Chapter 13

Extensions of the *lex Barbarius* to other cases (or vice versa)

As with previous civil lawyers, we might now turn our attention to Baldus' application of the *lex Barbarius* to analogous instances – especially the secretly deposed notary, the secretly excommunicated judge and the putative prelate. With an important caveat: quite unlike the other civil lawyers that we have seen, Baldus does not apply the rationale of the *lex Barbarius* to other cases. In fact, he does precisely the opposite: he highlights the similarity of those other cases with that of Barbarius, so as to strengthen his interpretation of it. In Baldus those other cases are straightforward applications of Innocent's concept of toleration (where the external validity of agency depends on its internal validity), whereas Barbarius' case is an indirect adaptation of the same principle, an adaptation that circumvents the fundamental problem of the lack of confirmation (thus severs the symmetry between internal and external validity). Stressing the similarity between improper (Barbarius) and proper toleration (judge, priest and notary), Baldus seeks to consolidate his reading of the *lex Barbarius*. He does so by inverting the roles: it appears to be the *lex Barbarius* that is extended by analogy to the other straightforward cases of toleration, whereas in fact the opposite is true. The outcome is remarkable. At least, later jurists must have thought so, because they had little doubt as to the deep similarity between Baldus' interpretation of the *lex Barbarius* and Innocent's interpretation of the other cases.

13.1 Judges and prelates

While in the *lectura* Baldus applies the *lex Barbarius* (albeit in a rather concise way) mainly to the putative or deposed notary, in the *repetitio* he also looks at two other cases: the excommunicated judge and the false priest. We might want to follow the general order of the *repetitio*, and so deal with the notary last. All three cases are straightforward examples of proper toleration, but the difference – thus their order within the *repetitio* – lies in the way in which each of them is compared to Barbarius. Since, as already stated, the ultimate purpose of Baldus is not to extend the *lex Barbarius* to these other instances but to use them to strengthen his approximation to toleration in Barbarius' case, he orders these cases so as to highlight their increasing similarity with that of Barbarius.

In the *repetitio*, the first case to appear is that of the excommunicate judge. This is the easiest of the three, because it is analysed as a straightforward application of Innocent's concept of toleration. We have seen how Baldus' *repetitio* divided the legal incapacity of the agent into three groups – holding an office only *de facto*, being in a condition for which one should be deprived of one's office, and having already been deposed from it.[1] Barbarius fell into the first category, for he never was praetor *de iure* (and so, as to himself – *ad se*). The judge, on the contrary, is 'true judge in himself' (*verus iudex in seipso*). The fact that his excommunication is secret allows him to be tolerated in office – and so to continue to represent it validly.[2] On the point, Baldus explicitly relies on a passage of Innocent, where the pope referred to the *lex Barbarius* in order to highlight the importance of public office and public utility. Because of the public nature of the office exercised, said Innocent, the occult character of the judge's incapacity is reason enough to invoke the toleration principle so as to hold the acts as valid, just as in the *lex Barbarius*.[3] Unlike for the pope, however, for Baldus the two cases are different: only that of the judge is a proper case of toleration – and so, of representation. Therefore Baldus explains that the validity of the acts of the secretly excommunicated judge is 'much stronger' (*multo fortius*)[4] than the validity of those of Barbarius. In admitting the lesser strength of Barbarius' acts (because, unlike the case of the secretly excommunicated judge, that of Barbarius fell outside proper toleration), Baldus however implicitly affirms their validity. This way, Baldus begins to subtly depart from Innocent's position.

1 *Supra*, last chapter, note 123.

2 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*rb*, n. 20: 'Sed quid dices de vero iudice, qui tamen erat excommunicatus occulte, an teneat processus suus? Videtur quod non, vt no(tatur) in l. i C. de iu(ris) et fac(tis) igno(rantia) (Cod.1.18.1). Tu dic contrarium, quia occulte excommunicatus partib(us) obesse non debet, arg(umentum) l. nostrae [*scil*., Dig.1.14.3], nam iste excommunicatus est verus iudex in seipso, ergo multo fortius valent *gesta vel acta* quam in Barbario: facit quod no(tat) Inn(ocentius) in c. consulti, de procu(ratoribus) (X.1.38.15).' On Innocent see *supra*, pt. II, §7.5, note 65. Cf. Baldus, *ad* X.2.27.24, § *Ad probandum* (*Baldvs svper Decretalibvs*, cit., *fol.* 234*rb*, n. 1): 'No(tandum) quod sententia iudicis publice excommunicati iure non tenet ergo a contrario sensu secus non excommunicatio esset clandestina vel occulta, de hoc … de offi(cio) preto(rum) l. barbarius (Dig.1.14.3). … Ista autem distinctio publice et non publice sit in iudice et tabellione propter authoritatem publici officii et similiter in teste, quia publica vtilitatem habet et locum quo ad ignorantes. Nam in sciente non est vis vtrum publice vel non publice vt c. i(nfra) de rescrip(tis) libr. vi (VI.1.3.1) et C. si seruus vel liber(tus) ad decuri(onatum) aspi(raverit) l. ii li. x (Cod.10.33.2).'

3 Cf. Innocent IV, *ad* X.1.38.15, § *Sententia*, *supra*, pt. II, §7.5, notes 64–65.

4 *Supra*, this paragraph, note 2.

The absence of confirmation entails the lack of internal validity of representation. The parallel between the judge and Barbarius therefore seems shaky. But it was necessary: from Monciaco onwards, nearly all the civil lawyers we have previously encountered dealt with the case of the excommunicated judge, Bartolus included. Dealing with it first, and in a rather succinct manner, served to underplay its – structural – difference with Barbarius. Blurring the underlying difference (and speaking of stronger vs. weaker validity instead of valid vs. void), Baldus sought to show the continuity between proper and improper cases of toleration. This way, even a straightforward case of toleration (thus of fully valid representation), that of the judge, does not look so structurally different from that of Barbarius. As we shall now see, the other cases are not described in terms of proper toleration. This is hardly fortuitous: in omitting any reference to toleration, Baldus seeks to strengthen the apparent continuity with Barbarius' case, and thus support his adaptation of the Innocentian toleration principle outside proper agency.

Immediately after the excommunicated judge, Baldus' *repetitio* moves on to the case of the illegitimate prelate: would his acts remain valid even after his deposition from office? Before answering, Baldus invokes several Roman sources dealing both with the slave–master relationship and with the *dominus–procurator* one. Some of those cases denied validity to the acts of the slave or the *procurator*, while others considered them valid. The difference, Baldus explains, depended on whether the slave or the representative was acting upon the authority of a public office – and so for public utility – or upon the authority of a private person – and so for that person's private utility. Hence the connection with the prelate: as his office is public, reasons Baldus, its exercise furthers public utility.[5]

5 Baldus, *repetitio ad* Dig.1.14.3, *fol.* 58*va*, n. 23: 'Sed quid de actis motis a minus iusto prelato, vel ab eo, qui postea remotus est ab actu *vel ab officio vel dignitate vel administratione*, an teneat *iudicium*? Videtur quod sic, arg(umentum) eius quod not(atur) i(nfra) de iudi(ciis) l. non idcirco § cum postea (Dig.5.1.44.1) et in rem ra(tam) ha(beri) l. procu(ratoris) ad exhibendum § fi. (Dig.46.8.8.2); contrarium facit i(nfra) de solu(tionibus) l. dispensatorem (Dig.46.3.62), si cer(tum) pe(tetur) <l.> eius qui (Dig.12.1.41), de admi(nistratione) tu(torum) <l.> vulgo (Dig.26.7.23), et l. actor, in rem ra(tam) ha(beri) (Dig.46.8.9). Dic que prima pars est vera in prelatis, ex quo sunt in pacifica possessione arg(umentum) l. nostrae [*scil.*, Dig.1.14.3] et de elec(tione) c. querelam (X.1.6.24). Secunda pars esset vera in tutoribus et simplicib(us) administratoribus, de quibus etiam loquitur gl(osa) {quae est i(nfra)} de procura(toribus) l. quae omnia (Dig.3.3.25) et adde quod no(tat) Di(nus de Mugello) in c. i. *extra de re(gulis) iur(is) li vi. in viii q*. (VI.5.13.8) ubi sentit, quod l(ex) nostra habet locum in publicis officiis auctoritate et vtilitate: secus si vtilitate *privatorum vel privatorum utilitate et auctoritate* secundum Dyn(um), et officium praelatorum censetur publicum *auctoritate et vtilitate*, arg(umentum) s(upra) de iusti(tia) et iur(e) l. i

The argument might appear a simple reiteration of something already said repeatedly, thus quite plethoric. In fact, it highlights the connection between public utility and the *exercise* of a public office. The emphasis on the exercise of the office – and not on the holder's entitlement to it – is a subtle way of bringing up the prelate's lawful possession of the office. It is on this basis that Baldus answers the question above. The prelate's 'unchallenged possession' (*pacifica possessio*) of the office, argues Baldus, allows for the enduring validity of the acts even after the prelate's deposition. This way, Baldus could say that the solution to the illegitimate prelate's case can be found not in the underlying relationship between prelate and office (i. e. proper toleration – thus internal validity of agency), but 'on the basis of our law', the *lex Barbarius*.[6]

Looking back, once again, at Baldus' three-fold division of the incapacities of those holding an office,[7] the unworthy prelate would clearly fall into a different category from Barbarius' one: whereas the prelate ought to be deposed from the office that he lawfully represents, Barbarius has only coloured possession of the office. This is why Baldus stresses the element of possession without mentioning the validity of the appointment. Doing so, the unworthy prelate (the quintessential case of 'proper' toleration) would seem an application of the *lex Barbarius*. Thus, while seemingly solving the problem of the unworthy prelate through the *lex Barbarius*, Baldus in fact strengthens his interpretation of Barbarius through the case of the unworthy prelate.

