This alternately valiant and frustrating monograph itself occupies a place between rule and exception. For which author would be so courageous or eccentric as to select for the title a seemingly counterfactual phrase the import of which will certainly be lost on most readers who are not aficionados of improbable occurrences. Reportedly it so happened that amidst the confusion of the triumviral period a fugitive slave was elected to the office of praetor. The Digest (1, 14, 3) contains this snippet from Ulpian's ad Sabinum: Barbarius Philippus cum servus fugitivus esset, Romae praeturam petiit et praetor designatus est. Sed nihil ei servitutem obstetisse ait Pomponius, quasi praetor non fuerit: atqui verum est praetura functum. Et tamen videamus: ... Quae edixit, quae decrevit, nullius fore momenti? ... Et verum puto nihil eorum repromari: hoc enim humanius est: cum etiam potuit populus Romanus servo decernere hanc potestatem, sed et si scisset servum esse, liberum effecisset. Quod ius multo magis in imperatore observandum est. Now the elevation of a slave to a magistracy was not an exception or irregularity: pro magistratu se gerere was an illegal and punishable act, and doubly so if the culprit was a slave. For historians this might be the end of the problem; yet for jurists it is only the beginning. We enter the treacherous ground of legal consequences of unlawful acts. As insignificant as the case might appear in the Digest, it mushroomed in modern jurisprudence. R. devotes to it almost 200 pages (357–552), painstakingly analyzing the connotation of every word, with an attentive ear to the fine points of legal reasoning (e.g. 'possidere' versus 'in possessione esse', 'praetorem esse' versus 'praetura fungere'), but his own position is often opaque buried in the avalanche of citations and summaries of disquisitions stretching from the medieval Glossators to the jurists of the Renaissance and Baroque to the contemporary practitioners of the craft. It is a stupendous assemblage of the punctilious and (sit venia

---

1 'Barbarius' has often been emended into 'Barbatius'. R. offers rather a chaotic treatment of the prosopographical issue (370–79). He seems to maintain (oddly quoting the once great but antiquated Heineccius) that Barbarius before standing for the praetorship «avrebbe dovuto rivestire infatti ... l’edilità». He also bizzarely entertains briefly the idea that Barbarius may have been solely 'quaestor pro praetore' (373, 549), thus confusing or identifying him with M. Barbatius, known from a coin as a quaestor of Antonius; and he further misstates the position of Syme, who never doubted that the abbreviation on the coin Q P is to be expanded as quaestor pro praetore.

2 He was further guilty of two preliminary offences: pro libero and pro cive se gerere: see T. Mommsen, Römisches Strafrecht (Leipzig 1899) 565, 857–860.

3 We miss, however, the eminently sane contribution by the often and unjustly neglected H. E. Dirksen, Hinterlassene Schriften 1 (Leipzig 1871) 287–296 (originally 1853). Perusal of electronic databanks reveals further reams of legal debates, in particular court decisions from all over the western world occasionally with explicit references to the case of Barbarius. The problem is defined as ‘la fonction du fait’, ‘il funzionario di fatto’. The United States Supreme Court in a unanimous decision in the case of Ryder versus United States of 1995 for instance decided «The de facto officer doctrine – which confers validity upon acts performed under the color of official title even though it is later discovered that the legality of the actor’s appointment or election to office is deficient – cannot be invoked to author-
verbo) not infrequently inane pursuits. The passage still bristles with textual and exegetical thorns; Mommsen (in apparatus to his edition) felt compelled to emend sed nibil to sed enim, which produces a smooth flow of argument and transforms et tamen videamus from conceptually awkward to stylistically perfectly aligned. This may have indeed been the idea of Pomponius: according to such astute critics as G. Beseler and O. Lenel the original text was severely mauled by the compilers. The following lines, however, beginning with et tamen and especially verum puto, display the unmistakable features of Ulpian’s style (though probably with the exception of humanius est). In conclusion R. points out that Barbarius was elected and installed as praetor rite, with all due formalities, but as he carried the indelible stain of slavery, upon the discovery of this vitium he could not be transformed into ‘funzionario di fatto’, and simply ‘fell’ (‘decade’) from office (549–550).

