Chapter 14

From the *lex Barbarius* to the brocard *error communis ius facit*

14.1 Late commentators and early simplifications

On the *lex Barbarius* very little happens after Baldus, with the exception of one important thing: the progressive simplification of his approach. This simplification would progressively detach Barbarius' case from the underlying issue of valid representation – and so, from the toleration principle. To some extent, the modern interpretation of the *lex Barbarius*, and so the *de facto* officer doctrine in civil law, is not the result of a progressive development but of a crystallisation of medieval ideas in the brocard *communis error facit ius*. More than progression, in effect regression.[1]

14.1.1 Angelus de Ubaldis

Although the commentary of Angelus de Ubaldis (1327/8–1407) on the *lex Barbarius* is based on Innocent IV,[2] his interpretation of the pope is somewhat creative. While Baldus studiously circumvented the main obstacle to the application of Innocent's toleration doctrine (confirmation by the superior authority), Angelus would appear to ignore it.

The first part of Angelus' *lectura* on the *lex Barbarius* reports faithfully what Innocent said on the toleration of the unworthy, both in general terms and

1 The short remarks in next few pages will not allow in-depth discussions on specific points. One of them is the *lex Iulia de ambitu*. The question of whether Barbarius did violate the *lex Iulia de ambitu* continued to occupy a central position in the scholarly debate for a long time. Just to give a later example, the seventeenth-century Brussels edition of Bugnyon's treatise on abrogated laws (edited by Libert François Christyn) has a long addition on the question of the sale of offices. This addition is based largely on medieval and early modern commentaries on the *lex Barbarius*, with regard to the applicability of the *lex Iulia de ambitu* to the appointments made by the prince. Bugnyon (1677), lib. 4, tit. 26, p. 48.

2 Cf. Lepsius (2008), p. 244, text and note 56.

specifically on Barbarius.[3] Despite the invalidity of his election, Barbarius is tolerated in office because of common utility.[4] Being tolerated in a public office however presupposes the right to validly exercise it. This, explains Angelus, can be achieved only with confirmation.[5] What gives the right to discharge the office (the *potestas administrandi*) however is not the election but the confirmation; Barbarius' incapacity invalidated the election, but was no obstacle to his confirmation.[6] So far, it would seem that Angelus was following the pope to the letter, even if that would have meant accepting the reading of the Gloss – and so the presumed will of the prince to confirm Barbarius' election. The opposite is true.

Having duly summed up the central tenets of Innocent's concept of toleration, Angelus then proceeds to twist their application systematically. Innocent – according to Angelus – argued that toleration also applies to the prelate who, having 'canonical entry' into office, turns into a heretic.[7] The statement is true,

3 Angelus de Ubaldis, *ad* Dig.1.14.3 (*Angeli Perusini conspicuae iurisprudentiae uiri in primam digesti ueteris partem co<m>mentaria*, Mediolanii [Beninus & Johannes Antonius de Honate] 1477 [*fols. 35vb–36rb*]). Most of the applications of the *lex Barbarius* in Angelus de Ubaldis' work may be found in his *lectura* on the Code: Angelus de Ubaldis, *ad* Cod.4.19.23, § *iubemus* (*Lectura domini Angeli de Perusio super C*(*odice*) …, 1534 [Lugduni], Vincenti Portonariis, *fol.* 82*rb*, n. 3); *ad* Cod.6.21.13, § *At militibus* (*ibid., fol.* 148*ra*, n. 2); *ad* Cod.6.23.1, § *testes* (*ibid., fol.* 150*ra*, n. 3); *ad* Cod.7.45.2, § *Si arbiter* (*ibid., fols.* 206*vb*–207*ra*).

4 Id., *ad* Dig.1.14.3 (*in primam digesti ueteris partem*, cit. [*fol. 35vb*]): 'Item dicit Inno(centius) eo ti(tulo) <c.> cum dilecta (X.1.3.22) quod toleratur processus barbarii propter multam utilitatem subditorum, unde secus si tanta utilitas non censetur, puta quia creditur delegatus qui non est.' Cf. *supra*, pt. II, §7.5, esp. note 81.

5 Angelus de Ubaldis, *ad* Dig.1.14.3 (*in primam digesti ueteris partem*, cit. [*fol. 35vb*]): 'dicit Inno(centius) de consuetudine <c.> cum dilectus (X.1.4.8) iuxta finem, quod excommunicatus uel suspensus qui ignoranter in officio tolleratur est si quod facit ratione publici officii illud tolleratur per hanc l(egem), secus si aliud gerant puta canonici excommunicati uel suspensi procedunt ad actum electionis et quid possit facere excommunicatus quia suspensus ibi uide per eum. Et dicit Inno(centius) de electionem <c.> qualit(er) (X.1.6.17) quod gesta per hunc barbarium ualent quia fuit confirmatus pretor, secus si confirmatio non interuenisset sed solum electus.' Cf. Innocent, *supra*, respectively pt. III, §11.6, note 119, and pt. II, §7.6, note 117.

6 Angelus de Ubaldis, *ad* Dig.1.14.3 (*in primam digesti ueteris partem*, cit. [*fols. 35vb –36ra*]): 'Item dicit Inno(centius) de elec(tione) <c.> cum dilecti (X.1.6.32) quod barbarius non fuit pretor ex electione sed ex confirmatione, unde tenuit confirmatio ualent ergo gesta per hunc et per prelatum non canonice electum tamen canonice confirmatum ex bono et equo et quia potestatem administrandi accepit ex confirmatione.' Cf. Innocent, *supra*, pt. II, §7.1, note 9.

7 Angelus de Ubaldis, *ad* Dig.1.14.3 (*in primam digesti ueteris partem*, cit. [*fol. 36ra*]): 'Audi<s> Inno(centium) dicentem de elec(tione) <c.> nihil (X.1.6.44) …

as we have seen, so long as the 'canonical entry' was preceded by both election and confirmation. Deliberately ignoring as much,[8] Angelus does not consider confirmation in office to be a prerequisite for canonical entry: for him, a simple election seems to suffice. Applied to the toleration principle, this means that confirmation is not necessary for the valid exercise of the office.[9] Arguing that canonical entry does not depend on confirmation but on simple election leads to the very opposite conclusion on Barbarius to that of Innocent: Barbarius' election did not need to be ratified by the prince. As such, concludes Angelus, common mistake and public utility would suffice to argue for the validity of Barbarius' acts.[10]

Angelus does not say openly that a voidable election suffices for canonical entry into office, but he seems to imply as much by equating canonical entry with lawful acquisition of the possession of the office (just like Baldus). As such, concludes Angelus, the acts of the putative prelate are valid if he is in possession of his office; otherwise they are void.[11] In effect, this is very similar to what Baldus said, with the difference that Baldus never spoke of toleration in office without prior confirmation. Baldus did not twist Innocent's position[12] – he simply tried to circumvent its less palatable applications. Angelus on the contrary does not hesitate to qualify as proper toleration what in Baldus was only coloured title. This is particularly clear in Angelus' comment on the case of the slave-arbiter (Cod.7.45.2).[13] There, Angelus states that the unlawful pos-

quod gesta per prelatum qui canonicum habuit ingressum sed per heresim superueniente remouetur non cassantur nisi essent ordinationes, consecrationes uel alia spiritualia quae quo ad executionem irrite sunt nisi interueniat dispensatio.' Cf. Innocent, *supra*, pt. II, §7.5, note 105.

8 Given the insistence of the pope on the point, it seems quite difficult to imagine that Angelus' approach was unintentional.

9 Angelus de Ubaldis, *ad* Dig.1.14.3 (*in primam digesti ueteris partem*, cit. [*fol.* 36-*ra*]): 'Si autem canonicum ingressum non habuit nec fuit confirmatus tunc omnia gesta per eum sunt nulla.'

10 *Ibid.*, 'sed si fuit confirmatus uel etiam solum electus nec erat necessaria confirmatio tunc propter communem errorem et publicam utilitatem quandiu in officio tolleratur ualent gesta per eum ut hic et ff. quod fal(so) tu(tore) l. i § p(enultimo) (Dig.27.6.15).'

11 *Ibid.*, 'Item si prelatus, ille qui reputatur prelatus, non est in possessione prelature indistincte gesta per eum non tenent, de iure pa(tronatus) c. consultationibus (X.3.38.19).'

12 With the exception of Barbarius' confirmation in Innocent: *supra*, pt. III, §12.2.

13 Angelus interprets this *lex* as if the *arbiter* was delegated to preside over a number of legal proceedings, not to a single case, so that public utility considerations could be invoked. Angelus de Ubaldis, *ad* Cod.7.45.2, § *Si arbiter* (*Lectura domini Angeli de Perusio super C*(*odice*), cit., *fols.* 206*vb*–207*ra*): 'Potes dicere quod hic loquitur de delegato ad vniuersitatem causarum: tunc enim versatur communis vtilitas; secus si ad vnam causam tantum: quia tunc cessat ratio.'

session of jurisdiction does not suffice for toleration, even if supported by common mistake as to its validity. In order for the acts to be valid, it is necessary to hold a title of sort to exercise the office. Invalid as the title may be, it makes the difference between proper toleration in office and mere *de facto* possession of the same office.[14]

Considering the *lex Barbarius* as a case of toleration in office, Angelus has no difficulty in invoking its direct application to other cases, especially the notary who forged an instrument, entirely skipping Baldus' careful distinction between the two situations. If the case of Barbarius does fall within toleration, then there is no need to imagine a third genus between intruder and proper toleration. So the *lex Barbarius* can be invoked to extend the concept of toleration to the notary who should be removed from office. Until condemned,[15] the notary will be able to exercise his office validly because of common mistake and public utility, just as in Barbarius' case.[16] By contrast, and again following Innocent, toleration in office after judicial condemnation is mere forbearance – which does not lead to the validity of further acts.[17]

14.1.2 Raphael de Fulgosiis

As we have abundantly seen, Baldus' complex reading of the *lex Barbarius* may be fully appreciated only by keeping Innocent's thinking in mind. 'Adjusting' the position of the pope made things considerably easier, and allowed Baldus' approach to be greatly simplified, just as his brother Angelus seems to have done.

14 *Ibid.*, *fol.* 207*ra*: 'si probatur delega(tionem) factam non esse, licet communis opi(nio) sit et etiam quasi posses(sio) iurisdi(ctionis) non sufficit: et sic intelligitur opi(nionem) Innocen(tii); secus si procedat titulus quantumcunque iniustus ex eo quia tribuit inhabili.'

15 More precisely, so long as the condemnation remains secret: 'si depositio erat occulta tenent instrumenta' (*ibid.*, *ad* Cod.6.23.1, § *Testes*, *fol.* 150*ra*, n. 3).

16 Id., *ad* Coll.2.6.1(=Nov.12.1), § *Pro incestis*(*Opus ac lectura authenticorum prestantissimi doctoris domini Angeli de vbaldis de Perusio* …, Venetiis [De Tortiis], 1489, *fol.* 9*vb*): '… instrumenta per eum facta post eius falsitatem commissam non ualent, nisi forte tenerent propter publicam vtilitatem et communem errorem vt fuit in barbario, vt l. barbarius de of(ficio) praeto(rum) (Dig.1.14.3).' Although the tone is dubitative ('forte'), elsewhere Angelus states as much in clearer terms: see next note, and Angelus' comment on Cod.6.21.13, § *At militibus* (*Lectura domini Angeli de Perusio super C*(*odice*), cit., *fol.* 148*ra*, n. 2).

17 Id., *ad* Cod.4.19.23, § *iubemus* (*Lectura domini Angeli de Perusio super C*(*odice*), cit., *fol.* 82*rb*, n. 3): '… et hoc intelligo verum donec [tabellio] in officio toleratur: vt in l. barbarius ff. de offic(io) presi(dis) (*sic*) (Dig.1.14.3) … Si vero esset condemnatus de falsa scriptura: tunc aliam scripturam deinde non posset conficere de nouo licet in officio toleretur.' Cf. Innocent IV, *ad* X.3.2.7, § *Operis*, *supra*, pt. II, §7.3, note 39.

A more efficient way of reaching the same goal was of course to remove the pope entirely from the picture. One of the first eminent jurists who did so was Fulgosius (Raphael de Fulgosiis, 1367–1420).

As a doctor *in utroque iure* (i. e. in both canon and civil law), Fulgosius must have known Innocent IV's writings well. But he was not particularly impressed with them, and certainly not on our subject: 'in my opinion Innocent approached this subject with wavering footstep as usual.'[18] Fulgosius was no more lenient with the traditional reading of Accursius: '*pace* the Gloss' (*cum pace glose*), Barbarius remains a slave, for neither the Romans nor the emperor had any intention to 'tarnish the praetorship' with a slave (*preturam maculare seruili conditione*).[19]

Already from these short remarks Fulgosius may be considered as representative of many later civil lawyers. Rejecting the Gloss (and thus, it is important to remember, also Bartolus), he finds it natural siding with Baldus. But his poor interest in Innocent's refined thinking leads him to prune Baldus' complex reasoning, skipping entirely the indirect application of the toleration principle. The main points left from this simplification are two. First, the validity of the acts depends on public utility, triggered by the common mistake. Second, to avoid an indiscriminate application of public utility, lawful possession of the office is required: for that purpose, a voidable election suffices. As a result of this simplification, Baldus may well be considered to follow the reading of the *Ultramontani*[20] – especially that of Cugno.

Fulgosius accepts the main tenet of the Orléanese and their sympathisers – full separation between source and acts. When the common mistake furthers public

18 Fulgosius, *ad* Dig.1.14.3 (*Raphaëlis Fulgosij Placentini … in primam Pandectarum partem Commentariorum …*, vol. 1, Lvgdvni, Apud Hugonem et haeredes Aemonis à Porta, 1554, *fol.* 25*vb*, n. 9): 'iudicio meo ibi Inno(centius) more suo incerto pede vagetur.' The reference was to Innocent's comment on X.1.6.32 and 44.

19 *Ibid.*, *fol.* 26*rb*, n. 14. See further *ibid.*, *fol.* 25*vb*, n. 9 (where Fulgosius lists the usual objections against Barbarius' praetorship, especially the opposition between *humanitas* and strict law).

20 *Ibid.*, *fol.* 25*va*, n. 1: 'Legitur duobus modis lex ista, vno modo secundum glos(am), Jac(obum) de are(na), Jac(obum) but(trigarium) et Bart(olum). Alio modo secundum Jac(obum) de ra(vanis), Pet(trum) et Cy(num) et Bal(dum).' It is on the basis of Baldus *ultramontanus* that Fulgosius disproves the reading of the Gloss: 'Bal(dus) addit tres rationes. Prima certum est quod iure communi non fuit pretor, sed nec publica vtilitas exigit, vt ipse sit liber. Nam satis est quod acta coram eo valeant. Unde non est recedendum a iure communi. … Mouetur secundo nam beneficium per obreptionem obtentum nullum est ipso iure. … Tertio mouetur, nam cum ipse princeps vel populus ignorauerit ipsum seruum, non intelligitur dispensasse super eo quod ignorabat … Et ad hunc text(um) dicunt vltramonta(ni) et Bal(dus) quod hic formatur vnica tantum questio scilicet an acta valeant, vel non' (*ibid.*, *fol.* 25*vb*, n. 9).

utility, the object of the mistake may be held as true.[21] The problem is whether public utility and common mistake suffice, or the intervention of the superior authority in some form is also necessary. For Fulgosius this means choosing between the approach of Bellapertica and Cynus on the one side, and that of Cugno and Baldus (!) on the other. After some hesitation, he sides with Baldus.[22] Fulgosius does not elaborate further as to the actual role of the superior

21 On the matter, Fulgosius provides an abridged reading of Butrigarius' scheme, duly cleansed of any support for the Gloss: '… Sed aliquando queritur, an error communis habeatur pro veritate quantum ad effectus, docto(res) dixerunt aut publica vtilitas suadet haberi pro veritate, et habetur pro veritate: vt hic et l. i C. de testa(mentis) (C.6.23.1) et § sed cum aliquis, insti. eo(dem) titu(lo) (Inst.2.10.7). Sed aliquando publica vtilitas suadet haberi pro falsitate, et tunc non habetur pro veritate, arg(umentum) l. quod vero, contra s(upra) de legi(bus) (Dig.1.3.14). Aut publica vtilitas nihil horum suadet, et tunc aut interest errantis haberi pro veritate, et non habebitur pro veritate: vt l. Zenodorus C. ad macedonia(num) (Cod.4.28.2) et l. iii i(nfra) ad macedo(nianum) (Dig.14.6.3). Sed aliquando interest errantis haberi pro falsitate, et tunc habetur pro falsitate: vt … l. i § fin. quando act(io) de pecu(lio) (Dig.15.2.1.10)' (*ibid.*, *fol.* 26*ra*, n. 9). Fulgosius does not openly quote Butrigarius in his commentary on the *lex Barbarius*, but he does so when reporting the same scheme in his *lectura* on the slave-witness: Fulgosius, *ad* Cod.6.23.1, § *Testes* (*Raphaëlis Fulgosij Placentini … in D. Iustiniani Codicem Commentariorum* …, vol. 2, Lvgdvni, Apud Hugonem et haeredes Aemonis à Porta, 1547, *fol.* 39*vb*, n. 5).

