baldus speaks of the 'great gloss' on the *Liber Extra* with regard to Innocent's commentary, not that of Bernardus Parmensis: *infra*, next chapter, notes 13 and 124. Cf. the similar approach of Bartolus, *supra*, pt. I, §5.4, note 53.

121 Baldus, *ad* X.1.4.8, § *Suspensus* (*Baldvs svper Decretalibvs*, cit., *fol.* 47*va*, n. 17): 'Item no(tatur) quod occulte suspensus omnia potest quo ad alium licet non quo ad se, i(d est) omnibus potest conferre sed non potest sibi conferri.'

triangle' is also a trite concept in today's agency theory. But this was not the case in Baldus' time.

Baldus describes this triangular situation in several cases dealing with the succession of the incumbent in office. Some cases focus on the obligation contracted by the previous incumbent, others deal with the incumbent's appointment to a specific role (e. g. testamentary executor). In both scenarios, however, the problem is ultimately the same: distinguishing between agent and person. Both counterparty (in the first group of cases) and appointor (in the other group) are third parties, and occupy one 'angle' of the triangular relationship. In approaching those cases, Baldus (and, before him, Innocent) moves from this 'angle' – that is, from the position of the third party. The way the triangle is drawn has important consequences for the solution of the case.

Sometimes Baldus links this 'angle' directly to the 'angle' of the office, and at other times to that of the individual representing it. In this last case (i. e. where the third party deals with the agent *qua* person), there is in effect no triangle: the fact that this person also happens to be the legal representative of the office is irrelevant. So the relationship would remain only between the third party and the individual who happens to be also the incumbent in office. Not a triangle, but a segment. When the third party deals with the agent *qua* representative of the office, by contrast, the legal relationship is between third party and office. Since the office can only will or act through a person,[122] that relationship has to be extended to the agent as well. Hence the need for a triangular relationship. But the triangle (thus the third 'angle' – the person of the agent) comes into play only because of the immediate relationship between third party and office (i. e. Baldus' *causa remota* of the agent's deeds).[123] When the primary relationship is between third party and office, therefore, the person of the agent is of little importance. In a manner of speaking, the agent is fungible.[124] It is this fungibility that ensures the succession of the new agent in the same contract or appointment as his predecessor. This is why, in all such cases, Baldus examines the triangular relationship always in the same direction: from the third party to the office, and only then from the office to the agent.

Let us look at the same triangle from the opposite direction. So long as the person is entitled to represent the office, the transaction between office and third party will be valid. This was also Innocent's conclusion: full symmetry between internal and external validity of agency. The office acts validly towards the thirds

122 Cf. *supra*, this chapter, §11.2, text and esp. note 37.
123 See again *supra*, this chapter, §11.2.
124 Hence the ultimate legal meaning of the metaphor of the phoenix, where the individual is defined by the species (*ibid.*, text and note 28).

when the agent acts validly towards the office (i. e. when he can validly represent it). The difference with Baldus lies in that Innocent excluded the relevance of another and weaker kind of relationship between person and office: not legal entitlement, but possession.

To appreciate the different position between Innocent and Baldus on the external validity of the deeds (in our triangle, the relationship between office and third party), we should look at the issue of payment of debts. When does payment to the false agent release the debtor? Innocent had already posed the question. He did so to remark that common mistake does not suffice: the debtor is not released from his debt to the office if he pays someone who only appeared to be the agent, whereas he was not. The debtor owes his debt to the office, not the person as an individual. And since the agent apparent cannot represent the office, the debtor is in effect paying to a third party altogether.[125] Baldus seems to follow suit: 'I am not surprised that sometimes those who pay are deceived – he says – for the legislator is no friend of mistake'.[126] As a matter of principle, without the confirmation of the superior authority the simple possession of an office (even if it follows a valid election) does not become legal representation. When speaking of the mystical body of the church to describe the link between prelate as legal representative (the soul) and church as office (the body), as we have seen,[127] Baldus explains that the prelate who cannot be the 'soul' of the church may not act in its name. In that case, the prelate was in possession of the 'body' of the church (the ecclesiastical office) but he lacked valid appointment to it. Not being able to act in the name of the church, says Baldus, that prelate was like a 'honorary guardian without administration'.[128] Only confirmation, as we