To stress the point, shortly thereafter in the same *repetitio* Baldus looks at the closest equivalent to the false praetor in canon law: the false bishop. Let us suppose, he says, that a servant runs away from a monastery and is made bishop by the pope. Better still, he continues, let us imagine that an apostate is promoted bishop. It is difficult to think of a starker opposition between office and person. Indeed, apostate/bishop is a relationship just as conflicting as servant/praetor, and this is why Baldus finds this example so appealing. The symmetry is perfect: both are *de iure* ineligible, yet both sit in high offices. Just like Barbarius, so long as the apostate is mistakenly believed to be Christian, his jurisdictional acts are valid. The situation, continues Baldus, is different in the case of some other (serious but not so extraordinary) impediments. So for instance the murderer may well become a true bishop. Of course he is *indignus* and should be deposed; but so long as he is not, he is entitled to represent the office, and so to exercise it validly.[8]

§ publicum ius in sacris {sacerdotibus etc.} (Dig.1.1.1.2).' Cf. Dynus de Mugello, *supra*, pt. I, §4.8, text and note 229.

6 Baldus, *repetitio ad* Dig.1.14.3, *fol.* 58*va*, n. 23.

7 *Supra*, last chapter, §12.4.2, text and note 123.

8 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*rb*, n. 21: 'Sed quid de servo religionis, qui fugit a claustro, *aut* sunt apostate, an si Papa ignorans promoueat eos, valeat

The unworthy prelate in the previous example was a clear case of toleration, which however Baldus described as if it were an application of Barbarius' case. The example of the bishop serves to strengthen the same argument. Just like the slave-praetor, the apostate-bishop falls outside the scope of proper toleration: his election is clearly unlawful. Nonetheless, like Barbarius, his (invalid) appointment allowed him to take possession of the office. So his acts are valid because of the public utility triggered by the common mistake. The difference between false and true bishop was suggested to Baldus by a passage of Innocent (which he openly recalls), where the pope described the outer boundaries of toleration according to whether the election was *ipso iure* void or not. As we have seen, Innocent distinguished different cases of *indignitas*. Where the *indignitas* was not such as to preclude *ipso iure* the validity of the election, the 'right of the *dignitas*' could 'fall on the elected'. It was the case of the (not manifest) murderer – which Innocent often recalled as a typical example of toleration. By contrast, other times the *indignitas* was so serious as to preclude *ipso iure* the validity of the election. Among those cases, the pope listed the election of a woman or a child, thus echoing Gratians' *dictum Tria* (C.3, q.7, p.c.1).[9] What Innocent meant, however, was the reverse of Baldus' conclusion. If the *dignitas* could not 'fall' on the unworthy *ipso iure*, then the unworthy could not be tolerated in office – and so his acts would be void. In law, Baldus' false bishop is identical to the false praetor Barbarius. In both cases Baldus seeks to reach the effects of Innocent's toleration doctrine, even if neither case falls within its scope.

The case of the false bishop is also useful for a different purpose: clarifying a point that was left out of Barbarius' case. The text of the *lex Barbarius* did not refer only to Barbarius' judicial acts, but also to his legislative ones ('quae edixit, quae decreuit'). Of course the latter was not proper law-making (the praetor would simply issue his edict, not pass new legislation). The medieval equiparation of the praetor to a *spectabilis* magistrate confirmed the point, for it implicitly denied him the highest level of *iurisdictio* (*merum imperium*), encompassing the

promotio, puta ad Episcopatum? Et dic quod non sunt Episcopi; tamen vale<n>t quae faciunt, ex quo a communi errore pro Episcopis reputantur, ut hic. Et iste casu frequenter contingere potest. Ratio autem quare non est episcopus, quia hoc ius non cadit in apostata, *secus* in homicida, in quo cadit {hoc} ius ipso iure, et ideo est verus Episcopus. Inn(ocentius) de conces(sione) praeben(dae) <c.> cum nostris (X.3.8.6), donec remoueatur. Nam remouendus est tanquam criminosus et indignus. Sed quandiu non priuatur, verus praelatus est, nec ob(stante) in(fra) de fideicom(missariis) liber(tatibus) l. cum vero § subuentum (Dig.40.5.26.7) quia ibi agitur de praeiudicio tertij {hic non. Nam ibi de iure tertii}, hic de iure solius concedentis, puta Papae.'

9 Innocent IV, *ad* X.3.8.6, § *Possidebat* (*Commentaria Innocentii Quarti*, cit., *fols.* 373*vb*–374*ra*, n. 1).

power to enact new law.[10] So in the Accursian Gloss, Barbarius could only put forward a new statute, not enact it.[11] But Barbarius' case could be applied to other situations, some of which presupposed that the occult unworthy would also exercise (proper) legislative powers – as in the case of the bishop. When Bellapertica (and then Cynus after him) also applied his reading of the *lex Barbarius* to the putative bishop, he referred only to the jurisdictional acts.[12] A bishop, however, had both jurisdictional and legislative powers: what would happen to his decrees if he was removed from office?

The example of the bishop-apostate is particularly useful in this regard. Moving from a decretal of Boniface VIII stating that the decrees of a bishop do not apply beyond his diocese (VI.1.2.2), Baldus wonders whether the decrees of the bishop-apostate would remain valid even after he is found out and deposed from office.[13] The answer, once again, comes from Innocent IV.[14] As the toleration principle entails full validity of the exercise of office, all kinds of acts issued while tolerated in office should be valid. This applies to sentences as much as decrees. Unlike a sentence, however, a decree is able to produce new effects even a long time after its enactment.

Letting such decrees produce new effects after the deposition of the unworthy would be both inequitable and in open conflict with the very rationale of the concept of toleration (given that all effects of toleration would cease with a formal deposition, and the unworthy previously tolerated would then become a simple intruder). The only solution therefore is to quash such decrees the moment the *indignus* is no longer tolerated in office. Innocent IV said as much only in passing, and Baldus makes sure to state expressly what Innocent had left implied – the annulment of the decree does not operate retroactively.[15]

10 Cf. *supra*, pt. I, §2.1, note 25.

11 *Ibid.*, note 24.

12 S*upra*, pt. I, §4.6, note 115, and §4.7, note 141, on Bellapertica and Cynus respectively.

13 The reference to VI.1.2.2 was very suitable, as it also dealt with the problem of whether justifiable ignorance could be considered as a valid defence against the application of an episcopal decree.

14 Innocent IV, *ad* X.1.6.44, § *Administrent* (*Commentaria Innocentii Quarti*, cit., *fol.* 74*vb*, n. 3): 'ratum est quod sit ab eis quousque tolerantur, vt in d(icto) c. nonne (C.8, q.4, c.1), *infra*, de do(lo) et contu(macia) <c.> veritatis (X.2.14.8), nisi forte essent ordinationes, vel consecrationes, vel alia spiritualia, quae quod ad executionem irritae sunt … vel nisi essent leges, vel ordinationes, quae fecisset, quae in eius opprobrium cassantur, *infra* de haer(eticis) <c.> fraternitatis (X.5.7.4).'

15 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*rb*, n. 22: 'Sed quid de his quae isti prelati putatiui ordinant per modum legis condendae, vt in c. animarum § statuto, de consti(tutionibus) li. vi (VI.1.2.2) an valeant? Breviter casus est

In his last references to canon law issues in the *repetitio*, Baldus deals with a case that falls clearly within the scope of toleration, but also has important repercussions on Barbarius' case – the problem of subjective mistake. Given the central role of the office in his reading of the *lex Barbarius*, Baldus devotes less attention to the problem than most *Ultramontani* (who on the contrary invoked public utility directly to the acts of Barbarius). If a bishop is translated (i. e. transferred) to another diocese but, unaware of that, continues to exercise his old office, his acts will be valid.[16] The question was simple to answer, yet it was already stretching Innocent's concept of toleration (for the bishop no longer enjoyed the superior authority's approval to exercise his previous office). Shortly thereafter Baldus looks at the opposite situation: the mistaken belief that one's status is invalid. Here Baldus gives the example of someone who mistakenly thinks he has been excommunicated. Can he sit in judgment? In effect, this case

hic, quod sic. Tamen dicit Inno(centius) quod licet processus exerciti per modum iurisdictionis inter partes non veniant cassandi, vt hic: secus in legibus, quia sunt *cassandae* quo ad futura damnata auctoritate, vt no(tat) Inno(centius) de elect(ione) <c.> nihil est (X.1.6.44). Tamen ista cassatio non trahit effetum suum retro.'

