The Barratry of the Shipmaster in Early Modern Law: Polysemy and *Mos Italicus*[*]

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Summary: 'Barratry' is a polysemic term: it means deceit, bribe, simony, and fraud of the shipmaster. This article seeks to trace the origins of the word and to explore its different meanings, focusing especially on the influence that older meanings had on the development of more recent ones. This operation is of particular importance to understand the meaning of barratry that would appear for last – that of fraud of the shipmaster. By the time civil lawyers started dealing with maritime barratry, they were already well familiar with the other meanings of the term. This probably favoured the adaptation process, but it also left a deep mark on its outcome: the weight of those other meanings of the same term had a significant influence on the qualification of maritime barratry, an influence otherwise difficult to explain.

1. Barratry, polysemy and law courts

To state the blind obvious, when early modern civil law courts had to qualify some facts, they searched the civil law sources for suitable legal principles. Normally they found more than enough. Normally, but not always. Sometimes, civil law sources did not provide a solution. When this happened, the facts of the case had to be interpreted through rules and categories thought for wholly different situations. This process is particularly evident in commercial law. The early modern period saw an exponential increase in commercial litigation before law courts, but not many commercial subjects (particularly in their current application) had clear links with Justinian's compilation. Asserting their jurisdiction on such subjects, law courts had to be particularly proactive. But they could not invent new remedies. Rather, they had to adapt existing ones, even when this adaptation was in fact a creative process.

The present contribution looks at one of such cases: the fraud of the shipmaster, typically known as barratry. Insurance did not develop out of Justinian's compilation, and civil lawyers had a hard time trying to find a foothold in the Roman law sources.[1] This meant that the bench had to adapt principles and legal solutions devised and developed for very different situations.

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What makes the case of barratry particularly interesting is the polysemy of the term. By the time learned jurists started dealing with maritime barratry, they were already well familiar with the other meanings of the term. This probably favoured the adaptation process, but it also left a deep mark on its outcome: the weight of those other meanings of the same term had a significant impact on the qualification of maritime barratry.

In English, there are two main senses in which the term 'barratry' is used. The first is the offence of exciting quarrels; the second that of fraud. This second meaning, in turn, has three main different applications. Hence the four different entries that can be found in the Oxford English Dictionary: *i*. purchase or sale of ecclesiastical preferment; *ii*. acceptance of bribes by a judge; *iii*. barratry in a maritime sense; *iv*. habitually exciting quarrels and vexatious litigation. Each of these meanings had a close counterpart in civil law, so that their examination can proceed together. We may start with the last one.

2. Brawl and deceit

Among Anglo-American scholars, the meaning of barratry as exciting quarrels (whether physical or legal ones), is usually ascribed to the influence of Old Norse 'barátta', meaning fight, struggle, and so brawl (‘barsmið’ meant ‘assault’ – e.g. 'síðastr barsmið' meant ‘the last assault’). In this sense, a barrator is a quarrelsome man (literally, a ‘fight-picker’). If we were to accept this origin, its adaptation to legal terminology would seem rather linear: if a barrator is someone used to brawling, there is no reason why the same term should not be employed to describe the picking up of legal quarrels, as opposed to physical ones. Indeed the proximity between the two contexts is apparent in the sources, first of all the description of the 'common barretor' in Coke's reports.[2] Possibly, it is assumed, the violence implied in the Old Norse 'barátta' might have been tempered by the conflation with the Old French 'barat', which implied the idea of deceit. After all, it would hardly be the first case of an encounter between Norse and French languages in English. This 'conflation' theory is the most accredited today,

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[1] G. Rossi, *Civilians and insurance: approximations of reality to the law,* Tijdschrift voor Rechtsgeschiedenis 83 (2015), p. 323-364. Cf. Id., *Insurance in Elizabethan England. The London Code*, Cambridge 2016, p. 4-14.

[2] *The Case of Barretry* (1588), 8 Co. Rep. 36*b*-37*b*: ‘barretor is a common mover or stirrer up, or maintainer of suits, quarrels, or parties, either in courts or in the country: in courts of record, and in the county, hundred, and other inferior courts: in the country in three manners. 1. In disturbance of the peace. 2. In taking or detaining of the possession of houses, lands or goods, etc., which are in question or controversy, not only by force, but also by subtilty and deceit, and for the most part in suppression of truth and right. 3. By false invention, and sowing of calumny, rumours, and reports, whereby discord and disquiet arise between neighbours. and all the said qualities of a common barretor are proved by the indictment of one for barretry, and by our books: for first it is said in the indictment, *quod est communis barrectator*, within which word is included a quarreller in his own cause, and a mover or maintainer of quarrels between others, for the most part in suppression of truth and right … a common barretor is principally an offender in moving or maintaining of quarrels at bars, *scil.* in courts, or in the country, which are causes of suits in courts, he is called a barretor, or bar offender. ... in the law of England, this word (*barret*) doth signify a quarrel, whence he who moves or maintains quarrels is called a barretor; and it is so expounded by the whole Parliament, in 33 E. l. *in Stat' De Conspir'* where the act saith, stewards and bailiffs of great lords, who by their seigniory, office, or power, take upon them to maintain or sustain pleas or barrets, for other parties than those which touch their lords or themselves. Where it is manifest, that barrets signifies quarrels’ (emphasis in the text). Cf. 3 Edw. 1 c.33 (the first Statute of Westminster of 1275): ‘qe nul Viscont ne suffre barettour ou maintener de paroles en Countees, ne seneschalx de graunt seignors, ne d<’>autres q<u>i ne soit attourne a son seignur, a seute faire, ou seuter defaire, les Justicementz des Countees, ne pronuncier les Justicementz, si ne soit especialment prie et requis de ceo faire de touz le seutours, et les attournes des seutours, qi y serront a le journe ; et si nul le face, le Roi se prendra grevousement, et a viscount, et a luy.’

especially among legal scholars.[3] The problem is that, on closer scrutiny, such a theory appears rather weak. One does not need Old Norse to account for the use of the term barratry in English. More than that, acknowledging any Norse influence would considerably narrow the polysemy of the term *barattaria* as used in Romance languages, without much reason for doing so.
Appealing as it might seem, establishing an Old Norse pedigree to the English term 'barratry' lacks strong ground. Neither is the barrator a trained warrior, nor is brawl a proper fight. In Old Norse the opposite is true. The Old Norse 'barátta' is closely associated to 'barsmið' ('fight') and 'baráttumaðr' (or 'barráturfullr', 'warrior').[4] Far from being a common scoundrel, 'baráttumaðr' was a proper warrior, and 'bardagi' does not convey the idea of a violent quarrel, but of an actual fight ('barsmið'). In Egil's Saga, for instance, we find the line '*Barðisk* vel, sás varði' ('Well did the warrior *fight*').[5] The fight can be a full-scale battle or a duel, but it always conveys the idea of proper combat. So for instance the Brennu-Njáls saga reads 'En ef þú vilt eigi *berjast* við mig þá skalt þú af allri fjárheimtunni' ('but if thou wilt not *fight* with me, then thou shalt give up all claim to these goods').[6] This is clearly a duel, not a battle. But the kind of physical confrontation is ultimately the same. There is another term in Old Norse that conveys the idea of a fight, but in a less specific sense: 'atganga'. This is not a proper combat between warriors, but it may be used for any sort of physical confrontation. The same Brennu-Njáls saga has also the line 'Hrútur ætlað að veita honum *atgöngu* en treystust eigi' ('Hrut and his brother had it in their minds to make an *onslaught* on him, but they mistrusted their strength').[7] More examples could be given on 'barsmið' – though of course one should avoid tracing too neat contours of the exact meaning of a word. But the point stands: the conflation between the violence of Old Norse 'barátta' and the cunning of the Old French 'barat' would need to be considerably better substantiated. The Norse influence could only account for the (rather marginal) meaning of barratry-brawl, excluding the main component, that of fraud and deceit. This is why, having looked at the North, we should turn our attention to the South.

