Chapter 8

Toleration in the aftermath of Innocent IV

Before turning our attention again to the civil lawyers to appreciate what influence Innocent's notion of toleration had on their approach to the *lex Barbarius*, we should briefly look at the reception of Innocent's ideas among canon lawyers, to see whether and to what extent they accepted them. We will look only at a few pre-eminent canonists active within a century from the pope's death. This very short comparison might serve to better highlight Innocent IV's innovative and highly refined elaboration.

8.1 Parmensis and the Gloss on the *Liber Extra*

First of all, we might want to look at what Innocent's contemporaries made of the concept of (jurisdictional) toleration. Their position seems to strengthen the conclusion that Innocent's ideas were hardly a refinement of an already accepted common opinion.

If we look at the Summa on the *Liber Extra* of Goffredus de Trano (c.1200–1245), probably written in the years 1241–1243[1] and so coeval with Innocent's own Apparatus on it, we find remarkably little use of the concept of toleration. The term is present only a few times, one with regard to toleration on moral grounds,[2] and two others with regard to our subject. There, Goffredus acknowledges the toleration of the heretic not yet excommunicated, and so the production of valid jurisdictional acts,[3] but he does not elaborate much further on either the precise meaning of toleration or on its scope.

1 Schulte (1877), vol. 2, p. 90; Bertram (1971), p. 79; Bertram (2012), p. 157.

2 Goffredus de Trano, *ad* X.1.40.2 (*Summa perutilis et valde necessaria super titulis decretalium* … (Lugduni [Jean de Moylin], 1519; anastatic reprint, Aalen: Scientia Verlag, 1968, *fol.* 68*ra*, n. 3): 'non enim ob metum damni debet mortale peccatum committi, quia potius debemus omnia mala tollerare quam in peccatum mortale consentire.'

3 Id., *ad* X.1.31.9 (*ibid.*, *fol.* 55*rb–va*, n. 9): 'Impeditur autem iurisdictio ordinarij per suspensionem ordinarij si ab officio suspendatur. Item per excommunicationem, quia suspensus ab officio intelligo suspensum ab ordinaria potestate et excommunicatus excommunicare non potest vt xxiiii q. i <c.> audiuimus (C.24, q.1, c.4), nec alia iudicare vt in de sen(tentia) et re iudi(cata) <c.> ad probandum (X.2.27.24). Si vero ordinarius sit alias in mortali crimine constitutus et si de merito vite iudicare non possit vt iii q. vii <c.> qui sine peccato iudicet (C.3, q.7,

The Ordinary Gloss on the *Liber Extra*, compiled by Bernardus Parmensis (Bernardus de Botone, d.1266) mentions the toleration principle only occasionally. When it does so, in most cases it seems to give little weight to it.[4] Similarly, a few times the Gloss refers to the *lex Barbarius*, but typically just among many other citations, without relying especially on it.[5] The fact that Parmensis drew largely from the glosses on the *Compilationes Antiquae* of authors earlier than Innocent might partially explain why he makes little use of the concept of toleration as shaped by Innocent. However, when Parmensis does make use of the toleration principle, his position appears different from that of the pope. Let us look at a few such cases. First, that of the legal decisions of the *infamis*. So long as not publicly excommunicated, says the Gloss, the decision rendered by an *infamis* judge is valid. In stating as much the Gloss invokes both the *lex Barbarius* and Gratians' *dictum Tria*. This, however, applies only if neither party raised an objection against the judge until the sentence was given (and so even after the joining of the issue).[6] In stating as much, the Gloss follows the traditional approach – but not that of Innocent. As we have seen, when commenting on the same point (X.1.3.13) Innocent stressed that the parties could not object to the jurisdiction of the *infamis* ordinary judge by way of exception.[7] A second case is that of the excommunicated judge. While a sentence is void if one of the judges who pronounced it was publicly excommunicated, says the Gloss, it stands valid if the excommunication was secret. The Gloss openly justifies such a conclusion

c.3) et c. sequentibus (C.3, q.7, c.4–7); de potestate tamen iurisdictionis potest quamdiu fuerit tolleratus iudicare vt ix q. iiii <c.> nonne (*rectius*, C.8, q.4, c.1).' See also Id., *ad* X.5.3.7 (*ibid.*, *fol.* 201*va*, n. 7): '… Et quod proxime dixi quilibet peccator potest missam cantare praeter symoniacum sic intellige quilibet non praecisus quilibet tolleratus.'

4 Gloss *ad* C.1.11.11, § *Toleratur* (*Decretalium domini pape Gregorij noni compilatio*, cit.): 'hec fuit comparatiua permissio: vt hoc innuitur. Ar(gumentum) i(nfra) de preben(dis) <c.> cum iam dudum (X.3.5.18), forte propter scandalum et multitudine talis consuedudo toleratur …'). Cf. also the position of the Ordinary Gloss *ad* X.1.14.2, § *Etatem*; *ad* X.2.13.13, § *Tolerare*; *ad* X.3.2.7, § *Occultum*; *ad* X.4.1.2, § *Tolerari* (the only one of this list reporting Bernardus Parmensis as its author); *ad* X.5.10.3, § *Tolerandi*; *ad* X.5.34.9, § *Tolerentur* (all *ibid.*).

5 Gloss *ad* X.2.21.7, § *a prohibendo* (*ibid.*, the deposition of a witness who becomes *infamis* thereafter remains valid), and *ad* X.2.25.12, § *Publice* (*ibid.*, the vassals of an occult heretic are not released from their duties towards him). Neither gloss reports its author.

6 Gloss *ad* X.1.3.13, § *Infamem* (*ibid.*): 'secus si lata sententia detegatur iudicem fuisse infamem iii q. vii § tria, ver(siculum) verum (C. 3, q. 7, p.c.1), et ff. de offi(cio) preto(rum) <.l> barbarius (Dig.1.14.3), et C. de testa(mentis) l. i (Cod.6.23.1); secus in excommunicatione: quia sententia publice excommunicati nulla est i(nfra) de re iudi(cata) <c.> ad probandum (X.2.27.24).'

7 *Supra*, last chapter, notes 45 and 48.

by reference to the common mistake, as it recalls both the *lex Barbarius* and the sources most closely related to it (the slave-arbiter in *Tria* and the slave-witness in Cod.6.23.1). But it does not hint at the concept of toleration.[8] The difference between Innocent and the Ordinary Gloss becomes even more pronounced in a third case, that of the unworthy prelate invalidly appointed to a parish who hears the penitent's confession (X.1.6.54). When the election is vitiated, states the Gloss, the prelate may not exercise jurisdiction on the parishioners. It is only the faith of the faithful that renders the absolution valid.[9] The Gloss however does not enquire as to the specific status of the prelate – whether or not he was tolerated in his office. Nor does it say that a further confession is necessary when the faithful discovers the truth about the prelate not tolerated in office. Its conclusion is therefore more logical than that of Innocent – it is difficult to put a sacrament under a resolutive condition! From a legal standpoint, however, the more coherent argument was that of Innocent. By contrast, the more linear approach adopted by the Gloss is also revealing of its scant interest in the legal ramifications of the toleration principle.

It is probably on the requirement of confirmation that the position of the Gloss differs most from that of Innocent. In its discussion of the election of an unworthy the Gloss gives ample details as to the punishment of both elector and

8 Gloss *ad* X.2.27.24, § *Innodatus* (*Decretalium domini pape Gregorij noni compilatio*, cit.): 'sic sub de excep(tionibus) <c.> exceptionem (X.2.25.12) ad fi(nem), vbi de hoc aliud si occulte: quia tunc nec ipse nec alii ipsum tenebant vitare quia diuinare non poterant, vnde cum communi opinione liber et absolutus habeatur et credatur quicquid interim facit viz. iii q. 7 § 3 ver(siculum) verum si seruus (C. 3, q. 7, p.c.1) et ff. de offi(cio) praetor(um) <l.> barbarius (Dig.1.14.3), C. de testa(mentis) l. i (Cod.6.23.1).' Those scholars who argued the opposite often relied more on different issues, especially the scope of the maxim *de occultis non iudicat ecclesia*. See e. g. Miaskiewicz (1940), p. 51, note 6. On the position of the Ordinary Gloss on the *Liber Extra* regarding the invalidity of the sentence rendered by the person who was publicly excommunicated see also the gloss *ad* X.3.49.7, § *Tempore valiture* (*Decretalium domini pape Gregorij noni compilatio*, cit.).

9 Gloss *ad* X.1.6.54, § *Decepte* (*ibid.*): 'quia cum desierit esse prelatus ipsorum: nihil potestatis habebat in eis, vnde non poterat illas alias soluere vel ligare, i(nfra) de peni(tentiis) et remis(sionibus) <c.> omnis vtriusque (X.5.38.12) … Sed nunquid valebit illis absolutio illius talis prelati siue penitentia per illum imposita? Non videtur: quod (*sic*) nullam potestatem habet ligandi vel soluendi: sicut non valet sententia a non suo iudice lata, i(nfra) de iudi(cis) <c.> at si clerici (X.2.1.4) et si sic periebant. In casu isto non credo quod perirent: non quod ille hoc posset, sed propter fidem quam habebant de sacramento: cum crederent illum adhuc esse suum prelatum, et ita in sola fide saluantur, i(nfra) de baptis(mo) et eius effec(tu) <c.> debitum (X.3.42.4).' On the subject, the position of the Gloss remained predominant until the early fifteenth century (i. e. before Panormitanus): *infra*, pt. IV, §14.3.

elected,[10] and explains that the deeds of the elected who is not confirmed may not stand valid unless the elected lies (hierarchically) immediately below the pope.[11] In the case discussed in X.1.6.44, argues the Gloss, the acts of the unworthy prelate would stand because he received papal dispensation.[12] Both argument and conclusion were different from those found in Innocent's comment on the same decretal.[13] But Innocent did not reach his – contrary – conclusion only because he discussed the matter more generally and avoided the case of papal dispensation. Quite probably, Innocent was against the solution adopted in the Ordinary Gloss. The Gloss also allowed for the validity of the administration of the diocese (and so, for the validity of the exercise of the office) without confirmation for two other reasons: because the bishop-elect was already in possession of his diocese,[14] and because 'being excessively subtle one might jeopardise ecclesiastical goods.'[15] The last words referred to the case in which the suffragan bishop-elected was far away from his metropolitan. The solution was therefore based on common sense: prohibiting him from exercising his office until confirmed in it would have led to the paralysis of the diocese. When commenting on the same passage, however, Innocent said expressly that any reason based on the possession of the office or on the need to avoid excessive subtlety in legal reasoning does not suffice to justify the validity of the acts done by the prelate who is elected but not confirmed.[16]

10 Gloss *ad* X.1.6.44, § *Suspendatur* (*Decretalium domini pape Gregorij noni compilatio*, cit.).

11 Gloss *ad* X.1.6.44, § *Administrent* (*ibid*.). The Gloss was careful in wording the statement 'qui subsunt nullo medio romano pontifici'. When Bernardus compiled the Gloss, the traditional privilege of the metropolitan to administer after his election (i. e. without papal confirmation) was increasingly under attack by canon lawyers. It may well be that the wording was crafted so as to echo Alexander IV's decree (of 1257) requiring papal confirmation for the 'prelates-elect of churches which pertain, without intermediary, to the Roman Church'. See Benson (1968), p. 185, text and note 50.

12 Gloss *ad* X.1.6.44, § *Administrent* (*Decretalium domini pape Gregorij noni compilatio*, cit.): 'Sed pone quod talis prelatus tempore confirmationis sue reperitur minus idoneus: et sic repellitur: nunquid ea quae medio tempore fecit sunt cassanda … Sed contrarium verum est in hoc casu: quia fuit inquiera (*sic*) administratione: et in quasi possessione prelationis de licentia pape.'

13 *Supra*, last chapter, esp. notes 121–123.

14 *Supra*, this paragraph, note 12. Without confirmation such a possession was not fully legitimate, so the Gloss spoke of *quasi possessio*.

15 Gloss *ad* X.1.6.44, § *Administrent* (*Decretalium domini pape Gregorij noni compilatio*, cit.): 'Sed quid si suffraganeus esse valde remotus a suo metropolitano: nunquid eodem modo potest ministrare? Videtur quod sic … et si nimia subtilitate vtamur res ecclesiarum depereunt.'

16 *Supra*, last chapter, note 124.

