Chapter 3

Postglossators and Common Mistake: a tale of Odofredus, Jacobus de Arena and Butrigarius

We have seen how Accursius' comment on the *lex Barbarius* was likely to have been made of two different parts. The first dealt with putative freedom and its effects on the validity of the deeds, the second sought to provide a legal basis for Ulpian's speculative conclusion about the will of the people. As to the first part, Accursius added little to what other jurists, Azo especially, had already said. The overall argument was coherent enough, and Accursius just bound together its different components. The second part, however, was far more problematic. Taking literally what Ulpian had said, Accursius sought to rescue the text of the *lex* with a rather creative – but legally weak – interpretation, which might have gone against the opinion of other jurists.

In his effort to provide as coherent as possible a reading of the different parts of the *lex Barbarius*, Accursius made the validity of the deeds strictly dependent on the personal status of Barbarius. This left little choice to later jurists: either accepting his position in full, or dismissing it *in toto*. A first consequence was that the complex discussion about Barbarius' putative freedom was soon overshadowed by the issue of the *de iure* validity of his praetorship. And Barbarius could become fully praetor only if duly emancipated. To rescue Barbarius' deeds, in other words, it became necessary to accept the presumed will of the people to set him free, so that he could validly be praetor. The validity of the deeds thus required the validity of his praetorship, which in turn depended on his freedom.

What Accursius did left later jurists in a rather difficult position. Full acceptance of his Gloss required a leap of faith – or rather deliberately ignoring the weakness of some of its conclusions. On the other hand, a wholesale rejection of Accursius was no easy task, not least because of the weight that his Gloss had rapidly acquired. As a result, for more than a century most jurists adhered to its overall position – most jurists, but not all of them. Some showed signs of increasing dissatisfaction; others launched a full-scale attack against the Gloss. The earliest open attacks on the Gloss, however, did not come from the Bolognese (or anyway Italian) environment, but from the School of Orléans. That is hardly surprising – it is perhaps easier to list the occasions where the jurists 'beyond the mountains' (the *ultra-montani*) agreed with Accursius than to count all those where they did not. Drawing a clear-cut distinction between 'Italian' and 'French' environments is however misleading. Some among the

most important early 'French' law professors had in fact studied in Bologna. They did not change their mind after they crossed the Alps. The seeds of doubt as to Accursius' reading of the *lex Barbarius* were already clearly visible in the teaching of some Bolognese jurists writing shortly after the Gloss. Indeed, if the French were the first to openly criticise Accursius' reading of the *lex Barbarius*, some of their Italian colleagues did not lose much time before joining them.

The academic rivalry between Accursius and some other colleagues, chiefly another eminent student of Azo, Jacobus Balduini (d.1235), is well known.[1] At least in part, this rivalry was because their approach to the text was different and more sophisticated than that of Accursius, which was still mainly based on the *distinctio*.[2] The triumph of the Accursian Gloss in effect coincided with the beginning of a different approach to the text, based on dialectics and syllogism.[3] This is particularly visible in the *lex Barbarius*, especially comparing one generation of jurists with the next. Even in Bologna, as we shall see, the predominance of the Gloss hardly meant unanimity of opinion.

We will first focus on the Italians, then (in the next chapter) move to the French and to their influence among the *Citramontani* (i. e. those 'within the mountains' – the Italians), and (in Chapter 5) conclude with the last great Italian jurist to side with the Gloss – Bartolus. Admittedly, our journey will be somewhat less linear: the division will be based on the personal stance of each jurist, not on his geographical location. Therefore, some Italian jurists – even Bolognese ones – will be placed among the French.

3.1 Variations on the Gloss: Odofredus de Denaris

Our starting point is the position of those Bolognese jurists writing a few decades after the Gloss. Already by then the limitations of Accursius' reading of the *lex Barbarius* were becoming manifest. Even those who sought to defend his

1 E. g. Meijers (1959*a*), p. 33; Tuck (1998), p. 16, and esp. Sarti (1990), pp. 63–65. On the life and works of Balduini, as well as his position in the Bolognese university, see the same Sarti (1990), pp. 1–68, with ample literature (updated in Sarti [2013], pp. 1095–1096). On this 'other' school and its difference with Accursius' approach, mention shoud be made of the work of Bellomo, esp. Bellomo (1992), pp. 177–179; Bellomo (1995), pp. 174–175; Bellomo (1997*b*), vol. 1, pp. 131–135. Bellomo has often pointed out the continuity between Ugolino, Balduini and Odofredus. On the point see also Bellomo (1982), pp. 199–203, and Bellomo (1992), pp. 176–180 and 189. On the fortune of Accursius' Gloss (and so, of his approach) over the 'rival' school see again Bellomo (1992), pp. 182–194.

2 Errera (2006), esp. pp. 5–66, where ample literature is quoted. See also Errera (2007), pp. 79–97.

3 Errera (2007), pp. 101–119.

conclusions had to adopt a different approach. To accept the outcome of the Gloss, in other words, it was necessary to go beyond it.

As often happens with mid-thirteenth-century authors, the commentary of Odofredus de Denaris (d.1265) is in effect a combination of his glosses, probably coming from some students' notes. In the case of his writings on the *lex Barbarius*, however, such notes appear particularly wanting in coherence – sometimes they look more like a patchwork of his utterances rather than a consistent report of his ideas. Occasionally, an excerpt is even taken from other lectures.[4] The result is neither systematic nor logically coherent,[5] and it requires some flexibility in its interpretation.[6] The disappointing quality of Odofredus' commentary on our text is not the only reason a modern reader may regret he was born too late to attend the actual lectures of its author. There are at least two other reasons. The main one lies in Odofredus' importance in applying a dialectical approach to the law, and so in his role in the transition from postglossators to proper commentators.[7] The other one is that Odofredus was genuinely amusing, and knew well how to capture the attention of his audience.

4 In the comment on the *lex Barbarius*, for instance, when discussing the problem of the *lex Iulia de ambitu* the text refers to two *leges*: Dig.50.12.1 and the *lex Barbarius* itself. The text even invites the reader to look at Odofredus' commentary on the *lex Barbarius*, where Odofredus dealt in more depth with the subject: 'et sic intelligit, quod dicit aug(ustinus) qui episcopatum desiderat, bonum opus desiderat, vt ff. de polli(citationibus) l. i § i et <§> si quis (Dig.50.12.1.1 and 6), et l. barbarius (Dig.1.14.3) et ibi plenius dixi.' Odofredus, *ad* Dig.1.14.3 (*In undecim primos pandectarum libros … Lectura*, Lvgdvni, P. Compater & B. Guido, 1550; anastatic reprint, Bologna: Forni, 1967, *fol.* 28*vb*, n. 1).

5 Suffice it to report the main arguments in Odofredus' commentary on the *lex Barbarius* in the order in which they appear: (1) the *lex Iulia de ambitu* is no obstacle to Barbarius' praetorship; (2) common mistake makes law, and so Barbarius' election is valid; (3) Barbarius' deeds have the force of res judicata and should not be revoked, but that is only out of fairness (*de equitate*), not according to strict law (*de rigore iuris*); (4) the Roman people and the prince may set Barbarius free out of public utility but they have to compensate his master.

6 On Odofredus' commentary on the *lex Barbarius*, manuscript sources are not particularly useful. See e. g. Pal. lat. 732, *fol.* 4*ra*.

7 The role of Odofredus has been long underestimated. Only recently has his dialectical approach been studied with more interest (cf. Padovani [2011], pp. 365–369), and put in relationship with the later and crucial developments in the period between the end of the thirteenth century and the beginning of the fourteenth: see esp. Padovani (2017), pp. 11–12 and 139–153. Cp. however Errera (2006), pp. 107–108. While the terms 'postglossator' and 'commentator' are often used coterminously, in this work the second will not include those jurists living in the mid and late thirteenth century. Among the manifold differences between late thirteenth-century jurists and fourteenth-century ones perhaps the main one is the distinction between text and rationale of the *lex*. Cf. Errera (2006), pp. 94–114. See further Errera (2007), pp. 97–149.

These two points may be seen together: looking at the captivating Odofredian style, we can also appreciate its distance from the exegesis of Accursius.

In his typical style, Odofredus opens his lecture on the *lex Barbarius* with a very colourful and imaginative picture of the situation:[8]

> Gentlemen, this is a good law and you may see many good things about it … There was one called Barbarius Philippus, he came from the province, or from France, and he was a slave. Either because he was exceedingly frightened of his master, or because the master often punished him, he escaped from him and went to Rome. But in Rome he did not portray himself as a slave. Rather, he dressed up in sumptuous and ornate robes and spoke much and in a pompous style. With his look and his bombastic speeches he threw dust in the eyes of the Romans, so that the day they had to elect the new praetor they chose him. Once elected he did not stay in his praetorship as a runaway slave, but like an emperor! And he did much in his office: he decided many things, issued decrees and pronounced many decisions. And so the Romans were very happy with him. His master came to hear about all that, and so he thought to go to Rome and see him. So he went to Rome and found him sitting in court. When Barbarius Philippus saw his master, he turned his head elsewhere and pretended not to know him. But one day the master secretly went to him and said: 'you know me'. Barbarius said: 'I do not'. The master said: 'you should know me well from the time I grabbed you by the hair. For I am your master, and you my slave, who run away from me.' But he replied, 'I have no idea what you are talking about'. The master said: 'since you claim that you do not know me, I will let the Romans know about this.' And so he went through the city and told the Romans: 'this is my slave, and I shall prove it to you!'

8 Odofredus, *ad* Dig.1.14.3 (*In undecim primos pandectarum libros … Lectura*, cit., *fol.* 28*va*, n. 1): 'Signori ista l(ex) bona l(ex) est et plura bona notabuntur vobis circa eam … Quidam barbarius philippus nomine vocabatur, et erat de prouincia, vel de francia et erat seruus. Quia ibi erat dominus suus nimis preternus (sic), vel quia sepe corrigebat eum fugit a domino suo, et venit romam. Dum esset rome incedebat in magno habitu et pomposo non autem gerebat se tanquam seruus, et valde pompose loquebatur. Iste ex ornatu suo et ex boatu suo periecit puluerem in oculos romanorum, ita quod vna die dum tractaretur de pretore eligendo, romani creauerunt eum in pretore. Cum iste esset creatus pretor, non stabat tanquam seruus fugitiuus in sua pretura, sed tanquam imperator. Iste in officio suo multa fecit, et statuit, et decreuit, multas tulit sententias, ita quod factum suum multum placuit ciuibus romanis. Deuenit istud in noticiam domini sui: vnde cogitauit ire et videre eum: vnde venit in vrbem, et inuenit istum sedente pro tribunali. Barbarius philippus dum vidit ipsum, auertit caput in aliam partem, et dissimulauit cognoscere ipsum. Tamen dominus vna die in secreto intrauit ad eum, et dixit ei "cognoscis tu me". Dixit ipse, "non"; dixit dominus "bene deberes me cognoscere, vnde traxi iam te per capillos: quia sum dominus tuus, et tu es seruus meus qui fugisti a me". Dixit iste "nescio quod dicas". Dixit dominus "ex quo tu dicis, quod non cognoscis me, deducam hoc in noticiam romanorum". Vnde ibat per ciuitatem et dicebat romanis, "iste est seruus meus, et de hoc faciam vobis fidem".'