The Old French 'barat', together with its equivalent in late medieval Latin *barataria* (or *barattaria*), may easily explain the origin of barratry in the English language - in all its meanings. And there is little doubt that 'barat' did mean fraud. Indeed, it is in this sense that we find the word used in Britton ('par barat et par contek', meaning 'by fraud and extortion').[8] By the time of Britton (late thirteenth century) the term barratry was already present in all Romance languages. So for instance the *Siete Partidas* punished those 'baratadores et engañadores' who tricked merchant into lending them money pretending to be solvent, when in fact they were penniless.[9] The same term was also present in coeval Latin. In his *Glossarium* Charles du Cange recalled the *Chronica Majora* of Matthew of Paris, but one could give several other

[3] See esp. the recent and thorough analysis of D.C. Smith, *Sir Edward Coke and the Reformation of the Laws,* Cambridge 2014, p. 66-67, who even traces the use of the term 'barratry' from Britton to the late sixteenth century.
[4] R.G. Arthur, *English-Old Norse Dictionary*, Cambridge (Ontario) 2002, available at: http://www.yorku.ca/inpar/language/English-Old_Norse.pdf.
[5] *Egil's Saga*, W.C. Green (transl.), London 1893, ch. 49 (emphasis added). Similarly, in the Saga of the Ere-Dwellers one finds the line 'Það sumar, áður *bardaginn* var í Álftafirði' (That summer, before the *fight* was in Swanfirth). *The Saga of the Ere-Dwellers,* W. Morris and E. Magnusson (transl.), London 1892, ch. 45 (emphasis added).
[6] *Brennu-Njáls Saga*, G.W. Dasent (transl.), Edinburgh 1861, ch. 8 (emphasis added).
[7] *Ibid*., ch. 24 (emphasis added).
[8] Britton, lib. 4, ch. 3, para. 3 (F.M. Nichols ed.), Oxford 1865, vol. 2, p. 176: '... et ausi a la reverse porra hom presenter par extorsiount maugré le verrei possessour par barat et par contek.'
[9] Siete Partidas, part. 7. tit. 16, ley 9 ('Del engaño que facen los baratadores faciendo muestra que han algo').

examples, such as the Chronicle of Salimbene de Adam, writing of the impostor ('baratator et trufator') who pretended to be Frederick II and stirred the German populace.[10]
In medieval Italian city-states, *barator* is a term commonly employed (and attested in many variants). Initially, it probably did not denote any specific activity but rather described a base and infamous way of living, which impacted on the social consideration of those who lived in that way. Quite probably, the different meanings of the term were just adaptations to diverse contexts of the same underlying concept.[11] In a more specific legal sense the term starts to appear during the thirteenth century in the statutes of northern Italian city-states. There, *barattaria* is attested as disreputable gambling at the least from the second half of the thirteenth century. The *baracterius* or *barateriu*s (a term also attested in several other Latin and especially vernacular variants) is first and foremost a gambler.[12] The licence to run a gambling house was often called *gabella* (or *dacium*) *baratariae*, where the term *barataria* conveys the idea of sordid (and sinful) gambling.[13] The Veronese statutes of 1276 contained a full chapter on barrators.[14] In the same years other northern Italian cities were selling licences for gambling houses or farming out the gambling monopoly (against conspicuous fees), and the language employed soon moved from the generic *ludus* to the more specific *barateius*.[15] This might account for the derogatory sense of the term, and especially for the close association between barratry and fraudulent activities. In prohibiting *barataria*, for instance, the Statutes of Alessandria of 1297 also forbade 'anything else that is or might be or might be understood as barratry or the fraud of barratry, by whatever name is called' ('aliquod aliud quod sit vel esse possit vel intelligi *barataria vel fraus baratariae* quocumque nomine censeatur').[16] The term

[10] '… Processu enim temporis repertum est quod quidam baratator et trufator erat qui talia simulabat ad lucrum; et sic tam ipse quam sui sequaces ad nichilum sunt redacti.' Salimbene De Adam da Parma, *Cronica*, G. Scalia (ed.), Bari 1966, p. 784.
[11] Cf. P. Mazzamuto, *s.v.* 'Barattiere', in *Enciclopedia Dantesca*, vol. 1, Rome 1970, p. 509-514, at 509-510. See also the seminal work of L. Zdekauer, *Il giuoco in Italia nei secoli XIII e XIV,* Archivio storico italiano, 4th series, 18 (1886), p. 20-74, and 19 (1887), p. 3-22, now in Id., *Il giuoco d'azzardo nel Medioevo Italiano*, Florence 1993, esp. p. 42-55.
[12] See first of all the remarkable collection of medieval municipal provisions on gaming in A. Rizzi (ed.), *Statuta de ludo. The laws governing games and gaming in Italian communes (XIII-XVI centuries*), Viella-Treviso-Rome 2012. Within this vast collection, particular attention ought to be paid to the following provisions: doc. 223, p. 110; doc. 229, p. 111; doc. 335, p. 132; doc. 403, p. 142-143; docs. 404, 408 and 409, p. 143; doc. 421, p. 145; doc. 427, p. 146; doc. 432, p. 147; doc. 434, p. 147-148; doc. 435, p. 148; doc. 437, p. 148-149; docs. 438, 441 and 442, p. 149; doc. 443, p. 149-150; doc. 444, p. 150; docs. 453-456, p. 151-152; doc. 508, p. 159; doc. 509, p. 159-160; doc. 547, p. 165; doc. 629, p. 178; doc. 655, p. 183; doc. 817, p. 210; doc. 1433, p. 302; doc. 2699, p. 481-482; doc. 2700, p. 482; docs. 2823-24, p. 504; doc. 2926, p. 526-527; doc. 3103, p. 567.
[13] See G. Ortalli, *Barattieri: Il gioco d'azzardo fra economia ed etica. Secoli XIII-XIV*, Bologna 2012, p. 11-12, 21, 30-31 (on the earliest uses of the term in a legal context), and 39-48 (on the use of the term in society and literature).
[14] G. Sandri (ed.), *Gli statuti veronesi del 1276: colle correzioni e le aggiunte fino al 1323*, Rome 1940, vol. 1, lib. 3, ch. 128, p. 473-475. The additions to the statutes of Verona are of interest to our purposes especially because of the specific point in the statutes where they were inserted. Just a year after the promulgation of the statutes, a new chapter was added on blasphemous gamblers, and it was inserted immediately after the one on *barattieri* (*ibid*., p. 475). Further, in 1302 an addition was inserted on ch. 128, dealing with both *barattieri* and prostitutes (*ibid*., p. 473-475). On the same Veronese statutes see also G. Ortalli, *Barattieri* (note 13), p. 34-37. In the years immediately following the promulgation of the statutes, it is even attested the compilation of a 'list of barrators' (*cronica barateriorum*), listing all the serial gamblers of the city: G. Ortalli, *Barattieri* (note 13), p. 66-67. See further *ibid*., p. 66-74.
[15] G. Ortalli, *Barattieri* (note 13), p. 48-66. Cf. L. Zdekauer, *Sull'organizzazione pubblica del giuoco in Italia nel medio evo*, in Id., *Il giuoco d'azzardo nel Medioevo Italiano*, Florence 1993, esp. p. 99-117.
[16] Statutes of Alessandria (published in 1547), in Rizzi (note 12), doc. 403, p. 142-143 (emphasis added).