16 *Ibid.*, *fol.* 58*va*, n. 27: 'Quid si papa transtulit Episcopum de uno Episcopatu ad alium Episcopatum, ignorans *tamen* primus Episcopus aliqua gessit: {quaeritur} an valeant? Et videtur quod sic, quia Papa non videtur executionem officij adimere ignoranti, de resti(tutione) spo(liatorum) c. audita (X.2.13.4), *nisi* ex eo quod sit plene translatus de iure, argu(mentum) in(fra) de off(icio) praesi(dis) l. si forte (Dig.1.18.17), ar(gumentum) contra de manu(missis) vin(dicta) l. si pater *et l. pater* ex provincia (Dig.40.2.4pr and Dig.40.2.22), et ar(gumentum) i(nfra) de iud(iciis) l. ii § i (Dig.5.1.2.1), *ubi* non requiritur scientia, sed *ibi* fauore iudiciorum. Hic autem est oppositum: alia non obstante, et ideo valet iudicium, quod fecerunt litigantes coram eo, et quia in legibus contrariis tractabatur de lucro captando: hic de damno vitando, saltem de {euitando} damno expensarum {factarum} in lite: facit quod no(tatur) i(nfra) de proc(uratoribus) l. Pompo(nius) § sed et si his (*sic*) (Dig.3.3.40.2).' Baldus' solution on the bishop, it should be noted, depends on his ordinary jurisdiction. Writing on the case of the slave-arbiter (and so, on the contrary, on a case of delegated jurisdiction), Baldus recalls Butrigarius' example of the delegates whose title was dubious but widely believed to be valid (*supra*, pt. I, §3.3, note 84). While Butrigarius solved the problem simply invoking the common mistake, Baldus distinguishes according to whether, despite the common mistake, the delegate was aware of the invalidity of his title or not. If he was aware of it – and even if he was the only one to know of its invalidity – then his decision would be void. Baldus, *ad* Cod.7.45.2, § *Si arbiter* (*Svper VII, VIII et Nono*, cit., *fol.* 52*rb–va*, n. 13): 'Sed pone quod iste dele<ga>tus erat reuocatus tamen publice credebatur quod non esset reuocatus. Respondeo, si quidem ipse sciebat se reuocatum ipso iure non valet processus, vt nota(tur) ff. de procuratori l. si pro<curatorem> absent [cf. e. g. the Lyon edition of 1556, *fol.* 27*rb* (*sed* 53*rb*)] (Dig.3.3.65). Secus si ignorat, vt not(atur) ff. si certum petetur l. eius qui, § i (Dig.12.1.41 *in fine*).'

is exactly the opposite as that of Barbarius. Baldus' answer is positive: he may judge. Baldus bases his solution on the ground that the false belief is not common, but just that of a single person.[17] However, he says elsewhere, even if the false belief was widespread, when the truth were to lead to the validity of the acts, it would still prevail on the common mistake.[18] Ultimately, in this case, common mistake would not be supported by public utility.

13.2 Notaries

While Baldus deals with the issue of the notary apparent also in the *lectura* on the *lex Barbarius*, it is in the *repetitio* that he elaborates more on it. We may therefore start there. We have seen that earlier civil lawyers, especially the *Ultramontani* (and, with them, first Cynus and then also Bartolus) looked at the case of the false notary as an application of the *lex Barbarius*. Stressing the relationship with the false praetor, their stance on the false notary depended on whether the *lex Barbarius* required only public utility or also a formally valid appointment. If public utility alone sufficed to make Barbarius' acts valid, then the same solution would also apply to the false notary.[19] On the other hand, those who also

17 Id., *repetitio ad* Dig.1.14.3, cit., *fol.* 58*vb*, n. 28: 'Sed quid si non est ignorantia circa factum superioris, sed circa qualitatem suae personae labitur, vt quia credit se excommunicatum cum non sit, an valeat processus? Credo quod sic, de condi(cionibus) et demon(strationibus) <l.> multum (Dig.35.1.21), quod circa impedimenta *iuris* inspicitur veritas, non sua opi(nio) singularis, et ar(gumentum) i(nfra) de iu(ris) et fac(ti) ign(orantia) l. regula § qui ignorauit (Dig.22.6.9.4).'

18 Id., *ad* Cod.7.45.2, § *Si arbiter* (*Svper VII, VIII et Nono*, cit., *fol.* 52*rb–va*, n. 6): 'Quero quid econtra si reuera erat liber sed communi opinione reputabatur seruus et erat in possessione seruitutis? Et dicunt quidam quod sententia valet. Nam aut veritas facit actum valere, et tunc inspicitur veritas; aut errror vel opinio facit rem valere, et tunc inspicitur opinio. Et ideo dico quod si quis habetur pro excommunicato et non est, tamen sententia sua valet: et contra si non habetur pro excommunicato et est similiter valet, vt not(atur) ff. de testamen(tis) l. cum lege, in fine (Dig.28.1.26), gl(osa) est multum singularis.' Cf. Gloss *ad* Dig.28.1.26, § *Putant*, *supra*, pt. I, §5.4, note 41.

19 Baldus often remarks how the office of the notary furthers public utility. He even explains that the parallel between a notary and a public slave (i. e. a slave owned by the *res publica*) in the Roman sources does not mean that the notary is also a slave but rather a public servant – that is, someone at the service of the people. Baldus, *ad* Cod.10.71(*69*).3 (Arcad. et Honor. AA. Hadriano PP., a provision dealing with the appointment of *tabularii*, preferably to be chosen among freemen, but also among slaves with their master's approval – hence the link with Barbarius), § *Generali lege* (*Lectura acutissimi … domini Baldi de Perusio super tribus libris Codicis …* [Lugduni, Garnier] 1541, *fol.* 42*rb*, n. 4): 'Sed modo op(ponitur), quia notarius dicitur seruus publicus vt l. non quasi ff. rem ra(tam)

considered the formal validity of the appointment necessary argued for the invalidity of the false notary's instruments.[20]

Significantly enough, Baldus opens his discussion of the notary without any reference to Barbarius: either of the above approaches would have been dangerous to his purposes. Stressing the need for a valid appointment could have implicitly highlighted Barbarius' lack of confirmation; relying on public utility alone would have contradicted the very foundations of representation. Instead, Baldus begins by distinguishing true from false notaries. In so doing he recalls Azo's teaching and especially Innocent's position: only appointment by the competent authority makes a notary.[21] Only at this point does Baldus bring up the difference with Barbarius: the slave was formally elected praetor, whereas the false notary was never appointed. Barbarius' defect was in his person (an occult defect *in qualitate*), not in the way his title was bestowed upon him. Much to the contrary, the notary apparent received no title (not even a voidable one). This means that, unlike Barbarius, his possession of the office is unlawful. Unlawful possession, in turn, entails invalid exercise of office.[22]

haberi (Dig.46.6.4 *sed* Dig.46.6.2). Solu(tio) est liber homo tamen dicitur seruus publicus quia publice omnibus seruit et ex eorum stipulationibus omnis queritur.' Cf. Gloss *ad* Cod.10.71(69).3, § *Generali – solidis* (Parisiis 1566, vol. 5, col. 111): '… quare ergo dicuntur serui publici? Respon(deo) quia ex eorum stipulatione quaeritur, vt ex stipulatione serui, maxime his qui non possunt stipulari … alias a seruiendo, non a seruando dicuntur serui.'

20 Especially Cugno and Suzzara: *supra*, pt. I, §4.2–3.

21 *Supra*, pt. II, §8.4, note 59.

22 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*rb*, n. 18–19: 'Ponamus quod deficiat autoritas superioris, *nunquid* error communis sufficiat? Exemplum in eo qui diu pro notario se gessit {cum non esset}, an valeant instrumenta? Semper enim falsum commisit, dum se in notarium subscripsit, et videtur quod non valeant de rigore sed de equitate, ar(gumentum) l. nostrae [*scil*., Dig.1.14.3] et C. de test(amentis) l. i (Cod.6.23.1). Nam notarius est testis approbatus *a iure*, vt l. hac consultissima § vl(timo) (Cod.6.22.8.2). Azo dicit contrarium in auth(entica) de fide instrum(entorum) (Coll.6.3[=Nov.73]), vbi dicit nullo modo valere [cf. *supra*, pt. I, §2.6, note 139]; et idem tenuit hic Guil(elmus de Cugno) per l. actuarios, C. de nume(rariis) et actuar(iis) (Cod.12.49.7); non ob(stante) haec l. quia hic non erat aliquis defectus, nisi in persona barbarij, qui (*sic*) defectus dicitur defectus materiae. Sed in questione proposita est defectus formae; *immo est funditus falsitas*, vt i(nfra) de fal(sis) l. eos § qui se (Dig.48.10.27.2). Vnde suae scripturae non debet credi, i(nfra) de eden(do) l. si quis ex argentariis § i (Dig.2.13.6.1) et C. de proba(tionibus) l. iubemus (Cod.4.19.24). Tenetur tamen iste scribens partibus ad interesse, vt l. vlt(ima) C. de magi(stratibus) conuenien(dis) (Cod.5.75.3). Non obstat l. i C. de testam(entis) (Cod.6.23.1), quia ibi in officio testis, in quo non requiritur autoritas superioris, sed tabellio nemo est nisi qui a superiore creatur, no(tat) Innocen(tius) de fi(de) instrumentorum, c. cum P. tabellio (X.2.22.15), nec iuuat possessio, quia in ea fuit mala fide versatus:

Arguing as much, having stressed the difference with the notary who holds a valid title, is an indirect way of bringing Barbarius' case closer to that of the true notary. This affinity is not noted on the basis of the valid appointment (Barbarius' praetorship was 'revocable')[23] but on that of the 'canonical entry' into office, and so on the way possession of the office is acquired. The approach builds on the interpretation of the unworthy prelate who should be deposed from office. There, as we have seen, Baldus insisted on the prelate's lawful possession of the office (rather than legal representation) so as to make that case look closer to that of Barbarius. In the same way, but *a contrario*, Baldus now stresses the lack of appointment of the false notary so as to highlight his unlawful possession, and so to mark the difference with Barbarius. The more the accent is on the lawful acquisition of the possession of the office, in other words, the closer Barbarius' case looks to proper toleration.