8.2 Hostiensis

In the case of Henricus de Segusio, cardinal Hostiensis (c.1200–1271) – together with Innocent IV, arguably the most important and influential canon lawyer of the thirteenth century – the situation is different. In his *Lectura Aurea* the concept of toleration is present on several occasions, for instance to avoid scandal,[17] and as a manifestation of benevolence (especially in contrast to strict law).[18] Hostiensis speaks of toleration with regard to the exercise of jurisdictional powers by those who ought to be removed (or have not been validly appointed in the first place).[19] As with Innocent, Hostiensis remarks that the

17 In this sense, an interesting passage of Hostiensis may be found not with regard to the jurisdiction of the occult heretic but to that of the wicked ruler: Hostiensis, *ad* X.3.34.8, § *Rursus* (*Lectura siue Apparatus domini Hostiensis super quinque libris Decretalium*, Argentine … Johannes Schottus, 1512, vol. 2, *fol.* 136*va*): '… Potest etiam papa assistere regi hierusalem, ad quem spectat de iure sicut credendum est: ex quo contrarium non apparet. Quinimmo et contra alios infedeles et si non teneant terram in qua iurisdictionem habuerint principes christiani: potest papa tamen iuste facere preceptum et constitutionem quod non molestent iniuste christianos qui eorum iurisdictioni subsunt, et etiam eos in totum eximere a iurisdictione et dominio eorundem, ar(gumentum) in(fra) de iude(is) c. i et c. cum sit et c. ex speciali et c. fi. (X.5.6.1, 16, 18–19), di. liiii, di. <c.> mancipia et c. sequen(s) (D.54, c.13–14). Immo et si male tractent christianos potest eos priuare per sententiam iurisdictionem et dominio quod super eos habent. Sed hoc non nisi ex magna causa: debet enim eos quantum potest tolerare, dummodo non sit periculum christianis nec exinde graue scandalum generetur.' See also Id., *ad* X.3.5.6, § *Cum teneamur* (*ibid.*, vol. 2, *fol.* 15*ra*): 'Si mandatum quod fecit papa pro aliquo beneficiando non debet: quia aliud habet beneficium sufficiens, vel non potest sine scandalo exequi. Hoc ducet papa equanimiter tolerandum.'

18 In this sense see esp. the case of a person who abjured his heresy but then relapsed into it. Id., *ad* X.5.7.9, § *Illos quoque* (*ibid.*, vol. 2, *fol.* 278*rb–va*) '… Alii tamen dicunt quo iste est casus specialis in fauorem fidei, et quod omnino reddidit se indignum audientia: ex quo abusus est prima gratia sibi facta. Et hoc credo verius de rigore … nullo modo amplius reconciliabuntur: audietur tamen defendendo se super aliis criminibus accusati … Prima tamen opinio de exuberanti equitate et benignitate tolerari potest …' See also Id., *ad* X.3.5.26, § *Verum* (*ibid.*, vol. 2, *fol.* 24*va*): '… Sed quare tenetur episcopus integrare prebendas has? Respondeo, quia licet non teneret factum episcopi: tamen non poterat quod fecerat reuocare, ne quis contra venire … Tu dic: quod episcopus intendebat numerum [*scil.*, prebendarum] augmentare: et ideo tenuit receptio. Sed non fiebat ex causa rationabili, vel non sufficiebat vtrique facta diuisio [of a same *prebenda*] et ideo reintegrare tenetur … Vel hoc de benignitate fit: quod talis receptio toleretur, quia de rigore iuris esset cassanda secundum quidam …'

19 See esp. Id., *ad* X.1.14.13, § *Licet igitur* (*ibid.*, vol. 1, *fol.* 114*ra*): '… Quid si aliquis irregularis vel criminosus in sacerdotali officio toleratur in aliqua ecclesia: nunc ad aliquam dignitatem eligitur in eadem, nunquid hi qui ipsum tolerarunt poterunt excipere contra ipsum.'

toleration of the unworthy priest applies only when he is confirmed in office.[20] While he seems to approve of the distinction between person and office as the ultimate rationale of toleration,[21] Hostiensis does not elaborate much on the legal features of the concept, or on its precise scope.[22] When he speaks of toleration with regard to the exercise of jurisdictional powers, he typically reports what Innocent said on the matter without any addition. This is the case, for instance, with his comment on the decretal *Sciscitatus* (X.1.3.13), which for Innocent was of paramount importance for the toleration of the ordinary judge.[23] There, Hostiensis merely provides a summary of Innocent's comment without building on it, or (and much unlike the pope) showing particular interest in its technicalities.[24] Hostiensis does the same in the case of the notary

20 Id., *ad* X.2.28.46, § *Nos ergo* (*ibid.*, vol. 1, *fol.* 418*rb*): 'talis prouisio [*scil.*, the duty of obedience to a prelate even though *illegitimus vel homicida*] habet vim non tantum electionis sed etiam confirmationis. Et confirmato prelato obediendum est etiam lite pendente, et quamdiu ab ecclesia toleratur vt patet viii q. i <c.> nonne (*rectius*, C.8, q.4, c.1), sub de elec(tione) <c.> transmissam (X.1.6.15) et in eo quod legitur et no(tandum) in(fra) de accusat(ionibus) <c.> olim I. V. et P, § prouisio (X.5.1.26).'

21 Id., *ad* X.2.14.8, § *Nos igitur, s.v.* 'excommunicationem' (*ibid.*, vol. 1, *fol.* 285*vb*): 'Dicunt aliqui, et forte non male: quod si praelatus excommunicatus ratione officij sibi commissi aliquid spirituale exerceat, puta prouidendo alicui de prelatura vel canonicatu, vel si representatum sibi instituit, vel electionem confirmat, valet quod agit, quamdiu ab ecclesia toleratur, ar(gumentum) viii q. iiii <c.> nonne (C.8, q.4, c.1) … Nisi forte esset notorium, vel alias probari posset, quod esset publice excommunicatus.' It is interesting to note that Hostiensis referred to 'some people' (*aliqui*) instead, more directly, to Innocent IV. While Hostiensis was probably alluding to a line of thought running from Paucapalea to Tornacensis and beyond, the omission seems nonetheless peculiar, because Innocent was far more explicit (and thorough) on the subject than most. On the subject, he would have been the obvious author to cite, all the more given Hostiensis' profound knowledge of Innocent's writings.

22 In this regard it is telling that Hostiensis considered the question of the exercise of jurisdictional acts of the occult excommunicate ultimately as a manifestation of the principle *ecclesia de occultis non iudicat*, and not – unlike Innocent – of the different principle of toleration. See esp. Id., *ad* X.5.39.34, § *Si vere* (*ibid.*, vol. 2, *fol.* 356*ra*): 'executionem enim ordinum vel beneficia confere (*sic*) vel acquirere non possunt excommunicati etiam occulti: quia non sunt ad hoc habiles seu capaces … licet de facto teneat quousque ecclesie exinde facta fuerit fides, quia non iudicat de occultis, s(upra) de simo(nia) <c.> sicut nobis (*sic*) (X.5.3.29).'

23 *Supra*, last chapter, notes 45 and 48.

24 Hostiensis, *ad* X.1.3.13, § *Nos vero* (*Lectura siue Apparatus domini Hostiensis super quinque libris Decretalium*, cit., vol. 1, *fol.* 13*ra*): '… hoc autem hota quod secundum d(ominum) n(ostrum) [*scil.*, Innocent IV] nemo potest se excusare a iudicando pretextum infamie nisi contra eum excipiatur, ar(gumentum) C. de decurio(nibus) <l.> infamia et l. nec infame (Cod.10.32.8 and 12). Sed nec pretextu infamie vel seruitutis lata sententia retractatur, ff. de of(ficio) praeto

whose legitimacy was later questioned. Here he does not refer expressly to Innocent, but his comment verges on a literal transcription of the pope's.[25]

By contrast, Hostiensis shows more interest in the toleration principle with regard to sacramental issues, especially the ordinations done by occult heretic tolerated by the Church.[26] Here as well, however, his position does not diverge

(rum) <l.> barbarius (Dig.1.14.3). H<a>e etiam exceptiones contra delegatum tamen competunt, non contra ordinarium quis diu in suo ordine et officio tolleratur vt no(tatur) in(fra), de offi(cio) del(egati) <c.> cum super (X.1.29.23), secundum d(ominum) n(ostrum) in(fra) de cohabi(tatione) cle(ricorum) et mu(lierum) <c.> vestra (X.3.2.7).' Cf. Innocent IV, *supra*, last chapter, notes 37–39.

25 Hostiensis, *ad* X.2.22.1, § *Si scripturam* (*Lectura siue Apparatus domini Hostiensis super quinque libris Decretalium*, cit., vol. 1, *fol. 336va*): '… Si tamen negetur illum qui instrumentum confecit fuisse notarium, necesse esse hoc probare per testes, vel per aliud instrumentum de officio sibi commissum confectum vt et no(tatur) i(nfra) c. i in prin(cipio) (X.2.22.1); sed et sufficeret si probaretur per testes, quod tempore illo quo fuit factum instrumentum quod nunc in dubium reuocatur officio notarij siue tabellionis publice fungebat, ar(gumentum) ff. ad macedonianum l. iii (Dig.14.6.3), ff. de offi(cio) praeto(rum) <l.> barbarius (Dig.1.14.3), C. de testamentis l. i (Cod.6.23.1), et forsan hoc potest intelligi s(upra) de elect(ione) <c.> scriptum est § i (X.1.6.40).' Cf. Id., *ad* X.1.6.40, § *Verum* (*ibid.*, vol. 1, *fol. 65rb*). Possibly because of his reliance on Innocent on the subject, Hostiensis does not discuss the question in its most obvious *sedes materiae*: see his commentary on X.2.22.15 (*ibid.*, vol. 1, *fol. 347ra–va*). Perhaps for the same reason, in another occasion in his (even by Hostiensis' own standards, remarkably lengthy) commentary on the same title he briefly touches upon the case of a document customarily believed to be authentic, but does not bring up the forgery issue: Id., *ad* X.2.22.9, § *Super tertio vero* (*ibid.*, vol. 1, *fol. 343ra–b*).

26 See esp. a long passage in his comment on X.5.8.1, § *Illos vero* (*ibid.*, vol. 2, *fol. 282va*): '… Idem videtur dicendum et de irregularitate ordinatoris vel ordinati, qua tamen talis est quod non impedit executionem quin conferatur habitum et exercitio (*sic*) sine actu, puta quia defectum patit … talibus ar(gumentis) lvi di. <c.> apostolica et c. cenomanenses et c. si (D.56, c.12–13 and 10) sub de renunciatione <c.> nisi quum pridem § persone (X.1.9.10). Inde videtur dicendum et de infamia, nam simoniaci etiam beneficio sunt infames … Hoc idem videtur dicendum de excommunicatis occultis et de omnibus alijs supradictis, s(cilicet) quod executionem conferant quamdiu ab ecclesia tollerantur, ar(gumentum) i q. i <c.> Christus (C.1, q.1, c.88), vi q. v c. ii et iii (C.6, q.5, c.2–3). Et etiam tales recipiunt executionem licet ligatam vt dictum est de homicida et tamen sunt indigni de conse(cratione) di. ii <c.> non prohibeat (*De cons*. D.2, c. 67), nec obstat ix q. i c. i et iii (C.9, q.1, c.1 and 3), sub de ord(inatis) ab episcopo c. i et ii (X.1.13.1–2) quia ibi loquitur de illo qui non tolerabatur ab ecclesia sed per sententiam vel denunciationem erat iam ei executio interdicta. Unde nec ipsam alij dare potest saluo excommunicato de quo dici potest quia quamuis toleretur dummodo probari possit excommunicatio possum prohibere volenti ordinari ne ab eo recipiat ordines quia excommunicatus est, vel possum ei dicere: non recipiam a te ordines cum excommunicatus

much from that of Innocent.[27] Both Hostiensis' greater interest in the concept of toleration as applied to sacramental issues and his closeness to Innocent's position may be also seen in Hostiensis' treatment of the ordinations of Latin priests after the Greek rite. In his comment on X.1.11.9 he employs the expression 'being tolerated' (*tolerari*) eight times in a relatively short passage.[28] In so doing Hostiensis openly adheres to the interpretation of Innocent (who also applied the concept of toleration to that subject).[29] But Hostiensis' attention is more on the underlying validity of the consecration of the priest than on whether he should retain his office. Because of the different perspective, Hostiensis shows little interest in enquiring as to the precise boundaries and the exact working of the concept of toleration. This different focus may be seen in Hostiensis' discussion of the validity of a confession heard by a prelate subsequently dismissed from office (X.1.6.54). As we have seen, in his comment on this decretal Innocent distinguished between justifiable ignorance and proper toleration principle – only the latter renders the confession valid, while excusable ignorance leads to a precarious validity only for pastoral reasons.[30] On the contrary, Hostiensis reaches the same positive conclusion in both cases because 'whoever is a priest can truly absolve', and because of the justifiable ignorance of the faithful. In so doing, therefore, Hostiensis' poisition lies between that of Innocent and that of the Ordinary Gloss. While the Gloss relied on the faith of the penitent so as to dispense with a second confession in any case,[31] Hostiensis gives a more refined legal shape to it: as the penitent's mistake is justifiable, and since the *falsus praelatus* is tolerated in office, the confession is valid. In stating as much, Hostiensis seems to refer to what Innocent said, seeking at the same time to underplay the pecularity of the pope's position. As a result, in Hostiensis toleration becomes more a justification for the common mistake of the penitent rather than the legal reason for the validity of the

> sis nec debet tecum participare, et ex hac causa possit legitime appellari. Secus est in infamibus irregularibus et alijs supradictibus in quibus non est admittenda talis exceptio: sufficit enim quod ab ecclesia tollerentur, ix q. iiii <c.> nonne (*rectius*, C.8, q.4, c.1). Ratio diuersitatis hec esse quia cum excommunicato communicari non potest sine periculo in alijs secus. Quod autem dictum est de excommunicato id intelligas de notorio fornicatore et simoniaco quia a talis obedientia propria auctoritate recedi potest, xxxii di. § verum (D.32, p.c.6).'

