Chapter 7

Innocent IV and toleration

The turning point in the interpretation by civil lawyers of the *lex Barbarius* came with their reception of the position of Sinibaldus de' Fieschi (c.1195–1254), from 1243 Pope Innocent IV. This is why we have to look at Innocent IV in far greater detail than the previous canonists.

Until the early thirteenth century, as we have just seen, canon lawyers developed the concept of toleration in an ecclesiological context, with occasional references to the non-justiciability of occult sins. It was within this concept that they looked at the *lex Barbarius*, whether in its original form in the Digest or through the mention of slave-arbiter in Gratian's *dictum Tria*. Nonetheless, the idea of toleration remained a somewhat vague concept, as the decretists agreed on neither its scope nor its exact meaning. In its vague shape, this concept could not be applied to strictly legal issues, whether of canon or civil law. The vague treatment of the concept of toleration entailed a similarly vague approach to the *lex Barbarius*. This is why Innocent IV is so important for our purposes: no other medieval canon lawyer – whether earlier than, contemporary with or later than Innocent – insisted so much and with such precision on the meaning, working and scope of the concept of toleration. Innocent IV explained the concept of toleration in terms of legal representation. This allowed him to give a precise and legally minded interpretation of the idea of toleration and, in so doing, to widen its scope considerably.

7.1 Confirmation and toleration

To understand Innocent's approach to the subject we have to look throughout his entire commentary on the *Liber Extra*. He did not provide a definition of the concept of toleration, but rather applied it to a variety of specific cases. One of the clearest statements on the subject is to be found in his comment on X.1.6.44. There, Innocent distinguishes between the case in which one receives valid authority but then ought to be dismissed from office and that where one has never received any valid authority. In the first case his acts are valid so long as he remains vested with his office. Remaining vested with the office from which one ought to be dismissed is tantamount to being tolerated in it:[1]

1 Innocent IV, *ad* X.1.6.44, § *Administrent* (*Commentaria Innocentii Quarti*, cit., *fol.* 74*vb*, n. 3): 'omnes qui habuerunt canonicum ingressum, licet post fiant

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> What is done by those who entered lawfully in their office is to be kept, even if subsequently they turn into heretics or simoniacs – so long as they are tolerated.

Before looking at the issue of toleration, we must first understand the precise meaning of entering lawfully into office for Innocent IV. In order to have *canonicum ingressum* in a dignity, for Innocent it was necessary to be both appointed and confirmed in it. For our purposes it is very important to stress the element of confirmation: as we shall see, it was crucial in Innocent's interpretation of the *lex Barbarius*. The confirmation ratified the appointment, and especially the election.[2] The higher the office, the more canon lawyers discussed the element of confirmation and highlighted its importance.[3] Innocent insisted on the point more than most canonists: the elected cannot administer until confirmed in his office.[4] But the pope went further than that.

For Innocent the confirmation of the elected by the superior authority is not only necessary, but it may even heal the defect in the election. This happens not only in general terms, when there is some irregularity in the election,[5] but even for simony.[6] It does not of course apply only to high offices such as the episcopal

haeretici, vel simoniaci, ratum est quod fit ab eis quousque tolerantur, ut in d. c. nonne (C.8 q.4 c.1), *infra*, de do(lo) et contu(macia) <c.>veritatis (X.2.14.8).'

2 See for all Gaudemet (1979), pp. 159–166.

3 See the classical study of Benson (1968), esp. pp. 60–149.

4 See esp. Innocent IV, *ad* X.1.6.15, § *Confirmationem* (*Commentaria Innocentii Quarti*, cit., *fol.* 46*rb–va*, n. 1). It should however be added that if the elected starts to administer before being confirmed, then confirmation is presumed. The issue was more procedural than substantive: a problem would typically arise only when the elected was challenged by a previous occupant of the same office. See Id., *ad* X.1.6.15, § *Confirmationem* (*ibid.*, *fol.* 46*va–b*, n. 2): ' Vel potes dicere, et melius, quod isti sic electi et confirmati, per se omnia bona ecclesiarum suarum, vel dignitatum, vel praebendarum suarum, si non habent contradictores, possunt sua authoritate occupare … Si vero non habeant contradictores, non tenentur aliquid probare de iustitia confirmationis, nec tenentur probare aliquid de iustitia electionis, et hoc ex eo apparet, scilicet, quod illi qui tenent bona ecclesiae, alias non debent res suas sibi restituere, nisi probent suam confirmationem tenere, quia si praedicti electi, id est, confirmati, non essent praelati, vel nisi tuitione confirmationum defenderetur, isti non liberarentur eis solummodo inuestitis.'

5 Id., *ad* X.1.6.44, § *Administrent* (*ibid.*, *fol.* 75*rb–va*, n. 4): 'Nec repellitur talis ab agendo huiusmodi exceptione, quod non sit Episcopus, sed fur, quia non intravit per ostium canonicae electionis, cum ipse et omnia gesta eius tolerat authoritate, et intentione confirmationis.'

6 *Ibid.*, *fol.* 75*rb–va*, n. 4–5: 'si autem non sit intrusus sua autoritate, sed confirmatur per superiorem cum ex confirmatione potestatem recipiat administrandi sup(ra) eodem [titulo] l. praealle(gata) transmissam (X.1.6.15) sive canonica fit electio, sive non, etiam si sit simoniacus in ordine, et in ipso beneficio tenebit, quicquid cum eo fit, et ratione officii ratum est 19 di. <c.> secundum (D.19, c.9) et est verum hoc quandiu toleratur 8 q. ulti. <c.> nonne (C.8 q.4 c.1) … Item

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one. For instance, after stating that the acts of anyone who had acquired an office by using violence must be retracted,[7] Innocent IV carves out an exception for a case where such an office holder was then confirmed in the role.[8] Although the pope implies as much more often than he states it expressly, it should be noted that Innocent considers the confirmation as curing the invalidity of the election only if the superior proceeds with full knowledge of the underlying defect.[9] This means that, prior to confirming the election, the superior authority must enquire as to both the election and the person elected, lest the confirmation itself be void.[10]

If however the election is invalid because the irregularities in the election are such as to void it, the confirmation cannot replace the election itself. So it is necessary that, when the superior authority ratifies an invalid election, the electors must still be of the same mind about the elected ('durante voluntate eligentium').[11] The perduring will of the electors is necessary because, in principle, an utterly void election may not be confirmed.[12] If the appointment is confirmed, says Innocent, the unworthy is to be tolerated in his office. What does this mean exactly?

obiicitur, si est simoniacus, ergo est suspensus ab officio, et administratione ipso iure: ut not(atur) *infra*, de simo(nia) <c.> per tuas (X.5.3.35) ergo non valent, quae cum eis fiunt, vel saltem excipi potest. Respon(deo) licet sit suspensus a iure, tamen facta eius defenduntur authoritate confirmationis.'

7 Id., *ad* X.2.13.5, § *In literis* (*ibid.*, *fol.* 226*va–b*, n. 1).

8 *Ibid.*, *fol.* 227*va*, n. 5.

9 Id. *ad* X.1.6.32, § *Confirmauit* (*ibid.*, *fol.* 63*ra*, n. 1): 'confirmatio electionis tenet etiam si electio fit nulla, dummodo fiat ex certa scientia confirmationis, et durante voluntate eligentium.' Cf. Agostinelli (1920), p. 53.

10 Innocent IV, *ad* X.1.6.32, § *Confirmauit* (*Commentaria Innocentii Quarti*, cit., *fol.* 63*rb*, n. 2): 'Item confirmatio semper fieri debet cum causae cognitione, scilicet vt semper inquiratur de forma, et processu electionis, et de persona electi. inf(ra) eo (titulo) <c.> nihil (X.1.6.44) et nisi inquiratur non valet confirmatio, arg(umentum) prae(dictae) decre(talis) nihil, ff. de transact(ionibus) <c.> cum hi § si praetor (Dig.2.15.8.17).'

11 *Supra*, this paragraph, note 9.

12 Innocent IV, *ad* X.1.6.32, § *Confirmauit* (*Commentaria Innocentii Quarti*, cit., *fol.* 63*rb*, n. 3). The position of the electors becomes particularly important when the confirmation is not made with full knowledge of the underlying defect in the election. In this case, if the electors ordinarily ('de iure communi') lack the power to elect, the burden of proof as to the validity of the election is on the elected: Id., *ad* X.5.30.3, § *Licentia* (*ibid.*, *fol.* 523*rb*, n. 1): 'In electione autem, si constet eam factam per eos, ad quos non spectat de iure communi, semper ante confirmationem, *et post confirmationem facta sine causae cognitione* oportet electum probare potestatem datam electoribus' (emphasis added).

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7.2 Toleration and representation

We have seen that the idea of toleration of the unworthy has a complex history. Declaring that the acts of the unworthy but lawful holder of an office are valid so long as he is is tolerated in that office was a statement sufficiently accepted (though not unanimously) among canon lawyers, who discussed it extensively in relation to the distinction between the sacramental and jurisdictional acts of the clergy, especially of the heretical bishop. In his extensive commentary on the *Liber Extra*, Innocent IV refers to such earlier discussions only sporadically. One case is to be found, revealingly enough, in the title on the excommunicated, deposed or interdicted cleric who continues to celebrate sacraments (*De clerico excommunicato, deposito vel interdico ministrante*, X.5.27):[13]

> Others say, and more correctly so, that whether one is good or bad, even heretic or excommunicated, so long as tolerated by the Church through his election and confirmation – even if that were to take place among sinners and even among heretics or excommunicates –, in that he is tolerated, he validly enters into his spiritual wedlock [*scil*., with the church] until the chaff be separated from the wheat.

For Innocent IV the legal mechanism through which the toleration principle operates (and so the reason why the unworthy may exercise valid authority so long as tolerated in office) ultimately depends on legal representation. The starting point is rather obvious, but extremely important: the acts done by the person in the exercise of his office are effectively imputable to the office, not to the person. Hence, the legal effects do not flow from the person, but rather from the office he holds. We have already seen some hints of this idea as early as in Paucapalea.[14] But in the century between Paucapalea and Innocent, such hints still lacked any legal ground: neither Paucapalea nor those who followed him associated toleration with legal representation, but considered it a practical application of ecclesiological principles. What Innocent did was to build extensively on these hints, so as to provide a solid – and, especially, legal – basis for the concept of toleration:[15]

13 Id., *ad* X.5.27.10, § *Irritanda* (*ibid*., *fol.* 522*rb*): 'Alii dicunt, et vt videtur melius, quod siue bonus, siue malus etiam haereticus, vel excommunicatus, dum toleratur ab ecclesia per electionem, et confirmationem, etiam si fiat a peccatoribus, etiam ab haereticis vel excommunicatis, dummodo tolerantur, bene contrahit in huiusmodi matrimonio spirituali, quousque separetur palea a granis.'

14 *Supra*, last chapter, notes 29 and 30.

15 Innocent IV, *ad* X.5.39.34, § *Circa temporalia* (*Commentaria Innocentii Quarti*, cit., *fol.* 552*ra*, n. 3): 'Item dum tolerantur in aliqua dignitate, et sint occulti, non nominatim excommunicati: satis videtur quod possint excommunicare, beneficia conferre, literas impetrare, quia haec, ipsa dignitas facere videtur, et non persona excommunicata 8 q. 4 <c.> nonne (C.8, q.4, c.1).' Cf. Fedele (1936), pp. 341–345.

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> While tolerated in some office, the occult excommunicate may well excommunicate, grant benefices and receive petitions, for it is not the person of the excommunicate who does so, but rather his office.

This text is typical of Innocent: concise and perfectly logical one the one hand, extremely bold in its legal consequences on the other. The text presupposes a thorough separation between the person and the office, and applies the toleration principle on the basis of such a separation. So long as the incumbent continues to validly represent his office (or rather, so long as the office is considered to act validly through the person who represents it) the condition of the person itself is irrelevant as to the validity of the acts done by the office through him.

Representation should be viewed within corporation theory. By and large, the discussion of canon lawyers focused on the corporation's decision-making process and on the scope (and limits) within which its representative could validly act on its behalf.[16] The contribution of Innocent IV to this subject was extremely important and is well known.[17] Most studies on the development of

16 On the subject the literature is wide. To give only a few references, the obvious starting point is the work of Tierney (1998), pp. 98–117 (among the previous studies of the same author, see esp. Tierney [1951], pp. 420–426). See also the classic studies of Congar (1958), pp. 210–221 and 224–234, Post (1964), pp. 91–162 and Padoa Schioppa (1976), pp. 117–123. More recently see also Pennington (2004), pp. 365–375.

17 See esp. Melloni (1990), pp. 101–131, with ample literature, esp. at pp. 102–106 (and, in the introduction, at p. 13, note 14); Melloni (1992), pp. 290–298. The author has published a small part of his work on Innocent's approach to corporation theory in English: Melloni (1986), pp. 188–193. Cf. Tierney (1998), pp. 99–108, and, more recently, Walther (2005), pp. 203–206. See also Panizo Orallo (1975), pp. 227–342. For a short and clear summary of Innocent's ideas see Ruffini (1936), pp. 13–20, and more recently Bueno Salinas (1985), pp. 17–24. What has attracted most attention of Innocent IV's corporation theory was the ambiguous meaning of the expression 'fingatur una persona': see esp. Innocent's comment on X.2.20.57(=VI.2.10.2), § *in animas* (*Commentaria Innocentii Quarti*, cit., *fol.* 270*vb*, n. 5). Innocent's concept of *persona ficta*, from Girke onwards, triggered a vast debate. As it is well known, Gierke had his own reasons to criticise Innocent and the whole concept of corporation in canon law. Beyond the discussion of the precise meaning of *persona ficta*, Innocent IV's concept (and institutionalisation) of corporation was in effect the very opposite of Gierke's idea of Germanic corporation as voluntaristic and especially bottom-up collectivity. Cf., among the more recent contributions, Tierney (1998), pp. 91–95; Walther (2005), pp. 209–210; Meder (2015), pp. 54–59. Progressively the debate shifted from the dialectic between Germanistic and canon law concept of corporation towards the precise meaning of legal person in Innocent. If ideology played a comparatively lesser role, nonetheless also this second 'phase' of the debate would appear (of course, with the benefit of hindsight) somewhat artificial, as it moved from the implied premise that subsuming the medieval

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corporation theory among canon lawyers, however, overlooked the interaction between toleration and representation. This is probably because such interaction operates at a deeper level, and does not usually affect the capacity of the representative to express the will of the corporate body. The exercise of jurisdiction may affect the corporation when the representative decides something on its behalf. But when the prelate exercises his jurisdiction not as a representative of a specific corporate body but just as a prelate, he is expressing his own will and not that of a specific corporation. Scholars have therefore focused exclusively on the representation mechanism occurring between *universitas* and the physical person. The point however is that, for Innocent, whenever a prelate exercises any jurisdictional power he is always representing an office – because, as a private person, he would have no jurisdiction. As such, the mechanism of representation operates both when the prelate acts on behalf of a corporation and when he exercises the jurisdiction pertaining to his own office. In both instances Innocent vests the representative with the office. The issue of whether and to what extent the prelate needs the consent of the chapter to act (and so, the limits of the *generalis administratio* of the *procurator*), therefore, does not shed full light on the different problem of the relationship between incumbent and *officium* but remains somewhat external to it, as it deals with the external limits of the exercise of such an *officium*, not on its internal working.

7.3 Scope of toleration

For Innocent IV, legal representation entails the functional identification between person and office: in the execution of his office, the person is the office.[18] So long as this identification holds, the office acts through the person.

canon law approach within the geometrical boundaries of modern legal categories was not only possible but even desirable. As Feenstra put it, 'le mot *fingere* a eu sans doute chez les décrétalistes un tout autre sens qu'il ne l'avait chez Savigny et tant d'autres auteurs modernes'. Feenstra (1956), p. 413. See further Michaud-Quantin (1970), pp. 206–211; H. Hofmann (1974), pp. 132–134; Becker (2000), pp. 111–113. For an overview of the different interpretations see Panizo Orallo (1975), pp. 379–387, Rodriguez (1962), pp. 309–312, and esp. Melloni (1990), pp. 116–125.

