Chapter 2

# The Accursian Gloss

The case of the slave-praetor has fascinated jurists from the dawn of Bologna University to our days. If our interest is mainly scholarly, that of medieval jurists went deeper: a slave acting as praetor questioned the fundamental principles underpinning the whole judicial system. It was difficult to think of two figures less compatible with each other than praetor and slave. In medieval legal thought, the slave is the prototype of the *inhabilis* and the *infamis*: he embodies all legal incapacities and lacks any *dignitas*. In general, the *infamis* could not exercise any public office.[1] Even more so, a slave could not be judge. This was both a consequence of general principles and a specific provision contained in a well known passage of Paul (Dig.5.1.12.2).[2] We will see its importance in the course of this study.

Paradoxically, had the *lex Barbarius* spoken of a slave becoming emperor, the consequences would have been milder. The jurists would have likely taken it as an *argumentum ad absurdum*, pointing to the fact that the prince is above the law (*legibus solutus*). But a slave discharging the duties of praetor was a more serious business, because of the position of the praetor as the prototype of the high-

1 See esp. Gloss *ad* Dig.3.2.2.3, § *Sacramento* (Parisiis 1566, vol. 1, col. 341): 'iurat enim miles, secundum Vegetium, quod mortem non euitabit causa reipublicae, a quo sacramento soluitur propter infamiam qua afficitur. Si ergo soluitur a sacramento militiae secularis: multo magis ab ecclesiastico. Et idem forte in omni publico officio, et omni publico crimine ex quo quis est damnatus. Nam et qui infamis est, non fert testimonium … eadem ergo ratione aliqua publica officia non exercebit: a dignitatibus autem constat eum esse remotum.' In this study, the Ordinary Gloss follows the above-mentioned 1566 Parisian edition of Merlin, Desboys and Nivelle (*Pandectarvm Ivris Civilis*, tomus primvs-quintvs …, Apud Gulielmum Merlin … et Gulielmum Desboys …, ac Sebastianum Niuellium …, Parisiis, 1566). While this edition is among the most accurate ones, comparisons have been made with others, from the Venetian ones (especially of 1484, 1491, 1494, 1499–1500) and the Lyon editions of 1539 and 1569, the Perugia edition of 1476, the Milanese one of 1482–1483, the Roman one of 1476 and the Mainz edition of 1476–1477.

2 Dig.5.1.12.2 (Paul 17 ed.): 'Non autem omnes iudices dari possunt ab his qui iudicis dandi ius habent: quidam enim lege impediuntur ne iudices sint, quidam natura, quidam moribus. Natura, ut surdus mutus: et perpetuo furiosus et impubes, quia iudicio carent. Lege impeditur, qui senatu motus est. Moribus feminae et servi, non quia non habent iudicium, sed quia receptum est, ut civilibus officiis non fungantur.'

ranking judge: neither the highest, nor the lowest. In other words, the judge *par excellence*. For medieval jurists, the higest judge was of course the prince. Those immediately below him (first of all the praetorian prefect, the urban prefect, consuls and quaestores) were *illustres*. The praetor was a step below: not *illustris* but *spectabilis*.[3] Medieval jurists found these terms in the Authenticae (imperial edicts, mostly taken from Justinian's Novels), especially in Justinian's provisions on appeals in the eastern provinces (Coll.4.2.3=Nov.23.3). The Novel of Justinian spoke of *maiores*, *medii* and *minores* magistrates, and stated that appeals against the decisions of *minores* could be brought not just before the *maiores* (chiefly the *praefectus augustalis*) but also – so long as the value of the cause did not exceed a certain sum (ten *auri*) – before the *spectabiles*, such as praetors and proconsuls. It was easy for the civil lawyers to identify such *spectabiles* with *medii magistratus*, and so to conclude that the praetor was not the highest judge but still a high-ranking one.[4] On this basis, at the beginning of the Digest's title on the office of the praetors, the Ordinary Gloss of Accursius (c.1182–1263), completed around 1230, drew a line: so far the Digest had dealt with *illustres* (i. e. in the titles on consuls, prefects and quaestores), now it moved to the *spectabiles*.[5] That was not only the position of other eminent glossators such as Azo (d. *ante* 1233).[6] Many

3 Or, more properly, two steps below – if one were to count also the title *superillustris*, a title chiefly attributed to the prince (e. g. Gloss *ad* Dig.1.9.4, § *Qui indignus* [Parisiis 1566, vol. 1, col. 120]), but sometimes also used for the consul. Cf. Lepsius (2008), p. 234. In terms of ranking, secular offices were equiparated to ecclesiastical ones. So, for instance, bishops and cardinals were of the same rank as the praetorian prefect: cf. Gloss *ad* Dig.1.11.1, § *Iudicaturus* (Parisiis 1566, vol. 1, col. 125). On the transposition of Roman law magistracies in the medieval world see e. g. Costa (1969), pp. 206–219 and again Lepsius (2008), pp. 233–237, text and and notes 27–31.

4 Gloss *ad* Coll.4.2.3 (=Nov.23.3), § *Illo videlicet* (Parisiis 1566, vol. 5, col. 205). This interpretation found a confirmation in Coll.3.7pr (=Nov.20pr). There, Justinian merged together (among several other things) the administration of the provinces of Paphlagonia and Honorias (in northwestern Anatolia) under a single magistrate who took the name of praetor ('et interim, quoniam Paphlagonia et Honoria diuisae prius in iudices duos, in vnum eundemque reductae sunt praetoris nomen suscipientem', *ibid.*, col. 154). See esp. Durantis' *Speculum*, lib. 1, partic.1, *De Iurisdictione omnium iudicium*, 1. § *Expedito* (*Gvl. Dvrandi Episcopi Mimatensis I.V.D. Specvlum Ivris* …, Basileae, apvd Ambrosivm et Avrelium Frobenios Fratres, 1574; anastatic reprint, Aalen: Scientia Verlag, 1975, p. 134, n. 5).

5 Gloss *ad* Dig.1.14: 'Hucusque de illustribus, nunc de spectabilibus. Nam praetor est spectabilis: vt in authen. de ap(pellationibus) coll. 4 § simili quoque modo (Coll.4.2.3[=Nov.23.3]). Accursius.' Cf. BNF, Lat. 4462, *fol.* 15*va*; Douai 575, *fol.* 11*rb*; Firenze, BML, Plut. 6, sin. 3, *fol.* 10*vb*.

6 *Ad* Dig.1.14, BSB, Clm 3887, *fol.* 10*ra*; BSB, Clm 14028, *fol.* 9*ra*; BNF Lat. 4463, *fol.* 12*vb*; Vat. lat. 2512, *fol.* 12*rb*; København, KB 394.1, *fol.* 13*ra*; Firenze, BML, AeD 417, *fol.* 11*rb*.

*Ordines iudiciarii* portrayed the *illustris* as a high-ranking judge, just one degree below the very top.[7]

## 2.1 The *lex Barbarius*

More than half of the titles of the first book of the Digest are devoted to the office of various Roman magistrates. Their text is largely taken from Ulpian. There is a title on the consul, one on the praetorian prefect, one on the prefect of Rome, and so on. Of these, title 14 is devoted to praetors. It is a small title containing only four passages, and its internal logic is not immediately apparent. The reader would find little information on either the actual powers of the praetor or his legal position. Justinian's compilers seem to have followed an alternative rationale: looking for problematic issues where the jurisdiction of the praetor could be allowed or curtailed. The first two texts, both very short, look at some issues on personal status involving a praetor who is not *sui iuris*. The first text states that a *paterfamilias* can manumit before the praetor who is his son-in-power (Dig.1.14.1).[8] The second text allows the emancipation or adoption of the same praetor to occur before himself and not before another praetor. In other words, the same praetor can be both the subject being emancipated or adopted and the magistrate before whom the proceedings take place (Dig.1.14.2).[9] The fourth and last text (Dig.1.14.4) prohibits a praetor from appointing himself as warden or *iudex specialis* (a likely replacement in case of recusation of the 'standard' judge).[10] Especially with regard to wardship, the connection with the previous two texts seems clear: the issue is still about family law, but this time the praetorial office is treated as incompatible with a specific position (that of

7 E. g. Litewski (1999), p. 95.

8 Dig.1.14.1 (Ulp. 26 ad Sab.): 'Apud filium familias praetorem potest pater eius manumittere.'

9 Dig.1.14.2 (Paul 4 ad Sab.): 'Sed etiam ipsum apud se emancipari vel in adoptionem dari placet.'

10 Dig.1.14.4 (Ulp. 1 de omn. trib.): 'Praetor neque tutorem neque specialem iudicem ipse se dare potest.' The *iudex specialis* appears only three times in the whole Corpus Iuris – twice in the first book of the Digest (Dig.1.14.4 and 1.18.5, both Ulp. 1 de omn. trib.) and once in the Code (Cod.3.1.18, Iust. A. Iohanni PP.). Dig.1.18.5 is nearly identical to Dig.1.14.4 – this time it is the *praeses provinciae* who is forbidden from appointing himself as warden or *iudex specialis.* Cod.3.1.18 is a longer text issued by Justinian to the praetorian prefect on the recusation of the *iudex specialis*. The text does not clarify the nature of this judge, but it does explain that he was appointed by the emperor himself or by the highest magistrate of a province ('sive ab augusta fortuna sive ab iudiciali culmine in aliqua provincia') in place of a standard judge who had been recused. Cf. A. Berger (1991), *s.v.* 'Iudex specialis', p. 519, and, more recently, Goria (2000), p. 198, note 102.

warden). Being emancipated does not entail any conflict of interest with serving as praetor, but clearly appointing oneself as warden does. By the same token, the magistrate who assigns an *ad hoc* judge ought not to pick himself for the task.

Between the second and the fourth texts lies an altogether different and lengthier passage, the so-called *lex Barbarius* (Dig.1.14.3). While still dealing with incompatibilities (thus vaguely related to the fourth text), it has very little to do with any of the previous ones. It reads as follows:[11]

> Barbarius Philippus, while he was a runaway slave, stood as a candidate for the praetorship at Rome, and was designated praetor. Pomponius says that his condition as a slave was no obstacle to him: as a matter of fact, he did exercise the praetorship. But let us consider: if a slave, so long as he hid his condition, discharged the office of praetor, what are we to say? That the edicts and decrees he issued will be null and void? Would that go to the benefit of those who sued in his court on statutory grounds or on some other legal grounds? I think that none of these deeds should be set aside. This indeed is the more humane view to take, since the Roman people had the power of conferring this authority to a slave. And if they had known that he was a slave, they would have set him free. And the same power must all the more apply in [the case of] the emperor.

The autenticity of the passage has been discussed for centuries, together with a variety of possible emendations.[12] While not everybody today would necessarily agree with Lenel that the text is a triumph of interpolations,[13] some features would suggest a post-classical re-elaboration of a sort. Equally problematic is establishing the truth of Barbarius Philippus' praetorship.[14] If one looks hard enough, it is possible to find some parallels in the sources. Whether such parallels have any merit (and to what extent the sources themselves are reliable),

11 Dig.1.14.3 (Ulp. 38 ad Sab.): 'Barbarius Philippus cum servus fugitivus esset, Romae praeturam petiit et praetor designatus est. Sed nihil ei servitutem obstetisse ait Pomponius, quasi praetor non fuerit: atquin verum est praetura eum functum. Et tamen videamus: si servus quamdiu latuit, dignitate praetoria functus sit, quid dicemus? Quae edixit, quae decrevit, nullius fore momenti? An fore propter utilitatem eorum, qui apud eum egerunt vel lege vel quo alio iure? Et verum puto nihil eorum reprobari: hoc enim humanius est: cum etiam potuit populus Romanus servo decernere hanc potestatem, sed et si scisset servum esse, liberum effecisset. Quod ius multo magis in imperatore observandum est.' The translation is based, with some amendments, on that of Watson (1985), vol. 1, p. 30.

12 An excellent summary of the most relevant literature in Rampazzo (2008), pp. 360, 366–369, 411–414 (esp. p. 411, note 207, on the ambiguous 'quasi praetor' of Pomponius), and pp. 474–485. Cf. Knütel (1989), pp. 345–353. For further literature see also Herrmann (1968), pp. 66–73, Cascione (2003), p. 148, note 323, and esp. Lucifredi Peterlongo (1965), pp. 49–84.

13 Lenel (1918), p. 122. Cf. e. g. Hohenlohe (1937), pp. 130–131.

14 For a careful review of most sources on the subject see see Rampazzo (2008), pp. 370–379. Cf. Lucifredi Peterlongo (1965), pp. 40–49.

is of course another matter. So, one Barbatius seems to have been quaestor (*pro praetore*) in 41 BCE. In his History of Rome, Cassius Dio writes of a large number of people (67 persons) who all became praetors just three years later (in 38 BCE).[15] It cannot be ruled out that Barbatius was one of them, as in the usual *cursus honorum* the office of quaestor was followed by that of aedilis and finally of praetor. The same Dio reports another case of a slave serving as praetor in the same years – though in Dio's example the slave was found out and killed.[16] The *Suda Lexicon* (a tenth-century Byzantine historical encyclopedia) refers to a Bárbios Philippikós (Βάρβιος Φιλιππικός), who acted as praetor until found out by his master.[17]

We are not interested in studying the text in its own terms – that is, according to Roman law itself. Classical (or even Justinian) Roman law and medieval law had little in common: their juxtaposition was seldom of help in the study of medieval legal problems. Medieval lawyers took the Ulpianean text at face value;[18] when studying the thinking of those medieval jurists, we should do likewise.

The only point in the text of the *lex Barbarius* that is relevant for its medieval interpretation is a rather self-evident one: the text consists of two parts. The first is Pomponius' statement that the office of praetor is valid despite the servile condition of its holder; the second is Ulpian's elaboration on it. Obvious as it may be, we must keep in mind this partition of the text, as it is crucial to appreciating the medieval jurists' comments on it. The more critical their reading of the text became, the more weight this bipartition would acquire.

For a long time, Accursius' Ordinary Gloss provided the standard interpretation of the *lex Barbarius*. To what extent this interpretation was the product of Accursius himself we do not know for sure. While it is very probable that it was entirely written by Accursius,[19] it also seems likely that he built on what earlier

15 Cassius Dio, *Historia Romana*, 48.43.2.

16 *Ibid.*, 48.34.5. Even the punishment however is perplexing: the slave was flung from the Tarpeian Rock (as a Roman) instead of being crucified (as a slave). Cf. Rampazzo (2008), p. 374, text and note 64, where further literature is listed.

17 Adler (1928), p. 454. See further Rampazzo (2008), pp. 376–379, text and notes, esp. note 70, and Lucifredi Peterlongo (1965), p. 41, note 137.

18 This way, incidentally, the status of Barbarius as praetor-elected (*praetor designatus*) was completely lost among medieval jurists. The result is somewhat ironic, because (as we shall see) of the great importance that the same jurists attributed to the modalities of Barbarius' entry in possession of the office. By definition, the praetor-elected became effectively praetor when he took possession of his office. The problem was only noticed in the early modern period, from Salmasius onwards. See again Rampazzo (2008), pp. 394–396.

19 References will be provided when examining each of the most important glosses on the *lex Barbarius*. The only exception is the initial gloss in printed sources that

jurists had already said. The influence of Azo is particularly strong. It is also possible to envisage, although to a smaller extent, some influence of Ugolino de Presbyteris (d. *post* 1233),[20] and of the teacher of both Ugolino and Azo, Johannes Bassianus.[21] We also know that other pre-eminent jurists such as Placentinus (d.1192) also dealt with our subject, at least indirectly. We will seek to identify these different contributions in our analysis of the Gloss, but only insofar as instrumental to a deeper understanding of the Gloss itself.

Following Azo,[22] the Gloss divides the *lex Barbarius* in three parts: the validity of Barbarius' praetorship, that of his deeds, and whether he received his freedom. This *lex* was hardly a masterpiece of clarity. Of the three issues, notes the Gloss, the *lex* gave a clear answer only to the second one (the validity of Barbarius' deeds). While it also argued in favour of his liberty, though in a rather unclear manner (*confuse*), it kept silent as to the validity of the praetorship.[23] It is important to look at each of the three issues in turn, for they would be amply debated by generations of jurists. Before doing so, we may recall the position of

explains the *casus*, which was added later on, and it was taken from Vivianus Tuscus (fl.1256–1270), *Casus longi super Digesto vetere* (Lyon, 1490), *ad* Dig.1.14.3, § *Barbarius*, *fol.* 4*r*.

20 On the life and works of Ugolino see recently Chiodi (2013), pp. 1994–1997.

21 On Bassianus as the teacher of both Azo and Ugolino see already H. Kantorowicz and Buckland (1969), pp. 44 and 168. More recently see also Conte and Loschiavo (2013), p. 137.

22 Very likely, Accursius followed the same tripartition of the *lex Barbarius* as found in Azo's gloss: *ad* Dig.1.14.3: 'primum queritur an fuit pretor. Secundo an quae gessit seruentur. Tertio an libertatem consecutus sit. Prime non respondet. Aliis respondet. Az(o).' Vat. lat. 1408, *fol.* 12*va*; Vat. lat. 2512, *fol.* 12*rb*; Gent, Hs. 23, *fol.* 17*ra*; Bamberg, Msc. Jur. 11, *fol.* 13*vb*; BNF, Lat. 4463, *fol.* 12*vb*; BNF, Lat. 4459, *fol.* 9*va* (the last one with a few small changes). It is very possible, however, that the tripartition predates Azo himself: see e. g. Troyes 174, *ad* Dig.1.14.3, § *barbarius, fol.* 19*va*. The gloss is anonymous, but it is part of a pre-Azonian apparatus (the latest glosses in the manuscript are those of Bassianus), and it comes immediately after another gloss of Irnerius, seemingly written by the same hand.