27 Cf. Innocent IV, *supra*, last chapter, note 103.

28 Hostiensis, *ad* X.1.11.9, § *Quum secundum regulas* (*Lectura siue Apparatus domini Hostiensis super quinque libris Decretalium*, cit., vol. 1, *fol.* 104*rb–va*). See also Id., *ad* X.1.11.10, § *Si vero* (*ibid.*, vol. 1, *fol.* 104*vb*).

29 Innocent IV, *ad* X.1.11.9, *supra*, last chapter, note 110.

30 Innocent, *ad* X.1.6.54, *supra*, last chapter, note 87.

31 Gloss *ad* X.1.6.54 (*supra*, this chapter, note 9): 'cum crederent illum adhuc esse suum prelatum: et ita in sola fide saluantur.'

absolution.[32] Innocent would never have said that any true priest can absolve: priesthood pertains to *ordo*, absolution to *iurisdictio*.[33] What attracted the interest of civil lawyers in Innocent's doctrine of toleration was precisely its neat legal shape and its precise and unambiguous boundaries – which Hostiensis was not always keen to provide because of his different sense of priorities between legal analysis and pastoral considerations.[34] This might explain why civil lawyers made comparatively little use of Hostiensis when writing on the subject, whereas they relied extensively on Innocent.

8.3 Guido de Baysio

If we look at another but slightly later pre-eminent canonist, Guido de Baysio (c.1250–1313), we can see the influence of Innocent but also its limits. As with Hostiensis, Baysio shows no particular inclination to read the concept of toleration in specifically jurisdictional terms. This may be seen in Baysio's comment on some of the *locus classici* on the subject in the *Decretum*. In his discussion of the incipit of C.2, q.1, c.18 ('Multi corriguntur ut Petrus; multi tollerantur ut Iudas'), for instance, the concept of toleration is based on the distinction between notorious and occult sin.[35] But the reason for tolerating the latter depends exclusively on the impossibility of proving the crime judicially. So

32 Hostiensis, *ad* X.1.6.54 § *Dudum* (*Lectura siue Apparatus domini Hostiensis super quinque libris Decretalium*, cit., vol. 1, *fol. 77ra*): '… Excusantur autem anime subditorum propter iustam ignorantiam, arg(umentum) viii dis. <c.> consuetudo (D.8, c.8), et quia prelatus ab ecclesia toleratus in de cohabi(tatione) cle(ricorum) et mu(lierum) <c.> vestra (X.3.2.7), viii q. iiii <c.> nonne (C.8, q.4, c.1). Dicunt autem quidam: quod ex quo subditi saltem per sententiam depositionis de veritate sunt certificati debent accedere ad verum sacerdotem et ab eo absolui, in de peniten(tentia) <c.> omnis (*De pen*., D.1, c.37) et melius in de presby(tero) non bap(tizato) <c.> veniens (X.3.43.3). Tu dicas hoc esse consilium cautum: non tamen est de necessitate iuris. Nam qualiscunque sit presbyter vere absoluit, ex quo curam tenet, dummodo seruet formam ecclesie, quamdiu probabilis est ignorantia et ab ecclesia toleratur, vt in premissis iuribus et ff. de offi(cio) preto(rum) <l.> barbarius (Dig.1.14.3) et in de consecra(tione) <c.> eccle(sia) (*De cons*., D.4, c.45).'

33 *Supra*, last chapter, esp. §7.5.

34 Much has been written on Hostiensis' understanding of *aequitas canonica*. Yet even there the link between *aequitas* and pastoral considerations has often been neglected. It is worth recalling what said by Lefebvre several decades ago: Lefebvre (1952), pp. 318–321.

35 Guido de Baysio, *ad* C.2, q.1, c.18, § *Multi* (*Rosarium super decreto*, Venetiis [Herbort], 1481): '… per petrum intellige notorios peccatores, per iudam uero occultos, quia eius crimen erat occultum.' The negative provision contained in this chapter (the occult crime is not to be judged) did not necessarily also entail

the (lengthy) commentary of Baysio on the *mali* who are tolerated within the Church focuses on the occult crimes that are known only to God and may not be judged by men. Similarly, the key-text C.2, q.1, c.6[36] is the object of a particularly detailed comment by Baysio on probatory and procedural issues, without mention of the concept of toleration.[37] This does not mean that Baysio rejects Innocent's arguments. Indeed elsewhere he refers to C.2, q.1, c.18 to argue that toleration entails the validity of the administration of an office: the tithe paid to the priest tolerated in office releases the debtor.[38] The ultimate reasons underpinning the toleration principle in Baysio – and so also informing its precise scope – do not entirely match those found in Innocent.

There is little doubt that Innocent influenced Baysio's position on our subject. This influence is particularly clear on Baysio's discussion of the possibility of recusing the jurisdiction of the heretic.[39] At least in principle, Baysio would seem to have accepted Innocent's reasoning on the limits and modalities of such recusation – namely the distinction between the prohibition on serving as judge and the prohibition on rendering a judgment.[40] But on the crucial link between confirmation in office and toleration he shows some hesitation – does it really

the positive prescription to tolerate the sinner's jurisdiction: a hint might be found in Baysio's *Tractatus super haeresi* (in Johannes Dominicus Mansi [ed.], *Sacrorum conciliorum Nova, et Amplissima Collectio* …, vol. 25, Venetiis, apud Antonium Zatta, 1782, col. 423).

36 C.2, q.1, c.6: 'Item Augustinus. Unus ex uobis me traditurus est. Bene dixit: ex uobis, et non: ex nobis. Ex uobis enim est, a quibus per iudiciariam potestatem confessus aut conuictus exclusus non est. A me uero, qui nullis indigeo argumentis, et omnia certissime noui, separatus et diuisus est. Tale est, ac si diceret: Etsi ego per occulti iudicii sententiam eum dampnatum habeo, uos tamen adhuc illum per tollerantiam sustinete.'

37 Baysio, *ad* C.2, q.1, c.6, § *Unus ex vobis* (*Rosarium super decreto*, cit.).

38 Id., *ad* C.8, q.4, c.1, *Nonne directa* (*ibid.*): '… quamdiu ergo prelatus toleratur possum ei soluere decimam, nam multi tolerantur ut iudas, ii q. i <c.> multi (C.2, q.1, c.18).'

39 See esp. Id., *ad* VI.1.14.14, § *Item habere negatur* (Guido de Baysio, *Apparatus Libri Sexti*, Mediolani [Jacobus de Sancto Nazario de Ripa, & Bernardinus de Castelliono], 1490, *fol.* 45*vb*). Baysio followed Innocent also on the issue of possession of the office by the unworthy: Id., *ad* C.12, q.2, c.37, § *Alienationes* (*Rosarium super decreto*, cit.): '… dicas quod si proponatur exceptio tu non est praelatus non bene excipitur. Sed si ita dicatur tu non est praelatus nec in possessione praelationis es nec haberis pro praelato tunc bene excipitur, et tunc ante lit(em) conte(statam) debet agens docere de sua possessione uel quasi … de hoc plene no(tatur) ex(tra) de elec(tione) <c.> nihil et c. transmissam (X.1.6.44 and 15) et ibi de hoc per inno(centium).' Cf. Innocent IV, *ad* X.1.6.44 and *ad* X.1.6.15, *supra*, last chapter, notes 5–6 and 4 respectively.

40 Baysio, *ad* C.3, q.7, p.c.1, § *Infamis* (*Rosarium super decreto*, cit.): '… et no(ta) quod infames et serui non prohibentur expresse iudicare, sed per consequens quia prohibentur ne iudices fiant, ut hic et … ff. de iudi(ciis) <l.> cum pretor

need to be based on legal representation? Baysio seems to accept that confirmation in office entails toleration of the acts carried out in the exercise of that office, but he finds the alternative explanation for the validity of the deeds – legal relevance of the common mistake out of fairness considerations – just as good.[41]

Not taking a clear side between the two arguments, Baysio appears somewhat ambiguous when discussing cases of toleration that are far more serious than the simple payment of a tithe. The foremost example is the validity of the excommunication issued by the secret excommunicate tolerated in office. The gravity of this case requires a clear analysis as to the reasons underpinning the toleration. If the validity of the deeds is based on common mistake, says Baysio, then that is not reason enough for the validity of the excommunication itself. If on the contrary the reason lies in the confirmation in office, he continues, then the excommunication might be considered valid.[42] Baysio is fully aware that Innocent's reasoning is based on legal representation, so that for Innocent the excommunicate does not excommunicate in a personal capacity but rather as the office he (validly though unworthily) represents.[43] Nonetheless, Baysio is reluctant to push this argument to its extreme (but logical) consequences, and

(Dig.5.1.12), secundum inno(centium), qui ita no(tat) extra de offi(cio) dele(gati) <c.> cum super (X.1.29.23).' Cf. Innocent, *ad* X.1.29.23 (*supra*, last chapter, note 49).

41 Id., *ad* D.62, c.3, § *nullus in episcopum* (*ibid.*): 'dicunt quidam quod sine electio non teneat sine confirmatio: non est praelatus … et no(tandum) xxii di. c. pe. (D.22, c.6). Dicit tamen quod que dixit et fecit tollerantur propter tuitionem confirmationis, ar(gumentum) extra de elec(tione) <c.> transmissa (X.1.6.15), nec ob(stat) secundum eos si obijciatur si non est praelatus quando aget, quando ualebunt que fecerit. Nam hoc contingit ex bono et equo propter commune ignorantia, uel quia potestatem administrationis recipit ex confirmatione ar(gumentum) pre(cedentem) c. transmissa (X.1.6.15).'

42 Id., *ad* C.11, q.3, c.1, § *Sententia* (*ibid.*): 'Et dicas quod in sententia excommunicationis plus consideratur veritas quam opinio vt si feratur ab eo qui non habet iurisdictionem, licet quod ad opinionem habeatur pro iudice non tamen valet sententia et hoc est propter specialitatem excommunicationis secundum vin (centium hispanum) … licet contrarium possit sustineri.' Cf. Id., *ad* VI.5.1.1, § *Cum medicinalis* (*Apparatus Libri Sexti*, cit., *fol.* 114*rb* and esp. 114*vb*).

43 See esp. Id., *ad* C.24, q.1, c.1, § *Quod autem* (*Rosarium super decreto*, cit.): '… vnde dicebat Inno(centius) quod dum tales tollerantur in aliqua dignitate et sunt occulti non nominati satis uidetur quod possunt excommunicare, beneficia conferre, literas impetrare. Quia hic ipsa dignitas facere uidetur et non ipsa persona excommunicata … facta enim eorum tuetur praetor, nec ob(stat) i(nfra) q. ii et iii (C.24, q.2–3) vbi dicitur quod excommunicatus non potest excommunicare: quia loquuntur de nominatim excommunicato et interdicto et non tollerato secundum inno(centium) qui ita no(tat) ex(tra) de sen(tentia) ex(communicationis) <c.> si uere (X.5.39.34).' Cf. Innocent IV, *ad* X.5.39.34, *supra*, last chapter, note 15.

he shows his preference for the contrary conclusion – that the sentence of excommunication issued by the secret excommunicate is void.[44]

This conclusion, in clear contrast with Innocent's position, seems to show Baysio's preference for common mistake as the basis of toleration. It does not appear fortuitous that Baysio grants far more space to the common mistake than Innocent did. Baysio relies on Innocent to draw a line between excusable ('probabilis') and non-excusable ('crassa et supina') ignorance.[45] But, once duly qualified, he lets such ignorance produce effects that Innocent would have never allowed. This is particularly clear in Baysio's discussion of acquisitive prescription based on false belief. If the false bishop widely believed to be legitimate alienates some goods or rights pertaining to the diocese he invalidly administers, this (invalid) title gives raise to usucapion, argues Baysio, just like the possession of territories beyond the true boundaries of the diocese. In both cases, he explains, the reason is that common mistake on circumstances of fact does make law, as the *lex Barbarius* and similar *leges* clearly show.[46]

44 Baysio, *ad* C.24, q.1, c.4, § *Audiuimus* (*Rosarium super decreto*, cit.): 'dicas quod sententia excommunicationis ab excommunicato quantumcunque occulto prolata est nulla dummodo postea detegatur et est ratio quia cum sit extra communionem ecclesie non potest habere hanc potestatem.'