After such an opening, Odofredus knew he commanded the full attention of his students.[9] And he used it to insist on the validity of Barbarius' election as praetor, focusing especially on the importance of the common mistake.

Already by his time (he might have delivered his lecture around the middle of the thirteenth century), this solution was no longer unanimous: 'As to the first question, we say that he was praetor, although some say he was not.'[10] The remark is interesting, though it is difficult to identify those early dissenting voices with precision. While Odofredus himself was not one of them, he was aware of the main weakness of the Accursian approach. This probably led him to stress the relevance of the common mistake more than the Gloss itself did.

Odofredus allows that the text of the *lex Barbarius* did not state unequivocally that Barbarius was praetor. 'Some argue – he says – that the text [likely, the part referring to Pomponius] is to be read not as stating a fact (*assertive*) but rather as raising a question (*interrogative*)'.[11] In effect, he continues, in the text the possible confirmation of the people or the prince seems to occur only when the true status of Barbarius is discovered, and so sometime after Barbarius' appointment as praetor. So, he says, even accepting that Barbarius did eventually become free and a true praetor, one might conclude that he remained a slave until that moment.[12] The point was serious, for it would entail the invalidity of the deeds made between election and manumission. Odofredus' initial answer appears remarkably weak: he does not address the issue, but simply invokes the literal tenor of the *lex Barbarius* (as well as the authority of Bassianus and Azo) to dismiss the objection.[13] In fact, he was only following the order of the Gloss. Shortly thereafter Odofredus comes back to the point. As already noted by Accursius, one of the main texts pointing against the validity of Barbarius' appointment was the *lex Herennius* (Dig.50.2.10): the mere discharge of the

9 Odofredus' peculiar style is often noted but seldom studied, and even more rarely appreciated as a teaching tool. An interesting exception can be found in the work of Tamassia (1981), pp. 48–87.

10 Odofredus, *ad* Dig.1.14.3 (*In undecim primos pandectarum libros … Lectura*, cit., *fol.* 28*va*, n. 1): 'Ad primam questionem dicimus, quod fuit pretor; licet quidam dicant, quod non.'

11 *Ibid.*, § *designatus est* (*fol.* 28*vb*, n. 1): 'Or signori, hic consueuit queri, an in litera determinetur prima questio que est, an barbarius philippus fuerit pretor, et dicunt quidam quod non, quia litera ista non assertiue legenda est, sed interrogatiue.'

12 *Ibid.*, 'Item si seruus erat, magistratum habere non poterat, vt *infra* de iudicijs l. cum pretor (Dig.5.1.12.2), ita talis debet dici quod fuerit medio tempore qualis inuenitur, vt C. si seruus export(andus) vt l. moueor (Cod.4.55.4) et sic seruus.'

13 *Ibid.*, 'Sed certe nos dicimus secundum Joannem [Bassianus] et Azo(nem), quod ista questio determinatur in litera: quia in litera aperte dicitur, quod fuit pretor. Et ideo legimus eam plane sine aliqua subauditione, et verum est.'

duties of an official does not make one such *de iure*. To avoid the application of this text, and again following the Gloss, Odofredus introduces the issue of the common mistake: much unlike Herennius, Barbarius was commonly believed to be free. Several *leges*, continues Odofredus, show that it is well possible to treat something as valid because it is widely believed so. It follows that Barbarius should be treated as free, and so also as praetor. A common mistake makes law, he says, in the sense that it bestows validity on something that would otherwise remain void.[14]

Odofredus introduces the common mistake in the same way as the Gloss did, but the similarities between Accursius and Odofredus stop there. While Accursius interpreted the common mistake as presumed consent, for Odofredus it remains a mistake. Subordinating the effects of the common mistake to the presumed will of the people, as Accursius did, would pose an obvious problem:

> Now gentlemen, here you have that if the Roman people had known that Barbarius Philippus was a slave, they would have set him free and then they would have elected him praetor. But he will never have become free, for they did not know that he was a slave.[15]

To avoid Accursius' impasse, Odofredus opts for a different approach: setting aside the presumptive will of the people[16] and focusing on the common

14 *Ibid.*, § *designatus est* and § *praetura functum* (*fol.* 28*vb*, n. 1 and 2 respectively): 'dicunt ipsi [those who deny the validity of Barbarius' appointment] quod non fuerit pretor, quia sola salarii prestatio non facit eum decurionem qui non est, vt *infra* de decur(ionibus) l. herennius (Dig.50.2.10). Ita iste petijt preturam non potuit eum facere pretorem cum esset seruus … Et eum pretorem fuisse, quia communi opinione putabatur liber, et tanquam liber creatus est pretor igitur communis opinio facit ius, vt *infra* de supplemento legato (*sic*) l. iii in fin(e) (Dig.33.10.3.5) sic et alibi valet ratione communis erroris, quod alias non valeret. Institu. de testamentis § sed cum (Inst.2.10.7) et C. de testamen(tis) et quemadmodum te(stamenta) or(dinantur) l. prima (Cod.6.32.1) et C. de sent(entiis) l. secunda (Cod.7.45.2) et *infra* ad mace(donianum) l. iii (Dig.14.6.3). Non ob(stante) sola salarij prestatio non facit decurionem si decurio electus fuit, quia iste fuit electus pretor, et communi opinione putabatur liber, vnde erit pretor. Item non ob(stat) quod ipse erat seruus, igitur pro mortuo reputatur, quia quantum ad ius ciuile attinet etc., et quia seruus igitur abesse causa reipub(lica) non potest. Item si seruus erat, igitur habere magistratum non potest, quia illud verum est si sciretur seruus. Sed vbi creditur liber, et communis opinio est quod sit liber, facit eum pretorem vt hic dicitur.'

15 *Ibid.*, § *Observandum est* (*fol.* 29*ra*, n. 3): 'Or signori habetis hic si populus romanus scisset barbarium philippum servuum, fecisset eum liberum, et postea creasset pretorem: sed nunquid erit liber effectus cum ignoravit eum servuum.'

16 Odofredus however agreed with the Gloss, if only in abstract terms, as to the interpretation of Ulpian's statement on the prince: he had the same right as the people to set Barbarius free. Ulpian's 'multo magis' had nothing to do with a higher level of sovereignty, but with the simple fact that the prince is one and the

mistake. The advantage is clear: the common mistake cures the invalidity of the election, for it dispenses with the cause of Barbarius' ineligibility – his servile condition.[17] Odofredus' reliance on the common mistake left little room not only for the presumed will, but also for the putative freedom, which was another important point in the Accursian Gloss. The common mistake leads to the validity of the election because it neutralises (so to speak) the legal incapacity of the slave. But Barbarius could not be at the same time both free and slave. A careful discussion of the effects of Barbarius' possession of his freedom was best avoided, for it would have highlighted the underlying invalidity of his election.

Odofredus relies on the common mistake, but he does not clarify its precise effects. Does the common mistake set Barbarius truly free or does it simply bar the exception as to his underlying legal incapacity? Although the point is not entirely clear, from Odofredus' description of the effects of the common mistake ('factus est pretor et liber et valent statuta … quia communis error facit ius'), it would seem that the common mistake operates at a substantive level and not just at a procedural one, so that Barbarius becomes free *de iure*. A second element – Odofredus' insistence on the duty of the Roman people to compensate Barbarius' master for the emancipation of his slave[18] – is not resolutive. Other

people many. Cf. *supra*, last chapter, note 89. It is worth reporting Odofredus' comment on the point, if only for his imaginative style: 'hic est ratio, quia populus est vniuersitas: vnde facile dissentirent, vt ar(gumentum) i(nfra) de (receptis qui) ar(bitrium) l. si vnus § principaliter (Dig.4.8.17.6), et ideo vniuersitates consentiunt cum difficultate, vt i(nfra) de liber(tis) vniuersi(tatum) l. vnica (Dig.38.3.1), et ait Satirus, mille hominum species est rerum discolor vnus velle suum cui datur, nec voto viuunt vno. Nam homines non concordant in specie et ideo dicit mille homines species similiter res non concordant adiuicem imo infiniti sunt colores rerum sed vnum est in quo satis concordant, scilicet quod homines leuiter discordant imo quod plus est si sunt plures homines in aliquo loco et proponitur aliquid coram eis vt consulant quid sibi placet si vnus surgit, quod cuilibet datur votum suum' (*ibid.*, § *Observandum est*, *fol.* 29*ra*, n. 2).

17 *Ibid.*, n. 3: 'dicimus quod sic, quia communis error totius populi romani facit ius, vt s(upra) dixi. Vnde si credebatur eum liberum ipsa electione factus est pretor et liber et valent statuta ab eo quod totum procedit, quia communis error facit ius, et propter autoritatem rerum iudicatarum et quia legitime factum est non debet superuenienti casu retractari vt C. de admi(nistratione) tut(orum) l. s<an>cimus (Cod.5.37.25) et i(nfra) de itinere actuque pri(vatu) l. i. in fi(ne) et l. seq. (Dig.43.19.1–2).'

18 *Ibid.*: 'Item not(andum) quod populus romanus seruum tui privati (*sic*) ob publicam vtilitatem potest ad libertatem producere dato precio, similiter et imperator, vt C. per quibus causis serui acci(piunt) liber(tatem) l. vlt(ima) (Cod.7.13.4) … Similiter et populus romanus et imperator potest rem alicuius priuati confiscare ob publicam vtilitatem dato precio ut i(nfra) de rei ven(dicatione) l. item si verbe § i (Dig.6.1.15.1) et i(nfra) loca(ti) et con(ducti) l. si

jurists who denied Barbarius' freedom discussed the issue of expropriation just in abstract terms, and simply because it was mentioned in the Gloss.[19]

Given the central position that the common mistake occupies in Odofredus' reasoning, one would expect to find it coupled with public utility – common mistake makes law because (and, perhaps, to the extent to which) it furthers public utility. But that is not the case. This seems hardly imputable to an omission in the notes of his students.[20] Just like the Gloss, Odofredus insisted on the importance of public utility both before and after speaking of common mistake: afterwards, when talking about Barbarius' (hypothetical) manumission by the people;[21] and beforehand, when rejecting the classical objection that Barbarius' election contravened the *lex Iulia de ambitu*. What is surprising is that he did not mention public utility during his discussion of common mistake.