23 Gloss *ad* Dig.1.14.3, § *Barbarius* (Parisiis, 1566, vol. 1, col. 130): 'Tria quaeruntur in hac lege: primo, an Barbarius qui praeturam petiit, fuerit praetor; secundo, an ea quae gessit seruentur; tertio, an libertatem fuerit consecutus. Primae non respondet, secundum quosdam secundae sic; item tertiae, sed confuse: vt dices exponendo literam.' The gloss is not signed by Accursius, and several manuscripts leave it anonymous. Nonetheless, it should probably be ascribed to him, at least in its substance. Many manuscripts (whose text is on the point almost identical to that in the Parisian edition) report it with the name of Accursius: see e. g. Pal. lat. 733, *fols.* 23*vb*–24*ra*, and Pal. lat. 738, *fol.* 13*va*; Cologny, Bodmer 100, *fol.* 11*ra*; Firenze, BML, Edili 65, *fol.* 10*vb*; Bern, Cod. 6, *fol.* 15*rb*; BAV, SMM 124, *fol.* 13*rb*; ÖNB 2265, *fol.* 13*ra*; Firenze, BML, AeD, 417, *fol.* 11*ra*; BL, Harley 3700, *fol.* 9*vb*; Balliol 297, *fol.* 9*ra*; BL, Add. 14858, *fol.* 15*ra*.

the praetor as a *spectabilis* magistrate. Medieval jurists saw his *iurisdictio* as a senior judge stretching to both judicial and (to a limited extent) legislative competences. Accordingly, Ulpian's rethorical question ('what are we to say? That the edicts and decrees he issued [*quae edixit, quae decreuit*] will be null and void?') was interpreted as listing his main competences: *edicere* and *decernere*. In Accursius' Gloss *edicere* meant rendering a judgment between the parties, and *decernere* was interpreted as putting forward a new statute.[24] The interpretation of *decernere* was consistent with the high but not supreme rank of the praetor, resulting in rather narrow legislative prerogatives. The praetor's *imperium* was not *merum* (absolute), so he could not change the law.[25] It is however important to remark that the praetor was also – and especially for medieval jurists – an ordinary judge.[26] His *iurisdictio* derived directly from his office, it was not delegated to him by someone else. The direct link between person and office highlighted the underlying problem with Barbarius: a slave is *infamis*, and the *infames*, as we have seen, are forbidden from public office.

## 2.2 Barbarius' praetorship

The first question in the Gloss is whether Barbarius became praetor *de iure*. The reason the Gloss deals with it first is not just that it is the first to appear in the text of the *lex* ('praetor designatus est'). It is also a question of logic: the issue of the validity of his deeds as praetor should depend on that of the validity of his appointment to the praetorship. The point could seem a truism, but its importance must be highlighted: from the Middle Ages to early modern times, the whole debate on the *lex Barbarius* focused on it.

24 Gloss *ad* Dig.1.14.3, § *Quae edixit*: 'pronuntiando, s(cilicet) inter litigatores' (Parisiis 1566, vol. 1, col. 130); *ibid.*, § *Decreuit*: 'edicta proponendo'. Although in many printed editions of the Digest (such as the Parisian one used here) the second gloss (§ *Decreuit*) was not signed by Accursius, there is little doubt as to its authorship: see e. g. Pal. lat. 732, *fol.* 4*ra*; Pal. lat. 735, *fol.* 15*ra*; Bologna, CS 285, *fol.* 15*va*; BSB, Clm 14022, *fol.* 15*vb*; Cologny, Bodmer 100, *fol.* 11*rb*. As to the first gloss (§ *Quae edixit*) see e. g. Pal. lat. 731, *fol.* 17*ra*; Pal. lat. 735, *fol.* 15*ra*; Pal. lat. 740, *fol.* 14*ra*; Bologna, CS 285, *fol.* 15*va*; BSB, Clm 14022, *fol.* 15*vb*; Cologny, Bodmer 100, *fol.* 11*rb*; Bern, Cod. 6, *fol.* 15*va*; Firenze, BML, AeD 417, *fol.* 11*ra*; BL, Harley 3700, *fol.* 9*vb*; Balliol 297, *fol.* 9*ra*; BL, Add. 14858, *fol.* 15*ra*.

25 On the relationship between *iurisdictio* and *imperium* see e. g. Fasolt (2004) pp. 178–185, and Maiolo (2007), pp. 143–145 and 153–155.

26 Gloss *ad* Dig.1.14.3, § *Vel lege* (Parisiis 1566, vol. 1, col. 130): 'id est iudicio ordinario peracto.' The gloss is not signed by Accursius but see e. g. Pal. lat. 738, *fol.* 13*va*; Bologna, CS 285, *fol.* 15*va*; BL, Harley 3700, *fol.* 9*vb*; Balliol 297, *fol.* 9*ra*. Azo was more explicit: his comment on the same words reads 'i(d est) iudice ordinario. Az(o)', Vat. lat. 1408, *fol.* 12*va*; Gent, Hs. 23, *fol.* 17*ra*.

The only clear element to be found in the text of the *lex* is that Barbarius' deeds are valid. The Gloss presupposes that the validity of the deeds depends on the validity of their source. The *lex Barbarius* stated that Barbarius' deeds were valid, though with rather confused arguments. The whole discussion in the Gloss sought therefore to reach a predetermined end: strengthening the ambiguous arguments of the *lex* to support the validity of Barbarius' deeds. The best way to prove as much was of course to argue in favour of the legal validity of Barbarius' position. Proving the validity of his appointment would automatically strengthen the validity of what he did in the exercise of his office. Although the Gloss discussed more the issue of Barbarius' praetorship and liberty, therefore, the ultimate purpose remained that of providing a clear basis for the validity of his deeds. The main obstacles as to the validity of Barbarius' praetorship were thus identified in two passages of the text. The first is the fact that Barbarius *sought* the praetorship (*praeturam petiit*). The second is that Pomponius described his exercise of praetorship in rather ambiguous terms (*praetura eum functum*).

Soliciting an office was a plain violation of the *lex Iulia de ambitu* (Dig.48.14), which prohibited such a practice. The prohibition in the *lex Iulia de ambitu* applied to secular and religious offices alike.[27] This made perfect sense in Rome, given the increasingly political meaning of many religious offices – one needs only to think of how much Caesar spent on securing his election as *pontifex maximus* to appreciate why the prohibition referred to *sacerdotium* as well as *magistratum*. But when medieval jurists looked at this text, they clearly thought of *sacerdotium* in Christian terms and associated the *lex Iulia de ambitu* with the prohibition of simoniacal ordinations. The association was strengthened by a post-classical source, a decree of the emperors Leo I and Anthemius, which found its way in the Code (Cod.1.3.30, the *lex Quemquem*).[28] This was the clearest reference against simony to be found in the whole *Corpus Iuris Civilis*. And it was one of the main problems that the Gloss identified in Barbarius' conduct.[29]

27 Dig.48.14.1 (Mod. 2 de poen.): 'Quod si in municipio contra hanc legem magistratum aut sacerdotium quis petierit, per senatus consultum centum aureis cum infamia punitur.'

28 Cod.1.3.30pr-1 (Leo et Anthem. AA. Armasio PP): 'Si quemquem vel in hac urbe regia vel in ceteris provinciis, quae toto orbe diffusae sunt, ad episcopatus gradum provehi deo auctore contigerit, puris hominum mentibus nuda electionis conscientia sincero omnium iudicio proferatur. Nemo gradum sacerdotii pretii venalitate mercetur: qualiter quisque mereatur, non quantum dare sufficiat aestimetur.'

29 Gloss *ad* Dig.1.14.3, § *Designatus* (Parisiis 1566, vol. 1, col. 130): 'et quomodo hoc fuit, cum in legem Iul(iam) ambitus commisit: vt C. de episco(pis) et cler(icis) si quemquam (Cod.1.3.30)?' The gloss is reported as written by Accursius both in the printed edition and in most manuscripts. See e. g. Pal. lat. 731, *fols.* 16

In the Gloss, Accursius reported three different solutions, all already present in Azo.[30] The first was that, although Barbarius should not have sought the office, his election would nonetheless hold ('fieri non debuit: factum tamen tenuit').[31] The argument might beg the question, but in fact it was somewhat more complicated. It was based on the interpretation of a text within the title of the Digest devoted to specific cases (mainly appointments or condemnations) in which it was possible to appeal (Dig.49.4). The text was the *lex Biduum* (Dig.49.4.1.5), which looked at the case of a conditional decision. Decisions ought not be rendered under condition. But if they were, should the period to appeal start accruing from the moment the sentence was rendered or from the moment the condition was fulfilled? The *lex Biduum* opted for the first possibility: the period would start accruing immediately (*statim*). The Gloss notes the paradox: what is the meaning of a period to appeal against a decision that is void since it is made under condition? The condition may be set aside or considered as valid – the Gloss offers both possibilities.[32] But either way the

*vb*–17*ra*; Pal. lat. 733, *fol.* 24*ra*; Pal. lat. 735, *fols.* 14*vb*–15*ra*, Pal. lat. 738, *fol.* 13*va*; Pal. lat. 739, *fol.* 13*va*; Pal. lat. 740, *fol.* 14*ra*; BSB, Clm 14022, *fol.* 15*va*; Cologny, Bodmer 100, *fol.* 11*ra*; Firenze, BML, Edili 65, *fol.* 10*vb*; Basel, UB, C.I.4, *fol.* 14*rb*; Bern, Cod. 6, *fol.* 15*rb*; Firenze, BML, Plut. 6 sin. 3, *fol.* 10*vb*; Girona 46, *fol.* 17*rb*; Douai 575, *fol.* 11*rb*; Assisi, BSC 216, *fol.* 13*ra*; BAV, SMM 124, *fol.* 13*rb*; Firenze, BML, AeD 417, *fol.* 11*rb* (§ *quomodo*).

30 Vat. lat. 1408, *fol.* 12*va*, *ad* Dig.1.14.3, § *petiit*: 'cum preturam petierit et in legem commisit vt i(nfra) ad l. iul(iam) am(bitus) l. i. (Dig.48.14.1) et C. de episcopis et <clericis>, l. si quemquam (Cod.1.3.30) quomodo pretor fuit. Respondo fieri non debuit, factum tamen tenuit: idem et in eo qui symoniace ordinatur nam ipse ordinem et dignitatem habet vel dic publice petiit quod licuit vt i(nfra) de pollicitationibus l. i. § i (Dig.50.12.1.1) et amministrat(ione) (*sic*) tu(torum) l. non existimo (Dig.26.7.54) vel melius hac lex iul(ia) non habet locum rom<a>e, ut in predicta l. i ad l. iul(iam) ambitus (Dig.48.14.1). Az(o).' Cf. BNF, Lat. 4459, *fol.* 9*va* (changing 'licuit' into 'placuit'); BSB, Clm 3887, *fol.* 10*ra*; Stockholm, KB, B.680, *fol.* 11*va*; Gent, Hs. 23, *fol.* 17*ra*; Bamberg, Msc. Jur. 11, *fol.* 13*vb*; BNF, Lat. 4463, *fol.* 12*vb* (§ *preturam*). In the printed edition of Azo's Summa see also *ad* Cod.9.26, § *Vt superiori* (*Azonis svmma avrea* … Lvgdvni, 1557; anastatic reprint, Frankfurt am Main: Minerva, 1968, *fol.* 232*ra*, n. 1): '… Et certe locum habet quando quis pecunia facit se elligi (*sic*) ad aliquam administrationem, non in ciuitate Romana. In ea enim elligit princeps magistratum: sed in municipio, vel in ciuitate alia, in qua non princeps, sed populus habet ellectionem (*sic*).' While it may not be excluded that Azo built on previous authors, perhaps Bassianus himself, at least part of his gloss might have been original. The gloss of Ugolino (*infra*, this paragraph, note 37) lists only the first two solutions, not also the third one (which was eventually adopted by Accursius).

31 Gloss *ad* Dig.1.14.3, § *Designatus* (Parisiis 1566, vol. 1, col. 130).

32 Gloss *ad* Dig.49.4.1.5, § *Statim* (*ibid.*, vol. 3, cols. 1607–1638): 'sed certe videtur quod non statim. Nam quod nondum tenet, quomodo rescindi potest?' The Gloss allowed two solutions: either the condition is to be considered as void and

sentence holds. Therefore, concludes the Gloss, the prohibition does not entail the invalidity of what is done in its violation: 'nota hic quod fieri non debet, tamen factum tenet'.[33] The same maxim, remarks the Gloss on the *lex Barbarius*, was even invoked for simoniac elections by those arguing that the ordination of the simoniacal prelate would confer both the sacrament and the office (*ordo* and *dignitas*).[34] This is not the only time the Gloss refers to simoniac elections in connection with the *lex Barbarius*.[35] We might want to remember the reference

the decision regarded as pronounced unconditionally, or the conditional decision may not be enforced until the condition is fulfilled – but the reckoning of the period to appeal starts accruing from the pronouncement of the decision and not from the fulfillment of the condition attached to it. *Ibid.*, col. 1608: '… sed forte dices eam tenere vt puram: et tantum conditio vitietur … vel dic quod tenet conditio vt ante non possit agi iudicati: potest tamen et debet ante appellari, et sic vnum pro condemnato, et aliud contra eum.'

33 Gloss *ad* Dig.49.4.1.5, § *Statim* (*ibid.*, col. 1608).

34 Gloss *ad* Dig.1.14.3, § *Designatus* (*ibid.*, vol. 1, col. 130): 'Idem et in eo qui simoniace ordinatur. Nam et ipse ordinem et dignitatem habet: ar(gumentum) *infra* quando ap(pellandum) sit l. i § biduum (Dig.49.4.1.5) secundum quosdam.' The reference is vague, and it is difficult to ascertain with precision to whom it refers. The difficulty is magnified by the imprecision of the language of those who defended the validity of the simoniacal consecration. So, for instance, in his *Dissensiones* Ugolino touched on the subject to argue for the validity of the sacrament of ordination conferred simoniacally (in so doing, interestingly, he also referred to the *lex Barbarius*). But it is not clear whether his reference was only to *ordo* or also to *executio ordinis*(the power to exercise it validly). *Hugolini dissensiones dominorum* (G. Haenel (ed., 1964), p. 317), *ad* Cod.2.59.2, § *Iusiurandum calumniae an remittatur parentibus uel patronis?*, *in fin.*: 'Sed sacramentum, quod fit in principio caussae (*sic*), non remittitur, ut hic dicitur, quia comprehendit generaliter omnes personas, et sic est generaliter accipienda, ut D. de officio praet(orum) l. 1 et 3 (Dig.1.14.1 and 3).' On the distinction between *ordo* and *executio* see *infra*, pt. II, §6.1.The same *lex Biduum* found its way also into Gratian's *Decretum* (C.2, q.6, c.29), prohibiting the imposition of conditions on a decision. But the Ordinary Gloss to the *Decretum* watered down the prohibition, and stated that the fulfillment of the condition would retroact to the time of the pronouncement of the decision itself. Until that moment, the Gloss continued, the execution of the decision is suspended – unless it is a sentence of excommunication. *Ad* C.2, q.6, c.29, § *Statim* (Basileae [Johann Petri & Johann Froben], 1512, *fol.* 140*va*): '… licet modo nulla sit: speratur tamen et timetur quod sit valitura. Nam in conditionalibus obligationibus spes est in debitum iri … vnde l(icet) appellatio non inueniat quod extinguat: tamen conditione existente retro fingitur extitisse.' *Ibid.*, § *sub conditione*, *fol.* 140*va*: 'de futuro: tunc suspendit sententia … tamen sententia excommunicationis lata sub conditione tenet lxiii. di. <c.> salonitane (D.63, c.24).'

35 A significant case is discussed in the Gloss on Dig.50.12.11, § *sacerdotium* (Parisiis 1566, vol. 3, col. 1784). In the text (Ulp. de off. curatoris rei pub.) someone promised money to be appointed to a secular or ecclesiastical office, but died before he could obtain it. The Gloss observed that this was in contrast with

to *ordo* and *dignitas*, for we shall see later that it was on that basis (or rather, on the progressive distinction between the two concepts) that the canonists built their theory of toleration of jurisdictional acts.

The second solution was likely proposed by Johannes Bassianus and then reported by his students Azo and Ugolino: the prohibition in the *lex Iulia de ambitu* applies only when seeking an office secretly, not when seeking it publicly. The Accursian Gloss cites only Bassianus,[36] so it is not clear whether Accursius

Cod.1.3.30.1 (the *lex Quemquem*). So it offered two different solutions. The first was that the promissor did not actually violate the prohibition to buy an ecclesiastical office since he died before he could receive it ('sol(utio) hic non suscepit honorem: ibi [*scil.*, in Cod.1.3.30.1] sic.'). This was hardly satisfactory, so the Gloss suggested another solution – that in *lex Barbarius* ('vel dic vt not(atur) s(upra) l. Barbarius, de offic(io) praeto(rum).'). Clearly the reference was to the gloss *Designatus* (see next note), the only one in the Accursian comment on the *lex Barbarius* that both dealt with simony and referred to Cod.1.3.30.1.

