# A HISTORY

OF

# MEDIÆVAL POLITICAL THEORY IN THE WEST

BY

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AND

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VOL II.

THE POLITICAL THEORY OF THE ROMAN LAWYERS AND THE CANONISTS, FROM THE TENTH CENTURY TO THE THIRTEENTH CENTURY

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# PREFACE TO VOLUME II.

WITH this volume we begin the treatment of the political theory of the great period of the Middle Ages, our first volume having really the character of an introduction to this. The materials have, on closer examination, proved to be so large and complex that we have been compelled to devote a whole volume to the political ideas embodied in the two great systems of law which are derived directly from the ancient world. I have felt very keenly how difficult and dangerous a thing it is for a student of history, who has no technical legal training, to deal with those great juristic documents; and indeed I should have felt much hesitation in presenting the result of this work to the public if it had not been for the great kindness of a number of scholars eminent in the civil and the canon law.

I must therefore express my most sincere thanks, first to Professor Fitting of Halle, Professor Meynial of Paris, and Professor Vinogradoff of Oxford, who have very kindly read the proofs of the first part of this volume: and secondly, to Professor Andrea Galante of Innsbruck, who has been so kind as to read the proofs of the second part.

Those eminent scholars are in no way responsible for the judgments which I have expressed, but I am under the greatest obligation to them for a great many most valuable corrections, emendations, and suggestions.

Every historical scholar who knows how great is the mass of unprinted material, especially in the canon law of the twelfth century, will feel that a treatment based only upon printed sources is necessarily incomplete. It is with great regret that we have been compelled by the scope of our work to limit ourselves in this way: we venture to think that the material is sufficient to justify such conclusions as have been drawn. It was with still greater regret that I found myself unable to use some very important printed material for the civil law, and especially Placentinus' treatise on the Code, and Azo's "Lectura"; but no copies of these works are apparently to be found in England, and I have been unable to go to Paris to consult them.

It would be a difficult matter to make a complete list even of the more valuable modern works which deal with the various aspects of the civil and canon law in the Middle Ages, but the following are among the most important:—

F. K. von Savigny, 'Geschichte des römischen Rechts in Mittelalter.'
H. Fitting, 'Die Anfänge der Rechtschule in Bologna.'
,, 'Juristische Schriften des früheren Mittelalters.'
,, Irnerius, 'Summa Codicis' (Summa Trecensis).
,, Irnerius, 'Quæstiones de Juris subtilitatibus.'
S. Brie, 'Die Lehre vom Gewohnheitsrecht.'
M. Conrat, 'Geschichte der Quellen des Romisches Rechts im Mittelalter.'
E. Besta, 'L'Opera d'Irnerio.'



G. Pescatore, 'Kritische Studien auf dem Gebiet der Civilistischen Litterärgeschichte des Mittelalters.'
J. Flach, 'Histoire du Droit Romain au Moyen Âge.'
P. Stintzing, 'Geschichte der Populären Literatur des Römischen und Kanonischen Rechts.'
J. F. von Schulte, 'Geschichte der Quellen und Literatur des Kanonischen Rechts.'
F. Maassen, 'Geschichte der Quellen und der Literatur des canonischen Rechts.'
A. Galante, 'Fontes juris canonici selecti.'
E. Friedberg, 'Corpus juris canonici.'
E. Fournier, "Yves de Chartres et le Droit Canonique," in 'Revue des Questions Historiques,' vol. lxiii.
,, "Les Collections de Canons attribués à Yves de Chartres," in 'Bibliothéque de l'École des Chartes,' vol. lvii.
Gierke, 'Das Deutsche Genossenschaftsrecht,' of which a part is translated by F. Maitland.

A. J. CARLYLE.

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# TEXTS OF AUTHORITIES REFERRED TO IN VOLUME II.


**Abbreviatio** Institutionum. Ed. F. Patetta (in Gaudenzi, Bibliotheca Juridica Medii Ævi, vol. II.)

**Accursius**—Glossa Ordinaria to—

| | |
|---|---|
| Institutes . . . . . | Maintz, 1472. |
| Codex . . . . . | Venice, 1478. |
| Digestum Vetus . . . . . | Venice, 1477. |
| Novels . . . . . | Venice, 1491. |

**Antiquissimorum** Glossatorum Distinctiones. Ed. J. B. Palmieri (in Gaudenzi, Bibliotheca Juridica Medii Ævi, vol. II.)

**Authentics**—in Corpus Juris Civilis. Ed. Gothofried, Paris, 1628.

**Azo**—Summa Institutionum. Ed. Basel, 1563; compared with ed. Spires, 1482.

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——— De Ordine Judiciorum Ed Tamasius and Palmerius in Gaudenzi, Bibliotheca Juridica Medii Ævi, vol. II.

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——— Vetus Collectio. Ed. G. Hänel, Leipzig, 1834.

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Gualcausus—Cologne Gloss on Institutes. Ed. H. Fitting.

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——— Distinctiones. Ed. G. Hänel, Leipzig, 1834.
——— Summa on Digest. Ed. in Azo, Opera, Basel, 1563.
Huguccio—in Schulte—Geschichte der Quellen des Canonischen Rechts, vol. i.

Irnerius—De Æquitate. Ed. H. Fitting.
——— Glosses. Ed. E. Besta.
——— Glosses—in Savigny, Geschichte des Römischen Rechts, vol. iv., chap. 27, note 49.
——— Quæstiones de Juris Subtilitatibus. Ed. H. Fitting.
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Rufinus—Summa Decretorum. Ed. H. Singer.

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# INTRODUCTION.

In the first volume of this work an attempt has been made to examine some of the sources of Mediæval political theory —that is, first, the jurisprudence of the Roman Empire, and the political principles assumed or defined in the writings of the Christian Fathers from the first century to the sixth; and secondly, the political theory of the societies which were built up upon the ruins of the ancient Empire in the West, as it finds expression in the institutions and in the literature of the ninth century. We have seen reason to conclude that while the civilisation of the New World was in many and most important respects different from that of the Empire, and while the political conceptions and customs of the Teutonic States were very different from those of the ancient world, yet it is also true to say that as soon as these began to assume a literary form, we find that the men of the ninth century had inherited much in theory from the ancient society, and that they constantly had recourse especially to the writings of the Christian Fathers for the reasoned framework of their own convictions and principles. The political writers of the ninth century inherited from the ancient world their theory of human equality, of the necessary and divine nature of organised authority in the State, and their principle of Justice as the end and the test of legitimate authority. It would seem that we are justified in saying that the political theory of the early Middle Ages represents a fusion of the political prin-

ciples of the ancient world with the traditions and customs of the barbarian societies.

When we now come to consider the political theory of the Middle Ages proper—that is, of the centuries from the tenth to the thirteenth,—it will be necessary to take account of elements which are little represented in the ninth century, especially of the direct influence of the ancient jurisprudence, through the closer and more general study of the ancient law, of the highly important developments of the theory of law and society in the Canonists, and of the necessary modification of the theory of society by the conditions and needs of the slowly developing civilisation of Mediæval Europe. Finally, we shall come to the time when the theory of the Middle Ages begins to be influenced by the writings of the great political thinkers of Greece, and especially by Aristotle. But this does not come till the middle of the thirteenth century; till that time there is very little of this to be traced in the literature of the Middle Ages.

The elements which go to build up the political theory of this time are very complex, and it is not easy to be certain as to the best mode of approaching them: it has, on the whole, appeared to us best to begin by studying the subject in the technical legal literature, not because this is the most fertile of ideas or the most living in its relation to the time, but because it represents better than the more popular or the more speculative literature the reasoned and considered judgments of the men of the Middle Ages, and also because in the Roman and Canon Law of these centuries we have embodied much of the inheritance of the ancient world. It is well to consider these older elements first; but it is even more necessary that we should in the Middle Ages, as, indeed, at all other times, distinguish between the often hasty and ill-considered phrases of controversy and the reasoned and deliberate record of more dispassionate reflection. Even now it is probably true to say that much confusion has been brought into the treatment of mediæval ideas and civilisation by the fact that many writers have not been at pains to distinguish between individual speculation and controversy and the normal judgment of the ordinary intelligent man.



It is, of course, true that often the most extravagant or paradoxical phrase covers the profoundest and most fruitful thought, that the eccentric and the insurgent often represent the future, while the normal man only represents the present, and we shall endeavour to recognise and to set out the value of even the most paradoxical and eccentric phrases and movements, of which the Middle Ages were indeed fertile. But if only to find the due place and to interpret the full significance of the ideals of these thinkers, it is well to begin with the most sober and matter-of-fact aspects of our subject.

In this volume, then, we propose to deal with the Roman and the Canon Law of the Middle Ages to the middle of the thirteenth century, leaving the new legal systems of national or feudal law to be dealt with in closer relation to the actual political history of these centuries. We deal, that is, with the study of the Roman Law down to the middle of the thirteenth century, taking the compilation of the great gloss by Accursius in the middle of the thirteenth century as the limit of our present inquiries; and in the same way we deal with the Canon Law down to and including the publication of the Decretals of Pope Gregory IX.

# PART I.

## THE POLITICAL THEORY OF THE ROMAN LAWYERS OF THE MIDDLE AGES TO ACCURSIUS.

### CHAPTER I.

#### THE THEORY OF LAW. *ÆQUITAS* AND JUSTICE.

WE have seen that there is but little trace of any influence of the Roman jurisprudence on the political theories of the ninth century. This does not mean that the Roman Law was exercising no influence in Western Europe during this period. A considerable part of the population of the Carlovingian Empire lived under the rule of Roman Law in some form or another; the people of Southern France were governed mainly by adaptations of this, and in Italy itself, the native population, as distinguished from the Lombard and Frank, lived under Roman Law. During this period, as well as later, the Roman Law was actually regulating the life of a great number of persons, and the influence of this system of law upon the laws and customs of the barbarian races is among the most important of historical subjects. We cannot, however, now consider this in general; we have to inquire how far the Roman jurisprudence affects the theory of politics in the Middle Ages—that is, how far, when men began to reflect on the nature and principles of political institutions, they were influenced by the theory as embodied in this jurisprudence. Men may long be governed by a system of law, or by a particular political organisation, before they ask themselves what

are the principles of political or social relations represented by their legal system. Some time or other they ask the question, and then political theory begins.

It was once thought that there was no such thing as a systematic study of the Roman Law until the eleventh century, and the beginning of the great law school at Bologna. It was once thought that Irnerius was the first to study the Roman Law systematically, and that the foundation of the great school of Bologna was also the beginning of the scientific study of the Roman Law in the Middle Ages. It seems clear now that these notions were erroneous, and that the more or less systematic study of Roman Law had never died out in Western Europe. There is some reason to think that the Law School of Rome had always continued to exist, and that Irnerius himself was a pupil of this school. There are traces of a school at Ravenna, and it is very possible that there may have been yet other schools of Roman Law in Southern France. A certain amount of literature has been preserved, or rather, we should say, the fragments of a literature which belongs to a period antecedent to, or at any rate to represent traditions independent of, the great school of Bologna. Such is the work known as 'Petri Exceptiones Legum Romanorum,' a little handbook of Roman Law; such also are a number of treatises and fragments collected by Professor Fitting in his 'Juristische Schriften des früheren Mittelalters.' It is, indeed, very largely to Professor Fitting that we owe our knowledge of this obscure but interesting subject. Whatever may be the exact facts about this, we shall see that there are important materials for our purpose not only in the writings of the great school of Bologna, but in writings which may be earlier than, and are at least independent of, the tradition of Bologna.

The political theory of the mediæval civilians is directly founded upon that of the law books of Justinian, and no doubt they often do little more than restate the positions laid down by the great jurisconsults of the second and third centuries or the editors of the sixth; but the world had greatly changed, and the mediæval civilians, even when they were



most anxious to restate ancient law, were yet influenced by these changes and sometimes aware of them. They did much more than merely repeat the phrases of the ancient law, they endeavoured to explain what was difficult, to co-ordinate what seemed to be divergent or contradictory, and to show how these ancient principles or rules could be brought into relation with the existing conditions of society.

We must refer to our first volume for a discussion of what seem to be the most important aspects of the political theory of the Roman Law. But briefly we may say that the most important aspects of this are to be found in its treatment of the nature of law, in its theory of equality and slavery, and in its conception of the source or origin of political authority. We shall see that the political theory of the mediæval civilians touches other subjects of importance, and especially the relations of Church and State, of Canon Law and Civil Law; but we must begin our consideration of their political theory by considering their treatment of the former subjects. Of these, the first, and perhaps the most important, is the theory of law. Like the ancient lawyers, the mediæval civilians think of law in the largest sense as the expression of the principle of justice; the positive law of any one state is only the application, by the authority of some society, of this principle to the actual conditions and circumstances of a particular place and time. We must, therefore, begin by considering their theory of justice and *æquitas*, and the relation of these to *jus*.

*Jus*, according to all these writers, is derived from justice and *æquitas*, while some of them distinguish between *æquitas* and justice. These terms, and their relations to each other, are defined by the author of an anonymous fragment which Professor Fitting has thought to be earlier that the school of Bologna: he defines *æquitas* as "rerum convenientia quæ in paribus causis paria jura desiderat," and adds that God is *æquitas* itself; when this temper is fixed in a man's soul and will, it is called *justitia*, while justice expressed in the terms of law, whether written or

customary, is called *jus*.[1] In this passage we have four important points: the definition of *æquitas*, the relation of this to God, the relation of justice to *æquitas*, and the relation of *jus* to justice.

The definition of *æquitas* would seem to be one generally adopted by the mediæval civilians. It is probably related to a phrase of Cicero's: "Valeat æquitas quæ paribus in causis paria jura desiderat," [2] and we find it again in the introduction to a Summa of the Institutes,[3] in the Summa Codicis known as the "Summa Trecensis," which Fitting attributes to the great Irnerius himself, the founder of the school of Bologna,[4] in the work of Placentinus, the founder of the School of Montpellier, in his work on the Institutes,[5] and in the work of Azo on the Institutes.[6]

We next consider the theory of the relation of justice to *æquitas*. In the passage of the Prague fragment which we have just quoted, justice is defined as *æquitas* translated into will, justice is a quality of will or purpose. This is the normal theory of these civilians. It is no doubt derived directly from Ulpian's definition of justice as "constans et perpetua voluntas jus suum cuique tribuendi." [7] We may cite

[1] 'Fragmentum Pragense,' iv 2: "Æquitas est rerum convenientia quæ in paribus causis paria jura desiderat. Item Deus, qui secundum hoc quod desiderat æquitas dicitur nihil aliud est æquitas quam Deus Si talis æquitas in voluntate hominis est perpetuo, justicia dicitur, quæ talis voluntas redacta in præceptionem, sive scripta sive consuetudinaria, jus dicitur"

[2] Cicero, 'Topica,' 23

[3] 'Summæ cujusdam Institution um,' 3.

[4] Irnerius, 'Summa Codicis,' Introduction, 3 It would be impossible here to enter into the extremely interesting discussion as to the authorship of the works attributed to Irnerius There is no serious doubt as to the authenticity of a certain number of glosses, and Professor Fitting has argued with great learning and force for the Irnerian authorship of the "Quæstiones de juris subtilitatibus," and of the "Summa Codicis" known as the Summa Trecensis. We must refer the reader to Professor Fitting's introductions to these works. For careful criticisms of Professor Fitting's arguments, the reader can turn to Professor E Besta, 'L'Opera d'Irnerio,' and to Prof. Pescatore, 'Kritische Studien auf dem Gebiete der Civilistischen Litterai-geschichte des Mittelalters'

[5] Placentinus, 'Summa Institutionum,' i. 1: "Æquitas est rerum convenientia quæ paribus in causis paria jura desiderat, et omnia bene coæquiparata, dicitur quoque æquitas, quasi æqualitas, et vertit in rebus id est in dictis et factis hominum"

[6] Azo, 'Summa Institutionum,' i. 1. 7.

[7] Digest, i. 1. 10.



as illustrative of this a gloss of Irnerius on the Digest, a phrase of the Summa Codicis attributed to him, and a phrase of Placentinus' work on the Institutes.[1] Justice is regarded as a quality of will, the will to secure and maintain *æquitas*. The definition of *æquitas* is no doubt partial and one-sided; *æquitas* may be taken, perhaps more normally, as the principle which distinguishes between a general law and its application to particular circumstances. We do not here deal at all with the general theory of the subject, but only with what seems to be the tendency of these civilians to relate the conception of *æquitas* to the abstract principle of justice in these formal definitions.

But it must now be observed that these conceptions have their first truth, their original being, in God Himself. "God is *æquitas*," the author of the Prague fragment says, and justice is primarily a quality of God's will. This is very clearly put in a little treatise on justice, whose date is uncertain, but which is regarded by Fitting as being either antecedent to or independent of the school of Bologna. It is the Divine will which we properly call justice, it is that will which gives to every man his *jus*, for it is the good and beneficent Creator who grants to men to seek, to hold, and to use what they need, and it is He who commands men to give such things to each other, and forbids men to hinder their fellows from enjoying them.[2] We find the same conception in another passage of

[1] Irnerius, 'Glosses on Digestum vetus' (ed E Besta) Gloss on Dig, i. 1 "Differt autem equitas a justitia equitas enim in ipsis rebus percipitur, que cum descendit ex voluntate, forma accepta, fit justitia" Irnerius, 'Summa Codicis,' i. 3 (ii 3) "Equitas enim est rerum convenientia, quæ cuncta coæquiparat (et in paribus causis paria jura desiderat). Quæ et justitia est ita demum, si ex voluntate redacta sit, quicquid enim æquum, ita demum justum, si est voluntare"

Placentinus, 'Summa Institution um,' i 1 "Vel sic, ut ego puto, vere et proprie omnis justitia est voluntas, et omnis voluntas talis, est justitia."

[2] 'De Justitia,' 1. "Divinam voluntatem vocamus justitiam, qua videlicet cuique persone tribuitur jus suum. Meum jus intelligo quod mihi expedit, Pius enim creator justus atque be nignus juxta conditionem meam, quibus rebus me videt indigere, eas mihi quærendas habendas utendasque permittit, nam et te jubet justis ex causis mihi res ejusmodi præstare, prohibet etiam ne quid incommodi mihi, quominus eis utar, infli gas."

the Prague fragment, and in an abbreviation or epitome of the Institutes which is of uncertain date.[1]

In order to appreciate these definitions and principles more completely, we turn to the full and formal treatment of the subject in two of the great civilians of Bologna, in Placentinus and Azo. We have already quoted some sentences from Placentinus' "Summa" on the Institutes, which deal with the nature of *æquitas* and justice; these are only parts of an extended discussion of the subject. He first defines the nature of *æquitas*, and then says that justice resides in the minds of just men, we ought to call a judgment *æquum*, while the man or the judge should be called just. He then quotes a definition of justice from Plato and another from Cicero, but it is the definition of Justinian, that is, of Ulpian in the Digest (i. 1. 10) and Institutes (i. 1. 1), on which he dwells, and from which he derives the principle that it is the will which makes an action good or evil; he adds that justice is not only a good will, but a good will or temper which is constant and enduring.[2]

[1] 'Fragmentum Pragense,' III. 9. "Est autem justitia voluntas jus suum cuique tribuere. Quæ quidem in Deo plena est et perfecta, in nobis vero per participationem justitia esse dicitur."

'Abbreviatio Institutionum,' I., "Justitiæ Deus auctor est"

[2] Placentinus, 'Summa Institutionum,' I. 1 "Æquitas est rerum convenientia, quæ paribus in causis paria jura desiderat, et omnia bene coæquiparata, dicitur quoque æquitas, quasi æqualitas et vertit in rebus, id est in dictis et factis hominum Justitia autem quiescit in mentibus justorum Inde est quod si proprie volimus loqui, dicimus æquum judicium, non justum, et hominem justum non æquum, abutentes tamen his appellationibus dici mus judicem æquum, judicium justum . . Restat ut exponamus quid sit justitia Justitia est secundum Platonem virtus quæ plurimum potest in his, qui minimum possunt, nempe in personis miserabilibus evidentius clarescit justitia. Vel ut Tullius ait, Justitia est habitus animi, communi utilitate conservata, suam cuique tribuens dignitatem, id est id quo dignus est, coronam, si bene meruerit; pœnam si peccaverit. Justinianus autem sic definit Justitia est perpetua et constans voluntas, etc, id est voluntarium bonum, habitus mentis voluntate nitens, ut sit definitio data per causam et effectum. Voluntas, id est voluntarium bonum, nihil enim potest dici bonum nisi intercedente voluntate. Tolle voluntatem omnis actus est indifferens, quippe affectio tua votum imponit operi tuo. Et alibi, crimen non contrahitur nisi intercedat voluntas nocendi, et alibi, voluntas et propositum distinguunt maleficium, ergo et factum bonum Vel ut alii dicunt, Justitia est voluntas, constans et perpetua id est justitia est virtus Vel sicut ego puto vere et proprie omnis justitia est voluntas, et omnis voluntas talis, est justitia Et quia posset esse voluntas inconstans, ad differentiam additur constans, id est invariabilis, quæ hominem facit constantem, et quia posset voluntas esse constans et temporanea additur perpetua id est indeficiens, vel ad omnia negotia patens. Et quia posset esse voluntas constans et perpetua, esset tamen de tribuenda injuria, additur tribuens jus suum cuique Dicitur autem tribuens propter aptitudinem et non in actu. Nec enim semper tribuit sed ad tribuendum semper est apta. Ergo et omnis justitia est voluntas talis et omnis voluntas talis convertabiliter est justitia . ." Cf Accursius, Gloss on Instit. I. 1, 'Justitia" and "Notitia."



The statement of Azo is extremely interesting, for he draws out at length the conception of justice as being primarily a quality of God, and secondarily of man.[1]

Justice is then a quality of will, it is the will to carry out that which is in accordance with *æquitas*, and this is found first of all in God, and secondly in man. Neither God's will nor man's determines the nature of justice, but justice is the conformity of the will of God and man with that which is *æquum*, the conformity of the will of God with that which is His own nature, for in the phrase of the Prague fragment, God is *æquitas*.[2]

The conception of justice in these writers is profound and significant. We shall presently deal with the interpretation of their conception into the practical theory and criticism of law, and we shall then see how significant these conceptions really are. We may find a fitting conclusion for their treatment of justice in a passage from the 'Quæstiones' of Irnerius, a passage which describes the vision of the ineffable dignity of Justice surrounded by her daughters, Ratio, Pietas, Gratia, Vindicatio, Observantia, and Veritas, and holding Æquitas in her embrace, while she deals with the "causes" of

[1] Azo, 'Summa Institutionum,' I. 1 "Est autem justitia constans et perpetua voluntas jus suum cuique tribuendi, ut ff. eodem l justitia Quæ definitio potest intelligi duobus modis, uno prout est in creatore altero prout est in creatura, et si intelligatur prout in creatore, id est in Deo, omnia verba proprie posita sunt, et plana sunt omnia quasi diceret, justitia est Dei dispositio, quæ in omnibus rebus recte consistit et juste disponit. ipse retribuit unicuique secundum opera sua, ipse non variabilis, ipse non est temporalis in dispositionibus vel voluntatibus suis; immo ejus voluntas est constans et perpetua. ipse enim nec habuit principium, nec habet vel habebit finem. Altero modo intelligitur prout est in creatura, id est in homine justo Homo enim justus habet voluntatem tribuendi unicuique jus suum. et ita voluntas dicitur justitia et dicitur voluntas tribuere jus suum, non quantum ad actum sed quantum ad affectionem"

[2] See note 1, p. 8.

God and men, and, rendering to every man his due, preserves unharmed the society of men.[1]

[1] Irnerius, 'Quæstiones de Juris subtilitatibus,' Exordium, 2: "Sunt enim preclusa vitreo pariete, cui litteris aureis inscriptus est totus librorum legalium textus. Quas cum avide legerem attentusque contuerer, quasi per speculum mihi visa est ineffabili dignitatis habitu Justitia, cujus in vertice recumbebat oculis sidereis ardenti luminis acie Ratio, dispositis hinc inde sex quasi circa matrem Justitiam filiabus: Religione, Pietate, Gratia, Vindicatione, Observantia, Veritate. Sub ipsius autem amplexu resedit Æquitas vultu benignitatis pleno . . . Justitia vero una cum prole generosa solis his quæ illic aderant invigilare contenta erat: causas enim et Dei et hominum crebris advertebat suspiriis easque lanæ prorsus equabili per manus Equitatis trutinabat ut salvo singulis suo merito servetur incorrupta societas hominum cunctorumque perseveret illibata communitas."



# CHAPTER II.

## THE THEORY OF *JUS*.

WE have considered the nature of justice as it is thought of by the civilians; we must now turn to the theory of *jus*—that is, the whole system of law. The author of the Prague fragment defines *jus* as being justice embodied in a command or law, whether written or customary,[1] and in another passage, of which we have quoted a few words, he describes *jus* as having its origin in *justitia*, and flowing from it as a stream flows from its source; justice is the will or purpose to give every man his due, a will which is perfect and complete in God; justice is this will unexpressed, *jus* is the expression of this will. But justice also differs from *jus*, for the former is constant, unchanging, while the latter is variable: this is due to the varying nature of the circumstances to which it has to be adapted.[2] This conception of the relation of *jus* and *justitia* represents, we think, the normal judgment of these civilians. Placentinus repeats the statement that *jus* is derived from *justitia*, and adds that *justitia* is so called because

[1] See p. 8, note 1.

[2] 'Fragmentum Pragense,' iii. 9: "Cumque de jure Romano tractare intendat, inde sumpta occasione de jure generali quædam præmittit, tam Romano juri convenientia quam alii. Set quia in justitia jus initia habet, et ex ea quasi rivulus ex fonte manat ideo eam anteponit. Est autem justicia voluntas jus suum cuique tribuens. Quæ quidem in Deo plena est et perfecta, in nobis vero per participationem justicia esse dicitur. Hoc autem totum commune habet cum jure, nisi quod justicia latens est voluntas, jus manifesta: vel scripto vel rebus vel factis. Set differt justicia a jure, quia justicia est constans, jus autem variabile. Set in eadem, insuper in eodem legislatore qui idem videtur justum facere; set potius facit hoc subjectarum rerum varietas ipsa, sicut splendor solis oculos quidem molles et lippos et egrotos ledit et exasperat."

all *jura* have their foundation in it.[1] The same conception is again stated by Azo, who adds that whatever *justitia* desires, that *jus* pursues.[2]

These are significant phrases, but it may be thought that after all they are only phrases which had little practical significance. That is not the case; but rather it is certain that the mediæval civilians were clear in their judgment that laws which are unjust must be modified and brought into accordance with justice.

It is, indeed, maintained by some that before the development of the great school of Bologna, the attitude of those who taught or practised the Roman Law was one of much greater freedom than later. It is certainly interesting to notice the very emphatic phrases of some of the early writers of the school of Bologna, or of those who stood outside it. One of the most remarkable of these is contained in 'Petri Exceptiones Legis Romani.' In the prologue to his work he uses a very emphatic phrase, expressing his determination to repudiate anything in the laws he was handling which might be useless or contrary to equity.[3] In another passage he lays down the principle that in special cases, affecting in a high degree the public or private convenience, or for the purpose of putting an end to quarrels, a judge should be allowed in some measure to depart from the law.[4]

[1] Placentinus, 'Summa Institutionum,' i. 1: "Competenter enim dominus Justinianus de justitia et jure præmittit, de justitia, ut pote ex qua omnia jura emanant, tanquam ex fonte rivuli . . . Est autem dicta justitia quia in ea stant omnia jura"

[2] Azo, 'Summa Instit.,' i 1: "A justitia enim velut a materia, et quasi fonte quodam omnia jura emanant, quod enim justitia vult, idem jus prosequitur. Et dicitur justitia, quia in ea stant omnia jura. Jus ergo derivatur a justitia"

[3] 'Petri Exceptiones Legum Romanorum,' Prologue: "Utriusque juris naturalis scilicet et civilis ratione perspecta, judiciorum et controversiorum exitus planis et apertis capitulis enodamus. Si quid inutile, ruptum, æquitative contrarium in legibus reperitur, nostris pedibus subcalcamus"

[4] 'Petri Exceptiones,' iv 3: "Cum autem secundum legem proferatur judicium, omnino legis sententia est servanda, nisi aliqua causa apparuerit, per quam necesse sit, aliquid temperamenti immisceri sententiæ. Causa autem illa debet esse evidens et honesta, pertinens ad maxima commoda et incommoda publica vel privata. Sicut enim maximæ utilitates conservandæ sunt atque retinendæ, sic et maxima mala et detrimenta vitanda atque repellenda . . .

"Si prævalida ratione monente vel cogente, legum sententia aliquando minus vel majus in judicio profertur, cum sancti canones, qui majoris vigoris sunt et auctoritatis, idem sæpissime patiantur, nemini mirum videri debet . . .

"Hoc igitur et in sæcularibus legibus atque negotiis ab eorum tractatoribus, cum res expostulat, observandum putamus, et non solum propter supradictas causas, sed etiam ut graves inimicitiæ velocius finiantur. Quis enim eam reprehendet sententiam, qua præterita mala sopiuntur, surgentia præfocantur pax firmior solidatur. Hoc autem legum sive judiciorum temperamentum non imprudenter quibuslibet hominibus judicibus est committendum, sed juris auctoritatibus, qui non faciliter gratia vel pecunia corrumpuntur, religiosis et timentibus Deum"



It is significant that the author of the 'Summa Codicis,' attributed to Irnerius by Fitting, takes up the same position, and clearly lays it down that laws which are contrary to equity are not to be enforced by the judge.[1] A similar view is expressed in an extremely interesting discussion by Bulgarus, one of the four doctors, the immediate successors of Irnerius in the school of Bologna. He is commenting on a phrase of Paulus, "In omnibus quidem, maxime tamen in jure, æquitas spectanda est." He urges that this means that we must always consider carefully whether any particular law (*jus statutum*) is equitable, if not it must be abolished. The judge must prefer equity to strict law—*e.g.*, strict law enacts that all agreements must be kept, but equity declares that certain agreements, such as those made under false pretences, or through fear or violence, or by minors or women, are not to be kept; the judge must decide such cases on the ground of equity.[2] It is clear that the civilians who have

"7 Omnis enim interpretatio ita facienda est, ne ab equitate discrepet, et ut omnis absurditas evitetur, et ne qua fraus admittatur"—Cf. on this passage Fitting's Introd., p lxxi, &c. Cf. also Irnerius, 'Questiones de Juris Subtilitatibus,' Exord. 5: "Parietem vero supra memoratam frequentabant honorabiles viri, non quidem pauci, sedulo dantes operam, ut si que ex litteris illis ab equitatis examine dissonarent, haberentur pro cancellatis"

[1] Irnerius, 'Sum. Cod.,' i 14 6: "Conditæ leges intelligendæ sunt benignius ut mens earum servetur et ne ab equitate discrepent. legitima enim præcepta tunc demum a judice admittuntur, cum ad equitatis rationem accommodantur. Item in legibus intelligendis ne qua fraus adhibeatur, vitandum est . . .

[2] Bulgarus, 'Comment on Digest,' L 17. 90: "In omnibus quidem, maxime tamen in jure, æquitas spectanda est (Paulus). Æquitas in singulis causis et negotiis spectanda est, maxime tamen in jure, hoc est, inquirendum an decem pro decem reddi, vel aliquid simile, sit æquum. Maxime vero inquirendum est, an quolibet jus statutum sit æquum. Verbi gratia, lex Fusia, lex Papia, quæ quia æquitatem

been cited looked upon *æquitas* as a test which should be applied to actual laws, that if these were not conformable to *æquitas* they ought to be amended, and it seems clear that some of these civilians thought that even the judge in deciding cases must correct the application of actual laws by reference to the principle of *æquitas*.

Here we come, however, to an ambiguity in the meaning of *æquitas*, of which we must take account. So far we have considered the term defined as some essentially fair and reasonable adjustment of things, a principle which finds expression in the just will to give every man his due. We have now to observe that the term *æquitas* is also used, by some at least of these civilians, in a much more technical sense. All the civilians agree with such a statement as that of Bulgarus, but they differ greatly as to the sense in which *æquitas* is to be understood.

The 'Brachylogus' draws attention to the apparently contradictory statements of the Code on the relations of the magistrate to *æquitas*. In one place it is laid down that *æquitas* and justice are to be held superior to strict law, while in another, all cases involving such a divergence of law and *æquitas* are said to be reserved for the Emperor's decision.[1] The author, who provides no solution of the question which he has raised, evidently feels that the relation of the magistrate to *æquitas* was not easy to determine.

non habent, tolluntur lex Falcidia, quæ, quia continet æquitatem, *confirmatur*. Vel dicit, in omnibus professionibus et artibus, maxime in juris professione. Nam in grammaticis et dialecticis spectatur et dijudicatur, quid æquius et melius sit utrum quod Plato an quod Aristoteles senserit Maxime autem in juris professione, ut dixi, spectatur æquitas, ut judex eam stricto juri præferat Nam cum jus strictum sit, pacta servari æquitas autem sua distinctione dicat quædam *pacta* servanda non esse, ut quæ dolo, quæ metu, quæ vi, quæve cum minore, vel quæ cum femina, et quæ cum filio fam facta sunt; judex decernere debet secundum æquitatem, id est, potius *non* esse servanda quam secundum juris rigorem atque angustias "

[1] 'Brachylogus,' iv 17 4 'Sin vero æquitas juri scripto contraria videatur, secundum ipsam judicandum est, ait enim (*constitutio*) 'Placuit in omnibus rebus præcipuam esse justitiæ æquitatisque quam stricti juris rationem' (Cod, iii 1 8) Huic vero adversari videtur lex posita in primo libro codicis, *titulo de legibus et constitutionibus* 'Inter jus et æquitatem interpositam interpretationem nobis solus licet et oportet inspicere'" (Cod, i. 14. 1).—Cf. Roger, Summa Cod., i. 1.



A gloss of Irnerius, published by Pescatore, seems clearly to teach that in the case of a conflict between *jus* and *æquitas* the prince alone can intervene.[1]

One school of civilians seems to have held to the view, possibly the older view, that the judge must decide cases in accordance with the abstract principle of *æquitas*, even against the written law; but another school maintained that the *æquitas* which the judge was to obey was of quite another kind. In the collection of disputed questions compiled by Hugolinus, we have a passage which makes the nature of the discussion clear. The question raised on Cod., iii. 1. 8 was the following—Whether unwritten equity was to be preferred to strict law? Some said that the passage meant by "justice" that which was established by law (*lege*), and not that which a judge might consider to be justice; and they quoted Nov., 18. 8 to show that the strict law must be preferred to such personal judgments. Others said that justice, whether written or unwritten, was to be preferred to strict law (*jus*), and they referred to Dig., i. 3. 32 and 33 in support of this position.[2] Savigny has drawn attention to an observation of Odofredus which seems to imply that Martin, another of the four doctors, had often appealed to an unwritten equity, even against the written

[1] Irnerius, Gloss on Cod, i 14 1 (in G. Pescatore, 'Kritische Studien auf dem Gebiete der Civilistischen Litterargeschichte des Mittelalters,' p. 91) "Y cum equitas et jus in his dem rebus versentur, differunt tamen Equitatis enim proprium est id quod justum est simpliciter proponere Juris autem idem proponere volendo scilicet aliquantum auctoritate subnecti. Quod propter hominum lapsus multum ab ea distare contingit, partim minus quam equitas dictaverit continendo, partim plus quam oporteat proponendo Multis quoque aliis modis equitas et jus inter se differunt, cujus dissensus interpretatio, ut lex fiat, solis principibus destinatur"

[2] Hugolinus, 'Dissensiones Domin orum,' 91. Prædicto titulo (Cod, iii. 1 8, Placuit) "An æquitas non scripta juri stricto præferatur?" Dissentiunt in eod tit (Cod, iii 1 8). Dicunt enim quidam quod ibi loquitur de justitia quæ est a lege constituta, et non de ea quæ quis excogitat ex ingenio suo, nam illi etiam strictum jus præferetur, ut in Auth de Triente et semisse § Studium (Nov, 18. 8) Alii contra, et dicunt idem in omni justitia, scilicet ut stricto juri præferatur, sive scripta sit, sive non, quum etiam, si non sit scripta bene debet servari, ut D (i. 1, 32, 1, and 33), et ut notavi supra de Legibus et Constitutionibus principum (Cod, i 14 1).

law.[1] Azo, in his treatise on the Institutes, shows that he understood by the *æquitas* which was to override the written law a written *æquitas*—not some principle which a man may chance to find in his heart.[2] In another place Azo puts the same view with great clearness: it is certain, he says, that *æquitas* is to be preferred to strict law—that is, an *æquitas* devised by law, not by any one's private judgment.[3]

When, therefore, we consider the account by Hugolinus of the dispute in the law-schools about the meaning of *æquitas*, and then compare the position of Azo with that of the 'Summa Trecensis,' and the author of the 'Exceptiones,' we become clear that there was a real uncertainty about the meaning of *æquitas* and its relation to strict law; and we shall be inclined to agree with Fitting that there is some reason to think that the early Bolognese and the pre-Bolognese civilians may have held a more free position with regard to the written law than the later members of the school of Bologna. For our purpose—at least for the present—it is sufficient to observe that the controversy brings out the great importance of the theory of justice, or *æquitas*, as the source and the test of law; and it is clear that even those who might not agree with the principle that the judge should decide according to his own opinion as to what might be just, yet held firmly that an unjust law must be abrogated. Irnerius, in the 'Quæstiones,' speaks of the many honourable men who diligently see to it that if anything in the law is found contrary to *æquitas*, it is

[1] Savigny, 'Geschichte des Romischen Rechts, etc.,' ch. xxviii., note 92. "Odofredus in Dig. Vetus, L 4, § 5, de his qui not (3. 2)· 'Dixit Martinus, de sua ficta æquitate et bursali, propter quas passus est multas verecundias, &c.'"

[2] Azo, 'Summa Institut.,' iv. 17. 2· "Item in pronunciando potius debet servare æquitatem, quam jus scriptam. Quod est intelligendum de æquitate scripta, non de ea quam quis ex corde suo inveniat: ut et majori reverentia vel timore serventur omnia æquitatis, seu justitiæ præcepta. Præsentia evangeliorum debet esse apud judicem a principio judicii usque ad finem ut no. in sum. C. de jud. § præsentiam." Cf. Accursius, Gloss on Cod., iii. 1. 8, "In omnibus rebus."

[3] Azo, 'Brocardica,' Rubric lxxvi: "Æquitas prefertur rigori juris." Certum est, æquitatem stricto juri esse præferendam, ut C. de jud. l. placuit (Cod., iii 1. 8). Æquitatem dico, lege, non cujusquam ingenio excogitatam, ut C. de leg. et senat. cons., l. 1 (Cod., i. 14. 1).



cancelled;[1] and in another treatise he says that the authority of the law is only gladly accepted when it is equitable.[2]

*Jus* is, then, according to the civilians, derived from *justitia*—is the manifestation of *justitia;* but the question then arises whether this manifestation is complete and adequate. Justice is the will to render to every man his due. Is this good will perfectly and constantly represented in the actual body of law or *jus?* Some of the civilians, at least, clearly recognise that the representation is not complete — that the embodiment of the good will is not perfectly adequate to the good will itself.

But before we deal with this, another question arises, that is, whether justice in man is a perfect reproduction of justice in God, of the final justice. Some at least of the writers on the Civil Law are very clear that this is not the case. There is a very interesting passage in that anonymous treatise, 'De Justitia,' to which we have already referred, bearing upon this. The author makes a very clear distinction between the divine and the human justice, although he holds that the latter is also by the divine testimony declared to be divine. He urges that there is a great difference between such a divine law as that of the Gospels which bids a man turn the left cheek to the smiter, and the human law which permits men to oppose violence to violence. The author looks upon human justice as incomplete and inadequate, but he argues that it is a preparation for the divine or perfect justice, and he regards the relation between the law of the Old Testament and that of the New as illustrating the conception of an imperfect law, and an incomplete conception of justice, preparing the way for the perfect.[3]

[1] Irnerius, 'Quæstiones de Juris subtilitatibus,' Exord. 5: "Parietem vero supra memoratam frequentabant honorabiles viri, non quidem pauci, sedulo dantes operam, ut si que ex litteris illis ab equitatis examine dissonarent, haberentur pro concellatis."

[2] Irnerius, 'De Æquitate,' i.. "Juris etenim legumque auctoritas tunc demum gratanter acceptatur, quando equitatis ratione commendatur."

[3] 'De Justitia,' 8. "Est autem justitia alia superna, alia humana. Supernam dico que et prima et ultima jure dicitur, que nunc evangelica dici potest, ex evangelio pus auditoribus

There does not seem to have been much discussion of this point among the civilians, but the distinction seems to have been familiar to them. Roger clearly refers to it in discussing the nature of justice and *jus*, when he speaks of that aspect of justice which allows a man to return a blow, as being unjust when considered by itself, but just when compared with injustice ; [1] and Azo does the same when he speaks

nunc influit, et hic incoatur, ibi perficitur Humana est quam legibus comprehensam videmus, quam et ipsam divinam esse divino didicimus testimonio. Et illam quidem ille per se vel per suos servos manifeste sanxit, istam vero nonnullorum hominum occulte nature instinctu sanciendam inseruit Videntur autem in meritis sibi invicem adversari, ut ecce permittit legitima vi oposita vim repellere, jubet evangelium percucienci maxillam prebere et alteram Set si hec pie ut oportet, advertamus, intelligetur non eas contrarietate sese opugnare, set alteram alteri quibusdam gradibus et preparatione congrua ministram esse A summa etenim iniquitate qua te ultro ledere cupio ut ad summam veniatur concordiam et pacienciam, gradus est nemini nocere, etsi lacessitus sis injuria Set si illato minori malo tu majus inferre velis, nondum ad id quod equum est ascendisti Permittit ergo justitiæ ratio par pari referri non tam inciando ad ipsum exigere quam proibendo, ne vel manus pro nullo inferatur, vel majus pro minori referatur . . Quare et proibitione qualibet arcemur et permissione quodam quasi limite distermin amur sicut et in eo quod permittimur oculum pro oculo vel aliquid ejusmodi petere, detinemur anima (a) dicta iniquitate Ab hoc gradu facile ascenditur ad illud evangelii (*dimitte* et) 'Dimittite et dimittetur vobis' Est in eodem et præparatio atque materia superioris justitiæ, cum enim ex hac justitia jus nobis fit sumende vindicte, nimirum habemus *quod juxta* evangelium dimittendo meritum nobis comparemus Sic et in aliis contemplari licet Quit autem mirum, si istius precepta sunt ab illius diversa, cum etiam illa ipsa aliud antiqui, aliud novi testamenti discipulis sit dictum ? Quod totum fit nulla variantis inconstantia set dispensantis providentia Novit enim Deus hominem proprio delicto mortalitatis *istius condicionem* subiturum esse, præparavit itaque suam justitiam mutabili vite congruentem, ut ipsa perpetua transitoris quoque rebus moderari dignaretur, quasi *lux permanens res transeuntes* suis perfunderet radiis, cum verissime dicatur in seculum seculi persevera tura Unde et in omnibus qui participes ejus fiunt non modo robur in *periculis laboribus contempnendis*, set in propriis moribus cohibendis habet temperantiam Humanam ergo justitiam in jure civili legibusque interim spectabimus "

[1] *Roger*, '*Summa Codicis*,' i 1 "Sed cum principes et alii de jure tractantes circa equitatem et justitiam intendant constituere, hoc faciunt vel referendo se ad illam primam partem *justitiæ in qua justitia, ratione naturali* dictante, primum debuit officium suum exercere, ut Deum revereri, parentes liberis alere, aut referunt se ad illam secundum partem que cum sit in se visa *injustitia*, tamen ex comparatione alterius injustitie visa est justitia, ut percussum repercutere, quia hoc est in officio justitie ne alium violes nisi lacessitus injuria "



of the second form of equity which forbids you to injure your neighbour unless you have been injured, and says that this is inequitable when compared with the highest equity, which consists in turning the other cheek to the smiter.[1]

When we turn back, then, to consider the relation of *jus* to justice we shall not find it surprising that these jurists hold that no system of law devised, however carefully, by man, can be a completely adequate manifestation of the principles of the Divine justice. This conception is very clearly illustrated in two passages of works which do not apparently come from the School of Bologna. The first is from that Abridgment of the Institutes to which we have before referred. Justice is said here to have many qualities in common with *jus*, but also they differ, for God is the author of justice, while He has made man the author of *jus*. Justice has also a wider scope than *jus*, and the author refers to an imaginary case, whether the property of Lazarus, which had upon his death passed to his sisters, should have been restored to him. *Jus* could say nothing on such a case, but justice would find the answer. And thus, he says, justice will always find a solution for new cases for which *jus* could not make provision.[2]

A similar conception is expressed by the author of the Prague fragment in the passage already quoted, when he says that in justice *jus* has its beginning, and that justice

[1] Azo, Summa Codicis,' Introd , 20 "Super iis omnibus *tractant principes* referendo se ad primam æquitatem, quæ est de summa Trinitate et fide catholica, sive ad secundam, quæ est de non violando proximo, nisi cum fueris lacessitus *injuria*, quæ quidem est iniqua respectu illius summæ æquitatis, quæ est, ut si quis te percusserit in unam maxillam, præbe ei et alteram "

[2] '*Abbreviatio Institutionum*,' 1 "Justitia et jus quod idem videtur esse in hoc quod conveniunt quia utrumque præcipit, prohibet, permittit et punit sed differunt quia justiciæ Deus auctor est, juris vero Deus hominem fecit auctorem, item justicia ad plura patet quam jus. Verbi gratia, ut in vulgari insistam exemplo, resuscitati post *triduum* Lazari devoluta erat, sive ex testamento sive ab intestato, ad sorores suas ejus hereditas. una ratione videtur ei restituenda hereditas, quia restituta erat et *vita*, quod majus erat, altera ratione non videtur ei restituenda, quia ad sorores translatum erat dominium. Hic de jure non invenies quid sit statuendum, justicia tamen quid *dictet* inveniet, et sic singulis diebus formantur nova negotia, in quibus locum habet justicia sine jure "

is the will to give every man his due: this is complete and perfect in God, in us it is called justice "per participationem"; justice differs from *jus*, for justice is constant, *jus* is variable, though this variability lies in the nature of the things with which it is concerned, rather than in itself.[1]

We have thus indicated some of the most important elements in the theory of the relation of *jus* to *justitia*, but the conception of *jus* can only be adequately considered in relation to the more or less formal definitions and discussions of it which we find in the treatises of the great jurists. We may take these in their chronological order, and begin with an interesting discussion by Irnerius of that phrase of Paulus on which we have already commented in our first volume: "Jus pluribus modis dicitur: uno modo, cum id quod semper æquum ac bonum est jus dicitur, ut est jus naturale. Altero modo, quod omnibus aut pluribus in quaque civitate utilis est, ut est jus civile"[2] (Dig., i. 1. 11). Irnerius compares with this the phrase of Ulpian: "Jus est ars boni et æqui" (Dig., i. 1. 1), and asks how these two conceptions can be reconciled with each other. He replies by pointing out that the phrase of Ulpian assumes that *jus* represents the authority of him who ordains it, but also the principles of *æquitas;* but the word *jus* is also sometimes used to describe a form of authority which does not necessarily represent *æquitas*, as, for instance, an unjust judgment of the Prætor. Irnerius explains that this is called *jus* because the Prætor ought to give a just judgment. The distinction between the "natural" and the "civil" *jus* is related to this double sense of *jus*, and also to the fact that the "civil" *jus* often has reference only to some particular place or time, while the "natural" holds always and everywhere.[3] This is only a

[1] See p. 13, note 2

[2] Vol i p 60.

[3] Irnerius, 'Quæstiones de Juris subtilitatibus,' i. 2. "Diffinitio quem commemorasti præcipentis auctoritatem simul cum equitate significat Ars enim præceptio est, 'bonum et æquum' hoc est quod equitas Hoc est ergo dicere· 'ars boni et equi,' quod est constituentis præceptio quæ vertitur in equitate. Est autem equitas ejus quod recte fit cum sua causa coequatio et congruentia. Set causa ejusmodi alia naturalis, alia civilis Dedi tibi X. mutua. reddi michi a te decem congruit causæ precedenti, id est dationi X quæ causa naturalis est. Item rem bona fide a non domino



brief summary of the discussion: how far Irnerius' interpretation really corresponds with the meaning of Paulus and Ulpian may be doubted, but the passage serves to show very clearly how strongly the mediæval civilians insisted upon the conception of law as representing the principle of justice, and

emptam triennio continuo possedi silente domino eam rem michi applicari convenit causæ possessionis et silentii, (et) hæc est causa civilis. Quare et equitas alia naturalis, alia civilis, utramque autem sub equitatis nomen cadere non ambigitur. Secundum hoc nomen simpliciter et in genere accipitur equitas in ea diffinitione, cum dico jus constitutam equitatem vel artem boni et equi. Et ita, sive diffinitio (nem) sive secundum eam nomen proferas, non aliud intelligo nisi auctoritatem cum equitate, sive naturali sive civili causa intente. Unus ergo significationis modus in talibus accipitur. Set etiam fit interdum, ut sola deprehendatur auctoritas, cum prorsus desit equitas veluti cum pretor inique decernit· set tamen et hoc solet jus appellari Licet enim non sit æquum, ab eo tamen statutum est quem oportet æquitatem statuere. Ergo et hoc dicitur jus respectu æquitatis non quia insit, set quia pro officio statuentis inesse debuit, nec dici potest alia(m) esse *nominis ejusdem significantiam* set magis eandem set impropriè acceptam. Set cum translato vocabulo ejus quod fit significamus locum in quo fit, tunc alia significatio recte dicitur. Et hoc ex ipsis libri verbis apparet, istam scilicet aliam esse, in superioribus eandem (esse) significationem. Unde non immerito te movet illud quo modo sit accipiendum, quod dicitur naturale et civile diverso modo jus dici, quid ergo michi hac in re videatur, accipe. Equidem opinor juris consulti ita dividentis intentionem hanc fuisse, diversitates quæ sub hoc nomen cadunt aperte distinguere Et illa quidem diversitas est precipue quam proponit in fine, qua jus dicitur, ut supra dixi, locus sive necessitudo eodem enim nomine res plane alia demonstratur. Set et illa prior significatio, quamvis sit una, non est tamen sine varietate. Cum enim ad demonstrandam constitutam equitatem accomodata sit, interdum demonstrat id constitutum quod oporteret quidem esse, set tamen non est æquum, hinc ergo gradatim venitur ad id quod habet quidem equitatem, set eam que certo loco vel tempore claudit, ideoque non exequatur naturali cum illa et ubique et semper optineat. Talis ergo videtur istius responsi sensus juris nomen in legibus assidue positum alias propriam alias translatam habet significantiam Propria est qua demonstratur constitutio pertinens ad equitatem. Hec autem constitutio alias equitatem habet, alias non habet etsi habere debet Rursus cum equitatem habet, aut est ea quæ omni *congruit et loco et tempori*, aut ea quæ non usque quaque est equitas, set certo dumtaxat loco vel tempore. Et ita fit (ut) sub una significatione ad equitatem scilicet pertinente multi sunt inspiciendi ipsius equitatis modi. Primus quidem ubi deprehenditur equitas immutabilis, sequens, ubi mutabilis, tertius ubi magis imitatio est æquitatis. Has autem sub una significatione diversitates sequitur *alia prorsus* significatio, quam supra dixi translatam. Cum ergo non significationis set magis *inspiciende* equitatis diversi dicantur hoc in loco modi, non est quare movearis, quoniam nulla relinquitur contradictio tam naturale quam civile una significatione jus dici, utroque responso in hoc consonante."

as deriving its character from this fact. This is still further illustrated by another passage in the same treatise.[1]

From Irnerius we turn to Placentinus and consider his definitions of *jus*, *lex*, and *jurisprudentia*. All *jura* flow from *justitia*, as the stream from the source. But *jus* may be used in many senses. It may be called an art, and it has then to do with the good and equitable; but it may also be used for the place where *jura* are declared, or for a relationship of blood, or it may be equivalent to *potestas*, as when a man is said to be *sui juris*. It may also be used for the form of an action, or for the rigour of the law, or "*æquivoce*" for broth (*pulmentum*). But *jus* is in the first place the art of that which is good and equitable. There are three precepts of *jus*—to live honourably, not to injure another, and to give every man his due. *Lex* is a general command to do all honourable things, and a prohibition to do the opposite. *Jus* is that which the law declares, while *lex* is the declaration of *jus*. *Jurisprudentia* is the knowledge of what is just, what is unjust, what is unlawful in divine and human and legal matters. Justice is a virtue, jurisprudence a science.[2]

[1] Irnerius, 'Quæstiones,' ii 1 "A Jus suum cuique tribuere pars est in diffinitione justitiæ Pars autem hujusmodi prior est toto Eadem ratione et jus prius est justitia Set cum dicitur jus artem esse boni et æqui et accipitur bonum et æquum pro justitia, videtur ipsa quasi materia prior jure

I Id quod modo jus appellamus, priusquam constitueretur, æquum fuit, et hoc quod dico, in jure gentium vel civili clarum est Nam ea quæ convenientia fuere, consensu comprobata sunt, nec posse(n)t comprobari, nisi prius essent quæ in deliberationem caderent . . Generaliter ergo sive justitiam sive bonum et æquum voces prius hoc intelligendum est Illud mox constitutum juris recipit nomen Ante quam autem constituatur, licet hoc nomine careat, in ipsa tamen justitia continetur, et ipsa tribuere hoc indesinenter gestire videtur. Unde et 'perpetua voluntas' jure vocatur. cum enim interdum re ipsa non tribuat, a *proposito tamen non desistit*, atque hac ratione voluntatis scilicet ab equitate discernitur"

[2] Placentinus, 'Summa Institutionum,' i. 1 "Quæ de justitia et jure *tractantur merito* leges appellantur Hæc enim inter cætera quæ leguntur, nobis ad legendum proponuntur, et veluti excellentiora, per autonomasiam leges nuncupantur. Competenter enim dominus Justinianus de justitia et jure, præmittit, de justitia, ut pote ex qua omnia jura emanant, tanquam ex fonte rivuli Et de jure, quod est universale et de singulis quæ sunt jura est prædicabile vel de jure, id est juris scientia, sive de arte ista Videamus itaque quot



The treatment of the subject by Azo is very similar: it would indeed appear probable that it is based upon Irnerius and Placentinus. He also describes *jura* as flowing from *justitia*, as the stream flows from its source. *Jus* is derived from *justitia*; but also *jus* may be used in various senses. It is interesting especially to observe that he gives the same explanation as Irnerius of the sense in which the Prætor is said to declare *jus*, even when his sentence is unjust. Azo concludes with a discussion of the relation of *jus publicum* and *jus privatum*, and with the statement of the tripartite nature of *jus privatum* as consisting of Natural Law, the Law of Nations, and Civil Law.[1]

modis dicatur jus, quid sit jus, quæ sint præcepta juris, quid lex, quid ratio, quid æquitas, et quid sit jurisprudentia, quid justitia, et unde dicatur Jus dicitur ars ista sicut jam dictum est Jus dicitur de bono et æquo Jus dicitur locus in quo jura redduntur Jus quoque vocatur sanguinis necessitudo Jus quoque dicitur potestas ut cum dicitur, hic est sui juris. Jus quoque dicitur instrumentum vel forma petendi ut actio est jus, item jus dicitur juris rigor Sed et pulmentum jus æquivoce nuncupatur.

Jus est ars boni et æqui, ergo per consequentiam mali et iniqui, potest enim intelligi ut hæc definitio sit hujus artis, potest et dici ut sit definitio præcepti quod est de bono et æquo Sequitur, juris præcepta sunt tria, juris inquam id est juris artis, vel juris omnis quod præcipit, nec enim jus omne præcipit, sed omne quod præcipit vel præcepit honeste vivere, vel alterum non lædere, vel suum cuique tribuere Sed notandum quod hoc ultimum arctius hic accipitur quam in definitione justitiæ Siquidem ibi complectitur hæc tria, hic autem illud solum, quod extra duo prima præcepta relinquitur Lex est generalis sanctio, cuncta jubens honesta, prohibens contraria Ergo jus legis est significatum, lex, ut oratio quæ legitur, juris est significatura, sicque jus et lex ita se habent ut argumentum et argumentatio Rationis nomen latius quam ista patet Nam et argumentum est ratio licet non sit jus, dicitur quoque ratio quia sit æquitas

Jurisprudentia est scire quid sit justum, quid injustum, quid illicitum in divinis humanisque, sive forensibus negotiis, differt ergo multum jurisprudentia a justitia Siquidem jurisprudentia præcipit sive dignoscit, justitia tribuit Item justitia est quoddam summum bonum, jurisprudentia medium, item justitia virtus est, jurisprudentia scientia"

[1] Azo, 'Summa Institutionum,' i. 1: "A justitia enim velut a materia, et quasi fonte quodam omnia jura emanant. quod enim justitia vult, idem jus prosequitur . . . Et dicitur justitia, quia in ea stant omnia jura Jus ergo derivatur a justitia, et habet varias significationes. Ponitur enim quandoque pro ipsa arte, vel pro eo, quod scriptum habemus de jure, et dicitur ars boni et æqui, cujus merito quis nos sacerdotes appellat justitiam namque colimus, sacra jura ministramus (unde et *leges dicuntur sacratissimæ*, l leges sacratissimæ Cod de legi) (Cod, i 14 9.) . . . Nam author juris est homo;

Our examination of these discussions will have made it plain that the mediæval civilians maintain the doctrine that law (i.e., *jus*) is the embodiment of the principle of justice, that they are clear that all systems of law represent the attempt of man to apply the principle of justice to the circumstances of human life. Justice is the source of law: from it law proceeds, by it law is to be tested, in accordance with it law is to be made or to be changed. In the first volume of this work we have endeavoured to point out that these are the principles laid down by the great jurists of the second and third centuries; while they are restated, and to some extent developed, by the compiler of the Justinian Institutes in the sixth century. We have now endeavoured to show that the mediæval civilians not

author justitiæ est Deus; et secundum hoc, jus et lex idem significant. Licet autem largissime dicatur lex, omne quod legitur; tamen specialiter significat sanctionem justam, jubentem honesta, prohibentem contraria. . . . Jus etiam quandoque ponitur pro jure naturali tantum, quandoque pro jure civili tantum, quandoque pro jure prætorio tantum, quandoque pro eo tantum, quod competit ex sententia. Prætor enim jus dicitur reddere etiam cum inique decernit, relatione facta non ad id quod prætor fecit, sed ad illud quod prætorem facere convenit. Nam si non habetur respectus ad id quod debuit fieri, non æquum jus, sed iniquum dicitur reddidisse. . . . Quandoque ponitur pro juris rigore, ut cum dicitur, inter jus et equitatem, etc., ut C. de legibus et constitut. l. prima. (Cod., i. 14. 1.) . . . Differt ergo multum jurisprudentia a justitia. Siquidem jurisprudentia dinoscit, justitia autem tribuit cuique jus suum. Item justitia virtus est, jurisprudentia scientia. Item justitia est quoddam summum bonum, jurisprudentia medium. . . . Hujus studii duæ sunt positiones: publicum et privatum. . . . Est autem jus publicum, quod ad statum rei Romanæ pertinet. Et consistit in sacris, sacerdotibus et magistratibus. . . . Jus autem privatum est, quod ad singularem pertinet utilitatem: subaudi principaliter, secundario tamen et ad rempublicam pertinet. Unde et dicitur: expedit reipublicæ, ne quis re sua male utatur, ut infra, de his qui sui vel alieni juris sunt § ult. Sic quod reipublicæ principaliter interest, secundario puto quod respiciat utilitatem singulorum. Est autem jus maxime privatum, tripartite collectum. Est enim ex generalibus præceptis, aut gentium aut civilibus. Maxime ideo dixi quia et jus publicum jure gentium est stabilitum. Nam erga Deum, vel ecclesiam vel sacerdotem religio est de jure gentium ut ff. eo. l. j. § ult. et l. ii. quod et publicum s. appellavi. Ex hoc patet etiam quod publicum et privatum non sunt species juris, sed assignentur res vel personæ, super quibus posita sunt jura."



only recognise these principles, but develop and expand them. To these writers law is not the expression simply of the will of the sovereign—if we may use a phrase which belongs to a later time,—but rather all systems of law represent the attempt to apply the fundamental principles of justice to the actual conditions of human life.

# CHAPTER III.

## THE THEORY OF NATURAL LAW.

WE have considered the nature of *Æquitas* and Justice, and their relations to *jus*—that is, the system of law. We have now to approach the question of law in another fashion, to consider the nature and significance of a classification of law which the mediæval civilians inherited from some parts of the Digest and from the Institutes of Justinian. Private law had been described by Ulpian and by the compilers of the Institutes as tripartite, as consisting of "Natural Law," the "Law of Nations," and the "Civil Law." We have now to consider the treatment of law under the terms of this tripartite description.

We must begin by observing that all mediæval civilians, whether of the school of Bologna or not, accept the tripartite division: it is needless to cite passages to establish this, as it is stated or implied by every writer who deals with this aspect of law. We quote two phrases to illustrate the matter, one from an anonymous work which is thought by Fitting to belong to the eleventh century,—to be antecedent, that is, to the school of Bologna,—the other from Placentinus.[1] As far as we have seen, there is no civilian down to the time of Accursius who rejects or throws doubt upon the propriety of the classification. We must consider what they understand it to mean, and what is its significance. We

[1] 'Libellus de verbis Legalibus,' 1: "Tria autem sunt principalia jura: jus naturale, jus civile, jus gentium."
Placentinus, 'Summa Institutionum,' i. 2: "Duplex est juris utilitas, terna est auctoritas, natura, gens, civitas, sicque jus aliud naturale, aliud gentile, aliud civile."



begin by considering the meaning of Natural Law, its definition and relations.

There is some uncertainty as to what exactly the great jurists of the second and third centuries understood by the phrase. Ulpian, in one well-known phrase, defines Natural Law as something very like an animal instinct, rather than a rational apprehension and judgment.[1] But, as we have endeavoured to point out, an examination of all the important references to the subject leads us to think that it is doubtful whether even Ulpian intended this as a complete treatment of the subject—in other passages he seems to come much nearer to the conception of Cicero: and the references of the other writers of the Digest and Institutes, and of St Isidore of Seville, seem to show that the jurists in general never accepted the theory of Ulpian. We have endeavoured to point out that the legal theory probably held the Natural Law to be the body of principles apprehended by the human reason as governing life and conduct, principles which are recognised as always just and good.[2] This, as we have pointed out, is the sense in which the phrase was understood not only by Cicero, before the lawyers,[3] but also by the Christian Fathers.[4] But we must refer our readers to our first volume for the complete exposition of our judgment upon this subject.

In what sense is the phrase understood by the mediæval civilians whom we are considering? In the first place, we must observe that they repeat from the Digest and the Institutes Ulpian's description of Natural Law, and sometimes they seem to agree with it. We may take as an example Placentinus' commentary on Ulpian's definition. Nature, he concludes, is here equivalent to God, who has caused all things to be brought forth. The law of nature is in one aspect permissive, as regards, for instance, the begetting of offspring; in another, obligatory, with respect to the bringing up of that which is begotten: this law is related to all animals.[5]

[1] Dig., i. 1. 1.
[2] Vol. i. chap. 3.
[3] Vol. i. pp. 3 6.
[4] Vol. i. chap. 9.
[5] Placentinus, 'Summa Inst.,' i. 2: "Jus naturale est quod natura, etc.

But this passage if taken alone would give us a false impression of the standpoint of these civilians. We get a good deal nearer their position in the discussion of the meaning of the *jus naturale* by Azo in his work on the Institutes. *Jus naturale*, he says, can be described in several fashions; it may be described as the instinct of nature, and then it has reference to all living creatures, or it may be described as the *jus commune* created by man, and in that sense it corresponds with the *jus gentium*, or yet again, it may be described as that which is contained in the Mosaic Law and the Gospel, or as that which is *æquissimum*, or again, it may be used for that law which protects agreements, and in this sense it is equivalent to the Civil Law.[1]

Azo enlarges the scope of the possible sense of *jus naturale*, while in the last sentence he suggests an important distinction between the first meaning he has mentioned and the other forms—namely, that in the first sense it describes a physical or sensuous instinct; in the others it has to deal with the reason. It is important to observe this significant distinction between Natural Law, as something related to instinct, as in Ulpian's definition, and Natural Law as related to Reason, as in the other forms of law mentioned by Azo.

. . . Natura id est Deus, quia facit omnia nasci Unde Ovidius, 'hanc Deus et melior litem natura diremit' Est autem jus naturæ per exemplum, prolem procreare, quod est permissionis, procreatam educare, quod est necessitatis, competitque hoc jus communiter et animalibus brutis, jus naturale intelligo, non ipsum educationis actum, sed animi præcedentem affectum, quo animal movetur ad educandum."

[1] Azo, 'Summa Inst,' i. 2: "Jus autem naturale pluribus modis dicitur. Primus est ut dicatur a natura animati motus quodam instinctu naturæ proveniens, quo singula animalia ad aliquid faciendum inducuntur. Jus naturale est quod natura, id est, ipse Deus docuit omnia animalia. . . . Dicitur enim quandoque jus naturale, jus commune hominum industria statutum; et ita jus gentium potest dici jus naturale ut J de re di. singulorum. (Inst, ii. 1. 11) Item dicitur jus naturale, quod in lege Mosaica vel in Evangelio continetur ut legitur in Decret. con i. distinc i. (Gratian, Dec. Dist, I) Item dicitur jus naturale æquissimum, ut cum dicitur lapsos minores secundum æquitatem restitui, ut ff. de min l. i in princ. (Dig, iv. 4. 1) Est etiam jus naturale quod tuetur pacta ut ff de pac. l. i in prin. (Dig, ii. 14 1) et in hac significatione jus naturale potest dici civile. Prima autem definitio data est secundum motum sensualitatis, aliæ autem assignatæ sunt secundum modum rationis" Cf. Accursius, Gloss on Inst., i. 2, "Jus Naturale."



We should observe in this passage a phrase which is of great importance, the words which identify the *jus naturale* with the Law of Moses and of the Gospel. We shall have to consider this in connection with the Canon Law. In the meantime we may notice that the phrase is not isolated. Azo in another work refers to the *jus naturale decalogi*.[1]

The formal definitions of the *jus naturale* leave us in doubt whether the civilians had arrived at any clear view as to the sense in which the phrase should be used; we may reasonably conclude that the ambiguity in the definitions of the 'Corpus Juris' hampered them so much as to make it difficult for them to come to any definite conclusion. The Canon Law presents in this respect a noticeable contrast with the Civil Law. The civilians cannot make up their minds to choose between the various senses in which the phrase might be used, while the canonists, as we shall see, decided clearly and definitely in favour of a particular usage. But on the whole it seems true to say that while the civilians hesitated to commit themselves in definition to any one sense of the phrase, they do very constantly mean by the *jus naturale* that body of moral principles which is always and everywhere recognised by men's reason as binding—that is, they do constantly use it in the sense in which it is sometimes used in the 'Corpus Juris Civilis,' and regularly in the Canon Law. With all their hesitation about definitions the civilians assert very emphatically that the *jus naturale* is immutable, and not to be overridden by any other system of law. It is a graver fault to be in error as to the Natural than as to the Civil Law;[2] no one can be allowed to plead ignorance of it.[3] Natural Law is not on the same level as other laws, but is in some sense supreme, not normally to be overridden

[1] Azo, 'Summa Cod,' i 18 11.

[2] Irnerius, 'De Æquitate,' 3 "Item plus est culpe naturale jus ignorare quam civile"

[3] Roger, 'Summa Cod cis,' i 14 "Item ignorantia juris alia naturalis, alia civilis. Ignorantia juris naturalis nemini subvenitur, nam nemini permissum est ignorare jus naturale, sicut dicitur de liberto qui vocavit patronum in jus, non venia edicti petita Nam etsi pretendat ignorantiam naturalis juris, non subvenitur ei quin incidat in edictum ut C. de in jus vocando, l. ii." (Cod, ii. 2. 2.)

by other laws, not to be abrogated except in certain rare cases.[1] The principle is well brought out by a passage in Hugolinus' collection of questions disputed among the jurists, in which he puts together the views of different lawyers on the question how far the emperor's rescripts, obtained contrary to the existing law, were to be accepted in the courts. We shall have to return to the discussion of this subject when we deal with the theory of the authority of the ruler. In the meanwhile it is enough to observe that, while some jurist is represented as maintaining that imperial rescripts, unless they have been obtained by falsehood, override the Civil Law, he is also represented to have said that if these rescripts are contrary to the Natural or the Divine Law, they are to be repudiated. The same principle is here said to have been held by Albericus.[2] Placentinus lays down a similar view in his work on the Institutes, in discussing the legislative power of the emperor.[3] Azo also held that a rescript of the emperor which is contrary to Natural Law is void.[4] It is clear from such passages as these that the mediæval civilians have carried on from the Institutes the conception that Natural Law represents the immutable principles by which the world is governed, principles apprehended by men but not controlled by them. The civilians have learned

[1] Bulgarus, 'Commentary on Digest,' L 17. 8: "Sanguinis, id est cognationis jura, quod *naturalia*, nullo jure civili, ut emancipatione, adoptione, *tolli* possunt. Naturalem enim rationem ratio civilis corrumpere non potest . . . Sunt tamen quædam civilia jura, ut maxima et media capitis diminutio quæ etiam jura cognitionis tollunt"

[2] Hugolinus, 'Dissensiones Dominorum,' 5: "Si vero rescripta non sint elicita, id est per subreptionem obtenta vel impetrata, etiamsi sint juri civili vel gentium contraria, peremtoriam exceptionem indulgentia, omnino rata erunt, nec ideo refutanda. Juri civili ideo dixi, quia, si juri naturali vel divino contradixerint, *refutantur* omnino. . . . Dominus Albericus aliter distinguit: utrum ex certa scientia imperator rescriptum dedit, an per ignorantiam vel obreptionem, ut, si ex certa scientia, valeant, nisi sunt juri naturali contraria."