125 Innocent IV, *ad* X.1.6.44, § *Administrent, supra*, pt. II, §7.3, note 43. See also, and more specifically, Id., *ad* X.2.13.5, § *In literis* (*Commentaria Innocentii Quarti*, cit., *fols.* 226*vb*–227*ra*, n. 3): 'Sed quaero quid facient subditi debitores huiusmodi violenti possessoris? Respon(deo) non respondebunt de iuribus pertinentibus ad dignitatem, quam violenter possidet, nec potest conqueri hic violentus praelatus de eis, qui spoliauerunt eum non reddendo sibi debitam obedientiam … quia ipsi non spoliant, cum non fuerit in possessione recipiendi huiusmodi ab eis, licet fuerit in violenta possessione dignitatis cui haec debentur … imo nec subditi per violentiam debent malaefidei possessorem expellere de possessione … sed denegare possunt sine violentia, tamen in ea in quorum mala possessione erat possessor, quod sic probatur, quia si sponte soluat, praestat malaefidei possessori causam peccandi. Item non liberatur subditus debitor per talem solutione, quin dignitati teneatur, cum non ei, sed dignitati sit obligatus.'

126 Baldus, *ad* X.2.13.5, § *In literis* (*Baldvs svper Decretalibvs*, cit., *fol.* 149*va*, n. 8): 'nec mirum quod aliquando decipiantur soluentes, quia legislator non est amicus errorem.'

127 *Supra*, this chapter, note 58.

128 *Supra*, this chapter, note 57.

know, allows *de iure* representation. By contrast, a payment to the 'false prelate' who is in possession of the office with the authority of the superior does release the debtor.[129] In that case, the authority of the superior entails confirmation in office – despite the (hidden) true condition of the prelate.

So far, the position of Baldus would appear the same as Innocent. Baldus, however, is less uncompromising (admittedly, not a difficult task). Possession should not be always dismissed so easily. If the prelate does not have a valid title to exercise the office but he plainly possesses it, considering the whole business as legally irrelevant would be – at least on a practical side – problematic. Material possession is a tangible approximation of substantive right. Possessing something is prima facie evidence of being entitled to it – holding something because of an underlying right on it. Undisputed possession of an office does not lead to the right of discharging it, but it might suffice to create a semblance of legal representation. As Baldus puts it, 'the habit does not make the monk, but rather shows him to be such if it was put on him by the person who has the power and the authority [to do so]'.[130] Possession would therefore suggest the existence of legal representation, but it does not prove it – still less create it. This can make things extremely difficult for the debtor. Let us suppose, says Baldus, that the intruder in an ecclesiastical office comes to the debtor and says: 'I am in possession and I am publicly called and treated as prelate by all others, hence you should do the same'. What should the debtor do? As a matter of principle, he should ask him to prove his right before paying him what he owes to the office.[131] But unchallenged possession of the office would typically point to an

129 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 218*vb*, n. 76): 'Sed quid … si debitores sponte soluant falso prelato qui tamen est in possessione an liberentur ab ecclesia? Dic quod non, de condic(tione) ob causam <l.> si procuratori falso (Dig.12.4.14), de fur(tis) l. falsus (Dig.47.2.43) et l. si quis vxori § apud labeonem (Dig.47.2.43), nisi sit in possessione auctoritate superioris. Nam licet talis auctoritas non valeret excusati sunt soluentes ne circumueniantur auctoritate superioris, ar(gumentum) C. de his qui ve(niam) eta(tis) impe(traverunt) l. i (Cod.2.44(45).1) … et ita sentit Inno(centius) extra de resti(tutione spoliatorum) c. in literis (X.2.13.5).' Cf. *supra*, pt. II, §7.3, text and note 43.

130 Baldus, *ad* X.2.13.5, § *Item cum quis* (*Baldvs svper Decretalibvs*, cit., *fol.* 149*vb*, n. 3): '… habitus monachum non facit, licet ostendit eum monachum si sit ei impositus per habentem potestatem vel authoritatem.'

131 *Ibid.*: '… Sed ecce aliquis tanquam prelatus agit contra debitorem ecclesie, debet debitor ostendere de prelatura, i(d est) de mandato: "alias non possum tibi soluere"… dicit prelatus: "ego sum in possessione et publice vocor et tractor tamquam prelatus per alios vniuersos: ergo et per te debeo tractari."' An interesting twist on the same issue is the problem of the payment into the hands of the abbot for a debt owed to the monk. The case was remarkably subtle: as monks take a poverty vow, it is more likely that the debt was owed to the