36 Gloss *ad* Dig.1.14.3, § *Designatus* (Parisiis 1566, vol. 1, col. 130): 'sed Io(hannes Bassianus) dixit quod publice petiit, quod licuit: vt *infra* de pol(licitationibus) l. i. § i [Dig.50.12.1.1: a promise made in consideration of an office is binding, see last note] et *infra* de admi(nistratione) tu(torum) l. non existimo [Dig.26.7.54 – a guardian should pay the usual interest rate to his ward, and not a higher one, if he promised publicly].' Cf. both Pal. lat. 733, *fol.* 24*ra*, and Cologny, Bodmer 100, *fol.* 11*ra*: 'sed Jo(hannes Bassianus) dix(it) quod publice petiit quod licuit ut i(nfra) de pollicit(ationibus) l. i § i (Dig.50.12.1.1) et i(nfra) de amm(inistratione) (*sic*) tu(torum) l. non existi(mo) (Dig.26.7.54) … ac(cursius).'
Instead of Bassianus, some manuscripts referred generically to 'someone' ('quosdam'). It is however possible that in some cases the hand skipped part of the argument on the simoniac election, thereby merging together the reference to the ordination of the simoniacal prelate with Bassianus' argument on the *lex Iulia de ambitu*. Compare e. g. Pal. lat. 734, *fol.* 16*va* with Pal. lat. 733, *fol.* 24*ra*, in the table below (emphasis added):

| Pal. lat. 734, *fol.* 16 *va* | Pal. lat. 733, *fol.* 24 *ra* |
|---|---|
| Item in eo qui simoniace ordinatur: nam et ipse ordinem et dignitatem habet ar(gumentum) i(nfra) qu(ando) ap(pellandum) sit l. i § biduum (Dig.49.4.1.5) *sed quosdam* dixit quod publice petiit quod licuit ut i(nfra) in de polli(citationibus) l. i. (Dig.50.12.1.1) et i(nfra) de ad(ministratione) tu(torum) l. non extimo (Dig.26.7.54). | Idem in eo qui symoniace ordinatur: nam et ipse ordinem et dignitatem habet ar(gumentum) i(nfra) qu(ando) ap(pellandum) sit l. i § i. biduum (Dig.49.4.1.5) *secundum quosdam. sed Jo*. dix(it) quod publice petiit quod licuit ut i(nfra) de pollicit(ationibus) l. i § i (Dig.50.12.1.1) et i(nfra) de amm(inistratione) tu(torum) l. non existi(mo) (Dig.26.7.54). |

Accursius used Azo's gloss but restricted Bassianus' argument only to secular offices: *ad* Dig.1.14.3, § *Designatus* (Parisiis 1566, vol. 1, col. 130): 'Sacerdotium tamen, id est episcopatus datur inuito tantum: vt d. l. de episco(pis) et cle(ricis) l. si quenquam (Cod.1.3.30).' Whether Bassianus actually meant what Accursius ascribed to him is less clear. Justinian's Novel 123 dealt, among other things, also with the ordination of the bishops. It stated that if a bishop, either before or after

took it directly from him or from the writing of his students.[37] It is interesting to note that both Azo and Ugolino explained this solution with reference to the same passage of Augustine found in the *Decretum*, stating that one should seek to become bishop to help others, not to help oneself. The reason for seeking office publicly, therefore, was ultimately to further the common good. Nonetheless – somewhat surprisingly – neither Azo nor Ugolino stated as much expressly. The argument might have come from Bassianus himself: while Ugolino reported it in his comment on the *lex Barbarius*, Azo mentioned it only in his *Summa* on the Code.[38] Also, when Odofredus reported the same argument, probably a few years after the Accursian Gloss, he also ascribed it to Bassianus.[39]

his consacration, wanted to give his goods to the Church, that should not be considered a sale but rather an offering ('non est emptio sed oblatio', Nov.123.3). Glossing on the word 'oblatio', Accursius noted that Bassianus held as lawful a donation made publicly with the intent of securing a bishopric. *Ad* Coll.9.15.3(= Nov.123.3), § *oblatio* (Parisiis 1566, vol. 5, col. 511): 'quod si ita dixit palam, offero vt eligar in episcopum: licitum est ei, secundum Io(hannem Bassianum) vt ff. de polli(citationibus) l. i. § non semper (Dig.50.12.1.1), et ff. de offic(io) praeto(rum) l. Barbarius (Dig.1.14.3). Accursius.' Although not particularly elaborate, these references would seem to echo the in-depth discussions among coeval decretists on the validity of gifts made on the occasion of entry into religious life. See e. g. the classic study of Lynch (1976), pp. 112–122.

37 On Azo see *supra*, this paragraph, note 30. On Ugolino see BL, Royal 11.C.III, *fol. 9vb*, § *petiit*: 'ergo puniendus est leg. i. ambitus vt i(nfra) ad l. I. ambitus l. i. (Dig.48.14.1) dico licet male fecit quod petiit et male pretura habet pretor nichil omninus est et quod facit ratum habendum est. Uel dic petiit non priuatim sed publice uidens publice expedire vtilitatem ar(gumentum) i(nfra) de pollicitationibus l. i. § i. (Dig.50.12.1.1) et ff. de minoribus (Dig.4.4) … h(ugolinus).' The rest of his gloss is reported in the next note.

38 Ugolino, BL, Royal 11.C.III, *fol. 9vb*, § *petiit*: '… et habetur ex sententia § qui pro bono ad episcopatum appetere bonum est non vt possit (sic) sed vt prosit vt augustinus (cf. C.8, q.1, c.11) h(ugolinus).' On Azo see his *Summa ad* Cod.9.26, *Vt superiori* (*Azonis svmma avrea*, cit., *fol.* 232*ra*, n. 1–2): 'Hoc tamen intelligo, si clanculo pecuniam alicui priuato det, vnde videtur ideo aspirare, vt pecuniam communem surripiat. Secus in publico concilio, vel concione, offerat vel promittat ciuitati uel municipio, quod velit prodesse ciuitati, non praeesse tantum: vt ff. de polli(citationibus) l. i. § si quis (*sed* Dig.50.12.1pr). et de admi(nistratione) tu(torum) <l.> non existimo (Dig.26.7.54). Sic et Barbarius Philipus petijt praeturam et pretor designatus est: vt ff. de offic(io) pre(torum) l. barbarius (Dig.1.14.3). Sed Apostolus Paulus i. ad Timoth(eum) iii (1 Timothy 3:5) et transumptive v. Augusti(num) viii. q. 1. c. qui episcopatum (C.8, c.1, c.11) desiderat bonum opus desiderat.' Whether the mention of St Paul's letter is genuine is not clear. It is present in the Venetian edition of 1581 (*Summa Azonis* … Venetiis, Sub Signo Angeli Raphaelis, 1581; anastatic reprint, Frankfurt am Main: Vico Verlag, 2008, col. 906, n. 2), but other editions omit it. So for instance the 1489 Venetian edition reads: 'Sed et beatus Augustinus dicit qui episcopatum desiderat bonum opus desiderat' (*Summa Codicis per Dominum Azonem* [Venetiis, 1489]). Elsewhere, however, Azo seems to have some doubts as

The third solution was the simplest one, and the one chosen by Accursius (and, before him, by Azo and others, such as Lanfrancus of Cremona, d.1229):[40] it was the same *lex Iulia de ambitu* that carved out an exception for Roman magistrates, since they were no longer elected by the people but appointed by the emperor.[41] Although the *lex Barbarius* seemed to imply that it was for the people to elect Barbarius, it also mentioned the prince – so the exception could safely be invoked.[42]

The second obstacle to Barbarius' praetorship was the remark of Pomponius, 'praetura eum functum'. Taken literally and isolated from its context, Pomponius' statement declared simply that Barbarius exercised the office of praetor, not that he *was* praetor – a point that later jurists would not miss. Accursius realised how this solution, which would deny the validity of Barbarius' praetorship, could receive support from the text of Dig.50.2.10, the so-called *lex Herennius*. That was a well known *lex*, and Accursius had to discuss it so as to provide an interpretation that would serve his purpose.

For the medieval jurists, the *lex Herennius* was the legal equivalent of the saying 'the cowl does not make the monk'. It stated that the simple enlistment as decurion did not make one such.[43] The association between *falsus decurio* and

to the scope of this rule in ecclesiastical appointments. Azo, *Summa ad* Cod.9.26, *Vt superiori* (*Azonis svmma avrea*, cit., *fol.* 232*ra*, n. 2): 'Si autem clanculo porigat preces et exaudiatur, incidet in hanc legem. Aliud si forte alius supplicauerit pro eo inscio: licet secus dicatur in simonia.'

39 *Infra*, next chapter, note 24.

40 *Ad* Dig.1.14.3, § *petiit*, Vat. lat. 2512, *fol.* 12*rb*: 'hic uidetur quod incidisse in penam leg(is) iulie de ambitu vt i(nfra) ad l. iuliam de ambitu l. i (Dig.48.14.1), sed non incidit quia hic palam petiit, uel quia bene meruerit populus concessit sibi … sed iste petiit in urbe et ideo non tenetur secundum La(nfrancum).' On Azo see *supra*, this chapter, note 30.

41 Dig.48.14.1 (Mod. 2 de poen.): 'Haec lex in urbe hodie cessat: quia ad curam principis magistratuum creatio pertinet, non ad populi favorem.'

42 Gloss *ad* Dig.1.14.3, § *Designatus* (Parisiis 1566, vol. 1, col. 130): 'Tu dic melius, quod hoc [*scil*., Barbarius' praetorship] fuit Romae, vbi non habet locum lex Iulia de ambitu: vt infra ad legem Iuliam de ambitu l. i (Dig.48.14.1). Accursius.' On the *sedes materiae* itself, the Gloss further stated that the prohibition of the *lex Iulia de ambitu* would probably not apply when it was a third person to pay for the election, so long as the elected was unaware of that. Gloss *ad* Dig.48.14.1, § *contra hanc legem* (Parisiis 1566, vol. 3, col. 1518): 'scilicet per pecuniam: vt C. eo(dem) l. fi. (Cod.9.26.1) et si hoc sit clam: secus si palam: vt … de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3) … Sed quid si preces tantum? Videtur item, si clam … Item quid si alius eo ignorante pecuniam dedit? forte non incidit iste in legem: licet decretistae dicant secus.' Cf. Azo's gloss, *supra*, this chapter, note 30.

43 Dig.50.2.10 (Mod. 1 resp.): 'Herennius Modestinus respondit sola albi proscriptione minime decurionem factum, qui secundum legem decurio creatus non sit.'

*falsus praetor* was rather obvious. But the Gloss brought the two cases even closer together. When commenting on the *lex Herennius*, the Gloss suggested that the person enlisted as a decurion might have perhaps been a minor or someone legally unfit (*inhabilis*) to serve in that capacity.[44] This way the reason why the *decurio* was *falsus* became the same as that of the *falsus praetor* Barbarius: underlying legal incapacity. It was thus even easier to apply the rationale of the *lex Herennius* to the *lex Barbarius*: the simple discharge of the duties of an official (whether military or civil) does not make one such *de iure*. Given the remarkable similarity between the two cases, the Gloss had to find a plausible reason to tell them apart. This is probably why it is with regard to the *lex Herennius* that the all-important subject of the common mistake is mentioned for the first time in the Gloss on the *lex Barbarius*.

The difference with the *falsus decurio*, says the Gloss, is that the *falsus praetor* is widely believed to be truly praetor. And this common mistake makes law.[45] It is important to observe that Accursius invokes (without explaining) the maxim *communis error ius facit*, not with regard to the validity of Barbarius' deeds, but of his praetorship: the deeds become valid because (and inasmuch as) the authority of Barbarius acquires legitimacy. In stating as much, the Gloss might have sought to prevent the analogical application of the *lex Herennius*, even though this *lex* denied the validity of the appointment, not of the deeds. Whatever the reason, the clear position of the Gloss made the validity of the deeds even more dependent on the validity of the appointment. We will come back to this point.

The Gloss added also the case where one received the decurion's pay: *ad* Dig.50.2.10, § *Albi* (Parisiis 1566, vol. 3, col. 1734).

44 Gloss *ad* Dig.50.2.10, § *Non sit* (Parisiis 1566, vol. 3, col. 1734).

45 Gloss *ad* Dig.1.14.3, § *functus sit* (Parisiis 1566, vol. 1, col. 130): 'huic quaestioni primae secundum quosdam non respondet: sed dicunt quod non fuit praetor, et pro eis est i(*nfra*) de decur(ionibus) l. Herennius (Dig.50.2.10). Tu dicas huic quaestioni responderi ibi supra, sed nihil ei etc. et sic fuit praetor … Nec obst(at) d(icta) l(ex) Here<n>nius, quia ibi solum salarium non facit. Hic autem est plus, scilicet communis error, qui facit ius.' In the printed editions this gloss is often anonymous, but most manuscript sources ascribe it to Accursius, e. g. Pal. lat. 731, *fol.* 17*ra*; Pal. lat. 732, *fol.* 4*ra*; Pal. lat. 735, *fol.* 15*ra*; Pal. lat. 738, *fol.* 13*va*; Pal. lat. 740, *fol.* 14*ra*; Cologny, Bodmer 100, *fol.* 11*rb*; BSB, Clm 14022, *fol.* 15*va*; Bologna, CS 285, *fol.* 15*va*; Firenze, BML, Edili 65, *fols.* 10*vb*–11*ra*; Firenze, BML, AeD 158.1, *fol.* 14*rb*; Basel, UB, C.I.4, *fol.* 14*rb*; Douai 575, *fol.* 11*va*; BAV, SMM 124, *fol.* 13*rb*; BL, Harley 3700, *fol.* 9*vb*; Balliol 297, *fol.* 9*ra*; BL, Add. 14858, *fol.* 15*ra*. It is possible that the reference to the *lex Herennius* came from Azo: see Azo's (short) gloss § *functus* in BNF, Lat. 4463, *fol.* 12*vb*. This gloss is however scarcely attested in other manuscripts reporting Azo's thought.

## 2.3 Putative freedom and the validity of the acts

Another *lex* invoked against Barbarius' praetorship was Cod.4.55.4, the *lex Moveor*.[46] This was a rescript of Alexander Severus. A Roman citizen was sold by his own slaves with the provison that he ought not to reside in his country, and was then manumitted by his purchaser. In his rescript the emperor said that, if the allegation were true, the slaves would be put to death. But until the case was decided, the petitioner would keep his current status – that of a freedman.[47] The last statement was of particular importance for medieval jurists, for it established the principle that, until proven otherwise, one's current personal status was also one's legal one.[48] In its comment on the *lex Moveor*, however, the Accursian Gloss carved out an important exception to this principle: if a slave poses as a freeman, until his servile status is legally ascertained he will be considered as free. The reason for that exception was quite straightforward: a slave cannot litigate in court. In order to have *locus standi*, therefore, he needs to be considered free.[49]

46 *Ad* Dig.1.14.3, § *functus sit* (Parisiis 1566, vol. 1, col. 130): '… item quia debet dici quod talis fuerit medio tempore, qualis postea deprehenditur: et sic seruus: vt C. si ser(vus) export(andus) l. moueor in fi(ne) (Cod.4.55.4). Tu dicas huis quaestioni responderi ibi supra, sed nihil ei etc. et sic fuit praetor. Nam cum incertum est aliquid, perinde est ac si nec illud fit: vt C. de testa(mentis) l. i. (C.6.23.1) et institu. de testa(mentis) § sed cum aliquis (Inst.2.10.7) … Item non ob(stante) lex illa, moueor (Cod.4.55.4), quia hic medio tempore fuit liber, vt in fine huius legis dicam.' This gloss likely built on Azo's gloss § *quamdiu*: 'cum incertum est an qui sit, perinde est ac si nec illud vt C. de testa(mentis) l. i. (C.6.23.1) argum(entum) contrarium C. si seruus expor(tandus) ven(eat) l. moueor (Cod.4.55.4). Az(o)', Stockholm, KB, B.680, *fol.* 11*va*; Vat. lat. 1408, *fol.* 12*va*; BNF, Lat. 4463, *fol.* 12*vb*; Avranches 156, *fol.* 229*rb*; BNF, Lat. 4459, *fol.* 9*va*; Bamberg, Msc. Jur. 11, *fol.* 13*vb*. Vat. lat. 2512, *fol.* 12*rb*, reports the same gloss twice: once in full, the other in abbreviated form, both signed 'az'.

47 Cod.4.55.4pr–2 (Alex. A. Aureliopapiae): 'Moveor, quod te a servis tuis dominum eorum venisse adfirmas sub ea lege, ne in patria moreris, et ab eo, cui te prior emptor vendiderat, manumissum esse dicis. Quare competens iudex adversus eum, quem praesentem esse dicis, cognitionem suam praebebit et, si veritas accusationi aderit, exsecrabile delictum in exemplum capitali poena vindicabit. Sed quoad usque probaveris quae intendis, status tuus esse videtur, qui in te post manumissionem deprehenditur.'

48 Gloss *ad* Cod.4.55.4, § *Deprehenditur* (Parisiis 1566, vol. 4, col. 872): 'scilicet libertinitatis. Et sic not(andum) quod statu te inuenero, eo te tenebo, donec contrarium videbo: vt hic, et i(nfra) de inge(nuis) ma(numissis) l. penul(tima) (Cod.7.14.13) et ff. de offic(io) praetor(um) l. Barbarius (Dig.1.14.3).' Cf. also *ibid.*, § *Moueor*.

49 Gloss *ad* Cod.4.55.4, § *Deprehenditur* (Parisiis 1566, vol. 4, col. 872): 'Sed in causa libertatis et seruitutis, et etiam dum agitur vtrum seruus sit in possessione seruitutis, necne: habetur pro libero interim, et sic alio statu quam prius erat:

This exception to the *lex Moveor* was strengthened by the curious reading of another text, Dig.40.9.19. This was a short text stating the obvious: the manumission effected by someone who is later legally pronounced to be a slave is void.[50] The verb 'to pronounce' (*pronuntiare*), however, was ambiguous: it could refer to either a constitutive or a declarative pronouncement. In the first case, the manumissor would become slave only after having set someone else free; in the other he was already a slave, but his servitude would be ascertained only after the manumission. The Gloss reports both interpretations. Johannes Bassianus, says the Gloss, was for the constitutive nature of the pronouncement: for him the *lex* was a rather obvious application of general principles. Others, continues the Gloss, would on the contrary opt for the declarative nature of the sentence: for them, much on the contrary, the manumissor was already a slave when he freed another slave.[51] Who are such 'others'? The Gloss does not say. It

vt ff. de libe(rali) ca(usa) l. ordinata (Cod.7.16.14), et est ratio: quia ibi alias non posset esse in iudicio: hic vero potest, quia liber.' Cf. Gloss *ad* Cod.5.34.1. The text (a rescript of Alexander Severus) discussed the possibility of appointing a guardian to stand in court on behalf of a minor whose freedom was challenged. The Gloss justified the positive solution on the basis of the same rationale as the exception to the *lex moveor*: in disputes on one's personal status, the defendant is to be considered free until proven otherwise. Gloss *ad* Cod.5.34.1 § *Cvm tibi* and § *Quia interim* (Parisiis 1566, vol. 4, cols. 1081 and 1082 respectively). The Accursian Gloss was probably building on Azo, although on that *lex* Azo highlighted the combined strength of *possessio libertatis* and common mistake, whereas Accursius expunged any reference to the common mistake and focused exclusively on putative freedom. Cf. Azo, *ad* Cod.5.34.1, *Quo magis* (*Azonis, Ad singulas leges XII librorum codicis iustinianei, commentarius* … Parisiis, Apud Sebastianum Nivellium, 1577; anastatic reprint, Augustae Taurinorum: ex officina Erasmiana, 1966, p. 418, n. 1): '… erat enim in possessione libertatis, quare valet datus curator interim cum credebetur liber, sic et in Barbariu Philippo: vt ff. de offic(io) praesid(is) (*sic*) <l.> Barbarius, et in testibus adhibitis, vt in tit(ulo) i de testamen(tis) <l.> testes (Cod.6.23.1).' Mention should also be made of the Gloss *ad* Dig.40.12.7.5. The Roman text (Ulp. 54 ed.) stated that if, at the time of the legal proceedings, the person whose liberty was disputed was 'in libertate sine dolo malo', then the burden to prove that he was indeed a slave would fall on the party asserting ownership on him; otherwise it would be up to the alleged slave to prove his free status. The problem of the Gloss was that, if that person was a slave at the time of the proceedings, he could not possibly fill the role of the plaintiff. So the Gloss interpreted the text as describing a case of putative freedom: the slave 'in libertate' was in fact just 'in possessione libertatis' (Gloss *ad* Dig.40.12.7.5, § *in libertate*, Parisiis 1566, vol. 3, col. 333).