[3] Placentinus, 'Summa Institutionum,' 1. 2: "Placuit inquam principi ut jus constituat ita ut non contra dominum statuat vel naturam."

[4] Azo, 'Sum. Cod,' 1. 22. 2: "Si tamen sit (rescriptum) contra jus humanum: aut est in læsione alterius aut non. Si est in læsione alterius: si quidem lædatur in eo, quod ei competit de jure naturali, nullum est: quia jura naturalia dicuntur immutabilia ut Institut de jure nat. penult." (Inst., 1. 2. 11.)



from the 'Corpus Juris' the same conception as that held by the canonists.

It must, however, be noticed carefully that these phrases do not by themselves furnish us with a complete or adequate exposition of the theory of Natural Law held by these civilians. For while in these sayings we have the statement of the supreme and immutable character of Natural Law, in other places we find the jurists recognising very clearly that as a matter of fact there was much in the actual law and in existing institutions which was contrary to Natural Law. We have just cited a passage from Bulgarus, in which he asserts that *naturalis ratio—i.e.*, in this case, *jura naturalia*—cannot be annulled by Civil Law, but we should now observe that the *jura cognationis*, which belong to the *jura naturalia*, are as a matter of fact abrogated by *capitis diminutio*.[1] This is expressed in more general terms in a treatise which may very probably be earlier than Bulgarus, in an appendix to 'Petri Exceptiones Legum Romanorum.'[2]

The truth is that the mediæval jurists, while they say that Natural Law is immutable, also maintain that certain rules or institutions of the Civil Law, which they recognise as legitimate, are in some sense contrary to Natural Law. It will be well therefore to consider their theories of certain institutions, and when we have done this, to ask how far these represent a coherent system of thought.

[1] See p. 32.

[2] 'Petri Exceptionum Leg. Rom.,' App. I. 2: "'Naturalia jura civilis ratio perimere non potest'. per se tantum; set aliquando alio *sustentata presidio* perimit: veluti jus *cognationis* naturale est, perimitur tamen maxima *capitis diminutione*: sot hoc facit malefitium cum jure."

# CHAPTER IV.

## THE THEORY OF SLAVERY.

THE mediæval civilians, like some of the great jurists of the Digest and Institutes, are involved in what seems at first sight an inconsistency and a self-contradiction. At one moment they speak of the *jus naturale* as immutable and perpetual; at another they describe and assent to institutions which they say are contrary to the *jus naturale*, such as the institutions of slavery and property. Some jurists of the Digest lay down very clearly the principle that slavery is contrary to nature or natural law, while at the same time they accept the institution. It is the same with the mediæval civilians, and indeed in general their views are directly taken from the ancient jurists. The author of the 'Brachylogus' puts together the phrases of Florentinus and Ulpian, which assert that slavery is contrary to nature, and that by natural law all men were born free.[1] Irnerius is quoted by Odofredus as classing slavery among those things in respect of which the Civil Law adds to or takes away from the *jus commune;*[2] and there is an

[1] 'Brachylogus,' i. 3 3 "Servitus autem est juris gentium constitutio, qua quis dominio alieno contra naturam subicitur Jure enim naturali omnes homines liberi nascebantur."

[2] Irnerius, 'Glosses on Dig Vet,' in Savigny, 'Geschichte des Rom. Rechts, &c.,' note 49 to chap xxvii Odofredus, in 'L Digest,' i 1 6 "Unde dominus yr lucerna juris super lege ista scripsit glosam inter linearem elegantissimis verbis, et bene dicit ipse ista litera dicit, jus civile est, quod neque a jure naturali vel gentium in totum recedit, nec per omnia ei servit cum ergo a jure aliquid additur vel detrahitur juri communi, illud jus civile efficitur Dicit glosa interlinearis additur vel detrahitur juri communi, tum nova materia ut tutela tum forma, ut servitus tum æquitas ut matrimonium tum iniquitas, ut dominium et sic interlinearis glosa denotat quatuor."



interesting discussion of the subject in another gloss on the Digest by the same jurist. Liberty, he says, belongs to the Natural Law; it exists both in fact and by law. In fact, it is interfered with by force, in law by another law,—for the law of nations is contrary to the law of nature, just as the *Lex Falcidia* was contrary to the earlier law. The slave has no doubt *naturalis facultas*, but he has not the *facultas* of doing whatever he wishes, for his *facultas* is dependent upon the will of his lord."[1] Bulgarus, in a passage to which we shall have to recur, asserts that slaves are by Natural Law free, and all men are equal.[2] Placentinus quotes and comments upon the saying of Florentinus.[3] Hugolinus describes freedom as the primitive condition of man.[4]

These quotations will suffice to make it clear that the jurists of the twelfth and thirteenth centuries take over from the ancient lawyers the theory that in some sense slavery is contrary to nature or Natural Law, and yet that it is an institution of the *jus gentium* or of the *jus civile.*

[1] Irnerius, 'Glosses on Digest Vet' (ed E Besta), Dig, i 5 4· "Libertas v naturalis Y a jure naturali introducta, sed quia in facto et jure hec facultas consistit, ideo factum et jus ei resistit v facultas Y duplex est hec naturalis facultas nam et posse mihi largitur quasi de facto et licenciam dat pro modo juris dupliciter ergo excipitur in eo enim quod facti est, facto, idest vi resistitur ei in eo enim quod juris est non videtur tacite permissum quod vetitum est nominatim § 1 v Contra naturam Y aliud jus alii contrarium, uti jus gentium juri naturali, lex falcidia legi antique, sed quod remanet ex priori una cum posteriori in unum quasi corpus conjungitur Hoc in corpore nil reperitur contrarium" Dig, i 5 5 "Et servorum § 1 v in dominum nostrum Y Per hoc differt liber a servo Servus enim licet naturalem habet facultatem non tamen habet facultatem faciendi quid vult cum servi facultas pendet ex arbitrio domini quod autem additur, 'nisi quod vi aut jure prohibetur' (facit) determinacionem facultatis"

[2] Bulgarus, 'Commentary on Dig,' L 17 22 "'In personam servilem nulla cadit obligatio' Jure quidem naturali quo liber est, naturaliter obligatur" L 17 32 "'Quod attinet ad jus civile,' &c Servi pro nullis habentur, quia nec civilia munera gerunt, nec alios obligant sibi, nec se aliis Jure vero naturali quo omnes homines æquales sunt et obligant et obligantur"

[3] Placentinus, 'Summa Inst,' i 3 "Servitus est constitutio juris gentium qua quis id est jus quoddam agentibus constitutum, quo quis dominio alieno subjicitur contra naturam, quippe inspecta natura omnes sunt æquales, sed jure gentium sunt inæquales"

[4] Hugolinus, 'Summa on the Three Digests,' i 5 "Et quidem distinguitur, quia alius est status primævus, et dicitur libertas, alius secundus, et dicitur servitus alius tertius, et dicitur libertinitatis."

We find that is the contrast between the natural and the conventional order of society, illustrated by the institution of slavery, just as it is in the ancient lawyers and in the Christian Fathers. We must presently consider how far the same thing is true in the case of these civilians with regard to the institution of private property. But before doing this, it will be convenient to consider a little further the principles of the civilians with regard to the position of the slave. As far as we can judge, these do not in any important point depart from the principles of the ancient law, but perhaps they carry a little farther that tendency to modify the condition of slavery which we find in the 'Corpus Juris'—at any rate, they restate some of the phrases which exhibit this tendency.

The author of the 'Brachylogus,' Bulgarus, and Azo, all restate the principle of the *jus civile*—that the slave has no *persona*.[1] But Bulgarus points out that, under the *jus naturale*, the slave is under "obligations," and others may be under "obligations" to him, and these obligations can be enforced under the Prætorian law. The slave cannot indeed sue or be sued in civil cases, but he can both sue and be sued in criminal matters; he can proceed even against his master in such cases, and can appear against him to maintain his own liberty and in some other matters.[2]

[1] 'Brachylogus,' i. 9. 2: "Servi enim jure civili nullam personam habent; ideo nuptias, quæ juris civilis sunt, non contrahunt."

Bulgarus, 'Comm. on Dig.,' L. 17. 107: "Servus in civili causa nec agere potest nec conveniri."

Azo, 'Sum. Cod.,' iv. 36: "Quia quantum ad jus illud (civile) servus pro mortuo habetur."

[2] Bulgarus, 'Comm. on Dig.,' L. 17. 22: "'In personam servilem nulla cadit obligatio.' Jure quidem naturali, quo liber est, naturaliter obligatur. Civili vero, quo neque civis est, neque civiliter obligatur. Dominum autem de peculio jure prætorio, ex suo contractu obligat, sicut ex delictis privatis noxaliter, ex publicis autem delictis naturaliter et civiliter obnoxius constituitur." L. 17. 32: "'Quod attinet ad jus civile,' etc. Servi pro nullis habentur, quia nec civilia munera gerunt, nec alios obligant sibi, nec se aliis. Jure vero naturali, quo omnes homines æquales sunt et obligant, et obligantur. Unde et alios dominis et dominos aliis jure prætorio obligant." L. 17. 107: "'Cum servo nullo *actio* est.' In criminali et accusari et accusare potest, *quandoque etiam* dominum. Sed et pro libertate adversus *dominum consistere potest*: sicut et in servitutem vindicari. Idem *de possessione momentanea* et sepulchro violato agit, et cum eo agitur."



When we turn to the subject of the limitation of the rights of masters over their slaves, we find that in the main these jurists restate the position of the older law. Placentinus, for instance, sums up its most important provisions in one passage founded on Inst., i. 8. The master could once ill-treat or kill his slave at his pleasure, now he may not do any of these things without definite cause, and even if he has cause, if he kills his slave, he will be punished as though he had killed another man's slave or a freeman, and he may not ill-treat him beyond reasonable measure. If he does this, the slave is to be compulsorily sold.[1] Roger puts one point very clearly when, in commenting on a rescript of Constantine (Cod., ix. 14), he explains that the master has the right to punish his slave, but if in doing so he wilfully kills him, he will be liable to a charge of homicide.[2] Azo, commenting on Inst., i. 8, repeats the view of Placentinus and the Institutes,[3] and does the same when commenting on Cod., ix. 14, but with some modifications, and, as he says, differing from Placentinus on one point. The master, he says, who kills his slave without cause and wilfully, is liable to the same charge as though he had killed a freeman; but if, he says, the master punish him reasonably, then he is not liable to any punishment, and he adds that

[1] Placentinus, 'Sum. Inst.,' i. 7: "Et quidem potestas dominica juris gentium est, et olim in servos domini latissime competebat, poterant enim impune eos occidere, multo fortius intollerabiliter verberare, atqui coercitionem accepit. Non enim licet *domino* sine causa justa *in servum suum* sævire, nec etiam causa intercedente *supra modum*. . . . *Ergo si* quis occiderit servum proprium ita punietur *per legem Corneliam*, ac si occiderit servum alienum, hominem ve liberum, sed Aquilia non tenebitur, quæ domino et non contra dominum ex ordine competit. Sed et si dominus servum non occiderit, sed alias male tractaverit, cum venundare hoc in casu bonis conditionibus jubebitur, ut nec amplius ad dominum revertatur, nec ab emptore possime tractetur. Et interest dominorum, servis juste deprecantibus auxilium non denegari, duplici ratione, ut vel modicum accipiant pretium, *et ne eis justa deprecantibus*, censura simili negetur *auxilium*."

[2] Roger, 'Summa Cod.,' ix. 12: "*Post* vim illicitam tractat de licita que adhibetur ad emendationem servorum sive proquinquorum si correptionis causa virgis aut loris servum dominus afflixerit aut in vincula conjecerit. Servo mortuo nullum crimen in his seu metum patietur; sed si voluntate ictus fustis aut lapidis eum occiderit, homicidii erit obnoxius."

[3] Azo, 'Sum. Inst.,' i. 8.

Placentinus had stated a contrary opinion. This is not the case in Placentinus' treatise on the Institutes just quoted, but it may be so in the treatise on the Code, or in some gloss; it would be interesting if indeed Placentinus had expressed this view, but it seems improbable.[1] It is important to notice that Placentinus says that a master killing his slave without cause will be punished as though he had killed a freeman, and that Azo says the same. This seems to be stronger than either Inst., i. 8, or Cod., ix. 14.

The mediæval jurists again follow the Code in recognising the Churches as places of sanctuary. Roger is clear that a slave taking refuge in a church must be surrendered to his master, but only when the latter takes an oath that he will not punish him,[2] while Azo holds that those who have fled from their masters to the church, in order to escape excessive cruelty, are to be sold, and not restored to him.[3]

With regard to the question of the ordination of a slave, Azo reproduces the provisions of Novel 123. 17. Slaves ordained with their master's consent are free; if ordained

[1] Azo, 'Sum Cod,' ix. 14 "Sciendum est autem quod dominus olim impune poterat occidere servum suum sed hodie distinguitur, an occidat justa causa ut tunc non teneatur, ut ff de verborum obligationib l qui servum, et de legatis primo l quid ergo § si hæres (*Dig* xlv 1 96 and xxx 1 53, 3) an sine causa · et tunc aut voluntate sua aut casu aut culpa In primo casu tenetur, tanquam si liberum occidisset In secundo nullo modo ut infra eodem l. unica (Cod ix. 14) Ubi autem verberibus et fame ipsum affligit si id fieret moderate, impunitum erit licet Placentinus dixerit contrarium. Si autem immoderate fiat. confugere potest servus ad statuas vel præsides, ut compellatur dominus vendere servum bonis conditionibus, id est ne revertatur in domini potestatem, ut Institut de iis qui sui vel alieni juris sunt § ult" (Inst i 8)

[2] Rogei, 'Sum. Cod,' i. 10 "Christiani quidam sunt servi, quidam liberi. Servi nullo modo debent suscipi, nisi propter domini duritiam vel intollerabilem injuriam confugerint. Hac causa cessante non sunt suscipiendi. Set si inopinate in ecclesia inventi fuerint, mox ab yconomis et aliis clericis dominis sunt reddendi, *sacramento tamen prestito quod* nullam patiantur injuriam a dominis propter hanc offensam Si vero etiam hac cautione præstita noluerint ad dominum redire, manu mox injecta revocentur, et si contigerit confligi in ipsa concertatione, dominus nullam penam patietur"

[3] Azo, 'Sum Cod,' i. 12: The slave who flies to a church is to be delivered up to his master "Et hoc, si servus confugerit ad ecclesiam propter delictum suum alioquin, si propter sævitiam domini, compellitur dominus vendere ipsum bonis conditionibus, id est, ne amplius revertatur in potestate domini"



without the knowledge of the master he can within one year prove that the man is his slave, and reclaim him.[1] With regard to the reception of slaves into monasteries, Azo summarises the provisions of Nov. 5, 2. If any unknown man enter a monastery, he is not to receive the habit for three years, and if within that time his master appears and proves that he is his slave, or *adscriptius*, or *colonus*, and that he has fled to the monastery to escape his work, or because he had committed some theft or other crime, he is to be restored to his master, on an oath that he will not punish him. But if after three years he has received the habit, no claim is to be entertained.[2]

It remains to notice some statements by these jurists on the position of the *ascriptitius*, and the distinction they draw between his position and that of the slave. Irnerius, commenting on Florentinus' definition of slavery in Digest, i. 5. 4, says that the *ascriptitius* is not subject to the dominion of another man, but is the slave of the estate (*glebe*).[3] Placentinus is more explicit, and says that in his judgment the *ascriptitius* is *liber*, although he is *servus glebe*.[4] And Azo is even more dogmatic, and maintains that the *ascriptitius* is really free (*liber*), although he is bound by

[1] Azo, 'Sum. Cod,' i 3 14: "Servi autem si fiant clerici scientibus et non contradicentibus dominis, liberi fiunt: si autem *ignorantibus*, licet domino intra annum fortunam servilem probare, et suum servum recipere" Cf. Nov 123 17.

[2] Azo, 'Sum Cod,' i 3. 16. "Nunc autem de monachis . . . si autem incognitus sit, per tres annos habitum ei non præstet, sed experimentum et probationem vitæ ipsius accipiat si quidem intra triennium venerit aliquis dicens eum servum suum esse, vel adscriptitium, vel colonum, et ideo ad monasterium venisse, ut culturam *agrorum effugeret*, vel propter furta, et alia delicta monasterium intrasse, eaque fuerint approbata, domino suo reddatur cum rebus, quæ in monasterium duxisse probetur: ut tamen prius quidem jus jurandum accipiat a domino suo, quod nihil patiatur. Si autem intra triennium nemo ex prædictis personis inquietaverit eum, et transacto triennio ostenderit se probatum Egumeno id est Abbati, det ei schema et nullus ei postea pro fortuna sit molestus donec tamen in monasterio deget"

[3] Irnerius, 'Glosses on the Digest Vetus' (ed E Besta), i. 5 4, § 3 "v. Manu capiantur. Y ascriptitia enim condicio non est ea qua quis alieno subjicitur domimo, sed glebe servus intelligitur, non principaliter persone"

[4] Placentinus, 'Sum. Inst,' i. 3 · "Ascriptitius quoque meo judicio liber est, licet sit servus glebæ."

certain kinds of *servitium*,[1] and he repeats the provision of the Novels that he can be ordained without his master's consent, but must in that case continue to fulfil his agricultural task.[2]

[1] Azo, 'Sum. Inst.,' i. 3: "Est ergo notanda summa divisio personarum, quod omnes homines aut liberi sunt aut servi, id est, omnis homo aut est liber aut servus, ut ita pluralis oratio resolvatur in singularem, ut ff. de condic. vet. l. falsa demonstratio § ult. (Dig., xxxv. 1. 33, 4), ut ita vitetur oppositio de duobus assignatis, quorum unus est liber, alter servus. Nec est oppositio de ascripticio, quia vere liber est, licet quodam servitio sit astrictus, ut C. de episcopis et cl. l. jubemus (Cod., i. 3. 36) et Aut. ascripticios (Nov., 123. 17)." The text quoted is that of Maitland in his 'Bracton and Azo.' The text of the Basle edition of Azo reads: "Quia fere liber est. Immo videtur quod vere sit servus, cum inter adscriptitios et servos nulla sit differentia, ut C. de agri. et censi. l. no diutius § si quis" (Cod., xi. 48. 21, § 1). Cf. for discussion of text of Azo, Maitland's 'Bracton and Azo,' p. xxxiv. Cf. Accursius, 'Gloss on Dig.,' i. 5. 3, "Summa": "Sed quid de ascriptitiis? Respon. liberi sunt . . . vel melius quo ad dominos servi sunt: quo ad extraneos liberi."

[2] Azo, 'Sum. Cod.,' i. 3. 14: "Nam ascriptitii contra voluntatem dominorum etiam in possessionibus, in quibus sint adscripti, fieri possunt clerici: ita tamen ut clerici facti impositam agriculturam adimpleant." Cf. Nov. 123. 17.



# CHAPTER V.

## THE THEORY OF PROPERTY.

It has been pointed out in the first volume, that while the legal and patristic theories of Natural Law and natural equality are related to the same philosophical principles, there is a difference between them as to the nature of property and its relation to the Natural Law. It is not indeed certain whether all the jurists held the same opinions, we have no information as to the opinion of Ulpian, and one passage of Hermogenianus suggests that he may have held that property belonged to the *jus gentium*, and not to the *jus naturale*, but it is clear that many of the great jurists conceived of property as a natural institution.[1] The Fathers, on the other hand, clearly held that property was not an institution of nature, that it belonged to the state of convention as opposed to the state of nature,[2] and it is fairly clear that they had learned this doctrine from the philosophers like Seneca.[3] This doctrine assumed a legal form in the Etymologies of St Isidore of Seville; his phrase is perhaps ambiguous, as we have pointed out,[4] but it was in the Middle Ages undoubtedly taken to mean that under the Natural Law all property was held in common. It is highly probable that this phrase of St Isidore is derived from some juristic source, for it is most probable that his legal chapters are based upon some law-book which we have lost.[5]

When we now turn to the theory of property in the

[1] Cf. vol. i., chap. 4.
[2] Cf. vol. i., chap. 12.
[3] Cf. vol. i., chap. 2.
[4] Cf. vol. i., pp. 142, 144.
[5] Cf. Voigt, 'Die Lehre vom jus naturale,' &c., vol. i., "Beilage," vi.

mediæval civilians, it is extremely interesting to find that they waver between these two traditions. Some of them simply repeat the general legal doctrine that property is an institution of natural law; others dogmatically assert the patristic theory; while others again seem to hesitate between the two views.

We begin with some references to the subject in those works which are either earlier than the school of Bologna, or at least independent of it. Conrat and Fitting have published a gloss on the Institutes which they consider to be entirely independent of Bologna; a passage in this speaks of things which are acquired by the civil law or by the natural law.[1] Fitting has published a little work which he considers to belong to the eleventh century, and to be of North Frankish origin, consisting of definitions of legal terms. This explains *possessio* in the terms of Digest, xli. 2. 1, and then adds that it is either natural or civil.[2] Another treatise, the 'De Natura Actionum,' speaks of the *accio in rem* to which a man has the right, who has *dominium* by civil or natural law;[3] and it is interesting to notice that the author has misquoted the passage in the Digest which he is citing—unless indeed his text was different, for Paulus, in this passage in the Digest, speaks of those who have *dominium* by the law of nations or by civil law. Fitting[4] has suggested that Placentinus is correcting this treatise, when in his work 'De Varietate Actionum' he states that *dominium* does not belong to the *jus naturale;*[5] we shall recur to this presently. The 'Brachylogus' enumerates six methods by which men acquire *dominia* under Natural Law; clearly

[1] 'Cologne Gloss on the Institutes': "Cum superius sit locutus de rebus que jure civili vel naturali adquiruntur." Fitting has shown that there is very strong evidence that the author of this is Gualcausus of Pavia. See his 'Die Institutionem Glossen des Gualcausus.'

[2] 'Libellus de Verbis Legalibus,' 54: "Possessio dicitur quasi positio sedis, quia naturaliter tenetur ab eo qui ei insistit. Possessio naturalis sive civilis detentio est."

[3] 'De Natura Actionum,' 63: "Accionum in rem alie utiles, alie directe. Directe, que domino competunt, ut in Dig.: 'In rem accio ei competit qui jure civili vel naturali dominium habet.'" Cf. Dig. vi. 1. 23.

[4] H. Fitting, 'Juristische Schriften, &c.,' p. 58, note 5.

[5] Placentinus, 'De Var. Act.,' i. 4. 3.



the author of the treatise had no doubt that the institution of private property belonged to it.[1]

When we turn to the great jurists connected with Bologna, we find that they are divided—some definitely taking one view, while others hold the opposite one, while some speak in terms which are a little difficult to interpret.

Irnerius, in a gloss on the Digest, lays down the principle that there is no private property by nature;[2] while in another gloss he says that private property is one of those institutions which illustrate the meaning of the saying that by the civil law something may be added to or taken from the *jus commune*, and that in the case of property this had been done by *iniquitas*.[3] These statements seem very clear and unequivocal. Private property is a conventional, not a natural, institution; and Irnerius seems to mean that it is the result of some vicious disposition, as Seneca and the Fathers had held. We should indeed be inclined to suspect the influence of the patristic tradition. In the 'Summa Codicis,' which Professor Fitting ascribes to Irnerius, we find, however, a different view. In one passage the author speaks of the beginnings of *naturalis juris dominium*, and gives an account of the origin of property by "occupation," "accession," "translation," as in Institutes, ii. 1, or Digest, xli. 1; and a little farther on he says that there is a natural as well as a civil possession.[4] In a

[1] 'Brachylogus,' ii. 2: "Speciali autem jure dominia rerum quæruntur jure naturali aut jure civili. Jure naturali quæruntur dominia rerum sex modis: occupatione, inventione, specificatione, contributione, accessione, traditione."

[2] Irnerius, 'Glosses on the Dig. Vet.' (ed. Besta), i. 1. 5: "v. distincta. Y. natura enim nichil privatum."

[3] Irnerius, 'Glosses on Dig. Vet.' (in Savigny, 'Geschichte des Röm. Rechts, &c.,' vol. iv. p. 387, &c.) Dig., i. 1. 6. Odofredus in his L.: "Unde dominus yr. lucerna juris super lege ista scripsit glosam interlinearem elegantissimis verbis, et bene dixit ipse: ista litera dicit, jus civile est, quod neque a jure naturali vel gentium in totum recedit, nec per omnia ei servit: cum ergo a jure aliquid additur vel detrahitur juri communi, illud jus civile efficitur. Dicit glosa interlinearis: additur vel detrahitur juri communi, tum nova materia, ut tutela: tum forma ut servitus: tum æquitas, ut matrimonium, tum iniquitas ut dominium, et sic interlinearis glosa denotat quatuor."

[4] Irnerius, 'Summa Cod.,' vii. 23. 1: "Nunc possessionis ratio edisserenda est. Et quia neque usucapio neque longa præscriptio sine possessione contingit, ideo igitur in medio de pos-

collection of the "Distinctiones" of the oldest glossators, it is said that possession may be understood in two ways—either as civil, which is a matter of law; or as natural, which is a matter *corporis vel facti*. Natural possession is described in terms suggested by the definition of Paulus (Digest, xl. 1. 2, 1) as "quasi pedum positio seu assessio"—that is, in terms of physical occupation.[1]

The jurists of the latter part of the twelfth century present very conflicting opinions. We have a report of the opinion of Joannes Bassianus, in which he is represented as having held that those things which are still common property have continued under the primeval natural law, by which all things were common.[2] Placentinus, in his treatise 'De Varietate Actionum,' says explicitly that by the *jus naturale* all things are common, and there is no private property;[3] and in his Summa on the Institutes he says that property in things is acquired by the *jus civile* or the *jus gentium*, but not by the *jus naturale*, by which all things are common.[4]

sessione apponit, cum et naturalis juris dominium ab apprehensione originem traxit. . . . 10. Alias autem possessio a te incipit, alias ab alio priore possessore in te transfertur, cum et possessio tribus modis tibi acquiratur: aut *enim occupatione*, aut accessione, aut translatione. Per occupationem vacuam seu que a nemine detinetur acquiris possessionem: quo casu a te incipit et omnino, sive nullius fuit sive alienam vacantem occupas. Cum enim quod nullius est natura possessionem occupas, etiam (et) ex ea causa tibi dominium acquiritur: cum enim justam causam possidendi habes, pro suo possides, ut in feris bestiis (et) lapillis in litore inventis. . . . 20. In summa est naturalis possessio, est et civilis."

[1] 'Antiquissimorum Glossatorum Distinctiones,' lxxv.: "Possessionum duplex est ratio: aut enim civilis est quæ juris dicitur, aut naturalis quæ corporis vel facti nuncupatur. Et quidem possessio naturalis est quasi pedum positio seu assessio, ut cum corpus corpori incumbit vel assidet, quod interpretatione civilis juris latius porrigitur."

[2] Joannes Bassianus (cited in edition of 'Corpus Juris,' Antwerp, 1575, which contains the gloss of Accursius), Inst., ii. 1. 5: "'Publicus'; Cujus respectu vera sit opinio Joan, nam communia sunt relicta sub suo jure naturali primævo, quo omnia erant communia."

I owe this passage to Note 137 in F. Maitland's translation of a part of Gierke's 'Das Deutsche Genossenschaftsrecht.'

[3] Placentinus, 'De Variotate Actionum,' i. 47: "Competit autem in rem actio ei qui dominium adquisivit jure civili, vel gentium, non jure naturali: nempe eo jure omnia sunt communia, nulla privata."

[4] Placentinus, 'Summa Institutionum,' ii. 1: "Hucusque de rerum divisione, nunc autem de acquirendo ipsarum rerum dominio disseramus. *Adquiruntur omnia rerum dominia* non jure naturali, quo omnia sunt communia, sed jure civili et gentium."



On the other hand, in the 'Summa Codicis' attributed to Roger we find that the author definitely holds that a man may have property in some particular thing by the *jus naturale*, while another may have property in the same thing by the *jus gentium* or the *jus civile*, and he takes the well-known example of the picture from Digest, xli. 1, and Instit., ii. 1: the owner of the material on which the picture is painted may claim by the *jus naturale*, while the painter may claim by the *jus gentium* or the *jus civile*, and each has his appropriate method of procedure: the former has the *actio utilis*, the latter the *actio directa*.[1]

The treatment of this subject by Azo is somewhat difficult, and it is specially complicated by the fact that while, as we have seen, he distinguishes between the *jus gentium* and the *jus naturale*, he also, as we have pointed out, holds that the phrase *jus naturale* may be used in several senses: it may be defined as something quite distinct from the *jus gentium*, but it may also in one sense be identified with it, and, in another sense still, it may be identified with the Mosaic Law and the Gospel.[2] In one passage of this 'Summa Institutionum' he says dogmatically that it is not by the *jus naturale*, but by the *jus gentium* or *civile*, that we obtain property: this is the more noticeable owing to the fact that the passage of the Institutes on which he is commenting says expressly that men become the owners of some things by the *jus naturale quod sicut diximus appellatur jus gentium*.[3] Azo evidently

[1] Roger, 'Summa Codicis,' iii. 21: "Directa (accio) ei competit qui dominus est jure gentium, vel jure civili: jure gentium ut inventione, occupatione, &c.—jure civili ut usucapione. Si autem dominus sit jure naturali, tamen cum alius sit dominus jure gentium vel civili, habet utilem, ut dicitur de eo qui pinxit tabulam: nam dominus tabulæ remanet dominus jure naturali, is qui pinxit est dominus jure gentium. Domino jure naturali datur utilis, dominio jure gentium datur directa."

[2] See p. 30.

[3] Azo, 'Summa Instit.,' ii. 1. 20: "Superest ut videamus de adquisitione dominii rerum. Adquiruntur autem dominia rerum non jure naturali, sed gentium vel civili. Civili multis modis, ut usucapione. . . . Commodius est autem a vetustiore incipere, id est a naturali, quod dicitur gentium, quod cum ipso genere humano rerum natura prodidit. . . . Jure igitur gentium dominia adquiruntur nobis multis modis."

means that in the strictest sense we do not obtain property by the natural law, but only in that sense in which the natural law may be identified with the law of nations. It is in this sense no doubt that a little farther on in the same passage Azo follows the Institutes in speaking of property by *traditio* as belonging to the *jus naturale*.[1] His theory is again set out in a passage of his 'Summa Codicis,' when he defines the nature of possession, and says that it is *naturalis*, but not under that *jus naturale* which belongs to all animals, for the irrational animals cannot have the desire for possession.[2] On the other hand, in his 'Summa Institutionum' he quotes the sentence of Hermogenianus in Dig., i. 1. 5, which speaks of *dominia distincta* as having been introduced by the *jus gentium*, but adds that he does not mean to say that *dominia* were first brought into existence by the *jus gentium*, for according to the Old Testament some things are mine, some things thine, and theft was prohibited.[3] In another place he says that theft is forbidden by the *jus naturale*,[4] and again that it is prohibited by the *jus naturale decalogi*,[5] and yet once more, defining the nature

[1] Azo, 'Summa Instit.,' ii. 1. 55: "Acquiritur etiam nobis dominium de jure naturali per traditionem."

[2] Azo, 'Summa Codicis,' vii. 32. 1: "Est autem possessio, corporalis rei detentio, corporis et animi, item juris adminiculo concurrente. . . . Item ideo dicitur possessio, detentio: quia naturaliter tenetur ab eo, qui insistit ei. Est enim appellata possessio (ut ait Labeo) pedum quasi positio, ut ff. eodem. l. i. in principio (Dig., xli. 2. 1). . . . 4. Hæc talis possessio quam quis corpore suo, vel oculis, et animi affectu adipiscitur, naturalis est ut ff. eodem l. i. in principio (Dig., xli. 2. 1) id est de jure naturali, quod gentium appellatur. Non dico de jure naturali omnium animalium, ut Instit. de rerum divisio, § per traditionem (Instit., ii. 1. 40). Nam irrationalia animalia affectum possidendi habere non possunt."

[3] Azo, 'Summa Instit.,' i. 2. 6: "Item ex hoc jure gentium introducta sunt bella . . . dominia distincta, scilicet, directa ab utilibus et e converso. Non dico, quod dominia sint inventa de jure gentium de novo: quia et veteri Testamento aliquid erat meum, aliquid tuum: unde et prohibebatur fieri furtum, et præcipiebatur ne retineat mercedem mercenarii sui."

[4] Azo, 'Summa Instit.,' iv. 1: "Licet enim furtum naturali jure prohibitum sit."

[5] Azo, 'Summa Cod.,' i. 18. 11: "Item et si putat sibi licere impune occidere, vel furtum committere, vel rapinam, vel adulterium; quæ etiam jure naturali decalogi prohibita sunt. Nam nihilominus tenebitur furti ex illo speciali delicto, quod jure naturali prohibitum est."



of theft, he says that it is contrary to the *jus naturale*, for the Divine authority warns us not to do to others what we should not wish them to do to us, and the Decalogue forbids us to steal.[1] The statement that theft is forbidden by the *jus naturale* is no doubt taken from Paulus in Dig., xlvii. 2. 1, repeated in Inst., iv. 1. 1, but Azo here identifies the *jus naturale* with the Decalogue, and we must understand him under the terms of this identification. Another passage is interesting, as illustrating the conception that one form at least of property has been created for the public convenience, but is contrary to *naturalis æquitas*:[2] what exactly Azo meant by this phrase it is difficult to say.

If we attempt to sum up his position, we should incline to say that it is governed by the tradition of the Fathers, and possibly of the canon lawyers, to this extent, that he recognises that in some sense private property is not an institution of Natural Law; but we must bear in mind that Azo held that the phrase "*jus naturale*" could be used in many senses. He holds that private property does not belong to the *jus naturale*, if you understand this in the sense of Ulpian's definition—that is, as describing the instincts which men have in common with the other animals; but it does belong to the *jus naturale* as identified with the Decalogue, and Azo seems to mean that in this sense it may be prior to the *jus gentium*.[3]

[1] Azo, 'Summa Cod.,' vi. 2. 1: "Est autem furtum fraudulosa contrectatio rei alienæ mobilis corporalis, quæ fit invito domino, animo lucrandi, scilicet gratia rei vel possessionis, vel usus, quod etiam jure naturali prohibitum est, ut ff. eod. l. i. § ult. (Dig., xlvii. 2. 1) et Instit. de oblig. quæ ex delicto nas. § primo (Inst., iv. 1. 1). Nam et divina testatur authoritas, quod tibi non vis, alteri ne feceris. Item hoc est unum de præceptis decalogi. Furtum ne facias. . . . 7. Quod jure naturali prohibitum est, ponitur in definitione ad majorem comprobationem ipsius."

[2] Azo, 'Summa Cod.,' vii. 26. 1: "Est autem inducta usucapio bono publico id est, utilitate publica, contra æquitatem naturalem, sicut et servitutes."

[3] It is possible that the ambiguities in the position of these civilians are in part due to the difficulties as to the relation of "dominium directum" and "dominium utile." Cf. upon the subject a very interesting and careful study by Professor Meynial: "Notes sur la formation de la théorie du Domaine Divisé du xii^e au xiv^e siècle dans les Romanistes," in 'Mélanges Fitting,' 1908.

It is clear that the civilians of the twelfth century were divided upon the subject of the "natural" character of private property, some being governed by the formal tradition of the *corpus juris*, others being much influenced by the philosophical and patristic conceptions. It is interesting to observe that Hugolinus, who does not furnish us with any direct statement upon the subject, does suggest an explanation of the origin of some methods of acquiring private property, in terms which remind us of the Stoic and Patristic doctrine. He lays down the general principle that it is contrary to natural equity that any man should be enriched at his neighbour's expense, and, he continues, it would seem to be contrary to this principle that a prescription of three years is enough to transfer property from one man to another. He argues that there is here no real inconsistency, for while the general principle is indeed in accordance with natural equity, the rule of prescription has been introduced by civil equity, lest the ownership of things should be uncertain.[1] The contrast between the natural and the civil equity certainly suggests the Stoic and Patristic distinction between the conditions appropriate to the state of innocence and the state of vice. Accursius says that some maintain that private property belongs to the *jus naturale*, for the divine law says, thou shalt not steal, and that when it is said that by the *jus naturale* all things are common, we should understand this to mean that all things are to be shared with others. He replies that when God gave Moses the command against stealing, the *jus gentium* was already in existence.[2]

[1] Hugolinus, 'Summa' of the Digest, Preface: "*Naturaliter equidem æquum est, neminem cum alterius jactura locupletari: cui contrarium videtur, quod præscriptione brevis etiam temporis, scilicet usucapionis, id est triennio, res aliena fit tua. Sed non est contra: primum enim dictum est secundum naturalem equitatem, secundum autem ex civili æquitate introductum est, ne dominia rerum essent in incerto.*"

[2] Accursius, 'Gloss on Dig.,' i. 1. 5, "Dominia distincta": "*Immo et secundum jus na. sunt distincta: quia secundum jus divinum aliquid erat proprium, dicitur enim; 'Furtum non facies.' . . . Et si dicatur: omnia sunt communia jure natu. expone i. communicanda. Sed respon. etiam tunc quando hæc præcepta divina dabantur Moysi a deo, erat jus gentium.*"



It seems, then, to be clear that the mediæval civilians account for the existence of institutions which are contrary to the Natural Law by the tacit or expressed assumption of a difference between the primæval or natural state of human life and the actual conditions. They do not, indeed, draw out these conceptions in the same explicit way as the Canonists, with whom we shall presently deal; they do not reproduce in explicit terms the theories of the Stoics and the Christian Fathers; but it would seem to be evident that they assume that the Natural Law was appropriate to a natural or primitive condition which, in some sense at least, is also an ideal condition, while the actual customs and laws of men have to be accommodated to other and less perfect conditions. The Natural Law represents the supreme moral principles of human life, it represents thus an immutable ideal, but in the world as it is, men being what they are, it is impossible in all respects at once to conform to this. The actual institution and laws of human society are not in themselves always ideally perfect, but are justifiable in so far as they may tend to check and correct men's vices.

# CHAPTER VI.

## THE THEORY OF THE *JUS CIVILE* AND CUSTOM.

WE can now resume our consideration of the theory of law, its nature and origin. In the first chapter of this volume we have made the attempt to draw out the theory of law in relation to the principles of Equity and Justice, and we have seen that the civilians of the twelfth and thirteenth centuries regard all actual law as the application to particular times and circumstances of principles which are not created by human will or power, but to which rather the will of men must submit. In considering the theory of natural law, we have seen that, in spite of the fact that the civilians are not always clear or consistent in their conception of this, it is yet true to say that they do constantly tend to think of the natural law as representing the immutable principles of right by which the world is governed, and to which human law must conform. That is, the theory of the civilians with regard to natural law represents in other terms the same general principles as these which are embodied in their theory of the relations of law to justice and *æquitas*.

We can therefore now turn to the theory of the Civil Law, the positive law of any one State, to the theory of its origin and the source of its authority. This will compel us to inquire first into the relations of law and custom, and secondly into the nature of political authority—that is, to examine the theory of the relation of the people and the ruler.

Before doing this, however, we must stop for a moment to deal with the meaning and use of the term *lex* in these



civilians. They sometimes use the word in the technical sense of the definition of Gaius—that is, as the decree of the Roman *populus*;[1] sometimes they use it to describe the written law, as distinguished from the unwritten *mos* or *consuetudo*; sometimes they use it in the most general sense for any law written or unwritten. In one of the works which is independent of the school of Bologna, we have a statement which treats *lex* as a branch of *jus*, and distinguishes it from *mos*, but neglects the distinction between the *lex* of the Roman *populus* and the *constitutio* of the Roman Emperor.[2] Placentinus, in a passage which we have already quoted, described *lex* as the expression of *jus*;[3] in another passage he says that we may understand *lex* in the broadest sense as meaning anything that men read; in a narrower sense in the terms of the definition of Papinian; while in the strictest sense *lex* is the decree of the *populus*.[4] Azo has set out the various senses in which the word *lex* may be used in an important passage. *Lex*, he says, is sometimes used in a stricter, sometimes in a broader sense. Strictly, it denotes the *statutum* of the Roman *populus*, made with the proper formalities; in a larger sense the word denotes any *rationabile statutum*—this is what is meant by the saying that *lex* is a sacred command, ordering what is *honestum* and forbidding what is the opposite of this; in the larger sense the constitution of the prince and the *edictum* are parts of *lex*.[5]

[1] Gaius, Inst. i. 2-7.

[2] 'Libellus de Verbis Legalibus,' *i.*: "Jus generale nomen est, inde dictum quia justum; lex autem juris est species et a legendo vocata quia scripta. Jus vero omne legibus constat et moribus. Lex est principum constitutio pro utilitate communi conscripta; mos autem est antiqua consuetudo de moribus tracta, sive lex non scripta." Cf. Isidore, *Etymologies*, v. 2 and 3.

[3] Placentinus, 'Summa Inst.,' i. 1: "Quæ de justitia et jure tractantur merito leges appellantur . . . ergo jus legis est significatum, lex, ut oratio quæ legitur, jus est significatura, sicque jus et lex *ita se habent ut argumentum et argumentatio*."

[4] Placentinus, 'Summa Inst.,' i. 2: "Generaliter lex dicitur quidquid legitur, minus late quicquid de justitia sancitur, secundum hanc significationem in ff. definitur, lex est commune præceptum, etc. (Dig., i. 3. 1), in arctissima significatione lex populi censura appellatur, quæ hic definitur."

[5] Azo, 'Summa Codicis,' i. 14: "Lex autem ponitur quandoque stricte, quandoque large. Stricte est cum ponitur pro statuto populi Romani:

We can now turn to the origin of Civil Law. The mediæval jurists, both of the civil and of the canon law, recognise very clearly that custom always has, or at least that it formerly had, the force of law. Azo uses a phrase which puts the principle in its broadest terms. Custom, he says, creates, abrogates, and interprets law.[1] Not all the civilians would have agreed to this statement without qualification, but they would all have agreed to it with regard to the past. All the civilians with whom we are dealing, from the earliest to the latest, whether of the school of Bologna or outside of it, held that, under certain conditions, custom either always did possess, or had once possessed, the force of law.

The author of 'Petri Exceptiones' says that what is approved by long usage has no less authority than the written law.[2] The Prague fragment quotes the saying of Ulpian (Digest, i. 3. 33), that long custom is wont to be recognised as *jus* and *lex*.[3] The author of the 'Brachylogus' speaks of that body of law which use approves; while he adds, citing the Code, that this law is not of such weight as that it can overcome reason or law (*i.e.*, written law).[4] A gloss on the 'Brachylogus' develops the matter somewhat further, and says that, according to Cicero, that is to be reckoned as the law of custom which the will of all has

et hoc est quod dicitur, lex est quod populus Romanus senatorio magistratu interrogante, veluti consule constituebat (Inst., i 2 4) . . . et quantum ad sententiam licet alia sint verba, eadem est illa definitio, qua dicitur, 'Lex est commune præceptum, virorum prudentium consultum, delictorum, quæ sponte vel ignorantia fiunt vel contrabuntur coercitio, communis reipublicæ sponsio,' ut ff. de legi, et senatus c 1 1 (Dig., i. 3. 1). Quandoque ponitur large pro omni rationabili statuto. unde et dicitur, lex est *sanctio sancta*, jubens honesta, prohibens contraria. Et ita est regula justorum et injustorum, ut dicitur in translatione Græca, ut ff e. l. 2 (Dig., i. 3. 2). Constitutio vero principis, et edictum, legis partes sunt, ut lex largo modo intelligatur."

[1] Azo, 'Summa Codicis,' viii 53 6: "Et quidem videtur quod consuetudo sit conditrix legis, abrogatrix et interpretatrix"

[2] 'Petri Exceptiones Leg Rom.,' iv. 3. "Ea enim, ut in Digestis loquitur, longi temporis usu approbata, non habet minorem auctoritatem, quam lex scripta"

[3] 'Fragmentum Pragense,' ii.

[4] 'Brachylogus,' i. 2 12. "Ex non scripto jus venit quod usus comprobavit, nam consuetudinis ususque longævi non levis est auctoritas, verum non adeo sui valitura momento, ut aut rationem vincat aut legem." Cf. Cod., viii 52. (53)



approved without any formal promulgation; and that while St Augustine rightly says that truth is greater than custom, yet when truth and custom agree nothing has greater authority.[1] Irnerius, in a gloss, speaks of the threefold nature of *jus*—that which is established by law (*lex*), by custom, and by the necessity of nature.[2] And in another gloss, while asserting that nowadays when the people have transferred their authority to the emperor their disuse does not abrogate law, he still maintains that in former times, when the people had the power of making laws, these were abrogated by the tacit consent of all.[3] In his 'Summa Codicis' he deals with the matter very fully, and brings out very clearly the important point that it is not only the custom of the Roman people, but that of any city which has the force of law—subject, of course, to the written law of the Empire; and he urges that as the principles of the written law are to be drawn out to meet similar cases which may not be directly provided for, the same is to be done with the unwritten law of custom. Only in regard to unwritten as well as the written laws we must consider the principles of justice and equity on which alone they can be founded. Custom is the best interpreter of laws, for by custom also laws themselves are abrogated.[4]

[1] 'Gloss on Brachylogus,' i. 6 2: "Consuetudinis Secundum Tullium consuetudinis jus esse putatur id, quod *voluntate omnium, sine lege*, voluntas comprobaverit. Item consuetudinis jus est quod aut leviter a natura tractum aluit et majus fecit usus, ut religionem vel si quid eorum quæ ante diximus, a natura profectum majus factum propter consuetudinem videmus, aut quod in morem vetustas vulgi approbatione perduxit Augustinus, frustra inquit, qui ratione vincuntur, consuetudinem nobis obiciunt, quasi consuetudo major sit veritate Hoc plane verum est, quia ratio et veritas consuetudini præponenda est sed cum consuetudinis veritas suffragatur, nihil oportet firmius retineri."

[2] Irnerius, 'Gloss on Dig.,' i 3. 40 (in Savigny, 'Geschichte des Romischen Rechts,' vol. iv chap xxvii note 49). "Quod constituitur tum lege, tum moribus, tum et naturæ necessitas induxerit, triplex jus esse constat."

[3] Irnerius, 'Gloss on Digest,' i. 3. 32 (in Savigny, 'Geschichte des Römischen Rechts,' vol iv. chap xxvii. note 49). "Loquitur hæc lex secundum sua tempora, quibus populus habebat potestatem condendi leges, ideo tacito consensu omnium per consuetudinem abrogabantur. Sed quia hodie potestas translata est in imperatorem, nihil faceret desuetudo populi"

[4] Irnerius, 'Summa Codicis,' viii 48 1: "Nunc de jure non scripto edisserendum est. Quem ad modum jus

Another exposition of the matter is given by Azo in a passage in his work on the Code, from which we have already quoted some words. He begins by inquiring what is *consuetudo*, and answers by saying that it is *jus non scriptum*, a body of unwritten, law made by the long custom of the people. How then, he inquires, are we to recognise it? and he gives these tests—the first, that it is received without contradiction; the second, that no complaint about it will be received in the law courts; the third, that the law courts have, after discussion and consideration, decided that this is the custom. Finally, he asks, what is the authority of custom? and answers that by custom laws are established, abrogated, and interpreted.[1]

It is clear, then, that these civilians all recognised that custom once had the force of law, but the passages which

scriptum auctoritate populi Romani nititur, imo ejus cui a populo hoc permissum est, ita jus non scriptum rebus ipsis et factis eodem judicio declaratur nihil enim interest, populus suffragio voluntatem suam declarat, an ipsis negotiis cotidie ex usu et consuetudine hoc ostendat Diuturni enim mores consensu utentium comprobati pro lege servantur Set in hoc differunt, quod jus scriptum nisi civitatis Romani non admittitur, jus autem consuetud inarium non solum urbis Romæ sed etiam cujusvis oppidi recipiendum est, dum tamen juri scripto non obviet Et quemadmodum jura scripta ad similia producenda sunt, ita et jura consuetudinaria ad exemplum trahenda sunt, et tam jus commune quam speciale ex consuetudine constitui potest, dum tamen illud diligenter intuetur, ne mali mores imitentur, item ne illud quod errore et non ratione inductum est, recipiatur. Et similiter non ratione(m) aut lege(m) vincere sciendum est Et sicut in jure scripto equitas et justitia premittenda est, ita in jure non scripto semper causa seu equitas quæ consuetudinem inducat inspicienda est Consuetudo etiam optima legum interpres est, nec non per consuetudinem quoque leges ipse abrogantur"

[1] Azo, 'Summa Codicis,' viii 53 1: "Videamus ergo quid sit consuetudo, et unde dicatur Et quidem consuetudo est jus non scriptum, moribus populi diuturnis inductum, ut Institut. de jur nat § constat (*Inst.*, i 2 3) . . . 5 Ex quibus dignoscitur esse inducta? Et quidam ex tribus præcipue Primum est, quia sic est obtentum sine contradictione Secundem quia libelli quærimoniarum de re tali non recipiebantur Tertium, si cum contradiceretur non esse consuetudinem, reprobata contradictione judicatum est esse consuetudinem 6 Quanta est consuetudinis auctoritas? Et quidem videtur quod consuetudo sit conditrix legis, abrogatrix, et interpretatrix, ut ff de leg. et senatus consulter, l de quibus, § ultimo, et l nam imperator (Dig., i 3 31 et 38) et Inst de jur. natura. § ex non scripto (Inst., i 1 12)"



we have quoted will have indicated that there was among them a difference of opinion on the question, whether custom still and always had this force. We shall best consider this question by proceeding to examine the theories of the civilians with respect to the source of political authority.[1]

[1] For a very admirable and detailed discussion of the theories of the civilians with regard to custom, cf. Professor Siegfried Brie, 'Die Lehre vom Gewohnheitsrecht,' Erster Theil, pp. 96-127.

# CHAPTER VII.

## THE SOURCE OF POLITICAL AUTHORITY.

In order to consider the theory of the civilians as to the source of the authority of law, and the place of custom in making law, we are compelled to extend the scope of our inquiry, and to ask what they thought as to the source or original fountain of political authority. We have to ask, first, with whom it was that originally there lay the power of making laws,—who were the original sources of political authority; and next, who was the actual lawgiver, the actual holder of political authority.

The great jurists of the Digest recognised one, and only one, source of political authority in the empire, that is, the Roman people, and the emperors themselves, as late as Justinian, acknowledged this as the true theory.[1] We want now to inquire what was the position taken up by the mediæval civilians down to the middle of the thirteenth century with respect to this theory, and the conclusions which they derive from it with regard to the nature of political authority. These jurists restate the theory of the *corpus juris*, but they do not merely restate it, they also discuss with some care the bearing of the theory on the political conditions of their own time.

We may find a convenient starting-point for our discussion by noticing a definition of the *universitas* and its functions which we find in the little treatise, 'De Æquitate,' which Prof. Fitting has edited, and has ascribed to Irnerius. It

[1] Cf. Digest, i. 3. 32. Gaius, Inst., i. 1. 7. Dig., i. 2. 2. Dig., i. 3. 1 and 2. Dig., i. 4. 1. Cod., i. 14. 4. Cod., i. 17. 7.



is the function of the *universitas*, that is, of the *populus*, says the author of this treatise, to care for the individual men who compose it, as for those who are its members, and hence it comes that it makes law, and interprets and expounds the law when made, since it is by the law that men are taught what they should do and what they should not do.[1] We may compare with this a gloss of Irnerius on Papinian's definition of *lex*, in which Irnerius treats the *populus* as being identical with the *respublica*, and says that the *populus* commands in virtue of the authority of the *universitas*, and undertakes obligations in the name of its individual members.[2] We may again compare with this an interesting phrase in that treatise on the fiftieth book of the Digest which Savigny identified as the work of Bulgarus. The author is commenting on a saying of Paulus, in which it is laid down that individuals are not allowed to perform those actions which belong to the public duty of the magistrate, lest this should prove the cause of disorder, and he explains this by saying that judicial authority has been established lest individuals should make laws for themselves; this power is reserved to the *universitas*, that is, the *populus*, or to him who represents (*obtinet vicem*) the *universitas*, as the magistrate does.[3] It is interesting to observe that we have here not only a statement of the supreme authority of the *populus*, but also of the doctrine that all magisterial authority is representative. These passages present a clear exposition

[1] Irnerius, 'De Æquitate,' 2: "Universitas, id est populus, hoc habet officium, singulis scilicet hominibus quasi membris providere. Hinc descendit hoc ut legem condat, conditam interpretetur et aperiat, quoniam lege prefinitur quod unusquisque sequi vel quid debeat declinare."

[2] Irnerius, 'Glosses on Digestum Vetus' (ed. E. Besta), Dig., i. 3. 1: "'Lex est' v. reipublica. Y. s. populi, quod unum et idem est re ipsa, secundum diversas inspectiones hec nomina recipit: populus universitatis jure precipit, idem singulorum nomine promittit et spondet."

[3] Bulgarus, 'Commentary on Digest,' L. 177, 176: "'Non est singulis concedendum, quod per magistratum publice possit fieri, ne occasio sit majoris tumultus faciendi.' Vigor judiciarius ideo est in medio constitutus ne singuli jus sibi dicant. Non enim competit singulis, quod permissum est tantum universitati, vel ei qui obtinet vicem universitatis, id est populi, qualis est magistratus: alioquin contingeret occasio majoris tumultus."

of the principle that the legislative authority of society is founded upon the natural relation between a society and its members, and that if this authority is intrusted to any particular person it is in virtue of some representative character in him.

These general conceptions find a concrete exemplification in the position of the Roman people, and of the Roman emperor upon whom the Roman people have conferred their authority. In the 'Summa Codicis,' which Professor Fitting has edited and attributed to Irnerius, we find a phrase analogous in its general conception to that which we have just quoted from the 'De Æquitate,' with regard to the relation of the *universitas* or *populus* to its members, but the phrase also transfers this principle to the case of the Roman State. The authority to make laws belongs, the author says, to the Roman people, and to the prince to whom the people have given this authority, for it is the duty of the people or the prince to care for the individuals, as those who are members and children of the State.[1] The Roman emperor exercises the legislative authority in virtue of the fact that the Roman people has given him authority; his action is that of a representative, or, as Placentinus, in a passage setting out the source of legislative authority, calls him, a vicar.[2]

We need not multiply citations to prove that the mediæval civilians, with whom we are dealing, have all accepted from the *corpus juris* the principle that the authority of the Roman emperor is derived from the grant of the Roman people. They not only repeat the phrases of the Digest or

[1] Irnerius, 'Summa Codicis,' i. 14. 3: "In condendis legibus spectandum est, a quo et quomodo condi debeant. Is quidem auctoritatem legis condendæ habet qui potestatem precipiendi habet. Ergo populus Romanus, ille immo cui a populo hoc permissum est: principes enim hanc facultatem habent. Nam populo seu principi hoc officium imminet ut singulis hominibus provideant ut filiis propriis seu membris."

[2] Placentinus, 'Summa Institutionum,' i. 2: "Quæri potest quare lex sicut cæteræ juris partes, non pluraliter, sed singulariter designatur, forte ideo quia populus ab initio communem potestatem habuit, et postea ab eodem in plures transfusa est, in principes, consules, prætores, imperatores. Principis placitum est imperialis sanctio, quæ per excellentiam vocatur constitutio, quod enim principi placuit legis habet vigorem, id est vicem, nam cum Imperator proprie sit vicarius ejus censura licet non sit lex, legis habet vigorem."



Code, but it is clear that they accept these as the foundation of their theory of political authority.

It is interesting to observe that Azo at least has explicitly applied this theory of the derivation of all authority from the people to the case of the Senate, while the jurists of the Digest can only be said to imply such a view. Both Gaius and Pomponius certainly seem to suggest that the legislative authority of the Senate rested upon the tacit if not expressed authority and consent of the whole people, but they do not directly say this.[1] Azo uses some authority which drew out the derivation of the authority of the Senate from the people in explicit terms, and relates how, when the people became very numerous, it was difficult to summon them for the purpose of making laws, and so the people elected one hundred senators, that they might take counsel on behalf of the people (*vice populi*), and ordered that whatever they should decree should have the force of law.[2]

We must now go a step further, and consider the theory of these jurists as to certain questions that arise out of these principles. The ancient lawyers, while stating that the people had conferred all their authority upon the emperor, do not expressly say whether, in doing this, they had renounced altogether their own authority, or whether they could possibly still exercise this either by direct legislation or by the force of custom. It is true that Justinian at least in one passage of the Code speaks of the emperor as being actually the sole legislator,[3] and that Constantine in the Code says that custom cannot prevail against law,[4] but how far these phrases represent the general judgment of the ancient jurists is uncertain.

[1] See vol. i. pp. 66-68.

[2] Azo, 'Summa Codicis,' i. 16: "Dictum est supra de legibus, quæ populo ejusque interventu fiebant: sed quia aucto populo in immensum, difficile cœpit esse convenire ad legem condendam, ideo elegit populus centum senatores, ut ipsi vice populi consulerentur: et quiquid statuerent, lex esset, ut Inst. de jur. scripto § senatus-consultum" (Inst., i. 2. 5).

[3] Cod., i. 14. 12: "Vel quis legum ænigmata solvere et omnibus aperire idoneus esse videbitur nisi is, cui soli legis latorem esse concessum est. Explosis itaque hujusmodi ridiculosis ambiguitatibus tam conditor quam interpres legum solus imperator juste existimabitur."

[4] Cod., viii. 52. (53.) 2: "Consuetudinis ususque longævi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem."

This is just the point on which our mediæval civilians differed or were doubtful: there were those who maintained that the people had in such a sense transferred their authority to the emperor, that they could not resume it, and that even the custom of the people had lost its authority in making and unmaking law, while others were inclined to hold that the people retained something of their old power, or at least the right of resuming it. On the one side we find, along with others whose names we cannot recover, Irnerius, in a gloss, Placentinus, and Roger, and on the other side Bulgarus, Joannes Bassianus, Azo, and Hugolinus, and their view again seems to have been supported by others whose names are unknown.

In one of the glosses of Irnerius on the Digest, which Savigny published, we have a comment on the saying of Julianus that custom has the force of law, makes and unmakes law (Dig., i. 3. 32). Irnerius urges that this was once true, but that the statement belonged to the time when the people had the power of making laws, but nowadays, when this power has been transferred to the emperor, the custom of the people can no longer abrogate law.[1] Placentinus is even more emphatic in his assertion of the view that the people have wholly parted with their authority. He describes "our law" as written and unwritten, but the latter, he says, cannot abrogate the former, for the people have transferred their authority to the prince and have reserved none to themselves, and he explains away the phrase of Julianus by saying that this only means that unwritten laws are abrogated by other unwritten laws—that is, one custom by another.[2] The judgment of Roger, in his commentary on the Code, is equally clear. He says indeed

[1] Irnerius, 'Gloss. on Dig.,' i. 3. 32 (in Savigny, 'Geschichte des Römischen Rechts,' vol. iv., chap. xxvii., note 49): "Loquitur hæc lex secundum sua tempora, quibus populus habebat potestatem condendi leges, ideo tacito consensu omnium per consuetudinem abrogabantur. Sed quia hodie potestas translata est in imperatorem, nihil faceret desuetudo populi."

[2] Placentinus, 'Summa Institutionum,' i. 2: "Jus autem nostrum, aliud scriptum, aliud non scriptum: non scriptum dicitur, quod moribus continetur, moribus inquam Romanò introductis et longævis, id est memoriam excedentibus: sed jus tamen istud jura scripta non abrogat ut C. de long. consuet. (Cod., viii. 52. (53.) 2). Nam populus in principem transferendo communem potestatem, nullam sibi reservavit, ergo potestatem leges scriptas condendi, interpretandi, et abrogandi. Nec obstat quod in ff. de jure (Dig., i. 3. 32) dicitur, leges moribus abrogari, sic enim intelligo leges non scriptas contrariis legibus non scriptis, id est moribus, tolli. . . . Lex est quod populus universus constituebat, ac si diceret: hodie non constituit nec destituit."



plainly that the legislative authority of the people preceded that of the emperor, and that it was from them that the emperor had received his authority; but this only brings out more clearly the fact that he maintains that "now" only the emperor and the man to whom the emperor has granted authority can make laws.[1]

We might have supposed from the confident tone of these statements that this was the only view generally current among the civilians in the twelfth and thirteenth centuries. When, however, we examine the literature more carefully we discover that some of them hold another tradition. The collection of "Dissensiones" of the great lawyers contained in the 'Codex Chisianus' includes a very elaborate discussion of the relations of Custom and Law, and of the effect upon the authority of Custom of the terms under which the people created the emperor. Some writers are mentioned as maintaining that no custom can override the written law, and this for the special reason that the prince is now the sole legislator, while some are mentioned as maintaining that only a universal custom which is approved by the prince can override written law. But on the other hand there are cited the views of some who maintained that either generally, or in certain cases, custom still prevailed against law. Some are cited as maintaining that customs which are contrary to law are to be observed when they are of such a nature that they could be confirmed by an

[1] Roger, 'Summa Codicis,' i. 12: "Ideo primum posuit de legibus quam constitutionibus, quia primum condite fuerunt leges a populo quam ab imperatore, cum dictum sit quod populus transtulit ei et in eum potestatem omnem: sic ergo inspexit ad originem potius quam ad dignitatem. . . . In condendis legibus inspicitur qua de causa sint condende, qua in re sint condende, et qualiter sint condende, in qua vi et potestate sint condende. Causa: veluti si novum negotium emergat, quod non sit lege decisum; quam olim populus habuit potestatem vel cui populus concedebat, nunc solus imperator vel cui imperator concedit."

agreement or contract, for custom is nothing but a tacit contract, but not otherwise. Others again are said to hold that a written law which has been ratified by custom cannot be abrogated by custom, but if the written law has not been ratified, then custom can in some cases render the law void. Others again held that a good custom can abrogate law, but not a bad one. More important, however, is the opinion of those who maintained that, while the custom of the people, which has grown up through their ignorance of the law, cannot override the law, that custom which the people have deliberately adopted in contradiction to the law does amend it; and again, the view that while a merely local custom cannot override the law, the universal custom of the people of the whole empire does this.[1] It is clear that the civilians

[1] Dissensiones Dominorum, 'Codicis Chisiani Collectio,' 46. "Differunt Quidam dicunt quod nulla consuetudo juri contraria, sive sit generalis sive sit specialis, abrogat vel derogat legi scriptæ, arg Dig (xlvii. 12 3 5) et hoc dicunt maxime ea ratione, quia solius principis est hodie condere legem intelligendam ita et solius est ejus, hodie legem intelligere Dicunt legem vero scriptam juri contrariam consuetudinem abrogare et sic, ubi invenitur, consuetudinem tollere, nam est lex scripta et ejusmodi lex non scriptam tollit Sed quod dicitur 'aut legem tollit aut rationem' ut Cod (viii 52. (53) 2, respondent consuetudo non tollit legem scriptam cum ratione, ut Cod (vi 2 22 § fin) veluti quum res viro commodata est et eam uxor surripuit, non teneatur uxor furti actione, scilicet ne aliqua causa seditionis oriatur Plac Alii autem dicunt, consuetudinem juri contrariam demum servari debere, quæ pacto expresso potest confirmari · nihil enim aliud est consuetudo quam tacitum pactum ut Dig. (i 3 35) Dicunt ergo, in hoc casu consuetudinem non vincere legem, in quo pactum expressum non admittitur, veluti ut partus non matris sed patris sequatur conditionem, nec consuetudo ut pote tacitum pactum observatur Al (Albericus). Item argumentum pro hoc est in Cod (iv. 32 26) et Cod (v 20) Sed respondent quod expressim hoc cavetur in lege Alii autem distinguunt, an consuetudo juri contraria sit generalis, vel specialis ut, si sit generalis, quæ ab omni populo imperii observatur indistincte, et per eam scripta lex abrogatur, et dicunt, senatum posse hodie condere legem et abrogare Si vero consuetudo specialis sit, puta alicujus municipii vel civitatis, distinguunt, si sit communi consensu utentium comprobata, quod potest adparere, si talis consuetudo sit aliquando contradicto judicio confirmata, alias vero non vincit sed vincitur. Nec obstat, quod in Dig (xlvii 2. 3, 5) dicitur quia scripta principalia post contrariam municipii legem latam fuisse intelligitur. Item sententiam illam, quæ prima facie videtur mulcere aures audientium, scilicet, nec consuetudo juri contraria eo casu admittatur, in quo pactum expressum contra leges valet, dicunt omnino reprobandam. Quum enim consuetudo omnes teneat etiam infames et furiosos, et omnes omnino et qui pacisci non possunt,



who are referred to, unfortunately only occasionally by name, were greatly divided; that while there were some who held that the Roman people had completely transferred their authority to the emperor, there were others who maintained that the Roman people had always reserved to themselves the authority which they had exercised through their custom.

In the works of Azo, and specially of Hugolinus, we find these positions drawn out more completely, and the conclusions which might be founded on them more explicitly stated. Azo discusses the question of the force of custom in commenting on that rescript of Constantine which we have just cited. What, he asks, is the authority of custom? It makes, it abrogates, and it interprets law, and he cites Dig., i. 3. 32, 33 and Inst., i. 2. 9. There are however, he adds, certain persons who maintain that the true principle nowadays is represented by the phrase in Constantine's rescript, and that all power has now been transferred by the people to the prince; or again such persons maintain that the principle of Dig., i. 3. 32,

constat, ipsam non esse tacitum pactum, nam si esset, obligaret eos, ut Dig. (xix 2 14) et Dig. (xlvi. 8) et Dig (xxxiii 5 8, 2) Arg contra, Dig (xxiv 3. 2) Ib (Joannes Bassianus) Alii dicunt, generalem dumtaxat consuetudinem, et eam solam quam princeps patitur, vincere legem Iudices, quum judicant, necesse habent parere legis auctori, id est, principi magis, quam auctori specialis consuetudinis et populo cujusque civitatis vel municipii Alii dicunt vero, si lex scripta sit approbata consuetudine, tunc non posse vinci consuetudine, sin autem nondum erat adprobata consuetudine arg pacti quod consensu solo contrahitur, contrario dissensu dissolvitur, si statum sit in finibus pacti. si ultra esset processum non solo consensu dissolvitur, si statum sit in finibus, rescinditur. Sic de lege, quum sit consuetudine adprobata, quasi duplici auxilio munita Alii dicunt consuetudinem bonam vincere legem, malam consuetudinem non vincere legem. Alii autem dicunt, quod si populus sciens utatur contra legem, tollitur lex, si vero ignorans, non tollitur, quia magis errare creditur. Sed secundum hoc melioris conditionis sunt delinquentes, quam innocentes Sed quare generalis observatur ubique, specialis saltem in eo loco, ubi non est inducta, non est observanda Respondent, quia generalis princeps est auctor, unde parere necesse est. Specialis autem consuetudinis auctorem esse populos cujusque civitatis seu municipii, cui parere nemo de jure adstringitur, et hoc probat Al. (Albericus) Sed quæritur si homines diversarum provinciarum quæ diversas habent consuetudines, sub uno eodemque judice litigant, utram earum judex, qui judicandum suscepit, sequi debeat? Respondeo eam, quæ potior et utilior videtur, debet enim judicare secundum quod melius ei visum fuerit. Secundum Aldri (Aldricum)" Cf. Accursius, Gloss on Cod, viii 52 (53), "Aut legem," and Gloss on Dig, i. 3. 32, "Abrogentur."

only applied to the case of customary laws, which could be overriden by custom, or to the authority of a general custom which had the sanction of the prince. We must, he adds, be careful to consider whether a law which is opposed to a custom, followed or preceded it; in the former case, the law will override the custom, in the latter the custom will override the law.[1] The discussion is very much on the same lines as that of the 'Codex Chisianus,' but it is fairly clear that Azo himself looks upon the custom of the Roman people as still possessing the force of law. His meaning in this passage finds its best comment in another passage of his work on the Code, in which he discusses the nature of law, and the persons by whom law can be made. He mentions first the emperor, who is to make law with the advice of the *proceres sacri palatii*, and of the Senate; then the Prætorian Prefect, and those persons to whom the emperor gives this authority; finally, he adds, perhaps even to-day the Roman people can make law, for though its authority has been transferred or conceded to the emperor, this does not mean that the people has wholly abdicated it: once before, the people transferred their authority, but afterwards they resumed it.[2]

[1] Azo, 'Summa Codicis,' viii. 53. 6, Rub., Quæ sit longa consuetudo: "Quanta est consuetudinis auctoritas? Et quidem videtur quod consuetudo sit conditrix legis, abrogatrix, et interpretatrix, ut ff. de leg. et senatus cons. l. de quibus, § ultimo, et l. nam imperator (Dig., i. 3. 32 et 38) et Inst., de jur. nat. § ex non scripto (Inst., i. 2. 9). Sed quidam dicunt quod illæ leges antiquæ sunt, hodie contra, ut j. eo. l. consuetudinis (Cod., viii. 52. (53.) 2). His enim legibus translata erat omnis potestas in principem. Vel ibi loquitur de eo, quod civitas sibi constituit per consuetudinem, namque ea vel lege scripta vel contraria consuetudine tollitur: lex autem scripta, tantum lege scripta. Vel ibi loquitur de generali consuetudine, id est quam princeps patitur, quæ ex certa scientia inducta videtur: hoc de speciali alicujus loci, quæ legem non abrogat, etiam si ex certa scientia sit inducta: licet in eo loco servetur, ut ff. com. præ. l. venditor § si constat (Dig., viii. 4. 13, 1). Sed contra videtur ut ff. de sepul. viol. l. iii., § divus (Dig., xlvii. 12. 3, 5). Sed distingue, utrum lex sequatur consuetudini, cui ipsa est contraria, an præcedat. Si lex sequatur, quia posterior est, derogat consuetudini, quæ præcessit: alioquin legi consuetudo derogat: nisi lex consuetudinem prohiberet admitti, ut in usuris habemus. Si vero per errorem inducta esset: nec in eo loco legi derogaret: licet quidam contradicant, qui aliter, quam nos, casum illius legis, ff. de legi, et senatus l. quod non ratione (Dig., i. 3. 39) ponunt; sicut ibi notavimus."