Odofredus' use of public utility when discussing the *lex Iulia* is particularly relevant. We have seen how Accursius, following Azo, provided three different solutions as to its application to Barbarius' case (what is done should not be reconsidered; the *lex Iulia* does not apply to public requests; the *lex Iulia* no longer applies in Rome). Both Azo and Accursius opted for the third one.[22] Odofredus also speaks of three alternatives, but he lists only the first two. Between them, he clearly shows his preference for the second one, arguing for the validity of the public request on the basis of the petitioner's intent to further public good. In so doing Odofredus builds on Azo and especially Bassianus,[23] explicitly linking public request with public utility. If one publicly seeks an office not for personal gain but to accomplish much-needed reforms, says Odofredus, he can be hardly accused of contravening the *lex Iulia*, let alone of simony.[24]

fundum (Dig.19.2.33) et i(nfra) de euict(ionibus) l. lucius (Dig.21.2.11pr), sed alias nisi propter publicam vtilitatem non potest manumittere vel confiscare nec ob(stat) quod omnia sunt principis: vt C. de quadri(ennii) pres(criptione) l. bene a zenone (Cod.7.37.3) quod illud est verum quo ad protectionem.'

19 Further, as Odofredus discarded the presumed will of the people to set Barbarius free, it would be difficult to explain why the same people should pay for an expropriation that occurred without their knowledge.

20 Cf. also ÖNB, 2265, *fol.* 13*ra*, where a second and later (likely, fifteenth-century) layer of glosses (at the bottom) provides a summary of both Odofredus and of Bartolus on the point. For Odofredus, the hand only notes: 'Communis error facit ius. S(ingularis) error facit non ius. Odof(redus).'

21 *Supra*, this chapter, note 18.

22 *Supra*, §2.2.

23 *Supra*, last chapter, note 38.

24 Odofredus, *ad* Dig.1.14.3, § *Designatus est* (*In undecim primos pandectarum libros … Lectura*, cit., *fol.* 28*va–b*, n. 1): 'Or signori secundum Jo(hannem Bassianum) et Azo(nem) hic op(inio) ita si barbarius philippus petijt preturam rome. Ergo iure nostro commisit in l. iu(liam) ambitus et iure can(onico) simoniam vt C. ad l. iu(liam) ambitus l. vnica (Dig.48.14.1) et C. de epi(scopis) et cle(ricis) <l.> si

The all-important role of public utility in Odofredus' discussion of the *lex Iulia* becomes remarkably marginal in his explanation of the common mistake. Odofredus hints at their relationship only once, and very briefly. When the mistake as to Barbarius' status is found out, says Odofredus, his previous deeds would stand because they have the strength of res judicata. Although this alone might not be sufficient ground, he adds, out of fairness (*de aequitate*) the deeds should not be revoked.[25] Odofredus does not elaborate further on the point. This

> quemquem (Cod.1.3.30). Si commisit in l. iu(liam) ambitus, factum est lege prohibente. Vnde quicquid ab eo vel ob id sequitur, cassum et inutile est, vt C. de leg(ibus) et co(nstitutionibus) l. non dubium (Cod.1.14.5). Vnde non sit pretor, quod hic statim dicitur. Ad istud vos dicetis tribus modis. Et vno modo sic: hic barbarius philippus petijt preturam rebus et factis et bonis operibus mediantibus, vnde sibi licuit hoc facere, nec committit hoc casu in lege iu(lia) ambitus, iuxta dictum agustini qui episcopatu desiderat bonum moribus, videlicet desiderat non vt presit, sed ut prosit. Si autem barbarius philippus petijsset preturam precio vel precibus, quia commisisset in legem iu(liam) ambitus non fuisset pretor, vt in l. contraria (i. e. Dig.48.14.1). Vel potest dici secundo modo secundum Jo(hannem Bassianum): aut petitur dignitas secularis vel ecclesiastica precibus vel data pecunia sub capa vel mantello et tunc committitur ambitus iure nostro, vel simonia iure cano(nico) et iste non adipiscitur honorem lege refragante. Et ita loquuntur l(eges) ille que signantur pro contrariis. Sed si aliquis petijt honores secularem vel eccesiasticum non clam sed palam, quia dicit vos estis in discordia de isto officio, vnde si vos eligitis me, bene facitis et mihi placet: quia nolo ideo habere vt non faciam mihi vtilitatem, sed vt reformem vos. Et tunc non committitur ambitus, vt i(nfra) de pollicit(ationibus) l. i § i et l. si quis (Dig.50.12.1.1 and 50.12.2pr). Nam qui petit clam videtur delinquere, qui petit palam non videtur delinquere, sed potius errare. Similiter si tutor convertit in usus suos pecuniam pupilli clam, tenetur ad centesimas usuras si palas ad legitimas vt i(nfra) de admi(stratione) tuto(rum) l. non existimo (Dig.26.7.54) … Et sic exponimus vno modo barbarius philippus petijt preturam moribus bonis et operibus mediantibus, quod sibi licuit facere.' The same rationale, continues Odofredus to better explain it, also applies in canon law: 'Si autem petit quis honorem palam, nam veniet bonus homo coram principe et dicet, domine talis episcopatus est inter tartaros: nullus vult eum habere eo volo eum habere, non vt pr<a>esim, sed vt prosim, vt edificem, et volo ibi expendere pecuniam meam. Iste non est simoniacus de iure cano(nico) vel de iure ciuili non committit in l. iu(liam) ambitus. Et sic intelligit, quod dicit aug(ustinus) qui episcopatum desiderat, bonum opus desiderat.'

25 *Ibid.*, *§ hoc enim humanius est* (*fol.* 29*ra*, n. 2): 's(cilicet) propter autoritatem rerum iudicatarum: nam et libertas data ab eo qui postea servus pronunciatur, vt in qui et a quibus ma(numissi) li(beri) l. competit (Dig.40.9.19). Vnde not(andum) licet forte de rigore iuris videantur non valere tamen de equitate est dicendum quod valeant, quia equitas praefertur rigori iuris, vt C. de iud(iciis) l. placuit (Cod.3.1.8) et ar(gumentum) C. de pact(is) l. minorem [*sed* 'maiorem', Dig.2.14.8] et maxime propter autoritatem rerum iudicatarum quod multa sunt que alias non fierent propter autoritatem rerum iudicatarum vt s(upra) de iusti(tia) et iur(e) l. vlt(ima) (Dig.1.1.11).'

way, the relationship between public utility and common mistake remains in the background. One has the impression that Odofredus brings up the issue of validity *de aequitate* only because it was Ulpian's solution to the entire *lex Barbarius*, so it could not be omitted.

The position of Odofredus on some related texts would confirm this impression. Whenever invoking the common mistake in support of the validity of the deeds, Odofredus always omits any reference to public utility. In some occasions that is unsurprising, especially with regard to the Pauline text on the bequest of the silverware (Dig.33.10.3.5). Commenting on that text Odofredus accepts the reading of the Gloss,[26] but he is more attracted to the possibility that the prince, being human, might just have made a mistake. Building on this hypothesis, Odofredus focuses on the effects of a widespread mistake, arguing that it does create law.[27] The silence on common utility is therefore hardly surprising.

In a second case, however, the exclusive focus on the common mistake appears less neutral as to the role of public utility: the case of the slave-arbiter (Cod.7.45.2).[28] There, Odofredus adheres to the interpretation of the Gloss: a slave mistakenly believed free when he rendered the judgment. Odofredus' explanation is entirely – and very explicitly – based on common mistake.[29] In

26 *Supra*, §2.5, text and note 110.

27 Odofredus, *ad* Dig.33.10.3.5, § *Error* (*D*[*omini*] *Odof*[*redi*] … *perelegans et elaborata elucidatio, in nouem posteriores libros Infortiati* … Lvgdvni, 1550; anastatic reprint, Bologna: Forni, 1968, *fol. 55ra*): '… no(tatur) hic inspecta hominum consuetudine vasa argentea non sunt in suppellectili propter hominum seueritatem licet imperatores vtantur. Sed hic error principis facit ius, i(d est), cum imperator possit ius condere, si facit aliquid non eo animo vt sit iudex, tamen ex certa scientia pro iure habetur. Nam communis error facit ius vt s(upra) de offi(cio) pre(torum) l. barbarius (Dig.1.14.3). Sed quomodo error cum omnia iura habeat in pectore et non verisimile pretorem errare, C. de testamentis l. omnium (Cod.6.23.19). Respondo hic non videtur errare, tamen errare potest in eo quod homo est, quia omnium habere etc. vt C. de veteri iure enu(cleando) l. ii (Cod.1.17.2pr).'

28 Text *supra*, last chapter, note 62.

29 Odofredus, *ad* Cod.7.45.2, § *Si arbiter* (*Odofredi … in secundam Codicis partem, Praelectiones* …, Lvgdvni, 1552; anastatic reprint, Bologna: Forni, 1969, *fol.* 118*vb*): 'In l(ege) ista ponitur talis casus. Quidam fuit delegatus iudex inter me et te: iste iudex sententiauit diffinitiue: et tempore delegationis et tempore diffinitionis cause, ab omnibus liber reputabatur: sed post latam sententiam apparet quod est seruus: nunquid sententia ab eo alias rite lata, irritabitur: Respondet quod non … in communi opinione liber putabatur … et hoc casu nulla est dubitatio in l(ege) ista: quia quod ab initio vt s(upra) de admi(nistratione) tu(torum) l. sancimus (Cod.5.37.28pr), vel aliter depulsus est, i(d est) quia apparet cum antea fuisse seruus: vnde habetis, si communis opinio iudex qui erat seruus reputabatur liber, valet quod ab eo factum est. Vnde ex l(ege) ista

itself, that is not surprising: the slave-arbiter pronounced a single judgment, so the utility in keeping his decision is not public but private. However, Odofredus' open reliance on the effects of common mistake seems to question the role of public utility. If common mistake suffices to bestow validity on what would otherwise be void, then there is no reason to invoke public utility, nor to limit its validity to the cases where the common mistake affects a large number of people and not a single litigant.