22 This is particularly clear in Fulgosius' interpretation of the false notary's case: despite the presence of public utility, a false notary cannot draft valid instruments. Fulgosius, *ad* Dig.1.14.3 (*in primam Pandectarum partem Commentariorum*, cit., *fol.* 26*ra*, n. 12): 'Superest vna dubitatio que sit ratio quare acta valeant, cum non sit iustus pretor. Guil(elmus de Cugno) dicit contingere ex tribus: quorum si quid desiit non valebunt gesta. Primo communis error, secundo publica vtilitas, tertio superioris auctoritas: et si deficiat quid horum, puta aliquis gessit se pro tabellione cum nunquid habuisset auctoritatem, et confecit multa documenta, non valebunt talia documenta, et allegat tex(tum) l. actuarios C. de numera(riis) et actua(riis) lib. xii (Cod.12.49(50).7). In hanc sententiam inclinat Bal(dus) referens consonantem Azo(nem) in summa de fide instrum(entorum) [Coll.6.3(=Nov.73), *supra*, pt. I, §2.6, note 139]; Pet(rus) et Cy(nus) sunt contra: quia sufficit communis error et publica vtilitas, per aut(henticam) de tabel(lionibus) § penul(timo) (Coll.4.7.1[=Nov.44.1§4]), vbi videtur glo(sam) hoc dicere [cf. *supra*, pt. I, §2.6, note 132], et in hoc videtur mihi Inno(centius) in c. i ad fi(nem), de fide instrumen(torum) per l. iii i(nfra) ad macedo(nianum) [*supra*, pt. II, §7.5, note 73], et in hanc sententiam videtur magis inclinare Bart(olus) [*supra*, pt. I, §5.3], et in veritate hec questio satis est ambigua. Et ad l. actuarios (Cod.12.49(50).7), respondet Bart(olus) quod illa loquitur in casu speciali. Nescio tamen in quam partem magis inclinem, verum tamen sententia Azo(ni), Bal(di) et Guil(elmi) in stricta disputatione videtur mihi verior: quia tamen contraria sententia humanior est, et quia sussulta est magna auctoritate, videtur mihi tenenda in iudiciis.'

authority, but it would seem that he meant a formally valid but substantively flawed election.[23]

14.1.3 Paulus de Castro

Ironically, one of the jurists who followed Baldus' interpretation of Barbarius' case more faithfully, Paulus de Castro (c.1360–1441), seems not to have written any comment on Dig.1.14.3.[24] Given his pre-eminent position among fifteenth-century civil lawyers and his lasting influence, it is worth looking at those other parts of his opus where he applied (Baldus' elaboration of) the *lex Barbarius*.

As a matter of principle, says Castro, Innocent's concept of toleration applies to the ordinary judge who becomes *infamis* and so legally incapable, not to the legally incapable who discharges the office of judge. It follows – contrary to Innocent's view – that the litigants could recuse the slave sitting in judgment even after the joining of the issue.[25] This way, Castro adheres strictly to the

23 This conclusion is strengtened by Fulgosius' short comment on the case of the slave-arbiter: although the appointment was flawed by a mistake as to the slave's status, the validity of the decision, says Fulgosius, ought to be assessed according to the time when it was made, even though the status of the judge was only putative: 'conditio iudicis ferentis sententiam, vera vel putatiua, perspicitur secundum tempus iudicii et date sententie … et idem putant doct(ores) in omni alio defectu, qui impediat iudicari: verbi gratia, erat aliquis excommunicatus, qui communi opinione putabatur non excommunicatus.' Fulgosius, *ad* Cod.7.45.2, § *Si arbiter* (*in D. Iustiniani Codicem Commentariorum*, cit. *fol.* 158*rb*, n. 1).

24 Castro's printed editions skip title 14 of the first book of the Digest; the same can be seen in manuscript sources: see e. g. BSB, Clm 6675.

25 Castro, *ad* Dig.5.1.12.2, § *Non autem omnes* (*Pavli Castrensis … In Primam Digesti Veteris partem Commentaria …*, Lugduni, 1585, *fol.* 126*va*, n. 5): 'Dicit etiam Inn(ocentius) quod exceptio infamiae non potest opponi contra iudicem ordinarium quousque in officio toleratur, ar(gumentum) s(upra) de offi(cio) praet(orum) l. Barbarius (Dig.1.14.3), melius in l. Cassius s(upra) de sena(toribus) (Dig.1.9.2), quae omnia dicta sunt notanda et declarant istum tex(um), et vide quod idem no(tat) in c. super literis ante fi(nem), extr(a) de rescri(ptis) [cf. *supra*, pt. II, §7.5, note 82]. Quidam autem prohibentur morib(us) vt foeminae: quia turpe est vt se ingerant publicis officiis. Item serui, et dicit Inn(ocentius) et etiam spe(culator) in ti. de excep(tionibus) § nunc videndum, ver(siculum) "sed quaero" [*Specvlum Ivris*, cit., lib. 2, partic. 1, *De Exceptionibus et Replicationibus*, 2. § *Nunc uidendum*, vol. 1, p. 511, n. 6], quod ista exceptio debet opponi ante lit(em) cont(estatam) et postea non. Tu dic in seruo contrarium, quia est incapax iurisdictionis, cum pro nihilo reputetur de iure ciuili: et ideo non cadunt in eodem quae sunt iuris ciuilis, sicut ciuilis obligatio et iurisdictio, et sic processus coram eo agitatus non potest valere.' Cf. Castro, *ad* Dig.5.1.44.1, § *Cum postea* (*In Primam Digesti Veteris partem Commentaria*, cit., *fol.* 139, n. 5).

principle that toleration in office applies only to the supervening incapacity.[26] Proper toleration, however, is not necessary to the validity of the acts. Lawful possession of the office would suffice, when coupled with common mistake and public utility. Castro explains the point in his analysis of the slave-arbiter (Cod.7.45.2). Because of the underlying legal incapacity, the appointment of the slave is substantively flawed but formally valid. The substantive invalidity bars full (i. e. *de iure*) entitlement to the exercise of jurisdiction (and so, proper toleration), but the formal validity suffices for Barbarius to receive possession of it (or rather, 'exercise and use of jurisdiction').[27] As with Baldus, Castro separates entitlement from lawful possession of jurisdiction. While Castro does not go into detail on the representation mechanism underpinning the toleration concept, this separation allows him to distinguish the position of the person from that of the office he exercises.[28]

26 Castro, *ad* Cod.7.45.2, § *Si arbiter* (*Pavli Castrensis … In Secundam Codicis partem Commentaria* …, Lugduni, 1585, *fol.* 128*rb*, n. 2): 'et sic no(tatur) mirabilem effectum communis reputationis, quia facit quem haberi pro idoneo et habili, licet non sit. Idem in testa(mentis) l. cum lege (Dig.28.1.26), et ibi no(tatur) ff. de test(amentis), et per istam l(egem) [*scil*., Cod.7.45.2] patet, quod si iudex est excommunicatus vel est infamis, si tamen reputabatur contrarium, valent acta coram eo, vt c. ad probandum, de re iu(dicata) (X.2.27.24).' Castro further elaborates on the point when writing on the revocation of delegated jurisdiction for the death of the delegator, focusing on its effects in case the parties remain unaware of it. If the parties do not raise an exception, says Castro, the judge may render a valid pronouncement. On the subject Castro agrees with Innocent. The solution, continues Castro, is different in case of an ordinary judge: the parties may not raise any objection as to his legal capacity. That, however, applies only if he was truly an ordinary judge. Otherwise, the *lex Barbarius* applies. Castro, *ad* Dig.12.1.41, § *Eius qui* (*Pavli Castrensis … In Secundam Digesti Veteris partem Commentaria* …, Lugduni, 1585, *fol.* 20*va*, n. 11): '… Inno(centius) in c. licet, de offi(cio iudicis) deleg(ati) (X.1.29.30) tenet contrarium, dicens quod post mortem delegantis non finitur iurisdictio delegata ipso iure, sed ope exceptionis … sufficit ergo, quod exceptio non fuerit opposita, vt valeant acta … pro opi(nione) Inn(ocentii) facit l. si forte, de offi(icio) praesid(is) (Dig.1.18.17), et c. si duobus, de app(ellatione) (X.2.28.7), vbi ignorantia iudicis credentis se iurisdictionem habere in aliqua causa, cum non habeat, faciat acta valere. … Aliud in iudice ordinario, vbi agitur de maiori praeiudicio, cum omnes ad ipsum recurrant, dummodo semel fuerit ordinarius vere, licet ignoret finitum esse officium, d. l. si forte (Dig.1.18.17), vt sit ordinarius de praesenti, licet non in certa causa, iniqua censebatur esse, vt in d. c. si duobus. Si autem nunquam fuisset, nec esset, dic vt l. Barbarius, s(upra) de offi(cio) praeto(rum) (Dig.1.14.3).'

27 Id., *ad* Cod.7.45.2, § *Si arbiter* (*In Secundam Codicis partem Commentaria*, cit., *fol.* 128*rb*, n. 2): 'et sic non haberet iurisdictionem, habebat tamen exercitium iurisdictionis et vsum, quod tantundem valet, acsi haberet iurisdictionem.'

28 This seems strengthened by Castro's reading of the *locus classicus* of the Code on tyranny, the *lex Decernimus* (Cod.1.2.16). That *lex*, says Castro, requires any act of

In turn – and, again, following Baldus – for Castro the lawful exercise of possession of the office (and thus of its jurisdiction) allows for the validity of the acts when that possession is coupled with common mistake and public utility. This is particularly clear in Castro's discussion of the notary. The putative notary cannot draft valid instruments: his *quasi possessio* of the office is just *de facto* exercise of it. The common mistake as to its validity can only invert the burden of proof as to the title (just as Innocent and Baldus had it), but cannot bestow legal validity on his instruments.[29] By contrast, the notary secretly deprived of his office (and so widely considered as still holding a valid title) can draft new documents.[30] The difference, explains Castro, depends on the presence of a formally valid title. A formally valid title would suffice because the object of the common mistake is not the existence of a title, but only its substantive validity. Public utility can make up for the substantive invalidity, but not also for the complete lack of any title. In Barbarius' case, he continues, the slave was formally elected, although the election was substantively invalid. Without a formal title, however, 'the common opinion or mistake would have no ground', and so 'it would not bestow validity on the instruments'.[31] Just as in Baldus, a voidable

the tyrant to be quashed. This however does not necessarily also apply to the decisions of the judges serving under the tyrant. If their jurisdiction is based not on statutes and privileges made by the tyrant, but rather on the *ius commune* or municipal statutes, then their decisions would hold – after the *lex Barbarius*. The reason, concludes Castro, is that the judges are simply exercising the jurisdiction that pertains to the city. Castro, *ad* Cod.1.2.16, § *Decernimus* (*Pavli Castrensis … In Primam Codicis partem Commentaria…*, Lugduni, 1585, *fol.* 12*ra*, n. 1): 'Omnia quae facta sunt tempore tyrannidis superueniente iusto dominio debent rescindi, hoc dicit tota lex, quod intellige de his, quae facta sunt per modum legis vel priuilegij. Si vero per viam iustitiae per eius officiales, tunc aut fundantur in legibus et priuilegijs praedictis, et idem, aut in iure communi, vel statutis loci, et tunc debent firma permanere, arg. in l. Barbarius ff. de officio praeto(rum) (Dig.1.14.3) quia dicti officiales magis dicuntur vti iurisdictione cohaerente loco, vel territorio, quam data a tyranno qui nullam habet.'

29 See esp. Id., *ad* Cod.4.21.7, § *Si solennibus* (*In Primam Codicis partem Commentaria*, cit., *fol.* 192*vb*, n. 3–4). Cf. Id., *ad* Dig.14.6.1.3, § *In filiofamiliae* (*In Secundam Digesti Veteris partem Commentaria*, cit., *fol.* 96*rb–va*, n. 11–12).

30 '… et si ista priuatio sit occulta, valent instrumenta per ipsum confecta.' (Castro, *ad* Cod.6.23.1, *In Secundam Codicis partem Commentaria*, cit., *fol.* 38*rb*, n. 2). The opposite applies of course if the deposition is notorious. Even then, however, the ex-notary would be able to give execution to previously drafted instruments (as Baldus had it): 'confecta vero ante priuationem non irritantur: imo etiam si non erant publicata, poterit publicare, quia eius delictum non debet nocere contrahentibus, qui ad ipsum habuerint recursum tempore quo erat habilis, etiam si eius inhabilitas sit notoria' (*ibid.*).

31 *Ibid.* n. 3–4: 'et praedicta procedunt, quando semel fuit notarius, sed postea priuatus, vel effectus inhabilis. Si autem nunquid fuit notarius, tamen communi existimatione habeatur pro notario, et postea detegitur, quod non est, an valeant

election does not allow the exercise of the office, but suffices as to its lawful possession.

In comparison with Angelus de Ubaldis and Fulgosius, Castro's precision on the subject was already quite uncommon. With the passing of the time, this became increasingly rare. So for instance Castro's most illustrious student, Alexander Tartagni (Alexander de Imola, 1424–1477), provided a rather sketchy commentary on the *lex Barbarius*. Relying entirely on Baldus' summary of Innocent, Tartagni made little effort to fully appreciate Innocent's position, and this ultimately resulted in a superficial understanding of Baldus himself.[32] By Tartagni's time this approach was extremely widespread: the interest of most jurists was to provide a summary of what older authorities had already said, not to delve even deeper into the matter. The growing consent towards Baldus' position became common opinion, and this further contributed to reducing any incentive for a thorough analysis of the subject – or of Baldus himself.

14.1.4 Jason de Mayno

Jason de Mayno (1435–1519) is among the last civil lawyers to deal extensively with the *lex Barbarius*, on which he published a (possibly, extended) version of the *repetitio* that he gave in Pavia on 14 February 1485 (n.c.).[33] While not very original, his *repetitio* is particularly useful for appreciating the position of most early modern authors on our subject. By the close of the Middle Ages, the centuries-long game of indirect quotations had multiplied to the point of blurring many differences between authors. At least on the *lex Barbarius*, Mayno's references to previous jurists are often hardly accurate.[34] On a practical

instrumenta per ipsum confecta? No(tatur) in Spe(culo), de instr(umentorum) edi(tione) § restat, ver(siculum) "si is qui" et § instrum(entum), ver(siculum) "quid ego si tabellio" [*supra*, pt. II, §8.4, note 58, and 55 respectively], vbi distinguitur, an fuit creatus per priuilegium imperiale, quod tamen erat inualidum, et sic communis opi(nio) fundatur in aliqua causa inductiua eius, et tunc valeant instrumenta, per d(ictam) l(egem) Barbarius (Dig.1.14.3). Nam, et ibi precedebat electio populi rom(ani) licet fuisset inualida, quia erat seruus, et ignorabatur, vnde non erat praetor, et tamen gesta coram eo erant valida, aut nullum praecesserat priuilegium, vel creatio notariatus, et tunc communis opinio vel error qui non habet fundamentum, non faceret instrumenta valere, per l. Herennius Modestinus ff. de decur(ionibus) (Dig.50.2.10).'