[2] Azo, 'Summa Codicis,' i. 14. 8, Rub., De leg. et const. princ. "A populo autem Romano forte et hodie potest condi lex, ut ex prædicta definitione legis patet, licet dicatur potestas translata in principem, ut j. de vet ju. enuc. l. l. § hoc etiam (Cod., i. 17. 7). Dicitur enim translata, id est concessa, non quod populus omnino a se abdicaverit eam, sic et ponitur ff. de offi. ejus cui manda. est jurisdict. l. j. § qu mandatam (Dig., i. 21. 1, § 1). Nam et olim transtulerat, sed tamen postea revocavit, ut dicitur, ff. de ori. juris; l. 2, § exactis, et § quid ad magistratus, et § et cum placuisset (Dig., i. 2. 2. 3, 14, 24)."



This is a passage of much importance: it goes indeed much further than the theories about the enduring importance of the custom of the Roman people which we have so far considered; it carries much further the conception that all political authority ultimately rests with the people. It is certainly of great importance to find an eminent civilian like Azo maintaining that the Roman people had not irrevocably surrendered its authority, and might perhaps resume it again, as it had done before.

Azo's position would be interesting, even if he stood alone, but his conception of political authority has a much greater interest when we observe that Hugolinus, a pupil, along with Azo, of Joannes Bassianus, holds the same principles, but expresses them with more confidence and emphasis. In his 'Distinctiones' he discusses the relation of law and custom in terms which are in large measure similar to those of the passage we have quoted from the 'Codex Chisianus'; but he also expresses with great clearness his own judgment on certain questions arising out of this. Placentinus, he says, had maintained that custom could not abrogate written law, and had interpreted the passage from Julianus in Dig., i. 3. 32, as referring only to those ancient days when the people had full power to make laws, and held that after they had transferred their authority to the emperor, they had ceased to possess this. Hugolinus himself bluntly and emphatically contradicts this, and maintains that the Roman people never transferred their authority to the emperor in such a sense that they ceased to possess it, while the position of the emperor, he maintains, is that of a *procurator ad hoc*. He adds the very important information that Bulgarus and Joannes Bassianus had taught that a universal custom abrogates law, and that even the local custom of a particular city

does so within that city, if the custom has been adopted knowingly or deliberately.[1]

We have, then, in Azo and Hugolinus, drawn out in explicit phrases the principle which underlies the theory of the enduring force of custom in making law,—the principle, that is, that the Roman people continued, at least in some sense, to be what they had always been, the source of all legislative authority, of all political power. It is, indeed, impossible, on the evidence before us, to determine whether this judgment was more or less widely held than that which maintained that the Roman people had completely transferred their authority to the emperor, and that even their customs had ceased to have authority. We have cited passages which show that this was maintained by Irnerius, Placentinus, and Roger; but against these must be set the names of Bulgarus and Joannes Bassianus for the continuing legislative authority of custom, and of Azo and Hugolinus as holding that the Roman people had never parted with their authority in such a sense that they could not resume it.

It would seem, then, to be clear that as late as the middle of the thirteenth century the civil or Roman lawyers were unanimous in holding that the *populus* was the ultimate source of all political authority, that they recognised no other original source of political authority than the will of the whole community. In the first volume of the work we have endeavoured to show that this was the principle of the ancient Roman jurisprudence; the mediæval civilians not only inherited these phrases, but understood and even developed the principles of the ancient law, for, as we have seen, they not only held that the *universitas* or *populus* is the source of law, but some of them at least recognise that this is the natural result of the relation between a society and its members. We have just seen that some of these civilians also maintained that the Roman people still continued to be the actual source of all political authority, that their custom still both made and unmade law, and that as they had once delegated their authority to the emperor, so they might, if occasion arose, resume that authority.

[1] Hugolinus, 'Distinctiones,' Dist. 148. 34: "Secundum Placentinum per consuetudinem numquam legi scriptæ derogatur et quod dicitur Dig. (i. 3. 32), intelligendum est secundum vetera jura, quum populus habebat plenam potestatem condendi jura: sed postquam transtulit omne jus in imperatorem, non potuit. Sed certe non transtulit sic, ut non remaneret apud eum, sed constituit eum quasi procuratorem ad hoc. . . . Secundum B. (Bulgarum) et Jo. (Joannem) distingue an consuetudo sit generalis, et tunc abrogat legem, an particularis, et tunc si est inducta ex certa scientia, derogat legi, in ea civitate, in qua est inducta, sed alibi non, et sic loquitur C. (viii. 52. (53.) 2), licet secundum P. (Placentinum) principium loquatur in ea consuetudine quæ est secundum legem, finis in ea quæ est contra; sed hoc litera non patitur."



There remain some interesting and important questions as to the theory of the civilians with respect to the mode in which the emperor was to exercise the authority intrusted to him by the people, and as to the extent of this authority. And first, we inquire into their theory as to the method of legislation by the emperor. Here again we find a sharp division of opinion, some maintaining that the simple letter or rescript of the emperor has the force of law, others that the emperor had to go through certain forms, and to obtain the assent of certain persons before he could promulgate a new law. This division of opinion arises directly out of a difference as to the interpretation and the permanent authority of certain passages in the Code.

The 'Libellus de Verbis Legalibus' defines a "Pragmatic Sanction" as a new constitution devised by the Senate, and bearing upon some new and difficult question submitted by the emperor.[1] This definition only refers to one particular form of imperial legislation; but it is suggestive to find that, in the view of the mediæval civilians, the Pragmatic Sanction required the advice or authority of the Senate. When we turn to Irnerius we find him laying down a general principle

[1] 'Libellus de Verbis Legalibus,' 21: "Pragmatica sanctio est novi negotii nova constitutio a senatoribus inventa quæstione difficili super hujusmodi ab imperatore sibi proposita." Cf. Azo, 'Summa Codicis,' i. 23. 7: "Pragmatica sanctio, quod consilio procerum statuit et sanxit, nec indulgetur super privatis negotiis singularum, sed universitatum, ut j. eod. l. ult. § ultimo" (Cod., i. 23. 7, 2).—There is no reference in this passage of the Code to the counsel of the "proceres."

of great scope and importance. In a passage, of which we have already quoted a part,[1] he discusses the question by whom and by what process laws are to be made, and says that laws are made by the Roman people, or by that person to whom the Roman people have given their authority; while the manner in which laws are to be made is defined by the constitution of Theodosius and Valentinian—that is, they are to be first considered by the chief men of the court, and especially by the Senate, and after that they are to be promulgated. This, Irnerius adds, is the true method of legislation, for law is an ordinance of the people, promulgated with the advice of the wise men of the community.[2]

It is very important to notice that this principle is maintained by Irnerius, and that several civilians follow him. Roger is very clear and emphatic in asserting this view, and says that, in making laws, the emperor is to follow the forms prescribed by the constitution of Theodosius and Valentinian.[3] Azo has discussed the matter very fully, and is equally clear. He first defines the nature of the constitution of this prince, distinguishing between this and the edictum, and then asks by whom these imperial laws are to be made. He answers that they are to be made by the emperor, with the council of the notables of the sacred "palatium," and in the assembly of the senators. A law is to be considered twice, and finally, if all agree, it is to be read in the sacred "palatium" or consistory, that it may be confirmed and promulgated by the prince.[4]

[1] See p. 58, note 1.

[2] Irnerius, 'Summa Codicis,' i. 14. 3: "In condendis legibus spectandum est, a quo et quomodo condi debeant. . . . Quomodo condendæ sint, hoc designat constitutio Theodosii et Valentiniani missa ad senatum (Cod., i. 14. 8). Aliter enim hodie leges confici non debent nisi secundum tenorem ejus constitutionis. Jubet enim leges non aliter promulgandas esse, nisi causa necessaria hoc exposcat et antiquis sanctionibus non inserta. Et hoc faciendum est, causa in auditorio a proceribus discussa, maxime a senatoribus, et cum eorum consilio ordinata. Et hoc recte, quia lex est constitutio populi cum virorum prudentium consulto promulgata." Cf. Dig., i. 3. 1.

[3] Rogei, 'Summa Codicis,' i. 12: "In condendis legibus inspicitur qua de causa sint condende, qua in re sint condende, et qualiter sint condende, in qua vi et potestate sint condende . . . Qualiter sicut constitutio Theodosii et Valentiniani exprimit sibi enim imponit formam constituendi."

[4] Azo, 'Summa Codicis,' i. 14. 2: "Constitutio vero principis, et edictum, legis partes sunt, ut lex largo modo intelligatur; et ita large positum esse in rubrica dici potest. Differt etiam constitutio principis ab edicto principis quia constitutio principis potest esse generalis et specialis, ut ff. de const. princip. l. 1 § hæc sunt, et § plane (Dig., i. 4. 1). Edictum vero principis est jus generale statutum, ut j. eo. l. in (Cod., i. 14. 3). Nec incompetenter species post genus supponitur, ut diximus, ff. de hæred. et ma. A quo debent condi? et quidem ab Imperatore cum consilio procerum sacri palatii, et cœtu honestissimo senatorum, qui erant centum numero; et dicuntur patres conscripti, Patres, vel ætate, vel similitudine curæ, ut ait Sallustius, et conscripti, quia Imperator eorum nomina habebat scripta in diademate capitis sui. Delegatur autem lex primo alicui dictanda, et dictata recensetur, id est iterum interrogatur an sit æquum ita censeri: et si tandem consentiant omnes, recitabitur in sacro palatio vel consistorio, ut confirmetur per principem, et per populos jussu principis divulgetur."



We must, however, notice that the view of Bulgarus is quite different. In a gloss on Cod., i. 14. 3, he says that there were some who wished to conclude from this constitution that the Lombard law was no law at all, inasmuch as it was not issued with this procedure: Bulgarus himself emphatically repudiates this conclusion, and maintains that Theodosius could not impose a law on the emperors who succeeded him, but could only give them his advice; the formalities, therefore, prescribed by the constitution of Theodosius and Valentinian need not be observed.[1]

Clearly there was a division of opinion among the civilians, but it is extremely interesting and important to observe that some of the most important among them should have so dogmatically held the view that the legislative authority of the emperor could only be exercised with the counsel and consent of the Senate. It would seem probable that the civilians may have been influenced by the general constitutional principle of the new Teutonic States, but it is also interesting to observe the continued or revived influence in the West of these clauses of the fourteenth title of the first book of the Code. There does not appear, as far as we can find, to be any very careful discussion of the significance and importance of these rescripts of Theodosius and Valen-

[1] Bulgarus, 'Gloss on Cod.,' i. 14. 3 (in Savigny, 'Geschichte des Romischen Rechts,' vol. iv., chap. xxviii., note 51) "Quidam sunt, qui ex hac lege inferre volunt, legem Langobardorum non esse legem, quoniam hac forma facta non est quibus non consentio, non enim Theodosius potuit facere legem secuturis Imperatoribus, potius consilium est quod ista lex dicit, ergo impune prætermitti potest C."

tinian. It would seem as though they were intended in some measure to revive the legislative functions of the Senate. It seems to be clear that Justinian did not regard them as in any way binding upon him,[1] and it would seem that the attempt to revive the functions of the Senate had little immediate effect; but it is possible that these rescripts may have exercised a greater influence in the West than we are at present aware of. It is worth while to observe that the "Dissensiones Dominorum," contained in the 'Codex Chisianus,' indicate that certain civilians maintained that the Senate still possessed the power of making and abrogating law.[2]

Some of the civilians then maintained dogmatically that the emperor or prince had no arbitrary authority in legislation; it is important to observe that some at least of the civilians maintained that his authority was always in some measure limited by the law. Azo discusses the question how far the emperor could issue rescripts or *privilegia* contrary to the law, and says that such *privilegia* are invalid if they do serious injury to any one, unless the emperor inserted a *non obstante* clause: he adds that it must not be assumed that the prince intended to act against the law, unless he definitely said so, inasmuch as at the beginning of his reign he swore to observe the laws.[3] We may perhaps here again trace the influence of contemporary and traditional Teutonic custom on the civilians.

There is an interesting discussion of the question of the limitation of the emperor's authority in the 'Questiones Juridicæ' of Pillius, a civilian of the latter part of the twelfth century. The particular point discussed is the question whether a sentence given by the emperor in an appeal case would be valid if both parties to the case had not been summoned to

[1] Cf. Cod., i. 14. 12, 4 and 5.

[2] 'Dissensiones Dominorum,' 'Cod. Chis. Coll.,' 46: "Et dicunt senatum posse hodie condere legem et abrogare." Cf. for the whole passage, p. 62, note 1.

[3] Azo, 'Brocardica,' Rub. xxxi.: "Idem dicendum est si simile sit his quæ dicuntur posse impetrari, non aliter tenet; nisi vel non lædat alium valde . . . nisi in rescripto supponat princeps, non obstante lege illa quæ dicit ita . . . non enim præsumitur quod voluerit, et si sciat contraria, et maxime, quia in principio suæ creationis jurat de consuetudine, se observaturum leges."



appear. Pillius first gives the reasons for holding that such a judgment would be valid, and enumerates some of the most noteworthy examples of the authority of the prince: he can emancipate a slave, he can make the freedman *ingenuus*, he can legitimatise a bastard, he can ennoble a man of humble station, he can make a rich man poor; the emperor can make law, can amend it, can abolish it, can interpret it; if he can do all these things, who can really doubt that he can give judgment without summoning both parties to a case. Further, every secular power is inferior to him,—who then can discuss his judgment? certainly not his inferiors; and, even if you could find an equal to the emperor, he could not annul his sentence, or even take cognisance of it. On the other hand, it is contended, Pillius says, that the judgment of the prince under such circumstances is invalid, for there are many things that he cannot do; for instance, he cannot annul a sale, or a testament, or a donation, he cannot confer a monopoly, he cannot enact anything contrary to *jus* and *lex*. If he cannot do any of these things, much less can he act in a manner so contrary to legal order as to give judgment without hearing both sides. Pillius concludes by giving his own opinion, which is very cautious; he holds that no judge can set aside the sentence of the prince, but that the prince himself should correct it.[1] Pillius has carefully balanced the arguments for

[1] Pillius, 'Quæstiones Aureæ,' Q. 43: "Summarium—an sententia appellationis per Imperatorem lata, parte non citata, valeat?"

"Cum quæstio vertitur inter Jacobum et N., victus Jacobus ad Imperatorem appellavit. Tandem volens suam prosequi appellationem, adivit Imperatorem; Imperator vero non requisita altera parte, priorem cassavit sententiam, et pro Jacobo judicavit. Quæritur utrum nunc talis sententia valeat, quæ non requisita parte adversa, lata est, proponitur actio vel exceptio judicati.

Quod valeat sententia.

Quod actio in factum judicati, vel exceptio locum habeat ex principali sententia, manifesta ratione potest probari: Imprimis propter ipsius principis privilegia, quæ varia sunt et immobilia, sed pauca numerari sufficiant. Ecce enim de servo potest facere liberum . . . de libertino ingenuum, . . . de bastardo legitimum . . . de divite pauperem, . . . de humili nobilem . . . de famoso infamem. . . . In summa, legem potest facere, corrigere, tollere, interpretari . . . igitur hæc et omnia et alia infinita Imperator cum possit, quis dicit omni altera parte irrequisita, quod non possit dare sententiam? Ad hæc, omnis potestas secularis est eo inferior, quis ergo de ejus judicio disputabit? Numquid inferiores et subditi? Absit. . . .

and against the limitation of the imperial authority; for us it is important to recognise that the question of the limitation of the imperial authority was discussed in the law schools.

There remains one aspect of the theory of the imperial authority in these civilians which we must consider—that is, the theory of the relation of the emperor to private property. Savigny has put together the traditions as to the differences among the Bologna doctors when consulted by Frederick Barbarossa, about the imperial rights over private property, some of them maintaining that the emperor was

Immo et si reperiretur æqualis, non tamen posset eius sententiam irritare, vel de ipsius sententia cognoscere. . . . Præter hæc allegatur, quia licet aliter debuit ferri, lata tamen non debet irritari. . . .

Ex adverso.

Et ut tollantur contraria contrariis allegationibus excipit N. et dicit nullam fere sententiam etiam a principe latam, et posse infirmari . . . numquid transactionem ? . . . numquid venditionem ? . . . numquid testamentum ? . . . numquid obligationem ? . . . numquid donationem ? . . . Item numquid tributorum immunitatem concedet ? . . . numquid monopolium ? . . . numquid pœnam liberto remittet ? . . . numquid dignitatem amissam restituet ? . . . numquid indigno dignitatem concedet ? . . . numquid contra jus vel legem aliquid statuet ? ut C. de precib. imper. offer. l. rescriptum (Cod., i. 19. 7). Numquid injustam postulationem admittet ? Numquid injustas nuptias concedit ? . . . numquid spurium legitimum faciet ? . . . Cum ergo nihil horum possit facere Imperator, multo minus juris ordinem perturbando, non requisita parte adversa, potest ferre sententiam. Imperator enim utitur jure communi, ut C. de legibus, l. digna vox. (Cod., i. 14. 4) et C. ad l. Falc. l. et in legatis (Cod., vi. 50. 4). Item numquid Imperator debet facere, quod ne fiat, tenetur defendere minime. . . . Præter hæc non quilibet alius judex possit hoc facere sequendo principis exemplum ? . . . Ad hoc videtur illicite extortum, damnandum esse, unde nullum extortum debet adferre emolumentum, præsumendum est enim, quod per falsam suggestionem appellantis potius hoc fecerit, quam ex certa scientia, nec enim verisimile est Principem Romanum quicquam illicite agere. . . . Adhuc occurrit facti irregularitas, quæ totum factum infringit. . . . Et ut breviter et succincter peroretur, respondeat objectis adversarius. Nonne in lege continetur quod statuta contra absentes non legitime citatos, nullius debent esse momenti ? . . . nec ibi distinguitur persona statuentis, ergo qualiscumque fuerit, debet irritari quod gestum est. . . .

Solutio.

Mihi videtur sine præjudicio melioris sententiæ; Principis sententiam a quoquam judice infringi non posse, sed per ipsummet debere in melius reformari, ut ff. de minor. l. minor autem § si autem princeps (Dig., iv. 4. 18, 1)."

With this should be compared a similar discussion in Hugolinus, 'Diss. Dom.,' 5.



really the lord of all property, while others denied this.[1] It is clear that there was much difference of opinion among the civilians of the twelfth and thirteenth centuries with regard to the subject. The earliest discussion of the matter which we have found in this period is contained in Irnerius' 'Summa Codicis'; according to the text which Professor Fitting considers to be the original, he holds a clear and decided opinion upon the subject, and maintains that any person who accepts from the prince property which belongs to another man may be compelled to make restitution: no rescripts, he adds, procured by fraud, or contrary to the law, or injurious to others are to be received; they are in error who maintain that the prince can seize a man's goods and give them to another, without due cause—such a proceeding is condemned by the law of the courts and of heaven.[2]

It is a curious thing to find that a Bologna MS. of this same work has a wholly different text in this passage, and seems to represent a defence of the view that the emperor can take a man's property and give it to another.[3] Professor Fitting has suggested that this text represents a modification of his original view by Irnerius himself, in consequence of his being in the imperial service.[4] However this may be,

[1] Savigny, 'Geschichte des Röm. Rechts, &c.,' chap. xxviii. 3. Cf. Accursius, 'Gloss on Cod.,' vii. 37. 3, "Omnia principis."

[2] Irnerius, 'Summa Codicis,' vii. 27. 3: "Sin autem aliquis sciens rem alienam esse et ex nulla justa causa a fisco vel a principe accipiat, nulla ratione se tueri potest quominus rem restituat cum omni causa, ne inde injuriarum sumatur occasio a quo jura initium sumpserunt. Alteri (enim) damnosa nec juri contraria impetranda sunt nec indulgenda sunt, quia rescripta per fraudem elicita seu contra jus vel alii damnosa modis omnibus refellenda sunt. Et ideo errant qui dicunt principem res alienas auferre posse et alii sine causa dare, ex quo forense et celeste jus contrarium clamat."

[3] Irnerius, 'Summa Codicis' (Bologna MS.) vii. 27. 3: "Si quam habet rationem integram (actionem, integra) ejus reservatur persecutio. Hoc autem verum est, sive imperator sive qui accipit sciant rem alienam esse sivenit (sive non). Merito enim nostra facimus, cum a nobis omnis (cum ea nobis summa) impertitur auctoritas. Nam et agitur veteram (agri veteranis) assignantur. Agnorum (ac verum) dicimus quandoque non justo, quandoque etiam nullo precio assignato, imperatoris auctoritate quod alias iniquus esset ad jus et equitatem redigente."

(We give this text as quoted by Professor Fitting, and with his suggested emendations.)

[4] Irnerius, 'Summa Codicis,' pp. lx. and lxxxix. Cf. Irnerius, 'Quæstiones de Juris subtilitatibus' (ed. Fitting), p. 43.

these texts will serve as illustrations of the diversity of opinion among the civilians upon this subject. We find the matter further illustrated in the collection of the "Dissensiones" of the early jurists. In the collection made by Hugolinus, some jurist is reported to have said that the emperor could transfer one man's property to another.[1] In the similar collection made by Roger, he states that some maintained that the prince could alienate a man's property whether he knew that it was the man's and not his own, or was ignorant of this, and that this was founded on Cod., vii. 37. 3, but adds that Jacobus, one of the four doctors, the immediate successors of Irnerius in Bologna, maintained that this law was only applicable to cases where the emperor was ignorant that the property was another man's.[2] Another collection cites Martinus, also one of the four doctors, as agreeing with Jacobus.[3] Azo discusses the question in his 'Brocardica,' and agrees with Martinus and Jacobus, but also holds that the emperor can make grants of that property which is in part his, and even of that in which he has no share, if this is for the benefit of the State and the public utility demands it.[4]

[1] Hugolinus, 'Dissensiones Dominorum,' 5: "Si quidem imperatori licet perpetuam exceptionem indulgere, ut D. (ii. 2. 3. 3), licet quoque servum liberum constituere, ut D. (i. 14. 3), potest etiam rei alienæ dominium transferre, ut C. (vii. 37. 3)."

[2] Roger, 'Dissensiones Dominorum,' 50: "Dissensus est inter eos in alienatione facta a principe. Nam quidem dicunt, sive imperator scivit, rem esse alienam, sive ignoravit, illud obtinere quod dicit C. (vii. 37. 3). Jacobus dicit, illam legem loqui: quum ignoraverit."

[3] 'Dissensiones Dominorum,' 'Vetus Collectio,' 71: "Nam quidam dicunt, sive imperator scivit, sive ignoravit, rem esse alienam, illud obtinere, quod dicit C. (vii. 37. 3), Martinus et Jacobus illam legem loqui dicunt, quum ignoraverit."

[4] Azo, 'Brocardica,' Rub. xciii.: "'Imperator potest omnia donare'—Hoc si donat rem alienam ut suam, ut C. de quad. præsc. l. 2 and l. bene (Cod., vii. 37. 2 and 3). Alioquin non potest, nisi ratione partis, ut Cod. de vend. rer. fisc. cum pri. ca. l. i. (Cod., x. 4), si enim etsi non habeat partem, alienar posset, pro nihilo dicerit ibi, ratione partis. Imo alienare, donare potest, et si nullam partem ibi habeat: si hoc tamen reip. expediat. Arg. C. de sacros. Eccles. Auth (Cod., i. 2. Authentic after 14), sed et permutare. Sicut rem ad alicujus instantiam, Cod. de loc. præ. ci. l. ult. (Cod., xi. 71. (70.) 5). Intelligas, si hoc publica utilitas exposcit."



If we attempt to sum up our impression of the theory of political authority which was held by these civilians, we are led to the conclusion that the conception of the revived study of the Roman law as unfavourable to the progress of political liberty, while it may contain some elements of truth, requires at least very considerable qualification—at least, so far as its influence in the twelfth and early thirteenth centuries is concerned. We have seen that these civilians are unanimous in recognising that the people is the only ultimate source of political authority and of law. This was not indeed a conception strange to the Middle Ages, for the normal conception of the new Teutonic States was that law and political authority proceeded from the nation as a whole; but while the conception was not strange, it was probably a thing of much importance that the representatives of the legal traditions of the ancient civilisation should have held the same principle as those who represented the new order. It is quite true that a section of the civilians held that the people had wholly parted with their original authority, and that some of them attributed to the emperor the possession of an almost unlimited authority; and so far it is true to say that the influence of the revised Roman law was unfavourable to the progress of political freedom. But against this must be set the fact that some of the most important of these jurists held very different principles—that some of them maintained that the legislative authority of the people had never been transferred to the emperor in such a sense that they had wholly and for ever parted with it, but that rather the people might at any time resume the authority which they had bestowed; while some of them also maintained that the emperor possessed no unrestricted authority—that his legislative functions could only be exercised with the advice of the Senate, and that he possessed no unlimited power over the property of his subjects.

# CHAPTER VIII.

## THE THEORY OF THE RELATIONS OF THE ECCLESIASTICAL AND SECULAR POWERS.

THIS subject presents considerable difficulties; for though these civilians furnish us with a considerable amount of material for the discussion of details, they do not discuss the general theory of the relations of the two powers. This arises from the fact that they do not often travel outside the scope of the law books of Justinian; and these, while also furnishing much information on details, do not contain any clear statement of the theory either of the spheres or of the relations of the two powers.

The lawyers, as we have endeavoured to show, are clear as to the nature of the authority of the civil law—that is, that it represents those principles of justice which ultimately have their fountain and source in God Himself; while the immediate and direct source of authority in political society is the people, or the person or persons upon whom the people have conferred their authority. The system of the secular order is, then, in their minds sacred, fulfilling as well as may be, under the terms of the actual conditions of the world, the purpose of the final justice of God Himself. We may find a formal expression of this conception in certain phrases of these writers. John Bassianus, the master of Azo and Hugolinus, in commenting on the 'Novels,' says that God established the emperor upon earth in order that by him, as by a "procurator," he might make laws suited to circumstances as they arise, and that the emperor might



thus benefit his subjects.[1] Again, Hugolinus, after beginning his work on the Digest with the invocation of the Holy Trinity, says that the fear of God is the foundation of law, which is in its turn the foundation of human society and the State—for the State is a multitude of men joined together to live by law.[2]

The civilians, then, clearly held the principle of the sacred nature of the secular law; but they also very clearly recognise the existence alongside of the civil law of another law which is not to be confounded with the civil law. We may find an expression of this conception in a phrase of the 'Summa Codicis' of Roger, in which it is said that there are two systems of *jus*—one human and one Divine; and of these the Divine is the more exalted.[3] And again,

[1] Joannes Bassianus, 'Summa in libro Novellorum,' "De Instrumentorum cautela et fide," p. 1287 (Nov. 73): "Quia propterea Deus de cœlis imperatorem constituit in terris, ut per eum tanquam per procuratorem leges factis emergentibus coaptet, ut hic proficiat subjectis, ut j. eo § quia igitur" (Nov. 73, Præf. 1).

[2] Hugolinus, 'Summa on the Digest' (Preface): "In nomine patris et filii et spiritus sancti—Amen. Principium omnium rerum est Deus, ut in Evangelio Joannis, cap. i. 'In principio erat verbum,' etc. Ab hoc enim principio cuncta (ut ait Justinianus) processerunt elementa, et in orbem terrarum sunt producta, ut in C. de Vet. jur. enuc. l. i. circa principium (Cod., i. 17). A capite ergo sumamus exordium in hoc tit. Habeamus initium ex hoc principio, accipiamus materiam et hujus scientiæ fundamentum principium hoc, sine quo sapientia non valet esse, principium nostrum verum perducat ad esse. In principio igitur hujus artis, quæ vocatur jus in elementis hujus civilis scientiæ, ponamus fundamentum. Quod nam? Sit juris fundamentum, sive materia et principium timor Domini: ut in Psalmo dicitur, Initium sapientiæ timor Domini. Timor Domini non servilis (de quo dicitur, Servilis timor est quo nil nisi pœna timetur) sed filialis: qui est mista cum timore dilectio, quæ et supplicium evitat et præmium meretur. Hoc ergo posito fundamento in timore et dilectione domini (timor enim filialis amplectitur ut diximus s̄ in proxima distinctione, utrumque) nostrum erit cura fideli perdocere, vestrum autem summo niti labore, ut hanc scientiam assequamini: quæ non solum dicitur scientia, sed glorioso vocabulo civilis, ut dictum est, id est elegans et urbana. Est enim (ut ait lex j. § proinde ff. de extraor. cog. Dig. l. 13. 5) res sanctissima civilis sapientia: vel scientia civilis (ut dictum) est elegans et urbana: aut potius, ut notetur maximus hujas effectus, per quem primo civitas est condita, sine qua humanæ societatis nullum est vinculum, sed nec civitatis consistit vocabulum. Est enim civitas multitudo hominum collecta ad jure vivendum."

[3] Roger, 'Summa Codicis,' i. 1: "Sed quia jus dicitur aliud divinum aliud humanum, præcipua autem sunt jura divina quam humana, tractat primum de divino jure."

alongside of the organisation of civil authority there is another organisation, which derives its authority from God as well as from men,—an organisation which, as it has its own laws, has also its own courts and jurisdiction. This conception is expressed in a phrase of that work on the Code which Professor Fitting attributes to Irnerius. The author speaks of the court or authority of the Bishop as being given to him by divine as well as by human law.[1] We may add to this a phrase of Pillius, in which he speaks of the Pope as having, in divine matters, that same complete (*plena*) jurisdiction which the emperor has in his.[2] The civilians may make little direct reference to the theory of the relations of the Church to the State, but there can be little doubt that they look upon it as related to it, but also distinct, and as possessing a character and authority which are divine.

We must begin by examining the conception of the canon law which is held by the civilians, or rather their view of its relation to secular authority and law. The civilians recognise very clearly the supremacy of the law of God over the civil law. The prince, according to Placentinus, is not to ordain laws contrary to the Lord or to nature;[3] according to a passage in the collection of Dissensiones of Hugolinus, rescripts which are contrary to the natural or

[1] Irnerius, 'Summa Cod,' i 4 2, "De Episcopali Audientia" "Audientia vero seu potestas eis permittitur tam jure divino quam humano in omnibus personis que divinam militiam gerunt, ut sive inter se aliquas lites habeant, sive ab aliis compulsentur apud episcopos conveniantur"

Cf i 4 6 and 'Lo Codi,' i 4 6 "Alie raciones et alia placita, sicut divina lex precipit, debent ab episcopo terminari et diffiniri melius quam noverit Quod si facere neglexerit, divine ulcionis subjacebit"

[2] Pillius, 'Ordo de civilium atque criminalium causarum judicis,' p 57, "De causarum cognitione" "Est enim jurisdictio, potestas alicui indulta cum licentia reddendi juris, et facultate statuendæ æquitatis, vel jurisdictio est, judicis dandi licentia, ut ff de juris omn ju l in (Cod, in. 13 3) Item jurisdictio alia est plena, ut in principe Romano quoniam populus Romanus ei et in eum omne suum imperium et potestatem concessit et contulit ut ff de constit princ l 1 (Dig, i 4 1) Et hoc idem habeatur in divinis, quoniam dominus Papa habeat plenitudinem potestatis ut dicitur cap xiii in Dec Col. ii Alia est non plena ut in aliis judicibus."

[3] Placentinus, 'Summa Institutionum, i 2 "Placuit inquam principi ut jus constituat ita ut non contra dominum statuat vel naturam"



divine law are to be rejected by the courts.[1] Azo says very emphatically that an imperial rescript or *privilegium* against the law of God, of the apostles and evangelists or prophets, is to be wholly rejected; the emperor cannot abrogate the laws of his superior, though he may apply them with some discrimination of persons, and of the public needs.[2] This is an important qualification; and in another passage he applies it specifically to the question of usury, which may be permitted by the civil law on account of the actual necessities of the world, though it is properly unlawful because it is against the law of God.[3] It is, however, clear that the civilians fully recognised that the law of God in the Scriptures represented an authority superior to that of the civil law, and that whatever was contrary to this was properly invalid.

But we must now ask what was their attitude to the canon law of the Church, as distinguished from Scripture. There is one set of canons which all the civilians seem to recognise as having the force of law. These are the canons of the first four general councils. We find this stated first in the

[1] Hugolinus, 'Diss Dom,' 5 "Si juri naturali vel divino contradixerint (rescripta) refutantur omnino"

[2] Azo, 'Summa Cod,' i 22 1. "Sciendum est autem quod si rescriptum, vel privilegium contra jus Dei, apostolorum, evangelistarum, prophetarum indulgeatur, omnino respuitur quia superioris leges tollere non potest, cum alias sit proditum, quod par pari imperare non potest, ut ff de recept arbitr l nam magistratus, et ff ad Trebellianum, l illæ § tempestivum (D, iv 8 4, and xxxvi 1 13, 4) Licet autem non tollat, distinguere tamen potest pro qualitate personarum, et publica utilitate Nam et apostolus ait Omnis anima subdita sit regi tanquam præcellenti et ducibus tanquam ab eo missis," etc

[3] Azo, 'Summa Cod,' iv 32 18 "Et hoc de jure humano Nam propter mundi necessitates et angustias, Imperator ex toto non potuit cassare obligationem usurarum sed tamen minuit Lege autem Dei, quæ veteri ac novo Testamento continetur, omnes usurarum obligationes prohibitæ sunt, et execratæ nihil ergo valet, quod sequitur ex eo, vel ob id, ut supra de legi et sanatus consultis, l. non dubium (Cod, i 14 5), cum et Imperator dicat sacras canones pro legibus observandis, ut in authentic, ut clerici apud episc § ultimo (Nov. 83 1) et, quomodo oporteat episcopos ad ordinationem adduci, § sed etiam sic eum (Nov 6 1 8) Certum est siquidem quod lex minoris non derogat legi superioris Nam nedum superiori, sed etiam pari quis imperare non valet, ut ff de arbitr l nam magistratus (D, iv 8 4) et ad Trebell l ille a quo § tempestivum (D, xxxvi 1 13, 4) Quomodo ergo servus abolebit legem domini sui Certe hoc durum esset, et contra naturam Unde et Paulo Apostolo dictum est, durum est tibi contra stimulum calcitrare, Acta ix. cap."

'Exceptiones' of Peter, then in Joannes Bassianus, and finally in Azo, and we may assume that the principle was universally accepted by the civilians. This is, indeed, what we should expect, for the principle is laid down by Justinian himself in the 'Novels,' from which, or from the 'Epitome Novellarum' of Julian, the civilians derive it.[1] It must be noticed, however, that these canons have the force of civil laws, because Justinian has given them this; there is not in any of these passages any suggestion that they have this force in virtue of their own authority,—that is, that their relation to the civil law is the same as that of the law of God in nature or of the Scriptures. We have not found that any civilian commenting on the civil law suggests that the canon law as such has the force of civil law, or is superior to civil law within the sphere of the latter. As far as we can understand these writers, their conception of the canon law seems to be that of a system parallel to the civil law, supreme, no doubt, in its own sphere, but not possessing authority outside of this.

[1] 'Petri Exceptiones Legum Romanorum,' *i.* 2: "Canones sanctorum quatuor conciliorum pro legibus habeantur: id est Nicenum, Constantinopolitanum, Ephesianum primum, et Chalcedonense. In hoc capitulo notare potes, quod si canones sunt contrarii legibus, canones tenendi sunt, non leges. Quia si canones habentur pro legibus, et novæ leges infirmant contrarias leges antiquas, tunc novi canones infirmant anteriores leges, quibus contrarii sunt."

Joannes Bassianus, 'Summa in Libro Novellarum,' p. 1311, "De ecclesiasticis titulis" (Nov. 131): "*Quia veriis* legibus tractatur de privilegiis ecclesiarum ideo omnia sub hac lege comprehendere vult; dicit ergo de ecclesiasticis titulis et privilegiis, quod expone ut dixi j. eodem in prin. In primum dat eis privilegium, ut omnes leges sint subjectæ sacris canonibus, quæ sunt in sacris quatuor conciliis, sive in ordine residendi, sine in aliis, quæ dic. ut j. eo usque; ad § ad hæc."

Azo, 'Summa Cod.,' iv. 33. 18: "Cum et imperator dicat sacros canones pro legibus observandos; ut in authentic; ut, clericis apud episc. § ultimo et quomodo oporteat episcopis ad ordinationem adduci; § sed *etiam sic* eum."

The phrase in the Epitome of Julian is as follows: 'Epitome Novellarum,' 119. 1: "Quatuor sanctorum conciliorum canones pro legibus habeantur." This comes from Novel., 131. 1: "Sancimus igitur vicem legum obtinere sanctas ecclesiasticas regulas quæ a sanctis quatuor conciliis expositæ sunt, *aut firmatæ*," etc.

It is on this that Jo. Bass. is commenting. Azo refers to Nov. 83. 1 and Nov. 6. 5, in which the same principle is laid down.

For a discussion of the question of a collision between the two systems of law, and for a further treatment of the passage from Peter, cf. pp. 227-233.



When we now consider the theories of the civilians on the immunities of the clergy, we come to the conception of the two societies, with their respective authorities and jurisdictions; and here it is important at once to observe that the civilians are clear that this authority and jurisdiction are founded not only on human law, but on the divine. We have already quoted the passages of Irnerius and Pillius in which these conceptions are expressed.[1] It must be observed that Irnerius is clear that the episcopal jurisdiction in its plenitude extends only over those persons who, in his phrase, *divinam militiam gerunt;* all secular legal proceedings, whether among these persons or against them, must be brought before the bishop, but in the case of other persons the bishop can only take action if they desire it.[2] We shall have to consider this matter presently in detail; for the moment we must fix our attention upon the fact that Irnerius clearly recognises two classes of persons—the one consisting of those over whom the bishop has full jurisdiction, and clearly he means by these those who have the ecclesiastical character; the other class, by which he means the laity, over whom, in secular matters, the bishop has no regular jurisdiction, except at their own desire. We have here very clearly the conception of two societies, two jurisdictions—not, indeed, that such a passage presents us with a complete view of the subject, for the laity, as members of the Church, belong to the ecclesiastical as well as the secular society, but we have at least, very clearly marked, the conception of the two jurisdictions, and the principle that the ecclesiastical jurisdiction exists by divine law, while it is supported by human law.

The clergy are, properly speaking, that is, as clergy, subject only to the jurisdiction of the Church. We may put this as summarily expressing the conception of the civilians. We must consider this in detail.

The first and simplest case is that of the prosecution of an

[1] See p. 78.

[2] Irnerius, 'Summa Codicis,' i. 4. 3: "Inter alias vero personas juditium episcopi immo arbitrium ex voluntate (esse) potest: qui postquam ejus audientiam elegerint, et apud eum venerint, etiam ex necessitate postea coguntur."

ecclesiastic for a spiritual or canonical offence. It is hardly necessary to cite authorities to illustrate the general principle that such cases belong to the bishop; we may refer to passages from Irnerius and John Bassianus.[1] The next case is that of civil proceedings by one ecclesiastic against another; such cases belong normally, according to Irnerius and Roger, to the bishop.[2] We come to a more difficult matter with the question of a civil suit brought by a layman against an ecclesiastic. Broadly, the civilians are clear that such cases must go to the bishop's court, and this principle is derived by them from the 'Novels' of Justinian, either directly or through the 'Epitome' of Julian. But while this principle is thus broadly held, they also derive from the 'Novels' and the 'Epitome' the principle that if the bishop will not or cannot decide the case, then the plaintiff may go to the secular courts. These principles are set out tersely but clearly in 'Petri Exceptiones' and in the 'Brachylogus.'[3] The same view is expressed by Irnerius,[4] and, with an important addition, by Roger and Accursius, who mention some civil cases which the bishop cannot decide, and also explain a process under which the case is to be re-tried by the secular

[1] Irnerius, 'Summa Cod,' i. 4. 5: "Hoc nisi delictum sit ecclesiasticum: hujus enim examinatio et castigatio episcopi erit, et hoc novis constitutionibus"

Joannes Bassianus, 'Sum. in Lib. Novellarum,' p 1293 "Ut clerici apud proprios episcopos conveniantur" (Nov 83) "Si quidem canonica (est causa) et infertur clerico episcopus tantum debit cognoscere"

[2] See p 78, note 1 Roger, 'Summa Cod,' i 4 "Nam si duo clerici inter se agant, et causa talis sit que per episcopum expedirı possit, ante eum necessario debet expedirı"

[3] 'Petri Exceptiones,' iv 47· "Si quis cum monachis vel clericis litigium habuerit, non currat ad secularem judicem, sed apud Episcopum eat, si ab eo potest judicium consequi Si vero Episcopus vel non curaverit facere, vel non poterit, liceat accusatori apud quem vult judicem ire, a quo suum jus consequatur"

The first clause is related to Julian, 'Epitome,' 73 1, and to 'Novel,' 79 1. The second is related to Julian, 'Epitome,' 115 34, and to 'Novel,' 123 21

'Brachylogus,' iv. 8 5 "Item si civilis causa est (actor) licet sit secularis, si reus clericus est, apud proprium episcopum debet definiri"

[4] Irnerius, 'Summa Cod,' i 4. 4 "Clerici quidem apud episcopum primo conveniendi sunt, apud quem his sine omni dispendio terminetur. Sin autem ex aliqua causa decidi per eum non potuerit, apud civilem judicem negotium sine dilatione decidatur, observatis clericorum privilegiis."



court if the bishop's sentence is held to be unjust.[1] John Bassianus states the general principles in much the same way, and mentions some other circumstances which may prevent bishops from acting; but he does not refer to the process by which the case is to be taken to the secular court in the case of an unjust sentence in the spiritual court.[2] Azo puts the matter briefly, very much as John Bassianus does; he also makes no reference to the possibility of recourse to a civil court against an unjust judgment of the

[1] Roger, 'Summa Codicis,' i 4 "Nam si duo clerici inter se agant, et causa talis sit que per episcopum expedirı possit, ante eum necessario debet expedirı, vel si laicus conveniat clericum, ante episcopum debet decidi, premissa tamen divisione cause Hec scilicet causa alia civilis, alia criminalis Civilis, alia potest expedirı per episcopum, alia non, que non potest expedirı, sive quia impossibilis ei videtur, sive quia natura cause ita se habet quod per episcopum non sit expedienda, alias decidenda velutı causa ingenuitatis et libertatis et si que alie inveniuntur, per civilem judicem sunt finiende Que vero per episcopum sunt finiende, si ab episcopo sententia dirimantur, quamvis ejus sententia visa fuerit iniqua, ab ea tamen non est appellandum, sed adeatur civilis judex ut cognoscat utrum sit equa vel iniqua, si equa, mandet eam executioni, si iniqua, ex integro cognoscat ac si non esset decisa" (Roger's opinion is probably related to Nov 123 21 "Si quis autem litigantium intra decem dies contradicat iis quæ judicata sunt, tunc locorum judex causam examinet et si invenerit judicium recte factum, etiam per sententiam propriam hoc confirmet, et executioni proponere tradat, quæ judicata sunt. et non liceat secundo in tali causa victo appellare Si vero judicis sententia contraria fuit iis, quæ a Deo amabili episcopo judicata sunt tunc locum habere appellationem contra sententiam judicis, et hanc secundum legum ordinem referri et exerceri Si tamen, ex imperiali jussione, aut judiciali præcepto episcopus judicat inter quascumque personas. appellatio ad imperium, ut ad eum qui transmisit negotium, referatur" Julian, 'Epitome,' 115 34 is a summary of this) Cf Accursius, 'Gloss on Nov,' 123 21, "Contradicat."

[2] Joannes Bassianus, 'De Ordine Judiciorum,' § 102 "Omnis ecclesiastica persona pro re pecuniaria, id est non crimine, apud suum episcopum convenienda est Idem in episcopum, ut apud suum archiepiscopum conveniatur, et sic deinceps Posset tamen defendi quod episcopus et archiepiscopus numquam sunt sub civili judice conveniendi, ut in auth de sanctissimis episcopis "Si quis vero sanctissimum," et "si autem a clerico" (Nov, 123 c. 22), § 103. Si vero cause natura non patiatur apud episcopum de causa cognoscere, forte quia libertatis causa est, que non nisi per presidem examinanda est, ut C de pedaneis judicibus l ii (Cod, iii. 3 2) et D de rescriptis l non distinguimus § de liberali (D, iv. 8 32, 7) aut aliqua forte necessitas enim impediat, ut adversa valetudo, vel prohibeatur a jure, forte quod ante episcopatum alicui partium in hac causa patrocinium præstitit, ut D de juris dictione omnium judicum, l puta aut si episcopus causam differat, actor civilem judicem adeat"

bishop.[1] A somewhat later civilian, Bagarottus, puts the principle briefly, that no civil case by an ecclesiastic or by a layman against an ecclesiastic is to be heard in the civil court.[2] It is noticeable that Roger is the only one of the civilians who, as far as we have seen, maintains that if the lay suitor thinks the Bishop's sentence is unjust he can go to the secular court.

We turn to the question of criminal proceedings against the clergy. The author of the 'Brachylogus' says that in criminal cases the cleric may be brought either before the bishop or before the secular court: if the case is taken to the bishop, and he finds the accused *dignus capitali supplicio*, he is to degrade him, and hand him over to the *præses* to be punished; if the case is taken in the first instance to the secular judge, he cannot punish the cleric until he has been degraded by his bishop; if the bishop is doubtful about the justice of the treatment of the case, he can postpone the degradation (*sub legitima cautela*) until the matter has been referred to the prince.[3] This is very close to the 'Epitome' of Julian and the 'Novels.' Irnerius says that criminal cases against a cleric are to go to the civil judge, who must decide the case in three months: if he find the accused guilty, he must not condemn him until he has been deprived of the priesthood (*sacerdotio*) by the

[1] Azo, 'Summa Codicis,' i. 3. 12: "Item sub certis tantum personis compelluntur (*i.e.*, clerici) respondere: hoc est, in pecuniaria causa apud episcopum: vel si ipse non posset cognoscere: vel nolit, vel differat, cognoscat civilis judex, observatis clericorum privilegiis."

[2] Bagarottus, 'De exceptionibus dilatoriis,' 57: "Item (excluditur) si clericus vel laicus conveniat alium clericum coram civili judice, ut in auth. ut cler. apud propr. epis. et in auth. de san. episcopis § si quis &c. (Nov., 83 and 123. 21) et C. de epis. et de auth. causa; et auth. clericus" (Cod., i. 3 after 33). *Cf.* Nov. 79 and 83.

[3] 'Brachylogus,' iv. 8. 6: "Quod si in causa criminali quæ ad ecclesiasticum negotium non pertinet, clericus accusetur, liceat et in hoc casu episcopum cognoscere; ut tamen, si dignum capitali supplicio clericum invenerit, omni clericatus honore denudatum ad puniendum præsidi tradat. Sin vero clericus ante præsidem accusetur, non liceat præsidi ante clericum punire, quam a proprio episcopo clericatus honore fuerit denudatus: quod si episcopus viderit acta sibi non juste constitisse, liceat ei differre gradus *denudationem* sub legitima cautela, quo usque super ea *re principi* suggeratur, justam causæ finem impositurо."

Cf 'Epitome Juliani,' 115. 34, and Novel, 123. 21. 1.



bishop.[1] Roger lays down practically the same rule as Irnerius.[2] John Bassianus holds that in criminal matters the case is to go to the secular court, unless the accuser prefer to take it first to the bishop's court: if the secular court finds the accused guilty, the sentence is not to be pronounced until the record of the proceedings has been sent to the bishop, who is to degrade if he is satisfied with the evidence, then the secular court is to impose the proper punishment.[3] The view of Azo is that criminal cases against the clergy belong to the civil judge, who can acquit without consulting the bishop; but if he conclude that the accused is to be condemned, he must first be deprived of his orders by the bishop.[4]

These civilians all agree in the main principles, that it is for the secular court to try and punish the cleric, but that the court cannot carry this out until the bishop has degraded the cleric. Some of them—*i.e.*, the author of the 'Brachylogus' and John Bassianus—also clearly held that the bishop is to consider whether the evidence is satisfactory before he degrades: it is not clear whether Irnerius, Roger, and Azo

[1] Irnerius, 'Summa Codicis,' i. 4. 5: "Si tamen de crimine (clerici) accusentur, civilis adeatur judex, ita ut inter duos menses per eum dirimatur, et, si rei inventi fuerint, non ante condempnentur, quam sacerdotio per episcopum exuantur." Cf. 'Lo. Codi.,' i. 4. 5.

[2] Roger, 'Summa Cod.,' i. 4: "Criminalis questio alia forensis, alia ecclesiastica. *Si criminalis et forensis est*, adeatur civilis judex, ut inter duas menses causa omni modo decidatur, et si rei inventi fuerint, denudati ac depositi ab officio prius a suo episcopo, condempnentur."

[3] Joannes Bassianus, 'De Ordine Judiciorum,' 105: "Si autem de crimine litigandum fuerit, si quidem civile crimen est, civilis judex erit adeundus, qui licet reum invenerit accusatum, tamen *non condempnabit* eum statim, sed gesta apud se habita ad episcopum suum mittet; et, si sufficere videbuntur, episcopus ordine graduque ecclesiastico expoliabit accusatum, et post civilis judex penam corporalem competentem imponet. Puto tamen quod ab initio cogatur respondere sub episcopo suo si accusator maluerit ut in Auth." (Nov. 123. 21. 2).

[4] Azo, 'Summa Cod.,' i. 3. 12: "*In criminali autem causa civilis* tantum præesse debet judex, ut causam terminet intra duos menses a tempore litis contestati computandos; et si viderit clericum condemnandum, primo debet spoliari ordinibus suis ab episcopo; si autem viderit eum absolvendum, etiam inconsulto episcopo, potest eum absolvere, ut in authent. ut cleric. apud proprios episcopos conveniantur (Nov. 83): et authentic. eod. tit. § si quis autem."

take this view or not. The author of the 'Brachylogus' stands alone in following Nov., 123. 21, in the view that if the bishop is not satisfied the matter is to be referred to the prince. The clergy are, then, primarily subject to the jurisdiction of the Church: it is not till they have been deprived by the Church itself of their ecclesiastical character that they come under the ordinary jurisdiction of the secular authority.

The theory of Church and State so far might seem to be comparatively simple; we might almost think that they were regarded by the civilians as two parallel societies, each with its own members and its own organisation, separate in such a degree that normally the members of the one are not subject to the jurisdiction of the other. The truth is, however, that no such simple and easy definition was possible, and this becomes very clear when we consider the principles of the civilians with regard to the relation of the laity to Church law and Church courts.

For the laity, as members of the Church, are in some respects subject to Church law, and are in some measure under the jurisdiction of Church courts. A layman may be guilty of an ecclesiastical offence, and is then liable to be brought before the Church courts. The layman, however, is not liable to the jurisdiction of those courts in the same way as the ecclesiastic. John Bassianus and Azo maintain that when a layman is charged with an ecclesiastical crime he is to be tried, not by the bishop alone, but by the bishop and the *præses*. They found this judgment upon certain phrases of Justinian in the Novels; whether their application of these was correct we do not pretend to say.[1] The layman is then subject to the Church law and to the jurisdiction of the Church, though, as

[1] Joannes Bassianus, 'Summa in Lib Nov' (p 1293), "Ut clerici apud *proprios episcopos* conveniantur," Nov 83 "Circa quod distingue: aut est causa canonica, aut civilis Si quidem canonica et infertur clerico episcopus tantum debet cognoscere, ut infra eodem § si vero ecclesiasticus (Nov 123 31 2). Secus si laico, tunc præses cum episcopo cognoscat, ut infra de mandat princip § si vero canoni cam" (Nov xvii 11).

Azo, 'Sum Cod,' i 3 13· "Laicus autem de ecclesiastico crimine coram episcopo (conventur) et coram præside, ut infra in authen . . . de man. princip § neque occasione" (Nov xvii. 11) Cf Accursius, 'Gloss on Nov,' 83, "Ecclesiasticum."



these civilians hold, the secular authority is entitled to take its part in the decision of cases brought against the laity in the Church courts.

And again, in quite another connection, we find illustrations of the fact that the two societies are not really separate. For the civilians very clearly recognise that in certain cases the ecclesiastical authorities could intervene even in purely secular matters. The first example of this which we have to consider is the permission given by the Roman law to take a civil case between two laymen before the bishop, instead of the secular judge, if both parties to the suit agreed. This is implied in the 'Exceptiones' and the 'Brachylogus,' and is laid down by Irnerius in his treatise on the Code and by the Provençal Summa of the Code. Irnerius makes it clear that such a procedure is entirely voluntary, but he adds that if the parties have agreed to it, and have appeared before the bishop, they will then be compelled to go on: against the judgment of the bishop in such cases there is no appeal, and it must be carried out by the civil authorities.[1] More im-

[1] 'Petri Exceptiones,' iv 37. "In sesta actione Chalcedonensis Concilii, Marcianus Imperator inter cetera dixit Omnes causæ quæ Prætoris jure vel civili tractandæ Episcoporum sententiis terminantur, perpetuo stabilitatis jure firmentur, nec liceat alterius tractare negotium, quod sententiis Episcoporum decidet"

'Brachylogus,' iv. 8 5 "Item si civilis causa est (actor) licet sit secularis, si reus clericus est, apud proprium episcopum debet definiri sin autem is, qui convenitur, est laicus, volens quidem ante antistitem litigare admittendus est invitus vero non est cogendus"

Cf 'Code,' i 4, 8 "Episcopale judicium ratum sit omnibus, qui se audiri a Sacerdotibus elegerint, eamque illorum judicationi adhibendem esse reverentiam jubimus, quam vestris defferri necesse est potestatibus, a quibus non licet provocare. Per judicem quoque officia, ne sit causa episcopalis cognitio, definitione executio tribuatur."

Irnerius, 'Summa Codicis,' i 4. 3: "Inter alias vero personas (*i e*, those who are not clerics), juditium episcopi imo arbitrium ex voluntate (esse) potest qui postquam ejus audientiam elegerint, et apud eum venerint, etiam ex necessitate postea coguntur. Cognoscere quidem possunt, item examinare ac pronuntiare. Quorum sententia (ab) appellatione immunis erit quemadmodum sententia prefectorum pretorio, set a judice civili executioni seu effectui mandanda est Hoc ita demum, si causa pecuniaria sit In criminali vero lite hoc non eis permittitur

'Lo. Codi,' i 4 3. "Eodem modo si duo homines habent placitum, episcopus potest esse judex inter eos, si *ipsi volunt set non potest* fieri appellatio a sentencia ipsius Hoc est verum quod potest judicare inter alios homines, si placitum est de avere vel de possesione. set si est de crimine, non potest hoc facere."

portant, however, is the doctrine of the civilians that, at least in some cases, if a suitor has doubts about the justice of the secular court he may demand that the bishop should sit in court with the secular judge. This doctrine is set out in the handbooks of law, and also by Joannes Bassianus and Azo, among the great civilians of Bologna. In the 'Exceptiones' the principle is laid down that while no one can refuse the jurisdiction of the *judex ordinarius*, if either the plaintiff or the defendant suspects the judge, he may demand that the bishop, or some other honest man (*probus*), should sit with the judge, and if they then agree in their judgment, the man who has called in the bishop, or other judge, may not appeal. The same principle is briefly stated in the 'Brachylogus.'[1] These regulations are evidently derived from the 'Novels' of Justinian and from the 'Epitome': but it must be observed that the rule that a man who thus calls in the bishop may not appeal is not clearly asserted in the 'Novels.' It lays down the principle that if a man cannot get justice from the judge, he is to call in the bishop; and if the bishop cannot persuade the judge to do justice, he is to give the suitor letters to the emperor.[2]

[1] Petri, 'Exceptiones,' iv. 1: "Judicium ordinarii judicis nemo recusare potest Sed si actor vel reus ordinarium judicem suspectum habeat, ei, qui suspectum judicem putat, Episcopum vel alium probum virum invocare licet, ut simul ambo judicent, et si de judicio *concordaverint, ipse qui* Episcopum vel alium invocaverit, nullo modo poterit provocare sententiam, id est quod vulgariter dicimus, non potest rancunare."

'Brachylogus,' iv. 4. 11 "Sed si suspectum judicem quis habuerit, liceat ei episcopum civitatis ad causam discutiendam *una cum judice suspecto* advocare"

[2] 'Novel,' 86 1 "Si vero dum aliquis adierit judicem provinciæ non meruerit justitiam, tunc jubemus eum adire suum sanctissimum episcopum, et ipsum mittere ad clarissimum provinciæ judicem aut per se venire ad eum, et præparare eum ut omnibus modis audiat interpellantem et liberet eum cum justitia secundum nostras leges, ut non cogatur peregre de sua patria proficisci Si vero etiam sanctissimo archiepiscopo compellente judicem cum justitia determinare interpellantium causas, judex differt discernere negotium et non servet a litigantibus justitiam, jubemus sanctissimum civitatis illius episcopum dare ad nos litteras ei qui non meruit quod justum est insinuantes, quia coactus ab eo judex distulit audire interpellantem *et judicare inter eum et qui* ab eo conventus est, ut hæc cognoscentes nos supplicia inferamus judici provinciæ, quod interpellatus ab eo qui injustitiam passus est et coactus a sanctissimo archiepiscopo non judicaverit quæ in dubitationem venerunt.

2. Si vero contigerit quendam nostrorum subjectorum in dubitatione habere judicem, jubemus sanctissimum archiepiscopum audire cum clarissimo judice, ut ambo aut per amicabilem conventum dissolvant quæ dubia sunt, aut ei adnotationem scriptis factam aut cognitionaliter judicetur inter litigantes et forma detur justitiæ legibusque conveniens, ut non cogantur nostri subjecti propter hujusmodi causa recedere a propria patria . . .

4 Si tamen contigerit quendam nostrorum subjectorum ab ipso clarissimo provinciæ judice lædi, jubemus eum adire sanctissimum illius civitatis episcopum, et ipsum judicare inter *clarissimum provinciæ judicem* et eum, qui putatur lædi ab eo Et si quidem contigerit judicem legitime aut juste adjudicari a sanctissimo episcopo, satisfacere eum omnibus modis ei qui interpellavit adversus eum Si vero refutaverit judex hoc agere, et pervenerit ad nos ipsa lis, si quidem invenerimus quia juste et secundum leges aditus a sanctissimo episcopo ea quæ condemnatus est, non fecit, novissimis eum supplicis subdi præcipimus, quoniam qui debet vindicare oppressum, ipse opprimere reperitur."

Cf. 'Epitome Juliani,' 69. 2.



Joannes Bassianus intended evidently to summarise the provisions of the same 'Novel,' and suggests a regular process —first to the judge, then to the bishop, and finally to the prince.[1] This does not seem a very accurate mode of dealing with the texts, but it is to us important as exhibiting the way in which he understood it. Azo, in his work on the Code, does not discuss the matter in detail, but writes as though it were a clearly admitted principle that while it is only minors, widows, and poor persons who have the right to refuse the jurisdiction of the *judex ordinarius* and to be heard directly by the prince, yet any person has the right, if he holds the judge in suspicion, to demand that the archbishop should sit with him.[2]

We have here a very important point in the relation of

[1] Joannes Bassianus, 'Summa in Lib. Nov.,' p 1313, 'Ut differentes justices," Nov 86 "Hæc constitutio tractat de ordine agendi nam primo ad suum proprium judicem, secundo ad episcopum, tertio ad principem est decurrendum, alias punitur, ut j cod § 1 & § si quis & § si hæc autem (Nov., 86 1 and 3) . . Si tamen judex suus faciat ei jus, sed habet eum suspectum, associet episcopum et sic ordinarius non recusatur sed delegatus tantum, ut j. eo c. si vero (Nov., 86 2) & C de judic l apertissimi (Cod., iii 1 16) Secunda parte dicit, si etiam ipsum vellet convenire (quod est intelligendum pro furtis, vel etiam pro oppressione nimia subjectorum) potest coram episcopo, ut j eodem § si tamen (Nov., 86 4) & s. ut judic sine quoquo suffrag § necessitatem de aliis, ut in prædicto § aliud"

[2] Azo, 'Summa Codicis,' iii 14 1: "Ita licet hic pupillis et similibus recusare judicem ordinarium, quod non permittitur aliis licet posset petere associari suspecto judici archiepiscopum s de judiciis authent. si vero contigerit" (Nov., 86. 2).

the ecclesiastical and secular authorities. We cannot discuss now the motives which led to Justinian, and perhaps earlier emperors, to establish this system: that they had any special intention of increasing the authority of the Church, as such, would not seem to be the case. These arrangements are, indeed, only a part of what would seem to have been an elaborate system for checking the representatives of the Imperial Government by means of the bishop and other persons of importance in the various localities.[1] The survival, however, of these principles in the Middle Ages, when the question of the relations between the ecclesiastical and the secular authorities had become so important, has quite another significance. We shall come back to the matter when we deal with the canonists; but in the meanwhile we find here an example of the fact that the recognition of the different spheres of the two authorities does not mean that these authorities, even in the judgment of strict lawyers, did not run across each other.

On the great question of the appointment of bishops these civilians say little; but that little has some significance. Joannes Bassianus discusses the question in commenting on 'Novel' 123, which prescribes that when there was a vacancy in any see, the ecclesiastics and principal persons of the place were to elect three persons, of whom one was to be made the bishop. John Bassianus alters this, so that apparently he means that the clergy and principal persons of the diocese are to choose three persons, who are then to elect the bishop.[2] Azo comments on the regulation of the Code—that when there is a vacancy, the inhabitants of the diocese are to elect three persons of proper character, of whom one is to be made the bishop. Azo alters this, so that the principal ecclesiastics of the diocese are to elect three of the clergy, who are in their turn to elect the bishop. But he also adds that the first body are to choose the electors with the sanction of the emperor.[1] It is interesting and important to observe that Azo excludes the laity of the diocese from any share in the election, and he also excludes the inferior clergy; while on the other hand he clearly requires that the emperor should have some share in the election.

[1] Cf. vol. i. p. 282, and Code, i. 3. 45 and i. 4. 26.

[2] 'Novel.,' 123. 1: "Sancimus igitur quotiens opus fuerit episcopum ordinare, clericos et primates civitatis cujus futurus est episcopus ordinari, mox in tribus personis decreta facere. . . . Nov. 123. 1. 2. Ut ex trium personarum pro quibus talia decreta facta sunt, melior ordinetur electione et periculo ordinantis," &c.

Joannes Bassianus, 'Summa in Lib. Nov.,' p. 1314, "De sanctissimis episcopis" (Nov., 123): "Electio autem episcopi fit solenniter vocatis primatibus, archipresbyteris, archidiaconis, et aliis clericis: et attenduntur quædam in persona eligentium: debent enim tres eligi electores, qui periculo suæ animæ eligent non habentes uxorem," &c.

[1] Cod., i. 3. 41: "Ab iis qui in ea civitate habitant decretum fiat de tribus personis, de quorum recta fide vita honesta reliquisque virtutibus constos, ut ex his qui magis idoneus sit ad episcopatum promovatur."

Azo, 'Summa Codicis,' i. 3. 2: 'Viso unde dicatur episcopus, nunc videndum qualiter fiat ordinatio episcopi. Et quidem clerici primates civitatis, ecclesiastici scilicet, ut archidiaconi et archipresbyteri, propositis eis sacrosanctis evangeliis, debent sua vota conferre non ex gratia, vel amicitia aliqua, vel promissione, in tres personas canonicas et religiosas, non filios non uxorem habentes, vel habentes sed virginem: vel si non habent tres, eligant duos, vel unum, habentes literas principis eis assentientibus. Hæ autem personæ propositis sacrosanctis evangeliis debent promittere, quod canonicam et legitimam eligant personam, ut in authen. eod. tit. j. respons. (Nov., 123).

# PART II.

## THE POLITICAL THEORY OF THE CANON LAW TO THE MIDDLE OF THE THIRTEENTH CENTURY.

## CHAPTER I.

### INTRODUCTION.

In the first volume of this work we have endeavoured to discuss, not only the theory of the relations of Church and State, but also the general theory of Society and its institutions, in the ecclesiastical writers of the first six centuries of the Christian era, and again in the ninth century. We have sometimes referred to the canons of councils and other sources of the systematic body of Church law, but the greater part of our information was drawn from works which were not, in their primary intention, legal works at all, from purely religious or theological works, or from the more formal correspondences of great churchmen. In the period which we have now to consider, we have found it necessary to separate the treatment of the theory of society which is presented in the formal treatises upon ecclesiastical law from the examination of the other works of churchmen. It is necessary to distinguish carefully between incidental and sometimes hasty sayings, made under the stress of some great controversy, and judgments expressed in legal and other works which were compiled in cold blood and represent reasoned and considered conclusions.

We do not need to discuss the history of the gradual

process of accumulation and selection through which the Canon Law passed before it reached the form which it now wears in the 'Corpus Juris Canonici,' but a few words are needed to explain the nature of the sources from which it was drawn, and the stages through which it passed. The canon law is in the main derived from four different sources—the Holy Scriptures, the decrees of the great general councils and of certain local councils, certain letters of the Bishops of Rome on public and judicial matters, and the writings of the Fathers. The relative importance and authority of these sources we shall have to discuss in detail when we come to deal with the theory of the canon law itself.

From these sources there arose various collections of canons, and these were greatly enlarged by the production in the ninth century of the great collection of spurious Papal letters which we know under the name of pseudo-Isidore—a collection which is now generally held to have been made in France, and which gradually found its way into the literature of the canon law, both in Italy and in the North, in the course of the tenth and eleventh centuries. In addition to these the mediæval canon law books also contain many passages taken from the Roman law books, and from the collections of the genuine and spurious capitularies. It was not till the middle of the twelfth century that Gratian, who had possibly been trained in the law school of Bologna, took in hand the task of selecting from and systematising this great but confused mass of materials, and in his 'Decretum' we have the first attempt to present a complete and ordered body of Church law. The work of Gratian was carried on by a number of canonists, who worked upon the materials contained in the 'Decretum' after the fashion of the work of the civilians of Bologna on the 'Corpus Juris Civilis.' They wrote glosses and commentaries on the 'Decretum,' in which they carried on Gratian's attempt at the systematic exposition of the texts, and the application of these texts to their own time. The formal collection of canon law was carried on by the publication of various small compilations of the decretal letters of the Popes of those times, until at last in 1234



Pope Gregory IX. issued what was intended to be a complete and sufficient collection of these letters. This is that part of the canon law which we know as the "Decretals." To this collection were later added by Pope Boniface VIII. the collection of Decretals known as the Sext, and by Pope Clement V. that known as the Clementines, but with these latter collections we do not deal in this volume.[1]

[1] For a full discussion of the sources of the mediæval canon law we may refer the reader to J. F. von Schulte, 'Geschichte der Quellen und Literatur des Canonischen Rechts,' vol. i.

# CHAPTER II.

## THE THEORY OF LAW IN GENERAL.

We begin by inquiring into the general theory of law in the canonists. We must do this before we can form any clear conception of the theory of the canon law and its relation to other systems of law. It is evident to any student that the principles of the canonists as to the nature of law are derived from the Roman law; but—and this is a fact of importance—it is derived from the Roman law very largely through St Isidore of Seville. What exactly are the sources of St Isidore's treatment of law is indeed doubtful: an interesting attempt has been made by Voigt to set out the relations between his work and that of Ulpian and Marcianus,[1] but much remains obscure. St Isidore's exposition of law is sometimes very close to that of the Digest and Institutes of Justinian, but is also in part independent.