A third case seems to confirm as much. There, bringing up the issue of public utility would have been all too easy – but Odofredus did not do this. This was the case of the false notary. If one is widely regarded as being a notary and is not, says Odofredus, one's instruments will be valid nonetheless.[30] The common mistake as to the notary's condition is sufficient to bestow validity on his deeds. Odofredus' position on the false notary is of particular interest because it openly diverges from that of both Azo and Accursius.[31] The point is of some importance and must be stressed: it is the first time (at least, that we know of) that a jurist moved from the *lex Barbarius* to argue for the validity of the acts carried out by someone lacking any title whatsoever (that is, not even an invalid one). In applying the *lex Barbarius* in favour of what is done by a plain impostor, Odofredus does something new and in open contrast with his predecessors. As such, one would expect him to highlight both the main elements of the *lex Barbarius*: not just common mistake, but also (and especially) public utility. In order to justify the validity of the false notary's instruments, in other words, the obvious thing to do would be to refer to the prejudice that many people would suffer if the instruments were declared void. But Odofredus does not do this: just as in the *lex Barbarius*, he simply remarks how 'common mistake makes law'.[32] Common mistake is not a reason to invoke public utility considerations, it

colligetis, quod communis error excusat et ad hoc facit s(upra) de tes(tamentis) l. i (C.6.23.1) et ff. de offi(cio) preto(rum) l. Barbarius (Dig.1.14.3) et ff. de sup(pellectili) le(gata) l. ii<i> in fi(ne) (Dig.33.10.3.5).'

30 Odofredus, *ad* Dig.1.14.3, § *observandum est* (*In undecim primos pandectarum libros … Lectura*, cit., *fol.* 29*ra*, n. 3): 'Item not(andum) quod communis error totius populi facit ius: ad istud accedit C. de testa(mentis) l. <i.> (Cod.6.23.1) cum similibus suis s(upra) dictis. Ex quo collige ar(gumentum) quod si aliquis in aliquo loco communi opinione putatur tabellio, et non sit, quod eius instrumenta sunt publica et valida, quia communis error facit ius, vt s(upra) dixi.' Cf. Leipzig, UB, 878, *fol.* 19*va–b*, lower margin.

31 Although it does not seem very likely, it cannot be ruled out that Odofredus misinterpreted Azo. Azo discussed the validity of the instruments drafted by an unknown but possibly genuine notary, but he did so in a somewhat ambiguous manner. if taken out of context, his words could be easily misinterpreted: see *supra*, §2.6, text and note 139.

32 *Supra*, this chapter, note 30.

suffices by itself. Thus the remarkably marginal role of public utility in Odofredus would seem intentional also to a modern reader – just as it did to the jurists writing after him.

Odofredus' application of the *lex Barbarius* to the false notary is of interest also for another reason: the change in the object of the common mistake. In the *lex Barbarius*, Odofredus applies the common mistake to the person of Barbarius, not directly to his deeds. Barbarius' deeds acquire validity because the common mistake allows Barbarius to be considered as free and so as praetor. In the case of the false notary, on the contrary, Odofredus applies the common mistake directly to the deeds, not to the person. That of course is the only way to give validity to the instruments drafted by an impostor. However, skipping the source to reach the deeds directly meant allowing for an indiscriminate application of the principle. If common mistake sufficed to bestow validity on the deeds, the position of the person who made them would become wholly irrelevant.

Odofredus' insistence on the role of the common mistake avoided Accursius' problems with the presumed will of the people. His argument was probably stronger than that of Accursius, and was employed to reach the same conclusions. The common mistake as to Barbarius' status cured the defect in his election and thus allowed for the validity of his deeds as praetor. When applied to other situations where the validity of the deeds could not depend on that of their source, however, the strength of Odofredus' argument becomes a major weakness. The point would not be missed by later jurists.

3.2 The dissent of Jacobus de Arena

If Odofredus had his reservations about some arguments of the Gloss, he certainly agreed with its conclusions: not only are Barbarius' deeds valid, but Barbarius himself becomes free and therefore also praetor. A generation later, however, things were already beginning to change: criticism from other jurists was no longer limited to the arguments employed by the Gloss, but also began to reach its conclusions.

The first Italian jurist traditionally considered to have denied Barbarius both freedom and praetorship was the Paduan law professor Jacobus de Arena (c.1220–*post* 1296).[33] Whether this was actually the case is somewhat doubtful. It is however true that Jacobus de Arena's approach to the *lex Barbarius* was very

33 The biographical data of Jacobus de Arena are particularly unclear. It is generally assumed that Jacobus started teaching in Padua in the first years of the 1260s, and Fulgosius (Raphael de Fulgosiis, 1367–1427) reported that Jacobus de Arena did not receive his doctorate before he was forty years of age. Hence the usual conclusion that he was born in the early 1220s. The point is of little relevance in itself, but it might help to establish a link with the first known Italian jurist who

different from that of Odofredus, and even more from that of Accursius. Jacobus de Arena focused mainly on the validity of the deeds, and only incidentally on the validity of Barbarius' appointment. As we will see, these two points are deeply related.

In his usual abundance of information on the opinion of the others, Albericus de Rosate (c.1290–1360) lists Jacobus de Arena, his student Oldradus de Ponte (d.1335) and Jacobus de Belviso (1270–1335), together with Petrus de Bellapertica (c.1230–1308). For these jurists, says Albericus, the *lex Barbarius* would pose only one question: the validity of Barbarius' deeds.[34] As to the freedom issue – again according to Albericus – Jacobus de Arena and many other jurists maintained that Barbarius did not become free.[35] On this basis, continues Albericus, they also excluded the validity of his praetorship.[36]

Had Albericus been as accurate as he was liberal with the amount of information he supplied on other jurists, we would know a great deal more on early postglossators. While the position of Jacobus de Arena was most probably not as described by Albericus, his remark is interesting in that it would

attacked the entire approach of the Gloss on the *lex Barbarius* – Guido da Suzzara. The possibility that Jacobus de Arena studied under Suzzara is based mainly on his own remark: 'Sed certe audiui hoc a doctore magno domino Guidone de succa …' (*Iacobi de Arena Parmensis … Commentarij in vniversum Ius civile* …, Lugduni, 1541, *ad* Cod.3.1.1). Cf. Savigny (1829), vol. 5, p. 350, note 66 (p. 388, note *f*, in the 2nd edn. of 1850). If Jacobus de Arena started to teach in Padua in the early 1260s, then he could have been Suzzara's student only if he had remained a student until his Paduan appointment (hence the relevance of the time of his doctorate). For an overview on Jacobus de Arena's life and work see Lange and Kriechbaum (2007), pp. 435–444, and Quaglioni (2013), pp. 1099–1101, where ample literature is listed.

34 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 65*ra* [*sed* 69*ra*]), n. 2: 'quaero quae lectura sit uerior, utrum glo(sae) quae dicit, quod hic formantur tres quaestiones. Vel Odof(redi) qui dicit hic formari quatuor quaestiones quarum quarta est, si populus Romanus scisset eum seruum an liberum effecisset, an lectura Oldr(adi de Ponte) et Pe(tri) de Bel(lapertica) et Iaco(bi) de Are(na) quod hic fit una quaestio tantum s(cilicet) de gestis coram Barbario an ualeant. Credo, quod ista ultima sit melior: nam prima et tertia quaestio, s(cilicet) an Barbarius fuerit praetor uel liber, non bene possunt elici ex tex(to).' According to Albericus, the same last position was also shared by Belviso: 'et hanc etiam sequitur Iac(obus) de Bel(viso)' (*ibid.*, *fol.* 70*rb*, n. 20).

35 *Ibid.*, *fol.* 65*va* (*sed* 69*va*), n. 15: 'quid dicemus? Iac(obus) de Are(na), Rich(ardus Malumbra) Old(radus da Ponte) et fere omnes citramontani, et ultramontani reprobant op(inionem) gl(osae) et dicunt, quod non fuit liber.' Cf. next note.

36 *Ibid.*, *fol.* 70*rb*, n. 20: '… Alia lectura fuit Iaco(bo) de Are(na) quod ponat unam q(uaestionem) s(cilicet) an fuerit praetor, et an gesta coram eo ualuerint. Et tenet communem opi(nionem) Doctorum, quod non fuerit praetor, nec liber.' When looking at Albericus, we will however see that his sweeping statement as to the 'common opinion of the doctors' should not be taken too seriously: *infra*, pt. III, §9.

suggest Jacobus de Arena's influence on the next generation of jurists (some of whom were Albericus' own teachers).[37] It is therefore useful to look briefly at what Jacobus de Arena might have actually said on the matter. The thought of Jacobus de Arena is also important because his position represents one of the first cases where a *Citramontanus* sought to dissociate himself openly from the Gloss on the *lex Barbarius*. While this does not mean that he rejected it *in toto*, his different approach was sufficient for the next generations to remember him as one of the first jurists who rejected the Gloss. When a staunch defender of the Gloss, such as Butrigarius, briefly recalled the dissent of some jurists on the *lex Barbarius*, for instance, he mentioned only Jacobus de Arena by name.[38] Finally, the last and possibly main reason to look at Jacobus de Arena lies in his important scheme on the effects of common mistake, which he developed in relation to the *lex Barbarius*.

The only printed edition of Jacobus de Arena is a collection of his works, sometimes of dubious authenticity.[39] Even when a text is indeed of Jacobus de Arena, its quality is often wanting. A comparison with manuscript sources[40] reveals several mistakes in the printed edition: some of little weight, but others very important to the overall meaning of the text.[41] The following discussion will take those differences into account.

37 That is, Malumbra and Oldradus: *supra*, this paragraph, note 35. Cf. Lange and Kriechbaum (2007), p. 666, note 7.

38 Butrigarius, *ad* Dig.1.14.3 (*Iacobi Bvtrigarii Bononiensis, In Primam et Secvndam Veteris Digesti Partem*, vol. 1, *In Primam ff. Veteris Partem Commentaria*, Romae, typis Lepidi Fatij, 1606, anastatic reprint, Bologna: Forni, 1978, p. 38, n. 17): 'Alij vt Iac(obus) de Aren(a) intelligunt, quod hic solum formetur vna quaestio, scilicet in verbo "quid dicemus", scilicet de gestis, et antequam respondeat venit discurrendo, et dicendo ipsum functum officio suo, et ex omnibus respondet, quod acta tenent et probat per rationes, vsque in fin(e). Nam nec quaerit an sit Praetor, vel liber, nec de hoc aliquid respondetur, vt tenet glo(sa) ibi.'

39 Cf. Lange and Kriechbaum (2007), pp. 441–444.

40 Especially Madrid, BN 920, *fols. 63vb–64ra*, the most accurate and complete version of Jacobus de Arena's comment on the *lex Barbarius* I could find.

41 The most significant differences are listed below (highlighted in italics):

Lyon 1541, *fol. 67ra–b*	Madrid, BN 920, *fols. 63vb–64ra*
§ Obstitisse, *fol. 67ra*: 'in functione officij preture: et dic seruitutem ei inherentem *etiam* dum gerit, et *quod sequitur quasi sub* sentiens ipse *Pompo*(*nius*) quasi pretor etc. et quod sequitur. *At qui* dicat licet pretor non fuerit *quin pro certe* verum est etc.'	§ Obstitisse, *fol. 63vb*: 'in functione officij preture: et dic seruitutem ei inherentem, *et* dum gerit et *consecutur quasi status* sentiens ipse *pro tempore* quasi pretor etc. et quod sequitur *ar*(*gumentum*) *quasi* dicat licet pretor non fuerit *quasi pretor contrarium esse* etc.'