50 Dig.40.9.19 (Mod. 1 reg.): 'Nulla competit libertas data ab eo, qui postea servus ipse pronuntiatus est.'

51 Gloss *ad* Dig.40.9.19, § *postea seruus* (Parisiis 1566, vol. 3, col. 323): 'factus ex aliqua noua causa: non aliter, secundum Ioan(nem Bassianum) … quidam in seruo manumittente hanc intelligunt: vt licet ipse seruus pronuntietur, non

is however possible that, among them, Accursius might have enlisted even Azo. While Azo's interpretation of this *lex* might have well been the same as that of his old teacher Bassianus, Azo did not say so openly. Taken at its face value, the way Azo referred to the *lex Moveor* in his comment on the *lex Barbarius* would rather point to the opposite conclusion: while discharging the duties of the praetor, Barbarius was in the same situation as the manumissor in Dig.40.9.19.[52]

Strengthened by this second reading of Dig.40.9.19 (declarative pronouncement, and so manumission effected by a slave), the Gloss used the exception to the *lex Moveor* (when the slave poses as a freeman) to invert the application of the same *lex Moveor* to Barbarius' case. As long as the servile status of Barbarius was not judicially ascertained, he ought to be considered as a freeman.[53] In stating as much, however, the Gloss did not seek to fully equate putative and actual freedom. The accent was not on the legal status of the slave believed to be free, but on the validity of the acts carried out while in putative freedom. The purpose was to show how putative freedom might produce legally valid effects, especially when it was the result of a common (almost universal) mistake.

To that end, an excellent case was found in a rescript of Hadrian, reported both in the Institutes (Inst.2.10.7) and in the Code (Cod.6.23.1), on a slave who witnessed a will while believed to be free. Since the opinion as to his free status was widely shared, the emperor granted validity to the testament. Of the two sources, the Institutes were more detailed: the emperor declared the will to be valid 'out of his generosity' (*ex sua liberalitate*), whereas the Code shortened the

noceat manumissio, nisi et ipsi fiat quaestio.' In the same sense as Bassianus, Franciscus Accursius gave a practical example that would be incorporated in the Gloss: if I manumit my slave but then I become myself a slave (for instance, because I sell myself), this does not prejudice the manumission I already made. *Ad* Dig.40.9.19, § *Nvlla* (Parisiis 1566, vol. 3, col. 323): 'Manumisi seruum meum: postea ego efficior seruus alicuius, vt quia passus sum me vendi: non impeditur per hoc libertas a me data. Fran(ciscus Accursius).' Interestingly, however, the editors of the 1566 Parisian edition noted how this example was in contradition with the *lex* (or rather, the other interpretation of it): 'hic casus nunc non congruit huic legi modo correctae' (*ibid.*).

52 Azo, *ad* Dig.1.14.3, § *heorum*: 'nam et libertas ab eo data qui postea seruus pronuntiatus est competit vt i(nfra) qui et a quibus ma(numissi) <l.> competit. (dig.40.9.19). Simile est quod legitur i(nfra) de testi(bus) l. ad testimonium § i. (Dig.22.5.20). Az(o).' BNF, Lat. 4459, *fol.* 9*va*; Stockholm, KB, B.680, *fol.* 11*va*; Vat. lat. 1408, *fol.* 12*va*; Vat. lat. 2512, *fol.* 12*rb*; Gent, Hs. 23, *fol.* 17*ra*; Avranches 156, *fol.* 229*rb* (the text in all these manuscripts is perfectly identical). Azo's words (apart from the reference to Dig.22.5.20) were then incorporated in Accursius' Gloss on the *lex Barbarius*, § *Reprobari* (*infra*, this chapter, note 68).

53 Gloss *ad* Dig.1.14.3, § *functus sit* (Parisiis 1566, vol. 1, col. 130): 'Item non ob(stante) lex illa, moueor (Cod.4.55.4), quia hic medio tempore fuit liber.'

passage and relied exclusively on the common mistake.[54] It is important to highlight this difference: while in both sources the rationale for the validity of the will lies in the common mistake, only in the Institutes does its legal basis remain the command of the emperor.

The validity of the will seems to have posed some problems to earlier glossators, especially those less prone to carving out exceptions to the law in the name of fairness. If we are to believe Azo, the text left Bulgarus particularly perplexed. Clearly a slave cannot witness a document. Surely, Bulgarus seems to have said, if he who was a slave also appeared as such, the will ought to be void even if he was subsequently manumitted. In all probability, he seemingly concluded, the Institutes opted for the opposite solution because witnesses are required for testaments but not for the validity of contracts at large.[55] Some years after Bulgarus, Placentinus was less reluctant to accept the validity of the will, since it depended on the will of the prince to maintain the validity of testaments.[56] Azo followed suit, but explained the version of the testament's case found in the Code on common mistake alone, without reference to the

54 Inst.2.10.7: 'Sed cum aliquis ex testibus testamenti quidem faciendi tempore liber existimabatur, postea vero servus apparuit, tam divus Hadrianus Catonio Vero quam postea divi Severus et Antoninus rescripserunt, subvenire se ex sua liberalitate testamento, ut sic habeatur atque si ut oportet factum esset, cum eo tempore quo testamentum signaretur omnium consensu hic testis liberorum loco fuerit, nec quisquam esset qui ei status quaestionem moveat.' Cp. Cod.6.23.1: (Hadr. A. Catonio Vero) 'Testes servi an liberi fuerunt, non oportet in hac causa tractari, cum eo tempore, quo testamentum signabatur, omnium consensu liberorum loco habiti sunt nec quisquam eis usque adhuc status controversiam moverit.'

55 Azo, *ad* Inst.2.10.7 (Caprioli *et al.* eds. [2004], p. 210, n. 579): 'Quid si tempore testamenti faciendi seruus erat, uel pupillus et pro seruo habitus; et postea is liber est: an tenet testamentum? Bulgarus dicit: non. In testamento enim sunt necessarii testes ut ualeat; set quia ualeret contractus et sine testibus, in eis admittit eos, ut D. de uerborum significatione, <l.> notione<m> § instrumentorum (Dig.50.16.99.2–3). Az(o).' The reference to this last text was due to the fact that it mentioned the possibility of asking for an adjournment (*dilatio*) to let the person who carried out something appear in court, even if that person was a slave ('puta qui actum gessit, licet in servitute').

56 Placentinus, *Summa Institutionum*, *ad* Inst.2.10.7 (*Placentini Ivrisconsulti vetvstissimi, in svmmam institvtionvm … libri IIII*, Moguntiae [15]35; anastatic reprint, Augustae Taurinorum: ex officina Erasmiana, 1973, p. 79): 'Item notandum est quod conditionem testium inspiciemus, non eo tempore, quo testator moritur, sed quo testamentum signatur … conditionem quoque, id est seruitutem uel libertatem siue ueram, siue putatiuam. Nam et uere seruus communi opinione liber creditus testamenti testis erit, ex principium liberalitate et testamentorum fauore.'

emperor's liberality (as in the Institutes).[57] Accursius' Gloss did the same. Accursius however omitted the reference to the liberality not only in the Code,[58] but also, moreover, in the Institutes. This way, the common mistake became the sole basis for the validity of the will. And the object of the common mistake was the putative freedom of the slave-witness: underpinned by the common opinion, putative freedom counted more than true status.[59] This, concluded the Gloss, proved that the common mistake makes law – just as in the *lex Barbarius*.[60]

When the putative freedom is the product of a common mistake, its effects might reach well beyond simply witnessing a testament. They might even

57 Azo, *lectura ad* C.6.23.1, *Testes Servi an Liberi* (*Azonis, Ad singulas leges XII librorum codicis iustinianei, commentarius*, cit., p. 480): 'Licet inhibeatur testamentum servis et mulieribus, et hoc circa confectionem testamenti, vt inst(itutiones) § testes (Inst.2.10.6). Hic tamen non propter hoc quod adhibitus fuit servus, vitiatur testamentum, si tamen credebatur liber, ut hic dicit: multum enim facit communis opinio, ut hic: et ita facit ad illud generale, opinionem spectandam, et alias ff. ad Macedon(ianum) l. 3 in princ(ipio) (Dig.14.6.3pr) et ff. de offic(io) praet(orum) <l.> Barbarius (Dig.1.14.3).' Without the element of common opinion, the solution would be the opposite: 'Sed tamen non credo quod testificari possit pro testamento, quia liberi tantum testantur, ut sub de testib(us) <l.> quoniam liberi (Cod.4.20.11)', *ibid*.

58 Gloss *ad* Cod.6.23.1, § *Omnium* (Parisiis 1566, vol. 4, col. 1263): 'error ergo communis aliquid facit: vt. ff. de officio praesi(dis) (*sic*) l. Barbarius (Dig.1.14.3) et *infra* de Lati(na) lib(ertate) tol(lenda) l. i § sed et qui domini (Cod.7.6.1.5) et ff. ad Macedon(ianum) l. iii (Dig.14.6.3) et infra de senten(tiis) et interlocutio(nibus) om(nium) iudi(cium) l. si arbiter (Cod.7.45.2).'

59 Gloss *ad* Inst.2.10.7 § *liber* (Parisiis 1566, vol. 5, col. 186): 'libertate scilicet putatiua. Et sic plus valet quod est in opinione, quam quod est in veritate, sic ff. de su(pellectile) leg(ata) l. iii in fi(ne).' Cf. Gloss *ad* Cod.6.23.1, § *Signabatur* (Parisiis 1566, vol. 4, col. 1263): 'quo tempore consideratur conditio vera vel putatiua vt valeat testamentum: vt hic, et ff. eo [titulo] l. ad testium § conditio (Dig.28.1.22.1).' An indirect confirmation of the relevance of the testament case to the *lex Barbarius* may be found in the Gloss on Dig.28.1.22.1. According to this text, the status of the testament's witnesses must be assessed at the time as the will, not on the testator's death. The Gloss recalled the *lex Barbarius* to affirm the validity of a testament witnessed by a freeman who would become a slave before the opening of the testament. Gloss *ad* Dig.28.1.22.1, § *contingerit* (Parisiis 1566, vol. 2, col. 376): 'Item liber testificans, et ante aperturam tab(ularum) factus seruus, valet: vt … de offi(cio) praet(orum) l. Barbarius' (Dig.1.14.3).

60 Gloss *ad* Inst.2.10.7 § *omnium consensum* (Parisiis 1566, vol. 5, col. 187): 'nota errorem prodesse: vt ff. de supel(lectili) leg(ata) l. iii in fi(ne) (Dig.33.10.3.5) et C. de La(tina) li(bertate) tol(lenda) § sed et si quis (Cod.7.6.1.5), et ff. de offi(cio) praet(orum) l. Barbarius (Dig.1.14.3). Et error communis facit ius, vt patet in his versibus: Error communis ius efficit, vt manifestat testificans seruus, qui liber creditur esse.' Cf. *ibid*, col. 186, § *Sed cum aliquis* (ascribed to Franciscus Accursius). Cf. *supra*, this chapter, note 49.

support the validity of a decision rendered by a slave. Such is the case with Cod.7.45.2 (the *lex Si arbiter*). The text (a rescript of Antoninus) spoke of an arbiter who fell into servitude after having rendered his verdict, and argued for the verdict's validity. Medieval jurists spared no effort to find contemporary equivalents to each part of the Roman formulary procedure. So the arbiter became a delegate judge.[61] This made the case of Cod.7.45.2 even more problematic: the slave was not acting merely as arbiter, but as judge (even though only a delegate one). The wording of the text of the *lex Si arbiter* was somewhat ambiguous: the arbiter gave his verdict while dwelling in freedom (*in libertate morabatur*), and was subsequently brought to servitude (*in servitutem depulsus*).[62] The problem of 'depulsus' was similar to that of 'pronuntiare' in Dig.40.9.19: it could refer either to the change of legal status or to the ascertaining of the true one. Also this time the Gloss offered both interpretations,[63] but it clearly sided with the second one. The decision of the slave-arbiter (that is, of the slave-judge), rendered while he was in putative freedom, would remain valid even after his true status is ascertained.[64] This way, the meaning of Cod.7.45.2 becomes remarkably stronger than that of the testament's case: the words 'in libertate morabatur' would allow moving from the mistaken common opinion about the freedom to the actual possession of such freedom. Clearly, the slave did not enjoy his freedom *de iure*, only *de facto*. But the common belief in his freedom allowed it to be qualified as a good faith possession, and so made it legally relevant. While this conclusion was not present in the text itself, it was underpinned by what earlier eminent jurists had already said. In his comment on Cod.7.45.2, Placentinus observed that the sentence pronounced while the

61 Gloss *ad* Cod.7.45.2 (Parisiis 1566, vol. 4, col. 1654), § *Si arbiter*: 'id est iudex delegatus.'

62 Cod.7.45.2 (Ant. A. Sextilio): 'Si arbiter datus a magistratibus, cum sententiam dixit, in libertate morabatur, quamvis postea in servitutem depulsus sit, sententia ab eo dicta habet rei iudicatae auctoritatem.'

63 Gloss *ad* Cod.7.45.2 (Parisiis 1566, vol. 4, col. 1654), § *Depulsus*: 'id est inuentus seruus, et a domino vindicatus: vt ff. de officio praeto(rum) l. Barbarius (Dig.1.14.3) et supra de testa(mentis) l. i (C.6.23.1). Vel dic, de nouo factus est seruus ex ingratitudine, vel venditus ad precium participandum: vt ff. qui et a quibus l. competit (Dig.40.9.19). Accursius.' This time the Gloss shows a clear preference for the opposite solution with regard to Dig.40.9.19 (the example in the Gloss strongly resonates of that of Franciscus Accursius: *supra*, this chapter, note 51). But this interpretation did not have repercussions on the *lex Barbarius* (more specifically, on the reading of the *lex Moveor* as applied to the *lex Barbarius*).

64 Gloss *ad* Cod.7.45.2 (Parisiis 1566, vol. 4, col. 1654), *Casus ad* § *Si arbiter*: 'Iudex delegatus, qui liber credebatur de causa quadam cognouit, et pronunciauit: postea apparuit quod erat seruus: an retractanda sit sententia, quaeritur? Dicitur quod non.'

slave was in possession of his freedom, a possession not vitiated by *dolus*, would stand even after his true status was ascertained.[65] Azo used the same passage of the Code to state the matter in more general terms. Slaves are forbidden from serving as judges, just like women and *infames*.[66] So any sentence they pronounce is void. But when a slave is commonly believed to be free, so that he is in possession of freedom, then his decision would stand all the same.[67]

It is in the light of both cases above (the slave-witness and the slave-arbiter) that we should read an important gloss of Accursius on the *lex Barbarius*, the gloss *reprobari*. Commenting on Ulpian's words 'none of these deeds should be

65 Placentinus, *Summa ad* Cod.7.45 (*Placentini Summa Codicis* …, Moguntiae, 1536, anastatic reprint, Torino, Bottega d'Erasmo, 1962, p. 347): 'Sententia quoque serui nulla est: nisi cum sententiam daret in libertatis possessione sine dolo maneret: tunc enim etiam sententia ab eo data, et libertas ab eodem praestita perseuerabit, ff. de offic(io) praeto(rum) l. Barbarius (Dig.1.14.3). C. eod(em titulo) l. ii. (Cod.7.45.2).' A similar observation may also be found in Placentinus' contemporary Pillius de Medicina (c.1167–c.1213), but the differences in the text are revealing. On the subject Pillus was both more prudent and more precise. More prudent, for he did not speak of a slave with *possessio libertatis* but only of a slave who behaved as a freeman, and especially because he was more hesitant in proclaiming the validity of his decision ('forte'). More precise, for he stated that the decision could be valid if the putative freedom of this slave was not based on *dolus malus* – not generically on *dolus*. The point is relevant, for this is not a case where the personal status was really uncertain. The slave was perfectly aware that he was not free. Speaking generically of the absence of *dolus*, therefore, was not sufficient. Pillius, *Libri de Ordine Iudiciorum*, lib. 3, ch. 15 (*De allegationibus*) (Bergmann ed [1965], p. 78, ll.24–26): 'Item [sententia] nec a servo ferenda est, ut Dig. de [receptis, qui] arbitr(ium) 4, 8. l. Pedius 7; nisi forte, cum sententiam dicit, gerat se pro libero sine dolo malo. ut Dig. de off. praetor. 1, 14. l Barbarius. 3 et Cod. de sent. et interl. 7, 45. l. 2.'

66 On the prohibition of *infames* from taking part in legal proceedings (especially as lawyers and judges) see esp. Migliorino (1985), pp. 154–157.

67 The position of Azo may be understood by reading together both his *Summa* and his *Lectura* on Cod.7.45. In the *Summa*, the slave would sit in judgment *propter ignorantiam*; in the *Lectura*, the same slave was *in possessione libertatis*. It would therefore seem that Azo qualified the slave's possession of his freeedom in the same terms as Placentinus. Azo, *ad* Cod.7.45, § *Qualiter* (*Azonis svmma avrea*, cit., *fol.* 195*va*, n. 1): 'Sciendum est igitur sententiam esse nullam … ratione iudicis: puta si is, qui sententiam tulit, iudex esse non poterat: vt quia seruus erat, vel mulier, vel infamis: vt ff. de iudic(is) cum praetor § non autem (Dig.5.1.12) … Seruus tamen quandoque iudicat propter ignorantiam: vt *infra* eodem (titulo), l. si arbiter (Cod.7.45.2), et ff. de offic(io) praeto(rum) <l.> Barbarius (Dig.1.14.3).' Cf. also Azo, *ad* Cod.7.45.2, § *Si arbiter* (*Azonis, ad singulas leges XII librorum codicis iustinianei, commentarius*, cit., p. 586): 'Quia sit seruus: vel quia prius moratus est in possessione libertatis: ut ff. de off(icio) praetor(um) <l.> Barbarius Philippus (Dig.1.14.3) et sub de testa(mentis) l. i (Cod.6.23.1).' Cf. also Azo's comment on Cod.6.23.1, *supra*, this chapter, note 57.

set aside [*reprobari*]', Accursius wrote: 'note that what has been carried out well should not be reconsidered in the light of another event'.[68] Accursius' words gave a very different twist to Ulpian's statement, for they presupposed the original validity of Barbarius' deeds. The question was no longer to pronounce on their initial status (void or valid), but to decide whether to change their status from valid to void. When Ulpian spoke against 'setting aside' Barbarius' deeds, of course he did not mean to imply their initial validity. Accursius, however, did. Assuming the initial validity of the deeds lent considerable strength to their position, as it dispensed with Ulpian's effort to qualify as valid something that should be void. Accursius' reasoning introduced a second temporal layer in Barbarius' case, and he could do this on the basis of Barbarius' putative freedom. So long as he was in possession of his freedom (we might say, at time zero), there is no issue as to the validity of the deeds. The problem arises only at time one, when Barbarius lost possession of his freedom. Looking at the issue from this perspective, the problem becomes similar to that of the slave-witness (Inst.2.10.7 and Cod.6.23.1), the slave-arbiter (Cod.7.45.2), and possibly also the slave-manumissor (Dig.40.9.19).