We begin by taking account of a definition of law contained in the work of Ivo of Chartres. In the great collection of canonical materials which is called the 'Decretum' of Ivo, and which was probably compiled by him, an interesting passage from St Isidore's 'Etymologies' is quoted. St Isidore describes the true nature of law as being *honesta*, just, possible, agreeable to nature, conformed to the customs of the country, suitable to its place and time, necessary, useful, clear, and devised for the common good of all the citizens, not only for that of some individual.[2] This quotation is

[1] Voigt, 'Die Lehre von Jus Naturale,' &c., vol. i., Beilage VI.

[2] Ivo of Chartres, 'Decretum,' iv. 168 (from St Isidore's 'Etym.,' v. 21): "Erit lex honesta, justa, possibilis, secundum naturam, secundum consuetudinem patriæ, loco temporique conveniens, necessaria, utilis, manifesta quoque ne aliquid per obscuritatem in cautione contineat, nullo privato commodo, sed pro communi civium utilitate conscripta."



repeated in the 'Panormia,' the handbook of canon law which is recognised as an undoubtedly genuine work of Ivo. These phrases set out the conception on which the canonical theory of the proper nature of law is built up. Law must be agreeable to nature, just, devised for the common good, must represent the custom of the country in which it is to be in force. That is, to express this in broader terms, law is not an arbitrary command imposed by a superior, but rather represents the adaptation of the permanent and immutable principles of "nature" and justice to the needs of a community, under the terms of the circumstances and traditions of that community.

When we turn from Ivo to Gratian, we turn from an intelligent and scholarly compiler to a technical jurist. For, as we have already said, it was the work of Gratian to impose upon what had hitherto been the somewhat formless collections of canons the character of an ordered system of law. Hitherto all that had been done had been to collect canons of councils, papal letters, and opinions of the Fathers, bearing upon the discipline and organisation of the Church, and to arrange these roughly under the various subjects to which they belonged. Gratian had possibly been trained in the technical law schools of Bologna, and recognised that if the canon law was to have any scientific character this heterogeneous mass of materials needed to be sifted, co-ordinated, and criticised. He accordingly set out to arrange the materials, to compare them, and to draw such general conclusions from them as were possible. When we come to discuss the theory of the canon law itself, we shall have to discuss more fully his attitude to the materials he found in the collections of canons which he used. For the moment it is enough to notice the fact that it was Gratian who first reduced the chaotic mass of canonical authorities to a system, and set his hand to the statement of such general principles and rules as could be deduced from them. When

we turn, then, from Ivo's treatment of law to Gratian's, we turn from a writer who is content to put together authorities, to a writer who endeavours to draw from these authorities an adequate and practical criticism of the nature and origin of law.

Gratian's treatment of the nature of law is founded primarily upon St Isidore: whatever his knowledge of the civil law may have been, it is on Isidore's sayings that his discussion of general principles is based. St Isidore in one place sets out a classification of law as human and divine, and says that divine law was established by nature and human law by custom (*mores*);[1] while in another passage he sets forth the tripartite character of law, as divided into the *jus naturale*, the *jus gentium*, and the *jus civile*.[2] Gratian accepts the tripartite division; but as the basis of his most general discussion of law, and at the outset of his work, states the twofold division, of divine or natural law on the one side, and human law, which is founded on custom, on the other.[3]

This passage contains two principles, which are each of the greatest importance,—the identification of natural law with divine, and of human law with custom. The first principle, that natural law is divine, is one of the most important conceptions of the canon law: we shall have to consider this presently in detail, and only make one observation for the moment. The explicit statement by Gratian is of the greatest importance, although the conception itself is not original. It is asserted in the passage of St Isidore quoted by Gratian, and St Isidore is only reproducing what we have endeavoured to show was the normal doctrine of the Christian Fathers,[1] and this again was derived in part from St Paul, but even more from Cicero and other ancient writers, for Cicero had taught very emphatically that the law of nature is the law of God.[2] It is not, however, any the less important that Gratian should have taken these principles as the starting-point for his treatment of the nature of law; we shall see, when we come to deal with the detailed discussion of the natural law, that this law, being itself divine, is superior in dignity and in permanence even to certain positive forms of the law of God, while it is superior to all authorities whether in Church or State. Gratian's principle should be compared with the carefully developed view of the mediæval civilians, that justice and equity are superior to all positive laws, and that God is Himself equity.[3]

The second principle is as important as the first. Human laws are regarded by St Isidore, in the passage here quoted, as based upon custom, and the variety of human laws is explained as due to the fact that different nations have different customs. Gratian accepts this principle, and uses the word *mores* to cover the whole range of human law, explaining these more fully by defining them as *mores jure conscripti et traditi*. In another passage of the same 'Distinction,' he quotes St Isidore's definition of *consuetudo* as being that form of *jus* which is founded upon custom, and which is accepted as *lex* in the absence of *lex*, and St Isidore's observation that custom is equally valid whether it is drawn out in writing or whether it is only established by "reason," for, after all, it is "reason" upon which the value of *lex*, the written law, depends. From these phrases Gratian draws the conclusion that all law is really custom, that part which is

[1] Isidore, 'Etym.,' v. 2.

[2] Isidore, 'Etym.,' v. 4.

[3] Gratian, 'Decretum,' D. i. Gratianus: "Humanum genus duobus regitur, naturali videlicet jure et moribus. Jus naturæ est, quod in lege et evangelio continetur, quo quisque jubetur alii facere, quod sibi vult fieri, et prohibetur alii inferre, quod sibi nolit fieri. Unde Christus in Evangelio: 'Omnia quæcumque vultis ut faciant vobis homines, et vos eadem facite illis. Hæc est enim lex et prophetæ.' Hinc Isidorus in v. libro Ethimologiarum ait: c. 1: 'Omnes leges aut divinæ sunt, aut humanæ. Divinæ natura, humanæ moribus constant, ideoque hæ discrepant, quoniam aliæ aliis gentibus placent. Fas lex divina est: jus lex humana. Transire per agrum alienum fas est, jus non est.' Gratianus: Ex verbis hujus auctoritatis evidenter datur intelligi, in quo differant inter se lex divina et humana, cum omne quod fas est, nomine divinæ vel naturalis legis accipiatur, nomine vero legis, humanæ mores jure conscripti et traditi intelligantur. Est autem jus generale nomen, multas sub se continens species."



[1] Cf. vol. i. pp. 102-106.

[2] Cf. vol. i. pp. 5, 6.

[3] See Part I. chap. i.

written down being called *constitutio sive jus*, while that part which is not written is known as *consuetudo*.[1] This is a far-reaching principle which is thus laid down by Gratian; it is no doubt implicit in the ancient Roman law, but it was not expressly drawn out, and it has very important consequences on the theory of the source of the authority of law.

Human law is, then, custom, whether reduced to writing or not. But this does not mean that Gratian thinks that any custom is entitled to be recognised as law. Having laid down the general principle which we have just discussed, he quotes Isidore's saying that *jus* is so called because it is just,[2] and in the fourth 'Distinction' he goes on to consider the purpose, and therefore the essential quality, of law; and, citing another passage from Isidore, he defines the purpose of law as being to restrain men's audacity and their opportunities of injuring others; while he describes the nature of law in the terms of the same passage from St Isidore which we have already discussed as cited by Ivo of Chartres. In establishing laws, he says, we must be careful to consider whether they represent the principles of *honestas*, justice, possibility, and those other qualities described by St Isidore.[3]

[1] Gratian, 'Dec.,' D. i. 5: "Consuetudo autem est jus quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex. Nec differt, an scriptura an ratione consistat, quoniam et legem ratio commendat. Porro si ratione lex constat, lex erit omne jam, quod ratione constiterit, dumtaxat, quod religioni congruat, quod disciplinæ conveniat, quod saluti proficiat. Vocatur autem consuetudo, quia in communi est usu" (Isid., 'Etym.,' v. 3, ii. 10).

Gratianus. "Cum itaque dicitur: Non differt utrum consuetudo scriptura vel ratione consistat; apparet, quod consuetudo partim est redacta in scriptis, partem moribus tantum utentium est reservata. Quæ in scriptis redacta est, constitutio sive jus vocatur; quæ vero in scriptis redacta non est, generali nomine, consuetudo videlicet appellatur."

[2] Gratian, 'Dec.,' D. i. 2: "Jus autem est dictum, quia justum est" (Isid. of Seville, 'Etym.,' v. 3).

[3] Gratian, 'Dec.,' D. iv. Pars I. Gratianus: "Causa vero constitutionis legum est humanam cohercere audaciam et nocendi facultatem refrenare, sicut in eod. lib. (v. 20) Ysidorus testatur dicens: 'Factæ sunt autem leges, ut earum metu humana coherceatur audacia, tutaque sit inter improbos innocentia, et in ipsis improbis formidato supplicio refrenetur nocendi facultas.'"

Pars II., Gratianus: "Præterea in ipsa constitutione legum maxime qualitas constituendarum est observanda, ut contineant in se honestatem, justitiam, possibilitatem, convenientiam, et cetera, quæ in eod. lib. Ysidorus enumerat, dicens. (v. 21) 'Erit autem lex honesta, justa, possibilis, secundum naturam, secundum consuetudinem patriæ, loco temporique conveniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem incon veniens contineat, nullo privato commodo, sed pro communi utilitate civium conscripta.'"



We shall have to return to this question presently, when we consider in more detail the nature of the particular law of any State, the source of its authority, and the relation of this to custom. In the meanwhile it is enough to observe that when Gratian identifies human law with custom, this does not at all mean that he conceives of custom as having any force, except so far as it corresponds with the principle of justice. But in order to treat this subject adequately, we must turn to that tripartite definition of law which the canonists inherit from Isidore and the *corpus juris civilis*.

# CHAPTER III.

## THE THEORY OF NATURAL LAW.

WE have pointed out that St Isidore of Seville restated the tripartite division of law set out by Ulpian and repeated by the Institutes of Justinian. Here therefore is a point where the patristic and the legal tradition of the Middle Ages coincided, and the canonists accept this tripartite division without question.[1]

We must however again notice that while Gratian accepts the tripartite definition of law, this threefold division is subordinate to the twofold division of Natural or Divine Law and Custom, for the *jus gentium* and the *jus civile* are both included under *mores*, while natural law is equivalent to divine law.[2] We must consider more closely what the canonists understand by *jus naturæ* or *jus naturale*. Gratian cites the definition of Isidore,[3] but does not himself furnish us with any technical discussion of this point, though, as we shall presently see, he discusses very important questions arising out of it. We have already quoted the words in which he describes the *jus naturæ* as

[1] *E.g.*, Gratian, 'Dec.,' D. i. 5: "Est et alio divisio juris, ut in eodem libro testatur Isidorus, ita dicens:

'Jus aut naturale est, aut civile, aut gentium.'"

[2] See for text, p. 98.

[3] Gratian, 'Dec.,' D. i. 7: "Jus naturale est commune omnium nationum, eo quod ubique instinctu naturæ, non constitutione aliqua habetur, ut viri et feminæ conjunctio, liberorum successio et educatio, communis omnium possessio, et omnium una libertas, acquisitio eorum, quæ celo, terra marique capiuntur. Item depositæ rei vel commendatæ pecuniæ restitutio, violentiæ per vim repulsio. Nam hoc aut si quid huic simile est, nunquam injustum, sed naturale equumque habetur" (Isidore, 'Etym.,' v. 4).



equivalent to that principle of the law and the Gospel which bids us do to others what we would that they should do to us,[1] and to this we shall have to return. But before doing this we shall find it useful to turn to the work of Rufinus, one of the most important twelfth-century commentators on Gratian. In his comment on the phrases with which Gratian introduces his first 'Distinction,' Rufinus has carefully stated the sense in which he understands the phrase "Natural Law." The *legistica traditio*, he says, has defined the conception of the *jus naturale* when it says that natural law is that law which nature has taught all animals, but the canonists, neglecting so general a conception, are concerned about its meaning in relation to matters which relate to the human race alone. The *jus naturale* is a certain quality implanted in mankind by nature, which leads men to do what is good and to avoid what is evil. This *jus naturale* consists of three parts—of commands, prohibitions, and *demonstrationes*. It commands men to do what is useful, as for example, "Thou shalt love the Lord thy God"; it forbids that which is hurtful, as for example, "Thou shalt not kill"; and it points out (*demonstrat*) what is expedient, as for example, that all things should be held in common, that there should be liberty for all mankind.[2] We must presently consider how it comes about that some of the latter provisions of the natural law have been set aside. But it is of great importance first to observe the formal

[1] See p. 98.

[2] Rufinus, 'Summa Decretorum,' D. i. *Dict. Grat. ad cap. i.*: "Humanum genus." "Gratianus tractaturus de jure canonico quasi altius rete ducto expandit iter operi, incipiens a jure naturali, quod quidem et antiquius est tempore et excellentius dignitate. Hoc autem jus legistica traditio generalissime diffinit dicens: 'Jus naturale est quod natura omnia animalia docuit.' Nos vero istam generalitatem, que omnia concludit animalia, non curantes, de eo juxta quod humano generi solum modo ascribitur, breviter videamus; inspicientes, quid ipsum sit et in quibus consistat et quomodo processerit, et in quo ei detractum aliquid aut adauctum fuerit. Est itaque naturale jus vis quedam humane creature a natura insita ad faciendum bonum cavendumque contrarium. Consistit autem jus naturale in tribus, scilicet, mandatis, prohibitionibus, demonstrationibus. Mandat namque quod prosit, ut: 'diliges Dominum Deum tuum;' prohibet quod ledit, ut: 'non occides;' demonstrat, quod convenit, ut: 'omnia in commune habeantur;' ut: 'omnium una sit libertas' et hujusmodi."

repudiation by Rufinus of Ulpian's definition, which makes "natural law" a matter of animal instinct. Rufinus returns to this in discussing a later part of the same 'Distinction,' and reminds his readers how he has already warned them that the ancient lawgivers use the phrase *jus naturale* in a different sense from that in which the canonists use it. They (the old lawgivers) use this phrase in such a general sense that it would seem to be something common to all animals, while the canonists use it in a restricted sense as applied only to mankind.[1]

We should compare with this the discussion of the subject by Stephen of Tournai, another of the important twelfth-century commentators on Gratian. He explains that the phrase *jus naturale* can be used in various senses: in that of Ulpian, as the principle or instinct common to men and all animals; as equivalent to the *jus gentium*; as equivalent to the divine law which God has taught men in the law and the prophets and the Gospel; in a still wider sense as that law which includes both human and divine law, and that instinct which is given to all animals; and finally, in a fifth sense, as that law which is by nature given to men and not to the other animals—the law which teaches men to do good and to avoid evil; this is a part of the divine law, and consists of commands, prohibitions, and *demonstrationes*.[2] In

[1] Rufinus, 'Summa Decret,' D 1 7 "Et ammonitum est supra aliter legum latores et aliter nos accipere jus naturale, et ipsi quidem simplicius et generalius, ut communiter ascribatur illud omnibus animalibus, nos autem specialius, ut attribuamus solummodo hominibus"

[2] Stephen of Tournai, 'Summa,' D 1 "Et notandum, jus naturale quatuor modis dici Dicitur enim jus naturale, quod ab ipsa natura est introductum et non solum homini, sed etiam ceteris animalibus insitum, a quo descendit maris et feminæ conjunctio, liberorum procreatio et educatio. Dicitur et jus naturale jus gentium, quod ab humana solum natura quasi cum ea incipiens traxit exordium. Jus etiam divinum dicitur naturale quod summa natura nostra, i e deus nos docuit et per legem et per prophetas et evangelium suum nobis obtulit Dicitur etiam jus naturale quod simul comprehendit humanum et divinum, et illud, quod a natura omnibus est animalibus insitum. Et secundum hanc ultimam acceptionem ponit, naturali jure, i e. divino, et illo alio primitive Vel si quintam juris naturalis acceptionem non abhorreas, intellige, hic dici jus naturale, quod hominibus tantum et non aliis animalibus a natura est insitum, scil ad faciendum bonum, vitandumque contrarium. Quæ quasi pars divini juris est Quod in tribus constat maxime, mandatis scilicet, prohibitionibus et demonstrationibus."



this last definition of the meaning of the *jus naturale* Stephen agrees with, is indeed probably following, Rufinus. In his analysis of the conception and his recognition that the phrase must have many senses, he suggests a comparison with the civilians. We have pointed out the recognition of the manifold significance of this term *jus naturale* in Azo's commentary on the Institutes;[1] whether Stephen, who had certainly studied the civil law at Bologna, had learned this mode of thinking from the civilians, or whether the civilians, like Azo, learned it from the canonists, we do not pretend to say.

Stephen's treatment of the subject is interesting, but we can hardly doubt that it is the definition of Rufinus which corresponds most closely with what is usually meant by the *jus naturale* in the works of the canonists. We have seen that Gratian, in dividing all law into natural and customary, identifies the *jus naturale* with the *jus divinum*. Its characteristic expression is found, he says, in the great phrase of the Gospel, "Do unto others what thou wouldest wish others to do unto thee."[2] Natural law, therefore, is superior to all other law—it is primitive and unchangeable,[3] all customs and laws contrary to the *jus naturale* are void.[4] In another passage Gratian urges the agreement of natural law and the Scriptures, and concludes that natural law is supreme just as the divine will and the Scriptures are supreme. All constitutions, whether ecclesiastical or secular, if they are contrary to the *jus naturale*, are to be rejected.[5]

[1] See p 30

[2] See p 98

[3] Gratian, 'Dec,' D. v. Part I § 1. Gratianus "Naturale jus inter omnia primatum obtinet et tempore et dignitate. Cepit enim ab exordio rationalis creaturæ, nec variatur tempore, sed immutabile permanet"

[4] Gratian, 'Dec,' D viii. Part II Gratianus "Dignitate vero jus naturale simpliciter prevalet consuetudini et constitutioni Quecumque enim vel moribus recepta sunt, vel scriptis comprehensa, si naturali juri fuerint adversa, vana et irrita sunt habenda . . ."

Gratianus "Liquido igitur apparet, quod consuetudo naturali juri postponitur"

'Dec,' D ix. Part I Gratianus "Quod autem constitutio naturali juri cedat multiplici auctoritate probatur"

[5] Gratian, 'Dec,' D ix at the end Gratianus "Cum ergo naturali jure nichil aliud precipiatur, quam quod Deus vult fieri, nichilque vetetur, quam quod Deus prohibet fieri, denique cum in canonica scriptura nichil aliud, quam in divinis legibus inveniatur, divine vero leges natura consistant: patet quod quecumque divinæ voluntati, seu canonicæ scripturæ contraria

Ignorance of the civil law may sometimes be condoned, but ignorance of the natural law is always to be condemned in those of mature years.[1] And finally, no dispensation from the natural law can be accepted, except in the case when a man is compelled to choose the lesser of two evils.[2]

These are strong and sweeping phrases of Gratian, but they only express a judgment which is repeated by all the canonists of this time. The first commentator on Gratian, Paucapalea, restates Gratian's principles, the *jus naturale* is contained in the law and the Gospel, and commands us to do to others as we would that they should do to us; it began with the beginning of rational creation, is superior to all other laws, and admits of no variation, but is immutable.[3] We have already quoted part of the important passage in which Rufinus discusses the character of natural law;[4] in the same passage he goes on to treat of the relation of this to other systems of law. He had begun by saying that the *jus naturale* was a principle implanted in human nature, teaching men to do good and to avoid evil; but, he says, the power of this principle was so much weakened after the sin of the first man, that mankind almost came to think that nothing was unlawful; natural law was, in part, re-established by the Decalogue, and completely by the Gospel.[5] This treatment of the subject is interesting, and is probably derived from the patristic discussions of the subject.[1] In another passage he interprets a phrase of Augustine as making truth and reason equivalent to the precepts of the *jus naturale*.[2] In another place he takes a reference of Gratian's to the Canonical Scriptures as implying that he holds them to be the same as *instituta naturalia*.[3] Such is the authority and sanctity of the natural law, and we therefore find him repeating in emphatic phrases Gratian's principles, that all laws contrary to the natural law are null and void. In one passage he draws this out with much force; in these three points especially does the natural law differ from the law of custom or constitution—namely, in its origin, its breadth, and its dignity: Gratian had already discussed its superiority in origin and breadth, but now drew out again its superiority in dignity, saying that whatever custom or constitution there might be which was contrary to the commands and prohibitions of the natural law was null and void, for the Lord said, "I am the truth," not, "I am custom or constitution."[4] And again, in a later passage, Rufinus says more emphatically still: "Whatever there may be in the laws of the emperors, in the writings of authors, in the examples of the saints, contrary to natural law, we hold to be null and void."[5]

probantur, eadem et naturali juri inveniuntur adversa Unde quecumque divinæ voluntati, seu canonicæ scriptura, seu divinis legibus postponenda censentur, eisdem naturale jus præferri oportet Constitutiones ergo vel ecclesiasticæ vel seculares, si naturali juri contrariæ probantur, penitus sunt excludendæ"

[1] Gratian, 'Dec,' C 1. Q 4 Pars 4 Gratianus "Item ignorantia juris alia naturalis, alia civilis Naturalis omnibus adultis dampnabilis est, jus vero civile alias permittitur ignorare, alias non."

[2] Grat, 'Dec,' D xiii Part I, Gratianus "Item adversus naturale jus nulla dispensatio admittitur, nisi forte duo mala ita urgeant ut alterum eorum necesse sit eligi"

[3] Paucapalea, 'Summa Decreti,' Introd "Naturale jus, quod in lege et evangelio continetur, quo prohibitur quisque alii inferre, quod sibi nolit fieri, et jubetur alii facere quod vult sibi fieri, ab exordio rationalis creaturæ cœpit et inter omnia primatum obtinet, nullo enim variatur tempore, sed immutabile permanet."

[4] See p 103.

[5] Rufinus, 'Summa Decret,' D. 1. Dict Grat, ad c 1 · "Hoc igitur jus naturale peccante primo homine eo usque confusum est, ut deinceps homines nichil putarent fore illicitum, unde apostolus 'Peccatum non imputabatur, cum lex non esset' Postmodum vero per decem precepta in duabus tabulis

designata jus naturale reformatum est, sed non in omnem suam plenitudinem restitutum, quia ibi quidem omnino opera illicita, sed non omni modo operantis voluntas condemnabatur Et propterea evangelium substitutum est ubi jus naturale in omnem suam generalitatem reparatur et reparando perficitur."

[1] Cf vol i pp 104 6

[2] Rufinus, 'Summa Decret,' D viii c. 4 "Veritatem dicit precepta juris naturalis in scriptis redacta, rationem dicit juris naturalis instituta sine scriptis."

[3] Rufinus, 'Summa Decret,' D ix c. 3 · "Canonicam scripturam veteris et novi testamenti instituta naturalia dicit."

[4] Rufinus, 'Summa Decret,' D. viii. · "Differt quoque" "In his tribus maxime jus naturale differt a jure consuetudinis et constitutionis, videlicet, in origine, amplitudine et dignitate. Et quidem quomodo origine discrepit, superius premissum est et qualiter in dignitate prelibatum est nunc autem latius repetit quonam pacto dignitate jus naturale a cetero jure distinguatur, quia quecumque de consuetudine aut constitutione juri naturali contraria sunt, utique in mandatis et prohibitionibus, vana et irrita judicantur quia Dominus dicat 'Ego sum veritas,' non 'Ego sum consuetudo,' vel 'constitutio.'"

[5] Rufinus, 'Summa Decret,' D ix.: "Liq igit appar" "In hac dis-

Finally, he restates Gratian's principle that no dispensation can be given from the rules of the natural law, except in the case when a man has to choose between two evils, as for instance if a man has sworn to kill his own brother.[1] Damasus, a canonist and civilian of the beginning of the thirteenth century, discusses the question of the authority of Natural Law in his "Burchardica," citing the authorities on each side, and himself, as we understand, concludes that the *jus naturale* is unchangeable, even by the Pope himself.[2] And finally Pope Gregory IX., in one of his Decretal letters, adopts and confirms the principle that no custom can override the *jus naturale*, and that any transgression of it endangers a man's salvation.[3]

A consideration of these passages seems to make it abundantly clear that these canonists look upon the law of nature primarily as equivalent to the general principles of the moral law—principles which are derived directly from God, and which are antecedent to and superior to all positive laws of any sort, whether ecclesiastical or secular. So far the

tinctione prosequitur, quo modo jus naturale constitutionis juri prescribat: quecumque enim leges imperatorum, quecumque scripta auctorum, quecumque exempla sanctorum contraria sunt juri naturali, ipsa omnia vana et irrita sunt habenda."

[1] Rufinus, 'Summa Decret.,' D. xiii.: "Item adv. jus. nat.," etc. "Demonstravit superius, quomodo jus naturale differat a constitutione et a consuetudine dignitate: nunc aperit qualiter ab eisdem discrepat sententie rigore: quippe contra jus naturale, exaudias quoad præcepta et prohibitiones, nulla dispensatio tolleratur. Quod in illo capitulo insinuatur, quod ait: 'Ceterum consuetudini et constitutioni proprius sepe rigor subtrahitur,' ut infra habetur: 'Sicut quedam'—'nisi duo mala ita urgeant ut,' etc. *Magist.* Gratianus sic dicit hic quasi aliquis sic perplexus sit aliquando inter duo mala, ut non possit vitare alterum, quin delinquat. Exempli causa: juravit quidam homo interficere fratrem suum." Cf. Rufinus, 'Summa Decret.,' C. i. q. 7. 'Dict. Grat.,' ad c. 6: "Quia omnia hæc statuta partes sunt juris naturalis adversus quod nulla dispensatio admittitur."

[2] Damasus, 'Burchardica,' Regula 142: "Jus autem naturale in se est incommutabile, ut Dist. non est, et ext. de consuetud.: c. ult. (D. vi. 3 and Decretals, i. 4. 11); igitur papa non posset constitutionem facere, qua matrimonium prohiberet—ut in illa, nuptiarum, etc., xxvii. q. 2; sunt qui" (Gratian, C. xxvii. q. 2. 19).

[3] Decretals, i. 4. 11, Gregory IX.: "Quum tanto sint graviora peccata, quanto diutius infelicem animam detinent alligatam, nemo sanæ mentis intelligit, naturali juri, cujus transgressio periculum salutis inducit, quacumque consuetudine, quæ dicenda est verius in hac parte corruptela, posse aliquatenus derogari."



subject is clear, and no special difficulty has presented itself; but we must now consider a real difficulty, which arises from the fact that the *jus naturale* has been said to be contained in "the law and the Gospel," while actually there is much in the "law" which is no longer obeyed. And again, the *jus naturale* is said to be immutable, while actually conditions of life now exist, and are allowed to exist, which are contrary to the principles of the *jus naturale*. We must consider these two questions separately; and first, How is it that the "Divine Laws" contained in the "law and the Gospel" have actually been changed?

It is Gratian, in his attempt to construct an intelligible system of Church law, who first among the canonists faces this question. Natural law, he says, is first in dignity, as it was first in time, beginning with the rational creation, and it is immutable; but the natural law is said to be comprehended in the "law and the Gospel," and yet men are now permitted to do things which are contrary to the "law." It would seem, then, that the natural law is not immutable. Gratian takes as an example the law that a woman was not allowed to enter the temple for a certain number of days after the birth of her child; nowadays a woman may enter a church and receive the Holy Communion at any time. Gratian replies to the difficulty by making an important distinction with respect to the "law" and its relation to the *jus naturale*. It is true, he says, that the *jus naturale* is contained in the "law and the Gospel," but not all that is in the "law and the Gospel" belongs to the *jus naturale*. There are in the "law" moral precepts, such as "Thou shalt not kill"; but there are also *mistica*, such as the regulations about sacrifices; the moral precepts belong to the natural law, and are immutable; the *mistica*, as far as their external character is concerned, do not belong to the *jus naturale*—they only belong to it in their moral significance; they are therefore liable to alteration in the former sense, while in the latter they are immutable.[1] Gratian's

[1] Gratian, 'Decretum,' D. v., Pars I. Gratianus, § 1: "Naturale jus inter omnia primatum obtinet et tempore et dignitate. Cepit enim ab exordio ratio-

critical explanation is of great importance; and it is especially noteworthy that he should so frankly recognise that positive law, even when it claims the authority of God Himself, is not unchangeable. This is repeated by Rufinus.[1]

We must turn to the second question. The *jus naturale* is said to be immutable. How is it, then, that conditions are allowed to exist which are contrary to this law? Gratian, in dealing with the institution of property, points out that there is a difference between the *jus naturæ* and custom or constitution, for by the law of nature all things are common, and he illustrates this not only from the practice of the primitive Church, but also from the Platonic doctrine of the most just form of State. It is by the law of custom or of "constitution" that one thing may be said to be "mine" and another "thine." Gratian then cites the passage from St Augustine's treatise on St John, which maintains that property is the creation of the law of the State.[2] Gratian points out the contrast between the *jus*

nalis creaturæ, nec variatur tempore, sed immutabile permanet § 2 Sed cum naturale jus lege et evangelio supra dicatur esse comprehensum (D. 1, Part I, see p 98), quedam autem contraria his, que in lege statuta sunt, nunc in veniantur concessa, non videtur jus naturale immutabile permanere In lege namque præcipiebatur ut mulier si masculum pareret, quadraginta, si vero feminam, octoginta diebus a templi cessaret ingressu nunc autem statim post partum ecclesiam ingredi non prohibetur Item mulier que menstrua patitur, ex lege immunda reputabatur, nunc autem nec ecclesiam intrare, nec sacræ communionis mis teria percipere, sicut illa, que parit, vel illud, quod gignitur, nec statim post partum baptizari prohibetur"

Do do, D vi, at end Gratianus "His ita respondetur. In lege et evangelio naturale jus continetur, non tamen quecumque in lege et evangelio inveniuntur, naturali juri coherere pro bantur. Sunt enim in lege quedam moralia, ut, 'non occides,' et cetera, quedam mistica, ut pote sacrifitiorum precepta, et alia his similia. Moralia mandata ad naturale jus spectant atque ideo nullam mutabilitatem re cipisse monstrantur Mistica vero, quantum ad superficiem, a naturali jure probantur aliena, quantum ad moralem intelligentiam inveniuntur sibi annexa, ac per hoc, etsi secundum superficiem videantur esse mutata, tamen secundum moralem intelligent iam mutabilitatem nescire probantur."

[1] Rufinus, 'Summa Decret,' D. v.

[2] Gratian, 'Decretum,' D viii., Pars I Gratianus "Differt etiam jus naturale a consuetudine et constitu tione Nam jure naturæ sunt omnia communia omnibus, quod non solum inter eos servatum creditur, de quibus legitur 'Multitudinis autem creden tium erat cor unum et anima una, etc', verum etiam ex precedenti tempore a philosophis traditum invenitur. Unde apud Platonem illa civitas jus tissime ordinata traditur, in qua



*naturale* and the actual order of society in this matter, but he does not furnish us with any explanation. This omission is repaired by Rufinus, who deals with the matter very carefully. We have already discussed the first two sections of his treatment of the natural law in commenting on Gratian's first Distinction.[1] We must now consider the rest of this important passage. After describing the character of the natural law as the moral principle implanted in man, and its division into commands, prohibitions, and *demonstrationes*, he argues that the force of this was so much weakened after the Fall that it had to be re-established in part by the Decalogue, and finally and completely by the Gospel. He then proceeds to show how the abstract and general character of the principles of the *jus naturale* made it necessary for additions to be made to it by good customs; and he gives as an illustration the institution of the rules and ceremonies of marriage. So far for the additions (*quod adauctum est*) to the law of nature which are to be found in the institutions of society. The subject of conditions contrary to the principles of the natural law (*quod detractum est*) presents greater difficulties. Rufinus explains this as follows. Referring to his analysis of the *jus naturale* into commands, prohibitions, and *demonstrationes*, he explains this last phrase as indicating those things which the *jus naturale* neither forbids nor commands, but shows to be good; as a special illustration he mentions the liberty of all men and the common possession of all things: these phrases are taken from Isidore's definition of the natural law as quoted by Gratian.[2] These conditions belong to the natural law, while under the civil law this man may be my slave, this field may be your property. Rufinus explains this by saying that such conditions, contrary as they may seem to the natural law, in reality carry it out.

quisque proprios nescit affectus Jure vero consuetudinis vel constitutionis hoc meum est, illud vero alterius Unde Augustinus ait, Tract 6 ad c. 1 Joannis, 'Quo jure defendis villas, etc'" (We have quoted the passage in full in considering the Patristic theory of property. Cf. vol. 1 pp 140, 141)

[1] See pp 103 and 106.

[2] See p. 102

To take the case of slavery, some men living without a master followed their own unrestrained desires and committed all manner of crimes with impunity, and it was therefore ordained that such men should be made perpetual slaves. The object of this was that such men, who had been full of pride and were injurious to others so long as they were free, should be rendered humane, humble, and innocent by the discipline of slavery. No one can doubt that as pride and ill-will are contrary to the *jus naturale*, so innocence and humility are proper to it.[1]

Rufinus's statement is interesting and suggestive; it is, of course, not in any sense original, for he is only putting into other terms the explanation of the contradiction between the law and institutions of nature, and the actual law and institutions of the world, which had been suggested by Seneca, and drawn out at length by the Fathers. Rufinus's statement serves to remind us that the mediæval theory of society rests upon the assumption that the conventional institutions of

[1] Rufinus, 'Summa Decret.,' D. i., Dict. Grat. ad. c. i.: "Quoniam autem ista lex naturalis nudam rerum naturam prosequitur, ostendendo solummodo hoc in natura sui equum esse, illud autem iniquum, ideo necessarium fuit ad modificationem et ornamentum juris naturalis bonos mores succedere, quibus in eo ordo congruus et decor servaretur. Puta: conjunctio maris et feminæ est de jure nature; ne vero isto bono passim et precipitanter homines sicut bestie uterentur, lex hujusmodi naturalis modificata est per ordinem discreti et honesti moris, scil. ut non nisi tales persone et sub tanta celebritate conjugii jungerentur. Ecce jam liquet quod juri naturali ab extra adauctum est, scil. modus et ordo morum. Detractum autem ei est non utique in mandatis vel prohibitionibus, que derogationem nullam sentire queunt, sed in demonstrationibus, que scil. natura non vetat non precipit, sed bona esse ostendit—et maxime in omnium una libertate et communi possessione; nunc enim jure civili hic est servus meus, ille est ager tuus. Omnia tamen hec, que juri naturali videntur adversa, ad ipsum finaliter referuntur. Exempli gratia. Quia effrenes quidam esse ceperant et tamquam acephali sine rectore vivebant, impune omnia concepta scelera committentes, statutum est, ut qui pertinaciter suis potestatibus rebelles existerent, pulsati bello et capti perpetuo servi essent. Ad quid hoc, nisi ut qui prius erant efferi, superbi et nocentes per vagam licentiam, post hec fierent mansueti, humiles et innocentes per servilis necessitatis disciplinam? Quod, scil. horrere superbiam et malignitatem et eligere innocentiam et humilitatem, nullus esse dubitat de jure naturali, et hunc in modum flumina honestatis humane redeunt ad mare juris naturalis, quod in primo homine pene perditum in lege Mosaica relevatur, in evangelio proficitur, in moribus decoratur."



society are the results of sin, and are intended to check and control sin. We shall come back to this when we deal with the theory of slavery and property.

Rufinus' explanation is briefly repeated by Stephen of Tournai in the conclusion of that passage of which we have already quoted a part.[1] He also divides the natural law into commands, prohibitions, and *demonstrationes*: commands, such as to love God; prohibitions, such as not to kill; and *demonstrationes*, such as that all men should be free. Custom has, however, added to and taken from the "natural law," it has added to it such things as the rules and ceremonies of marriage, it has taken away from it not with regard to its commands or prohibitions, but with respect to its *demonstrationes*, as in the matter of liberty, for the *jus gentium* has introduced slavery.[2]

To the mediæval canonist then, as to the Fathers, the *jus naturale* is identical with the law of God, it is embodied in the "law and the Gospel," for it represents the general moral principles which God has implanted in human nature, and it is, in its essential character, immutable. It is true that it is set aside by some of the legitimate institutions of society, but this is to be explained as a necessary accommodation to the corrupt state of human nature, and this is justified by the ultimate purpose of setting forward the principles of the *jus naturale*. The *jus naturale* is to the canonists the norm by which any law or institution must be tried.

[1] See p. 104.

[2] Stephen of Tournai, 'Summa Decreti,' D. i.: "Quod (*i.e.*, jus naturale) in tribus constat maxime, mandatis scilicet, prohibitionibus, et demonstrationibus. Mandat quod prosit, ut deum diligere; prohibet quod lædit, ut non occidere; demonstrat quod convenit, ut omnes homines liberos esse. Huic autem naturali juri per mores et additum est, et detractum. Additum, ut in maris et feminæ conjunctione, cui additæ solemnitates canonicæ cum inspectione idoneitatis personarum faciunt matrimonium. Detractum in demonstrationibus, tamen non in preceptis vel prohibitionibus, sicut in libertate, quæ per jus gentium immutata est, et servitus inducta."

# CHAPTER IV.

## THE *JUS GENTIUM.*

WE have considered one term of that tripartite definition of law which the Middle Ages inherit from the *corpus juris* and Isidore of Seville. We must briefly consider the meaning which the canonists attach to the second kind of law, the *jus gentium*. Gratian's definition of this is taken from Isidore, and is therefore not quite the same as the definition of the Digest or Institutes of Justinian.[1]

Gratian looks upon the *jus gentium* as one part of the customary law of mankind. As we have already seen, he has set out a distinction which, as we may gather, he considers to be more fundamental than the tripartite definition of law, the distinction between natural law and custom,—a distinction which corresponds to that between the Divine law which exists by nature, and the human law which exists by custom.[2] The *jus gentium* is a form of customary law, distinguished from the *jus civile*, because the former represents the custom of mankind, the latter the custom of some particular State. This seems to be clearly implied by Gratian and by Rufinus. The law of nature, Gratian says, began with the beginnings of the rational creation, and continues unchangeable; the law of custom came after the law of nature, and began from that time

[1] Gratian, 'Decretum,' D. i. 9: "Jus gentium est sedium occupatio, ædificatio, *munitio*, bella, captivitates, servitutes, postliminia, federa pacis, induciæ, legatorum non violandorum religio, connubia inter alienigenas prohibita. Hoc inde jus gentium appellatur: quia eo jure omnes fere gentes utuntur." (Isid., 'Etym.,' v. 6.)

[2] See p. 98.



when men commenced to dwell together; it was only later that the *jus constitutionis*, that is, a system of written law, began: the first example of this, Gratian, repeating Isidore, finds in the legislation of Moses, and this was followed by other legislators.[1] Paucapalea repeats the greater part of Gratian's phrases with little change or addition of any significance.[2] Rufinus also has an account of the beginnings of human societies, and of the origin of the general laws and customs of mankind, and he explicitly identifies these with the *jus gentium*. He describes how by the Fall man's sense of justice and capacity for knowledge were greatly impaired; but inasmuch as his natural powers were not wholly destroyed, he began to understand that he was different from the brute animals both in knowledge and manner of life, and he began to seek his neighbour's society and pursue the common service; the embers of justice which had been almost extinguished began again to burn, that is, the rules of modesty and reverence, which taught men to enter into agreement with each other,—and these are called the *jus gentium*, because almost all races of men obey them.[3]

[1] Gratian, 'Decretum,' D. vi. at end: "Gratianus, § 1. Naturale ergo jus ab exordio rationalis creaturæ incipiens, *ut supra dictum est*, manet immobile. Jus vero consuetudinis post naturalem legem exordium habuit, ex quo homines convenientes in unum, ceperunt simul habitare; quod ex eo tempore factum creditur ex quo Cain civitatem edificasse legitur, quod cum diluvio propter hominum raritatem fere videatur exstinctum, postea postmodum a tempore Nemroth reparatum sive potius immutatum existimatur, cum ipse simul cum aliis alios cepit opprimere; alii sua imbecillitate eorum ditioni ceperunt esse subjecti, unde legitur de eo: 'Cepit Nemroth esse robustus venatur coram Domino,' id est hominum oppressor et exstinctor; quos ad turrim edificandam allexit."

D. vii., Part I., *Gratianus*: "*Jus autem constitutionis cepit a justificationibus, quas Dominus tradidit Moisi dicens*: 'Si emeris servum ebreum, &c.' Unde Ysidorus in lib. 6, 'Etym.' i. 1. ait:

'Moises gentis Hebreæ primus omnium divinas leges sacris literis explicavit. Foroneus Rex Grecis primus leges, judiciaque constituit, &c.'"

[2] Paucapalea, '*Summa Decreti*': Introduction.

[3] Rufinus, 'Summa Decret.,' Præf.: "Dignitas humane creature ante peccatum hic duobus quasi funiculis suspensa eminebat, scil. rectitudine justitie, et scientie claritate: per illam presidebat humanis, per istam celestibus propinquabat. Diaboli autem invidia increscente, pondere distorte malitie depressa est rectitudo justitie, *et caligine erroris obscuratum est lumen*

scientie. *Quia igitur* per claudicationem malitie incurrit ignorantie cecitatem, naturali ordine commonente oportebat per justitie exercitia integritatem scientie reparari. Cum itaque naturalis vis in homine penitus exstincta non esset, nimirum satagere cepit, qualiter a brutis animalibus, sicut prerogativa sciendi, ita et vivendi lege distaret. Dumque deliberavit homo cum proximis convenire et mutuis utilitatibus consulere, continuo quasi deinter emortuos cineres scintille justitie, modesta scil. et verecundiora precepta, prodierunt que . . . et concordie subire federa docuerunt et certas pactiones inire: que quidem jus gentium appellantur, eo quod illis omnes pene gentes utantur, sicut sunt venditiones, locationes, permutationes et his similes."



# CHAPTER V.

## THE THEORY OF SLAVERY.

WE have now considered the character of the *jus naturale* as the norm and standard of all just law, and have seen that in the judgment of the canonists it is immutable—that, properly speaking, no institution is lawful, no law is valid, which is contrary to it. But we have also seen that certain institutions are mentioned by the canonists as being contrary to the natural law, especially the institutions of slavery and property, and we have already considered those distinctions within the natural law, by means of which Rufinus and Stephen of Tournai seek to vindicate their legitimate character. Natural law, they say, consists of three parts—commands, prohibitions, and *demonstrationes;* and while the commands and prohibitions are unalterable, the *demonstrationes* have not the same character, and it may even be necessary that the natural law, under this aspect, should be formally disobeyed, in order that its true ends or purposes may be fulfilled. We must now consider more closely the theory of the canonists with regard to the institutions of slavery and property, and must endeavour to ascertain more precisely their views with regard to them. And first we must deal with slavery.

The canonists inherited from the later philosophers of the ancient world, from the *corpus juris civilis*, and from the Fathers, the principle that by nature all men are free and equal, that slavery is an institution not of nature or the natural law, but of the *jus gentium* or the civil law. We have already considered this principle as held by the civilians of

the Middle Ages, and it is not necessary to cite many passages to prove that this was the doctrine also of the canonists. The equality of human nature is indeed the doctrine which is assumed by them all as the fundamental principle of human life—that is, the equality of men, as being all the children of one Father in heaven.

Burchard of Worms embodied in his 'Decretum' that canon, which we have already quoted in the previous volume, in which Christian men are admonished to remember that behind the diversity of the conditions of human life there lay the fact that men were all brethren, for they were the children of one Father, that is God, and of one mother, that is the Church, and that therefore they were bound to treat each other mercifully and considerately, and not to exact from each other more than was reasonable.[1] This is again included in the 'Decretum' of Ivo.[2]

This principle is regarded as determining the nature of the marriage relations of slaves, and a canon in Burchard's 'Decretum' lays down the rule that if a free woman knowingly married a slave, he was to be reckoned as her husband, "For, we all have one Father in heaven;"[3] this is also contained in the 'Decretum' of Ivo.[4] Ivo and Gratian include in their collections a canon which prohibits the dissolution of the marriage of slaves, on the ground that as God is the Father of all men, the same law is binding upon all in things related to God.[5] We shall have to return to the

[1] Burchard of Worms, 'Decret.,' xv. 32: "Quia ergo constat in Ecclesia diversarum conditionum homines esse, ut sint nobiles et ignobiles, servi, coloni, inquilini et cetera hujusmodi nomina, oportet, ut quicumque eis prælati sunt, clerici, sive laici, clementer erga eos agant, et misericorditer eos tractent, sive in exigendis ab eis operibus, sive in accipiendis tributis et quibusdam debitis, sciantque eos fratres suos esse et unum patrem habere Deum, cui sic clamant: 'Pater noster, qui es in cœlis,' unam matrem sanctam Ecclesiam, quæ eos intemerato sacri fontis utero gignit. Disciplina igitur eis misericordissima et gubernatio opportuna adhibenda est." Cf. vol. i. p. 201.

[2] Ivo, 'Decretum,' xvi. 33.

[3] Burchard of Worms, 'Decret.,' ix. 27. "Si femina ingenua accipit servum, sciens quia servus esset, habeat eum: quia omnes unum patrem habemus in cœlis."

[4] Ivo, 'Decretum,' viii. 52.

[5] Gratian, 'Decretum,' C. xxix. Q. 2. c. 1.: "Omnibus nobis unus pater est in cœlis, et unusquisque, dives et pauper, liber et servus, equaliter pro se et pro animabus eorum rationem reddituri sunt. Quapropter omnes, cujuscumque condicionis sint, unam legem quantum ad Dominum habere non dubitamus. Si autem omnes unam legem habent, ergo sicut ingenuus dimitti non potest, sic nec servus semel conjugio copulatus ulterior dimitti poterit" Cf. Ivo, 'Decretum,' viii. 156

[1] Burchard of Worms, 'Decret,' xv 44. "Propter peccatum primi hominis, humano generi pœna divinitus illata est servitutis ita ut quibus aspicit non congruere libertatem, his misericordius irroget servitutem. Et licet peccatum humanæ originis per baptismi gratiam cunctis fidelibus dimissum sit, tamen æquus Deus ideo discrevit hominibus vitam, alios servos constituens, alios dominos, ut licentia male agendi servorum potestate dominantium restringatur. Nam si omnes sine metu fuissent, quis esset qui a malis quemquam prohibeat." See for the whole passage vol. i p. 119, note 1.

[2] Paucapalea, 'Summa Decreti,' D. i. 9: "'Jus gentium est . . . servitutes . ' 'Jure enim naturali ab initio omnes homines liberi nascebantur.'"



question of the marriage of slaves; in the meanwhile these passages will serve to bring out clearly the fact that the canonists assume the principle of the equality of human nature.

The doctrine of the natural freedom of men is in the same way inherited by the canonists from the Civil Law and the Fathers, and assumed by them as true. It is sin, not nature, that has made some men free and some slaves; the origin of slavery is to be found not in some inherent and natural distinction in human nature, but in the fact that sin, as it has depraved men's nature, so it has also disordered all the natural relations of human society, and man now needs a discipline which in his original condition would have been as unnecessary as it would have been unnatural. Burchard of Worms cites that very important saying of St Isidore's, which describes slavery as a consequence of the sin of the first man,—a punishment, but also a remedy by which the evil dispositions of men may be restrained.[1] Paucapalea, the first commentator on Gratian, comments on the phrase *servitutes* in Isidore's definition of the *jus gentium*, as cited by Gratian, by quoting the words of the Institutes that by the law of nature all men were born free.[2] We have already considered the important passage in which Rufinus discusses the question of the apparent contradiction between the law of nature and the civil law with regard to slavery. Rufinus does not express his views in the

same strictly theological phrases as Isidore and the Fathers, but his explanation of slavery is substantially the same. Natural law shows that freedom is a good condition, and slavery would at first sight seem to be contrary to this, but its real purpose is to correct men's evil desires and criminal passions, and to produce those qualities of humility and innocence in which the natural law is fulfilled. Freedom is, indeed, that condition which is agreeable to natural law, but men are not yet fit for that condition.[1]

The canonists, then, like the Fathers and the jurists, recognise that slavery is contrary to natural law—that is, it is a condition adapted not to the ideal of human life, but to the actual imperfections of men's nature. But the canonists, like the Fathers, while they hold that slavery is not a natural institution, not only tolerate it, but justify it; they not only acquiesce in the institution, but hold that it serves a useful purpose. The strongest illustration of this attitude of the canon law to slavery is to be found in this, that it recognises and provides for the fact that the Church was itself a slave-owner. We find a series of regulations from the canonical collections of Regino of Prum in the ninth century to the Decretals of Pope Gregory IX. in the thirteenth century which deal with this.

Regino includes in his collection some sentences from a canon of a Council of Toledo which strictly forbid a bishop to emancipate slaves who belong to the Church unless he gives of his own property to the Church; if any bishop should emancipate Church slaves except under these conditions, his successor is to reclaim them.[2] Regino also cites a canon which forbids an abbot to emancipate slaves who have been given to a monastery, for it is unjust that while the monks do their daily agricultural work the slaves should live in idleness.[3]

[1] See p 112.

[2] Regino of Prum, 'De Synod. Causis,' i. 368: "Episcopi qui nihil ex proprio suo Ecclesiæ Christi conferunt, libertos ex *familiis* Ecclesiæ ad condemnationem suam facere non præsumant. Impium est enim ut qui res suas Ecclesiæ Christi non contulerit, damnum inferat. Tales igitur libertos successor Episcopus absque aliqua oppositione ad jus Ecclesiæ revocabit" (Conc. Tolet., iv. c. 67).

[3] Regino of Prum, 'De Synod. Causis,' i. 367: "Mancipia monachis donata ab Abbate non licet manumitti. Injustum est enim ut, monachis quotidianum rurale opus facientibus, servi eorum libertatis otio potiantur."



Burchard of Worms includes the first of these canons in his Decretum,[1] while Ivo of Chartres reproduces both.[2] Gratian states the same principles in connection with the ordination of slaves. He discusses the question whether the slaves of a monastery can be ordained, and points out that it may be argued that this is impossible, for no one can be ordained unless he is emancipated, and he cites as a canon of the eighth general council what is really a passage from the 'Regula Monachorum,' attributed to St Isidore of Seville, which lays down the rule that no abbot or monk can emancipate a slave. He replies to this by urging that while it is quite true that the slaves of a monastery cannot be emancipated in such a sense that they could leave the monastery, they can be ordained and so emancipated under the condition that they are to continue in the monastery—that is, as we understand, under the condition that they are admitted as monks; and he cites a passage from Gregory the Great which expressly authorises the admission of a slave of the Church into a monastery.[3] Gregory IX., in his Decretals, repeats the canon

[1] Burchard, 'Decret.,' iii 189.

[2] Ivo of Chartres, 'Decretum,' iii 249 and 163.

[3] Gratian, 'Decretum,' D. liv, Part IV.. "*Gratianus.* De servis monasterii queritur, an ecclesiasticis offitiis possunt aggregari, an non. Sed famuli ecclesiarum non sunt ordinandi, sicut supra dictum est, nisi a propriis episcopis libertatem consequuntur. Porro servus monasterii libertatem consequi non valet, non ergo ad clericatum sibi accedere licet. Quod autem liber fieri non possit, probatur auctoritate octavæ Sinodi, in qua sic statutum legitur:

c. 22. 'Abbati vel monacho monasterii servum non licebit facere liberum. Qui enim nichil proprium habet, libertatem rei alienæ dare non potest, nam, sicut et seculi leges sanxerunt, non potest alienari possessio, nisi a proprio domino.'

Gratianus: *Hac auctoritate* prohibentur servi adipisci libertatem recedendi ab obsequio monasterii, sed non prohibentur nancisci libertatem promovendi ad sacras ordines. Potest enim in sacris ordinibus constitutus monasterii obsequiis perpetuo deservire, ac sic servus monasterii et libertatem adipisci et sacrus offitiis valet associari. . . .

Part V., Gratianus. Quod autem servi ecclesiarum (quo nomine etiam monasterii servos significari intelligimus), ad sacræ religionis propositum debeant assumi, auctoritate beati Gregorii probatur, qui generali Sinodo residens dixit.

c. 23: 'Multos ex ecclesiastica familia novimus ad omnipotentis servitium festinare, ut ab humana servitute liberi in divino servitio valeant in monasteriis conversari,' etc."

of Toledo, which we have already cited from Regino of Prum, the canon which forbids a bishop to emancipate slaves belonging to the Church unless he gives property of his own to the Church.[1]

These passages will suffice to make it clear that the canon law accepted and sanctioned the institution of slavery, for they assume that the Church itself was a slave-owner. But the mediæval canon law goes further than this, and repeats from earlier Church authorities the very severe condemnation of those who encouraged slaves to fly from their masters, and of fugitive slaves. Burchard of Worms cites that canon of Gangræ, which we have discussed in the previous volume, in which the anathema of the Church is pronounced against those who teach slaves to despise their masters and to fly from them, and also part of the letter of Hrabanus Maurus which comments on this and discusses the question whether it was lawful to say mass for a slave who had died while in flight.[2] Burchard also cites a canon of the Council of Altheim which professes to repeat a saying of Gregory the Great, that a cleric flying from his church, or a slave flying from his master, is to be excluded from communion until he return.[3] Ivo of Chartres repeats these two canons in his 'Decretum,'[4] while Gratian cites the canon of Gangræ.[5] The canonists clearly look upon the institution of slavery as in such a sense authorised and sanctioned by God that any revolt against it was sinful.

We have just cited a passage from Gratian which refers to the question of the ordination of slaves, and we must now

[1] 'Decretals,' III 13 4

[2] Burchard of Worms, 'Decret,' XI 62: "Et in Gangrensi concilio ita scriptum est Si quis servum sub prætextu divini cultus doceat dominum proprium contemnere, ut discedat ab ejus obsequio anathema sit" For Hrabanus Maurus' discussion of this, see vol. I pp 204, 205

[3] Burchard of Worms, 'Decret,' XI. 78: "Sanctus Gregorius dicit clericum fugientem ab Ecclesia sua, vel servum fugientem dominum proprium, et nolentem reverti, judicamus communione privari quoadusque ad propriam ecclesiam, vel ad dominum suum redeat"

[4] Ivo, 'Decretum,' XIII. 48. and XIV. 126

[5] Gratian, 'Decretum,' C. XVII. Q 4. c. 37.



turn to this subject, for it serves to illustrate very clearly the degree in which the Church accepted the institution of slavery. There is no need to go through the evidence in detail, for the canonists restate those same general principles with regard to the subject which we have discussed in the first volume.[1] The slave must not be ordained until he has been emancipated,[2] and the emancipation must, in the case of slaves of lay masters, be absolute and complete—that is, the master cannot retain the *jus patrocinii*;[3] the Church, on the other hand, always retains these rights, even over those who are emancipated and ordained.[4] That is, the master can retain no rights of an ordinary kind: from other canons it would appear that the master might retain the right to the services of the emancipated slave as a minister of a church on his property.[5]

[1] Cf vol I. pp. 122, 206

[2] Regino of Prum, 'De Synod. Causis,' I 391, Burchard, 'Decret,' II 21, Ivo, 'Decretum,' VI 64, 100, Ivo, 'Panormia,' III 48, Gratian, 'Decretum,' D liv, Part I.

[3] Ivo of Chartres, 'Panormia,' III. 46 "Quicumque libertatem a dominis ita percipiunt, ut nullum sibimet obsequium patronus in eis retentet, isti, si sine crimine capitali sunt, ad clericatus ordinem liberi suscipiantur qui directa manumissione absoluti esse noscuntur. Qui vero retento obsequio manumissi sunt, pro eo quod adhuc patroni servitute tenentur obnoxii, nullatenus ad ecclesiasticum ordinem sunt promovendi, ne, quando voluerint eorum domini, fiant ex clericis servi."

Gratian, 'Decretum,' D. liv. 4. Gratianus: "Qui autem a dominis suis ordinandi libertatem consequuntur, ab eorum patrocinio penitus debent esse alieni, ut in nullo eorum obsequiis inveniantur obnoxii"

[4] Gratian, 'Decretum,' C XII Q 2 c. 58 Gratianus "Sed notandum est, quod servi ecclesiarum manumitti non possunt, non retento ecclesiastico patrocinio, nisi forte manumissor duos ejusdem meriti et ejusdem peculii ecclesiæ conferre voluerit."

Rufinus, 'Summa Decret.,' D. liv.: "Cum autem ecclesia servum suum ordinandum manumiserit, numquam sine aliquo retento obsequio, etiam non spirituale, liberare eum poterit"

[5] Burchard of Worms, 'Decret,' II 234 "Nullus clericus ad gradum presbyterii promoveatur, nisi ut scriptum in canonibus habetur. Si enim propter Dei dilectionem quis de servis suis quemquam elegerit, et docuerit literas, et libertati condonaverit, et per intercessionem erga episcopum presbyterium effecerit, et secundum apostolos victum et vestitum ei donaverit, ille autem postea in superbiam elatus missam dominis suis et canonicas horas observare et psallere renuerit, et ei juste obedire, dicens se liberum esse, noluerit, et quasi libere cujus vult homo fiat, hoc sancta synodus anathematizat, et illum a sancta communione arceri judicat, donec resipiscat et domino suo obediat secundum canonica precepta Sin autem obstinato animo et hoc contempserit, accusetur apud episcopum, qui eum ordinavit, et degradetur. et fiat servus illius idem domini sui, sicut

According to a canon in Regino's and Ivo's collections, if a slave is ordained by the bishop, knowing that he is a slave, but without the knowledge and consent of his master, he is to continue in his office, but the bishop is to pay double his value to the master; if the bishop was ignorant that he was a slave, then those who testified to his character, or who presented him for ordination, are to pay this compensation.[1] According to a canon in Burchard, which comes from the 'Capitula Ecclesiastica' of 818-19 A.D., a slave who procures his ordination by fraud is to be restored to his master; if he procured ordination, being himself ignorant of the fact that he was a slave, his master may grant him his liberty, and the slave will then remain in his order, or he may reclaim him as a slave, and he will then lose his order.[2] This canon

natus fuerat" Cf Ivo of Chartres, 'Decretum,' VI 302

Rufinus, 'Summa Decret,' D liv "Cum itaque servus ordinandus manumittitur a privato, nullo retento obsequio debet liberari Sed tamen notandum quod obsequium aliud spirituale, aliud non spirituale spirituale, sicut ministrare altario et hujusmodi, non spirituale autem manumissorum hic obsequium dicimus, quod leges seculi libertorum operas appellant . . . Cum ergo servum suum ordinandum privatus manumittit, nullum obsequium non spirituale in eo poterit retinere, *i e operam aut fabrilem aut officialem*— officialem, inquam, que consistit in faciendo . Spirituale vero obsequium retinere poterit, si ad hoc eum ordinari voluerit, ut sibi et sue quam forte edificavit ecclesie officia celebret, ut in Burc, II c, 'Nullus clericus, aperte invenitur"

Cf Decretals, I 18 4 Same as Burchard, II 231

[1] Regino of Prum, 'De Synod Causis,' I. 404· "Si servus, absente aut nesciente domino, episcopo autem sciente, diaconus aut presbyter fuerit ordinatus, ipse in clericatus officio permaneat, episcopus autem eum duplici satisfactione domino persolvat Si vero episcopus servum eum esse nescierit, qui testimonium de illo perhibent, aut eum postulant ordinari, simili recompensatione teneantur obnoxii." Cf Ivo of Chartres, 'Decretum,' VI 125

[2] Burchard of Worms, 'Decret,' II 31. "*Et si quilibet servus dominum* suum fugiens, aut latitans, aut ad *hibitis testibus munere conductis*, vel corruptis, aut qualibet callliditate vel *fraude, ad gradus ecclesiasticos* perven erit, decretum est ut deponatur, et dominus ejus eum recipiat Si vero avus aut pater, ab alia patria in aliam migrans in eadem provincia filium genuerit, et ipsa filius ibidem educatus, et ad gradus ecclesiasticos promotus fuerit, et utrum servus sit ignotum sit, et postea veniens dominus illius legibus cum acquisierit, sancitum est ut si dominus ejus illi libertatem dare volu erit, in gradu suo permaneat Si vero eum catena servitutis a castris Domini cis abstrahere voluerit, gradum amittat quia juxta sacros canones vilis persona manens sacerdotii dignitate fungi non potest" Cf 'Capitula Ecclesiastica' of 818-19 A D, in M G H Leg, sect. II. No 138 Cf. vol. i. p. 206.



is also found in Ivo's 'Decretum,' and was inserted as a Palea in Gratian's 'Decretum.'[1] It would seem, however, that this canon does not represent the judgment either of Gratian or of his commentators. Indeed even Burchard and Ivo have also cited canons which represent another judgment. Burchard cites a canon which prescribes that though a slave who has been ordained is to be restored to his master, he is to continue in his order.[2] Ivo cites a passage from a letter of Pope Gelasius I., which enjoins the restoration of the ordained slave to his master, but also provides that the slave who has been ordained priest, while he is to be sent back to his master, is to serve him as a priest;[3] and he also cites another letter of Gelasius which does not allow a priest to be degraded, but punishes him with the loss of his peculium, while slaves in the inferior orders are simply to be restored to their masters.[4] Gratian cites both these letters of Gelasius, and states his own judgment as being that, if a slave has been ordained without his master's consent, a priest is to be deprived of his "peculium," a deacon is to find a substitute, or, if he cannot do this, to be reduced to slavery, while those in other orders are simply to be reduced to slavery.[5] There

[1] Ivo, 'Decretum,' VI. 132 Gratian, 'Decretum,' D liv c 6 (Palea)

[2] Burchard of Worms, 'Decret,' VIII 3 "Si vero servus, qui superius taxato modo tonsuratus est, et ad gradus ecclesiasticos pervenerit, domino suo per legem emendetur, et ei red ditus in suo gradu permaneat"

[3] Ivo, 'Decretum,' VI. 354 'Pan ormia,' III 165 Cf vol I p 122

[4] Ivo of Chartres, 'Panormia,' III 164 "Actores siquidem illustris viri filii nostri Amandi graviter conquer untur, homines juri suo debitos, alios jam in clericos, alios jam subdiaconos ordinatos, cum non solum post mod ernum concilium quod *tantorum* col lectione pontificum sub omnium salu berrimæ *provisionis assensu constat* esse perfectum, hujusmodi personas suscipere non deberent, verum etiam si qui forte in divinæ cultum militiæ ante fuerint, ignorantia faciente, susceptι, eliminati prorsus et exuti reli gioso privilegio ad dominorum possessiones justa debuerint admonitione compelli, et ideo fratres charissimi, eos quos supradicti viri actores in clericatus officio monstraverint, detineri, discussos et obnoxios approbatos, custodito legum tramite, sine intermissione restituite, ita ut si quis jam presbyter reperitur, in eodem gradu peculii sola amissione permaneat. Diaconus vero aut *vicarium præstet*, aut si non habuerit, ipse reddatur. *Residua officia sciant neminem* posse ab hoc noxietate, si convincitur, vindi cari, quatenus hoc ordine custodito, nec dominorum jura, nec privilegia ulla ratione turbentur" (Gelasius I, Ep. XX, ed Thiel).

[5] Gratian, 'Decretum,' D liv, cc. 9 and 10, and before c 9 "Gratianus

might seem to be some uncertainty about Gratian's meaning; at first sight it would seem as though the priest were not to be restored to his master, but only to forfeit his "peculium," but the fact that he cites the passage from Gelasius which orders him to be restored to his master, but only in order to serve him as a priest, would seem to indicate that he approves of this, but does not understand this as equivalent to the reduction of the priest to slavery. Paucapalea restates the judgment of Gelasius (Epistle xx.) as to the priest.[1] Rufinus sums up the whole matter in a passage introductory to Gratian, D. liv. If, he says, a slave is ordained with the master's knowledge, and the master says nothing, the slave is free; if the slave is ordained against the declared wishes of the master, he must be reduced to slavery and lose his order, even if he is a priest, and he refers for proof to that canon of Burchard which we have already quoted,—it would seem that Rufinus did not know this as a Palea in Gratian's Decretum. This canon prescribes that a slave who has been ordained without his master's knowledge may be reclaimed by his master and degraded; Rufinus urges that if this were true of a man ordained to the priesthood without his master's knowledge, much more would it hold in the case of a man ordained against his master's declared will. Then, however, Rufinus considers over again the case of a slave ordained without his master's knowledge, and repeats Gratian's own judgment that in this case the man in subdeacon's orders, or in inferior orders, is to be reduced to slavery, the deacon is to find a substitute or to return to slavery, while the priest is to be punished only with the loss of his peculium, and is in nowise to be reduced to slavery—unless, Rufinus adds, the man or his parents fled from their master, as in the case contemplated in Burchard's canon. Finally, he adds, some may maintain that the regulation represented by Burchard's canon is annulled by the decree of Gelasius on which Gratian's own

Ceterum, si a dominis suis libertatem consecuti non fuerint, et ad ecclesiasticos ordines aliquo modo irrepserint, presbiter peculii amissione mulctetur, diaconus vero aut vicarium pro se prestabit, aut in servitutem revocabitur, ceteri vero gradus non possunt quemquam a nexu servitutis absolvere."

[1] Paucapalea, 'Summa Decreti,' D. liv.



saying is founded (Gratian, 'Decretum,' D. liv. c. 9).[1] These canonists evidently held what was substantially the same principles as the Fathers; if anything their views are rather more strict with regard to the rights of the master over his slave if he should have been ordained. It is, however, worth while to notice that some of the canonists have taken over from Justinian the principle that the master can only reclaim his slave who has been ordained within a certain time; Ivo includes in the 'Panormia' the provision of the Novels that if a slave is ordained without his master's knowledge the master can reclaim him, but only within a year. This rule is also cited by Gratian.[2]

Very similar rules are cited by the canonists with respect to the admission of slaves into monasteries. Burchard and Ivo cite a canon prohibiting a slave from entering a monastery

[1] Rufinus 'Summa Decret.,' D. liv.: "Cum autem non manumissi ordinantur, aut fit scientibus dominis aut nescientibus; cum vero scientibus, aut contradicentibus aut tacentibus. Si ergo scientibus dominis et tacentibus servi fuerint ordinati, ex hoc ipso efficiuntur liberi et ingenui, ut infra eadem dist. 'Si servus sciente' (Gratian, 'Dec.,' D. liv. c. 20). Si autem sciens contradixerit dominus, si voluerit dominus, in servitutem revocabitur ordinatus, non solum si diaconus, sed etiam si presbiter factus fuerit. Et quidem de diacono habes infra ead. dist. 'quis aut' (Gratian, 'Dec.,' D. liv. c. 11). De sacerdote vero sic habetur quia, si aliquis cum uxore ancilla in aliam patriam migraverit, ibique filium genuerit, qui filius postea suo tempore ad sacerdotium promotus fuerit—si veniens postea suus dominus recipere eum voluerit, sacerdos non erit, sed in servitutem redibit; quere in secundo libro Burchardi, capitulo 'De servorum ordinatione (Burchard, 'Decretum,' ii. 31). Ecce nesciente forte domino talis fuerat sacerdos ordinatus et tamen postea in servitutem depulsus: multo magis ergo, si eo contradicente. Denique si nesciente domino servus fuerit ordinatus, tunc dominus, protinus ut sciverit, illum poterit revocare, si ad subdiaconatum et infra servum contigerit ordinatum esse. Si autem diaconus factus fuerit, aut vicarius pro eo domino suo detur, aut ipse in servitutem revocabitur. Si autem sacerdos, sola peculii amissione mulctabitur, ipse autem nullo modo in servitutem revocabitur, ut infra ead. dist. cap. 'Ex antiquis' (Gratian, 'Dec.,' D. liv. c. 9): nisi forte a dominis suis vel ipsi vel eorum parentes prius fugerint, ut in supra designato capitulo Burchardi (Burchard, 'Decretum,' ii. 31) diximus—nisi quis astruat illud Burchardi per decretum Gelasii abrogatum."

[2] Ivo of Chartres, 'Panormia,' iii. 166: "Si servus sciente et non contradicente domino, in clero sortitus sit, ex hoc ipso liber et ingenuus fiat: si enim ignorante domino consecratio facta fuerit, liceat domino intra annum tantum conditionem probare et proprium suum recipere." (Novel, 123. 17.)

Cf. Gratian, 'Decretum,' D. liv. 20.

without his master's permission,[1] but again Ivo in the 'Panormia' quotes the regulation that while an unknown man who seeks admission to a monastery is not to receive the habit within three years, and if he should prove to be a slave his master can reclaim him within that time, yet after that time he cannot be claimed; and this rule is restated by Gratian and Rufinus.[2] Stephen of Tournai also repeats this rule, but adds that there was some doubt as to the proper course if the abbot had given the slave the tonsure and made him a monk before the three years were over; some, he says, maintained that in this case the slave was not to be restored to his master, but that the abbot should be required to find another slave of equal value and give him to the master.[3] We must notice that the canonical regulations are not so favourable to liberty as the provisions of Justinian's Novels, for these only allowed a slave to be reclaimed from a monastery, even within the first three years, if he had committed some crime.[4] We have already cited the passages in Gratian which deal with the question of the ordination of the slaves of a monastery; they may not be emancipated and ordained under such terms as that they could leave the monastery, but they can be ordained on condition that they are perpetually to minister in and for the monastery.[5]

With regard to the ordination of the freedman and the

[1] Burchard of Worms, 'Decret.,' viii. 24: "Placuit in monasterium non esse recipiendum servum ad monachum faciendum, præter proprii domini voluntatem. Qui vero hoc constitutum nostrum excesserit, eum a communione suspendi decrevimus, ne nomen Domini blasphematur." Cf. viii. 28 and Ivo of Chartres, 'Decretum,' vii. 44; xvi. 46.