45 Id., *ad* VI.5.11.1, § *Irregularitatem* (*Apparatus Libri Sexti*, cit., *fol.* 115*ra*).

46 Id, *ad* C.10, q.3, c.6, § *Quia* (*Rosarium super decreto*, cit.): 'Alii dicunt idem si esset titulus erroneus qui dat causam prescribendi secundum eos extra de iurepa (tronatus) <c.> cura (X.3.38.11), sed tu dic super hoc esse distinguendum, quia erroneus titulus aut est erroneus iure aut in fact. Si in iure nunquam dat causam prescribendi, quia iuris ignorantia non prodest usucapere uolentibus, ff. de iuris et facti igno(rantia) l. iiii et l. ignorantia et l. regula (Dig.22.6.4, 1 and 9), ff. de usuca(pionibus) <l.> ubi lex et l. nunquam (Dig.41.3.24 and 31). Ubi autem est erroneus in facto, uerbi gratia si ille qui concessit episcopalia aliquibus locis siue ecclesijs credebatur episcopus et non erat, talis titulus licet erroneus dat titulum prescribendi; uel potest dici erroneus titulus in facto, quando episcopo possidet latiorem dyocesim quam sua si credens eam esse totam de sua dyocesi, licet in ueritate non sit cum terminos et confines sue dyoc(esis) ignoraret, et episcopalia in aliena dyoc(esi) prescribat. Hec probari possunt ff. de offi(cio) preto(rum) <l.> barbarius (Dig.1.14.3), ff. de iure fis(ci) <l.> si in accep(to) (*sic*) (Dig.49.14.32), C. de testa(mentis) l. i (Cod.6.23.1), C. de sen(tentiis) interloc(utotionibus) om(ium) iudi(cium) l. ii (Cod.7.45.2), ff. ad macedoni(anum) l. iii (Dig.14.6.3), institu. de testamen(tis) in § testes (Inst.2.10.6). Error enim facti facit ius; error uero iuris minime.' The extensive number of Roman sources quoted by Baysio beyond the *lex Barbarius* is interesting: the impression is that Baysio sought to use, so to speak, nearly all the weapons in the civil law arsenal on the subject.

8.4 The *Speculum Iudiciale*

Although sometimes Innocent's arguments are filtered though the *Lectura Aurea* of Hostiensis, the *Speculum Iudiciale* of Guilelmus Durantis (Guillaume Durand, c.1230–1296) made considerably more abundant use of the concept of toleration than his 'master' Hostiensis.[47] The *Speculum* greatly contributed to the spreading of canon law principles among civil lawyers. Given its great influence, we will look in a little more detail at its approach to the *lex Barbarius* and the deep influence of Innocent.

A first trace of Innocent's ideas on toleration may be seen in the *Speculum*'s treatment of the plaintiff. While a plaintiff acting in his own name does not need to prove his right before the joining of the issue, when he acts in the name of another he does.[48] This however, continues Durantis, does not apply if he is discharging an ecclesiastical office. In such a case he shall be forced to prove his right only if the defendant objects both that he is not a true prelate and that he is not in possession of his office.[49] This and similar comments do not necessarily prove that Durantis would thoroughly adhere to Innocent's concept of toleration – one may find the same statement, for example, in Baysio.[50] It is to matters of excommunication that we have to look. And here there seems to be little doubt as to the profound influence of Innocent on Durantis. So long as the excommunicate is not deposed from office, writes Durantis, he retains the full jurisdictional powers deriving from it, and so he may pronounce a valid sentence. In arguing as much Durantis makes clear that toleration is based on

47 Durantis always refers to Hostiensis as 'dominus meus'. See first of all the proemium of his *Speculum* (*Specvlum Ivris*, cit., vol. 1, p. 3, n. 16). On the point see specifically Gallagher (1978), p. 23. Whether Durantis actually studied under Hostiensis is however not clear: see e. g. Lange and Kriechbaum (2007), p. 479.

48 *Speculum*, lib. 1, partic. 2, *De Actore* (*Specvlum Ivris*, cit., vol. 1, pp. 180–181, n. 73–74).

49 *Ibid.*, lib. 1, partic. 2, *De Actore* (vol. 1, p. 181, n. 74): 'Alij dicunt, et melius, quod si proponatur exceptio sic: "tu non es praelatus", non bene excipitur. Si uero dicatur: "tu non es praelatus, nec es in possessione praelationis, neque haberis pro praelato", tunc bene, et hoc casu ante litis contestationem debet agens docere de sua possessione, uel quasi.' By the same token, argues Durantis, it is possible to object to the jurisdiction of someone who acts as a bishop and claims a payment due to his church. *Speculum*, lib. 1, partic. 2, *De Actore* (*ibid.*, vol. 1, p. 180, n. 72): 'Sed pone, quidam dicens se episcopum cuiusdam ecclesiae in Graecia uel in Barbaria, conuenit me in curia nomine illius ecclesiae, cui me dicit obligatum in centum, ego dico "non te cognosco episcopum esse, nec in possessione episcopatus esse". Nunquid ante litis contestationem tenetur probare se episcopum esse, uel saltem in administrationibus ipsius ecclesiae in possessione esse? Videtur quod sic.'

50 *Supra*, last paragraph, note 39.

legal representation.[51] Because toleration relies on representation, it is necessary that the tolerated be in a position to exercise his office validly. This means not only that he needs to be confirmed in office, but also – just as in Innocent – that the confirmation must be given in full knowledge of the reason the appointment was not valid, otherwise it may not be presumed that the superior authority intended to dispense with the legal requirements.[52]

As toleration depends on the exercise of a public office, the condition of the excommunicated judge may not be extended to the excommunicated arbiter. Discussing this subject (*De Arbitro et arbitratore*) Durantis reports the opinion of Vincentius Hispanus (d.1248),[53] according to whom the full knowledge of the

51 *Speculum*, lib. 2, partic. 3, *De Executione sententiae*, 1. § *Est* (*Specvlum Ivris*, cit., vol. 1, p. 814, n. 4–5): 'Item sententia excommunicationis secum trahit suam executionem, et ubique excommunicato sua beneficia denegantur, ut extra de appel(lationibus) <c.> pastoralis (X.2.28.53). Mandatur tamen quoddamomodo executioni, quando publicatur, uel etiam aggrauatur … Item etiam aliae sententiae statim quosdam sortiuntur effectus, si enim in ea talis infligitur poena, quae adimat libertatem … Secus tamen est in his, quae ratione officij agit: puta si est praelatus, et sententiam fert: tenet enim sententia, quandiu toleratur, viii quaestione iiii <c.> nonne (C.8, q.4, c.1), iii quaestione vii § tria, prope princip(ium) (C.3, q.7, p.c.1), extra de cohab(itatione) cle(ricorum) et mu(lierum) <c.> nostra (*rectius*, vestra: X.3.2.7), xix distinctio <c.> serui (*rectius*, D.54, a.c.1), ff. de offic(io) praetor(um) l. Barbarius (Dig.1.14.3), nisi forte lata esset in eum sententia depositionis, uel spoliatus esset insigniis dignitatis … tunc enim sententia a tali praelato lata, non tenet, ff. de his, qui not(antur) infa(mia) l. ii § igitur (Dig.3.2.2?). ff. de iudi(ciis) <l.> cum praetor (Dig.5.1.12).'

52 *Speculum*, lib. 1, partic. 1, *De dispensationibus*, 9. § *Qualiter* (*ibid.*, vol. 1, pp. 87–88, n. 3–4): 'Dicunt autem quidam, quod ubicumque episcopus scienter facit aliquid contra ius commune: et est tale factum, in quo ipse dispensare potest, pro dispensatione habetur, maxime ubi nullus ex hoc laeditur, ut ex(tra) de biga(mis) <c.> super eo (X.1.21.2), et ex(tra) de cler(icis) coniug(atis) <c.> diuersis (X.3.3.5) et ex(tra) de fi(liis) presby(terorum) <c.> ueniens (X.1.17.5) … Alij dicunt, et melius, quod ad hoc ut dispensare intelligatur oportet, praecedere ea, quae praesumi faciunt dispensandi uoluntatem, scilicet, quod praecesserit cognitio summaria super causis dispensationis: puta, an sit necessitas uel utilitas, uel alias iusta causa subsit, ff. de in ius uoc(andum) l. libertus (Dig.2.4.15) … Nunquid ergo episcopus promouendo indignum, intelligitur dispensare cum illo? Et uidetur quod non … Ioan(nes Teutonicus) dixit, quod circa notum solo facto dispensat, sed non circa ignotum. Tu dic, quod si episcopus dicit se dispensasse, uel aliquis dicat secum dispensatum esse, non est ei credendum, nisi hoc probet. Debet enim dispensatio probari per testes uel etiam per literas dispensationis.' In mentioning the possibility of a *cognitio summaria*, Durantis was not going against Innocent's requirement that the confirmation should be given with full knowledge of the underlying cause of invalidity. Elsewhere, also Innocent stated that a *cognitio summaria* (but not also just a nominal one) would do: *Commentaria Innocentii Quarti*, cit., *ad* X.1.6.32, § *Confirmauit* (*fol. 63rb*, n. 2).

53 Cf. Gillmann (1933), esp. pp. 99–100; Schulte (1875), vol. 1, pp. 199–205.

arbiter's excommunication prior to his appointment would bar the exception of excommunication against the execution of the verdict rendered by that arbiter. To this Durantis replies that one is never bound by the decision of an excommunicated arbiter, whether or not one knows about the excommunication.[54]

Just as in Innocent, also in Durantis the rationale of the toleration principle lies in public utility considerations. This is particularly evident in Durantis' explanation of the reason why the notary who forged some documents, so long as tolerated in office, may continue to draft them validly. Public utility considerations, says Durantis, uphold the validity of the instruments of such a notary as much as they do with the sentences pronounced by the excommunicated judge tolerated in office.[55] Indeed, he argues, the *tabellio* is called a notary public precisely because his office was created for the sake of public utility.[56]

The parallel with the judge who is an occult heretic is not fortuitous. What if it is the notary who is a heretic, asks Durantis? Of the two alternative solutions, he says, whichever preserves the validity of the instruments is to be preferred. So long as he is not condemned for heresy – and so, as long as he is tolerated in office – then his instruments will be valid. Durantis reaches this conclusion, he says, having consulted a number of jurists who approved of it, and also taken into account the position of Innocent IV. Just as in the *lex Barbarius*, the rationale is not letting the people (here, the contracting parties) be deceived ('ne contrahentes hoc ignorantes decipiantur'), for they could not be aware of the notary's underlying incapacity.[57] The similarity with the judge tolerated in office

54 *Speculum*, lib. 1, partic. 1, *De Arbitro et arbitratore* (*Specvlum Ivris*, cit., vol. 1, p. 108, n. 10–11): 'Ego credo, quod siue scienter, siue ignoranter arbitrum excommunicatum eligerim, non teneor sibi communicare, nec tenet compromissum.'

55 *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 9. § *Instrumentum* (*ibid.*, vol. 1, p. 671, n. 21): '… licet tabellio confecit unum instrumentum falsum, nihilominus ualent alia uera instrumenta per eum confecta, quandiu in officio toleratur: et hoc est propter publicam utilitatem, ut in concor(dia) quas habes i(nfra) de execut(ione) sen(tentiae) § i ad fi(nem).' Cf. *supra*, this paragraph, note 51.

56 *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 7. § *Nunc* (*Specvlum Ivris*, cit., vol. 1, p. 652, n. 2): 'De notario autem dicetur i(nfra) § prox(imum) cuius officium dicitur publicum, quia ob publicam utilitatem est inuentum.' The next paragraph to which Durantis referred (8. § *Restat*, *ibid.*, vol. 1, pp. 656–664) was centred on the *fides publica* of the notary's instruments ('Fides quibus instrumentis adhibenda sit').

57 *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8. § *Restat* (vol. 1, p. 662, n. 34): 'Quid si confectum instrumentum ab haeretico sit? Respon(deo), dico quod non ualet, si confectum est post quam fuit de haeresi condemnatus; secus si ante, dum ut catholicus agebat et contrahebat, arg(umentum) … in prae(dicta) l.

becomes even stronger in the case of the excommunicated notary: so long as his excommunication remains occult, says Durantis, any new instrument he drafts will be valid.[58]

The notary is tolerated in office, explains Durantis, so as not to deceive the people who are unaware of the reason why his appointment should be terminated. Could the same principle be invoked to uphold the validity of an instrument that was made by a false notary who was however commonly reputed to be a true one? In effect, the question is whether the rationale of the toleration principle could be invoked also beyond the scope of representation. The issue seems a good way of testing the extent to which Durantis followed Innocent. And he did follow him: for Durantis also the toleration principle does not apply outside representation.

The starting point of his reasoning is very similar to that of Innocent. In order to become notary it is necessary to be appointed. Innocent insisted on the exclusive right of the highest authorities (pope, emperor and – somewhat

Barbarius (Dig.1.14.3) … C. de haeret(icis) l. Manichaeos, ibi, cuiquam coniuncto (*sed* 'convicto': Cod.1.5.4.3), etc. … et in praed(icta) § tria (C.3, q.7, p.c.1) … ff. de supel(lectili) leg(ata) l. i in fi. et l. iii § fi. (Dig.33.10.1 and 33.10.3.5) … Arg(umentum) contra, quod etiam prius confectum non ualeat: si tamen confectum est post quam tabellio in haeresim inciderit … Prius dictum plerique sapientes a me consulti approbauerunt: arg(umentum) eius, quod no(tatur) in praed(icto) c. exceptionem (X.2.25.12) et, secundum Papam, in prae(dicto) c. fraternitas (*sic*) (X.5.7.4), et ne contrahentes hoc ignorantes decipiantur.' Cf. Innocent, *ad* X.5.7.4, s*upra*, last chapter, note 70.