18 Cf. Tierney (1998), pp. 122–123; cf. *ibid.*, p. 85. It is not fortuitous that, in his discussion of corporation in medieval canon law, the same Tierney focuses considerably more on Hostiensis than Innocent IV (*ibid.*, pp. 99–108). With regard to corporations, this functional identification between prelate and office in Innocent IV has been studied mostly with regard to the passages where the pope would appear to deny any residual jurisdiction of the ecclesiastical corporation (Innocent IV, *ad* X.1.2.8, § *Cum accessissent*, esp. § *Sedis*, and *ad* X.1.3.21, § *Teneatur* [*Commentaria Innocentii Quarti*, cit., *fol.* 4*ra–b*, and *fol.* 19

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No matter how unworthy the person may be, his acts are valid because they are done by the office – not by the private person who represents it. The representation mechanism, therefore, provides both the rationale and the boundaries of the toleration principle. Without proper representation, there cannot be toleration. When this identification between person and office does not hold, the legal incapacity of the person precludes the validity of his acts. This is the case, for example, of a person acting as just a member of a collegiate body. There, it is not the single individual who holds the office, but rather the collegiate body itself. In this regard, Innocent provides an example specifically dealing with the concept of toleration. An excommunicate may be suffered in his office as canon of a cathedral chapter.[19] But when the chapter makes an election and this canon takes part in it, the election is invalid. For the toleration principle refers to the office, and in this case the office does not belong to the canon, but rather to the cathedral chapter itself.[20] When on the contrary a single person represents the office, then office and person coincide. Whether the person is worthy of his office or not, so long as the office operates through him, the deeds will be valid. Clearly, this does not amount to approving of the person as an individual, but focuses on that person only as representative. Representation provides the legal basis for toleration.

As already stated, what is tolerated is not the unworthy condition of the person (whether moral, legal or typically both), but rather his holding of the office despite his personal unworthiness. This is why the toleration principle operates only in favour of those who hold public office, and only to the extent of its exercise. To appreciate the link between excommunication, public office and the validity of the acts in Innocent's thinking we may first look at the different

ra–b, n. 4 respectively]). See for all Tierney (1998), pp. 98–99. For a simple introduction on the point see the classical study of Gillet (1927), pp. 128–140, and 163–168. Cf. Rodriguez (1962) pp. 305–307; Panizo Orallo (1975), pp. 297–299; Melloni (1990), pp. 109–110; Brundage (2013), pp. 101–102.

19 For a short introduction on the concept of *capitulum* see first of all the works of Michaud-Quantin (1970), pp. 82–90.

20 Innocent IV, *ad* X.1.4.8, § *Suspensus* (*Commentaria Innocentii Quarti*, cit., *fol.* 34*rb*, n. 5): 'Vnde si canonici excommunicati, vel suspensi eligant licet tolerentur, et etiam non sunt nominatim excommunicati vel suspensi, tamen excipi potest contra personas eorum, C. de ori(gine) iur(is) l. i (*rectius*, Dig.1.2.1) et cassatur quod fit ab eis, quia non dicitur quilibet canonicorum habere publicum officium, sed capitulum potest dici habere publicum officium in electione et aliis, quae ad illud pertinent.' Other canon lawyers remarked the invalidity of the deliberation of the chapter, but did not put it in relation to the absence of representation mechanism. See e. g. Abbas Antiquus (Bernardus de Monte Mirato, c.1225–1296), *ad* X.2.27.24, § *Ad probandum* (*Lectura Aurea Domini Abbatis Antiqui super quinque libris Decretalium*, Argentine [Johannes Schott], 1510; anastatic reprint, Frankfurt am Main: Vico Verlag, 2014, *fol.* 128*rb*).

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effects of excommunication on a person *qua* legal representative and on a person *qua* private individual. When Innocent IV sought to limit the effects of excommunication in his decretal *Pia* (VI.2.12.1), he ultimately followed the same rationale: public excommunication severs any link between the office and the person, but does not necessarily affect the acts made by the excommunicate as a private person.[21] Elsewhere, commenting on a decretal of the previous Innocent on the Petrine chair (Innocent III), he was even clearer on the point. The person who is publicly excommunicated, says Innocent IV, is suspended from office, so he cannot exercise it. It follows that he is prohibited from exercising any act pertaining to it. While he may not alienate ecclesiastical goods (for he cannot adminster the Church's estates), he may still validly dispose of his own property. Indeed, continues Innocent IV, such an excommunicate may even do the same for other people as their mandatee, for any contract that he makes as a private person remains valid.[22]

The difference between individual and representative can be better appreciated by looking at the legal effects of a judicial condemnation. When the legal effects are such as to preclude the validity of any further act of the person, those acts will be invalid. However, this does not apply if the condemned person holds an office. In such a case, argues Innocent, so long as he is tolerated in his office he will be able to act validly:[23]

21 Innocent IV, *Apparatus* on decretal *Pia* (=VI.2.12.1), § *Duraturis*, recension 2 (Vodola [ed., 1986], pp. 211–12, ll.50–57): 'Sed hec est differentia inter ea que aguntur extra iudicium et ea que aguntur in iudicio: quia ea que aguntur in iudicio ualent, et ea que aguntur extra iudicium non ualent, ut instrumenta et huiusmodi que fiunt ex officio publico, si est sententialiter dampnatus. Licet aliqui contradicant. Si autem sint talia que non aguntur ex officio publico, ut emptio, contractus, et huiusmodi, illa ualent etiam si publice et solempniter sit excommunicatus, ut not(tatur) supra de dol(o) et contum(acia) <c.> Veritatis (X.2.14.8), et *infra* eodem t(itulo) <c.> Exceptionem (X.2.25.12).' On Innocent's position in the decretal *Pia* see the same Vodola (1986), pp. 88–92.

22 Innocent IV, *ad* X.2.14.8, § *Excommunicationem* (*Commentaria Innocentii Quarti*, cit., *fol.* 240*vb*, n. 1): 'excommunicatus enim cum suspensus sit, et administrare non possit, alienare res ecclesiae non potest, quod intelligendum viditur de nominatim excommunicatis et publice … Item res suas vendere, donare, et alias emere potest, id est, teneret contractus si faciat 11 quaest. 3 <c.> quoniam mul(tos) in fin(e) (C.11, q.3, c.103) et expressius infra, de sen(tentia) exc(ommunicationis) <c.> si vere (X.5.39.34) ubi dicitur, quod etiam novos contractus cum eis inire licet, et forte constituat procuratorem ad negotia, oritur inter eos actio mandati, non enim invenimus huiusmodi contractus censeri nullos a iure.'

23 Id., *ad* X.5.1.24, § *Et famam* (*ibid.*, *fol.* 495*vb*, n. 10): 'Item nota quod sententia lata, statim sortitur quosdam effectus. Verbi gratia, si talis sit poena imposita, quae libertatem aufert, ulterius eius testimonium non valet, nec aliquid ex testamento capiet … Sed non idem dicimus in his, quae ratione officii facit, puta

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> Also note that a judicial decision produces immediately some effects. For instance, if the imposed penalty is such as to deprive one of his freedom, then his testimony will no longer be valid, nor he will be able to receive anything from a will … But this does not apply to what is done in the exercise of an office – say, if one is a prelate and renders a judgment. In such a case, the acts will hold so long as he is tolerated (as in C.8, q.4, c.1) … Anything is tolerated because of the office that one exercises (as in D.19, c.8 and in Dig.1.14.3)

It follows that the only way to prevent the validity of any further act done by the holder of an office is to issue a condemnation in order to specifically depose him from his office:[24]

> but if a legal decision deposes him or deprives him of the marks of his office, then the judgment rendered by this prelate is void (as in Dig.3.2.2.2 and Dig.5.1.12pr). Nor could it be said that he is tolerated; he should be rather called intruder. We believe, however, that if one is condemned of a crime, either in a civil or a criminal judgment, then his bishop or prelate may deprive him of his benefice (as in C.2, q.1, c.18), but he has to summon him and render a judgment against him – if he appears in court. If he does not appear, his bishop or prelate will condemn him in the same way, for the crime ascertained by legal judgment is notorious.

In other words, it is necessary that the prohibition to exercise an office be the direct effect of a specific legal decision issued to deprive someone of his office. It is not sufficient that the deposition is just an indirect effect of the condemnation. For it is only in the first case that the person is thoroughly severed from the office, so that the representation mechanism ceases altogether to apply. The point is further discussed in Innocent IV's comment on another decretal of Innocent III, *Literas vestras* (X.3.8.9). After observing how an ecclesiastical prebend ought not to be conferred on someone while still in someone else's possession (for that would trigger litigation and animosity), Innocent IV examines the relationship between the prebend (and especially the office associated with it) and its current possessor. Since the latter no longer has a valid title (having lost it *ipso iure*), he

> si sit praelatus et sententiam ferat, tenebit quamdiu toleratur, 8 quaest(io) quarta <c.> nonne (C.8, q.4, c.1) … omnia enim tolerantur propter officium, quod administrat, scilicet 19 distin. <c.> secundum (D.19, c.8) ff. de offic(io) praeto (rum) <l.> Barbarius (Dig.1.14.3).'

24 *Ibid., fols. 495vb–496ra*, n. 10: '… nisi esset in eum lata sententia depositionis, vel spoliatus esset insignibus dignitatis, tunc enim sententia a tali praelato lata, non tenet ff. de his qui no(tantur) infam(ia) l. secunda § igitur [*sed* 'ignominiae', Dig.3.2.2.2], ff. de iudi(ciis) <l.> cum praetor (Dig.5.1.12pr) nec potest dici, quod toleretur, sed intrusus dicitur. Credimus tamen, quod ex quo sententia de aliquo crimine lata est contra aliquem sive criminaliter, sive civiliter agitur, quod episcopus vel praelatus suus potest eum spoliare beneficiis, quod sub eo habet, 2 q. 1 <c.> multi (C.2, q.1, c.18) tamen debet eum vocare, et contra eum sententiam ferre, si invenietur, et si non inveniatur, eodem modo damnabit eum, quia notorum est crimen per sententiam.'

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now possesses it only *de facto*. *De iure*, the prebend is vacant and may be assigned to another. Nonetheless, the possessor was formerly elected and confirmed in the office associated with the prebend: if he continues to exercise it, his acts may be still imputed to the office. To fully sever the relationship between person and office, it is therefore necessary to remove him with a legal decision.[25]

For Innocent, only the legal deposition, or the notoriety of the crime (to which we shall come back), may fully sever the person from his office. This is why Innocent often remarks that, so long as the excommunication remains occult, the excommunicate can validly exercise his office without restriction of any sort. This principle extends also to feudal relationships. The manifest heresy of the lord releases his vassals from their duties towards him.[26] However, Innocent IV argues, one is not solved from one's duties to a lord who is an occult heretic: so long as his heresy remains occult, this heretic lord is to be fully tolerated in his position.[27]

We have seen how the emersion of the legal features of the concept of toleration are strictly associated with the progressive separation between the sacramental and the jurisdictional sphere. The ambiguities in the elaboration of the concept of toleration that we have so far encountered are fundamentally due to the lack of full separation between the two spheres. By contrast, the clarity of Innocent IV on the subject of toleration ultimately depends on the complete separation of jurisdictional powers from sacramental ones.

Excommunicating and absolving from the excommunication are – in principle – both jurisdictional acts. On the point there was little doubt among canon lawyers.[28] But only Innocent IV used this division to argue that an occult

25 Id., *ad* X.3.8.9 (*ibid.*, *fol.* 377*rb*, n. 2): 'Plus placet, quod ideo dicitur vacare de iure, quia in veritate praelatus non est: vt not(atur) sup(ra) de elec(tione) <c.> cum dilectus (X.1.6.32). De facto tamen non de iure est praelatus vel canonicus, quia eius electio est confirmata, vel de eo prouisum per eum, ad quem pertinet collatio, et ideo tenent, et valent, quaecumque eo fiunt nomine dignitatis suae, vel praebende. ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3), et ideo necessaria est amotio sententialis.'

26 Cf. X.5.7.16: 'Absolutos se noverint a debito fidelitatis et totius obsequii, quicunque lapsis manifeste in haeresim aliquo pacto, quacunque firmitate vallato, tenebatur adstricti …'

27 Innocent IV, *ad* X.5.7.16 § *Manifeste* (*Commentaria Innocentii Quarti*, cit., *fol.* 507*vb*): 'Secus si occulte, arg(umentum) s(upra) simo(nia) c. vlt(imo) (X.5.3.46) 11 q. 3 c. 3 et c. Iulianus (C.11, q.3, c.3 and c.94) ibi loquitur de apostata tolerato.' Cf. the Ordinary Gloss to the *Liber Extra*, *infra*, next chapter, note 5.

28 E. g. Gloss *ad* X.1.6.15, § *De talibus* (*Decretalium domini pape Gregorij noni compilatio*, cit.): 'Scilicet pertinentibus ad iurisdictionem: puta sicut est iudicare excommunicare corrigere iuramenta recipere a vassallis confirmare inuestire beneficia proferre et consimilia … Bern(ardus).' Innocent's clearest statement

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excommunicate could validly excommunicate.[29] We have seen how problematic such a case was for earlier decretists. For Innocent, on the contrary, it is a direct consequence of the toleration principle, which entails that the tolerated may validly exercise all the jurisdictional prerogatives related to his office.[30]

Innocent goes even beyond that, and extends the same rationale to simony. If his simony is occult, says Innocent, a prelate who ought to be suspended from his office may be tolerated in it.[31] The toleration of the Church entails the validity of the simoniac's discharge of his office in any jurisdictional (and so, to use a modern term, also administrative) matter.[32] Innocent's position on the scope of the toleration principle depends on its rationale. Its extension to the case of simony was consistent with it, but that did not make it any less daring – very few canonists would have argued as much.[33] Nonetheless, as we shall see, Innocent really meant as much.

Another important occasion where Innocent draws a sharp line between occult and manifest crimes entailing the deposition from office, invoking the

on the point may be found when discussing about lifting the sentence of excommunication, *ad* X.5.31.18, § *Violare* (*Commentaria Innocentii Quarti*, cit., *fol.* 527*vb*, n. 3): 'Absolvere autem excommunicatum per sententiam non est ordinis, sed iurisdictionis, sicut excommunicatio 2 q. 1 <c.> nemo (C.2, q.1, c.11) sed absolutionis solennia exhibere, sicut est dicere orationes cum stola et psalmum poenitentialem (*sic*), et in ecclesiam introducere ordinis et officii est.'

29 Innocent IV, *ad* X.5.39.34, § *Circa temporalia* (*ibid., fol.* 552*ra*, n. 3): 'nec ob(stant) 24 q. 1 c. 2 et 3 (C.24, q.1, c.2–3), vbi dicitur, quod excommunicatus non potest excommunicare: quia ibi loquitur de nominatim excommunicato, etiam non tolerator (*sic*).' See also *supra*, this chapter, note 15.

30 The difference with previous canon lawyers also depends on Innocent's more careful and in-depth analysis of the very concept of jurisdiction: see e. g. Legendre (1964), p. 123.

31 Innocent IV, *ad* X.5.3.35 § *Secure ministret* (*Commentaria Innocentii Quarti*, cit., *fol.* 502*va*, n. 3): 'occultus autem simoniacus in beneficio quamvis non sit suspensus ipso iure, sed suspendendus 1 q. 3 c. 1 2 et 3 (C.1, q.1, c.1–3).'

32 '… omnia quae faciunt administrando temporaliter tenent, quousque ab ecclesia tolerantur', Id., *ad* X.5.3.35, § *Vitium simoniae* (*ibid., fol.* 502*va*, n. 2).

33 Just by way of example, Teutonicus criticised Huguccio for arguing that the priest ordained by a simoniac would retain the power of *ordo* – implying that any power related to *iurisdictio* was all the more to exclude. Innocent went far beyond Huguccio: the pope was adamant in stating that the simoniac not only retains *ordo* (e. g. Id., *ad* X.5.8.1, § *Irritas*, *ibid., fol.* 508*va*, n. 4) but, so long as tolerated, he would also keep *iurisdictio*. Cf. Teutonicus' apparatus on the *Compilatio tertia, ad* Comp. 3, 5.2.7(=X.5.3.35), § *Ex relatione*: '… Huguccio tamen dicit quod licet quis scienter recipit ordinem a symoniaco, tamen quamdiu toleratur, confert uera sacramenta, arg(umentum) xv q. ult. c. ult. (C.15, q.8, c.5) sed ei obuiat quod hic dicitur et xxiii q. iiii <c.> Tres personas (C.23, q.4, c.12).' Transcription by Kenneth Pennington, available online at: http://legalhistorysources.com/edit501.htm (last accessed 6.8.2018).