It seems difficult not to observe that this strange case bears a formal resemblance to the situation envisaged by Varro (Ling. Lat. 6, 30): magistratus vitio creatus nibilo setius magistratus. And yet, surprisingly, this observation was first made, it appears, only in 1920 by a little known Italian jurist, L. Agostinelli; it enjoyed no favor. R. is dismissive (475–479), and rightly so for Agostinelli grossly distorted the sense of the excerpt in the Digest and tried to prove that Pomponius regarded Barbarius as a ‘verus praetor’. But we should not dismiss Varro himself but rather read him in the full context. Varro explains that if a praetor uttered the hallowed formula ‘do, dico, addico’ on a dies nefastus deliberately, prudens, he was impius forever; if he was only inadvertent, imprudens, he was to offer a hostia piaucularis. If a slave was inadvertently manumitted in iure on a dies nefastus the act was valid, he was liber, sed vitio. This is obviously the context in which the case of Barbarius will have been viewed by the late republican magistrates, jurists, and priests: there was nothing inadvertent about his deeds; he was impius ab initio: whatever he touched was polluted and had to be expunged.

We can now proceed backwards to chapter 2, ‘Ritualità ed irritualità dell’investitura magistratua’ (179–356), devoted precisely to magistratus vitio creatus. First the notion of vitium (180–187). R. auspiciously rescues from oblivion the elegant theory of Hägerström: as in private law a person who had no

ize the actions of the judges in question, and thus reached the conclusion diametrically opposite to that of Ulpian.

1 For the grammatical construct quasi ... non fuerit there seem to exist only two fairly close parallels (neither adduced by R.): Dig. 33, 4, 1: quasi concursus non fuerit, «as if they were not competing claimants» (which, at least originally, they were); and Eugraphius (on Terent., Phorm. 1022, p. 256 Wessier): quasi non illo tempore senex fuerit (which, in fact, he was). A student of the case might also consult the classic exposition by M. E. Lucifredi Peterlongo, Barbarius Philippus, forming part 1 of the book Contributi allo studio dell’esercizio di fatto di pubbliche funzioni (Milano 1965). Very much worth considering is her emendation niholominus (30–52; cf. R. 483–484), and her translation «come non se sia stato pretores» (32).

2 On Ulpian’s diction, see the brilliant investigations by T. Honoré, Ulpian (Oxford 1982, 2nd revised ed. 2002, not always an improvement) esp. 52 = 46, 67 = 64, 71 = 65, 111–112 = 215–216. R. shows rather little interest in stylistic features, and has only two general references to Honoré’s opus. He assigns humanius est to Ulpian (512–513).

3 R. discusses the text also at 160–163, 263–264, but offers no comment on the significance of si prudens dixit.
formal title to possession, provided he did not acquire it *vi clam precario*, could be deprived of it only by legal proceedings in a court, so also a magistrate to whose election or appointment (as in the case of a dictator) attained a formal flaw, could be declared *vitiosus* only by a decree of the augurs and the senate, and even then could be removed from office only through his own act of abdication. R. next presents a classification of various *vita*, and a chronological review of *magistratus vitiosi*. These pages will be consulted frequently as this is an extensive and competent study of all cases of a perceived formal deficiency, beginning with the case of military tribunes with the consular power in 445–44 and ending with the case of Pompeius *unus consul* in 52. Livy figures prominently, and R. presents his stories at face value. A historian will be appalled: Livy and his predecessors were half-fabulists. But what legal scholars are attempting to achieve is not to reconstruct history, ‘wie es gewesen’, but rather peer through the annalistic screen and recover shadows of arguments of republican priests and jurists. R. may be too credulous, but he is a student of procedures, whether factual or excogitated. The analysis of Pompeius’ *petitio* and election in 56–55 is superb (337–340), but it is difficult to see how Pompeius’ election in 52 can be classified as ‘irritual’ (343–356). Certainly irregular, hardly illegal, and certainly with no suspicion of a religious *vitium*. We should distinguish illegality, irregularity, and irrituality. Transgressions *contra leges* and *contra auspicia* or *religionem* were ultimately adjudicated by the senate, but the procedure was different: to appraise the offences against the religio or the auspices the senate would seek the expert opinion of the pontifical or augural college. This legal, religious and procedural principle was clearly expressed by the pontifex M. Licinius Lucullus at the debate in the senate concerning the status of Cicero’s house: *religionis indices pontifices fuisse, legis esse senatum* (Cic., Att. 4. 2. 4). It so always happens: the rules are set, and they are violated. That unchanging aspect of human societies has enticed students of history and law, but we must finally turn to the rules themselves, chapter 1, ‘Le regole della successione magistraturale’ (1–177). It delineates the stages in the transmission of magisterial power, and deals with: the structure of the voting groups; the convocation of the assemblies and the prerogatives of the presiding officer; the procedure of the vote; next the candidacy, especially the *petitio* and *professio*; the *renuntiatio*, and the assumption of the office. It is a well trodden ground, with T. Mommsen’s Römisches Staatsrecht (1, Leipzig 1887, 468–645; 3, 346–351, 369–419) and L. R. Taylor’s Roman Voting Assemblies (Ann Arbor 1966) still unsurpassed. Here a few observations of detail. It is misleading to speak of democracy in Rome in any shape and form (23–25). R. imagines that before the convocation of the *comitia*