32 Tartagni, *ad* Dig.1.14.3, § *Barbarius Philippus* ([Alexander de Imola,] *Apostille seu Additiones ad Bar(tolum) … super prima parte ff. veteris …* [Venetiis, 1488] [*fols.* 8*vb–9ra*]).

33 Mayno, *ad* Dig.1.14.3 (*Lectura in prima parte ff. veteris*, cit., *fol.* 40*va*, n. 12).

34 Mayno's references to Baldus are no exception. For instance, the only time that Mayno argues for the opposite solution to that of Baldus is on the effects of the

level, the point is not as serious as it might appear: if the inaccuracy greatly affected the reasoning leading to a certain conclusion, it did not touch the conclusion itself. On the contrary, blurring the precise differences among various authors greatly contributed to the strengthening of the common opinion, and its crystallisation.

With regard to the *lex Barbarius*, as Mayno recalls, the common opinion is definitely against the Gloss, Butrigarius and Bartolus.[35] By Mayno's time, the 'winning side' is clearly that of Baldus. The most revealing aspect of Mayno's *repetitio*, however, is not its approbation of Baldus' position but its remarkable simplification. Even a jurist as knowledgeable and careful as Mayno[36] could no longer fully appreciate the reason for certain subtleties in Baldus. That was also a consequence of the blurring of the difference between confirmation and election. By the late fifteenth century the process leading to the replacement of episcopal elections with papal appointments was nearly complete.[37] Canon lawyers still discussed election by the cathedral chapter, but largely because the main canon law sources dealt with this subject at some length – not because it was still of much relevance. Thus, Innocent's all-important difference between election and confirmation in office was lost, and so was Baldus' subtle adaptation of Innocent's toleration principle outside its proper boundaries.

Without a clear difference between election and confirmation, Mayno could only distinguish between intruder and elected. If 'elected' was almost coterminous with 'appointed', it was difficult to think of an elected that was not confirmed.[38] This assimilation between election and confirmation greatly simplified the issue: it was now only a matter of distinguishing between intentional dispensation from legal incapacity and mistaken appointment of the legally incapable. Since intentional dispensation was a theoretical possibility of little practical relevance,[39] the question focused mainly on the mistaken

secret deposition. Misunderstanding Baldus' position, in fact Mayno reached a similar conclusion: *ibid.*, *fol.* 40*rb*, n. 12.

35 *Ibid.*, *fol.* 36*vb*, pr: 'apparebit communior opinio est contra glo(sam) et Bar(tolum) quod barbarius neque liber nec verus pretor fuit.' Cf. *ibid.*, *fol.* 37*va*, n. 4: 'An si inhabilis eligeretur a populo credente eum habilem et exerceret officium puta preturam esset verus pretor et intelligeretur habilitatus … eadem opi(nionem) tenet Ja(cobus) bu(trigarius) et bar(tolus) et raro alii.'

36 Cf. *supra*, pt. III, §10.1, text and note 2.

37 *Supra*, pt. III, §11.3, note 61.

38 Mayno, *ad* Dig.1.14.3 (*Lectura in prima parte ff. veteris*, cit., *fol.* 40*ra*, n. 12): 'Limita nunc istam l(egem) precedere quando barbarius fuit rite electus in pretorem et confirmatus ab habente potestatem, tunc gesta ab eo valent propter communem errorem et vtilitatem pu(blicam), ita loquitur ista l.; secus si sine electione barbarius in pretura se ingessisset, quia tunc acta non valerent: ita Inno(centius) in c. nihil de elec(tione) (X.1.6.44).'

39 Cf. *ibid.*, *fol.* 37*ra*, n. 2.

appointment of the *inhabilis*. Without a clear difference between election and confirmation, the voidable appointment would become automatically coloured title to exercise the office. Because of public utility, in turn, this title would suffice for the production of valid acts.

Mayno was more careful than most jurists who came after him. So he showed some hesitation as to the ultimate consequences of Baldus' approach (if coloured title and public utility suffice, why not apply the *lex Barbarius* also to the popess Johanna?).[40] But, by and large, he followed Baldus. While Mayno quoted generously from Innocent, such quotations came mostly through either Baldus or his brother Angelus.[41] Also in Mayno, the apparent continuity between Baldus and the pope dispensed with the task of looking carefully at Innocent, and greatly strengthened Baldus' position. At the same time, however, Mayno's superficial knowledge of Innocent did not allow him to make full sense of Baldus' insistence on the importance of possession of jurisdiction.[42] Discarding

40 In abstract, observes Mayno, interpretations of the *lex Barbarius* may be applied to any similar case. Baldus himself, he says, applied it to the election of the pope. But one could go even further than that. There is little difference between the *inhabilitas* of a slave and that of a woman: in Dig.5.1.12.2 both are prevented from serving as judges because of customs – *moribus*). So, continues Mayno, if Barbarius can validly exercise the praetorship, then in principle under the same conditions a woman should be allowed to discharge the office of pope. Mayno, *ibid.*, *fol.* 40*ra*, n. 11–12: 'restat per complemento huius l. quod infinitio facturum me dixi potere extensiones et limitationes ad hanc l. Primo, istam l. loquentem in officio pretoris extendit Bal(us) in l. non mutat C. de libe(rali) ca(usa) (Cod.7.16.11) vt habeat locum in papa, quia si inhabilis eligeretur ad papatum puta fuit in illa femina omnia gesta propter solemnem electionem communem errorem et vtilitatem pu(blicam) valerent.' The reference to Baldus is correct, but Baldus mentioned the case of the pope only to narrow the scope of toleration to the jurisdictional sphere and not also the sacramental one, just as Innocent did. Cf. Baldus, *ad* Cod.7.16.11, § *Non mutant*, *supra*, pt. III, §11.6, note 154. Mayno follows the same distinction between jurisdictional and sacramental spheres, though without a clear understanding of the different positions of Innocent and Baldus (he quotes the former as interpreted by the latter: Mayno, *ad* Dig.1.14.3 (*Lectura in prima parte ff. veteris*, cit., *fols.* 39*vb*–40*ra*, n. 11).

41 See esp. Mayno's lengthy discussion *ibid.*, *fol.* 40*rb–va*, n. 12.

42 This is particularly evident in Mayno's main critique of Baldus. Barbarius' defect, says Mayno, was in the efficient cause: a slave lacks legal capacity, so he cannot make legally valid acts. Unlike other kinds of defects (such as the lack of the formalities required for the act), common mistake cannot make up for this. Baldus, observes Mayno, tried to solve the problem by stressing the importance of jurisdiction, but that explanation remains 'fragile'. *Ibid.*, *fol.* 37*vb*, n. 4–5: 'regula est quod communis error facit ius … intellige istam regulam quod communis error facit ius, verum est concurrente titulo et quasi possessione vt hic apparet in barbario … notabiliter limita quando defectus esset in solemnitate vel in causa materiali, puta in testibus adhibitis in testamento qui reputabantur

the role of possession of jurisdiction led Mayno to further highlight the formal validity of the election. At this point, any difference between positions as different as those of Cugno and Baldus was totally lost. Just like Fulgosius, Mayno described Baldus' position in the same terms as that of Cugno: a formally valid appointment that is however voidable because of the occult incapacity of the person appointed. This opposition between validity as to *forma* (of the appointment) and invalidity as to *qualitas* (of the appointee) would provide an easy explanation for the extension of the *lex Barbarius* to other cases, primarily to that of the *inhabilis* notary.[43] The complex reasoning on representation and the boundaries of toleration is lost, just like the difference between internal and external validity of agency.

14.1.5 Felinus Sandeus, delegate judges and public utility

As said, the progressive simplification of the underlying issues made a good part of both Innocent's and Baldus' reasoning superfluous.[44] In particular, Baldus'

> idonei, tunc verum est quod communis error facit ius d(icta) l. i C. de testa(mentis) (Cod.6.23.1). Sed si defectus esset in substantia seu in causa efficienti, puta quia testator erat seruus et reputabatur liber, vel erat in potestate patris et reputabatur sui iuris: tunc si faceret testamentum vel alium actum propter istum communem errorem non faceret ius nec statutum valeret, quia defectus in causa efficienti non sic de facili dispensatur sicut in substantia vel in causa materiali … respondet Bal(dus) fragiliter quod ibi speciale est fauore iurisdictionis, et si dicis quod ista limitatio est contra tex(tum) nostrum vbi defectus erat in causa efficienti i(d est) in ipso barbario, respondet Bal(dus) quod contrarium est verum, quia ista lex communis error non faciat ius quo ad substantiandum preturam in persona barbarii, licet propter publicam vtilitatem acta valeant; nam fatetur Bal(dus) quod in hac l(ege) barbarius non fuit verus pretor nec liber motus auctoritate Aristotelis: quia ens et verum conuertuntur inducendo vt per eum [cf. Baldus, *supra*, pt. III, §12.4.3, note 161]. Tamen dubia est hac limitatio si bene consideres.'

43 Mayno, *ad* Dig.1.14.3 (*Lectura in prima parte ff. veteris*, cit., *fol. 39rb*, n. 8): 'Istam conclusionem limita procedere proprie in istis terminis: quia cum sit defectus in forma creatus instrumenta annullantur; secus quando fuisset creatus tabellio legitime licet esset defectus in persona, puta quia seruus vel excommunicatus seu hereticus occulte, et sic esset solum defectus in materia seu in persona tunc instrumenta per eum facta propter publicam vtilitatem et communem errorem valerent. Ita proprie loquitur ista l(ex).' For more applications of the *lex Barbarius* see *Repertorivm sev Index ordine elementario digestus in commentaria Iasonis Mayni* … Lugduni, apud Sebastianum Gryphium, 1533, *s.v.* 'facta, factum'. Cf. Derrett (1958), p. 285.

44 In effect, looking at Baldus in search of a solution for the issue of the *de facto* officer, the most obvious element that one would find is public utility. If even modern scholars could say that Baldus considered the *lex Barbarius* as an outright application of public utility (e. g. Horn [1968], p. 109), it is difficult to reproach

three-step process leading to the adaptation of Innocent's toleration principle became unnecessary, for there was no longer any reason to avoid applying Innocent's toleration principle directly to Barbarius' case. As Innocent's approach was increasingly read through that of Baldus, the simplified reading of Baldus (often mediated through the summary provided by other jurists) resulted in a simplification of Innocent's thinking as well. Innocent's concept of toleration was based on representation. The superficial approach of many late medieval and early modern jurists discouraged in-depth analysis of the representation mechanism, and led to the acceptance of Baldus' conclusions on the basis of his authority.

When a conclusion is the product of complex reasoning, however, its application without a clear understanding of its rationale can create problems. In turn, those problems call for further simplification. Let us take for instance the relationship between public office and public utility. The exercise of a public office is itself an expression of public utility. Downplaying the central role of the office, however, it became necessary to highlight the importance of public utility, blurring the difference between proper representation and simple delegation. Applied to the office of the judge, this meant removing the underlying difference between ordinary and delegated jurisdiction. Toleration worked only within agency: so long as the unworthy could validly represent a public office, the office would still act through that person *qua* agent, despite his unworthiness *qua* individual. Delegation is no agency, and so Innocent excluded the delegate judge from the scope of toleration. Tolerating the delegated in an office he did not legally represent would be a self-contradiction.[45] Excluding the ratification of Barbarius' position (and so, the internal validity of agency), as we have seen, Baldus had to work outside toleration and so outside proper representation. This led him to highlight the importance of the exercise of ordinary jurisdiction. To that end, one of the arguments he used was the parallel with the slave-arbiter case (Cod.7.45.2).

In that case the slave-arbiter exercised delegated jurisdiction to issue a single decision, and yet the Roman source was clear as to the validity of that decision. If the exercise of delegated jurisdiction without public utility sufficed for the validity of the act of the slave-arbiter, reasoned Baldus, then all the more the acts of the slave-praetor in the exercise of ordinary jurisdiction could not possibly be void.[46] Simplifying the reasoning of both Innocent and Baldus, what was left

early modern authors for having looked at Baldus' outcome more than at the rather complex route he followed to reach it.

45 *Supra*, pt. II, §7.4, notes 45–47.

46 *Supra*, pt. III, §12.3, text and notes 108 and 110.

was only the bare fact that, unlike Innocent, Baldus extended the *lex Barbarius* also to the delegate judge who was secretly *inhabilis*. Since the requirements of the *lex Barbarius* – public utility and coloured title – were both present also for the delegate judge, late medieval authors saw no reason for Innocent's limitation and sided with Baldus. So, by the late fifteenth century, Felinus Sandeus (Felino Sandei, 1444–1503) could well say that 'all doctors are against Innocent, on the basis of Cod.7.45.2'.[47]

Supporting Baldus without a clear understanding of his position, however, could be problematic. The case discussed in Cod.7.45.2, as we know, dealt with a single decision by the delegate judge who was in fact a slave. Extending the *lex Barbarius* to the delegate judge in the name of public utility would require a series of acts, or at least a large number of recipients. Precisely the opposite of what was described in Cod.7.45.2. Baldus sought to highlight the importance of ordinary jurisdiction: when jurisdiction was delegated, the recipient was simply acting at the ordinary judge's behest – even a slave could do that.[48] Baldus therefore did not think that the slave-arbiter was a proper application of the *lex Barbarius*. But a simplified – and generously abridged – reading of his commentary would point precisely to that conclusion: invoking public utility, Baldus went beyond Innocent and held the acts of the delegate judge who was secretly *inhabilis* as valid, just like those of Barbarius. Reading the whole issue in terms of public vs. private utility, it was inevitable that both Innocent and Baldus would be seriously misunderstood. Innocent never said that private utility bars the application of toleration. That would have been a self-contradiction: toleration depends on representation. So if the occult heretic or excommunicate were to be deposed after having rendered a single decision, clearly that single decision would hold. Innocent, as usual, was more precise: he observed that toleration could not be extended beyond the boundaries of legal representation, all the more when its application would be limited to a single lawsuit, and so to private utility.[49] Baldus was more explicit: even if Barbarius issued a single act, since he did so in the exercise of ordinary jurisdiction, that act would still be valid.[50] Again, the difference between Innocent and Baldus

47 Sandeus, *ad* X.1.3.22 (*Commentaria Felini Sandei … in V. libr. Decretalium …* pt. I, cit., cols. 681–682, n. 3, § *Lex Barbarius*): 'lex Barbarius habet locum etiam in delegato. Omnes Doc(tores) hic contra Inno(centium) per l. ii C. de senten(tiis) (Cod.7.45.2).'

48 *Supra*, pt. III, §12.3.

49 Cf. *supra*, pt. II, §7.5 esp. note 81.

50 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*rb*, n. 18: 'et per hoc [*scil.*, on the basis of the *iurisdictio ordinaria* of the praetor] puto, quod si Barbarius non exercuisset nisi vnicum actum, ille vnicus actus valeret, et de aequitate ita valuit primus actus quem fecit, sicut vltimus.'

depended on representation. Operating outside it, Baldus had to emphasise the lawful exercise of ordinary jurisdiction, so as to equiparate it to the external validity of the agency relationship (i. e. the relationship office-third party in the agency triangle). In stressing the validity of the (hypothetical) single act of Barbarius, Baldus remarked the strength of the lawful possession of ordinary jurisdiction.