underlying right to administer it – again, the habit does not prove the monk's status, but the cowl is usually given by the abbot. In the mouth of a jurist, the adagio of the monk is more complex than it might appear, for 'habit' (*habitus*) was typically contrasted with 'act' (*actus*). As Baldus has it (interestingly, when commenting on the *lex Barbarius*), 'habitus denotes law'.[132] *Habitus* does not make the monk, but it strongly suggests that one is such. So, coming back to the problem of the improper payment, Baldus concludes that a judge might well consider the debtor who paid the false agent in possession of the office to be released. In such a case, says Baldus, the situation would be very close to that of the ward's business transacted by the false guardian (Dig.27.6.1.5): under certain circumstances, the praetor might ratify the deed.[133] We should pay attention to this example, and the fact that the praetor did not simply consider the payment valid, but ratified it for equitable considerations. In the same way, when the judge releases the debtor who paid the false agent in possession of the office, the validity of the payment (and so the release of the debtor) is not a legal effect of the common mistake, but depends on the authority of the judge. Stating as much, Baldus makes sure to avoid bestowing internal validity on abusive agency.

When Baldus dealt with the validity of the acts carried out by the secretly deposed, as we have seen,[134] he argued that leaving him in possession somewhat colours his possession with a 'vestige' of the previous confirmation in office. This trace of the initial confirmation lingers on, so that the incumbent is not

monastery and not to the person of the monk. Hence Baldus' solution: the payment to the abbot does release the debtor unless paying into the hands of the monk was a modal condition of the obligation itself. Baldus, *ad* Cod.7.56.1, *Si neque* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 88*ra*): 'Quero quid si soluatur abbati id quod debetur monacho an soluens liberatur: … Tu dic quod aut est quesitum ius monasterio et liberatur, vt l. i s(upra) de bo(nis) mater(nis) (Cod.6.60.1). Aut non est quesitum: vt quia per modum implende conditionis: et tunc secus vt in contrariis, quod tene menti. Bal(dus).'

132 Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 57*ra*, n. 43: 'actus in factum sonat, habitus vero ius designat.'

133 Baldus, *ad* X.2.13.5, § *Item cum quis* (*Baldvs svper Decretalibvs*, cit., *fol.* 149*vb*, n. 3): '… dic quod sufficit prelato quod sit in vniuersali possessione: licet iste debitor nunquam agnouerit debitum nec fuerit confessus illum esse prelatum dummodo pro prelato publice reputetur: vt i(nfra) e(o titulo) c. in literis (X.2.13.5). Ego dico quod iudex cauere debet se ratum habiturum quod cum eo gestum erit vel non tenetur debitor soluere … vt l. i § idem pomponius ff. quod cum fal(so) tut(ore) au<c>t(ore) (Dig.27.6.1.5) et ratione dubii videtur decretum.' It seems significant that Baldus said as much when commenting upon the only point of the *Liber Extra* (X.2.13.5) where Innocent admitted the possibility that the payment to the intruder in office might (exceptionally) free the debtor: *supra*, pt. II, §7.5, note 85.

134 *Supra*, this paragraph, note 115.

completely deposed from office. Stated otherwise, if the deposition occurs secretly and therefore leaves the deposed in unchallenged possession this is not the same as full deposition. The occult character of the deposition leaves tangible proof of the initial confirmation (a 'vestige' of it): the enduring possession of the office. Suspension is not as serious as deposition – this was the reason for the whole dispute between Laurentius Hispanus and Johannes Teutonicus on the one side, and Bernardus Parmensis and Innocent IV on the other. While Innocent solved the problem of the secretly suspended from the administration of the office by referring to the toleration principle, as we have seen, Baldus highlighted the role of possession. The 'vestige' of confirmation was meant mainly to describe that possession as lawful. And it is on the basis of the lawful possession of the office that Baldus solved the case of the occult deposed – not on the basis of toleration, as on the contrary Innocent did.

If the unchallenged possession of the office suffices to underplay the effects of the occult deposition, then it should be all the more relevant for a simple suspension. Unlike the intruder in office who just appears to be its lawful representative, in this case there is no need of a judge sympathetic towards the debtor's mistake to hold the payment valid. But, importantly, this validity pertains only to the external side of agency: in our triangle, to the relationship between third party and office. As the superior authority has withdrawn its approval of the office holder (secretly deposing or suspending him from office), the internal side of agency is compromised. So, when the person acts on behalf of the office to make a transaction with himself, the third party and the individual who acts as agent coincide. In this case, the external side of agency is in effect just a replica of the internal side. In rejecting the validity of the acts carried out by the agent in relation to himself as private individual ('the person who is occultly suspended may do anything as to the others, but not as to himself'),[135] Baldus therefore denies the internal validity of agency in the case of occult suspension of the agent. The point is rather obvious, but it has little to do with conflict of interest. The suspension of the incumbent is occult and so hidden to everyone but the incumbent himself.