It may be interesting to compare the careful distinction between Barbarius and the false notary in Baldus' *repetitio* with the rather more superficial way he proceeds elsewhere, especially in his comment on the slave-witness in Cod.6.23.1. There, Baldus wonders whether the same positive solution (i. e. validity of the testament) should also be extended to the instruments drafted by the putative notary. At first sight, he observes, one should conclude in the affirmative – the role of the notary is precisely that of a witness, only stronger.[24] After a careful and lengthy examination, however, Baldus concludes for the opposite solution. This is hardly surprising of course. What is interesting is that Baldus applies the same three-fold distinction of unlawful exercise of an office as he did when justifying Barbarius' position:[25] *de facto* exercise of the office; exercise of office after having been deposed from it; commission of a crime that calls for the deposition from the office so far validly exercised. Only in the third case (that is, proper toleration) are the instruments valid.[26] Not commenting on

facit quod no(tant) doct(ores) <in> C. de fid(e) inst(rumentorum) l. si solennibus (Cod.4.21.7).'

23 *Supra*, last chapter, §12.4.1, text and note 87.

24 Baldus, *ad* Cod.6.23.1, § *Testes* (*svper Sexto Codicis*, cit., *fol. 57rb*, n. 12): 'Sexto quero nunquid lex nostra habeat locum in tabellione putatiuo vt eius instrumenta inter ignorantes confecta valeant ac si esset iustus tabellio, et videtur quod sic: quia licitum est arguere de teste ad tabellionem.'

25 *Supra*, last chapter, note 123.

26 Baldus, *ad* Cod.6.23.1, § *Testes* (*svper Sexto Codicis*, cit., *fol. 57va*, n. 12): '… Solu(tio) aut nunquam fuit creatus tabellio aut fuit creatus et depositus: aut fuit creatus et deponendus, non tamen depositus. Primo casu non valent sua instrumenta per leges et rationes per hac parte inductas, quia eius officium nullum est, nec habet originem veritatis. Secundo casu similiter non valent sua instrumenta, quia per depositionem perdidit auctoritatem, vt ff. de infa(mia) l. ii, § miles (Dig.3.2.6.2.3), i(nfra) de dignitate, l. iudices (Cod.12.1.12) … Hoc est

Barbarius, Baldus had all the interest to keep the situation of the slave-witness distinct from that of the false notary: using the first to legitimise the second could have undermined the structure of representation, and so the boundaries within which a public office could be validly discharged.[27] As such, instead of embarking in subtle distinctions between simple and coloured possession, Baldus distinguishes only between possession deriving from a valid appointment and possession resulting from mere factual exercise of the office. Put in these terms, the solution is obvious: the false notary has no claim to the office, so his acts are void.[28]

As said, in the *lectura* on the *lex Barbarius* Baldus is more concise on the notary apparent than in the *repetitio*.[29] The reason is that he already dealt with the issue shortly beforehand, when commenting on the *lex Cassius Longinus* (Dig.1.9.2). This *lex* is a short passage taken from Marcellus, reporting how the jurist Gaius

verum nisi eius depositio occulta sit: tunc enim de rigore acta non valent, vt notatur in aut(hentica) de testi(bus) § pe(nultimo) (Coll.7.2.9[=Nov.90.8]), quia adhuc quedam reliquie remanserunt … Tertio casu valent instrumenta, quia licet aliquis sit ab officio deponendus, tamen antequam deponatur valent quecumque fiunt officii pretextu. Omnia enim tolerantur propter officium quod administrat donec in eum sit lata sententia depositionis: vel spoliatus sit insignibus vel notatus sit infamia vel per legem nominatim sit priuatus officio, vt s(upra) de here(ticis), aut(hentica) credentes, in fi. (Auth. *ad* Cod.1.5.4, § *Credentes*) et per Inno(centium) extra de accus(ationibus) c. qualiter, in fin(e) (X.5.1.24), vbi omnino videas.' Cf. Innocent IV, *ad* X.5.1.24, § *Et famam, supra*, §7.3, notes 23–24.

27 Incidentally, this might explain why Baldus made little use of the slave-witness case in his reading of the *lex Barbarius*. Cod.6.23.1 was a *locus classicus* among civilians in support of Barbarius' case. Opting for an indirect application of Innocent's toleration principle, however, the point became of secondary importance for Baldus.

28 Baldus, *ad* Cod.6.23.1, § *Testes* (*super Sexto Codicis*, cit., *fol. 57rb–va*, n. 12): '… quia nunquam fuit tabellio qui exercuit officium mala fide, et ideo quasi possessio ex tali exercitio inducta nihil potest operari: quia est iniusta et clandestina quae nihil operatur in his que iuris sunt iuxta nota(tur) per Innoc(entium) in c. nihil, de elect(ione) (X.1.6.44). Item solus princeps confert tabellionatum vel habens autoritatem ab eo, non vsus priuatorum vt no(tatur) de fide instru(mentorum) c. cum P. tabellio per Inn(ocentium) (X.2.22.15). Item hoc tenet do(minus) Azo in summa aut(henticae) de instrum(entorum) cau(tela) et fide (Coll.6.3[=Nov.73]), non ob(stante) l(ege) barbarius (Dig.1.14.3) quia ibi interuenit decretum superioris.' On Innocent see *supra*, pt. II, §8.4, note 59. On Azo see *supra*, pt. I, §2.6, note 139.

29 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 56ra*, n. 29–30: 'Ecce quidam tanquam tabellio confecit longo tempore instrumenta. Postea apparet quod non est tabellio: quia creatus a non habente potestatem a Principe, vel a Rege. Certe ille nullus est, et instrumenta sua sunt nulla, quia non sunt facta publica persona, licet faciant aliquam praesumptionem.' See also *infra*, this chapter, note 49.

Cassius Longinus denied a senator expelled from the senate for infamous behaviour the right to testify or to preside in court.[30] The case was straightforward, but medieval lawyers always had a touch for complicating things. The Gloss suggested that the senator's infamous behaviour occurred in the exercise of his office: the senator was bribed.[31] The reading of the Gloss made the case extremely serious – how could a high-ranking official continue to discharge his office after having patently abused it? This way, the passage became the perfect place to look at the notary, for the most obvious reason a notary would become *infamis* is forgery. Any public officer who committed a crime in office is to be deprived of it,[32] but a condemnation for forgery would also entail *infamia*: the condemned, says Baldus, 'is to be considered as if he was dead'.[33] This death is of course civil death – lowering the *dignitas* of the person to that of a slave. Hence the link with Barbarius: both are legally incapable, and both legal incapacities are occult (that is, neither notorious nor legally ascertained). Between slave-praetor and *infamis* notary, however, there is an important difference: the legal incapacity of the notary is a supervening one. What are its consequences? To answer the question Baldus draws a parallel with another public office whose *dignitas* is vastly superior to that of a simple notary, that of the count.

Medieval civil lawyers sought to equiparate Roman (or rather, early Byzantine) ranks with medieval dignities, so as to find a foothold in the sources for new titles clearly not present in Rome. The count (*comes*) was a step below the Roman senator: he was not *illustris* but *spectabilis* – just like the praetor.[34] This makes the present case of particular interest for our purposes: Barbarius' incapacity preceded his appointment to the rank of *spectabilis*, whereas the incapacity of the *spectabilis* count is a supervening one. If a count is condemned

30 Dig.1.9.2 (Marc. 3 dig.): 'Cassius longinus non putat ei permittendum, qui propter turpitudinem senatu motus nec restitutus est, iudicare vel testimonium dicere, quia lex Iulia repetundarum hoc fieri vetat.'

31 Gloss *ad* Dig.1.9.2, § *Turpitudinem* (Parisiis 1566, vol. 1, col. 120).

32 Baldus, *ad* Cod.1.3.17, § *Placet* (*svper Primo, Secvndo & Tertio Codicis*, cit., *fol.* 38*vb*): 'no(tatur) quod ille qui delinquit in officio est priuandus matricula et officio et beneficio.'