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toleration principle in favour of the first and denying it for the second, is in his discussion about fornicating priests. Here, the problem was whether the faithful should receive confession and communion by such a priest. The question was of particular importance given that both sacraments ought to be received at least once a year.[34] A decretal of Lucius III (X.3.2.7) stated that the faithful could receive sacraments from a fornicating priest so long as he was tolerated and his crime remained occult, ruling for the opposite solution if the fornication was notorious.[35] At the beginning of his comment on the same decretal, Innocent states as much.[36] However, he adds, if the faithful is aware of the secret state of fornication of the priest, he or she may refuse to receive sacraments from that priest, but only if this refusal does not generate scandal. In such a case, by contrast, the faithful must receive the sacraments from the tolerated occult fornicator.[37] The same, concludes Innocent, applies to any sort of occult crime

34 Cf. X.5.38.12.

35 On *notorietas* in X.3.2.7 see most recently Schmoeckel (2016), pp. 210–212.

36 Innocent IV, *ad* X.3.2.7, § *Abstinere* (*Commentaria Innocentii Quarti*, cit., *fol.* 349*vb*, n. 1): 'sic abstinere licet occulta esset fornicatio, vel etiam si esset aliud crimen quam fornicatio a proprio sacerdote in his officijs, quae ab eo audire non cogitur, qualia sunt, quae habes inf(ra) de poe(nitentiis) et remis (sionibus) <c.> omnis (X.5.38.12).'

37 Id., *ad* X.3.2.7, § *Abstinere* (*ibid.*, *fol.* 349*vb*, n. 1): 'et etiam est sciendum, si ex eius abstinentia contra talem sacerdotem, sed fornicatorem, et toleratum scandalum non generetur, alias autem non licet abstinere, nam et dominus corpus suum dedit Iudaeis, de consec(atione) dist. 2 <c.> non prohibeat (*De cons.* D.2, c.67).' Cf. Id., *ad* X.5.3.7, § *Potest* (*ibid.*, *fol.* 499*rb*, n. 3): 'sed homicidarum et etiam excommunicatorum occultorum, licet sint suspensi a iure, si tamen alias occultum sit, et tu scis, non debes eorum officia euitare.' The implications of such statements might verge on unorthodox conclusions, especially with regard to the sacraments celebrated by an heretic. So elsewhere Innocent specifies that it is not possible to force a Catholic to receive sacraments from an excommunicated priest although he is tolerated in office. In saying as much, however, Innocent argues that the opposite solution would apply to other kinds of unworthiness. Id., *ad* X.5.8.1, § *Irritas* (*ibid.*, *fol.* 508*ra*, n. 3): 'Nec est contra 9 q. 1 c. 1 et 3 (C.9, q.1, c.1 and 3) … quia ibi loquitur, quando per sententiam vel renunciationem non habebant executionem, nec tolerabantur ab ecclesia, et ideo aliis eam dare non poterant. Hic autem plus est in excommunicatis, quod etiam si tolerentur, dummodo probari possit, si vocent aliquem ab ordines, vel alia sacramenta, potest ei dici, non recipiam hoc a te, quia es excommunicatus, unde tibi participandum non est, et ex hac causa legitima est appellatio, secus autem esset in allis, puta irregularibus infamibus, et aliis praedictis, et quia non esset contra eos admittenda talis exceptio, non recipiam hoc a te, quia es irregularis, sufficit enim quod toleretur 8 quaestio fi. <c.> nonne (C.8, q.4, c.1).' Cf. also Id., *ad* X.2.27.24, § *Infirmandam* (*ibid.*, *fol.* 314*va*). The possibility of refusing contact with an excommunicate – and *a fortiori* to refuse to receive sacraments from him, Innocent says, has little to do with the toleration principle. Id., *ad* X.1.6.44,

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committed by a prelate. Heinous as the occult crime may be, even simony or murder (both entailing *ipso iure* suspension from office), the prelate is to be tolerated in it so long as not formally removed.[38] By contrast, if the crime entailing suspension from office is notorious, any Christian may lawfully avoid him, even if he is still tolerated in office.[39] This last statement is important as it strengthens the link between the toleration principle and the concept of representation. Whatever his sins, a prelate is to be tolerated in office so long as he may lawfully discharge it. But the moment the relationship between prelate and office is severed (such as in the case of manifest crime triggering the *ipso iure* suspension from office), then the toleration becomes only a question of fact, unable to produce legal consequences. If such a prelate were to retain his position, this would not amount to proper toleration but only to *de facto* forbearance. As such, it could not confer validity on the enduring exercise of the office that the prelate no longer validly represents.

At the beginning of this analysis of Innocent IV we saw how he applied the toleration principle only to cases in which the holder of an office received it lawfully.[40] The reason is simple: legal representation applies only in that case. Neither the person who is no longer legitimately vested with an office nor the

§ *Administrent* (*ibid.*, *fol.* 75*va*, n. 5): 'excommunicato autem propter periculum excommunicationis poterat obstare agenti, siue sit confirmatus, siue non, sed facta ab excommunicato tolerato non retractantur, inf(ra) de dona(tionibus) <c.> inter dilectos (X.3.24.8).' Similarly, while (as we have seen) the occult simoniac may validly exercise his office in any jurisdictional matter, he may not celebrate mass. Id., *ad* X.5.3.7, § *Potest* (*ibid.*, *fol.* 499*ra–b*, n. 3): 'Item alij licite audiunt officium aliorum criminosorum, nisi sint suspensi per sententiam, sed simoniacorum officium audire non debent, etiam si nulla sententia feratur contra eos. Est enim in eis speciale, sicut in notorijs fornicatoribus, quod eorum officia audire non debent, 32 dist. § verum (D.32, p.c.6). Ergo speciale in notorio fornicatore et simoniaco, quod etiam si tolerantur ab ecclesia, cuique licet eorum officium euitare: vt hic 32 di. § verum (D.32, p.c.6).'

38 Id., *ad* X.3.2.7, § *Operis* (*ibid.*, *fol.* 350*ra*, n. 2): 'sed et si crimina pro quibus a iure suspenduntur, sunt occulta, quandumcunque sint grauia, vt simonia, homicidium, et huiusmodi: tamen euitari non debent in his, quae ab eis recipi debent de iure, arg(umentum) hic de consec(atione) dist. 2, <c.> non prohibeat (*De cons.*, D.2, c.67), et idem videtur etiam dicendum in occulto excommunicato, 6 q. fi. <c.> tantum (C.6, q.2, c.2), su(pra) de offi(cio) ordi(narii) <c.> si sacerdos (X.1.31.2).'

39 *Ibid.* (*fols.* 349*vb–*350*ra*, n. 2): 'et hoc dicimus generale, quod omnium suspensorum a iure etiam sine scientia hominis, si crimina pro quibus ius eos suspendit ab officijs, vel quocunque alio actu sunt notoria per facti euidentiam, quod cuicunque licet eos vitare in his, quae eis interdicta sunt, licet adhuc idem suspensi tolerentur a suis praelatis, et idem dicendum videtur in regularibus, quia et ipsi suspensi a iure dici possunt.'

40 *Supra*, this chapter, note 1.

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one who has forcibly seized it may legally represent the office. For Innocent, they are both 'intruders' in the office. The *intrusus*, in other words, is not tolerated in the office because there is no representation mechanism at work. Acts carried out in such a way remain those of a private person, they do not become acts of the office. More precisely, the office cannot act through that person. Whether he ceases to represent his office lawfully or he assumes it unlawfully, therefore, his acts are void for they are not imputable to the office.[41] It should be noted that the reference to the *intrusus* had a specific meaning: someone who unlawfully occupies a position in the Church. The Ordinary Gloss on the *Decretum*, for instance, considered the heretical bishop an *intrusus* so as to deny that priests consecrated by him could validly exercise their ministry.[42] For Innocent *intrusus* is usually the prelate who either has seized his office or, and especially, has not been confirmed in it by the superior authority. As he lacks the power to validly represent the office, whatever he does remains void.[43]

7.4 Some specific applications

Having established the boundaries within which the principle of toleration applies in the thinking of Innocent IV, we may proceed to look at some specific cases in which it operates. The most relevant for our purposes is that of the legally unfit judge: its importance is both general and specific. General, for it highlights the connection between representation and toleration. Specific, for Barbarius sits in the office of praetor – the judge *par excellence*.

41 Innocent IV, *ad* X.1.6.44, § *Administrent* (*Commentaria Innocentii Quarti*, cit., *fol.* 75*ra*, n. 3): 'multo fortius cassantur, si a principio non haberent canonicum ingressum, ut quia simoniace, vel per intrusionem, vel schismatice, vel quia haereticus, vel excommunicatus assumptus est, vel alias etiam contra ius naturale est electio de eo facta, et etiam non est confirmata, alienationes enim et ordinationes ab eo factae non valent.'

42 The bishop retained *ordo*, but could not exercise it validly – so the new priests would receive *ordo* but not *executio ordinis*. Gloss *ad* C.9, q.2, c.5, § *Ordinationes*: '… In prima parte dicitur quod illi qui receperunt ordines ab episcopis ordinatis in heresi, vel ab intrusis, non tolerantur in suis ordinibus quo ad executionem, nisi probent se nesciuisse in tempore ordinationis eos fuisse damnatos. Jo.' (Basileae 1512, *fol.* 182*va*; cf. Pal. Lat. 624, *fol.* 133*vb*). For the (later) interpretation of *intrusus* as *invasor* see Fedele (1936), pp. 329–330.

43 Innocent IV, *ad* X.1.6.44, § *Administrent* (*Commentaria Innocentii Quarti*, cit., *fol.* 75*ra–b*, n. 4): 'Nam ubi aliquis est intrusus, in aliqua ecclesia sine authoritate superioris qualis est omnis non confirmatus, puta quia sua authoritate occupavit, vel aliorum potentum, quicquid facit non tenet, sive alienando, sive praebendas conferendo, sive agendo, sive iudicando, nec liberantur ei solventes 16 q. 7 <c.> si quis de(inceps) (C.16, q.7, c.12) sicut etiam non tenerent, si a quocunque extraneo fierent, non enim debet esse melioris conditionis, quia vitiosus est.' Cf. *infra*, pt. III, §11.6, note 125.

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If a legally unfit person serves as an ordinary judge,[44] says Innocent, he must be tolerated in that office and his deeds will be valid. The same however does not apply to the delegate judge, for the office does not operate through him. Innocent provides two different explanations for this distinction. The first is more pragmatic: so long as the ordinary judge is tolerated in his office, holds Innocent, the parties cannot raise any objection to his jurisdiction on the basis of his status.[45] Since he retains his office it would be absurd to object to his legal capacity to sit as a judge in one case, only to have him judging the next.[46] By contrast, the delegate judge has an *ad hoc* jurisdiction – he can hear only specific cases.[47] So it is possible to recuse the delegate judge by raising an exception to his status – say, by arguing that he is a slave or *infamis* – provided of course that the exception be raised before the joining of the issue.[48] The second explanation provided by Innocent is more sophisticated and deeply linked with his overall argument on toleration. According to him, the reason it is not possible to object

44 For a simple introduction to the difference between ordinary and delegated *iurisdictio* see the study on Hostiensis by Heintschel (1956), esp. pp. 145–148. On its early development in canon law see the classical early work of Legendre (1964), pp. 117–123.

45 Innocent IV, *ad* X.1.3.13, § *Sciscitatus* (*Commentaria Innocentii Quarti*, cit., *fol.* 12*ra*, n. 2): 'Sed quaeritur, an hae exceptiones de impotentia iuris vel facti contra ordinarium possint opponi? Respondeo, hae exceptiones locum habent contra delegatum, contra ordinarium autem quandiu toleratur in dignitate, locum non habent, ut notat(ur) *infra* de offic(io) delegat(i) <c.> cum super (X.1.29.23) … Item nec praetextu infamiae vel seruitutis sententia retractabitur. Item not(atur) quod infamis non potest se excusare a iudicando, nisi excipiatur contra eum, arg(umentum) C. de decu(rionibus) <l.>nec infamis et l. infamiam (Cod.10.32.10 and 8), ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.13.4).'

46 Id., *ad* X.1.29.23, § *Pro eo* (*ibid.*, *fol.* 130*rb*, n. 5): 'in ordinariis autem non est admittenda talis exceptio, tu es seruus vel infamis, cum quandiu toleratur, omnes sententiae eius tenent, ff. de offic(io) praet(orum) <l.>Barbarius (Dig.1.13.4) … et est ratio diversitatis [i. e. between ordinary and delegate judge], quia absurdum esset, quod ordinario semel amoto a iudicando, vel aliquo alio quod ratione officii facere tenetur, postea in dignitate remaneret.'

47 *Ibid.*, 'secus autem in delegato, qui vult illam causam tantum, quae in delegat(ione) continetur ratione illius commissionis facere, quod non debet.'

48 Id., *ad* X.1.3.13, § *Sciscitatus* (*ibid.*, *fol.* 12*rb–va*, n. 2): 'et hae exceptiones, quod sit infamis, vel seruus, vel mulier, vel alias moribus, vel legibus prohibeatur, cum sint declinatoriae iudicii ante litem contestatam proponendae et probandae sunt, arg(umentum) de arbit(ris) <c.> dilecti (X.1.43.4), C. de excep(tionibus) l. pe(nultima) (Cod.8.35.12).' Cf. also Id., *ad* X.1.29.23, § *Pro eo* (*ibid.*, *fol.* 130*va*, n. 6): 'et ideo licitum est apponere eam contra delegatum antequam iudex fiat, id est, antequam sit in eo statu, quod iurisdictio eius elidi non possit, vel antequam partes in ipsum consentiant: ut not(atur) supra, de rescrip(tis) <c.> sciscitatus (X.1.3.13): sed post quod iudex fuerit, non habet locum haec exceptio infamiae, vel servitutis, quae non apponitur, ne iudicetur, sed ne iudex fiat.'

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to the jurisdiction of the ordinary judge lies in that the exception based on his status is indirect. The law, argues Innocent, prohibits someone who is a slave or *infamis* from serving as a judge; it does not also prohibit him from rendering a judgment. It is only because of the prohibition on serving as a judge that such a person should not issue a judgment. But, so long as the person does serve as ordinary judge, the defence would be of little avail – the judge should be deprived of his office first.[49] The point might seem a cavil, but in fact openly challenged the restrictive interpretation of Gratian's *dictum Tria* provided by some early decretists, especially Rufinus.[50] By contrast, and precisely for the same reason, Innocent allows the delegate judge to be recused by challenging his jurisdiction: given the delegated nature of his powers, it is sufficient to object to their validity to bar the jurisdiction of the delegate judge on the specific case for which he received his jurisdiction.[51]

49 Id., *ad* X.1.29.23, § *Pro eo* (*ibid.*, *fol.* 130*rb–va*, n. 5–6): 'Item alia ratio est, quia praedicti scilicet, servi et infames non prohibentur expresse iudicare, sed per consequens, quia prohibentur ne iudices fiant, ff. de re iudic(ata) l. 1 (Dig.42.1.1), ff. de iudi(ciis) <l.> cum praetor (Dig.5.1.12.2). Quando ergo fiunt iudices, potest excipi, quod non fiant, quia infames sunt, sed si fiant licet infames vel servi sint, tamen iudices erunt, ff. de offic(io) praeto(rum) <l.> Barbarius (Dig.1.14.3). Per consequens ergo omnia facient, quae ad iudicem pertinent. Nec obstabit exceptio infamiae, vel servitutis, volenti iudicare, cum haec exceptio non impediat iudicare, sed tantum iudicem fieri, ut dictum est.'

50 *Supra*, §6.3.1, text and note 50. It is interesting to note how Innocent came to this conclusion on the basis not of canon law sources (as Rufinus did), but only of Roman law ones.