Assuming the initial validity of the deeds, it was easy to find some footholds in the sources to argue against their subsequent invalidation. Accursius listed down some cases from both Code and Digest pointing in this direction.[69] They all came from Azo's gloss on the *lex Barbarius*,[70] with a single exception – the only reference to a case that called for the acts to be declared invalid.

This case (Dig.3.5.30.6) was on the validity of the transactions carried out by a widow on behalf of her son (a minor) according to the will of his deceased father. Although she does so out of *pietas*, says the text, her deeds are not valid.[71] Unlike

68 Gloss *ad* Dig.1.14.3, § *Reprobari* (Parisiis, 1566, vol. 1, col. 131): 'Item nota quod bene gestum est, non debet ex alio euentu resuscitari.' Both in the Parisian edition of 1566 and in most others, the gloss *Reprobari* is typically anonymous. Manuscript sources would however attest to Accursius' authorship: e. g. Pal. lat. 735, *fol.* 15*ra*; Pal. lat. 738, *fol.* 13*va*; Pal. lat. 739, *fol.* 13*va*; Pal. lat. 740, *fol.* 14*ra*; Firenze, BML, Edili 65, *fol.* 11*ra*; Kórnik, BK 824, *fol.* 12*va*; Bern, Cod. 6, *fol.* 15*va*; Firenze, BML, Plut. 6 sin. 3, *fol.* 10*vb*; BAV, SMM 124, *fol.* 13*rb*; BL, Harley 3700, *fol.* 10*ra*; BL, Add. 14858, *fol.* 15*ra*; Balliol 297, *fol.* 9*ra*.

69 Accursius' gloss *Reprobari* referred to the following texts: Cod.5.37.28pr; Dig.3.5.30.6; Dig.27.9.14; Dig.42.5.6.1; Dig.43.19.1.12; Dig.43.19.2. All references seem to be of Accursius and not later additions, as they are constantly present in the manuscripts listed *supra*, last note.

70 E. g. BNF, Lat. 4459, *fol.* 9*va*, § *reprobari*. Azo seems to have simply mentioned the texts without commenting on them.

71 Dig.3.5.30.6 (Papin. 2 resp.): 'Quamquam mater filii negotia secundum patris voluntatem pietatis fiducia gerat, tamen ius actoris periculo suo litium causa constituendi non habebit, quia nec ipsa filii nomine recte agit aut res bonorum eius alienat vel debitorem impuberis accipiendo pecuniam liberat.'

the case of Barbarius and of those listed in its support, where the transactions were carried out 'bene', says Accursius, 'in this case it was not carried out lawfully [*legitime*]'.[72] Why did Accursius choose this text to strengthen the validity of Barbarius' deeds carried out while in putative freedom? His acts were not lawful either. But the only argument in favour of the mother was her *pietas* towards the deceased husband. Commendable as they may be, feelings are not sufficient to produce effects on third parties. The text in Dig.3.5.30.6, therefore, declares void all her acts (both the alienation of property and the discharge of a debtor). By contrast, Barbarius' putative freedom was supported by the common belief as to its truth. This means that – much unlike the case of the widow – any third party would have relied on Barbarius' full capacity to sit on the bench. At the time they were carried out, in other words, Barbarius' deeds were held as lawful. It was only a subsequent event – the discovery of his true status – that put them into question. This way, the case added by Accursius at the end of his gloss *reprobari* strengthened his interpretation of Ulpian's remark. The problem is not whether the deeds are truly valid *ab initio*, but whether their apparent validity should be reconsidered when the putative freedom of the person who made them is later disproved. The *communis opinio* element, in other words, is not invoked to change the status of the deeds (from void to fully valid), but to retain their initial apparent validity (based on putative freedom). Given the rationale of common opinion – the need to protect innocent third parties – this logical twist acquires particular strength. In turn, and finally, Ulpian's rethorical questions in the text of the *lex Barbarius*[73] are used to reinforce this interpretation. As the people who came before Barbarius in good faith could not be reproached, says Ulpian, it is 'humanius' to conclude in their favour. Ulpian's *humanitas* became fairness in the Gloss, thereby allowing for the standard opposition *aequitas/strictum ius*. While the solution should be different in terms of strict law, observes the Gloss, 'benevolence [*benignitas*] is to be preferred to rigour'.[74]

72 Gloss *ad* Dig.1.14.3, § *Reprobari* (Parisiis 1566, vol. 1, col. 131): 'ibi non fuerat legitime factum'.

73 *Supra*, this chapter, note 11.

74 Gloss *ad* Dig.1.14.3, § *Humanius est* (Parisiis 1566, vol. 1, col. 131): 'de iure stricto alius esset. Et sic not(andum) quod benignitas praefertur rigori: vt *infra* de pact(is) l. maiorem (Dig.2.14.8) et C. de iudi(ciis) l. placuit (Cod.3.1.8). Accur(sius).' Accursius' authorship of this gloss seems rather clear, as a large number of manuscript sources report his name (even manuscripts that leave many other glosses anonymous, such as Firenze, BML, Plut. 6 sin. 3, *fol.* 10*vb*, and Leipzig, UB, 877, *fol.* 12*ra*). The first sentence may also be found in Azo's gloss on the *lex Barbarius*, § *functus* (BNF, Lat. 4459, *fol. 9va*): 'q(uod) d(icit) de iure stricto non esset. az(o).' Cf. also Stockholm, KB, B.680, *fol.* 11*va*, § *populus*. Accursius' reference to the two *leges* Dig.2.14.8 and Cod.3.1.8 helps interpreting

After all, the putative freedom of the slave-praetor inspired a similarly equitable solution in both the case of the slave-witness (where reference to the emperor's generosity was duly forgotten) and that of the slave-arbiter.

Accursius' emphasis on the possession of freedom was not just meant to introduce a second temporal layer, which allowed him to argue against 'reconsidering' the initial validity of Barbarius' deeds 'in the light of another event'. Stressing the importance of the possession of freedom was also a way of placing a different legal element between election to praetorship and its exercise. As a consequence, the validity of Barbarius' deeds no longer depended exclusively on the validity of the election, but on the legal consequences of the possession of freedom (*quasi possessio libertatis*),[75] as supported by the common mistake.

## 2.4 The problem of presumed will

The text of the *lex Barbarius* does not close with Ulpian's reference to *humanitas*. The Roman people who relied on Barbarius' apparent status, continues Ulpian, should not also be penalised, because they could have set him free had they known of his servile condition. Of course the same, he concludes, applies even to the emperor.[76]

the Gloss' understanding of *benignitas* in the *lex Barbarius*. Both referred to the position of the debtor. The first (Dig.2.14.8, Pap. 10 resp.), on a question of *concursus creditorum*, stated that, in case of disagreement among the creditors, when neither part of them is stronger than the other, the praetor should opt for the most benevolent solution ('humanior sententia a praetore eligenda est'). The Gloss clarified that such a benevolence had to be interpreted with regards to the debtor: 'scilicet quae melior sit debitori' (Gloss *ad* Dig.2.14.8, § *Humanior*, 1566 Parisiis, vol. 1, col. 271). The second reference (Cod.3.1.8, a constitution of Constantius and Licinius) was more general: justice and fairness ('iustitiae aequitatisque') should always prevail on strict law ('stricti iuris rationem'). The statement (obviously extrapolated from its original context) was too broad. So the Gloss read it as applying in case of contradiction between strict law and fairness: 'vbi aequitas ex vna parte, ius strictum ex alia est, et contradicunt: aequitas praeferenda est' (Gloss *ad* Cod.3.1.8 § *Placuit*, 1566 Parisiis, vol. 4, col. 434).

75 We will find this possession often described as *quasi possessio*. The reason for the 'quasi' has typically little to do with the underlying different truth. Rather, it depends on the incorporeal status of freedom, which therefore could not be possessed. It is however true that sometimes the term *quasi possessio* has a negative undertone, alluding to the difference between state of fact and true legal status. The resulting ambiguity can be intentional. See esp. *infra*, §5.4, note 42.

76 *Supra*, this chapter, note 11.

So far, the Gloss was carefully building on Barbarius' putative freedom to argue for the validity of his deeds. The argument had coherence, found support in a sufficient number of texts (whether directly or by loose analogy) and aimed to protect innocent third parties who relied on the common opinion as to Barbarius' apparent status. The putative freedom argument, interpreted on the basis of the common mistake, was in other words self-consistent. Ulpian's final statements, however, forced the Gloss to add a different argument in support of Barbarius' freedom: the presumed will to set him free. The Gloss could hardly avoid dealing with that. On the one hand, this last part of the text seems to have been one of the earliest parts of the *lex Barbarius* to attract the attention of glossators.[77] On the other, and moreover, its ambiguity could not be ignored lest it might be used against the overall position of the Gloss on the subject. Even so, the new argument did more harm than good to Accursius' reasoning, for it considerably weakened his position, and left his overall conclusion exposed to the harsh critique of later jurists.

The main case in the Gloss where the sovereign intervened to make up for the invalid jurisdiction of the judge featured a judge of minor age. The same *lex* prohibiting slaves from judging (Dig.5.1.12.2)[78] applied the prohibition also to *impubes*. The Gloss extended it also to those below 18 years of age – unless appointed by the prince or accepted by the parties.[79] In so doing, the Gloss relied

77 Torino F.II.14, *ad* Dig.1.14.3, § *obseruandum est*: 'y(rnerius) si ab imperatore pretor qui seruus sit constituatur', transcription in Besta (1896), p. 16. Irnerius' initial is however absent from the other main manuscript on which Besta based his edition (Padova 941), *ibid.*, note 26. Whether the will of the prince played such a central role already in Irnerius or only later, therefore, is hard to say. The position of the important *Summa Vindobonensis* on the slave-witness would match well with the gloss of Irnerius (*Wernerii Summa Institutionum*, Palmieri ed. [1914], *ad* Inst.2.10.7, p. 49), but for the fact that the *Summa* is very probably not of Irnerius himself (see for all Lange [1997], pp. 434–35, with ample literature on the point). In either case, the early composition of this *Summa* (which might therefore betray some influence of Irnerius) would strongly suggest that the central role of the will of the emperor predates the Accursian re-elaboration. It seems therefore likely that Accursius had to combine two elements – putative freedom and presumed will – that earlier glossators had already discussed but failed to relate to each other. Another possibility, but a rather speculative one, is that the putative freedom argument is slightly posterior to the presumed will one. This might explain Bulgarus' perplexities on the slave-witness and the different approach of Azo from that of Placentinus (which we have seen in the last paragraph).

78 *Supra*, this chapter, note 2.

79 Gloss *ad* Dig.5.1.12.2, § *Et impubes* (Parisiis 1566, vol. 1, cols. 679–680): 'dic quod quatuor sunt aetates attendendae hic. Impubes ergo non, vt hic. Item adultus vsque ad decem et octo annos, non potest, nisi in duobus casibus,

on another text (Dig.42.1.57, the *lex Quidem consulebat*). This stated as much with regard to the minor of 25 years, and extended the same argument also in favour of the appointment of a minor to the praetorship. If the appointment of the minor as *iudex* is strengthened by the consent of the parties, says the *lex Quidem consulebat*, the appointment of the minor as praetor must be all the more valid when the prince is aware of the minor age.[80] The Gloss sought to apply the same rationale to the *lex Barbarius*: in both the case of the minor and that of the slave, the consent of the prince cures the underlying incapacity.[81] The parallel between minor and slave, however, highlights the difference between the two instances. The praetor of minor age was appointed by the prince with full knowledge of his incapacity – and with full intention to ratify the appointment.[82] Accursius'

quando princeps facit eum ordinarium vel delegatum. Item quando partes scientes eum minorem, in eum consentiunt: vt i(nfra) de re iudi(cata), l. quidam consulebat (Dig.42.1.57). Maior xviij annis vsque ad xx potest, sed non cogitur pronuntiare: vt s(upra) ti. ii cum lege (*sed* Dig.4.8.41). Maior vero xx cogitur, nisi petat restitui: vt d(icta) l. cum lege. Ac(cursius).'

80 Dig.42.1.57 (Ulp. 2 disp.): 'Quidam consulebat, an valeret sententia a minore viginti quinque annis iudice data. Et aequissimum est tueri sententiam ab eo dictam, nisi minor decem et octo annis sit. Certe si magistratum minor gerit, dicendum est iurisdictionem eius non improbari. Et si forte ex consensu iudex minor datus sit scientibus his, qui in eum consentiebant, rectissime dicitur valere sententiam. Proinde si minor praetor, si consul ius dixerit sententiamve protulerit, valebit: princeps enim, qui ei magistratum dedit, omnia gerere decrevit.'

81 Gloss *ad* Dig.42.1.57, § *Decreuit* (Parisiis, 1566, vol. 3, col. 550): 'potuit etiam Barbario dare libertatem: vt s(upra) de offic(io) praesi(dis) (*sic*) l. Barbarius (Dig.1.14.3), et not(andum) quod princeps dat siue eligit huiusmodi magistratus in ciuitate Romana: vt i(nfra) ad leg(em) Iuliam ambi(tus) l. i (Dig.48.14.1).' The point was then further strengthened by Franciscus Accursius, who linked this text with that in Dig.5.1.12.2, and interpreted the *lex Quidem consulebat* (which speaks only of the minor of 25 years) as allowing also the appointment of the minor of 18 years both as judge and as praetor. Gloss *ad* Dig.42.1.57, *Casus ad* § *Qvidam consulebat* (Parisiis 1566, vol. 3, col. 549): 'Sententia lata a iudice minore xxv an(nis) maiore tamen xviij tenet: cum et si magistratus sit, tenebit quod faciet. Et hoc facit per me Francisco, cum adhuc sim intra aetatem xxv an(nis). Secundo dicit: etiam minor xviij an(nis) poterit de causa cognoscere: vt si ex consensu partium datus sit. Et sic de facto euenit in me Francisco. Nam cum esse intra aetatem xviij an(nis) datus fui iudex in quadam causa, et de ea cognoui. Hoc etiam si princeps fecit minorem xviij an(nis) praetorem vel consulem, nam sententiae quas dabit, tenebunt. Franc(iscus).'

82 The point is particularly clear in Gloss *ad* Cod.12.59(60).2, § *Nvllus Affatibus* (Parisiis, 1566, vol. 4, col. 316): 'sic supra de cohor(talibus) l. si quis ex [Cod.12.57.11 – in order to be reinstated in his rank, a soldier dishonourably dismissed must receive an imperial pardon first]. Sed contra s(upra) ad le(gem) Iul(iam) am(bitus) l. i (Cod.9.26.1). Sol(utio) hic ex certa scientia: ibi non argu(mentum) supra C. de susce(ptoribus) <l.> si aliquid [Cod.10.72(70).12 – if a collector or receiver is condemned for fraud and fraudulently obtains an imperial

problem with the *lex Barbarius* was how to speak of the prince's intention when the text clearly excluded any knowledge on his part.

There is little doubt that the Romans could have set Barbarius free. In principle, says Accursius, they could have even changed the law so as to allow slaves to hold public offices.[83] That, however, was hardly necessary, he continues: if Barbarius acquired his freedom, no obstacle would stand against the validity *de iure* of his praetorship.[84] To argue as much, Accursius looks at the opposite solution: if Barbarius remained a slave, then his praetorship would be void, and that in turn would invalidate all the business transacted before him. Therefore, he argues, it is clearly better to imagine that the people did set him free.[85]

The statement is clearly wanting, for it ascribes to the people an intention they did not necessarily have, all the more since they were not even aware of Barbarius' servile condition. Doubtlessly Accursius realised this, for he made an effort to apply the same rationale used for Barbarius' putative freedom: the protection of third parties. To highlight it, Accursius relied on the text that stated

rescript to hold the same office again, the rescript is void]. Ad idem facit quod in l. contraria (Cod.9.26.1) no(tatur); item facit sub de re mili(tari) l. semel [Cod.12.35(36).6 – the soldier who is discharged on account of illness may be reinstated only if it appears from a medical report and examination by the magistrate that he did contract a disease].'

83 Gloss *ad* Dig.1.14.3, § *Seruo* (Parisiis, 1566, vol. 1, col. 131). The gloss does not report Accursius' name, but see e. g. Pal. lat. 732, *fol.* 4*ra*; Pal. lat. 735, *fol.* 15*ra*; Pal. lat. 738, *fol.* 13*va*; Pal. lat. 740, *fol.* 14*ra* (§ *seruo*); Cologny, Bodmer 100, *fol.* 11*rb*; BSB, Clm 14022, *fol.* 15*vb*; Bern, Cod. 6, *fol.* 15*va*. The point was already made by Azo: 'si uellet legem predictam tollere quia constituit seruos non posse frui dignitate. Az(o)', Vat. lat. 1408, *fol.* 12*va*, Bamberg, Msc. Jur. 11, *fol.* 14*ra*; Avranches 156, *fol.* 229*rb* (§ *potuit*); BSB, Clm 14028, *fol.* 9*ra*; BNF, Lat. 4459, *fol.* 9*va* (§ *Si uellet*); Stockholm, KB, B.680, *fol.* 11*va*; BL, Harley 3700, *fol.* 10*ra*; BL, Add. 14858, *fol.* 15*rb*; Balliol 297, *fol.* 9*ra*.

84 Gloss *ad* Dig.1.14.3, § *Multo magis* (Parisiis 1566, vol. 1, col. 131): 'Et secundum hoc dices, quod ius, scilicet in conferendo libertatem, non dico in faciendo seruum praetorem: imo et idem de praetore.' The gloss is anonymous, but see e. g. Pal. lat. 731, *fol.* 17*rb*; Pal. lat. 732, *fol.* 4*rb*; Pal. lat. 734, *fol.* 16*va*; Pal. lat. 738, *fol.* 13*va*; Cologny, Bodmer 100, *fol.* 11*rb*; BSB, Clm 14022, *fol.* 15*vb*; BSB, Clm 20, *fol.* 9*ra*; Bern, Cod. 6, *fol.* 15*va*; Douai 575, *fol.* 11*va*; BAV, SMM 124, *fol.* 13*rb*; Firenze, BML, AeD 417, *fol.* 11*ra*; BL, Harley 3700, *fol.* 10*ra*; BL, Add. 14858, *fol.* 15*rb*; Balliol 297, *fol.* 9*ra–b*.