Detaching public utility from legal representation, however, Baldus' statement became now a problem. So the same Sandeus proceeded to reconsider Baldus' position. In Sandeus' account, Baldus considered the exercise of a public office by the occult *inhabilis* as valid if that affected at least a few people (and not necessarily the whole commonwealth), because the public nature of the office would ensure the connection with public utility. The obvious exception, of course, was a single act – which could not possibly be valid.[51]

14.2 Early modern times

14.2.1 Simplifying the simplification

From the early sixteenth century onwards, progressively fewer jurists showed any real interest in studying the *lex Barbarius*. Early modern writers would typically provide simplified accounts of the late medieval simplifications that we have just seen. What remained of Baldus' complex approach was just the double requirement of public utility and coloured title, crystallised in the brocard *communis error facit ius*.

Public utility is a rather vague concept: alone, it can mean anything. So no jurist ever put its relevance in question. Its main function was now to justify the brocard and limit its application, loosely speaking, to public law issues (even though the reason for this limitation was no longer remembered).[52] Despite all the simplification process it went through, by contrast, coloured title remained a less immediate concept, and not all early modern authors made use of it. A large number of jurists, from Lessius[53] to Cocceius[54] and even

51 Felinus Sandeus, *ad* X.1.3.22 (*Commentaria Felini Sandei … in V. libr. Decretalium*, pt. I, cit., col. 681, n. 3, § *Lex Barbarius*): Et dicit Bald(us) in d. l. ii (Cod.7.45.2) quod sufficit, quod publica utilitas uersetur in qualitate officij, licet non in singulari actu exercitij: forte, quia usus sit, quantum ad paucos.'

52 Cf. Deroussin (2001), pp. 61–63.

53 On Lessius see *infra*, this chapter, §14.3.2, text and esp. note 135.

54 *Samvelis de Cocceji … Jvris Civilis Controversi, Pars II*, Francofurti ad Viadvm, Impensis Jo. Godofredi Conradi, 1718, lib. 22, tit.4, q.1, p. 112 ('*an notarii putativi, sive falsi, instrumenta valeant*?'), resp.2: 'Loquitur de vero Notario creato, sed qui talis esse non poterat, forte quia servus est, hujus acta valent.'

Menochius[55] (which is to say, from the least to the most practice-oriented writers) spoke of coloured title to signify formally valid appointment. Other authors did not speak of coloured title but of confirmation by the superior authority unaware of the defect *in qualitate*. This can ben already seen in late fifteenth-century authors such as Antonius Corsetti (c.1450–1503)[56] and Bartholomaeus Socinus (1436–1507)[57] and early sixteenth-century ones such as Aymonis Cravetta (1504–1569),[58] and then in Dutch jurists such as Arnoldus Vinnius (1588–1657)[59] and Johannes Voet (1647–1713).[60] The difference is just a formal one: the aim is always to bestow validity on the acts while denying it to their source. Stressing the power of the superior authority is hardly a revival of Accursius' fortunes, but rather a consequence of the need to avoid the unbridled application of the common mistake.[61] The *lex Barbarius* principle applies only

55 *Iacobi Menochii … De adipiscenda et retinenda possessione amplissima et doctissima commentaria* (3rd edn.), Venetiis, Apud Ioannem Baptistam Somaschum, 1576, *De retinenda possessione*, remedium 6, *fol.* 156*v*, n. 71.

56 Corsetti, *Repertorium in opera Nicolai de Tudeschis* [Venetiis, c.1486] *s.v.* 'error communis'.

57 Socinus, *Regulae et Fallentiae Juris Bartholomaei Socini … a Benedicto Vaudo … reuisae …* (4th edn.), Coloniae Agrippinae, Apud Ioannem Busaeum, 1663, reg.282, pp. 386–387.

58 *Aymonis Cravettae … Consiliorum, siue Responsorum*, tom. 5, Apud Ioan. Wechelum, impensis Sigismundi Feyrabendii, 1589, cons.958, p. 314, n. 9.

59 Vinnius, *ad* Inst.2.10.7 (*Arnoldi Vinnii JC. In Quatuor Libros Institutionum Imperialium Commentarius Academicus, Et Forensis*, Lugduni, Typis Petri Bruyset, Sumptibus Fratrum Detournes, 1755, pp. 331–332): 'Ridiculum vero est, quod vulgo ex hoc loco colligunt, communem errorem jus facere: non enim error, sed in errore summa Principum auctoritas jus hoc benigne et speciali favore ultimae voluntatis constituit. … Latius hic exspatiantur doctores dum quaerunt, an gesta ab his, qui se pro scribis aut notariis gerunt, cum non sint, sed communi errore tales habeantur, et instrumenta ab his facta, valeant. Et sic vulgo distinguitur, ut referat, utrum aliqui publica auctoritate hujusmodi persona per errorem imposita sit, an quis ipse sibi privatim eam assumpserit: illo casu valere quod gestum est, per l. 3. de off(icio) praet(orum) (Dig.1.14.3) hoc casu acta non valere, et speciale esse, quod in casu hujus § [*scil.*, Inst.2.10.7] testamento succurritur.'

60 Voet, *Commentarius ad Pandectas* (4th edn.), Bruxellis, Apud Simonem Serstevens, 1723, tom. 1, *ad* Dig.1.14.3, pp. 79–81. Voet insists on the validity of Barbarius' acts both for public utility ('ex aequitate et humanitate') and for the tacit approbation of the superior authority ('non propter communem errorem; sed propter designationem seu electionem, et discusso errore subsecutam tacitam comprobationem eorum, qui eligendi ac comprobandi potestatem habent', *ibid.*, p. 80, n. 6).

61 In this regard Zasius (Huldrych Zäsi, 1461–1535) provides a good example, as he bases his interpretation of the *lex Barbarius* on the distinction intruder/non intruder. Anyone who is not a mere intruder can be included in the scope of the *lex*. Zasius, *ad* Dig.1.14 (*Dn. Vdalrici Zasii … In primam Digestorvm Partem*

when the invalidity lies in the defect of the person appointed, not of the appointment itself. The appointment must be regular (both as to the procedure and as to the authority presiding over it). The title, therefore, is coloured only because of the incapacity of the person who received it.[62]

Admittedly, however, not all civil lawyers required anything other than public utility to apply the *Barbarius* principle. Sometimes a jurist is too succinct on the subject to draw any clear conclusion from his text. So for instance Hugo Donellus (Hugues Doneau, 1527–1591) invoked only public utility, but it is probable that he did so to deny the application of the *lex Barbarius* on the basis of

Paratitla, siue titulariae annotationes … Basileae, Apvd Mich[aelem] Ising[rin], 1539, pp. 26–27, at p. 27): 'superioris autoritas, error communis, publica utilitas, excusant ab incompetentia magistratus uel officij; quod maxime procedit ad ante acta. At uero uitio detecto, uitiaretur futura administratio. Bart(olus) Alex(andrus Tartagni) in d. l. Barbarius (Dig.1.14.3). Vnde si aliquis esset homo proprius, et in magistratu manumitteret alios, libertas ualet l. competit, *infra* qui et a quib(us) (Dig.40.9.19). Et ut gesta militaria in milite exautorato, sic gesta iudicialia in iudice excommunicato tolerantur quamdiu uitium latet. … Vnde si Papa ignorans ordinat homicidam in sacerdotem uel episcopum, perinde habetur ac si sit cum eo dispensatum. Poterat enim dispensari: et hoc intelligas quo ad ante gesta. Nam uitio patente, remouendus est ut criminosus: secus si non extaret crimen. Bar(tolus) et Bald(us) hic latius. … De praelato qui non rite eligitur sic habeas: Si sit de facto intrusus, nihil ualet quod per eum geritur. Si autem alias sui uitium, tunc necessarij contractus ualent, uoluntarij non, nisi quo ad fructus. Bald(us) diffuse post Bart(olum) in d. l. Barbarius, qui pro hoc allegat.'

62 This is particularly clear in Merlin's *Répertoire* (4th edn., vol. 6, 1813), *s.u.* 'Ignorance', § II, p. 9, n. 9: 'Lorsqu'il s'agit d'actes fait par le ministère d'officiers publics que l'on ignorait être incapables d'y procéder, il ne suffit pas que l'erreur soit générale: il faut encore qu'elle soit fondée sur un titre coloré, c'est-à-dire, sur un titre conféré par celui à qui en appartient le pouvoir.' Cf. *ibid.* (vol. 4, 1812), *s.u.* 'erreur', p. 836, n. 6: 'Il fault cependant que cette Erreur publique ait quelque fondement et quelque apparence de régularité, en sorte qu'elle ne serve qu'à couvrir le vice qui se rencontre dans la forme du titre, ou dans la capacité de celui qui exerce des fonctions publiques. Car si un homme, sans aucun titre, avait fait quelques fonctions publiques, cet homme serait un faussaire; et tout ce qu'il aurait fait serait nul.' It should be noted that most of the *répertoires* written between the late eighteenth century and the early (or middle) nineteenth tended to reproduce what already found in other similar works. For instance, the last quotation from Merlin may be found verbatim in the earlier *répertoire* (its first edition dates to 1775–1783) of Joseph-Nicholas Guyot (1728–1816), *Répertoire Universel et Raisonné de Jurisprudence civile, criminelle, canonique et bénéficiale* …, vol. 7 (2ndedn., Paris: Visse, 1784), *s.u.* 'erreur', p. 71. This seems to attest (and might have contributed to strengthening) a widespread common opinion as to the need of coloured title, and its precise nature.

the mere common mistake.[63] Similarly, Philippus Decius (1454–1535) did not speak of coloured title either, but he clearly implied it.[64] In case of (a few) other jurists, such as the French Jean-Baptiste Dantoine (d.1720), however, the insistence on public utility and the silence on coloured title would seem deliberate.[65] If that were truly the case, then it might not be excluded that the discussions taking place in the seventeenth century among canon lawyers (which we are about to see) were – once again – having a strong influence on the civil lawyers.[66]

63 Oswald Hilliger (ed.), *Donellus Enucleatus sive Commentarii Hugonis Donelli de iure Civili in Compendium … redacti …* Jenae, vol. 1, 1611, Sumptibus et typis Christophori Lippoldi, lib. 1, ch. 5, p. 9, not.a: 'Error igitur vulgaris est, communem errorem jus facere … Error enim consensui, quem jus omne requirit, contrarius, absurdumque est jus, quod aequum et bonum, ex erroribus nasci. … In l. 3 de offic(io) Praetor(um) (Dig.1.14.3), quod acta Barbarii rata manent, ratio est commodum publicum, non error. … Quae acta antea observata, non revocantur, non quia error jus faciat, sed propter utilitatem publica, quia multa facta fuerant, quae fiereri prohibentur.' Unlike most other jurists, Donellus excludes the case of the slave-witness from the scope of the *lex Barbarius*: there, the will was valid not because of common utility but for the specific permission of the emperor: 'quia imo testamentum eo casu (quando scilicet servus pro libero habitus testamentum signavit) ipso iure nullum, alioqui subventione Imperatoris opus non esset. Dicitur n(am) in d(icto) §7 (Inst.2.10.7) liberalitate principis subveniri. Ergo non mero jure. Et non error, sed summa potestas Imp(eratoris) ac benignitas illius juris causa est … quia ex illo errore facti nihil imputari potest testatori' (*ibid.*).

64 Decius, *Consiliorvm sive Responsorum … Philippi Decii Mediolanen(sis)*, vol. 2, Venetiis, Hieronymus Polus, 1580, cons.522, *fol.* 182*va–b*, n. 1–2 (on the validity of the election of the excommunicate). The same might be said of some commentaries on the customs of Paris, such as that of Ferrière. Claude de Ferrière, *Nouveau Commentaire sur la coutume de la Prévoté et vicomté de Paris …*, tom. 2, Paris, Paulus-du-Mesnil, 1741, art. 289, p. 253.

65 Dantoine, *Les Règles du Droit Civil, dans le même ordre qu'elles sont disposeés au dernier Titre du Digeste …*, Lion (*sic*), chez Claude Plaignard, 1725, rég. 175, pp. 518–519. Cf. Deroussin (2001), p. 221.

66 Either way, when the importance of public utility was highlighted and that of the coloured title downplayed or even ignored, sometimes the result was to stretch the application of the *lex Barbarius* even beyond the desired reach. A principle never put in question was that the *lex Barbarius* applied only to mistakes of fact, not of law. Stressing the public utility rationale of the *lex Barbarius*, however, could lead to a blurring of the difference between *error iuris* and *error facti*. Suffice it to recall two very different episodes that seem to clash with this *summa divisio* between fact and law. The first is to be found in Bijnkershoeck' *Observationes Tumultuariae*. There, Bijnkershoeck reports a dispute over the validity of the custom of Middelharnis, a town on the South Holland island of Goeree-Overflakkee, according to which two witnesses would suffice for a handwritten testament. The Senate of Holland, on 24.12.1705, accepted the point, but required more evidence on such a custom. *Cornelii van Bijnkershoek … Observationes Tumultuariae* (Meijers, de Blécourt and Bodenstein [eds., 1926],

By the late sixteenth century, a 'crowd of jurists' (*iuris interpretum caterva*) had already commented on the *lex Barbarius*.[67] Thereafter, the crowd became an army. Among the most representative jurists of this ever-growing group mention might be made of Ernstius,[68] Landus,[69] Faber,[70] Caldera,[71] López Madera,[72]

vol. 1, obs.154, pp. 67–68). The interesting point is not whether the custom was eventually upheld, but Bijnkershoeck's comment that, if the people of Middelharnis did effectively believe in that custom, then the will would be valid according to the *lex Barbarius*. The second episode is the famous 'Mountrouge weddings' case of 1883. The mayor of Mountrouge (a town south of Paris) did not follow the provision of a law of 1837, requiring mayors to follow a precise seniority order when delegating municipal counsellors to celebrate civil marriages. In principle, therefore, all the civil marriages celebrated in Mountrouge were void. As the mayor had ignored a law, the common mistake argument could not be invoked to make up for *ignorantia legis*. The court was however able to pronounce for the validity of the weddings by shifting the perspective: if the mistake of the mayor was on the law, that of the spouses was clearly on a fact – the wrong belief that the public officer in front of them was competent to celebrate their marriage. See esp. Mazeaud (1924), pp. 943–944. Cf. Roland and Boyer (1986), vol. 2, p. 303. From this perspective, there seems to be a coloured title. But the court did not provide a definition of coloured title. This omission might have been deliberate, for coloured title traditionally consisted of a formally valid appointment whose only defect lay in the quality of the person appointed. Here, however, the mistake was clearly in the procedure itself. That might not be the first time that a French court tacitly applied the *lex Barbarius* to what ultimately was an *error iuris*. If we are to believe Loniewski (1905), pp. 24–25, the Parliament of Paris reached the same conclusion as early as in 1598, allowing the application of the *lex Barbarius* on a mistake of law.

67 The expression is of Mascardus, *Conclusiones Probationvm*, cit., tom. 2, concl. 648, *fol.* 37*r*, n. 1.

68 *Henrici Ernstii … Breviores annotationes in librum primum digestorum …*, in Gerhard Meerman (ed.), *Novus thesaurus juris civilis et canonici, continens varia et rarissima optimorum interpretorum … opera*, Hagae-Comitum, Apud Petrum de Hondt, 1753, vol. 6, p. 852.

69 *Constantii Landi … in jus civile, sparsim contentarum exercitationum libellus*, in Everhard Otto (ed.), *Thesaurus Juris Romani* (2nd edn.), vol. 3, Trajecti ad Rhenum, apud Joannem Broedelet, 1733, col. 1404.

70 *Antonii Fabri … Rationalia In Pandectas: Ac Primum In Pandectarum partem primam …*, S. Gervasii, Ex Typis Vignonianis, 1604, *ad* Dig.1.14.3, p. 55.

71 Eduardo Caldera, *Variarum lectionum*, Matriti, Excudebat Cosmas Delgadus, 1614, lib. 2, ch. 7, *fols.* 31*ra*–34*vb*.