[2] Ivo of Chartres, 'Panormia,' iii. 184: "Si aliquis incognitus monasterium ingredi voluerit, ante triennium monachi habitus ei non præstetur, et si intra tres annos, aut servus, aut colonus, aut libertus, quæratur a domino suo, reddatur ei cum omnibus quæ attulit, fide tamen accepta de impunitate. Si autem triennium non fuerit requisitus, postea quæri non potest, nisi sit tam longe ut inveniri non possit; sed tamen ea quæ ad monasterium adduxit, servi dominus accipiat." Cf. Gratian, 'Decretum,' D. liv. 20; Rufinus, 'Summa Decret.,' C. xx. Q. 1; Novels, v. 2.

[3] Stephen of Tournai, 'Summa Decreti,' D. liv. 9: "Quid tamen, si abbas ipsum infra triennium totonderit et monachum fecerit? Quibusdam videtur favore religionis, quod non debeat eum dominus extrahere, sed abbas alium eisdem æstimationis teneatur restituere."

[4] Novels, v. 2. Cf. vol. i. p. 122.

[5] See p. 121.



*inscriptitius*, Gratian cites two regulations, but they are not in harmony with each other: the first forbids the ordination of any person who is under any servile obligation without the consent of the person to whose service he is bound,[1] while the other provides that the *inscriptitius* can be ordained without the permission of his master, but that if so ordained he must continue to discharge his agricultural task,[2]—this latter regulation is taken from the Novels. Gratian himself says that no freedman can be ordained unless the master surrenders his rights as "patron."[3] It is important to remember that the civilians look upon the *ascriptitius* as a free man rather than a slave, and that Azo held that he could be ordained without his master's consent.[4]

It is clear, then, that the mediæval canon law, while maintaining the philosophic and Christian doctrine of the equality of human nature, and while declaring that under the law of nature all men are free, yet very clearly defended and sanctioned the institution under the actually existing circumstances of human life, while the mediæval Church recognised it, by itself holding slaves and by refusing to allow the ordination of the slave. We must now consider how far the influence of canon law tended to mitigate the conditions of slavery, and how far, in spite of its formal theory, its influence tended to bring the institution to an end.

The Church gave the weight of its authority to the provisions of the Roman law which restrained the arbitrary power of the master and protected the slave, and lent the sanction of its own penalties to the enforcement of those laws, while in relation to the marriage of the slave it went further than the

[1] Gratian, 'Decretum,' D. liv. 7: "Si quis obligatus est tributo servili, vel aliqua condicione, vel patrocinio cujuslibet domus, non est ordinandus clericus: nisi probatæ vitæ fuerit, et patroni *consensus accesserit*."

[2] Gratian, 'Decretum,' D. liv. 20: "Inscriptitios vero in ipsis possessionibus clericos, etiam præter voluntatem dominorum fieri permittimus: ita tamen, ut clerici facti impositam sibi agriculturam adinpleant." Cf. Novel. 123. 17.

[3] Gratian, 'Decretum,' D. liv., after c. 4. Gratianus: "Qui autem ordinandi, a *dominis suis libertatem* consequuntur, ab eorum patrocinio penitus debent esse alieni, ut in nullo eorum obsequiis inveniantur obnoxii."

[4] See p. 40.

Corpus Juris Civilis. We have seen that both Placentinus and Azo deal very stringently with the master who ill-treats or kills his slave; they hold that a master is liable to be proceeded against for homicide, as though he had killed a freeman.[1] Regino of Prum cites a canon which imposed upon the Bishop in the visitation of his diocese the duty of inquiring whether any slave-owner had killed his slave without legal proceedings,[2] and another canon which imposes the sentence of excommunication for two years upon any slave-owner who has done this.[3] These regulations are repeated by Burchard of Worms.[4] Regino also reproduces from the Theodosian Code a regulation that, in the division or sale of properties, care should be taken that husbands and wives, parents and children, should not be separated from each other.[5] Gregory IX., in the Decretals, reproduces and amplifies the doctrine of the ancient Roman law, that a slave deserted or exposed in infancy or illness is to be reckoned as emancipated.[6] Ivo and Gratian include in their collections canons which extend the protection of the Church to the freedman, and provide that any person who attacks their liberty, without a judgment of the courts, is to be excluded from the Church.[1]

[1] See p. 37.

[2] Regino of Prum, 'De Synod. Causis,' ii. 5. 10. One of a series of questions to be asked by the Bishop in his visitation: "Est aliquis, qui proprium servum extra judicem occiderit, et aliqua femina quæ ancillam propriam necaverit furore zeli inflammata?"

[3] Regino of Prum, 'De Synod. Causis,' ii. 26: "Si quis servum proprium sine conscientia *judicis occiderit*, excommunicatione biennii reatum sanguinis emendabit."

[4] Burchard, 'Decretum,' i. 94. 10; vi. 18.

[5] Regino of Prum, 'De Synod. Causis,' ii. 122: "In divisione, inquit, patrimoniorum, seu fiscalium dominorum, seu privatorum, observari specialiter debet ut quia injustum est filios a parentibus, uxores a maritis, cum ad quemcunque possessio pervenerit, sequestrari, ut mancipia quæ permixta fuerint, id est uxor cum filiis et marito suo, datis vicariis, ad unum debeant pertinere, cui necesse fuerit commutare quod *sollicitudo ordinantium* debet specialiter custodire, ut separatio fieri omnino non possit."

Cf. Cod. Theod. ii. 25: "De Com. Divid.," Interpretatio.

[6] 'Decretals,' v. 11: "Si a patre, sive ab alio, sciente ipso aut ratum habente, relegato pietatis officio infans expositus exstitit: hoc ipso a potestate fuit patria liberatus. Nam et hoc casu in ingenuitatem libertus, et servus in libertatem eripitur, quod et de prædictis cujuscumque ætatis languidis, si expositi fuerint, vel si alicui eorum alimenta impiæ denegari contigerit, est dicendum. Sane qui hos suscipiunt, non possunt propter hoc in eorum personis jus aliquod vendicare." Cf. *Digest*, xl. 8. 2.



So far, the Church law does not do more than reinforce the civil law, but the most important aspect of the relation of the canon law to the condition of slavery is to be found in the treatment of the marriage of slaves with slaves, or of slaves with free people. We have just considered the rule which Regino takes from the Theodosian Code, that the slave husband and wife were not to be separated from each other;[2] this is a humane conclusion from the principle that the marriage of a slave, if contracted under legal conditions, is indissoluble, like the marriage of free people. This principle is expressed very emphatically in a canon contained in the collections of Burchard, Ivo, and Gratian.[3] It must, however, be noticed that according to this canon, if the marriage is to be indissoluble it must have been contracted with the consent of the master: a marriage without this consent is, we may infer, illegitimate. This is expressly stated in the latter part of Regino's canon; the slave wife is to be bought or sold with her husband, unless she is the slave of another master; the law strictly forbids a slave to marry the slave of another master (presumably without the master's leave); such a marriage is to be held null and void, and to be reckoned as adultery.[4] On this point we

[1] Ivo of Chartres, 'Decretum,' xvi. 51: "Libertos, legitime a dominis suis factos, ecclesia, si necesse fuerit, tueatur. Quod si quis ante audientiam aut pervadere eos, aut exspoliare voluerit vel præsumpserit, ab ecclesia repellatur." Cf. xvi. 53, 54, 'Panormia,' ii. 82-84, and Gratian, 'Decretum,' D. lxxxvii. c. 7.

[2] See last page.

[3] Burchard, 'Decret.,' ix. 29: "Dictum est nobis, quod quidam legitima servorum *matrimonia potestativa* quadam præsumptione dirimant, non attendentes illud evangelicum. 'Quod Deus conjunxit, homo non separet.' Unde nobis visum est ut conjugia servorum non dirimantur, etiamsi diversos dominos habeant: sed in uno conjugio *permanentes, dominis servant suis*. Et hoc in illis observandem est, ubi legalis conjunctio fuit, et per voluntatem dominorum."

Cf. Ivo of Chartres, 'Decretum,' xvi. 335; 'Panormia,' vi. 40. Gratian, 'Decretum,' C. xxix. Q. 2. c. 8.

[4] Regino of Prum, 'De Synod. Causis,' ii. 123: "Id etiam in venditione vel emptione videtur observari debere, ut quando quis maritum emerit emat pariter et conjugem, nisi forte alterius ancilla fuerit. Hac de re lex jubet atque interdicit ut nullus servus neque proprius neque ecclesiasticus neque de fisco ancillam alienam in conjugium ducat, similiter ancilla alterius servum

can trace a definite development in the canon law, for, in one of his Decretals, Hadrian IV. laid down the rule expressly that, inasmuch as in Jesus Christ there is neither free nor slave, and the sacraments are open to all, so also the marriages of slaves must be not prohibited; even if they are contracted against the will of their masters, they are not to be dissolved by Church authority, but the married slaves must discharge their accustomed services to their masters.[1] The canonists also deal carefully with the question of the marriage of free men or women with slaves. Burchard cites a canon which lays down the broad principles on which the matter was decided. If a free man marries a slave woman, not knowing that she was a slave, he is to redeem her from slavery if he can; if he cannot, he is free to marry another wife. If, however, at the time of marriage he knew that she was a slave, the marriage is valid; and so in the case of a free woman who marries a slave.[2] This canon is reproduced by Ivo in the 'Panormia,'[3] and Gratian discusses the whole question carefully, and concludes in terms which agree with those of Burchard's canon.[4]

Again, the Church offered a certain protection to the slave by its rights of sanctuary. In an appendix to the work of Regino of Prum there is a canon which lays down the rule that if a slave who has committed some fault flies to the Church, the master is to swear not to punish him for the

nequaquam accipiat: quod si fecerit, irritum habeatur hujuscemodi conjugium, et pro adulterio deputetur"

[1] 'Decretals,' IV 9 1 (Hadrian IV) "Sane, juxta verbum apostoli, prosit tua discretio recognoscit, sicut in Christo Jesu neque liber, neque servus est, qui a sacramento ecclesiæ sit removendus, ita quoque nec inter servos matrimonia debent ullatenus prohiberi. Et si contradicentibus dominis et invitis contracta fuerint, nulla ratione sunt propter hoc ecclesiastico judicio dissolvenda, debita tamen et consueta servitia non minus debent proprius dominis exhiberi"

[2] Burchard, 'Decret,' IX. 26 "Si quis ingenuus homo ancillam alterius uxorem acciperet, et existimat quod ingenua sit, si ipsa femina postea fuerit inservita, si eam a servitute redimere potest, faciat. si non potest, si voluerit, aliam accipiat Si autem servam eam esse sciebat, et collaudaverat post. ut legitimam habeat. Similiter et mulier ingenua de servo alterius facere debet"

[3] Ivo, 'Panormia,' VI. 41

[4] Gratian, 'Decretum,' C XXIX. Q 2. For the subject of the Canon Law and the marriage of slaves, cf. Freisen, 'Geschichte des Canonischen Eherechts.'



fault, and he is then to be restored to his master; if the master breaks his oath he is to be excommunicated. This canon is repeated by Burchard, and by Ivo in the 'Panormia.'[1] Ivo's 'Panormia' contains another canon which sets out that not only the Church and its court, but also the house of the bishop, are to be reckoned as sanctuaries, that no one may venture to take from thence a fugitive slave or criminal, and that the rulers of the Church are to obtain for him a promise of immunity. This canon is repeated by Ivo in the 'Panormia,' and in part by Gratian.[2] These canons, however, must not be misunderstood: the Church offers a certain protection to the slave through the right of sanctuary, but the Church must not finally detain the slave, or allow him to escape from his master by seeking its protection. Ivo's 'Decretum' contains a canon drawn from a letter of Pope Gelasius I., which lays this down very explicitly; the authorities of the Church must restore the fugitive slave, even against his will, to his master, after they have obtained from him an oath that he will not punish the slave; Gratian reproduces the canon,[3] and Pope Innocent

[1] Regino of Prum, 'De Synod Causis,' Appendix I. 14. "Servus qui ad ecclesiam pro qualibet culpa confugerit, si a domino pro admissa culpa sacramentum susceperit, statim ad servitium domini sui redire cogatur. Et si, posteaquam dato sacramento domino suo fuerit consignatus, si aliquam pœnam pro eadem culpa pertulerit, pro contemptu Ecclesiæ et prævaricatione fidei dominus a communione catholicorum habeatur extraneus"

Cf. Burchard, 'Decret,' III 192 Ivo, 'Panormia,' II. 73

[2] Ivo, 'Panormia,' II 75. "Servum confugientem ad ecclesiam seu in atrium ecclesiæ, aut in officinas regularium fratrum vel in curtim vel in domum episcopi, quia hæc in antiquis canonibus pro immunitate tenentur, nemo abstrahere audeat, neque inde donare ad pœnam vel ad mortem, ut honor Dei et sanctorum ejus præ omnibus servetur, sed rectores ecclesiarum pacem et vitam ac membra ei cum juramento obtinere studeant. Tamen legitime componat quidque inique fecerat, et si insecutor magistris ecclesiæ obedire noluerit, canonice constringatur."

Cf. Burchard, 'Decret.,' III. 194. Gratian, 'Decretum,' C. XVII. Q. 4. c. 9.

[3] Ivo, 'Decretum,' XVI. 68: "Metuentes famuli dominos, si ad ecclesiæ septa confugerint, intercessionem debent quærere, non latebras, ne hec ipsa præsumptio tarditatis temeritatem augeat remittendi. Filius etenim noster vir spectabilis Petrus queritur servum suum in ecclesia S. Clementis diutius commorari, cui cum deputasset sacramenta præstari, illum egredi nulla ratione voluisse. Et ideo directus supradicti homo de præsenti cum eo, quem elegerit esse mittendum, cum de impunitate ejus sacramenta prebuerint.

III. lays down the same principle very clearly in the 'Decretals.'[1]

One form of enslavement the Church law, following the secular jurisprudence, did prohibit and punish—that is, the kidnapping and enslavement of free Christians. The Theodosian Code punished with death those who kidnapped children;[2] Regino of Prum embodies this law in his work, and condemns especially the sale of Christians to the heathen;[3] Burchard's 'Decretum' contains similar regulations;[4] and Deusdedit's 'Collectio Canonum' contains a provision against the sale, presumably of Christian men, embodied in the oath of allegiance of Demetrius, Duke of Dalmatia, to the Pope.[5]

Finally, though the Church acquiesced in and sanctioned the institution of slavery, and though it did itself possess slaves, yet the canonists furnish us with continued evidence that the Church looked upon the emancipation of a slave as an action meritorious and acceptable to God. Regino and Ivo include in their collection a formula of manumission which expresses very clearly the conviction that he who releases his slave from bondage will be rewarded by God; and this formula is quoted by Rufinus,[6] and Gratian reproduces an even more significant statement by St Gregory the Great, in which he describes the purpose of the Incarnation as being to break the chain of slavery by which men are bound, and to restore them to their primitive liberty; and urges that it is therefore a good action to give back to men, who in the beginning were brought forth by nature free and whom the *jus gentium* had subjected to the yoke of slavery, that liberty in which they had been born.[1]

eum facias ad dominum suum modis omnibus remeare. Aut, si in hac pervicacia forte perstiterit, post sacramentum sibi præstitum reddatur invitus" Cf. Gratian, 'Decretum,' C. xvii. Q. 4. c. 32.

[1] 'Decretals,' iii 49. 6. (Inn. III.): "Si vero servus fuerit, qui confugerit ad ecclesiam, postquam de impunitate sua dominus ejus clericis juramentum præstiterit, ad servitium domini sui redire compellitur etiam invitus, aliquin a domino poterit occupari."

[2] Cod Theod., ix. 18, Ad Leg. Fab. Interpretatio: "Hi, qui filios alienos furto abstulerint et ubicumque transduxerint, sive ingenuus sive servus sit, morte puniatur."

[3] Regino of Prum, 'De Synod. Causis,' ii. 351, 352.

[4] Burchard, 'Decret.,' vi. 49; xix. 135.

[5] Deusdedit, 'Coll. Can.,' iii. 278.

[6] Regino of Prum, 'De Synod. Causis,' i. 414: "Qui debitum sibi nexum atque competens relaxat servitium, præmium in futuro apud Dominum sibi provenire non dubitet. Quapropter ego in Dei nomine ille pro remedio animæ meæ vel æterna retributione in ecclesia sancti Petri vel illius sancti sub præsentia episcopi vel sacerdotum ibi consistentium ac nobilium laicorum, ante cornu altaris istius ecclesiæ, absolvo servum meum illum per hanc cartam absolutionis et ingenuitatis ab omni vinculo servitutis," etc. Cf. Ivo, 'Decretum,' vi 131, Rufinus, 'Summa Decreti,' D. liv. 2.



[1] Gratian, 'Decretum,' C. xii. Q. 2 c 68: "Cum redemptor noster, totius conditor creaturæ, ad hoc propitiatus humanam voluit carnem assumere, ut divinitatis suæ gratia, dirupto, quo tenebamur captivi, vinculo servitutis, pristinæ nos restituueret libertati, salubriter agitur, si homines, quos ab initio natura liberos protulit, et jus gentium jugo substituit servitutis, in ea, qua nati fuerant, manumittentis beneficio, libertate reddantur." (Gregory I., Ep. v. 12.)

# CHAPTER VI.

## THE THEORY OF PROPERTY.

In private property we have a second important example of an institution which is recognised by the canonists as being contrary to nature and natural law, and as yet actually and legitimately existing. We must examine the apparent contradiction, and consider how far the canon law has a definite theory of the institution of property, and of its rights and limitations. The theory of the canon law is founded directly upon that of the Christian Fathers. We have endeavoured to set this out in our previous volume,[1] and cannot now restate this. The canonists assume the general principles of the theory, but they also draw them out in a careful and deliberate fashion.

There are several incidental references to the theory of private property and its origin in the earlier collections of the canon law, but it is not till we come to Gratian that there is anything of the nature of a systematic exposition of the subject. It is, therefore, with his treatment of the institution that we begin. In defining the difference between the law of nature and the law of custom, Gratian says that by the law of nature all things are the common property of all men; and that this principle was not only followed in the primitive Church of Jerusalem, but was also taught by the philosophers; it was thus that Plato excluded the desire for property from the most just form of State.[2] Gratian takes

[1] See vol. i. pp. 132-146.

[2] Gratian, 'Decretum,' D. viii., Part I.: Gratianus. "Differt etiam jus naturæ a consuetudine et constitutione. Nam jure naturæ sunt omnia communia omnibus, quod non solum inter eos servatum creditur, de quibus legitur; 'Multitudinis autem credentium erat cor unum et anima una, etc.;' verum etiam ex precedente tempore a philosophis traditum invenitur. Unde apud Platonem illa civitas justissime ordinata traditur, in qua quisque proprios nescit affectus. Jure vero consuetudinis vel constitutionis hoc meum est; illud vero alterius. Unde Augustinus ait, Tract. 6, ad. c. 1, 'Joannis,' C. i.: 'Quo jure defendis villas,'" etc. (Cf. vol. i. p. 140.)

[1] Gratian, 'Decretum,' C. xii. Q. i. c. 2: "Dilectissimis fratribus et condiscipulis. . . . Communis vita omnibus est necessaria fratres, et maxime his, qui Deo irreprehensibiliter militare cupiunt, et vitam apostolorum eorumque discipulam imitari volunt. § 1. Communis enim usus omnium, que sunt in hoc mundo omnibus hominibus esse debuit. Sed per iniquitatem alius hoc dixit esse suum, et alius istud, et sic inter mortales facta est divisio. § 2. Denique Grecorum quidam sapientissimus, hec ita esse sciens, communia debere, ait, esse amicorum omnia. . . . § 3. Istius enim consuetudinis more retento etiam apostoli eorumque discipuli, ut predictum est, una nobiscum et vobiscum communem vitam duxerunt."



his principle from the patristic theory, and illustrates this with that important passage from St Augustine, with which we have dealt in the first volume, in which it is very explicitly and emphatically laid down that private property is the creation of the State. In another part of the 'Decretum' Gratian cites an important passage from a spurious letter of St Clement in the pseudo-Isidorian collection, in which it is stated that the use of all things in the world ought to be common to all men, but through iniquity it has come about that men claim things as their private possessions, and the writer refers to Plato and to the example of the Apostles and their disciples.[1]

Here, then, we have the technical doctrine of Gratian with regard to private property. It is not a primitive or natural institution—it does not belong to the ideal or perfect life; the origin of private property must be looked for in sinful appetite, and rests upon the sanction of custom and of the civil law. This does not mean that in the view of Gratian or other canonists property is a sinful institution. We have already explained, in dealing with slavery, how in the opinion of the canonists, following the Fathers, an institution may arise out of some sinful condition or desire, and may yet be useful in correcting the consequences of such sinful passions.

It is important now that we should make clear to ourselves

that Gratian's theory of the origin and nature of property represents the general tradition of the canon lawyers. Ivo of Chartres in the 'Decretum' and the 'Panormia' had already cited that passage from St Augustine to which we have just referred, and in the 'Decretum' another passage from St Augustine which repudiates the claim of the Donatists to hold their property because they had acquired it by their labour;[1] we may infer that he took these passages to be characteristic of the doctrine of the Church as to private property. Rufinus deals with the theory of property in the same passage as that in which he discusses the theory of slavery. He holds with Gratian that by the law of nature all things should be held in common, but this principle, he says, belongs not to the commands or prohibitions of the natural law, but to its *demonstrationes;* the two former cannot be altered by human custom or law, but the latter may be changed, and thus, as a matter of fact, private property now exists by the civil law, and the change is legitimate because it is thus that under the actual conditions of human life the natural law itself is preserved.[2] Private property is not an institution of the natural law—does not belong to the ideal character of society or human nature, but under the actually existing circumstances of the imperfection and vice of human

[1] Ivo of Chartres, 'Decretum,' III. 194: "Quo jure defendis villas. . . . quibus possessiones possidentur." Cf. Pan. II. 63. Ivo, Dec. III. 179: "Et quamvis res quæcunque terrena non recte a quoquam possideri possit, nisi vel jure divino (quo cuncta justorum sunt), vel jure humano (quod in potestate est regum terræ) ideoque res falso appelletis vestras, quas nec juste possidetis, et secundum leges terrenorum regum amittere jussi estis, frustraque dicatis, nos in eis congregandis laboravimus, cum scriptura legatis 'Labores impiorum justi edent.'" Cf. vol. I. p. 140.

[2] Rufinus, 'Summa Decret,' D. I., Dict. Grat. ad. c. I.: "Est itaque naturale jus vis quedam humane creature a natura insita . . . Consistit autem jus naturale in tribus, scilic. mandatis, prohibitionibus, demonstrationibus. Mandat namque quod prosit, ut 'diliges Dominum Deum tuum,' prohibet quod ledit, ut 'non occides,' demonstrat quod convenit, ut 'omnia in commune habeantur,' ut 'omnium una sit libertas,' et hujusmodi. . . . Detractum autem ei est non utique in mandatis vel prohibitionibus . . . sed in demonstrationibus, que scil natura non vetat non precipit, sed bona esse ostendit—et maxime in omnium una libertate et communi possessione; nunc enim jure civili, hic est servus meus, ille est ager tuus. Omnia tamen hec, que juri naturali videntur adversa ad ipsum finaliter referuntur."



nature it represents the best arrangement that can be made, and does actually in the long-run tend to fulfil the principles of the natural law. This is put again by Rufinus in another place where he explains that when, in the passage from the letter of St Clement (from pseudo-Isidore), it is said that it was by iniquity that men came to claim things as their private property, this may have been true originally, but now by long custom this has become lawful and unblameable.[1] Stephen of Tournai, a little later than Rufinus, follows him in explaining how the *demonstrationes* of the natural law have been modified with respect to such principles as that of the common ownership of all things; but he also maintains that prescriptions and other modes of acquiring property have been sanctioned by the *jus divinum* or the canon law, which is divine, and that thus, while there is no private property by the *jus divinum*, that is the *jus naturale*, there is private property by the canon law which has been made by men, but with God's inspiration.[2] We shall have to deal with the relation of the canon law to the *jus divinum* when

[1] Rufinus, 'Summa Decret.,' D viii. Diff. quoque: "Amplitudine quoque jus naturale a ceteris juribus differt quia, jure nature omnia sunt communia, jure autem consuetudinis vel constitutionis hoc meum est illud autem tuum. Sed opponitur: si jure constitutionis hec villa mea est, illa autem tua, cum jus constitutionis jus sit, relinquitur, quod jure villa ista est mea, illa autem tua; si jure, tunc non ex iniquitati Quid est itaque quod alibi habetur: quia per iniquitatem alius dixit hoc esse suum, alius illud? —ut infra C. XII. Q. I, cap. 'Dilectissimi' Sed sciendum quod, sicut exactio obsequiorum et dominatus premens per iniquitateum fuisse cepit a Nemroth—sicut supra ex verbis Gratiani perpenditur, quod tamen, quia in longum usum derivatum est, non jam iniquitatis perversitate, sed consuetudinis jure exercetur; ita et quod aliquid proprium possideretur, ardente aliquorum cupiditate primitus factum est quod tamen postea ex longevo usu et legum institutione irreprehensibile judicatum est."

[2] Stephen of Tournai, 'Summa Decreti,' D. VIII. I: "'Nonne jure humano.' Non ergo per iniquitatem, aut jus humanum iniquum est. Unde videtur contra infra C. XII. q. I, c. 2. Ibi enim dicitur, per iniquitatem hoc alius dicit suum esse, alius istud. Sed ibi vocat iniquitatem consuetudinem juris gentium naturali æquitati contrariam Item videtur hic dici, quia solo jure humano hoc meum et illud tuum, et ita nihil est proprium. Jure divino vel jure etiam canonico, quod divinum est, et præscriptiones et aliæ acquisitiones et inducuntur et confirmantur. Unde potest dici, jure divino, *i.e.*, naturali, nihil est proprium, jure autem canonum, quod ab hominibus, quamvis deo inspirante, inventum est, aliquid proprium est. Unde et humanum dicitur aliud hujus, aliud illius."

we discuss the theory of the canon law itself; in the meanwhile we can only observe that Stephen clearly thinks that the canon law has given its sanction to private property, and that involves, in some sense at least, the authority of God. The conception is important, but it is not strictly novel, at least in substance, for it is, as we have seen, a part of the patristic theory of the great conventional institutions of human society that, while they are related to vicious impulses in human nature, they represent the divine remedies for these vicious characteristics.

Private property is then, according to the canonists, a thing legitimate and useful, resting upon the authority of the State, and, according to Stephen, upon the sanction of the canon law. This does not, however, mean that the principle that private property is not an institution of the natural law is of no importance,—is a mere abstraction which exercised no influence upon their conception of the rights and limitations of property. On the contrary, it would seem probable that two principles which the canonists lay down with regard to the ownership and use of private property are closely related to this theory. The first is, that no one has the right to take for himself more than he needs. Gratian cites a very important passage as from St Ambrose, which denounces as most unjust and avaricious the man who consumes upon his own luxury what might have supplied the needs of those who are in want, and maintains that it is as great a crime to refuse the necessaries of life to those who need, as to take from a man by force.[1] In another place Gratian refers to a saying which he attributes to St Jerome—it is really

[1] Gratian, 'Decretum,' D xlvii 8 § 3 "Proprium nemo dicat, quod est commune, plus quam sufficeret sumptum et violenter obtentum est . . § 4 Tu vero susceptis numeribus Dei, et in sinum tuum redactis, nichil te putas agere iniquum, si tam multorum vitæ subsidia solus obtineas? Quis enim tam injustus, tam avarus, quam qui multorum alimenta suum non usum, sed habundantiam et delicias facit? Neque enim majus est criminis habenti tollere, quam cum possis et habundas, indigentibus denegare Esurientium panis est quem tu detines, nudorum indumentum est, quod tu recludis, miserorum redemptio est et absolutio pecunia quam tu in terra defodis Tantorum te ergo scias invadere bona, quantis possis præstare quod velis."



from a spurious work—that the man who keeps for himself more than he needs is guilty of taking that which belongs to another.[1] These are broad and far-reaching statements, but there are some qualifying phrases. In another Distinction Gratian quotes a sentence from St Augustine which is important as furnishing a practical commentary on such phrases as those which have just been cited. The rich, St Augustine says, are not to be required to use the same food as the poor, but must be allowed to use such food as their habits have made necessary to them: they ought, however, to lament the fact that they require this indulgence.[2] Rufinus evidently felt that there was some difficulty in reconciling these phrases, and endeavours to explain them. His own judgment seems to be that the obligation of providing for those in want, and especially for those in danger of starvation, is absolute, and concludes that the man who does not help those who are dying of hunger, when he is able to do this, is actually their slayer.[3] The second principle is stated in the Decretals, and is this, that a man can only be said to possess that of which he makes a good use; the man who makes a bad use of his property has really no right to his property at all.[4]

These principles are most probably connected with the

[1] Gratian, 'Decretum,' D xlii Part I Gratianus . . . "quomodo etiam secundum Jeronimum aliena rapere convincitur, qui ultra necessaria sibi retinere probatur"

[2] Gratian, 'Decretum,' D xli 3 "Non cogantur divites pauperum cibis vesci, utantur *consuetudine infirmi* tatis suæ, sed dolebant se aliter non posse, si consuetudinem mutant egrotant Utantur superfluis, dent inopibus necessaria, utantur preciosis, dent pauperibus vilia"

Cf St Augustine, Sermo lxi

[3] Rufinus, 'Summa Decret,' D xlii "'Aliena rapere convincitur, qui ultra necessaria sibi retinere probatur' Hoc videtur contrarium ei, quod supra dictum est de divitibus, ut utantur superfluis supra prox dist c non cogantur Sed aliud est retinendo superflua pauperibus de necessariis succurrere quod ibi admittitur, aliud, nec de necessariis nec de superfluis elimosinam erogare, quod hic penitus reprobatur. Vel ad terrorem vel in eo tantum casu dictum intelligitur, cum aliquem videris fame perichtari, unde *dicitur* '*Pasce fame morientem*' Quisquis enim fame morientem servare poteris, si non paveris, occidisti"

[4] 'Decretals,' v 40 12 "Jus dictum est a jure possidendo Hoc enim jure possidetur, quod juste, hoc juste, quod bene, quod autem male possidetur, alienum est Male autem possidet, qui vel suis male utitur, vel aliena præsumit"

Cf St Aug, Ep. clii 6, and St Isidore of Seville, 'Etym,' v. 25, and vol. i. pp. 141, 142.

judgment that nature gave all things to men for the common use. It is true that the appearance of vice, and especially of avarice, made it necessary to establish the system of private property; but behind the right of private property there still remains the more general right of all men to what they need. The institution of private property may be necessary under the actual circumstances of human life, but it is really intended to set some restraint upon that instinct, and must not be taken as equivalent to a right to stand between a man and his needs. We shall in a later volume discuss the theory of property in St Thomas Aquinas; we may at once observe that he was not afraid to carry out these principles to the conclusion that the charitable man who sees his fellow-man in want, and has not wherewith to help him, may without moral fault take the rich man's property and give it to the needy.[1] The canonists, as far as we have seen, down to the time of the Decretals, did not draw this conclusion. On the contrary, Gratian cites a sentence from a sermon of St Augustine which strongly condemns the latter doctrine, and treats it as a suggestion of the devil.[2] At the same time, it is perhaps worth while to notice that Regino and Burchard cite a canon which suggests that the Church recognised that the moral offence of the man who was in want and stole another man's property was small,—the penance imposed in such cases is very slight.[3]

[1] St Thomas Aquinas, 'Summa Theologica,' 2. 2. q. 66. 7. 0. Cf. Notes in 'Econ. Review,' Jan. 1894, by R. W. Carlyle, "Some Economic Doctrines of St Thomas Aquinas."

[2] Gratian, 'Decretum,' C. xiv. q. 5. c. 3: "Forte aliquis cogitat et dicit. Multi sunt Christiani divites, avari, cupidi; non habeo peccatum, si illis abstulero, et pauperibus dedero. Unde enim ni boni agunt, mercedem habere potero. Sed hujusmodi cogitatio ei Diaboli calliditate suggeritur. Nam si totum tribuat quod abstulerit, potius peccatum addit quam minuat."

Cf. St Augustine—Serm. 287.

[3] Regino of Prum, 'De Eccl. Discip.,' ii. 437: "Si quis per necessitatem furatus fuerit cibaria vel vestem vel pecus per famem aut nuditatem, pœniteat hebdomadas quatuor. Si reddiderit, non cogatur jejunare."

Cf. Burchard, 'Decretum,' xi. 56.



# CHAPTER VII.

## THE NATURE OF SECULAR AUTHORITY.

THE canon lawyers of this period do not present us with any complete discussion of the origin and nature of civil society and government. Much that is of importance they do not refer to at all, and much else they only touch for a moment, and incidentally. And yet, when we put together their references to the subject, it becomes clear that behind their incidental phrases there lies a generally accepted theory of the nature of society, a theory which we can in a large measure reconstruct from their incidental phrases. And as we do this we shall recognise that the canonists in substance represent that theory of the nature of society and political authority which we have already recognised as developed by the Fathers.

There is little direct reference in these canonists to a primitive condition in which men lived without an organised social life, but there is enough to show us that they held the same view as that of the Fathers and such Stoics as Seneca and Posidonius, that behind the conventions of organised society there lay a time when men had lived without any definite and ordered social relation, and without any coercive authority. Gratian says that while the natural law began with the creation of rational beings, the law of custom arose when men began to live together, when Cain built a city, and again when, after the Flood, and in the time of Nimrod, men began to be subject to each other.[1] This passage is

[1] Gratian, 'Decretum,' D. vi.: exordio rationalis creaturæ incipiens. Gratianus. "Naturale ergo jus ab . . . Jus vero consuetudinis post

reproduced by Paucapalea, the first commentator on Gratian, in the introduction to his work,[1] and Rufinus speaks of lordship having begun with Nimrod, and having had its beginnings in iniquity.[2] This is the same view as that of the Fathers, who all held that men were originally free from the coercive control of their fellow-men, and trace the development of coercive government to the appearance of sin in the world.[3]

This last passage brings us to a question of great importance with regard to the political theory of the Middle Ages: the question, namely, whether the State is a divine institution like the Church, or whether it has properly no such character, but is merely an institution of man's devising, representing at best some convenience to mankind, at worst the sinful passions and ambitions of men, their lust of domination. We have pointed out in our first volume that the normal view of the Fathers is clear, namely, that while coercive government is not a "natural" institution, and is a consequence of the Fall and related to men's sinful ambitions, yet it is also a divine remedy for the confusion caused by sin, and is therefore a divine institution. The patristic doctrine is summed up in those phrases of Pope Gelasius' letters and tractates which describe the spiritual and the temporal powers as both deriving their authority from God Himself, and this doctrine is clearly and emphatically restated by the ecclesiastical and political writers of the ninth century.[4]

We have now to inquire what was the judgment of mediæval political thinkers upon this subject. In our next

naturalem legem exordium habuit, ex quo homines convenientes in unum coeperunt simul habitare, quod ex eo tempore factum creditur ex quo Cain civitatem ædificasse legitur. Quod cum diluvio propter hominum raritatem fere videatur extinctum, postea tempore Nemroth reparatum, sive potius immutatum existimatur; cum ipso simul cum aliis alios cœpit opprimere, alii sua imbecillitate ejus ditioni ceperunt esse subjecti."

[1] Paucapalea, 'Summa Decret.,' Introd.

[2] Rufinus, 'Summa Decret.,' D. viii.: "Diff. quoque." "Sed sciendum quod, sicut exactio obsequiorum et dominatio premens per iniquitatem fuisse cepit a Nemroth—sicut supra ex verbis Gratiani perpenditur, quod tamen, quia in longum usum derivatum est, non jam iniquitatis perversitate, sed consuetudinis jure exercetur."

[3] Cf. vol. i., chap. 11.

[4] Cf. vol. i., chaps. 11, 13, 15, and 17.



volume we hope to discuss the theory as illustrated by the general literature of the eleventh, twelfth, and thirteenth centuries, and we shall then deal with the highly controversial writings which belong to the long struggle between the Empire and the Papacy. For the present we have to consider the mediæval theory as represented in the canon law and the writings of the canonists. There is a famous saying of Hildebrand in a letter to Bishop Hermann of Metz, in which he uses very strong phrases as to the sinful character of the circumstances under which secular government first arose.[1] Some parts of this letter are frequently quoted by the canonists; it is perhaps noteworthy that this particular sentence is not quoted by them. This may be merely accidental, but it is possible that they felt that these phrases were a little too crude and controversial to be suitable for technical collections of laws and legal arguments. Not indeed that there is anything in these sentiments of Hildebrand which is strange or unprecedented; he is only putting in rather rigorous phrase the doctrine not only of the Fathers but of the later Stoics—the doctrine, namely, that in the primitive state of innocence there was no coercive authority, that this was a consequence of the loss of innocence and of men's sinful and vicious desire to lord it over each other, and this does not at all necessarily mean that Gregory VII. denied the truth of the doctrine of the Fathers, that, while coercive government is a consequence of sin, it is also a divinely appointed remedy for sin.

The canonists, we may safely say, accepted the patristic doctrine of the origin of secular government; we must now consider their theory as to its actual nature and present value. Here they are, fortunately, not only emphatic, but clear. Secular government, they hold, is an institution which represents the divine authority; it is sacred, and the man who sets it at naught is really guilty of setting at naught the authority

[1] Gregory VII., 'Registrum,' viii. 21: "Quis nesciat: reges et duces ab iis habuisse principium, qui Deum ignorantes, superbia rapinis perfidia homicidiis, postremo universis fere scelcribus, mundi principe diabolo videlicet agitante, super pares, scilicet homines, dominari cæca cupidine et intolerabili præsumptione affectaverunt."

of God Himself. This judgment can be followed throughout the whole course of that part of the canon law with which we are dealing—that is, from the ninth century to the middle of the thirteenth.

Regino of Prum's work contains a canon which pronounces the anathema of the Church on any who venture to resist the royal power, inasmuch as this derives its authority, according to the Apostolic teaching, from God Himself.[1] This canon is reproduced by Burchard of Worms ; [2] while he, Ivo, and a Palea to Gratian's Decretum cite passages from the Councils of Toledo which denounce the sentence of excommunication against all those who revolt against the king, inasmuch as he is the Lord's anointed.[3] Ivo also cites a passage from a letter of Pope Anastasius II. to the Emperor Anastasius, in which he speaks of the Emperor as being appointed by God Himself to reign over the earth as His vicar.[4] Ivo and Gratian again bring out the general principle very clearly when they cite a passage from St Augustine which lays down the doctrine that obedience to the secular authority is commanded by God, even when that authority

[1] Regino of Prum, 'De Synod. Causis,' ii. 301: "Si quis potestati regiæ quæ non est juxta Apostolum, nisi a Deo, contumaci et inflato spiritu contradicere vel resistere præsumserit, et ejus justis et rationabilibus imperiis secundum Deum et auctoritatem ecclesiasticam ac jus civile obtemperare noluerit, anathematizetur." Cf. ii 300.

[2] Burchard of Worms, 'Decret.,' xv. 22.

[3] Burchard of Worms, 'Decret,' xv. 23, "In libro regum legitur: Qui non obœdierit principi, morte moriatur. In concilio autem Agathensi præcipitur ut anathematizetur" (cf xv 26), 'Decret,' xii. 21. "Si quis laicus juramentum violando prophanat, quod regi et domino suo jurat, et postmodum perverse ejus regnum, et dolose tractaverit, et in mortem ipsius aliquo machinamento insidiatur: quia sacrilegium peragit, manum suam in Christum Domini mittens, anathema sit, nisi per dignam pœnitentiæ satisfactionem emendaverit, sicuti constitutum a sancta synodo est, id est, sæculum relinquat, arma deponat, in monasterium eat, ut pœniteat omnibus diebus vitæ suæ. Verumtamen communionem in exitu vitæ cum Eucharistia accipiat Episcopus vero, presbyter, vel diaconus, si hoc crimen perpetraverit, degradetur."

Cf. Ivo, 'Decretum,' xii 78. Gratian, 'Decretum,' C. xxii. Q. 5. c. 19 (Palea).

[4] Ivo, 'Decretum,' xvi 16: "Pectus clementiæ vestræ sacrarium est publicæ felicitatis, ut per instantiam vestram, quam velut vicarium præsidere jussit in terris, evangelicis apostolicisque præceptis non dura superbia resistatur, sed per obedientiam quæ sunt salutifera compleantur."



is in the hands of an unbeliever.[1] Cardinal Deusdedit, in his collection of canons, cites those passages from Romans xiii. and 1 Peter ii. which assert emphatically the principle of obedience to the secular power as deriving its authority from God ; [2] and Burchard, Ivo, and Deusdedit also cite a passage from a letter of Pope Innocent I., which defends the exercise of justice in criminal cases as being derived from the authority of God Himself.[3] Finally, the principle is laid down in the Decretals in a very important letter of Innocent III. to the Emperor Alexius of Constantinople—a letter to which we shall have to recur when we deal with the relations of the ecclesiastical and secular powers. Innocent III. here affirms clearly the doctrine that the authority of the king as well as of the ecclesiastic has been established by God Himself.[4]

These passages will serve to bring out the principles of the canon law with respect to the nature of secular authority, and can hardly leave us in any doubt as to their character. But the matter is put beyond all question when we observe that in these canonical collections, just as in the writers of the

[1] Ivo of Chartres, 'Decretum,' v. 7: "Julianus exstitit infidelis imperator, nonne exstitit apostata, iniquus idololatra? Milites Christiani servierunt imperatori infideli. Ubi veniebatur ad causam Christi non agnoscebant nisi illum qui in cœlo erat. Quando volebat ut idola colerent, ut thurificarent, præponebant illi Deum. Quando autem dicebat: 'Producite aciem, ite contra illam gentem,' statim obtemperabant. Distinguebant Dominum æternum a domino temporali, et tamen subditi erant propter Dominum æternum etiam domino temporali"

Cf. Gratian, 'Dec.,' C. xi. Q iii. 98, and St Augustine, Enarratio in Ps. 124

[2] Deusdedit, 'Collectio Canonum,' iv. 33, 34.

[3] Burchard, 'Decret,' vii. 44. "Quæsitum est etiam super his qui post baptismum administraverunt, et aut tormenta sola exercuerunt, aut etiam capitale protulere sententiam. De his nichil legimus a maioribus diffinitum. Meminerant enim a Deo potestates has fuisse concessas, et propter vindictam noxiorum gladium fuisse permissum, et dei ministrum esse datum in huiusmodi vindicem. Quomodo igitur reprehenderent factum (quod) auctore Deo viderent esse concessum? De his ergo ita ut hactenus servatum est, sic habemus, ne aut disciplinam evertere aut contra auctoritatem Domini venire videamur."

Cf Ivo, 'Decretum,' xi. 14, and Deusdedit, 'Coll Can.,' iv. 42

[4] Decretals, i. 33. 6. § 4 (Innocent III): "Ad firmamentum igitur cœli, hoc est universalis ecclesiæ, fecit Deus duo magna luminaria, id est, duas magnas instituit dignitates, quæ sunt pontificalis auctoritas, et regalis potestas."

ninth century, it is those definitions of Gelasius, whose importance we have endeavoured to set out in the previous volume, which furnish the complete statement of the theory, both of the nature of secular authority and also of its relation to the Church. Gelasius had carefully drawn out the conception of the two authorities which God had established in the world—the two authorities which had sometimes been united in pre-Christian times, but which in complete truth were united only in Christ Himself, who was both King and Priest. For Christ Himself had divided them—allotting to the priest his particular authority, and to the king also his,—in such a fashion that while each needed the other, each was independent within his own sphere.[1]

Any careful examination of the canonists will bring out very clearly that it is this treatment of the subject by Gelasius which lies behind all their theory. In Ivo of Chartres' 'Decretum,' in Cardinal Deusdedit's 'Collectio Canonum,' and in Gratian's 'Decretum,' the Gelasian passages are cited,[2] and, as we shall see when we come to discuss the theory of the relations of Church and State, they furnish the normal expression of the principles of the canonists with regard to these.

It is very clear, then, that the canon lawyers of these times held that the secular and civil power is a Divine institution and represents the Divine authority. Whatever may have been said and meant in the course of the great conflict between the Empire and the Church which might seem to indicate a disposition to doubt the Divine nature of the civil authority, nothing of the kind has been admitted into the canon law or is suggested by the commentators.

We may here notice a theory—the importance of which, however, as far as the Middle Ages is concerned, has been greatly exaggerated,—the theory that the emperor was not, in the strict sense of the word, a mere layman, for

[1] See vol. i. pp. 190 193.

[2] Ivo of Chartres, 'Decretum,' iv. 188, 190; v. 378. Deusdedit, 'Collectio Canonum,' iv 41, 97. Gratian, 'Decretum,' D. xcvi 6



his unction was equivalent to some kind of consecration. Rufinus discusses the propriety of the bishops taking the oath of fidelity to the emperor, and argues that the fact that this was regularly done does not prove that it was right; for he says the canons do not sanction all that was done by custom. He says, however, that it may be urged in defence of this that the emperor was not wholly a layman, since he had been consecrated by his unction.[1] It must be noticed that Rufinus only says that this suggestion may be made: he does not say whether he agrees with it. It is perhaps worth while to notice that among the Decretals is a letter of Innocent III., in which he carefully sets out the distinction between the mode of anointing of the bishop and of the king: the bishop, he says, is anointed upon his head, while the prince is anointed on the arm. The purpose of Innocent seems to be to draw attention to the symbolical significance of these different modes of anointing, and his words certainly do not suggest that he recognised that the anointing of the prince was of such a nature as to render him an ecclesiastic.[2] Whatever may have been said by other writers, there is no evidence that the canon lawyers, to the time of the Decretals, recog-

[1] Rufinus, 'Summa Decret.,' C. xxii. Q. 5. c 22 "Si opponatur de juramento fidelitatis, quod hodie episcopi faciunt imperatori, respondeatur non omnia que consuetudo habet canones permittur. Vel dicatur imperatorem non omnino laicum esse, quem per sacram unctionem constat consecratum esse"

[2] Decretals, I. 15 1 § 5 "Unde in veteri testamento non solum ungebatur sacerdos, sed etiam rex et Propheta, sicut in libro Regum Dominus præcipit Heliæ . . . Sed ubi Jesus Nazarenus quem unxit Deus Spiritu sancto, sicut in actibus apostolorum legitur, unctus est oleo pietatis præ consortibus suis, qui secundum apostolum est caput ecclesiæ, quæ est corpus ipsius, principis unctio a capite (scilicet) ad brachium est translata, ut princeps extunc non ungatur in capite, sed in brachio, sive in humero, vel in armo, in quibus principatus congrue designatur juxta illud, quod legitur—'Factus est principatus super humerum ejus,' etc. Ad quod etiam significandum Samuel fecit poni armum ante Saul, cui dederat locum in capite ante eos, qui fuerunt invitati. In capite vero pontificis sacramentalis est delibutio conservata, quia personam capitis in pontificali officio repræsentat. Refert autem inter pontificis et principis unctionem, quia caput pontificis chrismate consecratur, brachium vero principis oleo delinitur, ut ostendatur quanta sit differentia inter auctoritatem pontificis et principis potestatem"

nised as important the conception of a quasi-ecclesiastical character in the secular ruler.

The theory of the canon lawyers of this time is, then, perfectly clear and unequivocal, that the secular and civil power has a sacred character, and represents the Divine authority. This does not, however, mean that any manner of exercising this power has the Divine sanction or can claim the Divine authority.

The canonists very clearly describe the nature of those functions of the State which give it this sacred character, namely, that it is its purpose or function to restrain and punish evil and to set forward justice. Burchard, Deusdedit, Ivo, and a Palea to Gratian all cite, in part or whole, that group of passages from St Isidore's 'Sentences' which describe the proper purpose of secular authority as being to restrain evil, and the proper character of the king as being that of one who does right, while they also lay it down that it is just that the prince should conform to the laws of his kingdom.[1] Rufinus draws out at some length the important principle that an evil power—that is, the abuse of power—has no sanction or authority from God. He is discussing the meaning of some words of St Augustine's, in which he lays it down that all authority is from God, and represents either His sanction or His permission.[2] Rufinus's comment upon the passage is to this effect. An evil authority or power is said to be permitted by God, and is therefore said to proceed from Him; but the fact that God permits sin does not mean that it proceeds from Him; an evil authority can only be said to be from God in this sense, that God is the source of all authority, but not in the sense that He approves of its abuse. Rufinus draws this principle out in positive form when, in the same passage, he goes on to lay down the two characteristics of a good secular authority, without which no authority

[1] Burchard, 'Decretum,' xv. 38 43, xvi 25 - 29. Deusdedit, 'Collectio Canonum,' iv. 108. Ivo, 'Decretum,' xvi. 39-45. Gratian, 'Decretum,' D ix. 2. Cf vol i pp. 172, 173.

[2] Gratian, 'Dec,' C. xxii. Q i. c. 4: "Non enim est potestas, nisi a Deo, sive jubente sive sinente" (St Augustine, 'Contra Faustum,' xxii. 75.)



can be held approved; these are, legitimate institution and the supremacy of justice. It is true that his explanation of these two principles is highly technical, and largely concerned with the question of clerical exemptions, but it includes the principle of just and equitable action by the public authority, that is, action governed by the principle of the proper adjustment of punishment to fault, and of the elimination of all merely private interest in the action of the magistrate.[1]

The canonists, then, while maintaining the divine nature of secular authority, and while condemning revolt against this as a revolt against God, seem clearly to maintain the principles of the Fathers like St Ambrose and St Isidore, and of the ninth century writers, that the legitimacy of secular authority depends upon its being conformed to the law of justice.

We have already considered the relation of positive law

[1] Rufinus, Summa Decret,' C xxiii Q. i. c. 4: "Potestas autem mala a Deo esse simitur et ideo a Deo esse dicitur; non tamen quia Deus sinit peccatum, et ipsum a Deo erit. A sinente enim Deo mala potestas eo esse intelligitur, quia, cum Deus ipsius rei sit auctor, abusionis ejus non est approbator. quod de peccato sentiri non debet. Et quoniam hic de seculari potestate specialiter sermo habetur, sciendum quod duo sunt, quibus tamquam duabus columnis potestas bona nititur et sine quibus nulla potestas approbatur: legitima scil institutio et justitie moderatio. Et quidem institutio legitima circa tria versatur, videlicet circa instituentem, institutum, et eos, super quos instituitur Circa instituentem, ut qui instituit publicam instituendi habeat auctoritatem, ut imperator et prefectus et his similis, circa institutum. ut persona sit idonea, que secularis potestatis cingulo est decoranda, puta non regularis clericus sed strenuus laicus, circa eos, super quos constituitur. ut potestas secularis laicis dominetur non clericorum militie preponatur. Justitie vero moderatio quinque articulis determinatur: secundum personam, secundum causam, secundum modum, secundum locum, secundum tempus. Secundum personam aliquid licet et non licet seculari potestati. ut in personam laicam, si peccaverit, manum mittere liceat, in clericum autem non liceat. Secundum causam, moderatur justitia, ut videlicet negotia secularia, non spiritualia, a terrena potestate examinentur. Secundum mensuram vel modum: cum quilibet culpa congrua sibi et convenienti pena mulctatur, ut neque privatum odium adiciat pene sufficienti, neque privatus amor subtrahat debite severitati. Secundum locum determinatur justitia, si ubi convenit judicium exercetur et locis venerabilibus honor deferatur: ut in ecclesia aliquis reus non puniatur neque fugitivus inde extractus ad penam corporalem tradatur Secundum tempus; ut sacris et sollempnibus diebus reverentia exhibeatur, quatinus et his parcatur, quibus pro suis culpis supplicia debentur."

to natural law, and it will be evident that this is closely related to the question we are now considering, for, as we have seen, natural law is to the canonists that body of principles which must govern the actions and relations of men in all the circumstances of life, and against which no human law or custom can prevail.



# CHAPTER VIII.

## CIVIL LAW AND CUSTOM.

WE have now considered the character of that "Natural Law" which is the norm by which all law is to be measured and judged, and have also considered the relation of the actual institutions of society to these normative principles. We have seen that to the Canonists, as to the later Stoics and the Fathers, there is a profound difference between the ideal character of society and its actually existing institutions: the ideal continues to be valid, but human nature being what it actually is, the vicious impulses of man having that power which they actually have, human life would be impossible without the existence of institutions and regulations which, while they are far from belonging to the ideal in themselves, are yet necessary if men are to lead an orderly life, and to make any progress towards the ideal.

We can now, therefore, consider the nature of law under the terms of the positive law of any one state. We have already discussed, in our second chapter, the general principles of the theory of law, as set out by Gratian, and especially that fundamental division of law into Divine or natural on the one side and customary on the other.[1] It is true that under customary law more is included than the Civil law of any one state, for under this term falls the whole of that system which is called the *jus gentium*, the law which is composed of those conventional customs which are considered to be common to all mankind,—but we need say no more about this now. Civil law is that body of rules or laws

[1] See p. 98, &c.

which belong to any one state: Gratian takes over from St Isidore the definition of the Civil law as that which any people or state makes for itself, for some human or divine reason,[1] but this Civil law is, according to the classification which Gratian has elaborated on the basis of St Isidore's phrases, in the beginning simply custom. This is a conception of great importance, and though we have already dealt with the statement of this by Gratian, we must consider the matter again in connection with other passages in Gratian and in the works of other Canonists.

Burchard includes in his collection a phrase of St Augustine, in which it is said that in those matters as to which the Holy Scriptures have not laid down any definite rule, the customs of the people of God, or the *instituta* of former generations, are to be taken as law, and that this law is to be enforced like the Divine law.[2] This phrase is repeated by Ivo, both in the 'Decretum' and the 'Panormia,' and by Gratian. In a later chapter we shall have to consider the significance of this in relation to the theory of the Canon law: in the meanwhile, we are interested in it as indicating very clearly the importance of custom in relation to law. Again, Ivo in the 'Decretum' quotes from the Institutes of Justinian the phrase which describes that form of *Jus* which is established by the long-continued custom of those who are concerned.[3] We have already quoted and discussed the very important passages in which Gratian draws out the principle that all law is, properly speaking, custom.[4] Gratian looks upon Civil law

[1] Gratian, 'Decretum,' D. i. 8: "Jus civile est, quod quisque populus vel civitas sibi proprium, divina humanaque causa constituit."

[2] Burchard, 'Decretum,' iii. 126: "In his enim rebus de quibus nihil certe statuit Scriptura divina, mos populi Dei, vel instituta majorum pro lege tenenda sunt, et sicut prævaricatores legum divinarum, ita contemptores consuetudinum ecclesiasticarum coercendi sunt." Cf. Ivo, Dec. iv. 68, Pan. ii. 158 and Gratian, Dec. D. xi. 7.

[3] Ivo, 'Decretum,' iv. 194: "Ex non scripto jus venit quod usus probavit. Nam diuturni mores consensu utentium approbati legem imitantur." —(Inst., I. 2.) This passage is also quoted by Gratian, 'Decretum,' D. xii. 6. but with the important insertion after "diuturni mores" of the words "nisi legi sunt adversi." (I owe the observation of this insertion to Professor Brie, 'Die Lehre vom Gewohnheitsrecht,' Erster Theil, p. 79, note 9.)

[4] See pp. 98 and 100.



as being in its origin nothing but the general expression of the custom of any society. We must now consider to what extent this conception is modified where there is in any society a person or body of persons who have legislative authority.

In another passage of the 'Decretum' Gratian lays down the principle that a *Lex*, which he has before defined as a written constitution, is instituted when it is promulgated, but is confirmed by the custom of those who are concerned, just as it is abrogated by their disuse; and he cites as an illustration of this principle the fact that a rule of fasting imposed as it was thought by Pope Telesphorus, and by Gregory the Great, on the clergy, was never accepted by custom, and therefore never became law. He admits that it would be possible in this particular case to argue that these injunctions were rather of the nature of counsels than of commands, but he seems clearly to adhere to the principle that a law is not really established unless it is ratified by custom.[1] We shall recur to this passage when we deal with the theory of Canon Law: in the meanwhile, it is important to notice it as indicating that Gratian does quite clearly hold that even when there is in a community some person who has legislative authority, his legislation must be confirmed, and may be rendered void by custom. Gratian is here dealing with a question about which there was much discussion among the Civilians: they all maintained that custom originally had the force of law; while

[1] Gratian, 'Decretum,' D. iv. after c. 3: Gratianus, "Leges instituuntur cum promulgantur, firmantur cum moribus utentium approbantur. Sicut enim moribus utentium in contrarium nonnullæ leges hodie abrogatæ sunt, ita moribus utentium ipsæ leges confirmantur. Unde illud Thelesphori Papæ (quo decrevit, ut clerici generaliter a quinquagesima a carnibus et deliciis jejunent), quia moribus utentium approbatum non est, aliter agentes transgressionis reos non arguit."—Cf. c. 4, the letter of Thelesphorus; c. 6, part of a spurious letter of Gregory the Great. . . . Part IV., Gratianus. "Hec etsi legibus constituta sunt, tamen quia communi usu approbata non sunt, se non observantes transgressionis reos non arguunt; alioquin his non obedientes proprio privarentur honore, cum illis qui sacris nesciunt obedire canonibus, penitus officio jubeantur carere suscepto; nisi forte quis dicat hec non decernendo esse statuta, sed exhortando conscripta. Decretum vero necessitatem facit, exhortatio autem liberam voluntatem excitat."

some of them also held, as Gratian does, that no law, by whomsoever promulgated, has any real validity unless it is accepted by the custom of those concerned.[1]

We must, however, compare with this passage certain others in which Gratian's position might seem to be different. In one place he quotes a passage from Isidore which says that custom must yield to authority, and that *lex* and *ratio* are superior to bad custom, and he seems clearly to make this principle his own : in another part of the same Distinction he quotes that important passage in the Code which, while recognising the great authority of custom, denies that it can prevail against *ratio* or *lex*, and then adds himself that custom is to be faithfully observed, where it is not contrary to the sacred canons or human laws (*leges*).[2] We have already noticed the words which he inserts in the passage of the Institutes which describes the system of law which arises from custom.[3]

These views may seem rather difficult to reconcile with each other, but as a matter of fact they are not absolutely irreconcilable, for Gratian may have held that while a law was not really valid unless those concerned did by their custom accept it, once they had thus accepted it custom alone could not abrogate it. This doctrine was maintained, as we have seen, by some of the Civilians.[4] On the whole, it would seem that Gratian wavered between different views. When we turn to the commentators on Gratian, we find that they follow him in the general theory of the nature of law as custom, but that in some respects their theory may be different. Rufinus repeats Gratian's general principle that all positive law is really custom, whether it is written or unwritten.[5] But he is

[1] See pp. 62, 63.

[2] Gratian, 'Decretum,' D. xi., Part I. : Gratianus. "Quod vero legibus consuetudo cedat, Ysidorus testatur in Sinonimis, lib. ii. 16, 'Usus auctoritati cedat ; pravum usum lex et ratio vincat,'" . . . c. 4. Item Imper. Constantin. A. ad Proculum, "quæ sit longa consuetudo" (Cod., viii. 52, (53), 2) : "Consuetudinis ususque longevi non vilis auctoritas est : verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem scriptam."—Part II., Gratianus. "Cum vero nec sacris canonibus nec humanis legibus consuetudo obviare monstratur, inconcussa servanda est."

[3] See p. 3, note 3.

[4] See pp. 62, 63.

[5] Rufinus, 'Summa Decret.,' D. i. (Dict. Grat. ad c. 1) : "Mores autem *isti partim sunt redacti in scriptis* et vocantur jus constitutionum ; partim absque scripto utentium placito reservantur, et dicitur simpliciter consuetudo."



clear that under the actually existing condition of his time, the authority of custom in abrogating laws was greatly limited. When Gratian, in a passage we have just quoted,[1] lays down the broad principle that laws are abrogated by custom, Rufinus is careful to point out that custom only abrogates Canon laws with the consent of the Pope, just as custom only abrogates Civil laws with the consent of the Emperor, for the Roman people have transferred all their authority to him, and can therefore neither make nor unmake laws without his consent.[2] Rufinus represents the same position as that of one school of Civilians.[3] Stephen of Tournai follows Gratian in placing both the *jus gentium* and the *jus civile* under the category of *mores*.[4] His treatment of the relation of custom to existing written law is interesting but a little ambiguous. He lays down dogmatically the principle that if a people, which has the power of making laws, deliberately and knowingly follows a usage which is contrary to a written law, this usage abrogates the law : [5] this principle is also, we have seen, maintained by some of the Civilians.[6] Stephen leaves the question whether the

[1] See p. 155, note 1.

[2] Rufinus, 'Summa Decret.,' D. iv., "'Officium vero' : . . . Ubi demonstrat quorundam decretorum exemplo nonnullas etiam leges ecclesiasticas esse hodie abrogatas per mores utique utentium in contrarium. Et hoc consensu exaudias summi pontificis ; sicut enim hodie sine auctoritate vel consensu imperatoris leges non possunt statui, sic etiam nec infirmari quia populus Romanus ei et in eum omne suum imperium et potestatem concessit : ita absque conscientia et assensu summi patriarche canones sicut non potuerunt fieri, ita nec irritari."

[3] See pp. 60-63.

[4] Stephen of Tournai, 'Summa Decret.,' D. i. Dict. Grat. : "'et moribus,' scriptis vel non scriptis, in quo intelligas et jus gentium et civile."

[5] Stephen of Tournai, 'Summa Decret.,' D. i. 5 : "'Consuetudo,' i.e. jus consuetudinarium, 'nec differt,' i.e. non interest, an scripta sit consuetudo, cum tamen ratione nitatur, an non, si tamen non sit juri scripto contraria. Sed et si juri scripto contraria sit, et populus qui habeat potestatem condendi leges, sciens legem contrariam esse, contra eam consuetudine utatur, consuetudo etiam præponitur legi scriptæ. Nihil enim interest, an suffragio populus voluntatem suam declaret, an rebus ipsis. Tanto enim consensu omnium per desuetudinem leges abrogatur. Secus est si nescierim(nt) legem in contrarium dictare."

[6] See pp. 60-63.

people in his time did or did not possess this power uncertain. It is interesting to observe in the Canonists the traces of these views of the Civilians,—Gratian holding the principle that legislation, by whomsoever promulgated, has no authority unless it is ratified by the usage of the society; Stephen holding that any society which retains in its own hands the power of making laws, does by its usage abrogate any law, if it acts deliberately and consciously; Rufinus maintaining that, at least in the case of the Roman people, the authority of custom has really ceased except so far as it is sanctioned by the Emperor.

When we now turn to the Decretals, we find the doctrine that Custom overrides all law except that of Nature and Reason; only this Custom must be sanctioned by a sufficient prescription. Gregory IX. lays down this doctrine in words drawn from the famous passage in the Code, but with such additions as completely to transform its sense. While Constantine had recognised the great authority of long custom, but had also maintained that it could not prevail against reason or law, Gregory IX. held that it could not prevail against positive law, unless it was reasonable, and founded upon a legal prescription—that is, a definite, legally recognised period of time.[1] For the discussion of the important question of the appearance of this conception of a definite period of time as constituting a legally valid custom, we must refer to the very careful treatment of the matter by Professor Siegfried Brie, in his work on the doctrine of the Law of Custom. To this we would also refer the reader for a full discussion of the significance of *ratio:* we are, indeed, under great obligations to this work in relation to the whole subject of Custom.[2]

[1] 'Decretals,' i. 4. 11 (Gregory IX.): "Sicut etiam longævæ consuetudinis non sit vilis auctoritas, non tamen est adeo valiturus, ut vel juri positivo debeat præjudicium generare, nisi fuerit rationabilis et legitime sit præscripta."

Cf. Cod., viii. 52 (53): "Consuetudinis ususque longævi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem."

[2] Prof. Siegfried Brie, 'Die Lehre vom Gewohnheitsrecht,' Erster Theil, esp. pp. 67-78 and 83-92.



It is indeed true that in some earlier Decretals the matter is treated in the terms of the rescript of Constantine in the Code;[1] but it would seem to be clear that Gregory IX. deliberately decided the matter in the other sense, and that thus, whatever may be the ambiguities in the position of Gratian and other earlier Canonists, the final judgment of the Canon Law, so far as we are here dealing with it, is in favour of the continuing supremacy of Custom over all positive law. The text of the Canon Law is not here dealing with the authority of Civil Law, but the impression which is left upon us is that the Canon Law is on the same side as those Civilians who maintained that all positive law is ultimately founded upon, and continues to be valid in virtue of, the custom of the people.

[1] Cf. Brie, *op. cit.*, pp. 80, 81.

# CHAPTER IX.

## THE THEORY OF THE CANON LAW.

WE can now turn to the consideration of the nature and character of canon law. We could not approach this until we had endeavoured to get at the conception of law in its most general sense, for it has, in the judgment of the mediæval canonists, in large measure the same nature as other laws, and therefore, till we had endeavoured to fix the general principles of all legal systems, we could not with any hope of success attempt to apprehend the distinctive features of the canon law. We must approach the subject without assuming that the nature of canon law was quite clearly and completely understood or defined by any writer in this period. We must be specially on our guard against the danger of reading back into the twelfth and early thirteenth centuries the possibly more complete analyses and the precise definitions of later times. It is possible that by the middle of the thirteenth century the theory of the subject was complete, but if we are to consider the matter seriously we shall do well to keep an open mind, even upon that question. Nothing, indeed, has been, from a strictly historical point of view, more mischievous than the notion that the Middle Ages had a clear-cut and precise notion of the nature and authority of canon law. What we may take as fairly certain is that until Gratian men had hardly realised the complexity of these questions, and that his treatment of the subject does present us with the first reasoned attempt to analyse the essential character of canon law: this does not, however,



necessarily mean that the theory even of Gratian is complete.

The canonical collections which preceded Gratian's have, as we have already seen, the character of compilations small or large rather than of critical treatises, and there is no use, therefore, looking to them for any explicit discussion of the nature of canon law: this does not of course mean that the Church had no working conception of what it was, but it does mean that it had no fully formed and defined theory of its nature. At the same time the collections both of Burchard and of Ivo include passages from various ecclesiastical writers which may be taken as indicating the currency of some general conceptions both of the nature and of the sources of the canon law, and these and similar passages provide the foundation upon which Gratian constructed his own more definite theory.

Some passages from the writings of St Augustine, St Basil, and Pope Leo IV. are especially noteworthy in this connection. In the last chapter we have referred to the passage cited by Burchard and others to the effect that in those things with respect to which the Scriptures lay down no definite rules, the custom of the people of God and the institutions of the "majores" are to be taken as law, and are to be obeyed.[1] Here is an important statement of the place and nature of ecclesiastical law, as distinguished from the law of the Scriptures; the reference to the "mos populi Dei" is especially interesting and significant, as indicating an important point of similarity between the conceptions of canon law and secular law.

Ivo places immediately after this a passage derived ultimately from St Basil, which represents a very similar principle. Some Church institutions, he says, we have received from the Scriptures and from the apostolic tradition; some

[1] Burchard, 'Decretum,' iii. 126: "In his enim rebus de quibus nihil certe statuit Scriptura divina, mos populi Dei, vel instituta majorum pro lege tenenda sunt, et sicut prævaricatores legum divinarum, ita contemptores ecclesiasticarum coercendi sunt." This is again cited in Ivo, 'Decretum,' iv. 68; Ivo, 'Pan.,' iv. 158, and in Gratian's 'Decretum,' D. xii. 7. Cf. St Augustine, Ep. 36. 1, 2.

have been approved by custom, and these deserve a similar respect.[1]

Another passage from St Augustine is cited by Ivo in the 'Decretum,' which contains a very interesting enumeration and classification of the authorities in the law of the Church. The authority of Scripture is superior to that of all the letters of bishops, and no question can be raised as to the truth or correctness of that which is contained in it. The letters of bishops can be corrected by wise men or other bishops, while the judgments of councils may be corrected by those of later councils. The authority of provincial councils can be overruled by that of the universal councils of the Christian world, and that of universal councils by later ones when the Church may have received new light.[2]

In the absence of any comment on these passages, we cannot say with confidence how far Burchard or Ivo may have derived from them a theory of canon law, and of the relation of its various sources to each other. But we can for ourselves recognise at least four elements in the sources of canon law as indicated in these passages—first, the Holy Scriptures; second,

[1] Ivo, 'Decretum,' IV. 69: "Ecclesiasticarum institutionum quasdam Scripturis, quasdam vero apostolica traditione per successiones in mysterio, traditas recepimus, quædam vero consuetudine roborata approbavit usus"

Quoted also in Gratian, 'Decretum,' D. xi. 5.