85 Gloss *ad* Dig.1.14.3, § *Effecisset* (Parisiis, 1566, vol. 1, col. 131): 'id est efficere potuisset. Vel credimus quod fecisset potius quam dignitatem eriperet … Accursius.' Cf. Id., *ad* Cod.7.9.1 (Parisiis 1566, vol. 4, col. 1537), § *manumissus est*: 'sic ergo potest dari libertas: vt et ff. de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3).' Also for the gloss *effecisset* there is little doubt as to Accursius' authorship: see e. g. Pal. lat. 731, *fol.* 17*ra–b*; Pal. lat. 738, *fol.* 13*va* (§ *Et si fecisset*); Pal. lat. 740, *fol.* 14*ra*; Cologny, Bodmer 100, *fol.* 11*rb*; BSB, Clm 14022, *fol.* 15*vb*; Bern, Cod. 6, *fol.* 15*va*; Firenze, BML, Plut. 6 sin. 3, *fol.* 10*vb*. Here as well,

this most clearly: Cod.7.6.1.5. This was a rescript of Justinian to the praetorian prefect, dealing with the case of a funeral procession attended by many slaves of the deceased. To flaunt the liberality of the old master, the heir bestowed the felt cap (the *pileus*, representing the concession of freedom) on a large number of slaves: they would take part in the funeral wearing it, without being actually emancipated. The problem in the text was whether the slaves should become free even if their master had only intended to ostentate false generosity and had no intention of actually setting them free. In the text Justinian stated that the slaves would become free whatever the true intention of their master, so that the people may not be deceived.[86] And the Gloss on this text duly remarked the need to protect the people: as they relied on what they could see, they would be deceived if the master had his way.[87] Admittedly, the link with the *lex Barbarius* was tenuous at best: the circumstances of the two cases were not just different, but opposed to each other. In Barbarius' case it was not Barbarius' master who sought to deceive the people with his generosity towards the slave – the deceiver was Barbarius himself, a runaway slave posing as a Roman citizen. The Gloss on Barbarius, however, abstracted the rationale of that text from its context. What was left was only the idea that freedom may be granted to a slave so as to avoid deceiving the people unaware of his true status.[88]

The last statement of Ulpian – that the emperor could set Barbarius free even more easily than the people could – was not read in connection with the *lex*

Accursius probably looked at Azo: 'efficere potuisset. Uel credimus quod fecisset. Az(o)', Vat. lat. 1408, *fol.* 12*va*; Vat. lat. 2512, *fol.* 12*rb*; Bamberg, Msc. Jur. 11, *fol.* 14*ra*; Douai 575, *fol.* 11*va*; Bamberg, Msc. Jur. 11, *fol.* 14*ra*; BL, Harley 3700, *fol.* 10*ra*; BL, Add. 14858, *fol.* 15*rb*; Balliol 297, *fol.* 9*ra*.

86 Cod.7.6.1.5 (Iust. A. Iohanni PP.): 'Sed et qui domini funus pileati antecedunt vel in ipso lectulo stantes cadaver ventilare videntur, si hoc ex voluntate fiat vel testatoris vel heredis, fiant ilico cives Romani. Et ne quis vana liberalitate iactare se concedatur, ut populus quidem eum quasi humanum respiciat multos pileatos in funus procedentes adspiciens, omnibus autem deceptis maneant illi in pristina servitute publico testimonio defraudati: fiant itaque et hi cives Romani, iure tamen patronatus patronis integro servando.'

87 Gloss *ad* Cod.7.6.1.5, § *Sed et qui* (Parisiis 1566, vol. 4, col. 1528): 'Si serui alicuius voluntate ipsius vel heredis eius pileati antecesserint domini defuncti cadauer, statim fiant ciues Romani: ne populus credens eos liberos esse, deciperetur si secus fieret, patronatus iure patronis seruato.'

88 Gloss *ad* Dig.1.14.3, § *Effecisset* (*supra*, this paragraph, note 85): '… sed an hoc casu quando ignorauit fuerit liber? Dic quod sic: ne homines decipiantur: vt C. de Lati(na) li(bertate) tol(lenda) § sed quid si domini (*sic*) (Cod.7.6.1.5) … Accursius.' Here as well, Accursius relied on Azo's gloss on the same § *effecisset*: 'immo efficit ut C. de latina li(bertate) tol(lenda) l. i § Sed et qui dom(ini) (Cod.7.6.1.5). Az(o)', Vat. lat. 1408, *fol.* 12*va*; Bamberg, Msc. Jur. 11, *fol.* 14*ra*; BNF, Lat. 4459, *fol.* 9*va*; Avranches 156, *fol.* 229*rb* (with small variations).

*Regia* (transferring the sovereignty of the people to the emperor) and so had to be interpreted restrictively. Clearly, argued the Gloss, both emperor and the people had the same sovereignty. What Ulpian meant, therefore, is that it is much easier for a single person to decide something than it is for a whole people to agree on it.[89]

The Gloss sought to interpret Ulpian's final remarks (as far as possible) in the same way as it did with the rest of the *lex Barbarius*: the people relied on the validity of Barbarius' deeds, and the only way to uphold the deeds – and so to protect the people – was to maintain the validity of Barbarius' position. It was one thing, however, to ascribe some effects to Barbarius' putative freedom, but quite another to presume consent in the people and the emperor that was clearly absent from the text. The reference to Cod.7.6.1.5 was hardly conclusive, for that text spoke clearly in favour of the slaves' freedom *against* the wishes of their master. Indeed Accursius' solution was not unanimous. Ugolino for instance invoked the same text to reach the opposite conclusion. In that text the master let the slaves wear the *pileus*: that sufficed for their emancipation. In the same way, maintained Ugolino, if the people allowed a slave to be praetor, that was

89 Gloss *ad* Dig.1.14.3, § *Multo magis* (*supra*, this paragraph, note 84): 'immo perinde debuit dicere: vt C. de adop(tionibus) l. ii in fi(ne) (Cod.8.47(48).2.1). Sed ideo dixit, quia facilius consentit solus princeps in manumittendo, vel aliud faciendo, quam populus: vt *infra* de liber(tis) vni(versitatum) l. i (Dig.38.3.1) et i(nfra) de (receptis qui) arbi(trium) l. item si vnus § principaliter (Dig.4.8.17.6). Vnde Persius: Mille hominum species, et rerum discolor vsus. Velle suum cuique est: nec voto viuitur vno.' Cf. Aulus Persius Flaccus, Satire 5, ll.52–53. The reference to Flaccus seems to be from Accursius, as the quotation is found in all the manuscripts reporting Accursius' name cited *supra*, this paragraph, note 84. If Accursius quoted Flaccus; however, the explanation was probably not his own. The first part of this gloss likely came from Azo, who also mentioned the problem of the consent of a whole people. Azo, *ad* Dig.1.14.3, § *Multo magis*: 'immo perinde dicere debuit vt C. de adopt(ionibus) l. ii in fi(ne) (Cod.8.47(48).2.1). Sed hoc quia difficile est populum consentire vt i(nfra) de libertis uniuersita(tum) l. i (Dig.38.3.1). Az(o)', Vat. lat. 1408, *fol.* 12*va*; Vat. lat. 2512, *fol.* 12*rb*; Bamberg, Msc. Jur. 11, *fol.* 14*ra*; Avranches 156, *fol.* 229*rb*; BNF, Lat. 4463, *fol.* 12*vb*. The same explanation may be found in Ugolino's gloss on the *lex Barbarius*, *ad* Dig.1.14.3, § *Multo magis*: 'quod uidetur falsum cum dicimus populus et imperator parem habere potestatem vt C. de adopt(ionibus) l. ii. in fi(ne) (Cod.8.47(48).2.1), ergo multo etc. i(d est) facilius imperatore permittendo eum fungi pretura uel eligendo in eam, cum sciret eius condictionem daret ei libertatem quam populus, quia facilius consentire potest; uniuersitas enim difficilius in unum consentit vt s(upra) de orig(ine) iur(is) l. ii § Deinde quia difficile (Dig.1.2.2.9). H(ugolino).' BL, Royal 11.C.III, *fol.* 9*vb*; BNF, Lat. 4461, *fol.* 11*vb* (the first manuscript reads 'difficile' instead of 'difficilius', but the second one has more errors). The same gloss may be found, but more fragmented, in BNF, Lat. 4463, *fol.* 12*vb* (§ *multo*).

sufficient to argue that they did set him free. However, he continued, this would only apply if the people were aware of Barbarius' servile condition, just as the master in the *pileus* case.[90] A gloss attributed to Azo was even more explicit: in principle the Roman people or the prince could well have set Barbarius free; but since they were not aware that he was a slave, then clearly they did not consent to his manumission. It follows, continued this gloss, that Barbarius remained a slave, and so was neither free nor praetor.[91]

90 Ugolino, *ad* Dig.1.14.3, § *liberum*: 'hoc ipse enim quod permitteret eum preturam uti in liberum uideretur ei concedere libertatem si sciret eum seruum, et sic C. de lat(ina) lib(ertate) tol(lenda) l. i § sed et qui domini, § sed et si quis (Cod.7.6.1.5 and.9). H(ugolinus)', BL, Royal 11.C.III, *fol.* 9*vb*; BNF, Lat. 4461, *fol.* 11*vb*. Cf. Id., *ad* Dig.1.14.3, § *verum*: 'non tamen potest dici quod fuit pretor vt C. de decurionibus <l. Herennius>(Dig.50.2.10). H(ugolino)', BL Royal 11.C.III, *fol.* 9*va*.

91 BNF, Lat. 4463, *ad* Dig.1.14.3, § *Potestatem*, *fol.* 12*vb*: 'hoc verum si scisset quod manumittere posset vt C. ex q(uibus) c(ausis) serui propter p(remium) li(bertatem) ac(cipiunt) l. ii et iii (Cod.7.13.1–2). Imo etiam ipso solo quod eum imperatorem eligit cum finis sit ar(umentum) vt i(nfra) nequid in lo(co) pu(blico) fiat <l.> litora (Dig.43.8.3pr) et C. de quadri(ennii) praes(criptione) <l.> bene (Cod.7.37.3) et Instit. qui ma(numittere) <non> possunt § i (Inst.1.6.1). Sed cum hic ignorauit non eum manumisit, quia consensisse non uidetur vnde dico eum pretorem non fuisse: vt i(nfra) de iudic(is) <l.> cum pretor § non autem (Dig.5.1.12.2). Tamen confirmauit eius sententias: immo factum confirmatiue uidetur ualuisse, ar(gumentum) C. de testa(mentis) l. i (Cod.6.23.1). Dic ergo eum non fuisse pretorem uel liber vt i(nfra) de fideico(mmissaribus) lib(ertatibus) <l.> generaliter § si quis tutorem (Dig.40.5.24.9). Az(o).' Whether the gloss is really of Azo is not entirely clear. I could find it in only a single manuscript, whereas most manuscript sources reporting Azo's gloss skip it. At the same time, however, it would perfectly match another gloss clearly written by Azo. This other gloss states that, if the Romans wanted to appoint Barbarius as praetor, they should have first changed the law ('si uellet legem predictam tollere quia constituit seruos non posse frui dignitate'), *supra*, this paragraph, note 83. The reference to Dig.43.8.3pr is particularly interesting as very representative of the jurists' approach. The text (Celsus 39 dig.) simply stated that the sea shores under Roman control belonged to the Romans ('Litora, in quae populus Romanus imperium habet, populi Romani esse arbitror'). Meaning 'control', however, the text said 'imperium'. As a result, if one ignored the subject matter, the text proclaimed the sovereignty of the Roman people over what pertained to them. Hence it could well be invoked to argue in favour of the power of the Roman people to set Barbarius free. The last text invoked by the gloss attributed to Azo (Dig.40.5.24.9, Ulp. 5 fid.) was particularly clear: the appointment as guardian of a slave mistakenly believed to be free is of no effect, and it does not entitle the slave to claim his freedom either ('certissimum est neque libertatem peti posse neque tutelam libertatis praestationi patrocinari'). It seems telling that, when commenting on it, the Accursian Gloss skipped entirely the issue of freedom, to focus only on that of the guardianship: Gloss *ad* Dig.40.5.24.9,

What is of particular interest in this gloss ascribed to Azo is not just that it reached the opposite conclusion from that of Accursius, but the underlying logic it used. Azo (if he really wrote it) sought to keep the question of the validity of Barbarius' deeds as praetor distinct from that about the validity of his praetorship. This way he argued against Barbarius' freedom (and so, by implication, also against his praetorship), but in favour of the validity of his deeds as praetor.[92] In so doing, he relied on the same argument to reach two opposite results. The people's consent cannot be presumed, he argued, hence Barbarius is not manumitted. But his deeds remain valid, continued Azo's gloss, because those same people 'ratified his decisions' (*confirmavit eius sententias*).[93]

Ugolino's similar position might strengthen the authenticity of the gloss attributed to Azo (and in turn might suggest some influence of their teacher Bassianus). Even so, however, it is telling that most other manuscripts do not report it. Within a short time Accursius' position became predominant: the validity of Barbarius' deeds depended on the validity of his appointment. The acts, in other words, would stand only if their source was lawful. The Gloss therefore insists on the validity of Barbarius' praetorship to preserve the validity of his deeds as judge. Although Accursius' defence of the personal position of Barbarius is a means to a different end, it links the validity of the deeds with the validity of the appointment. The point is important: although the ultimate end is to preserve the validity of the deeds, for the Gloss that outcome depends on the validity of the source of those deeds. This is why the Gloss invokes public utility to argue for Barbarius' freedom, and not – directly – to hold the deeds valid. Their validity has necessarily to follow on from the freedom of Barbarius. The validity of the deeds is the final purpose, not the means. Even if the people were unaware of Barbarius' servile condition, the Gloss maintains, it is necessary to argue for their presumed will to set him free. Doing otherwise would prejudice those who relied on his putative freedom.[94] Arguing for a direct link between the validity of the source and the validity of the deeds required the connection between the deeds and public utility to be indirect – for it had to depend on the person of Barbarius. This might explain why Accursius usually refers to public utility not in positive terms, but in negative ones ('ne homines decipiantur'):[95] Barbarius must be praetor *de iure* so as to avoid the people suffering prejudice. Speaking of

§ *Patrocinari* (Parisiis 1566, vol. 3, col. 251). Cf. also the Gloss on the closely related text of Dig.26.2.22 (§ *Putabat liberum esse*, Parisiis 1566, vol. 2, col. 129).

92 *Supra*, last note.

93 *Ibid*.

94 Gloss *ad* Dig.1.14.3, § *Effecisset* (Parisiis, 1566, vol. 1, col. 131). Cf. *supra*, this paragraph, note 88.

95 *Ibid*.

public utility in positive terms would have been more difficult: the people had no interest in setting Barbarius free, even less in making him praetor *de iure*.

The *publica utilitas* argument is invoked openly (and in positive terms) only towards the end of the Accursian comment on the *lex Barbarius*, when the Gloss deals with the issue of Barbarius' price. If the people (or the prince) were to set Barbarius free, reasons the Gloss, they would effectively expropriate private property. Would this mean that they should compensate Barbarius' master? Very interestingly, and unlike other jurists, Accursius answered in the negative. Since the expropriation took place on public utility grounds, no compensation is due.[96]

96 Gloss *ad* Dig.1.14.3, § *Multo magis* (*supra*, this paragraph, note 84): '… Sed an vel imperator vel populus teneatur ad precium serui? Respon(deo) non, maxime si propter publicam vtilitatem faciat: vt C. pro quibus cau(sis) ser(vi) li(bertatem) accipi(unt) l. antepen(ultima) (Cod.7.13.2) et sic no(tandum) quod ex causa iusta princeps alienum seruum manumittit, non alias, vt puto quia licet omnia principis intelligantur, verum est quo ad protectionem, vt C. de quadri(ennii) praescrip(tione) l. fina. in princ(ipio) (Cod.7.37.3pr).' Accursius' position is interesting, as it would seem to suggest that the presence of public utility allowed the prince both to proceed with the expropriation and to refuse compensation for it. Accursius did not elaborate a systematic doctrine of expropriation for public utility, yet on the point he seems rather clear: no payment is needed. This position clashed with the jurists on whom Accursius built most of his comment (also) on the *lex Barbarius*: Ugolino and Azo. Both of them (although perhaps just in theory: cf. *supra*, this paragraph, notes 90 and 91 respectively) required compensation for the expropriation of Barbarius. Public utility was necessary to dispense with private property, but not with the payment for its expropriation. On Azo see his gloss § *observandum*: 'sed an tenetur imperator ad precium serui? R(espondeo) tenetur et maxime si propter publicam utilitatem faciat vt C. ex quibus c(ausis) serui premio ac(cipiunt) li(bertatem) l. antepenult(ima) (Cod.7.13.2). Az(o)', Vat. lat. 1408, *fol.* 12*va*; Bamberg, Msc. Jur. 11, *fol.* 14*ra*; Avranches 156, *fol.* 229*rb*; Stockholm, KB, B.680, *fol.* 11*vb*. The same may be found in the final part of Ugolino's gloss § *liberum*: 'Sed numquid dominus posset precium a fisco petere? R(espondeo) sic, ar(gumentum) C. in quibus causis serui pro premio lib(ertatem) l. ii (Cod.7.13.2). H(ugolino)', BL, Royal 11.C.III, *fol.* 9*vb*; BNF Lat. 4461, *fol.* 11*vb*. Sometimes the position of Azo and of Ugolino are found combined together. See e. g. BNF, Lat. 4463, *ad* Dig.1.14.3, *fol.* 12*vb*, § *multo*: '… tenetur imperator ad precium serui? Respondeo tenetur si propter pu(blicam) utilitatem faciat vt C. pro quibus serui pro p(remio) ac(cipiunt) li(bertatem) l. penult(ima) (Cod.7.13.3) Az(o). Et hoc dicit quod aliter non potest manumittere seruum meum. H(ugolinus).'
Medieval lawyers debated the issue animatedly for centuries, yet their discussions have not been studied by modern scholars working on expropriation in medieval law. I am purportedly avoiding to provide general references to the subject of public utility, as few subjects are as multifaceted and complex as this. Suffice to remember two classical works, that of Gaudemet (1951), pp. 465–499, and that of Nicolini (1940), pp. 189–289, esp. 205–211 and 243–254. The same work of

## 2.5 Applications of Barbarius' case

The common mistake informing the *lex Barbarius* may be found in many other parts of the Gloss, up to the very last text of the last title of the last book of the Digest.[97] The abundance of references to the *lex Barbarius* means that the Gloss invokes it not only in the most obvious cases, such as the exception to the Macedonian senatus consultum,[98] but in many other situations where its relevance was not so obvious. Let us take for instance Dig.29.2.30.3. The text (of Ulpian) dealt with the prohibition of the heir apparent entering upon the estate if the deceased's wife is pregnant. What happens, asks Ulpian, if the heir apparent thinks that the widow is not pregnant? If his belief is widely shared, he answers, then he may enter upon the estate.[99] In commenting on this last statement, the Gloss refers both to the case of the slave-witness and to the *lex Barbarius*.[100] Again, in Dig.1.18.17 Celsus argued that, when the *praeses provinciae* manumitted a slave or appointed a warden after his mandate had expired but before he knew of the arrival of his successor, the deed was valid.[101] In citing the

Nicolini is particularly useful to examine pre-Accursian jurists, and especially Azo, and their influence on the Accursian Gloss as to the limits of expropriation of private property (pp. 205–211). Nicolini mentions Accursius' gloss *multo magis* in passing (p. 246, note 2), but he does not look at other glosses on the *lex Barbarius* (apart from a short mention to Mayno's comment on it, p. 215, note 1).