33 Baldus *ad* Dig.1.9.2, § *Cassius Longinus* (*In Primam Digesti Veteris Partem*, cit., *fol.* 50*ra*), n. 6: 'Item condemnatus de falso habetur pro mortuo C. de transa(ctionibus) l. transigere (Cod.2.4.18) per Cy(num), nisi sit restitutus in integrum per Papam, vel Imperatorem in de postu(lando) l. i § de qua (Dig.3.1.1.10), extra, de re iud(icata) c. cum te (X.2.27.23), per Inno(centium).' Cf. Cynus, *ad* Cod.2.4.18 (*Cyni Pistoriensis In Codicem*, cit., *fol.* 64*ra*, n. 9): 'per maculam falsitatis homo deuenit ad nihilum inter homines, quia dicitur homo postea sine fide et sine conscientia.' Cf. Innocent IV, *ad* X.2.27.23, § *infamia* (*Commentaria Innocentii Quarti*, cit., *fol.* 314*rb–va*, n. 2).

34 *Supra*, pt. I, §2, text and note 5.

for theft or false witness, Baldus wonders, should he lose his title even if the king does not depose him?[35] The question explains the link between notary and count: in both cases the problem is whether the infamous behaviour that disqualifies someone from exercising an office should produce its full consequences from the commission of the act or from the moment it is judicially ascertained. Here as well Baldus relies on Innocent's elaboration of the toleration principle. Although there is no doubt that the count ought to be removed from his *dignitas*, until his deposition (thus as long as he is tolerated) he is legally able to fully represent the office.[36] The same, continues Baldus, applies to the *infamis tabellio*. As with the *infamis senator* in Dig.1.9.2, the infamous notary is legally entitled to continue in the exercise of his office until formally deposed from it. This, notes Baldus, is hardly satisfactory, especially on matters that require full honourability. Nonetheless there is little alternative, all the more since some passages of the Digest explicitly say as much.[37] Once again Baldus relies on Innocent, whose influence on the point is particularly evident: the reason for the above conclusion, explains Baldus, lies in the public office of the notary. Until deprived of his office, he remains its lawful representative, and so he is still entitled to exercise it.[38]

35 Baldus *ad* Dig.1.9.2, § *Cassius Longinus* (*In Primam Digesti Veteris Partem*, cit., *fol.* 49*vb*, n. 1): 'hic quaeritur, an comes condemnatus per furto vel falso in mille perdat comitatum quem habet a Rege, a quo non reperitur ammotus? Et videtur quod sic, quia comites sunt spectabiles, sed omnis infamis perdit dignitatem, ergo perdit comitatum: quia est ei annexa dignitas.'

36 *Ibid.*, *fol.* 49*vb*, n. 1: 'His quaerit, an comes condemnatus pro furto vel falso in mille perdat comitatum … Et per hoc facit Inno(centius) qui dicit quod in his quae ratione officij quis facit, puta si sit praelatus, tamen quod facit infamis, donec priuetur officio, de accu(sationibus) c. qualiter et quando, in gl(osa) mag(na) [cf. Innocent IV, *ad* X.5.1.24, § *Et famam*, in *Commentaria Innocentii Quarti*, cit., *fol.* 495*vb*, n. 10]. Item dicit quod irregularis et homicida remanet in sua dignitate, et praelatura, donec remoueatur ab ea, vt ipse not(at) extra de conces(sione) praeben(dae), c. cum nostris (X.3.8.6). Iste ergo est magis deponendus quam depositus, vt no(tat) ipse Inn(ocentius) de fo(ro) compe(tenti) c. postulasti (X.2.2.14).' Cf. Innocent IV's lengthy gloss *Assignarunt* on X.3.8.6 (*Commentaria Innocentii Quarti*, cit., *fol.* 375*ra–vb*, n. 1–4, esp. *fol.* 375*rb*).

37 The reference is to the bank-keeper's heir, 'humilis et deploratus', in Dig.2.13.6.1. Baldus, *ad* Dig.1.9.2, § *Cassius Longinus* (*In Primam Digesti Veteris Partem*, cit., *fol.* 49*vb*, n. 3): 'Item testimonium est dignitas i(d est) status illaesus absque macula. Sed infamia est macula legib(us) et morib(us) reprobata, et non debet in consortium bonorum admitti infamis, alias qua differentia esset inter bonos et malos? Certe nulla, quod est absurdum. Et hoc tamen glossa in d(icta) l. si quis ex argentariis § cogentur (Dig.2.13.6.1) in contrarium facit.' Cf. Gloss *ad* Dig.2.13.6.1, § *Cogentur* (Parisiis 1566, vol. 1, col. 247).

38 Baldus, *ad* Dig.1.9.2, § *Cassius Longinus* (*In Primam Digesti Veteris Partem*, cit., *fol.* 49*vb*, n. 3): 'nam donec priuatur priuilegio tabellionatus, tabellio est. Et sic

Baldus reaches the same conclusion also in the *repetitio* on the *lex Barbarius*.[39] There, he also makes sure to apply the same reasoning for the period between the commencement of the legal proceedings and the eventual condemnation of the notary – the notary may therefore draft new instruments even during his trial for forgery. This conclusion has little to do with presumption of innocence.[40] It simply derives from the fact that the representation mechanism ceases only with deposition, and condemnation does not retroact to the joining of the issue.[41]

videtur quod facit ratione publici officii, hinc est quod infamia ordinario non potest opponi, vt no(tat) Inn(ocentius) de resc(riptis) c. sciscitatus (X.1.3.13) [cf. Innocent, *supra*, pt. II, §7.4, note 45]. Sol(utio) aut notarius est nominatim priuatus officio et tunc aut per hominem in loco publico et consueto, et deinceps sua instrumenta non valent: sed iam facta non perdunt robur i(nfra) de eden(do) l. praetor § his esset desiit (Dig.2.13.4.4). Aut [privatus officio] per l(egem), et tunc valent, donec sit declaratum, vt in Auth(entica) de tabel(lionibus) § pe (nultimo) in gl(osa) ord(inaria) [cf. Gloss *ad* Coll.4.7.1(=Nov.44.1§4), § *Documentis*, Parisiis 1566, vol. 5, col. 225]. Aut notarius non est expresse prohibitus ab officio et tunc aut est infamia ex delicto commisso extra officium; et retinet officium, donec priuetur. Priuari nam debet et potest, ex quo est infamis, sed si non priuatur, videtur quod facit, quia facit legis auctoritate. Et lex potius quam persona ponderanda est.'

39 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 57ra*, n. 6: '… In tabellione autem certum est quod instrumentum suum non vitiatur: licet postea efficiatur infamis … Item non vitiatur instrumentum si eius infamia vel priuatio prius velata et occulta postea detegatur, vt in aut(hentica) de tabel(lionibus) § vlti(mo) (Coll.4.7.2 [=Nov.44.2]), in gloss(a) que incipit "hoc est arg(umentum)" quod est multum nota(ndum).' Cf. *supra*, pt. I, §2.6, note 132.

40 The point is too complex to be dealt with here, but it is important to note that the increasingly frequent description of the defendant's rights in natural law terms did not imply a fully-fledged legal presumption that the same defendant was innocent until proven otherwise. As recently argued, 'the modern use of the phrase "presumption of innocence" would have been, to a medieval jurist, a *violent* presumption of innocence, because it refers to an assumption that stands unless it is disproven', Vitiello (2016), p. 98 (emphasis in the text). Cp. Pennington (2003), pp. 112–119, and Pennington (2016), pp. 141–152.

41 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol. 58va*, n. 25–27. It is worth reporting the passage in full: not only is it quite important, but it also provides a good example of the differences in the text of the *repetitio* as found in the standard printed editions of Baldus and Bartolus. 'Sed quid si notarius non est adhuc damnatus *de falso*, sed pendet processus, an interim possit instrumenta *conficere*? Et videtur quod non, ut C. de procu(ratoribus) l. reum criminis (Cod.2.12.6), arg(umentum) de excu(sationibus) tu(torum) l. diximus (Inst.1.10.12), quia idem operatur processus pendens, quod sententia, de excep(tionibus) l. fundum et l. fundi (Dig.44.1.16 and 18), ad idem facit de li(berali) causa <l.> qui de libertate (Dig.40.12.29), de solu(tionibus) l. quod si forte § i (Dig.46.3.14.1), de admi(nistratione) tu(torum) l. chirograph(is) § pe(nultimo) (Dig.26.7.57.1). Econtra *videtur* quod pendentia processus operatur idem quod sententia absolutoria,

Supervening occult incapacities do not fully separate agent from office: the count retains his lordship and the notary his office until the incapacity is legally ascertained. This of course means that, after being deposed from office, the ex-notary cannot produce any valid instrument. But what about the instruments already made? Baldus touches on the point in the *lectura*, arguing (as one would expect) that the deposition of a judge or a notary from office should not affect acts already issued – just, he adds, as the acts carried out by Barbarius while his servile condition was unknown should not be affected by his eventual removal from office.[42]