In case of the secretly suspended, Baldus looks first at the external validity of agency (to approve of it), and only then at the internal one (to deny it). Once again, coming back to the agency triangle, the figure is drawn moving from the 'angle' of the third party. As usual, the direction is important: had Baldus started with the person of the agent, it would have been difficult to justify the external validity (office–third party) after having denied the internal one (agent–office).

135 *Supra*, this paragraph, note 121.

Possession does not entitle the agent to represent the office, but it might justify the third party dealing with the office in the person of its possessor. It is also important that the validity is not maintained on the basis of the common mistake. That would mean undoing the whole Innocentian concept of toleration as based on agency. Rather, the validity derives from the peculiarity of the agent's possession: not just the *de facto* holding of the office, but lawful possession deriving from the 'vestige' of the previous legal entitlement to it. We have seen how, in principle, deposition for Baldus 'changes the cause of possession from something into nothing'.[136] But that statement referred to manifest (or rather, notorious) deposition. By contrast, occult deposition does not remove completely the 'cause of possession' – at least for third parties. We will come back to the point when we look at Baldus' interpretation of the *lex Barbarius*: there, the same concept of lawful possession of the office plays a crucial role.[137]

Baldus' interpretation of the occult suspension from office does not lead to a widening of the scope of toleration, but rather to the blurring of the difference between entitlement and possession. Innocent insisted on the lack of toleration (and so, on the invalidity of the deeds) not for the occult suspension from office, but only for the manifest one. Having allowed the toleration of the secretly deposed, it would have been self-contradiction not to apply the same criterion to the secretly suspended. Rather, Innocent used the case of occult suspension to highlight the difference between individual office and collegiate body. Occult suspension produces tangible consequences for individual members of the chapter, because none of them individually is the representative of the office. By the same token, on the contrary, the same occult suspension does not prevent the valid exercise of the office when it is entrusted to a single person.[138] Occult suspension, therefore, falls within the scope of toleration, and so the incumbent, although *indignus* (in the sense here of legally unfit) retains full administration of the office.

In restricting the validity of the administration only to the external side of agency, Baldus says something different. Toleration depends on entitlement, and so on the right to represent the office. Hence for Innocent there could not be different 'degrees' of toleration, so he never spoke of a 'vestige' of confirmation. Someone who is tolerated in office is still entitled to its full exercise, whereas someone who is no longer entitled to it may not be tolerated but rather treated as an intruder. In opposing external validity and internal invalidity, Baldus trades

136 *Supra*, this paragraph, note 102.
137 *Infra*, next chapter, §12.4.3.
138 Innocent IV, *ad* X.1.4.8, § *Suspensus* (*Commentaria Innocentii Quarti*, cit., *fol.* 34-*ra–b*, n. 4). More in particular, see *supra*, pt. II, §7.3, note 20, and §7.5, note 104.

toleration in office with lawful possession of it. Despite its name, the concept of toleration is rather inflexible as to its scope. Baldus seeks to introduce more flexibility to it, but this opens the door to an ambiguity unknown to the Innocentian elaboration. Lawful possession of office thus allows the symmetry between the two sides of agency to be severed, and possibly to reach beyond the scope of Innocent's toleration. But possession does not amount to full representation, and so not to proper toleration either.

Whether or not the theoretical foundations of Baldus' solution are particularly sound, Baldus gives more space to possession than Innocent did. This, as we shall see, will be of paramount importance in his reading of the *lex Barbarius*, and so for the later developments of the *de facto* agent doctrine, because it introduces a third element (the coloured title) between mere appearance and full entitlement: neither just the product of common mistake,[139] nor the result of proper representation.

The greater importance of possession in Baldus can be also seen in a different but equally important context. We have seen earlier how Innocent distinguished between violations of positive law of and natural law in an election: a violation of natural law led to the *ipso iure* invalidity of the appointment and could not be ratified by ensuing confirmation, which would also be void.[140] In stating as much, however, as already mentioned, Innocent did not provide clear examples.[141] That might have been deliberate. By Innocent's time the requirement of confirmation was widely accepted in principle but not yet universally held as always necessary. Innocent insisted on its necessity in all cases.[142] Listing specific cases where the confirmation was invalid could have been multiplied by way of legal analogy, undermining the whole point. Baldus on the contrary is more detailed on the subject. However, such detail is not aimed at filling Innocent's gap, but rather at underpinning Baldus' shift from (proper) toleration to lawful possession of the office.