barataria was progressively transposed into legal terminology and adapted to different contexts, but its original meaning remained in use for a long while, even among lawyers.[17]
A term often associated with 'barataria' and 'barateius' is that of 'ribaldus'. *Ribaldi* are typically described as compulsive gamblers leading a dissolute life. In the late thirteenth-century statutes of Carrù (in Piedmont, near Cuneo), for instance, 'ribaldus' is defined as the gambler who would squander anything for a bet - 'up to his vest' (*'se spoliat ad ludum taxillorum azarii usque ad camiciam'*).[18] Sometimes the terms *ribaldus* and *barateius* were used interchangeably.[19] It is with *ribaldus* ('ribald' in English) that one finds the closest affinity with the English 'barrator' in the sense of quarrelsome and violent person. The affinity between *barator* and *ribaldus* is readily intelligible - suffices to think that the term still in use today to describe the Campanian mafia in Italy ('camorra') in all probability derives from *ca-morra* (*morra* meaning gamble). Indeed, the term *ribaldaria* was sometimes used to identify a gambling house (where barrators would play). The image of the *barateius*/*ribaldus* as a quarrelsome, vicious gambler - or just a quarrelsome and base person - is present in all Romance languages. The *barattieri* accepted any task, even the basest, and were often employed as spies, cesspit cleaners, and especially mercenaries recruited for the most dangerous tasks. If there was a brawl, one could be sure to find *barattieri* involved.
Unlike *barattaria*, however, *ribaldaria* is not a polysemic term. Broad as it may be, it always conveys the idea of deceit: *ribaldus* meant rascal, crook, swindler. Precisely because of its unequivocal meaning, this term was useful to describe the barratry of the shipmaster. *Barattaria* and *ribaldaria* are closer to each other than one might think even in legal terminology. Civil lawyers often treated them as coterminous words.[20] The first jurist writing a treatise on insurance, the Portuguese Petrus Santerna (Pedro de Santarém, c.1460–?), defined barratry as 'that case, which is commonly called *ribaldaria* of the master'.[21] Perhaps more

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[17] See e.g. Prosperus Farinacci (1554-1618), *Prosperi Farinacii ... Praxis et Theoricae Criminalis Amplissimae*, Pars Tertia, Francofurt[is], 1605*,* q. 109, pt. 4, p. 623, n. 137: 'Regula sit, quod retinens domi ludum, vltra domus publicantorem, et quod impune ei potest damnum, et iniuria inferri, videtur adhuc alia extraordinaria poena puniendus ... et vide in proposito Vrbis bannimenta edita de anno 1591 nu. 7, in quibus retinentes barattarias, et biscazas, vt illorum verbis vtar, puniuntur poena triremium per quinquennium.'
Cf. Dominicus Ursaya, *Institutiones criminales usui etiam forensi accomodatae* ..., Romae, ex Typographia Josephi Monaldi, 1701, lib. 3, tit. 10, p. 52, n. 25: 'Hujusmodi autem personae Domus ad hunc effectum retinentes dicuntur Barattariam, seu Biscazza excercere, et gravius puniendi sunt, quam ipsimet Ludentes ... quod non potest quis dici Barattariam, et Biscazza tenere, nisi emolumenti, et lucri causa principaliter ludunt retineat Domi.'
[18] Statutes of Carrù, in Rizzi (note 12), docs. 196 and 2742, p. 105 and 489 respectively. See also the statutes of Cuneo of 1380, *ibid.,* doc. 1493, p. 311: 'ribaldus intelligatur, in quolibet casu criminali, qui se expoliavit ad ludum usque ad camisiam ab uno anno citra, numerando vel computando a die maleficii in eum commissi, vel de quo manifestum et notorium esset ipsum esse publicum ribaldum ...'. Cf. the similar description in the statutes of the near-by town of Villanova Canavese (near Turin) of 1391, *ibid.*, doc. 1429, p. 302: 'Ribaldus vero intelligatur qui vilem et deploratam duxerit vitam, item qui non habet unde vivat qui ludit pannos dorsi usque ad camisiam, vel qui maiori parte temporis conversatur in tabernis.' See further *ibid.,* doc. 432, p. 147; doc. 435, p. 148; doc. 1498, p. 312; doc. 1544, p. 320; doc. 2928, p. 528; doc. 2989, p. 545; doc. 3093, p. 566.
[19] As the statutes of Faenza of 1410-14 had it, 'ribaldi autem et viles et abiecte persone esse intelligantur ... nuptii et familiares officialium de barateria seu conductorum baratarie.' Statutes of Faenza of 1410-14, in Rizzi (note 12), doc. 419, p. 145. See also the Statute of Lucca of 1308 and that of Parma of 1347, *ibid.,* docs. 432 and 439, p. 147 and 149, respectively. See further G. Ortalli, *Barattieri* (note 13), p. 42, where ample literature. It is also interesting to note how in Tuscany the chief of the *barrators* ('rex baracteriorum') was often also called 'rex ribaldorum': I. Taddei, *Gioco d'azzardo, ribaldi e baratteria nelle città della Toscana tardo-medievale*, 31(2) (1996) *Quaderni storici*, p. 335-362, at 347-349.
[20] Franciscus Roccus (1605-1676), *De Assecvrationibus*, in Id., *Responsorum legalium cum decisionibus centuria secunda ac mercatorum notabilia in sex titulos distributa*, Neapoli, ex Typographia Lucae Antonij Fusci, sumptibus Iacobi Antonii Bagnuli, 1655*,* not. 44, n. 139, p. 404.
[21] Petrus Santerna, *Tractatvs pervtilis et quotidianus, De Assecvrationibus et Sponsionibus Mercatorum, à D. Petro Santerna Lusitano ... aeditus,* Antverpiae, apud Gerardum Spelmannum*,* 1554, pt. 3, *fol.* 47*v,* n. 82 ('ille casus, vulgo qui dicitur Ribaldaria patroni'), emphasis added.

revealing is the second and only other occasion in which he uses the term in his treatise. This time, the subject is no longer the shipmaster but the Jews: Santerna warned his reader that, despite trading with a Jew is lawful, all Jews are cursed and *ribaldi*.[22] The warning could hardly be clearer: one can trade with a Jew but should not trust him, for he is inherently dishonest - so one should expect some mischief. The concept of barratry of the shipmaster (*barattaria patroni*) was precisely the same. In this sense, *ribaldaria* is very close to *barrateria*. It is probably not fortuitous that in Santerna's native country, Portugal, with the passage to the vernacular the barratry of the shipmaster was termed *ribaldaria* ('barataría ou ribaldia de patrão').[23]

3. Bribing a magistrate

Another meaning of the term barratry is the acceptance of bribes by a judge. This meaning is attested in the civil law tradition, but not in common law.[24] So for instance it is found in Scots law, but now also in English law. According to Erskine's *Principles of the Law of Scotland* 'this crime of exchanging justice for money, was afterwards called by the doctors *baratria*, from the Italian *barattare*, to truck a barter.'[25] This meaning has a long history in civil law, and it is important to spend a few words on it.