72 *Gregorii Lopez Maderae … Animadversionum juris civilis, liber singularis*, in Otto (ed.), *Thesaurus Juris Romani*, cit., vol. 3, 1733, ch. 6, cols. 442–444.

Constanus,[73] Lycklama,[74] van Bronkhorst,[75] Cujas,[76] Mascardus,[77] Turnebus,[78] Paezo (Plauzio Pezone),[79] de Maqueda,[80] Gabrieli,[81] Kettwig,[82] Schröter,[83] Ackersdijck,[84] Weißbrodt,[85] Rasch,[86] Campianus,[87] Heineccius[88] – the list

73 *Antonii Guiberti Constani… Quaestionum juris memorabilium liber*, in Otto (ed.), *Thesaurus Juris Romani*, cit., vol. 5, 1735, ch. 11, cols. 408–410, and ch. 20, cols. 443–444, n. 8–14.

74 Marcus Lycklama, *Membranarvm libri qvinque* … Franekarae, ex officina typographica Romberti Doyma, 1608, membr.1, ecloga 6, pp. 23–35.

75 *Euerardi Bronchorst … Enantiophanon centuriae quatuor, et Conciliationes eorundem* …, Francofurti ad Moenum, 1643, assertio 20, p. 20 ff. As I was not able to access Bronkhorst's volume, I relied on Rampazzo (2008), p. 409, note 193.

76 *Iacobi Cviacii … Observationvm et emendationvm*, *lib*(*ri*) *XVIII–XXIIII* …, Coloniae Agrippinae, Apud Ioannem Gymnicum, 1587, lib. 18, ch. 33, pp. 51–54.

77 *Iosephi Mascardi Ivrisconsvlti … Conclusiones Probationvm Omnivm qvae in vtroque Foro quotidie versantur* … Francofurdi (*sic*) ad Moenum, impensis haeredum Sigis. Feyrab., 1593, tom. 2, concl. 648, *fols.* 37*r*–41*r*, esp. *fol.* 38*v*, n. 16 (sacraments of occult heretics), *fol.* 38*v*, n. 17 (decision of occult excommunicated), *fol.* 40*r*, n. 57 (decision by invalidly appointed judge), *fol.* 39*v*, n. 51 (instruments of putative notary).

78 *Adriani Tvrnebi Adversariorum Tomi III* …, Argentinae, Sumtibus Lazari Zenzneri, 1599, book 7, ch. 7, col. 198.

79 Camillus Plautius Paezo, *in l. Barbarius De officio Praetoris singularia commentaria*, Patavii, 1554.

80 Paulus de Maqueda Castellano, *Commentaria haec, L. Barbarius Philippus III, ff. de officio praetoris* …, Salmanticae, excudebat Didacus à Cussio, 1615.

81 *Commvnes conclvsiones Antonii Gabrielii … In Septem Libros distributae*, Francofurti, impensis Rulandiorum, Typis Ioannis Bringeri, 1616, lib. 1 (*De probationibus*), concl. 8, pp. 44–46.

82 Mentetus Bebaeus Kettwig, *Disputatio juridica inauguralis ad legem Barbarius Philippus*, Franekarae, 1690.

83 Johann Wilhelm Schröter, *Discursus legalis ad difficilem et intricatam l. Barbarius Philippvs* … Giessae, Friderici Kargeri, 1675.

84 Willem Cornelis Ackersdijck, *Dissertatio juridica inauguralis ad L. 3. Digestorum de Officio praetorum* …, Trajecti ad Rhenum, ex officina Joannis Broedelet, 1757.

85 Johann Andreae Weißbrodt, *Disputatio Juridica de Judice Putativo, ad L. Barbarius 3 de Offic. Praet.* …, Francofurti ad Viadrum, 1681, Typis Johan. Coepselli, 1681.

86 Petrus Rasch, *Disquisitio juridica inauguralis ad L. Barbarius Philippus 3. D. de Officio Praetorum*, Hardervici: apud Joannem Moojen [1783].

87 *Augustini Campiani … de Officio Et Potestate Magistratuum Romanorum Et Jurisdictione, Libri Duo*, Genevae, Apud Marcum-Michaëlem Bousquet & socios, 1725, pp. 222–237.

88 *Io. Gottlieb Heineccii … Elementa Ivris Civilis, secvndum Ordinem Pandectarvm comoda avditoribvs methodo adornata* (6th edn.), in *Io. Gottlieb Heineccii … Opervm ad Vniversam Ivris Prvdentiam* …, vol. 5, Genevae, Impensis Hered. Cramer, et Fratr. hilibert., 1748; anastatic reprint, Frankfurt am Main: Vico Verlag, 2010, pt. I, 1.14, §205–207, p. 59.

could well go on.[89] By the sixteenth century, the questions of the common mistake and especially of the putative judge, notary and priest were ubiquitous and unremarkable. Any self-respecting jurist felt the need to mention the case of Barbarius, mostly in passing, between one erudite remark and the other.[90] Looking at each of them (from the early sixteenth century to the mid-eighteenth), wading through the forest of *disputationes academicae*, *animadversiones*, *annotationes* and the like would be pointless.

Similarly, if little could be gained from an in-depth examination of legal humanists, it is hardly for want of material. Combining historical with philological issues, the *lex Barbarius* was a honeytrap for legal humanists. If ambiguous statements such as Pomponius' 'quasi praetor non fuit' led to lengthy debates among modern scholars, they proved almost irresistible for the humanist jurists.[91] Indeed virtually all of them dealt with Barbarius' case. Despite the

89 I am not even mentioning works such as Robertus' *animadversiones* or Costanus' *Quaestiones*, which touch upon the subject. It would probably be easier to compile a list of the jurists who did not mention Barbarius' case than those who did. For more jurists, especially early modern French ones, see Deroussin (2001), esp. pp. 221–228. See further the list in Lucifredi Peterlongo (1965), p. 25, note 75.

90 So for instance Campianus referred to Baldus when noting the relevance of the public office in the *lex Barbarius*. Although Barbarius does not become praetor, says Campianus, his acts are valid both because of public utility and because they are referred to a public office. But then the author moves on, and the crucial importance of the last point is lost. *Augustini Campiani … de Officio Et Potestate Magistratuum Romanorum*, cit., p. 234: '… non reprobandum esse sententiam Baldus censuit, quia haec publicae utilitatis, et officii causa geruntur.' Cf. Rampazzo (2008), p. 434, note 280.

91 For instance, for Hotman the 'non' ought to be elided. *Franc. Hotomani Ivrisconsvlti, Quaestionum illustrium Liber* [Genevae], 1573, Excudebat Henr. Stephanus, q.17, pp. 128–136, at p. 131: 'Quo loco tollendam negationem, quis non videt? … Quod cum ipsa meridie clarius sit, demiror tam multos in tanta luce caligasse.' In the same sense (but with a more refined and articulated discussion based on the overall meaning of the text) Cujas, *Iacobi Cviacii … Observationvm et emendationvm, lib[ri] XVIII–XXIIII* …, Coloniae Agrippinae, Apud Ioannem Gymnicum, 1587, lib. 18, ch. 33, pp. 51–54, at 52. See also Bachovius, *ad* Dig.1.14.3 (*Reinhardi Bachovii … Commentarii in primam partem Pandectarum*…, Francofurti, Sumptibus Joannis Berneri … Excudebantur Spirae Nemetvm, Typis Georgii Bavmeisteri, 1630, p. 320). Other humanists opted for more invasive philological surgery. In his *Observationes ad ius atticum et romanum*, for instance, Hérauld reconstructed the text as 'Ita evm servvm mansisse, qvasi non fverit praetor'. Didier Hérauld, *Observationes ad ius atticum et romanum*, in *Desiderii Heraldi Quaestionum quotidianarum tractatus. Ejusdem observationes ad ius atticum et romanum*, Paris, 1650, lib. 5, ch. 10, n. 2, p. 364. Other humanists preferred to use the *lex Barbarius* as a pretext for erudite historical digressions: see for all Govea, *Antonii Goveani …*, *Lectionvm Iuris Variarvm Libri duo, in*

amount of ink they spilled on the subject, however, their erudite discussions left the legal issues wholly untouched.

A typical example is Jacobus Gothofredus (1587–1652). The jurists of old, he noted, were extremely prolix on the *lex Barbarius* – Baldus for instance needed as many as three different *lecturae* to explain it![92] With the typical modesty of the humanist scholar, Gothofredus however stated that he would only need a few pages to finally shed some light on the matter and bring it back to its pristine state.[93] All in all Gothofredus took the text to be original, save perhaps the final reference to the emperor, which could well be an unwelcome addition of the usual Tribonian.[94] The main difficulty, he observed, is to tell Ulpian apart from Pomponius.[95] After a long digression on historical and philological examples, Gothofredus agreed with the traditional civil law approach: the *lex Barbarius* requires public utility[96] and a formally valid title.[97]

Declarationvm, Variarvm Lectionvm et Resolvtionvm Ivris Libri XXII, Diversorum Clarissimorum Iurisconsultorum Recentium …, Coloniae Agrippinae, Apud Ioannem Gymnicum, 1599, lib. 1, ch. 6, pp. 398–400. For further references on humanist jurists on the *lex Barbarius* see esp. Weißbrodt, *Disputatio Juridica de Judice Putativo*, cit., membr.1, n. 12 and 19, pp. 9–10 and 13–14 respectively, and Schröter, *Discursus legalis ad difficilem et intricatam l. Barbarius Philippvs*, cit., membr.1, dect.4, pp. 9–10. For a more in-depth summary of other jurists with philological interests (especially Cujas, Hotman, Lycklama, Paezo, Gothofredus, Bachovius, and Faber) see Rampazzo (2008), pp. 421–430, 441–444 and 447–463. See also the (shorter) analysis of Cujas, Faber and Gothofredus in Lucifredi Peterlongo (1965), pp. 20–28.

92 Gothofredus, *De electione magistratus inhabilis seu incapacis per errorem facta, Dissertatio. Ad L. Barbarius Philippus 3. ff. de Officio Praetorum*, Genevae, Sumpt. Ioannis Ant. et Samuelis de Tournes, 1654, ch. 1, p. 4.

93 *Ibid.*, ch. 3, p. 11: 'Id quod nunc statuere iuuat: iam enim germanam lucem pristinamque sanitatem, quam dudum expectat, huic legi reddamus.'

94 *Ibid.*, ch. 14, p. 27: 'si modo Vlpiani et non Triboniani hic versiculus est.'

95 *Ibid.*, ch. 2, p. 7: 'Tandem Ulpiani verba a Pomponii sententia difficulter separes.' The part on Pomponius, concludes Gothofredus, must be emended as follows: 'Sed nihil ei seruitutem obstitisse ait Pomponius: quia, si Praetor non fuerit, adquin verum est, Praetura eum functum' (*ibid.*, ch. 4, p. 11). The proposed emendations have the advantage of being limited in number, yet very significant as to their consequences. To reach the desired outcome, it is just sufficient to separate 'quasi' into 'qua' and 'si', and slightly massage 'atquin' into 'adquin' (*ibid.*, ch. 4, pp. 11–12).

96 *Ibid.*, ch. 10. p. 21: '*Humanius* igitur in specie huius l. non vt stricto juri id opponatur, quod vulgus censet, verum vt in ambiguis id potius sequendum indicetur, quo absurdum vitetur, quoque communis vtilitas procuretur' (emphasis in the text).

97 Esp. 'nos vero versamur in casu, quo quis agendi substantiam habet, seu characterem et personam: ex electione publica et solemni' (*ibid.*, ch. 14, p. 25), and 'Nos enim in eo casu versamur, vbi licet inhabilis incompetens seu incapax

14.2.2 The fonctionnaire de fait

In-depth research on the application of the *lex Barbarius* by early modern and modern courts goes well beyond the scope of this work. But the subject should at least be mentioned to show its practical importance and the remarkable continuity between the medieval *lex Barbarius* and the modern *de facto* officer doctrine.

Many decisions relying on the *lex Barbarius* may be found in early modern European courts, from the Rota of Rome[98] to the Great Council of Mechelen.[99] Early modern French courts often relied on Barbarius' case, especially on the validity of the acts of putative notaries and putative prelates. Many such

aliquis, secundum legem tamen creatus est: titulumque proinde habet' (*ibid.*, ch. 14, p. 26).

98 In scholarly literature little is to be found on the applications of the *lex Barbarius* by the Rota of Rome, but that is mainly because of the scarce scholarly interest in the twilight of the *ius commune* combined with the (similarly scarce) interest for practice-oriented sources. What can be found are just a few pages in Fedele (1936), pp. 374–376, and Agostinelli (1920), p. 61, notes 1 and 5. Both authors look mainly at some compilations of decisions of the Roman Rota, especially the collection printed in Milan in 1731, *S(acrae) Romanae Rotae Decisiones recentiores in compendium redactae … a nonnullis mediolanensis Athenaei sociis*, Mediolani, 1731, vols. 1–4 and 6. Such collections however were seldom punctual, so a careful study among the early modern printed editions of the Rota's decisions would likely reveal more decisions on the subject. Among the most important decisions of the Roman Rota applying the *lex Barbarius* mention might be made of 4.11.1587 (*ibid.*, vol. 2, dec.4), 5.5.1614 (*ibid.*, vol. 3, dec.542), 12.5.1617 (*ibid.*, vol. 2, dec.483), 23.5.1618 (*ibid.*, vol. 2, dec.641), and 10.6.1695 (*Sacrae Rotae Romanae Decisiones nuperrimae nunc primum collectae*, Romae, apud Simonem Occhi, 1753, vol. 4, dec.391).

99 The reference is especially to its decision of 11.1.1628. The constitution of 21.3.1524 of Charles II of Burgundy (the emperor Charles V) allowed notaries to exercise their office only within the city where they were sworn in. After the rebellion against the Habsburgs, the provision was confirmed in 27.11.1608 (cf. Voet, *ad* Dig.1.14.3, *Commentarius ad Pandectas*, cit., p. 81, n. 7). In the small town of Zouteveen (south of Delft), however, there was no notary. So a notary of Delft was called there to draft a testament. Although the testament was then challenged because the notary lacked the authority to draft it, the Council of Mechelen invoked the *lex Barbarius* to pronounce for its validity. The case is described in Gehlen (2002), p. 57. Cf. also Dionysius van der Keessel, *Theses Selectae juris hollandici et zelandici ad supplendam Hugonis Grotii introductionem ad jurisprudentiam Hollandicam, et definiedas celebriores juris Hollandici controversias, in usum auditorum vulgatae,* Lugduni Batavorum, apud S. et J. Luchtmans, 1800, thesis 295, p. 98: 'Quamvis Notarii praxin exercere extra locum, ubi admisi sunt, prohibeantur, testamentum tamen coram iis ab eo, qui legem ignorabat, bona fide factum non videtur invalidum esse, *Decis. Sen. Supr. 11. Jan. 1628*' (emphasis in the text).

decisions may be found from the Bailliage of Troyes (southern Champagne)[100] to the *Parlements* of Dijon,[101] Toulouse,[102] Poitou,[103] and especially Paris.[104] In the course of the nineteenth century the *lex Barbarius* principle, now increasingly referred to as *fonctionnaire de fait* theory, was applied far beyond the traditional cases of marriage and testament:[105] from administrative deeds (the most obvious application of the *lex Barbarius*)[106] to contracts of sale by the owner-apparent and

100 See e. g. Legrand, *Coutume De Bailliage De Troyes Avec Les Commentaires De Mr Louis Legrand* … 4th edn., Paris, Chez Motalant, 1737, tit.6 (*Droit des successions*), art.97, gl.4, n. 32, p. 48, reporting an *arrêt* of 11.7.1590 on a putative prelate, and another of 4.10.1595 on a putative notary. Legrand himself noted that priests were expressly forbidden from drafting testaments (except for extreme circumstances) at least from the time of François I. Perhaps Legrand was referring to the specific custom of Troyes, for the custom of Paris (art.289–291) was rather clear in allowing prelates (specifically, the vicar of the parish in which the testator was resident) to draft wills. Cf. e. g. Claude Duplessis, *Traitez de Mr Duplessis … sur la Coutume de Paris* …, Paris, Chez. Nicolas Gosselin …, 1699, pp. 716–717.