In his terminology and conceptual approach R. follows in the footsteps of P. Cerami, *Strutture costituzionali romane e irrituale assunzione di pubblici uffici*, Annali del Seminario Giuridico di Palermo 36, 1969, 29–331 (and separately with own pagination), esp. 39–42 = 17–20. But Cerami also observes that the irrituality of the magic-religious character was gradually replaced by ‘una ritualità di tipo laico-formale, introdotta e alimentata da mores e leges publicae’ (40 = 18).

centuriata a templum was prepared «tracciando delle linee sul terreno» (35 n. 94). But a templum terrestre was a plot of land delineated by the augurs and permanently established through the act of inauguration; at the place of the assembly it included the tribunal where the presiding magistrate sat and the voting urns were placed. The analysis of Cicero’s critique of Antonius’ ignorance of the augural law (Phil. 2.80–84: ‘incredibilis stupiditas’) is convoluted and erroneous (39–41). R. seems unaware of the basic augural distinction between signa impetrativa and signa oblativa (signs actively sought from the gods and signs sent by the gods spontaneously), and of the rules of their observation and reporting. There are other similar inauspicious inaccuracies but it is time to conclude.

The book is equipped with full and useful registers of modern authors and ancient sources, but there are no indices of words, persons, and themes; and no bibliography. The footnotes overflow with citations having no immediate bearing on the point under discussion. Insights consort with misapprehensions. The writing meanders relentlessly, but nevertheless this is a strangely fascinating study. Labor improbus, perhaps, yet this curious preoccupation with the formal aspects of governance was an emblem of a great republic, and it will endure for as long as the Roman law casts its glow or shadow.

Chapel Hill Jerzy Linderski


In Frankreich besinnt man sich seit einigen Jahren der frühmittelalterlichen Rechtstradition in der südlichen Hälfte des Landes, also der westgotischen Kodifikation des römischen Rechts in der Lex Romana Visigothorum (kurz: Breviar)

1 R. maintains that s’augure era dotato esclusivamente di una capacità dichiarativa-formale, potendo effettuare cioè la mera nuntiatio del risultato interpretativo di colui che aveva compiuto l’osservazione. This is well-nigh incomprehensible. R. relies on the dissertation by G. Grosser, De spectione et nuntiatione, Vratislaviae 1851, 15–17, 21–26 (R. himself provides no page references – regrettably, a frequent practice). Grosser’s was a good effort, especially as concerns the magisterial auspicio et nuntiatio, but his treatment of the augural nuntiatio is largely inaccurate. Three other works R. adduces in this footnote are totally irrelevant for the theory of auspices or Cicero’s tirade. On the other hand conspicuously absent is the classic investigation by I. M. J. Valeton, De iure obnuntiatione, Mnemosyne 19, 1891, 75–113, 229–270 at 95–96, a mandatory reading to which I sent all the curious lectores; cf. also J. Linderski, Aug. Law (above, p. 514 n. 3) 2198; Roman Questions, Stuttgart 1995, 488–490.

2 The system of quotations consisting of an abbreviated title followed by ‘cit.’, without any indication in which footnote the full title was first adduced, is particularly annoying, archaic, and endemic to Italian legal publications.

3 Another example: on the basis of CIL III 7060 R. assumes that the designati received under the empire the ius referendi (386–387, n. 108). In fact in this inscription the designate consul is recorded as pronouncing only the sententia; the relatio was made by the emperor: see C. Nicolet, MEFRA 100, 1988, 842–844.