The use of barratry to signify the corruption of a magistrate probably originates in the context of the medieval Italian city-state. In his *Divine Comedy,* for instance, Dante has a particularly nasty place for *barattieri* in the *canti* 21 and 22 of *Inferno*.[26] The crime would clearly appear to be an adaptation of the *crimen repetundarum* (the extortion by a magistrate) to the late medieval city-state context, but we should be mindful of the peculiarities of such a context, as they might well account for its different nuances vis-à-vis the Roman law crime. Indeed, if we look at the definition of the *crimen repetundarum* in the Accursian Gloss we find the (medieval city-state) notion of *barattaria*. For Accursius the crime of extortion was first and foremost a grave case of abuse of power and a most serious violation of the basic civic duties of the magistrate.[27] Accursius did not refer to this *crimen* in the vernacular, both because of his typical reluctance to use vernacular expressions and because the term *barrataria* was not yet commonly employed in a legal context. But later jurists did. Among them Baldus provided a particularly significant definition of barratry, in all probability the most commonly cited in early modern civil law literature.[28] In a city-state context, this *crimen* was probably even more

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[22] *Ibid.,* pt. 5, *fol.* 83*r*-*v*, n. 23.

[23] E.g. A. Teixeira de Freitas Senior, *Vocabulario Juridico,* Rio de Janeiro 1882, *s.v.* 'Ribaldia': 'Ribaldia is any unfaithfulness or bad faith, committed by the shipmaster in the exercise of his nautical duties' (*Ribaldia é qualquer infidelidade, ou má fé, commettida pêlo Capitão do Navio no cumprimento de suas obrigações náuticas*).

[24] Although barratry in the common law does not have this meaning, some links between barratry and judicial corruption are not difficult to find: see esp. the very accurate and interesting work of Victor Saucedo, *Conspiracy. A Conceptual Genealogy (Thirteenth to Early Eighteenth Century)*, Madrid 2017, p. 94-100. While judicial corruption was qualified in terms of conspiracy, supporting false claims (and so, picking up legal quarrels) could be qualified as barratry.

[25] John Erskine, *The Principles of the Law of Scotland: In the order of Sir George Mackenzie's Institutions of that Law* (6th edn.), Edinburgh, printed for John Balfour, 1783, lib. 4, p. 825, n. 30.

[26] In the *Inferno* the terms 'barratry' (*baratteria*) and 'barrator' (*barattier*, *baratti*) are used five times in the sense of grafting and corruption: Canto 11, line 60; Canto 21, line 41; Canto 22, lines 53, 87 and 136. As it is well known, Dante himself was condemned (in all probability, unjustly) for the same crime on 27 January 1302.

[27] Gloss *ad* Dig. 48.11.1pr, § *Cepit* (Parisiis 1566, vol. 3, col. 1508): 'a priuato: vt faciat non faciendum, vel omittat faciendum ... et dic quod etiam durante officio accusatur: quia in officio delinquit, vel quia subiectos opprimit'.

[28] Baldus, *ad* C.4.2.16 (*super Sexto Codicis*, Ludguni, 1539, *fol.* 9*r*): 'Qui pecuniam iudici mutuat presumitur iudicem corrumpere, et qui propter honorem publicum consequendum dat pecuniam exilij poena punitur h[oc] d[icitur] in officiali recipienti licet adijciatur titulus mutui presumitur barataria'. Cf. Id. *ad* D.3.6.3 (*In Primam Digesti veteris partem commentaria,* Venetiis, 1577, *fol.* 218*r*).

heinous than our concept of graft.[29] This might account for the widespread idea that barratry (in the medieval sense of *repetundae*) is a capital crime.[30]
Baldus' notion of barratry was then consolidated in the work of some among the most illustrious jurists of the next generation, especially his student Petrus de Ancharano (1333-1416),[31] and it finally appeared in the greatly influential (and widely read) treatise of Paris de Puteo (Paride del Pozzo, 1413-1493).[32] Already by the early fifteenth century the crime of barratry is attested for other public officials. For instance, in a *consilium* of another of Baldus' students (probably the most famous of them all), Paulus Castrensis (Paolo di Castro, d.1441), dating to the late 1420s or - more probably - the early 1430s, Castrensis argued that the custom officer who falsified the account-books to pocket part of the custom would commit barratry.[33]

Outside the city-state context, the crime would soon lose its political features and focus exclusively on judicial corruption.[34] It is sufficient to look at authors like Aegidius Bossius (Egidio Bossi, c.1488-1546),[35] Josephus Mascardus (Giuseppe Mascardi, c.1540-1585),[36] Prospero Farinacci (1554-1618),[37] Gabriel Alvarez de Velasco (1595-1658)[38] and Lanfranco

[29] Hence I would be somewhat reluctant to follow the mainstream English literature on the subject, for which see esp. J.T. Noonan Jr, *Bribes*, Berkeley-Los Angeles 1984, p. 249-250, and, more recently, J. Steinberg, *Dante and the Limits of the Law,* Chicago 2013, p. 160.
[30] The qualification of barratry as a capital crime is also in good part a legacy of the same Baldus, not because he argued as much for first but because the weight of his authority among later jurists. Baldus, *de Sindicatu officialium*, in *Tractatvs Illvstrivm in vtraque tvm Pontificii, tvm Caesarei iusi facultate Iurisconsultorum, De Contractibus, et alijs illicitus ... tomvs septimvs*, Venetiis [Zilettus], 1584, *fol.* 226*r*, n. 39: 'et inter maximas causas capita est barataria: quia tunc tenetur crimine falsi'.
[31] See esp. Petrus de Ancharano (1333-1416), *Consilia*, Venetiis, 1490, cons. 272: '... delictum quod dicitur barateria quod crimen vulgus interpretatur esse illud quod committitur per iudicem mediante pecunia ...'.
[32] *Excellentissimi ac doctissimi Juris vtriusq*[*ue*] *doctoris ... Paris de Puteo Neapolitani in materia Sindicatus omniu*[*m*] *officialiu*[*m*] *Tractatus: vna Tractatus de Sindicatu ...*, Ludguni, Vincentius de Portonariis, 1529, *fol*. 93*v*: a judge who accepts bribes 'dicatur corruptus vel baratariam commisisse.'
[33] Paulus Castrensis, *Consilia*, Nurinberge, 1485, cons. 153: 'incidit in penas statutorm disponentium contra eos qui sunt in aliquo officio publico et committunt falsitatem furtum vel baratariam seu fraudem in officio'.
[34] The term 'barratry' remained somewhat broader in other fields - suffices to think of Don Quijote's Island of Barratry (II.49).
[35] *Practica et Tractatvs Varii, seu Quaestiones, Aegidii Bossii ...* Basileae, per Sebastianvm Henrici-Petri, Sum. ex bibliotheca Ioh. Gregorij a Werdenstein, 1580, § *De Officialibus corruptis pecunia, iniusteque iudicantibus*, p. 366-367, n. 1-2: 'si iudex corruptus pecunia iniustitiam fecerit, uel iustum omiserit, dicitur crimen illud committere, quod uulgus, baratariam uocat, et acriter puniendus est ... Dic, quando datur ut fiat, uel non fiat iniuste et ita sit iniuste, nulla est difficultas, quin simus in tit. ad l[egem] Iul[iam] repet[undarum] (Dig. 48.11) et in crimine uulgo appellato barataria ...'
[36] *Josephi Mascardi ... Conclusiones Probationum Omnivm Qvibusvis in vtroque Foro versantibus* ..., Francofvrti, Impensis Joan. Syberti Heyl, Typis Nicolai Kuchenbeckeri, 1661, vol. 1, concl. 164, p. 317, n. 1: 'Barataria (quae elegantius repetundae posset dici) probatur ex eo, quod magistratus recipiunt aliquid a privato, ut faciant non facienda, vel omittant ea, quae sunt facienda, sic loquutus est Accursius in l. i ff. ad l. Iul. repetund. (Dig. 48.11.1)'. See also *ibid.,* concl. 165-166, p. 318-319.
[37] *Dn. Prosp*[*eri*] *Farinacij ... Consilia siue Responsa atqve Decisiones Cavsarvm Criminalivm,* Coloniae Allobrogvm, Excudebat Philippvs Gamonetvs, 1649, vol. 1, cons. 5, p. 30 and 33, n. 33 and 53 respectively.
[38] *Gabrielis Alvarez de Velasco ... Judex Perfectus seu De Judice Perfecto Christo Iesu ...* (2nd edn.), Lausonii & Coloniae Allobrogum, Sumptibus Marci-Michaelis Bousquet & sociorum, 1740, annot. 11, n. 1-2: 'Advertendum in primis, *Barattariae* nomen barbarum esse, neque apuid legum conditores, neque Latinitatis Parentes aut Professores usquam reperit; a recentioribus Practicis, forentibusque Jurisperitis adinventum, seu excogitatum, frequenterque receptum ... proque *Repetundarum* crimine usurpatum, et Iudicium pecunia corruptum, Iudicem, que ita judicantem designas, quasi justitiam. Baractantem id est: *Malbarata*' (emphasis in the original text).