> quia dubium et certum parib(us) passibus ambulant pro *reo*, sed non operatur idem condemnatoria, *unde* ex quo interim est in possessione officii videtur quod possit officium exercere nisi expresse interdicatur, vt l. moris, de poenis (Dig.48.19.9) et l. chirographis, § vlti(mo) (Dig.26.7.57.1), ad idem facit quod not(atur) i(nfra) de infami(a) l. furti § i (Dig.3.2.6.1), nam et miles antequam sit exauctoratus, pro milite est *tractandus*, facit quod no(tatur) i(nfra) de infa(mia) l. ii § miles (Dig.3.2.2.3), et edend(o) l. si quis {ex argentariis} § i. (Dig.2.13.6.1), *et ibi* per Odo(fredum) [Cf. Odofredus, *ad* Dig.2.13.6.1, § *coguntur et successores*, *In undecim primos pandectarum libros*, cit., *fol.* 68*rb–va*]. Credo *quod* haec pars sit verior, quia licet *interim* ad nouum honorem aspirare non *possit*: tamen executio officii prioris non denegatur, quia est in quasi possessione, cuius vsus *quod* interim sibi competit iure proprio, nam etiam interim notarius est. Non ob(stante) C. de suspe(ctis) tu(toris) l. eum {quem} (Cod.5.43.7), quia officium *tutele* est gratia alterius *tantum* introductum, et non interest tutoris: secus in officio tabellionis. Nam honor est sibi credi, et sua interest *officium publicum autoritate et utilitate priuatus*. Et facit, quia in dubio constitutus potest licite possidere, et vti possessione, de oper(is) no(ui) nun(tiatione) l. si prius {cum si} (Dig.39.1.15), et sic interim non auferunt sibi bona, et *ita* non debet {ei} auferri officium, nec status, argu(mentum) de sta(tu) hom(inum) l. qui furere (Dig.1.5.20); nec *etiam* fama, C. de infa(mis) l. null*a*m (Cod.2.11.14). Honestius tamen facit, si interim abstinet a nouis instrumentis, imo videt quod sit omnino prohibitus, sicut ferre testimonium, vt i(nfra) de testi(bus) l. iii § lex Iulia (Dig.22.5.3.5), et {l. testimonium} l. ii (Dig.22.5.2) et not(andum) in l. i de reis postu(latis) libro xi (*sed* Cod.10.60(58).1). *Nisi* dicas aliud in teste simplici, aliud in tabellione. Nam infamis non potest esse testis: tamen potest exercere tabellionatum, nisi *in* officio delinquerit et sit ammotus ab eo. Item dictum tabellionis est magis autenticum, quam dictum testis, vt no(tandum) insti. de inuti(libus) stipulat(ionibus) § item verborum (Inst.3.19.12). Item quidam non possunt esse testes in iudicio, sed in contractibus sic C. de haereticis, l. quoniam (Cod.1.5.21pr), non credo fidem totaliter annihilari, sed diminui, si postea culpabilis *esse* iudicetur.'

42 Id., *lectura ad* Dig.1.14.3, cit., *fol.* 56*va*, n. 36: 'Item scias quod licet iudex, vel notarius sint depositi, tamen gesta non repelluntur, nam innuit quod Barbarius quamdiu latuit [cf. Dig.1.14.3: 'si servus quamdiu latuit …'] eius qualitas, stetit in praetura, quasi tacite dicat, fuit postea remotus, vel detectus nullus secundum varios intellectus, tamen actus retro exerciti sunt efficaces, facit quod no(tatur) in(fra) de infa(mia) l. furti, § i per glo(sam) [cf. Gloss *ad* Dig.3.2.6.2, § *Si ab initio*,

Formulated this way, the question of the validity of the previous acts of the notary was remarkably easy to answer. Indeed, Baldus' answer in the *lectura* is the same as that provided in the Gloss on the *Authentica* 'On the notaries' (*De Tabellionibus*),[43] which was widely accepted on this point.[44] Baldus' answer was almost obvious – but not so his parallel with Barbarius. The difference between the two cases was self-evident. The regularly appointed notary was no longer tolerated in office, the false praetor was removed from an office he never had *de iure*. Stressing the enduring validity of the acts made before their deposition, however, Baldus implicitly blurs the difference between the two cases. The impression, once again, is that the parallel with Barbarius served more to strengthen the false praetor's acts than the instruments of the true notary, who was fully entitled to his office.

Coming back to the subject in the *repetitio*, Baldus poses a subtler question: could an instrument made by the notary before his deposition be published and receive execution thereafter? The question is not merely whether the previous acts should be retrospectively invalidated (that would be a rhetorical question), but whether they could produce new effects after their source was deprived of validity. In this light, in effect the question becomes very similar to that on the validity of the decrees of the apostate made bishop, and it is not fortuitous that the two questions are found very close to each other in the *repetitio*.[45] Their similarity leads to the same answer (once again based on Innocent): deposition from office does not operate retrospectively. But the difference between the kinds of acts – notarial instruments and statutes – entails a different position as to their validity in the future (that is, from the moment of the deposition of the person who issued them). In the case of the statute, the choice was only between letting an act produce its full effects *sine die* or depriving it of any legal strength from the moment of deposition of the authority that issued it. As such, there was little choice but to quash it. Giving execution to an instrument made before the removal from office of the person who made it, however, is a different matter. The difference lies in that the parties are entitled to rely on its validity, since it was made when the notary was still tolerated in office. Denying that validity would amount to voiding retrospectively the instrument itself.[46]

Parisiis 1566, vol. 1, cols. 345–346] et in(fra) de ope(ris) lib(ertorum) l. hoc demum (Dig.38.1.38pr), et extra, ne cler(ici) vel mo(naci) c. sicut (X.3.50.8).'

43 Cf. *supra*, pt. I, §2.6, note 132.

44 Often through the (somewhat clearer) reading of Jacobus de Belviso, *supra*, pt. I, §2.6, text and note 136.

45 *Supra*, last paragraph, note 15.

46 Baldus, *repetitio ad* Dig.1.14.3, cit., *fol.* 58*va*, n. 24: 'quid de notario ab officio priuato, an vetera instrumenta perficere, et publicare poterit? Et videtur quod non, quia deficit in fide. In contrarium videtur quia fides illa in praeteritum

A last problem on the validity of the notary's instruments in Baldus' *lectura* on the *lex Barbarius* concerns his secret deposition. If the notary is already secretly condemned for forgery, asks Baldus, are the acts he issues thereafter valid? When commenting on the *lex Cassius Longinus*, as we have seen, Baldus drew a clear line between validity of instruments drafted before the condemnation and invalidity of instruments made thereafter. In that case, however, the notary's deposition was a formal one, publicly known because judicially ascertained. Does the same apply also to secret condemnation? The question is in effect very similar to that of the excommunicated judge (which Baldus discusses in the *repetitio*).[47] In that case, however, the purpose was mainly to draw a parallel with Barbarius. In the present case, avoiding (yet another) comparison with Barbarius, Baldus could afford to be somewhat more precise. The issue is but a secular adaptation of the canon law problem about the jurisdiction of the excommunicate, and the solution similarly depends on the division between public and occult excommunication. Public excommunication, says Baldus, would surely entail removal from office – just as it would preclude the validity of the appointment itself.[48] But (and here the influence of Innocent is obvious) full separation of the agent from the office occurs only when the agent's incapacity is legally ascertained or otherwise notorious. Occult heresy and excommunication, says Baldus, produce the same effects as a secret condemnation for forgery. In

aestimatur, et *ista* pars est vera, quia alii non debet nocere sententia lata contra notarium, de infa(mia) l. Lucius in fi. [Dig.3.2.21 (Paul. 2 resp.): '… cum non oportet ex sententia sive iusta sive iniusta pro alio habita alium praegravari'] et facit quod notat Inn(ocentius) de haeretici c. fraternitatis (X.5.7.4) [Cf. *supra*, pt. II, §7.5, note 98]. Ex quo sententia amotionis sortitur suum effectum, ex tunc non valent scripturae postea inchoate, sed *retro* vetera consumare potest, quia *sententia non mutat vim retro*, *argu*(*mentum*) vt causae post pu(bertatem) adsit tut(or) l. i (Cod.5.48.1.1).' Cf. Id., *ad* Cod.7.45.2, § *Si arbiter* (*svper VII, VIII et Nono Codicis*, cit., *fol. 52va*, n. 15): 'Et idem dico in notario qui post compilationem instrumentorum monachus est effectus vel alias officium perdidit, non suo vitio sed alio defectu vel etiam sua culpa. Nam vetera instrumenta perficere potest: sed noua inchoare non potest.' Cf. Id., *ad* Cod.6.23.1, § *Testes* (*svper Sexto Codicis*, cit., *fol. 57rb*, n. 10): 'Quarto quero nunquid communis opinio habeatur pro veritate? Et dic quod aut de contraria veritate est dubium aut est certum. Primo casu aut actus pendet ex veritate et inspicitur veritas, aut pendet ex opinione et tunc inspicitur opinio. … Secundo casu refert, aut loquimur quo ad actum gerendi in posterum et inspicitur veritas iam detecta, aut quo ad actum exercitii in preteritum, et tunc refert aut equitas fauet opinioni et inspicitur opinio vt ff. de offi(cio) preto(rum) l. barbarius (Dig.1.14.3), aut fauet veritati et inspicitur veritatis ff. quando actio de pecu(lio) est annalis l. quesitum (Dig.15.2.1.10).'

47 *Supra*, last paragraph, note 2.

48 Baldus, *lectura ad* Dig.1.14.3, cit., *fol. 56ra*, n. 30: 'Sed pone quod bene fuit creatus tabellio, tamen tunc erat excommunicatus; ergo non valuit creatio.'

both cases the notary may continue to discharge his office validly until the condemnation is made public or becomes otherwise notorious.[49] This time, it will be noted, Baldus speaks only of *de iure* entitlement to the office and not of lawful possession. It seems significant that, in so doing, he avoids any mention of Barbarius.