Baldus does not look at specific cases of *ipso iure* invalidity of the election (or, at least, he does not do as much in connection with toleration and agency). Rather, he focuses on the consequences of invalid confirmation. Where the

139 Cf. Baldus, *lectura ad* Dig.1.14.3, cit., *fol.* 56*vb*, n. 40: 'fama pro titulo non habetur.'

140 *Supra*, last paragraph, note 94.

141 *Supra*, last paragraph, text and note 94.

142 Innocent was at the same time one of the canon lawyers most determined to insist on the need for confirmation, and one of the first popes who began the process that eventually led to the replacement of canonical elections with papal appointments (*supra*, this chapter, note 61). The two points might be more related to each other than often assumed.

underlying defect is manifest, reasons Baldus, the ensuing invalidity of the confirmation does not pose many problems. But what if the defect is hidden? In this case the superior authority might not even be aware of its existence. The same problem would ultimately apply to any third party dealing with the office. When looking at the case of the payment to the agent apparent we have seen that, as a matter of principle, the debtor should have asked the incumbent to prove his right to represent the office before paying up.[143] The case of *ipso iure* invalidity of the election makes things particularly difficult. Because even if the debtor did ask, the incumbent could have proven both his election and, especially, his confirmation. When the confirmation cannot cure the invalidity of the election, it becomes nearly impossible to distinguish appearance from reality. All that may be seen is a formally valid election and a similarly valid confirmation. This explains Baldus' peculiar and very careful choice of words to describe such a case: the confirmation is valid 'so long as [the prelate] is in possession of the authority of the superior'.[144]

To explain these words, we might want to look back at the way Baldus relied on the concept of possession of the office for the case of occult deposition. Secretly deposing the agent while leaving him in possession did not fully sever the link with the superior authority, Baldus maintained, and so left the agent in an ambiguous position, lying midway between proper toleration and full deposition. Possession worked as tangible evidence of that (only half-severed) link – its 'vestige'. In the present case, on the contrary, the link between superior authority and agent is itself invalid, and it is invalid from the outset (so that there may not be any 'vestige' of its former full validity left). Hence Baldus refers the concept of possession not to the office, but directly to the authority of the superior. This makes the status of the agent even more ambiguous than that of the occult suspended: his confirmation is *ipso iure* invalid, but the superior authority that confirmed him is not aware of this. Hence the idea of possessing the confirmation as opposed to being confirmed. The concept of possession of

143 *Supra*, this paragraph, note 131.

144 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 218*va*, n. 73): 'Premitte quanquam ille qui est in possessione est funditus falsus praelatus: et talis possessio non patrocinatur … quanquam non est funditus falsus, quia habet confirmationem superioris, tunc autem confirmatio est nulla ipso iure: aut valet licet confirmatus si indignus: prio<re> casu aut est vitium patens et repellitur, aut latens et non repellitur, ar(gumentum) ff. de mi(noribus) l. verum § ex facto (Dig.4.4.11.2) et l. minor xxv an(nis) ex aspectu (Dig.4.4.32) … Secundo casu non repellitur quamdiu est in possessione autoritate superioris, ar(gumentum) de off(icio) presi(dis) (*sic*) <l.> barbarius (Dig.1.14.3), de rescri(ptis) <c.> sciscitatus (X.1.3.13) per Innoc(entium).' Cf. Innocent, *supra*, pt. II, §7.4, note 45.

confirmation was (unsurprisingly) not present in Innocent, but the pope's unwillingness to fully explain the consequences of the *ipso iure* void election left a gap that ought to be filled, especially when the invalidity was occult. The latent condition of some defects left a grey area between absence and presence of confirmation, both because of the requirement for full knowledge (*certa scientia*) in the superior authority that made the confirmation,[145] and because of the limits of the confirmation itself. For both reasons the latent defect in the elected could not be considered to be healed with confirmation. Hence the idea that the elected who may not be confirmed receives possession of the superior's authority. Here as well, possession works as a link of sorts. Connecting the agent to the superior, it shifts the perspective from the *indignitas* of the agent to the superior *dignitas* of the higher authority.[146] This way, the question becomes one of higher jurisdiction: 'As the superior considers him as such [i. e. as confirmed], so anyone else must regard him so'.[147] In stating as much, Baldus quotes the same text he invoked when discussing the payment to the agent apparent: the praetor may ratify the business transacted by the false guardian (Dig.27.6.1.5).[148] The point is important. In the case of payments to the agent apparent, the agent insisted on this right because 'all others' held him as true representative of the office.[149] Those 'others' were, in effect, all third parties. Hence Baldus invoked the text of the praetor who ratified the false guardian's deed to stress that the release of the debtor who paid into the hands of the false agent depended on the authority of the judge (on his *iurisdictio*), not on the belief of the thirds. But in the case of *ipso iure* void election invalidly confirmed by the superior authority, the false agent is not relying on the common belief of the thirds, but on the same authority of the judge. A superior authority has by definition a higher *iurisdictio*.[150] It is on the

145 Cf. Innocent IV, *ad* X.1.6.32, § *Confirmauit* (*Commentaria Innocentii Quarti*, cit., *fol.* 63*ra–b*, n. 1–2), *supra*, pt. II, §7.1, notes 9–10.