101 See e. g. the arrêt of 1656 of the Parliament of Dijon, pronouncing for the validity of a will where one of the witnesses was banished, but commonly believed not to be such. Cf. Merlin's *Répertoire* (4th edn., vol. 6, 1813), *s.v.* 'Ignorance', § II, p. 9, n. 9.

102 For the Parliament of Toulouse an arrêt of 1587 is reported in Maynard, *Notables et singulières questions de droit écrit, jugées au Parlement de Toulouse* …, Toulouse, chez François Henault, Jean-François Robert, 1751, vol. 1, ch. 64, p. 52, and another of 1608 in Loniewski (1905), p. 24. Both dealt with *prelati putativi*, but the first seems to be more interesting, as it focused on the presence of a coloured title to distinguish between *praelatus putativus* and mere usurper.

103 Joseph Boucheul reports an arrêt of the Parliament of Poitou of 30.12.1604, on the instruments made by a notary who was not 25 years old yet (and so, unable to discharge the office of notary). Boucheul, *Coûtumier general, ou Corps et compilation de tous les commentateurs sur la coûtume du comté et pays de Poitou* …, Potiers, chez Jacques Faulcon, 1727, tom. 2, tit.13, art.376, n. 9, p. 607. Another case (later but undated) on the notary apparent is mentioned *ibid.*, n. 6, p. 606.

104 So for instance a 1593 *arrêt* of the Parliament of Paris declared valid the testament made by the notary who did not take the required public oath. On this case see Loniewski (1905), p. 23; Boyer (1998), p. 51; Roland and Boyer (1986), vol. 2, p. 300. Cf. Duplessis, *Traitez de Mr Duplessis … sur la Coutume de Paris*, cit., p. 715.

105 For these 'traditional' applications see e. g. Boyer (1998), pp. 52–61; See further Mazeaud (1924), p. 939; Loniewski (1905), pp. 111–116; Roland and Boyer (1986), vol. 2, pp. 299–306, and especially the impressive work of Deroussin (2001). Specifically on the occult incapacity to serve as witness (whether in a wedding or a testament) see Carillo (1842), vol. 14, *s.v.* 'Testimonio Instrumentario', §2, pp. 749*a*–758*b* (especially foreigners commonly believed to be nationals, and minors or disertors commonly believed to be fully legally capable).

106 See esp. the decision of the Conseil d'État of 2.7.1807 (approving of the validity of the adminstrative deeds lacking the signature of a competent officer): Boyer (1998), p. 52.

even *ultra vires* acts of company directors.[107] Thus, in France there is no solution of continuity between the medieval *lex Barbarius* and the modern theory of the *fonctionnaire de fait*. The same may be said of the German *Scheinstandesbeamter* doctrine. In a response of 30 May 1681, for instance, the University of Frankfurt an der Oder invoked the *lex Barbarius* to argue for the validity of the decisions of the judge regularly appointed but not sworn in.[108] As in France, during the nineteenth century German courts widened the scope of the doctrine,[109] but the underlying rationale remained the same.

14.3 Toleration in late medieval and early modern canon law

Given the importance of canon law in the interpretation of the *lex Barbarius*, a few words might be spent to sketch its later developments. Unlike what happened with Baldus and the civil lawyers, however, late medieval and early modern canon lawyers did not progressively simplify the position of Innocent IV, but rather increasingly accepted its ultimate consequences. By the time that Innocent's influence on our subject started to wane among the civil lawyers, therefore, it became stronger in canon law.

14.3.1 Toleration and sacraments

We have seen earlier how the main thirteenth- and fourteenth-century canon lawyers accepted Innocent's doctrine of toleration in its main tenets, but not in its full scope. While Innocent's distinction between person and office proved extraordinarily popular, its implications on the sacramental sphere were downplayed. With few exceptions,[110] most canon lawyers rejected Innocent's position

107 See e. g. the cases in Mazeaud (1924), esp. pp. 937–959. Cf. Roland and Boyer (1986), vol. 2, p. 305 (on the sale by the owner-apparent – the case *De la Boussinière* of 1897).

108 Weißbrodt, *Disputatio Juridica de Judice Putativo*, cit., membr.3, pp. 34–35, n. 23.

109 E. g. Knütel (1989), pp. 359–363.

110 Among the canon lawyers writing between Innocent and Panormitanus, specific mention deserves Petrus de Palude (Pierre de la Palud, c.1275–1342). Interestingly, Palude was remarkably close to Innocent's positions on toleration also on a sacramental level – without however fully sharing the underlying reason, which in Innocent was legal representation. This is particularly clear on the subject of the confession to a putative prelate. In principle, says Palude, any obstacle as to the validity of the confession, whether occult or manifest, should preclude its validity: 'Queritur … vtrum omne impedimentum quod si esset manifestum feceret confessionem iterari, quando est occultum faciat similiter iterari … videtur quod sic: quia dicit extra de electione c. Dudum (X.1.6.54) quod per ipsum anime miserabiliter sunt decepte, quod non fuisset sic absolute, quod non

on the validity of the excommunication issued by the occult excommunicate,[111] as well as the absolution by the putative prelate.[112] From the fifteenth century,

tenetur amplius confiteri, ergo etc. Contra, quia sententia lata a seruo qui putabatur publice liber et pretor rata est: ac si impedimentum nullum fuisset, ergo a simili in proposito.' But if the *confessor* is the *ordinarius* (that is, the priest to whom the *dignitas* was conferred), and not someone delegated by him, then the same rationale as in the *lex Barbarius* applies: because of the common utility of his community, the common mistake – so long as based on justifiable ignorance – is sufficient to qualify the absolution as valid: 'Aut igitur confessor iste erat ordinarius, puta quia habebat parrochiam sibi intitulatam, et tunc valet absolutio per eum impensa; aut delegatus, vt quia habebat commendatam: et tunc non valet sicut in foro exteriori. Quod probatur dupliciter. Primo quia vtilitas publica prefertur priuate, vnde etc. propter vtilitatem eorum qui apud eum gesserunt ff. de offi(cio) preto(rum) l. Barbarius Philippus (Dig.1.14.3), qui est in iudice ordinario coram quo tota communitas habet litigare: et melius est vunm impunitum relinquere quam tot innocentes ledere. Sed ex parte iudicis delegati, qui non habet cognoscere nisi inter priuatos versatur vtilitas priuata: nec debet rigor iuris communis relaxari propter vtilitatem paucorum … Et quod dicunt tertio de falso procuratore [cf. Dig.47.2.43.1], dico quod vbi est probabilis ignorantia: vt quia prius fuit verus postea occulte fuit revocatus valet … Et huic simile quod dicunt C. si a non compe(tenti) iudi(ce) per totum (Cod.7.48) vbi dicit non valere: nec distinguitur vtrum esset incompetentia publica vel occulta.' Ultimately, concludes Palude, the reason lies in that the remission of sins is part of *iurisdictio*, not of *ordo*: the toleration principle bestows strength on all the jurisdictional acts of the person who is tolerated in office, absolution included: 'illud quod a iure statuitur in vno casu, eo ipso statutum reputatur in simili: vnde cum supposita potestate ordinis vterque forus quo ad potestatem iurisdictionis sit eiusdem rationis: quod in vno statuetur quo ad hoc in alio reputabitur statutum. Et ideo est quinta opinio [i. e. that of Petrus himself], quod confessus bona fide habenti occultum impedimentum iuris positiui non tenetur amplius confiteri.' *Petri de Palude … quartus sententiarum liber* [Coloniae Agrippinae], in officina Johannis parui [1514], dist.17, q.6, *fols.* 85*ra*–86*va*. For more details on the last part of Palude's reasoning see Wilches (1940), pp. 113–115. While Palude is influenced by Innocent (on whom he often relies), he stresses more the public utility argument than the representation mechanism. Even the distinction between ordinary and delegate judge (in our case, the titular of the office and the priest by him delegated) is entirely based on public vs. private utility: the delegate looks after a single case, the ordinary after the whole community. This different approach, however, can lead to the opposite conclusion from that of Innocent: when the delegate judge hears a number of cases, or the delegate priest hears a number of confessions, then the utility becomes public and so the deeds acquire validity. See further Wilches (1940), p. 91, text and note 3.

111 For the position of the main decretists writing after Hostiensis but before Panormitanus see Wilches (1940), pp. 155–156. See also Corsetti's *Repertorium in opera Nicolai de Tudeschis*, cit. *s.v.* 'error communis'.

112 This subject attracted more the decretists' attention, as the positive solution was not as daring as that on the excommunication. Nonetheless, most authors

however, the sacramental implications of Innocent's doctrine of toleration began to be increasingly accepted. That was mainly because of the influence of the greatest canon lawyer of the first half of that century, Niccolò de' Tedeschi (1386–1445, better known as Panormitanus after his appointment as archbishop of Palermo). Not only did Panormitanus fully accept Innocent's concept of toleration,[113] but he was also remarkably more explicit than most other canon lawyers in describing it in terms of legal representation.[114]

Panormitanus' reliance on Innocent is particularly clear in his comment on X.1.6.44. There, Panormitanus distinguishes three main cases. The first is the most obvious scenario where the putative prelate can rely only on common mistake: he has neither title nor even possession of the office. As such, his deeds are clearly void: the *lex Barbarius*, says Panormitanus, requires common opinion as much as superior authority. Alone, common opinion does not suffice.[115] The

preferred the negative conclusion. A reasoned list of the main decretists before Panormitanus may be found in the same Wilches (1940), pp. 111–119.

113 The only difference is that Panormitanus, as most fourteenth-century canon lawyers before him, applies the toleration principle also to the *iudex delegatus*. Panormitanus, *ad* X.1.3.22, § *Quum dilecta* (*Super Primum Decretali*[*um*] *Librum Commentaria*, cit.): 'Inno(centius) ponit vnam singularem limitationem in hac materia, dicit enim quod materia legis barbarius non habet locum in delegato, ratio diuersitatis quia coram ordinario versatur vtilitas plurimorum cum multi ex necessitate habeant adire ordinarium et ideo communis error facit valere gesta sed in delegato non vertitur nisi vtilitas duorum seu partium. … Moderniores communiter impugnant hoc dictum Inno(centii) et non immerito, nam textus videtur in oppositum iii q. vi § tria in verbo "verum" (C.3, q.7, p.c.1).' As we know, the limitation imposed by Innocent was not based on public utility, but on representation: the office acted through its proper representative, not the representative's delegate. Nonetheless, later authors did not have such scruples, especially after that Panormitanus had restricted the whole issue to the presence of public utility in the deeds of the delegate: see e. g. the already mentioned Philippus Decius as well as Henricus Henriquez (Enrique Henriquez, 1536–1608), on whom see Wilches (1940), pp. 94–100. By Lessius' times the position of the *moderniores* was by far the mainstream one: Lessius, *De Ivstitia et ivre*, Lovanii, ex officina Ioannis Masij, 1605, lib. 2, ch. 29, dubit.8, n. 66, p. 338. See further Wilches (1940), pp. 98–100; Miaskiewicz (1940), pp. 63–64; Herrmann (1968), pp. 84–87. Cf. also *supra*, pt. I, §4.2, note 185.

114 On Innocent's influence over Panormitanus on the subject of toleration see Wilches (1940), pp. 156–158 and esp. Fedele (1936), pp. 355–356.

115 Panormitanus, *ad* X.1.6.44, § *Nichil* (*Super Primum Decretali*[*um*] *Librum Commentaria*, cit.): 'Et primus casus sit quando gerebat se pro praelato tamen non erat in possessione et tunc indubitanter non valent gesta … nec hoc casu communis error substineret gesta ex quo deficit possessio … nec communis error iuuat, ex quo deest auctoritas superioris. Nam lex barbarius praeallegata (Dig.1.14.3) fundat se super communi errore et super auctoritate superioris. Nam ille seruus qui putabatur liber, habuit officium a superiore, et sic con-

obvious outcome of this case serves as to better highlight the different position of the other cases: the prelate whose election or confirmation is vitiated, and the prelate who, having received valid confirmation, then commits some serious but occult crimes calling for his *ipso facto* deposition. In both second and third cases, argues Panormitanus, the deeds of the prelate remain valid. In the second case, despite the underlying defect in the election or confirmation, both common opinion and superior authority are present.[116] By the same token, the deeds are valid also in the third case, which is the typical example of toleration in Innocent.[117]

As said, Panormitanus accepts without reservation Innocent's position and applies it on those jurisdictional matters bordering on sacramental issues. This means that Panormitanus applies the toleration principle both to the confession to the putative prelate and especially to the excommunication by the occult excommunicate. As to the confession to the putative prelate, Panormitanus is

currebant duo: scilicet, auctoritas superioris et communis utilitas. Secus autem vbi adesset vnum tantum, vt tenuit hic Inno(centius) et bene, et Baldus in repetitione dictae legis, Barbarius.'

116 *Ibid.*: 'Tercius casus cum quis se gerit pro praelato et habuit confirmacionem a superiore sed ex aliquo defectu non tenuit confirmacio vel electio et tunc gesta per ipsum non debent retractari ex quo alias legitime gesta sunt cum hoc cuncurrat auctoritas superioris et communis error. Vnde sumus in casu l. barbarius praeal(legatae) (Dig.1.14.3) et factum tenet, iii q. vii § tria verbo "verum" (C.3, q.7, p.c.1), et in l. si arbiter, C. de sent(entiis) et interlo(cutionibus) om(nium) iudi(cium) (Cod.7.45.2), et tenet sententia lata a delegato qui putabatur liber licet postea appareat eum fuisse seruum, sic ergo tenent gesta a delegato propter communem errorem et auctoritatem superioris, multo fortius debent tenere in ordinario in cuius offitio versatur maior vtilitas publica. Et idem dicendum in questione huius glo(ssae) [*scil.*, Innocent's gloss on X.1.6.44 § *Administrent*, on which *supra*, pt. II, §7.1, esp. note 6], nam ex quo iste electus habebat potestatem administrandi auctoritate huius iure, debent tenere omnia gesta alias legitime facta licet postea cassetur sua electio vel pronuncietur nulla. Et intelligo quando communis error concurrebat, ut quia putabatur communiter eum esse legitime electum, quod etiam sentit ista glossa.' On the possibility that the confirmation itself (and not just the election) is invalid, Panormitanus was perhaps somewhat more flexible than Innocent, although it may well be that Panormitanus was thinking of a case where the confirmation was simply voidable, not thoroughly void.