58 On the point, however, Durantis relies on the toleration principle as well as on the procedural limitations to the exception of excommunication, first of all the limitations contained in Innocent IV's decretal *Pia*. The references to the *lex Barbarius* and Gratian's *dictum Tria*, therefore, are not necessarily evidence of Durantis' reliance on the toleration principle. *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8. § *Restat* (*Specvlum Ivris*, cit., vol. 1, p. 661, n. 31): 'Quid si instrumentum confectum est a tabellione, qui erat excommunicatus? … Tertij, quos dominus meus [*scil*., Hostiensis] sequi uidetur, dicunt, et melius, ut uidetur, quod quandiu eius excommunicatio est occulta, ualet instrumentum ab eo confectum: uel etiam si sit manifesta, non tamen probari potest, arg(umentum) pro eis, ff. de off(icio) praet(orum) <l.> Barbarius (Dig.1.14.3), iii q. vii c. insanus (*sic*!) § tria, in prin(cipio) uers(iculum) uerum (C.3, q.7, p.c.1), C. de testa(mentis) l. i (Cod.6.23.1) … secus, si sit notoria, ut ex(tra) de excep(tionibus) <c.> exceptionem (X.2.25.12), de hoc not(andum) secundum Papam [i. e. Innocent IV], extra de excep(tionibus) pia § si uero (VI.2.12.1).'
The same procedural reason underpins another passage where *Tria* is quoted: the legal proceedings involving an excommunicated procurator are valid if he was an occult excommunicated. *Speculum*, lib. 1, partic. 3, *De procuratore*, §1. *Ratione* (*ibid.*, vol. 1, p. 204): '… Sed si sit occultus, credo, quod processus habitus cum eo tenet, ex(tra) de excep(tionibus) <c.> pia, li. vj (VI.2.12.1), iii q. vij <c.> infamis, § tria in prin(cipio) (C.3, q.7, p.c.1).'

reluctantly – other authorities, especially independent kings) to appoint notaries.[59] Durantis goes beyond that with a daring but very clear parallel: just as bread and wine are transubstantiated into the Body and Blood of Christ, so no one is born a notary, but he has to be created such.[60] It follows that the common mistake alone does not suffice to make the instrument valid. The most interesting part of Durantis' reasoning lies in his parallel with the *lex Barbarius*. Its rationale, he says, may be invoked to uphold the instruments made by the unworthy who was created notary by someone who had the power to do so. But the *lex Barbarius* may not be used to dispense altogether with the requirement of the appointment to the notarial office. So, for instance, if after someone is made notary it is found out that he was legally unfit for such an office (say, he was a slave), his appointment would hold. Barbarius himself, continues Durantis, was a slave but was made praetor by the Roman people: this is why the law says that his sentences were valid. It is therefore necessary, in order to tolerate the legally incapable in office, that he was appointed to it by someone who had the legal authority to do so.[61]

59 Innocent IV, *ad* X.2.22.15, § *Tabellio* (*Commentaria Innocentii Quarti*, cit., *fol.* 279*vb*, n. 1): 'De tabellionibus dicunt quidam, quod quilibet potest facere tabellionem … Nobis autem videtur aliter, scilicet, quod nullus potest facere tabellionem praeter Papam et Imperatorem, qui horum vsum approbarunt, et inuenerunt, nisi forte consuetudo vel speciale priuilegium Papae, vel Imperatoris alicui hoc concesserit specialiter.' Later on, Innocent carved out an exception for sovereign princes: Id., *ad* X.2.22.15, § *Tabellio* (*ibid.*, *fol.* 280*ra*, n. 3): 'Non credimus, quod alius subditus ecclesiae, vel imperio possit facere tabellionem, praeter Papam vel Imperatorem … credimus tamen quod alij reges qui habent supremum, et merum imperium possent idem statuere de tabell(ionibus) si vellent.' The fact that, in practice, many other authorities appointed notaries is readily explained in terms of implicit consent of the sovereign: Id., *ad* X.2.22.15, *Tabellio* (*ibid.*, *fol.* 280*rb*, n. 4): 'Nec etiam mireris quod per consuetudinem posset induci, quod aliquis inferior principe (*sic*) posset facere notarios … et est ratio in consuetudine ad hoc, vt valeat oportet, quod interueniat consensus superioris principis tacitus, vel expressus.'
On the origins of the imperial and papal appointment of notaries see Meyer (2000), pp. 12–35 and 45–46 respectively. An important step strengthening the principle that notarial appointments were a prerogative of the emperor was the Diet of Roncaglia of 1158. While the Roncaglia Statute referred only to judges ('omnes iudices a principe administrationem accipere debent et iusiurandum prestare'), the same provision was soon extended by analogy to notaries: *ibid*, p. 28.

60 *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8. § *Restat* (*Specvlum Ivris*, vol. 1, p. 663, n. 39): '… non enim nascitur quis tabellio, immo fit simile de consecrat(ione) dist. ii <c.> panis et calix (*De cons.* D.2, c.39).'

61 *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8. § *Restat* (*ibid.*, vol. 1, pp. 661–662, n. 32): 'Quid si is, qui non est notarius publicus, exercuit tabellionatus officium, sed postmodum apparet eum notarium non fuisse, nunquid instrumenta per eum confecta publica erunt, et fidem facient? Arg(umentum)

What has been said so far on Durantis is also useful for interpreting his approach to the role of common opinion as to the defunct notary's appointment: does it suffice to hold the instruments valid? We have seen that such a case was somewhat ambiguous in Innocent's commentary – while there is little doubt that Innocent meant it only as evidence of the true appointment, he did not say that openly. Durantis says what Innocent[62] (and, after him, Durantis' 'master' Hostiensis)[63] said: a common belief in the authenticity of the notary's appointment is to be taken as evidence of it.[64] For the same public utility considerations Durantis argues for the validity of the canonical election when recorded by a lay notary and not, as it should be the case, a clerical one. Ultimately, the rationale is not too dissimilar from that for toleration of the occult excommunicate. If the electors were not aware of the lay status of the notary who presided over it then the election is valid, just as in the *lex Barbarius*, 'not to let the people be deceived'.[65]

> quod sic, in prae(dicta) l. Barbarius (Dig.1.14.3) et in prae(dicto) § tria in prin(cipio) (C.3, q.7, p.c.1) et ff. qui, et a quibus, l. i (Dig.40.9.1), C. de testam(entis) l. i (Cod.6.23.1). Dic, quod si habuit priuilegium ab eo, qui potestatem habuit creandi notarios, licet ex postfacto appareat eum non posse notarium esse, puta quia seruus est … tunc instrumenta eius ualebunt, ut patet in Barbario, qui fuit a populo electus et ideo eius sententiae ualerunt. Si uero nullum priuilegium habuit, tunc communis error non potuit eum facere notarium, ut ex(tra) de cler(ico) non ord(inato) min(istrante) c. i et ii (X.5.27.1–2), arg(umentum) C. de iur(isdictione) om(nium) iud(icium) <l.> priuatorum (Cod.3.13.3) … unde non ualent talia instrumenta, ff. de bonis (*sic*) eorum, qui sub tut(ela) uel cur(a) sunt, l. qui neque (Dig.27.9.8), C. de sacrosan(tis) eccle(siis) <l.> decernimus (Cod.1.2.16).'

62 *Supra*, last chapter, note 73.

63 *Supra*, this chapter, note 25.

64 *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8. § *Restat* (*Specvlum Ivris*, cit., vol. 1, p. 663, n. 39): 'Probabit enim, quod publica fama et communis opinio est, illum esse publicum notarium, et quod publice conficit instrumenta in singulis contractibus, et quod instrumenta ab eo confecta pro publicis habentur in tali ciuitate, uel dioecesi, et quod exercet officium tabellionatus et tanquam tabellio fungitur publicis muneribus, ff. de off(icio) praet(orum) <l.> Barbarius (Dig.1.14.3), iii q. vii c. infamis, § tria (C.3, q.7, p.c.1), C. qui, et aduersus quos, l. i (Cod.2.41.1), ff. ad municip(alem) l. fi. § fi. (Dig.50.1.38.6).'

65 *Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8. § *Restat* (*ibid.*, vol. 1, p. 661, n. 28–29): 'Quid ergo, si tabellio laicus scribit uota canonicorum in scrutinio electionis? … Officium enim tabellionatus publicum est … Et publica negotia sunt clericis interdicta … Sed cum dixeris, existentis in sacris debere interdici tabellionibus officium, saltem in secularibus, quaeritur, si fiat tabellio, et instrumentum conficiat in illis [*scil.*, sacris], an ualeat? … Multa enim fieri prohibentur, quae iam facta tenent. Dicit dominus meus in prae. § sub. § clericis [see *infra* this note] quod non ualet, si publice et solenniter fuerit eis indictum; secus, si occulte, ne homines decipiantur, ff. de off(icio) praet(orum) <l.> Barbarius (Dig.1.14.3), ex(tra) de simo(nia) <c.> quoniam simoniaca ad fi(nem)

Durantis' interpretation of the *lex Barbarius* in his discussion of the false notary might perhaps be used to better appreciate his position in the only case in the whole *Speculum* where the toleration principle is used in open contrast with Innocent's interpretation. It is the case of a cardinal acting as papal legate without having a formal appointment. There, Durantis simply reports the opinion (which he takes to be the mainstream one) in favour of the validity of the cardinal's deeds. Such an opinion, he says, invoked the *lex Barbarius* and its interpretation that common mistake makes law. Durantis simply reports it without taking sides (as he normally does), neither confuting nor endorsing it.[66] His reluctance, quite unusual for him, might well depend on the fact that such a

(X.5.3.40), i(nfra) de sta(tu) monac(horum) uers(iculum) xxvij [*ibid.*, vol. 2, lib. 3, partic. 3, p. 419, n. 33]. Et puto, quod clerici in causa spirituali et ciuili possunt uti tali officio.' The reference to Hostiensis ('dominus meus') in Durantis' text is (rather unusually for him) not entirely clear. Taken literally, the only possible reference would be § *At si clerici* (Hostiensis *ad* X.2.1.4, *Lectura siue Apparatus domini Hostiensis*, cit., vol. 1, *fol.* 119*rb*), but there the reference to the notary has little to do with Durantis' reasoning. From the previous text of Durantis (*Speculum*, lib. 2, partic. 2, *De Instrumentorum editione*, 8. § *Restat* (*Specvlum Ivris*, cit., pp. 659–661, n. 22 ff.)) it would clearly appear that the 'abovesaid paragraph' ('praedicto §') is in Hostiensis' commentary on X.2.22.15 (which was the *sedes materiae* of Durantis' discussion). But there Hostiensis does not say what Durantis would have him do. It seems more probable that Durantis referred to Hostiensis' comment on X.2.22.1, § *Si scriptura* (*Lectura siue Apparatus domini Hostiensis*, cit., vol. 1, *fols.* 336*va*–337*va*), where Hostiensis did support the validity of a dubious public document when its author was commonly believed to be notary. Later on in the same occasion Hostiensis also referred to the document made *occulte* by the notary, arguing for its validity (although in the specific case the rationale had little to do with public utility: *ibid.*, vol. 1, *fol.* 337*ra–b*).

On the specific problem of the lay notary fulfilling tasks that canon law reserved to clerical notaries, beyond Hostiensis' commentary on X.2.22.15 see also his commentary on X.1.6.42, § *Statuimus* (*ibid.*, vol. 1, *fol.* 68*ra–b*), where he discussed the matter more in detail and argued for the validity of the document drafted or task performed by a *notarius laicus* in all cases but for canonical elections. The reverse situation ('instrumentum confectum a tabellione clerico etiam in temporalibus') was also valid without any restriction: Hostiensis, *ad* X.3.50.8, § *Sicut te accepimus* (*ibid.*, vol. 2, *fol.* 195*ra*).

66 *Speculum*, lib. 1, partic. 1, *De legato*, 4. § *Superest* (*Specvlum Ivris*, cit., vol. 1, p. 35, n. 18): 'Quid ergo, si quis se pro legato gerit, cum non sit: quia saepe etiam cardinales mittuntur nuncij pro certis negotijs, sine plenae legationis officio, nec ad prouinciam certam? Et quidem dicunt aliqui, quod ualebunt eius sententiae, si gentes ad eum bona fide, tanquam ad legatum, communiter recurrebant: quia communis error facit ius, iii q. vii <c.> infamis, § tria (C.3, q.7, p.c.1), ff. de off(icio) praetor(um) l. Barbarius (Dig.1.14.3), ff. ad Macedo(nianum) l. iii (Dig.14.6.3). Quos ergo absoluit, absoluti erunt: ut ex(tra) de sent(entia) excom(municationis) <c.> ad eminentiam (X.5.39.20).'

conclusion would clash with Innocent's interpretation of the toleration principle, and so with what Durantis himself has said so far.