51 A different (but straightforward) issue is the validity of the acts of the delegate judge when the ordinary judge suffers a sentence of excommunication. Deprived of its source, the delegation may no longer produce any effect and so the acts of the delegated (made after the excommunication of the ordinary) are void. Innocent IV briefly touched on this subject, not as a scholar but as pope, in the bull *Romana Ecclesia*, which he issued (on 17.3.1246) against the Archbishop of Rheims. The part of Innocent's decretal that then found place in the *Liber Sextus* (VI.1.8.1) was only the revocation of the Archbishop's edict (the edict that the Archbishop issued to advocate to himself the whole caseload of the suffragan whom he had excommunicated). In her masterly study, Vodola argues that the revocation of the edict was made on the basis that the suffragan was excommunicated for personal sins and not for the way he exercised his office (Vodola [1986], p. 119, text and note 40). The interpretation is however doubtful. Innocent's text states: 'Edictum uero … penitus revocamus; quia, si etiam tenerentur ijdem episcopi pro suis culpis uinculo excommunicationis adstricti, non tamen ex culpis ipsis, cum id non inveniatur a iure concessum, ad Remensem archiepiscopum iurisdictio devolueretur eorum, sed alia forte pro illis pena ipsis canonica posset infligi' (Kessler [ed., 1942], p. 178, 8a, ll.10–18). Vodola bases her interpretation on the distinction between personal sins and exercise of office. The revocation of the edict, however, was made on the basis

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An interesting confirmation of Innocent's position on both the toleration of the prelate exercising ordinary jurisdiction and the toleration of the simoniac may be found in the *Libelli iuris canonici* of Roffredus de Epiphanio (better known as Roffredus Beneventanus, c.1170–*post* 1244). There, Roffredus recalls a decision rendered by the future Innocent IV when still a cardinal. Roffredus was discussing the issue of whether a simoniac is entitled to collect the tithes that pertain to his office. He did not elaborate on the subject, but simply reported the opinion of Johannes Teutonicus (hardly an advocate of the toleration principle) on the (rather loose) idea that many sinners ought to be tolerated after the example of Judas.[52] It is one thing to tolerate the simoniac, says Roffredus,

that its ground was not one for which the metropolitan could advocate the suffragan's jurisdiction to himself (see e. g. the explanation of Johannes Andreae, *ad* VI.1.8.1, § *Romana* [*Ioannis Andreae … In sextum Decretalium librum Nouella Commentaria* …, Venetiis, apud Haeredem Hieronymi Scoti, 1612, *fol.* 42*rb–va*]). The exercise of office was present in Innocent's decretal, although not with regard to the excommunicated suffragan but rather with regard to the officers delegated by him. Attention should rather be drawn to the part of the decretal immediately preceeding the above text (a part that did not find a place in the *Sextus*). This part deals with the validity of the acts of the officials delegated by the same suffragan. It reads: 'Et cum in officialem alicuius suffraganei sui excommunicationis sententiam ex aliqua rationabili causa profert, illos, qui uices ipsius gerunt, propter hoc excommunicationis uinculo non astringat, cum non communice<n>t ob id officiali eidem in crimine, qui ecclesiastice censure districtione pro eo, quod suum exerce<n>t officium, non ar<c>ta<n>tur; ea tamen, que ipsi gerendo huiusmodi uices agunt, illo taliter excommunicato manente, si iurisdictionem tantum recipiunt ab eodem, non pos<s>unt obtinere uigorem' (Kessler (ed., 1942), pp. 177–178, n. 7, ll.1–9). Reading together the two parts of the decretal, we do find Vodola's distinction between personal sins and exercise of the office, but they do not refer to the same subject. The personal sins ('si etiam tenerentur ijdem episcopi pro suis culpis uinculo excommunicationis adstricti') constitute the ground for the excommunication of the suffragan; the exercise of the office is the reason why the officers delegated by the excommunicated did not partake in his excommunication. The delegated officers exercised an office belonging to the suffragan, and they did so in the name of the same suffragan. The delegate judge acted in the name and on behalf of the true representant of the office. When the latter no longer represented the office, the link between office and delegate judge was automatically severed.

52 Roffredus de Epiphanio, *Libelli iuris canonici*, Argentinae [Johann Grüninger], 1502, pt. 4, § *An expense sunt deducende de decimis, fol.* 14*vb*: 'Sed credit Jo(hannes Teutonicus) quod quamdiu ab ecclesia tolleratur quod possum ei soluere: nam multi tolerantur vt iudas: vt ii q. i <c.> multi (C.2, q.1, c.18).' The text quoted in this and the next few notes may also be read in the more accessible Avignon 1500 edition (anastatic reprint, Augustae Taurinorum: Ex officina Erasmiana, 1968, Corpus Glossatorum Juris Civilis, VI.2, G. C. Caselli ed., *fol.* 14*va*).
Teutonicus' reference to Judas as a case of toleration (in the sense of forbearance in order to avoid scandal) is perhaps clearer elsewhere: see *supra*, last chapter,

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another to let him bring forth a legal suit to enforce his claims. So what happens if the simoniacal prelate brings an action to get the tithes? The judge, he answers, may not hear his claim.[53] Nonetheless, Roffredus continues, this is not what he saw in the Roman Curia.

The bishop of Gallipoli, says Roffredus, sued an abbot to enforce his rights on tithes. The abbot raised an exception based on the bishop's alleged simony, but the future Innocent IV – by then, Cardinal Sinibaldus – dismissed it on the ground that the bishop was tolerated by the Church. So long as he was tolerated, Sinibaldus allegedly said, the bishop had the right to enforce any right pertaining to his office.[54] In Roffredus' report Sinibaldus therefore denied the exception because the bishop had been confirmed in his office. According to Roffredus, Sinibaldus stated that the accusation of simony could not be brought in the form of an *exceptio* but only as *accusatio*.[55] The last two statements are of particular importance, as they fit perfectly with Innocent's interpretation of the toleration principle. As toleration is based on representation, the unworthiness of the office holder, whatever its cause, may not void the election if the prelate is confirmed in office – as the bishop of Gallipoli was. Further, and more importantly, the same concept of legal representation underpinning the toleration of the unworthy means, as we have seen, that it is not possible to object to the jurisdiction of an ordinary judge (such as a bishop, whose office entitles him to

note 138. The reference to Teutonicus' interpretation of C.2, q.1, c.18 is in effect more on the procedural effects of excommunication (*ad* C.2, q.1, c.18, § *seculari* (Pal. Lat. 624, *fol.* 93*vb*; partially in Basileae 1512, *fol.* 132*ra*). On the point, the printed Gloss insists more on the idea of toleration (meant as Christian forbearance) than Teutonicus: *ad* C.2, q.1, c.18, *casus ad* § *Multi curriguntur* (Basileae 1512, *fol.* 131*vb*). See however Teutonicus *ad* C.2, q.1, c.19, § *si peccauerit* (Pal. Lat. 624, *fol.* 94*ra*; cf. Basileae 1512, *fol.* 132*rb*).

53 Roffredus, *Libelli iuris canonici*, cit., pt. 4, § *An expense sunt deducende de decimis, fol.* 14*vb*: 'Sed quid si prelatus petat: et ego obijtiam ei quod sit symoniacus: nunquid debeo audiri.'

54 *Ibid.*: 'vidi tamen in curia romana aliter pronunciatum per dominum sinibaldum tituli sancti lauren(tii) in licinia praesbyterum car(dinalem). Nam dum episcopus gallopolitanus peteret ab abbate de victo iura episcopalia: et opposita fuisset ei praedicta exceptio a procuratore abbatis et vellet eam probare ipsum non admisit, a cuius interlocutoria dum procurator abbatis appellasset, papa cum fratribus ipsum appellante non admittit: imo cum verecundia ipsum remouit, et his rationibus. Quia quamdiu ab ecclesia toleratur non debet repelli: imo ad omnia tanquam episcopus debet admitti, vt ii q. i <c.> multi corriguntur (C.2, q.1, c.18), et viii q. iiii <c.> nonne directa (C.8, q.4, c.1), et vi q. ii <c> si tamen episcopus (C.6, c.2, q.1).'

55 *Ibid.*: 'Preterea contra electum confirmatum non admittitur quis in in modum exceptionis sed in modum accusationis: ergo multofortius non debet excipi contra episcopum iamdiu (*sic*) in episcopatu extantes: vt extra de accusa(tionibus) <c.> super his (X.5.1.16).'

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ordinary jurisdiction within his diocese) by way of exception. An exception bars a specific action in a single suit, but it does not sever the link between the unworthy prelate and his office. So the bishop, as ordinary judge, would still retain his full jurisdiction. It is therefore necessary to bring an action specifically aimed at deposing the unworthy from office. Until then, the unworthy is to be tolerated in office – and so he is fully entitled to its exercise.

If we are to consider Roffredus' report as true, therefore, the position of Innocent IV in his commentary on the *Liber Extra* was the same as that of Sinibaldus acting as a judge.[56] Although Roffredus hardly approved of Sinibaldus' decision[57] there is no solid reason to dismiss his report, especially as

56 If this episode is true, it is difficult to date it with more precision than within the fifteen years separating Innocent's appointment as *auditor* and his election to the Petrine Chair in 1243. Sinibaldus de Fieschi was *auditor litterarum contradictarum* from 14 November 1226 to 30 May 1227 (Cerchiari [1920], vol. 2, p. 9), and then Vice-Chancellor from 31 May 1227. Shortly thereafter, on 18 September 1227, he became cardinal but (rather exceptionally) he retained for a while the office of Vice-Chancellor (his successor appears in the sources only on 9 December of the same year: Potthast [1874], vol. 1, p. 939). It is possible that he rendered this judgment in the short period in which he was already cardinal and still Vice-Chancellor. But it may not be ruled out that he did so at a later time. Innocent's involvement in the Roman Curia continued even after his appointment as *rector* of the March of Ancona (from February 1235 to December 1240), for he appointed some substitutes (we know of at least two) and spent a considerable part of his time in the Curia. See esp. Paravicini Bagliani (1972), vol. 1, pp. 65–67, where ample literature is listed. Cf. Piergiovanni (1967), p. 149.

57 Describing Sinibaldus' judgment, Roffredus observed that it was harsh ('sed durum videtur') and hardly justifiable in law. The simoniac was *ipso iure* suspended from office (Roffredus de Epiphanio, *Libelli iuris canonici*, cit., pt. 4, *An expense sunt deducende de decimis, fol.* 14*vb*: 'nam video quod symoniacus in ordine est ipso iure suspensus: vt extra de symo(nia) <c.> si quis ordinauerit (X.5.3.45).'), so the abbot's exception would have amply sufficed to bar his action. For Roffredus, the toleration principle was a consequence of the principle *ecclesia de occultis non iudicat*. As such, it would apply so long as the sin remained hidden. Seeking to enforce the rights he acquired through simony, however, the bishop made his simony manifest. Just as a thief could not bring an action on theft, argued Roffredus, so the bishop could not enforce the rights unlawfully acquired. Similarly, he continued, the bishop could not invoke his possession of the office, for that too was acquired unlawfully. 'Item nonne videtur necessarium quod soluantur sibi decime: quia est in posssessione, et quam toleratur ab ecclesia. Respondeo quia toleratur, quia usque modo fuit eius peccatum occultum; sed si illud volo facere manifestum, quare non sum audiendus. Nam si est fur vt dictum est, ergo non agit cum sit odiosus. Nam fur furti non agit, vt ff. de furtis <l.> qui vas (Dig.47.2.48) … Item non prodest ei sola possessio: quia illa est improba, et improba possessio firmum titulum possidenti non prestat: vt C. de acq(uirenda) pos(sessione) <l.> improba et l. nec ex vera (Cod.7.32.7 and 9). Item si aliquis agit vti possidetis non prodest ei possessio:

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Roffredus was a privileged witness of many episodes happening in the Roman Curia (as his *Libelli iuris canonici* would amply show), and, more specifically, for his account of Sinibaldus' decision was also reported in Guido de Baysio's *Rosarium*.[58]

7.5 Toleration, common mistake and public utility

While the toleration principle applies only to those holding an office, it derives not from a mechanical application of legal representation, but rather from public utility considerations.[59] Holding an office, argues Innocent IV, is

quominus possit quis contra ipsum excipere quod vi aut clam seu precario possidet: vt C. vti possidetis l. i (Cod.8.6.1), et ff. vti possidetis l. i (Dig.43.7.1),' *ibid*.

In his reproach against the decision of the future pope, Roffredus displayed a sense of humor: the prince (and so the pope) is *lex animata*, so he may derogate from positive law, and so his harsh decision is itself to be tolerated ('sed durum videtur, sed quia lex animata principit licet ita sit per quam durum tamen tollerandum est', *ibid*).

58 Baysio however took Roffredus' account out of context, and referred it to a question on vitiated possession. The error is understandable since, as we shall see, Innocent wrote an extensive commentary on the question of whether the possession of jurisdiction is to be tolerated (and so the jurisdiction enforced) when glossing on X.3.36.8. In Baysio's version, therefore, Sinibaldus invoked the toleration principle to uphold the bishop's vitiated possession of his office and to allow him to exercise the rights flowing from that office. Guido de Baysio, *Rosarium super decreto* (Venetiis [Herbort], 1481), *ad* C.8, q.4, c.1, § *Nonne directa*: 'Item si aliquis agit vti possidetis non prodest sibi possessio quominus possit excipere quod vi aut clam seu precario possideret … dicit tamen ipse rof(redus) quod uidit in curia romana aliter pronuntiari per dominum sinibaldum in s(ancto) la(urentio) praesbiterum cardi(nalem). Nam dum episcopus quidam peteret ab abbate iura episcopalia et opposita fuisset predicta exceptio a procuratore abbatis et eam uellet probare ipsum non admittit a cuius interlocutoria cum procura(tione) abbatis appellasset dominus papa cum fratribus ipsum appellantem non admisit immo cum verecundia repulit et hoc rationibus istis: quia quamdiu ab ecclesia tolleratur non debet repelli immo ad omnia ut episcopus debet admitti ii q. i <c.> multi (C.2, q.1, c.18), vi q. ii <c.> si tantum (C.6, q.2, c.2).' The two references in the text were added by Baysio. The first ((C.2, q.1, c.18) is an extremely general reference to toleration, the second (C.6, q.2, c.2) is one of the main sources of the principle *ecclesia de occultis non iudicat*, which was how Baysio – quite unlike Innocent – would often interpret the toleration principle: *infra*, §8.3.

59 On the concept of public utility in Innocent IV see esp. Innocent IV, *ad* X.3.35.6, § *Summus* (*Commentaria Innocentii Quarti*, cit., *fols.* 432*vb*–433*ra-b*, n. 2, 3 and esp. 4). Cf. Galli (2008), p. 155. See also more broadly Leveleux-Teixeira (2010), pp. 262–264 and 267–270. The canon law concept of *utilitas ecclesiae*, it may be noted, is not too distant from the civil law idea of *publica utilitas*. This closeness may be found as early as in Teutonicus' Gloss on the *Decretum*. When

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sufficient reason for the people to rely on someone's authority. If the office holder suffers some supervening legal incapacity, the people may not be aware of that and continue to rely on what they see – that is, on the simple fact of his holding the office. To be sure, he ought to be removed from it, but so long as he is not (and so, as long as he is tolerated in that office) this is sufficient reason for the validity of the deeds, which would otherwise be void. Ultimately, therefore, it is for the sake of the common good that his acts are held as valid.[60]

A clear example of this may be found in Innocent's discussion of the validity of the appointment of a procurator (*procurator ad lites*) by the excommunicate. As a general principle, an excommunicate may not sue.[61] So if he appointed a procurator to that end, the appointment should be void. But what if the excommunicate holds a public office? The answer, according to Innocent, depends both on the kind of excommunication and on the reason he sought to sue. If the excommunication is done by way of legal pronouncement (i. e. an excommunication *ferendae sententiae*),[62] or is manifest, then the procuration is void. This, as we have seen, is just an application of the toleration principle. The appointment of the procurator is done in the exercise of an office that the excommunicate should no longer discharge. But if the excommunication is *latae sententiae* (i. e. it does not depend on a judicial decision but occurs *ipso iure*) and remains occult, then the same person is tolerated in his office. Being still able to exercise the office, the appointment of the procurator is valid, and the exception of excommunication (which would otherwise suffice to bar the action) may not

commenting on C.1, q.7, p.c.6 (a *dictum* where Gratian observed that some crimes are tolerated by the Church out of mercy), Teutonicus observed that the same happens in Roman law (§ *utilitatis*: 'Sic et ius ciuile quaedam admittit propter utilitatem, ff. de pigno(ribus) <l.> sed an vie (Dig.20.1.12). Jo.' (Pal. Lat. 624, *fol.* 90*vb*; cf. Basileae 1512, *fol.* 126*va*). Cf. Eschmann (1943), p. 139.

60 This of course does not mean that there may not be public utility considerations (and so, validity of the deed) without legal representation. A good example is X.3.16.1, which discusses the validity of the deeds made by a prelate who has already been deposed. In principle, such deeds are void. But they may receive execution if they further the *utilitas ecclesiae.* More correctly, the Church is not bound to them, *nisi in utilitatem ecclesiae sit versum*. In his lengthy comment on the point, Innocent IV makes it clear that the possibility of giving execution to any such deed has nothing to do with the position of the person who made it (nor with his toleration in office), but exclusively with the *utilitas ecclesiae*. Innocent IV, *ad* X.3.16.1, § *Conuersam* and § *Pacisci* (*Commentaria Innocentii Quarti*, cit., *fols.* 390*vb*–391*vb*).

61 Vodola (1986), pp. 73–92.

62 On the distinction between excommunication *latae sententiae* and *ferendae sententiae* (or rather, on the progressive development and widening of the former) see Vodola (1986), pp. 28–35, and more in-depth Jaser (2013), pp. 359–373.