146 Cf. *supra* in this paragraph.

147 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 218*va*, n. 73): '… nam ex quo superior eum habet pro tali ergo a quolibet alio debet haberi, ff. quod fal(so) tu(tore) au<c>t(ore) l. i § item pomp(onius) (Dig.27.6.1.5).'

148 Compare the last note with Baldus' comment *supra*, this paragraph, note 133.

149 *Supra*, this paragraph, note 131.

150 It is the higher *iurisdictio* that defines the higher authority, and so the quality of being *superior*: the higher authority is *maior* in that it may judge the *inferior*. Hence the maxim 'the person who judges me is [my] lord' (*qui me iudicat dominus est*), on which see most emphatically the coronation sermon of Innocent III, *In consecratione Pontificis Maximi*, *Sermo* II (in Id., *Opera*, Coloniae, apvd Maternvm Cholinvm, 1575, p. 189). Cf. Huguccio's *Summa*, *ad* C.2, q.5, c.10 (Admont 7, *fol.* 159*va*; transcription in Maceratini [1994], p. 624).

basis of that *iurisdictio* that third parties cannot refuse to acknowledge the agent apparent. Being 'in possession of the authority of the superior' ultimately means being able to invoke the same higher *iurisdictio* in support of an otherwise invalid title.

Referring the element of possession not to the office but to the superior's approbation brings the agent apparent as close as possible to full entitlement to the office – without reaching it.[151] This extreme closeness ultimately depends on the simple fact that the possession of the superior's authority changes the perspective from which the agency triangle is observed. In this case, it is the agent who invokes the superior before the third party. The movement is not from the third party to the office (designating external validity), but from the agent to the office (implying internal validity). In other words, it is on the basis of the possession of internal validity that the agent apparent is able to exert full external validity. Because of this shift in perspective, the invalid confirmation for an irremediable but occult defect in the election becomes an approximation of proper agency – and so of proper toleration in office. The point will be further elaborated examining Baldus' reading of the *lex Barbarius*.

11.7 Toleration and sacramental issues

Before concluding this analysis on the scope of Baldus' concept of toleration, mention should be made of the thorny problem of those jurisdictional matters that border on sacramental issues. We have seen how Innocent drew a clear line between *ordo* and *iurisdictio*, and applied the toleration principle to all jurisdictional matters, none excluded. But we have also seen the reluctance of other eminent canon lawyers to follow suit. By Baldus' time the common opinion among canonists was still to follow Innocent's concept of toleration with the exception of those borderline cases. As we will see later, it was only with Panormitanus that Innocent's position also began to be fully accepted on those subjects. When writing, Baldus therefore sided with the mainstream approach among canonists. Hence his reasoning on the subject is not dissimilar from that of Hostiensis, Baysio and Johannes Andreae.[152]

151 Cf. Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 218*vb*, n. 75): 'Et generaliter nemo presumitur priuilegiatus nisi doceat de priuilegio et nemo presumitur confirmatus nisi doceat de confirmatione. C. de diuer(sis) offi(ciis) l. probatorias li. xii (Cod.12.59(60).9).'

152 This would suggest that Baldus' position was rather common among the civil lawyers who dealt with the subject. Albericus for instance said as much mainly on the basis of Baysio. Albericus de Rosate, *ad* Cod.7.45.2 (*In Secundam Codicis Part*[*em*] *Commentaria*, cit., *fol.* 116*rb–va*, n. 1): 'Et utrum excommunicatus, uel

Baldus acknowledges that jurisdictional powers pertain to the jurisdictional sphere, not the sacramental one.[153] But when a jurisdictional act has immediate effects on the sacramental sphere, he qualifies the act according to its consequences. Perhaps to avoid the obvious problem of the origin of the act (jurisdictional as opposed to sacramental), he does not speak of *ordo* and *iurisdictio*, but rather of authority in temporal and spiritual matters.