Zacchia (c.1624-1685),[39] to name but a few among the most often quoted early modern authors on the subject.[40]

Some jurists went further and sought to find some etymological explanation for the vernacular term barratry, given that it bore no apparent connection with its Roman ancestor *repetundae.*[41] The most obvious link was with barter (*baratum* in late medieval Latin). So for some jurists, from Amodeus Justinus (Amedeo Giustini, 1403-1477)[42] to Tiberius Deciani (1509-1582)[43] and Johannes Bernardinus Muscatelli (Giovanni Bernardino Moscatello, fl.1579),[44] the Roman crime of *repetundae* was called barratry because the judge barters justice with money. Clearly, this etymological explanation would not entail any difference as to the scope of the crime - at least typically.[45] On closer scrutiny, however, the consensus among jurists was not complete, for some debate remained as to whether barratry could be considered the same as *extortio* ('ordinary' extortion) and *concussio* (extortion with violence, actual or threatened),[46] or

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[39] *Lanfranci Zacchiae ... De Salario sev Operariorvm Mercede Tractatus,* Romae, Ex Typographia Nicolai Tinassi, 1658, q. 69, p. 238, n. 33: 'Vel [gubernatores] barattariam committerent recipiendo indebite pecunias pro sententiarum prolatione, tam si pecunias reciperent pro ferenda sententia iniusta ... quam etiam, si illas reciperent, vt secundum iustitiam pronunciarent ...'

[40] Mention should also be made of the famed *De Brachio Regio*, although it contains only a rather short mention of barratry: Hortensius Cavalcanus (1558-1623), *Tractatus D. Hortensii Cavalcani Fivizanensis …*, *De Brachio Regio …*, Marpurgi Cattorum, Excudebat Paulus Egenolphus, 1605, pt. 5, n. 67, p. 519: 'Barataria vero dicitur, quando Judex aliquid petit indebitum, ut justitiam faciat'.

[41] On the point, probably the lengthiest (if far from accurate) analysis comes not from civil law but common law scholars, especially the late-nineteenth-century New York judge Charles P. Daly, *Barratry. Its origin, history and meaning, in the maritime laws*, New York 1872, esp. p. 15-21.

[42] Justinus, *de Syndicatu*, in *Tractatvs de Syndicatv Variorvm Avthorvm ... a Gabriele Sarayna ... in vnvm congesti ...*, Lvgdvni, apud Heredes Iacobi Iuntae, 1560, *fols.* 82*v*-83*r*, n. 163-165: 'Barataria committitur ab officialibus, vbicumque aliquid recipiunt a priuato, vt faciant non facienda, vel omittant ea quae sunt facienda ... Iudicium enim iustum, vel iniustum vendere non licet ... Vnde iudex qui per pecuniam vel aliter corrumpitur, dicitur baratarius ... Et dicitur barataria a barato baratas: quia iudex recipiendo aliquid, dicitur baratare, et permutare iustitiam cum eo, quod recipit, sicut recipiens aliquid pro dando beneficium, dicitur vendere beneficium, et barataria pro pecunia'.

[43] *Tractatus Criminalis D. Tiberii Deciani ...*, Venetiis, Apud Franciscum de Franciscis Senensem, 1590, vol. 2, lib. 8, ch. 33, *fol*. 238*v,* n 9: 'Barattare, sit commutare, quasi quod iustitia cum pecunia commutetur, vt tradit Amode[us Justinus] in tract. de sindic. ... fol. 284, n. 165 [cf. *supra,* last note] et dicitur tunc committi ab officialibus et administratoribus publicis, quando recipiunt aliquid a priuato, vt faciant non facienda, vel omittant facienda ...'

[44] *Io*[*hannis*] *Bernardini Mvscatelli, Practica tvm Civilis S.R. Consilii ... Cum Criminalis, necnon praxis Fideivssoria ...*, Venetiis, apud Bertanos, 1686, § *De iudicis corruptela, concussione, extorsione, et barattaria*, p. 634, n. 21: 'corruptela principaliter, et absolute dicatur respectu iudicis, et officialis ..., barattaria autem ne dum dicitur respecto Iudicis, qui dum pecunia corrumptitur baratat iustitiam cum pecunia ...', and p. 635, n. 25: '... corruptela regulatiter per barattariam committitur, barattando Iudex iustitiam, pro pecunia iniustitiam per sordes committendo, non facienda faciendo, et facienda omittendo ...'

[45] An interesting exception is Jerónimo Castillo de Bobadilla (c.1547-c.1605), who is worth mentioning because of the great popularity he achieved with his main (and probably only) treatise – despite its frightfully long title, *Política para Corregidores y Señores de vasallos, en tiempo de paz y de guerra y para Juezes ecclesiasticos y seglares, y de Sacas, Aduanas, y de Residencias, y sus Oficiales: y para Regidores, y Abogados, y del valor de los Corregimientos, y Goviernos Realengos, y de las Ordenes,* Amberes, en casa de Juan Bautista Verdussen, 1704. Bobadilla moved from the premise that both *barateria* and *cohecho* (i.e. *repetundae*) are '*delito de falsedad*' (vol. 2, lib. 5, ch. 1, p. 442, n. 106), and that they are treated as coterminous by most jurists (*ibid.*, p. 473, n. 228), but then he sought to distinguish them. While *cohecho* is a bribe to 'adjust' a decision ('cohecho propriamente es una venta de la justicia recibiendo alguna cosa por hazer mas ò menos contra justicia', *ibid.*), barratry is an undue remuneration to the magistrate to accelerate the course of justice ('pero Barateria es baratar la justicia: que es lo mismo que los antiguos Jurisconsultos interpretaron, que era comutar la justicia, recibiendo interes pro hazer, ò dexar de hazer algo indevidamente, aunque sin corromper la justicia, como por dar el Juez sentencia justa, ò despachar presto el negocio, ò por dar las varas de Tenientes, ò Alguaziles, ò otros oficios por precio', *ibid.*). As such, barratry would not be *repetundae,* but a somewhat lesser crime.