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be raised.[63] If however the office holder so excommunicated were to appoint a procurator not in the discharge of his office but for personal reasons – and so, acting as a private person (*pro se*) – then his treatment would be no better than any other private individual, and the appointment will be void. It is only in the exercise of his public office, reasons Innocent, that the occult excommunicate acts for the sake of public utility.[64]

But what exactly is this public utility? A few lines later in the same passage Innocent reiterates the same concept. This time however he speaks of the validity of the appointment not 'for public office and public utility' (*ratione publicae utilitatis, et publici officii*), but rather 'for public office and public ignorance' (*propter publicam ignorantiam, et propter publicum officium*). Such reasons justify the different treatment between private persons and office holders. On their basis it is possible to hold as valid something that in normal circumstances would be void. Public utility considerations therefore depend on common ignorance as to the excommunicated status of the office holder, and so on common mistake. This is why Innocent cites the *lex Barbarius* in this occasion.[65] There may be little doubt as to the proximity between public utility and public ignorance, for the same concept is repeated yet again soon thereafter.[66] The point is interesting as it strengthens the conclusion that public utility in this case lies in the protection of

63 Innocent IV, *ad* X.1.38.15, § *Sententia* (*Commentaria Innocentii Quarti*, cit., *fol.* 172*ra*, pr and n. 1): 'Bene dicit, quod hi qui erant innodati per sententiam, quia si non essent per sententiam innodati, sed a canone, sive esset occultum, sive notorium, tamen constitutio procuratoris ab eis facta teneret, nec posset huiusmodi procurator per exceptio(ne) repelli, cum tolleretur in officio eius cuius authoritate procurator constitutus est 6 q. 2 <c.> si tantum (C.6, q.2, c.2), arg(umentum) 8 q. 4 <c.> nonne (C.8, q.4, c.1). Sed quando per sententiam sunt damnati, sive occultum, sive manifestum sit, non possunt constituere procuratorem.'

64 Id., *ad* X.1.38.15, § *Sententia* (*ibid.*, *fol.* 172*ra*, pr): 'si autem non pro universitate, sed pro se quis constituat procura(torem) tunc bene repellitur exceptione, etiam si tantum a canone est excommunicatus, et etiam si sit occultum, et est ea ratio diversitatis, quia ibi tolerantur, quae fecit ratione publicae utilitatis, et publici officij, quod exercet, at in alio casu, ubi publicum officium non excercet, non expedit.'

65 Id., *ad* X.1.38.15, § *Sententia* (*ibid.*, *fol.* 172*ra*, n. 1): 'vel dic quod aliter est circa illos, qui sunt in publicis officiis, aliter in contractibus, qui celebrantur cum aliis, vel in negotiis quae alios tangunt, ut sunt in instrumenta, et testimonia cuiuslibet iurisdictionis voluntariae, et contentiosae excercitium, ubi propter publicam ignorantiam, et propter publicum officium aliqua valent, et habent effectum quae aliter non haberent, ff. de offi(cio) praesi(dis) (*sic*) l. Barbarius (Dig.1.14.3), C. de testa(mentis) l. 1 (Cod.6.23.1).'

66 Id., *ad* X.1.38.15, § *Sententia* (*ibid.*, *fol.* 172*rb*, n. 1): 'quia iam ibi adest alia ratio, sci(licet) quod teneat propter communem ignorantiam, et publicum officium.'

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the people, who could not be aware of the underlying status of the excommunicate. This is why the toleration principle does not apply either in the case of excommunication *ferendae sententiae* or when the crime entailing the deposition from office is notorious. A sentence entails legal truth, against which one cannot plead ignorance.[67] Notoriety bars public utility considerations in that it does not excuse ignorance as to the true status of the office holder.

The same rationale is also visible in the case of the notary who forges a document.[68] Forgery is surely cause enough to deprive a notary of his office. But so long as he is tolerated in it, says Innocent, the documents he produces are valid.[69] Innocent IV does not elaborate further on the point, but he justifies his conclusion on the basis of public utility. In so doing, he relies again on the *lex Barbarius*.[70] It seems therefore likely that the public utility considerations in this case, just as in that of the appointment of the procurator, lie in the common ignorance as to the unworthy status of the notary. Both the occult heretic and the notary forging false documents ought to be dismissed from office. The parallel is strengthened by reference to another observation from Innocent, this time on the validity of the documents drafted by the excommunicated notary. Here again he stresses the relationship between representation and toleration. Just like the appointment of a procurator by an excommunicated office holder, the instruments made by an excommunicated notary are valid despite the excommunication. In both cases the act is made not 'motu proprio', and so by the person as a private individual, but 'ratione publici officii', and so because of the office they exercise.[71]

67 On the point see *infra*, §11.6.

68 In this sense also Wilches (1940), p. 163.

69 By Innocent's time the *fides* of the notarial documents was already due more to the quality of the notary's (public) office than to his condition as an especially reliable and trustworthy (private) person. Cf. Bambi (2006), pp. 29–41.

70 Innocent IV, *ad* X.5.7.4, § *Damnantur* (*Commentaria Innocentii Quarti*, cit., *fol.* 506*rb*, n. 1): 'In scripturis autem tabellionum et aliorum publicum officium gerentium secus est, quia licet fecerint vnam chartam falsam, aliae nihilominus valent, quamdiu in officio tolerantur, arg(umentum) 8. c. vlt. nonne (C.8, q.4, c.1) et est hoc propter publicam vtilitatem, ar(gumentum) ff. de off(icio) praesi(dis) (*sic*) <l.> Barbarius (Dig.1.14.3).'

71 Id., *ad* X.2.25.10, § *Duraturis* (*ibid.*, *fol.* 295*va*, n. 3): 'in iudicijs constat, quod quicquid facit excommunicatus, valet, vt hic. Idem dicimus extra iudicium, nam si sit notarius excommunicatus, non tamen sententialiter damnatus, et faciat instrumentum, valebit, licet aliqui dicant contra, ar(gumentum) pro eis, supr(ra) de procu(ratoribus) consulti (X.1.38.15). Sed alij respondent illam decr(etalem) loqui de illis, qui praestant authoritatem his, quae dicuntur in instrumentis, hic autem loquitur de illis, qui praestant authoritatem in instrumento, quod sit authenticum, et non in his, quae dicuntur vel fiunt in instrumento. Item pro eis est 3 q. 4 <c.> nullus (C.3, q.4, c.6). Sed ipsi respondent, quod ibidem loquitur de

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Civil lawyers amply discussed the case of the notary in relation to the scope of the *lex Barbarius*. As Barbarius was a false praetor, they sought to apply the same conclusions to the false notary. In so doing, as we shall see, they often relied on Innocent IV.[72] In his commentary, however, Innocent did not speak specifically of the false notary. If we were to apply his rules as to the boundaries of the toleration principle, we should conclude that a *falsus tabellio* could not be tolerated in his office, for he was never appointed to it. Yet this (speculative) conclusion would clash with public utility considerations because of the public ignorance argument. If the false notary drafted instruments for a long time, then not tolerating him would amount to rejecting all his instruments – with a clear prejudice to the commonwealth, which mistakenly relied on them. The point is important: if the toleration principle often relies on public utility and public utility is in turn triggered by common mistake, could the toleration principle operate even beyond representation, and so even when without a valid appointment to the office?

With regard to the notary, there is only one case where Innocent hints at this issue. When the authenticity of his appointment is doubtful, Innocent says, it is possible to prove it by testimonial evidence. The object of the witness testimony, however, is not the authenticity of the notary, but rather the fact that he exercised the notarial office. Indeed Innocent adopts for the notary the same verb found in the *lex Barbarius*: 'publice officio notarij *fungebatur*'. This does not seem fortuitous, as immediately thereafter he quotes the *lex Barbarius* itself, as well as two of the main *leges* usually invoked with it (Dig.14.6.3 and Cod.6.23.1).[73] Further, he continues, such a testimonial would be stronger if the notary made a large number of instruments.[74] Clearly, more documents drafted by the false notary would strengthen the public utility argument.

Whether that means that Innocent approved of the validity of the instruments drafted by someone commonly believed to be a notary, however, is quite

scripturis, quas faciunt excommunicati non ratione publici officij, sed proprio motu, item loquitur ibi in condemnatis, hic loquitur de toleratis.'

72 See *infra*, pt. III, §13.2, and esp. pt. IV, §14.1–14.2. With specific regard to Innocent IV, see also pt. II, §8.4.

73 Id., *ad* X.2.22.1, § *Authenticam* (*Commentaria Innocentii Quarti*, cit., *fol.* 273*va*, n. 2): '… Crederem autem, quod sufficeret si per testes probaretur, quod publice officio notarij fungebatur, ff. ad Macedo(nianum) l. tertia, in principio (Dig.14.6.3), ff. de officio praesidis (*sic*) l. Barbarius (Dig.1.14.3), C. de test(amentis) l. prima (Cod.6.23.1).'

74 Id., *ad* X.2.22.1, § *Authenticam* (*ibid., fol.* 273*va*, n. 2): 'Idem forte et si appareant instrumenta per eos facta inter multos super contractibus legitimis, quae firma maneant et sine contradictione, nec credunt aliqui in hoc casu sufficere duo instrumenta, imo tot quod bene apareat eum commune officium omnibus gerere.'

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doubtful. Innocent only said that the common opinion as to the authenticity of the notary could be used against an exception of forgery. His discussion was centred on whether the signature of two witnesses is sufficient to consider a notarial document valid, especially if the notary is dead.[75] Immediately thereafter, Innocent distinguished between a notarial document and the letter of excommunication with the bishop's seal: only the former is presumed to be valid.[76] It is more likely, therefore, that Innocent referred to the common opinion argument not as an alternative to the valid appointment, but rather as evidence of it.

Elsewhere, Innocent states clearly that the only effect of common opinion is to invert the burden of proof as to a question of fact: if the common opinion is that someone was truly a prelate, or that a couple was truly married, or that a person was truly a notary, says Innocent, then it is up to the counterparty to disprove as much.[77] This, however, normally applies only to past events, and typically to the status of people that are now deceased. For if the prelate or the notary are still alive and are in possession of their office, he continues, the issue is no longer just a simple question of fact. The possession of an office is stronger than the common opinion against its valid acquisition. It follows that such a contrary opinion, although common, is not sufficient as to invert the burden of proof.[78]

75 *Ibid*.

76 Id., *ad* X.2.22.1, § *Authenticam* (*ibid.*, *fol.* 273*vb*, n. 4–5).

77 Id., *ad* X.5.40.34(=VI.5.12.1), § *Memoriam* (*ibid.*, *fol.* 573*ra–b*, n. 3–4): 'Item no(tatur) quod haec communis opinio idem est, quod communis credulitas, et ideo oportet famam esse, et etiam credulitatem cum aliqua ratione … et quia solus Deus scrutatur animam, ideo ille qui fert testimonium de opinione si interrogetur, quomodo scit hanc communem opinionem, respondebit, non scio, sed solus Deus nouit. Sed credo causam autem credulitatis subijciat, quia sic verbis exprimebat, vel aliam quam volet, et hac ratione, quia tantum de credulitate respondet, quia testificatur super opinionem, videtur si interrogatur, quomodo scit, quod sit communis opinio, respondebit, quia sic audiui a multis … Item est iusta causa si dicat cum multi exprimerent suam opinionem. Et haec vera videntur, si dicitur contractus alicuius praelati mortui non valere, quia non fuit praelatus, vel contra instrumenta tabellionis mortui, quod non fuit tabellio, vel contra filios, quod non fuit matrimonium inter parentes, et sic videtur viuere ille, qui communi opinione dicitur mortuus, et sic in similibus, arg(umentum) … 34 q. i. c. i (C.34, q.1, c.1), ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3).' The scope allowed to the common opinion in Innocent IV would therefore seem somewhat narrower than sometimes assumed: see already Lefebvre (1938), pp. 269–270.

78 Innocent IV, *ad* X.5.40.34(=VI.5.12.1), § *Memoriam* (*Commentaria Innocentii Quarti*, cit., *fol.* 573*rb*, n. 4): 'secus autem esset si praelatus viueret, vel tabellio, vel maritus, nam in his casibus et similibus si praedicti agerent, puta, quia praelatus repeteret suam ecclesiam in cuius possessione alius esset, vel alter

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Toleration furthers public utility because of the non-manifest defect of the office holder – and so, of the common mistake as to his actual condition. This however does not mean that common mistake as to one's legal capacity leads necessarily to toleration. Toleration may only prolong the validity of legal representation for the sake of public utility, not replace it altogether.[79] As such, in many cases there is a clear trade-off between upholding the scope of the toleration principle and protecting the good faith of those who mistakenly relied on appearances. When dealing with this problem, Innocent would normally prefer the toleration principle to public utility.[80] Doing otherwise would have blurred its boundaries and weakened its rationale. Occasionaly, the choice between toleration principle (and so, representation) and public utility triggered by the common mistake was an easy one to make. For instance, that is the case in a legal proceeding where the procurator for the plaintiff acted on the basis of false documents, whose falsity was unknown to the plaintiff. Should the *lex Barbarius* be invoked to uphold the proceedings? Innocent answers in the negative, for Barbarius' deeds were tolerated for the utility of many, whereas in the present case the utility of a single plaintiff is at stake.[81] But can this rationale be read *a contrario*, so as to stretch the toleration principle beyond the boundaries of representation when there are more people unaware of the underlying invalidity (thus invoking public utility without legal representation)? When Innocent formulates the question most explicitly, his answer is a clear no. It is a situation very similar to the last one. When a decision is rendered on the basis of a false suit (*petitio*), but both parties are unaware of its falsity, should the decision stand? In cases of contentious jurisdiction the judge does not normally have compulsory jurisdiction, so he is not able to operate *ex officio*. To establish his jurisdiction on the matter, reasons Innocent, the *petitio* must therefore be

alterum peteret, vel tabellio peteret aliquem cessare a diffamatione sua super eo, quod non esset tabellio, nam in his casibus non videtur, quod communis opinio in alium transferat probationem, et est ratio, quia multa sunt pro reo, scilicet, quia est in possessione, et quia negat quod non est in alijs casibus: tamen et huic aliter subuenitur.'

79 *Supra*, this paragraph, notes 65–66.

80 See however *infra*, this paragraph, note 85.

81 Innocent IV, *ad* X.1.3.22, § *Subscriptione* (*Commentaria Innocentii Quarti*, cit., *fol.* 19*vb*, n. 1): 'Sed dices videtur, quod processus debuerit tenere, quia ignorabant literas obreptitias, ff. de offic(io) praesi(dis) <l.> si forte. (Dig.1.18.17), ff. de offic(io) praeto(rum) <l.> Barbarius (Dig.1.14.3), sed dicit illa tolerata propter vtilitatem multorum, qui habuerunt necesse agere apud eum, cum praefecturam teneret et praesidatum et in illa l. si forte (Dig.1.18.17) licet adueniente successore, non debeat exercere iurisdictione, tamen habet eam. Hic autem cum causa vna tantum commissa sit, non est multa vtilitas subditorum, vnde propter hoc non est tolerandus eius processus.' Cf. Wilches (1940), p. 89.

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valid. If not, in pronouncing his decision the judge is not exercising his office validly. If the *petitio* is void, argues Innocent, the sentence was rendered by an incompetent judge and so is itself void. As such, he states, it is not possible to invoke the *lex Barbarius* on the basis of the common ignorance of the parties.[82]

The difference between common opinion (*fama*) and toleration principle may also be seen in a remark of Innocent on the difference between possession and ownership. For possessory claims *fama* is sufficient both in case of presumed marriage (to claim possession of the wife's estate) and to keep possession of a *beneficium* that the prelate is widely regarded as being entitled to. The effects of *fama*, adds however Innocent, do not translate into substantive rights: in neither case could *fama* give rise to a defence against a *petitoria actio*.[83] Common opinion, as we have seen, may only invert the burden of proof as to questions of fact: it does not make law.