97 Dig.50.17.211 (Paul 69 ed.) prohibited slaves from absenting themselves on State business. But the Gloss carved out an exception for the case the slave was commonly believed free: *ad* Dig.50.17.211, § *Seruus* (Parisiis 1566, vol. 3, col. 1926): '… Ab hac l. excipe si communis error interueniat: vt supra de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3). Ac(cursius).'

98 Gloss *ad* Dig.14.6.3pr, § *Publice* (Parisiis 1566, vol. 1, col. 1495): 'Not(atur) quod communis error excusat: vt supra de off(icio) praeto(rum) <l.> Barbarius (Dig.1.14.3), et *infra* de acquir(enda) haere(ditate) l. cum quidam § quod si ipse (Dig.29.2.3.3), et *infra* de aedil(icio) edict(o) quis sit, § apud Caecilium (*sic*) [Dig.21.1.17.15: cf. its gloss § *Et in ea cella*, Parisiis 1566, vol. 1, col. 1967] et *infra* de supelle(ctili) leg(ata) l. iii in fine (Dig.33.10.3.5), et *infra* de eo qui pro tutore (Dig.27.5) per totum.'

99 Dig.29.2.30.3 (Ulp. 8 ad Sab.): 'Quod dicitur "si putetur esse praegnas", sic accipiendum est, si dicat se praegnatem. Quid ergo, si ipsa non dicat, sed neget, alii dicant praegnatem esse? Adhuc adiri hereditas non potest: finge obstetrices dicere. Quid si ipse putat solus? Si iusta ratione ductus, non potest adire: si secundum multorum opinionem potest.'

100 Gloss *ad* Dig.29.2.30.3, § *Potest* (1566 Parisiis, vol. 2, col. 645): 'scilicet adire. Et ad hoc … supra de offi(cio) praeto(rum) l. Barbarius Philippus (Dig.1.14.3) et C. de testa(mentis) l. i (C.6.23.1) et insti. de testa(mentis) § sed cum aliquis (Inst.2.10.7).'

101 Dig.1.18.17 (Cel. 3 dig.): 'Si forte praeses provinciae manumiserit vel tutorem dederit, priusquam cognoverit successorem advenisse, erunt haec rata.'

*lex Barbarius* the Gloss remarks how 'someone who is unaware can do what someone who is aware could not do'.[102] While the first text (Dig.29.2.30.3) referred to a common (if possibly mistaken) belief, the second (Dig.1.18.17) pointed to the mistake of a single person, albeit committed while discharging a public office. Perhaps because of the combination of a single mistake and the public office of whoever committed it, the Gloss avoids particularly significant statements (whereas later jurists would be more thorough when examining the issue). By contrast, commenting on texts about the mistake of single, private individuals, the Gloss is clear in stating that the mistake of a single person cannot be invoked in support of the validity of a deed. A particularly clear case is Dig.2.1.15: pleading before one praetor thinking he is another one voids the proceedings.[103] The Gloss clarifies that it was a case where someone pleaded before the urban praetor in the mistaken belief that he was the peregrine one.[104] In this case, comments the Gloss, the mistake was insufficient to argue for the validity of the deeds, for it was the mistake of a single person. It would be different, concludes the Gloss, if the mistake was a common one.[105] The same reasoning may be found in a very well known text of Paul that distinguishes between ignorance of fact (*ignorantia facti*) and ignorance of the law (*ignorantia iuris*) (Dig.22.6.9). Normally, says Paul, ignorance as to a fact does not cause harm. But there are limits. So for instance it is not possible to invoke it on something that everybody else knows.[106] The argument *a contrario* is easy to make: if the ignorance of a single person is condemned as *summa negligentia* in the text, argues the Gloss, then the ignorance of most or even all people (as in Barbarius' case) should be condoned.[107]

102 Gloss *ad* Dig.1.18.17, § *cognouerit aduenisse* (Parisiis 1566, vol. 1, col. 149): '… et sic no(tandum) quod potest ignorans quod non posset sciens. Sic s(upra) de offi(cio) praefect(i) vr(bis) (*sic*) l. Barbarius (Dig.1.14.3) et institu. de testa(mentis) § testes (Inst.2.10.6).'

103 Dig.2.1.15 (Ulp. 2 omn. trib.): 'Si per errorem alius pro alio praetor fuerit aditus, nihil valebit quod actum est. Nec enim ferendus est qui dicat consensisse eos in praesidem, cum, ut Iulianus scribit, non consentiant qui errent: quid enim tam contrarium consensui est quam error, qui imperitiam detegit?'

104 Gloss *ad* Dig.2.1.15 § *Si per errorem* (Parisiis 1566, vol. 1, col. 172).

105 Gloss *ad* Dig.2.1.15 § *Nihil* (Parisiis 1566, vol. 1, col. 172): 'quandoque tamen error facit ius, si est communis: vt *infra* de supel(lectili) leg(ata) l. iii in fi(ne) (Dig.33.10.3.5) et supra de offi(cio) praeto(rum) l. Barbarius (Dig.1.14.3).'

106 Dig.22.6.9.2 (Paul iur. et fact. ignor. l. sing.): 'Sed facti ignorantia ita demum cuique non nocet, si non ei summa neglegentia obiciatur: quid enim si omnes in civitate sciant, quod ille solus ignorat? …'

107 Gloss *ad* Dig.22.6.9.2, § *solus ignorat* (Parisiis 1566, vol. 1, cols. 2101–2102): '… econtra parcitur alicui si ignorat quod maior pars vel omnes ignorant: vt supra de offic(io) praeto(rum) l. Barbarius (Dig.1.14.3).'

We have seen that the most important glosses on the *lex Barbarius* (on Barbarius' praetorship, on the effects of his putative freedom and on the presumed will of the people to set him free) all invoke the principle that the common mistake makes law. Apart from referring to the need to protect innocent third parties, however, none explains its meaning.

Whenever the Gloss invokes the maxim *communis error facit ius* in its comment on the *lex Barbarius*, it always refers to a text of little prima facie relevance to our case: Dig.33.10.3.5. The text asks whether a bequest of household furniture should include silver candlesticks. In principle, says Paul, the material of which the furniture is made is irrelevant, and so silver candlesticks should be part of the bequest. But if a silver candlestick is put with the silverware, then it is considered as part of the silver and not of the household furniture. The reason, according to Paul, is to be found in the practice of inexperienced people ('propter usum imperitorum'), who misinterpreted the rule. Such a practice led to an exception to the rules on household bequest. This way, the mistake of the *imperiti* ended up creating a specific legal rule – and so 'error ius facit'.[108]

Paul's text clearly pointed to a custom based on a banal misconception that was strong enough to form an (illogical) exception to the general rule. The text could have become extremely important for civil lawyers, perhaps even more so than the *lex Barbarius* itself, had not been for a single vowel. In the *littera bononiensis* (the version of the Digest in circulation)[109] 'imper*i*torum' reads 'imper*a*torum'. As such, the change in the rule was no longer the result of ignorance ('propter usus imperitorum'), but depended on the will of the emperors ('propter usus imperatorum'). Thus Paul's conclusion ('et error ius facit') had to be reassessed. The prince introduced an exception to the rules governing bequests. It was somewhat easier to accuse some ignorant people of a mistake than to accuse the emperor. So the Gloss duly explained that what *ius facit* is not a common mistake but rather the will of the prince, whom everybody else has to follow.[110] This way, the strength of the maxim *error ius facit* was

108 Dig.33.10.3.5 (Paul 4 ad Sab.): 'Nec interest, cuius materiae sunt res, quae sunt in suppellectili. Sed craterem argenteum non esse in supellectili nec ullum vas argenteum secundum saeculi severitatem nondum admittentis supellectilem argenteam hodie, propter usum imperitorum si in argento relatum sit candelabrum argenteum, argenti esse videtur, et error ius facit.'

109 For a short explanation on the difference between the *litera bononiensis* (or *vulgata*) and the *litera florentina* see Dondorp and Schrage (2010), pp. 13–14.

110 Gloss *ad* Dig.33.10.3.5, § *Usum imperatorum* (1566 Parisiis, vol. 2, cols. 1221–1222): 'vtebantur imperatores: vt si vas argenteum relatum, id est annumeratum sit argento, tunc numero argenti non suppellectilis continetur: vt supra eo (titulo) l. i (Dig.33.10.1) et hic ergo si numero non est argenti, continetur appellatione suppellectilis: et sic error principis facit ius, vt supellectilis appella-

considerably reduced. As a consequence, the relationship between common opinion and mistake remained somewhat unclear – or rather, lacking precise normative ground. The problem of vitiated collective will, in other words, remained substantially unanswered.[111]

## 2.6 Putative notary?

Before concluding the analysis of the Gloss on *lex Barbarius* it is important to mention a particularly significant application of Barbarius' case, that would be amply discussed by civil lawyers and canon lawyers alike for centuries to come, well into the modern times. It is the case of the false notary.

The increasing reliance on notarial deeds in the twelfth century was accompanied by a similar growth in forgeries. The false notary was therefore a particularly relevant subject.[112] One of the earliest normative sources on the point is to be found in a letter from Pope Innocent III to the archbishop of Milan (Philip of Lampugnano) in 1199, eventually incorporated in the *Liber Extra* (X.2.22.6), discussing the main kinds of forgery. One of the cases listed by the pope was the fact that the document was not drafted by a notary ('quia nec erat publica manu confectum, nec sigillum habebat authenticum'). A few years later other sources, such as the earliest notarial registers, also attested to an increasing awareness of false notaries, and to the need to control their authenticity.[113]

The same awareness can be also seen in contemporary litigation. A good example comes from the diocese of Koper in Slovenia. This diocese was

tione contineatur argentum … Sed quomodo solius principis error facit ius? Resp(ondeo) quia et alij debent sequi quod ipse facit, argu(mentum) C. de episc(opali) au(dientia) l. iii [Cod.1.4.3 – an imperial rescript excluding some crimes from a general amnesty] et sic communis error hic facit ius: sic et supra de offic(io) praeto(rum) l. Barbarius (Dig.1.14.3).' Cf. Cortese (1964), vol. 2, pp. 105–106, note 14.

111 On the maxim *error facit ius*, the Gloss often cited Paul's text on silver household furniture together with the *lex Barbarius*. See e. g. *ad* Dig.2.1.15, § *Nihil* (Parisiis 1566, vol. 1, col. 172): 'quandoque tamen error facit ius, si est communis: vt *infra* de supel(lectili) leg(ata) l. iii in fi(ne) (Dig.33.10.3.5) et supra de offic(io) praeto(rum) l. Barbarius (Dig.1.14.3).'

112 The increasing importance of notarial deeds may be also appreciated in legal proceedings. The Fourth Lateran Council required ecclesiastical judges to avail themselves of a notary to record each phase of the proceedings (4 Lat. c.38). Cf. Brundage (2008), p. 147, text and note 75, where further literature is mentioned. In the Italian communes from the begining of the thirteenth century each phase of the proceedings – from beginning to end – was drafted as a public act. See e. g. Behrmann (1995), pp. 1–18.

113 So for instance the earliest entries in the register of the notaries of Bologna date to 1219: Ferrara and Valentini (1980), pp. 1–17.

administered by the bishop of Trieste until 1184, when it finally became administratively independent with its own diocesan bishop. From that moment the local bishop, Aldericus, sought to recover his bishopric rights to a series of tithes that the diocese of Trieste had alienated or lost in the course of the previous decades. One of the first cases was the tithes of the island of Istria, which had been alienated in favour of the convent of St Mary of Aquileia. In 1189 the Patriarch of Aquileia sought to mediate between the two parties, but indirectly acknowledged the rights of the bishop.[114] The dispute dragged on, and in 1201 the bishop produced a notarial copy of the Patriarch's ruling as evidence of his rights.[115] By then, however, the notary who drafted the original decision was dead, and the counsel for the nuns argued that he had not been a true notary – and therefore that the original document was void. The bishop had to resort to witness depositions to prove the authenticity of the notary,[116] yet it seems he lost the case all the same.[117] But the bishop was not a man to be easily discouraged.

114 The bishop of Trieste granted the tithes of the island of Istria to the convent of St Mary in 1166, although he had previously sworn not to alienate any income of the diocese of Koper. In principle, therefore, the alienation of the tithes was void, but the nuns had the good sense to obtain a series of papal confirmations of their privileges – tithes included. The bishop of Koper started suing the convent in 1188/9, but with little success. His perseverance on the matter is attested by appeals to a series of popes (Clement III, Celestine III and Innocent III), who appointed a number of successive judges to hear the case. One of the first decisions, of 1189, found for the bishop. But soon thereafter the Patriarch of Aquileia modified the decision of his delegate so as to achieve an equitable – but fragile – compromise. The Patriarch left the tithes with the nuns, but required them to pay a pound of incense each year to the bishop. See Härtel (2011), pp. 55–57. The relevant documentation may be read in Härtel *et al.* (2005), doc. 32, p. 122 (decision in favour of the bishop), doc. 36, pp. 126–128 (ruling of the Patriarch of Aquileia, 20.12.1189), doc. 23, 28–29, 36, 38, 40, 45, pp. 111–142 (series of papal confirmations of the convent's privileges, ranging from 1174 to 1199).

115 Zabbia (2013), pp. 203–204; Härtel (2011), p. 57. Cf. Härtel *et al.* (2005), doc. 49, p. 146 (1201).

116 Härtel *et al.* (2005), doc. 47 (12.4.1201), pp. 143–154, at 145: 'Giliolus de Sentella iuratus [*scil.*, one of the witnesses] dicit se bene scire Martinum qui morabatur iuxta capella(m) domini Gerardi Paduani episcopi fuisse notarium et habitum esse pro notario. Interrogatus quomodo scit dicit se scire quia instrumenta sua habebantur publica in tota terra Padue, et ipsemet testis habet de instrumentis factis per manum dicti Martini notarii, per publicam famam quia publica fama est per totam terram Padue quod erat notarius … Albertus notarius iuratus dicit idem per omnia que Giliotus de Sentella …' Cf. Zabbia (2013), pp. 203–204.

117 Härtel *et al.* (2005), doc. 48, pp. 145–146 (12.4.1201). Cf. Zabbia (2013), pp. 205–206.

On the contrary, he put the episode to good use. Just a few months later he was busy suing the citizens of a town close to the island of Istria, Pirano, again on tithe issues. As it was up to the bishop to prove his right to the tithes, he could not use the same strategy as the nuns. But he could adapt it to a different situation. So the bishop claimed that the notary who drafted the counsel's mandate (the *procuratio ad litem*) was not a true notary, and that the mandate was therefore void.[118] We do not know whether that was the first citation or a subsequent one, but perhaps the intention was to have the defendant declared contumacious, claiming that the town did not lawfully appear in court. The idea might have come from the poor technical preparation of the notary who drafted the town's mandate to the counsel – in all probability, it was a young notary still learning the ropes. The document he drafted had some imperfections, perhaps not serious enough to have it annulled but sufficient to cast some doubts as to the appointment of its author.[119] The counsel for the town, interestingly, stressed both the validity of the notary's appointment and the fact that he was widely reputed a true notary.[120] This last statement might be related to the fact that the witnesses gave different versions of the notary's appointment, although it had taken place just a few months beforehand.[121] The court, however, did not much appreciate the bishop's cavil and found against him. But the bishop did not give up so easily and appealed against the decision. The second court appointed to hear the case would have probably come to the same conclusion

118 'Ac vero dictus episcopus econtra excepit dicens predictum instrumentum non esse publicum, nec esse confectum per tabellionem creatum ab eo qui habere auctoritatem eius creandi tabellionem.' De Franceschi (1924), doc. 20, pp. 17–21, at p. 18 (12.11.1201). Cf. Zabbia (2013), p. 193.

119 Zabbia (2013), pp. 196–198, looked at extant documents drafted by the same notary. The first dates to the middle of July 1201. From beginning to end, the document seems somewhat poorly drafted: the invocation is not the standard one in use at that time, and the document even lacks the notary's *signum*. Looking at a couple of documents drafted by the same hand between this first one and the one we are concerned with (two documents written in July 1202 and January 1203), it would seem that the new notary was (slowly) learning his job.

120 The notary, claimed the counsel for the defendant, 'econtra proposuit quod dictus tabellio in Pirano habetur pro tabellione, et contractus illius loci ipse scribit sicut tabellio, et instrumenta sua habent publicam auctoritatem, et ille tabellio ab eo est factus tabellio qui habet jus faciendi tabellionem.' De Franceschi (1924), doc. 20, pp. 17–21, at 18 (the same defendant insisted on the point also – and particularly – at the subsequent hearing, *ibid*., p. 19, 10.12.1201). Cf. Zabbia (2013), p. 193.