117 Panormitanus, *ad* X.1.6.44, § *Nichil* (*Super Primum Decretali*[*um*] *Librum Commentaria*, cit.): 'Quartus casus principalis cum is qui gerebat se pro praelato fuit electus et confirmatus seu prouisus per superiorem, tamen postea aliquid egit propter quod fuit priuatus ipso facto praelatura: puta quod incidit in heresim … et tunc si ista priuatio fuit occulta tenent omnia gesta. Et idem videtur quando dubitatur de priuacione, ex quo tolerabatur in offitio debent tenere acta omnia interim gesta.' Cf. Fedele (1936), pp. 355–356; Wilches (1940), pp. 144–145, text and note 1.

careful to distinguish the *intrusus* commonly believed to be prelate from the putative prelate tolerated in office: only the second may validly exercise the office. It follows that the remission of sins does not depend on the faith of the penitent (as on the contrary still maintained by most canon lawyers), but on the power to bind and loose – and so, on the jurisdictional powers of the prelate tolerated in his office.[118] Panormitanus' position on the validity of the excommunication issued by the occult excommunicate is even more revealing of his close adherence to Innocent's position. In principle, Panormitanus says, someone who lies outside the Church should not be able to cast anyone else outside of it. Hence, he continues, most canon lawyers deny the validity of the sentence of excommunication issued by the occult excommunicate (with the problematic outcome of a void sentence that must be kept until the true status of the person who issued it would finally emerge). However, says Panormitanus, there is a 'remarkable statement' of Innocent IV against that, which is 'probably more true'. Excommunication pertains to the jurisdictional sphere. If tolerating the

118 On the one hand, the *intrusus* may not remit the sins even though he is widely believed to be validly exercising his office: 'Nota quod intrusus in beneficio non potest absoluere etiam in foro penitentiali: quamquam eum quilibet presbyter in ordinacione sua recipiat potestatem ligandi et absoluendi, illam tamen potestatem recipit in habitu non autem in actu ex quo non habet subditos ad hoc c. omnis vtriusque (X.5.38.12).' On the other hand, when the putative priest received a valid title, his absolution is valid: 'In glo(sa) in verbo "decepte", ibi "non credo quod perirent", etc. [cf. Gloss *ad* X.1.6.54, § *Decepte*, *supra*, pt. II, §8.1, note 9]. Signa istam particulam vsque ad finem et numquam tradas obliuioni, nam sepe numero practicatur dictum glo(sse) cum multi teneant beneficia minus canonice. Et potest dubitari nonquid valeant gesta per istum prelatum et respectu fori contentiosi seu respectu temporalioum dixi plene in c. nihil s(upra) e(odem titulo) quo ad spirituali respectu fori penitentialis … dicit Inno(centius) quod iste anime non erant decepte, quia ex quo habebatur pro prelato et tollerabatur a superiore vere absoluebantur ab illo, viii, q. iiii, nonne (C.8, q.4, c.1) [cf. Innocent, *supra*, pt. II, §7.5, note 87] et ad tex(tum) potest dici quod anime decipiebantur quantum erat in isto prelato. Item potest dici, quod ex quo notorium erat illum non habere titulum canonicum in benefitio, quod vere decipiebantur anime, quia non datur tunc tolerantia. … Posset tamen circa dictum glo(sae) dubitari, quid si aliquis esset intrusus, ita quod numquam habuisset superioris auctoritatem, nunquid gesta per istum in foro contentioso valeant, dic quod non. … Sed in foro anime posset dici quod sic, propter fidem sacramenti ex quo subditi credebant illum esse prelatum, presertim cum non sit peccatum male intelligere ius positivum … in his qui habuerunt [*scil*., istitucionem a superiore] et ex causa superuenienti fuerunt ipso iure priuati, et non obstante priuacione iuria tolerabantur non credo confessionem de necessitate irritandam, quia vt dicunt Inno(centius) et hosti(ensis) racione tolerantie vere iste absoluit per d(ictum) c. nonne (C.8, q.4, c.1).' Panormitanus, *ad* X.1.6.54, § *Dudum* (*Super Primum Decretali*[*um*] *Librum Commentaria*, cit.). Cf. Miaskiewicz (1940), pp. 56–57; Wilches (1940), pp. 119–123.

occult excommunicate amounts to holding his deeds as valid, it follows that his sentence of excommunication, for public utility considerations, shall also be valid.[119] Commenting on Innocent's distinction between what the excommunicate does in the exercise of a public office and as a private person,[120] Panormitanus comes back on the subject, linking together public utility considerations with legal representation in a remarkably explicit way. Whether the excommunication is manifest or occult, the person of the excommunicate always lies outside the Church. However, it is not the person *qua* individual who excommunicates, but rather the office he represents, which acts through the person *qua* legal representative ('et tunc gesta regulariter tenent favore iuris publici quia dignitas videtur exercere et non persona'). It follows that, so long as the person can still validly represent the office, the sentence of excommunication will be validly issued.[121]

119 Panormitanus, *ad* X.1.3.41, § *ab excommunicato* (*Super Primum Decretali*[*um*] *Librum Commentaria*, cit.): 'Item pone exemplum in iudice excommunicato, nam excommunicatus maiori non potest alium excommunicare quia cum sit ipse extra ecclesiam non potest alium extra ecclesiam ponere vt in c. audiuimus xxiiii q. i (C.24, q.1, c.4) et ibi vide bo(nam) glo(ssam) et in summa eiusdem cause cadit tamen notabile dubium, si iudex occulte excommunicatus aliquem excommunicat, numquid teneat sententia? [cf. *supra*, §6.4, esp. note 146] Et glo(ssa) tenuit in dicta summa excommunicationem esse nullam, licet debeat obseruari donec constiterit iudicem esse excommunicatum. Et ita communiter solent doctores tenere. Sed in contrarium ego allego singulare dictum Inno (centii) in c. si vere, i(nfra) de sen(tentia) excommuni(cationis) [cf. Innocent IV, *ad* X.5.39.34, *supra*, pt. II, §7.2, note 15], vbi tenet contrarium, et forte illa opinio verior, quia excommunicatio est iurisdictio(nis) et ea quae fiunt a iudice non notorie excommunicato tenent ratione publicae vtilitatis vt in c. ad probandum, de re iudi(cata) (X.2.27.24).'

120 Cf. *supra*, pt. II, §7.3, note 22.

121 Panormitanus, *ad* X.2.14.8, § *Veritatis* ([*Nicolaus de Tudeschis*], *Primae partis in Secundum Decretalium Librum Commentaria*, Basileae [Wenssler], 1477). Because of its importance, the relevant parts of this text are here transcribed. 'Nunc venio ad glo(ssam): notat Inno(centius) quae (*sic*) versatur virca validitatem gestorum cum excommunicato seu per excommunicatum [cf. *supra*, pt. II, §7.3, note 22] … dico quod quedam geruntur ratione publici officij et illa valent si excommunicatus est tolleratus, ista quod communi opinione habebatur pro non excommunicato, l. Barbarius ff. de offi(cio) preto(rum) (Dig.1.14.3), iii q. vii <c.1, vers.> "verum" (C.3, q.7, p.c.1), tamen per Inno(centium) hic et in c. si vere de sen(tentia) exco(mmunicationis) (X.5.39.34), et in c. nichil, de electio(ne) (X.1.6.44) [cf. *supra*, pt. II, §7.3, note 22, and §7.1, note 6 respectively] … Si gesta sunt ab excommunicato qui communi opinione habebatur pro absoluto et hec communis opinio erat probabilis vt quia excommunicatio non erat publice lata, et tunc gesta regulariter tenent fauore iuris publici: quia dignitas videtur exercere et non persona, vt in l. barbarius ff. de offi(cio) pretoris (*sic*) (Dig.1.14.3), iii q. vii <c.1, vers.> "verum" (C.3, q.7, p.c.1); tamen est melius in c. ad

Panormitanus' support of Innocent on the application of jurisdictional toleration to both the absolution by the putative prelate and the excommunication by the occult excommunicate of course did not entail immediate acceptance by all jurists. For instance, in the sixteenth century Mascardus still rejected both cases,[122] although by and large canon lawyers increasingly accepted them.[123] The problem of the validity of the absolution by a putative prelate was then developed especially by Francisco Suárez (1548–1617), who elaborated a more refined (and complex) theory that better defined the scope of the

probandum, de re iudi(cata) (X.2.27.24) in decisa, ubi valet confirmatio facta ab excommunicato tollerato ita et collatio et similia, et hoc communiter tenetur per doctores … dixi regulariter quod dubitatur de validitate excommunicationis ab excommunicato tollerato late. Nam communis opinio videtur quod excommunicatio non teneat licet debeat obseruari donec constiterit excommunicatorem fuisse excommunicatum, ratio quia cum excommunicatus sit extra ecclesiam non potuit alium ponere extra ecclesiam … Idem Hosti(ensis) et jo(hannes) an(dreae) recitando in c. pia de excep(tionibus) (VI.2.12.1) … Inno(centius) in dicto c. si vere (X.5.39.34) sentit oppositum ex quo excommunicator tollerabitur et illa opi(nio) Inno(centii) videtur michi tutior et verior: quia ex quo tolerabatur dignitas et non persona, videtur excommunicare: que quidem dignitas excommunicata non est.' Cf. Innocent IV, *ad* X.5.39.34, § *Circa temporalia, supra*, pt. II, §7.2, note 15. See also Panormitanus, *ad* X.2.27.24, § *Ad probandum* ([*Nicolaus de Tudeschis*], *Tertiae partis in Secundum Decretalium Librum Commentaria*, Basileae [Wenssler], 1477): '… etiam in spiritualibus valent gesta ratione publici officij ab excommunicato tolerato quod est notandum … dic tu quod hec fuit originaliter opinio Innocen(tii) in c. cum dilectus, de consue(tudine) (X.1.4.8), vbi posuit notabilem relatam quod in his que non geruntur ratione publici non est differentia inter excommunicatum publicum et occultum [cf. Innocent, *supra*, pt. III, §11.6, note 119] … Nam in istis cessat ratio publice vtilitatis. … Venio ad secundum membrum principale, quando actum quem exercet talis excommunicatus competit ratione publici officij: et tenet Jo(hannes) Cal(derinus) quod siue sit actus temporalis, siue spiritualis communis opinio iuuat, arg. 3, q. 7, c. <tria, vers.> "verum" (C.3, q.7, p.c.1), ff. de offi(cio) preto(rum) l. barbarius (Dig.1.14.3) et d(icta) l. ii de sen(tentiis) et interl(ocutionibus) (Cod.7.45.2) in tex(to) nostro a contrario sensu. Hec dicit uera nisi sententia excommunicationis que non tenet lata ab excommunicato quantumqunque occulto … Attende quia Inn(ocentius) expresse voluit contrarium in d(icto) c. si vere, de sen(tentia) excommuni(cationis) (X.5.39.34), vbi dixit tenere excommunicationem, collationem et similia a tolerato excommunicato lata, quia dignitas hec exercet, et non persona [cf. Innocent, *supra*, pt. II, §7.3, note 22], et hec opinio forte verior, licet Jo(hannes) And(reae) in c. pia, de exce(ptionibus) li. 6 (VI.2.12.2) teneat primam [*scil.* opinionem] et communiter teneatur.' Part of this text is also transcribed in Fedele (1936), p. 344, note 74.

122 E. g. Mascardus, *Conclusiones Probationvm*, cit., tom. 2, concl. 648, *fol.* 38*v*, n. 33 and *fol.* 39*r*, n. 39 respectively.

123 For a reasoned list of decretalists on the two subjects see Wilches (1940), pp. 123–134 and 152–159 respectively. See further Herrmann (1968), pp. 88–90.

ignorance as to the lack of jurisdiction of the confessor.[124] The approach of Suárez met with great success among later canon lawyers and moral theologians alike.[125] On the validity of the excommunication issued by the occult excommunicate, similar weight had the work of Thomas Sánchez (d.1616).[126] Sánchez sought to shield Innocent's theory from theological objections while accepting all its main points.[127]

The Council of Trent issued an important decretal on clandestine marriages, *Tametsi*. This decretal regulated the validity of marriage in stricter terms than before, as it required the sacrament to be performed by the spouses' parish priest or the priest by him validly delegated, before at least two witnesses.[128] After *Tametsi*, rather unsurprisingly, the case of the marriage performed by the putative prelate became a topos in canon law. It is difficult to find a canon lawyer – or a moral theologian – who did not write extensively on the issue. This of course also fuelled the debate on the similar problem of the absolution given by the putative prelate.[129]

14.3.2 Coloured title

Innocent's position, requiring both common mistake and superior authority, remained undisputed among canon lawyers – all the more after the staunch support of Panormitanus – and for a long time. Among the most important writers endorsing it[130] mention should be made of Navarrus (Martin de

124 *R. P. Francisci Suarez … De Sacramentis*, pt. 2 …, Venetiis, Ex Typographia Balleoniana, 1748, disput. 22, sect. 6, pp. 261–262.

125 See further Fedele (1936), pp. 368–374; Miaskiewicz (1940), pp. 90–98; Creusen (1937), p. 189.

126 Sánchez, *Disputationvm de Sancto Matrimonii Sacramento Tomi Tres*, Antverpiae, Apud Martinum Nutium, 1607, tom. 1, lib. 3, disp.22, q.3, n. 34–35, pp. 294–296.

127 *Ibid.*, n. 35, p. 295: 'Quia cum adsit communi error facti, cum titulo, aequitas poscit vt omnino valeat quicquid gerit: quia dignitas potius quam persona agit.' On Sánchez's influence see Creusen (1937), pp. 189–191.

128 Concil. Trid., Sess. 24, c.1, *de reform. matrimonii*, Richter and Schulte (eds, 1853), pp. 216–218, at 217. On the – rather complex – history of this decretal see the monumental and recent study of Reynolds (2016), pp. 896–982, esp.977–982, where the author provides a summary of the scope of the decretal in its final form.

129 E. g. Fedele (1936), p. 362; Deroussin (2001), pp. 451–453, where further literature is listed.

130 A remarkably longer list of canon lawyers up to the late sixteenth century who adhered to Innocent's position may be found in Sánchez, *Disputationvm de Sancto Matrimonii Sacramento Tomi Tres*, cit., tom. 1, lib. 3, disp. 22, pp. 286–300, esp. q.5, pp. 299–300, n. 49–52. See also the (shorter but more representative)

Azpilcueta, 1492–1586),[131] Diego de Covarrubias (1512–1577),[132] Thomas Sánchez (mentioned above),[133] Dominicus Tuscus (1535–1620),[134] Leonardus Lessius (Lenaert Leys, 1554–1623),[135] Aegidius Coninck (Giles de Coninck, 1571–1633),[136] Agostinho Barbosa (1589–1649),[137] and Anaklet Reiffenstuel (c.1641–1703).[138] While the majority of canon lawyers would continue to

list in Mascardus, *Conclusiones Probationvm*, cit., tom. 2, concl. 648, *fol.* 40*v*, n. 88. For a reasoned list of the most important followers of Innocent IV up to the 1917 Canon Law Code see Herrmann (1968), pp. 95–98; Miaskiewicz (1940), pp. 82–87. See also Wilches (1940), pp. 123–127 and 160–176; Fedele (1936), p. 367, note 122; Creusen (1937), pp. 188–191.

131 Azpilcueta, *Enchiridion sive Manvale Confessariorvm et Poenitentivm* …, Mogvntiae, excudebat Balthasarvs Lippivs, sumptibus Arnoldi Mylii, 1601, ch. 9, n. 11, pp. 141–142: 'absolutio data ab eo, qui titulum habet, licet malum, a superiori, et virtute eius possessione accepit, non est irrita secundum Innocentium quem Panormitanus et communis ibi sequuntur, et idem dico de absolutione data ab eo, qui aliqua de causa bonum titulum, quo fruebatur, amisit: dummodo amissio illa non esset notoria.'

132 Covarrubias, *Practicarum quaestionum liber vnus*, in *Didaci Covarrvvias … Opera Omnia* …, Venetiis, apud Haeredem Hieronymi Scoti, 1581, tom. 2, ch. 19, n. 9, p. 505 (on the notary who made a forgery). See also Id., *In Bonifaci Octavi Constitvtionem*, in *Didaci Covarrvvias … Opera Omnia* …, Venetiis, apud Haeredem Hieronymi Scoti, 1581, vol. 1, §7, n. 9, p. 398 and §11, n. 4, p. 420 (respectively, on the validity of the jurisdictional acts of the occult excommunicated in general and specifically of his sentence of excommunication).

133 Sánchez, *Disputationvm de Sancto Matrimonii Sacramento Tomi Tres*, cit., tom. 1, lib. 3, disp.22, pp. 286–300, esp. q.5, n. 49–52, pp. 299–300.

134 Tuscus, *Practicarum Conclusionvm Ivris in omni foro frequentiorvm Dominici TT.S. Onvphrii … Card. Tvschi*, (3rd edn.), Lvgdvni, ex Officina Ioannis Pilehotte, sumpt. Ioannis Caffin, & Francisci Plaignard, 1634, tom. 3, concl. 330, esp. p. 146, n. 8.