[46] E.g. *Prosperi Farinacii ... Praxis et Theoricae Criminalis Amplissimae* (note 17), pt. 3, q. 111, art. 11, p. 687-689, esp. p. 687, n. 261-264. See also *ibid*., q. 111, art. 8, ampl. 18, n. 177, p. 677: 'Vt puniatur iudex, qui pecuniam

whether (as the medieval jurists had it) it was a more heinous crime than either of them.[47] As it was often the case, such finesse was of little interest to the bench, which simply considered barratry as *repetundae*.[48]

Qualifying the bribing of the judge as barratry - and so as *crimen repetundarum* - was of considerable importance not just for the study of Roman sources, but also and especially for the application of new legislation. The edict of 1503 issued by Ferdinand II of Aragon for the kingdom of Sicily, for instance, prohibited to initiate *ex officio* legal proceedings against the magistrates of the kingdom unless for a few and particularly serious cases, including extortions.[49] The provision did not call that crime barratry, but the connection looked obvious to the jurists, who subsumed the new provision within *ius commune* categories and interpreted it accordingly.[50]

4. Simony

The explanation of barratry-*repetundae* as barter did not prove especially influential, but it helps to make sense of another meaning of the term in English, that of simony: bartering spiritual benefits for money. One of the earliest - and surely the most known - British records on the point is a statute of James I of Scotland of 1428.[51] Terming simony as barratry is not as

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accepit ob aliquid faciendum, etiam quod non fecerit id, quod facere promisit, text(us) expressus in l. et generaliter, § si igitur, ff. de calumniat[oribus] (D.3.6.3.1) cuius tex(tus) verba sunt haec: *Si igitur accepit, ut negotium faceret siue fecit, siue non fecit, tenetur, et qui accepit ne faceret, et si fecit tenetur*. Et ibi gl. in verbo *siue non fecit* notat puniri in hoc crimine propositum, licet non sequatur effectus [cf. Gloss *ad* D.3.6.3.1, § *Siue non fecit*, Parisiis 1566, vol. 1, col. 468: 'et sic punitur propositum, licet non sequatur effectus'], et Bal. in fi. testatur fuisse determinatum Florentiae contra quendam, qui in officio commiserat barattariam, et re integra poenituerat, et haec poenitentia sibi non prosuit [cf. Baldus *ad* D.3.6.3, *In Primam Digesti veteris partem commentaria* (note 28), *fol.* 218*r*] ... quod officialis attentans barattariam punitur' (emphasis in the text).

[47] E.g. Garcia Mastrillus (c.1570-1620), *De magistratibus, eorum imperio et jurisdictione tractatus*, Panormi, Apud Franciscum Ciottum Venetum, 1616, pt. 2, lib. 6, ch. 10, p. 287, n. 34-35: 'excusantur officiales inquisiti de extorsione, si ante litem contestatam, vel sententiam non animo confitendi delictum, sed ad redimendum propriam vexationem, pecunias, aut res extortas depositent .... *licet aliud sit in crimine barattariae, et caeteris atrocioribus criminibus* ...' (emphasis added).

[48] Among the court decisions on the barratry of the judge, special mention should be made at least for a sentence of the Florentine criminal Rota rendered by Marcantonio Savelli (c.1624-1695) in 1679, where the term 'barratry' (*baratteria*) was considered as the equivalent in the vernacular of the *crimen repetundarum*: *Marci Antonii Sabelli ... Summa Diversorum Tractatuum ... collecta, ac propriis locis distributa a Leopoldo Josepho Crescini*, Venetiis, ex Typographia Balleoniana, 1748, vol. 3, *s.v.* 'Officia', p. 320, n. 23). Incidentally, it should be noted that Savelli's treatment of judicial barratry is probably the best that could be found for the whole seventeenth century. It did not happen frequently that a pre-eminent judge of an important criminal court wrote on the corruption of fellow judges. The discussion of barratry-*repetundarum* may be found *ibid*., p. 320-325, n. 20-84, together with the *consilium* of the Roman jurist Alexander Lucidum, counsel for the plaintiff in the same proceedings*, ibid*., p. 325-327.

[49] *Capitula Regni Siciliae, quae ad Hodiernum diem Lata sunt*, Panormi, ezcudebat (*sic*) Angelus Felicella, 1741, vol. 1, ch. 39, § *Quod Sindicatores non se intromittant de male gestis officialium*, p. 540.

[50] Marius Giurba (1565-1649), *Consilia seu Decisiones Criminales*, Coloniae Allobrogum, excudebat Philippus Albertus, 1629, cons. 72 (decision of 24.1.1594), n. 6-7 and 13-14: 'Alias baractariam committet Iudex, licet coloratum aliquem mutui titulum alleget ... et recipiendo iura, vltra pandectas a sponte dantibus, per Magistrum Notarium non taxata, baractaria est ... Cumque iuratus a Seio, in Curia litigante, vncias sex receperit, Baractariam ab eo commissam probat Fiscus; etsi sponte ipse soluerit ... Vt in poena quatrupli (*sic*), exilij, et fustigationis puniendus sit, iure communi inspecto ... Siue ad iudicandum, vel non, dummodo accipiat quod non debet ... Cumque baractariae crimen sola promissione committi probauerit Fiscus ... quod atrox cum sit crimen, punitur affectus, nullo secuto effectu ... Nec re integra, poenitentiae locus est in baractariae crimine, vt euitare possit poenam.'

[51] APS ii 16, c.9 (=RPS 1428/3/10): 'Item, it is ordained that no cleric, religious or secular, pass out of the realm unless he comes to his ordinary first, [or then] to the chancellor of the realm and show him good and honest cause for his passage, and *make faith to him that he will do no barratry*, and have his letters of licence and witnessing. *And if any does the contrary or makes barratry*, when it is known with sufficient and good document, that he undergo the statute made against those that take money out of the country. And that this statute be *not only*

rare as one might think. For instance, a century earlier, the *Istorie Fiorentine* of Matteo Villani (1283-1363) give a rather vivid account of a similar and more serious case that happened in Florence in 1345.[52] The connection between barratry and simony could not have been so remote if it can be found even in some of the most widely read legal repertories, such as that of the cardinal Dominicus Tuschus (Domenico Toschi, 1535-1620).[53]
The link between judicial corruption and simony might appear somewhat far-fetched to us. But it is important to remember the gravity of the crime of barratry-*repetundae* in the context of a medieval city-state. Perhaps the best explanation for the link between bribe and simony is to be found in the first complete English translation of the whole *Divine Comedy*, that of Henry Boyd (published in 1802), who rendered Dante's *barattaria* (implied in line 40 of *canto* 21) with 'State-Simony'. It is precisely because of the connection between *repetundae* and simony that this meaning of the term barratry is only present in Scots law and not also in English law: without barratry-*repetundae* it would be hard to think of barratry-simony.

5. Fraud of the shipmaster

If one were to take the trouble to make a thorough research in early modern civil law books, the term barratry would appear frequently enough, but most of the times in the sense of bribe taken by the judge to absolve the defendant. Up to the late fifteenth century, the use of barratry as fraudulent conduct of the shipmaster among civil lawyers is very rarely attested; it is only from the late sixteenth century that its mention becomes less sporadic. By then, as already said, barratry meant first and foremost judicial corruption. This is very important, for it would have significant consequences on the understanding of barratry as fraud of the shipmaster. In Transposing barratry-corruption into a context as different as the maritime one ultimately meant adapting a pre-existing criminal offence to a contractual scenario so far regulated by commercial usages.
Despite the profound difference between the two cases, the link between barratry-*repetundae* and barratry of the shipmaster was not difficult to draw. The parallel was perhaps facilitated by a passage of the Digest (Dig.48.10.21),[54] equating some fraudulent transactions to the corruption of a judge. Although the connection might not be immediately evident in Roman law,[55] it was sufficiently clear to early modern civilians. By then, the corruption of a judge was the quintessence of the *crimen repetundarum*, leading beyond doubt to a false verdict. The

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extended to those who do barratry in times to come, but also to those now outwith the realm that are convicted of barratry. Also the king forbids that any of his lieges *send expenses to any barrator* that is now outwith the realm, nor give them help nor favour in whatever degree that pertains to them until they come home to the realm (emphasis added).