We have seen how Accursius inferred from the common mistake of the people their implied will to set Barbarius free for the sake of public utility.[42] Commenting on that point, Jacobus de Arena provides the first important scheme on the legal effects of common mistake:[43]

> When the common mistake does not harm anyone and is held as true, then it is as good as the truth itself, as in the present case and in Dig.33.10.3.5. When on the contrary it does harm, then the solution depends on whether the mistake harms the person who made it or another. If the mistake harms the person who fell in it, he is to be rescued (as in Dig.15.1.30pr and in Dig.4.1.1). If the mistake harms another, then we should distinguish whether this person is the counterparty of the one who gave cause to the mistake or it is a third party. If he is the counterparty, then the mistake is held as true (as in Dig.14.6.3pr). If on the contrary he is a third party, then the mistake does not hold (as in Dig.27.9.8, Cod.1.2.16 and Dig.12.2.17.1).

§ Decernere, *fol. 67ra*: 'due sunt rationes, prima equitas: secunda *pape* voluntas: § hanc, et si potuit, credendum est populum propter *vtilitatem publicam* voluisse quod potuit.'

§ In glos. *functus sit* ibi l. iii [i. e. Dig.1.14.3], *fol. 67rb*, n. 1–2: 'aut nullus leditur: *sed* error publicus pro veritate censeatur, tunc equiualet veritati … Si alius, aut is contra quem error laborat, et tunc pro veritate accipitur … aut tertius, et tunc non …'

§ Decernere, *fol. 63vb*: 'due sunt rationes, prima equitas secunda *presumpta populi* uoluntas: hanc et si potuit, credendum est populum propter *uoluntatem populum*voluisse quod potuit.'

§ In glos. *effeci*(*sset*) l. iii [i. e. Dig.1.14.3], *fol. 64ra*: 'aut nullus leditur: *si* error publicus pro veritate censeatur tunc equiualet veritati … Si alius, aut is quem contra (*sic*) error laborat, et tunc pro ueritate accipitur … aut tertius, et tunc non *patitur* …'

42 *Supra*, §2.4, text and notes 85 and 88.

43 Jacobus de Arena, *ad* Dig.1.14.3 (Madrid, BN 920, *fol. 64ra*): '§ In glos(a) effeci(sset) l. iii [i. e. Gloss *ad* Dig.1.14.3, § *effecisset*] aut nullus leditur: si error pu(blicus) pro veritate censeatur tunc equiualet veritati: vt hic, et in de supell(ectili) leg(ata) l. ii<i> § fi. (Dig.33.10.3.5) aut l<a>editur et tunc aut errans aut ali(us) si errans succuritur ei, i(nfra) quando actio de pec(ulio) est annalis l. qu<a>esitum (Dig.15.2.1.10) et i(nfra) de in integrum restitu(tionibus) l. i (Dig.4.1.1). Si alius, aut is quem contra (*sic*) error laborat, et tunc pro ueritate accipitur, i(nfra) ad mac(edonianum) l. iii (Dig.14.6.3) aut tertius, et tunc non pat(itur), ut in de excu(sationis) <l.> qui nequem (*sic*) (Dig.27.9.8) et C. de sacro(sanctis) ec(clesiis) <l.> decernimus (Cod.1.2.16) et i(nfra) de iureiur(ando) l. ius iurandum quod ex <conventione>, § i (Dig.12.2.17.1).' The gloss clearly uses a refined dialectical scheme. To make better sense of it, it might be useful to divide the text (skipping the references) as follows: 1. aut nullus laeditur: si error publicus pro veritate censeatur, tunc equivalet veritati: ut hic; 2. aut laeditur, et tunc aut errans aut alius: 2.i. si errans [laeditur] succuritur ei; 2.ii. si alius [laeditur], 2.ii.a) aut is contra quem error laborat, et tunc [error] pro veritate accipitur, 2.ii.b) aut [is] tertius, et tunc [error] non patitur.

Jacobus de Arena's text is not the simplest. The above translation is rather free and it benefits from both the passages cited in the text and the summary provided by Cynus.[44] In the *lex Barbarius* and the case of the silverware (Dig.33.10.3.5), says Jacobus de Arena, the mistake does not harm anyone in particular. So (presumably on the grounds of public utility) it may be held as true. By contrast, the mistake is to be set aside when its consequences would prejudice someone who erred. This applies in the case of the *paterfamilias* who thought his son to be dead and was time-barred from exercising the *actio de peculio* in consequence of his mistake (Dig.15.2.1.10). It also applies in the *in integrum restitutio*, which Ulpian commended as the chief remedy for the praetor to help those who made mistakes (Dig.4.1.1).[45] In both cases, the person who makes a mistake is also the one who suffers its consequences. The situation is different when the person who made the mistake and the one who is prejudiced from it do not coincide. Dig.14.6.3 is a classic example in that sense, as it carves out a well-known exception to the Macedonian senatus consultum. The lender to the son-in-power was barred from suing for his debt even when the debtor became legally independent (*sui iuris*). However, the senatus consultum introduced an exception for cases in which the son-in-power was widely believed to be *sui iuris*. The creditor could thus sue to claim his debt because of the common mistake as to the status of his debtor.[46] In this case Jacobus de Arena remarks that the common mistake depended on one contracting party (the son-in-power) and would prejudice the other (the creditor). Barring the application of the senatus consultum, he observes, is tantamount to considering the mistake as true. The case of the son-in-power who behaved as if he were *sui iuris* is useful for appreciating the difference between this and the last situation in Jacobus de

44 Cynus, *ad* Cod.1.2.16, § *Decernimus* (*Cyni Pistoriensis In Codicem et aliquot titulos primi Pandectarum tomi, id est Digesti veteris, doctissima commentaria … a iureconsulto celeberrimo Domino Nicolao Cinsnero … correcta, et illustrata, Francofurti ad Moenum, Impensis Sigismundi Feyerabendt*, vol. 1, 1578; anastatic reprint, Frankfurt am Main: Vico Verlag, 2007, *fol.* 10*va*): 'Unde Jaco(bus) de Aren(a) refert: aut error publicus laborat contra errantem et succurritur ei vt ff. quando actio de pecul(io) est an(nalis) l. quaesitum (Dig.15.2.1.10), aut contra alium et tunc aut alius est contrahens aut tertius. Si alius per veritate accipitur ut ff. ad mace(donianum) l. iii (Dig.14.6.3). Si tertius, tunc non vt hic, ff. de re(bus) eo(rum) l. qui neque (Dig.27.9.8).'

45 Dig.4.1.1 (Ulp. 11 ed.): 'Utilitas huius tituli non eget commendatione, ipse enim se ostendit. Nam sub hoc titulo plurifariam praetor hominibus vel lapsis vel circumscriptis subvenit, sive metu sive calliditate sive aetate sive absentia inciderunt in captionem.'

46 Dig.14.6.3pr (Ulp. 29 ed.): 'Si quis patrem familias esse credidit non vana simplicitate deceptus nec iuris ignorantia, sed quia publice pater familias plerisque videbatur, sic agebat, sic contrahebat, sic muneribus fungebatur, cessabit senatus consultum.'

Arena's scheme. Some of the examples provided in the text are perhaps not the most obvious, apart for the first one, Dig.27.9.8. The secondary importance of the other two texts,[47] together with the fact that only the first one is also reported in Cynus' summary of the same scheme,[48] both suggest focusing mainly on Dig.27.9.8. Dig.27.9.8 stated that the transactions made by the false guardian in the name of his ward are void. Hence its relevance to Jacobus de Arena's discussion: unlike the son-in-power who persuaded the counterparty to lend him money under false pretences, the ward did not collude with the false guardian against the third party. But the contract was between the third party and the ward – not between third party and false guardian. Hence, the only equitable solution was to void it.

Applying his reading of the common mistake to the text of the *lex Barbarius*, Jacobus de Arena inverts Pomponius' argument that the servile condition of Barbarius was no obstacle to his exercise of the praetorship.[49] Barbarius exercised the office of praetor while he was a slave: being 'quasi praetor' meant not being such *de iure*.[50] The Romans, holds Jacobus de Arena, elected him by mistake.[51] Their mistake, however, being common and not harming anyone, may well produce valid legal effects. For the validity of Barbarius' deeds, in other words, the common mistake would suffice.

By contrast, Jacobus de Arena does not provide a clear answer on the issue of Barbarius' freedom. Nor does he respond to the more important question as to

47 Of the other two texts the first was the *lex Decernimus* (Cod.1.2.16), on the invalidity of what done against the Christian faith. The text was commonly interpreted as prescribing the *ipso iure* invalidity of the tyrant's deeds: see e. g. Gloss, *ad* Cod.1.2.16, § *Decernimus* and § *Funditus* (Parisiis 1566, vol. 4, col. 44). The other text (Dig.12.2.17.1) allowed raising an exception against the oath tendered by the ward without the consent of his guardian. This case might appear more in line with the one on the exception to the Macedonian senatus consultum. Following Jacobus de Arena's scheme, therefore, it should lead to the opposite solution. It is likely, however, that Jacobus de Arena referred to this text as interpreted in the Gloss: a mother who tenders an oath for the child (*ad* Dig.12.2.17.1, § *Ait praetor*, Parisiis 1566, vol. 1, col. 1275).

48 *Supra*, this chapter, note 44.

49 Cf. Dig.1.14.3: 'Sed nihil ei servitutem obstetisse ait Pomponius, quasi praetor non fuerit: atquin verum est praetura eum functum.'

50 Jacobus de Arena, *ad* Dig.1.14.3, § *Obstitisse* (Madrid, BN 920, *fol. 63vb*): 'in functione officij preture: et dic seruitutem ei inherentem, et dum gerit et consecutur quasi status sentiens ipse pro tempore quasi pretor etc., et quod sequitur ar(gumentum) *quasi dicat licet pretor non fuerit quasi pretor contrarium esse* etc.' (emphasis added).

51 Jacobus de Arena, *ad* Dig.1.14.3, § *Et designatus* (*Commentarij in vniversum Ius civile*, cit., *fol. 67ra*): 'per errorem cum liber crederetur, licet seruus fuerit hic qui preterea designatus fuit.' Madrid MS 920, *fol. 63vb*, has the same text but emphasises the negation ('sed licet').

the validity of his praetorship. Albericus de Rosate took his silence as clear dissent.[52] Butrigarius, with more precision, lamented that Jacobus de Arena simply jumped to the issue of the validity of the deeds ignoring both freedom and praetorship issues.[53] The problem is that, at least from the sources we have, both authors would seem to be wrong.