Ironically, it is probable that this opinion derived from Innocent himself. Innocent stated that the papal legate could absolve from excommunication even outside the province to which he was sent as legate.[67] If he did so, argued Innocent, the excommunication would be lifted validly, on the basis of the *de facto* consent of the Church.[68] This statement is hardly a feast of common mistake. The validity of the deeds depends on the presumed confirmation from above – the Church is considered to approve of them *de facto*. It is significant that, quite unlike Durantis, Innocent was careful not to invoke the *lex Barbarius* and especially the issue of the common mistake and the protection of those who relied on it in good faith. What Durantis did not fully appreciate was that, in Innocent's argument, the consent of the Church was not merely putative, but derived from the very specific office of the legate in question. Innocent was not referring to any papal legate, but only to a specific class with particularly broad powers – the legate *de latere* (i. e. 'from the [pope's] side'). A decretal of Gregory IX, *Excommunicatis* (X.1.30.9), stated that only a *legatus de latere* could absolve from excommunication outside the province to which he was sent.[69] This is why Innocent referred only to cardinals: for Innocent, only a cardinal could be a *legatus de latere*.[70]

67 While the subject of papal legation is extremely complex and it may not be dealt with here, it is however important to remark the jurisdictional nature of such legation, and read it in the context of the growth of the appellate jurisdiction of Rome: cf. Rennie (2013), pp. 173–174.

68 Innocent IV, *ad* X.1.30.3 (*sed.* 4), § *Ex ipso* (*Commentaria Innocentii Quarti*, cit., *fol.* 146*rb*): 'et sic quod de facto approbat ecclesia Ro(mana) sufficit, vt habeatur pro iure.' See further *infra*, this paragraph, note 70.

69 As a matter of fact, the decretal left the point implicit, since it prohibited any legate who was not *de latere* from excommunicating or absolving from excommunication anyone outside the province to which he was sent. Innocent IV's interpretation was therefore very much in line with both the wording and the rationale of the decretal, so much so that other decretists such as Goffredus de Trano and Abbas Antiquus said just the same. See further Figueira (2006), p. 92, and K. Hofmann (1929), pp. 23–24.
To fully appreciate the decretalists' debate on the geographical boundaries of legatine powers, Gregory IX's decretal *Excommunicatis* should be read together with another decretal of Innocent III, *Novit ille* (X.1.30.7), confirming the validity of the interdict imposed on France by Innocent III's legate Peter of Capua in 1199. See the same Figueira (2006), pp. 76–92 (where Innocent IV's position on X.1.30.7 and X.1.30.9 is discussed at pp. 85–88 and 92–93 respectively).

70 Innocent IV, *ad* X.1.30.3 (*sed* .4), § *Ex ipso*: 'non solum ipsos de prouincia, sed etiam alios extra prouinciam decretam potest delegatus absoluere, inf(ra) eod(em titulo) <c.> excommunicatis (X.1.30.9), et sic quod de facto approbat ecclesia

It is however possible that Durantis had in his hands some unknown elaboration of Innocent's statement. When Albericus de Rosate briefly discussed the matter, he cited Durantis and, apparently, the same passage of Hostiensis invoked by Durantis on the validity of the deeds of a putative papal legate.[71] What Hostiensis did say, however, was the same as Innocent.[72] More specifically, Hostiensis approved of Innocent's conclusion on the validity of the jurisdictional act of the cardinal-legate outside the province to which he was sent: the *de facto* approval of the Church is sufficient to consider such an act as valid *de iure*.[73] Far from putting into question Innocent's stance on the *lex Barbarius*, therefore, the powers of the cardinal-legate to act even beyond his mandate would seem consistent with Innocent's concept of the office and its powers.

8.5 Johannes Andreae

Before moving back to the civil law side of things, we should look at a last and very influential canon lawyer – Johannes Andreae (Giovanni d'Andrea, c.1270–1348). The reason to look at him after Durantis is not based only on chronology, but also on Johannes' frequent quotations from the *Speculum*. In contrast with both Hostiensis and Baysio, Johannes Andreae shows an interest in the legal aspects of the concept of toleration. In so doing, he adheres more closely to Innocent's doctrine, even warning his reader that Hostiensis skipped

> Ro(mana) sufficit, vt habeatur pro iure, ff. de legi(bus) <l.> de quibus (Dig.1.3.32), ff. de adop(tionibus) <l.> emancipatam (*sic*) (Dig.1.7.36). Et hoc intelligo verum in legato, qui a latere Papae mittitur, scilicet, Cardinali, inf(ra) de sen(tentia) excom(municationis) <c.> ad eminentiam, c. ea noscitur (X.5.39.20 and.13). Alij autem legati qui non sunt Cardinales, et qui ex priuilegio sunt legati, non plus habent potestatis, quam in priuilegio continetur.' Cf. Id., *ad* X.1.30.9, § *Pro latere* (*ibid.*, *fol.* 147*ra*): 'latus Principis siue Papae sunt Card(inales), ff. ad l. Iul(iam) Maiest(atis) <l.> si quis eum (Cod.9.8.3?) et hi, scilicet, Cardinales extra prouinciam hominem alterius prouinciae absoluere possunt.' Cf. Figueira (1980), pp. 264–281.

71 Albericus de Rosate, *ad* Dig.1.14.3 (*In primam ff. Veter. part. commentarij*, cit., *fol.* 70*va*, n. 29): 'Item quaero, quidam gerebat se pro legato apostolicae sedis, qui non erat, nunquid gesta per eum, uel coram eo ualebunt? Dic plene, ut no(tatur) per Host(iensem) in summa de off(icio) legati (X.1.30) § quid pertinet, ver(siculum) quid ergo si quis gerat, et in Spec(ulo), de legato § superest uidere, ver(siculum) quid si quis se pro legato.' While the reference to the *Speculum* is clear (*supra*, this paragraph, note 66), I was not able to find that to Hostiensis' *Summa*.

72 Hostiensis, *ad* X.1.30.4, § *Quod translationem* and § *Et si quidem* (*Lectura siue Apparatus domini Hostiensis*, cit., vol. 1, *fol.* 163*ra–b*).

73 *Ibid.*, *fol.* 163*rb*: 'hoc enim secundum d(ominum) n(ostrum) [*scil.*, Innocent IV] licet quod istud de facto romana ecclesia approbauit quod sufficit ad hoc vt habeatur per iure.'

some important points of it,[74] possibly because of Hostiensis' disapproval of those legal subtleties that were so dear to the pope.[75] Unlike Hostiensis, Johannes Andreae does share Innocent's interest in those *subtilitates*: it was perhaps this common interest that allowed him to follow Innocent more closely on our subject (and beyond it). The point should not be underestimated, given Johannes Andreae's deep influence on later jurists – canon lawyers as much as civil lawyers.

In his discussion of the toleration principle Johannes Andreae follows Innocent very closely. The toleration principle operates only in the exercise of a public office,[76] and it bestows validity on situations where a private person could not act validly.[77] To highlight the difference between office holder and

74 See esp. Johannes Andreae, *ad* X.1.6.44, § *nichil* (*Ioannis Andreae … In primum Decretalium librum Nouella Commentaria …*, Venetiis, Apud Haeredem Hieronymi Scoti, 1612, *fol.* 120*vb*, n. 28): 'Scias, quod Inn(ocentius) posuit hic magnam glosam de qua non curauit Hostie(nsis) remittens ad no(tas) de scismati, ca. i (X.5.8.1).' Hostiensis was rather selective in his discussion of Innocent: with regard to the same subject, see esp. Hostiensis, *ad* X.5.8.1, § *Illos vero* (*Lectura siue Apparatus domini Hostiensis*, cit., vol. 2, esp. *fol.* 282*va*).

75 Johannes Andreae, *ad* X.1.38.15, § *Sententia* (*In primum Decretalium librum*, cit., *fol.* 289*rb*, n. 4): 'Hosti(ensis) de gl(osa) Inn(ocentii) [*scil*., on the same X.1.38.15] dicit, quod subtilitates, quibus hic vtitur, sibi non placent.'

76 Id., *ad* X.2.13.5, § *In literis* (*Ioannis Andreae … In secundum Decretalium librum Nouella Commentaria …*, Venetiis, Apud Haeredem Hieronymi Scoti, 1612, *fol.* 75*rb–va*, n. 11–12): 'Scripsit etiam hic Innoc(entius) quod si aliquis possideat episcopatum, vel aliam dignitatem, vel canonicatum, et omnia, quae occurrunt, gerat generaliter tanquam episcopus, vel tanquam archiepis(copus), vel tanquam canonicus, omnes illi, qui sic ei publice se gerenti soluunt debita, liberantur, et contrahentes cum eo excusantur, arg(umentum) ff. ad Mace(donianum) l. 3 et supra de iud(iciis) <c.> cum deputati (X.2.1.16). Alij tamen contradicunt … Et hoc teneas, quicquid infra vel supra no(tatum), isti tamen secundum Innoc(entium) quamdiu sunt in possessione tuendi sunt in ea, *infra* de inst(itutionibus) <c.> cum venissent (X.3.7.6), et eis reddendi sunt fructus castrorum, et villarum, quas possident: quia in hoc est commodum possessoris, vt fructus percipiatur. Si tamen talis a possessione cadat non habet aliud, vel ad minus aeq(uum) bonum remedium, quam vt praedictarum rerum, dum modo non sint sacrae, vel spirituales, restitutionem petat et agat proprio nomine tamquam spoliatus possessione iuris canonici, vel alterius dignitatis; et sic potest intelligi, quod hic dicit, nempe de iure proprietatis agere non potest, nisi probaret titulum … Alii etiam missi in possessionem auctoritate superioris, sed non confirmati, petere possunt et generalem restitutionem iuris pertinentis ad dignitatem suam nomine suo; quia et illud in genere nomine suo possident, sed restitutionem specialium, siue spiritualium iurium nomine suo petere non possunt, cum illa suo nomine non possederint, sed potius nomine dignitatis.'

77 Id., *ad* X.1.4.8, § *Cum dilectus* (*In primum Decretalium librum*, cit., *fol.* 58*rb*, n. 25): 'etiam excommunicatum ad electionem non vocandum, cum non possit eligere: et illi soli sunt vocandi, qui debent, et possunt intereste (*sic*) … nec ob(stat) 8 q. 4

private individual, Johannes Andreae contrasts *privata* with *publica persona*: in his exercise of a public office, the incumbent is himself a public person: he does not act as individual but only as representative.[78] As such, so long as legal representation continues, his deeds should be judged according to the legal capacity not of the individual, but of the office. This is how Johannes Andreae interprets (and uses himself) Innocent's statement 'anything is tolerated because of the office that one exercises'.[79] So long as regularly appointed (i. e. both

nonne (C.8, q.4, c.1), quia illud verum in his, quae spectant ad aliquos ratione publici officij, ff. de offic(io) praesi(dis) l. i (Dig.1.18.1), de off(icio) praeto(rum) <l.> Barbarius.' Id., *ad* X.1.38.15, § *Sententia* (*ibid.*, *fol.* 289*rb*, n. 4): 'Inno(centius) formans hic satis magnam gl(osam) dicit se intelligere de sententia lata ab homine: nam si a canone forent excommunicati, etiam si notoria esset excommunicatio, teneret tamen procuratoris constitutio ab eis facta, nec posset procu(rator) repelli, quamdiu excommunicati tolerantur in officio, cuius auctoritate constituerunt procuratorem … quod verum puto, quando ab vniversitate constituitur proc(urator). Nam si a priuato bene repelletur, etiam sit constituens esset excommunicatus a canone, quanuis occultus, si tamen non excipietur, teneret, quod faceret procu(rator) … vel dic, quod etiam circa illos, qui sunt in publicis officiis, et in his, quae sunt in publicis officiis (sic) vt in contractibus, qui celebrantur cum aliquo alio, vel aliis, vel negotiis, quae tangunt alios vt sunt ista, sententiae, testimonia, instrumenta, et exercitium cuiuslibet iurisdictionis voluntariae, vel contentiosae, vbi propter publicam ignorantiam, vel publicum officium aliqua valent, et effectu habent, quem alias non haberent, vt ff. de offi(cio) praeto(rum) <l.> Barbarius (Dig.1.14.3), C. de testa(mentis) l. i (Cod.6.23.1).' Cf. also Id., *ad* X.1.6.34, § *Venerabilem* (*ibid.*, *fol.* 65*vb*, n. 14).

78 Id., *ad* VI.2.12.1, § *alia communibus* (*In sextum Decretalium librum*, cit., *fol.* 75*vb*, n. 11–12): 'si excommunicatus extra iudicium aliquid facit vt priuata persona, indistincte valet in suum detrimentum, sed ad vtilitatem suam nil facere potest … Si vero tanquam persona publica, vel in iudicijs vt priuata vel publica et erat occultus, videlicet quod agit siue pro se, siue contra se … Item si manifestus, sed non potest probari; si sit notorius iudex ex officio ipsum repellere debet.'