[52] Giovanni Villani, *Istorie Fiorentine di Giovanni Villani* (P. Massai ed.) ... vol. 8, Milan 1803, ch. 58, p. 146-148. According to Villani (in fact, the author for the period we are interested in is his brother Matteo), the Florentine inquisitor (one friar Peter of Aquila) used the accusation of heresy to blackmail the city. Villani's chronicle reports how that inquisitor threatened the excommunication of both Prior and Captain of Florence and a general interdict to Florence itself if the city did not pay a conspicuous debt owed by the (by then, bankrupt) Acciaiuoli company. Florence immediately appealed before the pope and brought evidence of 'all the *baratterie* and *rivenderie* of that inquisitor', amounting to more than 7,000 golden florins. The Florentine ambassadors accused the friar of being 'disloyal and barrator' (*disleale e barattiere*), although apparently the pope did not prove too sympathetic towards the Florentines.

[53] Dominicus Tuschus (1535-1620), *Practicarvm Conclvsionvm Ivris … Dominici TT. S. onvphrii S.R.E. Presbyt. Card. Tvschi* (3rd edn.), Lvdgvni, ex Officina Ioannis Pillehotte, sumpt. Ioannis Caffin, et Francisci Plaignard, 1624, vol. 1, concl. 26, p. 295: 'Barattaria est crimen, quod vulgus interpretatur esse illud, quod committit Iudex mediante pecunia … Amplia, quia Iudex committit barattariam, et simoniam, etiamsi iustam sententiam ferat'.

[54] D.48.10.22 (Paul ad s.c. Libonianum): 'Qui duobus in solidum eandem rem diversis contractibus vendidit, poena falsi coercetur, et hoc et divus Hadrianus constituit. Is adiungitur et is qui iudicem corrumpit. Sed remissius puniri solent, ut ad tempus relegentur nec bona illis auferantur.'

[55] The text of Dig.48.10.21 is probably to be explained with the progressive extension of the scope of the *Lex Cornelia de falsis*: cf. Dig.48.10.1.2.

distance between a fraudulent (and so, voidable) private transaction and a false public act was rather short, all the more since the separation between public and private law was still emerging. So, for instance, in a decision of the high court of Sicily of the early seventeenth century, the defendant (who allegedly sold something twice) stood charged with both theft and barratry because of the connection in the Digest between the *lex Cornelia de falsis* and the corruption of a judge.[56]

Probably the clearest link between maritime and judicial barratry is to be found in the Italian jurist Benvenuto Stracca (1509–1578), who devotes to the subject the whole, lengthy gloss n. 31 of his famed treatise on insurance. Stracca does not start his discussion on barratry with the shipmaster, but with the judge, to whom he devotes a first long paragraph.[57]
Just as any coeval civilian would have done, Stracca maintains that barratry is first of all the bribe taken by the judge. The reason why the *crimen repetundarum* is called *barattaria*, he explains, lies in its etymology – barter. Indeed, the judge does something he should not in exchange for something else (a personal gain). Moving from such an *incipit* to maritime barratry, admittedly, might appear somewhat difficult. But the way Stracca does so is revealing. The first example he provides is that of the shipmaster who takes a bribe from the Turks to take onboard a spy of the Sultan disguised as a Christian. If the ship is subsequently seized and, with her, also the insured cargo, then the master may well be said to have committed barratry.[58] Such a case (hypothetical though far from unrealistic, especially at the time when the fear of Turkish spies was at its apex) hardly lies at the core of maritime barratry. But it allows Stracca to shift his analysis of barratry from a judicial to a maritime context. The master uses his position to render an illegal service against money: in doing so, he accepts the risk that the insured merchandise might be seized. The causal link between seizure of cargo and unlawful gain of the master is indirect, but it suffices to show the connection between maritime barratry and the bribe received so to abuse of one's position of authority. The next example of Stracca is a variation on the same theme. Now the shipmaster does not need the help of Turkish spies, and brings the ship with its cargo to the Turks by himself.[59] The connection with the previous case is clear, but so is also the increasing focus on the thing-at-risk. This time it is possible to speak of a direct causal relationship between fraudulent behaviour of the master and the mishap.
After this second example Stracca moves away from the *facio-ut-des* scheme of corruption. Now the master stops working for the Turks and, so to say, goes freelance: he first overinsures the ship and then sinks it deliberately.[60] This, it may be noted, is a classic case of maritime barratry, the previous two were not. Precisely for this reason, it is significant that Stracca does not begin with it but rather leads his reader towards it, building on the link with *repetundae.*
From now on, Stracca's discussion focuses on 'proper' cases of barratry of the master. But the mark of judicial barratry is still present. Indeed, when providing a general description (but not a proper definition) of the barratry of the master, Stracca remarks how the behaviour of the

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[56] Hieronymus Basilicus (Girolamo Basilico, d.1670), *Decisiones Criminales Magnae Regiae Curiae Regni Siciliae ..., Authore D. Hieronymo Basilico* ... (2nd edn.), Florentiae, ex Typhographia Joannis Philippi Cecchi, 1691, dec. 38, p. 334, n. 1: the person charged with selling something twice is accused of 'furti, et barattariae, quae nos vocamus, quando aliquis unam rem duobus vendit, vel fallit, aut decipit ... et puto, quod ratio sit, quod utrimque sub eadem poena falsi contineatur, et idem text. in l. qui duobus, unico contextu de utroque loquatur, ad l. Cornel. de falsis (D.48.10.21); Barattariam autem nomen esse barbarum, neque a legum conditioribus neque a Latinis usurpatum, sed inventum a recentioribus Jurisperitis, ut corruptionem Judicis significarent'.
[57] *Clarissimi Ivrisc. Benvenvti Stracchae ..., De Assecurationibus, Tractatus. ...,* Venetiis, 1569, gl. 31, *fol.* 128*r-v*, n. 1.
[58] *Ibid., fol.* 128*v*, n. 2.
[59] *Ibid.*
[60] *Ibid*., *fol.* 129*r*.