[2] Ivo, 'Decretum,' IV. 227. "Quis nesciat sanctam scripturiam canonicam tam veteris quam Novi Testamenti certis suis terminis contineri, eamque *omnibus posterioribus* episcoporum litteris ita præponi, ut de illa omnino dubitari et disceptari non possit, utrum verum vel utrum rectum sit quidquid in ea scriptura constiterit esse? Episcoporum autem litteras, quæ post confirmatum canonem vel scriptæ sunt vel scribuntur, et per seriorem forte sapientiorem cujuslibet in ea re peritioris, et per aliorum episcoporum graviorem auctoritatem doctioremque prudentiam, et per concilia licere reprehendi, si quid in eis forte a veritate deviatum est"

Ivo, '*Decretum*,' IV. 138. "Concilia posteriora prioribus apud posteros præponuntur, et universum partibus semper optimo jure præponitur. Ipsa concilia quæ per singulas regiones vel provincias fiunt, plenariorum conciliorum auctoritati, quæ fiunt ex universo orbe Christiano, sine ullis ambagibus cedunt, ipsaque plenaria sæpe priora a posteribus emendantur, cum aliquo experimento rerum aperitur quod clausum erat, et cognoscitur quod latebat, sine ullo typo sacri legæ superbiæ" The last sentence is also contained in Deusdedit, '*Collectio* Canonum,' I. 296.

Cf. St Aug., 'De Baptismo Contra Donatistas,' II. 3.



the decrees of councils; third, the writings of certain bishops; and fourth, the custom of the Church.

In another passage quoted by Ivo in the 'Decretum' and the 'Panormia,' we have a statement of the actual sources of the canon law as recognised by Pope Leo IV. in the ninth century. In this letter Pope Leo lays it down that alongside of the canons of certain councils, the courts of the Church must recognise as authoritative the decretal letters of Popes Sylvester, Siricius, Innocent, Zosimus, Cœlestine, Leo, Gelasius, Hilary, Simmachus, Simplicius, Hormisdas, and Gregory the Second; and that if it should chance that in some case questions should arise which could not be settled by reference to these, then recourse should be had to the sayings of Jerome, Augustine, Isidore, and other holy doctors, or to the Apostolic See of Rome.[1]

This is from the point of view of historical criticism an important passage; for our present purpose it has not the same significance, for, as we shall presently see, Gratian enumerates many other sources of canon law, and it cannot be doubted that Burchard and Ivo also recognised many others; but the passage indicates clearly the importance of the position of the decretal letters of the Popes in the canon law. This point is of so much importance that we must dwell upon it a little further.

Burchard has not, so far as we have observed, any direct references to this, but he reproduces an important canon which lays down the principle that the authority of sum-

[1] Ivo, 'Panormia,' II. 118. "De libellis et commentariis aliorum, non convenit aliquos judicare et sanctorum conciliorum canones relinquere, vel decretalium regulas, quas habentur apud nos simul cum canonibus, quibus in omnibus ecclesiasticis utuntur judiciis, id est, apostolorum, Nicænorum, Ancyritanorum, Neocæsarensium, Gangrensium, Sardicensium, Carthaginensium, et cum illis regulæ præsulum Romanorum, Sylvestri, Circii, Innocentii, Zozimi, Cœlestini, Leonis, Gelasii, Hilarii, Simmachi, Simplicii, Ormisdæ, et Gregorii Iunioris. Isti omnino sunt per quos judicant episcopi, per quos episcopi similiter et clerici judicantur. Nam si tale emerserit vel contingerit inusitatum negotium, quod minime possit per istos finiri, tunc illorum quorum meministis, dicta Hieronymi, Augustini, Isidoris, vel cæterorum similiter sanctorum doctorum similium, si reperta fuerint, magnanimiter sunt retinenda vel promulganda, vel ad apostolicam sedem referatur de talibus"

Cf. Ivo, 'Dec.,' IV. 72, and Gratian, 'Dec.,' D. xx. 1.

moning synods belongs to the Apostolic See, and that no council can be recognised as general which has been called without this authority.[1] Ivo includes the same canon in the 'Panormia,' and there is a similar one in his 'Decretum' and in Gratian.[2] Ivo, both in the 'Decretum' and in the 'Panormia,' and Gratian cite a canon saying that all commands of the Apostolic See are to be received as though they were confirmed by St Peter.[3] He also (in the 'Decretum') cites a letter of Pope Nicholas I., which has reference primarily to the psuedo-Isidorian collection. It had been apparently suggested that these were not to be received as having canonical authority, because they were not contained "in codice canonum." Nicholas urges that this objection has no weight, that there is no difference between the authority of those decretals and decretal letters which had been hitherto included in the "codices canonum" and others.[4] Ivo also includes in the 'Decretum' a letter of Pope Alexander II. which asserts very emphatically that the *decreta* of the Roman See are to be accepted and reverenced by all sons of the Church, even as are the *canones*.[5]

It was the great work of Gratian to take in hand seriously the task not merely of codifying the immense mass of material

[1] Burchard, 'Decret.,' i. 42: "Synodorum vero congregandorum, auctoritas apostolicæ sedi privata commissa est potestate. Nec ullam synodum generalem ratam esse legimus, quæ ejus non fuerit auctoritate congregata vel fulta. Hæc canonica testatur auctoritas, hæc historia ecclesiastica roborat, hæc sancti Patres conformant."

[2] Ivo, 'Pan.,' iv. 14; 'Dec.,' iv. 240; Grat., 'Dec.,' D. xvii. 1.

[3] Ivo, 'Decretum,' iv. 238: "Sic omnes apostolicæ sedis sanctiones accipiendæ sunt, tanquam ipsius divini Petri voce firmatæ sint."

Cf. 'Pan.,' ii. 101. (This reads "præcepti" instead of "Petri.") Cf. also Grat., 'Dec.,' D. xix. 2, which has "Petri."

[4] Ivo, 'Decretum,' v. 33: "His ita *divina favente gratia* prælibatis, ostendimus nullam differentiam esse inter illa decreta, quæ in codice canonum habentur sedis Apostolicæ præsulum, et ea quæ præ multitudine vix per singula voluminum corpora reperiuntur: cum omnia, omnium qui decessorum suorum decretalia constituta, atque decretales epistolas, quas beatissimi Papæ diversis temporibus ab urbe Romæ dederunt, venerabiliter fore suscipiendas, et custodiendas, eximios Præsules scilicet et Leonem Gelasium mandasse probavimus."

Cf. Gratian, 'Dec.,' D. xix. 1.

[5] Ivo, 'Decretum,' v. 31: "Ignorant miseri quod hujus sanctæ sedis decreta, ita pia fede a filiis matris Ecclesiæ accipienda sint et veneranda, ut tanquam regulæ canonum ab eisdem absque ullo scrupulo admittantur."



which had accumulated, but what was even more important, of analysing these materials, and of seriously facing the question of their relation to each other. But more than this, Gratian also for the first time among canonists set out to form some general philosophical conceptions of the ultimate nature of all law, and to apply these philosophical principles to the elucidation of some of the most difficult questions with regard to the whole body of the law of the Christian Church.

In order to deal accurately with Gratian's treatment of Church law, we must begin by observing once again his general principles on the nature of law, though we have already considered these in previous chapters. He begins by dividing all law into natural and human. Natural law he identifies with the divine law, and says that it is represented first by the great principle that a man should do to others as he would wish that they should do to him. Human law is essentially custom: this has been in part reduced to writing, while part of it continues unwritten.[1]

We have to consider how far these general principles apply to the canon law as well as to civil law. We might imagine that canon law belongs entirely to the category of divine natural law, but when we come to look at Gratian's treatment of the subject more closely we find that this cannot be what he meant. We must refer the reader to our discussion of the exact relation of the "law and the Gospel" to the natural law. The natural law is said to be contained in the "law and the Gospel," but not everything that is contained in the "law and the Gospel" belongs to the natural law. There are regulations of the "law" which are not permanent or unalterable, which are not really part of the natural law.[2]

Gratian does not, as far as we have seen, explicitly apply this to canon law, but we think that it is quite clear that he implies such an application, and that while the canon law may contain rules which are directly representative of the divine "natural law," yet it is not to be identified with this. There are rules of the civil law and of the canon law which are directly representative of the natural law, but the

[1] See pp. 98-101.

[2] See pp. 108-110.

natural law is not to be identified with either the civil law or the canon law. Not, indeed, that any law, whether civil or canon, is valid which contradicts the "natural law": we have pointed out that Gratian is perfectly clear that all such laws are necessarily void;[1] the civil law and the canon law must be in harmony with the natural law, but they represent not the mere assertions of it, but the applications of its principles to particular circumstances and times—applications which are not necessarily permanent, and whose authority is not the same as that of the natural law itself.

If canon law, then, is not divine law in the full sense, we must ask how far it can be said to belong to the domain of custom, whether written or unwritten. We find that while Gratian does not draw out the subject completely, yet clearly he implies that at least in part canon law represents the authority of custom. We have already referred to the two passages which he quotes, in which it is laid down that custom forms part of the law of the Church,[2] and the importance which he attaches to custom is brought out clearly by the terms in which he treats the general question of the validity of law. Gratian, as we have seen, treats law by whomsoever promulgated as really invalid unless it is confirmed by the custom of those who are concerned, and he finds his illustrations of this in certain decrees of Popes Telesphorus and Gregory the Great enjoining upon the clergy the observance of the Lent fast for seven weeks before Easter. This, he says, never became law, because it was not recognised by custom. Gratian does indeed suggest, after he has laid down the theory, that possibly these decretal letters may be taken as conveying a counsel rather than a command, but he does not suggest any modification of the general principle which the case was intended to illustrate.[3] It seems clear that in part canon law represents the authority of custom just as civil law does.

We can now consider the definition and classification of canon law with which Gratian furnishes us. In his formal definition of Church law he says that an ecclesiastical constitution is called a canon. He describes the collection of canons as consisting of decretals of pontiffs and statutes of councils. Some of these councils are universal and some provincial. Of these latter some have been held with the authority of the Roman See—that is, in the presence of a legate of the Roman See; others with the authority of patriarchs and primates or metropolitans of provinces. Further on he describes the purpose of the ecclesiastical as well as of the civil laws as being to ordain what men must do, and to forbid what is evil.[1]

This definition seems expressly to leave out of account such canons as may be merely restatements of the rules of Holy Scriptures, or of the natural law, and to confine itself to those which represent the authority of the Church. It is important, then, to observe that Gratian here describes broadly as sources of canon law the decretals of pontiffs, the canons of universal councils, and of some provincial councils. Gratian does not here mention custom as a source of Church law, but that he does include this is evident from the passages referred to above and from a passage in another 'Distinction,' where he lays down the principle that custom yields to law, but finally adds that when custom does not contradict the sacred canons or human laws, then it is to be maintained.[2] Clearly custom is, in his view, also a source of Church law, but he conceives of it as being invalid, as against actual written canon

[1] See pp. 105, 106.

[2] See pp. 161, 162.

[3] See pp. 155, 156.



[1] Gratian, 'Decretum,' D. iii. Part I., Gratianus: "Omnes he species secularium legum partes sunt. Sed quia constitutio alia est civilis, alia ecclesiastica; civilis vero forense vel civile jus appellatur, quo nomine ecclesiastica constitutio appelletur, videamus. Ecclesiastica constitutio nomine canonis censetur."

. . . . . .

Part II., Gratianus: "Porro canonum alii sunt decreta Pontificum, alii statuta conciliorum, conciliorum vero alia sunt universalia, alia provincialia. Provincialium alia celebrantur auctoritate Romani Pontificis presente videlicet legato sanctæ Romanæ ecclesiæ; alia vero auctoritate Patriarcharum, vel primatum, vel metropolitanorum ejusdem provinciæ."

. . . . . .

Part III., Gratianus: "Officium vero secularium, sive Ecclesiasticarum legum est, precipere quod necesse est fieri, prohibere quod malum est fieri."

[2] Gratian, 'Decret.,' D. xi. Part I., Gratianus: "Quod vere legibus consuetudo cedat, Ysidorus testatur in Sinonimis, Lib. ii., 'Usus auctoritate cedat pravum usum lex et ratio vincat.' . . . Part II., Gratianus: Cum vero nec sacris canonibus, nec humanis legibus consuetudo obviare monstratur, inconcussa servanda est."

law;[1] we must, however, bear in mind the principle which we have already seen Gratian to hold, namely, that written law must be approved by the custom of those concerned before it can become law. Canon law thus, in Gratian's treatment, has for its sources the authority of certain persons who are looked upon as having legislative authority, the decrees of councils, and custom.

Before we consider Gratian's theory of these various sources, we must be careful to notice once again that there is a law behind the canon law which is superior to it, just as it is superior to the civil law. The Scriptures and the Natural law represent the immediate law of God, and every law or constitution, whether civil or ecclesiastical, which contradicts these is null and void.[2]

We have already considered the theory of Natural law in Gratian and the other canonists,[3] and we need not therefore discuss over again his theory of this subject. We must, however, again bear in mind that there are certain difficulties connected with this subject. The canonists, as we have seen, clearly understand by the natural law those general principles of moral obligations which man is supposed to recognise by his reason as binding upon him. This natural law is contained in the Scriptures, but this raises the difficulty that there are many laws in Scripture which are not now recognised as binding. Gratian explains this by the distinction between the moral and the ceremonial aspects of the Scriptures. Another difficulty lies in the fact that while the Natural law represents the immutable moral principles of the Divine law, as a matter

[1] Cf. p. 154, note 3.

[2] Gratian, 'Decret.,' D. ix. Part I., Gratianus: "Quod autem constitutio naturali juri cedat, multiplici auctoritate probatur.... Part II., (after c. 11) Gratianus: Cum ergo naturali jure nihil aliud præcipitur quam quod Deus vult fieri; nihilque vetetur quam quod Deus prohibet fieri; denique cum in canonica scriptura nihil aliud quam in divinis legibus inveniatur; divine vero leges natura consistant, patet, quod quæcunque divinæ voluntati seu canonicæ scripturæ contraria probantur, eadem et naturali juri inveniuntur adversa. Unde quæcumque divinæ voluntati, seu canonicæ scripturæ, seu divinis legibus postponenda censentur, eisdem naturale jus preferri oportet. Constitutiones ergo vel ecclesiasticæ vel seculares, si naturali jure contrariæ probantur, penitus sunt excludendæ."

[3] See pp. 102-113.



of fact there are institutions of human society which seem to be contrary to these principles. Gratian himself points out the opposition, but does not suggest the explanation; but this is done by commentators like Rufinus, who distinguish between the commands and the *demonstrationes* of the natural law, and argue that while the latter represent the ultimate principles of moral relations, the actual conditions of human life, in virtue of the force of evil in human nature, require other regulations, and that institutions like property and slavery which are on the surface contrary to the principles of the Natural law are really the means by which men are to be trained to obey it. There are thus rules of human conduct which might seem contrary to the Scriptures and to Natural law, but this contradiction is to be explained by such considerations as those which we have mentioned; subject to such exceptions it remains true that any law, ecclesiastical or civil, is void, if it be contrary to natural law.

We can now consider the nature and the relative importance of those sources of the canon law which we have already enumerated. Gratian sets out at length in the fifteenth and sixteenth "Distinctions" the place of general councils, and cites several lists of canons of local councils and of letters and other writings which were recognised as having authority in the Church.[1] In the seventeenth Distinction he sets out the principle that such general councils can only be summoned by the authority of the Roman See,[2] and cites a number of passages in support of this view. To enter into the details of the sources cited by Gratian, or to discuss the question of the historical accuracy of his judgment that universal councils could only be summoned by the Roman See, would be entirely outside the scope of this work. It is enough for us to observe that Gratian is quite clear that the canons of universal councils, or works recognised by them, form the first important element in the body of the canon

[1] Grat., 'Decret.,' D. xv., xvi.

[2] Gratian, 'Decret.,' D. xvii. Part I., Gratianus: "Generalia concilia quorum tempore celebrata sint, vel quorum auctoritas cæteris præmineat sanctorum auctoritatibus, supra monstratum est. Auctoritas vero congregandorum conciliorum penes Apostolicam sedem est."

law, and that he is clear that the authority of the Pope is an element in their validity.

In the eighteenth Distinction Gratian deals with the place of provincial councils or synods in the canon law, and he maintains that these have in themselves no power of making laws, but only of administering and enforcing them.[1] We may take it that he means that so far as canons of local councils, such as Gangræ or Ancyra, were admitted into the body of the canon law, it is only because they have been ratified by the judgment of some general council or of the Pope.

We pass now to the second source of canon law dealt with by Gratian—that is, the decretal letters of the Bishops of Rome. Gratian deals with this subject in the nineteenth Distinction. He formally states the question whether the decretal letters have authority when they are not found in the collections of the canon law.[2] In the first passage he cites, the question refers primarily to the pseudo-Isidorian decretals, whether, namely, these, which had not hitherto had any place in the collections of canons current in the ninth century, were to be received as having canonical authority; but the question Gratian raises is not their genuineness, but whether, if taken as genuine, they are to be received as canons. He treats this by citing a number of passages from various Papal letters, and from the capitularies, which he takes as showing clearly that Papal letters have authority in the whole Church. He therefore concludes that the decretal letters have the same authority as the canons of councils.[3]

[1] Gratian,' Decret.,' D. xviii. Part I., Gratianus: "Episcoporum igitur Concilia, ut ex præmissis apparet, sunt invalida ad diffiniendum et constituendum, non autem ad corrigendum. Sunt enim necessaria Episcoporum Concilia ad exhortationem et correctionem, que etsi non habent vim constituendi, habent tamen auctoritatem imponendi et indicendi, quod alias statutum est, et generaliter seu specialiter observari præceptum."

[2] Gratian, ' Decret.,' D. xix. Part I., Gratianus: "De epistolis vero Decretalibus queritur, an vim auctoritatis obtineant, cum in corpore canonum non inveniantur."

[3] Gratian, ' Decret.,' D. xx. Part I., Gratianus: "Decretales itaque epistolæ canonibus conciliorum pari jure exequantur."

D. xxi. Part I., Gratianus: "Decretis ergo Romanorum Pontificum et sacris canonibus conciliorum ecclesiastica negotia ut supra monstratum est terminantur."



Gratian's position is quite clear, but he makes one important qualification. These decretal letters have the force of canons, unless they are contrary to the "evangelical precepts" or the decrees of earlier Fathers: a letter of Pope Anastasius II., which violated the law of the Church and was issued unlawfully and uncanonically, and was contrary to the decrees of God and to the regulations of his predecessors and successors, is repudiated by the Roman Church; and Gratian adds a tradition that Anastasius was struck down by the Divine judgment.[1]

In order, however, that we may form a complete estimate of Gratian's judgment on this subject, we must take account of a very important discussion of the whole question which we find in the second part of the ' Decretum.' The discussion arises out of the question how far the Pope has the power to confer upon the *Ecclesia baptismalis* of a diocese the right to all the tithes in that diocese, and how far, if the Pope has once done this, it is lawful for him to exempt certain monasteries from the obligation of paying tithes to the *Ecclesia baptismalis*. It is argued, in the first place, that the Popes cannot confer upon the *Ecclesia baptismalis* such a privilege, inasmuch as according to the ancient canons the tithes are to be divided into four parts—one for the bishop, one for the clergy, one for the repairs of church buildings, and one for the poor. This raises the whole question of the authority of the Pope to override the ancient canons by the grant of such a privilege, and this involves the question of the relation of his authority to that of the canons.

[1] Gratian, ' Decretum,' D. xix. (after c. 7). Gratianus: "Hoc autem intelligendum est de illis sanctionibus vel decretalibus epistolis, in quibus nec precedentium Patrum decretis, nec evangelicis preceptis aliquid contrarium invenitur. Anastasius enim secundus favore Anastasii imperatoris, quos Acatius post sententiam in se prolatam sacerdotes vel Levitas ordinaverat, acceptis offitiis rite fungi debere decrevit, ita inquiens." [Here follows the letter of Anastasius II. to the Emperor.] . . .

Gratianus: "Quia ergo illicite et non canonice, sed contra decreta Dei, predecessorum et successorum suorum hec rescripta dedit (ut probat Felix et Gelasius, qui Acatium ante Anastasium excommunicaverunt, et Homisda, qui ab ipso Anastasio tertius eundem Acatium postea dampnavit) ideo ab ecclesia Romana repudiatur, et a Deo percussus fuisse legitur hoc modo."

Gratian first cites a number of authorities which would seem to show that the Pope is bound to maintain the canons. Some of these are so strong that we shall do well to notice them before considering Gratian's own conclusions. One of them is a passage from a letter of Pope Urban I., in which he asserts very emphatically that the Roman pontiff has authority to make new laws, but only when the Lord, or His apostles, or the Fathers who followed them, have not laid down any rule: when they have done this, the Pope cannot make any new law, but must rather defend these laws at the risk of his life: if he were to endeavour to destroy that which they had taught, he would fall into error. Almost more emphatic is a fragment from a letter of Pope Zosimus I., which asserts that even the authority of the Roman See can do nothing against the statutes of the Fathers.

Gratian's own conclusion is stated at length at the end of the "question." He begins by enumerating the reasons that may be urged to show that the Roman See cannot grant any *privilegia* contrary to the canons. In reply to these he urges first of all that the Pope gives validity and authority to the canons, but is not bound by them; he has the authority to make canons, as being the head of all churches, but in making canons he does not subject himself to them. He follows the example of Christ, who both made and changed the law, who taught as one who had authority, and not as the scribes, and yet fulfilled the law in His own person. So also at times the Popes subject themselves to the canons; but at other times, by their commands or definitions, show themselves to be the lords and founders of the canons. Gratian therefore interprets the passages which he has cited as imposing upon others the necessity of obedience, while the Popes may obey if they think fit. (*Pontificibus . . . inesse auctoritas observandi.*) The Roman See, therefore, should respect what it has decreed, not through the necessity of obedience, but *auctoritate impertiendi*. It is therefore clear that the Popes may grant special *privilegia* contrary to the general law. But again, Gratian urges, it must be remembered that, strictly speaking, such *privilegia* are not really contrary to



the canons, for the interpretation of the law belongs only to him who has the right of making laws, and therefore to the Roman See. In the decrees of some councils it is specially stated that these are issued subject to the proviso that the Roman Church may ordain otherwise, or with the reservation of the apostolic authority; it must therefore be understood that canonical rules with respect to tithes or other Church affairs are made subject to the authority of the Roman Church to ordain or permit otherwise. *Privilegia*, therefore, granted by the Roman See are not really contrary to canonical order.

The Roman Church, therefore, can issue special *privilegia*, but must, in doing this, remember to maintain equity; *privilegia* should not enrich one at the expense of many. The Pope should remember the saying of the apostle to the Corinthians (2 Cor. viii. 13): "We do not wish that others should be relieved, and you distressed," and the parallel saying of the sacred law of the emperor: Rescripts obtained against law are to be rejected by all judges, unless they are of such a kind as to hurt no one; and, petition must not be made for things contrary to law and damaging to the revenue.[1]

[1] Gratian, 'Decret.,' C. xxv. Q. 1, Part I., Gratianus: "Quod vero auctoritate illius privilegii decimas sibi ex integro clerici vindicare non valeant, hinc probatur: quia decimæ juxta decreta sanctorum Patrum quadripertito dividuntur: quarum una pars episcopis, secunda clericis, tertia fabricis restaurandis, quarta vero pauperibus est assignata. Decreta vero sanctorum canonum neminem magis quam Apostolicum servare oportet." . . .

C. 6. Item Urbanus Papa: "Sunt quidem dicentes, Romano Pontifici semper licuisse novas condere leges. Quod et nos non solum non negamus sed etiam valde affirmamus. Sciendum vero summopere est, quia inde novas leges condere potest, unde Evangelistæ aliquid nequaquam dixerunt. Ubi vero aperte Dominus, vel ejus apostoli, et eos sequentes sancti Patres sententialiter aliquid diffinierunt, ibi non novam legem Romanus pontifex dare, sed pocius quod predicatum est usque ad animam et sanguinem confirmare debet. Si enim quod docuerunt apostoli et prophetæ destruere (quod absit) niteretur, non sententiam dare, sed magis errare convinceretur. Sed hoc procul sit ab eis, qui semper Domini ecclesiam contra luporum insidias optime custodierunt."

C. 7. Item Zosimus Papa: "Contra Patrum statuta concedere aliquid vel mutare nec hujus quidem sedis potest auctoritas. Apud nos enim inconvulsis radicibus vivit antiquitas, cui decreta Patrum sanxere reverentiam." . . .

Part II., Gratianus: "Si ergo primam sedem statuta conciliorum

It is interesting to observe that Gratian uses with respect to the Pope the phrase of the *corpus juris civilis* with regard to the emperor, he attributes to him the power *juris condendi*

pre omnibus servare oportet, si pro statu omnium ecclesiarum necesse est illam inpigro vigilare affectu, si ea, que a Romanis Pontificibus decreta sunt, ab omnibus servari convenit, si illi, qui nesciunt sacris canonibus obedire, altaribus ministrare non debent patet, quod contra statuta sanctorum canonum quibus status ecclesiarum vel confundentur vel perturbentur, privilegia ab apostolico concedi non debent. § 1. His ita respondetur. Sacrosancta Romana Ecclesia jus et auctoritatem sacris canonibus inpertit, sed non eis alligatur. Habet enim jus condendi canones, utpote que caput et cardo est omnium ecclesiarum, a cujus regula dissentire nemini licet. Ita ergo canonibus auctoritatem prestat, ut se ipsam non subjiciat eis. Sed sicut Christus, qui legem dedit, ipsam legem carnaliter inplevit, octava die circumcisus, quadragesima die cum hostiis in templo presentatus, ut in se ipso eam sanctificaret, postea vero, ut se dominum legis ostenderet, contra litteram legis leprosum tangendo mundavit, apostolos quoque contra litteram sabbati per sata pretergredientes, spicas vellentes et confricantes manibus suis, probabili exemplo David, circumcisionis, et templi excusavit, dicens, 'Non legistis quid fecerit Abimelech, quando venit ad eum David, et dedit ei panes propositionis, de quibus non licebat edere, nisi solis sacerdotibus, et comedit ipsi et pueri ejus' . .

"Hinc etiam de eo dicitur 'Erat Jesus docens tamquam potestatem habens,' id est tamquam dominus legis, addens moralibus ea quæ deerant ad perfectionem, umbram figuralium in lucem spiritualis intelligentiæ commutans, non tamquam scribæ eorum, qui littera legis astricti non audebant aliquid addere vel commutare. Sic et summæ sedis Pontifices canonibus a se sive ab aliis sua auctoritate conditis reverentiam exhibent, et eis se humiliando ipsos custodiunt, ut alios observandis exhibeant. Nonnunquam vero, seu jubendo, seu diffiniendo, seu decernendo, seu aliter agendo, se decretorum dominos et conditores esse ostendunt. In premissis ergo capitulis alius imponitur necessitas obsequendi: summis vero Pontificibus ostenditur inesse auctoritas observandi, ut a se tradita observando aliis non contempnenda demonstrent, exemplo Christi qui Sacramenta, que ecclesiæ servanda mandavit, primum in se ipso suscepit, ut ea in se ipso sanctificaret. Oportet ergo primam sedem, ut diximus, observare ea, que decernenda mandavit, non necessitate obsequendi, sed auctoritate impertiendi. Licet itaque sibi contra generalia decreta specialia privilegia indulgere, et speciali beneficio concedere quod generali prohibetur decreto. § 2. Quamquam si decretorum intentionem diligenter advertamus, nequaquam contra sanctorum canonum auctoritatem aliquid concedere inveniantur. Sacri siquidem canones ita aliquid constituunt, ut suæ interpretationis auctoritatem sanctæ Romanæ ecclesiæ reservent Ipsi namque soli canones valeant interpretari, qui jus condendi eos habent. Unde in nonnullis capitulis conciliorum, cum aliquid observandum decernitur, statim subinfertur. 'Nisi auctoritas Romanæ ecclesiæ inperaverit aliter,' vel, 'salvo tamen in omnibus apostolica auctoritate'

"Quecumque ergo de decimis vel quibuslibet ecclesiasticis negociis sacris canonibus diffiniuntur, intelligenda sunt necessario servari, nisi auctoritas Romanæ ecclesiæ aliter fieri mandaverit vel permiserit. Cum ergo aliqua privilegia ab Apostolico aliquibus conceduntur, etsi contra generalem legem aliquid sonare videantur, non tamen contra ipsam aliquid concedere intelliguntur, cum ipsius legis auctoritate privilegia singulorum penes matrem omnium ecclesiarum reserventur . .

"§ 4 Valet ergo ut ex premissis colligitur, sancta Romana ecclesia quos libet suis privilegiis munire, et extra generalia decreta quedam speciali beneficio indulgere, considerata tamen rationis equitate, ut que mater justiciæ est, in nullo ab ea dissentire inveniatur, ut privilegia videlicet, que ob religionis, vel necessitatis, vel exhibiti obsequii gratiam conceduntur, neminem relevando ita divitem faciant, ut multorum detrimenta non circumspiciendo, in paupertatis miseriam nonnullos dejiciant, illud apostoli ad memoriam revocantes, quod ad Corinthios scribens ait 'Non enim volumus ut aliis sit remissio, vobis autem tribulatio.' Cui sacra lex principum concordans ait: 'Rescripta contra jus elicita ab omnibus judicibus precipimus refutari, nisi forte aliquid est, quod non ledat alium et prosit petenti, vel crimen supplicantibus indulgeat' (Cod., i 19, 7). § 5. Item constitutio imperatoris ad populum 'nec damnosa fixo, nec juri contraria postulari oportet'" (Cod., i 19 3).



*et interpretandi*, and that he probably has in his mind also the legal doctrine that the emperor is not subject to the laws. This does not mean that Gratian borrows these conceptions from the civil law, but that he finds in these phrases of the civil law terms convenient to express that conception of the legislative authority of the Pope, and of his relations to Church law, which he judges to be true. It would be quite incorrect to suppose that these canonists constructed their conception of the legislative authority of the Popes by imitating the civil law; that conception was, as we have seen, much earlier than the new critical study of the civil law in the twelfth century, but this systematic study assisted the canonists like Gratian to find suitable terms and phrases under which to express their conceptions.

Gratian, then, is perfectly clear that the Pope has an authority which is legislative as well as judicial. But it is important to understand what is, in Gratian's view, the nature of this legislative authority of the Church and the Pope, and how it is related to other authorities. In one passage he raises an interesting question with regard to the relation of the canons of the Church and the interpreters of Scripture. The authority of these depends upon their spiritual enlightenment, upon their knowledge and wisdom, and in this respect, as Gratian says, it may be urged that the works of such Fathers as St Augustine or St Jerome

are superior to those of some of the Popes. Does this mean that the sayings of these Fathers have an authority greater than that of the Papal decrees or judgments? Gratian replies by pointing out the distinction between knowledge and jurisdiction, and urges that in determining legal cases not only knowledge but jurisdiction is necessary, and thus while some interpreters of Scripture may equal the Popes in knowledge, they are inferior to them in authority with regard to the decision of legal cases.[1] Gratian does not, so far as we have seen, draw this out in a complete analysis of the various aspects of the authority of the Church, but the discussion is sufficient to prove to us that Gratian does not look upon the authority of Church law as being of precisely the same nature as the authority of Church doctrine.

This does not mean that the canon law has not authority over all Christian men. On the contrary, the man who refuses to accept and to obey it is said in a passage of a letter of Pope Leo IV., quoted by Ivo in the 'Decretum' and 'Panormia,' and by Gratian, to be convicted of not holding the faith.[2] The canons, then, are binding upon all Christian men,

[1] Gratian, 'Decret,' D xx Part I., Gratianus "Decretales itaque epistolæ canonibus conciliorum pari jure exequantur Nunc autem queritur de expositoribus sacræ scripturæ an exequentur, an subjiciantur eis? Quo enim quisque magis ratione nititur eo majoris auctoritatis ejus verba esse videntur. Plurimi autem tractatorum sicut pleniori gratia spiritus sancti, ita ampliori scientia aliis precellentes, rationi magis adhesisse probantur Unde nonnullorum Pontificum constitutis Augustini, Jeronimi atque aliorum tractatorum dicta eis videntur esse preferenda"

Part II "Sed aliud est causis terminum imponere aliud scripturas sacras diligenter exponere Negotiis diffiniendis non solum est necessaria scientia sed etiam potestas Unde Christus dicturus Petro, 'Quodcunque ligaveris super terram, erit ligatum et in cœlis,' etc, prius dedit sibi claves regni cœlorum, in altera dans ei scientiam discernendi intra lepram et lepram, in altera dans sibi potestatem ejiciendi aliquos ab Ecclesia vel recipiendi. Cum ergo quelibet negotia finem accipiant vel in absolutione innocentium, vel in condemnatione delinquentium, absolutio vero vel condemnatio non scientiam tantum, sed etiam potestatem presidentium desiderant: aparet, quod divinarum Scripturarum tractatores, etsi scientia Pontificibus preminant, tamen, quia dignitatis eorum apicem non sunt adepti, in sacrarum scripturarum expositionibus eis preponuntur, in causis vero diffiniendis secundum post eos locum merentur.'"

[2] Ivo, 'Decretum,' iv. 72: "Quam ob causam luculenter et magna voce pronuntiare non timeo, quia qui illa quæ discimus sanctorum patrum statuta, quæ apud nos canones prætitulantur, sive sit episcopus, sive clericus, sive laicus, non indifferenter recipere ipse convincitur nec catholicam et apostolicam fidem, nec sancta vera Christi evangelia quatuor utiliter et efficaciter, et ad effectum (profectum) suum retinere vel credere."

Cf 'Pan,' ii 118, and Gratian, 'Dec,' D xx 1 From a letter of Leo IV, "Episcopis Brittaniæ"

[1] Gratian, 'Decret,' D lxi (after c. 8) Gratianus: "His omnibus auctoritatibus laici prohibentur in episcopatum eligi . . .

Part II. § 1 "E contra B Nicolaus ex laico est electus in episcopum, B Severus ex carnificio assumptus est in archiepiscopum, B. Ambrosius, cum nondum esset baptizatus, in archiepiscopum est electus § 2 Sed sciendum est, quod ecclesiasticæ prohibitiones proprias habent causas, quibus cessantibus cessant et ipsæ Ut enim laicus in episcopum non eligeretur, hec causa fuit, quia vita laicalis ecclesiasticis disciplinis per ordinem non erudita, nescit exempla religionis de se præstare aliis, quie in se ipsa experimento non didicit. Cum ergo quilibet laicus merito suæ perfectionis clericalem vitam transcendit, exemplo B. Nicolai et Severi et Ambrosii, ejus electio potest rata habere"



but again Gratian makes an interesting observation upon their nature: they are indeed authoritative, but they exist for certain definite reasons, and when these cease to exist then the laws also cease. Gratian gives as an example the canonical rule that laymen may not be elected as bishops, while as a matter of fact various great saints, like St Ambrose and others, were chosen as bishops while they were still laymen. He concludes that the reason of the rule was that the layman, not having been trained in the ecclesiastical discipline, cannot well teach it to others: when, however, a layman was superior in the character of his life to the ecclesiastics, as was the case with St Ambrose, the rule was not binding.[1]

Such, then, in its main outlines, is the theory of Gratian with regard to the canon law. Its sources are the custom of the Church, and the authoritative promulgation of rules and laws of ecclesiastical order by general councils or by the Popes. Behind these there lies the authority of the Natural law and of the Scriptures: these may be represented in the canons, but are not to be confused with the canons; they are rather the norm by which the validity of any canon may be tested. The canons of the Church belong to the same category as the civil law of the State; they do not represent an absolutely final authority, but are rather the expression of the authority residing in the Church and its proper officers for the

government of the society, subject always to the authority which lies behind the society. But they are binding upon all the members of the society; to refuse to obey them is to refuse to recognise the authority of God, from whom this authority is derived.

We must now examine the commentators on Gratian and the other canonical works down to the Decretals, and consider how far these carry on or modify the views expressed by Gratian.

The first of these commentators is Paucapalea, whose 'Summa' on Gratian's 'Decretum' seems to have been written not many years after the 'Decretum' itself. He begins his work with a description of the origin of law, general and ecclesiastical. This is in the main a summary of Gratian, but it is worth while considering, for it brings out very distinctly the main aspects of the subject. Ecclesiastical law, he says, is to be divided into natural, written, and customary law. Natural law is contained in the "Law and the Gospel," and commands men to do to each other as they would be done by. This law began with the rational creation, is supreme over all law, and is immutable. Customary law began later, when men first came together, "when Cain is said to have built a city," and it was renewed after the Flood, in the time of Nimrod. Written constitutions began with the regulations which God gave to Moses with regard to the condition of the Hebrew slave. The law of the Church began with the "decreta" of the holy fathers and the "statuta" of councils. After the Apostles came the supreme Pontiffs and the holy fathers, who had authority to make canons, for till the time of Pope Sylvester it was impossible for councils to meet; after that time the bishops of the Church began to meet in councils and to issue their decrees. The decrees, whether of councils or of the Holy Fathers, have the same subject matter, namely, ecclesiastical orders and causes.[1]

[1] Paucapalea, 'Summa Decret.,' Introduction: "De origine vero juris restat dicendum. Sed quia ecclesiasticorum jurum aliud naturale, aliud scriptum, aliud consuetudinarium dicitur, quo tempore horum quodque cœperit, merito quæritur. Naturale jus, quod in lege et in evangelio continetur, quo prohibetur quisque alii inferre, quod sibi nolit fieri, et jubetur alii facere quod vult sibi fieri, ab exordio rationalis creaturæ cœpit, et inter omnia primatum obtinet; nullo enim variatur tempore, sed immutabile permanet. Consuetudinis autem jus post naturalem legem exordium habuit, ex quo homines in unum convenientes cœperunt simul habitare, quod ex eo factum creditur tempore, ex quo Cain ædificasse civitatem legitur. Quod cum propter hominum raritatem diluvio fere videatur exstinctum postea tempore Nemroth immutatum sive reparatum potius existimatur, cum ipse una cum aliis cœpit alios opprimere, alii propria imbecillitate eorum cœperunt ditioni esse subditi. . . . Sed et scriptæ constitutionis origo ab institutionibus cœpit, quas dominus Moysi dedit, dicens, 'cum tibi venditus fuerit frater tuus hebræus *aut hebræa et vi. annos* servierit tibi, in vii. anno dimittes eum liberum.' . . . Hanc et alias divinas institutiones genti Hebrææ Moyses primus omnium sacris liberis explicavit. Ostenso constitutionum divinarum ac consuetudinis, naturalis quoque juris exordio, nunc de decretis illud videndum est, quod primo sanctorum patrum decreta, inde conciliorum statuta condi cœperunt. Post apostolos namque summi pontifices et sancti patres, penes quos condendi canonum erat auctoritas, continuo sibi successerunt. Non tamen eis fuit licentia convocandi concilia; usque ad tempora beati Silvestri papæ concessa est. Qui, dum sub Constantino imperatore in abditis Sirapei montis latitaret, per ipsum imperatorem revocatus est, sicque imperator per eum conversus et christianissimus factus licentiam ecclesias aperiendi et christianos ibidem conveniendi concessit; atque ex tunc pontifices in unum convenire, concilia celebrare et conciliorum decreta condere cœperunt. Sub hoc enim sancti patres in concilio Nicæno. . . . Quæ omnia tam conciliorum quam sanctorum patrum decreta communem habent materiam, ecclesiasticos videlicet ordines *et dignitates atque eorum causas*. Communem quoque habent intentionem, ostendere scil. (qui sint) ecclesiastici ordines, et qui provehendi ad ipsos, et quod officium cujusque, quæ etiam ecclesiasticæ dignitates, et quibus et per quos conferendæ, et qualiter in iis vivendum. De ecclesiasticis quoque causis, apud quos et per quos sint tractandæ. Ecce quæ materiæ et quæ generalis decretorum intentio."



This summary is interesting, not because it modifies in any important point the principles of Gratian, but because it brings out clearly the mode in which he was understood. In the first place, it is noticeable that Paucapalea looks upon canonical law as having the same varieties as secular law. Canon law is not to be identified with Natural law. A part of it is so, and that part is prior to and superior to all others. In the second place, it is very noticeable that Paucapalea looks upon custom as having a place in Church law. And again, Paucapalea recognises the decrees of the Pontiffs and Fathers as having the same canonical authority as the decrees of councils, and as even preceding them in point of time.

The only other matter of importance in Paucapalea's treatment of the theory of canon law is a brief discussion of the

relative value of different authorities in the Church: this occurs in connection with a difference of opinion between St Jerome and St Augustine as to the ordination of those who had been twice married, once before and once after baptism. Paucapalea solves the question by citing a sentence which he thinks comes from St Isidore, in which it is said that if there is a difference between two councils, that council should prevail which is the older, or has greater authority; and that the authority of the Pope (*apostolicus*) or of bishops is greater than that of a presbyter, even though the personal merit of the presbyter may be higher.[1]

We turn to Rufinus and Stephen of Tournai. And first we must recall to our reader that very elaborate and careful discussion of the subject of natural law by Rufinus, with which we have already dealt. Rufinus holds that the natural law is to be identified with that moral principle which bids a man do what is right and avoid what is evil. It is this principle, of which man had in part lost his knowledge through the fall, which was again set up, incompletely, in the Ten Commandments, and perfectly in the Gospel.[2] It is therefore in its essence immutable, and it is supreme over all systems of law,[3] and no dispensations against it can be granted, unless in some extreme case of necessity.[4]

[1] Paucapalea, 'Summa Decret.,' D. xxvi.: "*Hujusmodi vero contrarietates* beatus Ysidorus determinare videtur, cum ait: Quotiens in gestis conciliorum discors sententia invenitur, illius concilii magis teneatur sententia, cujus et antiquior aut potior extat auctoritas. Sed potior est auctoritas apostolici et pontificum, licet merita possint esse diversa, quam presbyteri; magis ergo eorum sententiæ standum est."

[2] See pp. 103 and 106.

[3] Rufinus, 'Summa Decret.,' D. ix., "'Liq igit.': In hac distinctione prosequitur, quomodo jus naturale constitutionis juri præscribat: quecunque enim leges imperatorum, quecunque scripta auctorum, quecunque exempla sanctorum contraria sunt juri naturali: ipsa omnia vana et irrita sunt habenda. c. 3: canonicam scripturam veteris et novi testamenti instituta naturalia dicit."

[4] Rufinus, 'Summa Decret.,' D. xiii., "'Item adv. jus nat.': Demonstravit superius, quomodo jus naturale differat a constitutione et a consuetudine dignitate, nunc aperit, qualiter ab eisdem discrepet sententie rigore. quippe contra naturale, exaudias, quoad precepta et prohibitiones, nulla dispensatio tolleratur. Quod in illo capitulo insinuatur quod ait: 'Ceterum consuetudini et constitutioni proprius sepe rigor subtrahitur', ut infra habetur: 'Sicut quedam'... 'nisi duo mala ita urgeant,' etc. *Magister Gratianus sic* dicit hic quasi aliquis sic perplexus sit aliquando inter duo mala, ut non possit vitare alterum, quin delinquat. Exempli causa juravit quidam homo interficere fratrem suum."



Canon law, according to Rufinus, arose with the growth of the Church, and the need of order and of the adjustments of disputes between ecclesiastical persons, for which the Gospel did not sufficiently provide. Regulations were made for these purposes by the apostles and their vicars and the other ministers of the Church, and these are called canons.[1]

Stephen of Tournai uses the phrase *jus Divinum* sometimes in the same sense as Gratian, but sometimes he also uses it to describe the whole body of Ecclesiastical law. He is aware that Gratian uses the phrase as equivalent to the *jus naturale*, and in this sense he distinguishes it from the *jus canonicum*, but in one place he speaks of property existing by the *jus Divinum* or by the *jus canonicum*, "which is Divine." He explains this, however, by saying that while by the *jus Divinum*, that is the *jus naturale*, there is no private property, by the *jus canonum*, which is made by men, but with the inspiration of God, there is such a thing as private property.[2] It seems clear that he agrees with Gratian that, in the primary sense, canon law is not the same as the *jus Divinum*, but he suggests that it may be called a part of this in some secondary sense,—it has been made with the inspiration of God. In another passage he

[1] Rufinus, 'Summa Decret.,' Præf.. "Denique cum auctore Deo ecclesia cresceret gradusque in ea disponerentur et ordines et tam in eis discernendis quam in litibus inter ecclesiasticas personas provenientibus sedandis evangelium sufficere non videretur, tam ab apostolis quam ab eorum vicariis nec non ceteris ecclesie ministris multa sunt addita, que, *licet multimode* in specie appellentur, uno tamen generali vocabulo nuncupantur. quod est canones."

[2] Stephen of Tournai, 'Summa Decret,' D. viii. 1: "'Nonne jure hum.' Non ergo per iniquitatem aut jus humanum iniquum est. Unde videtur contra infra (C. xii. q. 1. c. 2). Ibi enim dicitur: per iniquitatem hoc alius dixit suum esse, alius istud. Sed ibi vocat iniquitatem consuetudinem juris gentium naturali æquitati contrariam. Item videtur hic dici, quia solo jure humano hoc meum et illud tuum, et ita nihil est proprium. Jure divino vel jure etiam canonico, quod divinum est, et prescriptiones et aliæ acquisitiones et inducuntur et confirmantur. Unde potest dici, jure divino, i.e. naturali, nihil est proprium, jure autem canonum, quod ab hominibus, quamvis tamen deo inspirante, inventum est, aliquid proprium est. Unde et humanum dicitur aliud hujus, aliud illius."

uses the phrase *jus Divinum* to describe the whole body of religious law, whether pre-Christian or canonical, and in discussing the origin of this system of law he says that it began with the beginning of the world, and describes Adam's charge against his wife as marking the beginning of the legal process. Others, he says, have held that the organisation of judicial proceedings began with the law of Moses; but others again begin the treatment of the *jus Divinum* with the primitive Church. When persecution ceased, under Constantine, the Fathers of the Church began to meet together in councils and to enact canons for the regulation of ecclesiastical affairs.[1]

This is followed by a description of the various authorities from whom canon law has proceeded, and we must now consider this aspect of the theory of Stephen and Rufinus.

Some ecclesiastical laws, Rufinus says, are the decrees of the greater councils of Nice, Constantinople, Ephesus, and Chalcedon; others, of lesser councils; others, again, are Apostolic canons, or decrees of pontiffs, or they represent the authority of the expositors of Scripture. The decrees of the four greater councils and the Apostolic canons can under no circumstances be violated, except by way of relaxation of their rigour against certain persons and against certain offences, and he cites by way of illustration the Nicene canon against the ordination of the man who has

[1] Stephen of Tournai, 'Summa Decret.,' Introduction: "De jure autem divino dicendum est, et quidem imprimis de origine ipsius et processu. Divini juris originem quidam a principio mundi cœpisse dicunt. Cum enim Adam de inobedientia argueretur a domino, quasi actioni exceptionem objiciens relationem criminis in conjugem, immo in conjugis auctorem convertit dicens. 'Mulier quam dedisti mihi sociam, ipsa me decipit et comedi.' Sicque litigandi, vel, ut vulgariter dicamus, placitandi forma in ipso paradiso videtur exorta. Alii dicunt, judiciorum ordinem a veteri lege initium habuisse! Ait enim Moyses in lege: 'In ore duorum vel trium testium stat omne verbum.' In novo quoque testamento Paulus apostolus ait: 'Secularia igitur judicia si habueritis, contemtibiles qui sunt in ecclesia, illos constituite ad judicandum.' Alii compendiosius ordientes divini juris a primitiva sumunt ecclesia. Cum enim cessante martyrum persecutione ecclesia respirare cœpisset sub Constantino imperatore, cœperunt patres secure convenire, concilia celebrare et in eis pro diversitate negotiorum ecclesiasticorum diversos canones ediderunt et scripserunt."



been twice married, and the Apostolic canon that a presbyter guilty of fornication must be deposed. But whilst the prohibitions of these authorities cannot generally be altered, it is different with regard to that which they permit. The Nicene council, for example, permitted priests to live with their wives, a thing now prohibited (*apud nos*). The decrees of the lesser councils, of the pontiffs, and the judgments of the expositors of Scripture can, for sufficient reason, be changed by the supreme Patriarch.[1]

Stephen's treatment is similar, but rather more detailed and different in some respects. After describing the origin of ecclesiastical law in the passage we have just quoted, he goes on to distinguish between general and provincial councils: General councils are those which include bishops from all parts of the world, and are held in the presence of the Pope or his legate, while provincial councils are the meetings of the bishops of a province summoned by the primate or archbishop. The canons of general councils must be obeyed everywhere, those of provincial councils are only binding

[1] Rufinus, 'Summa Decret,' D. xiv. c. 2: "'Sicut quedam sunt quæ nulla ratione convelli possunt, ita multa sunt que aut pro necessitate temporum, aut pro consideratione etatum oporteat temperari, illa semper conditione servata, ut in his que vel dubia fuerint aut obscura, id noverimus sequendum quod nec preceptis evangelicis contrarium, nec decretis sanctorum patrum inveniatur adversum.' Non solum de scriptura N. T. hoc intelligendum est, que ex nulla dispensatione potest convelli, sed etiam de quibusdam institutionibus ecclesiasticis Institutionum namque ecclesiasticorum que in decretorum serie continentur, alie sunt concilia patrum, vel illa scil majora—Nicenum, Constantinopolitanum, Effesinum, Calcedonense—vel cetera minora, alie sunt canones apostolorum, alie decreta pontificum, alie auctoritates expositorum. Illa igitur quattuor majora concilia et canones apostolorum in nullo casu mutilari possunt nisi quando rigore magno aliquid statuunt in personas. . . . [Rufinus cites the Nicene prohibition of the ordination of the *bigamus*, and the regulation of the Apostolic canons, that a presbyter guilty of fornication must be deposed. These rigorous canons have been modified.] Quod vero preter hunc casum supradictas constitutiones dicimus immutari non posse, exaudiendum est in preceptionibus. Secus est in permissionibus, permisit enim Nicena synodus, ut sacerdotes suis utantur uxoribus, juxta illud 'Nicena' Dist. xxxi., c. 12, hodie tamen apud nos prohibetur, ut in eadem Distinctione plerumque reperitur. Denique minora concilia, decreta pontificum, auctoritates expositorum auctoritate speciali summi patriarche causa faciente immutari possunt."

upon those who are under the jurisdiction of the bishops of the province. Among the general councils there are four which are pre-eminent, those of Nice, Ephesus, Chalcedon, and Constantinople: their authority is almost equal to that of the Gospels. The name canon belongs properly to the decree of assemblies of bishops. By "decreta" are meant those decrees on Church matters which the Pope gives in writing in the presence and with the authority of the cardinals. "Decretalis epistola" is a letter which the Pope writes to some bishop or ecclesiastical judge who is in doubt, and who has asked the advice of the Roman Church. Canons are called "decreta" and "decreta" canons. These are the ordinances by which ecclesiastical affairs must be decided. The order of the authority of these rules should be carefully considered: the first place is held by the evangelical precepts, next come the sayings of the apostles, then the before-mentioned four councils, then the other councils, then the decreta and decretales Epistolæ, and last the sayings of the holy Fathers —St Ambrose, St Augustine, St Jerome, and others. In cases of difference between these, it is important to remember that they may be arranged under four heads—counsels, precepts, permissions, and prohibitions; and even the precepts and prohibitions are not all alike,—some are perpetual, some changeable.[1]

[1] Stephen of Tournai, 'Summa Decret.,' Introduction: "Conciliorum autem alia sunt generalia, alia provincialia. Generalia dicuntur, quæ in presentia domini papæ vel ejus legati, vicem ipsius gerentis, convocatis universaliter episcopis ceterisque prælatis ecclesiæ, celebrantur. Provincialia sunt, quæ a primate sive archiepiscopo aliquo, convocatis ad hoc suffraganeis tantum suis, in provincia fiunt. In generalibus canones editi ad omnes ecclesias vim suam generaliter extendunt, et qui eos *non observant pro* transgressoribus habentur. Qui autem canones in provincialibus editi fuerint concilis, provinciam non egrediuntur, nec alios coercent, nisi qui jurisdictioni illorum comprovincialium episcoporum subjecti sunt. Inde est etiam quod canonum alii dicuntur generales, i e. in generali concilio prodiți, *alii* provinciales, i e. in provinciali synodo promulgati. Inter generalia vero concilia iiii. sunt principalia, quam fere evangelis comparantur: Nicænum, Effesinum, Chalcedonense et Constantinopolitanum. Proprie ergo dicuntur canones, qui in conciliis auctoritate multorum episcopum promulgantur Decreta sunt, quæ dominus apostolicus super aliquo negotio ecclesiastico præsentibus cardinalibus et auctoritatem suam præstantibus constituit et in scriptum redigit. Decretalis epistola est quam dominus apostolicus aliquo episcopo vel alio judice ecclesiastico super aliqua causa dubitanto et ecclesiam Romanam consulente, *rescribit et ei transmittit*. Indifferenter tamen et canones decreta et e converso decreta canones appellantur. Hæc sunt, quibus ecclesiastica negotia et tractari habent et terminari. Hæc tamen in decisione causarum ecclesiasticarum diligentia est tenenda, ut primum quidem locum obtineant evangelica præcepta, quibus cessantibus apostolorum dicta, deinde quatuor prædicta concilia, postea concilia reliqua, tandem decreta et decretales epistolæ, ultimo loco succedunt verba sanctorum patrum Ambrosii, Augustini, Hieronymi et aliorum. Et hæc omnia sunt communis materia omnium de jure divino tractantium. Quæ, quoniam nonnumquam sibi adversari videntur, quadrifaria circa hæc consideranda est inspectio.

"Constitutiones enim ecclesiasticæ proditæ sunt quædam secundum consilium, quædam secundum præceptum, quædam secundum permissionem vel indulgentiam, quædam secundum prohibitionem." (Stephen goes on to explain these terms, and to show how even of the 'Præceptiones' and 'Prohibitiones' some are perpetual, others changeable.)

[1] Stephen of Tournai, 'Summa Decret.,' D. xiv. 2.



Stephen's discussion is notable specially for its definition of the nature of papal decreta and decretalia, and for its classification of the authority of the various canonical rules. The definition of the papal canons is interesting, and probably of some importance, but we have not found any parallel discussion of it in the works which we are now treating. As to the circumstances under which the canons may be altered, he discusses this point in much the same terms as Rufinus. That which is contained in the Gospels, in the words of the apostles and in the four general councils, and that which belongs to the articles of the faith, without which a man cannot be saved, these things cannot be altered; other canonical rules may be changed, but not these. Yet there are some possible modifications of the canons of general councils, and even of the apostolic canons. On this point there is no difference between him and Rufinus.[1]

Canon law, then, if we omit for a moment the regulations which are directly taken from the Scriptures, represents the legislative authority of the Church and of the Roman See, but that legislative authority is not entirely free and unhampered. Rufinus points out that there is one very important difference between secular and ecclesiastical law—that is, that while in secular jurisprudence new laws always override the old, this is not the case in ecclesiastical law, for, on the contrary,

it is frequently the case that the old laws cannot be overridden by new. The principle (ratio) of secular law is not the same as that of the divine laws.[1] He is here drawing out the principle which is contained in his classification of the canonical sources, and which is repeated by Stephen, that in some points the Church has not authority over its own legislative system.

We must for a moment consider the significance of the omission, in these classifications, of one important source of canon law, that is, the custom of the Church. We might at first sight be inclined to think that this is due to some tendency to depreciate the importance of this element, and it is, of course, possible that something of this may be the case here, but in other places Rufinus makes it clear that he follows Gratian in admitting the importance of a general custom of the Church. In the earlier part of that passage of which we have just cited the conclusion, Rufinus discusses the question of *prejudicatio*—that is, as I understand, the antecedent invalidity of certain legislation. His immediate subject is the question of dispensation, to which we shall presently return; and after saying that some laws can be dispensed with and others not, he says that some laws *prejudicantur*, either because they are opposed to some previous constitution or to some custom; and then resuming the subject a little later, Rufinus inquires what canons in particular *prejudicantur*, and mentions first those which clearly contradict either general custom or the *constitutio* of some greater authority, and he mentions as an example of *prejudicatio* by general custom that decree of Pope Telesphorus which Gratian had said was invalid because it had never been received by the custom of the Church.[2]

[1] Rufinus, 'Summa Decret.,' C. i. Q. 7, Dict. Grat. ad c. 6: "Non enim ad canones illa regula trahitur, que in humanis legibus habetur, scil. ut semper nova statuta prescribant antiquis; sed frequentius antiqua novis prejudicant, ut supra Dist. l. 28. Nec mirum, quia alia ratio est secularium causarum, alia divinarum, ut infra de consecr. Dist. iii. 22."

[2] Rufinus, 'Summa Decret.,' C. i. Q. 7, Dict. Grat. ad c. 6: "Sciendum est quod statuta canonum quedam sunt indispensabilia, quedam dispensantur, quædam etiam prejudicantur. Item que prejudicantur, alia prejudicantur contrarietate constitutionis, alia contrarietate consuetudinis. . . . Nunc videndum, que canonum statuta prejudicentur. Illa quidem prejudicantur que, cum sint in particularibus conciliis promulgata, vel de rebus non adeo necessariis constituta, implacabilem contrarietatem patiuntur vel a generali consuetudine, vel a majoris et potioris auctoritatis constitutione. A generali consuetudine, sicut illud decretum Telesphori pape, quod est supra Dist. iv. c. 'Statuimus' (c. 4) pluraque similia." Cf. p. 155.



It is clear that Rufinus had no intention of differing from the doctrine of Gratian with regard to the importance of the authority of custom as a source of canon law, but it is, of course, possible that he may have differed from him or from other canonists with regard to the actually existing force of custom. Rufinus was clear that if custom now abrogates canons, it only does so with the consent of the Pope, just as, he says, now that the Roman people have transferred their legislative authority to the emperor, their custom can only abrogate the civil law with his consent. There are also some canons of the ancient Fathers, such as those of Nice, which cannot be changed even by the Pope or by custom.[1]

There is nothing in the work of Stephen of Tournai to indicate his attitude clearly. In one place, indeed, he speaks somewhat disparagingly of custom,—this is when he says that Gratian had set about his work because, through mere ignorance, the Divine law was falling into disuse, and the various churches were living rather by custom than by canon law: this, he says, was deemed by Gratian to be perilous, and therefore he set about the collection of the laws of the councils and Fathers.[2] But it would

[1] Rufinus, 'Summa Decret.,' D. 4. Off. vero.: "Ubi demonstrat quorundam decretorum exemplo nonnullas etiam leges ecclesiasticas esse hodie abrogatas per mores utique utentium in contrarium. Et hoc consensu exaudias, summi pontificis; sicut enim hodie sine auctoritate vel consensu imperatoris leges non possunt statui, sic etiam nec infirmari, quia populus Romanus ei et in eum omne suum imperium et potestatem concessit; ita absque conscientia et assensu summi patriarchæ canones sicut non potuerunt fieri, ita nec irritari. Non autem istam derogationem generaliter intelligas in omnibus decretis; antiquorum enim patrum et venerabiliorum statuta, que pro omnium ecclesiarum statu conservando plena auctoritate sunt promulgata et totius pene mundi jam consecrata reverentia, sicut canones Niceni et his similes—illa, inquam, neque auctoritate Apostolici neque more utentium aliter valent evacuari, ut infra Dist. xl. c. 1, 2, 3, 4, et infra Dist. xv. c. sicut (c. 2) et C. xxv. q. 1. c. Divinis (c. 2) violatores (c. 5) contra patrum (c. 7) et Q. 2 c. Institutionis (c. 7)."

[2] Stephen of Tournai, 'Summa Decret.,' Introduction: "Causa operis

be foolish to take this as a serious criticism on the place of custom in the system of canon law.[1]

We turn now to consider the treatment by these commentators of the legislative authority of the Pope. We have already seen in the classification of the sources of the canon law by Rufinus and Stephen, that the decreta or decretalia of the Pope have the authority of law,[2] and we have just quoted the passage from Rufinus in which he says that just as civil laws cannot be made or abrogated without the consent of the emperor, so also canons cannot be made or unmade without the knowledge and assent of the Pope. The authority of the Pope is therefore necessary for all legislation, and he has also the power of promulgating canons by his own authority. In other passages Rufinus says he has the authority of making and interpreting the canons,[3] and explains this as being due to the primacy of the Roman Church.[4]

Stephen, as we have seen, while describing canons as being in the strict sense the decrees of general councils, adds that the Papal decreta and decretalia are also called canons,[5] and in another passage he says that the Popes alone have authority to make canons.[6] This might mean that the Popes are now the sole legislators, as Justinian claims that the emperor had become ;[7] but this seems hardly consistent with Stephen's own earlier statement as to the authority of general councils

hæc est. Cum per ignorantiam jus divinum jam in desuetudinem deveniret, et singulæ ecclesiæ consuetudinibus potius quam canonibus regerentur, periculosum reputans id, Gratianus diversos codices conciliorum et patrum capitula continentes collegit, etc "

[1] For Stephen's treatment of custom and civil law, cf p. 157.

[2] See pp 183, 184.

[3] Rufinus, 'Summa Decret.,' D. lxx. · "Sciat summum patriarcham qui auctoritatem habet condendi et interpretandi canones "

[4] Rufinus, 'Summa Decret ,' D. xix "'De epist.' Supra de auctoritate canonum egit, hic de momento decretalium epistolarum tractat, ostendens eas ejusdem auctoritatis fore, cujus et canones , propter primatum Romane ecclesie, de quo etiam hic mentionem facit."

[5] See p. 184.

[6] Stephen of Tournai, 'Summa Decret ' D. xx.: "Notandum, quia in determinandis causis ecclesiasticis decretales apostolicorum epistolæ sacrorum librorum expositionibus præponuntur. Soli enim apostolici jus habent condendi canones, vel ea quæ loco canonum habenda sunt Sanctorum autem patrum libros sacros exponentium scripta præponuntur etiam ipsis apostolicis in sententiarum pondere vel obscuritatis interpretatione."

[7] Cod., i. 14 , xii. 3 and 4.



held in the presence of the Pope or his legates,[1] and it seems most probable that Stephen is only contrasting the legislative authority of the Pope with the absence of legislative authority in the writing of the Fathers.

However this may be, Stephen clearly agrees with Gratian and Rufinus that the Papal decreta and decretals have the force of canons. In one passage he uses a phrase to describe the relation of the Popes to the canon law, which he probably drew from the civil law. He speaks of him as *legibus ecclesiasticis absolutus ut princeps civilibus*, but adds that he keeps the laws most carefully.[2] This phrase of Stephen should be compared with the passage of Gratian on the relations of the Pope to the canon law, which we have considered,[3] but what exactly Stephen understood it to mean it is difficult to say—as difficult as it is to interpret the phrase with regard to the emperor in the civil law. We have elsewhere suggested that probably the phrase finds its best interpretation in the parallel of the dispensing power of the crown, and it is probably in the same direction that we must look for the explanation of the phrase in relation to the Pope.[4]

The Pope has then the authority of making and unmaking canon law, but this authority is not unrestricted. Rufinus restates the judgment of Gratian, that the Pope cannot make canons against the authority of the Gospels or the decrees of the Holy Fathers, and again cites the case of the invalid decree of Pope Anastasius.[5] Neither custom nor the authority of the Apostolic See can abrogate the statutes of the ancient Fathers which were promulgated with full authority for the preservation of the whole Church, and are preserved by the reverence of almost the whole world—such as the canons of

[1] See p. 184.

[2] Stephen of Tournai, 'Summa Decret De Cons ,' D i c 6 · "'Cum enim ' Probat a majori canones servandos: cum enim pontifex legibus ecclesiasticis solutus ut princeps civilibus, eas integerrime conservet, patet neminem inferiorum contra eas venire debere."

[3] See pp. 173 175

[4] See vol. i. p. 229.

[5] Rufinus, 'Summa Decret ,' D xix : "'De epist.' Sunt enim decretales epistolæ quas ad provincias vel personas pro diversis negotiis sedes Apostolica direxit, que omni devotione sunt custodiende, nisi preceptis evangelicis vel decretis sanctorum patrum inveniantur adverse, sicut epistola illa Anastasii, 'secundum ' infra hac Dist. (c. 8)." Cf. p. 171.

Nice and other similar canons.[1] It is true that there is no passage in Stephen which is exactly parallel to this, but there is no reason to suppose that he would have differed; it is after all only the direct application to the Pope of these general principles, in which Stephen agrees with Rufinus, that certain parts of the canon law—*e.g.*, the canons of the four first general councils—cannot be abrogated by any later authority.[2]

We conclude that Rufinus and Stephen agree entirely with Gratian in holding that the Pope has the same legislative authority as the general councils of the Church, and that his co-operation is necessary for them; while his legislative authority has the same limitations as their authority, namely, that there are some parts of the Church law which cannot be abrogated or overridden by any new legislation.

We turn to the question of dispensation. Rufinus deals with this very carefully in one passage. He first defines dispensation as a special relaxation of canonical law, made by him who has authority to do this for some good reason. He then adds that there are some canons from which there can be no dispensation, and others which can be dispensed with. Those canons are not dispensable which are directly founded upon the moral law or the Gospel or the institution of the Apostles, and he gives as examples, the fulfilment of a vow, the prohibition to marry a second wife while the first is alive, the law that a man who is not ordained cannot ordain another or celebrate mass, the law that a man must not purchase ecclesiastical offices. No necessity of circumstance or time can ever enable a man to violate these without sin; some invincible or unavoidable ignorance may perhaps excuse him. The reason for this, Rufinus says, lies in the fact that these rules are all part of the natural law, and against this no dispensation is valid. Other canonical rules, which were promulgated and confirmed only by the authority of the holy Fathers or their successors, can be dispensed with, and he gives as examples, the rule that monks should not celebrate mass in public, or that a man who has done public penance or been twice married should not be admitted to the ranks of the clergy.[1]

We may compare with this another passage in which Rufinus lays down the same principle that there can be no dispensation from the natural law, admitting only one exception—that is, when a man has to choose between two evils, as, for instance, if he has sworn to kill his brother;[2] and in yet

[1] Rufinus, 'Summa Decret,' D. IV.: "'Off. vero' Non autem istam derogationem generaliter intelligas in omnibus decretis, antiquorum enim patrum et venerabilium statuta, que pro omnium ecclesiarum statu conservando plena auctoritate sunt promulgata et totius pene mundi jam consecrata reverentia, sicut canones Niceni et his similes—illa, inquam, neque auctoritate Apostolici neque more utentium aliter valent evacuari"

[2] See p. 185.



[1] Rufinus, 'Summa Decret,' C. 1 Q. 7 (Dict. Grat, ad c. 6). "Nisi rigor disciplinę relaxetur quandoque ex dispensatione misericordię . . . Videamus igitur ante omnia, quid sit dispensatio et unde dicatur, et que canonum statuta recipiant dispensationem et que non. Et que sint dispensabilia, quando possint dispensari et quando non. Est itaque dispensatio: justa causa faciente ab eo, cujus interest, canonici rigoris casualis facta derogatio. Dicta est autem dispensatio per similitudinem a familię procuratione. Sicut enim ibi fiat dispensatio, cum diversis diversa pensantur—i e pensa justitię, equitatis et discretionis procurantur, ita in familia ecclesiastica non solum pro diversitate personarum, sed et rerum vel temporum diverso modo canones relaxantur. Sciendum autem est quod statuta canonum quedam sunt indispensabilia, quædam dispensantur quædam etiam prejudicantur Item que prejudicantur alia prejudicantur contrarietate constitutionis, alia contrarię tate consuetudinis Et quidem indispensabilia illa sunt quorum mandata vel interdicta ex lege moralium vel evangelica et apostolica institutione principaliter pendent, scil ut qui absolutus votum fecerit reddat, ut vir vivente uxore aliam non ducat, ut nullus inconsecratus alium consecret vel missam celebret, ut nullus dona ecclesiastica per pecuniam acquirat, et cetera que prudenti meditatori facillime occurrunt. Talia neque temporum neque rerum necessitate ullo casu valent sine peccato violari, nisi forte invincibilis ignorantia vel inevitabilis excusaret. Et quare hoc? Quia omnia hec statuta partes sunt juris naturalis, adversus quod nulla dispensatio admittitur, ut supra dicitur Dist. XIII. §, 'Item adversus.' Dispensabilia vero sunt cetera statuta canonum que sola sanctorum posteriorumque patrum auctoritate promulgata sunt et firmata, ut: ne monachi publice missam celebrent, ne publice penitentes vel bigami ad clerum promoventur, et similia . . . Et quidem suadent dispensationem fieri necessitas et utilitas, prohibent eam enormitas persone et enormitas rei."