On spiritual matters, truth is more important than opinion.[154] Baldus finds this maxim quite useful in solving the problem, because it shifts the analysis from toleration as the product of confirmation in office (as Innocent) to toleration as the simple consequence of common mistake. So Baldus can argue that the toleration of the *indignus* whose defect is latent is sufficient for his exercise of the office in temporal matters (so long as he is confirmed), but not in

haereticus occultus, possit alium excommunicare, no(tatur) in gl(ossa), et per eum [*scil.*, Baysio] 24 q. i in summa et c. audiuimus [C.24, q.1, c.4, cf. *supra*, pt. II, §8.3, note 44] et de ista materia excommunicationis, satis nota(ndum) i(nfra) si a non compe(tenti) iudi(ce) l. fi. (Cod.7.48.4). Cf. Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*va*, n. 26–27): 'Item est bene notandum, quod Arch(idiaconus) tenet 11 q. 3 c. in sententia pastoris (C.11, q.3, c.1) quod speciale est in sententia excommunicationis lata ab eo, qui credebatur iudex, et non erat, quod nulla est, et non ligat illum contra quem est lata … Sed an sententia haeretici, qui reputabatur catholicus teneat? Dic, quod non vt no(tatur) 24 q. 1 in summa (C.24, q.1 pr), et plene per Arch(idiaconum) extra de off(icio) delegati, c. penult(imo) li. 6 (VI.1.14.14).' Cf. Baysio, *supra*, pt. II, §8.3, note 39.

153 Baldus, *ad* X.1.6.15, § *Transmissam* (*Baldvs svper Decretalibvs*, cit., *fol.* 57*ra*, n. 1): 'Electus confirmatus etiam non consecratus potest omnia quae sunt iurisdictionis: sed non ea que sunt ordinis et dignitatis episcopalis, et sic habet iurisdictionem ita et banna et omnia que iurisdictioni accedunt … quero extra de his quae pertinent ad iurisdictionem. Gl(osa) dicit sicut iudicare excommunicare subaudi absoluere … Item dicit gl(osa) quod similia quae consistunt in iurisdictione hoc enim scias per regulam: quia omnia que non requirunt ministerium consacrationis dicuntur pertinere ad iurisdictionem.' Cf. the Ordinary Gloss to the *Liber Extra, supra*, pt. II, §8.5, note 98.

154 E. g. Baldus, *ad* Cod.7.45.2, § *Si arbiter* (*svper VII, VIII et Nono Codicis*, cit., *fol.* 52*rb*, n. 10): 'Sed nunquid in puris spiritualibus aliquid operetur error communis. Respondeo non, xi q. iii c. i (C.1, q.3, c.1).' Cf. Id., *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 219*ra*, n. 84): 'Item iste spirituales pene debent potius inniti veritati quam opinioni.' The *lex Barbarius* could not therefore find application *in spiritualia*. See esp. Baldus, *ad* Cod.7.16.11, § *Non mutant* (*svper VII, VIII et Nono Codicis*, cit., *fol.* 12*va*): 'Publici honores proprii vel paterni non faciunt de seruo liberum qui ad honorem improbe aspirauit. Non ob(stat) l. barbarius (Dig.1.14.3), quia est speciale in dignitate pretoria, vel ibi licet acta valeant seruus est, vel ibi speciale in populo romano, vel ibi propter publicam vtilitatem: et quod ibi dicit in pretore multofortius esset in papa inteligibili quod valerent temporaliter facta non spiritualiter, dic ut not(at) Inno(centius) extra de elect(tione) c. nihil (X.1.6.44).'

spiritual ones.[155] Because confirmation could not cure the *ipso iure* invalidity of the election due to the gravity of the *indignitas*, it could only lead to a provisional validity of his administration so long as the defect remained hidden. This, we have just seen, works on secular matters (*in temporalia*). But *in spiritualia*, where the accent is on the truth of things, that provisional validity would not suffice. The consequences of this approach become particularly clear with regard to the power of binding and loosing. As we have seen, for Innocent that power was always and exclusively a jurisdictional one. In Baldus, however, the shift from the jurisdictional/sacramental opposition to the temporal/spiritual opposition, and the emphasis on the contrast between truth and opinion, both lead to a different conclusion about the power to excommunicate. The occult excommunicate may continue to exercise his office, says Baldus, with the ensuing validity of all his jurisdictional deeds – apart from excommunication.[156] 'Since it is God Who binds, He does not bind against the truth.' A putative bishop is in the same condition as a putative praetor, but that is only with regard to the (temporal) jurisdiction deriving from the secular office.[157] By the same token, argues

155 Baldus, *ad* Cod.3.34.2, § *Si aquam* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 219*ra*, n. 85): 'Confirmatus autem, cuius confirmatio est propter occultum vitium confirmata, omnia temporalia potest. Spiritualia vero non potest, vt si [praelatus] est falsus, hereticus vel scismaticus: vt no(tatur) de ele(ctione) <c.> nihil est (X.1.6.44) per Inn(ocentium).' As we have seen, however, Innocent's position was not precisely as reported by Baldus: Innocent said as much, but he included absolution and excommunication among the jurisdictional (or, in Baldus' language, temporal) matters. Referring to Innocent's general statements was correct in form but somewhat misleading in substance.