The same conclusion is also attested to outside the courtroom. We have seen earlier that a prelate who is not confirmed in office may not validly exercise it. This means that all his deeds are void, and so also is his administration of the ecclesiastical goods within the office he holds invalidly. As a consequence, says Innocent, those who pay him are not freed from their debt ('nec liberantur ei solventes'), for they would be paying to a third party, not to the representative of the office to which the debt is owed. Paying to a prelate who cannot validly exercise his office, therefore, is no different from paying to any third party whatsoever ('sicut etiam non tenerent, si a quocunque extraneo fierent').[84] There is little doubt that innocent third parties are going to suffer prejudice. But the alternative would be to question the very foundation of the toleration principle, and that is a price that Innocent is (usually) unwilling to pay.[85]

82 Innocent IV, *ad* X.1.3.20, § *Forsan* (*Commentaria Innocentii Quarti*, cit., *fol.* 17*rb*, n. 7): 'Et si quaeratur a quo habet iurisdictionem, dicunt quidam a lege, quae dat eis cognitionem et diffinitionem in hoc dubio, et ita suie iuste, siue iniuste iudicet, pro veritate sumitur talis sententia, nisi suspendatur per appellationem 2 q. 6 § si sententia (C.2, q.6, c.29), ff. de iusti(tia) et iur(e) l. penu(ltima) (Dig.1.1.11). Melius videtur dici, quod non tenet sententia, C. si a non compe(tente) iudic(e) l. i (Cod.7.48.1), nec de hoc forte cognoscet. Alij dicunt, sed non bene, quod in veritate iurisdictionem non habuit per literas falsas, et tamen quod fecerat tenet propter communem ignorantiam litigantium ff. de offi(cio) praeto(rum) <l.> Barbarius, et ff. eo [titulo, *sed* 'de officio praesidis'] l. si forte (Dig.1.18.17), sed certe hoc non videtur stare, etiam si modo constaret, quod falsae fuerint literae: quia sententia a non suo iudice lata non tenet.'

83 Id., *ad* X.23.11, § *Illvd Qvoqve* (*ibid.*, *fol.* 281*vb*, n. 2, and *fols.* 281*vb*–282*ra*, n. 3 respectively).

84 *Supra*, this chapter, note 43.

85 A single time in his opus, however, Innocent did offer a less uncompromising solution. If the intruder is widely regarded as lawful incumbent and he does

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If the mistake cannot be invoked when it clashes with the toleration principle, however, it may well be invoked to trigger its application. This is clearly visible in the case of a double appeal: as a rule, an appeal before the pope is to be preferred to an appeal before the archbishop. But if the archbishop was not aware of the appeal before the pope, says Innocent, then his decision (in the case he was commenting on, a sentence of excommunication) is valid. Thus, concludes Innocent referring to the *lex Barbarius*, what would otherwise be void may be held as valid 'because ignorance allows to tolerate what is done in the exercise of a public office'.[86]

In Innocent's thinking, the difference between a common mistake supported by public utility considerations and the toleration principle may also be seen in his discussion of the validity of the confession to a priest who is wrongly believed to have been appointed to the parish. The problem went to the core of the distinction between *ordo* and *iurisdictio*: the priest was a true one, but he was not appointed to the office, and so he lacked jurisdiction over the parishioners. Absolution pertained to *iurisdictio*, not to *ordo*. As such, the issue was whether his lack of valid appointment would render the absolution given by him invalid despite the good faith of the penitent.

The absolution given by such a priest is valid, argues Innocent, but if the penitent discovers the truth he must seek absolution from a 'true prelate'. However, he continues, this is not necessary if the prelate is tolerated in the office he does not lawfully occupy. So long as the prelate is tolerated by his superior,

everything that the true incumbent would do (so that no third party could possibly realise the lack of representation), then the debtor of the office who pays to him might be freed, after the example of the exception to the Macedonian senatus consultum. Innocent IV, *ad* X.2.13.5, § *Prius* (*ibid.*, *fol.* 228*ra*, n. 8): '… Credimus tamen, quod si aliquis vtitur generaliter in omnibus, quae concurrunt facienda secundum morem suae dignitatis iure episcopali, vel canonicali, vel consimili, quod illi qui cum eis contrahunt, vel soluunt debita eis, quod liberantur, et excusantur ff. ad Maced(onianum) l. 3 (Dig.14.6.3).'

86 Id., *ad* X.2.28.7, § *Cognouerit* (*ibid.*, *fol.* 318*vb*, n. 1): 'Si autem [archiepiscopus] ignorauit, eum iurisdictionem habeat, tenet citatio et sententia excommunicationis … est ratio, quia ignorantia facit tolerari ea, quae fiunt ratione publici officij, C. de testa(mentis) l. 1 (Cod.6.23.1), ff. de offic(io) praesi(dis) (*sic*) <l.> Barbarius (Dig.1.14.3).' Here as well Innocent emphasises the exercise of a public office – and not the simple mistake – as the ultimate reason for the validity of the archbishop's decision. Contrast for instance the position of Teutonicus in his apparatus on the *Compilatio tertia*, *ad* 3 Comp., 1.6.6(=X.1.6.21), § *apostolicam inuocauit*: 'Magis autem deferendum fuit appellationi facte ad papam, ut supra de offic(io iudicis) del(egati) c. i lib. i (1 Comp., 1.21.1). Si tamen archiepiscopus ignorans de appellatione alterius eum excommunicasset, tenet excommunicatio ratione ignorantie, ut supra de appell(ationibus) <c.> Si duobus, lib. i (1 Comp., 2.20.7[=X.2.28.7]). Jo.' (Pennington [ed., 1981], p. 55, ll. 18–21).

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Innocent argues, the absolution he gives is perfectly valid and the penitent does not need to confess again.[87] The position of Innocent is revealing of his stance on the scope of the toleration principle. The power to absolve from sin was ultimately an expression of *solvere* and *ligare*, and it clearly pertained to *iurisdictio*. Allowing the full validity of the absolution granted by someone who lacked *iurisdictio* was therefore problematic for Innocent. Hence the distinction on the basis of whether the unworthy prelate was tolerated or not in his office. The absolution given by the priest who was not tolerated in his office (more specifically, not tolerated by the superior authority) is valid only because it was very difficult to decide otherwise – it would have been difficult denying absolution to a penitent in good faith for a mistake that could not possibly be imputed to him (all the more given that the mistake was based solely on the jurisdictional powers of a validly consecrated priest).[88] But the validity of this absolution depended on ecclesiological grounds, not on legal principles. Hence, if the penitent were to discover the truth, the need of a further confession to a priest who did have the (jurisdictional) power to remit his sins. By contrast, the

87 Innocent IV, *ad* X.1.6.54, § *Deceptae* (*Commentaria Innocentii Quarti*, cit., *fol.* 78*va–b*): 'potest dici animas non deceptas, cum ab omnibus habeatur praelatus, et valet poenitentia ab eo recepta, veniam enim meruit, quia ignorans delinquit, 8 di. <c.> consuetudo (D.8, c.8). Sed si sciat antequam moriatur, credimus quod de nouo debet ire ad verum sacerdotem, et ab eo absolui, infr(a) de poeni(tentiis) <c.> omnis, in prin(cipio) (X.5.38.12). Et idem dicimus in poenitentia, quod in ordinante diximus, inf(ra) de simo(nia) <c.> per tuas (X.5.3.35), vel potest dici, quod vere absoluitur quamdiu toleratur a superiore, 8 q. 4 <c.> nonne (C.8, q.4, c.1).' Taken literally, the last part of this comment might seem to support the toleration of a false priest commonly believed to be such. The reference to C.8, q.4, c.1, however, would clearly point to a true prelate who was not holding his office validly. The question is therefore of *iurisdictio* and not of *ordo*.

88 It is significant that those who rejected the validity of the confession spoke only of the case of the faithful who would later find out the true status of the *praelatus* – not also of the (equally possible) case of the penitent who died without ever discovering it. This position was maintained especially by Abbas Antiquus, but it did not prove successful. Abbas Antiquus, *ad* X.1.6.54, § *Dudum* (*Lectura Aurea Domini Abbatis Antiqui super quinque libris Decretalium*, cit., *fol.* 35*rb*): 'Dicunt quidam quod licet postea sciat se confessum fuisse ei qui non poterat ipsum solvere, quod non tenebatur de illis criminibus iterum confiteri, quamdiu ab Ecclesia toleratur, arguo viii, q. iiii, <c.> nonne (C.8, q.4, c.1). Sed dic contra, quod tutius est, et eidem simile i(nfra) de presb(ytero) non bap(tizato), c. ult. (X.3.43.3), et viii di. <c.> veritate (D.8, c.4).' On this passage see also Wilches (1940), pp. 111–112. Abbas Antiquus' position seems ultimately inspired by the opposite principle: upholding ecclesiological considerations above strictly legal (and jurisdictional) ones. On the point see also Abbas Antiquus, *ad* X.1.6.44, § *Nihil* (*Lectura Aurea Domini Abbatis Antiqui super quinque libris Decretalium*, cit., *fol.* 32*vb*–33*ra*).

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validity of the absolution given by the *falsus praelatus* tolerated in office by the superior authority has nothing to do with the penitent's state of excusable ignorance as to the prelate's true status. Rather, the validity of the sacrament ultimately derives from the link between toleration and jurisdiction. The power to absolve belongs to *iurisdictio*, and toleration entails the full validity of all jurisdictional powers deriving from the office. Hence a second absolution is not needed. Just like the problem of the sentence of excommunication levied by the occult excommunicate, however, this is an extreme case, where sacramental and jurisdictional powers may not be fully separated. Applying the toleration principle without further distinctions, therefore, meant sacrificing sacramental considerations to jurisdictional ones. This explains the reluctance of later canon lawyers to accept Innocent's solution, as we shall see.[89]

What just said, however, does not mean that Innocent had little consideration for public utility based on common ignorance. We have seen earlier that if the excommunicate tolerated in office appoints a procurator, the counterparty may not bring the exception of excommunication to bar the suit. What happens if a private person is to be excommunicated, and the counterparty does not bring the same exception against his procurator? Until Gregory IX (and especially with him), the judge was meant to quash the proceedings and, if he did not, the decision could be avoided retrospectively. Innocent IV put an end to this with his decretal *Pia* (mentioned above). If the counterparty did not bring the excommunication exception, the decision would stand.[90] In the case of the excommunicate tolerated in office, we saw how Innocent justified his position, referring both to the public office and to the common mistake. According to Innocent, the rationale is very similar for a suit brought forth by a private person whose opponent did not raise the exception of excommunication during the proceedings. The legal transaction will not be retrospectively avoided, says Innocent, 'because of the common ignorance and the public utility of the contracting parties'.[91]

89 *Infra*, next chapter. See also pt. IV, §14.3.1.

90 On Innocent's position in the decretal *Pia* and the reasons behind its enactment see Vodola (1986), pp. 88–92.

91 Innocent IV, *ad* X.1.38.15, § *Consulti* (*Commentaria Innocentii Quarti*, cit., *fol.* 172*rb*, n. 2): 'Sed quaeris rationem quare ex quo tenet constitutio procu (ratoris) quare ad minus post absolutionem non tenetur exequi mandatu? Respon(detur) excommunicatus non habet exercitium litis, et ideo illud mandare non potest, ar(gumentum) 1 q. 7, <c.> Daibertum (C.1, q.7, c.24), sed quod habet mandat(um) scilicet quod teneat, quod cum eo factum fuerat, sicut teneat, si cum excommunicato de nouo actum esset, et propter communem ignorantiam et publicam contrahentium vtilitatem.'

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Few other cases are so revealing of Innocent's approach as his commentary on the decretal *Fraternitatis* (X.5.7.4), where he goes through most of what has been said so far – though, interestingly, in reverse order. We have seen the distinction between sacraments of necessity and of dignity, and how the heretic ordained by a Christian retains his *ordo* but loses *iurisdictio*. We have also seen that the *iurisdictio* may be validly exercised (bestowing legal validity upon the deeds) so long as the heretic retains the office from which he ought to be deposed. In his commentary on X.5.7.4 Innocent IV says all this, starting from the last point and ending with the first. The importance of this passage lies in its confirmation of the link between the sacramental sphere and the toleration principle on the subject of the validity of acts. The reverse order in Innocent's reasoning is also important. With Innocent, the concept of toleration acquires a specifically legal dimension; yet even in Innocent it is possible to find echoes of the separation between the sacraments of necessity and of dignity that triggered the progressive emersion of the very notion of (jurisdictional) toleration during the twelfth century.

X.5.7.4 stated that the condemnation of the heretic would also extend to his writings.[92] In the Ordinary Gloss on the *Liber Extra*, Bernardus Parmensis remarked that, although the writings of the heretic may contain something useful, nonetheless they should follow the same fate of their author, so they are inadmissible in court.[93] It is likely that Innocent has that interpretation in mind when commenting on the same text. For he opens his comment with the inadmissibility of a testimonial deposition or of a notarial document containing some falsehood, even if it was made in good faith.[94] The decretal said that the instrument was void because of the condemnation of its author (*damnantur*

92 X.5.7.4: 'Cum Coelestinus atque Pelagius in Ephesina synodo sint damnati, quomodo poterunt illa capitula recipi, quorum damnantur auctores.'

93 Gloss *ad* X.5.7.4, § *Pelagius* (*Decretalium domini pape Gregorij noni compilatio*, cit.): 'Isti duo damnati erant in synodo ephesino de heresi; dubitabat patriarcha antiochenus an scripta ipsorum essent recipienda, et dicitur quod non: quia exquo condemnatus est auctor, et scripta illius admitti non debent … quamuis aliqua vtilia sint ibi, arg(umentum) s(upra) de testi(bus) <c.> licet (X.2.20.23) … Item ar(gumentum) quod destructo principali destruitur accessorium, sicut in c. praedicto (X.1.1.2): et hoc diximus. Bern(ardus).'

94 Innocent IV, *ad* X.5.7.4, § *Fraternitatis* (*Commentaria Innocentii Quarti*, cit., *fol.* 506*rb*, n. 1): '… Si inter contrahentes auctum est, quod soluatur pecunia argentea, et notarius, vel testis dicit de aurea, quae melior est, et vtilior est ambobus contrahentibus, nam hoc mendacium licet sit pium, et vtile, tamen reddit instrumentum, vel testimonium inutile … Siue ignoranter, siue scienter falsum admisceat, non valebit instrumentum, vel testimonium, quod sic probatur, quia nunquam debet ponere in instrumento vel testimonio, nisi quod in veritate novit et vidit, et in hoc non posset esse ignorantia, 3 q. 9 <c.> testes hortamur pura (C.3, q.9, c.20).'

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auctores), and Bernard concluded approvingly that 'destructo principali destruitur accessorium'.[95] Innocent however cursorily remarks that this is not the case when one exercises a public office.[96] Immediately thereafter he focuses on the position of the notary. Because of the public office he exercises, Innocent notes, even if he forges a false document his other instruments will still be valid. Forgery, however, is the most serious ground for dismissing a notary from office. So Innocent adds that the notary could still validly exercise his office so long as he was tolerated in it, because of the same public utility considerations as in the *lex Barbarius*.[97] It was only from the moment that the notary was condemned for forgery that he would not be able to exercise his office: from that moment – and not before – any (new) instrument he drafted would be void.[98]

When condemned, the notary is deposed from office and may no longer draft valid instruments. Does this mean that the condemnation always entails the invalidity of the deeds? In the jurisdictional sphere this is certainly so, but not in the sacramental one. Immediately after his discussion of the notary, Innocent moves on to the sacraments received from a heretic. This last part of Innocent's comment is by far the longest. The validity of a sacrament ultimately depends on who operates through it. In the sacraments of necessity, to put it rather bluntly, the person administering them is only a vehicle, for it is only God Who operates through them. The priest administering them, therefore, cannot pervert their substance: they remain holy – and so valid – despite the unworthiness of whoever administers them. It follows that the relationship is ultimately between God and the sacrament's recipient: if the latter thinks that he is receiving the sacrament from a true Catholic, he shall receive it validly.[99] Because of this, in

95 *Supra*, this paragraph, note 93.

96 Innocent IV, *ad* X.5.7.4, § *Damnatur* (*Commentaria Innocentii Quarti*, cit., *fol.* 506*rb*, n. 1): 'hoc habet locum in exceptionibus scripturarum, et in omnibus alijs qui publica authoritate non habent officium sibi iniunctumm, 9 dist. <c.> si ad sa(nctas) (D.9, c.7), 16 di. c. 1 (D.16, c.1), 37 di. <c.> si quid (D.37, c.13).'

97 *Ibid.*, *fol.* 506*rb*, n. 1, text s*upra*, this chapter, note 70.

98 Id., *ad* X.5.7.4, § *Damnatur* (*ibid.*, *fol.* 506*rb*, n. 1): '… licet autem dicta cuisquam ratione personae nisi alias falsa probentur redargui non possunt de falso, si tamen publica persona accusata et condemnata fuerit de falso, et extunc instrumenta et dicta eius ratione personae robore carebunt, supra, de testi(bus) <c.> testimonium (X.2.20.54).'