121 For a detailed discussion of these testimonial depositions see Zabbia (2013), pp. 198–206.

as the first, for at some point the bishop recused it.[122] But he had more luck with the third attempt. The bishop of Trieste, appointed by Pope Innocent III to hear the case again, proved more sympathetic to his colleague than the previous judges had been, and found against the citizens of Pirano.[123] It was now their turn to appeal. Pleading before the new judge (the bishop of Padua) the counsel for Pirano went back to the issue of the legitimate position of the notary who drafted the documents for the city. Surely the notary was a true one, said the counsel. But even if he was not, he was widely believed to be such and that would suffice – according, *inter alia*, to the *lex Barbarius*.[124] The new judge quashed both previous decisions,[125] and the dispute continued before yet another court.[126] To the disappointment of the legal historian, however, the issue of the validity of the notary's appointment no longer appears in the documents.[127] The disappointment grows more profound when we consider that one of the two new judges was probably the great canonist Huguccio.[128]

122 A first appeal was heard in July 1202 in Rialto by the Abbot of St Felice, but it would seem that at some point the appellant (the Bishop) recused the court. De Franceschi (1924), doc. 32, pp. 39–40 (9.3.1202).

123 *Ibid.*, doc. 42, pp. 50–51 (1203).

124 'Quod autem opponitur de tabellione quod non sit tabellio, Piranensibus non preiudicat, quia testibus Piranensium probatum est Dominicum tabellionem esse, et sicut tabellio instrumenta pubblica conficit, et in Pirano pro tabellione habetur … Nam tabellio est et pro tabellione habetur sufficetur enim si tamen crederetur esse tabellio, ut in Extravagantibus, De iure patronatus, Consulta(tionibus) [Comp.1, 3.33.23(=X.3.38.19)], et in Decretis III, q. VII, § Tria (C.3, q.7, p.c.1), et in ff. De officio pretoris, lex Barbarius (Dig.1.14.3).' *Ibid.*, doc. 44, p. 56 (1203). De Franceschi's transcription is slightly improved in Zabbia (2013), p. 208.

125 De Franceschi (1924), doc. 45, pp. 61–63 (18.10.1203).

126 *Ibid.*, doc. 46–50, pp. 63–67 (October 1203 to January 1204).

127 *Ibid.*, doc. 51–65, pp. 67–89 (January 1204 to October 1205). The nature of the documents (and their length) would seem to exclude possible gaps. The issue of the notary was therefore intentionally dropped. This seems to be confirmed by the fact that the new – and, it would seem, final – decision was rendered on the basis of an agreement between the parties (decison of 3.10.1205, *ibid.*, doc. 65, pp. 87–89, 3.10.1205).

128 The new court appointed by Innocent III consisted of the bishop of Chioggia (Dominicus II) and that of Ferrara, Huguccio. The thorough study of Müller seems to strengthen the possibility that this bishop was indeed the author of the *Summa*: Müller (1994), pp. 21–34. It would be interesting to know what Huguccio would have made of the argument of the notary's public fame in relationship with the *lex Barbarius* and its closest equivalent in the *Decretum*, Gratians' *dictum Tria* (on which *infra*, pt. II, §6.2, text and note 26). The two judges had more important things to do than indulging in complex legal thinking, for the indefatigable bishop had in the meanwhile first excommunicated the inhabitants of Pirano and then, just in case, also put the city under interdict.

While perhaps not everybody was as obstinate as the tithe-collecting bishop Aldericus, his case shows the increasing importance of the application of the *lex Barbarius* to the validity of notarial instruments. So far, the standard accusation was that the seal of the notary was forged – not that the seal was authentic but the notary himself was an impostor.[129] It is within this context that we should look at the approach of the Gloss to the subject.[130]

Justinian's Novel 44 prohibited notaries from letting their clerks make public instruments using their seal, but it did not sanction the infraction by declaring such instruments invalid. Because of the utility of the contracting parties, stated the Novel, the document would remain valid.[131] The Gloss observed that such practice, perhaps, might still apply in Constantinople, but surely no longer in Italy: a document drafted by someone other than the notary is surely void. However, continued the Gloss, the same public utility argument might well be invoked in favour of the instrument's validity despite the dismissal from office of the notary who drafted it, just as in the *lex Barbarius*.[132]

129 It is considerably more difficult to find such accusations before the late twelfth century. A couple of cases of the early twelfth century may however be found in Padua. They are two contracts that were both subsequently declared void. But in both cases the reason was that they had been written by a local priest (who declared himself such), not by a self-proclaimed notary. The first case (of 1100) is only briefly mentioned in the records ('cartulam inanem nullo jure munitam nulloque tabellione conscriptam ibi ostendit quam Draco presbiter jam dudum fecerat'). The second one (of 1115) is slightly more elaborate. The defendant insisted that 'prenominata capella cum omnibus predictis rebus pertineret ad ecclesiam sancte Justine de civitate Padua per cartulam unam quam dicebant Draconem presbiterum fecisse quondam.' Upon close examination, the judges pronounced the documents false: 'Tunc iudices qui ibi aderant, perceperunt eas adduci. His ductis atque relectis, retulimus eciam plures cartas incisas ad predicto Dracone conscriptas, et quam noticiam falsam appellabant.' The documents are transcribed in Gloria (1877), doc. 334, p. 356, and Gloria (1879), doc. 70, p. 57 respectively. Cf. also Zabbia (2013), pp. 194–195.

130 The following notes concern only the problem of the false notary, not also that of the (true) notary declaring something false. On the increasing awarness as to this problem among civil lawyers (especially when notarial document and witness deposition diverged) see e. g. Bambi (2006), pp. 34–35.

131 Coll.4.7.1 (=Nov.44.1§4): 'Si vero praeter hoc fiat, et alter delegetur: tunc subiaceat poenae tabellio, qui auctoritatem habet a nobis dudum definitam: ipsis tamen documentis propter vtilitatem contrahentium non infirmandis.' Cf. Ankum (1989), pp. 37–39.

132 Gloss *ad* Coll.4.7.1(=Nov.44.1§4), § *documentis* (Parisiis 1566, vol. 5, col. 225): 'hic est argumentum, imo lex expressa quod tabellio non potest delegare discipulum suum ad componenda instrumenta. Sed si fecerit instrumentum, non vitiatur, sed tabellio poenam patitur. Sed certe hoc est in Constantinopolitana ciuitate tantum. Quid autem de aliis? … Item not(andum) hic aliud optimum ar(gumentum) quod vbicunque tabellio perdit officium suum … quod

The statement is remarkably ambiguous, as it is not clear whether it refers to the validity of the instruments drafted before the dismissal of the notary or to those composed thereafter. At first, one would assume that it referred to those drafted after the dismissal. The alternative solution might appear rather plenoastic – the notary was dismissed precisely to avoid the production of further (valid) instruments. There is little need to invoke the *lex Barbarius* for what was done during time the appointment was perfectly valid. By contrast, referring to the *lex Barbarius* would make more sense if the purpose was arguing for the validity of the deeds of someone who could not lawfully make them – and so, for the instruments drafted after the notary was dismissed. Nonetheless, it is more likely that the Gloss referred to the documents already drafted before the notary's dismissal from office. The last part of the Gloss insisted on the validity of its conclusion ('hoc est verum') despite the contrary argument found in Cod.9.51.13.[133] This was a rather complex text dealing with the will made by a son-in-power when his father suffered deportation. As deportation entailed *capitis deminutio*, the son would become *sui iuris* and so could make a valid will. But if the father was subsequently pardoned and restored to his former position, then the son would return under his father's *potestas* and the will would therefore become void.[134] It is now perhaps clearer why the Gloss might have singled out this *lex* as the main argument against its conclusion on the validity of the instruments made by the deposed notary. The reasoning of the Gloss seems to be as follows. At the time when they were made, both deeds (the notarial instrument and the testament of the son *sui iuris*) were valid. But the supervening loss of legal capacity of the testator led to the invalidity of his deed. Should the same happen to the instruments of the notary when he lost his capacity to draft them?[135] The Gloss of course answered in the negative. What is noteworthy is that it did so not by remarking the substantial difference between acts *mortis causa* and *inter vivos*, but rather by insisting on the common mistake and the public utility considerations of the *lex Barbarius*. Whether because of its

non ideo debent vitiari sua instrumenta. Et facit ff. de offic(io) praet(orum) l. Barbarius (Dig.1.14.3). Et hoc est verum: arg(umentum) contra(rium) tamen est C. de sen(tentia) pas(sis) l. fina. (Cod.9.51.13).'

133 *Ibid*.

134 Or, at least, this was the interpretation of the Gloss, which noted that the text did not explain the problem of the validity of the will: Gloss *ad* Cod.9.51.13, § *In quaestione* (Parisiis 1566, vol. 4, cols. 2133–2134).

135 This seems to be also the interpretation of later jurists. Baldus, for instance, first looked at the validity of the notarial instruments already drafted by the notary who then became monk, and immediately thereafter discussed the case of Cod.9.51.13. Baldus, *ad* Cod.7.45.2, § *Si arbiter* (*Baldi de Pervsio Ivrisconsvlti clarissimi, svper VII, VIII et Nono Codicis* … Lvgdvni, typis Gaspar & Melchior Trechsel, 1539, *fol. 52va*, n. 15 and 16 respectively).

ambiguity or because of its somewhat doubtful importance (or possibly both), however, later jurists did not rely much on the Gloss' approach to the subject. When they wanted to argue that the instruments drafted after the deposition of the notary were void, they referred more often to Jacobus de Belviso (1270–1335), who repeated what Accursius had said, only more clearly.[136]

Rather than the Accursian Gloss, the starting point of later civil lawyers on the subject was typically the gloss of Azo. Azo invoked the *lex Barbarius*, with regard not to Novel 44, but to Novel 73. This other Novel was mainly devoted to proving the authenticity of a transaction. In its third chapter, the Novel dealt with the problem of diffformity between written evidence and witness report as to the content of a contract. The Gloss lingered on the probatory strength of the witnesses against that of a written instrument.[137] Azo did the same. But he also noted that the Novel's chapter referred to a judgment (on the authenticity of the signature of the witness) that occurred in a far-off place – Armenia.[138] So he also posed the question of the validity of a notarial instrument drafted in a remote land. The deed looks authentic, says Azo, but no one has ever heard of the notary who signed it. Is the form sufficient as to its validity? The question was extremely important at a time where forged instruments were the order of the day. Azo pronounced for the validity of such an instrument: if it was forged, he said, there would be many ways to prove its falsity. After all, he concluded, 'Barbarius Philippus was praetor almost in the form of a freeman, and the deeds he made were valid'.[139] Taken alone, this quotation might point to Azo's approval of a

136 Jacobus de Belviso, *ad* Coll.4.7(=Nov.44) (*Commentarii in Avthenticvm et Consvetvdines Fevdorvm*, Aureliae, 1511; anastatic reprint, Bologna: Forni, 1971): 'Item est hic argumentum quod vbicumque tabellio perdit officium suum quod est propter multas causas … quod non ideo viciari debeant sua instrumenta vt ff. de offi(cio) praeto(rum) l. barbarius (Dig.1.14.3), et hoc est verum dicit glo(sa). Sed tu dic quod instrumenta postea facta viciantur vt C. de suscep(toribus) et archa(riis) l. fi. aliquid lib. x (*sic*!) (Cod.10.72(70).15), vbi de hoc et notatur ff. de ede(ndo) l. si quis ex ar(gentariis) § i (Dig.2.13.6.1).' Belviso was only repeating what Accursius had already said, just more clearly. Perhaps because of the ambiguity of Accursius' Gloss on the point, later jurists who recalled the same issue mentioned Belviso and not the Gloss: see e. g. Albericus de Rosate, *ad* Dig.1.14.3 (*Alberici de Rosate Bergomensis iurisconsulti clarissimi … In primam ff. Veter. part. commentarij*, Venetiis, 1585; anastatic reprint, Bologna: Forni, 1974, *fol.* 70*vb*, n. 32): '… ibi loquitur in instrumentis confectis ante officium amissum, secus si postea, ut ibi per Iacob(um) de Belu(iso) uide vers(iculum) "sed quid si producitur", et uer(siculum) "et scias", et uer(siculum) "illud autem".'

137 Gloss *ad* Coll.6.3.3(=Nov.73.3), esp. § *Cum iureiurando* (Parisiis 1566, vol. 5, col. 304).

138 Coll.6.3.3(=Nov.73.3). Cf. Amelotti (1985), pp. 135–136; Ankum (1989), p. 34.

139 Azo, *Summa ad* Coll.6.3(=Nov.73) (*Azonis svmma avrea*, cit., *fol.* 323*ra*, n. 2): '… Sed quid si [tabellio] proferatur carta publica et in forma publica, et de alia terra,

document drafted by a false notary who was widely believed to be a true one. However, read within its context, its meaning would rather seem the opposite. The simple fact that the name of the notary who drafted the instrument is not familiar should not prejudice the validity of the document. After all, if even the deeds of a slave who could not have become praetor *de iure* are to be kept, then a simple doubt as to the person of the notary should not suffice to void an instrument that looks perfectly regular.

This interpretation of Azo's position finds confirmation in the *Margarita Legum* of Albertus Galeottus Parmensis (d. *post* 1272), which was normally used to interpret Azo's remarks on the notary. Although not specifically concerned with the *lex Barbarius*, we might want to look at it briefly. Generally speaking, Galeottus' stance on the validity of notarial instruments was rather strict: even when an omission was dictated by necessity, he maintained, it would still invalidate the instrument.[140] It is important to keep this in mind when looking at his application of the *lex Barbarius* to the case of the notary. Galeottus did not invoke Barbarius' case to argue for the validity of the instruments of a false notary. Building on Azo, he only wondered whether common opinion could make up for the lack of evidence as to the notary's appointment. The problem was the same as in Azo. And the conclusion was not dissimilar either: in the absence of evidence as to the lawful appointment of the notary who drafted a document, the fact that he exercised his office publicly is evidence enough.[141] Thus the common opinion as to the notary's status suffices to argue for the validity of his deeds – but not of course to create him notary. As with Azo, Galeottus relied on the *lex Barbarius* only to make up for the lack of evidence as

> vnde non cognoscitur qui scripserit? Respondeo ei esse standum, si appareat in publica forma esse facta, non vitiata in aliqua parte sui: vt C. de edi(cto) diui hadr(iani) tol(lendo) l. fin. § i (Cod.6.33.3.4) ibi, qui ad hoc obijcit, probet contra: vt C. de probatio(nibus) l. sciant (Cod.4.19.25). Item videtur hec questio expediri, C. quemadmo(dum) test(amenta) aperian(tur) l. ii (Cod.6.32.2). Nec obstat quasi quilibet possit hec conficere, quia multis modis falsitas sua reconuincetur vt i(nfra) eo (titulo) § si tamen quisquam in fi(ne) (Coll.6.4). Item barbarius philippus quasi in forma liberi hominis fuit pretor, et valuerunt gesta per eum: vt ff. de offi(cio) pretoris l. barbarius (Dig.1.14.3).'

140 'Sed quid si aliquid ex necessitate omittat nunquid uiciatur instrumentum? Dic quod sic. Et ad hoc ff. de int(egrum) rest(itutione) l. diuus (Dig.4.1.7) et ff. de transact(ionibus) l. cum hii (*sic*) § si pretor (Dig.2.15.8.17)', Madrid, BN 824, *fol.* 38*va*; BNF Lat. 4489, *fol.* 112*vb*.

141 'Sed quid si non constet eum esse tabellionem qui dicitur confecisse instrumentum? Dic quod si publice exercebat officium illius erit ei habenda fides, ut ff. de off(icio) p(raetorum) l. barbarius (Dig.1.14.3) et dic ut ibi no(tat) az(o) in summa C(odicis) § in aut(hentica) (Coll.6.3[=Nov.73.3]).' Madrid, BN 824, *fol.* 38*va*; Paris, BNF Lat. 4489, *fol.* 112*vb* (the latter manuscript mistakenly refers to Accursius instead of Azo).

to the valid appointment of the notary, not to argue for the validity of his deeds in the absence of a valid appointment. While Galeottus approved of Azo's reasoning, he was less persuaded as to its scope. Notoriety may well make up for lack of evidence as to the valid appointment, so long as the problem arises where the notary is well known. But it remains only a probatory element. Invoking that notoriety elsewhere, in a place where the notary is quite unknown, would make considerably less sense. The notary might well be known in a region, and that is sufficient evidence of his appointment. If however the notarial deed is produced in a different region, *pace* Azo, it is far less clear whether the common opinion could support its validity. Because the *lex Barbarius* was invoked not to replace the requirement of a valid appointment but only to prove it, reasons Galeottus, the strength of common opinion as to the notary's appointment becomes considerably reduced when invoked elsewhere.[142] This opinion might have been quite widespread, as it is attested also in Belviso.[143]

142 'Sed pone questionem de facto. Quidam producebat instrumentum in alia prouincia factum nunquid erit ei fides adhibenda? No(tat) az(o) in summa C(odicis) aut(entica) de fide instrumentorum (Coll.6.3[=Nov.73]) quod sic et ad hoc C. quemadmod(um) te(stamenta) aperi(antur) l. ii (Cod.6.32.2). Alii contrarium in fi(ne) [*scil*., of the same Cod.6.32.2] constet illum in sua prouincia exercere officium ut in predicta l. barbarius', Madrid, BN 824, *fol.* 38*va*; Paris, BNF Lat. 4489, *fol.* 112*vb*. The reference to Azo is not in the Parisian manuscript (as it was not a few lines above: *supra*, last note). The Madrid manuscript however omits the reference to the Authentica *De fide instrumentorum.*

143 Belviso, *ad* Coll.6.5(=Nov.73.5) (Belviso, *Commentarii in Avthenticvm*, cit., *fol.* 45*rb*): 'Queritur quarto quid si prefertur charta publica et in forma publica et de alia terra in loco vbi non cognoscitur qui scripsit an presumendum sit pro carta. Respondeo vt in summa huius ti(tuli) vbi hec questio formatur. Ei standum esse si appareat in publica forma esse factum non viciatum in aliqua parte sui, vt C. de edic(to) diui adria(ni) l. fi. § i (Cod.6.33.3.1) … Item barbarius quasi in forma liberi fuit pretor et valuit vt ff. de offi(cio) preto(rum) l. barbarius (Dig.1.14.3) … Contra hoc videtur aperte vt s(upra) e(odem titulo) § si vero moriantur (Coll.6.5.7[=Nov.73.7]), vbi dicitur simpliciter quod si tabellio non superest … Item non obstat l. barbarius quia ibi fuit communis opinio, que facit ius. Sed in casu nostro nulla erat opinio per instrumento in loco producti instrumenti apud homines nisi quatenus ex ipsa scriptura demonstrabatur.'