79 Id., *ad* X.5.1.24, § *Qualiter* (*Ioannis Andreae … In quintum Decretalium librum Novella Commentaria*, Venetiis, Apud Haeredem Hieronymi Scoti, 1612, *fol.* 16*va*, n. 21): 'no(tatur) quod sententia lata statim sortitur quosdam effectus, ver(bi) gra(tia) si sit talis poena imposita, quae libertatem aufert, vlterius eius testamentum non valet, neque aliquid ex testamento capiet, ff. de legat(is) 3 l. i § a praefecto (Dig.32(.1).1.4), ff. de poenis <l.> qui vltimo, et l. ad bestias (Dig.48.19.19 and 31), sed non idem dicimus in his, quae ratione officij facit, puta si sit praelatus, et sententiam ferat, tenebit, quamdiu toleratur, 8 q. 4 <c.> nonne (C.8, q.4, c.1), nam si contrarium diceretur, absurditas sequeretur … Omnia enim tolerantur propter officium, quod administrat, 19 dist. <c.> secundum (D.19, c.8), ff. de off(icio) prae(torum) <l.> Barbarius (Dig.1.14.3), nisi esset in eum lata sententia depositionis, vel expoliatus esset in similibus dignitatibus. Tunc enim sententia a tali lata non tenet, ff. de his, qui no(tantur) infam(ia), l. 2 § igitur (Dig.3.2.2.3) … nec potest dici, quod toleretur, sed intrusus dicitur.' Compare it with Innocent's comment on X.5.1.24, *supra*, last chapter, note 23.

elected and confirmed),[80] the prelate tolerated in office retains full administration of it.[81] The necessity of the confirmation – and here Johannes Andreae is perhaps even clearer than Innocent – depends on the fact that only upon confirmation is the elected able to act in the name of the office.[82]

80 Johannes Andreae, *ad* X.5.27.10, § *Irritanda* (*In quintum Decretalium librum*, cit., *fol.* 89*ra*, n. 5): 'dicit Innoc(entius) plus sibi placere istos [*scil.*, indignos] a iure non suspensos. Dixit Inno(centius) in addi(tione) alios dicere (*sic*), et videtur melius, quod siue sit bonus, siue malus, etiam haereticus, vel excommunicatus ab ecclesia toleratur per electionem, et confirmationem, etiam si fiat a peccatoribus, vel haereticis, vel excommunicatis toleratis bene contrahitur inter hos matrimonum spirituale, donec separentur paleae a granis.' Cf. Innocent IV, *supra*, last chapter, §7.2, text and note 13.

81 See esp. Johannes Andreae, *ad* X.1.6.44, § *nichil* (*In primum Decretalium librum*, cit., *fol.* 121*ra*, n. 28–29): 'omnia, quae facit electus, cui defertur administratio a iure, vt hic … vel per superioris confirmationem, valent, etiam si canonica non fuit electio, et etiam si simoniacus fuisset in ordine, vel beneficio: habuit n(am) per confirmationem ius administrandi, s(upra) e(odem titulo) <c.> transmissam, et c. qualiter (X.1.6.15 and 17), vnde, licet postea remoueatur, auctoritate et tuitione confirmationis valent, quae gessit ar(gumentum) ff. quid cum falso tutore l. i § pe(nultimo) (Dig.27.6.5), ff. de mino(ribus) <l.> ait pretor, § permittitur (Dig.4.4.7.2) … contraria loquantur in his, quae gesta confirmatio non tuetur: haec vera, quamdiu toleratur, 8 q. 4 <c.> nonne (C.8, q.4, c.1) vel nisi sententia, vel inhibitio data esset contra eum … vel nisi aliter esset notorium illum suspensum … vel nisi sit intrusus, vt quia sua, vel potentum auct(oritate) occupauit ecclesiam, cuius facta non valent, nisi sicut extranei … nec liberantur eis soluentes ff. condi(cione) indebiti, si vrbana (Dig.12.6.55) … Ex his pateat, quod praelatus agens nomine ecclesiae non repellitur per has exceptiones: "tu non intrasti per ostium canonicae electionis", "tu es haereticus", "tu es simoniacus", "pater tuus fuit immediatus praelatus ecclesiae, cuius nomine agis", vel similes. Confirmatio nam omnia tuetur, vt dixi … Respondeo quod per illam transfertur in eum onus probandi, quod sit rite confirmatus … ad quod aliter non tenetur, ex quo administrasset sciente et patiente superiore, ad quem spectat confirmatio, C. de seruitu(tibus) l. 2 (Cod.3.34.2). Ex illa enim pacientia titulum habet praesumptum, ex quo releuatur ab honere probandi, nisi prohibetur aliquid contra ipsum.' On the necessity of confirmation prior to valid administration of the office see also *ibid.*, *fol.* 120*vb*, n. 27.

82 See esp. Id., *ad* X.1.6.15, § *Transmissam* (*In primum Decretalium librum*, cit., *fol.* 82*rb*, n. 10): 'Potest tamen differentia notari inter confirmatos, et non confirmatos, quod confirmati admittantur nomine ecclesiarum suarum, ex quo de confirmatione constat, nec potest obiici quod iniuste sint promoti, quasi confirmatione praetoris omnia roborentur, quod cum falso tutore l. i (Dig.27.6.1) et no(tantur) inf(ra) eo (titulo) <c.> nihil (X.1.6.44), imo ex quo sunt confirmati, sua auctoritate possunt apprehendere bona ad beneficia sua spectantia.' If Johannes Andreae is clearer than Innocent in that he links confirmation directly to representation, it should however be noted that by Johannes Andreae's time the precise scope of *confirmatio* was clearer, whereas Innocent was writing at a time when its precise scope (and, on specific issues, effect) was still debated.

For the same reason, and again following Innocent, Johannes Andreae does not extend the toleration principle to delegated jurisdiction: it is only the incumbent in office that may be tolerated, not also his deputy.[83] Toleration relies on representation. Hence a prelate is not able to legally represent his office when he was not confirmed in it, when he is deposed with a legal sentence, or if his incapacity is notorious.[84] In such cases, the absence of representation entails the lack of toleration. It follows that – just as in Innocent – for Johannes Andreae the common mistake as to the office holder's legitimacy is not sufficient for the validity of his deeds.[85]

The distinction between common mistake and toleration principle is important in understanding Johannes Andreae's position on Barbarius' case. While he mentions the *lex Barbarius* fairly often when writing of toleration, the only place in his opus where he explains his views on it is, significantly, also the place where he defines most clearly the scope and the working of the toleration principle itself. In his *Quaestiones Mercuriales* (or rather, his comment on the *Regulae iuris*

83 Id., *ad* X.1.3.13, § *Sciscitatus*, and *ad* X.1.3.20, *Super literis* (*ibid.*, *fol.* 26*vb*, n. 14–16, and *fol.* 33*vb*, n. 46–47 respectively). A partial exception (not present – at least explicitly – in Innocent) is made for the case of a plurality of delegated: see Id., *ad* X.1.6.30, § *In causis* (*ibid.*, *fol.* 104*ra*, n. 42): 'quid si vnus ex compromissariis excommunicatus est, an valeat ipsorum communis electio? Respond(deo) quod non, si publice est excommunicatus … Si vero occulte, tunc si duo tantum sunt compromissarii, non valebit … Si vero sunt tres, vel plures, adhuc videtur idem: quia non vt receperunt sententiam dixerunt … si plures alii dicunt, quod ex quo ille tertius excommunicatus praesens est, non obest excommunicatio, sicut nec contradictio … Hoc certum, quod in datione potestatis dictum fuisset, quod omnes, vel maior pars prouiderent, non obesset occulta excommunicatio partis minoris, ff. de (receptis qui) arbit(rium) <l.> sed si ita (Dig.4.8.8).'

84 On the limits of toleration in Johannes Andreae (and on Innocent's influence on him) see esp. Id., *ad* X.2.14.8, § *Veritas* (*In secundum Decretalium librum*, cit., *fol.* 97*vb*, esp. n. 8).

85 See especially the problem of the payment to the false creditor: Id., *ad* X.1.6.15, § *Transmissam* (*In primum Decretalium librum,* cit., *fol.* 82*rb*, n. 11): 'si contradictores habent, qui bona praedicta possidebant, oportet, quod doceant se confirmatos, et ab eo, qui potestatem habuit confirmandi: non tamen habent probare de iustitia suarum confirmationum, vel electionum. Confirmationem vero ideo probant: quia illi, qui bona ecclesiae possident, aliter non liberantur soluendo, nisi praelatis, vel talibus, qui tuitione confirmatorum defendatur, et idem de inuestitis dicendum est, ex quo de inuestitura apparet, sed illam probari oportet.' Cf. Innocent *ad* X.1.6.44, *supra*, last chapter, note 43. See further Johannes Andreae's commentary on X.1.3.22, § *Irritandum* (*in primum Decretalium librum*, cit., *fol.* 35*vb*, n. 13–14), and compare it with Innocent's reading of the same decretal (*ad* X.1.3.22, § *Subscriptione*), *supra*, pt. II, §7.5 esp. note 81.

of the *Liber Sextus*),[86] Johannes Andreae writes a long commentary on *mora* (VI.5.13.60). There, after dealing with time bar issues to raise an exception to the validity of the appointment, he moves on to discuss more substantive profiles of the appointment itself, including also the validity of the sentence rendered by the excommunicate. Although the occult excommunicate should not serve as judge, says Johannes Andreae, one might argue from some sources (especially the *lex Barbarius* and the *dictum Tria*) that his being tolerated – and the ensuing validity of the decisions he would issue – lie in the common opinion as to his apparent status. This however is not the case. The legal reason behind the toleration of the unworthy, he continues, is not just the common mistake as to their true status, but rather the fact that they received their office validly. Therefore, concludes Johannes, the common but mistaken opinion as to their legitimate authority may be invoked, but only when the mistake concerns the enduring validity of their appointment, not its initial validity. In other words, without a valid appointment (i. e. election and confirmation in office) the common mistake has no legal relevance. To be invoked, the mistake must be supported by the initial validity of the title. This means that the validity of later deeds is ultimately still based on the validity of the initial conferment of the title. Someone who is tolerated in office is someone who occupied it lawfully, but at some point did something for which he ought to be deposed from his office. The toleration principle covers the acts done between the moment in which such a person should have been deprived of his office and the moment that he actually lost it. In contrast, the *intrusus* may never be tolerated, because he never had a valid title to discharge the office.[87]

86 The name *Quaestiones mercuriales* derives from the fact that the work initially grouped together the questions debated on Wednesdays (*dies mercurii*), probably along with other more formal *disputationes* (O. Condorelli [1992], pp. 137–138). Its later elaboration, moving towards a full-scale commentary on VI.5.13, required an in-depth review of the original material (*ibid.*, pp. 140–143).

87 Johannes Andreae, *ad* VI.5.13.25 (*Ioannis Andreae … In titulum de Regulis iuris Nouella Commentaria …* Venetiis, Apud Franciscum Franciscium, 1581, sub reg. *mora, fol.* 44*rb*, n. 13): 'qui in veritate iudex non est, vt quia seruus, uel excommunicatus tamen occultus et ab ecclesia toleratus, ex quo communi opinione iudex habetur, valet, quod per ipsum agitur, de re iudi(cata) <c.> ad probandum (X.2.27.24), iii questio vii § tria (C.3, q.7, p.c.1), ff. de offic(io) praeto(rum) <l.> Barbarius (Dig.1.14.3). Saepe enim communis opinio praefertur veritati.' Shortly thereafter, Johannes Andreae narrows down this last broad statement and clarifies its scope. Common opinion, he says, can make up for the loss of title, but only if the holder of the office did initially receive a valid title to discharge it: 'Non obstant contraria … quae procedunt in intruso, qui a principio non habet titulum, sed secus in illo, qui a principio titulum habuit, et superioris auctoritatem: nam licet postea incidat in poenam priuationis, valent tamen quae agit, quandiu toleratur, et creditur ex primo titulo licite possidere' (*ibid.*, n. 15).

Johannes Andreae applies the same reasoning to the case of the excommunicated notary, who may validly draft instruments so long as his excommunication remains occult.[88] By the same token, and again following Innocent, Johannes Andreae argues for the validity of the instruments drafted by the notary who committed a forgery. That is surely reason enough to suffer *infamia* and be deposed from office. Because of the public office that he exercises, however, the notary would still be able to produce new instruments until deposed from office with a legal sentence.[89] Here as well Johannes adheres to Innocent's position, and rejects the application of the toleration principle to the false notary widely believed to be a genuine one. Toleration is based on legal representation, and representation does not apply to the intruder. It follows that only a true notary may be tolerated in office: the common opinion as to his condition may well be invoked, but only for probatory purposes in a legal dispute on the authenticity of a specific instrument, not to make the instrument valid, let alone to validate the position of the person who drafted it.[90]

88 Id., *ad* VI.5.11.8, § *Decernimus* (*In sextum Decretalium librum*, cit., *fol.* 165*rb*, n. 9). On the point Johannes Andreae follows almost verbatim Hostiensis (who, in his turn, heavily relied on Innocent: *supra*, this chapter, note 25).