[2] Rufinus, Summa Decret.,' D. XIII "'Item adv jus nat' Demonstravit superius, quomodo jus naturale differat a constitutione et a consuetudine dignitate, nunc aperit, qualiter ab eisdem discrepet sententie rigore: quippe contra jus naturale, exaudias quoad precepta et prohibitiones, nulla dispensatio tolleratur. Quod in illo capitulo insinuatur, quod ait 'Ceterum consuetudini et constitutioni proprius

another passage he says no dispensation can be granted against the New Testament.[1] This is an important statement of principle, important in its reference to the natural law, and also in its exposition both of the extent and of the limits of the dispensing power. The importance of the subject will be recognised by any who have any acquaintance with mediæval history.

We wish that we were able to discuss the theory of the commentators on Gratian more completely; unfortunately only a few of these are as yet accessible in a printed form. We shall not be in a position to discuss fully the development of the theory of the canon law on such a vital point as that of the legislative authority of the Pope till the mass of unprinted material has been fully examined. Especially do we regret that we cannot use the 'Summa Decreti' of Huguccio. The only portions of this important work which we have been able to use are those fragments quoted by Schulte in his work 'Die Stellung der Concilien,' &c. Among these we find some important phrases on the authority of Papal decretals. Huguccio discusses the regulations as to the circumstances under which a case may be taken from the inferior courts to Rome, and he concludes by saying that he trusts the ancient decrees and the new councils rather than the decretals; and again, on the same subject, he says that appeals, even before the trial of a case, are actually heard in Rome, but he is concerned, not so much with what is actually done, as with what ought to be done.[2] These passages illustrate an interesting

sepe rigor subtrahitur,' ut infra habetur: 'Sicut quedam' . . . 'nisi duo mala ita urgeant, etc.' Magist. Gratianus sic dicit hic quasi aliquis sic perplexus sit aliquando inter duo mala, ut non possit vitare alterum, quin delinquat. Exempli causa juravit quidam homo interficere fratrem suum."

(For the meaning of the phrase "exaudias quoad precepta et prohibitiones" see pp. 103, 106.)

[1] Rufinus, 'Summa Decret.,' D. xiv. 2: "Non solum de scripturis N.T. hoc intelligendum est, que ex nulla dispensatione potest convelli."

[2] Huguccio, 'Summa Decret.,' C. ii. Q. 6, Pr.: "Secundum canones vero et ante et post sententiam et quandocunque quis vult appellare, potest appellare, lite tamen contestata, ut infra eadem (quæstione) 'non ita' (c. 18), et in concilio Romano 'Reprehensibilis.' Decretales tamen Alexandri et ante litem contestatam admittunt appellationem, ut in extra, 'Cum sacrosancta, sicut Romana, consuluit.' Sed plus credo antiquo decreto et novo concilio, quam decretalibus. De facto tamen quotidie admittitur talis appellatio."

Id. id. c. 18: "Sed jam Romana ecclesia recipit talis appellationes, scil. ante ingressum causæ; sed non considero quid fiat, sed quid fieri debeat."

(From J. F. von Schulte, 'Geschichte der Quellen und Literatur des Canonischen Rechts,' vol. i. p. 165, note 26.)



attitude towards the Decretals, but whether it is more than an isolated opinion we are not in a position to say. It is perhaps worth while to notice that in another passage, which Schulte has quoted, Huguccio suggests that in one of his Decretals Pope Alexander is speaking rather as a teacher who is giving his opinion, than as Pope.[1]

One other canonist, Damasus, at a rather later date, but still earlier than the publication of the Decretals of Gregory IX., has some important remarks on the authority of modern Decretals of Popes. Of this Damasus two works have been printed, one on the civil law and one on the canon law. The latter, which is known as the 'Brocarda' or 'Burchardica,' consists of a series of discussions, in which a thesis is propounded, all the relevant authorities are quoted, first those in favour, then those against it, and finally a *solutio* is added. The thesis with which we are now concerned is this, that when there is a difference between various constitutions, it is not the later but the earlier—those, that is, which are nearer to the Apostolic simplicity and truth—which should prevail. Damasus cites a number of passages in favour of this view, and a smaller number against it, and then concludes that if there is a contradiction between some constitutions of recent Popes and the general canons which are approved by the authority of Holy Scripture, the latter must prevail, as being agreeable to the Divine will and the principle of equity. It must be remembered, he says, that the former Popes had the same power as the modern, and have greater authority on account of their antiquity: he is, indeed, worthy of anathema who endeavours, with whatever excuse, to destroy those things which are well ordered. He refuses to accept the authority of the comment on the canon *postea quam*

[1] Huguccio, 'Summa Decret.,' C. xxvii. Q. 1, Pr.: "Quid ergo dicemus quod Alexander in suis decretalibus utitur distinctione solemnis voti et simplicis, ut in extra 'Gratum' et 'fere tota ecclesia'? Dico quod Alexander ibi loquitur non ut papa, sed ut magister secundum suam opinionem."—Id. id. id.

(C. xv. Q. 2. 21), because these are the words of Gratian, not of the canon, and he puts aside another passage because there the opinion of Jerome, which is supported by the testimony of Scripture, is superior in authority to that of the Council.[1]

This passage is interesting, but its significance must not be exaggerated: we have already seen that Gratian and the commentators whom we have been considering are careful to state that there are ancient canons which no authority can change.

When we finally turn to the theory of the Canon Law in the Decretals, we must begin by observing that in the main they assume the general principles which we here discuss; they do not go over them again, we think that they take them for granted. Two points, however, require some notice. The first is the question of the place of custom in Canon Law. We have already discussed this in a previous chapter, and we need therefore only repeat that, whatever ambiguity there may be in the position of Gratian or his commentators, the

[1] Damasus, 'Burchardica,' R 143 "In diversis et contrariis constitutionibus non posteriores, sed veteres Apostolicæ simplicitate, et veritate proprius prævalent.

"Pro —Sup viii Dist 'si solem'—Sup. viii Dist 'quae contra,' et c. 'frustra'—Sup. ix Dist 'sana.' —Sup xi Dist. 'nolite,' et c 'quis nesciat'—Sup. 1 Dist. 'domino,' § in fine —Sup xxv. Q. 2, 'sunt quidem,' et c. 'dicenti'—Sup xix Dist 'nulli' —Sup xxxviii Dist 'relatum,' § et ideo

"Contra —Sup xxv Q 2, 'postea quam,' § his ita —D de legibus, 'non est novum'—Sup xxxvi Q ult c ult

"Solutio —Si per novorum pontifi cum constitutiones invehatur quædam diversitas, et discrepantia in veteres canones generales, sacrarum literarum auctoritate probatos prævalere et effec tui mancipari debent hi · cum quod voluntati divinæ et æquitatis rationi conveniant, ut in illo, 'dicenti' (C xxv Q 2 16) et majorem continent pietatem, ut in illo 'sana' (Dist ix 11), tum etiam quod anteriores Pontifices ut non minoris potestatis ita majoris auctoritatis sunt propter antiquitatem ut in illo 'domino' (Dist l 28, § 3), et valde incongruum et anathemate dignum judicatur, niti quempiam quantacumque rationis excusatione, quæ bene sunt ordinata rescindere, et exemplo docere cæteros, quemadmodum quandoque, sua etiam constituta dissolvant, ut C xxv Q 1, 'generali' (c 11) atque hoc est submovere ac transferre terminos quos posuerunt patres, ut C. xxiii Q 3, 'transferunt' (c 33) et C xxv Q 1, 'quæ ad perpetuam' (c 3) Non obstat c 'posteaquam' (C xxv Q 2 21) quia in § subjunguntur, verba Gratiani, non canonis Neque obstat c ult quia ibi sententia Hieronymi antiquior, testimonio scripturæ accedente, præfertur concilio"



theory of the Decretals is clear—namely, that custom, if it is "rationabilis et legitime præscripta," that is, if it is not contrary to "reason" and it has continued for a legally defined period of time, overrides even positive written law.[1]

The second matter is the treatment in the Decretals of the legislative authority of the Pope. For this we must take account not only of the Decretal letters contained in the collection of Gregory IX., but also of at least one or two which appeared in earlier collections. Between the time of the publication of Gratian's 'Decretum' and the publication of Gregory IX.'s collection of Decretals, five collections or compilations of Decretal letters had been put out—the first two and the fourth on the responsibility of private persons, but the third and the fifth by the authority respectively of Pope Innocent III. and of Pope Honorius III.

The papal letters prefixed to these collections were of considerable importance in determining the character and the future development of canon law. In the first of these Innocent III. writes to the masters and scholars dwelling at Bologna, and sends them a collection of Decretal letters made and arranged by P. Beneventanus, and authorises them to use these both in the courts and in the schools.[2] In the other, Honorius writes to Tancred, the Archdeacon of Bologna, sending him a collection which he had caused to be made of judgments by himself or his representatives, and he instructs Tancred to have these formally published for use both in courts and schools.[3]

[1] See p 158, note 1.

[2] Compilatio iii, Introductory Letter: "Innocentius Ep servus servorum Dei universis magistris et scolaribus Bononiæ commorantibus salutem et apostolicam benedictionem. Devotioni vestræ insinuatione præsentium innotescat, decretales epistolas a dilecto filio magistro P subdiacono et notario nostro compilatas fideliter, et sub competentibus titulis collocatas, in nostris usque ad xii annum contineri registris, quas ad cautelam vobis sub bulla nostra duximus transmittendas, ut eisdem absque quolibet dubitationis scrupulo uti possitis, cum opus fuerit, tam in judiciis quam in scholis"

[3] Compilatio v Introductory Letter "Honorius Ep servus servorum Dei, dilecto filio magistro Tancredo, Archidiacono Bononiensi salutem et apostolicam benedictionem Novæ causarum emergentium questiones novis exigunt decisionibus terminari, ut singulis morbis, competentibus remediis deputatis, jus suum cuique salubriter tribuatur Licet igitur a quibusdam predecessoribus nostris per ea que suis temporibus

With these we must now compare the letter prefixed by Gregory IX. to the great collection of Papal Decretals which now forms the second part of the 'Corpus Juris Canonici.' This is addressed to the doctors and scholars of Bologna. Gregory explains that he has caused Raymund, his chaplain and penitentiary, to make this selection of the constitutions and Decretal epistles of the former Popes,—the number and variety of these had been a cause of confusion in the courts; and he has added some constitutions and Decretals of his own. He desires that this collection alone should be used in the courts and schools, and strictly forbids any one to make any further collection without the authority of the Apostolic See.[1]

The importance of this letter and of the collection of the Decretals by Gregory IX. is certainly very great. The Decretals, to which were added later on the "Sixt" and the "Clementines," became for all practical purposes the law-books of the Church: it is true that the 'Decretum' of Gratian came in some way to be treated as the first part of the 'Corpus Juris Canonici,' but the Decretals became the principal law-book of the Church, and the commentaries on

sunt decisa, forma futuris negotiis provide sit relicta, quia tamen prodiga rerum natura secundum varietates multiplicium casuum parit cotidie novas causas, nos quasdam epistolas decretales super his, que nostris suborta temporibus, per nos vel fratres nostros decidimus, vel etiam aliis de ipsam consilio commisimus decidenda, compilari fecimus, et tibi sub bulla nostra duximus destinendas. Quocirca discretioni tuæ per apostolica scripta mandamus, quatinus eis solempniter publicatis absque ullo scrupulo dubitationis utaris et ab aliis recipi facias tam in judiciis quam in scholis."

[1] Decretals, Introductory Letter: "Gregorius Ep. servus servorum Dei, dilectis filiis doctoribus et scholaribus universis *Bononiæ commorantibus* salutem et apostolicam benedictionem. . . . Sane diversas constitutiones et decretales epistolas prædecessorum nostrorum, in diversa dispersas volumina, quam aliquas propter nimiam similitudinem, et quædam propter contrarietatem, nonnullæ etiam propter sui prolixitatem, confusionem inducere videbantur, aliquæ vero vagabantur extra volumina supradicta, quæ tanquam incertæ frequenter in judiciis vacillabant, ad communem, et maxime studentium, utilitatem per dilectum filium fratrem Raymundum, capellanum et pœnitentiarum nostrum, illas in unum volumen, resecatis superfluis, providimus redigendas, adiicentes constitutiones nostras et decretales epistolas, per quas nonnulla, quæ in prioribus erant dubia, declarantur. Volentes igitur, ut hac tantum compilatione universi utantur in judiciis et in scholis, districtius prohibemus, ne quis præsumat *aliam* facere absque auctoritate sedis apostolicæ speciali."



the 'Decretum' now gave place to the commentaries on the Decretals. But this is not the same as to say that these letters mark a new departure in the theory of canon law. We have already seen that Gratian quite clearly places the legislative authority of the Pope alongside of that of the councils,[1] and that the commentators whom we have discussed, except Huguccio, clearly take the same view.[2] We cannot, therefore, recognise that the letters make any change in the theory of the legislative authority of the Pope, though they may be said to represent a great development in the importance of his position as legislator.

Two phrases of the Decretals we may finally take as representing the completed Roman theory of the canon law. The first is indeed of a considerably earlier date than the publication of the Decretals by Gregory IX. It is a phrase of Pope Paschal II. on the subject of the oath of fidelity and obedience to the Pope which was required by an archbishop before he could receive the "pallium." Paschal says that some people urged that this was not ordained by the councils. He indignantly repudiates the notion that the councils had imposed any laws upon the Roman Church, for it was the Roman Church which called together the councils and gave them authority.[3] This is a strong statement, but it should be compared with Gratian's elaborate discussion of the relation of the Pope to the canon law in the 25th "Causa."[4] The other phrase is one of Innocent III., who speaks of the Roman See as the fountain from which laws are derived,[5]—a terse mode of expressing the conception of the legislative authority of the Roman See.

[1] See pp. 170-176.

[2] See pp. 188-193.

[3] Decretals, i. 6. 4: "'Paschalis Panormitano Archiepiscopo.' Aiunt in conciliis statutum non inveniri, quasi Romanæ ecclesiæ legem concilia ulla præfixerint, quum omnia concilia per Romanæ ecclesiæ auctoritatem et facta sint, et robur acceperint, et in eorum statutis Romani Pontificis patenter excipiatur auctoritas."

[4] See pp. 171-175.

[5] Decretals, i. 33. 8: "Quum a nobis injuriarum actio non debeat exoriri, a quibus jura tanquam a fonte ad cæteros derivantur."

# CHAPTER X.

## THE THEORY OF THE RELATION OF CHURCH AND STATE.

### I.

WE have endeavoured to set out the theory of these canonists with regard to the divine nature of secular authority. We have endeavoured to show that they clearly follow the Gelasian traditions of the two authorities as being both derived from God, and as having been separated by Christ Himself, who alone was both King and Priest. There is a passage in Stephen of Tournai which sets this out so clearly that we shall with advantage notice its terms. In the one commonwealth and under the one king there are two peoples, two modes of life, two authorities, and a twofold organisation of jurisdiction. The commonwealth is the Church, the king is Christ, the two peoples are the two orders in the Church, that is, the clergy and the laity, the two modes of life are the spiritual and the carnal; the two authorities are the priesthood and the kingship, the twofold organisation is the divine law and the human. Give to each its due and all things will be brought into agreement.[1]

Stephen's phrases are a summary of the Gelasian tradition, and, as we have endeavoured to show, this is the theory represented by the canon law as a whole. But Stephen's concluding words have a somewhat ironical sound, for a writer of the end of the twelfth century must have been well aware that it was just exactly here that the great problem of the eleventh and twelfth centuries had lain. It was easy to say that each authority should receive its due; the difficulty had been to determine what this was. As we have pointed out, the theory was simple enough. The difficulty lay in the application, or rather, within the theory itself there lurked the profound difficulty of the adjustment of the relations of the two authorities within the one society. For Gelasius had said that while each authority was independent within its own sphere, yet the persons who held such authority were subordinate each to the other within their respective spheres. It was indeed here that the difficulty had arisen. We have endeavoured to show how in the ninth century there was a general agreement as to the theory of the separation of the powers, but that as a matter of fact each authority had come to have a great deal to say in the sphere of the other.[1]

It may indeed be suggested that this attempt at the separation of the authorities was impossible: there have been political theorists who have argued thus, who have maintained that it is impossible in theory as in fact to separate the spiritual and the temporal authorities. For ourselves such a judgment seems to be both unphilosophical and unhistorical. However this may be, the difficulty of delimitation proved to be enormous.

We cannot write the history of the great controversy of these centuries: this has, indeed, been often done, though, as it seems to us, a complete treatment of the subject has not yet been produced, and will not be possible until the whole civilisation of these times has been more completely examined. When we come to deal with the controversial literature of the eleventh and twelfth centuries we shall have occasion to point out some of the more important aspects of this history. In the meanwhile it must suffice to say that while in the ninth century each authority interposed in the sphere of the other, with comparatively little friction, by the eleventh century all this was changed, and we find each authority repudiating with

[1] Stephen of Tournai, 'Summa Decret.,' Introduction: "In eadem civitate sub eodem rege duo populi sunt, et secundum duos populos duæ vitæ, secundum duas vitas duo principatus, secundum duos principatus duplex jurisdictionis ordo procedit. Civitas ecclesia; civitatis rex Christus; duo populi duo in ecclesia ordines, clericorum et laicorum; duæ vitæ, spiritualis et carnalis; duo principatus, sacerdotium et regnum; duplex jurisdictio, divinum jus et humanum. Redde singula singulis et convenient universa."



[1] See vol. i. c. xxi.

vehemence the claims of the other to interfere in its concerns, while each endeavoured to vindicate and sometimes to extend such authority as it had actually been exercising.

We deal in this chapter with the relation of the Canon law to the supposed tendency of the Church to claim, not only superiority, but in some degree at least supremacy, over the State. The question of the development of this tendency in the Canon law may be conveniently considered under four heads—first, the tradition of cases in which the Papacy had actually or apparently exercised some such supremacy; secondly, the development of the theory of the consequences of excommunication; thirdly, the theory that Peter, and therefore his successors, had received from Christ authority over the temporal as well as the spiritual power; and, fourthly, the interpretation of the Donation of Constantine. When we have examined these we shall be in a position to examine the more or less formal statements of the Decretals upon the subject.

In our first volume[1] we have pointed out that the great Churchmen, and pre-eminently the Pope, had sometimes, as a matter of fact, and were supposed to have frequently exercised a very great and at times a commanding influence upon the appointment and deposition of kings and emperors. The fact is not to be disputed that they had sometimes exercised such a power, and, as we have pointed out, the secular authorities in the ninth century sometimes at least quite frankly recognised this.

These traditions are well known to the canon lawyers: in a passage of that famous letter of Gregory VII. to Hermann, the Bishop of Metz, which is cited by Ivo in the 'Decretum' and by Gratian, it is related how the Popes deposed the last of the Merovingian race, and put Pippin in their place, absolving the Franks from their oath of allegiance to the former king.[2]

[1] See vol. i. pp. 282 287.

[2] Ivo, 'Decretum,' v. 378. "Alius item Romanus pontifex regem Francorum, non tam pro suis iniquitatibus quam pro eo, quod tantæ potestati erat inutilis, a regno deposuit, et Pippinus Caroli imperatoris patrem in ejus loco substituit, omnesque Francigenas a juramento fidelitatis absolvit." Cf. Gratian, 'Dec.,' C. xv. Q. 6. 3, and Gregory VII. Registrum, viii. 21.



Cardinal Deusdedit in his collection of Canons cites the words of the Synod of Rome of 877, in which Pope John VIII., with the other bishops, the Senate, and the whole Roman people, elected Charles the Bald as emperor,[1] and he cites from Anastasius 'Bibliothecarius' the tradition that it was Pope Gregory who led the revolt of Italy against the iconoclastic emperors, and renounced allegiance to them.[2]

When, therefore, Innocent III. in his Decretals maintains that it was the Popes who had transferred the empire from the Greeks to the Germans, he was only repeating a tradition which was in accordance with many others, and which had some reasonable colour of justification.[3]

[1] Deusdedit, 'Collectio Canonum,' iv. 92, "Johannis VIII. Papæ inter cetera habita in eadem synodo" (*i. e.*, the Council at Ravenna of 877): "Et quia pridem apostolicæ memoriæ prædecessoris nostri Nycolai id ipsum jam inspiratione celesti revelatum fuisse comperimus, eligimus Carolum hunc Magni Caroli nepotem, et approbavimus, una cum annisu et voto omnium fratrum et co-episcopum nostrorum, atque sanctæ Romanæ (Ecclesiæ ministrorum, apostolicique senatus, totiusque Romani) populi gentisque togatæ. Et secundum priscam consuetudinem solempniter ad imperii sceptra provexímus, et augustali nomine decoravimus, ungentes eum oleo extrinsecus, ut interioris quoque Spiritus Sancti unctionem monstraremus, constituentes ad imitationem scilicet veri regis Christi domini dei nostri, ita, ut quod ipse possidet per naturam, iste consequatur per gratiam. Denique non hic perpetuus Augustus ad tanta fastigia se velut improbus intulit, non tanquam importunus fraude aliqua, vel machinatione prava, aut ambitione ad imperialem inhiante apicem aspiravit. Absit. Neque enim sibi honorem præsumptiose assumpsit, ut imperator fieret, sed tamquam desideratus optatus, postulatus a nobis, et a deo vocatus et honorificatus ad defendendam religionem, et Christi ubique servos tuendos, humiliter ac obedienter accessit, operaturus et roboraturus in imperio summam pacem et tranquillitatem et in æcclesia Dei justitiam et exaltationem. Nisi enim nos talem eius cognovissemus intentionem, numquam animus noster fieret tam promptus ad ipsius provectionem."

[2] Deusdedit, 'Collectio Canonum,' iv. 271, "Ex Ystorica Anastasii Bibliothecarii Romanæ Ecclesiæ". "In seniori vero R(oma) Gregorius sacratissimus vir apostolicus, et P(etri) verticis apostolorum consessor, verbo et actu coruscans, removit Romam et Italiam necnon et omnia tam reipublicæ quam ecclesiastica jura in Hesperiis, ab hobedientia Leonis et imperii sub ipso constituti . . . Leonem per epistolas tamquam impie agente redarguens, et Romam cum tota Italia ab illius imperio recedere faciens."

[3] 'Decretals,' i. 6. 34 (Inn. III.): "Verum illis principibus jus et potestatem eligendi regem, in imperatorem promovendum, recognoscimus, ut debemus, ad quos de jure ac antiqua consuetudine noscitur pertinere, præsertim quum ad eos jus et potestas hujusmodi ab apostolica sede pervenerit, quæ Romanum imperium in personam magnifici Caroli a Græcis transtulit in Germanos."

The canonists then represent clearly the tradition that the Pope had actually exercised a large authority over the appointment and deposition of emperors and kings: we need not discuss how far this tradition was historically justifiable—in part undoubtedly it represented actual events; we are here only concerned with the fact that the tradition existed, and represents one element in the canonical theory of the relation of the Church and the Papacy to the secular power.

We find the second element in the canonical theory, in the development of the theory of the results of excommunication. With this is closely connected the question of the authority of the Church in absolving a man from an illegitimate oath. It is well to notice at the outset that Stephen of Tournai mentions that there are some who maintain that properly speaking the Pope does not absolve a man from his oath, but simply declares that he is absolved,[1] the oath, that is, being of itself null and void. It is not clear whether Stephen takes this view himself, but it may fairly be said that the principle lies behind the attitude of the Church in the Middle Ages to this question. The earlier canonists put the matter simply, that evil oaths should not be kept,—that it is better to commit perjury than to keep a wicked oath.[2]

The principle is reasonable, and it was natural under the

[1] Stephen of Tournai, 'Summa Decreti,' c. xv. Q. 6. 2, "Auctorit.": "Sunt qui dicunt, quod apostolicus neminem potest absolvere a juramento, sed ostendit eum absolutum, sicut sacerdos non dimittit peccatum, sed dimissum ostendit."

[2] Regino of Prum, 'De Synod. Causis,' ii. 329: "Si aliquid forte nos incautius jurasse contigerit, quod observatum pejorem vergat in exitum, illud consilio salubriori mutandum noverimus, ac magis instante necessitate perjurandum nobis, quam pro vitando juramento in aliud crimen magis esse divertendum." This is repeated by Burchard in the 'Decretum,' xii. 18.

Burchard, 'Decret.,' xii. 10: "Non est conservandum sacramentum quod malum incaute promittitur, veluti si quispiam adulteræ perpetuam cum ea permanendi fidem polliceatur. Tolerabilius est enim non implere sacramentum, quam permanere in stupri flagitio."

Id. 'Decret.,' xii. 29: "Etenim dum pejerare compellimur, creatorem quidem offendimus, sed nos tantummodo maculamus, cum vero noxia promissa complemus, et Dei jussa superbe contemnimus, ut proximis impia crudelitate noceamus, et nos ipsos crudeliore mortis gladio trucidamus."

Id. 'Decret.,' xix. 5. A list of oaths which should not be kept.



terms of the mediæval conception of society that it should have been held that the Church should determine which oaths were as a matter of fact proper to be kept. The ultimate consequence of this theory and its practical outcome in the attitude of the later Middle Ages to obligations deliberately undertaken we do not here discuss. The principle is clear that the Church was held to have the power to declare when an oath was null and void.

This principle assumed a great political significance when it was brought into connection with the theory of the consequences of excommunication. The history of this is a large subject, which we cannot stop to consider at length. It is enough to notice that in the earliest of the canonists whom we are considering—that is, Regino of Prum in the ninth century—the consequences of excommunication are already very emphatically drawn out, though with reference directly to monastic institutions only. No one is to pray, to speak, or to eat with an excommunicate person; those who do so incur the same sentence.[1] Regino and Burchard of Worms cite formulas of excommunication which again serve to bring out very clearly the nature of the sentence and its effects upon the actual as well as future condition of the excommunicate person, and especially the principle that he was in such a sense cut off from all the ordinary relations of life, that no one could live with him in those relations without incurring the same condemnation.[2] We need not multiply citations to

[1] Regino of Prum, 'De Causis Synodalibus,' ii. 396: "Si quis autem pro culpa sua fuerit ab oratione suspensus, nullus cum eo orandi aut loquendi habeat licentiam antequam reconcilietur. Nam qui se orationi vel confabulationi ejus, antequam a Priore recipiatur, inconsiderata pietate sociare præsumserit, similiter damnatus efficitur." 397: "Cum excommunicato neque orare, neque loqui, neque vesci cuiquam licet." 399: "Cum excommunicato nullus loquatur, neque qualibet eum compassione vel miseratione refoveat, neque ad contradictionem vel superbiam confortare præsumat."

[2] Regino of Prum, 'De Causis Synodalibus,' ii. 413: "Et qui illi quasi Christiano communicaverit aut cum eo manducaverit aut biberit, aut eum osculatus fuerit, vel cum eo colloquium familiare habuerit, nisi forte ad satisfactionem et pœnitentiam eum provocare studuerit, aut in domo sua eum receperit, procul dubio similiter sit excommunicatus." 415: "Prædictum pessimum virum a liminibus sanctæ matris ecclesiæ excludimus, et ab omne societate et communione Christiane separamus, separatumque esse

bring out the fact that this was the theory of the mediæval Church.

We have in our first volume pointed out that, in spite of certain ambiguous phrases, there can be no doubt that the Church clearly maintained that the king or emperor was in his own person subject to the ecclesiastical jurisdiction of the Church like any other person, and therefore, in extreme cases, to excommunication.[1] Ivo in his 'Panormia' cites part of a letter in which Gregory VII. vindicates the right of the Church to excommunicate even the supreme temporal ruler, and cites various real or traditional examples of this: there can be no doubt that Gregory's conclusion was historically justified.[2] There was here nothing new or revolutionary.

The emperor or king was then, in the theory of Church law, liable to excommunication for just cause, like any other person, and like every other excommunicate person was to be avoided and shunned. But this fact would easily bring with it consequences of a still larger kind: the excommunication of a king or emperor would make any relations between himself and his officials, and even his people in general, almost impossible. It was only natural that in the end men would ask whether the oath of allegiance to such a ruler could really be binding.

It is from the standpoint of this theory that we have to examine the claim of the Church and Pope to absolve a man from the obligation of an oath taken to the king or emperor. Gregory VII. absolved the subjects of Henry IV. from their

in æternum decernimus, id est, et in præsenti sæculo et in futuro Nullus ei Christianus ave dicat aut eum osculari præsumat . . . Nemo ei jungatur in consortio, neque in aliquo negotio, et si quis ei se sociaverit, et communicaverit ejus operibus malignis, noverit se simili percussum anathemate, his exceptis qui ob hanc causam ei junguntur ut eum revocent ab errore et provocent ad satisfactionem" Cf Id, 414, 416, and Burchard of Worms, 'Decret,' xi 3, 4, 5, 6.

[1] Vol i p 278 ff.

[2] Ivo, 'Panormia,' v 109 "Nonne sicut ait beatus Gregorius, recolendæ memoriæ Julius papa, tum contra Theodoram, tum contra Augustam damnationis promulgavit sententiam. Sic quoque Caribertus Parisiorum rex cum Theobergam legitimam uxorem suam reliquisset, et duas *sorores* Metroflidem et Marcovenam in uxores duxisset, a beato Germano Parisiorum episcopo excommunicatus est, et cum resipiscere nollet, non multo post divino judicio defunctus est."



oath of allegiance to him, and Ivo in the 'Panormia' quotes from the decrees of Gregory's council held in Rome A.D. 1078, the words in which the general principle is laid down.[1] Again, Ivo in the 'Panormia' cites a phrase of Pope Urban II., in which the principle is still more generally stated that oaths of fidelity made to one who was afterwards excommunicated are of no obligation.[2] These passages are again cited by Gratian in the 'Decretum.'[3] Gratian himself draws out the conclusion from these principles in general terms when he says that the Pope absolves men from their oath of fidelity when he deposes the rulers.[4]

It is important to notice the comment of Rufinus. He urges that it is necessary to observe that an oath may be of two kinds: it may be made to the ruler as a man, or it may be made to him as holding a certain office. In the first case, the oath is always binding on him who has taken it, unless the ruler is excommunicated, in which case he must not keep his oath of fidelity. In the second case, if the ruler is legally and canonically deprived of his office, then the oath is of no further obligation.[5]

[1] Ivo, 'Panormia,' v 110 "Prædecessorum nostrorum statuta sequentes, eos qui excommunicatis fidelitate aut sacramento constricti sunt, apostolica auctoritate a juramento absolvimus, quousque ipsi ad satisfactionem veniant, et ne eis fidelitatem observent, prohibemus"

[2] Ivo, 'Panormia,' v 111 "Juratos milites Hugoni militi, ne ipsi quando excommunicatus est, serviant prohibere. *Quod si sacramenta prætenderint*, moneantur oportere Deo magis servire quam hominibus fidelitatem enim quam Christiano principi juraverint, Deo ejusque sanctis adversanti, et eum præcepta calcanti, nulla cohibentur auctoritate persolvere"

[3] Gratian, 'Decretum,' C xv. Q 6, c. 4 and 5

[4] Gratian, 'Decretum,' C xv Q 6, Part 2 "Gratianus A fidelitatis etiam juramento Romanus Pontifex nonnullos absolvit, cum aliquos a suis dignitatibus deponit"

[5] Rufinus, 'Summa Decret,' C xv. Q 6 3, "'Alius item Romanus' Hic sciendum est quod juramenta fidelitatis fiunt aliquando intuitu personarum, aliquando dumtaxat intuitu dignitatum. . . Si quis itaque intuitu persone juraverit alicui fidelitatem, semper juramento obligatus ei tenebitur, nisi suus dominus ab ecclesia fuerit anathematizatus interea enim, scil. dum in excommunicatione dominus fuerit, fidelis etiam non debet servire ei, ut infra I. II (c 4 and 5) Si autem in tuitu dignitatis quis alteri fidelitatem juraverit, postquam dominus dignitatem illam canonice perdiderit vel legitime, juratorum ei deinceps obligatus nequaquam erit, ut notatur ex presenti capitulo Isti enim regi Francorum juraverant Franci intuitu regie potestatis, postquam ergo rex legitime regnum perdidit, juramenti vinculum absolutum fuit."

It is clearly, then, a principle of the canon law of these centuries that a ruler can be excommunicated, and that this carries with it the consequence that his subjects can be, or rather are, *ipso facto*, released from their oath of allegiance to him.

We turn to the third aspect of the canonical theory, the conception that Peter, and therefore his successors, had received from Christ authority over the temporal as well as the spiritual kingdom.

This appears first in the Canon law in Gratian's 'Decretum.' In the twenty-second Distinction he collects the passages which show that the Roman Church had authority superior to that of all other Churches. He begins by citing a part of what he considers to be a letter of Pope Nicholas II. to the Milanese (this is really a letter of Peter Damian to Hildebrand, preserved in the Acts of the Convention of Milan of A.D. 1059-60). In this letter it is laid down that it was the Roman Church which had created patriarchal and metropolitan dignities and the sees of bishops, and which had determined the rank of all the Churches, while the Roman Church was founded by Christ Himself, who committed to Peter the laws both of the earthly and heavenly empire.[1] It does not appear how Gratian understood these last words, or what importance he attached to them, for he makes no comment upon the passage: it must be noticed that the words occur incidentally in a passage which otherwise is concerned with the relation of the Roman Church to other churches.

This passage is commented on by Rufinus and by Stephen of Tournai. Rufinus deals with it in a somewhat elaborate fashion. He interprets the phrase *terreni simul et celestis imperii jura* as meaning that he has authority both over the

[1] Gratian, 'Decretum,' D xxii 1 "Omnes sive patriarchæ in cujuslibet apicem, sive metropoleon primatus, aut episcopatuum cathedras, vel ecclesiarum cujuslibet ordinis dignitatem instituit Romana ecclesia Illam vero solus ipse fundavit et super petram fidei nascentis erexit, qui beato eternæ vitæ clavigero terreni simul et celestis imperii jura commisit"

Cf. Mansi, 'Concilia,' vol. 19, p 886.



clergy and over secular persons and things: the vicar of Peter thus has the *jura* of the earthly kingdom. But, he says, we must distinguish between the *jus auctoritatis* and the *jus amministrationis*: the *jus auctoritatis* is that which a bishop exercises over all ecclesiastical matters; the *jus amministrationis* is that which the "*yeonomus*" (administrator of the temporalities of the diocese) exercises—he has the authority to administer affairs, but only issues commands to others by the authority of the bishop. The Pope has "*quoad auctoritatem, jus . . . terreni imperii*," for it is he who by consecration confirms the emperor in his earthly kingdom, and admonishes the emperor and other secular persons if they misuse their secular office, and absolves them when they repent. The prince has the authority after the Pope (*post ipsum*) of rule over secular persons, and *preter ipsum* has the duty of administration: for the Pope should not deal with secular matters, nor the prince with ecclesiastical matters, in accordance with the canon "cum ad verum ventum est" (Gelasius's statement of the division of the two powers cited in Dist. xcvi. c. 6). Rufinus adds that others understood the canon to refer to the fact that Christ gave Peter authority that what he should bind or loose on earth should be bound or loosed in heaven.[1]

[1] Rufinus, 'Summa Decret,' D xxii. c. 1, "'clavigero, i e Petro, terr. s. et cel imper jura comm.': Celeste imperium celestium militum, i e. cleri eorum universitatem cum his, que ad eos pertinent, dicit, terrenum vero regnum vel imperium, seculares homines, seculariesque res appellat per hoc ergo videtur quod summus pontifex, qui beati Petri est vicarius, habet jura terreni regni Sed animadvertendum est quod jus aliud est auctoritatis, aliud amministrationis Et quidem jus auctoritatis quemadmodum in episcopo, ad cujus jus omnes res ecclesiastice spectare videntur, quia ejus auctoritate omnia disponuntur, jus autem amministrationis sicut in yconomo, iste enim habet jus amministrandi, sed auctoritate caret imperandi: quicquid aliis precipit, non sua sed episcopi auctoritate indicit Summus itaque patriarcha quoad auctoritatem jus habet terreni imperii eo scil modo quia primum sua auctoritate imperatorem in terreno regno consecrando confirmat et post tam ipsum quam reliquos seculares istis secularibus abutentes sola sua auctoritate pene addicit et ipsos eosdem post penitentes absolvit Ipso vero princeps post ipsum auctoritatem habet seculares regendi et preter ipsum officium amministrandi, etenim nec apostolicum secularia nec principem ecclesiastica procurare oportet, ut infra d xcvi, 'cum ad verum ventum est' (c 6). Alii sic exaudiunt 'terreni simul et celestis

It would seem that Rufinus is anxious to preserve the principle that the Pope has the supreme authority over secular matters, but also to suggest that this authority is limited to confirming the election of the emperor, and to correcting the emperor and other secular rulers if they misuse their authority. He is anxious to bring the phrase into agreement with the principle which had been laid down by Gelasius, and which was still regarded as authoritative. The fact that he cites another interpretation, even though it is not his own, seems to show that he felt the phrase to be a difficult one.

Stephen of Tournai also suggests two interpretations—the first, that the Pope has authority both over laymen who govern worldly affairs and over the clergy who have the charge of heavenly matters, for the successors of Peter consecrate priests and crown the emperor; the second, that the Pope has such authority that what he binds and looses upon earth is bound and loosed in heaven.[1]

The 'Glossa Ordinaria,' commenting on the passage, says that the Pope has both swords, the spiritual and the temporal.[2]

What conclusion then are we to draw? It is impossible to say certainly in what sense Peter Damian used the phrase, or in what sense Gratian understood it. Rufinus clearly thought that it meant that in some sense the Pope, as the successor of Peter, had authority over secular affairs as well as over secular persons; but being aware of the emphatic terms of the Gelasian statement, he wishes to reduce the practical meaning of the phrase as far as possible, and he therefore suggests that it is best understood as explaining the authority by which the Popes consecrate and confirm the emperors, and their right of interfering if these misuse their power. Stephen is probably

imperii jura commisit,' i.e. ei dedit, ut quecumque ligaret vel solveret super terram, essent soluta vel ligata in cœlo."

[1] Stephen of Tournai, 'Summa Decret.,' D. xxii. 1: "'Terreni simul et celestis,' i.e. laicorum, qui terrena disponunt, et clericorum, qui celestibus intendunt. Nam Petri successores et consecrare sacerdotes habent et coronare imperatores. Vel ita: 'terr. sim. et c.,' i.e. dedit ei ut quæcumque ligaret vel solveret super terram, ligata vel soluta essent in cœlis."

[2] 'Glossa Ordinaria' to Gratian, 'Decret.,' D. xxii. 1. I owe the reference to note 12 in Maitland's translation of a part of Gierke—'Das Deutsche Genossenschaftsrecht.'



condensing the statement of Rufinus, and very probably would have assented to his interpretation, though of this we cannot be certain. Both Rufinus and Stephen are aware that the phrase may be taken in another and a more general sense, and intimate that other writers had taken it so. The 'Gloss' interprets it as referring to the power of the two swords. We have found no reference to the phrase in the other canonists with whom we deal or in the Decretals.

We turn to the fourth point we have mentioned, and we must now consider the place of the Donation of Constantine in the Canon law. In our first volume we pointed out that, whatever ambiguities there may be as to the original purpose of the Donation, one thing is very clear, and that is, that no writer in the ninth century suggests that it means that the Pope has temporal authority over the Empire in the West.[1] We cannot here discuss the history of the Donation in mediæval literature in general; we shall recur to this in a later volume. But we must consider its place in the canonical literature. Regino of Prum does not cite it. In Burchard there is a passage which contains the statement that Constantine left Rome, which had been the seat of the imperial authority, and granted it to St Peter and his successors.[2] The passage belongs to the literature connected with the Donation, but does not contain the important phrases. Ivo of Chartres cites the same passage in the 'Decretum,'[3] but he also cites the Donation itself, including the words in which Constantine is said to have transferred to Pope Sylvester not only Rome, but all the provinces of Italy and the West,[4] and both passages recur in the 'Panormia'[5] and in the collection of Cardinal Deusdedit.[6] As these canonists make no comment on the passages which they cite. it is impossible to say

[1] See vol. i. pp. 287-90.

[2] Burchard of Worms, 'Decret.,' iii. 5: "Denique idem præfatus princeps (Constantine) donaria immensa, et fabricam templi primæ sedis beati Petri principis apostolorum instituit, adeo ut sedem imperialem qua Romani principes præsidebant relinqueret, et B. Petro suisque successoribus profuturam concederet."

[3] Ivo, 'Decretum,' iii. 7.

[4] Ivo, 'Decretum,' v. 49.

[5] Ivo, 'Panormia,' ii. 3 and iv. 1.

[6] Deusdedit, 'Coll. Can.,' iv. 1.

in what sense they understood it. When we come to Gratian, it is certainly interesting to find that he omits it altogether from his collection. It stands, indeed, in all the editions of Gratian, but it is contained in two Paleæ—that is, two of those canons which were inserted by a later hand. It is, indeed, impossible to say precisely what importance we are to attach to this omission, but it is certainly remarkable, for the Donation is contained not only, as we have just seen, in Ivo and Deusdedit, but also in the collections known as 'Anselmus,' iv. 32, and 'Cæsareoaugustana,' ii. 72, and all of these collections were used by Gratian. Of the two Paleæ which have been inserted in Gratian, the first sums up the general purport of the Donation, saying that the Emperor Constantine granted the crown and all the royal dignity in the city of Rome, in Italy, and in the Western parts, to the Pope,[1] while the second gives a large part of the text of the Donation itself, including the most significant phrases.[2]

Gratian's first commentator, Paucapalea, who has been thought to be the author of the 'Paleæ,' is the first canonist whose treatment of the Donation is explicit. Commenting on the twenty-second Distinction, he explains that Byzantium is called New Rome because Constantine transferred thither the Roman *imperium*, for Constantine, on the fourth day after his baptism, gave to the Pontiff of the Roman Church a *privilegium*, by which he handed over to him the crown and all the royal dignity and the "palace" of the Lateran, and all his glory; and further, he handed over his kingdom, declaring that he had thought it meet to transfer the seat of government (*imperium*) to the East, and to build in the province of Byzantium a city called by his own name, in which to place his *imperium*, inasmuch as it was not just that where God had placed the *principatus* of the priests and the

[1] Gratian, 'Decretum,' D xcvi c 13 (Palea) "Constantinus imperator coronam et omnem regiam dignitatem in urbe Romana, et in Italia, et in partibus occidentalibus Apostolico concessit Nam in gestis B Silvester (que B Papa Gelasius in concilio LXX episcoporum a catholicis legi commemorat, et pro antiquo usu multas hoc imitari dicit ecclesias), ita legitur"

[2] Gratian, 'Decretum,' D xcvi c. 14 (Palea), cf Friedberg's note, for references to 'Anselmus' and 'Cæsareoaugustana.'



Christian religion, there the earthly emperor should hold his seat and power.[1] Paucapalea's own interpretation of this is completely set out later in his work. In commenting on the ninety-seventh Distinction, he says that while it has above been shown that the emperor is not to usurp the rights of the pontiff, nor the pontiff those of the king, yet, when the emperor has transferred all his power to the supreme pontiff he has renounced his rights and dignities. Constantine did this when, on the fourth day after his baptism, he handed over to the Pope his crown and all his royal dignity in the West. Besides this, he made many gifts, including the palace of the Lateran, and granted to the Pope the right to make consuls and patricians of the Roman clergy. Finally, he surrendered his whole kingdom and power when he said that he had thought it meet to transfer his *imperium* to the East, inasmuch as it was not just that the emperor should have his seat and power where God had established the *principatus* of the priests and the Christian religion.[2] Here we have a distinct exposition of the meaning which Paucapalea attached to the Donation. This is especially emphatic, because Paucapalea refers expressly to the Gelasian principle of the division of the two authorities, and, as expressly, argues

[1] Paucapalea, 'Summa Decret,' D. xxii 3 "Nova Roma ideo dicitur, quia noviter illuc a Constantino translatum est Romanum imperium Constantinus enim imperator Romanorum quarto die sui baptismatis privilegium Romanæ ecclesiæ pontifici contulit, in quo coronam et omnem regiam dignitatem ipsumque palatium Lateranense omnemque suam gloriam tribuit In super quoque regnum ei dimisit dicens Congruum esse perspeximus nostrum imperium et regni potestatem orientalibus transferri regionibus, et in Bizantiæ provinciæ optimo loco nomini nostro civitatem ædificari, et nostrum illic constitui imperium, quoniam, ubi principatus sacerdotum et christianæ religionis caput a deo est constitutum, justum non est, ut ibi imperator terrenus sedeat et potestatem habeat"

[2] Paucapalea, 'Summa Decret,' D. xcvii "Superius ostensum est, quod nec imperator jura pontificis, nec pontifex jura regalia usurpare debet Verumtamen ubi imperator omnem suam potestatem summo pontifici contulit, juri ac dignitati suæ renuntiasse videtur Constantinus enim imperator quarto die sui baptismatis coronam et omnem regiam dignitatem in partibus occidentalibus apostolico ejusque successoribus contulit Insuper donaria multa, ipsum quoque palatium Lateranense tradidit, et ut de clericis Romanæ ecclesiæ consules ac patricios faceret, concessit Tandem universum regnum ac propriam potestatem reliquit dicens, 'Congruum esse perspeximus,'" etc. (as in the last note)

that the Donation, presumably because it was a voluntary surrender by Constantine of his authority in the West, is not inconsistent with this. Paucapalea understands the Donation as conveying to the Popes all the imperial authority, not only in Italy, but in the whole of the West.

The position of Paucapalea is clear, but it does not appear that any of the canonists with whom we are dealing followed him. Rufinus, commenting on the twenty-second Distinction, shows that he is acquainted with some part at least of the Donation, for he explains the title of New Rome as having been applied to Constantinople, owing to the fact that Constantine transferred to it the Roman *imperium*, and he quotes the words of the Donation, "Congruum esse . . . habeat potestatem,"[1] but he makes no comment on this, or on the "Paleæ" in Distinction xcvi.—if indeed he found them there. Stephen of Tournai makes no reference at all to the Donation or the Paleæ. Damasus was acquainted with the Donation, but expressly repudiates the notion that it could have the effect of permanently transferring the imperial authority in the West to the Popes. Some people, he says, maintain that the emperor holds the sword from the Pope, because Constantine left the *imperium* to the Roman Church, but it is more true to say that he holds it from God, as St Augustine says (referring to Dist. viii. 1), and it does not appear either that the Pope received the *imperium* or that Constantine could have bound his successors.[2] There is no reference to the Donation either in the Compilations or in the Decretals, so far as we have seen.

Paucapalea is therefore the only canonist of those with whom we are dealing of whom we can say that they both knew the Donation and interpreted it as conveying the

[1] Rufinus, 'Summa Decret.,' D. xxii. 3.

Cf. p 211, note 1.

[2] Damasus, 'Burchardica,' R. 127, "Quod imperator non habet jurisdictionem a Papa . . . Solutio. Dicunt nonnulli, Imperatorem habere gladium a Papa, quia Constantinus Imperium reliquerit Romanæ ecclesiæ, ut in illa, 'Constantinus.' Verinus tamen est quod a Deo habeat, quemadmodum dicit Augustinus, sup. viii. dist. quo jure. Nec enim apparet Papam imperium accepisse, neque Constantinus potuit successori suo præjudicare."



imperial authority in the West to the Pope. As we have seen, it was known and included in the collections of the canonists before Gratian, but we have no knowledge as to the sense in which it was understood by them. Why Gratian should have omitted it from the 'Decretum' we cannot say. Rufinus and Stephen may not have found it in their copies of the 'Decretum,' for we cannot be sure whether the Paleæ were included in them. Damasus knew the Donation but repudiated its authority. We cannot say why there should be no reference to it in the Decretals.

It is possible that there was some doubt in the minds of the canonists as to the genuineness of the Donation. We shall return to this question when we deal with the Donation in connection with the general literature of these times. Its genuineness had been doubted as early as the beginning of the eleventh century, as we know from a constitution of the Emperor Otho III., if we may assume the authenticity of the document, which is generally admitted.[1]

At any rate, whatever may be the reason, we cannot say that the canon law and the canonists, with the exception of Paucapalea, till after the time of the Decretals of Gregory IX., used the Donation for the purpose of establishing the superiority or supremacy of the Pope over the secular authority.

We have then under these four heads examined the question how far the canon law claimed supremacy for the spiritual over the temporal power: first, the tradition of cases in which the Popes had actually appointed or deposed kings; second, the development of the theory of excommunication to the point that it implied that the Church had the authority of deposing kings and emperors; third, that isolated phrase in Gratian, which might mean that Peter received from our Lord Himself power both spiritual and temporal; and fourth, the interpretation of the Donation of Constantine. It is clear that while the canonists claim for the Pope authority to exercise discipline over all temporal rulers, to the extent even of deposing

[1] M. G. H. Legum, Sect. IV., vol. i. p. 26.

them, they are not clear or unanimous with regard to the theory that the Pope as the successor of Peter holds a supreme authority over both powers.

It is now possible to examine those phrases of the Popes which were considered by Gregory IX. and his advisers worthy of a place in the authoritative collection of the Decretals. It is indeed of real importance to consider these statements, which were formally adjudged to be deserving of a place in the system of the canon law, apart from the phrases which various Popes may have used at other times. It is extremely important to distinguish between phrases recognised as representing the carefully considered judgment of the authorities of the Church, from phrases which may have been used in the heat of controversy, which may have represented the actual feeling of the moment but were not finally considered adequately representative of the judgment of the Church.

The statements which we have now to examine are with one exception contained in Decretal letters of Pope Innocent III.; and we will do well to remember that there were few of the great Popes of the Middle Ages who set the ecclesiastical power higher, and who actually exercised a greater influence in Europe.

We begin by examining a letter which he addressed to the Emperor Alexius of Constantinople, on the relations and the relative dignity of the temporal and spiritual authorities. Alexius had apparently complained that Innocent had written of him in severe terms, and apparently had appealed to St Peter's phrase, "Be subject to every ordinance of man for the Lord's sake" (1 Pet. ii. 13), as indicating that the empire was superior in authority and dignity to the priesthood, and that the emperor had criminal jurisdiction over priests as well as over the laity. Innocent energetically repudiates these contentions, and specially urges that though the emperor is supreme in temporal matters, this only affects those who hold temporalities from him: the Pope is superior in spiritual things, which are superior to the temporal even as the soul is to the body As to the claim to criminal jurisdiction over



the clergy as well as the laity, this is not just, for this jurisdiction is limited to those who use the sword.

He cites various passages of Scripture to show that the priest is superior to the king, and finally compares the authority of the Church to the sun and that of the king to the moon. God has set in the firmament of the heaven, that is, in the universal church, two great lights, that is, two great dignities, the pontifical and the royal authorities. But as the sun which presides over the day is greater than the moon which presides over the night, so is the Pontiff greater than the king.[1]

[1] Decretals, I 33. 6 (Inn. III.), § 1: "Mirata est autem imperialis sublimitas, sicut per easdem nobis literas destinasti, quod *te* nisi [ausi] fuimus in nostris literis aliquantulum increpare, licet non increpandi animo, sed affectus potius commonendi quod scripsimus meminerimus nos scripsisse. Huic autem tuæ admirationi non causam, sed occasionem præbuit, sicut ex eisdem conjecimus literis, quod legisti beatum Petrum Apostolorum principem sic scripsisse: 'Subditi estote omni humanæ creaturæ propter Deum, sive regi, tanquam præcellenti, sive ducibus, tanquam ab eo missis, ad vindictam malefactorum laudem vero bonorum.' Volens enim de quo nos rationabilius admiramur, imperatoria celsitudo per hæc et alia, quæ induxit, imperium sacerdotio dignitate ac potestate præferre, ex auctoritate præmissa triplex trahere voluit argumentum, primum ex eo, quod legitur 'subditi estote,' secundum ex eo, quod sequitur 'regi tanquam præcellenti, tertium ex eo, quod est adjectum subsequenter "ad vindictam malefactorum, laudem vero bonorum", per primum subesse sacerdotium, per secundum imperium præeminere per tertium imperatorum tam in sacerdotes quam laicos jurisdictionem, immo etiam gladii potestatem accepisse præsumens Quum enim et boni quidam sint sacerdotes, et quidam eorum malefactores exsistant, is, qui secundum apostolum gladium portat ad vindictam malefactorum, laudem vero bonorum, in maleficientes presbyteros excessus præsumptos potest ultore gladio vindicare, quum inter presbyteros et alios apostolus non distinguat. Verum si et personam loquentis et eorum, ad quos loquebatur, ac vim locutionis diligentius attendisses, scribentis non expressisses talitor intellectum. . . . Nam si per hoc, quod dixit. 'subditi estote' sacerdotibus voluit imponere jugum subjectionis, et eis prælationis auctoritatem affere, quibus eos subjectos esse monebat, sequeretur ex hoc, quod etiam servus quilibet in *sacerdotes* imperium accepisset, quum dicatur, 'omni humanæ creaturæ' Quod autem sequitur, 'regi tamquam præcellenti,' non negamus quin præcellat imperator in temporalibus illos duntaxat, qui ab eo suscipiunt temporalia Sed Pontifex in spiritualibus antecellit, quæ tanto sunt temporalibus digniora, quanto anima præfertur corpori, licet non simpliciter dictum fuerit 'subditi estote' sed additum fuerit, 'propter Deum,' nec pure sit subscriptum, 'regi præcellenti,' sed interpositum forsitan fuit non sine causa 'tanquam' Quod autem sequitur· 'ad vindictam malefactorum, laudem vero bonorum,' intelligendum non est quod rex vel

This passage brings out clearly some important points with regard to the conception of the relative position of the two powers. Innocent sharply repudiates the notion that the secular authority is superior to the Pope: he acknowledges that the Emperor is supreme in temporal matters, but the Pope is supreme in spiritual things, which are far greater, and—a point of great importance—Innocent clearly holds that the clergy are only subject to the secular power so far as they hold temporalities from that power, and only in relation to these temporalities, and they are, therefore, not subject to him in criminal matters. But, finally, in spite of the fact that Innocent holds that the spiritual power is immensely superior in dignity to the secular, he restates the Gelasian theory, that both powers, the secular as well as the spiritual, have been established by God, and he expresses this in the terms current in the ninth century, that these two powers are within the Church. It is noticeable, therefore, that

imperator super omnes et bonos et malos gladii acceperit potestatem, sed in eos solummodo, qui utentes gladio, ejus sunt jurisdictioni commissi, juxta quod veritas ait: 'Omnes qui acceperint gladium gladio peribunt.' . . . Verum quicquid olim fuerit in veteri testamento, nunc aliud est in novo, ex quo Christus factus est sacerdos in æternum secundum ordinem Melchizedech, qui se non ut rex, sed ut sacerdos in ara crucis hostiam obtulit Deo patri, per quam genus redemit humanum, circa illum præcipue, qui successor est Apostoli Petri et vicarius Jesu Christi.

Potuisses autem prerogativam sacerdotii ex eo potius intelligere, quod dictum est: non a quolibet sed a Deo: non Regi, sed Sacerdoti; non de regia stirpe sed de sacerdotali prosapia descendenti, de sacerdotibus videlicet, qui erant in Anathot: 'Ecce constitui te super gentes et regna ut evellas et dissipes, ædifices et plantes' (Jer. i. 10). Dictum est etiam in divina lege: "Diis non detrahes, et principem populi tui non maledices,' quæ sacerdotes regibus anteponens, istos Deos, et alios principes appellavit.

Præterea nosse debueras, quod fecit Deus duo magna luminaria in firmamento cœli; luminare majus ut præesset diei, et luminare minus, ut præesset nocti; utrumque magnum, sed alterum majus, quia nomine cœli designatur ecclesia, juxta quod veritas ait: 'Simile est regnum cœlorum homini patri familias, qui summo mane conduxit operarios in vineam suam.' Per diem vero spiritualis, per noctem carnalis secundum propheticum testimonium: 'dies diei eructat verbum, et nox nocti indicat scientiam.' Ad firmamentum igitur cœli, hoc est universalis ecclesiæ, fecit Deus duo magna luminaria, id est, duas magnas instituit dignitates, quæ sunt pontificalis auctoritas, et regalis potestas. Sed illa, quæ præest diebus, id est, spiritualibus, major est; quæ vero (noctibus id est) carnalibus, minor, ut quanta est inter solem et lunam, tanta inter pontifices et reges differentia cognoscatur."



Innocent avoids here all suggestion that the spiritual power is supreme over the secular within the sphere of the latter.

We find that this position of Innocent is maintained consistently in other important Decretals which deal with the matter. There is a very remarkable illustration of this in a Decretal dealing with the dispute as to the election of Philip of Suabia and Otto to the empire. Innocent III. had interfered in this case to annul the election of Philip and to confirm the election of Otto. At first sight it would seem as though this were obviously an assertion by the Pope of his authority over the secular power, and of a claim to take the appointment into his own hands and to supersede the electors. But Innocent is at great pains to disclaim this construction of his action. Some of the princes had complained that the Papal legate had taken upon himself the office of an elector or "cognitor," and maintained that this was wholly illegitimate. Innocent denies that he had done this, and says that his legate had only acted as a "*denunciator*,"—that is, he had declared Philip to be unworthy and Otto to be worthy to receive the empire. Innocent recognises that the electors have the right and authority to elect the king, who is afterwards to be promoted to the empire; they have the right by law and ancient custom, and the Pope must specially recognise this, as it was the Apostolic See which transferred the empire from the Greeks to the Germans. But, on the other hand, Innocent urges that the princes must recognise that the right and authority of examining the person elected belongs to the Pope, who is to anoint and consecrate and crown him, for it is a general principle that the examination of a person belongs to him who is to lay hands on him, and the princes cannot maintain that if they elected, even unanimously, a sacrilegious or excommunicated person, the Pope would be obliged to consecrate and crown him. Finally, he claims that if the electors are divided, he has the right to decide in favour of one of the parties, and urges that this was done in the case of the disputed election of Lothair and Conrad.[1]

[1] 'Decretals,' i. 6. 34: "Inter cetera vero quidam Principes hac præcipue objectione sunt usi, dicentes, quod Apostolicæ sedis legatus, aut electoris gessit

It is interesting to observe how carefully Innocent guards his own action, and disclaims the intention of overriding the legitimate rights of the electors. His claim, in fact, no doubt amounts to an enormous invasion of the rights of the electors of the empire—that is, his claim to determine which of the

aut cognitoris personam; si electoris, in messem alienam miserat falcem suam, et electioni se ingerens, principum derogaverat dignitati; si cognitoris, absente altera partium videtur perperam processisse, quum citata non fuerit, et ideo non debuit contumax judicari: . . . Verum illis principibus jus et potestatem eligendi regem, in imperatorem postmodum promovendum, recognoscimus, ut debemus, ad quos de jure ac antiqua consuetudine noscitur pertinere; præsertim quum ad eos jus et potestas hujusmodi ab apostolica sede pervenerit, quæ Romanum imperium in personam magnifici Caroli a Græcis transtulit in Germanos. Sed et principes recognoscere debent, et utique recognoscunt, sicut iidem in nostra recognovere præsentia, quod jus et auctoritas examinandi personam electam in regem et promovendam ad imperium ad nos spectat, qui eum inungimus, consecramus et coronamus. Est enim regulariter et generaliter observatum, ut ad eum examinatio personæ pertineat, ad quem impositio manus spectat. Numquid enim, si principes non solum in discordia, sed etiam in concordia sacrilegum quemcumque, vel excommunicatum, in regem, tyrranum, vel fatuum, hæreticum eligerent, aut paganum, nos inungere, consecrare ac coronare hominem hujusmodi deberemus? Absit omnino.

Objectioni ergo Principum respondentes asserimus, quod legatus noster . . . approbando regem Ottonem et reprobando Philippum ducem Suaviæ, nec electoris gessit personam, . . . ut pote qui nec fecit aliquem eligi, nec elegit: . . . nec cognitoris personam exhibuit quum neutrius electionem quoad factum eligentium confirmandam duxerit, aut etiam infirmandam. . . . Exercuit autem denunciatoris officium; quia personam ducis ejusdem indignam, et personam regis denunciavit idoneam quoad imperium obtinendum: non tam propter studia eligentium, quam propter merita electorum: quamvis plures ex illis qui eligendi regem in imperatorem promovendum de jure ac de consuetudine obtinent potestatem, consensisse perhibeantur in ipsum Regem Ottorum; et ex eo quod fautores Philippi ducis absentibus aliis et contemptis, ipsum eligere præsumpserunt, pateat eos perperam processisse: quum explorati sit juris quod electioni plus contemptus unius, quam contradictio multorum obsistat: . . . Nos utique non ducem, sed reliquum reputamus et nominamus regem justitia exigente. . . . Quod autem quum in electione vota principum dividuntur, post admonitionem et expectationem alteri partium favere possimus, maxime postquam a nobis unctio, consecratio, et coronatio postulantur, sicut utraque pars a nobis multoties postulavit, ex jure patet pariter et exemplo. Numquid enim si principes admoniti et expectati, vel non potuerunt vel noluerunt in unum propositum convenire, sedes Apostolica advocato et defensore carebit, eorumque culpa ipsi redundabit in pœnam? Sciunt autem principes, . . . quod cum Lotharius et Corradus in discordia fuissent electi, Romanus Pontifex Lotharium coronavit, et imperium obtinuit coronatus, eodem Corrado tunc demum ad ejus gratiam redeunte."



candidates should be acknowledged in case of a disputed election; but, as we have pointed out, there were important precedents for his claiming a great and even a paramount share in determining the election.[1] His refusal to acknowledge an excommunicated person was only a natural extension of the principle that excommunication involved deposition. It is very significant that he makes no claim to any abstract political supremacy over the empire; his silence is indeed very significant, for, as we have seen, there was at least one phrase in the canonical collection of Gratian which seemed to imply that the successors of Peter had received this authority from Christ Himself.[2]

This conclusion is confirmed by the terms of another important Decretal letter of Innocent, written to the French bishops, defending his claim to arbitrate between the French and English kings. He begins by repudiating the notion that he desires to disturb or diminish the jurisdiction or authority of the French king, while he expects that the French king, on his part, will not interfere with the Papal jurisdiction and authority. The Lord in the Gospels had bidden an injured person appeal to the Church, and the king of England asserted that the king of the French had transgressed against him, and that he therefore had appealed to the Church, and the Pope, therefore, could not refuse to hear him. He disclaims all desire to judge as to the question of the fief, and he recognises that any question of this kind belongs to the feudal lord—that is, in this case, to the king of the French, unless, indeed, the *jus commune* had been altered by a special *privilegium* or by custom; but he claims the right to decide as to the "sin," for it cannot be doubted that jurisdiction on this point belongs to the Pope. The French king should not consider it derogatory to his dignity to submit in this matter to the Apostolic judgment; and he appeals to the words of the Emperor Valentinian and to a decree of the Emperor Theodosius, which, as he says, had been renewed by the Emperor Charles, under which any party to a suit might, even without the consent of the other party, appeal to the bishop. No sane

[1] Cf. vol. i. pp. 282-287.

[2] See pp. 206-209.

person, he continues, can doubt that it is the duty of the Pope to rebuke men for mortal sin, and if they refuse to submit, to subject them to ecclesiastical censure: it cannot be pretended that kings are exempt from this jurisdiction. If this is true of all sins, how much more must it be true with regard to a transgression against peace, and he appeals to the warning of the Gospel directed against those who refuse to receive the messenger of peace. Further, he reminds him that the king of the French had used the help of the Pope against Richard of England. Finally, he urges that a treaty had been made between the kings and confirmed by their oaths, and that this had been violated, and that no one could doubt that the question of the violation of an oath belonged to the Church. He has therefore, he says, appointed his legates to enquire into the matter, and if they found the complaint of the King of England to be a just one, to take such steps as he had authorised, and he admonishes the bishops to receive and carry out the judgment.[1]

[1] 'Decretals,' II. 1. 13. "*Non ergo* putet aliquis quod jurisdictionem aut potestatem illustris regis Francorum *perturbare* aut *minuere* intendamus, quum ipse jurisdictionem et potestatem nostram nec velit, nec debeat etiam, impedire, quumque jurisdictionem propriam non sufficiamus explere, cur alienam usurpare vellemus. Sed quum dominus dicat in evangelio 'Si peccaverit in te frater tuus . . si autem ecclesiam non audierit, sit tibi sicut ethnicus et publicanus' (Matt. xviii. 15 ff.), et rex Angliæ, sicut asserit, sit paratus sufficienter ostendere, quod rex Francorum peccat in ipsum, et ipse circa eum in correctione processit secundum regulam evangelicam, et tandem, quia nullo modo profecit, dixit ecclesiæ quomodo nos qui sumus ad regimen universalis ecclesiæ suprema dispositione vocati, mandatum divinum possumus non exaudire, ut non procedamus secundum formam ipsius, nisi forsitan ipse coram nobis vel legato nostro sufficientem *in contrarium* rationem ostendat? Non enim intendimus judicare de feudo, cujus ad ipsum spectat judicium, nisi forte juri communi per speciale privilegium vel contrariam consuetudinem aliquid sit detractum, sed decernere de peccato, cujus ad nos pertinet sine dubio censura, quam in quemlibet exercere possumus et debemus. Non igitur injuriosum sibi debet regia dignitas reputare, si super hoc apostolico judicio se committat, quum Valentinianus inclitus imperator suffraganeis Mediolanensis ecclesia dixisse legatur 'Talem in pontificali sede constituere procuretis, cui et nos, qui gubernamus imperium, sincere nostra capita submittamus, et ejus monita, quum tanquam homines delinquerimus, suscipiamus necessario velut medicamenta curantis.' Nec sic illud humillime omittamus, quod Theodosius statuit imperator, et Carolus, *innovavit*, de cujus genere rex ipse noscitur descendisse 'quicunque videlicet litem habens, sive petitor fuerit sive reus, sive in initio litis vel decursis temporum curriculis, sive quum negotium peroratur, sive quum jam cœperit promi sententia, si judicium elegerit sacrosanctæ sedis antistitis, illico sine aliqua dubitatione, etiamsi pars alia refragetur, ad episcoporum judicium cum sermone litigantium dirigatur.' Quum enim non humanæ constitutionis *sed divinæ legis potius* innitamur quia potestas nostra non est ex homine, sed ex Deo . . nullus, qui sit *sanæ mentis*, ignorat, quin ad officium nostrum spectet de quocumque mortali peccato corripere quemlibet Christianum, et si correctionem contempserit, ipsum per districtionem ecclesiasticam coercere . . Sed forsan dicetur, quod aliter cum regibus et aliter cum aliis est agendum. Ceterum scriptum novimus in lege divina 'Ita magnum judicabis ut parvum, nec erit apud te acceptio personarum,' quam B. Jacobus intervenire testatur, 'si discerris ei qui indutus est veste præclara,' &c. Licet autem hoc modo procedere valeamus super quolibet criminali peccato, ut peccatorem revocemus a vitio ad virtutem, ab errore ad veritatem, præcipue tamen quum contra pacem peccatur, 'quæ est vinculum caritatis,' [de qua Christus specialiter præcipue apostolis 'In quamcumque domum intraveritis, primum dicite Pax huic domui, et si fuerit ibi filius pacis, requiescet super illum pax vestra. Quicunque autem non receperint vos, *nec audierint sermones vestras*, exeuntes foras excutite pulverem de pedibus vestris in testimonium illis.' Quid enim est a talibus exire foras apostolos, nisi communionem eis apostolicam denegare? quid est excutere pulverem de pedibus suis, nisi districtionem ecclesiasticam exercere? Quam gravis autem districtionis sententia in ultimo sint examine ferendi qui non recipiunt pacis nuncios, nec audiunt sermones eorum, per se ipsa veritas consequentes ostendet, non simpliciter, sed cum quadam affirmatione proponens 'Amen dico vobis, tolerabilius erit terræ Sodomorum et Gomorrheorum in die judicii quam illi civitati,' in civitate cives intelligens, a quibus non ex *cepit ipses reges*. *Porro quum secundum* legitimas sanctiones quod quisque juris in alterum statuit, alius eo uti valeat *contra* illum, *et* sapiens protestetur 'Patere legem, quam ipse tuleris,' et rex ipse Francorum contra claræ memoriæ R. quondam Anglorum regis, qui, ut salva ipsius regis pace loquamur, quia non ad confusionem ejus, sed ad excusationem nostram hoc dicimus, non eo erat deterioris conditionis, in bello fuit officio et beneficio nostro usus, quomodo quod pro se adversus illum admisit contra se pro alio non admittet?] Numquid apud nos debet esse pondus et pondus, mensura et mensura, quorum utrumque est abominabile apud Deum? Postremo quum inter reges ipsos reformata fuerint pacis fœdera, et utrinque præstito proprio juramento firmata, quæ tamen usque ad tempus prætaxatum servata non fuerint, numquid non poterimus de juramenti religione cognoscere, quod ad judicium ecclesiæ non est dubium pertinere, ut rupta *pacis fœdera reformentur*? Ne ergo tantam discordiam videamur sub dissimulatione favere, *dissimulare religiosorum locorum* excidium, et stragem negligere populi Christiani, dilecto filio abbati Casemarii prædicto legato dedimus in præceptis, ut nisi rex ipse vel solidam pacem cum prædicto rege reformet, vel treugas ineat competentes, vel saltem humiliter patiatur, ut idem abbas et venerabilis frater noster archiepiscopus Bituricensis de plano



The claim which Innocent makes is no doubt one of great magnitude, but it is very necessary that we should observe carefully the grounds upon which Innocent rests it, and

notice again the omission of all claim to act as one who possessed a political authority superior to that of the temporal sovereign. His claim is based on two principles—first, the religious one, that any question of transgression or sin by one man against another belonged to the Church's jurisdiction, and therefore especially any transgression against peace, and any question concerning the obligation or violation of oaths; secondly, on the appeal to a legal ordinance, which permitted any party in a civil suit at any time to take the case from the civil court to that of the bishop. Innocent says that this law had been made by Theodosius and renewed by Charles the Great: the latter statement is incorrect, being based upon the spurious collection of Capitularies of Benedictus Levita (ii. 366); but it seems that the original source of the constitution is a genuine law of Constantine. It is contained in the constitutions of Sirmond, and Hanel and Maassen have argued that this one is genuine, though they think that it was repealed by Arcadius and Honorius (Cod., i. 4. 7), and by a Novel of Valentinian (iii. 34. 1).[1]

Whatever may be said as to the grounds upon which Innocent bases his claims, it is quite clear that we have here no pretension to a general political supremacy. It is perhaps worth while to put beside this a Decretal of Alexander III., and another of Innocent III., which, in regard to smaller matters, seem to illustrate the same principle. In the first of these Alexander III. deals with a case in which certain knights had been summoned before the Bishop of Trier about some matters concerning the fiefs which they held from a secular lord. Their lord forbade them to answer about the

cognoscant, utrum justa sit queri*monia, quam contra eum proponit* coram ecclesia rex Anglorum, vel ejus exceptio sit legitima, quam contra eum per suas nobis literas duxit ex primendam, juxta formam sibi datam a nobis procedere non omittat Ideoque universitatibus vestris per apostolica scripta mandamus, et in virtute obedientiæ districte præcipimus, quatenus postquam idem abbas super hoc mandatum fuerit apostolicum exsecutus, *sententiam ejus, imo nostram verius,* recipiatis humiliter et vos ipsi servetis et faciatis ab aliis observari, securi, quod si secus egeritis inobedientiam vestram puniemus"

[1] 'Constit Sirmond,' I ed Hanel, Introduction, and Maassen, 'Geschichte der Quellen des Kanonischen Rechts,' vol i p 794, note 11.



secular fiefs in the bishop's court, and the bishop excommunicated them. Alexander III. annulled the excommunication, and ordered the case to be determined by the feudal lord: only in case he should act unjustly does he order the matter to go to the ecclesiastical court.[1] In the second, Innocent III. orders the Bishop of Vercelli to declare null and void any letter which may be produced from the Holy See dealing with matters which belong to the secular courts of Vercelli. Only if the consuls and commune of Vercelli refuse to do justice to those who appeal to their court, then suitors may have recourse to the court of the bishop or the Pope, and this is permitted, especially because at that time the empire was vacant, and there was no secular superior to whom they might appeal for justice.[2] It is worth while to notice how in both these cases the Popes, while maintaining the principle that the Church was bound to protect those who were oppressed or unjustly treated, yet emphatically set aside any attempt on the part of Church authorities to supersede the ordinary process of secular justice.