shipmaster may consist of actions or omissions aimed at a specific fraudulent purpose.[61] This description is the same as Stracca's initial definition of (judicial) barratry, which was taken from the famed *de Syndicatu* of Amodeus Justinus (the acceptance of some benefit by an official from a private person to do what he should not or not to do what he should).[62]
To the modern reader, Stracca's convoluted approach might appear a little puzzling. One would be tempted to argue that Stracca needed neither Justinus' definition nor, more in general, the blueprint of judicial barratry to describe the maritime one. The work of Stracca, it should be noted, is remarkably focused and (at least for the standards of the times) practically-minded: he glosses an insurance policy with the precise intent to explain how does the policy work and when can one sue on it. In his treatise there is no room for theoretical digressions. And yet that on barratry is the only gloss where Stracca takes such a long detour to reach the point. This does not seem fortuitous. When writing his insurance treatise, Stracca was thinking of disputes before law courts, not mercantile consulates. As such, he had to persuade civil lawyers that maritime barratry was but an adaptation of the kind of barratry they were more familiar with. Moving from the *crimen repetundarum* to explain maritime barratry was not necessary. But it was the best way to make sure that law courts would accept what for them was a new concept. By the time Stracca wrote his treatise (first published in 1569), most law courts had yet to take notice of the barratry of the shipmaster. And civil law courts - just as any law court - had always to build on something known and widely accepted. Had Stracca done otherwise, bringing a maritime custom within the civil law framework would have been considerably more difficult. In this process of reception of a maritime custom into the civil law, the particular position of the shipmaster might have helped. The master of the vessel was entrusted with particular powers, making him a public official of sort. It is possible that the courts might have opposed more resistance against the analogy between *repetundae* and the fraud perpetrated by a different subject. But it was precisely because of the special position of authority traditionally recognised to the captain of a vessel that his fraudulent scheming looked to the courts sufficiently homogeneous with that of the bribe pocketed by the magistrate - or at least not too remote from it.
Stracca's treatment of maritime barratry is important because of the effort to bring it within the civil law framework as a sub-category of *repetundae*. Perhaps because of this, however, it lacks clear definitions. Reading Stracca one is left with the clear impression that barratry is some sort of mischief, but its specific features remain somewhat vague.

6. Customary law: barratry and blameworthiness

This vagueness is more than a simple impression: it is what often happens when lawyers look at customs. As said above, Stracca provided a description of the barratry of the master, not a definition. He did so because he sought to explain a customary rule, making it intelligible to a readership of civil lawyers, without twisting (too much) both scope and working of the custom. Providing a legal definition would have had far more profound effects, for the approach of the lawyers diverged from that of the merchants not just on some specific features of certain kinds of liability, but on the way itself in which responsibility should be ascribed.
Maritime customs qualified barratry first of all within the sea-carriage context. Insurance rules came (or became widespread enough) only later. In a pre-insurance context, therefore, there were only two parties – merchant and shipmaster. In such a scenario, there was little point in providing a sharp distinction between fault and fraud of the master. Rather, it made more sense

[61] *Ibid.,* 'Et denique generaliter dicendum est si magister nauis, seu scriba per calliditatem *quid fecerint, aut non fecerint, unde* nauis amissio sequuta fuerit, seu merces deperditae, aut deteriores fint redditae, exceptio haec assecurantibus prosit tanquam in formula excepta, et ex conuentione permissa etc.' (emphasis added).
[62] *Supra*, note 42.

to divide mishaps depending on whether or not the shipmaster was to be blamed for the mishap. The shipmaster warranted safe delivery at destination, barring several events that we would qualify as *vis maior*.[63] On the face of it, liability might appear strict. In fact, the fortuitous events mentioned in most charter-parties just provided a typical - but not exhaustive – list of cases where the master could not be blamed for the loss. Blameworthiness dispensed with strict proof of causation. Detaching oneself from the usual *modus operandi* of one's peers was itself evidence of faulty behaviour. It was up to the master to provide a reasonable explanation for his conduct, persuading his judges that, if he acted differently from what could be expected, he did so for a good reason.

The advent of insurance (or rather, its increasingly widespread use) progressively required to distinguish blameworthiness into fault and fraud. On the one hand, the insured could well be the shipmaster himself; on the other, and especially, the insurance policy covered the merchant for loss due to the shipmaster's negligence, but it would not necessarily go beyond that. This does not mean that merchants suddenly launched themselves into complex discussions as to the precise boundaries between fault and fraud - merchants have always shown better sense than us lawyers. Rather, they began to shift the discussion from imputable vs. non-imputable loss to intentional vs. unintentional loss. This distinction, it should be noted, was ultimately elaborated within blameworthiness, a general and wide criterion referring to the conduct - not to the actual loss.[64] As such, the question of intentionality was not referred to the mishap, but to the behaviour of the shipmaster. The basic approach to the whole issue remained therefore similar. If the shipmaster deviated from the usual conduct expected of him, that was taken as intentional: it was the master who would have to provide an explanation for his conduct. While the evidence is not as abundant and precise as one might wish, it would seem that an important criterion used – or, more often, implied – in the distinction between fault and fraud (or rather, between intentional and unintentional blameworthy conduct) was the divide between omissions and positive actions. If the shipmaster forgot to do something, or just did something badly, that would prima facie look negligent. But if he actually committed some very unorthodox action, that would appear to be fraudulent.[65]

7. Provisional conclusion

Barratry, as we have seen, had several and different meanings. That of fraud of the shipmaster was the last one that law courts noticed. In taking notice of it, the bench was deeply influenced

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[63] I intend to work further on this crucial point in other studies within the project 'Average-Transaction Costs and Risk Management during the First Globalization (Sixteenth-Eighteenth Centuries)'. The position of the shipmaster is normally studied either with regard to insurance or to sea-trade at large (and so, in terms of liability as common carrier), but not towards the merchants as a group. In a maritime context, the dichotomy between imputable vs. accidental loss was elaborated first of all with regard to averages, not to insurers or common carriers, and its development did have significant repercussions on both the other subjects.

[64] Blameworthiness is among the widest and most far-reaching concepts in the whole history of medieval and early modern commercial law - and of course well beyond it. Clearly it may not be discussed here in any detail. A conduct worth of blame - even the simple breaking of one's word - could have profound consequences with regard to the position of that person. That position should not be distinguished in social and legal terms: the one of course influenced and even determined the other. So it is well possible to think at the same time of ill-repute in terms of a sort of 'betrayal of the *res publica*' on the one hand, and to find a shipmaster condemned by a law court for a behaviour formally correct but substantially dishonest on the other. See respectively G. Todeschini, *La reputazione economica come fattore di cittadinanza nell'Italia dei secoli XIV-XV*, in I. Lori Sanfilippo and A. Rigon (eds.), *Fama e publica vox nel medioevo*, Rome 2011, p. 105-118, at 107, and M. Fusaro, *'Migrating Seamen, Migrating Laws'? An Historiographical Genealogy of Seamen's Employment and States' Jurisdiction in the Early Modern Mediterranean*, in A. Cordes and S. Gialdroni (eds), *Migrating Words, Migrating Merchants: Migrating Law, Studies in the History of Private Law*, Leiden, forthcoming 2019.

[65] See further G. Rossi, *Insurance in Elizabethan England* (note 1), p. 274-281.

by other and (at least for the judges) older and more important meanings of the same term. Despite their different focus, all such meanings described liability in clear terms of causality and intentionality: a specific conduct deliberately leading to a certain result. In their effort to qualify the barratrous behaviour of the shipmaster, civil law courts provided a stringent definition based on both elements: strict causality and clear proof of intentionality. Only if the judge was satisfied as to both requisites (which the counter-party had to prove in full) would the shipmaster be considered a barrator. Civil law courts thus inverted the approach of the older mercantile justice. By contrast, in the common law the decision as to the occurrence of the fact was left to the jury. As such, the bench did not have to pronounce on whether the behaviour of the shipmaster was to be qualified as barratrous, nor did the jury have to justify its choice. During the early modern times, these two different approaches of the law courts led to very different results, even though the starting point (the understanding that merchants had of barratry) was the same. It remains now to be seen how this happened.[66]

[66] Cf. G. Rossi, *The Barratry of the Shipmaster in Early Modern Law: The Approach of Italian and English Law Courts*, forthcoming in this Journal.