Jacobus de Arena's gloss is remarkably ambiguous. What he says on Barbarius' freedom is simply that Ulpian's words must be taken at face value. This way, he reaches the same conclusion as Odofredus: if the Romans knew that Barbarius was a slave, they would have set him free – but they did not know. Imputing to the people a will they did not possess, concludes Jacobus de Arena, is tantamount to saying that Barbarius would have become free both if the Romans had known of his servitude and if they had ignored it. Barbarius, continues Jacobus de Arena, could have become free only if the Romans had known that he was a slave.[54] The statement might be taken as a denial of Barbarius' freedom, or perhaps as a way of avoiding the issue – hence the different conclusions of Rosate and Butrigarius. Shortly before this ambiguous statement, however, Jacobus de Arena says something else.

We have seen how Accursius ascribed to the people a will they did not have, so as to avoid their being deceived.[55] The presumed intention of the people answered a predetermined end, based on public utility. If the end was commendable, the argument remained weak. In a slightly more elaborate way, Jacobus de Arena seemed to say exactly what Accursius said. The will of the Romans was clearly vitiated as to their knowledge of Barbarius' status, but changing his status was within their sovereign power. Since they could have wanted to do what surely was in their power, argues Jacobus de Arena, their actual will to exercise their power should be inferred for the sake of public utility (the Latin expression is particularly refined: 'credendum est populum propter utilitatem publicam voluisse quod potuit').[56] So far, it would seem that Jacobus

52 *Supra*, this chapter, note 36.

53 *Supra*, this chapter, note 38.

54 Jacobus de Arena, *ad* Dig.1.14.3, § *Sed et si scisset* (Madrid, BN 920, *fol.* 64*ra*): 'dicet quis: tantum videtur Barbarius consecutus errante populo quantum si sciuisset. Respon(deo) non est verum: nam predicta cum errauit populus credens eim liberum locum habet, sed et si scisset etc.' The last words refer to Ulpian's statement 'sed et si scisset servum esse, liberum effecisset.' The Madrid manuscript is slightly more accurate than the printed edition, but the overall meaning is the same.

55 *Supra*, §2.4.

56 Jacobus de Arena, *ad* Dig.1.14.3, § *Decernere*: 'due sunt rationes, prima equitas: secunda presumpta populi voluntas: hanc, "et si potuit" [cf. Dig.1.14.3: 'cum etiam potuit populus Romanus servo decernere hanc potestatem'], credendum est populum propter vtilitatem publicam voluisse quod potuit, et sic est aliqua

de Arena is simply rephrasing Accursius without adding any new argument. Jacobus de Arena's gloss however closes with a short but extremely significant conclusion: 'this way there is some will in the person who errs, as in Dig.35.2.1.11'.[57]

The text in Dig.35.2.1.11 provided relief to the heir who failed to realise that a bequest exceeded the portion of the estate of which the testator could freely dispose.[58] Relief was needed in the form of a special action: the heir could not obtain a possessory interdict since he had already allowed the legatee to take possession of the land. This last point attracted the attention of the Gloss: the heir consented to give execution to the bequest. This means, concluded the Gloss, that one may well be mistaken as to something (the value of the bequest) but consent to something else (the execution of the same bequest).[59] Commenting on a related text (the silverware in Dig.33.10.3.5), Jacobus de Arena approves of that interpretation: while the heir was initially mistaken, the fact that he executed the bequest would attest his consent to it.[60] From this perspective, the text on the invalid bequest would support Jacobus de Arena's argument on the *lex Barbarius*. The will of the people was putative as to their intention to ratify Barbarius' appointment, but it was genuine as to their intention to have Barbarius as praetor.

At first sight, opposing the people's genuine intention to elect Barbarius to their vitiated knowledge as to his status would appear to contradict Jacobus de Arena's previous statement against the presumed will of the same people (i. e. since the Romans did not know of Barbarius' servile condition, it cannot be inferred that they set him free).[61] In fact, there is no contradiction. In arguing

hic voluntas errantis, vt i(nfra) ad legem falci(diam) l. i § si legatarius (Dig.35.2.1.11)' (*Commentarij in vniversum Ius civile*, cit., *fol. 67ra*, pr-n.1; Madrid, BN 920, *fols. 63vb–64ra*. I have used both versions, as each contains clear mistakes (*supra*, this paragraph, note 41).

57 *Ibid*.

58 The Gloss reports the explanation of Vivianus Tuscus: a testator left a number of bequests that in total exceeded three-quarters of the inheritance value. Among them, there was a parcel of land left to Titius. Believing the inheritance value to be higher, the heir gives the land to Titius. Gloss, *ad* Dig.35.2.1.11, § *Si legatarius* (Parisiis 1566, vol. 2, cols. 1464–1465).

59 Gloss, *ad* Dig.35.2.1.11, § *errantis* (Parisiis 1566, vol. 2, col. 1465): 'quia putabat plura esse in hereditate quam erant: sed in legato soluendo bene consentiebat: et nihil prohibet aliquem in vno errare, et in alio consentire.'

60 Jacobus de Arena, *ad* Dig.33.10.3.5, § *Ius facit* (*Commentarij in vniversum Ius civile*, cit., *fol.* 119*vb*): 'dic quod fuit error in origine, sed consensus in obseruatione: sicut alle(gatum) i(nfra) ad leg(em) fal(cidiam) l. i § si legatarius (Dig.35.2.1.11).' Jacobus de Arena's comment on this last text (*ibid.*, *fol.* 122*va*) is on the contrary very brief and does not touch upon our issue.

61 *Supra*, this chapter, note 54.

against the presumed will to set Barbarius free, Jacobus de Arena simply rules out Barbarius having become praetor *de iure*. Thereafter, in the short conclusion ending with the reference to Dig.35.2.1.11, he seeks to cast a positive light on the people's mistake. Once again, the reason is to be found in Jacobus de Arena's scheme of the mistake. When looking at that scheme, we saw that a mistake is equivalent to the truth when two conditions are fulfilled: first, that it is common; second, that it does not harm anyone. While there is no doubt that the mistake as to Barbarius' status was common, it is less clear whether ending up with a slave as praetor would not cause any harm at all. Proving that the people's mistake as to Barbarius' condition was compatible with their intention to have him as praetor (or at least finding a foothold in the sources to that end), Jacobus de Arena removes the only obstacle as to the application of his scheme on mistake to Barbarius' case. Clearly, the mistake that 'aequivalet veritati' is in our case that on Barbarius' freedom.

At this point we may appreciate why Albericus de Rosate and Butrigarius said that Jacobus de Arena rejected the Gloss and argued only for the validity of the deeds. The mistake in relation to Barbarius neither set him free nor made him praetor – at least, not *de iure*. It simply removed the obstacle as to the validity of his deeds. The obstacle was Barbarius' status as slave. Because of the common mistake, Barbarius can be treated as if he were free and as if he exercised his praetorship validly. This way, Jacobus de Arena does not reject the Gloss in full: the validity of Barbarius' acts would still depend on his personal status. It is important to remark the point: in Jacobus de Arena the common mistake is not in the validity of the deeds but in the status of Barbarius. The relationship between the validity of the deeds and public utility, therefore, still depends on the status of Barbarius. At the same time, however, Jacobus de Arena does not accept the Gloss' solution based on the presumed will of the people to set Barbarius free. For Jacobus de Arena, Barbarius became neither truly free nor *de iure* praetor. In rejecting the second part of Accursius' scheme, Jacobus de Arena provides a better explanation as to the validity of the acts carried out by Barbarius while he was in putative freedom (or, as he puts it more nicely, 'in spe libertatis').[62] On the basis of Jacobus de Arena's general theory of common mistake, putative freedom would suffice: being the object of common mistake, and not harming anyone, it may be equiparated to the truth.

Applied to Barbarius' case, the position of Jacobus de Arena on the common mistake might not seem particularly different from that of Odofredus. In both cases the mistake on Barbarius' status allows the production of valid legal effects.

62 Jacobus de Arena, *ad* Dig.1.14.3, § *fugitiuus* (*Commentarij in vniversum Ius civile*, cit., *fol. 67ra*). This gloss is identical to that in Madrid, BN 920, *fol. 63vb*.

Among the two jurists, however, there are some important differences, chiefly Jacobus de Arena's more refined position as to the precise nature of the common mistake and the way it operates. For Jacobus de Arena mistakes do not really make law: if widespread, they can only lead to the production of the same effects as a non-vitiated volition would. Hence Barbarius does not become truly (i. e. *de iure*) a praetor, or actually free. Further, and crucially, what is done under common mistake may be valid only when it does not harm the position of anyone who partakes in the mistake itself. In his abstract and refined scheme, Jacobus de Arena left implied what other people would say expressly: a common mistake cannot be invoked by someone who knew the truth and exploited the others' mistake.

3.3 Butrigarius and the Accursian Orthodoxy

Jacobus de Arena's general scheme on the common mistake allowed to separate the issue of Barbarius' praetorship from that of the validity of his deeds. As such, it was an open threat to the position of the Gloss. At the same time, however, the scheme was remarkably sophisticated and considerably useful. Some among the more conservative jurists sought therefore to modify it in a more Gloss-friendly way. The best example in this direction is that of the Bolognese law professor Jacobus Butrigarius (c.1274–1347/8).[63] Together with his most famous student, Bartolus de Saxoferrato, Butrigarius was among the last main jurists who kept the overall approach of the Gloss to the *lex Barbarius*.

While Butrigarius was sufficiently open to more modern influences,[64] he typically accepted them if compatible with the Gloss. This does not mean that he never sided against Accursius – only that he needed particularly strong arguments to do so. Later jurists would remark on his loyalty towards the Gloss: Fulgosius for instance described him as the 'defender of the Gloss'.[65] Butrigarius

63 For a short recent introduction on Butrigarius' life and work, see Kriechbaum (2013), pp. 1096–1098.

64 When writing on the *lex Barbarius* Butrigarius does not cite anyone by name, apart from Odofredus and Jacobus de Arena. But it is likely that he was familiar with other approaches, especially that of the *Ultramontani* – effectively the main group of jurists that denied Barbarius' praetorship. On Butrigarius' sources there are no in-depth studies, and the occasional broad statements might not have helped (see e. g. Dilcher [1960], p. 286). A few remarks from scholars writing over the past thirty years may be found in Lange and Kriechbaum (2007), pp. 624–626, and esp. Kriechbaum (2013), p. 1098.