Civil lawyers and canon lawyers alike both relied on the *lex Barbarius* to reach a positive solution for the validity of the instruments drafted by the occult *inhabilis* notary. At first sight, Baldus' approach might appear similar, whereas in fact it moves from the opposite direction: it is Barbarius' case that needs the support of the notary – as well as that of the judge and of the prelate. For they are proper cases of toleration, that of Barbarius is not. Baldus' skilful approach, however, would lead later jurists to highlight the continuity between those figures and to overlook the subtle underlying distinction.

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It may be interesting to conclude this chapter with some remarks on Baldus' treatise *On the Notaries* (*Tractatus de Tabellionis*),[50] which is effectively a compendium of Innocent's thinking.

49 *Ibid.*: 'vel pone in haeretico, qui longo tempore confecit instrumenta inter ignorantes, certe valent instrumenta tanquam publica, ut hic, si erat excommunicatus, vel haereticus occultus; secus si manifestus. Sed pone, sicut de facto vidi, quod erat tabellio: tamen Episcopus eum condemnauit de falso secrete in camera sua, et ipse postea inter ignorantes confecit instrumenta, quaeritur an valeant? Et videtur quod non, cum sit degradatus, ut dixi in l. Cassius [Dig.1.9.2: cf. *supra*, this paragraph, note 38]. In contrarium videtur, quia non desinit omnino esse tabellio, ut l. si pluribus de aucto(ritate) tut(orum) (Dig.26.8.4). Item sententia legis qua non declaratur ab homine, non priuat ab exercitio, vt no(tatur) in Auth. de tabel(lionibus) § pe(nultimo) (Coll.4.7.1[=Nov.44.1§4]).' Baldus develops the point further when commenting on the arbiter-slave. Baldus, *ad* Cod.7.45.2, § *Si arbiter* (*svper VII, VIII et Nono Codicis*, cit., *fol.* 52*va*, n. 14): 'Quid dices de questione facti? Episcopus in camera et in secreto damnat quaedam notarium de falso, populum hoc ignorans confluebat ad eum instrumenta facientem sicut per prorsus: nunquid valent instrumenta per errorem iustum et propter primordium veritatis, quod sumit naturam a primeua origine veritatis; et si quidem degradatus a lege propter delictum occultum, et valent instrumenta ex quo crimen est occultum, ista est glo(sa) singula in aut(hentica) de ta(bellionibus) § penul(timo) (Coll.4.7.1[=Nov.44.1§4]), que incipit "hic est argumen(tum)", ver(siculum) "item not(andum)" [cf. *supra*, pt. I, §2.6, note 132]. … Publice enim debet fieri sententia non in secreto loco tex(tum) est i(nfra) eo (titulo) l. cum sententiam presidis (Cod.7.45.6).'

50 The treatise was attributed to other jurists, Bartolus included. In fact, it was among the earliest works of Baldus, pre-dating of several years the *repetitio* on the

When Bartolus sought to apply Bellapertica's ideas to the notary apparent, he insisted that his appointment was not the exclusive prerogative of the prince.[51] Stressing the need of certain formal requirements for the validity of the notary's appointment would highlight the negative consequences of their absence. The more the notary had to be created such, in other words, the more the putative notary would be seen as an impostor. The point was made explicitly by Suzzara and Cugno to exclude the false notary from the scope of the *lex Barbarius*,[52] and it was probably for the same reason that Ravanis omitted the notary's case from his lengthy *lectura*: behind Barbarius was the 'power of the appointer' (*potentia committentis*); behind the false notary was only the common mistake.

Baldus' position is remarkably close to that of Innocent, almost a summary of it. In principle, says Baldus, only the prince may appoint a notary;[53] lower authorities might do as much only with the permission (even just tacit) of the prince.[54] The long exercise of the office and the common opinion as to the

lex Barbarius, and possibly also the *lectura* on it. Cf. Valentini (1965–1966), pp. 46–53, text and notes (esp. notes 39 and 41). See also Colli (2005), p. 47, note 58, where further literature is listed.

51 *Supra*, pt. I, §5.2, note 21.

52 *Supra*, pt. I, §4.6, note 154, and §4.7, note 203 respectively.

53 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], p. 85, ll.40–44, and pp. 86–87, ll.3–6 respectively): 'primo quero quis possit creare tabelliones et ei concedere auctoritatem condendi instrumenta; et uidetur quod nemo nisi princeps, quia per tabellionem alteri acquiritur, ut l. non aliter enim ff. de adoptionibus (Dig.1.7.18), ergo oportet quod habilitetur a principe, sicut dicitur de illo qui habilitatur ad postulandum … Idem tenet Ynocentius in capitulo ultimo, in prima glosa, Extra, De fide instrumentorum (*nunc* X.2.22.15), ubi dicit quod nemo subditus pape vel imperatori potest creare tabelliones, sed ipsi soli hoc possunt.' Cf. Innocent, *ad* X.2.22.15, § *Tabellio, supra*, pt. II, §8.4, note 59.

54 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], pp. 94–95, ll.4–6): 'Secundo quero nunquid consuetudo possit inducere quod inferior a principe possit creare tabelliones. Respondeo: Ynnocentius in dicto capitulo finali, Extra, de fide instrumentorum (*nunc* X.2.22.15), tenet quod sic et est ratio, secundum eum, quia ad hoc ut valeat consuetudo, requiritur consensus superioris, scilicet principis, tacitus uel expressus, ut ipse notat, Extra, de consuetudine, super rubrica (X.1.4).' Cf. Innocent IV, *ad* X.1.4, *De consuetudine* (*Commentaria Innocentii Quarti*, cit., *fol.* 31*va*, n. 4). There, the pope referred to a custom contrary to the law, or at least able to adversely affect its application. Because of that, Innocent required full knowledge (*certa scientia*) of the superior authority as to the applicability of such a custom: 'Item oportet quod sit inducta de scientia eius, qui super eos, vbi inducitur habet ordinariam iurisdictionem et potestatem condendi leges … et non sufficit toleratio.' Cf. also *ibid.*, *fol.* 32*ra*, n. 10. The custom allowing lower authorities to appoint notaries is ultimately an application of the same principle – hence the need of 'consensus superioris': *supra*, pt. II, §8.4, note 59.

legitimate status of the notary, therefore, served only as a – rebuttable – presumption as to his valid appointment.[55] The legal strength of the notarial deeds drafted by him depends on the exercise of a specific public office, but that office cannot be validly exercised without prior lawful appointment. Once the agency relationship is validly established, however, the supervening legal incapacity in the person of the agent precludes the continuation of the representation mechanism only if the incapacity is notorious. So a publicly excommunicated notary may not validly draft any instrument, because he may no longer act in the name of the office.[56]

55 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], pp. 100–101, ll.38–42): 'Tertio quero quid si ille, qui confecit instrumentum, negatur fuisse notarius, qualiter probabitur eum notarium fuisse. Ynocentius in c. i, Extra, De fide instrumentorum, primum post principium, dicit quod debet probari privilegium seu auctoritas per testes vel per publicum instrumentum. Sufficit tamen, secundum eum, si probetur per testes quod publice officio notarii fungebatur, quod multa instrumenta confecerit de aliis legitimis contractibus, firmis manentibus.' Cf. Innocent, *ad* X.2.22.1, § *Si scripturam*, *supra*, pt. II, §7.5, note 74.

This passage in Baldus' treatise should be read together with his comment on both the slave-witness and especially the slave-arbiter. Baldus, *ad* Cod.6.23.1, § *Testes* (*svper Sexto Codicis*, cit., *fol. 57ra*, n. 3): 'quando veritas et fama discordant magis attenditur fama ratione publici instrumenti quam veritas. Item potest esse quod de testamento apparet notoria scriptura manu testatoris vnde aduersarius non potest eam inficiari, et ideo non negat veritatem sed solemnitatem: supposita ergo veritate hec lex determinat quod testamentum sit solemne, et sic heres institutus in eo succedit. Si autem aduersarius negaret veritatem, tunc ipsa veritas per seruos non posset in iudicio probari: quia non videtur esse testis ille qui de iure non est testis …' Id., *ad* Cod.7.45.2, § *Si arbiter* (*svper VII, VIII et Nono Codicis*, cit., *fol. 52rb*, n. 11): 'Quero quid si aliquis reputatur tabellio cum non appareat quod fuerit constitutus tabellio. Respondeo si quidem aliqua sunt indicia vt quia est in matricula tabellionum sua instrumenta valent ex presumptione matricule: quia matricula inducit presumptionem et incorporationem et inuestituram … Si autem non sunt alias indicia et fuit in longa possessione, id est longo exercitio, valent sua instrumenta.' This however – just as in Innocent – remains a rebuttable presumption. So, concludes Baldus (*ibid.*), 'officium tabellionis non potest acquiri per rerum naturam sed sola auctoritate principis vt eleganter notat Inno(centium) de fide instrumentorum c. cum P. tabellio (X.2.22.15).' Cf. Innocent IV, *ad* X.2.22.15, § *Tabellio*, *supra*, pt. II, §8.4, note 59.