156 Baldus, *ad* X.2.14.8, § *Veritatis* (*Baldvs svper Decretalibvs*, cit., *fol.* 154*va–b*, n. 6): 'no(tandum) quod quando quis prelatus est excommunicatus statim suspensus est ab omni officio et ab omni iurisdictione non solum quo ad spiritualia, sed etiam quo ad temporalia, quod est verum si est publice excommunicatus: secus si est excommunicatio occulta, quia valent gesta inter ignorantes, vt i(nfra) de re iudi(cata) c. ad probandum (X.2.27.24), saluo quod etiam occulte excommunicatus alium excommunicare non potest, vt in c. ii i(nfra) de eo qui renu(nciavi) epis(copatui) (X.1.13.2).' Cf. Albericus de Rosate, *supra*, this paragraph, note 152.

157 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*rb–va*, n. 23: 'Sed quid de sententijs spiritualibus istorum Episcoporum putatiuorum, an ligant? Et videtur quod non: nam cum Deus ligat, non ligat contra veritatem, ar(gumentum) i(nfra) de condi(ctione) ob causam, l. si pecuniam § si seruum (Dig.12.4.5.1), vnde in sententia excommunicationis plus consideratur veritas quam opinio ut no(tat) Arc(hidiaconus) xi q. iii <c.> sententia pastoris (C.11, q.3, c.1). *Credo ergo quo ad tertiam huiusmodi conclusionem habebit* [cp. Baldus' Venetian edition of 1577: 'et credo contrarium quo ad ecclesiam huius mundi, quia habet'] administrationem iurisdictionis, et meri et mixti imperii tam in ciuilibus quam in criminalibus, et per inquisitionem et iudicis officium, vt hic, et hoc est verum in spiritualibus, quae fiunt ratione publicae vtilitatis, et publici officij: secus in aliis, ut not(at)

Baldus, confession to a *falsus praelatus* is valid only because of the penitent's faith, not because of the power of that 'defrauder of souls'. What would suffice in secular matters cannot suffice in spiritual ones.[158]

Inn(ocentius) de consue(tudine) c. cum dilectus (X.1.4.8) et no(tat) Arc(hidiaconus) ix q. i <c.> Nos in homine (C.9, q.1, c.6) vbi omnino vide per eum.'

158 Baldus, *ad* X.1.6.54, § *Dudum* (*Baldvs svper Decretalibvs*, cit., *fol.* 73*rb*, n. 5): 'No(tandum) quod ille qui non est praelatus, non potest absoluere vel ligare et facit quod apostaticus dicitur esse deceptor animarum, et de hoc non est dubium, tamen illi qui credunt in eum non confundentur: quia excusat publicus error et bona fides secundum Ber(nardum) et Inn(ocentium) quod est notandum, quod intellige quo ad deum: quia cor contritum et humiliatum deus non spernit [cf. Psalm 50(51):19], sed quo ad forum iudiciorum inspicitur veritas in litigando et solvendo, vel quasi possessio cum iusto errore: vt lex Barbarius (Dig.1.14.3), et fuit quaestio de facto vtrum cautio vsurarum prestita putatiuo sacerdoti reddat vsurarium testabilem, et dixi quod sic.' Cf. *supra*, pt. II, §7.5, note 87, and §8.1, note 9. See also Wilches (1940) p. 117. The difference of Baldus' position from that of Innocent is also visible on the subject of the fornicating priest. There, however, the difference does not lie in what Baldus says, but in what he omits. Like Innocent, Baldus also holds that parishioners may receive sacraments from such a priest, so long as his crime is occult. But Innocent's reference to the possibility of forcing the parishioner to receive sacraments from the occult fornicator is not to be found in Baldus. Cf. Baldus, *ad* X.3.2.7, § *Vestra* (*Baldvs svper Decretalibvs*, cit., *fol.* 259*rb*): 'A clerico fornicario non notorio licite audimus diuina et precipimus ecclesiastica sacramenta, sed si esset notorius abstinere debemus non tamen ea intentione, vel animo quo credamus officia vel ecclesiastica sacramenta per tales fore polluta.'