135 Lessius was one of the first authors who explained the toleration principle in terms of supplied jurisdiction provided by the Church for public utility, thereby leading to the formulation of the *supplet ecclesia* principle in the 1917 Codex Iuris Canonici (CIC). Lessius, *De Ivstitia et ivre*, lib. 2, ch. 29, dubit.8, n. 67, p. 339: 'Supradicta locum habere, non solum in foro contentioso, sed etiam in sacramentali … Ecclesia defectum iurisdictionis non minus hic, quam in foro externo supplere potest, et vult, concurrente titulo colorato, et communi errore.' Cf. 1917 CIC, lib. 2, pt. I, tit.5, can.209: 'In errore communi aut in dubio positivo et probabili sive iuris sive facti, iurisdictionem supplet Ecclesia pro foro tum externo tum interno.'

136 De Coninck, *Commentariorvm ac Dispvtationvm in Vniuersam doctrinam D. Thomae De Sacramentis et Censvris Tomi Duo*, Antverpiae, apud Haeredes Martini Nvtl, 1619, tom. 2, disp. 8, dub. 3, concl. 6, n. 22, p. 470.

137 Barbosa, *Augustini Barbosae … Pastoralis Solicitudinis, sive De Officio et Potestate Episcopi* …, Venetiis, 1707, Apud Natalem Feltrini, tom. 1, pt. II, alleg.32, n. 94, p. 337 (on the marriage celebrated by the *parrochus putativus*).

138 Reiffenstuel, *Jus Canonicum Universum clara methodo ivxta titulos qvinque librorvm Decretalium in Quaestiones distributum* …, Monachij, Sumptibus Viduae et

require both public utility and the intervention of the superior authority (often describing the latter as 'coloured title'), from the beginning of the seventeenth century others began to highlight the importance of public utility, arguing that it sufficed for the validity of the jurisdictional acts even without any title.[139] Probably the first to maintain as much was Basilius Pontius (1569–1629) in his treatise on marriage (first printed in 1624).

Any modern canon law work on supplied jurisdiction seems to cite Pontius, without however necessarily examining his approach. We have often seen that medieval jurists discussed putative jurisdiction moving from the *lex Barbarius* (or its canon law equivalent, Gratian's *dictum Tria*), then focusing on the jurisdiction of the excommunicated judge and typically concluding with the false or excommunicated notary. The same occurred with most early modern canonists – until Pontius. Pontius wanted to reach the opposite conclusion: public utility suffices despite the lack of a coloured title. To do so he inverted the scheme, starting first with the notary. The advantage of doing so was clear: the case of the notary marked the outer boundaries of the toleration principle, so that his deeds were regarded as valid only in rather limited situations. Only a true notary could be tolerated in office after his deposition, so long as that remained occult. Being quite selective in his citations, Pontius led his reader to believe that the common opinion among the jurists was on the contrary in favour of the validity of the false notary's instruments.[140] Pontius' arguments might not strike as compelling. But the strictness of the decretal *Tametsi* made urgent to widen the scope of the toleration principle, lest any marriage not celebrated by the *parrochus* or his delegate would be void.[141] Indeed, it is probably not fortuitous that Pontius allowed for the validity of the acts of the intruder only with regard to the *parrochus putativus*.

Haeredum Johannis Hermanni à Gleder, 1700–1702, lib. 2 (1700), tit.1, §8, n. 199, p. 29. For a specific application see *ibid.*, lib. 1 (1700), tit.3, §10, n. 234, p. 221 (on the expiration of the mandate).

139 *R.P.M.F. Basilii Pontii … De sacramento matrimonii tractatvs cum appendice de matrimonio catholici cum haeretico …* Venetiis [Combi.], 1645, lib. 5, ch. 20, n. 1–9, pp. 224–225.

140 *Ibid.*, n. 5–6, pp. 224–225. Pontius' selective quotations allowed him to overcome the objections of a contemporary and highly authoritative jurist, Thomas Sánchez. On the subject, Sánchez was merely the last of a very long series of canonists, but Pontius' readership was familiar with him. This might explain Pontius' efforts to describe Sánchez (and not himself) as going against the common and consolidated opinion of canon lawyers (*ibid.*, n. 5–7).

141 See esp. *Iacobi Pignatelli … Consvltationvm Canonicarvm …*, tom. 6, Venetiis, Apud Paulum Balleonium, 1688, cons.3, pp. 6–8, esp. p. 7, n. 14–16.

From Pontius onwards, starting with Johannes Sanctius (Juan Sánchez),[142] an increasing number of authors started to follow this new – and simpler – approach. While the old position of Innocent probably remained the majority one,[143] the 'new' doctrine became increasingly widespread among canonists.[144] Ignoring the position of those *Ultramontani* who said as much centuries before them, they stressed the novelty of their approach,[145] which ultimately culminated in the Canon Law Code of 1917 and the omission of the need of coloured title.[146]

14.4 Bellapertica the American (or, a hint at the common law side of things)

Early modern canon lawyers were not the last to reach the same conclusions as Bellapertica. The honour belongs to nineteenth-century American judges. In their defence, however, it must be said that the *de facto* officer doctrine had a different history in England, and its connection with its Continental sister is somewhat doubtful.

The starting point in common law is usually identified with the Abbot of Fountain's case (1431).[147] A new abbot of Fountain was elected with a minority of votes. Although the election was invalid, this abbot exercised his office for a while. When another abbot was lawfully elected, he was confronted with some obligations undertaken by his unlawfully appointed predecessor, who had purchased some goods for the abbey using its seal.[148] Confronted with one such sealed bonds, the new abbot refused payment arguing that the person who

142 Sanctius, *Selectae, illaeque practicae disputationes de rebus in administratione sacramentorum*, Venetiis: Apud Bertanos, 1639, disp.44, n. 3, *in fine*, p. 275.

143 The point was also acknowledged by Pontius' followers: see the list of excerpts in Miaskiewicz (1940), p. 85, note 164.

144 For a list of the main ones see Miaskiewicz (1940), pp. 85–87. Cf. Wilches (1940), pp. 176–186; Fedele (1936), pp. 366–367, esp. note 122.

145 As stated by a pre-eminent canonists and moral theologian of the seventeenth century, Antoninus Diana (1585–1663): 'Notent hoc Confessarii, quia haec opinio est nova, et satis probabilis, et ex illa bono communi magis consulitur, quam si praeter communem errorem titulus quoque foret necessarius.' *R.P.D. Antonini Diana … Coordinati, seu Omnium Resolutionum Moralium …* Tomus Primus, Venetiis, Ex Typographia Balleoniana, 1728, tract.3, *De sacramento poenitentiae*, resp.19, n. 3, p. 67. Cf. Miaskiewicz (1940), p. 86.

146 *Supra*, this paragraph, note 135. See further *inter alios* Deutsch (1970), pp. 189–190.

147 YB 9 H. 6, *fols.* 32*v*–34*v*, pl.3 (1431).

148 While the consequences of sealing a document in common law are obvious, it might be interesting to observe that the *sigillum* was one of the main features of a corporation in canon law, and its use was left to the person representing the same corporation. See e. g. Gillet (1927), p. 154.

had used the seal was a mere usurper. In canon law, that might have sufficed. The problem, however, was how to frame that defence in a common law court. Pleading a general issue would have left the whole business to the jury (which would have likely found against the abbot). Pleading confession and avoidance would have had similarly little hope of success. What the abbot needed was to show that the plaintiff had only an apparent cause of action, not a true one (that is, just colour). The problem was that the plaintiff's colour looked quite strong. The best defence in substantive terms – the fact that the previous abbot was just a usurper – could not be translated in procedural terms, for it would have amounted to claiming that the plaintiff lacked any colour as abbot. Such a claim would have been plainly false, and indeed the court dismissed it at once.[149] The Year Book does not report the outcome of this case, only the difficulties of the abbot as to how framing his plea. From what the Year Book does report, however, it seems quite likely that the court held the bond as valid. This seems also the opinion of most of the (admittedly few) extant decisions on the subject from the late sixteenth century onwards.

The first of them, *Knowles* v *Luce* (1580), was on surrender and admittance of copyhold tenure before a steward of the manor who lacked proper title.[150] The King's Bench highlighted the difference between possession of coloured title (*colour & nul droit*) and mere usurpation of an office (*n'ad colour ne droit*). The coloured title of the steward, argued the Bench, is sufficient to hold a court because the tenants are not obliged to examine the authority of the steward, nor should the steward give account to them.[151] More such decisions on the subject begin to be found shortly thereafter,[152] especially with regard to invalidly appointed or irregular officers.[153] Up to the end of the seventeenth century, it

149 YB 9 H. 6, *fol.* 32*v*, *per* Strange J. See *inter alios* Constantineau (1910), pp. 9–10; Dixon (1938), pp. 289–290.

150 *Knowles* v *Luce* (1580) Moore 109; 72 E.R. 473.

151 *Knowles* v *Luce* (1580) Moore 109, 112; 72 E.R. 473, 474 (*per* Manwood J, referring to the Abbey of Fountain's case).

152 On copyhold tenure and *de facto* stewards see further *Rous* v *Arters* (1587) 4 Co. Rep. 24*a*; 76 E.R. 927; *Dillon* v *Freine* (1589) 1 Co. Rep. 120*a*; 76 E.R. 270; *Harris* v *Jays* (1599) Cro. Eliz. 699; 78 E.R. 934; *Parker* v *Kett* (1697) 1 Ld. Raym. 658; 91 E.R. 1338. Most works on the early cases of *de facto* officers also cite Coke's report on *Tey's Case* (5 Rep. 38*a*–*b*, Trin. 34 Eliz.) because of the application of the maxim '*fieri non debuit sed factum valuit*' (*ibid.*, 38*b*) to an unjust fine, but it is difficult to find a link between that case and our subject.

153 The first known case on the subject is *Leak* v *Howell* (1596), Cro Eliz. 533; 78 E.R. 780, on duties paid to a *de facto* deputy customer (on which see Pannam [1966–1967], p. 40). Other cases include *Knight* v *Corporation of Wells* (1695) Lutw. 508; 125 E.R. 267; *R.* v *Pursehouse* (1733) 2 Barn. K.B. 264; 94 E.R. 490; *R.* v *Malden* (1767) 4 Burr. 2135; 98 E.R. 113. See further Pannam (1966–1967), p. 41.

would seem that the courts followed the double standard imposed by *Knowles* v *Luce*: common mistake and coloured title are both necessary. At the beginnig of the eighteenth century the King's Bench however seemingly changed position with *Parker* v *Kett* (1701).[154] There, the Bench decided that the surrender of copyhold in fee tail made to the *de facto* deputy of a deputy-steward was a good surrender, despite the lack of any title, even a coloured one. The reputation of being steward sufficed: 'such steward is no other, than he who has the reputation of being steward, and yet is not a good steward in point of law.'[155] Although references to the need of coloured title may be occasionally found thereafter,[156] English courts no longer required it.[157]

Pace Innocent IV, common law developed its doctrine of *de facto* officer without any significant reference to legal representation and toleration doctrine.[158] Requiring the presence of a coloured title was ultimately only a way to distinguish *de facto* officers from intruders, not a consequence of representation. Admittedly, the connection with representation was lost also by early modern civil lawyers. But the weight of previous authorities was often stronger in civil law than in common law. English courts found easier to dismiss the requirement of coloured title than their Continental counterparties.

By contrast, coloured title remained a prerequisite in the American approach to the *de facto* officer doctrine. While the rationale of the doctrine was clearly the protection of third parties in good faith (and so public utility triggered by the common mistake),[159] the coloured title could not be disregarded. As late as in

154 *Parker* v *Kett* (1701) 1 Ld. Raymond, 658.

155 *Parker* v *Kett* (1701) 1 Ld. Raymond, 658 at 660, *per* Holt CJKB.

156 Reporting the case of *R.* v *Lisle* (1738, on a *de facto* major), Strange J noted that 'in order to constitute a man an officer *de facto*, there must be at least the form of an election'. Cf. Pannam (1966–1967), p. 49, note 69.

157 E. g. *R.* v *Pursehouse* (1733) 2 Barn. K.B. 264; 94 E.R. 490; *Rex* v *Bedford Level Corporation* (1805) 6 East 356; *Scadding* v *Lorant* (1851) 3 H.L.C. 418; 10 E.R. 164.

158 Incidentally, this is also why the present short notes do not refer to the Act of Parliament, passed on the accession to the throne of Edward IV, that confirmed all the official acts of the Lancaster kings as *de facto* sovereigns ('late kings of England successively in dede, and not of ryght', 1 Edw. IV. c. 1). Despite the point is often mentioned in relation to our subject, from the available case law it would seem that the bench did not look at corporation theory when deciding on *de facto* officers. Something not too different from the Act of Parliament above happened in the United States in the aftermath of the Civil War, with the often quoted decision of the US Supreme Court in *Texas* v *White*, 74 US (7 Wall.) 700 (1868).

159 Esp. *Norton* v *Shelby County* 118 U.S. 425, 442 (1886) (*per* Field J): 'The doctrine which gives validity to the acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose

the mid-nineteenth century, the US Supreme Court was adamant on the need of coloured title.[160] It was only in the early 1870s that American courts relented on the subject, and began to consider the coloured title only as one of the possible elements for such an officer. On the point, the most important decision is *State* v *Carroll* (1871),[161] which provided the standard definition of *de facto* officer.[162] In that case, the existence of a *de facto* officer was questioned on the basis of a rather strict interpretation of coloured title, for the appointment had been made under a statute then found to be unconstitutional. Innocent IV would have likely approved, but the Connecticut Supreme Court did not. When reading the reasons put forward by the Court, it is difficult not to think of an up-to-date version of Bellapertica.[163] Subsequent case law clarified the

> interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in the apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by the law their title is investigated and determined.'

160 See esp. *Worth* v *Mattison* 59 U.S. (18 How.) 50 (1855). See further Wallach (1907), pp. 479 and 481–483; Constantineau (1910), pp. 127–139.

161 38 Conn. 449; 9 Am. Rep. 409. The salient parts of the decision may also be read in Goodnow (1906), pt. 2, pp. 144–149. Cf. Tooke (1927–1928), pp. 944–946.

162 'An officer *de facto* is one whose acts though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the appointing or electing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such' (text in Goodnow [1906], pt. II, p. 147).

163 'The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. … But to protect those who dealt with such officers when apparent incumbents of offices under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons, on the ground that, as to them, although not officers *de jure*, they were officers in fact, whose acts public policy required should be considered valid. It was not because of any quality or character *conferred upon the officer* or attached to him by reason of any defective

scope of the doctrine,[164] but did not alter its main tenets nor added much to its rationale.[165]

election or appointment, but a name or character given to his acts by the law, for the purpose of validating them' (text in Goodnow [1906], pt. II, pp. 145–146, emphasis in the text).

164 See on the point the extremely detailed study of Constantineau (1910) and the more recent work of Pannam (1966–1967), pp. 50–57, and Clokey (1985), p. 1126, where further literature is listed. The same Clokey provides a reasoned list of the main reasons invoked in support and against the *de facto* doctrine in the American case law from the 1960s onwards *ibid.*, pp. 1128–1139.

165 Among the most recent decisions on the subject should be mentioned *Ryder* v *United States* (94–431), 515 US 177 (1995). In this case the US Supreme Court pronounced against the *de facto* validity of the decision of a panel of judges invalidly appointed. Nonetheless, it did so because there was no mistake on the validity of the appointment, as the petitioner had immediately objected to the composition of the court. Without a common mistake, there was clearly no public utility consideration at stake. Interestingly, instead of briefly dismissing the point, the Court looked at its main decisions on the subject, mainly those of the late nineteenth century, so as to stress their importance. See esp. *Norton* v *Shelby County*, 118 US 425, 441–442, 446 (1886); *Ball* v *United States*, 140 US 118 (1891); *McDowell* v *United States*, 159 US 596, 601–602 (1895).