56 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], pp. 134–135, ll.16–19): 'Decimoseptimo quero nunquid tabellio excommunicatus possit conficere publica instrumenta. Bar(tolus) in l. Eadem in fine ff. ad legem Juliam repetundarum (Dig.48.11.6), dubitat de hoc; sed dicendum est quod non, ut est casus in titulo De statutis et consuetudinibus contra libertatem Ecclesie, § Credentes, coll. X (Const. Friderici II Imp., tit. unicus, § *Credentes*), et in Auth. Credentes, C. De hereticis (Auth. Credentes, *ad* Cod.1.5.4) et Extra, eodem titulo, C. Excommunicamus, § Credentes (X.5.7.13.5).' More than uncertain ('Bartolus … dubitat de hoc'), as reported by Baldus, Bartolus simply ducked the

It may be recalled that Bartolus highlighted the task of the *tabellio* (writing documents for others) so as to blur the difference between public scrivener and public notary. This way he could conclude that the formal appointment was not always necessary to make a notary, and so apply Bellapertica's reading of the *lex Barbarius* also to the notary apparent.[57] That conclusion, however, is precisely what Baldus seeks to avoid – hence his open criticism of Bartolus. What Bartolus suggested, remarks Baldus, would mean that the office of the notary is not a *dignitas*.[58] The difference is important, for representation applies only to public offices. And Baldus is very clear that the notary exercises a public office: not just a public task, but a *dignitas*.[59] This is precisely the reason his instruments are deemed authentic.[60]

issue telling his reader to 'ask the canonists' on the matter: Bartolus, *ad* Dig.48.11.6, *supra*, pt. I, §5.4, note 61.

57 *Supra*, pt. I, §5.3, note 32.

58 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], pp. 136–140, ll.27–42) Bartolus in l. Eadem, § i, supra allegato (Dig.48.11.6) tenet contrarium, videlicet, quod tabellio infamis conficere possit instrumenta; movetur ratione: quia officium tabellionatus non est dignitas, sed est munus, ut notat glosa in lege finali, in principio, C. Qui militare non possunt, libro XII. Cf. Gloss *ad* Cod.12.33(34).7pr, § *Si quis-Dominio servi*, Parisiis 1566, vol. 5, col. 276. See also Baldus, *ad* Dig.3.2.2.3, § *Miles qui* (*super Primo, Secvndo & Tertio Codicis*, cit., *fol.* 172*rb*, n. 3).

59 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], p. 140, l.50, and pp. 140–141, ll.1–3 respectively): 'quod sit officium publicum tenet Ynocentius in c. i, Extra, De fide instrumentorum [*infra*, next note]. Quod autem non sit munus publicum, patet evidenter ex diffinicione: dicitur enim munus publicum, "quod in administranda re publica cum sumptu sine titulo dignitatis subimus", hec diffinicio, seu descripcio, habetur ad litteram in l. Honor, § Munus, ff. De muneribus et honoribus (Dig.50.4.10).' Cf. Dig.50.4.10 (Mod. 5 different.): 'Honorem sustinenti munus imponi non potest: munus sustinenti honor deferri potest.'

60 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], pp. 104–105, ll.7–9): 'Quinto quero quale sit officium tabellionis. Respondeo, secundum Ynocentium in c. I. Extra, De fide instrumentorum (X.2.22.1), quod eius officium est publicum et commune, et ideo creditur eius scripture, tamquam publice, sine alio adminiculo.' Cf. Innocent IV, *ad* X.2.22.1, § *Authenticam* (*Commentaria Innocentii Quarti*, cit., *fol.* 273*va*, n. 2): 'Item publicam scripturam appello generaliter omnem scripturam, cui creditur sine alio adminiculo de iure, vel consuetudine speciali infr(a) eodem [titulo], cum dilectus (X.2.22.9) si autem esse specialis consuetudo praeter scripturas tabellionum, et acta iudiciorum, omnes scripturas reputo priuatas, cum ad hoc officium non specialiter sint deputatae personae, per quas factae sunt. Et appello publicam scripturam quae sine adminiculo viuae vocis alicuius notarij, qui forte mortuus est, vel testium qui similiter mortui sunt authoritatem habet, in Authentic. de fide instrumen-t(orum) § sed et si, et § si vero, colla. sexta (Coll.6.3.2–3[=Nov.73.2–3]).'

Looking at Baldus' writings on the *lex Barbarius*, we have more than once noted how his knowledge of Cugno's *lectura* on the same *lex* remains unclear. In his treatise on the notaries, however, Baldus shows in-depth knowledge of it. And he uses that knowledge to further disprove Bartolus' conclusion on the possibility of extending the *lex Barbarius* also to the false notary widely reputed as such. Bartolus referred to Cugno – to dismiss his opinion – at a crucial juncture of his analysis: having just approved of the Gloss, and before seeking to extend the validity of the acts also to cases that would fall outside the scope of the Gloss. To do so, he rejected Cugno's argument (on the need for a formal appointment) in a rather perfunctory manner, twisting Cugno's own words.[61] That does not escape Baldus, who on the contrary explains Cugno's position well and, in so doing, implicitly criticises Bartolus' reconstruction.[62]

To conclude these short remarks on Baldus' treatise *On the Notaries*, it may be interesting to recall the dispute between the town of Pirano and the local bishop that we saw at the beginning of this work. When the bishop sought to deny the validity of the town's privileges by questioning the appointment of the notary who drafted the town's mandate to the counsel, the counsel insisted on the common opinion as to the validity of the notary's appointment.[63] In his treatise, Baldus gives his reader some advice as to what to do if confronted with a similar case. A 'careful lawyer', he says, should do anything in his power to remark the

61 *Supra*, pt. I, §5.2, note 21.

62 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], pp. 143–145, ll.9–22): 'Vigesimo quero: tabellio excommunicatus vel infamis, non obstante excommunicacione vel infamia, diu stetit in possessione tabellionatus et bone fame, numquid valeant instrumenta per eum scripta? Bartolus videtur in hoc sibi contrarius in l. Eadem lege, § i supra allegato (Dig.48.11.6), et tenet indubitanter pro sic per l. Barbarius ff. De officio pretorum (Dig.1.14.3) et per l. ii C. De sententiis (Cod.7.45.2). Guilelmus de Cunio, quem sequitur idem Bartolus, in dicta l. Barbarius tenet contrarium, videlicet quod licet diu fuerit in possessione tabellionatus, tamen non valent eius instrumenta, et ista secunda opynio est vera, pro qua est casus in l. Generali, C. De tabulariis, libro X (Cod.10.(69).3). Nec obstat l. Barbarius, quia ibi erat peccatum in materia tantum; nam ibi intervenerat communis error et auctoritas eius, qui hanc poterat dare jurisdictionem, nisi fuisset aliud impedimentum in persona Barbarii, qui erat servus; sed in questione nostra fuit peccatum in forma et in materia: nam hic non intervenit error et auctoritas eius, qui posset creare tabelliones, et peccatum forme est majus quam peccatum in materia et magis tolleratur peccatum in materia tantum, ut l. i § Eum qui, ff. De constituta pecunia (Dig.13.5.1.4) et l. An inutilis, in principio, ff. De acceptilatione (Dig.46.4.8). Item non obstat l. ii, C. De sententiis (Cod.7.45.2), quia loquitur in liberto, qui poterat esse judex tempore quo judicavit licet postea fuerit revocatus in servitudinem ex causa ingratitudinis vel alia.' Cf. *ibid.*, pp. 101–103, ll.42–48.

63 *Supra*, pt. I, §2.6, text and note 124.

common opinion as to the validity of the notary's appointment. He should say that the notary was a true one and that he was widely reputed as such, that he was in possession of his office and that he had no legal incapacity preventing him from discharging it.[64] The similarity is remarkable. There is only one difference: unlike the counsel for the town, Baldus does not quote the *lex Barbarius*. Throughout his lengthy treatise *On the Notaries* Baldus studiously avoids referring to Barbarius' case, despite dealing in detail with heretical, excommunicated and *infames* notaries. After all that we have seen, the point seems far from irrelevant. The validity (or invalidity) of the notary's instruments is a direct application of Innocent's toleration theory – the validity of Barbarius' acts is not. In this treatise Baldus refers to the *lex Barbarius* only when mentioned by other jurists whom he quotes (and even there, mostly to disagree with them).[65] Stressing the importance of the common opinion as to the appointment and the possession of the office, Baldus just follows Innocent: both elements were evidence of the underlying valid appointment of the notary, not a way of making up for its absence.[66]

64 Baldus, *Tractatus de tabellionibus* (Valentini [ed., 1965–1966], p. 103, ll.48–50 and l.1): 'Et ideo quando contra instrumentum opponitur quod ille, qui scripsit illud, non erat tabellio, cautus advocatus debet articulari facere, quod tempore confectionis dicti instrumenti, ille qui scripsit erat tabellio, et in quasi possessione officii tabellionatus, et quod pro tabellione habebatur et reputabatur ab omnibus cognoscentibus eum, et quod erat liber homo et talis conditionis, quod non prohibebatur esse tabellio.'

65 Baldus, *Tractatus de tabellionibus*, *supra*, this paragraph, note 62, and in Valentini [ed., 1965–1966], pp. 101–103, ll.42–48.

66 *Supra*, pt. II, §7.5, text and notes 73–74.

Part IV

Barbarius post Baldum