99 *Ibid.*, *fol.* 506*rb*, n. 2: 'In sacramentis secus est, quia sacramenta ab haereticis recepta, quo ad essentiam vera sunt, 32 di. § verum (D.32, p.c.6). Item effectum virtutis habent, vel proprias virtutes dignitatis habent, quia veneranda sunt in se, et gratiam etiam conferunt, si qui illa scienter sumant ab eo, quem non putant haereticum.' To argue as much, Innocent relied on the *locus classicus* that Judas (the heretic by definition) administered baptism validly. Indeed, Innocent continued, if someone wanted to prohibit Judas from baptising, fearing that those who received baptism this way would be deceived, he would sin: 'De Iuda

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case of extreme necessity (and so, *in puncto mortis*) it is possible for any sort of excommunicated or suspended priest to administer all sacraments of necessity.[100] In the sacraments of dignity, however, the person who administers them plays a more substantial role. As such, if he lacks *executio ordinis*[101] he may not confer it validly, despite the good faith of the recipient.[102]

enim constat, quod fuit haereticus, arg. 1 q. 1 <c.> eos qui (C.1, q.1, c.21) et tamen baptizati ab eo gratiam receperunt, nam alias peccasset, qui eum emisit, cum alijs ad baptizandum, cum sic baptizati ab eo deciperentur, 1 q. 1 <c.> Christus (C.1, q.1, c.88) etc.' (*ibid*., *fol.* 506*rb–va*, n. 2). Innocent's words are particularly telling as very shortly beforehand in this commentary he defined the heretic focusing on the concept of *perversio sacramentorum*: 'haereticus dicitur, qui peruertit sacramenta ecclesiae vt simoniacus. i. q. i. <c.> eos qui (C.1, q.1, c.21). Item diuisus ab vnitate ecclesiae, 7 q. i <c.> denique (C.7, q.1, c.9).' (Id., *ad* X.5.7.3, § *Vel schismaticum*, *ibid.*, *fol.* 506*ra*). The ultimate rationale for the distinction between *ordo* and *iurisdictio* (*scil*., whether God alone operates in the sacrament) could also be described in more legally-oriented terminology. This, it should be noted, was remarkably more appealing for civil lawyers – and indeed it was another point on which Innocent exercised considerable influence on them. So long as God alone operates in the sacrament, says Innocent, it might be possible to speak of validity according to natural law. Sometimes positive law derogates from it, so as to punish the unworthy who continues to minister the sacrament. But because the sacrament is valid according to natural law, then it would be unfair to penalise the faithful who hears Mass celebrated by heretics and excommunicated if he is unaware of their condition. Id., *ad* X.5.8.1, § *Irritas* (*ibid., fol.* 508*vb*, n. 4): '… Item cum haec poena [i. e. the prohibition against heretics and excommunicates to celebrate Mass] non sit imposita a iure naturali, imo ius naturale vult, quod eum solus Deus in collatione operetur, quare vicarius Christi immeritam iniungeret poenitentiam ignorantibus, licet enim ex causa decreverit poenitentiam scientibus contra contemptum, tamen iniustum est imponere poena ignorantibus sine causa.'

100 Id., *ad* X.5.7.4, § *Damnatur* (*ibid.*, *fol.* 506*va–b*, n. 3): 'nam cum solus Deus gratiam conferat, non minister, non attenditur qualis sit minister, nisi in eo qui scienter contra constitutiones ecclesiae recipit. Idem dicimus in omnibus praecisis, puta depositis, excommunicatis, et suspensis a collatione sacramentorum, siue a iure, siue ab homine sint suspensi … qui licet suspensi sint a collatione sacramentorum, tamen in articulo mortis corpus Christi, et baptismum conferunt … Et hic est casus, in quo licite communico cum excommunicatis, et hi dando baptismum non peccant, posset tamen dici, et non male, quod a suspensis a iure toleratis omnia sacramenta vbi non confertur executio, sed gratia, vt in poenitentia, extrema vnctione, et caeteris consimilibus licite recipiantur, quia solus Deus ibi alias hoc operatur, ar(gumentum) 19 di. <c.> secundum (D.19, c.8), 1 q. 1 <c.> Iudas (C.1, q.1, c.46).'

101 On the concept of *executio ordinis* (and its distinction from *ordo*) see *supra*, §6.1.

102 Innocent IV, *ad* X.5.7.4, § *Damnatur* (*Commentaria Innocentii Quarti*, cit., *fol.* 506*vb*, n. 4): 'Executionem autem ordinis nullus suspensus dat, quia quod non habet, dare non potest, 1 q. 7 <c.> Daibertum (C.1, q.7, c.24).'

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The closeness between the instruments drafted by the heretical notary and the sacraments celebrated by the heretical priest might appear puzzling. In fact, it was perfectly logical: Innocent explains the distinction between *ordo* and *iurisdictio* also in terms of toleration in office. This should not come as a surprise, if we think that the concept itself of toleration finds its origins in the progressive elaboration of that distinction. So long as he is tolerated, says Innocent, the heretical bishop (as any other occult excommunicate) retains his *iurisdictio*. Being tolerated within the Church, he can confer not only *ordo* (which he could bestow in any case, having been consecrated lawfully) but also the power to exercise it validly (*executio ordinis*).[103] Conversely, the moment the heretic is no

103 Id., esp. *ad* X.5.8.1, § *Irritas* (*ibid.*, *fol.* 508*ra*, n. 3): 'Idem dicendum videtur de irregularitate ordinatoris, vel ordinati, quod non impedit executionem, quin conferatur habitu et exercitio arg. 56 di. <c.> apostolica canon(icamque) et c. ul. (D.56, c.12 and 14) sub de renunc(iatione) <c.> nisi cum § personae (X.1.9.10). Idem dicendum videtur et de infamia, nam simoniaci etiam in beneficio sunt infames. C. de epis(copis) <c.> si quenquem § ul. (Cod.1.3.30.6), et tamen executionem conferunt, sub de simo(nia) <c.> per tuas (X.5.3.35). Et hoc dicendum videtur de excommunicatis occultis, et de omnibus aliis praedictis, quod quamdiu tolerantur ab ecclesia executionem ordinum conferunt.' Here as well, Innocent IV appears consistent in his thinking. As the occult simoniac is tolerated in his office, he retains the jurisdictional powers deriving from it – and so also *executio ordinis*. But the notorious simoniac, not being tolerated in office, may not exercise it validly. As such, he lacks *executio* and may not confer it in his turn. Id., *ad* X.5.3.35 § *Secure ministret* (*ibid.*, *fol.* 503*ra–b*, n. 4): 'Quod verum credimus in omnibus aliis criminosis, sed in simoniacis et fornicatoribus notoriis speciale est, quod etiam sine sententia licet ab eorum obedientia recedere, 32. dist. § verum (D.32, p.c.6), et secundum hoc potest intelligi decre(talis) ista [*scil.*, D.32, p.c.6: 'non debet quis ordinem recipere ab eo, quem credit simoniacum'], quia iste ordinatus credebat, quod ordinator suus ex relatione multorum esset notorius simoniacus … Pro his autem sufficiens ratio esse videtur, quia cum haec poena non inveniatur in canonibus, quod recipiens ordinem ab haeretico, vel quecunque alio criminoso tolerato, nos poenas extendere non debemus, de poe. dist. 1 poenae (*De pen*., D.1, c.62); speciale tamen est in notorijs simoniacis et fornicatore, si autem coactus recipit ordinem a simoniaco, recipit executionem, 1 q. 1 <c.> constat (C.1, q.1, c.111). Nos autem hoc non credimus, imo generaliter dicimus nullum qui non habet, posse dare executionem, et quod factum est, de dispensatione factum fuit, et repete, quae dicuntur, 32 di. § verum (D.32, p.c.6).' At times, however, Innocent's position on the subject appears more complex. This is particularly the case in his lengthy commentary on X.1.6.44. After a long discussion of the validity of the acts of those already removed from their office, having reviewed a number of (sometimes, conflicting) sources, Innocent concludes by separating jurisdictional acts from sacramental ones. For the latter, argues the pope, the unworthy tolerated in office needs a specific dispensation. Innocent's position might appear slightly ambiguous, for X.1.6.44 dealt with the unworthy elected in office who exercised it until his deposition. In such a situation it is understandable that Innocent would require a dispensation for the

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longer tolerated in the Church, while he retains *ordo* (as any sacrament, consecration is indelible), he loses any power that requires enduring participation in the Church – and so both *iurisdictio* and *executio ordinis*). In this case, says Innocent, it is not possible to invoke the toleration principle to argue in favour of his jurisdictional acts, even in the case of ignorance as to his true status.[104]

Tolerating the legal representative of a public office furthers public utility: Innocent is quite clear on this point. Public utility however should not be seen just as the ultimate reason for the toleration principle, but as a qualitative constraint to its application. This is why the principle of toleration applies to any sinful priest so long as the reason why he should be deposed remains occult. By contrast, when the sinful state becomes manifest, Innocent is remarkably clear that the toleration principle no longer applies. For particularly henious crimes, the effects of notoriety are the same as those of a sentence of deposition: from that moment the unworthy prelate is severed from his office, and any act he carries out may no longer be imputed to it. As simony was the gravest case of unworthiness, it should come as little surprise that Innocent states as much with particular clarity when discussing the toleration of the simoniac. While the occult simoniac is to be tolerated in office, if his simony is notorious there is no need to wait for the formal (and judicial) deposition.[105] The same applies in case

elected to perform any sacramental act – especially ordinations (to which he specifically referred). Indeed Innocent would often repeat that, without confirmation, the elected could not lawfully exercise his office. On the other side, however, the literal tenor of the passage would appear more general, as it refers to any heretic or simoniac, even those who were confirmed in office. Id., *ad* X.1.6.44, § *Administrent* (*ibid.*, *fol.* 74*vb*, n. 3): 'Sed pone quod isti, qui sic administrant post remouentur, nunquid tenet quod ab eis factum est: arg(umentum) … ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3), 3 q. 7 § tria (C.3, q.7, p.c.1). Arg(umentum) contra(rium) *infra*, de haere(ticis) <c.> fraternitatis (X.5.7.4), 12 q. 2. <c.> alienationes (C.12., q.2, c.37), 25 q. 1 <c.> omnia (C.25, q.1, c.12), 12 q. 2 <c.> precarie (C.12, q.2, c.44), ff. de eo qui pro tut(ore) l. si is (Dig.27.5.2), ff. de re(bus) eo(rum) qui sub tu(tela) quod neq(ue) (*sic*) (Dig.27.9.8). Sol(utio) dicimus, quod omnes qui habuerunt canonicum ingressum, licet post fiant haeretici, vel simoniaci, ratum est quod fit ab eis quousque tolerantur, vt in d. c. nonne (C.8, q.4, c.1), *infra*, de dol(o) et contu(macia) <c.> veritatis (X.2.14.8), nisi forte essent ordinationes, vel alia spiritualia, quae quo ad executionem irritae sunt, nisi interueniat dispensatio, 1 q. 1 <c.> si quis a simonia(cis) (C.1, q.1, c.108), 9 q. 1 c. 1 et 2 (C.9, q.1, c.1–2).'

104 Id., *ad* X.1.4.8, § *Suspensus* (*ibid.*, *fol.* 34*rb*, n. 4): 'Quidam tamen dicunt, sed non placet, quod [suspensus] excommunicare possit, et praebendas dare, et alia facere quae sunt ex iurisdictione, non de ordine, arg(umentum) *infra*, de elect(ione) <c.> ex transmissa (*sic*) (X.1.6.15). Et haec inteligimus vera, nisi suspensus est ab officio et beneficio, vel officium tantum cum ratione officij competat beneficium, 81 dist. <c.> si quis sacerdotum, et c. eos (D.81, c.17–18).'

105 Id., *ad* X.1.6.44, § *Administrent* (*ibid.*, *fol.* 75*rb–va*, n. 4–5): '… potestatem recipiat administrandi … etiam si sit simoniacus in ordine … et est verum hoc quamdiu

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of notorious excommunication.[106] The notoriety of the simony or the excommunication bars any public utility consideration – there is no need to protect the good faith of the people if they are (or they ought to be) fully aware of the condition of the holder of the office.

Notoriety not only dispenses with public utility, but it may even detract from it. This happens especially in the case of scandal. Avoiding *scandalum* is a corollary of furthering public good – it is precisely because public good is to be furthered that scandal must be avoided.[107] The subject of *scandalum vitandum* is very broad, but there are only few cases where Innocent IV links it expressly to the subject of toleration. We have already seen one of them – the faithful aware of the occult sin of fornication of his or her parish priest may refuse to receive sacraments from him only if that does not create scandal in the community.[108] The main case discussed by Innocent is a variation on the subject – the case of married priests.[109] In principle, the ordination of a Latin priest with the Greek rite, while forbidden, is to be tolerated. But the opposite may be more problematic, for in the Greek rite priests are married. When a Latin priest is therefore ordained with the Greek rite, argues Innocent, his marriage may be tolerated only for a brief spell. Leaving a married priest in charge of a community that follows the Latin rite (by Innocent's time, the overwhelming majority of churches in Western Europe) for very long, he reasons, would on the contrary be a source of great scandal. And this is why such a situation may not be tolerated.[110] The rationale of this passage seems to be that a prolonged state of

> toleratur … nisi sententia vel inhibitio data est contra eum, *infra*, de dolo <c.> veritatis (X.2.14.8) vel nisi alias esset notorium eum suspensum *infra*, de re iud(icata) <c.> ad probandum (X.2.27.24), 32 dis. <c.> preter (D.32, c.6), optime habetur *infra*, de excess(sibus) praela(torum) <c.> tanta (X.5.31.18) … licet sit suspensus a iure, tamen facta eius defenduntur authoritate confirmationis, nisi esset notorius simoniacus, quia tunc licet subditis ab eo recedere, 32 dist. § verum (D.32, p.c.6).'

106 Id., *ad* X.5.3.35 § *Secure ministret* (*ibid.*, *fol.* 502*va*, n. 3): 'et quod dicimus de simoniacis suspensis, idem dicimus de omnibus notorijs excommunicatis depositis et suspensis.'

107 Cf. Fossier (2009), pp. 320–323 and esp. 327–331, where ample literature is mentioned. Most recently see also Bianchi Riva (2016), pp. 3–4. On *scandalum* as the outer boundary of toleration see also (more broadly) Innocent's letter of 27.5.1249 (E. Berger [ed., 1887], vol. 2, p. 85, n. 4554).

108 *Supra*, this chapter, note 37.

109 In another case Innocent speaks of toleration to avoid scandal in a rather cursory way: *ad* X.1.15.1, § *Idem* (*Commentaria Innocentii Quarti*, cit., *fol.* 105*va*, n. 1).

110 Id., *ad* X.1.11.9, § *Nolumus* (*ibid.*, *fol.* 99*ra–b*, n. 1–2): '… hic non prohibet ordinari graecos a latinis, vel econuerso, sed prohibet commixtiones et consuetudines rituum obseruari in ordinibus, id est, quod episcopus graecus secundum ritus suos, puta extra quatuor tempora, vel alios consimiles ordinat clericum latinum, et eodem modo, nec latinus debet ordinare graecum contra ritus suos

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wedlock would perforce become notorious. In such a case toleration is not possible: instead of furthering the common good, it would harm the commonwealth.

7.6 Innocent IV and the *lex Barbarius*

Unlike previous (and, sometimes, later) canonists, Innocent was remarkably precise in his use of the verb 'tolerare',[111] and that depends on the close link between toleration and representation. Several of the quotations from Innocent reported above mention the *lex Barbarius*.[112] Does this mean that Innocent considered Barbarius' case as a particularly good example of toleration? Later jurists often thought so. Yet Innocent IV was not just one of the greatest canon

approbatos … Vel dic, quod licet prohibeatur facere [*scil*., ordaining to the priesthood a Latin with the Greek rite] vt hic tamen factum tolerantur, vt in contrario, et not(andum), quod ordinatus a graeco, et vtens matrimonio contracto secundum graecos in sacris ordinibus, si breuem moram tractaturus sit apud latinus tolerandus est vtens contracto matrimonio, si vero longam moram traheret, non esset tolerandus propter scandalum, et nunquam debet sibi dari ecclesia latinorum, nisi primo continentiam promittat: Latinus autem nec apud graecos, nec latinos matrimonio vtetur contracto.' Cf. Id., *ad* X.1.11.11, § *toleratur* (*ibid*., *fol.* 99*va*).