65 Fulgosius, *ad* Dig.1.14.3 (*Raphaëlis Fvlgosii Placentini … in primam Pandectarum partem Commentariorum …* vol. 1, Lugduni, Apud Hugonem, et haeredes Aemonis a Porta, 1554, *fol.* 25*vb*, n. 9): 'Jac(obus) autem butri(garius), *qui semper*

himself did little to dispel that impression. He even famously compared the Gloss to the law, and the contemporary use of the sources as custom: 'I would not move away from the Gloss, for the custom is not against it; you should therefore keep whatever the Gloss accepts, unless the custom is the opposite. Only in that case you may depart from it, just as one moves away from the law because of a contrary custom'.[66]

Butrigarius' commentary on the Vetus was printed twice, both times in Rome, first in 1606[67] and then in 1617. The second edition was in fact a simple reprint of the first: the text is perfectly identical but for the greatly elaborated and eye-catching title – marketing is not a modern invention.[68] We will therefore use only the 1606 edition. Manuscript sources, while very different from the printed edition as to the form, seem fairly similar as to the content. In the present work, the printed edition of 1606 will be compared to the only known complete text of his *lectura* on the *lex Barbarius*, preserved in Bologna,[69] together with some other partial manuscript sources.[70] Any difference that is especially important for our purposes will be accounted for. Otherwise, the text will follow the printed edition, all the more because of the somewhat ambiguous structure of the text in the manuscript sources.

Much of Butrigarius' commentary on the *lex Barbarius* is a reiteration of what had already been said by others, and it may be safely ignored here. So for instance, to mention only the issues on which Butrigarius lingered the most, the discussion about the *lex Iulia de ambitu* (which in principle could have voided Barbarius' appointment for having sought the office proactively) is circumvented with the same solution as Odofredus' (seeking an office publicly is

fuit defensor glos(*ae*), tenet gl(osam) quod fuit pretor per primum responsum huius legis.' Emphasis added.

66 With a literal translation the image would be even stronger: 'wherever the Gloss stops its feet at, keep it'. Butrigarius, *ad* Cod.3.4.1 (*Iacobus Butrigarii … super Codice hanc subtilissimam editit lecturam …*, Parrhisiis (*sic*), a Joanne paruo [1516]; anastatic reprint, Bologna: Forni, 1973, *fol. 93rb*): 'ergo non recederem a Glo(sa), quia vsus non est contra eam: vbicumque ergo glo(sa) firmat pedes serua eam nisi vsus sit in contrarium: quia tunc recedas ab ea: quia etiam a lege receditur propter consuetudinem contrariam.'

67 Butrigarius, *In Primam ff. Veteris Partem Commentaria*, cit., *supra*, this chapter, note 38.

68 The title of the 1617 edition is so long that it must be abridged: *Commentaria Ervditissima atque pariter accutissima* (sic), *In Quamplurimos Ivris Communis Titulos…; Ita vt Fere Dici Potest, saltem per extensionem, in uniuersum ius … In Dvos Tomos Distribvta. Tomus Primus … Auctore … D. Iacobo Bvtrigario Bononiensis* … Romae, Typis Lepidi Fatij, 1617.

69 Bologna, CS 272, *fols. 7rb–8ra*.

70 Especially Pal. lat. 733, *fols. 23vb–24rb*.

lawful).[71] Similarly, the emperor may well set Barbarius free for public utility considerations, in which case Barbarius' master ought to be compensated for the manumission of his slave.[72] The point is hardly important for the *lex Barbarius*, but it is worth mentioning, as it is not often found in Butrigarius. Butrigarius is on the contrary often credited (starting already with Bartolus)[73] with having relieved the prince of the need of just cause in order to proceed with the expropriation.[74] In fact, the contradiction is only apparent: the seemingly 'absolutist' position was meant only in abstract terms, as a matter of principle.[75]

71 Butrigarius, *ad* Dig.1.14.3 (*In Primam ff. Veteris Partem Commentaria*, cit., p. 36, n. 7). Cf. Bologna, CS 272, *fol. 7va*.

72 Butrigarius, *ad* Dig.1.14.3 (*In Primam ff. Veteris Partem Commentaria*, cit., p. 37, n. 12): 'Item opp(ono) quod Imperator non possit quem priuare de dominio rei suae, vt l. quotie<n>s C. de precib(us) Imp(eratori) offeren(dis) (Cod.1.19.2). Sol(utio) potest ex causa, vt hic fauore publicae vtilitatis, sine causa non posset, vt ibi.' Cf. Bologna, CS 272, *fol. 7va–b*.

73 Bartolus, *ad* Cod.1.22.6, § *Omnes cvivscvnqve* (*In I. Partem Codicis Bartoli a Saxoferrato Commentaria* …, Basileae, ex officina Episcopiana, 1588, p. 112, n. 2): 'Do(minus) Iac(obus) But(rigarius) dicebat simpliciter, quod Princeps potest auferre mihi dominium rei meae, sine aliqua causa. Nam eius potestas, et potestas istarum legum, quae hoc prohibent, procedit a pari potentia: ergo sicut potest istas leges tollere: ergo eodem modo possit dare alteri dominium rei meae, sine causa.'

74 E. g. Canning (1989), p. 80.

75 Butrigarius was always careful to clarify that, in principle, the prince could derogate from the law and so dispense with private property without any just cause. Butrigarius' discussion of the expropriation of Barbarius from his master continues as follows: 'imo puto, quod vbicunqe princeps non errat in facto, et refert ibi contra ius aliquid, quod valeat rescriptum; nam quod ipse non possit aliquem priuare re sua non est ex defectu potestatis suae; sed ideo quia dixit se nolle hoc facere, vbicunque ergo ipse vult, dummodo non fit error in facto, tenet rescriptum, et videtur tollere legem derogatoriam, quae contra hoc est, cum scire omnia praesumatur', Butrigarius, *ad* Dig.1.14.3 (*In Primam ff. Veteris Partem Commentaria*, cit., p. 37, n. 12). Cf. Id., *ad* Cod.7.37.2pr, § *Omnes* (*Iacobus Butrigarii … super Codice*, cit., *fols.* 41*vb*–42*ra* – the folio numbering starts again with the sixth book of the Code): 'Nota casum contra illos qui dicunt quod princeps per priuilegium non potest ream meam alteri concedere, et dominium mihi auferre: immo potest. Etsi dicas quod est per legem communem. Certe immo ante hanc legem quibusdam concessum per priuilegium vt hic dicit et valebat. Unde quod princeps non possit mihi auferre dominium rerum meum (*sic*) non est ex defectu potentie: sed si velit et dicat non obstante tali lege bene valet et potest. Aut ergo princeps donat vel vendit rem fiscalem et statum est securus donatarius olim et hodie si proprio motu donauit imperator aliis videretur per importunitatem concessum et posset reuocari: vt in de peti(tionibus) bo(norum) sub(latis) (Cod.10.12), aut rem alienam alienauit ut suam: et tunc olim emptor non erat statim securus, scilicet vsque ad quadriennium poterat a domino conueniri; hodie statim est securus sed donatur regressus in fiscus vsque ad quadriennium ad precium et non vltra vt hic'.

Butrigarius' defence of the Gloss hardly meant that he advocated the same old literal interpretation of the text as Accursius and the early glossators. As many other late glossators and early commentators, he distinguished normative from descriptive parts of the Roman sources: in so doing he often rearranged a text according to his ultimate purpose.[76] The fact that such a purpose often coincided with the interpretation of the Gloss (making him the 'joining ring between Gloss and commentary'),[77] makes his position all the more interesting. This can be seen in his comment on the *lex Barbarius*, especially on the debated issues of Barbarius' freedom and the people's mistake. Says Butrigarius:

> I ask if [Barbarius Philippus] is free and (according to Cod.7.16.27.1 and Cod.7.16.11) it would seem he is not. Besides, he would deserve a punishment for what he has done, hence he should not be recompensed. What then? The Gloss holds that he is free, but it does not prove it well. You may prove it with the words of the text, when it says that, if [the people] knew [of his servile condition], they would have set him free. And they could have well done as much, for the people had both the will and the power, and so he is free. That the people have the power is certain. But you might say that the people lack the will, for they are mistaken. I reply that the people do have the will, for the common mistake presupposes the truth. Indeed, when the people make a mistake, they provide for that in which they are mistaken (as in Dig.33.10.7.2 and Dig.33.10.3.5). For common mistake is to be taken as consent, and everybody's mistake is held as true.[78]

The last part of Butrigarius' reasoning leads to the same conclusion as Accursius on the presumed will of the people, but it follows a different and safer route. Accursius simply held that public utility allowed the presumption of something

76 A good example is his comment on Cod.1.18.7, the *lex Error*: Di Bartolo (1997), pp. 208–209. The same *lex Error* is also useful for our purposes, for it shows both Butrigarius' knowledge of the *Ultramontani* and his defence of the Gloss: *Iacobus Butrigarii … super Codice*, cit., *fol. 33vb*.

77 Nicolini (1968), p. 873.

78 Butrigarius, *ad* Dig.1.14.3 (*In Primam ff. Veteris Partem Commentaria*, cit., pp. 37–38, n. 15–17): 'sed quaero, an sit liber, et videtur quod non per l. Arianus § cohaeres (Cod.7.16.27.1) et l. non muta<n>t, C. de lib(erali) causa (Cod.7.16.11). Praeterea ex isto facto meretur paenam, ergo non debet praemium inde consequi. Quid ergo? Glo(sa) tenet, quod sit liber, sed non bene probat, sed tu proba per text(um) in verbo, nam dicit text(us), quod si sciuisset, fecisset liberum, et facere potuisset; cum ergo adsit potestas, et uoluntas; ergo est liber: quod adsit potestas, certum est; et si dicas non adest voluntas, cum erret. Respon(deo) imo adest; nam communis error praesupponit veritatem; nam populus errando etiam disponit in eo, in quo errat, vt l. labeo in fin(e) (Dig.33.10.7.2) et l. 3 de sup(pellectili) legat(a) (Dig.33.10.3.5), nam communis error pro consensu habetur, et id, quod est in errore omnium, habetur pro vero.'

that is not attested – namely, that the people wanted to set Barbarius free.[79] Butrigarius seeks to reach the same outcome by different means. Interpreting the common mistake as common will, he can argue that the people's will to emancipate Barbarius is not presumptive, but already present in the text.

By stressing the element of volition, Butrigarius downplays the mistake as a pathology of the will. This can be seen also in his comment on the case of the slave-arbiter (Cod.7.45.2). There, Butrigarius compares the condition of the people who elected a slave with that of the ordinary judge who delegated a slave (since the Roman arbiter was considered a delegate judge). In both cases Butrigarius ascribes to the subject who appointed the slave a clear intention to do so in spite of the latter's servile condition. The mistake, in other words, is implicitly qualified as intentional. This way, the issue is no longer whether the subject is mistaken, but whether he has the power to reach his goal. Since the ordinary judge could appoint a delegate but not also set free a slave against his master's wish, says Butrigarius, the deeds of the slave-arbiter would remain precarious. By contrast, the people did possess the power to manumit the slave-praetor, so both his appointment and consequently his deeds were valid.[80]

This operation ultimately follows the same logic as Accursius, but in a subtler way. As in Accursius, the ultimate goal remains that of furthering public utility. This is particularly clear in Butrigarius' adaptation of Jacobus de Arena's scheme on the effects of the mistake. We have seen how Jacobus de Arena based his entire scheme on the presence or absence of damage (*laedere*). Only the mistake that did not cause harm could be qualified as producing valid legal effects.[81] Butrigarius replaces harm with utility. The absence of *laesio* now becomes the presence of *utilitas*:[82]

79 To argue as much, as we have seen, Accursius referred to a passage in the Digest where freedom was granted to the slaves despite their master lacking this intention: *supra*, §2.4, text and notes 87–88.