89 Johannes Andreae, *ad* X.5.7.4, § *Fraternitatis* (*In quintum Decretalium librum*, cit., *fol.* 46*vb*): 'intelligit Innocen(tius) hoc [*scil.*, 'Damnato auctore damnantur eius scripturae et libri et opera', X.5.7.4] in expositionibus scripturarum, et omnibus alijs confectis ab his, qui non gerunt publica officia … In scripturis autem tabellionum, et aliorum publicum officium gerentium secus est: quia licet vnam chartam falsam fecerint, nihilominus valent aliae, quamdiu in officio tolerantur, argum(entum) 9 q. 4 <c.> nonne (C.8, q.4, c.1) … et hoc propter publicam vtilitatem, ne venientes ad eos decipiantur, argum(entum) ff. de off(icio) praeto(rum) l. 4 (*sed* 3, Dig.1.14.3) … si tamen publica persona de falso accusata, et condemnata fuerat, ex tunc instrumenta, et dicta eius carebunt robore ratione personae.'

90 Id., *ad* X.2.22.1, § *Si scripturam* (*In secundum Decretalium librum*, cit., *fols.* 162*vb*–163*ra*, n. 2): 'Quid si negetur illum, qui instrumentum confecit, fuisse notarium? Hanc quaestionem intellige, quando quaestio est inter duos, quorum alter vtitur instrumento: secus si quaestio esset cum ipso notario. Ac dixit ipse Inn(ocentius) in decre(talem) veniens, de ver(borum) signif(icatione) [X.5.40.34=VI.5.12.1; cf. *supra*, last chapter, notes 77–78], cuius verba videas in Spe(culo), de proba(tionibus) § i ad fi(nem), ver(siculum) verum [*Specvlum Ivris*, cit., vol. 2, p. 179, n. 5] … Dicit Innocen(tius) quod necesse est hoc probare per testes, vel per aliud instrumentum de officio sibi commisso confectum … sed et sufficeret, si probaretur per testes, quod tempore illo, quo fuit factum instrumentum, quod nunc in dubium reuocatur, officio notarij, vel tabellionis publice fungebatur, ar(gumentum) ff. ad Macedo(nianum) l. 3 (Dig.14.6.3), ff. de officio praeto(rum) <l.> Barbarius (Dig.1.14.3) … Et secundum hoc potest intelligi supra de elec(tione) scriptum est § i (X.1.6.40). Idem forte, si appareant multa et diuersa instrumenta inter multos, et diuersos per manus eiusdem confecta super contractibus legitimis, quae firma manent, et sine contradictione

From what has been said so far, it would seem that Johannes Andreae adhered unreservedly to Innocent's position. That is certainly the case for issues dealing with plain jurisdictional matters. However, just like Hostiensis and Baysio, in cases bordering on sacramental matters Johannes Andreae was somewhat more reluctant to follow Innocent.[91] In Johannes Andreae the accent on ecclesiological matters is not as pronounced as in Hostiensis, but he is not as ready as Innocent to sacrifice them to legal principles either. So, while Johannes follows Innocent on the issue of the sacraments performed by the occult fornicator tolerated in office,[92] he appears more willing to protect the faithful from the danger of communicating with the occult heretic tolerated in office – even (and quite unlike Innocent) at the cost of rejecting his jurisdiction.[93] It is significant that Johannes speaks of toleration also with regard to the valid exercise of sacramental powers: just like most other unworthy prelates, he says, the secret excommunicate who is tolerated by the Church retains the *executio* of his powers

aliqua tanquam vera et publica ab omnibus recipiuntur communiter, et etiam approbantur.'

91 Johannes Andreae appears as keen to cite Innocent when he agrees with him as he seems reluctant to make his name when he does not. In the two main cases that we are going to discuss – the excommunication by the occult heretic and the confession to the *falsus praelatus* – Johannes Andreae opted for vague reference to 'others' when reporting Innocent's opinion.

92 Johannes Andreae, *ad* X.3.2.7, § *Abstinere* (*Ioannis Andreae … In tertium Decretalium librum Nouella Commentaria …*, Venetiis, Apud Haeredem Hieronymi Scoti, 1612, *fol.* 8*vb–ra*, n. 4–5): 'sic abstinere licet, etiam si occulta esset fornicatio, vel esset aliud crimen, quam fornicatio a proprio sacerdote, in his officiis, quam ab eo audire non cogitur … et est sic faciendum, si ex tali abstinentia contra talem sacerdotem, s(cilicet) fornicatore, et toleratum scandalum non generetur, alias autem non licet abstinere. Nam et dominus Iudae corpus suum dedit … secundum Inn(ocentium) … Omnium suspensorum a iure, idest sine sententia hominis, si crimina, pro quibus ius eos suspendit ab officijs, vel quolibet actu, sint notoria facti euidentia, licet cuicunque eos in his vitare, etiam si a praelatis tolerentur … Si vero crimina, pro quibus a iure suspenduntur, sint occulta, licet grauia, vt simonia, homicidium, et huiusmodi, tamen euitari non debent in his, quae ab ipsis de iure recipi debent … idem in excommunicato occulto.' By contrast, following Innocent, the sacraments ought not be received from a notorious fornicator, for he is not tolerated in office: 'tales quorum fornicatio est notoria, ab ecclesia non tolerantur' (*ibid.*, *fol.* 10*rb*, n. 22).

93 E. g. Id., *ad* X.1.6.44, § *nichil* (*In primum Decretalium librum*, cit., *fol.* 121*ra*, n. 29). Johannes Andreae appears to be fully aware that Innocent's position – by the pope's own admission – was far from unanimous. Id., *ad* X.5.3.35, § *Errorem* (*In quintum Decretalium librum*, cit., *fol.* 32*vb*, n. 4): 'no(tat) Innocent(ius) hic quod secundum quosdam a deposito, excommunicato, vel suspenso quantuncunque occulto non sunt recipienda ecclesiastica sacramenta … et secundum Innocen (tium) occulto peccatori quantuncunque etiam excommunicato tenemur ministrare officia, sicut et alijs.'

relating to *ordo* (that is, has *executio ordinis*).[94] This means, for instance, that a bishop may not prohibit the parishioners from receiving sacraments from the unworthy rector of a parish so long as the latter is tolerated.[95] In Johannes Andreae, the concept of toleration does not follow the boundaries of the distinction between *ordo* and *iurisdictio* – applying to any jurisdictional act and avoiding the sacramental sphere. Just as it is sometimes applied with regard to sacramental issues, so – and contrary to Innocent – it does not cover all manifestations of jurisdictional powers.

A first important case is that of the occult simoniac: quite unlike Innocent, in Johannes Andreae's view the toleration principle does not extend to him.[96] In stating as much, Johannes refuses to follow the pope's strict division between *ordo* and *iurisdictio*. Such a distinction may be a necessary legalism, but ultimately it remains somewhat artificial. This is particularly clear in the case of the secret excommunicate. In principle, so long as the excommunication remains occult, it should not affect one's legal capacity.[97] But does this mean that

94 Id., *ad* X.5.8.1, § *Subiacere* (*In quintum Decretalium librum*, cit., *fol.* 53*va*, n. 7): 'Alij autem criminosi, vt adulteri, fures, periuri, et huiusmodi, licet quamdiu sunt in peccato, celebrare non debeant … tamen constitutionum non habent ligatam executionem sui ordinis … hoc idem videtur dicendum de excommunicatis occultis, et omnibus alijs supradictis, scilicet quod executionem conferant, quamdiu ab ecclesia tolerantur, argum(entum) i q. i <c.> Christus (C.1, q.1, c.88).'

95 Id., *ad* VI.5.12.1, § *Veniens* (*In sextum Decretalium librum*, cit., *fol.* 171*vb*, n. 5).

96 Id., *ad* X.5.3.35, § *Errorem* (*In quintum Decretalium librum*, cit., *fol.* 33*rb*, n. 8): 'non licet ab obedientia superioris recedere, et ipsum spernere, quantumcunque notorius sit, nisi in duobus casibus, scilicet si est simoniacus in ordine, vel notorius fornicator, 32 dist. § verum (D.32, p.c.6). In omnibus ergo alijs criminosis aliud est, quamdiu ab ecclesia tolerantur, argumen(tum) 15 q. fi. c. fi. (C.15, q.8, c.5).' The difference with Innocent's commentary on the same point may seem of little importance (what they say is very similar), but in fact it is very significant. Innocent allowed the superior authority to be disobeyed – treating him as if he was already deposed from office and so already without valid jurisdiction – in case of notorious fornication or notorious simony. Johannes Andreae however speaks of simony in general, thus seemingly including also the occult simoniac. Compare the passage of Johannes Andreae with Innocent commentary on X.5.3.35 *supra*, §7.5, note 103.

97 Johannes Andreae, *ad* X.5.27.8, § *nominatim* (*In quintum Decretalium librum*, cit., *fol.* 87*ra*): 'licet generalis sententia omnes liget, tamen si quis ex inclusis lateat, non imputatur communio, nisi convincatur vel publicetur …' See also Id., *ad* X.1.4.8, § *Cum dilectus* (*In primum Decretalium librum*, cit., *fol.* 58*rb*, n. 28): 'si excommunicati, qui vocandi non sunt, se ingerant electioni, si sunt occulti, non repellentur: alias fieret eis iniuria, 2 q. 1 <c.> multi (C.2, q.1, c.18) … nec nocet non excommunicatis, si talem occultum secum ad eligendum admittant: quia non debent eum repellere, vt dixi; nec eis imputatur.' Cf. Id., *ad* X.5.39.34, § *Circa temporalia* (*In quintum Decretalium librum*, cit., *fol.* 141*va*, n. 3): 'hic dixit

the secret excommunicate retains the power to excommunicate others? We have seen resistance to this conclusion in several pre-eminent canon lawyers writing before Innocent. Even after Innocent, and despite his profound influence, few canonists were prepared to stretch the toleration principle to the extreme case of excommunication by an occult excommunicate. Excommunication may well be a jurisdictional act,[98] but even in the fourteenth century there was still sufficient resistance to looking at fundamental ecclesiological issues through the lens of legal reasoning. Siding with Hostiensis and Baysio, Johannes Andreae carved out a specific exception to the toleration of the occult heretic so as to avoid also encompassing the sentence of excommunication.[99]

Johannes' dissent against what one might be tempted to call the proto-positivist attitude of Innocent is also visible in the case of the confession to the *falsus praelatus*: if the faithful discovers the truth later, says Johannes Andreae, he must confess again.[100] Here the explanation is particularly important: the *falsus praelatus* might well be tolerated and so absolve validly, says Johannes, but that is true in a legal sense, not in a sacramental one.[101] As we will see, it is only from the fifteenth century that opposition to Innocent's legalistic attitude would be fully overcome. It is however important to stress that, on the toleration principle, this opposition was restricted only to the above few extreme cases, that is, to the most blatant conflicts between sacramental and jurisdictional approaches. On all other (jurisdictional) matters, Innocent's doctrine of toler-

Inn(ocentius) satis videri, quod occulti non nominatim excommunicati, quamdiu tolerantur in dignitate, possint excommunicare, beneficia conferre, et literas impetrare, quia non persona, sed dignitas illud facere videtur.'

98 See 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).'

99 Johannes Andreae, *ad* VI.2.12.1, § *his* (*In sextum Decretalium librum*, cit., *fol.* 75*va*, n. 9): 'dicit ergo [Hostiensis] idem in iudice, quod in actore, quia tenet sententia excommunicati occulti, hoc verum salua sententia excommunicationis, quam dicit nulla, ex quo detegitur nunc per excommunicatum fuisse lata, quia cum sit extra communione ecclesiae, alium extra ponere non potest 24 q. 1 <c.> audiuimus (C.24, q.1, c.4).' As a matter of fact, Hostiensis did not deal with the validity of the excommunication issued by an occult excommunicate. But most decretalists qualified his silence as implicit dissent against Innocent. Cp. however Zeliauskas (1967), p. 264.

100 Johannes Andreae, *ad* X.1.6.54, § *Dudum* (*In primum Decretalium librum*, cit., *fol.* 129*va*, n. 42). In a rather long discussion, Johannes Andreae reports the opinion of both sides, but then opts for the need for a second confession.

101 Id., *ad* X.1.6.54, § *Suspendit* (*In primum Decretalium librum*, cit., *fol.* 128*vb*, n. 25): 'licet a iudiciali possit absoluere, non tamen reconciliari.'

ation quickly became the common opinion among canon lawyers. Now it remains to be seen what civil lawyers made of it, and how it changed the understanding of the *lex Barbarius*.

Part III

Baldus de Ubaldis and the limits of representation