111 In the previous pages mention was made of all the most important cases where Innocent used the verb 'tolerare' in his commentary on the *Liber Extra.* Among the other cases that have not been mentioned, some use it in the same sense: *ad* X.2.2.14, § *Sententia* (*ibid*., *fol.* 198*vb*, pr, on the possibility of tolerating *ex dispensatione* someone who should be deposed); *ad* X.2.24.11, § *Praeiudicat* (*ibid*., *fol.* 284*vb*, on the toleration of a prelate who ought to be expelled from his office); *ad* X.1.19.1, § *Ordinari* (*ibid*., *fol.* 110*vb*, n. 2: if a cleric who should not be *generalis administrator* of religious estates is lawfully appointed as such, he may not be prohibited from administering so long as he is tolerated). Very occasionally, however, Innocent writes of toleration without reference to an office (and so without connection to representation). He does so only in a very few cases, four in total within his entire commentary on the *Liber Extra*, of which three are about procedural irregularities and one about defective possession: *ad* X.2.4.1, § *Non per positiones* (*ibid*., *fol.* 205*va*, n. 3: if in the *libellus* there is no *petitio* but only the exposition of the facts, so long as the defendant does not object, such a defective *litis contestatio* is to be tolerated by the judge); *ad* X.2.27.25, § *Actio* (*ibid*., *fol.* 351*ra* [*rectius*, *fol.* 315*ra*], n. 3: although the wife may not vindicate her dowry, if she does so and the husband tolerates it, the *vindicatio* is valid); *ad* X.4.3.3, § *In ecclesijs* (*ibid*., *fol.* 469*rb*, n. 3: even without banns, the marriage is to be considered as valid and the spouses' negligence is to be tolerated to avoid exposing the offspring to the risk of illegitimacy); *ad* X.1.41.2, § *Pertineret* (*ibid*., *fol.* 178*ra*, n. 9: when a monastery possesses something irregularly, if such irregularity is tolerated the possession is valid).

112 *Supra*, this chapter, notes 45, 46, 49, 65, 70, 73, 81, 82, 86, 97 and 104.

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lawyers of his times. He was also remarkably knowledgeable in civil law. A closer look at Innocent's approach to the *lex Barbarius* would reveal a more ambivalent position: while he could not avoid citing it when writing of toleration, he was well aware that that *lex* was a double-edged sword.

A first case where he looked at the *lex Barbarius* more carefully than simply citing it in passing may be found – revealingly enough – when discussing the effects of the confirmation on the vitiated election of a prelate. We have seen how Innocent insists that confirmation would cure the underlying defects of the election, or at least would allow the elected to validly exercise his office. At the same time, however, he is clear in requiring that the confirmation must take place. Saying as much, the pope recalls the text of the *lex Barbarius*: could Barbarius' case be invoked to argue against the need for confirmation? Although he immediately sides with the negative solution, Innocent observes that this *lex* might seem to bestow validity on the deeds of someone invalidly elected, and possibly even lacking confirmation.[113] Indeed Innocent is aware of the debate among civil lawyers as to whether Barbarius was confirmed in his office, and even recalls how the *lex Herennius* was used to argue against the validity of his appointment.[114] The problem is, he observes, that the *lex Barbarius* does not provide a clear answer as to whether the slave truly became praetor: Ulpian did not say whether Barbarius was actually confirmed.[115] Despite this ambiguity, continues Innocent, it is not possible to argue by analogy with the *lex Barbarius* that a prelate can be tolerated in office despite not being validly elected or confirmed.[116] It is quite possible to invoke the toleration principle on the basis

113 Innocent IV, *ad* X.1.6.32, § *Confirmauit* (*Commentaria Innocentii Quarti*, cit., *fol.* 63*rb*, n. 2): '… licet sit nulla confirmatio, tamen quae dicit, et quae facit quamdiu tolerantur valent 8 q. nonne (*sic*) (C.8, q.4, c.1) ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3), quamuis posset dici quod illa l. loquitur quando tenet confirmatio.'

114 *Ibid.*: '… sed satis bene creditur alijs, quod possit obijci, quod confirmatio non teneat, arg(umentum) de decur(ionibus) l. vlt(ima) (Dig.50.2.14 *sed* 10). Alij tamen hoc non fatentur probato tamen in modum exceptionis, quod cum confirmatio nulla est non tenebit, quod egit, quia non est communis ignorantia, licet res inter alios acta non praeiudicet.'

115 *Ibid.*, *fol.* 63*rb*, n. 3: 'Sed potest quaeri de confirmatio, cuius electio non tenet, an sit praelatus huius ecclesiae et certe iurisconsultus interrogatus de ista quaestione non respondit, sed dixit, quod ea quae dicit, et quae facit valerent, ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3).'

116 *Ibid.*: '… nobis autem videtur, quod siue electio non teneat, siue confirmatio non est electus praelatus, 62. dist. per totum (D.62), i q. i <c.> ordinationes (C.1, q.1, c.113).'

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of the common mistake, continues Innocent, provided however that there is the 'support of the confirmation'.[117]

Because of its underlying ambiguity, Innocent considered the *lex Barbarius* more of a threat than a support to his arguments.[118] This is particularly clear in his comment on Innocent III's decretal *Nuper a Nobis* (on a second marriage made in the mistaken belief of the death of the previous spouse). As we have seen earlier, Innocent III declared that in such a case 'the opinion is to be preferred to the truth'.[119] Commenting on these words, Innocent IV hastens to clarify that, in normal circumstances, it is the other way round: truth must prevail over mere opinions. The few exceptions, such as the present one, are inspired by equitable considerations: protection of the offspring, or of third parties in good faith, or of the testator's will. Then, concludes Innocent IV grudgingly, there are few other cases where no such specific (and commendable) reason may be found, such as the *lex Barbarius*.[120]

117 *Ibid.*: '… sed in eo quod dicunt, quod quae dicit, et quae facit tolerantur, bene dicunt propter communem ignorantiam, et propter tuitionem confirmationis, arg(umentum) sup(ra) e(o titulo) <c.> transmissam (X.1.6.15), et no(tandum) sup(ra) [*rectius*, infra] e(odem titulo) <c.> nihil (X.1.6.44) … nec valet si obijciatur, si non est praelatus, quomodo aget, quomodo valebunt quae cum eo qui est praelatus fierent. Respondeo, bene ex bono et aequo animo propter communem ignorantiam, vel quia potestatem administrandi recipit ex confirmatione, supra eo(dem titulo) <c.> transmissam (X.1.6.15), et vide simile, quia si sententietur pro aliquo super aliqua re, quae non fit sua sententia, non facit eam suam, ff. de condi(ctione) inde(biti) <l.> Iulianus (Dig.12.6.60) …' In this passage the conjunction 'vel' ('propter communem ignorantiam, *vel* quia potestatem administrandi recipit ex confirmatione') might suggest that the confirmation is not necessary if someone is commonly believed to be a priest. On the contrary, this 'vel' should be read in the sense of *et*, just as Innocent did a few lines before ('propter communem ignorantiam, *et* propter tuitionem confirmationis').

118 In his vast study on the invalid excommunication, Zeliauskas seems to say the opposite: for him, Innocent IV pronounced in favour of the validity of the excommunication by the excommunicate because of the *lex Barbarius*. Zeliauskas (1967), pp. 263–264. The argument however does not seem to be sufficiently supported in the sources.

119 *Supra*, §6.3.2, text and note 128.

120 Innocent IV, *ad* X.1.21.4, § *Reputandi* (*Commentaria Innocentii Quarti*, cit., *fol.* 112*va*, n. 1): 'Et est verum, quod veritas praeualet opinioni. Contraria casualia sint, et praefertur enim opinio in fauorem contrahentium et odium decipientum, ff. ad maced(onianum) l. 3 (Dig.14.6.3). Vel in fauorem prolis et testamentorum, inf(ra) qui fil(ii) sint legi(timi), <c.> cum inter (X.4.17.2), C. de testa(mentis) l. 1 (Cod.6.23.1), vel aliqua communis opinio praefertur veritati ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3).' This passage of Innocent is to be read together with his comment on X.4.1.18: if the spouse is aware that his or her first marriage is valid and not void, a second marriage is not to be tolerated (Id., *ad* X.4.1.18, § *Protulerunt*, *ibid.*, *fol.* 465*rb*: 'nullo modo tolerandum est secundum matrimonium').

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The ambiguity in the *lex Barbarius* however could be played to Innocent's advantage. Ambiguous as it was, the text of the *lex* was in favour of Barbarius' confirmation by the prince, and the Accursian Gloss, as we have seen, stressed this point greatly. Innocent was happy to follow the civil lawyers' intepretation: it was much safer for his own purposes to accept Barbarius' confirmation in office than to question it.

Innocent says as much openly on two occasions. The first is in his lengthy discussion of the validity of elections. If the unworthy prelate is elected to an office and administers it without having being confirmed, says Innocent, the moment he is removed from the office everything he has done would be invalid. To strengthen the point, he quotes, *inter alia*, both the *lex Barbarius* and its closest equivalent in the *Decretum*, Gratian's *dictum Tria*.[121] Both texts, however, speak of the unworthy so as to defend the validity of their deeds. Their citation therefore makes sense only if interpreted as referring to the unworthy who is confirmed, so as to differentiate his case from that of the unworthy who is not confirmed. This seems the case here, for just a few lines later Innocent recalls how others used the same *lex Barbarius* to argue for the opposite solution. According to such interpretation, which Innocent considers to be contrary to his own, common mistake and public utility allow for the validity of the acts carried out by the elected who is not confirmed, after the example of Barbarius' case.[122] Innocent answers sharply: the text says that Barbarius' deeds are valid because he was confirmed in office.[123] This statement dispels any ambiguity in Innocent's previous reference to the *lex Barbarius* and Gratian's *dictum Tria*. Incidentally, the same statement also strengthens the conclusion that, for Innocent, public utility and common mistake do not operate outside representation. Indeed, Innocent continues arguing against the opinion favouring the validity of the deeds of the bishop-elect who would not receive confirmation. In that case the bishop was unworthy: although elected, he would not be confirmed but rather deposed from office. Yet he was already in possession of his diocese. Because of that,

121 Id., *ad* X.1.6.44, § *Administrent* (*ibid.*, *fol.* 74*vb*, n. 3): 'Sed pone quod isti, qui sic administrant post remouentur, nunquid tenet quod ab eis factum est: arg(umentum) … ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3), 3 q. 7 § tria (C.3, q.7, p.c.1).'

122 *Ibid.*, *fol.* 75*ra*, n. 3: 'sed de isti non confirmatis dicunt aliqui, quod si aliqua fecerit in iudicio, vel etiam extra iudicium ex officio, vt emancipationes et similia, quod propter errorem communem, et vtilitatem publicam valet, ff. de offi(cio) prae(torum) <l.> Barbarius (Dig.1.14.3).'

123 *Ibid.*: 'Quamuis posset responderi, quod ibi [i. e. in Dig.1.14.3] ideo tenet, quia erat praetor confirmatus a praefecto praetorio (*sic*!), vel ipsa electione, sed non confirmatus, nec electus non est Praelatus, sed fur, ff. de decur(ionibus) <l.> Modestinus (Dig.50.2.10), 1 q. 1 <c.> ordinationes et c. si quis neque (C.1, q.1, c.113 and 115).'

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Innocent says, some would argue for the validity of his deeds, so as not to deceive any third party dealing with him. Nonetheless, Innocent dismisses this solution ('sed non placet'): without confirmation, he was not legally entitled to exercise his office.[124]

The second case where the pope relies on the *lex Barbarius* as an example of an unworthy confirmed in office is in his (similarly lengthy) commentary on X.3.36.8. There, Innocent explains the difference between the *de facto* and *de iure* exercise of jurisdiction in terms of representation. The text of X.3.36.8 discussed whether a bishop could validly suspend an abbot and put his abbey under interdict if the abbey was within the borders of the bishop's diocese but not under his jurisdiction. In the specific case under discussion the problem was that, although *de iure* the abbey was not under the jurisdictional remit of the bishop, the abbot had nonetheless promised obedience to him. While the Ordinary Gloss on the *Liber Extra* discusses the text exclusively in procedural terms,[125] Innocent IV takes a much broader stance. If someone does not have the right to exercise jurisdiction on another but enters into possession of such a jurisdiction, can he issue a sentence of excommunication or an interdict against the other person? Innocent's answer is in the negative: in order to excommunicate or to place someone under interdict, it is necessary to enjoy valid (i. e. *de iure*) jurisdiction on them. The simple *de facto* possession of jurisdiction does not suffice.[126] What is particularly interesting is Innocent's reasoning. The simple possession of jurisdiction (its *de facto* exercise) does not entail the validity of the jurisdictional acts issued by such a possessor.[127] For the jurisdictional act to be

124 *Ibid.*: 'Alij dicunt, sed non placet, quod quandiu est in possessione episcopatus, etiam non confirmatus valent, non solum praedicta sed alia omnia, quae facit, nec illudatur contrahentibus, et quia tanta subtilitas de facili verteretur in pernicem ecclesiae, C. de ver(borum) signi(ficatione) l. cum quidam (Cod.6.38.4), C. ad Treb(ellianum) l. pe(nultima) (C.6.49.7).'

125 A first gloss (bearing the name of Bernardus Parmensis) focused on the validity of the mandate to the procurator (Gloss *ad* X.3.36.8, § *Ratihabitione* [*Decretalium domini pape Gregorij noni compilatio*, cit.]). A second and last one discussed time limits for raising an exception during the proceedings (*ibid.*, § *Repromissit*).

126 Innocent IV, *ad* X.3.36.8, § *Cvm dilectvs filivs* (*Commentaria Innocentii Quarti*, cit., *fol.* 437*vb*, n. 1): 'Hic satis expresse colligi videtur, quod quamuis aliquis sit in possessione subiectionis aliquorum, non tamen valet excommunicationis sententia in eum lata, nam videtur quod hic episcopus fuerit in possessione subiectionis Abbatis huius, et tamen non valet excommunicatio ab ipso episcopo in eum lata, et consimili ratione videtur etiam de alia sententia, puta si condemnasset eum in ciuili vel criminali actione. Et certe quidam hic fatentur subiectionis huius monasterij, non tenet eius sententia excommunicationis, vel alia.'

127 *Ibid.*, *fol.* 437*vb*, n. 2: 'Sed iudicare vel excommunicare, non sunt fructus iurisdi(ctionis) quia nec propriae fructus dici possunt, imo labor et onus.'

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valid, it is necessary to be vested with the office from which such jurisdiction flows. And this is particularly clear in the case of a sentence of excommunication, because it is the Church that suspends or casts away a sinner. Clearly, the Church operates through Her ministers. But the ministers may do so only because they represent the Church and act in Her name. Ultimately, therefore, it is a question of representation: only a prelate elected and confirmed in his office may exercise the jurisdictional prerogatives of that office.[128] It follows that the sentence issued by the bishop who does not enjoy jurisdiction on the abbey *de iure* but simply *de facto* is void and of no effect.[129] This conclusion, Innocent notes, does not go against the *lex Barbarius*, which may not be invoked so as to argue for the validity of the bishop's *de facto* exercise of jurisdiction on the abbey. Barbarius' deeds, says the pope, were valid not because he was commonly considered praetor, but rather because he was confirmed in his office by the emperor. This way, Barbarius' confirmation cured the underlying defect of his fraudulent election.[130] Precisely because of that, concludes Innocent, the *lex Barbarius* may be considered an example of the same principle underpinning the toleration of the unworthy prelates confirmed in office.[131]

128 *Ibid.*, *fol.* 438*ra*, n. 2: 'Item in hoc casu [*scil.*, 'in quolibet praelato confirmato'], non dicitur praelatus confirmatus esse in possessione excommunicandi aliquos, quia eos excommunicauit, vel alias iudicauit, quia non nomine suo eos iudicat, sed ecclesiae, vnde ipsa per eum dicitur quaerere vel retinere possessionem iudicandi, vel excommunicandi.'

129 *Ibid.*: 'sed in hoc casu, scilicet, quando excommunicaret vel iudicaret illos in quorum possessione erat ecclesia, sed in veritate subiecti non erat, non valebit excommunicatio in eos lata, quia sicut dictum est, non est fructus possessionis vel commodi excommunicare, vel iudicare.'

130 *Ibid.*, *fol.* 437*vb*, n. 2: 'Item non est contra ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3) vbi dicitur, quod sententiae latae ab eo, qui erat in possessione tenent, licet praetor non esset, sed ibi respondent, illud ideo esse non potest, quia in possessione erat, quia vere iudicandi potestatem acceperat ab Imperatore, et omnia alia faciendi, quae ad praetorem pertinebant, licet non esset legitimus praetor, sed per obreptionem.'

131 *Ibid.*, *fol.* 438*ra*, n. 2: 'Et idem dicendum est in quolibet praelato confirmato, et de hoc no(tatur) sup(ra) de elect(ione) <c.> nihil. (X.1.6.44).'

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