80 Butrigarius, *ad* Cod.7.45.2, § *Si arbiter* (*Iacobus Butrigarii … super Codice*, cit., *fol.* 47*ra*): 'ibi fuit populus romanus [qui] dedit ei iurisdictione qui eum poterat facere liberum et presumitur quod fecisset si sciuisset. At hic iudex eum delegauit qui eum liberum facere non poterat.'

81 *Supra*, this chapter, note 43.

82 Butrigarius, *ad* Dig.1.14.3 (*In Primam ff. Veteris Partem Commentaria*, cit., pp. 36–37, n. 10): 'Plane, aut loqueris de errore singulorum, et talis non facit ius vt l. 3 § subtilius in de condict(ione) caus(a) dat(a) (Dig.12.4.3.8) et l. si procurator meus in de acquir(endo) rer(um) dom(inio) (Dig.41.1.35) et l. si per errorem in de iurisd(ictione) omn(ium) iud(icium) (Dig.2.1.15). Si autem loqueris de errore communi et tunc dic, aut publica utilitas suadet id, quod est in errore seruari pro vero, aut suadet non seruari, aut neutrum: primo casu facit ius, vt hic, et l. 3 § fi. (Dig.33.10.3.5) et l. labeo in fi(ne) in(fra) de suppell(ectile) leg(ata) (Dig.33.10.7.2); secundo casu non facit ius, vt l. decerni-

> Clearly, if you speak of the mistake of single individuals, it does not make law (as in Dig.12.4.3.8, Dig.41.1.35 and Dig.2.1.15). If you refer to a common mistake, then look at whether holding the mistake as true would further public utility, it would not, or it would make no difference. In the first case, the mistake makes law (as here, in Dig.33.10.3.5 and in Dig.33.10.7.2); in the second case it does not (as in Cod.1.3.26 and Dig.1.3.39). In the third case, if the person who falls in the common mistake would benefit from holding it true and letting it make law, then the mistake does make law (as in Dig.14.6.3pr and Cod.4.28.2); if however that person would benefit from not allowing the mistake to make law, then it does not (as in Dig.14.6.20 and Dig.28.5.93).

Butrigarius' scheme is perhaps not as refined as Jacobus de Arena's. Trading harm for utility does not allow to take full account of the consequences of the mistake, especially for the counterparty and even more for third parties. But inverting the logic of Jacobus de Arena also means replacing a negative requirement with a positive one (i. e. from absence of harm to presence of utility). That would seem intentional: the more the accent is on the benefit of the *errans*, the more the deeds of such *errans* implicitly acquire intentionality. This is particularly clear in the last part of Butrigarius' scheme, centred on the cases where neither solution would affect common utility. The common mistake that neither furthers nor detracts from public utility, says Butrigarius, is to be interpreted according to the

> mus C. de Episc(opis) et Cler(icis) (Cod.1.3.26) et sub de legib(us) l. quod contra rationem (*sic*, Dig.1.3.39); tertio casu, aut expedit erranti propter communem errorem, quod error facit ius, et quod pro veritate seruetur, et facit ius, vt l. si quis patrem in de Maced(oniano) (Dig.14.6.3) et l. Zenodorus C. eod(em titulo) (Cod.4.28.2). Si autem expedit erranti propter communem errorem, vt non faciat ius, et non facit, vt l. ad Maced(onianum) l. vltima (Dig.14.6.20), et in de haer(edibus) instit(uendis) l. fi. (Dig.28.5.93(92)).' Cf. Bologna, CS 272, *fol.* 7*va*; Pal. lat. 733, *fol.* 24*rb*, § *reprobari*. Butrigarius used the same scheme when commenting on the *lex Si arbiter*. Id., *ad* Cod.7.45.2, § *Si arbiter* (*Iacobus Butrigarii … super Codice*, cit., *fol.* 47*ra*): 'Item opp(ono) quod error non faciat ius: vt l. iii § subtilius ff. de condic(tione) ca(usa) da(ta) (Dig.12.4.3.8). Sol(utio) distingue quia aut erat error singularis et non facit ius: vt l. iii § subtilius (*ibid.*). Aut est communis et tunc aut suadet communis vtilitas quod habeatur pro veritate et habetur: vt l. barbarius ff. de offi(cio) preto(rum) (Dig.1.14.3); aut suadet oppositum et non habetur pro veritate: vt l. quod non ratione, ff. de legi(bus) (Dig.1.3.39) et l. decernimus s(upra) de episco(pis) et cleri(cis) (Cod.1.3.26); aut non suadet pro nec contra, et tunc aut expedit erranti quod habeatur pro veritate et habetur, aut non expedit et non habetur, vt colligitur ex l. i § fi. ff. quando act(io) de pecu(lio) est anna(lis) (Dig.15.2.1.10) et ad mace(donianum) l. zenodorus (Cod.4.28.2) et l. si quis <pro> prem(io) (Cod.7.13.3).' While the version in Butrigarius' commentary on the *lex Barbarius* is somewhat clearer, that in the Code might be closer to the original: cf. Pal. lat. 733, *fol.* 24*rb*, § *reprobari*; Bologna, CS 272, *fol.* 7*va*. A slightly abridged version of the same scheme is found also in Butrigarius' comment on Cod.4.28.2 (the *lex Zenodorus*, on the exception to the Macedonian senatus consultum): *Iacobus Butrigarii … super Codice*, cit. *fol.* 130*rb*.

private utility of the single individual who makes it. When this individual does something mistakenly that would go to his detriment, Butrigarius implicitly considers the common mistake as against the specific intention of that person. This entails the assumption that, if that person were aware of the mistake, he would have not acted the way he did. While the mistake has still to be a general one (for the mistake of a single person could not bestow validity on something that is void), its consequences ultimately depend on his own presumed volition. In turn, this presumed volition is either inferred from his benefit or excluded because of his nocument. A modern reader might be tempted to see in this last division some sort of rational agent theory *ante litteram*.

These remarks help our understanding of the previous quotation from Butrigarius, on the will of the people to set Barbarius free. Butrigarius maintains that the people had the will to emancipate Barbarius for 'the common mistake presupposes the truth' (*communis error praesupponit veritatem*). This cryptic statement is explained with reference to the volition of people: 'when the people make a mistake, they provide for that in which they were mistaken' (*populus errando etiam disponit in eo, in quo errat*). The emphasis on the desired outcome of the people's choice allows the way in which this choice was made to be reinterpreted. This way Butrigarius can affirm that 'the common mistake is to be taken as consent' (*communis error pro consensu habetur*). In so doing the mistake is no longer opposed to the will of the people, but it becomes an integral feature of their volition process. To make sure of the outcome of their choice, Butrigarius in effect forces the people's hand. Keeping Barbarius praetor but slave, he says, would presuppose the intention to infringe the law (it would not be *honeste*).[83] Presuming bad faith is of course impossible: another reason to argue for the people's intention to set Barbarius free.

The whole operation might not be logically flawless, but it has its own coherence. To defend the position of the Gloss, Butrigarius seeks to establish a link between Barbarius' election and the people's knowledge of his true status.

83 Butrigarius, *ad* Dig.1.14.3 (*In Primam ff. Veteris Partem Commentaria*, cit., p. 38, n. 17): '… cum ergo potuerit hanc dignitatem seruo dare, non ergo sequitur, quod voluerit liberum esse. Resp(ondeo) non, quia licet seruo dare potuerit, non tamen honeste; nam hoc erat inhonestum, quod Populus Romanus haberet suum Praetorem seruum; cum ergo honeste non poterat, potuisse non videtur, vt s(upra) de statu hom(inum), l. vulgo (Dig.1.5.23); videtur ergo voluisse id, quod honestum est, s(cilicet) liberum esse.' It should be noted, however, that even if the people wanted to pursue that dishonest route (i. e. keeping Barbarius praetor but slave), for Butrigarius their action would have been still intentional and not just the product of a mistake. *Ibid*, p. 36, n. 6: 'et probat iste tex(tum) in fi(ne) nam dicit, quod si populus sciuisset eum seruum liberum fecisset, poterat etiam seruo concedere, per quam concessionem videtur tollere legem prohibentem seruos habere dignitates.' Cf. Bologna, CS 272, *fol.* 8*ra*.

Doing otherwise would have led to the same conclusion as Accursius – a presumed will of the people to emancipate Barbarius wholly detached from their actual volition.

The importance of the people's consent might also depend on Butrigarius' restrictive stance on the effects of putative freedom. Unlike Accursius, Butrigarius seems to consider the *quasi possessio* of freedom as insufficient to ensure the validity of the acts carried out while enjoying that *quasi possessio*. For Butrigarius the *quasi possessio* of a status produces effects until the truth is discovered, but the validity of such effects remains precarious. When the lack of legal capacity is ascertained, the deeds already done become invalid. By contrast, the common mistake as to the incumbent's status would suffice as to the enduring validity of his deeds.[84] This way, the presumed will of the people to set Barbarius free is no longer the weak spot in Accursius' reading of the *lex Barbarius* that previous jurists – from Odofredus onwards – thought it to be. Much to the contrary, in Butrigarius it becomes the very source of the validity of Barbarius' deeds. Butrigarius' theory of the common mistake may well be an adaptation of that of Jacobus de Arena, but it was a very ingenious one, for it led to the opposite result – the *de iure* validity of Barbarius' praetorship.

84 Butrigarius, *ad* Cod.7.45.2, § *Si arbiter* (*Iacobus Butrigarii … super Codice*, cit., *fols.* 46*vb*–47*ra*): 'delegatio confert iurisdictionem, sed per se non potest nisi alia subsequatur quid ergo hec operatur: nunquid quasi possessio libertatis hoc facit? Certe non, quia illa quasi possessio non prodest veritate comperta vt l. circa ff. de probatio(nibus) (Dig.22.3.14), sed hoc facit communis error. Et ideo hoc a<n>no vidi dubitari de quibusdam auditoribus domini legati, an valeret eorum sententia: quia de delegatione dubitabatur et dicebatur quod valebat, quia erat in quasi possessione delegationis. Ego dicebam quod hoc est verum, donec contrarium reperiatur: sed magis hoc facit communis error ne vitientur gesta coram eis facta.'