[1] 'Decretals,' ii 2 6 (Alex III) "Ex transmisa nobis insinuatione B C et W militum ecclesiæ tuæ intellexi mus, quod, quum R de Cassaville eos super quadam possessione coram *venerabili fratre nostro Trecensi epis*copo traxisset in causam, nobilis vir de Campis eorum dominus, [a quo possessiones tenebant] sub debito fidelitatis eis inhibuit ne de sæculari feudo in judicio ecclesiastico respond erent Itaque præfatus episcopus in eos velut in contumaces excommuni cationis sententiam promulgavit etc (et infra) [Mandamus, quatenus præfatos milites ab excommunicatione contradictione et appellatione cessante absolvas etc] (et infra) Deinde per dominum feudi causam jubeas termini, et si ipse aliquid malitiam distulerit, tu ei sublato appellationis obstaculo debitum finem imponas"

[2] 'Decretals,' ii 2 10 (Inn III) "Mandamus quatenus si quando a laicis Vercellensibus litteras super rebus, præcipue quæ forum seculare contingunt, a sede Apostolica contigerit impetrari, eas sublato appellationis obstaculo, decernas auctoritate nostra irritas et inanes, dummodo dicti consules, et commune de se conquerentibus in judicio sæculari, exhibeant justitiæ complementum Liceat tamen ipsis, qui sub eisdem consulibus taliter duxerint contendendum, si se in aliquo senserint prægravari, ad tuam, sicut hactenus servatum est, vel ad nostram, si maluerint, audientiam appellare, hoc præsertim tempore, quo vacante imperio ad judicem sæcularem recurrere nequeunt, qui a superioribus in sua justitia opprimuntur Si vero consules justitiæ tanquam merito suspecti fuerint recusati, coram arbitris communiter electis de causa suspicionis agatur, quæ si probata fuerit esse justa, ad te vel ad nos pro justitia recurratur, sicut superius est expressum."

In two Summas described by Schulte, the Pope is called "verus imperator," and in one of them it is said that the emperor is his vicar.[1] It is clear that this judgment does not correspond with that of the Decretals.

[1] Summa Coloniensis on Gratian, Dec., C. ii. Q. 3. 7, 'Dict. Grat.': "Quare imperator potest infamiam abolere ideoque, cum papa super imperatorem, immo ipse verus imperator sit, non est dubium eum idem posse."

Summa Coloniensis on Gratian, Dec., C. ii. Q. 6. 3: "Hic quæritur an a sæculari tribunali in causis pecuniariis ad papam appellari possit. Videtur hoc inde quod papa verus imperator est."

Summa Parisiensis on Gratian, C. ii. Q. 6. 3: "Quod ad dominum papam de sæcularibus dicit, quid sit faciendum, sed non precipit, vel possumus dicere quod ipse est verus imperator et imperator vicarius ejus."

Quoted by J. F. von Schulte in 'Sitzungsberichte der Akademie der Wissenschaften.' Wien, 1870, pp. 111, 131. I owe the reference to note 12 in F. Maitland's translation of a part of Gierke's 'Das Deutsche Genossenschaftsrecht.'



# CHAPTER XI.

## THE THEORY OF THE RELATION OF CHURCH AND STATE.

### II.

In the passage quoted at the beginning of the last chapter, Stephen of Tournai speaks of the two peoples, the clergy and the laity, who dwell within the one state or commonwealth of the Church.[1] To the careless reader this might seem to imply that the secular authority is subject to the ecclesiastical. This would be a complete misunderstanding of his meaning; the Church, in the sense in which he uses it here, is not to be confused with the ecclesiastical organisation of which the Pope is the head. For Stephen is careful to say that the head of the Church, in the sense in which he is here using the word, is Christ, while the priesthood and the kingship are the heads of the two authorities which are within the Church. Stephen is putting into his own phrase the principle of the Gelasian theory of Church and State.

We have in the last chapter discussed the question how far this conception had been abandoned by the canonists in the eleventh and twelfth centuries, and its place taken by the theory that the Pope was supreme in secular things over the secular as well as over the ecclesiastical authority; and our examination has led to the conclusion that, whatever view may have been maintained in the heat of controversy, the Canon law of the period we are considering does not admit this principle, and the great Popes, so far as their judgment is embodied in the Canon law, repudiate this conception.

[1] See p. 198.

This does not mean that the authority of the Church is not of greater dignity than that of the State. Gelasius had confined himself to pointing out that the responsibility of the priest was greater than that of the king;[1] while Hincmar of Rheims added that the dignity of the bishop is greater, for he consecrates the king.[2] The Canon law holds to the conception of the greater dignity of the spiritual power; its general principle is well expressed in a phrase quoted by Ivo and Gratian as from Gregory Nazianzen, which lays stress upon the superior dignity of that authority which deals with the soul over that which only deals with the body.[3] In the last chapter we have quoted that phrase of Innocent III. in which he compares the spiritual power to the sun and the temporal to the moon.[4] These phrases illustrate the growing sense of the superior dignity of the ecclesiastical authority, but they do not mean that the Church claims authority over the State

The whole matter would indeed have been simple and easy if the spiritual society could be separated from the secular,—indeed Stephen's rather easy phrases would have been adequate if we could imagine this to be possible; in fact, of course this was impossible, for in fact the two jurisdictions ran across each other, or, to put it more correctly, the layman and the cleric were each subject not only to the one authority, but in some measure at least to both, and the two systems of law sometimes at least deal with the same subjects. The difficulties of the relations of Church and State in the Middle Ages arose in large measure from the very nature of things, while in a large measure also they were the results of historical conditions whose character we have considered in relation to the ninth century in the first volume, and which we shall have to consider in relation to the tenth, eleventh, and twelfth centuries

[1] Vol. i. pp. 191, 192.

[2] Vol. i. pp. 255, 256.

[3] Ivo, 'Decret.,' v. 5: "Suscipitisne libertatem verbi? Libenter accipitis quod lex Christi sacerdotali vos subjecit *potestati, atque istis* tribunalibus subdidit? Dedit enim et nobis potestatem, dedit et principatum multo perfectiorem principatibus vestris. Aut numquid justum vobis videtur si cedat spiritus carni? Si a terrenis cœlestia superuntur? si divinis præferantur humana?" Cf. Gratian, 'Dec.,' D. x. 6.

[4] See pp. 215, 216.



in a future volume. We cannot now anticipate this discussion, but we must bear in mind the fact that the eleventh and twelfth centuries were full of the clamour of the great controversy between the Empire and the Papacy, between the Kings and the Bishops, and that the real difficulty in the adjustment of this controversy lay, not so much in the fact that each side put forward unreasonable claims, as indeed they sometimes did, but much rather in the fact that the two jurisdictions did really cross each other, and that in the conditions of the society of that time it was very difficult indeed to find a satisfactory adjustment of claims which in themselves, or at any rate as related to the conditions and circumstances of those times, were reasonable. For that matter, the difficulty has not disappeared even in our time.

We have in the last chapter dealt with the supposed claim that the Pope was supreme over the State both in spiritual and temporal matters. We must now consider the more general relations of the authorities of Church and State.

We begin by considering the theory of these canonists with regard to the relations of Canon law and secular law. We have already discussed their conception of the Canon law itself, and it will be evident from this that whatever may have been the theory or practice of the ninth century, the Canon law recognises no authority of the secular power over Church law. The civil ruler has no authority over Canon law, but rather he cannot abrogate Canon law;[1] he has no authority to make laws in regard to ecclesiastical matters,[2]

[1] Ivo, 'Decret.,' iv. 187: "Imperiali judicio non possunt ecclesiastica jura dissolvi. Non quod imperatorum leges, quibus sæpe Ecclesia contra (circa) hæreticos utitur, sæpe contra tyrannos, atque contra pravos quosque defenditur, dicamus penitus renuendas; sed eas quidem evangelicis, apostolicis atque canonicis decretis, quibus postponendæ sunt, nullum posse inferre præjudicium asseramus." Cf. Gratian, 'Dec.,' D. x. 1.

[2] Gratian, 'Decretum,' D. xcvi., Gratianus: "Illud autem Honorii Augusti, quod de electione summi Pontificis supra constituisse legitur, nullius esse momenti probatur: cum non solum de ordinibus, sed nec etiam de rebus Ecclesiasticis laicis legatur aliquando attributa disponendi facultas. Unde quecumque a Principibus in ordinibus, vel in Ecclesiasticis rebus decreta inveniuntur, nul *lius auctoritatis* esse monstrantur." Cf. Rufinus, 'Summa Decret.,' D. xcvi.

—such regulations, even though well-intentioned and designed for the good of the Church, are void, and must be repudiated.[1] There is no doubt about the theory of the canonists: the Church has its own legislative authority, and its own system of legislation, which is wholly independent of the secular authority and of secular law. This principle is, so far, nothing more than the application of the Gelasian theory of the two authorities with their two spheres.

But now we come to a more difficult question, and that is, How far is the secular law subordinate to the law of the Church? The consideration of this question requires much care if we are to keep clear of mistakes into which even some very competent historians have fallen. One thing is perfectly clear in the theory of the canonists, and that is, that the secular law is inferior and subordinate to the law of God, and that no secular authority can lawfully make laws which are contrary to the law of God. This is very positively expressed in a phrase of the Pseudo-Isidorian decretals which is cited by Burchard of Mainz, by Ivo, and by Gratian,[2] and more tersely in another phrase quoted by the same canonists.[3] This principle is one about which there was no substantial difference in mediæval society. But the principle must not be misunderstood,—the law of God is not the same as the Canon law of the Church. We have discussed this subject in a previous chapter, and now only recall the necessity of careful distinction between the Divine law in the strict sense of the term, and the positive Canon law of the Church.[1] In considering the relation of the Canon law to the secular law, we must not confuse the authority of the Canon law with that of the law of God.

Canon law is binding upon all members of the Church, whether laity or clergy: those who do not obey it are to be held as though they repudiated the faith. This is very forcibly put in a passage from a letter of Leo IV. which is cited by Ivo and by Gratian.[2] There is no doubt about the principle that the layman as a member of the Church must obey the Canon law, with regard to all those matters which belong to the sphere of the Canon law. And more than this, there are strong phrases in the canonists which lay down the principle that all constitutions (*i.e.*, secular ones) contrary to the Canons and to the decrees of Rome are void.[3]

But,—and here we must be very careful,—this does not mean that the Canon law has any place or authority in secular matters: there is, indeed, no suggestion in any of these writers of any such notion. An examination of the context of the passage just quoted from Gratian will show that he is here only considering the question of the relation of the secular law to ecclesiastical affairs. It has been suggested that Gratian implies in these passages that if there is a conflict

[1] 'Decretals,' I. 2. 10: "A quibus (laicis), si quid *motu proprio* statutum fuerit, quod ecclesiarum etiam respiciat commodum et favorem, nullius firmitatis exsistit, nisi ab ecclesia fuerit approbatum, unde statutum Basilii de non alienandis prædiis rusticis vel urbanis, ministeriis et ornamentis ecclesiarum, illa reprobatum fuit potissima ratione, quod auctoritate non fuit Romani Pontificis roboratum."

[2] Burchard, 'Decret.,' xv. 8: "Non licet ergo imperatori, vel cuiquam pietatem custodienti, aliquid contra mandata divinitatis præsumere, nec quidquam quo evangelicis propheticisque seu apostolicis regulis obvicetur agere. Injustum enim judicium, et diffinitio injusta, regio metu, vel jussu a judicibus ordinata non valeat: nec quidquam quod contra evangelicam et propheticam aut apostolicam doctrinam, constitutionemque eorum sive sanctorum Patrum actum fuerit, stabit: et quod infidelibus aut hæreticis factum fuerit, omnino cassabitur." Cf. Pseudo-Isidore, 'Calix.,' I. ep. 1. 16. Cf. also Ivo, 'Decret.,' xvi. 9; 'Pan.,' ii. 141; Gratian, 'Decretum,' D. x. 2.

[3] Burchard, 'Decret.,' xv. 10: "Lex imperatorum non est supra Dei *legem* sed subtus." Cf. Ivo, 'Decret.,' xvi. 11; 'Pan.,' ii. 139; Gratian, '*Decretum*,' D. x. i.



[1] See chap. ix., especially pp. 165, 166.

[2] Ivo, 'Decret.,' iv. 72: "Quam ob causam luculentius et magna voce pronuntiare non timeo, quia qui illa quæ diximus sanctorum patrum statuta, quæ apud nos canones prætitulantur, sive sit episcopus, sive clericus, sive laicus, non *indifferenter receperit, ipse* convincitur nec catholicam et apostolicam *fidem, nec sancta* vera Christi evangelia quatuor utiliter et efficaciter, et ad *effectum* (profectum) suum retinere vel credere." Cf. Ivo, 'Panormia,' ii. 118, and Gratian, 'Decretum,' D. xx. 1.

[3] Ivo, 'Dec.,' xvi. 10: "Ut *constitutiones* contra canones et decreta præsulum Romanorum, vel *bonos mores*, nullius sint momenti." Cf. Gratian, 'Dec.,' D. x. 4.

Gratian, 'Dec.,' D. x., Gratianus: "*Constitutiones* vero principum ecclesiasticis constitutionibus non preminent, sed obsecuntur. . . ." Part II., Gratianus: "Ecce quod constitutiones principum ecclesiasticis legibus postponendæ sunt. Ubi autem evangelicis atque canonicis decretis non obviaverint, omni reverentia dignæ habeantur."

between the two systems of law, the secular must necessarily give way.[1] There is no reason to think that the question in this general sense is present to Gratian's mind at all in these passages. It will be useful to compare with these phrases of Gratian the comment which Rufinus makes upon this "Distinction." He observes that the statement, that secular laws which contradict ecclesiastical law are to be set aside, requires some analysis. There are two kinds of ecclesiastical law: the one is "merum"—that is, it is founded upon the divine ordinance, or that of the holy fathers,—such is the law of tithes; the other is "adjunctum vel mixtum"—that is, it really depends upon human law,—such is the law of prescription and other similar matters. Ecclesiastical laws, which are "mera," cannot be annulled by the laws of the emperor; but of those ecclesiastical laws which depend upon the imperial legislation there are some which can be thus annulled.[2]

It is plain that Rufinus recognises the fact that the two systems of law have each their own province, but that the two provinces are not wholly separate,—that there are at least some cases in which the Church regulations are related to secular laws, and that at least in some of these cases it lies with the secular authority to continue or to abrogate certain rules. Rufinus does not discuss the question who is to decide

[1] *I.e.*, by Gierke, 'Das deutsche Genossenschaftsrecht,' vol. iii. sect. 11, *note* 19

[2] Rufinus, Summa Decret.,' D. x.: "Illud autem, quod in subjecto capitulo dicitur, quod 'l ex imperatorum ecclesiastica jura dissolvere non potest,' non omnino indistincte pretereundum est. Sciendum ergo est quod jus ecclesiasticum aliud est merum solummodo, scil. ex divina constitutione vel patrum sanctorum descendens, ut jus decimationum, diocesium et hujusmodi; aliud adjunctum vel mixtum, scil. quod ex constitutione humanorum legum perpendit, ut *jus prescriptionis* et si qua similia. Mera itaque jura ecclesiastica leges imperatorum nulla ratione, nec in totum nec in partem, valent dissolvere; ea vero jura ecclesiastica que de imperatorum constitutionibus pendent, aliqua quidem sunt, que lege imperatorum in totum et in partem credimus quod possent convelli: que quidem magis in odium quorundam, quam in generalem favorem ecclesie instituta sunt, ut predictum jus prescribendi. Hoc enim jus ecclesie in partem cotidie dissolvitur, quando aliqua ecclesia ab imperatore privilegium impetrat, ne adversus eam ecclesia alia prescribat. In totum etiam putamus quod jus hoc posset extingui; si eum imperator legem daret, ut *omnis et omnium prescriptio* quantumvis longi temporis de cetero cessaret, ex tunc et deinceps nec ecclesia ullo modo prescribere posset."



in cases of a conflict between the two systems of law. On the whole, it does not appear that these canonists present any definite theory upon this subject: their general principle is clear, that each system of law is supreme within its own sphere.

Among the earlier writers the one who seems to come nearest to asserting the authority of the canons over the laws is the author of 'Petri Exceptiones.' We have quoted an important passage from him in the first part of this volume, and it is worth noticing that he speaks not merely of the legal authority of the canons of the first councils, but also holds that a new canon may abrogate an earlier law.[1]

There is also one passage in the Decretals which seems to assert the claim that where there is any doubt to which jurisdiction a particular question belongs, the matter should be referred to the Pope. This passage occurs in a decretal of Innocent III.: he had been asked by the Count of Montpellier to legitimatise his illegitimate children, and, while refusing to do this, sets out the grounds upon which he considered that the Papal See was competent to deal with the question. The treatment is complicated, but, as it seems, Innocent claims that the Roman See has always, and in all places, power to legitimatise as far as the qualifications for spiritual offices are concerned, but does not normally claim authority to legitimatise for secular purposes, such as inheritance, except in those territories which are subject to the temporal authority of the Pope. Where, however, there is no secular authority to which recourse can be had, as in the case of the King of France, who recognises no superior in temporal things, the Pope could deal with the matter if the King chose to submit it to him, though the King in the judgment of some had no need to do this, but could have dealt with the matter himself. The King of France had applied to him in such a case, and he had complied with his request. So far Innocent seems to make no very advanced claim. But he then goes on to say that not only in the patrimony of the

[1] Cf. p. 80, note 1.

Church—that is, in the Papal States—but also in other territories, in certain cases, the Pope exercises temporal jurisdiction "casualiter." He explains this by saying that he does not wish to interfere with other men's rights, and he recognises that Christ bade men give to Cæsar what was Cæsar's, and refused to decide the case of the man who asked him to judge between him and his brother about their inheritance. But, he continues, in Deuteronomy the principle is laid down that in difficult and obscure cases the matter should be referred to the decision of the priest, and that his judgment should be accepted. He urges that the Pope occupies the position of the priest in the Deuteronomic legislation, and that this principle applies especially to those cases where there is any uncertainty whether the matter belongs to the ecclesiastical or the secular authority.[1]

[1] 'Decretals,' iv. 17 13 (Innocent III, "Per Venerabilem"). "Rationibus igitur his inducti regi gratiam fecimus requisiti, causam tam ex veteri quam ex novo *testamento trahentes*, quod non solum in ecclesiæ patrimonio super quo plenam in temporalibus gerimus potestatem, verum etiam in aliis regionibus, certis causis inspectis, temporalem jurisdictionem casualiter (carnaliter—c a g h k, carnaliter—Reg) exercemus, non quod alicno juri præjudicare velimus, vel potestatem nobis indebitam usurpare, quum non ignoremus, Christum in evangelio respondisse 'Reddite quæ sunt Cæsaris Cæsari, et quæ sunt Dei Deo' Propter quod postulatus, ut hereditatem dividerct inter duos, 'quis,' inquit, 'constituit me judicem super vos?' sed, quia, sicut in Deuteronomio continetur, 'si difficile et ambiguum apud te judicium esse perspexeris, inter sanguinem et sanguinem, causam et causam, lepram et non lepram, et judicium inter portas tuas verba videris variari surge et adscende ad locum, quem elegerit Dominus Deus tuus, venies ad sacerdotes Levitici generis, et ad judicem, qui fuerit illo tempore, quæresque ab eis, qui indicabunt tibi judicii veritatem, et facies quæcumque dixerint qui præsunt loco, quem elegerit Dominus, sequerisque eorum sententiam nec declinabis ad dexteram vel ad sinistram Qui autem superbierit, nolens obedire sacerdotis imperio, qui eo tempore ministrat Domino Deo tuo, decreto judicis morietur, et auferes malum de Israel' Locus enim quem elegit Dominus, apostolica sedes esse cognoscitur sic, *quod eam Dominus in se ipso [e] lapide* angulari fundavit. . Tria quippe distinguit judicia primum inter sanguinem et sanguinem, per quod criminale intelligitur et civile, ultimum inter lepram et lepram, per quod ecclesiasticum et criminale notatur, medium inter causam et causam, quod ad utrumque *refertur*, *tam ecclesiasticum* quam civile, in quibus quum aliquid fuerit difficile vel ambiguum, ad judicium est sedis apostolicæ recurrendum, cujus sententiam qui superbius contempserit observari mori præcipitur et auferri malum de Israel, id est, per excommunicationis sententiam, velut mortuus, a communione fidelium separari."



This is a far-reaching claim, and in the course of the thirteenth century furnishes one of the starting-points for the most extreme claims made by some writers, that the Pope possessed in the last resort all temporal as well as all spiritual authority.[1] But that Innocent III. himself contemplated such an interpretation of his claim seems very doubtful, especially in view of the great caution with which, as we have seen, he expresses himself.[2] Still it remains true that Innocent III. does in this passage, clearly though incidentally, set forward the claim that in cases of conflict between the spiritual and the temporal jurisdiction, the spiritual power is to decide. It must, however, be remembered that the incidental statement of such a view in a passage in the Decretals does not justify the assertion that it was an established principle of the Canon law that in cases of conflict between it and the secular law, the Canon law was necessarily to prevail. The normal view of the Canon law down to the thirteenth century is that the sphere of the two systems of law are distinct, and that each is supreme in its own sphere.

If there were grave difficulties in adjusting the relations of canon law and secular law, it was even more difficult under the terms and traditions of mediæval society to adjust the relations of the clergy and the laity to the two authorities. It cannot seriously be questioned that Gelasius and the ecclesiastical writers of the ninth century clearly recognised that in secular matters the clergy were subject to the jurisdiction of the secular power.[3] But there had gradually grown up in the later centuries of the ancient empire a great system of exemptions of the clergy from the jurisdiction of the ordinary secular courts, and these exemptions continued and developed in the new states which grew up on the ruins of the ancient empire in the West. In an earlier chapter of this volume we have discussed the treatment of these exemptions by the civil lawyers, and have pointed out the extent to which they were

[1] Cf esp. R Scholz, 'Die Publizistik zur Zeit Philipps des Schonen und Bonifaz VIII.,' esp. pp. 84-90.

[2] Cf pp. 213 223.

[3] Cf vol. i pp 190, 191, and pp. 257 264.

founded upon the legislation of the emperors from Constantine to Justinian.[1] We must now consider the mode in which these matters were discussed and the conclusions which were maintained by the canonists and the Canon law.

It is not necessary to discuss the question of the procedure in ecclesiastical cases where the clergy were concerned. No canonist suggests that in such cases any one but the bishops had jurisdiction. The really difficult question arises as to civil and criminal cases in which the clergy were concerned. It would take a long time to go through all the canons referring to the subject; but the very detailed discussion by Gratian will serve to give a sufficiently clear impression of the general position of the canonists. In the first Question of the eleventh Cause Gratian has collected a great mass of canons bearing upon the subject, and adds his own observations and conclusions. He first cites many authorities which seem to show that the ecclesiastic must not be brought before the secular courts unless he has first been degraded. To this, he says, it has been replied that while the clergy, as far as their office is concerned, are only subject to the bishop's authority, they are under the emperor so far as relates to their estates, for it is from the emperor that they have received them; and he refers to that famous passage which is quoted in 'Distinction' viii. 1, in which Augustine maintains that property is held only by the laws of the emperor. Gratian then cites a number of canons which seem to teach that the clergy must pay taxes to the emperor, and that the bishops are not to interfere in secular matters, and says that it is therefore contended that in civil cases the clergy are to go to the secular courts, while they are not to be taken to the secular courts in criminal cases unless they have been degraded. But he urges emphatically that, plausible though this may seem, the canons and the secular law do actually forbid that the clergy should be brought before the secular courts either in a civil or a criminal matter, and cites a number of canons which assert this principle. And, finally, he concludes that unless in a civil case the bishop refuses to deal

[1] Cf. Part. I, chap. viii.



with the matter, and until in a criminal case the cleric has been degraded, the clergy must not be brought before either a civil or a criminal court.[1]

This conclusion of Gratian does fairly represent the whole tendency of the Canon law in this period: the treatment of the subject by Rufinus and Stephen of Tournai is for the most part the same.[2]

[1] Gratian, 'Decretum,' C xi Q 1, Part I,—citation of canons to show that the Ecclesiastic must not be brought before the secular court After c 26, Gratianus "Cum ergo his omnibus auctoritatibus clerici ante civilem judicem denegentur producendi, cum nisi prius depositi, vel nudati fuerint, curiæ non sint representandi, patet, quod ad secularia judicia clerici non sunt pertrahendi"

Part II, Gratianus "His ita respondetur Clerici ex officio sunt subpositi episcopo, ex possessionibus prediorum imperatori sunt obnoxii Ab episcopo unctionem deum nationes et primitias accipiunt, ab imperatore vero prediorum possessiones nanciscuntur Unde Augustinus ait supra Johannem 'Quo jure villas defendis? divino an humano,' &c Require in principio, ubi differentia designatur inter jus naturæ et jus constitutionis Quia ergo ut predia possideantur imperiali lege factum est, patet quod clerici ex prediorum possessionibus imperatori sunt obnoxii"

Gratian then cites some canons which show that the clergy should pay taxes to the emperor, and might seem to indicate that the clergy may be brought into the secular courts in civil cases, and in criminal cases when they have been degraded His comment is as follows —

Gratianus "Ex his omnibus datur intelligi, quod in civili causa clericus ante civilem judicem est conveniendus Sicut enim ecclesiasticarum legum ecclesiasticus judex est administrator, ita et civilium non nisi civilis debet esse executor Sicut enim ille solus habet jus interpretandi canones, qui habet potestatem condendi eos, ita ille solus legum civilium debet esse interpres, qui eis jus et auctoritatem impertit In criminali vero causa non nisi ante episcopum clericus examinandus est et hoc est illud, quod legibus et canonibus supra diffinitum est, ut in criminali videlicet causa ante civilem judicem nullus clericus producatur, nisi forte cum consensu episcopi sui, veluti, quando incorrigibiles inveniuntur, tunc detracto eis officio curiæ tradendi sunt . . . Quia ergo iste non in criminali sed in civili causa clericum ante civilem judicem produxit, non est judicandus transgressor canonum, nec est dicendus pertraxisse reum ad judicem non suum, quia de civili causa non nisi civilis judex cognoscere debet"

Part III, Gratianus. "E contra ea quæ in actoris defensione dicta sunt, verisimilia quidem videntur, sed pondere carent Sacris enim canonibus et forensibus legibus tam in civili quam in criminali causa clericus ad civilem judicem pertrahendus negatur"

Gratian then cites a great number of canons which assert the principle that the clergy must not be brought before the secular court, and concludes—

After c 47, Gratianus: "Ex his omnibus datur intelligi, quod clericus ad publica judicia nec in civili nec in criminali causa est producendus, nisi forte civilem causam episcopum decidere noluerit, vel in criminali sui honoris cingulo eum nudaverit"

[2] Rufinus, 'Summa Decret.,' C xi Q 1, Stephen of Tournai, 'Summa Decret,' C xi. Q 1.

The clergy are thus, in the normal canonical theory, exempt from the jurisdiction of the secular courts. We have, in considering the matter, already touched upon the question of the taxation of the clergy by the secular authority, but we must consider this a little further. The treatment of the subject by Gratian is not very full, and is incidental to a discussion of the canons which prohibit the bearing of arms by the clergy, but it will serve to illustrate the canonical view. Gratian holds that those ecclesiastics who live on tithes and first-fruits are free from all secular taxation. As to those who hold estates and houses, he first suggests that they are liable to pay taxes, but then raises the question whether even these properties are liable to taxation, and, after quoting some authorities which seem to justify the view, he finally concludes that the clergy are only to pay taxes on those things which they have bought or have received as gifts from living persons.[1] Gratian's treatment is both inadequate and obscure,

[1] Gratian, 'Decretum,' C xxiii Q 8, After c 20, Gratianus "Talibus nulla occasio relinquitur occupationis secularis militiæ quia cum de decimis, et primitiis vivant, tanquam filii summi regis in omni regno a terrenis exactionibus liberi sunt, ita ut dicere valeant, 'venit Princeps hujus mundi et in nobis non habet quicquam' Porro alii sunt, qui non contenti decimis, et primitiis, prædia, villas et castella, et civitates possident, ex quibus Cæsari debent tributa, nisi Imperiali benignitate immunitatem ab hujusmodi pro meruerint Quibus a Domino dicitur, 'Reddite que sunt Cesaris, Cesari, et que sunt Dei, Deo' Quibus idem Apostolus, 'Reddite omnibus debita, cui tributum, tributum, cui vectigal, vectigal'"

This is followed by two quotations to illustrate the propriety of the clergy paying taxes on certain property, but then Gratian suggests that this is after all doubtful

Part II, Gratianus "Quamvis etiam hujusmodi non videantur Imperialibus excutionibus subjiciendi. Nam, cum tempore famis cunctorum Egyptiorum terram sibi emerit Pharao, atque sub eadem fame suæ servituti cunctos subjiceret, sacerdotibus ita necessaria *subministravit, ut nec* possessionibus, nec libertate nudarentur, Domino ex tunc pronuntiante, sacerdotes in omni gente liberos esse oportere"

Gratian then cites certain passages which he understands to mean that the clergy are not to pay taxes even on certain Church lands. He concludes as follows —

After c 25, Gratianus: "Hinc datur intelligi quod de his, quæ Imperiali beneficio, vel a quibuslibet pro beneficio sepulture Ecclesia possidet, nullius juri, nisi Episcopi, teneantur astricta. De his vero, quæ a quibuslibet emerit, vel vivorum donationibus acceperit, Principibus consueta debet obsequia ut et annua eis persolvat tributa, et convocato exercitu cum eis proficiscatur ad castra."



but it may suffice for our present purpose, which is, not to discuss the question of the taxation of the clergy in the Middle Ages, but to consider the theory of the canonists as to the relation of the clergy to the secular power.

When we have recognised the whole effect of the immunities of the clergy from the jurisdiction of the secular courts, and from taxation of certain sorts, we can ask whether we are to conclude that the canonists held that the clergy were not properly subject to the secular authority. Such general phrases as those of Stephen of Tournai which we have quoted[1] might almost seem to suggest this. But such a conclusion was not actually drawn by the canonists. We have just seen that Gratian admits that on certain kinds of property the clergy must pay taxes, and he seems to give as the reason for this that certain kinds of property are held by the clergy under the sanction of the secular power. In virtue of this fact then at least, the clergy, so far as they held such property, are subject to the secular power. This seems to be what was meant by Innocent III. in that decretal which we have cited in a previous chapter, when he says that the emperor has superiority in temporal things, but only over those who hold temporal things from him.[2] It is not clear from the passage as it stands whether Innocent meant to admit that some of the clergy held temporal things from the emperor, but he probably did so, while he in the same passage emphatically repudiates the criminal jurisdiction of the secular power over the clergy, on the ground that this only extends over those who use the sword.

The principle that in some sense the clergy are normally subject to the temporal power is very clearly maintained by Rufinus in a passage in which he asserts that the Pope is in no sense subject to this authority, but that the metropolitan is subject with respect to secular matters.[3] Damasus,

[1] Cf p 198

[2] 'Decretals,' I 33 6, § 2 "Quod autem sequitur, 'regi tanquam præcellenti,' non negamus, quin præcellat imperator in temporalibus illos duntaxat, qui ab eo suscipiunt temporalia" For the whole passage, cf. p. 215, note 1

[3] Rufinus, 'Summa Dec,' D xviii. c 13, "Si episcopus" "Ex hoc quidem habere volunt quia, si imperator vocaverit aliquem clericum et

indeed, goes much further, and maintains that as Christ and His apostles were subject on earth to the emperor, so must their successors also be subject, and he repudiates the doctrine that the Pope has the two swords.[1] Damasus, however, would seem to have belonged to the anti-papal party, and his statements must be taken as representing that position. On the whole, it seems to be fairly clear that the Canon law, as late as the Decretals of Gregory IX., knew nothing of a theory that the clergy are outside of the sphere of secular authority. As ecclesiastics they may be so, but as men they are, in some degree at anyrate, subject to it.

The two "peoples," then, of the clergy and the laity, are not to be conceived of as living wholly separate from each other under different jurisdictions. The clergy are in some measure under the secular authority, and the laity under the ecclesiastical. But it is also clear that the clergy have some special rights and obligations of intervention in secular affairs. We have in the last chapter discussed the question whether these canonists believed that the Church exercised supremacy over the State, and we have seen reason to conclude that this was not normally the case. We must now, however, be careful to notice that the Canon law does maintain that the Church has the right and the duty to intervene in certain cases for the defence of those who have been unjustly treated by the secular power.

We can trace this principle throughout the canonists with whom we are dealing. Regino, Burchard, and Ivo cite a

postea vocaverit eum apostolicus, primo adire imperatorem debet, postmodum apostolicum Sed longe alia ratio est in apostolico, alia in metropolitano, metropolitanus quippe pro secularibus principis subjacet, summus vero pontifex in nullo ei subest Nec de alio episcopo hoc est intelligendum, nisi de eo, quem ab imperatore comitatum habere constiterit"

[1] Damasus, 'Burchardica,' R 128, "Solutio" "In temporalibus vero superioritatibus, et omnibus juribus mundanis sicut Deus et apostoli in terris Imperatori subditi fuerunt, ita quoque successores eorundem subjici debent, ne sibi judicium acquirant, ut in illo, 'magnum' (C xi Q 1 27), et xi Q 111 qui resistit (C xi Q 3 97) Nam imperialis potestas a Deo est ut in illa, 'si imperator' (D xcvi 11). Quomodo autem Papa utrumque gladium, et cœlum et terram a Deo in solidum acceperit, Deus novit."



canon which lays upon the bishops the duty of remonstrating with those judges and others who oppress the poor, and bids them, if their intervention should be ineffectual, address themselves to the king, that he may restrain the oppressor.[1] Burchard and Ivo add a canon bidding the bishops excommunicate those judges and powerful men who oppress the poor, if they will not listen to their protests.[2] But this is not all: Ivo summarises the provisions of the Novels that if any suitor suspects the governor of the province, he is entitled to demand that the bishop should sit with the governor to hear the case.[3] We have already pointed out that this is the doctrine also of some of the civilians.[4] To this is probably related the claim that in civil cases one party to a suit could take the case from the secular court to that of the bishop even against the will of the other party. This is quoted by Deusdedit, by Ivo, and by Gratian, and part of the passage is cited by Innocent III. in that letter which we have already discussed.[5] As we

[1] Regino of Prum, 'De Synod causis,' ii 296 "Episcopi in protegendis populis ac defendendis impositam sibi curam non ambigant, ideoque dum conspiciunt judices ac potentes pauperum oppressores existere, prius eos sacerdotali commonitione redarguant, et si contempserint emendari, eorum insolentiam regus auribus intiment, ut quos sacerdotalis admonitio non flectit ad justitiam, regalis potestas ab improbitate coerceat" Cf Burchard of Worms, 'Decret,' xv 1, and Ivo, 'Decret,' xvi 2. (Burchard and Ivo substitute for the last clauses the rule that they shall excommunicate those who will not listen)

[2] Burchard of Worms, 'Decret,' xv 3 "Ut judices aut potestates qui pauperes opprimunt, si commoniti a pontifice suo non emendaverint, excommunicentur." Cf Ivo, 'Dec,' xvi. 3

[3] Ivo of Chartres, 'Decret,' xvi 143 "Si cui præses provinciæ suspectus esse videtur, et litigare apud eum solum noluerit, liceat ei ad episcopum invocare, ut cum ipso considente causam audiat, et vel amicali compositione litigatores transigere faciant, vel cognitaliter, ita tamen ut sententia legibus consentanea imponatur." Cf. 'Novel,' 86, 1-4

[4] Cf pp 87 90

[5] Deusdedit, 'Coll. Can,' iv 283, "In Cap Karoli Imp". "Volumus atque præcipimus, ut omnes nostræ ditioni . subjecti . hanc sententiam quam ex xvi° Theodosii imperatoris libro, capitulo videlicet xi° ad interrogata Ablavii ducis, quam illi et omnibus prescriptam misimus inter nostra capitula pro lege tenenda, consulto omnium fidelium nostrorum posuimus, lege cunctis perpetua teneant —Idem, 284. Quicumque litem habens sive petitor fuerit, vel in initio litis, vel decursis temporum curriculis, sive cum negotium peroratur, sive cum jam ceperit promi sententia, si judicium elegerit sacrosanctæ legis antistitis, illico sine aliqua dubitatione etiam si alia pars refrangatur, ad Episcoporum judicium cum sermone litigantium dirigatur. Multa enim quæ in judicio copiosæ

have pointed out, the passage is contained in the Constitutions of Sirmond, and is a genuine law of Constantine, but was probably repealed by later legislation. No re-enactment of it can be traced in any genuine legislation of Charlemagne, but it is among the spurious Capitularies of Benedictus Levita. There is no trace of any recognition of this by the civilians; indeed its provisions go far beyond what they recognised. But the general principle of the recourse to ecclesiastical authority in defect of justice was recognised by them, and was clearly based upon the legislation of the ancient empire.

The Decretals are generally careful to limit the claim of the spiritual court, with respect to secular matters, to the case of defect of justice. We have already quoted two passages which illustrate this; [1] but as the matter is so important, it is worth while to take note of some other passages. In a Decretal letter addressed to the Archbishop of Rheims by Alexander III., in answer to a question of the Archbishop whether an appeal could be legitimately made from a civil court to the Papal See, he says that such appeals could be made by those who were subject to the Pope's temporal jurisdiction; but though the custom of the Church might permit such appeals even in other cases, the strict law did not allow them.[2] Again, Innocent III. refused to allow a certain widow to bring her case into the spiritual court unless it related to matters which belonged to the ecclesiastical judges, unless the secular court refused to administer justice to her.[3]

proscriptionis vincula promi non patiuntur, investigat et promit sacrosanctæ religionis auctoritas. Omnes itaque causæ quæ prætorio jure vel civili tradantur, Episcoporum sententiis terminatæ, perpetuo stabilitatis jure firmentur. Nec liceat ulterius retractare negotium quod Episcoporum sententiis deciderit." Cf. Ivo, 'Decret.,' xvi. 312; Gratian, 'Decretum,' C. xi. Q. 1. 35-37; and 'Decretals,' II. 1. 13; and for a discussion of the sources of the regulation, cf. p. 222.

[1] See pp. 222, 223.

[2] 'Decretals,' ii. 28. 7: "Denique, quod in fine questionum tuarum quæris, si a civili judice ante judicium vel post ad nostram audientiam fuerit appellatum, an hujusmodi appellatio teneat: tenet quidem in his, qui sunt nostræ temporali jurisdictioni subjecti; in aliis vero, etsi de consuetudine ecclesiæ teneat, secundum juris rigorem credimus non tenere."

[3] 'Decretals,' ii. 2. 11: "Nos igitur attendentes, quod aliis injustitiam facere non debemus: mandamus, quatenus nisi sit talis causa quæ ad ecclesiasticum judicem pertinere noscatur, ei supersedere curetis: dummodo per judicem secularem, suam possit justitiam obtinere, alioquin non obstante ipsius contradictione, causam ipsam . . . ratione prævia terminetis."

[1] Stephen of Tournai, 'Summa Decret.,' C. ii. Q. 6. 3: "'Omnis oppressus libere sacerdotum (si voluerit) appellet judicium;' per sententiam vel ante gravatus injuste. 'Sacerd.,' *i.e.* synodi, ubi resident sacerdotes scil. episcopi, vel sacerdotes superiorum prælatorum. 'Ad majorem sedem,' metropolitani vel primatis. Quæritur, utrum in forensibus causis laicus possit appellare ad apostolicum? Quidam dicunt non posse, nisi ad imperatorem, ab impera-



The matter was doubtless one of great difficulty: a recourse of some sort to the bishop had no doubt been permitted in the later centuries of the ancient empire, and had been adapted to the elaborate organisation of the administrative and judicial system of those centuries, and during the period when the new political organisations of the Middle Ages were only slowly taking shape, an appeal to the ecclesiastical protection was natural, and probably not resented. But as mediæval civilisation became organised and the secular power developed a coherent machinery, the intervention of the ecclesiastical authority in secular matters became more and more difficult to harmonise with the regular working of government. By the twelfth and thirteenth centuries, customs which had once worked without difficulty were becoming matters of serious controversy. But we cannot here discuss this subject fully: it cannot be properly dealt with in relation merely to the Canon or the Civil law.

The matter may very well here be concluded by noticing some sentences of Stephen of Tournai, which illustrate the hesitation and uncertainty which was coming over the minds of many practical men. Stephen comments upon a passage quoted by Gratian from Pseudo-Isidore, which lays down, in broad terms, the right of any oppressed person to invoke the protection of the Church, and then adds that it was a disputed question whether a layman could appeal in secular law-cases to the Pope. Some said that no such appeal could be made, while others maintained that this could be done, for even the emperor acknowledged the Roman Church as his mother, and the Pope as his father, for it was from him that he received the imperial crown.[1]

The claim that the ecclesiastical officers had not only the right but the duty of intervening in secular affairs seems to us specially important, as illustrating the fact that it was impossible to secure a complete separation between the two spheres of the spiritual and the temporal authorities. In some cases, at least, the ecclesiastical authority could intervene with regard to matters which primarily concerned the secular authority; or, to put the matter in another way, matters which seemed at first sight of purely temporal significance might frequently prove to have a relation with principles with which the spiritual authority was primarily concerned. Stephen of Tournai's facile phrases about the separation of the two spheres were misleading rather than illuminating.

It is important to observe that in another direction still this receives important illustration. There are traces even in the Canon law of the eleventh and twelfth centuries of the principle that the laity had some, if an undefined, share in the government of the Church. We do not here discuss the question of patronage and investiture: these matters are so closely connected with the great controversy of the times that the canonical treatment of these subjects can only be considered along with the general history and literature of that subject: we hope to deal with the matter in another volume. But it is worth while to notice here that even the canonical collections of the eleventh and twelfth centuries contain passages which imply that the laity, formerly at least, had sometimes possessed the right to be present at the Synods of the Church. Some of the canonists reproduce older regulations which imply the presence of the laity at some Church assemblies. Burchard of Worms quotes the thirteenth canon of the Council of Tarragona, which enjoins upon metropolitans to summon to their synods not only the cathedral

tore autem et præfecto provinciæ non est appellandum, sed supplicandum. Et dicunt quidam, posse appellare ad apostolicum a seculari judice, alii contra; nam ipse imperator non dedignatur vocare ecclesiam Romanam matrem suam et apostolicum patrem suum; ab eo enim accepit coronam imperii."



and diocesan clergy, but also some of the laity.[1] Ivo cites a canon of the Fourth Council of Carthage in a form which implies that laymen might be present at synods, and bids them speak only on the permission of the clergy.[2] These reminiscences of an older system of Church authority have some importance as indicating that even in the canon law of the eleventh and twelfth centuries there was still some tradition that the laity had some place in Church authority. This is further illustrated by the citation, both by Deusdedit and Gratian, of a sentence from a well-known letter of Pope Nicholas I. to the Emperor Michael, which repudiates indeed the claim of the Emperor to take part in the discipline of the Church, but admits that the Emperor and all the laity may perhaps have some claim to be present at those synods which deal with the faith, inasmuch as this is a matter which is related not only to the clergy but to all Christian people.[3] Such phrases may be difficult to reconcile with the general tendencies of the Canon law in the eleventh and twelfth centuries, but we must take account of them in estimating the whole character of the mediæval position.

We have seen that the Canon law does not deny that the clergy are in secular matters subject to the authority of the secular power, though it insists upon the importance of certain important exemptions of the clergy from the jurisdiction of the secular courts and from certain kinds of taxation. It is not necessary to bring forward evidence to

[1] Burchard, 'Decret.,' i. 48: "Epistolæ tales per fratres a metropolitano sunt dirigendæ, ut non solum de cathedralibus Ecclesiæ presbyteris, verum etiam de diœcesanis ad concilium trahunt, et aliquos de filiis Ecclesiæ secularibus secum adducere studeant."

[2] Ivo, 'Decret.,' xvi. 13: "Laici in synodo, præsentibus clericis, nisi ipsis jubentibus, docere non audeant." Cf. Fourth Council of Carthage, 98 (the text in Bruns' 'Canones Conciliorum,' omits the words "in synodo").

[3] Gratian, 'Decretum,' D. xcvi. 4: "Ubinam legistis, imperatores antecessores vestros sinodalibus conventibus interfuisse, nisi forsitan in quibus de fide tractatum est, que universalis est, que non solum ad clericos, verum etiam ad laicos et ad omnes omnino pertinet Christianos." Cf. Deusdedit, 'Coll. Can.,' iv. 164.

show that the layman is in spiritual matters subject to the jurisdiction of the Church. We have in the last chapter dealt with the question of the excommunication of emperors or kings: if the supreme secular ruler was thus subject in spiritual matters to the spiritual authority, there could be no doubt as to the position of the private layman. We have found no trace in those canonists whose works we have been able to use of any recognition of the principle asserted by John Bassianus and Azo, that when the layman was brought before the spiritual court the secular judge was to sit with the bishop.[1] We shall recur to this matter in a later volume, when we deal with such well-known regulations as those of William the Conqueror in England, or of the Constitutions of Clarendon, that the king's tenants in chief and ministerials, and the men of the king's boroughs and domains, might not be excommunicated without the king's consent, or at least until the matter had been brought before the king or his Justiciar.[2]

But it is necessary here to take account of an aspect of the canonical theory of excommunication which we have not yet had occasion to consider, and which is sometimes overlooked. We have in the last chapter briefly illustrated the tremendous nature of excommunication, and its far-reaching consequences. But we must now be very careful to recognise that the power of excommunication was not an arbitrary power, but could only be exercised for lawful reasons and in a lawful manner. An unreasonable or unjust sentence of excommunication had not in the canonical theory any final validity: it might be right that a man should submit to it until it could be revised by competent authority, but such a sentence had no effect before God. The canonical writers are quite aware of this principle,—indeed they discuss the matter very carefully, and lay down some conclusions without hesitation.

Cardinal Deusdedit has a very important summary of passages from the patristic writings dealing with the subject. An unjust excommunication injures him who inflicts the sentence rather than him who is sentenced; the Holy Spirit

[1] Cf. p. 86.

[2] We have not found it possible to deal with this in detail (1928).



by whom men are bound or loosed will inflict on no man an undeserved punishment; justice annuls all unjust sentences; the man who is unjustly sentenced will be recompensed.[1]

Gratian discusses the subject in the third Question of the eleventh Cause, and cites an immense number of passages bearing upon it. He first quotes many canons which seem to show that a sentence of excommunication, whether it is just or unjust, must be respected by the person condemned until he has brought his case before a synod of bishops.[2] But he then points out that there are also canons which seem to point to another conclusion—that is, that an unjust sentence is not to be obeyed;[3] and he cites a number of canons which

[1] Deusdedit, 'Coll Can,' IV. 72. "Augustinus ad Auxilium Episcopum inter cætera Illud plane non temere dixerim quod si quisquam fidelium fuerit anathematizatus iniuste, ei potius obierit qui facit, quam ei qui hanc patitur iniuriam. Spiritus enim sanctus habitans in sanctis per quem quisque legatur aut solvitur, immeritam nulli ingerit pœnam. . . Idem ad Auxilium Episcopum qui excommunicaverat Cassianum cum familia sua . . . cepisti habere fratrem tuum tamquam publicanum, ligas illum in terra, sed ut juste facias vide. Nam iniusta vincula dirumpit justitia. Idem in sermone Domini in monte Temerarium judicium plerumque nihil nocet ei de quo *temerarie judicatur*. Ei autem qui temere judicat, ipsa temeritas necesse est, ut noceat. . . . Idem *in expositione psalmi* CII Si quis justus est qui iniuste maledicitur, et si iniuste maledicitur, præmium illi redditur. Hysidorus in libro de summo bono. 'Qui nocet,' ait Apostolus, 'recipiet id quod nocuit' Non solum enim credendum est ei qui injuste maledicitur, nihil omnino ei illam maledictionem obesse, verum insuper credendus est maledictus injuste, per id præmii incrementa suscipere"

[2] *E g*, Gratian, 'Decretum,' C XI Q. 3, c. 1, "Sententia pastoris, sive justa sive iniusta fuerit, timenda est."

c. 2: "Si quis a proprio Episcopo excommunicatus est: non eum prius ab aliis debere suscipi, nisi aut a suo fuerit receptus Episcopo, aut consilio facto Episcopis occurrat et respondeat: et si Sinodo satisfecerit, et statuerit sub alia eum sententia recipi Quod etiam circa laicos et Presbyteros, et Diaconos, et omnes qui in clero sint, convenit observari"

c. 9· "Placuit universo concilio, ut qui excommunicatus fuerit *pro suo* neglectu, sive Episcopus, sive quilibet clericus, et tempore suæ excommunicationis *ante* audientiam communicare præsumpserit, ipse in se damnationis judicetur sententiam protulisse"

c. 30 "Clericus qui Episcopi districtionem circa se iniustam putat, recurrat ad Synodum"

[3] "Gratian, 'Decretum,' C. XI. Q. 3, after c. 40, Gratianus. "Premissis auctoritatibus, quibus iniustæ sententiæ usque ad excommunicationem utriusque partis parere jubemur, ita respondetur Gregorius non dicit sententiam iniuste latam esse servandam, sed timendam. Sic et Urbanus Timenda est ergo, id est non ex superbia contemnenda. Reliquæ vero auctoritates de excommunicatis loquuntur, qui vel vocati ad Synodum venire contempserunt, vel calliditatibus adversantium occurrere

might seem to prove this,[1] and asks how these canons are to be reconciled with each other.[2] He points out that a sentence may be unjust for various reasons: it may be unjust in consequence of the intention of the judge, or in consequence of some impropriety in form, or in respect of the ground which is alleged for it; and he cites a number of canons bearing more or less upon these various causes. Gratian's own conclusions are not very clearly expressed, but he seems to mean that an unjust sentence of excommunication, though it has no validity before God, must be respected, both by the excommunicated person and by others, until it has been brought before the competent authority, except in the case where a person has been excommunicated because he will not commit some wickedness.[3]

nescientes, iniustam sententiam a judice reportaverunt, vel qui neglectu suæ vitæ sinistram de se opinionem nasci permittentes sententiam in se excep-erunt. Hos siquidem solos excommunicationis sententia ferire licet."

Gratian, 'Decretum,' C xi Q 3, Part IV., Gratianus. "De his inquam et hujusmodi, præmissæ auctoritates loquuntur, non de iniuste suspensis. Quod autem iniustæ sententiæ parendum non sit multis auctoritatibus probatur"

[1] *Eg*, Gratian, 'Decretum,' C xi. Q. 3, c. 46: "Cui est illata sententia, deponat errorem, et vacua est, si iniusta est, tanto eam curare non debet, quando apud Deum, et eius ecclesiam neminem potest gravare iniqua sententia Ita ergo se non absolvi desideret, qua se nullatenus perspicit obligatum"

[2] Gratian, 'Decretum,' C xi Q 3, after c 64, Gratianus. "Ex his datur intelligi, quod iniusta sententia nullum alligat apud Deum, nec apud Ecclesiam ejus aliquis gravatur iniqua sententia sicut ex Gelasii capitulo habetur (*i.e*, C. xi. Q 3, c. 46, 'Cui est illata') Non ergo ab eius communione abstinendum est, nec ei ab officio cessandum in quem cognoscitur iniqua probata sententia Cur ergo capitula Carthaginensis (C xi. Q. 3, c. 30) et Africani (C xi Q. 3, c. 9) atque aliorum conciliorum, prohibent injuste damnatum in communionem recipi ante judicii examinationem?"

[3] Gratian, 'Decretum,' C x Q. 3, Part V, Gratianus. "Si ergo iniuste dejecti, non etiam per Episcopos repararı possunt, nisi de manibus eorum recipiant, quæ amiserant: quomodo sua auctoritate cuique licet iniuste ligatis communicare, et eis, non petita absolutione, sua celebrare officia, sicut Gelasius videtur sentire? (*i.e*, C xi. Q. 3, c 46, 'Cui est illata'). Ad hec respondendum est, quod sententia aliquando est iniusta ex animo proferentis, iusta vero ex ordine, et causa. aliquando est iusta ex animo et causa, sed non ex ordine: aliquando iusta ex animo et ordine, sed non ex causa. Cum autem ex causa iniusta fuerit, aliquando nullum in eo omnino qui accusatur delictum est, quod sit damnatione dignum. aliquando non est in eo illud, supra quod fertur sententia sed ex alio nominandus est. Ex animo est iniusta, cum aliquis servata integritate iudiciarii ordinis in adul terum, vel quemlibet criminosum, non amore iustitii, sed livore odii, vel



There is an important passage in Stephen of Tournai which sums up the canonical view of excommunication. It must be observed, he says, that a sentence of excommunication can be regarded in three ways. A man may be excommunicated before God and the Church, when a man has justly been cut off from the Church on account of his crimes; or he may be in

pretio, aut favore adversariorum inductus sententiam profert. Unde Beda super epistolam Jacobi ait 11, 'Ira enim viri iustitiam Dei non operatur,' quia qui iratus in aliquem sententiam profert, et si ille quantum ad se iustam reportet sententiam: iste tamen qui non amore iustitiæ, sed livore odii in eum sententiam dedit, iustitiam Dei, in quem perturbatio non cadit, non imitatur."

Gratian, 'Decretum,' C x. Q. 3, after c 72, Gratianus: "Huic itaque sententiæ quæ non amore iustitiæ, sed ex alia qualibet causa fertur in quemquam humiliter obediendum est."

Gratian, 'Decretum,' C. x. Q. 3, Part VI, Gratianus· "Cum ergo sententia ex ordine iniusta est, nec tunc ab ea recedendum est: quia etiam ante quam sententia daretur in eum, pro qualitate sui reatus ligatus apud Deum tenebatur. Contingit aliquando, ut adulter sententiam pro sacrilegio reportet, cuius reatum in conscientia non habet. Hæc sententia, etsi iniusta sit, quia non est in eo crimen, super quod lata est sententia, tamen iuste ab eo reportata est, quia ex reatu adulterii iamdiu apud Deum excommunicatus fuerat Et in hoc casu intelligenda est illa auctoritas Gregorii ('Sententia pastoris,' &c, Gratian, C. x. Q 3, c. 1). Iustam sententiam vocat, quando crimen subest, super quod fertur. iniustam, quando illud non subest, quæ tamen timenda vel servanda est, quia ex alio iamdudum damnandus erat. Unde cum præmisisset Gregorius. 'Utrum iuste an iniuste obliget pastor, pastoris tamen sententia gregi timenda est' (subsecutus adiecit), 'ne is qui subest, et cum iniuste forsitan ligatur, ipsam obligationis suæ sententiam ex alia culpa mereatur. Pastor ergo vel absolvere indiscrete timeat, vel ligare. Is autem qui sub manu pastoris est, ligari timeat vel iniuste nec pastoris sui iudicium temere reprehendat. ne etsi iniuste ligatus est, ex ipsa tumidæ reprehensionis superbia, culpa, quæ non erat, fiat'

Aliquando nullum subest crimen et tamen vel odio judicis, vel factione inimicorum oppositam sibi sententiam damnationis in se excipit"

Gratian, 'Decretum,' C. x. Q. 3, after c. 86, Gratianus: "Hæc sententia potius iudicem lædit, quam eum, in quem temere fertur"

Gratian, 'Decretum,' C. x Q 3, after c. 90, Gratianus "Hic etsi, ut dictum est, non teneatur ligatus apud Deum, sententiæ tamen parere debet: ne ex superbia ligetur, qui prius ex puritate conscientiæ absolutus tenebatur"

Part VII, Gratianus. "Idem est, quando contra æquitatem sententia fertur: veluti quando subditi non possunt cogi ad malum, scientes obedientiam non esse servandam prælatis in rebus illicitis"

Gratian, 'Decretum,' C x. Q 3, after c. 101, Gratianus. "Cum ergo subditi excommunicantur, quia ad malum cogi non possunt, tunc sententiæ non est obediendum quia iuxta illud Gelasii, 'Nec apud Deum nec apud Ecclesiam eius quemquam gravat iniqua sententia'" (c. 46).

the position of one who is excommunicated before God, and is therefore not a member of His body, which is the Church, although he had not been cut off from the Church by its sentence; or again, a man may be excommunicated before the Church, but not before God, if the sentence of excommunication is unjust and founded upon no true cause.[1]

Finally, it is important to observe that the Decretals draw the same distinction between the validity of excommunication before God and before the Church. Innocent III. in one passage does not hesitate to say that there may be cases where a Christian may know that a certain action will be a mortal sin, though it may not be possible to prove this to the Church, and that in such a case he must rather submit to excommunication than commit the mortal sin;[2] and in another place he lays it down explicitly that while the judgment of God is always true, the judgment of the Church may be erroneous, and that thus a man may be condemned by God who is held guiltless by the Church, and may be condemned by the Church who is guiltless before God.[3]

It needs no elaborate argument to demonstrate the great importance of this distinction between the formal and outward,

[1] Stephen of Tournai, 'Summa Decret,' C. III. Q. 4, Dict. ad c. 11. "Notandum Excommunicatio multis modis dicitur. . . Excommunicatur autem quis apud Deum et ecclesiam, alius apud Deum et non apud ecclesiam, alius apud ecclesiam et non apud Deum. Apud Deum et ecclesiam qui propter sua scelera iuste per sententiam ab ecclesia separatus est, qui autem criminaliter delinquit, statim apud Deum pro excommunicato habetur, quoniam, quantum ad ipsum, non est membrum corporis sui, quod est ecclesia, quamvis per sententiam ecclesiæ non sit separatus ab ea. Apud ecclesiam et non apud Deum excommunicatus est, qui non iuste, nulla causa subsistente, sententiam excommunicationis accipit"

[2] 'Decretals,' v. 39. 44: "Inquisitioni tuæ breviter respondentes, credimus distinguendum, utrum alter coniugum pro certo sciat impedimentum coniugii, propter quod sine mortali peccato non valeat carnale commercium exercere, quamvis illud apud ecclesiam probare non possit: an impedimentum hujusmodi non sciat pro certo, sed credat. In primo itaque casu debet potius excommunicationis sententiam humiliter sustinere, quam per carnale commercium peccatum operari mortale"

[3] 'Decretals,' v. 39 28. "Nos igitur consultationi . . . tuæ breviter respondemus, quod iudicium Dei veritati, quæ non fallit, nec fallitur, semper innititur. iudicium autem ecclesiæ nonnunquam opinionem sequitur, quam et fallere sæpe contingit, et falli. Propter quod contingit interdum, ut qui ligatus est apud Deum, apud Ecclesiam sit solutus. et qui liber est apud Deum, ecclesiastica sit sententia innodatus."



and the real validity of the censures of the Church. Mediæval history is full of examples of the defiance of these censures by men who had no thought of repudiating the spiritual authority of the Church. It would, however, be impossible to deal with this subject completely without passing from an examination of the theories of the Canon law into the discussion of the general history of these centuries, and that must be reserved for another volume.

# CHAPTER XII.

## SUMMARY.

WE have now endeavoured to consider some of the most important aspects of the political theory of the Civil and Canon lawyers down to the middle of the thirteenth century. Enough has been said to show the immense importance of distinguishing the tendencies of that period from those of the period which followed it; for the more closely we study the movement of ideas in the Middle Ages, the more clear does it become to us that we must distinguish very sharply between the views of those great thinkers who in the thirteenth century endeavoured to construct a coherent and logical system out of the infinitely complex elements of mediæval life and thought, and the judgments of those earlier writers of the eleventh and twelfth centuries who represent an intellectual and political civilisation which was growing and changing too rapidly to allow them to stop and attempt to marshal their ideas in a systematic order. The great systematisers do no doubt represent the Middle Ages, but only in this sense, that they endeavour to fix and define, and therefore in some measure to stereotype, what had been a thing living and growing and continually changing. For there are few periods in the history of the world when the movement of circumstances and ideas was more rapid, and there is nothing which still obscures any real apprehension of the Middle Ages more effectively than the notion that these centuries were a period of fixed opinions and unvarying conditions.

In this volume we have dealt with some aspects of the



political ideas implicit or formally expressed in a literature whose conceptions are directly founded upon antiquity, the civilians building primarily upon the ancient jurisprudence, the canonists primarily upon the Christian Fathers: they represent, therefore, some of the most important elements which the Middle Ages inherited from the ancient world.

If now we ask ourselves what are the most significant conceptions which they present, we may well begin with that majestic conception of law, presented to us both by civilians and canonists, as representing not the mere will or power of a community or ruler, but rather the attempt to translate into the terms and to adapt to the conditions of actual life, those ultimate principles of justice and equity by which, as they believed, the whole universe was controlled and ordered. In the civilians this is related primarily to the discussion of the nature and meaning of *æquitas* and *justitia*, and secondarily to their treatment of the *jus naturale;* while the canonists deal with it chiefly in relation to the *jus naturale* and its character as the standard to which all laws must conform, the norm or test to be applied to all institutions.

It is out of these conceptions that there grows the necessity of distinguishing between the world as it actually exists, and the ideal or perfect conception of the world and human life. And, again, canonists and civilians have alike inherited from the later philosophy of the ancient world and from the Fathers the conception of the distinction between the natural conditions of human life, which they think of as primitive, and the conventional institutions under which men actually live. Many of these conventions are in themselves to be reprobated, but are accepted as being the means by which men's vicious and criminal tendencies may be controlled, and they may be trained for the ideal.

We have dealt with the treatment of the institutions of slavery and property as illustrating this conception, but the theory of the State both in the canonists and civilians is also related to it. To them both the State is a sacred institution that is necessary and sacred as the means of establishing such a measure of justice and order as is attainable in this world.

The canonists do not indeed look upon it as natural in the stricter sense, but rather as a conventional institution, made necessary by men's vices, but still a sacred and divine remedy for those evils, and with this judgment the civilians probably agreed. They represent not so much the Aristotelian theory of the State, as that modification of it presented by some at least of the Stoic writers.[1] It has indeed been urged by some writers of eminence that the ecclesiastical theory of the State denied its sacred character, and, following some supposed theory of St Augustine, held that the State did not really represent the authority of God. We shall have to return to this question in later volumes, and shall then try to reduce the complexities of mediæval thought to some reasonable proportions. In the meanwhile, we must content ourselves with saying that this is not the conception of the canon law, not even of the Decretals, and that whatever may be the final conclusion about the general principles of the Middle Ages, the canonists at least as well as the civilians held to the principle of the sacred character of the State.

The civilians, as far as we can understand them, shared in these conceptions, but we also find in some of their writings an interesting attempt to establish the conception of the State as resting upon the natural relation between the whole society or *universitas* and its members.[2] It would seem that we have here a more organic conception of the nature of political society, as necessarily arising out of the constitution of human nature and the principles of social relations. And alongside of this and in close relation to it we have to recognise the great importance of the fact that the civilians repeated for the Middle Ages the principles of the Roman jurisprudence that the only source of political authority was the whole community, the *universitas* or *populus*. In our first volume we have pointed out the great significance of the fact that this was the normal theory which the ancient world handed on to the Middle Ages and the modern world. This was not the less important, because the conception coincided with the native traditions of the barbarian societies; the doctrine of

[1] Cf. vol. i. pp. 23-29.

[2] Cf. p. 67.



the civilians stated clearly and explicitly what was implicit in the new constitutions.

There are indeed other aspects of the theory of the ancient jurists which do not correspond with the traditions of the new societies, and here the influence of the civilians is more complex, and it requires some care and some discrimination to estimate the whole nature of this. We have seen that they were divided upon the question whether the Roman people, in transferring their authority to the emperor, had wholly parted with their original authority. Some of them maintained that this was the case, and here we have what was undoubtedly a new and alien element in the mediæval tradition. Some of the civilians maintained that the people having transferred their authority had done this once and for all, and that even their custom had lost its original force in making and abrogating law; and that thus the emperor was left as the sole and absolute legislator. This conception was new to the Middle Ages, and indeed it did not attain any great importance in these times: its development belongs to the period of the Renaissance, when, in the breaking up of the general fabric of mediæval civilisation, the personal monarchies which reached their full development in the seventeenth century began to take definite shape. Some share in this development is probably to be traced to the influence of some of the civilians.

It is, however, a great mistake to suppose that this was the only or the most general view of the civilians, for many of them, including the great Azo, held quite another view, and maintained that the people had never really parted with their authority, that the ruler held a delegated authority which was not unlimited, while the people always continued to control all legislation by their custom, and might even if they chose reclaim the authority which they had entrusted to the ruler. And, as we have seen, Irnerius, Roger, and Azo are very clear in holding that the emperor, even though entrusted by the *populus* with legislative as well as administrative authority, could only exercise this with the counsel and consent of the Senate, which Azo, at least, held

had received its authority from the *populus*. Their doctrine is generally related to the phrases of Theodosius and Valentinian in the Code, but we are left with the impression that we may here suspect also the influence of the contemporary constitutions.

The canonists have little to say directly upon this subject: some of them, indeed, like Rufinus, agree with those civilians who hold that custom has no longer any legislative authority, except with the consent of the ruler; but on the whole the great importance attached to custom in the canonical theory of law, and the final decision of the Decretals that custom, under the condition of a legal period of prescription, always retained the force of law, seem to throw the weight of the canon law on to the same side as the civilians like Azo.

It is difficult to summarise what we have said as to the theory of the relations of the two authorities of Church and State; but we may once again point out that in order to understand their relation in the Middle Ages we must begin by taking account of the fact, which is brought out with special clearness in the work of the civilians, that a great part of the exemptions of the clergy from secular jurisdictions and obligations, and a good deal of their claim to intervene authoritatively in secular affairs, is really to be traced to the deliberate organisation of society in the later empire, and especially by Justinian. And finally, we think that an examination of the subject will have made it clear that while the Church had come to claim a tremendous authority in relation to the empire, it is not the case that the Church as represented in the deliberate judgments of the Canon law claimed to be supreme over the State. The normal doctrine of the Canon law down to the time of the Decretals is the same as that of the fifth and the ninth centuries, that the two authorities, the ecclesiastical and the civil, were equally and separately derived from Christ, and that strictly each was supreme in its own sphere.

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